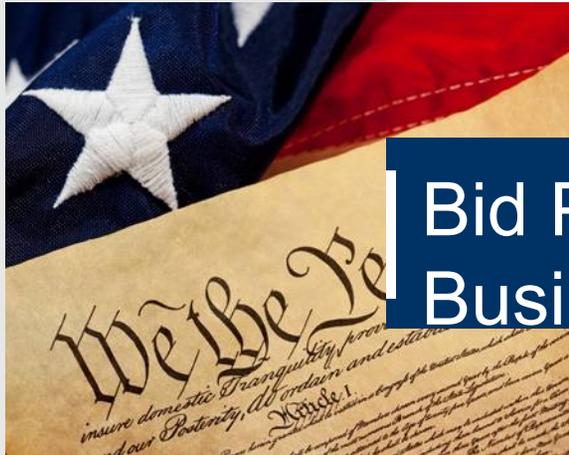


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Bid Protests From A Small Business Perspective

San Diego NCMA Chapter

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Introduction

- Goals
 - Become familiar with the bid protest process
 - Learn when and how to ***most effectively*** pursue bid protests
 - In view of the Protective Order’s “Cone of Silence” requirements, learn how to successfully support your bid protest team





Agenda

- Choosing the bid protest forum
- GAO bid protest process overview
- GAO Timeliness rules
- GAO Stay rules
- Preparing for a debriefing
- Frequently successful GAO and COFC protest grounds
- Corrective actions
- Supporting your protest legal team





CHOOSING THE BID PROTEST FORUM

- Three possible types of bid protests
 - Agency protests
 - GAO protests
 - COFC protests





CHOOSING THE BID PROTEST FORUM

- Agency Protests
 - Number of agency protests is unknown
 - Quick, usually within 35 days
 - Stay of contract award or performance
 - One pleading, so less expensive
 - Less objectionable to customer
 - Useful where agency action is poor exercise of discretion
 - No discovery of evaluation documents or proposals
 - Pleading is based upon debriefing facts
 - No outside review of protest or underlying facts
 - If lose, can still protest same grounds to GAO, but no CICA stay





CHOOSING THE BID PROTEST FORUM

- GAO Protests
 - Approximately 2,400 GAO protests in FY 2013
 - Relatively quick, within 100 calendar days
 - Automatic CICA stay of contract award or performance
 - Relatively inexpensive, may only be two pleadings
 - Counsel access to evaluation documents and proposals
 - Heard by independent GAO attorney
 - Well established GAO case law
 - Sole jurisdiction for task order protests exceeding \$10 million
 - If lose, usually can still protest to COFC





CHOOSING THE BID PROTEST FORUM

- COFC Bid Protests
 - Approximately 100 COFC protests in 2013
 - Duration may vary from 1 to 6 months or more
 - No automatic CICA stay of contract award or performance, must prove right to injunctive relief
 - Expensive, multiple pleadings to file protest and expect motion to dismiss on procedural grounds
 - Counsel has access to administrative record
 - Heard by COFC Judge with still developing COFC case law
 - Narrow jurisdiction for task order protests
 - If lose, can appeal of CAFC





GAO Bid Protest Overview

- Notice of award
- Debriefing
- Timely protest
- CICA stay
- Awardee intervention
- Motions to dismiss
- Protective order





GAO Bid Protest Overview

- Agency report within 30 days
- Comments and supplemental protests within 10 days
- Supplemental report and comments
- Hearings
- Decision within 100 days



The image shows a close-up of the American flag's stars and stripes, with a parchment document featuring the words "We the People" in cursive script overlaid on it.

GAO Bid Protest Timeliness Rules

- Strictly enforced – protest is dismissed
 - Calendar days
 - GAO office hours
- Often cannot wait to file protest until contract award decision is announced
- Timeliness rules listed in 4 C.F.R. 21.2
 - Solicitation improprieties
 - General ten day rule
 - Denial of agency protest, including informal protest
 - Required debriefing
- With complex timeliness rules, raise possible protest concerns immediately

The top left corner of the slide features a graphic with a portion of the United States flag (stars and stripes) and a parchment document with the words "We the People" written in cursive.

CICA Stay Rules

- Per 31 U.S.C. § 3553, agency must suspend contract performance if procuring agency receives notice that protest is filed
 - Within 10 days of contract award
 - Within 5 days of required debriefing
- Filing at GAO is not sufficient, agency must receive timely notice from GAO





CICA Stay Rules

- Required debriefings
 - Time requirements
 - Written request within 3 days
 - Should be held within 5 days of request
 - Deadline starts with first offered debriefing date
 - Competitive proposals
 - FAR 15 acquisitions
 - Not required for FAR 8.4 FSS procurements
 - IDIQ task order >\$10 Million ???
 - If debriefing not required, must file and agency must receive notice within 10 days of contract award to impose stay





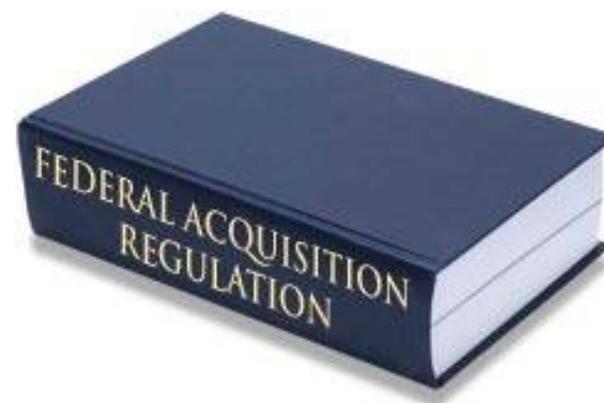
CICA Stay Rules

- Stay overrides
 - Agency may override contract suspension if the head of the contracting activity finds:
 - Contract performance will be in the best interest of the U.S.;
or
 - Urgent and compelling circumstances that significantly affect the interest of the U.S. will not permit waiting for GAO's decision
 - Agency decision to override stay may be challenged at COFC; GAO does not consider such challenges



Preparing For A Debriefing

- Purpose for debriefing
- Offeror's goals for debriefing
- FAR debriefing rules
- Planning for debriefing





Preparing For A Debriefing

- Purpose for debriefing
 - Pre-award debriefings - eliminated from competitive range or excluded from competition - FAR 15.505
 - Post-award debriefings – FAR 15.506
 - Allow offerors to better understand why their proposal was not chosen
 - Help offerors prepare better proposals in future
 - Avoid protests filed based upon inadequate information
 - Gain information to evaluate and formulate possible protest
 - Counsel for offeror often does not attend



Preparing For A Debriefing

- Goals for disappointed offeror at a debriefing
 - Not the time to argue for your proposal – agency has already made its award decision
 - Learn as much as possible about the agency's evaluation of your proposal and its best value decision
 - Debriefing statements generally are not considered admissions by GAO



A decorative graphic in the top left corner featuring a portion of the United States flag (stars and stripes) and a parchment document with the words "We the People" written in cursive.

Preparing For A Debriefing

- Post-award debriefings – FAR 15.506
 - Debriefing includes
 - Significant weaknesses or deficiencies
 - Overall evaluated cost/price and technical rating of awardee and debriefed offeror
 - Summary of rationale for award
 - Reasonable responses to relevant questions
 - No point-by-point comparison of proposals
 - No information exempt from disclosure under FOIA



Preparing For A Debriefing

- Planning for a debriefing
 - Request available documents from agency
 - Appoint debriefing team leader to guide discussion
 - Appoint team recorder
 - Enlist key members of proposal team
 - Review proposal
 - Consider evaluation findings and ratings
 - Perform appropriate price/cost calculations
 - Compare weaknesses and deficiencies with discussion topics
 - Develop series of questions, especially about the evaluation of your proposal





Frequently Successful Protest Grounds

GAO: Protests sustained between 4/1/12 – 3/31/14:

- Departure from solicitation's evaluation scheme (19)
- Inadequate documentation or explanation (14)
- Unreasonable technical evaluation (11)
- Flawed discussions (7)
- Unequal Treatment (6)
- Unreasonable Price Evaluation (6)
- Flawed best value analysis (4)





Frequently Successful Protest Grounds

- **COFC:** Protests sustained between 4/1/11 – 3/31/14:
 - Inadequate documentation or explanation (11)
 - Departure from evaluation scheme (8)
 - Corrective action unwarranted (5)
 - Irrational technical evaluation (4)
 - Improper rejection of “late” proposal (4)
 - Flawed OCI analysis (2)
 - Irrational past performance evaluation (2)
 - Defective solicitation (2)





Frequently Successful Protest Grounds

- Frequently, protester is not aware of successful protest ground at time of filing initial protest
- Use initial protest to justify gathering as many potentially relevant agency documents as possible
- During 10-day Comment period, scrutinize record
 - Lack of support in record for evaluation conclusions
 - Inconsistencies between proposals and evaluation findings
 - Disparate treatment in evaluations
 - Agency errors in evaluations findings and calculations
- May use supplemental protests to gather more information



Corrective Actions

- Either in response to protest or GAO decision
- Agencies took more than 800 corrective actions in FY 2013, 45 % effectiveness rate
- Agencies have broad discretion to fashion corrective action needed to continue acquisition
 - Can be limited to address problem
 - Limit on proposal revisions
 - Limit re-evaluation
 - Can be broader than protest issue



Corrective Actions

- Protest of corrective action must be timely
- If discussions are re-opened or proposal revisions allowed
 - Unequal disclosure of competitive information
 - Awardee's name and price disclosed
 - Often no meaningful remedy
 - Awkward for initial awardee to protest proposed corrective action
- Can protest new award decision

An image showing a portion of the United States flag (stars and stripes) and a document with the words "We the People" written in cursive, likely the opening of the US Constitution.

Supporting Your Protest Legal Team

- Understand the basics of bid protests
 - Timeliness and stay rules
 - Debriefings
 - Possible protest grounds
- Identify acquisition as candidate for possible protest as soon as possible
- Maximize lawyers time to work
- Explain your product and business to lawyers





Supporting Your Protest Legal Team

- Provide key documents
 - Solicitation
 - Proposal
 - Communications with agency
 - Award notice
 - Debriefing materials



An image showing a portion of the United States flag (stars and stripes) and a document with the words "We the People" written in cursive, likely the US Constitution.

Supporting Your Protest Legal Team

- Make appropriate company personnel available to answer questions
- Explain all concerns about conduct of acquisition
- Prepare factual rebuttals, citing proposal
- Help identify consultants





Questions?

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