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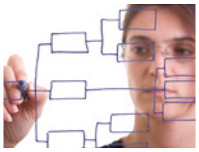
NCA APMP NATIONAL CAPITAL AREA

EXECUTIVE summary

Winter 2015 | Volume 22, Issue 1

This Issue's Theme: What Does Your Customer Really Want – And How Do You Find Out What Is "Behind The Curtain"?

Inside:



A Publication of the Association of Proposal Management Professionals (APMP) National Capital Area (NCA) Chapter

Legal Corner

What Does Your Customer Really Want? Does It Matter?

by Shlomo D. Katz, Counsel, Brown Rudnick LLP

This issue of the Executive Summary asks: *What does your customer really want – and how do you find out what's "behind the curtain"?* This article, however, asks whether that's the right question to ask. Knowing what the customer really wants may help offerors win the procurement if the "customer" happens to be on the source evaluation board or, better yet, is the source selection official. But, will an offeror that wins a contract because it knows what the customer really wants, as opposed to what the solicitation asks for, keep the contract after a bid protest is filed against it? And, will it perform the contract at a profit?

Make no mistake! Business intelligence is important. Talking to your customers and potential customers about what they need and how you can help them accomplish their mission is a good thing to do. In fact, the Office of 'Federal' Procurement Policy issued a series of memoranda a few years ago intended to foster communication between contractors and Government personnel. (See Legal Corner: Myth-Busters vs. Capture Planners in the Summer 2012 Executive Summary.)

Nevertheless, thinking that you can outsmart the system by offering what the customer really wants, even if it's not what the solicitation requests, is risky on several levels.

The Government Accountability Office (GAO) has said many times that it's 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. If an offeror's proposal appears to take exception to solicitation requirements, that offeror risks having its proposal rejected as technically unacceptable.

What if the proposal is not rejected by the agency, and the offeror does win the award? A disappointed offeror may protest that the agency relaxed the requirements for the awardee or applied unstated evaluation criteria since all of the offerors were judged based on what the solicitation said and one offeror--the awardee--was judged by a different standard.

In a protest last year, for example, GAO overturned an agency award because one offeror had been downgraded for failing to address matters that were discussed at the Industry

Day, but were never incorporated into the RFP (see Risk Analysis and Mitigation Partners, B-409687, 2014 CPD ¶214). What was discussed at the Industry Day may have been what the customer really wanted, but it was not what the RFP asked for, so it could not have been the basis for evaluation or award.

Even if there's no protest, the awardee is not home free yet. This situation is a recipe for disputes during contract performance. The contracting officer may think that the contractor promised to deliver one solution--the one described in the solicitation's statement of work—while the "user" or "customer" will be expecting a different solution—the one described in the proposal or the oral presentations. That, in turn, may have two unpleasant consequences: First, your company may 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). Second, you will be fighting with your customer--never the ideal situation.

When the solicitation allows for creativity, flexibility, and innovation, by all means, make sure you give the customer what he or she wants--making sure, of course, to be clear about what you are offering and at what price. But, take care not to be too clever for your own good.

Shlomo D. Katz is Counsel in the Washington, DC office of the international law firm of Brown Rudnick LLP, a Corporate Sponsor of APMP-NCA. Shlomo specializes in all aspects of Government contracting and is a regular presenter at Chapter events. If you have any questions about the topic of this article or other proposal or contracting issues, please contact Shlomo at 202.536-1753 or skatz@brownrudnick.com.