

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

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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 primarily is a litigator and has represented clients in over 100 protests before various federal agencies, including SBA and FAA, the U.S. Court of Federal Claims, and the GAO. Ms. Hewitt also represents clients in subcontract and other disputes in civil courts and in arbitrations. On the transactional side, she regularly reviews teaming agreements and subcontracts and advises companies on FAR compliance. Ms. Hewitt has considerable experience in SBA's small business contracting programs, having authored a treatise and twice served as an expert witness on the subject.

Ms. Hewitt sits on the SECAF Board, was appointed its General Counsel in 2018 and serves as the Chair of the Legislative & Regulatory Committee.

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. Ms. Hewitt has been named one of the Legal Elite by Virginia Business Magazine for the last three years and a Best Lawyer 2019 by Arlington Magazine.

*What are the **THREE** most important things you need to know if a protest is being considered by the company?*

- **What is a protest?**
- **Can a protest be filed?**
- **What are the potential remedies if a protest is successful?**

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

Can a protest be filed?

- “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 a debriefing is 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
 - Subcontractor
 - 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

Can a protest be filed? (cont.)

- **Nature of company's concerns**
 - Violation of procurement law or regulation
 - Unreasonable action
 - Was agency evaluation consistent with the Solicitation's evaluation criteria?
 - Undocumented evaluation and source selection
 - Not typically a protest allegation since disappointed offerors generally not allowed to see agency documents before filing a protest
 - Bad faith
 - Need "well-nigh irrefragable proof"
 - The Government is too disorganized to engage in a conspiracy

What are the potential remedies?

- **CICA Stay**
 - Stop Work Order (Temporary)
 - Override of Stay
- **Corrective Action**
 - Price Exposure
- **GAO**
 - Recommendation
- **United States Claims Court**
 - Injunctive Relief

*What are the **THREE** critical questions your company should consider before filing a protest?*

- **What is the likelihood of success?**
- **How much will the protest cost?**
- **Should the company intervene?**

What is the likelihood of success ?

- **It Depends.**
 - Depends on definition of success
 - Depends on forum in which protest is filed
 - Agency/GAO/FAA/Court of Federal Claims
 - Statistics
 - 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 will it 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 (GAO)
 - Reimbursement of protest costs (GAO)
 - Extent of company participation

Should the company intervene?

- **Who can intervene?**
 - Contract/task order awardee
- **Why intervene?**
 - Participate in preliminary process
 - Granting in-house counsel access to protected material
 - Participating in decisions re corrective action
 - Increase chances of keeping award
 - Better defense
 - Monitor process
 - Compromise/settlement
- **How much does it cost to intervene?**

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

The **SIX** ways to improve your chance of winning a protest:

- **Familiarize yourself with the protest process** (*Check √*)
- **Hire a lawyer** (*my number is 703-942-6746 ☺*)
- **Re-read your proposal** (*“you can't handle the truth”*)
- **Listen to your lawyer** (*“don't kill the messenger”*)
- **Participate in the process** (*“help me help you”*)
- **Drop Protest allegations** (*don't be greedy*)

Questions ?

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