

Bid Protests: Avoiding Common Procurement Pitfalls

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State of GAO Bid Protests

- Sustain in FY2014 dropped to 13%, the lowest in recent history
- So far in 2015, very few published decisions sustaining protests
 - Only 15 in first six months of FY2015
- Heavy push to resolve cases through voluntary agency corrective action prior to final GAO decision
- Fewer decisions means less educational guidance to the contract community

FY 2014 Bid Protest Statistics

	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010
Cases Filed ¹	2,561 (up 5% ²)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)
Cases Closed	2,458 ³	2,538	2,495	2,292	2,226
Merit (Sustain + Deny) Decisions	556	509	570	417	441
Number of Sustains	72	87	106	67	82
Sustain Rate	13%	17%	18.6%	16%	19%
Effectiveness Rate ⁴	43%	43%	42%	42%	42%
ADR ⁵ (cases used)	96	145	106	140	159
ADR Success Rate ⁶	83%	86%	80%	82%	80%
Hearings ⁷	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)

Common Procurement Risks Which Can Be Avoided by Early, Smart Intervention

- In era of record-high rates of corrective action, being able to convince the agency to defend your award is critical
- Three areas where contractor mistakes early in the procurement process can lead to major bid protest exposure down the road:
 1. Hiring and Use of Former Government Employees
 2. Proposed Staffing of New Contracts Via Incumbent Capture With Overaggressive Compensation Cuts
 3. Bidding on Government Contracts While in the Midst of Corporate Reorganization/Restructuring

NAVIGATING THE REVOLVING DOOR

Revolving Door Statutes

- Limitations on employment negotiations with current government officials
 - 18 U.S.C. § 208 – generally applicable
 - 41 U.S.C. § 2103 – for officials involved in procurements
- Limitations on compensation/hiring government officials
 - 41 U.S.C. § 2104
- Representational Bans for Former Gov't Officials
 - 18 U.S.C. § 207 – numerous different categories of bans

Role of the Ethics Official

- Interpretation of the scope and applicability of revolving door statutes are the province of the Designated Agency Ethics Official (“DAEO”)
- DAEOs issue opinions which provide guidance to current and former government officials about what they can and cannot do
- Proceeding without DAEO consultation is a MAJOR RISK

The DAEO vs. The Contracting Officer

- While DAEOs interpret revolving door statutes, only the Contracting Officer is authorized to make procurement integrity determinations, per FAR subpart 9.5
- A DAEO “clean letter” to be hired by a firm does not mean the former government official is clear to do any and all work for that firm
- Use of former government officials can still give rise to unfair competitive advantages in a procurement
- The Contracting Officer must sign-off on the participation of the former official or else there is a risk of disqualification from the procurement
 - Significance of the risk is highly circumstantial

Unfair Competitive Advantage

- When a former government official participates in the effort to obtain a contract, he/she is presumed to use any inside information he/she has which may be competitively useful
 - *Health Net Fed. Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220
 - *International Resources Group*, B-409346.2, Dec. 11, 2014, 2014 CPD ¶ 369
- Entire proposal team may be tainted

Early Disclosure to Contracting Officer

- The best way to resolve a potential unfair competitive advantage situation is to seek early guidance from the contracting officer
 - If CO reasonably investigates the situation and deems it acceptable, that determination is entitled to substantial deference and is very difficult to challenge successfully
- Inadequate investigation may lead to protest sustain
 - *International Resources Group*, supra.
 - *PCCP Constructors, JV et al.*, B-405036.6 et al., August 4, 2011, 2011 CPD ¶ 156

Early Disclosure to Contracting Officer

- Risk of disclosure is that the contracting officer may not give you the answer you want
 - May require onerous mitigation measures
 - In rare instances, could disqualify a firm from the competition
- While CO determinations are entitled to deference, mistakes of fact can still be challenged
 - *VSE Corporation*, B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268

Practical Tips to Navigating the Revolving Door

- For revolving door statutory restrictions, know the rules, obtain DAEO letters before employment or employment discussions, and do due diligence on the disclosures underlying the DAEO letter
- If considering former government official for involvement in competitive procurement proposal strategy or preparation
 - Disclose fully to contracting officer far enough in advance to permit agency investigation and determination before official begins involvement in proposal OR
 - Wall off the former government official from all involvement in proposal preparation
- Be alert to, and analyze, hires of agency officials by potential competitors

RISKS OF RELYING ON INCUMBENT CAPTURE TO STAFF SERVICE CONTRACTS

Proposing Incumbent Capture

- Common fact pattern:
 - Contractor bidding on service contract, hoping to unseat incumbent contractor
 - RFP requires a staffing plan to account for challenge of staffing a large or sophisticated contract
 - Contractor does not have a sufficient surplus of qualified employees to staff the contract from current ranks
 - Contractor wants to rebadge some or all of the incumbent workforce

Proposing Incumbent Capture

- Common mistakes:
 - Relying on incumbent capture while also committing to employee compensation and/or labor rates which reflect substantial reductions from the status quo
 - Misrepresenting commitments from key personnel

Underpricing Incumbent Employees

- Relying exclusively on incumbent capture for some or all of staffing creates evaluation risk in many different procurement circumstances:
 1. Upward cost adjustment in cost realism review
 - *Magellan Health Servs.*, B-298912, Jan. 5, 2007, 2007 CPD ¶ 81: Cost realism evaluation of awardee's proposal improper where, although knowing that awardee had proposed to recruit the incumbent workforce, agency failed to adjust awardee's proposed labor rates as part of its cost realism evaluation where labor rates were unrealistically low

Underpricing Incumbent Employees

- Evaluation risks (continued)
 2. Rejection of price or down-scoring of proposal in price realism evaluation (firm fixed price procurement)
 - *Health Net Federal Servs., LLC*, B-401652.3, Nov. 4, 2009, 2009 CPD ¶ 220: Evaluation of compensation of awardee's proposed staff unreasonable where awardee relied on high percentage of incumbent capture yet proposed substantially lower salaries than current incumbent salaries. Price realism review was required to consider risk of unsuccessful incumbent capture.

Underpricing Incumbent Employees

- Evaluation risks (continued)
 3. Direct penalty in technical evaluation
 - *Alutiiq Pacific, LLC*, B-409584, June 18, 2014, 2014 CPD ¶ 196: Even where RFP had no price realism evaluation, awardee's high staffing evaluation rating in staffing subfactor unreasonable where agency evaluators gave substantial credit for incumbent capture plan, yet gave "no consideration to [the awardee's] proposed compensation reductions"

Best Practices to Avoid Penalties

- Propose multiple staffing approaches, of which incumbent capture is one
- Avoid quantitative commitments to particular level of incumbent capture (i.e. 50% or 70% capture)
 - GAO has recently denied protests where an awardee's staffing plan did not rely exclusively on incumbent capture and, instead, "identified multiple sources for staffing the task order and the agency's evaluation reflected that multi-faceted approach"

Bait and Switch, Defined

- The “bait and switch” definition closely tracks the broader “material misrepresentation” standard
- *CACI Technologies, Inc.*, B-408858, Dec. 5, 2013, 2013 CPD ¶ 283: “In order to establish an impermissible ‘bait and switch,’ a protester must show:
 1. that an offeror either knowingly or negligently represented that it would rely on specific personnel that it did not expect to furnish during contract performance,
 2. that the misrepresentation was relied on by the agency, and
 3. the agency's reliance on the misrepresentation had a material effect on the evaluation results.”

Bait and Switch vs. Incumbent Capture

- In dozens of cases over the past 20 years, GAO has rejected bait and switch claims in which a new contractor attempts to hire incumbent key personnel after naming other key personnel in the proposal
- *PricewaterhouseCoopers LLP; IBM U.S. Federal, B-409885, Sept. 5, 2014, 2014 WL 4923905:*
 - “IBM complains that E&Y engaged in an improper bait and switch because the awardee began an *‘extensive effort to recruit IBM’s incumbent key personnel’ within days of contract award*. We have reviewed IBM’s allegation and conclude that the protester has not satisfied [the bait and switch] requirements here. *The mere fact that E&Y was seeking to hire additional qualified personnel to meet the needs of the RFP does not demonstrate that E&Y failed to propose appropriate personnel in its proposal or misrepresented the availability of the personnel.*”

Strategies for Mitigating Bait and Switch Risk

- Honesty is the best policy
- NEVER represent a commitment from anyone who has not made such a commitment
- Always clearly represent that your proposed list of key personnel is ready to perform the work as promised, even if you hope to supplement with incumbent personnel
 - Of course, this needs to be a truthful representation!

CONTRACTING DURING CORPORATE RESTRUCTURING

Corporate Changes

- All forms of corporate restructuring create potential contracting issues due to questions of privity of contract and the possible need to novate agreements
 - Many issues relate to contract administration
 - But there are also contract formation and procurement-related concerns arising from:
 - Corporate restructuring
 - Mergers
 - Acquisitions
 - Name Changes

Changes Affecting Ongoing Evaluations

- Corporate structural changes can affect the accuracy and validity of pending proposals
 - *Wyle Laboratories, Inc.*, B-408112.2, Dec. 27, 2013, 2014 CPD ¶ 16: Protest sustained where awardee's proposal in cost reimbursement procurement contained assertions about corporate finances, including overhead rates, that were rendered inaccurate by mid-procurement split of major defense contractor
- Other potential issues:
 - Past performance evaluations where newly structured firm relies on contracts performed by predecessor entity
 - New OCI risks from newly acquired entities *e.g.*, *Guident Technologies, Inc.*, B-405112.3, June 4, 2012, 2012 CPD ¶ 166

Other Technical Contracting Issues

- Questions of privity and acceptance - Who is the offeror and who can accept?
 - What if a company submits a proposal under one name and that name is changed during the procurement?
 - Offeror in ongoing procurement absorbed by another firm and ceases to exist by time of award, *e.g.*, *ITT Electronic Sys.*, B-406405, May 21, 2012, 2012 CPD ¶ 174
 - Offerors bidding under predecessor entity's GSA schedule contract

Practice Tips

- Some of these challenges are unavoidable
- Others can be mitigated or resolved through careful planning prior to corporate changes being instituted
- Communication with the Contracting Officer can resolve many of these concerns
- Update proposals during proposal revision opportunities to avoid accusation that the proposal contained stale or inaccurate information

Questions?

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