



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. She advises clients on a wide range of government contracting issues including FAR compliance; small business contracting programs; intellectual property and data rights; GSA Schedule; the Service Contract Act; noncompete, nonsolicitation and nondisclosure agreements; subcontracts and teaming arrangements; joint ventures; FOIA; due diligence and novations; contract claims; codes of ethics and business conduct; mandatory and voluntary disclosures; suspension and debarment; terminations; and government audits and investigations. Ms. Hewitt also is a litigator and has represented clients in nearly 100 protests before federal agencies, the U.S. Court of Federal Claims, and the Government Accountability Office. In addition, Ms. Hewitt represents clients in subcontract and other dispute matters in civil courts and in arbitrations. Prior to joining Protora Law, Ms. Hewitt was a partner at Piliero Mazza in DC and a partner in the Government Contracts practice of Pillsbury, a large, multi-national law firm.

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 vs. Court of Federal Claims
 - 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
 - CICA Stay
 - *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/**3** calendar days from notice of award

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 exception
 - GAO
 - Contract awards
 - 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
 - 1/16 review of agency record
 - 1/2 drafting comments
 - 1/16 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**
 - Lack of “meaningful discussions”
 - Unreasonable Technical evaluation
 - Unreasonable “Cost Realism” evaluation
 - Unreasonable Pricing evaluation

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

- **Continued performance/incumbency**
- **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 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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