

## CLIENT ALERT

### File Your Pre-Award Protest Early. Just Not Too Early.

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Filing a pre-award protest can be an effective tool to protect a contractor's ability to compete for a contract. But a recent Court of Federal Claims decision counsels that while a pre-award must be filed early—typically prior to the date for submission of proposals—it cannot be filed *too* early.

In *Goodwill Industries of South Florida, Inc. v. U.S.*, the U.S. Court of Federal Claims considered a pre-award protest filed by Goodwill Industries, a qualified nonprofit agency for disabled workers identified on the AbilityOne Program's procurement list as a provider of hot-weather trousers and combat pants. Goodwill challenged the Defense Logistics Agency's ("DLA") intent to procure both items from sources other than Goodwill. For the hot-weather trousers, though DLA had not yet issued a solicitation, it had drafted an Individual Acquisition Plan ("IAP") indicating an intent to award two indefinite delivery indefinite quantity ("IDIQ") contracts based on a best value procurement. For the combat pants, DLA had issued a solicitation for the award of two IDIQ contracts, though DLA had placed the procurement "on hold" to make design changes. Goodwill argued that the AbilityOne Program required DLA to procure both items from Goodwill on a non-competitive basis, and sought an injunction preventing award to any other company.

The Court dismissed the protest as premature. Regarding the hot-weather trousers, the Court held that in the absence of a solicitation, DLA's draft IAP was not a "final agency action," and that Goodwill's "anticipation of a future procurement violation is not sufficient to make a claim ripe in a bid protest before the court." As to the combat pants, the Court explained that the "on hold" status of that solicitation rendered that aspect of Goodwill's protest similarly unripe. The Court reasoned that while the procurement was "on hold" only while DLA was "waiting for specification changes to the purchase description and technical data," indicating DLA's intent to continue with a competitive best value procurement, the protest was still premature because the Court could not "rule out the possibility that the change in purchase description will match Goodwill's production of the Army Combat Pants, nor can the Court rule out the chance that the description will be changed, and not match Goodwill's production." Accordingly, the Court dismissed both challenges as premature.

Given the complex considerations a company must weigh when determining whether a protest is premature, untimely, or "just right," potential protesters should engage in close coordination with their protest counsel to identify the appropriate time to file.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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