JUSTIFICATION AND APPROVAL FOR USING OTHER THAN FULL AND OPEN COMPETITIVE PROCEDURES

Presented by Office of Counsel, Code 3.1

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Agenda

- Common form and substance issues with J&As
  - Discuss issues found in specific paragraphs
- General issues such as timing of the RFP release, synopsizing, and the routing process

GOVERNING LAW

- Requires full and open competition in Government procurement
  - 10 U.S.C. § 2304 and 41 U.S.C. § 253
  - Competition in Contracting Act (CICA)
    - You must compete the contract unless you meet the requirements of an exception. CICA allows several narrow exceptions.
    - J&A documents the justification for using the exception
    - Most common exception:
      - Only one responsible source (FAR 6.302-1).
      - Also, can be used to limit competition.
      - Includes Brand Name Justifications.
  - Will also address Unusual and Compelling Urgency (FAR 6.302-2)

Form and Substance Issues

- Recommend starting with the SPAWAR SCPPM and the referenced sample formats
- Focus is mainly on lessons learned with Paragraph 5, Demonstration of Contractor's Unique Qualifications
- Also briefly mention other discrete issues on other paragraphs

Precision

- The document needs to be complete, accurate, and tight. It will be scrutinized in a protest.
- Most J&As will have at least two SES, an O6, and two DP-IVs signing them. Reputation and credibility are on the line.

Paragraph 5, Rationale for Using Other than Full and Open Competition

FAR 6.302-1, Only one responsible source authority

- Explain why identified source is only one that can meet our requirement
- Not that the identified source is “best value”
  - Inappropriate logic, “Contractor A is the only responsible source because it can meet the requirement most effectively and/or most efficiently.”
  - Correct logic, “Contractor A is the only responsible source because it is uniquely qualified for the following reasons (e.g. contractor has specialized skills and experience or work involves contractor’s intellectual property).”

Paragraph 5, Only One Responsible Source

- Heart of paragraph 5 is explaining why the identified source is the only contractor that can perform the requirement.
- Don't get lost providing a tutorial on the importance of the supplies or services, and then provide an unsupported conclusion that the contractor is the only source.
- Make the argument as concise and straightforward as possible. If you believe there are multiple reasons for a sole source, choose the best rationale for paragraph 5. Additional supporting facts can be placed in paragraph 9.
- Avoid the "everything but the kitchen sink approach" – provides the appearance that we are reaching.

Use of Substantial Duplication of Cost or Unacceptable Delay with FAR 6.302-1

- Only applies with a follow-on contract for continued development or production of a major system or highly specialized equipment/services.
- With substantial duplication of cost, describe the cost to the Government and how it is not expected to be recovered through competition.
  - Usually involves comparing the amount of the duplicative cost to the value of the acquisition and the potential cost savings due to a competition.
  - Duplicative cost should consider all life cycle costs, e.g. logistics/support/maintenance.

Substantial Duplication of Cost

- Describe the method for determining the amount of the duplicative cost of awarding to another contractor.
- GAO expects estimate to be based on hard data. GAO will closely scrutinize the quality of the estimate.
- Often based on costs of previous development efforts. Consider though:
  - Will all the costs of previous development be incurred again?
  - Is industry willing to or has it already invested its own money?
- What is the potential savings that a competition would provide? 20% savings from the amount of a sole source?
- Example: Estimated cost of the sole source contract is $10. Estimated cost to us for another contractor to perform the effort is $13. The duplication of cost is $3, but you can recover 20% of that through a competition. Is $1 (10% vs. 30%) a substantial duplication of cost?

Unacceptable Delay

- Provide specific details
  - State how long it would take another contractor to obtain the necessary capability to perform the effort and discuss how this estimate was developed.
  - Must be specific with the details of the estimate.
  - Discuss the impact or problem to the Government, (e.g. Warfighter, Fleet, or Command) because of the delay.
  - Follow-on/Successive J&As can be problematic if utilizing the unacceptable delay justification.

Paragraph 5, Unusual and Compelling Urgency Authority, FAR 6.302-2

- Provide details

  Reason for urgency, i.e. why is there an unforeseen requirement?

  What is the serious injury to the Government of not executing a contract immediately?

- Authority does not automatically create a sole source. Must request offers from as many sources as is practicable.
- Authority allows you to acquire only the amount necessary to fulfill the urgent need.
- Very rare.

Urgency is not . . .

- A substitute for lack of planning (note: lack of advance planning is not an acceptable rationale for any sole source acquisition)
- This justification cannot be used when:
  - Funds are about to expire
  - Contract is about to expire
  - Did not fulfill known needs and now have a problem
  - You do not want to synopsize. This occurs when there is a 6.302-1 justification, but you don't want to wait.

Paragraph 10, Listing of Interested Sources

- If, in response to a synopsis or otherwise, another source expresses interest, must mention that source and how the Government resolved the issue.
- If another source indicates interest, recommend a documented exchange with that source to help defend how the Government came to its to decision to continue with the sole source.
- SPAWAR 2.0 requires a synopsis to be issued for at least 15 days prior to 2.0 signing (address it in paragraph 6 of the J&A).

Paragraph 11, Actions Taken to Remove Barriers to Competition

- Explain what actions will be taken to ensure future acquisitions will be competed.
- In other words, explain what the Government is doing to fix the anti-competitive situation discussed in paragraph 5.
- Particularly important if including option years in the J&A.
- If nothing is being done to remove the barriers, need appropriate justification.
- If current contract action is a follow-on to a previous sole source action, reference the previous J&A paragraph 11 and, if actions were identified, explain why they were not effective.

Paragraph 13, Total Estimated Value of Acquisition

- Funds must be identified by both Fiscal Year and by color. Recommend using a funding matrix. Make sure the math adds up.
- NMCARS 5206.303-2(a)(2) requires the identification by year and color.
- Recommend placing total estimated amount in paragraph 2 as well.

Other General Issues

Can the RFP be released before approval of the J&A when using FAR 6.302-1?

- Statute, 10 U.S.C 2304(f)(1), states no award without approved J&A.
- Regulation, FAR 6.303-1, states cannot “commence negotiations” without approved J&A.
- FAR 15.306(d) defines negotiations as exchanges with an offeror undertaken with the intent of allowing the offeror to revise its proposal.

Recommendation from 3.1

- Do not release RFP to a single source without approved J&A.
- Law is not absolutely clear, but good argument that this is what the law requires.
  - Releasing RFP to only one source is restricting competition, and only authority to do so is an approved J&A.
- Practical reason. Avoid creating unfair competitive advantage that would result if sole source is not approved or justification falls apart.

What About Releasing a Draft RFP?

- Law does not prohibit the release of a draft RFP.
- It is not advisable to release to only one source due to the potential to create an unfair competitive advantage, especially if there will be substantive exchanges with the contractor.
- If done publicly, a benefit is it ensures final RFP (the contract type, specification, quantities, etc.) is a stable document. Increases likelihood that the contractor will fully understand our requirement and respond with a better proposal, and lowers risk of having to re-synopsize.
- If release draft RFP, must still synopsize once the RFP is finalized if you haven't already done so or if description of action has changed notably from original synopsis.

Brand Name Specifications

- Brand name designation in specs/SOW/section B
  - Requires J&A, even if competing the brand name among many vendors.
  - FAR 6.302-1(c) and 11.105
  - The justification only needs to address that portion of the acquisition that is brand name. Approval levels apply only to the brand name portion of the acquisition.
  - Brand name or equal descriptions require a general description of the salient characteristics of the brand name.
  - Salient characteristics cannot be so restrictive as to limit choice to just the brand name.

- Brand name description + sole source vendor = double layer J&A.

Synopsis Issues

- Quantity of equipment or services, delivery schedule, and duration of contract period in J&A must be consistent with the synopsis.
- If the amounts in J&A differ from the synopsis, most likely need to re-synopsize.
- Question to ask: Would the field of competition be different with the modified scope?
  - Difficult to answer until you have synopsized the modified scope.

Scope of J&A vs. Scope of Contract

- The scope of the contract action (particularly quantity of items) cannot exceed the scope of the J&A.
  - J&A specifies the limit of the contractual authority.
- If the scope of the contract action is notably less than the scope of the J&A, may need to re-synopsize and modify the J&A.
- If dollar value of contract exceeds the dollar threshold of the original justification approval authority, must obtain new approval from the appropriate approval authority prior to award.

Class J&As

- Execute a class J&A when intent is multiple contract actions.
  - Example. J&A states 10 units. A contract is executed only for 5 units. In order to execute another contract for the other 5 units, the J&A needs to have been a class J&A.
- Remember to identify the date the class J&A expires, typically done in paragraph 3.
- Authority to act under a class J&A expires on the stated expiration date. But, when the RFP is sent out before the expiration date, the authority under the J&A will continue until award of the contract.

Signature Issues

- A change to the J&A after a signature requires a new signature.
- Exceptions: fixes of typographical errors or genuine non-substantive changes.
  - Recommend notifying signatories of changes and request confirmation.
  - What is a substantive change? No bright line rule. Using best judgment, determine on a case-by-case basis.
- Typical scenario. J&A is signed for technical and requirements cognizance, and 3.1 or 2.0 recommends substantive changes to paragraph 5.

The Aggregation Issue

- Issue – Execute J&A for $70M, award contract for $70M, during performance modify contract to add new scope of $20M. Do you aggregate amounts so that second J&A's value is really $90M needing ASN(RDA) signature?
- Answer – Generally No. Two separate contracting actions, both can be approved locally. But, allegation of splitting the requirement likely if added scope is soon after initial award.

Routing Issue

- Legal can sign the J&A for legal sufficiency only after the certifications by the Technical and Requirements personnel, but those signatories want to see that it has already been reviewed by 3.1.
- 3.1 can review and chop on route sheet before the PEO's chop and signature, but will need to be returned to 3.1 for legal sufficiency signature after the PEO has signed the J&A.
- Process of drafting the J&A. J&A should be reviewed by contracts (PCO level) at least concurrently with, if not before, legal's review.
- Work with your legal counsel regarding preferences on how to manage the review and comments to the document.

Publication Requirement

- J&As must be made publicly available within 14 days after contract award.
- The time is 30 days after award for J&As based on Unusual and Compelling Urgency.
- Must be made available on fedbizopps and posted for a minimum of 30 days.
- Brand name J&As must be posted with the solicitation.
- Must sanitize the J&A. Remove anything that is not publicly releasable.

QUESTIONS/DISCUSSION