



**888 17<sup>th</sup> Street, NW, 11<sup>th</sup> Floor**  
**Washington, DC 20006**  
**Tel: (202) 857-1000**  
**Fax: (202) 857-0200**

# **NAVIGATING BID PROTESTS**



**A PilieroMazza Webinar**  
July 29, 2014



## PRESENTED BY

Pam Mazza, Managing Partner  
Government Contracts Group  
[pmazza@pilieromazza.com](mailto:pmazza@pilieromazza.com)  
(202) 857-1000



Jon Williams, Partner  
Government Contracts Group  
[jwilliams@pilieromazza.com](mailto:jwilliams@pilieromazza.com)  
(202) 857-1000





## **OVERVIEW**

- ❖ **Filing a Bid Protest: Who, Where, When, & What**
- ❖ **Common Protest Grounds**
- ❖ **Deciding Whether to Protest**
- ❖ **Understanding the Bid Protest Process**
- ❖ **Q&A**



## WHO CAN FILE A BID PROTEST?

- ❖ You must be an “interested party” to file a bid protest
- ❖ Generally, an interested party is:
  - A disappointed offeror
  - A prospective offeror
- ❖ You must have a direct economic interest affected by the award or failure to award a contract
  - You may not be an interested party if you are not next in line for award



## WHERE TO FILE A BID PROTEST?

- ❖ Four options:
  1. Contracting Officer
  2. U.S. Government Accountability Office (“GAO”)
  3. U.S. Court of Federal Claims (“COFC”)
  4. FAA’s Office of Dispute Resolution for Acquisitions (“ODRA”)
- ❖ You can file via email with GAO and most contracting agencies
- ❖ You need to file via facsimile for ODRA
- ❖ Initial filings with COFC are hand-delivered, with electronic filing thereafter
- ❖ Choice of forum depends on the type of contract and other factors



## WHEN TO FILE A BID PROTEST?

- ❖ Bid protest deadlines vary depending on the protest forum, the type of procurement, and the type of protest
  - For example, pre-award protest grounds generally must be filed by the due date for proposals
- ❖ 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



# WHAT DO YOU NEED TO DO TO FILE A BID PROTEST?

- ❖ Filing requirements depend on the forum
  - For protests to a contracting officer, GAO, and ODRA, a letter will suffice
  - For COFC, you must file a formal complaint and likely a motion for injunctive relief, with various supporting documents
- ❖ Explain what you think went wrong with the procurement and the relief you are seeking
  - You need more than speculation – your protest must describe specific facts and provide support for your allegations



## PRE-AWARD PROTEST ISSUES

- ❖ Protest of the solicitation terms
  - Inclusion or exclusion of clauses and provisions
  - Solicitation is unduly restrictive
  - Improper bundling
  - Solicitation is unclear or ambiguous
  - Evaluation method is unreasonable
- ❖ Small business issues
  - The “Rule of Two” and decision to set aside or not set aside
  - Hierarchy of set-aside programs
- ❖ Exclusion from competitive range
- ❖ Improper cancellation of solicitation





## POST-AWARD PROTEST ISSUES

- ❖ Improper evaluation
  - Agency failed to follow the stated evaluation criteria
  - Agency did not apply the evaluation criteria fairly or evenly
  - Agency misread the proposal
- ❖ Inadequate discussions with offerors
- ❖ Flawed price realism and reasonableness determinations
- ❖ Insufficient documentation of evaluation
- ❖ Improper or non-existent best value tradeoffs
- ❖ OCI
- ❖ Compliance with the performance of work requirement



## DECIDING WHETHER TO PROTEST

- ❖ All protests are not created equal
- ❖ Any well-grounded protest has a good chance to succeed, but some grounds of protest are particular GAO favorites:
  - Evaluation inconsistent with solicitation
  - Errors in conducting discussions
  - Inadequate evaluation documentation
- ❖ In addition, the following protests commonly result in a “sustain” decision:
  - Offeror treated unequally
  - Awardee has an actual, apparent or potential OCI
  - Agency misread the protester’s proposal
  - Use of unstated evaluation criteria



## **OTHER CONSIDERATIONS BEFORE PROTESTING**

- ❖ Are you the incumbent?
- ❖ Is your price lower than the awardee?
- ❖ Do you have more than merely complaints about your score?
- ❖ Did you knock it out of the park, or do you acknowledge you could have done better?
- ❖ How will the protest impact your relationship with your customer?



## GAO STATISTICS

- ❖ Fiscal year 2013:
  - 2,429 protests filed (down 2% over 2012)
  - 509 decisions on the merits
  - 87 sustain decisions
  - 17% of decisions resulted in “sustains”
- ❖ Is the success rate really just 17%?
- ❖ No! “Sustain” statistics omit:
  - Corrective actions
  - Alternate dispute resolutions
  - Settlements



## GAO STATISTICS (CONT'D)

- ❖ Effectiveness rate: 43%
  - Includes both sustains and other contractor-favorable outcomes
- ❖ Rate would be even higher if not for:
  - Untimely protests
  - No GAO jurisdiction
  - Other technically-deficient protests



# UNDERSTANDING THE PROTEST PROCESS

- ❖ Likelihood of suspension of contract performance depends on the forum
- ❖ Discovery
  - You will receive the agency's evaluation file and other documents you ask for in your protest
  - Protective order will limit your access to information, so you will need to educate and have trust in your counsel to know what to look for in the discovery
  - Agency may seek to limit document production
- ❖ Hearings
  - Unlikely at GAO and ODRA
  - Typical for COFC



# UNDERSTANDING THE PROTEST PROCESS (CONT'D)

- ❖ Typical bid protest timeline
  - 100 days for GAO
  - 3-4 months for ODRA and COFC
  - 30 days for contracting officer
- ❖ Range of outcomes
  - Voluntary corrective action by the agency (most common)
  - Denial or dismissal by the trier of fact
  - Sustain, with recommendation for corrective measures
  - Temporary and/or permanent injunction



## CORRECTIVE ACTION

- ❖ Most common bid protest resolution
  - More than 75% of the bid protests we handle are resolved via voluntary corrective action initiated by the agency in response to a bid protest
- ❖ Corrective action means the agency agrees to take some action to address the issues raised in the protest
  - The agency may not address every protest issue, and likely will not admit fault
  - You can challenge the proposed corrective action if it does not sufficiently address the protest grounds, but difficult to do
- ❖ Depending on when the agency takes corrective action, you may not be entitled to attorneys' fees





## **CORRECTIVE ACTION (CONT'D)**

- ❖ **Corrective action often results in the same award decision, but not always**
  - **When agency has flexibility to make an additional award, it often does**
  - **You can protest again after the completion of the corrective action if flaws remain**
- ❖ **Corrective action typically takes several months to complete, and often much longer**



## INTERVENTION

- ❖ The awardee has the right to intervene and participate in a bid protest
- ❖ As the protester, you should expect the awardee to intervene and actively defend your protest
- ❖ As the awardee, you have a lot at stake so intervention is critical to protect your interests
  - Defend your contract
  - Assist the agency
  - Protect your proprietary information



## ATTORNEYS' FEES

- ❖ Protests are not always cost prohibitive, particularly when most cases are resolved on corrective action after filing only the initial protest letter
- ❖ Also, if your protest is successful, you may be able to recover some or all of your protest costs, including attorneys' fees
  - ODRA and COFC: EAJA
  - GAO: Easier to obtain most or all of your protest costs
  - The general rule at GAO is no attorneys' fees if the agency takes corrective action before filing its response to the protest, but if the agency takes steps that require you to make further use of the protest process, and your protest was clearly meritorious, you may get most or all of your attorneys' fees



## QUESTIONS?

Thank you for joining us today.

If you would like to speak with Pam or Jon about bid protests, please contact them at:

Pam Mazza

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

(202) 857-1000

Jon Williams

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

(202) 857-1000



## WANT TO LEARN MORE?

Sign up for our newsletters and blog at

[www.pilieromazza.com](http://www.pilieromazza.com)

***PM Legal Minute*** - Our blog, written by all of PilieroMazza's attorneys, provides trending insight to small and mid-sized businesses.

***Legal Advisor Newsletter*** - Our 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 e-mail sent every Friday that provides an up-to-the minute recap of legislative and regulatory issues affecting small businesses.

***You can also follow us on:***



@pilieromazza



**Find past webinar recordings on the PilieroMazza YouTube Channel**