

2007 Annual Update
on Government Contracts

BID PROTESTS

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Bid Protest Topics



- Why are bid protests filed?
- Where are bid protests filed?
- When must bid protests be filed?
- How can I get a stay of contract performance while my protest is pending – and why do I need one?
- What does “corrective action” mean, and can it be protested?

Why File a Bid Protest?



- If you believe the agency is violating a statute, regulation or provision of the solicitation
- If you are second in line for award and you did a good job in preparing your proposal, you should think of a protest as essentially an extension of your marketing efforts, highlighting the advantages your proposal provides the government and the reasons why the government should have selected you if it had evaluated properly
- If you are the incumbent, a protest also may allow you to continue providing goods or services while the protest is pending
- If the protest is sustained (or if agency delays in taking corrective action), you can recover attorneys fees

Where Are Bid Protests Filed?



- Three forums for bid protests:
 - Administrative
 - Agency-level protests (Contracting Officer)
 - Government Accountability Office (GAO)
 - Judicial
 - U.S. Court of Federal Claims (COFC)

Decision Deadlines at the Three Bid Protest Forums



- GAO: 100 days (averages around 80)
- Agency: 35 days
- COFC: No deadline, but decisions on whether to grant an injunction staying award or contract performance are typically issued within 10 to 30 days

Typical GAO Protest Process



- Protest filed
- Agency Report filed (30 days later)
- Protester has 10 days to file comments on agency report and any supplemental protest grounds based on agency report
- Agency responds to new protest grounds (if any)
- GAO may hold a hearing to take testimony, hear argument
- GAO issues decision on protest (within 100 days of initial protest filing date)

Protests at GAO



- Fiscal Year 2006 Statistics
 - Protests filed: 1,327
 - Includes 58 claims for cost and 57 requests for reconsideration
 - Decrease of 2% from FY2005
 - Merits decisions: 249
 - Protests sustained: 72
 - Sustain rate: 29%
 - Highest rate in last 10 years (previous high, 23%)
 - Hearings: 51
 - Effectiveness rate: 39%
 - “Effectiveness rate” indicates percentage of cases in which protester received some relief from the agency.

Obtaining “Some Relief from the Agency” in a Bid Protest



- “Effectiveness rate” statistic highlights that you can “receive some relief from the agency” even in protests that don’t go to a final decision
- By filing a protest and pointing out a potential error in the procurement that could delay award and contract performance, you can put yourself in position to negotiate with the agency to obtain an outcome that provides you with some benefit, even short of winning the protest
- The stronger the protest, the greater your leverage with the agency is likely to be
- FAR 33.102(b): agency can take any action that could have been recommended by GAO, including paying protester’s costs

Protests at FAA's Office of Dispute Resolution for Acquisition



- FAA's Office of Dispute Resolution for Acquisition (ODRA)
 - Handles bid protests of procurements by FAA and Transportation Security Administration (TSA) of Dept of Homeland Security
- Total protests filed since 4/1/96: 309
 - 35 filed between 6/8/06 and 9/24/07
- Final decisions: 110
 - 14 between 6/8/06 and 9/24/07
- Full or partial relief granted: 27
 - But only 1 between 6/8/06 and 9/24/07
- Sustain Rate: 24.5%
- Statistics as of September 24, 2007

Protests at COFC



- Fiscal Year 2006
 - 73 bid protests filed
 - 721 total cases filed
 - Bid protests = approximately 10% of COFC docket
 - Average COFC bid protest case is disposed of about 5 months after protest was filed

Bid Protest Filing Time Requirements



- Teaching point: Prompt (really, really prompt) action on bid protests is a must. Call counsel as soon as a protest is considered.
- Consult with counsel when preparing your proposal if you believe there may be issues with the solicitation (particularly important based on deadlines for protesting solicitation defects)

Bid Protests: GAO Timeliness Rules



- Administrative filing deadlines:
 - GAO Timeliness Rule is at 4 C.F.R. § 21.2
 - 3 Different Standards for Timeliness at GAO
 - Solicitation/RFP/RFQ Defects
 - Protest at GAO Following Agency-Level Protest
 - All Other Protest Issues

Protesting Solicitation Defects



- Solicitation/RFP/RFQ defects
 - 4 CFR § 21.2(a)(1)
 - Must file prior to due date for initial proposal/quote submission/bid opening
 - Alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation through an amendment must be protested not later than the next closing time for receipt of proposals following the incorporation.

Protesting Solicitation Defects



- Council for Adult & Experimental Learning, B-299798.2 (Aug. 28, 2007)
 - GAO bid protest concerning Army solicitation for lead integration and other technical support for online web-based educational portal, GoArmyEd
 - After Army awarded to incumbent on previous contract (IBM), CAEL protested, claiming Army had tilted acquisition unfairly in favor of incumbent

Protesting Solicitation Defects



- Council for Adult & Experimental Learning, B-299798.2 (Aug 28, 2007)
 - CAEL protested that Army failed to provide needed technical specifications and legacy information regarding former contract, forcing all offerors other than incumbent to “guess” at Army’s needs
 - Also argued that Statement of Work contained insufficient detail
 - Result: protest **denied as untimely** for failure to file prior to solicitation closing date

Common “Defective Solicitation” Protest Grounds



- RFP not detailed enough
- RFP too detailed, too restrictive (sets standards that are not needed)
- Many brand-name or equal issues
- Need more time to respond
- RFP is clearly ambiguous (“patent ambiguity” vs. “latent ambiguity”)
- Small-business issues (failure to set aside, wrong size standard, HUBZone issues)

Protesting Solicitation Defects



- Good rule of thumb as to whether an issue is a “solicitation defect” issue that must be raised prior to closing date:
 - Is there something about this acquisition that you have a problem with even BEFORE you know who will win the contract?
 - If so, that probably means your objection or concern is a “solicitation defect” issue that you will need to protest prior to the closing date.

Timeliness of Protests at COFC



- Until recently, there was no specific deadline for filing protests at COFC, only real limit was statute of limitations (6 years, which is not relevant in most cases)
- COFC does not generally follow GAO's strict timeliness rules (i.e., no ten-day limit to file a protest)
- Recent decision by Court of Appeals for the Federal Circuit does, however, embrace GAO's rules regarding protests of solicitation defects

Timeliness of Protests at COFC: Solicitation Defects



- Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir., June 26, 2007)
- Formally adopted application of GAO timeliness rule at COFC for protests of errors apparent on the face of a solicitation
- Now, such errors must be protested at COFC prior to the closing date for receipt of proposals (just like GAO), or the protest will be dismissed as untimely
- Federal Circuit: protesters cannot “sit on their rights” to challenge a solicitation they believe to be unfair
- Rule promotes efficient resolution of protest grounds at a time when errors can be fixed with the least disruption to the procurement process, and is meant to discourage strategic behavior by bidders (“rolling the dice” on award)

Timeliness of Protests at COFC



- For all other protests (protests not based on solicitation defects, such as those challenging an award decision or evaluation of proposals), the operative principle is the equitable concept of “laches”
- “Laches” means unreasonable delay – essentially a fancy way of saying, “You snooze, you lose”

Timeliness of Protests at COFC



- Specifically, a filing of a protest at COFC (that does not relate to a solicitation defect) is timely unless the protester's delay in filing is:
 - (1) unreasonable and unexcused, and
 - (2) prejudicial to the other party.
- Delay much beyond award, however, will severely reduce the likelihood of obtaining COFC injunction of contract performance

Agency-level Protests



- To be considered timely, generally follow GAO rules, unless the agency's rules are more stringent.
- Agency protest procedures usually cited or identified in solicitation.

Agency-level Protests



- To be considered an agency-level protest, the protest must be in writing and must “convey the intent to protest” by containing (1) “an expression of dissatisfaction,” and (2) “a request for corrective action.” Federal Marketing Office – Reconsideration, B-249097, Jan. 5, 1993, 93-1 CPD ¶ 4.
- If the writing is couched in terms of “questions” about the procurement or a “request for clarification,” it will likely not be treated as an agency-level protest

Agency-level Protests



- Advantages of agency-level protests:
 - Least formal and least costly forum in which to raise issue
 - May succeed in getting agency to resolve issue without need for further protest at GAO or COFC
 - Can preserve “solicitation defect” issues for later challenge at GAO
- Disadvantages of agency-level protests:
 - Protest typically asks agency to reverse its own decision or admit it made a mistake
 - Waiting for agency-level protest decision can affect timeliness of GAO protest or impact ability to obtain stay of contract performance

“Appealing” Agency-level Protests to GAO



- Protester dissatisfied with result of agency-level protest can still file a protest on the same grounds at GAO
- **BUT** be aware of the timeliness issues
- GAO Rule 4 CFR § 21.2(a)(3)
 - If a timely agency-level protest was previously filed, any subsequent protest to GAO on those grounds must be filed **within 10 days** of actual or constructive knowledge of **initial adverse agency action**

Timeliness of Agency-level Protests



- Adverse Agency Action
 - Defined in GAO Rules at 4 CFR § 21.0(f)
 - “any action or inaction by a contracting agency which 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 contracting agency acquiescence in continued and substantial contract performance.”

Timeliness of Agency-level Protests



- GAO defines an agency's decision to proceed with opening of bids or receipt of proposals in the face of an agency-level protest as "adverse agency action" on the protest. 4 CFR § 21.0(f)
- Thus, if agency has not acted on an agency-level protest prior to closing date for receipt of proposals, the receipt of proposals will be the "initial adverse agency action," triggering 10-day rule
- In that scenario, protester would have 10 days after closing date to file protest at GAO – even if agency still hasn't issued a decision on the merits of the protest or made an award decision

Using Agency-Level Protest to Preserve Solicitation Defect Issues



- Recall that protests against “solicitation defects” typically must be filed at GAO prior to the closing date or they are waived
- One exception: where protester timely filed an agency-level protest against the solicitation defect prior to the closing date, and then files at GAO within ten days of closing date

Using Agency-Level Protest to Preserve Solicitation Defect Issues



- Illustration based on issues in the Council for Adult & Experimental Learning (“CAEL”) decision
- Protest grounds at GAO in CAEL case were that RFP did not contain necessary information and lacked sufficient detail, but protest dismissed as untimely because CAEL did not protest these issues until after RFP closing date
- But what if CAEL had filed an agency-level protest on those issues with the contracting officer prior to the closing date?

Using Agency-Level Protest to Preserve Solicitation Defect Issues



- Assume RFP closing date is 8/1/2007
- On 7/25/2007, CAEL files agency-level protest that RFP lacks necessary information and contains insufficient detail in Statement of Work
- On 8/1/2007, agency accepts proposals without taking action on CAEL's agency-level protest
- On 8/10/2007, CAEL protests at GAO
- Result? Timely protest, even though it comes **AFTER** solicitation's closing date, because filed within **10 days** of initial adverse action on **timely** agency-level protest

GAO Timeliness Rules

Non-“Solicitation Defect” Cases



- 4 CFR 21.2(a)(2)
- General rule: protests not based on defects apparent on the face of a solicitation are required to be filed within 10 days of when the protester became aware of the basis for the protest (unless the debriefing date is later)
- Typically comes up in situations where a proposal has been rejected after submission or award has been made to another offeror

Common Protest Grounds That Don't Relate to Solicitation Defects



- Failure to follow evaluation criteria in solicitation
- Use of unstated evaluation criteria
- Improper past performance evaluation
- Lack of meaningful discussions
- Improper best value determination
- Unequal treatment
- Latent ambiguity in RFP

GAO Timeliness Rules and Debriefings



- Impact of Debriefings
- Government is required to give a debriefing to offerors who request it – in writing – within 3 days of notification of exclusion from competition (pre-award, FAR 15.505(a)), or of notification of award to a competing offeror (post-award, FAR 15.506(a))

GAO Timeliness Rules and Debriefings



- Common question: you receive notice of exclusion from competitive range. Should you request a pre-award debriefing, or request that the debriefing be delayed until after award?
- Better to request **pre-award** debriefing to find out what agency's basis for exclusion was. If you act promptly and file protest before agency makes award decision, easier to get a fairer shake at ultimate award decision than after agency has already picked another offeror it believes deserved to win the contract

GAO Timeliness Rules and Debriefings



- When protester has requested a required debriefing, protester has up to 10 days after the date on which the debriefing is held to file a protest at GAO
- **BUT...** if you want to stay contract performance, you **MUST, MUST, MUST** file the protest at GAO within **5 DAYS** of the date of a post-award debrief.
- So a protest can be **TIMELY** at GAO, but still not be filed in time to stay contract performance

GAO Timeliness Rules

Non-“Solicitation Defect” Cases



- That means you would have the chance to argue that you should get the contract, but – because the awardee will be performing the contract while the protest is pending – you may not have much contract left to get even if you win the protest
- If no stay of contract performance, the relief available if you win the protest will be limited

Obtaining Stay of Contract Performance



- To obtain **stay of contract performance** (which is very important), you must file protest at GAO/agency within latter of:
 - Ten (10) days of contract award, or
 - Five (5) days of the offered debriefing date, if the debriefing is required (written request for debrief must've been filed within 3 days)
- At GAO, must file early enough to permit GAO to call agency with the notice of protest filing within the 10/5 day period. (The GAO call triggers the statutory stay of contract performance.)
- Stay at COFC requires an injunction

“Corrective Action” as Means to Dismiss Protest



- When faced with a protest at GAO or COFC, the agency sometimes elects to “throw in the towel” and take what it will characterize as “corrective action” to address the error alleged in the protest
- Provided the “corrective action” adequately addresses the error the agency says it is trying to correct, GAO will generally dismiss the protest as moot (GAO’s term: “academic”)

Protesting “Corrective Action”



- If the agency’s proposed “corrective action” is not adequately corrective – or if you think it goes too far – you can protest the corrective action
- If you believe corrective action proposed by the agency is insufficient, first step is to fight dismissal of protest, pointing out that corrective action does not fully address errors alleged in protest
 - Example: protest of award decision of a multi-year contract calling for base year and three option years. Agency proposes as “corrective action” that it will not execute the option years, but intends to leave the award of the base year intact. Not complete “corrective action” – doesn’t render protest moot.

Protesting “Corrective Action”



- Note, though, that agencies have broad discretion in fashioning corrective action
- Key is showing disconnect between proposed corrective action and error agency is supposedly trying to correct
- Also, GAO’s timeliness rules apply to protests of corrective action
- Protests against revised solicitation must be submitted prior to next closing date for receipt of revised proposals
- Protests of other corrective action must be submitted within 10 days of when protester learned of the corrective action

Protesting Corrective Action



- Partnership for Response and Recovery, B-298443.4 (Dec. 18, 2006)
 - Previous protest filed by Alltech, challenging agency’s evaluation of its proposal as irrational
 - During course of prior protest, agency found that there had been numerous errors in evaluation, including reliance by source selection evaluation team on an inaccurate “draft” evaluation report of Alltech and lack of meaningful discussions with Alltech regarding its past performance

Protesting Corrective Action



- Partnership for Response and Recovery, B-298443.4 (Dec. 18, 2006)
 - Corrective action initially proposed by agency was limited: would appoint a new source evaluation board (SEB) to conduct de novo evaluation of competitive range offerors, but planned to reopen discussions only for newly identified significant weaknesses that were not the subject of previous discussions, and price revisions would be permitted only to extent they could be tied to technical changes resulting from new discussion questions
 - Agency later decided the restrictions on discussions and price revisions were unworkable, and decided that there would be no restrictions on the new evaluation, discussions, and price revisions
 - Agency also amended RFP to add new requirement

Protesting Corrective Action



- Partnership for Response and Recovery, B-298443.4 (Dec. 18, 2006)
 - Original awardee protested agency’s revised corrective action as overbroad
 - GAO denied protest
 - “Details of implementing corrective action are within the sound discretion and judgment of the contracting agency”
 - GAO will not object to specific corrective action “so long as it is appropriate to remedy the concern that caused the agency to take corrective action”
 - GAO also pointed out that agency can amend RFP to add new requirements as part of corrective action, and is not required to limit submission of revised proposals to address only those new requirements