

# THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from  
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## DATELINE MAY 2020

*Ralph C. Nash*

Is it possible that 2020 will be remembered as the year when college graduates recognized that Government service is one of the best careers available and opted to apply for Government jobs? We've had several decades of politicians denigrating Government employees—culminating in the current crescendo. The result has been that only 7% of the employees of the Federal Government are under the age of 30. Yet change may be on the horizon.

In the last few months we have seen career employees come to the fore in guiding the response to the COVID 19 pandemic. We have seen career foreign services officers risk their careers telling the truth to congressional committees. At the state and local level, we have seen heroic actions of Government workers risking their lives to perform their duties. It has been inspiring but it also has provided a great example of the value of public service—both to the society at large and to the individuals that have chosen these careers.

We have also seen some agencies fail but that only magnifies the need to attract talented people to work for the Government. The response to the pandemic has illustrated the importance of highly competent Government at all levels and that means highly competent people.

I can testify to the fact that Government service is both worthwhile and challenging. I went to work in the Navy Department right out of Princeton. I was quickly given a level of responsibility in negotiating contracts that I would never have been given in any private organization. I learned about the business of Government contracting at an accelerated pace and it was a great experience. The same opportunity is available to young college graduates today. They have seen exemplary performance by Government employees. But they need to be told of the benefits of Government service. Let's all make it our job to spread the word. Governments at all levels in the United States perform vital and challenging functions and to perform these functions well they need highly competent employees. That means challenging jobs for young people. It's a win-win proposition. *RCN*

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## COMPETITION & AWARD

### ¶ 25 THE JEDI ACQUISITION: Innovation Rejected

*Vernon J. Edwards*

If you were to read the Request for Proposals for the Department of Defense’s Joint Enterprise Defense Infrastructure (JEDI) acquisition, issued on July 26, 2018 (the source selection is still underway), you might notice a strange thing. The DOD wanted to enter into a single-award indefinite-delivery, indefinite-quantity contract with a 10-year ordering period for commercial cloud services. The maximum value of the contract was set at \$10 billion. The scope and requirements of the prospective contract were described in a 20-page “Statement of Objectives” (SOO), which was attached to the proposal preparation instructions. The stated goal of the acquisition was to enable the DOD to manage information so it could make decisions at “mission speed.” The strange thing you might notice is that the RFP instructed offerors to prepare a “performance work statement” (PWS) based on the SOO and the JEDI Cloud Cyber Security Plan. The PWS was to be a “[d]etailed description of the work to be performed, including the services that the Offeror proposed to perform to achieve the SOO.” According to the RFP: “All Performance Metrics listed in the PWS shall apply to all [task orders] unless otherwise noted.” The RFP stated that the DOD would evaluate the PWS as part of an offeror’s “proposed approach” and would incorporate the successful offeror’s PWS into the contract. The RFP did not limit the number of pages in the PWS, but the SOO described eight objectives, 87 (by our count) performance requirements, three “desired capabilities,” 31 performance metrics, and 16 “deliverables.” What is strange about the requirement to produce a PWS? Several things.

#### What Did The DOD Expect From Offerors?

First, it is not clear what kind of document the DOD expected to get from companies like Amazon and Microsoft. Beyond the sparse guidance in Federal Acquisition Regulation 37.602, the PWS concept is a little hazy. According to FAR 37.602(b), a PWS must “[d]escribe the work in terms of the required results rather than either ‘how’ the work is to be accomplished or the number of hours to be provided” and “[e]nable assessment of work performance against measurable performance standards.” The JEDI RFP did not include any specific instructions about PWS content and style, and if you look at enough Government RFPs you will find documents of widely varying content and style that Government personnel refer to as PWSs. So what did the DOD expect the offerors to submit?

One attachment to the RFP was a prospective task order (Task Order 001) for program management support that contained a “performance work statement.” But the brief instruction to prepare a PWS did not refer to the task order, which did not contain any recognizably measurable performance standards. For instance, subtask 3.1.5, Communications, stated:

The Contractor shall communicate with CCPO counterparts regularly, including but not limited to Program Manager, security, technical, user engagement, strategic communications, provisioning support, and contracts, and proactively raise issues that may affect contract performance.

There were no specifications of results or measurable performance standards for “communicate,” “regularly,” or “proactively.”

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Subtask 3.4, Property Management, stated:

The Contractor shall provide management and reporting of Government Furnished Property for all [task orders] placed under the ID/IQ. The Contractor shall ensure its property management system is in compliance with FAR 52.245-1. In the event there are any changes to the pre-approved documentation provided at time of proposal submission, the Contractor shall provide updated documentation under [contract data requirements list] A014, Technical Report. The Contractor shall also properly handle all Government Furnished Information for all [task orders] placed under the ID/IQ.

There were no measurable performance standards for “management” or “reporting” of Government property, and we found none for any of the other tasks in the prospective order. So if the DOD expected offerors to follow the limited guidance in the FAR, then Task Order 001 must not have been an example of what the DOD expected from them. A Google search yields some PWS guidance and examples, but there is little depth or consistency among them.

How would the DOD evaluate the proposed PWSs? Would it do so on the basis of technical writing standards, legal writing standards, or both? The RFP’s description of the evaluation factors for award were of no help. The only mention we found of PWSs in the statement of evaluation factors was this:

For Factors 2 through 7, in addition to the criteria listed below, the Government will also consider the degree to which the proposed approach and proposed ID/IQ PWS (for the sections that are applicable to the respective Factor) are consistent with each other and reflect an understanding of the Government’s requirements (Section 3 and Section 5 of the SOO) as applicable to the respective Factor.

That reads like guidance about how the DOD will evaluate essay tests.

### How Do You Write A Performance Work Statement For A Task Order Contract?

There is a second reason for saying that the requirement to write a JEDI PWS is strange. A service is work done by one party for another in which the service provider is expected to change some state of affairs with regard to some object—a person or group, property, information, a set of circumstances, etc. A service result is a new state of affairs. A work statement in a services contract specifies the Government’s requirements—the results that it wants. If the work statement is a PWS, then it must also specify the results in measurable terms. But the JEDI contract is to be IDIQ because the DOD does not know specifically what its requirements will be over the course of the 10-year ordering period—what its service objects will be, what states they will be in at the outset of performance, and what changes (outcomes, results) the DOD will want.

Long-term and broadly scoped IDIQ support service contracts are really indefinite-delivery, indefinite-requirement (IDIR) contracts. They typically do not specify standard tasks, such as *Mop the floor* or *Test specimens in accordance with CDC Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens from Persons for Coronavirus Disease 2019 (COVID-19)*. Tasks are specified in the course of time, as requirements become known. That being the case, how could the DOD expect offerors to write a “detailed” PWS for services that are to be specified in the future? And what did the DOD mean by “detailed”?

Performance under JEDI task orders will entail the use of dynamic technologies, require the production of diverse results, and be performed using ever-evolving methods under who knows what future circumstances? How could an offeror realistically anticipate and forecast what its obligations would be to DOD components that would issue such orders over the course of a 10-year ordering period, especially in light of the statement in the RFP that, “All Performance Metrics listed in the PWS shall apply to all [task orders] unless otherwise noted”? Under the circumstances, how could an offeror describe the actions they would have to take, the results they would have to produce, and set measurable standards for its performance?

### Why Put A Performance Work Statement In A Task Order Contract?

Even if offerors had the foresight and imagination needed to write a detailed PWS for JEDI, why did the DOD want one for a task order contract? The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (FASA), §§ 1004 and 1054, turned the IDIQ contract for services into a game changer, especially in its single-award manifestation. Before FASA, the first paragraph of FAR 16.504, “Indefinite-quantity contracts,” read as follows:

(a) Description. An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of *specific* supplies or services to be furnished during a fixed period, with deliveries to be scheduled by placing orders with the contractor. [Emphasis added.]

When implementing FASA at 60 Fed. Reg. 49723, 49725 (Sept. 26, 1995), the FAR councils deleted the word “specific” from that sentence and added paragraph (a)(4)(iii), which now requires a solicitation and contract for an indefinite quantity contract to—

(iii) Include a statement of work, specifications, or other description, that reasonably describes the *general* scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer[.] [Emphasis added.]

So the FAR does not require a detailed PWS for a task order contract. Why not? Because it makes no sense to include one when requirements are nonstandard and indefinite at the time of contract award. Moreover, an agency should not want a detailed PWS in a long-term task order contract for commercial services, because such contracts typically do not include a “Changes” clause unless the inclusion of such a clause is customary commercial practice. See FAR 12.302(c) and *Smelkinson Sysco Food Services*, Comp. Gen. Dec. B-281631, 99-1 CPD ¶ 57, 1999 WL 140173, 41 GC ¶ 218. The JEDI RFP does not contain a “Changes” clause. Without a “Changes” clause, a detailed PWS in a base contract that becomes outdated will be a nuisance that limits the contract’s adaptability, which is its most potent feature, and complicates contract management. Statements of work are to be included in individual task orders, FAR 16.505(a)(2) and (3). So why force offerors to write a PWS for the base contract, and why incorporate it into the contract?

The beauty of a single-award task order contract is that it lets an agency defer specification and ordering of work until requirements are known and the work is actually needed. It lets the agency and its contractor work together to develop a statement of work and negotiate a deal without the folderol of the Competition in Contracting Act, the cumbersome FAR Part 15 clarification/discussion/final proposal revision rules, and the equally cumbersome “fair opportunity” rules applicable to multiple-award task order contracts. Given the current limits of statute, regulation, and bureaucratic imagination, the single-award task order contract is the ideal vehicle for innovative relational contracting. It allows the parties to make decisions cooperatively, quickly, and at the appropriate time instead of trying to specify everything before award. It is a transaction cost reducer, something we discussed more than 20 years ago in *The New Rules for Multiple Award Task Order Contracting*, 9 N&CR ¶ 35:

A task order contract obligates a contractor to render services only as ordered from time to time. Award of the contract merely puts the contractor on standby. The contract statement of work is a general description of the services that the contractor is obligated to render on demand. After contract award, the buyer specifies detailed and specific service requirements by issuing task orders. The contract stipulates the basis for pricing individual task orders. Task order contracts are wonderfully adaptable contracting instruments that are used by a number of Government agencies. They allow agencies to enter into contracts before their specific service requirements are known, thus reducing some of the transaction costs and contracting administrative lead time that would be associated with making several separate awards.

FASA’s recognition and legitimization of the single-award indefinite-delivery, indefinite-requirement contract for the acquisition of complex services was a glorious innovation. The multiple-award version is too cumbersome to be “glorious,” but it was an okay thing until the acquisition community wrecked the fair opportunity process. See *Compensatory Scheming: How To Do Things When You Can’t Do The Right Thing*, 29 NCRNL ¶ 59.

### The Perversion Of Innovation

No innovation is proof against perversion by people who do not understand the concept, do not think things through, and do not know what they are doing. Consider the DOD’s use of the SOO technique in the JEDI RFP. One of the earliest reported uses of a SOO was for the award of a production contract for the Joint Defense Attack Munition (JDAM) in the mid-1990s. The program office adopted commercial practices, replacing their 137-page statement of work with a two-page SOO and instructing the contractor to write a work statement based on the SOO. Using the SOO technique and other innovations, the DOD obtained significant reductions in acquisition lead time and unit prices. See Lorell et al., *CHEAPER, FASTER, BETTER? COMMERCIAL APPROACHES TO WEAPONS ACQUISITION* ch. 7, “Pilot Programs: Lessons Learned” (Rand 2000).

The first formal instruction in the use of SOOs appeared in Military Handbook 245D, *Handbook for Preparation of Statement of Work* (1996). Among the instructions was the following:

The program SOO should provide the basic, top level objectives of the acquisition and is provided in the RFP in lieu of a Govern-

ment written SOW....SOOs are normally in the 2–4 page range....The key is to keep the SOO clear and concise and to provide potential offerors with enough information and detail to structure a sound program, designed to be executable and satisfy government objectives.

The JEDI acquisition is for commercial services that are already being provided to governmental and nongovernmental customers, and descriptions of those services are available from the providers and third parties. Nevertheless, the JEDI “SOO” is 20 pages long, and offerors had to write “detailed” PWSs. If the DOD could reduce a statement of work for the production of a weapon system from 137 pages to a two-page SOO in the late 1990s, why, after two decades of acquisition innovation and streamlining, did it need a 20-page SOO for a commercial item, and why did it need a PWS for a commercial item task order contract?

A practical person might reasonably argue that the JEDI RFP did not need a 20-page SOO, and the JEDI contract does not need a PWS. All the RFP needed was a short (two or three pages at the most) statement of “the general scope, nature, complexity, and purpose of the...services” to be ordered, which would be incorporated into the contract in accordance with FAR 16.504(a)(4)(iii). The time to use a SOO would be when issuing a task order, for which the contractor could develop a work statement for review and approval by the customer prior to task order price negotiation.

The DOD could have prepared a concise statement of the contract scope and general requirements and asked each offeror’s chief executive officer to sign each and every page, thereby acknowledging the content, assenting to it, and promising that the company would comply as required by properly issued task orders. The signed statement could have been evaluated as acceptable or unacceptable based on whether the offeror’s CEO complied, and the winner’s signed statement could have been incorporated into the contract. That would have been easier on the offerors and the evaluation team, and it would have preserved the adaptability of the single-award task order scheme.

## Conclusion

Why make solicitation preparation, proposal preparation, proposal evaluation, and contract management more complicated than they need to be by misusing the SOO concept and requiring offerors to write a “detailed” PWS that will serve no essential or lasting contractual purpose? And why risk wasting time and making evaluation mistakes by giving evaluators unnecessary work to do? Why incorporate the successful offeror’s PWS into the contract, thereby making the contract less readily adaptable, when task orders will describe the Government’s actual requirements and specify the contractor’s actual obligations? The complexity of a solicitation, proposal, source selection process, or contract are not, of necessity, functions of the amount of money to be spent, and a complex process and deal are not necessarily better than simple ones. Why do anything when conducting an acquisition that you don’t have to do and that will be of little practical use when you want to make decisions at “mission speed”?

The DOD wrote one of the most needlessly complicated and demanding solicitations we have ever seen in order to choose a contractor to provide a commercial service under a task order contract. We do not doubt that DOD’s team honestly believed that they needed a PWS and that such a document would be useful, but we do not understand why they believed it. Contractually, it makes no sense. The JEDI acquisition team essentially discarded key advantages of the commercial item and single-award task order contract acquisition innovations authorized by Congress. We wonder why *somebody* in DOD didn’t ask them: *Why the heck are you doing those things? VJE*