

Bid Protests

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Bid Protest Topics

- Why bid protests are filed?
- Where filed?
- Processing time
- Decision deadlines
- How to get a stay of contract performance while protest is pending – and why it is needed
- What does “corrective action” mean, and can it be protested?
- Major protest decisions in 2008



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Why File a Bid Protest?

- The agency violated a statute, regulation or provision of the solicitation
- When second in line for award – a protest is continuation of marketing efforts
 - Highlight advantages your proposal provides
 - Why it would have been selected in proper evaluation



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Where Are Bid Protests Filed?

- Three administrative fora for bid protests
 - Agency-level protests (Contracting Officer)
 - Government Accountability Office (GAO)
 - FAA's Office of Dispute Resolution for Acquisition (ODRA)
- Two judicial fora
 - U.S. Court of Federal Claims (COFC)
 - U.S. Court of Appeals for FAA ODRA



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Decision Deadlines at the Three Bid Protest Forums

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



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Agency-level Protests

- Advantages of agency-level protests:
 - Least formal/least costly forum
 - Agency may 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/admit mistakes
 - Waiting for agency-level protest decision can affect timeliness of GAO protest or impact ability to obtain stay of contract performance



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Agency-level Protests

- Agency-level protest – informal, but in writing and “convey the intent to protest” by containing:
 - “an expression of dissatisfaction,” and
 - “a request for corrective action.”

Federal Marketing Office – Reconsideration, B-249097, Jan. 5, 1993, 93-1 CPD ¶ 4.
- If couched in terms of “questions” about the procurement or a “request for clarification,” not likely considered an agency-level protest



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Typical GAO Protest Process

- Protest filed
- Agency Report filed (30 days later) with contract documents
- Protester - 10 days to file comments on agency report and supplemental protest grounds based on agency report
- Agency responds to new protest grounds (if any)
- GAO may hold hearing if key facts disputed, and will hear argument
- GAO issues decision on protest (within 100 days of initial protest filing date)



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Protests at GAO

- Fiscal Year 2007 Statistics
 - Protests filed: 1,411
 - Includes 42 claims for cost and 93 requests for reconsideration
 - Increase of 6% from FY2006
 - Merits decisions: 335
 - Protests sustained: 91
 - Sustain rate: 27%
 - Second highest rate in last 10 years
 - Hearings: 51
 - Effectiveness rate: 38%
 - “Effectiveness rate” = percentage of cases in which protester received some relief from the agency



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

- “Effectiveness rate” - highlights relief obtainable even when protests don’t reach final decision
- By filing protest showing potential error in procurement and delayed award/contract performance, possible to negotiate with agency
 - For some benefit, even short of winning the protest
 - Payment of fees
- Stronger the protest - greater the leverage with agency
- FAR 33.102(b) - agency can take any action that GAO could recommend, including paying protester’s fees/costs



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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
 - Transportation Security Administration (TSA) of Dept of Homeland Security through June 2008
- Total protests filed since 4/1/96: 322
- Final decisions: 114
- Full or partial relief granted: 28
- Sustain Rate: 24.5%
- Statistics as of Feb. 29, 2008



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Protests at COFC

- Fiscal Year 2007
 - 69 bid protests filed
 - 665 total cases filed (excluding vaccine)
 - Bid protests = approximately 10% of COFC docket
 - Average COFC bid protest case is disposed of about 5-6 months after protest was filed
 - Injunctions addressed quickly



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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).



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Bid Protest Timeliness Rules

- Administrative filing deadlines:
 - Agency
 - Timeliness Rule – FAR 33.103
 - Solicitation/RFP/RFQ Defects
 - Ten calendar days of learning of basis of protest
 - GAO
 - Timeliness Rule - 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



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Protesting Solicitation Defects

- Solicitation/RFP/RFQ defects
 - FAR 33.103(e)/4 CFR § 21.2(a)(1)
 - Must file prior to due date for initial proposal/quote submission/bid opening
 - Alleged improprieties not in initial solicitation but subsequently incorporated into solicitation via amendment
 - Must be protested by next closing time for receipt of proposals after incorporation



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Protesting Solicitation Defects

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



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Protesting Solicitation Defects

- Council for Adult & Experimental Learning, B-299798.2 (Aug 28, 2007)
 - CAEL protested Army failed to provide needed technical specs and legacy information on prior contract, forcing all offerors except 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



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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 ambiguous (“patent ambiguity” vs. “latent ambiguity”)
- Small-business issues (failure to set aside, wrong size standard, HUBZone issues)



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Protesting Solicitation Defects

- Good rule of thumb whether issue is a “solicitation defect” that must be raised prior to closing date:
 - Is there a problem with acquisition even BEFORE proposal submission/contract award?
 - If yes, probably a “solicitation defect” issue that must be protested prior to closing date.



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“Appealing” Agency-level Protests to GAO

- Protester dissatisfied with agency-level decision can protest on 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**



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Timeliness of GAO Protests After 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 protester’s position in agency-level protest, including:
 - decision on the merits of a protest
 - opening of bids or receipt of proposals
 - award of a contract
 - rejection of a bid/proposal despite pending protest
 - agency acquiescence in continued/substantial contract performance



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Timeliness of GAO Protests After Agency-Level Protests

- GAO defines 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
- So, if agency fails to act on agency-level protest prior to proposal submission, receipt of proposals is “initial adverse agency action,” triggering 10-day rule
- Protester has 10 days after closing date to file protest at GAO – even if agency still hasn’t issued decision on merits of protest or awarded contract



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Using Agency-Level Protest to Preserve Solicitation Defect Issues

- Recall - protests against “solicitation defects” must be filed at GAO prior to closing date or they are waived/untimely
- One exception: Protester files agency-level protest against solicitation defect **before** proposal submission, **and** then files at GAO within ten days of proposal submission



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Using Agency-Level Protest to Preserve Solicitation Defect Issues

- Illustration provided in CAEL decision
- Protest grounds at GAO in CAEL case were RFP did not contain necessary information and lacked sufficient detail
 - Protest dismissed as untimely because CAEL did not protest these issues until after RFP closing date
- What if - CAEL filed agency-level protest on those issues prior to the closing date?
 - Timely at GAO if filed within 10 days of submission, if CAEL submitted proposal



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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 SOW
- On 8/1/2007, CAEL submits and agency accepts proposal 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



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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



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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



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GAO Timeliness Rules and Debriefings

- Impact of Debriefings
- Government is required to give briefing 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))
- MUST be in writing and within 3 calendar days



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GAO Timeliness Rules and Debriefings

- Common question: Agency issues 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 agency's basis for exclusion
 - Can protest at agency
 - Better chances before agency has picked another offeror
 - Can protest at GAO



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GAO Timeliness Rules and Debriefings

- When protester requests required debriefing, protester has up to 10 days after debriefing to protest at GAO
- **BUT...** if stay of contract performance desired, **MUST, MUST, MUST** file the protest at GAO within **5 DAYS** of the post-award debriefing
- So - protest can be **TIMELY** at GAO, but still not timely to stay contract performance



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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



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Obtaining Stay of Contract Performance

- To obtain **stay of contract performance** (which is very important), 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



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Timeliness of Protests at COFC

- Until recently, no specific deadline for filing protests at COFC (except 6 year statute of limitations - 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)
- But COFC and Court of Appeals for Federal Circuit have embraced GAO's rules regarding protests of solicitation defects



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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 GAO timeliness rule at COFC for protests of errors apparent on the face of a solicitation
- Such errors - protested at COFC prior to the closing date for receipt of proposals (just like GAO), or the protest dismissed as untimely
- Federal Circuit: protesters cannot "sit on their rights" to challenge a solicitation they believe unfair
- Rule promotes efficient resolution of protest grounds when errors can be fixed with least disruption of procurement process. Meant to discourage strategic behavior by bidders ("rolling the dice" on award)



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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), operative principle is equitable concept of “laches”
- “Laches” means unreasonable delay – essentially saying - “You snooze, you lose”



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Timeliness of Protests at COFC

- Specifically, 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 likelihood of obtaining COFC injunction of contract performance



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“Corrective Action” Issues

- When faced with strong protest at GAO/COFC, agency may “throw in the towel”
 - take “corrective action” to address error alleged in the protest
 - Usually some form of “do over”
- GAO will dismiss protest as moot (GAO’s term: “academic”) when “corrective action” addresses error **agency** says it wants to correct
- Corrective action need not address errors raised in protest



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Protesting “Corrective Action”

- If agency’s “corrective action” not adequately corrective – or goes too far –
 - fight dismissal of protest on ground corrective action does not render all issues moot
 - 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.
- Then, promptly protest the corrective action!



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Protesting “Corrective Action”

- Key - show disconnect between proposed corrective action and error agency is supposedly trying to correct
- 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
- COFC – more likely than GAO to scrutinize lawfulness of agency corrective action
 - COFC can retain jurisdiction while “do over” conducted
 - COFC realizes undue burden to refile to address corrective action issues



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Protesting Corrective Action

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



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Protesting Corrective Action

- Partnership for Response and Recovery, B-298443.4 (Dec. 18, 2006)
 - Agency initial corrective action limited:
 - would appoint a new source evaluation board (SEB)
 - conduct de novo evaluation of competitive range offerors
 - planned to reopen discussions only for newly identified significant weaknesses that were not the subject of previous discussions
 - price revisions would be permitted only to extent they could be tied to technical changes resulting from new discussion questions
 - Agency later decided restrictions unworkable, and restrictions on the new evaluation, discussions and price revisions
 - Agency amended RFP to add new requirement



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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 notes agency can amend RFP to add new requirements as part of corrective action, not required to limit submission of revised proposals to address only those new requirements



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Significant Protest Decisions in 2008

- GAO
 - Tanker Protest – The Boeing Co., B-311344 (Jun 18, 2008)
 - Sustained protest of tanker award to Northrop Grumman/EADS
 - Air Force gives up on “do over” in 2008
- COFC
 - Serco, Inc. v. U.S., 07-691C (Mar. 5, 2008)
 - Talismanic technical point calculations are not a substitute for reasoned decision-making
 - Klinge Corp. v. U.S., 08-134C (June 10, 2008)
 - Trade Agreements Act bid protest
 - Adopts GAO rule that agency must reasonably investigate TAA complaint before award once given fair notice of TAA issue
 - Crafts new “substantial transformation” rule

