



Some Legal ABCs of the Bid and Proposal Profession

by Shlomo D. Katz



By the time you read this, we will hopefully know the outcome of the “Showdown at Budget Gulch”—whether the government and many of its contractors had to shut their doors in early April because our leaders in Washington failed to pass the appropriations bills necessary to keep the lights on. At least some of you reading this will have had a proposal affected by a shutdown or potential shutdown, either because you were pressured to deliver a proposal early out of fear that the government would lock its doors, you were unable to deliver a proposal during a shutdown, or your company reassigned idle employees to your bid and proposal team during their hiatus from working on their contracts. However this episode has turned out, it does remind us that the proposal business is significantly impacted by the existence of laws that regulate government procurement. What better time, then, to review what some of those laws are and how they affect you as a proposal professional.

The Anti-Deficiency Act is the law that was behind the actual or potential government shutdown, as the case

may be. This law prohibits government employees from spending money without the permission of Congress. In fact, the law makes it a crime to do so. If a government employee went to work during a shutdown and turned on the lights in her office, she could theoretically go to jail for spending money on electricity that Congress has not appropriated for that purpose.

What does this mean to the proposal profession? First, it explains why procurements are frustratingly often delayed because of a lack of funding. Second, it is one of the reasons why there are limitations on the proposals that the government can accept. For example, if the

government has money for one widget, and you propose a truly innovative solution that requires the Government to buy two widgets, the government might not be able to accept your proposal, no matter how much it would like to. In one actual case that comes to mind, the bidder’s proposal required the contracting officer to agree to an open-ended indemnification of the contractor, and the contracting officer did, in fact, agree. Years later, after the contractor had already performed, the government backed out of the deal because the open-ended indemnification was, in effect, a promise to pay money in a future year without an appropriation from Congress for that purpose. The contractor sued to enforce the contract, and lost. As unfair as that may seem, the contractor arguably should have known that contracting officers generally cannot make promises or accept offers that they don’t have the money to pay for.

Another law that might prohibit the government from accepting your innovative two-widget solution is the Competition-in-Contracting Act. This is the law that requires the government to maximize competition for

contracts. Like any law, it has exceptions, and exceptions to the exceptions, and so on, which is why people like me get to stay up nights figuring out if your proposal was given a fair chance. Depending on how the RFP is written, the government may not be giving itself the leeway to accept a solution that does not meet the literal requirements of the statement of work or Sections L or M. In that case, if the government accepts your solution that deviates from the specifications without telling your competitors that they also can deviate from the specs, the government may, in effect, be depriving your competitor of a chance to compete. What can you do to ensure that your innovative solution is accepted? One possibility is to ask a question during the solicitation phase or, better yet, during the draft RFP stage if there is one. Then, when the contracting officer publicly answers your question or amends the RFP, it will put other offerors on notice that the contracting officer is considering innovative solutions. Of course, the trick is to ask the question in such a way that you get a definite enough answer without telegraphing your plans to other bidders.

Another possible solution is to submit a strictly compliant proposal together with an alternate proposal. This will allow the government to decide whether it has the leeway to accept the two-widget solution, but it does not leave you out in the cold if the contracting officer and his lawyers are not feeling adventurous. But, read the RFP carefully! Some of them state plainly that alternate proposals are not permitted.

Finally, a third basic law to remember is the Procurement Integrity Act. This is the law that prohibits the government from slipping you the source selection plan under the table and from telling your competitor about your two-widget solution. It also prohibits you from offering jobs to certain procurement officials and forbids them from asking for a job. People can and do go to jail

for violating this law, including some very high-profile government and contractor officials.

Perhaps because of its serious penalties, many procurement officials are overly cautious about what the Procurement Integrity Act actually prohibits. Some government personnel refuse to speak with contractors' marketing and proposal personnel even when the law permits it. Earlier this year, the Office of Federal Procurement Policy (OFPP) attempted to debunk some of these fears in a memorandum entitled, "Myth-Busting: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process." Among the misconceptions that were collected by OFPP in actual interviews with procurement personnel were: "We can't meet one-on-one with a potential offeror" and "Industry days and similar events attended by multiple vendors are of low value to industry and the government because industry won't provide useful information in front of competitors, and the government doesn't release new information." All in all, OFPP concluded there should be more, not less, communication between the Government and its contractors, even during the proposal and pre-proposal stages. (A future article will explore these myths and the related truths in greater detail.)

These laws are only the tip of the iceberg when it comes to the legal framework that governs the federal contracting process. As the Showdown at Budget Gulch hopefully has taught us, these laws do affect real people and the jobs that they do.

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Fun Fact

Most people fell into the proposal profession by accident; a negligibly small percentage planned it as a living all along. Don't believe it? Ask your colleague how they got into this field.