

The GAO Bid Protest: The First Thirty Days—A Procedural Guide For the Local Counsel

Phillip E. Santerre*

Introduction

This article serves as a brief practical guide for practitioners assigned to the Corps of Engineers dealing with the administrative aspects of a Government Accountability Office (GAO) bid protest. Although practitioners working in the regular contracting offices of the U.S. Army and Air Force follow a very different procedure through a central contracting office, this article provides them a useful overview of the GAO process. This article provides a reference for regulatory and policy requirements and offers practical tips on preparing and filing documents through the Corps of Engineers. It is intended for Judge Advocates (JAs) and civilian attorneys who directly represent the Corps of Engineers as well as for those who support a central agency bid protest litigation group. This article does not attempt to discuss substantive legal or contract issues that may arise in a protest.

Take the following hypothetical. It is Friday noon, the day before a three day holiday weekend. As the organization's backup contract attorney, you're breathing a sigh of relief because the protest time period will expire today on a critical contract award. The primary contract attorney, who left on indefinite emergency leave yesterday, told you he was concerned because the debriefing of one unsuccessful offeror was very contentious. Although you have done some contracts work (and even attended The Judge Advocate General's School's Contract Attorneys Course), you see the GAO protest process as a confusing maze and are not sure if there is a piece of cheese at the end—if there is an end. The contracting officer told you not to worry, this offeror was just blowing off steam. So naturally, the contracting officer now walks in your office saying, "I just got this fax copy of offeror X's protest. It says he filed it with the GAO today." Having never worked with a GAO protest, you now feel like the mouse dropped in that confusing maze. What do you do?

Filing and Notice of Protest

The GAO regulations require that the protester furnish a copy of a protest to the contracting agency (a designated office) within one day after the protest is filed.¹ The "official" GAO notification may not be received for several days, depending on the timing and efficiency of the intra-agency communication when the GAO notifies the designated official agency contact.² Protesters' attorneys will often provide a copy to the local contracting officer on the same day as filing the protest with the GAO. Receipt of this copy from the protester allows the contract attorney to perform the following preliminary tasks:

- (1) Check the GAO docket at <http://www.gao.gov/decision/docket/> to ensure the protest has actually been filed.³
- (2) Notify appropriate agency officials, such as the central agency protest litigation office, to ensure all relevant parties have received a copy.⁴
- (3) Coordinate with the contracting officer to ensure the appropriate Competition in Contracting Act (CICA) stay actions are prepared to be taken pursuant to 31 U.S.C. § 3553(c) or (d), either withholding the award or suspending contract performance.⁵
- (4) Ensure agency decision makers are informed. Consider whether the project is so important as to merit a request (pursuant to CICA override provisions in 31 U.S.C. § 3553(c)(2) or (d)(3)) to award or to

* Deputy District Counsel, Alaska District, U.S. Army Corps of Engineers.

¹ 4 C.F.R. § 21.1(e) (2008).

² *Id.* § 21.3(a).

³ U.S.GAO: GAO Bid Protest Docket, <http://www.gao.gov/decision/docket/> (last visited Mar. 28, 2009).

⁴ See, e.g., U.S. ARMY CORPS OF ENGINEERS, FEDERAL ACQUISITION REG. SUPP. pt. 33.104-100(a) (Apr. 2007) [hereinafter EFARS].

⁵ 4 C.F.R. § 21.6; GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 33.104(b)(1), (c)(1) (Oct. 2008) [hereinafter FAR].

continue contract performance notwithstanding a protest.⁶ Such an override of the CICA stay is very difficult to obtain. The contracting officer must prepare a determination and findings for signature by the Head of Contracting Activity, clearly explaining the damage the United States will suffer with and without the override, and obtain approval by the Deputy Assistant Secretary of the Army (Policy and Procurement). The contracting officer must also prepare a request for approval discussing the merits and expected resolution of the protest, and including details of any Congressional interest.⁷

(5) Review the protest for potential reasons for dismissal,⁸ including timeliness and interested party questions. These should be filed as soon as practicable.⁹

(6) Coordinate with the contracting officer to begin gathering of all relevant documents. Getting a head start on this action is critical given the short time (thirty days) in which to file the agency response.¹⁰

(7) Upon receipt of notice from the GAO, notify the contractor if award has been made. If award has not been made, notify all bidders or offerors who appear to have a substantial prospect of receiving an award.¹¹ Furnish a copy of the protest submissions to those parties, except when disclosure of the information is prohibited by law, with instructions to communicate further directly with the GAO.¹²

(8) File a notice of appearance with the GAO, copying the protester or his counsel. This will ensure communications from the GAO and other interested parties reach you in a timely manner.¹³ Without a notice of appearance, the GAO will send communications to the last known agency point of contact, which is likely agency headquarters.

Notification of the awardee (contractor) and other bidders or offerors must be done with care. The GAO requires certain parties to receive copies of protest submissions, except when disclosure is prohibited by law.¹⁴ Protest submissions should contain a statement advising that the protest contains information that should be withheld, identifying this information whenever it appears.¹⁵ If this restrictive legend appears in a protest, the JA must ensure that the protest is not provided to anyone outside the government until the protester provides a redacted copy.¹⁶ Always be careful even if the protest does not contain a restrictive legend. Depending upon the substance of the protest, call the protester's attorney (or, if unrepresented, the protester) to confirm that the protest does not contain protected information. This will avoid issues of competitive disadvantage in later stages of the procurement, such as, if the protest results in reevaluation of proposals.

Initial Evaluation

Following the initial review and administrative actions, the JA should examine the protest for potential grounds for early dismissal. In some cases, when a defect is plain on the face of the protest, the GAO will dismiss the protest without an

⁶ FAR, *supra* note 5, pt. 33.104(b)(1), (c)(2); *see also* U.S. DEP'T. OF ARMY, FEDERAL ACQUISITION REG. SUPP. pt. 5133.104(b), (c) (AFARS Revision 21, May 22, 2007) (setting forth procedures for such requests).

⁷ *Id.* Overrides are rare; the author has not seen one processed in the course of eighteen years in the Corps of Engineers.

⁸ 4 C.F.R. § 21.5.

⁹ *Id.* § 21.3(b).

¹⁰ *Id.* § 21.3(c).

¹¹ *Id.* § 21.3(a).

¹² *Id.*; *see* Trade Secrets Act, 18 U.S.C. § 1905 (2006) (giving an example of a legal prohibition of disclosures).

¹³ *Id.* ("All protest communications shall be sent by means reasonably calculated to effect expeditious delivery."); *see* EFARS, *supra* note 4, pt. 33.104-100(a)(5) (showing an example of an agency provision for notice of appearance).

¹⁴ *Id.*; *see* Trade Secrets Act § 1905 (giving an example of a legal prohibition of disclosures).

¹⁵ 4 C.F.R. § 21.1(g).

¹⁶ *Id.*

agency request.¹⁷ However, do not make the assumption this will occur; prepare a draft request for dismissal as soon as possible and coordinate it up the chain of command as required.

For example, untimeliness is an important ground for dismissal,¹⁸ the assertion of which can quickly derail a protest. There are numerous reasons a protest may be untimely but the key is that the issue be raised immediately, since a request for dismissal on this ground may eliminate the need for submitting a full agency report.¹⁹ Because a protest that raises significant procurement issues may be considered despite its lateness,²⁰ the JA should be sure to explain in the dismissal request why this particular protest does not raise such issues.

Only interested parties may file a protest under the GAO regulations.²¹ Although the protest itself should contain an explanation establishing that the protester is an interested party,²² examine the information provided and determine whether this may be a ground for dismissal. The protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by award or failure to award a contract.²³

Judge Advocates should review 4 C.F.R. § 21.5 (protest issues not for consideration) to determine if the protest raises any of the protest grounds not for consideration by the GAO.²⁴ These grounds include Small Business Administration issues, affirmative determinations of responsibility, procurement integrity violations, and subcontract protests, among others.²⁵ Identification of these issues and submission of a request for dismissal can eliminate or shrink the issues to be resolved. When specific protest allegations are dismissed, the agency report shall be filed on only the remaining allegations.²⁶

When a dismissal is not a viable option or is denied, the JA must evaluate whether or not the GAO's express option or other alternative procedures may be appropriate to resolve the protest.²⁷ The GAO may adopt the express option at its discretion, either upon request or on its own initiative, and only in those cases suitable for resolution within sixty-five days.²⁸ Shorter filing deadlines accompany this option.²⁹ The request for an express option must be made within five days after the protest is filed.³⁰ If an agency need for a fast decision can be articulated and the facts are not overly complex, this may be a useful option to obtain a quicker decision.³¹ If the express option is unsuitable for the protest, evaluate other options, such as an accelerated schedule or alternative dispute resolution.³²

An early status conference³³ with the assigned GAO attorney will be of great assistance in identifying and resolving administrative issues. Such conferences involve all participating parties and are intended to address issues in such a way as to promote the expeditious development and resolution of the protest.³⁴ Such a conference may be requested by telephone or

¹⁷ *Id.* §§ 21.1(i), 21.2(b), 21.5.

¹⁸ *Id.* § 21.2.

¹⁹ *Id.* § 21.3(b).

²⁰ *Id.* § 21.2(c).

²¹ *Id.* §§ 21.1(a), 21.0(a)(1) (definition of interested party).

²² *Id.* § 21.1(e)(5).

²³ *Id.* § 21.0(a)(1).

²⁴ *Id.* § 21.5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § 21.10.

²⁸ *Id.* § 21.10(b).

²⁹ *Id.* § 21.10(d).

³⁰ *Id.* § 21.10(c).

³¹ *See, e.g.,* B&S Transp., Inc., B-299144, Jan. 22, 2007, 2007 CPD ¶ 16.

³² 4 C.F.R. § 21.10(e).

³³ *Id.* § 21.10(f).

³⁴ *Id.*

e-mail, coordinating with other parties as necessary. Typically, a telephone conference is set up by the GAO attorney and an agenda distributed. This agenda is normally generated by the GAO, but may be supplemented at the request of the parties. This is an opportunity to raise questions on the method of filing, time extensions, document delivery, protective orders, and anything else which is unclear. Take advantage of the GAO conference call whenever needed throughout the process.

Protective Orders

Many bid protests involve issues requiring the review of proprietary, confidential, source selection sensitive material, or other information the release of which could result in competitive advantage to other firms. The GAO may issue a protective order to allow limited access to such protected information and to control the treatment of protected information.³⁵ Because the protective order facilitates the pursuit of a protest by a protester's counsel, protester's counsel is responsible for requesting the order and submitting timely applications for admission to the order.³⁶ Detailed guidance on protective orders is found in the *Guide to GAO Protective Orders*.³⁷

As agency counsel, the JA has a responsibility to ensure that protected material is not improperly released. When a protective order has not been issued, the GAO permits the agency to withhold from the parties the portions of its report that would be subject to a protective order.³⁸ This includes documents filed as part of the report. The GAO will review withheld information in camera.³⁹ They generally will not issue a protective order when the protester is proceeding without an attorney.⁴⁰ The protester's attorney often will include a request for protective order in the initial protest filing. The GAO may issue a protective order on its own initiative whenever it appears appropriate and the protester has counsel.⁴¹ The protective order package will be issued soon after a protest is filed, possibly with the protest acknowledgement notice.⁴²

When the JA receives the GAO protective order in the protest, can unrestricted information be sent to protester's counsel? Not yet. Counsel (and any consultants) must apply to be admitted to the protective order.⁴³ Application forms come with the order package. Each individual seeking admission to the order must file a separate application to establish that the individual is appropriate for admission, is not involved in competitive decision-making, has read the protective order, and will comply with its terms and conditions.⁴⁴ Counsel has two days from receipt of the application to make any objections to the proposed admission.⁴⁵ Consult the *Guide to Protective Orders* for examples of admissions and denials of admissions to protective orders.⁴⁶

Working with our hypothetical, the protester's counsel and their associate have now been admitted to the protective order in your protest. They provided a redacted copy of the protest, filed within one day of the filing of the protest. How does the existence of the protective order affect planning for future filings?

Any party preparing a filing under the protective order must submit a redacted version of the filing which omits protective information so you must build in time to redact documents and the agency report.⁴⁷ This places a greater

³⁵ 31 U.S.C. § 3553(f)(2) (2006); 4 C.F.R. § 21.4(a).

³⁶ 4 C.F.R. § 21.4(A).

³⁷ U.S. GOV'T ACCOUNTING OFFICE, GAO-06-716SP, GUIDE TO GAO PROTECTIVE ORDERS (May 2006) [hereinafter GAO-06-716SP], available at <http://www.gao.gov/legal/bidprotest.html>.

³⁸ 4 C.F.R. § 21.4(b).

³⁹ *Id.*

⁴⁰ GAO-06-716SP, *supra* note 37, at 4.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 4 C.F.R. § 21.4(c).

⁴⁴ GAO-06-716SP, *supra* note 37, at 6.

⁴⁵ 4 C.F.R. § 21.4(c).

⁴⁶ GAO-06-716SP, *supra* note 37, at 8–11.

⁴⁷ *Id.* at 4.

administrative burden on agency counsel because two filings are now required. Work with the contracting officer to initially identify protected documents. Do not forget the waiting period before release of redacted documents to parties outside the protective order. When sending or receiving unprotected or redacted documents, a party may not release those documents to anyone not admitted to the protective order until the end of the second day following receipt of the document by all parties.⁴⁸ This allows time to identify any mistakenly unprotected documents.⁴⁹ All protected material provided under the order must contain the required markings.⁵⁰ With appropriate software, the markings may be applied electronically.

Transmitting the protected and redacted documents can be time-consuming. Electronic transmission may assist with this issue. When a protective order has been issued, documents may be transmitted by e-mail, unless objected to by a party to the protest.⁵¹ This is an example of when a GAO telephone conference may be helpful. Judge Advocates should request a conference well before the report is due. Tell the parties and the GAO attorney that you plan to submit the agency report, including the documents, by e-mail with attachments (use CD/DVD for voluminous documents). Assure the parties that documents provided on a CD/DVD format will be appropriately protected from modification and that electronic redactions are effective. Try to respond to any potential objections as soon as possible. Electronic and CD/DVD delivery of documents will save time, money, paper, and promote efficiency of the process. Confirm that the agency report (less voluminous documents) will be submitted by e-mail to the GAO's electronic filing address.⁵²

Preparing the Documentary Record

Agency counsel must file a report on the protest with the GAO within thirty days after telephone notice from the GAO.⁵³ If telephone notice was given to the agency headquarters, find out from them when it was received. If there is any doubt, raise the issue in an early conference call. Documents to be produced as part of the report may be filed with the report or produced prior to filing of the report.⁵⁴ Be aware of the requirement to file a list of documents five days prior to filing of the report.⁵⁵ This filing requirement is triggered by the protester's filing a request for specific documents.⁵⁶ The initial protest will likely contain such a request. The agency list must identify documents already released or intended to be provided with the report, and identify any documents the agency intends to withhold and the reasons for the proposed withholding.⁵⁷ Any objections to the proposed withholding must be filed within two days of receipt of the list.⁵⁸ The agency may request an extension of time for filing the list or the report.⁵⁹ If more time is needed, request it soon. Don't ask for more than a few days; any time extension will cut into the GAO's 100-day time for decision,⁶⁰ which it takes very seriously.

There is no prescribed format for organizing the documents to be filed as part of the agency report. However, strive to make the review of these documents as user-friendly as possible. An unorganized pile of paper will not suffice. Build time in the schedule to consider the order of the documents, any tabbing, and even page numbering where a lengthy document has no internal numbering. The most efficient way to deal with a lot of documents is to (1) put them in order, (2) use a scanning program to create an electronic read-only document file, (3) use a bookmarking hyperlink system to create a table of contents which the reader can use to jump to different documents and pages, and (4) use a word-searchable program. This will

⁴⁸ *Id.* at 4–5.

⁴⁹ *Id.*

⁵⁰ *Id.* at 17–18.

⁵¹ *Id.* at 3.

⁵² U.S. GAO: Bid Protest Filings by E-Mail, <http://www.gao.gov/decisions/moreinfo.html> (last visited Mar. 28, 2009).

⁵³ 4 C.F.R. § 21.3(c).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* § 21.3(f).

⁶⁰ *Id.* § 21.9(a).

provide all parties with an efficient navigation system for a voluminous record. Parties may print all or part of the documents as desired.

Work with the contracting officer to get started on document identification and organization as soon as possible. Call a strategy meeting of the protest team as soon as possible and check status of tasks regularly. Take advantage of the efficiencies offered by electronic document management programs. Ensure there are no objections to electronic filing. The contract specialist, working with a paralegal, can make the administrative job much easier, allowing the attorney to focus on planning the protest response, dealing with protester's counsel, and writing the substantive agency report. In a document-intensive protest, thirty days will go by quickly.

Conclusion

Let us return to our hypothetical. It is now thirty days after that fateful day the contracting officer gave you a copy of the protest. You just filed the agency report after successfully navigating the complexities of notifications, CICA stays, protective orders, filing choices, and organization of documents. It feels good to have learned how that black box of protests works. Now it's time to go attend the latest debriefing of an unsuccessful proposer. No big deal. After all, the contracting officer told you, "This guy just likes to blow off steam."