SOURCE SELECTION AND BID PROTESTS: PRE- AND POST-AWARD CONSIDERATIONS

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The Procurement Cycle

• Continuous cycle:
  – Source selection
  – Bid protest litigation (during and/or after source selection)
  – Contract performance

• Considerations/timelines driven by need for competition
CICA’s Competition Mandate

• The Competition in Contracting Act of 1984
  – Passed to foster competition and reduce costs
• Mandates full and open competition
  – I.e., all responsible sources are permitted to submit proposals
• Sets minimum time frames after publication before the procurement can be processed
  – Typically procurements must be advertised for at least 15 days before issuance of the solicitation
  – Minimum response times (30-45 days) set for receipt of proposals or bids from the date of issuance of the solicitation
CICA’s Fundamental Requirement of Competition

• Seven exceptions to full and open competition:
  1. Only one responsible source (FAR 6.302-1)
  2. Unusual and compelling urgency (FAR 6.302-2)
  3. Industrial Mobilization, Engineering Development, or Research Capability (FAR 6.302-3)
  4. International Agreement (FAR 6.302-4)
  5. Authorized or Required by Statute (FAR 6.302-5)
  7. Public Interest (FAR 6.302-7)

• Requirements for Justifications for Other than Full and Open Competition
  – Documentation, publication, approval levels
CICA’s Fundamental Requirement of Competition

• Typical procedures that are considered competitive:
  – Sealed Bids in accordance with FAR Part 14
  – Competitive Proposals in accordance with FAR Part 15
  – GSA award schedules if orders are placed following the procedures in FAR 8.405
  – Architect-engineer contracts using procedures in FAR Subpart 36.6

• Different rules apply for:
  – Contracts awarded using the simplified acquisition procedures of Part 13
  – Orders placed under task and delivery order contracts entered into pursuant to Subpart 16.5
  – Orders placed under indefinite-quantity contracts that were awarded using competitive procedures
  – Contract modifications that are within the scope and terms of an existing contract
  – Awards made pursuant to Section 8(a) of the Small Business Act
Full & Open v. Set-Aside Competitions

• Set-asides limit pool of competition – easier for contractors to compete

• Statutory government-wide goals:
  SB = 23%; SDB = 5%; WOSB = 5%;
  HUBZone = 3%; SDVOSB = 3%

• Set-aside defines eligibility
  – Subcontracting opportunities?

• Potential challenges to set-aside determination
Understanding the Key Steps in the Procurement Process

• Posting of Draft RFP or Other Pre-Solicitation Notices (not required)
• Issuance of Solicitation
  – Q&As, Amendments
• Proposal Submission
• Evaluation
• Competitive Range Determination (not required)
  – Discussions
  – Request for FPRs (possibly multiple rounds)
• Award
• Debriefing
Procurement Process: Key Steps

Acquisition Planning

• Agency must determine requirements and acquisition strategy—i.e., proposed contract type, terms and conditions, and acquisition planning schedules

• FAR encourages agencies to have exchanges with industry to identify and resolve concerns regarding:
  – acquisition strategy;
  – the feasibility of the requirements, including performance requirements, statements of work, and data requirements;
  – the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; and
  – the availability of reference documents

• Mechanisms: RFIs, industry conferences, draft RFPs, pre-solicitation notices, site visits
Procurement Process: Key Steps

Issuance of the Solicitation

• Solicitation must include:
  – Government’s requirements
  – Evaluation factors and significant subfactors
  – Information required in offerors’ proposals

• The Government must ensure a level playing field and that no offeror receives an unfair competitive advantage

• Solicitation Q&A process can be an effective tool for advocating change to solicitation or identifying shortcomings
  • Understand how to ask questions to improve your competitive standing

• Important to resolve any ambiguity or confusion in the solicitation prior to proposal submission
Proposal Submission

- It is an offeror’s responsibility to submit a proposal that establishes its capability and the technical merits of its proposed approach, and allows for a meaningful review by the procuring agency in accordance with the evaluation terms of the solicitation
  - Important to provide all required information
  - Demonstrate compliance with material solicitation requirements
- Key RFP Sections: C, L, M (and H for “special” clauses)
- Ensure timely submission (“late is late”) – even if protest terms of RFP
Evaluation

• FAR Part 15 prescribes policies and procedures governing negotiated acquisitions
• Agencies must evaluate proposals in accordance with stated criteria and may not introduce new criteria midstream without affording offerors a chance to revise proposals
• Agencies may not ignore stated criteria
• Note: While agencies may not create new criteria on the fly, certain unannounced considerations will be deemed to be “encompassed” by stated evaluation criteria (e.g., proposal risk)
• Focus on weighting of factors
• Understand key differences between best-value and LPTA
Procurement Process: Key Steps

Exchanges

• Clarifications
  – Limited exchanges between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal
  – It is in the Government’s discretion to issue clarification questions – offerors should not rely on the Government doing so

• Establishment of competitive range and discussions
  – Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect
  – If the Government holds discussions, they must be meaningful, equal and not misleading

• Train your employees to recognize permissible communications
Procurement Process: Key Steps

Contract Award

• Determination of awardee responsibility
  – Contracting Officer must find the awardee responsible as the Government cannot contract with a non-responsible party

• Notice of award & debriefing
  – Debriefings are an opportunity for an offeror to better understand the basis for an agency’s selection decision
  – Timely request debriefing (and accept first date offered)
  – In FAR part 15 debriefings, Government must provide certain information
    • Formats and level of detail provided varies greatly
    • Cannot provide point-by-point comparisons
  – No recourse if Government does not provide a debriefing or all of the information required to be provided by the FAR
  – Understand differences with pre- v. post-award debriefings
Bid Protests: Preserving Your Right to a Fair Competitive Process

• A bid protest:
  – Is a statutorily created right to challenge procurement ground rules (solicitation terms), proposal evaluations, and award decisions
  – Provides offerors an opportunity to ensure a fair and objective chance to compete for and win government business

• Pre-award protests may allege error in the creation of a procurement solicitation

• Post-award protests may allege error in the evaluation of the protesting company, or errors in the evaluation of the company selected for award

• Note: Some unusual types of bid protests do not quite fit into either box, e.g.:
  – Protests of certain sole source awards
  – Protests of mid-procurement “competitive range” eliminations
Pre-Award Protests

• Common issues:
  – Solicitation is unduly restrictive/overstates agency needs
  – Ambiguous requirements/terms in the solicitation
  – Inconsistency in terms of RFP
  – Solicitation requirements unnecessarily favor one offeror
  – Solicitation’s identification of contract clauses is flawed
Pre-Award Protests

• Usually must file prior to time set for receipt of proposals
• Effect of filing: If timely filed, agency may not award the contract pending the outcome of the protest
• May still need to submit timely proposal to preserve standing
• Sensitivity to filing while proposal is still subject to agency evaluation
• Practice Tip: Use the solicitation Q&A process before filing protest in order to seek clarification of ambiguous terms and/or advocate for changes to the solicitation
Post-Award Protests

• Filed after the evaluation process has been completed, and generally after the award decision has been announced

• Common Issues:
  – Deviation from the solicitation’s stated evaluation criteria
  – Relaxation of solicitation technical requirements and/or addition of unstated minimum technical requirements
  – Arbitrary proposal evaluation (technical, price, past performance, etc.)
  – Unequal treatment
  – Improper best value tradeoff analysis
  – Lack of meaningful discussions or misleading discussions
  – Organizational Conflicts of Interest
  – Cost/price realism
  – Key personnel bait & switch or late substitutions by awardee
  – Improper determination of contractor responsibility
Post-Award Protests

- Post-award protests may allege error in the evaluation of the protesting company, or errors in the evaluation of the company selected for award.
- **Post-Award**: If filed within 10 days of award or 5 days after a requested and required debriefing, the agency must immediately suspend contract performance.
- **Note**: The 5-day post-debriefing rule for obtaining a CICA stay of performance is different from the post-debriefing timeliness rule (10 days).
- One of the major challenges of the bid protest process is that you must generally move quickly and file a protest with limited information.
Considerations Before Filing a Protest

• Among the issues offerors should consider before filing a bid protest are:
  – Perception of merits of protest allegations
  – Ability to establish interested party status and prejudice
  – Customer reaction
  – Incumbent status
  – Cost of protesting
  – Likelihood of “win” beyond a sustained protest
    • Agencies often afforded significant discretion

• Tough, high-level decisions to make in short time window
Bid Protest Forums

• **Agency-Level Protest**
  – Cheapest alternative
  – Slim chance of success, but a good way to make a statement of frustration and/or disappointment without “suing the customer”

• **GAO**
  – Recommended forum in most circumstances
  – Decision-makers have specialized expertise in procurement law
  – Quick process: 100 days from start to finish
  – Mandatory stay of performance when protests are timely filed
  – Recovery of protests costs including attorneys fees for certain successful protests

• **Court of Federal Claims**
  – No automatic stay and unlikely award of protest costs
  – Decisions are binding but can be appealed
  – Can cost more and take longer than GAO protests

• **FAA Office of Dispute Resolution (“ODRA”)**
  – Special forum for Federal Aviation Administration bid protests
Considerations for Selecting a Bid Protest Forum

- Would protest be time-barred in one or multiple forums?
- Does each forum have jurisdiction over this particular protest?
- How expensive will it be not only to file, but to pursue the protest to decision on the merits?
- What discovery is available to the protester?
- Is a stay of performance or award automatic?
- What is the effect of a protest decision, and what options are available for further review after decision is issued?
- What is the background or experience of the individual who will be deciding the protest?
- What are the current trends for filings and “win-rates”? 

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Post-Protest Considerations

• Resolution timelines vary based on forum
  – GAO decision by statute must be issued within 100 days of filing initial protest

• Corrective action – pre- or post-decision
  – Increasingly common
  – Wide variation in implementation timeline
  – Actual corrective action can vary from what was proposed
  – Could lead to additional rounds of protest litigation

• Contract performance builds into next round proposal (past performance, etc.)
QUESTIONS?

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