

Government Contracts Blog

Posted at 8:10 AM on February 17, 2010 by Sheppard Mullin

Understanding GAO's Bid Protest Timing Rules: A Concise Summary For The Uninitiated

The Government Accountability Office (“GAO”) is a stickler when it comes to the timing of bid protests. One misstep – even if that misstep causes you to miss a deadline by only seconds – and you could find yourself out on the proverbial curb. GAO has a saying when it comes to the timing of its bid protests: “Late is late.” And GAO means it.

A protesting party generally is required to file its protest within 10 days of when it knows or should have known of the basis for its protest, whichever is earlier. Where a party is entitled to a “requested and required” debriefing, GAO’s rules extend the filing date to 10 days following the first date offered for the debriefing. An automatic stay of performance only goes into effect, however, if the awarding agency is notified of the protest by GAO within 10 days of contract award (where a debriefing is not required) or within 5 days of a debriefing (where a debriefing is required). As such, most parties that receive a “requested and required” debriefing smartly elect to file their initial protest within the abbreviated 5-day period to avail themselves of the stay, even though they technically could wait until the 10th day following the debriefing and still have a timely protest (but without the benefit of the stay).

The filing of the protest begins a 100-day journey that ultimately will result in a GAO decision (unless resolved sooner through a dismissal, withdrawal, or an early decision). A lot happens within these 100 days. And the timing of each event is critical.

- Approximately 25 days after the Agency receives notice from GAO of the protest, the Agency is required to provide the protester with a list of the documents that it plans to produce as part of its “Agency Report.”
- The Agency next files its Agency Report, generally within 30 days of having received notice of the protest from GAO. The Agency Report is, for all practical purposes, the Agency’s response to the protest accompanied by the relevant source selection materials. The protester may object to the completeness of the Agency’s submissions, and may request that GAO order the production of additional documents.
- The protester subsequently replies to the Agency Report through the filing of “Comments” – *i.e.*, its primary substantive brief. The protester must file its Comments within 10 days of receiving

the Agency Report or risk dismissal of its protest.

- It is within this same 10-day period that the protester must raise any supplemental protest grounds that have come to light as a result of the Agency's submissions. Protesters typically submit their Comments and supplemental protest grounds in the same document.

GAO possesses the discretion to request additional filings, extend or shorten timelines, and even hold a hearing – so long as it issues its decision within 100 days of protest filing.

With respect to the extension of filing timelines, protesters are well-advised to keep an important caution in mind. The fact that GAO may extend the timeline for filing Comments does not mean that the 10-day time period for filing supplemental protest grounds is likewise extended. GAO's Bid Protest Descriptive Guide warns that "if a protester waits until the extended due date for filing comments to raise new or amended protest grounds, those grounds may be dismissed if they were raised more than 10-days after the protester learned or should have learned of them."

A recent GAO decision well illustrates this warning. In January 2009, a disappointed bidder protested its exclusion from the competitive range in a procurement for 25 million doses of an anthrax vaccine. In the course of the protest, GAO granted the protester a one-day extension to file its Comments. As permitted, the protester filed its Comments in a timely fashion, but also raised several new protest allegations at the same time. GAO accepted the Comments, but dismissed the supplemental protest grounds as untimely. *See Panacea Biotec, Inc.*, B-400776, Jan. 21, 2009, 2009 WL 5545554.

The take away point from the *Panacea* case? An extension of time for one purpose does not equal an extension of time for another. As we said, late is late.

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