

rational or contrary to law—not whether the court agrees with the decision. So long as the evaluation factors are reasonably established and applied, an otherwise subjective evaluation is difficult to overturn.

VI. REMEDIES FOR IMPROPER AWARD OF PUBLIC CONTRACT

§ 2:176 Generally

To protect the integrity of public procurement systems, adequate remedies for wrongful awards of public sector contracts are crucial. Protests against award of contracts under either the competitive sealed bidding process or competitive negotiation process¹ may be asserted by any “aggrieved” party to challenge a contract award. Whereas disputes over private contract awards typically are resolved in local courts, disputes over public contract awards are typically directed into arcane administrative processes and specified courts. At the federal level,² multiple forums are

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¹Protests against the award of negotiated contracts present the identical issues. Federal protest procedures are highly refined. See F.A.R. § 15.507; 48 C.F.R. § 15.507 and F.A.R. §§ 33.000 et seq.; 48 C.F.R. §§ 33.000 et seq. (Federal procedures for protests, disputes and appeals). See, generally, Nagle and Lasky, *Federal Bid Protests*, in *Federal Government Construction Contracting* 143–158 (2d ed. 2010); Cibinic, Jr. and Nash, Jr., *Formation of Government Contracts*, 1481–1588 (3d ed. 1998) (discussing generally contract award controversies in federal procurement).

²For review of federal protest remedies, see Stein, *Bid Protests in the United States*, 9 *Construction L. Int'l* 11 (March 2014); Gordon, *Bid Protests: The Costs are Real but the Benefits Outweigh Them*, 42 *Pub. Cont. L.J.* 489 (Spring 2013); Nibley and Totman, *Let the Government Contract: The Sovereign Has the Right, and Good Reason, to Shed Its Sovereignty When It Contracts*, 42 *Pub. Contr. L.J.* 1 (Fall 2012); McCullough, Anstett and Stanford, *Observations on the Federal Circuit's Impact on Bid Protests Litigation Since ADRA*, 42 *Pub. Contr. L.J.* 91 (Fall 2012); Nedler and Chiarodo, *The Public Disclosure Bar: New Answers and Open Questions*, 47 *Proc. Law.* 1 (Fall 2011) (discussing the public disclosure bar to a qui tam suit); Nagle and Lasky, *Federal Bid Protests*, in *Federal Government Construction Contracting* 143–158 (2d ed. 2010); Feldman and Fioratanti, *Contract Dispute or Bid Protest? The Delex Systems Dilemma*, 39 *Pub. Cont. L. Rev.* 483 (Spring 2010); Fickey, *Fraud in the Bidding Process: The Limited Remedies Available to Contractors*, 38 *Pub. Cont. L.J.* 913 (Summer 2009); Gordon, *Constructing a Bid Protest Process: The Choices at Every Procurement Challenge System Must Make*, 35 *Pub. Cont. L.J.* 1427 (Spring 2006) (reviewing the key decisions to be made in the creation of a bid protect system, and noting that “many public procurement systems, both within the United States and in other countries, have established systems for allowing vendors to challenge the conduct of procurement processes”); Cibinic, Jr. and

available for deciding such protests: the procuring agency,³ the United States Court of Federal Claims,⁴ United States District Court,⁵ and the United States Government Accountability Office (GAO).⁶ State and local award protests typically involve venues established by statute⁷ or straightforward taxpayer suits challenging contract awards.⁸ Any party has standing to protest where it can demonstrate a “non-trivial competitive injury which can be addressed by judicial relief.”⁹ At the state level,¹⁰ agency

Nash, Jr., *Formation of Government Contracts 1481–1583* (3d ed. 1998); *Recovery from United States of costs incurred by unsuccessful bidder in preparing and submitting contract bid in response to government solicitation*, 30 A.L.R. Fed. 355.

³See F.A.R. § 33.103; 48 C.F.R. § 33.103.

⁴See 28 U.S.C.A. § 1491(a)(1), (b)(2). See also Saunders and Butler, *A Timely Reform: Imposed Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 Pub. Cont. L.J. 539 (Spring 2010) (reviewing the history of the bid protest jurisdiction of the Court of Federal Claims and recommending reforms); *Al Andalus General Contracts Co. v. U.S.*, 86 Fed. Cl. 252 (2009) (the government’s evaluation of a proposal may be reviewed by the court, which may remand with directions to remedy, when determined to be improper, unfair or impartial in any material respect). See also Blake, *The COFC Pre-Award Protest Timeliness Rules: Exactly Where We Want To Be*, 45 Pub. Cont. L.J. 515 (Spring 2016).

⁵See 5 U.S.C.A. § 702; 28 U.S.C.A. §§ 1346(2), 1491(b)(2).

⁶See 31 U.S.C.A. § 3551. See also Brittin, *the Comptroller General’s Dual Statutory Authority to Decide Bid Protests*, 22 Pub. Cont. L.J. 636 (1993). The GAO’s Bid Protest Regulations are found at www.gao.gov/legal/bid-protest-regulations/. See also Boland, et al., *Bid Protests Before the Government Accountability Office: Basic Facts and Misconceptions*, 52 Proc. Law. 1 (Fall 2016).

⁷See 2000 Model Procurement Code for State and Local Governments § 9-102 (adopted in whole or in part by over 15 states); 2007 Model Code for Public Infrastructure Procurement § 9-101. See also Silberman, *Square Peg, Round Hole: Bid Protests in Nontraditional Construction Procurement*, 51 Proc. Law. 1 (Winter 2016).

⁸See *Danzl v. City of Bismarck*, 451 N.W.2d 127 (N.D. 1990) (holding local taxpayer had standing to challenge procurement action).

⁹See *Weeks Marine, Inc. v. U.S.*, 575 F.3d 1352, 1360 (Fed. Cir. 2009) (rejecting the “substantial chance” test for standing in favor of the “non-trivial competitive injury” test).

¹⁰For review of state award protest remedies, see *Low Bidder’s Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 ALR 4th 93; Lusby, *Improving the Effectiveness of State Bid Protest Forums: Going above and Beyond the Agreement on Government Procurement and Adopting the ABA’s Model Procurement Code*, 43 Pub. Cont. L.J. 57 (Fall 2013); 2000 Model Procurement Code for State and Local Governments §§ 9-101, 9-203; 2007 Model Code for Public Infrastructure Procurement § 9-101; Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 Pub. Cont. L.J. 265 (1996).

dispute boards often hear protests before the dispute may proceed into state courts. At the local level,¹¹ taxpayer suits brought in local courts may be the only procedure available. As in all areas of public procurement and binding dispute resolution, the government procedural “square corners” must be turned.

An unsuccessful party wrongfully denied the award of a public contract may have available one or more remedies: (1) recovery of damages from the public owner—usually only bid or proposal preparation costs and perhaps attorney’s fees but not lost profits—upon a showing of a public owner’s breach of its obligation of good faith and fair dealing in the consideration and award of public work; (2) obtaining an injunction barring the award to another party, or stopping performance of a contract already awarded, until issues regarding entitlement to the award have been resolved, subject to filing of the requisite injunction bond and meeting the customary tests for injunctive relief, *e.g.*, lack of an adequate remedy at law, existence of irreparable harm, and likelihood of success on the merits; (3) recovery of damages from the successful awardee due to misrepresentations that allowed the awardee to wrongfully secure the contract; and (4) recovery of damages against the owner and others under special statutes, such as federal and state civil rights, anti-trust, deceptive business practices and *qui tam* statutes. Five threshold questions impacting a protestor’s right to relief for wrongful denial of a public contract are:

1. “Standing” of the protesters to challenge invitation provisions prior to bid opening or a threat or actual award after bid opening;
2. Mootness resulting from procurement cancellation;
3. Laches or waiver resulting from unreasonable delay in pursuing remedies to the prejudice of the owner and successful contractor;¹²
4. Forum for protest; and

¹¹See McQuillin, *Law of Municipal Corporations* (3d ed.) §§ 29:90 et seq.; Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 *Pub. Cont. L.J.* 265 (1996); *Low Bidder’s Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 *ALR* 4th 93.

¹²A bidder may in advance waive its rights to seek recourse against an owner for an improper award. See *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 136 Ed. Law Rep. 627 (Tex. App. San Antonio 1999) (bidder waived right to make claim against county where invitation stated that by submitting bid, each bidder waived any claims it may have against owner or engineer arising out of administration, evaluation, or recommendation of any bid). See also 2007 Model Code for Public Infrastructure Procurement § 9-108(1).

5. Scope of judicial review.

Because of the wide discretion routinely accorded public agency decisions by courts, recovery of damages from a public agency requires the protester to establish that the wrongful denial of a public contract was without rational basis, arbitrary, capricious, and in bad faith.¹³ In some jurisdictions, recovery is made even more difficult by a requirement that, as a precondition to a claim for damages, the unsuccessful bidder must timely seek to enjoin award of the contract.¹⁴ In a few jurisdictions, a protesting bidder can sue a public body only if there has been an express waiver of governmental immunity from suit.¹⁵

The trend of large public owners is to require award protests to be heard initially by a governmental administrative body,¹⁶ and if not resolved there then to a designated court.¹⁷ Where public agencies do afford protestors an administrative hearing, the hear-

¹³See *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324 (Fed. Cir. 2001) (confirming as the universal standard for review of federal bid protest cases the Administrative Procedure Act standards permitting set-aside of a bid award if either “(1) the procurement official’s decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure,” and rejecting the “fraud or bad faith” standard); (rejecting determination of nonresponsibility as arbitrary); *Lincoln Services, Ltd. v. U. S.*, 230 Ct. Cl. 416, 678 F.2d 157, 29 Cont. Cas. Fed. (CCH) ¶ 82506 (1982); *Morie Energy Management, Inc. v. Badame*, 241 N.J. Super. 572, 575 A.2d 885 (App. Div. 1990); *Ralph L. Wadsworth Const. Co., Inc. v. Salt Lake County*, 818 P.2d 600 (Utah Ct. App. 1991).

¹⁴See *C.N. Robinson Lighting Supply Co. v. Board of Educ. of Howard County*, 90 Md. App. 515, 602 A.2d 195, 72 Ed. Law Rep. 890 (1992) (holding that the contractor’s claims for damages were moot because contractor failed to try to enjoin award to rival contractor in timely fashion); *Hartman Enterprises, Inc. v. Ascension-St. James Airport and Transp. Authority*, 582 So. 2d 198 (La. Ct. App. 1st Cir. 1991), writ denied, 582 So. 2d 195 (La. 1991).

¹⁵See *Satterfield & Pontikes Construction, Inc. v. Texas Southern University*, 472 S.W.3d 426, 324 Ed. Law Rep. 1130 (Tex. App. Houston 1st Dist. 2015), review denied, (June 17, 2016) (dismissing a protesting bidder’s claim for the reason that the Texas Education Code had not expressly waived the owner’s governmental immunity from suit).

¹⁶See *General Elec. v. Department of Transp.*, 869 So. 2d 1273 (Fla. 1st DCA 2004) (reviewing the administrative bid protest procedures of the Florida Department of Transportation, and ruling that new process required the Department to notify the protestor of and allow the protestor to cure any deficiencies in the form of a bond submitted with its protest).

¹⁷See 2007 Model Code for Public Infrastructure Procurement § 9-107 (suggesting designation of a court).

ing must provide basic due process¹⁸ but does not need to be governed by detailed rules. Where agencies have promulgated detailed protest regulations, such as those of the U.S. Government Accountability Office,¹⁹ the rules must be followed carefully.²⁰

§ 2:177 Standing to protest

The current trend of the law of “standing”²¹ has been to enlarge the class of individuals deemed to have sufficient “interest” to

¹⁸See *Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority*, 369 N.J. Super. 175, 848 A.2d 793 (App. Div. 2004) (holding that the absence of administrative rules governing a bid protest hearing would not vitiate the proceedings so long as “basic due process” was afforded the protestor).

¹⁹See 31 U.S.C.A. § 355 and 4 C.F.R. §§ 21 et seq. (GAO Bid Protest Regulations are found at www.gao.gov/legal/bid-protest-regulations/). The Comptroller General heads the General Accountability Office which then reports to Congress its bid protest statistics. See www.gao.gov/products/GAO-16-270SP (December 10, 2015). According to this report, the five most prevalent grounds of bid protests are unreasonable cost or price evaluation, unreasonable past performance evaluation, failure to follow evaluation criteria, inadequate documentation of the record, and unreasonable technical evaluation.

²⁰See *Nottingham Const. Co., L.L.C. v. City of Waveland, Miss.*, 2008 WL 611652 (S.D. Miss. 2008), judgment aff'd, 291 Fed. Appx. 665 (5th Cir. 2008) (dismissing a bid protest that was not filed within 10 days after issuance of a final decision to award a contract as required by Mississippi law); *Philips Bros. Elec. Contractors, Inc. v. Pennsylvania Turnpike Com'n*, 960 A.2d 941 (Pa. Commw. Ct. 2008) (rejecting as premature and “not right” a bid protest filed by a prospective bidder more than a year prior to the time that the owner intended to solicit bids); *Bannum, Inc. v. U.S.*, 60 Fed. Cl. 718 (2004) (denying a bid protest over the award of a contract for a Federal Bureau of Prisons community corrections center in Mississippi, where the protestor failed to challenge alleged deficiencies in the specifications prior to bidding as required by the Comptroller General’s Bid Protest Regulations); *Fieldturf, Inc. v. State, Dept. of Admin., Div. of Public Works*, 140 Idaho 385, 94 P.3d 690, 190 Ed. Law Rep. 656 (2004) (denying bid protest because the protestor failed to follow the appeals procedures set forth in the specifications, and thereby waived its right to protest alleged restrictiveness of specifications).

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²¹The standing doctrine is expressed variously as (1) “interested party” in federal bid protest cases and (2) the more stringent “injury in fact” standard in affirmative action plan protests. See *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324 (Fed. Cir. 2001) (applying “interested party” definition of “aggrieved party” standard under the Federal Administrative Procedures Act, 28 U.S.C.A. § 149(b)(1) and the test for award controversy standing); *OSG Product Tankers LLC v. U.S.*, 82 Fed. Cl. 570 (2008) (following the *Impresa* standard that a potential bidder must establish that it has a substantial chance of securing the award in order to establish standing). Compare the prior standard in *Ryan Co. v. U.S.*, 43 Fed. Cl. 646, 656 (1999) (defining an “interested