

## **Bid Protests**

### **Background**

Federal contractors have an expectation that an agency will identify the bases to be used in evaluating bids and proposals and make awards solely on the criteria identified. Federal agencies are required to award government contracts in accordance with numerous acquisition laws and regulations.

### **What is a Protest?**

Protests generally challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract. A protest may also challenge defective solicitations (e.g., allegedly restrictive specifications, omission of a required provision, and ambiguous or indefinite evaluation factors), as well as certain other procurement actions, for example, the cancellation of a solicitation).

### **Where can a Protest be filed?**

An interested party in federal acquisition programs actually has three potential avenues for protest. Those options range from an informal resolution at the agency level to a formal judicial forum. A bid protest can be filed with the

- Procuring agency contracting officer. See FAR 33.103
- General Accountability Office (GAO). See FAR 33.104
- U.S. Court of Federal Claims (USCFC). See FAR 33.105

Selection of a venue for protest can depend on many factors including the specific issues, expectation of success, the amounts at issue, the cost of litigation. When available, corporate counsel should be involved in making the choice of venue. GAO is a long standing, widely used forum for bid protest resolution. GAO reported that 2789 protests were filed in FY 2016. The USCFC reported 120 cases filed during that same period. There are no readily available statistics for agency level bid protests. Because GAO is the most commonly used venue, this article will be devoted to information about that forum.

### **Who can protest?**

Section 33.101 of the Federal Acquisition Regulation (FAR) defines “protest” as a written objection by an interested party to:



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- A solicitation or other request by an agency for offers for a contract for the procurement of property or services
- The cancellation of the solicitation or other request
- An award or proposed award of the contract
- A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract

FAR 33.101 further defines “Interested party” as

an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract

In essence, a member of the general public cannot bring a protest; only an offeror or prospective offeror, with a specific interest in an acquisition is entitled to do so.

### **Is GAO Jurisdiction the same for all IDIQ contracts?**

There have been some recent changes to GAO authority to consider protests of against task and delivery orders under multiple award IDIQ contracts. Those changes do **not** affect protests involving the GSA Schedule program. Rather, the changes impact civilian agency and department of defense multiple award IDIQ contracts.

GAO’s protest jurisdiction derives from the Budget and Accounting Act of 1921<sup>1</sup>, the Competition in Contracting Act (CICA), and The Federal Acquisition Streamlining Act (FASA).<sup>2</sup> Further, changes to GAO authority to hear protests concerning the award of task or delivery orders issued under multiple-award indefinite delivery, indefinite quantity (ID/IQ) contracts have been affected by several National Defense Authorization Acts (NDAA). With the signing of the FY2017 NDAA on December 23, 2016, GAO’s protest jurisdiction is as follows:

- All GSA Schedule program orders
- DoD task order awards valued at least \$25 million.
- Civilian agency task order awards valued at \$10 million or more.
  - DoD task orders issued under civilian agency Government Wide Acquisition Contracts (GWAC) are subject to the \$10 million threshold applicable to civilian task order awards.

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<sup>1</sup> P.L. 67-13, §305, 42 Stat. 20, 24 (June 10, 1921)

<sup>2</sup> (Pub. L. No. 103-355, 108 Stat. 3243, 3264)



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### **What are Common Protest Issues?**

- Improper sole source award
- Contract modification exceeds scope of original contract
- Unduly restrictive specifications or requirements
- Ambiguous or unclear requirements
- Organizational conflict of interest
- Unequal access to information
  - Biased ground rules
  - Impaired objectivity
- Use of unstated evaluation criteria
- Acceptance of offer that fails to meet mandatory requirement
- Unreasonable evaluation (technical, cost, etc.)
- Lack of “meaningful discussions”
- Unfair competitive advantage
- Improper business conduct or representations
- Issues specific to GSA Schedule Contractors
  - The use of FAR Part 15-type procedures, versus FAR Subpart 8.4.
  - Scope issues can arise if some of the work involved in providing a solution for a federal customer is outside the scope of the Schedule contract.
  - “Open market” rather than included on a schedule contract as required by the terms of a solicitation.

### **Does GAO have a specific Protest Process?**

GAO has a statutory mandate to provide for an inexpensive and expeditious resolution of protests.<sup>3</sup> GAO implements this mandate, in part by enabling interested parties to represent themselves, rather than rely on attorneys. GAO also does not require formal briefs or other technical forms of pleadings or motions. Although attorneys are not required, many protesters utilize an attorney because of the complexity of the procurement issues, the attorney’s familiarity with GAO’s bid protest process, the significance of GAO’s timeliness regulations, and GAO procedural restrictions on non-attorneys obtaining access to contractor proprietary and government source selection sensitive information.

GAO maintains detailed regulations and guides that inform protesters of the rules concerning timeliness, how to file a protest, what to expect throughout the process. GAO’s web site provides information and gives a sense of the level of effort it takes to pursue a protest. <http://www.gao.gov/legal/>. We highlight a few aspects of the procedures below.

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<sup>3</sup> CICA



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### ***Timeliness***

The bid protest process at GAO begins with the filing of a written protest. GAO regulations establish timeliness requirements for filing a protest. GAO. 4 C.F.R. § 21.2.

- Protests alleging improprieties in a solicitation must be filed before bid opening or before the time set for receipt of initial proposals if the improprieties were apparent prior to those times.
- A solicitation defect that was not apparent before those times must be protested not later than 10 days after the defect became apparent.
- In negotiated procurements, if an alleged impropriety did not exist in the initial solicitation, but was later incorporated into the solicitation by an amendment, a protest based on that impropriety must be filed before the next closing time established for submitting proposals.
- In all other cases, protests must be filed not later than 10 days after the protester knew or should have known the basis of protest (whichever is earlier),
  - An exception is allowed for protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is “requested and, when requested, is required,” that is, a debriefing required by law. Note that this exception does not apply to task orders under the GSA schedule program because a debriefing is not required

*GAO strictly enforces its timeliness rules.*

### **GAO Remedies**

If GAO determines that a solicitation, cancellation of a solicitation, termination of a contract, proposed award, or award does not comply with statute or regulation, it will recommend that the agency implement any combination of the following remedies:

- Refrain from exercising options under the contract;
- Terminate the contract;
- Recompete the contract;
- Issue a new solicitation;
- Award a contract consistent with statute and regulation; or
- Such other recommendation(s) as GAO determines necessary to promote compliance.



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### **Issues that GAO will not Decide**

GAO Bid protest regulations set forth some matters that it will not consider under its protest authority. See 4 C.F.R. § 21.5. Some matters that the regulations specifically provide will not be considered include:

- Small Business Administration size standard issues
- Small Business Certificate of Competency Program.
- Affirmative determination of responsibility by the contracting officer

### **Getting Help**

Although GAO protest proceedings are less formal than a judicial proceeding, it can be daunting to negotiate the process, particularly in the time required by the rules. An attorney is definitely a benefit for high dollar acquisitions, complex issues and matters that will have a significant impact on your business.

***Gormley Group clients can contact their consultant for assistance in identifying appropriate resources.***

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