



# Bid Protests and Contract Claims

When to use them and how to make them work

## *Speakers:*

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# Presentation Outline

## **Bid Protest Options**

- The truths about bid protests
- Where to protest
- What are my chances?
- Contractor end goals, i.e., why and when to use a protest

## **Contract Disputes Act (“CDA”) Claims**

- What can you claim / What can't you claim
- Essential elements of claims
- Requests for Equitable Adjustment (“REAs”) v. Claims
- Where to appeal
- The how-tos of good claims



# **Bid Protests**

# The Truths – No matter where you protest

- You must have standing to protest
- All challenges to solicitation defects must be raised prior to the submission of bids / proposals or be forever lost
- Protests must allege agency error. Cannot be based on speculation or mere disagreement
- Time is of the essence
- You will likely get some kind of stay
- You will generally get an Administrative Record, but you don't get to see it
- Protests are time consuming and expensive
- Generally, the best you can hope for is corrective action, is it worth it
- How do you win – show mistake, unstated evaluation criteria, failure to document, or leverage corrective action
- You may agitate the agency
- Consider intervening
- Protest success rate is going . . . UP ???

# Where to Protest

- Agency Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- GAO Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- COFC Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- How do you decide the forum?

# The Agency

## Pros

- Comparably inexpensive;
- Procedurally simple;
- Expeditious resolution (within 35 days) *See FAR 33.103*; and
- Second bite at the Apple

## Cons

- No right to discovery in the Agency Protest; and
- While the Agency can provide a “stay” to disappointed bidders, the “stay” do not necessarily continue at the GAO. *See FAR 33.103*

# The GAO

## Pros

- Speedy decision (within 100 days) *See* 31 U.S.C. § 3554(a)(1);
- Automatic Stay; and
- Second Bite at the Apple

## Cons

- Relatively short time-line to file, *see* 4 C.F.R §21.2-5 ; and
- The agencies are only required to share “relevant documents” and not the entire documents that were used to make award decision. Even shared documents are often redacted, making the access to the complete record hard

# The Court of Federal Claims

## Pros

- Enforceable Judgement by impartial judge in a more formal court settings;  
and
- Less strict deadline to bring a claim.

## Cons

- Proceedings takes comparably longer time;
- Automatic stay is not guaranteed, *see e.g.*, 28 U.S.C. §1491, 41 U.S.C. §7101;  
and
- The process is comparably more complicated and costly.

# What are my Chances?

Bid Protest Statistics for Fiscal Years 2019-2023

	FY2023	FY2022	FY2021	FY2020	FY2019
Cases Filed[5]	2025 (increase of 22%)[6]	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)
Cases Closed[7]	2041	1655	2017	2137	2200
Merit (Sustain + Deny) Decisions	608	455	581	545	587
Number of Sustains	188	59	85	84	77
Sustain Rate	31%	13%	15%	15%	13%
Effectiveness Rate[8]	57%	51%	48%	51%	44%
ADR[9] (cases used)	69	74	76	124	40
ADR Success Rate[10]	90%	92%	84%	82%	90%
Hearings[11]	2% (22 cases)	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)

# Top 3 Grounds for Sustaining Protests in 2023

## Unreasonable Technical Evaluation

- *Phoenix Data Security, Inc. et al.*, B-419956.200 *et al.*, July 10, 2023, 2023 CPD ¶ 172 (sustaining a protest where the record provided by the agency does not support that the evaluations were reasonable).

## Flawed Selection Decision

- *Systems Plus, Inc. et al.*, B-419956.184 *et al.*, June 29, 2023, 2023 CPD ¶ 163 (finding the agency's explanations incomplete and misleading).

## Unreasonable Cost or Price Evaluation

- *TRAX Int'l Corp.*, B-420361.7, B-420361.8, June 28, 2023, 2023 CPD ¶ 162 (sustaining a protest where the agency engaged in unequal/misleading discussions when it failed to discuss costs that the agency considered to be unrealistic).

# Contractor End Goals of Protests

- Balance the chance of success with effort / cost and Agency agitation level
- Some protests are better than others
- What message do you want to send to the Agency?
- Will the Agency hate me? Is Agency retaliation for protests real?
- Some agencies may provide “credit” on the backend for not protesting
- Do protests create friction if you perform the work?
- Can you negotiate your way out of a bid protest?



# The Contract Disputes Act ("CDA")

41 U.S.C. §§ 7101-7109

# What can you claim / Can't you claim?

- Any claim against the United States “founded upon any express or implied contract . . . in cases not sounding in tort.” *See* 28 U.S.C. § 1491
- Can bring claims for:
  - Claims for money damages for extra work, changes, increases in costs, delay damages
  - Claims to set the scope of work / duration of the contract / ensure Agency compliance with Contract specifications
  - Prime contractor / subcontractor / supplier costs
  - CPARS revisions or corrections
  - Termination for convenience costs
  - Misc. monetary and nonmonetary relief
- Can't bring claims for:
  - Disputes prior to award, bid protest issues
  - Torts, like negligence, defamation, battery
  - Consequential damages, like lost contracts, lost profits, business losses
  - Requests to get the government off your back

# Elements of All Claims (and REAs too) (FAR 52.233-1)

- In writing
- Submitted to the CO
- Submitted within 6 years of claim “accrual”
- Demonstrate entitlement to payment
- Provide a “sum certain”
- Include a claim certification over \$100,000
  - The Claim is made in good faith
  - The supporting data are accurate and complete to the best of contractor’s knowledge and belief
  - The amount requested accurately reflects the adjustment for which contractor believes the government is liable; and
  - The person asserting the Claim is duly authorized (such as a CEO or general partner of the contractor having overall responsibility for conduct of contractor’s affairs) to certify the Claim

# REAs vs. Claims – Pick one

- What is your goal with Agency?
- If Agency will negotiate in good faith – consider an REA
  - Same general format as a claim, but no Agency mandatory deadline to respond
  - Can claim attorneys' fees and consultant costs up until file a claim
  - Don't file an REA just to be nice, may never get an answer
  - If an REA fails or no response, convert to a claim
- If Agency won't negotiate or want leverage over Agency – file a claim
  - Agency must respond. Puts them on the clock
  - Can still negotiate
  - Have the right to appeal a denial
  - Lose the ability to claim attorneys' and consultant fees once becomes a claim, but . . .

# Where to Appeal

- Agency time period to decide claims:
  - Under \$100,000 – 60 days
  - Over \$100,000 – 60 days; or notify claimant that the decision will take more than 60 days (within a reasonable period of time)
  - Deemed denial option
- If claim is denied, can appeal to:
  - ASBCA or CBCA within 90 days of denial
  - COFC within 1 year of denial
- Pros / cons of Agency boards vs. COFC

# The How-Tos of Good Claims

- Identify the problems during the contract
- Document all changes as they occur – send letters – 30 days or less rule
- Track all of your impacted costs
- Use consultants where needed – costs / schedule impacts / changed conditions
- Work with the Agency early and often to resolve prior to filing REA or claim
- REAs can work, but consider leverage
- Consider pros / cons prior to picking appeal forum

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