



## Government Contract Bid Protests Before Agencies

### Committee on Administration and Management

#### Proposed Recommendation | December 17, 2020

1 Federal law establishes policies and procedures governing how federal executive  
2 agencies procure ~~goods~~ supplies and services.<sup>1</sup> The primary source of these policies and  
3 procedures is the Federal Acquisition Regulation (FAR),<sup>2</sup> which applies to all executive-agency  
4 acquisitions of supplies and services with appropriated funds by and for the use of the Federal  
5 Government, except where expressly excluded. Other relevant policies and procedures are found  
6 in federal statutes and agencies' own procurement rules.

7 If a vendor believes a federal executive agency has not complied with the law or the  
8 terms of a solicitation, it may file what is called a bid protest—that is, a written objection to a  
9 government agency's conduct in acquiring supplies and services for its direct use or benefit.<sup>3</sup>  
10 Responding to bid protests can require agencies to reevaluate their procurement processes and,  
11 sometimes, make improvements. That, in turn, results in more competitive, fairer, and more  
12 transparent procurement processes, benefitting vendors, agencies, and ultimately the public.

13 To file a bid protest, an actual or prospective vendor need only show that it is an  
14 "interested party," meaning that its direct economic interest would be affected by the award of,

<sup>1</sup> See Federal Acquisition Regulation, 48 C.F.R. ch. 1; see also Competition in Contracting Act of 1984, 41 U.S.C. § 253 Pub. L. No. 98-369, div. B, tit. VII (codified, as amended, in various parts of the United States Code); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355; Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106 (later renamed the Clinger-Cohen Act of 1996); Exec. Order 12979, Agency Procurement Protests, 60 Fed. Reg. 55171 (Oct. 25, 1995).

<sup>2</sup> See 48 C.F.R. ch. 1.

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

**Commented [A1]:** Federal law typically uses the phrase "supplies and services" rather than the term "goods and services." The next paragraph uses this more appropriate "supplies" rather than "goods" language. Recommend being consistent and substituting "supplies" for "goods" here.

**Commented [A2]:** The changes enacted by the Federal Acquisition Streamlining Act of 1994 and Federal Acquisition Reform Act of 1996, later renamed the Clinger-Cohen Act, are so significant that we recommend including them in the footnote along with CICA. In particular, these statutes had a major impact on the acquisition of commercial items and information technology.

**Commented [A3]:** Recommend adding after "acquisitions" the following: "of supplies and services with appropriated funds by and for the use of the Federal Government." This additional language comes from the FAR's definition of the term "acquisition." 48 C.F.R. § 2.101. Because the FAR only applies to "acquisitions as defined in part 2, except where expressly excluded," 48 C.F.R. § 1.104, there are instances where agencies are procuring supplies or services not covered by the FAR because appropriated funds are not being used and/or the supplies and services are not for the agency. Alternatively, a footnote could be added after "acquisitions" noting that the term "acquisition" is defined by the FAR definition and reference to or the language from that definition.



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15 or failure to award, the contract in question.<sup>4</sup> Vendors that qualify as interested parties may file  
16 bid protests in any of three forums: (1) the Court of Federal Claims (COFC),<sup>5</sup> (2) the  
17 Government Accountability Office (GAO),<sup>6</sup> and (3) the procuring agency.<sup>7</sup> The procedural tools  
18 available in a given forum, along with other strategic and cost considerations, typically drive  
19 vendors' decisions about where to file their bid protests.

20 Bid protests filed with procuring agencies are commonly referred to as agency-level  
21 protests. Agency-level protests have important benefits for the public, contractors, procuring  
22 agencies, and COFC and GAO. By "provid[ing] for inexpensive, informal, procedurally simple,  
23 and expeditious resolution of protests,"<sup>8</sup> agency-level protest mechanisms allow small businesses  
24 (among other vendors) to affordably contest agencies' procurement decisions. They also give  
25 procuring agencies the chance to review and improve their own procurement practices. And they  
26 funnel some protests away from COFC and GAO, reducing the likelihood that the number of  
27 protests will overwhelm those institutions.

28 Vendors, however, seldom file agency-level protests. Although there is little data on the  
29 number of agency-level protests filed each year, available evidence suggests that substantially

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<sup>4</sup> 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). There are some instances where Congress has restricted the ability to file a protest, regardless of whether a vendor is an "interested party." See, e.g., 41 U.S.C. § 4106(f) and 48 C.F.R. § 16.505(a)(10) (limiting the ability to protest the issuance or proposed issuance of a task or delivery order).

<sup>5</sup> See 28 U.S.C. § 1491(b).

<sup>6</sup> See 31 U.S.C. §§ 3552(a), 3553(a). For civilian agencies, GAO has exclusive jurisdiction over protests of task and delivery orders valued in excess of \$10 million unless the protest is on the grounds that the order increases the scope, period, or maximum value of the contract. See 41 U.S.C. § 4106(f); 48 C.F.R. § 16.505(a)(10).

<sup>7</sup> See 48 C.F.R. § 33.103.

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



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30 more protests are filed with COFC and GAO each year than with procuring agencies.<sup>9</sup> There are  
31 several reasons why vendors may forego agency-level protests that implicate the themes of  
32 transparency, predictability, and accountability.

33 First, some vendors report shying away from agency-level protests because they perceive  
34 them as biased.<sup>10</sup> Sometimes, for instance, the official responsible for soliciting or awarding a  
35 procurement contract is also responsible for handling any agency-level protests that are filed  
36 regarding the procurement. This perceived conflict of interest may cause some vendors to file  
37 their protests at GAO or COFC, rather than at the agency level.

38 Second, some vendors report that they view agency-level protest processes as opaque.<sup>11</sup>  
39 Agencies do not publish or provide comprehensive data on their bid protest decisions. And the  
40 FAR and agency-specific bid protest rules establish few hard-and-fast requirements for the  
41 process. For example, although the FAR states that “[a]gencies shall make their best efforts to  
42 resolve agency protests within 35 days after [an agency-level protest] is filed,”<sup>12</sup> that language is  
43 hortatory and does not establish any binding deadlines for agency decisions. Nothing in the FAR  
44 does. The failure to provide for any binding deadlines distinguishes the FAR from other federal  
45 procurement statutes, such as the Contract Disputes Act,<sup>13</sup> which sets or requires contracting  
46 officers to set firm deadlines for deciding most claims<sup>14</sup> and provides that the passage of the  
47 deadline for a claim means the claim is deemed denied.<sup>15</sup>

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<sup>9</sup> 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](http://www.acus.gov/sites/default/files/documents/Agency%20Bid%20Protests%20Report.pdf).

<sup>10</sup> *Id.* at 23.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> 48 C.F.R. § 33.103(g).

<sup>13</sup> 41 U.S.C. §§ 7101 *et seq.*

<sup>14</sup> See *id.* § 7103(f)(1)–(2).

<sup>15</sup> See *id.* § 605(c)(5).



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48 Third, some vendors report being dissuaded by their inability to compel production of the  
49 procurement record as part of an agency-level protest.<sup>16</sup> The FAR gives disappointed offerors the  
50 right to an agency debriefing—a procedure whereby contracting personnel provide offerors with  
51 an explanation of the agency’s evaluation process and an assessment of the offerors’ proposals.  
52 But nothing in the FAR guarantees vendors the right to view the procurement record itself. The  
53 FAR provides only that agencies “*may* exchange relevant information” with agency-level  
54 protesters.<sup>17</sup> By contrast, vendors that file bid protests at GAO may demand to see the entire  
55 record of the procurement, and procuring agencies must respond to such requests within ~~30~~25  
56 days ~~and —either by producing~~ the responsive documents within 30 days (unless they are  
57 withheld for a valid reason or giving a valid reason for withholding them.<sup>18</sup>

58 Finally, some vendors deem agency-level protests to be too risky.<sup>19</sup> In many cases,  
59 vendors who do not obtain relief through an agency-level protest will seek relief from GAO by  
60 pursuing their protest in that forum. But GAO’s deadline for filing such “follow-on protests”  
61 often begins to run as soon as the vendor has actual or constructive notice of some “adverse  
62 agency action,” which can occur before a protester receives the decision in its agency-level  
63 protest.<sup>20</sup> In this way, delayed notification about an agency’s decision in a bid protest can  
64 seriously prejudice protesters’ rights at GAO.<sup>21</sup> This causes some vendors to forego agency-level  
65 protests altogether.<sup>22</sup>

66 The perception that agency-level protests lack transparency, predictability, and  
67 accountability makes it more likely that protesters who lose at the agency level will mistrust the

**Commented [A4]:** Procuring agencies actually are required to **respond** to such requests within 25 days after receiving notice of the protest from GAO. 4 C.F.R. § 21.3(c) provides that “At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall file a response to the request for documents. ... The agency’s response shall, at a minimum, identify whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof. Any objection to the scope of the agency’s proposed disclosure or nondisclosure of documents must be filed within 2 days of receipt of this response.” The documents are to be **produced** within 30 days (as part of the Agency Report) unless an objection to a particular document request is not yet resolved. See also 48 C.F.R. § 33.104(a)(3)(iii).

<sup>16</sup> Yukins, *supra* note 9, at 39.

<sup>17</sup> 48 C.F.R. § 33.103(g) (italics added).

<sup>18</sup> 4 C.F.R. §§ 21.3(c)-(d); 48 C.F.R. § 33.104(a).

<sup>19</sup> Yukins, *supra* note 9, at 31.

<sup>20</sup> See 4 C.F.R. §§ 21.0(e), 21.2.

<sup>21</sup> See Yukins, *supra* note 9, at 13–14, 18–19.

<sup>22</sup> See *id.* at 23.



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68 agency’s decision and file follow-on protests with GAO or COFC. Such follow-on protests not  
69 only tax the limited resources of GAO and COFC, but also can disrupt activities at procuring  
70 agencies. For instance, just as a valid agency-level protest automatically ~~stays a~~  
71 ~~procurement~~ prohibits the contract from being awarded or performed until the agency denies or  
72 dismisses the protest and takes some adverse action,<sup>23</sup> a valid follow-on protest at GAO may  
73 automatically ~~stay a procurement~~ prevents the contract from being awarded or performed (if the  
74 requisite filing deadlines are met) until GAO denies or dismisses the protest.<sup>24</sup> Thus, when an  
75 agency-level protest is followed by another protest at GAO, delays in procurements can be  
76 substantial.

77 Protesters, agencies, and the public would all benefit from an improved agency-level  
78 protest system. Protesters would benefit because agency-level protests are typically the least  
79 formal and least costly types of bid protest procedures. Agencies would benefit from an  
80 improved agency-level protest system because greater use of agency-level protests means more  
81 agency control over the timing and conduct of protests and more opportunities for agencies to  
82 superintend their own procurement processes. And the public would benefit from more  
83 competitive, fairer, and more transparent agency procurements.

84 Because an improved agency-level protest system is of significant value to contractors,  
85 agencies, and the public, this recommendation identifies changes to make it more likely vendors  
86 will avail themselves of agency-level protest procedures. The recommended changes reflect three  
87 overarching principles—transparency, simplicity, and predictability—meant to address  
88 contractors’ principal concerns about agency-level protest systems.

**RECOMMENDATION**

<sup>23</sup> 48 C.F.R. § 33.103(f). Under certain circumstances, the agency can override the regulatory stay for agency-level protests. See 48 C.F.R. §§ 33.103(f)(1) and (f)(3)

<sup>24</sup> 31 U.S.C. §§ 3553(c)(1) & (d)(3). Under certain circumstances, the agency can override the statutory stay for protests to GAO. See 31 U.S.C. §§ 3553(c) and (d); 48 C.F.R. §§ 33.104(b) and (c).

**Commented [A5]:** The phrase "stays a procurement" seems over broad as used here. The FAR defines the term "procurement" consistent with the term "acquisition," which encompasses all of the steps in the acquisition process. See 48 C.F.R. § 2.101. It is useful and important to distinguish between pre-award protests and post-award protests. A timely pre-award protest to the agency or GAO will only prevent an agency from awarding the contract before it is resolved, but it does not prevent the agency from moving forward with other procurement activities leading up to award (e.g., accepting and evaluating offers, conducting clarifications or discussions, etc.). A timely post-award protest to the agency or GAO will automatically prevent the agency from moving forward with performance of the awarded contract. See Compare 48 C.F.R. §§ 33.103(f)(1), with 33.103(f)(1)(f)(3); compare 48 C.F.R. §§ 33.104(b), with 33.104(c).



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

- 89 1. Agencies should clearly identify which categories of procurement decisions may or may  
90 not be made the subjects of agency-level protests.



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

- 91 2. Agencies should formalize and compile in a publicly available, online document the  
92 procedures they apply in adjudicating agency-level protests. In so doing, they should be  
93 guided by the principles set out in Conference Recommendation 2018-5.<sup>25</sup>
- 94 3. Agencies should clearly identify who within the agency will adjudicate an agency-level  
95 protest. They should consider designating at least one Agency Protest Official (APO)—a  
96 person who specializes in handling agency-level protests—to oversee and coordinate  
97 agency-level protests and to hear protests brought to a level above the contracting officer.  
98 Agencies lacking the resources to designate their own APO might consider sharing an  
99 APO with other agencies.

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

- 100 4. Agencies should consider adopting presumptive timelines for agency-level protests,  
101 similar to the ones under the Contract Disputes Act. Agencies should also make best  
102 efforts to notify protesters of the timelines applicable to their agency-level protests.
- 103 5. Agencies should clearly and immediately provide written notice to protesters of any  
104 adverse agency action affecting the rights of the protester under the challenged  
105 procurement. Protests should be deemed denied after a certain number of days without a  
106 decision, with the agency to notify the protester of the number of days at the beginning of  
107 the protest.

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<sup>25</sup> 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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### Compiling the Record and Making It Available

- 108 6. Agencies should make available to protesters as much of the procurement record as is  
109 feasible. To address confidential information in the record, agencies should consider  
110 using tools such as enhanced debriefings.
- 111 7. Agencies should consider adopting a 30-day deadline, running from the date a protest is  
112 filed, for providing protesters with as much of the procurement record as is feasible.

### Protecting Against Adverse Consequences

- 113 8. Although the FAR ~~automatically stays a procurement~~ ~~prohibits the award of contract or~~  
114 ~~continued performance under an awarded contract~~ during an agency-level protest,  
115 agencies should provide for a short extension of the stay after a final decision in an  
116 agency-level bid protest ~~as permitted by regulation~~. The short extension should be of  
117 sufficient duration (*e.g.*, five days) to give the protester time to bring a follow-on protest  
118 at GAO or COFC after the agency's decision.
- 119 9. Congress should provide that, if a protester promptly files a GAO protest after an adverse  
120 decision in an agency-level protest, ~~the procurement is automatically stayed~~ ~~the agency~~  
121 ~~shall not award the contract or commence performance under the contract~~ during the  
122 pendency of the GAO protest.
- 123 10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO  
124 are handled on an expedited basis, to the extent feasible.

### Publishing Data on Agency-Level Bid Protests

- 125 11. Agencies should annually, on a fiscal year basis, collect and publish data about the bid  
126 protests they adjudicate. To the extent feasible, the data should at least include what the  
127 GAO currently provides in its annual reports about the bid protests it adjudicates (*e.g.*,

**Commented [A6]:** Please see comments inserted for lines 70 to 73, above.

**Commented [A7]:** To recognize that this is already provided for at 48 C.F.R. § 33.103(f)(4) ("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."), so the recommendation should be to encourage agencies to make use of this authority.

**Commented [A8]:** Please see comments inserted for lines 70 to 73, above. This revision to the text is offered to prevent Recommendation 9 from being interpreted as ACUS suggesting a change to the status quo for pre-award protests. In other words, it is assumed that ACUS does not intend to recommend that for a pre-award protest *all* procurement activities leading up to award be stayed.



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128 the number of bid protests filed with the agency; the effectiveness rate of agency-level  
129 bid protests (the ratio of protests sustained or in which corrective action is afforded  
130 versus the total of all agency-level protests filed and closed in the fiscal year); the number of  
131 merits decisions by the agency; the number of decisions sustaining the protest; the  
132 number of decisions denying the protest; and the average time required for a bid protest  
133 to be resolved).

**Commented [A9]:** GAO's effectiveness rate published in its annual report to Congress is a percentage of all protests closed during the fiscal year, not filed. See *GAO Bid Protest Annual Report to Congress for Fiscal Year 2019*, GAO-20-220SP (Nov 5, 2019) (available at <https://www.gao.gov/products/GAO-20-220SP>), Enclosure 2 at fn 5. We note that there tends to be more procurements awarded in the fourth quarter of the fiscal year, as well as an increase in bid protest during this period, and yet resolution of the protest may not occur until the subsequent fiscal year. GAO's reporting methodology therefore does not capture the number of cases that were filed *and* closed in the same fiscal year. While mirroring GAO's effectiveness rate formula will allow for easy comparisons between reported agency-level protests and GAO protests, agency reporting will also be subject to the same shortcomings.

**Commented [A10]:** We note that "the average time required for a bid protest to be resolved is not currently part of GAO's reporting: GAO only indicates whether or not there were protests that were not resolved within 100 days. So under the draft recommendation, there would be some different reporting outcomes for GAO and for agencies.