

The Difference between GAO and Court of Federal Claims Bid Protests

A Practical Guidance® Article by Kristi Morgan Aronica, Weitz Morgan PLLC



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Bid protests are another one of the unique aspects of participating in the government contracts marketplace. In short, they allow prospective contractors to challenge aspects of the procurement process pre-award and provide an avenue of redress for a disappointed offeror, post-award. Three protest forums exist: the procuring agency, the Government Accountability Office (GAO), and the Court of Federal Claims (COFC). And each possesses benefits and varying procedural requirements that are crucial for businesses seeking to challenge a government contract award to know and consider prior to filing. Given their prevalence, this article will focus on GAO and COFC protests.

A Brief Overview: GAO and COFC Bid Protests

The GAO is an independent agency tasked with reviewing bid protests related to government contracts. Protests are filed directly with the GAO and are typically resolved within 100 days. They also provide for an automatic stay, which prevents award or performance until the protest is resolved. The GAO has the power to recommend that the contract be re-bid or that a contract award be canceled. But its decisions are not binding. Nevertheless, as the leading forum for bid protests, agencies and protestors often defer to the GAO's decisions. A party displeased with the outcome of a GAO protest may re-file at the Court of Federal Claims.

The Court of Federal Claims holds exclusive judicial jurisdiction to hear bid protests related to government contracts. No automatic stay exists in COFC protests, so a protestor will need to move for emergency relief requiring the agency to defer action on the procurement. Because COFC protests are formal legal actions, they involve a longer process, strict rules of procedure, and therefore greater expense than GAO protests. The court's decisions, however, are binding, absent an appeal to the Federal Circuit.

Comparison of Key Procedural Factors

There are several key procedural factors to consider.

- **Governing Rules.** GAO protests are governed by the Bid Protest Regulations at Title 4, Part 21 of the Code of Federal Regulations. A protest before the COFC, however, proceeds according to the court's rules of procedure, which generally track the Federal Rules of Civil Procedure.
- **Timeliness.** Protests challenging the terms of a solicitation made at the GAO must be filed before the time for submission of proposals. And post-award protests must be filed within 10 days of when the protestor knows or should know the basis of the protest. Like the GAO, COFC pre-award protests challenging patent errors are timely only if filed before the close of bidding. On the contrary, no strict deadline for the filing of a post-award protest exists at the COFC. But prospective protestors should file as timely as possible, as other theories, like the doctrine of laches, may be a basis for dismissal.

- **Standing.** In order to survive summary dismissal on jurisdictional grounds in either forum, the protestor must demonstrate that it has the ability to bring the protest. At GAO, the protestor must be an actual or prospective bidder whose direct economic interest would be impacted by the award of or failure to award the contract. In practice, this commonly means it is an entity that would potentially be in line for award. The COFC generally uses the same standard as GAO.
- **Discovery.** At GAO, the agency is required to provide an administrative record, consisting of a written report responding to the protest and a list and copy of all documents relevant to the protest grounds. The COFC, however, requires an agency to produce the entire administrative record, which means all documents related to the procurement.
- **Appeals.** Because GAO opinions are non-binding recommendations, they cannot be appealed directly to a court of law. The protestor must re-file at the COFC. The COFC is not obligated to follow or provide any deference to GAO opinions. COFC decisions, however, are appealable and are exclusive to the U.S. Court of Appeals for the Federal Circuit.

Choosing Between GAO and Court of Federal Claims

Deciding whether to file a bid protest with the GAO or Court of Federal Claims depends on a variety of factors, including the specific details of the case, the desired outcome, the timeline for resolution, and costs. Most entities protest at the GAO due to expediency, the automatic stay, and reduced financial expenditures. Protestors at GAO can expect to obtain a decision within

100 days, counsel is not required, and the process and formalities are less restrictive than at the COFC. But the COFC, despite it being a more formal, and therefore a more expensive process, has its benefits. If a protestor has missed a filing deadline, the agency has overridden the stay, the protest issues are complicated or are a matter of first impression, or the protestor has lost at the GAO, and wants a final, appealable decision, then the COFC may be the more ideal forum.

The Takeaway

Bid protests require thought and strategic planning. In short, they necessitate an evaluation of the issues, goals, present procedural condition, and cost outlay. And while most are filed at the GAO, an agency level or COFC protest may in fact be the best approach when these various factors are considered. Thus, entities considering a pre- or post-award protest will want to take care to assess the intricacies of each path in light of their given circumstances in order to make an informed decision as to which forum is best.

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An experienced attorney with comprehensive capabilities in commercial litigation and government contracts, Kristi has an extensive track record of excellence in work product and client satisfaction. A graduate of the University of Miami School of Law, she is licensed to practice in Texas and in various federal jurisdictions.

Kristi represents government contractors and subcontractors in federal procurements, including advising on applicable laws and solicitation terms, bid protests, contract negotiations, conducting post-award training and compliance, REAs and claims, litigating disputes, drafting/reviewing teaming agreements and subcontracts, and providing counsel or assistance with mergers and acquisitions, organizational conflicts of interests, GSA Schedules, small business programs, suspension and debarment proceedings, grants, and cooperative agreements.

Providing reliable legal representation founded on strength of conviction, strategic decision making, and substantive knowledge, Kristi is driven in her commitment to clients and their matters. As a result, she has also had successful outcomes in both state and federal courts as counsel for prime contractors and subcontractors in commercial disputes arising from federal procurement contracts. Experienced on both sides of the docket, she serves as plaintiff's or defendant's counsel and has a unique skill set of combined proficiency in federal public contract law and the civil procedure and substantive law of state and federal jurisdictions in Texas.

Kristi represents a diverse set of clients working on government contracts and has particularly strong knowledge in the unique aspects of entities operating in the government marketplace in the industries of construction, parts supply, and tech.

In addition to practicing law, Kristi has published on subcontract terms and conditions and in the fields of American literature and U.S./Mexican immigration and has been quoted by Bloomberg Law on federal procurement cases. She also spent numerous years in a leadership position on the board of directors of The Arc of the Capital Area, a Texas non-profit focused on enhancing the lives of those with intellectual and developmental disabilities.

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