Bids and RFPs: Make the Process Fit the Purchase

October 21\textsuperscript{st}, 2009

Bill Pigott
Agenda

- Bid/RFP: What's the difference?
- When to use what?
- How to avoid accidents
- How to get what you want (most of the time)
**Bid RFP: What's The Difference?**

<table>
<thead>
<tr>
<th>Bid</th>
<th>RFP</th>
</tr>
</thead>
<tbody>
<tr>
<td>√ Fixed Close</td>
<td>√</td>
</tr>
<tr>
<td>√ Irrevocable Offer</td>
<td>X</td>
</tr>
<tr>
<td>√ Offer Security</td>
<td>X</td>
</tr>
<tr>
<td>√ Performance Security</td>
<td>X</td>
</tr>
<tr>
<td>√ Scope Fixed</td>
<td>X</td>
</tr>
<tr>
<td>X Negotiations</td>
<td>√</td>
</tr>
<tr>
<td>√ Contract Fixed</td>
<td>X</td>
</tr>
</tbody>
</table>

**AN RFP CAN BE A BID!**

**WATCH YOUR LANGUAGE!**
Bidding Until 1981

BID CALL → SUBMIT BID → ACCEPT BID → CONTRACT → BUILD

OFFER → ACCEPTANCE

CLAIMS → LITIGATION
1981 – Ron Engineering: The Big Bang

[Diagram showing the process of bidding and contract acceptance]
THE BIG BANG

BID CALL → SUBMIT BID → CONTRACT A → ACCEPT BID → CONTRACT B → BUILD

CLAIMS → LITIGATION

CLAIMS → LITIGATION
When Would You Use An RFP?

- Wish to avoid "Contract A"
- Need flexibility because
  - Scope not fixed
  - More than one solution
  - Want to explore
  - Need to negotiate
  - Vendor terms may apply

AN RFP IS COMPETITIVE!
THE PATH TO CONTRACT B IS DIFFERENT
No “Contract A” (True RFP)

**Advantages**
- Maximum flexibility
- Either party can walk
- Allows negotiation
- Explore solutions
- Test pricing
- Low key
- Tort damages / low risk

**Disadvantages**
- No commitments
- Either party can walk
- Negotiation
- No time limit
- Very loose
- Tort damages
- No leverage
When Would You Use “Contract A”?

- Purchase suitable
  - Product/service fully specified
  - Competition required and available
  - Comparison possible
  - No competing drivers
  - Owner contract available
**Contract A: Balance Sheet**

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Irrevocability</td>
<td>• Obvious error</td>
</tr>
<tr>
<td>• Competition</td>
<td>• Qualifications (yes, but)</td>
</tr>
<tr>
<td>• Apples to apples</td>
<td>• Fairness/evenness</td>
</tr>
<tr>
<td>• Bid security</td>
<td>• Non-compliance</td>
</tr>
<tr>
<td>• Nuance/privilege clause</td>
<td>• Can be rigid</td>
</tr>
<tr>
<td>• Flexibility (some)</td>
<td>• Owner obligations</td>
</tr>
<tr>
<td>• Limit/exclude liability</td>
<td>• Contract damages / risk</td>
</tr>
<tr>
<td>• Arbitration</td>
<td></td>
</tr>
</tbody>
</table>

**LIMITS CHOICES - SOMEWHAT**
Avoiding Accidents

• If true RFP avoid:
  – Irrevocability
  – Bid security
  – “late bids shall be rejected”
  – Fixed form of contract
  – Requesting an “offer”
  – Avoid “bid”, “tender”, “bidder”

• Either way
  – State intentions: be clear
  – Beware “copycats”

WATCH YOUR LANGUAGE!
Avoiding Accidents (Continued)

Consider your process carefully

- Bid process
  - No negotiation (usually)
  - Implied duty to be fair
  - Strict accountability for actions
  - Exposed to damages for process mistake

- Non-binding process
  - Can negotiate (usually)
  - Either party can walk away – no / little risk
  - Negotiations anticipated
  - No contract duty on buyer to “play fair”
Make The Process Fit The Buy

- Envelope 1 (RFP)
  - open/flexible
  - evaluate
    - Technical proposals
    - Financials
    - Track record
    - Expertise

- Envelope 2 (Bid Contract)
  - firm offer
  - contract objections

GET THE BEST OF BOTH PROCESSES
Some RFP Suggestions

- Flexibility is great but
  - Pick preferred, then
  - Negotiations are tough
  - Choice: walk or bad contract

- Structure RFP to
  - Provide contract or key terms
  - Invite contract comments
  - Limit negotiations to comments
  - Evaluate on extent of comments
  - Retain second proponent, just in case
  - State: debrief or not
Some Myths

- Only a “bid” is competitive
- We must reveal scores
- We are obliged to debrief
- We have to be “fair”

THERE ARE MANY WAYS TO BE COMPETITIVE
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