

# **Numerical Evaluations in Best Value Procurement**

NIGP Forum 2021

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## **Additional Resources from the Forum 2021 Session, Numerical Evaluations in Best Value Procurement**

Bonfire, NIGP Webinar 092619: 5 Mistakes You Might Be Making in Your RFP Evaluations and How To Avoid Them.

Erwin, Mike. 6 Reasons We Make Bad Decisions, and What to Do About Them. *Harvard Business Review*, August 2019.

Heath, Chip and Dan Heath. *Decisive: How to Make Better Choices in Life and Work* (2013)

Daniel Kahneman, Olivier Sibony, & Cass Sunstein, *Noise: A Flaw in Human Judgment* (2021)

Pennington, Richard. “The Precision, Accuracy, and Utility of Numerical Evaluations in Best-Value Procurements, LinkedIn, Jan. 24, 2018, <https://www.linkedin.com/pulse/part-2-precision-accuracy-utility-numerical-richard-pennington>

Ullman, David. *Making Robust Decisions: Decision Management for Technical, Business, and Service Teams*. Oxford UK: Trafford Publishing, 2006.

The NIGP Document Library has an evaluation plan (RFP Evaluation Plan Pennington), evaluation spreadsheet with conditional formatting (Evaluation Spreadsheet Pennington 5-Point 2021), and award memorandum (Evaluation Memo Pennington 2021). Note that the 100-point scale in the RFP was changed to a 5-point scale in the spreadsheet for reasons explained in the Forum session.

**NOTE: The following RFP extract was prepared for a 2016 presentation to the NASPO Procurement Law Institute and parallels the numerical evaluation ideas in the Forum 2021 session. It uses portions of the RFP language from the 2000 RFP for the Colorado Attorney General Information System. The extracts include the background, evaluation process, basis of award, weighting of factors, instructions for how to identify exceptions to RFP terms and conditions, and the scope of post-selection contract formalization.**

### **1.3 Scope of the RFP/Basis for Award**

The Department of Law is beginning the detailed design and installation of a new, computerized billing, docketing and case management system for its 350 users.

The successful vendor will be chosen based on the following evaluation factors in decreasing order of importance: technical, functional, and services features of the proposal (section 4); offeror experience and demonstrated capabilities; and price/cost.

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### **3.1 Project Overview**

The Colorado Attorney General and the Department of Law which he oversees (collectively referred to as the Colorado Attorney General's Office or AGO) plans to replace its existing Billing, Docketing, and Case Management systems. Major parts of the existing systems were designed and developed in the early 1980's. They are implemented on a State operated mainframe (MVS, COBOL, CICS, etc.) and interface with the AGO's local area network (LAN) through daily file transfers. The systems do not have simple, easy to use, user interface screens and often reference data required for attorney time entry must be transferred to the LAN overnight. The billings for the client agencies do not contain sufficient detail and result in requests for additional information from the AGO, reconciliation problems, and lack of satisfactory management information for the AGO's supervisors and managers. The AGO needs an automated tracking system that is in common use throughout the AGO to ensure that case deadline dates are being met. The AGO management needs better case information to use for client contact and problem resolution, for supervision of attorney caseload, for reporting to oversight agencies including the State's Joint Budget Committee.

The AGO provides billings for legal services to approximately 300 agencies within the Executive Branch of State government. The AGO provides legal services that impact citizens of the State of Colorado both directly and indirectly. The work of the AGO involves investigation, litigation, mediation, and consultation. The primary customers of the AGO are the citizens of the State and the Executive Branch agencies. In addition, the AGO works closely with Law Enforcement Agencies from municipal to federal levels. The needs of the agencies represented by the AGO are equivalent to the needs of an individual that requests legal representation. In other words, the clients want to avoid excessive litigation but want to pursue litigation that is justified, the clients want to develop policies and procedures that discourage practices that will result in litigation. The clients want advice and representation that is fair and competitive in the

legal profession.

The new system will provide a number of capabilities that will enable the AGO to provide quality legal representation.

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## **5.4 Evaluation Process**

Although specific disclosure of evaluation points, formulas, and committee structure is not required under Colorado procurement rules, the following description of the evaluation process is being provided to clarify the nature of the Department of Law involvement and commitment to this process.

An Evaluation Committee is being assembled that will consist of representatives from within the Department of Law and include attorneys, paralegals, and information technology professionals. An evaluation plan is being developed that will be finalized before proposals are distributed to individual evaluators.

A numerically based evaluation methodology will be used to assist in the evaluation. A scoring system of 0-100 will be used, and specific evaluation weights for subfactors are being selected to reflect the low, medium, high, and very high descriptions in section 4. Committees will discuss evaluation criteria for scores to be in the poor, marginal, fair, good, and excellent categories.

The relevance and comprehensiveness of past experience and qualifications will similarly be evaluated to assess the risk of either unacceptable or late performance.

Price/cost will be the lowest weighted factor and will be quantitatively evaluated.

While a numerical rating system will be used to assist the evaluation committee in selecting the competitive range (if necessary) and making the award decision, the award decision ultimately is a business judgment that will reflect an integrated assessment of the relative merits of the proposals using the factors and their relative weights disclosed in the RFP.

Offerors should not assume that they will have an opportunity for oral presentations or revisions of proposals, so they should submit their most favorable proposals as their initial proposal. If award is not made on receipt of initial proposals, offerors in the competitive range (those most responsive to the requirements and reasonably susceptible of being selected for award) will be provided an opportunity to make an oral presentation. The competitive range determination will be based on the written proposals, so offerors are cautioned to ensure that their proposals adequately convey the soundness of their approach and understanding of the requirements.

Oral presentations with offerors in the competitive range are planned to be two hours in duration. The presentation may consist of an offeror briefing or demonstration concerning its technical approach as well, and the offeror should address any clarifications and deficiency items that may have been identified in advance by the State.

If proposal revisions are permitted after the conclusion of oral presentations and discussions, a date will be established in writing by the State for submission of best and final offers. Revisions will be made by “change page” to proposals. Offerors will not be provided an opportunity for comprehensive proposal revisions.

Upon request, the apparent successful offeror will be required to submit a Dunn and Bradstreet credit report and third-party audited financial statement, or a third-party prepared financial

statement if an audited statement is not available, in order to assist the State in making its determination of contractor responsibility in accordance with CRS 24-103-401.

## 5.5 Basis for Award

The successful vendor will be chosen based on the following evaluation factors in decreasing order of importance: technical, functional, and services features of the proposal (section 4); offeror experience and demonstrated capabilities; and price/cost.

The technical factors will be assessed based on the soundness of the offeror's approach and the offeror's understanding of the requirement. The experience and/or demonstrated capabilities factor will be assessed by considering the extent to which the qualifications, experience, and past performance are likely to foster successful, on-time performance. Assessments may include a judgment concerning the potential risk of unsuccessful or untimely performance, and the anticipated amount of State involvement necessary (beyond that reasonably necessary) to insure timely, successful performance.

While a numerical evaluation method may be used as an aid to evaluation, the selection ultimately is a business judgment that will reflect an integrated assessment of the relative merits of proposals using the factors identified above. The State reserves the right to reject any (or all) proposals that pose, in the judgment of the State, unacceptable risks of unsuccessful or untimely performance, unacceptable State resources requirements, or costs exceeding the budget constraints.

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## 6.4 Document and Data Deliverables

The contractor shall deliver, unless otherwise specified in the proposal and accepted the following documentation.

- a) Software documentation of source code relating to any modification of existing State timekeeping, docketing or other systems to the extent the delivered system interfaces with existing legacy systems. The documentation shall be in human readable format, which clearly identifies the programming language and version used, and when different programming languages are incorporated, identifies the interfaces between code programmed in different programming languages.
  1. The software documentation shall contain source code in a human readable format, which describes the program logic, relationship between any internal functions, and identifies the disk files that contain the various parts of the code.
  2. Detailed "commenting" of source code may be used to partially satisfy the documentation requirements, although documentation shall also include a flowchart that identifies the program flow between files and functions. Comments may be used to document internal flow control in functions.
  3. Files containing the source code shall be delivered or may be left on the host machine, so long as the files and their location are identified and their significance to the program is documented.

4. Documentation shall describe error messages and the location in the source code, by page, line number, or other suitable identifier, where the error message is generated.
- b) Additional written documentation shall be delivered that describes operation of the system by those placing orders, persons maintaining the system, and other users necessary to operate the authentication, workflow, authorization, and security aspects of the system.
- c) It is the intent of the parties that documentation be written so persons reasonably proficient in the use of graphical user interface software and web-based systems can efficiently use the documentation to understand the system operation and administration and, in the case of software documentation, program structure, iterative and other control techniques, and decipher error messages should they occur. Within the rights granted elsewhere in this contract, the contractor warrants that the delivered documentation will be sufficiently descriptive to enable maintenance and modification of the software and other system functions to permit the anticipated use by the State, as well as maintenance of the interface between the system and State accounting and other legacy systems.

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## **1.8 Modified BIDS Contract Terms and Conditions.**

As indicated in section 4 of the State of Colorado Solicitation Instructions/Terms and Conditions on Bid Information and Distribution System (BIDS), a bilateral contract will be executed by the parties and approved in accordance with State law. The Purchase Order terms and conditions and Special Provisions will govern this agreement.

***[Note for this panel discussion, the State of Colorado Solicitation Instructions/Terms and Conditions included these relevant provisions:***

### **3.8. Evaluation and Award.**

3.8.1. In the case of competitive sealed proposals (RFP), the State reserves the right to make an award on receipt of initial proposals, so offerors are encouraged to submit their most favorable proposal at the time established for receipt of proposals. Proposals requiring major revision in order to be susceptible of award, or otherwise not meeting the mandatory or other requirements required for further consideration as specified in the RFP, may be classified as unacceptable and shall be ineligible for further consideration. The State may conduct discussions with offerors in the competitive range for the purpose of promoting understanding of the state's requirements and the offeror's proposal, to clarify requirements, and to make adjustments in services to be performed and in prices. Revisions to proposals, if permitted, will be requested in writing or electronically from offerors.

3.8.2. Award of a contract as a result of an IFB will be made to the low responsive and responsible bidder. For a competitive sealed proposal award (RFP), award will be made to the responsible offeror whose proposal is determined to be most advantageous to the State, price and other factors considered, in accordance with the criteria described in the RFP.

The following changes and/or additions are hereby made to the “Purchase Order Terms and Conditions”:

#### **6.8.1 Paragraph 5, Rights in Data, Documents, and Computer Software or Other Intellectual Property.**

The parties agree that the State owns the intellectual property rights to all documentation produced and delivered pursuant to the terms of this contract. The contractor, as licensor, grants to the State, their agencies and political subdivisions, a perpetual, irrevocable, non-exclusive, royalty-free license to use the software (including data) and related software documentation required for performance under this contract. This includes the rights to:

1. Reproduce and use, and permit others to reproduce and use for the State the software/documentation pursuant to this contract,
2. Prepare derivative works necessary to perform the contract,
3. Prepare copies for archive purposes,
4. Receive upgrades and updates within 30 days of commercial release, and use the software on any government computer being used for contract purposes. The licensor grants these rights without reservation or any additional compensation.

#### **6.8.2 Paragraph 7, Disclaimer of Warranties.**

The State will accept proposals, which disclaim the warranties of merchantability, fitness for a particular purpose, or express warranties except as they may arise out of written requirements in this request for proposal or the offeror’s proposal. The State will not accept disclaimers of the warranty of title and against infringement. The warranty provisions may be clarified during post award contract formalization in a manner described in the proposal to align its operation with the inspection and acceptance protocol proposed and accepted by the State, and the express system warranty (90-days minimum or as proposed).

#### **6.8.3 Paragraph 8, Inspection and Acceptance.**

The contract clause on inspection and acceptance may be clarified during post-award contract formalization, so long as the clauses reserve the right to termination and other remedies available at law and equity in the event that any other contractor repair obligations that are proposed by the contractor fail of their essential purpose. Any clarification to the inspection and acceptance provision must be described in the proposal.

#### **6.8.4 Insurance**

The Vendor shall be required to meet the insurance requirements specified in paragraph 4.3 of the State of Colorado Solicitation Instructions/Terms and Conditions. The State will consider bonafide self insurance programs as compliant with the insurance provisions so long as they meet applicable State requirements and, in the judgment of the State, provide comparable coverage and protection against risk to the State. Any offeror proposing such coverage must

provide information requested by the State it deems necessary to evaluate the self-insurance program.

## 6.9 Limitation of Liability

The State will agree to commercially reasonable limitation of liability clauses that limit the contract breach remedies. The limits on such clauses are:

1. Limitations of liability must exclude from their operation claims or liability for damage to tangible property and bodily injury (including death) arising out of acts of the contractor.
2. Claims and damages arising out of intellectual property infringement actions must be excluded from any limitation of liability provision, although the State will agree to reasonable notice and litigation control provisions that further clarify the operation of the indemnification obligation.
3. Offerors must identify any limitation of liability provisions that they intend to propose. The State reserves the right to make reasonable adjustments in the cost evaluation factor to account to increased risk suffered from inclusion of limitation of liability provisions.

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## 1.12 Offeror's Proposed Terms and Conditions

Except as specified in the offeror's proposal, the submission of the offeror's proposal will indicate its acceptance of these terms and conditions. Offerors must disclose in their proposals their required terms and conditions, substantial objections to these proposed terms or conditions, or required clarifications of terms and conditions as required in the instructions in this section and the BIDS Solicitation Instructions and Terms and Conditions (e.g. limitation of liability and intellectual property rights). Offeror proposed terms and conditions do not count against the page limits specified for proposals. The State reserves the right to clarify terms and conditions not having an appreciable affect on quality, price/cost risk or delivery schedule during post-award formalization of the contract.

**NOTE While not used in the AGIS RFP, the following clause was later developed to frame the scope of post-selection contract formalization:**

Post-Selection Formalization of the Contract. The State reserves the right during contract negotiation of the Contract to adjust terms and conditions that would not (in the State's judgment) have a material effect on price, schedule, scope of work, or risk to the State, with materiality defined in terms of the effect on the evaluation and award selection decision. The State reserves the right to accept contract or pricing changes that are more favorable to the State.