

# Bid Protests

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## Outline

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## Definitions

Federal Acquisition Regulation (FAR) Subpart 33.1  
4 CFR Part 21

U.S. Government Accountability Office (GAO) website

- <http://www.gao.gov/legal/bid-protests/search>
- “A Descriptive Guide”



## Definitions

### Forums

- Agency
- Government Accountability Office (GAO)
- United States Court of Federal Claims (COFC)



## Definitions (Agency, GAO)

*Protest* - Written objection by interested party to:

- Solicitation or other request for contract for products/services
- Cancellation of a solicitation
- Award/proposed award of a contract
- Termination/cancellation (if allegedly done because of evaluation/award improprieties)

*Interested Party* - Actual/prospective offeror whose direct economic interest would be affected by award/failure to award (FAR 33.101, 4 CFR 21.0(a)(1)). Adopted by Court of Federal Claims.

## Types of Protests

### Preaward protests

- Generally, challenges to the terms of a solicitation (e.g., overly restrictive)

### Post-award protests

- Generally, challenges to the award or proposed award of a contract because of improprieties in the negotiation, evaluation, or award

## Proper Subjects for Protests (Examples)

### Preaward

- Improper sole source award/proposed award
- Patent ambiguity in RFP
- RFP evaluation criteria improperly favors an offeror
- RFP otherwise violates law/regulation (e.g., agency must show that RFP terms that restrict competition are necessary to meet minimum needs)

## Proper Subjects for Protests (Examples)

### Post-award

- Improper or unreasonable evaluations
- Failure to follow evaluation criteria
- Use of unstated evaluation criteria
- Failure to perform price/cost analysis
- Improperly documented source selection decision
- Improper (inadequate/unequal/misleading) discussions
- Awardee has an organizational conflict of interest



## Improper Subjects for Protests (Examples)

- Budgetary actions
- Contract administration matters (generally)
- Subcontract awards (generally)
- Grant/subgrant awards (however, protest of such awards allowed in COFC)



## Forums Pros/Cons - Agency

### Pros

- Cheapest protest forum
- Can be quick (FAR “best efforts” goal is 35 days)

### Cons

- “Road game” for protestor – unless clear error in procurement process, agency unlikely to uphold protest
- Unlikely to get documents/other discovery to support protest
- May not be able to get stay of award/suspension of performance at GAO if you file a later protest there
- May not get effective relief (especially post-award) compared to GAO and COFC

## Forums Pros/Cons - GAO

### Pros

- Less expensive than COFC (more expensive than agency)
- Impartial, most likely to question agency decision
- Time for decision predictable (generally maximum 100 days, “express option” allows 65 days)
- GAO may act more quickly if it sees clear error (“outcome prediction”)
- Discovery (agency must produce full report)
- May recover attorney’s fees if successful

### Cons

- Strict filing deadlines
- Agency report likely covered by protective order - unlikely that company personnel will be admitted to order and permitted to review documentation

## Forums Pros/Cons - COFC

### Pros

- Prompt – court may act within a few days of filing if protest has merit by granting temporary restraining order, preliminary injunction
- No ability of agency to override TRO or injunction
- No strict timelines for filing and postaward protest
- “Second bite at apple”: may file here if protest denied at GAO and/or agency

### Cons

- Most expensive of three forums
- Limited discovery - generally confined to administrative record produced by agency - and company will not get access to agency, competitor information (protective order likely will cover)
- More of a “home court” for agency than GAO, most believe
- No automatic stay of award/performance - court decides

## Timing - Filing a Protest

### Preaward protest of solicitation issues/defects

- Must be filed before bid opening or due date for receipt of proposal

### General rule - other cases

- No later than 10 days after basis of protest is known/should have been known (applies only to agency, GAO)

### Post-award debriefing cases

- If postaward debriefing requested and required, must file within 10 days of debriefing (applies only to agency, GAO)
- Protests filed before a required debriefing are premature and will be dismissed

## Stays/Overrides

Applies to agency and GAO protests only

- Preaward protests – contract may not be awarded until protest decided
- Post-award protests:
  - Agency - CO must stay performance if agency receives protest within later of 10 days of award *or* 5 days of a required debriefing
  - GAO - CO must stay performance if agency receives *notice from GAO* within later of 10 days of award *or* 5 days of a required debriefing
  - Practical effect - should file 1 day before GAO deadline to ensure notice/stay

## Tips

### Procedure and Jurisdiction

- Timeliness strictly enforced
  - Significant issue exception – issue not previously decided and is potentially of widespread interest (4 CFR 21.2(c))
- GAO generally does not review protests of the award of agreements other than procurements

## Tips

### Preaward protests

- Get full legal review of any RFP when issued
  - Opportunity for legal to identify potential issue with RFP
- Ask questions about RFP issue early in process
  - First Q&A session
  - Or letter to CO
  - Goal: get RFP fixed without need for protest
- Let legal know ASAP if protest planned
  - Need to work up full legal filing before proposals are due



## Tips

### Postaward protests

- Notify legal immediately if:
  - Adverse award decision and possibility of protest
  - Positive award decision and possibility loser may protest
    - Company may wish to intervene/defend award
  - Immediately request debrief if adverse award decision
    - Must request debrief in writing within three days of receiving notification of contract award



## Tips

Look at agency record objectively and as reality check

Although protests are fairly common, evaluate impact on relationships

Costs are available only where protest ground is found to be clearly meritorious

Must show actual prejudice – state it in protest

## Questions

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