



THE PULSE  
OF GOVCON

Smith • Pachter • McWhorter

Lunch + Learn Series: Part 1

# Protest-Proof Your Proposal: Reviewing RFPs & Avoiding Protestable Mistakes

February 26, 2020

# Ground Rules + Logistics

- Men's restroom is open, the key to the women's restroom is available at the front desk.
- First hour of parking is free with validation, please see the receptionist to collect a ticket.
- A note on protective orders:

Applicants for admission under a protective order must establish that they are not involved in competitive decision making for any company that could gain a competitive advantage from access to the protected information. This generally means protest attorneys cannot provide advice on pricing, competitive structuring and composition of bids, or similar proposal development issues, since they may have had access to competitors' proprietary information. No information subject to a protective order will be shared during this presentation. Further, only Amber and Lisa will provide advice on proposal development. Elizabeth will provide legal insight and information on protest trends.

# Speaker Introductions



**Elizabeth Jochum**  
Member, Smith Patcher McWhorter PLC



**Amber Hart**  
Co-Founder, The Pulse of GovCon



**Lisa Shea Mundt**  
Co-Founder, The Pulse of GovCon

# Objective of Today's Lunch + Learn

*“But what about the compelling story?”*

Proposals are an exercise in following instructions. All good writers know their genre. Remember that your proposal is not prose.

**Bringing us to today.**

This presentation is the first in a series where we will focus on the *legal implications* behind reading and responding to a solicitation all while identifying potential pitfalls to help you “protest-proof” your proposal.

# Objective of Today's Lunch + Learn

## DISCLAIMER

The title of this series is a bit tongue-in-cheek. Many, if not most, protests are won because of errors made by the agency in the course of its evaluation. Even the world's most perfect proposal can still result in an overturned award if the agency doesn't follow the ground rules of the solicitation and treat offerors equally.

# Questions We Are Answering Today....

- What is the Impact of Compliance?
- Aren't Rules Meant to be Broken?
- What Are the Risks, Exactly?
- So Compliance Really Matters?



# What is the Impact of Compliance?

- You've heard that Compliance is King, but it's also Judge, Jury, and [most importantly] Executioner.
- Capture, relationships, and name recognition are what **win** proposals. Not following the RFP is how you **lose** proposals... *if they never really wanted you that is.*
- It's ALSO what people like Elizabeth look for to win protests.
  - Even if the agency is willing to overlook a non-compliance, GAO or the Court of Federal Claims likely won't be.

# What is the Impact of Compliance?

- Being compliance literalists is the easiest tactic to prevent a protest lost because of something within your control.
- Government agencies and their source selection boards work to create processes and procedures to evaluate bids fairly and objectively.
- ***But*** at the end of the day they are translating qualitative data into a quantitative scorecard...*and they're only human.*



# Aren't Rules Meant to be Broken?

- Not in proposals. RFPs – in their truest form – should be treated like a paint-by-numbers exercise. This includes *more than just responding to the shall requirements*.
- The technical requirements are important, and so is showing differentiators, but what turns out to be equally as important is making sure you follow the instructions to the letter.

# What Are the Risks, Exactly?

## ■ Proposal Instructions:

- Outline your response responding to all L (preferably in the order the instructions appear), followed by M, and the rest of the RFP.
- Give the customer what they are asking for (literally)... not what you think they want. “Well I’m currently working the contract and that’s not the way it is now” is not a justification for providing different content.

## ■ Protest Potential:

- Risks of moving forward with a proposal despite clear ambiguities or conflicting provisions of an RFP.
- Failing to identify - and get a resolution to - ambiguities in an RFP can cost you after award.
- Many offerors are hesitant to push the agency to fix these issues, but bidding on an ambiguous proposal means rolling the dice that the agency will accept your interpretation AND that, if the agency does, it will be upheld during a protest.
- Protest of Tridentis, LLC - GAO and COFC

# What Are the Risks, Exactly?

- **Proposal Formatting:**

- Yes, you can get thrown out or lose a protest based on formatting – you can also capitalize and win as well.
- This includes font size, spacing, and graphic text.
- You’re not fooling anyone with “creative spacing”.

- **Protest Example:**

- *DKW Communications, Inc.*, B-412652.3, May 2, 2016 - nuances of the formatting protests (line spacing vs. table exceptions)

# What Are the Risks, Exactly?

- **Proposal Graphics and Tables:**

- If you build a graphic with 8-point font but then manually shrink it, that font is no longer 8 point.
- Don't try to present a larger graphic on an 11.5x17 page if it hasn't been explicitly permitted in the RFP.
- Don't abuse the use of tables to fit in more text using a smaller font. Tables need to have at least two corresponding columns to be functional.

# What Are the Risks, Exactly?

- **Proposal Page Count:**

- It's not worth the risk to exceed page count.
- If you must add more content, change the page numbering to an appendix, but know that it most likely will not be read.
- If it's required in L and it doesn't say otherwise, then it **MUST** be included in page count to be evaluated.

- **Protest Potential:**

- *ENSCO, Inc.; PAE National Security Solutions LLC, B-414844, Oct. 2, 2017*
- *DynCorp International LLC, B-411126.4, Dec. 20, 2016*

# What Are the Risks, Exactly?

## ▪ **Proposal Submission Time:**

- Submit on time and to the right location. This is true whether it's in-person, via email, or through a portal.
- Note - saying “e-buy crashed” is not an excuse.
- Be sure you're cognizant of the agency's email size limitations and plan accordingly.
- Make sure you plan enough time in advance of an in-person delivery to get through security AND call down the POC.

## ▪ **Protest Potential:**

- Late is late rule
- Government control rule (GAO vs. COFC) - *Federal Acquisition Services Team, LLC v. US*

# What Are the Risks, Exactly?

- **Proposal Administrative Requirements:**

- Don't forget the checklist volume.
- Administrative requirements are still requirements!
- You can lose a proposal if your cover page, binder covers, or CD covers do not follow the instructions. Making these should not be a last minute activity.

- **Protest Potential:**

- Registration on SAM - *Acon Traders, LLC*, B-417558, June 26, 2019 (be careful about required timing of registration)
- Who is the offeror? - Uncertainty as to the identity of an offeror renders a proposal unacceptable. *W.B. Constr. & Sons, Inc.*, B-405874, B-405874.2, Dec. 16, 2011. (consider DUNS number/CAGE code discrepancies)

# So Compliance Really Matters?

- **Strict adherence makes it harder to justify your loss.**
- Let's talk about **post-proposal debriefs**.
  - After evaluation, agencies need to submit a winning and losing justification for all parties.
    - All they need to write in a *losing* justification is that you submitted your proposal 30 seconds too late (doesn't matter if the third-party provider had a lag time, or their own Government system crashed).
    - If they can point to a specific, tangible compliance-based reason for your loss, then that is much harder to argue than if they say “*the approach wasn't strong*”.



# So Compliance Really Matters?

- **Strict adherence also makes it harder to win a protest.**
  - Baseline compliance issues are the FIRST thing protest attorneys are scanning for when they get your proposal under the protective order.
    - Protest attorneys use the RFP as a checklist and go through the proposal making sure you met all the requirements.
    - Even with confidence that the agency will overlook a noncompliance, you are taking a risk by submitting a noncompliant proposal.
    - In a protest, the decision making power is given to agency attorneys, not your contacts in the program shop.

# Lesson Learned

- Getting thrown out on compliance is **not an old wives tale** - if it hasn't happened to you, that doesn't mean it isn't a very real risk.
- It's painful when it happens during the evaluation, but even more painful when it comes after you've already won.
- Use these case studies to point to when someone on your team tells you these elements aren't a big deal.
- Remember, *customer love is fickle* and not enough to save you in a protest. Whether or not you hold onto a contract comes down to the validity of the loser's case.



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