

# Be Careful What you Wish For...

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*A recent decision by the Canadian International Trade Tribunal puts a spotlight on mandatory criteria in solicitation documents. It serves as a reminder that no matter our intentions, we must only evaluate in accordance with what we wrote and distributed to bidders!*

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**D**ecision PR-2009-130 by the Canadian International Trade Tribunal (CITT), published in June, 2010 ([http://www.citt.gc.ca/procure/determin/pr2j130\\_e.asp](http://www.citt.gc.ca/procure/determin/pr2j130_e.asp)), highlighted the importance of the phrase “be careful what you wish for, it might come true” when considering your evaluation criteria for public solicitation documents.

In a Request for Proposal (RFP) for informatics professional services, the issuing department included a common clause:

*... Bidders are advised that only listing experience without providing any supporting data to clearly demonstrate where and how such experience was obtained by providing complete details as to where (company name and address), when (month and year) and how (including responsibilities, duties and relevance to the requirements); will result in the experience not being included for evaluation purposes. . . .*

Bidders raised questions about this clause, specifically that the company address requirement seemed particularly strict. The issuing department answered that “Bidders must provide a company name and address” that “should conform to the addressing convention of the company’s geographical location.”

With questions clearly answered, the solicitation closed, the department received twenty-one proposals and began evaluating. At first, the complain-

ant was deemed non-responsive in the two streams in which it bid as a result of not meeting the address requirement as written. However, the department reviewed this requirement, and decided that:

*... for government references that identified a specific department or agency, more specific address information ought to be within the knowledge of the Crown. On the other hand, references by bidders to non-government projects without a complete address, i.e. not including a street address, would still be considered non-compliant with the detailed address requirements of the RFP.*

The Evaluation Committee then diligently went about applying this re-interpretation of the Criteria across all proposals, thereby allowing more Bidders’ proposals, including the complainant’s in one stream, to be deemed compliant.

The department followed all the rules, right? You’re allowed to reinterpret ambiguous evaluation factors in the course of an evaluation, as long as you apply it to every Proposal, aren’t you? You are. However...

The Tribunal ruled that the RFP did not indicate in any way that government and non-government addresses would be treated differently. As such, it saw the Committee’s re-interpretation as contrary to the clear statements made in the RFP and in the Questions and Answers provided dur-

ing the solicitation.

The Tribunal states that “nothing in the RFP could have allowed a bidder to know that a distinction would be made between government and non-government addressing requirements.” The CITT then ordered that the Department re-evaluate all proposals in accordance with the original requirements, as written.

So how can a situation like this be avoided?

The answer is quite simple: In a mandatory criterion, ask for what you need, and that’s all. In the case above, the department was quite clear that they ‘needed’ the complete address, and, says the Tribunal, if the department “wanted something different, it would have said so in an amendment to the RFP.”

A bidder that can meet all of the mandatory criteria should be able to complete all of the work as described in the RFP’s Statement of Work to the quality level indicated. Anything more than that is a ‘value added’, that could serve to further differentiate suppliers in the evaluation process.

When writing the Criteria, the common practice of indicating required elements using the terms “must” and “mandatory” is a good one. This also leaves the equally common practice of allowing the use of the term “should” for the ‘would be nice to see’ elements. There’s nothing wrong with using a ‘should’ even in a

mandatory criterion!

For example, if you would like to see full addresses for the entire work history of a proposed resource, but would accept working with a resource that was unable to track down each and every prior client address, clearly stating that the Bidder “should include the address” will relieve the obligation to require it, but will still encourage its inclusion.

In many cases, departments have added a separate row in a Mandatory Criterion table for all elements it would like to see, but are not absolutely required. Such a method helps inform Bidders as to what you want to see, while not leading to an overly onerous or punitive evaluation.

Alternatively, if it really is of benefit to see the addresses across the resource’s work history—but not absolutely necessary—rather than making this a mandatory, make-or-break requirement, consider adding a couple of points for including that information in the CV, or other related portion of the proposal.

It’s a good practice, when developing your Evaluation Criteria, to

decide on what the minimum requirements for a successful Contractor would be. Do you need a report writer, and you use Microsoft Office 2007? It’s reasonable to ask and include, at a mandatory level, that the report writer has used Word 2007 before.

However, having a mandatory requirement that the report writer must have written a report in Word 2007 on a laptop with a black wireless keyboard on a screen at least 19 inches while monitoring media on a purple television screen exactly 102 degrees to their left on a table that’s about three and a half feet tall, might not get you what you want, and is of questionable value (even if that really is the exact setup they would have to work with). Consider putting that in the “point-rated/would be nice” column, if anywhere at all!

You can also consider different levels of skills and knowledge as well. Maybe you’d accept knowledge of Word 2003, but Word 2007 would be great. Put “Microsoft Word 2003 or greater” in the Mandatory, with 2007 in the Point-Rated.

As well as being overly prescriptive in drafting Mandatory Criteria may lead to perceptions of incumbent bias or wiring of the RFP towards a specific firm, even when this is not the case at all. Just as troublesome is the possibility of not receiving any compliant bids at all, or scaring otherwise excellent firms from submitting a bid in the first place.

If we consider the CITT case above once more in light of the above, it seems we may need to revise the expression we started with: “Be careful what you wish for, you might *not* get it.”

#### About the Author

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