

UNDERSTANDING GOVERNMENT CONTRACT BID PROTESTS

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The Whay Law Firm has successfully handled numerous protests on behalf of clients challenging contract awards, their exclusion from the competitive range, and those seeking to retain awarded contracts. Whether you are considering filing a protest or a protest has been filed against a contract which you have been awarded, our firm can help with effective and affordable legal services.

Utilizing the services of an attorney familiar with government contracts and the protest process can be the difference between success and failure. Engaging an attorney is often necessary because most protests are subject to protective orders, which prevent protesting companies from seeing vital information such as proposals and evaluations. Quickly engaging a qualified attorney is important due to the short filing deadlines for protests. The Whay Law Firm can assist you with the following:

A. Explaining the time restrictions for filing a protest and what to expect from the process. Protests filed within strict deadlines may require the procuring agency to suspend the contract award or performance.

B. Identifying and evaluating potential protest grounds. If you do not raise an issue in your initial protest, you may be unable to raise it later.

C. Choosing the appropriate forum for filing a protest. The forum could be the agency, the General Accountability Office (GAO), the Court of Federal Claims, or the Small Business Administration (SBA). Certain issues have to be filed with the SBA, while others must be filed in the other forums. Which forum you choose will impact the cost and timing of the protest.

D. Determining if you are entitled to a debriefing, and what impact that may have on your potential protest.

E. Preparing a protest submission which complies with the regulatory requirements, includes all appropriate protest grounds, and cites to relevant agency and court cases.

F. Interacting with the various attorneys representing the agency, the GAO, the SBA, and other companies involved in the protest.

G. Responding to various filings by the agency and opposing parties, such as motions to dismiss and objections to discovery requests.

H. Reviewing documents provided by the agency. A supplemental protest may be necessary because additional grounds of protest are often discovered during review of the documents provided by the agency. Companies typically do not have direct access to the documents because they may be subject to a protective order. In such instances only your attorney will be allowed to review the documents.

I. If you are the awardee and someone has protested your award, we can explain to you why you should intervene in the protest.

There are strict filing deadlines for filing bid protests. Please make sure you know the deadlines and the actions necessary to protect your interests.

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The following is a brief overview of the bid protest process:

If a company believes the federal government failed to comply with the terms of a solicitation (i.e. IFB, RFP, RFQ, etc.), or applicable laws or regulations in a procurement, the company must follow strict rules or face losing the right to protest. A protest is a legal challenge to the actions of the government during the procurement phase, including the evaluation of bids/proposals and the award of a contract. The how, when, and where of protests are controlled by various laws and regulations.

There are three basic venues for protesting. A company may choose to file a protest directly with the procuring agency, it may file with the General Accountability Office (GAO), or it may file with the Court of Federal Claims (COFC). Which venue is best will depend upon various facts. Basic considerations include the value of the procurement to your company, the cost of pursuing a protest in the particular venue, whether the protest would be timely in the venue (i.e. a protest that is untimely in the GAO may be timely in the COFC), and whether the protest will involve information that requires a protective order (i.e. competitive information is limited to the attorneys, and not disclosed to the companies involved). Most protests are filed with the GAO, so this primer will focus on the GAO protest process.

How many days you have to file a protest will depend. In general, if a protest is based on an obvious problem with the solicitation documents, the protest must be filed before the date the bid or proposal must be submitted. The purpose of this rule is to prevent a contractor from sitting on their rights to challenge what they believe to be an unfair solicitation, rolling the dice to see if they win, and then, if unsuccessful, filing a protest.

The time requirements for other protests, such as a challenge to the government's decision to award to another company, will depend on the venue as well. At the GAO, a protest must be filed within 10 days after the basis for the protest is known or should have been known. If a debriefing is requested, and the government is required to provide the debriefing (i.e. negotiated procurement under FAR Part 15), then the protest may be filed within 10 days after the debriefing.

However, there are benefits to filing even earlier. An automatic stay (i.e. the government is required to withhold award and suspend contract performance) is available if the protest is filed with the GAO within 5 days of the offered mandatory debrief date or within 10 days of contract award. A stay of performance can be key since it can impact your remedy. Without the stay, the contract will continue to be performed and there may not be any contract requirement left to award to you even if your protest is successful.

Once your protest is filed with the GAO, the agency has 30 days to provide the agency report (AR). The AR will include documents responsive to your protest arguments, including documents specifically requested in your protest. The AR will include a statement by the contracting officer regarding the grounds of protest, as well as a legal memorandum from the agency's lawyer. Basically, the AR will show what the agency actually did during the procurement process, which may bolster the initial protest or provide additional grounds of protest. Sometimes the agency refuses to provide certain requested documents, and the dispute has to be settled by the GAO attorney assigned to the protest.

The agency or an intervening awardee may request that all or part of your protest be dismissed. Such requests by the agency or intervenor are often based upon arguments of timeliness, standing, ripeness, and lack of prejudice. If a request for dismissal is filed, the protestor will have to file a response opposing the request. If a dismissal request is submitted, it is often before the 30-day deadline for filing the AR.

Once the AR is provided, the protestor has 10 days to file comments responding to the agency's arguments. If the protestor fails to address any ground of protest in its comments, the GAO will deem the omitted ground as abandoned by the protestor.

In addition to comments, a protestor often discovers additional grounds of protest upon reviewing the AR. These additional grounds of protest have to be filed within 10 days of receiving the AR (i.e. within 10 days of knowing the basis for the protest ground). The agency will be required to file a supplemental AR in response, and the protestor will have to file supplemental comments. The process for supplemental protests is truncated (e.g. the GAO may require the supplemental AR to be filed within 10 days, instead of the 30 day period allotted for the initial AR).

The agency may take corrective action at any point in the process. Corrective action by the agency is a recognition by the agency that they failed to comply with some part of the procurement process, and they are therefore correcting that mistake. The agency has wide discretion in the form of corrective action, and it often includes reevaluation of proposals or amendments to the solicitation. If the agency takes corrective action, the GAO will dismiss as moot the portion of the protest related to the corrective action.

The GAO will issue its decision within 100 days of the filing of the protest. The GAO may deny or sustain the protest, in whole or part. If the protest is sustained, the GAO will direct the agency to remedy the problem. If the GAO denies a protest, the protestor may refile the protest with the Court of Federal Claims.

Understandably, clients often want to know the likelihood that their protest will be successful. The likelihood of success or failure is fact specific to each protest. Moreover, many successful protests are based upon the supplemental protest, which is information not available to the protestor until the AR is filed. Statistically, however, the GAO has reported that the effectiveness rate of protests in the last several years is between 42% to 45%. That means that nearly half of the protests filed result in the GAO sustaining the protest or the agency taking corrective action to remedy the mistakes cited in the protest.

You should promptly speak with an attorney if you believe the government has not abided by the terms of a solicitation, or applicable laws and regulations. Timely guidance and evaluation of your protest is important to meeting the stringent requirements for protesting.

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Please contact us if we can be of any assistance to you with your legal matters:

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