

# What Is This “Exclusive” Remedy We Call A Protest?

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## ABSTRACT

*The passage of the Procurement Code marked the end of an era—no longer would the disappointed bidder or offeror wronged in the procurement process have the ability to sue to enjoin the expenditure of public funds. In place of the taxpayer suit, the General Assembly provided the “exclusive” remedy of a protest for which the absolute protection of sovereign immunity was expressly waived. This article explores the particular procedures afforded (and not afforded) to the disappointed bidder or offeror and also analyzes the decisional law of the Commonwealth Court and Supreme Court of Pennsylvania that has shaped the contours of the statutory protest remedy.*

Prior to 1998, a disappointed bidder or offeror involved in a Pennsylvania procurement could only sue to enjoin an award of a contract to another vendor if it had taxpayer standing to do so. With the passage of the Commonwealth Procurement Code (“Procurement Code”) in 1998,<sup>1</sup> the General Assembly expressly reaffirmed,<sup>2</sup> then waived,<sup>3</sup> sovereign immunity for the purpose of creating an “exclusive” remedy for aggrieved bidders and offerors, *i.e.*, a protest.<sup>4</sup> Thus, a statutory remedy was born where none previously existed. As of that moment, a taxpayer that was also a disappointed bidder or offeror could no longer sue to enjoin the expenditure of public funds; the protest was and remains the sole avenue of recourse.

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1. Act of May 15, 1998, P.L. 358, No. 57, §1, *as amended*, 62 Pa.C.S. §§101-2311.  
2. *See id.* §1702(a).  
3. *See id.* §1702(b).  
4. *See id.* §1711(a); *see also Scientific Games Int’l, Inc. v. Department of Rev.*, 66 A.3d 740, 743 (Pa. 2013); *Direnzo Coal Co. v. Department of General Services*, 779 A.2d 614, 616 (Pa. Cmwlth. 2001).

In 2002, the General Assembly substantially amended the Procurement Code.<sup>5</sup> The 2002 amendments rendered the Administrative Agency Law<sup>6</sup> inapplicable, and with it, all of its built-in procedural due process protections, such as the right to a hearing and to subpoena documents and witnesses. The “exclusive” remedy, which already included harsh deadlines and afforded little relief, was thus curtailed even further. Absent a property interest in a contract, disappointed bidders and offerors were left with only that which is set forth in the statute, and nothing more.

These legislative actions have left the Commonwealth Court and Supreme Court of Pennsylvania as the last bastions for aggrieved bidders and offerors, who are often reduced to arguing that the purchasing agency failed to follow its own invitation for bids or request for proposals, or that the agency failed to follow the Procurement Code in handling their protest. The question, after 16 years of Commonwealth agencies operating under the Procurement Code and court decisions interpreting it, is whether the “exclusive” remedy of a protest is any remedy at all.

### PROTEST PROCEDURE UNDER SECTION 1711.1

Section 1711.1 of the Procurement Code sets forth the “exclusive” remedy in Pennsylvania for challenging procurements by Commonwealth agencies. A bidder or offeror that is “aggrieved in connection with the solicitation or award of a contract” may file a protest with the head of the purchasing agency or their designee, setting forth all of the reasons the protestant believes that it has been aggrieved by the purchasing agency’s actions regarding the solicitation or award of the contract.<sup>7</sup> The protestant also has the opportunity to submit with the protest “any documents or information it deems relevant to the protest.”<sup>8</sup>

Ostensibly for the purpose of expediting protest procedures and avoiding inordinate delay in the execution of contracts, a protest must be filed within seven days after the protestant “knew or should have known of the facts giving rise to the protest,” and in no event may any protest be filed more than seven days after award of the contract.<sup>9</sup> Additionally, protests filed by prospective bidders or offerors must be filed prior to the bid opening or receipt of proposals.<sup>10</sup> Failure to file a protest in a timely manner has grave consequences, such that a bidder or offeror failing to file a protest or filing an untimely protest “shall be deemed to have waived its right to protest the solicitation or award of the contract in any forum.”<sup>11</sup> The Procurement Code provides purchasing agencies no discretion in this regard, mandating that untimely filed protests be disregarded.<sup>12</sup>

The filing of a protest also triggers a mandatory stay of procurement during the pendency of the protest and through any appeal therefrom, such that the purchasing agency shall not proceed further with solicitation or award of the contract.<sup>13</sup> The automatic stay may be lifted prior to resolution of the protest only if “the head of the purchasing agency, after consultation with the head of the using agency, makes a written determination that the protest is clearly without merit or that award of the contract without delay is necessary to protect substantial interests of the Commonwealth.”<sup>14</sup> There are no other exceptions provided in the statute for lifting the automatic stay.

Upon receipt of the protest, the contracting officer<sup>15</sup> has the opportunity, but not the obligation, to “submit to the head of the purchasing agency and the protestant a response to the

**The question, after 16 years of Commonwealth agencies operating under the Procurement Code and court decisions interpreting it, is whether the “exclusive” remedy of a protest is any remedy at all.**

5. Act of Dec. 3, 2002, P.L. 1147, No. 142.

6. 2 Pa.C.S. §§101 *et seq.*

7. 62 Pa.C.S. §§1711.1(a), (c).

8. 62 Pa.C.S. §1711.1(c).

9. *Id.* §1711.1(b).

10. *Id.*

11. *Id.*

12. *Id.*

13. See 62 Pa.C.S. §1711.1(k).

14. *Id.*

15. “Contracting officer” is defined by the Procurement Code as “[a] person authorized to enter into and administer contracts and make written determinations with respect to contracts.” 62 Pa.C.S. §103. For purposes of a protest proceeding, the contracting officer is also the party that defends the purchasing agency’s procurement decisions. In other words, the contracting officer is the protestant’s adversary.

protest” within fifteen days after the protest is received.<sup>16</sup> The contracting officer also has the opportunity to submit with his response “any documents or information he deems relevant to the protest.”<sup>17</sup> If a response is submitted, the protestant is permitted, but not required, to file a written reply within ten days of the date of the response.

Protests are to be evaluated and ultimately decided at the administrative level by the head of the purchasing agency or his/her designee (sometimes called the “presiding officer”), who is directed to “review the protest and any response or reply,” including any documents or information submitted by the protestant with the protest or the contracting officer with the response.<sup>18</sup> The presiding officer also has the opportunity to “request and review such additional documents or information he deems necessary to render a decision.”<sup>19</sup> The presiding officer, however, must give the protestant and the contracting officer a “reasonable opportunity to review and address any additional documents or information deemed necessary . . . to render a decision.”<sup>20</sup>

There is no absolute right to a hearing under Section 1711.1(e), however, the presiding officer “may, at his sole discretion, conduct a hearing.”<sup>21</sup> Thus, the record before the presiding officer consists of the following: (1) the protest, including any documents or information submitted by the protestant therewith; (2) the response, if any, including any documents or information submitted by the contracting officer therewith; (3) any reply; (4) any additional documents or information considered by the presiding officer; and (5) the hearing transcript and exhibits, if any.<sup>22</sup>

The presiding officer must issue a written determination stating the reasons for the decision within sixty days of receipt of the protest, unless such time is extended by consent of the protestant.<sup>23</sup> The presiding officer’s determination is the final order of the purchasing agency.<sup>24</sup> If the presiding officer determines that the solicitation or award was contrary to law, *i.e.*, the presiding officer grants the protest, the remedy provided depends upon whether or not the contract has been executed. If the contract has not been executed at the time of the determination, “the remedies are limited to cancellation of the solicitation or proposed award or revision of the solicitation or proposed award to comply with the law.”<sup>25</sup> If the determination is made after execution of the contract, the contract may be (1) ratified and affirmed if it is determined by the presiding officer that doing so is in the best interest of the Commonwealth or (2) modified, with the consent of all parties, to comply with the law.<sup>26</sup> A third remedy provided under Section 1711.2 depends upon whether the bidder or offeror awarded the contract has acted fraudulently or in bad faith. If no fraud or bad faith is found, the contract may be terminated, with the successful bidder or offeror “compensated for the actual expenses reasonably incurred under the contract prior to termination,” not to include “loss of anticipated profit, loss of use of money or administrative or overhead costs.”<sup>27</sup> If fraud or bad faith is present, the resulting contract may be declared void.<sup>28</sup> There is no statutory guidance for what constitutes fraud or bad faith in this context or how it would be proven or by whom.

If the presiding officer denies the protest, the protestant has fifteen days from the mailing date of the final determination to file an appeal with the Commonwealth Court.<sup>29</sup> The protestant may not raise issues on appeal that were not raised in the protest proceeding.<sup>30</sup> The record before the Commonwealth Court on appeal is the record of the determination certified by the purchasing agency, which, by statute, consists of (1) the solicitation or award; (2) the contract, if any; (3) the protest, including any documents or information submitted by the protestant therewith; (4) any response, including any documents or information submitted by

16. 62 Pa.C.S. §1711.1(d).

17. *Id.*

18. 62 Pa.C.S. §1711.1(e). Section 1711.1(e) also permits the head of the purchasing agency to designate someone else to evaluate a protest. *Id.*

19. 62 Pa.C.S. §1711.1(e).

20. *Id.*

21. *Id.*

22. *Id.* §§ 1711.1(c)-(e), (h).

23. *Id.* §1711.1(f).

24. *Id.*

25. *Id.* §1711.2(1).

26. *See id.* §§1711.2(2)(i)-(ii) & (3)(i)-(ii).

27. *Id.* §1711.2(2)(iii).

28. *Id.* §1711.2(3)(iii).

29. *Id.* §1711.1(g).

30. *Id.*

the contracting officer therewith; (5) any reply; (6) any additional documents or information considered by the presiding officer; (7) the hearing transcript and exhibits, if any; and (8) the final determination.<sup>31</sup>

The Commonwealth Court’s standard of review on appeal is whether the “determination is arbitrary and capricious, an abuse of discretion or is contrary to law.”<sup>32</sup> If the Commonwealth Court determines that the solicitation or award of the contract was contrary to law, the remedy is “limited to cancelling the solicitation or award and declaring void any resulting contract.”<sup>33</sup> In that instance, no other remedy is available to the Commonwealth Court under the Procurement Code. If the Commonwealth Court determines that the solicitation or award of the contract was arbitrary and capricious or an abuse of discretion, “the court may enter any order authorized by 42 Pa.C.S. §706 (relating to disposition of appeals).”<sup>34</sup>

## CASELAW

Since the 2002 amendments to the Procurement Code, Pennsylvania courts have wrestled with the contours of the “exclusive” protest remedy. Often the issues on appeal concern not whether the presiding officer properly determined the substantive grounds for the protest, but whether the presiding officer and the purchasing agency properly handled the protest remedy itself.

### Sections 1711.1(a)-(f), (k): Evaluation of a Timely Filed Protest and Automatic Stay of the Procurement

In *GTECH Corporation v. Department of Revenue*, 965 A.2d 1276 (Pa. Cmwlth. 2009), the Commonwealth Court addressed, *inter alia*, whether a purchasing agency must act immediately on a timely filed protest, including honoring the automatic stay of the procurement. There, GTECH filed a protest within seven days after the Department of Revenue (“DOR”) announced its selection of another offeror for contract negotiations. But DOR deferred action on GTECH’s protest, deeming the protest to be premature until final execution of a negotiated contract.<sup>35</sup> As a result, DOR took no further action on GTECH’s protest until approximately five months later, after it negotiated a contract with the selected offeror.

In an original jurisdiction action filed in the Commonwealth Court, GTECH sought injunctive relief and a declaratory judgment that DOR had violated the Procurement Code because it failed to provide GTECH its exclusive protest remedy found in Section 1711.1. GTECH argued, *inter alia*, that Section 1711.1(b) contemplates the filing of a protest prior to award or execution of a contract, that DOR violated Section 1711.1(f) by not deciding its protest in the statutorily mandated timeframe, and that DOR violated the automatic stay under Section 1711.1(k) by engaging in contract negotiations while GTECH’s protest was put “on ice.” The court agreed, reasoning that:

The Department is required to evaluate and issue a written determination on a protest within 60 days, but it had not yet acted on GTECH’s May 1, 2008, protest as of the filing of its petition for review [Oct. 8, 2008]. Section 1711.1(k) requires the Department to stay negotiations on a contract upon the filing of a protest and not proceed further with the award of the contract until the time has elapsed for a protestant to file an appeal to this Court. Instead, the Department continued to negotiate with SGI. *By deeming GTECH’s protest ‘premature’ and refusing to stay negotiations with SGI, the Department placed GTECH into an administrative void, thereby depriving GTECH of its remedies in the Procurement Code. In the meantime, the very thing the protest and stay were designed to avoid has occurred, i.e., the Department has negotiated a contract with the ‘winning’ offeror even though the selection may have been wrongly decided.*<sup>36</sup>

Denying DOR’s preliminary objections to GTECH’s Petition for Review, the Commonwealth Court held that DOR had deviated from the exclusive statutory protest remedy, concluding that Section 1711.1 required DOR to act immediately upon GTECH’s protest, and that

31. *Id.* §§1711.1(h)-(i).

32. *Id.* §1711.1(i).

33. *Id.* §1711.1(j).

34. *Id.*

35. According to DOR, final execution of a negotiated contract represented the “award” of the contract. *See GTECH*, 965 A.2d at 1280. DOR then argued that Section 1711.1(a) limited disappointed bidders or offerors to protesting only the “solicitation” or “award.” *See infra* n.45.

36. *GTECH*, 965 A.2d at 1282 (citations and footnotes omitted) (emphasis added).

subsections (e) and (f) required DOR to evaluate GTECH's protest and issue a written determination within sixty days.<sup>37</sup> The court further held that DOR violated the mandatory stay required by Section 1711.1(k) by continuing contract negotiations after receipt of GTECH's protest.<sup>38</sup> In so holding, the GTECH court determined that DOR failed to properly invoke Section 1711.1(k)'s exception for when "award of the contract without delay is necessary to protect substantial interests of the Commonwealth." The court explained that this exception is meant "[t]o address emergencies, such as a collapsed bridge," and that an "agency cannot invoke the exception when its own violation of the Procurement Code, *i.e.*, its failure to act promptly on the bid protest, has caused the need for the exception."<sup>39</sup> The court also found that DOR's attempt to invoke the exception in a conclusory manner, without explanation of the exceptional circumstances for its decision, was ineffective.<sup>40</sup>

### Section 1711.1(b): The Seven Day Deadline

In large part, the seven day deadline in Section 1711.1(b) for a bidder or offeror to file a protest has been treated as a "bright-line" by the Commonwealth Court. But protestants often have a different view as to when the seven day clock begins.<sup>41</sup>

In one recent case, *Omnicare, Inc. v. Department of Public Welfare*, 68 A.3d 20 (Pa. Cmwlth. 2013), the Commonwealth Court found that the Department of Public Welfare ("DPW") erred after the presiding officer deemed a portion of Omnicare's protest untimely based upon the "knew or should have known" language from Section 1711.1(b). DPW had approved the contract with the selected offeror on March 2, 2012 and posted a copy of the executed contract on the Pennsylvania Department of Treasury's website. DPW, however, did not post a copy of the contract on DGS' own website until April 27, 2012. Omnicare filed its protest on May 4, 2012, seven days later.

In denying Omnicare's protest, DPW claimed that Omnicare knew or should have known of the facts giving rise to its protest grounds based on the issuance of the request for proposals or, at least, by no later than seven days after it posted a copy of the executed contract on Treasury's website. On appeal, Omnicare contended that it did not know the basis of its protest until the executed contract was posted on DGS' website. Omnicare also pointed out that, with respect to any filing deadline for protests, the requests for proposals ("RFP") itself expressly provided that "[i]n no event may an Offeror file a protest later than seven days after the date the notice of award of the contract is posted on the DGS website."<sup>42</sup>

Relying on Section 1711.1(b), the Commonwealth Court concluded that the basis for Omnicare's protest was not explicit until the contract was posted on DGS website based on the express language from the requests for proposals.<sup>43</sup> Thus, the *Omnicare* Court concluded that Omnicare should have been afforded seven days from the date the contract was posted on the DGS website to file its protest.<sup>44</sup> The *Omnicare* holding is noteworthy because the Commonwealth Court refused to find that the seven day clock commenced when DPW posted the contract on Treasury's website, while also suggesting that the date of "award"<sup>45</sup> is the date the contract is posted on DGS' website.

### Section 1711.1(e): Additional Documents or Information Deemed Necessary to Render a Decision

Section 1711.1(e) of the Procurement Code requires the presiding officer to provide the protestant and the contracting officer with a "reasonable opportunity to review and address any additional information or information deemed necessary by the [presiding officer] to render a decision."<sup>46</sup> In the context of Section 1711.1(e), the language "additional documents

37. *Id.* at 1287.

38. *Id.*

39. *Id.*

40. *Id.*

41. See 62 Pa.C.S. §1711.1(b). Sections 1711.1(a) and (b) also require that a bidder or offeror be "aggrieved" prior to filing a protest. See *id.* §§1711.1(a), (b). The Commonwealth Court, however, has not yet specifically interpreted what "aggrieved" means in the context of Section 1711.1.

42. *Omnicare*, 68 A.3d at 24.

43. *Id.* at 26.

44. *Id.*

45. Under Section 1711.1(b), a bidder or offeror *must* file a protest no later than "seven days after the date the contract was awarded." Remarkably, the term "award" is not defined by the Procurement Code.

46. 62 Pa.C.S. §1711.1(e).

or information” refers to any document that was not submitted with and any information that was not contained within the protest, the contracting officer’s response (if any) or the protestant’s reply to the contracting officer’s response (if any).<sup>47</sup> While there has been little dispute over what constitutes “additional documents or information,” a fair amount of case law has developed over whether additional documents or information have been “deemed necessary by the [presiding officer] to render a decision,” such that they must be provided to the protestant as part of the protest remedy itself.

In *Integrated Biometric Technology, LLC, d/b/a L-1 Enrollment Services v. Department of General Services*, 22 A.3d 303 (Pa. Cmwlth. 2011), the Commonwealth Court reversed a determination denying a protest where the presiding officer failed to provide Integrated Biometric with an opportunity to review and address “additional documents or information.” Specifically, the presiding officer unilaterally considered Integrated Biometric’s own publicly-available SEC filings, which she then *sua sponte* made part of the record of the protest proceeding for the first time in her determination. The presiding officer did not request Integrated Biometric’s SEC filings and Integrated Biometric was not advised that its most recent SEC filings would be reviewed in connection with the presiding officer’s determination denying its protest.<sup>48</sup> In holding that the presiding officer violated Section 1711.1(e), the Commonwealth Court interpreted the phrase “deemed necessary . . . to render a decision” to mean any additional documents or information “considered” or “reviewed” by the presiding officer.<sup>49</sup> Accordingly, the court concluded that the SEC filings were “deemed necessary . . . to render a decision” because they were considered by the presiding officer; thus, the presiding officer violated Section 1711.1(e) by denying the protestant the opportunity to review and address that information prior to a determination on its protest. Moreover, because the court found that the presiding officer had violated the Procurement Code (*i.e.*, acted contrary to law), it cancelled the RFP and declared void the resulting contract, as required by Section 1711.1(j).<sup>50</sup>

The Commonwealth Court also analyzed the meaning of Section 1711.1(e) in *JPay, Inc. v. Department of Corrections*, 89 A.3d 756 (Pa. Cmwlth. 2014). There, JPay filed a protest after a rival offeror, Global Tel\*Link Corporation (“GTL”), was selected for contract negotiations by the Department of Corrections (“DOC”) for an electronic commissary system. Addressing JPay’s protest ground that DOC lacked adequate justification to select GTL, the contracting officer, in his response, asserted that GTL established its prior experience by submitting references demonstrating its implementation of similar systems in other states.<sup>51</sup> JPay requested discovery of GTL’s references, which the contracting officer denied. In denying JPay’s protest, the presiding officer determined that JPay was not entitled to discovery of GTL’s references because “JPay only had a right to review documents that were deemed necessary to render the Determination by the [presiding officer], and the [presiding officer] had not reviewed GTL’s references.”<sup>52</sup> Affirming the presiding officer’s determination on appeal, the Commonwealth Court explained that, unlike Section 1711.1(e), Section 1711.1(d) does not provide protestants the opportunity to discover documents, but rather, only provides that the contracting officer may submit a response with supporting documents.<sup>53</sup> Thus, the *JPay* court concluded that a protestant is not entitled to review and address all documents considered by the contracting officer if they were not cited among the documents the presiding officer actually reviewed in order to render the determination.

The Commonwealth Court further interpreted Section 1711.1(e) in *Corizon Health, Inc. v. Department of General Services*, 2013 WL 3960974 (Pa. Cmwlth., January 4, 2013). There, the presiding officer, in evaluating Corizon’s protest, requested additional information from the offeror selected for contract negotiations, Wexford Health Resources, Inc. (“Wexford”).<sup>54</sup> Wexford provided the information requested by the presiding officer, but also submitted additional information that it claimed was confidential and could not be shared with the protestant.<sup>55</sup> The presiding officer permitted Corizon to review the additional submissions, but withheld the information marked confidential.

47. *Id.* §§1711.1(c)-(e).

48. *Integrated Biometric*, 22 A.3d at 307-08.

49. *Id.*

50. See 62 Pa.C.S. §1711.1(j).

51. *JPay*, 89 A.3d at 760.

52. *Id.* at 761 (emphasis added).

53. *Id.* at 762.

54. *Corizon*, 2013 WL 3960974 at \*4.

55. *Id.*

On appeal, Corizon argued that the presiding officer violated Section 1711.1(e) by denying Corizon an opportunity to review and address the confidential information submitted by Wexford.<sup>56</sup> The Commonwealth Court held that Corizon was not entitled to copies of Wexford's confidential information because the presiding officer did not deem that information necessary to render his decision.<sup>57</sup> In so holding, the court distinguished *Integrated Biometric*, noting that the presiding officer in that case expressly stated that he relied on the SEC filings to make his decision, whereas the presiding officer in *Corizon* expressly claimed he did not rely on the confidential information submitted by Wexford.

The Commonwealth Court most recently interpreted Section 1711.1(e) in *American Traffic Solutions, Inc. v. Philadelphia Parking Authority*, 2014 WL 2447308 (Pa. Cmwlth., May 30, 2014). There, the presiding officer, in denying the protest of American Traffic Solutions ("ATS"), attached additional documents to the final determination as exhibits to the determination.<sup>58</sup> No response to the protest was filed by the contracting officer, so the protestant first saw the additional documents and information as attachments to the determination denying its protest. On appeal, ATS asserted, *inter alia*, that the presiding officer violated Section 1711.1(e) by considering the additional documents and information without providing ATS an opportunity to review and address them prior to the determination.<sup>59</sup> Despite the fact that the presiding officer considered and relied on the additional documents and information in rendering his determination, the Commonwealth Court refused to find a violation of Section 1711.1(e), holding, instead, that ATS failed to "demonstrate how any of this documentation or information was critical to the conclusion that the protest was clearly without merit."<sup>60</sup>

### **Section 1711.1(d)-(e): Participation of Selected Bidders or Offerors in Protest Proceedings**

In *Corizon*, the Commonwealth Court also considered whether persons or entities other than the protestant and the contracting officer can participate in protest proceedings, and whether sur-replies are permissible.<sup>61</sup> There, Corizon filed a protest after DGS announced selection of Wexford for contract negotiations. The presiding officer stayed award of the contract and solicited responses to the protest from both the contracting officer and Wexford.<sup>62</sup> After Corizon submitted a reply to both responses, the presiding officer permitted the contracting officer and Wexford each to submit a sur-reply.

On appeal, Corizon argued, *inter alia*, that the presiding officer violated the Procurement Code by permitting Wexford to participate in the bid protest and by permitting the contracting officer and Wexford to submit sur-replies. The only protest participants expressly contemplated Section 1711.1 are (1) the protestant, (2) the agency's contracting officer who may file a response, and (3) the presiding officer.<sup>63</sup> The Commonwealth Court disagreed, holding that Wexford's participation and the sur-replies were not prohibited by the Procurement Code and could be allowed by the presiding officer at his discretion, because Section 1711.1(e) "authorizes the presiding officer to solicit information he deems necessary to render a decision from any sources, including other bidders or offerors."<sup>64</sup> Key to the court's holding was the fact that Corizon had the opportunity to review and respond to the sur-replies and the additional information submitted by Wexford. The court also cited to Part 1, Chapter 58(D) of the DGS Procurement Handbook, which provides that "all bidders and offerors who appear to have a substantial and reasonable prospect of winning the award shall be notified [of the protest] and may file their agreement/disagreement with the purchasing agency."<sup>65</sup>

### **Section 1711.1(e): Is There a Right to a Hearing?**

The Commonwealth Court in *Durkee Lumber Co., Inc. v. Department of Conservation and Natural Resources*, 903 A.2d 593 (Pa. Cmwlth. 2006), addressed when a hearing is required un-

56. *Id.* at \*5.

57. *Id.* at \*7.

58. *American Traffic Solutions*, 2014 WL 2447308 at \*3.

59. *Id.* at \*2.

60. *Id.* at \*3 (emphasis added).

61. *Corizon*, 2013 WL 3960974.

62. *Id.* at \*8.

63. *Corizon*, 2013 WL 3960974 at \*8; see also 62 Pa.C.S. §§1711.1(a)-(b), (d)-(e).

64. *Corizon*, 2013 WL 3960974 at \*8.

65. *Id.*

der Section 1711.1(e). There, Durkee Lumber filed a protest after the Department rejected its bid due to a record of non-compliance in timber sales. The presiding officer, in reviewing the protest, invited the contracting officer and Durkee Lumber to submit additional documents and information to aid in his determination. Based on that record, the presiding officer determined that Durkee Lumber did not qualify as a responsible bidder and denied its protest.

On appeal, Durkee Lumber asserted that the presiding officer was required to provide a due process hearing. The Commonwealth Court disagreed “[b]ecause a disappointed bidder on a government contract has no right to have a contract awarded to it.”<sup>66</sup> The court explained that the presiding officer has “sole discretion” to decide whether a hearing is necessary to decide a bid protest, and that the presiding officer’s decision in this regard “can only be reversed if he exercised his discretion with bad faith, fraud, capricious action or abuse of power.”<sup>67</sup> The Court stated: “If, as the [presiding officer] found, there are no disputed material facts necessary to make his determination, then necessarily he has not abused his discretion by refusing to hold a hearing.”<sup>68</sup>

The protestant in *Corizon* also argued that it was deprived of due process of law and that the presiding officer abused his discretion in denying Corizon’s request for a hearing. Citing *Durkee Lumber*, the Commonwealth Court held on appeal that “whatever due process rights Corizon has are coextensive with the Procurement Code bid protest procedures.”<sup>69</sup> The court noted that, while a protestant has a right to notice and hearing under the Administrative Agency Law (“AAL”), the 2002 amendments to the Procurement Code rendered the AAL inapplicable, and thus, Corizon was entitled to a hearing only to the extent provided under Section 1711.1(e), which places the decision to hold a hearing in the sole discretion of the presiding officer.<sup>70</sup> Rejecting Corizon’s argument that the presiding officer abused his discretion by not holding a hearing, the court held that Corizon “fail[ed] to identify a single fact that was in dispute and would have merited a hearing.”<sup>71</sup>

## CONCLUSION

The passage of the Procurement Code marked the end of an era—no longer would the disappointed bidder or offeror wronged in the procurement process have the ability to sue to enjoin the expenditure of public funds. In place of the taxpayer suit, the General Assembly provided the “exclusive” remedy of a protest for which the absolute protection of sovereign immunity was expressly waived.

On the one hand, the statutory protest remedy provides an expedited and truncated process that avoids the slow and “stately” procedures often inherent in litigation;<sup>72</sup> it affords a stay as part of the remedy so that the merits of the protest can be determined before the potentially unlawful contract gets too far along; and it provides the presiding officer and appellate courts with various options to right the wrong, requiring cancellation of the solicitation and voiding of any resulting contract only if the agency acted “contrary to law.” On the other hand, however, appellate decisions reflect a somewhat uneven interpretation of the statutory rights afforded the protestant. Even assuming constitutional due process does not apply (*i.e.*, because the disappointed bidder/offeror has no constitutionally protected property interest), the protestant still has a statutory right to the remedy set forth in the statute. This includes, *inter alia*, the right to be free of participation by those whose involvement is not statutorily authorized; the right to review and address additional documents and information deemed necessary by the presiding officer to render a decision (which could not even be requested or reviewed if they were not already deemed necessary); the right to a stay; the right to a timely determination; and honoring of deadlines applicable to agencies with the same force with which deadlines are applied to protestants.

There are still areas of the protest remedy not yet explored in the decisional law of Pennsylvania. As issues arise, time alone will tell whether the “exclusive” remedy of a protest is any meaningful remedy at all.

66. *Durkee Lumber*, 903 A.2d at 599.

67. *Id.* at 597.

68. *Id.*

69. *Corizon*, 2013 WL 3960974 at \*5-\*6 (citing *Durkee Lumber*, 903 A.3d at 598-99).

70. *Id.* at \*6.

71. *Id.*

72. *GTECH*, 965 A.2d at 1288 n.23.