

Win or Lose: How to Manage Bid Protests

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Robert K. Stewart, Jr.
Davis Wright Tremaine LLP
188 W. Northern Lights Blvd., Suite 1100
Anchorage, AK 99503

This outline is intended as a survey of the key issues that businesses and their legal counsel may face if they compete for public contracts awarded by agencies of the federal government.

I. Types of Procurements.

A. Invitations to Bid - Invitations to Bid (“ITBs”) are characterized by a set of specifications created by the agency which must be met with evaluation based solely on the lowest priced compliant offer.

B. Requests for Proposals - Requests for Proposals (“RFPs”) typically are used where an agency desires proposers to offer solutions to a set of general requirements and the submittals are evaluated on a set of stated subjective criteria in addition to price. The criteria typically include understanding of agency requirements, key personnel, organizational experience, past performance and similar factors. This is typically the type of procurement used for more complex construction projects.

C. Exercise of Options - It is often overlooked that in the federal system where a contract has a fixed initial term and option years, that an unsuccessful bidder can protest the exercise of the options.

II. Time for Protest.

A. SBA Size Criteria - If a procurement involves a federal small business set aside, any protest to the NAICS classification assigned to the procurement must generally be made within 5 days of issuance of the solicitation. The SBA is typically very strict about its procedural requirements.

B. Terms of Solicitation.

1. Federal - A protest to the Government Accountability Office (“GAO”) concerning the structure of a solicitation must be made prior to bid opening or the time set for receipt of proposals. 4 CFR 21.2(a)(1).

3. Policy Rationale - The purpose for these requirements is to give the procuring agency an opportunity to correct any defects in the procurement documents or structure through amendment of the solicitation before prices and proposals are disclosed.

C. Protests Concerning Award.

1. Protests relating to the award or prospective award of a contract must be filed on a moving deadline which is not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Regarding RFPs, where a debriefing is required if requested, any protest based on information which is known or should have been known either before or as a result of the debriefing cannot be filed before the debriefing date offered to the protester, but must be filed not later than 10 days after the date on which the debriefing is held. 4 CFR 21.2(a)(2). Government accommodation of a request for delayed debriefing or any untimely debriefing request will not automatically extend the deadlines for filing protests. 48 CFR 15.506.

D. Late Protests.

1. Federal - The GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest. 4 CFR 21.2(c).

E. Court of Federal Claims - The United States Court of Federal Claims (“COFC”) also has original jurisdiction over federal protests. There is no specific statute of limitations for the filing of a protest with the COFC, except perhaps a defense based on laches. As discussed below, few federal protests are initially filed with the COFC because the automatic stay provisions of the Competition in Contracting Act (“CICA”) apply only to protests filed with the GAO, not with the COFC.

III. Debriefing.

A. Federal.

1. Preaward - Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 253b(f)-(h)). Preaward debriefings must 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. Preaward debriefings may 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 any of the information prohibited regarding postaward debriefings. 48 CFR 15.505.

2. Postaward - If requested in writing within 3 days of notification of contract award, an offeror in the competitive range shall be debriefed and furnished the basis for the selection decision and contract award. The postaward debriefing information must 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. A postaward debriefing should not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors or the disclosure of information or documents exempt under FOIA 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 and the names of individuals providing reference information about an offeror's past performance. 48 CFR 15.506.

C. Potential Reforms - The U.S. Air Force is experimenting with early disclosure procedures which might reduce the number of non-meritorious protests and allow the service to correct errors at early stages of the procurement process. While early disclosure would certainly be beneficial, there are confidentiality considerations which have not yet been resolved.

IV. Contents of a Protest.

A. Federal - A protest filed with GAO must include the name, street address, electronic mail address, and telephone and facsimile numbers of the protester; be signed by the protester or its representative; identify the agency and the solicitation and/or contract number; set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents; set forth all information establishing that the protester is an "interested party" for the purpose of filing a protest; set forth all information establishing the timeliness of the

protest; specifically request a ruling by the Comptroller General of the United States, and state the form of relief requested. 4 CFR 21.1(c).

In addition, a protest filed with GAO may request a protective order, request specific documents, explaining the relevancy of the documents to the protest grounds, and request a hearing, explaining the reasons that a hearing is needed to resolve the protest. 4 CFR 21.1(d).

The protest document must be clearly labeled if it contains information that the protester believes is proprietary, confidential, or otherwise not releasable to the public. In those cases, within 1 day after filing the protest with GAO, the protester must provide to GAO and to the agency a redacted version of the protest that omits such information

C. Interested Parties - Only interested parties may file protests. In the federal system, an 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. 4 CFR 21.0(a).

D. Other Good Practices - Other good practices include making a statement concerning timeliness; making a statement concerning stay of award or suspension of performance; requesting documents with as much specificity as possible and requesting a hearing.

V. Stay or Suspension of Award.

A. Federal - When a federal agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except when the head of the contracting activity authorizes contract performance based upon a written finding that contract performance will be in the best interests of the United States or that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision. 48 CFR 33.104(c).

There is a trap here for the unwary. To obtain the stay, the protest must be filed with the GAO a day earlier than stated above because the GAO has one day to transmit a protest to the agency.

VI. Getting the Record.

A. Federal - In protests before the GAO, a protestor generally does not get access to the bid file until the agency files its report 30 days after the protest is filed. 4 CFR 21.4(c). On occasions, agencies may make

voluntary early disclosures of certain source solicitation records. A useful strategy is to immediately file a FOIA request for all relevant documents.

VII. Protective Orders.

A. Federal - The GAO, as well as the COFC, has sophisticated procedures established for the issuance of protective orders to facilitate access to procurement records while protecting the confidentiality of proposals and the agency decision making process. 4 CFR 21.4. The Guide to GAO Protective Orders is comprehensive and available at <http://www.gao.gov/products/GAO-09-770SP>. It should be noted that protestors themselves are not permitted access, only their attorneys and authorized outside consultants not involved in the entities contracting function.

VIII. Discovery.

A. Federal - There are no specific discovery provisions in GAO protests except that at least 5 days prior to the filing of its report, the agency shall respond to any request for documents the protestor has made. The agency's response must identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency's proposed disclosure or nondisclosure of documents must be filed by the protestor within 2 days of receipt of this list. 4 CFR 21.3(c).

IX. Protest Supplementation.

A. Federal - Because the GAO's rule permits filing of protest grounds on a rolling basis within 10 days of the date information becomes known, or should have been known, to the protestor, supplementation of protests is authorized and common.

X. Intervention.

A. Federal - The GAO rules expressly authorize intervention by an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied. 4 CFR 21.0(b).

XI. Federal Procedural Overview.

A. Federal - The GAO process provides for a protest, the agency report 30 days after that and an opportunity for the protestor to comment on the agency report within 10 days. 4 CFR 21.3. In appropriate cases, the GAO will conduct

informal conferences with the parties indicating how it is evaluating a protest in the interest of voluntary corrective action of protest withdrawal.

XII. General Concepts.

A. Responsiveness/Responsibility - The concept of responsiveness involves whether a proposer has materially complied with the technical requirements of a procurement. It is one of the factors which should be examined most closely in determining whether to file a protest. The concept of responsibility has to do with whether an entity has the organizational capacity to perform. Generally a procuring agency is accorded a great degree of discretion in deciding issues of responsibility.

B. Price Reasonableness/Realism - The related concepts involve the questions of whether the price offered is either too high or too low. Price reasonableness is addressed in most procurements and examines whether the price offered by the putative awardee is in line with those anticipated in the market. Price realism, on the other hand, examines whether the price offered is adequate such that the agency can expect performance rather than default or attempts to gain price adjustments.

XIII. Some Common Protest Issues.

A. Timeliness - The federal system has an inflexible late-is-late rule. Geo-Seis Helicopters, Inc. This is similar to Alaska law where bids received after the bid due date and time indicated on the invitation to bid may not be accepted unless the delay was due to an error of the contracting agency. AS 36.30.160(a). A similar rule applies to RFPs. 2 AAC 12.250.

B. Responsiveness - As discussed above, a bid or proposal must materially comply with all required terms and conditions of a procurement to be deemed responsive.

C. Evaluation/Stated Terms - It is a fundamental principle of competitive procurements that competitors be treated fairly, and fairness in competitions for procurements is largely defined by an evaluation that is reasonable and consistent with the terms of the solicitation. For that reason, agencies are required to identify the bases upon which offerors' proposals will be evaluated and to evaluate offers in accordance with the stated evaluation criteria. Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(2)(A), (b)(1) (2000); FAR §§ 15.304(d), 15.305(a); Sikorsky Aircraft Co.; Lockheed Martin Sys. Integration-Owego, B-299145 et al., (Feb. 26, 2007).

D. Key Personnel - Key personnel are often a material component in evaluating a proposal. If those personnel are not available, or if there is evidence

that they have been assigned to other projects or do not meet the requirements of the procurement, that may constitute a basis for protest.

E. Unduly Restrictive Terms - The CICA has a provision which generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent “necessary to satisfy the needs of the executive agency.” 41 U.S.C. § 253a(a)(2)(B).

F. Cardinal Change - The cardinal change principle prohibits an agency from negotiating material changes in contract terms after an awardee is selected. The policy rationale is that if the terms are changed materially, then a procurement should be rebid so that all proposers have an opportunity to respond to the modified terms and conditions.

G. Ambiguity - An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A party’s particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached. DynCorp Int’l LLC, B-289863, B-289863.2 (May 13, 2002); Aerospace Design & Fabrication, Inc., B-278896.2 et al. (May 4, 1998).

H. Incorrect Evaluation - This is probably the most commonly alleged form of defect and the least likely of all arguments to succeed. Procuring agencies are given great latitude in the evaluations they conduct and administrative reviewers are loath to substitute their judgment for reasonable action by an agency. Therefore, the evaluation of offerors’ technical proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency’s discretion because the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., B-401062.5 et al. (Oct. 29, 2010). In reviewing an agency’s evaluation, the GAO will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and procurement statutes and regulations, and to ensure that the agency’s rationale is adequately documented. Carothers Constr., Inc., B-403382 (Oct. 28, 2010).

XIV. Remedies.

A. Federal - Where it finds a protest has merit, the GAO can recommend that the agency implement any combination of the following remedies: Refrain from exercising options under the contract; terminate the contract; recompet the contract; issue a new solicitation; award a contract consistent with statute and regulation or make such other recommendation(s) as GAO determines necessary to promote compliance. 4 CFR 21.8(a). In determining the appropriate recommendation, the GAO is to consider all circumstances surrounding the

procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the agency's mission. 4 CFR 21.8(b). The GAO has the authority to recommend that an agency pay the protester's costs of filing and pursuing the protest, including attorneys' fees and consultant and expert witness fees, and bid and proposal preparation. 4 CFR 21.8(d). It should be noted that the GAO has authority only to make recommendations.

On the other hand, the COFC, as an Article III court, has the power to issue injunctions granting essentially the same range of relief. It also has the power to award attorneys' fees under the Equal Access to Justice Act.