



BID PROTESTS: **An Increasingly Attractive Remedy In These Competitive Times**

With the decline in the nation's economy, more and more contractors are looking to obtain federal Government contract work to replace their previous commercial work. As a result, the competition for federal contracts has increased, as have the number of bid protests. Bid protests are a cause of action unique to public procurements. They allow a disappointed bidder to challenge the Government's award of a contract to another bidder and, in some instances, to challenge the terms of the solicitation itself. The rules governing when protests must be filed are complex and vary depending upon the forum in which the protest is filed and the type of protest.

Many contractors decline to file bid protests because they believe they have little or no chance of winning. Statistically, this is true, as only about one protest in five is sustained. However, these statistics do not reflect the protests in which the procuring agency voluntarily elects to take corrective action before a written decision is rendered. It is increasingly common for federal agencies to take corrective action in response to a protest when the agency is concerned that the protester has a valid basis for protest and the agency wants to take corrective action before it is ordered to do so.

Over the last few years, Peckar & Abramson's clients have enjoyed a success rate that is substantially higher than the sustain rate on protests of federal procurements, whether by written decision, settlement with the procuring agency, or corrective action by the agency. The total value of the procurements in which our clients have been successful is in excess of \$15 billion. Many of these protests have involved "best value" award decisions. In a number of these protests, our clients have also been awarded their attorneys fees. In part, this success is attributable to our practice of candidly advising clients on their prospects for winning *before* a protest is filed.

Bid Protest Forums

There are three forums in which a protest may be filed: (1) the contracting agency; (2) the Government Accountability Office ("GAO"); and (3) the U.S. Court of Federal Claims. While the majority of protests are filed with GAO, each forum has its own advantages and disadvantages.

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Procuring Agency - A disappointed bidder may file a protest with the agency that issued the solicitation. Some of the advantages of filing a protest with the agency are that the process is informal and inexpensive, and a decision on the protest generally will be issued within 35 days. In addition, some protesters perceive that agency protests are less likely to offend the agency which, after all, is the bidder's customer. There are, however, a number of disadvantages to agency protests, including the lack of an opportunity to review the agency's procurement record, the lack of any discovery, and the lack of an independent review outside of the agency. Since the protester is asking the agency to reverse the agency's own decision with regard to the procurement, many protesters perceive that agency protests, especially post-award protests, are futile. It should be noted, however, that the filing of an agency protest does not preclude the protester from subsequently pursuing its protest at GAO or the U.S. Court of Federal Claims if the timeliness rules of those forums are met.

GAO - As an agency of Congress, GAO provides an independent administrative forum for resolving bid protests. There are a number of advantages to filing a protest with GAO, including specialized attorneys to resolve protests, an automatic stay of the contract award or the suspension of contract performance if the protest is filed within certain time limits, the protester's counsel can review the procurement record under a protective order, the proceedings tend to be less formal, GAO will issue a decision within 100 days, and a successful protester generally is entitled to its protest costs including attorney's fees. There are also disadvantages to filing a protest with GAO, including strict filing deadlines, no discovery beyond the procurement record, and the fact that GAO rarely conducts hearings. As with an agency protest, a disappointed bidder can pursue a protest at the U.S. Court of Federal Claims if its protest is denied by GAO.

U.S. Court of Federal Claims - Finally, protests may be filed with the U.S. Court of Federal Claims. Unlike agency and GAO protests, protests before the court are more formal and usually more expensive. The protester must file a complaint and if, as is usually the case, the protester wants to prevent the agency from awarding the contract or directing the awardee to proceed with the work, the protester must also file motions for a temporary restraining order and an injunction. Some of the advantages to filing a protest with the court are the potential for discovery outside of the procurement record (including document discovery and depositions as the court may allow) with the resulting potential for discovering additional errors in the procurement process. The court may also order an evidentiary hearing. Some of the disadvantages are the expense, the involvement of the U.S. Department of Justice in defending the agency, the fact that not all of the court's judges are experts in procurement law, and the lack of any specific time period in which a decision will be issued. Despite these disadvantages, the court may be the preferable forum for a protest when additional discovery is necessary.



Pre-Award Protests

Most pre-award protests involve challenges to the terms of the solicitation itself. Some common examples of the types of pre-award protests are:

- ❖ The solicitation provisions are unduly restrictive of competition, i.e., the agency has improperly draft its requirements in such a manner that only a few bidders can satisfy the requirement.
- ❖ The solicitation is an improper sole source procurement, i.e., the agency has announced that the award will be made to a specific contractor when other contractors are capable of performing the work.
- ❖ The solicitation provisions are ambiguous, contain conflicting terms, or violate a procurement statute or regulation.
- ❖ The solicitation does not give bidders adequate time to prepare their bids/proposals.
- ❖ The solicitation improperly bundles unrelated requirements. This type of protest usually applies to procurements for goods or services.

Protests based upon alleged improprieties in a solicitation, which are apparent prior to bid opening or the time set for receipt of initial proposals, must be filed prior to bid opening or the time set for receipt of initial proposals regardless of the forum in which the protest is filed. *A protester cannot wait until after bids have been opened, proposals have been received, or an award decision has been made to challenge the terms of the solicitation.*

Other types of pre-award protests not involving solicitation improprieties, such as a bidder's elimination from the competitive range, generally must be filed within 10 calendar days after the bidder knew or should have known of the basis for its protest when the protest is filed with the agency or GAO. There is no specific deadline in which the protest must be filed in the U.S. Court of Federal Claims; however, the protester's likelihood of obtaining an injunction prohibiting the agency from proceeding with the procurement may decrease the longer the protester waits to file its protest.

Post-Award Protests

Post-award protests involve challenges to the agency's award decision. The types of post-award protests, and the time in which the protest must be filed, depend upon the type of the solicitation – Invitation for Bids (“IFB”) or Request for Proposals (“RFP”) – and the forum in which the protest is filed.

Invitations for Bids - When the procurement is conducted using an IFB, the bidders submit sealed bids which are publicly opened on the date and time specified in the IFB.



Any person may examine the bids during the bid opening to determine if there are any obvious defects in the bids, such as the failure to submit a bid bond or the failure to acknowledge a material amendment to the IFB. Since award is to be made to the lowest priced responsive and responsible bidder, most post-award protests under IFBs generally involve a challenge to the agency's determination that the awardee's bid was responsive or, if the protester was the low bidder, the agency's determination that the protester's low bid was nonresponsive or the protester was not responsible. Some common bases of post-award protests include:

- ❖ The awardee failed to meet definitive responsibility criteria such as a license, permit, or specified number of years of experience or the agency improperly determined that the protester did not meet definitive responsibility criteria.
- ❖ The awardee's bid did not include an acceptable bid bond or the agency improperly determined that the protester's bid bond was not acceptable.
- ❖ The awardee's bid was materially unbalanced or the agency improperly determined that the protester's low bid was materially unbalanced.
- ❖ The awardee failed to acknowledge a material amendment to the IFB or the agency rejected the protester's low bid for failure to acknowledge a non-material amendment.
- ❖ The agency did not calculate the bid prices in accordance with the IFB.
- ❖ The agency improperly allowed the awardee to correct a mistake in its bid or improperly failed to allow the protester to correct a mistake in its low bid.

Post-award protests to the contracting agency or GAO must be filed within 10 calendar days of when the protester knew or should have known of the basis of its protest. While there is no specific deadline in which a post-award protest must be filed in the Court of Federal Claims, the protester's likelihood of obtaining an injunction prohibiting the agency from allowing the work to begin may decrease the longer the protester waits to file its protest. In addition, if the protester waits an unreasonably long time to file its protest, the court may determine that it is unfair to permit the protest to continue if the lapse of time is prejudicial to the agency or the awardee.

Requests for Proposals - When a procurement is conducted using an RFP, the contract is often awarded on the basis of the "best value" to the Government and not necessarily the lowest price. The RFP will specify the evaluation factors that the agency will use to evaluate the proposals. Depending upon the circumstances, there are a number of potential bases of protest involving best value procurements. Most best value protests involve challenges to the agency's evaluation of the proposals or failure to follow the evaluation scheme set forth in the RFP. Recently, Peckar & Abramson successfully protested an agency's failure to properly evaluate the proposals in a \$300 million best value procurement. Other common bases of protest include:



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- ❖ The agency's best value determination was improper, unreasonable, or not in accordance with the evaluation criteria.
- ❖ The agency used evaluation criteria that were not stated in the RFP.
- ❖ The agency failed to conduct meaningful discussions (i.e., did not identify significant weaknesses or deficiencies in the protester's proposal), the agency conducted misleading discussions, or the agency conducted unequal discussions (i.e., the agency conducted discussions with other offerors but not the protester).
- ❖ The agency failed to perform a proper cost or price realism or reasonableness analysis if required by the RFP.
- ❖ The awardee was not technically acceptable or failed to meet definitive responsibility criteria such as a license, permit, or specified number of years of experience or the agency improperly determined that the protester was not technically acceptable or failed to meet definitive responsibility criteria.
- ❖ The source selection authority failed to adequately document his/her source selection decision and/or decision to reject the evaluators' award recommendation.
- ❖ The agency improperly excluded the protester's proposal from the competitive range.

The time in which to file a protest generally is triggered by the agency's notice to the unsuccessful offeror that its proposal has been excluded from the competition (i.e., eliminated from the competitive range) or that award has been made to another offeror. An unsuccessful offeror who has been excluded from the competition or who has received a notice of award to another offeror has the right to a debriefing by the agency if the offeror requests the debriefing within three calendar days of the notice. While the agency may accommodate a late debriefing request, the late debriefing does not extend the time in which to file a protest.

The purpose of the debriefing, which may be conducted face-to-face, over the telephone, or in writing, is to provide the unsuccessful offeror with an explanation for the award decision and the agency's evaluation of its proposal. Even if the unsuccessful offeror does not believe that the award was improper, the unsuccessful offeror should nevertheless request a debriefing to get an understanding of how the agency viewed its proposal in order to improve its chances of receiving an award in the future.

Task Orders - Prior to May 27, 2008, the award of a task orders could not be protested to the agency, GAO, or the U.S. Court of Federal Claims except under very limited circumstances. A contractor who wished to challenge the award of a task order on the basis of a lack of a fair opportunity to compete could only request a review of the award decision by the agency ombudsman. These challenges, however, were largely ineffective. GAO now has been given exclusive jurisdiction over protests of the award of task order contracts when: (1) the protest alleges that the task order increases the scope, period, or maximum



value of the contract under which the order was issued; or (2) when the task order is valued in excess of \$10 million. Task order protests must be filed within 10 calendar days of when the protester knew or should have known of the basis of its protest.

Time Limits for Filing a Protest

Agency protests must be filed within 10 calendar days of when the unsuccessful offeror knew or should have known of the basis of its protest. In many instances, the unsuccessful offeror will not know of the basis of protest until after the debriefing. If, however, the unsuccessful offeror knew of the basis of its protest prior to the debriefing, it needs to be careful that it files its protests within 10 days of when it knew of the basis of the protest.

The time period for filing a post-award protest at GAO is different than the time period for filing a post-award protest with the agency. In fact, GAO has different protest periods depending upon whether the protester timely requested a debriefing. At GAO, a timely debriefing extends the period in which the protester must file its protest even if the protester knew or should have known of the basis of its protest prior to the debriefing. When the protester timely requests and receives a debriefing, the protester has 10 calendar days from the date of the debriefing to file its protest. If, however, the protester wants to take advantage of the automatic stay of the contract award or contract performance, this time period is shortened to five calendar days from the date of the debriefing. Protesters who wait until the fifth calendar day to file the protest should be cautioned to file their protests as early in the day as possible as the automatic stay is triggered by GAO's notice to the agency that a protest has been filed and not the filing of the protest itself.

If the protester did not timely request a debriefing, the protester must file its protest within 10 calendar days of when the protester knew or should have known of the basis of its protest. To take advantage of the automatic stay of contract award or performance, the protester must file the protest within 10 calendar days of the award of the contract. Protesters who wait until the 10th calendar day after award to file their protests should be cautioned to file their protests as early as possible on the 10th day as the automatic stay is triggered by GAO's notice to the agency that a protest has been filed.

Unlike agency protests and GAO protests, the U.S. Court of Federal Claims does not have a specific deadline in which a post-award protest must be filed with the court. However, as previously noted, the likelihood of the protester obtaining an injunction prohibiting the agency from allowing the work to begin may decrease the longer the protester waits to file its protest. In addition, if the protester waits an unreasonably long time to file its protest, the court may determine that it is unfair to permit the protest to continue if the lapse of time is prejudicial to the agency or the awardee.



The Bottom Line

Bid protests are not a panacea. Disappointed bidders should not file protests simply because a competitor has been awarded a contract. However, in this era of financial uncertainty, contractors should carefully consider whether a bid protest might be a viable remedy when they have been treated unfairly in the procurement process or the Government has failed to follow the rules.