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

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and James F. Nagle

AUGUST 2022 | VOLUME 36 | ISSUE 8

¶ 43 THE MEANING OF "SHOULD": Two Approaches

Ralph C. Nash

Addendum by Vernon J. Edwards

Occasionally the U.S. Court of Federal Claims and the Government Accountability Office disagree on the proper treatment of a protest. This occurred in a sequential protest of IAP Worldwide Services, Inc. where the issue was whether the Army should have established a competitive range in a major procurement where Defense Federal Acquisition Regulation Supplement 215.306(c) provides that "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions."

The Army had received five offers and, after a detailed evaluation of the required management and technical proposals, had concluded that one (Vectron's) was superior, three were acceptable, and IAP's was unacceptable. Although there was a significant difference in probable costs—Vectron at $1,027,490,421 and IAP at $776,954,538—the agency awarded the contract to Vectron without establishing a competitive range and conducting discussions. IAP protested to the GAO and then the court, contesting the evaluation that led to its unacceptable rating (based primarily on inadequate staffing) and arguing that DFARS 215.306(c) should be interpreted to call for discussions in circumstances, such as these, where it could have readily added the required personnel, giving it an opportunity to win the competition. Both the GAO and the court found that the Army had conducted the evaluation in accordance with the solicitation but they disagreed on the proper interpretation of the DFARS.

The Government Accountability Office

The GAO denied the protest in *IAP Worldwide Services, Inc.*, Comp. Gen. Dec. B-419647, 2021 CPD ¶ 222, 63 GC ¶ 209, following the analysis in earlier decisions:

> We have explained that, although DFARS section 215.306(c) establishes an expectation that discussions will be conducted in Department of Defense procurements valued over $ 100 million, agencies retain the discretion not to conduct discussions based on the particular circumstances of each procurement. *Omni2H, LLC*, B-418655, July 16, 2020, 2020 CPD ¶ 239 at 6–7; *Science Applications Int'l Corp.*, B-413501, B-413501.2, Nov. 9, 2016, 2016 CPD ¶ 328 at 8–9. In this regard, we will review an

> agency's decision to forego discussions, taking into consideration various facts, including notification in the solicitation of that intent; existence of clear technical advantages/disadvantages in initial proposals; and submission of initial proposals offering fair and reasonable prices. *Novetta, Inc.*, B-414672.4, B-414672.7, Oct. 9, 2018, 2018 CPD ¶ 349 at 22–23. We have additionally recognized that an agency generally need not conduct discussions with a technically unacceptable offeror. *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200 at 5; *SOC LLC*, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 8.
>
> Here, we reject IAP's assertion that the agency was required to conduct discussions. As discussed above, the [Request for Proposals] three times clearly advised offerors that, while conducting discussions was an option, the Army intended to award without conducting discussions. Further, based on our review of the record, the agency reasonably concluded that the initial proposals demonstrated clear technical advantages and disadvantages between the competing proposals. Specifically, the Army received five proposals, four of which were technically acceptable with fair and reasonable pricing, and Vectrus's proposal offered unique strengths under the most important evaluation factor and the factor's corresponding most important subfactors. Finally, the agency reasonably found that IAP submitted a technically unacceptable proposal for failing to adequately address material solicitation requirements. On this record, we do not find that the agency's determination to award on the basis of initial proposals was unreasonable….

This line of decisions appears to make "should" a highly discretionary word.

The Court Of Federal Claims

In *IAP Worldwide Services, Inc. v. U.S.*, 159 Fed. Cl. 265 (2022), the court conducted a far more extensive analysis of the degree of discretion conferred by the use of "should." It first concluded that the term creates "a regulatory presumption in favor of conducting discussions," citing *Oak Grove Technologies., LLC v. U.S.*, 155 Fed. Cl. 84, 108–14 (2021). This placed the burden on the Army to demonstrate that it had done sufficient analysis to overcome the presumption. This led the court to examine the administrative record where it found:

> To say that the record addressing the subject is thin would be an understatement. In that regard, the [Source Selection Advisory Council's (SSAC's)] final report assessed that IAP's "proposal is unawardable" due to its Subfactor 2 rating—and, thus, that "[i]t is unlikely this area can be rectified with discussions." There is nothing more in the SSAC final report. The [Source Selection Authority (SSA)] in the [Source Selection Decision Document (SSDD)] similarly concluded that "[a]s a result of the [Source Selection Evaluation Board (SSEB)] review and in accordance with the basis for award, it is my determination there is one offeror that offers the best value to the government *and discussions are not required*." [Emphasis added by court.] Although the SSA indicated that her "decision [was] based on the following information," the subsequent discussion in fact consists only of the justification for the SSA's best value decision, with the exception of a short, discrete section focused on the decision to "Award Without Discussions." But that section contains only a summary of the offerors' evaluations and this assertion:
>
> > Based on an integrated assessment of the proposal evaluations and the drafted evaluation notices, I have determined that *discussions would not result in any meaningful benefit to the Government*, or any changes to the apparent outcome of the source selection decision. Thus, in accordance with the terms and conditions of the solicitation, a contract will be awarded without discussions and a competitive range will not be established. [Emphasis added by court.]
>
> That threadbare, conclusory assertion is insufficient pursuant to DFARS 215.306. [Footnote omitted.]

The court follows this top-level conclusion with a detailed explanation of why the emphasized language is insufficient to overcome the presumption, stating:

> [N]either the SSAC nor the SSA provided any facts, explanation, or analysis substantiating their question-begging conclusions, respectively, that IAP's initial ratings could not be "rectified with discussions," and that discussions would not change "the apparent outcome" of the procurement. In the absence

> of facts substantiated in the administrative record—and reasoned agency judgment based on such facts—these conclusions are mere *ipse dixit* and insufficient even under the deferential [Administrative Procedure Act] review standard.

The court bolstered this analysis by questioning why the agency had prepared evaluation notices but not used them and the fact that the agency source selection plan indicated that it intended to establish a competitive range and conduct discussions. In sum, this decision places a far higher requirement on a contracting agency than the GAO standard.

The End Result

Because the word "should" is used throughout the FAR and its supplements this divergence of views may (or may not) have broader implications than its application to DFARS 215.306(c). As to IAP, it is stuck in limbo. The court denied the issuance of an injunction and asked the parties for additional briefing on whether an injunction should be granted. Based on these briefs, the court, in *IAP Worldwide Services, Inc. v. U.S.*, 160 Fed. Cl. 57 (2022), granted a "limited remand" telling the Army to make a new determination as to whether it should establish a competitive range and conduct discussions. In discussing the Army's specious argument that "conducting discussions would take a minimum of 9–12 months, and would require the [Army] to divert resources from other important missions…to conduct the discussions," the court noted that it was not ordering the Army to conduct discussions but merely to revisit its decision.

The Army has announced that it will create new documentation justifying its decision not to establish a competitive range. Perhaps this decision is based its view that it would actually take 9–12 months to conduct discussions. This, of course, risks the likelihood of more litigation, consuming more time. Perhaps both parties are in limbo. *RCN*

ADDENDUM

The IAP Worldwide Services protests to the GAO and the Court of Federal Claims were about the Army procurement entitled, "Operations, Maintenance, and Defense of Army Communications in Southwest Asia and Central Asia" (OMDAC-SWACA).

A Complex Acquisition

OMDAC-SWACA is an extremely complex procurement. The SAM.gov announcement included 160 attachments of various kinds and lengths. The Request for Proposals was 336 pages long. RFP Section B, the Schedule, contained 108 contract line items and subline items, not including the myriad option items.

The line items were indecipherable to anyone without a codebook. They included descriptions of the deliverables such as:

> 0001 LABOR - Phase-In, CPFF [no quantity or unit]
> 0002 DBA-Phase-in, COST DBA Insurance costs required IAW 52.228-2 [no quantity or unit]
> 0003 OVERTIME/CALLOUT – Phase-In Period I, CPFF [no quantity or unit]
> …
> 0010AA CONTRACT REP-OTH-Phase-In Period I, COST, 60-Day Phase-In Period I, CONTRACT REPORTING-OTHER-Phase-In Period I, FOB: Destination [no quantity or unit]

RFP Section C, the Performance Work Statement (69 pages, not counting the pages of multiple attachments), described the scope of the prospective contract in the following stream of consciousness:

The Contractor shall provide personnel that understand, speak, read, and write the English language to provide operation and maintenance (O&M) support of Title X telecommunications equipment and information systems that is U.S. Government owned or leased and under the operational purview of the Network Enterprise Technology Command (NETCOM), 160th Signal Brigade and its subordinate units in the Southwest Asia (SWA) and Central Asia (CA) Theaters of operation. While telecommunications services are currently provided in Afghanistan, Iraq, Kuwait, Bahrain, United Arab Emirates (UAE), Jordan, and Qatar, the possibility exists that the 160th Signal Brigade mission could expand into other Southwest Asia or Central Asia locations. The Contractor shall provide all, project management, administration, personnel, service support, parts, supplies, tools, leased vehicles (quantity approved by the Government), overtime, travel, training, and equipment (except for Government-Furnished Property (GFP) Technical Exhibit (TE)1 and Government-provided services as stated herein) required to perform the O&M, and repair of telecommunications systems and equipment supported in TE2 locations. Locations may change depending on the mission requirements of the 160th Signal Brigade and its subordinate units. The Contractor shall perform O&M of Information Technology (IT) environments, which includes any hardware, software, applications, tools, systems, or networks used by the Government, whether developed, owned or leased. The Government requires that all tasks employing agency-specific or unique hardware and software in both classified and unclassified network environments be accomplished to ITIL compliant standards. Scope of work shall include legacy, current, and newly employed systems at various lifecycle stages. The Contractor shall provide O&M services in support of USARCCSWA, Regional Network Operation Security Centers (RNOSCs), Technical Control, Earth Terminal Complex (ETC), Defense Satellite Communications System (DSCS), Standardized Tactical Entry Point (STEP), Regional Hub Node (RHN) and Defense Red Switch Network (DRSN) facilities, to include future requirements identified in this Performance Work Statement (PWS). The O&M responsibility includes all telecommunications hardware, software, Network Operations (NetOps) capabilities, Computer Network Defense (CND), Information Assurance (IA), Enterprise System Operations (SysOps), Network Management, Defensive Cyberspace Operations, and Configuration Management (CM) appliances currently being used, developed and implemented by the Government for the duration of the contract. The Contractor shall also perform Inside Plant (ISP) and Outside Plant (OSP) O&M tasks, install and de-install telecommunications equipment, as required, O&M Cable Television (CATV) and public address systems. The Contractor shall perform work required to move equipment in Government-provided transportation. The Contractor shall provide Network engineering support; operate Service Desks, Facility Control Offices (FCOs), and the Theater Logistics Supply Facilities (TLSFs); perform supply functions; and provide logistics support. Current locations and systems to be supported are specified in TE1, TE2, TE4 and TE5. This contract provides hands-on operations, maintenance and repair type services for telecommunications facilities (RNOSC, USARCC-SWA, TCF, Satellite Communications (SATCOM), etc.) only. Staff support services are provided under another contract and shall not be duplicated under this contract. Operations, maintenance, and repair service for facilities other than communications facilities (barracks, warehouses, etc.) is provided by the local Department or Public Works and shall not be duplicated under this contract. The Contractor shall be required to continue performance during peace, crisis, hostilities, and wartime operations.

A Lengthy Process

OMDAC-SWACA was launched with an announcement at SAM.gov dated September 30, 2018. The solicitation was released on April 3, 2019, and required the submission of proposals by May 17, 2019. The most important evaluation factor was the content of the "Mission Support/Technical Approach" part of the proposal. It was limited to 100 pages and was to contain a description of an offeror's "methodologies" and "approaches" to doing this or that. We found no indication in the RFP that it was to be promissory in nature and part of the offer, or that it would be incorporated into the contract. It was just an essay test.

The Army received five such proposals. The protester and the other candidate for selection

estimated that their costs would be $776 million and $1,067 billion, respectively. Assuming that the proposals were actually received on May 17, 2019, the Army took 592 calendar days, more than a year and a half, to read and evaluate the five 100-page nonprice proposals and other proposal information and award a contract on December 29, 2020. (We presume that the extreme length of the source selection was due in part to the COVID-19 pandemic, which may have begun to effect agency operations in February or March of 2020, seven or eight months after the presumed date on which proposals were received.)

Despite the complexity of the procurement and any disruption caused by COVID-19, the Army decided not to conduct discussions before making the award. Only an agency of the U.S. Government would choose to do such a thing in a complex procurement like OMDAC-SWACA. Thus, the Army took more than a year to evaluate five proposals prepared and submitted in response to an extraordinarily complex solicitation and then decided that there was no need to talk to anyone about anything during contract formation. See *Contract Formation Without Conversation: How Do You Do That? Why Would You Want To?*, 31 NCRNL ¶ 20.

IAP Worldwide Services filed a protest at the GAO on March 8, 2021. One of the protester's principal complaints was that the Army had not conducted discussions. The GAO denied the protest in a 12-page decision issued on June 1, 2021, *IAP Worldwide Services, Inc.*, Comp. Gen. Dec. B-419647, 2021 CPD ¶ 222, 63 GC ¶ 209. IAP then protested to the Court of Federal Claims on July 13, 2021. On March 28, 2022, the court issued an 80-page decision in which it agreed with the protester that the Army had not adequately explained and justified its decision to award without discussions. *IAP Worldwide Services, Inc. v. U.S.*, 159 Fed. Cl. 265 (2022). In a 42-page order issued on May 25, 2022, the court gave the Army until August 8 to further explain and justify its decision to award without discussions. See *IAP Worldwide Services, Inc. v. U.S.*, 160 Fed. Cl. 57 (2022). As of July 2, 2022, SAM.gov had still listed OMDAC-SWACA as an "active" procurement. The Army's procurement has now been "active" for 1,371 calendar days, longer than the period between Pearl Harbor and V-J Day (1,346 days). The awardee is performing the services.

A Bizarre System

OMDAC-SWACA is yet another signal display of America's bizarre acquisition "system" at work. That system is comprised of statutes, policies, regulations, processes, procedures, websites, electronic "tools," templates, contractual "vehicles," acquisition "universities," and an undeveloped-but-nevertheless-certified workforce. It is a one-half trillion dollar-a-year gravitational vortex of politics, ignorance, misplaced intention, adversarial legalism, and neglect, all centered on a black hole of incompetence. Special commissions, committees, panels, and acquisition reforms have not enabled us to escape it, nor will artificial intelligence. *VJE*