

Attaching Standard Legal Terms to RFPs – Top Eight Considerations

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Economic considerations and efficiency gains are forcing companies to reconsider their procurement strategies. Many of our clients who use RFPs or similar procurement processes often ask us whether they should attach a form of agreement or standard terms and conditions when issuing an RFP. There is no set answer to this question, but here are eight things to consider when thinking about whether you should attach “Ts and Cs” to your RFP:

1. What are you buying? It is somewhat trite, but the specific services or products being procured, the scope of the project and its importance to your company will generally drive the complexity of the RFP process. Buying standard equipment may not warrant attaching a pro forma contract to the RFP (but it could ...), and a significant IT outsourcing deal worth hundreds of millions of dollars may.

2. What kind of RFP is it? If the procurement process automatically results in a contract with the successful bidder, it is preferable for the form of agreement to be included in the bid package (dependent on the deal and the specific services, see above). If, on the other hand, the RFP involves down-selecting vendors and carrying out further bid phases or negotiations prior to final selection, you may want to wait for the subsequent round before surprising proponents with your favourite 100-page agreement.

3. How much time do you have (Part 1)? Strategic sourcing and supply chain groups often want to pull the trigger on issuing the RFP, but do not always seek input from legal early in the process. If your project is on a tight timeline and the work has to start by a certain date, you might have to send out the RFP documents without a form of agreement, or perhaps with only a summary of important legal terms. If your company has key terms and conditions that it insists on when contracting, you should include those if possible, but whether you delay issuing the RFP to tailor terms and conditions (see #4) will be driven by timing requirements.

4. Tailor the terms. If you are attaching terms and conditions or a form of agreement, do take the time to make sure that they work for the deal. If you are outsourcing HR functions (or IT infrastructure services such as HelpDesk, it doesn't much matter), and employee or customer information will be in the “cloud,” for example, well-crafted service levels and appropriate confidentiality, privacy and security terms will be critical. Your company's standard multi-purpose goods and services contract may not be the best starting point.

5. Focus on “hot button” provisions. If you don't have time to attach a fully tailored form of contract, do think about including a shorter list of critical terms and conditions. We all know the ones – they're the terms that are raised as issues upfront and, more often than not, left to the eve of the absolute-drop-dead-signing-date, when a flurry of decisions are made and perhaps not the best drafting takes place in the wee hours: limitation of liability, indemnity, confidentiality, privacy, security, IP rights, change process, ... and there are others depending on the deal. It is worthwhile setting these terms out, even briefly, so that vendors can respond to the terms and reflect these items in the bid price.

6. Take risk into account in the price. This is directly related to the previous point. It goes without saying that a low price doesn't mean the best solution, but assuming that the solutions

are equal, is having a comprehensive indemnity provision or a higher limitation of liability important? Having recourse against the supplier could well be a differentiator in assessing RFP responses and should be taken into account when the business team is drooling over the lowest bid submitted – apologies, I meant to refer to the thoughtful consideration of all components of the response. In all seriousness, your organization’s appetite for risk and appropriate allocation of risk between the parties for the particular goods or services must be front of mind, which means the legal terms, and the proponents’ responses to those, will be important when assessing bids.

7. How are you using the standard terms as part of the RFP process? If proponents will have the opportunity to state exceptions to specific terms and conditions, and this will form part of the assessment criteria and scoring methodology, they should obviously be attached. It will be the same where the scope is well-defined and the successful proponent is deemed to agree to the terms and conditions as presented with the RFP package. In fact, even where the legal terms have less importance for a particular project, it is usually worthwhile to attach them and request proponents to provide comments or submit their “best position” on those terms – at the very least, it may highlight some red flags for any subsequent negotiation of the ultimate agreement and help with planning your team’s negotiation strategy. Do include instructions that direct proponents to provide specific responses rather than ambiguous references to “negotiating mutually agreeable terms” at a later date – these types of comments are not helpful to assessing responses.

8. How much time do you have (Part 2)? Spend the time now, or spend the time later – if you want a solid contract, at some point someone is going to have to do some hard work thinking about the nuances of the transaction and what terms should be in the agreement. As a general proposition, investment by the deal team at the front end, including time spent on defining business requirements as well as on legal provisions, will pay dividends on a number of fronts. You will substantially reduce the negotiation time and the number of drafts required to complete the deal, especially if the form of agreement and the response will be binding on the successful proponent. And your legal fees will be lower – it is much easier to negotiate with yourself when putting together the form of agreement than to negotiate an agreement with six or eight people on the other side. In any event, perhaps you will avoid hearing the oft-repeated, “We’ll need to reconsider the fees – we didn’t include insurance or an uncapped LOL cap for breach of confidentiality [or insert your favourite] in the price.” With few exceptions, nobody includes those in the price!

You will appreciate that none of these considerations are absolute, and they are all related and dependent on each other; this is intended to give you some additional food for thought the next time your organization is thinking about issuing an RFP. And if you do attach a form of agreement or a schedule of legal terms, leverage it to result in better-quality proposals from your vendors and a more efficient and effective RFP process.

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