



PilieroMazza Webinar

Pre-Award Protests – An Underutilized Tool

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Presented by

Michelle E. Litteken
Associate

mlitteken@pilieromazza.com

(202) 857-1000



Timothy F. Valley
Associate

tvalley@pilieromazza.com

(202) 857-1000



About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
- Labor & Employment
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Overview

- What Is a Pre-Award Protest?
- Other Strategies
- Deciding to Protest
- Potential Protest Arguments
- Protest Process
- Available Relief
- Recent Developments

What Is a Pre-Award Protest?

- A challenge to the ground rules for a procurement before proposals are due
 - Solicitation term
 - Evaluation criteria
 - Requirement/specification
- Relief sought:
 - Changes to or removal of problematic solicitation terms
 - Extra time to submit a proposal

Other Strategies

Alternatives to Protesting

- Pre-award protests are not your only option
- Offerors should also consider:
 - Solicitation Q&A
 - Letters to the Contracting Officer

Solicitation Q&A

- A great opportunity to ask the agency questions about the solicitation and raise concerns
 - Identify conflicting provisions
 - Ask for clarification
 - Explain consequences
- A properly framed question may inform the agency regarding problematic terms and may result in a favorable amendment and extra time to submit proposals

Letter to the CO

- If Q&A fails, or is not an option, contractors can always send a letter
- What to include?
 - Explain the problem
 - Cite FAR provisions and/or legal decisions
 - Request relief
 - Provide a deadline

To Protest, or Not to Protest?

Deciding to Protest

- You must be an “interested party” to file a pre-award bid protest
- Assess the arguments
 - Factual support
 - Legal authority
- Assess your competitive position, customer relations, teammates

When to Protest

- **Before** award
- Generally, pre-award protests grounds must be filed by the due date for proposals
 - Make sure to check the time zone!
- Submit a proposal

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

Where to Protest

- Four options:
 - Contracting Officer (“CO”) (also known as “agency level”)
 - 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
 - 35-day resolution
 - No intervenors
- Disadvantages:
 - Not reviewed by an outside, neutral party
 - Unlikely to get any discovery

The Protest Process: CO

- File protest
- Automatic stay
- Follow other agency procedures, if they exist
- Await decision (typically within 35 days)
- If unfavorable, seek higher level review or file with GAO/COFC
 - If filing at GAO, agency may choose to end stay

Where to Protest: GAO

- Advantages:
 - Relatively quick resolution (100 days or less)
 - May obtain automatic stay of contract award
- Disadvantages:
 - Less scrutiny on agencies?
 - Narrow jurisdiction
 - Statistics decidedly against protester

The Protest Process: GAO

- Filing of protest
- File redactions (day after protest)
- 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
- Destruction

The Protest Process: GAO



Where to Protest: COFC

- Advantages:
 - Right to appeal
 - Rigor of review
 - More comprehensive agency report
- Disadvantages:
 - No automatic stay of award
 - Time-consuming
 - More expensive

The Protest Process: COFC

- File complaint and motion for temporary restraining order (“TRO”)
- Protective order
- Hearing
- Motions or cross-motions
- Responses
- Hearing
- Decision

Potential Pre-Award Protest Arguments

Protest Grounds

- Improproprieties in the solicitation:
 - Terms that are unduly restrictive of competition
 - Unclear (or conflicting) solicitation provisions
 - Inclusion or exclusion of required clauses and provisions
 - Unreasonable evaluation method
 - Insufficient information

Protest Grounds

- 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
- Last minute amendments
- Improper cancellation of solicitation
- Organizational conflict of interest (“OCI”)

Available Relief

Corrective Action

- Voluntary action by the agency
 - Amendment of the solicitation
 - Remove or revise challenged provision(s)
 - More time to submit proposals
- Attorneys' fees?

What Does a Win Mean?

- Relief depends on the protest grounds
 - Revised solicitation terms
 - More time to submit a proposal
 - Recommendation depends on basis for sustaining protest
- Attorneys' fees
 - COFC: limited to permitted recovery under Equal Access to Justice Act
 - GAO: may recover some or all
- Bid and proposal costs

Recent Developments

Changes to Filing at GAO

- Electronic filing system – Electronic Protest Docketing System (EPDS)
 - Must create account before filing
 - All protest filings submitted via EPDS
 - GAO communicates through EPDS
- \$350 filing fee

Task Order Jurisdiction

- To challenge the term of a task order, the value of the task order must exceed...
 - Civilian agencies: \$10 million
 - DoD, NASA, & USCG: \$25 million
- The value limit does not apply if alleging that the task order exceeds the scope, period, or value of the master contract
- Cannot protest a task order at the COFC or with the CO/agency
- Applies to task orders issued under IDIQs, MACs, and GWACs

Recent Decisions

- Office Design Group, B-415411 (Jan. 3, 2018)
 - Protest sustained when the removal of a mandatory contract clause created two reasonable interpretations concerning whether the procurement was set aside for competition among service-disabled veteran-owned small businesses

Recent Decisions

- Global SuperTanker Services, LLC, B-414987, B-414987.2
(Nov. 6, 2017)
 - Specification required the maximum tank size for fire retardant to be 5,000 gallons
 - GAO found that the record did not support the imposition of the requirement

Recent Decisions

- Pitney Bowes, Inc., B-413876.2 (Feb. 13, 2017)
 - Statement of work provision required high capacity sheet feeders to be capable of being loaded on the fly, have folders/inserters with a specified capacity, and have folders/inserters that could handle all types of envelopes
 - GAO held the agency did not provide a reasonable justification for any of the requirements

Questions?

Michelle E. Litteken
mlitteken@pilieromazza.com

Timothy F. Valley
tvalley@pilieromazza.com



888 17th Street, NW
11th Floor
Washington, DC 20006
202-857-1000

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