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*PCI Protests Series - 2024*

# Effective Use of Debriefings and Bid Protests

# Meet the Presenter



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# Meet the Presenter



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# A PROTEST PRIMER

*Let's Start at the Very Beginning ...*

# Bid Protests 101

All protests challenge some form of Government action or inaction, *e.g.*,

- The terms and conditions of the RFP or RFQ
- The evaluation of offers and the resulting source selection decision
- Awarding to a company despite an unmitigated Organizational Conflict of Interest
- Awarding to an offeror who violated the Procurement Integrity Act

# Bid Protests 101

## Learn Your Lingo!

- **Bid Protests** - Challenge raised by contractor (competitor), based on alleged improprieties in procurement source selection process (i.e. something wrong with solicitation, failure of agency to comply with applicable law or terms of solicitation, etc.)
- **Size Protests** - Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to size)
- **Status Protests** - Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to other eligibility issues)

# Bid Protests 101

## Who Are the Parties in a Bid Protest?

- Protestor
- Government
- [Intervenor, possibly]

# What Laws Govern Bid Protests?

- Federal Acquisition Regulation (FAR)
    - Substantive and Procedural (Part 33.1)
  - Supplemental Agency Acquisition Regulations (i.e. DFAR or VAAR)
  - Other Government Contracting-Related Statutes/Regs
  - Small Business Regulations
  - Forum Rules
- *What role does the Solicitation itself play?*



# Critical Questions and Considerations

- **Who** are you dealing with?
- What **type** of contract is at issue?
- What **method** of Procurement is being used?
- **Where** are you filing?

# LEARNING THE FRAMEWORK

# Different Types of Protests

## Overview of Procurement Timeline:

- Government Identifies a Need
- Solicitation Issued
  - [Q&A]
- Contractors Submit Responses to Solicitation
  - [Competitive Range/Discussions]
- Evaluation of Contractors/Source Selection/Awardee(s) Chosen
- Award(s) Made
- Notice(s) of Award / Unsuccessful Offeror

# Different Types of Protests

Remember the Procurement Timeline!

There are Different Jumping Off/Trigger Points and Filing Deadlines, Depending on How You Answered Those Critical Questions Before, and What Type of Protest You are Filing!

# Different Types of Protests

- The type of protest is defined by/dependent on what you are protesting, **and** where you are in the procurement timeline
  - Critically important to frame your protest properly and know what you are challenging
  - Critically important to understand the procurement timeline
  - Critically important to act at the right time....or lose your protest rights
  - For example...

# Pre-Award Protests Based on Errors in Solicitation

- Government Identifies a Need
- **Solicitation Drops**
  - **Is there a problem with the Solicitation itself?**
    - Time for a **Pre-Award Protest Based on Errors/Issues Relating to the Solicitation**
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- Awardee(s) Chosen

# Protests Based On Exclusion from the Competitive Range

- Government Identifies a Need
- Solicitation Drops
- Contractors Submit Responses to Solicitation
- **Evaluation of Contractors/Source Selection**
  - **Is this a FAR Part 15 procurement that utilized competitive range? Were you excluded from the competitive range?**
- **Time to start down the path to a Pre-Award Protest Based on Exclusion from Competitive Range**
- Awardee(s) Chosen

# Post-Award Protests

- Government Identifies a Need
  - Solicitation Drops
  - Contractors Submit Responses to Solicitation
  - Evaluation of Contractors/Source Selection
  - [Pre Award Notice → Size/Status Protest]\*\*
  - **Awardee(s) Chosen**
    - **Is there something wrong with the Award Decision?**
- Time to start down the path to a Post-Award Protest**



# WHAT IS PROTESTABLE?

# Pre-Award Protests

## Based on Errors in Solicitation

### What is **Protestable**?

- Ambiguous or contradictory terms
- Inclusion of prohibited terms/exclusion of required terms
- Inaccuracies, Nonsensicals, Things that are Violative of Inconsistent with Applicable Law
- Unduly or overly restrictive terms or specifications
- Arguments concerning consideration of teaming partner and/or JV member qualifications/past performance
- Improper use of LPTA (compare to improper conversion to LPTA)
- Set-aside/“rule of two”/Kingdomware issues
- (Smallbiz) Pass/Fail Requirements like de facto responsibility determination

# Competitive Range and Post-Award Protests

## What is **Protestable**?

- Will depend on the nature of the procurement/under which section of the FAR the requirement is being procured
  - Price Only or Non-Price Evaluation Factors?
- Critical analyses:
  - Did the Agency follow the Solicitation's Stated Evaluation Scheme?
  - Did the Agency follow/comply with Applicable Law?
  - What was exclusion based on?

# Competitive Range and Post-Award Protests

## What is **Protestable**?

- Common **Non-Price** Evaluation Factor Issues
  - Unstated evaluation criteria or subfactor, etc.
  - Error in applying evaluation criteria/assigning ratings
  - Unequal or disparate treatment of offerors
  - Misapplication of law or unreasonable evaluation methods
  - Meaningful/misleading/uneven discussions
- Common **Price** Evaluation Issues
  - Price Reasonableness
  - Price Realism
  - Escalation, Adjustment
  - Balanced Pricing
  - HUBZone Preference

# PREPARING TO PROTEST

# Identifying Winning Protest Arguments - Not All Protests Are Created Equal

- Protest Issues Not For Consideration - 4 CFR 21.5 (GAO)
- Jurisdiction (Task Order Limits)
- Standing / Competitive Prejudice
- Objective v. Subjective Arguments
- Deference to Agency – GAO/COFC Will Not Substitute Their Judgement for that Of Agency
- Honest Assessment of What a “Win” Really Looks Like. Does it Result in Award?

Prompt, Regular, Honest, and Frank Discussion with Your Attorney is Necessary

- Can You Take it in Stages/Control Costs?

# Preparing to Protest – A Comprehensive Plan Of Attack

- » The business and legal teams should coordinate all actions well in advance of the protest
- » The business team should provide the RFP/RFQ to the legal team as soon as the document is issued so that a parallel review can be conducted
- » Potential solicitation defects should be identified and researched as early as possible
- » Consider filing a preaward protest if the Government fails to rectify the issue
- » In a postaward context, the business and legal team should work hand-in-hand to analyze the debriefing (if required) or Government-provided explanation as to why your company lost the procurement

# Business Team Responsibilities

- Educate the protest team regarding the solicitation, the company's proposal, areas of concern, ongoing dialogue with the agency, and the agency's evaluation
- Provide the protest team with copies of all important solicitation and evaluation documents
- Inform the protest team of any specific concerns and provide updates as necessary
- Identify potential experts/consultants

## Business Considerations Include:

- Customer relations issues
- Costs
- Diversion of resources
- Publicity
- Impact on existing and future business opportunities



# Protest Team Responsibilities

- Review the RFP/RFQ, any bidders' conference materials, Q&As and all RFP amendments
  - This will permit an understanding of the requirements and evaluation structure and identification of potential preaward protest grounds
- Understand the proposal
  - Learn the technical aspects of the procurement
  - Understand the objectives, strengths and weaknesses of the offeror
  - Understand the competitor's objectives, strengths and weaknesses
- Review and analyze all communications with the Government
- Interview expert consultants
- Provide legal advice
- Avoid competitive decisionmaking

# Legal Team Considerations

Once the potentially protestable issues are identified, legal research should be conducted immediately to determine ...

- Likelihood of “success” based on factual strengths and weaknesses and likely remedies if the protest arguments prevail
- Overall protest structure
- Relevant timelines depending on the nature of the procurement

Should be done in conjunction with fact gathering/investigation – these processes are intertwined

# Utilizing Debriefings to Gather Information

## Pre-Award Debriefings

At a minimum, pre-award debriefings **shall include:**

- The agency's evaluation of significant elements in the offeror's proposal;
- A summary of the rationale for eliminating the offeror from the competition; and
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.

# Utilizing Debriefings to Gather Information

## Pre-Award Debriefings

Pre-award debriefings **shall not disclose:**

- The number of offerors;
- The identity of other offerors;
- The content of other offerors' proposals;
- The ranking of other offerors;
- The evaluation of other offerors; or
- Trade secrets; Privileged or confidential manufacturing processes and techniques; Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; or the names of individuals providing reference information about an offeror's past performance

# Utilizing Debriefings to Gather Information

## Post-Award Debriefings

At a minimum, post-award debriefings shall include:

- The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
- The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- A summary of the rationale for award;
- For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed

# Utilizing Debriefings to Gather Information

## Post-Award Debriefings

Post-award debriefings **shall not disclose:**

- The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors
- Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including: Trade secrets; Privileged or confidential manufacturing processes and techniques; Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; or the names of individuals providing reference information about an offeror's past performance

# Utilizing Debriefings to Gather Information

**BUT**, You May Not Always be Entitled to a Debrief!

- When Are Debriefings Required (When are Contractors Entitled to Debriefing?)
- When Are they Not?
- What other Sources of Information Might Exist?

# Choose Your Forum

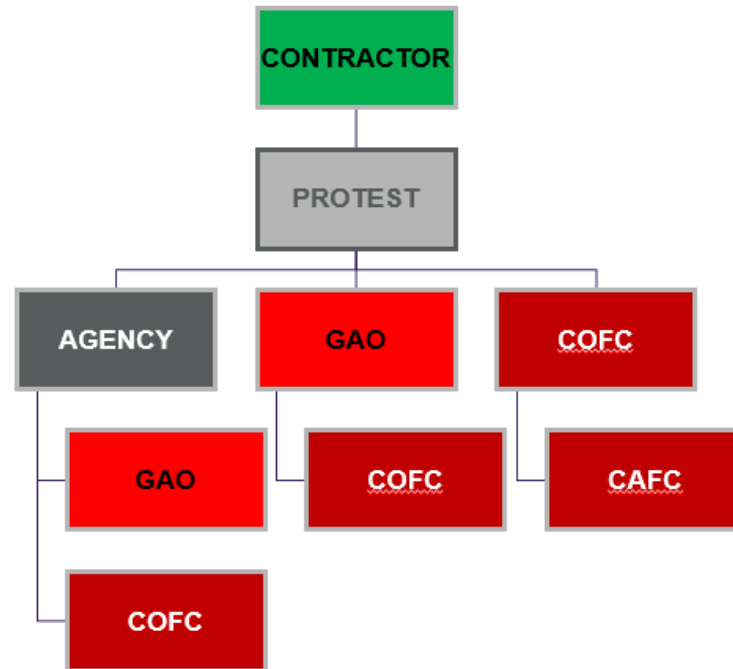
- Contracting Officer/Agency Protest
- U.S. Government Accountability Office (“GAO”)
- U.S. Court of Federal Claims (“COFC”)



# Choose Your Forum

	<b>Agency</b>	<b>GAO</b>	<b>COFC</b>
<b>Suspension Of Procurement</b>	Automatic suspension if protest filed within 10 days of contract award or 5 days after receipt of requested and required debriefing	Automatic suspension if protest filed within 10 days of contract award or 5 days after receipt of requested and required debriefing and GAO notifies agency within same time period	Temporary Restraining Order and Preliminary Injunction (Always Discretionary)
<b>Discovery Rights</b>	Usually none	“Agency Report” includes relevant documents and factual/legal response to allegations raised in the protest	Potentially significant discovery; at minimum, receipt of Agency’s administrative record
<b>Available Remedies</b>	Broad range of remedies available, depending on the allegations	Full range of remedies available, plus protest costs and attorney’s fees	Injunction or declaratory judgment; may award bid and proposal preparation costs
<b>Appeal Avenues</b>	No direct appeal, but a protest may be filed at GAO or COFC	No direct appeal, but protestor may seek reconsideration within 10 days of decision or file protest at USCOFC	Federal Circuit

# Choose Your Forum



# Choose Your Forum

- Automatic Stay
- More Bites at the Apple
- Discovery Rights
- Forum Knowledge on Subject Matter
- Objectivity
- Opposing Counsel
- Timing
- Costs & Filing Fees

# FILING YOUR PROTEST

# Calculate Your Deadline: Pre-Award Protests Based on Errors in Solicitation

What is the **Deadline** To Bring the Protest?

- Pre-Award Protests Based on the Errors in the Terms of the Solicitation must be brought **before the deadline to respond to the solicitation**
  - May require proceeding on parallel tracks
- A post-award protest of such issues is untimely -- Do **not** roll the dice or hedge

# Calculate Your Deadline: Competitive Range and Post-Award Protests

What is the **Deadline** To Bring the Protest?

- **...It Depends!**

# Calculate Your Deadline: Competitive Range and Post-Award Protests

- **General (GAO) Rule**: Protestor must file its protest **not later than 10 days after the basis of protest is known or should have been known** (whichever is earlier)
- **Exception**: In protests challenging a procurement conducted on the basis of competitive proposals under which a **required debriefing is (timely) requested** the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed **not later than 10 days after the date on which the debriefing is held**

# Calculate Your Deadline: Competitive Range and Post-Award Protests

## Required and Requested Debriefs

- Remember, When is a Debriefing **Required?**
  - Can get TRICKY!
- When is a Debriefing Timely **Requested?**
  - Post Award
  - Competitive Range (Agency Delay?)



# Calculate Your Deadline: Competitive Range and Post-Award Protests

Another Deadline Calculation Curveball: Enhanced Debriefing & Impact on Deadlines

Deviation → DFARS 215.506-70

- Only applicable for DoD procurements
  - Offerors have 2 business days to submit questions after receiving the debriefing
  - The agency should respond in writing within 5 business days
  - **Debriefing not concluded until the agency *responds* to the questions**
- 
- What about GSA INFORM?

# A Quick Recap on Protest Deadlines

- Pre-Award Based on Solicitation Errors/Issues → **Submit before the deadline to respond to the Solicitation**
- Otherwise, We are looking at **10 days from....**
  - Required, Timely Requested Debriefing → 10 days from the **conclusion of the debriefing** (remember **Enhanced Debriefing impact**)
  - Everything Else → 10 days from the day you **knew/should have known the basis of your protest** (often, award date...but not always)
- Ready for a new wrinkle? What is the **Automatic Stay**? Why Would You Want It and What is the Deadline to Get It?

# Debriefings, Part Deux

- Telephonic/Zoom v. Written
  - How to Handle Questions (Interplay with Enhanced Debriefing)
    - Two Rounds of Questions?
- Who Should Attend
- Preparation: “Reasonable Responses to Relevant Questions” Is KEY
- Demeanor and Comportment
- Pro Tip: **ALWAYS Get A Debriefing!**

# Initiating a Protest: What Does a Protestor Need to File?

## **FORMAT:** Differs by Forum

- Agency and GAO – A Letter Brief
- COFC - Complaint, Corporate Disclosures
  - If seeking a stay, you likely also need a Motion for Temporary Restraining Order, a Motion for Preliminary Injunction, a Memorandum in Law in support of the two motions, possibly affidavits, etc.

# Initiating a Protest: What Does a Protestor Need to File?

## **SUBSTANCE:** Same across all Forums

- Threshold requirements
- Factual/Legal Grounds for Protest
  - Need to get past “speculation” level - Failure to provide specific details and concrete facts may support a motion to dismiss
    - This is a balancing act
    - “Sometimes you don’t know if you have a protest....”

\* Pro Tip - Include a Specific Request for Documents

# Protest Litigation Timeline

- Protest
- (Requests for Dismissal)
- (5 Day letter)
- Agency Record/Report
- Comments to the Agency Report/Supplemental Protests
- (Additional Briefing)
- Decision
- Appeal/Another Bite at the Apple
- Corrective Action
- Hearing
- Other Oddities

# Typical Protest Remedies

- Contract Termination
- Re-Evaluation of Proposals
  - At What Stage?
  - What Scope of Re-Evaluation?
- Solicitation of Revised Proposals
- Re-Opening of Discussions
- Modification of the Solicitation
- Partial Recovery of Protest Costs

# Key Takeaways

- Protests require careful coordination between business and legal teams
- Protests are emotional and sometimes expensive endeavors
- Successful protests identify *objective* errors
- There is no ONE common path forward, or one deadline, or one right argument
- This is complicated!! Don't be afraid to ask questions or seek help.

Additional Lessons (*tune in for next in series!*)

- From the Flip Side: Intervention (September 19)
- Remember the Differences Between Bid v. Size/Status (September 26)



# QUESTIONS?

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