



# EXECUTIVE summary

Spring 2014 | Volume 21, Issue 2

This Issue's Theme: **Solutioning – What's Your Solutioning Doing For You?**

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# What's In a Word?

by Shlomo D. Katz, Counsel, Brown Rudnick LLP

I confess! I work around proposals and contracts all day long, but when I heard that the theme for this issue was Solutioning, I had to look up that word. Here's what I found in one online dictionary: *"Solutioning: A word many business-people misuse to describe the process of creating a solution. These people need a grammar lesson and should be fired immediately."* Yes, that last sentence was part of the definition

This got me thinking about how we use words, especially in proposals. It is a general principle of contract interpretation—a proposal is an offer to enter into a contract and is subject to contract interpretation rules—that words will be given their plain, everyday meaning unless there is a clear indication that a different meaning was intended. Of course, it may be obvious from the context that a word is being used as a term of art or that it has a specific technical meaning. For example, if a computer scientist uses the term Git, he probably is referring to “a distributed revision control and source code management system with an emphasis on speed” rather than “an unpleasant or contemptible person.” The point is that if you intend a word in your proposal to have some meaning other than what the reader would expect, you'd better say so.

Many disappointed offerors know the frustration of learning that the agency misunderstood their proposals. Usu-



ally, that will be tough luck, because the Government Accountability Office (GAO) has said many times that it is the offeror's responsibility to submit a proposal that responds to, and demonstrates a clear understanding of, the solicitation requirements; where a proposal fails to do so, the offeror runs the risk that the procuring agency will evaluate the proposal unfavorably. The same applies to a proposal that is ambiguous.

The dangers of submitting an ambiguous proposal are illustrated by the following excerpt from a GAO bid protest decision:

Here, Potomac submitted a blanket offer of compliance with the RFP requirements by

offering a price and signing the solicitation cover sheet and acknowledging copies of amendments 1 and 2 to the RFP. This was all that the RFP required in order for a proposal to be found acceptable. However, as noted, Potomac's cover letter noted that it was proposing a "FIT, FORM and FUNCTION replacement of the motor described" in the RFP. The contracting officer, upon reading Potomac's cover letter, construed Potomac's "FIT, FORM and FUNCTION replacement" statement as an offer to provide a motor that Potomac was representing to be interchangeable with the motor contained in the

solicitation with respect to physical and functional capacity, but not necessarily a motor that would fully comply with all of the detailed TDP requirements. Potomac argues that its language did not imply that it would be proposing an alternative to the TDP requirements and that the “fit, form and function” expression is a term of art among engineers in the field and did not take exception to the RFP requirements. Nevertheless, we find that this terminology, at best, created an ambiguity, such that the contracting officer was unable to unequivocally determine whether Potomac's replacement would comply with all of the requirements of the TDP or provide a fully compliant replacement motor. Since the solicitation did not allow submission of proposals departing from the TDP requirements, the contracting officer reasonably rejected Potomac's offer to be unacceptable because it was

ambiguous as to whether it was offering an alternative motor which complied with all of the RFP requirements.<sup>[1]</sup>

In truth, it is not necessarily in your company's interest to win a contract based on an ambiguous proposal, since that is a recipe for disputes during contract performance. The Government will think that you promised to deliver one solution, while you intended a different, probably less costly, solution. That, in turn, means has two nasty consequences--first, your company will spend its hard-earned profits preparing claims and litigating disputes instead of returning them to the shareholders (or to you, in the form of a bonus) and, second, you will be fighting with your customer--never the ideal situation. Therefore, use words that make it clear what you are offering. If you are using any words that could be ambiguous in the context of your proposal or your industry, make sure you define them.

[1] Potomac Electric Corporation, B-311060, 2008 CPD ¶ 63.

So get out there and start solutioning. But, do it in words that make clear to the customer what you mean.

Solutioning: A word many businesspeople misuse to describe the process of creating a solution. These people need a grammar lesson and should be fired immediately.”

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