THE IMPORTANCE OF INCLUDING IMMIGRATION AND SUPPORT SERVICES AS PART OF TECHNICAL COMPLIANCE WITHIN OCONUS ACQUISITIONS

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ABSTRACT

Government entities initiating and managing OCONUS procurements should always include, in the technical requirements, provisions requiring a bidder to ensure that their proposed OCONUS solution is fully compliant with host-nation immigration and labor laws. These requirements should specify that the bidder fully describe their understanding of local laws, and their methodology for delivering the required services while also adhering to those local laws.

In many or most FORS and other solicitations observed by this author, government program management entities do not include a technical requirement that ensures bidders fully explain how they intend to deploy staff to a foreign country within the context of compliant immigration procedures and the ongoing maintenance of that immigration over the term of deployment. And while many multi-award IDIQ contract vehicles may require generalized technical information concerning OCONUS deployments and other general guidelines about foreign law adherence at the IDIQ level, at the actual task order level, specific immigration and labor law compliance requirements are almost never included.

The omittance of these requirements causes significant increases in risk to the government program management entity, the bidders, the awardee, and the taxpayer. These risks include program startup/transition delays, un-forecasted costs, performance risks and legal risks within the host nation, among others.

To fully mediate these risks at no cost to the government, the government can simply include specific requirements and statements in any solicitation for contracted services that will take place OCONUS, and make these part of the evaluation criteria. These simple inclusions, as well as a full explanation of the issue, are listed in detail in this paper.

BACKGROUND ON THE AUTHOR

This paper was authored by the executive team of Pilgrims Group USA, a firm providing DOD Support services. This firm is NOT soliciting business from the government with the submission of this document. Further, this document should NOT be viewed as an advertisement of any kind. Our company is NOT requesting that the government procure any services or build a new procurement opportunity resulting from the solutions outlined herein. This paper was prepared on behalf of industry members providing services to the US government overseas and due to the frequently observed occurrences of the issues outlined herein. The case studies are made up of totally fictitious companies, programs, and government entities. Any similarities to actual entities are coincidental. However, all the invented 'facts' mentioned herein are believed by the authors to have occurred on various projects over time.

INTRODUCTION

Acquisitions stemming from Department of Defense (DOD) FMS cases are an integral part of US National Security and the security of our allies and global partners. It is critical that the DOD and its implementing agencies and program offices maximize the value of, and reduce performance risks for, all OCONUS acquisitions. The purpose of this document is to identify a specific issue within many OCONUS acquisition processes and to present potential solutions that should be considered to lower both costs and program risk.

According to the Department of State Bureau of Political and Military Affairs Fact Sheet, January 25, 2023, the US Government has authorized an average of $45B per year in FMS cases over the preceding 3-year period in numerous countries. Billions more in cases had been notified to Congress but were not yet approved at the time of this publication. Nearly all of these cases require follow-on sustainment, spare parts, maintenance, operations support, logistics and training contracts that span years and employ many American workers in the various OCONUS locations carrying out these services. These follow-on services are typically acquired through DOD Program Executive Offices (PEOs) or Project Management Organizations that specialize in some subset of the products and/or services or else the specific locations/customers. Typical OCONUS services contracts might include operations and maintenance of TADSS, life-cycle maintenance and management of aircraft/other military systems, or large-scale operations and training missions.

The deployment of thousands of American technical experts and trainers around the world, and the huge value of these services to both the USA and our allies, presents specific risks to the government acquisition processes as well as industry contractors carrying out the work on behalf of the US and its allied governments. This paper will focus on the risks arising from these deployments, specifically the risks to the government and small and medium sized industry partners alike, due to RFP's/FORS' non-inclusion of immigration, sponsorship, and support services (which are required in order for the contractors to carry out the work in OCONUS settings) as technical requirements. The failure to include at minimum immigration and sponsorship, as well as other support services, as technical requirements in government solicitations results in an increase in the number of performance delays, higher performance risks and the potential for higher costs resulting from overruns or REAs.

THE PROBLEM

Competent small and medium sized companies bid at a disadvantage to uneducated companies of any size on nearly all OCONUS programs. This is evident in best value bids, but much exacerbated for lowest price technically acceptable bids. LPTA bids offer a good value to both government program managers, and their foreign customers. If bidders are bidding apples to apples, it offers a high chance of a competent contractor being awarded to carry out the work. And in almost all cases in our experience, a RFP's and/or TORP's technical requirements development have been done with exacting detail and are very well technically explained. Apples equals apples.

However, the ODC's and ancillary support services, like immigration and sponsorship, required to comply with local labor laws are in many cases not defined, because, as one might expect, the

requirements development teams are focused on their customers' actual needs and rightfully expect the contractor to have these items in place. The problem starts when otherwise technically capable bidders are not at all familiar with the requirements of supporting a team of Americans in a particular location overseas, especially when the country in question has opaque government and business practices, or suffers from insecurity or austerity (or all the above). And every country has very different immigration and access requirements and issues, some of which are incredibly complex and have lengthy processes to complete. Industry members observe this consistently occurring for many OCONUS opportunities.

The issue is that while many contractors are competent to deploy staff to some bureaucratical and inconsistent country, their bidding competitors do not necessarily know about the ~18,000 issues and costs required to immigrate their teams to that location and successfully access a local government facility. These bidders are lower priced, but not actually "technically acceptable", which we take to mean "technically capable".

When the successful offeror doesn't bid support services correctly, the government's risk greatly increases. This has nothing to do with core mission capability of the bidder i.e. the ability to field instructor/operators and manage life cycle maintenance for a simulator training system or weapons platform. It is the risks involved with not attaining the critical path of simply getting people in country legally and on the work site due to noncompliance with immigration, host-nation labor laws, and military site access rules. Major risks include:

R1.	Program startup and transition delays	Inability to successfully phase in workforce to country prior to POP start date and/or inability to transition incumbent workforce to a new sponsor.
R2.	Cost overruns/REAs	Utilizing terms and conditions to justify exceeding TEP and/or utilizing REA processes to recoup losses due to justified lack of local knowledge.
R3.	Performance Risks	Usually associated with the inability to access the work site due to the 'wrong' immigration status in noncompliance with site security requirements. Also associated with the inability to bring new workers into the country (see R1) to backfill workforce attrition.
R4.	Potential for Protest	Unsuccessful bidders who believe that the successful bidder did not propose a legal sponsorship/immigration plan and that the subsequent lower TEP in the winning bid is the reason for their unsuccessful bid.
R5.	Non-compliance with Host-country Immigration and Labor Laws	Failure to comply with local labor laws will result in non-admittance, penalties, deportation of staff, and/or debarring of the company working in the OCONUS country.

PRO FORMA EXAMPLES

Let's examine a pro-forma case of an LPTA project in the fictitious country of Yurbuti. Yurbuti has recently purchased 25 Chippewa utility helicopters and 4 full-motion flight simulators spread over 2 training bases. This fictitious case study looks at the procurement process for a task order FORS on a MATOC with 5 large and 2 small down-selects providing operations, maintenance, and instruction services for the flight simulators. All the down-selects are extremely familiar with providing TADSS O&M and simulated flight instruction (which will be serviced by approx.

10 in-country staff). One of the small companies and 3 of the large firms have done business in Yurbuti in the past. There is a 60 day ramp up period allowed.

The original final FORS states nothing about immigration or sponsorship. A question is asked by one of the bidders as to 'whether the government will assist with immigration and site access'. The following scenarios detail expected outcomes given two different (and both very common) government responses.

1. The government response is: "the contractor must supply all necessary services in order to fulfill the mission requirement".
-OR-
2. The government response is: "the government will assist the contractor in gaining local visas".

In either of these scenarios, the competent bidder is forced to NOT bid known costs. And in the 2nd scenario, the competent bidder understands that the government will be able to gain a letter of invitation or support from the client government verifying the need for a travel visa. However, the government did not specify what type of visa (visa type affects process costs/time, and the duration of validity) this letter is providing and whether this letter will force the host government to provide a long-term work permit. Nor does it specify whether local labor laws must be complied with (or whether the letter will result in some type of local-military-issued mission visa, wherein compliance with local labor laws is not required).

The incompetent bidder will simply assume that the government is 'handling' visas and only bid the basic cost of processing paperwork. They will include a very innocuous and simple term/condition in their pricing proposal saying that 'they assume that government-provided articles are sufficient to ensure access to the work location'. It's almost never the case that host governments allow people to simply enter their countries and/or military bases. And this T&C may allow the incompetent bidder to come back to the government for either extra support, money, or both. This also forces the competent bidder to knowingly leave out needed costs, adding similar T&Cs, or risk not having their proposal even read, due to typical LPTA source selection (SSB) processes. This is because immigration, sponsorship requirements, and the need to understand host-nation complexities were not well defined in the LPTA requirement. Immigration, sponsorship, support services, and other related ancillary costs are therefore included in both the incompetent and competent proposals in such a way to ensure the bidder has the ability to come back to the government and demand extra money and time above what was bid.

One of the reasons that this issue could go unnoticed by any individual contract authority is because of how this issue is handled by large companies, which make up much of the business on the books of any given PEO or PM shop. And assuming the government doesn't wish to disadvantage small and medium sized firms, a follow-up example is warranted delving into outcomes after an award is made. With the above scenario staying the same, let's look at a pro forma case study comparing a fictitious large multinational company and a generic barely large (depending on the NAICS) Orlando-based services firm each winning the bid. The large firm is very familiar with Yurbuti; the small business is also.

Company Name: Grandiosely Large, Inc.
Yearly Revenues: $40B
Backlog: $122B
Narrative: Publicly traded, and a seat-holder on the MATOC servicing Yurbuti, this firm employees more than 80,000 Americans and operates in all US CENTCOM AORs and other locations globally. They have a massive auditing team on staff and their board of directors consists of former flag officers and army generals, former US senators, former deputy directors of major intelligence agencies, and a former Vice President of the USA.

Company Name: Smallishly Large, Inc.
Yearly Revenue: $28M
Backlog: $61M
Narrative: This Orlando based services firm has been in business for 20 years. It's a seat-holder on the MATOC servicing Yurbuti. This firm is very experienced in the provision of technical services, simulator O&M and software development. They employ 80 people both in-office and remote within the USA.

Again, using the above scenario for Yurbuti, and assuming that the government required contractors to manage immigration and support services themselves, we'll look at two cases. In the first case, Grandiosely Large (GLI) bid the lowest price and had a technically acceptable proposal. Further, given their experience in the region, the government deemed their technical proposal 'low risk'.

During the bid, GLI's capture team reached out to their pricing staff for acquiring all needed ODC line-item costs. The pricing team called up to the program folks in Washington who had successfully delivered radar systems to Yurbuti last year and asked for support on costing the ODCs. They assigned a 23-year-old former J4 staffer to research all the ODCs and for what he couldn't find, to use an average of what they'd costed over the last 2 deliveries in the Yurbuti region. The young staffer found most of the items in recent bid data but was reminded that they would need 10 travel visas to enter Yurbuti. He promptly Googled "cost of a visa to Yurbuti" and found 25 visa agencies in Washington providing services. He called the first 3 wherein the best price for 10 travel visas, usually $400 for the agency (plus $120 to the Yurbut embassy), was negotiated down to $375 for each visa, plus the Yurbut embassy fee. He was told that there would be travel document requirements but assured the visa agent that this was just for a proposal and that they would work that out if/when the time comes. He included this rate and the vendor information in the package and sent it back along with 41 other ODC line items to be included in the pricing. Compliance workers vetted and approved the visa agency, and the pricing team was cleared to utilize all the ODCs in the bid.

The issue is that Yurbuti requires each foreign worker to enter the country on a work visa, and must possess a work permit, a local driving license, and be paid through a local bank account by a locally-registered, tax-paying company in order to comply with local labor laws (**R5**). All of the services required in order to fully comply will actually cost about $100,000 (**R2**). Certainly, someone in the company knew about the visas processes for Yurbuti… but it's a large stove-piped company with many layers of bureaucracies and politics… and it just slipped through. The

government received bids from four of the large companies, and none of the smalls. And the bid was close. GLI won by a slim margin of only $81,000 under the next bidder and the average bid was only $164,000 higher than the GLI bid. Government SSB managers were mollified by the closeness of the bid and were reassured of their decision. Since none of the large companies who competed the bid actually priced proper immigration, including the ones that knew about the requirement, the government avoided a technical compliance protest (**R4**). But it was a close thing as one of the unsuccessful capture managers was pushing for it.

Once awarded, GLI got to work. The Simulations Services Program Manager tasked a very competent and experienced project manager who got in touch with the head of HR, with whom she was familiar. They started recruiting immediately both from the open market and their internal databases of prospective candidates. Within 2 weeks they had 26 solid resumes. After another week of interviews, 10 people, including a team leader accepted the positions for deployment within 30 days to Yurbuti, about a week ahead of schedule.

The project manager and the assigned HR team then started the deployment process for all 10 workers, including training, security and travel requirements. The visa agency was contacted and was requested to send the RFIs for immediate processing of 10 visas to Yurbuti. The issues started when the visa agent sent the request for their sponsorship LOI and Yurbut corporate trade license. Neither of these documents were available. However, the PM was well connected in Yurbuti and contacted a local company there that she'd done business with five years back on another program. The company agreed to provide the LOIs and process the visas, locally employ the staff as their employer of record, and pay these staff 20% of their US salaries from the local company to local banks to comply with labor laws. They're charging a pretty low cost for this: $3,500 per person for the sponsorship letters, visas and setup, $425/pax/month for the employer of record services and $100/pax/month for running payroll through the companies compliant, government-monitored, payroll system. They'll also charge the company for obtaining driving licenses, exit permits (for when staff go on leave), no-objection certificates for vehicle leasing and apartment rentals (all of on which the sponsor must sign off) and any other requirement that comes up. But they'll inform GLI about that when the time comes. They lost about 2 weeks getting this setup, which is very fast for the region, and the KO was informed of the potential delay due to "immigration issues our of our control" (**R1**).

Unfortunately, half of the initial visas were denied due to the sponsor's PRO incorrectly providing job descriptions for technical expert positions requiring accredited university degrees. This took another week to process these folks so instead of being 2 weeks overdue for 10 people, GLI decided to eat the cost and fly the delayed staff over to enter Yurbuti on an arrival visa, knowing that they'd have to exit the country in 30 days and start the visa process again (**R1, R2**). But, they thought, rather than longer delays, they'd rather show that they're in country and trying to start work. Unfortunately, as they quickly learned, base access, which was to be handled by the individual staff on the ground and ODC at the US embassy in Yurbuti, required valid work permits. So, the early trips were just wasted time and costs (**R1, R2**). Because of this, GLI was non-compliant on the program (**R3, R5**) and work was not getting done. Eventually it was all settled and work started, late and over budget. Since this was a firm fixed price bid, the government did not receive a request from GLI for reimbursement and it was all settled with a

verbal agreement that the Yurbut government was less than transparent on the management of their FMS case.

Make no mistake: the government and the taxpayers are paying for the cost overruns that this large multinational firm has against a budget on this fictitious FMS case. And while FAR Part 31.205.25 disallows losses from one contract to be applied to another, the company's general practice is to use past operational losses (they did not lose money on the task order, just the underfunded ODC line) as justification for projected overhead and G&A cost increases which affect their cost wrap rate for next year, in this case by approximately 0.0000024. This is not even a rounding error for the company. But as stated, the taxpayers will reimburse this company for the loss in the following year on their cost contracts and the government has not recognized the problem in order to have it solved on the next OCONUS requirement.

In our second scenario, Smallishly Large, Inc (SLI) decides to bid on this job. They have a good relationship with the PEO in question and are probably the forerunner capability-wise of the small businesses on the MATOC. They really specialize in this type of service, at least in the USA, and they've hired an expert in OCONUS operations as a subcontractor to fill the gap on their lack of overseas work. In this case, when SLI asked the question to the government about immigration support, which they did on the advice of their sub, the government responded with the second option, "the government will assist the contractor in gaining local visas".

This gave SLI the greenlight to bid the job without all the costs associated with immigration and sponsorship and just bid the visa processing costs at around $400/visa. Again, on the advice of their expert sub, they included an innocuous pricing term/condition which stated "SLI assumes the government will provide adequate immigration support per their answer to question XX.XXX". This condition was buried between 40 other standard conditions and because the SSB price team was not given details on technical requirements, this condition was not regarded. And because immigration requirements were not included as part of the technical requirement, the SSB technical team cleared SLI for award, wrote up the justification and sent the package to their Army Contracting Command for award.

Of course, SLI knew that they would need full sponsorship services, including LOIs, Visas, Employer of Record services, local payroll, driving licenses, NOCs and more. And they'd partnered with the company that was going to provide it: their expert sub. But they also knew that if they bid the actual cost of the job, they would lose the bid (**R1**). Instead, they easily built in a way to come back to the government for more money, once the government's letter, which essentially was a notice to the Yurbut immigration department that these people need visas, failed to materialize in a work visa, labor card, or any of the other required items to ensure local labor law compliance (**R5**). As referenced in the Journal of the American Planning Association 68, no. 3 (2020), the author concludes that bidders "routinely ignore, hide, or otherwise leave out important project costs in order to make total costs appear low". This case demonstrates this type of occurrence and how it can lead to increases in risk, unexpected costs and poor outcomes.

THE SOLUTION

Luckily the government can easily prevent all of the risks described herein with a simple, and free solution. The solution is to include the requirement to comply with local labor laws within the technical requirements of the solicitation and specify which CLIN the costs associated with immigration and/or sponsorship should be proposed. The government could also utilize a 'Plug CLIN' to capture the costing for the required services. This, and a very simple statement consisting of direct and positive notice to the bidder requiring compliance with local immigration and labor laws will solve literally all of the issues described herein. For instance:

"The successful offeror must ensure that all deployed staff have gained proper travel documentation in order to enter the country and reside in that country for the duration of their tenure on the program. The successful offeror must also ensure that all deployed staff are legally employed in the country in such a way as to comply with all local labor laws, sponsorship requirements and facility security and access rules."

This simple statement will force inexperienced bidders to:

1. Explore the meaning of the requirement fully.
2. Research viable methods of providing for the technical requirement.
3. Provide cost backup for the requirement, and price accordingly.

Experienced bidders will already have a methodology in place and will price this accordingly. And all bidders will be required to address each requirement in their technical proposal and will be judged both on price, and their technical plan. The SSB's technical review team will be equipped with the basic knowledge of this important technical component. Namely, they will have the minimal viable technical standard for the requirement. This standard could be something like:

1. Successful offeror has identified a visa processor or how they access the foreign mission.
2. Successful offeror has identified a local sponsor or else operates a locally registered entity in good standing.
3. The successful offeror has identified a clear plan to carry out all requirements including processing visas, sponsorship agreements and local labor contracts. The offeror has also identified how it intends to process driving licenses (assuming staff are self-driving, and not chauffeured), exit permits and NOCs, etc.

All these items above could be easily technically achieved by the bidder by using a competent local sponsor who will carry out these service items. The successful offeror can simply point to the experience of their sponsor as technical compliance.

Following this guidance will help the government and the bidders, especially the small and medium sized companies, reduce risk and keep procurements completely fair and level for all parties. Whether for Best Value or LPTA procurements, simply including the requirement to comply with specific host nation immigration and labor laws, gives the government the ability to reduce significant risk and ensure an equitable bid process with the highest chance of success.

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