

Government Contracts: Agency-Level Bid Protests

DAVID T. RALSTON JR. AND FRANK S. MURRAY JR., FOLEY & LARDNER LLP,
WITH PRACTICAL LAW COMMERCIAL TRANSACTIONS

Search the [Resource ID numbers in blue](#) on Westlaw for more.

This Practice Note provides an overview of agency-level bid protests filed by prospective bidders dissatisfied with the terms of a federal government agency's solicitation or disappointed bidders seeking to challenge a federal government agency's contract award. It includes a discussion of the benefits and disadvantages of agency-level bid protests compared to protests filed with the United States Government Accountability Office (GAO) and the United States Court of Federal Claims (COFC).

Like clockwork, each September, the last month of the federal government's fiscal year, federal agencies rush to award contracts, obligating tens of billions of dollars of current fiscal year funds by the September 30 deadline. Almost as certain, during the ensuing months numerous bid protests against those contracts will emerge.

Despite a 20-year movement toward more commercialized approaches to federal procurement, vendors must still invest considerable time and resources to:

- Prepare their proposal or bid in response to an agency solicitation.
- Ensure compliance with a variety of federal statutes and regulations in the event of contract award.

After meeting these requirements, vendors understandably expect fair and even-handed consideration of their submissions, consistent with the terms of the solicitation and governing statutes and regulations. Congress also uses the federal acquisition marketplace to advance a variety of socio-economic goals. Those benefitting from those policies, notably the small business community, insist that the agencies adhere to these policies in the acquisition process. Above all, those participating in the process expect an honest, competitive

and transparent procurement system that yields good value for taxpayer dollars.

When procuring agencies fail to adhere to the terms of the solicitation and applicable law and regulation, offerors, potential or actual, primarily use a bid protest (also referred to as a procurement protest) to challenge the procuring agency's action and vindicate the offeror's expectations. Bid protests enhance the integrity and transparency of the federal procurement process by providing:

- Prospective offerors with an effective tool to challenge the terms agencies are including in their solicitations.
- Disappointed bidders with an opportunity to challenge federal contract awards to determine whether the agency action conformed to federal procurement law and regulation.

At the same time, those firms awarded contracts must be prepared to intervene in a bid protest to help defend the agency's contract award when a disappointed competitor brings a protest.

In ascending order of formality and expense, three forums may be used to launch federal bid protests:

- An agency-level protest filed with the agency conducting the procurement.
- A protest filed with the GAO (see Practice Note, Government Contracts: GAO Bid Protests ([2-581-7651](#))).
- A judicial action brought at the COFC (see Practice Note, Government Contracts: COFC Bid Protests ([1-583-9427](#))).

This Note directly deals only with agency-level protests filed with the agency conducting the procurement.

AGENCY-LEVEL BID PROTESTS

The agency-level protest as a formally recognized procedural option stems from an experimental program of the Army Materiel Command (AMC) first implemented in 1991. Government-wide regulatory guidance on agency-level protests is now provided at Section 33.103 of the Federal Acquisition Regulation (FAR) (48 C.F.R. § 33.103). Most agencies supplement the FAR provision, to a varying degree, through their own regulations. Vendors should review the

regulations of the relevant agency before commencing an agency-level bid protest.

WHO MAY PROTEST?

A protest may be brought by an “interested party,” defined to mean an actual or prospective offeror whose direct economic interest would be affected by either:

- The award of a contract.
- The failure to award a contract.

This is the same standard applied by the GAO. For an actual offeror, typically a disappointed bidder that has not received the contract award, this means that, should the protest succeed, the offeror would be next-in-line for award or entitled to participate in a recompetition if one were determined to be warranted.

For “prospective” bidders or offerors seeking to challenge the terms of a solicitation, the relevant agency looks to whether a successful protest would allow the protester to participate in the competition going forward. If that test is satisfied, the protester qualifies as an interested party.

By contrast, suppliers, subcontractors and associations or organizations that do not perform contracts do not enjoy interested-party status, nor do persons acting as private attorneys general, because these entities and persons do not have a direct economic interest in the procurement.

As noted above, regarding the direct economic interest requirement, the protester must be in line for award or be able to compete for award if its position in the protest were sustained. The necessary showing required of the protester depends on:

- The type of competitive procedure being used.
- The point in the competition when the protest is brought.

An offeror that is determined to be ineligible for an award (for example, because it lacks a required technical capability) does not have a direct economic interest in the award. Therefore, this offeror is not an interested party unless its protest contests the matter of the determination of ineligibility. Where multiple contract awards are made in the same procurement, one awardee cannot protest an award to another party.

WHAT MAY BE PROTESTED: MATTERS OF JURISDICTION

As a general matter, most any procurement matter can be raised in an agency-level protest, as there are no jurisdictional restrictions on an agency-level protest because an agency is deemed to have inherent authority to consider a protest dealing with all aspects of its own procurements. However, an agency may not consider a protest addressed to the issuance of task and delivery orders under already existing multiple-award task and delivery order contracts, where the agency has the ability to choose among several contractors when it seeks to place a specific order for goods or services (the Federal Acquisition Streamlining Act) (10 U.S.C. § 2304c(e) and 41 U.S.C. § 4106).

Instead, the aggrieved party must bring its complaint to the agency’s task and delivery order ombudsman (48 C.F.R. § 16.505(b)(4)).

An exception to this “no protest rule” is available for orders that increase the relevant contract’s:

- Scope.
- Period of performance.
- Maximum value.

AGENCY-LEVEL TIMELINESS RULES

Protests of apparent solicitation improprieties must be filed before either:

- Bid opening.
- The closing date for receipt of proposals.

In all other cases, the protest must be filed no later than ten days after the basis for the protest is known or should have been known.

Failure to satisfy these timeliness rules inevitably results in dismissal of the protest. While the FAR allows the agency, for good cause shown, to consider the merits of an untimely protest, that authority is seldom used.

STAY OF CONTRACT AWARD OR PERFORMANCE

The relevant agency must stay the award or performance of the contract if the protest is filed timely (48 C.F.R. § 33.103(f)). The timeliness requirements depend on whether the protest is lodged:

- **Before contract award.** On receipt of a protest before award, the agency must withhold the award of the contract until the protest is resolved. The agency is not required, however, to stop the procurement processing short of award and, therefore, it may accept and evaluate proposals while the stay of award is in place.
- **After contract award or debriefing.** The contracting officer (CO) must suspend performance pending resolution of a protest (including any review by an independent higher-level official) received:
 - within ten days after contract award; or
 - five days after a timely, written debriefing.

The agency can override a stay regardless of when the protest was received if the agency justifies in writing that award or performance is either:

- Necessary for urgent and compelling reasons.
- In the best interest of the federal government.

THE AGENCY PROTEST PROCESS

A protest is commenced by providing a written submission of the protest grounds to the CO.

Depending on the agency, the protest will be considered by the CO or by an independent decision authority at a level higher than the CO. If the CO decides the protest, the agency must provide for appellate review of the CO’s decision by an independent decision authority.

The FAR does not impose a requirement for a written agency report in an agency-level protest. However, some agencies do so under their own rules. Under the FAR, the protestor does not have an opportunity to reply to whatever response the agency may make to the protest, although some agencies do allow that opportunity.

There is no automatic entitlement to agency documents relevant to the procurement. The FAR merely advises that the parties may exchange relevant information (48 C.F.R. § 33.103(g)). Therefore, there is no use of protective orders to control the treatment of protected information because protected information is not usually disclosed by the agency.

No formal intervention procedure exists to allow the successful awardee or other offerors to intervene in the agency protest to present their views, although the agency can invite comments from them.

The agency must use its best efforts to render a decision within 35 days (48 C.F.R. § 33.103(g)). The decision is provided only to the protester and it is not published (48 C.F.R. § 33.103(h)).

AVAILABLE RELIEF

The agency may take any action or grant any remedy that could be recommended by the Comptroller General if the protest were instead filed with the GAO, including one or more of these remedies:

- Refrain from exercising options under the contract.
- Terminate the contract.
- Recompete the contract.
- Amend the solicitation.
- Re-evaluate previously submitted proposals.
- Such other relief as the agency determines necessary to promote compliance with statutory and regulatory requirements applicable to the procurement.
- Reimburse the protester's costs of filing and pursuing the protest (including attorneys' fees and consultant fees) and, where no other substantive relief is possible (such as when the contract at issue has already been substantially performed), the protester's costs of bid and proposal preparation.

While agencies may pay protest costs under the same standards that allow costs to be paid to a prevailing party in a GAO protest, protest costs are seldom paid in an agency-level protest.

WHY BRING AN AGENCY-LEVEL PROTEST?

Advantages of an agency-level protest include:

- The forum is the least formal, least costly, and most quickly reaches a decision.
- There is the possibility that the protester may succeed in getting the agency to resolve the issue favorably, eliminating the need for further proceedings at the GAO or the COFC, or both.
- The public profile of an agency protest is low, essentially limited to agency officials, because agency protest decisions are not published. This spares the procurement officials whatever public embarrassment may result from publication of a decision detailing a flawed procurement. At the same time, it reduces the risk of generating an adverse agency view of the protester. This becomes an important factor for vendors concerned that a protest may adversely impact their relationship with their agency customer.
- Solicitation defect issues can be preserved for later challenge at the GAO, as the GAO will consider challenges of solicitation

defect issues provided they were timely raised at the agency. An agency-level protest can be a particularly effective tool to preserve a solicitation defect issue that first arises in an amendment to a solicitation because these amendments often impose tight deadlines for receipt of proposals, which would make it difficult to prepare and file the more formal protest filing expected by the GAO or COFC before the solicitation closing date.

- A negative decision concerning the protest does not have preclusive (*res judicata*) effect. The protester can still file a further protest on the same grounds at the GAO, so it gets "two bites at the apple."
- If the protest occurs after award and seeks to overturn the agency's award decision, the awardee does not have an assured opportunity to participate or make its views heard in an agency-level protest, unlike in a protest filed at the GAO or COFC.

Disadvantages of an agency-level protest include:

- There is no access to procurement-related documents. In the great majority of instances, an agency report is not prepared, and when this report is compiled, it may not be available to the protester. At the GAO, it is common for the more persuasive grounds of protest to be developed after review of documents produced in the agency report that responds to the initial protest. That opportunity does not exist in the case of an agency-level protest.
- The CO frequently serves as the agency decision maker, but someone within the CO's supervisory chain may also render the decision. This raises concerns that the decision may be biased in favor of the agency. Because a protest typically asks an agency's procuring officials to reverse their own decision or admit that a mistake was made, the odds of success are lowered when those procuring officials are rendering the decision.
- Because protest decisions are not published:
 - there is no transparency to the process, which may potentially lead to arbitrary and capricious decision making; and
 - the lack of a record of "precedent" deprives future protesters of the benefit of the agency's reasoning in previous decisions.
- Waiting for an agency-level protest decision can affect:
 - the timeliness of a further GAO protest; or
 - the ability to obtain a stay of contract performance on filing an otherwise timely GAO protest.

Timeliness becomes a factor because the GAO's timeliness rules are keyed to the initial adverse agency action and not the protester's receipt of the agency's actual written decision. The GAO defines "adverse agency action" in the context of an agency-level protest as:

"...any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or agency acquiescence in continued and substantial contract performance."

(4 C.F.R. § 21.0(e).)

Therefore, in many cases, the clock for filing a protest at the GAO begins running well before the protester receives a written decision

on the merits of its agency-level protest because some other action or inaction by the agency will be deemed to constitute the initial adverse action on the protest. For example, if the agency-level protest relates to an alleged solicitation defect and the agency proceeds with receipt of proposals despite the agency-level protest but without having rendered a decision, the agency's conduct in accepting proposals is viewed by the GAO as notice of initial adverse agency action, meaning that, in the GAO's view, the agency has implicitly denied the protest. This initial adverse agency action starts the clock running for purposes of determining the timeliness of a further GAO protest. Similarly, when an agency permits an internal appellate review of an agency protest decision, this review does not extend the time to file a protest at the GAO.

COMMON PROTEST GROUNDS

In view of the disadvantages of agency-level protests, the protest grounds most suitable for resolution in this forum are the more simple, straightforward and less fact-dependent matters as compared with those filed with the GAO or the COFC. Agency-level protests generally tend to be:

- Pre-award protests against solicitation terms.
- Post-award protests relating to:
 - the timely receipt of bids;
 - bid responsiveness; and
 - mistakes in bids.

Protests involving factually complex issues, extensive analysis, the evaluation of proposals, or comparisons between proposals are better left for the other two forums.

AGENCY-LEVEL PROTEST STATISTICS

Because few agencies make available their agency-level bid protest statistics, there is insufficient government-wide data to track trends and draw conclusions about agency handling of protests.

However, some information is available regarding the agency-level protests filed with the AMC, which was the prototype for the current agency-level protest process. According to the AMC (as reported by Erik A. Troff in 2005), its protest filings during the fiscal years 1999 through 2004 averaged 28 per year, a decline of nearly 60% in activity from the earlier years of the AMC program.

By comparison, AMC procurements precipitated an average of 68 protests per year directly to the GAO between fiscal years 1999 through 2004. The AMC took corrective action in 15% of the protests that came before it, although the nature of those corrective actions is not necessarily equivalent to the results that would likely accrue in a sustained GAO protest. The AMC also reported that of the 633 protests it resolved between fiscal years 1991 through 2004, 57 (9%) were refiled at the GAO, and of those 57 protests, only four were sustained by the GAO.

The number of agency-level protests filed at the AMC appears to have rebounded somewhat in recent years, as it reported that it received 48 agency-level protests in fiscal year 2012, nearly double the annual volume reported for fiscal years 1999 through 2004. The AMC took corrective action in nearly 17% of those fiscal year 2012 agency-level protests (eight out of 48), which suggests that the rate of agency corrective action has remained relatively consistent despite the increased number of protests.

Because the AMC bid protest forum is staffed by independent legal professionals separate and apart from the CO and the agency's acquisition personnel (a process authorized by 48 C.F.R. § 33.103(d)), it is likely that a protester's chances of success at the AMC are higher than at other agencies.

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.