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Fighting Over
Government
Contracts

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FIGHTING OVER GOVERNMENT CONTRACTS

BY JEROME S. GABIG, JR.

Introduction

Government contracts are a major contributor to Alabama's economy. Governor Riley has observed:

[Defense spending is] an engine of economic growth that brings and creates good, quality jobs for Alabama. Over 30,000 of our citizens are employed on our military bases, and thousands more throughout the state have jobs today because these bases are located here. Alabama's military installations exceed \$4 billion in operating budgets and payrolls, creating a multi-billion dollar impact to our state economy.¹

Of the 30,000 jobs, many of them are subject to being outsourced to industry through government contracts.² Much of the four billion dollars in operating budgets for Alabama's military installations is spent through government contracts.

Although unmentioned by Governor Riley, four federal contracting activities in Alabama annually award many more billions dollars to companies that primarily perform the work in other states. These four federal contracting activities are the U.S. Army Aviation and Missile Command; NASA's Marshall Space Flight Center; the Missile Defense Agency; and the Corps of Engineers Support Center. For example, in fiscal year 2003, "Team Redstone" (*i.e.*, the military contracting activities located on Redstone Arsenal) awarded about \$11.3 billion in federal contracts.

Invariably, when contracts are competitively awarded, there are "winners and losers." Unlike the private sector where the disappointed vendor has essentially no recourse, an unsuccessful offeror for a federal procurement has a statutory right to protest.³ As explained by the Court of Appeals for the Eleventh Circuit, Congress created this right because "the public and ... bidders have a strong interest in certainty in the bidding process.... To achieve this certainty, strict adherence to the procedures for bidding is necessary."⁴

statutory right

The Majority of Protests Are Filed At the GAO

A disappointed vendor has a choice of three forums in which to file a protest: the procuring agency, the United States Court of Federal Claims, and the General Accounting Office ("GAO").⁵ For a variety of reasons, most protests are filed at the GAO.⁶ Over the years, the GAO has developed a substantial body of precedent for bid protests. In fiscal year 2004, 1,483 protests were filed at the GAO.

Of these 1,483 protests, the GAO sustained 21 percent. This low percentage presents a misleading picture of the effectiveness of the protest process. The primary reason for the low percentage of sustained protests is that a minority of protests involve ill-conceived grounds, amateurish preparation, or unwarranted whining.⁷ Nevertheless, the GAO contends that the "effectiveness rate" for protests is approximately 40 percent. The effectiveness rate recognizes that agencies often take some corrective action in instances where there appears to be merit to the protest. Examples of corrective action include revising the solicitation, re-opening discussions and re-evaluating offers.

One of the major advantages of a protest to the GAO is the automatic stay provisions. If properly invoked, these provisions prevent the procuring agency from awarding a contract.⁸ If the contract had been awarded before the protest is filed, the automatic stay provisions can nevertheless require the agency to issue a stop work order until the protest is decided.⁹ As a practical matter, obtaining a stay is very important from a protester's perspective. Consider a situation where there is no stay; instead, the awardee performs some of the work during the months that the protest is pending. If the GAO sustains the protest, the GAO may be reluctant, because of the economic waste, to recommend that the contract be terminated and re-competed.

The GAO's web site, www.gao.com, contains useful guides and recent decisions. Where the acquisition involves a large quantity of money, savvy protesters are likely to retain attorneys with experience in GAO protests. Likewise, an astute awardee is also likely to retain counsel to protect the awardee's interest by intervening. To be effective, intervenor's counsel should work closely with the attorney for the procuring agency.

Filing the Protest

The GAO protest process officially begins with the protester filing a written protest with the GAO.¹⁰ The GAO will not consider protests relating to (1) contract administration; (2) small business administration matters; (3) the awarding of subcontracts; and (4) challenges to suspensions and debarments.¹¹ Although there is no prescribed format for filing a protest, the GAO requires some minimum information.¹² The most important information that a protester must provide is "a detailed statement of the legal and factual grounds of protest including

copies of relevant documents."¹³ These grounds for protest generally involve allegations that the procuring agency violated one or more procurement statutes or regulations. Simultaneous with filing a protest, the protester should file a request for specific documents. The document request must explain the relevancy of the requested documents to the protest grounds.¹⁴

Drafting a protest requires strategic thinking not unlike drafting a complaint. Thinking strategically, counsel must keep in mind that many GAO protests are won with documents that the agency produces either in its agency

report or in response to a document request. However, the agency need only provide documents to the protester that are relevant to the grounds for protest. Hence, a seasoned protest attorney fashions the grounds for protest as broadly as possible to force the agency to produce key documents. In this regard, it is not uncommon for the GAO to sustain a protest that is based on grounds raised in a supplemental protest based on what the protester learned from documents provided by the agency in an earlier protest.

If a protester can establish that the agency violated either a procurement law or regulation and that the violation resulted in prejudice to the protester, the GAO will probably sustain the protest. The following are among the more common reasons for sustained protests:

- A lack of "full and open" competition as required by the Competition In Contracting Act;
- Failure of the agency to make an award based on the evaluation criteria set forth in the solicitation;
- The evaluators incorrectly evaluated the proposals;
- The awardee's proposal does not comply with the solicitation;
- The offerors were not treated equally during the procurement process;
- The agency did not engage in adequate discussions regarding deficiencies and significant weaknesses in the protester's proposal; and
- The record does not support a rational basis for the award decision.

A large percentage of all protests are summarily dismissed by the GAO for failing to comply with strict time limits for filing a

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protest.¹⁵ These timeliness rules vary depending on when the protester first became aware of the grounds for protest as well as whether a debriefing was provided by the agency. An example of a specific timeliness rule is the requirement for a vendor to protest objectionable terms of a solicitation either prior to bid opening or at the time established for receipt of initial proposals. Where no specific timeliness rule is applicable, the GAO invokes a general timeliness rule—the protest must be filed no later than ten days after the basis of protest is known or should have been known.¹⁶

The Agency Report and Release of Documents

As previously indicated, winning a protest is often a matter of getting incriminating documents from the Government. The Government, however, is reluctant to release procurement documents for two reasons. First, the proposals of other offerors may contain trade secrets. Second, the agency's evaluation can provide insight into the agency's deliberative processes. This information could provide a competitive advantage to the protester if the Government were required to re-compete the acquisition.

To overcome the valid concerns of the Government, the GAO has authority to issue protective orders.¹⁷ Under a protective order, only attorneys and experts retained by attorneys are permitted access to the documents. In fact, in-house counsel will not be admitted under the protective order unless the in-house counsel convinces the GAO that he or she is not involved in competitive decision-making on behalf of the company.

If the protester submitted a document request with its protest, the agency must provide a list of any requested documents that the agency intends to withhold. The list must be provided to the protester no later than five days before the protester is provided with a copy of the agency report. The protester has two days to

object to the GAO regarding the documents on the list.¹⁸ The GAO encourages agencies to release documents to the protester as soon as possible rather than delaying to provide the documents with the agency report.¹⁹

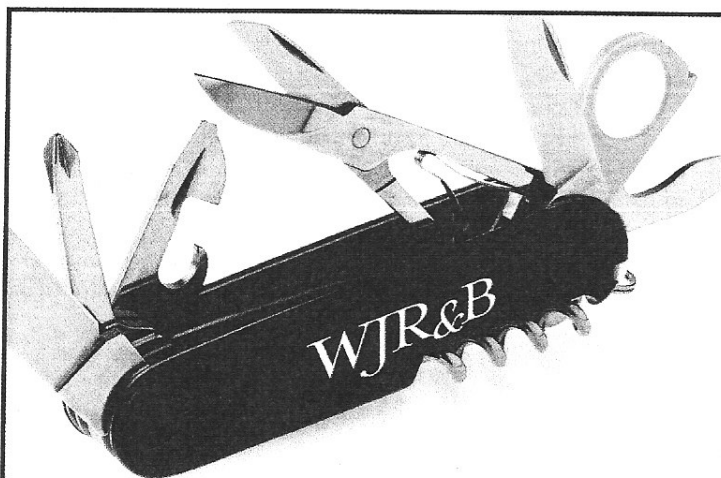
Within 30 days of the protest being filed, the procuring activity must provide the GAO and the protester with a copy of the agency report. The agency report should consist of a statement of facts by the contracting officer, a memorandum of law and the relevant documents.²⁰ If there is no protective order, the protester is provided with a redacted version of the agency report. The redacted version excludes much of the proposals of the other vendors as well as matters that the agency deems competition sensitive.

Protester's Response

Upon receiving the agency report, the protester should quickly study the report to ascertain if it justifies seeking additional documents. Under the GAO Rules, the protester may request additional documents after receipt of the agency report when either the existence or the relevance of nondisclosed documents first becomes evident in the agency report. However, this opportunity to request additional documents ceases two days after receipt of the agency report.²¹

As previously mentioned, agency reports frequently provide information to support a supplemental protest. Two of the more common grounds raised in supplemental protests involve allegations of the agency (1) failing to treat all offerors equally, and (2) incorrectly evaluating the awardee's proposal. To be timely, the supplemental protest must be filed at the GAO within ten days of the protester receiving the agency report.²²

The protester has ten days to file comments to the agency report. Failure to provide comments can result in the GAO dismissing the protest as abandoned.²³ The comments to the agency report are the best opportunity for protester's counsel to



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persuade the GAO that the protest is meritorious. The most effective form of advocacy is to analogize the facts involving the contested acquisition to the facts in a GAO decision where the protest was sustained.

Possible Hearing

Hearings are the exception rather than the rule. In fiscal year 2003, the GAO granted hearings for 13 percent of the protests. Hearings are primarily used where there are factual disagreements. Usually, the hearing is held at the GAO offices in Washington, D.C. Occasionally, the GAO attorney will schedule the hearing at a location that is more convenient for the parties.

The GAO rules allow either the protester or the agency to request a hearing. The request must set forth the reasons why a hearing is necessary to resolve the protest.²⁴ Alternatively, the GAO may order a hearing on its own initiative. Since the protester bears the burden of proving its protest, astute protesters usually request a hearing.²⁵ Conversely, rarely will an agency request a hearing.

Experienced procurement attorneys generally regard the scheduling of a hearing as a preliminary indicator that the GAO is inclined to believe that there is merit to the protest. However, hearings are not always beneficial to protesters. The hearing presents an opportunity for the Government to provide testimony to overcome a lack of an administrative record.

Hearings are relatively informal compared to litigating in more traditional tribunals. The GAO attorney has broad discretion on how the hearing will be conducted. Nevertheless, protester's counsel is always given an opportunity to question any witness. If a witness designated by the GAO to give testimony does not attend or fails to answer a relevant question, the GAO may draw an inference unfavorable to the party for whom the witness would have testified.²⁶

The post-hearing comments are due five days after the hearing is complete. If the protester does not file comments within five days, the GAO may dismiss the protest.²⁷ In post-hearing comments, the protester should quote the testimony which supports the grounds for protest. When quoting from the transcript, the protester should cite the page and line numbers. Hence, prior to the hearing, the protester should retain a court reporter to record the hearing and provide copies of the transcript within 24 hours after the hearing is complete.

The Decision and Possible Reimbursement Of Costs

Once the administrative record is complete, the Comptroller General promptly issues a written decision. In the decision, the GAO will either dismiss, deny, or sustain the protest.

Because the GAO is part of the legislative branch, as a matter of constitutional law, a GAO decision cannot be binding on the

executive branch. Hence, the decisions are couched as a recommendation. Although any party may request reconsideration, it is uncommon for the GAO to change its recommendation.²⁸ More importantly, once the time to request reconsideration has expired, it is exceedingly rare for an agency to refuse to follow the GAO's recommendation.²⁹

Thirty one USC § 3554(b)(1) identifies the following remedies that the GAO can recommend:

- (A) Refrain from exercising any options under the contract;
- (B) Recompete the contract immediately;
- (C) Issue a new solicitation;
- (D) Terminate the contract; and
- (E) Award a contract consistent with the requirements of such statute and regulations

**Failure to file
the claim within
60 days
can result in
forfeiture of the
right to recover.**

Where the agency has not stayed the performance of work until the protest is decided, the likelihood of the GAO recommending the contract be terminated is significantly reduced.³⁰ In those instances where the GAO sustains the protest but does not recommend that the agency recompete immediately, the vendor's remedy may be limited to recovering the cost of preparing its bid or proposal.

The GAO has demonstrated that it will fashion remedies that it deems appropriate. For example, the GAO has recommended that a contract be awarded to the protester.³¹

In another instance, because the GAO had misgivings whether the government evaluators were impartial, the GAO recommended that the agency replace the evaluators.³²

The Competition in Contracting Act allows the recovery of protest costs by both large and small businesses.³³ The statute, however, grants GAO considerable discretion in allowing reimbursement of protest costs. In exercising its discretion, GAO balances "the competing policies of encouraging litigation of procurement conflicts" and controlling "litigation costs."³⁴ If an agency delays taking corrective action until after the protester provides comments to the agency report, the GAO is likely to permit attorney fees on "clearly meritorious protests."³⁵

If the GAO recommends that the contracting agency pay the protester the cost of filing and pursuing the protest, the protester has 60 days to submit a claim to the contracting officer. Failure to file the claim within 60 days can result in forfeiture of the right to recover.³⁶ If the protester and the contracting officer cannot settle the claim within a reasonable amount of time, the protester can petition the GAO to recommend the amount to be paid.³⁷

Final Comment

The GAO has an exemplary record of complying with its duty to decide protests within 100 days.³⁸ To appreciate the time constraints, imagine an Alabama circuit court disposing of a lawsuit on the merits 100 days after the filing of the complaint. During that this short period, the attorneys must complete discovery and file closing arguments. As shown by the time constraints

identified in this article, any attorney who represents a protester before the GAO should anticipate some short suspenses that are likely to have a disruptive impact on the rest of his or her practice.

Endnotes

1. Press Release entitled "Proactive Partnership Will Protect Alabama's Bases and the Jobs That Depend on Them," January 20, 2004.
2. See generally, Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) ("FAIR Act").
3. See generally, the Competition in Contracting Act of 1984, 31 U.S.C. § 3551-56 and 28 U.S.C. § 1491(b)(1).
4. *Choctaw Manufacturing Co., Inc. v. United States*, 761 F.2d 609, 619 n. 17 (11th Cir. 1985).
5. There was a time when U.S. District Courts had jurisdiction to decide bid protest cases under the Administrative Procedure Act. See generally, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). However, the Administrative Disputes Resolution Act of 1996 had a sunset provision for such jurisdiction. As of January 1, 2001, U.S. District Courts no longer have bid protest jurisdiction. See generally, *Novell v. United States*, 109 F. Supp. 2d 22 (D.D.C. 2000).
6. Agency-level protests can be troublesome in terms of getting the procuring activity to stay the procurement until the protest has been decided. Additionally, rarely is the agency willing to provide the Protester will documents that are either source selection sensitive or trade secrets of other vendors. Also, there is a perception (which is sometimes justified) that an agency is pre-disposed to "rubber stamp" the decision of its procurement officials. Protests to the Court of Federal Claims can be twice as expensive as a GAO protest because of the formalities of the litigation process.
7. It is not in the best interest of a vendor to file such protests. They annoy government personnel. Savvy vendors keep in perspective that past performance is usually one of the evaluation criteria for large procurements. Savvy vendors also know that government personnel have considerable discretion in making past performance assessments. Hence, needlessly annoying government officials might not be helpful in trying to obtain future business. It should also be noted that the GAO may summarily dismiss a frivolous protest without obtaining an agency report. 31 U.S.C. § 3554(a).
8. The rules for obtaining an automatic stay are similar to the GAO rules for timeliness. See generally, Federal Acquisition Regulation ("FAR") Subpart 31. However, if a protester files a protest on the tenth day and the GAO does not notify the agency of the protest until the eleventh day, the protest may be timely but the agency may not be bound by the statutory stay. Hence, it is prudent to file protests a day earlier than required by the timeliness rules. If the protest is filed on the tenth day, it is advisable to call the GAO to verify that notice has been sent to the agency before the end of the tenth day. Also, it should be noted that the timeliness rule for automatic stays where there has been a requested and required debriefing is different. The protest following a debriefing must be filed within five days.
9. Under limited circumstances, an agency may override the stay. Prior to award, an agency may override the stay for "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO." See FAR § 33.104(b)(1)(i). After award, the agency may override the stay for the additional reason that "contract performance will be in the best interest of the United States." See FAR § 33.104(c)(2)(ii).
10. Unofficially, the vendors should be sensitive to protestable issues from the inception of the procurement. At a minimum, a disappointed offeror should be considering a possible protest strategy when assessing its debriefing options.
11. 4 C.F.R. § 21.5.
12. 4 C.F.R. § 21.1(c).
13. 4 C.F.R. § 21.1(c)(4).
14. 4 C.F.R. § 21.1(d).
15. 4 C.F.R. § 21.2.
16. 4 C.F.R. § 21.2(a)(2).
17. 31 U.S.C. § 3553(f)(2)(A).
18. 4 C.F.R. § 21.3(c).
19. Protesters occasionally submit untimely supplemental protests because they overlook that the ten days to file a supplemental protest based on information revealed in the disclosed documents began on the date that the Protester received the documents.
20. 4 C.F.R. § 21.3(d).
21. 4 C.F.R. § 21.3(g). Many GAO attorneys will allow requests for additional documents even though filed more than two days after receipt of the report.
22. While the ten days to file comments can be extended by the GAO attorney, this does not extend the time to file supplemental protests—a trap for the unwary.
23. 4 C.F.R. § 21.3(f).
24. 4 C.F.R. § 21.7(a).
25. In general, the GAO follows the well-established principle of administrative law that "in the absence of clear evidence to the contrary, courts presume that [Government officials] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).
26. 4 C.F.R. § 21.7(f).
27. 4 C.F.R. § 21.7(g).
28. 4 C.F.R. § 21.14. Only a participating party can file a request for reconsideration; an awardee who declined to intervene cannot request reconsideration.
29. Agencies prefer to avoid the consequences of ignoring a GAO recommendation. Specifically, 31 U.S.C. § 3554(e)(1) requires the Comptroller General to report to Congress "any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General."
30. An exception exists if the agency declines to stay the performance of work based on a determination that "contract performance will be in the best interest of the United States." In those instances, if the GAO sustains the protest, the remedy recommended by the GAO will not consider "any cost or disruption from terminating, recompetiting, or reawarding the contract." 31 U.S.C. § 3554(b)(2).
31. *BAE Systems*, B-293070, January 28, 2004.
32. *Beneco Enterprises*, B-283512.3, July 10, 2000.
33. 31 U.S.C. § 3554(c)(1).
34. *Innovative Refrigeration Concepts - Claim for Costs*, B-258655.2, July 16, 1997.
35. *Millar Elevator Services Co - Costs*, B-281334.3, Aug. 3, 2000.
36. 4 C.F.R. § 21.8(f)(1).
37. *Id.*
38. The duty to decide protests within 100 days is not absolute. Congress limited the duty "to the maximum extent practicable." 31 U.S.C. § 3554(a)(1).

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