Practical Answers to Business Questions About Post-Award Bid Protests

Project Management Institute
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Topics

- Debriefings
- Whether to Protest
- Protest Forums
- GAO Procedures
What Is Special About the Federal Procurement Process?

- Governed by numerous statutes and regulations
- Generally competitively awarded
- Government officials are required to comply with those statutes and regulations, but also have significant discretion
What are Debriefings?

- Informative exchanges required by regulation after contract award
  - FAR 15.505 (Pre-award – exclusion)
  - FAR 15.506 (Post-award)
- Can be telephonic, face-to-face, or in writing
  - CO discretion
What is the Government required to disclose during the debrief?

- Government's evaluation of requestor's weaknesses and deficiencies
- Overall evaluated cost or price and technical rating of the awardee and the debriefed offeror
- Past performance of debriefed offeror
- Make and model of successful offeror
- Overall rankings of offerors
- Summary of rationale for award
- Reasonable responses regarding procedures
Who is Entitled to a Post-Award Debrief?

- “Competitive proposals” or a “combination of competitive procedures”
  - All offerors after award selection
- Mandatory only for:
  - FAR Part 15 (negotiated) procurements See FAR 15.502 (applicability of Part 15 procedures)
  - Orders > $5 million under IDIQ contract See FAR 16.505(b)
- Not necessarily required for formally advertised (Part 14) or simplified acquisitions (Part 13)
What is the Timeline for Requesting a Post-Award Debrief?

Contract Award: 3 days

Notice to Disappointed Offeror:
- Number of proposals received
- Items, quantities, and any stated unit prices of each award
- Reasons offeror’s proposal not accepted

Deadline to Request Debrief (FAR 15.506(a)(1))

Debrief to Occur to Maximum Extent (FAR 15.506(a)(2))

5 days

Note: Government may accommodate an untimely request for a briefing
What is the use of a Post-Award Debriefing?

- To help make an informed and intelligent decisions regarding whether to protest
- To help obtain information to use in pursuing a successful protest
- To obtain additional insights for future competitions
- To help position you (as successful contract awardee) to defend against a protest
Is the Government prohibited from disclosing information?

- Point by point comparisons
- Trade secrets or confidential processes/techniques
- Confidential commercial or financial information
- Names of references providing past performance information
What are Effective Debriefing Techniques?

- Be fully prepared (evaluation criteria, process, focus areas)
- Listen closely and read between lines
- Ask follow-up questions
  - Confirm de-brief will remain open pending questions
- Agree in advance on how far to push
- Possibly caucus to evaluate how to proceed
- Agree to accept additional information
  - Agency may provide more than FAR minimum information
- Face-to-face is preferred if possible
  - Have counsel on the phone if possible
What Standard Applies to Agency Decisions?

- Source selection decisions must be rational and consistent with the solicitation's evaluation criteria
- Reasonableness/rationality:
  - GAO will not "reevaluate" the proposals
  - Protester's "mere disagreement" with the evaluation is not sufficient to render it unreasonable
What is a Bid Protest?

- A formal complaint against some aspect of a federal procurement process which asserts either:
  - A violation of law; or
  - A decision that lacks a rational basis
What Do I Need to Know to Decide Whether to Protest?

- Federal procurement process rules
- Bid protest process rules – tight timelines
- Your own objectives in filing a protest
  - Importance?
  - Incumbency?
What Should I Focus on for Potential Protest Grounds?

- § M, Evaluation Factors for Award to Offerors
- § L, Instructions, Conditions, and Notices to Offerors

Figure 5-1: Sample Structure of Evaluation Factors and Subfactors
What Are the Some of the Potential Bases for Post-Award Bid Protests?

- Deviation from Stated Evaluation Criteria
- Defects in:
  - Technical Evaluation
  - Past Performance Evaluation
  - Cost Evaluation
  - Price Analysis
- Unequal or defective discussions
- Flawed Best Value decision
- Organizational Conflict of Interest (OCI) issues
- Defects in responsibility determination
- Unequal treatment
- Undisclosed evaluation ground
Can I Protest My Competitor’s Ethical Issue?

- 14 day limit for protest based upon Procurement Integrity Act violation
Will a protest affect my relations with my customer?

- Formal protest is not the preferred approach to most issues
- Sometimes it is the only way to protect your interests
- Valid grounds
- Customer sophistication
- Other awards pending before same customer?
What are the Forums for a Bid Protest?

* GAO will not hear protest that have been the subject of litigation or decided on the merits by a court. 4 CFR 21.11(b)
What About Protesting at the Procuring Agency? (FAR 33.103)

- Interested party may request an independent review by procurement professionals at levels above the CO
- Some agencies take more seriously than others
- Can be most effective on pre-award issues (overly restrictive; exclusions; Procurement Integrity Act
- Unusual to gain satisfaction in post-award protests
- Quick resolution; decision encouraged in 35 days
What Are the Key Characteristics of A Protest at GAO?

- Provides true outside expertise (80+ years)
- Automatic stay
- Substantial opportunities to develop facts regarding evaluations and other proposals
  - Full report
  - Document requests
  - Hearings (at GAO's discretion)
- Opportunities maximized through protective order; requires legal counsel not involved in competitive process
- Recovery of protest costs
- Agencies almost always follow GAO's recommendations
What About Protesting at the Court of Federal Claims?

- Court process – opportunity for discovery
- GAO deadlines do not apply
- No automatic stay; agency may stop voluntarily or enjoined
- Process more expensive and can be more complicated than GAO
- Decisions are appealable to Federal Circuit
- Can challenge agency override of stay
What Specific Procedures Apply at GAO?
GAO: Cases Filed

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I Have Decided to Protest at GAO – What Are the Deadlines?

#1. Deadline for GAO Filing:
- NLT 10 days after the basis of the protest is known or should have been known
- Or within 10 days of debriefing. 4 C.F.R. § 21.2(a)(2).

#2. Deadline to Stay Contract Performance:
- Within 10 days after contract award or
- Within 5 days of the offered debrief date
- Stay is crucial in order to obtain meaningful relief
- By law, an Agency may not award a contract after notice of pending protest – CICA, 31 U.S.Code 3553(c) and (d)
- GAO must notify agency within the required time limits
- Head of procuring agency must make finding to override
What Is a “CICA Stay?”
(FAR 33.104(c)(1))

Contract Award

Notice to Agency by the GAO

10 days

or

5 days

Offered Debrief Date
What does Standing mean?

- A GAO protest must be filed by an "interested party," which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. 4 C.F.R. § 21.0(a).
  - Generally means an offeror that would potentially be in line for award if the protest were sustained.
- **No Subcontractors** unless exception applies:
  - Interested parties do not include subcontractors except where the awarding agency has requested in writing that subcontract protests be decided pursuant to 4 C.F.R. § 21.13.
What Is the “Protective Order?”

- Purpose – protect:
  - Company’s proprietary or confidential data
  - The agency’s source-selection-sensitive information
- Attorneys and consultants retained by attorneys may be admitted if they meet requirements
- Certification required that not involved in “competitive decisionmaking”
- Analyze risk of inadvertent disclosure
- Protected material may only be provided to GAO and individuals authorized under the protective order
What Goes on During a Protest at GAO?

Protestor
- Protest Filed at GAO, § 21.2(a)(2)
- Submit Protective Order Applic.
- Object to Doc List 2 days.
- Protests Comments § 21.3(i);
- Supplemental Grounds?

GAO
- GAO Acknowledgement and Notice of Prot. Order

Agency
- Poss. Mot. Dismiss
- Agency Document List § 21.3(c)
- Agency Report § 21.3(c)
- Agency Response to Supplemental Grounds § 21.3(c)

Intervenor
- Poss. Notice Intervention
- Intervenor Comments on Agency Report

Request for Reconsideration § 21.14(a)
- Potential Hearing § 21.7(g)
- GAO Decision § 21.9

100 Days
Time is Up!

0 25 30 40 50 70

Object to Doc List 2 days.

Agency Response to Supplemental Grounds § 21.3(c)

Intervenor Comments on Agency Report

Agency
- Agency Document List § 21.3(c)
- Agency Report § 21.3(c)
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Request for Reconsideration § 21.14(a)
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Time is Up!
What Are the Potential Remedies for A Protest Filed at GAO?

- Refrain from exercising options under the contract
- Terminate the contract
- Recompete the contract
  - Re-evaluation may result in reaward to awardee
- Issue a new solicitation
- Award a contract consistent with statute and regulation
  - Directed award (rare)
- Such other recommendations as GAO determines necessary to promote compliance
  - Exclude awardee
GAO: Merit Decisions and Protests Sustained

Merit Decisions

Sustains

FY05 FY06 FY07 FY08 FY09 FY10 FY11 FY12 FY13

306 251 335 291 315 441 417 570 509

70 72 91 60 57 82 67 106 87

23% 29% 27% 21% 18% 19% 16% 18.6% 17%
GAO "Effectiveness Rate" = GAO Merits Decisions or Agency Corrective Action
If I am the Awardee Should I Intervene?

- To protect its interests
- To obtain access to information subject to a protective order
Can I Protest a Corrective Action?

- As a general matter, the details of corrective action are within the sound discretion of the contracting agency.
- An agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety.

_Nuclear Production Partners, LLC, B-407948.9 (Sept. 24, 2013)_
Can I Protest a Corrective Action? (Example)

- Army awarded hospital construction contract to Turner Construction
  - Two rival contractors filed protests at GAO
- GAO sustained the protests
  - Found OCI, recommended re-procurement without Turner
  - Army agreed to follow GAO recommendations
- Turner sued in Court of Federal Claims (COFC), contesting termination and reprocurement
- COFC found GAO irrationally found OCI based on “suspicion or innuendo” rather than hard facts
  - Army’s decision to follow GAO and revoke contract was “arbitrary and capricious”
- Federal Circuit affirmed COFC
  - GAO’s “cursory” OCI inquiry departed from GAO precedent
Can I recover my protest costs?

- Expressly unallowable under FAR 31.205-47 unless incurred pursuant to CO written request
- If protest sustained, GAO will generally recommend reimbursement of attorney, consultant, and expert witness fees
- Can recommend B&P costs
- 60 days to file claim
What Was the Point of This Presentation?

- Make the most of your debrief
- Protests are sometimes required to protect your interests
- Protests move very quickly
  - Imperative to know the rules to meet deadlines
- Counsel should be involved as early as possible
  - Spot and evaluate potential protestable issues
- Requires evaluation of both legal and business issues
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