

A primer on agency-level protests of federal procurements — Part I

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The nuts and bolts

As most federal contractors are aware, unlike commercial contracts, federal contractors may challenge solicitation defects or contract award decisions made by the government through the bid protest process. Although protests at GAO¹ and the Court of Federal Claims² receive most of the attention due to the fact that their decisions are ultimately made public (at least in part), another forum also exists for disappointed offerors: protests made directly to the agency.

Conceptually, agency-level protests are designed to be even less formal and quicker than those before GAO.

This post is part one of a two-part series. This post will provide the basic nuts and bolts of the agency-level protest, and part two will provide the pros and cons of this specific approach.

FAR 33.103³ provides general guidance on these agency-level protests that agencies may supplement through their own regulations (e.g., GSA,⁴ NASA,⁵ DOE,⁶ VA⁷). Conceptually, agency-level protests are designed to be even less formal and quicker than those before GAO.

Paragraph (g) instructs agencies to use their “best efforts” to resolve the protests within just 35 days of filing. And Paragraphs (b) and (c) instruct the government and offerors to have “open and frank discussions” about the concerns being raised and to even use ADR techniques to resolve the issues.

Although the FAR emphasizes informality, there are some hard ground rules for agency-level protests.

First, to be considered a protest, it must be sent to the contracting officer and contain each of the elements listed in Paragraph (d)(2) below:

- (1) Name, address, and fax and telephone numbers of the protestor.
- (2) Solicitation or contract number.

- (3) Detailed statement of the legal and factual grounds for the protest, including a description of resulting prejudice to the protestor.
- (4) Copies of relevant documents.
- (5) Request for a ruling by the agency.
- (6) Statement as to the form of relief requested.
- (7) All information establishing that the protestor is an interested party for the purpose of filing a protest.
- (8) All information establishing the timeliness of the protest.

Just sending a disgruntled email to the contracting officer is not enough under this requirement — a protestor must actually “convey the intent to protest by a specific expression of dissatisfaction with the agency’s actions and a request for relief.”

Although FAR 33.103(e), permits an agency to consider untimely protests for “good cause shown” or “issues significant to the agency’s acquisition system,” this is rare in practice.

In *Silver Investments, Inc.*,⁸ B-419028, for example, GAO determined that the protestor had not filed an adequate agency-level protest when it sent contracting personnel an email outlining why the awardee was unqualified to receive the award and stating it “will be taking legal action because [the agency] did just what [the protester] thought [it] would do, put out minimum requirements then act like they don’t matter and lease ground that does not meet the requirements.”

According to GAO, this did not qualify as an agency-level protest (for purposes of tolling GAO’s time limits) because (1) the offeror did not request a ruling or any specific relief from the agency as was required under the FAR; and (2) the offeror threatened future legal action.

Second, there are strict timeliness rules that apply under Paragraph (e) that closely follow those at GAO. Protests based on solicitation improprieties (known as pre-award protests)⁹ must be filed before the bid opening or the closing date for receipt of proposals.

In all other cases, including protests concerning the agency's award decision (known as post-award protests), protests must be filed no later than 10 days after the basis is known or should have been known, whichever is earlier. Although FAR 33.103(e), permits an agency to consider untimely protests for "good cause shown" or "issues significant to the agency's acquisition system," this is rare in practice.

The agency's final decision can take a variety of forms and may or may not be as comprehensive as decisions issued by GAO.

Stay provisions also closely track those found at GAO. For agency-level protests regarding solicitation defects, Paragraph (f)(1) instructs agencies to refrain from awarding the contract when a timely agency-level protest is filed unless the contract award is "justified."

For other protests, Paragraph (f)(3) states the protestor must file within 10 days after contract award or "5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with 15.505¹⁰ or 15.506,¹¹ whichever is later."

The agency, however, may decide to override the stay under (f)(3) if an authority above the contracting officer determines in writing

that there are "urgent and compelling reasons" or it is "in the best interest of the Government" to do so. Also, should the protestor wish to file the protest again at GAO, paragraph (f)(4) explicitly states that the agency-level protest does not extend the time for obtaining a stay at GAO.

Part of the reason agency-level protests are so quick is that they often do not require the agency to produce documents or to issue a formal agency reports like GAO. There is also generally no process to intervene by the awardee. Unless the agency's regulations specifically require the agency to undertake these actions, agencies are under no other requirement to do so.

However, the agency regulations require the protest to be handled — whether at the contracting officer level or some other higher body — Paragraph (h) requires that the agency's decision "be well-reasoned, and explain the agency position." The final decision can take a variety of forms and may or may not be as comprehensive as decisions issued by GAO. At any rate, these decisions are not public and have no preclusive effect should the protestor wish to file again at GAO or COFC.

Notes

¹ <https://bit.ly/3HclwN7>

² <https://bit.ly/3FtPgFd>

³ <https://bit.ly/3VzTReA>

⁴ <https://bit.ly/3iz5bJf>

⁵ <https://bit.ly/3FsQf8m>

⁶ <https://bit.ly/3uram0t>

⁷ <https://bit.ly/3XYfB5r>

⁸ <https://bit.ly/3VxbJGN>

⁹ <https://bit.ly/3XXQD68>

¹⁰ <https://bit.ly/3BzpE7B>

¹¹ <https://bit.ly/3F3P2mH>

About the author



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