

PTAC Training: Playing the Protest Card: If, Where, and How



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Panel Members

- Jerry Gabig, Wilmer & Lee
- Steve Feldman, Army Corps of Engineers
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Outline

- I. Setting the Stage
- II. “If” to Protest
- III. “Where” to Protest
- IV. “How” to Protest Successfully

I. Setting The Stage





**“[N]o one has a
right to a
Government
contract.”**

American Federation of Labor and Congress of Indus.
Organizations v. Kahn, 618 F.2d 784 (D.C. Cir. 1979)

The Big Picture

- There is no private sector equivalent to a vendor having a right to protest not being awarded a contract.
- The right to protest federal procurements exists because of Congressional permission.



Congressional Purpose

“The court's primary purpose in allowing protestors standing to challenge the government's procurement process is not to vindicate individual entitlement rights to government business. Rather, the court's objective is to advance the public interest by ensuring that the government obtains the most advantageous contracts by complying with applicable regulations and treating all bidders and offerors without discrimination. *(continued)*”

Congressional Purpose

When protestors assert their personal rights by suing the government for injunctive relief or monetary damages, they simultaneously advance the public interest in preventing the granting of contracts through arbitrary and capricious action.”

Grumman Data Systems Corp v. U.S. 28 Fed. Cl. 803 (1993)

Public Purpose For Protests

“[T]he government is a powerful entity in the economy and, as such, has a moral duty to maintain fairness in how it awards large contracts. Bid protests attempt to accomplish nonefficiency goals that ordinarily are of little concern to private firms.”

RAND Study at 11

Public Purpose For Protests

“Taxpayers typically want their government to deal fairly when it distributes money, judgments, and other services paid for by taxpayer money. Bid protests aim to ensure that government purchasing agents deal fairly with prospective suppliers.”

RAND Study at 11

Public Purpose For Protests

“U.S. agencies are held to a different set of standards than their private counterparts, simply because they are using government funds. By that measure, protests and control measures are in place to deter and punish ineptitude, sloth, or corruption of public purchasing officials.”

RAND Study at 12

Government Perspective

“In our discussions, DoD personnel expressed a general dissatisfaction with the current bid protest system. They believed that contractors have an unfair advantage in the contracting process in that they are able to impede timely awards with bid protests. *** In addition, there was a commonly held belief that a contractor is more likely to file a bid protest if it is an incumbent that has lost in a follow-on competition.”

RAND Study at vii-viii

Industry Perspective

“Overall, the private sector views bid protests as a healthy component of a transparent acquisition process, because these protests hold the government accountable and provide information on how the contract award or source selection was made.”

RAND Study at xiii

Views Of Seasoned Army Attorney

"Despite the tension, there is also significant common ground shared by both camps. Both sides benefit from an external check on government sloth, mistakes, ineptitude, and/or corruption—evils that detract from the goals of both camps.

(continued)

Views Of Seasoned Army Attorney

Bid protests supply an effective mechanism to deter such conduct in the first place, and, if undeterred, to expose and correct it.” Additionally, both camps have a common interest in fostering inexpensive and efficient protest procedures.”

Raymond Saunders, The Clause (Sept 2010)

Rand Study Insights

- “We found a steady increase in the number of bid protest actions at GAO between FY 2008 and FY 2016.”
- “[T]he overall percentage of contracts protested is very small—less than 0.3 percent.”
- “The number of protesters and protest actions tends to grow with a contract’s value.”
- “DoD uses stay overrides infrequently.”

Rand Study Insights

Characteristic	GAO (all actions)	COFC (case data)
Observations	11,459	475
Time frame	FY 2008–FY 2016	CY 2008–CY 2016
From small businesses ^a	53%	58%
Value under \$0.1 million ^a	7.9%	3.5%
Task-order protests	10.6%	NA ^b
Sustained rate ^c	2.6%	9%
Effectiveness rate	41%	NA ^d
Average time to close (days)	41	133

Rand Study Insights

- “The stability of the bid protest effectiveness rate over time—despite the increase in protest numbers--suggests that firms are not likely to protest without merit”
- “Small-business protests are less likely to be effective and more likely to be dismissed for legal insufficiency.”
- “Task-order protests have a slightly higher effectiveness rate than other types of protests.”

Rand Study Insights

- “Cases in which legal counsel is required (*i.e.*, a protective order was issued by GAO) have higher effectiveness and sustained rates.”
- “The number of protesters and protest actions tends to grow with a contract’s value.”
- “There is a strong correlation with the sustain rate and value.”
- “The largest DoD contractors have slightly higher sustained and effectiveness rates.”

Rand Study Insights

- “Bid protests by small-businesses plaintiffs represent the majority of protests.”
- “[T]he Army has relatively more protests compared with its spending or number of contracts.”
- “The Army has a slightly higher effectiveness rate but a much lower sustained rate than the baseline.”

“Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.”

FAR § 33.103(b)



Rand Study Insights

“An unsuccessful offeror is usually reluctant to file an agency-level bid protest because the relationship with the contracting officer may already be strained and the offeror may feel that the contracting officer and agency will not be able to render an impartial, objective decision.”

Global Force Symposium

Army pleads for industry to halt filing contract award protests on 'autopilot'

By: Jen Judson  March 17

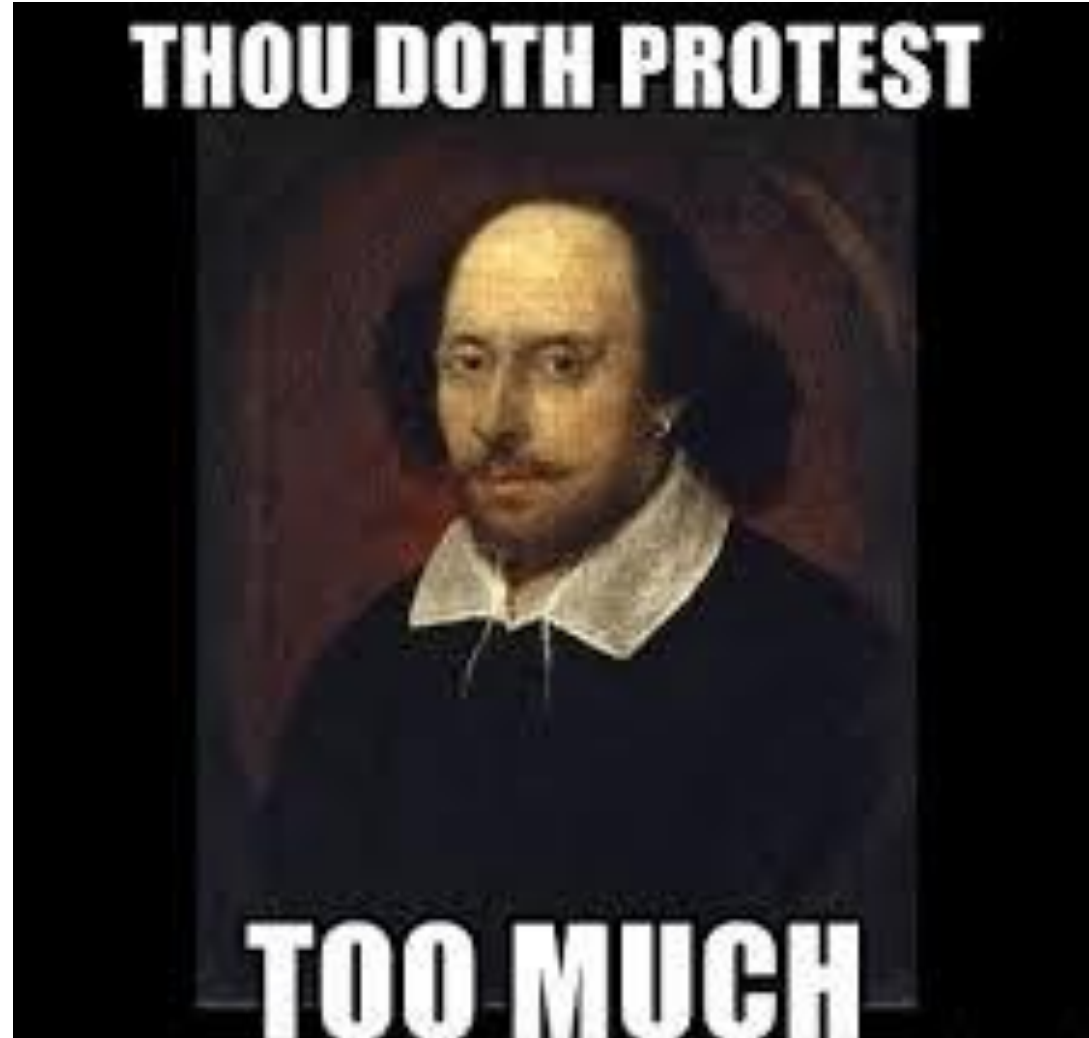


HUNTSVILLE, Ala. – High-ranking U.S. Army officials pleaded for industry to halt filing protests on a nearly automatic basis over contract awards at the Association of the U.S. Army's Global Force Symposium this week.

The Army is "working hard" to "reduce the requirement for protest, we are taking that obligation on us," Gen. Gus Perna, the head of Army Materiel Command, told an audience filled with military and industry representatives during a speech at the symposium on Monday.

But while the service will hold its contracting workforce accountable, "I ask that as you [industry] work through the process, that you don't bombard us with unnecessary protests," Perna said. "I need you to help self-assess, it cannot be on autopilot, protests are anchoring us down, just anchoring our capability to do other things."

II. “If” To Protest



Whether to Protest is a Business Decision

Should we protest?



Factors Favoring Protesting

- Probability of meaningful relief?
- Was the unsuccessful proposal critical to your business plan?
- Did the unsuccessful proposal expend significant amount of company's annual B&P funds?
- If you are the incumbent, can you retain the work pending the protest?
- Employee morale: is your proposal team convinced evaluators were wrong or did not following the evaluation criteria?
- Pressure from other vendors who are team members?
- Competitor mischief such as buying-in or gaming cost model?

Is the gamble to get a second bite at the apple worth it?

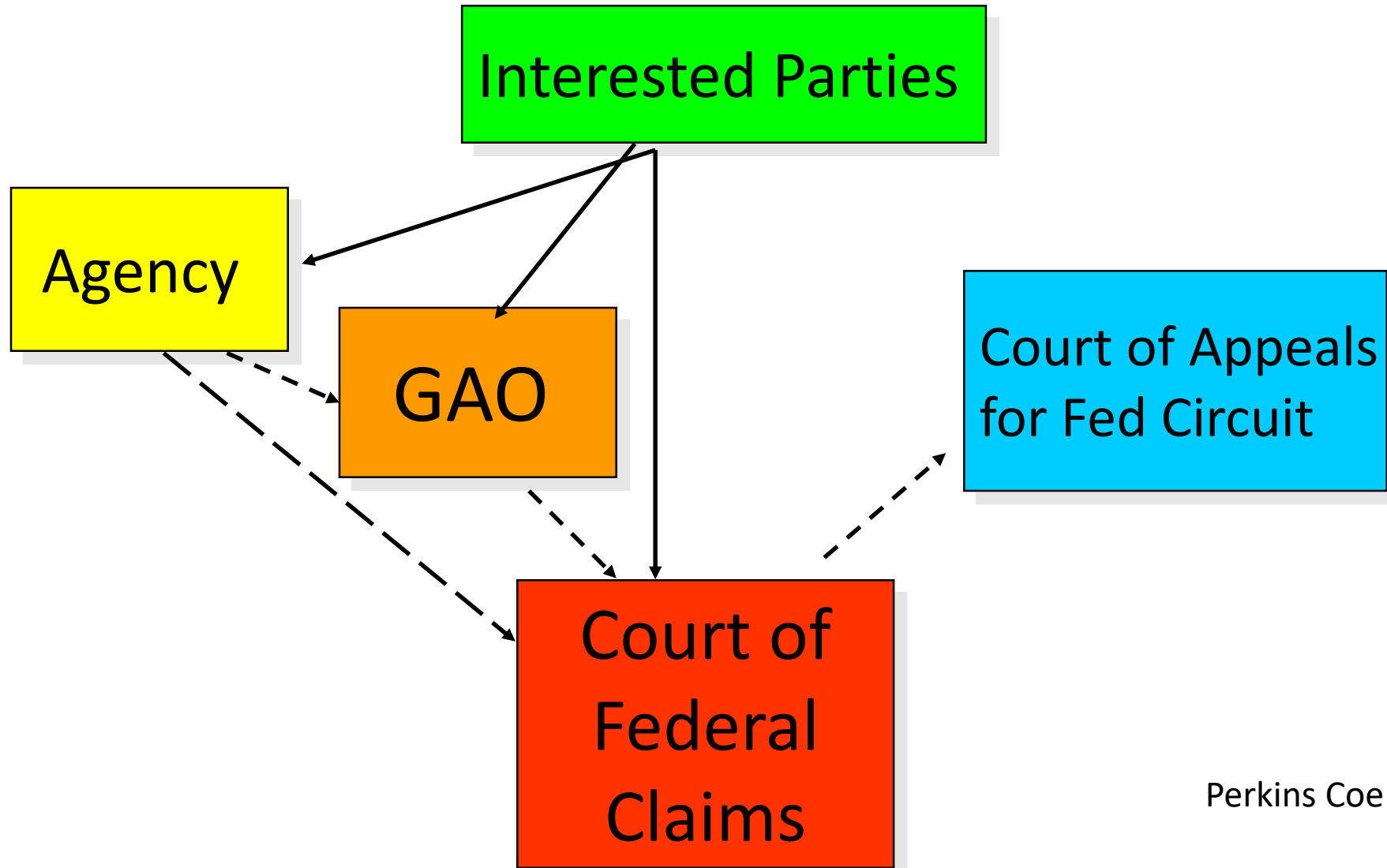


Factors Against Protesting

- Probability of success is difficult to predict but rarely high.
- Does your company need this government customer for future business?
- Legal fees can be significant (but may be recoverable if successful).
- Distractive to your on-going business.
- If your business philosophy is “win some; lose some” – flawed source selections are a price of doing business which average out over time.



III. “Where” To Protest



Perkins Coe Slide

III. “Where” To Protest

Discussion Outline

- I. FORUM SELECTION BASICS
- II. TASK ORDER PROTESTS
- III. SPECIAL RULES FOR FOLLOW-ON PROTESTS
- IV. FORUM DECISIONS—ARE THEY PRECEDENTS?
- V. PROS AND CONS OF SELECTING THE AGENCY PROTEST FORUM

III. “Where” To Protest

- VI. REQUIREMENTS FOR STAY OF AWARD/PERFORMANCE—
AGENCY LEVEL PROTESTS
- VII. REQUIREMENTS FOR STAY OF AWARD/PERFORMANCE—
GAO PROTESTS
- VIII. REQUIREMENTS FOR STAY OF AWARD/PERFORMANCE—
PRACTICAL ISSUES
- IX. SPECIAL RULES FOR TIMELINESS
- X. TRUE LIFE EXAMPLE OF MISSING A MANDATORY STAY
FILING DEADLINE

III. “Where” To Protest

XI. COFC TEMPORARY RESTRAINING ORDERS (TRO)
AND PRELIMINARY INJUNCTIONS (PI)

XII. JURISDICTION STANDARDS

XIII. STANDARD OF REVIEW

XIV. TIMELINESS RULES

IX. REMEDIES

XX. DECISIONS OF THE FORUMS

IV. “How” To Protest Successfully



Mere Whining Doesn't Win

“There is no such thing as a perfect procurement. Thus, a bid protestor must show prejudice, not mere error, for ‘[n]ot every error compels the rejection of an award.’ (*citation omitted*). Rather, it is ‘the significance of errors in the procurement process [that determines] whether the overturning of an award is appropriate,’ and it is the protestor who ‘bears the burden of proving error in the procurement process sufficient to justify relief.’ *Id.*”

Amazon Web Services, Inc. v. United States, 113 Fed. Cl. 102 (2013) (Judge Wheeler) (Emphasis added)

Mere Whining Doesn't Win

“Any good lawyer can pick lint off any Government procurement, pundits say. We will not set aside an award, even if violations of law are found, unless those violations have some significance.”

Andersen Consulting v. United States, 959 F.2d 929, 932 (Fed.Cir.1992)

Mere Whinning Doesn't Win

“It is the offeror's burden to submit an adequately written proposal, including all information that was requested or necessary to demonstrate its capabilities in response to a solicitation. Where the proposal omits or provides inadequate information addressing fundamental evaluation factors, the offeror runs the risk of an adverse agency evaluation.”

Great Lakes Towing Company, B-408210, June 26, 2013

Common Reasons For Successful Protests

1. Unreasonable technical evaluations
2. Unreasonable past performance evaluations
3. Unreasonable cost or price evaluation
4. Inadequate documentation of the record
5. Flawed source selection decision

<https://www.gao.gov/assets/690/688362.pdf>

#1. Unreasonable Technical Evaluations

Protest challenging the agency's technical evaluation was sustained where the agency's evaluation was based on a flawed methodology and contained numerous unreasonable conclusions.

Nexant, Inc. B-407708.2, January 30, 2013

#1. Unreasonable Technical Evaluations

Protest of a \$7.3M VA solicitation for an outpatient clinic sustained. The VA improperly credited the awardee for strengths that were unrelated to the evaluation criteria and overlooked instances where the winning bid left out important information.

Sterling Medical Corporation, B-412407, February 3, 2016

#1. Unreasonable Technical Evaluations

“The agency’s source selection decision criticized Intercon’s proposed wizard function on the basis that ‘[t]he wizard looks weird when the form is above it.’ Intercon asserts that this negative observation is unexplained in the record and bears no relationship to the requirements of the RFP and the evaluation criteria. We agree with the protester.”

Intercon Associates, Inc., B-298282.2, August 10, 2006

#1. Unreasonable Technical Evaluations

Protest of evaluation of protester's proposed contingency plan is sustained where the protester provided detailed arguments why the evaluation was unreasonable, which were consistent with the record, and the agency did not explain why the evaluation was reasonable in light of those arguments.

Kellogg Brown & Root Services, B-298694, November 16, 2006.

#1. Unreasonable Technical Evaluation

Evaluators awarded the challenger a strength for proposing to recruit incumbent employees, but did give the incumbent a strength—even though the incumbent proposed to retain the very same people.

SURVICE Engineering Company, LLC, B-414519, July 5, 2017

#2. Unreasonable Past Performance Evaluations

The awardee's past performance references had so little to do with the contract requirements that the Air Force had no basis for the "substantial" confidence rating. Although the contract had an estimated value of approximately \$110 million and a 5-year period of performance, the four past performance references provided by the awardee ranged from just 3 days and \$465 worth of work to one year and \$145,000.

Al Raha Group for Technical Services, Inc., B-411015.2, April 22, 2015

#2. Unreasonable Past Performance Evaluations

	GID	Patricio
Reference 1	Very Relevant/Exceptional	Very Relevant/Exceptional
Reference 2	Very Relevant/Exceptional	Very Relevant/Exceptional
Reference 3	Not Relevant	Very Relevant/Very Good
Reference 4	[none]	Relevant/Exceptional
Reference 5	[none]	Relevant/Exceptional
Overall Past Performance Rating	Substantial Confidence	Satisfactory Confidence

Patricio Enterprises, B-412740, May 26, 2016

#2. Unreasonable Past Performance Evaluations

Protest challenging agency's rating of protester's past performance as satisfactory rather than outstanding was sustained where agency fails to rebut protester's allegation that its past performance met the definition for a rating of outstanding.

Native Resource Development Co., B-409617.3, July 21, 2014

#3. Unreasonable Cost or Price Evaluation

Protest challenging agency's evaluation of awardee's proposal for price realism is sustained, where record shows that agency failed to evaluate disparity between staffing offered in awardee's technical proposal and price proposal, and also failed to evaluate awardee's ability to hire incumbent's employees (as it proposed) given relatively low labor rates in its price proposal.

General Dynamics One Source, LLC, B-400340.6, January 20, 2010

#3. Unreasonable Cost or Price Evaluation

Protest challenging the agency's cost evaluation is sustained, where the agency did not evaluate current market rates or incumbent pay rates, even though the awardee's proposed staffing plan relied largely on recruiting new hires and incumbent staff, and where the agency did not evaluate the awardee's proposed professional compensation plan in relation to its management approach and understanding of the requirements.

Target Media Mid Atlantic Inc., B-412468.6, December 6, 2016

#3. Unreasonable Cost or Price Evaluation

Protest sustained where the Navy's price realism adjustment twice penalized an offeror. After adjusting the offeror's direct labor rates to be realistic, "there was no reason for the Navy to separately adjust ORBIS' proposed costs with the variance between ORBIS' section B and cost summaries."

ORBIS Sibro, Inc., B-415714, February 26, 2018

#4. Inadequate Documentation

“[W]e cannot determine the reasonableness of the evaluation of the vendors' product demonstrations because the evaluation was not adequately documented.”

Swets Information Services, B-410078, October 20, 2014

#5. Flawed Source Selection Decision

A best value source selection was converted to a low cost-technically acceptable award. “[T]he SSA's tradeoff determination was not consistent with the stated evaluation criteria. Rather, the SSA discounted PwC's technical superiority....”

PricewaterhouseCoopers LLP, B-409537, June 4, 2014

#5. Flawed Source Selection Decision

The source selection decision failed to consider the variety and quantity of amenities offered under the access to amenities subfactor. The protest was sustained for not assessing the differences in the proposals.

One Largo Metro LLC, B-404896.7, June 20, 2011

#6. Unstated Evaluation Criteria

Agency used unstated evaluation criteria where it assessed a significant weakness to a proposal that did not demonstrate it could perform concurrent task orders where the solicitation did not include a requirement for offerors to demonstrate ability to perform concurrent task orders.

McGoldrick Construction Services, B-409252.2, March 28, 2014

#7. Unequal Technical Evaluations

Protest sustained where the protester and awardee both addressed staffing and marketing approach and the agency did not fairly consider the protester's similar proposed staffing and marketing approach.

Spherix, Inc., B-294572.2, December 1, 2004

#7. Unequal Technical Evaluations

Protest was sustained where the agency evaluated the awardee's and the protester's proposals unequally by crediting the awardee for the experience and past performance of a specialty subcontractor, but not similarly crediting the protester, which proposed the same subcontractor.

Brican, Inc., B-402602, June 17, 2010

#7. Unequal Technical Evaluations

“[T]he record is devoid of any reasonable explanation as to why EFW’s standard resolution camera ... was assigned a unique strength under the operational utility factor for enhancement to image quality, while Raytheon’s high resolution camera with image enhancement features was not.”

Raytheon Company, B-409651, July 9, 2014

#8. Organizational Conflicts of Interest

“[T]he record here is replete with solid analysis of the potential for concern with regard to the Awardee’s conflict of interest Accordingly, since there is nothing in the record documenting that the agency meaningfully considered Safeguard’s conflict, we conclude that the agency’s actions here were not reasonable, and sustain this ground of protest.”

AdvanceMed Corporation, B-415062, November 17, 2017

#9. Key Personnel

Protest sustained where agency allowed awardee to substitute key personnel after submission of final proposal revisions without also opening discussions with protester. Protest sustained.

YWCA of Greater L.A., B-414596.3, July 24, 2017

Competency Of Evaluators

“Most federal agencies have not engaged systematically in human capital planning for the federal acquisition workforce. Few agencies have systematically assessed their acquisition workforce in the present or for the future.”

*Report of the Acquisition Advisory Panel (2007)
Chapter 5, Finding # 6*

Competency Of Evaluators

The GAO will not review challenges to the competency of evaluators or to the composition of an evaluation panel unless there is an assertion of fraud, conflict of interest, or actual bias alleged.

American Correctional Healthcare Inc., B-415123.3, Jan. 2, 2018

Conclusion

- **The protest card is a gamble.**
- **Be selective when playing the protest card.**
- **If you chose to play, play to win.**

