

Vendor Issues
(Last Updated September 1, 2000)

Independent Technical Review of the Carnivore System

Due to the short time frame for this procurement, the Department will use this document to publish issues raised by interested parties and our response. Updates will be posted daily if need be. This 9/1/00 update adds issues 8 through 35.

(1) The RFP was issued on a full and open competition basis yet press reports indicate that DOJ is only considering Universities for this work.

The Department will consider proposals from all responsible sources. However, as noted in the Commerce Business Daily announcement and the RFP, independence is a key evaluation and selection factor. Universities have been mentioned in press releases as they are generally perceived to have fewer conflicts (actual or apparent) than many commercial organizations.

(2) DOJ's time frame for submitting a proposal is quite short and the RFP doesn't contain enough information about the system to prepare and submit a thorough proposal.

The Department's process with regard to evaluating proposals is briefly described in Section M.1.3 of the RFP. We understand that initial proposals, which are limited to 10-pages (not counting resumes), will only be able to highlight the offerors' technical proficiency, technical approach, and independence as it relates to the general technical information provided with the RFP. Initial proposals will be evaluated by the Department to determine which offerors are the most capable and independent. The Department will then enter into negotiations with this group (most capable and independent) of offerors. Part of the negotiation process will include providing these offerors additional information about the system which will allow them to revise their proposal with tailored cost, schedule and team make-up. The Department will evaluate these revised proposals and select the offeror whose proposal best meets the Department's requirements.

(3) DOJ states that the review is intended to be "independent" yet DOJ reserves the right to withhold certain portions from the published versions of the draft and final reports.

As noted in the RFP (see Section C.4.2.1), the only information that will be withheld from published reports is that which may compromise the effectiveness of Carnivore as a law enforcement tool. The Department's goal is to maximize disclosure to the public and the report (as publicly released) will identify any portion of the report that has been withheld from disclosure, and the Department's reasons for deciding to maintain it in confidence. The Department will not otherwise attempt to control the form or content of the draft and final reports produced by the contractor.

(4) The delivery schedule specified by DOJ for the draft and final reports is extremely short and appears impossible to meet.

The delivery dates specified in the RFP for the draft report (11/17/00) and final report (12/8/00)

are the Department's desired dates. Offerors can propose alternative delivery schedules that extend beyond the desired dates. The delivery schedule is part of the evaluation of technical approach and can be revised during the negotiation process (see issue (2) above).

(5) In the interest of proposing a highly qualified team, can an offeror propose an individual(s) that is not an employee of, or directly associated with its organization.

Yes. An offeror's proposal may include team members, subcontractors, consultants, etc. However, the Department will give added preference in the evaluation to offerors that demonstrate significant breadth and depth of expertise available within the offeror's organization.

(6) Will DOJ be furnishing the requisite hardware and test environment or is the contractor expected to furnish the hardware, build and configure the system according to DOJ's specifications, develop a test environment, and the DOJ simply furnishes the requisite software.

The Department is interested in an approach that will ensure an independent, objective, impartial and thorough technical review of the Carnivore system within the time frames specified in the RFP. We understand that some offerors may prefer to use their own facilities for part or all of the review. The Department is open to that option, and particularly to testing of the system using team facilities; but we would expect to authorize the review of source code, or of certain other sensitive information, only in government facilities or in team facilities with equivalent security arrangements.

Offerors can assume that, within reason and subject to the RFP security requirements, the Department will make available to the contractor whatever is necessary to conduct a thorough review at either the Government's or the contractor's facility. Please note that DOJ will provide a complete system and access to personnel to assist with the setup. Offeror proposals should describe assumptions with regard to any equipment or other items to be furnished to the contractor for the duration of the project. With regard to the test environment, initial proposals should describe the extent to which the offeror intends to rely on the Department's test environment and the offeror's ability to generate significant and varied test traffic for purposes of ensuring a thorough review.

In addition, as noted in response to Issue number 2 above, part of the negotiation process will include providing offerors (that are included in the most capable and independent group) additional information about the system (to include the DOJ test environment) which will allow them to revise their proposal with tailored cost, schedule and team make-up.

(7) Does the 10-page limit specified in RFP Section L.4, Table 9 for technical proposals include appendices.

The 10-page limit includes everything (i.e., appendices, attachments, etc.) except resumes.

(8) Reference C.3. In addition to the objectives identified as C.3.a (1) through (4), is it within the scope of this contract for the technical review of the Carnivore system to address additional questions?

Per C.3(b), Additional, relevant questions may be added to those listed in the RFP. Offerors may identify such questions in their proposal if they choose.

(9) Reference C.4.1. If the goal of this contract is an impartial review by a university, as Attorney General Reno stated at her press conference on August 23, then how can this be reconciled with the requirement for government controlled space or equivalent facility security? Please clarify these requirements and the level of security envisioned. Do university laboratory spaces typically meet these requirements? Is there a specific process that would certify a university laboratory space as "secure" to Department of Justice standards, and how much time would this process require?

The security provisions are not intended to be onerous, and are subject to further discussion with the offerors included in the competitive range (see M.1.3). It is possible, for instance, that system testing could be performed at university facilities with basic security precautions that are presumably already in place, while review of source code would take place in government facilities located near the university. See also DOJ response to issue #6.

(10) Reference C.4.1. The statement of work proposes an evaluation of "model scenarios." It is conceivably that the Carnivore system could handle all the proposed model scenarios well yet fail in other situations. A detailed system specification is needed to ascertain what scenarios Carnivore is intended to work in, and what scenarios it is not. Has such a system specification been defined, and will it be made available to the Contractor?

As stated in the DOJ response to issue #6, we will, within reason and subject to the security requirements of the RFP, provide everything necessary to conduct a thorough review. Additional information about what will be made available to the contractor will be given to those offerors judged to be most capable and independent after our initial technical evaluation (see DOJ response to issue #2). Note that there is no detailed system design for Carnivore. If the contractor were ultimately to conclude that specifications or documentation for the system are inadequate, that would be a legitimate subject for comment in the review.

(11) Reference C.4.1. Some inherent design limitations of the Carnivore system are sufficiently obvious that they are even being discussed in the popular press by analysts who have only superficial, publicly available knowledge of Carnivore. Many of the potential bidders for this contract already have publicly identified or discussed such limitations. What sorts of statements are to be covered by this restriction on dissemination of information? If one were to read this clause adversarially, one might conclude that the Department of Justice can prevent review panel participants from discussing any risk it doesn't want them to disclose, merely by telling them about the risk -- even if they already were aware of it and had been discussing it in public forums. Will serving on the Carnivore review panel have the effect of prohibiting participants from engaging in open discussions of previously known issues?

Serving on the Carnivore review panel will not prohibit participants from engaging in open discussions of previously known issues. Additional information about the Carnivore system that becomes known to the Contractor solely as a result of its work under this project will be subject to the confidentiality provisions of the contract.

(12) Reference C.4.2.1. What is meant by "offer suggested replacement text" and "resolve" in this context? Must the Contractor include "suggested replacement text" and censor the original text of the report at the direction of the COTR, or is the content of the report intended to be the independent product of the Contractor's technical expertise and best judgment? Will the Government consider a proposal that takes exception to this requirement?

The Department is committed to an independent review. The contractor will have the discretion to accept or reject comments on draft deliverables. The Department will retain unilateral authority in only one respect, which is the right to forbid disclosure of certain system details or other sensitive information. If such information is withheld, the report will be expected to so indicate, and to include the Department's explanation for the refusal to disclose. See C.4.2.3(b).

(13) Reference C.4.2.2. Given the extremely short period of performance and the time involved in preparation and travel, may these briefings be located at the Contractor's facility or conducted by telephone?

This is subject to discussion, but the general answer is that we intend to be as flexible and accommodating as possible, and to do whatever makes sense under the circumstances. This could well include on-location or telephone briefings.

(14) Reference C.4.2.3. Given (A) the extremely short period of performance, (B) the requirements of C.4.2.2 for progress reports and briefings, and (C) the Government's restrictions on any release of "sensitive" information in the Draft and Final Reports, the requirement for a Draft Report seems counter-productive and pointless. Will the Government consider a proposal that takes exception to this requirement and omits preparation and delivery of a Draft Report from the Statement of Work?

The Department views the draft report as necessary to provide a basis for a public discussion that may both improve the final technical report and provide one basis for a final report to the Attorney General by Department personnel, which will also address non-technical issues.

(15) Reference C.4.2.3. Will the Government consider a proposal that takes exception to this requirement, to the extent that any withholding of information in the public version of the draft report must be with the mutual agreement of the COTR and the Project Manager, with disagreements resolved by a previously agreed upon third party?

No. See response to issue #12.

(16) Reference C.4.2.4. Are there any limits on when, where, and how often the Project Manager must make himself/herself available, especially considering the fact that the Project Manager may have other duties such as preparing the Final Report during the public comment period?

The Project Manager must be available to the extent required by the Contracting Officer's Technical Representative. You may assume that the requirements will be reasonable, subject to discussion, and imposed in good faith.

(17) Reference C.4.2.4. Would the Project Manager of an organization performing the review at no cost to the government be subject to the requirement for participation in public discussions if this participation involved significant amounts of travel?

Yes. Note that the Government will reimburse all legitimate and approved long distance travel in accordance with the provisions of the contract.

(18) Reference C.4.2.4. "Consider" to what extent? Given that the Government expects "that interested members of the public will express their views" during this time, does "any

comments" mean "all comments" relating to the technical issues addressed by the Contractors report? If not, please clarify.

The Contractor is to consider all comments related to the technical issues addressed by the Contractor's report. "Consider" does not necessarily mean "respond specifically to." The need for and degree of response is a matter for the contractor's professional judgment.

(19) Reference C.4.2.5. "Revise the draft report as necessary" to what extent? If (per L.4.2.1.4) the goal of this contract is a review by an organization that is publicly recognized as "independent, objective, and impartial," does a provision that essentially gives the Department of Justice the ability to rewrite the Contractor's conclusions in the Final Report serve the purpose of avoiding "any appearance of improper influence by the Department, including the FBI, or by other law enforcement or governmental interests"? Clarification and/or limits requested here. Will the Government consider a proposal that takes exception to this requirement?

The extent that the draft will be revised depends on the nature and extent of the comments received and can only be determined at that time. The Draft and Final Reports are to reflect the views, opinions, and criticisms of the contractor and only the contractor. Changes to the reports will be required only to correct inaccurate, erroneous, or misleading statements. The only portions of the reports that will be withheld from public release will be those that reveal certain system details or other sensitive information. The Department will identify those portions of the reports that are withheld from public release and explain the bases for the withholdings.

(20) Reference C.5.2. The sample Nondisclosure Agreement forbids any participant in the review from ever discussing "any and all information" of the Carnivore system, including elements that are currently public knowledge. Are common-sense modifications to this agreement allowed? Specifically, will the Government accept Nondisclosure Agreements "similar to" the sample agreement that set a time limit on restricting dissemination of "sensitive" information, or NDAs that exempt from nondisclosure any information that is now public, or that was known to the parties before the review, or that will have been made public by that time by the Government or third parties? COMMENT: NDAs such as Attachment 2 present a major problem for many academic researchers, because the NDA can affect their ability to study other related topics. We believe a less stringent NDA would be more consistent with the Government's stated desire to encourage submissions from universities.

The Nondisclosure Agreement included in the solicitation is a sample. Provisions of the NDA are subject to negotiation, however, the Department will not agree to limit the NDA to a specified period of time.

(21) Reference C.5.2. Considering the extremely short period of performance, is a 30-day advance notice reasonable or necessary? Will the Government consider a proposal that takes exception to this requirement?

The notice is reasonable and necessary. C.5.2(c)(3) refers to situations where the Contractor plans on moving any key personnel off this contract.

(22) Reference C.5.2. If (per L.4.2.1.4) the goal of this contract is a review by an organization that is publicly recognized as "independent, objective, and impartial," does a provision that essentially allows the Department of Justice to hand-pick the review team serve

the purpose of avoiding "any appearance of improper influence by the Department, including the FBI, or by other law enforcement or governmental interests"? Clarification and/or limits requested here.

The purpose of C.5.2, which is a standard provision in most government contracts, is to eliminate or at least mitigate a bait and switch situation where highly qualified individuals are identified in the proposal but the Contractor moves these individuals to another project after contract award. The Department is simply trying to ensure that any substitutions proposed by the Contractor be as qualified as the individual they are replacing.

(23) Reference C.5.2. Rejection of "individuals who do not have appropriate experience in the conduct of reviews such as this" would exclude many of the people with the best technical qualifications to review Carnivore. Deliberate exclusion of individuals who conform to all other requirements -- including criminal record checks, federal agency index checks, and biographical review -- on this basis does not seem to serve the purpose of avoiding "any appearance of improper influence." If these individuals meet all other qualification requirements and are under the supervision of the Program Manager, what is the justification for excluding them? Will the Government consider a proposal that takes exception to this requirement?

C.5.2(c)(4) should read "...and to reject individuals who do not have appropriate qualifications in the conduct of reviews such as this."

(24) Reference E.1. If the Contractor performs the review at no cost to the Government, under what circumstances is the Contractor legally bound to present a report that meets the ambiguous standards of acceptance as stated in Section C (specifically those pertaining to revising the report document "as necessary in light of technical comments received from the Department or the public"), and what penalties may apply?

The term "contract" implies that there is some form of consideration. Remedies for unacceptable performance include: reducing the consideration; correction or replacement at no cost; charge to the Contractor the cost to replace or correct (by contract or otherwise); or terminate the contract for default.

(25) Reference H.1. If (per L.4.2.1.4) the goal of this contract is a review by an organization that is publicly recognized as "independent, objective, and impartial," stating that the Department of Justice "may" terminate this contract at no cost to the Government under these circumstances seems unaccountably lenient. Wouldn't "shall" be more appropriate here than "may"? Why would deliberate nondisclosure of known conflict of interest not constitute fraud, and why would this not be subject to penalty?

The permissive "may" is used so that we can tailor the action we take to the circumstances of the situation. We do not interpret the clause as prohibiting us from taking action more severe than a no cost termination.

(26) Reference H.2. These rights in data provisions seem unnecessarily stringent for what supposedly will become a public document. Will the Government consider a proposal that takes reasonable exception to this requirement, e.g., giving the Contractor non-exclusive publication rights to the report and/or to other non-sensitive information developed under the contract?

No. As noted in C.4.2.1(b), the entire report may not be made public. Further, paragraph H.2(b) should read as follows: "All property rights, including publication rights, in the information and materials first produced by the Contractor in connection with this contract shall vest in the Government. Information and materials shall include, but are not limited to all reports. Once the Department releases the public versions of the draft and final reports, any restrictions on the contractor's right to release those versions of the reports become void."

(27) Reference H.3.1. Given the extremely short period of performance of the contract and the possibility that background checks might take appreciable time to conduct, is the Government willing to relax this requirement, specifically to allow individual members of the Contractor's organization to commence work upon receiving favorable checks? If not, why not?

The minimal checks required should not be onerous or time-consuming. The Department intends to be reasonable and flexible in facilitating the contractor's performance of the review.

(28) Reference H.3.1. Given the extremely short period of performance of the contract, not allowing any members of the Contractor's organization to commence work until some undefined "sufficient" number of its personnel have been cleared seems to be unreasonable and unnecessary, and may even be construed by the public as intended to provide a competitive advantage to certain bidders who routinely perform classified studies and who might be perceived as having an organizational conflict of interest. What is a "sufficient" number of personnel, and why is this a requirement?

See response to issue #27.

(29) Reference H.4. Does this paragraph deal with disclosure of data only during the period of performance of the contract, or does it also cover disclosure at any time thereafter, not subject to time limits or to later availability of the same information? Please clarify.

There is no time limit on the applicability of the Confidentiality clause (H.4), but, see also DOJ response to issues #11 and #20.

(30) Reference H.6. Given the restrictions on "sensitive" information elsewhere in this solicitation, what is the reason for a requirement that would essentially restrict open discussion of non-sensitive information? What forms of publicity would be covered by this clause? Will the Government consider a proposal that takes exception to this requirement?

This clause applies to press releases about the award of the contract. The Department does not intend to restrict the contractor's open discussion of non-sensitive information.

(31) Reference L.1. Given that several potential bidders had informally indicated before the solicitation was released that they would be willing to undertake a review of Carnivore at no cost to the Government, does the Government contemplate any possibility of making multiple awards?

No, but see response to issue #5.

(32) Reference L.4.2.1.4. To what extent will the Government consider proposals that take exception to provisions of the solicitation? If (per L.4.2.1.4) the goal of this contract is a

review by an organization that is publicly recognized as " independent, objective, and impartial," do provisions that apparently give the Department of Justice the ability to rewrite the Contractor's conclusions in the Final Report, to impose restrictions that discourage participation by university researchers, to impose restrictions on the Contractor's review panel members' discussion of publicly known information after delivery of the report, and to unilaterally dismiss on nebulous criteria members of the review team proposed by the selected Contractor serve the purpose of avoiding "any appearance of improper influence by the Department, including the FBI, or by other law enforcement or governmental interests"?
Clarification and limits on the Government's solicitation provisions requested here.

See response to issue #12.

(33) Reference M.2.2. What sorts of "other information known to the Department" not contained in the proposal or attachments will be considered in the evaluation? Please clarify.

Evaluators are obligated to consider any information they are aware of about an offeror that bears on the results of the evaluation whether or not that information is in the offeror's proposal.

(34) Reference M.2.3. Is this award criterion meant to exclude or discourage offerors who propose to perform the review on a pro bono basis, at no cost to the Government? Will such offerors' proposals be down rated on account of "unrealistic" low price?

This is standard language included in many of our solicitations and is not intended to encourage or discourage pro bono proposals. It is important for us to know that an offeror understands our requirements and is committed to dedicating resources sufficient to ensure successful completion of the project. A pro bono offer, like any other offer whose pricing appears to represent a financial loss, must demonstrate to our satisfaction that the offeror can and will perform successfully given the amount of compensation it will receive (of course, none in the case of a pro bono offer).

(35) Section L.4.1.3 Section 2 - Pricing Tables (a) (2) states in part: " A sample submission is provided below for informational purposes." Within that same section and just below the table is a note that states: Note: For the C.4.2 work, the offeror should assume, for proposal preparation purposes only, that 1,100 hours for professional level personnel and 100 hours for support personnel will be required to perform the work. The offeror shall allocate these 1,200 hours across its proposed labor categories consistent with its technical approach. For the optional C.4.3 work, the offeror must insert labor categories and hourly rates to perform this type of work. Is the note above, which is contained in Section L.4.1.3 Section 2 - Pricing Tables, an actual requirement or just part of the example submission?

The "Note" that appears under the sample table is a proposal preparation instruction. The reference to "For the C.4.2 work" should actually read "For the C.4.1 and C.4.2 work" as the 1,200 hours applies to the technical review and the report preparation.