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# LEGAL NOTES

## CONTRACTING BY COMPETITIVE NEGOTIATIONS IN SUPPORT OF FMS

By

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### INTRODUCTION

Security Assistance is an important tool of U.S. national security and foreign policy. An element of security assistance, the foreign military sales (FMS) process, is used to transfer by sale, lease, loan, or grant a wide range of defense articles, and services to allied or friendly governments. For example, sales may include major weapon systems such as aircraft or tanks, and the necessary initial and follow-on logistics support; and other types of military equipment and associated spares and repair parts, publications, training, and so on. Many of these products and services must be procured by the U.S. Government for sale to FMS nations/customers.

Contracting is a vital, on-going function of global as well as national importance. For example, there were 4,518,168 (\$61.5 billion) U.S. Government procurement actions during just the first half of FY 1993, of which 68,336 (\$4.9 billion) actions were in support of the FMS program and "intragovernmental" activities.<sup>1</sup> (Similar data are not gathered on awards in support of the FMS program alone, except that \$3.7 billion of the \$4.9 billion was in the first half of FY93.) Out of the 4.5 million procurement actions, 66 percent were spent on contracts supporting FMS alone, 8.2 percent were follow-on actions, and 25.8 percent were not.<sup>2</sup> (Similar percent data are not collected on awards in support of FMS.<sup>3</sup>) However, since DoD acquisition for FMS is conducted consistent with DoD procurement regulations and procedures, it should be safe to conclude that *most* FMS-related procurements are *competed*.

In 1994 and ensuing years, contracting will play a major role in supporting FMS by procuring *most* of the products and services ordered by FMS customers in cases which were initiated in FY93. According to the Defense Finance and Accounting Service - Denver Center (DFAS-DE), *68 percent* of the approximate \$32 billion worth of products and services ordered through FMS in FY 1993, will be supplied by U.S. Government procurement actions. This means that approximately \$21.8 billion worth of FMS items will be supplied through U.S. Government contracts with industry.

This article will focus on **three** main acquisition topics which affect the supply of FMS items through U.S. Government contracts with private industry. *First*, why it takes, on average, 6-18 months to complete the competitive negotiation of procurement contracts. *Second*, the

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<sup>1</sup>DoD Prime Contract Awards, First Half FY 1993, Washington Headquarters Services, Directorate for Information Operations and Reports, at pages 1, 39, and 45. An "intragovernmental order" is written by a Defense Agency or Military Department purchasing office requesting that a non-Defense Federal agency furnish supplies or services from its stocks, in-house manufacturing facilities, or contracts." Id., p. 59 and Economy Act, 31 U.S.C. 1535 and FAR 6.002 and 17.501 et seq. Also, "procurement" and "acquisition" are synonymous terms, with the former used in the United States Code and the latter used in the Federal Acquisition Regulation, R. Nash and S. Schooner, *The Government Contract Reference Book*, 1992, p. 308.

<sup>2</sup>*Ibid.*, at p. 35.

<sup>3</sup>*Ibid.*

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source selection process of picking contractors through competitive negotiation. *Third*, recent acquisition reform initiatives.

### **Time to Complete Competitive Negotiation**

At any step of the FMS sales process, whether you are an SAO member of the country team at a U.S. Embassy or are working in a CONUS security assistance office, your international customer may ask you: "Why does the U.S. Department of Defense take so long to negotiate a contract for our FMS requirements?"

### **Main Reasons**

The U.S. procurement process is subject to 4,000 current acquisition laws and 30,000 pages of regulations. The process or system "has become far too complex to permit government agencies to acquire goods and services in an efficient and effective manner."<sup>4</sup> As a result the process is "over-regulated," in the view of two recognized authorities in federal government contract law.<sup>5</sup> In balance, however, another respected authority who recognizes that the system "does not work nearly as well as it could," has stated that: "Despite its size and complexity, the system somehow works—America's military hardware is sought by almost every nation."<sup>6</sup>

In 1993, I requested a leading authority on Government procurement contract law, John Cibinic, now Professor of Law Emeritus at The George Washington University, to discuss his response to the broader question of why does DoD take so long to negotiate its contracts? According to Professor Cibinic, there are three overall reasons for why it takes so long for DoD to complete procurement contract negotiations.

(1) **Complexity of the item procured and the RFP process used by the government.** The Government's Request for Proposal (RFP) contains a statement of work, military-unique technical specifications, schedules, cost accounting and pricing requirements, auditing practices, clauses, instructions, and possibly other requirements that are very complex, sometimes ambiguous, and usually lengthy. The very nature of certain products or services acquired in major procurements by the Government are often so complicated and hard to adequately describe, that it is very difficult for the Government to solicit and contractors to propose, the desired items or service. (The average time frame is six to eighteen months to negotiate a U.S. government contract.)

(2) **Sole source negotiation.** This type of negotiation will require extensive effort and time to determine the "right price." Negotiating a sole source contract requires many of the same actions as for a competitively negotiated contract, e.g., RFP or RFQ (request for quote), proposal preparation and submittal, cost and technical evaluation, negotiations, and award. (However, the "written and oral discussions" step in competitive negotiation does not apply to sole source negotiation.) An additional major step, is a pre-negotiation audit by the Defense Contract Audit Agency (DCAA) that the CO must utilize and address during the negotiating process.

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<sup>4</sup>The Nash & Cibinic Report, Vol. 7, No. 2, Feb. 1992, Para 7; *Contract Management*, NCMA 32nd Annual West Coast National Educational Conference. Summary by T. Wilkinson, Nov. 1993, p. 72.

<sup>5</sup>Op.cit, Vol. 7, No. 3, March 1993, p. 33.

<sup>6</sup>N.R. Augustine, (CEO, Martin Marietta Corporation), "Defense: A Case of Too Many Cooks," *Fortune*, Dec 15, 1988, p. 219. For a discussion of the essential principles and concepts of U.S. public procurement activity, as explained in the context of the U.S. assisting the emerging democracies in Central and Eastern Europe to develop transparent, competitive public procurement systems, see W. Wittig, "The Essence of Public Procurement for the Post-Communist World," *Contract Management*, March 1993, p. 18. Mr. Wittig is Deputy Administrator for International Procurement Systems and the Procurement Workforce, Office of Federal Procurement Policy.

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For follow-on, sole source negotiated procurement of large scale purchases or major weapons systems you might think that the complexity of the product would become less of an issue. In many contract negotiating experiences, however, the negotiating process for large-scale procurements or major weapons systems can still be a complicated, long, and costly process. It might be shorter in time than a competitively negotiated procurement contract, but still be an extensive and drawn-out process.

(3) **Lack of knowledge and understanding** of the heavily regulated Government contract negotiating process, rules, regulations, and laws among some industry and Government representatives.

The balance of this article addresses the *statutory/regulatory regime* that drives the source selection negotiating process; the *seven main steps of source selection by competitive negotiation*; the *streamlining* efforts implemented by the Air Force, Army, and NASA; and a brief discussion of other recent reform studies, and initiatives to *streamline* the acquisition process, e.g., the *Section 800 Panel*.

## SOURCE SELECTION

**Statutory and Regulatory Requirements.** As a starting point, *before* the contracting officer (CO) can utilize contract negotiation procedures, the CO *must* make two basic determinations. *One*, that the *sealed bidding* method (one of the two basic methods) of contracting would be inappropriate for *any one* of four reasons: 1) insufficient time; 2) award cannot be based on only price or other price-related factors; 3) discussions are necessary; or 4) only one proposal will be submitted.<sup>7</sup> If any of these four conditions are present, then the procurement contracting will be conducted by the competitive negotiation method.<sup>8</sup> *Second*, the CO must decide whether any of the seven exceptions to conducting a “full and open” competitive negotiation exist, that will justify the negotiation of a sole source contract.<sup>9</sup> In conducting either a competitively negotiated or sole source negotiated procurement, the CO must still comply with many of the same steps of the negotiation process. This will become apparent as you review the *seven main source selection steps* described below.

The statutory and regulatory authorities for conducting a negotiated procurement are:

- *Truth in Negotiations Act of 1962* (TINA).<sup>10</sup>
- *Competition in Contracting Act of 1984* (CICA).<sup>11</sup>
- FAR, Part 15, “Contracting by Negotiation.” (See the Table of Contents for Part 15, which outlines the duties of a CO.)

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<sup>7</sup>FAR 6.401(a).

<sup>8</sup>D. Arnava & W. Ruberry, *Government Contract Guidebook*, FPI, 1987 & 1992 Supp., pp. 4-2, 4-3.

<sup>9</sup>FAR 6.302 and 10 USC 2304(c).

<sup>10</sup>10 USC §2304, as amended.

<sup>11</sup>41 USC 251 et. seq. and 10 USC §2304 et. seq. CICA prescribes the two basic methods of contracting: sealed bidding and competitive negotiation. For SAOs in less developed countries, such countries might be interested in the new simplified “UNCITRAL Model Law on Procurement of Goods and Construction,” adopted in 1993, by the United Nations Commission on International Trade Law. Contracting for services is likely to be added in 1994. Also, effective January 1, 1996, a new international agreement on government procurement will replace the existing agreement, due to the recently concluded GATT Uruguay Round of multilateral trade negotiations. Among other items, the new agreement generally prohibits signatories, e.g., the U.S., the European Community, Japan, Canada, and Israel, etc., from using offsets as a condition of award.

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**Source Selection by Competitive Negotiation.** Since 1962, when TINA was implemented, specific procedures have been prescribed for negotiated procurements.<sup>12</sup>

**Seven Main Steps:**

(1) **Solicit competitive proposals** by RFP under “*full and open competition*.” [Emphasis added] This means from all responsible sources, as defined in 41 USC 403(7), which elements are discussed in Step 4 below. Only one proposal is solicited, if a sole source is justified and approved per FAR 6.302 (CICA, 10 USC §2304). There are times when an RFP is amended before or after receipt of proposals. When this is done, the procuring process must be extended to allow a reasonable time for the offeror(s) to submit revised proposals.

(2) **Pre-proposal Conference** for at least complex procurements. This may be done to brief, clarify, and explain RFP requirements. If the solicitation is changed, then the RFP must be amended in writing.<sup>13</sup>

(3) **Proposals Submitted.** The FAR does not address how much time should be allowed for preparation and submittal of proposals for negotiation.<sup>14</sup> (For sealed bids, FAR requires not less than 30 calendar days between issuance of the solicitation and opening of bids.<sup>15</sup>)

The nature of and requirements for the item being procured will generally determine how much time is specified for submittal of proposals by the CO for a negotiated procurement. Past experience shows allowable time periods included 18 days, 60 to 90 days, 120 days, or more, depending on complexity. The normal time specified for submitting a proposal in response to an RFP, is 30 calendar days.

The RFP should include a clause “Period for Acceptance of Offer” by the Government.<sup>16</sup> It states “(60 calendar days unless a different period is inserted by the offeror) from the date specified in the solicitation for receipt of offers . . . .”<sup>17</sup> In many negotiated procurements, the 60 days for the Government to accept must be extended because the Government cannot make an award decision in 60 days.

“A proposal received in response to an RFP is an offer that can be accepted by the Government to create a binding contract, either following negotiations, or when authorized by FAR 15.610 [on written or oral discussions], without discussion.”<sup>18</sup>

(4) **Written or Oral Discussions.**<sup>19</sup> Prior to evaluation and negotiation, these discussions, initiated by either party (but controlled by the CO), can cover information essential

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<sup>12</sup>See generally, P. Shnitzer, “Competitive Negotiation/Edition II,” Briefing paper No. 83-10 (FPI Oct. 1983) and P. Shnitzer, “Discussions In Negotiated Procurements.” Briefing Papers No. 91-4 (FPI, March 1991). In negotiated procurement, if the Government obtains adequate price competition, the contracting officer may waive the requirement for certified cost or pricing data. Nash and Schooner, *op. cit.*, p. 81.

<sup>13</sup>FAR 15.409(a)-(c).

<sup>14</sup>See generally FAR 15.412(b).

<sup>15</sup>FAR 14.202-1.

<sup>16</sup>FAR 52.215-19.

<sup>17</sup>*Ibid.*

<sup>18</sup>FAR 15.402(d).

<sup>19</sup>FAR 15.601 and 15.610.

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for determining acceptability of a proposal, or to give the offeror an opportunity to revise or modify its proposal.<sup>20</sup>

Award can be made without discussion on the basis of *initial proposals*, if the RFP so provided (always does), and if award would result in “the lowest overall cost to the Government at a fair and reasonable price” for civilian and defense agencies.<sup>21</sup>

If the CO decides to hold such discussions, they must be held with *all responsible* offerors submitting proposals within a *competitive range*. Prior to contract award, a CO must make an “*affirmative determination*” of *responsibility* with respect to a prospective contractor.<sup>22</sup> This entails determining whether a prospective contractor is financially capable to perform; able to meet the delivery or performance schedule; has a satisfactory performance history; has a satisfactory record of integrity and business ethics; has effective management experience and operational controls and technical skills, and other related capabilities.<sup>23</sup>

A proposal is within the “competitive range” if it has a “reasonable chance of being selected for award.”<sup>24</sup> This determination must be made by the CO, *prior* to discussions, on the basis of cost or price and other factors stated in the RFP.

All these actions expend significant amounts of time in the negotiated procurement process.

In addition, the foregoing procedures as well as the ones below, *apply to both military and civilian agencies*.<sup>25</sup>

**(5) Proposal Evaluation.** The Government evaluation team must assess both the proposal and the offeror’s ability (as stated in the proposal) to perform the contract requirements successfully.<sup>26</sup> The RFP must disclose the factors that will be considered and the relative weights assigned to these factors.<sup>27</sup>

The team must employ the evaluation factors set forth in the solicitation.<sup>28</sup> The procuring agency, however, in “most competitively negotiated procurements” provides itself a “considerable degree of discretion” by stating in the RFP that it will award to the offeror that offers the “best value” to the Government.<sup>29</sup> “Best value” means the source selection officials perform a technical/cost trade off analysis to “determine whether the difference in technical merit is worth the difference in cost.”<sup>30</sup>

The three major evaluation categories are: technical, management, and cost.<sup>31</sup> Each of these evaluations consume significant amounts of time in most negotiated procurements.

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<sup>20</sup>FAR 15.601.

<sup>21</sup>FAR 15.610(3) for civilian and 15.610(4) for DoD agencies. 41 U.S.C. §253b(d)(1)(B).

<sup>22</sup>FAR 9.103(b).

<sup>23</sup>FAR 9.104-1; 41 U.S.C. §403(7)

<sup>24</sup>FAR 15.609 (a).

<sup>25</sup>FAR 15.6 applies to both; 10 U.S.C §2305(b)(4)(A) and 41 U.S.C. §2536(d)(1)(A).

<sup>26</sup>FAR 15.608.

<sup>27</sup>Comp. Gen. Decision, B-215313 (7 Dec 1984), 84-2 CPD ¶ 657, 27 G.C. ¶72

<sup>28</sup>FAR 15-605.

<sup>29</sup>The Nash and Cibinic Report, Volume 7, No. 5, May 1993, at p. 75.

<sup>30</sup>*Ibid.*, at p. 78.

<sup>31</sup>Arnavas and Ruberry, *Government Contract Guidebook*, 1987, with 1992 Supplement, at p. 4-5.

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A good part of this effort must be started or done prior to negotiation itself, in order to have a solid understanding of the offeror's proposal and capabilities.

If either a *sole source contract* or a non-price competitive contract (i.e., award based upon factors other than price, such as applicable experience, technical/management capability), is being negotiated, the award will not be based on "adequate price competition." In either case, there are two more important requirements:

(a) Certified cost or pricing data for negotiated contracts over \$500,000 will have to be submitted by the contractor before contract award.<sup>32</sup> The Government CO will conduct price and cost analysis to determine the allowability, allocability, and reasonableness of the price.<sup>33</sup>

(b) A pre-award "audit" of the proposal will be conducted by DCAA. DCAA prepares a report of their findings, which the CO must use in discussions and negotiation with an offeror. In addition, the CO must address the findings and recommendations in the audit report and explain the reasons for any decisions made which are at variance with the report.

(6) **Best and Final Offers (BAFO).**<sup>34</sup> In a competitive negotiated acquisition or procurement, upon completion of discussions (and negotiations), the CO shall issue to all offerors still within the competitive range, a request for a BAFO.<sup>35</sup>

The request shall include a notice that discussions are concluded; this is the opportunity to submit a BAFO (i.e., do not expect further discussions); and a common cut off date to submit the BAFO, which must be submitted by the date and time specified.<sup>36</sup> This, of course, adds time to the negotiating process. Sometimes, the period of time to submit a BAFO is short (only price proposals are requested), meaning it is due in 2-5 days. Other times, the period for response may be 10 days. The time allowed to submit a BAFO will depend on the nature and complexity of the item and time constraints imposed on the CO.

BAFOs are not limited to one round.<sup>37</sup> After receipt of the BAFOs the CO may determine that "it is clearly in Government's interest" to reopen discussions or negotiations. As examples: information made available in the proposals and BAFOs are inadequate to reasonably justify selection of a contractor; the number of units might be changed; inadequate specifications are discovered; or material advice was given by the CO to one offeror but not to all others within the competitive range. As a result, two or more rounds may be required.<sup>38</sup> This, too contributes to the time to complete a negotiation. However, due to the risk of abuse of offerors and the competitive process that could arise when more than one BAFO is requested, DoD has imposed restrictions on the use of BAFOs. In 1988, DoD implemented a restriction requiring the approval of a service's acquisition executive when more than one BAFO is requested.<sup>39</sup>

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<sup>32</sup>10 U.S.C. 2306a.(a) and (b), 1993 Supplement.

<sup>33</sup>FAR 15.804 and 15.805. "Adequate price competition" exists when two or more solicited, responsible offerors submit priced offers responsive to expressed requirements for a contract to be awarded to the offeror with the lowest evaluated price, FAR 15.804-3(b).

<sup>34</sup>FAR 15.611.

<sup>35</sup>FAR 15.611(a).

<sup>36</sup>FAR 15.611(b).

<sup>37</sup>FAR 15.611(c).

<sup>38</sup>Amavas & Ruberry, *Government Contract Guidebook*, 1987, at p. 4-12.

<sup>39</sup>DFARS 15.611.

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(7) **Selection and Award.** After the BAFO is completed, the CO or designated source selection authority, shall select the offeror whose BAFO offer “is most advantageous to the Government, considering price and the other factors included in the solicitation.”<sup>40</sup> The written notice of award is sent to the successful offeror.

Although not exhaustive, the foregoing seven main steps of negotiated procurements, demonstrate why, in many cases, it may take a year or more after acceptance of an LOA for DoD to complete negotiated procurements of large, major procurements or of complex weapon systems.

## ACQUISITION STREAMLINING INITIATIVES

The foregoing discussion serves as a partial explanation of why there has been “a prevailing view that we are frozen into a procurement system which is inefficient and uneconomical.”<sup>41</sup> It is widely accepted that “we need to streamline the entire process.”<sup>42</sup>

In pursuit of making the competitive negotiation process shorter and less expensive, two major government agencies implemented certain streamlining initiatives in the late 1980s.<sup>43</sup> The two agencies are the Air Force Material Command (AFMC) and the National Aeronautics and Space Administration (NASA). See the attached report, “Streamlining Efforts—Competitive Negotiations,” which relates their efforts.

The Army has initiated several actions to streamline the acquisition process (which, in turn, should reduce the time it takes to complete the contract negotiation process). Since February 1993, the Army has reportedly “eliminated or consolidated more than 40 percent of the service’s own acquisition regulations . . . .”<sup>44</sup> During the past two years, the Army has been reviewing all of its military specifications and standards to identify those that can be replaced by commercial specifications.<sup>45</sup> According to a recent Army Directive, “The use of commercial products, processes, and practices in procurements is a fundamental component of the new Army acquisition approaches.”<sup>46</sup>

In addition, for many years DoD has studied proposed changes to the whole statutory and regulatory structure for acquisition or procurement contracting. Examples include the Holifield Commission, the Carlucci Initiatives, the Grace Commission, and the Packard commission. The most recent example is the major Report of the Department of Defense Acquisition Law Advisory Panel (the “Section 800 Panel”). The report is entitled “Streamlining Defense Acquisition Laws” and was transmitted to the Congressional defense committees on January 14, 1993, as directed by §800, Public Law 101-510. The Section 800 Panel’s four goals<sup>47</sup> and corresponding major recommendations are:

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<sup>40</sup>FAR 15.611(d).

<sup>41</sup>Nash & Cibinic Report, Vol. 4, No. 11, Nov. 1990, at p. 161.

<sup>42</sup>*Ibid.*

<sup>43</sup>Nash & Cibinic Report, Vol. 4, No. 6, June 1990, at pp. 87-91.

<sup>44</sup>*Defense News*, “DoD Tackles Procurement Reform,” by S.C. Le Seur, December 13-19, 1993.

<sup>45</sup>*Ibid.*

<sup>46</sup>*Ibid.*, quoting from an Army Directive dated November 10, 1993, signed by George Dausman, acting Army Assistant Secretary for Research, Development and Acquisition, and General Jimmy Ross, Commander of Army Material Command.

<sup>47</sup>“Streamlining Defense Acquisition Laws-Executive Summary: Report of the DoD Acquisition Law Advisory Panel,” Defense Systems Management College Press, March 1993, Section 800 Report, p. 4. Volume 7 of this report is on acquisition and international defense trade and cooperation.

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**Goal #1:** Streamline the defense acquisition process and prepare a new code of acquisition laws.

**Major Recommendations:**

1. Add a new broad definition of “commercial item” (for both end-items and components).<sup>48</sup>

2. Change the “small purchase threshold” of \$25,000 to a “simplified acquisition threshold” of \$100,000.<sup>49</sup>

Also, add language on a “contingency operation” with a threshold of \$200,000 for purchases made outside the United States.<sup>50</sup>

3. Implement electronic data interchange (EDI) or paperless procurement of simplified purchases under \$100,000.

4. Eliminate the preference for cost or pricing data from contractors, unless there is no “adequate price competition.”<sup>51</sup> (Generally, adequate price competition exists where two or more responsible offerors submit priced offers responsive to the requirements of the solicitation. [FAR 15.804-3(b)])

Give the Contracting Officer more discretion to use market research to determine price reasonableness.

5. The Section 800 Panel has provided changed statutory language for many of the 600 laws reviewed.<sup>52</sup>

**Goal #2:** Eliminate unnecessary acquisition laws, focus on the buyer/seller relationship.

**Main Recommendation:**

The Panel reviewed a total of 889 laws, of which 625 are acquisition-related laws. The Panel recommended that the government amend 163, delete 11, retain 201, repeal 124, and take no action on 126 of the acquisition-related laws.<sup>53</sup>

**Goal #3:** Ensure/Protect the financial and ethical integrity of the procurement process.

**Main Recommendations:**

1. Establish a single payment statute by consolidating the three other statutes into 10 U.S.C. §2307, to be renamed as “Contract Financing.”<sup>54</sup>

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<sup>48</sup>*Ibid.*, at p. 69.

<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*, at p. 70.

<sup>52</sup>*Ibid.*, at pp. 69-90.

<sup>53</sup>*Section 800 Report*. Also, see *Contract Management*, “NCMA 32nd Annual West Coast National Educational Conference.” Summary by T. Wilkinson, November 1993, at p. 56, provides a shorter similar report.

<sup>54</sup>*Section 800 Report*, *Supra* note 47, at p. 72.

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2. Repeal duplicative ethics statutes.<sup>55</sup>

**Goal #4:** Protect the best interests of DoD.

If Congress enacts the above and other changes in the laws, as recommended by the Panel, and if DoD changes procurement procedures and regulations within existing laws, then the best interests of DoD (and indirectly, FMS customers) should be well-served.

## SUMMARY

This article has explained the reasons for why it takes, on average, 6-18 months to complete the competitive negotiation of procurement contracts, the source selection process, and the reform initiatives intended to streamline the overall acquisition process.

Three main reasons for the length of time to complete contract negotiations are: the complexity of the item being procured by the USG, sole source negotiations and inadequate knowledge and understanding among some government and industry representatives.

The seven main steps of the competitive negotiated source selection process are: (1) solicit competitive proposals; (2) conduct a pre-proposal conference; (3) prepare and submit proposals; (4) conduct written or oral discussions; (5) evaluation of proposals by DoD; (6) issue a request for a Best Final Offer (BAFO) to all offerors within the competitive range; and (7) select and award a contract to that offeror whose offer is most advantageous to the Government.

The Section 800 Panel recommendations are the best recent hope for acquisition reform that, among other things, would reduce the time and effort it presently takes to award procurement contracts for FMS and USG requirements. Several reform bills have been introduced in Congress. Time will tell which measures will be enacted by Congress to shorten and streamline the acquisition process for FMS and DoD requirements alike.

## ABOUT THE AUTHOR

Charles B. Barry is the Attorney-Advisor (International), and Instructor, and Functional Coordinator for Acquisition Contracting at DISAM. Prior to coming to DISAM, he had 13 years of domestic and international government contracting experience (including FMS contract negotiations), in primarily the private sector. He has served in various contract negotiating and legal positions in both industry and federal government, most recently serving as a contracting officer and assistant director, contracts, for the Resolution Trust Corporation. He earned a Bachelor's degree in Law and Psychology from the University of Minnesota, and a J.D. degree from Hamline University School of Law in St. Paul, Minnesota.

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<sup>55</sup>*Ibid.*, at pp. 78-79.

## Streamlining Efforts—Competitive Negotiations

This attachment explains twelve types of actions that were implemented in the late 1980's by AFMC and NASA to streamline and shorten the time it takes for the Government to conduct competitive negotiations. Some of the procedures adopted by the Air Force and NASA could be applied as well to sole source contract negotiations, e.g., use draft RFPs to shorten time for proposal preparation, and impose page limitations on proposals, and take only 120 days from issuance of RFP to award.

Actions Implemented	AFMC <sup>1</sup>	NASA <sup>2</sup>
Target Shorter Time Period - RFP to Award	<ul style="list-style-type: none"> <li>• 120 Days from issuance of RFP to award.</li> <li>• Policy applies to only major procurements but can be applied to any size.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as AFMC.</li> <li>• Same policy as AFMC.</li> </ul>
Acquisition Planning	<ul style="list-style-type: none"> <li>• Severely limit internal documentation and and briefing reqts.</li> <li>• Avoid repetitive internal coordination.</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain firm commitment on schedule before RFP issued.</li> <li>• Avoid repetitive internal coordination.</li> </ul>
Pre-Proposal Conferences	<ul style="list-style-type: none"> <li>• Not addressed.</li> </ul>	<ul style="list-style-type: none"> <li>• When deemed effective, use to give advance notice of agency's requirements on even-handed basis.</li> </ul>
Draft RFPs	<ul style="list-style-type: none"> <li>• Obtain industry views on unnecessary reqts and inform potential competitors of details.</li> <li>• Permits shorter time for preparation of proposals due to advance receipt of draft RFP.</li> </ul>	<ul style="list-style-type: none"> <li>• Not addressed.</li> </ul>
Page Limits	<ul style="list-style-type: none"> <li>• Goal is to limit tech and management proposals to 100 double-spaced pages each. Up to 100 pages for cost.</li> </ul>	<ul style="list-style-type: none"> <li>• Limit RFP to 350 pages; proposals to 500 pages, excluding cost proposal.</li> </ul>
Evaluation Factors	<ul style="list-style-type: none"> <li>• Reduce number of factors to minimum needed.</li> </ul>	<ul style="list-style-type: none"> <li>• Limit evaluation sub-factors to "key Swingers" that distinguish competitors in areas being evaluated.</li> </ul>

Actions Implemented	AFMC <sup>1</sup>	NASA <sup>2</sup>
Size of Source Selection Team	<ul style="list-style-type: none"> <li>• Small, expert panels with broad experience.</li> <li>• Each technical rater reads proposal at outset.</li> </ul>	<ul style="list-style-type: none"> <li>• No more than 20 people.</li> </ul>
Electronic Submission of Cost Proposals	<ul style="list-style-type: none"> <li>• Encourages this for cost proposals on uniform formats. Improves analysis process and permits easier comparison of data between competitive proposals.</li> </ul>	<ul style="list-style-type: none"> <li>• Not addressed.</li> </ul>
Audit and Field Pricing Support	<ul style="list-style-type: none"> <li>• Limit use. Tailor request for audit to need.</li> </ul>	<ul style="list-style-type: none"> <li>• Audit rates only.</li> </ul>
Oral Presentations	<ul style="list-style-type: none"> <li>• Encourage use by competitors in early stages of evaluation.</li> <li>• After initial evaluation of each proposal.</li> </ul>	<p>Same as AFMC.</p> <ul style="list-style-type: none"> <li>• Make to source evaluation board, for overview and highlighting of key strengths.</li> </ul>
Establish Competitive Range	<ul style="list-style-type: none"> <li>• Exclude marginal offerors upon initial receipt of proposals.</li> </ul>	<ul style="list-style-type: none"> <li>• Conduct initial screening out.</li> <li>• Have only one, detailed evaluation of the best and final offers.</li> </ul>
Past Performance as Evaluation Factor	<ul style="list-style-type: none"> <li>• A major evaluation factor. AFSC Reg. 800-54, 8-11-88.</li> </ul>	<ul style="list-style-type: none"> <li>• Not addressed.</li> </ul>

1. AFSC Regulation 550-23, Streamlined Source Selection, 2-28-87.

2. NASA Streamlined Acquisition Handbook, 2-21-90.

NOTE: These two policy handbooks/manuals apply to only major procurements, but could be applied to procurements of any size.

SOURCE: The Nash & Cibinic Report, Vol. 4, No. 6, June 1990, pp. 88-90.