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# What Government Contractors Need to Know about Bid Protests

By Elizabeth W. Newsom

**A** distinctive feature of government contracting is the right of an unsuccessful bidder to protest an agency's decision to award a contract to a competitor and, potentially, to have the award reversed. In the federal government, these challenges are called "bid protests."

No analog for bid protests exists in most commercial settings. Executives new to government contracting should develop a basic understanding of bid protests, so as to know their rights when they lose a procurement competition and be able to assess the risks of a protest by their competitors when they win.

Critically, the time frames for bringing a bid protest are short and strict. Knowing in advance when and how to protest a contract

award – and when and how your competitors may protest your awards – is crucial to a good result.

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Why would anyone protest a government contract award – in effect, sue the customer?

Consider this scenario: ABC Company spends thousands preparing a proposal for a five-year, \$300 million contract with the Department of Federal Widgets. The contract is critical for any company competing in the federal widget market, not only because the contract itself is lucrative, but also because the winner will be well positioned to leapfrog ahead of the competition and win future similar contracts in the federal and commercial marketplace. ABC assembles what it thinks is a superior proposal, forgoing many other opportunities in the process.

But ABC is chagrined to learn that its fiercest competitor wins the contract, even though ABC bid a lower price. ABC now must contend with a powerful, better-positioned competitor for the next five years, and senior executives are at a loss to explain why.

In many federal procurements, ABC does not have to simply put up with a bad result. More than 20 years ago, Congress decided it was good public policy to introduce accountability in government contracting decisions, both to increase competition for federal contracts and to ensure the government gets value for taxpayer dollars. Congress embraced and strengthened the pre-existing protest process as a

mechanism for holding agencies accountable. Federal law grants most unsuccessful bidders the right to protest a contract award either before the U.S. Government Accountability Office (GAO) or by filing a lawsuit in federal court at the U.S. Court of Federal Claims (COFC). An unhappy bidder protests, an impartial body takes a look, government agencies are made to explain their decisions, and faulty decisions can be corrected.

In either forum, bid protest litigation is blazingly fast compared to other litigation. Congress decided that a protest should not clog the bureaucracy indefinitely, so, by law, GAO must resolve protests within 100 days. That is warp speed compared to most litigation. There is no statutory deadline for court protests, but they too generally proceed at least as fast as GAO protests.

These rapid timelines beget short filing deadlines. It is crucial to act immediately if you want to file a protest, or if your competitor files a protest of your award. Deadlines for filing GAO protests are short and unbending, generally no more than 10 calendar days after the basis is known. Court protest deadlines are more flexible, but, still, a court protester that delays filing risks losing key remedies.

Protests are not without risks and costs. Some say a contractor that files a protest risks irritating its customer government agency, but as protests have become a well-established aspect of federal procurements, this risk is probably overstated. Government agencies have benefitted from the increased competition that protests tend to foster, sometimes obtaining after a protest even better prices or higher values than the original contract award. The primary costs involved in protests are attorney fees; many sophisticated companies retain outside counsel with specialized bid protest expertise to represent them. Awards of attorney fees mitigate this risk. At GAO, large companies who win a protest receive reimbursement of a limited portion of their attorney fees, and small companies that win receive reimbursement of all of their attorney fees. At the COFC, small businesses can in some circumstances qualify for attorney fee awards.

Often it's important to retain outside counsel to litigate a protest. During a protest, the agency produces the procurement records for review, including each competitor's proposal and confidential agency documents. Needless to say, few companies are willing to allow their proposals to be reviewed by their competitors. To protect this information from disclosure, the GAO and court issue "protective orders" that restrict access to these documents. Under these protective orders, company personnel are not allowed to view their competitors' proposals or other confidential procurement documents, and this prohibition

sometimes extends to in-house lawyers. Outside counsel are often the only persons allowed to view all the procurement records, on the promise that they will not share this confidential information with their clients. Thus, outside counsel can be critical to effective representation in a protest.

These protective order procedures take some getting used to, because executives cannot communicate with their counsel as readily as they do in normal litigation. Sophisticated contractors, however, recognize that the tradeoff — ensuring that their own proprietary information remains secret — is well worth it.

The primary benefit protesters hope to gain from filing a protest is the chance to continue competing. To put teeth into the protest process, Congress mandated that, if a GAO protest is timely filed, the agency may not allow the protested contract to be performed during GAO's review. This automatic "stay" of contract performance allows a protester a chance to win the contract if it wins the protest, and it is a major advantage for GAO protests over court protests.

In a court protest, the "stay" is not automatic or even presumed; the protester must ask the court to enjoin contract performance, and the extra burden to prove that an injunction is warranted can raise the risks and costs of COFC protest litigation.

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The likelihood of success varies. GAO reports that protesters receive some form of relief in approximately one third of its protests, and that GAO sustains outright approximately one fifth of its protests. Sustain rates for court protests are probably about the same as GAO. These statistics lump together a great variety of protest grounds; the likelihood of success on particular grounds can vary widely.

The risk of loss can be mitigated somewhat by performing a realistic assessment of a potential protest before it is filed. Indeed, regulations encourage such assessments. Agencies are generally required to offer debriefings to bidders after contract award

decisions to help bidders understand why they lost (or won). Information gleaned from a debriefing can allow bidders and their counsel to assess the risks and likelihood of success of a protest.

While there is no appeal per se from a GAO decision, a protester that is unsuccessful at GAO has the right to pursue its protest at the court and litigate the

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matter from scratch. Both the government and the unsuccessful protester may appeal an adverse COFC decision to the United States Court of Appeals for the Federal Circuit.

Many protesters find the benefits of a protest outweigh the costs and the risks. A successful protester typically wins either a chance to submit a new proposal and have it considered in a new evaluation, or a reevaluation by the agency of existing proposals. An alternative, albeit less satisfying, remedy is reimbursement of the protester's proposal preparation costs. The holy grail remedy is an order or recommendation that the agency simply award the contract to the protester, although this remedy is often sought but rarely achieved. GAO and the court are not in the business of telling agencies with whom they should do business, unless the law leaves the agencies no other choice.

Companies whose contract awards have been protested have the right to join the protest litigation and participate fully, both before the GAO and the court, to defend the award. Although an awardee cannot recover its costs from the protester, it is almost always advisable for an awardee to intervene. The awardee can ensure that the award is vigorously defended, ensure that its own proprietary information is protected from disclosure, and protect its interests in any settlement discussions between the agency and the protester.

In sum, executives of government contractors should be aware of the rights of their companies — and of their competitors — to protest government contract awards. They should especially be aware of the critical need to act quickly if a bid protest is possible.



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