

# Protests 101



**Devon E. Hewitt**

**Partner, Protora Law PLLC**

8075 Leesburg Pike, Suite 760

Tysons, VA 22182

703.942.6746

[dhewitt@protoraelaw.com](mailto:dhewitt@protoraelaw.com)



**PROTORÆ LAW<sub>PLLC</sub>**

# What is a Protest?

- A challenge (“written objection”) by a “disappointed offeror” to a procurement action
  - Protester must be an “interested party”
- A protest must allege a violation of procurement law or regulation
- Two types of protests
  - Challenging the size/status of an offeror
  - Challenging agency’s conduct of the procurement
    - Award of a contract, solicitation terms, exclusion from the competitive range etc.

# Size/Status Protests

# Size/Status Protests

- Protest the status or size of the apparent successful offeror in a set-aside procurement
  - Whether offeror legitimately has represented itself as a **SDVOSB**, **WOSB** or **HUBZone**
  - Whether offeror legitimately has represented itself as **small** under the applicable NAICS code
  - Size/status are two separate protest tracks

# Size/Status Protests (cont.)

- Must be filed with the Contracting Officer
- Must be filed within 5 *business* days of receiving notice of the apparent successful offeror
- No particular format but must relate to a particular procurement
- Must state all specific grounds
  - Status
    - Ownership/control
    - Eligibility requirements
  - Size
    - Employees/Receipts
    - Affiliation

# Post Size/Status Protest Steps

- If your company is the target of a size protest, the company will receive notice from SBA and will be asked to fill out Form 355 (Application for Small Business Size Determination) and to submit a tremendous amount of information with a short turnaround (3 business days)
- SBA review (supposed to take 15 business days)
  - Contracting Officer typically waits for decision

# Size/Status Decision

- If contract not awarded, shall not be awarded to apparent awardee if it is determined to be “other than small”
- If contract awarded and awardee determined to be “other than small,” then contract must be terminated
- Decision may be contract specific or NAICS code specific (affects all procurements with same NAICS code until concern is recertified under that NAICS code)
- SDVOSB/size decision will affect CVE verification

# Size/Status Decision Appeal

- **SBA size** decision may be appealed to SBA's Office of Hearings and Appeals (OHA) within 15 calendar days after receipt of size determination
- **SBA status** decision may be appealed to SBA OHA within 10 business days after receipt of status determination
- **VA status** decision is final, unless appealed to a federal court



# Size/Status Decision Appeal

- Contracting Officer shall consider withholding award or suspending performance pending appeal, but not required to do so
- If contract awarded and awardee found to be ineligible, CO shall terminate the contract unless finding made; then CO cannot exercise future options/orders

# Standard Protests

# Possible Venues for Protests

- Procuring Agency
  - Agency Specific procedures
  - Federal Aviation Administration (exclusive)
- Government Accountability Office (GAO)
  - Arm of Congress
- United States Court of Federal Claims (USCFC)
  - Federal court, appointed judges

# Differences in Protest Venues

- Cost
  - Agency protest typically the least costly
  - USCFC protest the most costly
- Possibility for a stay of contract performance
  - Agency supposed to stay performance unless it makes certain findings
  - Automatic stay at GAO but agency can override
  - Motion for Injunctive Relief at USCFC
- Likelihood of success
- Recovery of Protest Costs
- Timely resolution

# GAO Bid Protest Fun Facts

- From FY 2001-FY 2014, protests increased by 125%
- From FY 2001-2008, GAO sustained 22% of protests filed; in FY 2009-FY 2014 GAO sustained 17% on average
- In FY 2014, only sustained 13%; lowest rate since FY 2001
- Greater “effectiveness” rate; over last five fiscal years remained about 42%
- DoD contracts less likely to be protested and less likely to be sustained
  - Protests against civilian agencies growing at faster rate than protests against defense agencies

# Key Issues in Filing a Protest

- Timeliness
  - If challenging improprieties in solicitation, protest due in all forums before bid opening or date identified for receipt of initial proposals
  - If challenging a procurement action, protest due at agency or GAO ten calendar days of when protester knew or should have known grounds for protest

# Key Issues in Filing a Protest (cont.)

- Suspension/Stay of Contract Performance
  - If pre-award, protest at agency/GAO will delay/stay award
  - If post-award debriefing required, must file a protest at agency/GAO no later than *5 calendar days* following debriefing *date offered* by the agency
  - If post-award debriefing not required, must file protest at agency/GAO no later than 10 calendar days after contract award
  - No particular timeframe required at USCFC, but must show urgency of request for injunction
  - In rare instances, agency may override GAO stay of contract performance

# Key Issues in Filing a Protest (cont.)

- Debriefing
  - Not required in all types of procurements
    - GSA (FAR Part 8) v. Negotiated (FAR Part 15)
  - Where required, must request debriefing in writing within 3 calendar days of notice of elimination from the competitive range/contract award
    - At GAO, if debriefing required, can't file protest until after debriefing held
  - Information provided during a debriefing is limited



# Mechanics of Filing a Protest

- Anyone can file a protest (in theory)
  - At GAO, only attorneys will likely be granted access to protest record produced by agency
  - At USCFC, usually filed by attorneys
- Certain content required
- Common protest grounds
  - Solicitation terms too restrictive
  - Agency treated offerors unequally
  - Agency failed to follow evaluation criteria set forth in the solicitation

# Participating in a Protest

- Once protest is filed, Contracting Officer is supposed to inform all interested parties
  - If protest filed at GAO, contract awardee may “intervene” and defend the protest with the agency
  - Same ability to participate in USCFC protest as an “intervenor”

# Protest Decision

- Timing
  - Generally, no due date for agency-level protest decisions but must use best efforts to issue decision within 35 calendar days after protest is filed
  - GAO decisions due within 100 calendar days of protest filing
  - USCFC no due date, couple of months typical
- Type of relief
  - Won't recommend directed award
  - Usually requires agency to take corrective action
    - GAO also will recommend recovery of protest costs or bid and proposal costs
    - USCFC protest costs recoverable if small business under EAJA

# Protest Decision (cont.)

- GAO and agency decisions are only recommendations
  - If agency fails to follow a GAO recommendation, the agency must report itself to Congress
- Court issues an order which is binding
- Appeal
  - Agency appellate procedure or GAO (within 10 calendar days of initial adverse agency action)
  - GAO decision does not preclude USCFC action

# Questions ?

Devon E. Hewitt  
Partner, Protora Law PLLC  
[dhewitt@protoraelaw.com](mailto:dhewitt@protoraelaw.com)  
703.942.6746

