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FILING A TIMELY BID PROTEST

With the end of the federal government's fiscal year quickly approaching, agencies will be scurrying to spend every last cent of those "use it or lose it" appropriations. As a result, it is appropriate to review a contractor's options in seeking to challenge the conduct of a federal procurement, and the time periods within which to do so.

A contractor initially can protest a federal procurement in one of three forums:

- (1) the federal agency conducting the procurement;
- (2) the General Accounting Office ("GAO"); or
- (3) the Court of Federal Claims ("Court").

Further, a protest initially filed with a federal agency may subsequently be filed with the GAO or the Court, and a protest filed with the GAO may subsequently be filed with the Court.¹ Each of these forums has its own bid protest timeliness requirements. This article discusses the filing deadlines of these forums, and provides suggestions to assist contractors in filing timely protests.

*Federal Agency
Timeliness Requirements*

At the agency level, any protest alleging a solicitation defect that is apparent before bid opening or before the initial proposal due date must be filed before the bid opening or the initial proposal due date. In addition, any protest based upon alleged improprieties other than solicitation defects, must be filed within the time period set forth in the agency's protest regulations after the basis for the protest is known, or should have been known. Federal agency protest regulations largely mirror GAO timeliness requirements. Differences are generally limited to the number of days within which a contractor must file a protest. As a result, a contractor should become familiar with the timeliness requirements for the agency conducting a procurement.

GAO Timeliness Requirements

The GAO's Bid Protest Regulations contain three principal bid protest timeliness requirements:

- (1) Any protest alleging a solicitation defect apparent before bid opening or the initial proposal due date must be filed before bid opening or the initial proposal due date.²

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(2) Any protest based upon alleged improprieties other than apparent solicitation defects must be filed within 10 calendar days after the basis for the protest is known or should have been known.³

(3) Any protest brought to the GAO after first being filed at an agency must be filed at the GAO within 10 calendar days after initial adverse agency action on the protest.⁴

Significantly, GAO Bid Protest Regulations also provide for automatic suspension of contract performance if the procuring agency receives notice of the protest from the GAO within 10 calendar days of contract award or within five calendar days after a “required debriefing.”⁵

At the GAO, a protester must show, on the face of its protest, that it has correctly calculated the applicable deadline.⁶ Failure to do so may result in dismissal of the protest with no opportunity to provide the information establishing timeliness in a subsequent request for reconsideration. Any question as to whether a contractor has enough information to state a basis for protest should be resolved in favor of filing the protest. A protest not sufficiently supported may be dismissed as premature, but a contractor is generally allowed to refile when additional information becomes available.

Would-be protesters must know these basic requirements. The GAO will not entertain untimely protests. The GAO has stated that “prospective contractors are on constructive notice of our Regulations since they are published in the Federal Register and Code of Federal Regulations.”⁷

Protest Based Upon Solicitation Defects

A protest alleging a solicitation defect apparent before bid opening or the initial proposal due date must be filed before bid opening or the initial proposal due date.⁸ Likewise, an apparent solicitation defect introduced by the agency through an amendment to a request for proposal must be protested before the closing time for the submission of the next round of proposals.⁹

A solicitation defect is “apparent,” and often called a “patent” defect if a contractor was aware, or should have been aware, of the grounds for protest from reading the solicitation. Solicitation defects are not limited to inaccuracies in the express words of the solicitation. A contractor must consider, for example, whether solicitation provisions will result in the flawed evaluation of proposals because of circumstances external to the solicitation. Procedures called for in a solicitation, such as pre-award site visits, also may have to be protested as solicitation defects.

Solicitation defects that are not apparent, *i.e.*, “latent” defects, are not subject to this rule. Similarly, solicitation defects contained in a solicitation with no formal or informal closing date for receipt of proposals, or one for which the time for receipt is “practically simultaneous with the solicitation itself,” are not subject to this rule.¹⁰ The situation may arise, for instance, in solicitations conducted under the simplified acquisition procedures in FAR Part 13, which provide for a flexible approach to small-dollar-value procurements, including oral solicitations. Both of these exceptions are subject to the 10 calendar day rule discussed below.

Protest Based Upon Improprieties Other Than Solicitation Defects

Protests other than those involving apparent solicitation defects must be filed at the GAO no later than 10 calendar days after the basis of the protest is known, or should have been known, whichever is earlier.¹¹ Determining the date upon which the basis for protest “was known or should have been known” is a fact-based inquiry that has generated a substantial body of case law. While the basis for a protest often is provided to the protester upon written notice that it has been eliminated from competition or has not been awarded the contract, the notification necessary to start the 10 calendar day clock need not be conveyed to the contractor in any official form, and need not provide all the information necessary to evaluate the protestable issue.¹² For instance, an informal telephone conversation with the contracting officer indicating that another contractor is in line for award based upon a superior evaluation has been found to trigger the 10 day filing period.¹³ Because the threshold for stating a *prima facie* basis for a protest is fairly low, the GAO tends to require protesters to err on the side of filing.

An exception to this rule arises in negotiated procurements in which a disappointed bidder is entitled to receive, and requests in a timely manner, a required debriefing.¹⁴ An agency debriefing is required if a disappointed bidder for a negotiated procurement files a written request for a debriefing within three days after receiving notice of the award or notice of exclusion from the competitive range.¹⁵ In such a case, the disappointed bidder may wait 10 calendar days after this statutorily-required

debriefing to file a protest, whether the protest basis is known before, or as a result of, the debriefing. In the event the protester does not learn of the basis for protest until after the debriefing, the protest must be filed within 10 calendar days after the basis for protest is known, or should have been known.¹⁶

Protest Previously Filed at Agency Level

An agency-level protest, meeting the timeliness requirements of both the procuring agency and the GAO, subsequently may be pursued at the GAO if filed within 10 calendar days from the day the protester knew, or should have known, of “initial adverse agency action” on the agency-level protest. Adverse agency action is broadly defined to include any agency action prejudicial to the position taken in a protest. Adverse agency action can occur without a formal response from the agency rejecting the protest, and can include any act or omission indicating failure to adequately consider, or rejection of, the protest grounds.

Contractors must pay careful attention to the differences between agency and GAO timeliness requirements. Failure to do so could foreclose filing of a protest at the GAO. For example, an agency-level protest filed on time that does not satisfy the GAO’s timeliness requirements will not be considered by the GAO – even if filed within 10 days of adverse agency action. This situation arises when the agency-level timeliness requirements are different from, and less stringent than, those of the GAO. For example, the Department of the Treasury (the “Treasury”) timeliness requirements provide that protests based on factors other than solicitation improprieties must be

filed within 10 working days after the basis of protest is known, or should have been known. A GAO protest on the same grounds must be filed within 10 calendar days after the basis of protest is known, or should have been known.¹⁷ Thus, a protest filed with the Treasury within 10 working days, but not within 10 calendar days, after knowledge of the basis of protest, will be considered timely by the Treasury, but not by the GAO. As a result, to preserve its right to pursue a GAO protest after agency-level consideration, a contractor must be cognizant of both GAO and procuring agency deadlines.

Automatic Contract Suspension

Award and performance of a protested contract will be automatically suspended if the agency receives notice of the protest from the GAO within 10 calendar days of contract award, or within five calendar days of a required debriefing.¹⁸ To trigger a suspension of award and performance, the notice to the agency of the protest must come from the GAO.¹⁹ Because the GAO’s notification to the agency is not required to occur until one business day after its receipt of a protest, the protest must be filed with the GAO within nine calendar days of contract award, or four calendar days of the required debriefing, to ensure occurrence of the automatic suspension.²⁰

Unlike the deadlines for filing a protest, the deadlines for obtaining a suspension of performance are based not on when protest grounds are discovered, but on when the contract is awarded, or the required debriefing is

held. Contractors must remain aware that even a protest that is filed in a timely manner after the protester learned of its basis for protest, will fail to trigger an automatic suspension if the protest is filed after the deadline for obtaining a suspension expires.

The Court of Federal Claims Timeliness Requirements

The Court has both original bid protest jurisdiction and jurisdiction to consider protests previously filed with the GAO and/or the procuring agency.²¹ Unlike the strict GAO and agency deadlines, there are no express timeliness requirements for filing protests at the Court. The statute granting the Court bid protest jurisdiction states only that, in exercising jurisdiction, the Court “shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”²² The Court, therefore, has considered timeliness of protests by determining whether the disappointed bidder has waived its rights to protest a solicitation by “sitting on” those rights for an unreasonable period of time.

With one substantial exception, the Court rarely finds a protest to be untimely, even if the protest clearly would be untimely at the GAO. Indeed, the Court has sustained at least one protest that was filed first at the GAO and dismissed by the GAO as untimely.²³ However, while a moderate delay in filing a protest with the Court may not result in the Court’s finding the protester to have waived the protest grounds, a delay may adversely impact the protester’s ability to obtain injunctive relief, such as

suspension of contract award or performance, otherwise available from the Court. Therefore, a contractor wishing to avail itself of both injunctive and monetary relief from the Court should seek to file at its earliest opportunity. And while a contractor not seeking injunctive relief is afforded a larger window within which to file a protest, the contractor must avoid delays in filing that could give the appearance that the contractor was “sitting on” its rights.

Notwithstanding the Court’s otherwise flexible approach to protest timeliness, a protest of patent solicitation defects must generally be brought, at the latest, before contract award.²⁴ While in some cases the Court has advocated a deadline identical to that employed by the GAO, requiring filing of such a protest before bid opening or the time set for receipt of proposals, in other cases the Court has indicated that such protests need only be filed prior to contract award to be considered timely.

To be safe, a contractor should treat GAO deadlines for protesting patent solicitation defects as controlling in the Court, but in no case should contract award pass without filing of the protest. ♦

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¹ A protest filed with the GAO may not subsequently be filed with the agency, and a protest first filed with the Court may not subsequently be filed with the agency or the GAO.

² 4 C.F.R. § 21.2(a)(1).

³ 4 C.F.R. § 21.2(a)(2).

⁴ 4 C.F.R. § 21.2(a)(3).

⁵ 4 C.F.R. § 21.6; 31 U.S.C. § 3553 (c) and (d).

⁶ 4 C.F.R. § 21.2(b). This is also an agency-level protest requirement.

⁷ *General Hone Corp.*, B-242357, Mar. 22, 1991, 91-1 CPD 322.

⁸ 4 C.F.R. § 21.2(a)(1).

⁹ *Id.*

¹⁰ *Skyline Indus., Inc.*, B-257340, Sept. 22, 1994, 94-2 CPD 111.

¹¹ *Id.*

¹² *Aero Components Co.*, B-244100, June 20, 1991, 91-1 CPD 586.

¹³ *Id.*

¹⁴ 4 C.F.R. § 21.2(a)(2).

¹⁵ 10 U.S.C. § 2305(b)(5)(A); 41 U.S.C. § 253b (e)(1).

¹⁶ 4 C.F.R. § 21.2(a)(2).

¹⁷ 48 C.F.R. § 1033.103(b)(3) (Treasury Protest Requirements); 4 C.F.R. §§ 21.0(e) and 21.2(a)(2) (GAO Protest Requirements).

¹⁸ 4 C.F.R. § 21.6; 31 U.S.C. § 3553(d)(4).

¹⁹ *Id.*

²⁰ 31 U.S.C. § 3553(b)(1).

²¹ 28 U.S.C. § 1491(b)(1).

²² 28 U.S.C. § 1491(b)(3).

²³ *Griffy's Landscape Maint. LLC v. United States*, 46 Fed. Cl. 257 (2000).

²⁴ *Cubic Defense Sys., Inc. v. United States*, 45 Fed. Cl. 239, 252 (1999).



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