

GAO BID PROTESTS

1. ALWAYS ASK FOR A DEBRIEFING, EVEN IF YOU WIN

2. IF IT EVEN CROSSES YOUR MIND THAT YOU MIGHT FILE A PROTEST, CALL COUNSEL IMMEDIATELY!!!!

§ 21.2 Time for filing.

(a)(1) -- If the protest is based on an objection you have to solicitation terms, a protest has to be filed prior to the time set for receipt of initial proposals. If there is something incorporated into the solicitation through an amendment that you object to you must protest no later than the next closing time for receipt of proposals following the incorporation.

(a)(2) -- Protests other than those covered by paragraph (a)(1) must be filed no later than 10 days after the basis of protest is known or should have been known (whichever is earlier).

Debriefing: If the agency is required to conduct a debriefing and you request one you cannot protest until after the debriefing, and must then protest within 10 days of the debriefing.

You Must Include All Information Establishing Timeliness In Your Initial Protest.



Automatic Stay:

- If you protest before award the agency cannot make an award.
- If you timely protest after award performance is automatically stayed.
- If you protest after a debriefing, performance is stayed if the protest is filed within 5 days of the debriefing or 10 days after award, whichever is later.

Agency protest:

Generally, if you file an agency level protest within the above timeframes and the agency denies the protest (or takes some other adverse action) you then have 10 days to protest to GAO. There are several nuances to this so you should discuss with counsel if you want to file with the agency first. It's rare to get relief on an agency level protest, except where you are protesting objectionable or ambiguous solicitation terms, in which case it's not unusual for the agency to address the problem. You should file with the agency as far in advance of proposal submission as possible, and **if you're closing in on the proposal submission date with no action by the agency you must file with GAO** prior to the submission date.

SBA SIZE PROTESTS

13 C.F.R. §121.1004 - You must file within 5 business days of notice of award - DO NOT DELAY

WINNING BID PROTEST ARGUMENTS



Unreasonable Cost or Price Evaluations

- Cost Realism v. Cost Reasonableness
 - o If the procurement is for a cost reimbursement contract, or if the solicitation calls for a cost realism analysis, the agency must perform it. If the solicitation does not call for a cost realism analysis the agency is not required to do one.
 - o GAO's FY 2015 bid protest analysis found that the number one reason to sustain a bid protest was for unreasonable cost or price evaluations by the contracting agency.
 - o Look for discrepancies between how the awardee proposed to staff the project and how those numbers interact with the proposed price.
 - o GAO analyzes whether the contracting agency adequately assessed on its own whether the proposed hours of work and mix of labor and skills would get the job done.
 - o GAO will also look at the explanations offered for why an agency ticked a proposed price upward.

Inadequate Or Unequal Contracting Discussions

- Were discussions held on an equal footing? Agencies often conduct discussions during the selection process, which must include all offerors in the “competitive range” for award.
 - o If the agency has discussions with a competitor that allows them to cure deficiencies and doesn't have similar discussions with you, this is a protest ground.
 - o If told of weaknesses or deficiencies in your proposals in a debriefing instead of during discussions while the selection process was still ongoing this may be a ground to protest.
 - o Arguments based on inadequate discussions can have added advantages after the protest - GAO usually recommends reopening discussions, which gives you a chance to revise your proposal.

Uneven Treatment Between Competitors

- Unfairness - where one offeror was treated differently than another - can be a strong argument.
 - o Unequal or disparate treatment: one offeror being awarded a strength or weakness where a competitor is gauged differently, despite being virtually the same in that area.
 - o The awardee may have been treated more favorably than you were, or the agency may have relaxed a requirement for the awardee when they held you to strict compliance.

The Solicitation Criteria Wasn't Followed

- Agency didn't follow the criteria in the solicitation; for example, they waived a material requirement.
- Or the agency applies an evaluation criteria that wasn't stated in the solicitation.

LOSING BID PROTEST ARGUMENTS



- **Alleging Bias** - Unless you have hard evidence or a smoking gun don't go there.
- **Simply Disagreeing With The Agency's Evaluation** - to win when challenging technical evaluation results you have to show there were inconsistencies between the solicitation terms and how offers were evaluated, or that the agency ignored information in your proposal.