

Government Contracts: GAO Bid Protests

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This Practice Note provides an overview of United States 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 or 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, and the terms of the solicitation.

At the same time, successful contract awardees must be prepared to intervene in a bid protest to defend their contract award when challenged in a bid 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 (see Practice Note, Government Contracts: Agency-Level Bid Protests ([2-561-9585](#))).

- A protest filed with the Government Accountability Office (GAO).
- A judicial action brought at the US Court of Federal Claims (COFC) (see Practice Note, Government Contracts: COFC Bid Protests ([1-583-9427](#))).

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.

Based on that authority, for decades 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. Also, 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 GAO 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 outside legal counsel. However, unless outside counsel is used, access to protected information (necessary to develop the protest record fully) is almost always embargoed from the protester (see Procedural Relief: The Protective Order).

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

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 contract 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, to the obvious disadvantage of the awardee (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 ([2-561-9585](#))). The FASA bar does not apply, however, 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, and then, in the NDAA for fiscal year 2013, repealed the sunset provision for protests of task and delivery orders valued at over \$10 million awarded by defense agencies. While this repeal gave GAO permanent statutory authority to hear protests of the award of high value defense agency task and delivery orders, Congress left the September 30, 2016 sunset date in effect for protests of task and delivery orders issued by federal civilian agencies. That sunset date arrived without further Congressional action to extend GAO's bid protest jurisdiction over high value civilian agency task or delivery orders as of October 1, 2016.

Congress reinstated GAO bid protest jurisdiction over the award of civilian agency task or delivery orders valued at over \$10 million in the NDAA for fiscal year 2017, which was signed into law by President Obama on December 23, 2016. However, in the same statute Congress raised the jurisdictional threshold for GAO protests of high value task or delivery order awards by defense agencies from \$10 million to \$25 million.

In the wake of this recent Congressional action, the status of bid protest jurisdiction over high value task or delivery orders depends on whether the contract is awarded by a defense or civilian agency.

TASK/DELIVERY ORDER ISSUED UNDER ID/IQ CONTRACT AWARDED BY DEFENSE AGENCY

Before December 23, 2016, the GAO had jurisdiction for protests of award of task/delivery orders valued at over \$10 million. From December 23, 2016 and forward, the GAO has permanent jurisdiction for protests of award of task/delivery orders valued at over \$25 million.

TASK/DELIVERY ORDER ISSUED UNDER ID/IQ CONTRACT AWARDED BY CIVILIAN AGENCY

Before October 1, 2016, the GAO had jurisdiction for protests of award of task/delivery orders valued at over \$10 million. From October 1, 2016 to December 22, 2016, the GAO had no jurisdiction. From December 23, 2016 and forward, the GAO has permanent jurisdiction for protests of award of task/delivery orders valued at over \$10 million.

The above jurisdictional thresholds relate only to challenges of the agency's task/delivery order award decision by a disappointed ID/IQ contract holder competing for that award. There is no dollar limit for challenges that the award of a particular task or delivery order is outside the scope of the underlying ID/IQ contract (a type of protest typically brought by a vendor that is not among the ID/IQ contract holders).

Because Congress has now created different jurisdictional thresholds for protests of the award of civilian agency and defense agency high value task/delivery orders, the issue of which type of agency is responsible for the task order may come into play in a

jurisdictional challenge at GAO. In that regard, a series of decisions (see *Analytic Strategies LLC*; *Gemini Indus., Inc.*, B-413758.2, B-413758.3 (Nov. 28, 2016), *HP Enter. Servs., LLC*, B-413382.2 (Nov. 30, 2016), and *Wyle Laboratories, Inc.*, B-413989 (Dec. 5, 2016)) issued by GAO during the interval in which its jurisdiction over civilian task/delivery order protests had lapsed illustrates how GAO distinguishes between civilian and defense agencies in the case of ID/IQ contracts. Those protests involved task orders awarded by (or on behalf of) a defense agency under an ID/IQ contract that had been awarded by a civilian agency (the U.S. General Services Administration). The GAO pointed out that the statutory framework governing its jurisdiction over task and delivery order protests was rooted in the nature of the agency that had awarded the underlying multiple award ID/IQ contracts, not the nature of the agency that would be funding the order or receiving the ordered goods or services. When the underlying ID/IQ contract is awarded by a civilian agency, the civilian agency jurisdictional threshold applies, even if the task or delivery order:

- Is being solicited or awarded (and funded) by a defense agency.
- Contains Defense Federal Acquisition Regulation Supplement (DFARS) contract clauses.

The GAO does not generally entertain protests relating to grants and cooperative agreements because those vehicles are not considered procurements of property or services. (An exception is when a grant is awarded as a result of a competitive process.) 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.

When a solicitation impropriety arises in an amendment to the solicitation, the deadline for protesting that solicitation impropriety is the next closing time for receipt of proposals/bids after that amendment.

There are two circumstances in which GAO imposes a ten-day time limit on protests of solicitation improprieties, as opposed to the general “prior to the closing time” rule described above:

- When no closing time for receipt of proposals has been established in the solicitation.
- If the solicitation impropriety arises in an amendment and further submissions by offerors are not anticipated.

In each of those two cases, the GAO considers a protest of the solicitation impropriety untimely if filed more than ten days after the date the alleged impropriety was known or should have been known.

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 ([2-561-9585](#)).

In a 2015 decision, the GAO took the position that, in the case of an agency-level protest challenging an alleged solicitation impropriety, this ten-day deadline takes precedence over the general timeliness requirement for protests of solicitation defects that would treat a protest as timely if it were filed before the next closing date for receipt of proposals. In *Coulson Aviation (USA), Inc.*, B-411525, B-411525.2 (Aug. 14, 2015), the protester had filed an agency-level protest challenging the agency’s decision to issue a solicitation that did not invoke the Federal Acquisition Regulation (FAR) Part 12 commercial item procedures. The agency definitively rejected the protester’s agency-level protest on that point in November 2014, and continued to reject the protester’s request for reconsideration of that decision in December 2014. Nevertheless,

according to the GAO decision, the solicitation did not ultimately close for receipt of proposals for several more months, staying open until May 26, 2015, some two weeks after the protester had filed a protest at the GAO against the agency’s failure to use FAR Part 12 commercial item procedures. No doubt based in large part on how stridently and unequivocally the agency had communicated its rejection of the protester’s agency-level protest in December, the GAO dismissed as untimely the protester’s May 11, 2015 protest at the GAO of the same issue raised in that months-earlier agency-level protest. In so doing, the GAO assigned primacy to the ten-day appeal period for agency-level protests of 4 C.F.R. Section 21.2(a)(3) over the pre-closing date deadline for solicitation defect protests provided by 4 C.F.R. Section 21.2(a)(1).

It is not clear from the GAO’s bid protest regulations that the GAO’s interpretation in *Coulson Aviation (USA)* is the correct one, as the timeliness standard for solicitation impropriety protests unequivocally states that a protest of an alleged solicitation impropriety is timely filed (4 C.F.R. § 21.2(a)(1)). In contrast, the timeliness standard for appeals of agency-level protest decisions is phrased permissively, couched apparently as an exception to permit consideration of a protest that would not **independently** satisfy one of the other two timeliness prongs in Section 21(a)(1) and (a)(2) of the GAO’s rules: “If a timely agency-level protest was previously filed, any subsequent protest to the GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action **will be considered**...” (4 C.F.R. § 21.2(a)(3)). Therefore, the seemingly more faithful reading of the two standards in conjunction with each other would suggest that the GAO need not even **reach** the issue of whether a protest is timely under Section 21.2(a)(3) covering appeals of agency-level protest decision, **unless** the protest otherwise fails to satisfy one of the standards for timeliness under Section 21.2(a)(1) or (2).

Nevertheless, the teaching point for offerors from the *Coulson Aviation (USA)* decision is that, to be certain of preserving a solicitation-impropriety protest ground first raised in an agency-level protest, they need to raise that issue in a GAO protest filed within ten days of initial adverse agency action on the agency-level protest—**even if the solicitation at issue has not yet closed for receipt of proposals**.

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.

The "debriefing" exception to the GAO's normal ten-day deadline for filing a protest is available only for competitions conducted on the basis of competitive proposals. The GAO has found that a competition is "conducted on the basis of competitive proposals" when it uses FAR Part 15 negotiated procedures, as evidenced by the

issuance of the solicitation in the form of a "request for proposals." Therefore, when a solicitation is styled as a "request for quotations," the GAO generally does not consider that competition to be one conducted on the basis of "competitive proposals," for the simple reason that "quotations" are not the same as "proposals." While the GAO has noted that the term "competitive proposals" is not defined in statute or regulation, it has further observed that FAR 6.102 lists "competitive proposals" as one type of competitive procedure, while characterizing other types of competitions, including Federal Supply Schedule procurements conducted under FAR Subpart 8.4, and Brooks Act procurements conducted under FAR Subpart 36.6, as "other competitive procedures." Accordingly, the GAO has found that debriefings offered under those "other competitive procedure" described in FAR 6.102(d) do not count as "required" debriefings under GAO's bid protest timeliness rules. If the debriefing is not a "required" one (either because the request for it was not submitted timely, or because the procurement was not one "conducted on the basis of competitive proposals"), a protest must comply with the general timeliness requirement that it be filed within ten days of the date on which the protester first knew or should have known of the basis for the protest.

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—THE CURRENT METHOD

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.
- Email.

(See the GAO website, File a Bid Protest.)

The easiest and now preferred method of filing a protest at the GAO is to email 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.

FILING AND SERVING THE PROTEST—PROPOSED CHANGES

The GAO was directed by the Consolidated Appropriations Act for 2014 (Pub.L. 113–76, 128 Stat. 5) to establish and operate an electronic filing and document dissemination system for bid protests, similar to the electronic case filing and docketing system used by federal courts. On April 15, 2016, the GAO published in the Federal Register proposed changes to its procedural rules governing the filing of bid protests, intended to reflect the eventual (but as yet still pending) implementation of that new electronic filing system, which GAO proposes to call the Electronic Protest Docketing System (EPDS) (81 FR 22197). Once finalized and officially implemented, EPDS will become the only means for filing a protest at the GAO (with the exception of protests containing classified information, which require special filing procedures). The GAO will charge a filing fee for protests through EPDS to recover the costs of establishing and maintaining EPDS. The GAO anticipates that the filing fee will initially be set at \$350, although the GAO will review the fee amount every two years for potential adjustment to make sure it is properly calibrated to recover the costs associated with EPDS. The GAO will issue guidance at that time regarding how protesters will register to file protests through EPDS and make payment of the required filing fee.

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 protester 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 19 years (fiscal year 1998 through fiscal year 2016), the GAO has reported 46 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 ([8-535-3587](#)) and SBA Amends Government Contracting Regulations for Small Businesses ([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 fiscal years 2009 and 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, on average, roughly 3% annually between fiscal years 2011 and 2016 (including a 2% decrease in total protests filed in fiscal year 2013 as compared to 2012).

Total protests filed at the GAO between fiscal years 2010 and 2016 have been in the 2,300 to 2,600 per year range or 9 to 11 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 slightly more than 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 45 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 12% and 22.56% and is at an average of 18.5% over the past ten years. 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 43% of cases closed, and reached as high as 46% in fiscal year 2016. Therefore, between protests that were sustained on the merits and corrective action, protesters have ultimately obtained some form of relief in 37% to 46% of the protests brought before the GAO since fiscal year 2005.

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