

**BID PROTESTS:
BEING A SORE LOSER OR
DEMANDING FAIR PLAY!?**
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Ron Perlman and Will Pannier
Holland & Knight
Washington, DC and Los Angeles, CA

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 Aside Protests**

- **“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