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Notes From a Hearing Officer

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Learning Objectives

• Identify the issues that lead to bid protests
• Describe the abilities and duties of a hearing officer
• Discuss the steps taken by hearing officers in resolving protests
• Apply sound principles to writing sourcing documents in order to avoid protests

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Sources of Protests

• Having requirements that are too restrictive/vague
• Non-conforming responses
• Deficient surety
• Failure to provide required information
• Late responses
• Others
  • Substantial deficiency
  • Arbitrary evaluation criteria
  • Minor irregularities
Sources of Protests

- Not following our process
- Lack of clarity in bid document
- Perception of not being fair
- Lack of transparency
- There's too much at stake to lose

The Protest Process

- Right to protest
- Must file within 3 days of NOI to Award
- Must provide all exhibits within 3 days of filing
- Protest bond equal to 5% or $10,000, whichever is less
- CPO can resolve through mutual agreement with vendor
- Use a Hearing Officer if not resolved
  - Must be a CPPO or equivalent
  - Hearing is open to anyone who may be affected

- Hearing Officer makes recommendation to CPO
- CPO notifies protestor of decision
- Protestor has three days to file appeal to board
- Board can over-ride CPO by two-thirds vote and sustain the protest.
- Or CPO moves ahead with original award
- Legal recourse for protestor if appeal is lost
  - Procurement is stayed during the protest process
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What is a Hearing Officer?

• A person designated to review a bid protest and render an opinion on its merits.
• Has knowledge of public procurement policies and procedures.
• Good communication skills
• Good writing skills
• Ability to listen effectively
• Analytical ability
• Organizational skills

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Essential Duties

• Review the original Bids/RFP’s and all addendums
• Review the bids or proposals received
• Review any letters of protest
• Chair the hearings
• Listen to all parties present their cases
• Ask questions
• Evaluate the arguments
• Write and submit the findings

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Initial Observations

• Vague instructions to evaluation committee
• Lack of experience on the part of some of the evaluation committee members.
• Relying on the general rule that RFP evaluation committees have a lot of latitude in how they score.
• Possible sunshine violations in how meetings were conducted.
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**Initial Observations**

- Using some sort of pricing matrix to award cost points, but not having a definite plan in the RFP on how it would be used.
- Making changes to the RFP after it has been opened.
- Not requesting input from proposers prior to an RFP being issued on how a pricing matrix should be structured.

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**Protest A – Medical Supplies**

- RFP was issued
- Five proposals received
- Third party consultant assisted with analysis and cost points calculation.
- Top two firms went to BAFO
- Final ranking
  - Meds-R-Us
  - Ouch
- $150 million award
- Ouch protested

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**Protest A – Medical Supplies**

- Reason’s for Ouch’s protest:
  - Market basket analysis for cost points fatally flawed.
  - Meds-R-Us did not provide their information in the same way as Ouch, leading to faulty comparison.
  - Contracts submitted by Meds-R-Us did not meet the definition given in the RFP.
  - Debriefing team admitted there were errors.
  - Meds-R-Us’ information should be discarded and the technical proposals be re-scored.
Protest A – Medical Supplies

County’s position:
- Evaluation committee exercised normal discretion.
- The specifications regarding the use of proposer-furnished spreadsheets for market basket analysis were reasonably interpreted.
- That analysis was used to determine vendor’s ability to provide goods and services.
- The RFP was not intended to support one business model, but rather to be flexible.
- Ouch’s position restricts competition.

Decision on Protest A

- Market basket analysis was not fatally flawed.
- Evaluation committee had discretion to evaluate in the best interests of the county.
- There was no direction given in the RFP on how to interpret the spreadsheets or to interpret them in a certain manner.
- There was no confusion on the part of the committee on how they were going to interpret the analysis.
- This is part of the normal flow and discussion by an evaluation committee.

Protest B – Cafeteria Services

- RFP was issued.
- Three proposals received.
- Evaluation committee reviewed/ranked as follows:
  - 1 – Santex
  - 2 – Aimsley
  - 3 – Mansfield
- First two to BAFO.
- $4.4 million award.
- Mansfield protested.
Protest B – Cafeteria Services

Reasons for Mansfield’s protest
- Scores of committee member #2 were disproportionately low compared to other members.
- Scores of Santex were disproportionately high compared to other proposers.
- Committee failed to allocate 10 SBE points to Mansfield.
- Committee had insufficient time to evaluate.
- They also claimed during the hearing that the pricing structure for cost points was improperly applied.

County’s position:
- Evaluation committee exercised normal discretion
- No evidence of fraud or illegality was alleged
- Four of five members ranked Mansfield third and the fifth member ranked them second, never first.
- Even if scores of member #2 were deducted, they would still be third.
- The 10 SBE points would not change their position.
- The pricing structure issue was not in the original protest letter so it is moot.

The ranking of the proposals was done in accordance with the RFP, the County’s policies and procedures and with the discretion allowed RFP evaluation committees.
- Mansfield was entitled to the 10 SBE points, but the additional points would not move them to second.
- The evaluation committee met several times and there was no indication that time was an issue. They were also polled on the rankings at the final meeting & concurred.
- The points structure was understood by all parties, with the exception of Mansfield.
Protest C – Coding Services

• ITB was issued
• Six bids were received
  • Two declared non-responsive
  • One of them was McKostit
• $900,000 award to the low bidder
• McKostit protested

Protest C – Coding Services

• Reasons for McKostit’s protest
  • They were the lowest responsive/responsible bidder
  • Their bid conformed in all material aspects to the ITB
  • The table of contents language is similar to that used by the county elsewhere in the bid document
  • The bid pricing offered was clear enough and capable of comparison to the other bidders
  • McKostit has been a trusted partner for many years with no issues of “non-responsiveness”
  • The issues should be waived or a re-bid conducted

Protest C – Coding Services

• County’s position:
  • The bidder modified the required bid response form by subdividing box #6 and adding a box #7
  • This made it difficult to compare their bid to the other bidders
  • The bidder included language that the bid was not an offer that could be accepted
  • The issues cannot be waived in fairness to the others
  • The county is under no obligation to re-bid because a bidder made an error
Decision on Protest C

- The ITB states that a bid submittal must conform in all material aspects to the ITB and that no other bid response form may be used. They altered the form.
- The county had the right under the ITB to "...reject bids that do not conform to the requirements..."
- The county could declare a bid non-responsive if any T's & C's were in conflict with the ITB.
- The county's reference to negotiating new contract terms referred to issues that might arise after signing.
- Responsiveness to contract issues is not the same as responsiveness to an ITB.

Recommendations (1)

- Know the objective of the procurement
- Be clear in the solicitation document
- Have someone else review it
- Ask for what you want or don't want
- Don't ask for things you don't even need
- Explain your protest procedures
- Be open and above board with what is taking place

Recommendations (2)

- Don't change things mid-stream without issuing an addendum
- Don't change things at all after the bid is open
- If using a best value procurement, explain in your sourcing document how this will be done
- Be clear in how the cost points will be calculated
- Follow your agency's process
Protest Avoidance Strategies

- Issue a Request for Information (RFI)
- Post the RFP/ITB on the Internet
- Use Notice of Intent to Award
- Hold debriefings
- Keep communication lines open
- Respond diplomatically
- Agree with protestor whenever possible
- Try to avoid being adversarial

Questions?