



# The Art of Protest War

Gathering market intelligence on your competitors is essential to developing a winning bid protest strategy.



BY STEPHEN L. BACON

In *The Art of War*, published more than 2,500 years ago, the military strategist Sun Tzu said: “Know the enemy and know yourself; in a hundred battles you will never be in peril.” In the business context, this advice underscores the need for contractors to collect market intelligence on their competitors.

In federal procurements, market intelligence is crucial to preparing winning proposals. An offeror that knows its adversary can craft a proposal that highlights areas where it has a distinct competitive advantage.

If the offeror is unsuccessful, however, market intelligence gathered during proposal preparation can be repurposed to develop a viable protest strategy. Offerors that know their competitors are better situated to make credible allegations that challenge the propriety of an award made to another offeror.

It is common for protesters to

make allegations that their proposal was improperly scored and should have received higher evaluation marks from the agency. These protest grounds are rarely successful because they are usually considered “mere disagreement” with the procuring agency’s judgment.

But a protester that is armed with solid market intelligence on the awardee can use that information to make credible allegations that challenge aspects of the awardee’s proposal and the agency’s evaluation of it.

This article spotlights several areas where collecting market intelligence regarding your competitor’s weaknesses can be particularly useful in giving you a strategic advantage in a bid protest “war.”

## Product Features

In many procurements, it is difficult to know how competing offerors may respond to a solicitation’s technical requirements. But, where an agency is procuring commercial products, offerors usually have a better understanding of products their competi-

tors are likely to offer in response to the agency’s solicitation.

Offerors should carefully assess the solicitation to determine whether their competitors’ products will be able to meet the agency’s technical requirements. By doing this analysis during the pre-award phase, the offeror will be well-positioned to challenge an award to any competitor that may have offered a technically noncompliant product.

In *RELX, Inc.*, for example, the Government Accountability Office (GAO) sustained a protest challenging the award of a task order for an electronic search and data access software license.<sup>1</sup> The solicitation required vendors to provide “a single platform with a singular login” and the agency was clear that “[m]ultiple platforms, applications, or systems are not acceptable.”<sup>2</sup>

The protester had done its homework on the awardee’s solution and argued that its software was technically unacceptable. After reviewing the awardee’s quotation, GAO agreed with the protester that

the awardee's quoted software did not comply with the solicitation because it relied on multiple applications to meet the agency's technical requirements. This protest is a prime example of how to leverage market intelligence to overturn an improper award made to a competitor's noncompliant product.

### Past Performance

Protesters often use public information about their competitor's past performance to challenge an agency's evaluation. Although Contractor Performance Assessment Reports (CPARS) are not publicly available, other public data can be used to make credible protest allegations regarding a competitor's past performance.

For example, offerors can use the Federal Procurement Data System (FPDS) to gather information about the value of prior contracts that may have been cited as references in a competitor's proposal. This data can then be used to argue that those prior contracts should not have been deemed "relevant" under the solicitation's past performance criteria because they were too small in comparison to the contract at issue.<sup>3</sup>

A protester also may be able to learn about the scope of work performed by a competitor on a prior contract by obtaining a Performance Work Statement (PWS) for the contract through SAM.gov or the Freedom of Information Act. A protester can potentially cite the PWS in a protest as evidence that the awardee's prior work was not sufficiently similar to the solicitation's scope of work.

Finally, protesters should be aware of any negative public information about

a competitor's prior work, particularly work previously performed for the procuring agency. Under the "too close at hand doctrine," agencies cannot ignore adverse past performance information that "relates to contracts for the same services with the same contracting activity, or information personally known to the evaluators."<sup>4</sup>

To the extent an agency does not consider this type of information in its evaluation, a protester can argue that the agency's past performance evaluation was unreasonable.

### Key Personnel

In the age of social media, companies are able to find more information than ever before about their competitor's employees. LinkedIn and company websites are particularly useful sources of information about employees that can be exploited as evidence in a bid protest.

When a solicitation includes key personnel requirements, protesters may use this information to challenge either the qualifications or the availability of individuals proposed by their competitors.

The protester in *Insight Technology Solutions Inc.*, for example, used a LinkedIn profile to challenge their competitor's key personnel qualifications in connection with the award of a task order for information technology support services.<sup>5</sup> Under the solicitation, the agency was required to evaluate the qualifications of six key personnel including a project operations manager.

The protester alleged that the awardee's proposed project operations manager did not possess the five years of experience required for that

position, citing evidence from his LinkedIn profile. GAO sustained the protest and held that the awardee's proposal misrepresented that its project operations manager had nine years of experience when, in fact, his qualifications did not meet the solicitation's requirements.

Protesters may also use market intelligence collected from LinkedIn or other online sources to allege that the awardee either misrepresented the availability of key personnel identified in their proposal, or failed to disclose the departure of a key person between proposal submission and award.

The protester in *M.C. Dean*, for example, used job postings on the awardee's website to allege that several of its key personnel were not available to perform.<sup>6</sup> GAO sustained the protest after finding that the awardee failed to disclose that its program manager would be unable to perform due to the denial of his security clearance.

### Organizational Conflicts of Interest

Gathering market intelligence is essential to making credible allegations that a contract award is tainted by an organizational conflict of interest (OCI). Indeed, OCI allegations must be substantiated with "hard facts" as opposed to inference or suspicion.<sup>7</sup>

Actionable market intelligence regarding a competitor may provide support for OCI allegations that fall into three familiar categories: (1) unequal access to information; (2) impaired objectivity; and (3) biased ground rules.

In *MANDEX, Inc.*, the protester

alleged that the Navy failed to reasonably evaluate the awardee's OCI in connection with an engineering support task order for Marine Air Ground Task Force Command and Control System Applications (MC2SA).<sup>8</sup>

The protester used its knowledge that the awardee had previously received the MC2SA management support task order to allege that its work on that separate task order created unequal access to information and impaired objectivity OCIs.

GAO agreed with the protester that the agency failed to properly evaluate whether the awardee's work on the management support task order gave rise to an OCI. In GAO's view, the agency failed to reasonably consider whether the awardee's access to information on the management support task order gave it an unfair competitive advantage in the competition for the engineering support task order at issue.

Moreover, GAO found that the agency also did not properly assess whether the awardee's work on the management support task order would involve evaluating its own work on the engineering support task order, which would create an impaired objectivity OCI.

### Small Business Affiliation Issues

In addition to traditional protest grounds, market intelligence can also be extremely valuable in small business size protests. When a solicitation is set-aside for small businesses, it is especially important to gather information that could establish that a competing prime offeror is affiliated with another firm. The offeror will be deemed ineligible for award if the

combined revenues of the offeror and its affiliate exceed the applicable size standard.

One way to prove affiliation is by showing that the prime small business offeror violated the "ostensible subcontractor" rule. An offeror violates that rule if its subcontractor will perform the "primary and vital" requirements of the work, or where the offeror is "unduly reliant" on its subcontractor.<sup>9</sup>

Through market intelligence, a protester may learn that one of its competitors will need to rely too heavily on a subcontractor to perform the contract at issue. That information can then be used to credibly allege that the competitor is in violation of the ostensible subcontractor rule and, thus, affiliated with its subcontractor.

Crop Jet Aviation, LLC (Crop Jet) recently applied this strategy to successfully challenge the size eligibility of its competitor in a procurement to provide "herbicide application services" to the Bureau of Land Management for 51,000 acres of property.<sup>10</sup>

Crop Jet's size protest established that High Desert Aviation, LLC was affiliated with its "ostensible subcontractor," Thomas Helicopters, because that firm would be responsible for performing the "primary and vital" requirements under the solicitation – spraying the herbicide.

### Conclusion

It is well understood that market intelligence is critical to a contractor's success in the highly competitive federal procurement landscape. Contractors use market intelligence to make decisions about which procurements to pursue and how to craft a winning

proposal.

Possessing actionable market intelligence is equally important to developing a winning bid protest strategy. As the cases above illustrate, gathering market intelligence on competitors can provide ammunition in the event bid protest "war" becomes necessary to overturn an improper source selection decision. **CM**

*The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.*

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**Stephen L. Bacon** is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

### ENDNOTES

- 1 RELX, Inc., B-421597.2, B-421597.3, Nov. 17, 2023, 2023 CPD ¶ 262.
- 2 Id. at 3.
- 3 General Dynamics Information Technology, Inc., B-421290, B-421290.2, Mar. 1, 2023, 2023 CPD ¶ 60 at 8-9 (the agency failed to reasonably explain how the awardee's references valued at \$101 million and \$41 million were relevant given that its awarded price was \$241 million).
- 4 Perspecta Engineering, Inc., B-420501.2, B-420501.2, Dec. 13, 2022, 2022 CPD ¶ 314 at 12.
- 5 Insight Technology Solutions, Inc., B-420133.2, et al., Dec. 20, 2021, 2022 CPD ¶ 13 at 6.
- 6 M.C. Dean, Inc., B-418553, B-418553.2, Jun. 15, 2020, 2020 CPD ¶ 206 at 4.
- 7 Northrop Grumman Sys. Corp.--Mission Sys., B-419560.3, et al., Aug. 18, 2021, 2021 CPD ¶ 305 at 7.
- 8 MANDEX, Inc., B-421664, et al., Aug. 16, 2023, 2023 WL 5393491.
- 9 See 13 C.F.R. § 121.103(h)(3).
- 10 High Desert Aviation, LLC, SBA No. SIZ-6179 (2022).