

# When and How to Throw the Challenge Flag:

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**Bid Protest Considerations and Strategies Under State and Federal Law, Including Traps for the Unwary**

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# Agenda

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- What is a bid protest?
- Should you protest?
- What to look for (and ask for) when evaluating your chances on a bid protest
- What you need in order to protest
- Defending against a protest
- Standards to prevail
- Procedure and timing of a protest
- Outcomes

# What is a Bid Protest?

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A challenge to a government's procurement process.

- Providing offerors an opportunity to ensure a fair and objective process
- Providing the public with accountability

# Should You Protest?

- GAO protest statistics

	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed <sup>1</sup>	2198 (down 16%) <sup>2</sup>	2607 (less than 1% increase) <sup>3</sup>	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)
Cases Closed <sup>4</sup>	2200	2642	2672	2734	2647
Merit (Sustain + Deny) Decisions	587	622	581	616	587
Number of Sustains	77	92	99	139	68
Sustain Rate	13%	15%	17%	23%	12%
Effectiveness Rate <sup>5</sup>	44%	44%	47%	46%	45%
ADR <sup>6</sup> (cases used)	40	86	81	69	103
ADR Success Rate <sup>7</sup>	90%	77%	90%	84%	70%
Hearings <sup>8</sup>	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)

GAO Bid Protest Annual Report to Congress for Fiscal Year 2019

# Two Types of Protests

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## Pre-award

- Challenging the terms of the solicitation
  - Common examples:
    - The solicitation is unduly restrictive/overstates the government's needs
    - Ambiguous requirements or terms
    - Requirements that unnecessarily favor one offeror

## Post-award

- Challenging the evaluation and award decision
  - Common examples:
    - Deviating from stated evaluation criteria
    - Relaxing RFP requirements
    - Unequal discussions
    - Arbitrary evaluations

# What You Need to Protest

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- Good faith basis
  - SCR 20:3.1
- Federal
  - Interested party
    - "[A]n 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." 4 CFR § 21.0(a)(1)
- Wisconsin
  - Bidder, proposer, labor organization, or CBA representative (Wis. Admin. § 10.15)
- Always start with the solicitation

# Getting the Records

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## Wisconsin

- Procurement Manual – PRO-D-23
  - "The public may inspect RFB records and may copy them after the notice of intent to award is issued..."
  - "All materials submitted for the RFP process are available for public inspection after the notice of intent to award is issued..."
- Public records – Wis. State. Sec. 19.31 et al.
  - May require a petition for writ of mandamus

## Federal

- Freedom of Information Act (FOIA) request
- Bid protest request for specific documents 4 CFR § 21.1(d)

# Procedures and Timing: Know Where You Are/Know When You Are

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## Wisconsin – FIVE DAYS (Wis. Admin. § 10.15)

- Pre-proposal/bid
  - A notice of intent to protest must be filed within five (5) working days after issuance of the solicitation
  - The actual protest must be filed within ten (10) working days after issuance of the solicitation
- Post-award
  - A notice of intent to protest must be filed within five (5) working days after issuance of the letter of intent to award
  - The actual protest must be filed within ten (10) working days after issuance of the letter of intent to award

## Federal – TEN DAYS

- Pre-proposal/bid
  - The protest must be filed before the protester's proposal or bid is submitted. 4 CFR § 21.1(1)
- Post-award
  - The protest must be filed within ten (10) days of when the basis for protest is known or should have been known. 4 CFR § 21.1(2) or 48 CFR § 33.103
    - Agency-level and debriefing exceptions exist



# Procedures and Timing: Know Where You Are/Know When You Are, *cont.*

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## Wisconsin local government

- Pre-proposal/bid
  - A protest must be filed before a proposal or bid is submitted
  - The timing can be shortened by the terms of the solicitation
- Post-award
  - Check the solicitation
  - However, the protest must be filed, and an agreement to stop the procurement, before a contract is signed (MAY REQUIRE AN INJUNCTION)

## Outside of Wisconsin (not federal)

- Start with the solicitation
- Check the statutes
- Check the local ordinances and regulations

# Standard of Review: Arbitrary and Capricious

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- Whether the government:
  - Kept within its jurisdiction;
  - Acted according to law;
  - Acted arbitrarily; or
  - Made a reasonable decision

# Defending Against a Protest

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- Know the rules
- Work with the government
- Intervene if permitted and necessary

# Don't Forget *PRN*

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*PRN Associates LLC v. State*, 2009 WI 53

- Once a contract is signed, a protest is moot

# Outcomes

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- Know your measures of success beforehand
- Protests are always uphill battles, but can be won

# Questions?

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# Thank you!

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