



## 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 and services.<sup>1</sup> The primary source of these policies and procedures is the  
3 Federal Acquisition Regulation (FAR),<sup>2</sup> 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.<sup>3</sup>  
9 Responding to bid protests can require agencies to reevaluate their procurement processes and,  
10 sometimes, make improvements. That, in turn, results in more competitive, fairer, and more  
11 transparent procurement processes, benefitting vendors, agencies, and ultimately the public.

12 To file a bid protest, an actual or prospective vendor need only show that it is an  
13 “interested party,” meaning that its direct economic interest would be affected by the award of,  
14 or failure to award, the contract in question.<sup>4</sup> Vendors that qualify as interested parties may file

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<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; 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).

<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)



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

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

27 Vendors, however, seldom file agency-level protests. Although there is little data on the  
28 number of agency-level protests filed each year, available evidence suggests that substantially  
29 more protests are filed with COFC and GAO each year than with procuring agencies.<sup>9</sup> There are  
30 several reasons why vendors may forego agency-level protests that implicate the themes of  
31 transparency, predictability, and accountability.

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(defining “interested party” for purposes of 28 U.S.C. § 1491(b), which covers actions in the Court of Federal Claims).

<sup>5</sup> See 28 U.S.C. § 1491(b).

<sup>6</sup> See 31 U.S.C. §§ 3552(a), 3553(a).

<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).

<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).



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

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

47 Third, some vendors report being dissuaded by their inability to compel production of the  
48 procurement record as part of an agency-level protest.<sup>16</sup> The FAR gives disappointed offerors the  
49 right to an agency debriefing—a procedure whereby contracting personnel provide offerors with  
50 an explanation of the agency’s evaluation process and an assessment of the offerors’ proposals.  
51 But nothing in the FAR guarantees vendors the right to view the procurement record itself. The

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<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).

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



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52 FAR provides only that agencies “*may exchange relevant information*” with agency-level  
53 protesters.<sup>17</sup> By contrast, vendors that file bid protests at GAO may demand to see the entire  
54 record of the procurement, and procuring agencies must respond to such requests within 30  
55 days—either by producing the responsive documents or giving a valid reason for withholding  
56 them.<sup>18</sup>

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

65 The perception that agency-level protests lack transparency, predictability, and  
66 accountability makes it more likely that protesters who lose at the agency level will mistrust the  
67 agency’s decision and file follow-on protests with GAO or COFC. Such follow-on protests not  
68 only tax the limited resources of GAO and COFC, but also can disrupt activities at procuring  
69 agencies. For instance, just as a valid agency-level protest automatically stays a procurement  
70 until the agency denies or dismisses the protest and takes some adverse action,<sup>23</sup> a valid follow-  
71 on protest at GAO may automatically stay a procurement (if the requisite filing deadlines are

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

<sup>18</sup> 4 C.F.R. § 21.3(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.

<sup>23</sup> 48 C.F.R. § 33.103(f).



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72 met) until GAO denies or dismisses the protest.<sup>24</sup> Thus, when an agency-level protest is followed  
73 by another protest at GAO, delays in procurements can be substantial.

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

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

### **RECOMMENDATION**

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

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

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<sup>24</sup> 31 U.S.C. §§ 3553(c)(1) & (d)(3).



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

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

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

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



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

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

### **Protecting Against Adverse Consequences**

- 110 8. Although the FAR automatically stays a procurement during an agency-level protest,  
111 agencies should provide for a short extension of the stay after a final decision in an  
112 agency-level bid protest. The short extension should be of sufficient duration (*e.g.*, five  
113 days) to give the protester time to bring a follow-on protest at GAO or COFC after the  
114 agency's decision.
- 115 9. Congress should provide that, if a protester promptly files a GAO protest after an adverse  
116 decision in an agency-level protest, the procurement is automatically stayed during the  
117 pendency of the GAO protest.
- 118 10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO  
119 are handled on an expedited basis, to the extent feasible.

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

- 120 11. Agencies should annually collect and publish data about the bid protests they adjudicate.  
121 To the extent feasible, the data should at least include what the GAO currently provides  
122 in its annual reports about the bid protests it adjudicates (*e.g.*, the number of bid protests  
123 filed with the agency; the effectiveness rate of agency-level bid protests (the ratio of  
124 protests sustained or in which corrective action is afforded versus total agency-level



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125 protests filed); the number of merits decisions by the agency; the number of decisions  
126 sustaining the protest; the number of decisions denying the protest; and the average time  
127 required for a bid protest to be resolved).