

INCORPORATION BY REFERENCE

By Dick Lieberman, Consultant and Retired Attorney

Black's Law Dictionary (5th Ed. 1979) defines "incorporation by reference" as the "method of making one document ... become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein." Agencies, which are the writers of government contracts, would be hard pressed to draft contracts without this artifice of language, and government contractors must be careful to understand its implications. A misuse of incorporation by reference was explained in a recent bid protest, *IBM Corp. v. United States*, No. 14-864C (Fed. Cl. Nov. 7, 2014).

The Federal Acquisition Regulation ("FAR") and Incorporation by Reference

Almost every government contract incorporates contract clauses by reference. Indeed, a typical government contract may incorporate 10 to more than 200 clauses by reference. FAR 52.107 directs contracting officers to insert the provision at 52.252-1, Solicitation Provisions Incorporated by Reference, and the clause at 52.252-2, Clauses Incorporated by Reference, in solicitations and contracts in order to incorporate those provisions by reference. These two clauses are set forth below.

FAR 52.252-1 Solicitation Provisions Incorporated by Reference.

This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. The offeror is cautioned that the listed provisions may include blocks that must be completed by the offeror and submitted with its quotation or offer. In lieu of submitting the full text of those provisions, the offeror may identify the provision by paragraph identifier and provide the appropriate information with its quotation or offer. Also, the full text of a solicitation provision may be accessed electronically at this/these address(es): [insert one or more internet addresses].

FAR 52.252-2 Clauses Incorporated by Reference.

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es): [insert one or more Internet addresses]

If either of these clauses appears in a contract, the agency must merely list *by title* the clauses incorporated by reference, and *presto*, the full text of those clauses are thereby included in the solicitation or contract. Most importantly, *the contractor is fully responsible for compliance with all clauses incorporated by reference, just as if they were typed in full in the contract.*

So when you read a solicitation or a contract, it is imperative that you either read or fully understand the duties imposed by all clauses incorporated by reference. And understand that those duties are frequently the subject of cure notices, show cause notices, default notices, routine inspections or contractor claims and appeals.

IBM v. U.S.

So who went afoul of this very easy method of writing solicitations and contracts? None other than the IBM Corporation, which bid on a General Services Administration schedule contract to assist the Army in auditing its financial statements – a challenging task indeed. The solicitation was for a time and materials contract, and Section 2.14 stated maximum number of hours (level of effort) for each of six labor categories (Director, Senior Manager, Managers, etc.). A question and answer attached to a solicitation amendment stated as follows:

Question: Will the successful offeror have flexibility to reallocate the hours among labor categories during project execution, as long as we do not exceed the ceiling?

Answer: As approved by the COR [Contracting Officer’s Representative], the successful offeror will have the flexibility to reallocate hours as long as the ceiling is not exceeded.

IBM’s proposal was for \$86 million, while the proposal of Ernst and Young (“EY”) was for \$56 million--a significant difference. IBM’s proposal acknowledged flexibility to reallocate hours by labor category, *with COR approval*. However, EY’s proposal said that it “reserve[d] the right to reallocate hours between labor categories...provided [this] does not result in exceeding the ceiling price of the contract.” (EY made no mention of “COR approval” of such reallocation.)

EY’s offer, in box 28 & 29 of its Standard Form (“SF”) 1449, Solicitation/Contract/Order for Commercial Items, was as follows:

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| <p>28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN <u>1</u> COPIES <u>X</u> TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN</p> <p>REF: EY proposal</p> | <p>29. AWARD OF CONTRACT: REFERENCE _____ OFFER DATED <u>05 MAR 2014</u>. YOUR OFFER ON SOLICITATION (BLOCK 5) INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS. SEE SCHEDULE.</p> |
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IBM's principal protest was that EY's offer was ineligible for award because it incorporated EY's proposal by reference in Block 28 by typing "REF: EY proposal," and this proposal reserved EY's right to reallocate labor hours in violation of Section 2.1.4 of the solicitation, as explained by the answer above.

The Court held that EY's proposal *was not* incorporated by reference in EY's offer. The Court noted that no "magic words" are required to incorporate extrinsic material—all the contract or solicitation must do is use language that "leaves no relevant ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated in the contract." *Lakeshore Eng'g Servs. Inc. v. U.S.*, 748 F. 3d 1341, 1347 (Fed. Cir. 2014). The Court held that "no such clear and express language unambiguously communicates an intent to incorporate EY's proposal here."

Unlike the FAR's clear cut "incorporation by reference" language set forth in FAR 52.252-1 & 2 above, the Court found that the notations on the SF 1449 did not provide the clear, express or unambiguous evidence of an intent to incorporate the terms of EY's proposal into the contract. The Court noted that item 28 is applicable where a solicitation, not a contract is being prepared. Further, item 29, which is used for a contract award, would identify parts of a proposal to be incorporated --but item 29 *is not checked at all—it merely contains the date of EY's proposal.*

Because the contract did not incorporate EY's proposal, and did not include its reservation of right to change labor categories without COR approval, the contract as awarded holds EY to the exact requirements of the solicitation, and IBM's protest was denied.

TIPS (1) Understand the meaning of incorporation by reference, and examine all clauses so incorporated in your solicitation and contract.

(2) When preparing an offer that includes clauses or other matter included by reference, keep a complete copy of the incorporated matter in your solicitation and contract files. **Be sure you understand what you must do in order to comply with all incorporated clauses, and be sure that your cost proposal or bid reflects the costs all of this compliance.**

(3) If you seek to incorporate something by reference (such as a section or all of your proposal) in your offer to the government, use precise language in your offer such as the following, which should appear in your cover letter: "The offer of [X company] incorporates by reference Section 2 of the attached proposal which is to be included in the resulting contract."