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¶ 38 PRE-BID/PRE-PROPOSAL CONFERENCE QUESTIONS: The Good, The Bad And The Ugly

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During contract formation, the Government has many questions for the proposers to answer, such as who you are, why you think you are responsible, and why your proposal should be considered the best value. But often proposers have numerous questions for the Government. During the formation process some fairly formal settings in which proposers are allowed to question the Government are pre-bid or pre-proposal conferences. Questions need not be asked only in those settings, however, because not every solicitation will have a pre-bid or pre-proposal conference.

Pre-Bid Conferences

The general rule in Federal Acquisition Regulation Part 14, "Sealed Bidding," regarding pre-award questions is implemented in the "Explanation to Prospective Bidders" solicitation provision at FAR 52.214-6. 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.

Pre-bid conferences, a formal setting in which such pre-award questions may be asked, are described in FAR 14.207:

> A pre-bid conference may be used, generally in a complex acquisition, as a means of briefing prospective bidders and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before the bids are opened. It shall never be used as a substitute for amending a defective or ambiguous invitation. The conference shall be conducted in accordance with the procedure prescribed in [FAR] 15.201.

FAR 14.211 elaborates on providing information to prospective bidders, whether in response to a question or not, especially in paragraph (b) which addresses such release after the solicitation is issued:

> (a) *Before solicitation*. Information concerning proposed acquisitions shall not be released outside the Government before solicitation except for presolicitation notices in accordance with 14.205 or 36.213-2, or long-range acquisition estimates in accordance with 5.404, or synopses in accordance with 5.201. Within the Government, such information shall be restricted to those having a legitimate interest. Releases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another. See [FAR] 3.104 regarding requirements for proprietary and source selection information including access to and disclosure thereof.
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> (b) *After solicitation*. Discussions with prospective bidders regarding a solicitation shall be conducted and technical or other information shall be transmitted only by the contracting officer or superiors having contractual authority or by others specifically authorized. Such personnel shall not furnish any information to a prospective bidder that alone or together with other information may afford an advantage over others. However, general information that would not be prejudicial to other prospective bidders may be furnished upon request; *e.g.,* explanation of a particular contract clause or a particular condition of the schedule in the invitation for bids, and more specific information or clarifications may be furnished by amending the solicitation (see [FAR] 14.208).

Apparently, the word "discussions" in the first sentence of paragraph (b) refers to a standard dictionary general meaning of oral or written conversations between parties rather than the more formalized meaning of discussions contained in FAR 15.3 because FAR 14.211 applies to sealed bidding.

FAR 14.211(a) stresses what information should be given to which parties and that it should be done fairly and as nearly as possible at the same time so that one prospective bidder is not given an unfair advantage over another. Paragraph (a) also invokes FAR 3.104 regarding protective requirements for proprietary and source selection information. FAR 14.211(b) stresses that fairness must be uppermost in the post-solicitation environment.

Pre-Proposal Conferences

With regard to negotiated procurements, FAR 15.201 specifically mentions pre-solicitation or pre-proposal conferences in paragraph (c)(8) as one of the techniques agencies are encouraged to use "to promote early exchanges of information." FAR 15.201 also mentions various other types of situations in which information can be exchanged including one-on-one meetings in paragraph (c)(4) but stresses the restrictions regarding disclosure of information. Paragraph (f) states:

> (f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under [FAR] 3.104 or subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.

Unlike in FAR Part 14, the rules in Part 15 regarding pre-award questions are not implemented through a specific FAR solicitation provision. So agencies have filled in that gap via supplementation. For example, where a pre-proposal conference will be held, the Department of Commerce acquisi-

tion regulations prescribe the solicitation provision at 48 CFR 1352.270-71, providing in pertinent part:

> (b) Offerors are encouraged to submit all questions in writing at least [__] days prior to the conference. Questions will be considered at any time prior to, or during, the conference; however, offerors will be asked to confirm verbal questions in writing. Subsequent to the conference, an amendment to the solicitation containing an abstract of the questions and the Government's answers, and a list of attendees, will be made publicly available.
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> (e) Offerors are cautioned that, notwithstanding any remarks, clarifications, or responses provided at the conference, all terms and conditions of the solicitation remain unchanged unless they are changed by written amendment. It is the responsibility of each offeror, prior to submitting a proposal, to seek clarification of any perceived ambiguity in the solicitation or created by an amendment of the solicitation.

A similar provision, for some reason limited to services contracts, has been adopted by the Department of Agriculture at 48 CFR 452.237-71. Offerors should therefore check their agency supplements and the particular solicitation to see any special rules pertaining to pre-proposal conferences regarding that particular agency acquisition.

Note that both agency FAR supplements quoted above stress that is the responsibility of offerors to seek clarification prior to submitting an offer. This memorializes the case law. For example, in *Per Aarsleff A/S v. U.S.,* 829 F.3d 1303 (Fed. Cir. 2016), 58 GC ¶ 255, the U.S. Court of Appeals for the Federal Circuit emphasized that questions seeking clarification and their anticipated answers play a significant role in the bidding process and that it is critical that bidders avail themselves of the opportunity to ask clarifying questions if they have questions regarding the contract. Moreover, the court stated that, under its long-held rule, if an ambiguity is patent, i.e., so glaring it imposes an affirmative duty on the plaintiff to seek clarification, failing to ask such questions constitutes a waiver from introducing the issue the first time on appeal or even when filing a new protest at the U.S. Court of Federal Claims, citing *Blue & Gold Fleet, L.P. v. United States,* 492 F. 3d 1308, 1313 (Fed. Cir. 2007), 49 GC ¶ 320.

What Questions Will The Agency Answer?

● *Questions The Agency Must Not Answer*—The FAR at various points stresses that some information may not be provided by the Government despite a specific question. For example, in FAR 3.104, which implements the Procurement Integrity Act, 41 USCA §§ 2101–2107, FAR 3.104-3 forbids knowingly disclosing contractor bid or proposal information or source selection information before the award of a federal agency procurement contract. See also FAR 3.104-4.

● *Questions The Government May Or May Not Answer*—Numerous questions may be asked that the Government is not specifically prohibited from answering, but neither is it required to answer. For example, nowhere in the FAR is there a requirement that the Government disclose the names of the people on the source selection evaluation board. But nor is disclosure prohibited. So the Contracting Officer has discretion to decide whether to answer.

● *Questions The Government Must Answer*—So, in pre-bid/pre-proposal conferences, bidders and offerors are clearly entitled to ask questions. If they ask a timely reasonable question, aren't they entitled to an adequate response? Consider the case of *Leeward Construction Corp. v. Department of Veterans Affairs*, CBCA 3724, 15-1 BCA¶ 35,861, 2015 WL 394120, *motion for recons. granted regarding quantum*, CBCA 3724-R, 15-1 BCA ¶ 35,919, 2015 WL 1382047, where the specifications

for construction at a Department of Veterans Affairs Medical Center (VAMC) contained a section on "asbestos abatement" with a heading that included the parenthetical phrase "(PROVIDED BY VAMC)." On April 26, 2012, the VA held a site visit for all potential bidders at which the bidders were allowed to ask questions. (Such a combination of site visit and pre-bid conference is common as, for example, in the Department of Commerce provision cited earlier.) On May 7, 2012, the VA posted the following questions and answers as an amendment to the solicitation:

> Question: All abatement is by the owner, correct?
>
> Answer: Per the contract documents.
>
> Question: All floors on first floor are to be abated by owner. All floors on 4th floor are to be removed by contractor as normal construction debris.
>
> Answer: Per the contract documents….

Leeward was the low bidder and won the contract. After award, it became clear that Leeward did not think that asbestos abatement was the responsibility of the contractor but that the Government believed that it was. Because the Government was requiring Leeward to perform asbestos abatement, it submitted a request for equitable adjustment, which the CO denied. The REA was converted to a claim and the litigation began.

The board focused on the fact that the solicitation clearly stated that asbestos abatement would be provided by VAMC. The board noted that, absent that phrase, "the contract would certainly require the contractor to perform the asbestos abatement work, as the specification is replete with references to the contractor performing the work. With this phrase included, however, the specification becomes far less clear about which party is to perform this work." The board pointed out that regardless of the phrase and despite the VA's responses to the questions at the bidders conference, the VA maintained that the contract, read as a whole, unambiguously required Leeward to perform the abatement. The VA contended that the phrase merely meant that the VA "provided the specification." Moreover, the VA argued that, at best, the specification was ambiguous and because Leeward itself did not make the specific inquiry, it must absorb the cost of performance.

The board emphasized that, absent the phrase "provided by VAMC," the VA's argument would prevail. However, the phrase was used! So, the issue became how to interpret the contract, including the phrase, especially considering the agency's responses to the bidders' questions. The board held that the VA's argument that the phrase simply indicated that the agency "provided the specification" was not reasonable. The fact that more than one bidder asked questions to clarify the requirement indicates that the bidders had a legitimate concern. Yet "the VA chose not to resolve this obvious ambiguity."

In answer to the VA's contention that the actual awardee, as opposed to any bidder, must make the specific inquiry, the board disagreed, stating: "If that were true, there would be no purpose in disseminating the questions and answers to all bidders and to incorporating the questions and answers into the solicitation. Mandating that only the winning bidder's inquiry is relevant makes little sense." That's rather a damning statement to say about a Government interpretation! The board continued:

> That would necessitate that all bidders ask the same question at the bidders conference to protect themselves, as no one would know at that point who the winning bidder would be. The law does not require that the specific winner of the contract make inquiry.

> It only requires that the inquiry be made and the response promulgated. This was done in this case.
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> …Instead of clarifying the situation, the VA on two occasions simply stated "Per the specifications." [Actually the exact phrase used was "per the contract documents."] Under these circumstances the only rational conclusion that a reasonable bidder could draw would be that the VA would perform the work. To conclude otherwise would put bidders at risk of losing the award to a bidder who did so conclude.

Therefore, Leeward was entitled to its equitable adjustment.

Unfortunately, in the author's experience, often the Government tries to be cagey and deliberately not specifically answer a question. This worked out badly for the VA in this case because the board decided that the specifications were ambiguous, if not contradictory, and that the VA deliberately chose not to clarify the situation.

A more recent case, *ECC International LLC*, ASBCA 58993, 22-1 BCA ¶ 38,073, 2022 WL 843578, illustrates the danger of giving a different but still non-clarifying response (not an answer) to timely relevant questions. The case involved ECCI's contract with the U.S. Army Corps of Engineers to construct a Military Police School and a Signal School for the Afghan national army in Afghanistan. Before bids were due, one of the bidders asked about the specifications: "Could you please confirm 'excavate the footings 3.0 m below the level of intended bottom of the footing foundation' is requirement (sic) for both Military Police and Signal School sites since they are adjacent." The CO only responded: "Bid it as you see it." That "bid it as you see it" response was "copied and pasted" by the USACE and sent out to the bidders.

This vague response was specifically chosen by the USACE because collapsible soils were a common occurrence in that area of Afghanistan. Internal USACE documents showed that its personnel recognized that specifically answering the question would leave the Government "open to millions of dollars in modifications." Hence, they decided to use the "bid it as you see it" phrase. By doing so, they apparently believed they were shielding the Government from that liability, but that did not turn out to be the case.

ECCI determined to "bid it as it saw it." Its proposal spelled out its rationale for excluding the cost of collapsible soil mitigation in a full-page clarification immediately following the SF 1442 form into which it had inserted its prices for the work. In that page ECCI had specifically referenced the Government's bidder inquiry response of "bid it as you see it." The USACE awarded the contract to ECCI with no objection to the clarification contained in the proposal.

The board agreed with the Government that a different site condition was not present. It concluded, however, that the Government's acceptance of ECCI's proposal constituted its acquiescence to ECCI's clearly expressed interpretation of a solicitation ambiguity created by the Government, stating: "Thus, we construe the contract, as awarded, to not require the mitigation of collapsible soil, and we conclude that the government's direction to ECCI to mitigate for the MP/Signal School project was a compensable change of contract."

In reaching that decision, the board stressed that there had been a bidder inquiry about the discrepancy between the two sections:

> If in fact USACE meant for the requirement to be in both sections, it had the opportunity to say so in response to the inquiry. Instead, it threw open the door for bidders to make their own interpretations of the requirement with the response "bid it as you see it." The government response created more ambiguity rather than less.

The board continued that ECCI "and surely other bidders as well," taking the Government at its word, told the Government "how they saw it" in their proposals. So the board concluded: "The government is responsible for creating ambiguity in the solicitation and is bound by ECCI's reasonable and clear pre-award, pre-dispute interpretation."

In the author's experience, responses such as "bid it as you see it" or other variations such as "bid it according to the specifications" are quite common. Sometimes the response of "per the specifications" is justified. The specifications may be sufficiently clear but a bidder simply has not read them at all or at least not carefully or is maneuvering for more time or an easing of the specifications. Certainly, there is no requirement for the CO to read a clear requirement of the solicitation to a particular bidder.

In this case, however, that was not the situation. The board delved into the fact that the USACE personnel recognized that this was a thorny issue that could expose the Government to a liability of millions of dollars. So, the USACE personnel decided to be "cagey" (my word, not the board's) and tried to shift all the risk to the contractor. Kudos to the board for not allowing this maneuver. It is doubtful that the USACE's maneuvering here would satisfy the guiding principles of the FAR—integrity, fairness, and transparency—set forth in FAR 1.102(b)(3). Those principles can only be achieved if there is an honest exchange of information between the parties

Bidders, however, should recognize that the board in *ECCI* pointed out that ECCI specifically explained "how it saw it" in its enclosure with its bid. By not challenging that at the time, the Government acquiesced in that interpretation. Therefore, when the Government later required the extra mitigation to be performed, it was constructively changing the contract.

Takeaways

Bidders must carefully review the solicitations on which they wish to bid. They must do their review critically and avoid the temptation to read a solicitation in a way that is most satisfactory to the bidders. They must check the definitions and consider whether there are other possible interpretations. If there is any doubt, they must ask the appropriate questions before bidding, whether in a formal pre-bid/pre-proposal conference or a one-on-one setting. If the response from the Government is not adequate, they must follow up with another question or questions. Then, as did ECCI, in their proposals, they should specify that they are relying on the interpretation provided.

The Government should recognize that there are no perfect specifications. A solicitation, including the specifications, which might seem crystal-clear to the Government drafter, might well be subject to different interpretations by reasonable and knowledgeable bidders. So, it should answer questions seeking clarification appropriately. An agency should not assume, as the VA apparently did in *Leeward Construction*, that its interpretation of the specifications is so crystal-clear that no one else could have a differing reasonable interpretation. Moreover, an agency should not do what the USACE did in *ECC International*. By answering "bid it as you see it," the Government opened the door to any bidder's reasonable interpretation in the light of an ambiguous, if not contradictory, specification. *JFN*