



PROGRAM MATERIALS
Program #29209
November 18, 2019

Agency Protests: An Emerging Tool and Potential Threat for Contractors

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Agency Protests: An Emerging Tool and Potential Threat for Contractors

Celesq AttorneysEd Center and
West LegalEdcenter Webinar

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November 18, 2019

1:00–2:00 p.m. (EST)

Overview

- Background of the Agency-Protest Process
- Increase in Agency Protests?
- Pros and Cons of Agency Protests
- What Will the Future Look like If Agency Protests Become Popular?

Protests and Origin of Agency Protests

- Three Options Where to File a Protest
 - Agency
 - Government Accountability Office (“GAO”)
 - Court of Federal Claims
- Agency Protests
 - Army Material Command Pilot Program early '90s
 - Executive Order 12979

Increase in Agency Protests?

- Maybe
 - But, no one knows
- GAO Filing Fee
 - Reason(s) for implementing fee
- Increase in Agency Protests – An Unintended Consequence
 - Non-attributable comments/rumor/hearsay

Nature of an Agency Protest

- Inexpensive, Informal, Procedurally Simple, and Expeditious
- Regulatory Requirements in FAR 33.103
 - Name and contact information of protester
 - Solicitation or contract number
 - Legal and factual grounds (including standing, timeliness, and prejudice)
 - Copies of relevant documents
 - Request for ruling by the agency and type of relief
- Similar to GAO Requirements but Less Formal

Agency Protest and Stay Requirements?

- Pre-Award Agency Protest
 - Protest must be filed prior to bid opening or deadline for receipt of proposals
 - The contract may not be awarded pending agency resolution of the protest
- Post-Award Agency Protest
 - Protest must be filed with the agency within 10 days after contract award
 - Within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later
- Agency may override stay for:
 - Urgent and compelling reasons
 - Best interest of the Government

Who Reviews an Agency Protest?

- Contracting Officer or Another Designated Official
- Independent Reviewer One Level Above the Contracting Officer
- Some Agencies Provide for Appellate Review
- GAO Filing Deadlines Are Not Tolled During Appellate Review

Agency Protest Process and Procedures?

- No Protective Order
 - Agency and Protester may exchange information (very rare)
- No Intervenor
- No Agency Report
- FAR Encourages Resolution Within 35 Days
- Agency Decision
 - Well-reasoned
 - Explains the agency position

Differences between Agency and GAO Protests

Agency Protest - FAR 33.103

- No filing fee
- Standing, prejudice, and timeliness requirements
- Decisions issued within about 35 days
- No guarantee of neutral third-party reviewer
- No intervenors
- No protective order
- No agency report
- Appellate review within the agency (possibly)
- More streamlined process resulting in lower legal bills

GAO Protest - FAR 33.104

- \$350 filing fee
- Standing, prejudice, and timeliness requirements
- Decisions issued within 100 days
- Neutral third-party decides protest
- Intervenors generally permitted
- Protective order
- Production of agency report
- No appellate review within GAO
- Less streamlined process resulting in higher legal bills

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Pursuing a GAO Protest after an Unsuccessful Agency Protest

- Same Timing Requirements as GAO Protests (4 C.F.R. § 21.2)
- Timing of Agency Protests
 - Pre-Award Agency Protests:
 - Prior to bid opening or the time set for receipt of initial proposals
 - For improprieties subsequently incorporated into the solicitation, protests must be filed no later than the next deadline for receipt of proposals
 - If no deadline is set, protester must file within 10 days
 - For all other Protests:
 - Within 10 days after the basis of the protest is known or should have been known
 - Within 10 days of a required debriefing requested by the protester
- Check Solicitation and Agency Regulation for More Stringent Timelines

Pursuing a GAO Protest after an Unsuccessful Agency Protest

- A **Timely** Agency Protest Pauses the Clock for a GAO Protest (4 C.F.R. § 21.2(a)(3))
- Timing of Subsequent GAO Protest
 - Within 10 days of actual or constructive knowledge of “initial adverse agency action”
 - For protest alleging an impropriety in the solicitation, the GAO protest is still timely even if protester learns of adverse agency action **after** bid opening or closing time for receipt of proposals
 - Receipt of proposals is generally considered “adverse agency action,” which starts the 10-day clock. *See MLS-Multinational Logistic Services, Ltd.*, B-415782, March 7, 2018, 2018 CPD P 105.

Pursuing a GAO Protest after an Unsuccessful Agency Protest

WARNING:

Generally Automatic Stay NOT Available for Subsequent GAO Protest

- CICA Stay Requirements:
 - Pre-Award Protest – Contracting officer generally prohibited from awarding contract until protest is resolved, if the protest is filed with GAO before contract award (FAR 33.104(b)(1))
 - Post-Award Protest – Performance of contract is stayed if protest is filed with GAO within 10 days of award or within 5 days after a debriefing date offered to the protester for any debriefing required by FAR 15.505 or 15.506
- These CICA Stay Deadlines Are NOT Tolled Pending the Outcome of an Agency Protest (FAR 33.103(f)(4))

Pros and Cons of Agency Protests

- Pros
 - Lower costs
 - Faster resolution
 - Stay of award or performance
 - Customer-friendly
 - Not *res judicata*
 - No intervenors

Pros and Cons of Agency Protests (continued)

- Cons
 - Asking agency to reverse prior decision and/or admit mistake
 - Agency bias – no independent review
 - No procurement record
 - No supplemental protest grounds
 - No document requests
 - Lack of transparency
 - Decision not published
 - No precedents
 - Agency consistency
 - GAO stay mechanics
 - Initial agency adverse action complexities

Contractor Best Practices for Filing Agency Protests

- Simple, Straightforward, Less Fact-Dependent Matters
 - Pre-award challenge of solicitation terms
 - Post-award
 - Timely receipt of bids/offers
 - Bid responsiveness
 - Mistake in bid
 - Not proposal evaluation challenges
- Low \$ Value Procurements
- Cost-sensitive Clients
- Gut-feeling if Agency will “do the right thing”
- Read the Applicable Agency’s Regulations
- Communicate with your Contracting Officers

The Future If Agency Protests Become (More) Popular

- No Data on Current Use
- Process is in the Dark – Public Trust and Transparency
 - No notice to awardee or others in competition
 - No right to intervene
 - Decisions not public
 - Redacted decisions can be requested
 - Agency delay in providing
 - Contractor would need to know of agency protest to request

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