



BID PROTEST AS A BUSINESS STRATEGY

January 19, 2022

CohnReznick LLP



MEET THE PRESENTERS



STEPHEN RAMALEY
Principal,
Government Contracts
Miles & Stockbridge
Speaker



RICH MEENE
Principal,
Government Contracting,
CohnReznick Global Consulting
Solutions
Speaker



CHRISTINE WILLIAMSON, CPA
Partner,
Government Contracting,
CohnReznick Global Consulting
Solutions
Moderator



MEET COHNREZNICK – OPTIMIZING PERFORMANCE

CohnReznick's Government Contracting Industry practice helps federal contractors optimize performance by providing strategic advice on compliance and federal regulations, while also providing a range of audit, tax, and business advisory services.

We provide full life-cycle support of your contract, and as you seek to grow, we help you stay ahead of the curve by implementing proactive strategies to increase profitability and competitiveness, while minimizing the costs and effects of regulatory noncompliance.





MILES & STOCKBRIDGE - GOVERNMENT CONTRACTS

Innovative, Client-Focused Solutions

- We identify, mitigate and manage the risks and opportunities of doing business with government – from international to local – and provide premier counsel, compliance, litigation and white collar solutions.
- GovK+® government contracts and outside general counsel services: what you need, when you need it at a predictable price.
- We testify before Congress and help Congressional Committees and the Administration craft policy, legislation, and regulation.
- We facilitate complex M&A, SBIR grant awards, and next generation joint ventures addressing the small business legal landscape.
- We counsel clients on procurements and public-private partnerships.

Experienced and Collaborative Team

- Former senior official, Executive Office of the President of the United States
- Former prosecutor and Healthcare Fraud Coordinator, United States Attorney's Office for DC
- Former senior legal and business executives of major government contractors
- Trial lawyers with decades of experience litigating and resolving some of the largest and most complex contract claims against the federal government
- 30+ lawyer, full-service practice that is fully integrated with the Corporate, Environmental, Labor, IP, Real Estate, Tax and White Collar practices at Miles & Stockbridge, a leading law firm with offices throughout mid-Atlantic region



What the team is known for:

Distinguished team of respected practitioners with notable experience of handling bid protests before the GAO. Demonstrates substantial experience of advising clients on sizable transactions.

Clients consider the team to be "absolutely superb counsel and a top-flight legal team."



PLEASE READ

Any advice contained in this communication, including attachments and enclosures, is not intended as a thorough, in-depth analysis of specific issues. Nor is it sufficient to avoid tax-related penalties. This has been prepared for information purposes and general guidance only and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice.

No representation or warranty (express or implied) is made as to the accuracy or completeness of the information contained in this publication, and CohnReznick LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.



AGENDA

- Bid Protest Overview & Some Specifics
- Deadlines and Timelines
- Outcomes & Remedies
- Allowability, Recoverability and Audits
- Strategic View of Bid Protest
- Considerations if you Anticipate Filing a Bid Protest

A low-angle, blue-tinted photograph of a classical building, likely a government capitol, featuring a large dome and ornate architectural details. An American flag is prominently displayed on a tall pole in the foreground, partially obscuring the building's facade. The sky is filled with soft, white clouds.

BID PROTEST OVERVIEW

WHAT

- Challenge that in
 - Soliciting or
 - Awarding a contract, the procuring activity acted
 - Arbitrarily or capriciously or
 - Contrary to law
- Cannot relate to contract performance

What is a federal bid protest? Federal agencies are required to act in accordance with federal acquisition laws and regulations. They are also required to be “rational” in their decision making (i.e., not “arbitrary or capricious”). If an “interested party” has evidence that there has been a violation of law or regulation, or that an agency has acted “irrationally,” it can protest the terms of the solicitation (pre-award protest) or the award of the contract (post-award protest).

Before filing a protest, there are many issues that a protestor needs to consider - most importantly (i) forum & jurisdiction; (ii) filing deadlines (forum dependent); and (iii) potential grounds for protest.



WHEN IN PROCUREMENT CYCLE

- Pre-Award
- Post-Award

HOW

There are three potential forums for filing a bid protest (pre-award and post-award) of a federal procurement:

1. Agency;
2. Government Accountability Office (GAO); and
3. Court of Federal Claims

BID PROTEST STATISTICS

Bid Protest Statistics for Fiscal Years 2017-2021

	FY2021	FY2020	FY2019	FY2018	FY2017
Cases Filed ¹	1897 (down 12%) ²	2149 (down 2%)	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)
Cases Closed ³	2017	2137	2200	2642	2672
Merit (Sustain + Deny) Decisions	581	545	587	622	581
Number of Sustains	85	84	77	92	99
Sustain Rate	15%	15%	13%	15%	17%
Effectiveness Rate ⁴	48%	51%	44%	44%	47%
ADR ⁵ (cases used)	76	124	40	86	81
ADR Success Rate ⁶	84%	82%	90%	77%	90%
Hearings ⁷	1% (13 cases)	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)

GAO report for FY20: <https://www.gao.gov/products/gao-22-900379>

IN THE NEWS...

- Protests caused DOD to abandon the **JEDI Procurement** --- its \$10 billion deal with Microsoft to move DOD to the cloud --- after challenges from AWS and Oracle.
 - DOD blamed shifting needs more than the protests, but yeah --- if not for the protests, DOD would all be on Microsoft servers right now.
- **DynCorp International LLC v. U.S. et al., case number 20-2041, in the U.S. Court of Appeals for the Federal Circuit** (held that obligation during discussions to inform vendors of prices that are unreasonably high does not extend to prices that are merely “higher” than others --- having a “higher” price is not a deficiency or significant weakness within the meaning of FAR 15).
- **Aero Spray Inc. dba. Dauntless Air v. U.S. et al., case number 1:21-cv-01079, in the U.S. Court of Federal Claims** (holding that an IDIQ holder does not have standing to challenge other IDIQ awards; future competition not enough of a direct economic interest).
- **Matter of Cotton & Co. LLP, file number B-418380.4** (agency not required to consider negative public information about company).



SPECIFICS TO FILING PROTEST

CohnReznick LLP

FORUM & JURISDICTION CONSIDERATIONS

1. Agency

- Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. (FAR 33.103(g).)
- Automatic stay of performance pending resolution of performance is available if the protest filed within the requisite time period. (FAR 33.103(f)(3).)
- Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO. (FAR 33.103(f)(4).)

FORUM & JURISDICTION CONSIDERATIONS

2. Government Accountability Office (GAO)

- GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with GAO. FAR 33.104(g).
- For pre-award protests, a stay of contract award is available pursuant to FAR 33.104(b)(1),(2); 31 U.S.C. 3553 (c).
- For Post-award protests, a stay of performance is available if filed within the requisite time period pursuant FAR 33.104(c)(1), (2), (3); 31 U.S.C. 3553 (d).
- GAO has exclusive jurisdiction over civilian task and delivery order contracts over \$10M. 41 U.S.C. 4106(f).
- GAO has exclusive jurisdiction over Department of Defense task orders over \$25M. 10 U.S.C. 2304c(e), as amended by Section 835 of the 2017 National Defense Authorization Act).
- Disappointed bidders may still challenge improper federal supply schedule awards at GAO, regardless of the size of the award.

FORUM & JURISDICTION CONSIDERATIONS

3. Court of Federal Claims

- TRO/PI necessary to obtain stay of performance unless Department of Justice voluntarily agrees.
- The COFC has no jurisdiction to hear protests concerning the issuance or proposed issuance of any task or delivery orders except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued. 41 U.S.C. §4106(f), 10 U.S.C. §2304c(e).
- Disappointed bidders may still challenge improper federal supply schedule awards at the COFC, regardless of the size of the award.



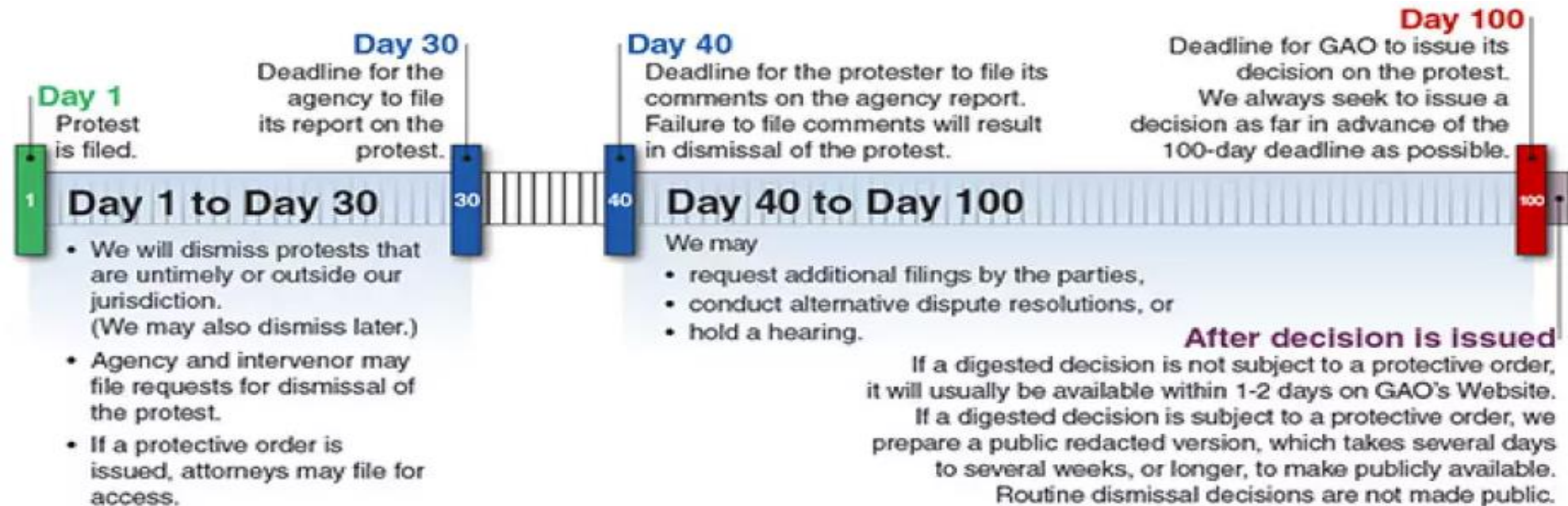
DEADLINES/TIMELINES

FILING DEADLINES

- **Agency Protests** - FAR 33.103
- **GAO Protests** - FAR 33.104; 4 C.F.R. §21.2 (GAO Bid Protest Regulations)
- **Court of Federal Claims Protests** - FAR 33.105, Rules of the Court of Federal Claims (Appendix C - Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. §1491(b)).

TIMELINE DAY 1 - 100

Timeline of Bid Protest Process



[Accessible Text for Timeline of Bid Protest](#)

GAO Contact

For questions about bid protests, email ProtestFinder@gao.gov or call our Procurement Law Control Group at (202) 512-4788.

FILING DEADLINES – AGENCY PROTESTS

- “Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals.” (FAR 33.103(e).)
- “In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.” (FAR 33.103(e).)
- “The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency’s acquisition system, may consider the merits of any protest which is not timely filed.” (FAR 33.103(e).)

FILING DEADLINES – GAO PROTESTS

- “Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.” (4 C.F.R. §21.2(a)(1).)
- All other protests “shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of, protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.” (4 C.F.R. §21.2(a)(2).)

FILING DEADLINES – GAO PROTESTS

- “If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (a)(2) of this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.” (4 C.F.R. §21.2(a)(3).)
- “GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.” (4 C.F.R. §21.2(c).)

FILING DEADLINES – COURT OF FEDERAL CLAIMS

- COFC implements the Tucker Act (28 USC §1491(b)), which is the jurisdictional basis for the court's contract jurisdiction.
- Pre-award protests have no specific timelines, but apparent errors in the solicitation must be protested prior to the time set for receipt of proposals (*Blue & Gold Fleet v. U.S.*, 492 F.3d 1308, 1315 (Fed. Cir. 2007))
- Post award protests have no specific deadlines, but serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches. Best to protest within the deadlines that would apply at GAO unless there is a good reason to take more time prior to filing.

COMMON GROUNDS FOR PROTEST

- Common protest grounds include the following:
 - The agency failed to follow stated evaluation criteria - i.e., the Agency failed to evaluate proposals in the manner stated in the solicitation. For example, the agency may have failed to perform a cost realism analysis, cost reasonableness analysis when required, or the agency didn't perform them properly.
 - The agency engaged in making and producing a flawed source selection decision - i.e., the Agency failed to perform a best value determination, or failed to properly perform one - quite often, the source selection documentation is insufficiently documented.

COMMON GROUNDS FOR PROTEST

- The agency engaged in an unreasonable technical evaluation - i.e., the protestor should have received certain strengths based on the solicitation that the Agency failed to recognize, or the Agency assigned certain weaknesses where it should not have.
- The agency engaged in disparate treatment between offerors (either in proposal evaluations or through discussions) - i.e., the agency may have given one offeror a strength for X but failed to give the protestor a similar strength when evaluating its proposal.

PROTECTIVE ORDERS

- **Per 4 CFR § 21.4:**
 - (a) At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include **proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms.**
 - (c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the order by submitting an application to GAO, with copies furnished simultaneously to all parties. The application shall establish that the applicant is **not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information** and that there will be no significant risk of inadvertent disclosure of protected information.
- **Per Article III of Appendix C to the Rules for the Court of Federal Claims:**
 - Prescribes procedures for filing documents under Seal - the equivalent of COFC's Protective Order

USE OF EXPERTS

Experts should be used strategically in bid protest situations as well. It is not a requirement to have an expert and, like other aspects of bid protests, navigating this poorly can backfire both on the expert, and the protestor. Some common expert types and uses in protest situations include:

- Engineering expert - can be useful in assessing and challenging technical or practical elements of the approach utilized in the winning proposal to determine if additional cost, time or other aspects might affect the court's view of the proposal evaluation.
- Cost Accounting Expert - often useful in assessing cost reasonableness and realism (i.e. does the cost book reflect the effort in the management book) or assessing the compliance of costing methods to identify material issues that may have been overlooked by the proposal evaluation team.
- Other experts (e.g. project management, HR, industry experts) - can be used to address particular elements of the approach represented in the proposal (e.g. HR on compensation, industry experts on cost of materials) or critical issues in the approach to managing the project.



OUTCOMES AND REMEDIES

BID PROTEST OUTCOMES

All Bid Protests have three possible results:

- **Denial**
 - Protest's claims were evaluated. Agency action was determined to be rational and in accordance with applicable law or regulation.
- **Sustain**
 - Protest's claims were evaluated. Agency action was determined not to be rational and in accordance with applicable law or regulation.
- **Dismissed**
 - Procedural defect - Protest's claims were not evaluated. Popular grounds are:
 - Speculative ("fishing expedition")
 - Untimely (GAO, mostly)
 - Matter of contract administration (should have been a "claim")
 - Subject matter jurisdiction (e.g. size issues)
 - Corrective Action
 - Agency is voluntarily taking action that the protestor had been seeking. Protest is now moot.

BID PROTEST REMEDIES

GAO:

- Per 4 C.F.R. §21.8, remedies for a sustain may include:
 - Refrain from exercising options under the contract
 - Terminate the contract
 - Re compete the contract
 - Revise solicitation/reevaluate in accordance with solicitation
 - Award a contract consistent with statute and regulation; or
 - Such other recommendation as GAO determines necessary to promote compliance
- GAO may also award costs to the protestors where the agency has lost the protest, or where it delayed in taking corrective action

BID PROTEST REMEDIES

COFC:

- “Any relief that the court considers proper” (28 USC §1491(b)(2)) - Broader than GAO, but typically requires a permanent injunction, which GAO does not require.
 - Monetary relief limited to “B&P” costs, but can award legal fees to lower net worth protestors under the Equal Access to Justice Act.

A blue-tinted photograph of a classical building, likely a government capitol, featuring a large dome and ornate architectural details. An American flag is visible in the center, waving in front of the building. The sky is filled with soft, white clouds.

ALLOWABILITY, SEGREGATION, AUDIT CONCERNS AND RECOVERABILITY OF BID PROTEST COST

ALLOWABILITY

Bid protest costs and costs of defending against protests are expressly unallowable whether incurred by the protester or the contractor who received the award; however, costs of defending against a protest are allowable, if reasonable and the contracting officer requested in writing that the contractor provide assistance in defending against the bid protest (FAR 31.205-47(f)(8)).

SEGREGATION OF BID PROTEST COST

- Contractors are required to segregate and remove from Government billings the costs related to proceedings described in paragraph 41-3.1, which are unallowable regardless of the outcome, in accordance with CAS 405 and FAR 31.201-6 Accounting for Unallowable Costs.
- Contractors are also required to segregate, and contracting officers are required to withhold payment of, the costs of a proceeding whose outcome determines cost allowability until the outcome is determined (FAR 31.205-47(g)). Thus, contractors should segregate costs described in paragraph 41-3.2 (FAR 31.205-47(b) and paragraph 41-3.3 (FAR 31.205-47(f)(4) & (f)(7)) as incurred, and not bill them to the Government until the outcome is determined.
- The contracting officer may enter into an advance agreement to make conditional payments to the contractor for such potentially unallowable costs if the contractor agrees to repay the Government with interest if the ultimate outcome of the proceeding makes the cost unallowable.

AUDITING BID PROTEST COST

- If the contractor claims a significant amount of costs related to legal proceedings we should gain an understanding of the internal controls the contractor has over those costs as part of our risk assessment. When the contractor's internal controls are inadequate, we should follow the guidance in MRD 12-PAS-012(R) Audit Guidance on Auditing Contractor Business Systems and Contractor Compliance with DFARS 252.242-7006, Accounting System Administration, dated April 24, 2012, and MRD 14- PAS-009(R) Audit Guidance on Reporting Business System Deficiencies, dated June 26, 2014, regarding reporting business system deficiencies and adjust the scope of the audit, accordingly. (The guidance in the referenced MRDs will be incorporated into CAM 5-100.)

WHAT AUDITORS ARE LOOKING FOR

- When it is determined that there is significant risk associated with the costs related to legal proceedings, we should review billings that the contractor paid related to legal services and other documents, including those related to costs that the contractor has segregated, to:
 - Ensure that all known unallowable and potentially unallowable proceedings costs have been included.
 - Identify other unallowable proceedings and professional service costs that the contractor has not segregated. The contractor should also segregate any inhouse support costs (particularly in the legal and accounting departments) incurred for unallowable types of proceedings.
 - To substantiate that the proceedings were not the result of unreasonable acts committed by the contractor in which it violated its “responsibilities to the Government, other customers, the owners of the business, employees, and the public at large,” as prescribed in FAR 31.201-3.

RECOVERING COSTS

- Bid & Proposal cost recovery
- Protest cost recovery
- REA filing
- Differences between GAO, COFC and Agency

A low-angle, blue-tinted photograph of the US Capitol building dome and an American flag. The flag is prominently displayed in the center, waving in front of the building's ornate facade. The sky is a deep blue with some clouds. The text "STRATEGIC VIEW TO BID PROTEST" is overlaid in white, bold, sans-serif font. A small white graphic element, resembling a stylized flag or a checkmark, is positioned above the first few letters of the text.

STRATEGIC VIEW TO BID PROTEST

TYPICAL APPROACHES / COMMON ERRORS

- Always protest
- Win at all costs
- Throw everything at the wall and hope something sticks (though this can sometimes be effective)

AVOID THE NEED

- Avoiding the need for protest is always the best strategy
 - Raise concerns during the procurement process (Q&A)
 - Evaluate status based on Government response
 - Can result in no-bid decision, a different bid decision (subK or teammate), or proposal re-write rather than protest.

NOT TO PROTEST

- Sometimes **NOT** protesting is the right answer
 - If you aren't likely to win the protest
 - Unless you are the incumbent contractor
 - Even if you are likely to win the protest, if you aren't likely to win the work
 - If you've learned new information about the work suggesting that you would not be able to perform profitably
 - Protect your relationship with the Customer
 - Who is the KO? Who is the PMO? Are you likely to be in front of those individuals again?

WHEN TO PROTEST OR INTERVENE

- Sometimes protesting is the right answer
 - When you are reasonably likely win the award post-protest (favorable probability of win, lower probability of the agency confirming the award)
 - When the anticipated financial benefits of the win justify the cost of the protest
 - When you can protest in a way so as not to poison the relationship with the customer; or when you are not concerned with damaging the relationship with the customer
 - You are the incumbent contractor and the bridge contract is worth the protest
- Always intervene
 - Can be inexpensive and allows you to be part of the process, giving you the opportunity to ratchet up your involvement as necessary



WRAP UP & CONSIDERATIONS

CohnReznick LLP

CONSIDERATIONS

- If you are going to or anticipate a protest will occur... then for God's sake do it right.
 - Relationship with the agency and/or prime contractors
 - The substance of protest issues (don't throw a grenade and hit yourself with the shrapnel)
 - What forum to take
 - How to communicate/use counsel
 - How to use experts
 - Technical concerns
 - Management concerns
 - Cost concerns
 - Cost realism
 - FAR/CAS noncompliance
 - Failure of the agency to use surrogates in cost evaluation



GOVERNMENT CONTRACTING RESOURCES

The screenshot shows the GovCon360° Resource Center website. At the top, there's a header with the title "GovCon360° Resource Center" and a subtitle "Resources for government contractors to increase competitiveness and lower the cost of compliance." Below this is a "Subscribe" button. A profile section for Kristen Sales, CPA, follows, with a "Contact Kristen" button. The main logo "GovCon360°" is prominently displayed, with the "G" and "v" in blue and "Con360°" in orange, featuring a stylized Capitol dome. Below the logo, a "Register for webinar" section highlights a webinar titled "Webinar: Disparate commercial and federal business interests" with a description and a "Register for webinar" link. To the right of the text is an image of the American flag. At the bottom, a "Featured Insights" section displays eight tiles, each with a thumbnail image and a title, such as "Contribute to the 2021 GAUGE survey" and "2020 GAUGE Report: Industry roadmap of benchmarks an...".

For more government contracting insights, visit our GovCon360° Resource Center at CohnReznick.com/GovCon360



QUESTIONS? CONTACT US



KRISTEN SOLES, CPA
Managing Partner, Advisory –
Global Consulting Solutions
and Government Contracting
Industry Leader

kristen.soles@cohnreznick.com



CHRISTINE WILLIAMSON, CPA, PMP
Partner,
Government Contracting,
CohnReznick Global
Consulting Solutions

christine.williamson@cohnreznick.com



JEFF SHAPIRO, CPA
Partner,
Government Contracting,
CohnReznick Global
Consulting Solutions

jeff.shapiro@cohnreznick.com



RICH MEENE
Principal,
Government Contracting,
CohnReznick Global
Consulting Solutions

rich.meene@cohnreznick.com