

COMPETITIVE NEGOTIATION WLMP STYLE

INTRODUCTION

The primary objective of the Wholesale Logistics Modernization Program (WLMP) is to reengineer the Army's wholesale logistics business processes by adopting commercial business practices and the information technology supporting those commercial practices. It was clear from the inception of the WLMP in 1997 that, in order to take the right first step to accomplishing the intended revolution in military logistics, the acquisition and source selection had to be conducted in a manner that was revolutionary in its own right. After all, the uniqueness of the program and its critical importance to the readiness of the Army made finding the right industry partner and negotiating the best possible contract absolutely essential to the success of this program.

The basic regulations governing how the federal government conducts its acquisitions are set forth in the Federal Acquisition Regulation (FAR). FAR Part 15 is the section of the FAR that governs the conduct of competitive negotiations. Through a fortunate coincidence for the WLMP, 1997 was also the year that the FAR Part 15 underwent some reengineering of its own. In September of that year the long awaited FAR Part 15 Rewrite was published as a final rule and became effective for all solicitations to be issued after January 1, 1998. In publishing this final rule, the FAR Council described the Part 15 Rewrite as something that "reengineers the processes used to contract by negotiation." It was part of the FAR Council's "continuous improvement" efforts intended to make the competitive negotiation process easier to use and better designed to promote best value for the government. The expressed goal was "to infuse innovative techniques into the source selection process, simplify the process...and facilitate the acquisition of best value." The publication of this final rule was a greatly anticipated and vigorously debated step in the Acquisition Reform movement that has been sweeping through the Federal Government in recent years. The WLMP saw the Part 15 Rewrite as providing the program with a golden opportunity! A program looking for an innovative way to conduct a revolutionary acquisition was handed a "reengineered" process designed to "infuse innovative techniques". So lets look at what the WLMP did with this golden opportunity.

There is clearly a predominant theme running throughout the changes made by the Part 15 Rewrite - an attempt to foster and encourage open communication between industry and the Government during an acquisition and to expand the scope of the information exchanged during those communications. In fact, the following phrases are some of those used by the FAR Council itself to describe what the changes are intended to accomplish:

- “Supporting more open exchanges between the Government and industry, allowing industry to better understand the requirement and the Government to better understand industry proposals”,
- “Providing early feedback as to whether a proposal is truly competitive”,
- “Increasing the scope of discussions”, and
- “Enhancing the ability of the parties to communicate and document understandings reached during discussions.”

The term “exchange” is a good place to start in examining this predominant theme. In this regard, the new FAR Part 15 has two sections that warrant our attention, FAR 15.201 “Exchanges with industry before receipt of proposals” and FAR 15.306 “Exchanges with offerors after receipt of proposals”.

EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS

FAR 15.201 states “Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, is encouraged.” It goes on to describe the purpose of these exchanges as improving the “understanding of Government requirements and industry capabilities”, “allowing potential offerors to judge whether or how they can satisfy the Government’s requirements”, and enabling all participants in the acquisition to “identify and resolve concerns regarding the acquisition strategy”. It also identifies a number of specific techniques to promote these exchanges, such as industry conferences, market research, one-on-one meetings with potential offerors, presolicitation notices, draft solicitations, requests for information, and site visits. Clearly this section is promoting a broad, open, and two-way exchange of information between industry and the Government throughout the early formative stages of an acquisition, to include development of the requirement, the acquisition strategy, the evaluation approach, and the solicitation itself. Notice that this open exchange of information is intended to continue right up to the receipt of proposals. It should not stop when the solicitation is issued.

The WLMP decided early on to embrace the guidance in FAR 15.201 to the fullest extent possible. Before developing an acquisition strategy or any requirements or solicitation documents, the program held a conference in October 1997 that was open to all of industry. The purpose was to explain what the Army wanted to accomplish with this acquisition and to solicit ideas from industry regarding the feasibility of the program, definition of requirements, and acquisition strategy. Extensive market research was conducted by the WLMP team regarding what industry had already accomplished in the field of logistics business process reengineering, what the Army’s logistics business process needs for the future are, and what the best strategy for change might be. This market research included one-on-one sessions with any industry member that was

interested in sharing its thoughts on the program. The one-on-one format was chosen in order to achieve an atmosphere conducive to the exchange of information and advice without the normal industry fear of compromising competitive sensitive information or giving away a possible competitive advantage in the open forum of a presolicitation conference.

In March 1998, as the market research drew to a close and the development of the solicitation and requirements documents commenced, the WLMP also made use of another new tool added to the acquisition toolbox by the Part 15 Rewrite – the advisory multi-step process. This process is described at FAR 15.202. It is nothing more than a presolicitation notice published to provide a general description of the scope or purpose of an upcoming acquisition and to ask potential offerors to submit a certain limited amount of information about their qualifications to participate in the acquisition. The Government then evaluates the information submitted and tells the company that submitted the information whether the Government considers that company to be a viable competitor. The notice must specifically identify the information to be submitted and the criteria that will be used in evaluating the information. The purpose of this tool is to provide constructive feedback to industry sufficient to assist them in making an informed judgment regarding whether to continue to pursue this business opportunity. The responses to the notice could also give the Government some indication of which industry members are seriously interested in the acquisition. Due to the enormous scope and breadth of the initial industry interest in the WLMP, it was determined that the additional effort involved in using the multi-step advisory process would produce a result that had value to the program. Namely, it would serve to narrow the potential field of offerors through feedback that would explain the scope and level of capabilities and resources that would be necessary in order to be a viable competitor. It should be recognized that this process is not a mandatory down-selection where offerors who are determined to not be viable are prohibited from participating further in the acquisition. It is merely advisory. For this reason, before making a decision to utilize this new tool, the potential value of using this process should always be carefully weighed against the additional effort that will be needed to implement this process. It is also important to recognize that the extent of value to be realized from the use of this process will be directly proportional to the program's ability to ask for the right information, effectively evaluate that information when it is received, and provide substantive feedback to all companies that submit information - those that are considered viable as well as those that are not. A letter stating that the company is, or is not, considered viable, with nothing more, should not be considered "substantive" feedback. The letter should explain the basis for the conclusion and where the information evaluated shows weakness or strength in terms of viability. The WLMP did provide this type of substantive feedback with some positive results. One company that submitted information and was told that it was not considered viable did not participate further in the acquisition. Several companies that were told they were considered viable but had some weaknesses in their evaluated information actually made changes to their teams of subcontractors to shore up these weaknesses.

Throughout this acquisition, beginning with the market research, the WLMP made maximum use of the Communications-Electronics Command's (CECOM's) Business Opportunities Page (BOP) World Wide Web site to disseminate and to gather information regarding the WLMP. The BOP, also implemented in 1997, uses interactive commercial technology that gives Government and industry personnel the ability to use the "point and click" technology of Internet browsers to view information about draft and final solicitation documents. This technology makes it easier than ever before to exchange information and proved to be an invaluable tool for the WLMP [In fact, implementation of the BOP at CECOM was so successful that it has been adopted for use by the entire Army Materiel Command, State Department and Department of Energy, and is now called the Interagency Interactive Business Opportunities Page (IBOP).]. The BOP was utilized to publish numerous draft solicitations and receive comments thereon between May 1998 and March 1999. Comments were received in a secure area of the BOP to protect any that were sensitive in nature. The BOP was also used to issue the final solicitation on 29 April 1999. In May 1998, a "Virtual Library" was created containing extensive information about every aspect of the WLMP. This Virtual Library was also accessible through the BOP. Additionally, a site was provided on the BOP for a continuously open question and answer dialogue between the WLMP team, industry and the general public on the subject of WLMP.

Another technique that the WLMP used to foster an open exchange of information was to conduct one-on-one face-to-face sessions with industry to discuss in detail their comments on the draft solicitations. These sessions were held in September and October 1998 with each company that was still seriously interested in potentially participating in the WLMP competition as a prime contractor. These were essentially the same companies that had submitted information for evaluation under the advisory multi-step process. In preparation for these sessions, WLMP team members were told that absolutely anything about the program or the draft solicitation was open for discussion. They were also schooled in the idea that these exchanges were not for the purpose of "defending" what was in the solicitation. The word "draft" was emphasized. Rather, the exchanges were to answer honestly and forthrightly any questions that industry may have about the draft solicitation and to listen openly to industry comments or suggestions about how to revise the solicitation. Although human nature made it difficult, this schooling helped the team successfully rid itself of this "defensive" mode during these sessions. Industry was also a little tentative when they arrived at these sessions, but the WLMP team's openness and honesty brought industry out of its shell within a few hours. Each session was scheduled for two full days and proved to be very constructive and informative for both Government and industry.

In fact, when the final solicitation release, originally scheduled for late fall 1998, was delayed until April 1999, the WLMP team used this same technique again. Shortly after the final solicitation was issued, one-on-one face-to-face sessions were held with

each of the companies that had participated in the fall 1998 sessions. The purpose of these sessions was to explain to industry the reasons for the delay, the status of any on-going issues with respect to the program, the changes made to the solicitation during the delay, and to answer any questions industry may have had at that time. Because the purpose was more limited than the original sessions, these sessions were much shorter – each was scheduled for four hours. Industry was very appreciative of this additional openness by the Government, especially in light of the lengthy delay and all the rumors that had surfaced about the program during the delay.

EXCHANGES WITH OFFERORS AFTER RECEIPT OF PROPOSALS

FAR 15.306 implements some of the most significant and interesting changes to the competitive negotiation process that have come out of the Part 15 Rewrite. This section delineates three types of exchanges that it labels “clarifications”, “communications”, and “negotiations”. It is important to understand what each of these terms means within the context of the Part 15 Rewrite.

CLARIFICATIONS: Clarifications are a very limited type of exchange applicable only to acquisitions where award without discussions is contemplated. The Government can have exchanges with offerors for the limited purpose of resolving minor clerical errors or to clarify certain aspects of the proposal. This is a very limited opportunity for exchanges with the offerors. These exchanges must be for the sole purpose of “clarifying” minor informalities or clerical errors in order to not be considered to be a commencement of “discussions” and, therefore, to preserve the Government’s ability to award without discussions. However, even though clarifications are a type of exchange that is quite limited, there may even be a slight broadening of this concept by the Rewrite with the express inclusion in FAR 15.306(a) of certain aspects of past performance as examples of matters that could properly be addressed in an exchange prior to an award without discussions.

Since the WLMP never had any intention of awarding the contract without discussions, the WLMP team never considered utilization of clarifications.

COMMUNICATIONS: The second type of exchange discussed in FAR 15.306 is communications. Communications are described in FAR 15.306(b) as exchanges between the Government and the offerors occurring after receipt of the proposals but before the establishment of the competitive range. Thus, this type of exchange would be applicable where the Government does intend to establish a competitive range and conduct discussions. This type of exchange is certainly broader than clarifications, but still must satisfy certain criteria set forth in FAR 15.306(b). The exchanges may only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. The new FAR language gives a fairly broad sampling of the types of topics that can be covered during communications, including things of such significance as perceived deficiencies and weaknesses, and even states that these exchanges “...may be considered in rating proposals.” The language even requires that these exchanges address adverse past performance information that the offeror has not previously had an opportunity to comment on. The key limitation on this broad type of exchange is stated twice, probably for emphasis. FAR 15.306(b)(2) states that these communications “...shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.” FAR 15.306(b)(3) again states that these communications “...shall not provide an opportunity for the offeror to revise its proposal...” The Rewrite has clearly and

significantly expanded the scope of the information that can be exchanged with the offerors prior to setting the competitive range. The only type of exchange allowed under the old version of FAR Part 15 prior to setting the competitive range was clarifications. Pursuant to the new FAR, communications, “(m)ay be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government’s evaluation process” and “Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. [Note the new standard set forth in FAR 15.306(c) for determining which proposals shall be included in the competitive range. It is no longer based on those proposals which have a “reasonable chance” to win. Instead, it is based on the “most highly rated” proposals and “efficient competition”.] It would appear that anything that is reasonably related to the Government’s understanding or evaluation of the proposal can properly be addressed during communications, as long as it does not involve allowing an offeror to revise its proposal in any way. It seems clear that this expanded type of exchange of information with the offerors prior to the establishment of the competitive range is for the express purpose of allowing the Government to make the most educated and effective competitive range determination possible. The bottom line here is that the Government has a much broader ability than ever before to exchange information with offerors about their proposals before establishing a competitive range.

The WLMP decided to take maximum advantage of this new broader ability in a number of ways. Again using the paperless technology referred to above, proposals were received electronically from the offerors through the BOP. These electronic proposals were then loaded into the Acquisition Source Selection Interactive Support Tool (ASSIST), a newly developed software tool enabling the entire proposal evaluation to be done electronically. To reiterate what was stated above, this new technology proved invaluable to the WLMP in implementing some of the innovative techniques that were used to exchange information with the offerors.

In conducting the initial proposal evaluation, the evaluators must identify the “strengths”, “weaknesses” and “deficiencies” that serve as the basis for their assessment of the merits of the proposal. But, as evaluators go through initial proposals, there are always many aspects of the proposals that are unclear, confusing, or that the evaluators just don’t understand. As a result, the evaluators aren’t sure whether there is a strength, weakness or deficiency. The WLMP evaluators were instructed to identify all these aspects of the proposals in a new category called “uncertainties”. The WLMP coined this term in its Source Selection Plan (SSP) to signify that category of information that would be addressed with the offerors prior to the establishment of the competitive range using communications. To assist and guide the members of the WLMP evaluation team to properly identify and manage all four of these categories of evaluation information, the SSP included the following definitions;

Strength: Any aspect of a proposal which, when judged against a stated evaluation criterion, enhances the merit of the proposal or increases the probability of successful performance of the contract.

Weakness: Any aspect of a proposal which, when judged against a stated evaluation criterion, reduces the merit of the proposal or decreases the probability of successful performance of the contract.

Deficiency: Any aspect of a proposal that fails to meet a solicitation requirement.

Uncertainty: Any aspect of a proposal for which the intent of the offer is unclear because there may be more than one way to interpret the offer or because inconsistencies in the offer indicate that there may be an error, omission or mistake.

Each offeror's uncertainties were released to that offeror as they were identified during the conduct of the initial evaluation. Before release, however, each of these uncertainties was carefully reviewed and approved by the Source Selection Evaluation Board (SSEB) Chairman, Deputy Chairman, Contracting Officer and Legal Advisor to ensure that it was consistent with the concept of what communications should properly address. Each offeror was allowed to respond to/comment on these uncertainties, but was not allowed to revise its proposal at that time. When all these responses/comments were received from all the offerors, the evaluators completed their assessment of the merits of the proposals and prepared the Initial Evaluation Report. This report included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation but did not include any uncertainties. If communications are used properly, there should never be any "uncertainties" in the Initial Evaluation Report [the evaluation report upon which the competitive range determination is based]. Remember that the primary purpose of this early type of exchange with the offerors about their proposals is to clear up vague or ambiguous aspects of the proposal or aspects of the proposal that are not clearly understood prior to making a determination of which proposals should be included in the competitive range. Note that, in being cleared up, or resolved, an uncertainty could simply go away or it could become a strength, weakness, or deficiency. Because these uncertainties will not show up in the Initial Evaluation Report, it is very important for the SSEB to maintain a trackable record of what uncertainties were identified and how they were resolved.

The WLMP's next exchange with the offerors was something quite unique. After the Initial Evaluation Report was completed, but before the establishment of the competitive range, each offeror was given a copy of the Initial Evaluation Report on its proposal. The purpose of this disclosure was to keep the offeror fully informed as to

how the Government currently viewed the merits of that offeror's proposal. The offeror was also given a limited opportunity (only a few days) to provide the Government with whatever comments on the Initial Evaluation Report. However, the offeror was not allowed to revise its proposal at that time. The WLMP's logic here was that the Part 15 Rewrite is encouraging a very robust exchange of information between the Government and the offerors throughout the source selection process. The WLMP felt this disclosure would serve several purposes. First, if the SSEB had missed something or got something wrong in its attempt to clear up these uncertainties or in evaluating the entire proposal, the offeror would have an opportunity to bring that error to the SSEB's attention before the competitive range was established. Such an error could have an impact on whether an offeror was included in the competitive range or not, especially under the new more stringent competitive range standard discussed above. Second, by allowing the offeror to see the Government's evaluation of the merits of the offeror's proposal in its entirety before entering into the full blown negotiations and bargaining contemplated by the Part 15 Rewrite [see below], the offeror would be better prepared for those negotiations. The offeror would have a clear understanding of what the Government did not like about the proposal and why, as well as what the Government did like about the proposal. The offeror would be able to make much better informed business judgments about how best to fix weaknesses and deficiencies and what trade-offs it should make in attempting to give the Government the best possible offer. Third, by seeing the Initial Evaluation Report, the offeror could know not only those aspects of the proposal that are considered weak or deficient, but also those aspects that are considered a strength. This should eliminate the possibility an offeror, while making revisions to fix some deficiency or weakness disclosed to it during negotiations, could inadvertently remove or change that aspect of its proposal considered a strength. Remember that, traditionally, strengths are not matters normally addressed during negotiations [although, with the emergence of bargaining, one could argue that will change (see below)]. Therefore, the offeror may unknowingly lose the strength and, with it, maybe an advantage the offeror enjoyed in comparison to the competing offerors and not find out about it until the offeror receives its unsuccessful offeror debriefing. Showing the offeror the Evaluation Report should avoid this problem.

It must be pointed out that disclosing Evaluation Reports to offerors cannot be done on a whim or without preparation. Obviously the Reports have to be well written, thorough, complete, and consistent with the SSP. Otherwise the intended benefits will not be achieved and the Government will be asking for trouble - maybe even "documenting a protest". Furthermore, Evaluation Reports are considered "source selection" information pursuant to Section 27 of the Office of Federal Procurement Policy Act and FAR 3.104, "Procurement Integrity". Pursuant to FAR 3.104-5, source selection information cannot be disclosed to anyone other than someone authorized by the agency head or designee. The Army FAR Supplement (AFARS) designates the Source Selection Authority (SSA) as the person who can authorize the release of source selection

information after the release of the solicitation but prior to award in a formal source selection, which is what the WLMP was. Therefore, the WLMP made sure to specifically inform the SSA of this proposed document release and include a description of what was going to be done in the SSP. When the SSA approved the SSP, he was also approving the release of the Evaluation Reports in accordance with the delegation of authority in the AFARS.

It must also be pointed out that the other document that must be disclosed to the offerors if you intend to disclose the Evaluation Reports is the SSP. This is because, in order for the offeror to understand the Evaluation Reports, the offeror must understand the rating methodology being used in the evaluation. For example, the WLMP used adjectival ratings [Outstanding, Good, Acceptable, Marginal, and Unacceptable] supported by narrative explanation. As discussed above, the Evaluation Reports also identified strengths, weaknesses, and deficiencies. To assure understanding and consistency of implementation by the evaluators, the rating methodology and terminology was all defined in the SSP. Therefore, when the WLMP obtained the SSA's approval to disclose the Evaluation Reports to the offerors, it also obtained the approval to disclose the content of the SSP (except for the names of the members of the SSEB, the Source Selection Advisory Council, and the SSA) to the offerors. In order for the offerors to understand the entire process that the WLMP intended to use for this acquisition, including the communications before the establishment of the competitive range, the use of "uncertainties", and the intent to disclose to them the Evaluation Reports, this disclosure had to be accomplished before the offerors submitted their proposals. The WLMP again used the BOP to publish this information in late May 1999, approximately one month before the proposal due date of June 28, 1999.

COMPETITIVE RANGE: After receipt and consideration of the offerors' comments on their Initial Evaluation Reports [the comments received were few in number and mostly complimentary of the quality of the Reports], the Contracting Officer made a determination, with approval by the SSA, of which offerors were to be included in the initial competitive range. Here again, the WLMP took advantage of one of the opportunities presented by the Part 15 Rewrite. As discussed above, the Rewrite set forth a new standard for determining which offers should be included in the competitive range – one based on the "most highly rated proposals" rather than the old "reasonable chance for award" standard. But the Rewrite also included language allowing the competitive range to be "further reduced for the purposes of efficiency." FAR 15.306(c)(2) states;

"After evaluating all proposals... the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency... the contracting officer may limit the

number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals...”

The proposal evaluation strategy developed for the WLMP encompassed a complex and resource consuming effort with respect to the offerors determined to be in the competitive range. This strategy included Government site visits to a prior customer of the offeror where similar work had already been accomplished, Government Process Risk Evaluation (PRE) site visits to the offeror’s facilities, offeror Due Diligence site visits/reviews of the Government activities to be outsourced by the program, offeror oral presentations of the sample task solution to the SSEB, and extensive face-to-face negotiations/bargaining on the terms and conditions of the contract. In light of all these planned activities, it was not considered feasible to efficiently conduct the portion of the WLMP acquisition following the establishment of the competitive range with more than three offerors. This determination and the supporting explanation were documented in the contract file during the development of the SSP and the solicitation included a notice of the Government’s intent to limit the initial competitive range to no more than three offerors for the purposes of efficiency. As it turned out, the WLMP only received two proposals in response to the solicitation and so did not have to avail itself of the ability to further reduce the competitive range for the purposes of efficiency. However, the acquisition planning recognized the potential need for this ability and the tools in the FAR were utilized to make that ability available if it were needed.

It must be recognized during acquisition planning that there is an irrefutable relationship between this new treatment of how the competitive range is established and the expanded scope of exchanges between the Government and the offerors that is allowed before establishment of the competitive range. The Part 15 Rewrite is certainly encouraging smaller more efficient competitive ranges, but not before the Government thoroughly examines, fully understands, and completely assesses the merits of all the initial proposals. Surely expanded communication with the offerors before establishing that smaller more efficient competitive range, and thereby eliminating some offers from any further consideration for award, is sound business practice for both the Government and the offerors. The Government is able to make a better informed determination of which initial proposals truly show enough merit to be worth carrying forward into the full-scale negotiations and bargaining. These negotiations can be very demanding on both the Government’s and the offeror’s resources. Also, offerors who are eliminated from the competitive range may be more likely to feel that they were given a fair opportunity to compete before being eliminated, which could lessen the chances for a protest. Finally, with respect to those offerors who do make it into the competitive range, both they and the Government should be much better prepared for negotiations and true bargaining because of a much better understanding of the other party’s position. Under the old rules of no communication before establishment of the competitive range, much time and effort

were often wasted during negotiations just trying to reach a level of full understanding of the other party's position.

NEGOTIATIONS: Having reached the establishment of the competitive range, this brings us to the third type of exchange discussed in FAR 15.306 - negotiations. Negotiations are described in FAR 15.306(d) as exchanges between the Government and the offerors occurring after the establishment of the competitive range. These are exchanges “that are undertaken with the intent of allowing the offeror to revise its proposal.” [Note that FAR 15.306(d) defines negotiations that are conducted in a competitive acquisition as “discussions”. Therefore, in a competitive acquisition, the terms negotiations and discussions mean the same thing.] The primary objective of negotiations is “to maximize the Government’s ability to obtain best value”. The scope and extent of the negotiations are “a matter of contracting officer judgment.” While the scope of the negotiations is left to the contracting officer’s discretion, the clear intent of the Rewrite is to broaden what has traditionally been the scope and focus of negotiations under the old FAR language – disclosing deficiencies and weaknesses and giving the offeror an opportunity to fix the problem. The new language requires that negotiations with an offeror cover “significant weaknesses, deficiencies, and other aspects of its proposal [such as cost, price, technical approach, past performance, and terms and conditions] that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award.” But the new language also says negotiations may include “bargaining”. “Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.” The FAR Council even included an example of the type of bargaining that would be permitted during negotiations at FAR 15.306(d)(3);

“In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.”

Clearly, the FAR Rewrite contemplates negotiations that are very broad in scope, encompassing full-scale bargaining with the offeror until agreement is reached on the best deal obtainable from that offeror. This focus on negotiating to agreement and bargaining for the best deal with each offeror is substantially different from the traditional focus on giving each offeror notice and the opportunity to fix whatever is deficient or weak in its proposal. This shift of focus is apparently intended to liberate the Government evaluators and negotiators from concentrating only on the weaknesses and deficiencies. The weaknesses and deficiencies are the mandatory part of negotiations – they must be

covered during negotiations. But what about the discretionary part of the negotiations – the “other aspects” referred to in the language quoted above, the “bargaining” that may be included in the negotiations. This is where the new language is encouraging the Government to negotiate more like a commercial buyer – try to get the best deal you can possibly get for your agency. To emphasize this freedom, the Part 15 Rewrite even narrowed the limitations on the scope of exchanges, set forth at FAR 15.306(e). The traditional prohibitions on “technical leveling” and “auctioning” have been removed. The new language simply prohibits conduct which would favor one offeror over another, reveal an offeror’s technical solution or intellectual property to another offeror, reveal an offeror’s price without that offeror’s permission, reveal the names of people providing past performance information, or improperly disclose source selection information. This opening up of the potential scope of the negotiations could easily be perceived as the biggest change to come out of the Part 15 Rewrite.

With this new concept of negotiations in mind and after the competitive range was established, the WLMP team sent to each offeror remaining in the competitive range a package of information called Items for Negotiation (IFNs). These were questions addressing each of the deficiencies and weaknesses identified in the Initial Evaluation Reports regarding that offeror. This act was the beginning of the exchanges with the offerors after establishment of the competitive range, in other words, the beginning of negotiations. This is the phase of the acquisition where the offerors are given the opportunity to revise their proposals in order to cure deficiencies and improve or remove weaknesses. Offerors were given a specific period of time to respond to these IFNs. While the offerors were working on and submitting these responses, a number of other evaluation activities referred to above were conducted concurrently – such as the customer site visits, the PRE site visits, the Due Diligence site visits, and the oral sample task presentations. After all of these evaluation activities were completed and the IFN responses had been received and evaluated, the WLMP team was ready to enter into face-to-face negotiations with each of the remaining offerors.

The WLMP team developed an agenda for these face-to-face negotiations. First, they would go over all remaining weaknesses or deficiencies with the offeror to make sure the offeror understood the nature of the perceived problem and had one last opportunity to resolve it. Remember, weaknesses and deficiencies are the mandatory part of the negotiations. Therefore, the WLMP team wanted to make sure that these had been adequately covered with the offerors. Next on the agenda was to cover all those areas of the offeror’s proposal that were considered strengths by the evaluators. The object here was to make sure that all of these aspects or features are actually captured in the contract document and that the offeror is actually willing to be contractually bound to include these aspects or features in its performance [See the discussion of “model contract” below]. Then the agenda moved to those areas of the proposal where the Government wanted to bargain for a better deal than had been offered. This included areas such as attempting to persuade the offeror to increase levels of offered performance [even, in

some cases, where the performance offered already exceeded the minimum required level] where these increases were considered advantageous to the program; endeavoring to get a better “soft landing” package for the displaced Government employees who the offeror was required to give job offers to; and attempting to flesh out a more definitive and beneficial schedule for the logistics business process improvements. This bargaining even encompassed efforts to dissuade the offeror from including aspects in its proposed approach that the evaluators did not consider of value or benefit to the Government but which could add cost to the contractor’s performance.

As discussed above, the only limitation on this bargaining was to avoid five types of conduct –favoring one offeror over another, revealing an offeror’s technical solution or intellectual property to another offeror, revealing an offeror’s price without that offeror’s permission, revealing the names of people providing past performance information, and improperly disclosing source selection information. The last three types of conduct are quite clear and easy to understand. They are also relatively easy to manage and avoid. The first one, conduct that would favor one offeror over another, simply involves fair treatment of all offerors. The WLMP agenda [described above] applied in the same manner to each offeror accomplished fair treatment. The second one, conduct that would reveal an offeror’s technical solution or intellectual property to another offeror, is probably the one that worried the WLMP team the most. The team came up with a simple test to check themselves. Any aspect of an offeror’s proposal that involves that offeror’s methodology for achieving a particular result or output [as opposed to the result or output itself] is an aspect of the proposal that the team must not reveal to any other offeror in the course of this bargaining. In other words, to bargain for more result or output is not prohibited conduct. To bargain for one offeror to utilize the same methodology as the other offeror to achieve that result or output would be prohibited conduct.

The WLMP team concluded that the best way to “negotiate to agreement” is to write it down. Therefore, the team decided to utilize the face-to-face negotiations to draft a complete “model contract” for each offeror. This would be the actual contract document that would be signed by the contracting officer if that offeror were selected as the winner of the competition. By drafting the actual contract during negotiations, the parties are able to reach written agreement on the statement of work, the specification, the delivery schedule and terms, the acceptance criteria, the terms and conditions of the contract, and any special provisions, added features or higher levels of performance that have resulted from bargaining. Again, the paperless technology that the WLMP was utilizing to conduct this acquisition proved to be invaluable in executing this model contract strategy. At the face-to-face negotiations, a computer was hooked up to a projector and a screen was set up in the room. Since all the relevant documents - solicitation, proposals, statement of work, specification, and the model contracts themselves – were in electronic format, the WLMP team and the offeror were able to access and work on all the documents right there at the negotiation table simply by

projecting them up on the screen. When the negotiations were completed, all the documents were also essentially done.

For example, in the WLMP contract there is something called a Performance Bonus Plan. Under this Plan, significant portions of the contractor's potential payment under the contract are contingent upon the contractor exceeding minimum acceptable levels of performance against measurable logistics metrics. The solicitation allowed the offerors to propose what metrics they wanted to use, how much of their payment would be contingent upon this Plan, and how much of the money set aside in the Plan would be earned at each successive level of performance. At the face-to-face negotiations, the actual Plan document to be included in the contract was agreed to, including the specific metrics, the target levels of performance for earning the bonus money, and how much money would be earned by the contractor if it achieved that level of performance. Since the Plan is focused on exceeding minimum acceptable performance, it was also critical to agree at the face-to-face negotiations on the specific acceptance criteria included in the contract, both for the minimum levels of acceptable performance and for the "bonus" performance. At every opportunity, the WLMP bargained with the offerors for the best possible deal for the Government. For instance, higher target levels than were originally offered, specific metrics that were considered of more value to the Government than the ones originally offered, or even larger portions of the contractor's potential payment under the contract being made contingent upon achieving "bonus" levels of performance rather than just acceptable levels of performance. The agreements reached as a result of this bargaining were written right into the model contract at the negotiation table.

When the face-to-face negotiations were completed with all the offerors in the competitive range the SSEB prepared the Interim Evaluation Report which, just like the Initial Report, included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation. At this point in the process, each offeror was again provided a copy of the Interim Evaluation Report on its proposal. The purpose of this second disclosure of the Evaluation Report was to keep offerors fully informed as to how the Government viewed the merits of that offeror's proposal at this point in the acquisition. The offerors were again given a limited opportunity [a few days] to provide to the Government whatever comments on the Interim Evaluation Report they felt were appropriate. After receipt and consideration of any such comments, the Contracting Officer made a determination, with approval by the SSA, of which offerors should still be included in the competitive range and requested to submit final proposal revisions.

It is appropriate here to point out another advantage of the "model contract" approach. If executed smartly, it can reduce the time and effort needed to actually award the contract after the SSA's final source selection decision is made. The smart way to utilize the model contract in this fashion is to tell the offerors early and often that the

model contract agreed to during negotiations is the document that the Government intends to use for award. Tell them that, even though FAR 15.307(b) requires that each offeror be given the opportunity to submit a final proposal revision when the negotiation phase has been completed, the Government is definitely not expecting any changes to the model contract at that time. When final revisions are requested, the exchange of information is over. Negotiations have ended. If this final revision is something the Government doesn't understand or doesn't like, the offeror will have no further opportunity to explain it or to revise the proposal. Of course, any change made by the offeror at this point presents the risk that it could adversely affect the Government's evaluation of the proposal and, therefore, the offeror's standing in the competition. Make sure that the offerors understand that the burden of this risk lies solely with the offeror if it decides to make a change. It is probable that the combination of this risk and the broad scope of those "negotiations to agreement" that the model contract is a product that will discourage most offerors from making any changes at this point. When the request for final proposal revisions is actually issued, it should include a reminder that revisions are not actually expected or encouraged. The request should also instruct the offerors to respond to the request, whether they plan to make revisions or not, by submitting to the contracting officer a copy of the model contract signed by an individual with the authority to bind the offeror to the contract. The offerors should also be instructed that, if revisions are made, they must be included in the model contract and clearly highlighted. When these signed model contracts are submitted by the offerors, the Government has binding offers that require nothing more than a contracting officer's signature to make them binding contracts. All that is needed is money and an SSA decision regarding which offer represents the best value to the Government.

After final proposal revisions were received, the WLMP SSEB prepared the Final Evaluation Report. This report, just like the ones before it, included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation. At this point in the process, each offeror was again provided a copy of the Final Evaluation Report on its proposal. The purpose of this disclosure was once again to keep offerors fully informed as to how the Government viewed the merits of that offeror's proposal at this point in the acquisition. However, at this point, unlike the previous disclosures, since negotiations had been concluded, the offerors were not allowed to provide any comments on the Final Evaluation Report.

CONCLUSION

The WLMP contract was awarded on December 29, 1999. The unsuccessful offeror was debriefed on January 6, 2000 and, although deeply disappointed at not winning, did not file a protest. Contract performance is currently well under way. The contract that was put in place and the working partnership that has developed between the Government and the contractor to date are unique in this writer's experience. I believe the success of the acquisition to date is a direct result of the WLMP team maximizing the opportunity handed to it by the FAR Part 15 Rewrite to be open and innovative in finding the right industry partner and negotiating the best possible contract. While not every specific aspect of the WLMP acquisition process will work for, or is appropriate for, every single acquisition, one aspect that will improve any acquisition is to open up the lines of communication between industry and the Government during an acquisition and to expand the scope of the information exchanged during those communications. The WLMP experience demonstrates that the opportunity for innovation is there. Seize it!

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