

## Bid Protest Filing Deadlines

Protests are an outgrowth of intense competition for federal contracts. Whether a contractor or vendor *should* file a protest is governed by many factors. However, whether a contractor or vendor *may* file a protest is as a threshold matter governed by protest filing deadlines. These deadlines vary by forum, type of procurement, and whether a stay of the procurement is sought. This advisory addresses the threshold issue of time to file federal protests.

**Where to File?** A protester may elect to file a protest of a federal procurement at one of three primary forums: the US Court of Federal Claims (COFC), the Government Accountability Office (GAO), or the federal agency (Agency). Each of these forums has its own rules, which may also differ depending on the type of procurement.

**Will The Agency Stay The Award?** A critical issue in any protest is whether the protest will suspend, or “stay,” the awardee’s contract performance pending the protest. Determining jurisdictional deadlines to obtain a stay, by forum, and by type of procurement can be confusing. Whether the agency issues the procurement under Federal Acquisition Regulation (FAR) Parts 12 or 15, as a FAR Part 8<sup>1</sup> GSA Schedule competition, or as a task order under an indefinite delivery/indefinite quantity (IDIQ) contract can dramatically alter filing deadlines affecting a stay. Moreover, recent legislation permitting protests of tasks orders under IDIQ contracts adds yet another layer of complexity.

**What’s The Deadline?** Protest filing deadlines are set forth in the rules for each forum. The COFC publishes (and updates) its own rules that implement the Tucker Act,<sup>2</sup> the jurisdictional basis for the court’s contract jurisdiction. GAO’s rules are set out in the Code of Federal Regulations (CFR) and are described in the FAR.<sup>3</sup> These rules are subject to notice and public comment, and have the force of law. The filing deadlines for Agency Protests were first set out in Executive Order 12979, and are now codified in the FAR.<sup>4</sup> These FAR rules also have the force of law. Other statutes, such as the Competition in Contracting Act (CICA), affect automatic stays of performance,<sup>5</sup> and the more recent authority for protesting task orders of IDIQ contracts<sup>6</sup> also contributes to this deadline maze.

1 FAR Part 15 applies to negotiated procurements; FAR Part 12 applies to commercial item procurements; and FAR Part 8 applies to Multiple Award Schedule procurements.

2 28 U.S.C. § 1491(b).

3 See 4 CFR § 21.0 *et. seq.*; see also FAR 33.104.

4 FAR 33.103.

5 10 U.S.C. § 2304; 41 U.S.C. § 253.

6 10 U.S.C. § 2304c(e); 41 U.S.C. § 253j(e).

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Most protesters care little about the legal niceties and origins of forum jurisdiction, and are more focused on when a filing is due at the selected forum. The following chart and narrative seek to summarize key protest filing deadlines:

**Bid Protest Reference Chart: Jurisdiction and CICA Stay Requirements<sup>7</sup>**

Procurement Type	GAO		COFC		Agency	
	Jurisdiction Timelines	Performance Stay	Jurisdiction Timelines	Performance Stay	Jurisdiction Timelines	Performance Stay
<b>FAR Part 15 and Part 12</b>	<p>A pre-award protest must be filed <b>prior to the time set for submission of initial proposals</b>. 4 C.F.R. § 21.2(a)(1).</p> <p>A pre-award offeror eliminated from competitive range must request a debriefing within <b>3 days</b> after receiving notice of exclusion to obtain a "required debriefing."<sup>8</sup> FAR 15.505(a)(1). The protest must be filed within <b>10 days</b> of the debriefing date offered to the protester. 4 C.F.R. § 21.2(a)(2).</p> <p>A post-award protest must be filed within <b>10 days</b> of the debriefing date offered to protester. 4 C.F.R. § 21.2(a)(2).</p> <p>In all other cases, the offeror must file not later than <b>10 days</b> from the date the offeror knew or should have known of the grounds for the protest.</p>	<p>Upon notice of a pre-award protest at GAO, the Agency must delay the award. FAR 33.104(b)(1).</p> <p>For post-award protests, the automatic CICA stay applies if the protest is filed within <b>5 days</b> of a "requested and required" debriefing under FAR 15.506, or within <b>10 days</b> of contract award (FAR 33.104(c)(1)) <b>provided that</b> GAO notifies the agency of the protest within those time frames.</p>	<p>Pre-award protests have no specific time limits, but errors apparent on face of a solicitation must be protested prior to the time set for receipt of proposals.<sup>9</sup></p> <p>Post-award protests have no specific time limits, but in some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.<sup>10</sup></p>	<p>No automatic stay applies; instead, the protester must meet the standards for a preliminary injunction: 1) it is likely to succeed on the merits of the protest; 2) it will suffer irreparable harm unless the injunction is granted; 3) the preliminary injunction will not harm the public interest; and (4) the balance of hardships tips in the protester's favor.</p>	<p>Pre-award protests based on alleged apparent improprieties in a solicitation must be filed <b>before bid opening or the closing date for receipt of proposals</b>. FAR 33.103(e).</p> <p>Post-award protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. FAR 33.103(e).</p>	<p>Upon receipt of a pre-award protest, the Agency must stay the award. FAR 33.103 (f)(1).</p> <p>For post-award protests, the stay applies to protests filed <b>10 days</b> after contract award or within <b>5 days</b> after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505, 15.506 or 52.212-1(l); FAR 33.103(f)(3).</p>

<sup>7</sup> All references to "days" are to calendar days.

<sup>8</sup> An agency may opt to delay the pre-award debriefing until after contract award if the Contracting Officer concludes that delay is in the Government's best interest. FAR 15.505(b). An offeror may also request that the agency delay the debriefing until after final award. However, this is not advised. The FAR cautions that such a delay could affect the timeliness of any subsequently filed protest. FAR 15.505(a)(2).

<sup>9</sup> See *Blue & Gold Fleet v. U.S.*, 492 F.3d 1308, 1315.

<sup>10</sup> "Laches" is an equitable doctrine that bars a claimant from receiving relief where the claimant's delay in pursuing the claim has harmed the opposing party. See e.g., *Wit Associates, Inc. v. U.S.*, 62 Fed.Cl. 657 (2004); *Software Testing Solutions, Inc. v. U.S.*, 58 Fed.Cl. 533 (2003) (delay of request for temporary restraining order of nearly four months after contract award, with contract nearly performed, significantly undercut any claim of irreparable injury).

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Procurement Type	GAO		COFC		Agency	
	Jurisdiction Timelines	Performance Stay	Jurisdiction Timelines	Performance Stay	Jurisdiction Timelines	Performance Stay
<b>FAR Part 8</b>	<p>A pre-award protest must be filed <b>prior to the time set for submission of initial quotations.</b> 4 C.F.R. § 21.2(a)(1).</p> <p>A post-award protest must be filed not later than <b>10 days</b> after the basis of protest is known or should have been known (debriefings not “required” per FAR 8.405-2(d)). 4 C.F.R. § 21.2(a)(2).</p>	<p>Upon notice of a pre-award protest at GAO, the Agency must delay the award. FAR 33.104(b)(1).</p> <p>For post-award protests, the automatic CICA stay applies if the protest is filed within 10 days of award and the agency receives notice of a protest within timeframe FAR 33.104(c)(1).</p>	<p>Pre-award protests have no specific time limits, but errors apparent on the face of a solicitation must be protested prior to the closing date for receipt of quotations.<sup>11</sup></p> <p>Post-award protests have no specific time limits, but in some cases, a serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.<sup>12</sup></p>	<p>No automatic stay applies; instead, the protester must meet the standards for a preliminary injunction: 1) it is likely to succeed on the merits of the protest; 2) it will suffer irreparable harm unless an injunction is granted; 3) a preliminary injunction will not the harm the public interest; and (4) the balance of hardships tips in protester’s favor.</p>	<p>Pre-award protests based on alleged apparent improprieties in a solicitation must be filed <b>before bid opening or the closing date for receipt of quotations.</b> FAR 33.103(e).</p> <p>Post-award protests must be filed no later than <b>10 days</b> after the basis of protest is known or should have been known, whichever is earlier. FAR 33.103(e).</p>	<p>Upon receipt of a pre-award protest, the Agency must stay the award. FAR 33.103(f)(1).</p> <p>For post-award protests, the stay applies to protests filed within <b>10 days</b> of contract award (debriefings are not “required”).</p>
<b>Task Order/IDIQ</b>	<p>A pre-award protest must be filed <b>prior to the time and date for submission of initial proposals.</b> 4 C.F.R. § 21.2(a)(1).</p> <p>A post-award protest must be filed within <b>10 days of the debriefing date offered to protester</b> (debriefings required for task and delivery orders exceeding \$5 million. FAR 16.505(b)(4)). 4 C.F.R. § 21.2(a)(2).</p> <p>In all other cases, the offeror must file not later than <b>10 days</b> from the date the offeror knew or should have known of the grounds for the protest.</p>	<p>Upon notice of a pre-award protest at GAO, the Agency must delay the award. FAR 33.104(b)(1).</p> <p>For post-award protests, the automatic CICA stay applies if the protest is filed within <b>5 days</b> of “requested and required” debriefing under FAR 15.506; or within 10 days of contract award.<sup>13</sup></p>	<p>Pre-award protests have no specific time limits, but errors apparent on face of a solicitation must be protested prior to the closing date for receipt of proposals.<sup>14</sup></p> <p>Post-award protests have no specific time limits, but in some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.<sup>15</sup></p>	<p>No automatic stay applies; instead, the protester must meet the standards for a preliminary injunction: 1) it is likely to succeed on the merits of the protest; 2) it will suffer irreparable harm unless an injunction is granted; 3) a preliminary injunction will not harm the public interest; and (4) the balance of hardships tips in protester’s favor.</p>	<p>Pre-award protests based on alleged apparent improprieties in a solicitation must be filed <b>before bid opening or the closing date for receipt of proposals.</b> FAR 33.103(e).</p> <p>Post-award protests must be filed no later than <b>10 days</b> after the basis of protest is known or should have been known, whichever is earlier. FAR 33.103(e).</p>	<p>Upon receipt of a pre-award protest, the Agency must stay the award. FAR 33.103(f)(1).</p> <p>For post-award protests, the stay applies to protests filed <b>10 days after contract award or within 5 days after a debriefing date offered to the protester</b> under a timely debriefing request in accordance with FAR 15.505 or 15.506. FAR 33.103(f)(3).</p>

11 See *supra* footnote 9.

12 See *supra* footnote 10.

13 See *e.g. Altos Federal Group, Inc. v. U.S.*, 60 Fed.Cl. 832 (explaining that upon the filing of *Altos’* GAO protest, challenging an Federal Supply Schedule IDIQ task order, the Agency properly imposed an automatic stay pursuant to the Competition In Contracting Act (CICA). 31 U.S.C. § 3553(d)(3).)

14 See *supra* footnote 9.

15 See *supra* footnote 10.

## Summary of GAO Protest Deadlines—By Procurement Type

### *FAR Part 15 and FAR Part 12 Procurements*

As noted in the above chart, for FAR Part 15 and Part 12 procurements, a pre-award protest challenging the terms of the solicitation must be filed prior to the time and date set for submission of initial proposals. Offerors eliminated from the competitive range must file a protest within 10 days of the debriefing date offered by the agency. A post-award protest must be filed within 10 days of the debriefing date offered to the protester or GAO will not consider the protest. 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.

The automatic “CICA stay” applies to protests filed prior to award. For post-award protests, the CICA stay applies if the protest is filed within five days of a “requested and required” debriefing and GAO notifies the agency within one day of the filing of the protest and within the five day time frame. Protests filed after five days of the debriefing date offered by the Agency but within 10 days of the date of award are timely and will be considered, but the CICA stay will not apply.

### *FAR Part 8 Procurements*

As with FAR Part 15 procurements, under FAR Part 8, a pre-award protest must be filed prior to the time and date for submission of initial quotations.<sup>16</sup> A post-award protest must be filed not later than 10 days after the basis of protest is known or should have been known.

The automatic CICA stay applies to pre-award protests filed under FAR Part 8. For post-award protests, the CICA stay applies if the agency receives notice of a protest at GAO within 10 days of award. Unlike FAR Parts 12 and 15, debriefings are not “required” under FAR Part 8, and hence, there is no benefit to filing within five days of a requested but not required debriefing.

<sup>16</sup> See, e.g. *QuickHire, LLC*, B-293098, Jan. 30, 2004, 2004 CPD ¶ 33 (protester’s pre-award protest under FAR Part 8 concerned an alleged solicitation defect that, in order to be timely under GAO bid protest regulations, was required to be protested prior to the closing time for receipt of quotations). (Citing 4 C.F.R. § 21.2(a)(1) (2003).)

### *Task Order/IDIQ Procurements*<sup>17</sup>

For Task Order/IDIQ procurements, a pre-award protest must be filed prior to the time and date set for submission of initial proposals. Post-award protests must be filed within 10 days of the debriefing date offered to the protester. Debriefings are required for task and delivery orders exceeding US \$5 million. 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.

With regard to the CICA stay, task order/IDIQ procurements are subject to the same rules as applied to FAR Part 12 and 15 procurements. The automatic CICA stay applies to protests filed prior to award. For post-award protests, the CICA stay applies if the protest is filed within five days of a “requested and required” debriefing and GAO gives timely notice to the agency.

## Summary of COFC Protest Deadlines—By Procurement Type

### *FAR Part 15 and FAR Part 12, FAR Part 8 and Task Order/IDIQ Procurements*

As noted in the chart, the COFC does not impose the same rigid timeliness rules that apply to GAO and agency-level protests. However, as in the other forums, pre-award protests involving errors apparent on the face of the solicitation must be filed prior to the time and date set for receipt of proposals. While no specific time limits apply to post-award protests, a serious delay in raising a claim may adversely impact the court’s decision to issue injunctive relief.

The automatic CICA stay does not apply to the COFC. To suspend contract performance, a protester must meet the standards for a preliminary injunction, as discussed in the chart.

<sup>17</sup> GAO’s jurisdiction for task order protest was originally slated to expire in May 2011. Congress extended GAO’s jurisdiction for DoD task order protests to September 2016, but it is not clear whether or when Congress will extend GAO’s jurisdiction for civilian agency procurements.

## Summary of Agency Protest Deadlines—By Procurement Type

### **FAR Part 15 and FAR Part 12 Procurements**

Pre-award protests based on alleged apparent improprieties in a solicitation must be filed before bid opening or the closing date for receipt of proposals. Post-award protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

An automatic stay applies to protests filed prior to award. For post-award protests, the stay applies to protests filed 10 days after contract award or, where a debriefing is required, within five days after a debriefing date offered to the protester.

### **FAR Part 8 Procurements**

Pre-award protests must be filed before bid opening or the closing date for receipt of quotations. Post-award protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

An automatic stay applies to protests filed prior to award.<sup>18</sup> For post-award protests, the stay applies to protests filed within 10 days of contract award.<sup>19</sup>

### **Task Order/IDIQ Procurements**

Pre-award protests based on alleged apparent improprieties in a solicitation must be filed before bid opening or prior to the closing date for receipt of proposals. Post-award protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

As with FAR Parts 12 and 15, an automatic stay applies to protests filed prior to award. For post-award protests, the stay applies to protests filed 10 days after contract award or, where a debriefing is required, within five days after a debriefing date offered to the protester, in accordance with the FAR, however, not CICA.<sup>20</sup>

<sup>18</sup> FAR 33.103(f)(1).

<sup>19</sup> FAR 33.103(f)(3).

<sup>20</sup> *Id.*

## **Conclusion**

The chart and discussion above are intended to assist company executives in assessing whether a protest can be filed—that is, whether the deadlines for filing can be met in a particular forum for a particular type of procurement. The more complex question of whether a protest should be filed involves many more considerations than timeliness. The decision to file a protest, including an actual determination regarding timeliness, depends on the facts of the case and should be the subject of discussions with the disappointed bidder's professional advisors.

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*We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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