

AIM #4

o AMENDED GENERAL ACCOUNTING OFFICE (GAO) BID PROTEST REGULATIONS (SEA 0331, 746-3036). The following is extracted (not verbatim) from SEA 00L memorandum 5800 OPR 00L2/145 dated 27 March 1991:

GAO has published an amendment to its bid protest regulations, applicable to bid protests filed on or after 1 April 1991. The changes principally concern three main areas: protective orders for documents, hearings, and remedies. In most instances, GAO's adoption of protective orders will require NAVSEA to quickly identify and release, to specifically designated representatives of the protester and other parties, all relevant source selection documents, including those documents which NAVSEA considers to be privileged and business sensitive (such as the source selection plan, evaluation reports, award recommendations and offerors' proposals). GAO's new hearing procedures may also significantly increase the number of protests in which GAO directs NAVSEA to present oral testimony by source selection personnel designated by GAO. Finally, the changes further expand remedies such that a protester may now be able to recover the reasonable cost of filing and pursuing a protest, even where the contracting agency takes corrective action prior to any decision by GAO.

GAO's amendments in the areas of protective orders and hearings make it clear that GAO is continuing to head in the direction of making GAO protest procedures into quasi-formal litigation. In light of these changes, NAVSEA must be prepared to release all source selection documents and also be prepared to provide testimony at hearings. Consideration will have to be given to the increased time and effort needed to prepare for such proceedings and to the need for source selection personnel at all levels to be cooperative and available for such preparations and, if required, testimony, even though this may conflict with other duties. It is also imperative that day-to-day business decisions as well as source selection actions be fully and accurately documented. Prior legal review of contract-related issues and decisions is critical and may often avert the diversion of time, resources and funds which results from GAO protests (or court litigation).

The SEA 00L memo should be read in its entirety for the details of the new procedures. Paragraph 7.12 of NAVSEA's Source Selection Guide will be updated in the near future to address the new protest regulations. Meanwhile, questions should be addressed to the 00L Section Head or other attorney assigned to your Directorate.

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o DODD 5000.1, DODI 5000.2 AND DOD 5000.2M. (SEA 033, 746-3033). DODD 5000.1 (Subj: Policies Governing Major and Nonmajor Defense Acquisition Programs), DODI 5000.2 (Subj: Defense Acquisition Program Procedures), and DOD 5000.2M (Acquisition Documentation and Reporting Procedures) were signed on 23 February 1991. The documents are still in printing. Distribution is now projected for early May.

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o PROCUREMENT REQUEST (PR) APPROVAL AUTHORITY (SEA 0331, 746-3036).

Numerous people have inquired as to who signs in Block 10(d) of the PR Form NAVSEA 4205/1. NAVSEANOTE 5400 dated 17 May 1990, which disestablished SEA 90, transferred responsibility for Contracted Advisory and Assistance Services oversight and Requiring Activity Competition Advocacy to the platform and engineering Deputy Commanders.

DFARS Part 237.206 and DODD 4205.2 require certain Contracted Advisory and Assistance Services (CAAS) oversight functions to be performed at the Flag Officer or SES level, including ensuring that CAAS funds are obligated for purposes planned in the CAAS Budget Exhibit (PB-27).

FAR Part 6 requires that Competition Advocates promote full and open competition in their cognizant acquisitions, including challenging barriers to competition (such as unnecessarily detailed specifications and unnecessarily restrictive statements of need). This requirement implies that PRs should be reviewed for competitive aspects by the Deputy Commander or a designee other than the originator of the PR; the designee is not required to be a Flag Officer or SES.

Deputy Commanders are responsible for establishing specific streamlined PR review and approval procedures within their organizations consistent with the above requirements, and designating the individual(s) authorized to sign Block 10(d). "Double-hatting" of reviewing officials is encouraged to minimize the number of reviews required; for instance, if the Deputy Commander designates the Program Manager to ensure that competitive aspects of a PR are examined, then, in addition to signing in Block 10(c) as the Acquisition Approving Official, the PM would sign in Block 10(d). If the PR is for Contracted Advisory and Assistance Services, Block 10(d) would be signed instead by the Flag Officer or SES designated by the Deputy Commander to perform CAAS oversight.

As another example, if the Deputy Commander designates a Flag Officer or SES in the PR originator's organization as both the CAAS oversight and competition reviewer, then that individual would sign Block 10(d) for both purposes.

Note that these procedures generally apply only to new PRs; Other-Than-New-Procurement PRs, such as those for incremental funding or change in delivery date modifications to an existing contract, would not be required to receive the same levels of review.

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o COMPONENT BREAKOUT ACQUISITION STRATEGY (SEA 0331, 746-3036). During a recent DOD Inspector General (IG) audit, the IG determined that component breakout on major defense acquisition programs was not always considered as a potential acquisition strategy. As a result, the Assistant Secretary of the Navy (Research, Development and Acquisition) [ASN(RD&A)] has reiterated that it is the responsibility of the PEOs and Program Managers to evaluate component breakout for their programs. This evaluation is not an option; it is a requirement. The DOD FAR Supplement (DFARS) 217.7202 and the new DODD 5000.1, DODI 5000.2, and DOD 5000.2M provide guidance.

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o SMALL BUSINESS ADMINISTRATION (SBA) 8(a) PROGRAM CONTRACTS (SEA 0331, 746-3036). The Small Business Act gives contracting officers discretion to let contracts to SBA for inclusion in the 8(a) program. The General Accounting Office (GAO) has traditionally limited review of 8(a) awards to showings of possible fraud, bad faith, or violations of agency regulations.

The Business Opportunity Development Reform Act of 1988 (PL 100-656) amended the Small Business Act to require selections of 8(a) firms on a competitive basis if the contract amount thresholds and other statutory conditions are met. SBA's regulations implementing the 8(a) program require that the competition be conducted in accordance with the Federal Acquisition Regulation (FAR).

GAO has now decided that it will review all protests against competitive procurements issued under the 8(a) program, since award decisions are no longer purely discretionary and are subject to FAR.

See related article on GAO's new Bid Protest Regulations on p.1.

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o JUSTIFICATION AND APPROVAL FOR PROCUREMENTS UNDER INTERNATIONAL AGREEMENTS (SEA 0331, 746-3036). Revised DFARS 206.302-4 allows for an exception to the requirement for a written Justification and Approval when the terms of an international agreement have the effect of requiring the use of other than competitive procedures; i.e., other than full and open competition. Pursuant to the Competition in Contracting Act, and for the purpose of applying this revised coverage, "other than competitive procedures" includes procurements limited to dual sources. The international agreement may be in the form of a Letter of Offer and Acceptance, Memorandum of Understanding, or other comparable agreement.

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o BUSINESS SENSITIVE DATA (SEA 0331, 746-3036). "Inside the Navy" reported that Congressional investigators have condemned Navy abuse in the ADP procurement process and recommended, among other things, that contractor assistance in drafting specifications and source selection criteria in ADP acquisitions be eliminated. This same recommendation is also appropriate for other types of contracts; NAVSEAINST 4200.19, Service Contract Restrictions and Safeguards, establishes limitations and safeguards to follow when using service contracts in support of NAVSEA programs.

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o CONTRACT DATA REQUIREMENTS LIST (CDRL) (SEA 0331, 746-3036). DFARS 227.475-1(a)(4) allows waiving use of CDRLs in service contracts "when the contracting officer determines that the use of the DD Form 1423 is impractical." Such can be the case in level-of-effort service contracts in which Technical Instructions or other similar means are used to provide specific direction, including format and content of deliverables, to the contractor after contract award.

In many of these contracts, a typical CDRL for a report might state "The type of report (interim or final) and the technical subject content shall be in accordance with the applicable Technical Instruction(s)," or one for drawings may read "For the type of drawing required, preparation requirements and type of drawing copy (regular/repro) to be delivered, see the applicable Technical Instruction." Dates of submission of the data are often "As required by the applicable Technical Instructions." It is this type of CDRL where use of the DFARS exemption should be considered in order to shorten the PR preparation and review process.

SEA 02, 06, and 03 are investigating the use of "CDRL-less" service contracts as a pilot effort to see if it is practical for general NAVSEA use. Efforts being considered to ensure that a potential offeror understands what data will be required include:

- For those few data requirements which are known specifically at time of PR preparation (such as monthly status reports), the requirement language will be incorporated in the PR statement of work.
- If requested by potential offerors, consideration will be given to establishing a "reading room" with examples of individual deliverables.

Further information on the pilot program will be announced when it is fully implemented.

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o CONTRACTING GOALS (SEA 0331, 746-3036). The following information is provided to familiarize NAVSEA managers with some of the new requirements that they must be prepared to address when processing acquisition documents. While most of the goal setting and reporting mechanics are not the responsibility of the program offices, managers are expected to consider the requirements when executing their programs and support the information needs of those monitoring the goals.

ASN(RD&A) has set a sixty one percent (61%) procurement competition goal for NAVSEA in FY 1991. The percentage is based on dollars and not on procurement actions.

In addition, the Office of Federal Procurement Policy (OFPP) has issued Policy Letter No. 91-1 as a result of Congressional direction expressed in sections 502 and 503 of the Business Opportunity Development Reform Act of 1988, PL 100-656. The letter establishes two Government-wide goals for procurement contracts, one of awarding to small business concerns no less than twenty percent (20%) of the total value of all prime contract awards for each fiscal year, and the second of awarding to small disadvantaged business concerns no less than five percent (5%) of all prime contract and subcontract awards for each fiscal year. The five percent (5%) goal for small disadvantaged businesses must be applied separately to prime contracts and subcontracts, resulting in two distinct small disadvantaged business goals.

For purposes of this program, small disadvantaged businesses will be considered a subset of small businesses and, therefore, prime contract awards to such concerns will also be counted towards achievement of the 20% small business goal.

Each individual department or agency, in consultation with the Small Business Administration (SBA), will continue to establish its own annual goals; OFPP and SBA are responsible for ensuring that the cumulative goals for all agencies meet or exceed the annual government-wide goals.

Agencies must report to the SBA various statistical data regarding this program. They must also submit to the SBA an analysis of any failure to meet their goals, and a statement of actions planned to achieve the goals in the next FY. The SBA will report the actual results to the President for inclusion in his State of Small Business Report to Congress.

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This Acquisition Information Memorandum was prepared by SEA 033 and is intended to provide guidance in the implementation of the Federal Acquisition Regulations (FAR), DoD FAR Supplement (DFARS), Navy Acquisition procedures Supplement (NAPS), DoD Directive 5000.1, and DoD Instruction 5000.2 in NAVSEA acquisitions. While not directive in nature, the memorandum provides information for use by personnel responsible for managing acquisition programs or approving acquisition documents. When an existing directive must be modified, changes will be submitted through the normal directives process.

Subj: ACQUISITION INFORMATION MEMORANDUM

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NAVSEA 5216/30 (5.74)

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| ORIGINATOR M. Koebke | | CODE SEA 03313 | ROOM 1 CPK, 1102 | TEL.EXT. 746-3178 | DATE 4/18/91 |
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| | | | | COMMENTS: |
| SEA 0331 | 3 | 4/18/91 | AK | <p>Gene -</p> <p>I put an article in this issue of our AIM regarding your memo on the new GAO bid protest reqs. I'd appreciate any comments/thoughts you might have before I release it.</p> <p>Thx, Frank Favennel 746-3036 ← Please call for PU</p> |
| SEA 02K | 3 | 4/18/91 | AK | |
| SEA 00L | 3 | 4/22 | GA | |
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