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ISSUES AND ANSWERS

APRIL 2003

Cutting-Edge Acquisition: Due Diligence

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The process of due diligence has been used, and is currently being used, to fundamentally transform how agencies solve their mission needs in the areas of major technology and financial support services buys.

Over the last several years, a new term has entered the "vocabulary" of acquisition. That term is "due diligence." Before our clients in CIO and CFO and program organizations "tune out" this discussion, let us offer this viewpoint. *The process of due diligence has been used, and is currently being used, to fundamentally transform how agencies solve their mission needs in the areas of major technology and financial support services buys*. We encourage all our clients to read on.

This *Advisory* addresses what due diligence is and how it can be used to foster the successful accomplishment of agency mission through competitive acquisition.

What is "due diligence"?

The term "due diligence" is used in acquisitions to describe the period and process during which an agency affords competitors the time and opportunity to become knowledgeable about its needs in order to propose a competitive solution. Due diligence usually includes site visits, meetings with key agency people, and research and analysis necessary to develop a competitive solution tailored to agency requirements. Due diligence is afforded to competitors *separately*. In other words, contractor teams have access to agency personnel without their competitors present.

What is the theory behind the definition?

The due diligence *concept* is really quite simple. The more an offeror understands about an agency's objectives, problems, and constraints, the more likely that offeror can provide a superior and executable solution. The process of due diligence provides offerors that opportunity.

What happens during due diligence?

During due diligence, the competing contractors have access to members of the acquisition team and program staff so that the contractors can learn as much as possible about the requirement. It is a far more open

Due Diligence . . .

- Is **NOT** a pre-proposal conference.
- **IS** the contractor's independent access to the government team and government information: Competitors are "nowhere to be seen."
- **IS** the contractor's opportunity to ask solution-specific questions: The answers will not be shared with competitors.
- Is **NOT** a verbal form of the traditional question-and-answer exchanges.
- Is **NOT** "communications" or "negotiations."

period of communication than is typical in more traditional acquisitions and gives contractors the opportunity to engage in conversations, ask questions, inspect actual conditions, and gain a better understanding of the problem to be solved and the conditions under which the successful offeror must work.

Wherever possible, Acquisition Solutions encourages agencies to grant contractors broad access to both managers and sites to verify existing conditions and to learn. (The exception is access to the source selection official, who is not available to competing teams.) Again, it is to the agency's advantage to help contractors really understand the objectives and use that information to craft superior solutions.

Should the contracting officer be present during due diligence exchanges?

Yes. The Federal Acquisition Regulation (FAR) *requires* that the contracting officer be present during exchanges with industry once an acquisition has begun. FAR 15.201(f) specifically provides that, "After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors."

Serving as "focal point," however, does not mean that the contracting officer controls the flow of information. We recommend that the contracting officer open and close the session, but otherwise allow the government and contractor experts to freely exchange information. That is what due diligence is supposed to achieve. The contracting officer's additional role is to be alert to changes that might affect the proposal process and about which other competing teams need to be alerted—more on this later—and to ensure that other competing contractors' confidential business approaches and strategies are not disclosed.

When is due diligence best used?

We believe that due diligence makes sense in many acquisitions, but it is absolutely required when an agency uses a statement of objectives (SOO).[1] In a SOO-based acquisition, the agency's requirement is set forth as desired objectives or outcomes of contract performance and constraints (such as conformance with laws, standards, or regulations). A contractor responds with a proposed statement of work and performance metrics and measures that describe that contractor's unique solution to the objectives set forth in the SOO. In such acquisitions, contractors need a period of due diligence in which

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to better understand the agency objectives, constraints, workload, processes, and culture so that a solution can be crafted.

The due diligence process may not be well suited for requirements where an industry sector *is not ready or able* to provide solutions or where the objective is so "cut and dried" the objective is the task. An example we have encountered that fits both conditions is fiberglass boat refinishing. When an agency with high-speed vessels needs the bottoms of the boats refinished, the objective is (for example) to refinish the bottom of a 35-foot boat. This objective is both the solution and the work required. The only "due diligence" that might be required (and this is a stretch in the definition) would be an examination of the boat's actual condition. There is nothing further to know and a more sophisticated process is not required. However, in most other cases, the due diligence process can work, and work well.

Does the FAR support the use of due diligence?

Yes. The FAR permits exchanges of information between the government and contractors—and even requires the government to protect that information. Even when the rule-laden FAR part 15 competitive procedures are used, due diligence is conducted *before* receipt of proposals, making communications with potential offerors "exchanges with industry before receipt of proposals" (FAR 15.201). That section provides (in pertinent part):

> Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition

> The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.
>
> *Information provided to a particular offeror in response to that offeror's request shall not be disclosed if doing so would reveal the potential offeror's confidential business strategy*, and would be protected under 3.104 or Subpart 24.2. [Emphasis added.]

Note that if other acquisition approaches are used, such as use of Federal Supply Schedule contracts (FAR subpart 8.4) or use of multiple-award, indefinite-delivery, indefinite-quantity contracts (such as GWACs and multiagency contracts) (FAR subpart 16.5), there are even fewer provisions that address or limit communications with industry. Even so, the provisions in FAR 15.201 make sense and can guide agency actions when using other than negotiated procurement techniques.

So the FAR supports answering contractor questions "one on one" during due diligence?

Yes, the FAR completely supports this process. While fundamental information should be collected and made available to *all* the prospective offerors, there is no prohibition against contractors asking questions and an agency representative or team responding during a private meeting. In fact, FAR 15.201(c) promotes the use of one-on-one meetings as a means of early exchanges of information with potential offerors. In addition to all the previous citations, FAR 15.201(f) states, in pertinent part, "General information about agency mission needs and future requirements may be disclosed at any time." Also adding support, the FAR guiding principles[2] state:

> The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, *Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority*.

As you can see, the FAR encourages openness, provided it is fair and the integrity of the process is preserved.

Should the due diligence questions and answers be written?

No. There is no requirement that due diligence questions and answers be part of a written process and many practical reasons argue against it. These include the associated time and expense, as well as the simple fact that the purpose of the exchanges is to share information, not to make official policy proclamations. And, unless the question results in an amendment to the solicitation, there is certainly no rule that says every contractor should know what others are asking and the answers they've received. (To the contrary, in fact, as we will address in the next question.) However, the "fair and equitable" standard does dictate that, if two contractors ask the same question, they get the same basic information in response … but it doesn't have to be written.

Should the questions and answers be shared with other contractors?

Absolutely not. The whole objective of the SOO process is to enable contractors to apply their own unique abilities during due diligence and to develop unique solutions to meet the government's needs. This is the essence of competition. More significantly, remember that you have an obligation under doctrines of fairness and equity and the FAR to protect such information.

To repeat:

> *Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under 3.104 or Subpart 24.2.*

The whole objective of the SOO process is to enable contractors to apply their own unique abilities during due diligence and to develop unique solutions to meet the government's needs. This is the essence of competition.

Failing to abide by this rule could result in "leveling the solution" by pointing offerors in the same direction. Leveling is unfair and, further, would make it harder for the agency evaluators to identify the real experts, as all the solutions would start to look alike.

In sum, questions that an offeror asks to better understand the mission, organization, culture, or the desired outcomes do not affect the ability of any other vendor to prepare its proposal. Thus, these types of questions and answers need not be posted or shared among the competing teams.

Is there an exception to this "sharing answers" rule?

Yes. The government does not have to announce and share a question *unless* the answer would affect the proposal submission process. While there is no perfect on-point guidance, the right course of action is clear from these provisions in FAR 15.201(f):

> When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.

Applying the guidance to the due diligence process, the rule becomes: "When specific information that would be necessary for the preparation of proposals is disclosed to one or more *competing offerors*, that information must be made available to the *remaining competing offerors* as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage."

Are there any other exceptions?

Maybe. There is one that should only occur very, very rarely and be exercised with great care. If an offeror's proposed solution is of great interest to the government and it involves a *departure from the original objectives* (or other key aspects of the solicitation), the contracting officer must amend the solicitation, *provided* this can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection.

We say "maybe" because we hope agencies will avoid this situation by releasing a carefully crafted SOO with five or six high-level, mission-related objectives, with closely tied mission-focused subobjectives, and with limited constraints tied to law, standard, or regulation. Such a SOO will not lead to situations that require modifying the solicitation to allow for a brilliant proposed solution. In fact, this eventuality is more likely in traditional solicitations with detailed specifications.

Does the plan to use due diligence affect the acquisition approach?

Yes. Due diligence can be an expensive procedure depending on the size and scope of the program. It is labor intensive for both the government officials who play an integral role in the due diligence process and for the competing contractor teams. (While expensive, however, the returns have consistently been proven worth the investment of time in our view.) Therefore, you will want to either downselect or limit the number of offerors performing due diligence to only those that are the most competitive.

There are three effective ways under current acquisition processes to limit the pool of contractors that compete, at least in the acquisition's final stages (to include due diligence). They are:

- Competitions conducted under FSS MAS contracts or FSS MAS BPAs using special ordering procedures for services,
- Multiple-award delivery order and task order acquisitions under the "fair opportunity" competitive processes of existing GWAC or multiagency contract vehicles, and
- Contracting by negotiation, using the advisory multi-step process and other techniques as warranted.

All three acquisition techniques can be used with a SOO to generate considerable competition among both solutions and price.

Note that the latter acquisition approach of the three, using FAR part 15 negotiated procedures, takes far longer and costs more to implement, but may in some circumstances be required because of the nature of the products or services and the terms and conditions in the existing contractual vehicles vis-à-vis the agency requirement. No single competitive methodology fits all needs.

How is due diligence incorporated into the phases of such acquisitions?

Acquisition Solutions' new course—Seven Steps to Performance-Based Acquisition: Using a SOO™—describes an acquisition process that can be performed in a highly expedited, competitive, and performance-based manner. These steps work well in any of the three acquisition pro-

Acquisition Solutions' Seven Steps to Performance-Based Acquisition: Using a SOO™

- Step 1 Establish the Team
- Step 2 Define the Need and Conduct Market Research
- Step 3 Develop the Statement of Objectives
- Step 4 Develop the Competitive Pool
- Step 5 Conduct Due Diligence
- Step 6 Select the Best Solution
- Step 7 Deliver Results through Partnership

cesses mentioned above. Due diligence is the fifth of the steps. See box above.

Can you describe a due diligence process Acquisition Solutions has facilitated?

We have used the due diligence process successfully at a number of agencies, including the Transportation Security Administration (TSA). *Each due diligence approach is tailored to the acquisition at hand. They are not all the same*.

In practice, TSA's due diligence scenario played out like this: Potential offerors under a multiple award contract were notified—in the fair-opportunity solicitation—of the agency's intent to use the due diligence process. The notice stated:

> A due diligence period has been incorporated into the proposal preparation period. Due diligence is a commercial best practice that allows industry much greater access to information regarding the problem the Government wants solved. It is understood by the TSA ITMS program office that the more contractors understand the problem and constraints, the more likely they will submit superior proposals (solutions)…

After the competitive pool was established (downselecting under the fair opportunity procedures), each potential offeror's team was provided a meeting time and place to kick off the due diligence process. Each offeror was assigned to a separate conference room with a contracting officer present. Various government officials entered the rooms under staged schedules to present identical prepared briefings about the overall objectives. Following each briefing, the contractor team was given the opportunity to ask questions of the presenters that would help them better understand the agency's current situation and intended outcomes (objectives). (The government team members had been advised to answer all questions honestly and to the best of their knowledge and not to respond to questions like, "What do you think is the best solution?")

After the briefings each offeror team was provided an opportunity to tour Baltimore Washington International (BWI) airport–individually, without competitors–to observe every aspect of airport security. During and after the on-site briefing and tour, the offerors were again given the opportunity to ask about any other facets of the TSA organization.

The questions posed by the offerors' teams throughout due diligence were asked to better understand the agency's problems and objectives. The government team's responses typically were to provide information, background, and explanations. These conversations did not change (and have not changed in our experience) the government's desired outcomes. Offeror's specific questions only helped them to propose the most executable solution. Thus, these questions were not (and typically are not) published, and the solicitation need not be amended, for all potential offerors to see. The only exception was a question and answer that directly affected the proposal submission process. All competitors needed that information.

In short, the government stopped being "information cops" and became "traffic cops." The primary role of the government was to get the offerors everything they needed to know about TSA in order to propose the best possible solution. This significant role change was possible as the government's desired outcome would not change. The information provided in the briefings and tour and the answers to questions from the offerors supported the development of each offeror's own solution and strategy.

Can you provide another example of language used in a solicitation?

Yes. The TSA solicitation for information technology and telecommunication managed services included this language we helped to craft to define the process:

> *It is well understood by the TSA ITMS program office that the more competitors understand TSA's objectives, plans and operations, the more likely they are to submit superior*

solutions. ITOP II Contractors intending to submit a TSA ITMS Task Order proposal and their team members will be given the opportunity to conduct a due diligence survey of TSA locations and meet with TSA representatives. The due diligence process allows prospective contractors to gain a better understanding of TSA mission objectives and existing conditions. The due diligence process will follow the principles identified by Federal Acquisition Regulation (FAR) Part 15.201, Exchanges With Industry Before Receipt of Proposals. Specifically, during one-on-one sessions, a major objective of the due diligence process is to provide confirming contractors and their team members the ability to ask questions that by their very nature they would not ask if the response would be posted and provided to their competition. As such, if the confirming contractor notifies the Government that the questions it intends to ask during the one-on-one sessions are proprietary and whose release would identify confidential business strategies, or approaches, the questions and responses will be protected and held confidential.

Requests for clarification that result in specific information necessary to submit proposals will be provided to all confirming prime contractors. The Government will provide competing contractors equal access to data and information. The Government assumes no responsibility for any representation made by any of its officers or agents during due diligence. Contractor questions and Government responses furnished during due diligence are unofficial. If requested, the Government will attempt to provide an official response within the due diligence time period.

Does the due diligence process give some offerors an unfair advantage?

No. Each offeror is afforded the same access to information and to people. What they do with that access is the very essence of competition. More capable competitors will make every effort to learn enough to develop a superior approach with competitive discriminators—that is, they will take full advantage of the opportunity. But this is fair and earned advantage … not unfair advantage.

Has GAO weighed in on the due diligence process?

No. GAO has not addressed a case citing the due diligence process as a basis of the protest. In fact, based on our experience, potential offerors *like* the due diligence process. Even unsuccessful offerors have reported back to agencies that they like the approach and look forward to the next competition.

Based on our experience, potential offerors like the due diligence process. Even unsuccessful offerors have reported back to agencies that they like the approach and look forward to the next competition.

We advised earlier in this *Advisory* that the "fair and equitable" standard does dictate that, if two contractors ask the same question, they get the same basic information in response. We also advised that each government team member must answer honestly to the best of his or her knowledge, and that he or she can't answer the same question differently *if* asked by another vendor. The key is to give consistent answers to each offeror's questions. However, there is still not high risk here if the agency is conscientious. In this regard, GAO has stated that oral advice that conflicts with the solicitation is not binding on the government, and an offeror therefore relies on an oral explanation of a solicitation at its own risk.[3]

How long does due diligence take?

It depends on the size and scope of the acquisition. We have seen due diligence periods that have taken as little as a half day to as long as several years.

Yes, it took *years* for the Coast Guard's enormous fleet modernization program called the Integrated Deepwater System, a $17 billion, 30-year effort to replace aging ships and aircraft and to furnish state-of-the-art navigation and communications equipment. In this acquisition, three companies were awarded competitive contracts to develop their solutions toward meeting the Coast Guard's objectives. Each award was equal in value. During this three-year phase, the contractors crafted their solutions. You read it correctly, the due diligence period was a three-year effort. In this case, the government determined that the complexity was so enormous it would take industry three years to understand the operation and processes in place to craft a solution that would meet the agency's mission needs. This was, in essence, funded due diligence.

The more typical range in our experience is several weeks to several months.

Does due diligence affect how quickly a SOO-based buy can be made?

No, for two primary reasons. First, due diligence is only a small part of the acquisition process. Second, it tends to take place in the time when contractors normally would be working the proposal process *without* the benefit of the additional information they would gain during due diligence. Acquisition Solutions, brought in at team formation, typically helps agencies conduct these seven-steps, SOO-based buys in three to six months total.

What are the top three "due diligence dos and don'ts"?

In our view, they are:

- Do name a single point of contact to schedule all contractor meetings and visits.
- Do develop a list of rules and brief participants in the due diligence process.
- Do not expose one contractor's due diligence with others. That would result in *leveling the solution* and pointing the offerors in the same direction.

Conclusion

Due diligence is based on this belief: The more contractors understand about an agency's objectives, problems, and constraints, the more likely they will be able to provide a superior solution. The due diligence period provides an additional level of fact-finding and knowledge building not available in more traditional acquisitions and helps to ensure that competing contractors will deliver innovative and executable solution-based strategies in support of agency mission requirements.

Due diligence is an important strategic approach to crafting effective performance-based and results-oriented strategies. All those who rely on acquisition to meet their mission needs, including program managers, CAOs, CIOs, and CFOs, need to be aware that contractor due diligence can help achieve your objectives.

ENDNOTES

1 For further information, see the Acquisition Directions™ May 2001 *Advisory*, "An Innovative Approach to Performance-Based Acquisition: Using a SOO." (See page 2.)
2 1.102 Statement of Guiding Principles for the Federal Acquisition System. (See page 3.)
3 Input/Output Tech., Inc., B-280585, B-280585.2, October 21, 1998. (See page 7.)

The *Advisory* is published monthly as part of the Virtual Acquisition Office™ subscription service, made available by Acquisition Solutions, Inc., 1655 North Fort Myer Drive, Suite 1000, Arlington, Virginia 22209, 703-253-6300, fax 703-253-6301, www. acquisitionsolutions.com. Information and opinions are based on best available information, but their accuracy and completeness cannot be guaranteed. Layout by Julie Olver.