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Here’s the Drill: Strategic Procurement – Drawbacks of Using Nonnegotiable Supplementary Conditions in RFPs

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By Jeff Scorgie

Requests for proposals (“**RFPs**”) are a popular procurement model for those looking to hire a construction contractor. RFPs will commonly stipulate the form of contract the owner intends to use. If it is a standard form contract such as a CCDC, the supplementary conditions are often attached to the RFP as an appendix. The RFP may also require proponents acknowledge in their proposals that they agree to the contract and supplementary conditions *without any revisions*. While this can dispense with contract negotiations, owners (and contractors using a similar approach to retaining subtrades) should be aware of the drawbacks associated with this “take it or leave it” strategy.

Perhaps most notably, nonnegotiable supplementary conditions can dissuade contractors from pursuing the RFP altogether and unintentionally shrink the pool of interested proponents. A contractor may pass on an RFP if they see some onerous clauses in the supplementary conditions such as hefty liquidated damages or provisions that significantly curtailing their cost and schedule entitlement for delay events. The contractor may in fact have been willing to play ball had one or two of the more contentious clauses been modified (and those modifications may have been perfectly acceptable to the owner).

Using non-negotiable supplementary conditions can also create challenges if they were not thoroughly finalized when attached to the RFP. What should proponents think when they see a term in the supplementary conditions that is highlighted or accompanied with an internal note-to-draft that says “to be reviewed”, or when terms in the supplementary conditions contradict terms in the RFP? How should proponents evaluate a liquidated damages clause that has a dollar value of “TBD”? Too often these drafting mishaps are associated with the very clauses contractors view as contentious or relevant to pricing and can result in proponents making assumptions that impact their price submissions. While proponents can try to gain clarity by submitting requests for clarification, this may not be practical if the ambiguity or error is discovered on the eve of the proposal submission deadline.

There may be situations where it is logical to use nonnegotiable supplementary conditions to avoid protracted contract negotiations. However, owners (and contractors) need to appreciate the associated drawbacks and ensure the supplementary conditions and RFP are carefully drafted and vetted to avoid unintended consequences.

Click here to read Issue 1 of Here’s the Drill, “Prompt Payment – Are your contracts in order?”.

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