

Contract Formation

Activity 28: Protests

Procedures for responding to a written objection by an interested part to a solicitation or contract award decision.

Related Flow Charts: [Flow Chart 28](#)

Part A: Protests of Set-Aside or Small Business Preference Eligibility

Tasks	FAR Reference(s)	Additional Information
1. Prepare a protest if questioning an offeror's small business representation.	<p>FAR 19.302 (b) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>Normally, an offeror, the SBA, or another interested party may protest an offeror's small business status</p> <p>Send to the SBA Government Contracting Area Office for the geographical area where the principal office of the concern is located. The protest should be in writing and contain the specific, detailed evidence to support the allegation that the offeror is not small business.</p>

Tasks	FAR Reference(s)	Additional Information
<p>1a. Promptly forward the protest to the SBA Government Contracting Area Office for the geographical area where the principal office of the concern in question is located.</p>	<p>FAR 19.302 (c)(1) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	

Tasks	FAR Reference(s)	Additional Information
<p>2. Forward to the SBA a protest of an offeror's small business status from an interested party unless the protest is premature.</p>	<p>FAR 19.302 Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>Normally, an offeror, the SBA, or another interested party may protest an offeror's small business status. However, the interested party differs depending on socioeconomic status. Refer to the applicable FAR and FAR supplement for further details.</p> <p>A protest is considered premature if it is submitted prior to bid opening (sealed bidding) or prior to preaward notice (negotiated acquisition procedures).</p> <p>If the protest is not premature, forward it to the appropriate SBA Office.</p> <p>In order to affect a specific solicitation, a protest must be timely.</p> <ul style="list-style-type: none"> • To be timely, a protest by any concern or other interested party must be received by the contracting officer by the close of business of the 5th business day after bid opening (in sealed bid acquisitions) or receipt of the special notification from the contracting officer that identifies the apparently successful offeror (in negotiated acquisitions). • A contracting officer's protest is always considered timely whether filed before or after award. <p>The protest must also be in writing. A protest may be orally if it is confirmed in writing either within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.</p> <p>If the protest involves the status of an offeror not being considered for award, include a notation to that effect and notify the protester of this action.</p> <p>A protest that is not timely, even though received before award, must be forwarded to the SBA Government Contracting Area Office with a notation on it that the protest is not timely.</p>

Tasks	FAR Reference(s)	Additional Information
<p>3. Determine whether to withhold award pending the outcome of the protest.</p>	<p>FAR 19.302(h) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>After receiving a protest involving an offeror being considered for award:</p> <p>Unless the contracting officer determines in writing that an award must be made to protect the public interest, never award the contract until:</p> <ul style="list-style-type: none"> • The SBA has made a determination on the protest; or • The required number of business days for the type of protest has expired since SBA's receipt of a protest, whichever occurs first. <p>After the required number of business days has expired, the contracting officer may, when practical, continue to withhold award until the SBA's determination is received, unless further delay would be disadvantageous to the Government.</p>
<p>4. If the award is made before receipt of SBA's size determination, notify SBA that award has been made.</p>	<p>FAR 19.302(h)(3) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>Whenever an award is made before the receipt of SBA's size determination, the contracting officer must notify SBA that the award has been made. There is no requirement for the contracting officer to suspend the award.</p>

Tasks	FAR Reference(s)	Additional Information
5. Forward to the SBA Office of Hearings and Appeals any appeal of an SBA determination.	<p>FAR 19.302(i) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305(i) Reviews and Protests of SDB Status.</p> <p>FAR 19.305(j) Reviews and Protests of SDB Status.</p> <p>FAR 19.306(i); Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.306(j) Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307(i) Protesting a Firm's Status as a Service-disabled Veteran-owned Small Business Concern.</p> <p>FAR 19.308(h) Protesting a Firm's Status as an Economically Disadvantaged Women-owned Small Business Concern or Women-owned Small Business Concern Eligible Under the WOSB Program.</p>	<p>An appeal from an SBA small business status determination may be filed within the prescribed number of days for the type of protest involved. The appeal must be filed by an individual or concern permitted to appeal the SBA determination.</p>

Tasks	FAR Reference(s)	Additional Information
6. Implement SBA determinations.	<p>FAR 19.302(g) & (h) Protesting a small business representation or rerepresentation.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>If award has not been made, make award considering the final SBA determination on a timely protest to the current acquisition.</p> <p>If award has been made or the protest was not timely, normally no action on the current acquisition is appropriate.</p> <p>However, the contractor may agree to terminate an award based on disadvantaged business status after receiving the outcome of an appeal.</p>
7. Support SBA or agency action against any business entity that knowingly misrepresented its small business status.	<p>19.301-1(d) Representations and rerepresentations.</p> <p>FAR 19.305 Protesting a representation of disadvantaged business status.</p> <p>FAR 19.306 Protesting a firm's status as a HUBZone small business concern.</p> <p>FAR 19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.</p> <p>FAR 19.308 Protesting a firm's status as an economically disadvantaged women-owned small business or women-owned small business concern.</p>	<p>Provide any support for SBA or agency action against any business concern that knowingly misrepresented its small business status.</p> <p>The SBA may take action as specified in Section 16(a) or 16(d) of the Small Business Act</p> <p>If the SBA declines to take action, the agency may initiate the process.</p>

Part B: Agency Protests

Tasks	FAR Reference(s)	Additional Information
<p>1. Respond to complaint or concern about the acquisition.</p>	<p>FAR 33.103(b) Protests to the agency.</p>	<p>Ask questions to clarify the complaint or concern.</p> <p>Attempt to resolve the complaint with open and frank discussions.</p> <p>Where necessary, collect additional relevant information to improve chances of resolving the complaint or concern.</p> <p>Advise the person expressing the complaint or concern about:</p> <ul style="list-style-type: none"> • Available methods for resolving a complaint; and • The requirements for a written agency protest. <p>Document the complaint.</p>
<p>2. Attempt to resolve complaints or concerns using established agency or contracting activity alternatives to the protest process.</p>	<p>FAR 33.103(b) & (c) Protests to the agency.</p>	<p>Use alternatives to the protest process that are inexpensive, informal, simple and expeditious.</p> <p>Available alternatives may include use of ombudsman, dispute resolution techniques, third party neutrals or another agency's personnel.</p>
<p>3. Determine whether to override CICA stay.</p>	<p>FAR 33.103(f)(1) Protests to the agency.</p>	<p>Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless:</p> <ul style="list-style-type: none"> • The contract award is justified, in writing, for urgent and compelling reasons or • The contract award is determined, in writing, to be in the best interest of the Government.
<p>4. If contract award is justified to continue, seek approval.</p>	<p>FAR 33.103(f)(1) Protests to the agency.</p>	<p>Such justification or determination must be approved at a level above the contracting officer, or by another official pursuant to agency procedures.</p>

Tasks	FAR Reference(s)	Additional Information
5. If award is withheld, inform the offerors whose offers might become eligible for award of the contract.	FAR 33.103(f)(2) Protests to the agency.	If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to FAR 33.103 (f)(1).
6. Determine whether to override CICA stay.	FAR 33.103(f)(3) Protests to the agency.	<p>Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with FAR 15.505 or FAR 15.506, whichever is later, the contracting officer must immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for:</p> <ul style="list-style-type: none"> • Urgent and compelling reasons or • To be in the best interest of the Government.
7. If contract award is justified to continue, seek approval.	FAR 33.103(f)(3) Protests to the agency.	Such justification or determination must be approved at a level above the contracting officer, or by another official pursuant to agency procedures.
8. Determine whether to deny or uphold the protest.	FAR 33.102 General, Protests. FAR 33.103 Protests to the agency.	<p>The contracting officer should determine whether to deny or uphold the protest after considering:</p> <ul style="list-style-type: none"> • The applicable FAR requirements; • The most relevant Comptroller General decisions/cases; • Additional information obtained from the protester and other sources; and <p>Legal advice.</p>

Tasks	FAR Reference(s)	Additional Information
9. Select the proper course of action.	FAR 33.102 General, Protests.	<p>Normally, the alternatives include:</p> <ul style="list-style-type: none"> • Preaward: and • Post-award. <p>See Activity 16 for rules on amending or cancelling IFBs. See Activity 18 for rules on amending or cancelling solicitations for RFPs.</p>
10. Issue the protest decision.	FAR 33.103(h) Protests to the agency.	<p>An agency protest should be resolved within 35 days after the protest is filed.</p> <p>Provide the protest decision to the protester using a method that provides evidence of receipt (e.g., certified mail).</p>
11. Support agency response to any authorized agency appeal.	FAR 33.103(d)(4) Protests to the agency.	<p>Agency procedures and/or solicitations may provide for an appeal of the protest decision to an independent official.</p> <p>Provide the support needed for this independent review in accordance with agency and contracting activity guidelines.</p>

Part C: Protests to GAO

Tasks	FAR Reference(s)	Additional Information
1. Provide notice of protest.	<p>FAR 33.104(a) Protests to GAO.</p> <p>4 C.F.R 21.3(a) Notice of protest, submission of agency report, and time for filing of comments on report.</p>	<p>Immediately after receipt of the GAO's written notice that a protest has been filed:</p> <ul style="list-style-type: none"> • Give notice of the protest: <ul style="list-style-type: none"> ○ To the contractor if the award has been made; or ○ If no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. • If the protest identifies sensitive, obtain a redacted version from the protester. • Furnish copies of the protest submissions to parties identified above with instructions.

Tasks	FAR Reference(s)	Additional Information
<p>2. Determine whether or not to continue with contract award or contract performance.</p>	<p>FAR 33.104(b) & (c) Protests to GAO.</p>	<p>Protests before award:</p> <ul style="list-style-type: none"> • When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that: <ul style="list-style-type: none"> ○ Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and ○ Award is likely to occur within 30 days of the written finding. • A contract award shall not be authorized until the agency has notified the GAO of the finding. <p>Protests after award:</p> <ul style="list-style-type: none"> • When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by FAR 15.505 or FAR 15.506, whichever is later, the contracting officer will immediately suspend performance or terminate the awarded contract, except if an override is sought. • In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that: <ul style="list-style-type: none"> ○ Contract performance will be in the best interests of the United States; or ○ Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision. • Contract performance shall not be authorized until the agency has notified the GAO of the finding.

Tasks	FAR Reference(s)	Additional Information
		<ul style="list-style-type: none"> • When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis. • When the agency receives notice of a protest filed with the GAO after the dates contained in this section, the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.
<p>3. Respond to any protester request for documents.</p>	<p>4 C.F.R. 21.3(c) Submission of agency report.</p>	<p>At least 5 days prior to the filing of the agency report to the GAO, the agency must provide to all parties and the GAO a list of those documents:</p> <ul style="list-style-type: none"> • Portions of documents that the agency intends to produce in its report, and • That the agency intends to withhold from the protester and the reasons for the proposed withholding. <p>Any objection to the scope of the agency's proposed disclosure must be filed with the GAO and the other parties within 2 days after receipt of this list.</p>
<p>4. Consider whether to take corrective action.</p>	<p>FAR 33.102 General, Protests.</p>	<p>Prior to the GAO resolving a protest, an agency may, on its own initiative, take corrective action. As long as the agency acts in good faith, the GAO will find that the agency's corrective action appropriate.</p>

Tasks	FAR Reference(s)	Additional Information
5. Prepare agency report.	4 C.F.R. 21.3 Submission of agency report. FAR 33.104 (a)(3) Protests to GAO.	The report must include the contracting officer's statement of relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: <ul style="list-style-type: none"> • The protest; • The bid or proposal submitted by the protester; • The bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; • All evaluation documents; • The solicitation, including the specifications; • The abstract of bids or offers; And any other relevant documents.
6. Distribute the agency report on the protest.	4 C.F.R. 21.3 Submission of agency report. FAR 33.104 (a)(3) Protests to GAO.	Furnish copies of the report to the protester and any intervenors. Each party must receive all relevant documents, except classified, covered by a protective order issued by the GAO, or competitive information.
7. Respond to any request for additional documents.	4 C.F.R. 21.3(g) Submission of agency report.	If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents. Notify the GAO of any documents withheld from the protester and other interested parties and the reasons for withholding them.
8. Participate in any hearing scheduled by GAO.	FAR 33.104(e) Hearings. 4 C.F.R. 21.7(a) Hearings.	<ul style="list-style-type: none"> • The GAO may hold a hearing at the request of the agency, a protester, or other interested party. Participate as necessary to support the agency position.
9. Submit written comments on any hearing held by the GAO.	FAR 33.104(e) Hearings. 4 C.F.R. 21.7 Hearings.	A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. <ul style="list-style-type: none"> • Submit relevant written comments on the hearing and the agency report within 5 days of the hearing.

Tasks	FAR Reference(s)	Additional Information
10. File a request for reconsideration, if applicable.	4 C.F.R. Request for reconsideration.	<p>The protester, any intervenor, and any Federal agency involved in the protest may request reconsideration of a bid protest decision. GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.</p> <p>A request for reconsideration of a bid protest decision shall be filed, with copies to the parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.</p> <ul style="list-style-type: none"> GAO will summarily dismiss any request for reconsideration that fails to state a valid basis for reconsideration or is untimely. To obtain reconsideration, the requesting party must show that our prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of our decision; GAO will not consider a request for reconsideration based on repetition of arguments previously raised.
11. Report any failure to implement a GAO recommendation.	FAR 33.104(g) Notice to GAO.	<p>The head of the contracting activity must:</p> <ul style="list-style-type: none"> Implement the GAO recommendation within 60 days of receiving the recommendation; or Report any failure to implement the GAO recommendation within 65 of receiving the recommendation. <p>The report must explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.</p>
12. If an award was suspended or terminated as a result of a protest, negotiate any necessary equitable adjustment or settlement.	FAR 33.104(c)(4) Protests after award.	If an award was suspended or terminated as a result of a protest, attempt to negotiate a mutual agreement on a no-cost basis.

Tasks	FAR Reference(s)	Additional Information
13. Negotiate protest costs.	FAR 33.104(h) Award of costs.	The GAO may recommend that the agency pay to an appropriate protester the cost exclusive of profit, of filing and pursuing the protest. For a list of the applicable cost refer to the applicable FAR section.
14. Demand reimbursement from the awardee of protest costs to the extent those costs resulted from the awardee's intentional or negligent misstatement, misrepresentation, or miscertification.	FAR 33.102 General, Protests.	If the Government pays protest costs because of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of those costs.

Part D: Protests to the Court of Federal Claims

Tasks	FAR Reference(s)	Additional Information
1. Prepare an affidavit and memorandum of facts upon request from the legal counsel representing the Government in a court action.	RCFC App C Procedure in Procurement Protest Cases, Provision 21.	The court action may seek a temporary restraining order or a preliminary and/or final injunction. The affidavit and memorandum of facts is generally equivalent to the agency report for a GAO protest.
2. Respond to discovery motions for written records.	RCFC Title V Disclosures and Discovery.	Provide the documents requested or justify why they cannot be provided, such as: <ul style="list-style-type: none"> Classified information; or Information restricted from release by public law or regulation.
3. Give deposition, if ordered by the court,	RCFC 30 Depositions by Oral Examination. RCFC 31 Depositions by Written Questions.	Under oath, respond to examination from the plaintiff's attorney.
4. Provide testimony under oath, as direct by the judge.	RCFC 43 Taking Testimony.	Under oath, respond to examination from the plaintiff's attorney, Government legal counsel, or the judge.

Tasks	FAR Reference(s)	Additional Information
5. Act on the court's decision.	RCFC Title VII, Judgment.	Implement the court's decision in a timely manner, unless the Government appeals the decision. If the Government appeals, take action as directed by the Government legal counsel.