

BID PROTESTS PROCESS

Do You Know How Long You Have to File and Where? Odds Are You Don't!

INTRODUCTION

In its September 2013 issue, the NCMA (National Contract Management Association) re-published an article from the Spring 2013 issue of *The Public Contract Law Journal* (http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1330&context=faculty_publications). Excell Consulting is providing you with a “snapshot” of the article in an effort to provide you, the Contractor, with important information regarding Bid Protests and the process required to file a Bid Protest. Some examples of information that Contractors may not be aware of include:

- A. Did you know that some protest costs are recoverable?
- B. Did you know that you only have a certain number of days (dependent upon the type of bid) in which to file a protest?
- C. Do you know where you must file a protest?
- D. Do you know the proper procedure for filing a protest?

There are specific steps, time periods, and venues in which to file a protest. Federal Acquisitions Regulation (FAR) provisions are in place to ensure that protests are filed properly and handled properly. As per FAR 33.101 in subpart 33.1 “Protests”:

“ *Protest* means a written objection by an interested party to any of the following:

1. A solicitation or other request by an agency for offers for a contract for the procurement of property or services,
2. The cancellation of the solicitation or other request,
3. An award or proposed award of the contract,
4. A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.”

The purpose for protests is basically to ensure that the Government is lawfully using money allotted for projects and the General Accounting Office (GAO) is, for the most part, the responsible entity for reviewing such protests if they proceed past the Contracting Officer level. Some protests are “pre-award” which means the party or parties protesting disagree with something about the solicitation before the award of a contract. Other protests are “post-award” meaning the other party is, or several parties are, protesting the award of a contract to another entity based upon stated and specific grounds.

VENUES AND TIME FRAMES

Protests normally begin at the Contracting Officer level in the agency involved with the solicitation as it is preferable, under FAR 33.103(b) that **“all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.”** **However**, protests can also be filed with the General Accounting Office (GAO) and can be taken as far as the Court of Federal Appeals.

It is important to note that despite the venue, there are important time frames that a contractor must keep in mind. For example, if a solicitation is being protested “alleging improprieties”, the protest must be filed before the bid

opening date or when the proposals are due to be submitted “...if the improprieties were apparent prior to that time.” (See 4 C.F.R. § 21.2(a)(1)) Otherwise, any defective solicitations must be protested within ten (10) days (calendar days except when the last day is a Saturday, Sunday, or legal holiday) after it became apparent. If the defect was due to any amendments, a protest must be filed by the date required to submit bids. *Id.* In most cases, ten (10) days to file a protest is customary. An exception would be a five (5) day period after a debriefing, which then becomes the time limit in which to file a protest. (See FAR 33.104(7)(c))

As outlined in FAR 33.103(d)(2), protests must minimally contain:

- (i) Name, address, and fax and telephone numbers of the protester
- (ii) Solicitation or contract number
- (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester
- (iv) Copies of relevant documents
- (v) Request for a ruling by the agency
- (vi) Statement as to the form of relief requested
- (vii) All information establishing that the protester is an interested party for the purpose of filing a protest
- (viii) All information establishing the timeliness of the protest

Contractors need to be compliant with the requirements in order to be assured that filed protests are handled correctly and to avoid any possibility that the agency or the GAO might dismiss the protest due to failure to follow procedure.

COST RECOVERY

It is important to note that simply because an entity protests a contract award or a bid process, even if the protest is sustained, this does not necessarily mean that the protester will be awarded the contract. However, if the GAO sustains a protest, contractors should be aware that there are certain costs that are recoverable. Under FAR 33.104(h)(1) “*If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs.*”

CONCLUSION

Clearly, it may be beneficial to a bidder to aggressively pursue filing a protest if there is an apparent problem with the solicitation or in instances where a solicitation is cancelled or even in instances involving termination of a contract, especially when the “termination was based on improprieties in the award of the contract.” (See 4 C.F.R. § 21.2(a)(1))

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor’s interests properly and thoroughly. The experts at Excell Consulting International, Inc. stand ready to assist and evaluate your company’s position and provide valuable and cost-effective guidance for your business. **Thus, in the case of Protests, “Time is really of the essence.”**

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

Author’s note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – John G. Balch, CEO CPCM