

Playing to win

After the competition: What to consider if denied a Federal contract

What do you do if you have invested countless hours and significant resources in developing a response to a solicitation or invitation for bids issued by a federal government agency and lose?

For starters, you gather all the information possible regarding how the response may have gone awry. This can be easily done by timely requesting a debriefing from the procuring agency, as allowed by the Federal Acquisition Regulation (FAR). The government is required by FAR §15.506 to provide official feedback on a proposal if a request is made within three days of a notification of award, and a debriefing can be requested by winners and losers alike.

During the debriefing, the government Contracting Officer (CO), with support from other evaluators, if necessary, discuss strengths and weaknesses of the evaluated proposal, provide the overall evaluated price and technical rating of the winner, offer summary rationale for award, and provide “reasonable” responses to “relevant” questions.

After a loss, a debriefing is the first step in understanding what may have been missed and what could have done better, but also may illuminate a problem with the government’s logic or analysis in selecting or awarding to another offer.

Additionally, every contractor should, after distilling information from a debriefing, consider a bid protest if it was not treated fairly. Understanding the federal bid protest process and the alternative protest forums allows a bidder to consider options in the event its bid for a federal contract has been, or is about to be, unfairly denied.

A decision to file a bid protest must be made quickly, generally within just a few days after receiving disappointing news of losing a bid competition, so advance knowledge of the options is wise.

What Is a Bid Protest?

FAR § 33.101 defines a bid “protest” as a written objection filed by an “interested party,” meaning an entity or individual

whose interests are being – or about to be – harmed by a procurement procedure or award of an agency of the federal government.

Protests can be either pre-award or post-award. To be considered pre-award, a protest must be filed either before bids or offers are due, and allege issues in the solicitation, such as improper specifications, an improper limit on competition, the omission of a required provision, ambiguities, or indefinite evaluation factors; or after offers are submitted but before the award is made, often to protest the contractor’s elimination from award consideration.

For example, exclusion from an agency created short-list for award of a contract is an agency decision that is protested with some frequency.

A post-award protest challenging the award decision of the agency may be launched within 10 days of award or contractor selection.



Where to Seek Relief?

The three federal bid protest forums, in ascending order of formality and expense to access, are:

- Agency-level protest filed with the procuring agency
- Protest filed with the Government Accountability Office (GAO)
- Judicial action brought at the United States Court of Federal Claims (COFC)

Each of these forums carries unique costs, benefits and drawbacks. The contractor considering a bid protest, or its counsel, must weigh costs, benefits and drawbacks before choosing where and how to present a case.

1. The Procuring Agency

FAR §33.103 provides guidance for an agency level bid protest. It is by far the least expensive option for review of an adverse

agency decision, and a determination generally is issued within 35 days of the protest being filed.

The assistance of an attorney is optional, as you simply provide a written submission of the protest grounds to the CO. The CO or an independent decision authority at a level higher than the CO will consider the protest. An agency level protest rarely produces a favorable result if the disagreement is fundamental, but it may be a relatively quick and inexpensive level of review of an obvious or clerical type of error by the agency.

Negatives of the agency level protest include no opportunity for discovery of documents that might help establish the basis of the protest as review of documents by counsel rarely is permitted. Additionally, procedures vary from agency to agency.

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2. The General Accounting Office

The GAO may hear both pre-award and post-award protests under its general authority to audit and settle financial matters on behalf of the federal government. It has clear but stringent rules, and an attorney is recommended to assist in navigating this process.

A GAO protest generally results in an automatic stay of the government's award of the contract, or performance of the contract, during the protest. This means no action is taken regarding the contract until the protestor's concerns are addressed. Other benefits of GAO include a relatively inexpensive and informal forum, and the contractor's counsel is permitted to review all agency documents, including competing proposals.

Additionally, GAO procedures require a written decision within 100 days from the protest's filing, offering timely relief. Rarely is a GAO protest decision not timely issued.

Drawbacks of GAO include relief only when the contractor establishes a clear violation of procurement law, and requests

for hearings are rarely granted as most cases are decided on the procuring agency's administrative record.

Another disadvantage is that the GAO exercises only an advisory role. The GAO is part of the legislative branch and cannot constitutionally order an executive agency to take any particular action, impose declaratory relief, or issue injunctions, as can the courts. GAO's decisions are in the form of recommendations. However, GAO recommendations almost are always followed by the agencies.

Under 31 USC §3554(e)(1), the head of the GAO, the Comptroller General, reports to Congress "any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General."

3. The United States Court of Federal Claims

The Claims Court hears only pre-award bid protests and a filing here does not automatically stay award. Therefore, it may be necessary to obtain a stay of an award, either by consent of the procuring agency, or the Court itself in the form of an injunction. An attorney, and the resulting expense, absolutely is necessary at this forum. As this is a trial court, a hearing

will be held before a Federal judge after a full administrative record is made available by the procuring agency. Discovery, or the request for certain agency documents, is available to the parties.

This judge has the power to grant injunctive relief and issue declaratory judgments, useful forms of relief to a contractor seeking to wrest a contract award away from a third party. Judges at this forum generally are familiar with government contract principles; and the court's discovery tools can be useful in proving complicated cases.

Decisions generally are rendered promptly – occasionally on the day of hearing. But the schedule for each case is determined by the assigned judge, so there can be no expectation for a decision date upon protesting in this forum, and some cases have resulted in multi-year litigation.

Contractors planning to protest a federal procurement decision must decide whether to bring that protest to the agency, the GAO or the COFC. Each of these forums has their own advantages and disadvantages.

But in most situations, the GAO offers the best balance of cost and procedural protections. Most lawyers would not recommend their clients file an agency protest. The COFC may be the appropriate forum if there are concerns with meeting the GAO's timeliness requirements or a clear need for injunctive relief. ■

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