

# Federal Contracting

## Protests Update

*SOCIETY OF AMERICAN MILITARY ENGINEERS  
(SAME) MIDWEST SMALL BUSINESS EXPO*

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# PROTESTS

- FAR 15.308 states:

The source selection authority's (SSA) decision shall be based on a comparative assessment of proposals against all sources selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment.

- Must be an impartial, fair selection



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# Debrief

- Agencies are required to notify offerors, when they are eliminated from competition and to provide debriefings when requested. FAR 15.605 and 15.606
- As discussed last hour the first opportunity (generally) for protest is at a pre-award notice (See FAR 15.503(a)) of exclusion from further competition. This serves several purposes:
  - Allows the unsuccessful offeror to move on to other opportunities
  - Save offerors resources – Spend no more on this one
  - Allows the offeror the opportunity to challenge its elimination from competition by requesting a pre-award debriefing and perhaps filing a protest



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# Preaward Protest

- Time to Request a pre-award debriefing
  - No less than 3 days after receipt of notification of exclusion from competition.
  - The offeror may request a delay until after award in order to obtain all the information contained in the post award debrief
  - Failure to meet the timeline relieves the Government of offering any debrief.



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# Preaward Debriefing

- What do you learn in a pre-award debriefing
  - The agency's evaluation of your proposal
    - Significant strengths and weaknesses
  - A summary of the rationale for eliminating your proposal
  - Reasonable responses to your questions about whether or not source selection procedures in the solicitation were followed, as well as whether applicable regulations were followed
- What they will not disclose:
  - Number of offerors, identity of other offerors, content of proposals, rankings, evaluations, prohibited information (but ask anyway)



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# Post Award Protests

- Notice of contract award must be given to unsuccessful offerors within 3 days of award. The Notice includes:
  - Number of offerors solicited
  - Number of proposals received
  - Name and address of each offeror receiving an award
  - Contract awardee price
  - A basic overview of why the offeror's proposal was rejected



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# Post Award Debriefing

- The offeror has 3 days after the notification to request a debriefing FAR 15.506
  - The Government should provide a debriefing within 5 days of the request – not fatal to the Government – best efforts sort of thing.
  - Failure to make a timely request eliminates the Government's obligation to provide a debrief
  - Debriefs may be done orally, in writing or any other method acceptable to the Contracting Officer.



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# Debrief, cont

- Contents of a Debrief:
  - Significant strengths and weaknesses
  - Overall evaluated price and technical rating of winner
  - Overall ranking of all offerors
  - Summary of rationale for award
  - Reasonable responses to your questions about whether or not source selection procedures in the solicitation were followed, as well as whether applicable regulations were followed\*



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# Debrief, cont.

- What is not in a debrief
  - No point by point comparisons of our offer with other offerors
  - No trade secrets (remember to mark your bid)
  - Privileged or confidential business information
  - Names of Past Performance POCs



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# Filing the Protest

- When to File
  - Subject Matter
    - If the issue in question is a flaw or error in the solicitation that was obvious or patent on the face of the solicitation that our protest argument indicates is something we could or should have noticed prior to bid opening, the time to protest is prior to bid opening. Otherwise, the Government should file a motion to dismiss on those grounds.



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# Post Award Protest

- You must protest the award of the contract
  - This means it must pertain to the basis of the award
    - What you cannot allege:
      - The contractor will not be able to perform, because they have not obtained a specific license – This pertains to their ability to perform – not an award issue, but a performance issue; however, if the Definitive Selection Criteria (DSC) was – must be a licensed contractor in IL and they were not – then you could protest
  - Best bet
    - Find something in the DSCs not followed



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# Examples

- Offeror A, winner, in a LPTA bid, is the lowest bidder, but you realize that through discussions with other bidders) the bid required 6” ceramic tile and you discover their bid is lower, because they offered 9”.
  - This is a nonconforming bid, they failed to bid according to the specifications and the Government accepted a nonconforming bid.
    - Too bad they are not all this easy
    - Questions?



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# Example

- In a Best Value Procurement there are 5 bidders with one successful offeror:
  - The ratings for each offeror are
    - A: O, E, E, G, G – Price: 13 Million
    - B: E, E, G, G, S – Price: 10 Million
    - C: S, S, S, S, S – Price 9.8 Million
    - D: E, G, S, S, S – Price 11 Million
    - Us: E, E, G, G, G –Price 11.5 Million
    - They select Offeror D – Protest?



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# Jurisdiction over Protests

- The subject of the Protest determines where you file the Protest – a wrong choice can be fatal:
  - If you are protesting an award decision you can take it to the GAO, US COFC, CO, U.S. Dist. Ct. or BCA
- If the subject is Protesting whether or not the company is a small business in a set aside:
  - US Small Business Administration
- If you are protesting the status of a business
  - E.g. 8(a) or Vet owned (CVE or Veteran 13 CFR 125?)
    - US Small Business Administration
    - For Vet status SBA defers to DVA



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# Time for Filing

- Agency Protests
  - Improprieties in the solicitation must be filed prior to bid opening
  - Others must be filed within 10 days after the basis for the protest is known or should have been known.
  - The Agency is not required to suspend the award or performance of the contract upon receipt of a protest within the 10 day window – See GAO Protests (next)



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# Time for Filing

- GAO Protests
  - Improprieties in the solicitation – Prior to bid opening or closing date for receipt of proposals
  - Other basis – within 10 days of notification of award or 10 days after a requested debriefing is held 4 CFR 21.2 Untimely protests are summarily dismissed
  - Proper and timely filing of a Protest institutes an automatic stay of performance 31 USC 3553(c)



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# Time for Filing

- Courts – No specific time, but current case law states 4 months is too long – very helpful right? They have adopted the GAO rule that pre-award issues must be brought prior to bid opening or time for receipt of proposals.
- SBA – 13 CFR 121.1001. Must protest by the 5<sup>th</sup> day following bid opening.
  - Caveats: CO has no time limit
    - CO also does not have to terminate if found other than small during exercise of an option year



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# Contents of a Protest

- Name, address, telephone and fax of protestor
- Signed by protestor or its lawyer
- Identify the contracting agency and solicitation/contract number
- A detailed statement of the factual and legal grounds of protest and copies of relevant documents
- Establish the protestor is an interested party
- Establish the protest is timely
- Request ruling
- State form of relief requested



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# What is Important Here

- Know what you want to protest
- Know where you need to protest it
- Request the debrief
- Calendar the dates
- Understand the forum
  - Lets discuss forum selection here
- Failure to select the proper forum is fatal
- Missing a deadline is fatal



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# Questions

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