

Don't neglect or forget to review contract forms included in RFPs



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With the increased use of project delivery methods other than lowest bid, contractors find themselves submitting responses to more requests for proposals (RFPs) for public projects. Faced with RFPs that require contractors to review and/or submit hundreds if not thousands of pages of documents about the company, its proposed team for the project, and its proposed plan for the project, as well as cost and fee information, it is tempting for the contractor to ignore the proposed contract form that is often included with the RFP. Contractors sometimes assume that the terms of the contract will be negotiated and finalized only if the contractor is selected from the list of proposers. Contractors who take that approach, however, do so at their peril.

The contracts included with RFPs can sometimes appear to be standard industry form contracts (e.g., AIA, DBIA, and ConsensusDocs) when, in reality, the “standard” forms have been heavily modified to include owner-slanted provisions that place most (and sometimes all) of the risk on the contractor. If you wait until after you have been selected as the contractor on a project to negotiate the terms of the contract, it is now increasingly more likely that you are too late. Recent RFPs and proposed contract documents for public construction projects have included the following provisions:

Example RFP #1

A copy of the Agreement that will be used for the Project is included as Attachment C to this RFP. While Proposers have the **option of submitting proposed modifications to the Agreement** as described in

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this RFP under Section 3.2, Tab 2, such modifications may be taken into account in determining “best value” and any modifications will be in the Owner’s sole discretion. **In submitting their proposals, Proposers shall assume that the legal terms set forth in the Agreement will not be subject to modification.** If selected, information or terms in the Proposal that are inconsistent with the RFP and the Agreement may be excluded.

If the Proposer would like to propose any deviation from the terms of the Agreement attached to the RFP, the Proposer **must submit its proposed modification language with specificity on a separate page** titled “Proposed Modifications to the Agreement.”

Submission by the Construction Manager of a GMP Proposal that attempts to modify or alter the Construction Fee (including the At-Risk Fee), General Conditions, or Contingency submitted with its Original Proposal submitted in response to the Owner’s RFP shall be a material breach of the Agreement by the Construction Manager. In addition, **any attempt by the Construction Manager to alter the terms of the modified A133 or modified A201 that was included in the Owner’s RFP** as a condition or assumption of the GMP Proposal **shall be a material breach** of the Agreement by the Construction Manager.

Example RFP #2

The Owner anticipates entering into a Preliminary Services Agreement (copy included with this RFP) with the DB Firm determined to provide the best value for the Project, which will cover the preliminary services to be provided by the DB Firm. At the conclusion of these preliminary services, which include achieving 60% complete Construction Documents, the DB Firm will submit its Guaranteed Maximum Price (GMP) Proposal. If the Owner accepts the GMP, the DB Firm and the Owner will enter into the DB Agreement (copy included with this RFP). **No exceptions will be taken to the terms of the Contract Documents included with this RFP.**

Qualifications/Objections to Contract Terms. Provide any qualifications or objections to the Contract Documents. **Any qualifications not noted on a separate sheet accompanying the Proposal will not be considered later.** The Owner's expectation is that the selected firm will enter into the Contract with only minor changes or modifications to address Project-specific requirements and processes

Under provisions like those, a contractor who ignores the proposed contract form when it responds to the RFP opens itself up to either (1) being forced to enter into a contract that includes terms it never would have agreed to if it had known they were included or (2) incurring liability if it refuses to accept those objectionable terms and backs out of the deal. Some of the provisions in these proposed agreements where the contractor can be stuck with severely unfavorable terms include, among others, provisions related to claims, delays, indemnification, design issues, differing site conditions, and dispute resolution procedures. If you do not review the proposed forms and submit requested changes prior to submitting your response to the RFP, you may be stuck with provisions that place a significant amount of risk on you,

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the contractor.

Like with most issues, you should contact your attorney as early as possible in the process as you respond to an RFP. Our experienced construction attorneys regularly assist client with responding to RFPs and proposing changes to contract documents included with RFPs on public projects. Contact one of the attorneys listed below if you would like to discuss how our team can assist you at the beginning of your next commercial construction project to make sure you take the best first step toward a successful project.



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