

Section 4: Bid Protests and Appeals

Bid Protests and Appeals

Objectives:

1. Define what a bid protest is and list its consequences.
2. Describe the process for resolving bid protests.



To silence criticism is to silence freedom.

Sidney Hook

What is a Protest?

A written objection by an interested party to :

- A solicitation by an agency for a contractor to provide property or services to the agency, or
- The cancellation of the solicitation, or
- An award or proposed award of the contract, or
- A termination or cancellation of an award of the contract.

Source: FAR 33.101



Letter Bid Protest



Email Bid Protest



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Common Protest Arguments. . .

- 1) Non-discretionary decision by the Contracting Officer
 - Failure to follow a procurement statute or regulation
- 2) Defective Specifications
 - Ambiguous or unnecessarily restrictive
- 3) Responsiveness of Apparent Low Bidder
- 4) Finding by Contracting Officer that Protestor is non-Responsible
- 5) Fraud
- 6) Termination or Cancellation of Award
 - Ensures that cancellation is not used to avoid competition



What May Not Be Protested?

- Small business size and competency issues (but may be protested to the Small Business Administration);
- Affirmative responsibility determinations; and,
- Procurements by non-federal agencies.
- Task and Delivery Order contracts that
 - 1) are within the scope of the original contract, and
 - 2) are valued at less than \$10 million.



(10 USC 2304c(e): Expiration date: September 16, 2016)



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Who May Protest?

Any “interested party.”

An Interested party is an **actual** or **prospective offeror** whose **direct economic interest** would be affected by the award of a contract or by the failure to award a contract.

Example: Bidder



Timing of a Protest

Some protests must be filed **BEFORE** bid opening:

For example: Protests that allege that the Solicitation is defective.

In all other cases, protests shall be filed no later than **10 days** after the basis of protest is known or should have been known, whichever is earlier.

The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency’s acquisition system, may consider the merits of any protest which is not timely filed.

Source: FAR 33.103(e); 4 CFR 21.2



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Impact of Bid Protest on Contract Award

The Competition In Contracting Act “CICA” Stay

- If a protest is received **before** the contract is awarded—
 - The contract may not be awarded until the protest has been resolved by the agency



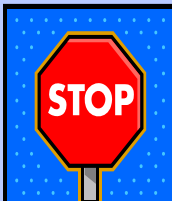
UNLESS

- The contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing to be in the best interest of the Government.
- For USACE, this justification must be approved by the Head of the Contracting Activity (that is, the Chief of Engineers).

Impact of Bid Protest on Contract Award

The “CICA” Stay

- If a protest is received **after** the contract is awarded:
 - It must be received within 10 days after contract award or within 5 days after a debriefing date offered to the protester. If it is not, then the protest is untimely.
 - Upon receipt of a timely protest, the Contracting Officer shall immediately **suspend** performance, pending resolution of the protest within the agency.



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- For USACE, this justification must be approved by the Chief of Engineers as Head of the Contracting Activity.



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Where Are Protests Most Commonly Filed?



A. Agency

Contracting Officer may take “corrective action” to resolve a protest.

Chief Counsel has delegated Agency Protest Decision authority to Division Counsels, except for HECSA and ERDC. EFARS 33.103(d)(3)-100

B. Government Accountability Office (GAO)

Presentation of Final Agency Position relative to a GAO protest rests with the Chief Counsel or his delegate (usually, Division Counsel).

Agency Record



General Contents:

- Contracting Officer’s Statement of Facts;
- Memorandum of Law;
- The protest;
- The offer submitted by the protester;
- The offer being considered for award or being protested;
- All relevant evaluation documents;
- The solicitation, including the specifications or portions relevant to the protest;
- The abstract of offers or relevant portions; and
- Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

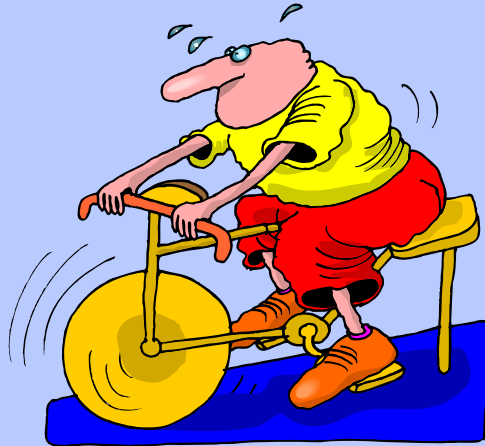


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EXERCISE:

Can you spot
the problem
with the
documents in
the agency
record?



Options When A Bid Protest Is Filed

Wait for the Final Agency Decision

The contract will be placed on hold until the protest is resolved.

Extend/Modify existing contract

May be an option, unless the previous contractor is the protestor.

Purchase Order

May be possible for small segments of a larger contract.

Government Labor

If sufficient labor force is available.

Award in the face of a protest– Approval UNLIKELY



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Consequences of a Successful Protest

Prior to Bid Opening or Receipt of Proposals:

- Correction of the Solicitation
- Cancellation of the Solicitation
- Allow Re-submittal

After Receipt / Prior to Award:

- Reopen Negotiations
- Award to the next low bidder
- Cancellation and Re-advertise

After Award:

- Terminate contract for convenience and Re-advertise

**A Protest Increases
Contract Costs and
Negatively Impacts
the Project
Schedule.**



Questions?



**It is better to know some of the questions
than all of the answers.**

James Thurber

