

WHAT IS, AND WHAT ISN'T AN INFORMAL AGENCY PROTEST AT GAO?

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Many contractors have determined that they may save money and time by filing an “agency level” protest before a Government Accountability Office (“GAO”) protest needs to be filed. This is particularly true when a contractor wants to protest a solicitation as ambiguous or in excess of agency needs.

Federal Acquisition Regulation (“FAR”) 33.103 is the source of “Protests to the Agency” and sets forth the requirements for *formal* agency protests. (Timeliness rules are the same as the GAO timeliness rules). But there is a less formal way to accomplish your protest, and still enjoy the benefits of having the agency rule on it—that is the “informal agency protest.” The GAO has long held that in order to be regarded as a protest, a written statement need not state explicitly that it is, or is intended to be a protest. All the document must do is (1) convey the intent to protest with a specific expression of dissatisfaction with the agency’s procurement actions (such as ambiguity in a solicitation or other defect in the solicitation or procurement); and (2) include a request for relief.

This longstanding policy was recently expressed in *Science and Tech. Corp.*, B-420216, Jan. 3, 2022, and contrasted informal agency protests with what is *not* an agency protest. The GAO explains that a letter that merely expresses a *suggestion, hope or expectation* does not constitute an informal agency-level protest.

S&T prior to the closing date protested a Department of Commerce solicitation for support services, arguing that certain requirements in the solicitation were unduly restrictive of competition. S&T submitted a “letter of concerns” to the department about competition inhibiting requirements in the solicitation, including the number of key personnel positions. One of the requests in the letter was that the agency reduce the number of key personnel from five to two.

The agency acquisition director responded to this letter explaining that the number of key personnel would remain the same, and was an important aspect of the procurement.

The GAO first considered the timeliness of S&T’s later, but similar GAO protest, which was submitted 16 days after S&T received the agency acquisition director’s denial of S&T’s agency level protest. This was beyond the 10 days when the protester “knew or should have known” that its agency protest was denied.

Despite S&T’s argument that its letter to the agency was not a proper agency level protest, the GAO held that it was such a protest because it conveyed the intent to protest with a specific expression of dissatisfaction with the agency’s procurement actions and included a request for relief—to reduce the number of key personnel required. Therefore, GAO dismissed that portion of S&T’s protest as untimely (i.e. more than 10 days after S&T’s agency protest was denied).

Takeaway. The use of informal agency protests is a simplified method of protesting to the contracting officer. Instead of including a large number of details that a *formal* (FAR 33.103) agency protest or a GAO protest requires, the contractor merely submits a letter conveying an intent to protest with a specific expression of what was wrong with the agency's procurement actions *and* includes a request for some specific relief. Please notice that S&T believed the number of key positions inhibited competition (conveying an intent to protest and a statement with what was wrong with the procurement action), and stated the agency should grant the relief of reducing the number of key positions to two. That is a specific protest, not a mere suggestion, hope or expectation, which would not be an agency level protest. (For example, had S&T simply stated "we hope you will re-examine the number of key positions" or "we suggest that you re-examine the number of key positions," its letter would not have qualified as an informal agency level protest—and the agency would not have been required to respond to the letter.) However, having made a specific informal agency level protest, the agency was *required* to respond to it.

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