



Procurement Protests & Appeals

Todd R. Overman
Bryan R. King

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Bass Berry & Sims, PLC

◆ Offices

- ▶ Nashville, Memphis and Knoxville, TN & Washington, D.C.

◆ Practice Areas

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- ▶ Full service federal contracting practice based in DC with TN procurement expertise in Nashville

Topics of Discussion

❖ Bid Protests

- ▶ Agency
- ▶ GAO
- ▶ COFC

❖ SBA Protests and Appeals

Bid Protests

What is a “Bid Protest”?

- ❖ A written action
- ❖ By an interested party
- ❖ Objecting to
 - ▶ a proposed contract,
 - ▶ a proposed award or the award of a contract, or
 - ▶ any alleged violation of statute or regulation
- ❖ In connection with a procurement or a proposed procurement conducted by a Federal agency.

Who Can Protest?

◆ An “Interested Party”

- ▶ Actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract

◆ Examples:

- ▶ Disappointed Offeror
- ▶ 2nd Lowest Bidder
- ▶ Etc.

Where Can I File a Bid Protest?

- ◆ Procuring Agency
- ◆ Government Accountability Office (GAO)
- ◆ Court of Federal Claims (COFC)

When Do I Have to Protest?

❖ Agency Level Protest

- ▶ Pre-Award?
 - Before proposal deadline
- ▶ Post-Award?
 - Within 10 days after knew or should have known basis of protest

❖ GAO Protest

- ▶ Pre-Award?
 - Before proposal deadline
- ▶ Post-Award?
 - Within 10 days after knew or should have known basis of protest, or
 - Within 5 days of required debriefing, whichever is later

❖ COFC Protest

- ▶ No Set Time Limit
 - Must be within a “reasonable time”

Required Debriefings

- ❖ Only applies to FAR Part 15 (negotiated) procurements
- ❖ Offeror must request debriefing within 3 days of either;
 - ▶ Learning it has been excluded from competitive range (pre-award), or
 - ▶ Receiving Notice of Contract Award (post-award).
 - ▶ Pre-award debriefing must be requested (when excluded from competitive range, to preserve post award debriefing.
- ❖ Agency must identify weaknesses/deficiencies, evaluated price and technical rating of both offeror and awardee, overall ranking of offerors, rationale for award, etc.
- ❖ Debriefings **not required** in sealed bid, FSS, commercial item procurements (unless Part 15 procedures are used)

What Can I Protest Pre-Award?

- ❖ Sole Source Awards
- ❖ Solicitation Requirements
 - ▶ Ambiguities
 - ▶ Terms unduly restrictive
- ❖ Brand Name Requirement
- ❖ Bundling
- ❖ Cancellation
- ❖ Exclusion from Competitive Range
- ❖ Rejection from Consideration
- ❖ Failure to Set Aside for Small Business
- ❖ Etc.

What Can I Protest Post-Award?

- ❖ Cost Evaluation
- ❖ Price Evaluation
- ❖ Technical Evaluation
- ❖ Past Performance Evaluation
- ❖ Failure to Perform Price/Cost Realism Analysis
- ❖ Failure to Adhere to Stated Solicitation Terms
- ❖ Improper Cost/Technical Tradeoff
- ❖ Improper or Unequal Discussions
- ❖ Etc.

What Can't I Protest?

- ❖ Contract Administration
- ❖ Responsibility
- ❖ Small Business Administration Issues
- ❖ Task/Delivery Orders
 - ▶ Two exceptions to bar against task/delivery order protests:
 - Protest that order increases the scope, period, or maximum value of the underlying contract
 - Protest of an order valued in excess of \$10 million
 - GAO has exclusive jurisdiction over task/delivery order protests under the \$10 million exception

Agency Level Protest Process

- ❖ Least formal, least expensive
- ❖ Agencies required to issue decision within 35 days when practicable
- ❖ No set process for exchange of information
- ❖ Appeal agency decision to GAO or COFC
- ❖ Relief
 - ▶ Before Award: correct deficiency
 - ▶ After Award
 - Void Contract (Rare)
 - Terminate Contract for Convenience
 - Permit Award to Stand
 - Direct a Re-Evaluation
 - Award Cost of Pursuing Protest, including Fees

GAO Protest Process

- ❖ Protests must be resolved within **100 days of filing of the protest**
 - ▶ 65 day elective Express Option
- ❖ **Protective Orders**
 - ▶ Can be issued to protect proprietary, confidential or source-selection-sensitive information
- ❖ **Agency Report**
 - ▶ Must release within 30 days of protest & contain all relevant procurement documents
- ❖ **Comments to Agency Report**
 - ▶ Protester must file within 10 days or withdraw protest
- ❖ **Supplemental Protest Grounds**
 - ▶ Must do so within 10 days of when grounds are known
 - Can be based on information in agency report
- ❖ **Hearings - Rare**
- ❖ **Remedies**
 - ▶ Recommend Agency Action
 - Re-compete, issue new solicitation, terminate, award contract that complies with the law etc.
 - ▶ Bid/Proposal and Protest Costs (including Attorney's Fees)
- ❖ **Reconsideration/Appeal Options**
 - ▶ Request GAO Reconsideration
 - ▶ Appeal to COFC for independent decision

CICA Automatic Stay

- ◆ Agency Level or GAO
- ◆ Pre-Award Protest
 - ▶ Agency cannot make award without substantial justification
- ◆ Post-Award Protest
 - ▶ Agency must suspend performance of contract if:
 - Protest filed within 10 days of contract award or;
 - Within 5 days of required debriefing
 - (Whichever is Later)
- ◆ Agency Override
 - ▶ Pre-Award
 - Must demonstrate “urgent and compelling” circumstances
 - ▶ Post-Award
 - Must demonstrate “urgent and compelling” circumstances; or
 - Performance of the contract is in the “best interests of the United States”
 - ▶ Protester can challenge agency override at Court of Federal Claims

Court of Federal Claims Protest Process

- ❖ Only court forum to pursue a pre-award or post-award protest
- ❖ Can file with COFC:
 - ▶ After GAO/Agency Level protest or;
 - ▶ Instead of GAO/Agency Level protest
- ❖ COFC not bound by GAO decision but it is given deference
- ❖ Depositions and Discovery Allowed
- ❖ **No Automatic Stay**
 - ▶ Must seek injunction to stay award or performance

What If My Award is Protested?

- ❖ Intervening in the protest process
 - ▶ Allows awardee to ensure its interests are protected; awardee and agency interests not always in sync
- ❖ Agency Level Protests
 - ▶ Procuring agency's discretion to allow intervenor
 - Rarely granted
- ❖ GAO & COFC
 - ▶ Awardee may intervene (Recommended)
 - Intervenor counsel has access to materials under Protective Order
 - Intervenor allowed to submit filings

Protest Takeaways

- ❖ Move quickly!
- ❖ Always request a debriefing (within 3 days)
- ❖ GAO is most common forum for protests
 - ▶ The Automatic Stay is your friend
- ❖ If your award is protested, intervene to protect your interests

SBA Protests & Appeals

SBA Size/Status Protests

❖ Who Can Protest?

- ▶ An Offeror, the CO, the SBA, or any interested party

❖ Where Do I Protest?

- ▶ File with Contracting Officer
- ▶ CO forwards the protest to SBA
- ▶ Area Office where protested concern is located issues determination

❖ When Do I Have to Protest?

- ▶ Within 5 business days after notification of award
- ▶ Pre-Award Status Protests → Dismissed as Premature

What Can I Protest at SBA

❖ Size of Small Business

- ▶ For a specific procurement under the solicitation's NAICS code

❖ SDVOSB Awardee Owner Not Eligible

- ▶ SDVOSB Awardee not 51% Owned or Controlled by SDV

❖ Awardee's Status as:

- ▶ Small Disadvantaged Business
- ▶ WOSB
- ▶ EDWOSB
- ▶ HUBZone

❖ Can Not Protest: Status of 8(a) Small Business

❖ NAICS Code in Solicitation

- ▶ Note: This challenge made directly to OHA

Size Protests of Task Orders

- ❖ With long term contracts, such as multi-year ID/IQs, size protests may only be filed:
 - ▶ When the original contract is awarded;
 - ▶ After an option is exercised on the original contract; or
 - ▶ After the award of a task/delivery order where the CO requested a recertification in conjunction with the order
- ❖ Otherwise, size of contract holder cannot be protested by interested parties (CO and SBA can still initiate protest)

SBA Protest Process

- ❖ CO transmits protest to SBA Office of Government Contracting
- ❖ Notice to Protested Concern
 - ▶ Protested concern may submit information in response to protest
 - E.g., Form 355 within 10 business days
- ❖ Applicable SBA Area Office Responsible for Determination
 - ▶ Area Office can request additional information from protested concern
- ❖ Issue Determination Within 15 days
 - ▶ CO can grant additional time
- ❖ Appeal
 - ▶ To SBA Office of Hearings and Appeals (OHA)
 - ▶ HUBZone Appeals heard by SBA's Director of Office of HUBZone

What Happens to Award During SBA Protest?

❖ No Award

- ▶ Agency cannot make award until after 15 day decision period is concluded
 - Unless justified in writing

❖ If Protest is Sustained

- ▶ Agency cannot make award to protested concern determined to be ineligible

❖ Becoming Re-Eligible

- ▶ Protested Concern cannot later become eligible for procurement by reducing size
- ▶ Future Set-Aside Procurements
 - Must demonstrate to SBA overcome ineligibility as small business, SDVOSB, SDB, WOSB, or EDWOSB; or
 - If HUBZone, must wait 90 days to reapply to program

OHA Appeals

❖ What Can Be Appealed to OHA?

- ▶ Size Determinations: 13 CFR 134.301-318
- ▶ NAICS Determinations in Solicitations: 13 CFR 134.301-318
- ▶ Denial or Suspension from 8(a) Admission: 13 CFR 134.401-409
- ▶ Status as SDVOSB: 13 CFR 134.501-515
- ▶ Status as WOSB/EDWOSB: 13 CFR 134.701-715

❖ OHA Before Judicial Review

- ▶ Administrative review must be exhausted before judicial review of a size determination

OHA Appeals

❖ Who Can Appeal?

▶ Size Appeals

- SBA, CO, any person adversely affected by size determination

▶ NAICS Appeals

- SBA, CO, any person adversely affected by NAICS Code determination

▶ 8(a) Appeals

- 8(a) Concern/Applicant

▶ SDVOSB/WOSB/EDWOSB

- Protested Concern, Protester, CO

OHA Appeals

❖ When Do I Have to Appeal?

▶ Size Appeals

- Within 15 calendar days after receipt of formal size determination

▶ NAICS Appeals

- Within 10 calendar days after issuance of solicitation, or amendment affecting NAICS code or size standard

▶ 8(a) Appeals

- Within 45 calendar days after receipt of SBA determination being appealed

▶ SDVOSB/WOSB/EDWOSB

- Within 10 business days after receipt of protest determination

OHA Appeal Process

❖ OHA sets deadline for responses to appeal petition

- ▶ Size Appeals: 15 days after receipt of appeal petition
- ▶ Status Appeals: 7 days after receipt of appeal petition

❖ Appeal File

- ▶ Compiled by Area Office

❖ Evidence

- ▶ New evidence not allowed, must move for admission of new evidence

❖ Decisions

- ▶ Size Appeals: within 60 days after close of record
- ▶ NAICS Code Appeals: as soon as practicable after close of record
- ▶ Status Appeals: within 15 days after close of record

SBA Protest/Appeal Takeaways

- ❖ Move quickly on any protest or response to a protest!
- ❖ Engage knowledgeable counsel to assist:
 - ▶ If you are protested, counsel can ensure your interests are protected
 - ▶ If you are the protester, counsel can have access to protected documents
- ❖ Know your company – small business certifications are affirmative declarations, and miscertification can have significant consequences

Questions and Contact Info

◆ Todd Overman

- ▶ Toverman@bassberry.com
- ▶ (202)-827-2975

◆ Bryan King

- ▶ Bking@bassberry.com
- ▶ (202)-827-2965

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