

# Bid Protests: An Overview for Agency Counsel

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*There have been many attempts to reduce waste and excessive costs, especially with respect to the procurement of major weapons over the last two decades. Beginning in the early sixties, practically every Secretary of Defense has made good faith efforts to try to stop the leaks in the acquisition process from draining off valuable defense dollars. Yet, it seems these efforts to reduce the costs of buying weapons and other goods in [the Department of Defense] is like playing catch with a wet cake of soap—as soon as you think you have got it in your hands, it somehow slips away.*<sup>1</sup>

It is late Friday afternoon, just before Christmas. As you sit at your desk thinking about the holiday dinner you are going to cook over the weekend, you hear a document come through the fax machine. Confident it is not for you, you ignore the machine and complete your grocery list. Suddenly, from the corner of your eye, you see your colleague approach holding papers in his hand. He shoots you an empathetic smile, wishes you a Happy Holiday as he drops a faxed bid protest filing on your desk, and leaves for the night. After a while, your stunned silence recedes, and you begin to wonder what to do.

Do not fear. This guide will help you grasp the bid protest “cake of soap,” and will wash your hands of any concerns about wasting valuable defense dollars. Written for agency attorneys new to bid protests and those looking for a review of the rules, this article provides practitioners with a basic understanding of the General Accounting Office (GAO) bid-protest process and practical tips for defending bid protests.

## Introduction

The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly and, whenever possible, in a way that maximizes competition. On occasion, however, bidders or others interested in government procurements may believe that an agency has awarded (or will award) a contract improperly, or that they have been unfairly denied a contract or the opportunity

to compete for a contract. A major avenue of relief for those concerned about the propriety of an award has been the GAO.<sup>2</sup> For almost seventy-five years, the GAO “has provided an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts.”<sup>3</sup>

## Initial Actions upon Receipt

After reading the bid protest, agency counsel should first contact their Directorate of Contracting and find out if the contracting officer knows about the protest. If not, counsel must immediately send her a copy. Second, agency counsel should call their agency’s contract litigation office, inform them of the protest, and ensure they also have a copy. A positive, proactive relationship between the installation attorney and the agency’s litigation attorney is extremely important. Next, counsel must start thinking about how to defend against the protest.

## How Did This Protest Land on the Agency’s Desk, and What Should Agency Counsel Expect?

The bid-protest process at the GAO begins when the protester files a written protest.<sup>4</sup> After receiving the protest,<sup>5</sup> the GAO will send a copy to the relevant contracting agency.<sup>6</sup> The GAO requires the contracting agency to respond by filing an agency report with the GAO and providing a copy to the protester. The protester can then file written comments to the agency’s report. Under limited circumstances, the GAO allows parties other than the protester and the agency to intervene in the protest by filing written comments on the report. Generally, these intervening parties can also receive a copy of the protest, the agency report, and any other protest filings.<sup>7</sup>

After these steps are completed, the GAO attorney assigned to the bid protest may schedule conferences to resolve procedural matters or other issues necessary to dispose of the protest. If a hearing is necessary, the GAO attorney “will usually conduct a pre-hearing conference to decide the issues [the hearing

1. *Acquisition Process in the Dep’t of Defense: Hearings Before the Comm. on Gov’t Affairs*, 97th Cong. 1 (1981) (statement of Sen. William V. Roth, Jr., Chairman).

2. Protesters often select the GAO because this forum resolves issues faster and cheaper than court litigation. Two other forums contractors can protest contract issues are (1) the Court of Federal Claims, and (2) within the specific contracting agency itself. On 1 January 2001, the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b)(1) (2000), removed bid protest jurisdiction from U.S. District Courts. This article focuses only on bid protests to the GAO.

3. OFFICE OF GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 1* (1996) [hereinafter *GAO BID PROTEST GUIDE*] (providing guidance to parties participating in a bid protest at the GAO), available at <http://www.gao.gov/special.pubs/og96024.htm>.

4. *Id.* at 7. Protesters can represent themselves pro se or by counsel. *Id.*

will address], identify . . . witnesses who will testify . . . , and to settle any [outstanding] procedural questions. After the hearing, all parties [can] submit written comments on the hearing.”<sup>8</sup>

After completing the record, the GAO attorney will consider the facts, the issues in dispute, and the law, and will then issue an opinion. He can sustain, dismiss, or deny the protest, and he must “issue his decision [within] 100 days from the date the protest was filed.”<sup>9</sup> The GAO will mail the decision to the parties.<sup>10</sup>

## The Protest—Preliminary Issues

### *Does the GAO Have Subject-Matter Jurisdiction?*

As in all litigation, the first item agency counsel should consider when reviewing a bid protest is whether the GAO has subject-matter jurisdiction. If the GAO does not have jurisdiction, the protest should be dismissed.

Jurisdiction is not litigated extensively because the GAO has jurisdiction over most bid protests. As such, counsel sometimes overlook this important first step. The GAO has subject-matter jurisdiction when the protest alleges that a federal agency violated a procurement statute or regulation,<sup>11</sup> acted unreasonably and abused its discretion,<sup>12</sup> or based a termination on the improprieties in the award of the contract.<sup>13</sup> Protesters must provide a detailed statement of the facts and explain the legal theory upon which the protest is based.<sup>14</sup> If they do not, agency counsel should ask the GAO to dismiss the protest for this failure<sup>15</sup> or for being frivolous.<sup>16</sup>

The protester must also make a prima facie case of improper agency action. If the protester fails to meet this minimum standard, the GAO will dismiss the protest, as in *Brackett Aircraft Radio Co.*<sup>17</sup> In *Brackett*, the agency cancelled an invitation for bids (IFB) before bid opening because the government’s needs changed. Brackett protested, arguing that “a reduction in agency’s requirements is not a proper basis for cancellation of an IFB after bid opening because [the Federal Acquisition Reg-

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5. On 6 October 2000, the GAO commenced a pilot program for electronically filing bid protests. This is the first step of an incremental bid-protest program designed to keep the GAO bid protest procedures in step with technology. Currently, five GAO attorneys are participating in this program. The program permits parties to file two types of electronic data: filings or communications transmitted via e-mail and filings provided on electronic media. *GAO Launches Pilot Project to Test E-Filings in Bid Protests*, 74 FED. CONT. REP. (BNA) 316 (2000).

The ground rules for using the e-mail system include:

- (1) protests and protected documents or communications may not be transmitted via e-mail,
- (2) an e-mail address list of all relevant persons from each party to the protest must be established at the beginning of each protest,
- (3) the party sending an e-mail assumes the risk of late or non-receipt, and
- (4) all parties sending e-mails must utilize the return receipt function.

*Id.* The ground rules for filing on electronic media include:

- (1) all submitted documents must be compatible with GAO computer hardware and software,
- (2) all filings must be indexed or organized so that their contents are easily ascertained and searched,
- (3) documents will be considered filed if they are posted on the Internet and accessible to all parties; and
- (4) that the GAO reserves the right to request that any document be submitted in paper form.

*Id.*

6. 4 C.F.R. § 21.1(e) (LEXIS 2002).

7. GAO BID PROTEST GUIDE, *supra* note 3, at 8.

8. *Id.* Unless the GAO sets a different date, all written comments are due five days after the hearing ends. *Id.* at 35.

9. 4 C.F.R. § 21.9(a).

10. GAO BID PROTEST GUIDE, *supra* note 3, at 19.

11. 31 U.S.C. § 3552 (2000).

12. S.D.M. Supply Inc., Comp. Gen. B-271492, June 26, 1996, 96-1 CPD ¶ 288.

13. 4 C.F.R. § 21.1(a).

14. *Id.* § 21.1(c).

15. In *Fed. Computer Int’l Corp.*, B-257618.2, 1994 U.S. Comp. Gen. LEXIS 612 (July 14, 1994), the GAO dismissed the protest for not providing a detailed statement of facts and legal theory upon which the protest was based. In this case, the protester used the generic pleading language “upon information and belief” to support its allegations instead of factual evidence. *Id.* at \*1. The protester argued that it was only required to provide allegations or sufficient evidence to establish its likelihood of prevailing. The GAO dismissed the protest, stating that the “[p]rotester must provide more than a bare allegation; [a protester must support its allegations] with some explanation that establishes the likelihood that its claims of improper agency action [will prevail].” *Id.* at \*2.

ulations (FAR) do not explicitly authorize this basis].”<sup>18</sup> Emphasizing the timing of the cancellation, the GAO noted that federal agencies have the discretion to cancel IFBs before bid opening. The GAO ruled that the agency did not abuse its discretion, and dismissed the protest for failure to establish a prima facie case of improper agency action.<sup>19</sup>

Practically speaking, most protests challenge the acceptance or rejection of a bid, or the award or proposed award of a contract.<sup>20</sup> To avoid dismissal, protest allegations should contain a reasonable degree of specificity<sup>21</sup> and show material harm to the protester.<sup>22</sup> Successful protests must include facts establishing that the agency failed to act as required.<sup>23</sup>

Finally, as a matter of law, the GAO does not have jurisdiction over protests involving contract-administration matters, small business size and industrial classification determinations, small business certificate of competency determinations, section 8(a) Small Business Act procurements, affirmative responsibility determinations, subcontractor protests, procurements by non-federal agencies, and judicial proceedings.<sup>24</sup> Additionally, the GAO will not review allegations of Procurement Integrity Act violations unless the protester reports the allegation and the supporting evidence to the federal agency responsible for

the procurement within fourteen days after the protester first discovered the possible violation.<sup>25</sup>

### *Is the Protest Timely?*

Next, agency counsel should determine if the protest was filed on time because the GAO strictly enforces its timeliness rules.<sup>26</sup> The GAO may dismiss a protest filed only a minute late.<sup>27</sup> Although the timeliness rules and exceptions may appear complicated at first glance, the fundamental concept underlying them is that “Late is Late.”

### **GAO Rules Regulating When Protests Must Be Filed**

Determining the timeliness of a bid protest requires evaluating them under three criteria: (1) whether the protest was filed before or after contract award; (2) whether the protest complies with the required debriefing rule; and (3) whether the protest complies with agency protest rules.

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16. In *Odgen Support Serv., Inc.—Reconsideration*, Comp. Gen. B-270354.3, June 11, 1997, 97-1 CPD ¶ 212, the GAO dismissed the protester’s request for reconsideration because the issue was too general. In the initial protest, the protester alleged that the agency evaluated the protester’s proposal unfairly and unequally against the awardee’s proposal. This initial protest contained numerous detailed allegations involving only the protester and the awardee. The GAO ruled that the agency conducted reasonable evaluations of Odgen’s proposals, and it determined that Odgen was not an interested party because an intervening offeror had a higher technical rating and lower cost than Odgen. The initial protest was denied in part and dismissed in part. *Id.* at 1-3.

Odgen requested reconsideration of the initial ruling, alleging that the GAO improperly failed to consider that its allegation of unequal and unfair evaluations applied to all offerors. Odgen did not submit any evidence in support of this new, broader allegation. *Id.* at 1-2. The GAO denied Odgen’s request for reconsideration, holding that “such a general allegation would be insufficient to constitute a protest under our Bid Protest Regulations, 4 C.F.R. § 21.2(c).” *Id.* at 2.

17. Comp. Gen. B-244831.2, Dec. 27, 1991, 91-2 CPD ¶ 585.

18. *Id.* at 1.

19. *Id.* at 2.

20. GAO BID PROTEST GUIDE, *supra* note 3, at 9.

21. See, e.g., *Palmetto Container Co.*, Comp. Gen. B-237534, Nov. 8, 1989, 89-2 CPD ¶ 447.

22. See, e.g., *Int’l Bus. Sys., Inc.*, Comp. Gen. B-270632.2, June 27, 1996, 96-1 CPD ¶ 276. In *International Business Systems, Inc.*, the GAO denied the protester’s attempt to stop the agency from recalculating a competitor’s best and final offer (BAFO) after the agency discovered an obvious clerical mistake that the contracting officer should have discovered earlier. The GAO determined that the protester suffered no material harm in allowing the agency to correct its obvious clerical mistake and evaluate all BAFOs in accordance with the pricing instructions in its request for proposals. *Id.*

23. 4 C.F.R. § 21.5 (LEXIS 2002).

24. *Id.* § 21.5.

25. *Id.* § 21.5(d).

26. GAO BID PROTEST GUIDE, *supra* note 3, at 12. The GAO strictly enforces the statutory timelines governing the filing of bid protests to minimize the impact of bid protests on the procurement process. JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1503 (3d ed. 1998).

27. GAO BID PROTEST GUIDE, *supra* note 3, at 42. The GAO must receive a document by 5:30 p.m., eastern time, for it to consider the document as filed on that day. *Id.*

Protesters alleging an impropriety or error in a solicitation, which is apparent on the face of the solicitation, must file their protests with the GAO before bid opening or before the closing date for receipt of initial proposals.<sup>28</sup> Otherwise, such protests are ripe for dismissal.<sup>29</sup>

If agency counsel cannot get the entire protest dismissed as late, they should evaluate protest allegations individually for timeliness. If some allegations are late, the GAO may dismiss these, and then rule on the remaining allegations. In *Coastal Drilling, Inc.*,<sup>30</sup> the protester alleged, after contract award, that the agency improperly tailored the contract specifications and improperly evaluated the protester's proposal. The GAO considered the improper specification untimely, ruling only on the evaluation issue.<sup>31</sup>

The GAO is also interested in ensuring that protesters raise all allegations of improprieties and errors in the solicitation (and all of its amendments) before bids are opened or before initial proposals are due.<sup>32</sup> In *Parcel 47C L.L.C.*,<sup>33</sup> for example, the GAO would not hear any challenges to solicitation amendments filed after the receipt of proposals were due, stating that the bid protest regulations "do not contemplate the piecemeal development of protest issues."<sup>34</sup>

If the protester feels that the agency committed an impropriety or error other than during the period discussed above, the protester must file its protest with the GAO within ten days of the date the protester knew, or should have known, of the basis for protest.<sup>35</sup> Protesters sometimes procrastinate and file protests after the ten-day period, or they think of new issues to raise after these ten days pass. When this happens, agency counsel may get the protest dismissed on timeliness grounds. Other times, protesters may attempt to disguise untimely protests as supplemental matters to an earlier and timely filed protest. If a subsequent filing presents new and independent grounds for protest, rather than providing additional support for an earlier, timely protest, agency counsel should consider having the filing dismissed.<sup>36</sup>

In other situations, protesters granted an extension to file comments to the agency report<sup>37</sup> may attempt to file new protest allegations, thinking the extension also allows them additional time to file new allegations.<sup>38</sup> Agency counsel should remain wary of this situation, and move to dismiss such protests as untimely.<sup>39</sup>

#### Debriefings and Protests

Bidders participating in competitive proposals are afforded debriefings. When a debriefing is requested within a specific time period, a protester cannot file a protest before the debrief-

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28. 4 C.F.R. § 21.2(a)(1).

29. See, e.g., Neal R. Gross, Comp. Gen. B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30. In *Neal R. Gross*, the GAO denied the protest, stating that the protester's objection to the proposed price-evaluation method was untimely because the protester raised this allegation after contract award. *Id.* at 4-5.

30. Comp. Gen. B-285085.3, July 20, 2000, 2000 CPD ¶ 130.

31. *Id.* at 4 n.2.

32. CIBINIC & NASH, *supra* note 26, at 1503.

33. B-286324, B-286324.2, 2000 Comp. Gen. LEXIS 215 (Dec. 26, 2000).

34. *Id.* at \*10.

35. 4 C.F.R. § 21.2(a)(2) (LEXIS 2002).

36. Ti Hu, Inc., Comp. Gen. B-284360, Mar. 31, 2000, 2000 CPD ¶ 62, at 4 (citing Vinnell Corp., Comp. Gen. B-270793, B-270793.2, Apr. 24, 1996, 96-1 CPD ¶ 271, at 7).

37. The protester and any intervenors can file written comments on the agency report. 4 C.F.R. § 21.3(i). The parties have ten days from the date of receipt of the agency report to file these comments with the GAO and the agency. *Id.* The comments allow the protester to refute the agency's version of the facts and applicable law and regulations. Unless the protester raises new, timely allegations in its comments, the agency cannot file any additional explanation based upon the protester's comments unless the GAO so requests. Agency counsel may request to provide the GAO and the parties with such an additional submission, however. The GAO attorney will then determine whether such a submission is warranted and advise the parties of this decision. Agency counsel should be cautious regarding additional submissions, however, since the GAO will probably allow the protester to respond to the agency's submission, thereby restarting the ten-day clock for any new protest issues.

38. See GAO BID PROTEST GUIDE, *supra* note 3, at 17. According to the GAO, if it grants a protester an extension to file comments to the agency report, such an extension does not extend the ten-day timeframe for filing a timely supplemental protest for allegations that the protester knew, or should have known, from the agency report. *Id.*

ing date offered to the protester, and the protest must be filed not later than ten days after the debriefing is conducted.<sup>40</sup> Agency counsel should therefore move to dismiss all protests filed before a requested debriefing is held. The GAO ruled in *Omni Corp.*<sup>41</sup> that it will dismiss such protests as premature, even if the protest basis is known before the debriefing.<sup>42</sup> The GAO's rationale for strictly enforcing this rule is to "encourage early and meaningful debriefings, and to preclude strategic or defensive protests."<sup>43</sup> Counsel can convince the GAO to dismiss these premature protests by simply faxing the GAO a copy of the letter advising the protester of the debriefing date along with a request that the GAO dismiss the protest as untimely. Usually, the GAO will then dismiss the protest without prejudice.<sup>44</sup>

#### *Agency Level Protests—Follow-On Protests to the GAO*

When a party files a protest with an agency, and then wishes to contest the agency's determination, the party must file with the GAO within ten days after receiving actual or constructive notice of the initial adverse agency decision.<sup>45</sup> Examples of adverse agency actions include: "the agency's proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, . . . the award of a contract despite the agency-level protest, [and] any [other] action [indicating] that the agency is denying the agency-level protest."<sup>46</sup>

Despite the rules stated above, the GAO may consider late protests: (1) if the protester raises issues "significant . . . to the procurement community;" or "exceptional circumstances beyond the protester's control caused the delay in filing the protest[.]"<sup>47</sup> Fortunately, however, the GAO rarely invokes these exceptions.<sup>48</sup>

#### *Does the Protest Complaint State a Basis for Protest?*

Although no formal requirement specifies exactly what a protest letter should include, all protests must provide a detailed factual and legal statement outlining the basis for the protest; identify the protester's name, address, and telephone number; identify the protested transaction; state the relief sought; and contain the signature of the protester or its representative.<sup>49</sup> If the protest allegations do not: (1) include sufficient facts to form a basis of protest; and (2) establish the likelihood that the protester will prevail in its claims of improper agency action, the GAO can dismiss the protest.<sup>50</sup>

Before filing a motion to dismiss, agency counsel should consider two practical issues. First, counsel should consider whether the protester is representing himself or is represented by counsel. Second, counsel should consider the time elapsed since the protest was filed.

The type of representation used by the protester should affect how agency counsel approach the issue of dismissal. For

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39. See, e.g., *SDS Int'l*, B-285821, 2000 Comp. Gen. LEXIS 139 (Sept. 21, 2000). In *SDS International*, the GAO granted the protester an extension to file comments on the agency report. Fourteen days after receiving the report, the protester filed a supplemental protest challenging the award of the contract. The GAO dismissed the supplemental protest based on matters contained in the agency report because the protester did not file within ten days after learning of the basis of the protest. The GAO ruled that an extension issued for the purpose of filing comments to an agency report does not waive timeliness rules with regard to new grounds of protest. *Id.* at \*11.

40. 4 C.F.R. § 21.2(a)(2). An offeror must request a debriefing from the agency, in writing, within three days after receiving notification of contract award. The agency should, to the maximum extent practicable, conduct the debriefing within five days after receiving the protester's written request. 31 U.S.C. § 3553(d) (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. § 15.506 (Feb. 2001) [hereinafter FAR].

41. Comp. Gen. B-281082, Dec. 22, 1998, 98-2 CPD ¶ 159.

42. *Id.* at 6 (citing 4 C.F.R. § 21.2(a)(2) (1998)).

43. *Minotaur Eng'g*, Comp. Gen. B-276843, May 22, 1997, 97-1 CPD ¶ 194, at 3.

44. See GAO BID PROTEST GUIDE, *supra* note 3, at 15.

45. 4 C.F.R. § 21.2 (a)(3) (LEXIS 2002).

46. GAO BID PROTEST GUIDE, *supra* note 3, at 13.

47. *Id.* at 14.

48. See *id.*

49. See 4 C.F.R. § 21.1.

50. See, e.g., *Science Applications Int'l Corp.*, B-265607.2, 1995 U.S. Comp. Gen. LEXIS 612 (Sept. 20, 1995); *Vero Tech. Servs.*, Comp. Gen. B-282373.3, B-282373.4, Aug. 31, 1999, 99-2 CPD ¶ 50. In *Science Applications*, the GAO dismissed the protest as legally insufficient because the agency completely refuted the protester's allegations, and because the protester provided no evidence or a detailed factual statement to support its allegations. 1995 U.S. Comp. Gen. LEXIS 612, at \*6. In *Vero Technical Services*, the GAO found that no convincing evidence supported the protester's contentions. The GAO dismissed the protest, concluding that the protester's mere speculation did not provide a basis to sustain the protest. *Vero Tech. Servs.*, 99-2 CPD ¶ 50, at 3.

example, if the protester is a pro se small business owner filing his first protest, the GAO will likely let this protester amend his pleadings. Because of this, agency counsel can ease the process, better her reputation with the GAO, and improve relations with the protester by asking the protester directly for the missing information. This should also foster better communication between the protester and the government.

On the other hand, if the protester is represented by counsel, the GAO may enforce its rules more stringently since counsel are expected to know basic filing requirements. Agency counsel should take into consideration whether the omission is merely an administrative oversight, such as a telephone number, or substantive, such as failing to assert sufficient facts to establish the likelihood of prevailing. The closer the omission is to being a substantive flaw in the pleading, the more aggressive agency counsel should be in seeking a summary dismissal.

Regarding the second issue, agency counsel should check if ten days have passed since the protest was filed. Before moving for a summary dismissal for failing to provide the necessary facts, agency counsel should keep in mind that the GAO might allow the protester to supplement his protest within ten days of filing his protest.<sup>51</sup>

#### *Is the Protester an “Interested Party?”*

Another important point agency counsel should consider early in the agency’s response is whether the protester is an interested party.<sup>52</sup> The GAO considers the interested party determination as an essential element in all protests,<sup>53</sup> and absent this showing, the protest may be dismissed. To evaluate

whether a protester is an interested party, agency counsel should apply one of two tests. The first test applies before bid opening, and the second applies afterward.<sup>54</sup>

Before bid opening, the GAO will consider protests from *prospective* bidders who have a direct economic interest in the contract and have expressed an interest in competing for the contract.<sup>55</sup> The term “prospective bidder” means a potential competitor for the type of work being procured.<sup>56</sup> For example, in *Total Procurement Services, Inc.*,<sup>57</sup> the GAO dismissed the protest because the protester “[failed to demonstrate that it was] a ‘prospective bidder . . .’ with a sufficient direct economic interest in the Request For Quotations (RFQ) to be considered an interested party.”<sup>58</sup> The RFQ solicited medical and computer equipment. Total Procurement Services (TPS) provided information from electronic government solicitations to businesses registered to do business with the government, and then submitted quotes to the government on behalf of these enterprises, but TPS did not trade, sell, or service medical or computer equipment itself. The GAO rejected TPS’s argument that the GAO should consider anyone who takes the steps necessary to compete as an interested party. Instead, it ruled that TPS was not an interested party because TPS did not have the capability, intent, or past performance to execute this contract.<sup>59</sup>

After bid opening, the GAO only considers protests from *actual* bidders with a direct economic interest in the contract.<sup>60</sup> Actual bidders are those bidders who: (1) have submitted a bid; and (2) are next in line to receive the contract<sup>61</sup> if the protest succeeds.<sup>62</sup> If the protester does not satisfy these two elements, the agency attorney should seek to dismiss the protest.

51. See 4 C.F.R. § 21.2.

52. An interested party is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” *Id.* § 21.0(a).

53. Total Procurement Servs., Inc., Comp. Gen. B-272343.2, Aug. 29, 1996, 96-2 CPD ¶ 92, at 3 (citing 4 C.F.R. § 21.1(c)(5) 1996)).

54. For purposes of this article, the terms “bid opening” and “receipt of proposal date” are the same.

55. 4 C.F.R. § 21.0(a) (LEXIS 2002).

56. See *Tumpane Servs. Corp.*, Comp. Gen. B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95, at 2.

57. 96-2 CPD ¶ 92.

58. *Id.* at 4. Protesters have the burden to “[s]et forth all information establishing [they are] interested part[ies].” 4 C.F.R. § 21.1(c)(5).

59. *Total Procurement Servs.*, 96-2 CPD ¶ 92, at 3-5.

60. 4 C.F.R. § 21.0.

61. A second-rated protester is almost always next in line to receive award when it protests. Protesters ranked third or higher, however, can also be next in line to receive the contract if their protests demonstrate how and why they will receive award ahead of the higher-ranked offerors.

62. See, e.g., *Tulane Univ.*, Comp. Gen. B-259912, Apr. 21, 1995, 95-1 CPD ¶ 210 (protest dismissed—protester not an interested party because second-ranked entity would receive award even if the protester, the third-ranked entity, succeeded with its protest); *SouthWest Critical Care Assocs.*, B-279773, 1998 Comp. Gen. LEXIS 252 (July 16, 1998) (protest denied—protester not an interested party because two entities stood between the awardee and the protester if protester’s challenge succeeded).

## Intervenors

Sometimes, in addition to the agency and the protester, a third party will intervene in a protest. After the award has been made, an awardee may intervene in a protest to protect its interests. Pre-award, “all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied” can intervene.<sup>63</sup>

Intervenors often enter a protest in support of the agency to protect an award either made to them or for which they are in line to win.<sup>64</sup> Intervenors are helpful to agency counsel because intervenors can supplement the government’s position and make their counsel available to the agency attorney. The synergistic effect can be tremendous when the intervenor and the agency share the same position.

There is a catch, however. The government’s position is to secure an award that is in the best interest of the government and that comports with regulations. The awardee’s interest is making a profit, maintaining the status quo, and keeping the award. If the GAO rules in favor of the protester and against the intervenor, the intervenor can quickly become the government’s adversary. For this reason, agency counsel should always maintain a guarded relationship with the intervenor’s counsel, sharing only public information. The intervenor may later use any shared information against the agency, particularly legal or contracting strategy. The more sensitive the information shared, the more difficult it could be for the government to defend a protest lodged later by the intervenor.

### *Has the Protester Demonstrated Prejudice?*

Demonstrating how the agency prejudiced the protester is another essential element the protester must establish.<sup>65</sup> The GAO regularly stresses the importance of establishing preju-

dice in a successful protest.<sup>66</sup> Thus, the agency attorney should always review protests for a clearly articulated statement showing exactly how the agency prejudiced the protester. If the protester does not make this showing, the agency attorney should move to dismiss the claim.

To determine prejudice, the GAO will look at whether the protester demonstrated a reasonable possibility that it was prejudiced by an agency’s improper actions. In other words, “but for the agency’s actions, would [the protester] have had a substantial chance of receiving the award[?]”<sup>67</sup> For example, in *Minolta Corp. v. Department of the Treasury*,<sup>68</sup> the GAO found that the agency prejudiced Minolta when it solicited a contract for nationwide copying services and then tried to award the contract under a pre-existing General Services Administration (GSA) contract. The GAO reasoned that because the new contract was an out-of-scope change to the GSA contract, the agency’s actions prejudiced Minolta; that is, Minolta had a reasonable chance of receiving the contract but for the agency’s improper use of the GSA contract.<sup>69</sup>

The cumulative effect of many minor agency errors can also constitute prejudice to a protester. In *CRAssociates, Inc.*,<sup>70</sup> the GAO concluded that the combined effect of the agency’s technical evaluation errors—such as failing to conduct meaningful discussions, making mathematical errors when scoring CRAssociates’ proposal, and not properly substantiating CRAssociates’ cost/technical tradeoff rationale—prejudiced the protester.<sup>71</sup> The GAO stated that although none of the deficiencies standing alone warranted sustaining the protest, “the cumulative effect of these shortcomings call[ed] into question the reasonableness of the evaluation and the resulting [determination to award this contract to the protester’s competitor].”<sup>72</sup>

Finally, in *Johnson Controls World Services, Inc.*,<sup>73</sup> the GAO highlighted the need for successful protesters to establish competitive prejudice, not simply to show that an agency failed to

63. 4 C.F.R. § 21.0(b).

64. GAO BID PROTEST GUIDE, *supra* note 3, at 20.

65. *Sabreliner Corp.*, Comp. Gen. B-284240.2, B-284240.6, Mar. 22, 2000, 2000 CPD ¶ 68, at 10. “Prejudice is an essential element of every viable protest and our office will not sustain a protest if there is no reasonable possibility that the protester was prejudiced by the agency’s actions.” *Id.* (citing *McDonald-Bradley*, Comp. Gen. B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54, at 3).

66. *See, e.g., id.*; *CRAssociates Inc.*, Comp. Gen. B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63, at 10.

67. *Mech. Contractors*, Comp. Gen. B-277916, Oct. 27, 1997, 97-2 CPD ¶ 121, at 6.

68. B-285010.2, 2000 Comp. Gen. LEXIS 141 (Sept. 26, 2000).

69. *Id.* at \*7.

70. Comp. Gen. B-282075.2, B-282075.3, Mar. 15, 2000, 2000 CPD ¶ 63.

71. *Id.* at 4-10.

72. *Id.* at 4.

73. Comp. Gen. B-285144, July 6, 2000, 2000 CPD ¶ 108.

comply with a procurement regulation. In its protest, Johnson Controls alleged that the agency did not comply with commercial item procedures and improperly expedited the award process.<sup>74</sup> In denying the protest, the GAO noted that Johnson Controls did not demonstrate how the agency's decision to use commercial item procedures prejudiced its competitive position, stating that "[p]rejudice is an essential element of every viable protest and even where the record establishes a procurement deficiency, [the GAO] will sustain a protest on this basis only where it resulted in competitive prejudice."<sup>75</sup>

### *Should the Agency Take Corrective Action?*

After the agency counsel determines that the protest meets all essential jurisdictional elements, she must then decide which of the protester's allegations, if any, have merit. At this point, agency counsel must view the protest objectively and ask challenging questions. Since contracting personnel naturally believe they identified and corrected any shortcomings before placing the procurement "on the street," they may view the procurement with bias.

If any of the protest allegations are meritorious, the contracting office and agency counsel should consider taking corrective action. Corrective action is any effort the government can take to address shortcomings in the procurement, such as inconsistencies or ambiguous guidance, and includes anything from correcting a mistake in the bidding instructions to terminating the award and re-evaluating proposals.<sup>76</sup>

The timing of corrective action is important because it affects government liability. If the GAO determines that the government unduly delayed taking corrective action in the face of a clearly meritorious protest, it can hold the government lia-

ble for the protester's costs.<sup>77</sup> How much time constitutes "an undue delay" is a case-specific question of fact;<sup>78</sup> however, if the agency takes corrective action before the agency report submission date, generally it will not be liable for protest costs.

Finally, the protest must be "clearly meritorious." This means that either "the issue involved must not be a close question; [that is], the record . . . establishes that the agency prejudicially violated a procurement statute or regulation,"<sup>79</sup> or a "reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position."<sup>80</sup>

### **Competition in Contracting Act (CICA)<sup>81</sup> Stays**

A stay in proceeding with contract award or performance is a significant matter for the customer at the installation because it prevents commanders and soldiers from receiving needed services and supplies. When stays occur, commanders will inevitably ask their legal advisor what a stay is; how long the stay will last; why the stay was imposed; how a civilian contractor can stop the military from completing its mission; and most importantly, if there is a way to proceed despite the stay.

### *Background*

In pre-award protest situations, the CICA prohibits agencies from awarding a contract after receiving notice of a timely protest from the GAO.<sup>82</sup> This automatic stay is colloquially known as a "CICA stay." In post-award situations, the CICA requires agencies to suspend contract performance immediately when the agency receives notice of a protest from the GAO within ten days of the date of contract award or within five days after the

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74. *Id.* at 2-3.

75. *Id.* at 3.

76. *See, e.g.*, U.S. Property Mgmt. Serv., B-278727, 1998 Comp. Gen. LEXIS 99, at \*16 (Mar. 6, 1998) (recommending that the agency re-evaluate BAFOs and terminate the contract if the awardee was not the successful offeror after re-evaluation).

77. *See* 4 C.F.R. § 21.8(e) (LEXIS 2002). Protest costs include the costs of filing and pursuing the protest, attorney fees, expert fees, consultant fees, and bid and proposal costs. *Id.* § 21.8(d).

78. *See, e.g.*, Griners-A-One-Pipeline Servs., 1994 U.S. Comp. Gen. LEXIS 616, at \*7 (July 22, 1994) (after agreeing corrective action necessary, Army did not take such action until after compiling a report, submitting report to the GAO, and waiting two weeks; Army ordered to pay costs protester incurred because Army did not take corrective action immediately); Lynch Mach. Co., B-256279.2, 1994 Comp. Gen. LEXIS 590, at \*6-7 (July 11, 1994) (agency not required to pay protest costs after taking three months to investigate a highly technical protest issue and subsequently canceling contract to broaden competition; agency launched investigation immediately after learning of the issue and was responsive to protester's questions throughout investigation).

79. Millar Elevator Serv. Co., Comp. Gen. B-281334.3, Aug. 23, 1999, 99-2 CPD ¶ 46, at 2 (citing J.F. Taylor, Inc.—Costs, Comp. Gen. B-266093.3, July 5, 1996, 96-2 CPD ¶ 5, at 3; Tri-Ark Indus., Inc., Comp. Gen. B-274450.2, Oct. 14, 1997, 97-2 CPD ¶ 101, at 3).

80. Minolta Corp.—Reconsideration, B-285010.2, 2000 U.S. Comp. Gen. LEXIS 141, at \*5 (Sept. 26, 2000) (citing The Real Estate Ctr.—Costs, Comp. Gen. B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105, at 3).

81. 31 U.S.C. §§ 3551-3356 (2000).

82. *Id.* § 3553.

date offered for the required debriefing.<sup>83</sup> If the requirement is of great importance to the agency, it can override the stay and proceed with contract award or performance.<sup>84</sup>

#### *When Must the Agency Suspend Contract Award or Performance, and When Can the Agency Override This Suspension?*

When determining whether a commander can proceed in the face of a stay, agency counsel should first consider two timing issues: (1) when the protest was filed; and (2) when the government received notice of the protest from the GAO. If both the filing of the protest and the GAO's notification of the protest occur *before* award, the agency may not award the contract until the GAO resolves the protest, or until "the head of the procuring activity [HPA] responsible for awarding the contract [determines, in writing], that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the [GAO opinion]."<sup>85</sup> The agency must also advise the GAO of the HPA's finding.<sup>86</sup> This automatic stay rule can be triggered only after the GAO issues the notice of protest filing to the agency within the statutory timeframe.<sup>87</sup>

If the agency receives notice of the protest *after* contract award, but within ten calendar days thereafter, or within five calendar days after a debriefing date offered under a timely request, the agency must, upon receipt of that notice, immediately direct the awardee to cease performance under the contract.<sup>88</sup> The HPA can override this type of CICA stay under the

same conditions as overriding a pre-award stay, and must notify the GAO of such an override.<sup>89</sup>

Whenever protesters fail to comply with these strict time rules, they risk losing their opportunity to stay a contract award or performance. For example, in *Florida Professional Review Organization*,<sup>90</sup> the agency awarded its contract on June 17. Eight days later, on Friday, June 25, at 5:15 p.m., the protester filed its protest with the GAO. In accordance with the CICA, the GAO notified the agency of the protest within one working day. Because the next working day was Monday, 28 June, the agency did not receive GAO notice of the bid protest filing until eleven calendar days after contract award. As a result, the agency did not have to suspend performance.<sup>91</sup>

#### *When Can the Agency Override a Suspension of Performance?*

A CICA stay, therefore, is not a complete roadblock to fulfilling the commander's intent. However, just because the HPA responsible for awarding contracts decides to override the CICA stay does not mean the issue is over. If a protester disagrees with the override, it can use the Administrative Procedures Act (APA)<sup>92</sup> to request that a federal district court enjoin the agency from overriding the stay.<sup>93</sup> Under the APA, a district court can set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>94</sup> When evaluating overrides under the "urgent and compelling" standard, district courts tend to look at whether the type of work is urgently needed,<sup>95</sup> whether an incumbent con-

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83. *Id.* This suspension of performance is also known as an automatic stay.

84. *Id.* § 3553.

85. *Id.* § 3553(c). The agency must also allege that it will likely award the contract within thirty days after the HPA makes this finding. *Id.*

86. *Id.* § 3553(c).

87. *See, e.g.,* Techn. for Communications Int'l, Inc. v. Garrett, 783 F. Supp 1446 (D.D.C. 1992). In *Communications International*, the district court rejected the plaintiff's argument that its protest was timely filed because it notified the agency of the protest within ten calendar days of contract award. Considering the applicable statutory and regulatory language, the court determined that only the GAO notice to the agency matters when calculating whether the protester submitted its protest on time and the agency must stop contract award or performance. *Id.* at 1455.

88. 31 U.S.C. § 3553(d); FAR, *supra* note 40, § 15.506. To receive a debriefing, an offeror must request, in writing, a debriefing from the agency within three days after receiving notification of contract award. The agency should, to the maximum extent practicable, conduct the debriefing within five days after receiving the protester's requestor.

89. *See* 31 U.S.C. § 3553(d); U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP., pt. 33.104 (1996). Agencies must notify the GAO of their decision to override the stay before proceeding with contract performance. The GAO will not review the agency's decision to override the stay. 31 U.S.C. § 3553(d).

90. Comp. Gen. B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17.

91. *Id.* at 10-11 (citing BDM Mgmt. Servs., Comp. Gen. B-228287, Feb. 1, 1988, 88-1 CPD ¶ 93).

92. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (2000).

93. *See, e.g.,* Delta Dental Plan of California v. Perry, No. C95-2462 TEH, 1996 U.S. Dist. LEXIS 2086, at \*36, (N.D. Ca. Feb. 21, 1996). The statutory authority for U.S. District Courts to enjoin an agency from overriding a CICA stay, the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b)(1) (2000), expired on 1 January 2001. *Id.* Whether U.S. district courts will continue to hear motions requesting temporary restraining orders (TROs) enjoining agencies from overriding CICA stays is currently unclear. Regardless, a protester can always request the Court of Federal Claims to issue a TRO enjoining the agency from overriding a CICA stay. *See id.*

tractor is available to perform the work during the stay,<sup>96</sup> whether the incumbent contractor is capable of satisfying the urgent need,<sup>97</sup> and the balance of harm to each party and the public.<sup>98</sup>

To override a CICA stay post-award, agencies have the option of using either the best interest of the government or the urgent and compelling standard. Since any matter that is urgent and compelling should necessarily also be in the best interest of the government, the latter test is easier to meet.<sup>99</sup> In light of this practical consideration, if a protester files for a TRO in district court, an attorney can reduce his agency's workload and anxiety level by helping the head of the contracting agency categorize a post-award CICA stay override decision as being in the government's best interest.

### Signing CICA Stay Overrides

Federal statute requires the head of the contracting activity (HCA) to sign a CICA stay override.<sup>100</sup> The signing of a determination and findings<sup>101</sup> authorizing an override by someone other than the HCA can create a challengeable issue. For example, in *Superior Engineering & Electronics Co. v. United States*,<sup>102</sup> the contracting officer requested that the HCA cancel an order to stop work. Because the HCA was unavailable, the Assistant Deputy Commander for Contract Management signed the determination and findings. The protester claimed that the contracting officer lacked the authority to cancel the work stop order because the FAR and the CICA require that the HCA make this finding. On review, the court noted that the government did not comply with the FAR and the CICA, but found that this noncompliance was not fatal. Stressing that the assistant was a Senior Executive Service employee, and that the contracting officer canceled the stop work order believing he

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94. 5 U.S.C. § 706(2)(A). Courts have interpreted this language of the APA "to mean that the disappointed bidder must demonstrate prejudice attributable to either (1) a violation of applicable statutes or regulations, or (2) an arbitrary or irrational decision of the procurement officers on matters primarily committed to his or her discretion." *Delta Dental Plan*, 1996 U.S. Dist. LEXIS 2086, at \*36 (construing 5 U.S.C. § 706).

95. See, e.g., *Litton Sys., Inc. v. Sec'y of Def.*, No. 88-0652, 1988 U.S. Dist. LEXIS 18673, at \*4, 6 (D.D.C. Mar. 14, 1988) (finding CICA override not irrational or arbitrary because agency critically needed night vision goggles (NVGs) to ensure the continuation of a safe mission, and because override avoided a significant delay in the lead-time necessary for increasing the production of NVGs during the next six to nine months).

96. See, e.g., *Taylor Group, Inc. v. Johnson*, 915 F. Supp. 295, 299 (M.D. Ala. 1995) (finding CICA stay unwarranted because the incumbent contractor/protester was ready, willing, and able to continue providing its services until the GAO resolved the protest issues, and the government had found protester's past performance acceptable).

97. See, e.g., *Superior Servs., Inc., v. Dalton*, 851 F. Supp. 381, 386 (S.D. Cal. 1994) (agency override reasonable and not arbitrary). *Superior Services* involved a small business set-aside contract for the collection and disposal of refuse and for pest control services. The protester could not satisfy contract requirements because it no longer qualified as a small business. The court agreed with the agency that these services were urgently needed and necessary for the health and safety of Navy personnel. *Id.*

98. See, e.g., *DTH Mgmt. Group v. Kelso*, 844 F. Supp. 251, 253-54 (E.D. N.C. 1993).

In evaluating a preliminary injunction motion, the [Court of Appeals for the] Fourth Circuit has adopted a "balance of hardships" approach employing four factors:

- (1) likelihood of irreparable harm to plaintiff without the injunction;
- (2) likelihood of harm to defendant with the injunction;
- (3) plaintiff's likelihood of success on the merits; and
- (4) the public interest.

The Fourth Circuit has stated that "the decision to grant or deny a preliminary injunction depends upon a 'flexible interplay' among the factors considered." For example, if plaintiff demonstrates that the first two factors are resolved in its favor, it is sufficient that "grave or serious questions" are raised affecting the merits. Conversely, a showing of strong probability on the merits will outweigh a showing of only "possible" irreparable injury to plaintiff. In all cases, the court should consider the public interest.

*Id.* at 253 (quoting *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 192 (4th Cir. 1977)).

99. See also *Universal Shipping Co. v. United States*, 652 F. Supp. 668, 673 (D.D.C. 1987) (stating courts should give substantial deference to an administrator's decision about what is in the best interest of the United States).

100. See 31 U.S.C. § 3553 (2000). "Head of the contracting activity" includes the official "who has overall responsibility for managing the contracting activity." FAR, *supra* note 40, § 2.101.

101. A "determination and findings" is a written document, prepared before an action is taken, explaining why the agency decided on the course of action. FAR, *supra* note 40, § 1.704. For the action to be legally sufficient, the installation contracts advisor must ensure that the determination and finding addresses all elements of the legal basis for the planned action.

102. No. 86-860-N, 1987 U.S. Dist. LEXIS 7940 (E.D. Va. Aug. 31, 1987).

had that authority, the court concluded that the agency did not arbitrarily and capriciously cancel the order.<sup>103</sup>

### Protective Orders

Sometimes business or agency records cannot be released to parties because the records are “protected information.” Examples of protected information include a business’s “proprietary or confidential data [and an] agency’s source-selection-sensitive information.”<sup>104</sup> To protect this information, and still allow parties to learn facts relevant to their protests, the GAO issues protective orders granting access to select persons. Protective orders “strictly control . . . access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest.”<sup>105</sup>

While a protective order is in effect, only the GAO can authorize access to protected information. There are three general categories of officials authorized access: in-house counsel, retained counsel, and experts or consultants hired by a party participating in the protest.<sup>106</sup> Those officials participating in a company’s decision-making process are unlikely to gain access to protected information.<sup>107</sup> “Participating in the decision-making process” is a malleable term consisting of many factors, to include “whether the attorney’s activities, associations, and relationship with the client . . . involve advice and participation in any of the client’s decisions (such as pricing [and] product design) made in light of similar or corresponding information

about a competition.”<sup>108</sup> After hearing arguments from both sides, the GAO must decide whether the risk of inadvertent disclosure of proprietary or procurement-sensitive information outweighs the public policy of granting access to the protester’s representative.<sup>109</sup>

Pro se protesters will not gain access to a competitor’s protected information or the agency’s source-selection information.<sup>110</sup> The GAO will not risk providing pro se protesters a competitive advantage by granting them access to protected information.<sup>111</sup> To balance competing interests, the GAO will assist protesters with perfecting their appeals by authorizing access to their attorneys or consultants. Although forcing a small, family-owned business to hire a representative can impose financial hardship, this policy is the government’s attempt to safeguard confidential information while remaining open and forthcoming with industry.

When applying to the GAO for access to information under a protective order, parties must show that “they are not involved in the competitive decision-making [process] for any company that could gain a competitive advantage from [the protected information], and that there will be no significant risk of inadvertent disclosure of such information.”<sup>112</sup> Parties must also promise not to disclose the protected information to others.<sup>113</sup> If an attorney shares protected information with her client or anyone else not authorized access, the attorney can be sanctioned by the GAO,<sup>114</sup> investigated, and disciplined by her state bar.<sup>115</sup>

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103. *Id.* at \*27.

104. GAO BID PROTEST GUIDE, *supra* note 3, at 22 (citing 4 C.F.R. § 21.4).

105. *Id.*

106. GAO BID PROTEST GUIDE, *supra* note 3, at 23.

107. *See, e.g.,* *Ralvin Pac. Dev., Inc., Comp. Gen. B-251283.3*, June 8, 1993, 93-1 CPD ¶ 442, at 3 n.2. In *Ralvin Pacific*, the GAO denied two attorneys initially representing the protester access to protected information because of their involvement in an ongoing lease negotiation with the agency on behalf of the protester’s affiliate. Procedurally, both the agency and the awardee objected to these attorneys gaining access. *Id.*

108. *Mine Safety Appliances Co., Comp. Gen. B-242379.2, B-242379.3*, Nov. 27, 1991, 91-2 CPD ¶ 506, at 6 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)).

109. *Global Readiness Enter., Comp. Gen. B-284714*, May 30, 2000, 2000 CPD ¶ 97, at 2 n.1.

110. 4 C.F.R. § 21.4. (LEXIS 2002).

111. GAO BID PROTEST GUIDE, *supra* note 3, at 22.

112. *Id.* at 23.

113. *Id.*

114. *GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Information*, 65 FED. CONT. REP. (BNA) 17 (1996). In 1996, the GAO sanctioned two attorneys for violating the terms of a protective order and releasing a competitor’s protected information. The GAO agreed that the disclosure was inadvertent, but still sanctioned each attorney because the disclosure affected the remedy in the case. The GAO sanctioned the attorney who released the information, and sanctioned her supervisor for inadequate supervision. The GAO prohibited both attorneys from accessing protected information for three months, admonished them, and required the attorneys to disclose their sanctions in all future applications for admission to materials under a protective order. *Id.*

115. 4 C.F.R. § 21.4(d).

The GAO determines those authorized to access protected information, and it will advise all parties concerned when it receives an application requesting access. Because the information does not belong to the GAO, the GAO relies on the parties involved in the protest to object to any improper person applying for access. Parties should file any objections quickly because the GAO will promptly decide the issue. If the GAO does not hear any objections within two days of receiving the application, it will authorize access. If an improper party gains access to protected information, however, agency counsel can still file a late objection and request that the GAO rescind its prior authorization. The GAO will also address this issue at once.<sup>116</sup>

In summary, agency counsel should ensure that the agency review each page of its report and that the agency withhold or redact all protected information. Counsel should also remind contracting personnel, on a routine basis, to inspect all documents for protected information every time they release information.<sup>117</sup> In addition, agency counsel should scrutinize anyone applying for access to protected information for disqualifying associations, relationships, or activities. The government should object to pro se protesters and representatives who participate in the protester's decision-making process gaining access to protected information. As a practical matter, the GAO usually does not need to admit agency counsel to a protective order because the agency should already have the disputed information.<sup>118</sup>

## **The Agency's Defense**

### *The Agency Report*

After reviewing all preliminary issues, agency counsel must plan the agency's defense strategy. This is when the true work begins. Two questions agency counsel must consider are: who will constitute the expert team needed to defend the protest, and what documents the agency needs to include in its report. Answering these questions early will make it easier for the agency to assert a successful defense.

### *Who Will Be on the Agency's Protest Team?*

Since each protest involves different facts and questions of law, the composition of protest teams will vary. Most protest teams, however, will include at least the following members:

- (1) Litigation attorney representing the agency before the GAO;
- (2) Field contract/installation attorney;
- (3) Contracting officer;
- (4) Contract specialist;
- (5) Program manager;
- (6) Contract evaluator(s); and
- (7) Source-selection authority.

To determine the composition of its team, agency counsel should consult with the installation contracting attorney and the contracting officer.

### *The Agency Administrative Report*

The agency's administrative report is the foundation for a thorough defense to a bid protest. All administrative reports should include the following:

- (1) Index;
- (2) Protest document;
- (3) Contracting officer's statement of facts;
- (4) Legal memorandum;
- (5) Solicitation with all amendments;
- (6) The protester's complete bid or proposal;
- (7) The awardee's complete bid or proposal;
- (8) All evaluation documents;
- (9) The abstract of bids and offers; and
- (10) Any other relevant document.<sup>119</sup>

Although agency reports have no required formats, they should present the materials in a manner that assists the GAO's review and presents the agency's actions in a favorable light. Installations should use the same format on every agency report. Consistency gives everyone involved predictability, and it helps successors prepare their first defense of a bid protest.

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116. GAO BID PROTEST GUIDE, *supra* note 3, at 22.

117. Interview with Raymond Saunders, Deputy for Bid Protests, U.S. Army Contract Appeals Division, in Arlington, Va. (Mar. 16, 2001) [hereinafter Saunders Interview]. The Contract Appeals Division is the point of contact for most of the Army's contract litigation. One of Mr. Saunders's primary responsibilities is managing Army bid-protest litigation at the GAO. *Id.*

118. In addition, agency counsel have an independent obligation to safeguard protected information under the Procurement Integrity Act. *See* 41 U.S.C. § 423 (2000); 18 U.S.C. § 1905 (2000).

119. 4 C.F.R. § 21.3.

When organizing a report, the letter of protest should appear first since it contains the protest allegations. The GAO must know the protester's allegations up front to understand what the agency is refuting. The contracting officer's statement of facts should follow the letter of protest because the GAO needs to learn the facts as understood by the agency. The legal memorandum should be next because this document explains the agency's legal authority for taking the protested action. The remainder of the documents—clearly tabbed and organized—should appear in whatever order the protest team deems appropriate.

### *The Contracting Officer's Statement of Facts*

The contracting officer's statement of facts is perhaps the most important document in the agency report. A well-written statement of facts is often the cornerstone of a positive, productive, and proactive relationship between the installation and the contract litigation attorney.<sup>120</sup>

The contracting officer, with her intimate knowledge of the facts, should lead the preparation of this document. The installation attorney should help the contracting officer develop facts that support the agency's legal defense. A well-written statement presents the facts chronologically, cross-references each fact to the agency report, directly addresses each allegation raised in the protest letter, and states each fact in simple terms. These measures will help the contract litigation attorney understand the case quickly, navigate through the voluminous case file efficiently, and litigate the protest in a fair and equitable manner for the installation.<sup>121</sup>

Perhaps the biggest challenge for agencies in defending bid protests is meeting short suspense dates. The entire agency report is due to the GAO within thirty days after the agency first receives telephonic notice of the appeal from the GAO.<sup>122</sup> Because of this, most contract litigation offices require agencies to produce their agency report within twenty days after receiving the GAO's notification. While complying with this requirement, the contracting officer and installation attorney should anticipate receiving phone calls from the contract litigation attorney assigned to the case. While the installation is busy preparing the agency report, the contract litigation attorney is

busy trying to learn the facts and legal issues involved in the protest.<sup>123</sup>

### *The Legal Memorandum*

The installation attorney plays a crucial role in achieving a favorable disposition of a bid protest. A well-crafted legal memorandum, in conjunction with the contracting officer's statement, helps the contract litigation attorney understand the facts, the legal issues, and the agency's defenses. It also helps the contract litigation attorney understand the rationale for the installation's decisions.<sup>124</sup>

When drafting a legal memorandum, the installation attorney must work in tandem with the contracting officer. The attorney should ensure that the facts contained in the legal memorandum are consistent with the contracting officer's statement of facts, and must cross-reference the facts to the tabbed documents in the agency report. Furthermore, to provide a valuable platform for the contract litigation attorney to formulate the agency's defense, the legal memorandum should cite relevant GAO opinions in support of the agency's actions.<sup>125</sup>

While drafting documents and compiling the agency report with the contracting officer, the installation attorney must stay objective and remain alert to the need for corrective action. Not only can this save everyone work, as the contract litigation attorney will raise the need for corrective action with the installation after reviewing the agency report, it may also save the agency money.<sup>126</sup>

### **Comments on the Agency Report**

After submitting the agency report, agency counsel should determine if the protester or any intervenors filed written comments on the report. Protesters can file written comments based on their review of the agency's defense. Agency counsel must track the timeliness of protesters' responses because a protest can be dismissed if the protester fails to do any of the following within ten days of receiving the agency report:

- (1) File written comments to the report;

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120. Saunders Interview, *supra* note 117.

121. *Id.*

122. 4 C.F.R. § 21.3(c).

123. Saunders Interview, *supra* note 117.

124. *Id.*

125. *Id.*

126. *Id.*

- (2) Request that the case be decided on the existing written record; or
- (3) Request a time extension.<sup>127</sup>

The protester or intervenors must provide copies of their comments to all parties no later than the day after the GAO receives their comments.<sup>128</sup>

### The Hearing

The GAO conducts hearings to “examine testimony of relevant witnesses, [to measure their] credibility, and to resolve factual disputes.”<sup>129</sup> Any party participating in the protest, to include the GAO, can request a hearing. All hearing requests must explain why the hearing is required, and should be detailed and clearly articulate every issue.<sup>130</sup>

Parties should not presume that the GAO will conduct a hearing; the GAO has complete discretion over whether to conduct one.<sup>131</sup> “Because hearings increase the costs and burden of protests, [the] GAO holds hearings only when necessary.”<sup>132</sup> Generally speaking, the GAO will conduct hearings when: (1) it cannot resolve a factual dispute between the parties without oral testimony; (2) assessing witness credibility is necessary; or (3) “the issue is so complex that proceeding with supplemental written pleadings clearly constitutes a less efficient and burdensome approach than developing the protest record through a hearing.”<sup>133</sup> For example, in *Allied Signal, Inc.*,<sup>134</sup> the GAO conducted hearings because the GAO attorney needed assis-

tance in understanding the complex electronic signal information involved in the protest.<sup>135</sup>

The GAO may grant a request in full or in part.<sup>136</sup> If the GAO grants a request, it will usually hold a pre-hearing conference to clarify procedural issues and substantive questions.<sup>137</sup> This allows the GAO to avoid “unduly disrupting or delaying the procurement process” as much as possible.<sup>138</sup>

The GAO will not conduct a hearing if the record is complete or unquestionable. The GAO will not delay procurements if witnesses are only going to reiterate protest issues, or to allow parties to engage in a discovery fishing expedition.<sup>139</sup> When the GAO allows a witness to testify, the witness must attend the hearing and answer all relevant questions. “If a witness . . . fails to attend the hearing, . . . [the] GAO may draw an inference unfavorable to the party for whom the witness would have testified.”<sup>140</sup>

### The Decision

#### *Protest Disposition*

The GAO must either dismiss, deny, or sustain a protest within 100 days after the protester filed his complaint.<sup>141</sup> “Dismissing” a protest is a favorable outcome for the government. The GAO dismisses a protest when it determines that the protest is without merit or is procedurally or substantively defective.<sup>142</sup> “Denying” a protest is also a favorable outcome for the government. The GAO denies a protest when, after reviewing

127. 4 C.F.R. § 21.3(i).

128. GAO BID PROTEST GUIDE, *supra* note 3, at 31.

129. Soc. Sec. Admin., Comp. Gen. B-261226.2, Nov. 30, 1995, 95-2 CPD ¶ 245, at 2 n.1 (citing *Town Dev., Inc.*, Comp. Gen. B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155).

130. 4 C.F.R. § 21.7(a).

131. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5.

132. GAO BID PROTEST GUIDE, *supra* note 3, at 33.

133. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5.

134. Comp. Gen. B-275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136.

135. *Id.* at 6.

136. GAO BID PROTEST GUIDE, *supra* note 3, at 34.

137. See 4 C.F.R. § 21.7(b) (LEXIS 2002); *supra* text accompanying note 8.

138. *Town Dev., Inc.*, 94-2 CPD ¶ 155, at 5 (citing *Border Maint. Serv., Inc.—Reconsideration*, Comp. Gen. B-250489.4, June 21, 1993, 93-1 CPD ¶ 473).

139. *Id.*

140. 4 C.F.R. § 21.7(f).

141. *Id.* § 21.9.

the allegations and considering the evidence, it concludes that the government did not violate any procurement statute or regulation. After the GAO dismisses or denies a protest, the government can continue with the procurement.

“Sustaining” a protest is bad news for the government. The GAO sustains a protest when it agrees with the protester and determines that the government has violated a procurement statute or regulation.<sup>143</sup> If the GAO also finds that the violation prejudiced the protester,<sup>144</sup> the GAO will recommend appropriate action,<sup>145</sup> including any combination of the following options:

- (1) Refrain from exercising options under an existing contract;
- (2) Terminate [an existing] contract;
- (3) Re-compete the contract;
- (4) Issue a new solicitation;
- (5) Award [the contract] consistent with statute and regulation; or
- (6) Such other recommendation(s) the GAO deems necessary to promote compliance [with the CICA].<sup>146</sup>

Before advising the agency what corrective action it should take, the GAO is required to consider the following matters concerning the procurement:

the seriousness of the . . . deficiency, the degree of prejudice to other parties or the integrity of the [procurement process], the good faith of the parties, the extent of [contract] performance, the cost to the government, the urgency of the procurement; and the impact . . . on the agency’s mission.<sup>147</sup>

Finally, the GAO can only recommend, not order, that agencies implement their findings within sixty days of receiving the

GAO’s ruling.<sup>148</sup> The GAO therefore requires agencies to report their failure to implement the GAO’s findings to the GAO within five days after the sixty-day deadline has elapsed.<sup>149</sup> The GAO must report all such failures to Congress.<sup>150</sup> Because of the close scrutiny given GAO reports, installation and litigation contract attorneys should coordinate noncompliance decisions with their higher headquarters.

#### *Obtaining a Copy of the GAO’s Decision*

If contracting personnel are anxious to learn about the status of a protest, they can call the GAO’s current bid protest status line at (202) 512-5436. Furthermore, the GAO generally posts decisions within twenty-four hours after the case is closed on its Web page—[www.gao.gov](http://www.gao.gov).<sup>151</sup>

#### **Protest Costs**

As part of every successful protest, protesters likely will request reimbursement of their costs for pursuing the protest, attorney fees, and costs for preparing their bid or proposal.<sup>152</sup> This section of the article provides agency counsel with a few tips for monitoring a protester’s claim and ensuring the government only makes proper payments.

#### *General Protest Costs*

To receive protest costs, protesters first have to file their claims, certified and documented, within sixty days of receiving the GAO’s recommendation that the agency pay such costs.<sup>153</sup> Agency counsel should monitor when the claim was received and keep in touch with the contracting representative responsible for paying the claim. If the protester fails to file within this sixty-day timeframe, the agency can potentially deny the claim with the support of the GAO.<sup>154</sup> Furthermore,

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142. *Id.* § 21.5.

143. GAO BID PROTEST GUIDE, *supra* note 3, at 37.

144. *See supra* notes 65-75 and accompanying text.

145. GAO BID PROTEST GUIDE, *supra* note 3, at 37.

146. 4 C.F.R. § 21.8(a).

147. *Id.* § 21.8(b).

148. 31 U.S.C. § 3554 (2000).

149. FAR, *supra* note 40, § 33.104(g).

150. 31 U.S.C. § 3554.

151. GAO BID PROTEST GUIDE, *supra* note 3, at 39.

152. *See* 31 U.S.C. § 3554 (c)(1). The test for paying costs is whether the costs were reasonably incurred in pursuit of the protest. *Commerce Land Title—Costs*, Comp. Gen. B-249969.2, Oct. 11, 1994, 94-2 CPD ¶ 131, at 2 (citing *Data Breed Decisions, Inc.—Costs*, Comp. Gen. B-232663.3, 89-2 CPD ¶ 538).

counsel should be wary of claims for interest because the government cannot pay interest on protest costs.<sup>155</sup>

Second, “[i]f the agency decides to take corrective action in response to a protest, [the] GAO [can still] recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorney’s fees and consultant and expert witness fees.”<sup>156</sup> Under these circumstances, the protester must file its claims “within [fifteen] days after being advised that the contracting agency has decided to take corrective action.”<sup>157</sup> The GAO will consider awarding these costs when “the agency unduly delay[s] taking corrective action in the face of a clearly meritorious protest.”<sup>158</sup> What constitutes “unduly delayed” is a case-specific factual determination.<sup>159</sup>

Finally, if the parties cannot agree on a fair payment for fees and costs, the protester can ask the GAO to determine a fair amount.<sup>160</sup> When the GAO resolves disputes of this nature, the GAO will calculate an award equal to the expenses that a reasonable, prudent person would have incurred in a similar lawsuit.<sup>161</sup>

Attorneys fees usually constitute the bulk of protest costs, and they can add up quickly. The GAO does not have a per se limit on the number of attorneys or attorney hours for which a successful protester can be reimbursed. Instead, the GAO looks at whether the claimed expenses are reasonable in relation to the protest.<sup>162</sup> The more complex the protest is, the more attorneys and attorney hours the protester can claim. Considering how much large firms bill, especially senior partners, failing to take corrective action can quickly cost the agency a lot of money.

Prevailing protesters are typically entitled to all attorneys fees incurred with respect to all protest issues pursued.<sup>163</sup> Although attorneys fees are usually not allocated between those issues on which the protester prevailed and those on which it did not, the agency should not accept legal bills blindly. If the protester litigates separate, distinct, and clearly severable issues so as to constitute a separate protest, the agency can deny payment for legal fees associated with those separate issues in which the government prevails.<sup>164</sup>

153. 4 C.F.R. § 21.8(f)(1) (LEXIS 2002). The GAO may deny a protester’s claim if the protester fails to substantiate its costs. *See* A-1 Movers of America, Inc.—Costs, Comp. Gen. B-277241.31, Aug. 2, 1999, 99-2 CPD ¶ 24, at 4.

154. *See, e.g.,* Aalco Forwarding, Inc.—Costs, Comp. Gen. B-277241.30, July 30, 1999, 99-2 CPD ¶ 36. In *Aalco Forwarding*, the GAO supported the agency’s denial of the protester’s claim because the protester did not file his claim within sixty days, stating that “the [sixty-day] timeframe . . . was specifically designed to avoid a piecemeal presentation of claims and to prevent unwarranted delays in resolving claims.” *Id.* at 4 (citing HG Props. A. L.P.—Costs, Comp. Gen. B-227572.8, Sept. 7, 1998, 98-2 CPD ¶ 62, at 2). The GAO also stated that a “failure to file an adequately supported claim in a timely manner results in forfeiture of a protester’s right to recover costs.” *Id.* For each expense, claims must identify the amount claimed, the purpose, and how it relates to the protest. *Id.*

155. *See* Techniarts Eng’g—Costs, Comp. Gen. B-234434, Aug. 24, 1990, 90-2 ¶ 152, at 7 (citing Ultraviolet Purification Sys., Inc.—Costs, Comp. Gen. B-226941.3, Apr. 13, 1989, 89-1 CPD ¶ 376).

156. 4 C.F.R. § 21.8(e).

157. *Id.*

158. Oklahoma Indian Corp., Comp. Gen. B-243785.2, June 10, 1991, 91-1 CPD ¶ 558, at 2.

159. *Id.*

160. 4 C.F.R. § 21.8(f)(3).

161. *See* Pulau Elects. Corp.—Costs, Comp. Gen. B-280048.11, July 31, 2000, 2000 CPD ¶ 122, at 11 (citing Main Bldg. Maint., Inc.—Costs, Comp. Gen. B-260945.6, Dec. 15, 1997, 97-2 CPD ¶ 163, at 10).

162. *See, e.g., id.* at 6; JAFIT Enters., Inc., Comp. Gen. B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125, at 3. In *Pulau Electronics*, the agency, relying on a Defense Contract Audit Agency (DCAA) audit, denied the protester’s claim seeking reimbursement for 1086.25 hours of attorney time. The agency considered the claim excessive and an unreasonable duplication of effort. On appeal, the GAO examined the reasonableness of the attorney hours claimed to determine whether the claim exceeded, in nature and amount, what a prudent person would incur in pursuit of her protest. After reviewing the protester’s detailed claim, the GAO recommended that the agency reimburse the protester for most of the attorney hours. The GAO concluded that the protester’s thorough claim did not indicate a duplication of effort, determined that it was reasonable for five attorneys to work on a substantively and procedurally complex protest, and found that the agency misplaced its reliance on DCAA’s audit findings. *Pulau Elects. Corp.*, 2000 CPD ¶ 122, at 4-11.

When evaluating reasonableness, the GAO generally considers the amount claimed for attorney fees to be reasonable when the hourly rate is similar to those charged by similarly situated attorneys, the hours are properly documented, and the bill does not appear to be excessive. The GAO also generally accepts the number of attorney hours claimed unless it can identify specific hours it considers excessive. *Techniarts Eng’g—Costs, Comp. Gen. B-234434.2, Aug. 24, 1990, 90-2 CPD ¶ 152, at 3-4.*

163. Minolta Corp.—Costs, B-285010.2, 2000 Comp. Gen. LEXIS 141, at \*9 n.2 (Sept. 26, 2000) (citing Real Estate Ctr.—Costs, Comp. Gen. B-274081.7, Mar. 30, 1998, 98-1 CPD ¶ 105, at 5 n.2).

## Alternative Dispute Resolution (ADR) Techniques: Negotiation Assistance and Outcome Prediction

To reduce the time and expense associated with bid protests,<sup>165</sup> the GAO offers two ADR programs: negotiation assistance and outcome prediction.<sup>166</sup> Although neither program is binding on the parties, the GAO offers these ADR options with the hope that parties will voluntarily take action to end the case. For example, a successful ADR hearing could help encourage an agency to take corrective action voluntarily, or it could persuade a protester to “[withdraw voluntarily] the protest, request for reconsideration, or cost claim.”<sup>167</sup>

### *Negotiation Assistance*

The GAO offers negotiation assistance when the parties “have a realistic chance of reaching a ‘win-win’ solution.”<sup>168</sup> Typically, these cases involve two parties and arise in cost claims or protests that challenge the terms of a solicitation.<sup>169</sup> Any party, including the GAO attorney assigned to the case, can suggest using negotiation assistance. The final decision to use negotiation assistance, however, rests with the GAO.<sup>170</sup>

After the parties agree to proceed with negotiation assistance,

the GAO attorney will explain the ground rules and ensure that the parties agree to them before moving forward. Basically, those ground rules are that the GAO attorney handling the case will act as facilitator, that any settlement will be voluntary, that [the] GAO will not “sign off” on or otherwise review

any settlement, and that, if ADR fails, the same attorney will draft the decision.<sup>171</sup>

During the ADR proceeding, the GAO attorney will likely explain the strengths and weaknesses of the parties’ positions, and will encourage the parties to identify issues and possible resolutions jointly. Notably, though, the use of negotiation assistance ADR does not toll the 100-day CICA deadline.<sup>172</sup>

### *Outcome Prediction*

In outcome prediction, “the GAO attorney tells the parties what she . . . believes is the likely outcome of the case.”<sup>173</sup> Unlike negotiation assistance, outcome prediction is not a win-win situation. Thus, cases best suited for this type of ADR are those in which the outcome is certain. Cases of first impression are the worst candidates for outcome prediction ADR.<sup>174</sup>

Although the parties learn in advance how the GAO attorney will rule, some parties, such as an incumbent contractor who will lose the contract when the GAO issues its decision, will insist on a written opinion, regardless of the outcome. Other parties, hoping the GAO attorney changes her mind or that the Comptroller General will issue a contrary written finding, may also request a written opinion.<sup>175</sup>

The GAO can use outcome prediction for an entire protest, or it can use it for select issues within a multiple-issue case. In either situation, since the GAO must understand the positions of each party before predicting an outcome, the protester will get the opportunity to respond to the agency report before the GAO attorney invokes outcome prediction.<sup>176</sup>

164. Price Waterhouse, Comp. Gen. B-254492.3, July 20, 1995, 95-2 CPD ¶ 38, at 3.

165. *GAO’s Use of “Negotiation Assistance” and “Outcome Prediction” as ADR Techniques*, 71 FED. CONT. REP. (BNA) 3 (1999) at 1. The GAO averages seventy-seven days to issue a bid protest decision in which an agency report was filed. *Id.*

166. *Id.* at 2. With respect to bid protests, the GAO defines ADR “as a procedure designed to resolve a dispute more promptly than through issuance of a written decision.” *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 4.

176. *Id.*

## Conclusion

Bid protests in which the protester is successful can have a dramatic effect on an installation or a procuring agency. On the other hand, bid protests in which the government prevails can amount to nothing more than a mere speed bump in the road to a successful acquisition. The differences between these two situations are precisely why it is so important for attorneys to work closely with their contracting office, take an active role in the planning of an acquisition and, when necessary, defend the acquisition. Attorneys who scrutinize acquisition plans and solicitations objectively for inconsistencies, ambiguities, and other protest issues will help their commands acquire goods and services quickly and serve as invaluable and proactive assets to their contract litigation teams. These efforts will help avoid bid protests.

Unfortunately, even the best planning will not prevent some protests. Unsuccessful contractors, fighting for missed business opportunities, will inevitably file protests. Because of this reality, contract attorneys should always approach acquisition planning aggressively. This will increase the government's chances of prevailing at the GAO, and will greatly reduce the stress and time associated with bid protests.

Responding to a bid protest is a team effort. Agency counsel should always work closely with contracting personnel and installation attorneys since they are more familiar with the procurement. When an agency counsel blends her knowledge of the law with the contracting office's technical knowledge of the procurement, she will find that responding to a bid protest can be a creative, educational, and rewarding experience that still allows her to get home at a reasonable hour.