



## Government Contract Bid Protests Before Agencies

### Committee on Administration and Management

Proposed Recommendation | December 17, 2020

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

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,

<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; Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) (later renamed the Clinger-Cohen Act of 1996) 41 U.S.C. § 253; Exec. Order 12979, 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).

**Commented [CMA1]:** Proposed Amendment from Government Member Robert J. Girouard # 1. Note: Change appears in footnote 1.

**Commented [CMA2]:** Proposed Amendment from Government Member Robert J. Girouard # 2

**Formatted:** Font: Italic, Highlight



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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,  
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.

<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); 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 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).

**Commented [CMA3]:** Proposed Amendment from Government Member Robert J. Girouard # 3. Note: Change appears in footnote 4.

**Commented [CMA4]:** Proposed Amendment from Government Member Robert J. Girouard # 4. Note: Change appears in footnote 6.

**Commented [CMA5]:** Comment from Special Counsel Jeffrey S. Lubbers # 1: This is a bit confusing. Are these three routes mutually exclusive? Does a vendor who files an agency-level protest lose the right to file with the COFC or the GAO? It appears that way from the description (although lines 65–67 state otherwise). I also assume the agency-level decision is judicially reviewable but in what court?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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  
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 which** implicate the themes  
32 of 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 perception of a pre-judgment by the**  
37 **agency** may cause some vendors to file their protests at GAO or COFC, rather than at the agency  
38 level.

**Commented [CMA6]:** Proposed Amendment from Senior Fellow Alan B. Morrison

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

<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.), <https://www.acus.gov/report/agency-level/bid-protests-final-report>.

<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.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

47 officers to set firm deadlines for deciding most claims<sup>14</sup> and provides that the passage of the  
48 deadline for a claim means the claim is deemed denied.<sup>15</sup>

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

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

**Commented [CMA7]:** Comment from Special Counsel Jeffrey S. Lubbers # 2: Do vendors have the same right if they file with the COFC?

**Commented [CMA8]:** Proposed Amendment from Government Member Robert J. Girouard # 5

**Commented [CMA9]:** Proposed Amendment from Government Member Robert J. Girouard # 6. Note: Change appears in footnote 18.

<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.

<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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

66 seriously prejudice protesters’ rights at GAO.<sup>21</sup> This causes some vendors to forego agency-level  
67 protests altogether.<sup>22</sup>

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

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

<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). 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>24</sup> 31 U.S.C. §§ 3553(c)(1), ~~(2)~~ (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).

**Commented [CMA10]:** Comment from Special Counsel Jeffrey S. Lubbers # 3: What does “valid” mean in this sentence? Note: See parallel comment at line 74.

**Commented [CMA11]:** Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 75, 118-19, and 125-26.

**Commented [CMA12]:** Proposed Amendment from Government Member Robert J. Girouard # 8. Note: Change appears in footnote 23.

**Commented [CMA13]:** Comment from Special Counsel Jeffrey S. Lubbers # 3: What does “valid” mean in this sentence? Note: See parallel comment at line 72.

**Commented [CMA14]:** Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 118-19, and 125-26.

**Commented [CMA15]:** Proposed Amendment from Government Member Robert J. Girouard # 9. Note: Change appears in footnote 24.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

### RECOMMENDATION

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

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

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

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

---

<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).



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

- 103 4. Agencies should consider adopting presumptive timelines for agency-level protests,
- 104 similar to the ones under the Contract Disputes Act. Agencies should also make best
- 105 efforts to notify protesters of the timelines applicable to their agency-level protests.
- 106 5. Agencies should clearly and immediately provide written notice to protesters of any
- 107 adverse agency action affecting the rights of the protester under the challenged
- 108 procurement. Protests should be deemed denied after a certain number of days without a
- 109 decision, with the agency to notify the protester of the number of days at the beginning of
- 110 the protest. Agency rules should provide that protests are deemed denied after a specified
- 111 number of days without a decision, and should also provide that agencies may grant case-
- 112 specific extensions based on identified criteria.

**Commented [CMA16]:** Comment from Special Counsel Jeffrey S. Lubbers # 4: Shouldn't the FAR itself be amended to include the requirements in paragraphs 4-7 (or at least to provide that the agencies do so)?

**Compiling the Record and Making It Available**

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

**Commented [CA17]:** Proposed Amendment from Council # 1. Explanation: Change is intended to avoid vesting agencies with unnecessary and potentially problematic discretion.

**Protecting Against Adverse Consequences**

- 118 8. Although the FAR automatically stays a procurement prohibits the award of a contract or
- 119 continued performance under an awarded contract during an agency-level protest,
- 120 agencies should provide for a short extension of the stay after a final decision in an
- 121 agency-level bid protest as permitted by regulation. The short extension should be of
- 122 sufficient duration (e.g., five days) to give the protester time to bring a follow-on protest
- 123 at GAO or COFC after the agency's decision.

**Commented [CMA18]:** Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 75, and 125-26.

**Commented [CMA19]:** Proposed Amendment from Government Member Robert J. Girouard # 10

**Formatted:** Font: Not Italic, Highlight



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 124 9. Congress should provide that, if a protester promptly files a GAO protest after an adverse
- 125 decision in an agency-level protest, the ~~procurement is automatically stayed~~ agency shall
- 126 not award the contract or commence performance under the contract during the pendency
- 127 of the GAO protest, subject to potential override in urgent and compelling circumstances.
- 128 10. GAO should amend its bid protest procedures to ensure that follow-on protests at GAO
- 129 are handled on an expedited basis, to the extent feasible.

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

- 130 11. Agencies should ~~annually collect and annually~~ publish data on a fiscal year basis about
- 131 the bid protests they adjudicate. To the extent feasible, the data should at least include
- 132 what the GAO currently provides in its annual reports about the bid protests it adjudicates
- 133 (e.g., the number of bid protests filed with the agency; the effectiveness rate of agency-
- 134 level bid protests (the ratio of protests sustained or in which corrective action is afforded
- 135 versus the total of all agency-level protests filed closed in the fiscal year); the number of
- 136 merits decisions by the agency; the number of decisions sustaining the protest; the
- 137 number of decisions denying the protest; and the average time required for a bid protest
- 138 to be resolved).

**Commented [CMA20]:** Proposed Amendment from Government Member Robert J. Girouard # 7. Note: See parallel amendments at lines 72-73, 75, and 118-19.

**Commented [CA21]:** Proposed Amendment from Council # 2. Explanation: Change made to align text with 31 U.S.C. § 3553(c)(2).

**Commented [CMA22]:** Comment from Special Counsel Jeffrey S. Lubbers # 5: Should this sort of stay also apply if the protester files a COFC protest? Also, this is the only recommendation directed to Congress. Aren't there any others that could be?

**Commented [CMA23]:** Proposed Amendment from Government Member Robert J. Girouard # 11

**Formatted:** Font: Not Italic, Highlight

**Commented [CMA24]:** Proposed Amendment from Government Member Robert J. Girouard # 12

**Commented [CMA25]:** Comment from Government Member Robert J. Girouard: "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 resolved within 100 days. So under the draft recommendation, there would be some different reporting outcomes for GAO and for agencies."