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## **Should I File a Bid Protest at GAO?**

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You were just notified by the government that your proposal, for an important government contract or task order that you were hoping to be awarded, was unsuccessful. The question that immediately jumps to your mind is "what, if anything, can I do to change this result?" The answer to that question depends on a number of considerations.

The vast majority of challenges to federal government contract award decisions are filed with the General Accountability Office ("GAO"). For fiscal year 2017, there were over 2,400 protests filed at GAO. However, not all award decisions can be protested. For example, task orders awarded under existing multiple award government contracts may only be protested if they exceed certain dollar thresholds. For civilian agencies, the awarded task order must be at least \$10 million; for military agencies, as well as for NASA and the Coast Guard, the task order must be at least \$25 million. (In either case there is an exception to the dollar thresholds for protests asserting that the task order increases the scope, period, or maximum value of the underlying contract, pursuant to which the task order was issued. For those three protest grounds, there is no dollar limitation.)

GAO has also determined that it will not consider certain matters in a bid protest. GAO will not hear issues that it considers to be "contract administration." Such issues relate to the performance of a government contract rather than the evaluation process leading to its award. Additionally, GAO generally will not hear challenges related to the "responsibility" of the awardee. (The exceptions to this rule are for protests alleging that "definitive responsibility criteria" contained in the solicitation were not met and protests providing evidence raising serious concerns that, in finding the awardee responsible, the contracting officer unreasonably failed to consider relevant, available information or otherwise violated statute or regulation.) A protest alleging that the awardee does not qualify as a small business, under a procurement set aside for small businesses, will not be heard at GAO but instead must be filed with the Small Business Administration ("SBA"). There are a number of other issues that GAO also will not consider so, if you have questions in this regard, you should consult with your attorney.

If you pass through these threshold issues, the next question becomes whether you have any viable basis to challenge the agency's award decision. One of the most common grounds of

protest concerns the reasonableness of the agency's technical evaluation of proposals. While the agency has broad discretion in performing a technical evaluation, an evaluation that is unreasonable or inconsistent with the terms of the solicitation may result in a sustained protest. Protests that merely disagree with the agency's subjective technical judgments are less likely to be successful than protests which prove that the evaluation was inconsistent with the solicitation or inconsistent with the contents of offerors' proposals. Similarly, a proposal that fails to meet a material requirement of the solicitation should be considered unacceptable and should not result in a contract award. An agency's waiver of material solicitation requirements for the awardee can be the basis for a successful protest. Other potential grounds of protest include:

- Does the awardee have an Organizational Conflict of Interest ("OCI")?
- Was the agency's past performance evaluation reasonable? (In this regard, GAO has held that it is unreasonable for an agency to ignore past performance information that is "close at hand" (*i.e.* information that the agency knew or reasonably should have known at the time of the evaluation). Contractors should also be aware that a lack of relevant past performance cannot be used as the basis for a negative evaluation. Instead, a contractor that lacks relevant past performance should be given a "neutral" rating.)
- Was the agency's cost or price evaluation reasonable? (On "cost-plus" contracts the agency must perform a realism analysis to determine each offeror's most probable cost (as opposed to relying on the offeror's proposed price or cost). On fixed price contracts, realism analyses are not required *unless* the solicitation indicates a price realism analysis will be performed. The failure to perform an analysis required by regulation or by the terms of the solicitation states a valid grounds of protest. Moreover, a price or cost evaluation that uses an unsound methodology or reaches an unreasonable result may also form the basis for a valid protest.)
- Were the agency's discussions with offerors flawed? (If an agency conducts discussions with offerors, those discussions must be meaningful, which means the agency must identify all deficiencies and significant weaknesses in the offeror's proposal and allow the offeror the opportunity to correct the issues raised. If the agency fails to point out deficiencies or significant weaknesses that were contained in the proposal, at the time of discussions, and later uses those same deficiencies or weaknesses as a reason for denying the contract award, the offeror has a valid grounds of protest.)
- Were offerors treated unequally? (It is a fundamental tenet of procurement law that all offerors must be treated equally. Unequal treatment can occur during discussions, during the evaluation, or at other points in the procurement process.

If the agency treats offeror's disparately, the unequal treatment may be used as a grounds of protest.)

- Does the agency's explanation of the award decision deviate from the evaluation criteria provided in the solicitation? (The agency must evaluate proposals strictly in accordance with the evaluation criteria contained in the solicitation. If the agency evaluates proposals using criteria that were not stated in the solicitation, that can be the basis for a successful protest. Similarly, if the agency deviates from the "weightings" that were provided for the individual criteria in the solicitation, that too can be the basis for a successful protest.)

The above examples represent just a small sampling of protest grounds available to disappointed offerors at GAO. There are many others and a successful protest will depend on the facts and law applicable to the particular procurement and evaluation decision. Nevertheless, if the answer to any of the questions above was "yes," then you may want to consider filing a protest. Similarly, if you have reason to believe that you were not treated fairly during a procurement or evaluation, for reasons other than those stated above, it likely would be worth your time and effort to, at minimum, have a conversation with your attorney about the possibility of filing a protest.

For fiscal year 2017, GAO reported that it had an "effectiveness rate" of 47%. GAO defines its "effectiveness rate" as the protester obtaining some form of relief from the agency either as the result of voluntary agency corrective action or GAO's sustaining the protest. Of course, agency corrective action or GAO's sustaining a protest does not necessarily mean that the protesting contractor will ultimately receive award of the contract. However, we believe the high effectiveness rate indicates that GAO is an effective forum for challenging evaluation improprieties. If you feel that an evaluation, in which you have participated, was conducted unfairly, you should consult your attorney immediately, as GAO has strict timeliness rules that must be adhered to for filing protests. Your attorney can advise you as to whether or not a bid protest at GAO is a viable course of action based on your particular circumstances.