Webinar Hosted by AFCEA Small Business Committee

Debriefings, Bid Protests, and Small Business Regulatory Update

Presentation by Joshua B. Duvall

Webinar Materials

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Practice Areas

Government Contracts
Bid Protests
Cybersecurity
Outside General Counsel

Education

- J.D., The George Washington University Law School
- B.S., University of Maryland University College

Law Journals

- Senior Staff, *Federal Circuit Bar Journal*

Admissions

- Maryland Bar
- Florida Bar
- District of Columbia Bar
- U.S. Court of Federal Claims
- U.S. Court of Appeals for the Federal Circuit
- U.S. District Court for the Southern District of Florida

Certifications

- Certified Information Systems Security Professional (CISSP)

Josh Duvall is the founder and managing partner of Matross Edwards, and he leads our team of trusted contract attorneys in the firm's government contracts and cybersecurity practices. Josh is also the founder/author of two blogs, GovConJudicata and CyberJudicata, and he is the founder/host of the GovConJudicataPodcast.

Josh is trusted counsel and outside general counsel to small and mid-size businesses in the government contracts and commercial space. Josh counsels and represents government contractors in a broad range of issues relating to the laws and regulations of federal procurement, such as bid protests (GAO, COFC, agency level), size protests, claims and disputes, solicitation review, debriefings, teaming agreements, joint ventures, cybersecurity, data breach, and compliance issues.

Prior to the practice of law, Josh worked in the IT space for small and mid-sized government contractors around the DC Beltway. Having worked as a malware analyst and systems administrator, and now practicing law in the government contracting space, Josh has a unique understanding of the legal, business, and cybersecurity hurdles that these businesses need to overcome to be successful.

Josh is Vice-Chair of the Bid Protest and Membership Committees for the ABA Section of Public Contract Law, is a Certified Information Systems Security Professional, and is a frequent presenter and author on government contracts and cybersecurity issues.

To learn more about the firm's services, including select representative experience, please visit our Services page.

Speaking Engagements

- "Basic Training: Small Business Legal and Regulatory Issues" – National Veteran Small Business Coalition V-VETS'20, Webinar
- "TBD" – 2020 HUBZone Small Business Week, Webinar
- "GAO Bid Protests Explored!" – Glenn Robinson & Blue Ridge Information Systems, GovCon Best Practices Series, Webinar
- "FAR Part 7 – Acquisition Planning" – J. Schaus & Associates, 2020 FAR Webinar Series
- "Government Contracts Bid Protests in 2019: Latest Trends, Developments, and Issues Explored!" – The Knowledge Group, Webinar/Course (CLE credits available)
- "Debriefings and Bid Protests" – 2019 National HUBZone Conference, Chantilly, VA
- "Pitfalls and Perils of Compliance" – Florida 8(a) Alliance's 2019

Federal Contracting Conference, Orlando, FL

- "Legal Challenges in Cybersecurity: Data Breaches, Security Assessments, and Cyber Insurance Coverage" – $(ISC)^2$ Miami Chapter, Miami, FL
- "Effective Strategies for Government Contract Debriefings and Bid Protests" – NCMA Mid-Florida Chapter, Orlando, FL
- "Small Business Primer: Government Contract Debriefings and Bid Protests" – Florida 8(a) Alliance, Webinar
- "Data Breaches and Crisis Management Planning" – Compliance Week 2018, Washington, DC
- "Product Security and Compliance Risks with Emerging Technologies" – Compliance Week 2018, Washington, DC
- "Mentor-Protégé, Joint Venture, and Teaming Agreements" – NVSBC South Florida Chapter, Doral, FL
- "Best Practices for Debriefings and Protests" – Florida PTAC at UCF, Orlando, FL
- "Engagement in Defense Innovation and Technologies" – TiECon Florida, Tampa, FL
- "Contracts 101: The Basics" – In The Trenches MBA Summit, Webinar
- "GAO Bid Protests: Small Business Primer" – Federal Publications Seminars, Webinar

Select Publications

- DoD Contractors Beware: CMMC & DFARS 252.204-7012 & NIST SP 800-171, GovConJudicata/CyberJudicata (January 2020)
- GAO: Email Transmission Delay Sinks Contractor's Proposal, GovConJudicata (January 2020)
- NAICS Code Appeals (and the One-Shot Rule), GovConJudicata (January 2019)
- Got Proposal Submissions? Plan Ahead, Submit Early, and Confirm Receipt, GovConJudicata (September 2018)
- Legal Considerations for Cybersecurity Audits and Data Breach Response, GovConJudicata/CyberJudicata (August 2018)
- Three-Phase Debriefing Approach: What is Not Measured Cannot Improve, GovConJudicata (March 2017)
- Prevailing Wages: Walking the Fine Line Between Underpayment and Overpayment Under the Davis-Bacon Act, The Procurement Lawyer, Vol. 52, No. 1 (Fall 2016)
- Capture and Proposal Teams Beware: Do Not Let Hypotheticals Ruin Your Chances, GovConJudicata (August 2016)

Memberships

- American Bar Association, Section of Public Contract Law
  - Vice-Chair, Bid Protest Committee
  - Vice-Chair, Membership Committee
- National Contract Management Association (NCMA)
- International Information System Security Certification Consortium $(ISC)^2$
- International Association of Privacy Professionals (IAPP)

DEBRIEFING & BID PROTEST TIPSHEET

February 2021

Debriefings

* Debriefings are available in procurements under FAR Part 15 (negotiated) & FAR 16.505(b)(6) (task or delivery orders that exceed $6 million).
* Under FAR Part 15, contractors are entitled to both pre-award (FAR 15.505) and post-award (FAR 15.506) debriefings, provided that the request is timely made.

Requesting the Debriefing

* E-mail agency with request for a debriefing under FAR 15.505 (pre-award) or FAR 15.506 (post-award).
* To be timely, debrief request must be w/in 3 days of notice of award or exclusion from competitive range. Remember, agency COB is presumed 4:30pm local time unless otherwise stated. If untimely requested, the debrief (if given) is not "required."
* Take the first debriefing date offered, always.
* Pre-Award – debrief occurs as soon as practicable; do not voluntarily delay debrief until after award. If agency decides to delay the debrief, that's ok.
* Post-Award – debriefings "should occur" w/in 5 days after receipt of the written request for debrief.

Debriefing Tips

* Relationship building & information gathering.
* Process: pre-debriefing, debriefing, post-debriefing.
* Always request a debriefing, win or lose.
* Use the debriefing to learn what you can do to improve proposals and to develop a good relationship with agency personnel. Even if you are unsuccessful, the agency might want you for other opportunities.
* Re-read your proposal and RFP (§§ L, M). Refresh memory with what you proposed, what the agency wanted, and how you were to be evaluated.
* Bring someone to take notes (if in person/phone).
* Review what the agency is required to disclose and what the agency cannot disclose (middle column).
* Prepare questions/submit to agency in advance (various online resources for sample questions).
* Be polite; the debrief is not the time to convince the agency (or argue) why you should have won.
* If DoD enhanced debrief, always ask additional questions (improve proposals, procurement issues).
* Post-debriefing: lessons learned, protest go/no-go.

Pre-Award Debriefing

FAR 15.505(e) (at minimum)

* Evaluation of significant elements in your proposal.
* Summary of the rationale for eliminating offeror.
* Reasonable responses to relevant questions about whether solicitation procedures or applicable laws and regulations followed.

FAR 15.505(f) (not include)

* *Not required to disclose number or identity of offerors, content of other proposals, ranking, evaluation of other offerors, and any information prohibited in FAR 15.506(e).*

Post-Award Debriefing

FAR 15.506(d) (at minimum)

* Significant weaknesses or deficiencies, if applicable (terms are defined in FAR 15.001).
* Overall evaluated cost/price and technical rating of awardee and debriefed offeror and past performance of debriefed offeror.
* Overall ranking, if developed.
* Summary of the rationale for award.
* Commercial items, the make and model procured.
* Reasonable responses to relevant questions about whether solicitation procedures or applicable laws and regulations followed.

FAR 15.506(e) (not include)

* *No point-by-point comparisons, trade secrets, privileged or confidential manufacturing processes, commercial or financial information (cost breakdowns, profit, indirect cost rates, etc.), and names of persons providing past performance reference information.*

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Enhanced Post-Award Debriefing Rights (DoD)

* For DoD post-award debriefs, unsuccessful offerors have option to submit additional questions w/in 2 business days of debrief; agency's written response w/in 5 business days. 10 USC § 2305; DoD Class Dev.
* Where an offeror submits additional questions, debrief is not over until the agency delivers its written response. 10 USC § 2305; DoD Class Dev.
* Option to ask questions does not extend debrief (i.e., if no questions submitted, protest clock starts when you receive debrief). *NIKA Techs. v. US* (Fed. Cir. 2021).
* Redacted source selection award determination for all contract awards > $100m; small or nontraditional contractors have option to request redacted source selection for awards b/w $10m–$100m. 2018 NDAA.
* Written or oral debrief for all contract awards and task or delivery orders ≥ $10m. 2018 NDAA.

Bid Protest Tips

* Objective, procedural grounds typically prevail.
* Subjective grounds tend to lose (agency discretion).
* GAO strict timeliness rules (4 CFR § 21.2) – protests of patent solicitation defects must be filed before proposal deadline; protests other than solicitation defects (post-award, excl. comp. range) must be filed w/in 10 days known or should have known. If debrief "required," protest due w/in 10 days of debrief.
* Trigger "CICA stay" – protests must be filed later of 10 days after award or 5 days after "required" debrief ends (31 USC § 3553(d)(4)) ("required" = timely filed).
* Awardees should intervene (defend award, protect confidential info, corrective action, monitor, etc.).
* GAO Task Order Threshold: DoD > $25m; Civ > $10m.

Sample Bid Protest Grounds

* Unreasonable technical or past performance evaluation (failure to consider relevance of PP info).
* Unreasonable price/cost evaluation (failure to conduct a required price realism analysis).
* Failure to follow stated evaluation criteria (§ M).
* Applying unstated evaluation criteria.
* Lack of meaningful discussions.
* Unequal or disparate treatment of offerors.
* Inadequate documentation of the record.
* Unreasonable/flawed selection decision.

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Debriefings, Bid Protests, and Small Business Regulatory Update

AFCEA Small Business Committee

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May 13, 2021

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Syllabus

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- Debriefings
- GAO Bid Protest Overview
- Likelihood of Success
- Intervening
- Small Business Regulatory Update
- Q&A
- Contact Information

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DEBRIEFINGS

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Debriefings

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- Transparency in procurement
- An opportunity to learn why your offer was not selected
- Determine whether there may have been flaws in the evaluation process
- Available under FAR Part 15 procurements
- Available under task and delivery orders exceeding $6.0 million per FAR § 16.505(b)(6)

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Debriefings

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- Pre-Award – FAR § 15.505(a)
  - Within 3 days of receipt of notice of exclusion
  - Delaying until after award could impact protest timeliness
- Post-Award – FAR § 15.506(a)
  - Request debriefing within 3 days of award notice
  - Debriefing usually performed within 5 days of request

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Debriefings

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- Requesting Debriefing
  - E-mail the CO to request a debriefing pursuant to FAR § 15.505(e) (pre-award) or FAR § 15.506(d) (post-award)
  - Make sure to include that your request timely
    - Agency COB is 4:30 p.m. unless otherwise indicated
- Take first date offered
- Awardees and unsuccessful offerors
- Debriefings impact protest shot clock

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Pre-Award Debriefings

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- Minimum requirements – FAR § 15.505(e)
  - Agency's significant elements in the offeror's proposal
  - Summary of rationale for eliminating offeror from competition
  - Reasonable responses to relevant questions about whether procedures followed

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Pre-Award Debriefings

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- Not Discussed – FAR § 15.505(f)
  - Number of offerors
  - Identity of other offerors
  - Content of other proposals
  - Ranking of other offerors
  - Evaluation of other offerors
  - Information prohibited in FAR § 15.506(e)

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Post-Award Debriefings

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- Minimum requirements – FAR § 15.506(d)
  - Government's evaluation of significant weaknesses or deficiencies
  - Overall evaluated cost or price
  - Overall ranking, if ranking developed
  - Summary of the rationale for award
  - Reasonable responses to relevant questions about whether procedures followed

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Post-Award Debriefings

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- Not discussed – FAR § 15.506(e)
  - No point-by-point comparisons
  - No trade secrets
  - No privileged or confidential information
    - No manufacturing processes or techniques
    - No financial information
      - Cost breakdowns; Profits; Indirect cost rates
  - No names of individuals providing information about offerors past performance

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Debriefing Approach

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- Pre Debriefing
  - Review proposal and RFP (§§ L, M)
  - Prepare questions in advance (submit to agency)
- Debriefing
  - Know what the agency will/will not discuss under FAR
  - Bring designated note taker, ask for clarifications
  - Be polite – don't air grievances, try to persuade
- Post Debriefing
  - Regroup w/ leadership; learn and improve; go/no-go

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GAO BID PROTEST OVERVIEW

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Bid Protest Forums

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- Procuring Agency
  - Agencies use "best efforts" to resolve w/in 35 days
  - No statistics (unlike GAO)
  - FAA ODRA (AMS; not the FAR)
- U.S. Court of Federal Claims (COFC)
  - Federal court; DOJ defends; procedural differences
- Government Accountability Office (GAO)
  - Only makes recommendations
  - Handle 2000+ protests each year

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GAO Bid Protests

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- Challenge to a solicitation or award
- Integrity, accountability, transparency
- Set up to avoid unnecessary delay/costs in federal procurements
  - 100 days to issue decision
- Filed electronically via EPDS

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GAO Timeline

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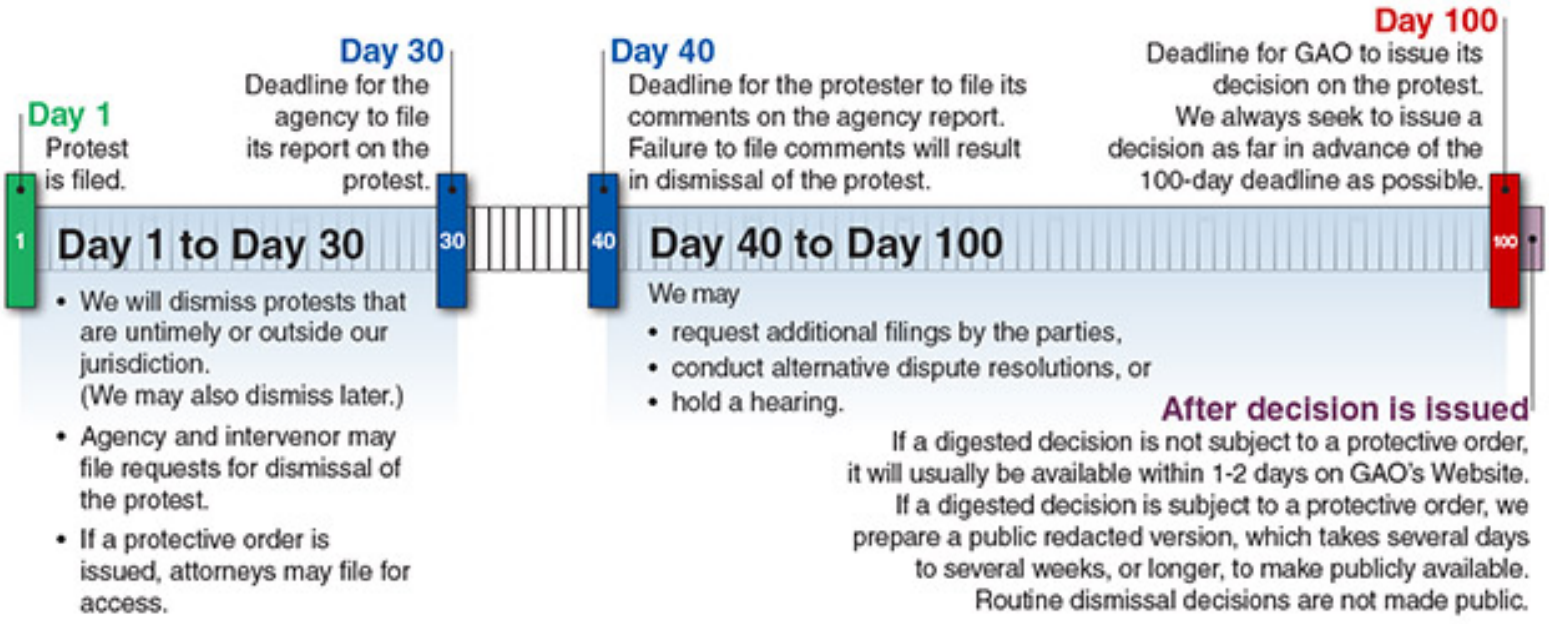

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Types of Protests

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- Pre-award
  - Ambiguous solicitation language
  - Efforts that improperly restrict competition
  - Use of unreasonable evaluation method
  - Language that violates law or regulation
- Post-award
  - Agency's evaluation was unreasonable
    - Technical, past performance, cost/price
  - Flawed best value trade-off decision

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Who May Protest

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- Only an "interested party" may protest
  - "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1)
- Intervenors
  - Awardees should consider intervening (protect your award)
  - Reasons for intervening later in the webinar

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Task Orders

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- GAO task order jurisdiction
  - Protest grounds that increases scope, ordering period, max value of contract
  - Civilian
    - Value > $10 million
  - DoD/ NASA / USCG
    - Value > $25 million

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Timeliness

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- GAO has strict filing deadlines
- Protests must be electronically filed by 5:30 p.m. on the date that the protest is due
  - GAO interprets this rule as meaning "until the clock reaches 5:31 p.m."
  - EPDS fee must be paid by the deadline
- Don't confuse a bid protest with an SBA size or status protest – the deadlines are different!

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Timeliness – Solicitation Defect

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- Protesting ambiguous terms, unduly restrictive terms, unreasonable evaluation methodology, etc.
- 4 C.F.R. § 21.2(a)(1)
  - "Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."

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Timeliness – Not Solicitation Defect

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- Protesting evaluations, award decisions, exclusion from competitive range, etc.
- 4 C.F.R. § 21.2(a)(2)
  - "shall be filed not later than 10 days after the basis of protest is known or should have known (whichever is earlier)"
    - This can sometimes be difficult to determine
      - Protest grounds learned during phone call
  - Exception when debriefing requested and required

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Timeliness – Not Solicitation Defect

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- 4 C.F.R. § 21.2(a)(2) – Debriefing exception
  - ". . . the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held."
  - But remember… CICA Stay

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CICA Stay

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- Competition in Contracting Act (CICA)
  - Increase competition and reduce costs
- CICA Stay
  - Statutory – 31 U.S.C. § 3553
  - Automatically triggered if protest is filed the later of:
    - 10 days of award, or
    - 5 days after a required debriefing
  - Remember… DoD enhanced debriefings (additional questions)

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CICA Stay – Sidebar

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- Enhanced debriefing rights in DoD procurements
  - Debriefings shall include . . . "*an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing.*" *See* 10 U.S.C. § 2305(b)(5)(B)
- GAO bid protest timeliness debriefing exception
  - "5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required" 31 U.S.C. § 3553(d)(4)(A)(ii)
- *NIKA Techs., Inc. v. U.S.* (Fed. Cir. 2021) (option to ask questions did not extend debriefing).

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Protests Not Considered

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- Protest issues GAO will not consider
  - Contract administration (i.e., claims for money)
  - SBA issues
    - Size Protests, NAICS Protests, Certification of Competency Program
  - Untimely protests
  - Protests which lack a detailed statement of the legal and factual grounds
  - Protests from subcontractors

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LIKELIHOOD OF SUCCESS

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Bid Protest Statistics

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Bid Protest Statistics for Fiscal Years 2016-2020

	FY2020	FY2019	FY2018	FY2017	FY2016
Cases Filed[1]	2149 (down 2%)[2]	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)
Cases Closed[3]	2137	2200	2642	2672	2734
Merit (Sustain + Deny) Decisions	545	587	622	581	616
Number of Sustains	84	77	92	99	139
Sustain Rate	15%	13%	15%	17%	23%
Effectiveness Rate[4]	51%	44%	44%	47%	46%
ADR[5] (cases used)	124	40	86	81	69
ADR Success Rate[6]	82%	90%	77%	90%	84%
Hearings[7]	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)

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Successful Protest Grounds

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- Not based on a protester's subjective assertions
- Successful grounds tied to procedural flaws
  - Unreasonable cost/price evaluation
  - Unreasonable past performance evaluation
    - Size/scope of past performance
  - Unreasonable technical evaluation
  - Failure to follow stated evaluation criteria
  - Unequal treatment
  - Inadequate documentation of record

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INTERVENING

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Intervening

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- GAO – 4 C.F.R. § 21.0(b)(1)
  - "Intervenor means an awardee if the award has been made or, if no award has been made, all bidders and offerors who appear to have a substantial prospect of receiving an award if the protest is denied."
- COFC – Rule 24

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Intervening to Defend Your Award

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- Agencies anticipate that awardees will intervene
- Primary reason is to protect your award (you know your proposal better than the government)
- Intervening actively (filing briefs, resource to agency counsel, etc.)
- Intervening passively (monitoring)
- Limit the record at GAO

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Intervening to Defend Your Award

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- If GAO issues a protective order, intervenor's counsel will be able to read unredacted protest and agency source selection documents
- Protect confidential/proprietary information
- Intervenor's interests may not entirely align with agency interests (corrective action)
- Shape the scope of corrective action
  - *Peraton, Inc.*, B-416916.5, Apr. 13, 2020
- Support agency, urge GAO to deny/dismiss protest

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SMALL BUSINESS REGULATORY UPDATE

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Small Biz Regulatory Update

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- SBA published a final rule – 85 Fed. Reg. 66146 –*Consolidation of Mentor-Protege Programs and Other Government Contracting Amendments* (effective November 16, 2020)
- *** *extensive changes; this webinar does not include all* ***
  - Consolidated Mentor-Protégé Programs
  - Eliminated JV "3-in-2" Rule; Clarified definition of "contract"
  - JV/Teaming Past Performance
  - Clarified that JVs may be populated with administrative personnel, which includes Facility Security Officers
  - JV Facility Security Clearance
  - Much, much more…

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Small Biz Regulatory Update

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- **Joint Venture – Past Performance**
- 13 C.F.R. § 125.8(e)
  - Capabilities, past performance and experience. When evaluating the capabilities, past performance, experience, business systems and certifications of an **entity submitting an offer for a contract set aside or reserved for small business as a joint venture** established pursuant to this section, a **procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously**. A procuring activity may not require the protege firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. **The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.**

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Small Biz Regulatory Update

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- **Joint Venture – Past Performance**
- 13 C.F.R. §§ 124.513 [8(a)], 125.18 [SDVOSB], 126.616 [HUBZone], and 127.506 [WOSB/EDWOSB]
  - Capabilities, past performance and experience. When evaluating the capabilities, past performance, experience, business systems and certifications of an **entity submitting an offer for [an SDVOSB, HUBZone, 8(a), or WOSB/EDWOSB] contract as a joint venture** established pursuant to this section, a **procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously**. A procuring activity may not require the [SDVOSB, HUBZone, 8(a), or WOSB/EDWOSB] to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. **The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.**

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Small Biz Regulatory Update

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- **Prime/Sub – Past Performance**
- 13 C.F.R. § 125.2(g)
  - Capabilities, past performance, and experience. When an offer of a small business prime contractor **includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s)** in the proposal, the head of **the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience** of the small business prime contractor **if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award**.

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- **Joint Venture Agreement**
- 13 C.F.R. §§ 124.513 [8(a)], 125.18 [SDVOSB], 126.616 [HUBZone], and 127.506 [WOSB/EDWOSB]

  – Designates a named employee of the managing venturer as the "Responsible Manager" (previously "Project Manager")

  – Responsible Manager has "manager with ultimate responsibility for performance of the contract."

  – Responsible Manager need not be an employee of the managing venturer at the time the JV submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the managing venturer if the JV is the successful offeror.

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- **Joint Venture Agreement**
- 13 C.F.R. §§ 124.513 [8(a)], 125.18 [SDVOSB], 126.616 [HUBZone], and 127.506 [WOSB/EDWOSB]
- Clarifies that the non-managing venturer may participate in a JV's corporate governance activities:
    - "The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary."

NOTE: SBA's JVA requirements are slightly different in 13 C.F.R. § 125.8. As always, for legal advice on a particular matter, contact an attorney.

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- **Joint Venture – Facility Security Clearance**
- 13 C.F.R. § 121.103(h)(4)
- A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.
    - (i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.
    - (ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

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QUESTIONS?

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News, Insights & Legal Analysis
News, insights, and legal analysis for the government contracting space.
Published by Joshua Duvall, managing partner at Matross Edwards LLC.

Joshua Duvall Mar 24 3 min read

6 Successful Pre-Award Protests Challenging Solicitation Terms and Key Takeaways

Note: This article originally appeared in G2XchangeHealth and G2XchangeFedCiv.

It's no secret that doing business with the Federal Government involves a complex system of law and regulation. Indeed, many successful Government contractors will happily explain that part of their success stems from quickly learning how to use all of the tools in the proverbial procurement toolbox. Interestingly, one tool that contractors appear to be using more often is the pre-award protest.[1]

For the uninitiated, the pre-award protest is generally described as a challenge to the terms of a solicitation or the ground rules of a procurement. Given that a successful challenge may result in the agency modifying solicitation terms that a protester argued were ambiguous or unduly restrictive, the pre-award protest is often viewed as a powerful tool.

As with any powerful instrument, there are limitations. In that respect, the cardinal rule is that a pre-award challenge to apparent solicitation defects must be lodged prior to the proposal deadline.[2] This is true for protests at the agency level, the U.S. Government Accountability Office ("GAO"), and the U.S. Court of Federal Claims.[3] Where a contractor fails to meet that timeliness deadline, their protest will likely result in a swift dismissal.

Below is a quick take on two common pre-award protest issues, as reflected in sustained GAO bid protest decisions.[4] So, the next time a solicitation hits your desk (or inbox), remember that you've got a powerful tool at your disposal should you determine that it includes ambiguous or unduly restrictive terms.

Ambiguous Terms

- *IDS International Government Services, LLC*, B-419003; B-419003.2 (November 18, 2020) (sustaining a protest where the solicitation's experience factor was ambiguous because of a conflict between the evaluation criteria and the adjectival ratings).
- *ASRC Federal Data Network Technologies, LLC; Ekagra Partners, LLC*, B-418085.4; B-418085.5; B-418085.7 (May 5, 2020) (sustaining protests where the solicitation's requirement for fixed-price services above the current operations level was insufficiently detailed because it failed to adequately detail the scope and boundaries of such services).
- *Global Technical Systems*, B-411230.2 (September 9, 2015) (sustaining a protest where the solicitation's requirement for engineering services was ambiguous and vague where it failed to provide sufficient information to allow offerors to intelligently prepare their proposals and compete on a common basis).

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Unduly Restrictive Terms

- *Phoenix Environmental Design, Inc.*, B-413373 (October 14, 2016) (sustaining a protest where the justification the agency put forth for to restrict terms on a brand name only basis was not supported by the record).
- *AES UXO, LLC*, B-419150 (December 7, 2020) (sustaining a protest where the solicitation's relevant experience and past performance evaluation criteria required such experience and past performance to have been gained by firms while performing only as prime contractors or as a joint venture, and not while performing as subcontractors).
- *Ekagra Partners, LLC*, B-408685.18 (February 15, 2019) (sustaining a protest where a solicitation term prohibits a mentor-protégé joint venture from submitting a proposal as part of a contractor teaming arrangement that includes additional subcontractors where the agency does not provide a reasonable basis for its inclusion).

Key Takeaways

The pre-award bid protest is a powerful tool for Government contractors. As shown above, each protester was able to successfully challenge the terms of a solicitation as ambiguous or unduly restrictive. For patent ambiguities, look for ambiguous or vague terms that could prevent your team from competing intelligently and on a relatively equal basis (i.e., terms that are susceptible to two or more reasonable interpretations). For unduly restrictive terms, look for solicitation provisions that restrict your ability to compete (i.e., brand name requirements or other terms that are not reasonably necessary to meet the agency's needs).

Of course, if you believe the solicitation conflicts with statute or regulation, then that would also be another fertile bid protest ground, among others. Yet as powerful as this tool may be, contractors must remember that challenges to patent defects are only available so long as the protest is timely filed. As the court in *Blue & Gold* explained, "[v]endors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award [sic] and then, if unsuccessful, claim the solicitation was infirm."[5]

_____

[1] *See* GAO Bid Protest Annual Report to Congress for Fiscal Year 2020, GAO-21-281SP, *available at* https://www.gao.gov/products/gao-21-281sp (last visited March 22, 2021). Notably, it appears that the FY 2020 report was the first time a pre-award ground appeared on GAO's list of most prevalent grounds for sustaining bid protests.

[2] There are nuances to solicitation defects (e.g., latent ambiguities), but those are outside the scope of this article.

[3] FAR 33.103(e) (agency-level bid protests); 4 C.F.R. § 21.2(a)(1) (GAO bid protests); *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (COFC bid protests).

[4] The bid protest grounds discussed in this article are by no means exhaustive.

[5] *Blue & Gold Fleet*, 492 F.3d at 1314 (quoting *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 175 n.14 (2005)).

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News, Insights & Legal Analysis

News, insights, and legal analysis for the government contracting space.
Published by Joshua Duvall, managing partner at Matross Edwards LLC.

Joshua Duvall Apr 28 3 min read

GAO: Protégé Venturer Not Required to Have Same Level of Experience as Other Offerors

A recent Government Accountability Office ("GAO") bid protest decision is welcome news for mentor-protégé joint ventures ("JV") in finding that, under the Small Business Administration's ("SBA") regulatory update (discussed here), "a procuring agency may not require a protégé firm to individually meet the same evaluation requirements as those imposed on other offerors."

The protest of *Innovate Now, LLC*, B-419546, April 26, 2021, 2021 CPD ¶ ___ involved an Air Force solicitation for various engineering and professional services at the Air Force Material Command headquarters in Ohio. [1] Relevant here, the solicitation required each member of a JV to provide at least one prime federal contract work sample that was performed on a non-fixed price basis for at least six months within the last five years, with a satisfactory or above rating for its most recent past performance or contractor performance assessment reporting system ("CPARS") report.

Here, the protester argued that the solicitation ran afoul of SBA's JV regulation because it "improperly requires the protégé member of any mentor-protégé joint venture offeror to meet the same experience requirements as all other offerors." To support its position, the protester pointed to 13 C.F.R. § 125.8(e), which provides as follows:

- When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section [which includes mentor-protégé joint ventures], a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. *A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.* The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract. [2]

On the other hand, the agency argued (among other things) that the solicitation did not run afoul of SBA's regulations because JV offerors were "not restricted to submitting work samples performed only by the joint venture entity, and are instead permitted to submit work samples performed by each member of the joint venture." The agency also argued that the solicitation reflected its minimum needs and, as such, was reasonable.

At bottom, GAO determined that "[t]he plain language of the regulation is clear; a procuring agency may not require a protégé firm to individually meet the same evaluation requirements as those imposed on other offerors." Thus, according to GAO, the solicitation violated that clear prohibition. In supporting this finding, GAO not only pointed to SBA's comments that accompanied its revised JV regulation but also sought comments from SBA regarding it viewpoint (which also confirmed GAO's position). [3] As a result, GAO sustained the protest and recommended that the agency amend the solicitation consistent with the decision.

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Takeaway

This decision is welcome news for small business mentor-protégé JVs, and particularly protégé firms, as it confirms that SBA's regulations do not require a protégé firm to meet the same level of experience that is required by other offerors. Indeed, this is harmonious with SBA's stated rationale that the reason a small business forms a JV is because "it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner."

_____

[1] Notably, the solicitation provided an evaluation method described as, "the highest two technically capable offerors with realistic, balanced and reasonable pricing source selection methodology."

[2] SBA issued an amendment in January 2021 that harmonized this language across its socio-economic programs' JV past performance regulations. *See SBA Amends Final Rule, Harmonizes JV Past Performance Regulations.*

[3] In response to GAO's request for comments, SBA noted that:

- SBA regulations at 13 C.F.R. § 125.8(e) prohibit an agency from applying the same experience requirements to protégés as other offerors generally. This requirement does not mandate a particular level or type of experience and provides agencies with the flexibility to determine the appropriate criteria, *with the understanding that protégés must be held to a different experience standard from mentors and other offerors.*

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