

Clarity is essential for bid solicitations

Firms can best avoid litigation by preparing bid documents that eliminate possibilities for confusion



CONSTRUCTIVE ADVICE

Sean Gay

Nearly every construction project involves bidding in one form or another, but only a small percentage of all bids involve the use of bid documents. These are frequently an afterthought and are given

short shrift. However, owners, developers, contractors and subcontractors seeking bids should be sure to avoid common pitfalls and establish clear expectations regarding the bid process.

The specific issues that should be addressed in a bid document depend on several factors, such as project type, anticipated contract value, goals for the procurement process and whether the contract is public or private. At a minimum, however, several key points should be explicit in every bid solicitation. Public owners should be aware that federal, state or local laws may require certain mandatory provisions different from those addressed in this column.

Award criteria

One of the most important provisions to include in a bid document is the award criteria. For example, for competitively bid public projects, the award criteria provision typically states that the contract will be awarded to the responsible bidder who submits the lowest responsive bid. For private projects, the preferred provision should generally state that the contract may not be awarded to the lowest bidder and instead may be awarded based on any and all factors that the party seeking bids deems, in its sole discretion, appropriate under the circumstances. This provides for significant discretion in awarding the contract and may help avoid disputes with unsuccessful bidders.

Responsibility for preparation costs

Preparing a bid often requires significant time, resources and effort, and losing a bid is understandably disappointing. Occasionally, an unsuccessful bidder will believe that it was treated unfairly and rightly deserves the contract. In rare circumstances, an unsuccessful bidder will file a lawsuit seeking recovery of its bid preparation costs and other damages. To help avoid this potential liability, the party conducting the bid should include in the bid document language stating that each bidder is responsible for any costs incurred in preparing and submitting its bid.

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Additionally, the bid document should state that, by submitting a bid, the bidder agrees that the party requesting bids is not responsible for any bid preparation costs.

Reservation of rights

Among other things, the party conducting the bid process should explicitly reserve its rights to: 1, award the contract with or without negotiations; 2, select one or more firms and then negotiate with them jointly or collectively before making an award decision; 3, not award a contract; and 4, waive or disregard any minor defects, irregularities or shortcomings in any bidder's bid. By reserving these rights, the party conducting the bid retains the flexibility to negotiate with bidders and appropriately address unforeseen circumstances that may arise during the bidding process.

Form of agreement

Attaching a form of agreement to the bid document has several benefits. First, it gives the party conducting the bid inherent leverage during later contract negotiations. Second, it may help avoid protracted contract negotiations because each bid presumably is based, in part, on the

form of contract. To reap these benefits, the bid document should reference the attached form of agreement and include a statement that, except to the extent explicitly stated in its bid, each bidder agrees to the terms and conditions of the contract. One effective way of discouraging any bidder exceptions to the contract terms and conditions is to state that any proposed changes may be one of the many factors considered in awarding the contract.

The issues to be addressed in a particular bid document will, to a large extent, be dictated by the unique aspects of the project and the factors discussed earlier. However, the provisions discussed here are generally applicable to any bid process and will help minimize misunderstandings, preserve valuable business relationships and avoid potentially costly disputes.

Sean Gay is an attorney in the construction and design practice group at Stoel Rives LLP. Contact him at 503-294-9239 or scgay@stoel.com.