

DON'T ASK QUESTIONS—FILE A PROPER INFORMAL AGENCY LEVEL PROTEST

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In a recent decision, the Government Accountability Office (“GAO”) reiterated the ground rules for the filing of an informal agency level protest (instead of filing a formal agency level protest set forth in Federal Acquisition Regulation (FAR) 33.103). *Byrd Enterprises Unlimited, Inc.*, B-421462, May 9, 2023. Even though your informal agency level protest need not ever mention the word “protest,” it must convey the intent to protest by a specific expression of dissatisfaction with the agency’s actions and include a request for relief. Absent both of those elements, the GAO will not consider your letter or email an informal agency protest, and you will receive none of the protections, such as withholding of award unless there are urgent and compelling reasons or it is in the best interest of the government. FAR 33.103(f).

Byrd asserted that it had submitted an informal agency level protest of an Air Force solicitation for grounds maintenance services at Malmstrom Air Force Base in Montana. Byrd specifically maintained that the Air Force violated FAR 33.103(f) by making an award before resolving its alleged protest. Byrd submitted three emails to the Air Force prior to the closing date. The three emails read in full as follows:

January 16 email: Please find attached initial questions for [the RFQ]

January 17 (2nd) email: Appendix A and Att 1 Bid Schedule shows CLIN 002 as (PWS 1.1 through 1.14), however this means the bid sheet is missing 1.1.5/1 “TRIM and 1.1.6 “WEED CONTROL” from the PWS. I am running through the rest and will send more questions but wanted to bring this to your attention sooner than later so that it doesn’t cause issues after the fact if those were meant to be included. Thank you sirs.

January 17 (3rd email): Additional questions below for [the RFQ, and listed five questions which GAO stated were not relevant to this decision]

The GAO held that even if all three of the emails were considered together, Byrd had not submitted an agency protest. In order to be considered a protest, the letter/email/emails must include a sufficient showing of intent that its document be considered a protest to the agency through *a specific expression of dissatisfaction with the agency’s actions and a request for relief.*

The protest never articulated its dissatisfaction by the solicitation’s failure to leave certain tasks off the pricing sheet. It merely brought this matter to the agency’s attention. The second email may show some form of dissatisfaction but it never requests any relief from the agency. The request for some kind of relief (“please clarify, please correct, etc.”) is essential to make a letter or an email into an informal agency level protest. The GAO therefore held that there was no violation of FAR 33.0103(f) when the Agency made award because there had been no protest of the solicitation.

The GAO raised other points not relevant to this blog. But the basic point is that your letter or email must request that the agency solve a specific problem and provide relief, in addition to mentioning your dissatisfaction with the solicitation or other action taken by the agency.

Takeaway. If you want to submit an agency-level protest, either formal or informal, you must include in your letter or email (1) your dissatisfaction with the agency's actions—and cite what they are; and (2) request specific relief (corrective action). Whether your letter or email is titled "Protest" or not, the GAO will recognize it as a protest.

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