

# **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)
  6. National Security (FAR 6.302-6)
  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

# Procurement Process: Key Steps

## 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

# Procurement Process: Key Steps

## 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”?

## 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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