UNSOLICITED PROPOSALS

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On July 11, 1969, the Comptroller General issued rulings in two cases involving "Unsolicited Proposals."

In the first case (B-165369 and B-165947), the Defense Communications Agency (DCA) —because of France's withdrawal from NATO—was interested in relocating its communication facilities which handle messages between Britain and the Continent. The method it originally intended to use consisted of Troposcatter equipment over the English Channel and Line-Of-Sight Microwave equipment elsewhere.

Lenkurt Electric independently studied the problem, informally briefed the Air Force on its findings and, finally, submitted an unsolicited proposal based on a complete Line-Of-Sight System. This proposal included data on the cost savings and technical feasibility of the Cross-Channel Line-Of-Sight link as well as appropriate language restraining its use in developing a work statement for competitive procurement. Air Force Headquarters rejected making a sole source procurement of this total Line-Of-Sight System from Lenkurt and directed that it be procured competitively. Lenkurt protested.

General Accounting Office's decision pointed out that Kenkurt's efforts had been limited to demonstrating the technical and economic feasibility of employing existing techniques for the Cross-Channel link. The Air Force conceded that Lenkurt's effort had in fact influenced its decision to drop the idea of using the Troposcatter Cross-Channel link, but argued that there was nothing new or novel in the technological aspects of using Line-Of-Sight across the English Channel. They pointed out that before making their decision to go 100% Line-Of-Sight in this System, both Collins Radio and Philco had also submitted Unsolicited Proposals which included Line-Of-Sight Systems. Therefore, the Air Force concluded, these companies should also be allowed to compete for the procurement. The Comptroller General concurred in this view, and in denying Lenkurt's protest concluded that:

> "... The consequences which flow from the improper use of data relate back to technical information which constituted the very essence of the procurement.... (Data relevant to the cost and technical reliability of the LOS approach) cannot be regarded as in the same category as manufacturing or design data."

That's the first case I wanted to mention. In the second case (B-165542), Standard Manufacturing Company alleged that the Air Force had purchased an item whose specifications were based upon a proprietary design submitted to the Air Force in an Unsolicited Proposal. This firm had designed a special electric lift truck for handling munitions, and had provided the Air Force with both its designs and a scale model in an Unsolicited Proposal—all marked as "proprietary" information. The Air Force argued that the specification used in its Request for Proposal (RFP) was drafted from information other than what was included in Standard's Unsolicited Proposal. This did not persuade anybody, however, because the Air Force DID NOT and, I guess COULD NOT identify those "other sources." Hence, GAO's decision which read:

"We are therefore compelled to reach the conclusion that the report from your department does not identify the sources of specification material sufficiently to overcome the presumption raised by the protest that the Air Force did, at the very least, adopt and use the basic proprietary design concept set out in Standard's Proposal."

"Accordingly, it is our opinion that an award based upon such a design under the present specification would be improper. We therefore believe it would be appropriate under the circumstances for your department either to negotiate a sole source contract with Standard or to re-solicit proposals on the basis of specifications which would not involve the use of proprietary data and would give any interested parties the opportunity to submit proposals and have them considered on an equal basis."

Now, the different conclusions in these two cases—which came out at the same date—let one of the Government contract reporting services to write them up and to comment that even when an Unsolicited Proposal does contain manufacturing or design data (as distinguished from funding or feasibility data), the efforts of the firm submitting such an Unsolicited Proposal

"...may still go unrewarded, for the procuring agency is always free to frame a competitive solicitation around performance specifications that do not reveal the data provided in the Unsolicited Proposal."

Free to frame a competitive solicitation around performance specifications that do not reveal data provided in the Unsolicited Proposal! Free!?! the procuring agency is required to do this! Except in a couple of special circumstances, ALL DoD procuring agencies must frame a competitive solicitation if this can be accomplished without using the data in the Unsolicited Proposal.

We have been aware for some time that in some Navy areas—too many—the misconception persisted that Unsolicited Proposals automatically meant sole source contracts. In fact, we have been putting forth a substantial effort to eradicate this misconception, to educate our people in this subject and, thus to correct it internally. And now here we find a supposedly sophisticated contract reporting service expressing surprise that the Government has what it calls the "freedom" NOT to go sole source. So I am afraid the misconception is external as well as internal.

But it brings me to my purpose here today, and that is a very simple one—to make it abundantly clear that an Unsolicited Proposal neither guarantees nor automatically *justifies a Sole Source contract.*

To begin, I want to emphasize—loud and clear—that there is nothing magic about the term "Unsolicited Proposal." It is merely an idea in the Research and Development field which was not prompted by a Government procurement action. Everything that it connotes today, however, is a little hard to describe, because it means many things to many people. Principally, though, an Unsolicited Proposal seems to be viewed as an easy way to cut through a lot of procurement red tape and to award a contract without wading through the procedural alphabet soup of RFQ's, or RFP's, or IFB's. "Give us an Unsolicited Proposal on that, intercosmic, and we will be ready to go with it within a week." I don't say that this approach may not be entirely proper and fully

within the letter and the spirit of our regulations in any given case. But the reasons which make it kosher or not run a lot deeper than the simple issue that is usually bandied about—that is, whether it's a genuinely Unsolicited Proposal. There are other far more important hurdles to clear, and those bear some careful study.

Now, ASPR defines an Unsolicited Proposal in this way:

> "[An] Unsolicited Porposal is a research or development proposal which is made to the Government by a prospective contractor without prior formal or informal solicitation from a purchasing activity." (4-101(c))

Just a little further on, in discussing solicitations for Research and Development, ASPR then makes the statement I am sure you are all familiar with:

> "The following examples are illustrative of circumstances where there may be no substantial question as to choice of source:
>
> .....
>
> (ii) " Where the purpose of the contract is to explore an Unsolicited Proposal which offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source." (4-106.2(d))

The preceding page of ASPR contains a caveat to that, however. It says, rather elliptically:

> "The submitter of an Unsolicited Proposal is not necessarily entitled to preferential treatment in the award of any contract because of his submission of such a proposal." (4-106.1(e)(6)).

To translate all that to plain English, a contract is not to be awarded to a contractor who submits an Unsolicited Proposal simply because it is Unsolicited. The heart of the decision is whether the contractor who submits it is—on one ground or another—really in a Sole Source situation. In the field of Research and Development, ASPR—as well as the statutes which underlie it—grant us considerably more freedom in selecting contractors than they do in the ordinary supply situation. As spelled out in ASPR, procurement in Research and Development is geared toward seeking:

> "The best possible equipment, weapons, and weapon systems that can be devised and produced." (4-106.1(a))

The keynote is basically quality rather than price. Again quoting ASPR this means:

> "Seeking the best scientific and technological sources consistent with the demands of the proposed procurement for the best mix of cost, performances and schedules." (id.)

In Research and Development, then, there may be a wide range of legitimate Sole Source justifications for negotiating with only one contractor. He may have come up with the best new mousetrap in the field—or he may have the most promising idea

idea for one—or he may be furthest along in mousetrap research—or he may just have on his staff the best darned staff of mousetrap scientists anywhere in the country and, thus he offers the best prospect for coming up with what we want. Those are the sort of considerations around which Sole Source Research and Development contracts may be made.

With this in mind, let us look again at the ASPR Section I just read regarding source selection in the case of Unsolicited Proposals. First, it reads:

> "The following examples are illustrative of circumstances where there may be no substantial question as to choice of source."

Obviously the drafters of this sentence intended to establish no presumption in favor of Unsolicited Proposals. The words are "maybe no substantial question." If there is any presumption here at all, it clearly runs in the opposite direction—that in the case of an Unsolicited Proposal its odds on that there will be doubt as to contracting directly with the offeror, and that furthermore there is a good chance this doubt will be substantial.

Then the next sentence adds several additional qualifications.

1. The purpose of the contract must be to explore the Unsolicited Proposal,
2. The proposal must offer significant scientific or technological promise,
3. It must represent the product of original thinking, and
4. It must have been submitted in confidence by one source.

If the Unsolicited Proposal passes all of these tests—and I suggest that viewed with an impartial, objective eye a great many will not—there is still the second hurdle—the question "Could anyone else do the job?" which is raised by the "Substantial Doubt" phrase—and that puts us right back to applying Standard Sole Source procurement tests.

Viewed from this angle, I think ASPR has actually tried to make it harder rather than easier to make awards on Unsolicited Proposals. and in view of the emphasis Congress has placed on competition in procurement, I think this is entirely proper. We are committed to building up all the competition we can in Research and Development, or as ASPR says, to developing "the broadest possible base of contractor and subcontractor sources." (4-102). We are instructed to "search for and develop" information on sources—by using the Commerce Business Daily to publicize our needs—by reviewing literature from Research and Development firms—and by encouraging technical people, small business specialists, and contracting officers to work cooperatively toward this end. (4-103). But while we may be desperately reliant on the fruits of independent Research and Development, and may wish to encourage it, all we can, we still have the fundamental obligation to ensure that someone else could not do the job just as well as the fellow who walked in the front door with an idea wrapped in a nice Unsolicited Proposal.

So the question whether his proposal is truly "Unsolicited" is NOT the important determination. Whether he got the idea from a pre-contract solicitation—or from a presentation at a Government-Industry Conference—or whether we sort of hinted to him that he should go back home and send us a gift-wrapped Unsolicited Proposal—these

tests only get him in the ball park. ASPR—and the Comptroller General too—are both fairly liberal in their definitions of Unsolicited Proposals for just that reason—in the final analysis it DOES NOT MATTER MUCH whether the proposal came spontaneously or whether it came after a little subtle urging. The heart of the matter is whether the proposal consitutes a genuine Sole Source procurement.

The ASPR Sections I have referred to here all come from the Chapter on Research and Development, because that is the field which generates by far the most Unsolicited Proposals. We can, though—and we do—get Unsolicited Proposals for purely supply items—nuts and bolts and pots and pans. And while the pure Research and Development tests may not be applicable to supplies—such as the question "Would this contract be to explore an idea that is the product of original thinking?"—What I have described as the really crucial test applies just as well—that is, "Is this a legitimate Sole Source procurement?"

So before I close, let me go back to the beginning and that contract reporting service's write-up of those two GAO cases. Its message to its industrial subscribers was:

> "Before expending substantial amounts of time and financial resources seeking an answer to one of Uncle Sam's many technological difficulties, the businessman should carefully consider the limits of the competitive advantage obtainable by such efforts."

Excellent advice! But I would also advise all Government personnel that they likewise should consider most seriously the limitations on their ability to award a Government contract before they suggest to any company that it submit an Unsolicited Proposal. Contrary to the folklore, the Unsolicited Proposal is not exception 18 to the Armed Services Procurement Act.