

Mean what you say; say what you mean

Poorly drafted RFP and tender documents can maximize your price

RFP AND TENDER DOCUMENTS constitute some of the most important forms of business communication. Attention tends to be focused on including the right clauses in order to permit modifications to the original specification, where additional needs are identified during the contract competition; protect the issuer from the risk of litigation; or allow some flexibility in the selection of a supplier.

The more fundamental commercial needs of the customer entering into the contract are given too little attention. Some municipalities will invest thousands of dollars branding themselves, but will invest little effort in producing clearly written documents under which they propose to spend millions of dollars.

No municipality wishes to pay more than the market price for what it buys, but insufficient thought concerning what to put into RFP or tender documents can have that effect. Contract terms always have price implications. In general, supplier prices reflect the costs incurred in filling the proposed order, plus allowances for the specific risks associated with the contract; the general business risk; and profit.

The allocation of risk under a contract largely flows from the terms in which the contract is drafted. The more risk assigned to the supplier, the more the quoted price will be. (See “Yours, mine and ours” in the January-February 2008 issue of *Summit*.) However, risk can also arise from uncertainty. When the document terms are vague or otherwise confusing, they create uncertainty. The more uncertain the meaning of the contract, the higher the quoted price will be.

High-risk documentation increases the price in two ways. First, it encourages suppliers submitting a bid to hedge their prices to offset any risk that they identify. Second, it encourages many potential suppliers not to bid at all. The importance of this second problem is easily underestimated. Generally, the bidders who decide not to bid are the top suppliers in the field, who are able to offer the best prices. Such entities usually have their choice of work because they are known to be highly stable, properly capitalized, offer good quality products, and have an experienced and professional staff. These companies need to bid for high-risk work.

As mentioned earlier, most municipal contracting has focused on making tender documents “bullet proof” to minimize the municipality’s exposure to the risk of litigation. While that concern is certainly relevant, it is at least equally important to draft the documents in clear language and to avoid including provisions out of step with market practice. A poorly written or one-sided contract may secure your supply, but there is little gain if the consequence is to pay well above the market price.

Contracts that depart from language that has a settled meaning within an industry make suppliers fear the unknown, discouraging the better suppliers from bidding, and causing those bidders participating in the tender or the RFP to hedge their price against the perceived risk.

Departing from the norms of good writing also tends to produce a document that is confusing. For instance, the use of inconsistent terminology (i.e., using different words to describe the same thing,

or the same word to describe two different things) will confuse suppliers. Long, poorly structured sentences and the use of too much government jargon can add further confusion.

Disorganized documentation is another source of difficulty. Common problems include scattering related information throughout the documents without making the linkages between various parts of the document clear, and incorporating key terms of the supply arrangement into the proposed “contract” that will be entered after the successful bidder is selected. Bidders need a fair opportunity to identify what the customer is seeking to buy. Failing to do so may undermine the “bullet proofing” that a municipality tried to build into its contracts through the inclusion of carefully worded provisions. Courts consistently construe tender and RFP documentation so as to resolve any doubt against the governments that issued those documents. Thus the documents need to be well organized and clearly written.

Suppliers are wary of hidden specifications and requirements that are buried in detail. Where the purpose of a particular provision within the documents is not clear, suppliers tend to assume the worst. As a result, bid prices go up.

One-sided contract terms can greatly increase the cost or reduce the choice of supply. Municipalities should consider whether the benefit derived from extensive bonding requirements is sufficient to justify their cost. The tendency to insist on the supply of particular brands of equipment or other goods, rather than generic equivalents, also pushes up the price of a supply contract. It is difficult for bidders to commit to meet an open-ended demand, especially when such a requirement is accompanied by unrealistic restrictions on subcontracting. Most of these provisions reflect the fears of the municipality’s legal or purchasing department, rather than the concerns of the department making the request. Building flexibility into a contract to allow the customer the option to obtain highly unlikely services often means that the supplier will need to pay a stand-by fee to its seasonal workers or other suppliers. And obviously, these costs will have to be borne by the customer – you.

Many RFPs and tenders suffer from the inclusion of too much and unnecessary information. Resulting from too strict adherence to standard form documents, for example, provisions intended to relate to only one type of supply arrangement (e.g., construction) are included in a tender or RFP of a very different kind. Suppliers bidding to supply t-shirts to a city’s lifeguards are asked to provide evidence that they have welding or automobile insurance. When the documents include provisions that clearly have no application, suppliers doubt whether other provisions are intended to apply.

Excessive background information creates uncertainty and tends to increase price. Lengthy descriptions of how programs came into being, and when and why they have changed, are rarely relevant from the supplier’s perspective. Plus a supplier may wonder whether such information relates to a risk the supplier has not identified. The critical information from the supplier’s perspective can be quickly summarized: what type of product or service is sought; when; how often is it to be supplied; what are the performance characteristics that it must satisfy; warranty terms; and the terms and conditions

of payment? Information beyond these basic contract parameters, distracting attention away from what is important.

Contract documentation can undermine the benefit of a competitive process through the imposition of highly technical bidding requirements, experience or other qualification criteria. Where such criteria reflect realistic customer concerns, there may well be justification for excluding suppliers who do not satisfy the test. In other cases, tight criteria works against the customer's interest.

Overly specific requirements relating to experience can also be problematic. There is a rationale for requiring a construction contractor, service supplier or custom manufacturer to demonstrate that it has performed work of comparable complexity, scope and price magnitude. Closely comparable experience is desirable when dealing with a general area of specialty (such as hospital construction). In any of these cases, past experience is likely to evidence an ability to perform the contract on time and within the contract price. However, requiring exactly comparable experience overly narrows the field of competition, which generally leads to a higher price for services or supply. Although not always true, there are legitimate suspicions that where overly exacting prior experience is demanded, the RFP or tender has, in effect, been rigged to favour a particular supplier.

The tendency is towards including far more information than bidders require, but many documents suffer from insufficient content – e.g., the bid documents may not indicate the actual level of supply required. This inadequacy may result from a deliberate policy of making no commitment to purchase even a minimum level of sup-

ply. At the same time, bidders are often asked to make a firm commitment to supply – sometimes even beyond the levels of consumption indicated in the bid documents. It is unrealistic to expect bidders to maintain a reserve when the customer is not prepared to commit to any level of consumption. Similar problems arise when the contract affords the government an open right to cancel the contract.

Writing suitable documents is an exercise in sound business practice that requires common sense. The use of precedents is important in making sure that every “I” is dotted and “T” is crossed, as are carefully crafted provisions that protect the municipality from lawsuit. It is equally important to ensure that the documents used are not drafted in a way that results in an unnecessary increase in the cost of supply.

There are two basic steps that any municipality could take to avoid some of the problems discussed here. First, have the documents read by an informed person who was not involved in drafting them. If he (or she) finds them difficult to read, then they need to be revised. If he/she cannot follow them, then there is a serious problem. Second, before any document is issued, the purchasing manager should ask him/herself, “if I was the supplier, would I sign this contract?” If the answer is no, then the contract is too one-sided. *MM*

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