



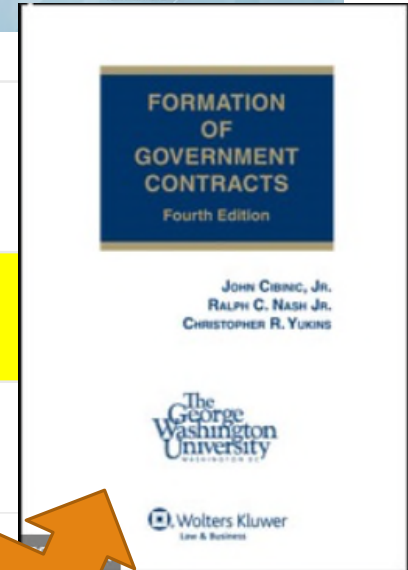
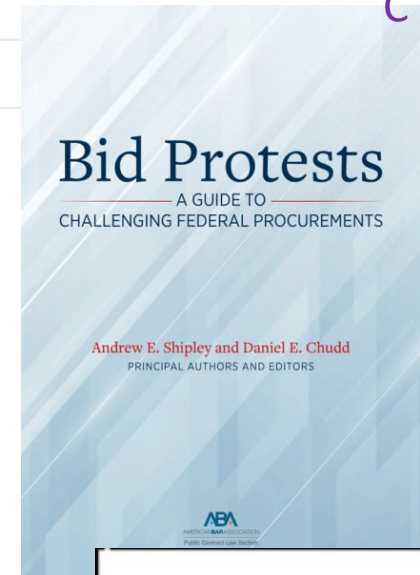
**Free Summer Series -
July 20-29, 2021**

**Introduction to
U.S. Bid Protests**



Session 3 – Addressing the Merits &
Preaward Protest Grounds

Session – Please register	Guests	Reading
<p>1. Introduction Tuesday, July 20, 2021, 6-8 pm ET</p>	<p>Craig Holman – Welcome Judge Patricia Campbell-Smith, U.S. Court of Federal Claims Ralph White, U.S. Government Accountability Office (GAO) Andrew Shipley & Daniel Chudd (principal authors, Bid Protests)</p>	<p>Ch. 1 – History Ch. 2 – Forums</p>
<p>2. Procedural Issues Thursday, July 22, 6-8 pm ET</p>	<p>Kendra Perkins Norwood Joshuah Turner</p>	<p>Ch. 3 (Standing, Etc.) Ch. 4 (Stays) Ch. 5 (Protective Orders)</p>
<p>3. Addressing the Merits Tuesday, July 27, 6-8 pm ET</p>	<p>Nathan Castellano Sonia Tabriz</p>	<p>Ch. 6.A (Protest Grounds: Pre-Award)</p>
<p>4. Protest Grounds Thursday, July 29, 6-8 pm ET</p>	<p>Marcus Childress Kristen Ittig</p>	<p>Ch. 6.B (Protest Grounds: Post-Award)</p>





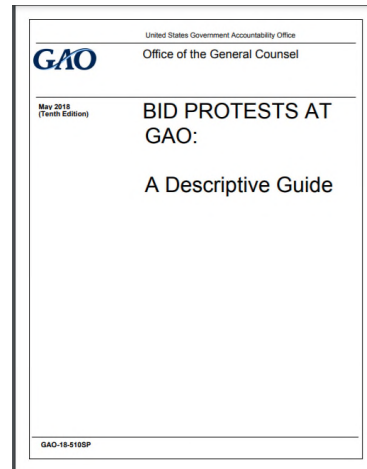
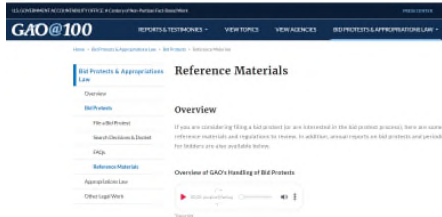
Guests

Sonia Tabriz &
Nathaniel Castellano
Arnold & Porter

Responding to the Merits -- Three Pathways for Protest

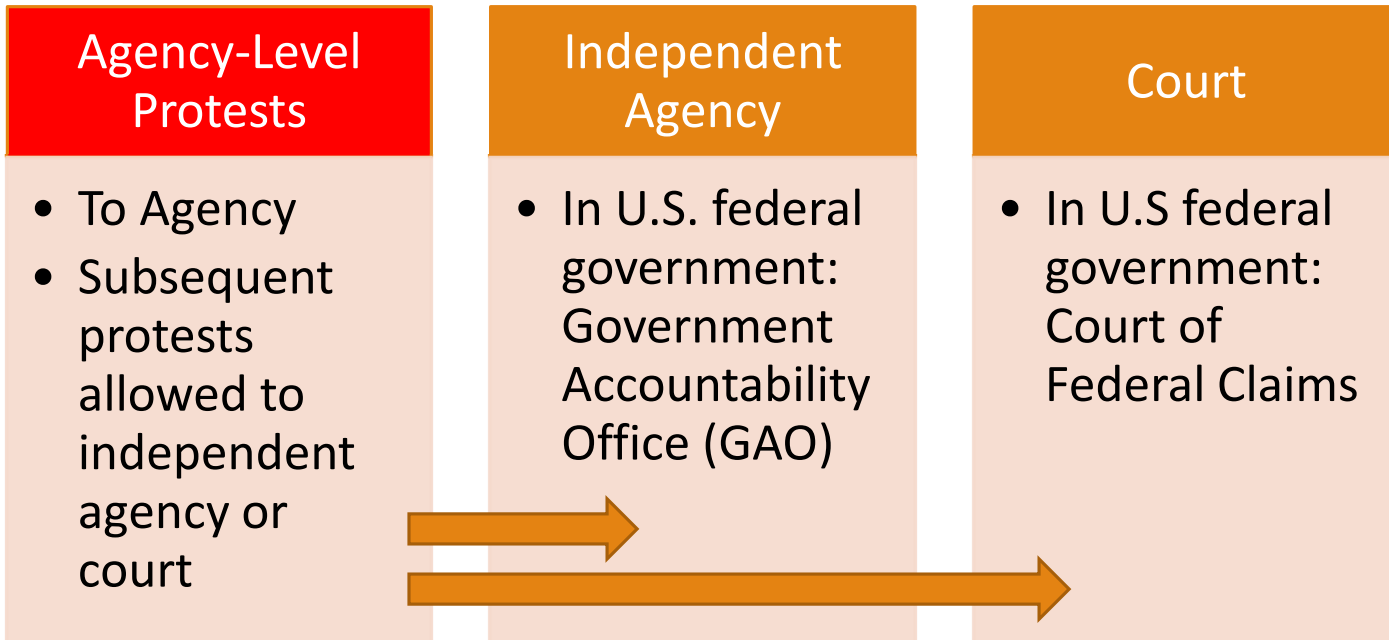


Federal Acquisition Regulation (FAR) 33.103 & Agency Supplements Acquisition.gov



U.S. Court of Federal Claims Appendix C - PROCEDURE IN PROCUREMENT PROTEST CASES PURSUANT TO 28 U.S.C. § 1491(b)

Protest Options



Agency-Level Protests

**STEPPING STONES TO REFORM:
MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE
FOR AGENCIES AND BIDDERS BY BUILDING ON BEST
PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT**

Draft Report: May 1, 2020

Christopher Yukins
George Washington University School of Law
Washington, D.C.

- Informal and inexpensive – typically letter to contracting officer or designated official (FAR 33.103), setting forth:
 - Protester
 - Solicitation/contract number
 - Legal/factual grounds (including prejudice)
 - Basis for standing
 - Timeliness
 - Requested ruling and form of relief
- Stay of award or performance – subject to override
- Little (if any) discovery
- Best efforts to resolve within 35 days
- Agency-level protests “are best employed to address the most obvious of errors or to put an agency on notice of perceived problems” – text, page 14

GAO Protests

The logo for the Government Accountability Office (GAO) is displayed in large, white, serif capital letters. A blue swoosh underline is positioned beneath the letters 'A' and 'O'.

Court of Federal Claims Protests

- Formal and structured – and often more expensive
- APA standard of review
- Broader administrative record
- No strict timeliness rules
- No statutory/automatic stay
- “Second-bite” protests
- Appeals are to the US Court of Appeals for the Federal Circuit



COFC: Procedures

Pre-filing Notice

Complaint and Initial Filings

- Complaint
- Civil cover sheet
- Disclosure statement
- Motion to file under seal
- Redacted complaint
- Motion for protective order
- Request for preliminary injunctive relief
- Filing fee

Intervention

Initial status conference and scheduling order

Temporary Restraining Order (TRO) / Preliminary Injunction (PI)

Administrative record

Motion for judgment on the administrative record

Decision and Appeal



Pre-Award Protest Grounds

Patent Ambiguities



- Patent ambiguity = two reasonable persons could interpret the same provision in different ways
- If *not* protested before bids or proposals are due, the patent ambiguity cannot be raised later as a ground for protest
- Question: Why does the law *force* vendors to protest patent ambiguities before offers or proposals are due?



Failure to Provide Full and Open Competition

- Only one responsible source
- Unusual and compelling urgency
- Industrial mobilization
- International agreement
- Authorized or required by statute
- National security
- Public interest
- **Question:** the law often requires the agency to prepare a written justification and (sometimes) publish notice of a procurement using other than full and open competition – is this sensible?

Restricting Competition Based on Lack of Advance Planning

QUESTION: SHOULD AGENCIES BUILD THE POSSIBILITY OF A PROTEST INTO TIMELINES FOR A PROCUREMENT?


Restricting Competition for Administrative Convenience

QUESTION: WHY WOULD GAO OBJECT TO SOMETHING (SUCH AS “BUNDLING”) WHICH *REDUCES* ADMINISTRATIVE COSTS?



Failure to Provide Fair Opportunity to Compete Under Multiple-Award IDIQ Contracts

QUESTION: IS THIS PROTEST OVERSIGHT MORE IMPORTANT NOW THAT CONGRESS HAS ALLOWED “NO-PRICE” IDIQ CONTRACTS?

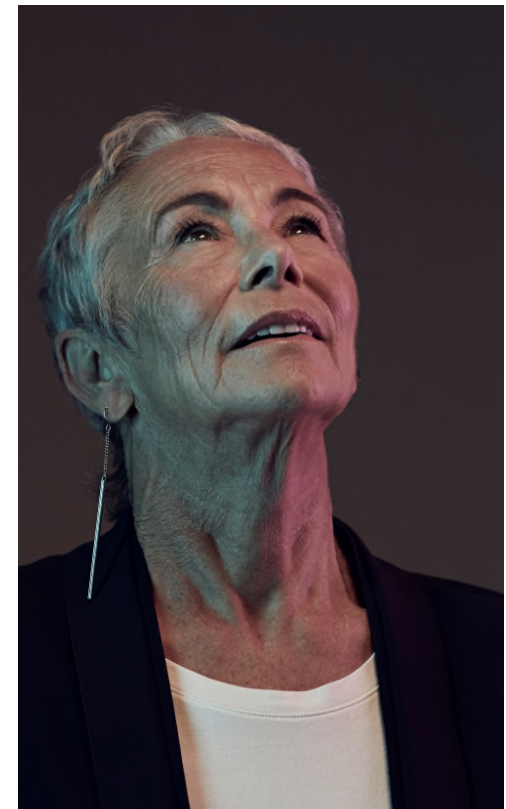


Orders That Exceed the Scope of the Underlying Contract

QUESTION: WHY DO WE MEASURE THE MATERIALITY OF THE SCOPE CHANGE BY THE REASONABLE ANTICIPATION OF THE ORIGINAL BIDDER?

Failure to Observe Socioeconomic Requirements

QUESTION: WHY NOT LEAVE IT TO CONTRACTING OFFICIALS' DISCRETION TO ENSURE THAT SOCIOECONOMIC GOALS IN PROCUREMENT ARE BEING MET?



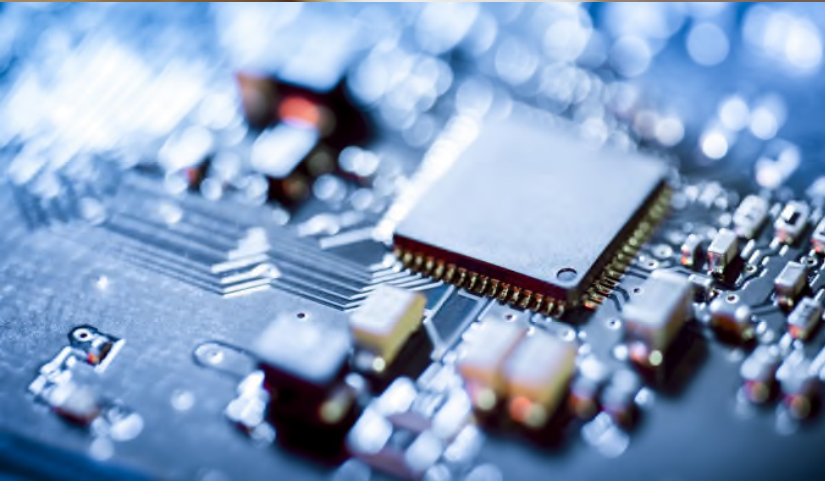
Improper Cancellation of a Solicitation

QUESTIONS: WHY DO CONCERNS ARISE IF AN AGENCY CANCELS A SOLICITATION? WHAT DOES IT MEAN TO ASSESS THE “REASONABLENESS” OF THAT DECISION?



Solicitation Terms Conflict with Statutory or Regulatory Requirements

QUESTION: ARE SOME
LEGAL REQUIREMENTS
MORE IMPORTANT THAN
OTHERS? DO
CONTRACTING OFFICIALS
HAVE MORE DISCRETION
IN SOME AREAS?



Commercial Item Procurements

QUESTION: WHY DOES IT
MATTER IF THE
GOVERNMENT BUYS
COMMERCIAL ITEMS ON
NON-COMMERCIAL TERMS?

Unreasonable Evaluation Methodology or Criteria

QUESTIONS: WHAT IF THE AGENCY PROPOSES AN EVALUATION METHODOLOGY BASED PURELY ON NUMERICAL SCORING? AND WHY DO AGENCIES HAVE MORE DISCRETION REGARDING WHICH *CRITERIA* TO APPLY IN EVALUATING PROPOSALS?



Change In Requirements

QUESTION: HOW CAN AN AGENCY STRUCTURE A SOLICITATION TO WITHSTAND CONSTANTLY CHANGING REQUIREMENTS?

Improper Bundling

QUESTION: WHY DOES GAO HOLD THAT “WHEN CONCERNS OF ECONOMY OR EFFICIENCY ARE BEING WEIGHTED AGAINST MAXIMIZING COMPETITION, CICA [COMPETITION IN CONTRACTING ACT] AND THE IMPLEMENTING REGULATIONS REQUIRE THAT THE SCALES BE TIPPED IN FAVOR OF MAXIMIZING COMPETITION”





Improper Disclosure of Proprietary Information

QUESTION: WHY WOULD A GOVERNMENT PROTECT A PRIVATE VENDOR'S PRIVATE INFORMATION?



Insourcing

QUESTION: WHY MIGHT INSOURCING BE CONSIDERED A "PROCUREMENT" DECISION? WHY NOT?

Videoconference – please register for link	Guests	Reading (all from ABA Bid Protests text except as noted)	Videos (on YouTube) – please review before videoconference
<p>1. Introduction Tuesday, July 20, 2021, 6-8 pm ET</p> <p>Session 1 Recording (1 hour 54 mins)</p> <p>Session 1 Slides</p>	<p>Craig Holman – Welcome Judge Patricia Campbell-Smith, U.S. Court of Federal Claims Ralph White, U.S. Government Accountability Office (GAO) Andrew Shipley & Daniel Chudd (principal authors, Bid Protests)</p>	<p>Ch. 1 – History Ch. 2 – Forums</p> <p>Optional reading: M. Schaengold, T.M. Guiffre & E. Gill, Choice of Forum for Federal Government Contract Bid Protests, 18 Fed. Cir. B.J. 243 (2009)</p>	<p>By C. Yukins:</p> <p>Welcome (3:11) Bid Protests: An Overview (26:43)</p>
<p>2. Procedural Issues Thursday, July 22, 6-8 pm ET</p> <p>Session 2 Recording (1 hour 46 mins.)</p> <p>Session 2 Slides</p> <p>Live Session Chat</p>	<p>Kendra Perkins Norwood Joshuah Turner</p>	<p>Ch. 3 (Standing, Etc.) Ch. 4 (Stays) Ch. 5 (Protective Orders)</p>	<p>By Victoria Christoff:</p> <p>2a – Chapter 3 – Standing, Timeliness and Whether to Protest (16:11)</p> <p>2b – Chapter 4 – Stays, Overrides & Injunctions (10:28)</p> <p>2c – Chapter 5 – Protective Orders (8:14)</p>
<p>3. Addressing the Merits Tuesday, July 27, 6-8 pm ET</p>	<p>Nathan Castellano Sonia Tabriz</p>	<p>Ch. 1 (procedures) Ch. 6.A (Protest Grounds: Pre-Award)</p>	<p>By C. Yukins:</p> <p>3a – Addressing the Merits (15:59)</p> <p>3b1 – Preaward Protest Grounds – Part 1 (19:30)</p> <p>3b2 – Preaward Protest Grounds – Part 2 (20:02)</p>
<p>4. Post-Award Protest Grounds & Next Steps in Reform Thursday, July 29, 6-8 pm ET</p>	<p>Marcus Childress Kristen Ittig David Drabkin</p>	<p>Ch. 6.B (Protest Grounds: Post-Award)</p>	<p>By C. Yukins:</p> <p>4a – Chapter 6.b – Post-Award Grounds for Protest (28:56)</p> <p>4b – Next Steps in Bid Protest Reform (18:51)</p>

Conclusion

PLEASE WATCH PREP VIDEOS FOR SESSION 4 – THURSDAY – JULY 29 – 6 PM ET

TOPICS FOR NEXT SESSION:

-- POST-AWARD PROTEST GROUND

-- NEXT STEPS IN PROTEST REFORM