Bid Protests: When, Where, Why, and Can You Win?

Presented by CohnReznick’s Government Contracting Industry Practice

Christine Williamson, Partner and Lee Dougherty, General Counsel, P.C.
PLEASE READ

This presentation has been prepared for information purposes and general guidance only and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice.

No representation or warranty (express or implied) is made as to the accuracy or completeness of the information contained in this publication, and CohnReznick LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

This presentation and its content are the property of CohnReznick LLP and are protected by applicable copyright laws. Any unauthorized use of the information herein will be considered a violation of CohnReznick LLP’s intellectual property rights. Unless stated otherwise herein, no part of this presentation may be copied, distributed, or published, in whole or in part, without the prior written agreement of CohnReznick LLP.
WHAT IS A BID PROTEST?

- A written objection by an interested party to a federal government procurement activity. This could be issuance or cancelation of a solicitation, award or proposed award of a contract, or the termination or cancellation of an award.

- A protest can be pre-award (regarding the terms of a solicitation) or post-award (regarding an award or proposed award).

- Your protest must allege that the federal government violated a procurement law or regulation by its action or inaction. And that you were prejudiced by that action or inaction (you would have won the award but for what the government did or didn’t do).
WHO CAN FILE A BID PROTEST?

• You must be an interested party – having some economic interest in the outcome of the protest.

• In a pre-award protest, you must be an actual or prospective bidder.

• In a post-award protest, you must have a direct economic interest that would be affected by the award – usually that means you must be in line for or at least eligible for award if your protest is sustained.
WHERE DO YOU FILE A BID PROTEST?

• You have three non-exclusive options, each carrying its own advantages and disadvantages

• **Agency Level Protest**: You can submit your protest to the contracting officer, the very person who’s actions you are protesting.

• An Agency Protest is generally inexpensive, quick (usually resolved in 30 days) and often does not involve a lawyer (because most experienced bid protest lawyers advise against Agency protests).

• Agency protests are very rarely successful. They are advisable only for gross and obvious agency errors or to send a message to the contracting officer.

• Loss of an agency protest can be appealed to the GAO, but some of the advantages of a GAO protest are lost if you protest to the Agency first.
WHERE DO YOU FILE A BID PROTEST?

• **GAO Protest**: You can submit your protest directly to the Government Accountability Office (GAO).

• This is a relatively inexpensive venue, but is more likely to succeed if you have a lawyer.

• Recent GAO statistics show the likelihood of achieving some success is about 45% (“effectiveness rate”).

• It can be procedurally challenging because of very short deadlines for filing and complex rules for disclosure of information. Not as complicated as a federal court filing.

• By law, GAO protests are resolved within 100 days of filing the protest.
WHERE DO YOU FILE A BID PROTEST?

• **Court of Federal Claims Protest:** You can submit your protest directly to the U.S. Court of Federal Claims for resolution.

• Like any federal court litigation, this can be very expensive, requires an attorney, and requires that the U.S. Department of Justice defend the Agency in court.

• Because of its more relaxed time deadlines, sometimes it’s the only option if you are too late to file at GAO. Judges have more power and flexibility in assessing your allegations and providing a remedy.

• Sometimes a Court of Federal Claims protest is resolved in eight to ten weeks, but sometimes much longer.
WHY ARE GAO PROTESTS THE MOST COMMONLY FILED PROTEST AND MOST RECOMMENDED?

• They are relatively inexpensive and they carry a respectable chance of success, if you know what you are doing.

• Most importantly, post-award protests carry an automatic stay of new contract performance if timely filed under the rules.

• Pre-award protests, they carry an automatic stay of award.
## Bid Protest Statistics for Fiscal Years 2007-2011

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Filed(^1)</td>
<td>2,353(^2) (up 2%(^3))</td>
<td>2,299 (up 16%)</td>
<td>1,989 (up 20%)</td>
<td>1,652 (up 17%)</td>
<td>1,411 (up 6%)</td>
</tr>
<tr>
<td>Cases Closed</td>
<td>2,292</td>
<td>2,226</td>
<td>1,920</td>
<td>1,582</td>
<td>1,394</td>
</tr>
<tr>
<td>Merit (Sustain + Deny) Decisions</td>
<td>417</td>
<td>441</td>
<td>315</td>
<td>291</td>
<td>335</td>
</tr>
<tr>
<td>Number of Sustains</td>
<td>67</td>
<td>82</td>
<td>57</td>
<td>60</td>
<td>91</td>
</tr>
<tr>
<td>Sustain Rate</td>
<td>16%</td>
<td>19%</td>
<td>18%</td>
<td>21%</td>
<td>27%</td>
</tr>
<tr>
<td>Effectiveness Rate(^4)</td>
<td>42%</td>
<td>42%</td>
<td>45%</td>
<td>42%</td>
<td>38%</td>
</tr>
<tr>
<td>ADR(^5) (cases used)</td>
<td>140</td>
<td>159</td>
<td>149</td>
<td>78</td>
<td>62</td>
</tr>
<tr>
<td>ADR Success Rate(^6)</td>
<td>82%</td>
<td>80%</td>
<td>93%</td>
<td>78%</td>
<td>85%</td>
</tr>
<tr>
<td>Hearings(^7)</td>
<td>8% (46 cases)</td>
<td>10% (61 cases)</td>
<td>12% (65 cases)</td>
<td>6% (32 cases)</td>
<td>8% (41 cases)</td>
</tr>
</tbody>
</table>
WHEN MUST A GAO PROTEST BE FILED?

- There are two separate time requirements for a GAO protest. One for a timely filing at GAO and one to trigger the automatic stay of contract performance. Unfortunately, these time requirements are not identical.

- To trigger a stay of new performance, GAO must notify the Agency of your protest within 10 days of contract award or within 5 days following a mandatory debriefing under FAR Part 15, whichever is later.

- To file a timely pre-award protest with GAO, you must file a protest involving the terms of a solicitation before the time proposals are due. For all other protests (all post-award protests), you must file within 10 days of when you knew or should have known of your grounds of protest, or, in the case of a mandatory debriefing under FAR Part 15, within 10 days following the debriefing.
WHAT ARE POSSIBLE GROUNDS OF PROTEST?

- Improper technical or price evaluation.
- Relaxation of the RFP/RFQ requirements.
- Failure to follow the stated evaluation grounds.
- Addition of an undisclosed evaluation ground.
- Improper cost-technical trade-off decision (the additional technical advantage of the awardee does not justify the high price premium paid.
- Improper or incomplete discussions.
- Organizational or personal conflict of interest.
ARE THERE PROTEST GROUNDS THE GAO WILL NOT CONSIDER?

- Protests filed by a subcontractor.
- Protests that raise contract administration issues (such as substitution of proposed personnel or place of performance after notice to proceed).
- Protests raising small business issues: the awardee is not a small business, or not an SDVO or HUBZone company as required by the solicitation.
- Untimely protests.
- Protests challenging an affirmative finding of responsibility under FAR Part 9.
WHAT IF I WON THE AWARD AND SOMEONE ELSE PROTESTS MY AWARD?

- An awardee has a right to have its counsel intervene in the protest, which means the counsel can monitor the progress of the protest and assist the agency in defending the protest, as needed.
- We always recommend that the awardee file an intervention to help protect the award.
WHAT HAPPENS IN A GAO PROTEST?

• Within a few hours of filing or within 24 hours at the latest, the GAO notifies the relevant agency that a protest has been filed. This notice triggers the automatic stay of performance.

• Every protest is initially reviewed by GAO’s procurement law group for sufficiency. Under GAO rules a protest must include “a detailed statement of the legal and factual grounds of protest including copies of relevant documents.”

• Each protest is assigned to an attorney advisor who will adjudicate the protest. The GAO attorney advisor will then request the agency to file an agency report within 30 days of the initial notice of protest to the agency. The Agency Report will include a contracting officer’s statement of facts relevant to the protest, a memorandum of law in response to the protest, and all relevant documents in the agency’s possession.
WHAT HAPPENS IN A GAO PROTEST?

• The protester or its counsel will then review the Agency Report and provide written comments to be filed with the GAO and agency counsel within 10 days of receipt of the agency report.

• GAO has the option of holding a hearing and taking testimony on any factual issues that may be unresolved by the agency report and the protester’s comments. Hearings occur in only about 10% or less of the protests filed.

• GAO must render its decision on the protest within 100 days of the filing of the protest. GAO has never missed this deadline.
ARE ALL PROTESTS THIS SIMPLE?

• No. Each protest may involve multiple protest “grounds.” Each individual ground must be timely under the rules, but new protest grounds may be filed at any time during the protest.

• For example: A protester may file its first three protest grounds quickly to insure receiving the automatic stay of contract performance. It may file additional protest grounds (called a supplemental protest) at any later time, so long as the grounds are timely under the GAO rules. Also, the protester may discover new protest grounds upon receipt of the Agency Report and attached documents. These new protest grounds must also be filed within 10 days of receipt of the new information.

• A supplemental protest will often require an additional Agency Report and, sometimes, a separate, later decision date.
IF I FILE A PROTEST, WILL I GET TO SEE THE AGENCY’S DECISION DOCUMENTS?

• The Agency Report contains all documents relevant to the protester’s allegations. That includes agency evaluation documents and other offerors’ proposals, to the extent necessary to adjudicate the protest. While GAO will review all the relevant documents, only the protester’s outside counsel is allowed to review all documents produced. In this case, the GAO will issue a protective order, which outside counsel must agree to, prohibiting the disclosure in any way of protected information.

• A pro se protester will not see the whole record available to GAO.

• A protective order, while important to prosecuting a protest, often makes client discussions difficult because the client is not allowed to review any draft documents produced by its counsel and conversations must be limited only to information previously disclosed.
WILL I GET TO SEE THE GAO’S FINAL DECISION?

- Yes, eventually. The GAO’s final decision will resolve all pending protest grounds either by sustaining the protest, denying the protest on its merits, or dismissing the protest for a procedural or jurisdictional defect.

- If the decision might contain protected information, the GAO may issue its initial decision under the protective order and give the parties an opportunity to request that some information be redacted from the final decision as either proprietary to the client or source selection sensitive to the agency.
WHAT HAPPENS IF GAO SUSTAINS MY PROTEST?

• If GAO sustains your protest, it will recommend one or more remedies available to the agency to correct the errors found by the GAO decision.

• Likely outcomes are a re-evaluation of existing proposals, modification to the solicitation and request for final proposal revisions, or (occasionally) exclusion of the awardee from eligibility or recommendation of awardee for award.

• Technically, GAO, as a division of Congress, can only recommend a solution. GAO’s recommendations are followed more than 99% of the time.

• If GAO sustains a protest, the GAO will recommend payment of the protester’s attorney’s fees (with some restrictions).
IF I LOSE A PROTEST GROUND, CAN I APPEAL?

• No, not technically. There is no appeal from a GAO decision.

• But, a losing protester may file the same protest grounds at the U.S. Court of Federal Claims, which will litigate and adjudicate the protest de novo. There is no time limit for filing a post-award protest at the Court of Federal Claims, but the later the protest is filed the more likely the work will be completed or nearly completed and the protest will be moot.
WHAT HAPPENS IN A COURT OF FEDERAL CLAIMS PROTEST?

• A Court of Federal Claims protest, whether or not there is a prior GAO protest, begins with a formal, written complaint, just as any federal court litigation does.

• It may also involve seeking an injunction to stop performance of the work until the protest is resolved. There is **no automatic stay of performance** at the Court of Federal Claims, although often the Department of Justice attorney will convince the agency counsel to agree to a voluntary stay of performance.

• The Court makes its decision based on a written record – “the Administrative Record” – which consists of all the documents and information that the contracting officer and source selection officials had before them at the time of decision-making.
WHAT HAPPENS IN A COURT OF FEDERAL CLAIMS PROTEST?

• While there is a possibility of discovery, such as interrogatories and/or depositions, discovery is heavily discouraged and requires prior court approval.

• Each party files a series of written briefs arguing their relative positions with detailed references to the administrative record. Usually two rounds of briefs for each party.

• The judge will usually convene a hearing to discuss the arguments with counsel in the form of an oral argument. Occasionally, the Court will take testimony from relevant parties – usually the agency decision-makers. No trial in the traditional sense.
HOW LONG DOES IT TAKE TO DECIDE A PROTEST AT THE COURT OF FEDERAL CLAIMS?

- There is no set time for a judge to render a decision in the Court of Federal Claims. The Court has a non-binding rule that gives protest decisions priority over other matters in order to make a decision as soon as possible.

- Sometimes the Court will decide a case in less than the GAO’s 100 day time frame, but sometimes it is later.
IF I LOSE MY PROTEST AT THE COURT OF FEDERAL CLAIMS, CAN I APPEAL THAT DECISION?

• Yes, the appeal from a Court of Federal Claims decision goes to the U.S. Court of Appeals for the Federal Circuit, one of 13 U.S. Courts of Appeal.

• Appeal from a Federal Circuit decision is discretionary with the U.S. Supreme Court.
IF I PROTEST, CAN I WIN?

• Yes. A successful protest can come by way of a GAO or court decision sustaining at least one protest ground, or by the agency agreeing to take corrective action to reconsider its action, re-evaluate proposals, or sometimes to re-open the competition.

• Occasionally, the agency will take corrective action by terminating the award and making award to the protester. It does happen and did happen to one of our clients just last month.

• The GAO recently released statistics showing that 45% of all protests filed at GAO get some form of the relief requested in the protest. While a protest is always an uphill battle, it can be successful.
The first thing any losing bidder should do is ask for a debriefing. (You should even ask for it if you win, but that’s another issue.) If FAR Part 15 entitles you to a debriefing, you must ask for it in writing within 3 days of notice to you that you’ve lost.

Use your debriefing to find out as much about your evaluation and the awardee’s evaluation as they are willing to disclose. See FAR § 15.506(d) for the information required to be released.

A debriefing benefits everyone by giving all parties as much information as possible to make an informed decision.

You need experienced bid protest counsel to advise you on your current situation and the available remedies. If you protest just because your upset that you lost or think you’ve been treated unfairly, you are likely to lose and waste your money.
HOW WILL I KNOW WHEN TO PROTEST?

- Ultimately, protesting is a *business* decision dependent on your particular circumstances.

- If you are an incumbent, you can benefit from a good faith protest because of the automatic stay of performance. In a protest situation, the incumbent will often receive a four to six month extension on the contract – and sometimes even a sole source contract during the pendency of the protest.

- Other factors include: strength of your protest grounds, customer reaction (do you have current contracts or pending awards before the same customer?), the relative cost of a protest, and the likelihood that you will eventually obtain the contract.

- You need to rely on your counsel in this situation and your counsel must be both knowledgeable and experienced in this area.
WHAT COSTS ARE RECOVERABLE?

- Expressly unallowable per FAR 31.205-47 f(g) – unless incurred pursuant to a written request from Contracting Officer

- If protest is sustained, GAO will generally recommend reimbursement.
  - Attorney fees
  - Consultant
  - Expert Witnesses

- GAO could recommend reimbursement of B&P costs

- Contractors have 60 days to file detailed claim for reimbursement
RESOURCES

Christine Williamson, Partner
Christine.williamson@cohnreznick.com
(703) 847-4412

Lee Dougherty, Chair, GovCon Practice Group
ldougherty@generalcounsellaw.com
(703) 226-1869

GovCon360 keeps you abreast of the ever-changing regulatory environment that is Government contracting. From reference materials, like searchable pdf copies of the FAR and DCAM, to our past Lunch and Learn seminar slide decks and thought pieces on industry matters, we’ve got it covered. Subscribe to our RSS feed to receive short alerts on recent industry changes. It’s always been our job to help our clients maintain a competitive advantage by staying ahead of the curve. This website is an extension of the services we’ve been providing for over 35 years by putting useful resources and up-to-date information at your fingertips.

www.govcon360.com