Requests for Information (RFIs) can be by turns helpful, illuminating, infuriating and costly, but one thing’s for certain—you must take them seriously.

RFIs are a valid part of just about every project. No matter how carefully construction documents are created, they can still contain language that could be misinterpreted.

As veteran project managers have most likely experienced, however, these “simple” requests often mask an underhanded strategy by a contractor that may have found itself running out of time, money or both.

According to Nancy Rigassio, Esq., Executive Claims Counsel and Assistant Vice President for XL Catlin’s Design Professional team, “We often see situations in which the contractor, frequently the low bidder, has determined that its best chance to make a profit on the project is to claim that inadequate design or a poorly coordinated set of construction documents has caused delays on the project and forced the contractor to charge the owner more than was bid. To bolster its argument, the contractor will inundate the architect or engineer with unnecessary RFIs to try to make a case based on the number of RFIs generated on the project.”

Another reason for a contractor to submit an inordinate number of RFIs, Rigassio says, is that its project team is inadequately staffed. “A contractor may try to save money either by short-staffing a project or assigning inexperienced staff,” she says. “Since there aren’t enough experienced staff to look through the documents for answers, they find it easier to issue RFIs.”

Such was the case in one claim in which the contractor for a professional sports arena unleashed a torrent of RFIs on the structural engineering firm, raising the specter of an eventual lawsuit against the firm. “The contractor was a responsible bidder,” Rigassio says, “but didn’t assign its ‘A team’ to the project.”

Sensing that the contractor might very well attempt to use RFIs to help manufacture a claim, one of the engineers on the project was determined to respond promptly to each request so that no one could accuse her firm of further delaying the project. In addition, Rigassio says, “She crafted each response as if it were a defense against a claim because she knew, in effect, that it was.”

Since she was confident her responses would show up as part of legal discovery down the road, the engineer also made sure each response not only included the answer to the request, but also a road map to how the contractor could have obtained each answer without submitting an RFI. For example, she would write a response that included language similar to the following: “As can be clearly seen in section four, the specifications are listed in paragraph three.” “That way,” Rigassio says, “anyone reading the RFI and the response could reasonably conclude that the RFI was unnecessary.” Although the contractor did sue the engineering firm, settling the case was made much easier by the engineer’s diligence regarding RFIs.

Drawing the Line
Rigassio and her colleague Randy Lewis, VP of Loss Prevention & Client Education for XL Catlin, believe that A/E s need to take a stronger stand against this all-too-
Set up a system for submitting and responding to RFIs during your pre-construction meeting with all the parties.

common contractor strategy of using RFIs to make up for too low a bid, inadequate staffing or both. “Design professionals have to become more assertive, both in their approach to the RFIs themselves and in their relationships with the contractor and the owner,” Lewis says, adding, “Our rule of thumb is that an RFI should be issued only when information is either missing from the construction documents or is ambiguous.”

In addition to writing each response as if it’s a defense against an eventual claim, Lewis says designers need to get the project owner involved as soon as they suspect a contractor is attempting to manufacture a claim. “Our recommendation is that the A/E let the owner know that the contractor is submitting unnecessary RFIs and that the designer will have to charge the owner for the extra staff work that goes into responding to these requests,” Lewis says. “That should get the owner’s attention and spur a conversation between the owner and contractor.”

Making the owner aware of the situation is one of several tactics AEs can and should employ to avoid being buried by unnecessary RFIs. Lewis and Rigassio recommend the following:

- **Work with qualified, reputable contractors.** Discourage the owner from working with contractors that have a reputation for using RFIs to compensate for a low bid or inadequate staffing. Sometimes, of course, it’s impossible to avoid working with a contractor of dubious repute, but you should still do your due diligence to lower your risk.

- **Establish RFI procedures and effective project communication.** An important part of your pre-construction meeting with the other parties should be setting up the system for submitting and responding to RFIs. By including this as part of the meeting agenda and documenting the discussion in the meeting minutes, you’ll have a better chance of holding the contractor to the agreed-upon procedures. You’ll also want to keep the channels of communication open throughout the project.

Many RFIs can be promptly addressed during project meetings and site visits as long as the parties are talking to each other.

- **Promptly answer all RFIs, legitimate or not.** Providing timely responses to legitimate RFIs is just good business practice; the sooner the contractor has the answer, the sooner work on a particular aspect of the project can continue. And while you work on a separate strategy to stop the flow of unnecessary RFIs, you should issue prompt responses to those you do receive. If a claim is filed, you’ll want the evidence to show you did everything possible to avoid delaying the project.

- **Make the most of project contracts.** As is often the case, there is no more effective way to avoid claims and mitigate losses than by strengthening the language in your contract to defend against the unsavory practices of other project parties. To discourage the contractor’s use of unnecessary RFIs as a profit mechanism, guide the owner to spell out the consequences of such behavior in its contract with the contractor and do the same in your contract with the owner.

In the first instance, the owner should add a paragraph in its construction contract to make it clear to the contractor that 1) RFIs should be submitted only after the construction documents and field conditions have been thoroughly reviewed and 2) the contractor will be responsible for reimbursing the owner for any costs charged by the A/E for providing information that is readily available to the contractor. Here’s an example of language that could be used:

> “The Contractor may, after exercising due diligence to locate required information, request from the Consultant clarification or interpretation of the requirements of the Contract Documents. The Consultant shall, with reasonable promptness, respond to the Contractor’s requests for clarification or interpretation. However, if the information requested by the Contractor is apparent from field observations, is contained in the Contract Documents or is reasonably inferable from them, the Contractor shall be responsible to the Client for all reasonable costs charged by the Consultant to the Client for the Additional Services required to provide such information.”

“[The engineer] crafted each response as if it were a defense against a claim...”
In the second instance, you’ll want to include language in your contract with the owner that requires compensation for any additional services you must provide to respond to an excessive number of RFIs. Here’s a sample clause:

The Consultant shall provide, with reasonable promptness, written responses to requests from the Contractor for clarification and interpretation of the requirements of the Contract Documents. Such services shall be provided as part of the Consultant’s Scope of Services. However, if the Contractor’s requests for information, clarification or interpretation are, in the Consultant’s professional opinion, for information readily apparent from reasonable observation of field conditions or a review of the Contract Documents, or are reasonably inferable therefrom, the Consultant shall be entitled to compensation for Additional Services in accordance with Section _____. Compensation, for the Consultant’s time spent responding to such requests.

By spelling out the consequences of flooding a project with RFIs, you’re putting the contractor on notice that you’re not about to provide unnecessary services for free and that the net effect of the contractor’s possible strategy will be additional costs to the contractor and not to you or the owner.

This article is an excerpt from Communique—XL Catlin’s monthly newsletter. To find out more about XL Catlin’s professional liability and risk management program for A/Es and to test drive the Contract eGuide, go to xlgroup.com/dp.