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PCI Protests Series - 2024

Keeping Your Award: Bid Protest Intervention

Meet the Presenter



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Meet the Presenter



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Agenda

- The Basics: The Lingo, the Law, and the Critical Considerations
- An Introduction to Intervention
- Defense Strategies

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)

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?

Where Are Bid Protests Filed

Where are Bid Protests Heard and Adjudicated?

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

(Remember the Differences Between Bid v. Size/Status Protests...)

Timeline For Bid Protest Litigation

- Bid Protest is Filed
- [Requests for Dismissal]
- 5 Day Letter
- [Documentation Disputes]
- Agency Record/Report
- Comments to the Agency Report/Supplemental Protests
- [Additional Briefing]
- Decision

INTRODUCTION TO INTERVENTION

Defending Against Bid Protests: A Primer

Because Protest is Technically Against the Agency...

Government Counsel Will be Defending Against the Protest and Seeking to Maintain Award

- Why not just sit back let the agency take care of it?
- Because you need to protect YOUR rights.
 - Your interests may be in line with the government's interests *right now*. It might stay that way...or, interests may diverge (Corrective Action)
 - Gov't counsel might need help, or disagree with approach

Take Away: Always Intervene!!!!

Defending Against Bid Protests: A Primer

INTERVENTION

- Easy, not time-consuming, initial filing
- Your counsel can cultivate a relationship/partnership with government counsel
- You can modulate efforts/legal costs once you have your foot in the door, and are able to monitor the case, and cover your bases

Defending Against Bid Protests: A Primer

A Bid Protest is Technically Against the Agency...

- Even though you, as the awardee, were the ultimate beneficiary of the agency's source selection decision, you did not have control over the agency source selection process
- So how can you defend the Agency's actions? (And do you even have the information necessary to do so?)

Defending Against Bid Protests: A Primer

A Bid Protest is Technically Against the Agency...

- This makes substantive arguments hard, at times. But you may still be able to find some...
- Even if you can't, you can usually find procedural arguments or maybe some mixed substantive/ procedural arguments
- You might also be able to defeat the protest in practical terms using strategic maneuvers

WHEN to Intervene?

- Bid Protest is Filed

****INTERVENTION!!****

- [Requests for Dismissal]
- 5 Day Letter
- [Documentation Disputes]
- Agency Record/Report
- Comments/Supplemental Protest
- [Additional Briefing]
- Decision
- Corrective Action

DEFENSE STRATEGIES

Defense Strategies

- A Note About Dismissal v. Denial
- What is Corrective Action?

Defense Strategies: Untimeliness as a Basis for Dismissal

A Simplified Procurement Timeline

- Solicitation (RFP, IFB, RFQ, etc.)
 - Q&A
- Responses to Solicitation Submitted
 - [Competitive Range/Discussions? → Notices]
- Evaluation Process/Source Selection and Award Decision
- [Pre-Award Notices]
- Award
- Post-Award Notices

Defense Strategies: Untimeliness as a Basis for Dismissal

Pre-Award Protests Based on the Solicitation

- Is the protestor attacking problems with the solicitation itself?
 - Is the protestor attacking problems regarding agency's decision to set aside or not set aside the contract?
- ➔ Such protests must be brought before the deadline to respond to the solicitation; a post-award protest of such issues is untimely

Defense Strategies: Untimeliness as a Basis for Dismissal

Pre-Award Protests Based on the Solicitation

- Ambiguous or contradictory terms
- Inclusion of prohibited/exclusion of required terms
- Unduly restrictive terms
- Improper use of LPTA
- Set-aside/“rule of two”/*Kingdomware* issues
- Pass/Fail like requirements / de facto
Responsibility Determination

Defense Strategies:

Untimeliness as a Basis for Dismissal

Other Types of Protest

- General 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: Protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is **(timely) requested** and, when requested, is **required**. . .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

Note: What if the Protestor Wants a Stay?

Defense Strategies: Untimeliness as a Basis for Dismissal

- When is a Debriefing **Required**?
- When is a Request for a Debriefing **Timely**?
 - Post-Award
 - Competitive Range
- Another Wrinkle: Enhanced Debriefings

Defense Strategies:

Untimeliness as a Basis for Dismissal

In Summary, There are Different Deadlines for Different Type of Protests, Procurements, Forums

- What Type of Procurement/Contract is at Issue?
- Was a Debriefing Required/Timely Requested?
At What Stage in the Debriefing Process was the Protestor?
- Was Enhanced Debriefing Applicable?
- Was a Stay Timely Requested?

Defense Strategies:

Untimeliness as a Basis for Dismissal

Bid Protest Deadlines Are Complex, Confusing, Strict, and NOT Subject to Extensions or Excuses

- Can be as short as 5-day turnaround
- Deadlines are **strict** – There are hundreds of cases where GAO says no excuses
- Failure to meet any of the relevant deadlines can support dismissal

Calculating Protest Deadlines Is **Complicated**!!!

- It is very **easy** for protestors to make a mistake.

Defense Strategies: Speculation as a Basis for Dismissal

What is Protestable? This Will Depend on What Type of Procurement is at issue

- Non-Price Evaluation Factors
- Price Issues
- Competitive Range Issues
- Insufficient Documentation

Defense Strategies: Speculation as a Basis for Dismissal

What Does the Protestor Need To File?

- **FORMAT:** Differs by Forum
 - Agency and GAO – A Letter
 - COFC – Complaint. If seeking a stay, the protestor likely also needs a Motion for Temporary Restraining Order, a Motion for Preliminary Injunction, a Memorandum in Law in support of the two motions, possibly affidavits, etc.
- **SUBSTANCE:** Same across all Forums
 - Need to get past “speculation” level
 - Failure to provide specific details and concrete facts may support a motion to dismiss

Defense Strategies: Jurisdiction

There are Limits to the GAO's & COFC's Jurisdiction

- General
 - Claim v. Protest
 - Tucker Act v. APA
- Task Order Thresholds (GAO Only)

Defense Strategies: Standing

Not Everyone Can Protest. A Protestor Must Be an “Interested Party” to Have “Standing”

- Tucker Act Definition: An “interested party” is “an actual or prospective bidder or offeror whose direct economic interest would be affected by award of contract or by failure to award contract”
- GAO Definition: “ ‘Interested party’ means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”

Defense Strategies: Standing

Can the Protestor Show They Have Standing?

- Are they an actual or prospective bidder?
 - Eligibility Issues, Responsibility, etc.
- Can they demonstrate prejudice?
- Key questions:
 - Was the protestor in line for award?
 - Was the evaluation system so flawed that the rankings are completely irrelevant?

***These types of arguments can get
VERY technical and very complicated***

Defense Strategies: Competitive Prejudice

Protestor Must Show Competitive Prejudice

- “Competitive prejudice is an essential element of a viable protest, and [the GAO] will sustain a protest only where the protestor demonstrates that, but for the agency’s improper actions, it would have had a substantial chance of receiving the award.”
- Can you make an argument that, even if the protestor is right, and a procurement mistake was made, awardee would still win even if the mistake was corrected?

Defense Strategies: Piecemeal Argument

The GAO Will Not Permit Piecemeal Arguments

- All arguments must be stated in the initial protest
- Examples won't work to "save a place"
- Thematic arguments don't get the protestor there

Defense Strategies: Defense on the Merits

What is the Basis of the Protest?

- Non-Price Evaluation Factors
- Price Issues
- Competitive Range Issues
- Insufficient Documentation

Defense Strategies:

Deference to Agency Judgment

The GAO and Courts Will Not Substitute their Judgment for that of the Procuring Agency

- Many protests can be boiled down to an argument that the protestor feels they should have been rated better
 - Objective v. Subjective Arguments
 - “I’m better than you think I am!” is woefully insufficient
- Agencies are entitled to discretion

Defense Strategies: Procedural Strategies

Sometimes, When Both Substantive and Procedural Arguments Fail You, There are Still Tactics that Can Be Used Strategically

- Limit the documents in Agency Report
- Try to defeat the Stay

A Note About Size and Status Protest Defense

Remember...

- Size Protests - Challenge raised by contractor (competitor); challenge based on awardee eligibility (specifically with regard to size)
- Status Protests - Challenge raised by contractor (competitor); challenge based on awardee eligibility (specifically with regard to other eligibility issues)

QUESTIONS?

Remember that this is the second in a three part series. Check out the first session (Asserting Bid Protests) on demand at PCI's website, and sign up for the third session (Size & Status Protests) on 2/15

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