

Vinson&Elkins

In-House Counsel's Bid Protest Playbook

Practical Approaches to Bid Protests

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Meet the Speakers



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Addressing Pre-Award Protest Issues Pre-Award

- A “pre-award” protest is any protest that, under the Government Accountability Office’s (“GAO”) rules, is required to be filed before the next deadline for the submission of proposals.
 - Broader than “alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals”; includes most challenges to the ground rules, structure, and acquisition strategy that form the basis of the procurement.
 - Pre-award protests must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. 21.2(a)(1).
 - Pre-award protest grounds that become apparent after the deadline for receipt of initial proposals must be filed before the next closing time for receipt of proposals. *Id.*
 - “If no closing time has been established, or if no further submissions are anticipated, any alleged solicitation improprieties must be protested within 10 days of when the alleged impropriety was known or should have been known.” *Id.*
- In *Blue & Gold Fleet, LP v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), the Federal Circuit generally held that GAO’s timeliness rules for pre-award protests apply to protests before the Court of Federal Claims (“COFC”).

Addressing Pre-Award Protest Issues Pre-Award

- Effect of a pre-award protest
 - An agency may not award a contract while a pre-award protest is pending before GAO. FAR 33.104(b). (COFC protester must obtain a TRO or preliminary injunction.)
 - A pre-award protest generally does not prohibit the agency from evaluating proposals and conducting other procurement activities prior to contract award.
 - As a result, an offeror filing a pre-award protest that will not be decided until after the deadline for submission of proposals must determine whether to submit a proposal under the allegedly defective solicitation.
 - If protest is sustained, the agency ordinarily must revise the solicitation to address the defect and set a new time for submission of proposals based on the revised solicitation.
 - If protest is denied, offeror generally is not entitled to an extension of the deadline for submission of proposals.
 - Submission of a proposal may undercut certain pre-award protest grounds and prejudice arguments (e.g., excessive risk, unduly restrictive requirements, etc.).

Addressing Pre-Award Protest Issues Pre-Award

- Viable Pre-Award Protest Arguments
 - **Ambiguities** (most frequently overlooked pre-award protest ground)
 - Omission of terms/clauses required by law/inclusion of terms/clauses that are inconsistent with law
 - Requirements no longer reflect Government's actual needs or realities impacting performance
 - Requirements/terms that are unduly restrictive of competition
 - Insufficient requirements definition to permit reasonable pricing (based on reasonable risk allocation)
 - Improper bundling
 - Out of scope task orders

Addressing Pre-Award Protest Issues Pre-Award

- Ambiguities

- An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53.
 - Whether an interpretation is reasonable is based on standard principles of contract and statutory interpretation, e.g., read the solicitation as a whole and in a manner that gives effect to all of its provisions, etc.
 - Where an offeror's interpretation of a solicitation is not reasonable, there is no basis to find that a latent ambiguity exists.
 - Ambiguity cannot be created from extrinsic sources, including oral advice from agency officials, that are contrary to the clear terms of the solicitation. *Spacesaver Storage Sys., Inc.*, B-298881, Dec. 11, 2006, 2006 CPD ¶ 196.
 - An offeror must actually rely to its detriment on a reasonable interpretation of an ambiguity in order to advance that ambiguity in a post-award protest.
- A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *FEI Systems*, B-414852.2, Nov. 17, 2017, 2017 CPD ¶ 349.
 - An offeror has an affirmative obligation to seek clarification of a patent ambiguity prior to the first due date for submissions responding to a solicitation following introduction of the ambiguity into the solicitation. *Pitney Bowes, Inc.*, B-294868, B-294868.2, Jan. 4, 2005, 2005 CPD ¶ 10.
 - Where a patent ambiguity exists but is not challenged prior to the submission of solicitation responses, GAO/COFC will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. *FFLPro, LLC*, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10.

Addressing Pre-Award Protest Issues Pre-Award

Viable Pre-Award Protest Arguments (cont'd)

- Organizational conflicts of interest
 - As a general rule, a protester is not required to protest that another firm has an impermissible OCI until after that firm has been selected for award. *Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49.
 - OCI challenges must be filed as pre-award protests (i.e., before proposal deadline) if
 - The solicitation is issued on an unrestricted basis;
 - The protester is aware of the facts giving rise to the potential OCI; and
 - The agency advises the protester that a potentially conflicted firm is eligible for award.
 - Id.*
 - OCI terms in a solicitation (e.g., eligibility restrictions, identification of work that creates an OCI, identification of acceptable mitigation strategies, restrictions on future activities) must be challenged in pre-award protest.

Addressing Pre-Award Protest Issues Pre-Award

- Non-Viable Pre-Award Protest Arguments
 - Pre-judging the results of an evaluation
 - Anticipating improper agency action
 - Challenging initial evaluation results revealed during discussions
 - Challenging scope of corrective action
 - As a general matter, the details of corrective action are within the sound discretion of the contracting agency, and an agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety. *Alliant Techsystems, Inc.*, B-405129.3, Jan. 23, 2012, 2012 CPD ¶ 50.
 - When an agency's proposed corrective action does not alter the ground rules for the competition, GAO generally will consider a protester's pre-award challenge to be premature. *Nuclear Prod. Partners, LLC*, B-407948.9, Sept. 24, 2013, 2013 CPD ¶ 228.

Procurement Integrity Act Protests

- Procurement Integrity Act (“PIA”) Overview
 - PIA codified in 41 U.S.C. §§ 2101-2107
 - Implemented under FAR 3.104
 - Designed to promote the integrity of federal procurements and limit access to competitively sensitive information to prevent unfair advantages
- Both GAO and COFC have recognized that an alleged violation of the PIA constitutes a valid cause of action in a bid protest
- If proven, an actual or potential violation of the PIA can result in the agency being required to:
 - Set aside the award pending a full investigation
 - Redo the procurement
 - Exclude a non-compliant bidder from the competition

Procurement Integrity Act Protests

- Requirement for prompt reporting of potential PIA violations (41 U.S.C. § 2106)
 - A person may not file a protest against the award or proposed award of a Federal agency procurement contract alleging a violation of [the PIA] . . . unless the person, no later than 14 days after the person first discovered the possible violation, reported to the Federal agency responsible for the procurement the information that the person believed constitutes evidence of the offense
- Protests are only ripe when the agency completes its investigation after the 14-day notice has been made
- Protest must be filed at GAO within 10 days of notice unfavorable investigation outcome (see *SRS Techs.*, B-277366, July 30, 1997, 97-2 CPD ¶ 4)

Procurement Integrity Act Protests

- However, this is a narrow protest ground
- *The GEO Group, Inc.*, B-405012, July 26, 2011, 2011 CPD ¶ 153
 - A former employee of the protester absconded with proprietary information belonging to the protester, formed his own company, and submitted a competing bid in a follow-on contract for one of the protester’s major contracts
 - The former employee utilized language that was almost word for word the same as language from the protester’s proposal, evidencing usage of the confidential documents
 - The former employee’s new company won the contract award
 - Protester alleged that the agency had overlooked a PIA violation
 - GAO concluded that there was no violation of the PIA
 - GAO found that the PIA was not designed to resolve the “private disputes” between contractors
 - The former employee was given the confidential information voluntarily by the protester, thus implicating the “savings clause” provision at 41 U.S.C. § 2107(2)
 - Despite protester’s assertion that the information was provided through fraudulent inducement, GAO ruled that the motives of the recipient are irrelevant to the savings clause

Procurement Integrity Act Protests

- PIA does not afford private litigants a right of action to sue competitors (or the Government)
 - A contractor cannot sue someone for violating the PIA; only the Government can enforce the statute
 - Contractors can use the notice provisions to seek a review, but the Government has considerable discretion in extent of investigation and what steps it takes to enforce the statute
- GAO and COFC very reluctant to become a forum for private companies to fight out private disputes

Identifying and Mitigating Post-Award Risks Pre-Award

- Ambiguities
 - Ambiguities create two post-award protest scenarios:
 1. The agency adopts a different interpretation of an ambiguous provision that you relied on, forcing you to file a post-award protest.
 2. A competitor adopts a different interpretation of an ambiguous provision than the interpretation held by you and the agency.
 - In either case, the protester must show:
 1. An ambiguity (i.e., the protester's interpretation is reasonable);
 2. The ambiguity is latent (i.e., not obvious); and
 3. Detrimental reliance.

Identifying and Mitigating Post-Award Risks Pre-Award

- Ambiguities (cont'd)
 - Use the pre-proposal Q&A period to clarify potentially ambiguous terms.
 - Don't assume that your company's interpretation is shared by the agency or by the other offerors based on extrinsic sources.
 - Think about how the solicitation could be strengthened to prevent your competitors from "gaming" the competition or obtaining an unfair advantage.
 - Don't give up if agency doesn't clarify solicitation after Q&A process.
 - Consider writing to agency to describe significant concerns or filing an agency-level pre-award protest.
 - Carefully review ENs and exchanges after the submission of initial proposals to identify potential ambiguities that were not apparent solely from the solicitation.
 - Exchanges may review unstated assumptions and/or requirements, as well as alternative interpretations of solicitation provisions.

Identifying and Mitigating Post-Award Risks Pre-Award

- Clarity and compliance
 - “It is an offeror’s responsibility to submit a proposal that responds to, and demonstrates a clear understanding of, the solicitation requirements” *United Contracting, LLC*, B-408279, June 25, 2013, 2013 CPD ¶ 150.
 - Prepare comprehensive compliance matrices that track all solicitation requirements, including requirements from Sections C, L, and M (as well as special requirements in other section).
 - Leverage review teams independent of capture team.
 - Be sensitive to ENs and exchanges indicating that the agency does not understand your proposal—no pride of authorship!

Identifying and Mitigating Post-Award Risks Pre-Award

- Post-proposal/pre-award changes to proposed technical approach.
 - Offerors are obligated to advise agencies of material changes in their proposed technical approach. *General Revenue Corp.*, B-414220.2, March 27, 2017, 2017 CPD ¶ 106.
 - Most often comes up when proposed key personnel become unavailable after the submission of proposals but prior to award. *Id.*
 - The offeror’s dilemma—notice of a material change in technical approach gives the agency two options:
 1. Evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement based on the offeror’s notice that the proposed approach is no longer viable; or
 2. Open discussions to permit the offeror to amend its proposal. *Id.*
 - Consider the risk that a failure to give notice could be construed as a material misrepresentation, which may result in disqualification following a post-award protest. *NetCentrics Corp.*, B-417285.3, June 5, 2019, 2019 CPD ¶ 211.

Effective Use of Debriefings

- Purpose

- The purpose of a debriefing is “to furnish the basis for the selection decision and contract award so [the offeror] can better compete in the future.” *Next Tier Concepts, Inc.*, B-406620.3, Nov. 12, 2012, 2013 CPD ¶ 5.
- “Timely and thorough debriefings increase competition, encourage offerors to continue to invest resources in the Government marketplace, and enhance the Government’s relationship and credibility with industry. The debriefing also provides feedback to offerors to assist in improving future proposal submissions.” DoD Source Selection Procedures (“DoD SSP”), App. A.1 (Apr. 1, 2016).
- Approach each debriefing as an opportunity to learn more about how the agency viewed your proposal so that you can submit a better proposal next time.

Effective Use of Debriefings

- Purpose
 - Protest considerations should be secondary; however, information learned can provide basis for protest arguments.
 - “We really thought X would have been viewed as a significant strength because Y.”
 - Response may reveal that agency failed to apply evaluation criteria/applied unstated criteria.
 - “Were there any requirements that we failed to address?”
 - Response may reveal that agency applied unstated/or latently ambiguous requirements.
 - DoD policy recognizes that “[a]n effective debriefing often deters a protest by demonstrating that the Government conducted a thorough, fair evaluation and made a sound decision according to the established source selection methodology.” DoD SSP App. A1.

Effective Use of Debriefings

- Purpose

- “How to improve” questions are most likely to generate a dialogue that identifies procedural defects that are likely to succeed as protest grounds:
 - Failure to apply evaluation criteria/requirements and application of unstated evaluation criteria/requirements
 - Inadequate discussions
 - Improper cost/price evaluation (e.g., mechanical application of IGCE)
 - Unequal treatment protest grounds also have a high likelihood of success
 - “How to improve” questions can establish how you were treated
 - Feel free to ask how the awardee was treated, but agencies are unlikely to respond
 - Allegations regarding the awardee’s treatment will usually have to be based on publicly known information regarding the awardee’s solution/capability (or reasonable assumptions)
- See GAO’s annual reports to Congress for the issues GAO considers most likely to result in a sustained protest
 - 2020 Report named unreasonable technical evaluation, unreasonable cost or price evaluation, and unreasonable past performance evaluation

Effective Use of Debriefings

- Purpose
 - Other allegations with higher likelihood of success will have to be alleged as supplemental protest grounds after outside counsel reviews the Agency Report
 - Waiver of a mandatory technical requirement for awardee
 - Evaluation of awardee inconsistent with evaluation criteria
 - Evaluation of awardee inconsistent with content of awardee's proposal
 - Unequal discussions
 - If aware of suspected issues relating to awardee, feel free to ask whether agency considered them, but agency is unlikely to respond
 - Organizational conflicts of interest
 - Past performance problems
 - Lack of a required capability

Effective Use of Debriefings

- Purpose
 - “How to improve” questions will also generate areas of disagreement that are not likely to succeed as protest grounds:
 - Disagreement with technical ratings and assessment of strengths/weaknesses
 - Technical findings in areas of the agency’s expertise that GAO will not second-guess
 - Best value tradeoffs
 - Bias/bad faith
 - These areas of disagreement may be asserted as initial protest grounds to ensure production of a complete record, but they will be the first grounds abandoned in comments after receipt of the Agency Report.

Debriefings – When Required

- Required:
 - In negotiated acquisitions conducted under FAR Part 15
 - This includes most of the large procurements in which you will participate as an offeror
 - After award of a competed task or delivery order under a multiple-award contract when the total price of the order exceeds \$6 million (FAR 16.505(b)(6))
- Not Required:
 - GSA Schedule competitions
 - After award of a competed order for services requiring a statement of work (FAR 8.405-2(d))
 - After award of a competed Blanket Purchase Agreement (BPA) (FAR 8.405-3(b)(3))
 - In these situations, the unsuccessful offeror is entitled only to a “brief explanation of the basis for the award decision”
 - After award of a competed task or delivery order under a multiple-award contract when the total price of the order is \$6 million or less

Pre-Award Debriefings – FAR 15.505

- Available when an offeror is excluded from the competition before award
- Must be requested within three days of notice of exclusion
- May be delayed until after award at offeror's request
 - However, if delayed, could affect the timeliness of a protest
- Government can refuse the request if “not in the best interests of the Government” to conduct debriefing at that time
 - In this circumstance, debriefing must occur at the time post-award debriefings are provided
- May be provided orally, in writing, or by any other method

Pre-Award Debriefings – FAR 15.505

- Pre-award debriefings “shall include” the following, “at a minimum” (FAR 15.505(e)):
 - The agency’s evaluation of significant elements in the offeror’s proposal
 - A summary of the rationale for eliminating the offeror from the competition
 - Reasonable responses to relevant questions about whether the source selection procedures in the RFP and regulations were followed
- Pre-award debriefings “shall not disclose” the following (FAR 15.505(f)):
 - The number of offerors
 - The identity of other offerors
 - The content of other offerors’ proposals
 - The ranking of other offerors
 - The evaluation of other offerors

Post-Award Debriefings – FAR 15.506

- Post-award debriefings “shall include” the following, “at a minimum” (FAR 15.506(d)):
 - The Government’s evaluation of the significant weaknesses or deficiencies in the debriefed offeror’s proposal
 - The overall evaluated cost or price (including unit prices) and technical rating of the successful offeror and the debriefed offeror
 - Past performance information on the debriefed offeror
 - The overall ranking of all offerors (if a ranking was developed)
 - A summary of the rationale for award
 - Reasonable responses to relevant questions about whether the source selection procedures in the RFP and regulations were followed

Post-Award Debriefings – FAR 15.506

- Post-award debriefings “shall not include” the following (FAR 15.506(e)):
 - Point-by-point comparisons of the debriefed offeror’s proposal with those of other offerors
 - Any information exempt from release under the Freedom of Information Act, including:
 - Trade secrets
 - Privileged or confidential manufacturing processes and techniques
 - Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information
 - The names of individuals providing reference information about an offeror’s past performance

Preparing for Debriefings

- Request that Government provide debriefing materials (usually PPT slides) in advance
- Request a redacted version of Source Selection Decision Document (SSDD) and any other documents the agency is willing to release
 - Agencies not required to provide these documents, but some agencies appear to be trending toward providing more information/documentation.
 - More COs are embracing the policy that “An effective debriefing often deters a protest,” and that providing redacted documents furthers this policy. DoD SSP App. A.1.
 - Section 818 of National Defense Authorization Act for FY2018 directed DoD to amend the DFARS to require:
 - Disclosure of redacted SSDD for all contract awards exceeding \$100 million, and
 - For awards \$10 million – \$100 million, an option for small businesses or nontraditional contractors to request such disclosure.
 - Rulemaking is still pending – as of 5/10/2021 “preparing for publication” (DFARS Case 2018-D009)
- Prepare questions based on materials received

Debriefings - Strategies for Preparing Questions

- Focused, reasonable questions are helpful to the agency:
 - Most agencies try to develop a list of anticipated questions anyway, e.g., DoD SSP, App. A.6
- Questions should be targeted to issues about which you are actually interested
 - Going through a long list of stock debriefing questions will cause the Government to refuse to answer or provide minimal, unhelpful answers
- Focus on evaluation criteria in Section M of the RFP
 - But phrase questions in a way that shows you are treating the debriefing as a learning opportunity
- Ask for additional detail or clarification on information already presented in writing
 - Government is more likely to answer if it considers the question to be within the scope of the prepared materials

Debriefings - Who Should Attend?

- Push back on arbitrary limits on the number of attendees:
 - “It is recommended not to restrict the number of personnel the debriefed offeror may bring unless there are space limitations.” DoD SSP App. A.5.2.
 - Justify attendees based on your desire to learn how to improve.
- Counsel
 - Pro: Counsel may be able to help identify irregularities and targeted questions to identify potential protest grounds.
 - Cons:
 - Counsel is not necessary for a “how to improve” discussion.
 - People talk less when someone else’s lawyer is staring at them.
 - If you bring yours, they’ll bring theirs, which will further restrict dialogue. DoD SSP App. A.5.1.
 - Outside counsel is more adversarial than in-house counsel.

Debriefings – Final Thoughts

- Debriefings can take many forms; oral debriefings not always provided
- Agency's willingness to answer additional questions after debriefing generally does not extend the deadline for filing a protest
- Exception: DoD Enhanced Debriefings
 - Allows debriefed offeror to submit questions in writing two business days after receiving the debrief; agency required to respond in writing within five business days
 - Debriefing is not concluded until agency delivers written responses to the unsuccessful offeror
 - *Nika Technologies v. United States*, Case No. 2020-1924 (Fed. Cir. 2021): if debriefed offeror doesn't submit follow-up questions, the debriefing concludes as of the debriefing date (i.e., not automatically held open for two days)
- Request debriefings when you win contracts as well
 - Information can be helpful on future opportunities
 - Information can be helpful in defending against protests by competitors

Identifying Viable Protest Grounds

- Try to identify allegations that establish that the agency made an objective error in the evaluation
 - Examples: failure to comply with evaluation criteria; use of unstated evaluation criteria; unequal treatment
- Allegations that express subjective disagreement with the evaluation results are not strong
 - However, it is sometimes necessary to include such allegations in order to obtain access to the complete record
- Allegations regarding the evaluation of the awardee
 - These are often challenging to assert since very little information regarding the evaluation of the awardee is revealed in the debriefing
 - Potential additional sources of information include public statements made by the awardee, as well as publicly-known information regarding the awardee's capabilities
 - Avoid engaging in pure speculation, as speculative allegations will be dismissed
- GAO minimum pleading standard:
 - “A protest must include a detailed statement of the legal and factual grounds of protest, including either evidence or allegations sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action.”

Identifying Viable Protest Grounds

- GAO will dismiss protests involving certain issues (4 C.F.R. § 21.5):
 - Contract administration
 - Certain Small Business Administration issues
 - Affirmative responsibility determinations (with exceptions)
 - Procurement integrity (if information not reported to contracting agency within 14 days of discovery)
 - Procurements by certain agencies (e.g., USPS, FDIC)
 - Subcontract protests
 - Suspensions and debarments
 - Competitive range determinations
 - Orders issued under task or delivery order contracts unless:
 - The protest alleges that the order increases the scope, period or maximum value of the contract; or
 - The value of the order is over \$25 million (for DoD, NASA and the Coast Guard); or
 - The value of the order is over \$10 million (for all other agencies).
 - Solicitations or awards of agreements other than procurement contracts

Deciding Whether to Protest

- Likelihood of “success”
 - Define “success” and ensure that all stakeholders agree on what constitutes success.
 - Sometimes, success may simply be confirmation by outside counsel that the procurement was conducted fairly and in accordance with the solicitation’s evaluation criteria.
 - If success is defined as obtaining a contract award or a meaningful chance of contract award, consider the following:
 - A protest will almost never result in a directed award, and rarely results in the exclusion of the awardee from the competition. The best possible outcome is usually corrective action by the agency (either recommended/ordered by GAO/COFC or voluntary).
 - Corrective action can involve re-evaluation of proposals, re-opening of discussions, amendment of the RFP, etc.
 - Unless the corrective action provides for the submission of new proposals or substantially alters the manner in which proposals are evaluated, a re-evaluation, standing alone, may be unlikely to change the award decision.
 - Definition of success may be different for incumbents or where a significant change in the competitive landscape or procurement strategy may occur following a successful protest (whether or not as a direct result of the protest).

Deciding Whether to Protest

- Likelihood of “success” (cont’d)
 - It is difficult—if not impossible—to handicap the likelihood of a sustain at the outset because initial protest grounds are based on limited information.
 - Purely legal grounds (e.g., interpretation of unambiguous RFP terms, etc.) may be more susceptible to handicapping
 - Other considerations:
 - Do my protest grounds provide a realistic (as opposed to just plausible) explanation for the evaluation differences among the proposals?
 - How many protest grounds does GAO/COFC have to agree with in order to sustain my protest?
 - Is the agency likely to challenge my standing or argue lack of prejudice?
 - How much of my protest depends on factual assertions/characterizations by the capture team (who may not be objective)?
 - Likelihood of success is easier to handicap after outside counsel has reviewed the record and/or identified supplemental protest grounds; however, the protective order will limit counsel’s ability to provide the basis for that assessment.

Deciding Whether to Protest

- Cost
 - Often depends on the quantity and complexity of the protest grounds, as well as the manner in which the protest progresses (i.e., whether a request for dismissal is filed, whether the record is voluminous, whether supplemental protest allegations are identified, whether a hearing is called, etc.)
- Competitive considerations
 - Protective orders are designed to, and do, prevent the disclosure of contractor bid or proposal information and source selection information.
 - It is more likely that a protester's information will be disclosed in a published decision than the awardee's information.
- Customer relations
 - Most agency officials understand that protests are part of the process.
 - Although agencies generally are not offended by protests, they may take offense to protest grounds that contradict assertions/promises made in other protests/proposals.
 - E.g., don't criticize the awardee's past performance when you are relying on that same past performance in another procurement where the awardee is a team member.

Possible Protest Fora

- Available Fora:
 - Contracting Agency (FAR 33.103)
 - GAO (4 C.F.R. Part 21; FAR 33.104)
 - COFC (Tucker Act, 28 U.S.C. § 1491(b) and Administrative Dispute Resolution Act (ADRA)
 - ADRA eliminated *Scanwell* jurisdiction in District Courts over protests under the APA
- Special Fora:
 - Federal Aviation Administration ODRA
 - USPS (No GAO jurisdiction)

GAO v. COFC

- At GAO, protester can obtain automatic suspension of award/performance (CICA, 31 U.S.C. § 3553)
 - CICA, 31 U.S.C. § 3553(c) and (d), and FAR provide for automatic stay of contract award or contract performance for timely filed protests at GAO or agency
 - For timely pre-award protest filed at agency or GAO, award of contract must be stayed. 31 U.S.C. § 3553(c)(1) (GAO protest); FAR 33.103(f)(1) (agency protest)
 - For post-award protests where a debriefing was timely requested and required, stay of performance available if protest filed at agency or GAO within 5 days of debriefing or 10 days of contract award, whichever is later. 31 U.S.C. § 3553(d)(3)&(4) (GAO protest); FAR 33.103(f)(3) (agency protest)
 - In order to obtain an automatic stay, the agency must receive notice of the protest from GAO within five days after the debriefing date offered to an unsuccessful offeror, if requested and required (or within 10 days after award, whichever is later)
 - If agency offers a debriefing date and unsuccessful offeror requests an alternate date, the five-day clock starts running after the date originally offered
 - Notice of the protest from GAO to the agency now sent immediately upon filing by GAO's Electronic Protest Docketing System (EPDS)

GAO v. COFC

- GAO process is fast and allows for less expensive access to the record
 - Agency Report often includes documents that would not be considered part of the record at the COFC
 - But GAO only requires that agencies produce “relevant documents,” which means the record is limited to documents directly related to the protest grounds alleged
- GAO attorneys sometimes have greater expertise in general procurement law
 - Higher volume of caselaw/precedent
 - Does not necessarily mean more uniformity/predictability
- GAO will not hear a protest if the “matter” is the subject of litigation at the COFC
 - GAO will dismiss protests where another protester has filed a COFC protest involving the same solicitation
 - GAO will not dismiss a protest if the COFC protest is limited to challenging the propriety of an override of the CICA stay (or a failure to implement the CICA stay)

GAO v. COFC

- GAO Litigation Timeline

- Day 0/1: File protest
- Day 0/1-25: Intervene, dismissal requests filed, protective order issues addressed
- Day 25: Agency list of documents it will produce
- Day 30: Agency Report filed and documents produced
- Day 40: Protester/Awardee file comments/supplemental protest
 - Extension of comments does not extend deadline for supplemental protest
 - Failure to submit comments can lead to dismissal
- If supplemental protest filed, GAO sets deadlines for supplemental Agency Report and supplemental comments
- Possible hearing and, if so, post-hearing comments
- Day 100: GAO decision published

GAO v. COFC

- COFC “protest” jurisdiction extends to “an *action* by an *interested party* objecting to”:
 - Solicitation for bids or proposals for a proposed contract
 - Proposed award or the award of a contract
 - Any alleged violation of statute or regulation in connection with a procurement or a proposed procurement
 - Includes decisions “involv[ing] a *connection with any stage of the federal contracting acquisition process.*” *Distributed Solutions, Inc. & STR, LLC v. United States*, 539 F.3d 1340 (Fed. Cir. 2008).
- At COFC, no automatic stay
 - If protest is filed at COFC, protester needs to file a motion for a preliminary injunction – not easily obtained or routinely granted
 - Preliminary injunction factors (see, e.g., *PGBA, LLC v. United States*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004)):
 - Whether the plaintiff is likely to succeed on the merits of the case;
 - Whether the plaintiff will suffer irreparable harm if the Court withholds injunctive relief;
 - Whether the balance of hardships to the parties favors the grant of injunctive relief; and
 - Whether it is in the public interest to grant injunctive relief.

GAO v. COFC

- Reasons to file at COFC:
 - Protest is not timely under GAO's rules, either for jurisdiction or for stay
 - Agency has overridden the stay
 - Split of authority/issue of first impression for the Court
 - Need for access to the complete record and potential discovery
 - Supplementation of the record is rare and limited to situations where the evidence missing from the record is necessary for effective judicial review. *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009).
 - Complicated issues of statutory or regulatory interpretation
 - Because you lost at GAO and think the COFC or the Federal Circuit will come to a different conclusion (very rare)

Standing

- FAR and GAO provide that a protester must be an “interested party” (FAR 33.101; 4 C.F.R. 21.0)
- COFC uses the same standard, based on the use of the same phrase in the Tucker Act.
 - *Am. Fed’n Gov’t Employees, AFL-CO v. United States*, 258 F.3d 1294 (Fed. Cir. 2001)
- Interested party is an actual or prospective bidder or offeror . . . whose direct economic interest would be affected by the award of a contract or the failure to award a contract
 - Pre-award – Prospective offeror with direct economic interest
 - Post-award – Actual offeror with direct economic interest
 - An offeror who did not submit a bid or proposal is not an “interested party” for a post-award protest
 - Must have a substantial chance/reasonable possibility of receiving an award if the errors alleged are remedied
 - GAO resolves doubts about prejudice in favor of the protester, e.g., will not speculate as to what the result of a new tradeoff would be if errors are corrected
 - Offerors that are ineligible for award (technically unacceptable, unreasonable cost/price, non-responsible) are not interested parties unless they can successfully challenge the basis for ineligibility.
 - An ineligible offeror can challenge the eligibility of the awardee if there are no intervening offerors next in line for award and the offeror would be eligible to participate in a re-solicitation if the protest were sustained.
 - Offerors generally lack standing if they were not next in line for award.

Standard of Review

- GAO does not conduct de novo review. Instead, GAO reviews agency actions to determine whether they violate procurement statutes or regulations, are arbitrary and capricious, or an abuse of discretion.
- Protester has the burden of proof. Exceptions:
 - Timeliness: Agency bears burden
 - Overly restrictive specifications: Agency must make prima facie case that restriction necessary to meet agency needs. Burden then shifts to protester to show that the agency's position is unreasonable.
- Whole record will be evaluated
- Agency can introduce statements/arguments in agency record that “explain” prior decisions
 - “Our Office does not limit its review of an agency's evaluation to contemporaneously documented evidence, and will consider an agency's post-protest explanations that provide a detailed rationale for contemporaneous conclusions by filling in previously unrecorded details so long as those explanations are credible and consistent with the contemporaneous record. We will find unpersuasive and afford little weight, however, to post-protest explanations that are not supported by the contemporaneous record or are inconsistent with the record.” *Command & Control Constr.*, B-419567, Apr. 22, 2021.
- GAO sustain rate low

When to File Comments

- Agency files report on the protest within 30 days of receiving GAO's notice (4 C.F.R. § 21.3(c), (d))
 - Statement of Relevant Facts
 - Memorandum of Law
 - All relevant documents not previously produced
- Protester's comments due within 10 days after agency files report (4 C.F.R. § 21.3(i))
 - GAO may grant extension or shorten time
 - Failure to file comments can lead to dismissal
 - GAO may let other parties (e.g., intervenors) submit statements

Activities During the Stay

- If the agency receives a protest within 10 days of contract award or 5 days of a “required” debriefing date offered by the agency, the CO must suspend contract performance immediately. FAR 33.103(f)(3).
 - The agency can override the stay if one of the following if (1) performance is justified in light of “urgent and compelling” reasons; or (2) performance is in “the best interests of the Government.”
 - Override decisions can only be challenged in a separate protest at the COFC; override protests do not divest GAO of jurisdiction to hear the underlying protest challenging the award.
- Stay is implemented as a “stop work” order through FAR 52.233-3; requires the contractor to “take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order.”
 - Contractor entitled to an equitable adjustment if the order results in an increase in the time/cost to perform the contract.
- Stay prohibits contract performance, but does not prohibit contractor from conducting planning, organizational, and other activities incidental to contract performance, so long as those costs are not allocated to the contract.
 - Examples of incidental activities can include contingent hiring and staffing, setting up contractor facilities, and establishing the infrastructure necessary to perform.
 - It is a business decision whether to incur these costs “at risk.”
 - Costs for incidental activities should be segregated from costs that will be claimed as an equitable adjustment.

Resolutions and Dispositions

- Protester can withdraw protest at any time
 - For example, if after reviewing Agency Report, outside counsel advises that there is very little chance of success
- Agency can take corrective action at any time
 - Usually happens before Agency Report, as agency avoids any potential liability for protest costs
- GAO will sometimes engage in “outcome prediction,” a form of alternative dispute resolution
 - Expectation is that parties will take appropriate action after being informed of likely result (i.e., protester withdraws or agency takes corrective action)
- Dismissals based on jurisdictional issues, timeliness, or corrective action
- Sustains/Denies
 - GAO issues recommendations, not directions, e.g., re-evaluate proposals; revise solicitation to reflect actual requirements; re-open discussions; refrain from exercising option; terminate contract
 - Agency refusal to implement must be reported to GAO; GAO reports agency refusal to Congress
 - Directed award or disqualification from re-competition rare
- Protest costs, including reasonable attorneys’ fees (capped), for successful protester (protest sustained)

Bid Protest Statistics for Fiscal Years 2016-2020

	FY2020	FY2019	FY2018	FY2017	FY2016
Cases Filed ¹	2149 (down 2%) ²	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)
Cases Closed ³	2137	2200	2642	2672	2734
Merit (Sustain + Deny) Decisions	545	587	622	581	616
Number of Sustains	84	77	92	99	139
Sustain Rate	15%	13%	15%	17%	23%
Effectiveness Rate ⁴	51%	44%	44%	47%	46%
ADR ⁵ (cases used)	124	40	86	81	69
ADR Success Rate ⁶	82%	90%	77%	90%	84%
Hearings ⁷	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)

THANK YOU



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*By appointment only

