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Government Contracts Bid Protests: Preparing for and Prevailing in Protests

Determining Whether, Where and How to Challenge a Contract Award

THURSDAY, DECEMBER 16, 2010

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Government Contracts Bid Protests: Preparing for and Prevailing in Protest

Webinar - Strafford Legal Seminar

December 16, 2010

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SECTION I

Overview of the bid protest process

- Provide a **forum** to hear complaints by, and **grant relief** to, interested parties
- Enhance **accountability** of procurement officials and government agencies
- Promote **transparency** into how the procurement system works
- Protect **integrity** of procurement system
- Avoid unnecessary **cost** and **delay & disruption** of procurements during protest process

Bid Protest-Basic Numbers

- 3 forums for bid protests
 - GAO, Court of Federal Claims, Agencies
- Over 2,200 protests were filed at GAO in FY 2010
- Court of Federal Claims received approximately 70 protests in FY 2009
- Many protests are filed with contracting agencies directly--no statistics available

GAO Bid Protest Statistics Fiscal Years 2006 - 2010

	FY 2010	FY 2009	FY 2008	FY 2007	FY 2006
Cases Filed	2,229 (up 16%)	1,990 (up 20%)	1,652 (up 17%)	1,411 (up 6%)	1,327 (down 2%)
Merit (Sustain + Deny) Decisions	441	315	291	335	249
Number of Sustains	82	57	60	91	72
Sustain Rate	19%	18%	21%	27%	29%
ADR (cases used)	159	149	78	62	91
ADR Success Rate	80%	93%	78%	85%	96%
Hearings	10% (61 cases)	12% (32 cases)	6% (32 cases)	8% (41 cases)	11% (51 cases)

Parties to a Protest Protesters

- A GAO protest can only be filed by an “**interested party**,” which means an actual or prospective bidder or offeror with a direct economic interest in the procurement.
 - In challenges to the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.
 - In challenges to the terms of a solicitation, this generally means a party who would likely be an offeror and whose interest would be affected if the protest were sustained.

Parties to a Protest Agency

- The contracting agency participates primarily by responding to the protest allegations in a report and at a hearing, if required.
- Within 1 day of receipt of the protest, GAO will telephone the contracting agency to advise it that a protest has been filed.
 - This call is important because it is the official notice that may trigger a statutory stay of the award or performance of a contract pending GAO's decision.
 - The call also triggers the agency report requirement.

Parties to a Protest Intervenor

- Immediately after receiving notice of the protest from GAO, the contracting agency must give notice of the protest to the awardee if an award has been made; if no award has been made, the agency must notify all bidders or offerors that have a substantial chance of receiving an award.
- GAO may permit other firms to participate in the protest as “intervenor.”
 - If the award has been made, GAO permits only the awardee to intervene.
 - If the award has not been made, firms wishing to intervene should so advise GAO and the other parties, and then contact GAO to learn whether they will be permitted to intervene.
 - In A-76 protests, both the ATO and a representative of the affected employees have authority to intervene.

When to file a Protest

Pre- & Post-award Timeliness

- The Bid Protest Regulations set forth the timeliness requirements for filing protests at GAO.
 - GAO, except under limited circumstances, strictly enforces these timeliness requirements.
- There are different timeliness rules based on:
 - Pre-award vs. post-award protests
 - Protests following required post-award debriefings
 - Protests following agency-level protests
- The rules on timeliness also affect the suspension of performance.

Pre-award Challenges to the Solicitation

- Basic rule: Protests alleging improprieties in a solicitation must be filed before bid opening or the time set for receipt of initial proposals if the improprieties were apparent prior to that time.

Post-award Challenges: Ten Day Timeliness Rule

- In all other cases, protests must be filed not later than 10 days after the protester knew or should have known the basis of protest (whichever is earlier)

Post-award Challenges: Debriefings

- Exception to ten day rule
- Protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is “requested and, when requested, is required” (that is, a debriefing that is required by law).
 - In these cases, with respect to any protest basis that was known or should have been known before the statutorily required debriefing, the protester should not file its initial protest before the debriefing date offered to the protester, but must file its initial protest not later than 10 days after the date on which the debriefing was held.

Protests Following Agency-Level Protests

- Special timeliness rules govern protests initially filed with the contracting agency.
 - In those cases, the protest to GAO must be filed not later than 10 days after the protester learned of “initial adverse agency action.”
 - The agency-level protest must have been filed within 10 days of when the protester knew or should have known of the grounds for protest, unless the agency provides for a shorter time.

Decision Timetable

- Once the record is complete, GAO will consider the protest and decide the case through a written decision issued by the Comptroller General.
- GAO will either dismiss, deny, or sustain a protest.
- By law, the must be issued no later than 100 days after the protest was filed (which is 14 weeks and 2 days).

Evaluation of the Protest

- GAO does not reevaluate proposals or substitute its judgment for that of the agency; a protest will only be sustained where the agency's position was unreasonable or arbitrary.
- The protest must demonstrate violation of a federal procurement statute or regulation.
- The protest must fall within the jurisdictional boundaries of GAO's bid protest authority.

Where GAO Has No Jurisdiction

- Procurements by agencies that do not meet statutory definition of “federal agency”
- Procurements conducted by certain agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, the Federal Aviation Administration, and procurements by nonappropriated fund activities
- Protests of actions that are not “procurements,” e.g. certain “other transactions”
- Contract administration issues
- Certain Small Business Administration issues
- Subcontract protests
- Suspensions and debarments
- Issuances of task and delivery orders under indefinite-delivery, indefinite-quantity (ID/IQ) contracts below \$10M, absent certain limited exceptions

GAO Publications

- Revised Descriptive Guide to Bid Protests
- Revised Guide to Protective Orders:

<http://www.gao.gov/legal/bidprotest.html>

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SECTION II

Determining Whether to Protest



- Determining whether to protest is a matter of business judgment, as well as legal strategy
 - Any decision to file a protest will depend on numerous factors, including:
 - the timeliness of the protest grounds
 - the type of contract or task order contemplated by the procurement, as well as the value of the contract to the contractor's business
 - the contractor's status and the remedies that may be available if the protest is ultimately sustained
 - the nature of the potential protest grounds at issue and prejudice
 - the protester's relationship with the customer
 - the point in the procurement process when the potential protest grounds emerge, and the amount of information that the potential protester has about those grounds

Determining Whether to Protest: Timeliness



- Timeliness is always the threshold issue in deciding whether to protest
 - Contractors who gain knowledge of potential grounds of protest, either pre-award, such as solicitation defects, or post-award, regarding the agency's evaluation of the contractor or the award decision, must quickly decide whether or not to protest
 - GAO has very short deadlines for protests
 - Agencies will attempt to utilize these short deadlines to request dismissal of protests as untimely filed

Determining Whether to Protest: Type and Value of Contract



- Contractors must analyze the value of the contract and how much the lost procurement opportunity may negatively impact their future business with this customer and overall profitability
- Contract type is also a valid consideration from a profitability perspective

Determining Whether to Protest: Contractor Status



- Incumbency status may also heavily influence a contractor's decision to protest
 - A timely-filed protest will stay performance of the new contract and will often allow an incumbent contractor to continue its performance of the prior contract for the duration of the protest
 - This stay of the awardee's performance of the new contract will generate continued revenues for the incumbent contractor
 - The agency may "override" the automatic stay under appropriate circumstances, i.e., based upon "urgent and compelling circumstances" or the "best interests" of the United States
 - The protester may challenge any such override at the U.S. Court of Federal Claims

Determining Whether to Protest: Prejudice



- Not only must a protester allege a procurement violation, but the protester must also allege and prove that the alleged violation prejudiced the contractor, i.e., that but for the violation, the contractor would have had a substantial chance of receiving the award
 - Contractors should always consider whether they were next in line for award and/or if they would have had a substantial chance at being awarded the contract but for the agency's procurement violation

Determining Whether to Protest: Customer Relations



- There may be agency-contractor relations issues which could be impacted by a protest
 - Contractors must assess whether a protest could harm their ongoing business relationship with the procuring agency, as well as future contracting opportunities
 - Contractors must seriously consider whether the relief requested, if granted, would be worth the cost and disruption of the protest

Determining Whether to Protest: Information-gathering Via Debriefings



- FAR 15.505 and 15.506 govern debriefing procedures both before and after award
 - Under FAR 15.505, offerors that are excluded from the competition before award may request a debriefing before award within 3 days after receipt of the notice of exclusion from competition
 - Under FAR 15.506, an offeror may request a post-award debriefing within 3 days after the date on which the offeror received notification of the contract award.
- Under both FAR 15.505(c) (preaward) and FAR 15.506(b) (postaward), debriefings may be given orally, in writing, or by any other acceptable method
- Because the FAR does not prescribe any required method of debriefing, agencies have developed different approaches to the conduct of debriefings
 - For example, the agency may conduct a formal debriefing in the form of an in-person meeting or teleconference
 - Alternatively, the debriefing may consist of a written statement with short responses to the contractor's follow-up questions

Determining Whether to Protest: Debriefings



- Although the agency is required to disclose its evaluation of significant elements of the offeror's proposal, as well as deficiencies and significant weaknesses in an offeror's proposal, the agency's disclosures may be vague and incomplete
- Thus, disappointed offerors sometimes protest to obtain details of the agency's evaluation and to better understand the basis for the agency's exclusion/award decision
- Contractors should always request a copy (redacted as necessary) of the agency's Source Selection Decision Document



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Determining Where to Protest / Choice of Protest Forums



GAO, Court of Federal Claims (COFC) and contracting agency

- Factors in Choosing Where to File
 - Stopping Performance, GAO--stay automatic if procedures followed; COFC--seek injunction; agency stay process, **COFC can review overrides**
 - Costs, GAO may recommend the agency pay the protester's costs of pursuing protests and, in appropriate cases, bid/proposal preparation costs, COFC can grant injunctive relief; limited costs
 - Success rate
 - Expertise/Predictability (Substantive law applied--are there differences?)
 - Jurisdictional differences (Task Order Jurisdiction)

Some numbers...



- GAO received 2,299 protests in FY 2011 (a 16 percent increase over the FY 2010 level), but GAO gained task order jurisdiction in 2009.
- The Court of Federal Claims receives approximately 60-70 protests per year. However, Fiscal Year 2010 numbers could double.
- Many protests are filed with contracting agencies directly--no statistics available.

What You Need to Know about GAO as a Forum



- 100 days to decide protest
- No filing fee
- If protester wins, can be reimbursed costs of pursuing protest
- If protester files timely, agency must automatically stop procurement unless implements override procedure
- Less Expensive than Court

GAO Bid Protest Statistics- What you Need to Know



- GAO is the primary forum for protests
- 75% of protests are resolved without written decision—of those where a decision is issued, protester wins approximately 20%
- Effectiveness rate at GAO is approximately 45%, chances of some favorable relief for protester is high
- Protest can have meaningful impact for both the protester (unsuccessful offeror) in terms of potential relief and intervenor (awardee) who must defend award and face delay in performing contract
- Protests can have serious business consequences

Decisions



- GAO will either dismiss, deny, or sustain a protest.
- GAO generally sustains protests where it determines that the contracting agency violated procurement statutes or regulations, unless violation did not prejudice the protester
- GAO recommendations are not binding, but they are followed more than 95 percent of the time. If not, GAO reports the agency to Congress.
- A decision is issued publicly--Only proprietary, competitive advantage information and source selection sensitive information will be removed. Expect to see past performance information and evaluated prices in public decision

SECTION IV

Standing Requirement

- The protester must be an interested party; an actual or prospective bidder or offeror with a direct economic interest in the procurement.
- The protest grounds must demonstrate that the protester was prejudiced; i.e. but for the agency's actions, the protester would have had a substantial chance of receiving the award.
 - Examples:
 - Challenges to only a part of evaluation
 - Not next in line for award
 - Subcontractor claims

SECTION IV

C. Documents to File



- In addition to the protest itself, which contains the factual and legal bases of the protest, a contractor should attach any additional documentation which is referenced in the protest and which may support the protestor's grounds of protest
 - Such documents may include:
 - The solicitation (especially the evaluation criteria)
 - Any proposal documents or other materials submitted by the protestor in response to the agency's request for proposals
 - Any notice to the protestor as an unsuccessful offeror
 - Any agency communications to the protestor which are relevant to the protest
 - Debriefing materials provided by the agency and the source selection decision (if the protestor has obtained a copy)

Keys To Winning Protest at GAO



- Protest must--
 - demonstrate violation of a federal procurement statute or regulation
 - GAO must find violation competitively harmed the protester (prejudice)
- Intervenor/Awardee --
 - can and should challenge protester on any of these points and jurisdiction where possible

Remedies Available



- Where a protest is sustained, GAO will recommend appropriate corrective action such as reevaluation and termination of the improperly awarded contract.
- Relief tailored to specific impropriety. Examples:
 - Revisions to solicitation
 - Re-evaluation of proposals
 - Further negotiations with offerors
 - Termination of contract & award to protester (rare)
 - If no other relief possible: reimbursement of bid or proposal costs
 - Reimbursement of costs of protesting (with cap)
- No lost profits
- Losing protester does not reimburse agency's litigation costs
- COFC basically has same remedies except the Court can enjoin, not just recommend. Protest costs only through EAJA.

Recovery of Fees



- If the protest is sustained in a Decision, GAO generally will recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees.

Recovery of Fees – Agency Corrective Action



- Agencies may take corrective action on its own. Protester may seek entitlement to protest costs Based on Corrective Action
 - For the agency:
 - Right thing to do.
 - Upholds integrity of procurement process
 - Avoids further, unnecessary delay while GAO develops record and reaches decision on current protest.
 - Even if protest of implementation of corrective action is likely, agency will be in a better position to defend new source selection decision than prior flawed source selection process.
 - Affords contracting agency, not GAO, the initial opportunity to determine the nature and extent of the corrective action.

Recovery of Fees – Agency Corrective Action (continued)



Agency may avoid reimbursement of protest costs if determination to take corrective action announced by date of report.

- GAO will recommend reimbursement of protest costs where corrective action both:
 - (1) in response to clearly meritorious protest, and
 - (2) unduly delayed.
 - Not unduly delayed if corrective action announced by report.
 - Need only be announced, not completed, by report.
 - Costs if undue delay in implementing.
 - Each protest and supplemental protest stands on its own.

Recovery of Fees – Agency Corrective Action (Continued)



- Period before filing clearly meritorious protest generally not considered.
 - E.g., agency-level protest.
 - Louisiana Clearwater exception, B-283081.4, Apr. 14, 200, 2000 CPD ¶ 209 (where new protest is necessitated by agency failure to carry out promised corrective action in response to prior protest, costs for 1st and 2nd protest).

Reimbursement After Corrective Action



- If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees.
 - The protester shall file any request that GAO recommend that costs be paid within 15 days of the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action.
 - The protester shall furnish a copy of its request to the agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester.

Filing Cost Claim Where GAO Recommends Reimbursement



- If GAO recommends that the agency pay the protester the costs of filing and pursuing the protest and/or of bid or proposal preparation, the protester and the agency shall attempt to reach agreement on the amount of costs.
 - The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the agency within 60 days after receipt of GAO’s recommendation that the agency pay the protester its costs.
 - Failure to file the claim within that time may result in forfeiture of the protester’s right to recover its costs.
 - The agency shall issue a decision on the claim for costs as soon as practicable.

Attorneys' Fees Capped for Large Businesses



- Where the Comptroller General recommends that a successful protester's costs, including reasonable attorneys' fees, be reimbursed, those fees are capped at \$150 per hour, except where the protester is a small business concern.
- This hourly rate may be increased where the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.
- Recently, GAO authorized attorney fee rate of \$211.12 per hour using DOL's CPI. *Transportation Security Administration – Costs*, B-400340.8, May 20, 2010.

Tips – For Protester or Intervenor



- Facts are Critical to Winning or Losing a Protest
 - Monitor FedBizzOpps for Notices of Sole Source, Amendments etc.
 - Maintain records of conversations with agency officials including dates
 - Ask questions if you don't understand parts of solicitation-resolve ambiguities
 - Ensure proposal is complete and responsive-make sure everything is part of written proposal
 - Answer all questions agency asks
 - address past performance

Post-Award Keys for Protester



- Need to be aware and follow Debriefing Procedures –
 - The rules governing the timing and contents of a statutorily required debriefing are contained in Part 15 of the Federal Acquisition Regulation
 - Debriefing critical fact-finding effort -- ask about process followed by agency and why you lost
 - Need to follow deadlines under debriefing rules to obtain Statutory Stay
 - Use internet to find out about competitor
 - Freedom of Information Act Requests

Intervenor in Protest has a lot at Stake



- Awardee should request debriefing – understand process and basis for award
- Need to participate and help agency defend procurement – it is your contract in jeopardy
- You know your product and services as proposed in your offer—opportunity to educate GAO
- Correct Protester’s misstatements
- Remember—What You Did Contemporaneously is Critical
- Be prepared to furnish witnesses if GAO convenes a hearing

Potential Winning Protest Issues



- Agency failed to follow ground rules
- Agency failed to document record of selection decision
- Agency did not conduct meaningful discussions
- Awardee is non-compliant with solicitation
- Challenge to sole source
- Cost evaluation conducted improperly
- Conflicts of interest exists
- Small business issues

Potential Losing Protest Issues



- Protester did not follow solicitation ground rules
- Protester disagrees with Agency's technical conclusions or award decision
- Not prejudiced by Agency action
- Challenge to Agency needs
- Correcting ambiguity or flaw in protester's proposal
- Challenge that awardee's cost unrealistically low
- Challenge to Agency decision that proposal was late
- Challenge to Agency corrective action

*Remember: Protester must meet procedural filing requirements

SECTION V

Deciding When to Intervene



- After the filing of a protest, the agency must notify interested parties
- If an award has been made, GAO will permit the awardee to intervene in a protest
- If award has not been made, any other offeror wishing to intervene must notify GAO and the agency and provide support concerning its "interested party" status
- GAO often declines to allow intervention by other offerors in preaward protests
- The awardee, as intervenor, will receive access under the protective order and will receive the agency report in the protest, as well as have the opportunity to comment on the agency report and assist the agency in its defense on procedural or substantive grounds