Lessons Learned from Procurement Protests
2017 AASHTO SOC MEETING

August 15, 2017
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Division Administrator
VDOT Alternative Project Delivery
## Design-Build Program - July 1, 2017

<table>
<thead>
<tr>
<th></th>
<th>Number of Contracts</th>
<th>Total Value (in Millions)</th>
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<tbody>
<tr>
<td>COMPLETED CONTRACTS</td>
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</tr>
<tr>
<td>ACTIVE CONTRACTS</td>
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<td>ACTIVE PROPOSALS</td>
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<td>$1007</td>
</tr>
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<td>CANDIDATE PROJECTS</td>
<td>4</td>
<td>$247</td>
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</table>
What is a Bid Protest?

A challenge to the award or proposed award of a contract for the procurement of goods and services (Post-Award Protest)

A challenge to the terms of a solicitation for such a contract (Pre-Award Protest)
Purpose of Bid Protests

Ensure integrity in the public procurement process
Provides transparency
Encourages participation in government procurements
Protects public from misuse or waste of public funds
Who Can File a Bid Protest?

Federal Bid Protests

Only “interested parties” may file protests
An “interested party” is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
Who Can File a Bid Protest? (cont.)

Typical Protesters in State Procurements

- Disappointed bidders or offerors
- Parties excluded from bidding
- Parties disadvantaged during procurement
- Parties that believe some aspect of the procurement is not in accordance with law or regulation
Timing of Bid Protests

Timing requirements vary among states
Typically very short windows of time
Window to file bid protest often shorter than window for agency to respond to a public records request

Virginia Statue
Requires protest to be filed within 10 days after notice of intent to award
Traditional Project Delivery

Low-bid and design-bid-build procurements
Procurement is focused on price rather than ideas and concepts
Agency typically required to award to lowest responsible bidder
Rules that govern bid protests often well-established through statutes, ordinances, agency regulations, and common law
Traditional Project Delivery (cont.)

Grounds for Protest

- solicitation documents unduly restrict competition (overly restrictive requirements)
- solicitation documents unfairly favor certain bidders
- solicitation documents contain illegal requirements
- selected bidder is not the lowest responsible bidder
- late or incomplete submissions
Alternative Project Delivery

Design-build and public-private partnerships (P3)
Factors other than price may be considered (technical factors, bidder’s qualifications)
Scope of work usually defined more broadly (performance specifications vs. design specifications)
Agency’s evaluation of proposal is more nuanced and subjective, which provides additional flexibility, but also creates different risks for bid protests
Alternative Project Delivery (cont.)

Grounds for Protest

Choice of project delivery method

• alternative project delivery methods typically must be specifically authorized by statute
• legislation sometimes limits alternative project delivery methods to certain types or sizes of projects
Alternative Project Delivery (cont.)

Grounds for Protest (cont.)

Communications with bidders

• bidders allowed/encouraged to propose different solutions to agency’s needs (ATCs); agency permitted to conduct discussions with bidders

• agency must ensure all bidders receive the same information (e.g., at one-on-one meetings)
Grounds for Protest (cont.)

Adherence to stated evaluation criteria

- in alternative project delivery, agency weighs other factors in addition to price
- evaluation and weighing of factors must strictly conform to the requirements in the solicitation documents
- agency must apply evaluation criteria uniformly across proposals
Alternative Project Delivery (cont.)

Grounds for Protest (cont.)

Pass/fail criteria

- a proposal’s failure to meet a pass/fail requirement typically requires agency to reject or disqualify the proposal
- not all pass/fail requirements are created equal; agency often reserves right to waive minor irregularities (e.g., font size, page size)
Grounds for Protest (cont.)

Organizational conflicts of interest

• when a bidder has access to non-public, competitively-useful information

• examples:
  – when an agency contracts with an architect/engineer to develop preliminary design
  – when subsidiaries compete on two separate teams, or are on both sides of the transaction
Other Grounds for Protest (Technical) Observed by VDOT

Acceptance of Alternative Technical Concepts that are significantly different from RFP Conceptual Plans
Performance requirements that cannot be validated during the procurement such as operational analysis
Proposal plans are scrutinized as final design plans
Introduction of design exception and/or waiver
Failure to meet RFP design criteria
Conflicts among various documents such as standards, specifications, plans and technical requirements
Ambiguous requirements
Bid Protest Case Study

460 Connector – Bristol, Virginia

- Twin high-level bridge structures approximately 1,600 feet in length
- Mainline four-lane divided highway totaling approximately 4,800 feet in length
- A two-lane connector road to Route 80, including a second multi-span bridge over Route 768 and Hunts Creek
- Contract Value was estimated at $100M
New Construction Roadway Project
Route 460 - Buchanan County
UPC: 64144 & 85914
Project: 0460-013-773, RW201, C501
Fed. Project# APD-460-1(005)
From: Kentucky State Line
To: 0.833 Mi. East Kentucky State Line
Case Highlights

• Project derailed by a lawsuit
  • Brief description of the grounds for protest
    • Selected Offeror failed to meet minimum requirements with respect to Right of Way Manager
    • Protesting Offeror’s Right of Way manager score need to be modified (higher) since the selected Offeror’s ROW manager also didn’t meet the requirements
    • VDOT failed to advise all Offeror’s of its interpretation of the Resume requirements
    • Selected Offeror failed to represent in its Technical Proposal that it would self perform 30% of the work
    • Protesting Offeror’s roadway design concept was improperly scored with respect to the RFP requirements
Case Highlights

• Project derailed by a lawsuit
  • Five grounds to protest
  • Protest focused primarily on arbitrary and capricious evaluation of protestor’s proposal
• VDOT prevailed at the Temporary Injunction Hearing and awarded the project to highest-ranked team
• Plaintiff pursued and case went to trial
• At trial plaintiff narrowed its protest to one ground
  • Failure to meet minimum requirements with respect to experience of Right of Way Manager
The RFP Stated:

“The Right of Way Manager shall have at least ten (10) years of experience in managing complex right of way projects. Evidence of this experience will be of sufficient detail on the resume to satisfy the requirements.”
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“The Right of Way Manager shall have at least ten (10) years of experience in managing complex right of way projects. Evidence of this experience will be of sufficient detail on the resume to satisfy the requirements.”
### Brief Resume of Key Personnel/Design-Build team members anticipated for this project.

<table>
<thead>
<tr>
<th>a. NAME &amp; TITLE:</th>
</tr>
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<tbody>
<tr>
<td>b. PROJECT ROLE:</td>
</tr>
<tr>
<td>c. NAME OF FIRM WITH WHICH ASSOCIATED:</td>
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<tr>
<td>d. YEARS EXPERIENCE: With this firm:</td>
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<tr>
<td>e. EDUCATION: Educational Institution:</td>
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<tr>
<td>f. ACTIVE REGISTRATION: Year First Registered:</td>
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<tr>
<td>g. CERTIFICATIONS:</td>
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<tr>
<td>h. EXPERIENCE AND QUALIFICATIONS RELEVANT TO THE PROPOSED PROJECT: (List at least three (3), but no more than five (5) projects of similar size and scope to this project, including dates, for which Key Personnel/Design-Build team member has performed a similar function. Project examples listed for Key Personnel/Design-Build team member should demonstrate requirements, including experience requirements, as set forth in Section 3.5 of this SOQ).</td>
</tr>
</tbody>
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Project:
Name of Firm:
Start Date: Finish Date:
Project Role:
Responsibilities:
Client/Owner Contact: (Name/Title/Phone):
Judges Decision was in Favor of the Plaintiff

- Providing a mere number of years of experience is not “sufficient detail” as anticipated by the RFP.
- Moreover, the Right of Way Manager failed to buttress his assertion with corresponding detail.
- The Court has determined that the resume was deficient in that it failed to provide evidence of sufficient detail to support the contention that the Right of Way Manager had more than the ten-year minimum experience required by the Department.
Victory from the Jaws of Defeat

- Set in motion a change in process
- Realization VDOT had to make improvements to our procurement process
- Documented Procedures and Guidelines – “Guidelines for Evaluation of Design-Build Proposals” (On VDOT’S DB Website)
- Training for Evaluators
- Provide more time and resources for Technical Proposal Evaluations
Lessons Learned

• Do not award project until protest is resolved.
• Expect a protest when lowest price doesn’t win in best-value selection
• Define limited number of pertinent “differentiators” for each project
• Own your mistakes and take corrective action quickly
• Be as explicit and as objective as possible with all evaluation criteria
• Clearly state the evaluation criteria and weight given for each item
• Ensure that the evaluation team is highly qualified and understands how to apply the criteria
• Clearly state the requirements of the RFP including what will be considered a non-responsive proposal
Lessons Learned

• Evaluation plan should be Fair, Equitable and Transparent
• Communicate and seek input from the Industry regarding the program
• Keep the Industry informed of proposed changes
• Build relationship and develop trust with the Industry