



WHAT YOU NEED TO KNOW WHEN THINKING ABOUT A FEDERAL BID PROTEST

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What is a Bid Protest?

- A bid protest is a process in which an “interested party” files a written objection concerning the solicitation or award of a government contract. Basically, a bid protest allows an interested part to challenge the terms of a solicitation, the evaluation process and/or the award of a government contract.
- An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract. 31 U.S.C. §3551(2)(A). In other words, an interested party is one who has an economic interest in the outcome of the solicitation.
- A bid protest may be brought in three forums: (1) the Contracting Agency; (2) the General Accountability Office (“GAO”); and (3) the United States Court of Federal Claims.
- Should you decide to engage in a bid protest, you will quickly be faced with extremely tight filing deadlines, special procedural requirements, and complicated decisions ranging from whether to file at all, to when, where and how to file a protest. To assist you through this challenging process, we offer a general overview of this complex but urgent puzzle.

What Can Be Protested?

- If you are protesting with the Agency itself, protest grounds usually consist of the simplest and most straight-forward grounds. These can be protests against solicitation terms, issues relating to timely receipt of bids, bid responsiveness and mistakes in bids. More factually-complex protests (those requiring extensive evaluation or comparisons) are often heard at the GAO of U.S. Court of Federal Claims.
- In these forums, the government conduct at issue can include the following:
 - (A) A solicitation or other request by a Federal Agency for offers for a contract for the procurement of property or services.
 - (B) The cancellation of such a solicitation or other request.
 - (C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

- Grounds for a pre-award protest include: (1) inclusion of improper clause or provision; (2) unduly restrictive solicitation provisions; (3) improper bundling of requirements; (4) ambiguous solicitation provisions; (5) unreasonable evaluation method; (6) other than full & open competition; and (6) small business issues, to name a few.
- Some prevalent grounds for sustaining a bid protest at the GAO include: (1) unreasonable cost or price evaluation; (2) unreasonable past performance evaluation; (3) failure to follow evaluation criteria; (4) inadequate documentation of the record; and (5) unreasonable technical evaluation.

What Needs to be Done Before Filing a Bid Protest?

- Information Gathering. In general, agencies will permit potential offerors to submit written questions about the solicitation. When this happens, the questions and the Agency's answers are usually incorporated into the solicitation by amendment. It is a good idea to participate in this process in that it provides a wealth of information, not only as to how to structure your proposal, but also to help make sure you have identified any pre-award bid protest grounds.
- Debriefing. After an adverse award decision is made, it is always recommended that you request a debriefing from the Agency. A request for a debriefing is a request for the basis for the selection decision and contract award. Remember that this request must be made in writing ***within 3 days after the date on which you received notification of the contract award***. Debriefings provide essential information upon which to base your protest. Debriefings may be done orally, in writing, or by other means acceptable to the Contracting Officer.
- A debriefing will provide:
 - (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
 - (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
 - (3) The overall ranking of all offerors, when any ranking was developed by the Agency during the source selection;
 - (4) A summary of the rationale for award;
 - (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

How to Decide Whether to File a Bid Protest

- Many considerations are involved in the decision whether to file a bid protest. This analysis will be aided by your pre and post-award information gathering. But there are various issues that will impact this important consideration.¹
 - *Are you able to establish that you are an interested party?* Remember that you must be able to show that you are a “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award contract.”²
 - *Effect on Customer relations.* Government contractors deciding whether to file a bid protest face a distinctive determination – whether it makes business sense to challenge the decision of a customer with whom you wish to continue doing business. This can be one of the most difficult factors to weigh.
 - *What are the strengths and weaknesses of your potential allegations?* The trust is that only rarely will you have a clear “winning” argument. Usually, this analysis involves weighing the strengths and weaknesses set forth in a debriefing and determining whether there are valid grounds for protest. Do you have a strong argument that the strengths of your proposal outweighed the weaknesses and does this argument hold up when compared to the actual awardee? These are a few of the questions that should be addressed.
 - *Are you the incumbent?* If you are the incumbent who has lost the award, do you want to take advantage of the stay that is usually put in place upon the filing of a bid protest? If a stay is awarded, and additional period of contract performance by the incumbent may result. Not only would this stay last until the bid protest is resolved, but it is also important to consider that, if the protest is sustained or the Agency takes corrective action, there may be an additional period of contract performance.
 - *What is the cost?* The costs of protesting an award of a contract are difficult to determine because the course of the protest is often unpredictable. But, in order to make the most informed decision whether to file a protest, cost must be estimated. We recommend that, if you consult legal counsel, make sure that you get a good understanding of the costs involved with representation.
 - *What result are you looking for?* Make sure you have an understanding of the type of relief that is available. What do you want to happen? Are you expecting a re-compete? Do you want the Agency to take corrective action? Determine what type of outcome you want and whether this is an actual outcome that is available.

¹ For a helpful discussion of pre-protest business decisions, see *Government Contract Bid Protests: A Practical and Procedural Guide*, 2015-2016 ed. p. 24-26.

² 4 C.F.R. §21.0(a)(1).

Where to File a Bid Protest?

- As mentioned earlier, there are 3 forums within which a bid protest may be filed: (1) the Contracting Agency, (2) the GAO, and (3) the United States Court of Federal Claims. Each forum has its own particular rules, advantages and disadvantages.
 - Agency Level:
 - **Stay**: If a protest is submitted before an award, the Agency must withhold that award pending resolution of the protest. Upon the filing of a post-award protest, a stay of performance of the contract must be entered within 10 days after the award or within 5 days after a debriefing, whichever is later. It is important to note that, under a pre- or post-award protest, there is a mechanism for the Agency to override the stay for urgent and compelling reasons.
 - **Rules/Process**: To protest an impropriety in the solicitation, a written protest must be filed *before the closing date for receipt of proposals or the opening of the bids*. In post-award protests, the filing of the written protest must be within 10 days *after the basis for the protest is known or should have been known*. For the most part, ***failure to follow these timeliness rules will result in the dismissal of the protest***. The Agency is not required to produce an Agency Report, however, some Agencies may do so. Additionally, there is no requirement for the parties to exchange documents, but the FAR does permit the parties to exchange documents, if they choose. Usually a decision on the protest is made by the Contracting Officer or an independent authority above the CO level. Generally, the Agency will seek to make its decision within 35 days from the date of the filing of the protest.
 - **Advantages**: This is the least formal of all forums. Therefore, it is the least costly and a decision may be reached more quickly than in other forums. This is the least public as well because Agency decisions are not published. Another important aspect of an Agency level protest is that the timely raising of defects in the solicitation may be preserved for later challenge at the GAO. Lastly, even if a protester receives a negative decision at the Agency level, protester may still file a protest at the GAO level. Because of this, it is often said that a protester “gets two bites at the apple.”
 - **Disadvantages**: There is generally no Agency report filed at an Agency level protest. The Agency report, which is available at GAO and the Court of Federal Claims, includes valuable information including the contracting officer’s statement of the relevant facts, a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents. This information is invaluable in developing more substantive grounds for protest, but is not available at the Agency level. Further, because the decision is made by the Contracting Officer there may be a concern that the decision may be more likely to favor the Agency. Timing issues also arise. Because the GAO’s timeliness rules begin at the “initial adverse Agency action”, the timeliness of a “second bite of the apple” at the GAO might be affected.

○ GAO:

▪ **Stay:** An Agency is prohibited from awarding a contract once it receives notice³ of the filing of a protest with the GAO. This is called the automatic stay. If the contract has not been awarded the Agency must not make the award. If award has been made, the Agency must direct the awardee to stop performance (assuming the protest has been filed and notice received by the Agency within 10 days after the award of the contract, or within 5 days after the debriefing date, whichever is later). Like at the Agency level, there are provisions which permit the Agency to allow performance under urgent and compelling circumstances.

▪ **Rules/Process:**⁴

❖ Timing. For improprieties in a solicitation, written *protests must be filed before bid opening or the time set for the receipt of initial proposals*. Most other bid *protests must be filed within 10 calendar days after the basis of the protest is known or should have been known*, whichever is earlier. It is important to note that in negotiated procurements when a debriefing is requested, the protest must be *filed within 10 days after the debriefing is given*. We highly recommend filing the protest a day early in order insure adequate time for the GAO notification to the Agency of the filing of a protest because it is this notification to the Agency which triggers the automatic stay.

❖ Protective Order. When filing a bid protest, the protester usually includes a request for a protective order. If a protective order is requested, the protester must file a redacted copy of the protest within one day of filing the protest. A protective order is an order entered to control the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive materials, as well as other information the release of which could result in a competitive advantage to one or more firms. While protective orders are a must to provide against public disclosure of protected information, it is important to understand that under a protective order, legal counsel may not disclose protected information even to its own client. Contractors cannot, therefore, gain access to business proprietary information or the evaluation of its competitors.

❖ Intervention. Other offerors may intervene in the protest if they are interested parties. At a minimum, the awardee will likely intervene to protect its interests. The notice of intervention must be filed within as soon as practicable.

³ This notice is usually given telephonically within 1 day of filing.

⁴ At the time of this writing, there is no cost to file a bid protest with the GAO. However, this summer, GAO will establish a secure and easy-to-use web-based electronic bid protest filing and dissemination system (EPDS). EPDS will also provide automatic notice of a protest to the Agency. Once it is live, all protesters will be required to use the system to file new protests, and there will be a \$350.00 filing fee. Funds from the filing fee will be used to pay for the operation and maintenance of the system. GAO's new Rules regarding the new filing system are not yet finalized and still subject to change.

- ❖ Request to Dismiss the Protest. If the Agency or intervenor wishes to file a request to dismiss, this should be done with 10-20 days. In the event a request to dismiss is filed, the parties are generally given the chance to respond before the GAO will rule on the motion.

- ❖ Agency Report. Within 30 days after the notice of the protest for the GAO, the Agency must file an Agency Report which includes:
 - the contracting officer’s statement of the relevant facts, including a best estimate of the contract value;
 - a memorandum of law;
 - a list and a copy of all relevant documents, or portions of documents, not previously produced, including as appropriate:
 - the protest;
 - the bid or proposal submitted by the protester;
 - the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested;
 - all evaluation documents;
 - the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.

This Agency Report must be filed with the GAO with a copy sent to the protester and any intervenor. Significantly, the Agency Report is usually filed subject to the protective order, so only the parties admitted to the protective order (generally, the attorneys) shall have access to the unredacted report.

Comments. Once the Agency Report is filed, the protester (and optionally, the intervenor) has 10 calendar days to file comments on the Agency Report and to include supplemental protest grounds of which the protester is first made aware by the Agency Report or any other documents that have been produced. If the protester fails to file comments within 10 days, the protest will be dismissed. The GAO may request or permit the parties, including the intervenor, to submit additional statements. If this instance, there may be additional written statements due under very strict time guidelines, often between 7-10 days.

- ❖ Hearing. The GAO may hold a hearing after comments are filed but often no hearing is held.

- ❖ Decision. Lastly, the GAO is required to file its decision regarding the protest within 100 calendar days of the filing of the protest. Should a party seek a reconsideration of the decision, this request must be filed within 10 days of the decision.

- **Advantages:** In addition to providing for a “second bite of the apple” after an Agency protest, GAO protests can be resolved fairly quickly. The GAO involves more due process protection than an Agency protest and the forum can be more impartial. Protester’s and Intervenor’s counsel can gain access to protected

information. The automatic stay prevents ongoing contract performance, thereby preserving the status quo so that the protester has an opportunity to obtain full benefit of the contract. As explained previously, the stay is particularly valuable should the protester also be the incumbent. Attorney's fees may be awarded to the successful protester (under limited circumstances) and proceeding at the GAO can be less expensive than filing at the Court of Federal Claims. Lastly, protest decisions may be subsequently filed in the United States Court of Federal Claims – “another bite at the apple”.

- **Disadvantages:** Protesting at the GAO involves extremely accelerated and complicated timeframe and deadlines. Further, GAO decisions are only advisory. Agencies are not required to follow the recommendation of the GAO, although it is rare for the Agency to not do so. Lastly, proceeding at the GAO is more expensive than filing on the Agency level and almost always involves retaining counsel.

- Court of Federal Claims

- **Stay:** There is no automatic stay (suspending contract award or performance) in the U.S. Court of Federal Claims (“COFC”). In order to obtain a stay, the protester must file for a temporary restraining order, a preliminary injunction, or both. This request for injunctive relief is usually filed at the same time as the bid protest. When seeking injunctive relief, the protester will need to meet the 4-factor test showing: (1) protester has demonstrated a reasonable likelihood of success on the merits (of the underlying protest); (2) the protester will suffer irreparable harm if injunctive relief is not granted; (3) the balance of hardships to the respective parties favors granting the injunctive relief requested; and (4) it is in the public interest to grant injunctive relief. As a result of the necessity of applying this test, should a request for stay be made, the bid protest is sometimes decided (at least informally) at this initial stage because application of the test involves a decision on the merits of the protest grounds. Although, the U.S. Court of Federal Claims does not grant preliminary injunctive relief often, if it does grant such relief, the protester must be prepared to provide adequate security to cover potential damages to the Agency if the injunction was improperly imposed.

- **Rules/Process:**

- ❖ With respect to defects in the solicitation, the COFC requires the protester to object to the defect prior to the closing of the bidding process. With respect to post-award protests, the COFC is not as restrictive as the GAO and has not adopted the GAO's 10-day rule. It is presumed that the COFC's 6-year statute of limitations applies; however, this time frame is not extremely helpful. Without a stay the awardee will continue working under the contract. And, the COFC generally applies the equitable doctrine of laches and equitable estoppel to questions of timeliness. These doctrines generally have to do with determining what is a reasonable time within which to file and the issue of fairness.
- ❖ Filing the Bid Protest. Twenty-four hours before filing a complaint (the written bid protest), protester's counsel must file a “Pre-Filing Notice” to the Department of Justice, the Clerk of the COFC, the contracting officer,

and, if there has been a contract award, the awardee. The complaint is filed with the clerk of the COFC and there is a \$400 filing fee⁵. Usually, a motion for leave to file the protest under seal and a motion for entry of a protective order are filed with the complaint, as is the motion for temporary or preliminary relief to stay the performance or award of the contract.

- ❖ Intervention. Like at the GAO, interested parties have a right to intervene in the protest filed at the COFC.
- ❖ Status Conference. After the protest is filed a Judge will be appointed and the Judge will hold an initial status conference. This is to be done as soon as is practicable after the complaint is filed (usually within two days). During the status conference the Judge will discuss with the parties: the identity of interested parties, admission of intervenor, any request for injunctive relief, the protective order, the requirement of redacted copies, the content and filing of the administrative record; and the nature and schedule for further proceedings.
- ❖ Administrative Record. Like the Agency Report at the GAO level, the government must identify and provide the administrative record by the date identified in the status conference (usually about 2 weeks). Here, the government is required to provide “core documents relevant to [the] protest,” which can include the solicitation, records of discussions, proposals, Agency evaluations, and the “record of any previous administrative or judicial proceedings, including any other protest of the procurement.
- ❖ Determining Preliminary Relief. If there has been a motion for injunctive relief, the motion may be deferred to the hearing in the merits, or it may be heard prior to the hearing on the merits of the case. In this event, the parties will be given time to brief the issues.
- ❖ Motion for Judgment on the Administrative Record. In the COFC, the bid protest is determined by a motion for judgment on the administrative record. This is essentially a trial based on a paper record. The parties will be allowed to brief the issues and the Judge will hear oral argument on the issues presented. Sometime after oral argument, the Judge will issue an opinion, which will be redacted by the parties prior to public release. The unsuccessful party then has the right to appeal the decision to the Federal Circuit.
- ❖ Enforceable Judgment. One benefit of filing a bid protest in the COFC is that the relief granted is more than merely a recommendation to the Agency. It is an enforceable judgment. However, in reality, in many cases the protester will still have to obtain a permanent injunction, in the event that no stay was granted.

⁵ This is the filing fee as of this writing. For current fees, refer to the Fee Schedule posted on the Court’s website.

- **Advantages:** The timeline involved in filing a protest is not as short. A protester may file at the COFC even if it is too late to file at the GAO or even if it has received negative treatment at the GAO. Additionally, it can be the case that the COFC's position (i.e., case precedent) regarding the particular procurement law at issue is more favorable than that of the GAO.
- **Disadvantages:** At the COFC there is no automatic stay and it is substantially costlier than proceeding at the GAO. The requirements for recovering attorney's fees and expenses are more stringent than at the GAO and may only be available to lower net worth protesters.

What are the possible outcomes of a bid protest?

- At the Agency level, if the Agency decides that a solicitation or proposed or actual award is non-compliant with applicable procurement statutes and regulations, it may take any action that the GAO could have recommended and may award costs to the protester.
- If the GAO decides that a solicitation, proposed or actual award is non-compliant with statute or regulation, it may recommend to the Agency that it (1) stop exercising options under the contract; (2) terminate or re-compete the contract; (3) issue a new solicitation; (4) award a contract consistent with statute or regulation; or (5) make any other recommendations or combinations of the recommendations deemed necessary to promote compliance.
- The COFC may award any relief that it “considers proper, including declaratory and injunctive relief, except that monetary relief shall be limited to bid preparation and proposal costs.” Examples of the type of relief awarded include: ordering the termination of the awarded contract and allowing the government to resolicit bids; preventing the performance of a defective procurement and authorizing reprocurement; and, after expiration of the base period, preventing the exercise of a contract's options and ordering resolicitation for a new contract award; remand to the Agency for further determinations. Under certain specific circumstances, the COFC may also award attorney's fees and expenses, in lower net worth cases.

What Can Deale Services Do for You?



We are here to help you through what can be a confusing and complicated process. Our experienced attorneys will provide guidance in all phases and forums of the bid protest process. We recognize that important decisions must be made and are ready to partner with you going forward. We hope that you have found this guide useful. If you have additional questions or concerns, please feel free to contact Jerry Miles.

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