Chapter 1

Solicitations

1

You failed to read the entire solicitation, including any clauses incorporated by reference.

The *Federal Acquisition Regulation* (*FAR*) requires that a solicitation include all anticipated terms and conditions that will apply to the contract.[1] Both invitations for bids (IFBs) and requests for proposals (RFPs) must be prepared using the Uniform Contract Format, which includes all terms and conditions.[2] Solicitations will also specify when you must submit your offer (bid or proposal) and how you must submit it. Read the solicitation in its entirety and follow it to the letter, even if you don't understand why or don't agree with the solicitation's approach. The written solicitation is the key to preparing your bid or proposal because it will govern your obligations and responsibilities if you win the award.

How many contractors actually read their entire solicitation before preparing their offer? Most only read the statement of work (SOW) and proceed from there. However, there are other critical sections in the solicitation that may be equally important, such as Section L, Instructions, Conditions, and Notices to Offerors; and Section M, Evaluation Factors for Award.

Here are just a few reported cases of offerors failing to read a solicitation:

- The solicitation specifically advised offerors that a one-ton truck would be needed. The offeror's failure to read or understand this provision of the solicitation did not provide a valid basis for protesting the agency's downgrading of its proposal.[3]

- The offeror should have realized that bid prices would be adjusted for prompt payment discounts of 20 days or more. Any failure to understand this fact was the result of a failure to read and apply all IFB provisions.[4]

- A protester objected that the agency failed to test a sample item provided by the protester. The protester did not submit the sample within the time frame required by the solicitation. The problem was caused primarily by the protester's failure to read the solicitation carefully.[5]

These are only a few examples of procurements where the offeror's failure to read the solicitation became part of a bid protest. But there have been many, many more cases in which offerors discovered their own mistakes or found out about them at a debriefing. Then there were no protests at all, just sad and dejected offerors that had to wait until their next opportunity to compete on a contract.

Potential government contractors must understand that many vital clauses or provisions[6] are not even printed in the solicitation. Almost every solicitation includes a provision that permits the government to incorporate clauses or provisions by reference.[7] Essentially, the government lists the *FAR* provisions and states: "This [solicitation] incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text.[8]" You can easily obtain the full text on the Internet, or you can ask your contracting officer (CO) for a copy. It doesn't matter whether the clauses and provisions are printed in your solicitation in full text or incorporated by reference; they will still be part of the eventual contract, and you will still be responsible for all the duties and obligations contained in them. Indeed, the typical government solicitation, which might be only 30 pages long, expands to two or three times that length once the clauses and provisions incorporated by reference are printed out.

Smart contractors print out a copy of all clauses and provisions incorporated into a solicitation by reference and insert them into the master solicitation file so they can be reviewed carefully before preparing a bid or proposal.

There is no substitute for a detailed, in-depth reading of your solicitation before preparing your offer. Only then are offerors assured that their offer conforms to the solicitation and that their prices reflect every obligation contained in the solicitation's clauses, terms, and conditions.

2

You failed to read, consider, and acknowledge all of the subsequent amendments to the solicitation.

As a matter of good business sense, contractors should ensure—for the reasons outlined in mistake number one—that they have received and considered every amendment to a solicitation before they sign and submit an offer. Contractors can easily confirm that they have all of the amendments by contacting the CO or by checking www.fedbizopps.gov, the Web site that is the government point of entry (GPE).

Additionally, when submitting a bid in response to an IFB, contractors must formally acknowledge receipt of all material amendments to the solicitation, or the bid will be deemed nonresponsive because, without such an acknowledgement, the bid does not obligate the bidder to meet the requirements of the amendments.[9] An amendment is material when it imposes legal obligations on a prospective bidder that were not contained in the original solicitation or if it would have more than a negligible effect on price, quantity, quality (specifications), or delivery.[10] An example of a nonmaterial amendment was involved in *Fort Mojave/Hummel*,[11] where the unacknowledged amendment in question would have increased the cost of a $31.4 million contract by a mere $10,000.

As a matter of practice, rather than trying to divine which amendments are material and which are not, simply acknowledge all of the amendments to a solicitation.

3

You failed to ask about a patent ambiguity in the solicitation.

Whenever you are about to submit an offer, whether in response to an IFB or an RFP, you must scour the solicitation for any obvious ambiguities. If there are any, you have a duty to obtain clarification before you bid, or the consequences may be unpleasant. An ambiguity exists when a phrase, clause, or section of a solicitation does not have one plain meaning, but has two reasonable interpretations.[12] An ambiguity may be either patent or latent. A patent ambiguity in a solicitation is one that is, on its face, glaring and obvious (for example, where two solicitation provisions clearly conflict).[13] A latent ambiguity, conversely, is not obvious on the face of the solicitation.[14]

A contractor may not rely on its own interpretation of patent ambiguities, but instead has a duty to seek clarification from the government before submitting its bid.[15] A bidder who does not inquire into a patent ambiguity assumes the risk for any unanticipated costs incurred as a result. That is not the case with a latent ambiguity. Courts will adopt a contractor's reasonable interpretation of a latent ambiguity under the *contra proferentem* rule, thus construing the ambiguity against the drafter.[16] Of course, it is the government that drafts a solicitation and against whose interest the reasonable interpretation of a latent ambiguity will be construed.[17]

The message is simple: submit your questions and requests for clarification to the CO before the closing date when offers are due. Only then will you meet your obligation to inquire, thereby ensuring that any remaining latent ambiguities will be interpreted against the government, and not against you. You should ensure that the CO actually received your inquiry by obtaining a receipt or a signature by certified mail, or from a private package delivery service. Even if a solicitation contains a cutoff date for submission of questions, the agency must clarify an ambiguity at any time before the closing date. Simply send the CO an informal agency protest with your question, and the CO must answer. A protest of a solicitation is timely at any time before the closing date. You do not need to label your letter as a protest. The Government Accountability Office (GAO) has consistently held that even if a letter to an agency does not explicitly state that it is intended to be a protest, the GAO, nevertheless, will consider it as such where it conveys an expression of dissatisfaction and includes a request for corrective action.[18]

If the CO acknowledges an ambiguity, he or she should amend the solicitation. In any event, follow the interpretation that is given by the CO in writing.

4

You relied on the verbal representations of a government official rather than on the written solicitation.

Contractors should never rely on the verbal representations of government officials, particularly during the bidding stage.[19] Verbal advice from an agency that is inconsistent with the unambiguous terms of the solicitation is not binding on the government, and offerors who rely on such advice do so at their own peril.[20]

Contractors frequently call government officials and ask for clarifications in an RFP or IFB. This is a bad practice. As previously mentioned, if there are patent ambiguities, offerors should address their questions in writing to the CO. You should get into the habit of doing and demanding everything in writing. There must be a written amendment for a change to a solicitation to be binding. The CO's verbal advice alone just won't do.

Verbal solicitations are permitted in some cases, but offerors must recognize that those situations are carefully circumscribed in the *FAR*. Verbal solicitations may be used for micropurchases, as well as those under the simplified acquisition threshold (SAT)—($100,000)—and COs are instructed to solicit quotations verbally to the maximum extent practicable.[21] Verbal RFPs are authorized when a written solicitation would delay the procurement and notice is not required.[22]

An example of the type of problem you can encounter when you rely on verbal advice can be found in the case of *Spacesaver Storage Systems, Inc*.[23] This case involved a best-value procurement for weapon storage systems, wherein the solicitation specifically provided that high-pressure laminate end panels were not permitted. Spacesaver, however, asserted that the agency had advised it verbally that high-pressure laminate end panels would be acceptable. Spacesaver's offer was deemed not acceptable by the government. Again, verbal advice that conflicts with the unambiguous terms of a solicitation is not binding on the government, and a contractor relies on such advice at its own risk.

5

You failed to request a post-award debriefing in a negotiated procurement.

Many contractors do not take advantage of the significant information they can obtain from a post-award debriefing as required by FAR 15.506 (a)(1). By simply submitting a written request to the CO within three days of receiving notification of award in a negotiated procurement, offerors can ensure that they will receive a debriefing. Those post-award debriefings are acknowledged to have reduced the number of bid protests.[24] The purpose of a debriefing is not to provide grist for a bid protest, but to furnish the basis for the selection decision and contract award.[25] Although it may come too late to help an offeror win the current contract, the information obtained in a debriefing is substantial, and may help an offeror win the *next* procurement.

In a debriefing, FAR 15.506 requires that the offeror be given, at a minimum, the following:

- The government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror;
- Past performance information on the debriefed offeror;
- The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- A summary of the rationale for award;
- For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

Of course, during a debriefing, an offeror may find out that the rules were violated and may choose to protest, but the most important benefit of debriefings is learning how to make the next procurement successful.

ENDNOTES

1. See FAR 14.201; FAR 15.203.
2. See FAR 14.201-1 for IFBs and FAR 15.204-1 for RFPs.
3. *Atl. Coast Contracting, Inc.*, B-259082, July 17, 1995, 95-2 CPD ¶ 21.
4. *Capitol Hill Blueprint Co.*, B-220354, November 13, 1985, 85-2 CPD ¶ 550.
5. *Hydraulic Design & Mfg.*, B-213756, June 5, 1984, 84-1 CPD ¶ 594.
6. There is a distinction made in the *FAR* between a "clause" and a "provision," even though the contractor is responsible for both. A clause may be found in a solicitation or the resulting contract, while provisions are exclusively used in the solicitations.
7. FAR 52.252-1 (provisions) and FAR 52.252-2 (clauses).
8. Id.
9. *Fort Mohave/Hummer*, B-296961, October 18, 2005, 2005 CPD ¶ 181.
10. Id.
11. Id.
12. *Aerospace Design & Fabrication, Inc.*, B-278896, May 4, 1998, 98-1 CPD ¶ 139.
13. See *Beacon Constr. Co. of Mass. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) (describing patent ambiguity as an obvious omission, inconsistency, or discrepancy of significance).

14. *Triax Pac., Inc., v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997) (describing a latent ambiguity as [m]ore subtle than a patent ambiguity).

15. *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1355 (Fed. Cir. 2002).

16. See *Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982) (*Contra proferentem* means against the party who proffers or puts forward a thing, i.e., the drafter of the solicitation).

17. See *Salem Eng'g. & Const. Corp. v. United States*, 2 Cl. Ct. 803, 807 (1983).

18. See, e.g., *Am. Material Handling, Inc.*, B-250936, March 1, 1993, 93-1 CPD ¶ 183.

19. All invitations for bids (IFBs) require the inclusion of FAR 52.214-6, which indicates that verbal information is not binding. It states:

> Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

20. *Sw. Educ. Dev. Lab.*, B-298259, July 10, 2006, 2006 CPD ¶ 105 at *3 n.3.

21. FAR 13.106-1.

22. FAR 15.203(f).

23. B-298881, December 11, 2006, 2006 WL 3615155.

24. Steven W. Feldman, "Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process Debriefings of Unsuccessful Offerors," *Army Lawyer*, Sept., Oct. 2001; statement by Kenneth J. Oscar, assistant secretary of the Army for Research, Development, and Acquisition, before the Senate Committee on Armed Services, March 18, 1998.

25. See 10 U.S.C. § 2305(b)(5); OMV Med., Inc., B-281388, February 3, 1999, 99-1 CPD ¶ 53 n.3.