



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Government Contract Bid Protests Before Agencies

Committee on Administration and Management

Proposed Recommendation for Committee | July 27, 2020

1 Federal law establishes policies and procedures governing how federal executive
2 agencies procure goods and services.¹ The primary source of these policies and procedures is the
3 Federal Acquisition Regulation (FAR),² which applies to all executive-agency acquisitions
4 except where expressly excluded. Other relevant policies and procedures are found in federal
5 statutes and agencies' own procurement rules.

6 If a vendor believes a federal executive agency has not complied with the law or the
7 terms of a solicitation, it may file what is called a bid protest — that is, a written objection to a
8 government agency's conduct in acquiring supplies and services for its direct use or benefit.³ To
9 file a bid protest, an actual or prospective vendor need only show that it is an "interested party,"
10 meaning that its direct economic interest would be affected by the award of, or failure to award,
11 the contract in question.⁴

¹ See Federal Acquisition Regulation, 48 C.F.R. ch. 1; see also Competition in Contracting Act of 1984, 41 U.S.C. § 253; Exec. Order 12979, Agency Procurement Protests, 60 Fed. Reg. 55171 (Oct. 25, 1995).

² See 48 C.F.R. ch. 1.

³ See Admin. Conf. of the U.S., Recommendation 95-5, *Government Contract Bid Protests*, 60 Fed. Reg. 43108, 43113 (Aug. 18, 1995).

⁴ See 4 C.F.R. § 21.0(a)(1) (defining "interested party" for purposes of bid protest proceedings before the Government Accountability Office); 48 C.F.R. § 33.101 (defining "interested party" for purposes of bid protest proceedings before procuring agencies); *CliniComp Int'l, Inc. v. United States*, 904 F.3d 1353, 1358 (Fed. Cir. 2018) (defining "interested party" for purposes of 28 U.S.C. § 1491(b), which covers actions in the Court of Federal Claims).

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12 Vendors that qualify as interested parties may file bid protests in any of three forums: (1)
13 the Court of Federal Claims (COFC),⁵ (2) the Government Accountability Office (GAO),⁶ and
14 (3) the procuring agency.⁷ Bid protests filed with procuring agencies are commonly referred to as
15 agency-level protests.

16 Agency-level protests have important benefits for contractors, procuring agencies, and
17 the COFC and GAO. By “provid[ing] for inexpensive, informal, procedurally simple, and
18 expeditious resolution of protests,”⁸ agency-level protest mechanisms allow small businesses
19 (among other vendors) to affordably contest agencies’ procurement decisions. They also give
20 procuring agencies the chance to review and improve their own procurement practices. And they
21 funnel some protests away from COFC and GAO, reducing the likelihood that the growing
22 number of protests will overwhelm those institutions.

23 Vendors, however, seldom file agency-level protests. Although there is little data on the
24 number of agency-level protests filed each year, available evidence suggests that substantially
25 more protests are filed with COFC and GAO each year than with procuring agencies.⁹ There are
26 several reasons why vendors may forego agency-level protests.

27 First, vendors might shy away from agency-level protests because they perceive them as
28 biased. Sometimes, for instance, the official responsible for soliciting or awarding a procurement
29 contract is also responsible for handling any agency-level protests that are filed regarding the
30 procurement. This perceived conflict of interest may cause some vendors to file their protests at
31 GAO or COFC, rather than at the agency level.

⁵ See 28 U.S.C. § 1491(b).

⁶ See 31 U.S.C. §§ 3552(a), 3553(a).

⁷ See 48 C.F.R. § 33.103.

⁸ See Exec. Order No. 12979, 60 Fed. Reg. 55171, 55171 (Oct. 25, 1995).

⁹ See Christopher Yukins, *Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government 12–13* (May 1, 2020) (report to Admin. Conf. of the U.S.), www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf (hereinafter “Yukins Report”).



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32 Second, vendors might also view agency-level protest processes as opaque. Agencies do
33 not publish or provide comprehensive data on their bid protest decisions. And the FAR and
34 agency-specific bid protest rules establish few hard-and-fast requirements for the process. For
35 example, although the FAR states that “[a]gencies shall make their best efforts to resolve agency
36 protests within 35 days after [an agency-level protest] is filed,”¹⁰ that language is hortatory and
37 does not establish any binding deadlines for agency decisions. Nothing in the FAR does.

38 Third, vendors might also be dissuaded by their inability to compel production of the
39 procurement record as part of an agency-level protest. The FAR gives disappointed offerors the
40 right to an agency debriefing — a procedure whereby contracting personnel provide offerors
41 with an explanation of the agency’s evaluation process and an assessment of the offerors’
42 proposals. But nothing in the FAR guarantees vendors the right to view the procurement record
43 itself. The FAR provides only that agencies “*may* exchange relevant information” with agency-
44 level protesters.¹¹ By contrast, vendors that file bid protests at GAO may demand to see the entire
45 record of the procurement, and procuring agencies must respond to such requests within 30 days
46 — either by producing the responsive documents or giving a valid reason for withholding them.¹²

47 Finally, vendors might deem agency-level protests to be too risky. In many cases,
48 vendors who do not obtain relief through an agency-level protest will seek relief from GAO by
49 pursuing their protest in that forum. But GAO’s deadline for filing such “follow-on protests”
50 often begins to run as soon as the vendor has actual or constructive notice of some “adverse
51 agency action,” which can occur before a protester receives the decision in its agency-level
52 protest.¹³ In this way, delayed notification about an agency’s decision in a bid protest can

¹⁰ *Id.* § 33.103(g).

¹¹ *Id.* § 33.103(g) (italics added).

¹² 4 C.F.R. § 21.3(d).

¹³ *See id.* §§ 21.0(e), 21.2.



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53 seriously prejudice protesters' rights at GAO.¹⁴ This may prompt some vendors to forego agency-
54 level protests altogether.

55 Agency-level protests can also be disruptive for procuring agencies, especially when
56 disappointed agency-level protesters file follow-on protests at GAO or COFC. Just as a valid
57 agency-level protest automatically stays a procurement until the agency denies or dismisses the
58 protest and takes some adverse action,¹⁵ a valid follow-on protest at GAO may automatically stay
59 a procurement (if the requisite filing deadlines are met) until GAO denies or dismisses the
60 protest.¹⁶ Thus, when an agency-level protest is followed by another protest at GAO, delays in
61 procurements can be substantial. Contractors might be less inclined to file follow-on protests
62 were they more confident in agency-level processes.

63 Protesters and agencies all benefit from a robust agency-level protest system. Protesters
64 benefit because agency-level protests are typically the least formal and least costly types of bid
65 protest procedures, and also because the low public profile of an agency-level protest minimizes
66 the risk that an agency will come away with an adverse view of the protester. Agencies benefit
67 from a robust agency-level protest system because greater use of agency-level protests means
68 more agency control over the timing and conduct of protests and more opportunities for agencies
69 to superintend their own procurement processes.

70 Because a robust agency-level protest system is of significant value to contractors and
71 agencies alike, this recommendation identifies changes to make it more likely vendors will avail
72 themselves of agency-level protest procedures. The recommended changes reflect three
73 overarching principles — transparency, simplicity, and predictability — meant to address
74 contractors' principal concerns about agency-level protest systems. Each recommended change
75 can be accomplished by legislation. In the absence of legislation, each of the reforms other than
76 the one directed to GAO — which GAO can implement on its own — could be accomplished

¹⁴ See Yukins Report 13–14, 18–19.

¹⁵ 48 C.F.R. § 33.103(f).

¹⁶ 31 U.S.C. §§ 3553(c)(1) & (d)(3).



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77 either (1) by amending the FAR, or (2) by amending the agencies' own protest procedures,
78 which usually supplement the FAR. These recommendations take no position on the relative
79 merits of these different approaches. Rather, they merely set forth the substance of potential
80 reforms without addressing who should make them.

81 While each recommendation has been crafted to minimize the burden on implementing
82 agencies, the feasibility of implementing each recommendation will depend on the specific
83 circumstances confronting those agencies.

84 **RECOMMENDATION**

85 **Identification of Decisions Subject to Agency-Level Protests**

- 86 1. Agencies should operate under the presumption that, in general, all types of procurement
87 decisions that otherwise may be the subject of protests at GAO or the COFC may be the
88 subject of agency-level protests. Agencies should clearly identify which categories of
89 procurement decisions may *not* be made the subjects of agency-level protests. So far as is
90 feasible, agencies should allow agency-level protests concerning any of their
91 procurement decisions.

92 **Transparency for the Process and Personnel for Agency-Level Protests**

- 93 2. Agencies should formalize and compile in a publicly available, online document the
94 procedures they apply in adjudicating agency-level protests. In so doing, they should be
95 guided by the principles set out in Conference Recommendation 2018-5.¹⁷
- 96 3. Agencies should clearly identify who within the agency will adjudicate an agency-level
97 protest. They should consider designating at least one Agency Protest Official (APO) —
98 a person who specializes in handling agency-level protests — to oversee and coordinate
99 agency-level protests and to hear protests brought to a level above the contracting officer.

Commented [MT1]: For Committee consideration: This section was the subject of some debate at the first committee meeting. Is there a more precise and concise way of conveying the underlying point?

Commented [MT2]: For Committee consideration: Chris suggests the Committee consider removing this language.

¹⁷ See Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2142 (Feb. 6, 2019).



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100 Agencies lacking the resources to designate their own APO should consider sharing an
101 APO with other agencies.

Commented [MT3]: For Committee consideration: Chris suggests “might” instead of “should.” He says that “splitting this function between agencies runs counter to a main argument for enhancing agency-level protests: improving management of protests within the agency.”

102 **Notice of the Timeline for Agency-Level Protests**

103 4. Agencies should consider adopting presumptive process deadlines for agency-level
104 protests, similar to the deadlines under the Contract Disputes Act, 41 U.S.C. § 7101 *et*
105 *seq.* Agencies should also make best efforts to notify protesters of how those general
106 timelines apply to their specific agency-level protests.

Commented [MT4]: For Committee consideration: Is there a way to succinctly set forth these procedures (either here or in the preamble), rather than simply referring to the statute as a whole?

107 5. Agencies should provide prompt, written notice to protesters of adverse agency actions
108 and procedural milestones in agency-level protests, including when agency-level
109 proceedings are initiated and terminated. Agencies should clearly and immediately
110 communicate when they have made a decision. Protests should be deemed denied after a
111 certain number of days without a decision, with the agency to notify the protester of the
112 number of days at the beginning of the protest.

113 **Compiling the Record and Making It Available**

114 6. Agencies, to the extent feasible, should consider adopting similar rules for compiling the
115 record as apply to GAO-level protests, 4 C.F.R. pt. 21 and 48 C.F.R. 33.104.

Commented [MT5]: For Committee consideration: Is there a way to succinctly describe these procedures, rather than simply referring to the regulations?

116 7. Agencies should make available in a timely manner as much of the procurement record as
117 is feasible. Agencies should consider the use of enhanced debriefings and confidentiality
118 agreements between protesters and agencies to address confidential information in the
119 record.

120 **Protecting Against Adverse Consequences**

121 8. Although the FAR automatically stays a procurement during an agency-level protest,
122 agencies should provide for a temporary extension of the stay after a final decision in an
123 agency-level bid protest. The temporary extension should be of sufficient duration to give



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124 the protester time to bring a follow-on protest at GAO or COFC after the agency’s
125 decision.

126 9. Congress should amend the statute governing GAO protests (31 U.S.C. § 3553) to trigger
127 an automatic stay of the procurement decision if a protester promptly files a GAO protest
128 after an adverse decision in an agency-level protest.

129 10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO
130 are handled on an expedited basis.

131 **Publishing Data on Agency-Level Bid Protests**

132 11. Agencies should annually collect and publish data about the bid protests they adjudicate.

133 The data should include:

- 134 a. the number of bid protests filed with the agency;
- 135 b. the effectiveness rate of agency-level bid protests (*i.e.*, the ratio of protests
136 sustained or in which corrective action is afforded versus total agency-level
137 protests filed);
- 138 c. the number of merit decisions by the agency;
- 139 d. the number of decisions sustaining the protest;
- 140 e. the number of decisions denying the protest;
- 141 f. the average time required for a bid protest to be resolved.

Commented [MT6]: For Committee consideration: This recommendation has been modified to address some questions raised by Anne Joseph O’Connell. Anne further asks:

1. Would it be better to say something like, “Agencies should annually collect and publish data about the bid protests they adjudicate. To the extent feasible, the data should match what the GAO provides about the bid protests it adjudicates (*i.e.*, provide the list of items.)”?
2. Is it worth referencing the GAO reports? If not, might it be worthwhile to define effectiveness rate?
3. Do agencies ever use ADR? If so, would that be included (as it’s included in the GAO)?

Chris has responded to Anne’s last question by noting that agency-level bid protests are arguably an expanded form of ADR.