

Snatching Victory: Lessons Learned from Recent Bid Protests

June 30, 2020

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Source Selection Objective

“The objective of source selection is to select the proposal that represents the best value.”

- FAR 15.302

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Key Portions of Solicitation

- Section C: The Schedule
- Section K: Representations, certifications and other statements required of offerors or respondents
- Section L: Instructions, conditions and notices to offerors or respondents
- Section M: Evaluation factors for award
- Solicitation Clauses

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What does the Government look for when it reviews a proposal?

- Does your proposal meet the RFP's requirements (i.e., did you follow the instructions in Section L)?
- Does your proposal show that you understand the PWS/SOW?
 - Does the proposal contain a good technical approach?
 - Does the proposal show that you understand how to manage the contract?
 - Is your LOE appropriate for the required task?
- Does your price proposal add up?
- Does your proposal demonstrate a good record of past performance? Is that past performance relevant?
- Are you responsible?

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What are strategies for a winning protest?

- The facts will govern which protest grounds can be successful.
- While the GAO will dismiss a protest based on mere speculation, alleging errors in the awardee's proposal (or the agency's evaluation thereof) can help set you up for success by giving you a bigger record (if before the GAO) from which to identify supplemental protest grounds.
- Depending on the circumstances, where multiple contractors protest the same award, it may be helpful to share a public, redacted version of protests.

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What issues or mistakes prevent offerors from winning a contract or cause the GAO or COFC to overturn the Agency's award decision?

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Overview

- Procuring agencies have broad discretion in evaluating proposals
- GAO
 - GAO limits review of award decision to whether the agency’s decision “was reasonable, consistent, and in accord with law, regulation and the terms of the solicitation.” (citation omitted)
 - GAO does not reevaluate proposal and the protestor’s mere disagreement is not a valid protest ground.
- COFC
 - COFC will set aside an award decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedure required by law.” (citations omitted)
 - Focus: Did the Government’s award decision have a rational basis?

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Lesson #1 Understand What the Government Actually Wants

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NIKA Technologies, Inc., B-418563, June 5, 2020

- Protest of solicitation for facility maintenance and medical facilities operations and maintenance was denied.
- The fundamental issue under all protest grounds was NIKA's understanding of the solicitation's requirements—NIKA was disqualified because it failed to show relevant corporate experience in "preventative maintenance."
- Though "preventative maintenance" was not explicitly used in the solicitation, it was clear from reading the PWS that the "very nature" of the work "amounts to preventative maintenance."

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Facility Services Mgmt., B-418526, et al., May 20, 2020

- Protest of solicitation for facility operations and maintenance was denied.
- Protester's proposed O&M supervisor was found to lack relevant experience—protester did not understand that the supervisor was required to have direct knowledge and ability to perform the work themselves, and there was nothing in the proposed resume that indicated the supervisor had such experience.
- GAO held that that the proposed supervisor's experience was "inconsistent with the plain language of the solicitation."

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Lesson #2

Follow the Rules or Face Disqualification

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Cla-Val Co., B-418443, May 13, 2020

- Protest denied where protester failed to submit proposal in time.
- The Navy provided two different delivery addresses—one for hand delivery and one for mail. The proposal was delivered by a commercial carrier at the mail delivery address at 9:39 AM on the due date (with a delivery confirmation from the carrier), with a 3:00 PM deadline. However, the actual package was not logged into the Navy's receiving system until the following day.
- The Navy rejected the submission as untimely, but protester argued that the carrier's delivery confirmation was proof of timely submission.
- The GAO consistently finds that commercial carrier records, by themselves, do not establish the time of delivery.

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Lesson #3

Don't Expect the Government to Fill in the Gaps

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AECOM Management Services, Inc., B-418467, et al., May 15, 2020

- Protest of solicitation for support services at Army base was denied.
- Protester raised several grounds, including that the Army unreasonably concluded that it could not perform a price realism analysis when the Army found that the cost proposal relating to one of the proposed subcontractors was missing certain required information.
- Ultimately, the Army could have reverse-engineered the missing information, but the proposal did not provide the information as required by the solicitation.
- “An offeror is responsible for submitting a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency.”

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Valida Tek-CITI, LLC, B-418320, et al., April 22, 2020

- Protest of solicitation for IT services denied.
- Protester identified three relevant contracts for past performance, but the agency could not locate on either PPIRS or CPARS. It assessed a “neutral” rating.
- Protester argued that the agency should have looked harder and, therefore, unreasonably ignored its past performance. However, there was nothing in the solicitation that required the agency to look further (such as to FAPIIS or SAM).
- The GAO concluded that the agency followed the terms of the solicitation.

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Lesson #4 Don't Expect the Government to Notify You of Mistakes or Weaknesses in Your Proposal

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JJ Global Services, B-418318, February 7, 2020

- Protest of solicitation for landscaping services denied.
- RFP set strict page limits for narratives supporting the technical approach—anything beyond the page limits would not be considered.
- There was an obvious error in formatting and printing that caused required information to fall outside the page limits and the protester was assigned an unacceptable rating.
- “[I]t is up to the agency whether or not to seek clarifications regarding proposals...[A]n agency is not obligated to sort through an offeror’s proposal to decide which pages should or should not be counted.”

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Lesson #5 Understand How to Leverage Your Team

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Red River Science & Tech., LLC, B-417798.2, Oct. 24, 2019

- Red River submitted a proposal that included a significant subcontractor, The Logistics Company.
- Because of Red River's proposed division of labor, GAO held that the Army acted reasonably in not crediting The Logistics Company's experience with transportation to the team.
- GAO further concluded that it was reasonable for the Army to evaluate past performance experience in context with the specific functional areas each contractor would perform because the solicitation contemplated this type of evaluation.

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Lesson #6 Proving Competitive Prejudice is Essential

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Inquiries, Inc., GAO B-418486, et al., May 27, 2020

- Competitive prejudice is a required showing for any protest.
- GAO agreed that in evaluating the protester, the agency had failed to adhere to solicitation criteria and disparately evaluated proposals. Even accounting for these errors, however, the awardee still had a higher-rated proposal that was only slightly more expensive than the protester's. Thus, GAO could not find that the protester had been prejudiced.
- "Despite this disparate treatment, we see no basis to conclude that Inquiries was competitively prejudiced by the error."

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Acuity-Exemplar, JV, GAO B-418428, April 7, 2020

- GAO found the agency misled the protester concerning contributions to be made under a collective bargaining agreement.
- Nevertheless, GAO concluded that the protester had not been prejudiced by the error. Even if the agency had not misled the protester, the protester's price was still higher than the awardee's higher-rated proposal.
- Thus, the protester could not establish that it had a substantial chance of receiving the award.

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Lesson #7

Be Mindful of Business Decisions

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Quality Control Int'l, LLC v. United States, COFC **No. 20-37C, May 29, 2020**

- The protester alleged that the agency's discussions, which identified prices that seemed unrealistically low, coerced the company into needlessly raising its prices.
- COFC held that the discussions were not coercive. The discussions did not limit the protester's ability to exercise its own business judgment, did not require a particular price, and avoided any conclusive determination on an acceptable price.

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Lesson #8 Know When to Submit Your Protest

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Timeliness - Pre-Award Protests of Obvious or Known Solicitation Improprieties

GAO

Draeger, Inc., B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 (GAO dismissed protest challenging award of purchase order as exceeding the scope of the underlying IDIQ contract; GAO found that protester knew of its basis prior to competing for the underlying IDIQ contract).

Protest must be filed before the time and date for receipt of proposals/quotations

Agency

COFC

Concourse Group, LLC v. United States, 131 Fed. Cl. 26 (2017) (Court dismissed OCI challenge where protester knew of the potential OCI prior to contract award.)

Stay at GAO & Agency

Automatic stay of award upon timely filing of a pre-award protest. Stay does not require the Agency to stop the procurement or suspend receipt of proposals.

No Automatic Stay at COFC

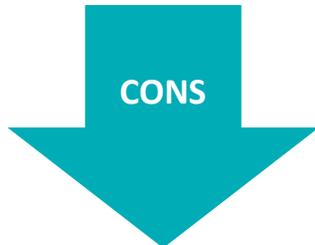
Lesson Learned – Question or Protest Ambiguity Prior to Proposal Submission

Weigh Risks of Questions



Benefits

1. Puts all offerors on the same playing field
2. Agency may change or clarify its approach
3. Fosters intelligent decision making for offeror – participate & comply, pass, or protest; how to structure the team, etc.



Risks

1. May inform competitors of approaches or risks
2. Clarification may not favor the offeror requesting it
3. May demonstrate that the ambiguity is obvious (i.e., patent ambiguity)

Timeliness - Pre-Award Protest of Exclusion from the Competitive Range

Agency & GAO

Must file no later than **10 days** after the basis of protests is known or should have been known, even if exclusion occurs pre-award. The Final Rule clarifies that “the basis for a protest becomes known when there is no solicitation closing date or when no further submissions in response to the solicitation are anticipated.”

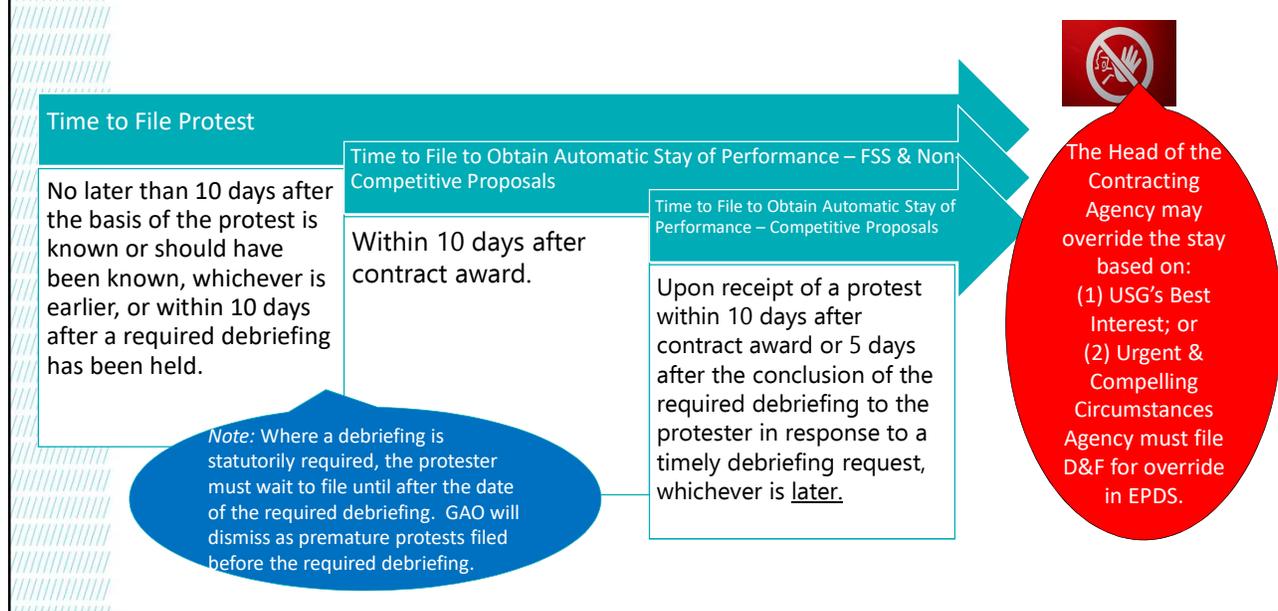
COFC

While there are no strict filing deadlines, delay in filing may impact the remedy.

Wit Assocs., Inc. v. United States, 62 Fed. Cl. 657, 662 n.5 (2004) (“[I]n some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.”)



Timeliness - GAO & Agency Post Award Issues



American Systems Group, B-418535, June 9, 2020

- The protester contended that the agency capriciously selected a deviation factor for assessing price realism. GAO found that this argument was an untimely challenge to the terms of the solicitation.
- “[O]ur review of the solicitation reveals no requirement, nor has ASG cited to any, that obligated the agency to request a price breakdown as part of its price realism evaluation. Thus, to the extent ASG is arguing that the agency was required to do so, such an allegation is also an untimely challenge to an alleged impropriety in the solicitation that was apparent prior to the closing time for receipt of initial proposals.”

Key Takeaways for Submitting a Winning Proposal

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Lessons Learned

1. Understand what the Government actually wants.
2. Follow the rules or face disqualification.
3. Don't expect the Government to fill in the gaps.
4. Don't expect the Government to notify you of mistakes or weaknesses in your proposal.
5. Understand how to (and if you can) leverage your team.
6. Proving competitive prejudice is essential.
7. Be mindful of business decisions.
8. Know when to question and when to protest.

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Questions?

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