

Bid Protest Primer

What is a Bid Protest?

A bid protest is a right created by statute that allows government contractors to challenge an agency's decision regarding the ground rules for a procurement and the eventual award decisions made by the agency. Bid protests provide the bidding contractor an opportunity to make sure their competition for government contracts is fair and objective. There are two main types of bid protests. "Pre-award" protests challenge the terms of the government solicitation, while "post-award" protests challenge the way the agency evaluated the bid and who was finally awarded the contract, with a few minor exceptions. A contractor that believes it may have been the victim of improprieties in the government contracting process has a number of different options for how to resolve the issue.

The Armed Services Procurement Act of 1947 (ASPA), Federal Property and Administrative Services Act of 1949 (FPASA), and the Competition in Contracting Act (CICA) are the main laws under which federal government contracting takes place. The ASPA governs the acquisition of all property (except land), construction, and services by defense agencies; the FPASA governs similar civilian agency acquisitions. The CICA, applicable to *both* defense and civilian acquisitions, requires federal agencies to seek and obtain "full and open competition" wherever possible in the contract award process. The Federal Acquisition Regulation (FAR) also represents a basic uniform structure for executive branch contracting that is supplemented in certain cases by agency regulations. The goal of these regulations generally is to ensure full and open competition for the Government's acquisition of products and services from the private sector.

Before actually filing a protest it is important to consider the costs and benefits of taking action. These concerns include the merit of the allegations, the ability of the protesting bidder to prove they are an interested party and that they suffered prejudice, possible adverse customer reactions, the monetary costs of engaging in a protest, and the likelihood of winning a protest or obtaining any meaningful relief.

Where is a Bid Protest Adjudicated?

Another important consideration for any contractor contemplating a bid protest is what venue to select. There are three venues available for a bid protest: the deciding agency itself, the Government Accountability Office (GAO), and the U.S. Court of Federal Claims.

Making a bid protest at the agency level is the cheapest available alternative, and may be best if the bid protestor is leery of souring their relationship with the government agency in question. An agency-level protest generally has a slim chance of success. It sometimes is used as a forum to air grievances with the agency without an expectation of any real success. In an agency protest, you can specifically request that the final decision on the agency protest be made at a level higher than the contracting officer.

The second alternative is the GAO, which is the best venue in most circumstances, as they have specialized experience in handling government contracts and bid protests. The GAO's jurisdiction has recently been expanded to include TSA procurements, and task and delivery contracts worth in excess of \$10 Million dollars. One disadvantage is the protective order that keeps all except outside counsel and experts from knowing the details of the protest. Decisions at the GAO level are characterized as recommendations, since the GAO is an arm of the legislative branch. Therefore, agencies are not bound by a GAO opinion, but they will usually abide by the GAO's guidance.

The third choice for contractors is the Court of Federal Claims. Typically this option is used when the contracting agency overrides the automatic stay put in place during the GAO process, or if GAO or agency-level deadlines have passed. This process is generally the least attractive due to the high cost and length of time required, although the decisions are binding.

What is Being Protested?

Bid protests can be broken down into two categories: pre-award and post-award. Pre-award protests that challenge the terms of a solicitation must be filed before the proposals are received by the agency, though it is recommended (but not required) that a proposal still be submitted to preserve a contractor's standing in the matter for any future contentions. Following the lodging of a protest of this kind, the government agency is prevented from awarding the contract until the matter is resolved, with a few exceptions. Some common reasons for filing such a protest are that the solicitation is unduly restrictive and overstates agency needs, the requirements and terms are ambiguous, or the requirements unnecessarily favor one offeror over the others.

Post-award protests must be filed within ten days of when you knew or should have known of your protest grounds. Often, but not always, this is either 10 days after your notice of award or 10 days after your debriefing date. If your protest meets some additional timeliness requirements, the government agency must immediately suspend contract performance. Some common reasons for filing such a protest include deviation from stated evaluation criteria, relaxation of solicitation requirements, lack of meaningful discussions or unequal discussions, arbitrary technical/price/past performance evaluations, or organizational conflicts of interest.