

CONTRACTING UNDER THE TECHNOLOGY REINVESTMENT PROJECT: ONE CONTRACTOR'S EXPERIENCE

BY JOHN ROSCHE

AS CONTRACTORS WE TALK ABOUT HOW EASY CONTRACTING would be if we could cut through all the red tape and not have to comply with the Federal Acquisition Regulation (FAR). Little did we know that we would get our wish under the Technology Reinvestment Project (TRP). This program was established by the government to expand research and to develop technology in order to get it into the marketplace. In March 1993 the government issued a solicitation calling for proposals to be submitted under eight statutory programs. Response to this call was overwhelming and only a limited number of awards could be made because of funding limitations.

UNDERSTANDING THE GUIDELINES

As in all solicitations, guidelines were published to guide potential awardees through the proposal phase and must be thoroughly understood in order to develop the contracting methodology. Procurement contracts would not be used since supplies or services were not being acquired by the government.

The choices provided by the solicitation were either grants and cooperative agreements or "other transactions." Grants were to be used when involvement by the government agency was not substantial. If government involvement was substantial, the cooperative agreement was the preferred instrument. An "other transaction" was defined as any form of transaction that was not a grant, contract, or cooperative agreement. In addition, since this procurement was not obtaining supplies or services, the FAR did not apply.

Each statutory program had guidelines as to the minimum requirements for team composition. For example, under the Defense Dual-Use Critical Technology Partnerships, the minimum requirements were two or more eligible firms or a nonprofit research corporation established by two or more eligible firms. The term eligible firm was

defined in the solicitation. Other guidelines included a required 50 percent contribution of funds by the participants, with the government putting up the other 50 percent. The participant funds could be cash, in-kind (equipment or other items of value), or independent research and development (IR&D). The participants had a choice to either use their existing accounting systems or those based on generally accepted accounting principles. This allows for government contractors, industry, and universities to participate in the program.

Finally, the solicitation called for all parties to be in place during final award and one firm to be selected as the administrative organization responsible for reporting and accounting for federal and participant funds.

BEGINNING THE CONTRACTING PROCESS

The first task was to determine how the parties and the government would execute a contract document

under this program. There was no previous information to go out and get so as to model your documents around it. The solicitation suggested topics to include but did not provide any language. At first there were no draft copies, so anything developed had to be from scratch or from closely related but modified documents such as existing memorandums of agreements or teaming agreements. When this happens you have to return to the basics of contracting to determine what you need to include. You certainly need to identify the parties and include a statement of work, schedule, and reporting requirements. With research and development work you need to consider patent and data rights as well as a payment schedule.

The best avenue is to go ahead and draft a document for review. The first draft will be far from complete, but the document will be strengthened after several reviews by different personnel within your organization as well as the reviews by the other parties within the other organizations you are grouping with.

Later, after we submitted proposals, the government issued a draft cooperative agreement and articles of collaboration. The only problem with these draft documents was that they still contained many of the standard FAR clauses. It is hard to operate without specific guidelines for both the government and industry. Without specific guidelines, the government relied on what it knew best. Our job as the contractor was to keep the new way of contracting in view of the government as well as ourselves. Every time a draft was provided to our group, we objected to the inclusion of these FAR clauses and reiterated the intent of this program. It took several reviews and finally the document had to be sent higher up in the agency to get the issue resolved.

The final documents executed were the articles of collaboration, which was the binding document between the parties, and the cooperative agreement, which was the binding document between the parties and the government. A description of what was included in the final docu-

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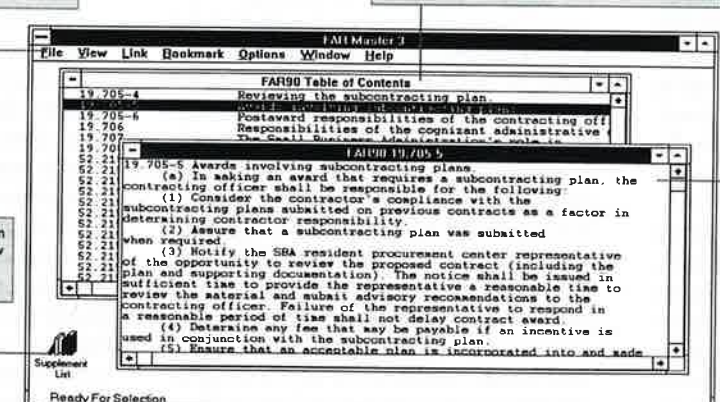
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ments was provided as a guide. Always remember that no matter what document you have, it must always be modified to meet your particular circumstances.

ARTICLES OF COLLABORATION

It is the intent of the TRP program to further research by pulling together eligible firms that have complementary research interests for a limited duration to accomplish specific objectives. All eligible firms together form a consortium. Each party of the consortium is bound by a duty of only good faith and reasonable efforts in achieving the goals set under the TRP. These articles do not form any type of formal business relationship nor do they allow one company or participant to represent the other. Each party acts as an independent contractor subject only to the terms stated within this document and the cooperative agreement.

These articles identify one party as the financial services provider responsible for the accounting of both federal and party funds as well as for seeing that all reporting requirements are met. A management committee also is established to run the consortium and is represented by one member from each party. The management committee meets at least monthly and is empowered to determine all policy, business, financial, legal, and technical issues of the consortium as well as to represent the consortium in reporting progress and in dealing with the government. Each member of the consortium is responsible for getting the appropriate technical support in any of the areas listed as required. No one expects one person to be knowledgeable in all areas of operation.

The articles also address when members may be added to the consortium or when members may leave the consortium. Intellectual property rights, patents, and data rights between the parties in the consortium are identified as well as the handling of proprietary information. Each party is responsible for ensuring that proprietary information is properly marked and that the other party's information is handled with

the same degree of care as its own proprietary information. Termination provisions also are provided and state when and under what conditions they become active.

The exchange of information between the parties must take place through specific personnel (usually the company representative on the management committee). A mechanism for handling disputes also should be identified within this document. Finally, if the parties that form the consortium are from different states, a statement as to what state laws will govern the document must be included. It usually rests with the party performing the largest portion of the work, which also may be the financial services provider.

When parties forming the consortium are from different states, it can add to the complexity of performing the work. If this is the case, the work will have to be separated into identifiable portions to allow each party to perform its piece of the work at its location with plans for total integration as required. It certainly is not impossible to do this, but it does require planning by the consortium. After these articles are signed, the management committee represented by the financial services provider is authorized to represent the consortium and sign the cooperative agreement with the government.

COOPERATIVE AGREEMENT

Once the articles of collaboration are executed between the parties of the consortium, your next job is to finalize the agreement between the consortium and the government. The cooperative agreement begins with a purpose, which describes the objective of the research to be performed and identifies the entities forming the consortium. The next area to address is the authority of the agreement, which will be the statutory program under which the funds are being provided. Next is a responsibility section, which identifies what specific responsibilities the consortium will perform as well as what the government will do, since it supports this agreement from an oversight perspective.

The next area addresses the resource sharing requirements, identifying the percentage of funding provided by the government for each year the research is performed. It also should mention that IR&D funds are an allowable cost share contribution if the work performed would have been allowed had there been no agreement. In other words, if your contribution is IR&D, it must meet the requirements of being IR&D and stand on its own as a qualified IR&D had there been no cooperative agreement. This is specified in the solicitation and stems from FAR 31.205-18, "Independent research and development and bid and proposal costs." Remember, although the FAR does not apply, similar requirements may be stated in the solicitation.

The agreement must address the matter of allocation of principal patent rights as well as rights in data. Since many companies may use IR&D money or private funds to perform the majority of the work, you are entitled to limit the use of the data for the purpose of accomplishing the objectives under the agreement. This data should be properly marked and controlled since it could and should lead to potential future work in the commercial market. In addition, the government will insert language limiting foreign access to the technology for a period of five years. The wording in this agreement is not intended to replace the existing provisions of the International Traffic in Arms Regulation or any government export regulations.

There must be a disputes section that identifies where either the government or the consortium can go to resolve disagreements. There also is a liability and risk of loss section and a milestone payment section identifying the specific actions that authorize a payment to the consortium from the government. There also is a funding statement which sets forth that there is only a fixed amount of funding and that the government is under no obligation to provide additional funds nor is the consortium obligated to continue performance should the funding be consumed before the objectives are reached.

There also should be a key personnel section which ensures the

government that the appropriate personnel with the proper qualifications will be on the program or notification must be made to make a change. There also will be a section on suspension or revocation rights for both parties.

The last paragraphs of the document will contain the regulatory clauses that the government must comply with even though the FAR does not apply. These are as follows: clean air-water, debarment and suspension, drug-free workplace, foreign national employee investigative requirements, restrictions on lobbying, travel and transportation, and officials not to benefit.

THE CHALLENGE OF BREAKING NEW GROUND

With the prospects of reducing federal regulations in the near future, this TRP gives us a glimpse of what the future can be like. As with all change, this will not happen overnight or without resistance and confusion in both industry and gov-

CONTRACTING • *Cont'd from page 25*

ing pre- and postaward contracting actions necessary to provide spares worldwide.

During my tour in the UK and especially in Saudi Arabia, I realized the procurement process did not happen overnight. In fact, it can take as much as 18 to 24 months from the time an IM initiates a purchase order to the time a contractor receives and delivers an item.

There are many elements to a successful small or large dollar acquisition. A typical file includes items such as a price negotiation memorandum, a profile of a contractor's past performance, justification and approval documents to solicit a sole source, and chronology sheets to document almost every pertinent action taken on the acquisition. Additionally, there are the numerous phone calls to contractors, transmittals of documents via fax, requests for data clarification from engineers, and—not the least—making sure your requirement still exists with the IM six or seven months later. These

actions are just a few in the preaward or "buying" phase.

We have become so used to following the established rules that when many of the rules are taken away, we find it is hard to operate. Don't be reluctant to work your way through a new program. One way is to brush up on the basics of contracting. Recall what you need to make an agreement, and then build on that to meet your particular needs.

It appears that the TRP will be around for several years, but competition will be fierce for the limited amount of funding available. Awards are made based on innovative ideas that have the potential to bring new products or services into the market.

If you find yourself winning an award, you will need to be prepared for the contracting process. There will be many ways to contract for these TRP awards and they will vary depending on which agency of the government implements the award. We found ourselves using articles of collaboration and modified cooperative agreements, but others may find themselves using the "other transactions" as identified in the solicita-

tion. As more awards are made, more information and previously executed agreements will become available. As you are aware, once a process is established we tend to follow that process for future business. The same is true for these government agencies.

A key component in the execution of these agreements is in planning to ensure that the work being performed over long distances is coordinated so that the final objectives of the TRP can be accomplished. As a contracts person, you should rely on your basic contracting skills to get you through this new program. As always, don't forget resources that may be available to you from other companies or outside colleagues—or NCMA! □

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the right MOD clause is used and ensuring adequate monetary consideration is applied in the MOD are just two of the challenges a contract administrator must tackle daily.

In less than seven months of training I was directly exposed to the amount of time and effort required to obtain spares through the procurement process. As a supply officer during Desert Storm, my view was limited to just the requisitioning process. No longer will I believe a requirement is satisfied by merely picking up the phone or accessing the SBSS. I now know the Air Force's spares acquisition process supporting our units around the world is more involved than I initially thought. Being in the acquisition career field has opened my eyes to the "big picture." □

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