

Use of Due Diligence in the Wholesale Logistic Modernization Program

The Army's Wholesale Logistics Modernization Program (WLMP) will dramatically upgrade the Army's wholesale logistics business processes and supporting information technology (IT), ensuring future and current Army readiness. The WLMP involves converting existing Government functions at the Logistics Systems Support Center (LSSC) and the Industrial Logistics Systems Center (ILSC) to the private sector.¹ Specifically, the WLMP contract requires Computer Sciences Corporation (CSC), the winning offeror, to provide business process re-engineering and modernization services for the Army's current wholesale logistics processes and supporting IT. Moreover, CSC will also provide sustainment services for the Army's wholesale logistics IT systems that will be transferred to CSC. Finally, all Government employees that are displaced by the WLMP will receive a "soft landing." The "soft landing" requires that CSC provide three-year job offers, consisting of equal or better pay and benefits within the same geographic area. Accordingly, the WLMP acquisition is equivalent to a commercial organization acquiring another corporate entity.

Throughout the WLMP acquisition process, a concerted effort was made to maximize free and open communication between Industry and Government to the extent permissible by law and regulation. Among the numerous innovative acquisition practices used was a commercial business practice known as due diligence.

Due diligence has many meanings in the commercial world, ranging from the investigation process done prior to corporate acquisitions, initial public stock offerings or acquisition of real property to its use as an affirmative legal defense. Due diligence investigations are often conducted by corporations prior to making business decisions, such as whether to acquire another corporation. These investigations often entail analyzing the risks, assets and liabilities, of a project, acquisition or venture. This investigation often involves examination of myriad items, including, but not limited to pending litigation, financial records, leases, potential environmental liabilities, etc. Thus, the due diligence investigation can be used as a valuable risk management tool.²

In the context of the WLMP, due diligence was used to provide offerors with a vast array of information, including, but not limited to information regarding the operations of the LSSC and ILSC IT systems and the operations and structural nature of the organizations supporting those IT systems. The WLMP solicitation defined "due diligence" as a "period of time wherein offerors shall be allowed to examine the organizations and operations associated with the WLMP. This

¹ The Office of Management and Budget (OMB) Circular No. A-76's cost comparison requirements were waived for the WLMP in accordance with OMB Circular No. A-76 and the OMB A-76 Revised Supplemental Handbook. Accordingly, the functions at LSSC and ILSC were directly converted to the private sector without an A-76 competition.

² Due Diligence itself is an affirmative legal defense often asserted by underwriters, corporations and venture capitalists and others, when being sued by investors, fiduciaries and shareholders, for breach of a fiduciary duty.

period will allow offerors to assess the program's needs in order to mitigate proposal risks." The decision to use due diligence was made to ensure that offerors fully understood the complexities of those IT systems and the organizations that supported them. Through the use of due diligence, offerors were able to mitigate their proposal risks, which in turn mitigated the Government's risk. Since risk management was one of the fundamental building blocks upon which the WLMP acquisition was constructed, due diligence was an integral component of the WLMP's overall risk management plan.

In applying this commercial concept to the WLMP it was important to tailor it to conform to Federal acquisition regulations and law. Moreover, it was important to mold the process in order to ensure that it would be manageable from a business perspective and at the same time could handle all the offerors' reasonable requests. Generally, the WLMP due diligence process was on-going and consisted of two major components: an Internet based virtual library and site visits.

First, as much information as possible was placed in the WLMP's virtual library, which was updated throughout the WLMP acquisition process. Often, these updates were provided at the request of offerors, via face to face exchanges and the Interagency Interactive Business Opportunities Page (IBOP). The IBOP is a webpage, which the Government uses to electronically procure goods and services. This webpage allows interested Contractors to view and download U.S. Army market surveys and Government solicitations, as well as messages pertaining to those solicitations and to communicate via the IBOP with Contracting Officers. It should be noted that the entire due diligence process was shaped through Industry input throughout the course of the acquisition.

Second, offerors were informed in the solicitation, that only offerors remaining in the initial competitive range were allowed to conduct site visits to the two affected organizations, LSSC and ILSC, as well as various related organizations, such as the Communications-Electronics Command (CECOM). The purpose of the site visits was to provide offerors a chance to verify and validate information (e.g. virtual library information) they had already obtained throughout the acquisition. On the site visits, offerors were able to question and request information pertaining to the WLMP, from Government management personnel and subject matter experts. If the information was not readily available by the end of the site visit, but the information request was reasonable and made during the site visit, a record of the requests was made and an attempt was made to answer those requests in a reasonable period of time after the due diligence site visit period ended.

Throughout the site visit period, the Government strove to maintain an equilibrium between providing offerors as much information as possible within the desired acquisition schedule and ensuring that the overall due diligence process remained manageable without impacting or disrupting the Government workforce's mission. Accordingly, the Government, with substantial input from Industry, formulated written operating procedures for how to conduct the site visits (the solicitation contained a draft due diligence framework, outlining

potential rules and site locations, which was provided to offerors for suggestions and comments and these comments/suggestions were used to develop the operating procedures).

To help facilitate the process, these written operating procedures were provided to Government due diligence Site Managers, who would oversee the offerors' site visits. The operating procedures covered what information could be provided to offerors, and outlined Site Manager guidelines and responsibilities, as well as administration of the site visits. These operating procedures were provided not only to the Site Managers, but also to participating offerors. This was part of the Government's continuous effort to be as open as possible with offerors during the acquisition process, as well as to ensure that both sides clearly understood the guidelines for conducting the site visits.

Limiting the number of offerors and the amount of time to conduct the site visits were two of the key parameters that were necessary to make the site visits manageable. First, only offerors remaining in the initial competitive range³ were allowed to participate in the site visits. The number of attendees an offeror could bring to a location was also limited. Second, the entire due diligence site visit period was limited to a total of ten days. During that time, offerors were allowed to visit ILSC and LSSC for ten days and simultaneously allowed one or two day visits to other organizations. This often meant that offerors sent different teams simultaneously to a multitude of locations. Generally, the visits were only to be conducted during normal business hours to minimize disruption to the workforce and its mission.

However, despite these constraints, it is important to note that a guiding principle during the site visits was to provide as much information as possible within prescribed limits. The operating procedures contained a checklist of questions for Site Managers to use to determine whether to provide information requested by offerors. For example, some of the questions contained in the checklist were: whether the request was reasonable and whether the request for information was prohibited from disclosure for security reasons. Most importantly, the operating procedures emphasized that Site Managers should fully respond to any reasonable information requests provided that the information was available and was not specified as something that should not be disclosed.

Particular attention was paid to ensure that provision of information did not violate any federal regulations or laws. Since this acquisition required the winning offeror to provide job offers to displaced Government employees, there was considerable interest in obtaining personnel information. However, the Privacy Act, 5 U.S.C. § 552a (2000), prohibits the release of certain information regarding individual employees. This was the only area where Site Managers were specifically instructed to only provide the information listed in the operating procedures. In all other instances, Site Managers were informed to provide answers to reasonable requests if the information existed and didn't fall into one of the exceptions (e.g. the requirement

³ Pursuant to Federal Acquisition Regulation (FAR) 15.306(c)(2), offerors were informed in the solicitation that in the interest of conducting an efficient competition it was anticipated that the initial competitive range would consist of no more than three offerors.

not to disclose source selection information). In other words, not disclosing requested information was meant to be the exception, not the rule. Thus, the desire to fully provide any requested information, within prescribed limitations, to offerors, was strongly stressed to the Site Managers. As stated above, an underlying principle of due diligence was to provide offerors with as much information as possible unless an exception applied.

Additionally, it was also important to make certain that the site visits would not create any conflict of interest or post-employment job restrictions per 18 U.S.C. §§ 207-8 (2000) for current employees, since the offerors, as part of the soft landing requirements in the solicitation, were required to provide job offers to the displaced Government employees. Accordingly, offerors were asked to refrain from extending job offers or accepting resumes from those Government employees during this time period. Finally, Site Managers were informed not to disclose proprietary, source selection or competition sensitive information in accordance with FAR Part 3 and 41 U.S.C. § 423 (2000). To help Site Managers prevent disclosure of this type of information, the operating procedures contained examples of what constitutes proprietary, source selection and competition sensitive information.

Finally, since these site visits were part of an overall source selection, it was essential that all offerors were treated equally during the visits. For instance, operating procedures required that there must be consistency for unrequested information (e.g. introductory briefs) provided by Site Managers. Additionally, the availability of locations and the maximum amount of time allotted for the site visits was the same for all offerors. Ultimately, it was the offerors who chose, within prescribed limits, the amount of time to spend at a location or what location to visit. How much time the offerors used or what locations they visited was wholly at the offerors' discretion, but all offerors were given equal opportunity during the visits. This was a crucial aspect of the site visits because it afforded offerors maximum flexibility during due diligence which allowed offerors to gather the information that they felt was necessary.

The due diligence process was an integral part of the overall WLMP acquisition. Use of this commercial business practice allowed interested offerors to examine in-depth, the IT organizations and systems to be transferred to the private sector and thereby fully ascertain the program's needs. With the knowledge gained during due diligence, offerors were able to mitigate their proposal risks. Ultimately, this resulted in the Government being able to mitigate its own program risks, by having confidence that the offeror it selected had a full and thorough knowledge of the needs of the program.

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