

Salvaging Your Government Proposal
A Short Primer on Bid Protests
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Introduction

Selling to the federal government is unique in many ways. One significant difference with selling in the commercial market is the availability of legal remedies for disappointed bidders. The proposal process required for government procurements can be lengthy and expensive. Offerors who have made large investment in proposals in the hope of winning large government contracts routinely employ these legal remedies in hopes of salvaging that investment. Offerors who feels strongly that they have not been treated fairly have a way to challenge the government's actions. By the same token, winning offerors also need to be aware of these remedies and the necessity to defend their winning proposal from protests by other bidders.

The Usual CYA Legal Disclaimers

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Some Definitions

Even though we refer to federal pre-award disputes as bid protests, not all tenders from the federal government ask for "bids." While that term is still used in some procurements, it is more common for the company's offer to be called a "proposal," or a "quote." Regardless of the term used for the offer, the pre-award dispute follows the same procedures and may be called a "bid protest" or just a "protest."

If the solicitation document is called an Invitation for Bids ("IFB"), the offer is obviously called a "bid." The IFB process is used only for firm fixed priced contracts. IFB awards are made to the lowest "responsive" bid from a "responsible" bidder and the bids are publicly opened.

If the solicitation document is called a Request for Proposals ("RFP"), the offer is called a "proposal." At least in this respect, the process is logical. RFP's can result in either a cost plus or a fixed price contract (of various types). RFP's are characterized by more involved government methodology for evaluating the offers.

Other solicitation formats are also used such as Request for Quotations or task order or blanket purchase agreement competitions that are limited to companies with a specific type of indefinite delivery indefinite quantity (“IDIQ) contract. Solicitations that are not IFB’s are generally referred to as negotiated procurements (even if no negotiations actually occur).

Each type of solicitation has its unique issues when it comes to protests.

I’m sure it comes as no surprise that the entire federal government contracting process is highly regulated. The rules are compiled in the Federal Acquisition Regulation (“FAR”) and found in the Code of Federal Regulations, Title 48, Chapter 1. The FAR can be found at www.gpoaccess.gov.

Deadlines

The one most important issue to keep in mind with bid protests is that the deadlines for pursuing a protest are very tight. (Actually, the same is true for the entire federal government proposal process.) We are talking days, not weeks here. And the deadlines can be in terms of calendar days, not business days. There is no way to emphasize this point too much. To protest a company’s right to pursue a bid protest, actions must be taken very quickly even for very agile businesses.

Preliminary matters

In most competitions, losing offerors have the right to a debriefing by the agency. (See FAR 15.505 and 15.506) Offerors should always ask for a debriefing even if there is no obvious problem with the award, if only to be educated about the agency procurement process.

Debriefing must be requested within 3 days of notice of being excluded from the competition (FAR 15.505) or notice of award (FAR 15.506). Miss the deadline and you have no right to a debriefing.

Disappointed bidders can file an agency level protest with the Contract Officer. FAR 33.103. In theory at least, the protester is entitled to “an independent review of their protest at a level above the contracting officer.”

The Two Bid Protest Forums

Protests may be filed with the Government Accountability Office (“GAO”) or the United States Court of Federal Claims (“COFC”). These are the only two forums available outside of the purchasing agency for bid protests.

GAO is a government agency that is actually a part of the Legislative Branch, but has by statute authority to decide protests. The COFC is a federal court of limited jurisdiction

located in Washington DC (across the street from the White House), the primary purpose of which is to decide monetary claims against the federal government.

Issues

Most protests challenge the rejection of a company's offer or and the award of a contract to another company. A common basis for a protest is the failure of the agency to follow the evaluation scheme set out in the solicitation. Protesters can also challenge disparate treatment of offerors (although frankly this is a harder case to make). Protesters can also challenge a violation of statutory or regulatory requirements, but the protester will also have to prove that it has been prejudiced by the violation.

Protests also can challenge defects in the solicitation document itself, such as restrictive specifications that make it difficult for all but one company to win, omission of a required provision, and ambiguous or indefinite evaluation factors.

At GAO, a company can protest a solicitation; the cancellation of a solicitation; the award or proposed award of a contract; and a termination of a contract, if the termination was based on improprieties in the award of the contract. In order to file a protest at GAO, a company must be an "interested party," which is defined as "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."

The COFC has jurisdiction over an "action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 USC 1491(b)(1). The standard the Court applies is whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC 706. To be successful, the protester must show it was prejudiced by the agency action. At the COFC, an "interested party" is a plaintiff that stands "in some connection to the procurement" and that has an economic interest in the procurement.

Timeliness

Timeframes for filing all Bid Protests are extremely short. If you remember nothing else about bid protests, remember this. There is no way this can be emphasized too much.

As noted above, there are essentially two types of protests, those that challenge some aspect of the solicitation document itself and all other protests.

Protests about problems with the solicitation document itself must be filed before time for government's receipt of offers, regardless of the forum (agency, GAO or COFC). If a company sees a problem with a solicitation, it cannot wait to see how the competition turns out before filing a protest. A problem with a protest filed after the government's receipt of offers can arise when the agency sees the issue, not as a problem with the

proposed award, but with the solicitation itself. An agency will use this argument to defend against the protest if it can.

At the agency and at GAO, a protest (other than a protest about the solicitation document itself) must be filed within 10 calendar days of when the basis for the protest is known. While the rules allow the agency and GAO to consider late protests, this is rarely done.

The COFC does not follow the GAO timeliness rules. However, wait too long to file a protest at the COFC and the government may try to use the defense of “laches,” which basically means that the government has been prejudiced by the protester’s delay. The Court of Federal Claims can issue a temporary restraining order or preliminary injunction requiring the government agency to suspend the procurement pending the Court’s decision. However, a delay in filing at the COFC may make it difficult or impossible to get the Court to agree to such an order.

At GAO, if an agency is notified by GAO of a protest within 10 days of award or 5 days of a debriefing, the agency is required to suspend of performance of the contract. (31 USC 3553(d)) This is a little tricky because GAO has one day to notify the agency after receiving the protest. GAO usually notifies the agency the same day the protest is received but it is not prudent to rely on this, especially if the protest is filed late in the day.

At GAO, protests can be filed by fax or by email, but if the protest is received after 5:30 pm Eastern time, it will be deemed to be received the following day. Protests can be filed in person, but depending on security status, that can be problematic. Although the rules provide for protest filing by mail, that usually isn’t practical because of the strict interpretation of the timeliness rules.

Process

GAO has rather informal procedures. A protest can be initiated with a letter (however, it is advisable to check the GAO rules to make sure all the information that is required is included in the letter). The agency is required to provide a report with documents in response. The protester gets to comment on the agency report. GAO can hold hearings and take testimony, but that is entirely up to GAO.

The Court follows rules similar to those that apply in a federal district court. While the agency is required to submit an administrative record, the record can be supplemented by the protester with the court’s permission. While there is no trial as such and no jury in the COFC, there can be a hearing before the Judge for oral argument.

GAO allows the awardee to intervene in the protest. The Court, depending on the judge assigned, may allow the awardee to intervene. Generally, an awardee will want to intervene to protect its award and to support the agency.

Protective Orders

Both GAO and the Court will protect proprietary and acquisition sensitive information with appropriate protective orders.

Protests can be handled by non-lawyer contractor employees at GAO, but only outside counsel can see documents under the protective order (usually information about other offerors).

Final Comments

This primer is a work in process and will be revised from time to time, perhaps with my thoughts on choosing one protest forum over the others, among other things. Readers interested in getting any updates are welcome to contact me at jvanhorne@vanhornelaw.com. While I have put a copyright notice on this primer, it can be copied and reproduced. I would however request that the copyright notice and my contact information be retained in any copies.

Useful Links

GAO's Descriptive Guide: <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>

This pdf document includes the GAO rules from the Code of Federal Regulations as well as practice suggestions.

COFC Bid Protest Procedures: <http://www.uscfc.uscourts.gov/node/4090>

This is Appendix C to the Rules of the Court of Federal Claims (RCFC) which also apply. While theoretically individuals can represent themselves, as a practical matter protesters need to be represented by attorneys at the COFC.

Bid Protest Decisions: WIFCON.COM (<http://www.wifcon.com/>)

This is a great resource to all involved in government contracting. In addition to links to GAO and COFC decisions, there is a Forum where both government and contractor types discuss all sorts of federal procurement issues. If you register (to get access to the forums—it's free), feel free to give me credit for introducing you.