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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 (1)

- 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




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Sources of Protests (2)

- 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



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The Protest Process (1)

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

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The Protest Process (2)


- 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 move ahead with original award
- Legal recourse 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 RFP's and all addendums
- Review the proposals received
- Review the letters of protest
- Schedule 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 (1)

- 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 (2)

- Using some sort of pricing matrix to award cost points, but not having a definite plan in the RFP on how it will 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 (1)

- 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 (2)

- 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.

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Protest A – Medical Supplies (3)

- 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

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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

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Protest B – Cafeteria Services (1)

- RFP was issued
- Three proposals received
- Evaluation committee reviewed/ranked as follows:
 - 1 – Santex
 - 2 – Aimsley
 - 3 - Mansfield
- First two to BAFO
- \$44 million award
- Mansfield protested



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Protest B – Cafeteria Services (2)

- 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.

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Protest B – Cafeteria Services (3)

- 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.

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Decision on Protest B


- 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.

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Recommendations (1)

- Know what the objective of the procurement is
- 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




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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




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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



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