

CHAPTER CONTENTS

Key Points	248
Introduction.....	248
Protests	248
Contract Claims.....	256
Seizures.....	258
Contract Disputes and Appeals.....	260
Contract Settlements and Alternative Dispute Resolution.....	262
Website and DVD Materials Related to Chapter 7	264

Chapter 7

Protests, Claims, Disputes, and Appeals



Key Points

- After receipt of a protest, the contingency contracting officer (CCO) needs to act quickly and contact the supporting legal counsel.
- To avoid distracting, time-consuming disputes and litigation, the CCO should strive to resolve contract performance issues by mutual agreement with the contractor.

Introduction

Effective lines of communication between the contingency contracting office and the supporting legal office are critical to successfully dealing with a bid protest or appeal. As part of deployment preparations, the CCO must identify and know how to work with supporting legal counsel. In addition, protests can sometimes be averted by frank and open communications with the vendors, who might recognize significant errors in solicitations and evaluations overlooked by the CCO because of the pace of the operation. The CCO should encourage vendors to attempt to resolve their concerns with the CCO, pursue an agency protest if the issue is not resolved by the CCO, and then file a protest with the Government Accountability Office (GAO) as a last resort. Although the vendor has complete freedom to protest in any forum, and the CCO is never an advocate of the vendor, the interests of the government can often be best protected when vendor concerns are resolved quickly and at the lowest level.

This chapter discusses actions that a contracting officer should take when notified of a possible protest, claim, dispute, or appeal.

Protests

Protests. As described in Part 33 of the Federal Acquisition Regulations (*FAR Part 33*) a protest is defined as a written objection by an interested party to any of the following:

- Solicitation or other request by an agency for offers of a contract for the procurement of property or services
- Cancellation of the solicitation or other request
- Award or proposed award of the contract
- Termination or cancellation of an award of the contract if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract
- Delivery orders and task orders under multiple award contracts that exceed \$10 million, as specified in FAR 16.505 (a)(9)(B).

Protests to the agency

Executive Order 12979, “Agency Procurement Protests,” establishes policy on agency procurement protests. Before submission of an agency protest, all parties should use their best efforts to resolve concerns raised by an interested party at the CCO level by undertaking open and frank discussions. The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Acceptable protest resolution methods include the use of alternative dispute resolution (ADR) techniques, third-party neutrals, and personnel from another agency.

Protests to the agency shall include the following (FAR 33.103(d)(2)):

- Name, address, fax, and telephone numbers of the protester
- Solicitation or contract number
- Detailed statement of legal and factual grounds for the protest, including a description of resulting prejudice to the protester
- Copies of relevant documents

- Request for a ruling by the agency
- Statement about the form of relief requested
- All information establishing the protester as an interested party
- All information establishing the timeliness of the protest.

Failure to substantially comply with these requirements may be grounds for dismissal of the protest.

Agency procedures or solicitations shall notify potential bidders and offerors whether independent review is available as an alternative to consideration by the CCO of a protest—or is available as an appeal of a CCO decision on a protest. If there is an agency appellate review of the contracting officer decision on the protest, it will not extend the GAO timeliness requirements. Therefore, any subsequent protest to GAO must be filed within 10 days of knowledge of an initial adverse agency action, as specified in Section 21.2(a)(3) of Title 4 of the Code of Federal Regulations (*4 C.F.R. 21.2(a)(3)*). If a party wishes to have the case classified as an express option (*4 C.F.R. 21.10(a)*), the party must submit a written request no later than 5 days after the initial or supplemental amended protest is filed. GAO will notify both parties of its decision. In some cases, GAO will decide that the express option is appropriate even though no party formally requests it.

Action after receipt of protest. If a protest is received before the award of a contract, the contract may not be awarded until the protest is resolved. Unless urgent and compelling reasons exist for contract award, the justification should be submitted in writing and determined to be in the best interests of the government. Such justification or determination shall be approved at a level above the CCO (or by another official pursuant to agency procedures).

If an award is withheld pending agency resolution of the protest, the CCO will inform those offerors whose proposals or bids may

become eligible for the contract award. If appropriate, the offerors should be asked to extend the time for acceptance to avoid the need for resolicitation.

After receipt of a protest, the CCO shall immediately suspend performance pending resolution of the protest by the agency. This resolution includes any review by an independent high-level official unless continued performance is justified. Additional information on receipt of protests is available in *FAR 15.505* and *15.506*.

Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. Agency protest decisions shall be well reasoned and shall explain the agency position. The protest decision shall be provided to the protester by using a method that furnishes evidence of receipt.

Protests at the Government Accountability Office

Receipt of protest. As described in *4 C.F.R. 21*, this guidance focuses on protests before GAO, where the vast majority of protests are filed. After receipt of a protest, the CCO should immediately contact the supporting legal counsel. GAO protests are fast-moving actions, with a government report due to GAO within 30 days (within 20 days under the express option) and a GAO decision issued within 100 days (within 65 days under the express option).

Reachback. Reachback is a highly effective tool during a protest. A CCO's legal counsel for working on bid protests may be a remote reachback asset. If the CCO has local legal counsel available, chances are that the local counsel will be working with a reachback legal office.

Such reachback offices frequently work on bid protests and can rapidly understand protest issues.

Protest before award. As described in *FAR 33.104(b)*, when the agency receives notice from GAO of a protest filed directly with GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity (HCA) on a nondelegable basis, after a written finding of the following:

- Urgent and compelling circumstances that significantly affect the interest of the United States will not permit awaiting the GAO decision.
- Award is likely to occur within 30 days of the written finding.

A contract award shall not be authorized until the agency has notified GAO of the finding, as discussed in *FAR 33.104(b)(1)*. When a protest against the making of an award is received and the award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose proposals or bids might become eligible for award after the protest.

Protest after award. As discussed in *FAR 33.104(c)(1)*, when the agency receives notice of a protest from GAO within 10 days after contract award, or within 5 days after a debriefing date offered to the protester for any debriefing required by *FAR 15.505* or *FAR 15.506*, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract. In accordance with agency procedures, the HCA, on a nondelegable basis, may authorize contract performance, notwithstanding the protest, upon a written finding of the following:

- Contract performance will be in the best interests of the United States.

- Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO decision.

Contract performance (or continued performance) shall not be authorized until the agency has notified GAO of the aforementioned finding. When a decision is made to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis. When the agency receives notice of a protest filed with GAO after the dates in *FAR 33.104(c)(1)*, the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award might be invalidated and a delay in receiving the supplies or services is not prejudicial to the government's interests.

Response to a protest, the first 24 hours. The actions that the CCO should accomplish within 24 hours of receipt of a written protest include the following:

- Transmit a copy of the protest document to the supporting legal office. Because the protest document may contain proprietary or source selection sensitive information, do not release any copies of the protest to other parties (e.g., the awardee or offerors) until you discuss the release with the assigned attorney.
- Confirm the identity of the attorney assigned to work on the protest, and obtain contact information (email address and telephone numbers). Ensure that the attorney has the CCO's contact information.
- Discuss the allegations with the attorney, and explain the impact on mission operations if a delay of award or performance is triggered by a protest.
- If a delay is triggered, the award cannot be made (pre-award protests) and contract performance may not begin (post-award protests).

- Following coordination with the assigned attorney, inform offerors and the awardee that a protest has been filed and that contract award or contract performance has been stayed. Ensure that the assigned attorney informs GAO of the status of the delay.
- If the HCA authorizes contract performance, discuss this development with the attorney. (*FAR 33.104*)
- Identify the key people who are knowledgeable about the allegations in the protest, and obtain their contact information to give to the attorney. These people might be technicians, evaluators, or personnel at the requiring activity. Inform these key people about the protest, and ensure their availability for the next 100 days (protest time frame) to support the government's response to the protest. Determine whether declarations, affidavits, or other statements of fact from key people will be necessary.

Response to a protest, the first 30 days. The first 30 days of any GAO protest are very important. The government must submit its agency report to GAO and the protester within 30 days. This time period gives the CCO and legal counsel an opportunity to assess the merits of the case and develop an appropriate response. Items to consider or accomplish are as follows:

- Chances are that the CCO and the contingency contracting office have extremely limited administrative support and equipment. GAO protests are typically document intensive, requiring considerable copying and collating. Given these circumstances, the CCO and supporting legal counsel should determine the best way to assemble the agency report.
- The CCO should immediately coordinate with, and begin transmitting key contract documents to, the supporting legal counsel. This approach enables the government counsel to understand the relevant

facts and issues and to assess the merits of the protest early in the process. Such an approach also allows the legal office to begin assembling the agency report to GAO.

For an agency report to GAO, the required documents include:

- CCO statement of relevant facts
- Bid or proposal submitted by protester
- Bid or proposal of the awardee
- Solicitation
- All evaluation documents
- Other relevant documents (for example, debriefing slides and related documents).

Given the concentrated timeline involved, it is good practice to maintain daily communications between the attorney and the CCO regarding the status of the protest.

Corrective action. For a GAO protest, Day 30 (Day 20 under the express option) is a significant milestone because the government must file its agency report with GAO by this deadline. In addition, GAO has held that the government is not liable for a protestor's legal fees and costs if the government takes corrective action in response to a protest within the first 30 days (20 days under the express option). Consequently, the timely review and assessment of the merits of a protest not only help get the acquisition back on track toward award, but also are key to avoiding the payment of potentially significant legal expenses.

Actions after Day 30 (Day 20 under the express option). A protester has 10 days to file a written response to the government's agency report, usually in the form of a legal brief. GAO will issue its decision by Day 100 (Day 65 under the express option). On occasion,

to clarify the record or the issues involved, GAO requests a hearing and requires testimony from government officials.

Contract Claims

Several aspects of contingency contracting produce an environment ripe for contract claims. A CCO can do little to eliminate the likelihood of claims. The key is focusing on actions that will ease the resolution of the claim. Such actions include monitoring contractor performance (to create a clear record of exactly what the contractor did) and performing ongoing market research (to monitor fair and reasonable price data).

As appropriate, the CCO should strive to resolve contract performance issues by mutual agreement with the contractor, thereby avoiding distracting and frequently time-consuming litigation. When a claim (or a potential claim) arises, the CCO should contact the supporting legal counsel for assistance and advice. If an agreement cannot be reached with a contractor, the CCO must issue a final decision on the contractor claim. During a contingency, the CCO must strike a balance between expeditious settlement of contract claims and protection of government interests.

Contractor claims. Because of the high operational tempo usually associated with contingency contracting, responding to contractor claims and disputes can divert precious time from the mission at hand. The CCO should consider or accomplish the following:

- The CCO should recognize that not every contractor request for costs or other relief is a claim. A contractor request for equitable adjustment may be just that—a straightforward request that is related to changed or increased contract requirements. If so, the CCO might be able to dispose of such requests relatively quickly. Unlike requests for adjustments, the submission of a contract claim begins accrual of interest on the claim.

- The administrative burden that contractor claims can place on the CCO and the overall contingency contracting mission can be mitigated by a working understanding of the flexibility that exists under FAR and the Defense Federal Acquisition Regulation Supplement (DFARS); an understanding of what is (and is not) a contract claim; assignment of, and maintenance of communications with, a trained contracting officer's representative (COR); the existence and quality of contract file documentation; and application of ADR techniques. To help alleviate this burden, the CCO should seek early and frequent counsel from the supporting legal office.
- After receiving a claim that exceeds \$100,000, the CCO should ensure that the claim is certified by the contractor, consistent with FAR 33.207.
- Any suspected fraudulent claim or other misrepresentation of fact should be reported to the supporting legal office and the chief of the contracting office (COCO).

Contingency contracting officer final decision. The CCO should make the final decision as follows.

- The CCO should use the specialized skills of the functional representatives (e.g., the COR) when addressing the facts and issues in dispute.
- Final decisions for a claim of \$100,000 or less must be issued within 60 days after receipt of the claim.
- For claims exceeding \$100,000, within 60 days after receipt of a certified claim, the CCO must either issue a final decision or notify the contractor when a final decision will be issued.
- Final decisions will be prepared in accordance with FAR 33.211. Final decisions must include notification to the contractor pursuant to the disputes clause in the contract.

- The CCO's final decision to deny a contractor claim (either in part or in whole) can result in a dispute by the contractor under the applicable contract disputes clause.

Seizures

Under the principle of military necessity and subject to restrictions, commanders may seize private property during hostilities. Seizing private or public property for mere convenience is unlawful. Commanders may *not* leave civilians without adequate food, clothing, shelter, or medical supplies as a result of a seizure of civilian property. Legal assistance must be obtained before the seizure of any property.

Property control record book. The property control record book (PCRB), which may be issued to any level, confers no authority, but merely facilitates the ability to document seizures under the law of war.

Procedures for the property control record book. PCRB procedures are as follows:

- Each PCRB should be numbered and should contain a minimum of 10 sets of 4 serial-numbered copies of the property control record form.
- The cover of the book should contain a statement detailing where the book may be used.
- The inside cover of the PCRB should contain instructions for the commander on the use of the forms, including the appropriate distribution of the four property control and receipt records.
- The serial-numbered property control record should require the soldier seizing the property to enter pertinent information concerning the seized property and should contain a receipt, both in English and the local language, to be signed by the property owner, if available.
- The inside of the back cover should contain a seizure record.

- The Staff Judge Advocate Office should be responsible for the issuance of PCRBs to the commanders. Hand receipts can be used to issue PCRBs to the units. It should be emphasized that the staff judge advocate is only issuing the books and that accountability for the books and seized property is a command responsibility.

Payment for seizures. The following procedures are available to provide compensation for seized property:

- **Ratification.** The act of approving an unauthorized commitment by an official who has the authority to do so. Additional information on ratifications is included in Chapter 5.
- **Retroactive leases.** The US Army Corps of Engineers may negotiate retroactive leases in accordance with Army Regulation 405-15.
- **National defense contracts.** Defense agencies may enter into and modify contracts—without regard to other provisions of law related to making, performing, amending, or modifying contracts—whenever the Secretary concerned decides that such action would facilitate the national defense. (Section 1431–1435 of Title 50 of the United States Code [*50 U.S.C. Section 1431–1435*] and *Executive Order 10789*, as amended)
- **Claims adjudication in accordance with applicable Service regulations.**

Whatever process is used to settle claims will be influenced by the local conditions. However, contracting responsibility is generally limited to ratification actions and extraordinary contractual relief under Section 1431–1435 of Title 50 of the United States Code (*50 U.S.C. Section 1431–1435*) and *FAR Part 50*.

Contract Disputes and Appeals

The rules for handling contract disputes and appeals are the same in a contingency contracting environment as they are for routine contract actions occurring at home base. Under the Contract Disputes Act (*41 U.S.C. Section 7101-7109* and *FAR 33.202*), CCOs receive no special treatment or waiver of applicable rules simply because a contingency contract action is at issue. As with bid protests, the CCO's legal support probably will be provided by a reachback attorney. Experience shows that early involvement by legal counsel can help avoid an appeal altogether. However, if an appeal is received, legal counsel should be extremely effective in assessing and orchestrating a government response to the contractor appeal. The underlying record of evidence related to any contract dispute is critical to crafting the government's response. By applying a few simple practices, the CCO can greatly enhance the underlying contract record and the government's position in a contract appeal. Contractors should send appeals to the following address:

Civilian Board of Contract Appeals
1800 F Street, NW
Washington, DC 20405

Additional information is available at <http://www.cbca.gsa.gov/>.

A few best practices. In general, contract disputes involve issues that develop over time and entail a series of actions by both the contractor and government personnel. In a contingency contracting environment, assembling a solid contract record presents unique challenges. To mitigate these challenges, the CCO should employ the following simple tools in the contingency contracting office:

- **Digital and video images.** As so often noted, a picture is worth a thousand words. Case law and experience demonstrate that evidence

obtained concurrently with contract performance or a disputed event is generally given greater weight than evidence that is cobbled together after contract litigation begins. The CCO should ensure that inspectors, quality assurance personnel, CORs, and other representatives make it a standard practice to use digital cameras. This approach is particularly valuable for vehicle leases in the area of responsibility (AOR). Pictures and videos should immediately be emailed to the CCO for review and should be included as part of the contract file. Such pictures are especially useful for assessing, if not enhancing, the strength of the government's case.

- **Accounting for personnel turnover.** The turnover of government personnel involved in contingency contracting actions represents a significant impediment to developing the government's case in an appeal. The CCO should work with J1, Manpower and Personnel, to ensure that key witnesses, past and present, can be located. The CCO must employ a personnel locator process that permits the CCO and successors to identify and locate witnesses, including personnel who redeploy away from the contingency. At a minimum, the CCO should inform key personnel about the appeal and their associated roles and should ensure that the government can locate them if necessary.
- **Contract files and related documentation.** The key to success in prosecuting any contract dispute is the availability of contract documents. Without the necessary documents, a case is seriously weakened. Hence, the CCO should establish an administrative process for obtaining and filing the documentation that underlies a contract action.
- **Storage and retrieval.** The CCO should consider developing an electronic contract file where documents, digital pictures, charts, and other records can be readily stored and retrieved. Note that CCOs also should make an electronic copy of all emails pertaining to

claims and should include them with the contract file before leaving the AOR. This documentation might be needed later to assist with claims.

- **Appeals.** As appropriate, the CCO should use the reachback legal office to assemble the underlying record for any contract appeal, referred to as the Rule 4 file. (*28 U.S.C. Appendix Rule 4*) At this point, the CCO practice of establishing an electronic contract file pays significant dividends.

Contract Settlements and Alternative Dispute Resolution

If a dispute cannot be resolved between the parties, a protracted litigation process often results. To avoid distracting, time-consuming litigation, the CCO may consider negotiating a settlement with the contractor or using more formal ADR procedures, as described in *FAR 33.214*. In either event, the CCO should seek the assistance and support of legal counsel. As stated previously, CCOs should regard legal counsel as useful problem solvers who can help negotiate settlements or pursue ADR measures, thereby expediting the resolution of contractor disputes. Note that a timely agreement developed by the parties—rather than a decision resulting from litigation—might be more valuable in maintaining a continuing business relationship with the contractor during a contingency.

Alternative dispute resolution elements. The essential ADR elements are (1) existence of an issue in controversy, (2) voluntary election by both parties to participate in the ADR process, (3) agreement on an alternative procedure and terms, and (4) participation in the process by officials of both parties who have the desire and authority to settle the dispute. If ADR is used, The CCO should consider the following few tips before beginning:

- Know your facts.
- Avoid using words and body language that might produce an angry reaction.
- Be professional, and observe local customs at all times.
- Develop an appreciation for the other side's viewpoint.
- Diffuse anger when it first appears.
- If using a mediator or facilitator, talk to the other side, not the mediator, who is there to help, not to judge.
- Use simple, clear, and concise language, and recognize that most people want to settle a dispute.

Claims under alternative dispute resolution. If a claim has been submitted, ADR procedures may be applied to all or only part of the claim. If ADR is used subsequent to a CCO's final decision, its use does not alter any of the time or procedural requirements for filing an appeal, nor does it constitute reconsideration by the CCO of the final decision.

Continued performance. If a determination is made under agency procedures that continued performance is necessary pending resolution of any claim arising under (or relating to) the contract, the contracting officer shall use the disputes clause described in FAR clause 52.233-1 (and its Alternate I).

Reminder. In preparing contracts and solicitations, The CCO must remember to insert the disputes clause in FAR 52.233-1 unless the conditions in FAR 33.203(b) apply and to insert applicable law for the breach of contract claim clause in FAR 52.233-4.

Website and DVD Materials Related to Chapter 7

- [Chapter 7 PowerPoint Briefing](#)
- [Chapter 7 Test Questions](#)
- [Trainings Related to Chapter 7](#)
- [Scenarios Related to Chapter 7](#)
- [Topical Index Webpages](#)
 - » [Alternative Dispute Resolution \(ADR\)](#)
 - » [Claims](#)
 - » [Disputes](#)
 - » [Protests](#)