



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

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Devon E. Hewitt

Chair, Government Contracts Practice

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

Assisant 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
 - A challenge to an agency’s conduct of a procurement
 - Challenge to solicitation 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
 - Standing
 - “Timeliness”
 - Subject Matter Jurisdiction

- **How much will the protest cost?**
 - Different stages of the protest process
 - Fees associated with each stage
 - Options for reducing fees/costs

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

- **What is the likelihood of success?**
 - Protest venues
 - Type of procurement
 - Nature of allegations
 - Demonstration of “prejudice”

- **What are the potential remedies if a protest is sustained?**
 - Types of agency “corrective action”
 - GAO recommendations
 - Reimbursement of bid and proposal/protest costs

- **Are there any other issues that should be taken into consideration? **Yes!****

Can a protest be filed?

- **Nature of company concerns**
 - Violation of procurement law or regulation
 - Arbitrary or unreasonable agency action
 - Bad faith

- **“Timeliness”**
 - Agency/GAO v. COFC protests
 - Agency/GAO protests
 - 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
 - COFC protests
 - No timeliness window but delay may affect balancing of equities

Can a protest be filed? (cont.)

- CICA Stay
 - Pre-Award
 - Agency cannot award contract pending resolution of protest
 - Override possible if urgent and compelling circumstances exist or it is in the government's best interest
 - 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
 - ❖ New DoD "enhanced debriefing" rule
 - Override possible if *urgent and compelling* reasons exist or agency determines override is in the *best interests of the government*

Can a protest be filed? (cont.)

- **Is the company an “Interested Party”?**
 - Prospective/actual offeror
 - Prejudice

- **Is there a protest forum that has subject matter jurisdiction over the protest?**
 - Agency
 - FAA/SBA
 - GAO
 - Contract awards *by a federal agency*
 - Task Order awards
 - Dollar Threshold/Civilian/\$10 million
 - Dollar Threshold/Defense/\$25 million
 - FSS Order awards
 - Court of Federal Claims
 - No jurisdiction over protests re Task Order awards

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 associated with different stages of the 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

How much is it going to cost? (cont.)

- **Factors that can *increase* anticipated costs**
 - Choice of outside counsel
 - Agency override of CICA stay
 - Supplemental protests
 - Experts/Consultants
 - Extent of company participation
- **Factors that can *decrease* anticipated costs**
 - Choice of outside counsel
 - Alternative dispute resolution
 - Agency corrective action
 - Outcome prediction
 - Reimbursement of bid and proposal costs
 - Reimbursement of protest costs
 - Extent of company participation

What is the likelihood of success ?

- **It Depends.**
 - Depends on definition of success
 - What are the potential remedies?
 - Depends on forum in which protest is filed
 - Agency/GAO/FAA/Court of Federal Claims
 - 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
 - Depends on outside counsel

What is the likelihood of success? (cont.)

- **Remedies**
 - Contract Award v. Agency Corrective Action
 - Court Order vs. GAO Recommendation
- **Statistics**
 - GAO
 - Decisions vs. Effectiveness rate
 - Court of Federal Claims
- **Nature of Allegations**
 - Easiest to survive motion to dismiss
 - GAO sustains

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

- **Continued performance/incumbency**
 - Decision timelines
- **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 access
 - Company access to evaluation and source selection information

New Developments

- **Rand Bid Protest study**
 - Only applied to DoD procurements
 - Mandated by Section 885 of the FY 2017 National Defense Authorization Act
 - Sent to Congress on December 21, 2017
- **Updated GAO “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
- **2018 National Defense Authorization Act**
 - Enhanced Debriefing (§ 818) – Implemented Mar. 22, 2018
 - Loser Pays Pilot Program (§ 885) – Effective Oct. 1, 2019

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*

Questions

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