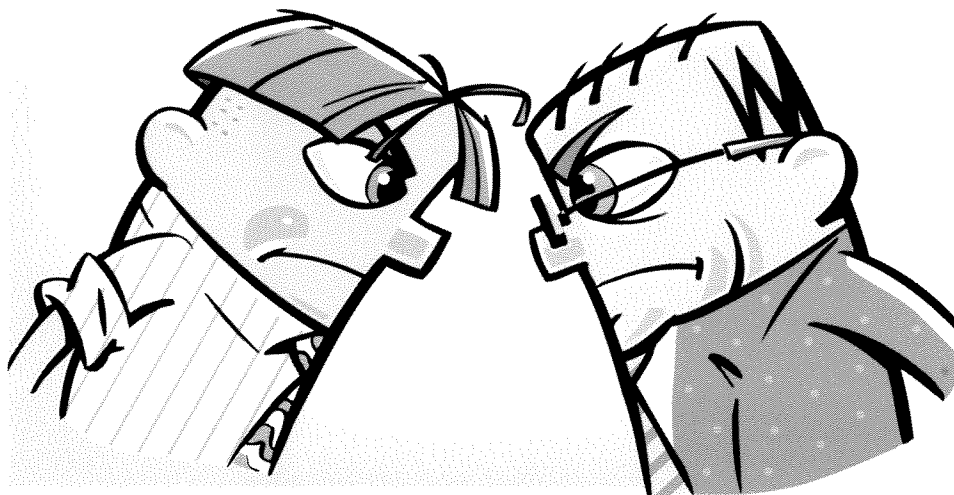


Government Contracting by John W. Chierichella

GAO protests: Right and wrong ways to claim 'foul'



Anyone holding the winning ticket at the racetrack knows the sinking feeling that hits when the "Steward's Inquiry" sign is posted. The race has been run, the competition is over and there is an apparent winner. With the lodging of a claim of "foul," however, the outcome now hangs in the balance. The race is to be reviewed, the claim adjudicated, and — perhaps — the order of finish altered.

In the race for government contracts, the "steward's inquiry" is a common occurrence, going by a different name, i.e., the "bid protest," the most common forum for which is the Government Accountability Office.

What is a bid protest?

Essentially, it is a claim that a competition is being or has been conducted improperly. The complaint can be directed at the solicitation (certain of its requirements are unduly restrictive, for example); the agency's conduct (a failure to apply the same standards in evaluating all competitors); or a competitor (the competitor has some conflict of interest that bars it from award).

Who can file a bid protest?

Protests may be filed by "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."

What forms are required to file a protest?

None. The rules simply require a succinct statement of the grounds of protest.

When do I file my protest?

It depends. A protest directed at a problem apparent on the face of the solicitation must be filed before the date for the submission of offers. You are not allowed to "sit on" an obvious problem while a flawed competition eats up valuable time.

After an award, you have 10 days to file a protest from the point at which you knew or should have known of your basis for protest. If an award is made on the basis of competitive proposals and a "debriefing" is both required and requested, your protest will be timely if filed within 10 days of the date offered for the debriefing. This will not, however, necessarily stop the procurement in its tracks.

Can I get discovery?

You can obtain documentary discovery if you request it with your initial protest. It is not uncommon for an initial document request to be used as a "fishing expedition," looking for a potentially winning fact or theory in a document that might not even be relevant to the initial grounds of protest.

Can I "freeze" the contract while I protest?

Yes, if you file your protest within 10 calendar days of the date of the award or, if the award involved competitive proposals, within five calendar days of a "required" and "requested" debriefing. A "stay" of performance is automatic when you meet these timelines.

Will my competitors see my protest?

Yes, but if you request the entry of — or the GAO on its own initiative enters — a protective order and you mark the protest and related materials as "protected material," they will see very little that is meaningful. Admission under a protective order is strictly controlled; often, no employee of any nongovernmental party will have access to anything other than a heavily redacted record of the proceedings.

How long will it take?

If you are the awardee, an eternity. Seriously, the statute requires a decision within 100 days. Notwithstanding the filing of supplemental protests, the GAO strives to resolve all of the issues raised by the protester within 100 days of the initial protest.

What do I do if I'm the awardee?

Intervene. Oppose the production of documents that are not reasonably related to the stated grounds of protest. Be attentive to grounds for summary dismissal of all or portions of the protest (such as timeliness issues). Most importantly, coordinate with agency counsel to the maximum extent possible. Agency counsel can and should be your best friend.

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