

BID PROTESTS IN DOAS COMPETITIVE SOLICITATIONS: ANSWERS TO KEY QUESTIONS

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Introduction

In Georgia, state purchasing activities are run through the Department of Administrative Services' ("DOAS") State Purchasing Division ("SPD") unless specifically exempted by statute or regulation. [1] If your business is serious about contracting with state entities, it is imperative to know your rights and obligations under State Purchasing Act,[2] as well as the administrative rules issued by SPD in the Georgia Procurement Manual ("GPM"), including the rules and standards governing challenges to statewide procurements, otherwise known as "bid protests."

Navigating the bid protest process can be tricky. The rules are largely stacked against the protesting party and there are several procedural pitfalls designed to thwart a bid protest without having to reach the merits of a protestor's arguments. Even if you do comply with the procedural rules, the standard of review is demanding and contains a number of presumptions you will have to overcome to prevail.

The following questions are a good starting point if you are a disappointed bidder in a DOAS competitive solicitation procurement and are considering a challenge to the procurement. [3]

Discussion

1. What type of protest do I have?

A key first step in any bid protest is to properly identify the type of protest you have, based on what aspects of the procurement you are challenging. Bid protests can be broken down into two overarching categories: pre-close challenges and post-close challenges.

Examples of pre-close challenges are challenges to a cooperative purchase or sole source notice, or, in competitive solicitations (the focus of this discussion), challenges to the process and/or terms of the solicitation itself. Examples of post-close challenges include challenges to the results of the procurement, challenges to an intended or actual contract award, or challenge to actual award of a contract if a notice of intent to award ("NOIA") is not required for the solicitation. Additionally, post-close bid protests are broken down by the dollar value of the procurement.

The reason these distinction matters is that the rules – including the applicable deadlines –governing your protest, are driven by the type of protest you are submitting as well as the amount in controversy. [4] If, for

example, you believe the terms of the solicitation were vague or unenforceable, but you wait until after the close of the solicitation to challenge them, you are already too late, and your argument will be denied on procedural grounds.[5] To avoid this outcome, it is key to spot – and raise as appropriate – issues as they come up in the solicitation process, rather than wait until the end to raise them. DOAS can and will deny your protest if it is untimely under the rules.

2. What documents should I ask for, and what if I get more documents later?

It is important to request documents as soon as possible when you have a potential bid protest. Having the necessary documents – including communications – to support your arguments will be essential in carrying your significant burden as the protesting party. At a minimum, it will be necessary to obtain the records included in the register of proposals or administrative review, which DOAS is required to make available within one business day of a NOIA in accordance with the Georgia Open Records Act. [6]

Another important reason to request documents is that it can lead to extensions on your filing deadlines. If, for example, the state entity fails to provide access to records included in the register of proposals or the administrative review within one business day of issuance of the Notice of Intent to Award, the protesting party is permitted to file, within the filing period, a request for extension of the filing period to extend the protest period by the number of days that it takes for the state entity to produce the records beyond the first business day.[7]

And, protesting parties typically will be granted leave to amend and/or supplement their protests upon later receipt of documents produced in response to open records requests. [8] Document requests thus not only are a necessary part of fleshing out your arguments, but can provide a route to make additional arguments as new information is learned during the protest process.

3. What do you I have to prove in order to win?

Under the GPM, the protestor “bears the burden of proving error in the procurement process sufficient to justify relief.”[9] Not just any error will carry the protestor’s burden. Instead, the protestor must show material “prejudice” resulting from the error, i.e., “but for the state entity’s actions, the protesting party would have had a substantial chance of receiving an award.”[10]

There are several presumptions weighing against the protestor. For starters, the GPM expressly mandates that the standard for reviewing bid protests is one of “deference to any reasonable judgment of the evaluation team.”[11] As such, mere disagreement with the state entity’s evaluation is insufficient. In order to establish that an evaluation was improper, the protestor has to show that the actual evaluation lacked a rational basis. [12] Furthermore, government officials and state entities are expressly “presumed to act in good faith.” Any argument to the contrary will not be considered by DOAS “unless supported by convincing proof.” [13]

Additionally, in order to be actionable, the alleged error must not have equally affected all of the bidders. Id. Thus, even where the evaluators clearly deviated from the terms of the procurement, if they did this “across the board,” it is prejudicial to no one and the protestor’s argument will fail. Perhaps unsurprisingly, the Georgia Supreme Court has said that the protestor’s burden in a DOAS bid protest is a “heavy” one. [14]

4. What are some common types of challenges to a procurement?

While there are a number of arguments a protestor can make in challenging a procurement, there are a handful of frequently protested issues raised by disappointed bidders, again breaking down along whether the challenge is generally to the solicitation terms (pre-close) or the procurement results (post-close).

Frequent pre-close challenges to the solicitation terms are that the terms are ambiguous or vague, and thus cannot be complied with, at least without further clarification. Similarly, challenges can be made that the terms contain internally inconsistent or conflicting requirements and thus should be clarified prior to the close of the solicitation. Such challenges will result in a stay or extension of the solicitation until the protest is decided.[15]

Post-close challenges often are to the cost or technical evaluation of the bids. Challenges may also be made as to the successful bidder's responsiveness or responsibility as a bidder.[16]

Typical cost-based challenges include allegations that cost offers were miscalculated or should have been calculated differently. For cost-based challenges, it is especially important to make sure you have your math right and fully understand the cost scoring parameters before you raise an issue. While cost errors can provide compelling "bright line" arguments for overturning or resoliciting a procurement, they are just as easily dispensed with if you didn't analyze the issue correctly.

Technical scoring challenges often allege that the evaluation team members abused their discretion, i.e., misunderstood the operative facts or standards, exercised bias in scoring, or acted arbitrarily, i.e., scored substantively identical technical submissions inconsistently from one bidder to the next. These types of challenges require convincing proof that the evaluators acted improperly or exceeded and/or abused their discretion. Indeed, the DOAS Commissioner has held in prior final agency decisions that "second-guessing evaluation scores" is not enough to prevail in a bid protest.[17] For this reason, it is especially important to have documents – and if applicable – internal communications demonstrating or at least strongly corroborating your theory as to how or why the procurement was tainted.

5. What are some potential remedies if DOAS agrees with my protest?

Depending on the posture of your protest (i.e., pre or post-close), there are several potential outcomes and remedies where the protest is successful. Prior to closing, the solicitation may be clarified or amended to cure the protested issue. If the protest is to the procurement result, remedies may include revisions or cancellation of the NOIA, reevaluation and re-award of the contract, or re-solicitation so the bidders can make new offers. Before or after closing, the solicitation may be cancelled altogether, which will moot the protest.[18]

6. What are my options if my protest is denied?

If your protest is initially denied, that is not necessarily the end of the road. If the contract at issue has an estimate value of \$100,000.00 or more, you have the automatic right to formal review by the DOAS Commissioner upon (timely) request. If the contract is valued below \$100,000.00, it is within the Commissioner's discretion whether a request for formal review will be granted.[19]

Assuming your protest meets the dollar amount threshold or is otherwise granted discretionary review, the parties involved in the protest have a right to hearing before the DOAS Commissioner upon request. If a

hearing is requested, the DOAS Commissioner will issue a procedural order setting out any scheduling or other logistical details for the hearing.[20] Notably, the GPM permits the protesting party to request that the hearing be conducted before a court reporter, so long as they agree to secure and pay for the court reporting services.[21] This is a good idea if you are considering seeking judicial review in the event of an unfavorable final agency decision, in which case you will want to have preserved the administrative record as much as possible.

Once the Commissioner makes a decision, that will be the final DOAS action regarding the protest. Motions for reconsideration of final DOAS decisions are not permitted.[22]

If the Commissioner denies your protest, it is possible to further appeal the protest decision by filing a petition for judicial review in Superior Court. Because you are coming into court as an “appellant,” you are limited to the agency record and typically not allowed to conduct discovery (i.e., take depositions or propound written discovery requests), and the focus will be on briefing the alleged errors below and oral argument. A reviewing court generally may affirm the final DOAS decision, reverse it, or in some cases remand the matter to DOAS for further review and ruling. Requests for judicial review should be exercised with caution, as, understandably, initiating litigation may strain your relationship with the state entity you are ultimately trying to do business with.

Conclusion

With many state contracts coming within DOAS’s purview, it is critical to get familiar with the applicable agency rules, including the rules governing the process, timing, and standards of review for bid protests. While there is no substitute for a good offer, understanding how and when to make a bid protest will put your business in the best position possible to overturn – and possibly later prevail in – a procurement that does not initially go your way.

[1] O.C.G.A. §§ 50-5-54.

[2] O.C.G.A. §§ 50-5-50, *et seq.*

[3] The focus of this discussion is on competitive solicitations, as distinguished from sole source or consortium/cooperative purchase solicitations.

[4] GPM § 6.5.7; Table 6.8.

[5] GPM § 6.5.7 Table 6.8.

[6] O.C.G.A. §§ 50-5-67(d)(2), 50-18-70, *et seq.*

[7] GPM § 6.5.7.

[8] GPM § 6.5.7.

[9] GPM § 6.5 Step 4.

[10] GPM § 6.5 Step 4.

[11] GPM § 6.5 Step 4.

[12] Id.

[13] Id.

[14] Int'l Bus. Machines Corp. v. Evans, 265 Ga. 215, 217 (1995), overruled on other grounds by Georgia Dep't of Natural Res, v. Ctr. for a Sustainable Coast. Inc., 294 Ga. 593 (2014).

[15] GPM § 6.5.8.

[16] GPM § I.3.4.

[17] 05/30/14 Commissioner Decision in RFP No. eRFP-40800-14 (Back Office Insurance Licensing System), at pg. 2.

[18] GPM §4.8.2.

[19] GPM § 6.5.11

[20] GPM § 6.5.11.

[21] GPM § 6.5.11.

[22] GPM § 6.5.11.