

Government Contractors Beware: The Trap of the Unintended Agency-Level Protest and Timeliness Implications

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One forum to raise a protest against the award of a contract is at the agency responsible for the procurement, pursuant to the procedures set forth in Federal Acquisition Regulation (“FAR”) 33.103. The procedures require that a protester submit a protest to the agency that details the legal and factual grounds for the protest; describes the resulting prejudice to the protester; establishes that the protester is an interested party; requests a ruling by the agency; demonstrates timeliness; and includes a request for relief.

What contractors may not realize, however, is that there are also *informal* means to protest a procurement at the agency. Federal contractors may find themselves falling into the trap of an unintended agency-level protest when they engage in certain email communications with agency personnel.

You may be asking yourself, why does this matter? The answer is that such informal protests have potentially significant consequences such as inadvertently activating the timeliness clock for a Government Accountability Office (“GAO”) protest.

GAO’s Bid Protest Regulations contain strict rules for the timely submission of protests. Where an offeror has filed an agency-level challenge to a procurement, any subsequent protest on the same issue must be filed at the GAO within ten (10) days of actual or constructive knowledge of an agency’s initial adverse action.^[1] Knowing *if* and *when* an agency-level protest has been filed is thus critical to ensure any subsequent protests with the GAO are timely filed.

What is, and what is not, considered an agency-level protest?

Whether a communication will be considered an agency-level protest is a fact-specific determination that can hinge upon several distinct factors. As discussed below, the GAO has employed a flexible version of FAR 33.103(d) to assess whether an agency-level protest was filed.

GAO considers an agency-level protest to be (1) a written statement to an agency; that (2) expresses

dissatisfaction with the agency's actions; and (3) requests relief.[2] In fact, the communication need not expressly state that it is (or intends to be) a protest. The GAO will consider such a communication to constitute a protest where it conveys an expression of dissatisfaction and requests corrective action.[3] Even where a contractor asserts that it does not intend for its communications to be a protest, the GAO has held that a protester's subjective intent is not determinative as to whether a written request constitutes a protest.[4]

Absent either the contractor's stated dissatisfaction or request for corrective action, GAO will not consider the writing to be an agency-level protest. For example, a written submission which merely states a suggestion, hope, or expectation, and does not include a specific request for relief, does not constitute a protest.[5] Moreover, a request for corrective action without a corresponding expression of dissatisfaction similarly does not constitute a protest.[6]

Whether or not the agency responds to the written communication, the federal contractor has ten (10) calendar days from when it had actual or constructive knowledge of the agency's initial adverse response to the protest to then file a subsequent protest at the GAO.[7]

What constitutes an adverse agency action?

Adverse agency action can include either agency action *or inaction* that is prejudicial to the offeror's position taken in its protest.[8] While a response from the agency that expressly denies the protester's position would more clearly indicate adverse agency action[9], it is important for federal contractors to be aware that any *inaction* that is unfavorable to the contractor's position could also be considered adverse agency action for purposes of timeliness at the GAO.

Adverse agency action need not be a formal denial of the agency-level protest. Rather GAO has recognized a broad range of responses to constitute adverse agency action. For example, adverse agency action may include agency email communications that generally decline to provide the relief requested by the protester[10], or oral communications from the agency that are adverse to the protester's position.[11]

The GAO has also construed inaction broadly. GAO has found that an agency letter that notified offerors of the agency's intent to proceed in awarding a contract placed a protester on notice that the agency would not undertake the requested corrective action.[12] In another case, GAO determined adverse agency action included the agency's continued receipt of proposals, despite the pendency of a protest.[13]

Whether an agency expressly denies the protester's challenge, or merely takes a position that is adverse to the protester, the protester then has ten (10) calendar days to file at the GAO for purposes of timeliness. Protests filed after this ten (10) day period will be considered untimely and dismissed by GAO.

Conclusion

In short, Federal contractors should exercise caution when engaging in agency email communications that express dissatisfaction with a procurement, to avoid unintentionally filing an agency-level protest. Accordingly, it is important to be familiar with GAO's timeliness rules and to be able to discern *if* and *when* an agency-level protest has been filed and to ensure any subsequent protests brought to the GAO concerning the same issues are timely filed.

FOOTNOTES

[1] 4 C.F.R. § 21.2(a)(3).

[2] See *Science and Tech. Corp.*, B-420216, Jan. 3, 2022, 2022 CPD ¶ 1 at 3.

[3] See *Silver Investments, Inc.*, B-419028, Oct. 26, 2020, 2020 CPD ¶ 332 at 4; *Mackay Commc'ns—Recon.*, B-238926, B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426 at 1.

[4] See *Coulson Aviation (USA), Inc.*, B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 5.

[5] See, e.g., *Byrd Enters. Unlimited, Inc.*, B-421462, May 9, 2023, 2023 CPD ¶ 113 at 3-4; *Masai Techs. Corp.*, B-400106, May 27, 2008, 2008 CPD ¶ 100 at 3.

[6] See, e.g., *Fed. Marketing Office – Recon.*, B-249097, B-249097.3, Jan. 5, 1993, 93-1 CPD ¶ 4 at 2-3.

[7] 4 C.F.R. § 21.2(a)(3).

[8] 4 C.F.R. § 21.0(e).

[9] See, e.g., *Export 220Volt, Inc.*, B-422216, Feb. 27, 2024, 2024 CPD ¶ 59 at n. 2 (denying protester's email protest alleging that awardee's quotation could not have been compliant with the RFQ's specifications)

[10] See, e.g., *Rotair Aerospace Corp.*, B-421381, B-421381.2, Apr. 19, 2023, 2023 CPD ¶ 99 at 8; *VSolvit, LLC*, B-421048, B-421048.2, Dec. 6, 2022, 2022 CPD ¶ 310 at 5-6).

[11] See e.g., *W.D. McCullough Constr. Co. and M&A Equipment and Constrs, Inc.*, B-23460, B-23460.2, Mar. 5, 1990, 90-1 CPD ¶ 252 at 1-3.

[12] See *Impact Resources, Inc.*, B-416093, June 11, 2018, 2018 CPD ¶ 207 at 4-5.

[13] See *Scopus Optical Indus.*, B-238541, Feb. 23, 1990, 90-1 CPD ¶ 221 at 1.

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