INSIDE THE MINDS

Government Contracts Law Client Strategies

Leading Lawyers on Counseling Clients During the Bidding Process, Negotiating Contracts, and Minimizing Litigation Liability

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Winning the Bid: The Value of a Government Procurement Lawyer

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Government agencies contract for millions of dollars of goods and services every year. Contracts range from basic supplies to complex construction projects. For companies that master the government procurement process, it can be lucrative, and is typically recession-proof and consistent work.

As an attorney who specializes in the field of government procurement, I assist clients by reviewing their contract documents, either before they submit a bid to perform services or while they are seeking an award of a contract from a governmental agency. I also assist clients who may have already submitted a bid or proposal to a government agency, and who are now awaiting the results of a pending selection process.

Simply stated, a government procurement attorney can assist clients on the front end (i.e., during the bidding phase) by reviewing contract documents. They then assist clients during the selection phase in procuring an award or, in some cases, protesting an award that seems likely to go to another contractor. Once the client's bid is selected as being first among the top-ranked firms, the attorney may be involved in negotiating the contract or reviewing the proposed contract terms. After the actual contracting phase, the attorney further assists the client during the performance phase with respect to any issues that may arise, such as payment or performance disputes.

The Competitive Bidding Process

Phase One: Submitting a Bid—Mistakes to Avoid

To ensure that taxpayers' interests are properly protected, it is important to award government projects in a competitive bidding process—a process aimed at ensuring the government obtains quality work at a fair price. This process is generally similar from state to state and city to city. It essentially begins with an advertisement stating that a governmental agency will be accepting offers/bids/proposals until a certain date or time. These bids are typically submitted in a sealed envelope, and once the bidding deadline has been reached, the bids will be opened.

During the course of my career, I have found that the majority of clients like to submit their own proposals and prepare their own bid documents.

Since clients are familiar with their own business and pricing, they feel comfortable preparing bid documents. However, clients could often avoid many potential pitfalls by consulting counsel before submitting those bids. Unfortunately, my initial involvement with most clients is during the selection or bid evaluation phase. This is usually when the client first realizes the government agency may have rejected their bid, has deemed them non-responsive because they left out important information or made errors on their submission form, or they believe a competitor has been unfairly selected, and they wish to file a protest. For example, a contractor may have omitted required information as to their qualifications, or may believe its competitor did not meet the requirements of the bid.

Indeed, a government procurement attorney can prevent many difficulties and provide a great deal of value to those clients who consult them before submitting a bid. At that early stage of the contracting process, counsel can help ensure the client understands what is required of them, and help them submit a full and complete proposal to the governmental agency they wish to contract with. For example, the client needs to be sure they have the requisite license for the job they are seeking. In addition, they might not realize they need to submit a copy of their license certificate, or a copy of their certificate of insurance, as part of the bid proposal. Legal counsel can help ensure the client's key personnel understand they have to be meticulous in the documentation process, because the client might not get to phase two if its bid has not been properly assembled.

Thus, it is essential to put together a complete and error-free responsive bid package. I have represented both government agencies and private clients throughout my career, and all too often I have found that bids are rejected because of simple mistakes made during the first phase of the bidding process (e.g., the contractor forgets to sign the bid form, or an administrative assistant signs it rather than the person with the authority to bind the company to the contract). When such errors are discovered, the bid will not be deemed as a bona fide offer—as the government is only interested in firm offers, not bids that are subject to being withdrawn or bids that may have been submitted simply because the company was "testing the waters" in terms of comparing prices for services.

It is equally essential to be sure the company submitting the bid is the entity the government agency is to evaluate. For example, a company submits a bid for a government job, knowing they would be relying on the capability of their affiliated companies to do the work in a joint venture, but they do not make that clear in their bid proposal. When the government pulls the background material on the company listed on the proposal, it finds the company is a small venture that does not do the kind of work the job requires and does not have the proper license. If the company explains the situation to the governmental agency, it may or may not accept the submittal of additional information. However, the firm that submitted the second-lowest bid may protest that award based on the grounds that the winning company's bid was non-responsive. Indeed, I have been involved in several contested proceedings over that particular issue—disputes that could have been avoided had the person who prepared the bid made sure they submitted the correct company names in the first place.

There are many other minor mistakes companies can make during the bidding process that can turn into major problems. What seem like minor details may lead to rejection of a bid. For example, an office equipment supplier submits a bid to provide copier machines, but the company fails to specify how many pages per minute its copiers could produce, or the copiers' paper load capacity. Overlooking such details during the bid submittal phase can cost a company millions of dollars in lost bids, since these are typically multi-year projects.

Phase Two: Contract Selection/Award

In most cases, a procurement manager will open the bids after the bidding deadline has passed, and start reviewing them for responsiveness. If someone forgets to sign a bid, forgets to include a price, or does not have the right licenses, the government will weed out those "unresponsive" bidders and may reject them on the front end. If price is the determining factor with respect to which company is awarded the contract, the lowest bidder will usually win, provided the company or individual has the licensure and other background required to do the work.

If, however, the contract is not being awarded in a traditional bid where price is paramount, it may be because the government has other selection

criteria it wishes to employ. In that case, the process may be more of a "request for proposals." Selection criteria in this scenario may include having to demonstrate experience with similar projects, having had prior governmental experience, or having certain staffing or technical expertise within the contractor's firm. In the request for proposal context, not only will the bid be evaluated on price, but it is likely to be evaluated by a technical review/selection committee that ranks the bidders by responsiveness. In many cases, each bid will be awarded points—a certain number of points for the best price, years of experience, and comparable projects. The ranking will then be based upon that overall grading system, which is tied to whatever criteria was specified in the bid package.

Filing a Protest or Lawsuit

In general, public agencies have broad discretion in decisions relative to bid awards. Courts will not second-guess the subjective decision-making process of procurement officials. If, however, there are objective deviations from the established bidding procedure or violations of law, an award may be subject to challenge.

In some cases, governmental staff may change or not follow the published selection criteria. They may stipulate in their advertised request for proposals that 50 percent of the proposal will be graded on price and the other 50 percent on comparable projects. After proposals are received, staff decides to grade 20 percent of the proposal on the number of offices a company has within a certain proximity to where the project is located. If changing the criteria after the fact changes the outcome of the process, the client may have a legitimate protest. Indeed, our firm is often contacted during the selection and award phase, in cases where the agency that was in charge of the bidding did not make an award in accordance with the advertised selection criteria.

There is typically no requirement that the agency receive a certain number of bids. Therefore, if only one bid is received, that will be the entity that usually gets the work. However, if five to ten bids are submitted, the government will often rank the top three bids, and may call in those companies to make live presentations. In some cases, our client will be informed during the interviewing process that they were not sufficiently

responsive in a certain area, or that they were ranked lower than another company for a certain reason. If the client feels the government staff did not read their entire proposal, or made some other error that led to that evaluation, they may also have grounds for filing a protest.

In many cases, we are able to seek administrative review of the agency's decision, rather than going to court to resolve the dispute. Parties are typically required to exhaust administrative remedies before filing a lawsuit. Therefore, if you learn of some error or other problematic situation during the bid review phase, and there is an administrative procedure the government agency has put in place for bidders to seek redress or file a protest, you need to take advantage of those procedures. There are some exceptions that allow you to file a lawsuit before you exhaust your administrative remedies. For example, in Florida, an aggrieved bidder can go straight to court for certain statutory violations. In most cases, however, you must direct your protest to the agency itself, and the agency may or may not grant an administrative hearing.

If, after going through an administrative process, the client still believes there are grounds to dispute the award, the remedy may be to file a lawsuit. The relief an aggrieved bidder would seek in a lawsuit is generally to hold up the award process and seek an injunction to enjoin another contractor from getting the contract or the government from proceeding with the award.

As referenced above, in certain circumstances, a bidder may be permitted to bypass the administrative process and go straight to court. For example, in Florida, if a government agency violates the open meetings or "Sunshine Law," there is a private cause of action. An aggrieved bidder need not exhaust its administrative remedies to challenge decisions made in violation of the Sunshine Law. Pursuant to Florida's Sunshine Law, members of the public, including the bidders themselves, can attend the award deliberations, and if it is found that the agency awarding the contract committed any violations, such as failing to notify the public of where and when the meetings will be held, the statute provides that the proposed contract and/or award is deemed void. Other states may have comparable statutes, which are valuable means for bidders to monitor the award process.

Defending the Client from a Protest

In addition to helping their client dispute any decision that has the effect of rejecting them from consideration or deeming them non-responsive, a government procurement attorney is often called upon to intervene on their client's behalf in the opposite scenario, when other bidders attack the award of the contract to your client.

For example, a competing contractor may file a protest that essentially says, for whatever reason, your client should not be getting the work the government has awarded them. If that contractor is very aggressive in terms of raising issues that may lead to a costly and protracted lawsuit—a scenario that would ultimately put the project on hold—the government may be inclined to simply reject all the current bids and open a new bidding process. If there is no legitimate basis for a re-bid, a lawyer will typically intervene on their client's behalf. If the government is put on notice that your client will be equally inclined to file a lawsuit if they feel they were rejected improperly, you might thwart any inclination the government has to reject your client's bid and start the whole process anew.

There may be deadlines to intervene or formal application that needs to be made. Counsel must immediately research the legal procedure to intervene in another contractor's protest proceeding. Failure to do so could result in your client's argument not being heard.

Time Considerations

Many clients who wish to file a protest are unprepared for what is essentially a very intense, fast-paced, confusing process. The protest process has very tight deadlines. Therefore, clients can be greatly assisted by attorneys who help them be responsive and quickly fulfill whatever the process requires. If you are not quick and responsive in the protest phase, the right to protest may be time-barred.

Generally, each agency has its own rules and time restrictions for filing a protest. For example, you may have to file a protest within as little as seventy-two hours of learning of the grounds for your rejection, and if you do not know exactly how to proceed, you may lose any opportunity to

challenge the government's decision. In addition, if you fail to exhaust the stipulated administrative remedy in a timely fashion, the court may not permit you to file a lawsuit.

In many cases, the client might find out during the award and review phase that there is an issue with their bid and that they may have grounds for protest, but if they do not immediately put counsel to work with respect to examining the relevant bid documents (e.g., the client's proposal and advertised requirements, ordinances, and policies), they may have no idea what the deadline is for filing that protest, and they may not know what the form of the protest needs to be. In some cases, the attorney can simply send a letter of protest to the agency. For example, "We represent Jim Smith, who was deemed second-ranked in the bidding process based upon lack of a proper license, but on page thirty of his bid package Jim Smith included his license, and therefore we protest that he should not have been downgraded on that point." On the other hand, the procedure may be far more complex, including a formal complaint and filing fee or protest bond.

Indeed, one of the most challenging aspects of being a lawyer in this area is the fact that you have days, not weeks, to figure out how to defend your client in the bidding process. If the client does not seek your assistance as soon as possible, you may find you have only one day to review their file and prepare your protest. All too often, a client who has come in for a consultation seems to have good grounds for protesting an award ruling, but after we look at the facts, dates, and applicable procedures, the client may already be beyond the time limit for doing so. The procedure for filing a protest is usually established by statute, local code, or ordinance, and may be referenced in the bid documents.

Phase Three: Contract Negotiation/Execution

The third phase in the bidding process is the contract negotiation and/or execution phase. The value a government contract attorney provides to his or her clients during negotiations is twofold. Counsel assists the client in actually getting a contract by making sure the contract negotiations do not fall through, and he or she can protect them from burdensome or unclear contract terms. It is the attorney's role to make sure the terms of the

contract are not adverse to the client, and that the client does not sign a contract without understanding all of the terms and conditions.

Indeed, even though you may have resolved all disputes with respect to who should get the contract, the process may still fall apart because the selected contractor does not see eye to eye with the government agency's representatives as to what the written contract should say. It should be noted that there is no universal rule stipulating that a written contract is needed in the contracting process. In some cases, all that is required is that the governmental agency vote on the offer the contractor has made in the bid documents, and it may then simply issue a notice to proceed. However, in situations where all the terms and conditions of the project are not spelled out in the bid documents (e.g., whether the services can be subcontracted, how much insurance is required, whether one side or the other can terminate the contract), or if the particular agency is required to enter into a written contract by statute or ordinance, we need to enter the contracting phase, which can often be quite protracted.

In many instances, the contracting phase of the bidding process can become an extended process. Even if the material terms have already been defined, you may find there is a whole other realm of issues that have not been contemplated or need to be negotiated. These may include an indemnification clause pertaining to whether the contractor will indemnify the government agency or other bonding issues. The subject and scope of an indemnification provision can be a negotiation in and of itself. Government agencies usually want a contractor to indemnify (pay for or reimburse) the agency for any damages or claims made because of the contractor's work. Whether the indemnity applies to damages that may have been caused in part by the agency's own staff, and whether there would be a dollar limit to the indemnity obligations, are terms that may need to be hammered out. The contract or bid documents may also require a bond, but they may not have specified all of the bond terms. Government agencies often require performance and payment bonds. (A performance bond is a guaranty that the work itself will be completed, and a payment bond is a guaranty that subcontractors, suppliers, and laborers will be paid.) In lieu of bonds, the parties may negotiate to have the contractor post cash or other security.

Other Contract Clauses and Terms

During this phase, the parties will typically negotiate the actual contract language or the length of the contract. Some areas may be clear-cut in that there is no room for negotiation, and other areas may require a great deal of negotiation. For example, I have been involved in day-long negotiations over what a contract's renewal clause should say. In one case, the government had awarded a contractor a lease to provide mechanical services as a vendor on its airport property. The renewal clause provided that contractor had a right to renew, subject to renegotiation of price and other terms—and what that really meant is that all the contractor had was the option to renegotiate. Thus, what may seem like a simple term may have significant consequences if attention to detail is not paid.

The client may also suddenly be faced with a situation where a termination of contract issue did not come up in the bid documents, but only arose during the negotiation phase. When that happens, it is important for the attorney representing the contractor to seek a clause that provides that the contractor can only be terminated with cause, and that there is an opportunity to cure prior to being terminated. Indeed, there is a big difference between a termination clause that requires a government agency to give a contractor thirty days to cure a default or challenge the grounds, and a termination clause without cause.

For example, a vendor that has contracted with the government to provide hot dogs at a public facility must take out a three-year lease to rent hot dog vending machines. In such a scenario, it would be critical for the attorney negotiating the contract with the government agency to make sure a "termination without cause" clause is not included in the performance contract. If the government suddenly decides to terminate the arrangement two months later, the client could be stuck with lengthy leases on their hot dog equipment, without the revenue to pay for the rent.

In a similar scenario, I represented a company that was awarded a contract by a city to operate an amusement ride. One of the issues that arose in that context was whether the contract could be terminated with or without cause. The client would have to make a considerable investment to perform this service—it would have to construct the ride, buy a lot of equipment,

and purchase substantial insurance coverage. Due to the costs involved, we had to be sure the government could not suddenly cancel our client's contract if they decided they were not getting the results they wanted.

If the contract terms the government wants to impose on the contractor are so burdensome that they may render the work that was about to be performed substantially less profitable, or altogether unprofitable, they should be given serious consideration. For example, if the original bid terms required the contractor to post a certain amount of insurance, but then during the contract phase the government sought to impose a whole other array of insurance requirements, including increased coverage or indemnity, the contractor may find they are responsible for paying a significant amount of additional money, and they may need an attorney to readjust the framework of the contract in a process of open negotiation.

In another example, if the contractor submitted a price based on their original understanding of what their overhead was going to be, but they then find their overhead is going to significantly increase because of the terms the government wants to put in their contract, they are going to need some assistance in trying to get a contract clause or term that is more consistent with what they contemplated when they put in their original price bid. Perhaps the contractor is going to be a vendor for a government agency and provide a service at a park, or manage a public facility, and they anticipated receiving a lump sum to do the job, but the bid documents and proposal did not cover the hours of operation. When the contractor sits down to sign the contract, they suddenly find their daily hours of operation will be 8:00 a.m. to 8:00 p.m. instead of 9:00 a.m. to 5:00 p.m., as they had originally anticipated, and what was once a profitable contract arrangement may actually be highly unprofitable. In such a scenario, the services of a government procurement attorney can be highly beneficial.

Coming to terms during the contracting phase can be critical, because if the government does not achieve a contract with the first-ranked firm in certain contexts, and it then turns to the second-ranked firm, they may be precluded by statute from going back to the top-ranked firm at another time. For example, Florida has a statute titled the Consultants' Competitive Negotiation Act (Florida Statutes, Section 287.055) that stipulates that the government is required to follow certain procedures to select professional

services, including architects and engineers, and if it cannot agree on contract terms with the top-ranked firm, it is required to go to the second-ranked firm. At that point, the first-ranked firm is no longer in the bidding process. If you are representing the first-ranked firm and you do not successfully negotiate the terms of the contract or your client is unwilling to make concessions to get the contract in place, it could lose the contract and be disqualified from further consideration.

Phase Four: Post-Contract Performance

Finally, we enter the post-contract or performance phase, which is when the bidder starts to deliver the goods or perform the work it has contracted for. This may involve constructing a building, maintaining/managing a facility, or providing other goods or services. During this phase, disputes between the contracting parties frequently arise.

Payment and Performance Disputes

The nature of the disputes that may arise cover the full gambit, and depend upon the subject of the work. The issues could involve sufficiency of the services, conformity of goods or materials to the contract, or compliance with other terms.

For example, I represent a business that manages a public recreational facility. Pursuant to a written contract with the city where it is located, the management agreement allows the client to conduct their own events on the site, and gives them flexibility in allowing sub-users or licensees to come on the property. Their contract also contains certain maintenance requirements (i.e., the client must maintain the facility, in addition to using it). In this scenario, disputes may arise concerning the client's maintenance of the facility or damages to the property caused by a licensee's use of the property. If a licensee damages the public property, the client may need to restore it pursuant to the management agreement, and then seek damages from the licensee.

Disputes often arise in construction projects as well. Maybe the contractor is not getting paid in a timely fashion, or maybe the government's engineer/architect is not reviewing their invoices and approving payment

quickly enough. Essentially, one side or the other is saying the other party is not doing what they are supposed to do under the terms of the contract. These types of disputes often become protracted and costly to resolve.

In addition, under Florida case law, a government agency may hire a contractor to build a building, and they may appoint a foreman or project manager to supervise the work or interact with the contractor. However, the contractor cannot rely on any verbal representations by that project manager to increase the scope of the work, as there must be a written change order. In such a scenario, a contractor/client may tell us they were verbally instructed to add another floor to a building, and now the government agency is refusing to pay for the work. We will advise them they can get paid if whatever verbal instructions they were given were within the scope of the work they originally contracted for. On the other hand, if the work the contractor did was outside the scope of the original contract, they will need to procure a written and signed change order to demand payment.

As to disputes concerning adequacy of performance, the agency and/or a court may also take a close look at whether the contractor actually performed the services they were supposed to render. The contractor should maintain records that are sufficient to demonstrate all goods and services actually charged for have been performed.

Prompt payment is another area that leads to many disputes during the performance phase. Florida, for example, has prompt payment statutes that are applicable to both state and local governments. These statutes provide that government is supposed to review invoices within a certain number of days, and then either accept or reject the pay application. If the application is accepted, the government must pay the contractor within a certain time.

Alleged delays in performance may also result in contract disputes. A construction project contract usually follows a certain schedule (e.g., the slab poured within thirty days, certain elements constructed within sixty days). In some cases, however, it may not be the contractor's fault that the project is not on schedule. The government may have caused the delay itself. If so, the contractor may be entitled to extra pay or damages, or an extension of time to complete the work. For example, what if the

contractor cannot proceed with certain work until the government agency's architect provides instructions? The issue as to which party caused a delay in performance often leads to payment disputes or claims on the part of the contractor for additional time to perform the work.

Termination of the Contract

Termination of the contract is an issue that leads to a significant number of disputes. This highlights the need to distinguish between "with" or "without" cause in the contract negotiation phase, as referenced above. The instances where government seeks to terminate the contract involve a wide array of issues.

The level of service can become an object of dispute. A public gym, for example, may be required to be open during certain hours, and if the manager is not living up to the contract by providing that level of service, the government may seek to terminate their contract with the vendor. A critical element of contract negotiation may have been whether the contract could be terminated with or without cause. In most cases, the government will want the termination clause to be "without cause" (i.e., the government can cancel the contract at any time, without reason). However, most contractors/vendors do not want to enter into such a contract. If the contract entered into provided termination for cause only, the government would need to demonstrate that the contractor was not providing the level of service prior to termination.

Indeed, many disputes arise over termination of contract issues. If the termination was not proper, the client may be able to file a breach of contract claim for lost profits or damages. Therefore, the attorney who is representing a client that was terminated needs to review the original contract to determine whether the government agency had a right to terminate, whether it was with our without cause, and whether the procedure in the contract was followed.

Price Changes

One of the biggest mistakes many contractors make is failing to get commitments from their subcontractors and suppliers with respect to

pricing. As a result, a good contract can suddenly become unprofitable and lead to financial hardship. For example, a government job requires the contractor to buy bulk shipments of steel. The cost of steel can often go up dramatically, and if the contractor does not get a firm commitment on the price of steel for a certain number of months and the job is delayed, they may have to ultimately pay more than they intended for the steel that is needed to complete the project. If the contractor has signed a contract with a "no damages for delay" clause, they may not be able to pass on those additional costs to the government. If possible, the contractor should negotiate an escalation clause in the contract (i.e., a clause that states that the client's rates or charges can be adjusted on a periodic basis to account for added costs).

The Client/Attorney Relationship

Working with the Client

The nature of the attorney/client relationship in government procurement matters typically depends on the level of sophistication of the client and the issues they are facing. For example, most clients are not overly involved in issues surrounding the precise wording of termination clauses, remedies in the event of default, or the nature of an arbitration clause (e.g., whether arbitration will be mandatory, binding, or the exclusive remedy). On the other hand, some clients will be actively involved in negotiating every word of a voluminous contract. Depending upon the needs of the client, counsel will either be a peripheral player or be required to have direct input in all aspects of the bid process and contract negotiation phase.

Establishing a Positive Rapport

The best way to establish a positive rapport with your client is to always keep in touch. The biggest mistake many attorneys make is not following up with clients, even after the contract is signed. This is as simple as sending an e-mail or making a phone call to see how the project is going. If you do not stay in touch with the client, you will not be fully up to speed if a dispute occurs during the performance phase. Moreover, if you do not stay in touch with the client, they may not keep you in mind the next time they go to submit a bid. As a result, they may not ask you to review the contract on

the front end. Indeed, your services may not be on their mind until a dispute arises, if at all.

Even if the client does not get the job, it is important to stay in touch with them and help them look out for other opportunities. If, for example, you become aware that a government agency has issued an invitation to bid for a job your client might be right for, you should advise the client that they might want to consider applying for that opportunity. Should issues arise with respect to getting the work, or during the contract negotiation or performance phases, the client is more inclined to enlist your services if you were the one who alerted them to the project.

Misguided Goals

In some cases, you may be confronted by a client who wants to follow a strategy that is either illegal or simply ill-advised. If the action the client wishes to take is fraudulent, you have to counsel them against following that course of action and let them know you cannot participate in it. For example, if you know the client does not have the proper license to do a project, you should not simply ignore that fact and allow the client to misrepresent their qualifications within the bid documents.

In other cases, however, you may simply disagree with the client's business strategy. For example, you may be engaged in negotiating a termination clause for a three-year project, and the government wants the right to terminate the project at any time for any reason. You may pull the client aside and explain that since the project is costing them $100,000 in start-up costs, and it will take them over a year to recoup that amount, they need to be aware they could suffer severe losses if the government suddenly decides to terminate the contract before that time. If the client still decides to go ahead with the deal, you may let them know it is an unsound and unwise business decision, but it is still the client's decision to make.

It is the attorney's job to make sure the client is fully informed as to the advantages and disadvantages of a particular clause, term, or approach. Ultimately, the client must make the final decision with respect to going ahead with the deal. However, should the client wish to overlook what appear to be significant risks, the attorney should confirm in writing with

the client that he or she is aware of the risks and advantages of the contract terms, so there will be no misunderstandings at a later time.

Meeting Challenges: Short Timeframes and High Costs

One of the most challenging aspects of working in this area of the law involves analyzing complex documentation and issues in a very tight timeframe. If the client suspects they were improperly rejected in the bid procurement process, they may not have the documentation on hand to back up that claim. This process may take an extended period, but you ultimately get the information you need. However, if you only have three days to file a protest in a bid award situation, and you do not have all the facts on hand, it may be difficult to obtain the documentation you need within that short time. Accordingly, counsel must use whatever resources are available to compile bid documents, ordinances, procurement policies, and so on.

In Florida, fortunately there is a public records law that allows you to go to the government agency in question and request permission to see all of the bids, correspondence, and memorandum of the selection committee with respect to a particular project. If you have additional time, you might undertake a "public records request" to get copies of the documentation you need. In some cases, the client may know the government agency made a decision during the procurement process that they feel should be challenged, but they do not have any substantive evidence to give you. If neither you nor your client were at the meeting in question, you may be able to request a copy of the audio tapes that were recorded at that meeting to gain first-hand evidence of what occurred.

The abbreviated timeframes allotted to filing a protest during the bid procurement process also translate into condensed litigation-type proceedings. In the bid protest area, an entire trial may be condensed into a period of just thirty days, including all discovery, depositions, and hearings.

Whether the client can even afford the bid protest process is a significant issue the attorney should always address up front, rather than simply agreeing to take on the case with a nominal retainer. If the cost of filing and litigating the protest would be more than the profit it would ultimately

achieve (and if the client would also be running the risk of ruining their relationship with officials at an agency that may give them dozens of other projects in the future), they may wish to walk away from the dispute. The long-term costs to the contractor's business in terms of lost work and relationships must always be considered before going through with a protest filing. And unfortunately, that decision must typically be made within a very short period of time.

In addition to the challenges that often arise in getting the facts that are needed to file a protest, making a cost/benefit analysis, and dealing with time constraints, it is important to consider any potential conflicts of interest on the part of the attorney. Most states have ethical requirements that stipulate that attorneys not take on clients whose interests may conflict with that of their other clients. For example, if your law firm also does work for the successful bidder, you are likely ethically prohibited from filing a protest on behalf of the client. Therefore, whenever one of our firm's clients asks us to file a protest in a bid procurement matter, we immediately check for any possible conflict of interest. In some cases, you may be tempted to immediately send out a protest letter and ask questions later, but what if the top-ranked firm in the bidding process turns out to be your partner's client?

Simply put, the entire bid procurement process typically takes place within very condensed and restricted timeframes, and many important matters need to be analyzed on a "drop everything" basis. These constraints make government procurement one of the most challenging areas of law for any attorney, especially those who are not experts in the field. Consider a situation where an attorney who does not specialize in government contract law is approached by a contractor client who says they were up for a project to construct a new toll-booth facility. The notice of intended award just came out, they have been told they are not getting the project, and they want to file a protest. If you are a general practitioner who is swamped with other projects, you may agree to take on the case, not knowing you may only have hours or a few days to file a notice of intent to protest. If your client was legitimately the low bidder and should have gotten the work on this multimillion-dollar project, and you let the deadline pass, you may be facing a malpractice claim. It is essential not to miss deadlines in this area of the law, and to be ready to fully assess such cases on an expedited basis.

William J. Cea is a shareholder with Becker & Poliakoff PA, where he serves as a member of the firm's civil and complex commercial litigation, construction, and government law departments. He is board certified in construction law by the Florida Bar, and he earned his B.A., cum laude, from the State University of New York at Albany and his J.D., cum laude, from the University of Miami School of Law, where he was awarded the American Jurisprudence Book Award in U.S. constitutional law and administrative law.

Mr. Cea has experience in many areas of law, including civil litigation, construction, community association, and landlord/tenant issues, and he has substantial experience with government procurement. He also represents private companies doing business with local governments during the request for proposal, bidding, negotiation, and selection process, and he has been successful on clients' behalf in numerous bid protests and other governmental contract disputes throughout the state of Florida. In addition, he has experience representing governmental bodies on a case-by-case basis. He has lectured on such topics as government procurement, public records, and open meetings in Florida, and the public bidding process to vendors and government procurement officials. He is admitted to practice in Florida and the District of Columbia, as well as before the U.S. District Court for the Southern District of Florida.

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