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Chapter 7 Protests, Claims, Disputes, and Appeals



Protests, Claims, Disputes, and Appeals

Key Points

- Upon receipt of a protest, the contingency contracting officer (CCO) needs to act quickly and contact supporting legal counsel.
- To avoid distracting, time-consuming litigation, strive to resolve contract performance issues by mutual agreement with the contractor to avoid disputes and litigation.

Introduction

Good lines of communication between the contingency contracting office and the supporting legal office are critical to successfully deal with a bid protest or appeal. As part of deployment preparations, the CCO must identify and know how to work with supporting legal counsel. Additionally, protests can sometimes be averted by frank and open communication with the vendor. Vendors may recognize significant errors in solicitations and evaluations overlooked by the CCO due to the pace of the operation. Encourage vendors to attempt to resolve their concerns with the CCO, then pursue an agency protest if not resolved by the CCO, and then file with the Government Accountability Office (GAO) as a last resort. Although the vendor has complete freedom to protest in any forum, and the CCO is never an advocate of the vendor, the interests of the government can often be best protected when vendor concerns are resolved quickly and at the lowest level.

This chapter discusses actions a contracting officer should take when notified of a possible protest, claim, dispute, or appeal.

Protests



Protests. (*Federal Acquisition Regulation [FAR] Part 33*) Protest means a written objection by an interested party to any of the following:

- A solicitation or other request by an agency for offers of a contract for the procurement of property or services.
- The cancellation of the solicitation or other request.
- An award or proposed award of the contract.
- 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.
- Delivery and task orders under multiple award contracts in excess of \$10M. (*FAR 16.505 (a)(9)(B)*)

Protests to the Agency

Executive Order 12979, *Agency Procurement Protests*, establishes policy on agency procurement protests. Prior to submission of an agency protest, all parties should use their best efforts to resolve concerns raised by an interested party at the contingency contracting officer (CCO) level through open and frank discussions. The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Acceptable protest resolution methods include the use of alternative dispute resolution techniques, third party neutrals, and other agency's personnel.

Protests to the agency shall include the following: (FAR 33.103(d)(2))

- Name, address, fax, and telephone numbers of the protester
- Solicitation or contract number

- Detailed statement of legal and factual grounds for the protest, to include a description of resulting prejudice to the protester
- Copies of relevant documents
- Request for a ruling by agency
- Statement as to the form of relief requested
- All information establishing protester as an interested party
- All information establishing the timeliness of the protest

Failure to substantially comply with the above may be grounds for dismissal of the protest.

Agency procedures or solicitations shall notify potential bidders and offerors whether independent review is available as an alternative to consideration by the CCO of a protest, or is available as an appeal of a CCO decision on a protest. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action. (*4 Code of Federal Regulations [CFR] 21.2(a)(3)*) If a party wishes to have their case classified as an *express option*, (*4 CFR 21.10(a)*) the party must submit a written request no later than 5 days after the initial or supplemental amended protest is filed. GAO will notify both parties of its decision. In some cases, GAO will decide the express option is appropriate even though no party formally requested it.

Action Upon Receipt of Protest. If a protest is received prior to the award of a contract, the contract may not be awarded until the protest has been resolved. Unless urgent and compelling reasons exist for contract award, justification should be submitted in writing and determined to be in the best interest of the government. Such justification or determination shall be approved at a level above the CCO, or by another official pursuant to agency procedures.

If an award is withheld pending agency resolution of the protest, the CCO will inform those individuals whose offers may become eligible for the award of the contract. If appropriate, the offerors should be requested to extend the time for acceptance to avoid the need for resolicitation.

Upon receipt of a protest, the CCO shall immediately suspend performance, pending resolution of the protest within the agency. This includes any review by an independent, high-level official, unless continued performance is justified. See FAR 15.505 and 15.506 for more information on receipt of protests.

Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

Protests at the GAO

Receipt of a Protest. This guidance focuses on protests before the GAO, where the vast majority of protests are filed. Upon receipt of a protest, the CCO should immediately contact supporting legal counsel. GAO protests are fast moving actions, with a government report due to the GAO within 30 days (within 20 days under the express option) and a GAO decision issued within 100 days (within 65 days under the express option).

Reachback. Reachback is a highly effective tool during a protest. A CCO's legal counsel for working bid protests may be a remote reachback asset. If the CCO has local legal counsel available, then the chances are that local counsel will be working with a reachback legal office. Reachback offices frequently work bid protests and can rapidly understand protest issues.

Protests Before Award. (FAR 33.104(b)) 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 (HCA), on a nondelegable basis, upon a written finding that:

- Urgent and compelling circumstances that significantly affect the interest of the United States (US) will not permit awaiting the decision of the GAO
- 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 as discussed at FAR 33.104(b)(1). When a protest against the making of an award is received and the award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest.

Protest After Award. (FAR 33.104(c)(1)) 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 shall immediately suspend performance or terminate the awarded contract. 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:

- Contract performance will be in the best interests of the US.
- Urgent and compelling circumstances that significantly affect the interests of the US will not permit waiting for the GAO's decision.

Contract performance (or continued performance) shall not be authorized until the agency has notified the GAO of the aforementioned finding. 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 subparagraph *FAR 33.104(c)(1)*, 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.

Responding to a Protest—the First 24 Hours. The actions the CCO should accomplish within 24 hours of receipt of a written protest include:

- Transmit a copy of the protest document to the supporting legal office. Because the protest document may contain proprietary or source selection sensitive information, do not release any copies of the protest to other parties (for example, awardee or offerors) until you discuss the release with the assigned attorney.
- Confirm the identity of the attorney assigned to work the protest and obtain contact information (e-mail address and telephone numbers). Ensure the attorney has CCO contact information.
- Discuss the allegations with the attorney and the impact on mission operations if a delay of award or performance is triggered by a protest.
 - If a delay is triggered, the award cannot be made (pre-award protests) and contract performance may not begin (post-award protests).
 - Following coordination with the assigned attorney, inform offerors and awardee that a protest has been filed and that contract award or contract performance has been stayed.
 - Ensure the assigned attorney informs GAO of the status of the delay.
- Discuss with the attorney if the HCA authorizes contract performance. (*FAR 33.104*)
- Identify the key persons who are knowledgeable about the allegations of the protest, and obtain their contact information to

pass on to the attorney. These persons may be technicians, evaluators, or personnel within the requiring activity. Inform these key persons of the protest and ensure their availability for the next 100 days (protest time frame) to support the government's response to the protest. Determine whether declarations, affidavits, or other statements of fact from key persons will be necessary.

Responding to a Protest—the First 30 Days. The first 30 days of any GAO protest are very important. The government must submit its agency report to the GAO and the protester within 30 days. This period provides the CCO and legal counsel an opportunity to assess the merits of the case and develop an appropriate response. Items to consider or accomplish are as follows:

- Chances are that the CCO and the contingency contracting office have extremely limited administrative support and equipment. GAO protests are typically document intensive, requiring considerable copying and collating. Given these circumstances, the CCO and supporting legal counsel should determine how to best assemble the agency report.
- The CCO should immediately coordinate with and begin transmitting key contract documents to supporting legal counsel. This enables government counsel to understand the facts and issues, and to assess the merits of the protest early in the process. It also allows the legal office to begin assembling the agency report to the GAO.
- Agency Report. The documents required in an agency report to the GAO include:
 - CCO's statement of relevant facts.
 - The bid or proposal submitted by protester.
 - The bid or proposal of the awardee.
 - The solicitation.

- All evaluation documents.
- Other relevant documents (for example, debriefing slides and related documents).
- Given the concentrated timeline involved, it is good practice to maintain daily communication between the attorney and the CCO regarding the status of the protest.

Corrective Action. Day 30 (Day 20 under the express option) of a GAO protest is a significant milestone as the government must file its agency report with the GAO by this deadline. Additionally, the GAO has held that the government is not liable for a protestor's legal fees and costs if the government takes corrective action in response to a protest within the first 30 days (20 days under the express option). Consequently, the timely review and assessment of the merits of a protest not only aid in getting the acquisition back on track toward award, but are key to avoiding the payment of what may be significant legal expenses.

After Day 30 (Day 20 under the express option). A protester has 10 days to file a written response to the government's agency report, usually in the form of a legal brief. GAO will issue its decision by day 100 (day 65 under the express option). Occasionally, to clarify the record or the issues involved, the GAO requests a hearing and requires testimony by government officials.

Contract Claims



There are a number of aspects of contingency contracting that produce an environment ripe for contract claims. There is little a CCO can do to eliminate the likelihood of claims. The key is to focus on actions that will ease the resolution of the claim. These actions include monitoring the contractor's performance (so there is a clear record of exactly what the

contractor did) and performing market research on an ongoing basis (to keep an eye on fair and reasonable price data).

As appropriate, the CCO should strive to resolve contract performance issues by mutual agreement with the contractor, thereby avoiding distracting and frequently time-consuming litigation. When a claim or a potential claim occurs, contact your supporting legal counsel for assistance and advice. If an agreement cannot be reached with a contractor, the CCO must issue a final decision to a contractor's claim. During a contingency, the CCO must strike a balance between expeditious settlement of contract claims and protecting the government's interests.

Contractor Claims. Because of the high operations tempo usually associated with contingency contracting, responding to contractor claims and disputes can divert precious time away from the mission at hand. You should consider or accomplish the following:

- The CCO should recognize that not every contractor request for costs or other relief is a *claim*. A contractor request for equitable adjustment may be just that—a straightforward request that is related to changed or increased contract requirements. If so, the CCO may be able to dispose of such requests relatively quickly. Unlike requests for adjustments, submission of a contract claim begins accrual of interest on the claim.
- A working understanding of the flexibility that exists under the FAR and the Defense Federal Acquisition Regulation Supplement, an understanding of what is and is not a *contract claim*, assigning and maintaining communications with a trained contracting officer's representative (COR), ensuring good contract file documentation exists, and applying alternative dispute resolution techniques are some ways to mitigate the administrative burden that contractor claims can place on the CCO and the overall contingency contracting mission. To help alleviate this burden, the CCO should seek early and frequent counsel from the supporting legal office.

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- Upon receipt of a claim exceeding \$100K, the CCO should ensure that the claim is certified by the contractor, consistent with FAR 33.207.
- Report any suspected fraudulent claim or other misrepresentation of fact to the supporting legal office and the chief of the contracting office.

The CCO's Final Decision. The CCO's final decision should be as follows.

- The CCO should utilize the specialized skills of the functional representatives (for example, COR) when addressing the facts and issues in dispute.
- Final decisions for claims equaling \$100K or less must be issued within 60 days after receipt of the claims.
- For claims exceeding \$100K, within 60 days after receipt of a certified claim, the CCO must either issue a final decision or notify the contractor when a final decision will be issued.
- Final decisions will be prepared in accordance with FAR 33.211. Final decisions must include notification to the contractor pursuant to the disputes clause contained in the contract.
- The CCO's final decision to deny a contractor's claim (either in part or in total) may result in a dispute by the contractor under the applicable contract disputes clause.

Seizures

Commanders may, under the principle of military necessity, and subject to restrictions, seize private property during hostilities. Seizing private or public property for mere convenience is unlawful. As a result of a seizure of civilian property, commanders may not leave civilians without

adequate food, clothing, shelter, or medical supplies. Legal assistance must be obtained prior to the seizure of any property.

Property Control Record Book (PCRB). This book, which may be issued to any level, confers no authority—it merely facilitates the ability to document seizures under the law of war.

PCRB Procedures. PCRB procedures are outlined below.

- Each PCRB should be numbered and contain a minimum of ten sets of four serial numbered copies of the property control record form.
- The cover of the book should contain a statement detailing where the book may be used.
- The inside cover of the PCRB should contain instructions to the commander on the use of the forms to include the appropriate distribution of the four property control and receipt records.
- The serial numbered property control record should require the soldier seizing the property to enter pertinent information concerning the seized property and should contain a receipt, both in English and the local language, to be signed by the property owner, if available.
- The inside of the back cover should contain a seizure record.
- The staff judge advocate (SJA) office should be responsible for the issuance of the books to the commanders. Hand receipts can be used to issue PCRBs to the units. It should be emphasized that the SJA is only issuing the books and that accountability for the books and seized property is a command responsibility.

Payment for Seizures. There are several procedures available to provide compensation for seized property. They are as follows:

- **Ratification.** This is the act of approving an unauthorized commitment by an official who has the authority to do so. More information on ratifications can be found in Chapter 5.

- Retroactive leases. The Corps of Engineers may negotiate retroactive leases in accordance with in accordance with (IAW) Army Regulation 40515.
- *Public Law 85-804*, as amended by *Public Law 93-155 (50 United States Codes [USC] §1431-1435)*, as amended, and Executive Order 10789 dated November 14, 1958, as amended. Defense agencies may enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying, whenever the secretary concerned considers that such action would facilitate the national defense.
- Claims adjudication IAW applicable Service regulations.

Whatever process is used to settle claims will be influenced by the local conditions. However, contracting responsibility is generally limited to ratification actions and extraordinary contractual relief under Public Law 85-804.

Contract Disputes and Appeals



The rules for handling contract disputes and appeals are the same in a contingency contracting environment as they are for routine contract actions occurring at home base. Under the *Contract Disputes Act*, CCOs receive no special treatment or waiver of applicable rules simply because a contingency contract action is at issue. As with bid protests, the CCO's legal support will likely be provided via a reachback attorney. Experience shows that early involvement by legal counsel can help avoid an appeal altogether. That said, if an appeal is received, legal counsel should be extremely effective in assessing and orchestrating any government response to a contractor's appeal. The underlying record of evidence related to any contract dispute is critical to crafting the government's response. Through the application of a few simple practices, the CCO can

greatly enhance the underlying contract record, and the government's position, in a contract appeal. Have contractors send appeals to the following address:

Civilian Board of Contract Appeals
1800 F Street, NW
Washington, DC 20405

For more information go to: <http://www.cbca.gsa.gov/>

A Few Best Practice Tips. Generally speaking, contract disputes involve issues that develop over time and entail a series of actions by both the contractor and government personnel. In a contingency contracting environment, assembling a solid contract record presents unique challenges. To mitigate these challenges, the CCO should employ a few simple practices within the contingency contracting office.

- **Digital and Video Camera—A Picture is Worth a Thousand Words.** Case law and experience demonstrate that evidence obtained concurrently with contract performance or a disputed event is generally given greater weight than evidence that is cobbled together after contract litigation has commenced. The CCO should ensure that inspectors, quality assurance personnel, CORs, and other representatives make it a standard practice to use digital cameras. This is of particular value for vehicle leases in the area of responsibility (AOR). Pictures and videos should immediately be e-mailed to the CCO for review and be included as part of the contract file. Such pictures are particularly useful for assessing, if not enhancing, the strength of the government's case.
- **Account for Personnel Turnover.** The turnover of government personnel involved in contingency contracting actions is a significant impediment to developing the government's case in an appeal. The CCO should work with J1 to ensure that key witnesses, past and present, can be located. The CCO must employ a personnel

locator process that permits the CCO and his successors to identify and locate witnesses—to include personnel who redeploy away from the contingency. At a minimum, the CCO should inform key individuals of the appeal, their role in the appeal, and ensure that the government can locate them if necessary.

- **Contract Files and Related Documentation.** The key to success in prosecuting any contract dispute is the availability of contract documents. Without the necessary documents, a case is seriously weakened. Hence, the CCO should establish an administrative process for obtaining and filing documentation underlying a contract action.
- Consider developing an electronic contract file where documents, digital pictures, charts, and other records can be readily stored and retrieved. **Note:** CCOs should make an electronic copy of all e-mails pertaining to claims and include them with the contract file prior to leaving the AOR. This documentation may be needed later to assist with claims.
- As appropriate, use your reachback legal office to assemble the underlying record for any contract appeal (referred to as the Rule 4 file [Title 28a USC, Rule 4]). This is where the CCO's practice of establishing an electronic contract file pays dividends.

Contract Settlements and Alternative Dispute Resolution



If a dispute cannot be resolved between the parties, then a protracted litigation process often results. To avoid distracting, time-consuming litigation, the CCO may consider negotiating a settlement with the contractor or using more formal alternative dispute resolution (ADR) procedures. In either event, the CCO should seek the assistance and

support of legal counsel. As stated previously, CCOs should regard legal counsel as useful problem solvers who can assist in negotiating settlements or pursuing ADR measures, thereby expediting the resolution of contractor disputes. Finally, a timely agreement developed by the parties, rather than a decision resulting from litigation, may be more valuable in maintaining a continuing business relationship with the contractor during a contingency.

ADR Elements. The essential elements of ADR are as follows: (1) the existence of an issue in controversy, (2) a voluntary election by both parties to participate in the ADR process, (3) an agreement on an alternative procedure and terms, and (4) participation in the process by officials of both parties who have the desire and authority to settle. If ADR is used, a few tips to consider prior to commencing are as follows:

- Know your facts.
- Avoid using words and body language that anger.
- Be professional and observe local customs at all times.
- Develop an appreciation for the other side's view.
- Diffuse anger at first sight.
- If using a mediator or facilitator, talk to the other side, not the mediator. The mediator is there to assist, not to judge.
- Use simple, clear, and concise language. Most people want to settle.

Claims Under ADR. If a claim has been submitted, ADR procedures may be applied to all or only a portion of the claim. If ADR is used subsequent to a CCO's final decision, its use does not alter any of the time or procedural requirements for filing an appeal nor does it constitute reconsideration by the CCO of the final decision.

Continued Performance. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim

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arising under or relating to the contract, the contracting officer shall use the disputes clause (FAR 52.233-1) with its Alternate I.

Reminder. In preparing contracts and solicitations, remember to insert the disputes clause at FAR 52.233-1 unless the conditions in FAR 33.203(b) apply, and to insert the applicable law for the *Breach of Contract Claim* clause at FAR 52.233-4.

Chapter Acronyms

ADR – Alternative Dispute Resolution

AOR – Area of Responsibility

CCO – Contingency Contracting Officer

CFR – Code of Federal Regulations

COR – Contracting Officer's Representative

FAR – Federal Acquisition Regulation

GAO – Government Accountability Office

HCA – Head of Contracting Activity

IAW – In Accordance With

PCRB – Property Control Record Book

SJA – Staff Judge Advocate

US – United States

USC – United States Code

Chapter 7 Notes
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