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COMMENTARY

How to avoid a contract protest

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Are protests destined to become just one more milestone in the federal procurement process? Recent evidence might suggest so. Notably, the protested award to Lockheed Martin for the U.S. Antarctic Research program in the South Pole and the Hawker Beechcraft protest of the award of the new light attack aircraft trainer are recent examples.

In addition, market experts predict that as defense budgets decline, companies fighting over fewer dollars will launch more protests when losing procurements that can lock them out of programs or agencies for a decade.

If protests are to become the norm for competing in major programs, then it's to everyone's advantage to find ways to reduce the number of protests and awards that are overturned. When companies file protests, everyone loses. The procuring agency loses because procurement time lines get stretched out. Bidders lose because the cost of participating in federal procurements goes up. Even the apparent winner incurs additional costs to defend the award, and the losing bidders incur additional costs to file the protest.

Capture and proposal managers can take some precautions that may help minimize the likelihood that their procurement will be protested or award overturned. To learn first-hand what you can do, I reached out to three attorneys with practices in federal procurement protests to see what they suggest. Here's what I learned.

According to Dave Nadler, a partner at Dickstein Shapiro LLP in Washington D.C., protests can begin when the government releases a defective request for proposals. "Review the RFP with an eye to unclear, ambiguous, unduly restrictive text, especially text specifying a brand name or written around someone else's product. It is better to seek clarification and use the Q&A process to make sure the solicitation is clear and that your interpretation is reasonable than to file a protest," he said.

If you are unclear about the interpretation of proposal instructions (typically Section L) or the evaluation criteria (typically Section M), then the evaluation team will probably be confused too. If the RFP is deficient, and you choose to protest the RFP, then you must file your protest before your proposal is submitted, otherwise the Government Accountability Office will rule that your protest is untimely and will summarily dismiss it, Nadler said.

As a proposal writer, there is nothing more frustrating than working with a poorly written RFP. If you have one of these, let me know and I'll present your argument to the agency pro bono for the good of our industry. We will all benefit from well-written RFPs.

As you write your proposal, there are other pitfalls to avoid. Shlomo Katz, counsel at Brown Rudnick LLP, reinforces that you must follow the requirement of the RFP precisely. "If the RFP requires certain documentation (e.g., resumes) or certain credentials (e.g., a Ph.D.), and you don't provide what was required, and the agency selects you anyway, that may be grounds for a successful protest. Similarly, if you make technical claims back them up with data, especially if you are claiming your widget is twice as good, twice as fast, twice as durable, etc. Ditto if you claim you can deliver in half the time of your competitors. Explain your technical approach in sufficient detail to justify that you are the best (if that's what the evaluation criteria call for)," said Katz.

You can also have protests related to your proposed costs. According to Katz, "If your cost/price is significantly higher than your competition, make sure you explain the value proposition, and if your cost/price is significantly lower than your competition, make sure you explain why it is realistic. I had a protest where the agency selected the offeror whose cost was way below the government estimate, and GAO threw out the award because the proposal did not prove its own cost realism."

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There are also some legal gotchas, according to Carol L. O'Riordan, partner in the O'Riordan Bethel Law Firm, LLP. "Ensure that everyone on the team has current and required licensing, credentials, and past performance in place because it is more than embarrassing if a subcontractor's employee is put forth as key personnel, but his required license is outdated or lapsed," O'Riordan said. "If the procurement uses GSA schedule vehicles, make sure the team's vehicles include the required services. Watch out for organizational conflicts of interest. Starting with all known information regarding the procurement and evaluation, make sure you understand to what extent everyone on the proposed team checked and confirmed that each has no affiliation or involvement with those identified on the other side or other procurements where conflicts may exist."

As a final thought, some protests can be brought to the procuring agency for review, rather than going directly to GAO. This may be more advantageous, but be mindful that there are certainly timeliness rules that apply to whichever protest venue you choose.

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