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Federal Bid Protests "Soup to Nuts": A Bid Protest Deep Dive in Two Parts

Part 1: Bid Protests Basics; Pre-Award Protests; and Pre-Award Debriefings

Kara M. Sacilotto
Cara L. Sizemore

What is covered in the Two-Part Series?

- In depth discussion of Federal bid protests (The “Soup to Nuts”)
  - Bid Protest Basics
  - Pre-award bid protests
  - Post-award bid protests
  - Pre- and post-award debriefings
  - “Override” of the stay of award/performance afforded by the Competition in Contracting Act (CICA) (Part 2 topic)
  - Practical tips and traps for the unwary provided throughout

Note: *Part 2 assumes some basic familiarity from Part 1!*

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Part 1 Agenda

- Bid Protests Basics—the “who, what, and where” of Federal bid protests
- Pre-Award Bid Protests
  - Protest of Solicitation
  - Other Unique Pre-award Type Bid Protests
  - Elimination from Competitive Range/Competition
- Pre-Award Debriefings
  - When available (and not)
  - Requesting a debriefing
  - What to expect in a pre-award debriefing

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Intro to Federal Bid Protests: Where to Protest?

- **Government Accountability Office** (GAO)
  - Except: protests of task orders under IDIQ contracts valued under certain dollar thresholds
- **Court of Federal Claims** (COFC)
  - Except: protests of task orders under IDIQ contracts
- The **procuring agency itself**
  - Except: protests of task orders under IDIQ contracts
- That means, ***there are 3 potential forums for most federal bid protests***

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Intro to Federal Bid Protests: What is a Bid Protest?

- Written objection by interested party re:
  - Solicitation
  - Cancellation of solicitation
  - Award or proposed award of a contract
  - Termination or cancellation of an award of a contract, if alleged that the termination/cancellation is based in whole/in part on improprieties in the award itself
- Note that at COFC, jurisdiction is potentially broader
  - Also has jurisdiction over “an action by an interested party objecting to any alleged violation of statute or regulation “in connection with” a procurement or a proposed procurement

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Intro to Federal Bid Protests: Who Can Protest?

- All forums require protester to be an "interested party" or have "standing" to protest
- Different standards for pre-award and post-award protesters
  - Pre-award: A *prospective* offeror with *direct economic interest*
  - Post-award: An *actual* offeror with *direct economic interest*
    - Must have a substantial chance of award "but for" the alleged improprieties by the agency

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Intro to Federal Bid Protests: What to Consider Before Filing a Protest with the Agency

- Most informal (but with few procedural protections)
- Get “automatic stay” of contract award or performance, if meet timing requirements in the FAR
- Keeps dispute “in the family”
- Focus on good business decision for Agency
- Agency personnel are the “deciders,” including on how much to tell protester about basis for decision
- Can file protest at GAO within 10 days if lose at the agency
  - But only get ***one*** stay

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Intro to Federal Bid Protests: What to Consider Before Filing a Protest with GAO?

- Primarily record review (occasionally, GAO holds a hearing)
- Strict timeliness rules
- Automatic stay of award/performance if timely file protest with GAO
  - Agency can "override" stay
- Expertise
  - Dedicated bid protest hearing officers
  - ~2,000/year, compared to ~150/year at COFC. (Agency protests = "black box")
- *Generally* more uniform decisions and more predictable
- Some document production, but not full "discovery"
- Decision is a "recommendation" and agency can decide not to follow
- 100 calendar-day statutory deadline

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Intro to Federal Bid Protests: What to Consider Before Filing a Protest with COFC?

- Well-defined processes; parties participate in defining process through scheduling conference
- Most lenient timing rules for post-award protests
- More expansive record
- Dep't of Justice (DOJ) defends the agency
- Can be filed as "second bite" after loss at GAO
  - Some legal standards differ
- Decided by a single COFC Judge, usually after oral argument
  - Judge can issue injunctive or declaratory relief
- If lose at COFC, can appeal to U.S. Court of Appeals for the Federal Circuit

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Pre-Award Protests

- Some bid protests must be brought *before* there is an award in a procurement, regardless of forum
- Most prominent: Solicitation challenges
  - Under GAO rules, the FAR, and Federal Circuit precedent, protests of the Solicitation must be brought *prior* to award of the contract
  - Goal is not to sit on challenge to ground rules of competition until after evaluation and award
- The precise timing rules for each forum are different

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Timing Rules for Pre-Award Protest of Solicitation

- **Agency**: Protests based on alleged apparent improprieties in a solicitation shall be filed *before proposal due date*
- **GAO:**
  - Protests based on problems or defects with a solicitation that are apparent *prior to bid opening or the time set for receipt of initial proposals* must be filed *before initial proposal due date*
  - Problems/defects that do not exist in the initial solicitation but are added later (e.g., by an amendment) must be protested not later than the *next proposal due date*
    - If no deadline established for next proposal submission, or if no further submissions are anticipated, must protest *within 10 days* of when the alleged impropriety was known or should have been known
- **COFC**: Must be filed before proposal due date

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Common Problems That Lead to a Pre-Award Protest of Solicitations

- Ambiguous specifications or solicitation terms
  - "Patent" vs. "Latent" ambiguities
- Unduly restrictive specifications or solicitation terms
  - Agencies can only include restrictive provisions reasonably necessary to meet minimum needs
- Items peculiar to one manufacturer ("brand name") or solicitations drafted to "fit" a particular offeror
- Solicitation for commercial items includes terms inconsistent with commercial practices

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Unique Issues that Could Trigger a Pre-Award Bid Protest

- Organizational Conflict of Interest (OCI) Protests. See FAR subpart 9.5 (OCIs)
  - Must be raised before proposal due date if:
    - Solicitation is issued on an unrestricted basis
    - Protester is aware of the facts giving rise to the potential OCI, and
    - Protester has been advised by the agency that it considers the potential (allegedly conflicted) offeror eligible for award
  - Examples:
    - *A Squared Joint Venture*, B-413139, 2016 CPD ¶ 243: agency expressly informed offeror that it had an OCI and that the OCI would preclude it from award unless the offeror implemented mitigations, protest of agency's OCI determination was due by the date set for receipt of proposals
    - *Guidehouse LLP*, B-419848.3, 2022 CPD ¶ 197: OCI protest timely where agency deferred determination on eligibility until it obtained additional information

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Unique Issues that Could Trigger a Pre-Award Bid Protest (cont'd)

- Protests of Corrective Action
  - Where an agency takes corrective action, and a party challenges the *scope* of the corrective action or its *ground rules*, the protest must be filed in accordance with GAO's timing rules for protests of solicitations (i.e., preaward)
  - A protest that anticipates an improper re-evaluation is premature when filed preaward
  - Examples:
    - *CPS Prof. Servs., LLC d/b/a CATHEXIS*, B-417928.2, 2020 CPD ¶ 69: protest alleging that agency should have accepted revised proposals during corrective action is untimely when filed after re-award where agency only committed to reevaluate proposals and make new award decision
    - *HeiTech-PAE, LLC*, B-40049.7, 2021 CPD ¶ 361: protester's pre-award corrective action challenge is premature because agency's proposed corrective action does not alter the ground rules for the competition

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Pre-Award Protest When Eliminated From the Competition or the Competitive Range

- Offerors may be excluded early for non-compliance or other reasons (e.g., alleged OCI; failure to submit proposal on time; failure to comply with proposal rules)
- Offerors may also be excluded after an initial evaluation and establishment of a competitive range
  - FAR 15.306(c) gives agency discretion to reduce the pool of competitors by setting the "competitive range"
  - If small number of competitors, and discussions to be held with all, may not eliminate any offerors
  - If large pool, can reduce the "competitive range" to the most highly rated proposals
    - No magic number of competitors for competitive range
    - Must consider all evaluation factors in setting competitive range
- A **pre-award debriefing**, if available, may help an excluded offeror decide whether it should protest

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Overview of Debriefings

- When is a debriefing available?
  - Procurements conducted under FAR Part 15 negotiated procedures
  - Task order awards under IDIQ contract, if order over $6 million
- There is no required debriefing in the following:
  - Procurements for orders conducted under **FAR 8.5** (GSA Schedule Contracts)
  - Procurements conducted under **FAR Pt 14** (Sealed Bidding)
  - Procurements conducted under **FAR Pt 13** (Simplified Acquisitions)
  - Procurements conducted under **FAR Pt 12** (Commercial Items) *if the procurement does not follow FAR Pt 15 procedures*
  - **Competitions not conducted under CICA** (e.g., Other Transaction Agreement competitions; grants)
  - Procurements for basic and applied research conducted pursuant to a Broad Agency Announcement (BAA) under **FAR Subpart 35.017**

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Overview of Debriefings (cont'd)

- Why does it matter if it's a "debriefing?"
  - For GAO protests, the availability of a "required debriefing" extends the time to protest
    - 4 C.F.R. § 21.2(a)(2): When debriefing timely requested and required, "***with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held***."
    - A timely request is important: If request is not timely, debriefing is not "required"
  - For agency protests, this "extension" in the case of required debriefings does not apply
    - FAR 33.103(e): All protests, other than those relating to a Solicitation, should be filed ***within 10 days of when offeror knew/should have known protest grounds***
    - If the agency protest is not timely, a subsequent GAO protest also will not be timely
      - *See M2 Global Tech., Ltd.*, B-400946, 2009 CPD ¶ 13; *see also RTI Techs., Inc.,* B-401075, 2009 CPD ¶ 86 (Protest untimely where first filed at agency and denied, and then filed with GAO more than 10 days after receipt of the denial; protester's receipt of a required debriefing after receipt of denial of agency-level protest does not toll or provide an exception to GAO's timeliness rules where an agency-level protest was filed first, and no new info in debriefing)

All of these request/timing rules also apply to post-award debriefings!

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Overview of Debriefings (cont'd)

- **Purpose**: To provide feedback to offerors on strengths/weaknesses of their proposals so that they understand why they did/did not win and allow them to improve future proposals
- **Format**: May be oral (in person/telephonic/video) or written, or a combination
- **Questions?**: The FAR requires agencies to provide reasonable responses to relevant questions for *any* debriefing (often ignored). DoD has enhanced debriefing rules that keep procurement open for asking/answering questions in a *post-award* debriefing
- **Protest a bad debriefing?**: Nope…

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Pre-Award Debriefing

- Governed by FAR 15.505
- Request: Must be made in writing w/in 3 calendar days of notice of elimination
  - Email is fine (telephone call is not)
  - No magic words but referencing FAR 15.505 is good idea
  - Request a pre-award debriefing
    - If the *offeror* requests a delay until award decision made, it will *not* extend protest deadlines. *See* FAR 15.505(a)(1)(2)
- Under FAR 15.505(b), agency is encouraged to provide debriefing right away, but can *choose* to hold it after award.
  - If agency chooses to delay timely requested required debriefing until after award, protest filed thereafter that meets GAO timing rules *will still be timely*.

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Pre-Award Debriefing (cont'd)

- What information is shared during pre-award debriefing, per FAR 15.505?
  - Must include:
    - Evaluation of significant features of proposal
    - Why excluded from competitive range
    - Reasonable responses to relevant questions
  - Must not reveal:
    - Number/identity of other offerors
    - Content of other proposals
    - Ranking of others
    - Any of the information prohibited in FAR 15.506(e) (post-award debriefing)
    - If deferred until after award, however, would include more information included in post-award debriefings

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Practical Considerations for Pre-Award Protests

- The biggest pitfall of pre-award protests is failing to identify solicitation flaws and thus not protesting them before proposal submission
  - Take advantage of draft solicitation opportunities and Q and A offered by the agency. Read all of the submitted Q and A, and follow up as necessary
  - If the solicitation strikes you as confusing or conflicting, then it probably is. If you wait to raise objections until after award, you risk waiving any challenge, as the flaw in the solicitation was likely "patent"
- If you are eliminated from the competition before award, and don't know why from the elimination notice, you must timely request a debriefing (if one is available).
  - Failure to request the debriefing on time or delaying the actual debriefing will accelerate protest deadlines (at least at GAO)
- More so for pre-award protests than post-award, an agency protest is a credible option to consider
  - In the pre-award context, agency may be more willing to be flexible; in a post-award context, it has already decided that some other offeror provides the better value

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Thank you for joining us for Part 1 focused on pre-award bid protests. We look forward to talking with you about post-award bid protests in Part 2.



Kara M. Sacilotto
202.719.7107
ksacilotto@wiley.law



Cara L. Sizemore
202.719.4192
csizemore@wiley.law

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Federal Bid Protests "Soup to Nuts": A Bid Protest Deep Dive in Two Parts

Part 2: Post-Award Debriefings and Post-Award Protests

Kara M. Sacilotto
Sarah B. Hansen

Part 2 Agenda

- Post-Award Debriefings
  - When available (and not)
  - Requesting a debriefing
  - What to expect in a post-award debriefing
  - Enhanced debriefings for certain Department of Defense (DOD) procurements
- Post-Award Bid Protests
  - Forums
  - Timing
  - Forum differences
  - Arguments
- Practice Tips throughout

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Refresher on Availability of Debriefing

- When is a debriefing available?
  - Procurements conducted under FAR Part 15 negotiated procedures
  - Task order awards under IDIQ contract, if order over $6 million
- There is no required debriefing in the following:
  - Procurements for orders conducted under **FAR 8.5** (GSA Schedule Contracts)
  - Procurements conducted under **FAR Pt 14** (Sealed Bidding)
  - Procurements conducted under **FAR Pt 13** (Simplified Acquisitions)
  - Procurements conducted under **FAR Pt 12** (Commercial Items) *if the procurement does not follow FAR Pt 15 procedures*
  - **Competitions not conducted under CICA** (e.g., Other Transaction Agreement competitions; grants)
  - Procurements for basic and applied research conducted pursuant to a Broad Agency Announcement (BAA) under **FAR Subpart 35.017**

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Requesting Post-Award Debriefing

- Request must be made in writing within **3 days*** of notice of award. FAR 15.506(a)(1)
  - Email is acceptable writing. Telephone call is not.
  - No magic words required. Good idea to reference Solicitation number and FAR 15.506
  - Be sure to send to proper CO
- ***Practice Tips***:
  - Have the debriefing request ready before award. Make submission of the debriefing request immediately upon receipt of the award notification a "muscle memory"
  - Have more than one person identified as the POC for emails from the CO so that the award notification does not sit in an unattended mailbox
  - Do ***not*** wait until the last minute! Email can fail, and agencies close earlier than many businesses (e.g., 4:30 pm local time, per FAR 33.101)
  - Successful offeror can and should request a debriefing as well

*All "days" are **calendar** days unless otherwise noted

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Post-Award Debriefing Content

- Purpose: to provide feedback to offeror on strengths and weaknesses of its proposal to understand why it did/did not win and allow it to improve future proposals
- Format: May be oral (in person/telephonic/video); written; or a combination
- Per FAR 15.506 (d), at a minimum the debriefing must include:
  - The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
  - The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
  - The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
  - A summary of the rationale for award;
  - For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
  - Reasonable responses to relevant questions . . .

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Post-Award Debriefing Content

- Per FAR 15.506(e), in a post-award debriefing, agency should *not* disclose:
  - Point-by-point comparisons of the debriefed offeror's proposal with other offerors' proposals
  - Trade secrets or info exempt under FOIA
  - Privileged or confidential manufacturing processes and techniques
  - Confidential commercial and financial information (e.g., cost breakdowns, profit, indirect cost rates, and similar information)
  - Names of individuals providing reference information about an offeror's past performance
- Debriefing "should" occur within **5 days** after receipt of written request. FAR 15.506(a)(2)
  - Not enforceable

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DOD Enhanced Post-Award Debriefing

- Sec. 818 of FY18 NDAA expanded debriefing requirements for most DOD procurements
  - In part to reduce protests by providing contractors with more information on evaluation and award decision
  - Applies to (i) contract and (ii) task order awards above $6M, including for commercial products and services and COTS, where a debriefing is otherwise required
- DFARS 215.506-70: Opportunity to ask additional questions and receive written responses
  - Contractors may submit additional questions within **2 business days**
  - Debriefing closes on the later of (1) date of debriefing, if no questions timely submitted or (2) when the agency provides written responses (should be within 5 business days)
- Redacted Source Selection Decision Document
  - Agency required to provide for all awards over $100 million and, if requested, small business/non-traditional contractor awards over $10 million

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Debriefing Practice Tips

- If debriefing is oral/telephonic, plan who will talk and designate a notetaker
- If debriefing is written or not subject to DOD enhanced debriefing requirements, still prepare questions
  - Even if "enhanced debriefing" processes do not apply, the FAR requires "reasonable responses to relevant questions." FAR 15.505(1)(e)(3); FAR 15.506(d)(6). With a written debrief, reasonable argument that you have not yet been able to ask questions
  - When submitting questions outside the enhanced debriefing process, ask the CO to confirm that the debriefing remains open until you receive responses
- Debriefing is an information gathering exercise. It is not a forum to argue about evaluation of proposal or expect agency to change its mind
- Questions should be targeted to areas that are most important for understanding the evaluation or deciding whether to protest
  - Keep questions open ended to avoid "yes/no" response. Recognize the agency will not reveal much about the awardee's evaluation/strengths/proposal

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Available Post-Award Protest Fora

- Contracting Agency (FAR 33.103)
- Government Accountability Office (GAO) (4 CFR Part 21; FAR 33.104)
  - Exclusive jurisdiction for protests of IDIQ task orders over $25M for DOD/NASA/Coast Guard and $10M for civilian agencies
- Court of Federal Claims (COFC) (28 USC 1491(b) and Administrative Dispute Resolution Act (ADRA))

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Post-Award Protest Parties (Besides Agency)

- Protester
  - FAR, GAO, and COFC provide that the protester must be an "interested party" (FAR 33.101; 4 CFR 21.0)
    - Post-award = Actual offeror with direct economic interest
- Intervenor
  - GAO and COFC allow the awardee to intervene in post-award protest to defend its award along with agency/DOJ (GAO 4 CFR 21.0; Rule 24 of Rules of Court of Federal Claims (RCFC); Appendix C to RCFC includes intervention by successful offeror as part of initial status conference))
  - FAR does not address intervention for Agency protests

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When Must Post-Award Protests Be Filed at GAO?

- Within **10 days** of contract award ("knew or should have known" protest ground) (4 CFR 21.2(a)(2))
  - Or if debriefing is timely requested and required, no later than **10 days** after close of debriefing
    - See later slide re **shorter deadline to receive stay of performance under CICA**
- GAO challenge to adverse agency action on an agency level post-award bid protest
  - Within **10 days** of "actual or constructive" knowledge of initial adverse agency action. 4 CFR 21.2(a)(3)
    - "Oral" notification, even if writing to follow, triggers the 10 days
    - Request for reconsideration does not toll

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Special GAO Timing Rules and Exceptions

- "Significant Issue" Exception (4 CFR 21.2(c))
  - GAO may hear untimely protest where it is determined that the protest raises "issues significant to the procurement system"
    - FAR has similar "good cause" or "issues significant to the agency's acquisition system" exception for agency protests
- Procurement Integrity Act (PIA) Protests – Must have notified the contracting agency of potential PIA violation within **14 days** of first discovery of potential violation or subsequent GAO protest will be untimely (4 C.F.R. 21.5(g))
- Amended/supplemental protest raising new protest grounds – **10 days** from when basis of protest known/should have been known

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When Must Post-Award Protests Be Filed at Agency and COFC?

- Agency
  - Protests must be filed with the agency within **10 days** of when protester knew or should have known of protest grounds, unless agency specific rules have shorter time period. FAR 33.103(e)
  - If Agency informs offeror of grounds for rejection prior to debriefing, debriefing likely does not extend timing for agency level protest
    - *Compare* FAR 33.103(e) (agency protests) *with* 4 CFR 21.2(a)(2) (GAO Rule)
- COFC
  - No hard deadlines. COFC statute of limitations (28 USC 2401) is 6 years, but need to move much more quickly because COFC has no automatic stay of performance

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Stay of Contract Performance under CICA: Agency and GAO

- CICA, 31 USC 3553(c) & (d), and FAR provide for automatic stay of contract performance for timely filed protests at agency and GAO
  - Within **10 days** of contract award; or
  - Where debriefing timely requested and required, stay of performance available if protest filed at agency or GAO within **the later of 5 days of debriefing or 10 days of contract award**. 31 U.S.C. § 3553(d)(3)&(4) (GAO protest); FAR 33.103(f)(3) (agency protest)
  - For protests filed at GAO, stay is triggered by GAO's notice to the agency
    - GAO implemented Electronic Protest Docketing System (EPDS) in 2019 that generates automatic notice to agency

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Override of Stay of Performance (31 USC 3553(d))

- Head of contracting activity may authorize performance even if timely GAO/agency protest filed by issuing a written finding:
  - Best Interests of the Government to go forward
  - Urgent and Compelling Circumstances require agency to go forward
- Only COFC has jurisdiction over challenge to override
  - *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286 (Fed. Cir. 1999)
  - COFC standard of review: arbitrary, capricious; not in accordance with the law. Agency has to sort through relevant and irrelevant factors

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What to Expect in a Post-Award Agency Protest

- Governed by FAR Subpart 33.1 and any Agency FAR Supplement
- Few firm rules for agency protest process (e.g., no mention of intervention in FAR)
- Review is by CO or, at protester request, designated official at a level above the CO. FAR 33.103(d)(4)
- Process
  - Varies by agency; consult Agency FAR Supplement
    - Discovery/Receipt of Record?: "To the extent permitted by law and regulation, the parties may exchange relevant information." FAR 33.103(g)
    - Generally, no production of record, no protester briefing after initial protest, no hearing
  - Agency must make "best efforts" to resolve w/in 35 days, and decisions should be “well-reasoned.” FAR 33.103(g)
  - Protester can ask for reconsideration, but it will not toll timing of protest at GAO

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What to Expect in a Post-Award GAO Protest

- Governed by GAO rules in 4 CFR Pt. 21
- Deferential standard of review. Violation of law, regulation, Solicitation/RFP or unreasonable agency determination
  - Historical “sustain rate” (GAO finds merit in protest that goes all the way to decision) is historically low (13%)
  - GAO “effective rate” (protester gets some form of relief through agency corrective action) is higher (51%)
- GAO is not a "notice pleading" forum
  - Allegations based on "information and belief“ or speculation face potential dismissal for failure to state a legal or factual basis for protest
- Primarily a “paper process” although GAO can choose to hold evidentiary hearing
- Protester entitled to agency record documents, but only those “relevant” to protest allegations (requires counsel admitted to protective order)

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Typical GAO Protest Schedule

- Day 1: File protest with GAO and serve agency CO; GAO notice to agency (triggers stay of performance)
- Day 2: File redacted protest with GAO
- Day 1-25: Intervention; Protective Order applications; any motions to dismiss
- Day 25: Agency identifies documents it will produce and objections to document requests (called a “5-Day Letter”)
  - Protester has **2 days** to raise any objections to proposed production
- Day 30: Agency Report (AR) filed and documents produced
- Day 40: Protester/Awardee file comments/supplemental protest grounds
- Day 45-60 (set by GAO): Agency response to new protest issues and protester/awardee comments on supplemental AR
- [Possible hearing and, if so, post-hearing comments]
- Day 100: GAO decision ("recommendation") due
  - Regardless of number of supplemental protests, to date, GAO has decided all protest arguments 100 days from initial protest

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GAO Protective Order

- Standard GAO order to protect competition and source selection sensitive information
  - *Pro se* protester will not be admitted to PO and will not get this material
- In-house and outside counsel may be admitted if not involved in competitive decision making
  - "Competitive decision making" -- do not provide advice concerning or participate in decisions about marketing or advertising strategies, product research and development, product design, competitive structuring of proposals, including technical cost or pricing considerations. *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984)
- Experts (technical and cost) admitted subject to prospective prohibition on proposal preparation
- Must vigilantly protect documents, limit copies and dissemination; destroy/return documents at protest end
  - Violations of PO can lead to bar to practicing before GAO or dismissal of protest

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Agency Report Contents

- Agency Report must include relevant docs. What is relevant will depend on protest allegations and resolution of document production disputes. Typical Agency Report may include:
  - Index of documents
  - Legal Memo that supports the award/responds to protest allegations
  - Statement of facts by CO
  - Protest
  - RFP/IFB
  - Protester's proposal/bid
  - Awardee's proposal/bid
  - Relevant evaluation documents
  - Source selection/award decision document
  - Other relevant documents, e.g. discussions
  - Docs requested by protester that agency agrees/ordered to produce (4 CFR 21.3(g))

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Typical Post-Award Protest Arguments

- Evaluation or award issues
  - Failure to follow evaluation criteria
  - Unreasonable cost realism analysis (for RFP for cost-reimbursement contract)
  - Unequal treatment of offerors during evaluation
  - Source selection decision challenges
- Eligibility Issues
  - Awardee has organizational conflict of interest (OCI)
  - Awardee did not comply with mandatory proposal requirements
  - Awardee has “unfair competitive advantage”
  - Key personnel availability
- Prejudice
  - Protester must show prejudice - but for agency error, "substantial chance" that the offeror would have been awarded the contract. *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996)

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Difficult Protest Arguments to Win

- Technical merit challenges
  - GAO does not reevaluate proposals, but instead examines record to determine whether agency's judgment was reasonable and consistent with RFP evaluation criteria
  - Protester's disagreement with rating, where reasonable and consistent with solicitation, is "inconsequential." *Business Consulting Assocs., Inc.*, B-299758, Aug. 1, 2007, 2007 WL 2264682
- Challenge to whether higher cost/higher rated or lower cost/lower rated proposal presented best value
- Agency Bias
  - Gov't officials are presumed to act in good faith; protester's claim that CO is motivated by bias/bad faith must be supported by convincing proof; GAO will not attribute bias based on inference or supposition. *K9 Operations, Inc*., B-299923, Aug. 6, 2007, 2007 WL 2243364
- Request for Reconsideration
  - Must identify *truly new facts* or a fundamental legal error. Virtually unheard of for GAO to grant

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Issues GAO Will Not Hear

- Contract Administration
- SBA Size Standards/Related Issues
  - SBA has process
  - GAO has limited exception for Certificate of Competency (COC) challenges (SBA failed to follow own regs/bad faith/failed to consider vital info)
- Affirmative responsibility determinations (4 CFR 21.5(c))
  - *Except* where definitive responsibility criteria in RFP; protester alleges fraud/bad faith or that agency failed to consider relevant available evidence/violated statute or regulation
- Procurement Integrity Act violation, unless reported within 14 days of discovery
- Subcontractor protests
- Debarment and suspension

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GAO Protest Remedies

- Recommendations
  - Agency refusal to implement must be reported to GAO; GAO reports agency refusal to Congress
- Directed award or disqualification from re-competition rare
- Protest costs, including reasonable attorneys' fees (capped, except for small businesses), for successful protest
  - Might get bid and proposal preparation costs if other relief not available. 4 CFR 21.8(d)
- No “appeal”; may be able to get “second bite” at COFC

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What to Expect in Post-Award COFC Protest

- RCFC App. C (bid protest specific guidance)
- Notional schedule (only bench proceedings exist)
  - Day 0: Pre-filing notice to DOJ
  - Day 1: File complaint + papers required to initiate action; TRO/PI motion
  - Days 1-5: Initial status conference; possible TRO hearing: Protective Order applications
  - Days 10-20 (notional): Filing of Agency Record
  - Discovery if authorized (next slide)
  - Days 30-90: Briefing on cross-motions for PI or motion for judgment on administrative record per RCFC 56.1
  - Average decision ~125 days

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What to Expect in Post-Award COFC Protest

- No de novo review; review on record before agency, which can be supplemented by discovery in some limited circumstances
  - *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009)
- May get more documents than at GAO because COFC rules identify the documents that the agency must produce
  - COFC/DOJ position is "the record" must be produced, regardless of relevance to complaint arguments
- Review standard (APA) & POs are similar to GAO
- "Interested party" similar to GAO
- "Usually" deference is given to GAO decisions. Not uniform, may be decreasing with newer judges.
- A GAO protest can move to COFC, but GAO will then dismiss the protest under its rules

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Issues COFC Will Not Hear and COFC Protest Remedies

- COFC will not hear:
  - Protests of task orders under IDIQ contract, except for allegations that the task order exceeds the scope, period, or maximum value of the contract under which the order is issued
  - Contract administration
- But COFC will hear:
  - Challenge to decision from SBA Office of Hearings and Appeal (OHA)
  - Challenge to affirmative responsibility (more broadly than GAO)
  - Postal Service protest
- Remedies
  - Equitable relief
  - Reasonable bid preparation costs
  - Attorneys' fees
- Appeals to Federal Circuit

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Practical Considerations Post-Award Bid Protest

- Take advantage of the debriefing and (if available) the enhanced debriefing processes. Use the time and information gathered to assess protest arguments (or even start drafting) as the timeline for protesting to GAO or an agency is short once the debriefing closes
- Understand that a protest does not automatically "flip" the award to another offeror. It gives you, potentially, another shot at competing
- Consider protest arguments that will get you the relief you require to better compete
- Realistically assess your protest grounds given the deferential standard of review

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Thank you for joining us for Part 2 of our bid protest series focusing on post-award bid protests



Kara M. Sacilotto
202.719.7107
ksacilotto@wiley.law



Sarah B. Hansen
202.719.7294
shansen@wiley.law

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