

**WHAT DO YOU DO IF THE FEDERAL AGENCY DOESN'T SELECT YOU?**  
**FEDERAL DEBRIEFINGS AND PROTESTS**

By James E. Krause, Attorney  
Federal Contract Law - Jacksonville, FL  
May 2016

Your construction company spent countless hours researching and preparing an outstanding proposal for the Government. You are clearly the best contractor providing the “best value” for the U.S. taxpayers. Unfortunately you were not selected. What do you do now?

The Government has provided contractors with two valuable tools to use: Debriefings and Protests. These tools are not only for the benefit of the contractor. They provide the Government with real time evaluation of Government actions from the private sector, and help the Government avoid errors, frequently unintentional, in the Federal procurement process.

Government contracting in the United States has generally been marked by openness, fairness, economy, and accountability. It is based on the concept of full and open competition, as codified in the Competition in Contracting Act (“CICA”). Contractors across the United States have the opportunity to bid or propose on jobs, secure in the knowledge that they have a fair chance of winning in a fair competition against their peers, and secure in the knowledge that the money to pay for their services will be forthcoming in a timely fashion. A primary reason for this system is the understanding that contractors who participate in Federal contracting should feel that they have a fair chance of success in return for the time and effort they put in preparing proposals and bids.

Some Government officials understand the purpose of providing debriefings and allowing protests, and agree. “Government succeeds or fails by the confidence of the governed in its fairness and effectiveness. So it is with the procurement system. If the public loses confidence in the system, it will fail.” Stephen Daniels, Chairman, General Services Board of Contract Appeals, speaking to the Office of Federal Procurement Policy. However, there are other Government personnel that view all protests as a nuisance and irritant, and dislike all protests, whether valid or not. It should never be a contractor’s intent to file an invalid or frivolous protest.

What protestable errors could be made by the Federal agents? While it has seemingly endless rules and regulations, the Federal Acquisition Regulations (FAR) provide contractors for the Federal Government with a roadmap of the parameters of the given procurement. It publicly acknowledges rules and regulations the Government intends to operate by, and provides all contractors free and constant access to these rules and regulations. This consistency is intended to provide contractors nationwide the confidence to bid and propose without fear that they have to learn and perform to innumerable local rules and regulations. This, in return, provides a benefit to the Government, and the taxpayers of the U.S., in the form of lower priced bids and proposals.

Federal Source Selection methods will vary depending on project specific criteria. However, Best Value source selection is the primary method the government now uses to select contractors. While there will always be some sealed bid competition, more and more governmental agencies are looking beyond the bounds of the Invitation For Bid (ITB or IFB) and the low bidder to select a contractor that more nearly meets the needs of the agency and the public’s interest in a completed project. Selection



**JAMES E. KRAUSE, ATTORNEY**

9700 Phillips Highway, Suite 107, Jacksonville, FL 32256

904.353.5533 [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net) [www.krauselaw.net](http://www.krauselaw.net)

FEDERAL & PUBLIC CONTRACT LAW - CONSTRUCTION - LITIGATION

methods that involve looking at technical qualifications in addition to price are referred to as best value procurements. These procurements are appropriate for both design/build and design/bid/build projects.

### DEBRIEFINGS

First and foremost, contractors should always immediately request a debriefing in a negotiated procurement. Debriefings are great learning tools for contractors if they know how to use them. Debriefings are required by the FAR and are an excellent tool to assist contractors in preparing for the next proposal. It is critical to understand there is a very short fuse to request a debriefing. Contractors must request a debriefing properly, and in a timely fashion, or they will lose their right to a debriefing.

A Debriefing should be for the purpose of learning what the Agency needs and requirements are and how the Contractor's abilities meet the Agency's needs, as well as trying to determine what Contractor did right and wrong with their proposal. Debriefings are not intended to provide an opportunity to learn another contractor's information, and contracting officers are limited in what information they are allowed to provide to a contractor requesting a debriefing. Nonetheless, this is an excellent opportunity for the contractor to discuss its proposal with a contracting officer and understand what the Agency was looking for and how the Agency made its decision. The protesting contractor will have the opportunity see how its company fits with the needs of the Federal government.

### PROTESTS

As a proposer on a Federal Project, if a contractor knows the Government made an error in the source selection or procurement process, the contractor has the right to protest the Government's decision. Protests are either pre-award or post-award. In very basic terms, the pre-award protest challenges the Government's solicitation process, in effect saying that the Government did not prepare the solicitation properly; whereas a post-award protest challenges the Government's actions during the source selection process.

Typically a contractor will file a protest because the contractor believes the Government made an error in selecting another contractor. In this case, the protesting contractor will need to prove there was an error on the part of the Agency, and that the contractor was prejudiced by the actions of the Agency. In challenges of the evaluation of proposals and the award of contracts, this generally means an offeror that would potentially be in line for award if the protest were sustained.

The remedies available to the protesting contractor depend on the type of protest. In a pre-award protest, the Agency could issue an amendment to the solicitation prior to award, start over and resolicit the procurement, or cancel the procurement completely. Post-award, the Agency can terminate the award and issue the award to the protesting contractor. The Agency could always simply terminate the procurement at either the pre or post award stage.

Debriefings and Protests may occur either pre- or post-award, depending on the issue being raised. The time limit to file a protest is absolutely critical, and depends on the Court the contractor selects for its protest. All pre-award protests must be filed prior to bid or proposal opening regardless of forum. A post-award bid protest at the General Accountability Office (GAO) must be filed within either 5 or 10 days of award or debriefing, depending on which GAO regulations the contractor wishes to



**JAMES E. KRAUSE, ATTORNEY**

9700 Phillips Highway, Suite 107, Jacksonville, FL 32256

904.353.5533 [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net) [www.krauselaw.net](http://www.krauselaw.net)

FEDERAL & PUBLIC CONTRACT LAW - CONSTRUCTION - LITIGATION

invoke. A post-award protest at the Court of Federal Claims has no specified time limit, but the practical reality dictates you should file your protest very quickly to receive meaningful relief.

Protests are a two way street, and timely protests can provide real value to the Government. A Protest, especially a pre-award protest, can identify correctable errors in a Federal procurement before they cost the Agency time and money, and allow the agency to either amend or resolicit their procurement.

This information is a brief sampling of the information Contractors must be aware of when contracting with the Federal Government regarding Debriefings and Protests. For additional information, please contact Jim Krause at (904) 353-5533 or [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net) .



**JAMES E. KRAUSE, ATTORNEY**

9700 Philips Highway, Suite 107, Jacksonville, FL 32256

904.353.5533 [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net) [www.krauselaw.net](http://www.krauselaw.net)

FEDERAL & PUBLIC CONTRACT LAW - CONSTRUCTION - LITIGATION