GAO BID PROTESTS:
“HOT TOPICS” FOR INFORMED CONTRACTORS

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OBJECTIVES

① Demystify the protest process (for those who are unfamiliar)
② Instruct on how to find protest grounds – and inform of how to defend award when challenged
③ Discuss critical timing considerations
④ Explain differences between GAO and Court of Federal Claims
⑤ Distinguish “good” from “bad” protests
⑥ Keep companies better informed during the protest process
⑦ Manage fees and costs
⑧ Share insight into relevant protest trends
⑨ Maximize prospects for successful outcome
## SOME STATISTICS

<table>
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<th>FY 2014</th>
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<tbody>
<tr>
<td>Cases Filed</td>
<td>2561</td>
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<tr>
<td>Merit Decision</td>
<td>556</td>
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<tr>
<td>Sustain Decisions</td>
<td>72</td>
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<tr>
<td>Sustain Rate</td>
<td>13%</td>
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<td>Effectiveness Rate</td>
<td>43%</td>
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<tr>
<td>ADR</td>
<td>96</td>
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<td>ADR Success Rate</td>
<td>83%</td>
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<td>Hearings</td>
<td>42 (5%)</td>
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GOOD VS. BAD PROTEST GROUNDS

- What can be protested and what cannot?
- “GOOD” grounds:
  - Violation of law or regulation
  - Deviation from solicitation
  - Inadequate record
  - Unequal treatment
  - Objective flaws
- “BAD” grounds:
  - My approach is better than their approach
  - Subjective flaws
  - Challenging the solicitation terms after the competition has been completed
KNOW YOUR FORUM

• Choice of forums: Agency; GAO; COFC
  • Stay
  • Available relief
  • Timeliness rules
• Turnover in people and skillsets
  • how cases are managed and assigned
  • brief writing and advocacy tips
• How turnover impacts your arguments and protest strategy
• How timeliness rules differ among the forums
  • Note also that timeliness for jurisdiction is different from timeliness to obtain CICA stay.
MAXIMIZE YOUR RESULTS

• Strategies for protester
• Strategies for intervenor
• Discovery strategies
  • targeted requests
  • reverse discovery
• ADR ("feedback")
  • what it means depends on who gives it
• Corrective action
  • differences between GAO and COFC
• Recovery of fees & costs
HOW CAN YOU AS THE CLIENT . . .

- Effectively participate?
  - redactions
  - conference calls & ADR
  - protective orders
- Keep your protest costs down?
  - initial protest
  - role of the intervenor
- Recover protest costs?
  - severability
EFFECTIVE STRATEGY

- Argue the facts, not the law (but know law)
- Educate, don’t argue
- Look for “objective” hooks
- “Kitchen soup” protests are okay at the outset, but narrow them ASAP
- Prioritize arguments
- Map arguments to RFP
- Citations, citations, citations!
- Eliminate hyperbole
- Keep your arguments straightforward, logical, and simple
- Get “feedback” whenever you can
TRENDS

- Price and cost issues
- OCI and discussions (timing)
- Commercial item procedures
- Federal Supply Schedules
- “2d Bite” actions at COFC
- Media & Congressional outreach
## CONTACT INFORMATION

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<thead>
<tr>
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Rogers Joseph O’Donnell, a boutique law firm that has specialized in public contract matters for 33 years, is ranked in “Band 2” by the 2014 *Chambers USA* – the only boutique among the nine highest ranked firms.

**SELECTED PUBLICATIONS & PRESENTATIONS**


- “GAO Bid Protest Practice Tips and Pitfalls,” Potomac Chapter of the National Contract Management Association, Nov. 8, 2012
- Practical Comparison of Bid Protests at the GAO and Court of Federal Claims, Board of Contract Appeals Bar Association, Oct. 24, 2012

**SHARON LARKIN**

Sharon Larkin received her B.A. from Albany College of Pharmacy and graduated *magna cum laude* from Suffolk University School of Law, where she was a member of the *Suffolk University Law Journal*. Sharon worked for 12 years at the Government Accountability Office, where she served as an Assistant General Counsel in the Procurement Law Division and a Trial Judge on the GAO Contract Appeals Board.

At the GAO, Sharon presided over complex bid protests and contract appeals, including disputes involving the acquisition and performance of contracts involving commercial items and services, environmental remediation, healthcare services, information technology, and facilities modernization. She issued more than 425 public decisions, presided over more than 40 hearings and trials, and conducted more than 65 alternative dispute resolution sessions. Sharon won numerous awards for distinguished service, including the GAO Meritorious Service Award from the Comptroller General in 2007, and several Office of General Counsel Outstanding Achievement Awards. Sharon was the Chair of the American Bar Association Section of Public Contract Law for the 2013-2014 term.
Robert S. Metzger received his B.A. from Middlebury College and his law degree from Georgetown University Law Center, where he was an Editor of the *Georgetown Law Journal*. He was a Research Fellow at what is now the Belfer Center for Science & International Affairs, Harvard Kennedy School of Government. Bob is admitted to practice law in California and the District of Columbia.

Bob holds leadership positions in the American Bar Association Section on Public Contract Law and Section of International Law. A recognized authority on public procurement practices and policies, Bob is the co-author (with Daniel Lyons) of “A Critical Reassessment of the GAO Bid-Protest Mechanism,” *Wisconsin Law Review*, Volume 2007, Number 6, 2008 and is a presently a Guest Lecturer at the George Washington University Law School on procurement issues. He is ranked in 2014 *Chambers USA* as a top Government Contracts lawyer (national). Bob is the Vice-Chair of the Software & Supply Chain Assurance Working Group of ITAPS, a leading IT trade association.

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**SELECTED EXTERNAL PUBLICATIONS**


- “GAO’s Neglected § 21.8(b): How it Can be Used to Address Concerns that Bid Protests are too Costly and Disruptive,” *Federal Contracts Report*, 102 FCR, Aug. 5, 2014 (Oliya Zamaray, co-author)