

Q&A WITH PILLSBURY'S JOHN JENSEN

This article first appeared in *Law360*, March 14, 2013.



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John E. Jensen is managing partner of the Northern Virginia office of Pillsbury Winthrop Shaw Pittman LLP and head of the firm's government contracts and disputes practice group. His practice consists of assisting clients with all aspects of federal government contracts law. His work includes the representation of clients in bid protests, particularly before the U.S. Government Accountability Office. Jensen is a former co-chairman of the American Bar Association section on public contract law's small business committee. Prior to joining Pillsbury, he was a government contracts lawyer for the U.S. Environmental Protection Agency and worked in the government contracts program at George Washington University Law School for professors John Cibinic and Ralph Nash.

Q: What is the most challenging case you've worked on, and why?

A: A challenging and fascinating case that I worked on involved a string of bid protests over the award of a follow-on contract to operate a data center for a Homeland Security agency. We raised our arguments in three different forums, prevailing finally and conclusively in the last, the ombudsman's office. The path the case took was not pretty.

The case began in a typical enough fashion. Our client was the incumbent contractor at the agency's data center. The agency made award of the new contract to our client, and a competitor protested at the General Accounting Office. The GAO protest led the agency to take corrective action. As a result of a further evaluation of proposals, the agency selected the competing firm over our client. At that point, our client protested to the GAO.

Things then took a turn down a perverse path. At the GAO, agency counsel argued that our client lacked standing. The argument was premised on the facts that, as a result of the initial award decision, which was to our client, our client technically held a new contract for the services in question. This was true because the agency had not, pending the outcome of its

corrective action, terminated our client's award. Agency counsel argued further that, because our client held a new contract, it could not protest the award of "second" contract to the competing firm. Our position was that the agency plainly only intended there to be one awardee, and had selected the competitor following corrective action. Further, the fact that our client technically still held a contract was just a timing issue.

But agency counsel disagreed. According to agency counsel, the agency had made "multiple awards," and, now, the agency intended to have two contractors. The request for proposal and the awarded contracts notably did not contain the mandatory provisions for multiple award task and delivery order contracts. The agency did not disagree that the source selection official chose the competitor's proposal over our client's proposal. The agency did not seriously challenge our argument that the original procurement strategy was to make one award. The agency also never disagreed that only one contractor could run the Homeland Security data center at time.

Rather, following our bid protest, the agency's position was that its procurement approach had changed.

The agency's clever maneuver proved a success. The GAO, and then the Court of Federal Claims, both ruled that our client's untermiated contract gave it at least the theoretical possibility of winning orders for work, so our client lacked standing to challenge the latest source selection.

Out of protest options, we turned to the agency's task order and delivery order ombudsman. We filed a complaint and argued that, if these actually were multiple awards — as the agency was on record as arguing before the GAO and the court — then the agency must conduct a task order procurement and award a task in accordance with the Federal Acquisition Regulation. The ombudsman agreed with this step in the logic. The agency modified the two contracts to add task order procedures and task order award criteria, then conducted a task-order procurement. The one task-order procurement the agency then conducted under the newly-modified contracts was for operation of the entire data center for all contract years — winner-take-all. While the legal work ended at that stage, in a topsy-turvy turn of events, our client's task order proposal was rated as most advantageous and it won the work for the balance of the contract life.

Q: What aspects of law in your practice area are in need of reform and why?

A: The debriefing and protest process requires further refinement. Although the introduction of task

order debriefings and the GAO protest right several years ago was a welcome development, all kinds of awards, especially orders under a General Services Administration schedule, should be subject to the same debriefing rules, the same protest timeliness rules and the clear application of the Competition in Contracting Act stay. Debriefings also should be more uniformly fulsome because too often agencies still take a minimalist approach to debriefings, frustrating offerors and inviting them to protest.

Q: What is an important issue or case relevant to your practice and why?

A: Small business issues remain ever-present matters of concern to businesses of all sizes and stripes. Small businesses annually receive nearly \$100 billion in prime contract awards alone. There are numerous unsettled legal issues involving such topics as: affiliation between contractors — large and small, mergers and acquisitions, size recertification, continuation of small business credit, and unique rules for each of the Small Business Administration small business procurement programs. Industry would benefit from more clarity on the application of the SBA's rules and policies, so all companies can make business decisions with greater confidence that they comport fully with prevailing federal interpretations of SBA programs.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: A lawyer outside Pillsbury who has impressed me greatly is my former government contracts partner, Devon Hewitt, who now works at Protora Law. I worked closely with Devon for many years, beginning in the heyday of General Services Board of Contract Appeals bid protests, and then for an ensuing 15 years. Watching Devon practice law puts two principles in stark relief: (1) the client comes first, and (2) integrity.

One of my recollections was on 9/11, when almost everyone was understandably shifting their attention to the news of events unfolding in our country and to their personal situations. That afternoon one of Devon's clients remarkably insisted on meeting her downtown to discuss a new legal problem. If you remember that day, you might recall that no one was scheduling new business meetings that afternoon. While I know Devon thought the request unreasonable, she did not say no — and she went downtown to meet with the client in the midst of the city's chaos. Devon is the kind of lawyer that generates real enthusiasm from her clients.

Q: What is a mistake you made early in your career and what did you learn from it?

A: More than 25 years ago, in my first job as newly minted lawyer, which happened to be with a federal agency, I worked with great lawyers but I had only a modest amount of supervision, so I was free to do pretty much what I thought best.

Autonomy is a great thing but occasionally dangerous, especially when you are fresh out of law school. I was able to write legal briefs using a variety of different legal “styles.” I tried to change long-standing GAO jurisprudence, which I learned was a quixotic quest. I initiated a “substantial variance hearing” under the Service Contract Act (not realizing that nobody ever does this) and, on the eve of the hearing, negotiated a wage reduction with the union that lowered the contract cost to the agency, which was a great result, in part because I had not had the time or resources to prepare sufficiently the hearing scheduled for the next morning. Things universally turned out okay, but, as a law firm partner, the lesson I learn from all this is that, while young lawyers have lots of creativity, we all also need supervision now and again.

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