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THE NASH & CIBINIC REPORT®

government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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DATELINE MARCH 2012 • Every so often we see a protest decision that demonstrates how dysfunctional the tradeoff process is. The latest one is *Freedom Systems, LLC*, Comp. Gen. Dec. B-405846, 2012 CPD ¶ 18, where the Army was procuring meals, lodging, and transportation for applicants. The Request for Proposals called for detailed technical proposals and stated, as is usual, that nonprice factors were significantly more important than price. It also warned that proposals that left out required information "may be judged unacceptable."

The winning offeror submitted a great technical proposal and was awarded a contract for $11,165,914.70. The protester offered a price of $7,839,826.50, received an excellent past performance rating, but was dropped from the competition because it had two significant weaknesses, lack of clarity in the breakfast location and in its plan for addressing applicant overflow, and two deficiencies, lack of a breakfast menu and lack of several items of required documentation. Interestingly, the documentation was included in the original proposal but inadvertently left out of the copies that were given to the evaluators. As might be expected, the Government Accountability Office denied the protest, stating:

> [W]e have no basis to conclude that the agency acted unreasonably in not noticing the protester's error [in submitting incomplete copies]. We also know of no basis to shift responsibility to the agency for the protester's mistake.

We don't fault the GAO because all it does is referee this stupid game. But shouldn't someone in the Army have asked whether it was willing to live with the protester's minor glitches in order to save $3,326,088.20? That seems like an exorbitant amount to pay for some unclear language and the lack of a breakfast menu. And the missing documentation could easily have been copied from the original proposal and attached to the copies. Apparently, the Army is so rich that this type of analysis is not undertaken. And incidentally, why in the procurement of such mundane services should the nonprice factors be significantly more important than price?

It appears that some contracting offices are so caught up in the game that no one asks whether the proposed source selection is in the best interest of the Government. We have a simple suggestion. Contracting Officers should sit back and ask if they would spend their own money the way they are proposing to spend the Government's money. If the answer is no, as it almost has to be in this case, they should do their best to find a way to avoid this outcome. Let's exercise some ingenuity in finding ways to save the Government money rather than routinely following rote procedures that waste Government funds. Ron

Competition & Award

¶ 11 • POSTSCRIPT VII: CLARIFICATIONS vs. DISCUSSIONS • It's time to take another look at the distinction between clarifications and discussions. Four years ago, in *Postscript V: Clarifications vs. Discussions*, 21 N&CR ¶ 45, Vern described 10 less than clear rules on how to make this distinction. See also *Clarifications vs. Discussions: The Obscure Distinction*, 14 N&CR ¶ 29, and *Postscripts* at 15 N&CR ¶ 41, 16 N&CR ¶ 13, 17 N&CR ¶ 20, 18 N&CR

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¶ 2, and 23 N&CR ¶ 46. The key to making this distinction seemed to be ascertaining the purpose of the inquiry. If it was to determine the "acceptability" of a "proposal," it was a discussion. Otherwise, the inquiry might be a clarification. The problem is that proposals contain not only offers but also information, and it is not clear what the term "acceptability" means when it applies to information. Contracting agencies need information to make a reasonable determination of exactly what a competitor is offering and exactly what the capability of the competitor is. Obtaining such information frequently doesn't relate to whether the agency will "accept" the competitor's offer, but rather relates to assisting the agency in making a sound source selection decision. Here, the Government Accountability Office throws in the rule that "materiality" of the necessary information is the test because obtaining material information is a discussion. Thus, the GAO has chosen to discuss this issue in terms of "acceptability" and "materiality."

Cases Dealing With Information

Obtaining information that is required by the Request for Proposals but is missing from the proposal has been held to be a discussion. See *Tetra Tech Tesoro, Inc.*, Comp. Gen. Dec. B-403797, 2011 CPD ¶ 7, where the agency dropped the protester from the competition because it did not submit a required subcontracting plan. The GAO rejected the argument that the plan could have been obtained through a clarification without any reasoning—merely citing *Environmental Quality Management, Inc*., Comp. Gen. Dec. B-402247.2, 2010 CPD ¶ 75. That case contains the most comprehensive discussion of the distinction between clarifications and discussions of any case so far. There, the agency evaluators found errors in almost all of the proposals and met with the Contracting Officer to determine which errors could be dealt with in the clarification process. They decided that they could obtain clarification of "ambiguities in an offeror's past performance references, apparently missing fringe rate information, and failures to complete Section K certifications, among others." However, they decided that they could not ask the protester to submit a "project" demonstrating experience of one of its team members because that was a "material" error not a minor one.

The protester argued that what actually occurred was a transposition of percentages in the proposal that led to the agency's belief that the missing information was required to be submitted. The GAO agreed with the agency that it could not have perceived this error and that, even if it had, it was more than a "minor" mistake. Thus, it agreed with the agency's reasoning, stating:

> Minor or clerical errors subject to clarifications stand in contrast to material modifications of proposals which can occur only under the discussion process set out at [Federal Acquisition Regulation] § 15.306(d). Here, the contribution of effort expected from each team member identified in the proposal, stated in the percentages at issue here, was a material aspect of each offeror's proposal, and affected the agency's evaluation of proposals as set forth in the solicitation. Thus, no matter how minor or clerical the transposition error may have been in its commission, it was clearly material in its effect, and as such cannot be considered subject to correction through clarifications, but only through discussions under FAR § 15.306(d). *See Cooperativa Maratori Riuniti—Anese*, B-294747, Oct. 15, 2004, 2004 CPD ¶ 210. Accordingly, we disagree with [the protester] that the error it asserts it committed, or the error [the agency] reasonably perceived, was correctable through clarifications, and we find no basis to sustain the protest based on these arguments.

In contrast, the GAO agreed with the agency's determination that asking one of the other offerors to identify its "fringe rate" in its price proposal was a clarification because it was already in the supporting documentation with the label of "labor burden." The GAO reasoned:

> As a general rule, discussions occur where the government communicates with an offeror for the purpose of obtaining information essential to determine the accept-

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> ability of a proposal, or provides the offeror an opportunity to revise or modify its proposal in some material respect. FAR § 15.306(d)(3); *Priority One Servs., Inc*., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5. Clarifications, on the other hand, are "limited exchanges" agencies may use to allow offerors to clarify certain aspects of their proposals or resolve minor or clerical mistakes. FAR § 15.306(a)(2); *Manthos Eng'g, LLC*, B-401751, Oct. 16, 2009, 2009 CPD ¶ 216. In situations where there is a dispute regarding whether communications between an agency and an offeror constituted discussions, the acid test is whether the offeror has been afforded an opportunity to revise or modify its proposal. *TDS, Inc*., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 at 6. . . .
>
> Here, it is clear from the evaluation notice and declaration of the price analyst that the agency was not initially aware of the hidden sheets in the offeror's electronic submission, and for that reason was unable to determine if the offeror's fringe rate was applied to the labor rates, or what the fringe rate might be. The exchange between the offeror and [the agency] brought the hidden sheets in the offeror's proposal to [the agency's] attention for the first time, and allowed the price analyst to locate the necessary information in the proposal. That the information was not labeled as the "fringe rate" is immaterial. In sum, the record is clear that the exchange in question constituted a confirmation of information that was already contained in the proposal (though initially hidden), and fell within the bounds of a clarification under FAR § 15.306(a).

Kudos to the CO for making this distinction but it doesn't seem clear to us. "Material"/"minor" and "acceptability" are fuzzy concepts that may not be applied until after the information is obtained (as seems to be the case here).

Clarifications were also found in *Highmark Medicare Services, Inc*., Comp. Gen. Dec. B-401062.5, 2010 CPD ¶ 285 (confirmation that information in proposal as to staff availability was still accurate pending delayed award); *SOS International, Ltd.*, Comp. Gen. Dec. B-402558.3, 2010 CPD ¶ 131 (learning that a past performance questionnaire submitted by offeror on performance of a joint venture of which it was a part was not relevant to current procurement); *Allied Technology Group, Inc*., Comp. Gen. Dec. B-402135, 2010 CPD ¶ 152 (obtaining confirmation that offeror would comply with Request for Quotations requirement and determining that statement in quotation that cost of certain work was not included in price was not relevant because work was not required by specifications); *EMS Ice, Inc*., Comp. Gen. Dec. B-401688.3, 2009 CPD ¶ 211 (correcting "obvious" mistake when offeror did not carry forward contract line item price but put much larger amount in "net" price); *Kuhana-Spectrum Joint Venture, LLC*, Comp. Gen. Dec. B-400803, 2009 CPD ¶ 36 (obtaining missing Online Representations and Certifications Application certification and required representations); *Career Training Concepts, Inc*., Comp. Gen. Dec. B-311429, 2009 CPD ¶ 97, and *Career Training Concepts, Inc. v. U.S.*, 83 Fed. Cl. 215 (2008), 50 GC ¶ 369 (obtaining information explaining elements of the proposed price); and *Colson Services Corp*., Comp. Gen. Dec. B-310971, 2008 CPD ¶ 85 (requesting confirmation that rebate amount was on a monthly rather than annual basis). In a number of these cases, the result swung on the fact that the response to the clarification request was that the discrepancy that was perceived in the proposal was a mistake that should be removed from the proposal. If the response had been the opposite, the request would likely have been held to be a discussion.

On the other hand, clarifications were not permitted to clear up issues in *URS Group, Inc*., Comp. Gen. Dec. B-402820, 2010 CPD ¶ 175 (determining whether the offeror had the required security clearance when the parent company that made the offer did not have the clearance but a division listed in the technical proposal had the required clearance); *Superior Gunite*, Comp. Gen. Dec. B-402392.2, 2010 CPD ¶ 83 (correcting major omissions from technical proposal); *Analysis Group, LLC*, Comp. Gen. Dec. B-401726, 2009 CPD ¶ 237 (removing a blanket indemnification provision from a quotation); *FedSys, Inc*., Comp. Gen. Dec. B-401453, 2009 CPD ¶ 181 (questioning proposal information to ensure that a cost realism adjustment was proper); and *Paraclete Contracts*, Comp. Gen. Dec. B-299883, 2007 CPD ¶ 153 (correction

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of apparent mistake when the amount of the intended price was not "apparent from the face of the offer"). As Vern pointed out in 21 N&CR ¶ 45, this "apparent from the face of the offer" rule followed in *Paraclete* is one of those rules that the GAO has created out of thin air. It has no basis in the FAR, which permits correction of "minor or clerical errors" during clarifications with no reference to any such condition, FAR 15.306(a)(2).

It seems clear that if an agency determines that a proposal is "unacceptable" in its initial evaluation, obtaining any information to improve the proposal would be held to be discussion not a clarification. See, for example, *Chicago Dryer Inc*., Comp. Gen. Dec. B-402340, 2010 CPD ¶ 52, stating this proposition in a very straightforward manner.

Cases Dealing With Proposed Solutions

When an agency requires the submission of a proposed solution to the agency's requirements, permitting the offeror to improve its solution will not be considered to be a clarification. See, for example, *Sletten Cos./Sletten Construction Co.*, Comp. Gen. Dec. B-402422, 2010 CPD ¶ 97, where the RFP called for the submission of concept designs. The GAO rejected a protest that correction of material problems with the protester's proposed design could have been dealt with through clarifications, stating that clarifications "may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal," citing FAR 15.306(b)(2) (the rule governing communications prior to establishing a competitive range). See also *TMM Investments, Ltd.*, Comp. Gen. Dec. B-402016, 2009 CPD ¶ 263, where the GAO characterized questions about deficiencies in proposed rental space as discussions because they allowed offerors "to make substantive changes to their offers." In this case, the GAO perhaps regarded the proposal of space as part of the *offer* that would be incorporated into the contract as a firm contractual requirement (at least it used the word "offer" not the word "proposal").

Similarly, when an agency requires the submission of a demonstration project, improvements to the project cannot be obtained or permitted through the clarification process, *JBlanco Enterprises, Inc*., Comp. Gen. Dec. B-402905, 2010 CPD ¶ 186. This situation is regarded as a test that must be graded on the initial submission—without the opportunity to obtain a better grade by having the agency point out weaknesses. It is not clear why soliciting technical and management proposals to demonstrate the capability of an offeror is not also a test which would preclude any clarifications—but this issue has never been addressed.

Clear Guidance?

We won't argue for a minute that this update will assist our readers in distinguishing between clarifications and discussions. The GAO has created the "acceptability" and "materiality" rules with some subsets and the best we can do is to report the cases and let COs figure it out. The end result is undoubtedly great hesitancy to fully understand proposals when the agency intends to award without discussions.

Wouldn't it be helpful if we just had a rule that said that the CO could obtain any information necessary to come to a full understanding of the offer that a competitor is making and of the capabilities of that offeror. Would such a rule be any more harmful to the competitive negotiation system than the current rule in FAR 15.306(d)(4) that encourages technical leveling? We would vote for a fully informed source selection official over a system that tries to bring all of the offerors in the competitive range up to some level of performance. We can dream can't we? Rcm

▼

¶ 12 • SOLE-SOURCE ACQUISITIONS: What Are The Proper Procedures? • What are the rules for conducting sole-source acquisitions under the Competition in Contracting Act as implemented by the Federal Acquisition Regulation 6.302-1? FAR 2.101 defines a *sole-*

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source acquisition as one in which an agency solicits and negotiates with only one firm. The CICA statutes, 10 USCA § 2304 and 41 USCA § 3304, the public notice statutes, 15 USCA § 637 and 41 USCA § 1708, and FAR Subparts 6.3 and 5.2 authorize sole-source negotiations only when an agency has:

(1) Published a prescribed notice at the Governmentwide Point of Entry (GPE), unless one of 14 exceptions applies;

(2) Waited prescribed periods of time before issuing a solicitation and requiring a response;

(3) Made its solicitation available through the GPE, unless one of three exceptions applies, and makes any brand name justification available with the solicitation;

(4) Considered any bids, proposals, quotations, or capability statements it has received;

(5) Justified its decision to proceed on a sole-source basis in writing; and

(6) Gotten approval from the appropriate official.

As straightforward as that might sound, the prescribed implementing procedures have crucial gaps and some inconsistencies, especially with regard to public notice. Agencies have over time developed procedures of their own, but the question is whether those procedures comply with law and regulation. We were prompted to look into the matter by a U.S. Court of Federal Claims protest decision and an affirmation by the U.S. Court of Appeals for the Federal Circuit.

The DODEA Sole-Source Acquisition And Protest

On September 10, 2010, 20 days before the end of Fiscal Year 2010, the Department of Defense Education Activity (DODEA) decided to buy 50 digital planetarium projection systems—commercial items used to project an image of the night sky onto a classroom ceiling. The list price was around $40,000 each. DODEA wanted a specific brand name item available from only one company, even though other companies make such devices. Why? Because its classroom lesson plans were based "exclusively" on the specified item and teachers had already been trained in its use. DODEA proceeded under the commercial items test program described in FAR Subpart 13.5, but did not use the combined synopsis-solicitation procedure then described in FAR Subpart 12.6.

DODEA posted a "special notice" at the GPE, Federal Business Opportunities (FBO), *http://www.fbo.gov*, a little after noon September 17, stating its intent to buy the planetariums on a sole-source basis and that any company that thought it could satisfy the requirement had to submit a written "capability statement that clearly supports and demonstrates their ability to provide the items" by September 22. A justification for other than full and open competition was approved on September 20 citing FAR 6.302-1, "Only one responsible source and no other supplies or services will satisfy agency requirements," as authority. On the day the justification was approved another planetarium manufacturer requested DODEA's specification. The agency contacted its "sole source" and asked for specifications for the brand name item, which the "sole source" provided in detail. The second manufacturer submitted a capability statement, but DODEA determined that it was not capable of providing the required product.

DODEA asked its "sole source" for a quote on September 23, and on Saturday, September 25, awarded a $2,292,498.21 contract without competition. A third planetarium manufacturer, Digitalis Education Solutions, Inc., learned about the award and complained to its congressman on October 11 about the way that the procurement had been conducted. The congressman referred the complaint to the DOD. The DOD referred it to DODEA. DODEA did not respond until November 23, at which time it pointed out that Digitalis had neither responded to its

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special notice nor filed a protest before the September 22 deadline for submitting a capability statement.

Digitalis protested to the Court of Federal Claims asserting, among other things, that DODEA had erred in conducting a sole-source procurement, had included erroneous or misleading information in its synopsis, and had set an unreasonably short deadline for responding. The court found that Digitalis was not an interested party under the Tucker Act, *Digitalis Education Solutions, Inc. v. U.S.*, 97 Fed. Cl. 89, *aff'd*, 663 F. 3d 1380 (Fed. Cir. 2012), 54 GC ¶ 7. The court noted, however, that it had found evidence of "hasty and shoddy" contracting by DODEA, a finding that the Federal Circuit mentioned in its appellate decision.

The DODEA case is a classic example of a run-of-the-mill, end-of-fiscal-year, hurry-up-and-obligate-the-money-before-the-deadline workaround of the rules. It happens all the time and usually draws little attention. But it raises questions about the proper public notice procedures when conducting sole-source acquisitions.

The Requirement For Public "Notice Of Solicitation" (Synopsis)

The public notice statutes and FAR 5.201 require Contracting Officers to publish "notices of proposed contract actions" in excess of $25,000 unless one of 14 exceptions listed in FAR 5.202 applies. FAR 5.001 defines *contract action* as any action that results in a contract. The statutes refer to this type of notice as a "notice of solicitation." The FAR refers to them as "synopses." FAR 5.201(c) states the "primary purposes of the notice are to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities." See generally Feldman, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 3.2 (Thomson Reuters 2011–2012).

• *Prescribed Content Of Synopses.* The publication statutes require that "each synopsis" include a description of the requirement. FAR 5.207(c) states in part as follows:

> *(c) General format for "Description."* Prepare a clear and concise description of the supplies or services that is not unnecessarily restrictive of competition and will allow a prospective offeror to make an informed business judgment as to whether a copy of the solicitation should be requested including the following, as appropriate:
>
> * * *
>
> (2) Specification and whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and identification of the office from which additional information about the qualification requirement may be obtained (see [FAR] subpart 9.2).
>
> * * *
>
> (15) *In the case of noncompetitive contract actions (including those that do not exceed the simplified acquisition threshold), identify the intended source and insert a statement of the reason justifying the lack of competition.*
>
> (16)(i) *Except when using the sole source authority at [FAR] 6.302–1, insert a statement that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the agency.*
>
> (ii) *When using the sole source authority at [FAR] 6.302–1, insert a statement that all responsible sources may submit a capability statement, proposal, or quotation, which shall be considered by the agency.* [Emphasis added.]

The only difference between the prescribed content of a public notice of a full and open competition and a notice of a sole-source contract action is that a notice of a sole-source contract action must include the additional information described in items (15) and (16). Agencies are not excused from the statutory and FAR public notice and content requirements when contracting on a sole-source basis except as provided in FAR 5.202, which does not exempt sole-source acquisitions under FAR 6.302-1 *per se*.

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• *Time Requirements For Synopses And Solicitations.* FAR 5.203 establishes two minimum time periods: (1) between publication of a synopsis to release of a solicitation and (2) from release of a solicitation to required response. They are summarized in the table below.

Description of Acquisition	Minimum time from publication of synopsis to release of solicitation or proposed sole-source contract action	Minimum time from release of solicitation to required response
Noncommercial > $25,000 and ≤ SAT*	15 calendar days	Reasonable time
Noncommercial > SAT	15 calendar days	30 calendar days
Commercial	Reasonable time	Reasonable time
Commercial/Combined synopsis and solicitation procedure	Reasonable time	
R&D > SAT	45 calendar days	
Acquisitions subject to World Trade Organization Government Procurement Agreement or other free trade agreement**	Must meet all other FAR 5.203 requirements, providing at least a minimum of 40 calendar days between synopsis and required response	
Acquisitions subject to World Trade Organization Government Procurement Agreement or other free trade agreement that are within a general category identified in a published annual forecast**	Must meet all other FAR 5.203 requirements, providing a minimum of 10 calendar days between synopsis and required response	
* The simplified acquisition threshold (SAT) may be $150,000, $300,000, or $1,000,000, depending on the circumstances of the acquisition. See the definition in FAR 2.101.		
** These WTO rules apply mainly to acquisitions below the SAT and for commercial items, which otherwise might permit for less time.		

With respect to sole-source acquisitions of noncommercial items greater than the simplified acquisition threshold, FAR 5.203(a) includes this peculiar statement:

> All publicizing and response times are calculated based on the date of publication. The publication date is the date the notice appears on the GPE. The notice must be published at least 15 days before issuance of a solicitation, *or a proposed contract action the Government intends to solicit and negotiate with only one source under the authority of [FAR] 6.302* . . . . [Emphasis added.]

In that context, the language "a proposed contract action the Government intends to solicit and negotiate with only one source under the authority of [FAR] 6.302" is unclear, leaving the prescribed time period open to interpretation. The language does not appear in either of the publication statutes. Unlike the other time periods, the time from publication to further action is not specified in terms of event to event, but from event to "a proposed contract action." If the language means from publication of the notice to the commencement of a proposed contract action, then what event marks the commencement?

The "proposed contract action" language was added to FAR 5.203(a) by Federal Acquisition Circular 2005-24, 73 Fed. Reg. 10960 (Feb. 28, 2008), when the GPE eliminated the old "numbered notes" that had been used in publication of synopses in the *Commerce Business Daily,* which ceased publication in 2003. The only explanation for the addition of the language appeared in the proposed rule, 72 Fed. Reg. 10964, 10966, (Mar. 12, 2007):

> This rule proposes to make the following changes to the FAR:
>
> (a) Require that a "proposed contract action the Government intends to solicit and negotiate with only one source under the authority of [FAR] 6.302" be subject to the 15-day advance notice publishing requirement at FAR 5.203 to establish a minimum time period for which the Government will consider proposals from other than an intended source.

That refers to the first of the two time requirements, not the second, but 15 days from publication to what? The rule is not clear and is likely to be interpreted differently among COs.

• *Making The Solicitation Available.* FAR 5.102(a) requires that COs make solicitations available through the GPE unless (1) publication would compromise national security, (2) the nature of the file makes doing so impracticable, or (3) the agency's senior procurement executive decides that it is not in the public interest. If the solicitation will not be made available through the GPE the CO must make it available in some other way.

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FAR 5.102(e) expressly requires COs to make sole-source solicitations available through the GPE or some other medium. See FAR 5.102(e):

> (e) Provide copies of a solicitation issued under other than full and open competition to firms requesting copies that were not initially solicited, but only after advising the requester of the determination to limit the solicitation to a specified firm or firms as authorized under [FAR] Part 6.

See also FAR 6.301(d):

> (d) When not providing for full and open competition, the contracting officer shall solicit offers from as many potential sources as is practicable under the circumstances.

But must an agency prepare a solicitation when contracting on a sole-source basis? This question comes up from time to time in contracting office discourse, because as a practical matter a solicitation may be unnecessary.

It is clear that the FAR contemplates the issuance of a solicitation in a sole-source acquisition. See, e.g., FAR 15.002(a):

> (a) *Sole source acquisitions*. When contracting in a sole source environment, the request for proposals (RFP) should be tailored to remove unnecessary information and requirements; e.g., evaluation criteria and voluminous proposal preparation instructions.

See also FAR 15.203(e):

> (e) Letter RFPs may be used in sole source acquisitions and other appropriate circumstances. Use of a letter RFP does not relieve the contracting officer from complying with other FAR requirements. Letter RFPs should be as complete as possible and, at a minimum, should contain the following:
>
> (1) RFP number and date;
>
> (2) Name, address (including electronic address and facsimile address, if appropriate), and telephone number of the contracting officer;
>
> (3) Type of contract contemplated;
>
> (4) Quantity, description, and required delivery dates for the item;
>
> (5) Applicable certifications and representations;
>
> (6) Anticipated contract terms and conditions;
>
> (7) Instructions to offerors and evaluation criteria for other than sole source actions;
>
> (8) Proposal due date and time; and
>
> (9) Other relevant information; e.g., incentives, variations in delivery schedule, cost proposal support, and data requirements.

And see FAR 6.302-1(d)(2):

> (2) For contracts awarded using this authority, the notices required by [FAR] 5.201 shall have been published and any bids, proposals, quotations, or capability statements must have been considered.

So when contracting on a sole-source basis a CO must (1) prepare some kind of solicitation that describes its requirements, (2) notify the public that it is available, (3) furnish it to others upon their request, and (4) consider any proposal or "capability statement" received. (We know what a proposal is, but what is a capability statement? We will come to that shortly.)

What Really Happens

A review of public notices for sole-source acquisitions posted at the GPE shows that many agencies do not comply with time and content requirements for notices and do not make solicitations available. Instead, they publish something like the following, which appeared at the GPE on January 23, 2012 and set a response date of January 24:

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> The Navy and Marine Corps Spectrum Center (NMSC) has operated with centralized spectrum management support at the national level. Frequency Assignments are required in order to radiate radio frequencies (RF). These are submitted in either the Standard Frequency Action Format (SFAF) or in the Government Master File (GMF) format by NMSC to the National Telecommunication Information Administration (NTIA) where they are voted on by other federal agencies belonging to the Frequency Assignment Subcommittee (FAS). The timely processing of proposals is critical to meeting the emerging spectrum management requirements of the DoN.
>
> To that end establishing spectrum support closer to the warfighter will better anticipate and meet the warfighter's spectrum management requirements. The services required will provide NMSC with essential field level technical support in the planning, acquisition, retention, protection and effective use of electromagnetic spectrum resources in support operations to the Department of the Navy.
>
> This is a sole source action which will be a nine-month contract to Odyssey Systems Consulting Group LTD (Odyssey), in response to an effort to extend present services, while a follow-on acquisition is being processed. Odyssey Systems Consulting Group LTD is the only firm who can supply the required services for the acquisition.
>
> The proposed action is for services for which the Government intends to solicit and negotiate with only one source under the authority of 10 U.S.C. 2304(c)(1), and Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements as implemented by FAR 6.302-1(a).
>
> Interested parties may identify their interest and capability to respond to the requirement or submit proposals. This notice of intent is not a request for competitive proposals. The new Solicitation Number is N00189-12-R-Z021.

The description of the required service is broad and vague. The solicitation number is given, but the solicitation was not made available. There is no indication that the acquisition is at or below the simplified acquisition threshold or that it is for a commercial item and thus the agency should wait 15 days before requesting a proposal, make a solicitation available upon request, and allow 30 days for a response. Even if it were for a commercial item, the one-day response time from January 23 to January 24 would be unreasonably short. The final paragraph of the notice states that interested parties may "identify their interest and capability" or submit a proposal, but there are no instructions about doing either thing and, in any case, the notice states that it is not a request for competitive proposals. Neither the public notice statutes nor the CICA statutes make provision for this sort of thing. Unfortunately, it is not atypical of what you can see at the GPE these days.

What Are Capability Statements?

The CICA statutes make no mention of capability statements. 10 USCA § 2304(f)(1) states in pertinent part as follows:

> [T]he head of an agency may not award a contract using procedures other than competitive procedures unless—
>
> * * *
>
> (C) any required notice has been published with respect to such contract pursuant to section 1708 of title 41 and all *bids or proposals* received in response to that notice have been considered by the head of the agency. [Emphasis added.]

See also 41 USCA § 3304(e)(1)(C). Neither of the two public notice statutes, 15 USCA § 637(e) and 41 USCA § 1708, mention capability statements. See 41 USCA § 1708(c):

> (c) Contents of notice.—Each notice of solicitation required by paragraph (1) or (2) of subsection (a) shall include—
>
> * * *

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> (4) a statement that all responsible sources may submit a *bid, proposal, or quotation* (as appropriate) that the agency shall consider[.] [Emphasis added.]

See also 15 USCA § 637(f)(4).

The FAR mentions capability statements in only two places, at FAR 5.207(c)(16)(ii) and FAR 6.302-1(d)(2), but does not describe or explain them and provides no instructions about their use. Where did the term come from? Until 2008, FAR 6.302-1(d)(2) had followed the statutes and mentioned only bids and proposals. The term capability statement was added by FAC 2005-24, 73 Fed. Reg. 10960 (Feb. 28, 2008), the same circular that added the "proposed contract action" language discussed above. The FAC contained the following explanation:

> Comment D: A final commenter indicated that there is confusion as to what is being sought from industry in Note 22, where the Note states "Interested parties may identify their interest and capability to respond to the requirement or submit proposals" in response to a sole source synopsis. He noted that, at the point in time when the synopsis is published, there is no solicitation available, and therefore, using the standard FAR definition, a proposal cannot be submitted. He suggested clarifying in the final rule that a submission identifying interest and capability to submit a proposal would be adequate.
>
> Response: The Councils agree. In researching pertinent FAR sections, we noted that [FAR] 5.207(c)(15) suggested inserting a statement in the synopsis that all responsible sources may submit " * * * a bid, proposal, or quotation which shall be considered by the agency." Further, [FAR] 6.302-1(d)(2) currently states only that " * * * the notices required by [FAR] 5.201 shall have been published and any bids and proposals must have been considered." These references have been revised to be consistent and to allow "capability statements" to be added to the list of responses from industry.

Given the requirement in the CICA statutes to consider any proposal received, the concept of a capability statement raises some issues. By what authority did the FAR councils permit agencies to ask for capability statements instead of making solicitations available and giving interested firms a chance to submit proposals? What information is to be included in a capability statement? What are the criteria and standards for review of capability statements? By what authority may an agency find a firm to be incapable? If an agency finds a firm to be incapable, by what authority may it refuse to give a firm a chance to submit a proposal? Is a finding of incapability tantamount to a finding of nonresponsibility? If an agency finds a small business to be incapable, must it refer the firm to the Small Business Administration for Certificate of Competency consideration? There are no answers to these questions in the FAR or anywhere else that we know about.

Conclusion

Sole-source acquisitions under FAR 6.302-1 are not exempt from the rules about public notices, response times, and solicitation availability, but many agencies routinely do not comply. There is nothing surreptitious about their noncompliance. It is blatant, and it has been going on for a very long time. It would not be going too far to say that noncompliance is more or less standard practice. However, agency noncompliance has not provoked a significant number of protests, and there have been very few successful ones, probably because the allowance for response times is often so short that it confronts what would otherwise be interested firms with what appears to be a *fait accompli*. Moreover, when response times are short an interested firm had better protest the very moment it sees a GPE notice of intent to conduct a sole-source acquisition, even before it makes inquiries of the agency, otherwise there is a good chance that its protest will be considered untimely or it will not be considered an interested party, as in the DODEA protest described above.

The oft-used "capability statement" technique is not mentioned in the CICA statutes or in the public notice statutes and is barely mentioned in the FAR. Its statutory and regulatory basis is unclear, as are the proper procedures for its use. Use of it by agencies frequently appears to amount to little more than a wholesale dodge of the competition and public notice require-

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ments. Agencies rarely if ever provide instructions for the content of capability statements and commonly provide unreasonably short submittal times. There are no rules in statute or in the FAR about the evaluation of capability statements, about notification or explanation of results to submitting firms, about what agencies may do if they find an offeror to be incapable, about the connection, if any, between capability and responsibility under FAR Subpart 9.1, or about the applicability of the Certificate of Competency program when a small business has been found to be incapable.

All of this seems odd when one considers the never-ending drumbeat for more competition and greater opportunities for small businesses in Government contracting. But this has been going on for so long that change is unlikely. Curiouser and curiouser, cried Alice.

▼

¶ 13 • POST-PROTEST DISCLOSURE OF INFORMATION: Conferring A Competitive Advantage? • Federal Acquisition Regulation 15.507 appears to give an unfair competitive advantage to protesters by mandating disclosure of debriefing information as follows:

> (b) If a protest causes the agency, within 1 year of contract award, to—
>
> (1) Issue a new solicitation on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to all prospective offerors for the new solicitation; or
>
> (2) Issue a new request for revised proposals on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to offerors that were in the competitive range and are requested to submit revised proposals.
>
> (c) The following information will be provided to appropriate parties:
>
> (1) Information provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror's proposal; and
>
> (2) Other nonproprietary information that would have been provided to the original offerors.

Since FAR 15.506(d) requires that debriefings include "the overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror," this requirement means that all competitors in a new competition held as a result of a successful protest will have this information. However, the successful offeror will not have similar information about its competitors. See *Alatech Healthcare, LLC*, Comp. Gen. Dec. B-289134.3, 2002 CPD ¶ 73, denying a protest arguing that FAR 15.507 requires that the winning offeror be given the protester's pricing information.

While this seems unfair, the Government Accountability Office has ruled that it is fair. See *Norvar Health Services*, Comp. Gen. Dec. B-286253.2, 2000 CPD ¶ 204, 43 GC ¶ 16, stating:

> While we recognize that possession of this information could provide a competitive advantage under some circumstances, an agency is not required to equalize such an advantage unless it results from preferential treatment or other improper action by the government. *Federal Auction Serv. Corp*., et al., B-229917.4 et al., June 10, 1988, 88-1 CPD ¶ 553 at 3, *recon. denied*, B-229917.8, June 22, 1988, 88-1 CPD ¶ 597 at 2. We have held that where later events require the reopening of a procurement, there is nothing improper about any competitive advantage provided by the disclosure of an awardee's price and rating (or ranking), where that disclosure has been made pursuant to the FAR's debriefing requirements. *NavCom Defense Elec., Inc*., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 4; *Sherikon, Inc*., B-250152.4, Feb. 22, 1993, 93-1 CPD ¶ 188 at 4; *Federal Auction Serv. Corp*., et al., *supra*.

This reasoning has been followed in *Symvionics, Inc*., Comp. Gen. Dec. B-293824.2, 2004 CPD ¶ 204, 46 GC ¶ 456, and *PCA Aerospace, Inc*., Comp. Gen. Dec. B-293042.3, 2004 CPD ¶ 65.

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Efforts To Ameliorate The Unfairness

In spite of the GAO reasoning that there is nothing unfair in this situation, several agencies have attempted to find a method to create a level playing field. In *Power Connector, Inc.*, Comp. Gen. Dec. B-404916.2, 2011 CPD ¶ 186, 53 GC ¶ 398, the agency attempted to preclude the unfairness that it had created by improperly giving the protester the prices of all of the competitors in its debriefing by calling for revised proposals against new past performance criteria but prohibiting new price proposals. The GAO granted a protest of this procedure on the ground that new prices were necessary because the revised criteria could lead to lower prices. It suggested instead that the agency should "advis[e] all offerors of the pricing information." This ad hoc solution goes far beyond the requirement of FAR 15.507 and avoids any unfairness by giving total pricing information to the winning contractor as well as its competitors. However, it is probably only appropriate when the agency has improperly disclosed full pricing information in the debriefing process. It is in line with statements in these decisions calling for leveling the playing field when information has been released *improperly*.

In *Mantech Telecommunications & Information Systems Corp. v. U.S.*, 49 Fed. Cl. 57 (2001), 43 GC ¶ 196, the agency decided to release the protester's pricing and technical scoring information to the winning contractor to level the playing field. The U.S. Court of Federal Claims read FAR 15.507 to require the release of the same type of information regarding the protester that had been released regarding the winning contractor during the debriefing, stating:

> Based upon this regulation, as well as principles of fairness, various cases have held that the disclosure of information "to equalize competition is an appropriate alternative to eliminating an offeror from a competition due to a prior disclosure of information that could result in an unfair competitive advantage." *Cowperwood Co.*, 96-2 Comp. Gen. Proc. Dec. ¶ 240, at 3, B-274140.2, (Comp. Gen. 1996) (citing *KPMG Peat Marwick*, 73 Comp. Gen. 15, 93-2 Comp. Gen. Proc. Dec. ¶ 272, B-251902.3 (Comp. Gen. 1993)). *See also Sperry Corp.*, 65 Comp. Gen. 715, 86-2 Comp. Gen. Proc. Dec. ¶ 48, B-222317 (Comp. Gen. 1986). According to this court, "these decisions make clear that when an unsuccessful offeror lawfully obtains source selection information, such as a competitors prices and technical scores, and the agency subsequently properly reopens negotiations, the agency may disclose similar information to all the competitors to eliminate any competitive advantage." *DGS Contract Serv. Inc. v. United States*, 43 Fed. Cl. 227, 238 (1999).

In this case, the court ruled that the pricing information from the protester's proposal should not be released because it was dissimilar to the information released during the debriefing but that the technical scores on the protester's proposal should be released because they were the same as the technical scores released during the debriefing. *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227 (1999), 41 GC ¶ 229, which the court cites, permitted the release of the protester's pricing information based on the reasoning that this was necessary to ameliorate the unfair competitive advantage of only releasing the winning contractor's information.

The only other case dealing with this issue is *Fore Systems Federal, Inc. v. U.S.*, 40 Fed. Cl. 490 (1998), where the court held that FAR 15.507 did not apply because no contract had been awarded at the time of the protest.

Mixed Signals

The GAO and the Court of Federal Claims seem to be reading FAR 15.507 differently. The GAO appears to read it literally to require only the release of the winning contractor's pricing and scoring information, while the court appears to read it broadly to require the release of comparable information regarding the protester—and perhaps other competitors. The court's stretch of the language arrives at a fairer result but that doesn't keep it from being a stretch.

If fairness is important to the procurement process, the best solution would be to amend the FAR to adopt the court's rule. However, that's not going to happen in the near future. That leaves

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Contracting Officers in the typical dilemma when the court and the GAO disagree. Whichever procedure they follow is subject to challenge if the protester is smart enough to discern the different views of the GAO and the court. Luckily, the scenario doesn't arise too often—only when there is a protest after a debriefing and contract award.

Procurement Management

¶ 14 • ELIMINATION OF THE "PAID COST RULE": Undocumented History • In 1972, David Packard took the number two job in the Pentagon and embarked on a mission to change the perception of the Government that money was free. (He undoubtedly would be surprised today to learn that it almost is!) He must have concluded that there was little chance of altering the cost principle making interest an unallowable cost—now in Federal Acquisition Regulation 31.205-20—so he attacked two other policies. The one that we all know about is the requirement that the Government pay a contractor imputed interest on claims that was adopted as an Executive Branch policy in 1972 and became part of the Contract Disputes Act in 1978, 41 USCA § 7109. See *Dateline November 2011*. The one that seems to have been forgotten was the requirement that contractors other than small businesses could not invoice the Government for a subcontractor's costs until it had *paid* the subcontractor.

This "paid cost rule" was based on a simple fact. In those days, the major defense contractors were essentially financing their work with subcontractor money. They would add a subcontractor's invoice to their invoice to the Government, collect in a week or two, and pay the subcontractor a month or two later. We remember one study of a defense contractor that demonstrated that it had negative working capital. It was not only financing its entire operation with subcontractor money, it was banking some of it.

David Packard saw that this was an unfair business practice and he changed the rule. And that change stuck. The "paid cost rule" was adopted in 1972, inserted into the FAR in 1984, and remained part of the system until it was altered in 2000. A provision in the Senate version of the National Defense Authorization Act for Fiscal Year 2012 that required payment of subcontractors within 30 days caught our attention because it indicated that some subcontractor(s) had raised this issue with Congress. The provision was knocked out in the final version of the Act but it inspired us to find out why the "paid cost rule" was eliminated.

The History Of The Deletion

The trail goes back to May 1, 1997, when the FAR councils issued an advance notice of proposed rulemaking at 62 Fed. Reg. 23740 stating that a special interagency team had been established to review existing progress payment policies to simplify them. The major effort that led to this step appears to have been the desire to adopt performance-based progress payments but the team looked at other issues as well. In a second advance notice of proposed rulemaking at 63 Fed. Reg. 11074 (Mar. 5, 1998), the team indicated that it was considering the elimination of the "paid cost rule," stating:

> A. Elimination of the "Paid Cost Rule"
>
> Currently, large businesses must have actually paid a subcontractor before including the payment in progress payment billings. This is the so-called "paid cost rule." In contrast, small businesses need only have incurred the subcontract cost, provided the payment will be made in the ordinary course of business. The interagency team proposes the elimination of this "paid cost rule" by revising the Progress Payments clause (FAR 52.232-16), as needed, to put large and small businesses on the same footing.

There was no explanation of why it was desirable to put large and small business "on the same footing."

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The FAR councils then conducted a public meeting and issued a proposed set of changes in 64 Fed. Reg. 6758 (Feb. 10, 1999). There is no indication in the documentation that there were any comments on the elimination of the "paid cost rule"—probably indicating that subcontractors do not monitor the regulatory process. In any event, a final rule was issued in 65 Fed. Reg. 16276 (Mar. 27, 2000), taking the "paid cost rule" out of four contract clauses—the "Progress Payments" clause in FAR 52.232-16, the "Allowable Cost and Payment" clause in FAR 52.216-7, the "Payments of Allowable Costs Before Definitization" clause in FAR 52.216-26, and the "Payments Under Time-and-Materials and Labor-Hour Contracts" clause in FAR 52.232-7. The language of these clauses stated that subcontractor costs could be included in a contractor's invoice *before the subcontractor was paid* if the subcontractor was paid (1) "In accordance with the terms and conditions of a subcontract or invoice," and (2) "Ordinarily prior to the submission of the Contractor's next payment request to the Government." There was no explanation or justification for the elimination of the rule but the FAR Councils did recognize the impact on small businesses by stating:

> [S]ome of the commentors expressed the concern that elimination of the "paid cost rule" may have a significant impact on a substantial number of small entities. Accordingly, even though an Initial Regulatory Flexibility Analysis had not been done, the Councils prepared a Final Regulatory Flexibility Analysis (FRFA) as a result of those comments. The FRFA is summarized as follows:
>
> > The small entities that may be impacted by elimination of the "paid cost rule" are subcontractors to large businesses. That is, the current FAR requires large businesses to pay its subcontractors by cash or check before the large business can request payment from the Government under cost reimbursement contracts or progress payments for amounts owed to subcontractors. The final rule will permit prime contractors to request payment of those amounts from the Government when it incurs a cost based on a request for payment from its subcontractors.
>
> We do not have any reporting mechanisms or central data collections that reveal how many subcontractors may be impacted by this rule. However, we have concluded that the number may be substantial.
>
> In order to mitigate any potential impact this portion of the rule may have on small businesses, the Councils adopted a range of safeguards to provide further assurances that payments to subcontractors will not be delayed. These safeguards were adopted rather than merely applying the policies previously used for small businesses that permitted small business prime contractors to recognize subcontract costs immediately after they were incurred, even if they were not yet paid to the subcontractor. This final rule requires that both large and small business prime contractors pay these incurred subcontract amounts in accordance with the terms of the subcontract and ordinarily before submittal of the next payment request sent to the Government.

It should be noted that while the language of the rule contains "safeguards," there was no enforcement mechanism if a contractor did not pay the subcontractor on a timely basis.

To complete the history, the payment rules were altered in a proposed rule at 65 Fed. Reg. 56454 (Sept. 18, 2000), and a final rule at 67 Fed. Reg. 70520 (Nov. 22, 2002). Some technical errors were corrected and the payment requirement was altered to require that subcontractors be paid "ordinarily not later than 30 days after submission of the Contractor's payment request to the Government." The use of a fixed 30-day period was explained in the proposed rule as follows:

> A large business prime contractor is allowed to submit cost vouchers on a cost-reimbursement contract every 14 days, but can bill no more frequently than every 30 days when billing progress payments on a fixed-price contract. Therefore, contractors may need to maintain several systems and procedures to accommodate the timing differences for payments to vendors, depending on whether the costs are

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> billed on a cost-reimbursement or fixed-price type prime contract. To eliminate the timing differences, the proposed FAR rule revises the second condition to establish a single standard time period of 30 days[.]

This "fix" obviously allow contractors more "float" time in some situations. The rule was explained in the final rule as follows:

> As amended by this final rule, the contractor can bill the Government when contractor payment for the amount determined due the supplier or subcontractor is scheduled to be made within 30 days of the submission of the contractor's current payment request to the Government. The Councils believe that a 30-day float period for the prime contractor represents a reasonable time period and do not believe it would be in the best interests of the Government or subcontractors to effectively encourage float periods in excess of 30 days.

The End Result

So there you have it. We don't know who believed it was a good idea to allow contractors to finance their operations with subcontractor money or why they thought this would improve the procurement process. We doubt if the FAR councils even knew that one of the most of the astute businessmen that ever worked for the Government had instituted the "paid cost rule" to fix what he perceived as a serious flaw in the procurement process. We don't even know if the folks that wrote the new rule understood the impact of the change. They seemed to have recognized that it would affect some small contractors and should have recognized that it would have a major impact on medium-size companies that serve mainly as subcontractors.

I learned the impact last year in talking to the head of a purchasing department of a major defense contractor. He told me that his company received payment from the Government in 14 days but had a standard procedure of paying its subcontractors in 60 days. The comptroller of the company was obviously earning kudos for earning interest on its subcontractors' money but the result was that the subcontractors were raising their prices to compensate for the slow money flow. What else would you expect?

This would also indicate that the 30-day requirement is virtually unenforceable. How do you enforce a requirement that a contractor do something "ordinarily?" What is the sanction for not paying in the 30-day nominal period? In short, the rule is stacked against subcontractors and it apparently will not be changed until they assert themselves in Congress. The action of the Senate this last term may be the first salvo but the large companies obviously shot it down. Perhaps the subcontractors will try again. Qcn

Potpourri

¶ 15 • BOOK REVIEW: DEFECTIVE PRICING HANDBOOK • The Truth in Negotiations Act will be 50 years old this year. Off hand, aside from the Competition in Contracting Act, we cannot think of any other statute that has had as big an impact on the acquisition process or that has been the source of more complex litigation. Originally enacted on September 10, 1962, as Pub. L. No. 87-653, 76 Stat. 528, TINA is now codified at 10 USCA § 2306a and 41 USCA § 3501 et seq. and implemented in FAR Subpart 15.4. TINA requires offerors, contractors, prospective subcontractors, and subcontractors to disclose to the Government during price negotiations facts in their possession ("cost or pricing data") that could significantly affect the negotiations. They must submit that information with their proposals or otherwise make it available and, upon reaching agreement on price, certify that the data were accurate complete and current as of the date of agreement or an earlier date agreed upon by the parties.

One could make an argument that the administrative and litigation costs of TINA since 1962 have far exceeded any savings to the Government, but it would be difficult to prove ei-

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ther way because there are no reliable data. Before and throughout negotiations, contractors must assemble and package their cost or pricing data and then update that data. Contracting Officers may receive massive amounts of information that they are ill equipped to analyze and understand. Auditors require time to review the data for defects and submit reports to COs. After award, the contractor and its subcontractors are subject to costly compliance audits, and contractors may be subject to Government defective pricing claims and prosecution for false claims. There has been a lot of litigation over defective pricing, the apotheosis of which may have been the Government's claims against and prosecution of United Technologies for defective pricing and false claims in connection with the Air Force's "Great Aircraft Engine War," a competitive acquisition that began in 1984 and continues with an appellant decision in 2010 remanding to the district court. See Bodenheimer, *Government's Defective Pricing Claim in The Great Engine War Flames Out at the Federal Circuit*, 48 GC ¶ 338; *United Technologies Corp.*, ASBCA Nos. 5410, 53089, 53349, 04-1 BCA ¶ 32556, modified on recons., 05-1 BCA ¶ 32860; *Wynne v. United Technologies Corp.*, 463 F.3d 1261 (Fed. Cir. 2006); and *U.S. v. United Technologies*, 626 F.3d 313 (6th Cir. 2010), 53 GC ¶ 7.

David Z. Bodenheimer, a partner in the Washington, D.C. offices of Crowell & Moring LLP and an experienced counselor and litigator who is one of the attorneys who represented United Technologies before the Armed Services Board of Contract Appeals and the U.S. Court of Appeals for the Federal Circuit, has written the definitive text on TINA. His DEFECTIVE PRICING HANDBOOK (West 2011–2012 ed.) covers the statute, the complex implementing regulations, the contract clauses, and the extensive case law of cost or pricing data and defective pricing in 15 comprehensive chapters. See *http:store.westlaw.com*. The 359-page softcover book is well organized and the text is both accessible to newcomers to the topic and satisfyingly detailed for experienced practitioners.

After three introductory and overview chapters, succeeding chapters provide in-depth analyses of key issues: definition of cost or pricing data; reasonable availability of the data; disclosure (submission); Government knowledge and reliance; causation of overpricing; certification of accuracy, completeness, and currency; subcontractor data; damages; offsets and price reductions; litigation and proof; procedural issues; and Government audit rights. Other chapters delve into application of the rules to subcontracts, offsets and price reductions, and Government audit rights.

Mr., Bodenheimer's approach to explanation is historically analytical. In each section, he begins with an overview of the pertinent rule and then shows how it has evolved in statute, regulation, and litigation from the beginning to the present. This is helpful to newcomers and to those who know only a little something about TINA or may have only vague recollections of aspects of it that have been overcome by events and are no longer pertinent. Contractor personnel, COs, attorney advisors, auditors, and litigators will find the approach especially useful for development of a deep understanding.

Unlike many such professional texts, which are designed to be dipped into rather than read from cover to cover, this text can be read front to back with genuine pleasure (assuming that you want to know about TINA), which is enhanced by the author's occasional use of brief narratives of past cases to fortify the exposition. The use of footnotes instead of intralinear parenthetical notes allows for uninterrupted reading and also avoids the aggravating need to flip to the back of the book to see endnotes. The footnotes are extensive and briefly explanatory when appropriate. The handy (and thankfully) one-volume paperback format makes it easy to toss it into a briefcase. There is a desperate need for such texts in our business and we wish that we had more of them.

Mr. Bodenheimer's DEFECTIVE PRICING HANDBOOK is essential reading for all who are involved in large and complex acquisitions and all who want to understand one of the most confounding rules in Government contracting. VJE