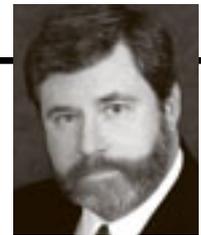


The devil's in the details



Kevin McGuinness



Stephen Bauld

TENDER SPECIFICATIONS FORM one of the most important areas of the final supply contract – governing the supplier's performance and entitlement to payment – however, drafting specifications is one of the most troubling areas in procurement.

If care is not taken in drafting specifications, disputes can arise – particularly concerning the manner in which the request for proposal (RFP) is conducted. For the supplier, it is essential to be clear and concise about a product's characteristics in order for it to qualify for purchase.

Often, the primary responsibility for preparing the specifications is assigned to members of the ordering department – rather than purchasing – since they are most familiar with the range of products available and the performance requirements needed. Unfortunately, this results in the buyers and their legal advisors having only limited input into the drafting of specifications.

Experience suggests that a more cooperative approach is required. Although primary responsibility for drafting the specs may rest with the user department, buyers need to educate their client departments concerning what specifications ought to contain and how they should be drafted. And, since the effect of any specification is to exclude products from consideration, it is our opinion that specifications should be minimalist in approach.

In their oversight role, buyers should identify the source of those specifications and confirm that:

- a) Specifications are generic (i.e. not tied to a particular product or manufacturer). Few products or features are so different from others that there are no substitutes available. Minor differences between products should not exclude suppliers from a competition.
- b) Specifications are not anachronistic (i.e. containing references to obsolete or otherwise out-of-date technology or design).
- c) The minimum specification is truly a minimum – the product would not perform properly or be suitable for the use intended without it.
- d) Specifications focus on performance, functionality, durability and maintenance cost. Preference should not be given to a particular design or technology when another would perform just as well.
- e) The form of tender does not require disclosure of product details that are irrelevant. These confuse the evaluation of bids.
- f) There is no "glass ceiling." Suppliers may quote for a higher specification than the minimum required, provided it is understood that by doing so they take the risk that their price may not be competitive.

One problem in drafting specifications is a lack of understanding about the role that they are intended to perform.

Specifications, which can serve a range of purposes, fit in two main categories:

- **Mandatory specifications:** These features must be provided in the bid response. If the mandatory features requested are not offered, then the buyer will prefer not to buy.

- **Proscribed features:** Occasionally, a product will be excluded from purchase if it has a particular characteristic. For instance, if a vehicle is to be used in a closed space, it may be desirable to proscribe internal combustion or diesel engines.

Tender documents must state clearly the category into which each product description fits. The requirements or prohibitions concerned need to be clearly indicated. In each case, the number of specifications should be kept low.

There is also a range of other types of specification that, too often, are considered by user departments to be mandatory, which, in reality are no more than product preferences:

- **Provisional specifications:** features included in the price quotation request, on the understanding that the government may elect to purchase the item in question without these features should it conclude that the benefit to be derived from purchasing them does not justify the incremental cost; or the lowest bid price exceeds the government's budget. The advantage of including a list of provisional specifications in a tender is that it is possible to determine the optimal configuration that can be purchased within budget.
- **Preferred specifications:** features given a declared weighting in the evaluation of the prices that have been bid (provisional specifications are not given a weighting). The tender should explain how preferred features will be factored into the purchase decision, but allow the buyer the discretion to decide whether the functional (or other) benefit of a preferred feature is sufficient to determine its cost.
- **Optional features:** features that exceed the minimum acceptable standard set by the tender, but may be something the government is prepared to consider purchasing if available at a satisfactory price. They reflect the common sense rule that specifications should not include "wish list" luxury items, since they mislead suppliers into bidding higher priced configurations. Suppliers should be asked to quote a price for the minimum acceptable configuration, but also offer "additional prices" for the optional features, allowing the government to decide whether or not to purchase any of them. The lowest acceptable price is determined without reference to these features.

In our opinion, a cooperative effort between the user department and the buyers in drafting specifications would stimulate fair and open competition among suppliers and improve the government's options in determining which product best suits its needs and budget. *mm*

Steve Bauld is purchasing manager at the City of Hamilton, and Kevin McGuinness is a lawyer with Ontario's Attorney General.