THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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JUNE 2022 | VOLUME 36 | ISSUE 6

¶ 35 RETREATING FROM REFORM: "We Have Met The Enemy, And He Is Us!"

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(Note: In this article, rather than use the obsolete phrase *commercial items* or the awkward phrase *commercial products and commercial services*, we will use the phrase *commercial contracts*.)

Some of our readers will remember when Vice President Al Gore appeared on the Dave Letterman show on September 7, 1993, to talk about the Clinton Administration's efforts to reinvent and streamline Government procurement. He told Letterman about the Government's 10-page specification for an office ashtray, Federal Specification AA-A-710D, ASH RECEIVERS, TOBACCO, (DESK TYPE), dated July 26, 1990. One of the specification requirements pertained to shock:

> 3.4 Shock requirements.
>
> 3.4.1 Type I, glass. The ash receivers shall not break into more than 35 pieces when tested in accordance with 4.5.2.

A shock test was specified as follows:

> 4.5.2 Breakage, type I glass. The test shall be made by placing the specimen on its base upon a solid support (1-$^{3}/_{4}$inch maple plank), placing a steel center punch (point ground to a 60 degree included angle) in contact with the center of the inside surface of the bottom and striking with a hammer in successive blows of increasing severity until breakage occurs. The specimen should break into a small number of irregular shaped pieces not greater in number than 35, and it must not dice. Any piece $^{1}/_{4}$ inch or more on any three adjacent edges (excluding the thickness dimension) shall be included in the number counted. Small fragments shall not be counted.

To the audience's amusement, Gore and Letterman proceeded to break an ashtray and count the pieces. You can watch the episode at: https://www.youtube.com/watch?v=1dyIQcHljl4. The ashtray specification was cancelled on October 1, 1993, less than a month after Gore's appearance on Letterman.

That was not the only goofy Government specification. A 23-page military specification for cookies and brownies, MIL-C-44072B, *Cookies, oatmeal; and brownies; chocolate covered*, dated December

9, 1987, incorporated hundreds of pages of Government regulations and other publications by reference, including a 50-page Environmental Protection Agency regulation governing the water used to make the cookies, which cites even more publications. There was also a 16-page military specification for chewing gum, MIL-C-10022D, CHEWING GUM, dated 14 September 1972, requiring the gum to be tested for palatability, as follows:

> 4.4.2.1 Procedure.- Samples shall be served to a consumer type panel. The panel members shall rate each sample on a 9-point hedonic scale…graduated in successive degrees of like and dislike. The samples shall be presented successively with a minimum interval of 30 seconds between samples, in controlled orders, so that each sample is served an equal number of times in each temporal position. Each subject shall rate from 2 to 6 samples at a test session. Panelist [sic] evaluating peppermint or spearmint flavored gum shall be limited to not more than two samples per session, but all subjects shall rate the same number of samples in a given session. The subjects shall test without interference from each other or from outsiders.

The Federal Acquisition Streamlining Act Of 1994 And Commercial Contracting Reform

On October 13, 1994, President Bill Clinton signed the 167-page Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, based on S. 1587, which had been introduced on October 26, 1993, by Senator John Glenn. It was the first major achievement of the administration's reinvention and streamlining effort and was greeted with great fanfare. See Gore, From Red Tape To Results: Creating A Government That Works Better And Costs Less, Report of the National Performance Review (Government Printing Office, Sept. 1993); Barr, "Trying To Add Common Sense to Procurement," Wash. Post, Feb. 24, 1994, at A25; Bingaman, *The Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, 145 Mil. L. Rev. 149 (1994). The Administrator of the Office of Federal Procurement Policy from 1993 to 1997, Harvard University Professor Steven Kelman, vigorously and effectively pursued the reinvention and streamlining campaign, mainly through advocacy and persuasion rather than decree. See Kelman, *Unleashing Change: A Study of Organizational Change in Government* (Brookings 2005).

Title VIII of FASA was devoted to reforms mandating and facilitating the award of commercial contracts. Increased reliance on commercial contracts was expected to give the Government access to the latest and the best goods and services and reduce costs by relying on the commercial marketplace instead of specifying Government-unique supplies and services. See the analysis of the legislation in S. Rep. No 103-258, 103d Cong., at 5 (May 11, 1994):

> The commercial items provisions of the bill, which are set forth in Title VIII, would encourage the use of commercial items, and when such items are not available, other nondevelopmental items, and make it substantially easier for federal agencies throughout the government to purchase such items. The purchase of proven products such as commercial and nondevelopmental items can eliminate the need for research and development, minimize acquisition leadtime, and reduce the need for detailed design specifications or expensive product testing.

(Despite the emphasis on "items" and "products" in that quote, § 8001 of the Act defined commercial items to include commercial services.)

FASA's two-prong approach to commercial contracting was to (1) eliminate reliance on standard Government specifications and reduce the number of applicable Federal Acquisition Regulation contract clauses and (2) speed up the buying process. That approach addressed the two characteristics of procurement that were presumed to discourage commercial firms from pursuing Government contracts—the excessive cost of doing business with an overbearing bureaucracy and lengthy, tedious, and expensive contractor selection and contract formation processes.

So, 28 years after FASA, how has commercial contracting reform worked out?

The Air Force Wants To Buy Commercial Meteorology Support Services

On April 27, 2022, the Air Force issued a combined synopsis/solicitation (see FAR 12.603, *Streamlined solicitation for commercial products or commercial services*) FA8601-22-R0020, seeking proposals for "meteorology support services" at Wright Patterson Air Force Base. There is a commercial market for such services. A National Weather Service website, *Commercial Weather Vendor Web Sites Servicing the U.S.*, https://www.weather.gov/IM/more, lists hundreds of firms that provide such services. So it appears that such services fit the definition of *commercial services* in FAR 2.101.

The Air Force is conducting the acquisition pursuant to FAR Part 12, *Acquisition of Commercial Products and Commercial Services*, and Defense FAR Supplement Part 212, *Acquisition of Commercial Items*. The Air Force has set the acquisition aside for 8(a) small businesses and is using the procedures described in FAR Subpart 12.6, *Streamlined Procedures for Evaluation and Solicitation for Commercial Products and Commercial Services*. According to FAR 12.601(b): "These procedures are intended to simplify the process of preparing and issuing solicitations and evaluating offers for commercial products and commercial services consistent with customary commercial practices." As of the time of this writing the Air Force was awaiting proposals due on May 20, 2022.

The Requirement/Performance Work Statement

The Air Force's 59-page combined synopsis/solicitation (see FAR 12.603) for commercial meteorological services comes with a 63-page "Performance Work Statement" (PWS). The PWS describes the scope of work as follows:

> The contractor shall provide all personnel, equipment, tools, materials, supervision, and associated items and services to provide BWS [Base Weather Station] meteorological services. The contractor shall provide all mission, airfield, and staff meteorological services required to operate the Wright Patterson Air Force Base (WPAFB) BWS, and provide specialized support to meet National Airborne Operations Center (NAOC) mission support requirements. *The Contractor shall perform these services in accordance of [sic] all applicable Department of Defense (DoD), Air Force (AF), and Wright-Patterson AFB Instructions, Manuals, and Directives.* [Emphasis added.]

Vice President Gore had ridiculed the needless and costly noncommercial requirements in Government specifications. FASA was supposed to do away with them. But the Air Force PWS, Appendix 4, *Applicable Publications, Regulations, and Forms*, lists 15 Air Force publications and seven forms "that shall be used unless as specified in the basic PWS." Nine of the publications are Air Force instructions and manuals, such as the 106-page Air Force Manual (AFMAN) 15-111, *Surface Weather Observations*, and the 97-page Air Force Instruction (AFI) 33-322, *Records Management & Information Governance Program*. And scattered throughout the PWS are references to other Government publications with which the contractor must comply in some way, but that are not listed in Appendix 4. For example, PWS 2.3.1.12 requires the contractor to "attend and participate in quarterly AOB meetings in accordance with AFI 13-204V3," a reference to the 268-page Air Force Instruction 13-204, Volume 3, *Air Traffic Control*. Another example is PWS 2.3.10, requiring the contractor to "apply RM [risk management] principles and processes to day-to-day weather operations to focus activities and allocate resources to exploit environmental conditions, mitigate mission delays, and enhance the overall effectiveness of operations in accordance with AFMAN 15-129 series publications and AFI 90-802, *Risk Management*." AFI 90-802 is 30 pages long. Yet another such reference, in PWS 2.3.11.1, is to the 164-page Air Force Instruction 90-201, *The Air Force*

Inspection System: "The contractor shall comply with AFI 90-201, The Air Force Inspection System, and supporting Inspection systems and programs. Compliance and performance checklists, or Self-Assessment Communicators, assess the contractor's compliance with Air Force guidance and standards for, and performance of, assigned missions." That requirement is contrary to FAR 12.208, *Contract quality assurance*:

> Contracts for commercial products shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial product being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice. The Government shall rely on the contractor to accomplish all inspection and testing needed to ensure that commercial services acquired conform to contract requirements before they are tendered to the Government.

So much for getting rid of the ashtray, cookie, and chewing gum types of specifications.

Incorporating those publications into a "performance work statement" and requiring compliance seems contrary to the tenets of another Clinton-era reform—performance-based acquisition, which FAR 2.101 defines as "an acquisition structured around the results to be achieved as opposed to the manner by which the work is to be performed." See also FAR 37.602, *Performance work statement*:

> (b) Agencies shall, to the maximum extent practicable—
>
> (1) Describe the work in terms of the required results rather than either "how" the work is to be accomplished or the number of hours to be provided (see [FAR] 11.002(a)(2) and 11.101);
>
> (2) Enable assessment of work performance against measurable performance standards;
>
> (3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

And FAR 11.002, *Policy*, subparagraph (a)(2) states, in pertinent part:

> (2) To the maximum extent practicable, ensure that acquisition officials—
>
> * * *
>
> (ii) Define requirements in terms that enable and encourage offerors to supply commercial products or commercial services or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items, in response to the agency solicitations;
>
> * * *
>
> (v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial products or commercial services or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items.

Are all those Air Force requirements consistent with commercial practice? We do not know. But, if they are, then why the need to cite and require compliance with them? And, if they are not, but are essential to Air Force operations, then why does the Air Force think that the service it wants is commercial? We understand the importance of sound meteorological practice at military airfields, so we do not fault the Air Force because it considers such requirements to be operational necessities. They know best what they need. But if those requirements are not consistent with commercial practice, then procurement under FAR Part 12 procedures and contract clauses is inappropriate.

Commercial Contract Terms And Conditions—1996 vs. 2022

One of the most significant of the FASA reforms for the purchase of commercial products and ser-

vices was a limitation on the applicability of standard FAR clauses. The rules about commercial contract clauses are in FAR 12.301, *Solicitation provisions and contract clauses for the acquisition of commercial items*. In 1996, FAR 12.301—as supplemented by DFARS 212.301 and the clause at DFARS 252.212-7001, "Contract Terms and Conditions Required to Implement Statutes Applicable to Defense Acquisitions of Commercial Items"—prescribed a maximum of 28 contract clauses for possible use in commercial contracts. Today, FAR 12.301 and its DFARS supplement specify a maximum of 152 clauses. No Government commercial contract will include all of those clauses, but the fact that so many more clauses might apply to a commercial contract in 2022 than in 1996 shows that commerciality is not as free from FAR clauses as it was 26 years ago. That is largely Congress's doing, because it just cannot stop writing procurement legislation.

The Air Force synopsis/solicitation for meteorological services lists 58 clauses from the FAR, the DFARS, and the Air Force FAR Supplement, more than twice as many as would have been required in 1996. That is not to say that any of those clauses are inapplicable or inappropriate, but if so many more FAR and agency FAR supplement clauses apply to commercial contracts today than would have applied in 1996, then some of the advantages of the FASA commercial contracting reforms have been lost to subsequent legislation and policy. That in turn suggests a lack of continuing commitment to the FASA reforms on the part of Congress and executive agencies.

The Source Selection And Contract Formation Process

The Air Force synopsis/solicitation includes the solicitation provision at FAR 52.212-2, "Evaluation—Commercial Products and Commercial Services (NOV 2021)," which states:

> (a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:
>
> (1) Ability to comply with the requirements of the Performance Work Statement as evidenced by providing a complete description of the services to be provided; and
>
> (2) Determination of a Fair and Reasonable Price (Lowest Total Evaluated Price (TEP) that is found to be Technically Acceptable.)

The synopsis/solicitation states that the Air Force will not evaluate past performance and experience because "the Small Business Administration (SBA) will put forth 8(a) small businesses that have the capability of meeting the needs of the Government."

The synopsis/solicitation includes a four-page addendum that provides more information about evaluation factors for award and an eight-page addendum containing proposal preparation instructions. According to the addendum about evaluation factors:

> The Government will use procedures described in FAR 12.602, Streamlined Evaluation of Offers, as well as FAR 13, Simplified Procedures for Certain Commercial Products and Commercial Services, to evaluate offers submitted in response to the solicitation. The Government will award to the offeror with the lowest total evaluated price (TEP) among those that are found technically acceptable.

It then goes on to say:

> FACTOR I – Technical Acceptability: The Government's technical evaluation team shall evaluate the technical proposals on a pass/fail basis, assigning one of the ratings described in the table below for each sub-factor. Any sub-factor evaluated as 'Unacceptable' will render the entire proposal unacceptable and, therefore, ineligible for award. Only those proposals determined to be technically acceptable, either

initially or as a result of discussions, will be considered for award. However, offerors are cautioned that the Government reserves the right to award this effort based on the initial proposal, as received, without discussions.

Rating	Description
Acceptable	Proposal clearly meets the minimum requirements of the solicitation.
Unacceptable	Proposal does not clearly meet the minimum requirements of the solicitation.

Proposals shall be evaluated against the following technical sub-factors:

Sub-factor 1: Transition Planning

Description: This sub-factor will assess the offeror's Transition Plan, to include staffing, management, equipment, supplies, and security considerations.

Measure of Merit: This sub-factor is met when the offeror's proposed Transition Plan demonstrates a sound approach for transitioning the services from the incumbent contract to the ensuing contractor, while maintaining continuity of all contracted services throughout the Transition Period.

Sub-factor 2: Staffing Approach

Description: This sub-factor will assess the offeror's overall approach to manning each functional area of the PWS.

Measure of Merit: This sub-factor is met when:

a) The offeror's organizational chart reflects a sound manning approach to properly staff, manage, and maintain all the PWS requirements, and the organization chart demonstrates a complete understanding of each functional area of the PWS.

b) The narrative demonstrates a complete understanding of the positions, training qualifications, and contractor provided equipment, supplies, materials, etc., necessary to execute each functional area of the PWS.

Sub-factor 3: Continuation of Essential Contractor Services

Description: This sub-factor will evaluate the offeror's proposed plan to meet the Continuation of Essential Contractor Services during periods of crisis or contingencies.

Measure of Merit: This sub-factor is met when the offeror's proposed Continuation of Essential Contractor Services Plan demonstrates a sound approach for performing those services identified as essential contractor services during crisis/contingency situations.

The synopsis/solicitation instructed offerors to submit their proposals in two "volumes," which it gave offerors 30 days to prepare and submit. Volume I, to be entitled, *Technical Acceptability*, is limited to 120 pages. Volume II, to be entitled *Price & Offer Documentation*, is limited to 30 pages. The instructions for preparing Volume I are as follows:

a. FACTOR I – Technical Acceptability

4. Evaluation Factors and Offer Volume Content:

i. Specificity and Completeness: The Technical Acceptability Volume (Volume I) shall be specific and complete. Legibility, clarity, and coherence are very important. Offeror responses to the Technical Acceptability Factor and Sub-factors will be evaluated [in accordance with] the addendum to the solicitation titled 'Evaluation Factors.' All requirements specified in the solicitation are mandatory. Except as provided for in paragraph 2(c) and paragraph 4(b)(vi) of these instructions, by submission of a proposal, the offeror is representing that the offeror shall perform all requirements specified in the solicitation. *It is not necessary or desirable to repeat that fact within the proposal. The offeror shall NOT merely reiterate the objectives or reformulate the requirements specified in the solicitation.* [Emphasis in original.]

ii. Organization: Volume I shall include a table of contents to include a list of tables, figures, and drawings, as applicable. The Technical Acceptability Volume shall also include a glossary if it will enhance the Government's ability to understand the proposal and facilitate its evaluation.

iii. Content:

Sub-factor 1 – Transition Planning (PWS Paragraph 2.7.11)

The offeror shall submit a proposed Transition Plan that addresses the offeror's proposed approach to staffing, management, equipment, supplies, and security considerations. The offeror's Transition Plan shall address the following:

- A plan for ensuring that personnel have the required clearance, as outlined in the DD Form 254, Attachment 3 to the solicitation, at the beginning of the period(s) of performance. See Schedule of the Synopsitation [sic] for Period of Performance.
- A management structure (organizational chart), processes for controlling/managing/dispatching personnel, and quality control plan.
- Recruitment processes (incentives and benefits) for acquiring and retaining qualified personnel, processes for continued employee training, and plans for limiting substitutions of qualifications in only exceptional situations.
- Procedures to provide appropriate mix of skilled employees to assume responsibilities for all contract functions for a successful transition from the incumbent performing this work.

Sub-factor 2 – Staffing Approach

The offeror shall submit a proposed organizational chart which illustrates a clear understanding of the manning requirements for the Base Weather Station (BWS) / Weather Flight (WF) Operations as identified in the Performance Work Statement (PWS). The offeror's organizational chart shall:

- Describe the number of personnel required to perform each part of the requirements.
- Describe the proposed organization to convey the structure, staffing, and key aspects of the offeror's management methodology over the life of the contract.
- Describe any cross-utilization between personnel assigned to each function.
- Separately identify prime contractor personnel from subcontractor personnel, if applicable.In addition to the organizational chart, the offeror shall submit a detailed narrative to describe the staffing approach illustrated in the organizational chart described above. The narrative shall:
- Detail the minimum qualification requirement for each person that will perform the functions found in the PWS.
- Provide information for recruiting and retaining qualified personnel capable of meeting the requirements of this solicitation.
- Provide an overall training approach that addresses all offeror and subcontractor (if applicable) employees and ensures the workforce is technically qualified to meet the PWS requirements on an initial and recurring basis.
- Detail any necessary equipment, supplies, etc., (not already owned by the Government and made available to the contractor) that will be used during the performance of the requirements, and for which function(s) of the requirements the item(s) will be used.

Sub-factor 3: **Continuation of Essential Contractor Services (PWS paragraph 2.4.4)**

The offeror shall provide a written plan describing how it will continue to perform the essential contractor services listed in the PWS. The offeror shall:

- Identify provisions made for the acquisition of essential personnel and resources, if necessary, for continuity of operations for up to thirty (30) days or until normal operations can be resumed;
- Address within the plan:
- Challenges associated with maintaining essential contractor services during an extended event;
- The time lapse associated with the initiation of the acquisition of essential personnel and resources and their actual availability on site;
- The components, processes, and requirements for the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing work from home;
- Any established alert and notification procedures for mobilizing identified "essential contractor service" personnel; and
- The approach for communicating expectations to contractor employees regarding their roles and responsibilities during a crisis.

Given the 120-page limitation on the length of the technical proposal, the Air Force apparently expects an extensive exposition of the specified topics. But since none of that information is to be included in the "price and offer documentation," the instructions say nothing about the need for promissory language, and there is no mention of incorporation into the contract, those submissions appear to be an exercise in persuasive essay-writing.

Since the Air Force expects the SBA to proffer competent firms, why not use oral presentations to interview the offerors and ask them questions, face-to-face, about their plans and procedures? (The 1997 FAR Part 15 Rewrite addition of FAR 15.102, *Oral presentations*, was another Clinton-era acquisition reform.) If economically done, oral presentations would cost less and be more expedi-

tious than instructing offerors to write extensive plans and making Government employees read and evaluate what are likely to be competing versions of 120 pages of *blah*, *blah*, *blah* written in a 30-day heated rush. Less costly and more expeditious is very commercial.

Acquisition Reform And Practitioner Recidivism

Much of the failure of reform is due to congressional legislative malpractice and poor regulatory implementation. But much of it is due the failure of agency managers to prepare working-level practitioners for a new way of doing business.

What happens when acquisition reform is handed over to working-level practitioners? Perhaps the most vivid example is the FASA "fair opportunity" procedures for issuing task orders under multiple-award task order contracts. After the enactment of FASA, in *The New Rules for Multiple Award Task Order Contracting*, 9 N&CR ¶ 35, we predicted:

> The multiple award preference policy states that every awardee must be given a "fair opportunity" to be considered for the award of each task order in excess of $2,500. The proposed rule leaves the choice of evaluation factors to the CO's discretion. The CO need not publish a synopsis, solicit written proposals, or conduct discussions with awardees prior to the award of a task order, proposed FAR 16.505(b)(1). The rule precludes protests against task order award decisions. Agencies must appoint task order "ombudsmen" to handle complaints from awardees about task order selections, proposed FAR 16.505(b)(4).
>
> Notwithstanding these liberal policies, it is not difficult to imagine Government procurement officials conducting a mini-source selection before the issuance of each task order. Some will almost certainly consider a more formal procedure to be necessary to ensure fairness. One can easily imagine requests for proposed task order "performance" plans or "management" plans, especially for task orders of significant dollar value. One can also imagine requests for extensive cost breakdowns, certified cost or pricing data, and proposal audits. If too complex and demanding, such procedures would significantly increase an agency's administrative costs, extend the lead time associated with task order issuance, and force awardees to incur significant costs in the preparation and negotiation of task order proposals.

And that is exactly what happened. In 2012 we reported:

> In October 1995, the original implementation in FAR 16.505(b) of the "fair opportunity" procedures for awarding task order contracts was 565 words long and protests could not be lodged against task order awards. Today that paragraph is 2,201 words long and protests are authorized for large orders.…The rules were made more restrictive and prescriptive and protests were authorized because contracting personnel did not obey the regulations. Instead, they devoted their creativity and innovation to finding ways to twist, bend, and break the rules.

See *Knowledge of the Regulations: Is That All It Takes?*, 26 N&CR ¶ 56. Since then FAR 16.505(b) has grown by 190 more words to 2,391 words. A regulation-writer can cram a lot of process-burden into 190 words.

Many acquisition reforms have been subverted by what we call practitioner recidivism. It happens when managers do not prepare working-level practitioners for effective implementation of something new. On-the-job training teaches them practice by cut-and-paste—"*Don't reinvent the wheel!*"—which is easier to teach than process design based on concepts and sound principles of practice. Faced with something new, and not knowing how to proceed without detailed instructions, they soon do what they were taught to do. So, not understanding the concept of *evaluation factor*, practitioners stick to the factors used in prior source selections—*soundness of approach* and *understanding of the requirement*, though unable to define *approach* or *soundness* or explain what constitutes *understanding*. When entering into commercial contracts, not being familiar with commercial

practices, products, services, and contract terms, they cut and paste from Government regulations, manuals, standards, instructions, and old specifications and statements of work. When given considerable freedom to design processes for providing multiple-award indefinite-delivery, indefinite-quantity contractors a fair opportunity to be considered for a task order, they resort to the FAR Part 15 process model.

No reform is immune to practitioner recidivism. It is inevitable. It will happen to other transaction authority and commercial solution openings. Just as sure as the turning of the Earth. *VJE*