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REPORT

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A Simple – And Overlooked – Change That Will Reduce The Cost Of Defense Systems

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Despite the recent intense focus on the cost of defense systems that culminated in the enactment of the Weapon Systems Acquisition Reform Act of 2009 on May 20, 2009 (Pub. L. No. 111-23, 123 Stat. 1704), policymakers have overlooked a critical provision of current law that likely contributes to the problem of increasing acquisition costs. Current law governing negotiated procurements allows agencies to relegate the evaluation of cost or price to an immaterial role in selecting a contractor to develop, test, and produce a new system. This provision applies to all negotiated procurements, not just those conducted by DOD. Sections 15.304(d) and (e) of the Federal Acquisition Regulation, mandated by the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, 108 Stat. 3243), provide that in developing a competitive solicitation, agencies must set forth:

(d) All factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation. . . .

(e) The solicitation shall also state, at a minimum, whether all evaluation factors ***other than cost or price, when combined,*** are—-

(1) ***Significantly more important than cost or price***;

(2) Approximately equal to cost or price; or

(3) Significantly less important than cost or price.

The addition of language allowing agencies to establish factors such as technical capability or technical quality and past performance as collectively ''significantly more important than cost or price'' was contained in the earliest versions of FASA in 1993 (*See* S.1587, 103rd Cong. § 1011 (as introduced in Senate, Oct. 26, 1993). This change in the law was enacted as part of FASA in its final form at section 1011 and applies to both defense and civilian agencies (10 U.S.C. § 2305(a)(3)(A)(iii) and 41 U.S.C. § 253a(c)(1)(C)). The explanation for the change offered in the executive order implementing FASA was to ''promote best value rather than simply low cost in selecting sources for supplies and services . . . .'' Exec. Order No. 12,931, 59 Fed. Reg. 52,387 (1994).

For major defense systems, as well as IT and services procurements, agencies routinely use best value source selection. Very frequently, although not exclusively, agencies choose to take the approach that determination of value lies in aspects other than cost or price. Thus, the typical solicitation treats cost or price as significantly less important than other factors in evaluating and selecting a proposal for award.

While it certainly is reasonable for agencies to want some flexibility and not be tied—as in a sealed bid scenario—to the lowest price without regard to the quality of the technical solution offered, the question is how much leeway is appropriate. In practice over time, the choice to relegate cost or price to a minimal role in the evaluation and selection process has caused agencies to pay too little attention to the potential cost or price of the solutions they select. The problem is that without the discipline of being forced to take cost or price into account as a serious consideration, agencies

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are at liberty to become overly focused on the most exciting, if yet to be developed, technical capabilities. Although no one actually has collected the data[1], it would not be surprising to find that a review of major defense procurements in the past five years, as well as major IT systems procurement across the government, would show agencies very frequently electing to treat factors other than cost or price as the most important aspect of the evaluation and selection process. How seriously agency buyers take cost or price when evaluating offers for advanced technologies and systems when cost or price is designated as not only less important, but ''significantly'' so, is unclear. The statute and the FAR actually give somewhat contradictory commands in requiring that price or cost to the government be evaluated in every source selection, but then allowing agency officials to downgrade price or cost to a minor role. (10 U.S.C. § 2305(a)(3)(A), 41 U.S.C. § 253a(c)(1)(B), and FAR 15.304(c)(1)). However, it is reasonable to ask why – especially with the experience of recent years and escalating costs – the government would allow price or cost to play an insignificant role at the exact point where competing solutions are being analyzed for major long-term commitments to new systems. At this pivotal point in the process, perhaps significant attention should be devoted to both the analysis of cost or price, and to the weight it is given in the selection process.

Congress may want to consider revising the statutes to provide that cost or price must be a significant evaluation factor. Such an approach still leaves room for agencies to emphasize the importance of technical quality and past performance, but it requires them to also consider seriously the cost to the government of those proposed attributes of a new technology, approach, or system.

[1] To obtain this data, one would simply need to obtain copies of the relevant solicitations.

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