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Chapter 1 : Protesting Exclusion from Competitive Range Determination Letter | Watson Lawyers

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Most agencies supplement the FAR provision, to a greater or lesser degree, through their own regulations, and the regulations of the agency at issue should be reviewed before commencing an agency-level bid protest before that agency. This is the same standard applied by the GAO. As regards the various issues that arise under this definition, see the discussion below dealing with GAO bid protests. What May Be Protested â€" Matters of Jurisdiction As a general matter, there are no jurisdictional limitations on an agency protest because an agency is deemed to have inherent authority to consider a protest dealing with all aspects of its own procurements. By statute the Federal Acquisition Streamlining Act , however, an agency may not consider a protest of the issuance of task and delivery orders under already existing multiple-award task and delivery order contracts, where the agency has the ability to choose among several contractors when it seeks to place a specific order for goods or services. Agency-Level Timeliness Rules Protests of apparent solicitation improprieties must be filed before bid opening or the closing date for receipt of proposals. In all other cases, the protest must be filed no later than 10 days after the basis for the protest is known or should have been known. Failure to satisfy these timeliness rules inevitably results in dismissal of the protest, although the FAR does allow the agency, for good cause shown, to consider the merits of an untimely protest, but that authority is seldom used. Upon receipt of a protest before award, the agency is required to withhold award pending resolution of the protest. However, the agency can override this stay by written justification that award is necessary for urgent and compelling reasons or is in the best interest of the federal government. Additionally, the agency is not required to stop the procurement processing short of award; thus, it may accept and evaluate proposals while the stay of award is in place. Upon receipt of a protest filed within 10 days after contract award or within five days after a debriefing to the protester given pursuant to a timely, written debriefing request, whichever is later, the contracting officer CO is to suspend performance pending resolution of the protest including any review by an independent higher-level official. Again though, the agency can override this stay by written justification that award is necessary for urgent and compelling reasons or is in the best interest of the federal government. The Agency Protest Process. Hence, there is no use of protective orders to control the treatment of protected information because protected information is not disclosed by the agency. The decision is provided only to the protester; it is not published. Available Relief The agency may take any action or grant any remedy that could be recommended by the Comptroller General if the protest were instead filed with the GAO. See the discussion below regarding available relief in a GAO bid protest. Further, agencies may pay protest costs under the same standards that allow costs to be paid to a prevailing party in a GAO protest. Why Bring an Agency-Level Protest Advantages The forum is the least formal, least costly, and most quickly reaches a decision. This spares the procurement officials the public embarrassment that may result from publication of a decision detailing a flawed procurement, and concomitantly reduces the risk of generating an adverse agency view of the protestor. Solicitation defect issues can be preserved for later challenge at the GAO, as the GAO will consider challenges of solicitation defect issues provided they were timely raised at the agency. Furthermore, in the great majority of instances, an agency report is not prepared and, when such a report is compiled, it may not be available to the protester. At the GAO, it is not uncommon for the more persuasive grounds of protest to be developed upon review of documents produced in the agency report that responds to the initial protest. That opportunity is lacking in the case of an agency-level protest. This, of course, raises concerns that the decision may be biased in favor of the agency. Common Protest Grounds In view of the disadvantages of agency-level protests, the protest grounds suitable for resolution in this forum are the more simple, straightforward, and less fact-dependent. As summarized by one commentator Troff, , these tend to be pre-award protests against solicitation terms and post- award protests relating to the

timely receipt of bids, bid responsiveness, and mistakes in bids. Protests involving factually complex issues, extensive analysis, the evaluation of proposals, or comparisons between proposals are better left for the other two fora. Agency-Level Protest Statistics Very few agencies make available their agency-level bid protest statistics; therefore, government-wide data is lacking from which to track trends and draw conclusions as to agency handling of protests. One noteworthy exception is the AMC, which was the prototype for the current agency-level protest process. According to the AMC as reported by Troff , its protest filings during the FY through FY period averaged 28 per year, a decline of nearly 60 percent in activity from the earlier years of the AMC program. The AMC took corrective action in 15 percent of the protests that came before it, although the nature of that corrective action is not necessarily equivalent to the results that would accrue in a sustained GAO protest. For many years, the GAO was the sole forum available to aggrieved offerors, although the precise source of its authority was clouded. In furtherance thereof, the GAO has promulgated regulations governing the bid protest process, which are found at 4 C. The protester may, but is not required to, use legal counsel either in-house or outside. However, as explained below, unless outside counsel is utilized, access to protected information which is necessary to develop the protest record fully will be embargoed. The procuring agency will be represented by agency counsel who, not infrequently, will have played a role in the procurement process. Where there has been an award of the protested contract, the awardee is entitled to intervene, although that does not always occur. Who May Protest CICA extends the right to protest to an interested party, which it defines as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract. If that test is satisfied, the protester qualifies as an interested party. The necessary showing required of the protester will depend on the type of competitive procedure being used and the point in the competition at which the protest is brought. A contractor that is ineligible for award does not have a direct economic interest in the award and, thus, is not an interested party unless its protest contests the matter of eligibility. Finally, where multiple contract awards are made in the same procurement, one awardee cannot protest a second award to another party. The first relates to the status of the entity conducting the procurement that is generating the protest. Federal agency is defined to include an executive department or independent establishment in the executive branch, a wholly owned government corporation, and certain establishments in the legislative and judicial branches. Additionally, the GAO will decline to hear protests relating to procurements by federal agencies that have been exempted from CICA by their own authorizing legislation such as the U. The second aspect of the jurisdictional question deals with the nature of the transaction being protested. Previously, we noted that an agency-level protest cannot be brought against the award of task or delivery orders issued under already-existing multiple-award task and delivery order contracts. This jurisdiction is in the nature of a pilot project because it will expire after three years unless Congress acts to renew it. Note, however, that these limitations with respect to protest jurisdiction, both before and after May 27, , do not apply to protests of task and delivery orders placed under General Services Administration GSA multiple-award schedule MAS contracts awarded as part of the Federal Supply Schedule FSS , and the GAO regularly has entertained such protests. Protests relating to grants and cooperative agreements are not entertained by the GAO because those vehicles are not considered procurements of property or services. Protests arising out of subcontractor procurements likewise are declined unless the agency that awarded the prime contract requests the GAO to hear the protest, or the ostensible prime contractor is actually an agent of the government such as federal research labs. Similarly, protests involving the sale of property by a federal agency will not be heard unless the agency agrees in writing to have the GAO decide the matter. Their stringency is justified as being necessary to ensure that the impact of protests on the procurement process is minimized. By way of example, if a qualified small business concern interested in submitting a proposal wished to protest the fact that the solicitation should have been set aside for small business but was not, the protest must be filed before the date set for receipt of initial proposals, because the fact that the procurement is not set aside is evident on the face of the solicitation. However, with respect to protests involving best value procurements under which a debriefing is

requested and, when requested, is required to be given meaning the debriefing was requested in writing within three calendar days of learning of the contract award see below , the protest will be timely if filed within 10 days after the debriefing is given. Where the timely agency-level protest involved an alleged solicitation impropriety, a subsequent protest to the GAO will be timely if filed within this day period, even if filed after bid opening or the closing time for receipt of proposals. The purpose of the stay is to ensure that effective relief can be obtained by a successful protester. It is the notification to the agency within the time requirements that triggers the automatic stay, not mere filing of the protest with the GAO. Filing may be accomplished by hand delivery, mail, commercial carrier, fax, or e-mail. A copy of the protest must be served on the procuring agency within one day of filing at the GAO. Presuming a protective order has been requested, the protester must file a redacted copy of the protest with the GAO and the contracting agency within one day of the initial filing. The redacted copy is used by the agency to notify potential intervenors of the protest. A notice of intervention may be filed by other interested offerors, notably the successful awardee s , if award has been made. If such a motion is filed, the protester is given an opportunity to respond, and then the GAO rules on the motion sufficiently in advance of the due date of the agency report. If documents are to be withheld, they will be so noted so that expedited proceedings may be held to resolve the production issue. Objections to agency withholding of requested documents must be filed within two days. It should be noted that under GAO rules, the agency can request documents of the protester, although this is atypical. Further document requests also may be filed by the protester, but these are due within two days of becoming aware of the existence of the documents being sought. The GAO will grant modest extensions of the comment period. Note, however, that such an extension does not go to extend the day period in which to raise new or supplemental protest grounds, which deadline will not be extended by the GAO. Thus, in the event the protester secures a three-day extension within which to file its comments, and if those comments are accompanied by a supplemental protest, the supplemental protest will be dismissed as untimely because it was filed more than 10 days after the protester became aware of the basis for its supplemental protest grounds. Meanwhile, should the intervenor wish to file comments on the agency report, those comments also are due within 10 days. No specific time limit for the supplemental agency report is pre-ordained, but the timeline is dependent on the detail and complexity of the supplemental protest, although obviously no more than 30 days will be allowed. In practice, however, such filings by the intervenor are deferred until the next step in the process, described in the following bullet point. The intervenor also may file comments on the supplemental agency report during this period, which comments also will encompass an opposition to the supplemental protest. Hearings are held at the discretion of the GAO. Where a supplemental protest has been filed, the GAO may extend the deadline by rolling the initial protest into the supplemental protest. However, this is seldom done. It is far more common for the GAO to decide the entire protest initial and supplemental within days of the initial protest filing. Available statistics indicate an average decision time of less than 90 days. The request must be filed within 10 days of rendition of the decision. Grounds for reconsideration are i failure of the GAO to consider evidence that should have been considered; ii newly discovered evidence that the party could not reasonably have furnished for the initial consideration; or iii errors of law in the decision. There is no deadline for issuance of a reconsideration decision, and there is no requirement on the part of the agency to withhold award or suspend performance during the pendency of the reconsideration. Standard of Review and Competitive Prejudice The GAO reviews the agency action to determine whether it complies with applicable statutory and regulatory requirements and is consistent with the terms of solicitation. Even if there has been a violation of statute or regulation or some other defect is shown, the protester must demonstrate competitive prejudice to succeed. What constitutes a substantial chance or reasonable likelihood again will depend on the type of competitive procedure being used, the point in the competition at which the protest is brought, and the nature of the procurement error involved. Thus, in some instances, the GAO speaks of prejudice being assumed. Available Relief â€” Procedural As previously noted, the protester is entitled to request documents relevant to the procurement and the selection process and to receive an agency report that responds to the protest grounds.

Because the extent of information conveyed by a debriefing will be limited, the true details of the procurement process often are not revealed until this additional material is made available. Thereupon, the protester may file additional or supplemental protest grounds, which frequently become the primary focus of the protest. Only attorneys generally outside counsel and consultants retained by attorneys may be admitted to a protective order. The GAO closely oversees the protective order process in order to protect the integrity of the bid protest system, and in the event of violations, may impose sanctions up to and including dismissal of the protest. Available Relief â€" Substantive If the GAO sustains a protest, it may recommend that the contracting agency implement any combination of the following remedies: Corrective action may be taken at any time before the protest is decided. Thus, the corrective action need not resolve the errors raised in the protest. In the former situation, the protester argues that the corrective action does not adequately address the flaws in the procurement that have been raised. In the latter event, the intervenor argues that the corrective action gives the protester more than that to which it is entitled.

Chapter 2 : Protest of Exclusion From The Competitive Range

*[Protest of Army exclusion of bid from competitive range for generators] (SuDoc GA /AB) [U.S. General Accounting Office] on theinnatdunvilla.com *FREE* shipping on qualifying offers.*

Competitive Range Comptroller General - Key Excerpts Pinnacle argues that the exclusion of its proposal from the competitive range was arbitrary and based on a flawed mission suitability evaluation. As noted previously, an agency may eliminate an acceptable proposal from the competitive range where the proposal is not among the most highly rated or has no realistic prospect of award. Environmental Restoration, LLC, supra. The reliance on point scores or adjectival ratings in making a competitive range decision, as here, is improper. The reasoned judgment required to exclude a proposal from a competitive range cannot rely on the unreasoned distinctions used here: May 19, Competitive Range Determination AMEC asserts that even if it had three significant weaknesses under the area of fieldwork, it should have been included in the competitive range because at the time the competitive range was determined, its proposal was evaluated similarly to the proposal of another offeror, identified as offeror A, which was included in the competitive range. Specifically, AMEC notes that at the time the competitive range was determined, it had three significant weaknesses, four weaknesses and two strengths, while offeror A had two significant weaknesses, nine weaknesses, and one strength. AMEC claims that the contracting officer improperly failed to consider its proposed cost which was lower than that proposed by all offerors that were awarded contracts before eliminating its proposal from the competitive range. Here, the solicitation stated that a proposal that was rated unacceptable under any technical factor or unsatisfactory for past performance would not be considered for award. As a result, it was reasonable for the agency to exclude AMEC from the competitive range without considering its proposed cost. The protest is denied. Agencies are not required, however, to retain in the competitive range a proposal that is not among the most highly rated or that the agency otherwise reasonably concludes has no realistic prospect of award. In addition, the record reflects that the agency evaluated the technical proposals of the two lowest-priced offers, and found that each had only one minor technical issue, which the agency believed could be resolved with brief discussions to make either one or both technically acceptable. Indeed, on September 21, , two days prior to the date the protester filed this protest, the agency evaluated the revised technical proposal submitted by the lowest-priced offeror in response to discussions, as technically acceptable. The protester argues that a more in-depth technical evaluation was required for purposes of establishing the competitive range. As such, it would have been improper for the agency to evaluate the technical proposals in the manner asserted by ER. Rather, as discussed above, the record reflects that the contracting officer based her determination that ER did not have a realistic chance of receiving the award, as well as the overall competitive range determination, on consideration of both price and non-price factors for all proposals. As noted above, agencies are not required to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award, and in fact, even a technically acceptable proposal may be excluded from the competitive range if it does not stand a real chance of being selected for award. Indeed, cost or price not only is a proper factor for consideration, but may emerge as the dominant factor in determining whether proposals fall within the competitive range. National Medical Staffing, Inc. The protester alleges that its evaluated weaknesses could reasonably have been addressed during discussions without the need for material proposal revisions. In this regard, Straughan alleges that it was unreasonable for NASA to assume that the protester could not readily substitute its program manager and business manager as a result of discussions. We find no basis to sustain the protest. As an initial matter, we note that Straughan relies on older decisions issued by our Office that interpreted and applied materially different and superseded competitive range requirements under the FAR. Additionally, in amending the competitive range requirements in , the FAR Council specifically rejected retaining the previous presumption in favor of retaining a proposal in the competitive range. In this regard, we have held that there is nothing inherently improper in a competitive range of one

where the agency has a reasonable basis for its competitive range determination. See AR, Tab With respect to Straughan, the agency found that the protester was ranked fourth of five under the mission suitability factor, and points behind Offeror A, the highest rated offeror. In contrast to Straughan, whose proposed program and business managers resulted in the assessment of a significant weakness, the three higher-rated offerors, including Offeror A, received significant strengths for their respective proposed management teams. We find that this determination was reasonable. Contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. For the reasons set forth in detail below, we see nothing improper about the decision to eliminate Avar from the competition using a second competitive range decision. During discussions, the agency advised Avar of its high price and permitted Avar an opportunity to revise its price proposal prior to conducting its oral presentation. While Avar asserts that it was improper for the agency to eliminate its proposal from the competition because the RFP required the agency to weigh technical merit more heavily than price, our Office has previously concluded that in determining the competitive range, price is a proper factor to consider and may emerge as the dominant factor, even where the solicitation criteria place greater weight on technical factors than on price. Where a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, exclusion from the competitive range is generally permissible. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors. Depot, B et al. There was essentially no discussion of specific measures that Kaseman would take to accomplish the particular requirements of this solicitation. Kaseman asserts that this deficiency could have been corrected through discussions and without a major revision to its proposal. Because the solicitation expressly instructed offerors to provide an approach to accomplishing the requirements and informed offerors that the feasibility of the approach would be evaluated, we think it is fair to say that providing such an approach was a core requirement for proposals. Although Kaseman argues that it could have corrected the issue through discussions and a proposal revision, an agency is not required to include in the competitive range a proposal that requires major revisions to be made acceptable. In this regard, contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to omitted or merely inadequate information addressing fundamental factors. The determination of whether a proposal is in the competitive range is principally a matter within the judgment of the procuring agency. Where a solicitation requests offers on a fixed-price basis, an offer that is conditional, and not firm, cannot be considered for award. Omega World Travel, Inc. This argument is without merit. The determination of whether a proposal is in the competitive range is principally a matter within the sound judgment of the procuring agency. While exclusion of technically unacceptable proposals is permissible, it is not required. Grove Resource Solutions, Inc. A fundamental purpose in conducting discussions is to determine whether deficient proposals are reasonably susceptible of being made acceptable. In the latter connection, Arc-Tech contends that the agency failed to consider price in determining the competitive range and instead based its determination as to which proposals were included on an arbitrary technical cut-off score. The determination of whether a proposal is in the competitive range is principally a matter within the reasonable exercise of discretion of the procuring agency. Smart Innovative Solutions, B In this connection, we recognize that an agency may properly exclude a technically unacceptable proposal from the competitive range regardless of its price. We also recognize that an agency has the discretion to exclude a technically acceptable proposal that is not among the most highly rated proposals where it determines that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted provided that the solicitation notifies offerors, as the RFP here did, that the competitive range might be limited for purposes of efficiency. An agency may not exclude a technically

acceptable proposal from the competitive range, however, without taking into account the relative cost of that proposal to the government. Similarly, an agency may not limit a competitive range for the purposes of efficiency on the basis of technical scores alone. On the contrary, the score sheets of the individual evaluators reflect ratings of [deleted]. The protest is sustained. It asserts that since the proposals of the remaining small business offerors received evaluation ratings that were not acceptable, i. The decision to establish a competitive range and the determination whether a proposal should be included therein is principally a matter within the sound judgment of the procuring agency. Under the regulatory scheme applicable here, the contracting officer was required to establish a competitive range comprised of all of the most highly rated proposals based on the "ratings of each proposal against all evaluation criteria. As mentioned previously, of the remaining small business offerors, the initial proposals submitted by Chugach and Sim-G were determined to be the most highly rated based on the overall technical rating of marginal. That is, the agency evaluators concluded that any errors or deficiencies in the proposals could be corrected through discussions without a major rewrite or major revision of proposals. Rather, as noted above, section M of the solicitation simply mandated that to be considered for award, proposals had to receive at least an acceptable rating under the non-price evaluation factors. In any event, as the agency and Chugach both argue, based on the initial evaluation of proposals the two offerors included in the revised competitive range were determined capable of performing the required effort, and Cambridge has not shown otherwise. Finally, the protester maintains that the agency impermissibly reopened the competitive range despite a FAR provision prohibiting it to do so. The provision in question provides as follows: In fact, FAR part 15 recognizes the authority to make successive competitive range determinations albeit generally with the intent of narrowing the competitive range. Lakeside contends, for example, that its proposal stated that all of the individuals listed would perform the Michigan work and that they were committed to the contract. Specifically, the protester asserts that the agency evaluators believed that Lakeside had no experience in Michigan, although its proposal made explicit that the firm was currently closing properties and issuing policies in Michigan. See Instrument Control Serv. Although agencies are not required to retain proposals in the competitive range that the agency reasonably concludes have no realistic chance for award, SDS Petroleum Prods. As mentioned above, there is no requirement that an agency exclude a proposal that is technically unacceptable as submitted. The agency recognized that Evolvent would need to acknowledge its receipt of the amendments in order for its proposal to comply with the terms of the RFP. Although JAVIS submitted an acceptable proposal, its evaluation ratings were lower than those of the proposals included in the competitive range; the agency reasonably determined that a competitive range consisting of those higher-rated proposals was the largest number that could be permitted and still allow an efficient competition. The RFP specifically permitted the agency to limit the number of proposals in the competitive range to the greatest number that would permit an efficient competition. Indeed, we believe the agency had the discretion to establish a smaller competitive range.

Chapter 3 : ERAPSCO Protests Navy Decision to Exclude it from GFY QA Sonobuoy Solicitation - Sparton

A firm protested the Army's exclusion of its bid from the competitive range under a solicitation for research support services, contending that the Army: (1) unreasonably determined that its bid was technically unacceptable; (2) improperly established a competitive range of one firm; and (3) improperly released sensitive information regarding its protest to the awardee.

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals. There are other Federal court-related protest authorities and dispute-appeal authorities that are not covered by this part of the FAR, e. Contracting officers should contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts. In the computation of any period -- 1 The day of the act, event, or default from which the designated period of time begins to run is not included; and 2 The last day after the act, event, or default is included unless -- i The last day is a Saturday, Sunday, or Federal holiday; or ii In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4: Court of Federal Claims. District Courts do not have any bid protest jurisdiction. In addition to any other remedy available, and pursuant to the requirements of Subpart If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later. The contracting officer may stay performance of a contract within the time period contained in subparagraph Executive Order , Agency Procurement Protests, establishes policy on agency procurement protests. Failure to substantially comply with any of the requirements of subparagraph d 2 of this section may be grounds for dismissal of the protest. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action 4 CFR In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to subparagraph f 1 of this section. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO. To the extent permitted by law and regulation, the parties may exchange relevant information. The protest decision shall be provided to the protester using a method that provides evidence of receipt. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day. The agency shall furnish copies of the protest submissions to such parties with instructions to i communicate directly with the GAO, and ii provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided. However, if the GAO dismisses the protest before the documents are

submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate -- A The protest; B The offer submitted by the protester; C The offer being considered for award or being protested; D All relevant evaluation documents; E The solicitation, including the specifications or portions relevant to the protest; F The abstract of offers or relevant portions; and G Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester. A party shall receive all relevant documents, except -- A Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. B The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason see subdivision a 4 i of this section. This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order. C The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency. Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties. Copies of the request shall be furnished simultaneously to all parties. If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties. The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order. If a hearing is held, these comments are due within 5 days after the hearing. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extensions of offers, consideration should be given to proceeding under subparagraph b 1 of this section. If the decision is to proceed with contract award, or continue contract performance under paragraphs b or c of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties. The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph a 2 of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing. GAO issues its recommendation on a protest within days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option. If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the day period. The

agency shall use funds available for the procurement to pay the costs awarded. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay. Procedures for protests at the U. Court of Federal Claims are set forth in the rules of the U. The rules may be found at http: If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration and use of ombudsmen. Failure to certify shall not be deemed to be a defective certification. In addition, the Disputes statute provides for: Agency Boards of Contract Appeals BCAs authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals under the Disputes statute. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate see 5 U. Agencies may also elect to proceed under the authority and requirements of the ADRA. However, relief formerly available only under Public Law ; i. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part. However, the claim must first be submitted to the contracting officer for consideration under the Disputes statute because the claim is not cognizable under Public Law , as implemented by Part 50 , unless other legal authority in the agency concerned is determined to be lacking or inadequate. This 6-year time period does not apply to contracts awarded prior to October 1, The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer. The 6-year period shall not apply to contracts awarded prior to October 1, , or to a Government claim based on a contractor claim involving fraud. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected. See the clause at However, if a contractor has provided a proper certificate prior to October 29, , after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate. If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and The authority to decide or resolve claims does not extend to -- a A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or b The settlement, compromise, payment, or adjustment of any claim involving fraud. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims except as provided in 41 U. This requirement shall apply to decisions on claims initiated by or against the contractor. Such payment shall be without prejudice to the

rights of either party.

Chapter 4 : Bid Protests | Blank Rome LLP

A firm protested the Army's exclusion of its bid from the competitive range under a solicitation for the maintenance of various government facilities, contending that the Army: (1) should have held discussions; (2) improperly rejected its bid as deficient, since the solicitation cautioned against elaborate proposals; and (3) should have considered its past performance under similar contracts.

Specifically, the language of the amended statute provides: General Accounting Office the "GAO" , it has done so with a liberal interpretation of who can meet that standard. For example, in Cincom Systems, Inc. The COFC reasoned that there was no evidence that Congress intended to allow a contracting officer to make a legally erroneous decision not to entertain an offer from a party seeking to compete for a contract, and then rely upon that decision as the basis for concluding that the party lacked standing. But, see, CC Distributors, Inc. Similarly, in Delbert Wheeler Construction, Inc. The Government contended that the protester could not be awarded a contract for certain construction work because its proposed price exceeded the Government cost estimate by 38 percent, and 33 U. Finally, in CCL, Inc. Given the fact that no solicitation had been issued, the Government contended that the plaintiff was not an actual or prospective bidder for the work covered by the modification. The Court then found that CCL possessed the requisite standing, reasoning that where a claim is made that the Government violated CICA by refusing to engage in a competitive procurement, it is sufficient for standing purposes if the plaintiff shows that it likely would have competed for the contract had the Government publicly invited bids or requested proposals. The Court acknowledged, however, that post-decisional documentation in such a record served only as argument for the Court to consider. On the other hand, where the administrative record did not adequately explain the basis for the agency decision, the COFC has allowed both the Government and the protester limited opportunity to supplement the record. See, Cubic Applications, Inc. Notably, the COFC took much more restrictive approach when the Government intentionally failed to include relevant documentation in the record in a timely manner. Finding that the Government had intentionally withheld the relevant evidence, the Court drew negative inferences against the Government. Specifically, the Court found that had the document been admitted to the record it would have revealed information favorable to the plaintiff, i. For example, in Cubic Applications, Inc. Cubic argued that "extra-record" evidence from these individuals would be permissible under three of the standards set forth in Esch v. The Court did permit Cubic to conduct a limited deposition of the contracting officer, however, on the basis that Cubic had raised a new issue at the COFC in response to which the Government had submitted an affidavit from the individual. See, also, Delbert Wheeler Construction, Inc. Claims LEXIS October 3, , limited discovery permitted to enable plaintiff to compile information related to matter that would fall beyond the administrative record, and to prepare for oral argument ; Aero Corp. In Allied Technology Group, Inc. But see, CC Distributors, Inc. In Cubic Applications, Inc. On the other hand, in Lyons Security Services, Inc. The Court noted that GAO decisions are not entitled to any deference where GAO precedent can be viewed as inconsistent or where GAO acted beyond its mandate because it did not find any violation of statute or regulation. Essentially, the COFC has demonstrated that it will take a close look at the protest issues presented and will not summarily dismiss protests unless a valid basis exists. Based on the decisions issued by the COFC in its first year of post-award jurisdiction, the COFC should be considered a viable protest alternative, particularly where review might otherwise be denied at the GAO for procedural reasons or where the GAO caselaw appears to be inconsistent with applicable law.

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Chapter 5 : FAR -- Part 33 Protests, Disputes, and Appeals

On February 11, VMD filed a GAO bid protest challenging its exclusion from the competitive range. VMD claimed disparate treatment by NASA, alleging that its proposal was held to a higher standard because other offerors received strengths that VMD did not.

Google Introduction On January 1, , the U. For example, in Ramcor Services Group, Inc. United States, 41 Fed. Under the Competition in Contracting Act, an agency can override such a GAO stay if there are "urgent and compelling circumstances" supporting such a decision. In Hewlett Packard Co. The Court found that Synernet could not rely on the APA as providing an independent basis for invoking COFC jurisdiction, since Tucker Act jurisdiction requires the existence of a separate substantive right enforceable against the United States for money damages and the APA provides no such right. This "interested party" standard is similar to the one utilized by the General Accounting Office "GAO" , but the COFC has made it clear it will continue to develop its own definition of "interested party". For example, in WinStar Communications, Inc. The Government argued that WinStar lacked standing to challenge this decision, contending that the statutory and regulatory preference for multiple awards in such procurements was meant only to benefit the Government, and not WinStar. The Court agreed with WinStar. Citing Cubic Applications, Inc. United States, 37 Fed. On the other hand, in Advanced Data Concepts v. The order states that the COFC will use protective orders to prevent the improper disclosure of sensitive and proprietary information. Included in General Order No. The order also offers guidance to the Government concerning the content of the administrative record, and states that early production of certain "core documents" may expedite the final resolution of a case. The court held that "unexplained irregularities" in the administrative record justified supplementation of the record, and that to achieve this supplementation, limited discovery was "imperative". The COFC also issued several decisions in that dealt with problems arising in connection with protective orders in bid protest cases. In Fore Systems Federal, Inc. In connection with the resolicitation of the contract that was the subject of the earlier protest, NSA sought to release unit pricing information that had been provided by Cisco, the successful offeror from the original procurement. In Modern Technologies Corp. The case involved efforts by Modern Technologies, the Air Force, and two intervenors to keep under seal information covered by a protective order that was agreed to by all parties. Judge Harkins noted that the scope of the protective order was so broad that if enforced, it would have resulted in nearly the entire official record of the protest litigation being permanently unavailable to the general public. Citing the need for public access to information connected with judicial proceedings on claims against the Government, the Court abrogated the protective order. The Court found that public access to such information was necessary to implement "full and open competition" in Government procurements, and to help effectuate oversight of Government compliance with statutory and regulatory requirements. With respect to the terms of the protective order itself, which indicated that the material would be held in confidence in perpetuity, the Court found that its provisions could be abrogated if doing so was "established as both reasonable and in the public interest.

Chapter 6 : ERAPSCO Protests Navy Decision to Exclude it from GFY QA Sonobuoy Solicitation

Therefore, filing a bid protest for exclusion from the competitive range determination can have merit. For more help in a GAO protest challenging exclusion from the competitive range determination letters, call a bid protest lawyer at

Chapter 7 : FPM Remediations, Inc., B, April 22, | Bid Protest Weekly

When litigating a GAO protest of exclusion from the competitive range, contractors must be aware of this change is procurement law. Protesting of Exclusion from the Competitive Range to GAO When reviewing your bid protest, GAO

will only look to see if the Agency's exclusion from the competitive range was reasonable and followed applicable.

Chapter 8 : IAP World Services, Inc., B, October 9, | Bid Protest Weekly

In September , MicroTech filed a bid protest with the GAO, saying it had been challenging its exclusion by the Army from the competitive range for the $5 billion IT contract, after the Social.

Chapter 9 : Guide to Federal Procurement Protests â€" GovCon Network

Where, as here, a protest challenges an agency's evaluation and exclusion of a proposal from the competitive range, we first review the propriety of the agency's evaluation of the proposal, and then turn to the agency's competitive range determination.