

Not the Third Wheel: Intervenor in Government Accountability Office Protests

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Introduction

In protests at the Government Accountability Office (GAO), the protester and agency have easily defined roles. Intervenor, however, may seem about as useful as a third wheel on a bicycle. Protesters' counsel properly see the intervenor as an obstacle to a successful protest, while agency attorneys are often hesitant to work too closely with intervenor counsel either out of concerns related to information sharing or that the interests of the government and the intervenor may diverge, or both. Our goal in this article is to dispel these agency concerns. We will, accordingly, explain why the intervenor should not be perceived as a third wheel, but rather as an integral and valuable part of the agency's defense. We explain why intervenors intervene, discuss the government's perspective, and describe a roadmap of how intervenors can help agency counsel defend an award. We offer these views to illuminate a clearer role for intervenors in a bid protest as a key part of the agency defense.

Why Intervenor Intervene

When we discuss the role of intervenors with friends and colleagues who are agency protest counsel, they are sometimes skeptical that intervenors can be a useful part of the process. Many claim, only half in jest, that the most substantive document filed by the intervenor is usually its Notice of Intervention. But we suggest that their views may have been colored by intervenor counsel who did not do all they should to assist the agency as a team player. And the reality is that both active and passive intervenors exist; knowing which one you are dealing with, and their motivations, can go a long way in determining how helpful they can be.

According to the GAO's regulations, an intervenor is "an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied."¹ This is about as dry a definition as there is, and offers no insight into the real world of intervenors. So, to clarify things, we will divide intervenors into three categories: Risk Assessors, Trackers, and Litigators.

The Risk Assessor is the most conservative intervenor. Full scale litigation, even a short term bid protest, can cost hundreds of thousands—if not millions—of dollars. With a sustain rate of less than 20%,² many contract awardees see no reason to expend resources defending against ill-founded protests. However, to make an assessment of whether a particular protest poses significant risk, the awardee needs to understand the protester's claims. This is not easy without intervening. Awardees are entitled only to a redacted copy of the initial protest, and often the redactions are so extensive that it is impossible to discern the quality of the protest.³ As a result, the Risk Assessor asks counsel to intervene to obtain a copy of the unredacted protest, and then asks counsel for an appraisal of the merits. But, after this initial flurry, a Risk Assessor may disappear, confident that the agency has the case well in hand. This intervenor typically will not file any further documents, and there is no requirement that it do so. If, however, the intervenor's counsel thinks that there is exposure and the intervenor's perspective can add value, a Risk Assessor may transform into a Litigator, discussed below. Whatever approach this intervenor takes, agency counsel should appreciate that even the most passive Risk Assessor will be willing to answer agency questions or provide information at any point during the protest process. This information may take the form of declarations from key company employees or assistance finding particular references in the awardee's proposal. There is no reason not to take advantage of this resource.

A close cousin to the Risk Assessor is the Tracker. The Tracker follows the same pattern as a Risk Assessor, but may be more active after the filing of the Agency Report and any supplemental protests. These intervenors are most common in protests that raise substantive challenges to the protester's proposal, but non-existent or general challenges to the awardee. Trackers are known for silently participating in conference calls with GAO attorneys and filing one- or two page Comments on the Agency Report which add little more than a "me too" to the agency's filing. If, however, a direct challenge is levied against the Tracker's proposal, a Tracker may become active to address that issue.

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¹ 4 C.F.R. § 21.(b)(1).

² See GAO BID PROTEST ANN. REP. TO THE CONGRESS FOR FISCAL YEAR 2010, at 2 (2010), available at <http://www.gao.gov/legal/bids/bidproan.htm>.

³ See 4 C.F.R. § 21.3(a) (2011) ("The agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall furnish copies of protest submissions to those parties, except where disclosure of the information is prohibited by law . . ."). As disclosure of protected information outside of the protective order would be prohibited, intervenors are, initially, only entitled to redacted filings.

As a result, one way to engage this type of intervenor is for the agency to ask for assistance on a specific issue on which the intervenor could add value. This is a sensible proposition in all events.

Finally, there are Litigators. From the beginning of the protest to its conclusion, and no matter whether the protest is focused on the protester's proposal or the awardee's, these intervenors file substantive briefs and actively engage the protester's arguments. They can add significant value by bringing important legal resources to bear and often provide new arguments or perspectives to support the agency's position. It is easy to identify this type of intervenor, because they not only will ask the agency for its assessment of the merits of a given protest, but will also ask how they can help, often offering to perform legal research or sending cases or draft arguments to agency counsel before the filing of the Agency Report. These intervenors would prefer to be full partners in the defense of the award, but, as discussed below, that is not always the agency's preference. The disconnect between the agency and a Litigator is not beneficial to either party, as a well informed intervenor is a more effective advocate for dismissal of the protest.

Concerns About Intervenors

When it comes to Litigators, we hear two primary concerns from agency attorneys. First, they are concerned that sharing government information with the intervenor without sharing it with the protester is inequitable or contrary to the GAO's regulations. Second, agency attorneys worry that working too closely with an intervenor will be counterproductive if the parties' interests diverge. Although we appreciate these perceptions, neither of them should stand in the way of close coordination between agency and intervenor.

Once a Protective Order Is Entered, Information Can Be Shared with the Intervenor

We have heard concerns from agency counsel that working too closely with intervenor counsel is unfair to the protester or a prohibited ex parte communication. Protests are an adversarial process with the intervenor and agency on one side and the protester on the other. Many agency attorneys, however, mistakenly believe that information must be shared evenly with the intervenor and protester because of GAO rules or because information shared could be used against the agency in future litigation. As a result, agency counsel are often disinclined to preview the contents of the agency record or the Government's proposed arguments for intervenor counsel before the record is filed. These concerns are simply misplaced. To the contrary, good communication between parties that find themselves on the same side of litigation is essential to presenting the best case possible.

There are two GAO rules that address information sharing. First, 4 C.F.R. § 21.3(e) requires that "the contracting agency shall simultaneously furnish a copy of the report to the protester and any intervenors."⁴ This rule does *not* prohibit an agency from sharing documents with the intervenors *before* the agency Report is filed.⁵ This type of preview, or at minimum a summary of key documents, can often help the intervenor understand why the agency came to the conclusion it did, focus the intervenor's arguments in its support of the agency's position, and advance the parties' joint goal of defending the award decision. Moreover, no privilege or other joint defense issue is compromised by merely sharing because the documents will eventually be released to all parties as part of the agency record. Second, the GAO discourages *ex parte* communication with GAO attorneys: "Parties should not engage in ex parte communications with the GAO attorney assigned to the protest or with any other GAO employee."⁶ But by its terms, this language applies only to communications with GAO attorneys, not between counsel for the parties. Thus, this does not limit communications between agency and intervenor counsel.

Aside from GAO rules, there is also the issue of the standard protective order that is issued for protests. In the early stages of a protest that involves protected information, counsel for the intervenor will seek access to that information through the GAO's standard protective order. The protective order "limits disclosure of certain material and information submitted in the above captioned protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure."⁷ Of course, once intervenors are admitted, the protective order does not preclude free information sharing between the agency and intervenor counsel. To the contrary, the protective order prohibits intervenor counsel from sharing with its client competitively sensitive information that might yield an unfair advantage in any future competition.⁸ Thus, the protective order should encourage, rather than discourage, open lines of communication between attorneys.

⁴ *Id.* § 21.3(e).

⁵ In fact, "GAO encourages agencies to voluntarily release to the parties documents that are relevant to the protest prior to the filing of the agency report." U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 22 (9th ed. 2009) [hereinafter GAO DESCRIPTIVE GUIDE], available at <http://www.gao.gov/http://www.gao.gov/special.pubs/og96024.htm> (citing 4 C.F.R. § 21.3(c)).

⁶ *Id.* at 24.

⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF GEN. COUNSEL, GUIDE TO GAO PROTECTIVE ORDERS 17 (2006), available at <http://www.gao.gov/special.pubs/d06716sp.pdf> (showing complete text of the standard order)

⁸ *Id.* at 18 (order allows sharing of the information only with individuals "admitted under the order," to include paralegals and support staff, "*who are not involved in competitive decisionmaking for a party or for any firm that might gain a competitive advantage from access to the protected material. . .*"). "[O]nly attorneys and consultants they retain may be admitted under a protective order." *Id.* at 4.

In addition, we occasionally hear agency counsel question whether information sharing may allow the intervenor to bring related challenges to the agency. For example, could information provided to an intervenor in one successful protest be used to later challenge a re-evaluation of that same award? Almost never! As a practical matter, it is unlikely that information from one protest would be of any use in another as each procurement is evaluated on its own merits.⁹

In addition, using information in this manner is not permitted by the GAO's standard protective order without the GAO's permission. "All material that is identified as protected" is covered by the protective order,¹⁰ whether it was released before or after the agency report. As a result, these materials cannot be used in a subsequent protest without permission: "Material to which parties gain access under this protective order is to be used *only for the subject protest* proceedings, absent express prior authorization from the GAO."¹¹ This text is found in the GAO's standard protective order that is issued to all parties. Thus, there is little risk that a policy of transparency between the agency and the intervenor will result in future protests.

The Interests of the Parties Are Unlikely to Diverge

It seems obvious, on the surface, that the agency and the intervenor have the same goal: defending the award and proceeding with performance as quickly as possible. Nevertheless, although it is rare, the parties' interests and arguments may diverge over the course of the protest. This should not inhibit full cooperation for very practical reasons, which become clear if one examines the circumstances when divergence actually occurs.

One area where the intervenor and agency may diverge is in the substance of arguments. For example, when faced with an unexplained downward shift in technical ratings between an initial and final evaluation, the intervenor may review the record and assume that the change is the result of additional weaknesses that were assigned. The agency, however, may know that the shift was a scrivener's error and that the Source Selection Official actually considered the previous, higher rating in the award decision. While it is true that these arguments diverge, there is no harm in the

⁹ See *Renic Corp., Gov't Sys. Div.*, B-248100, 92-2 CPD ¶ 60, at *3 (July 29, 1992) ("[E]ach procurement stands alone, and a selection decision made under another procurement does not govern the selection under a different procurement."); *Leader Commc's, Inc.*, B- 298734, B- 298734.2, 2006 CPD ¶ 192, at *7 (Dec. 7, 2006) ("[W]ith regard to [Protester's] apparent complaint that certain alleged aspects of its proposal were more favorably evaluated in procurements with other agencies, we note that each federal procurement stands on its own, so that evaluation ratings under another solicitation are not probative of the alleged unreasonableness of the evaluation ratings under the present [request for proposals].").

¹⁰ GAO DESCRIPTIVE GUIDE, *supra* note 5, at 58.

¹¹ *Id.* at 62 (emphasis added).

alternative explanations and, in the end, the agency's superior knowledge will carry significantly more weight than the intervenor's educated guess. Of course, as discussed below, good communication between intervenor and Government counsel can avoid this divergence in the first place.

Similarly, the parties may diverge on whether errors were made in the procurement decision. When faced with potentially meritorious protest grounds, the intervenor may choose to focus its argument on prejudice, rather than the merits. That is, the intervenor may take the position that even if the protester was correct it would not affect the outcome because the error would have made no difference in the award decision. The agency, on the other hand, has every incentive to defend the substance of its award decision before falling back to an argument of prejudice. Thus, although these arguments are different, they are complementary. The divergence is not harmful to the collective position supporting the award.

The other instance in which intervenor and agency interests may diverge is when the agency concludes that a protester's claims are valid, and corrective action is required. In this circumstance, there is no doubt that the parties' interests—with the intervenor seeking to maintain its award and the agency wanting to get the procurement right—are very different. As a practical matter, however, corrective action will often occur *before* the Agency Report is filed,¹² so any divergence in this area is unlikely to affect parties in substantive filings. Even if corrective action occurs after substantive filings have begun and significant information has been shared between the agency and intervenor, the decision to undertake corrective action, and its scope, are within the discretion of the agency. As a result, while the intervenor could protest the corrective action, such protests very rarely succeed and the likelihood of their doing so is not affected by the level of cooperation between the agency and intervenor during the protest process.

Thus, although there are instances where the interests of the agency and the intervenor diverge, none of these should block close coordination between the parties. In the end, it is the agency whose arguments will carry more weight, and the agency that will make—and defend—any decision to take corrective action. While the intervenor may not agree with the agency's decisions, it is in no position to determine the Government's course.

¹² After all, if the agency delays corrective action until after the filing of the Agency Report, it risks being required to pay the protester's legal fees. *Id.* at 29 ("Where the agency takes corrective action in the face of a clearly meritorious protest, but fails to do so promptly, GAO may recommend that the agency pay the protester its reasonable protest costs. In general, if an agency advises GAO of its intent to take corrective action by the due date of its protest report, GAO will consider that action to be prompt and will not recommend reimbursement of protest costs.").

How an Intervenor Can Assist Government Counsel (the Right Questions to Ask)

Once agency counsel establish open lines of communication with intervenors, the next question is what they can ask an intervenor to do. The answer is almost anything. Although intervenors cannot assist in preparing the agency record, they can be helpful in a myriad of other areas while the agency focuses on the record.

For example, the intervenor can help to shorten the protest process. As agency counsel are well aware, one of the largest burdens for the agency often is compiling the agency record within thirty days from receipt of the protest. This task can be especially burdensome these days, as documents and evaluators may be found as often in Afghanistan as in Aberdeen, depending on the procurement. During that same period, the intervenor can work with the agency to prepare a motion to dismiss some or all of the protest grounds.

Intervenor, of course, have as strong a motivation as the agency (if not more so) to dismiss protest grounds early. This not only reduces the risk of a successful protest, but also limits the number of documents the agency needs to include in the record and the awardee's potential exposure. Although it has been our recent experience that the GAO tends to look favorably on motions to dismiss all or part of a protest, the GAO often favors motions to dismiss filed by the agency rather than the awardee alone. Intervenor, therefore, are often keenly interested in assisting the agency by preparing initial drafts of motions to dismiss for agency counsel to consider. Agency counsel can adopt or disregard these drafts as they please, but there is nothing lost and much to be gained by being receptive to the intervenor's input. In addition, we have seen agency counsel move to dismiss only certain grounds while the intervenor successfully moved to dismiss the entire protest. This obviously is a significant benefit to both parties.

Likewise, intervenors often have the capacity and incentive during the initial thirty days to assist the agency in researching case law to be used in the Agency Report. Intervenor counsel, like agency counsel, are often repeat players in protests. Indeed, the fact that intervening counsel often have experience as both protester and intervenor may provide them with a useful perspective on the legal arguments that have and have not worked in the past. In addition, intervenor counsel have far fewer obligations than agency counsel during the first thirty days after a protest is filed. As a result, agency counsel can turn to intervenors to assist in researching case law, whether for an issue that comes up consistently in protests or a unique argument that may require more extensive research. Intervenor counsel may have a lot to offer in this regard given their experience in prior protests. It is often said that the GAO has a case for every proposition, and intervenor counsel may be aware of a key case to support the agency's argument. Where the issue is more unusual, intervenor counsel often have a deep bench

of attorneys to perform the necessary research. Moreover, counsel for "active" intervenors have a double incentive to assist the agency with research. Not only will the assistance be beneficial to the agency's defense of the award, but intervenors often want to see their counsel involved as early in the process as possible.

Intervenor also can be helpful to the agency in brainstorming potential responses to the protest. This is especially the case when the protest includes specific allegations concerning the intervenor's business or proposal. Nobody has a better understanding of what is contained in the intervenor's proposal than the intervenor's proposal team. When the agency is looking to identify specific references in the most efficient manner possible, the insights of these team members, provided through counsel in ways consistent with the protective order, may be invaluable. In addition, intervenors may have access to a host of technical and cost experts, and, if necessary, consultants that can supplement the agency's resources. Although these experts cannot explain why the agency did what it did, they may be able to improve on the statements of the Government's technical evaluators or demonstrate the flaws in the protest. Again, because the GAO tends to give greater weight to papers written by the Government, the intervenor is often happy to assist in preparation of the arguments to be included in the agency report, as opposed to waiting to make its own arguments in the comments.

While protest review at the GAO and Court of Federal Claims is focused mainly on what the agency did, certain allegations tend to require input or a response from the intervenor. For example, when the protester has been given access to the awardee's proposal, allegations about specific aspects of that proposal may become central. Likewise, allegations concerning the intervenor's accounting system status and audits, interpretation of an Organizational Conflict of Interest plan, or allegations concerning personnel issues may benefit from a direct response from the awardee. Intervenor counsel, of course, have access to the awardee's proposal team and others in the company, and therefore may have a better overall knowledge of the contents of the offeror's proposal, corporate structure, and business systems. Using redacted filings to keep within the bounds of the protective order, intervenor counsel can often go back to the awardee for support of a specific argument in response to the protester's allegations. Indeed, there are many cases in which the GAO has relied on declarations from intervenors to support decisions denying a protest.¹³

¹³ See *Freedom Scientific, Inc.*, B-401173.3, 2010 CPD ¶ 111, at *4 (Comp. Gen. May 4, 2010) (citing to declaration of intervenor's President regarding marketing of intervenor's existing models); *Servizi Aeroportuali, Srl.*, B-290863, 2002 CPD ¶ 208, at *4 n.3 (Comp. Gen. Oct. 15, 2002) (citing to declaration of intervenor's Vice President concerning lack of reliance on tax credit in formulating its proposed price); *Draeger Safety, Inc.*, B-285366, B-285366.2, 2000 CPD ¶ 139, at *7 (Comp. Gen. Aug. 23, 2000) (relying on declarations of intervenor's Government Sales/Technical Representative and intervenor's National Service Manager); *Constr. Tech. Grp., Inc.*, B-283857, 2000 CPD ¶ 15, at *1, *4 (Comp. Gen. Jan. 18, 2000) (relying on

Finally, intervenors can be instrumental in preparation for a GAO hearing, both from a substantive and practical standpoint. Substantively, intervenors can assist in strategizing the priorities for the hearing and identifying potential witnesses. Intervenor counsel, who have often also been protesters themselves, can assist in mock cross-examination of the agency witnesses and overall testimony preparation. From a practical standpoint, intervenors many times can offer office space in which witnesses can be prepared without any concerns about requiring access to Government facilities. This will allow agency counsel to put the majority of its time and effort into preparing for the hearing.

What Can Agency Counsel Do to Help Facilitate a Productive Relationship?

As discussed above, intervenor counsel can provide significant benefits to agencies during the stressful and time compressed bid protest process. To facilitate this relationship, we have prepared a top six list of ways agency counsel can get the most out of intervenors and make them more than a third wheel in the protest process:

- (1) Communicate early and often. Once the intervenor is admitted under the protective order, do not be afraid to make the first call. The sooner the lines of communication are opened between the intervenor and the agency, the sooner they can work together on motions to dismiss and the agency's legal memorandum.
- (2) Discuss at an early stage what level of participation the intervenor and the agency anticipate. This will allow both agency and intervenor to coordinate and allocate resources without duplication of efforts.
- (3) Identify the type of intervenor you are dealing with and let that determination guide your future requests. If the intervenor is a Risk Assessor or a Tracker, do not expect significant engagement in

the early stages of a protest. However, raising issues of concern to these types of intervenors may quickly change them into Litigators. If you are working with a Litigator, make full use of the resources that they have at their disposal, including a small army of researchers, writers, and individuals with access to the offeror.

(4) Do not be afraid to make specific requests. If the agency would benefit from legal research on specific topics including discussions, deference to technical evaluations, or case law addressing any of the variety of issues that come up at the GAO, make a specific request to intervenor counsel. They will be happy to help, and the agency may use or disregard this input as it pleases. If you ask, intervenors are also often willing to review and provide editorial comments to drafts of the agency report.

(5) If at all possible, promptly approve redactions. While agency counsel often leave redactions to the parties, for the intervenor to provide the best possible support, particularly concerning allegations about the awardee's proposal, intervenor counsel need the ability to discuss the non-protected information with their clients.

(6) You'll never get what you don't ask for. Whether the request involves drafting a motion to dismiss, a factual declaration on an issue concerning the intervenor, or brainstorming legal responses, even the most reluctant of risk-assessing intervenors will likely be happy to assist the agency in any way it can if it would improve its chances of keeping the award.

intervenor's affidavit explaining how mistake had been made in a bid); Premier Eng'g & Mfg., Inc., B-283028, B-283028.2, 99-2 CPD ¶ 65, at *4, *5 (Comp. Gen. Sept. 27, 1999) (relying on affidavit of awardee's President); *see also* Idea Int'l, Inc. v. United States, 74 Fed. Cl. 129, 141-42 (2006) (citing intervenor's declarations concerning balance of harms).