THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and James F. Nagle

NOVEMBER 2021 | VOLUME 35 | ISSUE 11

¶ 65 ACRONYMS, INITIALISMS, AND DEFINITIONS—*OH MY*! The Importance Of Understanding Each Other

James F. Nagle

Most of the articles in the REPORT deal with sophisticated, cutting edge issues, such as the latest trends in source selection or a current nuance in contract types. In this article we address a very old and fundamental issue—the need for each contracting party to understand what the other is talking about.

A Hodgepodge Of Letters: Acronyms And Initialisms

In *People, Technology & Processes, LLC v. U.S.*, 151 Fed. Cl. 713 (2020), a protest that involved a U.S. Special Operations Command solicitation, the protester challenged the evaluation of its proposals. The solicitation included detailed proposal preparation instructions, among which was the requirement that the proposal volumes "not include glossaries, compliance matrices or acronym lists." Instead, offerors were to submit as a stand-alone document entitled "Cross-Reference," "a comprehensive glossary, compliance matrix and acronym list."

The agency notified the protester, People, Technology and Processes, LLC (PTP), that it was not selected for award and provided a written debriefing. PTP protested the evaluation of its proposal to the Government Accountability Office. The parties underwent GAO alternative dispute resolution, after which the GAO's representative advised that he would recommend denial of the protest. PTP withdrew its protest to the GAO and filed with the U.S. Court of Federal Claims:

> In its Complaint, PTP alleges: (1) the Agency admits the contemporaneous rationale for rating PTP technical[ly] unacceptable is flawed, requiring remand; (2) the Agency determination that PTP is unacceptable under the capabilities sub-element is arbitrary, capricious, and contrary to law; (3) the Agency conducted an unequal capabilities sub-element evaluation to PTP's competitive prejudice; and (4) the Agency's best value determination is arbitrary, capricious, and contrary to law. Based on these alleged errors, PTP requests that the Court declare the Agency's evaluation of PTP arbitrary, capricious, or otherwise contrary to law; remand the matter back to the Agency for further consideration of PTP's proposal; and enjoin the Agency from initiating performance of any contract awarded under this Solicitation.
>
> The United States, on the other hand, argues that "PTP has failed to demonstrate that [USSOCOM]

> acted arbitrarily and capriciously when it rated PTP's Factor 1 (Technical) [indefinite-delivery, indefinite quantity] Management Proposal…as unacceptable, or that the United States is impermissibly relying on *post hoc* rationalizations to explain USSOCO's actions." The United States further contends that "PTP cannot establish that USSOCOM subjected it to unequal, or disparate, treatment…." Accordingly, the United States argues that PTP is not entitled to injunctive relief.

The court denied PTP's motion for judgment on the administrative record and its request for a preliminary injunction. It granted the agency's cross motion for judgment.

The court's decision is heavily redacted, so it is not possible to determine the specifics of the agency's evaluation or of PTP's complaints about it. It appears, however, that PTP asserted that the agency had not understood certain acronyms in PTP's heavily acronym-laden proposal, to which the court replied:

> Whether or not the Agency understood the acronyms in PTP's tables does not obviate the fact that PTP did not provide a reference for the acronyms it used, did not provide a [* * *] (*see* [Agency Report] 558 (inviting offerors to "submit, as a standalone document marked 'Cross-Reference,' a comprehensive glossary, compliance matrix and acronym list"), AR 565 (explaining that offerors that are able to describe how they meet the [statement of work] requirements would be viewed as satisfying the three mission Imperatives), AR 559 (instructing that "Volume II must provide specifics and be complete.")).

We cite that case because acronyms and initialisms so permeate Government contracting language that practitioners sometimes forget how incomprehensible they can be, not only to laypeople, but also to other practitioners who may not be familiar with the particular agency, industry, or process. For example, does the initialism "COC" mean "Certificate of Competency" under Federal Acquisition Regulation Subpart 19.6 or "Certificate of Conformance" under FAR Part 46. Does "BAA" mean "Buy American Act" under FAR Part 25 or "broad agency announcement" under FAR 35.016? Does "IBR" mean "incorporated by reference" in FAR 52.301 or "integrated baseline review" under FAR 34.202?

Abbreviations, Acronyms, And Initialisms

The word "acronym" was used broadly in the solicitation in *People, Technology & Processes*. Acronyms should be distinguished from initialisms. Both are forms of abbreviation. An acronym is a combination of the first letter of each word in a title that can be pronounced as a word, such as "FAR" for "Federal Acquisition Regulation." An initialism is a combination of the first letter of each word in a title that cannot be pronounced as a simple word, such as "USA" for "United States of America" or "CPU" for "central processing unit." See the entry "Abbreviations" in Garner, Garner's Modern English Usage 2 (4th ed. 2016), which is a must-read, and the entry "Acronyms and Initialisms," in Garner's Dictionary of Legal Usage 17 (3d. ed. 2011).

As a general rule, we think it is better for offerors to submit a separate list of proposal abbreviations, acronyms, and initialisms, unless a solicitation instructs otherwise. Government proposal evaluators are often pressed for time, and may find the evaluation process to be tedious and taxing. Lacking a designated place to go to check the meaning of "IBR," an initialism, means that an evaluator, who may not remember or even know where that phrase was first used and explained (whether it is on page 2 on page 222 of the proposal), may just assume incorrectly. Given that agencies often award contracts without discussions and are generally not required to seek clarification during proposal evaluation, it is essential that proposals be stand-alone documents and as clear as possible.

There is no one comprehensive official list of abbreviations, acronyms, and initialisms used in Government contracting, but various lists abound. For example:

- The United States Government Manual list of *Commonly Used Agency Acronyms*, *https://www.govinfo.gov/content/pkg/GOVMAN-2015-07-01/pdf/GOVMAN-2015-07-01-Commonly-Used-Agency-Acronyms-105.pdf*.
- The Defense Acquisition University (DAU) Glossary of Defense Acquisition Acronyms and Terms, *https://www.dau.edu/tools/t/DAU-Glossary*.
- The University of California at San Diego's website, *Govspeak: A Guide to U.S. Government Acronyms & Abbreviations*, *https://ucsd.libguides.com/govspeak*.
- The National Archives Library Information Center, *Acronyms, Abbreviations, and Initialisms*, *https://www.archives.gov/research/alic/reference/acronyms.html*.

There are many more. Another useful resource is The Government Contracts Reference Book (5th ed. Wolters Kluwer 2021).

So the parties must take steps to know what each is saying to the other. The possible lack of that understanding proved fatal for the protester in *People, Technology & Processes*.

Words And Phrases—What Definition Applies?

Separate from acronyms and initialisms is the problem of knowing the meaning of a particular word. As Justice Oliver Wendell Holmes wrote: "a word…is the skin of a living thought." It is essential that the parties agree on that thought but that takes us to definitions. Here I shall cite another giant of jurisprudence—Humpty Dumpty: "When I use a word,…it means just what I choose it to mean, neither more nor less." Therein lies the problem.

Sophion Bioscience Inc. v. United States, No. 21-1065, 2021 WL 2909029 (Fed. Cl. June 25, 2021), involved a postaward protest regarding a Department of Health and Human Services procurement for an automated high throughput patch clamp system used to analyze heart ion channel pharmacology. The contractor argued that the Request for Quotations contained a latent ambiguity and, thus the agency conducted a flawed evaluation. To support its position, the protester pointed to definitions of "throughput" from several dictionaries. However, the agency responded that the solicitation specifically defined "throughput" as dealing with the total number of cells, not merely the percentage of successful cells. The court agreed with the agency's argument. Moreover, the court concluded that any alleged ambiguity was obvious and should have been challenged prior to award.

When I pointed out this case to some colleagues, they were nonplussed. They thought that the court's decision was essentially a common sense ruling and did not change what they perceived to be the existing legal landscape. I agree, but sometimes, as Nobel laureate Saul Bellow stated: "It is necessary to repeat what we all know."

FAR 1.108(a) states that definitions in FAR Part 2 apply to the entire regulation unless specifically defined in another passage. Words or terms defined in a specific passage have that meaning when used in that passage. Undefined words retain their common dictionary meaning. *Sophion Bioscience* demonstrates that a definition in a solicitation or contract is also entitled to the priority of a regulatory definition. So, if a solicitation or contract contained language such as "for the purpose of this solicitation, 'office' shall be defined as…," that definition would take precedence over any contrary common dictionary meaning.

For example, in *Advanced Decisions Vectors, Inc.*, Comp. Gen. Dec. B-412307, 2016 CPD ¶ 18,

2016 WL 125354, 58 GC ¶ 48, the Department of Homeland Security had included in the solicitation, three times, the statement that proposals had to be submitted to the contract specialist's specific email address. The GAO noted that nowhere in the solicitation did the agency mention submitting the proposal to the General Services Administration's eBuy portal The GAO relied on that repeated emphasis and the omission of any reference to a portal in concluding that, pursuant to FAR 52.212-1, "Instructions to Offerors—Commercial Items," the "office designated in the solicitation" had to be that specific contract specialist's email address. The GAO essentially concluded that the fact that the emailed proposal was en route was not sufficient. The GAO required that the contract specialist's computer had to register the receipt of the email, à la "You've got mail!," by the deadline or the proposal was late.

Given the conflicts between the GAO and the Court of Federal Claims over the interpretation and application of the late proposal rule in FAR 15.208 and FAR 52.215-1, a solicitation definition of "office designated in the solicitation" is well-advised. It would be a *precising definition*. See Copi and Cohen, Introduction to Logic 91–99 (13th ed. 2009). A precising definition assigns a more specific meaning to a general word or phrase. As long as such a definition does not contradict a higher authority, a precising definition would not be a deviation from the FAR as defined in FAR 1.401.

Not all definitions are in FAR Part 2. Other definitions are scattered throughout the regulations. For example, FAR Part 3, "Improper Business Practices and Personal Conflicts of Interest," which has 12 different "Definitions" sections! That is necessary, because very often a new statute or executive order contains specific and unique definitions for that statute or executive order. So, such definitions are placed in the specific "Definitions" section for the portion of the FAR implementing that higher authority. Such specialized definitions are not in FAR Part 2 because the definition would not apply throughout the FAR in general. Moreover, just in case the issue of definitions in the FAR were not confusing enough, many other definitions are not in FAR Part 2 or in a definitions section. For example, FAR 33.213(a) has, in the middle of the paragraph, in parentheses, the definitions of "arising under the contract" and "relating to the contract"— a distinction that can be of critical importance.

When Such Matters Should Be Recognized

If divergent views or simple uncertainties are recognized preaward, the parties may be able to resolve the matter before the contract is awarded. It becomes immeasurably harder to resolve the matter after award if it becomes an issue. Contractors especially must be very careful about the terms in their proposals because while the economic impact of such a divergence of views can have serious impact on a Government agency, it can be devastating for a contractor.

Contractors must be aware of three issues. First, quite often the Government is not familiar with the terms of art and definitions in a particular industry. A term of art became quite important in *Metric Constructors Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747 (1999), 41 GC ¶ 186. The construction specification stated: "New lamps shall be installed immediately prior to completion of the project…." The contractor interpreted that to mean that any lamps that were broken or otherwise inoperative were to be replaced. After award, the Government said it meant that all lamps had to be replaced. The Government agreed to the change but demanded a significant price reduction. The contractor balked, arguing that if that is what the Government had meant, it should have used the term common in the industry—"relamp." The contractor appealed the Government deduction. The board agreed with the Government and what it considered to be the

plain language of the solicitation. The contractor appealed to the U.S. Court of Appeals for the Federal Circuit which, looking at the same language and at several findings the board made, concluded that Metrics' interpretation was reasonable and in accordance with the entire solicitation. "Relamp" is an industry term of art.

Second, too many contractors assume that clarifications or discussions will flesh out any ambiguity. This is a fatal error, because the FAR may not require or permit the Government to seek clarification, FAR 15.306(a). Moreover, quite often the Government does not plan on having discussions, see FAR 52.215-1(f)(1). Certainly, the Government reserves the right to change its mind and have discussion and an alternate to FAR 52.215-1 makes that clear, but the standard rule is that discussions will not occur. Indeed, as in *HP Group, LLC*, Comp. Gen. Dec. B-415285, 2017 CPD ¶ 385, 2017 WL 2965271, the GAO and judges will cling to the traditional rule that if an ambiguity exists, the onus is on the contractor to seek clarification and any such request for clarification " had to may be made prior to the closing date for receipt of proposals."

Oak Grove Technologies, LLC v. U.S., No. 21-775C, 2021 WL 3627111 (Fed. Cl. Aug. 2, 2021), reached a different conclusion but for a specific reason. In that Department of Defense solicitation, the Government had used FAR 52.215-1, asserting that the Government planned on awarding without discussions. However, Defense FAR Supplement 215.306 states that the Government "should" conduct discussions in solicitations and contracts estimated to be over $100 million, as this contract was. The court emphasized that the word "should" clearly allows some discretion but the Contracting Officer must explain any departure from the preferred action. Here, however, there was no explanation, just the conclusory statement that the CO decided it would be better to award without discussions, an explanation the court found "woefully short." Absent such a unique circumstance as was found in this case, a contractor simply cannot assume that the Government will engage in clarifications or discussions to flesh out any uncertainty.

Finally, if the ambiguity is not raised until after award, the Government will typically present a two-pronged argument, i.e., it was not an ambiguity, but even if it were, it was an obvious on latent ambiguity and should have been raised preaward. This is what the Government argued successfully in *HP Group* and *Sophion Bioscience* and numerous other cases.

Conclusion

Given the complexities of Government contracting and, especially, the pressures and stresses of competitive procurement, it is essential that COs and proposal managers work overtime to communicate as clearly as possible, make no unfounded assumptions about what the other party does or does not understand, and use every rhetorical device available to them to explain in no uncertain terms what they mean by the abbreviations, words, and phrases that they use. *JFN*

