



Government Contract Bid Protests Before Agencies

Committee on Administration and Management

Proposed Recommendation for Committee | July 10, 2020

1 Federal law sets forth policies and procedures governing how federal executive agencies
2 procure goods and services.¹ If it appears that a federal executive agency has not complied with
3 the law or the terms of a solicitation, actual or potential offerors may file what is called a bid
4 protest — that is, “a written objection to the conduct of a government agency in acquiring
5 supplies and services for its direct use or benefit.”² To file a bid protest, an actual or prospective
6 offeror need only show that it is an “interested party,” meaning its direct economic interest
7 would be affected by the award of, or failure to award, the contract in question.³

8 Vendors that qualify as interested parties may file bid protests in any of three forums: (1)
9 the Court of Federal Claims (COFC),⁴ (2) the Government Accountability Office (GAO),⁵ and

¹ See Federal Acquisition Regulation, 48 C.F.R. ch. 1; see also Competition in Contracting Act of 1984, 41 U.S.C. § 253; Exec. Order 12979, Agency Procurement Protests, 60 Fed. Reg. 55171 (Oct. 25, 1995).

² Cong. Research Serv., *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments* (Nov. 28, 2018); see also Admin. Conf. of the U.S., Recommendation 95-5, *Government Contract Bid Protests*, 60 Fed. Reg. 43108, 43113 (Aug. 18, 1995).

³ See 4 C.F.R. § 21.0(a)(1) (defining “interested party” for purposes of bid protest proceedings before the Government Accountability Office); 48 C.F.R. § 33.101 (defining “interested party” for purposes of bid protest proceedings before procuring agencies); *CliniComp Int’l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (defining “interested party” for purposes of 28 U.S.C. § 1491(b)).

⁴ See 28 U.S.C. § 1491(b).

⁵ See 31 U.S.C. §§ 3552(a), 3553(a).



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10 (3) the procuring agency.⁶ Bid protests filed with procuring agencies are commonly referred to as
11 agency-level protests.⁷

12 Agency-level protests have important benefits for contractors, procuring agencies, and
13 the COFC and GAO. By “provid[ing] for inexpensive, informal, procedurally simple, and
14 expeditious resolution of protests,”⁸ agency-level protest mechanisms allow small businesses
15 (among other vendors) to affordably contest agencies’ procurement decisions. They also give
16 procuring agencies the chance to review and improve their own procurement practices. And they
17 funnel some protests away from COFC and GAO, reducing the likelihood that the growing
18 number of protests will overwhelm those institutions.⁹

19 Vendors, however, seldom file agency-level protests. Although there is little data on the
20 number of agency-level protests filed each year, available evidence suggests that substantially
21 more protests are filed with COFC and GAO each year than with procuring agencies.¹⁰ There are
22 several reasons why vendors may forego agency-level protests.

23 First, vendors might shy away from agency-level protests because they perceive them as
24 biased. Sometimes, for instance, the official responsible for soliciting or awarding a procurement
25 contract is also responsible in many cases for handling any agency-level protests that are filed

⁶ See 48 C.F.R. § 33.103.

⁷ See, e.g., *Bannum, Inc. v. United States*, 779 F.3d 1376, 1380 (Fed. Cir. 2015).

⁸ See Exec. Order. No. 12979, 60 Fed. Reg. 55171, 55171 (Oct. 25, 1995).

⁹ See, e.g., Mark V. Arena et al., RAND Corp., *Assessing Bid Protests of U.S. Department of Defense Procurements* xiii (2018), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf (noting that, between FY 2008 and FY 2016, “protest activity for both [Department of Defense] and non-[Department of Defense] agencies approximately doubled”); U.S. Gov’t Accountability Off., GAO-18-237SP, GAO Bid Protest Annual Report to the Congress for Fiscal Year 2017 (2017) (pointing out that GAO protests increased from 1,212 protests in FY 2006 to 2,433 in FY 2017).

¹⁰ See Christopher Yukins, *Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government* 12–13 (May 1, 2020) (report to Admin. Conf. of the U.S.), www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf (hereinafter “Yukins Report”).



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26 regarding the procurement.¹¹ This perceived conflict of interest may dissuade some agency-level
27 protesters.

28 Second, vendors might also view agency-level protest processes as opaque. Agencies do
29 not publish their protest decisions and seldom provide comprehensive data on their bid protest
30 decisions.¹² And the rules and regulations governing agency-level protests establish few hard-
31 and-fast requirements for the process. For example, although the Federal Acquisition
32 Regulation¹³ — the primary regulation governing agency-level protests — states that “[a]gencies
33 shall make their best efforts to resolve agency protests within 35 days after [an agency-level
34 protest] is filed,”¹⁴ that language is hortatory and does not establish any binding deadlines.

35 Third, vendors might also be frustrated by their inability to compel production of the
36 procurement record as part of an agency-level protest. The FAR gives disappointed offerors the
37 right to an agency debriefing — a procedure whereby contracting personnel provide offerors
38 with an explanation of the agency’s evaluation process and an assessment of the offerors’
39 proposals. But nothing in the FAR guarantees offerors the right to view the procurement record
40 itself. The FAR provides only that agencies “*may* exchange relevant information” with agency-
41 level protesters.¹⁵ At GAO, by contrast, protesters may demand to see the entire record of the
42 procurement, and procuring agencies must respond to such requests within 30 days — either by
43 producing the responsive documents or giving a valid reason for withholding them.¹⁶

¹¹ See, e.g., Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 148 (pointing out that agency officials are “subject to untold potential influences to shade their decisions in favor of their agencies, and agency-level systems usually do not have a mechanism for managing or countering this built-in potential for bias”).

¹² See David H. Carpenter & Moshe Schwartz, Cong. Research Serv., *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments* 3 (Nov. 28, 2018).

¹³ See 48 C.F.R. ch. 1.

¹⁴ *Id.* § 33.103(g).

¹⁵ *Id.* § 33.103(g) (italics added).

¹⁶ 4 C.F.R. § 21.3(d).



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44 Finally, vendors might deem agency-level protests to be too risky. For instance, GAO’s
45 deadline for filing follow-on protests often begins to run as soon as the vendor has actual or
46 constructive notice of some “adverse agency action,” which can occur before a protester receives
47 the decision in its agency-level protest.¹⁷ In this way, delayed notification about an agency’s
48 decision in a bid protest can seriously prejudice protesters’ rights at GAO.¹⁸ This may prompt
49 some vendors to forego agency-level protests altogether.

50 Agency-level protests can also be disruptive for procuring agencies, especially when
51 disappointed agency-level protesters file further challenges *after* agency-level protests — often
52 called “follow-on protests” — at GAO or COFC. Just as a valid agency-level protest
53 automatically stays a procurement until the agency denies or dismisses the protest and takes
54 some adverse action,¹⁹ a valid follow-on protest at GAO may automatically stay a procurement
55 (if the requisite filing deadlines are met) until GAO denies or dismisses the protest.²⁰ Thus, when
56 an agency-level protest is followed by another protest at GAO, delays in procurements can be
57 substantial. Contractors might be less inclined to file follow-on protests were they more
58 confident in agency-level processes.

59 Because a robust agency-level protest system is of significant value to contractors and
60 agencies alike, this recommendation identifies changes to make it more likely vendors will avail
61 themselves of agency-level protest procedures. The recommended changes reflect three
62 overarching principles — transparency, simplicity, and predictability — meant to address
63 contractors’ principal concerns about agency-level protest systems. Each recommended change
64 can be accomplished by legislation. The recommended change directed to GAO can also be
65 accomplished by amending GAO’s own regulations. The recommended changes directed to

¹⁷ See *id.* §§ 21.0(e), 21.2.

¹⁸ See Yukins Report 13–14, 18–19.

¹⁹ 48 C.F.R. § 33.103(f).

²⁰ 31 U.S.C. § 3553(c)(1) & (d)(3).



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66 agencies can be accomplished either: (1) by amending the FAR; or (2) by amending the
67 agencies' own protest procedures, which usually supplement the FAR.

68 While each recommendation has been crafted to minimize the burden on implementing
69 agencies, the feasibility of implementing each recommendation will depend on the specific
70 circumstances confronting those agencies.

71 **RECOMMENDATION**

72 **Identification of Decisions Subject to Agency-Level Protests**

73 1. Agencies should clearly identify which of their procurement decisions may *not* be made
74 the subjects of agency-level protests. So far as is feasible, agencies should allow agency-
75 level protests concerning any of their procurement decisions.

76 **Transparency for the Process and Personnel for Agency-Level Protests**

77 2. Agencies should compile in a publicly available document the procedures they apply in
78 adjudicating agency-level protests.

79 3. Agencies should clearly identify who within the agency will adjudicate an agency-level
80 protest. They should strongly consider designating at least one Agency Protest Official
81 (APO) — a person who specializes in handling agency-level protests — to oversee and
82 coordinate agency-level protests. Agencies lacking the resources to designate their own
83 APO should consider sharing an APO with other agencies.

84 **Notice of the Timeline for Agency-Level Protests**

85 4. Agencies should make best efforts to notify protesters of the timeline for agency-level
86 protests.

87 5. Agencies should consider adopting presumptive process deadlines for agency-level
88 protests, similar to the deadlines under the Contract Disputes Act, 41 U.S.C. § 7101 *et*
89 *seq.*



90 **Compiling the Record and Making It Available**

91 6. Agencies should consider adopting the same rules for compiling and sharing the record as
92 apply to GAO-level protests.

93 7. Agencies that do not adopt GAO's rules for compiling and sharing the record should still
94 make available, in a timely manner, as much of the procurement record as is feasible. If
95 important parts of the record are confidential, agencies should consider disclosing them
96 to protesters subject to a protective order. When disclosure subject to a protective order is
97 infeasible, agencies should inform protesters about important but confidential parts of the
98 agency record through alternative means. Those alternative means could include
99 enhanced debriefings and confidentiality agreements between protesters and agencies.

100 **Procedures for Apprising Parties of the Status of Agency-Level Protests**

101 8. Agencies should provide prompt, written notice to protesters of procedural milestones in
102 agency-level protests, including when agency-level proceedings are initiated and
103 terminated.

104 9. To eliminate uncertainty as to whether an agency has taken adverse action on a protest,
105 agencies should clearly identify what constitutes adverse action and further provide that a
106 protest is deemed denied after a certain number of days without a decision.

107 **Protecting Against Adverse Consequences**

108 10. Although the FAR automatically stays a procurement during an agency-level protest,
109 agencies should provide for a temporary extension of the stay after a final decision in an
110 agency-level bid protest. The temporary extension should be of sufficient duration to give
111 the protester time to bring a follow-on protest at GAO or COFC after the agency's
112 decision.



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113 11. Congress should amend the statute governing GAO protests (31 U.S.C. § 3553) to trigger
114 an automatic stay if a protester promptly files a protest after an adverse decision in an
115 agency-level protest.

116 12. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO
117 are handled on an expedited basis.

118 **Publishing Data on Agency-Level Bid Protests**

119 13. Agencies should collect and publish data about the bid protests they adjudicate. The data
120 should include:

- 121 a. the number of bid protests adjudicated by the agency;
- 122 b. the number of bid protests which were sustained, or which resulted in some
123 corrective action by the agency; and
- 124 c. the average time required for a bid protest to be resolved.