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## Bid Protests: Where to File?

By

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## BRIEFING THE CAUSE

### *Bid Protests: Where to File?*

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One of the more difficult challenges in advising a client about pursuing a bid protest is when and where to file the protest. The rules governing the “when” question are pretty clear. For example, if your client does not challenge a problem with the bid documents before bid submission, they will not be able to do so afterwards. (So, while your client may consider “keeping quiet” in order to gain a competitive advantage from a defect in the bid documents, it is a mistake to do so.)<sup>1</sup> The rules of where to file are more complicated. There are three different forums for filing a bid protest:

1. The agency, which can be made at the contracting officer level or the agency level.
2. The Government Accountability Office (GAO), formerly known as the General Accounting Office (same place, same people, more impressive name).
3. The Court of Federal Claims (COFC).

Each forum has its own rules and procedures.

#### *Contracting Officer/Agency Protests (CO/A)*

If you are filing a protest before bids or proposals are due, I recommend you file with the CO/A. There are two benefits to doing so:

1. This will allow you to open a dialogue with the CO/A<sup>2</sup> and provide the CO/A an opportunity to take corrective action or explain to your client why there is no need to do so.
2. If you can't reach a resolution at the CO/A level, you can still take your protest to the GAO or COFC.

In reality, protests at the pre-bid stage of a competition are fairly common; they just aren't always called protests. Every time a potential bidder submits a question or a request for clarification, they are informally protesting. In many cases, the questions succeed in clarifying the terms of the competition without using the emotionally charged term: “protest.”

#### *Government Accountability Office Protests*

If a bidder is filing a post-award protest, I recommend starting with the GAO for a number of reasons:<sup>3</sup>

1. If your protest is timely filed, the agency will have to suspend contract performance<sup>4</sup> unless the head of the agency (HCA) makes a written finding allowing performance to continue.<sup>5</sup>

While the GAO procedures provide for automatic suspension of performance, you must strictly comply with the time limits. In order to get performance suspended, you

have to file your protest within 10 days of award or 5 days after a debriefing if one is required. FAR 33.104(c)(1)

However, you can't wait until the last day to file the protest, as the suspension only goes into effect when the agency is notified by the GAO that a protest has been filed. Since the GAO has 1 working day to provide that notice, a last minute filing can result in a loss of the automatic stay. If you do file at the last minute, call the GAO protest office and stress to them the urgency of immediately getting their notice out to the agency.

2. Filing a GAO protest is significantly less complicated and less expensive.
3. The attorneys at GAO who work on bid protests are very experienced acquisition law professionals. Resolving protests is their primary job. While the judges at the COFC are very experienced, that experience covers a wide range of areas, the vast majority of which do not involve bid protests.
4. The GAO must issue its decision within 100 days of the date the protest is filed.

#### *Court of Federal Claims Protests*

The standard of review at the GAO and the COFC are substantially the same, but the results may be different.<sup>6</sup> There is no automatic suspension of performance in the COFC, and stopping performance is critical to a successful protest. Instead of automatically suspending performance, you will have to convince the court that a preliminary injunction should be issued, applying the traditional standards for an injunction.<sup>7</sup> COFC Rule 65. On the plus side, if you win the injunction, there will be considerable pressure on the agency to negotiate a prompt resolution with you. Unlike the GAO, the COFC is not required to issue a final decision within 100 days. If you don't win the injunction, a COFC protest will take considerably longer than a GAO protest.

The primary advantage to a COFC protest is that the agency is represented by the Department of Justice (DOJ). The attorneys who represent DOJ are generally highly experienced in federal acquisition law and will conduct a thorough and independent review of your protest. If the root cause of your problem is an unreasonable agency, the DOJ can work with both sides to try and reach a quick, amicable resolution. In contrast, if you are before the GAO, you will be dealing with attorneys from the same agency that prepared and evaluated the solicitation even though the attorneys may serve at different levels of command. In effect, therefore, a COFC protest results in an independent review by an attorney who does not have a preexisting interest or position in the protest.

#### *Conclusion*

Forum selection for a bid protest must be made on a case by case basis. From my perspective, protests filed before bids or proposals are due are best filed at the contracting officer/agency level. Protests after award are best filed at the GAO. If you are

unhappy with the GAO's decision, you can file a second protest with the COFC.<sup>8</sup>

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#### Endnotes

<sup>1</sup>While this article does not address the "when" question, the rules are:

- a. Protests challenging the bid documents must be submitted before the date proposals are due. Failure to submit a protest before that date will result in your client's loss of its protest rights for all such issues. (4 C.F.R. § 21.2 (a)(1) ; FAR 33.103(e))
- b. Protests challenging the manner in which the award was made, must be filed within 10 days of the day the client learned of, or reasonably should have learned of the basis for its protest. (4 C.F.R. § 21.2 (a)(2); F.A.R. 33.103(e))

If your client wins the competition despite (or due to) a defect in the bid documents, it is unlikely they will be able to successfully pursue a claim for the extra costs or delay caused by fixing the "defect" if a court or board finds it was a "patent" defect. A patent defect is generally considered a defect that a bidder knew about, or should have known about through the exercise of reasonable diligence before it submitted its proposal.

<sup>2</sup>As a general rule, any questions you submit to the contracting officer will be memorialized in a modification to the bid documents which will show all of the questions asked and the answers given by the agency. This is done to ensure that none of the potential bidders get a competitive advantage by receiving information that is not provided to all bidders.

<sup>3</sup>In some cases, there may be a difference in decisional law that will make the COFC a better forum for a specific issue. Unfortunately, a discussion of these differences will take substantially more space than is available in this column (*see* endnote 4, below).

<sup>4</sup>This is also true with CO/A protests. If the protest is timely filed, performance must be suspended. However, there is one catch which makes this a poor choice for a post award protest. Even if you file a timely Agency Protest and a subsequent timely protest with the GAO, the Contracting Officer is not required to continue the suspension from the CO/A protest as the GAO protest is a new protest. Since the GAO protest was not filed with the GAO within the time requirements in the GAO rules, those rules do not apply. In many cases, the agency may voluntarily continue the suspension, but they are not required to do so.

<sup>5</sup>The HCA's written decision must show "that continued contract performance will be in the best interest of the United States or that there are urgent and compelling circumstances that significantly affect the interests of the United States that will not permit delay in contract performance." (FAR 33.104 (c) (1); 31 U.S.C. 3553(c)(2)(A) The use of this exception is very rare. As such, a timely GAO protest virtually guarantees performance will be stayed during the 100 day life span of the protest (FAR 33.104(c)(1); 31 U.S.C. 3553(c)(1)).

<sup>6</sup>In 2008, there were five instances in which a protest was denied by the GAO and granted by the COFC. The primary reason for the different results arose from each interpretation of the facts. A detailed discussion of these cases can be found in *Bid Protests: Different Outcomes in the Court of Federal Claims and the Government Accountability Office* published in Volume 44, Number 3 (Spring 2009) of *The Procurement Lawyer*, published by the Section of Public Contract Law of the American Bar Association.

<sup>7</sup>"In order to obtain a preliminary equitable relief, a party must demonstrate 1) a substantial likelihood of success on the merits; 2) specific, irreparable harm; 3) the balance of the hardships tips in its favor; and that 4) the preliminary injunction is in the public interest." *Anton/Bauer Inc. v. PAG Ltd.*, 329 F.3d 1343, 1348 (Fed. Cir. 2003).

<sup>8</sup>The court does not limit itself to review of the CO/A or GAO decision. It conducts a "de novo" review of the record. As such, even if you lost the CO/A or GAO bid protest, you may have discovered additional information in the course of the GAO protest, that will lead the COFC to make a different finding.