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**Give Me 5: Asserting and Defending
Against Protests**

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FEDERAL CONSTRUCTION CONTRACTING: CORE CURRICULUM UNIT

ASSERTING AND DEFENDING AGAINST PROTESTS

(INCLUDING BID PROTESTS, SIZE PROTESTS/SIZE DETERMINATIONS AND STATUS PROTESTS/ELIGIBILITY INVESTIGATIONS)

Presented By:
JENNIFER M. HORN & MARIA L. PANICHELLI
for
Women Impacting Public Policy and Give Me 5





Women Impacting Public Policy (WIPPP) is a nonprofit, membership organization working to increase the economic power and public policy clout of women entrepreneurs by providing essential business skills education, leadership opportunities for business and personal growth, and a seat at the table among policymakers in Washington, D.C.

WIPPP was founded in 2001 and is recognized as a national, nonpartisan voice for women business owners, advocating on behalf of its coalition of 4.7 million businesswomen including 78 business organizations. WIPPP identifies important trends and opportunities and provides a collaborative model for the public and private sectors to advance the economic empowerment of women.

www.WIPPP.org



Give Me 5

- National program from WIPP & American Express OPEN designed to educate women business owners on how to apply for and secure federal procurement opportunities.
- Give Me 5 works to increase the representation of Women Business Owners that win government contracts. We provide accessible business education tools to assist both new and experienced federal contractors.
- Women Business Owners could gain more than \$4 billion in annual revenues if the 5% contracting goal set by Congress was reached.





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Part I: Types of “Protests”



TYPES OF CHALLENGES

Several Varieties of “Protest” that Small Businesses Must Be Aware Of

- Bid Protest
- Size Protest (→ Size Determination)
- Status Protest (→ Status/Eligibility Investigation)

*** There are also NAICS code appeals***



TYPES OF CHALLENGES

Bid Protest - Another contractor's challenge of the procedures or process used during the bidding, source selection, evaluation and contract award process. Relates to a certain contract.



TYPES OF CHALLENGES

- **Size Protest** - Another contractor's challenge concerning the size of a small business in relation to a specific contract (→ can sometimes lead to Size Determination).
- **Size Determination** – SBA's investigation relating to a concern's size. Not specific to one contract. Can be initiated internally by the SBA or based on outside information.



TYPES OF CHALLENGES

- **Status Protest** - Another contractor's challenge concerning the status of a small business in relation to a specific contract (→ can lead to Status/Eligibility Investigation).
- **Eligibility Examination** - SBA's Investigation relating to a concern's status. Not specific to one contract. Can be initiated internally by the SBA or based on outside information.

A REFRESHER ON “STATUS”

WOSBs

To be a WOSB:

- Must be a SMALL Business 13 C.F.R. Part 121
 - Size includes Affiliates – Be Wary of Affiliation Issues 13 C.F.R. § 121.103
- Must participate in an industry that has been identified by the SBA as one where WOSBs are “substantially under-represented” – only 133 NAICS codes apply
 - Current list of available industries can be found on the SBA’s website at:
http://www.sba.gov/sites/default/files/files/2012_WOSB_EDWOSB_NAICS_Codes.pdf
- Not less than 51 percent unconditionally and directly **owned** and **controlled** by one or more women



A REFRESHER ON “STATUS”

EDWOSBs



To be an EDWOSB

- Must be a SMALL Business 13 C.F.R. Part 121
 - Size includes Affiliates – Be Wary of Affiliation Issues 13 C.F.R. § 121.103
- Must participate in an industry that has been identified by the SBA as one where EDWOSBs are “substantially under-represented” – only 197 NAICS codes apply
 - Current list of available industries can be found on the SBA’s website at:
http://www.sba.gov/sites/default/files/files/2012_WOSB_EDWOSB_NAICS_Codes.pdf
- Not less than 51 percent unconditionally and directly owned and controlled by one or more **economically disadvantaged**



Part II: Forums

Where Will the “Protest” be Decided?

FORUMS

Three Main Options for Straight **Bid Protests**:

- Contracting Officer (Agency)
- U.S. Government Accountability Office (“GAO”)
- U.S. Court of Federal Claims (“COFC”)

Also, less common:

- FAA’s Office of Dispute Resolution for Acquisitions (“ODRA”)



FORUMS

- **Size Protests & Size Determinations**
 - SBA
 - OHA (on Appeal)
- **Status Protest & Status/Eligibility Investigations**
 - SBA
 - VA, in some limited cases

Part III: Bid Protests

BID PROTESTS

ASSERTING BID PROTESTS

The Who, What, When, Where, and Why

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BID PROTESTS

DEFENDING AGAINST BID PROTESTS

- Unfortunately, not much you can do to avoid these, as they usually have to do with the applicable agency's actions rather than the winning contractor's actions or qualifications
- That said, it helps to be aware of the commonly protested issues so that you can be aware of potential issues with agency conduct
- Also, while substantive defenses depend entirely on the nature of agency conduct, there are procedural defenses that you can be sure to explore



BID PROTESTS

DEFENDING AGAINST BID PROTESTS

Common Pre-Award Protest Issues

- Patent Error/Unclear or Ambiguous (Bid it as you see it!)
- Improper Exclusion of Required Provisions/Inclusion of Inapplicable Provisions
- Unduly Restrictive
- Improper Bundling
- Unreasonable Evaluation Method(s)
- Small Business Issues
 - Hierarchy of Set-Aside Programs
 - Rule of Two (Increasing Discretion re: GSA & FSS?)

Common Post-Award Protest Issues

- Evaluation Issues
 - Improper Application of Provisions or Failure to Apply Required Provisions (be wary of timeliness defenses!)
 - Agency error in applying evaluation criteria
 - Agency misinterpretation of proposal
- Inadequate, Misleading or “Uneven” discussions with Offerors
- Insufficient Documentation
- Flaws in “Trade-Off” Process



BID PROTESTS

DEFENDING AGAINST BID PROTESTS

The Protest Process

- Initial Filings
 - **Intervention***
 - **Jurisdictional/Standing Issues***
 - **Other Motions to Dismiss/Injunctive Relief Briefing**
 - Discovery/Administrative Record
 - Comments to Administrative Record/MJOAR
- * ***Your Best Bets Relating to Defenses***



BID PROTESTS

DEFENDING AGAINST BID PROTESTS

Intervention!!!



BID PROTESTS

DEFENDING AGAINST BID PROTESTS

Jurisdiction - Tucker Act

Vests Court of Federal Claims with jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

BID PROTESTS

DEFENDING AGAINST BID PROTESTS

Standing

- Protestor must be an “Interested Party”
 - Disappointed Offeror
 - Prospective Offeror
 - SBA/VA – Definition can sometimes be a little broader
 - Seems like an easy issue, but can get *very* complicated
- Protestor must have a “Direct Economic Interest”
 - Was protestor next in line?
 - Was the evaluation *so* flawed as to allow someone other than the next in line to protest?

BID PROTESTS

DEFENDING AGAINST BID PROTESTS

Injunctive Relief Briefing

- Likelihood of success on the merits (mini argument/preview)
- Irreparable Harm (purely monetary is usually not enough)
- Public Interest
- Balance of Harms/Weighing of the Hardships

BID PROTESTS

Typical Timelines:

- 30 days at Agency Level
- 100 days for GAO
- Several Months at COFC, Subject to Injunctive Relief Issues or Special Circumstances

Typical Outcomes:

- Corrective Action or Settlement (Doesn't always solve everything)
- Sustain the Protest (Does not necessarily mean protestor gets award!)
- Dismissal (Jurisdiction/Standing)
- Injunctive Relief (denial of injunctive relief is not necessarily an overall loss)
- Attorneys Fees? (in limited cases)



Part IV: Size / Status Protests – The Procedural Process

SIZE/STATUS PROTESTS

- Offensive Tool, and Defensive Issue
- Contractor v. Contractor – Competitor challenging eligibility, usually because of size (including affiliation), ownership or control.
 - “Interested Party” may protest
 - Any other party may “persuade”
- Interested party seeking to protest both the size and the status (i.e. ownership and control) must file two separate protests
 - Size Protests must be brought pursuant to 13 CFR part 121
 - Protests challenging the WOSB/EDWOSB eligibility issues brought under subpart 13 CFR part 127 subpart F

SIZE/STATUS PROTESTS

If using offensively:

- What are the requirements for filing?
 - In writing
 - Within 5 days of award
 - Specify all grounds upon which protests are based
 - Specific facts, or allegations – “Bare Allegations” are insufficient

SIZE/STATUS PROTESTS

- SBA notifies protested party of the protest and allows chance to respond. (*355 form*) **This is your Due Process Chance to Respond! Utilize it accordingly!!!**
- SBA will determine the EDWOSB or WOSB status of the protested concern within fifteen days after receipt of the protest (sometimes extensions are granted to the agency)
- The SBA then notifies the CO, the protestor, and the protested concern in writing of its determination
- The protested concern, the protestor, or the CO may file an appeal of the protest to OHA (SBA's Office of Hearing and Appeals)



SIZE DETERMINATIONS

13 CFR § 121.1001 ET SEQ.

- May be initiated by SBA itself (though often spurred by protests or letters from competitors)
- The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. ***The determination, however, may also be based on grounds not raised in the protest or request for size determination.*** SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties. (Is this language enforceable after *Miles* and *AmBuild*?)
- Burden of persuasion: The concern whose size is under consideration has the burden of establishing its small business size



Part V: Size Determinations— The Procedural Process



SIZE DETERMINATIONS

Time frame for making size determination.

- After receipt of a protest or a request for a formal size determination, the SBA Area Office will issue a formal size determination within 15 business days, if possible
- The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest
- If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government
- The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions
- SBA will promptly notify the contracting officer, the protester, and the protested concern. SBA will send the notification by verifiable means, which may include facsimile, electronic mail, or overnight delivery service



SIZE DETERMINATIONS

13 CFR 121.108

What are the requirements for representing small business size status, and what are the penalties for misrepresentation?

Presumption of Loss Rule: In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation

Penalties for Misrepresentation: Suspension or debarment; Civil Penalties; Criminal Penalties



SIZE DETERMINATIONS

- Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination is the final decision of the agency – 13 CFR § 121.1101
- A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern - 13 CFR § 121.1010



Part VI: Eligibility Examinations— The Procedural Process



ELIGIBILITY EXAMINATIONS

13 CFR 127.400 ET SEQ.

WHAT IS AN ELIGIBILITY EXAMINATION?

- Purpose: to verify the accuracy of any certification made or information provided as part of the certification process (including third-party certifications), or in connection with an EDWOSB or WOSB contract
- Eligibility examinations may verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination
- SBA may perform eligibility examinations at any time after a concern self-certifies that it is an EDWOSB or WOSB (sometimes motivated by a protest)



ELIGIBILITY EXAMINATIONS

HOW WILL THE SBA CONDUCT AN EXAMINATION?

- No less than five (5) business days before commencing an examination, SBA will notify the concern in writing that it will conduct an examination to verify the status of the concern as an EDWOSB or WOSB.
- SBA reserves the right to conduct a site visit without prior notification to the concern.
- SBA will request that the concern or contracting officer provide documentation and information related to the concern's EDWOSB or WOSB eligibility.
- These documents will include those submitted under § [127.300](#) and any other pertinent documents requested by SBA at the time of eligibility examination to verify eligibility, including but not limited to, documents submitted by a concern in connection with any WOSB or EDWOSB certification.
- SBA may also request copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation.



ELIGIBILITY EXAMINATIONS

DOCUMENTS REQUESTED FOR ELIGIBILITY EXAMINATION AND PROTESTS

- For WOSBs & EDWOSBs: All documents submitted to the Repository Any other pertinent documents requested by the SBA, including copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation
- For EDWOSBs only: Signed copies of SBA Form 413, Personal Financial Statement, 3 most recent personal income tax returns (including all schedules and W-2 forms) for the women claiming economic disadvantage and their spouses (unless legally separated) SBA Form 4506-T, Request for Tax Transcript Form



ELIGIBILITY EXAMINATIONS

WHAT HAPPENS IF THE SBA VERIFIES THE CONCERN'S ELIGIBILITY

- If SBA verifies that the concern satisfies the applicable EDWOSB or WOSB eligibility requirements, it will send the concern a written decision to that effect and will allow the concern's EDWOSB or WOSB designation in CCR and ORCA to stand and the concern may continue to self-certify its EDWOSB or WOSB status.



ELIGIBILITY EXAMINATIONS

WHAT HAPPENS IF THE SBA IS UNABLE TO VERIFY THE CONCERN'S ELIGIBILITY

- If SBA is unable to verify that the concern qualifies as an EDWOSB or WOSB, then it will send the concern a written notice explaining the reasons SBA believes the concern did not qualify at the time of certification or does not qualify as an EDWOSB or WOSB. The notice will advise the concern that it has fifteen (15) calendar days from the date of the notice to respond.
- Following the fifteen (15) day response period, it will consider the reasons of proposed ineligibility and any information the concern submitted in response, and will send the concern a written decision with its findings. Agency's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a third-party certifier.
- A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB until it cures the reason for its ineligibility and SBA determines that the concern qualifies as a WOSB or EDWOSB. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in this section.



Part VII: Size & Status Challenges/ Investigations – The Common Issues



-- *AKA: How to Avoid Common Pitfalls--*

THE COMMON PITFALLS

Generally Speaking, Problems Arise in 4 Contexts:

Size Protests/Size Determinations

- Size
- Affiliation

Status Protests/Eligibility Determinations

- Ownership
- Control
- WOSB Status of Owner (*less common*)



THE COMMON PITFALLS: AFFILIATION

Common Affiliation Issues:

Two Types: Individual Contract v. General Affiliation

- Individual Contract/Ostensible Subcontractor
 - % of Work Requirements
 - Control on site
 - Other indicia of non-control



THE COMMON PITFALLS: AFFILIATION

Common Affiliation Issues:

Two Types: Individual Contract v. General Affiliation

General affiliation:

- Shared Space
- Shared Employees
- Past Employee Relationship
- Familial Relationship
- Frequent Subcontracting
- Financial Reliance
 - Guarantor? LOC? Bonding?



THE COMMON PITFALLS: AFFILIATION

Be Aware of Recent Developments Relating to Inter-affiliate Sales Transactions:

- 13 C.F.R. § 121.104(a) - provides that “total receipts” for SBA size purposes does not include “proceeds from transactions between a concern and its domestic or foreign affiliates.” In previous decisions, OHA has written that the purpose of the inter-affiliate transactions rule is to prevent “double counting of income” during the size determination process.
- Size Appeals of G&C Fab-Con, LLC, SBA No. SIZ-5649 (2015) – Exception is VERY NARROW. OHA concluded that the inter-affiliate transaction exclusion applies ***only if the concerns in question have a parent-subsidiary relationship and are eligible to file a consolidated tax return!!***

THE COMMON PITFALLS: OWNERSHIP

Most Common Ownership Issues:

- **Not Direct Ownership**

- No Holding Companies
- No Employee Stock Ownership Plan (ESOP)
- Revocable Trust is OK

- **Transfer Restrictions**

- Transfer upon Incapacity, Bankruptcy
- Rights of First Refusal
- Commercially Practicable Exception??

- **Voting Restrictions**

- Quorum or Supermajority Provisions
- Definition or Number of “Managers” or “Members”



THE COMMON PITFALLS: CONTROL

Most Common Control Issues:

- Definitions/Number of “Managers” or “Members”
- Not Highest Title
- Not Experienced Enough
- % of Work
- Negative Control
 - Control Vested in Multiple Employees
 - Unanimous Consent
 - Quorum or Supermajority Provisions
 - Banking Control/Signatory Powers
 - Authority to Sign Contracts/Bid



THE COMMON PITFALLS: EDWOSB ELIGIBILITY

What does “Economically Disadvantaged” really mean?

- 13 C.F.R. § 127.203
- A woman is economically disadvantaged if she can demonstrate that her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business.



THE COMMON PITFALLS: EDWOSB ELIGIBILITY

What does “Economically Disadvantaged” really mean?

- Factors to be considered:
 - Personal Net Worth must be less than \$750,000 – **excluding** her interest in the concern, her equity interest in her primary residence and funds invested in a retirement account that are unavailable until retirement age without a significant penalty.
 - Fair Market value of all assets **including** firm and equity interests in personal residence may not exceed 6 million.
 - Salary – Cannot exceed \$350,000 / year average over the last three years preceding certification or there is presumption of no disadvantage
 - Rebuttable Presumption – May show that high income level was unusual, losses were suffered, or that income was not otherwise indicative



THE COMMON PITFALLS: EDWOSB ELIGIBILITY

What does “Economically Disadvantaged” really mean?

- They will consider spouses’ financial situation as well – although the SBA does not take into consideration community property laws when doing overall analysis
 - Community Property States include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Puerto Rico is a Community Property Territory.
 - May consider spousal financial condition when determining women’s access to credit and capital
 - Will consider spousal financial condition if the spouse has a role in the business, or has a similar business
- Be wary of Transfers!!!



Questions?



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Thank You For Participating

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For questions, please contact Lin Stuart at

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