

VENABLE

# Bid Protest Strategies for Government Contractors

Wednesday, August 16, 2017  
12:00pm-1:30pm ET

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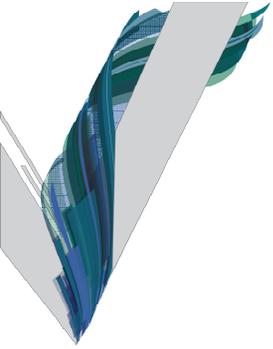
# Agenda

- Forum Selection
  - Agency
  - Government Accountability Office
  - U.S. Court of Federal Claims
  - Task Order Ombudsman
- Timeliness
  - CICA Stay
  - Agency/GAO vs. Court of Federal Claims
- Debriefings
  - Strategy
  - Questions to Ask



# Agenda

- Decision to Protest
  - Business/Customer Relationship Considerations
  - Successful Protest Grounds
  - Less Successful Protest Grounds
- Task and Delivery Order Protests
- Intervention
  - Should you intervene?
  - Top 10 considerations
  - Requesting dismissal



# Forum Selection



## **Bid Protest Forums**

- Agency
- Government Accountability Office (GAO)
- United States Court of Federal Claims (COFC)
- (Task and Delivery Order Ombudsman)



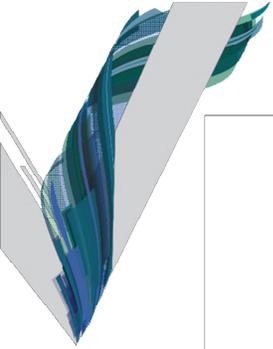
## **Bid Protests at GAO**

- GAO's bid protest function began in 1920s and was codified in the Competition in Contracting Act of 1984 (CICA)
- Bid Protest statutory provisions at 31 U.S.C. §§ 3551-3557
- Bid protest regulations at 4 C.F.R. Part 21
- 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.

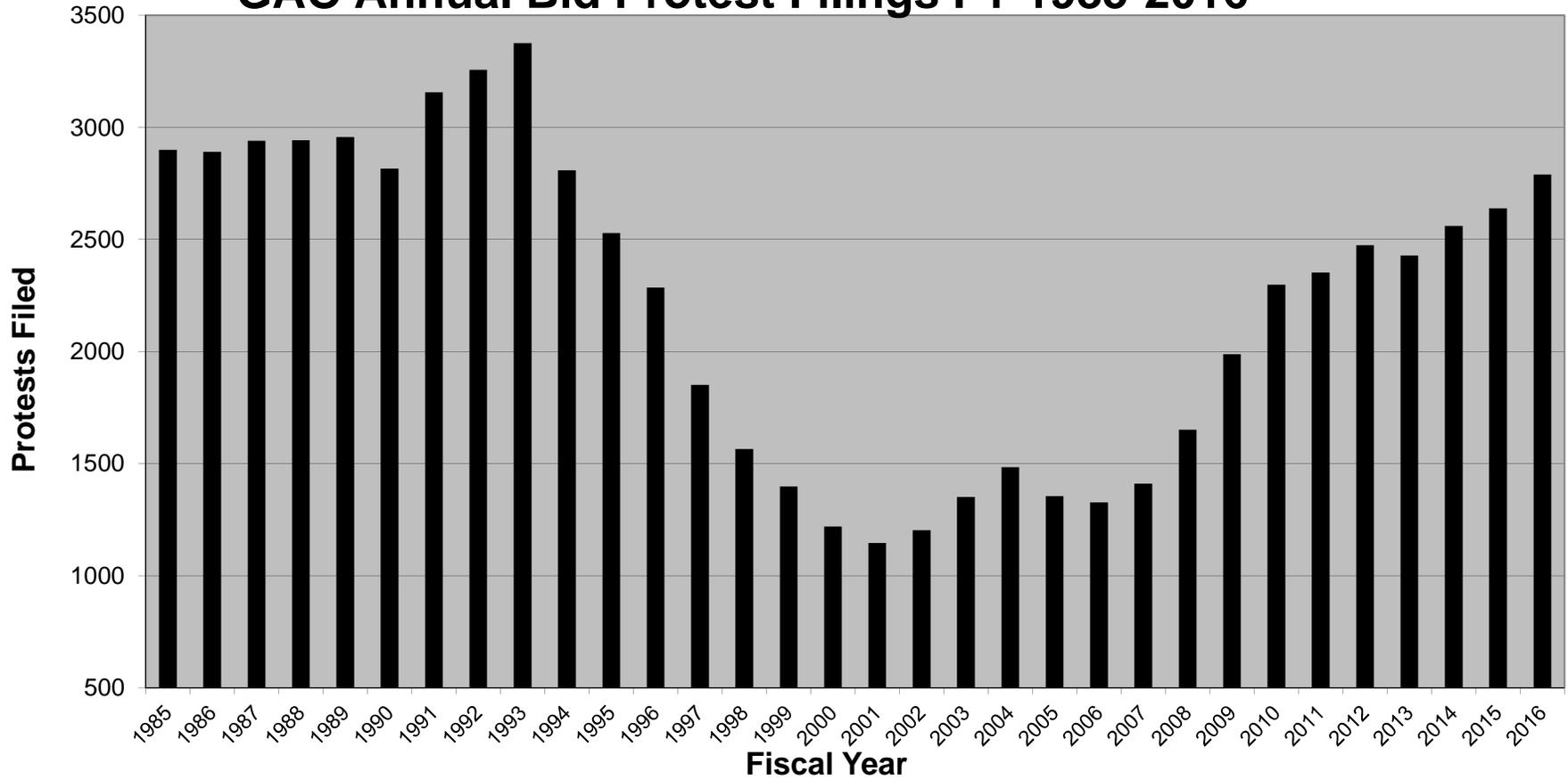


## CICA's Mandate

- CICA directs GAO to provide for the expeditious, and inexpensive resolution of protests. U.S.C. § 3554(a)(1).
- GAO “shall issue a final decision . . . within 100 days after [the protest is filed].” 31 U.S.C. § 3554(a)(4).



## GAO Annual Bid Protest Filings FY 1985-2016





# GAO BID PROTEST FILINGS FY 1985-2016

Fiscal Year	Filings		Fiscal Year	Filings
1985	2900		2001	1146
1986	2891		2002	1204
1987	2941		2003	1352
1988	2943		2004	1485
1989	2957		2005	1356
1990	2817		2006	1327
1991	3157		2007	1411
1992	3258		2008	1652
1993	3377		2009	1989
1994	2809		2010	2299
1995	2529		2011	2353
1996	2286		2012	2475
1997	1852		2013	2429
1998	1566		2014	2561
1999	1399		2015	2639
2000	1220		2016	2790



# GAO Bid Protest Statistics Fiscal Years 2012-2016

	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012
<b>Protest Filings</b>	2790 (up 6%)	2639 (up 3%)	2561 (up 5%)	2429 (down 2%)	2475 (up 5%)
<b>Merit (Sustain + Deny) Decisions</b>	616	587	556	509	570
<b>Number of Sustains</b>	139	68	72	87	106
<b>Sustain Rate</b>	23%	12%	13%	17%	19%
<b>Effectiveness Rate</b>	46%	45%	43%	43%	42%
<b>ADR (cases used)</b>	69	103	96	145	106
<b>ADR Success Rate</b>	84%	70%	83%	86%	80%
<b>Hearings</b>	2.5% (27 cases)	3% (31 cases)	5% (42 cases)	3% (31 cases)	6% (56 cases)



## Summary Comparison: Agency vs. GAO vs. COFC

- Jurisdiction
- Agency Decision vs. GAO Recommendation vs. COFC Order
- Automatic Stay vs. Injunction (TRO)
- Timeliness Requirements
- 35/100/??? Day Resolution
- Protective Order
- Summary Dismissals
- Standard of Review
- Discovery
- ADR



## Key Forum Selection Considerations

- Stay of contract performance
- Scope of administrative record
- Hearings
- Nature and objective of protest
- Time for decision
- DOJ involvement
- Standard of review
- Cost of litigation
- Different legal outcomes



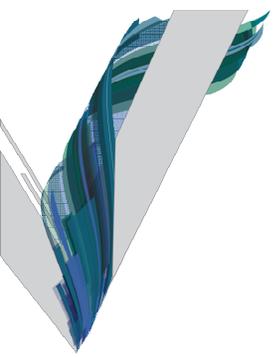
# Filing the Protest

FORUM	PLEADING
Agency	Informal letter explaining grounds of protest and demonstrating prejudice
GAO	Informal letter explaining grounds of protest and demonstrating prejudice
COFC	Formal federal court "Complaint" plus a formal "Motion for Preliminary Injunction" and/or "Temporary Restraining Order" (TRO) if seeking a stay of performance



# Protective Orders

FORUM	PROCEDURE TO OBTAIN PROTECTION FOR PROPRIETARY AND CONFIDENTIAL INFORMATION
Agency	There is no formal process to secure a protective order at the agency level, although all documents should be filed with the appropriate legends indicating that the document contains proprietary and confidential information and is <u>not</u> subject to release under the Freedom of Information Act.
GAO	Upon request, the GAO will issue a protective order to prevent the public disclosure of a company's proprietary or confidential data, or the agency's source selection sensitive information.
COFC	The parties may request a protective order to avoid the disclosure of proprietary or confidential data, or the agency's source-selection sensitive information, in which case documents will be filed "under seal."



# What Happens After the Protester Files a Protest at the Agency?

GOVERNMENT'S RESPONSE	DISCOVERY	PROCEEDINGS	DECISION	APPEAL
No responsive documents required; therefore, the agency's decision is likely to be the only other document.	Discovery is not provided; however, the regulations state that "the parties may exchange relevant information."	None, unless voluntary on the part of the agency.	Regulations state that agencies "shall make their best efforts to <b>resolve agency protests within 35 days</b> after the protest is filed."	The agency's adverse decision may be "appealed" internally according to agency procedures or by filing a protest at the GAO.



# What Happens After the Protester Files a Protest at the GAO?

GOVERNMENT'S RESPONSE	DISCOVERY	PROCEEDINGS	DECISION	APPEAL
<ul style="list-style-type: none"> <li>The agency must file an Agency Report <b>within 30 days</b> after receiving notice of the protest from the GAO.</li> <li>The agency will often file a Motion to Dismiss to avoid having to file an Agency Report.</li> <li>The agency may take corrective action.</li> </ul>	<ul style="list-style-type: none"> <li>Document requests are permitted both before and after the submission of the Agency Report.</li> <li>Depositions are <u>not</u> permitted.</li> </ul>	<ul style="list-style-type: none"> <li>Your company has <b>10 calendar days</b> after receiving the Agency Report to submit comments and/or supplemental grounds of protest.</li> <li>The GAO has the discretion to hold a hearing and/or engage in Alternative Dispute Resolution (ADR).</li> </ul>	<ul style="list-style-type: none"> <li>The GAO will issue a decision <b>within 100 days</b> after the protest was filed.</li> <li>The standard of review is whether the agency's conduct was reasonable and in accordance with the solicitation's evaluation criteria and applicable procurement laws and regulations.</li> <li>The GAO decision is not binding on the agency, but the agency must report to GAO (and GAO reports to Congress) if the agency fails to implement a GAO decision.</li> </ul>	<ul style="list-style-type: none"> <li>No formal appeal right, but you can request reconsideration (must file <b>within 10 days</b> of receipt of decision).</li> <li>You can also file a new protest at COFC.</li> </ul>



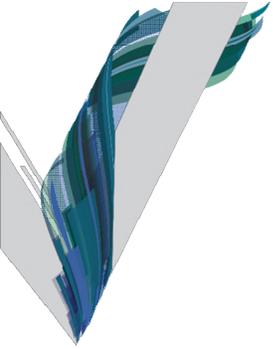
# What Happens After the Protester Files a Protest at the Court of Federal Claims?

GOVERNMENT'S RESPONSE	DISCOVERY	PROCEEDINGS	DECISION	APPEAL
<ul style="list-style-type: none"> <li>• The agency must file an Answer to the Complaint and file an Administrative Record.</li> <li>• If your company moved for a TRO, the agency must file an opposition, unless it agrees to voluntarily withhold performance.</li> <li>• The agency also may file a motion to dismiss the Complaint.</li> </ul>	<p>Discovery, including depositions, is permitted, but generally limited.</p>	<ul style="list-style-type: none"> <li>• Protests are typically resolved by motion (i.e., Motions for Judgment on the Administrative Record) with oral arguments held.</li> <li>• Evidentiary hearings may be held to decide disputes about material facts.</li> <li>• Under RCFC Appendix H, effective 8/1/2016, which revoked the ADR Automatic Referral Program – which did not encompass bid protests – ADR may be used.</li> </ul>	<ul style="list-style-type: none"> <li>• There is no mandated timeframe in which the COFC must issue a decision.</li> <li>• The standard of review is for arbitrary and capricious conduct or an abuse of discretion.</li> <li>• The decision is binding and results in an enforceable order.</li> </ul>	<p>Right of appeal exists to the United States Court of Appeals for the Federal Circuit.</p>



## Remedies: What Actions May Result From a Successful Protest?

- The agency may take corrective action and/or reopen the competition.
- The GAO may recommend (non-binding) that agencies take the following corrective action:
  - Refrain from exercising options under the contract;
  - Terminate the contract;
  - Open the contract to a new competition;
  - Issue a new solicitation;
  - Award a contract consistent with statute and regulation; or
  - Such other recommendation(s) as GAO determines necessary to promote compliance.
- The COFC may enjoin the award and order (binding) all actions that GAO can recommend.



# Timeliness



# Pre-Award Bid Protests: Timeliness

OUTCOME	WHEN PROTEST MUST BE FILED
<p><b>Agency, GAO, and COFC pre-award protest of improprieties in a solicitation</b></p>	<p>A protest of <b>improprieties in a solicitation</b> must be filed <u>before bid opening</u> or the <u>closing date/time set</u> for receipt of proposals/quotations. However, a solicitation defect that was not apparent before those times must be protested no later than <u>10 days after the defect became apparent</u>.</p>
<p><b>Agency, GAO, and COFC pre-award protest of exclusion from competition</b></p>	<p><b>Agency and GAO:</b> A protest of <b>exclusion from the competition</b> must be filed <u>no later than 10 days</u> after the basis of the protest is known or should have been known, whichever is <u>earlier</u>. As a general matter, this means within 10 days of learning of the exclusion or within 10 days of a pre-award debriefing.</p> <p><b>COFC:</b> <u>No strict filing deadlines</u>. However, COFC requires protester's counsel to provide at least 24-hour advance notice of filing a protest to the DOJ's Commercial Litigation Branch, the COFC Clerk, the procuring agency's CO (by fax), and the apparently successful offeror(s) (if any). Further, delay before the COFC is dangerous even if certain strict GAO and agency-level protest deadlines do not apply. For example, the COFC has found that delay in filing a protest can be prejudicial to a protester's case. See <i>Wit Assocs., Inc. v. United States</i>, 62 Fed. Cl. 657, 662 n.5 (2004) ("In 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.")</p>



# Pre-Award Bid Protests: Stay of Performance

OUTCOME	WHEN PROTEST MUST BE FILED
<b>Agency</b> pre-award stay of performance	Upon <u>receipt of a protest before award</u> , a contract may not be awarded pending agency resolution of the protest, unless someone above the CO or another agency official justifies the contract award in writing for <u>urgent and compelling reasons</u> or in the USG's <u>best interest</u> .
<b>GAO</b> pre-award stay of performance	Upon receiving notice of a protest from GAO, the agency may not award a contract unless the head of the contracting activity authorizes award based on a writing finding that <u>urgent and compelling circumstances</u> that significantly affect the interests of the United States will not permit awaiting the decision of the GAO and <u>award is likely to occur within 30 days of the written finding</u> .
<b>COFC</b> pre-award stay of performance = temporary restraining order (TRO)	To secure a stay of performance the protester must seek a temporary restraining order (TRO) and prove (1) likelihood of success on the merits; (2) irreparable harm to the protester if the TRO is not granted; (3) lesser harm to the USG and awardee if the TRO is granted; and (4) the TRO is in the public interest.



## **Pre-Award Bid Protests: Protest of the Solicitation**

- 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



## Pre-Award Bid Protests: Conversation for Corporate Team

- Is there anything in the solicitation that appears skewed towards a particular offeror, e.g., the incumbent?
- Is there anything in the solicitation that renders your company ineligible for award?
- Does the solicitation give you a disadvantage that it does not give anyone else?
- For ambiguities in solicitation, is the Q&A period still open?
- Probability of win if perceived defects remain in the solicitation vs. probability of win with corrected solicitation
- Size and strategic importance of procurement
- IDIQ vs. stand-alone contract
- Impact on customer relationship



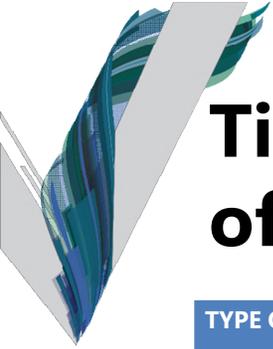
# Timeliness: Post-Award Bid Protests at the Agency

OUTCOME	WHEN PROTEST MUST BE FILED
Post-award protest	Protests must be filed <u>no later than 10 days</u> after the basis of the protest is known or should have been known, whichever is <u>earlier</u> .
Post-award stay of performance (FAR)	Upon <u>receipt of a protest within 10 days after contract award or 5 days after a debriefing date offered</u> to the protester in response to a timely debriefing request, whichever is <u>later</u> , the contracting officer shall immediately suspend performance pending resolution of the protest, unless someone above the contracting officer or another agency official justifies the contract award in writing for <u>urgent and compelling reasons</u> or in the government's <u>best interest</u> . Note: Agencies will rarely override the automatic stay, considering the short time frame for issuing protest decisions. Stay overrides are more likely in GAO protests, which take longer.



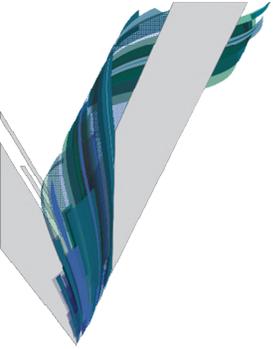
# Timeliness: Post-Award Bid Protests at the GAO

OUTCOME	WHEN PROTEST MUST BE FILED
Post-award protest	Protests of other than solicitation improprieties must be filed <u>no later than 10 days after the basis of the protest is known or should have been known, whichever is earlier, or within 10 days after a "required" debriefing has been held.</u>
"Appeal" of agency-level protest	If the agency-level protest was timely filed, any subsequent protest to the GAO must be filed <u>within 10 days of actual or constructive knowledge of initial "adverse agency action."</u> Pursuing an agency-level protest <b>does not</b> extend the time for obtaining a stay at GAO.
Post-award stay of performance	Upon receiving notice of a protest from GAO within <u>10 days after the date of contract award or 5 days after a "required" debriefing date, whichever is later,</u> contract performance must be suspended unless the head of the contracting agency authorizes continued performance based on a finding that contracting performance is in the USG's best interest or urgent and compelling circumstances that significantly affect the interests of the government and will not permit waiting for GAO's decision.



# Timeliness: Post-Award Bid Protests at the Court of Federal Claims

TYPE OF PROTEST	WHEN PROTEST MUST BE FILED
Post-award protest	Six-year statute of limitations includes post-award protest matters. No strict filing deadlines; <i>however</i> , COFC requires protester's counsel to provide at least 24-hour advance notice of filing a protest to the DOJ's Commercial Litigation Branch, the COFC clerk, the procuring agency's CO (by fax), and the apparently successful offeror(s) (if any). Further, delay before the COFC is dangerous even if certain strict GAO and agency-level protest deadlines do not apply. For example, the COFC has found that delay in filing a protest can be prejudicial to a protester's case. <i>See Wit Assocs., Inc.</i> , 62 Fed. Cl. at 662 n.5.
Protest of the override to a stay	Only the COFC has jurisdiction to hear challenges to the agency's decision to override the automatic stay; the GAO will not review an agency's decision to override the stay. However, a protester may file a separate action at the COFC to reinstate a stay while the GAO protest is pending.
Post-award stay of performance = temporary restraining order	To secure a stay of performance the protester must seek a temporary restraining order (TRO) and prove (1) likelihood of success on the merits; (2) irreparable harm to the protester if the TRO is not granted; (3) lesser harm to the USG and awardee if the TRO is granted; and (4) the TRO is in the public interest.

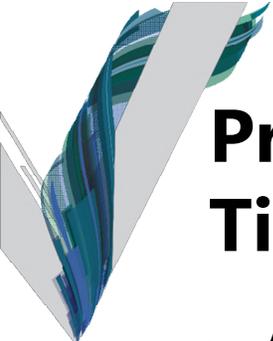


# Debriefings



## Pre-Award Bid Protests: Exclusion from the Competition and Requesting a Debriefing

- A debriefing must be requested **in writing** and must be received by the CO within **three** days after the protester receives notice of exclusion from the competition.
- A debriefing before award is limited, but must include:
  - The agency’s evaluation of significant elements of the offeror’s proposal;
  - A summary of the rationale for eliminating the offeror; and
  - Reasonable responses to relevant questions about whether source selection procedures, applicable regulations, etc., were followed.
- Timely requested debriefings must be held “as soon as practicable” (not defined) but may be refused if, for “compelling reasons,” it’s not in the USG’s best interest to conduct debriefings at that time.



## Pre-Award Bid Protests: Debriefings and Timeliness

- An unsuccessful offeror may request to delay the debriefing until after award, in which case the debriefing shall include all information normally provided in a post-award debriefing.
- The CO may refuse to provide a pre-award debriefing, in which case the CO must provide a post-award debriefing within the post-award debriefing time requirements (5 days).
- **KEY:** IF AN OFFEROR DECLINES A PRE-AWARD DEBRIEFING, POST-AWARD DEBRIEFINGS THAT IT ELECTS TO RECEIVE DO NOT EXTEND THE TIME TO PROTEST. *See VMD Systems Integrators, Inc., B-412729 (Mar. 14, 2016).*



## Post-Award Protests: Requesting a Debriefing, Timeliness, and Stay of Performance

- A debriefing request must be made **in writing** and must be received by the agency within **three** calendar days after your company receives notice of contract award.
- The debriefing is supposed to occur within **five** calendar days after the agency receives your company's request.
- Strategies:
  - Request to schedule the debriefing for a **Thursday or Friday** to maximize the timing for a stay (try to avoid debriefings Monday – Wednesday);
  - 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); and
  - **BEWARE OF RECEIVING A WRITTEN PACKAGE BEFORE THE LIVE DEBRIEFING.**
- Follow-up sessions generally do not constitute a “continuing debriefing.”



## Stay of Performance: Key Information

- The clock is triggered by the agency's receipt of notice of the protest from GAO (within one day of GAO's own receipt). In other words, protesters often have less time to file than they think.
- If a protest is being filed shortly before the deadline for triggering an automatic stay of award or performance, the protester should bring this to GAO's attention at the time of filing; GAO can attempt to provide expedited notice of the protest to the agency.
- While telephone notice from GAO to the agency *may* trigger a statutory stay, GAO does not review agency decisions in this regard, and won't consider a protest challenging an agency's decision not to delay a procurement.
- The notice must be received within 10 days of contract award or 5 days after the date offered for a required debriefing, *whichever is later*.
- Assuming the debriefing date is later...



# The Debriefing: What Information Should Be Released in Negotiated Procurements?

- 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 (if applicable) of the awardee and the debriefed offeror;
  - Past performance information on the debriefed offeror;
  - The overall ranking of all offerors, if such ranking was developed by the agency;
  - A summary of the award rationale; and
  - **Responses 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.**
  - For acquisitions of commercial items, the agency shall disclose the make and model of the item to be delivered by the successful offeror.

The focus will be on the offeror's proposal, not on the proposals of other offerors.



# Debriefing Strategies

- **In-Person Request**
  - 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.



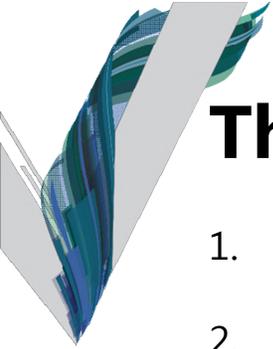
# The Debriefing: An Overview of Questions to Ask

- General evaluation criteria questions
- Technical evaluation questions
- Past performance evaluation questions
- Cost/price evaluation questions
- Best value analysis and cost/technical tradeoff questions
- Tailored questions



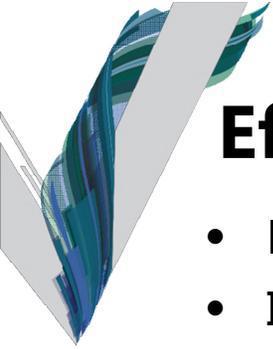
## The Debriefing: Your Company's Overall Strategy

- Ask in-depth questions
- Ask general questions first, and then more specific questions
- Set the tone: “friendly cost-examination” style
- Watch for visual cues such as facial expressions and body language – but don't read too much into it, as it may be a red herring
- Assign someone to take detailed notes, including documenting visual cues
- Should an attorney participate?



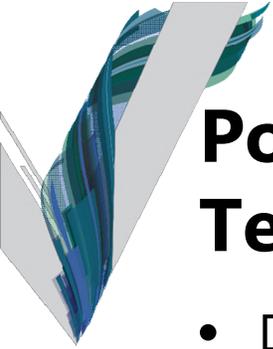
# The Debriefing: Top Ten Questions to Ask

1. What ratings were assigned for each factor and subfactor of the awardee's proposal, and why?
2. What ratings were assigned for each factor and subfactor of your company's proposal, and why?
3. What, if any, significant advantages/disadvantages did the agency perceive were provided by the awardee's proposal?
4. What, if any significant advantages/disadvantages did the agency perceive were provided by your company's proposal?
5. What ratings were assigned to your proposal and the awardee's proposal for past performance, and why?
6. What adjustments, if any, were made to the awardee's proposed price/cost?
7. What adjustments, if any, were made to your proposed price/cost?
8. Was our proposal price/cost the lowest (or second lowest)?
9. What was the rationale for the source selection, including the rationale for any cost-technical trade-off?
10. What specifically were the best value discriminators that favored the awardee's proposal over your proposal, and disfavored your proposal?



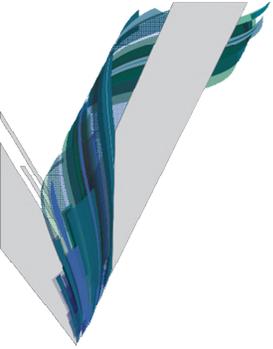
## Effective Post-Debriefing Strategy

- Document your impressions while they are fresh (not just the note-taker)
- Identify aspects of your company's proposal that the agency failed to understand or consider
- Identify any irregularities in the way the agency performed the evaluation (*i.e.*, whether the evaluation adhered to the solicitation's criteria in Section M)
- Identify any evidence your company was treated differently from the awardee (*e.g.*, the agency engaged in discussions with the awardee but did not do the same with your company, or the agency required your company to submit documentation that the awardee was not required to submit)
- Identify whether the awardee took exception to any solicitation requirements
- Were there any organizational conflicts of interest that agency failed to anticipate or protect against?



# Post-Award Debriefing: Questions for Corporate Team

- Did the agency talk to your competitors?
- Did the agency mislead you about what was being sought?
- Is there an OCI issue in the solicitation, *e.g.*, is there IV&V work or sale of goods or services that offerors have previously evaluated?
- If best-value award, is tradeoff analysis adequately documented?
- But for the agency's flawed procurement, would you have had a substantial chance at award?
- Who is the incumbent? If you are the incumbent, what effect does protest have on expiring contract? If awardee is the incumbent, what effect does protest have on expiring contract?



# Decision to Protest



# Deciding Whether to File a Protest: Standing and Technical Merit Considerations

- To bring a bid protest at the GAO, the protester must be an “interested party,” *i.e.*, any “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” 4 C.F.R. § 21.0(a)(1).
- To bring a bid protest at the COFC, the protester must be an “interested party,” *i.e.*, show that there was a “substantial chance” the protester would have received the contract award but for the alleged error in the procurement process.
- Prejudice rule of thumb: Must be able to argue protester is “next in line” for award.
- Technical Merit Considerations
  - Are there legitimate potential grounds to protest, *e.g.*, was there an impropriety in the agency’s evaluation?
  - Objective vs. subjective judgments; violations of law vs. agency discretion
  - Can the company show prejudice? Was your company treated fairly and equally?
  - Were there any organizational conflicts of interest?



# Deciding Whether to File a Protest: Business Considerations

- **Strategic Business Considerations**

- What are you trying to accomplish?
- Was the program a “must win” in a key strategic area for the company?
- Will your company be shut out of the relevant line of business because of the award?
- 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**

- What is the likely impact of the protest on your company’s relationship with the customer?



# GAO's Annual Report

GAO's Annual Report to Congress for FY 2016 reported the following:

- "Our review shows that the most prevalent reasons for sustaining protests during the 2016 fiscal year were:
  1. unreasonable technical evaluation;
  2. unreasonable past performance evaluation;
  3. unreasonable cost or price evaluation; and
  4. flawed selection decision."
- "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."



## What Protest Grounds “Work”?

Historically, the following protest grounds are the most common areas for sustains:

- Failure to follow the solicitation ground rules
- Failure to document the record
- Unequal treatment



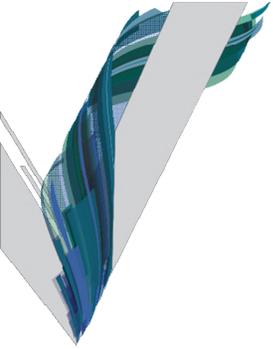
## Other Successful Arguments

- Clear factual errors – evaluation cites a failure to address a discrete issue/requirement that is cited in the proposal
- Math errors in cost or price evaluation
- Arguments about the awardee based on specific facts, *e.g.*, familiarity based on competition or collaboration
- Violations of laws or regulations (OCI, discussions, small business procedures, unique agency requirements)



## Less Successful Arguments

- Subjective agency judgments
  - Evaluation ratings
  - Tradeoff decisions
  - Risk to government regarding responsibility or OCIs
- Protester is the “industry leader,” incumbent, etc.
- Awardee’s price is unrealistically low
- General, unsupported arguments based on “information and belief”
- Agency should have known about issues/facts not addressed in proposal

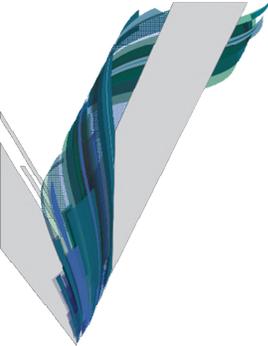


# Task and Delivery Order Protests



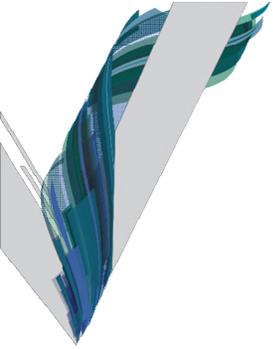
# When Can We Protest a Task/Delivery Order?

- Task/delivery orders may be protested when:
  - The task order of a military procurement exceeds \$25 million in value. *See* 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2000 § 835 (2016) (amending 10 U.S.C. § 2304c(e)(1)(B));
  - The task order of a civilian procurement, or a DoD task order issued under a civilian agency GWAC, exceeds \$10 million in value. *See id.* (amending 41 U.S.C. § 4106(f)); *Analytic Strategies LLC; Gemini Industries, Inc.*, B-413758.2, Nov. 28, 2016, 2016 CPD ¶ 340;
  - The task order exceeds the scope, period, or maximum size of the original contract (GAO will review to determine whether there is a “material difference” between the task order and the original contract); or
  - Special circumstances exist, *e.g.*, when the protester challenges the termination of its own order, which exceeds the \$10 million statutory threshold. In this regard, while GAO generally does not review a T4C of the government, it will review such a termination where it is based upon an agency determination that the initial contract award was improper. *See EA Eng’g, Sci., & Tech., Inc.*, B-411967.2; B-411967.3, *et al.*, Apr. 5, 2016, 2016 CPD ¶ 106.
  - Moreover, protests of Federal Supply Schedule (FSS) orders of any value may be brought at the GAO. *See Spectrum Comm, Inc.*, B-412395.2, Mar. 4, 2016, 2016 CPD ¶ 82 (resolving the merits of a protest of an FSS order valued at less than \$10 million).



## Task and Delivery Order Ombudsman “Protests”

- What if task/delivery order is under the \$10M/\$25M threshold?
- File a complaint with the agency’s Task and Delivery Order Ombudsman.
- “The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency’s advocate for competition.” FAR 16.606(b)(8).
  - Less effective
  - No procedural rights



# Intervention



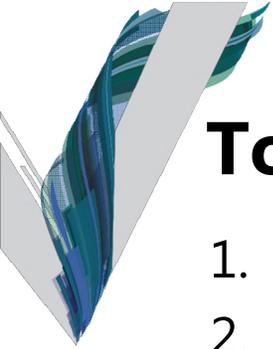
## Deciding Whether to Intervene

- Don't wait to be asked; agencies may refrain from requesting intervention so as to avoid converting bid protest costs into allowable costs chargeable to the government.
- Awardee's interests may not align perfectly with agency's (*e.g.*, agency may be inclined to take corrective action). As the intervenor, the awardee can convince the agency to defend the award.
- Two types of intervention:
  - "Light," *i.e.*, monitor, assist agency, report back risk analysis; or
  - "Active," *i.e.*, submit briefs to GAO, help agency write agency report, etc.



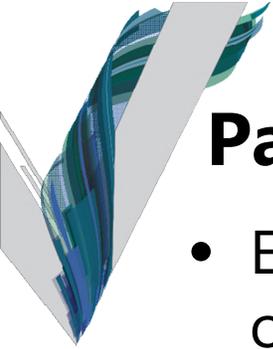
## **Intervention: Conversation with Operations**

- No visibility into protester's unredacted claims without intervention
- Intervenor can help defend award by assisting agency in its efforts and helping to convince GAO to deny protest
- Intervention may require support of operations to explain to agency counsel highly technical issues in protester's claims
- Awardee wants to avoid not only sustained protest but also corrective action
- Intervention is a way to increase contact with agency, allowing awardee to dissuade agency from taking corrective action



## Top 10 Considerations as Potential Intervenor

1. Discourage corrective action
2. Help shape corrective action
3. Limit the record
4. Supplemental legal support to agency
5. Advance arguments agency may be unwilling to make
6. Provide different perspective
7. Protect proprietary information
8. Factual support/technical understanding (*e.g.*, declarations)
9. Show of support
10. Monitor developments



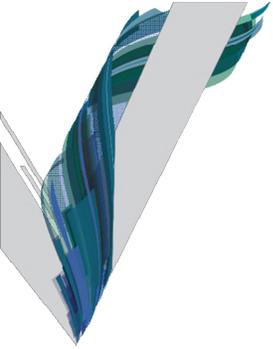
## Participating in the Protest Proceedings

- Engaging in discovery and assisting in the agency's opposition to the protester's discovery (such as document requests and requests to compel production of documents)
- Reviewing the Agency Report or Administrative Record
- Participating in hearings
- Seeking the admission of experts under a protective order
- Preparing comments, motions and/or other briefs
- Handling supplemental grounds of protest/amendments to the Complaint
- Controlling and/or avoiding settlement/corrective action



# Filing a Request for Summary Dismissal

- Untimeliness
- Failure to state a valid basis for protest, such as:
  - Contract administration issues
  - Small business administrative issues
  - Affirmative determinations of responsibility (unless definitive responsibility criteria)
  - Procurement integrity (if the protester failed to report the information it believed constituted evidence of the offense to the federal agency within 14 days after first discovery the possible violation)
  - Challenges to procurements by entities that are not “federal agencies” (e.g., the U.S. Postal Service, the FDIC, and non-appropriated fund activities)
  - Protest of a subcontract (unless the agency has requested in writing that such protests be decided by the GAO)
  - Suspensions and debarments
  - Protests of task/delivery orders
- Protester is not an interested party



# Lessons Learned



## Overview of Lessons Learned

- Maximize pre-proposal marketing
- Review solicitation
- Consider pre-award protests
- Consider fiscal environment
- Go on the offensive with OCIs
- Past performance references
- Proposal details
- Responses to discussion questions
- Other



## **Maximize Pre-Proposal Marketing Opportunities**

- Especially important when considering proposing innovative technologies
- Consider organizing/offering meeting with agency officials to demonstrate the proposed product
- Bring subject matter experts to meetings with agency personnel to explain new technologies
- Focus on the maturity of the system to allay government concerns regarding risk



## Scrutinize the Requirements of the Solicitation

- Focus on Section M requirements
- Look for any possible ambiguities in the requirements
  - Is a solicitation statement subject to multiple meanings or interpretations
- Submit questions to agency to clarify any ambiguities



# Proposal Details

- Consider the fiscal environment – the government is trying to maximize value by getting more for less.
- Apply stricter standards than required by the solicitation – for a best value trade-off, show that your solution exceeds the agency’s requirements.
- Make sure enhancements and special features are clearly called out and explained in the proposal.
- Clearly explain the risk, if any, associated with your approach and the steps taken to mitigate it.
- Double check to confirm that the name of the business entity that is submitting the proposal matches:
  - The names for DUNS and CAGE;
  - Information in Section K; and
  - The name that is on all proposal submissions.
- Review supporting documents and appendices to confirm they support the proposed solution.
  - Make sure all statements are clear and adequately explain technical information;
  - Make sure the information is not subject to multiple interpretations; and
  - Ask third-party vendors or testers to provide additional explanation if necessary.
- **DO NOT ASSUME THE GOVERNMENT WILL INTERPRET THE INFORMATION AS INTENDED OR THAT GOVERNMENT WILL EVALUATE YOUR COMPANY BASED ON INFORMATION THAT IT KNOWS ABOUT YOU!**



## Past Performance Considerations

- When considering which corporate entity will submit the proposal, examine the past performance requirements of the solicitation carefully to avoid limiting relevant past performance references.
  - A smaller business division may not be able to utilize the relevant past performance of a separate division.
- Follow-up with every reference listed for past performance.
  - Talk to references and confirm they have submitted any past performance questionnaires.
  - Make sure subcontractors contact their references.
  - A nonresponsive reference may result in a less-than-optimal rating.
- Pay close attention to the size or dollar value of potential past performance references.
  - The government often analyzes past performance using three factors, such as: content, complexity, and size.
  - A contract reference with excellent content and complexity can be found not relevant because it is not a significant size.



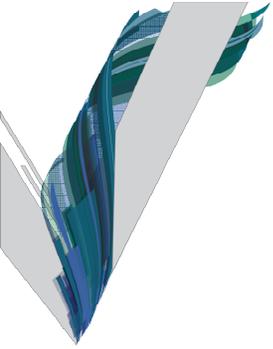
## Discussion Responses

- Use responses to discussion questions as an opportunity to amplify your proposal description.
  - This is an opportunity to further market the proposed solution – maximize with greater explanation and more data.
- Often, there is no limit on the amount of additional supporting material you can provide in response to a discussion question.
- Do not assume the government evaluators understand the technical information already included in the proposal.
- Update technical data in proposal and make sure that it supports responses.
- Do not simply reference citations to the proposal.



## Additional Things to Remember

- Neatness counts.
- Empirical data collected from government-observed testing will receive the greatest consideration.
- Write the proposal to the solicitation's requirements.
- Do not assume that the government reviewers will see all of your proposal.
- Explain why you believe the job can be performed with fewer hours, personnel, or at lower costs.



# Questions?

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**Next Month's Government Contracts Webinar:**

**GSA Audits – From Anxiety to Zen**

Wednesday, September 20, 2017

12:00 pm – 1:30 pm ET