

PROTESTS



Guiding Principles

- Resolving solicitation issues before a protest is filed may avoid a protest and associated costs and delays in contract award.
- When a protest is filed, prompt action by the Contracting Officer (CO) will help to assure efficient and timely resolution of the protest.

[Reference: FAR 33.1, DEAR 933.1, GAO Regulations at 4 CFR 21]

Overview

This chapter discusses the processing of documents in response to a bid protest filed for decision by the contracting activity, the Senior Procurement Executive, the Government Accountability Office (GAO), or the Court of Federal Claims.

Background

The FAR, DEAR and GAO regulations referenced above provide detailed direction for the handling of protests. This Guide section presents additional information that may be helpful to those personnel who are involved with the protest process.

Protests are a structured means by which offerors challenge some aspect of the Department's handling of a procurement. Protests can also provide the Department with an opportunity to remedy significant errors in a procurement.

Forums for Protest

Currently, protests can be filed in three different fora: 1) to the agency (these "agency protests" are decided by either the Head of the Contracting Activity (HCA) or the Senior Procurement Executive as set forth in DEAR Part 933); 2) to the GAO; and 3) to the United States Court of Federal Claims.

If an offeror contacts the CO or the Contract Specialist (specialist) prior to filing a protest, the CO or specialist should consider whether it is appropriate to provide substantive guidance that addresses the offeror's concerns. If it is appropriate, addressing the offeror's concerns may help avoid the filing of a protest, and may encourage the potential protester to pursue any protest within the agency before filing a protest with GAO or a suit in court. The CO may also determine, with the advice of Counsel, whether corrective action should be taken before a protest is filed.

Processing Protests

Upon receiving notice of a protest, the CO must withhold award or suspend contract performance in accordance with the provisions at FAR 33.103(f), 33.104(b), (c), and (d), and DEAR 933.103(f), 933.104(b) and (c).

I. Protests to the Department of Energy Contracting Activity's HCA or Senior Procurement Executive

Protests to DOE will be decided either by the HCA or the Senior Procurement Executive. Generally, unless the protester requests that the protest be decided by the Senior Procurement Executive, the HCA has served as the Source Selection Official, or the circumstances at DEAR 933.103 (i)(1)(i), (ii), or (iii) exist, protests to DOE will be decided by the HCA. The Senior Procurement Executive or the HCA (whichever is the deciding authority) will issue a decision on the protest within 35 calendar days, unless a longer period of time is needed. Within five calendar days of receipt of the protest, a letter shall be sent to the protester acknowledging receipt of the protest and indicating the projected date by which the protest will be decided. If the protest is to be decided by the HCA, the CO will issue the letter. If the protest is to be decided by the Senior Procurement Executive, the Office of Contract Management (OCM) will issue the letter. If the protest cannot be decided by the projected date, this information should be provided to the protester in writing, along with a revised estimate of the decision date.

Protest decisions must be in writing. Even if the decision is to dismiss the protest on a procedural ground (such as lack of timeliness, lack of interested party status), the protest decision should note the allegations of the protest. Protest decisions should be sent by expeditious means to the protester. If the protester has a designated representative, the decision must be sent to the representative. DOE should obtain verification of the receipt of the protest decision and this information should be included in the contract file. If there is a subsequent GAO or Court of Federal Claims protest, the date of receipt of the agency protest may be material. The contract file should include the protest decision and evidence of the protester's receipt of the protest.

The CO should make every attempt to resolve the protest through direct negotiations with the offeror with due regard for the need to take corrective action, if appropriate.

Protests to Be Resolved by the Contracting Activity's HCA

The CO should prepare a report including the elements at FAR 33.104(a)(3)(iv) and assemble the information (including legal analysis) necessary to enable review of the protest and the issuance of a decision by the HCA. The report shall be signed by the CO and field counsel. In order for the HCA to render a protest decision within 35 calendar days, the CO shall brief the HCA on the status of the protest within 14 calendar days after receipt of protest, and provide the report to the HCA within 28 calendar days after receipt of the protest. The CO should provide a copy of the protest and the protest decision of the HCA to the OCM.

Protests to Be Resolved by the Senior Procurement Executive

The CO should notify OCM immediately and provide OCM with a copy of any protest that is to be decided by the Senior Procurement Executive.

The CO shall prepare a report similar to that discussed in FAR 33.104(a)(3)(iv). The report should include both a statement of relevant facts and a legal analysis, and shall be signed by the CO and field counsel. The report shall be concurred on and submitted through the contracting activity's HCA to the OCM. The OCM will determine if it would be advantageous to provide the protester and interested parties with a copy of the statement of relevant facts. Prior to providing the protester and interested parties with a copy of the statement of relevant facts, the OCM shall coordinate with the Assistant General Counsel for Procurement and Financial Assistance (GC-61) regarding the information to be distributed. If it is determined to be advantageous, the OCM should allow the protester seven calendar days to provide comments. Any comments received should be provided to the CO to address, usually in writing. The CO shall be provided seven calendar days in which to submit an addendum. The CO shall consult with the OCM concerning the number of copies needed and any other information required.

The following provides a schedule of milestones in order for the Senior Procurement Executive to render a protest decision within 35 calendar days from receipt of the protest:

1. CO submits a report to the OCM within 12 calendar days after receipt of protest.¹
2. OCM, in coordination with GC-61, shall prepare a draft protest decision memo to be provided to the Director, OCM within 24 calendar days after receipt of protest.
4. OCM shall brief the Senior Procurement Executive on the status of the protest within 28 calendar days after receipt of protest.
5. The protest decision memo shall be provided to the Senior Procurement Executive within 33 calendar days after receipt of protest.

The Office of Contract Management will explore with the protester whether the use of alternative dispute resolution techniques may assist in the resolution of the protest decision.

¹ DEAR 933.103 currently includes a limit of 21 calendar days. An amendment to the DEAR to delete this internal guidance on timeframes is in process. Accordingly, CO's shall follow the timeframes prescribed in this chapter.

II. Protests to the GAO

Not later than one (1) day after a protest is filed with the GAO, the protester provides a copy of its complete protest to the contact person stated in the solicitation or to the CO. Within one (1) day of receipt of a protest, the CO must give notice of the protest to the contractor, if award has been made, or, if no award has been made, to all offerors who appear to have a reasonable prospect of receiving award if the protest is denied. In most instances, the protest will be marked as containing “protected material” or will have a legend reflecting that the protester considers the information nonpublic. Any protest with a legend of that nature, or one filed by the protester “per se” (that is, by itself and not by counsel) that appears to contain nonpublic information, may not be distributed to other offerors or to DOE personnel who are not involved in the procurement. In that event, the CO should request a redacted version from the protester. The CO works with the counsel to the procurement in reviewing the merits of the protest, and preparing the agency report. GC-61 will coordinate with the CO and counsel to the procurement on all stages of the protest. GAO makes every effort to issue a decision on the protest, and any supplemental protest, within 100 calendar days after the initial protest is filed.

III. Protests in Federal Courts

When a bid protest is filed with the Court of Federal Claims, the Department will be represented by the U.S. Department of Justice. Upon receipt of any bid protest complaint the CO should immediately notify counsel for the procurement, as well as GC-61 and GC-30.