The Procurement Cycle

- Acquisition planning/source selection
  - Pre-award bid protest litigation
- Proposal submission and evaluation
  - Exchanges and competitive range
- Contract award and debriefing
  - Post-award bid protest litigation
- Rinse, repeat
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
Full & Open vs. Limited Competition

• Typical full & open competitions:
  – FAR Part 14 Sealed Bids
  – FAR Part 15 Competitive Proposals
• Limited Competitions & Set-Aside Examples:
  – FAR Subpart 8.4 GSA Schedules
  – FAR Subpart 16.5 task and delivery orders
  – Small Business Section 8(a) set-asides
  – Etc.
Sole Source Awards

• 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)

• Requires Documentation (J&A), Publication, and Higher-Level Approval
Acquisition Planning

• FAR encourages agencies to have exchanges with industry to identify and resolve concerns regarding:
  – acquisition strategy—e.g., proposed contract type, terms and conditions, and acquisition planning schedules
  – feasibility of requirements, including performance requirements, statements of work, and data requirements
  – suitability of proposal instructions and evaluation criteria, including the approach for assessing past performance information
  – availability of reference documents

• Mechanisms: RFIs, industry conferences, draft RFPs, presolicitation notices, site visits
The Solicitation

• Solicitation must include:
  – Government’s requirements
  – Proposal instructions/information required
  – Evaluation factors and significant subfactors

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

• Look out for patent or latent defects
The Q&A Process

- Tool for advocating change to a solicitation or pointing out shortcomings
  - Understand how to ask questions to improve your competitive standing
  - Can be just as and often more effective than a pre-award protest (and significantly cheaper)
- Q&As published to all offerors
- Even if deadline for questions has passed, still consider submitting the question!
Bid Protests – The Basics

• A bid protest:
  – Is a statutorily created right to challenge procurement ground rules (e.g., 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

• Can be filed with Government Accountability Office (GAO), Court of Federal Claims (COFC), or procuring Agency
Pre-Award Protests – Common Issues

- Solicitation issues (e.g., requirements unduly restrictive, terms ambiguous, relevant clauses missing or incorrect)
- Other issues (e.g., improper sole-source award)
Pre-Award Protests – Considerations

- Timing – Solicitation challenges must be filed prior to proposal submission
- May need proposal to preserve standing (but award stayed pending protest resolution)
- **Practice Tip:** For solicitation challenges, use the Q&A process first!
- Timing – other challenges must be filed within 10 days of knowledge of alleged impropriety
Proposal Submission

- It is an offeror’s responsibility to submit a proposal that establishes its capability and the technical merits of its proposed approach
  - 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 protesting terms of Solicitation
Proposal Evaluation

- Agencies must evaluate proposals in accordance with stated criteria and may not introduce new criteria midstream without allowing offerors to revise proposals.
- Agencies may not deviate from stated evaluation 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 differences between best-value and LPTA.
Exchanges

• Clarifications
  – Limited exchanges between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal; do not allow proposal revisions
  – 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 provide an offeror the opportunity to revise or modify its proposal in some material respect
  – If the Government holds discussions, they must be meaningful, equal, and not misleading
    • Must address Significant Weaknesses, Deficiencies, and adverse past performance

• Train your employees to recognize permissible communications
Contract Award/Debriefing

- Debriefings typically must be requested within 3 days of award decision
- Debriefings help offerors better understand the basis for an agency’s selection decision, to improve their future proposals
- Always timely request debriefing (and accept first date offered)
- Format and level of detail provided varies greatly
  - E.g., FAR Part 15 v. Subpart 8.4
  - But agencies cannot provide point-by-point comparisons
- Debriefings are post-award events outside scope of protest jurisdiction
- Understand differences in pre- and post-award briefings
- Enhanced DoD post-award briefing procedures
Post-Award Protests: the Basics

• May allege error in the evaluation of the protester or the awardee (and sometimes intervening offerors, too)
• If filed within 10 days of award or 5 days after a requested and required debriefing, the agency must immediately suspend contract performance
  – Note: Technically, a GAO protest can be filed within 10 days of a requested and required debriefing; but it must still be filed within 5 days to get the automatic CICA stay
• One of the major challenges of the bid protest process is that you must generally move quickly and file a protest with limited information
Post-Award Protests: Common Issues

- Deviation from the solicitation’s stated evaluation criteria
- Relaxation of solicitation technical requirements and/or addition of unstated minimum technical requirements
- Arbitrary/Unreasonable 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
Considerations Before Filing a Protest

• Merits of protest allegations (including standing and prejudice)
• Customer reaction
• Incumbent status
• Cost of protesting
• Likelihood of “win” beyond a sustained protest
• These are tough, high-level decisions to be made in short time window
Bid Protest Forums

• **Agency-Level Protest**
  - Limited statistics re success, but can be effective to express 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
  - Potential 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

• **SBA; FAA ODRA**
  - Special forums for unique protests
## GAO Protest Statistics

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<th>Fiscal Year</th>
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<td>ADR Success Rate</td>
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QUESTIONS?

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