

Practical Answers to Business Questions About Post-Award Bid Protests

Project Management Institute

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Don Carney

Topics

- Debriefings
- Whether to Protest
- Protest Forums
- GAO Procedures

What Is Special About the Federal Procurement Process?

- Governed by numerous statutes and regulations
- Generally competitively awarded
- Government officials are required to comply with those statutes and regulations, but also have significant discretion



What are Debriefings?

- Informative exchanges required by regulation after contract award
 - FAR 15.505 (Pre-award – exclusion)
 - FAR 15.506 (Post-award)
- Can be telephonic, face-to-face, or in writing
 - CO discretion



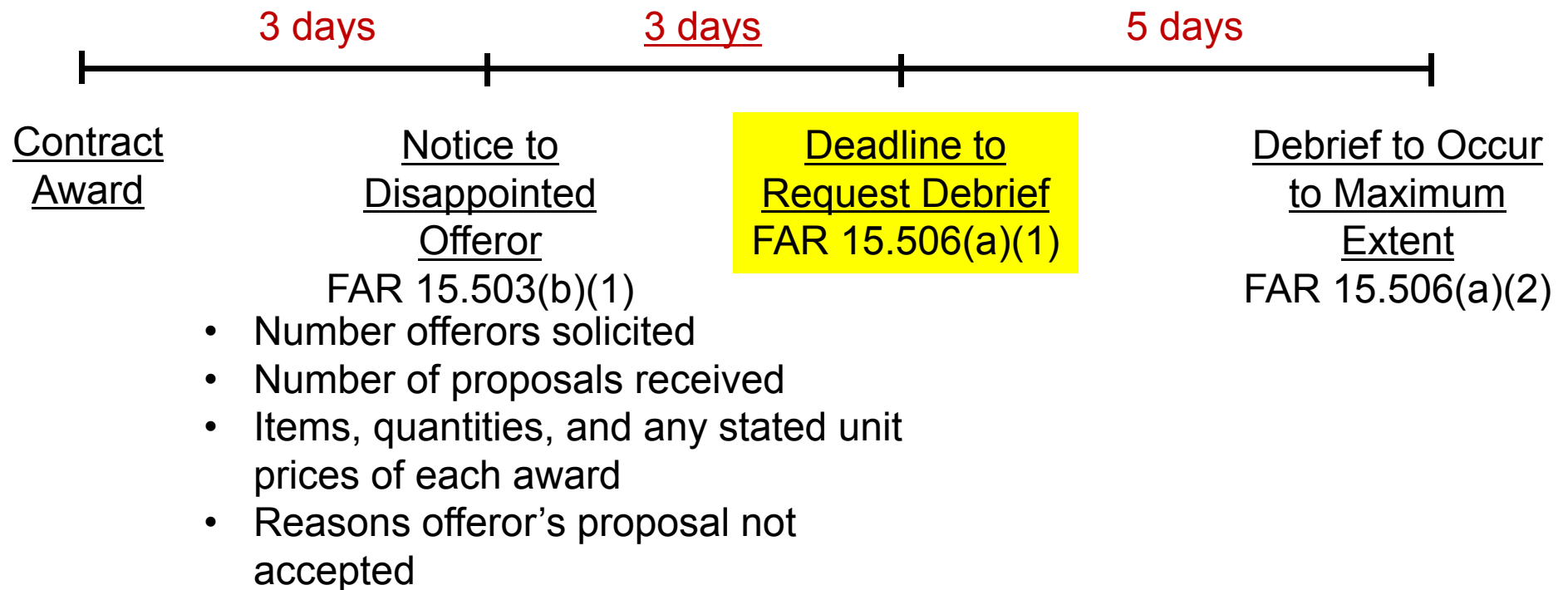
What is the Government required to disclose during the debrief?

- Government's evaluation of requestor's weaknesses and deficiencies
- Overall evaluated cost or price and technical rating of the awardee and the debriefed offeror
- Past performance of debriefed offeror
- Make and model of successful offeror
- Overall rankings of offerors
- Summary of rationale for award
- Reasonable responses regarding procedures

Who is Entitled to a Post-Award Debrief?

- “Competitive proposals” or a “combination of competitive procedures”
 - All offerors after award selection
- Mandatory only for:
 - FAR Part 15 (negotiated) procurements See FAR 15.502 (applicability of Part 15 procedures)
 - Orders > \$5 million under IDIQ contract See FAR 16.505(b)
- Not necessarily required for formally advertised (Part 14) or simplified acquisitions (Part 13)

What is the Timeline for Requesting a Post-Award Debrief?



Note: Government may accommodate an untimely request for a debriefing

What is the use of a Post-Award Debriefing?

- To help make an informed and intelligent decisions regarding whether to protest
- To help obtain information to use in pursuing a successful protest
- To obtain additional insights for future competitions
- To help position you (as successful contract awardee) to defend against a protest

Is the Government prohibited from disclosing information?

- Point by point comparisons
- Trade secrets or confidential processes/techniques
- Confidential commercial or financial information
- Names of references providing past performance information

What are Effective Debriefing Techniques?

- Be fully prepared (evaluation criteria, process, focus areas)
- Listen closely and read between lines
- Ask follow-up questions
 - Confirm de-brief will remain open pending questions
- Agree in advance on how far to push
- Possibly caucus to evaluate how to proceed
- Agree to accept additional information
 - Agency may provide more than FAR minimum information
- Face-to-face is preferred if possible
 - Have counsel on the phone if possible

What Standard Applies to Agency Decisions?

- Source selection decisions must be rational and consistent with the solicitation's evaluation criteria
- Reasonableness/rationality:
 - GAO will not "reevaluate" the proposals
 - Protester's "mere disagreement" with the evaluation is not sufficient to render it unreasonable

What is a Bid Protest?

- A formal complaint against some aspect of a federal procurement process which asserts either:
 - A violation of law; or
 - A decision that lacks a rational basis



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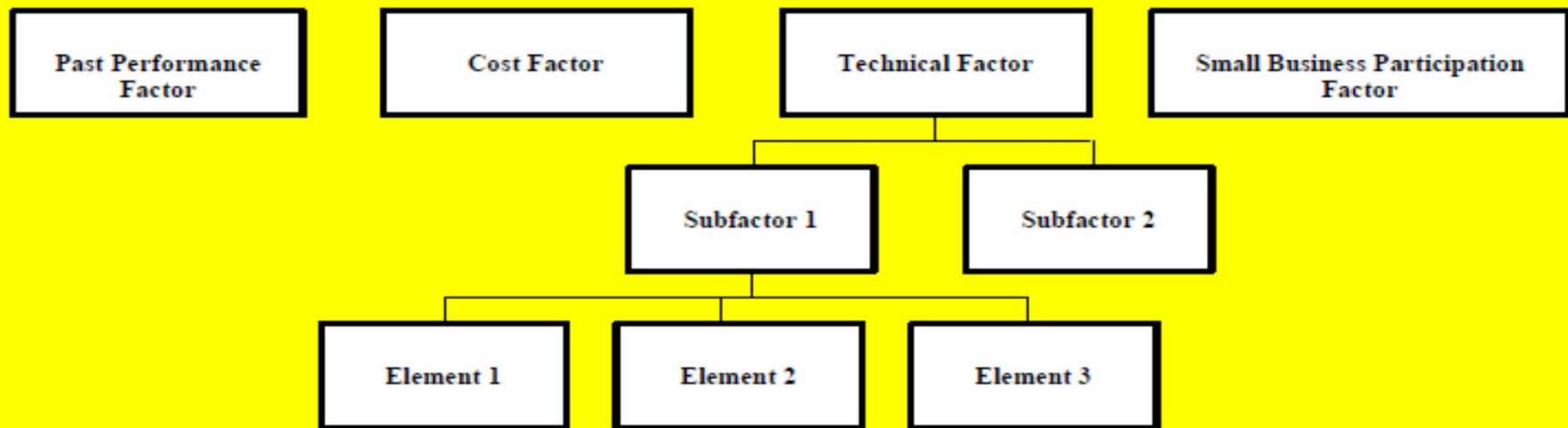
What Do I Need to Know to Decide Whether to Protest?

- Federal procurement process rules
- Bid protest process rules – tight timelines
- Your own objectives in filing a protest
 - Importance?
 - Incumbency?

What Should I Focus on for Potential Protest Grounds?

- § M, Evaluation Factors for Award to Offerors
- § L, Instructions, Conditions, and Notices to Offerors

Figure 5-1: Sample Structure of Evaluation Factors and Subfactors



What Are the Some of the Potential Bases for Post-Award Bid Protests?

- Deviation from Stated Evaluation Criteria
- Defects in:
 - Technical Evaluation
 - Past Performance Evaluation
 - Cost Evaluation
 - Price Analysis
- Unequal or defective discussions
- Flawed Best Value decision
- Organizational Conflict of Interest (OCI) issues
- Defects in responsibility determination
- Unequal treatment
- Undisclosed evaluation ground

Can I Protest My Competitor's Ethical Issue?

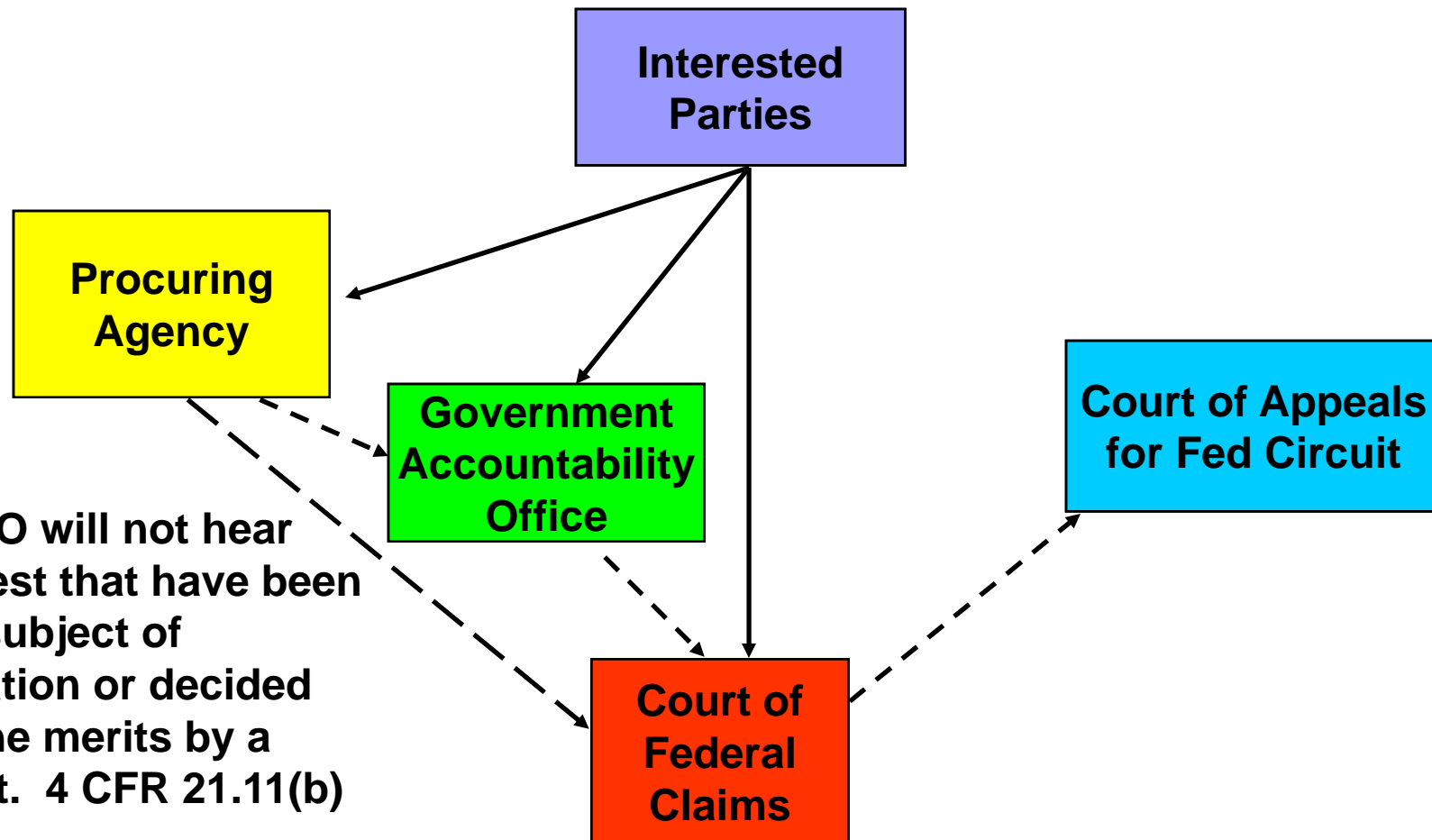
- 14 day limit for protest based upon Procurement Integrity Act violation



Will a protest affect my relations with my customer?

- Formal protest is not the preferred approach to most issues
- Sometimes it is the only way to protect your interests
- Valid grounds
- Customer sophistication
- Other awards pending before same customer?

What are the Forums for a Bid Protest?



What About Protesting at the Procuring Agency? (FAR 33.103)

- Interested party may request an independent review by procurement professionals at levels above the CO
- Some agencies take more seriously than others
- Can be most effective on pre-award issues (overly restrictive; exclusions; Procurement Integrity Act)
- Unusual to gain satisfaction in post-award protests
- Quick resolution; decision encouraged in 35 days

What Are the Key Characteristics of A Protest at GAO?

- Provides true outside expertise (80+ years)
- Automatic stay
- Substantial opportunities to develop facts regarding evaluations and other proposals
 - Full report
 - Document requests
 - Hearings (at GAO's discretion)
- Opportunities maximized through protective order; requires legal counsel not involved in competitive process
- Recovery of protest costs
- Agencies almost always follow GAO's recommendations ²⁰

What About Protesting at the Court of Federal Claims?

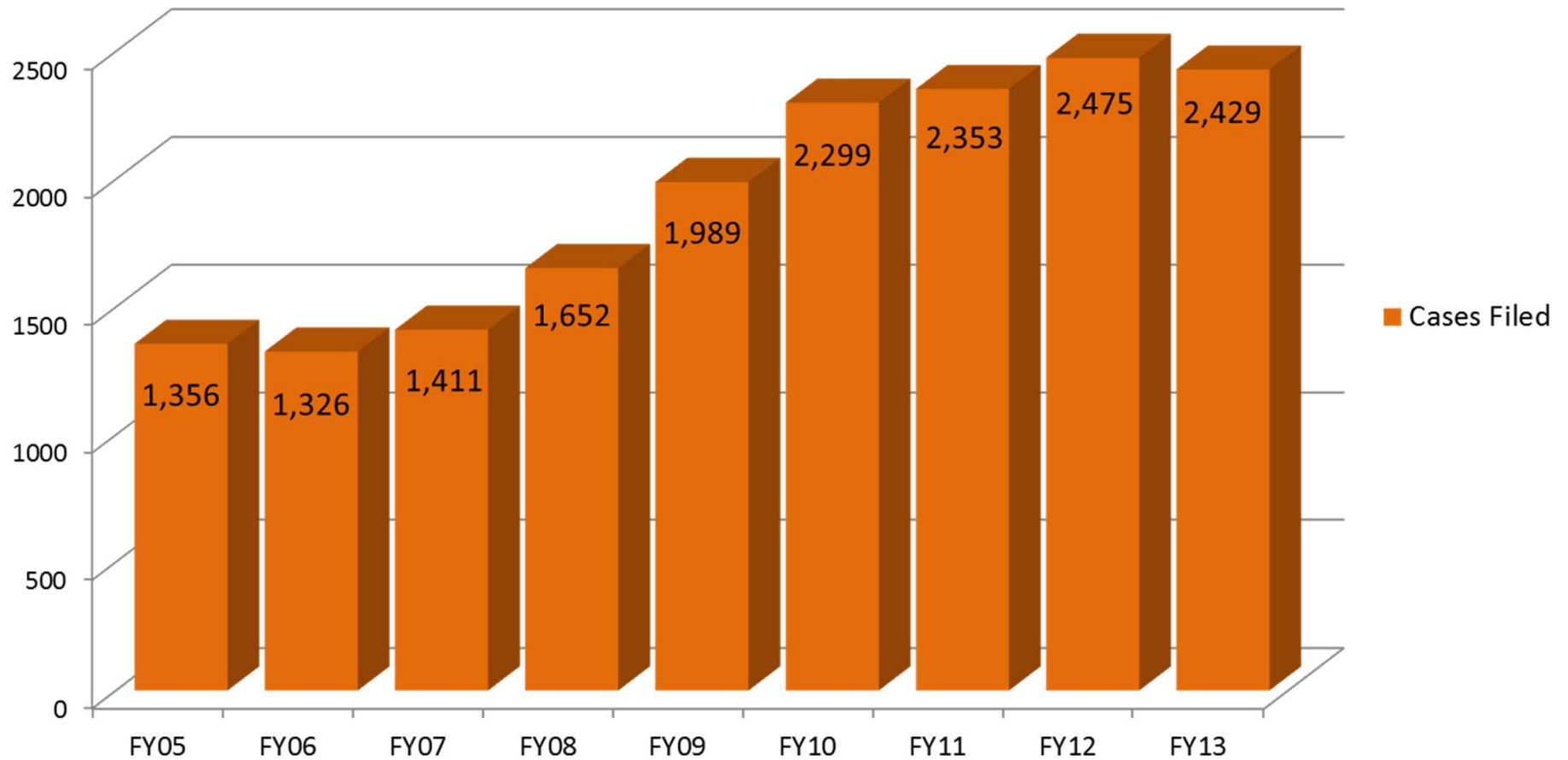
- Court process – opportunity for discovery
- GAO deadlines do not apply
- No automatic stay; agency may stop voluntarily or enjoined
- Process more expensive and can be more complicated than GAO
- Decisions are appealable to Federal Circuit
- Can challenge agency override of stay



What Specific Procedures Apply at GAO?



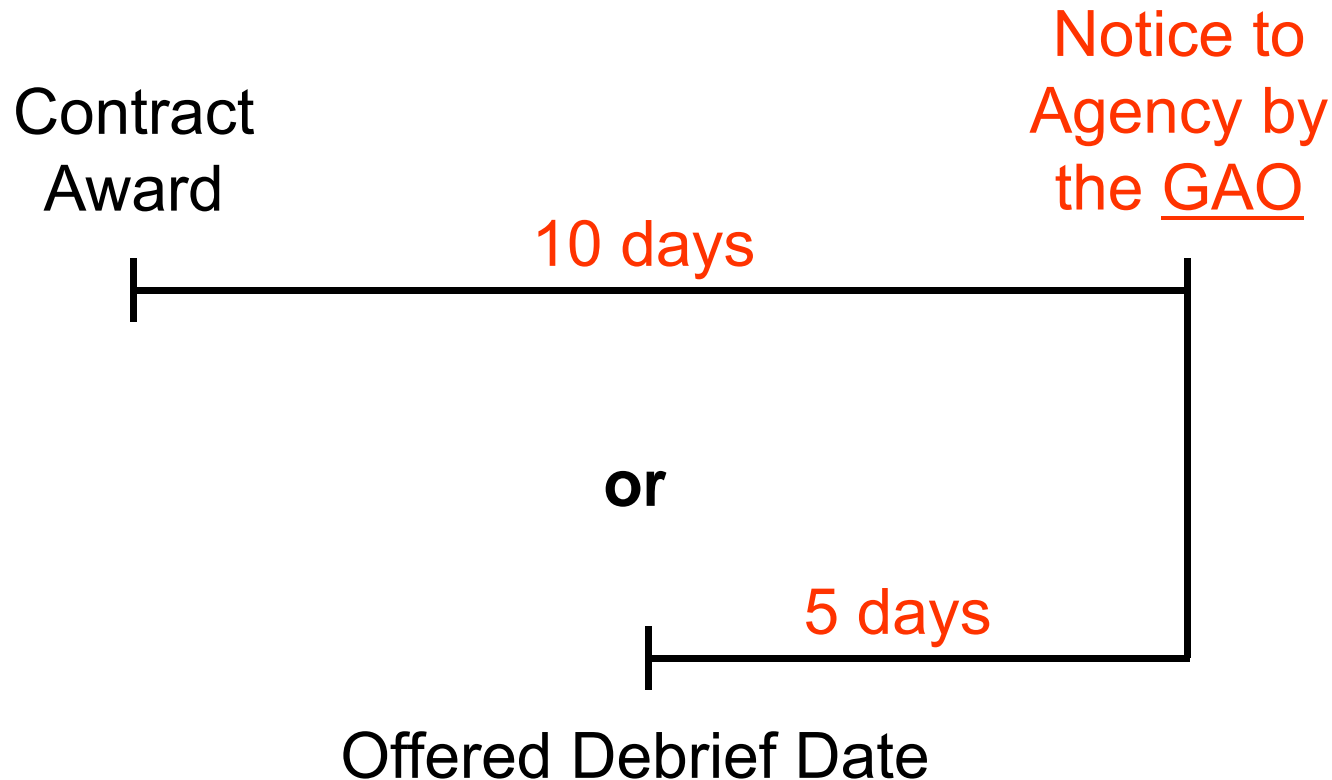
GAO: Cases Filed



I Have Decided to Protest at GAO – What Are the Deadlines?

- #1. Deadline for GAO Filing:
 - NLT 10 days after the basis of the protest is known or should have been known
 - Or within 10 days of debriefing. 4 C.F.R. § 21.2(a)(2).
- #2. Deadline to Stay Contract Performance:
 - Within 10 days after contract award or
 - Within 5 days of the offered debrief date
 - Stay is crucial in order to obtain meaningful relief
 - By law, an Agency may not award a contract after notice of pending protest – CICA, 31 U.S.Code 3553(c) and (d)
 - GAO must notify agency within the required time limits
 - Head of procuring agency must make finding to override

What Is a “CICA Stay?” (FAR 33.104(c)(1))



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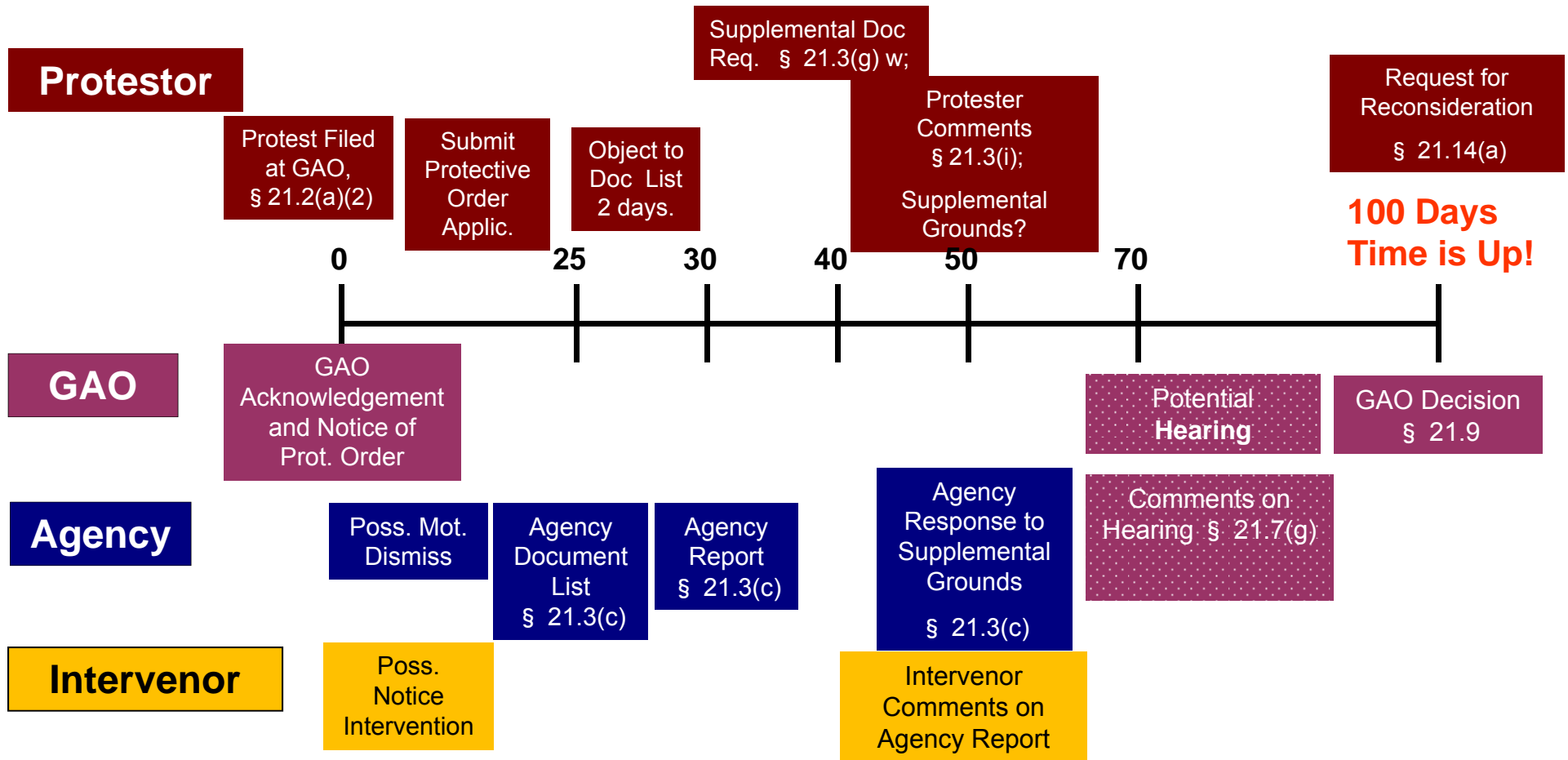
What does Standing mean?

- A GAO protest must be filed by an "interested party," which means an actual or prospective bidder or offeror with a direct economic interest in the procurement. 4 C.F.R. § 21.0(a).
 - Generally means an offeror that would potentially be in line for award if the protest were sustained.
- No Subcontractors unless exception applies:
 - Interested parties do not include subcontractors except where the awarding agency has requested in writing that subcontract protests be decided pursuant to 4 C.F.R. § 21.13.

What Is the “Protective Order?”

- Purpose – protect:
 - Company’s proprietary or confidential data
 - The agency’s source-selection-sensitive information
- Attorneys and consultants retained by attorneys may be admitted if they meet requirements
- Certification required that not involved in “competitive decisionmaking”
- Analyze risk of inadvertent disclosure
- Protected material may only be provided to GAO and individuals authorized under the protective order

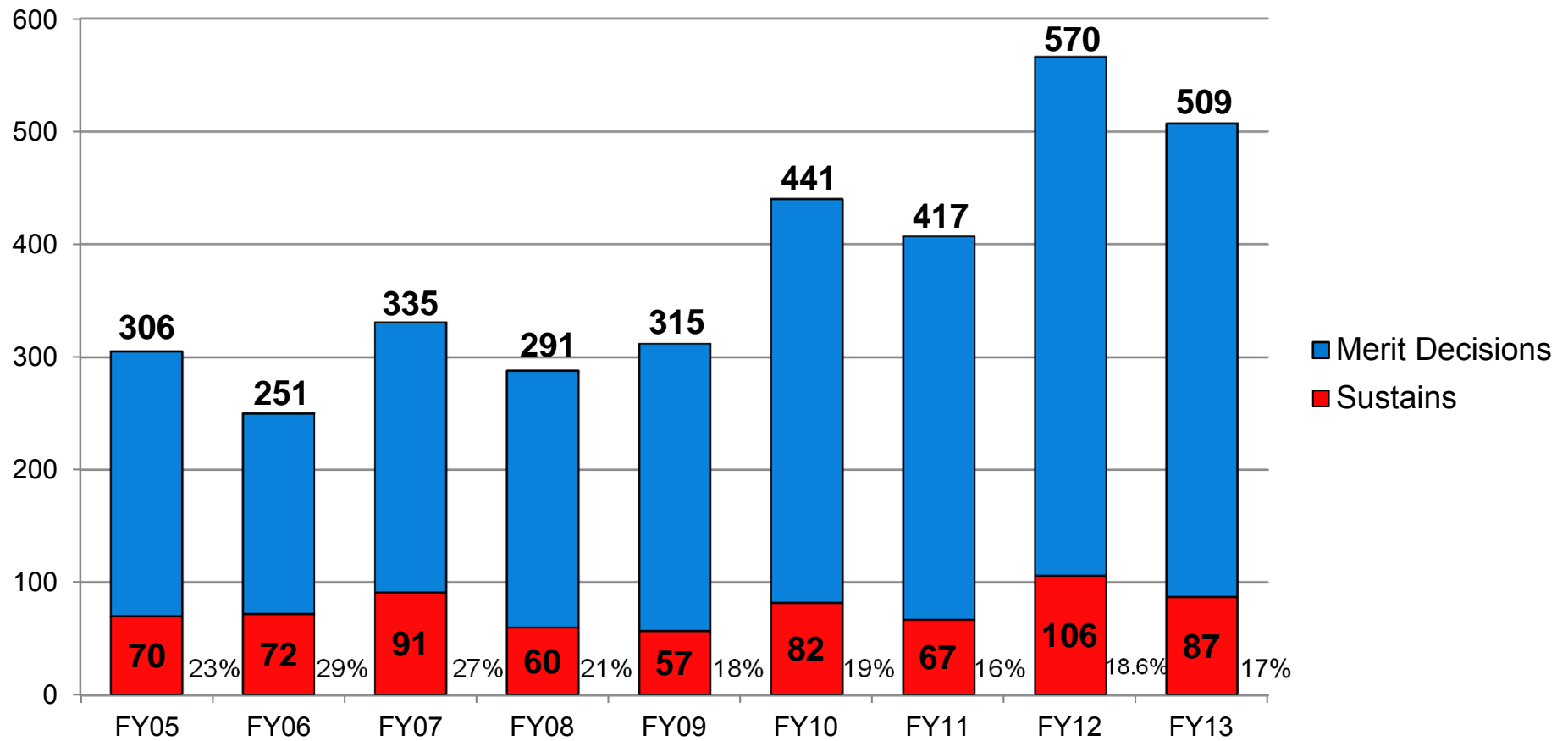
What Goes on During a Protest at GAO?



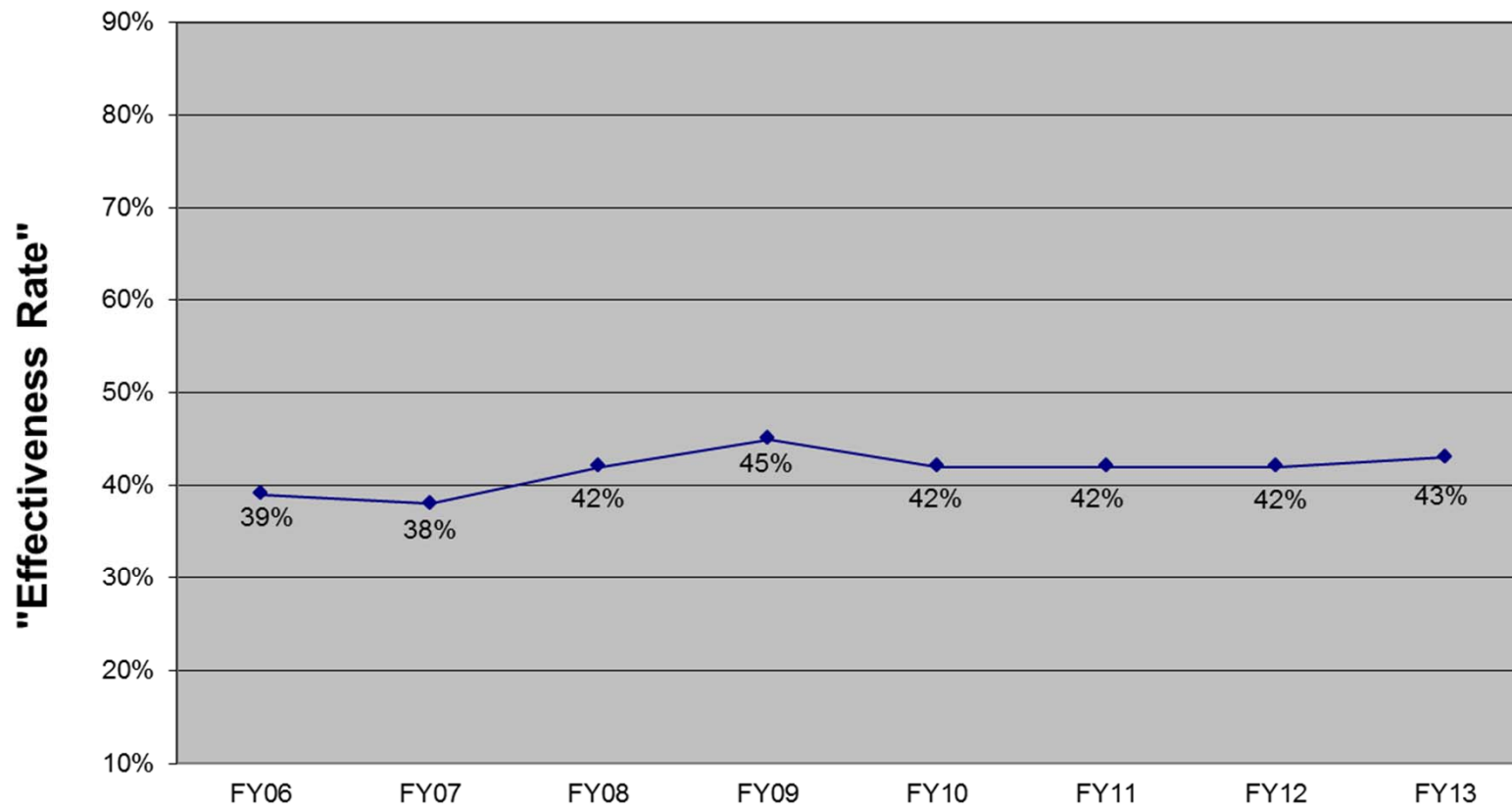
What Are the Potential Remedies for A Protest Filed at GAO?

- Refrain from exercising options under the contract
- Terminate the contract
- Recompete the contract
 - Re-evaluation may result in reaward to awardee
- Issue a new solicitation
- Award a contract consistent with statute and regulation
 - Directed award (rare)
- Such other recommendations as GAO determines necessary to promote compliance
 - Exclude awardee

GAO: Merit Decisions and Protests Sustained



GAO "Effectiveness Rate" = GAO Merits Decisions or Agency Corrective Action



If I am the Awardee Should I Intervene?

- To protect its interests
- To obtain access to information subject to a protective order

Can I Protest a Corrective Action?

- As a general matter, the details of corrective action are within the sound discretion of the contracting agency
- An agency may reasonably limit the scope of proposal revisions, provided such limitation is appropriate to remedy the procurement impropriety

Nuclear Production Partners, LLC, B-407948.9 (Sept. 24, 2013)

Can I Protest a Corrective Action? (Example)

- Army awarded hospital construction contract to Turner Construction
 - Two rival contractors filed protests at GAO
- GAO sustained the protests
 - Found OCI, recommended re-procurement without Turner
 - Army agreed to follow GAO recommendations
- Turner sued in Court of Federal Claims (COFC), contesting termination and reprocurement
- COFC found GAO irrationally found OCI based on “suspicion or innuendo” rather than hard facts
 - Army’s decision to follow GAO and revoke contract was “arbitrary and capricious”
- Federal Circuit affirmed COFC
 - GAO’s “cursory” OCI inquiry departed from GAO precedent

Can I recover my protest costs?

- Expressly unallowable under FAR 31.205-47 unless incurred pursuant to CO written request
- If protest sustained, GAO will generally recommend reimbursement of attorney, consultant, and expert witness fees
- Can recommend B&P costs
- 60 days to file claim

What Was the Point of This Presentation?

- Make the most of your debrief
- Protests are sometimes required to protect your interests
- Protests move very quickly
 - Imperative to know the rules to meet deadlines
- Counsel should be involved as early as possible
 - Spot and evaluate potential protestable issues
- Requires evaluation of both legal and business issues

Questions or comments, please write, call or email:

Don Carney
Perkins Coie LLP
700 13th Street, NW, Suite 600
Washington, DC 20005-3960
(202) 654-6336
DCarney@perkinscoie.com



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