Vague & Ambiguous Solicitations or Contracts

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A growing problem that federal procurement contractors are bringing to us is a lack of detail in Solicitations. Contracting Officer reliance on vague contract statements such as "the intent of the contract was to . . .", conflicting contract requirements, and general misunderstandings as to basic contract concepts, such as some contracting officers' beliefs that design-build puts all risk on the contractor, or that use of a commercial items contract is easier and faster for the Government with the same requirements as regular contracts. This is not a specific issue with any single government agency; examples come from numerous agencies.

Some additional examples include:

- No response to Requests For Information ("RFI") on contract clauses subject to more than one interpretation;
- Contracting personnel saying "build according to plans and specs" rather than answering questions; and
- Attempts to unilaterally change commercial items contract terms and conditions.

The question coming from contractors is how to handle incomplete or deficient solicitations and contract issues to minimize the potential unreasonable risk to the contractor. First let's look at a few specific examples to demonstrate the depth of the problem.

"The typical response from the government to an RFI is to "bid it according to the plans and specifications." This seldom answers the question, and requires the contractor to file a protest prior to award."

James E. Krause, Esq.

Real World Examples

When the lack of detail or ambiguity is in the solicitation documents, the contractor must question it before submitting a proposal. The typical response from the government to an RFI is to "bid it according to the plans and specifications." This seldom answers the question, and requires the contractor to file a protest prior to award. The government takes the stance that these RFI's are just caused by lazy contractors not reading the solicitation completely. It is certainly possible that some RFI's are unnecessary, but the majority of the questions I have seen were reasonable and required a government response. These are not attacks on the Government personnel who prepared the solicitation – in fact, they assist the government in putting out a better solicitation. Nonetheless, many government contracting officers consider these requests in a negative light.

Another possibility is the lack of knowledge on the part of the government person preparing the solicitation. One example was a solicitation for the contractor to simply locate and ship the Agency a free standing piece of equipment to replace an existing piece of equipment. The solicitation specifically identified the model number of the equipment, and there were no additional requirements for installation

– in fact, the contractor never had to visit the location, which was hundreds of miles away. When the equipment arrived, it was discovered that the new equipment had different power requirements, and would not work in the old equipment's location. The contracting officer demanded the contractor provide additional services to bring more power to the site and claimed these services were part of the contract, and that the contractor should have anticipated providing the additional services since the intent of the contract was for the Government to have a working piece of equipment. This contract was only to provide the specified equipment, and the government should have either investigated installation factors for themselves, or written this requirement into the contract.

Design-build contracts have been in common use since the 1990s, but contracting officers still misunderstand limitations in their ability to transfer all risk to the contractor. Most Federal design-build solicitations for new construction include a set of drawings prepared by the government and completed to a certain percentage, providing the design-build contractor a basic set of parameters to use in preparing a proposal. The contractor must use the government information to prepare their drawings. This information provided by the government to a contractor may be relied on under the Spearin doctrine[1], and the government does not automatically avoid all responsibility by calling it a design-build contract.

Another common area of contention is the use of design-build contracts on existing structures that are older and need to be renovated. There is a natural conflict in trying to decide what areas the contract actually identified for the design builder to perform, since the delineation of what work to do may not be clear. All too frequently, the government thinks by saying design-build on a renovation contract, the owner can make the contractor perform any additional work they spot as they uncover unknown problems in the existing structure.

A new issue coming up frequently is the use of commercial items contracts under the Federal Acquisition Regulations ("FAR") Part 12. One government agency resolicited a contract from a standard Time and Materials Contract on Standard Form ("SF") 1442 to a Firm Fixed Price Contract on SF 1449 for provision of personnel at various locations around the world. The contract allowed the contractor a certain number of days to fill personnel vacancies, with the time period longer for out-of-the-way locations. The new contracting officer took the stance that the "intent of the contract" was to have people in seats; she refused to pay the contractor for empty seats despite the clause allowing a certain number of days to fill vacancies in a position; and she demanded an audit of the contractor's past years' performance for compliance. The contracting officer also stated she was going to unilaterally change the terms of the contract, which is not allowed under commercial items contracts.

Other issues I have seen with commercial items contracts (SF 1449) are demands for actual costs and audits for terminations for convenience, which are specifically <u>not</u> allowed under FAR Part 12.

[1] "The Spearin doctrine comes from a 1918 United States Supreme Court decision, *United States v. Spearin*, 248 U.S. 132 (1918), and stands for the proposition that a contractor is allowed to rely on the plans and specifications provided by the government. The Court held "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work...the contractor should be relieved, if he was misled by erroneous statements in the specifications."

What a Contractor Can Do

What can you, as a contractor, do to minimize your risks of vague and ambiguous contract enforcement?

1. Know the FAR. Read it. Ask questions.
2. Read your contract thoroughly. Not just once. The contract administrator at your firm must have a completely dog-eared contract with tabs, highlights, and all notice periods identified. Pay attention to the SF number in the bottom right hand corner of the contract. It can change the rules.
3. All clauses incorporated by reference into the contract should be located, printed and attached to the contract.
4. All communications from the government must be in writing.
5. The only person with authority to bind the U.S. Government is the contracting officer, not the COR or anyone else.
6. Never agree to do anything for free.
7. If you have any questions at all about a government directive, search out the answer (in writing). Ask questions, and don't accept vague answers.
8. Beware of statements to "go ahead with the work and we'll get the paperwork handled later."
9. Document everything. If you get verbal instructions, immediately send a confirming email which asks for an immediate response if anything is misstated.
10. Use the government's required databases or systems and keep them up to date.
11. Don't stop working while waiting for an answer to an RFI, unless there is nothing else remaining to be done on the contract. If this is the case and you are in a stop work condition, notify the government immediately, and continue to notify the government on a daily basis until you get a response.
12. Above all, perform the contract!

James E. Krause is an attorney who primarily practices in the field of Federal Contracts law. Feel free to call if you have any questions about this article.

*Please note, this article will be the topic of one of my firm's seminars this year and will be a topic I present at the Jacksonville NCMA's 2015 Small Business Outreach Training Conference on April 16, 2015.