

# BID PROTESTS: LOCAL, STATE & FEDERAL

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# WHAT TYPE OF PROCUREMENT

- REQUEST FOR QUOTATION OR BID
  - ISSUES TEND TO BE SIMPLER
  - CHALLENGES TO DETERMINATION OF RESPONSIVENESS OR RESPONSIBILITY
  - ILLEGALITY
- REQUEST FOR PROPOSAL
  - ISSUES TEND TO REGARD THE EVALUATION PROCESS
  - ALSO QUALIFICATION OR PREQUALIFICATION

# WHY ARE YOU PROTESTING?

- FRUSTRATION WITH THE AGENCY
- COST AND EFFORT REQUIRED TO SUBMIT THE BID OR PROPOSAL
- COMPETITIVE POSITION
- OTHER

# WHAT OUTCOMES ARE POSSIBLE

- RECOMPETITION OF THE CONTRACT
- ISSUANCE OF A NEW, CORRECTED SOLICITATION
  - STATE AND LOCAL AGENCIES MAY, FOR ANY REASON, CANCEL A SOLICITATION AND REBID THE SOLICITATION
    - THIS IS VERY COMMON
- DENIAL OF THE BID PROTEST

# MOST BID PROTESTS FAIL

- INCLINATION TO NOT INTERFERE WITH THE PUBLIC CONTRACT PROCESS
- STATE AND LOCAL – MINIMAL STATISTICS BUT EXPERIENCE SHOWS THAT MOST AGENCIES SEEK TO ENFORCE DECISIONS OR, WORST CASE, IF A DETERMINATION IS MADE THAT A PROBLEM EXISTS, CANCEL THE SOLICITATION AND REBID
- STATE COURTS – VERY HIGH BURDEN PRECLUDES SUCCESS IN MOST CASES
- FEDERAL (GAO) – 2020 REPORT SHOWS 15% SUCCESS RATE
- COURT OF FEDERAL CLAIMS – NO PUBLISHED STATISTICS (VERY FEW CASES)

# WHAT IS NOT GOING TO HAPPEN

- DIRECTION THAT THE CONTRACT BE AWARDED TO YOU
  - THE TWO BID SITUATION
- RECOVERY OF LOST PROFIT

# WHAT ARE THE RULES

- FIRST AND FOREMOST: THE SOLICITATION
- PUBLIC CONTRACT CODE
- OTHER STATE CODES (E.G. LABOR CODE, BUSINESS AND PROFESSIONS CODE)
- STATE AND LOCAL REGULATIONS
  - PCC Section 10344 and 10345
  - California Code of Regulations 1195 et seq.

# BID PROTEST RULES IN THE SOLICITATION

- TIMING, TIMING, TIMING
- FORM OF PROTEST
  - WRITTEN V. EMAIL
- TO WHOM DELIVERED
- WHERE TO DELIVER
  - SOMETIMES CM
- PROOF OF DELIVERY AND TIME OF DELIVERY
- DELIVER TO ALL BIDDERS WHO CAN BE AFFECTED BY THE PROTEST (INTERESTED PARTIES)



# ARE YOU IN A POSITION TO PROTEST?

- WILL YOUR PROTEST MAKE YOU THE LOW BIDDER?
  - YOU NEED TO NOTIFY ALL INTERESTED PARTIES
- IN A PROTEST OF A PROPOSAL EVALUATION, IF THE EVALUATION CAUSED YOU NOT TO BE CONSIDERED, YOU CAN PROTEST
- IF THE EVALUATION TOO YOU OUT OF CONSIDERATION, WOULD A PROPER EVALUATION HAVE POSSIBLY LED TO YOUR AWARD

# REQUIREMENT FOR A STATE OR LOCAL AGENCY PROTEST

- IF THERE IS A BID PROTEST PROCEDURE, YOU SHOULD USE IT TO FIRST EXHAUST ALL ADMINISTRATIVE REMEDIES
- BEWARE OF PROTESTS THAT SHOULD BE FILED BEFORE BIDS ARE DUE (STATE, LOCAL AND FEDERAL)

# TIMING

- PER BID PROTEST PROCEDURES IN THE SOLICITATION
- IF NO TIMING IS SET FORTH, AS SOON AS POSSIBLE AS EVERY DAY THE AWARDEE IS PERFORMING CREATES THE RISK OF PREJUDICE TO THE AWARDEE

# DO YOU NEED AN ATTORNEY?

- AGENCY PROTESTS DON'T REQUIRE THAT YOU USE AN ATTORNEY
- TO THE EXTENT LEGAL ISSUES ARE IN PLAY, YOU SHOULD CONSIDER AN ATTORNEY.
  - MANY AGENCIES WILL HAVE THEIR ATTORNEY REVIEW THE PROTESTS
- IF YOU GO TO COURT:
  - SOLE PROPRIETOR CAN APPEAR PRO PER
  - CORPORATION OR LLC MUST HAVE AN ATTORNEY
  - PROTESTS CAN BE LEGALLY COMPLEX

# RELEVANT DOCUMENTS

- THE BID INSTRUCTIONS
- THE ENTIRE REMAINDER OF THE SOLICITATION
- YOUR BID
- OTHER BIDS (ALL DOCUMENTS SUBMITTED)
- USE OF THE PUBLIC RECORDS ACT
- ISSUES OF CONFIDENTIALITY AND PROTECTIVE ORDERS

# FORM OF THE AGENCY PROTEST

- SPECIFICALLY IDENTIFY FACT ISSUES AND LEGAL ISSUES
  - LIST EACH TOPIC OF PROTEST SEPARATELY (E.G. the totals don't match)
    - Quote the portion of the solicitation in issue
    - Quote the facts showing that the intent of that section of the solicitation was violated
    - Cite the statutes or cases supporting your position
  - Attach all documents you refer to.
    - You might add the specific pages from the solicitation you refer to
    - Don't make the reviewer go back to the contract file
  - Even if a digital file is not required, provide a PDF or offer to do so
  - Hyperlink the documents if you can

# Hearings

- MOST SOLICITATIONS WITH BID PROTEST SECTIONS DON'T PROVIDE FOR HEARINGS
- UNDER CALIFORNIA LAW, YOU ARE ENTITLED TO A HEARING ON ISSUES OF NON-RESPONSIBILITY AS A MATTER OF DUE PROCESS
- MANY AGENCIES PROVIDE HEARINGS ON ALL ISSUES UPON REQUEST
- IF THERE IS A HEARING, DO YOU WANT TO PAY FOR A COURT REPORTER
  - WILL THE AGENCY ALLOW A COURT REPORTER?
  - IF ALL ATTENDEES AGREE, YOU MAY BE ABLE TO RECORD THE PROCEEDINGS
  - OTHERWISE HAVE A PERSON ON YOUR TEAM KEEP NOTES

# GENERAL RULE ON RESPONSIVENESS

- “USUALLY, WHETHER A BID IS RESPONSIVE CAN BE DETERMINED FROM THE FACE OF THE BID WITHOUT OUTSIDE INVESTIGATION OR INFORMATION.”



# THE BID WAS LATE

- What is late?

# THE BID WAS NOT SIGNED

- CASE LAW PROVIDES THAT IF THERE IS A SIGNED SURETY BOND, THE LACK OF A SIGNATURE IS NOT A PROTEST ISSUE
- THE PERSON SIGNING THE BID LACKED AUTHORITY
  - CAN BE DIFFICULT TO PROVE
  - OLD CALIFORNIA LAW REGARDING SIGNATURE BY PRESIDENT AND SECRETARY
  - IF THE BIDDER IS A JOINT VENTURE, ONE JOINT VENTURER CAN BIND (BUT ALL MEMBERS AND THE JV MUST BE LICENSED)

# LACK OF REQUIRED DOCUMENTATION

- FAILURE TO INCLUDE OR LATE PROVISION OF A SURETY BOND IS SUBJECT TO PROTEST
- FAILURE TO CONFIRM ALL ADDENDA IS SUBJECT TO PROTEST

# LICENSURE

- DOES THE SOLICITATION SAY THE BIDDER MUST BE LICENSED AT THE TIME OF BID
  - ARE SPECIFIC LICENSES REQUIRED – IF SO LOGIC REQUIRES THAT LISTED SUBCONTRACTORS HAVE SUCH LICENSE AT THE TIME OF BID
- OTHERWISE ARGUMENT THAT SO LONG AS BIDDER OR ITS SUBCONTRACTOR ARE LICENSED BY THE TIME WORK BEGINS

# FAILURE TO USE SPECIFIED SUBCONTRACTOR

- FAILURE TO USE A SPECIFIED SUBCONTRACTOR CAN BE A BASIS FOR REJECTING A BID
  - Does the specified subcontractor's work exceed one half of 1%, otherwise they may not even be listed.
  - Is the use of the specified subcontractor conditional on some other event

# LISTING LAW

- IS THE LISTING LAW A VALID BASIS FOR A PROTEST?
  - The California Subcontractor Listing law has its own enforcement mechanisms all of which take place after work begins.
- SOME COURTS HAVE LOOKED AT LISTING LAWS, BUT THEY GENERALLY DON'T LOOK BEHIND WHETHER CONTRACTOR OR SUBCONTRACTOR NEEDS SPECIALIZED LICENSE TO PERFORM A TASK
  - Requirement that work can only be performed by a subcontractor holding a mandatory license such as hazardous waste
- A REQUIRED SUBCONTRACTOR IS NOT LISTED

# LISTING LAW CONT.

- THE LISTING INFORMATION IS NOT COMPLETE
- THE LISTING INFORMATION IS NOT CORRECT
  - Failure to use statutory procedure to correct listing errors

# Primary Rule

- DID THE ISSUE AFFECT THE AMOUNT OF THE BID?
- DID THE ISSUE GIVE THE BIDDER SUBJECT TO THE PROTEST AN ADVANTAGE OR BENEFIT THE OTHER BIDDERS DID NOT HAVE?
- INCONSEQUENTIAL VARIANCES MAY BE WAIVED BY THE AGENCY?
- WAIVER SHOULD ONLY BE ALLOWED IF IT WOULD NOT GIVE THE BIDDER AN UNFAIR ADVANTAGE BY ALLOWING THE BIDDER TO WITHDRAW ITS BID WITHOUT FORFEITING ITS BID BOND.



# CALCULATION ERRORS

- ABILITY TO WITHDRAW A BID FOR ERRORS UNDER THE PCC
- MOST SOLICITATIONS GIVE A PREFERENCE TO MULTIPLYING QUANTITIES (OFTEN LISTED IN SOLICITATION) BY THE UNIT RATE IF THERE IS A CONFLICT WITH THE TOTAL OF THOSE TWO FIGURES
- HARD TO CREATE ISSUES WITH A LUMP SUM BID
- THE UNEXPECTED, ODDLY LOW PRICE
  - Generally not a basis for a protest

# INFORMATION ADVANTAGE

- AGENCIES MUST BE SCRUPULOUS IN GIVING ALL BIDDERS EQUAL INFORMATION
- DID THE INFORMATION PROVIDED PROVIDE ANY ADVANTAGE?

# AWARD OF CONTRACT

- TYPICALLY AN AGENCY WILL NOT AWARD A CONTRACT DURING A PROTEST, BUT THERE IS NO LEGAL REQUIREMENT NOT TO AWARD
  - PRACTICAL ISSUES IN UNWINDING A CONTRACT
  - ILLEGAL CONTRACT?
- NOTHING TO PRECLUDE AWARD IN URGENT SITUATION
  - FIRES UP NORTH
  - EARTHQUAKES
  - GENERALLY COURTS WON'T ENJOINING

# JUDICIAL INTERVENTION

- INJUNCTIONS
  - BURDEN IS ON PARTY SEEKING THE INJUNCTION
    - Likelihood you will prevail
  - A BOND MAY BE REQUIRED

# WRITS OF MANDATE

- ARBITRARY AND CAPRICIOUS
- CONTRARY TO LAW
- PRIMARY REMEDY IS A DIRECTION TO REBID
- NO DIRECTION TO AWARD TO A PARTICULAR BIDDER
- RECOVERY OF BID EXPENSES ONLY
- NO RECOVERY OF LOST PROFITS

# FEDERAL PROTESTS

- SEQUENTIAL PROTESTS ARE POSSIBLE
  - E.G. GAO PROTEST FOLLOWED BY COURT OF FEDERAL CLAIMS PROTEST
    - FILING AN ACTION TO ENJOIN THE AGENCY CONCURRENT WITH GAO WHERE AGENCY DECIDES TO PROCEED WITH AWARD
  - BUT, TIME IS AN ISSUE

# FEDERAL AGENCY PROTESTS

- MOST INFORMAL
- GENERALLY DECIDED BY A LEVEL ABOVE THE CONTRACTING OFFICER
- AGENCIES MUST MAKE BEST EFFORTS
- NO ACCESS TO DISCOVERY
- STAY OF AWARD UNLESS A DETERMINATION IS MADE THAT THERE IS AN URGENT OR COMPELLING REASON TO AWARD
- DETERMINATIONS IN WRITING AND ARE TO BE WELL REASONED
- GOAL IS 35 DAYS TO ISSUE DECISION, BUT OFTEN LONGER
- SEE FAR 33.103

# GAO BID PROTEST

- RULES ARE IN 4 CFR §§21.0.
  - Significant guidance in GAO web site.
- TIMING
  - FILE PROTEST WITH 10 DAYS OF WHEN BASIS IS KNOWN OR SHOULD HAVE BEEN KNOWN.
  - IF DEBRIEFING HAS BEEN REQUESTED, WITHIN 10 DAYS, BUT 5 DAYS PREFERRED AS THE SHORTER PERIOD STOPS AWARD
  - AGENCY CAN STILL AWARD IF IT DETERMINES THAT THAT THERE ARE URGENT AND COMPELLING REASONS TO AWARD
- WITHIN 30 DAYS THE AGENCY PROVIDES AGENCY REPORT



# GAO BID PROTEST CONTINUED

- IMMEDIATE (1 DAY) NOTICE TO AGENCY
- AGENCY TO ISSUE A REPORT IN 30 DAYS
- PROTESTOR FILES COMMENTS ON REPORT WITHIN 10 DAYS THEREAFTER
- HEARINGS
  - UPON REQUEST OF PROTESTOR OR GAO
  - MUST FILE COMMENTS WITHIN 5 DAYS OF HEARING
- POSSIBILITY OF ADR

# GAO BID PROTESTS CONT.

- GAO PROTESTS ADMINISTERED BY GAO ATTORNEY.
- ABILITY TO OBTAIN PROTECTIVE ORDER ALLOWING PROTESTOR ATTORNEY TO REVIEW SENSITIVE DOCUMENTS (ALTHOUGH NOT AVAILABLE TO PROTESTOR)
- GENERALLY DECISIONS WITHIN 100 DAYS.
- THE DECISION IS PRESENTED AS A RECOMMENDATION, NOT AN ORDER
- CAN RECOMMEND REFRAINING FROM EXERCISING OPTIONS, TERMINATION OF A CONTRACT, RECOMPETE THE SOLICITATION, ISSUE A NEW SOLICITATION, AWARD A CONTRACT CONSISTENT WITH STATUTES AND REGULATIONS OR SUCH OTHER RECOMMENDATIONS NECESSARY TO PROMOTE COMPLIANCE.
- DECISION PUBLISHED (MAY BE REDACTED BASED ON PROTECTIVE ORDER)

# GAO BID PROTEST STANDARDS

- BURDEN ON THE PROTESTOR
- AWARD WAS ILLEGAL
- DETERMINE WHETHER THE SOLICITATION, PROPOSED AWARD, OR AWARD COMPLIES WITH STATUTE AND REGULATION.”
- THE GAO WILL ALSO SUSTAIN A PROTEST IF IT FINDS THAT “THE RECORD CLEARLY SHOWS THAT THE EVALUATION DOES NOT HAVE A REASONABLE BASIS OR IS INCONSISTENT WITH THE EVALUATION CRITERIA LISTED IN THE [SOLICITATION].”
- THE AGENCY’S AWARD DECISION IS NOT ADEQUATELY DOCUMENTED
- THE GAO ACCORDS SUBSTANTIAL DEFERENCE TO AGENCY DECISION MAKING AND WILL NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE AGENCY BASED ON A “MERE DISAGREEMENT” WITH THE AGENCY’S DECISION

# GAO BID PROTESTS CONT.

- THERE ARE SOME LIMITATIONS ON WHAT CAN BE PROTESTED TO THE GAO
- SOME ABILITY TO REQUEST DOCUMENTS PROMPTLY AFTER BECOMING AWARE OF THE EXISTENCE OF THE DOCUMENTS
- ABILITY TO REQUEST RECONSIDERATION

# COURT OF FEDERAL CLAIMS

- THESE ARE REGULAR COURT CASES
- MANY CASES DECISED ON SUMMARY JUDGMENT MOTIONS, OTHERWISE IT CAN BE A LONG TIME TO THE DECISION
- NO REQUIREMENT TO STAY AWARD WITHOUT AN INJUNCTION
  - AS EVERYWHERE, INJUNCTIONS CAN BE DIFFICULT TO OBTAIN
- DISCOVERY IS AVAILABLE
- FULL DUE PROCESS
- NO FIXED TIMING TO BRING THE ACTION

# COURT OF FEDERAL CLAIMS CONT.

- FORMAL BINDING COURT DECISION (NOT LIKE GAO RECOMMENDATION)
- STANDARD OF REVIEW: ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW.
- PROTESTOR MUST SHOW ERROR AND THAT THE ERROR PREJUDICED IT
- MORE LIMITED EVIDENCE – ADMINISTRATIVE APPEAL FILE
- BROADER JURISDICTION THAN GAO IN SOME WAYS, LESSER IN OTHERS
- AWARD OF BID COSTS AND EXPENSES
- LIMITED AVAILABILITY OF LEGAL FEE RECOVERY

# Q&A

- ZOOM Q&A
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