

# Bid Protests: Winning Strategies and Themes

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# Agenda

- Part I: Whether to Protest and Forum Selection
- Part II: Intervening
- Part III: Successful Arguments and Themes

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# Part 1

## Whether to Protest and Forum Selection

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# Deciding Whether to File a Pre-Award Protest

- Pre-award protests challenge ground rules of the competition or elimination from the competition/competitive range
- Most pre-award protests challenge the solicitation/ground rules
- Opportunity for formal Q&A?
- Can you submit questions to the awarding agency via email?
- Degree of solicitation defect
- Impact of the defect on your proposal

# Deciding Whether to File a Post-Award Protest

- Did you receive a debriefing?
- Preliminary considerations
  - Differences in ratings and prices – consider how many factors you need to win to become best value
  - Can you establish standing – are you next in line for award?
  - Can you demonstrate prejudice?
- Assessment of possible arguments
  - Evaluation issues regarding your proposal?
  - Evaluation issues regarding the awardee's eligibility and/or its proposal?
  - Other sources or information to file a protest?

# Choice of Forum

- Agency
  - Used more frequently in pre-award protests
  - Better when challenging clear errors (not asking agency to change its judgment)
  - Less adversarial
  - Should be decided within 35 days
  - Major downsides:
    - No procedural rights (no briefing, no record production)
    - Forfeit right to CICA stay if subsequent protest is filed in GAO
    - May need to file in GAO anyway to preserve objection if there is initial adverse action on the protest

# U.S. Government Accountability Office (Cont'd.)

- Forum of choice for vast majority of protests
- Most important feature is CICA stay of performance
- Timely resolution (100 days)
- Strict timeliness rules
  - Generally
  - Post-debriefing
  - CICA stay vs. timeliness rules
- Agency attorney defends agency

# U.S. Government Accountability Office

- Agency report
  - “Relevant” record largely determined by agency
- FASA task order protest bar
  - Value of civilian procurement >\$10 million **or** if the order “increases the scope, period, or maximum value of the contract under which the order is issued”
  - Value of DOD procurement >\$25 million **or** if the order “increases the scope, period, or maximum value of the contract under which the order is issued”
- Body of precedent and consistency of decisions
- Recovery of fees

# U.S. Court of Federal Claims

- Frequently used for “second bite” protests
- Production of full administrative record
- 6-year statute of limitations
- Need to seek preliminary injunction or TRO if DOJ does not voluntarily stay performance
- Oral argument
- DOJ defends agency

# U.S. Court of Federal Claims (Cont'd.)

- FASA task order bar (emphasis added):
  - A protest is not authorized ***in connection with*** the issuance or proposed issuance of a task or delivery order, except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.
- Other jurisdictional restrictions and requirements
- “Precedential” considerations
- New judges
- Perception that the review of issues is more focused
- Recovery of fees

# Task Order Ombudsman “Complaint”

- Only option for many task order protests
  - Value of civilian procurement <\$10 million
  - Value of DOD procurement <\$25 million

# Office of Dispute Resolution for Acquisition (ODRA)

- Venue for filing protests of FAA awards
- ADR process

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# Part II

## Intervening

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# General Considerations

- No option to intervene in agency-level protest
- Intervention available in GAO, COFC, and ODRA protests
- Are you the incumbent?
  - GAO vs. COFC vs. ODRA
  - CICA stay override
  - Possibility of bridge contract award

# Why Intervene?

- Help agency defend your award (more resources, value of additional arguments, etc.)
- Discourage corrective action
- Limit the scope of the record (GAO)
- Make arguments government unwilling to make
- Prejudice allegations
  - Generally – GAO vs. COFC
  - Declaration(s)
- Protect confidential information under the protective order
- Show of support to new customer
- Learn valuable information for potential follow-on protest
- Monitor developments

# Intervening

- Opportunity to request dismissal
  - Benefits: GAO vs. COFC
  - Dismissal process: GAO vs. COFC
  - Dismissal grounds

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# Part III

## Successful Arguments and Themes

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# Developing the Grounds of Protest

- Use information learned from debriefing and Q&A (recap)
- How many lawyers assess protest grounds
- GAO
  - Cast a wide net to generate broad record
  - Grounds must be factually and legally sufficient
- COFC
  - Well-pleaded complaint
  - Less particularity required vs. GAO
  - Opportunity to amend complaint post-production of AR
  - Motions to dismiss

# Pre-Award Protests

- Subjective vs. objective protest grounds
- Grounds that are more **objective**
  - Timeliness
  - Regulatory or statutory violation
    - CICA violation(s)
    - VA procurements
    - Small business procurements
    - GSA schedule contracting
  - Organizational conflicts of interest

# Pre-Award Protests (Cont'd.)

- Grounds that are more **subjective**
  - Unfairly favors incumbent
  - Conflicting or ambiguous solicitation requirements
  - Unreasonable and/or unduly burdensome requirements
    - Technical
    - Past performance
    - Security clearance
  - Cost and/or price evaluation scheme
    - Generally
    - Plug-in numbers

# Post-Award Protests

- Subjective vs. objective protest grounds
- Grounds that are more **objective**
  - Failure to evaluate proposals in accordance with:
    - Clear requirements of the solicitation
    - Requirements of the FAR or a statute
  - Disparate/unequal treatment
  - Unequal or misleading discussions
  - Awardee missing required certification(s)

# Post-Award Protests (Cont'd.)

- Grounds that are more **subjective**
  - Unreasonable evaluation of proposal
    - Technical
    - Management
    - Key personnel
    - Past performance
    - Cost/price
  - Unreasonable best value determination

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# Conclusion and Questions

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# Upcoming Bid Protest Series Presentations

- **Thursday, June 17, 2021** : [Key Personnel](#) - 12:00 pm - 1:30 pm ET
  - Presenters:
    - Paul Debolt, Partner
    - James Boland, Partner
    - Chelsea Knudson, Associate
    - Taylor Hillman, Associate
- **Thursday, June 24, 2021**: [Organizational and Personal Conflicts of Interests](#) - 12:00 pm - 1:30 pm ET
  - Presenters:
    - Paul Debolt, Partner
    - James Boland, Partner
    - Christopher Griesedieck, Associate
    - Lindsay Reed, Associate



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