



PROTORÆ LAW_{PLLC}

*The GovCon Guide to
What, When, Where and Why
to Protest*

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Devon E. Hewitt

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Devon Hewitt has over 20 years' experience in the field of government contracts, representing small, mid-tier and large government contractors. Ms. Hewitt is primarily a litigator and has represented clients in over 100 protests before federal agencies, the U.S. Court of Federal Claims, and the Government Accountability Office. She also has argued protest appeals at the United States Court of Appeals for the Federal Circuit and last year she assisted the appellants in the *Kingdomware* case filed in the United States Supreme Court. In addition to protest matters, Ms. Hewitt represents clients in subcontract and other disputes in civil courts and in arbitrations. Prior to joining Protora Law, Ms. Hewitt was a partner at Piliero Mazza in D.C. and a partner in the Government Contracts practice of Pillsbury. She is a graduate of Smith College (*magna cum laude* and Phi Beta Kappa) and the University of Virginia School of Law.

Courtney Edmonds

Assistant General Counsel, Leidos, Inc.

Courtney Edmonds is an Assistant General Counsel at Leidos, Inc. He has been involved in federal procurement law for over 20 years in a variety of professional roles. After serving in the U.S. Air Force in Germany, the Philippines and Washington, D.C., Courtney began his procurement career as a Contract Specialist for the U.S. Navy's Fleet Industrial Supply Command. Later, he became a procurement consultant for Mitretek Systems. While at Mitretek--which is now known as Noblis, Inc.--he supported the U.S. Postal Service Purchasing Department's effort to establish and administer a program that awarded over \$230 million in contracts relating to the Postal Services' IT systems modernization efforts.

During his tenure at Mitretek, he completed his J.D. through Georgetown University Law Center's Evening Division. After graduating from Georgetown, Mr. Edmonds was an associate in the government contracts practices of Sidley Austin, Fried Frank and McKenna Long & Aldridge. His practice included all aspects of procurement law, including bid protests, identifying and mitigating organizational conflicts of interest, dispute avoidance and resolution, M&A, battlefield contracting, internal investigations, ethics and compliance, and public private partnerships.

What is a Protest?

- **A challenge (“written objection”) to agency action in a federal procurement**

- **Types of protests**
 - A challenge to the size/status of an offeror in a small business set-aside procurement
 - Challenge to NAICS codes

 - A challenge to an agency’s conduct of a procurement
 - Challenge to solicitation terms
 - Specification too restrictive
 - Ambiguous provisions/terms
 - Challenge to exclusion from competitive range
 - Challenge to contract award

 - A challenge to an agency’s proposed corrective action

What are the questions in-house counsel should be prepared to answer if a protest is being considered by the company?

- **Can a protest be filed?**
 - Nature of company concerns
 - Protestable issue?
 - Standing
 - Company entitled to protest?
 - “Timeliness”
 - Still within protest timeframes?
 - Subject Matter Jurisdiction
 - Value of Task Order protested

- **How much will the protest cost?**
 - Different stages of the protest process
 - Always can withdraw
 - Fees associated with each stage
 - Most time spent on drafting protest and drafting protest “comments”
 - Drafting of protest comments more expensive than drafting protest

- Options for reducing fees/ costs
 - Many different options in addition to selection of counsel

- **What is the likelihood of success?**
 - Protest venues
 - Agency, FAA, SBA, GAO, COFC
 - Conventional wisdom is that likelihood of success greatest at COFC, weakest at agency level
 - Type of procurement
 - LPTA harder to protest than Best Value
 - Nature of allegations
 - Reviewing forum will not substitute its judgment for the judgment of the agency
 - Demonstration of “prejudice”
 - Protester must show that but for agency’s improper action, it had “substantial chance” of receiving the award
 - Hard in LPTA context; easier in Best Value context

- **What are the potential remedies if a protest is sustained?**
 - Types of agency “corrective action”

- Amendment of solicitation, reopening of discussions, resubmission of proposals, reevaluation of proposals, new source selection
 - GAO recommendations
 - Not binding; agency may ignore but must report choice to Congress
 - Reimbursement of bid and proposal/protest costs
 - GAO vs. COFC
 - Small Business v. Other Than Small Business
 - Protest Costs v. Bid and Proposal Costs
- **Are there any other issues that should be taken into consideration? **Yes!****
 - **Several business issues factor into protest decision in addition to legal issues**

Can a protest be filed?

- **Nature of company concerns**
 - Violation of procurement law or regulation
 - Agency conduct of procurement
 - “Reasonableness” = GAO standard of review
 - “Arbitrary and capricious” or “abuse of discretion” = COFC review
 - Bad faith
 - Almost impossible to win; must show “well nigh irrefragable proof”

- **“Timeliness”**
 - Agency/GAO vs. Court of Federal Claims
 - Timeliness window for agency/GAO protest
 - Pre-award protest
 - ❖ Before due date for submission of proposals
 - Post award protest
 - ❖ **10** calendar days of when protester knew or should have known the facts which form the basis of the protest

- No timeliness window for COFC but delay may affect balancing of equities in decision to award a preliminary injunction

- CICA Stay
 - Pre-Award
 - Agency cannot award contract pending resolution of protest
 - ❖ Override possible if *urgent and compelling* reasons exist or agency determines override is in the *best interests of the government*
 - Post-Award
 - Must file protest *within the later of 10* calendar days after notice of award or *5* calendar days from the date the agency proposes to hold the debriefing, *if debriefing required*
 - ❖ Debriefing request must be in writing and made w/in *3* calendar days from notice of award
 - Override possible if *urgent and compelling* reasons exist or agency determines override is in the *best interests of the government*

- **Is the company an “Interested Party”?**
 - Prospective/actual offeror
 - “direct economic interest” must be affected by the contract award
 - Subcontractors are not considered “interested parties”
 - Prejudice
 - Protester must demonstrate that it is next in line for award or that it would regain opportunity to compete if protest sustained
 - “substantial chance” of receiving award
 - “reasonable possibility of prejudice
 - Doubts resolved in favor of protester

- **Is there a protest forum that has subject matter jurisdiction over the protest?**
 - Agency
 - FAA/SBA
 - GAO
 - Contract awards made by a “federal agency”
 - Does not include FAA, NAFI, US Postal Service, US Mint
 - Task Order awards

- Dollar Threshold/Civilian/\$10 million
- Dollar Threshold/Defense/\$25 million
- DoD task orders issued under civilian GWACS subject to \$10 million threshold
- FSS Order awards
 - May protest GSA Schedule contract award at any value
- Court of Federal Claims
 - No jurisdiction over protests re Task Order awards unless Task Order increases the scope, period, or maximum value of overlying contract
 - Will not review GAO's review of a protest

How much is it going to cost?

- **Choice of protest forum**
 - Agency vs. GAO vs. Court of Federal Claims
 - Balancing costs/fees against “likelihood of success”

- **Costs/Fees per Stage of Protest Process**
 - 1/4 fact gathering, drafting protest
 - 1/8 review of agency record
 - 1/2 drafting comments
 - 1/8 miscellaneous
 - Protective Order issues
 - Discussions with outside counsel

- **Factors that can *increase* anticipated costs**
 - Choice of outside counsel
 - Agency override of CICA stay
 - Review at COFC
 - Supplemental protests
 - Experts/Consultants
 - Extent of company participation

- **Factors that can *decrease* anticipated costs**
 - Choice of outside counsel
 - Alternative dispute resolution
 - Can be reimbursed protest costs if agency unduly delayed
 - Agency corrective action
 - Can be reimbursed protest costs if agency unduly delayed
 - Outcome prediction
 - Can be reimbursed protest costs
 - Reimbursement of bid and proposal costs
 - GAO will only award bid and proposal costs where protester will not have a continued opportunity for award
 - Bid and proposal costs only relief available to successful protester at COFC
 - Reimbursement of protest costs
 - Attorneys' Fees/ Agency
 - Not recoverable
 - Attorneys' Fees/GAO
 - Small businesses get actual attorney hourly rates

- Other than Small Businesses recovery of hourly rates capped at \$150 unless GAO recommends increase because of COLA or special factors
- Expert/Consultant Fees
 - Capped at the highest rate government pays for same (\$75)
- In-house costs
 - Must be directly related to the protest
 - Must be adequately documented
- Protest Costs/COFC
 - Through Equal Access to Justice Act
 - Only applies to businesses with a net worth below \$7 million or less than 500 employees
 - Must show agency's position was not "substantially justified"
- Timing
 - GAO sustains
 - ❖ Must file certified claim for costs with agency within 60 days after receipt of GAO decision
 - Agency Corrective Action
 - ❖ Must file certified claim for costs within 15 days of the date on which protester

learned that GAO dismissed protest
based on corrective action

- Extent of company participation

What is the likelihood of success?

- **It Depends.**
 - Depends on definition of success
 - What are the potential remedies?
 - Contract Award
 - Second Bite at the Apple
 - More information on source selection decision
 - Elimination of awardee
 - Depends on forum in which protest is filed
 - Agency/GAO/FAA/Court of Federal Claims
 - Discovery
 - ❖ No discovery for agency protest
 - ❖ Discovery in GAO/COFC protests
 - GAO may conduct hearing but rare; in FY 2017 GAO conducted hearings in only 1.7% of cases
 - ❖ Additional discovery possible at COFC, i.e. depositions
 - CICA Stay
 - ❖ Automatic at GAO
 - Upon GAO (1) day notice

- ❖ Must get preliminary injunction at COFC; high standard, must post bond
- Remedy
 - ❖ GAO recommendation
 - ❖ COFC enforceable order
- Depends on the type of procurement
 - Best Value vs. LPTA vs. Fixed Price vs. Cost Reimbursement
- Depends on nature of allegations
- Depends on agency conducting the procurement
 - FY 2016 GAO sustain rate
 - DoD = 18.2%
 - HHS = 12.5%
 - DHS = 8.3%
 - Justice = 22.2%
 - Air Force = 20.4%
 - Army = 12.1%
 - Navy = 17.8%
 - VA = 21.1%
 - GSA = 25%
 - NASA = 9.1%
- Depends on outside counsel

- **Remedies**

- Contract Award v. Agency Corrective Action

- Successful protester will not receive contract award
 - GAO recommendation for corrective action
 - GAO only “recommends” a remedy
 - If agency does not follow recommendation it must report it to Congress
 - Rare; in last 20 years only happened around 50 times; 34/50 = VA *Kingdomware*
 - Recommendation = typically second bit at the apple (amendment of solicitation, reopening of discussions, resubmission of final proposal revisions, reevaluation of final proposal revisions, new source selection determination)
 - COFC will enjoin award or declare award improper

- **Statistics**

- GAO (FY 2017)

- Decisions vs. Effectiveness rate
 - Cases Filed = 2596 (down 7% from FY 2016)

- % increase steadily increased from FY 2014 – FY 2016
- Sustain rate = 17% (down from 23% in FY 2016)
 - As low as 12% (FY 2015)
 - As high as 23% (FY 2016)
- Effectiveness rate = 47%
 - As low as 43% (FY 2014/2015)
 - As high as 47% (FY 2017)

- Court of Federal Claims

- **Nature of Allegations**

- Protest Allegations

- Lack of “meaningful discussions”
- Unreasonable Technical evaluation
- Unreasonable “Cost Realism” evaluation
- Unreasonable Pricing Evaluation

- GAO Report FY 2017, in order of success

- Unreasonable Technical evaluation
- Unreasonable Past Performance evaluation

- Unreasonable cost/price evaluation
- Inadequate documentation of the record
- Flawed source selection decision

Are there any other issues that should be taken into account?

- **Continued performance/incumbency**
 - Agency supposed to issue decision on a protest w/in 35 days
 - GAO supposed to issue decision on a protest w/in 100 days
 - Nearly half of GAO protests decided within 30 days (deadline for filing agency report)
 - Around 70% resolved within 60 days
 - Not time limit on COFC protests
 - 75% resolved within 150 days

- **Customer Relations**
 - How important is the contract?
 - How important is it to have work at this agency?

- **Internal politics**
 - C-suite personnel concerns
 - General Counsel concerns
 - Business Leads concerns

- Business Development personnel concerns
- **Possibility of a compromise/settlement**
- **Distraction of company personnel/disruption of business operations**
- **Protective Order issues**
 - In-house counsel will not be able to participate in protest if he/she involved in “competitive decision making”
 - Company will not receive much information re evaluation of awardee proposal

New Developments:

- **RAND Study**

- Applied only to *DoD* procurements
- Mandated by Section 885 of the FY 2017 National Defense Authorization Act
- Sent to Congress on December 21, 2017
- *Findings*
 - Impossible to predict outcome of bid protest
 - Only .3% of DoD contract awards protested
 - Agencies override stay in only 1.4% of protests
 - More than half of protests filed by small businesses
 - 10.6% protests protest award of a task order
 - Task order protests more likely to be sustained
 - Inadequate debriefings provide fertile ground for debriefings
 - 2008-2017, 950 protests filed at COFC = .025% of contracts awarded during that time
 - Of 459 DoD protests filed at COFC, only 9% sustained

- **Updated GAO Bid Protest “Descriptive Guide”**

- May 1, 2018

- **EPDS**

- GAO “electronic bid protest filing and dissemination system”
- Effective May 1, 2018 (except for classified protests)
- \$350 filing fee
 - Only required for initial protest filing
- Issues
 - No messaging function
 - Indefinite storage of documents?
 - If agency decides to override; must upload determination and findings justifying override
 - Proposed redactions not uploaded into EPDS
 - Party-specific redactions not prohibited

- **2018 National Defense Authorization Act**

- Enhanced Debriefing (§ 818) – Implemented Mar. 22, 2018
 - Offerors may submit questions within two business days of the debriefing
 - Agency required to respond within five business days
 - CICA stay triggered if protester files within 5 calendar days of receipt of agency answers to questions

- Loser Pays Pilot Program (§ 885) – Effective Oct. 1, 2019
 - Large businesses (greater than \$250 million) filing protests *at the GAO* between October 1, 2019 and September 30, 2022 must reimburse DoD costs of defending the protest if protest *denied*
 - Applies also to *dismissed* protests?
 - What about partial denial?

In summary

- **Anticipate, then educate.**
 - Know *what* types of protests can be filed
 - Know *when* a protest can or should be filed
 - Know *where* a protest can be filed and the reasons to choose one forum over another
 - Know the reasons *why or why not* the company might file a protest

- **Time is of the essence.**
 - Remember the numbers **3** (debriefing request), **5** (CICA stay), and **10** (timeliness)

- **Money. Money. Money.**
 - Know what circumstances may increase or decrease the costs of a protest

- **Be a lawyer. Be a business advisor. Be a politician.**
 - Know the legal issues associated with protests

- Understand the business objectives and the big picture
 - Be sensitive to the different concerns of the different constituencies within the company
- **Have your outside counsel's number on speed dial.**
 - *My number is*