BID PROTESTS: BEING A SORE LOSER OR DEMANDING FAIR PLAY!? 
NDIA Small Business Division National Conference 
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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
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

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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
• **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 PO materials
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?

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