



SESSION GUIDE
SEASON 2023, EPISODE NINETEEN
FAR PART 33:
PROTESTS, DISPUTES, & APPEALS

I. Introduction

You've probably noticed throughout the series that we occasionally mentioned protests and disputes in passing, but we haven't really discussed them in detail. In this chapter, we will do just that. Before we do, though, let's look at how Part 33 defines some common terms in ways that are narrower than their general usage. Besides the definition of "protest," which we will talk about at length later in this chapter, there are three important definitions in **33.101**: "day," "filed," and "interested party." In **Part 33**, "day" means a calendar day, *not* a business day, unless the Subpart or contract clause specifies something else. "Filed" means complete receipt of a document by an agency before close of business. When we say complete receipt, we really mean complete; no stragglers! "Interested party" means an actual or prospective offeror whose direct economic interest would be affected by the award of (or failure to award) a contract. A third party who is just looking on or has only an intellectual interest in the contract will not be considered an "interested party." Economic involvement is absolutely necessary to establish the "interest" of the party. (Note: This is analogous to the concept of "standing" in federal court jurisdiction.)

Now that we understand the FAR definitions of these three important words, let's look at the rest of **Part 33**!

II. Protests, Disputes, and Appeals

So what exactly is the difference between a protest, a dispute, and an appeal? A protest is a *written objection* by an interested party to four specific procurement-related actions. **33.101**. A dispute involves disagreements that occur during the administration of a contract. **33.202**. While there are specific venues for resolving protests and disputes—which we will discuss later—the Government's policy is to resolve disputes at the contracting officer level as much as possible. **33.204**. An appeal is the step a contractor can take if it is not satisfied with the CO's final decision on an issue in dispute between the Government and the contractor. Generally, appeals go to the Court of Federal Claims or the Armed Services or Civilian Boards of Contract Appeals. **33.203(c)**.

Question 1 – Which third party venue has the authority to resolve a protest **AND** a dispute? [Hint: Check out **FAR 33.101** and **FAR 33.211**]. Tell me which branch of Government does this venue belong in.

A. Protests

As you may know, bid protest rules inform us that all protests must be in writing and timely filed with the appropriate decisionmaker. Simply complaining to the awarding agency over the phone or sending a letter to Congress will not help you overturn a contract award.

The bid protest rules also inform that a contractor can only file a protest if it is truly an “interested party.” To satisfy that requirement a contractor must prove two things: that its interest is (i) economic **and** (ii) directly affected by the contract decision being protested. **33.101**. So does this mean that subcontractors count as interested parties? The short answer is no, because subcontractors fail the “directly affected” test. [Note: A subcontractor, however, may “encourage” a protest filing by agreeing to finance any and all protest costs incurred by its prime contractor.]

Interested parties can file a protest at only one of the following three venues: the contracting agency, the Government Accountability Office (GAO), or the Court of Federal Claims (COFC). **33.102(a)**. Each venue comes with a different set of rules and deadlines. How then does a contractor make a decision as to where it files? Let’s explore each venue below.

1. Agency

When an interested party files a protest with the agency, that protest is addressed to the CO or to another official designated to receive protests. **33.103(d)(3)**. However, the interested party can also request an independent review of its protest at a level above the CO. (Since most protests are challenging a decision by the CO, most protestors request this higher level review.) COs, for their part, should be sure to advise potential bidders and offerors that this option is available. **33.103(d)(4)**.

Agency protests have strict timeliness requirements. If the protest is based on an allegation of impropriety in a solicitation, the protest must be filed before bid opening or before the closing date for receipt of proposals, depending on whether the procurement in question falls under **Part 14** or **Part 15**, respectively. Otherwise, all protests must be filed with the agency no more than 10 days after the interested party discovers (or should have discovered) the basis for a protest. **33.103(e)**. Sometimes an agency will consider a late protest, but this is extremely rare and interested parties should not count on it! **33.103(e)**

There are many benefits for choosing to file with the agency; especially if the protestor believes that the agency (or at least the higher-level reviewer) will recognize an obvious procurement error. Filing a protest at the agency level gives the agency an opportunity to address the problem “within the family,”

and not have to air its dirty linen in a public forum like GAO or COFC. Additionally, agency protests are fairly informal, are designed to be expedient and, as a general rule, are the least costly for the protestor. **33.103(c).**

The one significant downside to selecting this forum is that there is no objective third party decisionmaker outside the agency who will oversee the process and issue a decision which overturns or affirms the award or procurement action.

Agency protests often follow on the heels of a debriefing. If you recall, when we discussed **Part 15**, we learned that offerors, whether successful or unsuccessful, can request a debriefing after contract award. If a potential protestor has requested a debriefing, this changes the timeliness requirements for filing a protest at the agency (and, as we will see, at GAO). When a protestor has properly requested a mandatory debriefing, the deadline for filing the protest with the agency changes to five days after the debriefing date offered to the protestor, or 10 days after contract award, whichever is later. More important, if the agency protest is filed within this time frame the CO will suspend performance of the awarded contract, unless the CO makes a determination that continued performance is justified for urgent and compelling reasons or is in the best interest of the Government, and that determination is approved at a higher level in the agency. **33.103(f)(3).** Suspending contract performance can be extremely important where the awarded contract has significant start-up activities and expenses; without such a suspension a protest victory may have limited value, because the contract has already been largely performed. Agencies are directed to make best efforts to resolve protests within 35 days. **33.103(g).**

As noted below, if a protestor is not satisfied with a decision reached by the agency, it can seek additional relief at another protest forum.

2. GAO

The FAR rules for GAO protests are found in **33.104**. The detailed procedures that must be followed by the agency and the protestor(s), are set forth at references **4 CFR 21**. In the event guidance set forth in **FAR 33.104** concerning GAO protest procedure conflicts with **4 CFR Part 21**, **4 CFR Part 21** governs. Therefore, we will cite to **4 CFR 21** when discussing GAO-specific protest issues in this chapter.

The GAO is nearly as rigid with its timeliness requirements as agencies. In fact, the protest filing timelines are broadly the same. Protests based on an allegation of impropriety in a solicitation must be filed before bid opening or before the closing date for receipt of proposals. Otherwise, protests must be filed with the agency no more than 10 days after the interested party discovers (or should have discovered) the basis for a protest, **unless** the protestor has requested and receives a mandatory debriefing. In such case, the protest *may not* be filed *before* the debriefing date offered to the protestor, but must be filed within ten days *after* the debriefing. **4 CFR 21.2(a)(1) and (2).**

The GAO also acts as a type of appellate forum for agency protests, although protestors do not directly appeal from the agency to the GAO. Instead, protestors who file a protest at the agency, and receive a decision they don't like, may file another protest at GAO *within 10 days of learning of the agency's decision*. **4 CFR 21.2(a)(3).** However, the protestor must have filed the agency protest in a timely

manner. Protesters can't file a late protest with an agency, be rejected for lateness, and then file with the GAO. They must provide evidence of the timeliness of their original protest, or else the GAO may decline to hear the new protest. **4 CFR 21.2(b)**.

The timeliness rules for obtaining the “**automatic stay**” at GAO are tighter than the deadlines for filing the protest itself. To obtain the stay, the protest must be filed within ten days of contract award or five days (rather than ten) of the debriefing date. Operationally, that means that if the automatic stay is important, the would-be protestor has only five days after debrief to file at GAO. **33.104(c)(1) & 4 CFR 21.6**. Moreover, the automatic stay is not available at GAO when the protester has already filed an agency protest (although an agency may voluntarily continue to suspend performance).

Most post-award protests at GAO will be dealt with under a protective order, since competition-sensitive documents (including evaluations and competitive proposals) are usually important to the outcome. GAO rules limit access under the standard GAO protective order, in most cases, to outside counsel. **4 CFR 21.4**.

The GAO will issue a decision within 100 days after the protest is filed. **4 CFR 21.9(a)**. Even if the GAO uses the express options available in **4 CFR 21.10**, it will issue a decision within 65 days, which still might be a significantly longer timeline than that of an agency protest.

*Question 2 – What is the name of the electronic filing system that contractors must use to file a protest at the GAO? [Hint: Check out **4 CFR 21.1**]*

3. Court of Federal Claims

Another protest venue a disappointed bidder can choose is the COFC. The COFC is on the same level as the U.S. District Courts. It therefore comes with many of the trappings similar to the rest of the federal courts, such as a copious and specific set of procedural rules. The FAR does not actually contain any guidance or rules regarding bid protest procedures at the COFC. Instead, the FAR contains a [link to the COFC's rules and forms](#), which we have provided here for your convenience. **33.105**. The scope of the COFC's jurisdiction is found at **28 U.S.C. 1491**.

It is important to note that prior GAO and agency opinions are not binding on the COFC. It will review protests “de novo,” which is a lawyer-ese term for reviewing all the facts in the record without deferring to earlier opinions. As a result, it is possible for a protestor to go to the COFC after losing at GAO (and perhaps also at the agency). This is unusual, but it happens, and on rare occasion COFC may grant a protest denied by GAO. Just think, if one protest is disruptive to agencies and competitors, think about how disruptive two or even three protests can be!

Now we know when and where to protest, but what actually goes into the protest? That depends on where the interested party is filing the protest. When filing a protest with the agency, for example, the interested party must include eight categories of information, per **33.103(d)(2)**:

1. Name, address, and fax and telephone numbers of the protester

2. Solicitation or contract number
3. Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester
4. Copies of relevant documents
5. Request for a ruling by the agency
6. Statement as to the form of relief requested
7. All information establishing that the protester is an interested party for the purpose of filing a protest
8. All information establishing the timeliness of the protest

Some of that might seem fairly obvious, but the FAR tends to err on the side of requiring too much information rather than too little, as you are probably aware. The GAO requires similar information to be filed, as does the COFC.

Question 3 – What three additional things may a contractor request in a bid protest filed at the GAO? [Hint: check out **4 CFR 21.1(d)**]

B. Disputes

You might be tempted to think that protests and disputes are essentially the same thing. They are not, as **Subpart 33.2** makes clear. Protests are filed only by disappointed offerors, whereas disputes can include pretty much all issues that arise between the contractor and the Government during performance of the contract. We also see the word “claim” crop up on occasion. The FAR is admittedly a little fuzzy in its use of these terms. However, with some close reading, and with a quick perusal of the Disputes statute in **41 U.S.C. 71** (also known as the Contract Disputes Act), we can figure out what’s going on.

According to the Disputes statute, “disputes” is just a broad umbrella for claims and other types of contractual issues. The Disputes statute itself deals mostly with claims. **FAR Part 2** tells us that claims are written demands or assertions seeking some kind of relief arising under or relating to the contract. Claims can be brought by either the contractor or the Government. The contractor can bring a claim if, for example, it believes it is entitled to an equitable adjustment for changed work, but the Government has not agreed. On the flip side, the Government can bring a claim if it believes the Government is entitled to money back. If the contractor’s claim is for an amount greater than \$100,000, then the claim must be certified using the procedures in the Disputes statute. **33.207(a)**.

Question 4 – What are the three demands or assertions that a contractor may request in a claim?
[Hint: Check out **FAR 2.101**]

So how do we file claims? Are the timeliness requirements as tight as the requirements for filing a protest? Not at all. In fact, unless the CO and contractor agree otherwise, claims may be brought within six years (!) of the accrual of the claim. **33.206(a)**. This timeframe presumes the contract has not yet been closed out by the Government and the contractor. The date of accrual of a claim is the date when at least one party knew or should have known of the occurrence of all events that led to the alleged liability of the other party (and therefore permitted assertion of the claim). **33.201**.

As a general rule, it is prudent for contracting parties to resolve issues amicably and by agreement at the CO level. Additionally, Government policy offers and cites a preference use alternative dispute resolution (ADR) procedures in lieu of filing a formal claim. **33.204**.

If a contractor wishes to file a claim, it must submit the claim in writing to the CO within that six-year period we mentioned. **33.206(a)**. When the amount of the claim exceeds \$100,000 it must be “certified” by an appropriate contractor official. Failure to properly certify a claim or meet other regulatory requirements will, as a matter of law, cause the claim submission date to be delayed. Why may that be important? Because the timing of interest required to be paid is based upon the date a “proper” claim has been submitted. The FAR informs that interest accrues from either the date the CO receives a proper claim, or the date when payment would otherwise be due, whichever is later. **33.208(a)**.

COs are authorized to decide or resolve almost all claims arising under or related to a contract subject to the Disputes statute. **33.210**. This helps smooth the resolution of claims because it involves as few people as possible in the initial stages of claim resolution. **33.211** outlines the responsibilities of the CO in resolving a claim, as well as the deadlines by which the CO must issue a decision.

Question 5 – What are the two specific types of claims that may *not* be resolved by a CO via the claims process? [Hint: check out **33.210**]

Question 6 – How many days is a contracting officer provided to issue a final decision for claims of \$100,000 or less? What about certified claims for more than \$100,000? [Hint: check out **33.211**]

What if the CO does not issue a decision by the deadlines in **33.211(c)**? In that case, the contractor can consider the CO’s failure to decide to be a “deemed denial” of the claim. The contractor is then authorized to file an appeal or suit on the claim. **33.211(g)**. While this isn’t really a punishment for the CO, it’s definitely a pretty big incentive for the Government to encourage COs to issue decisions in a timely fashion. Defending against an appeal or suit on a claim gets very expensive very quickly, and the Government would always prefer not to pay those extra costs if they aren’t absolutely necessary.

C. Alternative Dispute Resolution

We briefly mentioned ADR above. But what does that mean? ADR is simply a streamlined and potentially less expensive set of procedures, such as mediation or arbitration, that can be used in place of more formal, time-consuming, and expensive proceedings.

Question 7 – What are the four essential elements that must be present for ADR to be appropriate? [Hint: check out **33.214**]

If a CO rejects a contractor’s request for ADR proceedings, she must provide a written explanation of the rejection which cites at least one of these essential elements. **33.214(b)**. Note that ADR can be undertaken at any point during the claim process. Perhaps the parties have gotten all the way to court and then decide that ADR would be a better fit. **33.214(c)** tells us that ADR is perfectly acceptable in such a situation. Remember, the Government (and the contractor!) want to keep unnecessary costs down, so if ADR is available and cheaper than a lawsuit, so much the better. For further regulations regarding ADR, and for a specific breakdown of ADR proceedings, we look to **5 U.S.C. 574**.

D. Appeals

One party is often disappointed after a decision on a protest or claim has been reached. That party may wish to appeal the decision. The venue for appeal—and, indeed, whether appeal is available at all—depends on where the original protest or claim was filed.

So how and where do you appeal a protest decision or contracting officer's final decision on a claim? That depends on what type of decision we're talking about.

There is no direct agency appellate body for protests (although the FAR does provide an opportunity to appeal the agency's protest decision within the agency. **FAR 33.103(d)(4)**). As we know, though, protesters can go to the GAO for a rehearing of their protest grounds if they receive an adverse decision from an agency. This rehearing is *de novo* (reviewed as if the agency protest did not occur) and not an appeal of the agency decision maker's factual findings or decision.

Claims are a different story entirely. There are two agency Boards of Contract Appeals (BCA) – primarily the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals - which are authorized to hear appeals from CO decisions under the Disputes statute. **33.203(c)**. Either party to a claim may appeal a CO decision to the applicable BCA. This is a direct appeal, and the CO must provide all information necessary for the appeal to the relevant BCA. **33.212**. Alternatively, a contractor may appeal the CO's decision to the COFC. The timelines are different for these paths; three months to go to the applicable BCA, or twelve months to go to the COFC. Note that the BCA and COFC have completely different procedural rules governing appeals. So doing good internal research or hiring experienced government contract counsel is important before filing your appeal at either venue.

Also note that the Government is represented by Department of Justice attorney in an appeal filed at the COFC and at the BCAs the Government is represented by agency counsel. This should be considered during any discussion about choice of venue for your appeal.

Believe it or not, decisions of the Boards and the COFC are not **FINAL**! If a party is *still* unhappy with a BCA or COFC decision and believe a legal error has occurred, they can go to the United States Court of Appeals for the Federal Circuit to challenge/appeal that decision. After that, if the party does not agree with the Federal Circuit Court's decision, it may petition the Supreme Court of the United States to issue a writ of certiorari, which is legalese for a discretionary appeal. It is rare for the Supreme Court to hear an appeal, though; it receives thousands of such petitions every year. Nevertheless, the option is technically available.

Question 8 – True or False? A contractor is permitted to stop work of the portion of the work that is subject to an appeal of a dispute. Support your answer.

Discussion Questions

1. What are the four types of activities a contractor can object to in a bid protest? Identify two types of activities that **4 CFR 21** informs may not be the subject of a bid protest.

2. Under the GAO rules, within what timeframe must an agency file its “report” in response to the disappointed bidder’s protest? When must a protester file its comments to the agency’s report?
[See Resources]

3. What seven things must be included in the Government’s protest file?
Who may obtain copies of the protest file? [Hint: Check out **FAR 33.104(a)**]

4. Identify the specific government personnel a contracting officer must consult with during the development of a contracting officer final decision? Explain why does the FAR Council mandate this consultation?

5. Is the Government permitted to require the use of mandatory arbitration as a means to resolve all disputes as a condition for award of a contract? Explain your answer.

6. **FAR Question:** According to FAR 33.102, what might happen to a contractor who wins a contract based upon a proposal that contains “lies”, or negligent/intentional “misrepresentations” or “miscertifications” that later successfully protested by a competitor based upon those lies?

Answer Key

Answer 1 – The Court of Federal Claims is the only legal venue that has authority to resolve protests and claims. the Court of Federal Claims is part of the Executive Branch.

Answer 2 – The Electronic Protest Docketing System (EPDS)

Answer 3 – A protester may also request a protective order, specific documents explaining the relevancy of the documents to the protest grounds, and a hearing explaining the reasons that a hearing is needed to resolve the protest.

Answer 4 – The three types of demands that can be included in a contractor claim are: (1) the payment of money in a sum certain, (2) the adjustment or interpretation of contract terms, or (3) other relief arising under or relating to the contract.

Answer 5 – A contracting officer does not have authority to resolve (1) claims or disputes for penalties or forfeitures prescribe by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine and (2) settlements, compromises, payment, or adjustments of any claim involving fraud.

Answer 6 – For claims of \$100,000 or less, the CO shall issue the decision within 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request. For certified claims for more than \$100,000, the CO shall issue a decision within 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

Answer 7 – The four essential elements that must be present to support the use of alternative dispute resolution processes like mediation or binding arbitration are: (1) Existence of an issue in controversy; (2) A voluntary election by both parties to participate in the ADR process; (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

Answer 8 – False. As a general rule, all contracts with the United States government are required to include the Disputes clause which is found at FAR 52.233-1. That particular clause expressly states that a contractor may NOT stop performance and must work diligently during the resolution of any dispute. See also guidance found at FAR 33.213(a). The only contracts that do not require the inclusion of the standard clause are those with a (1) foreign government or agency of that government or (2) an international organization or a subsidiary body of that organization.

Discussion Questions Answer Key

1. A contractor has the authority to protest (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services; (2) The cancellation of the solicitation or other request; (3) An award or proposed award of the contract; and (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. The two types of government activities that are not subject to bid protest are (1) Contract administration, (2) decision involving "procurement integrity" issues, and certain awards made under an ID/IQ contract. Also remember that the GAO, agency, and COFC do not have authority to hear protests involving small business contract awards and issues involving small business certificates of competency decisions as well.
2. When responding to a GAO bid protest, the agency is required by statute to file a report generally within 30 calendar days of receiving notice of the protest. After the agency's report is filed, the protester has 10 calendar days to submit written comments on the agency's report to GAO.
3. The protest file must include the protest; (2) the offer submitted by the protester; (3) the offer being considered for award or being protested; (4) all relevant documents; (5) the solicitation, including the specifications or portions relevant to the protest; (6) the abstract of offers or relevant portions; and (7) any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester. The procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to GAO.
4. The CO must secure assistance from legal and other advisors and coordinate with the contract administration officer or contracting office, as appropriate. Purpose is to properly prepare the COFD with an eye to future litigation at the COFC or BCA. Legal fees are allowable when they amount to consulting, or for FCA defense where the contractor is not at fault.
5. The use of arbitration as a means to resolve a dispute involving a government contract may be a good practice but is not required.
6. Under that circumstance, the contractor may be required to reimburse the Government's costs. In addition to any other remedy available, and pursuant to the requirements of **subpart 32.6**, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government. When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under **subpart 9.4**.

APPENDIX

All of the following materials are linked and can be found via the Links Document or online.

[AFGE Pre-Award Protest](#)

A copy of a protest submitted by AFGE in May 2010 concerning a solicitation issued by the U.S. Air Force Food Transformation Initiatives (FTI). The protest is based on a failure of the Air Force Nonappropriated Funds Purchase Office to conduct a private/public competition for food service functions at military bases in violation of 10 USC 2461.

[COFC Procedure in Procurement Cases](#)

Court of Federal Claims procedures in procurement protest case regulations pursuant to 28 USC 1491(b). These are the standard practices in protest cases filed at CoFC and supplements the Rules of the U.S. Court of Federal Claims.

[CRS Report – GAO Bid Protests](#)

GAO Bid Protests: An Overview of Time Frames and Procedures published in January 2016. The CRS Report states that the GAO is required to provide for the “inexpensive and expeditious” resolution of protests. This report reviews the GAO’s decision process and effectiveness.

[GAO Bid Protest Report: A Descriptive Guide and Regulations](#)

GAO’s guide covering an overview of the bid protest process, filing, initial steps, hearings, a decision timetable, and more. The guide includes up to date GAO regulations of bid protest which cover a variety of definitions, notifications, remedies and more.

[GAO Bid Protest Report FY21](#)

The GAO Bid Protest Annual Report to Congress for Fiscal Year 2021. The letter issued on December 23, 2020 is in response to the requirements of the Competition in Contracting Act of 1984 (CICA). The letter also addresses the requirement under CICA that the report include a summary of the most prevalent grounds for sustaining protests during the preceding year.

[RFP Pre-Award Protest](#)

A redacted sample of a protest from October 2008 concerning the Defense Supply Center in Philadelphia and PWC. The prayer for relief requests the protest be sustained, remedial action be taken, and PWC requests a recommendation that they be reimbursed for the protest costs.

[Sample Protest Response](#)

A sample protest response used by the procurement officer to respond to a protest received in response to a solicitation, notice of intent to award, or award. The response should contain the issue, references, and basis for the decision.

[The GAO Protest Process](#)

A timeline chart of the GAO Protest Process describing the 100 day process from protest filing to the issuance of a decision by the GAO and all the deadlines in between.

FUN WITH THE FAR
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