

# Federal Contracting

## Protests, Claims, and REAs

**2017 SAME Jacksonville Post**  
Joint Engineer Training Symposium (JETS)  
August 29 - 31, 2017 Jacksonville, FL  
*"Securing Our Future"*



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One Client at a Time

# PROTESTS

- FAR 15.308 states:

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all sources selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment.

- Must be an impartial, fair selection.



# Debrief

- Agencies are required to notify offerors, when they are eliminated from competition and to provide debriefings when requested. FAR 15.605 and 15.606
- As discussed last hour the first opportunity (generally) for protest is at a pre-award notice (See FAR 15.503(a)) of exclusion from further competition. This serves several purposes:
  - Allows the unsuccessful offeror to move on to other opportunities.
  - Save offerors resources – Spend no more on this one.
  - Allows the offeror the opportunity to challenge its elimination from competition by requesting a pre-award debriefing and perhaps filing a protest.

# Preaward Protest

- Time to request a pre-award debriefing
  - No less than 3 days after receipt of notification of exclusion from competition.
  - The offeror may request a delay until after award in order to obtain all the information contained in the post award debrief.
  - Failure to meet the timeline relieves the Government of offering any debrief.

# Preaward Debriefing

- What do you learn in a pre-award debriefing
  - The agency's evaluation of your proposal.
    - Significant strengths and weaknesses
  - A summary of the rationale for eliminating your proposal.
  - Reasonable responses to your questions about whether or not source selection procedures in the solicitation were followed, as well as whether applicable regulations were followed.
- What they will not disclose
  - Number of offerors, identity of other offerors, content of proposals, rankings, evaluations, prohibited information (but ask anyway).



# Post Award Protests

- Notice of contract award must be given to unsuccessful offerors within 3 days of award. The Notice includes:
  - Number of offerors solicited
  - Number of proposals received
  - Name and address of each offeror receiving an award
  - Contract awardee price
  - A basic overview of why the offeror's proposal was rejected

# Post Award Debriefing

- The unsuccessful offeror has 3 days after the notification to request a debriefing. FAR 15.506
  - The Government should provide a debriefing within 5 days of the request – not fatal to the Government – best efforts sort of thing.
  - Failure to make a timely request eliminates the Government's obligation to provide a debrief.
  - Debriefs may be done orally, in writing or any other method acceptable to the Contracting Officer.



# Debrief, cont

- Contents of a Debrief:
  - Significant strengths and weaknesses.
  - Overall evaluated price and technical rating of winner.
  - Overall ranking of all offerors
  - Summary of rationale for award
  - Reasonable responses to your questions about whether or not source selection procedures in the solicitation were followed, as well as whether applicable regulations were followed\*





# Debrief, cont.

- What is not in a debrief:
  - No point by point comparisons of our offer with other offerors
  - No trade secrets (remember to mark your bid)
  - Privileged or confidential business information
  - Names of Past Performance POCs

# Filing the Protest

- When to File
  - Subject Matter
    - If the issue in question is a flaw or error in the solicitation that was obvious or patent on the face of the solicitation that our protest argument indicates is something we could or should have noticed prior to bid opening, the time to protest is prior to bid opening. Otherwise, the Government should file a motion to dismiss on those grounds.



# Post Award Protest

- You must protest the award of the contract
  - This means it must pertain to the basis of the award.
    - What you cannot allege:
      - The contractor will not be able to perform, because they have not obtained a specific license – This pertains to their ability to perform – not an award issue, but a performance issue; however, if the Definitive Selection Criteria (DSC) was – must be a licensed contractor in IL and they were not – then you could protest.
  - Best bet
    - Find something in the DSCs not followed.



# Examples

- Offeror A, winner, in a LPTA bid, is the lowest bidder, but you realize that through discussions with other bidders) the bid required 6” ceramic tile and you discover their bid is lower, because they offered 9”.
  - This is a nonconforming bid, they failed to bid according to the specifications and the Government accepted a nonconforming bid.
    - Too bad they are not all this easy
    - Questions?

# Example

- In a Best Value Procurement there are 5 bidders with one successful offeror:
  - The ratings for each offeror are
    - A: O, E, E, G, G – Price: 13 Million
    - B: E, E, G, G, S – Price: 10 Million
    - C: S, S, S, S, S – Price 9.8 Million
    - D: E, G, S, S, S – Price 11 Million
    - Us: E, E, G, G, G –Price 11.5 Million
    - They select Offeror D – Protest?

# Jurisdiction over Protests

- The subject of the Protest determines where you file the Protest – a wrong choice can be fatal:
  - If you are protesting an award decision you can take it to the GAO, US COFC, CO, U.S. Dist. Ct. or BCA.
  - If the subject is protesting whether or not the company is a small business in a set aside you can take it to the US Small Business Administration.
  - If you are protesting the status of a business:
    - E.g. 8(a) or Vet owned (CVE or Veteran 13 CFR 125?)
    - US Small Business Administration
    - For Vet status SBA defers to DVA



# Time for Filing

- Agency Protests
  - Improprieties in the solicitation must be filed prior to bid opening.
  - Others must be filed within 10 days after the basis for the protest is known or should have been known.
  - The Agency is not required to suspend the award or performance of the contract upon receipt of a protest within the 10 day window – See GAO Protests (next)



# Time for Filing

- GAO Protests
  - Improprieties in the solicitation – Prior to bid opening or closing date for receipt of proposals.
  - Other basis – within 10 days of notification of award or 10 days after a requested debriefing is held (4 CFR 21.2). Untimely protests are summarily dismissed.
  - Proper and timely filing of a Protest institutes an automatic stay of performance 31 USC 3553(c).





# Time for Filing

- Courts – No specific time, but current case law states 4 months is too long – very helpful right? They have adopted the GAO rule that pre-award issues must be brought prior to bid opening or time for receipt of proposals.
- SBA – 13 CFR 121.1001. Must protest by the 5<sup>th</sup> day following bid opening.
  - Caveats: CO has no time limit
    - CO also does not have to terminate if found other than small during exercise of an option year.



# Contents of a Protest

- Name, address, telephone and fax of protestor
- Signed by protestor or its lawyer
- Identify the contracting agency and solicitation/contract number
- A detailed statement of the factual and legal grounds of protest and copies of relevant documents
- Establish the protestor is an interested party
- Establish the protest is timely
- Request ruling
- State form of relief requested



# What is Important Here

- Know what you want to protest
- Know where you need to protest it
- Request the debrief
- Calendar the dates
- Understand the forum
  - Lets discuss forum selection here
- Failure to select the proper forum is fatal
- Missing a deadline is fatal



# Requests for Equitable Adjustment

- Delay caused by Government
  - Identify a delay cause
  - Prove the delay cause is an enumerated cause of delay – legal delay
  - Identify the work affected by the delay
  - Prove the delayed work was delayed by the delayed cause
  - Prove the delayed work was on the critical path
  - Prove the costs incurred



# Legal Cause of Delay

- Ordering a suspension of Work under FAR 52.242-15.
  - Constructive suspension are covered at FAR 52.242-17, Government Delay of Work Clause.
- Delays in Availability to the Site – Possible liability to Government.
- Interference with Contractor's Work – Similar to Site Availability. e.g. where the Government was found at fault, when the contractor was delayed due to failure to issue a Notice to Proceed, which caused entry into rainy season. Contractor would otherwise have finished prior.
- Government Delays of Approvals – must be given in a reasonable time.
- Delay in Inspection of Work.
- Delay in Issuance of Changes.
- Miscellaneous Acts
  - Pressure and threats to alter sequence of work.



# Identify the Work Affected by the Delay

- You must call out the work that was affected by the delay.
- This requires an analyses of the schedule.
- Make sure you connect the dots for them.
- This includes dates and times in the CPM schedule, etc.

# Prove Gov't is Proximate Cause

- In law this is said that the delay caused by the Government is the proximate cause of the delay to the work.
- You must show that “but for” the Government’s actions, the work would have proceeded as scheduled.
- It must be the direct cause of the delay to the work.
- The delay must not be reasonable under the circumstances – no intervening cause that required the delay (e.g. had to close down the runway to launch bombers).

# Critical Path Analyses

- The delayed work must be on the Critical Path.
- This means that the work you are claiming an equitable adjustment for must be work that had to be performed sequentially and at the time of the delay you had to stop because there was no other work that could be performed until you did the claimed for work (e.g. you could not put on the roof until the roof trusses were in place).





# Damages

- What costs may be recovered when we have proven the delay is compensable?
  - Delay and Impact costs are recoverable:
    - Delay costs are based on idle time caused by a delay (General Conditions).
    - Impact costs are those costs related to increased costs of performance due to the delay (Increased material costs, etc.).
    - You must calculate both.

# Changed Site Conditions

- You can also have REA issues under a Changed Site condition
  - Proof in this case requires the Government knew of and did not disclose site conditions that were materially different than were known to it, which caused the contractor to incur additional costs.

# Constructive Acceleration

- Another common basis for a Claim or REA is when the Government either adds work, but does not add time to the schedule or weather or some other cause creates an excusable delay, but the Government uses threats or coercion to keep the contractor on schedule and this makes the contractor add resources or work overtime/weekends to complete.



# The Disputes Act

- Once we exhaust our attempts to reach an amicable adjustment, we must decide if we wish to enter into a Dispute (file a claim) with the Government. This formal process is done under The Disputes Act under 41 USC 601.
- The submission of a claim begins the disputes process.

# The Disputes Act

- A claim must contain the following elements:
  - A written demand
  - Seeking as a matter of right
  - The payment of money in a sum certain
- Although there is no specific content requirement, the Courts have held that the claim must be in sufficient detail to allow the CO to give meaningful, reasoned consideration to the claim.
- Also, if over a certain statutory amount – you have to certify the claim.



# The Disputes Act

- The CO has 30 days to respond
- If the CO has not responded in 30 days you may contact the CO and request an answer, allow for more time in writing after discussing the delay, take it as a deemed denial and move on to the next step, or drop the case.
- If you decide to move on to the next step you must decide the CO's failure to answer is a deemed denial, constituting final Agency action and either file in the COFC or BCA. Hire a Lawyer!



# Bonus Material

- Changes in the Law of Small Business
  - Similarly Situated Entities
  - Limitations on Subcontracting
    - Limitation for *services and supplies* is statutorily set at 50% of the *award amount*.
  - Affiliation – Identity of Interest
    - The SBA narrowed the (familial) relationships for identity of interest to a seemingly more reasonable level. Now *the presumption* (presumption means its rebuttable) exists for firms that conduct business with each other that are owned and controlled by: (1) married couples; (2) parties to a civil union; (3) parents and children; and (4) siblings.



# Bonus Material

- Changes in the Law of Small Business ... cont.
  - Economic Dependence
    - If a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA presumed and will presume that one firm is economically dependent on the other and likely find affiliation. – Rebuttable presumption as well – start up in first year – example
  - Joint Ventures – Any small business can joint venture with any other small business
  - New All Small Mentor Protégé Program



# Questions

## QUESTIONS?

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