



Government Contracts

A Contracting Officer's Perspective vs. the Recipient

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Who is this Speaker?

- Midge Breslof has over 30 years experience in pre- and post-award contracts and subcontracts at major aerospace companies, NASA/JPL, and educational institutions. She has been a member of SRA since 1994, has an MBA in Executive Management and is Distinguished Faculty.
- Midge is currently the Manager of Business Development in the Space System and Engineering Division of Southwest Research Institute, an independent, nonprofit applied research and development organization in San Antonio, TX, and the Business Manager for several high profile NASA Missions.

What we will discuss today

- Grants are Contracts but Contracts are not Grants
 - Legal instruments
 - Agreement
 - Consideration
- Mandatory Contract clauses not required by Grants
 - The Acts that enforce them
 - What the Contracting Officer expects





Grant vs. Contract

◆ Grant

- ◆ Legal instrument
- ◆ Reflects a **relationship** between Sponsor and recipient
- ◆ Recipient to **accomplish a public purpose of support or stimulation**

◆ Contract

- ◆ Mutually binding legal relationship
- ◆ Acquire, for Sponsor's **direct use or benefit**
- ◆ **Well-defined, specific effort** required for the accomplishment of a mission or project



Contract Requirements





P.L. 87-653

Truth in Negotiations Act

- Enacted by Congress on September 10, 1962
- Ensure a standard of measure for “fair and **reasonable**” when contracting in a non-competitive environment
- Certify data as **accurate, complete and current**
 - Cost Analysis
 - Price Analysis



Determining Reasonableness

Pursuant to OMB Circular A-21:

- A cost may be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefore, **reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made.**



Determining Reasonableness

Major considerations:

- The cost is recognized as necessary with regard to the operation of the institution and the sponsored agreement
- Restraints or requirements imposed by Federal rules and regulations
- The individuals concerned acted with due prudence
- The actions taken are consistent with established institutional policies and practices



Determining Reasonableness

Pursuant to FAR

- A cost is reasonable if, in its nature or amount, it does not exceed what would be **incurred by an ordinarily prudent person in the conduct of competitive business.**



Competition

- 2 or more bidders
- Responding to the same requirements
- Market price is determined by supply and demand
 - Within a competitive range
- **Best evaluated proposal wins**



Determining “Fair and Reasonable” Cost Analysis

- Review and evaluation of individual cost elements
- Review of facts (cost or pricing data)
 - Verifiable
 - Reasonably expected to contribute to the soundness of the proposal
 - Historical accounting data
 - Vendor quotations
 - Make - or - Buy Decisions
- Evaluate judgments applied to facts
 - Estimated future costs



TECHNICAL AND COST EVALUATION

Cost-Reimbursable Research Contract

A. PROPOSAL TO BE EVALUATED

Name of Contractor:

Date of Proposal:

Amount: \$ _____

Title of Research:

B. DIRECT LABOR

() The proposed labor mix and skills are appropriate for the effort to be performed.

For Consideration:

- Are the quantity of labor hours appropriate for the task to be performed?
- Is the labor skills mix appropriate?
- Is the time-phasing consistent with the delivery schedule?
- Is there any duplication of effort?
- Is the proposed task required by the Statement of Work?



TECHNICAL AND COST EVALUATION Cost-Reimbursable Research Contract

C. SALARIES AND BENEFITS

Amount Proposed: \$ _____ Amount Recommended:
\$ _____

- Salaries appear reasonable because they are represented to be based on actuals, or are based on past experience with the university, or are similar to local prevailing salaries for comparable labor classifications.

- The compensation package of tuition remission and salary appears reasonable, based on comparisons with other research centers.

For Consideration:

- Are the types of employees whose wages are being projected the same as those to be assigned to the contract?

TECHNICAL AND COST EVALUATION

Cost-Reimbursable Research Contract

D. INDIRECT RATES AND FACTORS

Amount Proposed: \$_____ Amount Recommended: \$_____

The Indirect Rate(s) proposed are currently approved for forward pricing.

Final Rate: _____% Rate Period: _____through _____

Provisional Rate: _____% Rate Period: _____through _____

Audit Agency: ONR DHHS Other_____

Escalation has been applied, and the factor of _____% is reasonable.

For Consideration:

- Is escalation necessary (is performance more than one year)?
- Are the escalation factors consistent with Government Inflation Factors?



TECHNICAL AND COST EVALUATION

Cost-Reimbursable Research Contract

E. TRAVEL

Amount Proposed: \$_____ Amount Recommended: \$_____

- () The purpose of each trip and the number of persons traveling are necessary to meet program objectives.
- () Proposed travel appears reasonable.

For Consideration:

- Is the purpose of each trip consistent with program requirements?
- Are the quantities, duration and number of people traveling consistent with program requirements?
- Are proposed airfares consistent with current rates?
- Are proposed hotel, car rental and per diem consistent with Government rates?
- Is relocation necessary?



TECHNICAL AND COST EVALUATION Cost-Reimbursable Research Contract

F. MATERIALS

Amount Proposed: \$_____ Amount Recommended:

\$_____

() The items and quantities in the Bill of Materials is reasonable.

For Consideration:

- Is the grade of part consistent with the research?
- Is the purchase schedule consistent with the contract schedule?
- Have the most efficient sources been considered?
- Have quantity purchases been considered?



TECHNICAL AND COST EVALUATION

Cost-Reimbursable Research Contract

G. EQUIPMENT

Amount Proposed: \$ _____ Amount Recommended:
\$ _____

- Each item of technical equipment that exceeds \$1,000 has been itemized and described, and is necessary to meet program objectives.

For Consideration:

- Has non-technical equipment, such as office equipment, reproduction equipment and general purpose ADP equipment, been proposed?
- Who will retain title to equipment? How will it be addressed?



TECHNICAL AND COST EVALUATION

Cost-Reimbursable Research Contract

H. Recommendation

Amount Proposed: \$_____ Amount Recommended: \$_____

- Based on the above evaluation, the proposed budget is fair and reasonable for the effort to be performed.
- All data submitted was relied upon in the evaluation of price reasonableness.

Technical Manager/Date

Contract Negotiator/Date



Price Analysis

- The process of examining and evaluation of a proposed price without getting into the detail of evaluating its separate cost elements and proposed profit.



Techniques of Price Analysis

- Adequate price competition
- Compare to
 - previously proposed prices
 - previous buys or historical data
 - previous Government and commercial contract prices
- Parametric estimating methods/application of rough yardsticks
- Compare to competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements
- Compare to independent cost estimates (I.C.E.)
 - in-house
 - market research
- Analysis of pricing information provided by the offeror



How Do You Get This Data?

- Specific instructions in the RFP



Sample RFP Letter

National Aeronautics and
Space Administration

Goddard Space Flight Center
Greenbelt, MD 20771


460

June 14, 2007

Southwest Research Institute
Attention: Mr. R. B. Kalmbach
Director, Contracts
6220 Culebra Road
San Antonio, TX 78238-5166

Subject: Contract NNG04EB99C, Request for Proposal for the Magnetospheric
MultiScale (MMS) Mission

You are requested to submit a Cost-Plus-Fixed-Fee (CPFF) proposal for the Magnetospheric MultiScale (MMS) Mission Project effort. The enclosed Statement of Work (SOW) for the MMS Instrument Suite Science Team for Phases B/C/D/E dated June 13, 2007, Clause B.1, Deliverable Requirements and Delivery Schedule dated June 13, 2007, Contract Deliverables Requirements List (CDRL) Data Item Description (DID) for the MMS Mission Project dated June 2007, the MMS Mission Instrument Suite Mission Assurance Requirements (MAR) dated June 2007, and the Level 1 Requirements for the MMS Project, Appendix C to the STP Program Plan dated June 11, 2007, are to be used as the basis for your proposal.




Your proposal shall include technical and cost information in order to determine how thoroughly you understand the needs and objectives of the Government's requirement. Information contained in your proposal must be in sufficient detail to allow adequate technical and cost evaluation (i.e., labor rates, overhead cost, fee, etc). Your technical

proposal must address the SOW and summarize your proposed approach for meeting those requirements.

The Government intends to use an IBM PC compatible computer in the evaluation of your proposal. Therefore, please submit a copy of the proposal on a compact disc (CD) as detailed below. Windows XP operating system and Office 2003, or earlier release is required for your CD submission. Please provide written documentation, which describes the contents of each disc and of each file.

In response to this solicitation, your offer should include the following:

1. A Technical Volume (original, two copies, and an electronic copy) summarizing the proposed work plan and a detailed explanation of any exceptions or recommendations to the requirements of this RFP.
2. A Cost Volume (original, two copies and an electronic copy), which shall include a complete cost estimate by elements of cost with supporting data. Please provide your basis of estimate (BOE) for each element of cost, including direct labor and other direct costs, that include any assumptions made in the generation of the estimate. Labor costs should be broken down by skill category, hours, and rates. Indirect rates should specify the percentage and basis of allocation. Any travel should be broken out by the number of trips, days, and per diem requested, as well as the rationale for the travel. Your proposal should include sufficient cost/price information to enable us to analyze your proposed costs.

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3. A revised Small Business Subcontracting Plan and cost and pricing data, as defined in FAR 2.101, shall be submitted as part of the proposal.
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The proposal submitted in response to this request must be signed by an official having the proper authority to act for this purpose and should contain all the information requested. The period of time for which the proposal is firm must be indicated. Your offer should be valid for at least 120 days from the date of your proposal.

Please note that this request does not commit the Government to pay any costs incurred in the submission of your proposal, nor to contract for the said services. Note also, that **full, accurate, and complete information is required by this request in accordance with U.S.C. 1001, which also prescribes the penalties for making false statements.**

The request for an offer is not an authorization to perform any of the described work. The Government will not be liable for any costs for work prior to any issuance of the duly executed contract modification. The Contracting Officer is the only individual who can legally commit the Government to the expenditure of public funds in connection with the proposed contract. Any other commitment either explicit or implied is invalid.

Receipt of your signed proposal within 60 days of this RFP is needed. Any efforts to expedite your submittal will be greatly appreciated. Your offer should be submitted to:

NASA/GSFC
Attention: Ms. Julie Janus, Code 460
Building 12, Room N33
Greenbelt, Maryland 20771

Bold added for emphasis: prior RFPs referenced FAR 2-101



U.S.C.1001

Fraud and False Statements

- (a) Except as otherwise provided in this section, **whoever**, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, **knowingly and willfully--** (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; **shall be fined under this title or imprisoned not more than 5 years, or both.**



FAR 2.101, Definitions

“Cost or pricing data” (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) **means all facts that**, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, **prudent buyers and sellers would reasonably expect to affect price negotiations significantly**. Cost or pricing data are data requiring certification in accordance with [15.406-2](#). **Cost or pricing data are factual, not judgmental; and are verifiable**. While they do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they do **include the data forming the basis for that judgment**. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include such factors as—

- (1) Vendor quotations;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit-cost trends such as those associated with labor efficiency;
- (6) Make-or-buy decisions;
- (7) Estimated resources to attain business goals; and
- (8) Information on management decisions that could have a significant bearing on costs.



What are the Consequences . . .

- Report on the Audit of Howell Instruments
- Lockheed Aircraft Corporation
- How to Avoid Going to Jail under 18 U.S.C. Section 1001 for Lying to Government Agents



Report on the Audit of Howell Instruments

- **Did Howell submit accurate, complete and current cost or pricing data?**
- Howell is headquartered in Fort Worth, TX and operates manufacturing plants there.
- Certain subassemblies of manufactured parts are historically co-produced in its Puerto Rican subsidiaries.
 - Howell consistently transferred a portion of the assembly work to its Puerto Rican subsidiaries where labor and overall operating expenses were lower than at Ft. Worth.
 - Parts were then transferred back to Ft. Worth for final rework and assembly.
 - Lower labor cost, manufacturing overhead and G&A in Puerto Rico resulted in much lower costs to manufacture in Puerto Rico but the cost difference was not passed on to the Government.
- Howell consistently certified costs based on contract performance in Ft. Worth even though parts were transferred regularly to and from the Puerto Rican subsidiaries for fabrication.



Lockheed Aircraft Corporation

- **Did Lockheed's price proposal contain Defective Cost or Pricing Data?**
- Lockheed was awarded a Letter Contract in anticipation of a \$10.5M negotiated fixed price contract with the Air Force to develop and produce an electronic Malfunction Detection and Recording System (MADREC) to be installed in B-52 aircraft.
- 813LQ recorder, a component of the MADREC, was to be built by subcontractor Midwestern Instruments
 - Since the 813LQ recorder had not been developed, Midwestern submitted a price proposal based on the 812L recorder with cost estimates for anticipated differences between the 812L and 813LQ models.
 - Lockheed performed an audit and price analysis, and had a series of negotiations and meetings, that resulted in a price reduction that was definitized into a subcontract.
- Lockheed submitted a price proposal to the Air Force which included the negotiated subcontract price.



Lockheed Aircraft Corporation (cont'd)

- Air Force Audit and Price Analysis team examined records and made production studies at Midwestern who had delivered 30 units.
 - A price reduction was realized and negotiated with Midwestern and subsequently Lockheed when definitizing the Letter Contract.
- GAO began a 4-month audit of the contract that revealed total unit price for purchase parts for the 813LQ recorder should have been \$1,530 instead of \$2,070 (\$540/unit price difference).
 - Lockheed audited Midwestern's accounts and concurred with GAO findings.
 - Air Force conducted an audit and made a formal demand on Lockheed for a refund on the basis of Midwestern's overstatement of material and labor costs by \$234,623.
- Moral: Don't definitize subcontracts until your contract negotiations are complete.



How to Avoid Going to Jail under 18 U.S.C. Section 1001 for Lying to Government Agents

- **What do Martha Stewart and enemy combatant Ali Saleh Kahliah Al-Marri have in common?**
 - Martha Stewart was convicted of intentionally misleading SEC and FBI officials who questioned her about insider trading.
 - Mr. Al-Marri, who voluntarily submitted to FBI interviews in the wake of 9/11 attacks, lied about the timing of a previous trip to the United States.
- Lying to a federal government agent is a criminal act.
- Mantra: You will not discuss anything without first consulting your attorney and your attorney will be in touch with the government agent.



Resulting FAR Clauses

- FAR 15.215
 - 52.215-2, Audit and Records – Negotiations
 - 52.215-10, Price Reduction for Defective Cost or Pricing Data
 - 52.215-11, Price Reduction for Defective Cost or Pricing Data Modifications
 - 52.215-12, Subcontractor Cost of Pricing Data
 - 52.215-13, Subcontractor Cost of Pricing Data - Modifications



P.L. 85-536

Small Business Act

- It is the declared policy of the Congress that the **Government should aid, counsel, assist, and protect**, insofar as is possible, **the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government** (including but not limited to contracts or subcontracts for maintenance, repair, and construction) **be placed with small business enterprises**, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.



Small Disadvantaged Business (SDB) Program

- Procurement tool
 - Designed to assist the government in finding firms capable of provided needed services
 - Helps address the traditional exclusion of minority owned firms from contracting opportunities
- Eligibility
 - Small business concern as defined by SBA rules and regulations
 - Firms must be at least 51% unconditional owned and controlled by one or more U.S. citizens who are socially and economically disadvantaged



Resulting FAR Clauses

- FAR 15.219
 - 52.219-9, Small Business Subcontracting Plan




The Walsh-Healey Public Contracts Act

- Requires **contractors engaged in the manufacturing or furnishing of materials, supplies, articles, or equipment** to the U.S. government or the District of Columbia **to pay employees who produce, assemble, handle, or ship goods** under contracts exceeding \$10,000, **the federal minimum wage** for all hours worked **and time and one half** their regular rate of pay **for all hours worked over 40 in a workweek.**



Walsh Healy Act

- Provides for a minimum wage
- Prohibits employment of youth under 16
- Convicts on certain federal contracts
- Prevents the practice of “bid brokering”
 - the practice of buying items and then reselling them to the Government without adding value to the item by the reseller.
- Contracts subject to its provisions may be awarded only to “manufacturers” or “regular dealers”



FAR Clause 52.220-20

Not Tailored for Not-for-Profit or University

- Objection

- The Institute and its subcontractors cannot certify that they are either regular dealers or manufacturers

- Solution

- “The Contractor agrees to meet the stipulations required by the Walsh-Healey Public Contracts Act pertaining to such matters as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.”



Questions?
