

**DIVING INTO
UNCHARTED WATERS**

Ounce of Prevention Seminar (OOPS)



Brace for Impact – Protest Reform that Could Affect Your Business

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809 Panel Recommendations

Volume 1 Recommendations Affecting Protests

- Solicitations not required for “Lanes 1 and 2”
- Sole source SBIR awards immune from protest
- Foreshadowing – protests have become a feedback tool

Protest Reform Recommendations Under Consideration

- Transparency – Release entire contract file at award
- Forum – DoD tribunal only
- Decisional Timing – 10 days from start to finish(!)
- Grounds – Sole basis: “good business decision?”
- Judicial Review – Appellate review only at CAFC
- Standing – Replace interested party with first-to-file bounty
- Remedies – Bounty system
 - No more CICA Stay
 - No more corrective action
 - Extend “loser pays” pilot program

Enhanced DoD Debriefings

- What are they?
 - Contractors now have two business days following initial debriefing to submit additional questions
 - DoD must respond in writing in five days; protest clock does not run until responses received
- When do they apply?
 - Apply to post-award debriefings in accordance with FAR 15.506(d)
- Do they provide different information?
 - No—changes do not impact the substance of what can be provided
- How do I use them to my advantage?
 - Potential for more information/clarification to inform protest decisions
 - More time to analyze situation before protesting

New GAO Rules and Regulations

- New rules effective May 1, 2018
- Formal Roll-Out of GAO’s Electronic Protest Docketing System (“EPDS”)
 - \$350 filing fee for filing GAO protests (previously free)
 - Filing through EPDS serves as instant agency notice for CICA Stay of Performance
- Timing Clarification for Certain Solicitation Protests
 - Protest of amendment to solicitation terms must be filed before next proposal submission deadline or within 10 days of announcement if no new submission deadline
- Assorted Minor Tweaks
 - Right to request redacted version of any protected document
 - Additional notice requirements for CICA Stay overrides
 - Additional briefing requirements for protest cost-recovery disputes



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Significant Developments—Protest Filings/Results

GAO Bid Protest Statistics

	FY2017	FY2016	FY2015	FY2014	FY 2013
Cases Filed	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)	2561 (up 5%)	2429 (down 2%)
Cases Closed	2672	2734	2647	2458	2538
Merit (Sustain + Deny) Decisions	581	616	587	556	509
Number of Sustains	99	139	68	72	87
Sustain Rate	17%	23%	12%	13%	17%
Effectiveness Rate	47%	46%	45%	43%	43%
ADR (cases used)	81	69	103	96	145
ADR Success Rate	90%	84%	70%	83%	86%
Hearings	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)

Lots of Corrective Action!



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Significant Developments— Decisions of Note

OCI Waivers

- *CACI, Inc.-Federal; General Dynamics One Source, LLC, B-413860.4 et al.*, Jan. 5, 2018, 2018 CPD ¶ 17
 - FAR 9.503: “Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee”
 - Waiver upheld, even though (1) agency denied OCI existed; (2) prior contract clause specifically called future work an OCI; and (3) agency waived OCI only after award
- Note: Unfair Competitive Advantage (UCA) concerns not OCIs and *cannot* be waived. *Northrop Grumman Systems Corp.*, B-412278.7, .8, Oct. 4, 2017, 2017 CPD ¶ 312

Cybersecurity Protests

- *First Financial Associates, Inc.*, B-415713, .2, Feb. 16, 2018, 2018 CPD ¶ 76
 - GAO upheld agency determination that proposed 12-hour timeline for data breach notification was not sufficiently “expeditious”
- Draft DoD Guidance for Evaluating Contractor Cybersecurity, including Implementation of NIST SP 800-171
 - Regulations.gov, DARS-2018-0023; Comments Due by May 31



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QUESTIONS?

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