

RFP Discussions & Guidance Documents

- The Problem - *many years*
 - Rejecting beneficial proposals.
 - examples
- The Solution - *2006 & 2007*
 - Revised statute - 11-35-1530(6)
 - Revised regulation - 19-445.2095(I)
- The “How To” - *2008*
 - Instructions: Guidance and Training Materials

RFP Discussions & Guidance Documents

- Policy Guidance & R.19-445.2095(G)
 - Do's and Don't with Shall's and Should's
- Drafting Process
 - Developed Context - how dovetail with other communications after opening but prior to award
- Result - Materials of interest FAR beyond Discussions

The Discussions Guidance Document

- (1) Clarifications (sealed bidding too)
- (2) Responsibility (sealed bidding too)
- (3) Oral Presentations
- (4) Negotiations
- (5) Best and Final Offers [BAFO]

and, of course,

Discussions

RFP Discussions

What they are NOT

- Discussions are not designed to allow unrestrained enhancements to or further development of proposals
- Discussions are not conducted to coach offerors regarding how to enhance or further develop their proposals.
- Discussions do not involve negotiations or changes to the solicitation.
 - [See (7) Guidance & (8) Training Materials Quote]

RFP Discussions

- What are they
 - Context
 - Rejecting Proposals
 - Available Flexibility

RFPs - Rejecting Proposals

Responsiveness:
A Different Approach
or
Business as Usual

RFPs - Rejecting Proposals R.19-445.2095(J)

Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

Reasons for rejecting proposals include but are not limited to:

RFPs - Rejecting Proposals R.19-445.2095(J)

- (a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
- (b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the **announced requirements** of the State in some **material respect**; or
- (c) the proposed price is clearly unreasonable.

RFPs / Discussions / Proposal Revisions

- Overview Only
- Many possible nuances
- Relates to Clarifications, Oral Presentations, Best & Finals, etc.
- Just the highlights.

RFPs / Discussions / Proposal Revisions

- Default - No substantive changes
 - 11-35-1520(6) “Bids must be accepted unconditionally without alteration or correction, **except as otherwise authorized in this code.**”
 - 11-35-1520(7) “After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it.”

RFPs / Discussions / Proposal Revisions

- 11-35-1530(1) “. . . a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

RFPs / Discussions / Proposal Revisions

- 11-35-1530(6) “(6) Discussion with Offerors. **As provided in the request for proposals, and under regulations,** discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and **responsiveness to, the solicitation requirements.** All offerors whose proposals, in the procurement officer’s sole judgment, need clarification must be accorded that opportunity.”

RFPs / Discussions / Proposal Revisions

- Regulation 19-445.2095(I)

» **READ IT & READ IT & READ IT**

RFPs / Discussions / Proposal Revisions

Three Fundamental Steps:

1. Decide whether to conduct discussions.
2. Classify Proposals
3. Conduct Discussions

RFPs / Discussions / Proposal Revisions

- First Question - Whether or Not to Conduct Discussions....
 - Because you don't have to conduct discussions
 - But, begs at least two questions
 - who can you have discussions with; and,
 - what is involved in conducting discussions
- first, you must classify the proposals --

RFPs / Discussions / Proposal Revisions

- Classifying Proposals. For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:
 - (a) acceptable (i.e., reasonably susceptible of being selected for award);
 - (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
 - (c) unacceptable.

RFPs / Discussions / Proposal Revisions

What do these phrases mean???

- “reasonably susceptible of being selected for award”
- “reasonably susceptible of being **made acceptable through discussions**”

RFPs / Discussions / Proposal Revisions

- Begs the Question:
 - To what degree can a proposal be “made acceptable through discussions”
 - Requires an understanding of the degree to which the law will allow post-opening proposal revisions.
 - THAT is the key to understanding this new flexibility

RFPs / Discussions / Proposal Revisions

- Scope of Proposal Revisions
 - correct “deficiencies . . . that will result in rejection as non-responsive”
 - “resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions”
 - “Resolve . . . mistakes ”
- “but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions”

RFPs / Discussions / Proposal Revisions

- Material Deficiencies in Responsiveness
 - Rely on Regulation 19-445.2095(J)
 - “the proposal ultimately . . . fails to meet the announced requirements of the State in some material respect”

RFPs / Discussions / Proposal Revisions

- Material Uncertainties
 - Generally, an uncertainty is the lack of clarity that results from the use of language or the presentation of information in a way that is ambiguous, equivocal, obscure, or vague.
 - Exercise business judgment in deciding which to resolve. You'll never resolve every lack of clarity.....

RFPs / Discussions / Proposal Revisions

- Suspected Material Mistakes
 - Mistakes include only unintended errors, defects, or omissions that the procurement officer has **reason to suspect** are **based solely on examining the proposal document**. Examples include apparent clerical errors, suspected errors in pricing, and inadvertent omissions.

RFPs / Discussions / Proposal Revisions

- BUT
 - Discussions are not designed to allow unrestrained enhancements to or further development of proposals
 - Discussions are not conducted to coach offerors regarding how to enhance or further develop their proposals.
 - Discussions do not involve negotiations or changes to the solicitation.

RFPs / Discussions / Proposal Revisions

- Process / How To
 - “exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable”
 - advise such offerors of the deficiencies, uncertainties, and mistakes you’ve identified, if any, in writing

RFPs / Discussions / Proposal Revisions

- “Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer”

RFPs / Discussions / Proposal Revisions

- Form Letter - Use it

RFPs / Discussions / Proposal Revisions

- To Discuss or Not to Discuss - Redux
 - What's involved
 - How complex is the solicitation
 - How complex are the proposals
 - How many proposals are there?
 - How many are reasonably susceptible of being selected for award
 - How many of them require discussions
 - How complex are the needed discussions
 - How badly do you need what discussions can give you / what is the price of not conducting discussions.