

# How to Successfully Navigate Bid, Size and Status Protests

August 22, 2023

# Agenda

- Introductions
- Presentation
- Q&A – Please use the chat feature to ask question

# About Us

GovSpend's vision is to be the leading trusted source of data, analytics, and insight for organizations buying and selling in the public sector marketplace.

Our Federal solution (Fedmine) enables better decisions, cultivates collaboration, and builds a greater sense of community in the government procurement ecosystem.

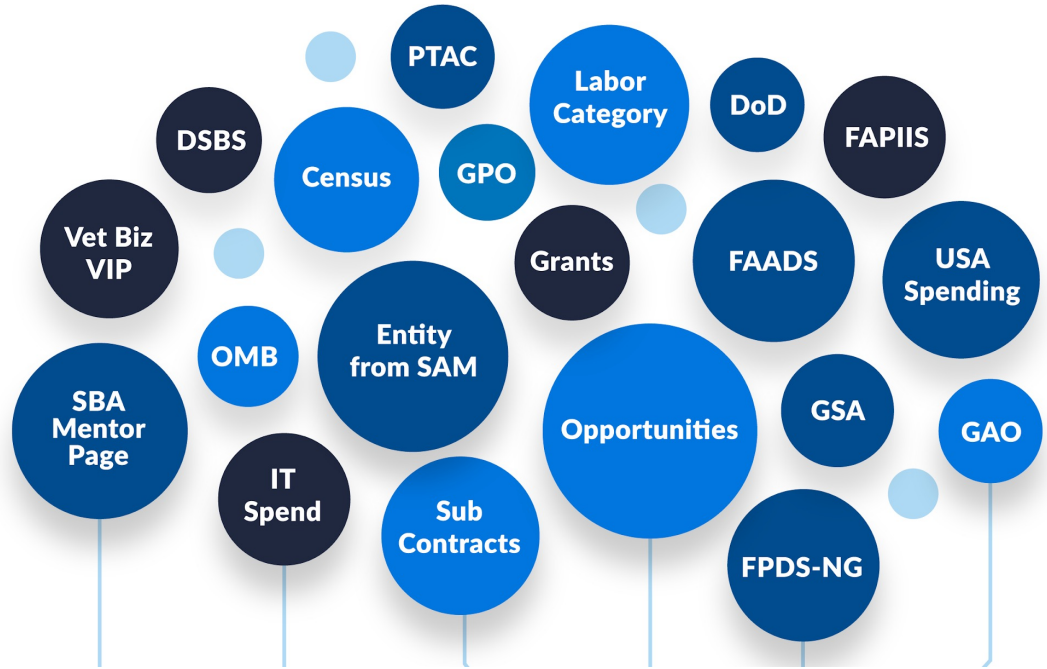
Our SLED solution provides relevant intelligence using spending, contract, contact and bid data directly from thousands of State, Local and Educational agencies.

Our new module, Meeting Intelligence, uses AI to transcribe thousands of agency meetings to deliver insights directly to your inbox.

# Fedmine

Founded 2004, Fedmine is a federal market intelligence software company that aggregates data from 18 federal data-sets into ONE platform – allowing reporting & analysis not previously possible.

In 21 we became part of GovSpend.



## Our Presenter

Maria Panichelli, Esq.  
Partner, McCarter & English LLC  
[mpanichelli@mccarter.com](mailto:mpanichelli@mccarter.com)  
T: 215-979-3886

## Moderator

Archisha Mehan  
Head of Public Sector, Federal  
GovSpend  
[amehan@govspend.com](mailto:amehan@govspend.com)  
T: 240-476-4850



---

## How to Successfully Navigate Bid, Size, and Status Protests

---

# Meet the Presenter

## Maria Panichelli, Esq.

Partner, McCarter & English LLP

[www.mccarter.com](http://www.mccarter.com)

[mpanichelli@mccarter.com](mailto:mpanichelli@mccarter.com)

T: 215.979.3886

[@MariaPanichelli](#)

<https://www.linkedin.com/in/mariapanichelli/>



# A Protest Primer

---

*Let's Start at the Very Beginning...*



---

# Don't Get Your Lingo Confused...

- **Bid Protests**

- Challenge raised by contractor (competitor), based on alleged improprieties in source selection process (i.e. failure of agency to comply with applicable law, terms of solicitation, etc.)

- **Size Protests**

- Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to size)

- **Status Protests**

- Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to other eligibility issues)

# An Introduction to **Bid** Protests

---

---

# What IS a Bid Protest?

- All protests challenge some form of **Government action or inaction**, *e.g.*,
  - The terms and conditions of the RFP or RFQ
  - The evaluation of offers and the resulting source selection decision
  - Awarding to a company despite an unmitigated Organizational Conflict of Interest
  - Awarding to an offeror who violated the Procurement Integrity Act

---

# What Laws Govern Bid Protests?

- Federal Acquisition Regulation (FAR)
  - Substance and Procedure
- Supplemental Agency Acquisition Regulations (i.e. DFAR or VAAR)
- Other Government Contracting-Related Statutes/Regs
- Small Business/VA Regulations
- Forum Rules

*What role does the Solicitation itself play?*

---

# Critical Questions and Considerations

- **Who** are you dealing with?
- What **type** of contract is at issue?
- What **method** of Procurement is being used?
- **Where** are you filing?

---

# Different Types of Protests

Keep the Procurement Timeline in Mind:

There are different jumping off/trigger points and filing deadlines, depending on how you answered those critical questions before, and what **Type of Protest** you are filing!

---

# Pre-Award Protests Based on Errors in Solicitation

- Government Identifies a Need
- **Solicitation Drops**
  - **Is there a problem with the Solicitation itself?**
  - Time for a **Pre-Award Protest Based on Errors/Issues Relating to the Solicitation**
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- Awardee(s) Chosen

---

# Protests Based On Exclusion from the Competitive Range

- Government Identifies a Need
- Solicitation Drops
- Contractors Submit Responses to Solicitation
- **Evaluation of Contractors/Source Selection**

**Is this a FAR Part 15 procurement that utilized competitive range?  
Were you (improperly) excluded from the competitive range?**

→ Time to start down the path to a **Pre-Award Protest Based on Exclusion from Competitive Range**

- Awardee(s) Chosen



---

# Post-Award Protests

- Government Identifies a Need
- Solicitation Drops
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- [Pre Award Notice → Size/Status Protest]\*\*
- **Awardee(s) Chosen**

**Is there something wrong with the Award Decision?**

→ Time to start down the path to a **Post-Award Protest**

---

# Pre-Award Protests Based on Errors in Solicitation

## What is **Protestable**?

- Ambiguous or contradictory terms\*
- Inclusion of prohibited terms/exclusion of required terms\*
- Inaccuracies, Nonsensicals, Things that are Violative of Inconsistent with Applicable Law
- Unduly or overly restrictive terms or specifications
- Improper use of LPTA (compare to improper conversion to LPTA)
- Improper Past Performance Consideration Issues (re: JV/Teaming Partners, etc.)
- Set-aside/“rule of two”/Kingdomware issues
- (Smallbiz) Pass/Fail Requirements like de facto responsibility determination

---

# Competitive Range and Post-Award Protests

- What is **Protestable**?

- Will depend on the nature of the procurement/under which section of the FAR the requirement is being procured
  - Price Only or Non-Price Evaluation Factors?
- Critical analyses:
  - Did the Agency follow the Solicitation's Stated Evaluation Scheme?
  - Did the Agency follow/comply with Applicable Law?
  - What was exclusion based on?

---

# Competitive Range and Post-Award Protests

## What is **Protestable**?

### ▪ Common **Non-Price** Evaluation Factor Issues

- Unstated evaluation criteria or subfactor
- Error in applying evaluation criteria/assigning ratings
- Unequal or disparate treatment of offerors
- Misapplication of law or unreasonable evaluation methods

### ▪ Common **Price** Evaluation Issues

- Price Reasonableness
- Price Realism
- Escalation, Adjustment
- Balanced Pricing
- HUBZone Preference



Meaningful/misleading/uneven discussions

---

# Debriefings

- Utilizing Debriefings to Gather Information
  - **“Reasonable Responses to Relevant Questions” Is KEY**
- Written v. Telephonic/Zoom v. In Person
- How to Handle Questions (Interplay with Enhanced Debriefing)
  - Two Rounds of Questions
- Who Should Attend
- Demeanor and Comportment
- *Pro Tip: ALWAYS Get A Debriefing, If Available*
- **But are you even entitled to a debriefing? Brief Explanation?**

---

# Know When to Fold ‘Em – Don’t Pursue a Losing Protest!

## Not all Protests Are Created Equal

- Jurisdiction (Task Order Limits)
- Standing / Competitive Prejudice (Lack Thereof)
- Objective v. Subjective Arguments;
  - GAO/COFC Will Not Substitute Judgement
- How do you know when to let it go?
  - Cost v. Likelihood of Success
  - What does a “Win” look like? What does a win result in? Do you actually walk away with an award?

---

# Preparing to File and Filing

## Choose Your Forum: Where Are Protests Filed and Heard?

- Contracting Officer/Agency Protest
- U.S. Government Accountability Office (“GAO”) \*\*
- U.S. Court of Federal Claims (“COFC”)

## What does a Protestor File?

---

# When to File: One of the Most Complicated Queries in GovCon

Remember the Procurement Timeline!

There are different jumping off/trigger points and filing deadlines, depending on how you answered those critical questions before, and what **Type of Protest** you are filing!

- Pre Award/Solicitation v. Competitive Range Exclusion v. Post Award
- Common Contractor Misconception: *Everything Happens After Award.* **FALSE!**



---

# Pre-Award Protests Based on Errors in Solicitation

- What is the **Filing Deadline**?
  - Parallel Tracks?
  - Do **not** roll the dice or hedge

---

# Protests Based On Exclusion from the Competitive Range

- What is the **Competitive Range**?
- What is the **Trigger**? *What* does it Trigger?

---

# Post-Award Protests

- What is the **Filing Deadline**?
  - There's the Rule, and then there is the Exception (that Many Contractors Mistakenly Think is The Rule)
    - Required and Timely Requested Debriefings
    - Enhanced Debriefing (DoD) → Impact on Deadlines
  
- A note about Pre Award Debriefings v. Post Award Debriefings

---

# A Quick Recap on Protest Deadlines

- Pre-Award Based on Solicitation Errors/Issues → **Submit before the deadline to respond to the Solicitation**
- Otherwise, We are looking at **10 days from....**
  - Required, Timely Requested Debriefing → 10 days **from the conclusion of the debriefing** (remember Enhanced Debriefing impact)
  - Everything Else → 10 days **from the day you knew/should have known** the basis of your protest (often, award date...but not always)
- Ready for another wrinkle? **Automatic Stay**

---

# Protest Litigation Timeline

- Protest
- (Requests for Dismissal)
- (5 Day letter)
- Agency Record/Report
- Comments to the Agency  
Report/Supplemental Protests
- (Additional Briefing)
- Decision
- Corrective Action
- Hearing
- Other Oddities

---

# Typical Protest Remedies

- Contract Termination
- Re-Evaluation of Proposals
  - At What Stage?
  - What Scope of Re-Evaluation?
- Re-Opening of Discussions
- Solicitation of Revised Proposals
- Modification of the Solicitation
- Partial Recovery of Protest Costs
- GAO/COFC Cannot Order Award

# Intervention

## (Defending against a Bid Protest)

---

---

# Defending Against Bid Protests: A Primer

Because Protest is Technically Against the Agency...  
Government Counsel Will be Defending Against the  
Protest

- Why not just sit back let them?
- Because you need to protect YOUR rights. Your interests may be in line with the government's interests *right now*.
  - It might stay that way...or, interests may diverge (Corrective Action)
  - Gov't counsel might need help, or disagree with approach

**Take Away: Always Intervene!!!!**



# Size and Status Protests

---

---

# It Starts With Understanding Eligibility...

- What is a "Small Business"
- 8(a)
- HUBZone
- VOSB/SDVOSB
- WOSB/EDWOSB

---

# What Are Common Protest Bases?

- Affiliation → Size
- Unconditional Control
- Unconditional and Direct Ownership
- Other Eligibility Challenges
  
- Teaming, JV, MP Mistakes
- Mistakes on Multiple Award Contracts & Vehicles / Recertification

---

# Size and Status Protests - WHY

- Remember...
  - It's the Protestor's Challenge to:
    - Size (Affiliation) and/or
    - Status
- of the Awardee
- Remember Comparison to Bid Protests...

---

# Size VS. Status Protests

- Size Protests – 13 CFR 121.1001 *et seq.*
- Status Protests – Program Specific
  - 8(a) – 13 CFR 124.517 (size only → Part 121)
  - HUBZone – 13 CFR 126.800 *et seq.*
  - VOSB/SDVOSB – 13 CFR 128.500 → 13 CFR 134.1001 *et seq.*
  - WOSB/EDWOSB – 13 CFR 127.600 *et seq.*

---

# Size and Status Protests - WHO

- Only an “Interested Party” Has Standing to File a Protest

---

# Size and Status Protests - WHAT

- What does a Protestor File?

---

# Size and Status Protests - WHERE

- Where does a Protestor File?



---

# Size and Status Protests - WHEN

- What is the Deadline to File a Size/Status Protest?

---

# Size and Status Protests - What Happens Next?

- And Then What....

---

# Size & Status Protests - The Process, Defense

- If you are the Protested Concern, do you have a Chance to Defend Yourself?
- After a Protest is Filed, What Happens?
  - How is it Different than the Bid Protest Process?

# Questions?

---

---

# Contact Information

## Maria Panichelli, Esq.

Partner, McCarter & English LLP

[www.mccarter.com](http://www.mccarter.com)

[mpanichelli@mccarter.com](mailto:mpanichelli@mccarter.com)

T: 215.979.3886

[@MariaPanichelli](https://www.linkedin.com/in/mariapanichelli)

<https://www.linkedin.com/in/mariapanichelli>



## Contact Information

Archisha Mehan

Head of Public Sector, Federal  
GovSpend

[amehan@govspend.com](mailto:amehan@govspend.com)

<https://www.linkedin.com/in/archisham/>

T: 240-476-4850

For our upcoming webinars please visit

<https://www.fedmine.us/upcoming-webinars>

# GovSpend Educational Webinar Series

Our Upcoming Webinars include:

- October 10th, 2023 at 10 am Eastern Time: GSA Schedules - Requirements & Strategies for Success . This two-hour training will be presented by Jennifer Schaus of Jennifer Schaus & Associates. Register [here](#)
- November 14th, 2023 at 12 noon Eastern Time: Critical Changes for Small Businesses with Maria Panichelli, Partner, McCarter & English. Register [here](#)
- January 24th, 2024 at 12 noon Eastern Time: REAs, Claims, and CDA Claims Litigation: A Primer with Maria Panichelli, Partner, McCarter & English. Register [here](#)
- March 12th, 2023 at 12 noon Eastern Time: Key Concepts in Federal SubContracting with Maria Panichelli, Partner, McCarter & English. Register [here](#)

GovSpend

THANK YOU

