# CHAPTER 5 DEFINITIONS

***Adverse past performance*** is defined as past performance information that supports a less than satisfactory rating on any evaluation. Adverse past performance that must be addressed with Offerors includes unfavorable comments received from sources such as those received from respondents from past performance questionnaires or interviews that have not been finalized within a formal rating system. A best practice can be to discuss adverse past performance which caused a rating to be lowered to Satisfactory Confidence.

***Due Diligence (Industry) –*** The process followed by prospective contractors to fully understand the government requirement in order to submit a complete, responsive proposal to the government which will result in a successful acquisition. Methods may include such activities as conducting site visits, attending industry days, one-on-one sessions with the acquisition teams, pre-proposal conferences and responding to draft requests for proposals.

***Due Diligence (Government) –*** The process followed by the government acquisition team to ensure all prospective contractors are as informed of the government requirement and method of acquisition as possible in order to receive a reasonable number of competitive proposals from industry. Methods may include such activities as providing for site visits, conducting industry days, one-on-one sessions with interested vendors, pre-proposal conferences and sending draft requests for proposals to industry.

***Evaluation Findings*** are the evaluator's written observations/judgments regarding the individual merits of the proposal against the RFP requirements.

***Formal Source Selection*** means the source selection process used where someone other than the PCO is the SSA, normally for high dollar value or complex acquisitions.

***Other than Small Business*** means businesses determined to be other than a small business based upon industry size standards assigned to North American Industry Classification System (NAICS) code. Includes: large businesses, state and local government and non-profit companies. May also include public utilities, educational institutions, and foreign-owned firms based in the U.S. and contributing to the U.S. economy through the payment of taxes or otherwise.

***Minor or Clerical Error*** is a minor informality or irregularity that is merely a matter of form and not of substance or a clerical error apparent on its face in the proposal. These may include obvious misplacement of decimal points, incorrect discounts, reversal of prices, and mis-designation of units.

***Probable Cost or also known as Most Probable Cost*** is the government's best estimate of the costs that a contractor will incur in performing a cost-reimbursement contract (FAR 15.404-1(d)(2)(i)). The probable cost must be ascertained by making a cost realism analysis during the evaluation of each proposal and must be used in making the source selection decision for best value.

***Program Manager or Requiring Activity*** is the entity responsible for providing contract requirements documents within the RFP that communicates those requirements to the offeror.

***Rating*** is the adjective/color descriptor assigned by the evaluators to the non-Cost/Price Factors and corresponding Subfactors. It represents their conclusions as to the quality of the proposal, supported by narrative write-ups identifying the associated findings (strengths, weaknesses,

deficiencies, risks, and uncertainties).

***Requirements Documents*** are all aspects of the RFP that convey the needs of the government to offerors, including the PWS/SOW/SOO, technical requirement documents, and system requirement documents. **NOTE**: All documents are to be properly safeguarded, to include marking, handling, and storage in accordance with government controlled unclassified information (CUI) policy and regulations if not properly marked at a higher level.

***Sample Task*** is a hypothetical task that is given to Offerors during source selection to evaluate their understanding of the work and their ability to perform the work. It must be a reasonable representative of the type of work that will be required. Some rates used to price the task order must be binding on the contractor for the sample to be valid. Incorporation of binding rates also applies to any live/real task order.

***Statement of Objectives (SOO)*** is an alternative to a statement of work and is provided as part of a request for proposal (RFP). The SOO provides the government's overall objectives of an acquisition/procurement to which an offeror responds, providing in their proposal a solution and possible means of support to achieve the contractual objective.

***Small Business Professional (SBP)*** is the all-inclusive term used to identify the individuals working in small business offices that assist requiring activities and contracting personnel throughout the acquisition process. SBP support to maximize opportunities for small businesses through document reviews and procedural guidance relating to market research, small business goals and subcontracting opportunities among other functions internal and external to the government.

***Source Selection*** is the process used in competitive, negotiated contracting to select the proposal that offers the best value to the government.

**NOTE**: A SSAC is only required for acquisitions over $100M and is NOT required for LPTA evaluation methodology.

***Source Selection Team*** is a team that is tailored to the unique acquisition, tasked with carrying out a source selection. Composition of the team generally consists of the SSA, PCO (if different from the SSA), SSAC (if applicable), SSEB, Advisors, Cost/Price Experts, Legal Counsel, small business professionals, and other subject-matter experts.

***Standard of Proof*** is the evidence or standard by which the government (evaluator) determines whether an offeror has complied with the government's stated requirement.

***Tradeoff Process*** is the competitive negotiation process where the government evaluates both cost/price and non-cost/price factors and awards the contract to the offeror proposing the combination of factors which offer the best value to the government. The process is appropriate when it is in the government's best interest to consider award to other than the lowest priced offeror or the highest technically rated offeror.

The SSA must then determine if a higher rated technical offer is "worth" the additional cost to the government.

**Parent topic:** Appendix - AA ARMY SOURCE SELECTION SUPPLEMENT

# Appendix A Debriefing Guide

## A-1 Purpose of Debriefing

***Constructive Communication with Industry***

Transparency, to the extent allowable by applicable regulations and laws, ***throughout the process*** can help to build trust and confidence on the part of offerors regarding the treatment of their proposal and the source selection decision outcome.

Unsuccessful offerors are sometimes able to accept negative findings in a debriefing if they perceive that the government acted with fairness, consistency, objectivity, and in accordance with the evaluation criteria described in the RFP.

## A-2 Requirements

Figure A-1 below provides a comprehensive side-by-side comparison of the requirements for preaward and postaward debriefings.

| | **PREAWARD DEBRIEFING FAR 15.505** | **POSTAWARD DEBRIEFING FAR 15.506** |
|---|---|---|
| **Who is Entitled to a Debriefing?** | Offerors excluded from the competitive range or otherwise excluded from the competition before award. | Any unsuccessful Offeror who has not had a preaward debriefing. ***A successful offeror may also be provided a debriefing.*** |
| **When Must the Government Conduct a Debriefing?** | As soon as practicable after receipt of a timely, written request. However, the PCO may refuse the request for a preaward debriefing if it is not in the best interest of the government to conduct a preaward debriefing. (1) (2) | Within five days, to the maximum extent practicable, after receipt of a timely, written request for a debriefing. (3) |
| **What is a Timely Request?** | A request received by the contracting activity within 3 calendar days after the offeror received notice of exclusion from the competition. (4) | A request received by the contracting activity within 3 calendar days after the offeror received notice of contract award. (4) |

| | | |
|---|---|---|
| **What Can <u>Not</u> Be Disclosed?** | □ Number of offerors<br>□ Identity of other offerors<br>□ Content of other offerors 'proposals<br>□ Ranking of other offerors<br>□ Evaluation of other offerors<br>□ Point-by-point comparisons of a debriefed offeror's proposal with other proposals<br>Information prohibited from disclosure by FAR 24.202 or information exempt from release under the FOIA (5) | □ Point-by-point comparisons of a debriefed offeror's proposal with other proposals. (The ratings of a debriefed offeror and the awardee may be disclosed to the subfactor level without violating this principle.)<br>□ Information prohibited from disclosure by FAR 24.202, or information exempt from release under the FOIA. (5) |
| | **Legal counsel must be consulted if there is *<u>any</u>* question regarding the releasability of information** | |
| **What Should Be Discussed?** | □ The agency's evaluation of significant elements in the offeror's proposal (6);<br>□ A summary of the rationale for eliminating the offeror from the competition;<br>□ Reasonable responses to relevant questions about whether source selection procedures contained in the RFP, applicable regulations, and other applicable authorities were followed in the process of eliminating the Offeror from the competition. | □ The government's evaluation of the significant weaknesses, weaknesses, or deficiencies in the offeror's proposal, if applicable.<br>□ The overall evaluated cost/price (include unit prices only if releasable under FOIA, and DO NOT disclose the IGE); technical rating, if applicable, of the successful offeror and the debriefed offeror; and past performance information on the debriefed offeror;<br>□ The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;<br>□ A summary of the rationale for award;<br>□ For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and<br>□ Reasonable responses to relevant questions about whether source selection procedures contained in the RFP, applicable regulations, and other applicable authorities were followed.<br>□ Other information, as appropriate. |

*Figure A-1: Comparison of Preaward and Postaward Debriefings*

**Notes to Figure A-1:**

(1) The offeror may request the debriefing be delayed until after contract award. When delayed, the debriefing shall include all the information provided in a postaward debriefing.

(2) In the event either the government or offeror delays the debriefing, the PCO must provide the debriefing within the timeframe established for postaward debriefings.

(3) If an offeror submits an untimely request for debriefing, the PCO may nonetheless conduct a debriefing if feasible. In such case, inform the offeror the request is untimely. **NOTE:** If new information is provided during an untimely debriefing, it may form the basis of a timely protest. Therefore, obtain legal advice prior to providing an untimely debriefing

(4) Do not count the day the offeror received the notice; start with the next day. Consider sending the notice by mail with return receipt requested or by electronic means (facsimile transmission or e-mail) with immediate acknowledgment requested so that you can easily establish the date the offeror received it.

(5) Includes such things as trade secrets; privileged or confidential information, e.g., manufacturing processes and techniques, commercial and financial information, and cost data; and the names of individuals providing past performance information. It does not include information otherwise available without restriction to the government or public.

(6) If the element was significant enough to eliminate the offeror from the competitive range, it is significant for debriefing purposes. Include both positive and negative aspects of the offeror's proposal to help improve future proposals.

**Other Information to Ensure a Meaningful Debriefing**

In a postaward debriefing, disclose the evaluation ratings of the debriefed offeror and awardee to the subfactor level of evaluation; and all significant weaknesses, weaknesses, strengths, and deficiencies (if any) of the debriefed offeror's proposal.

Disclose the debriefed offeror's total evaluated prices and the awardee's total evaluated cost/price (include unit prices only if releasable under FOIA, but DO NOT disclose the IGE).

Disclose a summary of the rationale for the contract award decision. The rationale is contained in the SSA's SSDD. Evaluation information concerning the other unsuccessful offerors and information not releasable under FOIA must be redacted prior to release of an SSDD, ensuring no information listed in FAR 15.506(e) is released.

For award of a contract in excess of $10 million and not in excess of $100 million with a small business or nontraditional defense contractor, the debrief must include an option for the small business or nontraditional defense contractor to request a redacted copy of the SSDD *(Reference DFARS Subpart 215.506(d)(i))*.

For all other awards below $100M, consider furnishing the debriefed offerors with a ***redacted*** copy of the SSDD.

For award of a contract exceeding $100M, a redacted copy of the SSDD is required to be furnished to offerors *(Reference DFARS Subpart 215.506(d)(ii))*.

Clearly indicate when the debriefing has been concluded. Formal conclusion of the debriefing begins the protest window.

## A-3 Notification of Debriefing

Regardless of the method of debriefing, the PCO should document all aspects of the process for arranging the debriefing date to include written acknowledgement from the offeror.

## A-4 Debriefing Location

The PCO should always consider the needs of the offeror as well as the ability of the government to accommodate when selecting the debriefing location. Just as important is the inclusion of the right personnel in the debriefing process. Therefore, all reasonable efforts should be made to ensure key individuals from distant locations can participate.

For face-to-face debriefings, the PCO shall ensure that all access and security requirements for offerors and government personnel attendance are met. This may include requirements to access the installation or debriefing facility.

## A-5 Debriefing Attendees

**Government Personnel.** As chair of the debriefing, the PCO should coordinate attendance of the appropriate government participants and ensure legal counsel attends, especially when the offeror's legal counsel is going to attend. *(Reference DoD Source Selection Procedures Appendix A.5.1)* The PCO shall also invite the SBP.

**Debriefed Offeror Personnel.** Subcontractors may attend the prime contractor's debriefing with the invitation and consent of the prime contractor. *(Reference DoD Source Selection Procedures Appendix A.5.2)*

## A-6 Preparing for the Debriefing

Because debriefings are time-sensitive, the prioritization of (and preparation for) this event(s) is critical. The extent of preparation may vary considerably with the complexity of each acquisition. This documentation (in addition to the outline, if used) will establish a "framework" to ensure the debriefing remains focused and productive.

***Establish and Prepare Debriefing Documentation***

 Briefing charts alone (with information taken directly from final briefing slides presented to the SSA) may be sufficient.

 A written script (which may later be provided to the offeror) may be prudent in addition to briefing charts.

 Review and be familiar with the final evaluation report for the debriefed offeror.

***Practice the Debriefing***

 Rehearse the order and execution of the debriefing.

 Ensure the government participants understand their roles and when to speak.

 Set rules for taking new questions and caucusing.

## A-7 Outline for the Debriefing – (*No Supplemental Army Guidance)*

## A-8 Conducting the Debriefing

### *Handling Questions*

 You may request that questions from the offeror's personnel be funneled through their main spokesperson (this facilitates the orderly conduct of the debriefing).

 As a general rule, do not answer questions "on the fly".

 Hold a government caucus to formulate a response before providing an answer *(maintain source selection materials in caucus room for reference, if needed).*

 Government participants should only speak when requested by the PCO with discussions tightly controlled.

 Additional questions may be answered during the debrief. DFARS Subpart 215.506-70 and DoD Source Selection Procedures Appendix A both provide specific guidance and timeframes for handling questions received during or following the debrief of offerors. Note: When providing a required postaward debriefing to successful and unsuccessful offerors, pay careful attention to the procedures and timeframes in DFARS 215.506-70. The number of days for these actions are in **business days**, not calendar days.

 The postaward debriefing is NOT considered concluded until all criteria specified in the DFARS and DoD Source Selection Guide has been properly met or performed.

 Ensure redacted SSDD is legally sufficient, as applicable, and all actions are performed timely per DFARS and DoD Source Selection Procedures.

### *The Post Debriefing Memorandum*

 The PCO must include a summary of each debriefing as a record in the contract file. This post-debriefing memorandum should include, at a minimum:

o A list of all debriefing attendees;

o A summary of the information disclosed during the debriefing. (The most efficient means for doing this is to attach the debriefing slides to the memorandum.);

o The offeror's request for a debriefing, if any;

o The substance of all questions and answers discussed at, or provided subsequent to, the debriefing. This includes previously submitted questions, any hand-outs, and a list of written questions/answers;

o Any other relevant documents.

**A-9 Sample Offeror Questions – *(No Supplemental Army Guidance)***

# Appendix B Tradeoff Source Selection Process: Subjective Tradeoff and Value Adjusted Total Evaluated Price Tradeoff

## B-1 Subjective Tradeoff

Where the tradeoff source selection process is used to obtain best value, ***the subjective tradeoff process is appropriate for most Army source selections.*** The subjective tradeoff process provides the following benefits in source selection:

 The ability for offerors to propose various technical approaches that may be of benefit to the government. The competitive environment should encourage the freedom to do so depending upon what the solicitation places the most value/importance upon;

 The ability to have meaningful comparisons and establish discriminators among competing proposals;

 The ability to place a greater value on past performance by enabling discernment of an offeror's performance record;

 The ability of the SSA to give consideration to the benefit/value of non-cost/price factor differences between offerors and to determine if those differences justify paying the cost/price differential between them.

When using this process, clearly:

 State the relative importance of the factors and subfactors;

 Describe, in Section L, the approaches or capabilities that the government places a higher value on for exceeding the threshold (minimum) requirements if applicable, and;

 Describe, in Section M, how the government will evaluate these areas and assign findings (strengths or significant strengths) correlated to the expected positive impact or benefit received when the offeror exceeds threshold requirements.

***Use of Entry-Gate Criteria –*** As part of the subjective tradeoff source selection process, the DoD Source Selection Procedures allows for the use of entry-gate criteria. This is considered a combination approach utilizing concepts from both LPTA and Subjective Tradeoff. When determining your evaluation criteria, the PM and the PCO should closely examine the key requirements and carefully consider whether some objective elements (i.e., entry-gate criteria) could be evaluated using an acceptable/unacceptable or pass/fail rating methodology. During the evaluation of proposals, offerors must be determined to be acceptable or pass the entry-gate criteria in order to advance in the subjective tradeoff evaluation. When the requirement can be clearly stated with a corresponding standard of proof, using this combination approach with entry-gate criteria can simplify and streamline the evaluation process. See also Appendix C for more information on acceptable/ unacceptable criteria.

## B-2 Value Adjusted Total Evaluated Price Tradeoff

VATEP may be appropriate where the PM is able to establish an affordability cap (limits on pursuing any above-threshold requirements), determine a relative order of importance for above-minimum performance or criteria, and assign a monetary value. ***Use of VATEP may be most suitable for procuring developmental items, where the government can determine the value (or worth) of "better performance" and quantify it in the RFP.***

**VATEP Example 1**

**Scenario:** This effort is for the purchase of an aircraft with multiple minimum performance specifications (threshold), some of which also have desired performance specifications (objective). The PM / RA has identified the 3 most desired objectives for which a Value Adjusted Total Evaluated Price will be determined.

**SECTION M LANGUAGE:** At the end of the paragraph, "Basis of Award", insert the following language:

This RFP employs the use of Value Adjusted Total Evaluated Price (VATEP) techniques which identifies, in advance, the value placed on above-threshold performance or capabilities in the Air Movement Mission-Range and Payload, Self-Deployment, and/or Cruise Airspeed requirements. The specific VATEP procedures and values for this effort are set forth below:

If an offeror's proposal exceeds the mandatory minimum performance specifications for the Air Movement Mission-Range and Payload, Self-Deployment Mission, and/or Cruise Airspeed requirements set forth in the Air Vehicle technical subfactor, the following VATEP procedures will be applied:

An offeror can earn VATEP evaluation credit for meeting performance between the threshold and objective for the Air Movement Mission-Range and Payload and/or Cruise Airspeed requirements. An offeror can also earn VATEP evaluation credit for meeting the objective for the Self-Deployment Mission. The VATEP eligible objectives shall be embodied in the FUA Aircraft and also priced and delivered in Contract Line Item Number (CLIN) X001AA.

The offeror's total evaluated price for CLIN X001AA will be adjusted, for evaluation purposes only, in accordance with the chart below where above-threshold performance has been achieved for any of the three objectives identified. The VATEP objectives must be available on the first aircraft in order to be eligible for VATEP evaluation credit. Risk will not be assessed in VATEP since risk was already assessed in the Air Vehicle subfactor.

| VATEP Objectives | Specification Paragraph | Maximum VATEP % Reduction in CLIN X001AA Proposed Price | Calculation of VATEP % | Identify where in Offeror's proposal the VATEP objective is met or partially met |
|---|---|---|---|---|

| | | | |
|---|---|---|---|
| Air Movement Mission-Range and Payload | 6.3.2 | 3% | (Offerors proposed payload less the threshold of 2100)/600*3% [Not-to-Exceed 3%) **NOTE:** *2100 is the threshold and 600 is the delta between the threshold and objective* |
| Self-Deployment | 6.3.1 | 2% | Objective is binary. An Offerors proposal will either meet or fail to meet the objective. |
| Cruise Airspeed | 6.1.6 | 1% | (Offerors proposed cruise airspeed less the threshold of 250)/150*1% [Not-to-Exceed 1%] **NOTE** *: 250 is the threshold and 150 is the delta between the threshold and objective* |

The SSA will consider the VATEP of the cost/price factor, along with the other evaluation factors, in making the source selection decision.

*VATEP is a technique used for evaluation purposes only. The value adjusted total evaluated price will not change the proposed unit prices set forth in Section B of the proposal, nor will it change the estimated contract value for award purposes.*

**SECTION L LANGUAGE** : The offeror shall complete RFP Attachment L-5 (VATEP Calculations) to facilitate the government's review process.

(**NOTE:** RFP Attachment L-5 contains the chart identified in Section M above.)

**VATEP Example 2**

*Example:* The Army is buying a large equipment trailer (LET) using VATEP, and one of the requirements is maximum payload. The threshold is 80,000 lbs., and the objective is 85,000. As stated in the RFP, During Step 2 of the VATEP process the SST will adjust each offeror's total proposed price (TPP) to derive the total evaluated price (TEP) by $1,000 for each 50 lbs. of increased payload over the threshold, for a maximum adjustment to the TEP of $100,000. This adjustment is for evaluation purposes only, and will not change the proposed pricing, which will become the awarded price. If an offeror proposes the threshold for payload, then they will receive no adjustment.

In this example, four proposals are received:

 Offeror A: TPP=$1,050,000; at least an “acceptable” rating for all minimum requirements, proposes a maximum payload of 83,500 lbs., an increase of 3,500 lbs. over the threshold.

 Offeror B: TPP=$1,000,000; at least an “acceptable” rating for all minimum requirements, proposes the threshold maximum payload of 80,000 lbs.

 Offeror C: TPP=$1,150,000; at least an “acceptable” rating for all minimum requirements, proposes a maximum payload at the objective level of 85,000 lbs., an increase of 5,000 lbs. over the threshold

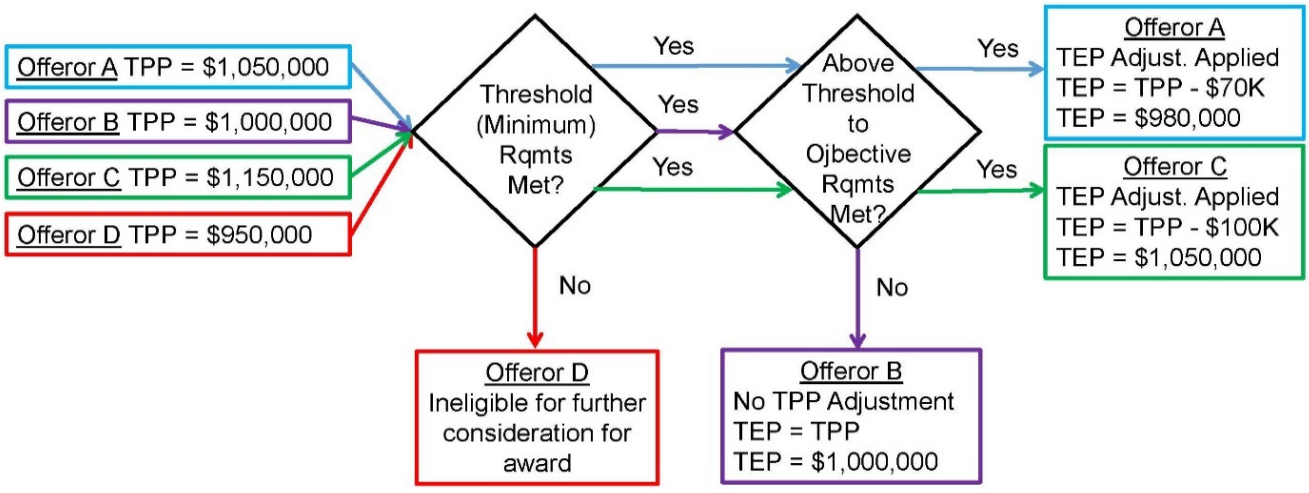
 Offeror D: TPP=$950,000; “unacceptable” for two minimum requirements, proposes a maximum payload at the objective level of 85,000 lbs., an increase of 5,000 lbs. over the threshold. *Offeror D is eliminated in Step 1.*

At the conclusion of Step 1, offeror B has the lowest TPP, with offeror A as the second-lowest cost/price and Offeror C as the highest price. However, offerors A and C have their TPPs adjusted since they have proposed maximum payloads above the threshold, while offeror B has no adjustment since they have proposed only the threshold maximum payload. The TEP adjustments are as follows:

 Offeror A has proposed an increase of 3,500 lbs., which leads to a decrease of their TPP by $70,000, for a TEP of $980,000.

 Offeror B has proposed the threshold and receives no adjustment to their TPP. Therefore, their TEP is $1,000,000.

 Offeror C has a proposed increase of 5,000 lbs., which leads to a decrease of their TPP by the maximum amount of $100,000, for a TEP of $1,050,000.




**Requirement**: The US Government (USG) is soliciting for a large equipment trailer (LET). The LET has a rated payload of a minimum of 80,000 lbs. (40 tons), with an objective payload of 85,000 lbs.

(42.5 tons). The LET is to be used to transport a variety of equipment. The LET will be employed for use on primary and secondary roads. The payload objective will be used to determine a Value Adjusted Total Evaluated Price (VATEP).

**SECTION M LANGUAGE** : At the end of the "Basis of Award" paragraph, insert the following language:

This RFP employs the use of the Value Adjusted Total Evaluated Price (VATEP) technique, which identifies in advance the value placed on above-threshold performance for the payload requirement. The specific VATEP procedures and value for this effort are set forth below.

The offeror's total proposed price will be adjusted to arrive at a total evaluated price, for evaluation purposes only, in accordance with the chart below where above-threshold performance has been achieved for the payload requirement. The VATEP objective must be available on the first LET in order to be eligible for VATEP evaluation credit. Risk will not be assessed in VATEP. For each 50 lbs. of increased payload, the total evaluated price (TEP) will be reduced by $1,000, for a maximum adjustment to TEP of $100,000. No credit will be provided above the maximum for performance over the objective.

| VATEP Objectives | ATPD Paragraph | Maximum VATEP Reduction to Total Evaluated Price | Calculation of VATEP % | Identify where in Offeror's proposal the VATEP objective is met or partially met |
|---|---|---|---|---|
| Payload | 4.3.2 | $100,000 | (Offeror's proposed payload less the threshold of 8000)/50*$1,000 [Not-to-Exceed $100,000 total reduction] **NOTE*:*** *8000 is the threshold and 5,000 is the delta between the threshold and objective* | |

The SSA will consider the VATEP of the cost/price factor, along with the other evaluation factors, in making the source selection decision.

The VATEP adjustment is for evaluation purposes only, and will not change the proposed pricing, which will become the awarded price. If an Offeror proposes the threshold for payload, then they will receive no adjustment.

**SECTION L LANGUAGE** : The offeror shall complete RFP Attachment L-X (VATEP Calculations) to facilitate the government review process.

The offeror's LET shall meet or exceed the threshold identified in the table below. LETs that fail to meet the threshold will not be considered. If an offeror's proposed payload exceeds the threshold

performance specification set forth in the technical subfactor, the following VATEP procedures will be applied:

An offeror can earn VATEP evaluation credit for meeting performance between the threshold and objective, or for meeting the objective requirement. This credit will be assessed as a reduction in the total evaluated price. If performance between threshold and objective is being proposed, the exact performance value shall be listed in Attachment L-X. A LET that meets the proposed above-threshold payload performance shall also be priced and delivered in CLIN X001AA.

# Appendix C Lowest Priced Technically Acceptable Source Selection Process

## C-1 Purpose

The purpose of this Appendix is to assist acquisition professionals in making sound decisions for determining whether to use a Tradeoff or LPTA source selection process to obtain best value. LPTA is an available source selection approach. However, a lack of understanding of when it is an appropriate choice may result in misapplication of this process. This Appendix includes “side-by-side” comparisons of LPTA vs. Tradeoff characteristics, methodologies, common concerns associated with each, tips and best practices.

## C-2 References

1. Federal Acquisition Regulation Part 15 https://www.acquisition.gov/far/part-15.

2. Defense Federal Acquisition Regulation Supplement (DFARS and Procedures, Guidance, and Information (PGI) Part 215 https://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.

3. Army Federal Acquisition Regulation Supplement (AFARS) and AFARS Procedures, Guidance, and Information (AFARS-PGI) Part 5115
https://spcs3.kc.army.mil/asaalt/procurement/AFARS/AFARS_5115.aspx.

4. Department of Defense Source Selection Procedures
https://www.acq.osd.mil/dpap/policy/policyvault/USA000740-22-DPC.pdf.

5. Government Accountability Office Cases - Various

6. News Article ‘Putting Best Value Back into the trade Off Acquisition Process” May 20, 2019 USAAC https://asc.army.mil/web/news-putting-best-value-back-into-the-trade-off-acquisition-process/.

## C-3 Purpose

**Policy Perspective on Use of LPTA**. The DoD Source Selection Procedures includes a separate Appendix C devoted to the LPTA Source Selection Process (reference 4).

Of note, and identified upfront in the DoD Source Selection Guide, is reference to DFARS 215.101-2-70 Limitations and Prohibitions specific to types of procurements and when LPTA is NOT to be used as a source selection procedure and when contracting officers are required to avoid using LPTA or are prohibited from using the process.

The use of LPTA has increased but not necessarily successfully in all cases, causing concern by both the government and industry partners. Some specific concerns include:

 Government officials are not able to adequately define the requirement and, therefore, not able to adequately define technical acceptability.

 Awarded prices are unrealistically low.

o Incumbent contractors underbid at unrealistic prices.

o Winning contractors cannot attract qualified employees.

o Contractors are unable to perform at acceptable quality levels.

 Poor outcomes from using LPTA endanger the security of government resources, to include information systems and networks and personnel.

## C-4 What is Risk?

Whether using Tradeoff or LPTA, the focus should always be on identifying the key discriminators based upon market research and the assessment of risk. Risk, as it pertains to source selection, is the potential for unsuccessful contract performance. Increased risk comes with numerous possible complicating factors including:

| | |
|---|---|
| **Disruption of Schedule** | **Funding/Budget Availability** |
| **Increased Cost or Degradation of Performance** | **Contract Type – Pricing Arrangement** |
| **Need for Increased Government Oversight** | **Dependencies on Other Projects/Systems** |
| **The Likelihood of Unsuccessful Contract Performance** | **Possible Effect on Other Simultaneous Projects** |
| **Technical Feasibility** | **Operational Risk** |

While it is impossible to eliminate all risk, the objective is to reduce or mitigate risks by selecting the best value offeror through a sound source selection evaluation process.

**The Government's risk is increased where the criteria (standards) are set too low.** The source selection team must work together to ensure the PWS/SOW/SOO/ Specification is complete and reflects the government's needs at the ***right*** quality level.

Identifying key discriminators that are linked to the critical requirements where key risks lie is one of the most important steps in the process of determining the right process to achieve best value.

**Key Risk Areas = Discriminators = Possible Evaluation Criteria**
**Crystal Clear, Non-Debatable Evaluation Criteria**
**+ Evaluation on Basis of Technical Acceptability**
**+ Objective Standard of Proof for Each Criteria**
**= Candidate for LPTA Source Selection Process**

If the evaluation criteria cannot be objectively defined strictly on the basis of acceptable/unacceptable, and a clear ***"standard of proof"*** be determined for each, the procurement is not a candidate for the LPTA process.

**NOTE:** If some, but not all, evaluation criteria fit the LPTA requirements a ***combination approach*** may be a consideration.

**Caution –** If the customer/requiring activity is concerned about improving performance, LPTA is not an appropriate source selection approach.

## C-5 Quick Comparison of Best Value Basics

### The FAR on Tradeoff vs LPTA Source Selection Processes

| FAR 15.101-1 Tradeoff Process | FAR 15.101-2 LPTA Process |
|---|---|
| Permits tradeoffs among cost or price and non-cost factors and allows the government to accept other than the lowest price proposal. | Does not permit tradeoff among cost or price and non-cost factors. |
| Used in competitive negotiated contracting. | Used in competitive negotiated contracting. |
| Select the most advantageous offer. | Select the lowest price proposal that meets/exceeds minimum requirements. |
| Evaluate and compare factors in addition to cost or price. | |
| Proposals may be ranked. | No ranking of proposals. |
| Exchanges may occur. | Exchanges may occur. |
| **IF** **THEN** | **IF** **THEN** |

| | | | |
|---|---|---|---|
| - Generally considered complex items or services<br>- Less definitive<br>- Developmental or developmental work is required<br>- Non-price factors play a dominant role in the source selection decision | **Use the Tradeoff Process** | - Commercial/non-complex items or services<br>- Clear and well-defined requirements<br>- Stable requirements<br>- Items or services are readily and consistently available in the marketplace<br>- Risk of unsuccessful performance is minimal<br>- There is neither value, need or willingness to pay for higher performance<br>- Cost/price plays a dominant role in the source selection decision | **Consider using the LPTA Process** |

## C-6 Comparing Key Characteristics

### Tradeoff vs LPTA Methods of Source Selection

**TRADEOFF**

**SUMMARY OVERVIEW**

A Tradeoff process is appropriate when it may be in the best interest of the government to:
a) consider award to other than the lowest-priced Offeror or:
b) other than the highest technically rated Offeror.
Therefore, if the ability to distinguish between the quality of non-cost/price factors and cost/price factors within Offerors' proposals and give credit (assign strengths) for aspects which provide a benefit to the government and for which it might be willing to pay more for (premium), then the tradeoff process is the best approach.
 Less definitive
 More complex and time-consuming development work
 Greater performance risk/integration risk
 Technical and past performance considerations more important than price
 Price based on performance-based approach
 Past performance is critical in reducing risk

**LPTA**

**SUMMARY OVERVIEW**

An LPTA process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest price.
Award is made to the responsible contractor who is technically acceptable and has the lowest evaluated price.
 government design or stable requirements, clearly definable
 Risk of unsuccessful performance is minimal
 No mission-related reason to pay a premium for quality or performance exceeding the acceptable level
 Only use LPTA when able to clearly define and strictly evaluate Offerors' proposals based on technical acceptability
 Technical evaluation lends itself to acceptable/unacceptable basis
 When requirement is easy to price
 When past performance is not critical to reducing risk
 When a "standard of proof" is identifiable for each evaluation criteria

**Tradeoff vs LPTA Methods of Source Selection**

| TRADEOFF | LPTA |
| --- | --- |
| **Encourages Innovation** | **Innovation Not Needed, Encouraged, nor Rewarded** |
| Proposals can offer various technical approaches that may be of benefit to the government and the competitive environment should encourage this depending upon what the solicitation places the most value/importance upon. | LPTA inherently places the most value on the technical acceptability to provide known, stable requirements for the lowest price and the government will not benefit from/is not willing to pay for above threshold performance. |
| **Maximum Flexibility** | **Minimum Flexibility** |
| The tradeoff process provides the most discretion/flexibility when it comes to the award decision.<br>The Source Selection Evaluation Board (SSEB) can identify strengths within proposals that may benefit the government and increase the value of the proposal.<br>The Source Selection Authority can give consideration to the benefit/value of non-cost/price factor differences between Offerors to determine if those differences justify paying the cost/price differential between them. | Tradeoffs not permitted – intended to be a simple selection process based upon technical acceptability/lowest price.<br>Use a checklist or form to document the technical evaluation (1) to ensure the requirements/criteria/standards are suitable for this process; and (2) enable the offeror to provide the standard of proof and determine whether the offeror should be rated as acceptable or unacceptable for that item.<br>- You must be able to evaluate everything included in your “checklist” using an objective standard of proof.<br>- By associating minimum standards with relative risks for execution of each task, risk of unsuccessful performance can be mitigated or decreased.<br>-The offeror is required to provide clear proof that they meet the requirement (and the government determines what the standard of proof is and announces it in the RFP).<br>No additional “credit” can be given for exceeding established standards. |

**Tradeoff vs LPTA Methods of Source Selection**

| TRADEOFF | LPTA |
| --- | --- |
| **Competitive Range and Discussions** | **Competitive Range and Discussions** |

52.215-1, Instructions to Offerors – Competitive Acquisition enables the government to provide notice to prospective Offerors of the intent to make award without discussions as well as limit the number of proposals in the competitive range to the number at which an efficient competition can be conducted.
Contracting officer can provide the opportunity for offerors to eliminate weaknesses and deficiencies through the discussion process.

If few or no acceptable offers are received or proposals indicate that the requirements are misunderstood, the contracting officer may set a competitive range and conduct discussions with technically unacceptable Offerors and provide them the opportunity to eliminate deficiencies.
A proposal rated technically acceptable cannot be further improved through the discussion process. However, all offerors in the competitive range must be afforded the opportunity to submit a revised proposal after discussions have concluded. See *Commercial Design Group, Inc.,* B-400923.4, August 6, 2009, CPD ¶ 157.

**Enables Meaningful Comparisons**

**No Comparisons Permitted**

Tradeoff allows for meaningful comparisons and discrimination between and among competing proposals.

If some, but not all, evaluation criteria fit the LPTA requirements, a combination approach may be a consideration. If a combination approach is used, comparison is allowable only for those factors based on tradeoff.

**Evaluation is More Complex But Can Be Simplified Using a Hybrid Approach When Appropriate**

**Evaluation is Straightforward**

By using a combination approach, the government can simplify some aspects of the evaluation where criteria are clear, can be evaluated on an acceptable/unacceptable basis, and a clear standard of proof can be linked to each one.
Examples of may include professional qualifications, special certifications, licensing.

Well-written evaluation criteria and "standard of proof" that the Offeror must provide to satisfy each, should enable the evaluation to be conducted in an efficient and straightforward manner.
If not all evaluation criteria is clear and objective with an objective standard of proof for evaluation, a combination approach may be appropriate.

**Tradeoff vs LPTA Methods of Source Selection**

| **TRADEOFF** | **LPTA** |
| --- | --- |
| **Performance Risk and Past Performance Assessment** | **Past Performance Rated Acceptable or Unacceptable** |

| | |
|---|---|
| In the case of an offeror without a record of recent/relevant past performance, or for whom information on past performance is not available, or so sparse that no meaningful past performance rating can be assigned, you must evaluate the offeror's lack of past performance as "Neutral Confidence", having no favorable or unfavorable impact on the evaluation. | Past performance shall be evaluated unless waived. However, a comparative assessment is not allowed. When using LPTA, unknown past performance shall be considered acceptable.<br>- You may utilize a combination approach where past performance is evaluated as part of the tradeoff and technical approach is assessed on acceptable/unacceptable basis. |
| **Planning Considerations** | **Planning Considerations** |
| The tradeoff methodology generally involves in-depth planning and more time and resources.<br>Tradeoffs must be clearly documented and supported. | The LPTA process is not necessarily faster. Requires significant up-front time investment to clearly identify the critical technical requirements (standards) for evaluation and the standard of proof (evidence of the offeror's compliance with the requirement) to determine whether each one is met (technical acceptability). ***The time investment is key to establishing whether the requirement is suitable for LPTA, and if so, setting up the procurement for success.*** |

## C-7 Rating Methodologies

**Rating Methodologies.** Tradeoff and LPTA each have a unique rating methodology as summarized below.

**COMPARING HOW OFFERORS ARE RATED FOR EACH APPROACH**

| **TRADEOFF** | **LPTA** |
|---|---|
| **Technical Performance** | **Technical Performance** |
| Subjective evaluation in accordance with DoD Source Selection Procedures and the Army Source Selection Supplement<br>Allows the government to:<br>a) consider award to other than the lowest-priced offeror, or;<br>b) other than the highest technically rated offeror | Objective evaluation of minimum requirements in accordance with DoD Source Selection Procedures and the Army Source Selection Supplement<br>Evaluated as acceptable or unacceptable |
| **Past Performance** | **Past Performance** |

| | |
|---|---|
| Confidence Assessment<br>Comparative analysis permitted | Acceptable or Unacceptable<br>No comparative analysis permitted |
| **Small Business Participation** | **Small Business Participation** |
| Factor or Subfactor | Exempt from evaluation (DFARS 215.304(c)(i)). However, if desired as an evaluation factor, it should be considered one of the technical factors/subfactors and evaluated accordingly |
| **Price** | **Price** |
| Not rated adjectively<br>Evaluated in accordance with the Source Selection Plan and Sections L and M (or equivalent sections) of the RFP | Not rated adjectively<br>Of the acceptable proposals, lowest evaluated price wins |
| **Tradeoffs** | **Tradeoffs** |
| In accordance with the Source Selection Plan and Sections L and M (or equivalent sections) of the RFP | Tradeoff not permitted<br>No additional credit for exceeding standards |

## C-8 Common Concerns for Each Methodology

It is important to understand and consider the benefits and possible down-sides of each approach in order to ensure you select the one that will help you achieve best value for the customer/program. Below are some of the common concerns.

**COMPARING COMMON CONCERNS**

| **TRADEOFF** | **LPTA** |
|---|---|
| **Will the Government Get What It Is Paying More For?** | **Will the Government Get What It Needs At the Price Proposed?** |

| | |
|---|---|
| The government shall incorporate evaluated strengths as a contractually binding requirement to the greatest extent possible (particularly when offeror was selected under VATEP).<br>Post-award management must follow through to ensure receipt of the anticipated benefits. | The government sometimes has difficulty identifying with enough clarity and specificity what its requirements are (even when we think we've done a good job).<br>If this occurs, the contract may require modifications to ensure the government's needs are met, which may increase the price over time.<br>Thorough, upfront analysis is essential. Careful post-award management is equally as important.<br>Apply lessons learned to appropriately determine the source selection methodology for follow-on contracts. |
| **Ensure the Tradeoff Decision Is Sound** | **Low Acceptability Standards/Evaluation Criteria Increase Performance Risk** |
| Does the order of importance of factors and subfactors reflect the goals of the program, and what is most important to the customer and the end user/warfighter?<br>Was the order of importance adequately described in the RFP?<br>Did the evaluation follow the Source Selection Plan and RFP? | Acceptability standards that are set too low can result in low prices that are also too low, resulting in award to the wrong Offeror at increased performance risk.<br>LPTA should not mean buying cheaper goods or services. Minimum requirements does not mean "bare bones".<br>No additional credit for exceeding standards |

## C-9 Tips and Best Practices for Using LPTA

Below are some general tips and agreed-upon best practices to guide application of LPTA techniques.

### Tips and Best Practices for Using LPTA

#### Establishing Technical Factors For Evaluation

When establishing technical factors for evaluation, each must link to specific critical technical requirements in the PWS/SOW/SOO.
Using a Technical Information Questionnaire (TIQ), which includes the requirement (and PWS/SOW/SOO reference), the criteria, and the "standard of proof" will make the job of the evaluator far easier.
Also, providing a technical information questionnaire to the Offeror to complete which includes the requirement (and PWS/SOW/SOO reference), the criteria, and the "standard of proof" required, will ensure consistency throughout the process. *See Attachment C-1, Technical Information Questionnaire.*

#### "Buy-In" and Performance Risk Can be Mitigated

***In LPTA –a very low price is often the result of acceptability standards (criteria) that are set too low or are ill-defined.***
Rigorous Definition and Evaluation of "Technical Acceptability" is key to success. By associating minimum standards with relative risks for execution of each task, the overall performance risk can be mitigated or decreased.

**Source Selection Evaluation Training**

Train the SSEB on the specific process of evaluating the proposal against the ***standard of proof*** relative to each evaluation criteria and documentation.

**Brand Name or Equal RFPs**

Ensure the salient characteristics are included in the solicitation. If a firm is offering an equal product, the proposal must demonstrate that the product conforms to the salient characteristics listed in the solicitation. If the firm fails to comply, its product is properly rejected as technically unacceptable. *Nas/Corp-Telmah, Inc.,* B-405893, Jan.10, 2012, 2012 CPD ¶ 88 at 2.

## C-10 LPTA Requirement and Standard of Proof Samples

**LPTA REQUIREMENT/STANDARD OF PROOF SAMPLES**

| **SUPPLIES** | **PROFESSIONAL SERVICES**<br>**Corporate** | **SIMPLE SERVICES** |
|---|---|---|

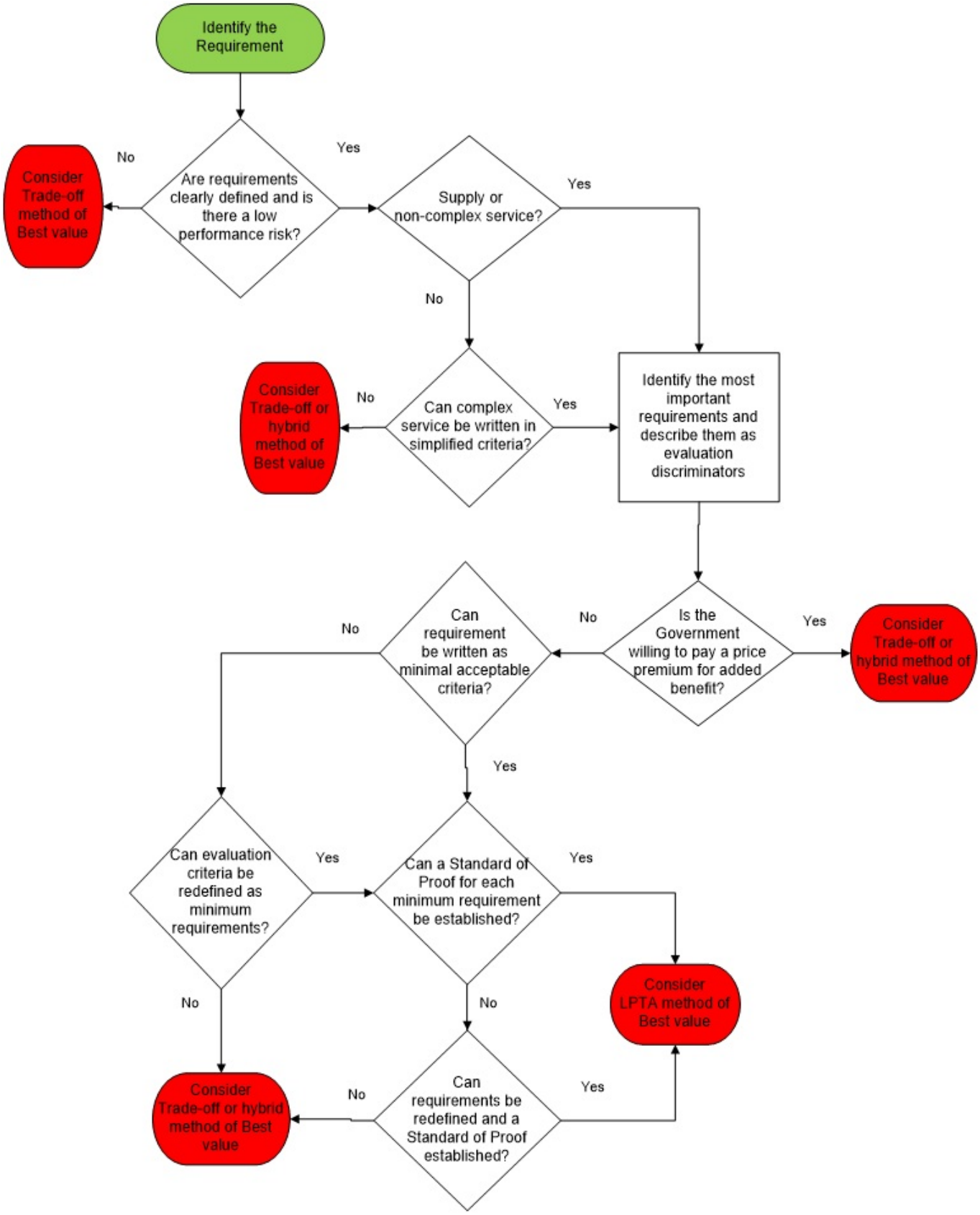
**LPTA REQUIREMENT/STANDARD OF PROOF SAMPLES**

| **SUPPLIES** | **PROFESSIONAL SERVICES**<br>**Corporate** | **SIMPLE SERVICES** |
|---|---|---|
| **Criteria:** All illumination must be provided by LED lights drawing a maximum of 5 amps (C.13.1)<br>**Question on Technical Information Questionnaire (TIQ):** Are all the lights of the Light Emitting Diode (LED) type and a maximum combined draw of 5 amps?<br>**Standard of Proof:** Manufacturer's spec sheets showing LED characteristics. | **Criteria:** Five program analysts with a Bachelor's Degree in a business discipline with a minimum of 10 years of program analyst experience or a post-graduate degree in a business discipline (Master's or Doctorate) with a minimum of 5 years of program analyst experience.<br>**Question on Technical Information Questionnaire (TIQ):** Do all of the program analyst executives possess either a Bachelor's Degree in a business discipline with a minimum of 10 years of program analyst experience or a post-graduate degree in a business discipline (Master's or Doctorate) with a minimum of 5 years of program analyst experience?<br>**Standard of proof:** Resume showing degree and years of experience as specified. | **Criteria:** Contractor shall possess storage facility to store all equipment listed in attachment X within 15 miles of Arsenal (15 radial miles from geographic center of Arsenal).<br>**Question on Technical Information Questionnaire (TIQ):** Does the Offeror possess storage facility that meets 15-mile requirement listed in Section C.4.4?<br>**Standard of proof:** Provide evidence of ownership or lease of facility that meets requirements listed in Section C.4.4. |

**LPTA REQUIREMENT/STANDARD OF PROOF SAMPLES**

| **SUPPLIES** | **PROFESSIONAL SERVICES**<br>**Corporate** | **SIMPLE SERVICES** |
|---|---|---|
| **Criteria:** The vehicle must be transportable by C-17, C-5, and military sea and rail IAW ATPD XXXX Section 3.1.X and 3.1.X<br>**Question on Technical Information Questionnaire (TIQ):** Does the width of the vehicle exceed 96”?<br>**Standard of Proof:** CAD drawing with all outside dimensions noted. | **Criteria:** Five Communications Personnel with minimum of 4 years of experience with military tactical or satellite communications system.<br>**Question on Technical Information Questionnaire (TIQ):** Do all of the candidates have a minimum of 4 years of experience with military tactical or satellite communications system?<br>**Standard of Proof:** Resumes showing years of experience as specified. | **Criteria:** Offerors must possess the equipment required to refinish a 3,500 sq. ft. wood floor.<br>**Question on Technical Information Questionnaire (TIQ):** Does the Offeror own or lease equipment that will be used to refinish a 3,500 sq. ft. wood floor IAW C.4.5?<br>**Standard of Proof:** Specify list of equipment and certificates of ownership for equipment or lease agreements. |
| **Requirement:** Engine must be able to be operated with JP-8 (C.1.3)<br>**Question on TIQ:** Does the vehicle run on JP-8 IAW ATPD- XXXX Section 3.3.5.1?<br>**Standard of Proof:** Manufacturer’s spec sheet for engine. | | |

## C-11 Flow Chart For Selection of Best Value Methodology




## C-12 LPTA – Sample Evaluator Write-Up

### Describe the Evaluation Process in the Source Selection Plan – Then Fully Document the Evaluation in Accordance With the SSP

Use a checklist or evaluation form such as the one below:

| | | |
|---|---|---|
| **FACTOR 3: Usability** | **SUBFACTOR 3.2: Setup and Breakdown** | **OFFEROR:**<br><br>**RFP No:** |
| **Instruction to Offeror** | | **Evaluation Criteria** |
| The offeror shall setup its radar system for test to the point of data recording. After completion of the test, the Offeror shall breakdown its system and return the system to its pre-setup state. | | The government will evaluate the offeror's radar system setup and breakdown.<br>To receive an acceptable rating, the Offeror must demonstrate all of the below items:<br>a. The system must be transportable by a two person carry.<br>b. The system must be setup, broken down and operated by one person.<br>c. The offeror must set up its radar system within a time not to exceed one hour using one person and break down its radar system within a time not to exceed one hour using one person.<br>d. Cable connectors connect and disconnect using no more than one turn, or other quick-disconnect system.<br>e. When the radar system antenna is mounted on the tripod, the range of motion must be +90 degrees to -10 degrees in elevation (horizontal is 0 degrees) and 360 degrees azimuth, without antenna removal. |
| ***Acceptable***<br>**Standard of Proof** | * The system is transportable by a two person carry; and is setup, broken down and operated by one person.<br>* The offeror sets up its radar system within a time not to exceed one (1) hour using one person, and breaks down its radar system within a time not to exceed one (1) hour using one person.<br>* Cable connectors are quick to connect and disconnect using no more than one turn, or other quick-disconnect system.<br>* When the radar system antenna is mounted on the tripod, the range of motion is +90 degrees to -10 degrees in elevation (horizontal is 0 degrees) and 360 degrees azimuth, without antenna removal. | |
| ***Unacceptable*** | Not clearly meeting the requirements required to be acceptable. | |
| | **Acceptable** | **Unacceptable** |

**SETUP/**
**BREAKDOWN**

**NARRATIVE:**

**TEAM MEMBER:** **DATE:**

**Evaluation Criteria: The Government will evaluate the offeror's radar system setup and breakdown.**

***To receive an acceptable rating, the offeror must demonstrate <u>all</u> of the below items:***

a. The system must be transportable by a two person carry.

b. The system must be setup, broken down and operated by one person.

c. The Offeror must set up its radar system within a time not to exceed one hour using one person and break down its radar system within a time not to exceed one hour using one person.

d. Cable connectors connect and disconnect using no more than one turn, or other quick-disconnect system.

e. When the radar system antenna is mounted on the tripod, the range of motion must be +90 degrees to -10 degrees in elevation (horizontal is 0 degrees) and 360 degrees azimuth, without antenna removal.

Evaluation narrative write-up below provides an example of both 'Acceptable" and "Unacceptable" proposal responses:

**Standard of Proof**

**Narrative:**

**Acceptable**: The offeror proposed a system that can be transported by two people (page 12); can be setup, broken down, and operated by one person (page 13); and can be assembled and disassembled in less than one hour (45 minutes) (page 14). The offeror's approach uses cable connectors that connect and disconnect using only one turn and the range of motion of the radar system antenna is +90 degrees to -10 degrees in elevation and 360 degrees azimuth (page 22).

**Unacceptable**: The offeror proposed a system that can be transported by two people (page 12); can be setup, broken down, and operated by one person (page 13); ***however, the system cannot be assembled and disassembled in less than one hour (90 minutes, as stated in the offeror's proposal in Volume 1, page 16). Based on the evaluation criteria, this is unacceptable and results in the entire factor being unacceptable.*** The offeror's approach uses cable connectors that connect and disconnect using only one turn and the range of motion of the radar system antenna is +90 degrees to -10 degrees in elevation and 360 degrees azimuth (page 22).

**OFFEROR NAME:**_____
**RFP NUMBER:**_____

| Factors | RFP Requirement Reference | Proposal Reference | Standard of Proof | Acceptable/ Unacceptable | Evaluators Comments |
|---|---|---|---|---|---|
| **1.0 TECHNICAL EXECUTION** | | | | | |
| 1.1. Key Personnel Professional Qualifications | | | | | |
| 1.2 Technical Certifications | | | | | |
| 1.3 Onsite Courseware Acceptance | | | | | |
| 1.4 Onsite Training Course | | | | | |
| 1.5 Electronic Classroom Upgrade | | | | | |
| **2.0 PROGRAM MANAGEMENT** | | | | | |
| 2.1 Integrated Master Schedule (IMS) | | | | | |
| 2.2 Computer-Based Training Development Schedule/Plan | | | | | |
| 2.3 Electronic Classroom Upgrade Schedule / Plan | | | | | |
| **3.0 ON-SITE PERSONNEL AND CERTIFICATIONS** | | | | | |
| 3.1 Manning Chart Provided | | | | | |

3.2 Labor categories to perform courseware and electronic classroom requirements. Minimum labor categories include Instructional Systems Specialists, Graphic Artists, Programmers, Computer Specialists and/or Engineers and Subject Matter Experts..

**4.0 SECURITY**

4.1 Classified Information Security Requirements

**5.0 PAST PERFORMANCE**

# Appendix D Streamlining Source Selection

## D-1 General Streamlining Tactics – *(No Supplemental Army Guidance)*

## D-2 Preparation for Proposal Evaluation and Source Selection – *(No Supplemental Army Guidance)*

## D-3 Source Selection Management Plan – *(No Supplemental Army Guidance)*

## D-4 Tiered or Gated Approaches – *(No Supplemental Army Guidance)*

## D-5 Oral Presentations

### Introduction

Oral presentations, as presented at FAR Part 15.102, provides offerors an opportunity to substitute or augment written information and can be conducted in person, via video teleconferencing, or a mix of the two. Pre-recorded videotaped presentations do not constitute an oral presentation since it

does not represent a real-time exchange of information, however, recordings may be included in offeror submissions when appropriate.

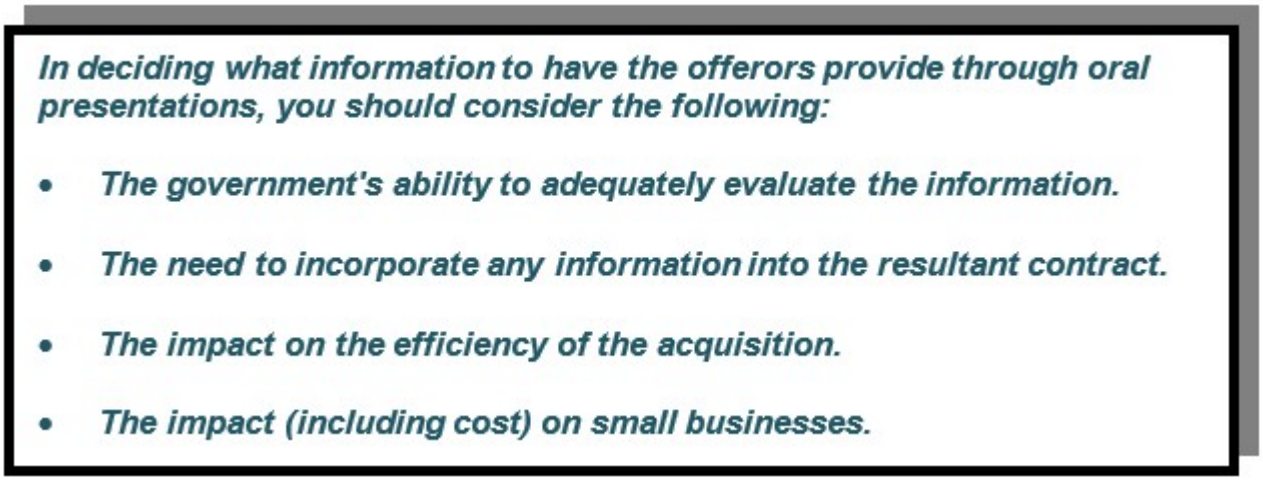
Oral presentations can be beneficial in a variety of acquisitions and are most useful when the requirements are clear, complete, and are stated in performance or functional terms. Oral presentations may be ideal for gathering information related to how well offerors understand, will approach, and qualifications offerors are to perform required work.

**Scope of the Oral Presentation**

Before deciding if oral presentations will be allowed for a given acquisition, the PCO or SSA must first consider and determine if applicable state or country privacy laws will impact and or restrict recordings of presenters/presentations. If oral presentations are deemed acceptable, the PCO or SSA then decides if the information needed to be evaluated and if factors and subfactor criteria is best presented orally, in writing, or through a combination of both means.

Oral presentations cannot be incorporated into the contract by reference, so any information to be made part of the contract needs to be submitted in writing. At a minimum, the offeror must submit certifications, representations, and a signed offer sheet (including any exceptions to the government's terms and conditions) in writing. Additionally, as a rule of thumb, the offeror must submit other hard data ("facts"), such as pricing or costing data and contractual commitments, as part of the written proposal.

Oral presentations can convey information in such diverse areas as responses to sample tasks, understanding the requirements, experience, and relevancy of past performance.




Require offerors to submit their briefing materials in advance of the presentations. This will allow government attendees an opportunity to review the materials and prepare any associated questions.

**Request for Proposal Information**

If oral presentations are appropriate, all offerors must be notified in the RFP that the government will use oral presentations to evaluate and select the contractor. The proposal preparation instructions must contain explicit instructions and guidance regarding the extent and nature of the process that will be used. Elaborate presentations should be discouraged since they may detract from the information being presented. At a minimum, include the following information in the RFP:

 The types of information the offeror must address during the oral presentations and how it relates to the evaluation criteria,

 The required format and content of the presentation charts and any supporting documentation,

 Any restrictions on the number of charts, the number of bullets per chart, and how material/ documentation will be handled that does not comply with the restrictions,

 The required submission date for presentation charts and/or materials,

 The approximate timeframe when the oral presentations will be conducted and how the order of the offerors' presentations will be determined,

 Whether any rescheduling will be permitted if an offeror requests a change after the schedule has been established,

 The total amount of time each offeror will have to conduct their oral presentation,

 Who will make the presentation and a requirement that the offeror provide a list of names and position titles of presenters,

 Whether presentations will be by video, or audio taped,

 The location and a description of the presentation site and resources available to offerors,

 Any rules and/or prohibitions regarding equipment and media,

 How will documents or information referenced in the presentation material but never presented orally be treated,

 Any limitations on Government-Offeror interactions during and or after presentations,

 Whether presentations will constitute discussions (S*ee Fi gu re 3-3*),

 Whether use of information provided during oral presentations is solely for source selection purposes, or whether information will become part of the contract (which will in turn require a subsequent written submission of that information), and

 Whether offerors should include any cost/price data in their presentations.

**Timing and Sequencing**

Oral presentations can be conducted either before or after establishing the competitive range. When oral presentations are the only means of proposal submission, they must be presented by all offerors. If oral presentations are conducted prior to establishing the competitive range, care must be taken to ensure the presentations do not result in discussions.

Since preparing and presenting oral presentations involves time and expense, thought should be given regarding requiring offerors who are not likely to be serious candidates for award having to conduct oral presentations. This can be an important consideration with some small businesses. When this is or will likely be a concern, it is recommended to establish the competitive range prior to oral presentations and clearly articulate the methodology and order of process in the RFP.

The PCO will often draw lots to determine sequence of the offerors' presentations. The time between the first and the last presentations should be as short as possible to minimize any perceived or actual advantages to the offerors that present later in the sequence.

**Time Limits**

Establish a total time limit for each offeror's presentation. It is not advisable to limit the time for individual topics or sections within the presentation as this detail is at the discretion of and is the presenter's responsibility to decide. If planning a question-and-answer session, it is excluded from the allotted time for presentations and a separate time limit it is established.

There is no ideal amount of time to be allotted for presentations and or question-and-answer sessions. The decision of how much time to allocate is determined based on prudent business judgment supported by the complexity of the acquisition and the PCO's or others' experience and lessons learned.

**Facility**

Ideally presentations will be conducted in a facility and environment that can be controlled. This helps guard against interruptions, distractions, and helps to ensure a more level playing field for all offerors and presenters. Nothing precludes oral presentations being conducted at offeror's facilities. This may be more efficient if site visits, or other demonstrations are part of the source selection process.

If using a government-controlled facility it should be made available for a pre-inspection, and if warranted a brief run-through of the agenda and order of events. Allowing offerors to get acquainted with the facility can help to minimize distractions during the presentation of content.

**Recording the Presentations**

Having an exact record of the presentation can prove useful during the evaluation process, and in the event of a protest or litigation. Oral presentations can be recorded using a variety of media, e.g., videotapes, audio tapes, written transcripts, or a copy of the offeror's briefing slides or presentation notes. The SSA is responsible for determining the method and level of detail of the record.

***Recording the presentation by some appropriate means is not only required by FAR 15.1029(e), but it also makes good business sense.***

If using videotaping, allow for the natural behavior of the presenters. If slides or view graphs are used, the camera should view both the podium and screen at the same time. Microphones shall be placed so that all communications can be recorded clearly and at adequate volume. Every effort should be made to avoid letting the recording become the focus of the presentation.

The recording, which is considered source selection information, will become part of the official record. A copy of the recording shall be provided to the offeror, with the master copy sealed and securely stored by the government to ensure there are no allegations of tampering in the event of a protest or court action.

**Government Attendance**

The PCO should chair every presentation. All of the government personnel involved in evaluating the presentations should attend every presentation.

**Presenters**

The offeror's key personnel who will perform or personally direct the work being described should conduct their relevant portions of the presentations. Key personnel include project managers, task

leaders, and other in-house staff of the offerors, or their prospective key subcontractors' organizations. This will avoid the oral presentation becoming the domain of a professional presenter, which would increase costs, detract from the advantages of oral presentations, and adversely affect small businesses.

**Reviewing the Ground Rules**

Prior to each presentation, the PCO shall review the ground rules with the attendees. This includes discussing any restrictions on Government-Offeror information exchanges, information disclosure rules, documentation requirements, and housekeeping items. These ground rules should also be included in the RFP.

If using a quiz as part of your evaluation, the PCO needs to discuss the related ground rules. For example, can the offeror caucus or contact outside sources by cell phone before answering?

Too much control and regulation should be avoided since it will inhibit the exchange of information. However, if intent is to avoid discussions, the PCO should control all exchanges during the presentations. If conducting oral presentations after opening discussions, compliance with FAR 15.306 and 15.307 is required.

**Evaluation of Presentations**

Evaluations should be performed immediately after each presentation. Using preprinted evaluation forms will help the evaluators collect their thoughts and impressions. Remember, even if preprinted forms are used, evaluators have to provide the rationale for their conclusions.

### D-6 Using Demonstration in Source Selection – *(No Supplemental Army Guidance)*

### D-7 Highest Technically Rated Offeror (HRTO) Approach – *(No Supplemental Army Guidance)*

### D-8 Performance Price Tradeoff – *(No Supplemental Army Guidance)*

### D-9 Useful Websites and Training

Source Selection templates are located on the ODASA(P) Procurement.Army.Mil (PAM) Knowledge Management Portal, in the Army Templates and Guides Library:

https://spcs3.kc.army.mil/asaalt/procurement/SitePages/NewTemplates.aspx

## Appendix E Intellectual Property, Data Deliverables, and Associated License Rights

# CHAPTER 1 PURPOSE, ROLES, AND RESPONSIBILITIES

## E-1.1 Purpose

The purpose of Appendix E is to provide acquisition professionals with guidance and/or best practices for conducting market research, developing solicitations, evaluating proposals, and awarding acquisitions requiring intellectual property (IP), data deliverables, and associated license rights. IP, data deliverables, and associated license rights are required for the operation, maintenance, installation, and training (OMIT); modernization; and sustainment of Army systems and services throughout a program's lifecycle.

Historically, the acquisition of IP, data deliverables and associated licenses has been constrained by the Government's inability to accurately define requirements, resulting in a number of programs becoming "vendor locked" into sole source agreements. The Government is now focused on reducing the number of sole source arrangements, promoting competition to the maximum extent practical, and avoiding or mitigating scenarios where a small amount of proprietary technology restricts a competitive re-procurement or sustainment of a system or service.

Title 10, U.S.C. § 2464(a)(1) states that the DoD must maintain a "ready and controlled" source of technical competencies and resources necessary to ensure effective and timely response to mobilization, national defense contingency situations, and other emergency requirements. In order to achieve that objective, appropriate levels of IP, data deliverables, and associated license rights must be obtained. The acquisition authority for licensing, management of IP, data deliverables and associated license rights is Title 10, U.S.C. Chapter 275, Proprietary Contractor Data and Rights in Technical Data.

The Program Office is responsible for preparing an IP Strategy, which is summarized, or wholly contained within, in the Acquisition Strategy/Plan sent to the Contracting Officer. The IP Strategy is a living document that identifies and manages the full spectrum of required IP, data deliverables, and associated license rights from inception of a program through the complete life cycle. The continuous assessment of program needs can lead to achieving greater competition and more affordable sustainment costs within the business objectives of the program.

The information provided in this Appendix and referenced templates are focused on generating thoughts and discussions among and across the respective acquisition teams. Use and/or modify as appropriate for individual acquisitions.

*NOTE: This guide may be used for all source selections, however, the language used in this guide is tailored to FAR Part 15 processes and procedures.*

## E-1.2 Applicability and Waivers – *(No Supplemental Army Guidance)*

## E-1.3 Best Value Continuum

**Subjective Tradeoff.** Subjective tradeoff can be utilized for the acquisition of IP, data deliverables, and associated license rights. (Reference DoD Source Selection Procedures identified at 1.3.1.3, Appendix B, and Army Source Selection Supplements Appendix B).

**Value Adjusted Total Evaluated Price (VATEP).** Use of VATEP may be suitable for procuring Intellectual Property when the Government can determine the value (or worth) and quantify it in the Request for Proposal (RFP). (See DOD Source Selection Procedures identified at 1.3.1.4, Appendix B, and Army Source Selection Supplement Appendix B).

**Lowest Price Technically Acceptable.** Lowest Price Technically Acceptable (LPTA). Use of LPTA is not suitable for procuring Intellectual Property or data rights.

### E-1.4 Source Selection Team Roles and Responsibilities

**Key Components of the Source Selection Team (SST)**

**The Procuring Contracting Officer (PCO).**

Early in the acquisition process, the PCO will work with program personnel to ensure the acquisition strategy includes identifying, acquiring, licensing, and enforcing the U.S. Government's rights to IP, data deliverables, and associated rights necessary to support operation, maintenance, installation, training (OMIT); modernization; and sustainment of a system or service throughout the acquisition lifecycle.

Work with the Program Manager (PM) to: 1) clearly define the overall requirement; 2) determine what IP, data deliverables, and associated license rights are necessary to achieve lifecycle goals; and 3) include in the solicitation/contract.

Negotiate for IP, data deliverables, and associated license rights early in the acquisition lifecycle and/or when competition exists in order to achieve a more affordable cost/price for the Government.

Provide business advice regarding IP strategy to PMs and Product Support Managers, as appropriate.

Assist in crafting the evaluation criteria.

**Legal Counsel.**

Consult cognizant legal offices (IP Attorney and/or Patent Attorney, if available) for detailed advice on IP, data deliverables, and associated license rights. Include IP Attorney or Patent Attorney if available, as an additional legal advisor to the source selection team.

**Program Manager (PM) / Requiring Activity (RA).**

Establish an Integrated Product Team (IPT) including subject matter experts (SMEs) from a variety of disciplines, including early coordination with PCOs and an IP or patent attorney.

In conjunction with Materiel Developers (MATDEVs), prepare an IP Strategy as a standalone document, or wholly contained within the Acquisition Strategy or Simplified Acquisition Management Plan (SAMP), which is required for all program types covered by DoDI 5010.44, Intellectual Property Acquisition and Licensing, starting at inception of a program. Although a team effort, the PM is ultimately responsible for preparing all comprehensive requirement documentation, subject to approval by the cognizant Milestone Decision Authority or other provisions within the Adaptive Acquisition Framework (AAF) (e.g., Urgent Capability Acquisition, Middle Tier of Acquisition, Major Capability Acquisition, etc.). The development and continuous updating of an

effective and robust IP strategy will require active participation of SMEs from a wide variety of disciplines, including but not limited to, engineering, logistics, contracting, cost, and accounting, legal, etc. In addition, Implementation Guidance for Army Directive 2018-26, Enabling Modernization through Management of Intellectual Property, 17 December 2020, Appendix C provides a sample negotiated license.

Ensure program personnel engaged in all stages of the acquisition life cycle have relevant knowledge of the rights and obligations of the Government regarding IP matters, including IP law and regulations.

Identify early in the acquisition process the intellectual property, data deliverables, and associated license rights needed in all phases of a defense business system or weapons system lifecycle.

For identified license rights, identify whether the Government: has already received these rights under another agreement; would be entitled to these license rights by operation of standard DFARS clauses; or would need to negotiate a separate license agreement to receive these license rights.

Support the PCO in development of the negotiation objectives and be accessible for participation in the negotiation process for required IP, data deliverables, and associated license rights.

Coordinate with Product Support Managers, logistics chief, technology lead, or other project office personnel, as appropriate.

Assist in crafting evaluation criteria.

## CHAPTER 2 PRESOLICITATION ACTIVITIES

### E-2.1 Conduct Acquisition Planning

The Program Managers and MATDEVs are required to document an IP strategy for all program types covered by DoDI 5010.44, Intellectual Property Acquisition and Licensing, starting at the Materiel Development Decision (MDD) and out through the declaration of a Program of Record (POR). The IP strategy is summarized in the Acquisition Strategy/Plan or SAMP and identifies the program’s comprehensive approach to managing the IP, data deliverables, and license rights requirements that will affect the program’s cost, schedule, and performance throughout the acquisition lifecycle. The IP strategy evolves over time and should continuously reflect the current status and desired goals of the program which is achieving greater competition and more affordable sustainment costs within the business objectives of the program. Acquisition planning includes all members of the IPT, to include PM, Engineering, Scientists, PCOs, Legal Counsel, etc.

Defense Acquisition University courses and learning modules to assist in Intellectual Property acquisitions are listed below. The courses are current as of the publication date of this appendix, please reference https://www.dau.edu/blogs/dau-intellectual-property-ip-and-data-rights-… for additional offerings.

**Courses/Learning Assets**

CLM 002, Intellectual Property (IP) Valuation

CLE 068, Intellectual Property and Data Rights

CLE 069, Technology Transfer

CLE 019, Modular Open Systems Approach

CLM 071, Introduction to Data Management

CLM 072, Data Management Strategy Development

CLM 073, Data Management Planning System

CLM 075, Data Acquisition

CLM 076, Data Markings

CLM 077, Data Management Protection and Storage

LOG 2150, Technical Data Management

CACQ 008, Foundational IP Credential.

CACQ 011: Foundational Software Acquisition Management Credential

CON 0180: Data Rights

**IP Strategy**

When developing the comprehensive IP strategy and the capability requirements for performance and sustainment, consider the following in respect to IP, data deliverables, and associated license rights (for additional information consult Army Directive 2018-26, Enabling Modernization Through the Management of Intellectual Property.):

1. Develop an IP strategy that accounts for both short-term and long-term needs, covering the full lifecycle of the system or service. The IP strategy should continuously be assessed (e.g., sustainment reviews (SR)) and updated to reflect current status (i.e. evolving technology, reduced program cost or schedule, etc.) and desired goals/objectives. At a minimum, customize IP strategies based on the common, shared, and unique characteristics of the system and its components: system architecture and interfaces: product support/sustainment strategy: organic industrial base strategy of the DoD Component concerned; whether the item can be found in the commercial market: and whether the standard commercial licensing terms meet DoD needs. (NOTE: These can be considered strengths during a tradeoff, but cannot be mandated.)

2. Determine the appropriate sustainment approach to use for the IP strategy. The strategy should focus on achieving greater competition and more affordable sustainment costs. Anticipate the impact of sustainment costs within program business objectives over the entire system or service lifecycle. (NOTE: This can be considered a strength during a tradeoff, but cannot be mandated.)

3. Determine what kind of data (e.g., form, fit, and function data), software, and associated license rights are required/desired for all stages of the acquisition life cycle, including operation, maintenance, installation, and training (OMIT); modernization; and sustainment. The IP strategy should be customized to meet specific sustainment needs of the program (i.e., data deliverable and any required computer software source code).

4. The Government should consider the following techniques for securing data/software and associated/corresponding license rights:

a. Consider including contract provisions providing for the transfer of a detailed data/software package with the corresponding license rights to the Government if the original contractor goes out of business or drops the particular item from production.

b. Consider including data escrow provisions (see DFARS PGI 227.7203-2(b)(2)(ii)(D)).

5. Describe the Modular Open System Approach (MOSA) objectives that drive modularity decisions to support the operational and lifecycle needs. Describe how IP, and related matters, necessary to support the program's use of modular open systems approaches, in accordance with 10 U.S.C. Sections §§ 3771-3775 and §§4401 - 4403, will be addressed. This includes providing guidance for how solicitations and contracts will:

a. Identify and require all major systems interfaces to be based on widely supported and consensus-based standards (if available and suitable), which are preferably non-proprietary.

b. Include requirements to acquire the appropriate IP rights in such major systems interfaces.

c. Include appropriate requirements for other non-major systems interfaces (e.g., interfaces necessary for segregation and reintegration activities).

d. Include request for Government Purpose Rights, when appropriate, for Circuit Card Assemblies in support of organic industrial base (OIB) DSOR and DSOS capabilities.

6. Appropriately reflect the IP strategy in both the solicitation and the resultant contract. Contents of both documents should include the IP, data deliverables, and associated license rights necessary to accomplish program objectives.

7. Request that offerors propose their own sustainment transition plan (to transition sustainment from their organization to the Government or another contractor) as an evaluation factor (technical sub factor – Supportability and Maintenance).

8. The Government should only seek the IP, data deliverables, and associated license rights necessary to support the mission of the program. In some instances, where offerors are willing to provide the Government with additional license rights to technical data and software, such additional costs may not be cost effective. Having an evaluation factor in a competitive procurement environment may drive down the associated costs for broader technical data or software license rights.

9. Consult with a Government IP attorney on IP, data deliverables, and associated license rights. Statutes and regulations related to technical data, software, and associated rights are set forth in 10 USC § Chapter 275 (and DFARS 227.7102-1, DFARS 227.7103-1, DFARS 227.7202-1, and DFARS 227.7203-1). The statute and DFARS regulations should be read carefully before procuring any technical data or software. Ensure the Government receives sufficient rights in technical data and software to enable organic or competitively established sustainment of items.

IP Strategy Checklist

**IP Strategy Checklist***

| **Phases of Acquisition** | **Key IP Management and Acquisition Activities, Considerations, Resources** |
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| **Pre-Solicitation** | 1. Align the initial design studies to the major functional elements<br>2. Establish a clear understanding of the IP, data deliverables, associated license rights requirements. If it is likely that an Offeror may propose IP that was not developed at private expense, the Contracting Officer should engage with DCAA to determine what assistance can be provided to verify funding source/existing data rights, specific to that requirement.<br>3. Contracting Officer/Specialist serves as Business Adviser in development of acquisition documentation.<br>4. PM and Contracting Officer/Specialist conduct market research, including through the Defense Innovation Marketplace<br>5. Write an IP strategy for the system modules that align with Modular Open Systems Approach (MOSA): Technology developed all/part by USG Funding, get delivery of what you're going to pay for (in native format, if it seems too early or costly to reformat the data for DoD's usual standard) **(Guidance Intellectual Property Strategy - 2015** (IP Strategy Brochure_Final 2-10-15.pdf (dau.edu) **and Army Implementation Guidance, Appendix C** (requires CAC)**)**<br>6. Verify that the strategy includes an approach for the remainder of modules that can be competitively acquired under the Restricted-Proprietary Model: Technology developed entirely at private expense **(IP Strategy Brochure 2015** (IP Strategy Brochure_Final 2-10-15.pdf (dau.edu) **and Army Implementation Guidance, Appendix C** (requires CAC)**)**<br>7. Verify the IP strategy accounts for both short-term and long-term needs, covering the full life cycle of the system.<br>8. Incorporate Modular Open Systems Approach (MOSA) considerations into Acquisition Strategy. |

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| **Solicitation** | 1. The solicitation should clearly and effectively communicate and prioritize IP goals.<br>2. Be transparent in articulating intellectual property; data deliverables; associated license rights requirements; Government operation, maintenance, installation, and training (OMIT); modernization; and sustainment objectives.<br>3. The Performance Work Statement (PWS)/Statement of Work (SOW) should identify the license rights and data deliverables (including OMIT data) required and be linked to CDRL(s). The offeror may need to provide costs/prices, if separately priced.<br>a. License Rights and data deliverables (including OMIT data) described under CDRLs should comprise a complete package (or as much as needed) of all technical data and computer software for enabling maintenance of an entire system.<br>4. Request that the offeror identify restrictions on license rights.<br>5. Incorporate delivery requirements and require offerors to assert their specific restrictions on license rights.<br>6. Required data or software must be a deliverable, assigned to a CLIN.<br>7. Incorporate appropriate provisions and contract clauses.<br>8. For commercial technologies, request information similar to that required in the DFARS listing and assertion requirements provision (DFARS 252.227-7017) and include CDRL requirements for copies of commercial and negotiated licenses in the solicitation.<br>9. Request that offerors propose their own sustainment transition plans. Suggestion: Use sustainment transition plans as an evaluation factor.<br>10. Use the deferred ordering and deferred delivery clauses (but don't overestimate its power!) Should not be used in place of proper acquisition planning. Acquisition planning for the data deliverables, and incorporate in the solicitation.<br>11. Consider incorporating statement for trademark license rights in solicitations and contracts *Army Source Selection Supplement, Section H-2.3, Develop the Request for Proposal<br>12. Consider adding in Section H – Special Contract Requirement language regarding background patent rights.<br>13. Consider adding in Section H – Special Contract Requirement language regarding Modular Open Systems Approach (MOSA) – including interfaces, patent and data rights, and data deliverables.<br>14. If the IP strategy includes recompeting a system, subsystem, or component, consider requesting the offeror's proposed terms and conditions for delivering a Technical Data Package (TDP) that grants rights to the TDP for the system/subsystem/component. Proposal shall clearly outline the terms and conditions, all associated costs, and any minimum quantity (if applicable), in addition to providing the Government with the capability to obtain an IP license from the date of notification of award. Government should be granted sufficient IP rights including technical data rights and background patent rights necessary to allow the Government to compete the design, potentially secure additional sources for the system/subsystem/component, and/or use submitted technical data on any other Government programs.<br>15. Consider the use of escrow. A data escrow account is an account, held by a third-party or even a prime (provided the prime is not the owner of the data to be placed in escrow), which is populated by the offeror with designated technical data, computer software, and/or computer software documentation ("the escrow data") and will only be released to the Government under specified, mutually agreed to, conditions. |

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| **Evaluation** | 1. Evaluate IP, data deliverables, license rights, and MOSA in accordance with section M of the solicitation and the source selection plan. Negotiate, as needed, whether sole source or competitive.<br>2. Evaluate the proposed assertions (as to the restrictions on license rights).<br>3. With the assistance of a cognizant IP attorney, research to verify IP and data rights assertions made by each offeror. If there is reason to believe an offeror correctly asserted an item was developed exclusively at private expense, audit the offeror's records with the assistance of the Defense Contracting Audit Agency (DCAA). (NOTE: The Contracting Officer should engage with DCAA as early in the process in the procurement planning process as possible to determine DCAA's availability to assist.) See DFARS 252.227-7019 or DFARS 252.227-7037 for additional information.<br>4. Evaluate the offeror's provided information for commercial technologies (similar to that required in the DFARS listing and assertion requirements provision (DFARS 252.227-7017)).<br>5. Evaluate offeror's proposed terms and conditions for delivering a TDP and granting rights to the TDP for the system/subsystem/component, as requested in Section L, in accordance with the evaluation criteria stated in the RFP.<br>6. Ensure specific up-front delivery requirements for technology being developed under the contract are met; determine if cost-effective/fair and reasonable.<br>7. Evaluate and negotiate competitively-priced options for IP deliverables for which Army's "need" for the deliverable is dependent on future uncertain events or decisions – When it is not certain whether an up-front purchase is cost-effective/fair and reasonable<br>8. Research to determine the cost of same or similar license rights or data deliverables (including data for OMIT). Research and understand any market trends specific to data and license rights that may directly impact cost. (This is typically necessary when license rights are a significant portion of the price and the evaluation will include a cost realism analysis or a complex price reasonableness analysis.)<br>9. When applicable, in accordance with the stated evaluation criteria in the solicitation:<br>a. Determine whether the software developer/owner is identified.<br>b. Determine whether the offeror wholly owns the rights necessary to make, use, sell, or offer for sale.<br>c. Determine whether there is a third-party software developer/owner.<br>d. Determine whether offeror proposed third-party software is open source software.<br>e. Confirm the offeror will ensure negotiated rights are passed down to subcontractors.<br>f. Determine whether the offeror has the capability and/or willingness to deliver license rights for technical data and computer software necessary for depot level maintenance.<br>g. Confirm whether the offeror's proposed special licenses meet the solicitation criteria and are reasonable. |

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| **Negotiations** | 1. Early in negotiation process, when competition exists, establish an environment of open communication and negotiations of prices/costs.<br>2. Consider negotiating license rights and data deliverables (including data for OMIT) required (should be linked to CDRL(s)) and costs/prices, if separately priced.<br>3. Consider negotiating to ensure a complete package (or as much as needed) of all technical data and computer software for enabling maintenance of an entire system is delivered, when appropriate.<br>4. Contract Officer should discuss the proposed level of rights and proposed price/cost.<br>5. Ensure requirements for license rights, and data deliverables – including data for OMIT (developed, delivered, or provided by subs of any tier) are understood and request inclusion of required/desired terms in contracts with subcontractors. |
| **Award** | 1. Incorporate into contract all asserted license rights restrictions.<br>1. Incorporate into contract all applicable IP clauses and provisions.<br>2. Document (within contract) specific up-front delivery requirements for: 1) Technology being developed under the contract (i.e., you're already paying for it!); and 2) Known requirements for proprietary technology deliverables, when cost-effective/fair and reasonable.<br>3. Ensure all data deliverables are assigned CLIN(s) and CDRL(s) and are traceable to the PWS/SOW<br>4. Incorporate proposed product support/sustainment strategy in the final contract.<br>5. If escrow account is used, ensure it is assigned a priced CLIN(s). |

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| **Post Award/ Administration** | 1. Make sure the award is clear on what will be delivered and delivery date.<br>2. If there is a patent clause (usually in research and development contracts), ensure the invention disclosures are timely, patent applications are properly filed when appropriate, and the Government's rights are established. Establish follow-up procedures.<br>3. Monitor to ensure the deliverable schedule is being met and the data quality is as required.<br>4. Review the IP strategy as major development milestones are completed.<br>5. Continuously, assess and update the IP strategy and ensure a life cycle consideration for competition is sustained within the costs of the program's business objective.<br>6. Create a Program or PEO Repository to ensure that the data can be retrieved and [re] used when it is needed later (bonus: transfer to, and reuse by, other programs whenever possible).<br>7. Technical/operational needs are the responsibility of the Government. Do not rely on industry to ensure Government requirements can be competitively replaced.<br>8. Business/legal needs are the responsibility of the Government program office with support from appropriate contacting office and legal office (e.g., tracking Gov't investment to support challenging IP restrictions/assertions).<br>9. Update as necessary any post-award changes to the list of asserted data rights restrictions.<br>10. Monitor compliance of requirement to report inventions developed during contract performance.<br>11. Conduct reviews to verify data is delivered and complies with contract requirements: 1) Does the data delivered match the technical/functional requirements identified in the contract; and 2) Asserted data rights markings (Do the markings match up with the list of assertions?).<br>12. Assess Technical compliance (audit or Independent Verification & Validation).<br>13. Regularly audit deliverables for Restrictive Markings (recurring) conforming and justified.<br>14. Invoke withhold payment clause (DFARS 252.227-7030, Technical Data-Withholding of Payment) for non-compliant technical data.<br>15. Initiate a validation procedure when markings are not justified (i.e., do not accurately describe the Army's license right) Refer to DFARS 252.227-7019 and 252.227-7037.<br>16. Follow procedures under DFARS 252.227-7013 and 252.227-7014 when markings are nonconforming (i.e., not a marking prescribed by the DFARS). |

*Adapted from: "Intellectual Property Acquisition and Licensing Checklist" DoD Brochure on Intellectual Property Strategy, Prepared by the Department of Defense Open Systems Architecture—Data Rights Team August 2014

**Market Research**

Once the Government's requirements are sufficiently defined, market research in accordance with FAR Part 10, begins and is a coordinated effort by the PM or MATDEVs and the PCO. The market research technique utilized is at the discretion of the acquisition professionals. When conducting market research, consider the critical characteristics and needs of the requirement to include the

following with respect to IP, data deliverables, and associated licensing rights:

1. Are there any hardware or software solutions that meet the requirement(s) that were developed using Government funding? If so, what?

2. Does Industry have any input to assist the Government in reaching the Government's objectives or meeting the Government's requirement(s)? If so, what?

3. Industry Standards

a. What are the usual terms in commercial transactions for the sale of the product or service you require?

b. Are the license and other intellectual property rights adequate for Government's needs?

c. Are there any proprietary processes or materials (e.g., trade secrets) that may limit future competition?

d. Do the commercial terms and conditions violate laws or policies applicable to Government contracting?

 Note: Rights related to commercial software are governed by the standard commercial software license agreement, rather than any DFARS clauses.

e. Does the Government need/want to negotiate revisions to the standard commercial software license agreement in instances where the commercial software license agreement conflicts with Federal procurement law or does not meet the Government user's needs?

 Note: In some instances, substantial revisions to the standard commercial software license agreement (e.g., additional software copies) may result in additional costs.

4. Technical Data Delivery Format

a. Contractors often do not have technical data in formats that DoD typically expects to receive. The Government should be willing to accept standard commercial data formats, to the maximum extent practicable.

b. Competitive: What are industry standards for technical data deliverable format(s)?

c. Sole Source: What is the contractor's usual deliverable format for technical data?

5. Technology Maturity

a. How much of the software and/or hardware is mature?

b. How much of the software and/or hardware is still in development or testing?

c. What is the overall Technology Readiness Level (TRL)?

d. Software is typically not delivered 100 percent "bug" free. It may take several years to mature. The logistics product support/sustainment strategy should address software maintenance including "bug" fixes.

6. Support and Sustainment

a. Offerors typically provide software bug fix support, but length of support varies. The Government may consider bug fix support (including cost, length, and scope of such support) during source selection as a trade-off.

 Are software bug fixes supported?

 If so, how long are they supported?

b. Offerors may provide software upgrades and cybersecurity updates. The Government may consider offeror provided software upgrades (including cost, length, and scope of such support)

 Are software upgrades and cybersecurity updates provided at no additional cost?

 If so, how long are they provided? What are the terms and conditions?

c. Is there a plan to later modify deliverable hardware, data, or software?

d. Will a data package be required?

e. Will access to support and support-related technical information be obtained, for hardware and software, to cost-effectively maintain the system at each of the designated levels of maintenance and to foster competition for sources of support throughout the life-cycle.

f. Will government purpose rights (GPR) to a Level 3 Technical Data Package enable 3D Modeling for hardware to avoid vendor lock and allow for hardware repairs within the organic industrial base (OIB)?

7. Logistics

a. What is the approximate period of time required to prepare validated procedures addressing software and configuration file loading and to maintain the software baseline?

b. What period of time is required to transition and set-up the necessary tools and test equipment for the Government to conduct maintenance on the software baseline?

c. What is the approximate period of time required to train Government personnel on required hardware testing, troubleshooting, and repair procedures and procedures for maintaining the software baseline?

### E-2.2 Develop a Source Selection Plan (SSP)

When developing the SSP, consider the evaluation elements contained within the IP Strategy Checklist.

### E-2.3 Develop the Request for Proposals (RFP)

In accordance with FAR 15.203, an RFP is used in negotiated acquisitions to communicate the Government’s requirement(s) to prospective offerors and to solicit proposals. When developing the RFP, consider the following:

1. The RFP should clearly and effectively communicate the Government's IP and data rights priorities. Incorporate delivery requirements and require offerors to assert their specific restrictions, if any.

2. Establish a clear understanding of the IP, data deliverables, and associated license rights requirements.

3. The required data or software must be a deliverable, assigned to a CLIN and associated with a CDRL.

4. Be transparent in articulating IP, data deliverables, and associated license rights requirements. Also, provide transparency for requirements related to data for operation, maintenance, installation, and training (OMIT); modernization; advanced/additive manufacturing; and sustainment objectives with industry.

5. Communicate early with industry. Provide details of the Army's intended program product support/sustainment strategy (including sustainment needs and broad categories of data and/or software required).

6. Determine whether an offeror has the capability to deliver license rights for technical data and computer software necessary for depot level maintenance.

7. Consistent with 10 U.S.C. §§ 3771-3775, the contractor or subcontractor is not required to sell or relinquish to the Government any additional rights in technical data the Government is not already entitled to as a condition of being responsive to a solicitation or as a condition of contract award. However, additional rights conveyed to the Government may be considered part of a source selection tradeoff.

8. Once the technical data and/or software required to complement the maintenance and supply support strategies has been identified, include solicitation provisions and contract clauses related to patent, data, and software license rights. Typical clauses that should be considered for inclusion are:

**Federal Acquisition Regulation (FAR)**

FAR 52.227-1 Authorization and Consent

FAR 52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement

FAR 52.227-3 Patent Indemnity

52.227-5 Waiver of Indemnity

FAR 52.227-6 Royalty Information

52.227-7 Patents-Notice of Government Licensee

FAR 52.227-9 Refund of Royalties

52.227-10 Filing of Patent Applications-Classified Subject Matter

FAR 52.227-11 Patent Rights – Ownership By the Contractor

FAR 52.227-13 Patent Rights – Ownership By the Government

FAR 52.232-39 Unenforceability of Unauthorized Obligations

**Defense Federal Acquisition Regulation Supplement (DFARS)**

DFARS 252.227-7013Rights in Technical Data—Other Than Commercial Products and Commercial Services.

DFARS 252.227-7014Rights in Other Than Commercial Computer Software and Other Than Commercial Computer Software Documentation.

DFARS 252.227-7015 Technical Data–Commercial Products and Commercial Services.

DFARS 252.227-7016 Rights in Bid or Proposal Information.

DFARS 252.227-7017 Identification and Assertion of Use, Release, or Disclosure Restrictions.

252.227-7018, Rights in Other Than Commercial Technical Data and Computer Software--Small Business Innovation Research (SBIR) Program

DFARS 252.227-7019 Validation of Asserted Restrictions--Computer Software.

DFARS 252.227-7020 Rights in Special Works.

DFARS 252.227-7025 Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

DFARS 252.227-7026 Deferred Delivery of Technical Data or Computer Software.

DFARS 252.227-7027 Deferred Ordering of Technical Data or Computer Software.

DFARS 252.227-7028 Technical Data or Computer Software Previously Delivered to the Government.

DFARS 252.227-7030 Technical Data--Withholding of Payment.

DFARS 252.227-7037 Validation of Restrictive Markings on Technical Data.

(NOTE: Regulations change over time and should be checked frequently for currency and content. Not all of the listed clauses above are appropriate together in any particular solicitation or contract. Other clauses may also be appropriate when there is development other than exclusively at private expense. Contract provision and FAR/DFARS clause selection should be modified to fit each effort. In addition to the standard acquisition attorney review, an IP attorney should be consulted prior to the release of any solicitation/contract award involving IP deliverables and associated license rights.)

9. Request that offerors propose their own sustainment transition plan and use it as an evaluation factor (technical sub factor – Supportability and Maintenance).

10. For trademark license rights and protection of Government Program names and model designators consult a Government IP or patent attorney for guidance.

11. Require offerors to submit computer software and data rights assertions of restrictions in a table consistent with DFARS 252.227-7013, DFARS 252.227-7014, or DFARS 252.227-7017.

12. Request that offerors propose all cost(s)/price(s) to acquire additional license and patent rights

than the Government is entitled to and explain any limitations that may be imposed by the offeror. Include FAR 52.227-6 in solicitation if appropriate and certifies cost and pricing data is required. (Note: The offeror is required to identify/disclose any royalty cost(s)/price(s) for third-party patents proposed to be used in performance of the contract.)

13. Ensure the MOSA requirements are set forth in the PWS, SOW, or Statement of Objectives (SOO), (Section C) of RFP, for a proposed Open Systems Management Plan and incorporated in resulting contract.

# CHAPTER 3 EVALUATION AND DECISION PROCESS

### E-3.1 Evaluation Activities

**Proposal Evaluation**

Evaluations shall either use separate technical/risk rating process in the DoD Source Selection Procedures (SSP), section 3.1.2.1, and applying the descriptions in the DoD SSP Table 2A Technical Rating Method; or the combined technical/risk rating process in the DoD Source Selection Procedures, section 3.1.2.2, and applying the descriptions in DoD SSP Table 3 Combined Technical/Risk Rating Method, consider all examples in DoD SSP Table 2A and considerations for application of risk evaluation applicable to the definitions in DoD SSP Table 2B.

Data rights cannot be a factor or subfactor. However, offerors may be granted one or more strengths related to data rights for a give factor or subfactor. Further, the Government cannot require the offeror to relinquish its data rights beyond Government's statutory entitlement. The Government may not assign a weakness or deficiency due to a lack of proposed data rights above the minimum statutory entitlement.

Strength Examples:

1) Delivering technical data with license rights that facilitate future competitive procurement;

2) Delivering items that are available in the commercial market that can be procured by other contractors in a future competitive procurement (even without providing detailed technical information on these commercially available items); and/or

3) Delivering a Product Support/Sustainment Strategy that includes Government purpose rights (licensing technical data to alternate contractors who will be able to participate in future competitive procurements).

**Evaluation Considerations**

When assessing the proposed data rights, consider the following:

1. The Government is entitled to an "unlimited rights license" or an "unrestricted rights license" to form, fit, and function data; and data necessary for operation, maintenance, installation, and training, other than Detailed Manufacturing and Process Data (under DFARS 252.227-7013(b)(1) and DFARS 252.227-7015(b)(1)). Furthermore, the Government is entitled to an "unlimited rights" license for studies, analyses, and test data produced for the contract (when the testing was specified as an element of performance) that relate to non-commercial items, components, and processes.

Thus, the Government should review and validate the offeror's data and software rights assertions, in coordination with the program's attorney advisor, to ensure that the offeror's proposal reflects at least the license rights to which the Government is entitled. (Note: For more detailed information, refer to the Army Data and Rights Guide http://www.acq.osd.mil/dpap/cpic/cp/docs/Army_Data_and_Data_Rights_Guide_1st_Edition_4_Aug_2015.pdf )

2. Negotiate data rights while still in a competitive environment. These negotiations will likely require the Contracting Officer to open discussions unless the solicitation provides another methodology. Although data rights cannot be a factor or subfactor, discussions/negotiations can be opened to negotiate any element of a solicitation or proposal ( see sample language for Sections L&M to incorporate data rights as a possible strength in the evaluation). Note: Certain Associated License Rights will be granted by standard DFARS clauses. Additional Associated License Rights may be applicable negotiated Special License Agreement or commercial license agreement. However, the data delivery requirements must be specified, case-by-case, in each individual contract, and data deliverables must be clearly identified by CLINs and CDRLs that are traceable to the PWS. Deferring the discussion of data deliverables will likely put the Government at a disadvantage, however, it is an option (see DFARS 252.227-7027 Deferred Ordering of Technical Data or Computer Software). If there are no data deliverables, the Government cannot exercise its data rights. The data rights and data deliverables should be negotiated at the same time. The IP Strategy should continuously be updated to forecast future sustainment needs so Government can obtain competitive pricing for future activities.) The negotiated rights shall be passed down to the subcontractor(s).

3. Ensure the solicitation requires the proposal to include the supporting information necessary for the Government to validate contractor's ability to provide any proposed data rights. For example:

a. The offeror's proposal shall demonstrate the ability to grant license rights for technical data and computer software necessary for depot maintenance, if applicable.

b. Identify the software developer/owner. Determine if the offeror wholly owns the rights necessary to make, use, sell, or offer them for sale. Is there a third party software developer/owner?

c. Determine if the offeror proposed third-party and/or utilizes open source software. Will any of the third-party software be open source?

4. With the assistance of a cognizant IP attorney, the Government should conduct research to verify IP and data rights assertions made by the offeror. If the Government has reason to believe that the offeror incorrectly asserted that an item was developed exclusively at private expense, the Government may audit the offeror's accounts with the assistance of the Defense Contracting Audit Agency (DCAA). (NOTE: The Contracting Officer should engage with DCAA as early in the process in the procurement planning process as possible to determine DCAA's availability to assist.)

**E-3.2 Documentation of Initial Evaluation Results – *(No Supplemental Army Guidance)***

**E-3.3 Award Without Discussions – *(No Supplemental Army Guidance)***

**E-3.4 Competitive Range Decision – *(No Supplemental Army Guidance)***

**E-3.5 Discussion Process –** ***(No Supplemental Army Guidance)***

**E-3.6 Final Proposal Revisions –** ***(No Supplemental Army Guidance)***

**E-3.7 Documentation of Final Evaluation Results –** ***(No Supplemental Army Guidance)***

**E-3.8 Conduct and Document the Comparative Analysis –** ***(No Supplemental Army Guidance)***

**E-3.9 Best-Value Decision –** ***(No Supplemental Army Guidance)***

**E-3.10 Source Selection Decision Document –** ***(No Supplemental Army Guidance)***

**E-3.11 Debriefings – See Appendix A of the AS3**

**E-3.12 Integrating Proposal into the Contract –** ***(No Supplemental Army Guidance)***

## CHAPTER 4 DOCUMENTATION REQUIREMENTS

**E-4.1 Minimum Requirements –** ***(No Supplemental Army Guidance)***

**E-4.2 Electronic Source Selection –** ***(No Supplemental Army Guidance)***

## CHAPTER 5 DEFINITIONS

1. **Associated License Rights (formerly Data Rights).** Government's nonexclusive license **rights** in two categories of valuable intellectual property, “technical **data**” and “computer software” delivered by contractors under civilian agency and DoD contracts.

2. **Covered Government Support .** A contractor under a contract, the primary purpose of which is to furnish independent and impartial advice or technical assistance directly to the Government in support of the Government’s management and oversight of a program or effort (rather than to directly furnish an end item or service to accomplish a program or effort), which contractor—

a. is not affiliated with the prime or a first-tier subcontractor, program or effort, or with any direct competitor of such prime contractor or any tier subcontractor in furnishing end item or services of the type developed or produced on the program or effort; and

b. executes a contract with the Government agreeing to and acknowledging—

i. that proprietary or nonpublic technical data furnished will be accessed and used only for the purposes stated in that contract;

ii. that the covered Government support will enter into a non-disclosure agreement with the contractor regarding rights to the technical data;

iii. that the covered Government support will take all reasonable steps to protect the proprietary and nonpublic nature of the technical data furnished to the covered Government support contractor program or effort for the period of time in which the Government is restricted from disclosing the technical data outside of the Government;

iv. that a breach of that contract by the covered Government support with regard to a third-party's ownership or rights in such technical data may subject the covered Government support contractor

1. to criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

2. to civil actions for damages and other appropriate remedies by the or subcontractor technical data is affected by the breach; and

3. that such technical data provided to the covered Government support under the authority of this section shall not be used by the covered Government support contractor against the third-party for Government or non-Government contracts. (10 U.S. Code § 3775- Definitions, paragraph (a))

3. **Computer Software (CS).** Computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation. (DFARS 252.227-7014)

4. **Computer Software Documentation.** Owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software. (DFARS 252.227-7014)

5. **Copyright.** Rights in original works of authorship, fixed in any tangible medium of expression. Works of authorship include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Under U.S. law, registration is not necessary for copyright to exist. Computer software can sometimes be protected by copyright, as a literary work. Copyright does not cover names, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries. (Implementation Guidance for Army Directive 2018-26, Enabling Modernization through Management of Intellectual Property)

6. **Depot-Level Maintenance and Repair.** Material maintenance or repair requiring the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of equipment as necessary, regardless of the source of funds for the maintenance or repair or the location at which the maintenance or repair is performed.

(a) The term includes: (1) all aspects of software maintenance classified by the Department of Defense as of July 1, 1995, as depot-level maintenance and repair, and (2) interim support or contractor support (or any similar contractor support), intent that such support is for the performance of services described in the preceding sentence.

(b) Exceptions. (1) The term does not include the procurement of major modifications or upgrades of weapon systems that are designed to improve program performance or the nuclear refueling or defueling of an aircraft carrier and any concurrent complex overhaul. A major upgrade program

covered by this exception could continue to be performed by private or public sector activities. (2) The term also does not include the procurement of parts for safety modifications. However, the term does include the installation of parts for that purpose. (10 U.S.C. § 2460)

7. **Detailed Manufacturing or Process Data (DMPD).** Technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the contractor to produce an item or component or to perform a process. (DFARS Clause 252.227-7013)

8. **Form, Fit, and Function Data (FFF).** Technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items. (DFARS Clause 252.227-7013)

9. **Intellectual Property (IP).** A product of the human mind which is protected by law. It includes, but is not limited to, patents, inventions, know-how, designs, copyrights, works of authorship, trademarks, service marks, technical data, trade secrets, computer software, unsolicited inventive proposals, and technical know-how. The intangible rights in such property are described as intellectual property rights. (AR 27-60 Intellectual Property)

10. **Intellectual Property (IP) Deliverables.** Products or services (including information products and services) that are required to be delivered or provided to the U.S. Government by contract or other legal instrument and that include or embody IP (e.g., technical data and computer software) (DoD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing)

11. **Intellectual Property (IP) Rights.** The legal rights governing IP, including ownership as well as license or other authorizations to engage in activities with IP (e.g., make, use, sell, import, reproduce, distribute, modify, prepare derivative works, release, disclose, perform, or display IP). When the IP involves access to classified information, DoD Directive 5535.02, DoD Instruction 2000.03, and Volume 2 of DoD Manual 5220.22 may apply. (DoD Instruction 5010.44, Intellectual Property (IP) Acquisition and Licensing)

12. **Modular Open Systems Approach (MOSA).**

**Modular Open System Approach Requirement**. See 10 USC 4401 for further definitions. The term "modular open system approach" means, with respect to a major defense acquisition program, an integrated business and technical strategy that—

1. employs a modular design that uses modular system interfaces between major systems, major system components and modular systems;

2. is subjected to verification to ensure that relevant modular system interfaces-

a. comply with, if available and suitable, widely supported and consensus-based standards; or

b. are delivered pursuant to the requirements established in subsection (a)(2)(B) of section 804 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, including the delivery of-

i. software-defined interface syntax and properties, specifically governing how values are validly passed and received between major subsystems and components, in machine-readable format;

ii. a machine-readable definition of the relationship between the delivered interface and existing common standards or interfaces available in Department interface repositories; and

iii. documentation with functional descriptions of software-defined interfaces, conveying semantic meaning of interface elements, such as the function of a given interface field;

3. uses a system architecture that allows severable major system components and modular systems at the appropriate level to be incrementally added, removed, or replaced throughout the life cycle of a major system platform to afford opportunities for enhanced competition and innovation while yielding—

a. significant cost savings or avoidance;

b. schedule reduction;

c. opportunities for technical upgrades;

d. increased interoperability, including system of systems interoperability and mission integration; or

e. other benefits during the sustainment phase of a major weapon system; and

4. complies with the technical data rights set forth in 10 USC 3771-3775

13. **Operation Maintenance Installation Training (OMIT). (There is no regulatory or statutory definition.) Recommend adding to PWS.**

OMIT is described in 10 USC 3771 as technical data that is necessary for operation, maintenance, installation, and training purposes, other than detailed manufacturing or process data. Data needed for OMIT can include technical data and computer software documentation pertaining to the system and associated equipment. It can be data necessary for providing field and sustainment level operators and maintainers the theory of operation; details on the equipment/software operation (including test and inspection procedures); details sufficient to affect maintenance (including removal, repair, replacement and the proper lubricants, tools, test equipment, etc. to be used in these operations); installation (for installing items, components, parts, etc. on a platform, assembly, component); and training (including instructors, operators and maintainers (field and sustainment level), packaging/preservation personnel, and logistics assistance representative.

14. **Patent.** In the United States, a patent is the grant of a property right by the United States Patent and Trademark Office (USPTO) to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement of one of those. The right conferred by the patent grant is the right to exclude others from making, using, offering for sale, or selling the invention in the United States or “importing” the invention into the United States. (Implementation Guidance for Army Directive 2018-26, Enabling Modernization through Management of Intellectual Property)

15. **Small Business Innovation Research (SBIR) Data Rights.** The Government’s rights during the SBIR data protection period to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated under a SBIR award as follows:

a. Limited rights in such SBIR technical data; and

b. Restricted rights in such SBIR computer software.

c. DFARS 252.227-7018 - Rights in Other Than Commercial Technical Data and Computer

Software—Small Business Innovation Research (SBIR) Program

1. **Specifically/specially negotiated license rights.** The standard license rights granted to the Government under the appropriate contract clause (for commercial/non- commercial technical data and/or computer software) may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in the appropriate contract clause (for commercial/non-commercial technical data and/or computer software). Any rights so negotiated shall be identified in a license agreement made part of this contract. (Implementation Guidance for Army Directive 2018-26, Enabling Modernization through Management of Intellectual Property)

2. **Technical Data.** Recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or financial, administrative, cost or pricing, or management information, or information incidental to contract administration. (DFARS 252.227-7013)

3. **Technical Data Package:** A technical description of an item adequate for supporting an acquisition, production, engineering, and logistics support. The description defines the required design configuration or performance requirements, and procedures required to ensure adequacy of item performance. It consists of applicable technical data such as models, engineering design data, associated lists, specifications, standards, performance requirements, quality assurance provisions, software documentation and packaging details. (MIL-STD-31000B)

4. **Trade Secret:** All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if – (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. (18 U.S.C. § 1839)

***Note:*** *This is not a wholly inclusive list of definitions associated with IP, data deliverables, and associated license rights. The full definitions and other associated terms and definitions are located in referenced IP documentation, Federal Acquisition Regulation (FAR), and Department of Defense Federal Acquisition Regulation Supplement (DFARS).*

## CHAPTER 6 Laws, Regulations, and Policies

### 1. Laws

In accordance with Title 10, U.S.C. 2464(a)(1), "It is essential for the national defense that the Department of Defense maintain a core logistics capability that is Government-owned and Government-operated (including Government personnel and Government-owned and Government-operated equipment and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements."

To achieve this objective, program acquisitions must include the appropriate levels of IP, data deliverables, and associated license rights. The acquisition authority for licensing, management of

IP, data deliverables and associated license rights required to maintain “ready and controlled” source of technical competencies and resources is under the authority of Title 10, U.S.C. §§ 3771-3775.

**2. Regulations**

The regulations for the acquisition of IP, data deliverables, and associated license rights are in set forth in FAR Part 27 (See DoD exclusion in FAR 27.400) – Patents, Data, and Copy Rights, and DFARS Part 227 – Patents, Data, and Copyrights.

**3. Data Markings**

The Government’s rights in non-commercial technical data shall be governed by DFARS 252.227-7013. The Government’s rights in non-commercial computer software and noncommercial computer software documentation shall be governed by DFARS 252.227-7014. The Government’s rights in Small Business Innovation Research (SBIR) technical data shall be governed by DFARS 252.227-7018. The Government's rights in commercial technical data deliverables shall be governed by DFARS 252.227-7015. All non-commercial technical data deliverables shall be properly marked in accordance with the marking requirements set forth in DFARS 252.227-7013(f). Technical data deliverables with non-conforming restrictive markings shall be rejected and corrected by the Contractor, in accordance with DFARS 252.227-7013(h)(2) and DFARS 252.227-7014(h)(2), respectively.

## CHAPTER 7 References


 Federal Acquisition Regulation, FAR 27 – Patents, Data, and Copyrights

 Defense Acquisition Regulation Supplement Part 227 – Patents, Data, and Copyrights.

 Department of Defense Source Selection Procedures, August 2022

 DoD Understanding and Leveraging Data Rights in DoD Acquisitions, Better Buying Power, October 2014

 DoDI 5010.44, Intellectual Property (IP) Acquisitions and Licensing, October 16, 2019

 DoDI 5000.87, Operation of the Software Acquisition Pathway, October 2, 2020

 “A COR’s Guide to Intellectual Property”, Virtual Acquisition Office (VAO), November 2018 (available on PAM data rights page)

 Army Directive 2018-26, Enabling Modernization Through the Management of Intellectual Property, dated 7 December 2018

 Memorandum, Office of the Assistant Secretary of the Army, Acquisition, Logistics, and Technology (ASA ALT), 17 December 2020, subject: Change 1, Implementation Guidance for Army Directive 2018-26, (Enabling Modernization through Management of Intellectual Property)

 Army Data and Data Rights Guide, 1st Edition – August 2015

 Modular Open Systems Approach (MOSA) Implementation Guide, Version 1.1,

 10 Jun 2020

 Lifecycle Sustainment Strategies for Acquisitions of Items Developed Exclusively at Private Expense, dated 6 Mar 2017, Army Material Command (available on PAM data rights page)

 A Guide to Data Item Descriptions, Contract Data Requirements Lists, and Standard Defense Acquisition Regulation Supplement Clauses, dated 6 Sep 2017, Army Materiel Command (available on PAM data rights page)

 Intellectual Property: Navigating Through Commercial Waters, October 15, 2001

 Army Regulation 27-60, Intellectual Property, 1 June 1993

## CHAPTER 8 License Rights

The table below identifies the license rights with permitted uses.

| Rights Category | Applies to These Types of Data | Permitted Uses within the Government | Permitted Uses by Third Parties Outside the Government |
|---|---|---|---|
| **Unlimited Rights (UR)** | Non-Commercial Technical Data (TD) and Computer Software (CS) | All uses: no restrictions | |
| **Government Purpose Rights (GPR)** | Non-Commercial TD and CS | All uses: no restrictions | For "government purposes" only; no commercial use |
| **Limited Rights (LR)** | Non-Commercial TD only | Unlimited: except may not be used for manufacture | Emergency repair/overhaul |
| **Restricted Rights (RR)** | Non-commercial CS only | Only one computer at a time; minimum backup copies; modification | Emergency repair/overhaul; certain service/maintenance contracts |
| **Specially Negotiated License Rights (SNLR)** | Any/all TD and CS – including commercial TD and CS | As negotiated by the parties. However, must not be less than LR in non-commercial TD and must not be less than RR in non-commercial CS (consult with legal counsel as other limits apply) | |
| **Small Business Innovation Research (SBIR) Data Rights** | Non-Commercial TD and CS generated under a SBIR contract | The equivalent of UR in Operation, Maintenance, Installation, and Training (OMIT) and Form, Fit, and Function (FFF) data; the equivalent of RR in all CS | |
| **Commercial Technical Data (TD) License Rights** | TD related to commercial products (developed at private expense) | The equivalent of UR in OMIT and FFF data; the equivalent of LR in all other delivered TD | |
| **Commercial Computer Software (CS) Licenses** | Any commercial CS or CS documentation | As specified in the commercial license customarily offered to the public | |

(Implementation Guidance for Army Directive 2018-26 Enabling Modernization through

Management of Intellectual Property, Figure 2, page 12)

## CHAPTER 9 Templates – Sections L & M

**<Green>** = Instructions (Delete before release of solicitation)

**<Blue>** = Fill-ins (Remove brackets)

USE: This document provides several tailorable narratives for use in Section L and Section M (or equivalent). These narratives support competitive source selection solicitations for the acquisition of intellectual property, data deliverables and associated license rights. Section L communicates to offerors what they are to propose in response to the solicitation. Section M describes to offerors how their proposals will be evaluated in accordance with the solicitation.

One or more of the tailorable narratives can be included in a solicitation based on the requirement and desired evaluation criteria. If more than one tailorable narrative is selected for inclusion in a solicitation, careful review may be needed to ensure there are no overlapping or conflicting evaluation criteria included in the solicitation. **At a minimum, contracting officers are required to tailor the content of the narrative below to reflect the specific requirement both in terms of desired proposal format and detailed evaluation factors.**

Offerors may be granted one or more strengths for: 1) delivering technical data with license rights that facilitate future competitive procurement; 2) delivering items that are available in the commercial market that can be procured by other contractors in a future competitive procurement (even without providing detailed technical information on these commercially available items); and/or 3) delivering a Product Support/Sustainment Strategy that includes Government purpose rights (licensing technical data to alternate contractors who will be able to participate in future competitive procurements). **If this is applicable to your solicitation, state this in sections L&M.**

Offerors will not be given an unacceptable rating in the evaluation of the solicitation or be considered ineligible for contract award, based on the offeror not proposing broader license rights than the Government is entitled in accordance with applicable DFARS citations (DFARS 252.227-7013, DFARS 252.227-7014, or 252.227-7015).

Notes:

 The Government may evaluate proposals on how well the offeror’s Product Support/Sustainment Strategy facilitates the Government’s objective to affordably sustain and compete procurement of end items and spare and/or repair parts.

 The Product Support/Sustainment Strategy proposal should document proposed and negotiated IP, data deliverables and associated license rights that will be priced as contract deliverable(s) under CLINs within Section B in the solicitation and final contract.

 If warranty is applicable, incorporate as a priced CLIN.

Sample Section L and Section M language can be found below. Remember, use only what is applicable and tailor the language, as required, for the respective requirement.

**Technical Volume: Intellectual Property, Data Deliverables, and Associated License Rights**

Section L

The offeror shall provide all required information and data requested to facilitate a thorough and complete Government evaluation. Offerors will not be given an unacceptable rating in the evaluation of the proposal or be considered ineligible for contract award, based on the offeror not proposing broader license rights than the Government is entitled in accordance with applicable DFARS citations (DFARS 252.227-7013, 252.227-7014, or 252.227-7015). Offerors’ proposals shall provide

sufficient information for the Government to determine whether or not strengths related to license rights may be applicable, see Section M.

Anything less than unlimited rights for noncommercial technology will require submission of documentation supporting funding stream for proposed technology.

The offeror shall address the following in the proposal:

<Examples of factors and/or subfactors to be emphasized and addressed by the offeror are listed below.>

Section M

Offerors may be granted one or more strengths for: 1) delivering technical data with license rights that facilitate future competitive procurement; 2) delivering items that are available in the commercial market that can be procured by other contractors in a future competitive procurement (even without providing detailed technical information on these commercially available items); and/or 3) delivering a Product Support/Sustainment Strategy that includes Government purpose rights (licensing technical data to alternate contractors who will be able to participate in future competitive procurements).

The Government will evaluate how well the offeror's proposal demonstrates:

1) The offeror’s strategy to assist the Government in the support of OMIT, modernization, and sustainment for the entire lifecycle of <Program Title> and facilitate competition**;** and

2) The offeror’s strategy to assist the Government in establishing organic and/or third-party support no later than <enter deadline> after contract award (using the required technical data deliverables under this contract and organic sustainment resources).

<Examples of factors and/or subfactors to be evaluated are listed below.>

**CDRLs**

Section L

<If applicable, include language instructing offerors to address CDRL requirements in the proposal.>

Section M

The Government will evaluate the offeror’s proposed approach to meeting requirements for CDRLs for <organic and/or third-party sustainment, based on the offeror’s proposed Product Support/Sustainment Strategy>.

**Configuration Control**

<Consult AR 700-127, Integrated Product Support, and DA PAM 700-127, Integrated Product Support Procedures >

Section L

The offeror’s proposal shall describe the configuration control board processes that enable the Government to identify, adjudicate, prioritize, and resolve issues/discrepancy reports and major critical defects related to procured software, hardware, firmware, and/or a combination thereof, as detailed in requirements and technical documentation in a timely manner <replace with more specific language as needed> and ultimately achieves a product that impacts acceptable mission functionality. <If applicable, address requirements for maintenance of the Technical Data Package (TDP) and Engineering Change Proposals (ECPs).>

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will ensure the Government’s ability to identify, adjudicate, and prioritize issues/discrepancy reports for resolution in a timely fashion. This includes scope for shared roles and responsibilities in support of the test/certification and deployment release process/capability.

**Configuration Management**

Section L

The offeror’s proposal shall describe the scope and effectiveness of the configuration control process and configuration management tools. The proposal shall include the degree of roles/responsibilities allocated to the Government and the role of the Government in the configuration management processes and decision making, including whether the Government will be included as a primary stakeholder in analyses, assessment, and/or implementation when the process will result in changes.

Section M

The Government will evaluate the proposal for how and the extent to which the scope and effectiveness of the configuration control process and configuration management tools and the degree of roles/responsibilities are allocated to the Government, and the role of the Government in the configuration management processes and decision making, including whether the Government will be included as a primary stakeholder in analyses, assessment, and/or implementation when the process will result in changes.

**Cost Drivers**

Section L

The offeror’s proposal shall identify supply and maintenance cost drivers that will contribute to reduced lifecycle sustainment costs and shall specify projected/estimated cost savings by <year, month, action, or other specified increment>.

Section M

The Government will evaluate the proposal for how and the extent to which it identifies the supply and maintenance cost drivers that will achieve reduced lifecycle sustainment costs.

**Design Upgrade Approach**

Section L

The offeror’s proposal shall describe the Government’s ability to analyze, assess, and support the execution of component level updates/enhancements, conduct regression testing, perform cybersecurity test, and integrate baseline changes (for resolving major to minor fixes) that preserve supportability, functionality, and key requirements in a cost effective manner.

Section M

The Government will evaluate the proposal for how and the extent to which the Government has the ability to analyze, assess, and support the execution of component level updates/enhancements, regression testing, perform cybersecurity test, as well as integrate baseline changes (for resolving major to minor fixes) that preserves supportability, functionality, and key requirements in a cost effective manner.

**Diminishing Manufacturing Source and Material Shortage (DMSMS)**

Section L

The offeror shall describe the efficiency and effectiveness of the proposed Diminishing Manufacturing Source and Material Shortage (DMSMS) approach. Specifically, the proposal should detail the roles and responsibilities of both the Contractor and the Government in the DMSMS process, including analyses, assessment, and implementation of changes.

The offeror's proposal shall clearly outline the respective roles and responsibilities of the Contractor and the Government in the DMSMS process. This includes how the Government is actively involved as a primary stakeholder during analyses, assessment, and/or implementation that result in changes.

Section M

The Government will evaluate the proposal for the efficiency and effectiveness of the proposed DMSMS approach and respective responsibilities of the Contractor and the Government.

**Field Support**

Section L

The offeror’s proposal shall specify how the offeror will provide the Government with field level support. The offeror shall identify the hardware and software tools required to execute field level maintenance of Shop Replaceable Units (SRUs). The proposal shall identify considerations for these field level support activities to include roles and responsibilities allocated to offeror and government organizations.

Section M

The Government will evaluate the proposal for how and the extent to which the proposed field level support will be provided, including common overarching hardware and software transition, quality

assurance, training, and design.

**Hardware Sustainment Activities**

Section L

The offeror's proposal shall address the range, roles, and responsibilities afforded the Government to analyze, assess, support LRUs and SRUs, level updates/enhancements, regression test, perform cyber security test, as well as integrate baseline changes (i.e., for resolving major to minor fixes).

Section M

The Government will evaluate the proposal for how and the extent to the Government is provided the range, roles, and responsibilities to analyze, assess, support LRUs and SRUs, level updates/enhancements, regression test, perform cybersecurity test, as well as integrate baseline changes (i.e. for resolving major to minor fixes).

**License Rights (LR)**

<This section should be tailored to the specific solicitation. If applicable, consider providing a spreadsheet to offerors for submission of the requested/required information. Consider identifying which data automatically comes with specific rights for the Government. License rights should typically be included in the total evaluated price. Analysis of proposed prices must be addressed in the cost/price evaluation part of in Section M.>

Section L

The offeror shall submit a complete proposal of all data deliverables necessary to support OMIT; modernization; and sustainment; and future full and open competition. including a plan to mitigate hindrances to sustainment, for organic and/or third-party sustainment of <Program Title>

The proposal shall identify and describe the proposed license rights, or a statement that no license rights are proposed, and background patent rights that will be provided to the Government. The proposed license rights shall clearly outline all terms and conditions required to grant license rights with clear definitions as to what conditions are required to activate the granting and maintenance of the license rights. The proposal shall identify how the proposed rights in <technical data deliverables and/or software deliverables> will support sustainment, for organic and/or third-party sustainment, and/or a plan to mitigate hindrances to sustainment, for organic and/or third-party sustainment of <Program Title>.

The proposal must clearly cross reference all costs/prices to the Government listed in the cost/price volume, and include any minimum quantity required to be purchased by the Government, the cost/price to purchase the Technical Data Package (TDP) or rights in offeror's background patents, minimum time in months to acquire license and patent rights, and limitations that may be imposed. .

The license rights may be realized through a royalty, minimum units to be purchased, lump sum license fee, or alternative approach for the license rights. If the offeror elects to submit a lump sum fee for license rights, the offeror shall specify that a portion of the proposed lump sum price that is associated with the cost to the Government to obtain these rights to background IP.

The actual level of license rights, patent rights, and patents and/or patent application(s) covered by the licenses provided by the offeror will be listed or described and incorporated in <Section J> of the resultant contract.

It is important to note that an offeror's proposal will not be considered not to meet the requirements of the solicitation or be determined ineligible for contract award if the offeror does not sell or otherwise relinquish data license rights (related to privately developed items, components, and processes) to the Government (with the exception of the license rights provided under DFARS 252.227-7013, 252.227-7014, and 252.227-7015). However, strengths may be assigned to an offeror's proposal related to the aforementioned evaluation criteria related to the aforementioned competitive procurement goals. Therefore, it would be prudent for offerors to consider this when drafting a proposal. Furthermore, this solicitation and evaluation criteria are not intended to dissuade the use of commercial hardware components or software. Lastly, this solicitation does not require offerors to refrain from offering to use, or from using, items, components, or processes that were developed at private expense [See 10 USC 3771(a)(2)].

Put in the pricing submission section: The pricing shall be provided for each separate instance of data deliverables for which limited rights or background patent rights are claimed. The offeror shall provide a brief description of the methodology or rationale used in determining the value of license rights for each separate instance of data deliverables claimed. The offeror shall provide an itemized list of these costs/prices in the cost/price section or volume of the offeror's proposal.

If the offeror is proposing trademark license rights, and if additional costs are to be incurred by the Government, then the offeror shall provide an itemized list of these additional costs in the cost/pricing section and/or volume of the offeror's proposal.

Any royalty costs/prices for third-party patents for use in the contract shall be disclosed in accordance with FAR 52.227-6

Section M

The Government will evaluate the proposal to determine the extent to which the proposal identified all data deliverables necessary to support OMIT; modernization; and sustainment; and future full and open competition, and the extent to which the offeror identifies the license rights and background patent rights that will be provided to the Government. The Government will evaluate how the proposed rights in <technical data deliverables and/or software deliverables> will support sustainment, for organic and/or third-party sustainment, and/or the proposed plan to mitigate hindrances to sustainment, for organic and/or third-party sustainment of <Program Title>. The Government will evaluate the proposed license rights, or confirm that a statement that "no license rights are proposed" was included, and what background patent rights will be provided to the Government.

**Logistics Support**

Section L

The proposal shall identify the logistics support cost drivers and describe how the offeror's strategy will enable the Government to achieve reduction of sustainment costs.

The offeror shall identify the proposed maintenance and logistics support plan at the field and depot levels. In particular, the offeror's proposal shall address organic or contractor logistics support with

a specific recommended path for transition to fully organic and/or third-party support.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will ensure the Government has the ability to achieve reduction of sustainment costs based on proposed maintenance and support plan at field and depot levels for transition to organic and/or third-party support.

**Maintenance Support Concept**

<In this section, it may be necessary to address whether the transition efforts are expected to be included in the proposed approach for Contractor Logistics Support (CLS).>

Section L

The offeror's proposal shall include a proposed approach for Contractor Logistics Support (CLS), to be utilized until the organic and/or third-party sustainment capability is established, and the proposed maintenance and logistics support concept at the field and sustainment levels. Discussion of the support concept should clearly explain any resulting reduction in lifecycle costs and logistics footprint as well as enhanced operational availability.

Section M

The Government will evaluate the proposal for how and the extent to which the proposed CLS maintenance and logistics support concept at the field and sustainment levels clearly demonstrates an optimal scenario of reduced lifecycle costs, reduced logistics footprint, and enhanced operational availability.

**Modular Open Systems Approach (MOSA) (10 U.S. Code § 4401)**

Section L

The offeror's proposal shall clearly:

 Describe how a MOSA is to be used for the <Program Title> and differentiate between Major Systems Platform (MSPs), Major System Components (MSCs), and Modular System Interfaces **(**MSIs.).

 Differentiate and describe the MSI(s) and non-MSI interfaces.

 Describe the evolution of the MSCs that are anticipated to be added, removed, or replaced in subsequent increments.

 Identify additional MSCs that might be added in the future.

 Describe how IP and related issues, such as technical data deliverables and license rights necessary to support a MOSA, will be addressed.

 Describe how a MOSA will preclude the need for purchasing of licenses or Government Purpose

Rights (GPR) by requiring the application of open, widely-used, consensus based standards <[e.g. Future Airborne Capability Environment (FACE™) and Sensor Open Systems Architecture (SOSA)]> in the solicitation.

 Describe the MSI(s) and where MSI(s) are in the system architecture. To the maximum extent practicable, ensure that MSI(s) incorporate commercial standards and other widely supported consensus based standards that are validated, published, and maintained by recognized standards organizations.

 Describe which MSI(s) are required for segregation and reintegration purposes.

 Describe the approach to systems integration and systems-level configuration management to ensure mission and information assurance.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror's ability to address both business and technical needs in support of the Government's objective to achieve lifecycle goals, as stated in the <PWS>, for a product or family of products.

<Consult: Army Directive 2018-26, Enabling Modernization through Management of Intellectual Property, 7 December 2018; Change 1, Implementation Guidance for Army Directive 2018-26, dated 17 December 2020; and DoDI 5010.44, Intellectual Property (IP) Acquisition and Licensing and Modular Open Systems Approach (MOSA) Implementation Guide, Version 1.1, 10 Jun 2020>

**Operation, Maintenance, Training, and Installation**

<This section includes many possible options that may be applicable to a particular requirement. Contracting officers should scale this section to include only the portions relevant to the requirement and solicitation.>

Section L

The offeror's proposal shall identify design-upgrade approach that will enable the Government to preserve supportability, maintainability, and operational availability. The proposal shall address the operations, training, and maintenance activities of the end item to include roles and responsibilities, system engineering activities, associated IP, data deliverables, and associated license rights required for Government to address repair and maintenance activities, technical manuals, training (both operator and maintainer), field level support, and provisioning.

The offeror shall propose the procedures, guidance, and instructions for the operation, handling, testing, utilization, familiarization, and functional use of the end item. Operation includes, but is not limited to all data to identify, catalog, stock, source, acquire, procure, replenish, package, handle, store, and transport.

The offeror shall identify data that will be delivered to the Government to conduct testing, troubleshooting, and/or repair activities. The offeror shall identify the tools required to execute field and depot level maintenance of LRUs and SRUs. The offeror's proposal shall identify considerations for these sustainment activities to include roles and responsibilities allocated to offeror and government organizations. The offeror shall identify those test equipment support requirements as applicable to the various stages of maintenance levels. The proposal shall identify associated

documentation that will empower the Government's ability to verify the functions of the products developed under this contract.

The offeror shall address the following, which is not limited to preliminary timeline considerations, upgrade approach, technical training, and the identification of additional services and/or considerations necessary to establish an organic government and/or third-party capability.

The offeror shall identify the level of repair and associated field and depot level analysis for <Program Title> solution. The proposal shall also identify required replacement intervals and tools required.

The offeror shall propose all scheduled and unscheduled field-level maintenance, depot-level maintenance, and repair capabilities to maintain, inspect, test, service, adjust, troubleshoot, analyze, remove and/or replace, repair, install, disassemble, reassemble, and overhaul to maintain in, or restore to, a serviceable condition.

The offeror's proposal shall identify considerations and required plans for <Program Title> operator and maintainer training. Offeror shall provide a list of training materials (i.e., manuals, training plans, etc.) required equipment, and power requirements necessary for training.

The offeror's proposal shall indicate how it facilitates future competitive procurement of <Program Title> using technical data, software, and software documentation deliverables and associated license rights under this procurement.

If the offeror's proposal **does not** facilitate competitive procurement of <Program Title> the offeror's proposal shall identify all data deliverables needed to facilitate the competitive procurement; regardless of whether the offeror proposes only a sub-set of the data rights needed for competitive procurement. Additional, the proposal shall identify any IP, data deliverables or licensing rights restrictions that will hinder future competition.

If the proposal **does** facilitate competitive procurement of <Program Title>, the offeror shall explain how its proposed competitive procurement strategy facilitates competitive procurement in instances where the Government will only be provided with "Limited Rights", "Restricted Rights", or other license restrictions to data deliverables related to <Program Title> sustainment (including license restrictions in commercial license agreements and third-party license agreements).

The offeror shall identify the proposed Diminishing Manufacturing Source and Material Shortage (DMSMS) and Obsolescence approach and respective responsibilities of the offeror and Government.

Section M

The Government will evaluate the proposal for a design-upgrade approach that will enable the Government to preserve supportability, maintainability, and operational availability. The proposal addresses the operations, training, and maintenance activities of the end item to include roles and responsibilities, system engineering activities, associated IP, data deliverables, and associated license rights required for Government to address repair and maintenance activities, technical manuals, training (both operator and maintainer), field level support, and provisioning.

The Government will evaluated the proposal to ensure it addresses procedures, guidance, and instructions for the operation, handling, testing, utilization, familiarization, and functional use of the end item.

**Operator and Maintainer Training**

Section L

The offeror's proposal shall explain how the offeror will address the requirement <PWS Section XX.XX> for the Government to support platform training development and the availability of instructor and maintainer training and training package that addresses the <Program Title> as installed on individual platforms. The proposal shall clearly address the proposed level of Government accessibility to test benches, technical manuals, training manuals, documentation, etc. in order to conduct tests, swap out batteries, troubleshoot and/or debug the <Program Title>.

Section M

The Government will evaluate the proposal for how and the extent to which the Government has the ability to support platform training development, availability of instructor and maintainer training and training package that addresses the <Program Title> as installed on individual platforms, and the accessibility to test benches, technical manuals, training manuals, documentation, etc. in order to conduct tests, swap out batteries, troubleshoot and/or debug the <Program Title>.

**Organic Field Level Support Provisioning**

Section L

The offeror shall identify how it will give the Government the ability to disseminate base software loads as well as updates to field/depot support assets for loading and provisioning, in accordance with PWS section <XX.XX>.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will ensure the Government's ability to disseminate base software loads as well as updates to field/depot support assets for loading and provisioning.

**Product Support/Sustainment Strategy**

Section L

The offeror's proposal shall include a Product Support/Sustainment Strategy that ensures the <Program Title> deliverables remain functional, sustainable, upgradable, and affordable. The Product Support/Sustainment Strategy shall: 1) Identify technical data and software that facilitate future competitive procurement; 2) Identify and explain how the proposed level of associated license rights will facilitate future competitive procurements; 3) Provide list of items that are available in the commercial market that can be procured by other contractors in a future competitive procurement (even without providing detailed technical information on these commercially available items); 4) Propose the procedures for leveraging technology to meet government mission goals and improving the capability over the lifecycle of the system; 5) Include the level of authorization for licensing technical data/software to alternate contractors who will be able to participate in future competitive procurements; 6) Delineate the required software, hardware components and configuration items; and 7) Identify those capabilities required for sustainment that are

commercially available as well as non-commercial or modified commercial items.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will perform the following:

(a) leveraging technology to meet mission goals and improve capability over the lifecycle of the hardware and software;

(b) identifies license rights to facilitate future competitive procurement goals outlined in Section L;

(c) delineating between software, software documentation, hardware components, and configuration items; and

(d) identifying capabilities for sustainment that are commercially available as well as non-commercial or modified commercial items.

**Quality Assurance**

Section L

The offeror shall identify how it will give the Government the ability to identify and replicate the verification processes ensuring the Quality Assurance of the Sustained Configuration Item.

Section M

The Government will evaluate the proposal for how and the extent to which the Government will be provided the ability to identify and replicate the verification processes ensuring the Quality Assurance of the Sustained Configuration Items.

**Risk Management**

Section L

The offeror shall identify, based on the level of license rights proposed, risks the Government will have in the Operation, Maintenance, Installation, and Training (OMIT); modernization; and sustainment of <Program Title>. Including but not be limited to, the applicable necessary documentation, security implementation, and associated security activities. The offeror shall propose specific actions to mitigate/manage the risks identified. <DoDI 5200.39, Critical Program Information (CPI), and AR 70-77, Program Protection>

Section M

The Government will evaluate the proposal for the level of proposed license rights, and the risks the Government will incur in OMIT; modernization; and sustainment of <Program Title>. Scope of documentation, security implementation, and associated <If applicable, cyber> security activities. <List additional items as applicable.>

<Note: It may be necessary to clearly state whether organic support includes contractors.>

**Software Sustainment Environment (SSE)**

Please review Software Modernization information at Army Directive 2024-02 (Enabling Modern Software Development and Acquisition Practices)

Section L

The proposal shall specify the required technical data, software, and software documentation (identified within the Contract Data Requirements Lists (CDRLs)), and any additional required deliverables necessary to establish a Software Sustainment Environment (SSE). The SSE is the set of automated tools, firmware, devices, hardware, and documentation necessary to perform the software support effort. The automated tools may include but are not limited to: compilers; assemblers; linkers; loaders; operating system; debuggers; simulators; emulators; test tools; documentation tools; and database management systems. The required hardware and software components and configuration items (i.e., hardware for development environment, source code, binaries/libraries, build scripts, configuration management databases and defect tracking toolkits, loading/imaging support, etc.) for SSE shall be proposed. The proposal shall describe those capabilities required for the SSE that are commercially available as well as non-commercial or modified commercial items.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will provide the range, roles and responsibilities afforded the Government to analyze, assess, and support executing code updates/enhancement, regression test, perform cybersecurity test, as well as integrate baseline changes (i.e., for resolving major to minor fixes).

**Subcontractor Proposal**

Section L

<Standard subcontractor proposal instructions should be used in this section.>

Section M

The Government will evaluate the proposal for how and the extent to which the proposed subcontracting process facilitates the organic and/or third-party support for <software and/or hardware> Product Support/Sustainment Strategy.

**Test and Validation**

Section L

The offeror’s proposal shall identify the technical data, software, and software documentation (i.e., test benches, training, documentation, etc.) that will be provided to the Government for conducting test and troubleshooting, and/or debugging activities. The proposal shall identify considerations for these sustainment activities to include roles and responsibilities allocated to offeror and government organizations. The proposal shall address support requirements for execution of Government Acceptance Testing (GAT), Independent Verification and Validation (IV&V), as well as

interoperability test capabilities of product baselines. The offeror shall identify the hardware and software tools required to execute field and depot level maintenance of Line Replaceable Units (LRUs) and Shop Replaceable Units (SRUs). The proposal shall identify considerations for these sustainment activities to include roles and responsibilities allocated to offeror and government organizations. The proposal shall identify test equipment support requirements as applicable to the various stages of maintenance levels. Consistent with the offeror's Product Support/Sustainment Strategy, the proposal shall identify associated documentation that will empower Government's ability to verify the functions of software products and hardware developed under this contract. The proposal shall also identify associated documentation required for the Government to establish the ability to verify the quality assurance of the sustainable hardware and software configuration items.

Section M

The Government will evaluate the proposal for how and the extent to which the offeror will ensure the Government has the ability to engage in testing, troubleshooting, and/or debugging activities.

**Test, Troubleshooting, and Repair**

Section L

The offeror shall provide a comprehensive rationale for all required support, test equipment, and repair procedures for the recommended maintenance levels. The proposed maintenance concept should address the following key elements:

a. Diagnosis at Field Level: The proposed maintenance concept should include tools to diagnose Line Replaceable Unit (LRU) or Shop Replaceable Unit (SRU) failure at the field level with a minimum confidence level of <Insert Percentage> (recommended 90%).

b. Test Measurement Diagnostic Equipment (TMDE) Preferred Items List: List any test/diagnostic tools that are listed in the Army's Test Measurement Diagnostic Equipment (TMDE) Activity Preferred Items List maintained by Product Director - TMDE.

c. Emphasis on Prognostics: The proposed maintenance concept should emphasize prognostics, showcasing the offeror's strategy for predictive maintenance.

Section M

The Government will evaluate the proposal for how and the extent to which a comprehensive rationale is provided for all required support, test equipment, and repair procedures for the recommended maintenance levels.

**Transition Strategy Plan**

Section L

The offeror shall propose a strategy to support the establishment of organic sustainment no later than <enter deadline> from contract award. A Transition Strategy Plan for establishing specified level of organic support shall be provided to include, but not limited to:

1) A schedule defining the sequence and timelines of events and activities required for facilitating

Government sustainment capabilities;

2) Itemization of the IP, data deliverables, and associated license rights required for offeror's proposed level of organic or third-party support to include but not be limited to training, automated tools, firmware, devices, hardware, and documentation;

3) Identification of data deliverables items listed within the CDRLs that will be delivered to facilitate offeror's defined/specified level of organic and/or third-party sustainment; and

4) Documented procedures and processes for establishing training for/of organic and/or third-party support established within Government resources.

Section M

The Government will evaluate the proposal for how and the extent to which the Transition Strategy Plan effectively establishes the proposed organic and/or third-party sustainment capability no later than <enter deadline> from contract award.

**Warranty**

Section L

The offeror shall provide a copy of the proposed warranty**.** <Incorporate specific warranty coverage required for respective acquisition. Include but not limited to duration from date of manufacture, receipt at location, etc. The associated cost/price shall be incorporated in the Cost/Price Section/Volume (Priced CLIN).> The warranty shall at a minimum address the following elements by topic, and any additional element(s) shall be included without changing the order or numbering of the following elements: **<**For information regarding warranty, refer to the following resources: DoD Warranty Guide 2020; FAR 46.703; DFARS 246.708; PGI 246.710-70; and AR 700-13>.

 Scope

 Definitions

 Individual Warranty Coverage

 Systemic/Performance Warranty Coverage

 Commercial Warranties

 Warranty Procedures/Remedies

 Other Rights and Remedies

 Warranty Administration

 Warranty Status Reporting

 Exclusions

 Presumption of Failure Defect

 Contractor Obligations

 No Evidence of Failure (NEOF)/Re-Test OK (RTOK) Reductions

 Disputes

 The terms of the “Warranty” shall not cause a conflict or otherwise diminish the Government’s rights in any other clause, provision or term of the solicitation or any resultant contract.

Section M

The Government will evaluate the proposal’s terms, conditions, and coverage of the offeror’s proposed warranty and any associated risks. <may need to add narrative applicable to respective requirement>

The offeror's proposed warranty will be evaluated for compliance with solicitation requirements and the overall effectiveness in providing adequate coverage. The evaluation will consider, but is not limited to, the following elements:

a. Scope: Clear and comprehensive coverage addressing the intended use and potential risks.

b. Definitions: Clearly defined terms and conditions to avoid ambiguity.

c. Individual Warranty Coverage: Specific coverage for individual components or items.

d. Systemic/Performance Warranty Coverage: Coverage for the overall system or performance.

e. Commercial Warranties: Compliance with commercial warranty practices, if applicable.

f. Warranty Procedures/Remedies: Clearly defined procedures for reporting and addressing warranty issues.

g. Other Rights and Remedies: Identification of any additional rights and remedies provided beyond the warranty.

h. Warranty Administration: Efficient and effective administration of the warranty.

i. Warranty Status Reporting: Timely and accurate reporting of warranty status.

j. Exclusions: Clearly outlined exclusions from warranty coverage.

k. Presumption of Failure Defect: Addressing the presumption of failure defect and related procedures.

l. Contractor Obligations: Clearly defined obligations of the contractor regarding the warranty.

m. No Evidence of Failure (NEOF)/Re-Test OK (RTOK) Reductions: Procedures for NEOF/RTOK reductions, if applicable.

n. Disputes: Clear and unambiguous procedures for handling disputes related to the warranty.

# Appendix F Small Business Participation Commitment Document

Small Business Participation Commitment Document (SBPCD) (Sample Format)

The SBPCD format is designed to streamline and bring uniformity to responses and evaluations for small business participation when required under FAR 15.304. The format is distinctly different than the small business subcontracting plan required for other than small businesses (FAR 52.219-9). Proposals addressing the extent of small business participation (SBPCDs) shall be submitted separately from small business subcontracting plans (DFARS 215.305(c)(i)(B). A copy of the SBPCD is recommended to be provided in your instructions to offerors or as an attachment to the RFP.

**Other than small businesses** are required to complete a SBPCD which will be incorporated into the resulting award by reference or attachment as an enforceable contractual requirement. Offerors should propose the level of participation of small businesses (as a small business prime, joint venture, teaming arrangement, and/or small business subcontractors) in the performance of the acquisition relative to the objectives/goals set forth in the evaluation of this area.

**NOTE**: Proposals including WOSB, HUBZone, VOSB, and SDVOSB percentages must ensure those socio-economic category submissions are SBA Certified.

**(a)** Check the applicable size and categories for the **PRIME** Offeror only -- Check all applicable boxes:

{ } Other than Small Business

or

{ } Small Business Prime; also categorized as a

{ } Small Disadvantaged Business (SDB)

{ } Women-Owned Small Business (WOSB)

{ } Historically Underutilized Zone (HUBZone) Small Business

{ } Veteran Owned Small Business (VOSB)

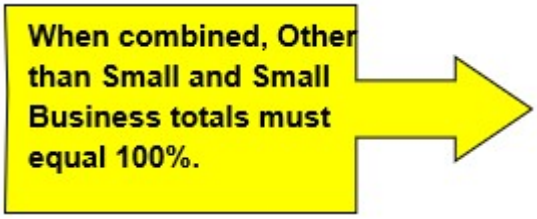
{ } Service-Disabled Veteran Owned Small Business (SDVOSB)

**(b)** Submit the total combined dollar value and percentage of work to be performed by both other than small and small businesses (include the percentage of work to be performed both by Prime, joint venture, teaming arrangement, and subcontractors):

**Example:** If the Prime proposes a price of $1,000,000 (including all options), and small business(es) will provide $250,000 in services/supplies as a prime, joint venture, teaming arrangement, or subcontractor, the % planned for small businesses is 25%; and 75% for other than small business, equaling 100%.

Total Percentage planned for Other than Small Business(es) ____75_% = $ 750,000

Total Percentage planned for Small Business(es) ____25_% = $ 250,000




**100% = $1,000,000**

**(c)** Please indicate the total percentage and dollar value of participation to be performed by each type of subcategory small business. The percentage of work performed by Small Businesses that qualify in multiple small business categories may be counted in each category:

**Example:** Victory Prop Mgt (WOSB and SDVOSB) performing 2%; and Williams Group (SDB, HUBZone and WOSB) performing 3%. Results equate to: SB 5%; SDB 3%; HUBZone 3%; WOSB 5%; SDVOSB 2%; VOSB 2%;). SDVOSBs are also VOSBs automatically; however VOSBs are not automatically SDVOSBs.

Small Disadvantaged Business _____% $_____

HUBZone Small Business _____% $_____

Women-Owned Small Business _____% $_____

Service-Disabled Veteran Owned SB _____% $_____

Veteran Owned Small Business _____% $_____

**(d)** Identify the prime offeror and type of service/supply that the prime offeror will provide. Then list each of the intended subcontractors and principal supplies/services to be provided by that subcontractor. Provide the Commercial and Government Entity (CAGE) code for the prime and each intended subcontractor. Also, provide the anticipated NAICS codes(s) that the prime offeror believes best describes the product or services being acquired by its subcontracts with each intended subcontractor. Small business Primes and small business subcontractors that qualify as small businesses in multiple small business categories should be listed in each applicable small business category.

**Example:** If a Small Business qualifies as a WOSB and a SDVOSB, you can add them to each category below in which they qualify.

Name of Company Anticipated NAICS Code Type of Service/Service

(Include CAGE Code) for Each Subcontractor (1)

Prime Offeror: _____ _____ _____

Other than

Small Business: _____ _____ _____

Small Business: _____ _____ _____

SDB: _____ _____ _____

_____ _____ _____

WOSB: _____ _____ _____

_____ _____ _____

HUBZone Small: _____ _____ _____

_____ _____ _____

VOSB: _____ _____ _____

_____ _____ _____

SDVOSB: _____ _____ _____

_____ _____ _____

**NOTE**: Pursuant to Sections 8(d) of the Small Business Act, a business is considered small for government procurements if it does not exceed the size standard for the NAICS code that the prime contractor believes best describes the product or services being acquired. In other words, the size of the prime's suppliers is determined by the applicable NAICS code of their joint venture, teaming partner, or subcontract, which may or may not be the same NAICS code as the one for your prime contract with the government.

**(e)** Describe the extent of commitment to use small businesses (e.g., what types of commitments, if any, are in place for this specific acquisition either – small business prime, written contract, verbal, enforceable, non-enforceable, joint venturing, mentor-protégé, etc.). Provide documentation regarding commitments to small business for this effort. Copies of such agreements should be provided as part of your SBPCD and will not count against the page limitation for this volume.

# Appendix G Online Reverse Auctions

## G-1 Definition

An online Reverse Auction (RA) is an internet-based (electronic commerce) acquisition tool that allows the government to procure goods and services from suppliers in a competitive environment in which sellers, anonymously, bid prices down until the auction is complete.

A reverse auction is simply the opposite of a traditional auction. In a traditional auction, the seller offers an item for sale and multiple potential buyers submit sequentially higher bids for the item. Conversely, in a reverse auction, there are multiple sellers of items that compete for the business of a single buyer. During this competition the sellers ultimately drive the price of the item down.




## G-2 Applicability to Best Value Acquisitions

Online RAs are legal as long as the identity of the bidders is not disclosed. Online RA tools may be used as a pricing tool for LPTAs or tradeoff acquisitions. For example, an RA tool can be used as a pricing tool for a tradeoff acquisition after the completion of technical discussion. You may conduct a reverse auction to establish the offerors' final prices, provide these prices, along with the rest of the evaluation results, to the SSA for his/her use in selecting the proposal that represents the best value.

Potential benefits are reduced acquisition cycle time and increased competition that in due course drive prices down as the offerors have visibility of the other prices being proposed. Additionally, the online RA process is inclusive, transparent, and immediately advantageous to both government and industry.

FAR Subpart 4.5 supports the use of electronic commerce whenever practical or cost-effective. Online RAs should be utilized when it is anticipated that this method will deliver more value than the use of other available procurement methods. Additionally, RAs are more advantageous to the government in reducing acquisition cycle time when the requirements are best suited for an RA environment.

## G-3 Process

Online RAs are conducted using a variety of procedures and automated tools. An agency may contract with an online auction service to conduct the reverse auction, or it may conduct the reverse auction itself using commercially available software.

In either case, the reverse auction must be conducted on a secure website, and you must clearly state in the RFP the ground rules for the auction, particularly when the bidding will start and stop.

Effective 29 August 2024, updated FAR language, as cited at FAR 17.802(c )(4) and FAR 17.802(d)(5)(iii) and in turn revised contract clause FAR 52.217-12 provides new guidance and awareness to offerors and reverse auction service providers regarding Government's access, use and disclosure requirements as well as the disposition instructions which contracting officers shall provide in solicitations and resulting awards.

# Appendix H Templates / Samples

## H-1 Content Location

Source Selection templates are located on the ODASA(P) Procurement.Army.Mil (PAM) Knowledge Management Portal, in the Army Templates and Guides Library:

https://spcs3.kc.army.mil/asaalt/procurement/SitePages/NewTemplates.aspx