

# A Primer on Protests

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## The Nature of a Protest

A protest is pretty much just what it sounds like. The word has several meanings, depending on the context, but in this case it means “to dissent or object.” In government contracting, it refers specifically to a contractor’s objection to a decision or action by a government agency with respect to an acquisition or proposed acquisition.

Theoretically, any decision or action of the government could be “protested,” but the most frequent subject of a protest is the competitive contracting process.

There are specific rules around the process. The rules specify...

- who may protest,
- what kinds of actions may be protested,
- when a protest must be filed in order to be considered “timely,”
- what action the government may take upon filing of a protest, and
- what action the government may take when a protest is “sustained.”

## Who can protest?

Any individual or organizational entity with “standing” (an interested party) who believes that a solicitation provision is incorrect, unfair or otherwise faulty may file a protest. Likewise, any decision of the government (usually a contract award) may be protested by an interested party if they have reason to believe that a law or regulation regarding the procurement process has been violated or some other circumstance has caused the resulting award to be invalid or unfair.

Typical protestors are...

- losers – referred to in the regulation as “disappointed bidders or disappointed offerors” – who believe they would have won were it not for some inappropriate action on the part of the government;
- parties excluded from bidding by some decision, action or solicitation provision (for example, a large business that believes that a competition has been improperly set aside for small business);
- parties disadvantaged by some decision, action or solicitation provision *or lack thereof* (for example, a small business that believes a competition should have been set aside for small business, but was not); and
- parties that believe that some other aspect of a solicitation was not in accordance with law or regulation (such as a sole source contract).

## What can be protested?

Theoretically, anything related to a procurement can be protested. In reality, there’s a short list.

- a solicitation or solicitation provision that someone thinks is faulty (for pretty much any reason);
- the decision to set aside a competition (or contract) for a subset of offerors;
- the decision NOT to set aside a competition (or contract) for a subset of offerors; and
- an award to someone else that should have gone to the protestor.

## When may or must a protest be filed?

A protest *may* be filed at any time, but *must* be filed **after the fact**. That is, a contractor may not protest what it believes (or even knows) an agency *plans to do*. The protest may only be filed when the decision has been made or an action has been taken.

Protests concerning **set-asides** *may* be protested any time following the decision (as evidenced by a synopsis of the intent to set aside the procurement or the release of the solicitation) but *must* be protested before the closing date of the solicitation.

Protests concerning **solicitation provisions** *may* be filed any time following the release of the solicitation, but *must* be filed on or before the closing date.

Protests concerning **awards** *must* be filed within 10 days of the award, OR within 10 days following a debriefing (provided that the debrief was requested timely and legally mandatory) OR within 10 days following the disclosure of information previously not available and pertinent to the action.

Protests concerning **sole source determinations** *may* be filed any time following the synopsis of the decision but *must* be filed within 10 days following the award.

## What are the possible results of a protest filing?

If a protest is filed *prior to award*, the award agency *must* delay award until the protest has been dismissed, withdrawn or decided. When protests are filed *after award*, the agency is required to delay contract performance until the protest is decided unless it can make the case that the public interest requires the contract to proceed.

If the agency presents a compelling case that the contract should proceed, the GAO may require the agency limit contract funding or activity pending a decision.

## What are the possible results of a protest?

Most protests are dismissed without examination (without a decision on the merits). Common reasons for dismissal are...

- untimely filing (filed before an action or decision has occurred or after the time limit has expired);
- lack of grounds (even if the allegation of the protest are factual, they do not constitute a protestable action or decision); or
- lack of standing (the protestor is not a party with an interest in the outcome).

When a protest is dismissed, the agency may proceed without further action or consideration.

When a protest is found to have grounds, the protestor is found to have standing and the filing is found to be timely, the GAO will accept it for review. Most reviews are conducted from the record (without a formal hearing). Whether or not there is a formal hearing, the GAO has a target of 100 (calendar) days to render a decision. The target is not binding. Most decisions are rendered within the target 100 days, but some take considerably longer.

If a protest is reviewed and denied, the effect is the same as dismissal. The agency may proceed with the procurement without further delay.

If a protest is sustained, several actions are possible.

When a protest filed prior to the closing date of a solicitation is sustained, the GAO may require changes in the solicitation such as...

- requiring that it be set aside for a subset of offerors;
- requiring that a full and open competition be conducted (no set aside);
- require modification of the evaluation criteria (or source selection plan); or
- require other changes to solicitation terms and conditions.

Protests filed after a solicitation has closed, but pre-award, are rare. They are usually the result of some alleged improper action on the part of an individual involved in the acquisition process (such as a source selection official). A prospective offeror that was improperly excluded from a bidders' conference, denied access to documentation made available to other offerors, or otherwise treated in a disadvantageous manner might file such a protest. Such protests often turn into prosecutions or IG investigations.

When a post-award protest is sustained, GAO may require:

- termination of the contract and reevaluation of the proposals;
- termination of the contract and award to another party;
- termination of the contract and re-competition of the procurement;
- award of an additional contract to the protestor and/or other parties (common in multiple award competitions); or
- nothing.

When an agency successfully argues that a contract should proceed in spite of a pending protest, the GAO may not necessarily require that the contract be terminated OR ANY OTHER ACTION, even if the protest is sustained.

### **When a Decision isn't really a Decision...**

The fact is, GAO decisions are NOT binding on federal agencies. Even when a GAO decision "requires" that an agency take a specific action, it's really a recommendation. Agencies can, AND DO, simply ignore them. It's rare, but it happens.

Each year, when GAO reports the metrics of the year's protests to Congress, it is required to identify each decision in which the agency involved did NOT comply with the recommendations in the decision. Typically, there will be one or two. Some years there are none. In 2010, there were three – all associated with the controversy around the preference for Hub Zone set-asides over other socio-economic set-aside categories.

In three different 2010 decisions, GAO held that both the applicable statute and the FAR provision required that certain procurement be set-aside for the Hub Zone program, if practicable, before any other set-aside could be considered. The Justice Department disagreed with the GAO's interpretation of the statute and effectively gave the agencies cover for disregarding the GAO decisions.

Congress has since passed a correcting bill putting all socio-economic program set-asides on equal footing, making the issue moot.

As a practical matter, GAO decisions ARE viewed as binding and agencies normally treat their "recommendations" as directives – except when they don't.

## Protest Facts and Trends

Protest filings in fiscal 2013 were down slightly from 2012. Protests considered (both denied and sustained) were also down year over year. While all the numbers are high, they are really moving very closely with the changes in federal procurement dollars (also predicted to also be down slightly from the previous year) with one exception.

Over 10 years, spending on federal procurement rose from about \$338B in 2004 to more than \$517B in 2012, with 2013 expected to be just over \$500B when all the numbers are finally in. The increase from 2004 to the predicted 2013 total is almost 50%. The increase in protest filings over the same period is almost 64%, but the increase in SUCCESSFUL protests is only 16%.

But percentages just don't tell the story. The federal government spent \$162 Billion more in 2013 than 2004 and the number of successful protests rose by 12. Not 1,200 or 12,000 – 12.

Despite the dramatic rise in contract spending, the acquisition workforce is at nearly a 20-year low and the same is true for the auditors and pricing specialists who review proposals. The small workforce gains that agencies made in 2012 and 2013 may be effectively wiped out by expected 2014 budget cuts.

The system is overloaded. That can cause occasional missteps and they can sometimes be highly visible. The result is a public perception that acquisition processes are broadly flawed. And yet, the number of verified mistakes seems to actually be decreasing relative to total procurement spending.

## The Raw Data

For those who just have to see the numbers, here's a summary of GAO protest activity for the last 10 fiscal years:

	Government Fiscal Year									
	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004
<b>Total Filings</b>	2,429	2,475	2,353	2,226	1,989	1,652	1,411	1,327	1,356	1,485
<i>Year-over-year change</i>	-1.9%	5.2%	5.7%	11.9%	20.4%	17.1%	6.3%	-2.1%	-8.7%	9.8%
<b>Withdraw or Dismissed<sup>(1)</sup></b>	1,920	1,905	1,936	1,785	1,674	1,361	1,076	1,078	1,050	1,120
<b>Total Considered</b>	509	570	417	441	315	291	335	249	306	365
<i>Year-over-year change</i>	-10.7%	36.7%	-5.4%	40.0%	8.2%	-13.1%	34.5%	-18.6%	-16.2%	25.9%
<b>Denied</b>	422	464	350	359	258	231	244	177	235	290
<b>Sustained</b>	87	106	67	82	57	60	91	72	71	75
<i>Success Rate(% of Filings)</i>	3.6%	4.3%	2.8%	3.7%	2.9%	3.6%	6.4%	5.4%	5.2%	5.1%
<i>Year-over-year change</i>	-17.9%	58.2%	-18.3%	43.9%	-5.0%	-34.1%	26.4%	1.4%	-5.3%	50.0%
<b>Hearings Conducted<sup>(2)</sup></b>	31	56	46	61	65	32	41	51	41	56

Those looking for "records" in the data will have some difficulty. Filings for this year at 2,429 did not set a record – that was last year at 2,475. At 87, the number of successful protests is not a record either – 2007 was higher at 91. The number of actual, face-to-face hearings conducted probably *should* be considered a record – it's a 10-year low.

## **The Bottom Line**

If there any story at all in the numbers, it's that the acquisition workforce continues to do more with less and to do a pretty good job of it.

As far as the perception that protests are rising meteorically, clogging the system, and delaying procurements across the system – reality just seems to be just a little different, doesn't it?