

# “To Protest, or Not to Protest... THAT is The Question”

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# Overview

- We will be covering:
  - Statistical overview of bid protests
  - Common types of protests and what to consider with each type
    - Flawed Evaluations
    - Discussions with Agency
    - FSS Contracts and Task Order Issues
    - Solicitation Issues
    - Past Performance
    - Best Value Analysis

# Protest Venues

- Agency level protests
- Court of Federal Claims
- US Government Accountability Office

# Protest Venues

- Agencies: Many protests are filed with contracting agencies directly—no statistics available.
- The Court of Federal Claims receives approximately 60-70 protests per year.

# Bid Protest Statistics for Fiscal Years 2010 to 2014

	<b>FY2015</b>	<b>FY2014</b>	<b>FY2013</b>	<b>FY2012</b>	<b>FY2011</b>
<b>Filed</b>	2,639	2,561	2,429	2,475	2,353
<b>Change Over Previous Year</b>	3%	5%	(2%)	5%	2%
<b>Closed</b>	2,647	2,458	2,538	2,495	2,292
<b>Effectiveness Rate</b>	45%	43%	43%	42%	42%
<b>Hearings</b>	3.10%	4.7%	3.36%	6.17%	8%



# To Protest or Not?

- Incumbency;
- Stage of Procurement;
  - Pre-award
    - Prebid
    - Down-select
  - Post-award

# Prebid Protest

- Terms of the Solicitation
  - May only be protested prior to the date that bids/proposals are due
  - Insufficiently detailed statement of work;
  - Ambiguous or internally inconsistent evaluation criteria;
  - Inadequate preparation time;
  - Unduly restrictive requirements.

# Flawed Evaluations

- Most difficult type of protest.
- “Mere disagreement with agency findings” insufficient basis to support a protest
- To succeed, must generally show some objective mistake.





# Successful Evaluation Protests

- Procedural Error
  - Agency allowed a procedural failure of the Awardee to stand (Excessive Page limits, noncompliant line spacing, etc).
- Unequal treatment of offerors
- Factual Error

# Discussions with Agency

- If Agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range.
- Additionally, Agency is not permitted to engage in conduct that favors one offeror over another (i.e. unequal discussions)

# Discussions with Agency

- Discussions, when conducted, must be meaningful; that is, they must identify deficiencies and significant weaknesses in offeror's proposal that could reasonably be addressed so as to materially enhance the offeror's potential for receiving award

# Discussions with Agency

- The content of discussions is largely a matter of the contracting officer's judgment
- However, an Agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address Agency's actual concerns, or otherwise misinforms offeror concerning a problem with its proposal

# Discussions with Agency

- Specifically, Agency may not, through its questions or silence, lead offeror into responding in a manner that fails to address Agency's actual concerns; many not misinform offeror concerning a problem with its proposal; and may not misinform offeror about the government's requirements
- Thus, for example, where Agency advises offeror in discussions to revise its proposal in a way that does not reflect Agency's evaluation or concerns, the discussions are misleading



# FSS Contracts and Task Order Issues

- FAR Part 15 does not apply to FSS awards under FAR Subpart 8.4
  - No required debriefing
- Standards are much less rigorous
  - Example: When conducting discussions, Agency does not have to follow FAR 15.306. Agency only has to conduct “fair and equitable” discussions
- While FAR Part 15 does not govern Subpart 8.4 procurements, GAO has looked to the Part 15 standards and decisions thereunder for guidance in determining whether exchanges with vendors under a FAR Subpart 8.4 procurement were fair and equitable

# FSS Protests

- Labor Qualifications
  - The labor categories listed in the underlying FSS contract must substantially match the labor categories in the Subpart 8.4 solicitation.
- Once Agency decides to use FSS – all items and services under the procurement must be available under the awardee's FSS contract

# Solicitation Protests – Unduly Restrictive Solicitation

- Agency is required to specify needs and solicit offers in a manner that achieves full and open competition
- Solicitations can only have restrictive provisions if those restrictions are necessary to satisfy Agency's needs (or as authorized by law)
- If protest challenges specification as unduly restrictive or challenges Agency's need for restriction, Agency has burden of establishing spec as reasonably necessary
  - This is done by examining whether Agency's explanation is reasonable; i.e. explanation must withstand logical scrutiny



# Solicitation Protests – Unduly Restrictive Solicitation (cont.)

- Additionally, FAR requires that contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those restrictive clauses that are determined to be consistent with customary commercial practice (FAR 12.301 (a)(2))
- This provision is applicable to establishment of FSS BPAs under FAR Subpart 8.4
- In establishing acquisitions for commercial items, FAR 10.002(b) requires market research by the acquiring agency to address (among other things) customary practices regarding provision of commercial items
- Consistent with that provision, FAR 12.302(c) bars the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice unless a waiver is approved in accordance with Agency procedures.

# Solicitation Protests – Unduly Restrictive Solicitation (cont.)

- As with any protest, GAO will not sustain protests of solicitations unless protestor demonstrates a reasonable possibility that it was prejudiced by Agency's actions
- In the context of solicitation protests, competitive prejudice occurs where the challenged terms place the protestor at a competitive disadvantage or otherwise affect the protestor's ability to compete

# Solicitation Protests – Ambiguous Terms

- A solicitation ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible
- As a general rule, solicitations must be drafted in a fashion that enables offerors to intelligently prepare their proposals and must be sufficiently free from ambiguity so that offerors may compete on a common basis

# Solicitation Protests – Ambiguous Terms

- Obvious, gross, or glaring errors are patent ambiguities
- Latent ambiguities are subtle, and are often seen in context where both parties' interpretation of a solicitation provision may be reasonable
- Appropriate course of action is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement

# Solicitation Protests – Misleading Results Flowing from Solicitation

- Agency must consider cost in evaluating proposals
- Though Agency has discretion to decide on appropriate and reasonable method of evaluating prices, Agency must not use method that produces misleading result
- Method chosen must include some reasonable basis for evaluating or comparing relative costs of proposals

# Solicitation Protests - GAO Timeliness

- Improproprieties or errors in solicitation apparent on their face:
  - Before bid opening or final submission of proposal
  - Example: failure to hold discussions.
- Protest grounds other than patent errors in the solicitation:
  - No later than 10 days after the date the basis was known or should have been known.

# Past Performance Protests

- As an overview, it is important to remember that GAO will not reevaluate proposals during a bid protest but instead will examine the record to determine whether the Agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations
- Determining merit or relevance of past performance is a matter within the Agency's discretion – GAO will not substitute its judgment for reasonably based (and documented) evaluations

# Past Performance Protests

- Critical questions:
  - was evaluation conducted fairly, reasonably, and in accordance with solicitation's evaluation scheme
  - Was evaluation based on relevant information sufficient to allow Agency to make a reasonable determination of offeror's past performance
  - was evaluation adequately documented



# Past Performance Protests

- GAO will question an Agency's past performance evaluation where record indicates that Agency either failed to evaluate, or otherwise unreasonably considered, the relevance of past performance references in accordance with solicitation's stated evaluation criteria
- An evaluation is unreasonable where solicitation requires Agency to consider relevance of offerors' references as compared to the solicited requirement and the Agency fails to document any evaluation of relevance

# Best Value Protests

- Source selection officials enjoy broad discretion in making tradeoffs between comparative merits of competing proposals in a best-value setting
- Such tradeoffs are governed only by the test of rationality and consistency with the solicitation's evaluation criteria
- It is the function of the source selection authority to perform a tradeoff between cost and non-cost factors; that is, to determine whether one proposal's superiority under non-cost factor(s) justifies a higher cost to Agency

# Best Value Protests

- Documentation is often a key factor in determining whether a best value protest succeeds
- As stated before, GAO examines the record to determine whether Agency's judgment was reasonable and consistent with solicitation terms
- In order to review record, there must be a record
- FAR requires that agencies sufficiently document their judgments, including documenting the relative strengths, deficiencies, and risks supporting their evaluations
- "An Agency that fails to adequately document its source selection decision bears the risk that [GAO] may be unable to determine whether the decision was proper."

# Best Value Protests

- Where Agency undertakes a cost/technical tradeoff, adequate documentation requires more than just generalized statements of proposal equivalency where the record reflects the existence of differences in proposals
- Source selection decisions that lack substantive analysis or consideration of whether one proposal is superior to another are insufficient to demonstrate the reasonableness of the Agency's decision

# Strategies for Success

- Facts are critical to winning or losing a protest.
- Maintain records of conversations with agency officials including dates.
- Ensure proposal is complete and responsive.
- Make sure everything is part of written proposal.
  - Answer all questions agency asks.
  - Address past performance.

# Strategies for Success

- Review solicitations carefully for ambiguities and inconsistencies:
  - The first step is to alert the agency.
  - Take advantage of the period available to ask questions and for clarification.
  - Consider whether any agency protest might be successful, but be mindful of deadlines for taking protest to GAO.
  - Do not fail to protest a defective solicitation before award for fear of upsetting the agency. It's your only opportunity.

# Strategies for Success

- Consult counsel early in the process.
  - Bid protest filings often require extensive document review, research, and production.
  - Filing deadlines require early engagement.
- Submit written requests for debriefing.
  - Debriefing can identify whether there are sufficient grounds to protest.
  - Can improve proposal writing in the future.

# Questions?

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