

**Additional Viewer Submitted Questions and Answers**

***Important Note: It is important to know your local agency supplemental regulation and policies before implementing any one of these tips to ensure they do not conflict.***

***Tip #1: Consider Releasing the Budget***

1. We use Go/No Go criteria to not "order a Rolls-Royce" vs sharing budget, due to our work. Can go/no go be shared too?

Absolutely and it should be! It's important for us to tell industry what's important to us and how we are going to evaluate proposals or quotations. It should not be a secret.

A Go/No Go concept we're big fans of is under FAR 15.202, the Advisory Multi-Step process. With this approach, the Government solicits general information from vendors and subsequently tells prospective offerors whether the Government believes them to be a viable competitor. Vendors are not precluded from competing when the Request for Proposals (RFP) comes out but most bid and proposal managers will give very serious consideration to whether they are going to make the investment after the Government has told them up front that they are not viewed as a viable competitor. We have seen this work over the years and have never seen a protest. This is a really good way to narrow the pool of vendors to those that are the best and industry really appreciates this as well. They don't have to go through the lengthy time and cost of submitting formal proposals if they really don't stand a chance and they can then focus on other opportunities for which they are a better fit.

***Tip #2: Designate CORs Only When Necessary***

2. Having the CO also be a COR (to accept services, etc), is that not a conflict of interest? The CO would obligate and accept services and it seems that this is a conflict. Thoughts?

FAR 46.502 actually says "acceptance of supplies or services is the responsibility of the contracting officer" and as we said in the seminar, the CO may retain COR responsibilities. However, you raise a good question about internal controls and the need to have proper separation of duties in the "procure to pay" process. Please ensure you are familiar with any specific agency supplemental regulations or policies that may require the separation of these duties and act accordingly.

***Tip #3: Use FAR Part 15 Terms ONLY for FAR Part 15 Buys***

3. What kind of acquisition does need to be done under FAR Part 15?

In our opinion, FAR Part 15 should be reserved ONLY for those requirements that cannot be satisfied through other acquisition strategies or vehicles. In our view, the

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biggest advantage for using FAR Part 15 is the ability to negotiate contract type and terms and conditions. We have used FAR Part 15 over the years mostly for complex requirements where the work cannot be clearly defined or has never been done before; necessitating the use of pricing arrangements other than firm fixed priced. It might also be used to expand the industrial base to try to draw in vendors with highly specialized expertise that cannot be obtained through other existing contract vehicles.

4. Can you expand on your tips related to Part 15 and Part 36 Architect and Engineering and construction contracts over the prospectus level?

This is a great question as the rules are very different for Construction and Architect and Engineering services.

For construction contracts, FAR 36.204 requires disclosure of the magnitude of construction projects; however, prohibits releasing the Government's estimate. FAR Part 36 also requires agencies to use sealed bidding on construction contracts, if there is time; award will be based on price or other price related factors; discussions won't be necessary; and there is a reasonable expectation of receiving more than one bid. FAR Part 15 may be used if the conditions for using sealed bidding are not present.

Architect and Engineering Services is a very different process and we encourage you to thoroughly read FAR Part 36 if you are buying A&E. At a high level, FAR Parts 13, 14, and 15 do not apply unless A&E are incidental to the overall effort. If the predominant requirement is A&E, agencies shall follow FAR Part 36. FAR Part 36.605(b) prohibits disclosure of IGCE outside of Government but does allow exceptions to this during negotiations in certain circumstances and consistent with agency regulations.

**Tip #4: Option Periods are Not Required for IDIQ Contracts**

5. What is the FAR reference or guidance where options are not required for IDIQ contracts?

*It's kind of buried in FAR 17.202(b)(2). Note particularly the part that says: "Inclusion of an option is normally not in the Government's interest when, in the judgment of the contracting officer an indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite quantity contract or requirements contract with options." This language clearly reflects the spirit and intent of what was contemplated regarding options and IDIQ contracts.*

6. Regarding Tip #4, what is the best way to prevention modifications for IDA contract?

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“IDA” is not a term we are particularly familiar with, but we assume that you mean an Indefinite Delivery Award (IDA). Options periods are not required on the umbrella IDIQ contract, but IDIQ orders may be different and options may be necessary.

7. Can you please recap tip #4 regarding multiple year contracts vs multi-year contracts?

A multiple year and multi-year contract are two separate things and it is important to understand this distinction and the rules that apply to each. IDIQs can be multi-year or multiple year contracts; with neither requiring the use of options.

FAR § 17.103 defines the term multi-year contract as follows:

"Multi-year contract" means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multi-year contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.

As a special contracting method under FAR Part 17, multi-year contracts are rarer and require upfront obligation of cancellation fees.

On multiple year IDIQ contracts, once you satisfy the guaranteed minimum, the Government is not obligated to place another order under that contract ever. And, you don't have to terminate the contract either – you can allow the contract to run its course and then proceed to contract closeout upon expiration of the basic IDIQ. Of course, you want to establish IDIQ contracts with the intent of using them for their intended purpose and periods of time but sometimes budget cuts, poor contractor performance, and changing requirements can impact your original intent.

8. There was an indication that options weren't intended for IDIQs, but FAR 16.504(a)(4)(i) indicates that a solicitation and contract for an indefinite quantity must "Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option." So, I'm not clear on that. Also FAR 17.103 indicates that, "The key distinguishing difference between multi-year contracts and multiple year contracts is that multi-year contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first." Wouldn't that make a 5 year IDIQ without options a multi-year contract?

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If you decide to include options in an IDIQ, then yes, you absolutely do need to provide information about options in the solicitation. The point we were making with our tip is that you don't need options in an IDIQ and we believe they add unnecessary burden without providing any real value to the Government.

With respect to the second part of the question, a 5-year multi-year contract **MUST** have cancellation fees funded up front. In contrast a multiple year contract IDIQ only requires funding the guaranteed minimum that must be satisfied under the basic umbrella contract. Both may include options, but again, we don't see the value of doing so.

9. Would not having options mean that a T&M IDIQ contract would have to be fully funded up front for the entire contract period?

No. Orders are funded at the time the need is determined and the order is placed. If you had a requirement with funding to cover T&M performance over a 10-month period, you would place the order and fund it for that amount of time. If you had a continued need for that work following the initial 10-months, once defined and funded, you would place a subsequent order under the contract.

10. With a multiple award IDIQ sans options, how do you recommend dealing with contractors that are either poor performers, nonresponsive, or whatever the reason is that an agency would not want to continue the IDIQ with that vendor? It seems if options are included, you could simply not exercise the option.

Taking steps early on to remediate poor contractor performance and documenting past performance accordingly is absolutely necessary. If you still found yourself in a situation where the vendor's performance had not turned around, you could choose to terminate the contract (either for convenience or default if the poor performance rises to the level of the latter). Remember, once the guaranteed minimum is satisfied, the Government is not obligated beyond that amount. In a multiple award IDIQ scenario, there would be a high probability of the vendor not being competitive (given the poor past performance) with the contractor pool making it hard for them to win future awards. We have seen some instances where agencies have terminated the contract because to avoid criticism or scrutiny of not using an existing contract vehicle to meet agency needs. One could argue that the IDIQ no longer meets agency needs because of poor contractor performance. Remember, Termination for Convenience and Termination for Default are expensive propositions to both Government and industry and are often quite litigious. So, carefully consider those options and use them only when absolutely necessary.

11. One reason I have included options on an IDIQ is because we only have one year funding and therefore a commitment cannot be made beyond one year. Do you still believe you don't need options in this case?

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Correct, you don't need options in this case. With an IDIQ you are not making a commitment beyond the time period or the amount of funding that you have available. Multi-year contracts under FAR 17.101 buy more than one year's requirements and must have cancellation fees funded up front.

**12. How long can you make an IDIQ if you don't use option years?**

Five (5) years for both services and supplies, unless a longer ordering period is specifically authorized by statute or otherwise approved in accordance with agency procedures. Note also that FAR 17.204(e) says that the 5-year limitation does not apply to information technology contracts; however we know of at least one agency supplemental regulation that limits IT contracts to 5 years unless they get a waiver from the Senior Procurement Executive. Also, statutes applicable to various classes of contracts, for example, the Service Contract Labor Standards statute (see 22.1002-1), may place additional restrictions on the length of contracts. Please be sure to check your respective agency FAR supplement for additional restrictions.

The CO may extend the contract on a sole-source basis only once for a period not to exceed 6 months, if specific determinations are made (See FAR 15.505(c), Limitation on ordering period for task-order contracts for advisory and assistance services). Note that FAR § 16.505(c) limits the duration of the "ordering period" of task order contracts for advisory and assistance services, not the duration of contractor's performance under the contract. If the total ordering period of a task order contract is five years long, including the basic and option periods, a task order may be issued on the last day of the final ordering period that could require the contractor to perform during a sixth year. However, such an order must be consistent with the bona fide needs rule of federal appropriations law and the rules in FAR § 32.703-3 about contracts that cross fiscal years.

***Tip #5: Establish an Appropriate Technical Evaluation Panel***

**13. Who determines who can be on the source selection board?**

Formal source selection boards are typically only used under FAR Part 15. In accordance with FAR "15.303 Responsibilities, (a) Agency heads are responsible for source selection. The contracting officer is designated as the source selection authority, unless the agency head appoints another individual for a particular acquisition or group of acquisitions." See the rest of 15.303 for the responsibilities of the CO as the source selection authority.

Under other FAR Parts, formal evaluation plans, establishing a competitive range, conducting discussions, and scoring quotations or offers are not required.

Additionally for other than FAR Part 15, Contracting Officers are responsible for ensuring the Technical Evaluation Panel has the appropriate number of people with the right expertise to perform a proper evaluation commensurate with the

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acquisition. However, we recommend that CO's defer to the program office for determining the technical expertise they believe is needed to conduct the evaluation. We have seen some cases where the CO has argued and disagreed with the technical experts the program office wanted on the panel and we do not believe that is the CO's call. If, during the evaluation, there is evidence that certain technical expertise is lacking that could jeopardize a sound source selection decision, the CO should work with the program office to ensure the right technical expertise is brought to the team.

Please also consult the FAR and your local agency supplements or other guidance for source selection procedures.

14. If I remember correctly, you had a tip that on a GSA buy for services that you could assign a one member Technical Evaluation Team. I think one should be cautious with this advice depending on the complexity. See GAO case [http://www.gao.gov/products/B-411884,B-411884.2,B-411884.3,B-411884.4,B-411884.5,B-411884.6#\\_ftn6=&mt=e-report](http://www.gao.gov/products/B-411884,B-411884.2,B-411884.3,B-411884.4,B-411884.5,B-411884.6#_ftn6=&mt=e-report) where the Technical Evaluation Board was ONE member. This (only one TEB member) may have been part of the problem.

We read the entire GAO case and did not read any reference to a protest issue being raised because there was only one evaluation panel member. This was clearly a case where the Agency failed to adequately evaluate proposals and adequately document its decision. The Contracting Officer's decision was not adequately supported to conclude that the agency had a reasonable basis for the award decision.

This case also supports our Tip #3: Use FAR Part 15 Terms ONLY for FAR Part 15 Buys. In this case, we believe that the CO may have set him/herself up for a protest because the solicitation used FAR Part 15 terms like negotiation, highest rated quote, etc. For example, the solicitation stated,

“If the contractor submitting the highest rated quote does not propose an appropriate mix of labor for the required effort at a fair and reasonable price, the contracting officer may obtain additional information from, and negotiate with, that contractor to improve the terms of the deal reflected in its quote. If the contracting officer is unable to negotiate a favorable deal with the contractor [the contracting officer] reserves the right to negotiate and reach agreement with the firm submitting the next highest rated quote. This process will continue until a contract has been reached or until all those firms submitting a quote have been considered.”

In a GSA schedule buy, it is not necessary to state that the proposals will be ranked or that you will negotiate. You are always allowed to do that during your evaluation, but when you put it in the solicitation, it becomes mandatory to do so.

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As a result, we disagree that only having one evaluator was the problem in this case. Given the complexity of the procurement, the CO obviously felt that they were competent to evaluate all of the technical aspects of the procurement and only one evaluator was sufficient. But, you are right to use caution when selecting the Source Selection Evaluation Team. Perhaps because of the complexity of the technical requirements, it would have been beneficial to have another set of eyes.

15. We are working on a construction management IDIQ. We are considering a one year base plus 4 option years. Is it more efficient to just award a 5 year contract?

This is a loaded question and without knowing all of the details, we can only say that the answer depends on the type of funding you are using and the flexibility you need during performance. An IDIQ would be appropriate if you do not know what construction project(s) you want them to manage at the onset or if more projects will be likely during performance, whether you are awarding a task order (services) for each project, whether it is FFP or CR, what type of funding you have, etc. On the other hand, if only one project is to be managed, why award an IDIQ? In this case, use a non-IDIQ contract type.

***Tip #7: Do NOT Make Vendors Revise Their Technical Proposals to Reflect Negotiations***

16. I agree the technical proposal shouldn't be incorporated into the contract, but in the event the contractor comes back for an equitable adjustment, say because they want to add more people for a task, and in review of their technical proposal, they simply want to bring the workforce to what they original told us, I think the technical proposal has merit, despite the contract not calling for a certain number of people, especially in a performance based scenario. Thoughts?

Your scenario leads us to believe that the contract was not funded properly at award or based on the contractor's proposed price/cost for some reason. Otherwise, why would the contractor be coming back asking for more money at this point? Without knowing more facts, we provide 2 answers based on whether the contract was awarded as firm fixed price or cost reimbursement.

**Firm Fixed Price Scenario:** Assuming the contract was awarded based on the proposed and/or negotiated price for a full complement of staff, we would not entertain a request for equitable adjustment in this scenario (unless some technical requirement has changed) because if this is truly a performance based contract, they agreed to achieving the outcome at the price awarded. If they want to bring on more people, they do not need the CO's permission or a contract modification for equitable adjustment. They simply hire more people and get the job done within the fixed price negotiated.

It is possible that there may be some overspending in other areas that were not anticipated when the contract was awarded, or some mismanagement is going on and the contractor wants to make a case for more money. Don't go there! If the

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contract was awarded based on a full complement of proposed staff, the technical proposal has no bearing at this point...Hold them to the price.

**Cost Reimbursement Scenario:** Assuming the contract was awarded based on the proposed and/or negotiated cost with a full complement of staff, we would also not entertain a request for equitable adjustment in this scenario (unless some technical requirement has changed). The contractor has discretion to hire appropriate staff to achieve the outcome without the CO's permission under a cost reimbursement contract. In addition, lots of Contracting Officers fall into the trap of funding every technical change. When you experience a technical change, it is not always necessary to fund it because there might be some cost savings in other areas that would offset the technical change.

The bottom line - the Government is at risk in this scenario to control costs. Therefore, it is wise to monitor costs throughout performance to ensure that the outcome can be achieved at the stated cost.

**Tip #8: Try True Negotiation Tactics**

17. You mentioned true negotiations. In a part 15 buy can you ask the vendor in line for award to lower their price without giving anyone else the chance? I thought if you gave one the opportunity you had to do it through negotiations and allow all those in the competitive range the same opportunity?

What you are describing is the FAR guidance on discussions at 15.306, Exchanges with offerors after receipt of proposals. If you open up discussions with one offeror in the competitive range, you must hold discussions with all offerors.

See 15.306(d) Exchanges with offerors after establishment of the competitive range. Negotiations are exchanges...When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

(1) Discussions are tailored to each offeror's proposal, and must be conducted by the contracting officer with each offeror within the competitive range.

FAR Part 15 is very strict about this but the other acquisition strategies give you more latitude in how you negotiate with vendors. With that said though, it is important to remember to operate under the long-standing principles of fairness that the FAR is based on. The scenario we talked about was if you already had determined who the apparently successful offeror was and, for administrative efficiency on both sides, it was more advantageous to ask them to come down in their price versus requesting more funding from the program office.

18. Regarding conducting negotiations under FAR Part 8, once those negotiations are complete with either one or multiple vendors, wouldn't they then be submitting a revised quote? Doesn't that put us into FAR Part 15?

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In general, the CO should always request a price reduction and the FAR encourages you to do so. FAR 8.405-4 Price reductions states,

“Ordering activities may request a price reduction at any time before placing an order, establishing a BPA, or in conjunction with the annual BPA review. However, the ordering activity shall seek a price reduction when the order or BPA exceeds the simplified acquisition threshold. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order or BPA.”

The CO’s responsibility is to fairly evaluate proposals/quotes and make an award to the offeror that provides the best value for the Government. Doing so might require you to have conversations with vendors, but that does not automatically mean that you are in a FAR Part 15 scenario. Remember, be careful in your solicitation about what and how you will evaluate quotes so as not to put yourself in a FAR Part 15 scenario (see the question above about one evaluator where the CO may have benefited from not using FAR 15 terms.)

We can find nowhere in the FAR where it talks about requiring a final revised quote. However, please also pay attention to local agency procedures and other rules that may be in place for using eBuy, GSAdvantage, etc.

***Tip #9: Consider Releasing Technical and Price/Cost Proposals Simultaneously to Evaluation Team***

19. For Tip #9, I agree mostly, but don't you think sharing pricing information with the technical team may add bias in to the process on how they evaluate quotes/proposals that wouldn't necessarily be there had pricing not been shared?

You must evaluate the circumstances of using this tip! It will not work in every situation. However, in the majority of cases where we have used this tip, there was no bias on the part of the evaluation team and they thanked us for giving them both the business and technical proposal at the same time because they were able to make a more informed assessment of the proposal overall.

***Tip #10: Keep File Documentation Appropriate***

20. Is it necessary to prepare a Technical Evaluation Report, Best Value Analysis Report, Source Selection Decision Report, and Price Analysis Report for FAR Part 8.4 or 16.5 acquisition?

None of these documents are identified in the FAR. You are identifying terms of art that have been used in the contracting environment and, in particular, for FAR Part 15 buys. FAR Part 8 talks about “written determination” and “documenting your decision.” Further, FAR 16.5(b)(7) Decision documentation for orders, states: “(i)

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The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.”

Neither Part 8 or 16.5 state exact criteria for what is to be included in a document to justify a decision, such as in FAR 15.406.-3, Documenting the negotiation. The documents you identify above for FAR 8 and 16, if used altogether to justify an award under Part 8 and 16, would be considered overkill, in our opinion. Most agencies will identify local policy for consistency on what is to be included in a document that supports an award decision. Use your discretion when there is no local policy and limit the documentation to only what the FAR requires.

