

Government Contract Bid Protest Update

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1. Bid Protest Philosophy

- a. Relationship with Customer v. Contract award
- b. Contractor goals in a protest
 - i. “Can” we protest?
 - ii. “Should” we protest?

2. Bid Protest Issues (“What?”)

- a. Challenge to the terms of a solicitation
- b. Challenge to the award of a contract

3. Bid Protest Jurisdiction (“Where?”)

- a. Agency protests
- b. Government Accountability Office (“GAO”)
- c. United States Court of Federal Claims

4. Timing for Protests (“When?”)

- a. Protests based on alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.
- b. At GAO, all other protests shall be filed not later than 10 calendar days after the basis of protest is known or should have been known, whichever is earlier.
 - (i) Except when a debriefing is requested and, when requested is required, a protest shall not be filed before the debriefing date offered, but not later than 10 calendar days after the date of the debriefing.

5. Standing to File a Bid Protest (“Who”)

- a. Must be an “interested party” or an actual or prospective bidder or offeror
- b. Economic interest would be affected

6. Debriefings

- a. Request within 3 calendar days of notice of award
- b. Always request debriefing even if you are the awardee
- c. Time limits for filing GAO protest from the date the debriefing is offered even if you are unavailable on that date

7. FAR 15.506(d) Postaward Debriefing of Offerors

(d) At a minimum, the debriefing information shall include —

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

7. FAR 15.506(d) Postaward Debriefing of Offerors (con't.)

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

8. Agency Protests

- a. Decided by Contracting Officer (can request review by level higher than Contracting Officer)
- b. “Inexpensive”
- c. Fast
- d. Can still protest to GAO or Court of Federal Claims
- e. Only recommend for a pre-award bid protest

9. GAO

- a. Less costly than Court of Federal Claims
- b. Form (letter citing specific grounds for a protest and attaching any relevant documents)
 - (i) Include request for automatic stay, request for production of documents and a protective order
- c. Automatic Stay Issues
 - (i) Override issues
- d. Protective Order Issues
- e. Decision by a GAO attorney
- f. GAO decision can be “appealed” to the Court of Federal Claims

10. GAO Bid Protest Process

- a. Pre-filing issues
- b. File protest
- c. Intervention by awardee
- d. Agency Report
- e. “Comments” must be filed within 10 calendar days
- f. Request for hearing (hearings rarely granted)
- g. Decision
- h. Request for reconsideration
- i. Can “appeal” to Court of Federal Claims

11. Court of Federal Claims

- a. More expensive (pleadings)
- b. No strict deadline for filing
- c. No automatic stay unless court grants injunction
- d. Decision by a judge
- e. More likely to obtain a hearing
- f. Takes longer for decision

12. Pre-Award Protests

- a. Protest of solicitation
 - i. Inclusion or exclusion of clauses or provisions
 - ii. Solicitation is unduly restrictive
 - iii. Solicitation is unclear or ambiguous
 - iv. Evaluation method is unreasonable
 - v. Agency's decision to use other than full and open competition

13. Issues Likely to Succeed GAO

- a. Evaluation inconsistent with solicitation
- b. Unstated evaluation criteria
- c. Inadequate evaluation documentation
- d. Defects in conducting discussions
- e. Offerors treated unequally
- f. Organizational conflict of interest (“OCI”)
- g. Agency misreads proposal

14. Issues You Cannot Protest at GAO

- a. Size protest (SBA)
- b. Eligibility protest (SBA/VA/WOSB/EDWOSB)
- c. NAICS codes (SBA)

15. What Constitutes “Winning” A Bid Protest

- a. Protesters rarely are provided a “direct award” of a contract
- b. GAO “recommends” relief (normally followed by agency)
- c. Success in a postaward protest often results in reevaluation of the award decision
- d. Award of attorneys’ fees
- e. “Corrective Action”
- f. Recovery of bid and proposal costs
- g. Bridge contracts

16. Practical Tips

- a. Early identification of protest issues
- b. Raise issues at agency if pre-award issue
- c. Consider communicating with corporate counsel for communication with agency counsel
- d. Document your communications
- e. Work with agency counsel if intervening in a protest to protect award
- f. Follow all deadlines or suffer the consequences

17. GAO Bid Protest Statistics

- a. 2,429 GAO bid protests filed in FY 2013
- b. Increase of 22% since FY 2009 and 83% since FY 2006
- c. 16-19% of protests sustained since FY 2009
- d. 43% of all cases in FY 2013 resulted in protester obtaining some form of relief (“corrective action” or GAO sustaining the protest) (“effectiveness rate”)

Decision Digest

- *So Long as It's Reasonable*

WKG and Associates, LLC, B-409835 (Aug. 26, 2014)

- DOE purchase order for fact-finding services
- Best value based on resumes, past performance, price (in that order)
- Agency found protester's resume lacked specific detail regarding understanding of requirements, nature of experience, and prior agency work. Assigned Satisfactory rating.
- Protest denied where agency reasonably found lack of specific details in resume created a risk of unsuccessful performance and therefore reasonably assigned satisfactory rating

Decision Digest

- *So Long as It's Reasonable, and documented!*

Solers, Inc., B-409079 (Jan. 27, 2014)

- DOD task order for purchase order for systems engineering and technical services; fixed-price and cost-plus-award fee
- Evaluation on technical/management approach, past performance, and price/cost
- RFP provided for cost realism analysis of cost-reimbursement CLINs
- Protest sustained where record and testimony at hearing did not demonstrate how agency evaluated the realism of offerors' price/cost proposal
 - Did not show how agency evaluated the offerors' technical approaches for the purpose of determining the realism of the proposed labor mix or level of effort

Decision Digest

- *So Long as It's Reasonable, and documented!*

Solers, Inc., B-409079 (Jan. 27, 2014)

- Protest sustained also where record did not adequately explain the basis for agency's evaluation of offerors' technical proposal
 - “Where, as here, an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, we give little weight to the later explanation.”

Decision Digest

- *Stick to the Terms*

Iron Vine, LLC, B-409015 (Jan. 22, 2014)

- DHHS task order for information system security support
- RFQ anticipated issuance of time-and-materials task order, fixed-price, fully-burdened labor rates
- RFQ required submission of cost/price volume, with proposed labor categories and rates broken out
- RFQ stated cost realism analysis would be conducted of the cost/price volume
- Protester alleged agency failed to evaluate realism of awardee's proposed labor rates
- Protest sustained where agency deviated from RFQ's evaluation scheme by failing to evaluate realism of offerors' proposed labor rates

Decision Digest

- *Options for protesting IDIQ orders under \$10M*
Colette, Inc., B-407561.2 (Jan. 3, 2013)
 - Protester argued that source selection did not comply with the evaluation criteria and resulting task order exceeded the “scope” of the contract.
 - Protest of awarded task or delivery order only if:
 - Order valued at more than \$10M, or
 - Order increased the scope, period or maximum value of underlying contract

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- GAO rejected protester’s argument that failure to follow the evaluation criteria exceeded the scope
 - Exceeding scope refers to scope of work authorized in underlying contract (i.e., change in amount or character of work)
- Non-protest options
 - Contact task order/delivery order ombudsman (FAR 16.505(b))
 - Request written statement documenting bases of award and a debriefing (FAR 16.605(b)(1)(iv)).

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- *Regulations aren't the Rule? Expansion of the Nonmanufacturer Rule*

Rotech Healthcare, Inc. v. U.S., No. 14-502C (Fed. Cl., Sep. 9, 2014)

- VA small business set-aside solicitation to “furnish, install and service oxygen equipment to dispense oxygen and supplies” under a “Services” NAICS code.
- Protester argued VA failed to issue solicitation in compliance with the statutory “Nonmanufacturer Rule,” which requires that a business concern “represent that it will supply the product of a domestic small business manufacturer” (unless a waiver is granted). 15 U.S.C. § 657s(a)(4) and (a)(3).

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- *Regulations aren't the Rule? Expansion of the Nonmanufacturer Rule*

Rotech Healthcare, Inc. v. U.S., No. 14-502C (Fed. Cl., Sep. 9, 2014)

- A nonmanufacturer may qualify as a small business concern if it:
 - i. does not exceed 500 employees primarily engaged in retail or wholesale trade and normally sells the type of item being supplied;
 - ii. takes ownership or possession of items with its personnel, equipment or facilities; and
 - iii. will supply the end item of a small business manufacturer made in the US or obtains a waiver of this requirement.

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- *Regulations aren't the Rule? Expansion of the Nonmanufacturer Rule*

Rotech Healthcare, Inc. v. U.S., No. 14-502C (Fed. Cl., Sep. 9, 2014)

- SBA Regulations state that “[t]he nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code....the [rule] does not apply to contracts that have been assigned a *service*, construction or specialty trade construction NAICS code” 13 CFR § 121.406(b)(3).
- COFC: statute is clear that the nonmanufacturer rule apply to all contracts *involving the provision of supplies, regardless of the NAICS code*
- “this Court is not required to defer to subsequent agency regulation that is contrary to the statute”

Decision Digest

- *Regulations aren't the Rule? Expansion of the Nonmanufacturer Rule*

Rotech Healthcare, Inc. v. U.S., No. 14-502C (Fed. Cl., Sep. 9, 2014)

- If providing any supplies in connection with a service contract, small businesses must comply with the Nonmanufacturer Rule (i.e., supplies must come from a small business manufacturer), even when the contract is primarily for services or procurement cannot be a small business set-aside

Decision Digest

- *Make Room for Similarly Situated Entities*

Sealift, Inc., B-409001 (Jan. 6, 2014)

- Contract for charter of a shallow draft tanker
- Protester argued awardee under small business set-aside could not perform the required minimum by itself
 - Limitation on Subcontracting, FAR 52.219-4, required at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the [small business] concern

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- *Make Room for Similarly Situated Entities*
- Sealift, Inc., B-409001 (Jan. 6, 2014)
 - Protester alleged that majority of crew of awardee's vessel would be employed by awardee's subcontractor
 - GAO found it "of significance" that both awardee and subcontractor were small businesses
 - Awardee explained in discussions that it had teaming arrangement with its small business subcontractor, resulting "in the same overall small business content of the contract"

Protests under the VPPA

- Virginia Public Procurement Act
 - § 2.2-4360. Protest of award or decision to award.
- In writing to the public body
- Include basis for protest and relief sought
- Within 10 days after the award or the announcement of the decision to award, whichever occurs first
 - If basis for protest depends upon information contained in public records pertaining to the procurement transaction that are subject to inspection under the VPPA, then no later than 10 days after those records are available for inspection

Protests under the VPPA

- “No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror”
- “Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.”

Protests under the VPPA

- Decision of public body final unless appealed within 10 days of the written decision
 - Through public body's administrative procedure for appeal, if available
 - Otherwise, by an action in circuit court
- Standard for review of a denied protest: the decision is not
 - (i) an honest exercise of discretion, but rather is arbitrary or capricious; or
 - (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

Protests under the VPPA

- Procurement decision will not be interfered with by the courts “even if erroneous.”
- Deferential standard limited to situations when public body acted illegally, arbitrarily or fraudulently (Taylor v. County Board, 189 Va. 472, 483 (1949)).

Protests under the VPPA

- Timing issues:
 1. Filing lawsuit to appeal a denial of a protest must wait until the agency issues a final written decision (Sabre Construction Corp. v. County of Fairfax, 256 Va. 68 (1998)).
 2. Virginia follows “bright-line” approach to whether bid submitted timely (Holly’s, Inc. v. County of Greenville, 250 Va. 12 (1995)).

Protests under the VPPA

3. “Informality” issues

- “Competitive Sealed Bidding”: award to lowest responsive and responsible bidder (Virginia Code § 2.2-4301)
- A public body may waive “informalities” in bids (Virginia Code § 2.2-4319(B))
- “Informality:” minor defect or variation of a bid from the IFB which does not affect “price, quality, quantity or delivery schedule”
 - Product submittal (no)
 - Minority business plan (yes)
 - Failure to acknowledge an addendum (maybe)

Protests under the VPPA

- *Watch what you say?*
 - Lockheed Info. Mgmt. Sys. Co., Inc. v. Maximus Inc., 259 Va. 92, 524 S.E.2d 420 (2000)
 - State privatizing two child support enforcement offices
 - Lockheed and Maximus submitted proposals
 - DSS issued Notice of Intent to Award to Maximus
 - Lockheed protested
 - Lockheed alleged conflict of interest issues with evaluation of proposals based on allegations that one evaluator was seeking employment with Lockheed (but not hired) and another evaluator had been offered employment with Maximus

Protests under the VPPA

- *Watch what you say?*
 - Lockheed Info. Mgmt. Sys. Co. Inc. v. Maximus Inc., 259 Va. 92, 524 S.E.2d 420 (2000)
 - Maximus sued Lockheed for tortious interference of contract and statutory conspiracy to injury Maximus' reputation and business
 - Court denied Lockheed's argument on appeal that the content of the bid protest was subject to privilege
 - Trial court was correct to allow Maximus' tort claim to go forward based on allegations in the protest

Questions?

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