

BOARDS LACK JURISDICTION TO HEAR BID PROTESTS EVEN IF CONTRACTING OFFICER INVITES IT

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The following forums have jurisdiction to consider bid protests:

Agency: jurisdiction provided by Executive Order 12979 and Federal Acquisition Regulation (“FAR”) 33.103.

Government Accountability Office (“GAO”): jurisdiction provided by Competition in Contracting Act, 31 U.S.C. §3551-3556,

Court of Federal Claims (“COFC”): jurisdiction provided by Tucker Act, 28 U.S.C. § 1491. (The Tucker Act also grants this court jurisdiction to decide any claim for damages against the United States.)

There are presently only three forums that can adjudicate bid protests. In addition to its bid protest jurisdiction, the Court of Federal Claims has jurisdiction to adjudicate claims under the Contract Disputes Act, 41 U.S.C. §§ 7101-09 (the “CDA”). The CDA also grants the Armed Services Board of Contract Appeals (“ASBCA”) and the Civilian Board of Contract Appeals (“CBCA”) jurisdiction to decide any appeal from the decision of a contracting officer on a claim.

Therefore, the CDA grants offerors a choice of forums (including the Boards) for contract disputes and claims. However, the CDA does not grant either the ASBCA or CBCA jurisdiction to hear bid protests, and neither does any other statute.

The Boards’ lack jurisdiction to hear a bid protest even if the Contracting Officer provides a notice of appeal rights to a disappointed offeror. *Spanish Solutions Language Servs.*, ASBCA No. 62233, Feb. 6, 2020. In that case, the appellant’s appeal stated that the agency had awarded a contract unfairly, and had denied the contract to the protester. The Board noted that there was no contract between Spanish Solutions and the government, and the Board did not possess jurisdiction to entertain the appeal. This was the case even though Spanish Solutions demonstrated that the contracting officer provided it with a written “notice of appeal rights.” The Contracting Officer’s notice regarding appeal rights does not create jurisdiction upon the Board or the court, where such jurisdiction does not otherwise exist.

Takeaway. Bring a bid protest in one of the three forums that has jurisdiction to hear it—and be sure it is timely under the rules of that jurisdiction. Regardless of what a contracting officer tells you, a protest before a Board of Contract Appeals will be dismissed for lack of jurisdiction.

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