

**Law Office of
Jon W. van Horne***

18222 Flower Hill Way, #112
Gaithersburg MD 20879-5300
(202) 478-2921
Fax: (202) 478-2921
*Admitted to Practice
In the District of Columbia

September 6, 2010

Protesting in the Nation's Capital

[A Government Contracting Alert from the Office of Jon W. van Horne.]¹

It's not what you're thinking. Public protests and rallies, political or otherwise, are a time honored and cherished democratic tradition here in Washington DC, but that's not the kind of protest I'm talking about. My interest is the procurement process of the District of Columbia Government and its pre-award dispute process, the bid protest. I recently had occasion to review this bid protest remedy and here for your education (as opposed to legal advice – since it's free) is a summary of what I found.

The federal bid protest remedies (at the Government Accountability Office (“GAO”) and the U.S. Court of Federal Claims (“COFC”)) are reasonably well known. Not as well known is that many state and local public procurement systems also have bid protest remedies of varying degrees of independence and professionalism. For contractors doing business with the District of Columbia government there is a bid protest remedy at the DC Contract Appeals Board (“CAB”). The CAB bid protest has many similarities to the GAO and COFC bid protests, but some important differences as well.

Here's what you need to know: Protests are possible against most but not all DC Government entities.

¹ The use of any content provided in this memorandum will not create an attorney-client relationship between us. The memorandum is provided solely for informational purposes: it is not intended as and does not constitute legal advice. The information contained herein should not be relied upon or used as a substitute for consultation with legal, accounting, tax, career and/or other professional advisers. For more information, email us at jvanhorne@vanhornelaw.com or call (202) 478-2921. © Jon W. van Horne 2010

Only “aggrieved parties” can protest. “Aggrieved parties” are essentially the same as “interested parties” under GAO and COFC bid protests. An aggrieved party is defined as “an actual or prospective bidder or offeror (i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract.”

Timeliness rules are very strict, similar but not exactly the same as GAO. A protest based on problems with a solicitation must be filed prior to bid opening or the time set for receipt of proposals. Other protests (essentially post-award protests) must be filed no later than ten (10) business days after the basis of the protest is “known or should have been known.”

There are provisions for an automatic stay of contract performance which can be over-ridden by the agency. Similar to GAO protests, the agency must file a report and the protestor must file comments. However, the time frames are 20 days for the report and 7 days for the comments. The CAB's decision must be issued within 60 business days from the date the protest is filed

As with GAO, a protester can be represented by a non-attorney officer. Of course, that can result in the protester not having access to confidential agency information. The CAB has a protective order process that allows attorneys and consultants to have access to the confidential information.

Here are some technical details: The DC Contract Appeals Board is the designated forum for hearing and deciding both contractual disputes and bid protests involving the DC government pursuant to the DC Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85) (D.C. Code Ann. §§ 2-301.01 to 2-311.02). The Act applies to all contracts and intergovernmental and interagency agreements for the procurement or disposal of goods and services by executive agencies and employees subordinate to the Mayor.

The Board is composed of Administrative Judges who hear and decide the cases. DC Code § 2-309.08 ("Protest procedures") and Chapter 3 of the Board Rules provide detailed requirements and rules governing protests of solicitations and awards.

The Board issues written decisions, which are published in the District of Columbia Register (DC Reg). Full text searches of the Board's published decisions are possible at the published decisions search page of the CAB website (<http://cab.dc.gov>). The CAB has provided for comprehensive electronic filing in bid protest (and other) cases through the LexisNexis File & Serve.

While no bidder should protest frivolously, you may want to think twice about doing so before the DC CAB. If the Board decides a protest has been frivolous, it can order the protester to pay the agency's attorney fees (fortunately limited to \$100 per hour) and damages for delay of an awarded contract.

Notwithstanding that interesting fillip in the rules, it is good to see that the DC procurement process has a judicial remedy for problems in the award of contracts.