



# 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 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 receives a post-award bid protest from the GAO within five calendar days of a protestor's debriefing.
- In March 2019, DoD implemented an enhanced debriefing process, which requires post-award debriefings must provide two business days after the 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 protestor 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
  - I can protest the agency’s failure to provide a required 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**
  - **Risk of being charged with imputed knowledge if you don't intervene**

# 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

# Questions?

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# THE PROCUREMENT PLAYBOOK

LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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