



## **Administrative Conference Recommendation 2020-4**

### **Government Contract Bid Protests Before Agencies**

**Adopted December 17, 2020**

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

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

To file a bid protest, an actual or prospective vendor must show that it is an “interested party”—meaning that its direct economic interest would be adversely affected by the award of,

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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, Pub. L. No. 98-369, div. B, tit. VII, 98 Stat. 494, 942–85 (codified, as amended, in various parts of the U.S. Code); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (later renamed the Clinger-Cohen Act of 1996); Exec. Order No. 12,979, *Agency Procurement Protests*, 60 Fed. Reg. 55,171 (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. 43,108, 43,113 (Aug. 18, 1995).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

or failure to award, the contract in question<sup>4</sup>—and that it suffered prejudice because of an error in the procurement process. Ordinarily, vendors who meet those requirements may file bid protests in any of three forums: (1) the procuring agency,<sup>5</sup> (2) the Government Accountability Office (GAO),<sup>6</sup> or (3) the United States Court of Federal Claims (COFC),<sup>7</sup> and depending on where the protest is initiated, may be able to file protests in series. For example, a protest may be filed first at the agency, then (if unsuccessful at the agency) at GAO, and then (if again unsuccessful) at COFC.<sup>8</sup> The procedural tools available in a given forum, along with other strategic and cost considerations, typically drive vendors’ decisions about where to file their bid protests.

Bid protests filed with procuring agencies are commonly referred to as agency-level protests. Agency-level protests have important benefits for the public, contractors, procuring agencies, and COFC and GAO. By “provid[ing] for inexpensive, informal, procedurally simple, and expeditious resolution of protests,”<sup>9</sup> agency-level protest mechanisms allow small businesses (among other vendors) to affordably contest agencies’ procurement decisions. They also give procuring agencies the chance to review and improve their own procurement practices. And they funnel some protests away from COFC and GAO, reducing the likelihood that the number of protests will overwhelm those institutions.

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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 in which 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) (limiting the ability to protest the issuance or proposed issuance of a task or delivery order); 48 C.F.R. § 16.505(a)(10) (same).

<sup>5</sup> See 48 C.F.R. § 33.103.

<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 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 28 U.S.C. § 1491(b).

<sup>8</sup> See Admin. Conf. of the U.S., Info. Interchange Bull. No. 007, Agency Bid Protests (June 2020), <https://www.acus.gov/fact-sheet/iib-007-agency-bid-protests>.

<sup>9</sup> See Exec. Order. No. 12,979, *Agency Procurement Protests*, 60 Fed. Reg. 55,171, 55,171 (Oct. 25, 1995).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Vendors, however, seldom file agency-level protests. Although there is little data on the number of agency-level protests filed each year, available evidence suggests that substantially more protests are filed with COFC and GAO each year than with procuring agencies.<sup>10</sup> There are several reasons why vendors may forego agency-level protests. Those reasons implicate the themes of transparency, predictability, and accountability.

First, some vendors report shying away from agency-level protests because they perceive the agency as unlikely to change its decision.<sup>11</sup> Sometimes, for instance, the official responsible for soliciting or awarding a procurement contract is also responsible for handling any agency-level protests that are filed regarding the procurement. This perception of a pre-judgment by the agency may cause some vendors to file their protests at GAO or COFC, rather than at the agency level.

Second, some vendors report that they view agency-level protest processes as opaque.<sup>12</sup> Agencies do not publish or provide comprehensive data on their bid protest decisions. And the FAR and agency-specific bid protest rules establish few hard-and-fast requirements for the process. For example, although the FAR states that “[a]gencies shall make their best efforts to resolve agency protests within 35 days after [an agency-level protest] is filed,”<sup>13</sup> that language is hortatory and does not establish any binding deadlines for agency decisions. Nothing in the FAR does. The failure to provide for any binding deadlines distinguishes the FAR from other federal procurement statutes, such as the Contract Disputes Act,<sup>14</sup> which sets or requires contracting

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<sup>10</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 the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-level-bid-protests-final-report>.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> 48 C.F.R. § 33.103(g).

<sup>14</sup> 41 U.S.C. §§ 7101–09.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

officers to set firm deadlines for deciding most claims<sup>15</sup> and provides that the passage of the deadline for a claim means the claim is deemed denied.<sup>16</sup>

Third, some vendors report being dissuaded by their inability to compel production of the procurement record as part of an agency-level protest.<sup>17</sup> The FAR gives disappointed offerors the right to an agency debriefing—a procedure whereby contracting personnel provide offerors with an explanation of the agency’s evaluation process and an assessment of the offerors’ proposals. But nothing in the FAR guarantees vendors the right to view the procurement record itself. The FAR provides only that agencies “*may exchange relevant information*” with agency-level protesters.<sup>18</sup> By contrast, vendors who file bid protests at GAO may demand to see the entire record of the procurement, and procuring agencies must respond to such requests within twenty-five days and produce the responsive documents within thirty days (unless they are withheld for a valid reason).<sup>19</sup>

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

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<sup>15</sup> *See id.* § 7103(f)(1)–(2).

<sup>16</sup> *See id.* § 605(c)(5).

<sup>17</sup> Yukins, *supra* note 10, at 39.

<sup>18</sup> 48 C.F.R. § 33.103(g) (*italics added*).

<sup>19</sup> 4 C.F.R. § 21.3(c)–(d); 48 C.F.R. § 33.104(a).

<sup>20</sup> Yukins, *supra* note 10, at 31.

<sup>21</sup> *See* 4 C.F.R. §§ 21.0(e), 21.2.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

seriously prejudice protesters' rights at GAO.<sup>22</sup> This causes some vendors to forego agency-level protests altogether.<sup>23</sup>

The perception that agency-level protests lack transparency, predictability, and accountability also makes it more likely that protesters who do file at the agency level and whose protests are denied will file follow-on protests with GAO or COFC. Such follow-on protests not only tax the limited resources of GAO and COFC, but also can disrupt activities at procuring agencies. For instance, just as the filing of an agency-level protest automatically prohibits the contract from being awarded or performed until the agency denies or dismisses the protest and takes some adverse action,<sup>24</sup> a follow-on protest at GAO may automatically prevent the contract from being awarded or performed (if the requisite filing deadlines are met) until GAO denies or dismisses the protest.<sup>25</sup> Thus, when an agency-level protest is followed by another protest at GAO, delays in procurements can be substantial.

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

Because an improved agency-level protest system is of significant value to contractors, agencies, and the public, this Recommendation identifies changes to make it more likely vendors will avail themselves of agency-level protest procedures. The recommended changes reflect three

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<sup>22</sup> See Yukins, *supra* note 10, at 13–14, 18–19.

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

<sup>24</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), (f)(3).

<sup>25</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)–(d); 48 C.F.R. § 33.104(b)–(c).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

overarching principles—transparency, simplicity, and predictability—meant to address contractors’ principal concerns about agency-level protest systems.

### RECOMMENDATION

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

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

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

2. Agencies should formalize and compile in a document that is publicly available online the procedures they apply in adjudicating agency-level protests. In so doing, they should be guided by the principles set out in Recommendation 2018-5, *Public Availability of Adjudication Rules*.
3. Agencies should clearly identify who within the agency will adjudicate an agency-level protest. They should consider designating at least one Agency Protest Official (APO)—a person who specializes in handling agency-level protests—to oversee and coordinate agency-level protests and hear protests brought to a level above the contracting officer. Agencies lacking the resources to designate their own APO might consider sharing an APO with other agencies.

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

4. Agencies should consider adopting presumptive timelines for agency-level protests, similar to the ones under the Contract Disputes Act. Agencies should also make best efforts to notify protesters of the timelines applicable to their agency-level protests.
5. Agencies should clearly and immediately provide written notice to protesters of any adverse agency action affecting the rights of the protester under the challenged procurement. Agency rules should provide that protests are deemed denied after a



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

specified number of days without a decision and that agencies may grant case-specific extensions based on identified criteria.

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

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

### **Protecting Against Adverse Consequences**

8. Although the Federal Acquisition Regulation (FAR) prohibits the award of a contract or continued performance under an awarded contract during an agency-level protest, agencies should provide for a short extension of the stay after a final decision in an agency-level bid protest as permitted by the FAR. The short extension should be of sufficient duration (e.g., five days) to give the protester time to bring a follow-on protest at the Government Accountability Office (GAO) or the United States Court of Federal Claims after the agency's decision.
9. Congress should provide that, if a protester promptly files a GAO protest after an adverse decision in an agency-level protest, the agency shall not award the contract or commence performance under the contract during the pendency of the GAO protest, subject to potential override in urgent and compelling circumstances.
10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO are handled on an expedited basis, to the extent feasible.

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

11. Agencies should collect and annually publish data about the bid protests they adjudicate. To the extent feasible, the data should at least include what the GAO currently provides



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

in its annual reports about the bid protests it adjudicates (e.g., the number of bid protests filed with the agency; the effectiveness rate of agency-level bid protests (the ratio of protests sustained or in which corrective action is afforded versus total agency-level protests filed); the number of merits decisions by the agency; the number of decisions sustaining the protest; the number of decisions denying the protest; and the time required for bid protests to be resolved).