



BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

TO FILE OR NOT TO FILE: KEY ISSUES WHEN DECIDING TO PROTEST

By Richard P. Rector, C. Bradford Jorgensen, and Daniel J. Cook

Deciding whether to file a bid protest can be difficult. Many companies are understandably reluctant to fight with a customer over a lost contract, and the payoff for a successful protest is not necessarily a contract award. On the other hand, losing a strategically important competition for reasons that are unclear or unfair may be unacceptable to a company's stakeholders, particularly in a declining market.

Only a small percentage of federal contracts are protested each year, but bid protests are more common on large procurements and those that have long-term significance within a particular market sector.¹ This makes economic sense, as companies often commit years of effort and financial resources to large, "must win" procurements. When these programs are lost in close competitions, and for unconvincing reasons, filing a bid protest is often the next logical step in the acquisition process. In short, the chance of salvaging a critical competition is often worth the incremental cost of pursuing a protest.

The number of federal protests has grown steadily since 2001, which is generally consistent with the growth of federal contracts in the same period.² Annual statistics published by the U.S.

Government Accountability Office (GAO)—the most active protest forum by number of cases—show that protests more than doubled from Fiscal Year (FY) 2001 (1,146 protests filed) to FY 2010 (2,299 protests filed), when annual procurement spending increased from \$235 to \$535 billion.³

The growth in protests has also continued in recent years despite the decline in procurement spending. Since FY 2010, with the exception of a 2% drop in FY 2013, GAO protests have increased between 2% and 5% per year, with FY 2014 (2,561 protests filed) setting the high-water mark for the

IN BRIEF

Understanding The Contract

Understanding The Competitive Environment

Identifying Potential Protest Grounds

Assessing The Likelihood Of Success

Evaluating Business Considerations

- Strategic Importance Of The Procurement
- Customer Relationship
- Potential Counter Arguments
- Incumbency
- Protest Costs
- Recovery Of Protest Costs

Protest Process

Richard P. Rector is a partner, C. Bradford Jorgensen is Of Counsel, and Daniel J. Cook is an associate in DLA Piper LLP.

number of protests filed during a single year.⁴ This continuing increase, which appears to be driven by heightened competition, suggests that companies are adopting a more aggressive approach to challenging adverse agency decisions. Rather than saying “we’ll do better next time,” companies are pursuing closely contested opportunities through the protest process, looking for an opportunity to snatch victory from the jaws of competitive defeat.

Nonetheless, the decision to protest can never be taken lightly. Given the financial costs, the uncertainty of potential outcomes (which rarely include a directed contract award),⁵ and the desire to maintain a positive working relationship with the procuring agency, companies are wise to think carefully before filing a protest. The decision should be based on a reasoned assessment of the potential business risks and rewards, not on the frustration and disappointment of losing an important competition.

This BRIEFING PAPER addresses the questions that should be asked by company executives who are responsible for making a “go/no go” decision on federal protest matters. To facilitate your decisionmaking process, this PAPER outlines—in checklist and narrative form—the key business and legal questions to consider when analyzing whether to file a bid protest. Some of the considerations are obvious and go to the structure and strategic value of the procurement to the company. Others are more subtle and, when meaningfully considered, will lead to a thoughtful, business-driven analysis of the costs, risks, and potential advantages of filing a bid protest.

Understanding The Contract

Before you can arrive at an informed decision regarding whether to protest an adverse agency action, you must have a clear understanding of the contract at the heart of the protest. Therefore, in making a “go/no go” assessment regarding a potential protest, the first step is to establish a detailed factual baseline of the contract at issue.

This baseline will typically include the following:

- (1) The identity of the Government agency that issued the solicitation or awarded the contract;
- (2) The nature and characteristics of the goods or services being procured, including how they align with the company’s core competencies and past performance;
- (3) The overall value of the contract, including the estimated profit margin for the company;
- (4) The contract type and structure, including whether the contract will be performed on a “commercial item” basis⁶ and how the company will be paid for its products or services;⁷
- (5) The contract’s place and period of performance, including the base period and option years;
- (6) The team that will perform the contract, including key personnel;
- (7) The percentage of work to be performed by the company versus subcontractors; and
- (8) The contract’s overall risk profile.



THOMSON REUTERS

BRIEFING PAPERS

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

BRIEFING PAPERS® (ISSN 0007-0025) is published monthly except January (two issues) and copyrighted © 2015 ■ Valerie L. Gross, Editor ■ Periodicals postage paid at St. Paul, MN ■ Published by Thomson Reuters / 610 Opperman Drive, P.O. Box 64526 / St. Paul, MN 55164-0526 ■ <http://www.legalsolutions.thomsonreuters.com> ■ Customer Service: (800) 328-4880 ■ Postmaster: Send address changes to Briefing Papers / PO Box 64526 / St. Paul, MN 55164-0526

BRIEFING PAPERS® is a registered trademark used herein under license. All rights reserved. Reproduction, storage in a retrieval system, or transmission of this publication or any portion of it in any form or by any means, electronic, mechanical, photocopy, xerography, facsimile, recording or otherwise, without the written permission of Thomson Reuters is prohibited. For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, (978)750-8400; fax (978)646-8600 or West’s Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551.

Understanding The Competitive Environment

Another critical consideration in your “go/no go” analysis will be the nature and conduct of the competition, including especially whether a preaward or postaward protest would be required. Some of this information will be based on the company’s internal planning (*e.g.*, competitive analysis), but much of it will be gained through a debriefing or other explanation in which the agency describes the basis for its procurement decision.

Although the critical data points for each procurement will vary, you should know the following in a postaward context:

- (1) The number, identity, and competencies of the competitors (to the extent known);
- (2) The stated evaluation criteria used to select an awardee, including how each criterion was weighted;
- (3) Whether the solicitation contemplated the submission of a novel technical solution or, instead, limited the method and manner of performance;
- (4) Whether the solution required the agency to perform a cost or price realism analysis and, if so, whether the agency made adjustments to proposals as a result;
- (5) Whether the agency conducted discussions with offerors and, if so, the key issues that were raised during discussions;
- (6) Whether offerors were permitted to submit revised proposals and, if so, whether significant technical or cost/price adjustments were made;
- (7) How the offerors were ranked (if a ranking was performed);
- (8) The company’s ratings under each evaluation criterion and how they compared to the awardee’s ratings;
- (9) The company’s evaluated cost/price and how it compared to the awardee’s evaluated cost/price;
- (10) Details regarding the strengths, weaknesses, and deficiencies (if any) of the company’s proposal, as evaluated by the agency;
- (11) The number of awardees;
- (12) If a “commercial item” acquisition, the make and model of the awardee’s offer;
- (13) The agency’s rationale for award, including any cost-technical tradeoffs that the agency may have made; and
- (14) The identification of the source selection official and the structure of the agency’s proposal evaluation teams.

Armed with these details of the procurement and competitive landscape, you will be equipped to identify potential protest grounds, assess the strength of each, and make an informed conclusion as to whether the filing of a bid protest is in the best interests of the company.

Identifying Potential Protest Grounds

Protest arguments come in all shapes and sizes, and entire BRIEFING PAPERS have been written on the various arguments that may result in a successful protest.⁸ In the experience of the authors of this PAPER, the best way to identify protest grounds is for the company’s legal and business teams to meet as soon as possible after the agency explains its procurement decision to the company (*e.g.*, through a debriefing). In this setting, memories of the agency’s explanations are fresh, and counsel can guide the discussion to protest theories that are timely, viable, and best protect the company’s interests. Five practical considerations are particularly important.

First, timeliness rules dictate that, if the company knows or should have known of the basis for a protest allegation, it generally must raise the allegation in a timely fashion or risk waiving it altogether.⁹ Thus, potential protesters should have a bias for action. If the company has sufficient evidence to plead—although not yet prove—a credible protest allegation, it should raise the allegation at the earliest opportunity. This will preserve the allegation and protect the company against a subsequent dismissal on timeliness grounds.

Second, you should carefully consider what additional evidence will be needed, if any, to prove your protest allegations. Are your arguments substantiated, in whole or in part, by facts already in your possession? What additional evidence would you need in order to prevail on each protest ground, and what should you reasonably expect to find on each ground in the procurement record to be produced by the procuring agency? Would you need to go beyond the procurement record (*e.g.*, request a hearing at the GAO¹⁰) to obtain such evidence? Questions of this type are critical not only to shaping viable protest grounds and identifying appropriate document requests, but also to selecting the best forum for the protest.¹¹

Third, you should consider what documents the agency will be required to produce in response to the protest allegations asserted.¹² For example, if the protest does not challenge the evaluation under certain factors or subfactors within the evaluation criteria, then the agency may argue that documents related to these factors and subfactors should be withheld from the record, on relevance grounds. While this may or may not be appropriate in a given case, it can directly affect the likelihood of success, because a more limited record will reduce the possibility of identifying supplemental protest grounds. As such, careful consideration should be given to this issue when identifying and selecting protest grounds.¹³

Fourth, you should understand that some protest arguments are typically more successful than others. In FY 2014, for example, the most prevalent reasons for the GAO to sustain a protest were (1) failure to follow the solicitation's evaluation criteria, (2) flawed selection decision, (3) unreasonable technical evaluation, and (4) unequal treatment of offerors.¹⁴ In addition, experience teaches that a protest challenging an agency's compliance with procurement *procedures* is more likely to prevail than a protest that challenges an agency's *judgment* regarding proposals. For example, it is easier to challenge an agency's procedural failure to adequately document the results of a cost/technical tradeoff than to challenge the agency's "best value" judgment in making that tradeoff. As such, you should be particularly attentive to possible procedural flaws in a procurement, and you should understand that judgmental challenges regarding technical evaluations will be more difficult to win.

Fifth, with regard to each potential protest argument, you must affirmatively consider whether the company was "prejudiced" by the agency's actions (*i.e.*, suffered competitive harm).¹⁵ It is not enough in a bid protest to simply demonstrate an error in the agency's evaluation process or judgment; rather, you must show that, but for the error, you would have had a substantial chance of receiving the award or, in the case of a preaward protest, you were a prospective offeror whose direct economic interest would be affected by the award.¹⁶ Thus, no analysis of potential protest grounds is complete without a thoughtful consideration of how each error in the procurement affected the company's likelihood of winning the procurement. Simply put, if there's no harm, there's no foul.

Assessing The Likelihood Of Success

Once you have identified potential protest grounds, you need an informed understanding of the likelihood of success to determine whether filing a bid protest is a good investment for the company. Of the protests resolved on the merits by the GAO in FY 2014, the GAO sustained only 13%.¹⁷ Over the last five fiscal years, the GAO's sustain rate ranged from 13% (FY 2014) to 19% (FY 2010), with an average sustain rate of 16.7% in the period.¹⁸ Although there are no similar statistics addressing the sustain rate for protests filed directly with procuring agencies or with the U.S. Court of Federal Claims (COFC), experience suggests that the sustain rate for agency protests is substantially lower than that of the GAO, while the sustain rate for the COFC is likely equal to or higher than that of the GAO.

Sustain rates, however, are not the only metric for successful protests. Agencies take voluntary "corrective action" in response to a significant number of protests every year. Corrective action—which is usually a "do over" of the flawed portion of the procurement—is an opportunity for the agency to preemptively fix errors identified in a protest, without the need for a decision by the protest forum. Corrective action, which typically involves a "reopening" of the procurement in some fashion and a new (although not necessarily different) award decision, can include any one or more of the following: amending the solicitation, accepting revised proposals (or portions

of proposals), seeking clarifications, reopening discussions, reevaluating existing or revised proposals, and making a new award decision.

In FY 2014, agencies took corrective action in roughly 30% of the protests filed at the GAO. This resulted in an “effectiveness rate” for GAO protests—the percentage of protests in which a protester obtained some form of relief from the agency (*i.e.*, either a sustained protest or voluntary corrective action)—of 43%.¹⁹ Although neither a sustained protest nor corrective action will necessarily result in an award to the protester,²⁰ the effectiveness rate is significant and helps explain why companies rationally pursue protests, especially when facing the loss of a large or strategically significant procurement.

The statistics on sustain and effectiveness rates, however, are just one part of calculating the likelihood of success. The more important questions are—

- (1) How strong are the company’s protest arguments in the particular procurement at issue?; and
- (2) What odds does counsel place on the likelihood of prevailing?

Legal substance and procedure are the principal drivers of success in a protest, so critical questions to consider include the following:

- (1) Whether your protest grounds are timely and factually supported (or may be subject to dismissal);
- (2) Whether you already have evidence to support your protest arguments (or need to discover such evidence in the procurement record);
- (3) Whether you have relevant, factually analogous legal precedent to support your protest theories (or need to extend existing law);
- (4) Whether you will be able to identify supplemental protest grounds based on newly discovered evidence in the record (or will largely be limited to the existing protest grounds);
- (5) Whether the protest arguments are procedural in nature and more commonly

sustained (or judgmental in nature and more commonly denied); and

- (6) Whether the company can win the protest by prevailing on a single issue (or must win multiple arguments in order to prevail).

In addition to these legal issues, there are organizational and human considerations that affect the likelihood of succeeding on a protest. These include:

- (1) The skill and experience of the agency’s contracting officials and counsel (some are better than others);
- (2) The procuring agency’s propensity to take voluntary corrective action (some are more likely to settle or take corrective action than others);
- (3) The availability of talented consultants to assist counsel on complex technical and cost/price issues (this can be critical in some cases);
- (4) The availability of knowledgeable company resources to assist, as appropriate, in the preparation and prosecution of the protest (this is always important, but sometimes underrated by the company); and
- (5) The track record of counsel in similar protests (counsel’s sustain and effectiveness rates versus the average rates).

A final organizational factor to consider, and one that can lead to a misguided protest, is whether the capture team is objective about the reasons for the lost procurement. In all likelihood, the information you will rely on to gauge the strength of a potential protest will be provided by the company’s proposal/capture team—*i.e.*, the individuals who prepared the unsuccessful proposal. Although this team may have a deep understanding of the competitive environment and the procurement at issue, members of the team may have a natural instinct to defend their work. Also, in some cases, the compensation or continued employment of key members of the capture team may be linked to winning the subject contract. In these circumstances, it is important to carefully weigh the team’s judgments about the quality of the company’s proposal and the agency’s evaluation.

Evaluating Business Considerations

■ Strategic Importance Of The Procurement

A critical consideration in any potential protest is the strategic value of the contract to the company's short- and long-term business objectives. The more vital the contract is to achieving those objectives, the more important it is for the company to consider challenging an unfair or unexplained procurement decision.

The strategic value of a particular procurement obviously varies from company to company depending on a broad range of circumstances. But relevant questions may include whether a subject contract will:

- (1) Maintain an existing customer base or establish an important new customer base;
- (2) Facilitate the company's ongoing product development and enhancements;
- (3) Protect or increase the company's existing market share against competitors;
- (3) Maintain key revenue streams; or
- (4) Increase the company's competitive edge for future contract opportunities, possibly by establishing the company's past performance in a specific area.²¹

As these considerations make clear, a contract may be strategically significant even if the contract's overall value or estimated profit margin is relatively small.

■ Customer Relationship

Another important business consideration is how a protest may affect the company's Government business. In the authors' experience, most Government contracting officials understand that protests are a normal part of the acquisition process; in fact, in large procurements, agencies frequently anticipate protests by the losing offerors and schedule such protests into their acquisition timeline. In addition, while contractors frequently refer to "the Government" as if it is a monolith, agencies act autonomously when it comes to procurement and contracting officials in one agency are not necessarily aware of, let

alone concerned by, a protest filed against another agency's procurement. Thus, contractors typically do not harm their reputations or business prospects, on a Government-wide basis, by judiciously exercising their right to protest.

But within a particular agency, the calculus may be different. Although a company's protest of one procurement is not supposed to influence an agency's decisionmaking in a separate procurement, Government contracting officials and evaluators are human, and it is human nature to prefer business partners who are cooperative rather than confrontational. It is also human nature to react defensively to criticism and to "circle the wagons" when our organization and colleagues are challenged.

Thus, when a contractor protests a procurement by an agency with whom it has recurring business, there is risk that the agency's negative reaction to the protest could influence other business. This is particularly true if the same agency personnel are involved in both procurements. Again, this should never occur and, if proven, would be a valid basis for protesting the second evaluation. Also, more importantly, there are situations in which taking this risk may be warranted, such as when a contractor wants to signal the agency, through a protest, that it will challenge unfair or irrational treatment in the future. Nonetheless, as a practical matter, a company should always consider whether filing a bid protest could harm the company's prospect for obtaining future work from the same procuring agency.

To assess this, you will need to understand the work the company has performed for the agency historically, as well as the volume and type of work that is in the pipeline with the agency. With this information, for example, you might conclude that it is not in the best interests of the company to protest the award of a \$1 million contract when the company will be submitting a proposal to the same agency on a \$250 million contract opportunity scheduled to be awarded in the next six months. Similarly, if the company has historically performed a significant volume of work for the agency and anticipates receiving significant new work in the future from the same agency, it may not be in the company's best in-

terests to rock the boat with a bid protest of an agency decision that—although questionable—is of only marginal importance to the company’s overall business objectives. Surely, under certain circumstances, you might reasonably conclude that losing a battle in order to win the war is the most appropriate strategy.

If you conclude that filing a bid protest is in the company’s best interests, the nature of the company’s business relationship with the procuring agency should also inform the “tone” of the protest. While tone is important in any protest, a protest challenging the actions of a long-term, valued business partner must be particularly thoughtful and employ an objective, solution-oriented approach to the protest. When this is done well, the agency will not be offended or alienated, but will understand the business concerns that led the company to protest.

■ Potential Counter Arguments

Another factor to consider is whether filing a protest exposes the company to counter allegations or heightened scrutiny regarding the company’s compliance or integrity, which could become publicly available in the published decision.²² In other words, does the company have “clean hands” on the issues it plans to raise in its protest and in its proposal generally?

For example, to the extent the company is considering a bid protest challenging the accuracy of the awardee’s certifications, the company should reasonably expect that, at some point during the protest proceeding, opposing counsel will closely scrutinize the accuracy of the protester’s same certifications—perhaps in conjunction with an argument asserted by the agency or intervenor that the protester has not established the requisite prejudice. As such, if there is doubt that the company itself failed to provide accurate certifications, it likely is not in the best interests of the company to file a protest raising the issue in the first instance.

Other examples might include protest allegations that the awardee:

- (1) Suffers from a significant, unmitigated organizational conflict of interest;²³
- (2) Improperly proposed former Government officials as key personnel in violation of applicable revolving-door restrictions;²⁴
- (3) Had access to information that created an unfair competitive advantage;²⁵
- (4) Conducted a “bait and switch” regarding key personnel;²⁶ or
- (5) Failed to meet size standards or subcontracting limitations.²⁷

If you intend to throw any of these punches at a competitor, you should be thoroughly ready to defend yourself against a likely counterpunch on the same or similar issues.

■ Incumbency

Under the Competition in Contracting Act (CICA), the timely filing of a bid protest at the GAO triggers an automatic stay of contract award or performance.²⁸ Unless overridden by the procuring agency (an uncommon occurrence),²⁹ implementation of the automatic stay frequently results in the agency’s continued reliance on the incumbent contractor to satisfy its needs for the duration of the protest proceeding, particularly on contracts for services.

As such, if the protester is the incumbent contractor, its performance may be extended for up to 100 days—the statutory time period for the GAO to issue a decision on the protest³⁰—if it files a protest that triggers the automatic stay. In some cases, months of additional performance under the incumbent contract—or perhaps even a longer period if the protest spurs corrective action that is also subsequently challenged—may constitute a substantial financial gain for the protester. Thus, if you identify viable protest grounds on a procurement in which you are the incumbent, there may be a financial advantage to the protest that is independent of the protest’s outcome.

■ Protest Costs

The costs associated with a bid protest, including both the financial and human resources, should be estimated and factored into the “go/no go” protest analysis. Although this is often a difficult task, the exercise of quantifying the potential costs will surely inform your cost/benefit analysis and the ultimate decision

whether or not to file a bid protest. With consideration given to (1) the number and complexity of the initial and possible supplemental protest arguments, (2) the number and perceived competency of the potential intervenors, (3) the likelihood, scope, and timing of agency corrective action, (4) the perceived competency of agency counsel, including whether a request for full or partial summary dismissal is likely to be filed, (5) the anticipated volume of the procurement record, and (6) the need for expert consultants, you should attempt to estimate the protest-related costs and factor them into your analysis.

To the extent you intend to work with outside counsel to prosecute the potential bid protest action, we recommend that you obtain an estimate of legal fees to help guide your “go/no go” protest analysis—understanding, of course, that bid protests, like any litigation, can be unpredictable and full of twists and turns that may not be readily foreseeable at the outset of the action. Notwithstanding the uncertainties, experienced bid protest counsel should be able to provide an estimate of the legal fees that are likely to be incurred, including the difference in estimated fees if the protest is filed directly with the procuring agency, at the GAO, or at the COFC, which can be significant.

■ Recovery Of Protest Costs

Depending on the protest forum, a successful protester may be entitled to recover all or a portion of the costs associated with filing and pursuing the protest, including reasonable attorneys’ fees, internal labor costs, and the fees for consultants and expert witnesses.³¹ In brief, the GAO will generally recommend the recovery of protest costs when (1) it issues a decision sustaining a protest, or (2) the procuring agency takes corrective action, but the GAO determines that such action was unduly delayed—*i.e.*, the corrective action is taken after the submission of the agency report.³² Under CICA, there is no cap on the attorneys’ fees recoverable by small business concerns in a GAO protest;³³ however, for large businesses, CICA imposes a fee cap of \$150 per hour that is typically adjusted upward based on the cost of living.³⁴ For successful bid protests filed at the COFC, small businesses may be entitled to a partial recovery of attorneys’ fees under the Equal Access to Justice Act (EAJA).³⁵ Large businesses, however, would not be entitled to any recovery.³⁶

The possibility of cost recovery should be considered in determining whether filing a protest is in the best interests of the company and in selecting a protest forum. If the decision is ultimately made to file a bid protest, the company should establish internal procedures to track, document, and quantify internal costs incurred in support of the protest action. This information, coupled with the detailed billing statements of outside counsel, will be required to substantiate a request for cost recovery if the protest proves to be successful and the company is otherwise eligible for cost recovery.

Protest Process

The final aspect of a thorough “go/no go” protest analysis focuses on the pros and cons of each of the three potential protest venues—the procuring agency, the GAO, and the COFC—including the strict timing considerations that may apply. These considerations have been carefully detailed in other publications and will not be addressed in this PAPER.³⁷ In brief, however, you should reasonably consider the following:

- (1) Differences in filing deadlines;
- (2) Likelihood of securing a stoppage of contract performance while the protest is pending, as well as the likelihood that the procuring agency might “override” the suspension if applicable;
- (3) Access to, and scope of, the procurement record;
- (4) Expense;
- (5) Timeline for a protest decision;
- (6) The key features and milestones of the applicable protest process;
- (7) Possible outcomes if the protest is successful; and
- (8) The force and effect of the protest decision, *i.e.*, whether the procuring agency is required to implement the decision.

A careful analysis of the above considerations will facilitate an informed, business-driven analysis of the risks, costs, and likelihood of success of a contemplated bid protest.

★ GUIDELINES ★

These *Guidelines* are intended to assist you in determining whether filing a bid protest is in the best interest of your company. They are not, however, a substitute for professional representation in any specific situation.

1. Upon receiving notice that the company's proposal was unsuccessful, provide the agency a written request for a debriefing, if applicable, or request an appropriate explanation of the award decision. The debriefing will provide details that are essential to identifying potentially viable protest grounds.

2. Consider engaging with counsel promptly upon learning of an adverse agency decision. Even if you ultimately decide that it is not in the company's best interest to file a protest, the input and assessment of experienced counsel can inform your "go/no go" analysis, including the identification of potentially viable protest grounds and the assessment of the overall likelihood of success.

3. As soon as possible after you receive an explanation of the reasons for the agency's award decision, meet with the business and legal teams to review the agency's evaluation and to identify potential areas of protest. Be sure that everyone at this meeting has a clear understanding of both the contract at issue and the competitive environment.

4. When evaluating potential protest grounds, pay special attention to timeliness rules and have a bias for action to avoid the potential waiver of protest arguments that are not timely raised. Also consider the additional evidence that will be needed to prevail on the protest, the inclusion of protest grounds that increase the likelihood of receiving a complete procurement record, and the need to prove competitive "prejudice" for each protest ground.

5. Understand the strength of each potential argument by considering whether your protest

grounds are commonly sustained by protest forums, as well as whether your arguments are based on procedural violations (easier to prove) versus judgmental challenges (more difficult to prove).

6. Assess the likelihood of success for protest grounds by considering (a) the overall average sustain and effectiveness rates for protests; (b) the strength of the specific protest grounds identified, in light of the facts of the procurement and the protest process; and (c) the organizational and human considerations, including whether the capture team is objective about the reasons for the competitive loss.

7. With an understanding of the potentially viable protest grounds and their likelihood of success, determine whether other business considerations exist that might weigh against or in favor of filing a bid protest. For example, consider the strategic importance of the contract to the company's overall business, the potential impact on the business relationship with the procuring agency, and whether the company has "clean hands" on issues likely to be addressed through the protest.

8. Also consider financial issues related to the protest, such as whether the company is the incumbent on the contract, the costs of filing and pursuing the protest, and whether the company may be eligible to recover some or all of its protest-related costs, including attorneys' fees.

9. Finally, there are significant procedural and cost differences between the three protest forums at the federal level (*i.e.*, the procuring agency, the GAO, and the COFC). If you have analyzed the factors above and are seriously considering a protest, you should discuss with counsel the pros and cons of each forum in relation to your potential protest grounds. Selecting the right forum is a critical step in deciding whether, when, and how to file a federal bid protest.

PROTESTING A FEDERAL PROCUREMENT: CHECKLIST OF QUESTIONS AND CONSIDERATIONS*

1. Summary of Potential Contract

- What Government agency awarded the contract?
- What goods or services are required?
- What is the contract term/duration?
- What is the contract value?
 - What percentage of the work would be performed by the company vs. subcontractors?

2. Summary of Procurement

- Who were the company's competitors in the procurement (if known)?
- What were the evaluation criteria for the procurement? How were the criteria weighted?
- Does the statement of work lend itself to multiple technical approaches (e.g., staffing levels in basis of estimates, methodologies to be employed, etc.) and/or proposed innovations and efficiencies?
- Did the solicitation require offerors to complete specific formats or tables for pricing? If so, did the company perform cross walks between the pricing and the technical performance work statement or work breakdown structure?
- Did the solicitation state that either cost realism or price realism would be conducted? If so, were adjustments made to offerors' cost or price estimates?
- What were the key issues raised during discussions?
- Were there significant technical or price adjustments in proposal revisions?
- How did the company score against the criteria? What was the company's evaluated price or cost? What were the strengths, weaknesses, and deficiencies (if any) of the company's proposal?
- How did the awardee score against the criteria? What was the awardee's evaluated price or cost? What was the make and model of the awardee's offer (if a commercial item)?
- What was the overall ranking of offerors (if a ranking was performed)?
- What was the agency's rationale for award? What tradeoffs, if any, did the agency make?
- Who made the award decision for the agency? What kind of evaluation teams/structure did the agency use?

3. Potential Protest Grounds

- What are the potential protest grounds identified by the company to date?
 - Are they procedural or judgmental in nature?
 - Are they commonly successful?
- Has there been competitive harm—or "prejudice"—to the company for each protest argument?
- Does the company need to win more than one argument to prevail? Are there certain arguments that the company *must* win to prevail?
- Does the company currently have sufficient evidence, based on the debriefing or other information, to prove its arguments? Or will the arguments succeed or fail based on the agency's documentation of the procurement?
- What documents will the Government agency produce or withhold based on the identified protest arguments? Are there arguments that would allow the company to obtain all of the procurement documents (and increase the chance of identifying supplemental protest grounds)? Based on the debriefing, can significant differences in cost/price elements be analyzed, either in detail or rough orders of magnitude?

4. Likelihood of Success

- How often are protesters generally successful at the GAO and the COFC?
 - Sustain rate
 - Effectiveness rate (sustained protests *plus* corrective action)
- Given the protest arguments identified to date, what is the likelihood of success?
- Can the Government agency appeal or circumvent the decision if we win?

5. Business Considerations

- What is the strategic importance of the procurement to the company's business plans?
- Is the proposal/capture team objective about the loss?
 - Have they rationally judged the validity of the agency's position?
 - Is their employment or compensation linked to winning the contract?
- Will a protest harm the company's prospects of future work?
 - What is in the pipeline with this specific Government agency?
 - What kind of "tone" should be used in the protest pleadings?
- Are there any other risks of protesting that should be considered?
 - Risk of counter-allegations regarding the company's compliance or integrity?
 - Commercial sensitivity to a published decision?
- Is the company the incumbent contractor?
 - If so, will the incumbent contract likely be extended in the event of a protest and what is the impact on the company?
- How much will a protest cost?
- Can a protester recover its fees from the Government if it prevails?
 - GAO: partial recovery for large business, full recovery for small business
 - COFC: partial recovery for small business
- What steps should the company take to enable cost recovery?

6. Protest Process

- Where can the company file a protest?
 - Agency
 - U.S. Government Accountability Office (GAO)
 - U.S. Court of Federal Claims (COFC)
- When does the protest have to be filed?
- How can the company *ensure* that the Government suspends—or "stays"—the award or performance of the contract until the protest is decided?
 - GAO and Agency: statutory stay of performance
 - COFC: voluntary stay or injunctive relief
- Are there situations in which the agency can "override" the statutory suspension of performance?
 - What is the likelihood of an "override" given the facts of this procurement?
 - If an "override" occurs, what recourse does the company have?
- If the protest proceeds to a decision on the merits, how long will the process take?
- Who are the expected parties to a protest?
- What are the key features and milestones of the protest process?
- Can a protest be resolved prior to a decision on the merits?
 - Withdrawal by protester?
 - Voluntary "corrective action" by the agency?
 - Settlement by the parties?
- What are the potential remedies if the protest is successful?
 - Directed award?
 - Re-evaluation of existing proposals and new award decision?
 - Submission of revised proposals, reevaluation, and new award decision?
 - Cancellation of solicitation?
 - Alternate procurement approach?
- Is the agency required by law to implement the decision of the GAO or COFC?

For more information about these questions, please contact Rich Rector, T: +1 202 799 4400, richard.rector@dlapiper.com, or Brad Jorgensen, T: +1 202 799 4413, brad.jorgensen@dlapiper.com.

*Reprinted with permission. © 2015 DLA Piper LLP.

★ REFERENCES ★

- 1/ See Gordon, "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them," 42 Pub. Cont. L.J. 489, 493–94 (Spring 2013).
- 2/ See Schwartz, Manuel & Martinez, Cong. Research Serv., R40227, GAO Bid Protests: Trends and Analysis (Aug. 9, 2013), available at <http://fas.org/sgp/crs/misc/R40227.pdf>.
- 3/ Compare GAO, GAO-02-177R, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2001, at 2 (Jan. 9, 2002), with GAO, GAO-11-211SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2010, at 2 (Nov. 23, 2010); see <http://usaspending.gov>.
- 4/ GAO, GAO-15-256SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014, at 2 & encl. II (Nov. 18, 2014); see 56 GC ¶ 385.
- 5/ See Gordon, "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them," 42 Pub. Cont. L.J. 489, 498–502 (Spring 2013).
- 6/ See FAR 2.101 (definition of "commercial item").
- 7/ See generally Edwards, "Contract Pricing Arrangements: A Primer—Part I," Briefing Papers No. 09-11 (Oct. 2009); Edwards, "Contract Pricing Arrangements: A Primer—Part II," Briefing Papers No. 09-12 (Nov. 2009).
- 8/ See Szeliga, Kipa & Marcinak, "Identifying Viable Postaward Bid Protest Allegations at the GAO," Briefing Papers No. 09-4 (Mar. 2009); Kipa, Szeliga & Madon, "Identifying Viable Preaward Bid Protest Allegations at the GAO," Briefing Papers No. 10-6 (May 2010).
- 9/ See Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11, at 7, 15–16, 24–25 (Oct. 2008).
- 10/ See 4 C.F.R. § 21.7.
- 11/ See generally Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008).
- 12/ See, e.g., 4 C.F.R. § 21.3(d).
- 13/ See generally Shaffer, Buckenmeyer & Prince, "Establishing the Record in Court of Federal Claims Bid Protests," Briefing Papers No. 12-10 (Sept. 2012).
- 14/ GAO, GAO-15-256SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014, at 2 (Nov. 18, 2014).
- 15/ See, e.g., Lithos Restoration Ltd., Comp. Gen. Dec. B-247003.2, 92-1 CPD ¶ 379, 34 GC ¶ 352; *Statistica, Inc. v. United States*, 102 F.3d 1577 (Fed. Cir. 1996), 39 GC ¶ 25.
- 16/ See, e.g., *Wheeler Bros., Inc., Comp. Gen. Dec. B-214081*, 85-1 CPD ¶ 388 ("[T]he standard of review as to a showing of prejudice is not that the protester must establish that it definitely would have been the successful offeror absent the solicitation defect, but rather that there was a reasonable possibility that the protester was displaced due to the unfair competitive advantage afforded another offeror as a result of the defect.").
- 17/ GAO, GAO-15-256SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014 encl. II (Nov. 18, 2014).
- 18/ GAO, GAO-15-256SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014 encl. II (Nov. 18, 2014); see also Gordon, "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them," 42 Pub. Cont. L.J. 489, 493–94 (Spring 2013).
- 19/ GAO, GAO-15-256SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014 encl. II (Nov. 18, 2014).
- 20/ See Gordon, "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them," 42 Pub. Cont. L.J. 489, 493–94 (Spring 2013).
- 21/ See FAR 15.305(a)(2)(iv).
- 22/ See, e.g., Richard, Whiteman & Gleich, "Contractor Reporting Requirements in the Wake of Implementation of the System for Award Management," Briefing Papers No. 13-6, at 7 (May 2013) ("Making certain information available to the public can increase a contractor's vulnerability to bid protests and other litigation.").
- 23/ See FAR subpt. 9.5. See generally Cairnie & Kessler, "Organizational Conflicts of Interest/Edition V," Briefing Papers No. 12-13 (Dec. 2013); Cantu, "Organizational Conflicts of Interest/Edition IV," Briefing Papers No. 06-12 (Nov. 2006).
- 24/ See generally West, Richard & Brennan, "Postemployment Conflict-of-Interest Restrictions on Former Employees of the Executive Branch," Briefing Papers No. 09-3 (Feb. 2009).
- 25/ See FAR subpt. 9.5. See generally Cairnie & Kessler, "Organizational Conflicts of Interest/Edition V," Briefing Papers No. 12-13 (Dec. 2013); Cantu, "Organizational Conflicts of Interest/Edition IV," Briefing Papers No. 06-12 (Nov. 2006).
- 26/ See *Data Mgmt. Servs. JV, Comp. Gen. Dec. B-299702 et al.*, 2007 CPD ¶ 139, at 10. See generally Jackson & DeLancey, "Service Contracts: Allegations of Bait & Switch," Briefing Papers No. 97-7 (May 1997).
- 27/ See generally Hewitt, Williams & Alba, "Small Business Contracting Programs—Part I," Briefing Papers No. 10-11 (Oct. 2010).
- 28/ 31 U.S.C.A. § 3553(c), (d).
- 29/ See, e.g., Santerre, "The GAO Bid Protest: The First Thirty Days—A Procedural Guide for the Local Counsel," 2009-APR Army Law. 55, 56 n.7 (2009).
- 30/ 31 U.S.C.A. § 3554(a)(1).
- 31/ 31 U.S.C.A. § 3554(c); see also Herzfeld & Wesser, "Turning Silver Into Gold: Recovering Protest Costs or Bid & Proposal Costs in Procurement Protests," Briefing Papers No. 10-4 (Mar. 2010); Vacketta, Yesner & Snyder, "Recovery of Legal Costs," Briefing Papers No. 93-12 (Nov. 1993).
- 32/ See GAO, GAO-09-471SP, Bid Protests at GAO: A Descriptive Guide 29 (9th ed. 2009) ("GAO does not contemplate reimbursement of protest costs in every case in which an agency takes corrective action, but rather, only where an agency unduly delays taking corrective action (i.e., corrective action is taken after the due date for the submission of the agency report) in the face of a clearly meritorious protest, that is, a protest that is not a close question."); see also KAES Enters., LLC—Protest & Costs, Comp. Gen. Dec. B-402050.4, 2010 CPD ¶ 49, at 4, 52 GC ¶ 96 ("[W]hile we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt if it is taken after that date.").
- 33/ 31 U.S.C.A. § 3554(c)(2)(B); see also T Square Logistics Servs. Corp.—Costs, Comp. Gen. Dec. B-297790.6, 2007 CPD ¶ 108, at 12.
- 34/ 31 U.S.C.A. § 3554(c)(2)(B).
- 35/ 28 U.S.C.A. § 2412. See generally Richmond, "Eligibility Under the Equal Access to Justice Act in Government Contracts Litigation," 1995-MAR Army Law. 17 (1995); Whalen, "Equal Access to Justice Act: Recent Developments," Briefing Papers No. 02-5 (Apr. 2005); Tobin & Stiffler, "Recovering Legal Fees Under EAJA/Edition II," Briefing Papers No. 91-7 (June 1991).
- 36/ 28 U.S.C.A. § 2412. See generally Richmond, "Eligibility Under the Equal Access to Justice Act in Government Contracts Litigation," 1995-MAR Army Law. 17 (1995); Whalen, "Equal Access to Justice Act: Recent Developments," Briefing Papers No. 02-5 (Apr. 2005); Tobin & Stiffler, "Recovering Legal Fees Under EAJA/Edition II," Briefing Papers No. 91-7 (June 1991).
- 37/ See Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008); McGovern & Palmer, "GAO Protest Timeliness Rules," Briefing Papers No. 99-03 (Feb. 1999); see also McCullough, Pollack & Aldering, "Bid Protest Practice in the Court of Federal Claims," Briefing Papers No. 00-10 (Sept. 2000).