

Defending Against a GAO Bid Protest: Protecting Your Contract Award

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Most government contractors know they can protest a contract award to another competitor at the Government Accountability Office (“GAO”). But, contractors may not know that as the awardee, they can intervene in a GAO protest challenging their awards and support the Government in defending the awards.

Intervention in a GAO protest is in the awardee’s best interest because the awardee can protect its award in what would otherwise be a dispute between only the government and the unsuccessful offeror. Below, we explore the GAO protest process from the perspective of an intervenor, and the benefits of intervening at each step of the protest process.

A Protest Is Filed

The good feelings associated with a contract award quickly dissipate when the awardee receives notice from the awarding agency that an unsuccessful offeror is protesting the award. The agency must provide the awardee with notice of and a copy of the protest. In many instances, the protester will request that a protective order be issued to protect proprietary and confidential information. In those circumstances, the awardee will receive only a redacted version of the protest.

The filing of a protest frequently triggers an “automatic stay” of contract performance, meaning the contract transition and work is on hold while GAO considers the protest. Companies find themselves searching for billable work for personnel hired for the awarded contract and footing the bill for equipment already rented or space already leased. This is the time awardees should intervene to be sure that their award and interests are best protected. In order to effectively intervene in a protest covered by a protective order, intervention requires outside counsel.

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Notice of Intervention and Application for Admission to the Protective Order

To intervene, counsel for the awardee must submit a formal notice of intervention through www.epds.gao.gov. This intervention (1) allows the intervenor to file legal briefs in support of the agency's award decision, or other legal documents such as a motion to dismiss, and (2) obligates the agency, protester, and GAO to serve filings on the intervenor. If the awardee chooses not to intervene, the awardee foregoes the opportunity to argue in favor of the award decision.

After filing a notice of intervention, intervenor's counsel can apply for access to information provided under a protective order, if a protective order has been issued by GAO. Barring an objection from opposing counsel or GAO itself, GAO will then admit intervenor's counsel under the protective order. This will allow counsel to review all relevant protest documents in full, including the protected version of the protest.

What Is A Protective Order and How Does It Impact the Intervenor?

GAO issues protective orders to control access to "proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms" if disclosed publicly. The protective order prevents competitors from seeing confidential or proprietary information related to the protester or any other awardee. In practice, this means that individuals not admitted to the protective order will receive only redacted versions of documents. The redacted documents will generally omit significant information such as evaluation ratings, price, and any technical or past performance information related to the protester.

GAO will admit individuals to the protective order if the individuals are not involved with "competitive decision making" for the company. This means that individuals who work for offerors will generally not be admitted under a protective order. Instead, access to protected material is reserved for outside counsel who do not participate in the competitive decision making process at the company, and, in certain instances, in-house counsel and outside consultants, provided appropriate controls are in place to protect the protected information.

The impact of the protective order on the entities filing or intervening in a protest is significant. The individual employees of the parties to the protest are barred not only from viewing "protected" documents, but the protected material may not be disclosed to the parties in any way; this means that the parties to the protest may not be informed of arguments raised or the facts surrounding the protest (for example, the agency's evaluations). While frustrating, this is critical so the protest process can proceed with entities trusting that confidential and proprietary information does not wind up in the hands of competitors.

Obtaining a Copy of the Protest as Soon as Possible

If the agency has not already provided a copy of the redacted version of the protest to the awardee, as an intervenor, the awardee can request a copy. The information in the redacted

protest may provide the intervenor with insight into the merits of the protest. If a protective order has been issued, GAO will process those applications and admit protester's counsel and intervenor's counsel to the protective order. Once admitted, intervenor's counsel will then have access to an unredacted version of the protest filed by the unsuccessful offeror, enabling counsel to develop the best strategy to protect the intervenor's interest.

Contacting Agency Counsel

Once the intervenor reviews the protected protest, the intervenor can work with agency counsel to defend the protest. This can occur in several ways, depending on the contractor's legal budget, the protest grounds, and the level of involvement desired by agency counsel.

However, intervenor's counsel may reach out to the agency to discuss the protest strategy, learn any additional facts surrounding the case, and share the intervenor's views of the case. Communication with agency counsel can protect the intervenor's interests in several ways. First, by discussing strategy, the parties can align their interests and ensure that arguments one party intends to raise do not conflict with facts known by the other. Second, a GAO protest record is limited to "relevant" documents. By working together, intervenor's counsel can request that agency counsel limit its document production, which may mean that the intervenor's proposal and evaluation can be withheld by the agency. Finally, by reaching out to agency counsel, the intervenor can help try to shape the course of the legal strategy.

Filing Motions to Dismiss

When a protest is filed, the agency has 30 days to file an agency report responding to all of the protest grounds. This report must include a legal memorandum of law summarizing the agency's legal defense of its award decision, a contracting officer's statement of facts, and all relevant documents related to the protest grounds. Prior to submission of the agency report, the agency and intervenor may submit motions to dismiss the protest in its entirety or dismiss specific protest grounds on procedural grounds such as timeliness, lack of standing, or pleading of protest grounds outside the scope of GAO's jurisdiction.

Motions to dismiss serve two important roles. First a motion to dismiss may dispose of a protest before the agency files its report saving the intervenor resources and quickly allowing the awardee to begin performance on the contract. Second, a successful motion to dismiss may result in a more limited agency report. As explained above, an agency report must contain only those documents relevant to pending protest grounds. By limiting the issues before GAO, a motion to dismiss may result in fewer documents being disclosed to protester's counsel.

For example, if a protest challenges the evaluation of both the awardee and the protester, the agency report is likely to include the proposal of the awardee (intervenor) as well as all documents related to the evaluation of the awardee's proposal. With these documents, protester may be able to draft additional protest grounds challenging additional aspects of the agency's evaluation that it did not previously know. However, if either the intervenor or agency counsel can craft a motion to dismiss that would result in the dismissal of the protest grounds challenging

the awardee's evaluation, the protester would not be given the awardee's proposal or evaluation documents. This could minimize the exposure to supplemental protests to the award decision.

Assisting with the Agency Report Memorandum Of Law

As noted above, agency counsel is tasked with compiling an entire agency record and drafting a defense of the agency's award decision in 30 days. Given the short time frame, agency counsel may appreciate assistance with either developing the facts or drafting legal arguments for its memorandum of law. As intervenor, counsel may work with the agency to draft those arguments or conduct legal research to assist the agency.

Preparing a Response to an Agency Report

Both protester and intervenor are provided ten days from the submission of the agency report to submit comments to GAO. As a protester, this is an opportunity to provide additional legal arguments and support the protest grounds with facts contained in the agency's record. As intervenor, this is an opportunity to supplement the agency's arguments or provide a more in-depth analysis of arguments that intervenor's counsel determines could be bolstered by additional briefing. The amount of support will be dependent upon the facts of the particular case.

Participating in a Hearing

In a small number of cases (1.7% in fiscal year 2017 and 2.51% in fiscal year 2016), GAO will conduct a hearing in a protest to further develop the record. In these cases, intervenor counsel can attend the hearing and participate, to the extent necessary.

Summary

A "protest dispute" is generally between an unsuccessful offeror and the agency, with the awardee often an "innocent bystander" with much to lose if the protest is sustained. Throughout the protest process, the use of counsel to intervene on behalf of the awardee serves to protect the interest of the awardee. At each step of the proceedings, intervenor's counsel can provide significant support. Therefore, if your company receives an award that is protested, you should reach out to counsel and intervene, in order to defend the award decision.