

DETERMINING PRICE REASONABLENESS IN UESC PRICE PROPOSALS

FOR THE SPECIAL SESSION: ENERGY LAWYERS AND CONTRACTING OFFICERS
WORKSHOP, FEDERAL UTILITY PARTNERSHIP WORKING GROUP MEETING

APRIL 23, 2015

Presented by: Alice Oberhausen
Former DoD Contracting Officer



DETERMINATION OF OFFER AS COMMERCIAL SERVICES

- The Contracting Officer will determine if the UESC services provided by the Utility company meets the definition of commercial services (FAR 2.101).
- Utility companies assert these services are commercial in nature and are offered to both the federal sector and their commercial and residential customers when requested.
- The Federal Acquisition and Streamlining Act (Oct 1994) created an exception to the Truth in Negotiations Act (TINA) for commercial items/services.

- FAR 15.403-1 (b) provides exceptions for requiring cost and pricing data, including when a commercial item (or services) is acquired and when there is adequate price competition
- Under FAR 15.403-1(c)(3)(ii) Services “of a type” but not sold competitively in substantial quantities in commercial marketplace “may” be considered commercial if CO determines in writing offeror has submitted sufficient information to evaluate price reasonableness
- Equipment proposed as Energy Conservation Measures (ECMs) are of a type commonly available and sold, repaired, and/or maintained in the commercial arena.
 - Examples: lighting and controls, water conservation devices, geo-thermal heat pumps, variable speed drives, motor upgrades, window replacements, insulation, chiller retrofit, boiler control improvements, cooling tower replacements or replacement, HVAC system improvements and other equipment/systems

- Modifications to equipment can still be commercial in nature if those modifications are customarily available in the commercial marketplace, or
- if NOT typically available in the commercial marketplace, if the mods are minor, and do not significantly alter the non-governmental function or essential physical characteristics of the item or component or change the purpose of the item.
- The installation services may be performed by the Utility or by another party (ESCO and/or subcontractors under a UESC) if
- The source of such services provides similar services contemporaneously to the general public under T&C similar to those offered to the Federal Government

METHODS OF DETERMINING PRICE REASONABLENESS FOR COMMERCIAL ITEMS/SERVICES

- Proposals will be evaluated using price analysis methods and not cost analysis.
- Pricing from sources such as internal government estimates (IGE) or market data should be reviewed first.
- If data from the offeror is needed, offeror formats should be used and the request tailored to be the least intrusive to the offerors as possible.
- The contracting officer may require the offeror to submit data other than cost and pricing data as determined necessary to determine fair and reasonable pricing.

TECHNIQUES FOR DETERMINING PRICE REASONABLENESS

- **COMPETITION:** The Utility company is **required** to use competitive procedures in soliciting offers from ESCOs, lenders, and subcontractors (both for installation services and for materials/equipment). Provide full transparency to the Contracting Officer.
- When only one response is provided, even if several solicited, there is no competition. Additional detail must be provided to substantiate fair and reasonable pricing (i.e., labor and material costs, overhead rates, and profit).
- **Note: Ensuring competition is the best practice.**

FAR 15.404-1 PROPOSAL ANALYSIS TECHNIQUES

- Catalog pricing - offered to the government at same rate as general public or discounted to the government
- Consider comparison of pricing for same items that are available on GSA Federal Supply Schedules
- Comparison with internal government estimate or independent government estimate (A&E firm for instance)
- Compare pricing for same/similar items procured by competitive means in recent history
- Request limited, but pertinent contractor data, especially commercial sales history (adjusting to current conditions) or cost data (uncertified cost or pricing data)
- **NEGOTIATE! FAIR AND REASONABLE TO BOTH PARTIES!**