



# FEDERAL SPENDING DATA MADE EASY

Immensely Powerful  
Intelligently connects  
key data points  
Win more business, and  
go beyond the ordinary

# Fedmine Webinar Series with Obermayer

Asserting & Defending Bid Protests  
September 15, 2020

# Agenda

- Introductions
- Presentation by Maria Panichelli
- Q&A – Please use the chat feature to ask or questions or when we open up at the end of the presentation

# Fedmine.us

Fedmine's mission is to bring accurate information, unmatched transparency and clear accountability to the world of government contracts.

Founded in 2004, we provide agencies, prime contractors and support firms convenient, simplified access to the best federal contract data sets available anywhere.

# What We Do

Our online platform analyzes and **simplifies** the increasingly complex federal business landscape in real time, providing you the visibility you need into your addressable market of business opportunities. With Fedmine, you're able to:

- Monitor federal spending by industry, geography or socioeconomic status
- Receive daily alerts based on awarded contracts within your addressable market
- Identify teaming partners and joint ventures, then confidently reach out armed with information from the most coveted Company Profiles in the market
- Dissect competition, quickly comprehend agency markets, drill down to key contacts, and download information or share it with peers
- Conduct fast Super Searches, create custom keyword alerts, discover subcontractors at the task order level, with complete comprehension of what matters most
- Build a pipeline with addressable re-compete and newly forecasted solicitations

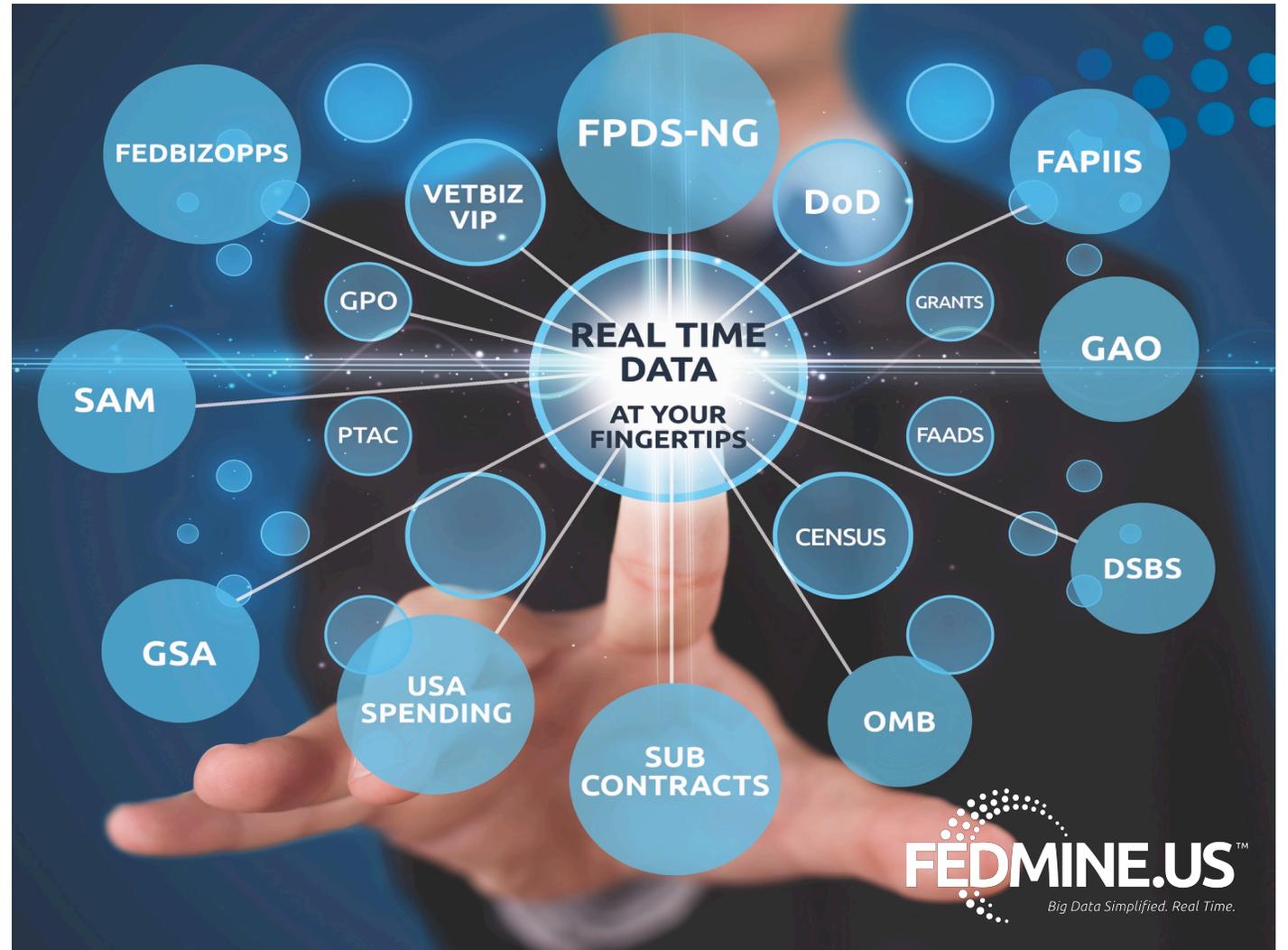
# How It Works

Data is populated directly from federal government sources. Unlike error-prone manual methods, our fully automated technology architecture leverages the power of the internet to curate real-time information from integrated data sets in an easy-to-use platform.

Using Fedmine, you get:

- Customized keyword searches to understand who's winning federal contracts
- Email alerts to keep you up-to-the-minute on re-compete contracts, new opportunities, and awards made to your competitors with task order detail
- Agency and company profiles by socioeconomic status, place of performance, industry, company size
- and more
- Competition mix analysis by agency, bureau, military base and contracting office
- Links to comprehensive federal spending information

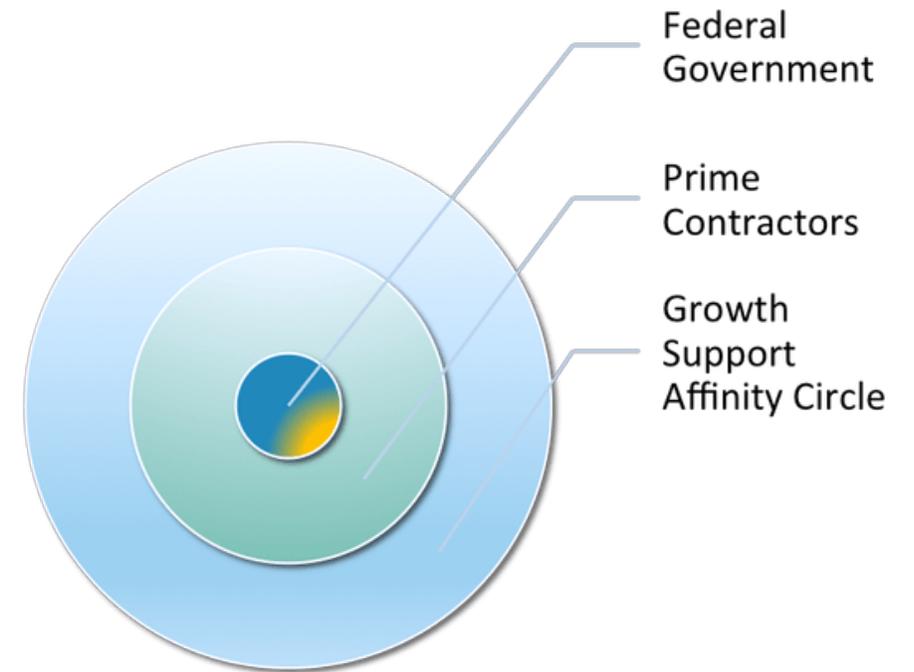
# Data Sources



# Who We Serve

Fedmine is SaaS (Software as a Subscription) product for commercial and government clients.

Our clients include Prime Contractors, Growth Support organizations and the Federal Government itself – we call this the “Fed Circle”



# GAO Bid Protests

One of the data sources for Fedmine is the protest database from the General Accountability Office (GAO)

Protests Decisions provide valuable information and can be a very helpful resource. Not only do they provide the reasoning, but can competitive information such as pricing, rating to name a couple

Check out this article on “Study of GAO Protest filed at the DoD” By Willamette Univ, using Fedmine data [on our website](#)

Within Fedmine you can search the protest database by agency, date range and type of outcome

Protests are also linked to the solicitation/award page to provide quick visibility to Fedmine users

**Solicitation Modifications Details** FISCAL YEAR - 2020

Add to MyPipeline [Update Missing Notices](#) [Tab View](#) [RFP Search](#) [Go Back To Paged Listing](#) [Download PDF](#) [Email Report](#)

<b>Subject:</b>	Marine Corps Tactical Systems Support Activity (MCTSSA) Networks, Engineering, Test and Cybersecurity (NETC) Services		
<b>Solicitation Reference #:</b>	M68909-20-R-7600	<b>Posted Date:</b>	06/17/2020
<b>Agency:</b>	DEPT OF DEFENSE	<b>Response Date:</b>	06/22/2020
<b>Sub-Tier:</b>	DEPT OF THE NAVY	<b>Archive Date:</b>	12/31/2020
<b>Office/Location:</b>	SUPPLY OFFICER	<b>Classification Code:</b>	R4 -
<b>State:</b>	CA	<b>NAICS Code:</b>	541512 - Computer Systems Design Services
<b>Zip:</b>	92055-5171	<b>Set-Aside Acquisition:</b>	8(a) Set-Aside (FAR 19.8)
<b>POP State:</b>	CA		
<b>Place of Performance:</b>	United States		

**Contact Details:** Name: Kate Wimmer, Email: [katrina.wimmer@usmc.mil](mailto:katrina.wimmer@usmc.mil)

Name	Title	Email	Phone	Fax
Kate Wimmer	Email	<a href="mailto:katrina.wimmer@usmc.mil">katrina.wimmer@usmc.mil</a>		

**Contracting Office:** CAMP PENDLETON CA 92055-5171 USA  
**Agency URL:** <https://beta.sam.gov/opp/a76131aa604748b58bdc55a2c975e3f2/view>

**Procurement Description**  
Amendment 0003 is posted to include the ability to provide an extract from the National Industrial Security System (NISS) or an executed DDS FL 381-R, Letter of Notification of Facility Security Clearance.  
Amendment 0002 is posted to provide responses to questions received.

**Protest Filings**

- 1) Logic West JV, LLC
  - Outcome : Not Decided
  - Filed Date : Sep 09, 2020[More Details](#)

**Complete Details**

- Solicitation Modifications
  - Jun 17, 2020
  - Jun 15, 2020
  - Jun 12, 2020
  - May 14, 2020
- Pre-Solicitations
  - Apr 17, 2020



# Asserting & Defending Bid Protests

Presented By:

Maria L. Panichelli, Esq.

*for Fedmine*

# Meet the Presenter

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# *A Protest Primer*

# It all Begins with a Requirement...

*In a nutshell:*

- Government Identifies a Need
- Solicitation is Put “Out on the Street”
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- Awardee(s) Chosen

# Know Your Lingo and Appreciate the Differences...



- **Bid Protests**

- Challenge raised by contractor (competitor), based on alleged improprieties in source selection process (i.e. failure of agency to comply with applicable law, terms of solicitation, etc.)

- **Size Protests**

- Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to size)

- **Status Protests**

- Challenge raised by contractor (competitor), based on awardee eligibility (specifically with regard to other eligibility issues)

# What **Laws** Govern Bid Protests?

- Federal Acquisition Regulation (FAR)
- Supplemental Agency Acquisition Regulations
- Small Business/VA Regulations
- Forum Rules

# Critical Questions and Considerations

- What **method** of Procurement is being used?
  - FAR Part 14 Sealed Bidding? FAR Part 15 Contract by Negotiation? (Competitive Range? LPTA?) Other types of procurement?
    - Evaluation Scheme, Phases, Debriefings
- What **type** of contract is at issue?
  - Is the contract award at issue an IDIQ? Set-aside contract? A Task Order under a GWAC?
- **Who** are you dealing with?
  - One Agency, Multiple Agencies? Which role is which agency playing?
    - DoD Debriefing Rules
    - Task Order Jurisdiction



# *Asserting Bid Protests*

# **Where** Are Protests Filed and Heard?

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

# Different **Types** of Protests



- The type of protest is defined by/dependent on what you are protesting, and where you are in the procurement timeline...
- Accordingly, it is:
  - Critically important to understand the procurement timeline
  - Critically important to act at the right time....or lose your protest rights

# Different **Types** of Protests



- Remember:
  - Government Identifies a Need
  - Solicitation is Put “Out on the Street”
  - Contractors Submit Responses to Solicitation
  - Evaluation of Contractors/Source Selection
  - Awardee(s) Chosen

***There are Different Jumping Off Points!***

# Pre-Award Protests Based on Errors in Solicitation



- Government Identifies a Need
- **Solicitation is Put “Out on the Street”**
  - Is there a problem with the Solicitation itself?  
→ Time for a **Pre-Award Protest Based on Errors/Issues Relating to the Solicitation**
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- Awardee(s) Chosen

# Pre-Award Protests Based on Errors in Solicitation



- What is **Protestable**?
  - Ambiguous or contradictory terms
  - Inclusion of prohibited terms/exclusion of required terms
  - Unduly or overly restrictive terms or specifications
  - Improper use of LPTA
  - Set-aside/“rule of two”/Kingdomware issues
  - *De Facto* responsibility determination

# Pre-Award Protests Based on Errors in Solicitation

- What is the **Deadline** To Bring the Protest?
- Pre-Award Protests Based on the Errors in the Terms of the Solicitation must be brought **before the deadline to respond to the solicitation**
- A post-award protest of such issues is untimely -- Do **not** roll the dice or hedge

# Protests Based On **Exclusion from the Competitive Range**



- Government Identifies a Need
- Solicitation is Put “Out on the Street”
- Contractors Submit Responses to Solicitation
- **Evaluation of Contractors/Source Selection**
  - Is this a FAR Part 15 procurement that utilized competitive range? Were you improperly excluded from the competitive range?
    - Time to start down the path to a **Pre-Award Protest Based on Exclusion from Competitive Range**
- Awardee(s) Chosen

# Post-Award Protests

- Government Identifies a Need
- Solicitation is Put “Out on the Street”
- Contractors Submit Responses to Solicitation
- Evaluation of Contractors/Source Selection
- **Awardee(s) Chosen**
  - **Post-Award Protests**

# Competitive Range and Post-Award Protests



- What is Protestable?
  - Will depend on the nature of the procurement/under which section of the FAR the requirement is being procured
    - Price only or Non-Price Evaluation Factors?
    - Did the Agency follow the Solicitation's stated Evaluation Scheme?
    - Did the Agency follow/comply with Applicable Law?

# Competitive Range and Post-Award Protests



- What is Protestable?
- Common Non-Price Evaluation Factor Issues
  - Unstated evaluation criteria or subfactor, etc.
  - Error in applying evaluation criteria/assigning ratings
  - Unequal or disparate treatment of offerors
  - Meaningful/misleading/uneven discussions
- Common Price Evaluation Issues
  - Price Reasonableness
  - Price Realism
  - Escalation, Adjustment
  - Balanced Pricing
  - HUBZone Preference

# Competitive Range and Post-Award Protests



- What is the **Deadline** To Bring the Protest?
- **...It depends!** The Deadline differs depending on forum and on other factual circumstances
- General” (GAO) Rule: Protestor must file its protest **not later than 10 days after the basis of protest is known or should have been known** (whichever is earlier) -- Generally going to be award notice, announcement, etc.
- Exception: In protests challenging a procurement conducted on the basis of competitive proposals under which a required debriefing is (timely) requested the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed **not later than 10 days after the date on which the debriefing is held**

# Required and Requested Debriefs

- When is a Debriefing Required?
  - Can get **TRICKY!**
- When is a Debriefing Timely Requested?

# A Quick Recap on Protest Deadlines



- Pre-Award Based on Solicitation Errors/Issues → Submit before the deadline to response to the Solicitation
- Otherwise, We are looking at 10 days from....
  - Required, Timely Requested Debriefing → 10 days from the conclusion of the debriefing
  - Everything Else → 10 days from the day you knew/should have known the basis of your protest
- Ready for a new wrinkle? What is the **Automatic Stay**, Why Would You Want It and What is the Deadline to Get It?

# Debriefings, Part Deux

## Pre-Award Debriefings

At a minimum, pre-award debriefings shall include:

- The agency's evaluation of significant elements in the offeror's proposal;
- A summary of the rationale for eliminating the offeror from the competition; and
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.

Pre-award debriefings shall not disclose:

- The number of offerors;
- The identity of other offerors;
- The content of other offerors' proposals;
- The ranking of other offerors;
- The evaluation of other offerors; or
- Trade secrets; Privileged or confidential manufacturing processes and techniques; Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; or the names of individuals providing reference information about an offeror's past performance

# Debriefings, Part Deux

## Post-Award Debriefings

At a minimum, post-award debriefings shall include:

- The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
- The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- A summary of the rationale for award;
- For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
- Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable

Post-award debriefings shall not disclose:

- The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors
- Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including: Trade secrets; Privileged or confidential manufacturing processes and techniques; Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; or the names of individuals providing reference information about an offeror's past performance

# Debriefings, Part Deux



- Pro Tip: ALWAYS Get A Debriefing!
- DoD Enhanced Debriefing Deviation
  - Impact on Filing Deadlines...
- What about non-DoD Procurements? In person v. telephonic v. written? Questions' impact on deadlines?
- Who Should Attend (if in person or telephonic)?
- Strategy Issues

# What Does a Protestor Need to File?

**FORMAT:** Differs by Forum

- Agency and GAO – A Letter
- COFC
  - Complaint
  - If seeking a stay, you likely also need a Motion for Temporary Restraining Order, a Motion for Preliminary Injunction, a Memorandum in Law in support of the two motions, possibly affidavits, etc.

# What Does a Protestor Need to File?

**SUBSTANCE:** Same across all Forums

- Threshold requirements
- Factual/Legal Grounds for Protest
  - Need to get past “speculation” level - Failure to provide specific details and concrete facts may support a motion to dismiss
  - But it is a balancing act
  - “Sometimes you don’t know if you have a protest....”

\* Pro Tip - Include a Request for Documents

# Protest **Litigation** Timeline

- Protest
- (Requests for Dismissal)
- Agency Record/Report
- (5 Day letter)
- Comments to the Agency Report/Supplemental Protests
- Additional Briefing?
- Decision

❖ *Corrective Action*

❖ *Hearing*

❖ *Other Oddities?*

# A Final Tip: Don't Pursue a **Losing** Protest!



- Jurisdiction
- Standing
- Competitive Prejudice (lack thereof)
- How do you know when to let it go?
  - Cost v. Likelihood of Success (Objective/Subjective; Speculation)
  - What does a “Win” look like? What does a win result in?
  - Can You Take it in Stages/Control Costs?
- \* Common Contractor Question: Practical Concerns



# *Defending Bid Protests*

# When **Your** Award Is Protested...

- Protest is Technically Against the Agency...
  - How can you defend the Agency's actions? You often can't...
  - Even though the contractor-awardee was the ultimate beneficiary, they had no control over the agency source selection process
  - This makes substantive arguments hard, at times
  - But – even in these circumstances - you can usually find procedural arguments that help
  - Often, through strategic planning, you can leverage those for a win or something close to a win

# INTERVENTION!

- Protest is Technically Against the Agency...
  - So Government Counsel Will be Defending Against the Protest
  - Why not just sit back and let them?
  - Because you need to protect YOUR rights. Your interests may be in line with the government's interests *right now*. Maybe it will stay that way...or maybe your interests will diverge. Someone needs to speak up for YOU.
  - Take Away: **Always Intervene!!!!**

# INTERVENTION!

- Intervention is Easy – A simple, short filing
- Jumping off point for cultivating a relationship/partnership with Agency Counsel/DOJ, and a means to track government efforts to defend your award
- You can modulate efforts/legal costs from there, but you have your foot in the door, and are able to monitor the case, and cover your bases
- Provide support to the agency/DOJ, pick up slack, voice YOUR concerns, protect YOUR rights and defend YOUR award

# INTERVENTION!

- Protest Deadlines / Timeliness as a Basis for Dismissal
- Substantive Validity / Speculation as a Basis for Dismissal
- Standing/Jurisdiction as a Basis for Dismissal
- Defenses Against Bid Protests
  - Lack of Competitive Prejudice
  - Agency Discretion/Deference
  - Piecemeal Arguments
  - (No) Diligent Pursuit of Information

# INTERVENTION!

- Sometimes, When Both Substantive and Procedural Arguments Fail You, There are Still Protest Litigation **Tactics** that Can Be Used Strategically
  - You can limit the documents in Agency Report
  - You can try to defeat the Stay



Questions?

# Contact Information



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