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TOP 10 TIPS TO CONSIDER WHEN LOSING OUT ON A GOVERNMENT CONTRACT

The competition for obtaining government contracts work today is lucrative and fierce. Companies work hard putting together materials to submit to the government to get work. They want to make sure they get a “fair shake” in the process and be treated fairly. However, a company pursuing government contracts work cannot fully protect its rights and business interests without knowing some of the basic rules governing federal government bid protests. Knowing the basics is all the more critical in view of the tight timeframes and deadlines associated with steps to be taken when losing out on a procurement opportunity. To assist in the process, we offer the following “Top Ten Tips” to help government contractors navigate through this lucrative yet tricky terrain.

Tip #1 – Find out why you lost.

Nobody wants to hear bad news, but it’s important to learn how to do it better the next time. You also need to reach out and get information establishing why you didn’t get the contract, and that may lead you to learn critical information establishing whether it should have been awarded to your company. The best way of doing this is to get a debriefing. That’s the government’s after-action description of why the company lost.

Debriefings come in several varieties.

1. RFP’s and procurements under FAR “Part 15.”

For a vendor who lost a negotiated procurement carried out under FAR Part 15, the most useful debriefing to a vendor is called a “required briefing.” It’s useful because the government MUST tell the vendor a lot of helpful information. FAR 15.506(d) says: “At a minimum, the debriefing information shall include – (1) The Government’s evaluation of the significant weaknesses or deficiencies in the offeror’s proposal, if applicable; (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror; (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection; (4) A summary of the rationale for award; ...”

To get this helpful “required debriefing”; a vendor, according to FAR 15.506(a)(1) has to meet a rigid 3 day deadline:

An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed...



Therefore, you have to get into the government's hands a written request for a debriefing 3 days after the company learns its lost. If this tight deadline is not met, the company's rights are jeopardized.

The second kind of debriefing is a voluntary one. If a vendor misses this 3 day deadline, the government can still give the vendor a debriefing (FAR 15.506(a)(4)(i)) but it's the government's choice whether to do one under the rules. You cannot assume that the government will automatically cooperate and accommodate the request. Check with government contract counsel to confirm whether a debriefing is required or not – that will have an impact on subsequent steps.

2. Federal Supply Schedule (FSS) buys.

On a related point, it is worth keeping in mind that vendors who lose out on schedule buys can get a debriefing of sorts. According to FAR 8.40-2(d):

If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis of award decision shall be provided.

Any questions on how these provisions apply should be discussed with counsel sooner rather than later.

Tip #2: Be careful how you handle the debriefings.

The company should attend the meeting with its senior personnel and take copious notes on the grounds of the agency's action. The company should then update their attorney on the results of the meeting, but should NOT bring the attorney to the debriefing session. Anytime the vendor's lawyer shows up at a debriefing, it raises the contracting officer's blood pressure because the contracting officer is afraid that the vendor's lawyer is looking for information to use in a protest challenging the validity of the contract award. A vendor can end up getting LESS information if a lawyer is present.

Tip #3: Stay focused and don't complain to your Member of Congress.

Complaining about a lost contract to a Member of Congress is a waste of precious time. If a vendor was treated unfairly and wants to protest to the Government Accountability Office (GAO), typically the vendor has (only) 10 days to do so. Getting to the Member can eat up some/all of these 10 days. Don't waste your time – each calendar day that goes by wastes another day that your counsel can use to consider and prepare a bid protest that can change how the government handled the situation. The attorney will need some time to do this, since the FAR has specific requirements that must be met to ensure that the filing is proper and will be accepted.

Tip #4: File a GAO protest rather than an agency-level protest.

A vendor who wants to formally complain about the way it was treated in losing the contract has three choices. One choice for the vendors is a protest directly to the agency. However, that's often a waste of time. The vendor is going to the agency that just "stole" the contract from them in such instances and basically ask the Contracting Officer "Don't you think you stole that contract from me?" That's often not productive.

Protests that are often more effective are protests filed at the Government Accountability Office (GAO), which is set up to administer such protests that are filed in compliance with the FAR. Such cases can be appealed to the U.S. Court of Federal Claims (CFC). Also, filing the protest to GAO can be easy – the GAO accepts protests by email!

Tip #5: Consider whether a CFC appeal is a smart decision.

A protest is really a lawsuit against your customer trying to get the order. If the protest fails at GAO, you can appeal to the Court of Federal Claims, which is located in Washington, D.C. However before doing so reflect on a basic economic analysis of whether it will be cost effective for you to take that path, which could be very effective but has an additional layer of expense.

Tip #6: Don't assume winning is a long shot – it's not.

According to GAO reports, the protestor effectiveness rating is over 40%. That is, protestors get SOME help as a result of protesting to the GAO over 40% of the time. That does not mean that 40% of the protesting vendors get the protested contract. All it means is that the protesting vendors get some sort of favorable settlement of the protest without getting a formal GAO decision: it could be getting put back into the competitive range; having its proposal re-evaluated; or sometimes actually winning the underlying contract. Reading formal GAO decisions gives a false impression of a protester's effectiveness since these settlement "victories" do not get reported in a GAO decision. In any event, statistics show that if you aggressively fight a bid protest with counsel, you have roughly a one-in-two shot at getting some form of relief – not bad!

Tip #7: Follow protest deadlines meticulously.

If a vendor wants to file a protest to GAO, it must follow strict deadlines: there is essentially no flexibility in the deadlines for protesting to GAO. If a vendor thinks there is something wrong with the solicitation, perhaps for example the solicitation should be a small business set-aside, it must file the protest PRIOR to the deadline for receipt of proposals or bids. If a protester wants to protest anything else, like the government did not fairly evaluate its proposal, it must protest to GAO within 10 days of when it knew, or should have known, of the reason it thinks it was not fairly treated. Bottom line – don't wait!

Tip #8: Protest early enough to grab the automatic stay.

As mentioned in Mistake 7, the time to protest a solicitation not being a small business set-aside is NOT after the vendor loses the contract to a large business. The time to protest is by the deadline for the submission of offers – usually months earlier. Too often, unfair treatment stemming from the solicitation does not get protested until it is too late – after the vendor has lost under the unfair solicitation.

ALSO, companies often fail to take advantage of the automatic stay that applies to protests that are filed **within 5 days** of a debriefing. Simply put, you are wasting a huge opportunity to freeze the entire procurement and gain leverage on the government and awardee if you don't file a bid protest within this five day timeframe. Sometimes cases reach a favorable settlement since the awardee and/or government wants to simply resolve the situation so that they can get on with performing the work. Carefully keep this tight deadline in mind.

Tip #9: Stick to strong arguments under the FAR.

When a vendor finds out it lost, often they blame the contracting officer and the government evaluation team and argue that the government dealt with it in "bad faith." That is an absolutely losing argument. GAO has never sustained a protest based on government bad faith.

Arguments that could be more successful are that the government paperwork on why the winner won is not adequate or that the government did not have "meaningful discussions" with the vendor over the vendor's proposal. In sum, the FAR and related law provides specific grounds on how the government should behave in maintaining fair and open competition. Make sure you talk to your lawyer on how the FAR can be best used to your advantage.

Tip #10: Use an attorney.

A protestor does not need a lawyer to win a protest at GAO, but using a lawyer can be invaluable. For example, when an agency responds to a protest with an "Agency Report" it usually contains confidential agency and winning contractor material. If a protester has a lawyer, the lawyer can be admitted to a "Protective Order," a GAO order that protects this confidential information from disclosure to all except those who promise not to disclose – even to their own client – any of the confidential material. That's where the lawyer comes in. He or she can then use such information to help you even if you can't immediately look at it. The lawyer can be admitted to the Protective Order and use the confidential information to win the protest, even though the lawyer can not tell the client any of the confidential material. The attorney can also help you understand how to meet the filing deadlines and take the best steps available to win the protest or appeal.

A company should keep these ten tips in mind, act quickly and not take itself out of serious competition for lucrative government contracts work.

This article was provided by Terry O'Connor, Special Counsel, Government Contracts, at Albo & Oblon, LLP (www.albo-oblon.com). Terry, with over thirty years experience, has published four books on government contract law and is a frequent government contracts instructor. He can be reached via phone at 703-562-3382 or via email at to@albo-oblon.com.