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FEATURE COMMENT • Tips For Agencies In Establishing Protest Procedures, And Factors Potential Protesters Should Consider In Selecting A Forum

A recent FEATURE COMMENT in THE GOVERNMENT CONTRACTOR discussed bid protest litigation from the perspective that "most protesters will have to choose between three potential forums for bid protests—the U.S. Court of Federal Claims, those U.S. District Courts which have jurisdiction and venue, and the General Accounting Office." See Petrillo, Powell, & Conner, "Where To File The Protest? Implications Of The Expanded Bid Protest Jurisdiction Of The Court of Federal Claims," 38 GC ¶ 536. The omission of any discussion of the evolving world of higher level agency protests ignores a viable and powerful tool available to potential protesters.

This FEATURE COMMENT addresses both the concerns of potential protesters, and of agencies that are attempting to set up a higher level protest program. Regarding the agency viewpoint, the COMMENT analyzes the issues that typically arise in handling protests at the agency level, and suggests procedures to resolve protests (many of which have been used successfully in the Army Materiel Command's higher level agency protest process). With regard to prospective protesters, the COMMENT addresses what potential protesters should look for in an agency's protest program.

Executive Order—Higher level agency protests have been in existence in both civilian and military executive agencies for at least a decade. Based upon experience gathered from these protest forums, and the desire to provide an alternate dispute resolution type forum to the General Accounting Office and the courts, President Clinton in October 1995 issued Executive Order 12979, titled "Agency Procurement Protests" (see 37 GC ¶ 554). The Order set forth four goals regarding the resolution of contested procurements:

(1) All parties to the procurement should attempt to resolve matters with agency Contracting Officers;

(2) Agencies should prescribe procedures for inexpensive, informal, procedurally simple and expeditious resolution of protests, including permissible techniques that are not normally part of a formal protest process (use of third-party neutrals being one example);

(3) Agencies should allow interested parties to file protests for review of CO decisions which are alleged to have violated a statute or regulation, resulting in prejudice to the protester, at a level above the CO; and

(4) Agencies should implement a stay of award or of contract performance when a higher level agency protest is filed, unless it is in the best interests of the Government, or urgent and compelling reasons exist, which require immediate contract award or performance.

Resolution of Procurement Problems with the Contracting Officer—There is significant question in the procurement community as to how to interpret the Executive Order's first stated goal that parties attempt to resolve problems with agency COs. In the prebid opening or preclosing stage of a procurement, there is no question that any disagreement or suggestion as to the terms of the solicitation should initially be brought to the CO. This provides the CO with the potential to correct an error without the need for higher level involvement. It is only after a negative response (or a lack of a response) from the CO that a potential bidder or offeror should take its complaint to a higher level for resolution. If the problem is not solved to the satisfaction of the potential offeror, steps should be taken to initiate a timely bid protest appeal either to a higher level agency protest forum, the GAO, or the courts. In a postaward situation, however, time is of the essence because there is limited time from the date of notice of award or from the debriefing to file an appeal. Any attempt to resolve a potential protest with the CO by a losing bidder or offeror must be immediate. If the problem is not quickly resolved, steps must be taken to preserve the timeliness of protest allegations.

Selecting the Protest Decision Authority—The determination of who shall act as the protest decision authority is probably the most important determination to be made in establishing the higher level agency protest process.

An agency could choose to put the protest decision authority at a lower level—likely meaning an individual who is co-located with the CO, and who has had some degree of contact with the procurement under review. For instance, this individual may have had award approval authority, or have been involved in processing waivers or requests for deviations, or processing necessary interim approvals during the conduct of the procurement. However, the Federal Acquisition Regulation directly addresses this issue by stating: "Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the CO's chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement" (FAR 33.103(d)(4); see 39 GC ¶ 7, addressing amendments made by Federal Acquisition Circular 90-45). Thus, as a practical matter, officials one step above the CO will normally be precluded from being the designated agency official.

Another possibility is to elevate the level of the protest decision authority to a position substantially higher than the CO. Such an individual should also be higher in rank than any likely higher level Source Selection Authority. When a protest decision authority is at this level, it is unlikely that he or she will have had any direct contact with the protested procurement. Being located in a different building, city, or state also makes unlikely any prior participation or knowledge of the procurement. An individual at this level can approach the protest like a "blank slate" for first time review of the procurement.

Must the higher level protest decision authority be in the CO's direct "chain?" Prior to the Executive Order, it was always possible to file an agency level protest with someone who was higher than the CO but who also was in the CO's chain of authority. In fact, this was often one of the most powerful means of protesting a procurement. Some protests were filed with a higher level official, like an agency Secretary (or Under Secretary) or an installation commander. A person in this position normally was not substantially involved in the area of procurement, but was directly in the CO's chain of authority. When that person received a letter of protest, he or she was in a position to let it be known to the CO that either the procurement had been conducted properly, or that corrective steps would be taken to rectify the error.

As noted in the FAR text above, there is no regulatory reason why an appropriate person outside of the CO's chain should not be designated as the protest decision authority. However, whoever acts as the protest decision authority must not only have experience in the field of Government contracting (although not necessarily as a CO) and knowledge of the FAR, but also knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in which this person typically acts. No matter who is selected as the protest decision authority, it is important for that person to receive some form of legal assistance.

There are two primary candidates for protest decision authority other than someone in the CO's chain of command. One is the agency chief counsel, senior procurement attorney, or other high level legal officer with significant procurement and protest experience. Their legal experience is invaluable in making sure that the higher level agency protest is decided in accordance with both the facts and the law. The second alternative is an ombudsman that is at a sufficiently high level to enforce agency compliance with a sustained protest. The ombudsman's expertise is in the resolution of problems, and a protest is simply a specific kind of procurement problem in need of resolution, albeit an essentially legal one. The ombudsman, like the higher level procurement person, should use the assistance of experienced counsel for the formal resolution of a higher level bid protest.

No matter who is selected as the protest decision authority, the bottom line is this: that person must wield sufficient clout within the bureaucracy to be able to sustain a meritorious protest, an action which is likely to be resisted by the CO and his chain. That person must also have the authority to make sure that any rec-

ommended corrective action in a sustained protest is properly implemented in the field.

Agency Procedures—Procedures for higher level agency protests should be short and clear. Their purpose is to alert potential protesters of critical aspects of the agency's procedures to enable them to make their choice of protest forum. The general sequence and procedures may resemble those of a GAO protest. However, the time provided for a higher level agency protest is only about one third of the 100-day GAO decision requirement. As such, compromises usually have to be made in structuring the process to allow the protest decision authority to decide cases within the permitted time. The goal should be to maximize the likelihood of providing a just and fair protest decision (one which will be upheld by a reviewing forum) in the limited amount of time available. Specific issues that commonly arise in protests, and suggestions for resolving those issues, follow.

Stay and Stop Work Orders: A stay of contract award or stop work order halting performance of a previously-awarded contract is a requirement of both the Executive Order and the FAR. The stay is a mandate that no contract be awarded pending resolution of the protest unless there is a written determination, approved at a level above the CO, that there are urgent and compelling reasons requiring immediate contract award, or that an immediate award would be in the best interests of the Government. The stop work order is a requirement that contract performance be halted pending resolution of the protest unless a similar determination is made. However, a protester is only entitled to a stop work order if the postaward protest is filed within 10 days of contract award, or within five days after a debriefing date offered to the protester under a timely debriefing request.

There are two critical factors about the handling of the stay of award or stop work order in a higher level agency protest. First, these actions are mandatory under both the Executive Order and the FAR. Second, automatic stays of award and stop work orders are also automatically available to a protester which files at GAO, absent an appropriate agency determination to proceed. Such determinations ("overrides") are rare in GAO litigation. They also should almost never be necessary in an agency protest in light of the short time span for issuing decisions (FAR 33.103(g) establishes a goal that higher level agency protests should be resolved within 35 days after the protest is filed).

The AMC higher level agency protest program has an even shorter period for decision—20 working days. Based on available statistics, AMC has handled the highest number of higher level agency protests of any agency to date, and it has issued no overrides in almost 400 protest cases. There has been no acquisition which could not wait for the extremely short turn-around involved in AMC protest decisions. Reality dictates that firms will hesitate to use higher level agency forums if those forums routinely issue overrides prior to decisions on the merits. This is especially the case in light of the fact that overrides are rarely granted by higher level authorities when protests are filed at GAO.

Administrative Report: A common question presented after a protest is initiated is whether an administrative report should be provided to the protester. It is obviously a desirable goal to provide an administrative report to the protester. This facilitates full litigation of the protest, including the raising of all protest issues, at the agency level. However, it may not be feasible to do so. First of all, it is additional work for the contracting office, which is under a short fuse to provide its report to the protest decision authority. Second, if the report is provided, the protester must be given a reasonable period of time to submit its comments on the report, and the contracting office must be given an opportunity to respond. This is a major problem given the tight time constraints associated with agency protests.

On the other hand, the failure to provide an administrative report to the protester means that some issues will remain timely when first raised on appeal to GAO. In addition, the protest decision authority must realize that he or she bears a significant risk when making a decision without the full comments of all parties.

The approach taken in the AMC protest program is that its regulations do not provide for production of an administrative report as a matter of right. However, if the attorney drafting

the decision sees the need for further comment by the protester based upon release of specific documents (for example the CO's statement or a technical analysis), he or she will request permission for release of this material, making sure that documents or portions of documents which must be protected are not released. This permits comment by the protester on critical protest issues (and rebuttal by the contracting office), without making document release a mandatory part of the agency protest process. This methodology clearly has been working, in that only two (of almost 400) AMC higher level agency protests have been reversed on appeal.

Protective Orders: The most controversial issue regarding release of documents in the agency level protest process is the potential use of "protective orders" to permit release of a full administrative report to a protester's counsel. One practical reason against this is simply the time factor. However, even apart from the time factor, it is recommended that those desiring full release under a protective order currently have viable protest forums (GAO and the courts) where they can obtain a protective order and litigate their issues at the more leisurely pace that full disclosure of documents demands. Those forums also have a wider range of sanctions available for violations of a protective order. (It is questionable whether agencies truly have any viable sanctions available for such violations.)

Selling Higher Level Agency Protest Programs—Once a higher level agency protest program has been established (a protest decision authority has been selected and procedures for processing the protest have been developed), the biggest question to the agency is whether anyone will bother using it. The clear answer is yes, so long as the program is properly "sold" to the consuming public, namely firms that currently contract with the Government, potential contractors, and law firms that represent contractors and potential contractors.

The AMC higher level protest program is the most widely used program to date, with almost 400 protests having been filed since 1991. The reason for this level of activity is that the program has been actively promoted from the highest level of the command (its Commanding General) down to the working level attorneys in the program. Their collective efforts have resulted in numerous protests being filed at the AMC level rather than with the GAO (or, prior to this year, with the General Services Administration Board of Contract Appeals).

The selling effort has been accomplished through several paths. At the most basic level, notice of the AMC higher level protest process is included in solicitations issued by AMC contracting activities. At the General Officer/Senior Executive Service level, AMC's top level management has described the program and encouraged its use during presentations at major industry gatherings. The theme has been that while the process is quick from start to finish, protests will receive an intensive review by experienced procurement/protest attorneys prior to decision by the protest decision authority, and complaints will be fairly and impartially reviewed. Not infrequently, this has resulted in Chief Executive Officers of major firms bringing up specific procurement problems to the speaker. This usually results in a repeated reference to the higher level agency protest forum (and the ombudsman, when the topic is appropriate). Multimillion dollar protests have been brought into the forum in this manner.

The process has also been "sold" intensively at the working level. AMC acts as the point of contact for all GAO protests involving its subordinate contracting activities. In its initial correspondence to protesters (be they pro se or represented by counsel), AMC includes a brief description of its higher level agency protest process and an invitation to the protester to make use of this process. Individual AMC attorneys are also involved in giving presentations on the AMC higher level protest process at bar association meetings and at other forums. In addition, the process is mentioned, discussed, and promoted whenever possible with opposing counsel and pro se litigants during the conduct of GAO protests with the hope that the litigant can be convinced to file future protests at AMC.

Ultimately, one of the biggest factors in the success of a protest program is the reputation in the community of the attorneys handling the protest. At AMC, the drafting attorneys are the same attorneys that are responsible for GAO litigation. Thus, private law firms with experi-

ence in GAO protest litigation have a feel for the quality of the work that will be done should they file their protest with AMC. The reputation has developed over a decade, and is likely a major factor in the large number of protests filed at this forum.

Thus, with a well-planned approach to promoting a higher level agency protest program, a significant proportion of bid protests can be diverted from outside forums. However, while these methods can bring law firms or contractors to the forum in one protest, it is only the fairness of the program, both in fact and as perceived by the litigant, that results in repeat customers and referral of others to the program.

Advantages to Using Agency Procedures— Even after agencies select higher level bid protest decision authorities, draft regulations for handling the anticipated protests, and sell their products to the consuming public, the critical question remains for the potential protester: Why should I file my protest with this higher level agency bid protest authority rather than with GAO or the courts? There are several significant reasons why a potential protester should file at a higher level agency forum once a determination is made that it respects and trusts that forum.

The first reason is simply a matter of reciprocal customer relations. If your firm is responding to an agency's solicitations, you obviously consider that agency to be a customer or potential customer of your firm. On the other hand, to the agency, your firm is a supplier or potential supplier of goods and services. By filing your initial protest at the agency level, you are providing the agency with the opportunity to review your protest and take corrective action, if warranted, without being in the limelight of a sustained GAO protest. A sustained GAO protest is not only published, but is also sent to the agency head, a form of attention which no CO should willingly seek. A sensible agency will be aware that it is being given the chance to "clean up its dirty linen" in house, if that is what the facts reveal.

Practical reasons also exist for deciding in favor of a higher level agency protest forum. The first is that the decision on the protest is faster than in any other forum. If a protest is filed at GAO and an override is granted by the agency, performance may be complete prior to GAO's decision. As stated above, there should be few protests in which an override is granted when the protest is filed with a higher level agency protest decision authority.

In addition to speed of decision, the process is normally more informal and procedurally more simple than procedures in other forums. Costs of litigating the protest are likely to be less than in other forums. Because of simplified procedures, there is increased opportunity for a potential protester to file without counsel. Even if a protester does use counsel, costs still are likely to be low because in those agency protest forums where administrative reports are not provided, the primary involvement of counsel will be the drafting of the initial letter of protest.

Significant substantive reasons also favor selecting a higher level agency protest program. The first is that GAO and the courts must review a protest based upon statute and regulation. However, many procurement problems do not obviously violate either statute or regulation, and may thus not be a basis for a decision in favor of the protester in these forums. Such problems may not be recognized by the CO or the working level team of evaluators, but may cause corrective action if brought to the attention of a higher level agency protest decision authority. This is especially the case regarding prebid opening or preclosing matters, usually involving evaluation factors, specifications, or the statement of work.

A protest to GAO of an apparently minor aspect of the evaluation factors, specification or statement of work, which might appear insignificant to an inexperienced observer, could easily result in a decision that the agency may define its own needs. However, review by higher levels within the agency by persons with expertise in the area may generate different results, especially since these are the people responsible for defining the agency's needs. Corrective action in such situations, when the matter is timely raised, is a low cost method of correcting the problem for the Government.

Timeliness concerns also favor filing at the agency. If a protest is not timely filed at the

GAO, it will not be heard. Agencies, however, are free to review protests and take corrective action *at any time*. If a protest is clearly meritorious, and the protest is only slightly untimely, chances of relief are enhanced, especially in a pre-award mode.

The higher level agency protest program is capable of handling both pre- and postaward protests, including the simple and the complex. The AMC level protest program has reviewed individual best value awards worth almost $600 million. Resolution of such complex protests may involve extension of the usual time for decision, but there are frequently supplemental protests in such cases which permissibly extend the decision time.

Possible Disadvantages are Minimal—Assuming an experienced and qualified protest decision authority (and supporting staff), the only likely disadvantage in comparison to other forums is the lack of full discovery of the administrative record under a protective order. Thus, the cornerstone of the decision regarding where to file the initial protest will frequently boil down to the question of whether the protester feels that it needs a protective order and full administrative report.

Another possible disadvantage involves a fear often expressed by protesters that they will lose their stay if they lose the agency protest and decide to appeal to GAO. This is a matter which should be dealt with through negotiations prior to filing the agency protest. The potential protester should specifically request that the agency agree to continue the stay if the agency dismisses or denies the protest, and the protester appeals to the GAO. The agency's decision on continuing the stay will be a factor in the protester deciding where to file its initial protest.

Further, if the protester's basic outlook is that the agency is biased and unfair, or perhaps does not have the experience to do the job, it is wasting its time and the time of the protest decision authority by filing with the agency.

Conclusion—It is clear that higher level agency protest programs can serve as a quality alternative to protests at GAO and in the courts. They offer significant advantages not available in other forums. These advantages include speed, low cost, greater opportunity for review of an untimely protest, and the potential for enhanced "customer relations" for both the protester and the Government. In addition, while higher level agency protests must conform to statute, regulation and precedent, there is also the ability, primarily in the prebid opening or preclosing time frame, to review problems which may not violate statute or regulation, but represent unwise actions on the part of the agency. The primary downside to the protester is the likelihood of less discovery, which may or may not be a factor in any given protest. In fact, the AMC experience has shown that once parties have faith in the forum, they are willing to accept this aspect of the process, knowing that they have access to appeal if they deem it necessary. Thus, the challenge to each agency is to create higher level protest forums which protesters will trust sufficiently to use, and to prospective protesters to seek out and make use of these programs.

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This Feature Comment was written for The Government Contractor by* Jeffrey I. Kessler, *a civilian protest attorney for the U.S. Army.

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ITAA Calls Government Cost Estimates For Year 2000 Compliance "Incredibly Low"

The Government has grossly underestimated the costs involved with resolving the year 2000 computer problem, according to the Information Technology Association of America. Agencies estimate that they will spend $2.3 billion between Fiscal Years 1996 and 2000 on software code date-field conversion, a figure well below the $30 billion estimated by private sector experts. By establishing such "incredibly low" cost estimates, "the Administration is not showing sufficient commitment to meeting the challenge," stated Harris Miller, ITAA President.

The Government's cost estimates are compiled in an Office of Management and Budget report, "Getting Federal Computers Ready for 2000," that was submitted to Congress with President Clinton's Fiscal Year 1998 budget re-