

Government Contracts, Investigations & International Trade Blog

June 16, 2011 by Sheppard Mullin

10 Ways To Waste Your B&P

By *John W. Chierichella*

B&P is a precious resource, a pool of investment dollars. Used wisely, B&P can perpetuate one's existing position in the market, grow existing product lines, and expand into new fields of endeavor. The prudent use of B&P can be the difference between achieving short, intermediate and/or long term business goals and failing to do so. All too often, however, companies can fall into patterns of conduct that effectively vitiate that investment.

Some common traps to avoid on the road between the decision to pursue a solicitation and the award of a contract include the following:

1. *Rely on what you hear and read at "Industry Day" meetings and pre-solicitation conferences* – These statements are, to be sure, well-intentioned and probably reflective of the speakers' actual, then-current mind sets, but they are irrelevant if contradicted by the words of the solicitation.
2. *Believe all that "back channel" communication about what the Government "really wants"* – However important and well-informed that source is, if the "chatter" does not mesh with the words of the solicitation, reliance on it is folly. So, if your source tells you that this is going to be a "price shoot-out" but the RFP says that "Technical" is the most heavily weighted factor, believe the RFP.
3. *Regard ambiguity as your friend* – A court may interpret an ambiguous contract terms against the party that drafted it, but neither the GAO nor the COFC will apply that rule in the context of a bid protest. If you have any doubt what an RFP provision means, ask.

4. *Be afraid of insulting the customer by asking for a written answer* – If you are going to ask, ask in writing and expect a written answer. You cannot – C-A-N-N-O-T – rely with any confidence on oral advice regarding the interpretation of terms and conditions of the RFP. There are two very simple reasons for this – (1) it is the law, and (2) it is the law because private, unilaterally communicated guidance regarding the agency’s intentions is inherently unfair to other offerors.
5. *Limit the number of questions you ask* – Obviously, you should not be asking foolish questions, but there is some merit to the adage that “The only foolish question is the one you don’t ask.” You should scrub the RFP using a multiplicity of disciplines, including Legal, to identify gaps, inconsistencies, ambiguities, informational deficiencies, and changes you would like. Then ask, in writing. There is no need to limit the number of requests for information that could legitimately affect the structure or composition of an offer. If the Government wants you to spend time and money responding to an RFP, the least it can do is provide a clearly written and unambiguous solicitation. Make sure it does so.
6. *Only ask questions for which you do not know the answer* – Sometimes a question by an incumbent can be used to educate uninitiated and uninformed competitors about problems they will confront in performance that might not jump off the pages of the RFP. Since the question and answer will be published to all offerors, this kind of question serves to communicate a risk to the competitors of which you are already aware and for which you will be making allowances in your pricing. The Q&A may well have the effect of motivating them to price that risk in their offers when they otherwise might have been oblivious to the risk and offered a lower price.
7. *Rely on your reputation* – This has been the downfall of many an incumbent. Warmed by the glow of the hearty reception that its performance has received from the customer, the incumbent all too often forgets that the award is based on an evaluation of *this* proposal against *these* evaluation criteria. You do not know who the evaluators are going to be or what knowledge they bring to the table, but, in any event, their duty is to evaluate the contents of the proposal, not your press clippings.
8. *Be intimidated by the prospect of customer backlash to a protest* – Of course it happens, but it is not supposed to, it happens far less than contractors fear, and it happens even less in the context of protests against the terms of an RFP, as opposed to protest against an award. Unless the RFP has been jiggered to favor a particular offeror (which, of course comes under the heading of “wrong” and should be protested), the likelihood that a reasoned protest against the terms of an RFP will incite Government ire and retaliation is relatively small. In fact, an early protest against the terms of the RFP gives the agency the opportunity to take corrective action and keep the procurement on schedule.

9. *Bide your time* – If you cannot get answers to your questions about the RFP, if the agency refuses to modify the T&C's that you regard as unfair or inappropriate, just wait until the award to see if you were damaged in the process. Why protest until it becomes clear that you need to spend that money on legal fees? "All things come to he who waits" and among those things are frustration, disillusionment, and the sure and swift dismissal of your untimely protest. If the problem is there on the face of the RFP you must protest before the date set for receipt of initial offers.

10. *Regard an agency level protest as an adequate response to a defective RFP* – This is a corollary to Rule No. 8 and Rule No. 9. The agency level protest is the contractor's hedge against an adverse customer relations response to a protest – "If I keep it private, the customer will appreciate my discretion." True in many cases, but with risk. The receipt of offers against the RFP notwithstanding the pendency of an agency level protest is regarded as "initial adverse agency action" on your protest. That adverse action triggers the time within which you must elevate your protest to the GAO or elect to put all your protest eggs in the agency protest basket. Fail to do so within ten days and, when the agency denies your protest, you will find access to the GAO barred by its timeliness rules. A hint here – if the agency has not granted your protest against the RFP by the time offers are due, it is pretty darn likely you have not persuaded it to change the solicitation.

Authored By:

John W. Chierichella
(202)218-6878
jchierichella@sheppardmullin.com