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WINNING A BID PROTEST BEFORE SUBMITTING A BID

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By: Dawn M. Meyers

Lawyers are often hired to assist clients in protesting or defending a government's award of a public contract. By the time the lawyer comes on board, however, the bid may have already been won or lost. Although clients often have experience in preparing responses to governmental solicitations, there are specific issues which should be considered in order to put the client in a stronger position should the ultimate award warrant defense or challenge.

Consider, for example, issues of timing. Certain objections in the procurement process have specific, and in many cases very short time limitations. In some instances, even the procurement document itself contains errors, omissions or ambiguities in the bid specifications. Generally, those can be challenged and corrected, and failure to timely do so may serve as a waiver of the right to challenge them later. These rights and obligations, as well as their associated timeframes, can differ significantly from jurisdiction to jurisdiction, so having a local procurement lawyer to guide you through the process can prove valuable.

Further, many local jurisdictions have unique code and/or bidding requirements that even the most experienced and savvy bidders could miss, but with which local counsel is likely quite familiar. Take for example the common practice of clients forming single-purpose entities to serve as the bidder. However, if the procurement process requires a specified level of experience by the bidder, the "newco" could, if not structured properly, prove to be a disqualifying decision. Generally, a local procurement lawyer can provide an objective view on the proposal's adherence to the solicitation's technical requirements and offer alternatives which can assist a client in maximizing its opportunities. This step is key to an ultimately defensible determination of both responsiveness and responsibility.

Finally, and perhaps most importantly, clients know their business and industries best. But it is difficult, if not impossible, for governments and their procurement officers to maintain the necessary level of knowledge and expertise to fully capture potentially significant details in their procurement documents. By engaging in the process early on – even prior to the preparation of the bid documents - clients can make governments aware of new trends, technology, products or other useful information enabling them to tailor the specific procurement more specifically to their actual needs, and allowing clients to showcase particular skills, products, knowledge or expertise that could set them apart from the competition.

In summary, a successful bid challenge or defense is often dependent on the decisions made and actions taken even prior to the government's initiation of the procurement process. Clients should be aware of the necessity of preserving their rights at each level of the procurement process, and building a case from the start to either defend or challenge an award. While an experienced and skilled bid protest lawyer can often provide the client with a cure, retaining a procurement lawyer from the outset can serve as a cost-effective ounce of prevention.

If you have questions about this topic, please contact the author, Dawn Meyers, on the firm's Government and Regulatory Team.

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Dawn M. Meyers

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