BID PROTESTS: BEING A SORC LOSER OR DEMANDING FAIR PLAY!? 
NDIA Small Business Division National Conference 
June 2011
Bid Protests: What?

• Written objection by an interested party re:
  
  – **Terms of a Solicitation** *(pre-award only)*
    • Examples: Illegal or vague solicitation provisions, unduly restrictive requirements, set-aside requirements
  
  – Agency’s Decision to:
    • Cancel a Solicitation
    • Eliminate the protester from the competition
    • Award the contract to another offeror
      - Examples: Failure to evaluate IAW the solicitation, unreasonable evaluation of proposals, failure to conduct meaningful discussions, unequal treatment of offerors
    • Expand contract scope post-award *(cardinal change)*
  
  – An offeror’s size or socio-economic status *(SBA)*
Bid Protests: Who?

• **Protester must be an “interested party”**
  – An actual or prospective offeror
  – Whose direct economic interests would be affected by the award of a contract or by the failure to award a contract

• **Not an interested party:**
  – Subcontractors
  – Unsuccessful offeror if not “in line for award”

• **Protester must be able to show “prejudice”**
  – But for the agency’s actions, the protestor would have a substantial chance of receiving the award

  • No harm, no foul
Bid Protests: Where and When?

1. GAO (FAR 33.104) (See GAO.GOV)
   - Solicitation terms: before proposal due date
   - Post-award protests where debriefing required: within 10 calendar days after debriefing (5 days to trigger CICA stay)
   - All other protests: within 10 calendar days after basis of protest is known or should have been known

2. U.S. Court of Federal Claims
   - Solicitation terms: before proposal due date
   - Post-award protests: no hard deadlines, but protester must show that it acted with reasonable diligence

3. Contracting Agency (FAR 33.103)
   - Same time limits as GAO, but no exception for debriefing
   - Can appeal to GAO within 10 calendar days after agency denies protest or acts in a manner adverse to protest

4. SBA (SBA 121.1004; see also FAR 19.3)
   - Within 5 bus. days after notice of apparent successful offeror
   - File protest with CO, who forwards it to SBA [FAR 19.302]
Forum Characteristics

- **GAO**
  - Publicly noted
  - Somewhat Burdensome on the Agency “Customer”
  - Less formal than COFC
  - Triggers Automatic Suspension of Work just by filing
  - Decision within 100 days
  - Review by one of 32 “independent” GAO staff attorneys
  - Attorneys can review the full evaluation record under Protective Order
  - Can be settled or withdrawn at various points

- **COFC**
  - No “Automatic” Stay
  - Must persuade Court to issue a Preliminary Injunction:
    - “balance of hardships” and “public interest”
  - Protective Order not guaranteed
  - Opportunity for discovery
  - No strict filing deadlines after award
  - No time-limit to issue a decision
  - DOJ attorneys versus Procuring Agency attorneys
Forum Characteristics

- **Agency Protest**
  - Less public
  - Less formal
  - Supposed to be faster
    - Agency shall make “best efforts” to resolve agency protests within 35 days.
  - Less objective / review not independent
  - Less risk for the Agency
  - A way to escalate a dispute **within** the Agency
Debriefings

- Required only in negotiated procurements
- Must be requested within 3 days of receiving notice of award
- Can be a meeting, teleconference, or in writing
- Required Disclosures:
  - Significant weaknesses and deficiencies in the debriefed offeror’s proposal
  - Overall evaluated cost and technical rating of the awardee and the debriefed offeror
  - Overall ranking of all offers
  - Summary of the rationale for the award
  - Reasonable responses to relevant question
- **Strategy -- Probe the agency’s:**
  - Consideration of evaluation factors
  - Evaluation of the proposal
Bid Protests: How?

1. GAO
   - Submit a letter stating the factual and legal basis for the protest with copies of supporting documentation
   - GAO assigns case to a staff attorney
   - Agency responds to the protest within 30 days (Agency Report)
   - All parties file briefs responding to the agency’s report
   - GAO may hold an evidentiary hearing
   - GAO must issue decision within 100 calendar days

2. U.S. Court of Federal Claims
   - File a Complaint and request for injunction
   - Case is assigned to a federal judge
   - Briefs / hearings / possibly some discovery or depositions
   - No deadline for decision

3. Contracting Agency
   - Submit a letter stating basis of protest (basically same as GAO)
   - Can request decision by CO or higher level authority
   - Agency supposed to rule on protest within 35 calendar days

4. SBA
   - Submit a letter stating basis of protest to CO; must have specifics
   - CO promptly forwards protest to SBA Govt Contracting Area Office
Protest Remedies

• **Pre-Award Protests**
  - Agency corrective action
  - Agency directed to follow procurement laws and regulations
    • Examples: revise solicitation provisions, amend solicitation to open competition, cancel improper set-aside

• **Post-Award Protests**
  - Agency corrective action
    • Reopen discussions
    • Terminate the award
    • Re-compete the contract
    • Reevaluate proposals
    • New award

• **Monetary Recovery**
  - Costs of filing and pursuing protest, including reasonable attorneys, consultant, and expert witness fees
  - Bid and proposal costs (GAO)
  - No lost profits
During Protest: Suspension of Award / Performance Stay

1. GAO
   - If debriefing is required, must file protest within 5 days after the first offered date for the debriefing
   - If no debriefing, or debriefing is not required, must file protest within 10 days of award
   - Head of agency can override suspension if “urgent and compelling” circumstances exist

2. U.S. Court of Federal Claims
   - Must convince Judge to issue TRO/preliminary injunction

3. Contracting Agency
   - Award must be suspended until protest resolved

4. SBA
   - Award must be suspended for 10 days
GAO Standard of Review

• Generally:
  – GAO will make sure Agencies follow the proper procedure and adequately document the procurement process
  – On substantive issues, GAO will defer to the Procuring Agency as long as its evaluation was “reasonable.”
  – If reasonable people can disagree with the Agency’s evaluation (and the Agency’s rationale was documented), GAO will not substitute its judgment for that of the Agency
GAO Standard of Review

• **Technical Evaluation**
  – Agencies have considerable discretion
  – Protester’s mere disagreement with an agency’s judgment is insufficient to establish that the agency acted unreasonably

• **Best Value Determination**
  – Agency has discretion to award to offeror with a higher technical rating and higher price where it reasonably determines the price premium is justified and the result is consistent with the stated evaluation criteria

• **Past Performance Evaluation**
  – Evaluation must be
    • Conducted fairly, reasonably, and IAW the solicitation’s evaluation scheme
    • Based on relevant info sufficient to make a reasonable determination of the offerors’ past performance
  – GAO will not substitute its judgment for reasonably based past performance ratings
    • GAO will question agency’s conclusions if unreasonable or undocumented
GAO Standard of Review

• **Agency’s Post-Protest Explanations**
  
  – Agencies have discretion in conducting procurements, but have an obligation to document their work.
  
  – If the Agency cannot show with *contemporary* documentation why it took a particular action, GAO is not required to defer to an Agency’s explanation developed after a protest is filed.

• Documentation prepared after the fact is given less weight.

  - “The lesser weight that we accord post-protest documents reflects the concern that, because they [are] prepared in the heat of an adversarial process, they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process.”
Legal Counsel

• **Required in U.S. Court of Federal Claims**

• **Not required for GAO, Contracting Agency, or SBA, but only an outside attorney or consultant may obtain access to bid and proposal or source selection information under a Protective Order (PO).**
  
  – Protestor can request the entire evaluation record and other relevant documents
  
  – Agency must produce all *relevant* documents re: protest grounds
  
  – Attorneys can review the full record subject to PO
  
  – Clients can only see redacted versions of documents and pleadings
  
  – Attorneys cannot communicate with clients about the details of the protest
Protest Considerations

- **Pre-Award**
  - Results of attempt to resolve through RFP questions
  - Impact of the RFP Defect on:
    - Your ability to compete
    - Your competitors

- **Post-Award**
  - Importance of the contract to your company
    - Percentage of overall revenue
    - Your company’s broader strategic goals
      - Trying to keep a competitor out of an agency?
      - Trying to get into an agency?

- **Universal**
  - Strength of potential protest grounds
  - Nature of the Procuring Agency’s conduct -- Reasonable?
  - Expense
  - Divert management attention from other matters
  - Customer relationship / your reputation
Recent Developments

• **Small Business Compliance with Subcontracting Limitations**
  - Increased focus on compliance with the Limitations on Subcontracting clause (aka the 50% rule) as a result of GTSI suspensions (small businesses having little or no contract involvement and acting as a front for large business GTSI)

• **Small Business Set Aside Protests**
  - Parity among the small business categories (e.g., Hub-Zone, 8A, SDVOSB) established by 2010 Small Business Jobs Act, as “may” replaced “shall”
    - Result: Harder to protest that a procurement should have been set aside for a particular category of small businesses
Recent Developments

• Small Business Set AsideProtests

  – “Rule of Two”: Set aside where 2 or more small businesses are capable of performing the work and are likely to bid.

  – **Task Order Competitions:** Under *Delex*, GAO required agencies to consider the Rule of Two for task orders under multiple-award contracts.

  – Under the **SBJA of 2010** Congress has directed OFPP to issue guidance that gives agencies *discretion* whether to apply the Rule of Two

• Result: Harder to protest that a task order procurement should be set aside for small businesses
Questions?

Ronald S. Perlman
Partner
Holland & Knight LLP
2099 Pennsylvania Ave., Suite 100
Washington, DC 20006
(202) 419-2420
ronald.perlman@hklaw.com

William M. Pannier
Associate
Holland & Knight LLP
400 S. Hope St., 8th Floor
Los Angeles, CA 90071
(213) 896-2435
william.pannier@hklaw.com