



Unlocking the Secrets of Debriefings, Government Evaluation of Proposals, and Protests

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Meghan counsels government contractors and commercial businesses on a broad range of government contracting matters. She advises companies on small business procurement matters, particularly on issues related to eligibility and participation in small business federal procurement programs, such as the SBA's SDVOSB, WOSB, 8(a) BD, and HUBZone programs as well as the All Small Mentor Protégé Program and the VA's VetBiz VIP program. She also assists clients in maintaining compliance with the FAR and small business regulations.

Meghan's practice includes size protests and bid protests at all levels. She is also a key member of PilieroMazza's Claims & Appeals Team, taking the lead on requests for equitable adjustment and claims and appeals.

About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

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- Business & Corporate Law
- Cybersecurity & Data Privacy
- False Claims Act
- Government Contracts Law
- Mergers & Acquisitions
- Intellectual Property & Technology Rights
- Labor & Employment Law
- Litigation & Dispute Resolution
- Native American Law
- Small Business Programs & Advisory Services
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Overview

- Debriefings
 - When a debriefing is required – pre- and post-award
 - Mechanics of a debriefing
 - New DoD debriefing rules
 - How to make the most of a debriefing
 - Common misconceptions
- Protests
 - Overview of the protest process
 - Making the decision to protest and what you can expect
 - When, where, and how to file
 - Common pre and post-award protest arguments
 - The strongest arguments
 - The type of relief a protest may provide
- Questions

When Is a Debriefing Required?

- Pre-award notifications
 - Exclusion from the competitive range
 - Procurements that are set aside
- Post-award notifications
 - FAR part 15 procurement
 - FAR part 16 procurement (multiple-award contracts)
 - FAR part 8 procurement (GSA Schedule)
 - FAR part 12 procurement (commercial items)

Mechanics of Requesting a Debriefing

- Pre-award
 - You must request one within 3 days after notice of exclusion from the competition
 - The debriefing will happen “as soon as practicable”
 - The debriefing can occur post-award
- Post-award
 - You must request one within 3 days after notice of contract award
 - The debriefing should occur within 5 days of the request, but only to the “maximum extent practicable”
- Impact of debriefing date on protest timing

What the Agency Must Tell You

- Pre-award
 - The agency's evaluation of significant elements in your proposal
 - A summary of the rationale for eliminating you from the competition
 - Reasonable responses to relevant questions
- Post-award
 - Significant weaknesses or deficiencies in your proposal
 - Overall evaluated cost and technical rating of you and the awardee
 - Your past performance information
 - Overall ranking of offerors (if developed)
 - Summary of rationale for award
 - Reasonable responses to relevant questions

What the Agency Cannot Tell You

- The number, identity, ranking, and evaluation of other offerors and the content of their proposals (pre-award only)
- Trade secrets
- Privileged and confidential manufacturing processes and techniques
- Privileged or confidential commercial and financial information
- Names of individuals providing past performance references

Format of Debriefing

- Oral or written
- In person or via telephone
- Led by the contracting officer
- Should attorneys attend?

New Department of Defense Debriefing Rules

- 2018 NDAA
 - If over \$100 million (or over \$10 million for small businesses), release the redacted source selection award determination
 - Debriefings required for all awards over \$10 million
 - Responses to written questions submitted within 5 business days after debriefing
- DoD FAR Class Deviation
 - Unsuccessful offerors can submit questions within 2 business days after receiving a debriefing, to which the agency must respond within 5 business days
 - The debriefing stays open until the agency responds to the questions
 - If the offeror timely submits questions, the protest is due within 5 days after the Government responds to the questions in writing

How to Make the Most of a Debriefing

- Analyze proposal and evaluation criteria
- Identify the right attendees
- Take detailed notes
- Prepare questions in advance
- Don't argue, don't accuse...just listen carefully
- If the agency agrees to look into your questions and respond later, ask to keep the debriefing “open” and then confirm this in writing

Common Debriefing Questions

- What was your technical rating?
- What was your evaluated price/cost?
- For LPTA procurement: Where did your company rank? Is your price the second-lowest?
- For procurement requiring “realism” analysis: Was a “realism” analysis performed? If so, what was this process?
- Any recommendations for future proposals?
- Was your proposal assigned any weaknesses? If so, what were they?
- Definitions of ratings

What to Look for in Your Debriefing

- How detailed/well-documented is the debriefing?
- Are there any mistakes in the debriefing? For instance, a reference to your technical proposal that is wrong?
- How are you rated vis-à-vis the awardee?
- How does your price/cost compare to the awardee?

Common Misconceptions

- Awardees may request debriefings too!
- They are not just for protests
- Can't protest untimely debriefing
- Can't protest content of the debriefing
- Not entitled to point-by-point comparison
- Can't get information on evaluation of all offerors
- Allegations of bias are rarely successful
- Waiting for post-award debriefing after exclusion from competitive range is not helpful

To Protest, or Not 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

To Protest, or Not 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?

Procurement Lawyer's Perspective: What We Look For

- In a best value procurement, potential protester is higher rated or lower priced (ideally both!)
- In LPTA with just one possible award, potential protester has second lowest price...or has grounds to knock out the offerors between awardee and protester
- The rationale for award in the debriefing is sparse
- The agency engaged in discussions and potential protester made changes in its proposal as a result of these discussions which led to the protester being unsuccessful

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
 - 30-day resolution
- Disadvantages:
 - Not reviewed by an outside, neutral party
 - Unlikely to get any discovery

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 award protests (over \$25M for DoD awards or \$10M for civilian agency awards)
- Disadvantages:
 - Less scrutiny on agencies?
 - Narrow jurisdiction
 - Statistics decidedly against protester

Where to Protest: COFC

– COFC:

■ Advantages:

- Not subject to GAO timeliness rules
- Right to appeal
- Rigor of review
- More comprehensive agency report

■ Disadvantages:

- No automatic stay
- Time-consuming
- 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
 - 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 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 (required vs. not required debriefings)
- 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

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

GAO's Most Prevalent Reasons for Sustaining Protests in 2017

- **Unreasonable technical evaluation** – E.g., CR/ZWS LLC, B-414766, B-414766.2 (Sept. 13, 2017) (finding that the agency failed to find awardee's proposal unacceptable where its technical proposal failed to satisfy the minimum requirements of the solicitation).
- **Unreasonable past performance evaluation** – E.g., MLU Servs., Inc., B-414555.3, B-414553.6 (July 17, 2017) (finding that the agency unreasonably considered the past performance of a firm that was not proposed to perform any portion of the work).
- **Unreasonable cost or price evaluation** – E.g., NCI Info. Sys., Inc., B-412870.2 (Oct. 14, 2016) (finding that the agency failed to demonstrate that the awardee's low price was consistent with its technical approach).
- **Inadequate documentation of the record** – E.g., Threat Mgmt. Grp., LLC, B-413729 (Dec. 21, 2016) (finding that the record was so limited that GAO could not conclude that the protested task order was within the scope of the underlying contract).
- **Flawed selection decision** – E.g., CALNET, Inc., B-413386.2, B-413386.3 (Oct. 28, 2016) (finding that the agency's best-value tradeoff decision relied entirely on adjectival ratings in finding the proposals equivalent under the non-cost evaluation factors, rather than considering the identified strengths and weaknesses and the evaluators' ranking of proposals).

Source: GAO Bid Protest Annual Report to Congress for Fiscal Year 2017

Bid Protest Statistics for Fiscal Years 2015-2019

Enclosure II Bid Protest Statistics for Fiscal Years 2015-2019

	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed ¹	2198 (down 16%) ²	2607 (less than 1% increase) ³	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)
Cases Closed ⁴	2200	2642	2672	2734	2647
Merit (Sustain + Deny) Decisions	587	622	581	616	587
Number of Sustains	77	92	99	139	68
Sustain Rate	13%	15%	17%	23%	12%
Effectiveness Rate ⁵	44%	44%	47%	46%	45%
ADR ⁶ (cases used)	40	86	81	69	103
ADR Success Rate ⁷	90%	77%	90%	84%	70%
Hearings ⁸	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)

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

The Protest Process: GAO

- Filing of protest
 - EPDS
 - \$350 filing fee
- 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

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?



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