

# Bid Protest Strategy: What Every Contractor Needs to Know

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# Presented By

Jon Williams

[jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com)

(202) 857-1000



Michelle Litteken

[mlitteken@pilieromazza.com](mailto:mlitteken@pilieromazza.com)

(202) 857-1000



# About PilieroMazza

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for more than 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on business, corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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***Legal Advisor Newsletter*** – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

***Weekly Update*** – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

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# Overview

- Making the decision to protest and what you can expect
  - When, where, and why to file
  - Common pre- and post-award protest arguments
  - The strongest arguments
- Defending your award against a protest
- Overview of the protest process
- The type of relief a protest may provide
- Q&A



# To Protest, or Not to Protest?



# Deciding to Protest

- You must be an “interested party” to file a bid protest
- Generally, an interested party is:
  - A disappointed offeror (post-award)
  - A prospective offeror (pre-award)
- You may not be an interested party if you are not next in line for award
  - Critical consideration in a lowest-priced technically acceptable procurement
  - Also important in best value procurements



# Deciding to Protest

- You must have factual support for your arguments
  - Agencies and opposing parties are often successful in moving to dismiss protests based on speculation
  - Ask for a debriefing
    - Pre-award vs. post-award
- Critically assess your competitive position
- Customer relations
- Teammates
- Are you the incumbent?





# Where and When to Protest



# Where to Protest

- Four options:
  - Contracting Officer (“CO”)
  - U.S. Government Accountability Office (“GAO”)
  - U.S. Court of Federal Claims (“COFC”)
  - FAA’s Office of Dispute Resolution for Acquisitions (“ODRA”)



# Where to Protest: CO

- Advantages:
  - Relatively low cost
  - May result in prompt “corrective action”
  - May be able to negotiate
  - 35\*-day resolution
- Disadvantages:
  - Not reviewed by an outside, neutral party
  - Unlikely to get any discovery

\* Correction made after webinar broadcast.



# Where to Protest: GAO

- Advantages:
  - Relatively quick resolution (100 days or less)
  - May obtain automatic stay of award or performance
  - Only forum for IDIQ task order protests (over \$10M)
- Disadvantages:
  - Less scrutiny on agencies?
  - Narrow jurisdiction
  - Statistics decidedly against protester



# Where to Protest: COFC

- Advantages:
  - Not subject to GAO timeliness rules
  - Right to appeal
  - Rigor of review
  - More comprehensive agency report
- Disadvantages:
  - No automatic stay of award or performance
  - Time-consuming
  - More expensive



# When to Protest

- Bid protest deadlines vary depending on the protest forum, the type of procurement, and the type of protest
  - Pre-award protest grounds generally must be filed by the due date for proposals
  - GAO protests must be filed within 10 days of when you knew or should have known the basis for the protest
    - To obtain the automatic stay of contract performance, the GAO protest must be filed within five days after a required debriefing, or within 10 days after award, whichever is later
  - ODRA post-award protests must be filed (1) no later than seven business days after the date the protester knew or should have known the basis for the protest or (2) five days after a debriefing if a debriefing has been requested.
  - COFC does not have a specific post-award protest deadline



# When to Protest

- If you receive a notice that you have been excluded from the competitive range:
  - Timely request a pre-award debriefing if you intend to protest
- If you receive a Notice of Award:
  - Immediately, and in writing, request a debriefing (even if a debriefing is not required)
  - Contact your attorney so you are aware of filing deadlines
- If you receive a Notice of Proposed Award:
  - The clock may not start running for bid protests, but
  - The clock may start running for size and eligibility protests



# Common Protest Arguments





# Pre-Award Protest Arguments

- Improproprieties in the solicitation, such as:
  - Terms that are unduly restrictive of competition
  - Unclear solicitation provisions
  - Inclusion or exclusion of required clauses and provisions
  - Insufficient information
  - Unreasonable evaluation method
- Exclusion from competitive range
- Improper cancellation of solicitation
- Organizational conflict of interest (“OCI”)



# Post-Award Protest Arguments

- Challenges to the technical evaluation:
  - Failure to follow stated criteria
  - Application of unstated criteria
  - Unequal evaluation
  - Agency misread proposal
- Inadequate, misleading, or unequal discussions
- Challenges to the price evaluation
  - Unreasonable price realism or price reasonableness analysis
  - Performing a price analysis not called for in the RFP, or failing to perform a price analysis called for in the RFP



# Post-Award Protest Arguments

- Insufficient documentation
- Past performance evaluation
  - Failure to consider close-at-hand information
- OCI
- Improper or non-existent best value tradeoff
- Improper sole source award



# Ambiguities in the Solicitation

- Pre-award or post-award protest?
  - Latent ambiguity = can be raised post-award
  - Patent ambiguity = must be raised before the proposal deadline; untimely to raise post-award



# The Strongest Arguments

- Generally, the strongest protest grounds pertain to:
  - Evaluation inconsistent with solicitation
  - Errors in conducting discussions
  - Inadequate evaluation documentation
  - Unequal treatment
- **Note:** GAO will not re-review proposals or substitute its judgment for the agency's



# Defending Your Award



# The Role of the Intervenor

- Defend award
- Assist agency
- Protect your confidential and proprietary information
- The awardee has the right to intervene
  - No deadline per se, but should do so as soon as possible
- Talk to agency about treating legal costs associated with the protest as allowable costs



# The Protest Process





# The Protest Process: GAO

- Filing of protest
- Stay of award/performance
- Acknowledgement
- Protective order
- Agency Report
  - Agency may resist producing relevant documents
- Comments, supplemental protest?
  - Must file comments to maintain protest
- Hearing?
- GAO decision



# The Protest Process: GAO

## Changes Coming?

- On April 15, 2016, GAO released a proposed rule for an Electronic Protest Docketing System
  - Will become the sole means for filing a protest at GAO
- Filing fee – anticipated to be \$350
- Clarify rules regarding pre-award protest timing
- Require parties to provide redacted versions of filings
- Require agency to file a notification when overriding the automatic stay



# The Protest Process: COFC

- File complaint and motion for a temporary restraining order (“TRO”)
- Protective order
- Hearing
- Motions or cross-motions
- Responses
- Hearing
- Decision



# Available Relief



# Corrective Action

- Voluntary action by the agency
  - May not address every protest issue
  - Likely will not admit fault
- The corrective action may be challenged as insufficient or unreasonable, but difficult to win
- May result in the same award decision
- Corrective action typically takes several months to complete
- Attorneys' fees
  - General rule: cannot recover if agency takes corrective action before the agency report is filed



# What Does a Win Mean?

- Relief depends on the grounds of protest
  - Reevaluation
  - Solicitation of revised proposals
- GAO or the COFC will usually not direct an agency to award the contract to the protester
- Attorneys' fees
  - COFC: limited to permitted recovery under Equal Access to Justice Act
  - GAO: may recover some or all
- Bid and proposal costs



# *Questions?*

Jon Williams  
[jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com)  
202.857.1000

Michelle Litteken  
[mlitteken@pilieromazza.com](mailto:mlitteken@pilieromazza.com)  
202.857.1000

