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**PROGRAM MATERIALS**  
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## **Asserting and Defending Bid Protests for Federal Contractors**

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# Asserting and Defending Bid Protests For Federal Government Contractors

Presented By:

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# Meet the Presenter

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# It All Starts with a Requirement. . .



In a nutshell...

- Government Identifies a Need
- Solicitation is Put “Out on the Street”
- Contractors Compete
- Awardee(s) Chosen
- Performance or Protest!

\*\* *FBO* → *Beta Sam*

# What Laws Govern Protests?

- Federal Acquisition Regulation (FAR)
  - Click [HERE](#) for the complete document
- Forum Rules

# FAR Organization

- The FAR is codified in Title 48 in the Code of Federal Regulations.
  - Chapter 1 is the FAR itself
    - Parts 1-51: Administration and Instructions
    - Part 52: Solicitation Provisions and Contract Clauses
- FAR **Part 33.1** Deals with Protests
  - But substantive argument bases might be impacted by other FAR sections
- Agency Supplemental Regulations



# *Asserting Protests*

# What Type of Protest Is It?



- **\*\*Bid Protests\*\***
  - Challenge raised by contractor (competitor), based on alleged improprieties in source selection process (i.e. failure of agency to comply with applicable law, 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)

*All of these relate to a specific procurement*



# Critical Questions: What Type of Procurement?

- FAR Part 14 Sealed Bidding
- FAR Part 15 Contract by Negotiation

# Critical Questions: What Type of Procurement?

- FAR Part 15 Contract by Negotiation
  - Competitive Range?

# Critical Questions: What Type of Procurement?

- FAR Part 15 Contract by Negotiation
  - LPTA?

# Critical Questions: What Type of Procurement?



- Part 8 - Required Sources of Supplies and Services
  - 8.4 – Federal Supply Schedules
- Part 12 – Acquisition of Commercial Items
- Part 13 – Simplified Acquisition Procedures
- Part 16 – Types of Contracts
  - 16.5 – Indefinite Delivery Contracts
- Part 17 – Special Contracting Methods

# Critical Questions

- What type of contract?
  - Is the contract award at issue an IDIQ? Set-aside contract? A Task Order? Under a GWAC? Etc.
- Who are you dealing with?
  - One Agency, or multiple Agencies? Which role is which agency playing?
  - Task Order Dollar Thresholds?
  - DoD Debriefing Rules?
- How many awards are being made?
- What is the scope of work/services contemplated by the solicitation?
- Does the contractor want a stay?

# Bid Protest Fundamentals: Where?



## Where are Protests Heard?

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

# Bid Protest Fundamentals: Where?

## Which Forum is Right for You?

- Cost of Litigation v. Size of Contract at Issue
- Complexity of Issues
- Objectivity (Agency Counsel v. DOJ)
- Stay/Injunctive Relief
- Jurisdictional Concerns
- Coordination with Similarly Situated Protestors (GAO/COFC)

# Bid Protest Fundamentals: How?

How do Protests Work? How do they Progress?

- Very Condensed Litigation
  - Protest
  - Docketing/Protective Order
  - Agency Record/Report
    - (- 5 days, “Five Day Letter”)
  - Comments to Agency Report /Supplemental Protests
    - Potential Additional Rounds
  - (Hearing?)
  - Decision

What is Corrective Action?



# Bid Protest Fundamentals: Why?

## What Types of Issues are “Protestable?”

### Pre-Award Protests Based on Errors in Solicitation

- Ambiguous or contradictory terms
- Inclusion of wrong or prohibited provisions
- Exclusion of required terms/provisions
- Unduly restrictive terms
- Set-aside/“rule of two”/Kingdomware issues

# Bid Protest Fundamentals: Why?

## What Types of Issues are “Protestable?”

### Common Non-Price Evaluation Factor Issues

- Unequal or disparate treatment of offerors
- Unstated evaluation criteria or subfactor, etc.
- Error in applying evaluation criteria/assigning ratings
- Discussions
  - Meaningful
  - Misleading
  - Uneven
  - (v. Clarifications)

# Bid Protest Fundamentals: Why?

## What Types of Issues are “Protestable?”

### Common Price Issues

- Price Reasonableness
- Price Realism
- Balanced Pricing
- HUBZone Preference
- Wage Determination Issues

# Not All Protests Are Created Equal



## How Do You Decide When To Pursue a Protest . . . and When To Let it Go?

- **Cost v. Likelihood of Success**
  - Forum, Number of Parties, Rounds of Briefing
  - Speculative or Based on Good Intel?
  - Objective v. Subjective Arguments; Discretion, Deference and Clear Error
  - Procedural Arguments?
  - “Sometimes You Don’t Know if You Have a Protest....” No Longer a Viable Gambit
  - Ultimate Benefit or Empty Victory?
- **Practical Concerns**
  - Agency Relations?
  - Do you want (and can you get) a Stay?

# Bid Protest Fundamentals: Who?

## Not Everyone Can Protest. You Must Be an “Interested Party” to Have “Standing”

- (1) Actual or prospective bidder or offeror, (2) whose direct economic interest would be affected by award of contract or by failure to award contract
- Must show prejudice
- Key questions:
  - Were you in line for award?
  - Was the evaluation system so flawed that the rankings are completely irrelevant?
  - Eligibility Issues?

*This is deceptively difficult, and can get VERY technical and very complicated*

# Bid Protest Fundamentals: What?



## What Do You Need To File to Meet Procedural Requirements?

- **FORMAT: Differs by Forum**
  - Agency and GAO – A Letter
  - COFC
    - Complaint
    - If seeking a stay, you likely also need a Motion for Temporary Restraining Order, a Motion for Preliminary Injunction, a Memorandum in Law in support of the two motions, possibly affidavits, etc.

# Bid Protest Fundamentals: What?

## What Do You Need To File to Meet Procedural Requirements?

- **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

# Bid Protest Fundamentals: When?

When Do You Need to File? Well, **It Depends!**

The Answer Varies Depending on Questions Like:

- What type of protest is this? Where in the procurement timeline are you?
- What type of procurement was at issue? Was a debriefing required? What type of debriefing did you get? Is the debriefing concluded?
- Do the DoD Enhanced Debriefing Rules apply? Where are you in that process?
- What forum are you going to?
- Do you want a Stay?



# Where are you on the Timeline?

## Solicitation

- Are there problems with the solicitation itself?  
→ Pre-award bid protests based on errors in solicitation

# Where are you on the Timeline?

## FAR Part 14 - Bid Opening / Award

→ Post-award bid protest based on improprieties in award

# Where are you on the Timeline?

## FAR Part 15

### Source Selection Process

- Is this a procurement that utilized competitive range? Were you improperly excluded from the competitive range?  
→ Pre-award protest bid based on exclusion from competitive range

### Award Decision

- Is the procurement at issue a set-aside?  
→ Size or Status Protest

### Notice of Award

- Is there a required debriefing?  
→ Post-award bid protest

# A Word On Required Debriefings

- When is a Debriefing Required?
- Why Do You Need to Care?
- Pro Tip: Get a Debrief, even if contractor won!
  - Dual purpose: Debriefs are a great way to gather information, BOTH to assess potential protests, but also to improve your own proposals going forward. Contractors should utilize this chance to grow!

# Know Your Triggers!

## FAR Part 14

- Bid Opening/Award

## FAR Part 15

- Pre-Award Exclusion Notice – 15.503(a)(1)
  - **3 days** to request debriefing in writing
- Pre-Award Notice of Intent to Award to Small Business – FAR 15.503(a)(2)
  - **5 days** to file a size/status protest
- Post-Award Notice / Notice to Unsuccessful Offeror– FAR 15.503(b)(1)
  - **3 days** to request debriefing in writing
- Other sections of the FAR, GWACs, Outliers?

# Pre-Award Debriefing



At a minimum, the pre-award debriefings must include:

- The agency's evaluation of significant elements in the offeror's proposal;
- A summary of the rationale for why the offeror was not selected for an award; 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.

# Pre-Award Debriefing



Pre-award debriefings shall 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 in 15.506(e) (Trade Secrets, Privileged or confidential/proprietary information, past performance references, etc.)

# Post-Award Debriefing



At a minimum, the post-award debriefing must include:

- The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal;
- The overall evaluated cost or price (including unit prices) and technical rating 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 were followed.



# Post-Award Debriefing



Post-award debriefings shall not include:

- Point-by-point comparisons of the debriefed offeror's proposal with those of other offerors.
- Any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) 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.

# Bid Protest Fundamentals: When?

## General Rules

- GAO
  - A “know or should have known” standard
  - 10 days/5 (4) days
- COFC

# Bid Protest Fundamentals: When?

These Deadlines Are Complex and Nuanced and, Therefore, Can Be Confusing. They are also Strict, and NOT Subject to Extensions or Excuses

- Different timelines for different types of protests, different types of procurement, different forums
- Deadlines are concrete - Hundreds of cases where GAO says no excuses
- Best practice advice is to call a government contracting attorney ASAP!



# *Defending Protests*

# Defending Against Bid Protests



## Protest is Technically Against the Agency...

- How can you defend the Agency's actions?
- You often can't...
- Even though the contractor-awardee was the ultimate beneficiary, they had no control over the agency source selection process

# Defending Against Bid Protests

## Protest is Technically Against the Agency...

- This makes substantive arguments hard, at times
- But – even in those circumstances - you can usually find procedural arguments
- Often, through strategic planning, you can leverage those for a win or something close to a win

# Defending Against Bid Protests



## Protest is Technically Against the Agency...

- ...Which means that Agency Counsel will be defending against the protest
- But you need to protect YOUR client's rights.
- At the beginning, government/awardee interests are aligned. Often, interests stay aligned. But sometimes...
- Intervene!!!!

# Defending Against Bid Protests

## INTERVENTION!

- You can modulate efforts/legal costs from there, but you have your foot in the door, and are able to monitor the case, and cover your bases
- Provide support to the agency/DOJ



# Defending Against Bid Protests

## INTERVENTION!

- Cultivating a Relationship/Partnership with Agency Counsel/DOJ

# Defending Against Bid Protests

## Procedural Defenses

- Standing
- Jurisdiction
  - General
    - Claim v. Protest
    - Tucker Act v. APA
  - Task Orders
- Timeliness
  - Type of Protest
  - Debriefing Implications

## Pseudo-Substantive Defenses

- Agency Deference/Discretion
- No Piecemeal Arguments

# Defending Against Bid Protests

## Other Procedural Tactics

- Defeat the Stay
- Limit Documents in Agency Report



# Questions?



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