

Appendix CC

Drafting Solicitation Amendments for Q&A (JUL 2017)

DRAFTING SOLICITATION AMENDMENTS

For Amendments that Publish Agency Answers to Vendor Questions Using a Q&A Format

Tips for Avoiding Problems

Issued July 2017

INTRODUCTION

A solicitation, including every amendment, is a contract document. Aside from the law, a solicitation is also the controlling set of instructions regarding the procurement process. While the original solicitation is usually drafted with care, amendments are often drafted under pressure – circumstances that may increase the likelihood of error. More importantly, amendments are often drafted in response to vendor questions – not from whole cloth. Stated differently, they are not drafted as an integrated whole – as a contract or solicitation would be drafted in the first instance; rather, they are drafted piecemeal – question by question; questions selected by the vendor, not the agency. Lastly, solicitation amendments that answer vendor questions are often responding to defective questions. A vendor’s question may include a false premise, an incorrect statement of fact, or a significant omission. Likewise, a vendor’s question may be ambiguous, i.e., capable of more than one reasonable interpretation. The two fundamental problems with amending solicitations in a question-and-answer format – piecemeal drafting and including defective questions– can be avoided only by very careful drafting. The following suggestions are offered to assist procurement officers in doing just that.

SUGGESTIONS

1. **New Instructions.** Include the following in each amendment:

THE SOLICITATION IS AMENDED AS PROVIDED HEREIN. INFORMATION OR CHANGES RESULTING FROM QUESTIONS WILL BE SHOWN IN A QUESTION-AND-ANSWER FORMAT. ALL QUESTIONS RECEIVED HAVE BEEN REPRINTED BELOW. THE “STATE’S RESPONSE” SHOULD BE READ WITHOUT REFERENCE TO THE QUESTIONS. THE QUESTIONS ARE INCLUDED SOLELY TO PROVIDE A CROSS-REFERENCE TO THE POTENTIAL OFFEROR THAT SUBMITTED THE QUESTION. QUESTIONS DO NOT FORM A PART OF THE CONTRACT; THE “STATE’S RESPONSE” DOES. ANY RESTATEMENT OF PART OR ALL OF AN EXISTING PROVISION OF THE SOLICITATION IN AN ANSWER DOES NOT MODIFY THE ORIGINAL PROVISION EXCEPT AS FOLLOWS: UNDERLINED TEXT IS ADDED TO THE ORIGINAL PROVISION. STRICKEN TEXT IS DELETED.

Of course, such language only helps if you draft each answer so it can be read, and fully understood, and connected with the original solicitation *without the need to read the question*. See suggestion number 2 below.

2. **Stand-Alone Answers.** Draft the State's Response so it can be read independent of the question. In other words, re-read every State's Response; if you cannot understand it without re-reading the question, then you need to re-write it.

3. **Q&A Format.** Use the following format for the Q&A:

Question: Lorem ipsum dolor sit amet, consectetur adipiscing elit. Fusce massa ex, mollis id venenatis et, cursus et purus?

State's Response: Duis non dapibus eros. Aliquam suscipit dictum est non varius. Proin lacinia ullamcorper imperdiet.

4. **No Change.** Unless the State's Response is intended to change something in the original solicitation, begin the State's Response with "No Change." To illustrate, the following would be circumstances in which the State's Response begins with "No Change."

Examples:

- a. The question requests factual information not previously published and the answer provides the information.
- b. The question inquires about a point the solicitation clearly addresses but was apparently misunderstood or missed by the vendor inquiring. Answer cross-references to numerous provisions in the original solicitation.

5. **Say It Once.** Do not re-word something that has already been said. Invariably, re-wording a statement will introduce problematic ambiguity. If the point was well stated in the original solicitation, do not republish the statement; rather, refer back to the original statement. For example, if the vendor's question inquires about the duration of the contract, do not state the contract's duration. Instead, reference or quote the language in the original solicitation that answers the question. If the original solicitation was ambiguous, then change the solicitation by expressly amending the original language.

Examples:

Question 1: What is the duration of the contract's first term?

State's Response: No change. In Solicitation Section VIIB, Terms and Conditions – Special, the clause titled Term of Contract – Effective Date / Initial Contract Period provides that "The initial term of this agreement is 1 year, 0 months, 0 days from the effective date."

Question 2: What is the duration of the contract's first term?

State's Response: The solicitation is modified as follows:

~~CONTRACT TERM. This is a five year contract with two options to renew, effective upon award.~~

TERM OF CONTRACT -- EFFECTIVE DATE / INITIAL CONTRACT PERIOD (JAN 2006)

The effective date of this contract is the first day of the Maximum Contract Period as specified on the final statement of award. The initial term of this agreement is 1 year, 0 months, 0 days from the effective date. Regardless, this contract expires no later than the last date stated on the final statement of award. [07-7B240-1]

TERM OF CONTRACT -- OPTION TO RENEW

At the end of the initial term, and at the end of each renewal term, this contract shall automatically renew for a period of 1 year if Contractor receives notice that the state elects to renew the contract at least thirty (30) days prior to the date of renewal. Regardless, this contract expires no later than the last date stated on the final statement of award.

6. **Modifying the Original Solicitation.** If the State's Response will modify a portion of the original solicitation, quote as much of the original solicitation as necessary to provide context. Underline any added language. ~~Strike out~~ any language deleted. You should exercise care in quoting the original solicitation, but the risk of an inadvertent error in quoting should be minimized by the following instructions, which are printed above in suggestion number 1: "ANY RESTATEMENT OF PART OR ALL OF AN EXISTING PROVISION OF THE SOLICITATION IN AN ANSWER DOES NOT MODIFY THE ORIGINAL PROVISION *EXCEPT AS FOLLOWS*: UNDERLINED TEXT IS ADDED TO THE ORIGINAL PROVISION. STRICKEN TEXT IS DELETED." In other words, if you quote language and it isn't shown as a change, no change was made.

Example:

Question 10: The FPB states the following on page 22:

Section 4.9.8 Limitation - Scope "...A contractor shall not provide any pre-existing software, any hardware, or any services other than those identified in Part VIII, Bidding Schedule..."

We have a suite of software which has benefited many South Carolina agencies, bringing consistent, high quality, tested functionality at minimum cost. Is there a vehicle for specifying and bidding proprietary software to be included in the solution, for example a security module?

State's Response: Paragraph 4.9.8 of the solicitation is amended as follows: 'The scope of this solicitation is limited to the acquisition of professional services to either (a) to enhance or re-write proprietary and/or pre-existing, installed software applications, either MOTS or custom software, or (b) to design and develop small custom software applications. A contractor shall not provide ~~any pre-existing software~~, any hardware, or any services other than those identified in Part VIII, Bidding Schedule, of this Solicitation, or any pre-existing software. If as part of the solution identified during any module, a COTS solution or MOTS solution is identified and approved, the UGU must either acquire said software by using a current State Term Contract or by issuing a bid outside of this framework. The cost of the software must be included in the total accumulated cost and recorded in the VM software.'

7. **Say It Once – In the Amendment.** Many vendors will ask similar questions. Do not repeat the answer or vary the answer. Invariably, re-answering a question will introduce problematic ambiguity. If

the point was well stated in a previous answer, do not re-answer the question; rather, refer back to the original answer. If additional information is required to answer the new question, refer back to the original answer, then supplement.

8. **Changes Independent of Vendor Questions.** If the amendment makes changes to the original solicitation that do not result from, or are not responsive to, vendor questions, start the amendment with a section labeled “Revision Unrelated to Questions” and include all such changes in that part.

9. **Explaining the Solicitation.** Contracts are not always easy to read. Sales staff quickly reviewing a lengthy solicitation may fail to see how all the parts connect. Some questions are a product of such quick reviews and may be answered simply by quoting relevant contract language.

Examples:

Question 5: Does the \$10 million budget include the personal identity protection product only or does it include business credit monitoring, notification services, reporting, and call center support?

State’s Response: No change. As provided in the Fixed Pricing Required clause in Section VIIA, “Any pricing provided by Contractor shall include all costs for performing the Work associated with that price.” As defined in Section II, “WORK means all labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations under the Contract.”

Question 16: We would like clarification on page 17, item one under Customer Service it states “During the first four (4) months of the contract, Contractor must have resources available before and after normal business hours (8:30 am-5:30 pm Eastern Time) and on weekends to assist, in a timely manner, eligible persons in the activation process and to answer questions concerning the Taxpayer Services. What time frame is requested when it refers to before and after? Do you have a certain time period you want Customer Service to be available after normal business hours?”

State’s Response: No change. In Section III, under the heading Services Requested, Customer Services, the solicitation provides as follows: “1. During the first four (4) months of the contract, Contractor must have resources available before and after normal business hours (8:30 am-5:00pm Eastern Time) and on weekends to assist, in a timely manner, eligible persons in the activation process and to answer questions concerning the Taxpayer Services.” The Solicitation does not mandate the exact extended hours – hours “before and after normal business hours . . . and on weekends” – that resources must be available. In response to paragraph II. E.1.a of Section IV in the solicitation, Offerors should outline the extended hours they are offering to provide.

10. **Providing “Unnecessary” Information.** Vendors will occasionally request information that should not be included in the contract, and thus, should not be included in the solicitation. For example, a solicitation to replace a boiler or roof-top HVAC may request the building’s as-built drawings or inspection reports. While the agency may have such information, it may be very dated or the agency may be unwilling to vouch for its accuracy. Vendors may also request information that is irrelevant to the solicitation. Usually, not responding is not an option. Two options are possible.

First, the agency could ignore the question for purposes of the solicitation amendment (e.g., not publish the question) and simply send the information directly to the offeror. In other words, treat the request as a FOIA request, i.e., a written request for public records. This approach only works if the information is irrelevant to the solicitation; otherwise, the information must be addressed in the solicitation – consistent with the Questions From Offerors clause, which provides as follows: “Any information given a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors as an Amendment to the solicitation, *if that information is necessary for submitting offers or if the lack of it would be prejudicial to other prospective offerors.*”

If the information is addressed in the solicitation, it can be provided in one of two ways; the procurement officer can make it available upon request or include the information in the solicitation itself. Either way, the State’s Response should make clear that the information or documents do not form part of the contract and that Using Governmental Unit disclaims the accuracy of the information. Because such “disclaimers” are not always enforced by the courts, the better approach may be to explain in the solicitation that the information is available outside of the acquisition process (e.g., downloadable from a separate URL, via mail, via email, for pickup) and why the information is not being included in the solicitation (e.g., irrelevant, inaccurate, dated, incomplete, all-of-the-above).

11. **Miscellaneous.** Consistent with Regulation 19.445.2010, review the questions and answers to insure that neither indicated the identity of any offeror.

12. **Alternative – Amendment Totally Restates the Amended Solicitation – Particularly for Bids.** Occasionally you may find that the degree of change is so substantial that the better approach is to simply issue an amendment that restates the entire original solicitation, as amended. As with any amendment, consider whether you are providing sufficient the time between publication of the amendment and the opening date for prospective offerors to react to the revised information. In an amendment that totally restates the solicitation, including – above Section 1 – introductory language such as that provided below should assist the vendors in identifying any changes.

IMPORTANT NOTICE: The state has opted to issue a total restatement of the entire solicitation, as amended. This approach has been selected in an effort to ensure the clarity of the contract documents during both the acquisition and contract administration phases of this procurement. Prospective bidders should discard the original solicitation document and use only this document when preparing their offer.

In an effort to assist your review of the amendment, we have endeavored to identify changes with yellow highlighting. Despite our best efforts, there is a chance that a change has not been identified. You are cautioned not to rely on our highlighting to identify all changes.

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