

The Executive

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*Association of Proposal Management Professionals

Should Your Proposal Team Include A Lawyer?

BY SHLOMO D. KATZ, ESQ

At a recent APMP-NCA dinner, one question kept being repeated when I introduced myself to fellow chapter members: Why is a lawyer interested in proposal management? It seems that the questioners were familiar with the attorney's role in filing or defending against a protest after the proposal process has been com-



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pleted. However, the importance of including a lawyer on the proposal team was being overlooked.

In fact, attorneys should be an integral part of any significant proposal effort. Legal counsel can assist proposal managers in a number of ways. For example, attorneys can help recognize potential organizational conflicts of interest ("OCIs") and help devise mitigation strategies. Or, if a contracting officer raises an OCI concern and proposes to exclude your company from a competition, your attorney may be able to help you convince the contracting officer that no conflict exists or that exclusion is not the appropriate remedy. Your legal team also can help you

understand the laws that may affect your proposed approach and pricing. These include, for example, the Buy American Act, Service Contract Act, Davis Bacon Act, and/or Fair Labor Standards Act.

Attorneys can review solicitations and help to define the requirements. Is your innovative technical approach permitted by the solicitation? If not, a contractor's first instinct might be to ask the contracting officer to amend the solicitation to permit the proposed approach. If that fails, some contractors will even file a protest against overly restrictive specifications. However, neither of those options may be the best approach,

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President's Corner by Kate Rosengreen

APMP: Your Personal Discriminator

Business Development in the Government market is highly volatile at the best of times. Standard tools used in forecasting future business activity seem to include crystal balls and Ouija boards. The remainder of 2004 and 2005 is going to be a particularly difficult time to do business forecasting because this is an election year. Regardless of how the elections turn out there will be significant political, budget and organizational Federal Government changes.

Many things are impacted by an election year. A brief internet search yields almost more than a million hits on this topic. Apparently there are many like-minded individuals writing about the future. According to the research, November's election results could affect Medicare legislation, the stock market, consumer safety, real estate, technology policy even the shooting and horse racing industries.

Traditionally elections impact business no matter how anyone intends to vote or how they feel things will go, businesses go into hibernation mode—they begin to put (squirrel) resources away for the possible harsh winter ahead. This protective instinct is understandable and serves to protect them from exposure to risk.

How do elections impact the proposal industry? Our proposal business is dependent on the flow of RFP's and any changes caused by elections often result in delays to RFP releases.

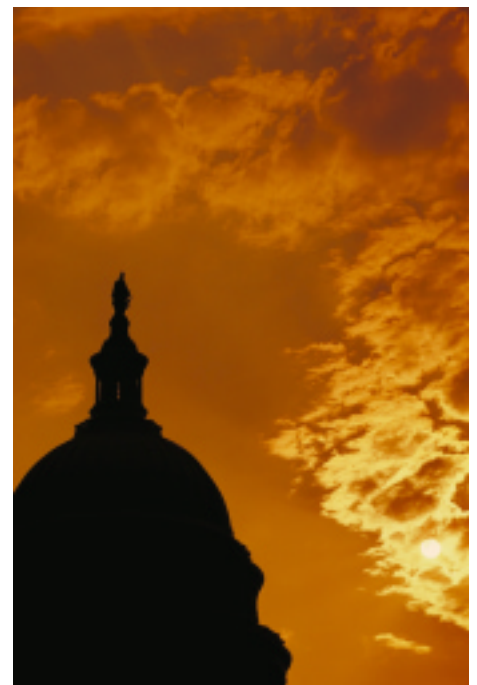
What can we do to protect against these uncontrollable elements during this uncertain period? It is time to do some introspection and determine what steps we can take to make us as good as we can be. It is time to play capture manager for yourself or your company and determine the discriminators that

make you the best. You need to increase your share of the market.

We have little control over external factors such as elections or budgetary allocations. In contrast we can do something to improve our personal discriminators. What factors make our careers a success? Experience, Education, Accreditations, Training.

With the majority of our business in the Washington DC area so closely tied to the Federal Government it is hard not to predict some changes to our industry. As Capitol Hill becomes increasingly focused on the mechanisms of government over the next few months, and less on activities that keep us in business, it is time to network and time to get smarter.

Involvement with APMP is an excellent way for you to increase your professional footprint within the industry. The APMP NCA chapter is holding two events within the next two months; the September Roundtable (September 22nd) and the Professional Day (October 20th). Both provide opportunities to mix with your peers, increase and reactivate your important personal network, and learn from leaders in the Business Development Community. This is the time to focus on your improvement and the development of effective discriminators increasing your success rate. ■



Roundtable Announcement

Wednesday, September 22, 2004

Topic: "Secrets of Winning Multi-Hundred-Million-Dollar Proposals."

PRESENTER: JOHN LAUDERDALE

We are in for a rare treat at the September 22, Roundtable meeting. **John Lauderdale** will speak on: "Secrets of Winning Multi-Hundred-Million-Dollar Proposals." No administrator, manager, or executive who prepares large proposals should miss this. It is not just John's 30 years of experience, his proposal winning record, and his dynamic manner of presentation. His presentations are often so funny that the audience wonders why he didn't become a stand-up comic. More important, he combines insight from three critical areas: (1) He is a large proposal process manager par excellence; (2) he has deep experience in capture leadership; and (3) he has also served as competitive pricing leader of his division. His combined experience in proposal management, capture, and pricing provides a level of judgment into how to win contracts rarely seen in the industry.

John currently serves as an independent proposal consultant, and his experience includes large IT bid wins for Nortel, Lucent, Sprint, and Adelphia. He served as a large program manager for Pacific Bell, Seibel, Harris, and Nasdaq. He served as the director of competitive analysis at Battelle, PRC and Grumman Data Systems. At General

Dynamics, he led the cost proposal efforts for highly competitive foreign fighter aircraft contracts worth billions of dollars. During his career, he has led or helped prepare proposals for contracts valued at \$15 billion with wins in excess of \$10 billion.

John will discuss fresh and innovative techniques that help win contracts. Even the most seasoned proposal professionals will come away with new ideas.

Who May Attend?

You do not have to be an APMP member to attend an NCA roundtable. You don't even have to be a proposal specialist. If you are interested in professional growth in the range of business acquisition disciplines that include proposals and business development, or are looking for networking and professional development opportunities, we welcome you to join us! Please refer anyone else in your organization that might be interested and encourage them to attend one of our interactive, informative and interesting roundtables!

Location:

Tysons Corner Holiday Inn on International Drive in McLean, Virginia

Agenda:

5:30pm Networking

6:15pm Buffet Dinner

7:00pm Announcements, Featured Presentation

Cost: \$35—Payment received in advance, \$55—Pay at the door. For immediate confirmed seats, go to our Chapter Web site to use our on-line credit card service!

IF YOU PLAN TO ATTEND...

Please make reservations by email to Dennis Doubroff at: apmpdoubroff@aol.com and mail your check to: APMP-NCA, PO Box 3063, McLean, VA 22103-3063. RSVP and send check by Friday, September 17. It is best to reserve your seat early. ■

Calendar of Events

The purpose of the calendar is to apprise NCA members of upcoming events of interest to proposal professionals.

For information on board activities or to become involved call Lou Robinson at 703-533-2102.

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|-------|----|----------------------|--|
| SEPT. | 22 | Roundtable | • John Lauderdale, Secrets of Winning... |
| OCT. | 20 | NCA Professional Day | • Fair Lakes, VA |
| NOV. | 17 | Roundtable | • Holiday Inn, Tysons Corner |

Should Your Proposal Team Include A Lawyer?

▼...Continued from page 1

as they both telegraph to the competition what your planned technical approach is. Instead, a possible solution is to have your attorney review whether the solicitation is broad enough to permit your desired method of performance or the product you are offering. Even if that is not the approach or the product that the contracting officer had in mind when he/she issued the solicitation, maybe the evaluators will love it when it is put in front of them, especially if the price is right. (After all, you know it can do the job just as well or better.)

On the opposite side of the coin, even when the customer's end-user does want your approach, the customer's contracting side may not have written the solicitation broadly enough to encompass what you are offering. In that case, your attorney can assess the risk that your competitor will file a successful protest against an award to you.

Of course, not all solicitation ambiguities have such dramatic consequences, but whatever the issue, legal counsel can explain how, if at all, similar language has been interpreted in bid protests and/or contract disputes in the past. Perhaps the "vague" provision actually has a clearly-defined legal meaning that proposal managers need to know in order to respond properly. And, an attorney can help you determine when to question a solicitation ambiguity, since some ambiguities may work in the offeror's favor.

When you do decide to ask a question of the contracting officer, your lawyer can help to formulate those questions. The precise wording of questions is crucial to eliciting a definitive answer that will bind the Government if a protest or contract dispute arises later.

If a proposal is not responsive to the

solicitation and does not demonstrate compliance with "definitive responsibility criteria," the customer might not even consider it. (Definitive responsibility criteria are certain solicitation requirements that can be measured objectively, for example, a requirement to obtain a performance bond in a stated amount, to have a program manager with a Ph.D. or to have a license to operate as an aircraft repair station.) Lawyers can help clients recognize such requirements and comply with them. If these requirements sound like they are too straightforward to require lawyers, take a look at the number of bid protest decisions that analyze when a facsimile signature on a performance bond is acceptable and when it is not. More generally, attorneys can help their clients understand solicitation instructions, proposed contract terms and conditions and applicable laws and regulations that may impact on the contents of the technical proposal, the offeror's risk or the pricing.

Attorneys also can help you scope-out the likely competitors. For example, lawyers and their staffs can search court records and reported decisions for past performance and other information on predecessor contractors (where applicable) and potential competitors. Knowing that a potential competitor has been the subject of a lawsuit or an inspector general (IG) or other investigation can help an offeror distinguish itself from the competition. In addition, knowing what types of disputes have arisen on similar contracts can help an offeror avoid similar problems, or at least prepare for problems by including appropriate contingencies in the proposal. Attorneys also can research other Government documents that may contain information relevant to the competition, for example, General Accounting Office reports and testimony and (again) IG reports.

At the last step in the initial proposal process, attorneys can be valuable members of a red team, reviewing proposals to ensure that the offeror has included the information required by the solicitation's instructions (Section L) and has responded to the evaluation criteria (Section M). In particular, lawyers can offer an outsider's perspective on whether the offeror has clearly laid out its technical approach or whether it has

APMP National Capital Area PROFESSIONAL DAY 2004

October 20, 2004—9:00 to 4:00



Mark your calendars and tell your colleagues—junior and senior—about our 2nd professional development day—a FULL DAY of career enhancing symposia, materials and insider information in an amphitheatre setting in Fair Lakes, VA!

The Agenda is finalized. The Speakers are committed. The Space is limited, so reserve early. Watch for details in the Executive Summary and NCA Web site:

<www.apmp-nca.org>

Among the many reasons for attending this conference are these:

- ★ A fantastic lineup at a fantastic price!
- ★ Insights into competitor practices!
- ★ Networking, tips and infectious exuberance!
- ★ Eight compelling presentations:
 - Best practices from today's winning companies
 - Proposal career advice and insights
 - Case study and lessons learned—DC area 2012 Olympics bid
 - Case study—Proposal Tools
 - Proposal writing "How-To"
 - Executive summary preparation
 - Powerful presentation methods
 - Reward/motivation policies that work!
- ★ Complimentary refreshments and lunch!

assumed too much knowledge on the part of evaluators. An offeror's assumption that the Government already knows its qualifications is a common reason why competitions are lost.

But, just as your job doesn't end when the initial proposal is submitted, neither does the attorney's role. Following the initial proposal stage, lawyers can help clients respond to discussion questions and revise their proposals. In one recent case, for example, one of my firm's clients had been downgraded wrongly for its past performance. Using factual input from the client, we helped draft the section of the Final Proposal Revision that rebutted the evaluators' claims. Lawyers also can help offerors determine whether the evaluators appear to have deviated from the stated evaluation criteria or have interpreted those criteria differently than the offeror did. Based on that analysis, offerors have a choice of asking a clarifying question or revising proposals. And, if negotiations are held, lawyers can, if the client chooses, participate in face-to-face discussions with

the Government. In other instances, attorneys can assist behind the scenes in analyzing negotiation positions and drafting proposed contract language.

On many large procurements, bid protests are often the norm. Accordingly, proposal teams should prepare their proposals from the beginning with an eye toward defending (hopefully) or prosecuting a bid protest. In all the ways described above, the lawyer can help you do that—especially an outside law firm that is familiar with the client's business but still brings a fresh perspective to the process. So, next time you meet a lawyer at a chapter meeting, you should have a more complete understanding about the interplay between attorneys and proposal preparation.

SHLOMO D. KATZ is Senior Counsel, Government Contracts and Technology Practice at Epstein, Becker & Green in the firm's Washington, D.C. office. Mr. Katz practices commercial and government procurement law and litigation, wage and hour law, and construction law. He is a frequent presenter and speaker at professional meetings and symposia. Mr. Katz can be contacted at skatz@ebglaw.com or by phoning 202-861-1809. ■

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Understanding the Use of Incentives in Performance Based Service Contracting

BY RON ROMONCHUK

The objectives of Performance-Based Service Contracting (PBSC) clearly call for a business relationship that is based on “shared common goals.” In a performance-based contracting environment, the business case must drive the development of the incentive relationship/strategy. The approach to incentives and disincentives stems from FAR 37.6, which states: “performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed meet contract standards”—which can only be implemented through the use of incentives and disincentives.

Defining incentives/disincentives first necessitates considering the business case and the business relationship between the Government and contractor. The following provides a few examples of both:

Incentives—which defines how the contractor will be rewarded or subsidized for performance above the required performance quality levels (e.g. + 0.5% of monthly fee, Processing of progress payment on time, etc.)

Disincentives—which defines how the contractor will be penalized, or reprimanded for performance below the required performance quality levels (e.g.—3% of monthly fee, Processing of progress payment deferred until the following month, Contractor must re-administer training at own expense until standard is met, etc.).

There are two types of incentives allowed in the FAR, which are:

Performance Incentives. This may be considered in connection with specific product or service characteristics (e.g., a missile range, aircraft speed, performance at a specified level, etc.) or other specific elements of the contractor’s performance. These incentives should be designed to relate profit or fee to results achieved by the contractor, compared with specified targets.



Cost Incentives. Most incentive contracts include only cost incentives, which take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs. No incentive contract may provide for other incentives without also providing a cost incentive (or constraint).

The following are some of the typical types of incentives currently used in Government contracting:

Incentive Fees—where specified ser-

vice levels or parameters are defined prior to beginning work and a base profit/fee is agreed upon contingent to the contractor meeting certain performance requirements or metrics, and additional or less profit/fee is applied as incentives or disincentives for contractor performance.

Share in Savings—used to encourage contractors to apply ingenuity and innovation to complete the planned work early, and the government and the contractor share the monetary savings.

Early Completion Bonuses—where a negotiated profit/fee is pre-established and a specified monetary value is established for early completion of the contract/task order.

Profit/Fee Pools—where a specified percentage of the profit/fee is held back and used to pay for monetary incentives.

Award Term—where the length of the contract or task order is defined upfront and, based on established performance parameters, the duration can be lengthened or shortened based on contractor performance.

The Quality Assurance Surveillance Plan (QASP), used in conjunction with the Performance Work Statement or contractor proposed SOW, provides a dynamic structure for the execution of quality and performance management processes. In addition, when used at the project-level, joint use of the QASP with the contractor can help *minimize the burden* on the Government and provide early warnings and insights to the application of incentives/disincentives by the government. ■

Ron Romonchuk is the President of Performance Management Associates, Inc. (PMA); a Fairfax, VA based firm specializing in PBSC implementation for both the Government and its contractors.

The articles presented in this newsletter are for information purposes only.

INTERESTED IN PERFORMANCE BASED CONTRACTING?

See another article on this subject by Ron Romonchuk entitled "It's All About Performance!"

(See the March/April issue of the Executive Summary at our Web site library <www.apmpnca.org>).

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