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Annual Review 2021

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Challenge Questions



Play for charity!

DAY 1

12:00 p.m. Bid Protests

2:00 p.m. Investigations, Disclosures & S&D

3:00 p.m. Labor & Employment

MONDAY, JANUARY 25, 2021

12:00 PM to 4:00 PM

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- Q&A – to ask a question of the panel, please type your comment in the Q&A box at the bottom of your screen. The panel will address as many questions as time allows.
- Materials
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- Email craig@pubklaw.com with questions.

SESSION 1

Bid Protests

Monday, January 25, 2021
12:00 p.m. to 2:00 p.m.



Jason Carey
Partner
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OTAs & Protest Jurisdiction: The Basics

OTAs are “transactions other than contracts, grants or cooperative agreements.” 10 U.S.C. § 2371

GAO: A “protest” is an objection to a solicitation for or award of a “contract for the procurement of property or services.” 31 U.S.C. § 3551.

COFC: Exclusive jurisdiction over protests of “any alleged violation of statute or regulation in connection with a procurement...” 28 U.S.C. § 1491(b)(1).

District Court: General APA jurisdiction, except where COFC has exclusive jurisdiction. 28 U.S.C. § 1331; 5 U.S.C. § 702.

SpaceX v. US

- Two-phase Air Force acquisition
 - ▶ Phase 1: OTAs for development of launch vehicles
 - ▶ Phase 2: FAR-based contracts for provision of launch services
- 4 companies submitted proposals; Air Force awarded OTAs to 3
- SpaceX protested at the Court of Federal Claims

SpaceX v. US

- Is there a “connection with a procurement”?
- A “close” question
 - ▶ “Separate and distinct solicitations”
 - ▶ “Different acquisition strategies”
 - ▶ Different “goals”
 - ▶ No “acquisition of goods or services”
- Also . . . competition for the future procurement contract would be full and open

MD Helicopters v. US

- Multi-phase Army acquisition for FARA
 - ▷ Phase 1: OTAs for preliminary design
 - ▷ Phases 2 & 3: OTAs for prototype and development
 - ▷ Phase 4: Follow-on “production contract or transaction”
- Army awarded 5 OTAs
- MD protested at GAO, then in district court

MD Helicopters v. US

- Is the claim “contractually-based”?
 - ▷ Nature of the relief requested
 - ▷ “Contract” v. “procurement contract”
- Is there a “connection with a procurement”?
 - ▷ No separate solicitation
 - ▷ Competition for later phases not full and open
 - ▷ “Contingent language regarding Phase 4”
 - ▷ But all “within the procurement process”

Where do we go from here?

- When and where is there jurisdiction?
- Inherent uncertainty
 - ▶ No binding precedent yet on key jurisdictional issues
 - ▶ Highly fact-specific determination
- Potential for increased disruption
- A legislative solution?



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Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who Is the Offeror and Evolving Questions of Attribution: Corporate Affiliates

- As a general rule, corporate affiliate attribution is discretionary
 - ▶ BUT - offeror must clearly demonstrate factual basis for how affiliate will be involved in performance and share resources with the offeror
- Broad impact of attribution perhaps with differing applications in same evaluation
 - ▶ Experience and past performance
 - ▶ Responsibility
 - ▶ Facility clearance, CMMI, subcontracting plans

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who Is the Offeror and Evolving Questions of Attribution: Corporate Affiliates (cont)

- Review RFP terms carefully, utilize Q&As, and avoid ambiguities and inconsistencies in proposal, *i.e.*, generic corporate references

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Corporate Affiliates

■ *DynCorp Int'l, LLC*, B-418594; B-418594.2, June 23, 2020, 2000 CPD ¶ 221

- ▶ RFP required offerors to “provide three individual subcontracting reports for recent contracts that included a subcontracting plan” and stated agency would “evaluate the Offeror’s . . . achievement on each goal stated within the subcontracting plan as reported on each ISR”
- ▶ None of CAGE codes on ISRs matched the offeror’s CAGE Code – and no clarification in the proposal
- ▶ GAO denied protest and held Agency reasonably evaluated offeror as unacceptable

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Corporate Affiliates

■ *Connected Global Solutions, LLC*, B-418266.4; B-418266.7, Oct. 21, 2020, 2020 CPD ¶ 349

- ▶ Corrective action following earlier protest – Agency failed to consider record of parent’s criminal antitrust violations in finding ARC responsible
- ▶ Second protest challenged new responsibility determination – GAO sustained
- ▶ Inconsistency between technical proposal and ARC representations regarding reliance on entity that pleaded guilty to criminal conduct – this required further investigation

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

- JV Advantage – pool resources, capabilities, and experience of two or more separate entities into single prime contractor
- JV Added Risk – JV could be evaluated as new entity with risk of Neutral past performance
- AGAIN – RFP terms are key, utilize Q&As – i.e., to clearly define what experience/past performance will or will not be considered
- Ensure awareness of additional protections and regulations for small businesses

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

■ *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83

- ▶ Confirms regulation only requires agencies to consider experience of mentor-protégé JV members, agencies are not prohibited from requiring the protégé to submit projects in their name or from limiting the number of mentor projects

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

■ *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83 (cont)

- ▶ Sustained challenge to agency's prohibition on CTAs comprised of a mentor-protégé JV and non-JV member subcontractors when other CTAs allowed
 - ▶ No applicable statutory or regulatory prohibition
 - ▶ GSA could not identify added administrative burden from evaluation

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

■ *Amaze Technologies, LLC*, B-418949, Oct. 16, 2020, 2020 CPD ¶ 347

- ▶ Confirms that SBA regulations do not mandate relative weight or degree of consideration for mentor v. protégé experience/past performance
- ▶ RFP required offerors to submit at least one relevant experience reference
 - ▶ Protester JV submitted three references – all from mentor
 - ▶ Only one evaluated as relevant

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

■ *Amaze Technologies, LLC*, B-418949, Oct. 16, 2020, 2020 CPD ¶ 347 (cont)

- ▶ Experience and past performance evaluated for JV, mentor, and protégé
 - JV experience evaluated as Marginal and past performance as Satisfactory
- ▶ GAO rejected argument that Agency was only permitted to evaluate mentor experience/past performance – with no weighting identified in RFP, evaluation was reasonable

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures

■ 85 FR 66146-01 (Oct. 16, 2020); 13 C.F.R. § 125.8

■ Effective 11/16/2020 - SBA amended the small business JV regulations to:

- ▶ Broaden the previous regulations to also address capabilities and business systems:
 - In evaluating the capabilities, past performance, experience, business systems and certifications of a JV bidding on a contract set aside or reserved for small business, the procuring activity must consider work done and qualifications held individually by each partner to the JV as well as any work done by the JV itself previously

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Who is the Offeror and Evolving Questions of Attribution: Joint Ventures (cont)

- ▶ Added prohibition on procuring activity from requiring protégé to individually meet the same evaluation or responsibility criteria as that required of other offerors generally
 - JV partners in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

- Protest decisions regarding matters of corporate status and restructuring are highly fact-specific, and turn largely on the individual circumstances of the proposed transactions and timing
- Generally:
 - ▶ An agency's lack of knowledge of a proposed corporate transaction is not unreasonable
 - ▶ An agency has no affirmative obligation to discover and consider such information

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control (cont)

- GAO has only required that an agency consider the potential impacts of a corporate change (e.g., merger, acquisition, restructuring, etc.) when the change is “imminent and essentially certain”

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

VSE Corp., B-417908, B-417908.2, Nov. 27, 2019, 2019 CPD ¶ 413

- Army task order request against the ERS TS3 IDIQ contracts - While proposals were pending:
 - ▶ June 17 – AECOM announced in a statement to shareholders that it intended to spin off AECOM Management Services as a new public company
- August 14 – Army completed its responsibility determination of AECOM Management Services and issued order to AECOM

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

VSE Corp., B-417908, B-417908.2, Nov. 27, 2019, 2019 CPD ¶ 413 (cont)

- VSE raised the announced spinoff during its debriefing
- August 26 – Army completed another responsibility determination
- VSE protested and while the protest was pending:
 - ▶ October 14 – AECOM announced that AECOM Management Services would not be spun-off as a public company, but AECOM would sell its equity interests in AECOM Management Services to two private equity firms

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

Wyle Laboratories, Inc., B-416528.2, Jan. 11, 2019, 2019 CPD ¶ 19

- June 5 – asset purchase agreement executed whereby Wyle transferred all “assets and liabilities” relating to Wyle’s OASIS contract to Grant Thornton
- June 14 – documentation submitted to GSA to have Grant Thornton recognized as the successor-in-interest to Wyle’s OASIS contract
- June 29 – Quotations due for a CBP task order procurement under OASIS
 - ▶ Wyle submitted a quotation prepared by Grant Thornton on behalf of Grant Thornton

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

Wyle Laboratories, Inc., B-416528.2, Jan. 11, 2019, 2019 CPD ¶ 19 (cont)

- ▶ Wyle's only duties as prime were to allow Grant Thornton to perform until novation was finalized

- CBP determined that Wyle was ineligible for award

- ▶ Even though the quotation had earned an outstanding technical and management rating and neutral past performance rating

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

Knight Point Sys., LLC, B-418746, Aug. 24, 2020, 2020 CPD ¶ 314

- Agency eliminated protester's quotation because agency believed that quotation was submitted by protester's parent company rather than protester and, as a result, did not comply with solicitation requirements

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

Knight Point Sys., LLC, B-418746, Aug. 24, 2020, 2020 CPD ¶ 314 (cont)

- GAO held that quotation met all solicitation requirements and clearly was submitted by protester, *e.g.*:
 - ▶ Quotation used protester's unique CAGE code and DUNS number;
 - ▶ Quotation relied on protester's GSA schedule contract;
 - ▶ Protester clarified with agency prior to elimination that quotation references to parent company simply indicated that protester would be using certain parent company resources

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

- Breadth and depth of analysis will depend on type of change and impact on procurement
 - ▶ Cost v. fixed-price procurement?
 - ▶ When in procurement did change occur?
 - ▶ How are offeror's proposed resources affected—e.g., personnel/financials/cost structure?

Identification of and Attribution to the Offeror and Impacts of Changes in Control

Impacts of Changes in Control

■ What can offerors do?

- ▶ Plan ahead, *e.g.*, consider impending changes; review target companies for pending proposals
- ▶ Inform government when necessary (*i.e.*, when transaction is imminent and essentially certain)
 - ▶ Confirm proposal validity and availability of resources
 - ▶ Couch as responsibility communications, if possible
- ▶ Monitor your competitors for potential changes



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Corrective Action at GAO (by the FY 2020 Numbers)

- “It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.” GAO Annual Report to Congress for Fiscal Year 2020, B-158766 (Dec. 23, 2020).
- GAO’s numbers suggest that more protests *may* end by corrective action than by GAO merit decisions.
- For FY 2020, GAO reports a 51% effectiveness rate (defined as some relief for the protester) driven largely by corrective action.

Bid Protest Statistics for Fiscal Years 2016-2020

	FY2020	FY2019	FY2018	FY2017	FY2016
Cases Filed ¹	2149 (down 2%) ²	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)
Cases Closed ³	2137	2200	2642	2672	2734
Merit (Sustain + Deny) Decisions	545	587	622	581	616
Number of Sustains	84	77	92	99	139
Sustain Rate	15%	13%	15%	17%	23%
Effectiveness Rate ⁴	51%	44%	44%	47%	46%
ADR ⁵ (cases used)	124	40	86	81	69
ADR Success Rate ⁶	82%	90%	77%	90%	84%
Hearings ⁷	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)

Source: GAO Annual Report to Congress for Fiscal Year 2020, B-158766 (Dec. 23, 2020).

CY 2020 Saw Increased Focus by GAO on Whether Corrective Action Moots a Protest (Pre-Award)

- *Mythics, Inc.; Oracle America, Inc.*, B-418785, Sep. 9, 2020, 2020 CPD ¶ 295 (sustaining protest and addressing prior proposed corrective action).

Vague, ambiguous, partial, or inadequate statements on the part of the agency to take corrective action at some indefinite point in the future - corrective action that may or may not render the protest academic - do not provide a basis for dismissal of the protests...Additionally, in the absence of an actual solicitation provision, there is no basis for our Office to consider the undefinitized corrective action measures sketched out in the agency's pleadings in reviewing the propriety of the solicitation as written. Under the circumstances, we will review the protest allegations in light of the record actually before us, without consideration of the assertions made by the agency to amend or modify the RFP at some time in the future.

CY 2020 Saw Increased Focus by GAO on What Corrective Action Moots a Protest (Post Award)

- *Raytheon Co.*, B-419393.5, B-419393.6, Dec. 22, 2020, 2020 CPD ¶ --- (dismissing corrective action challenge).

As discussed in detail above, the agency currently is weighing the extent of its corrective action, which could take one of two possible courses - the agency can either reevaluate the proposals already submitted in accordance with its existing solicitation, or the agency can engage in discussions and allow firms to revise their proposals, and thereafter perform its reevaluation and source selection. The fact that the agency has not yet reached a conclusion regarding whether to engage in discussions in no way invalidates, undercuts, or renders improperly vague, partial or inadequate the corrective action it has committed to take.

...Regardless of which of these two courses the agency selects, any current challenge to the agency's corrective action is premature at this juncture, as that challenge could prove immaterial in light of subsequent events.

CY 2020 Saw Increased Focus by GAO on What Corrective Action Moots a Protest (Post Award)

- *Odyssey Systems Consulting Group, Ltd.*, B-418440.8, B-418440.9, Nov. 24, 2020, 2020 CPD ¶ --- (dismissing corrective action challenge).

Of relevance here, we may dismiss a protest as academic where the corrective action, while not addressing the issues raised by the protester, appears appropriate based upon the particular circumstances of the acquisition and protest. . . . The agency has committed to making a new award decision and, as we explained in our decision dismissing Odyssey's prior protests: "Where, as here, an agency undertakes corrective action that will supersede and potentially alter prior procurement actions, our Office will generally decline to rule on a protest challenging the agency's prior actions on the basis that the protest is rendered academic."

CY 2020 Decisions: Corrective Action Protest Timing Rules

- Timing of Corrective Action Scope/Ground Rules Challenges (Protester)
 - ▶ *Leidos, Inc.*, B-418242.5, Mar. 3, 2020, 2020 CPD ¶ 93 (dismissing corrective action challenge as premature).
- Timing of Need for Corrective Action Challenges (Awardee)
 - ▶ *Unissant, Inc.*, B-418193.2, Jan. 31, 2020, 2020 CPD ¶ 67 (denying awardee's corrective action challenge and dismissing later added piecemeal corrective action arguments as untimely).
- Trap for the Unwary (Reminder)
 - ▶ *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168.



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Unavailable Key Personnel

- Many solicitations require offerors to identify key personnel, meeting specified criteria, by name. Proposing key personnel who meet the stated criteria generally is considered a material aspect of the proposal.
- Under current precedents, if an offeror gains actual knowledge prior to award that one of its proposed key personnel will be unavailable, it must report the unavailability to the agency. The agency then has two options: (re)open discussions to allow proposal revisions or eliminate the proposal.

Unavailable Key Personnel

- Rule applies even if the unavailability is unforeseeable and outside the offeror's control, such as unexpected medical issues. *Chenega Healthcare Servs., LLC*, B-416158, June 4, 2018, 2018 CPD ¶ 200.
- Rule applies not only to physical unavailability, but also to a key person's unavailability to perform as proposed. See *M.C. Dean, Inc.*, B-418553, B-418553.2, June 15, 2020, 2020 CPD ¶ 206 (sustaining protest where awardee failed to inform agency prior to award that its proposed program manager had been denied a security clearance required for him to perform as program manager).

Unavailable Key Personnel

- At least at the GAO, the rule has been softened a bit to make clear it does not apply to constructive knowledge of unavailability (“should have known”).
- In *NCI Information Systems, Inc.*, B-417805.5 *et al.*, March 12, 2020, 2020 CPD ¶ 104, GAO considered a protest alleging that one of the awardee’s key personnel became unavailable during post-protest corrective action.
- The protester’s basis for alleging unavailability appears to have been an internet search that supposedly showed the key person changed jobs and moved to Arizona during the pendency of the prior protest’s corrective action.

Unavailable Key Personnel

- GAO found it unnecessary to resolve whether the proposed key person was actually unavailable, as the awardee provided a declaration that it had no actual knowledge of unavailability and the proposed key person, who was another company's employee, had not rescinded his commitment letter.
- Lack of actual knowledge of unavailability was sufficient to deny the protest ground: "While an offeror generally is required to advise an agency where it knows that one or more key employees have become unavailable after the submission of proposals, there is no such obligation where the offeror does not have actual knowledge of the employee's unavailability."

Unavailable Key Personnel

- The GAO did not address the more interesting question of whether unavailability is even an issue when it occurs after an *initial* award but prior to the completion of a post-protest corrective action – particularly where key personnel were outside the scope of the corrective action.

Unavailable Key Personnel

- With long, drawn-out procurements, key personnel issues frequently arise, and allegations of unavailability are becoming a very common protest ground. We expect key personnel will continue to be a vexing issue and proposal risk until the GAO's current rule is changed.
- One of the best mitigations currently is to extract commitment letters from proposed key personnel and to impress upon them the seriousness of the commitment.
- Another mitigation strategy is to avoid unnecessarily checking in on availability prior to award. This will decrease the risk that the offeror will learn of an unforeseen unavailability and trigger a disclosure requirement, without a guaranteed opportunity to name a replacement.



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Timeliness

- *Insero Corp. v. United States*, 961 F.3d 1343 (Fed. Cir. 2020).
- *Harmonia Holdings Grp., LLC v. United States*, 146 Fed. Cl. 799 (2020), *appeal docketed*, No. 20-1538 (Fed. Cir. Mar. 6, 2020).
- *NIKA Techs., Inc. v. United States*, 147 Fed. Cl. 690 (2020).
- *Centerra Integrated Facilities Servs., LLC*, B-418628, 2020 WL 2096521 (Comp Gen. Apr. 23, 2020).

Inerso Corp. v. United States

- The Federal Circuit held that Inerso's organizational conflict of interest claim was barred under *Blue & Gold*.
- The Federal Circuit stated that Inerso, which competed in the small business pool of the competition, "knew, or should have known, that DISA would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards."
- The Federal Circuit's decision arguably expanded the *Blue & Gold* doctrine beyond patent solicitation defects.

Inerso Corp. v. United States

- Judge Reyna's dissent raised significant questions as to the continuing validity of the *Blue & Gold* doctrine in light of the United States Supreme Court's 2017 decision in *SCA Hygiene*.

Harmonia Holdings Grp., LLC v. United States

- Harmonia filed a pre-award agency-level protest, which was denied. Approximately five months later, Harmonia filed a post-award protest in the Court of Federal Claims.
- The Court of Federal Claims concluded that, notwithstanding Harmonia's timely pre-award protest, Harmonia "nevertheless waived its pre-award protest grounds by waiting five months to re-raise its pre-award arguments with its post-award protest grounds."
- Interestingly, the Court of Federal Claims found that "Harmonia facially met the requirements under *Blue & Gold*" before barring Harmonia's claim under *Blue & Gold*.

Harmonia Holdings Grp., LLC v. United States

- On March 6, 2020, Harmonia's appeal was docketed with the Federal Circuit. Oral argument was heard on November 5, 2020. The appeal remains pending. Judge Reyna is on the panel presiding over the appeal.

NIKA Techs., Inc. v. United States

- This case addressed the interplay between DoD's enhanced debriefing rules and GAO's requirement that, in order to obtain an automatic stay, a protest must be filed within 5 days of a required debriefing.
- On March 4, 2020, the Agency sent a written debriefing to NIKA and invited NIKA to submit questions on or before March 6, 2020. NIKA did not submit questions. On March 10, 2020, NIKA filed a protest at the GAO. The Agency argued that, because NIKA did not submit questions, NIKA's debriefing concluded on March 4, 2020, rather than March 6, 2020.

NIKA Techs., Inc. v. United States

- The Court of Federal Claims analyzed the relevant statutory language and cases addressing multi-day debriefings and determined that NIKA's debriefing concluded on March 6, 2020. Thus, NIKA was entitled to a stay because its March 10, 2020 protest was filed within 5 days of when the debriefing concluded.

Centerra Integrated Facilities Servs., LLC

- The contract in this protest was awarded by the Bonneville Power Administration (the “Administration”), which is not governed by the Competition in Contracting Act of 1984 or the FAR.
- On March 19, 2020, the Administration provided a written debriefing and provided the protestor with an opportunity to submit questions. The protestor submitted questions, and the Administration responded on March 27, 2020. In its response, the Administration stated that the debriefing had now concluded. The protestor filed a protest at the GAO on April 1, 2020.

Centerra Integrated Facilities Servs., LLC

- The Administration's acquisition policy required the Administration to provide a debriefing, but there was no statutory or regulatory requirement for a debriefing, so the debriefing exception to GAO's timeliness rules did not apply.
- Consequently, the April 1, 2020 protest was untimely, because it was filed more than 10 days after the protestor learned of the basis for its protest in the March 19, 2020 debriefing.

Challenge Question



Submit your answer to craig@pubklaw.com
Subject line: Panel 1 Challenge Question

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