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Key Considerations for Litigating Classified Bid Protests

*By Kevin P. Mullen, Sandeep N. Nandivada, James A. Tucker and Caitlin Crujido**

In this article, the authors suggest 10 factors to consider when contemplating a classified protest.

Litigating a bid protest, whether as a protester or as a challenged awardee, is a time-sensitive and often complicated undertaking, further complicated by numerous procedural traps for the unwary. Those complications and time sensitivities increase significantly when all or some portion of the protest involves classified information. Here are 10 considerations for those contemplating a classified protest.

FACTORS TO KEEP IN MIND

1. *Find a law firm with a sufficient number of experienced bid protest lawyers with the requisite clearances.* Even in a large firm, few attorneys typically have protest experience, and far fewer still have security clearances. The pool of available talent shrinks even further when high-level clearances are required. For a large, complex classified procurement, a party to a protest will typically need an entire team of cleared attorneys, and they will follow protocols that are different from those governing unclassified protests.
2. *Engage counsel early – long before contract award.* Bid protests are very fast-paced, with timelines that are measured in days, not weeks. If a company is pursuing an important classified opportunity that it may want to protest, or may need help defending against a protest, pre-award engagement is ideal, and often necessary. For Special Access Programs (SAP) or programs requiring access to Secure Compartmented Information (SCI), it may take months for a customer to approve counsel to be read into the program.
3. *Your attorneys may also need to find cleared technical or cost consultants.* Complex protests often require a protester or intervenor to retain technical or cost experts. This can be challenging even in a typical protest, as it is often difficult to find competent technical experts who are admissible to a protective order – a prerequisite to their being

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permitted to review proprietary information of other parties. Finding admissible experts who also have requisite, active security clearances is even more challenging. This is another reason to prepare for a classified protest long before contract award.

4. *Will the entire protest be classified, only some of it, or none of it?* Just because portions of a solicitation or proposal are classified does not necessarily mean a protest of that procurement will be classified. Even when a protester files an initial protest containing no classified information, other parties may later introduce classified materials, or the procuring agency may insist on some or all of the protest proceeding using classified procedures. The agency is the ultimate arbiter of security decisions. Parties that do not have cleared counsel may find themselves at a considerable disadvantage and scrambling for new counsel if a typical protest suddenly becomes classified.
5. *Think about secured space.* Cleared counsel typically will draft an initial classified protest within the client's own SCIF or other appropriate secured facility. This will generally require the attorneys to have access to cleared computers, a quiet place to work, and all necessary source documents. Once a protective order is issued, however, counsel may find themselves required to access and maintain protected information (and write their briefs) only in a designated government site, subject to government schedules. Sometimes, agencies will come to agreements with the parties on safeguards to allow each party to continue working from its client's own secured facilities. That, however, requires a client to set aside a segregated space for the duration of the protest that will be accessible only by protest counsel and a few client employees (such as security and IT personnel), who typically must sign non-disclosure agreements. This poses unique challenges in terms of available space, computers, and segregability.
6. *Be prepared to negotiate modifications to the standard protest protective order.* Going into a protest, one is never quite sure where the attorneys will work once protected information is exchanged. As detailed above, a party may request permission for its attorneys to work from its own facilities and store protected materials there, which is unheard-of in an unclassified procurement. Parties may object to such requests if the requester does not agree to implement suitable measures to prevent spillage of protected information.
7. *The company's security officer is key.* For classified protests, your security officer will be one of the most important resources for your protest attorneys. Counsel and the security officer will cooperate closely in

determining space arrangements and access to facilities and documents, and guaranteeing compliance with security protocols and the protest's protective order.

8. *Build in plenty of extra time.* Because of the strict and short timelines that apply to bid protests, time is usually in short supply even in typical litigation. That supply shrinks even further in classified litigation. Attorneys must account for the additional time needed for security reviews, portion marking, and transferring filings to the appropriate physical or electronic destination. If there are more attorneys than there are available computers, drafting will be less efficient. If the attorneys must work from a government facility, they also must account for the government facility's opening and closing times.
9. *Have realistic expectations.* The strictures of protective orders mean that protest attorneys are extraordinarily limited in the information they may communicate to clients during any protest. Classified protests – particularly those involving information at the SAP/SCI levels – add a further layer of restrictions to these communications. Companies may find these unavoidable limitations frustrating. Companies will also find the cost to pursue a classified protest typically is materially higher than the cost to pursue an unclassified protest of similar legal complexity. If the attorneys are working from the client's facility, the client's cost is further increased by its need to set aside space and computers for the segregated protest area, to have employees available to provide the attorneys physical access, and to make the security officer and couriers available as needed.
10. *Some work may be possible outside the secured facility.* Depending on the nature of the protest, it may be possible to leverage legal resources from outside the SCIF. This is easiest when a protest is largely unclassified, with classified documents playing only a small role in the litigation. But, even in protests that are wholly classified, it often is possible to perform needed legal research, draft arguments that do not implicate classified information, and engage in other typical tasks from the more efficient environs of the law firm.