Intervention Download: Why Offerors Must Prepare for Protests

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Introduction

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Intervention is the process by which awardees of a federal contract and other interested parties participate in bid protest litigation before the Government Accountability Office (GAO) and Court of Federal Claims (COFC). Intervention allows offerors to represent their interests in bid protest litigation and is the most impactful way for awardees to adequately protect their contract award. But intervention is not an automatic process. Protests usually develop rapidly, and interested parties must prioritize entry into the process the right way, with the right representative, as quickly as they can for numerous reasons.

In order to increase the odds that a contract award will go undisturbed, interested parties should assert their rights immediately following the filing of a protest through experienced protest counsel. The longer a potential intervenor waits, the less likely they will be able to effectively protect their interests and influence not only the tribunal, but the agency's decision to defend the award or take corrective action. Two primary causes for this urgency at GAO include a 100-day statutory deadline[1] to issue bid protest decisions and a requirement that agencies file their protest responses within 30 days of the protest filing.[2] These GAO deadlines accelerate the development of protests and leave very little time to pursue dispositive or partially dispositive motions, influence the scope and breadth of the record, and offer direct assistance to the agency who is ultimately responsible for defending the evaluation process and award decision.

The development of a protest at the COFC can be even faster. Before a complaint is filed, counsel for the protestor[3] and the agency, as well as the contracting officer (CO), are required to engage with Department of Justice (DOJ) counsel regarding forthcoming protest grounds and whether temporary injunctive relief will be sought.[4] Intervenors are always late to the party at the COFC and little time can be wasted. In fact, while no stay on the award or performance is statutorily required at the COFC, unlike protests at the GAO,[5] DOJ and the protestor's counsel often negotiate voluntary stays on the procurement before an intervenor is even aware a protest is forthcoming. Having retained counsel to actively pursue information and represent the awardee's interests in the ongoing communications with DOJ and protestor's counsel is

[1] 31 U.S.C. §3554(a)(1).

[2] 4 C.F.R. §21.3(c); 31 U.S.C. §3553(b)(2)(A).

[3] Protester is spelled with an "er" in GAO proceedings and with an "or" (Protestor) at the COFC.

[4] FCL CT App. C, §2.

[5] *See* 31 U.S.C. §§3553(c)(1) and (d)(3)(A).

critical to an intervenor's situational awareness and any possibility of influencing voluntary stay negotiations.

Finally, if source selection information or offeror proprietary and confidential information is relevant to the protest grounds raised (*e.g.*, proposals in an evaluation challenge), it is quite likely that counsel outside the intervenor's corporate umbrella and removed from the company's competitive decision-making processes will be needed to access, view, and scrutinize information produced under a protective order. Without access to such information by outside counsel, an intervenor may be left in the dark, on the sidelines and unable to fully defend its interests.[6]

Who Can Intervene?

GAO Regulations and the COFC's Rules allow awardees and certain other interested parties to intervene in protests. At the GAO, pre-award intervention is permissible by bidders and offerors with a "substantial chance" of receiving an award.[7] Although pre-award intervention is the exception, rather than the rule, it can occur under numerous circumstances including where the prospective intervenor is the only other acceptable offeror.[8] For example, in *Matter of: Enterprise Services, LLC*, the GAO allowed General Dynamics Information Technology, Inc. (GDIT), another offeror, to intervene in Enterprise's pre-award protest after Enterprise protested its exclusion from a competitive range.[9] Critically, GDIT was the only offeror in the competitive range at the time of the Enterprise's protest. Similarly, in *Perimeter Solutions LP,* the GAO treated Fortress North America, LLC – the prospective recipient of a sole-source contract – as an interested party, allowing them to intervene in a pre-award protest contesting the agency's decision to use non-competitive procurement procedures.[10]

The COFC's Rules also allow awardees and interested parties to intervene in bid protests. Under Rule 24(a), parties may intervene as a matter of right if they have "an unconditional right to intervene by federal statute" or claim an interest relating "to the property or transaction that is the subject of the action" that may be prejudiced if the party does not intervene. Under Rule 24(b), the court may allow parties to intervene if they have a conditional statutory right to intervene or if they have a "claim or defense" that shares "a common question of law or fact" with the protest. In *Red River Sci. & Tech., LLC,* the COFC allowed two prospective offerors to intervene in a pre-award protest on the basis that the

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[6] Our observations are primarily based on more than 20 years of bid protest litigation experience defending agency decisions for the U.S. Army and various Department of Defense (DOD) agencies. Scott Flesch previously served as the Chief, Bid Protests, U.S. Army and the Army Chief Trial Attorney before joining Miller & Chevalier as a Member in 2023. Matteo Amerigo de Laurentiis is a rising third year law student at the George Washington School of Law. Matteo provided invaluable insight and significant legal research to this thought piece.

[7] *See* 4 C.F.R. §21.0(b).

[8] GAO's descriptive guide provides that intervention in a pre-award protest is not generally permitted. *Bid Protests at GAO: A Descriptive Guide*, GAO-18-510SP (May, 2018) at 15; *see also Matter of: Vistronix, LLC*, B-416916.2, July 29, 2019, 2019 CPD ¶268.

[9] *Matter of: Enterprise Services, LLC,* B-414513.2 et al., July 6. 2017, 2017 CPD ¶241. *See also, Matter of: Bannum Inc.*, B-411074.5, Oct. 10, 2017, 2017 CPD ¶313 (intervenor was only other offeror); *Matter of: The Austin Company*, B-291482, Jan. 7, 2003, 2003 CPD ¶41 (intervenor was the apparent awardee).

[10] *Matter of: Perimeter Solutions LP,* B-423321, B-423321.2, May 6, 2025, 2025 CPD ¶109.

government may not adequately represent their interests.[11] Red River, the protester, argued that the government's arguments would inevitably align with those of the intervenors. The COFC dismissed Red River's claim, stating that "it is unrealistic to think that a court can predict litigants' future arguments" and that intervention was permissible because the intervenors had claims or defenses in common with the main action, which arose from Red River's complaints that the Army engaged in improper discussions with intervenors.[12]

The COFC further explained that the Federal Circuit's requirements for granting motions to intervene as a matter of right in an action in which the government is a party include a four-part test.[13] In order to succeed:

(1) The motion to intervene must be timely

(2) The movant must claim some interest in the property affected by the case, which must be legally protectable - merely economic interests will not suffice

(3) That interest's relationship to the litigation must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment

(4) The movant must demonstrate that said interest is not adequately addressed by the government's participation

Why Intervene?

So, you've just won a government contract. The hard part is done, right? Unfortunately, no – winning the contract is just half the battle. Proactively planning to defend an award from attacks by disappointed offerors is essential and should be part of your business plan. This also holds true for pre-award protests, where a non-protesting company believes it has a substantial chance of receiving an award and needs to participate in the protest process. It is no secret that protesting agency procurement decisions is a key business strategy for some government contractors and the data suggests that the practice is not slowing down anytime soon. In fiscal year (FY) 2024, the GAO and COFC received 1,740 and 266 protests, respectively.[14] The GAO provided some form of relief to protesters in 52 percent of its protests, including a 16 percent protest sustainment rate, resulting in hundreds of procurements being cancelled, recompeted, re-issued, or re-evaluated.[15] In each instance, an awardee stood to lose, in whole or part, their contract.

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[11] *Red River Sci. & Tech., LLC v. U.S. et al.*, 174 Fed. Cl. 431 (2025).

[12] *Id*. at 433-34.

[13] *Red River Sci. & Tech., LLC*, 174 Fed. Cl. at 433-34, (*quoting Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fishermen's Ass'ns*, 695 F.3d 1310, 1315 (Fed. Cir. 2012) (citation modified)).

[14] *See* GAO, "GAO Bid Protest Annual Report to Congress for Fiscal Year 2024," GAO-25-900611 (Nov. 2024) at 2; *see* COFC, "Statistical Report for the Fiscal Year October 1, 2023 – September 30, 2024" (2024) at 1.

[15] *See* GAO Bid Protest Annual Report 2024 at 5.

In light of this landscape, businesses competing for federal government contracts must plan early on to defend any award they receive. Fortunately, federal regulations and court rules allow awardees and other interested parties[16] to intervene, both at the GAO and the COFC. Although there is no prohibition on intervening at the agency-level, in practice, it is rarely successful because agencies do not have the authority to independently issue a protective order and thus intervenor's counsel will be unable to access relevant and material source selection and proprietary information shielded by the Procurement Integrity Act[17] and trade secrets laws.[18]

Additionally, by offering assistance to the agency, intervenors present additional resources and brainpower to often resource-constrained agency counsel. Such assistance may encourage an agency to fight a bid protest when appropriate rather than taking a corrective action that irreparably disadvantages the awardee. Intervenor assistance to agencies can take on many forms including legal research and analysis, motion drafting, war gaming, and declaration crafting. While some agencies are loath to accept intervenor assistance, others embrace it. In reality, the more credibility and experience (especially government experience) an intervenor's counsel has the more likely an agency may be willing to engage with the intervenor.

Another reason to intervene is that, at the GAO, intervenors may unilaterally request that a bid protest be dismissed before submission of the agency report, the record of relevant documents and information on which the GAO will decide the protest. However, time is of the essence. Agencies must submit their report to the GAO within 30 days of protest filing and may do so sooner. Even if intervenors are not successful in dismissing the entirety of a protest, early intervention may limit the scope of the agency report or of available protest grounds. At the COFC, motions can be filed at any time and jurisdictional motions are often litigated – and briefed – at the outset of the proceeding. Standing, procurement type, prejudice, the scope of the administrative record, supplementation of the administrative record, protective order applications and redaction of records, and many other fundamental and administrative issues must be addressed early in the proceeding and necessitate early intervention by interested parties.

The Risks of Not Intervening

Failure to intervene may have unintended consequences for interested parties later in the procurement cycle. For example, in *Matter of: Harris Corporation*, Harris lost its award following a GAO protest in which it chose not to intervene.[19] In response to the protest, the agency decided to take corrective action, re-evaluate proposals, and make a new award decision. Ultimately, the agency found Harris' proposal to be technically unacceptable and selected a different awardee. Harris then protested the agency's revised evaluations and new award decision to the GAO. After reviewing the protest and Harris's allegations, GAO

[16] The term "interested party" refers to "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract...." 31 U.S.C. §3551(2).

[17] *See* 41 U.S.C. §§ 2101–2107.

[18] The Defend Trade Secrets Act of 2016 (DTSA) (18 U.S.C. § 1836, et seq.), the Economic Espionage Act (EEA) (18 U.S.C. § 1831, et seq.) and the Uniform Trade Secrets Act (UTSA) (18 U.S.C. § 1839) collectively provide criminal penalties and civil remedies intended to protect against the misappropriation of trade secret information.

[19] *Matter of: Harris Corporation*, B-409148.3 *et al*., July 30, 2014, 2014 CPD ¶225.

dismissed the protest for failing to include a detailed statement of the legal and factual grounds for protest, as required by 4 C.F.R. § 21(c)(4). In doing so, the GAO noted that Harris' allegations were speculative, in part, because it had not actually seen its competitor's proposal. Further, the GAO noted that had Harris chosen to intervene in the original protest challenging its award, it would have been able "to review [its competitor's] proposal as part of the record" and advance "any and all challenges to the acceptability of [its] proposal at that time."[20] Simply, had Harris intervened in the protest of its initial award through counsel, it may have gained timely knowledge of a sufficient basis to challenge the agency's decision to take corrective action itself. In making the decision not to intervene, however, Harris failed to influence the kaleidoscope of corrective actions that ultimately resulted in the revocation of its award.

The COFC has also been critical of protestors who failed to intervene in earlier protests of their award that later shifted to another offeror following corrective action. In *Sonoran Tech. & Prof'l Servs., LLC*, the COFC dismissed awardee Sonoran's attempt to protest the Air Force's decision to cancel its award after the agency took corrective action in response to another bid protest on the same contract.[21] The court found that Sonoran's protest was untimely because, having chosen not to intervene in the previous protest, it could no longer allege that the agency's corrective action was unreasonable after the Air Force awarded the contract to Sonoran's competitor. The court also noted the importance of timely intervention stating, "why Sonoran chose not to intervene" in previous protests "is beyond the [c]ourt's comprehension" because if it had, it would have known that the agency was considering cancelling its award and could have mounted a vigorous defense.[22]

A similar result was reached in *Excelsior Ambulance Services*.[23] There, after Excelsior successfully protested an award of a contract to LMC Med Transportation, LLC by the Department of Veterans Affairs (VA), LMC sought to intervene in order to appeal the COFC's protest decision displacing its award. However, the COFC denied LMC's motion to intervene as untimely. Despite being notified of the underlying COFC protest at the outset, LMC informed the CO that it had decided: (1) not to hire an attorney, and (2) preferred to "self-intervene and be kept abreast of the [protest]" more informally through the CO.[24] LMC, however, did not participate in the court's proceedings or engage directly with DOJ counsel.

In defense of its motion to intervene, LMC argued that its earlier decision not to intervene in the COFC proceeding was based on information provided by the CO about the protest and the understanding that the protest allegations were limited in nature. LMC implied that the CO had a duty to accurately inform LMC about the protest. Contrary to this belief, the court found that "LMC's reliance on the information it purportedly received from the contracting officer [was] misplaced. Contracting officers are not required by statute or regulation to advise successful offerors of the grounds of a protest lodged at the [COFC]. Consequently, it is a successful offeror's responsibility to ascertain the basis of a protest filed in this

[20] *Id*. at 3.

[21] *Sonoran Tech. & Prof'l Servs., LLC v. U.S.*, 135 Fed. Cl. 28 (2017).

[22] *Id.* at 35.

[23] *Excelsior Ambul. Serv., Inc. v. U.S.*, 126 Fed. Cl. 69 (2016).

[24] *Id*. at 70.

court."[25] At bottom, the court found that LMC "assumed the risk" that the agency "might not adequately represent its interests" when it decided not to intervene.[26]

These decisions highlight just some of the nuances in protest litigation between the two protest fora and a sample of the pitfalls that inexperienced parties can fall into if not represented by experienced protest counsel.

Admission to a Protective Order and Access to Protected Information is Limited and Perilous

Intervention by interested parties with outside counsel is also important because of the prevalence of protective orders in bid protest litigation. Protective orders shield proprietary or confidential information, source-selection information generated by the agency, and other sensitive information which may provide an unfair competitive advantage to a particular business, from improper disclosure.[27] At the GAO, protective orders are issued at the request of the parties or on the GAO's own initiative. At the COFC, parties must submit a motion for a protective under the court's Rules.[28] Regardless of the bid protest forum, however, only attorneys and the consultants they retain are normally eligible for admission to a protective order and can view materials submitted under the order. There are also waiting periods, handling restrictions, frequent redaction requirements, and destruction obligations that make the handling and disclosure of protected material complicated and fraught with peril. Given that the most common grounds for sustaining protests at GAO are (1) unreasonable technical evaluation, (2) flawed selection decisions, and (3) unreasonable cost or price evaluations – all of which almost certainly include protected information – it is imperative that intervenors secure the assistance of experienced protest counsel, or risk being unable to fully protect their interests.

That said, not all attorneys are viewed equally through protective order lenses. Only attorneys who are not involved in a company's competitive decision making are eligible for admission under a protective order.[29] This stems from fear that admitting such counselors to a protective order produces an unacceptable risk of inadvertent disclosure. Similarly, counsel that involve themselves in proposal drafting – including outside counsel – may not be eligible for admission to a GAO or COFC protective order because proposal writing raises the risk of improper use and disclosure.

Although both in-house and outside counsel can be admitted to a protective order, the GAO has noted that "it is often easier for outside counsel to establish that they are not involved in competitive decision making."[30] When considering whether to admit in-house counsel to a protective order, the GAO considers

[25] *Id*.

[26] *Id*. at 4.

[27] *See* GAO Guide to Protective Orders, GAO-19-613SP (June, 2019) at 3.

[28] RCFC 26.

[29] *See U.S. Steel Corp. v. U.S.,* 730 F.2d 1465 (Fed. Cir. 1964); *see also* GAO Guide to Protective Orders at 8.

[30] GAO Guide to Protective Orders at 8.

factors such as whether they advise on pricing or product designs – including reviewing bids or proposals – the degree to which they are physically and organizationally separated from competitive decisionmakers, and the degree to which in-house counsel is supervised.[31] This may be difficult to demonstrate, especially for small businesses without sophisticated corporate structures and internal firewalls.

Again, potential intervenors must be proactive to ensure that they have sufficient time to admit counsel under a protective order after a protest is filed. As stated above, at the GAO, agencies have a maximum of 30 days to file their agency report after a protest is filed and may do so sooner. Once the agency report is submitted, protesters and intervenors alike have a mere 10 days to submit comments to the report arguing for dismissal or supporting the agency's evaluation. The GAO has noted that delays in submitting applications for admission to a protective order is generally not a valid ground for extending the comment period.[32] Failure to timely submit applications, therefore, can severely undermine an intervenor's ability to influence the course of litigation, potentially leaving them in the dark about information key to protect their award.

The Race to Secure Outside Counsel

Retaining counsel in anticipation of intervening in a protest implicating contract award represents the best way for awardees to protect their interests. Unfortunately, for a number of reasons, this requires advanced planning. First, recognized protest intervenors at the GAO and COFC normally receive copies of all communications relating to a protest. As a result, intervention is a meaningful way for awardees to monitor the progress of a protest in real time. Intervenor's counsel will also have access to non-public communications forecasting changes to the procurement including amendments, corrective actions, and cancellations in advance of publication. While such information and documentation can be protected, the GAO often allows counsel to share summaries of events with clients before they go public (*e.g.*, the GAO indicating a protest ground will be sustained during outcome prediction).

Second, agency interests are broad and may not be aligned with any single awardee. Agencies focus on their acquisition decisions and whether they are contemporaneously documented, compliant with procurement law and regulations, consistent with the ground rules in the competition, and reasonable in light of the protest allegations. Essentially, agencies are not focused on the interests of an awardee – they are focused on defending a proper award decision. Intervening is the only way that awardees can advocate and potentially influence agency or GAO decisions.

Third, certain protest allegations may require agencies to investigate alleged violations of procurement statutes or regulations (*e.g.*, organizational conflicts of interest, procurement integrity) in the heat of litigation during the initial 30-day period for filing an agency report. In such cases, intervenors may be required to produce statements, information, and responses to the CO with extremely short deadlines. In fact, during a GAO protest, CO investigations may start and end within the initial 20 days of a protest filing so that the agency can respond within the required 30-day period. If the investigation results from a

[31] *See id*. at 10.

[32] *See id*. at 8.

supplemental protest allegation, a response may be required in even less time. Of course, agencies can announce they will investigate allegations as part of corrective action over a longer period of time, but that occurs in a minority of protests and may still require the assistance of outside counsel to adequately respond.

Fourth, law firms must assess potential conflicts before agreeing to represent an interested party. This can take hours or days – wasting key time on administrative tasks before being able to enter an appearance or apply for access to materials covered by a protective order. This is especially poignant in large-scale procurements and multiple award scenarios where many companies may choose to protest. Each party will require a non-conflicted law firm to defend or prosecute an award in line with the company's interests. Waiting for the music to stop before attempting to grab a seat at the protest table is best avoided. To thwart the potential delay caused by conflict vetting, companies believing they may be in line for award – or are likely to consider a protest if they lose – are best served by engaging counsel of choice well before interested parties protest *en masse* at the GAO, COFC, or both.

How Do You Know a Protest is Filed?

The first step to intervening is knowing that a protest has been filed. If you are an awardee, this notice is provided by either the agency CO or the protester depending on where the protest is filed.

In GAO protests, the Federal Acquisition Regulation (FAR) and GAO's Bid Protest Regulations govern the procedures for filing a protest and the requisite notice requirements, respectively.[33] In accordance with this guidance, after the GAO notifies the agency of an initial protest filing, the agency must immediately notify awardees that a protest has been filed. If no award has been made, agencies must notify all parties with a "reasonable" or "substantial" prospect of receiving an award.[34] In the case of pre-award protests at the GAO, where offers or bids have been submitted and where no party is likely in line for award, there is no requirement for the agency to provide notice. However, offerors will most likely be notified of any delays in the procurement or any change in the submission deadline caused by the protest through a solicitation amendment.

The notification process and assigned obligations in protests at the COFC are very different. Here, protestors are required by the COFC's Rules to provide advance notice of protest to several parties, including the apparently successful offeror if known, at least one day before filing its protest.[35]

Government Perspective

Agency perspective on engaging with intervenors vary and are strongly influenced by the experience of individual agency counsel. That said, many agencies expect, and even welcome, intervenor assistance because intervenors frequently possess relevant information critical to an agency's defense of its award

[33] *See* FAR 33.103, 33.104.

[34] FAR 33.104(a)(2) (requiring notice to offerors with a "reasonable prospect" of receiving an award); *see also* 4 C.F.R. §21.3(a) (requiring notice to offerors with a "substantial prospect" of receiving an award).

[35] FCL CT App. C, §2(d).

decision. Additionally, intervenor counsel introduces additional resources to agency counsel, allowing them to leverage the strength and flexibility of law firm personnel to draft responses, declarations, motions, legal research, and arguments. At the same time, there are risks associated with intervention. Chief among these is that if the agency and intervenor lack a common legal interest, intervenors risk waiving privilege when sharing communications, documents, and strategies with agency counsel. Additionally, inexperienced agency personnel may fear that a friend today (*i.e.*, the "intervenor") could quickly be an enemy (*i.e.*, "protester") tomorrow and limit their interaction as a result.

This fear is short-sighted – intervenors identified as awardees want to protect the award and will objectively analyze the record to ensure the agency's decision is reasonable, supported by the administrative record, and can withstand scrutiny. All too often, the intervenor will highlight any weaknesses in the agency decision making process to the agency itself and recommend a narrowly tailored corrective action to address the procurement infirmity. Experienced agency and intervenor counsel know that very few awards change hands through a protest and they focus on analyzing whether an adequate administrative record exists and the source selection decision is reasonable.

Much like other aspects of a protest process, agency perspective, authority, and discretion are very different in COFC protests. Under federal law, the authority to direct litigation – including the decision to defend – is exclusively left to officers of the DOJ.[36] Practically, this means that agency counsel and contracting personnel take direction from the DOJ trial attorney assigned who represents the interests of the U.S. as a whole, not the specific agency involved in the procurement. While the agency will need to cooperate in order to facilitate any recommended contractual remedy, the DOJ unabashedly wields its statutory authority when needed – especially in appeals of COFC decisions to the Federal Circuit where Solicitor General consent is required. The DOJ takes a holistic approach and considers pending appeals in other matters, splits among COFC judges on various aspects of protest caselaw, resource allocation, and many other considerations before deciding to defend a protest or appeal a protest decision. Simply, agencies must defer to DOJ counsel when it comes to the "conduct" of litigation. Furthermore, protests in the COFC fall under the authority of a federal judge authorized under Article 1 of the U.S. Constitution. Once a complaint is filed and a COFC judge is assigned, even the decision to take corrective action must be approved by the judge. At bottom, agencies have less discretion in COFC protests and the willingness to work with intervenors is left to the DOJ's discretion and direction.

Practical Tips for Contractors

- **Intervention is an opportunity.** Intervenors can be active parties in a bid protest. While not universally true, agencies – especially more experienced ones – will often communicate and strategize with intervenor's counsel about the legal issues presented and open lines of communication early on to facilitate the exchange of information needed to assess a protest.
- **Time is of the essence.** Government contractors should engage counsel immediately. Disappointed offerors may already be planning to protest your award and corrective action discussions can occur within days of filing. Receiving admission to protective orders can take days,

[36] *See* 28 U.S.C. §516.

undermining awardees' ability to influence the litigation before it is too late. Additionally, the later an intervenor intervenes, the less likely it is that the GAO will allow them to join the litigation due to the GAO's statutory 100-day deadline to issue bid protest decisions. Any delay in intervening will also dilute the impact or persuasive force the intervenor may have. If an awardee wants to protect its award and be able to meaningfully assert its interests in the process, they must intervene immediately after notification of the protest. Able and non-conflicted counsel should already be engaged following an award to be able to respond to a protest in a timely manner.

- **Do not wait for a protest to happen.** In complex, high-valued, and multiple-award procurements where a protest is likely, engage counsel early, educate them on the nature of the requirement and important aspects of your submitted proposal, and prepare them to fight for your award. Advance preparation is particularly important in classified procurements where accessing materials takes added time.

- **Understand that hiring counsel and intervening does not provide instant access to protected information.** Your attorney may have it, but you will not. The sharing of information related to source selection information will be slow in coming as counsel coordinate redactions of protected material.