

**FISCAL YEAR 2011**

**REPETITIVE OR SIGNIFICANT**

**FINDINGS OF THE NIH BOARD**

**OF CONTRACT AWARDS**

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AWARDS

The following report documents repetitive or significant findings of the NIH Board of Contract Awards for Fiscal Year 2011. All substantive issues are included, given the significance of such issues and the need for resolution prior to taking any further action on the acquisition. For all other issues, only those that have been found in at least two reviews have been included.

**SUBSTANTIVE ISSUES**

**A. Presolicitation**

1. ISSO certificate is not in the file, and security categories and levels have not been addressed (2 instances).
2. Given the nature of the work, it would be fair to assume that contractors have access to Federal facilities/infrastructure and drawings, specifications and other sensitive project information; however, the AP states that this is not applicable. There is no documentation in the file to indicate that the ISSO reviewed the requirement to determine the applicability of HSPD-12/FISMA.
3. Solicitation documentation is not in accordance with Federal Information Security Management Act (FISMA) requirements in that required clauses are not included (2 instances).
4. No explanation provided for a geographic limitation as a mandatory evaluation criterion in the RFP.
5. Vague/ambiguous terms (e.g., “relatively,” “approximately,” etc.) used to describe the relative importance of factors/subfactors. Such terms do not ensure a consistent evaluation.
6. Although the AP states that the requirement is for severable services which are incrementally funded, the solicitation is written such that the requirement represents a single undertaking and is thus for nonseverable services. In accordance with appropriations law, a contract for nonseverable services must be fully funded unless multiyear authority has been granted.
7. No evidence in the contract file to demonstrate that the Contracting Officer performed any analysis to make the determination that the proposed contractor has an established system of accounting and financial controls in place to permit award of a contract on a cost reimbursement

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basis.

8. Solicitation's coverage of fair opportunity conflicts with FAR coverage (i.e., exceptions to fair opportunity at FAR 16.505(b)(2)), where the RFP states that past performance will be the sole factor in determining award of a task order, and the permission for the CO to otherwise determine that award to another contractor is not in the Government's best interests.
9. RFP, Section L states that proposals will be evaluated utilizing point scores. However Section M does not provide point scores, nor does it provide any description of how offerors will be evaluated or the relative importance of the evaluation factors (FAR 15.204(e)).
10. Solicitation contains both Service Contract Act and Davis-Bacon Act clauses (in a construction acquisition).
11. SBA 8(a) set-aside acceptance letter and the HHS Small Business Office review/approval of HHS Form 653 are 2 years old and must be updated to reflect the current requirement, including market research, before the solicitation can be issued.

**B. Preaward**

1. Price analysis was conducted when the evidence indicated that adequate price competition did not exist and therefore a cost analysis was required.
2. No evidence that cost analysis, which was required, was conducted. The only evidence presented was a comparison of offeror's budget summary with the Independent Government cost Estimate.

**ADVISORY ISSUES**

**A. Presolicitation**

**1. RFP**

- a. RFP does not contain required clauses, i.e., human subjects, price/cost, etc.
- b. Lack of clarity in Section M of the RFP as to how offerors should be expected to demonstrate their abilities.
- c. Section L does not address all of the areas that would be applicable to the requirement, i.e., qualifications of offeror/subcontractors, proposer's annual financial report, etc.

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- d. Discussion of multiple award task order procedures conflicts with the FAR coverage of fair opportunity process (FAR 16.505(b)(2)).
- e. No mention of requirement for reports to be Section 508 (Rehabilitation Act of 1973) compliant.

**2. File Documentation**

- a. HHS Acquisition Plan (AP) is not in accordance with the HHS Template and does not include several key items.
- b. AP has not been reviewed at one level higher than the contracting officer, when the contract is contemplated to be other than firm fixed price.
- c. AP: Under an IDIQ for severable services, in accordance with appropriations law, task orders may not exceed 12 months in length.
- d. No discussion in the AP regarding the applicability of trade-off process as described in FAR 15.101-1.
- e. No documentation in the file to justify the use of a time and materials contract type.
- f. No documentation provided to discuss the decision not to use a performance based contract (FAR 8.405-2(e)(7)(ii)). Discrepancy between the AP and the RFP as to when funding will be provided (e.g., obligated at the beginning of each year of contract vs. funding on a task by task basis.
- g. Conflict between AP and RFP as to the role of past performance in the evaluation. The AP states that past performance will be a major consideration in the award decision, whereas the RFP states that technical expertise, price and past performance are equally important.
- h. AP lists two different contract structures, a five year contract, and a one year base contract with options. There is no explanation of which one is applicable.
- i. The file does not document the choice of a cost reimbursement type contract as prescribed by FAR 16.103(d), nor was the AP approved at one level above the contracting officer.
- j. List of potential sources was not provided in the AP and the applicability and use of required Government sources was not addressed.
- k. Sources sought announcement is not proper – does not contain all required elements HHS Acquisition Policy Memorandum 2009-

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001.

- l. Incomplete or missing FedBizOpps presolicitation notice or notice was inconsistent with terms of the RFP.
- m. The SOW requires delivery of data to the Government via an online database; however the documentation states that IT Security is considered to be inapplicable.
- n. FAR 15.305(a) states that “evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinary rankings.” The Board noted that although the RFP stated that factors were listed in order of relative importance with weights assigned for evaluation purposes, no documentation was provided in the contract file that assigned weights or any other rating method to ensure consistency with the evaluation approach.
- o. Requirement for work to be performed after expiration date of the contract.
- p. Use of incorrect clauses for the type of contract.
- q. No evidence of internal review.
- r. No presolicitation review conducted by the Board in the case of a multiple award IDIQ contract (NIH Manual Chapter 6304.71).
- s. Board could not locate the mandatory file checklist prescribed by HHSAR 304.803-70.
- t. No documentation in file as required by FAR 17.205 re: use of options.

**B. Preaward**

**3. Contract**

- a. Omission of clauses required due to regulation or statute (i.e., human subjects clauses, IT security clauses, etc.).
- b. Contract Specialist did not include revisions recommended by the OA internal file review and did not explain why the revisions were omitted from the contract.
- c. Incorrect designation of contract type.
- d. In an IDIQ contract, no minimum quantity or task order is obligated with the base award.

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**4. Contract File Documentation**

- a. Lack of documentation that the project officer/contracting officer representative had met the necessary or up-to-date training requirements (HHSAR 301.604, 301.606)
- b. No evidence in file that at least 50% of Government evaluators have the necessary training (HHSAR 315.305(a)(3)(ii)(A)(3)).
- c. No waiver could be found for a reviewer with a conflict of interest.
- d. No evidence of technical reviewers' post-evaluation certifications.
- e. No evidence of each signed rating sheet from the reviewers of the technical proposal and no determination in file to justify the omission of the rating sheets (HHSAR 315.305).
- f. No documentation of evaluation of cost proposals of offerors in determining the competitive range.
- g. Competitive Range Determination: No documentation to explain why offers with higher scores were determined to be unacceptable, while offers with lower scores were considered acceptable.
- h. No explanation provided regarding why certified cost and pricing data was required.
- i. No evidence in file to explain why the Independent Government Cost Estimate was increased.
- j. No record was found of past performance evaluation.
- k. Insufficient documentation of contractor's responsibility (FAR 9.104-1(a) – (g)).
- l. Planned incremental funding of non-severable services, which is prohibited by HHSAR (HHSAR 332.702-70).
- m. Additional discussion necessary in the file as to how/why tradeoffs were used to justify awarding a contract to the lower technically rated offeror.
- n. Lack of documentation of draft synopsis (Manual Chapter 6304-71) or public award announcements (HHSAR 305.3).

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**COST/PRICE ISSUES**

1. No evidence of review of offeror's financial statement to reach determinations regarding "going concern issues," whether the current ratio is at an acceptable rate, or whether the notes to the financial statement disclose any issues that could adversely affect the contractor.
2. No evidence that contracting officer reviewed source documents or that such documents support the proposed costs.
3. No cost realism analysis was conducted, when required. (FAR 15.404-1(d)).
4. No evidence that CO determined whether the DCAA rates included IR&D costs in the contractor's indirect cost pool.
5. Incorrect computation of contractor's "current and quick ratios." (CO used total assets and liabilities as the basis of the computations, whereas the CO should have used current assets and liabilities as the basis of the computations.
6. No statement in the summary of negotiations regarding financial capability. (HHSAR 315.372).