

Taming the Protest Beast



FORUM2015

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Taming the Protest Beast



WHAT MAKES A PROTEST “BEASTLY”?

- **Out-of-control protests are costly, as they:**
 - Halt progress on important work
 - Divert agency personnel and attention
 - Trigger trial, re-procurement & claim costs
 - Cause bad publicity, allegations of illegality
- **But well-managed protests have limited costs**

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A WELCOME PROTEST – DOES IT EXIST?

- **Legislature created protest process to marshal losing vendor's self-interest to aid public body.**
 - Helps agency make wise purchase decision
 - Builds vendor confidence and participation

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WHAT FACTORS ENCOURAGE PROTESTS?

- **Contract amount – a contract worth fighting for**
 - Protests cost money
 - Vendors worry that protest hurts relationship
- **Non-economic issue worth fighting for**
 - SWAM vendor perceives discrimination
 - Rivalry between two vendors, litigious vendor
- **Legal weakness that protester can exploit**

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CAN YOU CONTROL PROTEST INCENTIVES?

- **Contract worth fighting for**
 - Procurement near end of current contract term
- **Non-economic issue worth fighting for**
 - Attention to vendors that feel excluded
 - Consider IFB to enhance objectivity
- **Legal weakness that protester can exploit**
 - This is in your control !!!
 - Understand judge's view and work backwards

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WHAT IS THE JUDGE LOOKING FOR?



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WHAT IS THE JUDGE LOOKING FOR?



“Did the agency announce an award?”

“Did you file a protest and get denied?”

“Was the agency’s award decision outside its legal range of discretion?”

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WHAT IS THE JUDGE LOOKING FOR?

“When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the court is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently.”

Taylor v. County Board, 189 Va. 472, 483 (1949).

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WHAT IS THE JUDGE LOOKING FOR?

Protestor must show that your award decision was:

- **Not an honest exercise of discretion (arbitrary);**
- **Not in accordance with law; or**
- **Not in accordance with terms of the solicitation**

Va. Code § 2.2-4364(C)

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NOT AN HONEST EXERCISE OF DISCRETION: USE PROTEST RESPONSE TO SHOW HONESTY

- Calm, respectful tone
(angry tone suggests bias)
- Rule-oriented
(ad hoc approach suggests arbitrary)
- Thorough and honest consideration of protest points
*(cursory suggests arbitrary;
refusal to address key points implies arbitrary)*
- Use judicial tone; evaluate selection committee docs

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NOT IN ACCORDANCE WITH LAW

- Legal checklists
 - Definitions of competitive sealed bidding and competitive negotiation (§ 2.2-4302.1, § 2.2-4302.2)
 - VPPA purposes (§ 2.2-4300(C).)
 - APSPM and IFB/RFP rules
- Examples of awards not in accordance with law
 - IFB lets agency pick award criteria
 - Ignoring bid exceptions, allowing post-bid fixes
 - Failure to rescore proposals after negotiation

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NOT IN ACCORD WITH SOLICITATION TERMS: TIPS FOR AVOIDING THIS RISK

- Minimize mandatory requirements
- Describe requirements in terms of agency's opinion (*"Solution must, in agency's opinion, support up to 400 users"*)
- Avoid describing your internal procedure (*e.g., "All proposals will be evaluated by experts"*)
- Avoid describing consequence of defects in bid/offer (*e.g., "Offers without a firm start date will not be considered"*)

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KEY CONTROL POINTS IN A PROCUREMENT

- Bid/Proposal due date
 - Last chance to amend/fix solicitation
- Notice of Award or Intent to Award
 - Triggers file examination requests and protests
 - NOA/NOIA decision affects ability to fix errors
- Response to Protest
 - Last chance to create snapshot for court
 - Last chance to fix error without court oversight

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QUESTIONS?

