

Winning Commercial Solutions Openings (CSOs): Legal Strategies and Proposal Tactics

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Agenda

- Welcome and Introduction of Speakers
- Overview and Authorities for CSOs – John McAdams
- Legal Strategies and Considerations – Jeremy Burkhart
- Practical Tips for Preparing Proposals – Keith Gibson
- Special Considerations for Foreign Offerors – Sarah Beard
- Audience Questions

Today's Speakers



Jeremy D. Burkhart

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Tysons, Virginia

- Jeremy Burkhart is a government contracts attorney based in Holland & Knight's Tysons, Virginia office. Mr. Burkhart provides counsel on all matters for government contractors, including litigation, compliance, mergers and acquisitions (M&A), federal leasing, small business compliance, and federal grants.
- Mr. Burkhart recently served on President Trump's Transition Team, advising the incoming administration on federal procurement matters. He continues to maintain strong connections within government. His articles frequently appear in legal and industry publications, and he is a regular contributor to *Law360*.
- Mr. Burkhart is recognized for his expertise in commercial solutions openings ("CSOs") including Other Transaction Agreements ("OTAs"), and Technology Investment Agreements ("TIAs"). He has significant experience in both counseling clients through CSOs and Requests for Prototype Proposals, and negotiating favorable terms for those clients once they receive awards.
- Before joining Holland & Knight, Mr. Burkhart served for 9 years on active duty with the U.S. Army, including 3 years stationed in the Republic of Korea, and a deployment to Afghanistan, where he advised NATO and U.S. Forces on fiscal law matters. While on active duty, Mr. Burkhart represented the U.S. Army in bid protests and contract appeals, and regularly advised contracting officers. He continues to serve in the U.S. Army Reserve.

Practice

- Government Contracts
- Litigation & Dispute Resolution
- GSA Leasing & Federal Real Estate
- Facility Security Clearance
- Mergers & Acquisitions
- Federal Grants

Education

- University of Akron School of Law, J.D.
- John Carroll University, B.S.

Bar Admission

- Ohio
- Virginia

Today's Speakers



John McAdams
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Tysons, Virginia

John McAdams is a government contracts and national security attorney based in Holland & Knight's Tysons, Virginia office. He represents clients before the national security and defense agencies on a range of issues including government contracts disputes, white collar investigations, and highly sensitive national security matters.

Mr. McAdams joined Holland & Knight in 2024 from the Department of Justice's ("DOJ") National Security Division ("NSD") where he led investigations overseeing foreign intelligence, counterintelligence and other national security activities of the Intelligence Community ("IC"), including matters under the Foreign Intelligence Surveillance Act ("FISA"). Before NSD, in the Civil Division, Mr. McAdams litigated government contracts disputes before the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit.

Before DOJ, Mr. McAdams served on active duty in the U.S. Army. As a judge advocate, he litigated government contracts disputes, prosecuted felony-level courts-martial and civilian defendants as a Special Assistant U.S. Attorney (SAUSA), and served as a principal legal advisor for an infantry brigade combat team.

He continues to serve in the U.S. Army Reserve, and has held assignments on the Joint Staff, at U.S. Special Operations Command, and in the Office of the Judge Advocate General. He is a graduate of the Army's Command & General Staff College.

Practice

- Government Contracts
- Litigation and Dispute Resolution
- White Collar Defense and Investigations
- Export Control Disputes and Advocacy
- Drone Practice

Education

- The George Washington University Law School, J.D.
- Villanova University, B.A., *magna cum laude*

Bar Admission

- Virginia

Today's Speakers



Keith W. Gibson
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Washington D.C.

Keith Gibson is a government contract and acquisition strategist based in Washington D.C. and President of the National Contract Management Association (NCMA) D.C. Chapter

Keith has extensive experience with Commercial Solutions Openings (CSO) and Other Transaction Authority and led the design and execution of the Department of War (DoW) Joint Artificial Intelligence Centers (JAIC) first CSO, which won the National Contract Management Association (NCMA) Innovation in Contracting Award.

Keith's research paper Fast Following = CSO + OTA was presented at the Naval Post Graduate Schools Acquisition Research Symposium, and his insights on CSO's and OTA's have been published in Contract Management Magazine.

Before founding Runyara, a boutique acquisition consulting firm, he served 10 years as an Air Force Program Manager and Contracting Officer, and later an asset manager for Goldman Sachs.

Practice

- Certified Federal Contract Manager (CFCM)
- Stanford Certified Project Manager (SCPM)
- NCMA Top Professionals Under 40
- NCMA Innovation in Contracting Award

Today's Speakers



Sarah Beard

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Tysons, Virginia

- Sarah Beard is a public procurement lawyer from Germany, who currently works for Holland & Knight as an International Law Clerk.
- She supports Holland & Knight's government contracts team in Tysons, Virginia and Washington D.C. as part of an exchange program.
- In Germany she works for the law firm CBH in Cologne. The stages of her professional training included, among others, the German Parliament (Bundestag), the Federal Foreign Office and the Federal Ministry of Defense.
- CBH is part of the IUROPE network and has a Security and Defense practice group that not only possesses legal expertise but also has a strong network with members being former officers and officials of the European Commission.

Practice

- Government Contracts
- Public Procurement Law

Education

- University of Cologne, Germany

Bar Admission

- Germany

Overview and Background of CSOs

What is a Commercial Solutions Opening (CSO)?

CSO = another name for a competitive solicitation -- but more flexible

- Solicitation, but distinct from FAR-based solicitations
 - Seek solutions for “area of interest”
 - I.e., Government-specified problem or need, rather than a specifically defined product/service
 - Ex. [JIATF 401 CSO](#) for Joint C-sUAS Capability
- CSOs are adaptable to help speed up acquisition timelines
 - Maintaining competitive procedures to satisfy CICA & other procurement law/regs
- Intent = facilitate innovative solutions and rapid implementation
- Legal authority = 10 U.S.C. 3458
 - Related authority = 10 U.S.C. 4022 (re: prototype OTA awards)

What is a Commercial Solutions Opening (CSO)?

Key CSO Characteristics

- **Flexible and Competitive**
Enables adaptable solicitations that maintain competition while speeding up procurement.
- **Designed for Innovation**
Encourages proposals from commercial vendors with cutting-edge solutions.
- **Multiple Award Paths**
Supports OTAs, grants, and FAR-based contracts—depending on mission needs.
- **Market Engagement First**
Promotes early industry dialogue and effective market research before requirements are finalized.
- **Statutory Authority**
Backed by 10 U.S.C. § 3458 and implemented via DFARS 212.70

What is a Commercial Solutions Opening (CSO)?

CSO History, Generally

- CSOs originally authorized in the NDAA for FY 2017 during Trump 1.0
- Originally intended to be a tool for the Defense Innovation Unit (DIU)
 - Used sparingly since
- Trump 2.0 - Sec. Hegseth has sought to increase use as part of “Commercial-First” approach to acquisition
- Nov. 2025 – DoW memo ordered streamlined solicitation approaches, including CSOs, be the **preferred approach for acquiring commercial products and services**
 - Previously, in March 2025 – DoW memo designated CSOs and Other Transaction Authority Agreements (OTAs) as “**the default solicitation and award approaches**” for acquiring capabilities under the Software Acquisition Pathway

*****Bottom Line***** = CSOs are here, they are expressly preferred, and defense contractors must be familiar with them if they want to continue to do business with DoW

What is a Commercial Solutions Opening (CSO)?

Key Recent Developments

- Previously, when the government identified a preferred solution via the CSO process it could make one of two types of awards:
 - 1 = traditional FAR-based procurement contract
 - 2 = **Prototype** OTA pursuant to 10 U.S.C. 4022
- 2026 NDAA (sec. 1823) revised CSO statutory authority at 10 U.S.C. 3458
 - Permits direct award of production OTAs from a CSO
 - Thus, can skip prototype OTA
 - Benefits of OTA = more flexible than FAR-based contracts; negotiated like commercial agreements
- CSOs no longer limited only to “innovative” solutions
 - Now a **general commercial acquisition tool**

*****DoW will be using this authority to speed up acquisition and draw commercial firms into the defense marketplace**

Types of CSOs

What are the different types of CSOs?

- OTA CSO
 - Competitive procedure developed and utilized to solicit solutions for intended OTA award pursuant to 10 U.S.C. 4022
 - Does **not** have to be prototype award
- FAR-Based Award CSO
 - Used to solicit and award FAR-based procurement contracts via authority in 10 U.S.C. 3458
 - DFARS 212.70 lays out procedures for publishing and making award
- Hybrid CSO
 - Blends authority of 10 U.S.C. 4022 and 10 U.S.C. 3458 to award OTA agreements **and/or** FAR-based procurement contracts
 - Ex. = JIATF 401 C-sUAS CSO

The CSO Process: Three General Phases

Phase 1: Solution Brief

- Initial pitch is written solution brief/ white paper (JIATF 401: 5 page max, 12 font)
- Company information and executive summary
- Technology concept
- Rough order of magnitude (ROM) price

Phase 2: Oral Presentation/ Oral Proposal

- Oral presentation (and potentially demonstration)
- Technical and business viability
- ROM pricing and IP considerations
- Notional schedule

Phase 3: Full Proposal

- Full Commercial Solution Proposal (CSP)
- Technical Volume and Price Volume
- Government may forgo earlier phases when urgent
- Offerors may elect to skip directly to proposal

Award - OTA Agreement, FAR-based Procurement Contract, or Hybrid Award

Helpful Reference = [GSA Commercial Solutions Opening Guide \(Sept. 17, 2024\)](#)

Legal Strategies and Considerations

Roadmap of Legal Considerations

1. Solution Brief (aka White Paper or Abstract)
2. Prepare for Long-Lead Time Compliance Issues
3. Teaming Considerations
4. Oral Presentations (aka Oral Proposals) and Phase 3 Technical/Price Proposal (Beware of FOIA)
5. Negotiation of OTA Award and Subcontracts
6. Negotiation of IP & Data Rights
7. Follow-on Production Contract and Cost Share

The Solution Brief (or White Paper or Abstract)

Don't just tell them, *Show* them. This is your one chance to impress the evaluators. "A picture is worth a thousand words. A video, ten thousand."

- Evaluators must sift through hundreds of briefs. Make it easy for them.

To Submit or Not to Submit? Some CSOs give you the option to skip phases 1 & 2 (solution brief, oral presentation) and submit directly a CSP (proposal).

- What's the customer's interest in your solution?
- How quickly is the Government awarding? How much \$ is left?
- Can you afford the time and resources for a full proposal?

Timing for Submission.

- Do you want to be first? Best? Wait and see?

Prepare for Long Lead Time Compliance Issues

CSOs were put in place to attract commercial companies who are not traditional defense contractors. There will be some leeway given to achieve compliance with DoD rules, but don't rely on this. (Leeway directly proportional to the intensity of the Government need and the uniqueness of your solution)

- **CMMC.** Most projects will involve handling Controlled Unclassified Information (CUI), thus requiring CMMC Level 2 and a third-party certification (C3PAO).
 - 6-18 month process. Enclave solution may shorten timeline.
- **SAM Registration** (necessary for award, unnecessary for subcontracts)
 - Should be 10 days, but easy to hit snags (especially for foreign firms).
- **ITAR/EAR**
 - Will “dual-use” items (commercial goods that have military applications) be involved? Must ensure compliance when receiving or transferring controlled technology.
 - Will non-U.S. persons have access to defense articles or controlled technical data?
- **Facility Security Clearance (FCL)** considerations. Is the work classified?

Teaming Considerations

Put an NDA in place *Early*

Teaming Agreements

- Exclusive? (Exception when govt. requests a party to work with another entity)
 - Closely related – can one party terminate for convenience?
- Assignable?
 - Can a third party be added to the team?
- Can proposed subcontractors be involved in proposal activities?
- Address other concerns – conflicts, performer of follow-on production K, etc.
- Outline scope of work for subcontract, not merely roles for the proposal
 - Subcontractors will want specificity, guarantees on work. Primes prefer this to be vague.
- Consider amending TA after each phase

Oral Presentations and Written Proposal

- **FOIA Warning:** Mark submissions as proprietary and exempt from disclosure; 5 U.S.C. § 552(b)(4) protects trade secrets and confidential commercial/financial information.
- Subcontractors have a stake in the proposal. Consider this when negotiating teaming agreement.
- Incorporate and address feedback from Oral Presentation.
- **License Agreements:** Offerors may propose SLAs/EULAs for SaaS and technology-licensing models, solutions with significant proprietary technology, or commercially available technology.
 - Consider Timing

Framework for IP & Data Rights in OTAs

- No mandatory IP/Data Rights. Bayh-Dole Act and corresponding FAR and DFARS provisions, which govern grants and procurement contracts, do not apply to OTAs.
- Govt generally takes the approach that its rights in a particular item, component, process, or software is determined by when it was developed and who paid for it.
- Mainly influenced by DFARS 252.227-7013 and 252.227-7014.(but DFARS N/A)

Three types of data rights, in order from least to most advantageous to the contractor.

1. “Unlimited Rights” gives the Government the right to use, modify, reproduce, perform, display, release, or disclose data in any manner, and for any purpose whatsoever, and to have or authorize others to do so (for any reason).
2. “Government Purpose Rights” (GPR), means the right to use, modify, reproduce, etc. within the Government without restriction; and the release/ disclosure to other contractors and third parties only for Government purposes.
3. “Limited Rights” only allows the Government to use the data within the Government, and is the most advantageous to the contractor. Government may not (w/o contractor permission) release or disclose the technical data outside the Govt. except in rare circumstances such as emergency repair.

Negotiation of IP & Data Rights in CSOs/ OTAs

- Assess what IP and data rights are involved in the effort and decide **When** to assert restrictions on IP (JIATF 401 allowed offerors to assert in Phase 2, but could wait).

1. ***Meticulously Define Preexisting IP***

- Govt. will typically seek GPR in the data generated under OTAs. Thus, it is critical to segregate your preexisting IP from what is being developed under the OTA.
- Carefully identify the existing IP you are bringing to the project. Explicitly describe preexisting IP in the OTA so there is no misunderstanding as to what data the contractor retains all rights in, and what data the Government will obtain GPR in.

2. ***Use an Appendix to List Preexisting Data and IP***

- Create appendix to list all preexisting Data/IP (DFARS 252.227-7017 table)
- Identify each item, component, process, or software that you developed previously at private expense, w/ SBIR funds, or w/ mixed funding at **lowest component level**.
- Identify all patents and pending patents, even if provisional.
- For each segregable component or subroutine, you should identify the asserted rights category, the basis for assertion (i.e., funding source, prior development, etc.)

Negotiation of IP & Data Rights in CSOs/ OTAs

3. *Assert Rights at the Lowest Practical Component Levels*

- DFARS guidance explains that development and expense determinations occur at the lowest levels. And the Govt. generally uses the DFARS framework.
- If you have patents or pending patent applications, even if only provisional, identify these in the OTA as well. If you fail to do this, you run the risk that your intellectual property will be considered “subject inventions,” —i.e., inventions first conceived or reduced to practice under the OTA agreement, entitling the Government to license rights.

4. *Consider Time Constraints*

- For items that will be developed entirely under the OTA, seek to put time constraints on the Govt. Do not accept a provision that permits GPR to revert to Unlimited Rights within 5 years. Seek a 20-year period before the Govt’s rights expand.
- Terms should be clearly defined in the OTA, or specifically reference the DFARS for the definition (e.g., “Government Purpose Rights has the meaning set forth in DFARS 252.227-7013(a).”)

Award Negotiation Tips

- Scrutinize Govt. standard terms. Consider **When** to propose your non-standard terms. With Phase 3 submission (full proposal)? Or during award negotiations?
- Nearly ALL Terms are Negotiable
- Ability to Negotiate Hinges on Leverage
- Factors to Consider When Determining Your Leverage
 - Understand Your Competition
 - Your Opportunity Cost and Alternatives
 - How Critical is the Government's Need
 - Importance of the Government-Customer Relationship Moving Forward
- Subcontract Considerations (Flow-down provisions, IP allocation, etc.)
 - Who will receive follow-on production contract?
 - Exclusivity
 - Non-solicitation

Follow-On Production Contract & Cost Share

- **Statutory Hook:** Under 10 U.S.C. § 4022(f), a sole-source follow-on production contract “may be awarded to the participants in the transaction” if competitive procedures were used in the initial selection and the participants successfully completed the prototype project.
- **“Participants” is undefined:** Neither § 4022 nor the DOD OT Guide defines the term.
- **Subcontractors may qualify:** Nothing in the authority limits “participants” to the prime contractor—significant subcontractors may be eligible recipients of follow-on production.
- **Negotiate teaming positions early:** Teaming and subcontract agreements should be structured to advance each party’s desired position on rights in the follow-on production contract.
- **Plan Around 1/3 Cost Share Requirement:** Can avoid if 1 of the following conditions is met: Nontraditional defense contractor or nonprofit research org. participates significantly; All significant participants are small businesses; or Senior procurement executive finds exceptional circumstances).

Nontraditional defense contractor: Per 10 U.S.C. § 3014, an entity that has not performed a DoD contract subject to full CAS coverage for at least the one-year period preceding the CSO.

Tips for Solutions Briefs and Proposals

Commercial Solutions Openings (CSOs)

Understanding the Landscape, Mechanics, and Future of Modern Acquisition

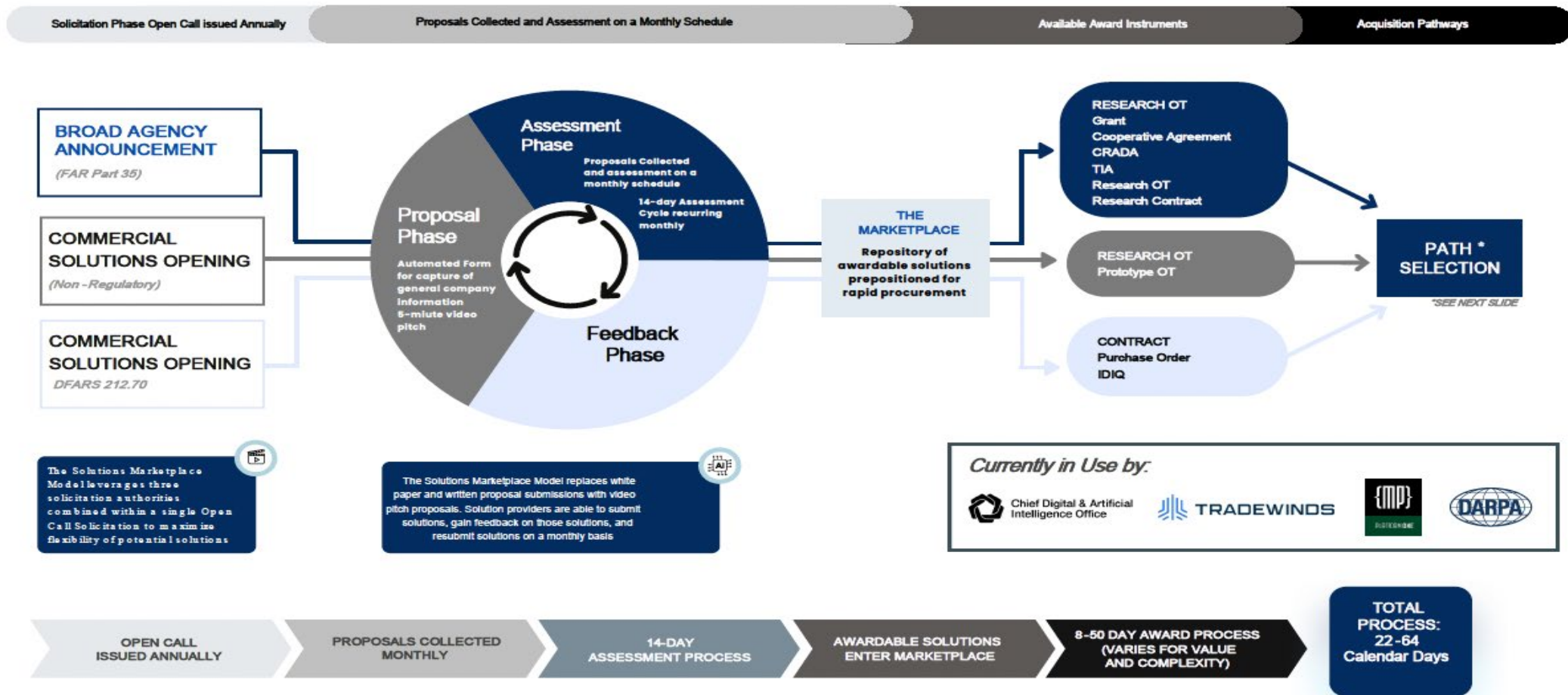
Discussion Topics

- Understand the Mechanics
- Understand the Landscape
- Understand the Trends
- Understand Your Company & This Administration
- Maximize Situation Awareness
- Using Technology

The organizations that adapt fastest to modern acquisition will create disproportionate advantage.

ARI Rapid Acquisition Model

How It Works



Understand the Landscape

Not all CSOs are solving the same problem.

Marketplace CSOs	Broad CSOs	Targeted CSOs
Existing solutions	Undefined needs	Specific operational problems
Commodity access	Exploration & discovery	Rapid mission response
Scale-oriented	Experimentation-oriented	High growth potential

The type of CSO tells you how the government understands the problem.

Understand the Trends

This is not slowing down.

This is the future of acquisition.

Increased demand for acquisition speed

Greater use of commercial technology

More operational urgency

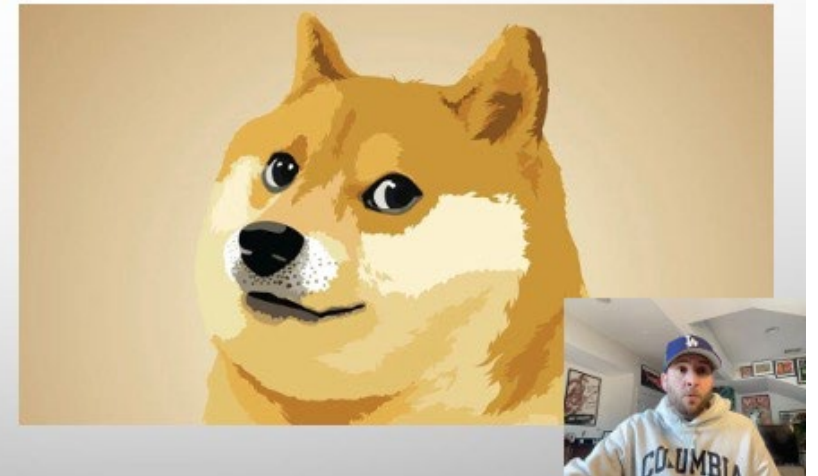
AI-enabled evaluation and decision support

Reduced tolerance for slow procurement cycles

Experience with CSOs today will pay dividends for the next decade.

WHY ARE AI VENDORS, VCS, INCUMBENTS MAKING THE INVESTMENT IN GOVCON?

CHANGE
IS
COMING



Understand Your Company & This Administration

Understand your differentiators — in the context of what matters right now.

Know Your Company

Non-traditional status

Cleared workforce/facility

Veteran-owned status

Technical differentiators

Ability to move quickly

Know the Environment

Administration priorities

Mission urgency

Budget environment

Risk tolerance

Operational priorities

Your differentiators only matter if they matter to the buyer.

Maximize Situation Awareness

Build your own acquisition intelligence ecosystem.

Market intelligence

Competitive intelligence

Opportunity tracking

AI-enabled workflows

Faster capture decisions

Better positioning before opportunities emerge

The gap between small companies and Fortune 500s has never been smaller.



Use Technology

The market is moving too fast for manual business development workflows.

Build your own intelligence stack

Use AI to increase situation awareness

Invest in market and competitive intelligence

Competitive intelligence creates advantage

Automate repetitive workflows

Free your team up to focus on capture and close

The companies that learn fastest will win fastest.



Considerations for Foreign Offerors

Special Considerations for Foreign Companies

Many CSOs allow foreign businesses to compete. Excerpt from JIATF 401 c-sUAS CSO:

“Foreign-Owned businesses may independently submit a solution or do so as part of a teaming arrangement with one or more United States-owned businesses. The ability to obtain an agreement based upon a submission may depend upon the ability of the Foreign-Owned business to obtain necessary clearances and approvals to obtain proscribed information.”

Buy American Act & Domestic Preference Not Applicable to CSOs/OTAs

SAM.gov – Search for opportunities, nearly all CSOs are posted on SAM.

- Must be registered on SAM and receive a Unique Entity ID (UEI) to receive an award.
- Obtain an NCAGE Code first (register with the NATO Support & Procurement Agency)
- SAM Tips
 - Ensure legal name and address matches on all platforms
 - SAM registration guide located [here](#) and video instructions [here](#)

Special Considerations for Foreign Companies

Foreign firms should have (1) a U.S. partner, or (2) develop a detailed compliance plan.

- CMMC. Must be Level 2 in order to handle Controlled Unclassified Information.
- If work is classified, must have a Facility Security Clearance (FCL).
 - National Industrial Security Program (NISPOM) requirements – 32 C.F.R. 117
 - Foreign Ownership, Control, or Influence (FOCI). Mitigation (e.g., special security agreements) may be required to participate.
- ITAR/EAR
- *Compliance with these requirements will take time.*

Overcoming These Obstacles

1. Partner with established U.S. primes, esp. in defense
2. Enter into a Joint Venture (JV) with an American company
3. Form a U.S. presence or U.S. subsidiary (will still need to mitigate FOCI)

Questions?



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