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Refresher on filing a federal bid protest at GAO

Contractors are running into ever more Government Accountability Office (GAO) bid protests. In 2013 alone, more than 2,400 protests were filed. Therefore, a short refresher on GAO protests of federal projects for new bidders and experienced hands is appropriate.

This refresher provides a brief overview of 1) who can protest at GAO, 2) filing the protest and attorney admission to a protective order, 3) timeliness of the protest, and 4) the crucial automatic stay of contract award or performance while the protest is decided.

Who can protest at GAO?

The protestor must be an “interested party.” GAO bid protest regulations define an “interested party” as any “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” This includes disappointed bidders on the federal procurement contract that is the subject of the protest. A bidder is not an interested party if there is no reasonable possibility it would be eligible for the award if the protest were sustained.

Filing the protest and attorney admission to a protective order

Protests must be in writing and delivered to GAO by hand, mail, commercial carrier, facsimile or email. GAO rules state the protest must:

- (1) Include the name, street address, electronic mail address, and telephone and facsimile numbers of the protestor
- (2) Be signed by the protestor or its representative
- (3) Identify the agency and the solicitation and/or contract number
- (4) Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents
- (5) Set forth all information establishing the protestor is an interested party for the purpose of filing a protest
- (6) Set forth all information establishing the timeliness of the protest
- (7) Specifically request a ruling by the comptroller general of the United States
- (8) State the form of relief requested

The protestor may also request a protective order and agency documents under such an order. GAO has stated:

The protective order process is essential to the proper functioning of GAO’s bid protest process. The terms of our protective order limit ‘disclosure of certain material and information submitted in the ... protest, so that no party obtaining access to protected material under this order will gain a competitive advantage as a result of the disclosure.’ Protective Order, Oct. 17, 2010¶ 1. The order strictly limits access to protected material only to those persons admitted under the order. *Id.* ¶¶ 1-3., *Waterfront Technologies, Inc. — Protest and Costs*, B-401948.16; B-401948.18, June 24, 2011, 2011 CPD P123, at 7.

While a lawyer is not necessary to file a protest, if the protestor is not represented by counsel, issuing a protective order serves no useful purpose since the protestor cannot apply for access to the protected material without counsel. GAO will only admit the contractor’s attorney to the protective order. Accordingly, any portions of the record that GAO determines cannot be released without a protective order will not be released at all if the protestor has no attorney. If the protestor has an attorney, they will be able to review the protected information in the agency file, which may uncover additional protest grounds and support for the original protest.

Timeliness of protest to GAO

Protests based upon alleged improprieties in a solicitation must be filed before bid opening or the time set for receipt of the proposals, unless the alleged impropriety is not apparent before that time. With the exception of additional rules for negotiated procurement protests discussed below, all other bid protests must be filed no later than 10 calendar days after the basis of the protest is known or should have been known, whichever is earlier.

Protests of negotiated procurements have additional rules. A post-award protest must be filed within 10 days of the debriefing date offered to the protestor or GAO will not consider the protest.

Importantly, for post award protests, the automatic 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 automatic stay will not apply.

Automatic stay

A powerful feature of a GAO protest is the ability to get an automatic stay for the price of a stamp/fax/email.

If the agency has received timely telephonic notice of the protest from GAO, the agency may not award the contract. If the contract has already been awarded, the agency must suspend performance of the contract if the procuring agency receives notice of a protest from GAO within 10 days after contract award, or within five days after a debriefing date, whichever is later. However, 10/5 days may not be 10/5 days, because under GAO regulations, the GAO has one day to notify an agency from the time of receipt of the protest.

Therefore, in order to trigger the stay it is critical that the protest is filed at least one full day in advance of the deadline in case GAO takes a full day to notify the agency. 🐢

This column provides information about the law designed to help users safely cope with their own legal needs. But legal information is not the same as legal advice — the application of law to an individual's specific circumstances. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

Howard W. Roth recently joined Oles Morrison Rinker and Baker, LLP as Of Counsel. His experience ranges from Commissioner at the Armed Services Board of Contract Appeals to Deputy Staff Judge Advocate at an Army Regional Support Command. He was Chief Government Contract Law for a nationwide military command and a trial team chief at the Army Contract Appeals Division.

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Clarification

The "Contractors & the Law" column on page 50 of the Winter 2014 issue described a recent Supreme Court decision, *North Pacific Erectors v. Department of Administration*. The court upheld a decision by the Alaska Department of Administration denying North Pacific Erectors' request for additional payment for the differing site condition surrounding the removal of asbestos. However, the column omitted an important detail. North Pacific Erectors (NPE) was the prime contractor on the project and thus any claims and subsequent appeals had to run through and name them. The subcontractor was Absolute Environmental. At the insistence of the subcontractor, NPE allowed the claim to proceed.