

# WMACCA Government Contractors Forum

## BID PROTESTS IN AN ERA OF SHRINKING AGENCY BUDGETS: *How to Maximize and Defend Your Awards*

May 20, 2014



# WMACCA Government Contractors Forum

## BID PROTESTS IN AN ERA OF SHRINKING AGENCY BUDGETS: *How to Maximize and Defend Your Awards*

**Moderator:** Bill Walsh, Partner, Venable LLP

**Panelists:**

- Ralph White  
Managing Associate General Counsel, Procurement Law, GAO
- Tamara Jack  
Associate General Counsel, LMI
- Rebecca Pearson  
Partner, Venable LLP
- Keir Bancroft  
Counsel, Venable LLP



# Biographies

## William L. Walsh, Jr., Venable LLP – Moderator



Bill Walsh concentrates his practice on representing federal sector companies who contract with DOD and civilian agencies. He represents clients locally, nationally, and internationally in issues including dispute resolution (ADR) and bid protests before the U.S. Government Accountability Office, Federal Boards of Contract Appeals, and executive agencies on contract administration matters, contract claims, contract terminations, teaming agreements, contractor qualification issues, organizational and personal conflict of interest concerns and small business matters.

Mr. Walsh has 40 years of federal and state government contract experience and extensive knowledge and skills in this complex area. Mr. Walsh's legal career began as a lawyer with the DOD on government contract and legislative issues. Mr. Walsh also served as Chief Counsel for NASA's Marshall Space Flight Center.

In the past few years, in addition to assisting several clients in pursuing protest claims before the Government Accountability Office, Mr. Walsh has also represented clients with claims before the Armed Services Board of Contract Appeals. He usually serves as lead counsel on numerous significant protest matters involving, collectively, several billion dollars in contract value. He has also managed several substantial prime-subcontractor disputes as well as a number of suspension/debarment matters and related civil false claims matters.



# Panelist Biographies

## Ralph White, Managing Associate General Counsel, Procurement Law, GAO



Ralph White is the Managing Associate General Counsel for Procurement Law, within the Office of the General Counsel, U.S. Government Accountability Office (GAO). Since joining GAO in 1989, Mr. White has handled bid protests as a writing attorney/hearing officer, as an Assistant General Counsel leading a team of GAO attorneys, and since early 2010, as the Managing Associate General Counsel leading GAO's bid protest forum.

Prior to joining GAO, Mr. White was an associate attorney in the Washington, D.C. Office of Fried, Frank, Harris, Shriver and Jacobson, where he practiced government contracts law from 1985 to 1989. Prior to entering private practice, Mr. White worked for six years as a Senate staffer, including serving on the staff of the Senate Armed Services Committee, and the Oversight Subcommittee of the Senate Governmental Affairs Committee. In the Senate, Mr. White specialized in federal procurement policy, including staff work on the Competition in Contracting Act of 1984, and other procurement-related legislation.

Mr. White is a graduate of the College of William and Mary (B.S. 1978), and the Catholic University Law School (J.D. 1985).



# Panelist Biographies

## Tamara Jack, Associate General Counsel, LMI



Tamara Jack is the Associate General Counsel at Logistics Management Institute (LMI). In this position, she advises the LMI staff on various U.S. government contracts formation and administration matters, contract claims and disputes, bid protests, teaming agreements, conflicts of interest issues, intellectual property rights issues, compliance matters, international trade controls issues, and immigration law issues. Ms. Jack serves on the Board of Washington Metropolitan Area Corporate Counsel Association (WMACCA). She was an adjunct instructor at

American University's Washington College of Law, and has spoken at numerous conferences and written articles on various government contracting, ethics and compliance, and international trade compliance issues.





# Panelist Biographies

## Rebecca E. Pearson, Venable LLP



Rebecca Pearson focuses on government contracts law. She assists clients in government contract litigation; contract award protests before the Government Accountability Office and federal courts; administrative claims before agency boards of contract appeals; representation before the Department of Justice and federal courts on civil matters involving government contractors; and civil litigation in federal courts involving government prime contractors and subcontractors. Ms. Pearson counsels clients on matters involving contracts including defective pricing and cost allowance questions, teaming agreements, legal and regulatory compliance and ethics, and small business issues. She has significant experience with due diligence in connection with the merger and acquisition of government contractors, as well as post-transaction matters such as novation.

Ms. Pearson's extensive experience as an Air Force attorney in federal litigation and client counseling, and in interfacing with other federal agencies, provides her with an invaluable "insider's" perspective and proven skills to render timely and effective assistance to clients in a wide variety of government contracts matters.



# Panelist Biographies

## Keir X. Bancroft, Venable LLP



Keir Bancroft provides a range of services to clients throughout the government contracting sector. Mr. Bancroft represents clients in litigation, including bid protests, size and status protests, and contract-related disputes before tribunals including the Government Accountability Office, the Small Business Administration, boards of contract appeal and the United States Court of Federal Claims. Mr. Bancroft also assists clients in responding to investigations from offices of inspector general and Congressional committees. He counsels clients in transactional matters, performing due diligence in mergers and acquisitions, and drafting post-merger novation and change-of-name agreements. Mr. Bancroft also drafts and negotiates subcontracts, nondisclosure agreements, mentor-protégé agreements, and licensing agreements on behalf of clients. Further, Mr. Bancroft counsels clients on a range of compliance issues, particularly those pertaining to information security and privacy.

Mr. Bancroft formerly served as an attorney advisor and Privacy Officer in the United States Department of the Treasury, Bureau of Engraving and Printing. There, he counseled and represented the Bureau in all facets of federal procurement. In his capacity as Privacy Officer, Mr. Bancroft coordinated the Bureau's compliance with the Privacy Act, and privacy-related issues pertaining to information security under the E-Government Act, and the Federal Information Security Management Act (FISMA).



# Agenda

- An Update on GAO Bid Protests
  - Statistics and Noteworthy Numbers
  - Price Realism at GAO
  - New Docketing System and Filing Fees
- In-House Counsel Perspective
- Debriefings and the Air Force Pilot Program
- Key Considerations on Corrective Action





# **An Update on GAO Bid Protests**

---

**Presentation for the Washington Metropolitan  
Area Corporate Counsel Association**

**May 20, 2014**

**Ralph O. White  
Managing Associate  
General Counsel  
202-512-8278  
[whitero@gao.gov](mailto:whitero@gao.gov)**

---

# Bid Protests at GAO

---

- GAO's bid protest function began in the 1920s and was codified in the Competition in Contracting Act of 1984 (CICA)
  - Bid Protest provisions at 31 U.S.C. §§ 3551-3557
  - GAO's bid protest decisions establish a uniform body of law relied on by Congress, the courts, contracting agencies, and the public.
  - Protests are based on a “private attorneys general” model of oversight.
-

## CICA's Mandate

- CICA directs GAO to provide for the *expeditious*, and *inexpensive* resolution of protests.
- GAO “shall issue a final decision . . . within 100 days after [the protest is filed.]” 31 U.S.C. § 3554.

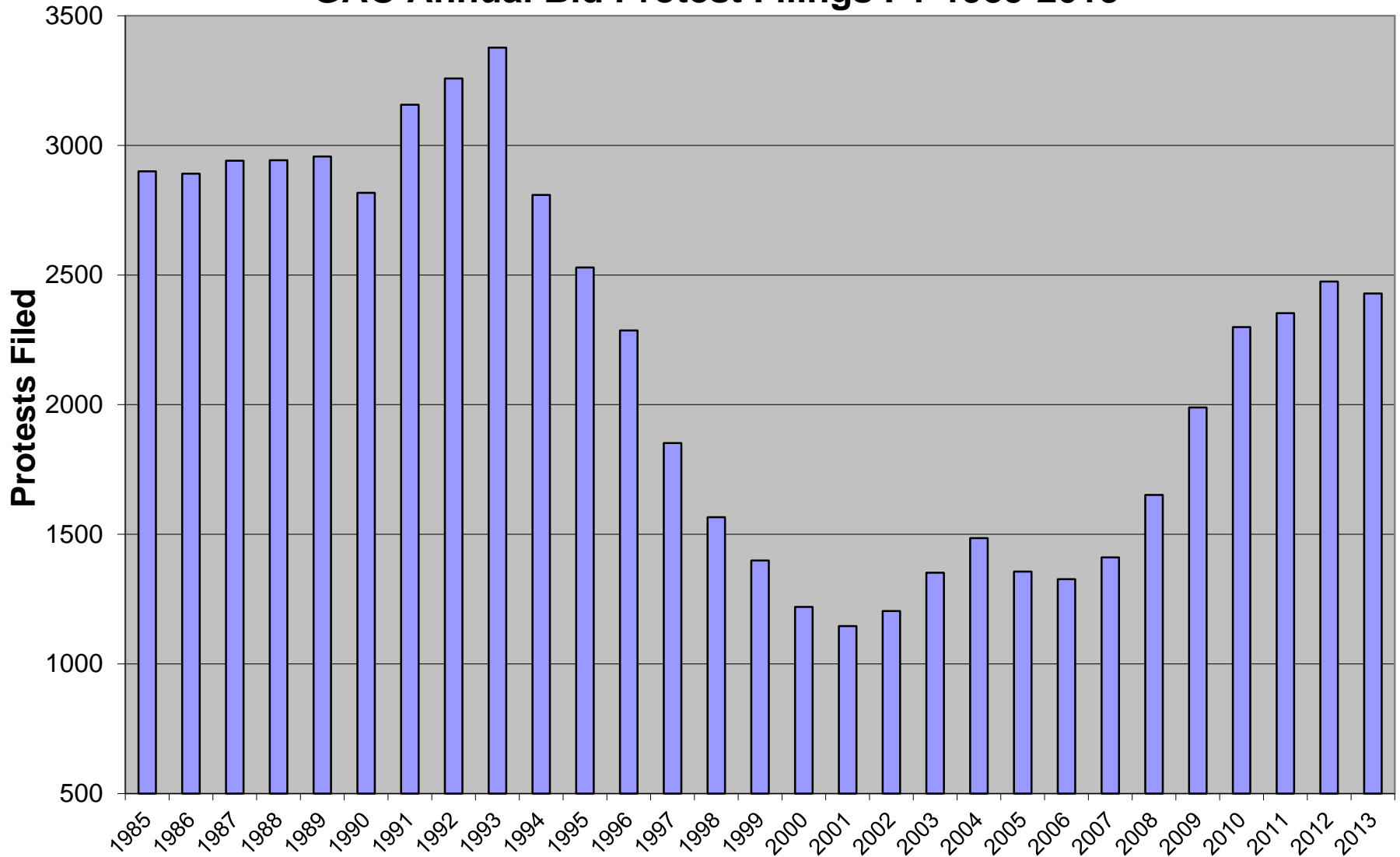
---

# What Do Bid Protests Promote?

---

- Provide a **forum** to hear complaints by, and **grant relief** to, interested parties
  - Enhance **accountability** of procurement officials and government agencies
  - Promote **transparency** into how the procurement system works
  - Protect **integrity** of procurement system
  - Avoid unnecessary **cost** and **delay & disruption** of procurements during protest process
-

## GAO Annual Bid Protest Filings FY 1985-2013



# GAO Bid Protest Filings FY 1985-2013

Fiscal Year	Filings
1985	2900
1986	2891
1987	2941
1988	2943
1989	2957
1990	2817
1991	3157
1992	3258
1993	3377
1994	2809
1995	2529
1996	2286
1997	1852
1998	1566
1999	1399

Fiscal Year	Filings
2000	1220
2001	1146
2002	1204
2003	1352
2004	1485
2005	1356
2006	1327
2007	1411
2008	1652
2009	1989
2010	2299
2011	2353
2012	2475
2013	2429



# GAO Bid Protest Statistics

## Fiscal Years 2009 - 2013

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
<b>Protest Filings</b>	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)	2,298 (up 15%)	1,989 (up 20%)
<b>Merit (Sustain + Deny) Decisions</b>	509	570	417	441	315
<b>Number of Sustains</b>	87	106	67	82	57
<b>Sustain Rate</b>	17%	19%	16%	18%	18%
<b>Effectiveness Rate</b>	43%	42%	42%	42%	43%
<b>ADR (cases used)</b>	145	106	140	159	149
<b>ADR Success Rate</b>	86%	80%	82%	80%	93%
<b>Hearings</b>	3% (31cases)	6% (56 cases)	8% (46 cases)	10% (63 cases)	12% (65 cases)

## 5 Myths About Bid Protests

### 1. Bid protests are at an all-time high

- Clearly, protests increased over the past years, but they are still well below the historical highs in the 1980s and 1990s.
- A very small percentage of federal procurements are protested (studies suggest less than 1 percent).

---

## 5 Myths About Bid Protests

---

2. There are more frivolous protests than ever
- Despite recent increases in the number of protests, the effectiveness rate has remained stable, i.e., agencies are voluntarily taking corrective action at the same rate.
  - When protests fail to state a valid basis, or raise matters not for GAO's review, GAO quickly dismisses them.
-

## 5 Myths About Bid Protests

### 3. Protests unduly delay federal procurements

- A very small percentage of procurements are protested (see Myth No. 1).
- Protest filings  $\neq$  number of procurements (Example: large multiple-award ID/IQ procurements are drawing multiple protests).
- Half of all protests are dismissed within 30 days.
- All protests are decided within the 100-day statutory deadline.
- CICA provides agencies the ability to override suspensions of performance when appropriate.

## 5 Myths About Bid Protests

### 4. GAO always sides with the agency

- GAO sustains about 20 percent of merits cases.
- Agencies often seek ADR on protests where they risk losing – and voluntarily take corrective action.
- The number of sustained decisions and voluntary agency corrective actions together demonstrate the robust level of oversight provided by GAO.

## 5 Myths About Bid Protests

5. GAO routinely second-guesses contracting officers' judgments
  - GAO denies 80 percent of merits decisions.
  - GAO's consistent standard is that mere disagreement with reasonable agency judgments will not win a protest.



## Price Realism at GAO

- Realism and reasonableness are distinct concepts.
- The FAR does not use the term, “price realism.” Instead, FAR § 15.404-1(d)(3) allows the application of cost realism principles to fixed-price proposals for the purpose of assessing performance risk.
- GAO decisions have addressed four general principles regarding price realism.

---

## 4 General Principles About Price Realism Analysis at GAO --generally not required

---

(1) If a solicitation does not provide for the evaluation of the realism of proposed prices, the agency is not required to do so.

- *Alamo City Eng'g Servs., Inc.*, B-409072, B-409072.2, Jan. 16, 2014, 2014 CPD ¶ 32; see also *Bannum, Inc.*, B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 (no basis to challenge affirmative determination of responsibility based on low price)
- *CACI-WGI, Inc.*, B-408520.2, Dec. 16, 2013, 2013 CPD ¶ 293
- *Network Innovations, Inc.*, B-408382, B-408382.2, Sept. 4, 2013, 2013 CPD ¶ 220
- *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160
- *PAE Gov. Servs., Inc.*, B-407818, Mar. 5, 2013, 2013 CPD ¶ 91

---

## 4 General Principles About Price Realism Analysis at GAO

--prohibited if not disclosed

---

(2) If the solicitation does not provide for the evaluation of the realism of proposed prices, the agency must not do so

- *Triad Int'l Maint. Corp.*, B-408374, Sept. 5, 2013, 2013 CPD ¶ 208

---

## 4 General Principles About Price Realism Analysis at GAO

--required if solicitation provides

---

(3) If the solicitation provides for the evaluation of the realism of proposed prices, the agency must perform an analysis. Even if the solicitation does not specifically use the term “price realism,” an analysis is required if: (i) the solicitation advises offerors that the agency will consider whether the proposed price is adequate/too low for the proposed technical approach, and (ii) the solicitation reserves the right to reject proposals (or assess risk) if the price is too low.

- *Esegur-Empresa de Seguranca, SA*, B-407947, B-407947.2, Apr. 26, 2013, 2013 CPD ¶ 109
- *Logistics 2020, Inc.*, B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258

## 4 General Principles About Price Realism Analysis at GAO

--But watch: FAR clause regarding compensation

(3a) GAO decisions have noted that FAR § 52.222-46(a) requires agencies to consider whether proposed professional compensation plans are realistic.

- *Portfolio Mgmt. Solutions, LLC; Competitive Choice, Inc.*, B-408846, B-408846.4, Dec. 12, 2013, 2013 CPD ¶ 290
- *Apptis Inc.*, B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237
- “The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation . . . Offerors are cautioned that lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement . . . Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.”

FAR § 52.222-46(a).

---

## 4 General Principles About Price Realism Analysis at GAO --discretion in manner/depth of evaluation

---

(4) If the solicitation provides for the evaluation of the realism of proposed prices, the agency has discretion as to the depth and manner of the evaluation.

- *Harris IT Servs. Corp.*, B-408546.2, B-408546.3, Oct. 31, 2013, 2013 CPD ¶ 245
- *Networking & Eng'g Techs., Inc.*, B-405062.4 *et al.*, Sept. 4, 2013, 2013 CPD ¶ 219
- *Triad Logistics Servs. Corp.*, B-407842.2, Apr. 22, 2013, 2013 CPD ¶ 106
- *Optex Sys., Inc.*, B-408591, Oct. 30, 2013, 2013 CPD ¶ 244



## Waivers of Organizational Conflicts of Interest

- Two GAO cases in 2013 involved an agency's waiver of an OCI late in the 100-day process. In both cases, GAO dismissed the argument based on the waiver, but said that the protester could subsequently challenge the waiver. Neither did at GAO.
- *SRA Int'l, Inc.*, B-407709.5, B-407709.6, Dec. 3, 2013, 2013 CPD ¶ 281 (waiver “late” in the process).
- *AT&T Gov. Solutions, Inc.*, B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45 (waiver on day 97).
- SRA subsequently challenged the waiver at the Court of Federal Claims. The court in a published opinion requested that GAO address the waiver issue.
- *SRA Int'l, Inc. v. United States*, COFC No. 13-969 C, Jan. 14, 2014.

# **New Requirement for GAO Annual Reports**

---

Section 867 of the FY 2013 National Defense Authorization Act contains a new requirement for GAO Annual Reports to Congress to identify the most common reasons for sustaining a protest:

“The report shall also include a summary of the most prevalent grounds for sustaining protests during such preceding year.”

---

# GAO's FY2013 Annual Report Addressing This Requirement

---

GAO's Annual Report to Congress for FY 2013 reported the following:

- “Of the decisions resolved on the merits, our Office sustained 17 percent of the decisions issued.”
- “It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.”

# GAO's FY2013 Annual Report Addressing This Requirement

The four most common bases for sustains were as follows:

- (1) Failure to follow the solicitation evaluation criteria, e.g., *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340 (finding that the agency's evaluation of the offerors' experience was inconsistent with the terms of the solicitation).
- (2) Inadequate documentation of the record, e.g., *Supreme Foodservice GmbH*, B-405400.3 *et al.*, Oct. 11, 2012, 2012 CPD ¶ 292 (finding that the record did not show whether the agency reasonably evaluated offerors' past performance in numerous areas, in part because the agency did not retain an adequate record of its evaluation).
- (3) Unequal treatment of offerors, e.g., *IAP Work Servs., Inc.; EMCOR Gov. Servs.*, B-407917.2 *et al.*, July 10, 2013, 2013 CPD ¶ 171 (finding that the agency unreasonably credited only the awardee's proposal with a strength where the record showed that the protester proposed a similar strength).
- (4) Unreasonable price or cost evaluation, e.g., *Esegur-Empresa de Segurança, SA*, B-407947, B-407947.2, Apr. 26, 2013, 2013 CPD ¶ 109 (finding that the agency failed to evaluate whether the awardee's low price was realistic, as it was required to do by the terms of the solicitation).

---

# New Docketing System and Filing Fees for Protests

---

Section 1501 of the Consolidated Appropriations Act for 2014 included a provision that authorizes GAO to charge a filing fee for bid protests.

- GAO shall create an electronic filing and docketing system.
- GAO may charge a filing fee to support the creation and operation of the system.
- Details regarding the docketing system and fees are under consideration by GAO.

---

## New Docketing System and Filing Fees for Protests

---

- On May 6, GAO posted an RFI on the FedBizOpps website seeking responses from vendors.
- We envision a system that is easy to use; not designed just for attorneys and law firms.
- This system may get implemented later this year.



# In-House Counsel Perspective

**Tamara Jack**  
Associate General Counsel

LMI

A decorative graphic at the bottom of the slide consisting of a series of parallel, wavy lines in a dark blue color, creating a sense of movement and depth.

# Decision-making Process

---

## Pre-award

- Timeline
- Business considerations
- Legal considerations

# Grounds for Pre-award Protests

---

- Unduly restrictive terms in the solicitation
- Inclusion of improper clause or provision
- Failure to include a mandatory clause or provision
- Improper bundling of requirements
- Ambiguous solicitation provisions
- Unreasonable evaluation method
- Use of FSS contract for non-FSS purchase
- Changed requirements
- Improper disclosure of proprietary information

# Decision-making Process

---

## Post-award: Challenging an agency award

- Whether to file?
- Where to file?
- Timeline
- Debrief
- Legal considerations
- Business considerations

# Grounds for Post-award Protests

---

- Lack of meaningful discussions
- Misleading discussions
- Unequal discussions
- Disparate treatment
- Organizational conflicts of interest
- Failure to consider relevant information
- Flawed technical evaluation
- Flawed past-performance evaluation
- Flawed cost evaluation
- Flawed price analysis

# Decision-making Process

---

## Post-award: Whether to intervene

- Timeline
- Business considerations
- Legal considerations
- Levels of intervention

# Checklist

---

## Do:

- Review each solicitation carefully
- Identify any OCI concerns early in the B&P process
- Look for the types of RFP defects listed above
- Determine/investigate any OCI issues with the awardee
- Ask for a debrief (for both wins and losses)

# Checklist

---

## Do not:

- Bid on procurements if there are any OCI concerns
- Engage in price or technical proposal discussions related to a RFP with the government's technical/program staff, if company is bidding on that RFP
- Discuss or provide input to the government on any aspect of the active procurement, if you are an incumbent and also bidding on the follow-on work



# VENABLE<sup>®</sup><sub>LLP</sub>

## Outside Counsel Perspective: Debriefings

Rebecca E. Pearson, Venable LLP

p: 202.344.8183 | f: 202.344.8300 | repearson@Venable.com

MAY 20, 2014



## Negotiated Procurements - Requesting a debriefing in time to trigger the automatic stay in a post-award protest

- A debriefing must be requested in writing, and must be received by the agency within three days after your company receives notice of contract award.
- The debriefing is supposed to occur within five days after the agency receives your company's request.
- Request to schedule the debriefing for a Thursday or Friday to maximize the timing for a stay (try to avoid debriefings Monday - Wednesday).
- Try to accept the first debriefing date offered by the agency (the timing rules for a stay are triggered by this date, not the date your company is actually debriefed).
- **BEWARE OF RECEIVING A WRITTEN PACKAGE BEFORE THE LIVE DEBRIEFING.**
- Follow up sessions generally do not constitute a "continuing debriefing."



# Obtaining a Stay of Performance in a GAO Post-Award Protest for a Negotiated Procurement – Thurs. or Fri. Debriefing

➤ Thursday Debriefing Offered – *Must File on Day 4 to Ensure CICA Stay*

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
				Debriefing	Day 1	Day 2 GAO Closed
Day 3 GAO Closed	Day 4 Must file protest to ensure stay	Day 5 GAO must notify agency.* ✓ CICA Stay				

➤ Friday Debriefing Offered - *Must File on Day 4 to Ensure CICA Stay*

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
					Debriefing	Day 1 GAO Closed
Day 2 GAO Closed	Day 3	Day 4 Must file protest to ensure stay	Day 5 GAO must notify agency.* ✓ CICA Stay			

**\*GAO often notifies the Agency in less than 24 hours**



# Obtaining a Stay of Performance in a GAO Post-Award Protest for a Negotiated Procurement – Mon. or Tues. Debriefing

- Monday Debriefing Offered - *Must File on Day 3 to Ensure CICA Stay*

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
	Day 1 Debriefing	Day 1	Day 2	Day 3 Must file protest to ensure* stay	Day 4 GAO must notify agency. ✓ CICA Stay	Day 5 GAO Closed

- Tuesday Debriefing Offered - *Must File on Day 2 to Ensure CICA Stay*

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
		Debriefing	Day 1	Day 2 Must file protest to ensure* stay	Day 3 GAO must notify agency. ✓ CICA Stay	Day 4 GAO Closed

\*GAO often notifies the agency in less than 24 hours.



# Obtaining a Stay of Performance in a GAO Post-Award Protest for a Negotiated Procurement – Debriefing on Wednesday, Federal Holiday on Monday

- **Wednesday Debriefing Offered, Federal Holiday on Monday**  
***Must File on Day 1 to Ensure CICA Stay***

Sun	Mon	Tues	Wed	Thurs	Fri	Sat
			Debrief	Day 1 Must file to ensure stay	Day 2 GAO must notify agency. ✓ CICA Stay	Day 3 GAO Closed
Day 4 GAO Closed	Day 5 GAO Closed	Day 6 If Protest is filed today --	Day 7 -- GAO deadline to notify agency is today. ❖ No Stay			



# The Debriefing in Negotiated Procurements: What information should be released?

FAR 15.506(d) requires that the following information, at a minimum, be provided at a debriefing in negotiated procurements:

- The agency's evaluation of the significant weaknesses and deficiencies in the offeror's proposal;
- The overall evaluated cost or price (including unit prices) and the technical rating of the awardee and the debriefed offeror;
- The overall ranking of all offerors, if such ranking was developed by the agency;
- A summary of the award rationale; and
- **Response to the offeror's relevant questions with respect to whether the agency followed the source selection procedures in the solicitation, regulations, and other applicable authorities.**
- The focus will be on the offeror's proposal, not on the proposals of other offerors.





## The Debriefing in Negotiated Procurements: What information should not be released?

The debriefing shall not include or reveal—

- Point-by-point comparisons of the debriefed offeror's proposal with those of other offerors.
- Information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) 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; and
  - The names of individuals providing reference information about an offeror's past performance.



# Brief Explanation under FAR Part 8

- Not required for all solicitations
- Require only “a brief explanation of the basis for the award decision.”

## Services

- A debriefing is required where—
  - The Solicitation exceeds the simplified acquisition threshold and contains a Statement of Work
  - Agency awards on factors other than price alone

## Blanket Purchase Agreements

- Required for competitive BPAs





# Debriefing Strategies

- **In-Person Request**
  - Watch out for the same-day debriefing letter.
  - Enforce opportunity for an interactive process.
- **Preparation of Questions**
  - Basic questions should be prepared ahead of award decision.
  - Tailor your questions to relevant issues.
  - Consider sending with debriefing request.
- **Document Requests**
  - Redacted source selection plan and decision document.
  - Government independent cost or staffing estimates.
- **Closing the Debriefing**
  - Open promises of documents or other answers.
  - Request that debriefing remain open until open issues are closed.



# Deciding whether to file a protest

- Technical Merit Considerations
  - Are there legitimate potential grounds to protest?
  - Can the company show prejudice?
- Strategic Business Considerations
  - Was the program a “must win” in a key strategic area for the company?
  - Are there other near-term opportunities to win work in this area?
  - Is the company the incumbent contractor?
  - What is the company willing to invest in a protest?
  - Will the company be able to win a re-evaluation?
  - Do the grounds of protest cause concern for future procurements?
- Customer Relationship Considerations



# Flaws in One-Day Debriefings



Typically one-sided, with the Agency pushing information and the offeror receiving information

- Limited, if any, ability to clarify ambiguities in the debriefing
- In person debriefings are increasingly rare



The short time that an offeror has to file to obtain an automatic stay does not provide any time to discuss concerns, prior to a protest



FAR 15.506 provides for limited information

- Offerors are not able to review source selection information, even through counsel
- No information is provided regarding the evaluation of the awardee

# The benefits of expanding debriefings to ensure they are meaningful

## Transparency

- Builds trust in the rationality and fairness of agency decision-making
- Preserves agency relationship with contractors

## Efficiency

- Avoids protests. It takes fewer resources to support an expanded debriefing than a protest.
- Minimizes mission disruption

## Early Remediation

- Allows agencies to identify and correct issues early in the process, prior to a protest



# The Air Force is conducting a pilot for expanded debriefings

- Parties execute an Extended Debriefing Agreement similar to a Protective Order or Non-Disclosure Agreement
- Agreement states that the debriefing will not conclude until the process is over
- As at the GAO, only outside counsel and individuals who are not decision makers may review the evaluation record and may not disclose to their clients
- Documents are typically limited to core source selection documents that address the offeror's concerns



# The AF extended debriefing does not impact an offeror's ability to protest

- Because the debriefing extends until the conclusion of the process, and timeliness standards for GAO post-award protests and the automatic stay are triggered off of the conclusion of the debriefing, timeliness at the GAO is unaffected
- GAO concurs



# Limitations of the Air Force Pilot

- Not appropriate or available in all procurements
- Awardee(s) must agree to the process





# Outside Counsel Perspective: Corrective Action

Keir Bancroft





# Corrective Action

## *Agency Reasons for Taking Corrective Action*

- **Getting It Right, Keeping on Schedule**
  - Ability to quickly address issues in the procurement.
  - Helps agencies preserve procurement timelines.
- **Resource Considerations**
  - Time and effort involved in defending protests.
  - Potential liability for protester's costs if no corrective action before 30-day Agency Report deadline.
- **GAO Recommendations**
  - GAO recommendation following decision on merits.
  - GAO outcome prediction.



# Corrective Action

## *Protester/Intervenor Reasons for Objecting To or Protesting Corrective Action*

- **Protester Considerations**
  - Reserve rights to arguments.
  - Keep protest at GAO.
- **Intervenor Considerations**
  - Prevent an overbroad approach to corrective action.
  - Guard against agency unnecessarily allowing for proposal revisions after pricing and other details have been provided to the protester.



# Corrective Action

## *Is Agency Corrective Action Too Broad . . .*

- **Must be “reasonable under the circumstances[.]”**
  - *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102 (2013).
    - Agency has broad discretion to take corrective action when “necessary to ensure fair and impartial competition[.]”
    - Corrective action following GAO sustained protest of two discrete defects provided for reopening the competition; determined to be overbroad.
    - Corrective action must be “reasonable under the circumstances.”
    - Disclosure of significant amounts of information, including the winning price, a 45-page debriefing, and a lengthy question and answer session held to be irrational.



# Corrective Action

## *... or is Agency Corrective Action Too Narrow?*

- **Must be “appropriate to remedy the [agency’s] concern[.]”**
  - *Crewzers Fire Crew Transport, Inc.*, B-406601 (2012), 2012 CPD ¶ 204.
    - Protester argued the agency improperly evaluated BPA pricing using a formula that differed from the one set forth in the BPA.
    - Agency took corrective action, allowing offerors to submit revised prices based on its new formula.
    - Protester objected to the corrective action and GAO considered the argument during the 100-day period.
    - Protester argued allowing re-submission of pricing would set off another bidding war, forcing reduction in prices.
    - Protest denied because allowing offerors to base price proposals on a faulty formula posed greater potential harm to the integrity of the competitive procurement system than disclosing the awardee’s price.



# Corrective Action

## *... or is Agency Corrective Action Proper?*

- **No benefit to the procurement system if “there was an actual impropriety that did not result in any prejudice to offerors[.]”**
  - *Security Consultants Group, Inc.*, B-293344.2 (2004), 2004 CPD ¶ 53.
    - DHS corrective action amending a solicitation to disclose relative weights of technical factors held unreasonable.
    - Awardee successfully argued that no offerors were prejudiced by the defect (*i.e.*, lack of detail on relative weights of technical factors).
    - Because awardee’s competitive position had been compromised by disclosure of its price “there is no benefit to the procurement system that would justify reopening the competition.”



# Corrective Action

## *Key Decision Points*

- **Timeliness**
  - Do you waive rights if you refrain from objecting to or protesting agency corrective action?
  
- **What Grounds?**
  - Was there prejudice sufficient to warrant corrective action?
  - Is the corrective action overbroad?
  - What is the balance between potential harm to the integrity of the procurement system and the competitive harm to awardees whose prices were exposed?
  
- **Effect on Agency Relationship?**



## Questions and Comments

Bill Walsh  
Venable LLP  
wlwalsh@Venable.com  
t 703.760.1685  
f 703.821.8949

Rebecca Pearson  
Venable LLP  
repearson@Venable.com  
t 202.344.8183  
f 202.344.8300

Keir Bancroft  
Venable LLP  
kxbancroft@Venable.com  
t 202.344.4826  
f 202.344.8300

[www.Venable.com](http://www.Venable.com)

