



BY KEITH R. SZELIGA

SO YOU LOST—

Now What?

A VACATIONER'S GUIDE
TO GAO BID PROTESTS

FOR FEDERAL GOVERNMENT CONTRACTORS, THERE ARE SEVERAL IMPORTANT FACTORS TO CONSIDER WHEN DECIDING WHETHER TO PROTEST AN AWARD OF A CONTRACT TO A COMPETITOR.

IT IS A BEAUTIFUL FRIDAY AFTERNOON AND YOU ARE SITTING AT YOUR DESK, DAYDREAMING ABOUT YOUR VACATION PLANS FOR NEXT WEEK. YOU RECEIVE A FAX FROM YOUR MOST IMPORTANT FEDERAL CUSTOMER ABOUT A HUGE PROPOSAL YOUR COMPANY RECENTLY SUBMITTED. YOU ARE THE INCUMBENT, YOU KNOW THE AGENCY, YOU KNOW THE WORK, AND YOU OFFERED A ROCK-BOTTOM PRICE. EVERYONE ASSUMED YOU WOULD WIN THE CONTRACT—BUT THE FAX SAYS OTHERWISE. YOU READ ON TO LEARN THAT THE AGENCY AWARDED THE CONTRACT TO YOUR COMPETITOR, WHO HAS NEVER PERFORMED ANY WORK FOR THE AGENCY AND WHO IS KNOWN FOR HAVING THE HIGHEST PRICES IN TOWN.

Now What?

Now you must begin the difficult process of deciding whether to *sue* your customer. While such an approach would normally be unthinkable in the private sector, the statutes and regulations that apply to most federal procurements allow you to file a bid protest challenging the award of a contract to a competitor. In addition to airing your grievances in an agency-level protest with the procuring agency, you can protest an award decision at the Government Accountability Office (GAO) or the Court of Federal Claims.¹

If you ultimately decide to file a protest, GAO will generally be your forum of choice. Provided you meet certain filing deadlines, the statute governing GAO protests provides for an *automatic stay of performance*, which prohibits the awardee from performing the contract until GAO resolves the protest.² While such an automatic stay is also available with an agency-level protest, the likelihood of a successful challenge at the agency is low. Moreover, an automatic stay is not available at the Court of Federal Claims. In addition, GAO has more institutional experience than the Court in adjudicating contract award controversies and is generally regarded as a less expensive forum in which to litigate.

The Debriefing

Before you can make an informed decision regarding a bid protest, you need to schedule a *debriefing*. As tempting as it may be to leave for your beach vacation and contact

the contracting officer (CO) when you return, that would be a very bad idea. Immediately after you receive a notice indicating that your company has not been selected for award, or that it has been eliminated from the competitive range, you should send a written request for a debriefing to the CO. If you wait more than three days to send your request, the agency will not be required to conduct a debriefing and, unless you file your protest within 10 calendar days of the actual award to your competitor, you will not be eligible for an automatic stay.³ An automatic stay is particularly valuable where you are the incumbent, since it is likely that the agency will allow you to continue performing, and getting paid, until the protest is over.

Realizing this, you immediately send a written debriefing request to the CO. The CO e-mails you back within the hour, offering a debriefing on Monday or the following Tuesday. Should you opt for the later debriefing date so that it does not interfere with your vacation? Not a chance. In order to obtain an automatic stay, you must file your protest within *five days* of the first date offered for the debriefing.⁴ Accordingly, you should always accept the *first* debriefing date offered by the agency. If you wait until next Tuesday (eight calendar days after the first date offered for the debriefing, and 11 calendar days after the award decision), you will be ineligible for a stay.

With your vacation on hold, it is time to round up the proposal team, notify your in-

house counsel, and prepare for the debriefing. Your goal at the debriefing will be to learn as much as possible regarding why the agency downgraded your proposal, whether it evaluated proposals in a manner consistent with the solicitation, and on what basis the agency decided to issue an award to your competitor. Prior to the debriefing, you should prepare a list of specific questions that focus on these issues. You should also prepare a few general questions regarding the agency's evaluation of your competitor. Although an agency is prohibited from providing a point-by-point comparison of proposals, most agencies will disclose the awardee's ranking under each evaluation factor, the awardee's total price, and the factors that led to the award decision.⁵

Attending the Debriefing

So now you are at the debriefing, where there is neither sand nor surf, but instead uncomfortable chairs and dull PowerPoint slides. On the bright side, you will not have to spend the day with your outside attorneys. Bringing outside counsel to a debriefing when you have lost heightens the defensiveness of the agency, limits the flow of information, and makes debriefings much less productive. For the same reason, no matter how much you think you deserved the contract, you should resist the urge to convince the agency that it made a bad decision. Nothing you say at this point will change the agency's mind. Being confrontational will just make the agency clam up, and prevent you from getting the information you need.

At the conclusion of the debriefing, the agency agrees to “hold open” your debriefing until next week in order to allow you to submit written questions. This is quite common. But does that mean that you can salvage what is left of your vacation while the rest of the proposal team drafts the questions? No such luck. Always remember that the five-day window for obtaining an automatic stay of performance begins on the first date *offered* for the debriefing. Thus, if you want a stay—and as the incumbent, you should—you have only five calendar days to file your protest.

However, if you miss this five-day window, all is not lost. You can still file a protest within 10 calendar days of the first date offered for the debriefing, but you will not get a stay.

Making the Big Decision

You now have five calendar days to make and implement a very big decision, or, as they would say at the resort where you planned to be at this very moment, “*la decisión mas difícil.*” Specifically, you need to decide whether to sue your best customer. In order to make this decision, you will need to determine whether the procurement was legally flawed, whether you were prejudiced by the errors in the agency’s evaluation, and whether there is an adequate business case for filing a protest.

STEP 1

Was the Procurement Legally Flawed?

Your first step should be to analyze whether there were legal improprieties in the agency’s award decision. The fact that you disagree with the agency’s judgment is not enough. Rather, you will need to determine whether there was something objectively wrong with the agency’s evaluation. For example, try to answer these questions:

- Did the agency evaluate factors or require capabilities that were not disclosed in the solicitation?

- Did the agency downgrade your proposal based on inaccurate information or incorrect assumptions regarding what you actually proposed?
- Did the agency disclose all significant weaknesses, deficiencies, and adverse past performance information during discussions?
- Did the agency evaluate your cost/price based on the technical solution you actually proposed?
- Did the agency ignore your competitor’s failure to meet a minimum mandatory solicitation requirement?
- Did the agency fail to analyze whether your competitor may have an organizational conflict of interest (OCI)?
- Did the agency consider all of the disclosed evaluation factors, and only the disclosed evaluation factors, in conducting its cost/technical tradeoff?
- Did the agency fail to adequately document its award determination?

These are only a few of the many grounds on which GAO has sustained protests. Your lawyer will be able to help you analyze whether the agency may have committed these or any other errors during the course of its evaluation.

STEP 2

Were You Prejudiced?

If you determine that the agency’s award decision was not legally flawed, your decision is easy: pack your bags and enjoy what’s left of your vacation since there is no point in filing a protest. If, on the other hand, you have reason to believe that there were fundamental errors in the procurement, it’s time for step two: determining whether you were prejudiced by the flaws in the agency’s evaluation.

The requirement for prejudice is nothing more than a *no harm, no foul* rule. To win a

protest, you must be able to show that the agency’s errors deprived you of a reasonable chance to win the contract. However, this requirement is not always easy to meet. Not all procurement errors impact the outcome of a procurement. And even when they do, it is possible that the contract still would have gone to another competitor, rather than your company. Accordingly, you need to look at your proposal and the errors in the agency’s evaluation, as objectively and realistically as possible, and then ask: “If the agency had not made those errors, would we have had a substantial chance for award?” If not, there is little reason to challenge the award since your protest will be denied.⁶

STEP 3

Is There An Adequate Business Case for Filing a Protest?

Let’s assume that you have determined that the procurement was flawed and that you can establish prejudice. Further, just to keep you honest, assume it’s hurricane season and a tropical storm is headed for that lovely resort where you booked your vacation. Your week in paradise would have been ruined anyway, so now you can focus on step three: analyzing the business case for filing a protest. In deciding whether to file a protest, you should consider at least the following questions.

How important is the contract to your company?

Consider not only size and profitability, but less tangible factors such as whether the contract would allow you to break into a new market, whether it is likely to lead to follow-on work, and whether it is critical to maintaining a particular line of business.

How will a protest impact your relationship with the customer?

Relevant factors include the strength of your existing customer relationship, whether the customer relies on you for products or services it cannot obtain elsewhere, the personalities of the individuals involved, and the amount of time that

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will pass until your next opportunity with the customer. However, it is important to remember that the government is not like a commercial customer. While a commercial customer can refuse to deal with you because you are a “litigious *so-and-so*,” Uncle Sam cannot.

What is the likelihood you will win the protest?

The published sustain rate for GAO bid protests in 2007 was 27 percent.⁷ Of course, every protest is different. Protests challenging an agency’s technical and best-value judgments rarely prevail. On the other hand, if the agency’s errors were so fundamental that you were denied a fair opportunity to compete for the contract, your probability of success will be greater.

What is the likelihood you will win the contract?

The most common bid protest remedies (in addition to reimbursement of a portion of your attorneys’ fees) include the re-evaluation of proposals and/or the solicitation of revised proposals. Thus, winning a protest does not guarantee that you will win the contract; it merely gives you another bite at the apple. If you believe, based on your debriefing, that your proposal is competitive or can be revised to be more advantageous to the government, then a second bite at the apple can be a very valuable opportunity. If, on the other hand, the agency seems unlikely to award your company the contract under any circumstances, then a successful protest may be a hollow victory. Ironically, the most common bases for winning protests involve *procedural irregularities*, such as formulaic cost evaluations or departures from stated evaluation criteria. You need to consider whether, in the end, your remedy will be nothing more than a revised solicitation or re-evaluation of proposals that corrects these types of procedural errors, but leads to the same result (i.e., an award to your competitor). In short, there is no reason to fight the battle if you know you will lose the war.

How much will the protest cost?

The answer depends on a number of factors, including the size and complexity of the procurement, the volume of the evaluation record, the need for expert consultants, and how the GAO hearing officer manages the protest. However, you should keep in mind two points: (1) the cost of drafting the initial protest is both relatively inexpensive and relatively predictable and (2) you can always withdraw the protest later and cut your losses if the evaluation record produced during the protest does not support your allegations.

Filing the Protest

If you consider these and other relevant factors, and decide to go

ahead with a protest, the next five days will be hectic.

To help you through the turmoil, one of the first things you should do is to immediately schedule a meeting or teleconference to allow the proposal team to get your attorney up-to-speed on the facts. In fact, if you know that a source selection is both highly important and hotly contested, you may want to engage counsel well in advance of an award decision in order to familiarize them with the procurement, the competition, and the likely areas of contention. This will make the five-day “Do I or don’t I?” period far less hectic.

During the meeting or teleconference with your attorney, make sure the proposal team does not leave anything out. If they became aware of a particular basis for protest at the debriefing, it must be raised in your initial protest, or it will be forever lost.

Authorize your attorney to begin preparing the protest as soon as possible. If you allow less than two or three days for the drafting and review cycle, you may not be satisfied with the results. Leave time for the proposal team to review and comment on your attorney’s draft protest. They are more familiar

than your attorney with your proposal and the relevant technical issues. Thus, they will be in the best position to determine whether the draft includes inaccuracies or leaves out key points.

The Protective Order

Once the protest is filed, go ahead and take that vacation, because you are about to become significantly less involved in the process. In order to obtain access to your competitor’s proposal and the evaluation record—which are essential to proving your case—your attorney will need to sign a *pro-*



tective order. To prevent you from obtaining an unfair competitive advantage in future procurements, the protective order precludes your attorney from sharing the substance of any of this information with you.⁸

As a result, you will be unable to review the evaluation record, the agency's response to your protest, or even the filings submitted on your behalf.⁹ Instead, you will need to rely on your attorney's judgment regarding your probability of success. Two words of advice: (1) make sure you hire an attorney you trust and (2) hold off on the lawyer jokes, at least until the protest is over.

While the protective order prevents you from seeing your competitor's sensitive information, it also prevents your competitor from seeing your sensitive information. Under GAO's bid protest rules, an awardee can intervene in a protest to ensure its interests are adequately represented.¹⁰ The awardee's attorney will have access to your proposal and the evaluation record. However, the protective order prohibits the awardee's attorney from disclosing that information to your competitor or anyone else who is not admitted to the protective order. Thus, the protective order is not only your enemy, but also your friend.

The Protest Process

If the agency does not take corrective action by voluntarily fixing the errors raised in your protest, then it will have 30 days to provide your attorney with an agency report, which consists of the CO's statement of facts, a legal memorandum, and the evaluation record.¹¹ Your attorney will then have 10 days to review the agency report, respond to the agency's position, and file supplemental protest allegations based on any new information disclosed in the evaluation record.¹²

This is where the legal fees begin to rack up. Accordingly, once your attorney has had a few days to review the record—but before he or she puts finger to keyboard on your comments and supplemental protest allegations—you should schedule a brief call to discuss whether it makes sense to continue with the protest. Protests are won or lost on the evaluation record. Once your attorney has reviewed the record, he or she will be in a much better position to advise you regarding whether you have a reasonable chance of overturning the award and receiving the contract.

If your attorney advises you that your probability of success is low, you may want to cut your losses and withdraw from the protest. On the other hand, if the procurement is large and the stakes are high, even a relatively low probability of success may justify the continued investment as long as your protest grounds are not so frivolous that you will lose credibility with your customer.

Assuming you decide to continue with the protest, your attorney will spend the next week drafting your comments and supplemental protest allegations. If there are supplemental protest allegations, the agency will be required to submit a supplemental agency report, and there will be another round of comments. In addition, GAO typically provides each side an opportunity to respond to the other's arguments, and, in some cases, requests additional briefing. You should communicate with your attorney regularly throughout this process to ensure that the facts warrant your continued investment in the protest.



The Hearing

Most protests (roughly 90 percent) are resolved on the evaluation record.¹³ However, if there are disputed issues of fact, or if the procurement is large and complex, GAO may hold an evidentiary hearing.¹⁴ At the hearing, the agency's witnesses will explain the basis for the agency's evaluation and award decision, and your attorney will have an opportunity to cross examine them. In addition, if you have retained technical or cost experts, they generally will have an opportunity to testify as well. Because of the protective order, however, you will not be able to attend the hearing.

Shortly after the hearing, GAO will request post-hearing briefs from the parties. Typically, the parties will also have an opportunity to respond to each others' arguments. Throughout this process, you can sit back and relax as your attorney toils away.

GAO's Decision

By law, GAO must decide a protest within 100 calendar days of the date on which it was filed.¹⁵ GAO never misses this deadline, so no matter how bad things may seem, there is always an end in sight.

GAO's decision will take the form of a recommendation, which, in practice, agencies almost always follow. If you win the protest, several forms of relief may be available.¹⁶ If the procurement defect was based exclusively on the evaluation of proposals, GAO may limit its recommendation to re-evaluation of the proposals already submitted. Alternatively, GAO may recommend broader relief, such as reopening discussions, soliciting revised proposals, and making a new source selection decision on that basis. If GAO determines that no other remedy is available, it may recommend that the agency reimburse your bid and proposal costs. In addition to these remedies, GAO may recommend that the agency reimburse the cost, including attorneys' fees, of filing and pursuing a successful protest.¹⁷

Keep in mind, however, that unless your company is a small business, the so-called *reasonable* attorneys' fees will rarely cover

your *actual* legal expenses. The reimbursement of such costs is subject to an hourly rate cap that is well below the prevailing rate for bid protest attorneys in most areas.¹⁸ If you raised multiple protest allegations, the agency is likely to argue that your recovery should be reduced to exclude the effort expended pursuing the losing protest grounds.

Additional Options

If you lose the protest, you have three options:

- Accept defeat and move on,
- Request GAO to reconsider its decision, or
- Begin the process anew at the Court of Federal Claims.

The first option is typically the most sensible, since reconsideration is rarely granted, and the conventional wisdom is that the Court of Federal Claims is unlikely to reach a different conclusion than GAO. On the other hand, there are a number of recent cases in which the Court of Federal Claims has sustained protests that previously were denied by GAO.¹⁹ Thus, if there is enough at stake, if you are convinced that the procurement was fundamentally flawed, and if you have both the stomach and budget for another round of litigation, filing a second protest at the Court of Federal Claims may be warranted. **CM**

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ENDNOTES

1. For a more detailed discussion of the GAO bid protest process, see GAO-06-797SP, *Bid Protests at GAO: A Descriptive Guide*, U.S. Government Accountability Office, 2006.
2. 35 U.S. Code (U.S.C.) 3553(d)(3); see also *Federal Acquisition Regulation (FAR)* 33.104(c). An agency may override the automatic stay of performance if it determines that there are urgent and compelling circumstances or that doing so would be in the best interest of the government. Override decisions are rare, but they do occasionally occur.
3. FAR 15.506(a).
4. FAR 33.104(c)(1).
5. FAR 15.506(d) and (e).
6. See, e.g., *Liquidity Servs., Inc.*, B-294053, Sept. 18, 2004, 2004 CPD 130 ("Competitive prejudice is an essential element of every protest; where the record does not demonstrate that the protestor would have had a reasonable chance of receiving award but for the agency's actions, we will not sustain a protest, even if deficiencies in the procurement process are found.").
7. GAO, GAO-08-0247R, *GAO Bid Protest Annual Report to Congress*, December 2007.
8. GAO, GAO-06-716SP, *Guide to GAO Protective Orders*, May 2006.
9. Actually, you can ask your attorney to prepare redacted versions of these documents, which must be approved by all parties before they can be released. This is rarely worth the expense, however, because everything of interest to you will have been redacted from the documents.
10. 4 Code of Federal Regulations (C.F.R.) 21.0(b)(1).
11. 4 C.F.R. 21.3(c) and (d).
12. 4 C.F.R. 21.3(i).
13. GAO, see note 8.
14. 4 C.F.R. 21.7.
15. 4 C.F.R. 21.9(a).
16. 4 C.F.R. 21.8.
17. 4 C.F.R. 21.8(e).
18. 31 U.S.C. 3554(c)(2).
19. See, e.g., *Axiom Resource Mgmt., Inc. v. United States*, 78 Fed. Cl. 576 (2007).