

APD ALERT



PROCESSING GAO AND AGENCY PROTESTS RESULTING FROM THE PROCUREMENT PROCESS

BACKGROUND

This memorandum updates information on processing Government Accountability Office (GAO) and Agency protests.

RESPONSIBILITIES

Responsibilities for processing GAO and Agency protests are as follows:

GAO Protest

Chief, Acquisition Programs and Oversight Branch (APOB), Acquisition and Property Division (APD)

- Answers questions concerning interpretation of the Federal Acquisition Regulation (FAR) requirements and Agency protest procedures.

Contracting Officer (CO) for the GAO Protested Action

- Contacts the Office of the General Counsel (OGC), General Law Division (Phone No.: 202-720-5565) to request the assignment of an Attorney, and notifies the Chief, APOB of the assignment;
- Provides a copy of the protest to the Chief, APOB simultaneously with submission to OGC;
- If award has been made, consult OGC to determine whether the protest triggers an automatic stay. If an automatic stay is triggered, immediately give notice of the protest to

the contractor to suspend all performance under the contract. If no award has been made, give notice of the protest to all parties who have a reasonable prospect of receiving award. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation;

- Provides the OGC Attorney clean copies of any relevant documents pertaining to the protest. Prepares or assists OGC in the preparation of the Agency Protest Report. See Enclosures 2 and 6 for details;
- OGC would prefer receiving the relevant documents within a week of the filing of the bid protest;
- Complies with the GAO protest regulations set forth in 4 Code of Federal Regulations (CFR) Part 21 (GAO Bid Protest Regulations) and FAR Subpart 33.1;
- To avoid conflicts between the Memorandum of Law prepared by OGC and the Contracting Officer's Statement of Relevant Facts prepared by the CO, ensure that the OGC Attorney reviews the Statement of Relevant Facts prior to preparation of the Agency Protest Report (See Enclosure 2);
- OGC would prefer receiving the CO Statement of Relevant Facts at least a week before submission of the Agency Protest Report, as the OGC attorney uses the CO Statement of Relevant Facts to prepare the memorandum of law; and,
- Provides a copy of the final Agency Protest Report to the Chief, APOB.

OGC Attorney Assigned

- Provides legal advice;
- Consults with agency actions on issues of timeliness, automatic Competition in Contracting Act (CICA) stays, or protestor compliance with bid protest rules;
- Reviews and makes recommendations on the CO's Statement of Relevant Facts;
- Prepares the Memorandum of Law, which becomes part of the Agency Protest Report;
- Provides legal counsel during any hearings or dispute resolution; and,
- Delivers the final Agency Protest Report, or notice of corrective action, to the GAO by the required submission date.

AGENCY PROTEST

Chief, APOB, APD

- Assists in the use of alternate dispute resolution techniques;
- Reviews the CO's Statement of Relevant Facts for adequacy and completeness, and ensures that it is forwarded to the Head of the Contracting Activity Designee (HCAD), APD, for review and concurrence, within 3 working days;
- Provides the HCAD's comments to the CO within 5 working days;
- Assists in the independent review process of the Agency protest, if applicable;
- Reviews the request for award in the face of a protest, (i.e., urgent and compelling reasons); and,
- Answers questions concerning interpretation of the FAR requirements and Agency protest procedures.

CO for the Agency Protested Action

- Immediately provide a copy of the protest to the Chief, APOB.
- If award has been made, immediately give notice of the protest to the contractor to suspend all performance if appropriate, under the contract. If no award has been made, give notice of the protest to all parties who have a reasonable prospect of receiving award. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation.
- Responsible for processing the Agency Protest Decision. The Agency Protest Decision is to be provided to the Chief, APOB, within 21 days after receipt;
- Incorporate the HCAD comments into the Agency Protest Decision prior to issuance; and,
- Complies with the Agency protest regulations set forth in FAR Subpart 33.103.
- Agency Protest related documents are to be kept in a similar manner, as outlined in Enclosure 2, GAO Protest Agency Report Exhibits.
- Ensure compliance with the regulations in 4 CFR Part 21, FAR Subpart 33.1 and AGAR 433.1

OGC Attorney

- Provides legal advice and counsel concerning the agency protest as requested.

APD POINT OF CONTACT

Acquisition Programs and Oversight Branch on 301-504-1725 or via e-mail at APOB@ars.usda.gov.

6 Enclosures

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SUMMARY OF GAO PROTEST REQUIREMENTS

Subject Area

Requirement

1. Time for Filing a Protest:

Pre-Award. Protests for Sealed Bid acquisitions are due prior to bid opening. Protests for Negotiated acquisitions are due prior to the time set for the receipt of initial proposals.

Post-Award. Protests are due **10 calendar days** after the basis of the protest is known or should have been known,

or,

within 10 days after a requested and required debriefing was held.

Note: If a significant legal issue is at stake, the GAO may accept an otherwise untimely protest (4 CFR Section 21.2 (c)).

Note: Debriefings are required only if requested, in writing, within **3 days** of notice of elimination from competitive range, or notice of contract award. The protest shall not be filed before the debriefing date offered to the protestor.

If an Agency-level protest was timely filed, subsequent protest to the GAO must be within **10 calendar days** of actual or constructive knowledge of adverse Agency action. The action may include the Agency Protest Decision.

Note: It is important that the agency be able to track the date of receipt by the protestor of important documents such as award notices and agency level decisions. Also, GAO considers a notice of award posted on FedBizOpps as constructive notice.

Note: Be careful in using permissive debriefings when a debriefing is not required. A permissive briefing can extend the deadline for filing a protest, so if you do not have to provide a required debriefing, carefully consider whether to provide a permissive debriefing.

2. Request for Express Option: Requests can be made by any interested party and must be filed within **5 days** of the protest filing. If GAO grants the request, it will issue a decision within **65 days**.
3. Suspension of Performance:
Pre-Award. Contract may not be awarded pending GAO resolution of a timely protest, unless authorized by the Head of the Contracting Activity (HCA).
Post-Award. Contract performance shall be suspended immediately and remain in effect until GAO resolution of a timely protest (when the agency receives notice of a protest from the GAO within 10 days after contract award or 5 days after the required debriefing date offered to the protestor). Note: The timeline is within 10 days of the agency receiving notice of the protest, not 10 days within GAO receiving the protest. Therefore, a protest received by GAO on the 10th day is timely, but if GAO notifies the agency the next day, there is no suspension of performance.
4. Submission of Agency Report:
The Agency Protest Report shall be submitted to GAO **30 calendar days (20 days for Express Option)** after notice of the protest to GAO.
A copy of the Agency Report must be simultaneously provided to the Chief, APOB.
5. List of Documents: When specific documents and material to the disposition of the protest have been requested, the Agency must provide a list of those documents at least **5 calendar days** prior to

the filing of the Agency Report. The Agency must provide all interested parties and the GAO a list of those documents and any portions thereof that they intend to withhold from the protester and the reasons for the proposed withholding.

Note: The CO does not directly contact the GAO or parties. Direct communication with the GAO and parties will occur through the Office of the General Counsel.

Any objections by the protester to the scope of the Agency's disclosure/nondisclosure of documents must be filed within **2 calendar days** after receipt of the list.

6. Comments on the Agency Protest Report:

Comments from interested parties are due directly to the GAO within **10 days (5 days for Express Option)** after receipt of report, with copies to the Agency and other Interested Parties.

7. Hearing

A hearing may be held at the request of the Agency, a protester, or other interested party. Comments on the hearing and the Agency Protest Report are due within **5 days** of the hearing.

8. GAO Decision:

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he GAO decision is due within **100 calendar days (65 calendar days for Express Option)** after the filing of the protest.

9. Sustained Protest

The protester shall file their claim for cost with the contracting agency within **60 calendar days** after receipt of the GAO's recommendation.

Note: If ANY deadline falls on a weekend OR Government Holiday, the deadline is extended to the next business day.

**GAO PROTEST
AGENCY PROTEST REPORT EXHIBITS**

Supporting documents required to determine the validity of a protest are submitted in the Agency Protest Report. Documents are to be arranged in chronological order within each submission, earliest documents first; bound on the left margin (where practicable); numbered (whole numbers only); tabbed; and indexed. At a minimum, a copy of the following documents shall be included in the Agency Protest Report to the GAO:

1. The protest;
2. The offer submitted by the protesting offeror;
3. The offer being considered for award or being protested;
4. All relevant evaluation documents;
5. The solicitation, including the specifications or portions relevant to the protest;
6. The abstract of offers or relevant portions;
7. Any other documents that are relevant to the protest, including documents specifically requested by the protester;
8. If applicable, the determination and findings to proceed with award and/or to continue contract performance;
9. The CO signed statement of relevant facts, including a best estimate of the contract value. The statement is to set forth findings, actions, recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest;
10. Memorandum of Law (to be prepared by the Office of General Counsel (OGC) Attorney assigned to the protest); and,
11. A list of parties being provided the documentation.

GAO PROTEST – CHART OF RELEVANT TIME PERIODS

REQUIREMENT	TIME PERIOD
Filing a Protest	Solicitation – before bid opening or the closing date for receipt of proposals. Other Matters – 10 calendar days.
Suspension of Award/Performance	Protests received prior to award, suspend contract award. Agency notified protests received within 10 calendar days after award or 5 calendar days after required debriefing date, suspend performance
GAO Notification to Contracting Agency	No later than 1 day.
Agency Report to GAO Requested Documents List Objections to Disclosure/Non-disclosure of Documents	30 days. 5 calendar days before filing of Agency Protest Report. Within 2 calendar days after receipt of the list.
Comments on the Agency Report Comments on Hearing	Within 10 calendar days after receipt of report. Within 5 calendar days of hearing.
GAO Decision	Within 100 calendar days.
Express Option	Request made within 5 calendar days of protest filing. Agency Report to GAO within 20 calendar days. Protester's comments on Agency Protest Report within 5 calendar days. GAO decision within 65 calendar days.
Sustained Protest	File claim for cost within 60 calendar days of GAO's recommendation.

SUMMARY OF AGENCY PROTEST REQUIREMENTS

<u>Subject Area</u>	<u>Requirement</u>
1. Protest Submission:	To be considered, the protest shall substantially comply with criteria established in FAR 33.103(d)(2).
2. Time for Filing a Protest to the Agency:	<p>Protests of alleged improprieties in a Solicitation shall be filed prior to bid Opening or the closing date for receipt of proposals.</p> <p>All other protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.</p>
3. Suspension of Award/Performance:	<p>Pre-Award Protest: Contract may not be awarded, pending agency resolution, unless justified, in writing, for urgent and compelling reasons, or determined, in writing, to be in the best interests of the Government, approved at a level above the CO. The CO will inform offerors whose offers might become eligible for award, and request a time extension for the acceptance of offers, if necessary.</p> <p>Post-Award Protests: When a protest is received within 10 days after award, or within 5 days after required debriefing date offered to the protester, the CO shall immediately suspend performance, pending protest resolution, unless continued performance is justified, in writing, for urgent and compelling reasons, or determined, in writing, to be in the best interests of the Government, at a level above the CO.</p>

Note: Consult the Office of the General Counsel prior to continuing performance.

4. Information Exchange:

Parties may exchange relevant information as permitted by law and regulation.

5. Agency Decisions:

Resolution of Agency protests within 35 days after the protest is filed.

Agency decisions shall be written, well-reasoned, and explain the Agency position. Decisions shall be provided to the protester using a method that provides evidence of receipt.

As required by AGAR 433.103(b), the written final decision shall include a paragraph substantially as follows:

“This decision shall be final and conclusive unless a further written notice of protest is filed with the Government Accountability Office in accordance with 4CFR Part 21. Neither the filing of a protest with USDA nor the filing of a protest with the Government Accountability Office affects your right to file an action in a district court of the United States or the United States Court of Federal Claims.”

AGENCY PROTEST – CHART OF RELEVANT TIME PERIODS

Filing a Protest	Solicitation – before bid opening or the closing date for receipt of proposal. Other Matters – 10 calendar days .
Suspension of Performance	Prior to award – no contract award, unless urgent and compelling reasons are justified. After Award - when a protest is received within 10 days after award, or within 5 days after required debriefing date offered to the protester, the CO shall immediately suspend performance, pending protest resolution, unless continued performance is justified, in writing, for urgent and compelling reasons, or determined, in writing, to be in the best interests of the Government, at a level above the CO.
Agency Decisions	Within 35 days of filing.
Subsequent Protest to GAO	Within 10 calendar days of adverse Agency action.

**OGC'S ADVICE ON HOW TO DRAFT A CONTRACTING OFFICER'S
STATEMENT OF RELEVANT FACTS**

What it is: The Bid Protest Regulations (4 CFR part 21) require agencies to respond to GAO bid protests by filing an agency report. The agency report includes copies of all documents relevant to the procurement and the protest subject matter. It also includes a legal brief (by OGC) and the "contracting officer's statement of the relevant facts." 4 CFR 21.3(d).

When we (your attorneys) need it: The agency report must be filed within 30 days of the protest submission. The OGC attorney assigned to the protest will need the final draft of the CO's statement at least a week before that deadline, so that it can be incorporated into the legal brief and the agency report. However, OGC will start working with the CO much earlier than that. If a protest has been filed, it's never too early to start!

Why we need it: The CO's statement provides a step-by-step explanation of the procurement, which is helpful for the judge to know what happened. Also, it provides a document the attorney can cite to in the absence of other evidence in the file.

What to include:

- Your name, position, and where you work.
- The solicitation number and a brief explanation of what was being procured.
- The type of contract (fixed-price, IDIQ, requirements, etc.)
- The estimated contract value.
- How the agency intended to evaluate (best value, bids versus negotiated, simplified acquisition, low cost/technically acceptable).
- The evaluation factors and any necessary explanation of them.
- The blow-by-blow of how the evaluation proceeded: How were scores tallied? Was there an evaluation team? Did they call references or rely on performance questionnaires? Basically, provide a narrative.
- A factual response to the protest allegations. Incorporate this in your narrative. Provide the facts that back up your position --not the position itself.

What NOT to include:

- Your opinion of the protest's merits.
- Speculation about why the protester filed with GAO (*e.g.*, "he is just bitter about not getting the [x] contract last year")
- Legal analysis
- Details that do not relate to the protest (*e.g.*, the names of all the evaluators, dates of RFP modifications --unless they matter).
- Responses to clearly irrelevant protest allegations. If the protester says, "The Forest Service has been trying to run me out of business for years," do not say, "no, it has not." Just do not address it.

SAMPLE STATEMENT

Contracting Officer's Statement of Relevant Facts

ABC Bid Protest, B-_____

Solicitation No. _____ for
Contract No. _____, Awarded to XYZ on January 1, 2005.

1 My name is Bob Smith, and I am a Contracting Officer for the U.S. Department of Agriculture, Forest Service, in Nevada City, California.

2 The requirement was for production and delivery of 60 bear proof/resistant lockers that were a minimum of 24 cubic feet to a maximum of 30 cubic feet. The Forest Service was looking for commercially available bear resistant lockers that are used at private campgrounds and residences throughout the communities along the California Sierra Nevada mountains. No other specifications were given, including any specifications regarding compliance with the Americans with Disabilities Act (ADA).

3 The purpose of the lockers is to prevent attracting bears and other wildlife into populated campgrounds by locking food and trash away at night. This provides people visiting these campgrounds a safe place to store food and trash, away from their sleeping areas. These sixty lockers would be installed by the Forest Service in two campgrounds located in the Tahoe National Forest.

4 The Yuba River Ranger District originally telephonically requested quotes from two known vendors for bear resistant lockers: XYZ and ABC. When quotes were returned the prices were above \$25,000.00 threshold. The purchasing agent was uncomfortable with the purchase and returned the acquisition to IBET Province Acquisitions. It was assigned to me as the Contracting Officer.

5 The Forest Service decided to solicit the requirement publicly on FedBizOpps to increase competition. Both vendors were notified of the public solicitation. The criteria in the solicitation specified that technical and past performance *were significantly less important than price*. The solicitation was for commercial items and was publicized as a synopsis/solicitation for commercial items on FedBizOpps on August 23, 2006, for a period of 9 days. The deadline for bids was September 1, 2006. For a commercial item, it was reasonable to establish a short time period for publicizing and the return of proposals since at least two vendors had catalog pricing and would be able to meet the timeframes.

6 During the solicitation there were several vendors with no experience asking questions about the specifications of the lockers. In each instance I made it clear that these were considered commercial items, and products that were untested would be unacceptable.

7 On September 1, 2006, there were 5 timely responses to the solicitation. During evaluation, on September 6, 2006, three of the vendors did not have commercial item products. The same three companies designed products specifically for this acquisition and were rated unacceptable under the evaluation criteria, based on price, past performance, quality and experience. The remaining 2 vendors (ABC, and XYZ) were evaluated.

8 XYZ was rated ACCEPTABLE with a price of \$41,400.00 and ABC was rated GOOD with a

price of \$48,710.00. The government estimate was \$41,830.00. The evaluator, Heather Newell, selected XYZ because the offered price was within our estimate and the product fulfilled our need. The quality and technical difference of ABC could not be justified for the \$7,310.00 difference in price.

9 I concurred with the evaluator's recommendation. On September 7, 2006, I awarded Contract No. XYZ in the amount of \$41,400.00. Notification letters went out to the other four vendors on the same date.

10 ABC emailed me on September 13, 2006 stating they protested the award. A second email arrived on September 19, 2006, in which ABC added to its September 13th protest statement.

11 I suspended work on the contract to XYZ on September 19, 2006, and provided a copy of the agency-level protest on the same day.

12 On October 6, 2006, I faxed to ABC issued my Contracting Officer Determination regarding ABC's agency-level protest. I also sent the letter by regular mail.

13 On October 16, 2006, I received an email from ABC, stating that they sent an appeal to GAO by Fedex that same date, and provided an unsigned electronic copy of the letter.

Bob Smith
Contracting Officer

Date