

# Federal Contracting Center (FeCC)

## An APEX Accelerator

“What you need to know about a bid protest”



# About Us



## Who we are

- A division of the Puerto Rico Department of Economic Development and Commerce (DDEC)
- Cooperative agreement with the Department of Defense (DoD)
- Part of a nationwide network of APEX Accelerators
- 35+ years of experience



## Mission

To empower Puerto Rican businesses to thrive in the government marketplace by providing technical assistance and facilitating strategic connections.

## Goal

To contribute to economic growth by increasing the number of local businesses successfully performing government contracts.

# Federal Contracting Center (FeCC)

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## Among the services that we offer are:

- Market research
- Getting registered to do business with the government (SAM, etc.)
- Understanding and implementing Federal Acquisition Regulations (FAR)
- Applying for small business certifications: 8(a), HUBZone, Women and Veterans
- Educate and assist with Cybersecurity compliance with the government
- Matching & marketing your product or service to right agencies
- Interpretation of solicitation and assistance with the bidding and proposal process
- Joint Ventures and Teaming Agreements
- Identifying sub-contracting opportunities with Prime Contractors
- DoD Innovation programs

# Important Notes

## Disclaimer

1. The information in this presentation is for general informational purposes only and is not intended to provide legal advice to any individual or entity.
2. Specific situations may require detailed legal analysis.
3. Always refer to the most current version of the FAR.
4. We make no claims, promises or guarantees about the accuracy, completeness and adequacy of this presentation. No warranty of any kind, implied, expressed or statutory is given with respect to the content of this presentation. We assume no liability for actions you take or fail to take based on the content of this presentation.
5. You should consult your own legal advisor before taking any action based on the topics addressed in this presentation.

# Learning Objectives

- What is a bid protest?
- What kinds of bid protests can be filed?
- Who can file a bid protest?
- When must a protest be filed?
- How is time calculated for filing deadlines?

# Definitions – FAR 33.101

- “Day” means a calendar day, unless otherwise specified. In the computation of any period-
  - The day of the act, event, or default from which the designated period of time begins to run is not included; and
  - The last day after the act, event, or default is included unless-
  - The last day is a Saturday, Sunday, or Federal holiday; or
- “Filed” means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

# Definitions – FAR 33.101

- “Interested party for the purpose of filing a protest” means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.
- “Protest” means a written objection by an interested party to any of the following:
  - A solicitation or other request by an agency for offers for a contract.
  - 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 is based on improprieties concerning the award of the contract.
- “Protest venue” means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims.



# Factors to Consider Prior to a Protest – Applicable Regulations

## FAR Part 19 for size and business status

- Small business status
- Disadvantaged business status
- HUBZone, Service-disabled veteran-owned small business or Women-owned small business concern status

## FAR Part 33 for the venue of the protest

- 33.103 Protests to the agency.
- 33.104 Protests to GAO.
- 33.105 Protest at the U.S. Court of Federal Claims.

## Contracting Agency

- Supplemental FAR



# Factors to Consider Prior to a Protest – Type of Contract

## FAR Part 14 Sealed Bidding

- Invitation for Bids (IFB)
- Award is made to the Lowest Responsive and Responsible Bidder
- Not much to protest except for price determination

## FAR Part 15 Contracting by Negotiation

- Request for Proposals (“RFP”)
- Award is made to the offeror who presents the “Best Value”
- Protest may challenge the evaluation factors

# Factors to Consider Prior to a Protest

- Cost versus Likelihood of Success
- The likelihood of a Stay
- How might this affect relationship with the agency?
- How much time and resources will it take to prepare a protest?
- Interested Parties
  - Only "interested parties" may file protests. In the case of a solicitation challenge (pre-award), an interested party is generally a potential bidder for the contract. In the case of a contract award (post award) challenge, an interested party is generally an actual bidder that did not win the contract. In addition, other factors, such as the bidder's standing in the competition and the nature of the issues raised may affect whether it qualifies as an interested party.

# When to File a Protests

- Pre-Award Protests
  - Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. FAR 33.103.
  - Upon receipt of a pre-award protest, the Agency must stay the award. FAR 33.103 (f)(1).
- Post Award Protests
  - Must be filed within 10 days of the debriefing date. In all other cases, the offeror must file not later than 10 days from the date the offeror knew or should have known of the grounds for the protest.
  - For post-award protests, the stay applies to protests filed 10 days after contract award or within 5 days after a debriefing date

# Why File a Pre-Award Protests

- The requirements are not detailed enough or vague or are too detailed (custom fit)
- It is too restrictive
- Contains ambiguous statements
- There are small business issues (wrong size standard, failure to set aside for small business)
- Unreasonable Evaluation Method(s)
- Unreasonable past performance requirements
- Others

# Types of Bid Protests



## Bid Protest - FAR Part 33

A challenge of the procedures or process used during the bidding, source selection, evaluation and contract award process.



## Size Protest - FAR Part 19

A challenge concerning the size of the potential



## Status Protest - FAR Part 19

A challenge concerning the status of the potential

# Where can you file a protest

## Three Main Options for a Bid Protests:

- Contracting Officer (Agency) [FAR part 33.103](#)
- U.S. Government Accountability Office (GAO's Electronic Protest ) [FAR part 33.104](#)
- U.S. Court of Federal Claims [FAR part 33.105](#)

## Some Considerations:

- Size of Contract
- Cost of Litigation
- Complexity of Issues

# 33.103 Protests to the agency

- Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.
- The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.
- Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements may be grounds for dismissal.  
**Specific allegations regarding what, exactly, you allege was a procurement error is key.**



# **33.103**

## **Protests to the agency**

### **Protests shall include the following information:**

1. Name, address, email and telephone numbers of the protester.
2. Solicitation or contract number.
3. Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.
4. Copies of relevant documents.
5. Request for a ruling by the agency.
6. Statement as to the form of relief requested.
7. Information establishing that the protester is an interested party for the purpose of filing a protest.
8. Information establishing the timeliness of the protest.

# 33.103 Protests to the agency

- All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests. Interested parties may request an independent review at a level above the contracting officer.
- Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals.
- 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 15.505 or 15.506, whichever is later, the contracting officer shall 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 urgent and compelling reasons

# 33.104 Protests to GAO

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations).

A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer , so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

Immediately after receipt of the GAO's written notice that a protest has been filed , the agency shall give notice of the protest 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.

# 33.104 Protests to GAO

- 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 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract , except for –
  - 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.

# US Government Accountability Office (GAO) Protest

- **How is time calculated for filing deadlines?**
  - "Days," under GAO's regulations, means "calendar days." In the event a deadline falls on a weekend, federal holiday, or other day when GAO is closed, the deadline is extended to the next business day.
- **Do I need an attorney to file a protest or participate as an intervener?**
  - No. Parties may file a protest without being represented by an attorney. However, only attorneys are permitted to have access to material subject to a protective order.
  - Protesters are required to use GAO's Electronic Protest Docketing System (EPDS) for all new bid protests. There is a \$350 filing fee. GAO uses funds from the filing fee to pay for the operation and maintenance of the system.

# Government Accountability Office Protest

- **What happens after a protest has been filed?**
  - If the protest is not dismissed for procedural reasons, the agency must, within 30 days of the filing of a protest, provide a report addressing the protest arguments.
  - The protester must file comments responding to the agency report within 10 days of receiving the report (failure to file comments will result in dismissal of the protest).
  - After the comment period, GAO may request additional filings from the parties, conduct alternative dispute resolution, or hold a hearing.
  - GAO must decide a protest within 100 calendar days. They always seek to issue a decision as far in advance of the 100-day deadline as possible.

# US Government Accountability Office (GAO) Protest

- **What are the possible outcomes for a GAO protest?**
  - A protest is concluded when it is "withdrawn" by the protester
  - Dismissed by GAO because the protest had a technical or procedural flaw (such as lack of timeliness or jurisdiction)
  - Denied by GAO because they found no merit to the protest
  - Sustained" by GAO because they agree with the protest arguments.



# Government Accountability Office Protest

- **What happens when GAO sustains a protest?**
  - If the GAO agree with a protester that the agency violated a procurement law or regulation in a prejudicial manner, they will issue a decision sustaining the protest and recommend that the agency address the violation through appropriate corrective action. The agency must then advise the GAO whether it will comply with the recommendation.

# Government Accountability Office

## Protest

### Bid Protest Statistics for Fiscal Years 2019-2023

	FY2023	FY2022	FY2021	FY2020	FY2019
Cases Filed <sup>1</sup>	2025 (increase of 22%) <sup>2</sup>	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)
Cases Closed <sup>3</sup>	2041	1655	2017	2137	2200
Merit (Sustain + Deny) Decisions	608	455	581	545	587
Number of Sustains	188	59	85	84	77
Sustain Rate	31%	13%	15%	15%	13%
Effectiveness Rate <sup>4</sup>	57%	51%	48%	51%	44%
ADR <sup>5</sup> (cases used)	69	74	76	124	40
ADR Success Rate <sup>6</sup>	90%	92%	84%	82%	90%
Hearings <sup>7</sup>	2% (22 cases)	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)

# Government Accountability Office Protest

Their review shows that the most prevalent reasons for sustaining protests

- (1) Unreasonable technical evaluation
- (2) Unreasonable past performance evaluation
- (3) Unreasonable cost or price evaluation
- (4) Inadequate documentation of the record
- (5) Flawed selection decision

It is important to note that a significant number of protests filed do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits.

# Size & Status Protests

- Small business size or socioeconomic challenges concern the eligibility of businesses to qualify for set asides not the procurement process.
- For example, someone can challenge the [size](#) or status of a competitor by alleging that the competitor has more employees or higher revenue than allowed by their relevant NAICS code.
- These size or status challenges are reviewed solely by the Small Business Administration Office of Hearing and Appeals.

# 19.302 Protesting a small business representation

## Small Business Protest Issues:

- Size
  - NAICS Code
  - Affiliation
- Unmet Eligibility Criteria
- Unconditional Ownership
- Unconditional Control
- Other

# 19.302 Protesting a small business representation

- The SBA regulations on small business size and size protests are found at [13 CFR part 121](#).
- Small business status
  - Disadvantaged business status
  - HUBZone, Service-disabled veteran-owned small business or Women-owned small business concern status
- Standing to File a Size Protest: An offeror , the contracting officer , SBA, or another interested party may protest the small business representation of an offeror in a specific offer for a contract . However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror , the contracting officer , or the SBA.

# 19.302 Protesting a small business representation

The status protest process for each program is explained in the CFR:

- [Small disadvantaged business\(Link is external\)](#)
- [HUBZone business\(Link is external\)](#)
- [Service-disabled veteran-owned business\(Link is external\)](#)
- [Women-owned small business](#)





# Timeliness of a Size Protest

- The regulations require size protests to be received by the contracting officer within **five (5) days** (excluding Saturdays, Sundays, and legal holidays) after a specific event occurs. The date the five-day period begins depends on the type of contract:
  - Invitation for Bids: Must be received before the close of business on the fifth day after the opening of the bid or proposal.
  - Request for Proposals: Must be received before the close of business on the fifth day after the contracting officer has notified the protester of the identity of the prospective awardee.

# Where Do I File the Size or Status Protest?

- File with the Contracting Officer, who will forward to the appropriate bodies (SBA or VA)
- You may need to file one for size and one for status even though you are sending both to the same CO

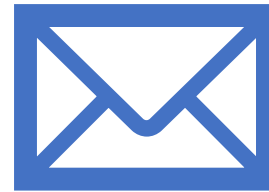
# Time Frame

- Agency will determine the status of the protested concern within 15 days (SBA) / 21 days (VA) after receipt of the protest
- Agency then notifies the CO, the protestor, and the protested concern in writing of its determination
- Size/SBA Status: Decision may be appealed to OHA(SBA's Office of Hearing and Appeals)
- VA VOSB/SDVOSB Status: VA CVE opinion can be appealed to OSDBU

# Remember



You are not alone in this process. Our experienced counselors will assist you navigate the Federal Government marketplace.



**Request an appointment today!**

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787.758.4747 x. 3181

<https://federalcontracting.ddec.pr.gov>

**Thank You!**

DEPARTMENT OF ECONOMIC  
**DEVELOPMENT**  
AND COMMERCE



**APEX**  
ACCELERATORS