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- National program from WIPP & American Express OPEN designed to educate women business owners on how to apply for and secure federal procurement opportunities.
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# Give Me 5 144: WIN STRATEGIES: Questions, Clarifications, Protests

Jerry Alfonso Miles, Esq.

DEALE SERVICES, LLC

for

Women Impacting Public Policy

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# Jerry Alfonso Miles, Esq.



## Experience

Jerry Miles is a government contracts attorney and business consultant with experience working in-house for KBR, a large government contractor, and a large, regional law firm. In addition to being the owner of a law firm, Mr. Miles regularly advises clients on teaming agreements, joint ventures, subcontracting, government contract disputes, litigation and bid protests.

## Education

William & Mary Law  
University of Virginia

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# Questions & Answers

- **No Guidelines:** Agency Can But Needn't Answer and/or Amend RFP
- **Beware:**
  - Unduly Restrictive Requirements
  - Patently Ambiguous Terms
  - Unnecessary or Missing Clauses
  - Unclear SoW Specifications
- **Considerations: (Reduce Cost Risk)**
  - Attorney Reviews Complex Solicitation Defects and Questions
  - Short, Succinct Explanation of Problem and Request for Action
- **Significance:** Raise Concerns Early To Give Agency More Control



# Exchanges

- **Permitted Pre-Proposal Exchanges (“Communications”):**
  - Market Research
  - Industry Days
  - RFIs & Sources Sought
  - Pre-Solicitation Notice
  - (Draft) RFP
  - Q&A
- **Clarifications of Proposals (Allowed If Award W/o Discussions)**
  - Relevance Past Performance
  - Inquiries Into Adverse Past Performance
  - Minor Clerical Errors
- **Goal: Clarify acquisition strategy, plans, requirements, SOW and amend RFP if necessary (but new Q&A after amendment?)**





# Exchanges

- Exchanges Before Competitive Range Enhance USG Understanding
  - Communications Can:
    - Address Proposal Ambiguities
    - Address Errors or Omissions
    - Information Regarding Past Performance
  - Communications Can't:
    - Cure Proposal Deficiencies
    - Cure Material Omissions
    - Materially Alter Technical or Cost Elements of Proposal
    - Otherwise Revise Proposal

→ No Discussions in Disguise
  - “Communications”= No Opportunity to Revise, “Negotiations”= May Include Discussions Resulting in “FPRs”



# Exchanges

- Exchanges After Competitive Range of Highly Rated Proposals
  - Discussions: (CO's Control Scope & May Tailor To Each Offerors' Proposal)
    - 1. Significant Weaknesses & Deficiencies
    - 2. Adverse Past Performance
    - 3. Proposal Alterations/Explanations
    - 4. CO Can Tell You If Your Price is Too Low or Too High
  - Discussion Restrictions: (Must Be Adequate & Meaningful= Allows Revision)
    - 1. Unequal: Cannot Favor One Over Another or Provide Unequal Access to Information
    - 2. Misleading: Cannot Push Offeror in Wrong Direction
    - 3. Improper: Take Place Only With One Awardee or Outside Discussions Period
    - 4. Revealing: Can't Reveal Source Selection Information or Offeror's Solution or Pricing



# Exchanges

- Exchanges After Competitive Range of Highly Rated Proposals
  - Discussions Goal:
    - 1. Materially Enhance Remaining Offerors' Award Chances
    - 2. Eliminate Non-Highly Rated (Even If Haven't Submitted FPR)
    - 3. No Unfair Competitive Advantage (e.g., OCI)



# Debriefing

- **Debriefing (Timely Request or Lose It)**
  - Pre-Award: (Notice of Exclusion): CO can delay debriefing to post-award
  - Post-Award (Notice of Award): request within 3 calendar days; debriefing w/in 5 calendar days of request
- **Pre-award Debriefing- What To Discuss:**
  - Agency's Evaluation of Significant Proposal Elements
  - Summary of Rationale for Eliminating Offeror from Competition
  - Reasonable Responses to Relevant Evaluation Procedures
- **Inadequate Debriefing Isn't A Protest Grounds**



# Post-Award Debriefing

- What To Discuss:

- Significant Weaknesses & Deficiencies
- Cost, Technical, Past Performance Rating of Awardee's Offer
- Rating of Your Proposal & Awardee's Proposal
- Overall Ranking of Proposals
- Summary of Basis for Award

- What Generally Can't Be Discussed:

- Point-by-Point Comparison
- Number & Identity of Offerors
- Content of Other Offerors' Proposal
- Ranking or Evaluation of Other Offerors
- Company Trade Secrets or Proprietary Information



# Protest Considerations

- Generally

- Unreasonable Agency Action (v. RFP?)
- Prejudice (“But For” Test)

- Forum

- Agency: 35 Days; Customer Relations; Impartiality
- GAO: 100 Days; Automatic Stay; Deference to Agency
- CoFC: Not Definite; Costly; Request TRO/Injunction

- Costs - Agency- Likely?, GAO- Yes, CoFC- B&P/EAJA



# Why Protest

- **Protesting Can Be Strategic?**
  - **Pre-Award Protests Can Reduce Agency Risk & Costs**
  - **Prevent Unreasonable Exclusion from Competitive Range**
  - **Incumbent Advantage & Statutory Stay of Award/Performance**
  - **Competitor's Unreasonably Win Multi-year Contracts**
- **Are Protest Statistics Misleading?**



# Pre-Award Protests

- **Standing- “Interested Party” (Considering Bidding); No Subcontractors?**
- **Timeliness (GAO):**
  - Solicitation Defects: Prior to deadline for submission of proposals
- **Reasons- Unreasonable Agency Action**
  - Exclusion from Competitive Range
  - Material Solicitation Defect
  - NAICS Designation; Size; Status





# Post-Award Protests

- **Standing- “Next in Line”; Actual or Prospective; Direct Economic Interest; Affected By Award or Failure to Award**
- **Timeliness (GAO): 10 days of when you knew or should’ve known BUT for GAO stay either the later of (1) ten days from contract award or (2) five days from a debriefing required under 15.506**
- **Grounds:**
  - Improper Technical, Pricing, Past Performance Evaluation
  - Irrelevant Past Performance
  - Improper Rating and/or Tradeoff
  - Unstated Evaluation Criteria



# Intervening

- **When To Intervene?**

- Pre-Award: Substantial Chance of Winning Award
- Post-Award: Awardee May Intervene

- **Why Intervene:**

- Added resources to the agency to
  - Prevent TRO,
  - Cause summary judgment; or,
  - Protect your bid
- **Attorneys Access Info Under Protective Order, and**
- **Attorneys Participate in Motions, Comments, and Hearings**



# NAICS Appeals

- **Purpose:** Re-designate an improper NAICS code allowing you to compete or preventing others from competing.
- **Jurisdiction:** Appealed to the SBA OHA; prior to proceeding to Court.
- **Timeliness:** Appeal to SBA OHA w/in 10 days of solicitation issuance or relevant NAICS amendment; BUT SBA OGC can appeal at any time.
- **Factors:** Blatantly unreasonable NAICS designation; past inconsistent action of this/other agencies.



# Size Protests

- **Purpose:** Prevent other than small business from protesting
- **Jurisdiction:** Protesters must file with the Contracting Officer who files the same with the SBA Contracting Area Office
- **Timeliness:** Generally, within 5 days of protester's receipt of the notice of award
- **Factors:** Proof including web, print and database (i.e., DUNS) media showing other than small by revenue or employees.



# Status Protests

- **Purpose:** Prevent non-qualifying small business from winning a 8(a), HUBZone, VOSB, SDVOSB, (ED)WOSB contract.
- **Jurisdiction:** Generally, interested parties may protest to the Contracting Officer who forwards the same onto the relevant SBA office.
- **Burden of Proof:** Must set forth specific allegations and/or facts in support of your position.



# Questions

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