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INVITATION TO NEGOTIATE: DETERMINING THE BOUNDARIES OF INNOVATIVE SOURCE SELECTION

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ABSTRACT. To purchase complex equipment and systems, procurement officials are employing competitive negotiation techniques because they are the most innovative, provide the most flexibility, and thereby have the greatest potential for success. What has not been clarified are issues dealing with the boundaries of what can be negotiated. More specifically, these issues deal with changes in the scope of services produced by negotiations, and the content of the communications made with offerors during the negotiations. A case study of the Invitation to Negotiate (ITN) process employed in the State of Florida by Department of Transportation officials to purchase Advanced Traveler Information Systems for South Florida is presented to illustrate these issues. With the aid of relevant guidelines from the Federal Acquisition Regulations, these issues are explored and analyzed.

INTRODUCTION

The implementation of information technology systems, as well as the acquisition of other complex systems, services and products, has had a profound impact on the choice of source selection types and formats for many governments in the United States. More so than in the past, procurement officials are realizing that forms of competitive negotiation offer the most productive way to purchase these systems, more preferable than traditional methods dealing with multi step bids.

This change in thinking has not come without a price. There are countless stories of delays, cost overruns, and failed IT systems that have

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occurred in part because of resistance to—or the avoidance of—competitive negotiation. In those instances in which procurement and/or agency officials are willing to negotiate, often they have been thrust into a negotiating situation without appropriate training or familiarity with the relevant rules.

Competitive Negotiation Approaches

An initial step in purchasing complex systems is to identify a list of suppliers that could provide the necessary hardware and software. In a growing number of cases, the suppliers are pre-qualified. In both the State of New York and the Commonwealth of Kentucky, for example, information technology (IT) suppliers are prequalified by a centralized purchasing agency that is separate from the agency that wishes to purchase a system. For Kentucky, the process is called the Strategic Alliance System. A letter is sent to all prequalified suppliers outlining the problem that needs to be solved and inviting vendors to propose solutions. Negotiations then begin with all vendors who respond to the letter (http://www.state.ky.us/agencies/sas). In New York, the prequalification process also involves setting an hourly rate. Agencies then establish a set of criteria and an evaluative process to choose one vendor to work on the project (Stoneman, 2000).

In the discussion of pre-qualification process in these two states, there is no mention of the negotiation process including the exchange between agencies and vendors that could occur if more than one supplier were interested in working with an agency to meet its needs. There is the implication that discussions could occur with more than one supplier on a concurrent basis, but what is lacking is a discussion of the negotiation process.

OVERVIEW

Appropriate Skills for the Negotiation Process

Research suggests that the most successful procurement professional should acquire a variety of process management skills, including negotiation (Giunipero and Pearcy, 2000). In terms of when negotiation skills should be exercised, much of the literature suggests that negotiation should occur after a supplier is chosen. Dobler and Burt (1996, p. 360) indicate that negotiation occurs "when competitive bidding is impractical," offering a list of conditions that should exist prior to negotiation. Similarly, Lanza (2002) indicates that negotiation

occurs before a contract is awarded, after the RFP process has identified the top rated supplier. There are few authors that suggest negotiation should occur prior to the contract award.[1]

Much of the literature dealing with negotiation focuses on how negotiation should occur in the context of the negotiation process. Rollwage, et al. (National Institute of Governmental Purchasing, Inc., 2001) discuss various negotiation approaches and tactics, including the Fischer and Ury (1991) "win-win" approach. Lanza (2002) suggests that various power sources exist that the successful negotiator should understand and use to his/her advantage. These power sources include those associated with legitimacy, knowledge, reward and punishment. Colosi (2002) indicates that various principles of negotiation exist, such as the importance of trust and the need to clarify expectations. Hoffman (2001), among many other authors, stresses the importance of planning and the need to not violate confidentiality. What is absent from this literature is a discussion of the content of the negotiations, as it must be assumed that content will vary so extensively that it is difficult to make generalizations that would benefit the negotiator.

The Need for Flexibility

As the procurement profession strives to introduce source selection methods that can effectively and successfully purchase complex systems, what can be negotiated in a competitive setting needs to be clarified. In many cases, agency professionals have called for procurement to become more "flexible."[2] Defining flexibility in any given situation often means defining the boundaries or limits of negotiation. More specifically, this flexibility refers to 1) the number of times the scope of services can be modified during negotiation; and 2) the means and methods by which responses to changed scope of services by one offeror can be conveyed to other offerors during the same negotiation process.

Successful purchase of complex systems also depends upon the additional recognition that negotiation is likely to occur after the contract has been awarded. To the extent that deadlines may have to be changed, technology evolves, subcontractors changed, and equipment/software fails or needs unexpected additional customization, the negotiation that occurs prior to contract award becomes more significant. Often the success of post-contract negotiations depends heavily on the nature and success of pre-contract negotiations.

This study presents an example of another type of competitive negotiations used by the State of Florida. Termed "invitation to negotiate" (ITN), it was used by Florida Department of Transportation (FDOT) procurement and agency officials from June to November 1999 to purchase an "Advanced Traveler Information System" (ATIS) for South Florida. First, the procurement options available to Florida procurement officials are reviewed. Next, using Federal Acquisition Regulations (FAR) as guidelines, a discussion of negotiation boundaries ensues. Finally, the case is presented, concluding with a discussion of whether any aspect of the negotiation was improper or unsuccessful.

The ITN Process

The three primary source selection procedures are identified by Florida state statute. These are as follows:

- Invitation to Bid,
- Request for Proposals, and
- Invitation to Negotiate

The Invitation to Bid (ITB) is used when a purchasing agency can provide a complete set of specifications for the services or commodities purchased. The Request for Proposal (RFP) is used when "it is not practicable for the agency to specifically define the scope of work for which the commodity, group of commodities, or contractual service is required" (Florida Statue 287.0012[22])

The RFP requests that the offeror's proposal meet the general or functional specifications that are identified. Also, the evaluative criteria must be spelled out in the RFP, including the weight given to price.

The Invitation to Negotiate (ITN) is used when the agency deems it is in the best interest of the state to negotiate with offerors to achieve "the best value." Two negotiation methods are allowed:

- Single Negotiations; or
- Concurrent Negotiations

For both methods, a short list of acceptable proposers is created.[3] For single negotiations, the technical and price proposals from this short list are then evaluated. The agency then negotiates with the top rated proposer or offeror. If agreement is not forthcoming, then negotiations

begin with the second highest rated proposer, and so on, until agreement is reached.

The concurrent negotiations method contains two variations. After technical and price proposals are opened, the agency can choose to revise the scope of services. This revised scope is then redistributed to all short-listed proposers. Additional oral presentations are heard. Negotiations then occur with all proposers concurrently, resulting in the receipt of a best and final offer. Alternatively, the agency may decide not to revise the scope of services and proceed directly to negotiate the best and final offer (FDOT, 2000).

By implication, little if any negotiation is expected with the RFP process, and none at all with the ITB process. The nature of the negotiation process under the ITN, however, is not clearly defined in at least two respects. First, the issue of how many times the scope of services can be revised is not clear. If it is possible for multiple revisions to occur throughout the negotiation process, then it is likely that these revisions will be the result of negotiations with offerors.

If multiple revisions of the scope of services are permissible, then multiple revisions of the offerors' proposals should be permissible during the negotiation process. In a sense, the negotiation process can be comprised of multiple "oral presentations", as offerors respond to earlier negotiation sessions with further discussion of scope revisions.

Second, the issue of the content of negotiations, more specifically the extent to which the nature of information about one offeror's ideas can be shared with another's ideas must be determined. The sharing of proprietary information certainly would be unacceptable. Yet if the system to be purchased contains software code that is proprietary, this level of detailed information is not likely to be present in the proposal.

The issue becomes whether it should be permissible, during negotiations, to state to one offeror: "A competitor is offering to change the scope of services by offering a different way to deliver the service" and then ask: "Will the first offeror alter his proposal to incorporate this method suggested by the competitor?"

To some extent the resolution of these issues can be assisted by reference to the FAR. Even though they are not applicable to all state and local purchasing efforts, they offer insights into appropriate

negotiation boundaries that can guide future negotiations dealing with the purchase of complex systems or services.

NEGOTIATING BOUNDARY ISSUES

Scope of Services

In many cases the government will find itself in a position that requires it to negotiate the scope of services. There are several reasons. First, government officials may not have the knowledge to issue a complete set of specifications for a system or product that will meet the goals or solve the problem identified by the government (Dobler & Burt, 1996). They may issue a Request for Proposal that defines the problem to be solved or service to be delivered without fully defining the scope of the services. Second, because of the complexity or newness of the system or service, there may be no universally accepted best way to build the system. Even if off the shelf software may be purchased, the nature of the required customization may be difficult for agency officials to fully understand and describe.[4] Third, technology required to build the system or provide the service may be changing so rapidly that a previously untested methodology or service delivery system may be the most effective choice. Government officials can not be expected to fully define a scope of services if an appropriate technology is in its infancy.

A second negotiation boundary is the timing and potential number of alterations to the scope of services as it evolves during the negotiation process. It is understood that after technical proposals have been received from offerors that the government may wish to adopt suggestions contained in these proposals and thereby modify or specify in more detail various aspects of the scope of services. This behavior should be permitted with two conditions:

- As long as these modifications do not significantly alter the intent of the initial Request for Proposal; and
- All modifications are communicated to all offerors in a timely fashion.

Communication with Offerors

If there will be negotiation and discussion[5] about the best means to deliver the services, and it is expected that identification of these means will evolve over the course of negotiations, then the content of the

communications with offerors needs to be clarified. More specifically, this content can be characterized by the following categories:

- Information relevant to deficiencies and weaknesses in an offeror's proposal;
- Information given to an offeror concerning what is contained in other offerors' proposals.

In a given negotiation, it is likely that the content that falls in each of these categories will overlap, or be closely related. The purchasing officials understanding of what is a deficiency or weakness may greatly depend upon information conveyed in other offerors' proposals.

Deficiencies and Weaknesses

A significant negotiation boundary refers to the procurement official's requirement to disclose deficiencies and weaknesses of an offeror's proposal during the negotiation. This requirement depends upon the officials understanding of the terms and the relevance of them in terms of revising the scope of services. The guidance provided by the FAR helps to clarify this issue.

FAR 15.301 defines the two terms:

- *Deficiency*…is a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.
- *Weakness*…is a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance (Nash, Cibnic & O'Brien, 1999, p. 662).

To better reach the goal of obtaining a contract that provides "best value" to the government, the FAR rewrite of 1997 broadens the acceptable content of negotiations. Procurement officials are required to communicate to offerors any deficiencies and weaknesses in their proposals. The intention is to encourage offerors to revise their proposals to increase the chance of contract award and subsequent successful contract performance.

The FAR definitions, however, assume that government officials have sufficient understanding of the best way to achieve goals identified

in the scope of services to adequately conclude that deficiencies and weaknesses exist. The more complex the system that is purchased, the less likely they have sufficient understanding to make this judgment. Two outcomes are likely under this situation:

- The issue of deficiencies and weaknesses is not relevant to the negotiations, since it is unclear what means to deliver a service or meet a goal is best;
- What is defined as a deficiency or weakness for one offeror may be the absence of a service delivery means, for example, that is found in a competing offeror's proposal.

To the extent that the latter outcome occurs, the appropriateness of what subject matter is communicated is governed by government rules and policies as well as by professional ethical standards. In some cases, however, additional clarification is needed. Again, the FAR Part 15 Rewrite can be used as illustration.

The Boundaries of Proper Negotiations and Prohibited Conduct

FAR 15.306(e) identifies limitations regarding communications with offerors. Those that are relevant here include "Government personnel involved in the acquisition shall not engage in conduct that

- Favors one offeror over another;
- Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror" (Nash, Cibinic & O'Brien, 1999, p. 682).

What constitutes intellectual property or proprietary information is that which is designated as such by the offeror in the proposal.[6] As such, it cannot be communicated to another offeror during the negotiations. What constitutes a "technical solution" or "unique technology", however, is not clearly defined. By implication, non-technical solutions or technology that is not unique can be communicated during negotiations without violating the FAR .

The other aspect of the wording above links the communication to a specific offeror. Again, by implication a reference to another offeror that does not specify that offeror by name is allowed to be communicated during negotiations.

Auctions

The use of an auctioning method during negotiations has been prohibited in the past by FAR if the content of the communication refers to price. Government officials have been prohibited from stating to one offeror that a competing offeror has proposed a specific price, and then asking if the first offeror will "beat" that price. The FAR rewrite published in 1997 does not refer to prohibiting an auction method, but does prohibit the communication of an offeror's price during negotiations without that offeror's consent. (Nash, Schooner & O'Brien, 1998)

Using an auctioning method for aspects of a service delivery approach is not specifically prohibited. It would be appropriate then for a purchasing official to state to an offeror that a competing offeror has suggested using a specific approach, and asking the initial offeror if he/she would agree to adopt that approach if he/she were awarded the contract. If there is more than one offeror in the competitive range, the same communication could be made to all offerors. In communicating this approach, the approach must be presented in a non-technical fashion without identifying a specific offeror by name.

ADVANCED TRAVELER INFORMATION SERVICES—SOUTH FLORIDA: A CASE STUDY

Advanced Traveler Information Systems

The procurement of Advanced Transportation Information Systems (ATIS) offers a case example of competitive negotiation dealing with complex systems. ATIS contains information systems that encompass a variety of means providing up to date information to the traveling public regarding traffic congestion. There are essentially four parts to an ATIS:

1. The content of the information collected and passed along to the public;
2. The information collection processes and devices;
3. The data collection or fusion hardware/software; and
4. The information dissemination means.

Fast evolving technologies in each of these four areas has resulted in a vast array of choices available to private firms as they create an ATIS.

In some cases, technology has been used for previously built ATIS and can be adopted or disregarded for future efforts. In other respects, there is little previous experience that can guide the choice of the best means to deliver traffic information.

Data regarding traffic congestion can be collected from several sources, including police accident reports, inductive loops embedded in the highways, traffic camera feeding visible images to traffic operations centers, 911 centers, travelers using cellular telephones, traffic helicopters and airplanes. This information is typically sent to one data fusion operations center, created using a variety of hardware/software.

Typically, messages communicated or disseminated to the traveling public contain information about accidents, road construction, bad weather conditions and other reasons for delay. In some cases, the messages may suggest the motorist take alternative routes. These messages can be sent out via several means, including highway advisory radio, variable message signs posted along the highways, website information, telephone advisories and even email alerts.

The ITN Experience

With traffic congestion in South Florida an increasingly visible and significant public policy problem, a partnership of local and state agencies in South Florida wanted to identify a private sector organization that would greatly expand the means by which travelers could access information about traffic. Given the complex nature of ATIS, an Invitation to Negotiate (ITN) process was chosen, with proposals due June 24, 1999 (FDOT, 1999).

The ITN indicated a five-year contract, with public funding providing "seed money" for the first three years. The private supplier was to deploy a telephone advisory service—in both English and Spanish—at no cost to local callers. In addition, the private supplier was expected to generate revenue from selling advertisements on information dissemination means such as cable television and websites, and from charging subscriptions to individuals that wished to receive personalized traveler information. By the end of the five-year contract, it was expected that the operation would be self sufficient, with revenues returned to the governments involved. As part of the response, private vendors were to estimate the amount of revenue that would be generated, along with the amount provided to the public partners.

Three responses were received from teams of private vendors headed by SmartRoute Systems (SRS), PBS & J, and Digital TI (DTI). The technical proposal from each was rated by a team of agency officials: there was one representative from each of 8 public partners. The evaluation committee would grade the Technical Proposal (on a maximum 100 point scale) with the following points assigned to the specified sections:

- Technical and Deployment Plan……..25 points
- Operation and Maintenance Plan…….15 points
- Business Plan……...20 points
- Management Plan…….10 points
- Legal and Institutional Issues…… 10 points
- Qualifications of Key Personnel……..20 points

By July 1999, all three teams had received a rating that was above the minimum 80 points. As agreed, the rating team did not rank the proposals. Instead, these teams constituted the required short list.

A smaller team of government agency and procurement officials then initiated a lengthy ITN process, using the concurrent method. The team was comprised of representatives from the three major state agencies: FDOT District Six (Miami-Dade County),[7] FDOT District Four (Palm Beach and Broward Counties); and the Florida Turnpike. Four negotiation sessions were held with each of the three teams between September 28, 1999 and November 16, 1999. After the final session, supplier teams provided a last best offer. On December 19, 1999, the Notice of Intent to Award was made, awarding the contract to Smart Route Systems. The contract was signed on November 13, 2000, with an initial start-up date of April 2001.

ITN Content

Offerors were instructed to submit a technical proposal and a separate cost proposal. The technical proposal was to contain the sections listed above as the criteria for the evaluation committee.

The ITN process had the greatest impact on the information provided in the first section, the Technical and Deployment Plan. The following

summarizes the requests of the ITN, outlining the differences and similarities of the proposals from the three respondents.

Technical and Deployment Plan

The Technical and Deployment Plan includes information about:

- Data and Information Collection;
- Data Fusion and developing traveler advisories; and
- Information dissemination;

Data and Information Collection

All offerors were directed to propose means of data collection that added to the data collection capacity of already existing publicly supported cameras and collection of speed data through loop detectors5. The three responses offered very different means of collecting data. SRS proposed to add at least 20 additional cameras, aircraft surveillance during rush hours, and a mobile probe network of volunteer travelers providing information via cellular telephones. DTI's proposal relied heavily on reading speed data from vehicles in South Florida that are equipped with electronic transponders, building a system of readers along major freeways throughout South Florida. PBSJ offered a third alternative, primarily using a combination of existing aerial surveillance currently used for radio and television transmission and a soon to be developed wireless microwave sensor system that could provide speed information.

***Data Fusion and Developing Advisor*ies**

The fusion of this data requires the supplier to provide a network server and appropriate software to process the collected data. The data is then "translated" into advisories that are disseminated to travelers. All three suppliers proposed adapting already existing systems that were in place in other metropolitan areas. Two proposed using proprietary systems that would not become the property of the public agencies if the contract with the supplier would be terminated in the future. SRS had a proven data fusion system and proprietary software that was already working in several metropolitan areas nationwide. DTI indicated it would adopt a transponder reader system already used in the New Jersey, New York and Connecticut area.

In contrast, PBSJ proposed using a server and software first developed in the San Antonio metropolitan area that would be provided at no charge to the public agencies. This server and software would not be proprietary, and would be retained by the public partners in South Florida in the case of the need to change private partners..

Information dissemination

In the initial proposals, the three offerors stated they would create the telephone advisory system as requested. They also provided different information concerning the additional information dissemination means that would furnish the basis for collecting revenue.

SRS listed several different information dissemination channels that are capable of producing revenue, including cable television, broadcast television and radio, wireless personal communication devices, the Internet, kiosks, and in-vehicle information. Beyond using the SRS website as a means of information dissemination, however, there was no commitment regarding which means would be provided for free and which would charge the user or subscriber. It described what it had provided in other metropolitan areas.

DTI proposed providing information via WebPages, to Palm VII and other wireless subscribers, and kiosks that would be provided for free to the users. In addition, DTI would establish an automated cable television service.

PBSJ stated a different philosophy of information dissemination, in that no one information service provider would be excluded from the South Florida market. PBSJ would actively pursue partnerships with other suppliers that would disseminate the data. It suggested that Internet, wireless hand held devices, and in-vehicle information could be provided.

ITN Process and Results

The stated philosophy of the public negotiating team was to win further concessions from the three suppliers both in terms of the services the suppliers were to provide for free to the traveling public and in terms of the overall cost. At the end of the negotiation sessions, the offerors were asked to submit a last best offer.

Throughout the negotiations, the original intent of the scope of services was not significantly changed. The minimum requirement to disseminate information via a free telephone number remained the same. The scope did change, however, in terms of the additional means that the offerors could use to convey the information, as well as regarding the time period that the information would be available to travelers. It changed at least three times, as at the conclusion of the negotiations there were three changes to the original proposals:

1. The time period that the information was to be available to callers was increased to 24 hours per day, 7 days per week.
2. At least two messages per day sent via fax and email were to be provided free of charge to travelers.
3. Cable television was to be included as one of the information dissemination means.

Offeror Communications

The scope of services was changed by a method that some may feel reflects an "auctioning" technique. As one offeror agreed to one of these three changes, this agreement was communicated to the other two offerors during subsequent negotiations. At no time, however, did the bargaining team overstep the boundaries identified by the legal and ethical principles reflected by traditional professional practices and the FAR rewrite as discussed above.

Deficiencies and Weaknesses

No deficiencies or weaknesses were found. In terms of the methods by which the data/information was to be collected and fused, even though these methods differed drastically, the proposals from all three offerors were accepted. During the negotiation, there was no inference that one data collection/fusion method was preferable over another. For at least one of the three methods, the technology was virtually untested. The government negotiating team, as would have been true for any other negotiating team, may not have possessed sufficient knowledge to identify deficiencies.

Second, since all three offerors agreed to provide the minimum requirements of telephone information dissemination, by definition deficiencies and weaknesses are not relevant because there was no

expectation of "unsuccessful contract performance" for any of the three offerors.

Third, if one offeror had not agreed to meet scope of service changes that the other two had agreed to, for example, there was no indication that this lack of agreement would have been perceived as a "weakness". The "best value" philosophy that underlies the ITN process would have dictated that the negotiating team weigh cost and the choice of service delivery means in making its contract award.

Proper Negotiations and Prohibited Conduct

No proprietary information was conveyed during negotiations. The proposals did not identify any such information. Brand names of software were discussed in the proposal, with a description of how information would be fused and disseminated, but none of this information was detailed enough for it to be proprietary. Offerors were not identified by name to other offerors.

More importantly, identifying a means such as cable television, does not convey "a unique technical solution", since television, fax and email are readily accepted means of information dissemination. None of the offerors were asked to provide specific detail concerning how and at what level of specificity these means would provide information. The "auctioning technique" simply requested whether the offeror would agree to adopt the dissemination means—obviously including the cost of doing so in its last best offer.

Auctioning

According to the guidelines established by the FAR Rewrite, no violations occurred as well. The negotiating team did communicate the amount of money budgeted for this effort. It did not tell any one offeror what another was proposing in terms of overall cost for the ATIS service.

Cost Benefit Analysis

Table 1 indicates basic cost benefit data. In this case, the choice of SRS was justified financially, as the cost is the least of the three and the revenue share is the largest and the most advantageous in terms of the ratio of revenue shared to cost.

TABLE 1
Basic Cost Benefit Data

Offeror	Last Best Offer	Revenue Sharing Total Anticipated	Revenue Shared With Public	Cost Benefit Ratio
SRS	$3.96 million	$6.45 million	$3.67 million	1:.94
PBSJ	$5.995million	$14.594 million	$2.68million	1:.44
DTI	$10.34million	$8.029 million	$.8 million	1:.06

CONCLUSION: ISSUES RELATED TO INNOVATIVE SOURCE SELECTION

The challenge of purchasing highly complex equipment or systems requires maximum flexibility for government procurement officials. This flexibility constitutes the foundation of competitive negotiation approaches, those that comprise the most innovative source selection procedures. The boundaries of the negotiation process in which this flexibility is exercised needs to be clarified for both government procurement officials and offerors. As this case illustrates, the negotiation process may result in changes to the scope of services using communications among offerors that convey information in a competitive manner. As long as traditional definitions of proper conduct are honored, and no proprietary or unique technical solutions are communicated, then the negotiation process can be successful.

Using prequalification of suppliers is an innovative sourcing technique that can encourage competitive negotiation after the appropriate suppliers have been identified. The use of a concurrent approach, however, has apparently not been fully considered by those jurisdictions that employ prequalification.

Even though the ITN process may have adhered to acceptable boundaries, challenges remain that are difficult to overcome. This case illustrates that the choice of which proposal offers the best value can be difficult to make when the proposals differ drastically in terms of price, service delivery and range. In other words, the ability to adequately compare supplier offers can be significantly reduced. The drastically

different means of data collection proposed by the three offerors illustrates this point.

Another challenge is to ensure that the negotiations skills of the negotiation committee or team are sufficient. Those skills must include understanding the negotiation process, planning negotiation strategy to best meet pre determined objectives, and being able to use various concepts, theories and tips to effectively negotiate. Training should occur for both agency officials as well as for procurement professionals.

If sufficient negotiation skills are not present, the potential difficulties that face the contract administrator can be much greater than if mistakes are made in the multi-step or ITB process. For example, the government procurement negotiating team and the offeror must agree on what documentation constitutes a legally binding agreement. If the supplier agrees verbally during negotiation to a change in the scope of services, but does not follow up with a written commitment, then the "concession" won during negotiation may not materialize.

At least two other challenges can enter the price proposal picture. These are common to all source selection, but may be much more difficult when purchasing complex systems. First, if the government officials state during the negotiation process how much money has been budgeted for the project, and two of the three suppliers last best offer is higher than this amount, the reality of a lack of funds may force public partners to choose the supplier with the lowest offer. The determination of best value is of lower priority than price, especially since the highly customized nature of the purchase means that service quality may be much more difficult to determine. In this case, SRS was the only supplier that had bid under the amount budgeted by the public partners.

Second, there is the risk that the last best offer is really too low to provide adequate services, as "lowballing" may occur. The offeror may do so anticipating that additional funds may be obtained from public partners during the life of the partnership or that promised delivery of goods and services may not have to be provided. Similarly, the public partners may not wish to consider the possibility that the budgeted amount for the project is not sufficient for the offeror to provide needed services. Because of the more uncertain nature of goods and/or services to be purchased through the competitive negotiation process, attempts to lowball may be less likely to be identified prior to the signing of a contract.

Innovative source selection methods are welcome, as the greater emphasis on negotiation processes offer the highest potential for successful purchase of complex systems. Government officials involved in negotiation must be aware of not only the boundaries of the negotiation process, but also must not forget the more traditional challenges of procurement.

NOTES

1. Asner (1995) is one exception.
2. See, for example, the discussion in DeBlasio, et.al. (1999).
3. This short list seems to be comparable to the federal practice of identifying all proposals that are in a "competitive range."
4. See for example, the situation described in United States General Accounting Office (2002).
5. The FAR rewrite uses the term discussion to encompass all negotiation, bargaining, and other interactions with offerors who have been designated as meeting the competitive range.
6. This definition is found in the Clinger-Cohen Act of 1996, which amends the Procurement Integrity Act, 41 U.S.C. 423(a). See Nash, Schooner and O'Brien (1998) for more discussion.
7. Florida DOT District Six was designated as the Project Manager, acting on behalf of all the public partners after the contract award.

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