



How To Win Your Bid Protest

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Roadmap to Protest Success

- **The Best Forum to Win Your Bid Protest**
 - Secret Weapon: Agency Protests
 - Winning at Government Accountability Office (GAO)
 - Winning at U.S. Court of Federal Claims (COFC)
- **Maximizing Debriefings**
- **Defending your Contract Award Under Protest**
- **Understanding Protective Orders**
- **The *Blue & Gold* Rule**
- **Other Transaction Agreement (OTA) Protest Jurisdiction**

The Best Forum to Win Your Bid Protest

- **Agency vs GAO vs COFC Protests**
- **Key Considerations:**
 - What are you challenging?
 - -Solicitation -Elimination -Award -Corrective Action
 - Stay of Performance/Award
 - Scope of Discovery
 - Evidence Considered
 - Differing Legal Interpretations
 - Subject Matter of Your Protest
 - Hearings
 - Opposing Counsel
 - Protest Costs

AGENCY PROTESTS: A CONTRACTOR'S SECRET WEAPON

- **Smart contractors utilize agency protests which are cheaper, quicker, not revealed to other offerors, and have little downside on pre-award issues.**
- **Agency Protest Stay of Contract Award and Performance**
- **GAO Automatic Stay of Performance**
- **Secrecy: Loose Lips Sink Ships**
- **Lower Attorney Fees and Quicker Decision**
- **Your Competitors Cannot Participate**
- **Risks**

How to Win at GAO

- **Maximize the debriefing process**
- **Drafting initial protest arguments and document requests to maximize discovery**
- **Take advantage of procedure (briefing schedule)**
- **Better to be dismissed as premature than dismissed as untimely**
- **Reviewing the Agency Report**
 - 2 days to request additional docs
 - Comments strategy
 - Supp. Protest strategy
 - Supp. protests to target more docs.
 - Supp. protests to win
- **Drop weaker arguments before GAO closes the record**
- **Be prepared to cut bait if need be**

Examples of Viable Post-Award Bid Protest Strategies

- **Deviation from RFP's stated evaluation criteria**
 - Use of unstated evaluation criteria (or failure to consider stated evaluation criteria)
 - Weighting evaluation factors inconsistent with the weighting stated in the RFP
- **Use of a clearly irrational evaluation method (not disclosed in RFP)**
- **Unequal treatment of offerors**
- **Inadequate documentation of the source selection record**
- **Flawed technical evaluation**
 - Acceptance of proposal that fails to meet a material requirement
 - Acceptance of a blanket offer of compliance
 - Acceptance of an offer that fails to provide information required by the RFP
 - Evaluation plainly inconsistent with, or ignores, information in technical proposal
 - Mechanical evaluation of technical proposal against government estimate
- **Flawed past performance evaluation**
 - Failure to consider relevance of past performance
 - Failure to consider past performance information that is “too close at hand” to ignore
 - Unreasonably crediting offeror with past performance of affiliates that were not shown to have meaningful involvement in proposed contract performance
 - Consideration of past performance reference that did not meet relevancy criteria in RFP
 - Consideration of past performance of subcontractor where prohibited by the RFP
- **Flawed cost evaluation (cost-reimbursement contracts)**
 - Failure to perform cost realism analysis
 - Material flaws in cost realism analysis
 - Mechanical application of government estimate in cost realism analysis
 - Use of unadjusted cost in tradeoff decision
- **Flawed price analysis**
 - Failure to conduct a required price realism analysis
 - Use of a price realism analysis where not called for in RFP
 - Mechanical application of government estimate in price realism analysis
 - Use of price realism analysis to adjust evaluated price
- **Flawed discussions**
 - Lack of “meaningful” discussions
 - Misleading discussions
 - Discussions favor one offeror over another
- **Flawed best value decision**
- **Organizational conflict of interest**
- **Waiver of definitive responsibility criteria**
- **Failure to refer the elimination of a small business based on a responsibility factor or traditional-responsibility-factor to the SBA for a Certificate of Competency proceeding**

Win Your Protest at COFC

- **Reviewing the Administrative Record**
 - Take advantage of COFC favorable discovery rules
 - Different briefing schedule from GAO
- **Open up lines of communication with DOJ early – advocate for corrective action**
- **Be cognizant of COFC evidence rules**
- **TRO standard**
- **Study your assigned Judge's opinions**
- **Second-bite protests**

Maximizing Debriefing for Protests

- **Why does it matter for bid protests?**
 - Obtain info that helps you decide whether to protest
 - Obtain info that helps you win a protest
 - Obtain information that supports suspected protest arguments
 - Obtain information that allows you to protest as many aspects of the evaluation as possible
- **Key Strategies**
 - Request a Debriefing Immediately After You Receive First Notice of Award/Elimination
 - Study the RFP Submission/Evaluation Criteria and Your Proposal
 - Know the Common/Successful Bid Protest Arguments
 - Assign Roles to Your Debriefing Team (1 person just taking notes)
 - Don't Argue with the Agency at the Debriefing
 - Don't Offer the Agency the Chance to Correct/Clarify a Misstatement
- **Key Regulations: FAR 15.505; FAR 15.506**

DOD Enhanced Debriefings

- DoD debriefings: when does the clock start to tick?
- Under CICA, Agencies are required to stay contract performance if they receive a post-award bid protest from the GAO within five calendar days of a protester's debriefing.
- In March 2019, DoD implemented an enhanced debriefing process, which requires that agencies give contractors two business days after the post-award debriefing for the contractor to submit written questions on the debriefing.
- Federal Circuit recently issued a decision clarifying this rule.
- A protester's five-day clock for filing a protest begins to tick on the day of the debriefing itself. That clock stops **only if** a protester submits written questions within two business days. If the protester submits written questions, then the five-day clock starts over and starts to count from the date the government provides answers to those written questions.

Debriefing Strategies

- **Pitfalls for the Unwary**
 - Waiting too long to request a debriefing
 - Assuming that the debriefing time extension for CICA Stays applies to all debriefings (must be a “required” debriefing)
 - Deferring a pre-award debriefing
- **Myths**
 - I shouldn’t request a debriefing until I have reason to suspect the agency did something wrong
 - I should use my debriefing to let the contracting officer know exactly what I think of his/her decision and convince him/her to change the award
 - I’m planning on protesting, I should bring my attorney to the debriefing

Defending Your Contract Award Under Protest

- **Awardees can and should intervene**
- **Why intervene?**
 - Seat at the table to assist defense and influence course of the protest
 - Assist defense of protest
 - Time, legal expertise, technical expertise, motivation
 - Opportunity to convince agency not to take corrective action or challenge an attempt to take corrective action
 - Avoid potential empty chair issues
 - **Benefit of knowledge gained from protest**

Defending Your Contract Award Under Protest

- **Effective Intervention at GAO**

- Intervener files its briefing (Comments) after the Gov't and at the same time as the Protester
- Get ahead of the game
 - Look for grounds for dismissal – file a motion to dismiss early
 - Contact Gov't as early as possible
 - Active support limits likelihood of corrective action
 - Volunteer to assist and provide help even if they don't ask for it
 - Provide Gov't counsel legal research
 - try to let them involve you in the Agency Report
 - make sure that the Agency Report is legally sound

Defending Your Contract Award Under Protest

- **Effective Intervention at the COFC**
 - Intervener files its briefing at the same time as the Gov't
 - Collaborate with DOJ on MJAR briefing if possible
 - Intervenor's MJAR can be very meaningful

Understanding Protective Orders

- **Vast majority of GAO and COFC bid protests are done under Protective Order**
- **Only people admitted to the Protective Order can see source selection sensitive materials (i.e. most of the protest related documents)**
- **Who can be admitted to Protective Orders?**
 - Outside counsel
 - Experts/Consultants
 - In rare circumstances in-house counsel
- **Impacts of Protective Order**
 - Client will not get to review anything before its filed other than the initial protest
 - Client get to see only a small subset of filings, mostly in redacted form
 - Requires client to give good direction in advance to attorney
 - Requires trust – outside counsel has to make strategic decisions without consulting client
 - Trying to prosecute a protest without having an attorney admitted greatly diminishes your chance of success

Blue & Gold

- ***Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007)**
 - Waiver doctrine
 - Must object to "patent error" in a solicitation prior to the close of the bidding process
 - Similar to GAO's timeliness rule for protests of solicitation terms
- ***Bannum*: "a formal, agency level protest before the award would likely preserve"**
- **Contractors should scrutinize solicitation terms and assert formal protests regarding defects in the solicitation before the end of bidding.**
- **If not successful at the agency or GAO level, contractors should promptly bring the protest to the COFC.**

OTA Protest Jurisdiction

- **The nature of OTAs and each protest forum’s jurisdiction are established by statute as follows:**
 - OTAs are “transactions other than contracts, grants or cooperative agreements.” 10 U.S.C. § 4021(a)
 - The GAO’s protest jurisdiction covers objections to a solicitation for or an award of a “contract for the procurement of property or services.” 31 U.S.C. § 3551
 - The COFC has exclusive jurisdiction over protests of “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement . . . 28 U.S.C. § 1491(b)(1)
 - The federal district courts have general APA jurisdiction, except where the COFC has exclusive jurisdiction. 28 U.S.C. § 1331; 5 U.S.C. § 702

OTA Protest Jurisdiction

- **Four cases that present a path forward for OTA protest jurisdiction at the COFC**
 - *Space Exploration Technologies Corp.*: COFC dismissed OTA protest for lack of jurisdiction where the OTAs at issue were “separate and distinct” from any future procurement contracts. COFC then transferred the case to federal district court for a merits decision.
 - *MD Helicopters Inc.*: U.S. District Court for the District of Arizona dismissed an OTA protest where the OTA provided for the award of a follow on procurement contract without further competition, pursuant to DOD’s unique authority in 10 U.S.C. § 4022(f). The Court found this was sufficiently connected to a procurement to place the process within COFC’s jurisdiction.
 - *Kinematics, Inc.*: CoFC found jurisdiction where the OTA utilized a Commercial Sources Opening (CSO). The solicitation sought technical and cost proposals and contemplated a follow-on contract or other transaction. The Court differentiated the *Space Exploration* decision and found that the CSO OTA solicitation “had a direct effect on the award of a contract” and so found jurisdiction.
 - *Hydraulics* decision
- **Takeaway**
 - If you can draw a direct line from the OTA awarded to eligibility for a future or proposed procurement contract, the COFC should review the protest just like it would any other bid protest; if not, relief may be found in federal district court.

Questions?

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LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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