

## **DO YOU KNOW THE TEXAS TWO STEP? HOW ABOUT THE D.C. THREE STEP?**

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Many readers are familiar with (or have danced) the Texas Two Step. “Two-stepping is just walking to a beat,” says Austin-based Rowdy DuFrene, a two-time United Country Western Dance Council World Champion. “While many variations exist, the true version follows a quick-quick-slow-slow pattern danced over six beats to music with four-four time.” But what about the D.C. Three Step – the three part bid protest process used by Government Contractors in Washington, D.C. to enhance their chances of winning a contract? It was recently danced successfully by BCPeabody Construction Services, Inc. *BCPeabody Const. Servs., Inc. v. United States*, No. 13-378C (Fed. Cl. Sept. 17, 2013).

What is the D.C. Three Step? It consists of taking your protest to as many as three different forums, in sequence, in the hope that you’ll win at one of them. Here’s how it works:

Step 1: The protester files its protest at the procuring agency. Although there are no statistics on sustain rates, it is well understood that most agencies and contracting officers will deny the protest and the sustain rates are low.

Step 2: If the protester loses at the agency, the protester files the same protest at the Government Accountability Office (“GAO”). GAO rules explicitly permit the protest to be timely if it was timely filed at the agency and was not sustained. In 2012, the GAO sustained about 19% of the bid protests that it fully developed.

Step 3: If the protester loses at the GAO, it may still file the protest at the Court of Federal Claims. While the Court respects the expertise of GAO and considers its decisions instructive, see, e.g. *Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49 (Fed. Cl. 2013), a GAO decision is not binding on the Court, and the Court will sometimes rule contrary to the GAO. (There are no statistics available on the number of times it happens, but BCPeabody is one of them). Of course, once the case has been ruled upon by the Federal Claims Court, it may be appealed to the Court of Appeals for the Federal Circuit, but such appeals are relatively rare.

The facts in BCPeabody are very simple. It involved a contract for construction of a cutoff wall, placement of a drainage blanket, repavement of a dike crown, and ancillary work in Florida. The Corps of Engineers set aside the procurement for small business and conducted a negotiated procurement. Although the bidders all proposed the use of Bauer Foundation Corporation as a major subcontractor, BCPeabody supplied in its proposal two copies of the same project information regarding Bauer’s work, and failed to supply in its proposal the necessary experience regarding cutoff wall experience. Only the proposal of Edens Construction Co. was deemed technically acceptable, and the Corps awarded the contract to Edens, even though its price was more than \$1 million higher than BCPeabody’s price. *However, the contracting officer knew that Edens was also proposing use of Bauer as its subcontractor, and knew that Bauer had the*

*requisite experience to perform the cutoff wall construction because the information was in Edens' proposal.*

Now for the dance steps. Edens requested a debriefing and submitted a protest to the Agency, alleging that the simple mistake (two copies of the same project information) in its proposal should have been corrected by the contracting officer. The Agency denied the protest. BCPeabody then filed a protest at the GAO, again alleging that the contracting officer abused her discretion in failing to clarify the alleged mistake, especially since she knew that BCPeabody planned to use Bauer as the major subcontractor and knew that Bauer was well qualified to perform the work.

GAO agreed with BCPeabody that the contracting officer should have considered Bauer to be an acceptable subcontractor for *both* prime contractors, and it was unreasonable for the Corps to find Bauer's experience acceptable for Edens but unacceptable for BCPeabody. However, GAO denied BCPeabody's protest, finding that that company was not prejudiced by the contracting officer's error. GAO asserted that Edens included information on Bauer Foundations, Canada, a separate legal entity from Bauer, and this was not covered by Bauer's letter of commitment to BC Peabody.

In ruling in BCPeabody's favor, the Court of Federal Claims concluded that the contracting officer has abused her discretion in two ways (1) she impermissibly found Bauer, the projected subcontractor for both BCPeabody and Edens, to have acceptable experience insofar as Edens's proposal was concerned but not for BCPeabody's competing proposal. (2) She improperly refused to seek clarification from BCPeabody regarding the copying mistake in BCPeabody's offer that related to Bauer's experience.

Finally, the Court noted that in order to demonstrate prejudice, BCPeabody had to show that but for the error in the procurement process, there was a substantial chance that it would have received the contract award. The Court held that BCPeabody would have had a substantial chance of receiving the contract because, if the procurement process had been correct, BCPeabody would have been a technically acceptable bidder offering the lowest price by more than \$1 million. The court issued a permanent injunction barring contract award to Edens, requiring the agency to restore BCPeabody to the competition and to re-evaluate proposals.

So BCPeabody successfully danced the D.C. three step, winning on the third try. Although the Agency still was required to re-evaluate proposals, the prospects look good given the significant price difference that is involved.

TIPS: Agency protests are unlikely to be sustained, unless they are protests of a defect in the solicitation that the agency can correct immediately without displacing a bidder. Chances at the GAO are only one in five that your protest will be sustained. If you lose at the GAO and can afford to battle in the Court of Federal Claims, you can then get your "day in court" and there is a possibility that the loss will be turned around. There are no published statistics on the number of Court decisions that reversed or changed GAO decisions, but some of the decisions are quite notable. BCPeabody was successful.

