

Government Contracts: GAO Bid Protests

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

When procuring agencies fail to adhere to the terms of the solicitation and applicable law and regulation, offerors, potential or actual, may 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 terms an agency has included in the solicitations.
- Disappointed bidders with an opportunity to challenge a federal contract award to determine whether the agency's action conformed to federal procurement law and regulation.

At the same time, successful contract awardees must be prepared to intervene in a bid protest to defend their contract award.

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 (see *Practice Note, Government Contracts: Agency-level Bid Protests* (<http://us.practicallaw.com/2-561-9585>)).

- A protest filed with the GAO.
- A judicial action brought at the COFC.

This Note directly deals only with bid protests filed with the GAO.

GAO BID PROTESTS

The GAO, an agency of Congress, has been involved with the resolution of disputes concerning the award of federal contracts since at least the early 1930s, its authority being derived, according to the GAO, from its role in:

- Reviewing questions of whether federally appropriated funds were properly spent.
- Determining the final adjudication of appropriated fund accounts.

In essence, the GAO provided advisory opinions on the validity of contract awards, opinions that contracting officials could accept or ignore, but if ignored, opened the contracting officials to personal liability for expending appropriated funds unlawfully. For many years, the GAO was the sole forum available to aggrieved offerors. While the executive branch occasionally questioned the GAO's precise source of authority for its review of actions by executive branch agencies, those questions were resolved by the 1984 enactment of the Competition in Contracting Act (CICA) (31 U.S.C. § 3551), which provides a clear and explicit statutory mandate for the GAO's bid protest function. Furthering this authority and function, the GAO has promulgated regulations governing the bid protest process (4 C.F.R. § 21.0).

PROCUREMENT LAW CONTROL GROUP

Protests at the GAO are decided by the Procurement Law Control Group, consisting of some 40 attorneys within the Office of the General Counsel. The protester may, but is not required to, use either in-house or to protected information (necessary to develop the protest record fully) is almost always embargoed (see *Procedural Relief: The Protective Order*).

The procuring agency is represented by agency counsel who frequently plays a role in the procurement process.



WHO MAY PROTEST?

INTERESTED PARTIES

CICA extends the right to protest to an "interested party," defined to mean an actual or prospective offeror with direct economic interest that would be affected by either:

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

This is the same standard applied in agency-level bid protests.

Regarding prospective bidders or offerors, the GAO looks to whether a successful protest would allow the contractor to participate as a bidder or offeror going forward, regardless of whether the protester did so in the first round of bidding. If that test is satisfied, the protester qualifies as an interested party.

To have a direct economic interest, the protester must be either:

- In line for award.
- Able to compete for award if its position in the protest is sustained.

The necessary showing required of the protester depends on both:

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

Interested-party status is not accorded to:

- suppliers or subcontractors, associations, or organizations that do not perform contracts; and
- persons acting as private attorneys general, because those entities do not have a direct economic interest.

A contractor that is ineligible for award does not have a direct economic interest in the award. Therefore, ineligible contractors are not interested parties unless their protest contests a matter of eligibility (see *Common Protest Grounds*). Where multiple contract awards are made in the same procurement, one awardee cannot protest a second award to another party.

AWARDEE INTERVENORS

Where the protested contract has already been awarded, the awardee is entitled to intervene, although this does not always occur. From the awardee's standpoint, the better practice is to intervene because the agency and the awardee do not always agree on how best to defend the award. As a consequence of this potential disagreement, the agency may:

- Fail to defend the award as vigorously as the awardee.
- Be more inclined to undertake unilateral corrective action in response to the protest that rescinds the award (see *Agency Corrective Action*).

WHAT MAY BE PROTESTED: MATTERS OF JURISDICTION

Whether the GAO has jurisdiction over a bid-protest depends on both:

- The status of the entity conducting the procurement that is generating the protest (see *Status of the Entity*).
- The nature of the transaction being protested (see *Nature of the Transaction*).

STATUS OF THE ENTITY

Under CICA, the GAO may only consider protests of procurements of property or services by a federal agency. Federal agency is defined to include:

- An executive department or independent establishment in the executive branch.
- A wholly owned government corporation.
- Certain establishments in the legislative and judicial branches.

(40 U.S.C. § 102.)

Because the GAO's bid protest jurisdiction is no longer based on the procurement at issue involving the expenditure of appropriated funds, the GAO also entertains protests relating to no-cost contracts, in which the contractor offers to provide services at no cost to the government. These include concession contracts and procurements undertaken by a federal agency that do not rely on appropriated funds for its operations, such as:

- Federal prison industries.
- The US Mint.

The GAO does not consider protests:

- Involving procurements of entities that are not federal agencies, such as the exchange services of the military departments.
- Relating to procurements by federal agencies that have been exempted from CICA by their own authorizing legislation, such as:
 - the US Postal Service;
 - the Federal Aviation Administration;
 - the FDIC; and
 - the Centers for Medicare & Medicaid Services, for certain contract actions.

NATURE OF THE TRANSACTION

The Federal Acquisition Streamlining Act (FASA) (*Pub. L. No. 103-355, 108 Stat. 3243, 3264*) barred bid protests concerning the award of task or delivery orders issued under multiple-award indefinite delivery, indefinite quantity (ID/IQ) contracts, other than those protests alleging that the task or delivery order at issue exceeds the scope, period or maximum value of the underlying contract. Therefore, for almost 20 years, absent an exception, contractors have not been able to file GAO bid protests challenging the award of a task order under an ID/IQ contract based on typical post-award protest grounds as:

- An unreasonable evaluation.
- Unequal discussions.
- Improper best value trade-off analysis.

This restriction is still in effect for agency-level protests (see *Practice Note, Government Contracts: Agency-level Bid Protests: What May Be Protested-Matters of Jurisdiction* (<http://us.practicallaw.com/2-561-9585>)). However, the FASA bar does not apply to GAO protests of task and delivery orders placed under General Services Administration (GSA) multiple-award schedule contracts awarded as part of the Federal Supply Schedule.

In the National Defense Authorization Act (NDAA) for fiscal year 2008, Congress amended FASA to give the GAO exclusive jurisdiction to hear protests of the award of high value task or delivery orders (those valued at more than \$10 million). That jurisdiction was due to sunset after three years, but in the NDAA for fiscal year 2011, Congress extended the GAO's exclusive jurisdiction over bid protests of high value task and delivery orders through September 30, 2016. This sunset date remains in effect for protests of task and delivery orders issued by federal civilian agencies. However, a provision of the NDAA for fiscal year 2013 removed the sunset provision for protests of task and delivery orders issued by Department of Defense agencies. Therefore, the GAO now has permanent jurisdiction to hear protests of the award of high value task and delivery orders issued by defense agencies.

The GAO generally does not entertain protests relating to grants and cooperative agreements because those vehicles are not considered procurements of property or services. Likewise, protests arising out of subcontractor procurements are declined, unless either:

- The agency that awarded the prime contract requests the GAO to hear the protest.
- The ostensible prime contractor is actually an agent of the government (for example, federal research labs).

Similarly, the GAO does not hear protests involving the sale of property by a federal agency unless the agency agrees in writing to have the GAO decide the matter.

GAO TIMELINESS RULES

The GAO imposes strict timeliness rules to file a protest (4 C.F.R. § 21.2). The GAO justifies its stringent position as necessary to ensure that the impact of protests on the procurement process is minimized.

PROTESTS BASED ON DEFECTS APPARENT ON THE FACE OF THE SOLICITATION

Protests based on alleged solicitation improprieties that are (or should be) apparent before bid opening or the time set for receipt of initial proposals must be filed before either:

- Bid opening.
- Deadline for receipt of initial proposals.

For example, if a qualified small business concern interested in submitting a proposal wished to protest the fact that the solicitation should have been set aside for small business but was not, the protest must be filed before the date set for receipt of initial proposals because the fact that the procurement is not set aside is evident on the face of the solicitation.

PROTESTS NOT BASED ON DEFECTS APPARENT ON THE FACE OF THE SOLICITATION

Protests not based on defects apparent on the face of a solicitation must be filed within ten calendar days after the basis of protest is known or should have been known to the protester, whichever is earlier.

However, protests involving negotiated procurements where a debriefing is requested are timely if:

- The debriefing is requested in writing within three calendar days of learning of the contract award (a required debriefing).

- The protest is filed within ten calendar days after the required debriefing.

PROTESTS FILED AFTER AN AGENCY-LEVEL PROTEST

If an agency-level protest was previously filed, a follow-up protest to the GAO filed within ten calendar days of actual or constructive knowledge of initial adverse agency action is timely if the agency-level protest was timely filed.

Where the timely agency-level protest involved an alleged solicitation impropriety, a follow-up protest to the GAO is timely if filed within this ten-day period. This applies even if the GAO protest is filed after bid opening or the closing time for receipt of proposals. For information on the timeliness rules for agency-level bid protests, see *Practice Note, Government Contracts: Agency-level Bid Protests: Agency Level Timeliness Rules* (<http://us.practicallaw.com/2-561-9585>).

STAY OF CONTRACT AWARD OR PERFORMANCE

CICA requires federal agencies to suspend contract award or performance pending a protest to the GAO, provided the agency receives notice that a protest has been filed at the GAO within a specified timeframe. The purpose of the automatic stay is to ensure that effective relief can be obtained by a successful protester. The agency may override the automatic stay in certain limited circumstances (see *Automatic Stay When Award Has Not Been Made* and *Automatic Stay Where Award Has Been Made*).

AUTOMATIC STAY WHEN AWARD HAS NOT BEEN MADE

If award has not been made, after receipt of notice from the GAO that a protest has been filed, the agency must refrain from making any award while the protest is pending (31 U.S.C. § 3553(c)). However, the head of the procuring activity within the agency may override the stay and authorize award of the contract after a written finding that urgent and compelling circumstances exist that significantly affect interests of the federal government does not permit waiting for the GAO's decision in the protest.

AUTOMATIC STAY WHEN AWARD HAS BEEN MADE

If the contract has already been awarded, the agency must direct the awardee to cease performance of the contract while the protest is pending, provided that the protest has been filed and notice received from the GAO within the later of either:

- Ten calendar days of the award date.
- Five calendar days after any debriefing that is requested and, when requested, is required.

(31 U.S.C. § 3553(d).)

However, the head of the procuring activity within the agency may override the automatic stay and authorize performance of the contract after a written finding that either:

- Performance of the contract is in the best interests of the US.
- Urgent and compelling circumstances that significantly affect interests of the US will not permit waiting for the GAO's decision in the protest (see *GAO Decision*).

REQUIRED DEBRIEFINGS

An unsuccessful offeror in a negotiated procurement can avail itself of a required debriefing. A required debriefing is a debriefing requested:

- In writing.
- Within three calendar days of notification from the agency of:
 - exclusion from the competition (pre-award) (*FAR § 15.505(a)*); or
 - award to a competing offeror (post-award) (*FAR § 15.506(a)*). In the post-award context, the debriefing is intended to explain the contract award decision.

At a minimum, the agency debriefing must provide the disappointed offeror:

- An identification of what the agency considered the debriefed offeror's significant weaknesses.
- The evaluated cost and technical ratings of the successful offeror versus the debriefed offeror and past performance information on the debriefed offeror.
- The overall rankings of all offerors.
- A summary of the rationale for award.
- Reasonable responses to relevant questions about the source selection process and whether the applicable authorities were followed.

(*FAR § 15.506(d)*.)

If the debriefing is not requested in writing or not within the three-calendar-day period, it is not a required debriefing, with the consequence that a protest filed based on its timing does not stay contract award.

However, even if a protester complies with the GAO's timeliness rules for filing a protest, that does not necessarily ensure that the automatic stay is triggered in instances where contract award has been made and timeliness is keyed to the date of the debriefing. Further, even assuming the CICA time requirements are met for entry of an automatic stay, if at all possible the protest should be filed a day earlier than necessary to insure adequate time for the GAO notification to the agency that a protest has been filed. It is the notification to the agency within the time requirements that triggers the automatic stay, not the mere filing of the protest with the GAO. If the protest filing is being made on the last day the GAO should be advised of the need for expedition by prominently highlighting that fact on the first page of the protest, for example, "EXPEDITED NOTICE TO AGENCY REQUESTED: LAST DAY FOR CICA STAY."

BASIC COMPONENTS OF A PROTEST

The basic components of a protest include:

- Details of the solicitation.
- A statement of the legal and factual grounds of protest.
- Information establishing the protester's interested party status (see *Who May Protest*).
- Information establishing the timeliness of the protest (see *GAO Timeliness Rules*).
- The form of relief requested (see *Available Relief Granted by the GAO*).

Beyond listing these basic components, a protest filing generally requests:

- The production of documents relevant to the procurement and protest grounds.
- The entry of a protective order to govern the proceedings.
- A hearing before the GAO attorney handling the protest, to hear testimony and argument on contested factual matters relevant to protest issues.

THE PROTEST PROCESS

FILING AND SERVING THE PROTEST

A protest is commenced by filing a protest with the GAO's Procurement Law Control Group. A protest may be filed by:

- Hand delivery.
- Mail.
- Commercial carrier.
- Fax.
- E-mail.

(See *How to File a Bid Protest*.)

The easiest and now preferred method of filing a protest at the GAO is to e-mail a copy of the protest to **protests@gao.gov**, the GAO's designated official address for receipt of protests and protest-related filings. The protester must serve the procuring agency with a copy of the protest within one day of filing at the GAO. Within one day of the GAO's receipt of the protest, it must notify the agency by phone that the protest has been filed.

INITIAL GAO ACTION

Presuming a protective order has been requested (see *Procedural Relief: The Protective Order*), the protester must file a redacted copy of the protest with the GAO and the contracting agency within one day of the initial filing. The redacted copy is used by the agency to notify potential intervenors of the protest. Then, shortly after, the GAO must:

- Acknowledge the protest.
- Set deadlines for:
 - filing the agency report (see *Agency Report and Document Production*);
 - entry of a protective order (see *Procedural Relief: The Protective Order*); and
 - further processing of applications for entry to the protective order.

INTERVENTION BY OTHER OFFERORS

Other interested offerors, notably successful awardees, may file a notice of intervention. Other unsuccessful offerors also may file their own protests regarding the same procurement. If they do, the protests are consolidated. For more information on who can file a protest, see *Who May Protest*.

AGENCY REPORT AND DOCUMENT PRODUCTION

An agency motion to dismiss some or all of the protest grounds is occasionally filed within the first ten to 20 days, particularly if

untimeliness of the protest is self-evident. If this a motion is filed, the protester is given an opportunity to respond. The GAO then rules on the motion sufficiently in advance of the due date of the agency report.

An agency report consists of:

- An affidavit or memorandum from the contracting officer (CO) responding to the protest.
- A legal memorandum from agency counsel.

Shortly before filing the agency report, the agency provides a list of the documents it intends to produce in response to the protester's document requests. The agency must note any documents requested by the protester that the agency intends to withhold, to allow for expedited proceedings to resolve the production issue. The protester must file any objections to the withholding of requested documents within two calendar days. Under GAO rules, the agency can also request documents of the protester, although this is atypical.

No more than 30 calendar days after filing of the protest, the agency must:

- File its report and documents responsive to the protester's document requests with the GAO.
- Serve its report and responsive documents on the protestor and any intervenor.

PROTESTER COMMENTS AND SUPPLEMENTAL PROTESTS

The protester then has ten calendar days to:

- File comments on the agency report.
- Raise any supplemental protest grounds of which the protester is first made aware by:
 - the agency report; or
 - the documents produced by the agency.

If the protester fails to respond to the agency's rebuttal of any protest issue, the GAO deems that issue abandoned by the protester. The protester may file further document requests, which are due within two calendar days of the protester becoming aware of the existence of the documents being sought.

Intervenors must file any comments on the agency report within ten calendar days. While designated as comments on the agency report, in actuality the intervenor's comments oppose the protest and typically support the agency's position.

Extension of the Comment Period

The GAO will grant modest extensions of the comment period. However, these extensions do not extend the ten-day period in which a protester must raise new or supplemental protest grounds. The GAO cannot extend the deadline to raise new or supplemental protest grounds, as that timeliness requirement is deemed to be jurisdictional. Therefore, if the protester secures a three-day extension within which to file its comments and if those comments are accompanied by a supplemental protest, the supplemental protest will be dismissed as untimely because it was filed more than ten days after the protester became aware of the basis for its supplemental protest grounds.

SUPPLEMENTAL AGENCY REPORT

If the protester files a supplemental protest in response to the original agency report, the agency then must respond to the supplemental protest grounds by filing a supplemental agency report. The GAO's bid protest regulations do not specifically establish a shorter deadline for the production of a supplemental agency report than the 30 days afforded for the original report. However, in practice, the GAO requires agencies to file these reports within a much shorter timeframe, typically within ten calendar days depending on the detail and complexity of the supplemental protest. The shorter response time reflects the fact that:

- The supplemental protest grounds are narrower than the original protest (as they would need to be based on documents or information first revealed in the agency report).
- The agency has already provided much of the factual and documentary background for the procurement as part of the agency report.

Should any intervenor wish to file comments on the supplemental protest, it could theoretically do so within the time allotted to the agency. In practice, however, such filings by the intervenor are deferred until the protester replies to the agency's supplemental report (see *Protester's Reply to Agency Response*).

PROTESTER'S REPLY TO SUPPLEMENTAL AGENCY REPORT

The protester then has the opportunity to reply to the agency's supplemental report, typically within seven to ten calendar days of receipt. The intervenor also may file comments on the supplemental agency report during this period, with those comments also encompassing an opposition to the supplemental protest.

GAO HEARING

Following completion of the comment period, the GAO may hold a hearing to take testimony on disputed factual issues. Hearings are held at the discretion of the GAO. Typically held at the GAO's hearing room, the duration of the hearing is usually limited to one or two days, although, at the GAO's discretion, hearings may be conducted at other locations or over the phone.

All parties are entitled to file comments on the hearing within five calendar days after the transcript is produced, and the protestor must file comments or the protest will be dismissed.

GAO DECISION

The GAO must issue a decision on the protest within 100 calendar days of the protest filing. Where a supplemental protest has been filed, the GAO may extend the deadline by rolling the initial protest into the supplemental protest, but this rarely occurs. Instead, the GAO commonly decides the entire protest (initial and supplemental) within 100 days of the initial protest filing. Available statistics indicate an average decision time of fewer than 90 calendar days (for more GAO protest statistics, see *Box, GAO Protest Statistics*).

RECONSIDERATION OF THE GAO DECISION

A party to the protest may seek reconsideration of a decision. The request must be filed within ten calendar days of the GAO rendering

its decision. Grounds for reconsideration include:

- Failure of the GAO to consider evidence that should have been considered.
- Newly discovered evidence that the party could not reasonably have furnished for the initial consideration.
- Errors of law in the decision.

When faced with a request for reconsideration, the GAO does not have:

- A deadline for issuing its decision.
- A withhold award or suspend performance during the pendency of the reconsideration request.

STANDARD OF REVIEW AND COMPETITIVE PREJUDICE

The GAO reviews the agency action to determine whether it:

- Complies with applicable statutory and regulatory requirements.
- Is consistent with the terms of solicitation.

Cost and technical trade-offs in negotiated procurements are judged by the test of reasonableness and for consistency with the request for proposal's stated evaluation criteria.

COMPETITIVE PREJUDICE

Even if there has been a violation of statute or regulation or some other defect is shown, the protester must demonstrate competitive prejudice for the GAO to sustain the protest. Demonstrating competitive prejudice requires the protester to show that, but for the agency's actions being protested, it would have had a substantial chance or reasonable likelihood of award. What constitutes a substantial chance or reasonable likelihood depends on:

- The type of competitive procedure being used.
- The point in the competition at which the protest is brought.
- The nature of the procurement error involved.

Based on these considerations, there are some situations in which the GAO presumes that the protester was competitively prejudiced. For example, the GAO presumes competitive prejudice exists where the protester can show that either:

- The awardee had an apparent organizational conflict of interest.
- The agency engaged in unequal or improper discussions with offerors.
- The agency failed to provide the required pre-award notice to unsuccessful offerors in a small business set-aside and the awardee was ultimately determined not to be eligible for award.

While the GAO speaks to those circumstances where prejudice is being presumed, the presumption of prejudice is rebuttable, and the agency is given the opportunity to argue that the protester was not prejudiced by the alleged error.

AVAILABLE RELIEF GRANTED BY THE GAO

The GAO may grant:

- Procedural relief, to ensure the integrity and thoroughness of the protest process (see *Procedural Relief: The Protective Order*).
- Substantive relief, if the protest is sustained (see *Substantive Relief*).

PROCEDURAL RELIEF: THE PROTECTIVE ORDER

Because the extent of information conveyed by a debriefing is typically limited, the complete details of the procurement process often are not revealed until the protester obtains the additional material made available in:

- The documents relevant to the procurement and selection process.
- The agency report, responding to the protest.

(See *Agency Report and Document Production*.)

The protester may then file additional or supplemental protest grounds, which frequently become the primary focus of the protest (see *Protester Comments and Supplemental Protests*).

Dissemination of this documentation would be impossible without the GAO's protective order regimen because the contract file contains source selection information and offeror proprietary information that cannot be publicly disclosed. The protective order is the very keystone of the GAO bid protest process because it allows counsel for the protester to:

- Learn the details of how the agency conducted the procurement.
- Assess independently the relative strengths and weaknesses of the awardee's proposal as compared to that of the protester.

Only attorneys (generally outside counsel) and consultants retained by attorneys may be admitted to a protective order. Protected information may not be disclosed to someone not admitted to the protective order. This means that a protester's or intervenor's counsel may not reveal the protected information to the client.

The GAO's protest procedures allow for the creation of redacted versions of protest filings to protect confidential information from public disclosure. Clients are kept informed of a protest's progress through these redacted comments and reports. All parties to the protest must agree to the redactions before distribution. The GAO closely oversees the protective order process to maintain the integrity of the bid protest system and in the event of violations may impose sanctions up to and including dismissal of the protest.

SUBSTANTIVE RELIEF

If the GAO sustains a protest, it may recommend that the contracting agency implement any one or combination of the following remedies:

- Refrain from exercising options under the contract.
- Terminate the contract.
- Recompete the contract.
- Issue a new or revised solicitation.
- Pay the protester the costs of:
 - filing and pursuing the protest (including attorneys' fees and consultant fees); and
 - bid and proposal preparation, where no other substantive relief is possible (such as when there is no reasonable prospect for recompeting the contracting opportunity).
- Other relief that the GAO determines necessary to promote compliance with statutory and regulatory requirements applicable to the procurement.

The GAO's action is only a recommendation because the constitutional separation of powers doctrine precludes the GAO, as a congressional agency, giving orders to executive branch agencies. However, federal agencies have a strong incentive to comply with the GAO's recommendation because CICA requires the GAO to report to Congress every time a federal agency fails to fully implement a GAO recommendation in connection with a bid protest (31 U.S.C. § 3554(e)(2)).

During the last 16 years (fiscal year 1998 through fiscal year 2013), the GAO has reported 44 such instances, with 34 of those instances related to the Department of Veterans Affairs' (VA) disagreement during fiscal years 2012 and 2013 with the GAO's interpretation of the extent of the VA's obligation to set aside procurements under the GSA's federal supply schedule for service-disabled, veteran-owned small business or veteran-owned small business concerns. Aside from that one specific set of protest decisions in fiscal years 2012 and 2013, the instances in which a federal agency has failed to fully implement the GAO's protest recommendations have been rare, averaging fewer than one per year (for more information on GAO protest statistics, see *Box, GAO Protest Statistics*).

AGENCY CORRECTIVE ACTION

If the contracting agency determines that its position in a protest is vulnerable, it may elect to take unilateral corrective action to:

- Remedy or address the alleged errors raised in the protest.
- Address other errors the agency has discovered.

Corrective action may be taken at any time before the protest is decided. Provided the corrective action adequately addresses the error that the agency says it is trying to correct, the GAO generally dismisses the protest as moot or academic.

Corrective action may be and often is less remedial than what the protester is seeking. It may also be predicated on errors discovered by the agency rather than errors raised in the protest. Therefore, the corrective action need not resolve the errors raised in the protest.

If the agency advises the GAO of its decision to take corrective action before the time for filing the agency report, the GAO considers the agency action to be prompt and will then not recommend reimbursement of protest costs. However, if the agency waits until later in the proceedings before taking corrective action, the GAO may recommend that the agency pay the protester's reasonable protest costs.

CORRECTIVE ACTION PROTESTS

The corrective action itself can be protested by:

- **The protester** who can argue that the corrective action does not adequately address the flaws in the procurement that have been raised.
- **The intervenor** who can argue that the corrective action is excessive.

A corrective action protest may be brought at either the GAO or the COFC. Because the GAO takes a much more deferential approach to agency corrective action decisions, the COFC generally is more amenable to overturning corrective actions deemed inadequate or excessive.

PROCESSING OF AWARDS OF PROTEST COSTS

When the GAO recommends that the agency pay the protester the costs of filing and pursuing a protest, it leaves it to the parties to agree on the amount. The protester must submit its detailed and certified cost claim to the agency within 60 calendar days after the GAO's recommendation that costs be paid. If the parties cannot reach agreement on amount within a reasonable time, the protester may then bring the matter to the GAO for decision.

FASA places a cap on attorneys' fees of \$150 per hour (which is regularly adjusted upward to account for inflation since the effective date of FASA's statutory cap in October 1995), unless the agency determines, on the recommendation of the GAO, that a higher rate is justified. This cap, however, does not apply to a small business that has successfully protested.

When the GAO dismisses a protest as academic because the agency has announced its decision to take voluntary corrective action, the GAO decision dismissing the protest does not include a recommendation that the agency pay the protester its protest costs. However, if the agency unduly delayed taking corrective action in a clearly meritorious protest, the protester may file a request with the GAO for a recommendation that the agency pay the protester its protest costs. In this case, the protester must file its request for a recommendation of payment of protest costs with the GAO within 15 calendar days of the date on which the protester learned (or should have learned) that the GAO had closed the protest (typically, the date of the GAO's decision dismissing the protest) (see *Agency Corrective Action*).

JUDICIAL PROCEEDINGS DURING PENDENCY OF THE PROTEST

The GAO will dismiss a protest if the protester commences an action at the COFC relating to the same procurement while the GAO protest is pending. Moreover, if another offeror in the same procurement commences a protest action at the COFC, the GAO will dismiss the protest of that procurement pending before the GAO.

However, this dismissal rule does not extend to judicial challenges to agency overrides of the CICA automatic stay (see *Stay of Contract Award or Performance*). Therefore, if the protester brings an action in the COFC to enjoin the override of the automatic stay, the GAO will then continue to entertain the protest while the COFC decides whether the override was arbitrary and capricious. The GAO itself will not consider a protest of an agency override of the automatic stay.

WHY BRING A GAO PROTEST?

The advantages of bringing a protests to the GAO include:

- The GAO is an independent, experienced administrative tribunal with decades of experience deciding bid protests.
- GAO decisions are published and constitute a recognized body of government contracts law.
- The forum is transparent and impartial.
- Protester's counsel can have access to offerors' proprietary information and agency source selection materials under protective order.
- At the GAO, it is sometimes possible to secure a hearing, at which live testimony is taken to help in resolution of significant factual disputes. By contrast, the COFC decides on the basis of

the administrative record, which is supplemented by deposition testimony or affidavits only when necessary to complete a record.

- The entire record of the GAO protest is admitted into the COFC record in the event of a later COFC protest, which may serve to admit documents at the COFC that would not otherwise be admissible in a COFC protest.
- A GAO protest usually is less expensive and less formal than a COFC protest.
- If the protest is promptly filed, contract award or performance is stayed. This ensures that the protester's entitlement to reap the full benefits of a sustained protest is not diminished by ongoing contract performance of the apparent awardee, which advances to such a degree that contract termination and resolicitation of the requirement becomes a practical impossibility. If the protester is the incumbent contractor for the requirement, stayed performance of the new follow-on contract likely will result in an extension of the prior contract during the pendency of the protest.
- A protester may obtain a "second bite at the apple" in the event of a prior unsuccessful agency protest, because it can file another protest at the COFC if the GAO denies the protest.
- Attorneys' fees are awarded to the successful protester (albeit at capped rates), while at the COFC, only small-net-worth entities are eligible for award under the more demanding requirements of the Equal Access to Justice Act.

COMMON PROTEST GROUNDS

Protest grounds are as varied as the procurements from which they arise and the multitude of statutory and regulatory provisions that govern. Therefore, enumeration of an exhaustive laundry list is not feasible in this Note. A few of the more frequently encountered protest grounds include:

- **Less than full and open competition.** This includes situations where there are:
 - unjustified sole source awards; and
 - restricting proposals to the original equipment manufacturer or a name brand.
- **Solicitation defects.** This includes situations whether the agency has allegedly:
 - failed to set aside the procurement for small business;
 - improperly set aside the procurement for small business concerns;
 - bundled requirements without justification; or
 - imposed solicitation requirements that are unduly restrictive of competition.

Aside from the pre-award solicitation-related protest grounds discussed above, which must be raised before the deadline for submission of offers, there are several other common protest grounds that arise only after the agency has received offers and begun (or completed) the evaluation and award process. These include:

- Flawed competitive range determinations.
- Evaluation inconsistent with the evaluation criteria specified in the solicitation.
- Use of unstated evaluation criteria.

- Failure to account for apparent adverse information regarding the awardee, including integrity-based challenges to CO determinations of contractor responsibility.
- Improper past performance evaluation.
- Lack of meaningful discussions.
- Improper price or cost realism evaluation.
- Improper or unreasonable technical evaluation.
- Improper best value determination.
- Unequal treatment.
- Failure to document or support the evaluation and award decision adequately.
- Latent ambiguity in the solicitation.
- Organizational conflicts of interest (see *Organizational Conflicts of Interest*).
- Failure to satisfy the 50% small business concern prime contractor requirement (commonly referred to as the 50% subcontracting limitation) in a small business set aside procurement (15% in construction contracts). For more information on the small business subcontracting rule, see: *Legal Updates, SBA Releases New Rules Implementing Small Business Jobs Act of 2010* (<http://us.practicallaw.com/8-535-3587>) and *SBA Amends Government Contracting Regulations for Small Businesses* (<http://us.practicallaw.com/5-544-3085>).

ORGANIZATIONAL CONFLICTS OF INTEREST

The following types of organizational conflicts of interest are often grounds for bid protests:

- **Unequal access to information.** Where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract.
- **Biased ground rules.** Where a firm as part of its performance of a government contract has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications for that other contract.
- **Impaired objectivity.** Where a firm's work under one government contract could entail the firm evaluating itself through either assessment of its own performance under another contract or evaluation of its own proposals or its competitors' proposals in a procurement process.

GAO PROTEST STATISTICS

Overall protest activity increased between 16% and 20% annually during fiscal years 2008-2010. A significant factor in the increased protest activity in FY 2009 and FY 2010 was the expansion of GAO's bid protest jurisdiction to encompass task and delivery order competitions in excess of \$10 million. Since fiscal year 2010, protest activity at the GAO has leveled off, with total protests filed only increasing slightly more than 3% between fiscal years 2011 and 2013 (including a 2% decrease in total protests filed in fiscal year 2013).

Total protests filed at the GAO between fiscal years 2010 and 2013 have been in the 2,300 to 2,500 per year range or nine to ten protests per business day. This level of activity should not be equated with the number of procurements that are challenged, which is a lesser number. Where a protester files one or more supplemental protests or where multiple parties protest the same procurement action, new docket numbers are assigned by the GAO for each protest. Each of these docket numbers is deemed a separate protest for GAO statistical reporting purposes.

The number of cases closed each year closely tracks the number filed. Merits decisions (published opinions) are rendered in nearly 20% of total dispositions. While this percentage is not calculated by the GAO and, is in fact inaccurate in view of how the GAO maintains its protest statistics, it is still referenced here because of its prevalence in the procurement literature. To illustrate the inaccuracy, the much-publicized 2008 Boeing tanker protest that the GAO sustained involved eight separate dockets, yet the decision counts as only one merits decision.

The balance of GAO protests are resolved by:

- Summary dismissal, where, for example, the protest is untimely on its face or the protester is found not to be an interested party.
- Dismissal for reasons of mootness where the agency takes unilateral corrective action.
- Alternative dispute resolution (ADR), which occurs in nearly 9% of cases.
- Voluntary withdrawal of the protest, where, for example, a settlement is reached between the protester and the procuring agency.

On average, hearings are held in nearly 50 protests annually.

Of those protests that are the subject of a merits decision, the GAO during the past ten years has sustained the protest on average 20% of the time. While sustain rates as high as 29% in fiscal year 2006 and 27% in fiscal year 2007 have been recorded, over the past five years, the sustain rate has ranged between 16% and 19%. The GAO also reports what it calls an effectiveness rate that is based on what is described as a protester obtaining some form of corrective action relief from the agency as reported to the GAO. The effectiveness rate averages 41% of cases closed, and reached as high as 45% in fiscal year 2009. Therefore, between protests that were sustained on the merits and corrective action, protesters have ultimately obtained some form of relief in 34% to 45% of the protests brought before the GAO since fiscal year 2004.

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Government Contracts: COFC Bid Protests

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This Practice Note provides an overview of US Court of Federal Claims (COFC) 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 COFC bid protests compared to protests filed at the agency level and with the Government Accountability Office (GAO).

When procuring agencies fail to adhere to the terms of the solicitation and applicable law and regulation, offerors, potential or actual, primarily use the 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, successful contract awardees must be prepared to intervene in the protest to defend their contract award.

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 at issue (see *Practice Note, Government Contracts: Agency-level Bid Protests* (<http://us.practicallaw.com/2-561-9585>)).

- A protest filed with the Government Accountability Office (GAO) (see *Practice Note, Government Contracts: GAO Bid Protests* (<http://us.practicallaw.com/2-581-7651>)).
- A judicial action brought at the US Court of Federal Claims (COFC).

This Note directly deals only with bid protests filed in the COFC.

COFC BID PROTESTS

While bid protests can also be filed with the relevant government agency or the GAO, the only court empowered to entertain federal bid protest actions is the COFC (28 U.S.C. § 1491(b)). For more information on the history of judicial consideration of bid protests and the creation of the COFC, see *Box, Judicial Consideration of Bid Protests*.

The COFC is composed of 17 regularly sitting judges, seven of whom are currently active senior judges. Cases are randomly assigned by the Clerk's office on filing of the complaint, and absent unusual circumstance, remain throughout the case with the judge initially assigned. COFC decisions are reviewed by the United States Court of Appeals for the Federal Circuit (Federal Circuit), which, absent Supreme Court review, is the court of last resort. Therefore, COFC judges are bound by Federal Circuit precedent but not by prior COFC decisions, even when directly on point. However, COFC judges do give careful consideration to prior COFC decisions.

The COFC is also not bound by GAO decisions that may have considered an issue directly on point or even a GAO protest decision involving the same procurement before the COFC. COFC judges do however seem to give GAO decisions a relatively high degree of deference, but point out that when the issue is a question of law, no deference is required. The interrelation between the COFC and the GAO is considerably more complicated when the court is called on to consider a protest that already has been the subject of a GAO decision (see *Procurement Related Activity*).



In a COFC protest, the bid protester must be represented by counsel who is a member of the bar of the court. The agency is represented by a Department of Justice (DOJ) attorney from the Civil Division, who generally is assisted by agency counsel. Where there has been a contract awarded, the awardee is entitled to intervene and typically does so more often than at the GAO level.

WHO MAY PROTEST?

The Administrative Dispute Resolution Act (ADRA) provides that the COFC has jurisdiction over protests of procurement-related actions brought by "interested parties" (28 U.S.C. § 1491(b)(1)). Unlike the Competition in Contracting Act (CICA) with respect to GAO protest jurisdiction, the ADRA does not define interested party.

The district courts, which exercised protest jurisdiction for several years before the ADRA (and which exercised concurrent jurisdiction with the COFC for the period of 1996 through 2000), applied the law of standing as developed under the Administrative Procedure Act (APA). This was a more lenient standard than the CICA definition of interested party. A majority of the COFC judges who considered this question in the first five years of the COFC's ADRA protest jurisdiction agreed with the district courts.

Once concurrent district court jurisdiction expired in 2001, the Federal Circuit moved to end reliance on the APA concept of standing and adopted the more restrictive CICA definition already applicable to the GAO (see *Practice Note, Government Contracts: GAO Bid Protests: Who May Protest?* (<http://us.practicallaw.com/2-581-7651#a935283>)). However, as applied on a case-by-case basis, one could argue that the Federal Circuit and the COFC have determined to define interested party even more narrowly than the GAO.

The Federal Circuit has caused further confusion by requiring proof of competitive prejudice in the standing or interested party inquiry. A protester previously had to address competitive prejudice only in the context of relief on the merits. Questions of standing focus not on the merits, but on whether a party has the right to seek judicial review. But now according to the Federal Circuit, "the prejudice issue must be reached before addressing the merits," which can require a mini-determination of the merits at the outset of the case, only to have to revisit the merits issues in the case in chief.

WHAT MAY BE PROTESTED: MATTERS OF JURISDICTION

The COFC's mandate provides for jurisdiction over an action objecting to:

- Solicitations by agencies for bids or proposals for proposed contracts.
- Awards or the proposed awards of contracts.
- Any alleged violations of statutes or regulations about procurements or proposed procurements.

(28 U.S.C. § 1491(b)(1).)

The Federal Circuit has not yet fully delineated the boundaries of this jurisdictional grant, but it appears broader than the GAO's protest jurisdiction (31 U.S.C. § 3551(1)). For more information on GAO bid protest jurisdiction, see *Practice Note, Government Contracts: GAO Bid Protests: What May be Protested: Matters of Jurisdiction* (<http://us.practicallaw.com/2-581-7651#a987794>).

Protesters should consult COFC and Federal Circuit precedent before bringing suit to confirm that there is jurisdiction over:

- The procuring entity (see *Procuring Entity*).
- The type of procurement or procurement-related activity intended to be protested (see *Procurement-related Activity*).

PROCURING ENTITY

The ADRA does not define "federal agency." Whether the Federal Circuit will opt for the CICA definition, as it did regarding interested party, has yet to be definitively decided. The inclination to date is to use the definition of agency found in Section 451 of Title 28 of the U.S. Code.

Individual judges of the COFC occasionally depart from GAO jurisdictional decisions about certain types of procurements. For example, the court:

- Agreed to hear the protest of a true non-appropriated fund instrumentality procurement, despite the GAO's categorization that this entity was not a federal agency (*Joyce Terry d/b/a Shirt Shack v. United States*, 96 Fed. Cl. 131 (2010)).
- Declined to hear a protest of a Small Business Innovation Research program award decision, although the GAO considers these protests as they apply to a limited range of issues (*R & D Dynamics Corp. v. United States*, 80 Fed. Cl. 715 (2007)).

PROCUREMENT-RELATED ACTIVITY

Task and Delivery Orders

The COFC's jurisdiction includes protests of task and delivery orders placed under General Services Administration (GSA) Multiple Award Schedule (MAS) contracts awarded as part of the Federal Supply Schedules, which is similar to the situation governing protests at the GAO.

It does not however have jurisdiction regarding protests of task and delivery orders issued under already existing agency indefinite delivery/indefinite quantity (ID/IQ) contracts, which is similar to the situation governing protests at the agency level.

As a result, only the GAO has jurisdiction over protests of task and delivery orders awarded under existing ID/IQ contracts and then only for task and delivery orders valued in excess of \$10 million (41 U.S.C. § 4106(f)). The Federal Circuit has recently emphasized that attempted protests of task order awards brought at the COFC must be dismissed for lack of jurisdiction (*SRA Int'l, Inc. v. United States*, 2014 WL 4494775 (Sept. 15, 2014)).

For more information on the jurisdiction of the other two bid protest forums, see *Practice Notes, Government Contracts: Agency-level Bid Protests: What May Be Protested: Matters of Jurisdiction* (<http://us.practicallaw.com/2-561-9585#a978214>) and *Government Contracts: GAO Bid Protests: What May be Protested: Matters of Jurisdiction* (<http://us.practicallaw.com/2-581-7651#a987794>).

Agency Override of the CICA Automatic Stay

CICA requires federal agencies to suspend contract award or performance pending a protest to the GAO. The Federal Circuit has confirmed the COFC's jurisdiction to entertain these protests of agency determinations to override the CICA automatic stay. The COFC now routinely hears these actions. For more information, see *Practice Note, Government Contracts: GAO Bid Protests: Stay of Contract Award or Performance* (<http://us.practicallaw.com/2-581-7651#a118283>).

Agency Acceptance of GAO Recommendations

Another area unique to COFC protest jurisdiction involves protests of a federal agency's acceptance of the GAO's recommendations resulting from a successful GAO protest (see *Practice Note, Government Contracts: GAO Bid Protests: Substantive Relief* (<http://us.practicallaw.com/2-581-7651#a764281>)). In this case, the apparent awardee, which in all likelihood was an intervenor before the GAO, brings the COFC action. These actions seek to undo the GAO protester's victory. The basis for this type of protests is that the GAO decision was irrational and, therefore, the agency decision relying on and seeking to implement the GAO decision was also irrational.

Agency Rejection of GAO Recommendations

This final and rare category of action, that only the COFC can entertain, involves the protest of a federal agency's decision to disregard the GAO's recommendation resulting from a successful GAO protest. Again, the basis here is that the agency's action was irrational.

TIMELINESS RULES

There is no specific statute of limitations forbid protests at the COFC. The general six-year statute of limitations applicable to most COFC actions presumably applies (28 U.S.C. § 2501), but in practice is not relevant because the procurement activity being protested almost always will have long since moved on. The COFC has instead applied equitable doctrines, such as laches, to preclude bid protests that were timely brought within the statute of limitations period (see *Post Award Protests*).

SOLICITATION DEFECTS

The Federal Circuit has moved to impose a prudential timeliness rule that covers protests of solicitation defects. The appeals court held that a party waives its rights to challenge a solicitation defect in the COFC when the party:

- Had the opportunity to object to the terms of a government solicitation containing a patent error.
- Failed to object to these terms before the close of the bidding process.

(*Blue & Gold Fleet, LP v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2010).)

Therefore, the COFC and the GAO now operate under the same timeliness rule for solicitation defects (see *Practice Note, Government Contracts: GAO Bid Protests: Protests Based on Defects Apparent on the Face of the Solicitation* (<http://us.practicallaw.com/2-581-7651#a531591>)).

Protesters seeking COFC review of a GAO protest of a solicitation defect should note that:

- A COFC protest will be dismissed as untimely if the earlier GAO protest was untimely.
- If the GAO protest was timely but resolved unfavorably, protesters should file the COFC action:
 - immediately on issuance of the adverse GAO decision; and
 - before contract award.

If the challenged solicitation defect does not render the protester ineligible to submit a proposal (such as a challenge by a large business to an agency's decision to set aside a procurement for small businesses), protesters should also submit a proposal or bid in response to the defective solicitation, pending resolution of its GAO protest, to maintain interested party status for any later protest to the COFC. Failure to do so can result in dismissal of the COFC action.

POST AWARD PROTESTS

There has been no movement at the COFC toward adoption of the GAO's ten-day rule for post award protests (see *Practice Note, GAO Bid Protests: Protests Not Based on Defects Apparent on the Face of the Solicitation* (<http://us.practicallaw.com/2-581-7651#a586135>)). The COFC instead looks to equitable doctrines, such as laches and equitable estoppel when considering timeliness. For example, the COFC has invoked laches to dismiss a protest as untimely where the protester knew of the alleged procurement flaw for several months without acting promptly to assert its rights in a protest. Undue delay in filing a bid protest can also affect the COFC's weighing of injunctive relief factors, such as if the court finds that the delay has magnified the harm to the government entity of granting an injunction to stay contract award or contract performance (see *Stay of Contract Award or Performance*). The wisest course is to then file a protest at the COFC as soon as practicable and not to view the lack of a specific filing deadline as an invitation to delay.

STAY OF CONTRACT AWARD OR PERFORMANCE

The CICA automatic stay has no application to COFC bid protests. For information on CICA automatic stays, see *Practice Note, Government Contracts: GAO Bid Protests: Stay of Contract Award or Performance* (<http://us.practicallaw.com/2-581-7651#a118283>). Therefore, to prevent contract award or performance, the protester must secure one or both of the following forms of provisional injunctive relief:

- A temporary restraining order.
- A preliminary injunction (see *Standard for Preliminary Injunctive Relief and Likelihood and Consequences of Preliminary Injunctive Relief*).

STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

When considering a request for preliminary injunctive relief, the COFC has adapted for bid protests the four-factor test routinely used in federal district court litigation.

Reasonable Likelihood of Success on the Merits

The practical consequence of this factor, where the protestor demonstrates a reasonable likelihood of success on the merits, is that a bid protest seeking preliminary injunctive relief is often effectively concluded at an early stage because the substantive merits of the protest grounds are tested in the context of deciding the request for preliminary injunctive relief. This pre-trial on the merits typically arises where the protester vigorously pushes a claim for preliminary injunctive relief and the agency adamantly refuses to stay its hand.

However, not all protests seeking preliminary injunctive relief follow this pattern. The agency may voluntarily stay its hand, in whole or in part, pending briefing on the case at the COFC, resulting in consideration of entitlement to injunctive relief on a more fully developed record that resolves the case on the merits.

Irreparable Harm

This factor, where the protestor attempts to show that it will likely suffer irreparable harm if injunctive relief is not granted, usually weighs in favor of the protestor because monetary relief is inadequate, being limited only to bid preparation and proposal costs. Therefore, a lost opportunity to compete on a level playing field for a contract and to earn the profit under the contract is sufficient to prove irreparable harm in a bid protest.

Balance of Hardships

This factor, where the balance of hardships to the respective parties favors the grant of injunctive relief, entails balancing the harms to:

- The protestor.
- The agency.
- The contract awardee, if the contract has been awarded.

In assessing this factor, the court generally considers affidavits and may even take live testimony. It is in the context of the balance of hardships that the government often raises issues of timeliness, for example:

- Why did the protestor not protest at the GAO first (if applicable).
- If there was a GAO protest, why did the protestor wait so long after the GAO decision to appeal in the COFC.

Another argument often presented by the government is the agency's pressing need for the item or service being procured. In weighing this contention, the COFC has demonstrated a willingness to consider the availability of alternative acquisition vehicles, such as:

- Short-term follow-on contracts to the prior incumbent contractor.
- Bridge contracts to tide the agency over during the pendency of the protest.

It is when considering the balance of hardships and the public interest that the government often invokes Section 1491(b)(3), title 28 of the U.S. Code, which instructs the COFC when deciding a bid protest to "give due regard to the interests of national defense and national security."

In the Public Interest

Somewhat offsetting the effect of Section 1491(b)(3) is the overriding public interest in preserving the integrity of the procurement process. Under this factor, the COFC considers whether the procuring agency followed applicable procurement statutes and regulations.

LIKELIHOOD AND CONSEQUENCES OF PRELIMINARY INJUNCTIVE RELIEF

Grants of preliminary injunctive relief by the COFC are relatively rare. The court generally heeds the advice of the Federal Circuit that "equitable powers should be exercised in a way which best limits judicial interference in contract procurement" (*United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1372 (Fed. Cir. 1983)).

If preliminary injunctive relief is granted, the protestor must be prepared to provide adequate security in an amount that the court considers proper, to pay the costs and damages sustained by any party later found to have been wrongfully enjoined. An informal survey of relevant COFC decisions shows bond requirements ranging between \$1,000 and \$100,000.

THE PROTEST PROCESS

A bid protest action at the COFC is resolved under the Rules of the US Court of Federal Claims (RCFC), like any other case prosecuted before the court. These rules are modeled on the Federal Rules of Civil Procedure with modifications to account for the court's non-jury nature and its unique jurisdictional grants. Appendix C to the RCFC also describes standard practices to be followed in bid protest cases.

PRE-FILING NOTICE

At least 24 hours in advance of filing a complaint, the protestor's counsel must provide advance notice of the impending action to:

- The DOJ.
- The Clerk of the COFC.
- The procuring agency's contracting officer.
- The contract awardee, if there has been a contract award and if the protestor has received notice of the identity of the awardee.

This pre-filing notification requirement is intended to expedite proceedings by permitting:

- The DOJ to assign an attorney to the case who can address relevant issues promptly.
- The court to ensure the availability of judicial resources.

The notice must address, among other things, whether:

- The plaintiff contemplates requesting preliminary injunctive relief.
- There has been or is pending a GAO protest of the same procurement.

For a sample pre-filing notice, see *COFC: Sample Bid Protest Pre-Filing Notice*.

COMMENCING THE BID PROTEST ACTION

The action is commenced when the protester:

- Files with the clerk's office hard copies of the complaint.
- Pays the clerk's office the filing fee (\$400).
- Files a completed copy of the Civil Cover Sheet form required by the court.
- Files a corporate disclosure statement under RCFC 7.1, if the protester is a non-governmental corporate party. The purpose of this form is to allow the judge assigned to the case to determine whether the judge holds financial or stock interests in the protester or its parent corporation that warrants recusal.
- In most cases, files motions for:
 - leave to file under seal (with accompanying redacted copies of the complaint); and
 - the entry of a protective order (see *Procedural Relief*).
- Where preliminary injunctive relief is sought, files these motions with a supporting brief (both unredacted and redacted).

After the initial hard-copy filing (which typically includes all of the above documents), the clerk docket the case on the COFC's Electronic Case Filing (ECF) system, and all later filings are made electronically. Filing electronically also effects service of the papers on DOJ and agency counsel.

INITIAL STATUS CONFERENCE

As soon as practicable after the action is commenced, the judge assigned to the case holds an initial status conference with the parties. This can occur as promptly as the day of filing and rarely takes place more than two business days after filing. Matters treated at the conference include:

- Admission of the awardee as an intervenor, if the awardee so elects.
- Entry of a protective order, if requested (see *Protective Order*).
- Where preliminary injunctive relief is sought:
 - whether, absent that relief, the court's ability to afford effective final relief is likely to be prejudiced;
 - whether the government agrees to suspend performance pending a hearing on the motion for preliminary injunction;
 - whether the government agrees to suspend performance pending a final decision on the merits;
 - entry of a schedule for completion of briefing on the motion for preliminary injunction; and
 - whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits.
- The content of and time for filing the administrative record which is comprised of the documents underlying the agency decision contested by the protest. In a post-award protest, these documents typically include, at a minimum:
 - the solicitation and any amendments;
 - the proposals of the protester and awardee and other interested parties;
 - the contents of any discussions with offerors;

- the documents memorializing the agency's evaluation of offers/proposals; and
- the source selection decision memorandum or other document memorializing the award decision (see *paragraph 22 of Appendix C to the RCFC*).
- The administrative record would likely be more limited in the case of a pre-award protest, as there would not be proposals or evaluation records to produce. If a protest at the GAO concerning the same procurement preceded the protest at the COFC, the records of the GAO protest (including the various filings and evidence submitted by the parties and any decision issued by the GAO) are also considered part of the administrative record that should be produced in the COFC.
- Whether supplementing the administrative record is appropriate (see *Procedural Relief*).
- Scheduling all further proceedings.

PROCEDURE FOR SUBSTANTIVE PROTEST DETERMINATION

Filing of the administrative record usually occurs within two weeks of the initial status conference. If the administrative record reveals additional grounds of protest, the protester should file an amended complaint.

In the event of a motion for preliminary injunction, a decision is rendered from the bench or shortly after briefing and oral argument, unless the resolution of the motion is deferred to a hearing on the merits.

Bid protests are resolved by motions for judgment on the administrative record, which in essence amounts to an expedited trial on a paper record (*RCFC 52.1*).

The order of briefing varies by judge, but most commonly is:

- The protester files first.
- The government and intervenor (if there is one) respond and cross-move.
- The protester replies and responds to the cross-motions.
- The government and intervenor reply.

At least one judge of the court has been known to reverse the order by requiring the government and intervenor to file first, while other judges employ simultaneous filings.

OPINION AND APPEALS

Following the close of briefing, the following events occur in sequence:

- Oral argument is held.
- The court issues an opinion to the parties under seal, pending agreement by the parties on a publicly releasable redacted version.
- The parties confer about redactions and identify their proposed redactions to the court's opinion.
- The court issues a public, redacted version of the opinion.

Once judgment is entered, the unsuccessful party may appeal to the Federal Circuit. Appeals in bid protests are usually taken by the protester. The DOJ rarely appeals an adverse decision, as its client agency is generally more interested in moving forward with the procurement.

STANDARD OF REVIEW AND COMPETITIVE PREJUDICE

The COFC's standard of review in bid protest cases, as prescribed in the APA, is whether the agency's decision is:

- Arbitrary.
- Capricious.
- An abuse of discretion.
- Otherwise not lawful.

(28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706.)

The court looks to see if either:

- The procurement decision lacks a rational basis.
- The agency's actions involved a violation of statute or regulation.

COFC STANDARD OF REVIEW VERSUS GAO STANDARD OF REVIEW

A casual comparison with the GAO's standard of review suggests a similar approach in both forums. However, in practice, that is not necessarily the case. COFC judges routinely emphasize:

- The deference owed agency procurement decisions in conformity with Federal Circuit guidance (for example, speaking of the protester's heavy burden).
- Where discretionary judgments are at issue (as is the case in negotiated procurements) that the deference accorded the agency is further elevated.

Overall, the COFC appears to apply a stricter standard of review, resulting in more deferential treatment of agency award decisions. For information on the GAO's standard of review, see *Practice Note, Government Contracts: GAO Bid Protests: Standard of Review and Competitive Prejudice* (<http://us.practicallaw.com/2-581-7651#a174218>).

However, one area in which the COFC appears to afford agencies less deference than the GAO is in the area of agency corrective action in response to a protest. The COFC's review typically accords more weight to the awardee's equitable interest in having won the initial competition than does the GAO. This is because the GAO views itself merely as weighing whether the competition at issue was fairly conducted, not whether the awardee would be prejudiced by having to compete twice for the same award.

Therefore, an awardee seeking to protest an agency's decision to take corrective action by canceling the original award, reopening the competition and soliciting another round of proposals, will find the COFC to be a more receptive forum to these challenges than the GAO. The COFC, unlike the GAO, also examines proposed agency corrective action to determine whether the corrective action bears a rational relationship to the procurement errors that the corrective action purports to correct. Also, the COFC will retain jurisdiction over the protest for a period sufficient to supervise an agency's implementing of corrective action, which then provides the parties

with the opportunity to complain immediately to the court should the agency's implementation vary from its prior corrective action proposal.

COMPETITIVE PREJUDICE

The COFC, like the GAO, requires that the protester show that, but for the agency's actions, it would have had a substantial chance or reasonable likelihood of award.

However, unlike the GAO, instances where the COFC assumes prejudice because of the nature of the procurement error are exceedingly rare. In fact, certain of the judges have used the prejudice determination as an opportunity to prejudge the results of agency action that would have resulted if the court remanded any procurement errors it otherwise found to the agency for correction.

AVAILABLE RELIEF

The COFC may grant:

- Procedural relief, to ensure the veracity of the protest (see *Procedural Relief*).
- Substantive relief, if the protest is sustained (see *Substantive Relief*).

PROCEDURAL RELIEF

Unlike a GAO protest where the obligation is on the protester to request documents if they are to be produced, Appendix C to the RCFC places the burden on the government to produce the administrative record and lists those categories of documents considered as core documents. With the court's decision to be made based on the administrative record, resorting to additional discovery (such as depositions) and supplementation of the administrative record with written documentation that post-dates the challenged procurement decision is rare, limited generally to prejudice issues. By further contrast with the GAO, no hearings are held to clarify or resolve disputed factual issues. If the COFC protest follows a GAO protest, the GAO protest record is made part of the administrative record.

Protective Order

Like the GAO, the court relies on and employs protective orders to prevent disclosure, except to counsel and any expert admitted to the protective order, of the following:

- Confidential bid and proposal information.
- Agency source selection documentation.

Those not admitted to the protective order are kept informed by using redacted copies of filings and decisions. For more information on bid protest protective orders, see *Practice Note, Government Contracts: GAO Bid Protests: Procedural Relief: The Protective Order* (<http://us.practicallaw.com/2-581-7651#a120811>).

SUBSTANTIVE RELIEF

The COFC is empowered to award any relief that it considers proper, including declaratory and injunctive relief, except that monetary relief is limited to bid preparation and proposal costs (28 U.S.C. § 1491(b)(2) and see *Awards of Protest Costs*).

The relief awarded by the COFC is an enforceable judgment, not a mere recommendation, as with the GAO. However, in most situations the protester must obtain a permanent injunction to attain full relief, because there is no automatic stay of contract performance. Consequently, even though it may have determined to uphold the protest on the merits, the court still proceeds to consider whether the protester has prevailed on factors two, three and four of the injunctive relief test before fashioning its award of relief (see *Standard for Preliminary Injunctive Relief*). The protester at the GAO faces no comparable burden.

There is a split of authority among the judges of the COFC about whether the protester's burden of proof is judged by the preponderance of the evidence standard or the more demanding clear and convincing evidence standard.

Awards of Protest Costs

A sustained protest at the COFC **does not** result in an award of protest costs except in limited situations that satisfy the requirements of the Equal Access to Justice Act (EAJA) (28 U.S.C. § 2412(d)). Attorney fees and expenses may only be awarded to parties that do not exceed the EAJA's:

- Net worth ceiling of:
 - \$2 million, for individuals; and
 - \$7 million, for entities.
- Limit of 500 employees, for entities.

Assuming these criteria are met, the protester must establish that:

- It was the prevailing party.
- The government's position in the litigation was not "substantially justified."

Attorneys' fees are capped at \$125 per hour unless the court makes special findings justifying a higher fee, although the COFC routinely grants protester requests for a cost-of-living inflationary adjustment to the \$125 per hour cap, to account for inflation since its adoption in March 1996. The application fee with supporting documents must be submitted to the court within 30 days of final judgment.

CORRECTIVE ACTION

There is little information available about how often COFC protests are resolved by corrective action before a court decision. Certainly, there is nothing to prevent the agency and the protester from agreeing to corrective action, resulting in voluntary dismissal of the action. Presumably this is a rare occurrence. Conversely, there is minimal opportunity for the agency to employ unilateral corrective action, as it can at the GAO, and secure dismissal of the protest. For information on corrective agency action affecting GAO protests, see *Practice Note, Government Contracts: GAO Bid Protests: Agency Corrective Action* (<http://us.practicallaw.com/2-581-7651#a99448>).

WHY BRING A COFC PROTEST?

The foregoing discussion of COFC bid protest practice and procedure demonstrates the considerable advantages to the protester of proceeding before the GAO. In addition, a protest at the GAO is less expensive than one before the COFC. However, there are several instances where bringing a formal bid protest action in the COFC is the right (or only) choice, including the following:

- An agency protest was pursued initially and was not decided until after the GAO 10-day period had expired. The only remaining available forum is the COFC.
- The protester slept on its rights and only belatedly decides to protest. Here, the protester took no action at the GAO within 10 days of notice of contract award or of elimination from the competitive range.
- The protester may have proceeded initially at the GAO without counsel (or with counsel unskilled in bid protests) and may have gotten into a morass, with little or no chance for success. Therefore, to start over, the protester dismisses the GAO protest and comes to the COFC with knowledgeable counsel.
- The protester originally filed at the GAO, but another unsuccessful offeror in the same procurement subsequently files a protest of the same procurement at the COFC. Under the GAO's bid protest regulations, the GAO will dismiss any case where the matter involved is the subject of litigation before the COFC. Therefore, when the GAO receives notification that a protest has been filed at the COFC in connection with a procurement being protested at the GAO, the GAO will dismiss the protest, and the protester will be forced to join in the pending protest at the COFC (by filing its own complaint and likely seeking to consolidate with the existing COFC protest) to continue to pursue relief.
- The protester has lost at the GAO, but desires a "second bite at the apple" because the procurement is of great importance to its overall business.
- The COFC's position on the particular issue of procurement law (such as an awardee's challenge to the reasonableness of the agency's proposed corrective action in response to a previous GAO protest) is more favorable than the GAO's.
- Certain COFC judges are willing to retain continuing jurisdiction to monitor implementation of the corrective action that has been awarded in a successful protest.
- The protest is one where only the COFC has jurisdiction, for example either:
 - a challenge to a CICA override; or
 - an agency's failure to implement the CICA automatic stay in the first place, notwithstanding timely GAO notification to the agency.
- The protest involves a challenge by the former apparent awardee to agency implementation of the GAO's recommendation in a sustained GAO protest.
- The procuring agency falls under the jurisdiction of the COFC but not the GAO (for example, the US Postal Service).

COMMON PROTEST GROUNDS

The universe of the grounds of protest before the COFC includes those available in GAO protests (see *Practice Note: Government Contracts: GAO Bid Protests: Common Protest Grounds* (<http://us.practicallaw.com/2-581-7651#a127447>)) as well as those unique to the COFC. However, protesters should note that some of the protest grounds shared between the two forums get little traction at the COFC, for example those relating to improper or flawed past performance evaluations.

JUDICIAL CONSIDERATION OF BID PROTESTS

Judicial consideration of bid protests, with accompanying power to grant injunctive relief, dates from *Scanwell Labs v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). In *Scanwell Labs*, the D.C. Circuit held that the APA gave bidders a right to bring an action in US district court challenging agency action about a procurement because the agency had an implied duty of good faith and fair dealing with offerors when considering their proposals submitted in response to an agency solicitation. (For more information about the implied duty of good faith and fair dealing applied to procuring federal agencies, see *Legal Update, Federal Circuit Clarifies Scope of the Implied Duty of Good Faith in Government Contracts* (<http://us.practicallaw.com/0-557-5605>.) In the ensuing years, this jurisdiction was exercised in both pre-award and post-award bid protests.

Around the time of the *Scanwell Labs* decision, the Court of Claims, which was the predecessor to both the COFC and the Federal Circuit, also began exercising jurisdiction over certain federal government contract award controversies. The Court of Claims heard these cases under a theory of an implied contract to consider bids and proposals fairly and honestly.

Upon reorganization of the Court of Claims in 1982, resulting in the creation of the COFC and the Federal Circuit where appeals from the COFC are heard, the COFC was granted equitable jurisdiction over bid protest actions. However, early on, the Federal Circuit restricted that jurisdiction to a limited class of pre-award protests. Then, with enactment of ADRA in 1996, the COFC was granted full authority, coextensive with that of the district courts, over bid protest actions. Moreover, ADRA also provided for the sunset of district court bid protest jurisdiction effective January 1, 2001. Consequently, the COFC is today the only court with jurisdiction over federal bid protests pursuant to the jurisdiction grant of 28 U.S.C. § 1491(b).

COFC PROTEST STATISTICS

The court's volume of bid protests is meager when compared to that of the GAO, averaging 81 actions filed per year over the ten-year period of fiscal years 2004 through 2013. Nonetheless, the number of bid protest actions at the COFC has trended upward in recent years, with an average of 97 actions filed in the three most recently completed fiscal years (2011 –2013). Exclusive of vaccine cases (which are handled almost exclusively by special masters rather than COFC judges), bid protests account for 11.5% of the actions commenced at the COFC during the period of 2004 through 2013 (though that percentage has ranged as high as 19.8% as recently as 2011).

The rate with which the court resolves bid protests, while not equal to that of the GAO and not subject to a statutory deadline, is nonetheless respectable. On average, a bid protest case is resolved in approximately five months.

As for success rates, no court-compiled statistics are available nor has any private organization published any. Moreover, even if success rate statistics were available on a court-wide basis, they would be of far less utility than those pertaining to the GAO because there is significant variability among the individual judges of the COFC with respect to their amenability to entertaining bid protest actions.

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Government Contracts: Agency-level Bid Protests

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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.
- A judicial action brought at the COFC.

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 protestor. 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 decisionmaker, 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 decisionmaking; 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.

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