



How To Win Your Bid Protest

August 23, 2022

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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

OTA Protest Jurisdiction

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 -  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. § 022(f). The Court found this was sufficiently connected to a procurement to place the process within COFC's jurisdiction.
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- **Takeaway**
 -      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.

