

A Refresher For Gov't Contractors On Bid Protest Intervention

By **Aron Beezley**

As a result of increased government spending at the end of the government's fiscal year — the 12-month period beginning on Oct. 1 and ending on Sept. 30 — the number of bid protest filings peaks in October. Accordingly, government contractors should be particularly mindful this time of year of their rights with respect to intervening in bid protests both at the U.S. Government Accountability Office and the U.S. Court of Federal Claims.



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In this regard, this article provides a user-friendly refresher for government contractors on the process for intervening in bid protests and provides 10 reasons why government contractors should consider intervening in bid protests.

Who may intervene in bid protests?

GAO Bid Protests

The GAO's bid protest regulations provide the following definition of intervenor, in relevant part:

Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.[1]

However, as the GAO notes, "permitting intervention in a preaward protest is generally the exception, not the rule." [2]

U.S. Court of Federal Claims Bid Protests

The rules of the Court of Federal Claims allow for two types of intervention: (1) intervention as of right and (2) permissive intervention. With regard to intervention as a matter of right, COFC Rule 24(a)(2) requires a would-be intervenor to demonstrate via a timely motion that:

- Its interests relate to a property or transaction that is the subject of the proceedings; and
- Its interests are so situated that disposition of the action may impair or even impede its ability to protect that interest.

Pursuant to COFC Rule 24(b) — which governs permissive intervention — the Court of Federal Claims may allow anyone to intervene who:

- Files a timely motion;

- Is given an unconditional right to intervene by a federal statute or has a claim or defense that shares with the main action a common question of law or fact; and
- Whose intervention will not delay or prejudice the adjudication of the original parties' rights.

When determining whether a potential intervenor's motion is timely, the court considers:

- The length of delay in making the application for intervention;
- Whether the prejudice to the existing parties by allowing intervention outweighs the prejudice to the would-be intervenor by denying intervention; and
- The existence of unusual circumstances weighing either for or against intervention.[3]

Importantly, the U.S. Court of Appeals for the Federal Circuit has held that the requirements for intervention are to be construed in favor of intervention.[4]

How does my company intervene in a bid protest?

GAO Bid Protests

The GAO's bid protest regulations require the contracting agency to immediately provide a potential intervenor with notice of the protest. Specifically, the regulations state, in pertinent part:

GAO shall notify the agency by telephone within 1 day after the filing of a protest, and, unless the protest is dismissed under this part, shall promptly send a written confirmation to the agency and an acknowledgment to the protester. The agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial prospect of receiving an award. The agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with GAO.[5]

The next step in the process is for the potential intervenor to promptly file a notice of intervention with the GAO.

The notice typically is a brief letter that includes the name, address, and telephone and fax numbers of the intervenor or its representative, if any, and advises the GAO and all other parties of the intervenor's status.

U.S. Court of Federal Claims Bid Protests

A party seeking to intervene in a Court of Federal Claims bid protest must file a motion to intervene with the court and it serve on all parties.[6] The motion must "state the grounds for the intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." [7]

Before filing the motion to intervene, it is generally prudent for the potential intervenor to ask the other parties to the protest whether they oppose the motion and then to state in the motion whether the parties oppose the motion.

Why should my company intervene in bid protests?

The following are 10 primary reasons that government contractors should consider intervening in bid protests:

1. The contracting agency's interests may not be the same as your company's interests, and your company is in the best position to protect and advocate for its own interests. In fact, contracting agencies owe an equal duty to all offerors, and thus their interests are broader than, and potentially distinct from, your company's interests.
2. Some government attorneys have limited resources or are overworked. Other government attorneys are green when it comes to bid protests because their offices simply do not see very many of them.
3. Intervening will help your company better protect its confidential and/or proprietary information if it becomes part of the record during the bid protest.
4. Similarly, by intervening, your company will be in a better position to protect its business reputation.
5. Your company knows its proposal better than anyone. As such, your company is best equipped to rebut challenges to your technical proposal, cost/price proposal and past performance. Likewise, intervenors often are in the best position to respond to allegations regarding key personnel and organizational conflict of interest matters.
6. An intervenor can make arguments that, for whatever reason, the government fails to address.
7. If your company is the incumbent contractor, then you may be more knowledgeable than the protester — and possibly the government — about the actual work under protest. As such, incumbent contractors may be uniquely able to rebut the protester's assertions about the scope and nature of the work at issue.
8. In a Court of Federal Claims bid protest, your company, as an intervenor, will be able to more persuasively and specifically articulate the harms that it will suffer if a temporary restraining order or an injunction is issued in connection with the protested contract.
9. Most bid protests are covered by a protective order that prohibits the attorneys from disclosing protected information — i.e., confidential, proprietary and source selection sensitive information. By intervening, however, your company will have the ability to be better informed about the course of the protest and the status of the procurement —

subject, of course, to the terms of any protective order that is issued in the protest.

10. If the contracting agency decides to take corrective action in response to the protest, an intervenor will be in a much better position than a nonintervenor in terms of being able to influence the scope and nature of the corrective action.

Conclusion

As noted above, bid protest filings peak in October because of increased government spending at the end of the government's fiscal year, which ends on Sept. 30.

Government contractors, therefore, should be particularly mindful this time of year of their rights with respect to intervening in bid protests both at the GAO and the Court of Federal Claims.

Government contractors should also be particularly mindful this time of year of the importance of intervening in bid protests.

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[1] 4 C.F.R. § 21.0(b)(1).

[2] Bid Protests at GAO: A Descriptive Guide, at 15 (May 2018).

[3] *Belton Indus. Inc. v. U.S.*, 6 F.3d 756, 762 (1993).

[4] *American Maritime Transport Inc. v. U.S.*, 870 F.2d 1559, 1561 (1989).

[5] 4 C.F.R. § 21.3(a).

[6] See RCFC 24(c).

[7] *Id.*