

PROTESTS: *Seven Things Every Contractor Should Know*



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OVERVIEW

- Success of GAO bid protests
- Things you didn't know you can protest (but can)
- The importance of intervention
- What must be protested prior to award



OVERVIEW

- The GAO's Protest "Pets"
- The GAO's Jurisdiction -- what gets protested
- Recovering attorneys' fees and costs
- Questions?



HOW SUCCESSFUL ARE PROTESTS?

- Fiscal year:
 - 556 decisions on the merits
 - 72 sustain decisions
 - 13% of decisions resulted in “sustains”
- Is the success rate really just 13%?
- No! “Sustain” statistics omit:
 - Corrective actions
 - Alternative dispute resolutions
 - Settlement



HOW SUCCESSFUL ARE PROTESTS?

- Effectiveness rate: 43%
 - Includes both sustains and other contractor - favorable outcomes
- Rate would be even higher if not for:
 - Untimely protests
 - No GAO jurisdiction
 - Other technically deficient protests



THINGS YOU CAN PROTEST

- Most contractors know that awards can be protested based on evaluation errors, but what else can be protested?
 - Defects in the Solicitation
 - Cancellation of the Solicitation
 - Small Business Issues
 - Sole Source Contract Awards



HOW SUCCESSFUL ARE PROTESTS?

- Exclusion from the competitive range
- Task and Delivery orders under IDIQ Contracts
- Corrective Action, including scope, timing and implementation



THE IMPORTANCE OF INTERVENTION

- Intervention should not always be viewed as options
- As the awardee, you have a lot at stake:
 - Your contract
 - Protection of your information



PRE-AWARD PROTESTS

- Protest of the solicitation
 - Inclusion or exclusion of clauses and provisions
 - Solicitation is unduly restrictive
 - Improper bundling
 - Solicitation is unclear or ambiguous
 - Evaluation method is unreasonable
 - Agency's decision to use other than full and open competition



PRE-AWARD PROTESTS

- Small Business Issues
 - The “Rule of Two”
 - Hierarchy of set-aside programs
 - Small business size status
 - NAICS code classification
 - Partial set-asides
- Out of Scope
- Improper Cancellation of Solicitation



THE GAO'S PROTEST "PETS"

- All protests are not created equal
- Any well-grounded protest has a good chance to succeed, but some grounds of protest are particular GAO favorites



THE GAO'S PROTEST "PETS"

- In response to a CRS inquiry, the GAO stated that it commonly sustains protests on these basis:
 - Evaluation inconsistent with solicitation
 - Errors in conducting discussions
 - Inadequate evaluation documentation



THE GAO'S PROTEST "PETS"

- In addition, the following commonly result in "sustain" decision:
 - Offeror treated unequally
 - Awardee has an actual, apparent or potential OCI
 - Agency misreads protester's proposal
 - Use of unstated evaluation criteria



GAO JURISDICTION

- General Rule:
 - GAO can hear challenges relating to pre-award matters and challenges to evaluations
 - Post-award challenges, like REAS and claims, do not go to GAO



GAO JURISDICTION

- Exceptions to GAO's jurisdiction:

Size protests	=	SBA
Eligibility	=	SBA/VA
FAA bid protests	=	ODRA
NAICS codes	=	SBA (OHA)



ATTORNEY'S FEES AND COSTS

- Protests should not always be seen as cost prohibitive
- If your GAO protest is found to be meritorious, you may be entitled to recover your attorneys' fees



BID PROTESTS: *Seven Things Every Contractor Should Know*

Any Questions?

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