

Bid Protests:

Protest Venues, Filing Deadlines, Protest Grounds, And Strategies For Success

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Agenda

- Protest Venues
- Protest Grounds
- Strategies for Success



Purpose of the Process

- Provide a forum to hear complaints by, and grant relief to, interested parties
- Enhance accountability of procurement officials and government agencies
- Promote transparency into how the procurement system works
- Protect integrity of procurement system
- Avoid unnecessary cost and delay & disruption of procurements during protest process

Protest Venues

- Agency
- Government Accountability Office
- United States Court of Federal Claims



Protest Facts

- GAO received 2,353 protests in FY 2011 (a 2% percent increase over the FY 2010 level)
 - GAO gained task order jurisdiction in 2009.
- The Court of Federal Claims receives approximately 60-70 protests per year.
- Many protests are filed with contracting agencies directly—no statistics available.

Agency Protests

- FAR Part 33
 - Review by CO and Level Above CO
- Timeliness
 - Improper Solicitation
 - Prior to date of opening bids/date for receipt of proposals
 - Any Other Reason
 - Within 10 days of when the contractor knew or should have known reason for the protest.

Agency Protests

- Suspension of Contract Award
 - FAR prohibits award while protest is pending
 - Agency is not prohibited from accepting bids/proposals
–CONTINUE TO COMPLY WITH DEADLINES
 - Suspension may be overridden in limited circumstances
 - Urgent and Compelling Need

“Initial Adverse Action”

- The GAO time period begins to run at the “Initial Adverse Action” by the CO
 - Failing to stop accepting bids
 - Agency lifts suspension of contract award or performance



Agency Decision

- Required to make “best efforts” to render decision within 35 days- FAR 33.103(g)
- Must be well reasoned, detailed decision
- Remedies
 - Any action that GAO could have recommended
 - May award costs and fees to protestor

Agency Protest: Pros and Cons

■ Pros

- Lower cost than GAO or COFC
- Less likely to injure relationship with customer
- Expedited decision

■ Cons

- Asking agency to overrule its own decision
- Likely loss of automatic stay in subsequent GAO protest
- Only likely to be successful in case of obvious error

GAO Protests: Who May Protest

- Interested Parties
 - An actual or prospective bidder
 - Economically affected
 - By the award or failure to award a contract
- Prior to Date of Submission
 - Any person expressing an interest in competing
- After Submission
 - An actual bidder
- After Award
 - “Next in Line”

GAO Protest

- Next in Line

- Not literally the second place bidder
- Only have to show an ability to receive the award upon resolicitation

GAO Protest: Intervenor

- Third-party that is able to participate
- After award: the awardee
- Prior to award
 - All bidders who appear to have substantial prospect of award
- Participation
 - Intervenor may file a motion to dismiss
 - May participate with agreement of other parties

GAO: Timeliness

- Improproprieties or errors in solicitation apparent on their face
 - Prior to bid opening/final submission or proposal
 - Examples
 - Failure to hold discussions
- Defects in solicitation not apparent prior to receipt of bids
 - No later than 10 days after defect becomes apparent
- Defect other than defective solicitation
 - No later than 10 days after defect is known or should have been known.

GAO: Timeliness and Debriefing

- Where a debriefing is both:
 - Requested; and
 - Required by law (FAR part 15)
- Protest must be filed no later than 10 days of date debriefing is held
- Note: Agency will often deliver a written debriefing along with the award decision
 - Important to request a formal debriefing in writing within 3 days of the award decision
 - Confirm that the clock will not begin to run until completion of the formal debriefing

GAO: Timeliness

- Prior agency protest
 - Protest must be filed within 10 days notice of initial adverse action.
 - Note that agency protest may not yet be complete
 - Note that agency protest must have been timely or GAO may dismiss protest
- All protest issues must be timely
 - Cannot bootstrap untimely issues with timely ones

GAO: Automatic Stay

- GAO must provide notice of protest to the agency within 1 day of receipt
- Pre-award protest
 - Agency may not award the contract while protest is pending
- Post-award protest
 - Agency must suspend performance if
 - Agency receives notice of protest within 10 days of award
 - Note: effect on protest deadline
 - Within 5 days of a required debriefing

GAO: Process

- Filing of protest document
 - Must set out sufficient legal and factual basis for protest
- Summary dismissal
 - Not an interested party
 - Untimely
 - Not a federal agency
 - TVA; USPS, FAA
 - Grounds outside GAO jurisdiction
 - Determinations of responsibility

GAO: Process

- Summary dismissal
 - Grounds outside of GAO jurisdiction
 - SBA issues (size determination, etc.)
 - PIA violations (unless contractor within 14 days of learning of potential violation disclosed the same to agency)
 - Debarment or suspension
 - Orders less than \$10M in value

GAO: Process

- Within 30 days of filing, agency required to provide the agency report and requested and relevant agency documents
 - Agency required to provide document list 5 days prior to date of delivery
 - Protestor may object within 2 days of document list
 - Protestor may request additional documents within 2 days

GAO: Process

- Agency report: agency's position on the protest
- Protestor must respond to agency report within 10 days of receipt
- GAO will issue decision within 40 days of receipt of protestor's response

GAO: Process

- Possible outcomes
 - Corrective action
 - Agency may correct issues on its own initiative
 - Deny
 - Remedies
 - Terminate and re-compete contract
 - Issue a new solicitation
 - Award contract to protestor

GAO: Process

■ Protective Orders

- Generally issued in any GAO protest
- Necessary to review proprietary material
- Only counsel may be admitted to the protected order
- Results in odd situation where attorney cannot communicate certain information to the client
- Order will require that all submitted documents have redacted versions to become publicly available

GAO: Pros and Cons

■ Pros

- Objective 3rd Party
- Less Expensive Than COFC
- Automatic Stay (if timely)
- Can Still File Protest with COFC

■ Cons

- Complicated Rules on Timeliness
- Limited Discovery
- More Expensive than Agency Protest

GAO Bid Protest Statistics

Fiscal Years 2007-2011

	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007
Cases Filed	2,353 (up 2%)	2,298 (up 15%)	1,989 (up 20%)	1,652 (up 17%)	1,411 (up 6%)
Merit (Sustain + Deny) Decisions	417	441	315	291	335
Number of Sustains	67	82	57	60	91
Sustain Rate	16%	18%	18%	21%	27%
ADR (cases used)	140	159	149	78	62
ADR Success Rate	82%	80%	93%	78%	85%
Hearings	8% (46 cases)	10% (63 cases)	12% (65 cases)	5.5% (32 cases)	8% (41 cases)

Court of Federal Claims (COFC)

- Interested Parties
 - Actual or prospective bidder with a direct economic interest – substantial chance of winning the contract
- When to Protest
 - Defective Solicitation
 - Court has adopted GAO rule- prior to date of submission
 - Other Grounds
 - Court does not have a strict rule, but delay is prejudicial to protestors case

COFC

- No Automatic Stay/Injunctive Relief
 - Likelihood of success on the merits
 - Whether plaintiff will suffer irreparable harm
 - Whether balance of hardships weighs in protestor's favor
 - Whether injunction is in the public interest
- Jurisdiction
 - COFC can hear protests against all government entities
- Protective Order- may be instituted at the request of either party

COFC

■ Remedies

- Court may order the same types of remedies GAO will award
- Court may award bid and proposal costs
- Court may award attorneys' fees to small businesses (net worth does not exceed \$7M or have more than 500 employees)

COFC: Pros and Cons

■ Pros

- Broader discovery rights
- More time to file action

■ Cons

- Expense
- Longer time to decision
- Less predictable
- Injunction against contract performance is not automatic

Protest Grounds

- Violation of procurement statute or regulation
- Agency acted unreasonably or inconsistently with stated evaluation criteria
- Defective solicitation
 - Unduly restrictive, inconsistent, ambiguous

Protest Grounds

■ Specific Grounds

- Improper technical or price evaluation.
- Relaxation of the RFP/RFQ requirements.
- Failure to follow the stated evaluation grounds.
- Addition of an undisclosed evaluation ground.
- Improper cost-technical trade-off decision (the additional technical advantage of the awardee does not justify the high price premium paid)
- Improper or incomplete discussions.
- Organizational or personal conflict of interest.

Strategic Protests

- Incumbency status may heavily influence a contractor's decision to protest
- A timely-filed protest will stay performance and allow an incumbent contractor to continue its performance of the prior contract for the duration of the protest
- Must have independent grounds for protest

Strategies for Success

- Facts are critical to winning or losing a protest
 - Monitor FedBizOpps for notices of sole source, amendments, etc.
- Maintain records of conversations with agency officials, including dates
- Ensure proposal is complete and responsive – make sure everything is part of written proposal
 - Answer all questions agency asks
 - Address past performance

Strategies for Success

- Review solicitations carefully for ambiguities and inconsistencies
 - The first step is to alert the agency
 - Take advantage of the period available to ask questions and for clarification
 - Consider whether an agency protest might be successful, but be mindful of deadlines for taking protest to GAO
 - Do not fail to protest a defective solicitation prior to award for fear of upsetting the agency. It's your only opportunity.

Strategies for Success

- Consult Counsel Early in the Process
 - Bid protest filings often require extensive document review, research, and production
 - Filing deadlines require early engagement
- Submit Written Requests for Debriefing
 - Debriefing can identify whether there are sufficient grounds to protest
 - Can improve proposal writing in the future

Questions

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