


**Bid Challenges,
the Role of the
Government Accountability Office (GAO),
and the Boeing Protest Decision**

Michael R. Golden
Associate General Counsel
202/512-8233
goldenm@gao.gov
United States Government Accountability Office


1



Introduction to GAO

- GAO is the investigative arm of Congress
- Established in 1921
- Headed by the Comptroller General
- Core values:
 - Accountability
 - Integrity
 - Reliability


2



What is a Protest?

- **Pre-award:** Protests include allegations that a solicitation is defective (for example, that it improperly restricts competition)
- **Award:** Protests include allegations that a contract award is improper (for example, that selection was unreasonable or inconsistent with the solicitation award criteria)


3



Bid Protests at GAO

- GAO's bid protest function began in 1920s and was codified in the Competition in Contracting Act of 1984 (CICA)
- CICA directs GAO to provide for the *independent, expeditious, and inexpensive* resolution of protests
- **Independent of GAO's Audit Function**
- GAO's bid protest decisions are published & establish a uniform body of law relied on by Congress, the courts, contracting agencies, and the public


4



Why a Protest System?

- Enhance **accountability** of procurement officials and government agencies
- Promote **transparency** into how the procurement system works
- Protect **integrity** of procurement system
- Protests are a check on procurement system


5



GAO's Protest Jurisdiction

- GAO generally has jurisdiction over federal agencies
- No exemption for national security agencies
- GAO has no jurisdiction below federal level
- GAO does not hear subcontractors' protests


6



**Interim Relief:
The Rules at GAO**

- Interim relief (“**stay**”) is automatic if protest is filed at GAO within timing deadlines
- Upon protest filing, no contract may be awarded; if contract has already been awarded, performance must be suspended
- Agency may “override” and proceed, after making specific findings—but there are checks on abuse & agencies do not override often


7



**Expertise of Forum & Representatives :
The Situation at GAO**

- GAO relies on civil service attorneys who are not judges, but who have extensive procurement experience and work exclusively on protests
- Protesters may elect to be represented by their own attorney or may proceed without (most rely on attorneys)
- Unlike in the U.S. judicial system (where the Department of Justice represents the entire Executive Branch), at GAO the contracting agency represents itself through attorney or other representative


8



Time: The Rules at GAO

- Protests of solicitation terms can be filed any time up to proposal submission
- Protests of awards generally must be filed 10 days after award
 - Limited exception for debriefings & facts learned later
- 10-day rule for supplemental protests


9



Other Time Limits at GAO

- Agency must provide report within 30 days
 - Set out in statute
 - Limited flexibility
- GAO decision within 100 days after protest
 - No flexibility

10




**Evidence (I): Agency Documents:
The Rules at GAO**

By regulation, agency must provide GAO and parties within 30 days of protest filing:

- All relevant documents
- Contracting officer's statement of facts
- Legal memorandum
- No Access Issues


11



**Evidence (II): Beyond Documents:
The Rules at GAO**

- Hearings are held in minority of protests, of varying formality
- At hearing, agency officials will be expected to testify
- Protester (and intervenor) may cross-examine
- Non-agency witnesses may be called as well
- Negative inference may be drawn from a failure to appear


12



**Evidence (III): Other parties' evidence:
The Rules at GAO**

- Protester can be asked to provide documents or testimony (but this is rare)
 - Negative inference may be drawn for failure to cooperate
- Same is true for intervenor (again, this is rare)


13



**Procedures:
The Practice at GAO**

- GAO dismisses many protests within first 3 weeks after filing: as based on mere speculation, untimely, or for other reasons
- A decision by agency to reconsider or reverse its actions will usually lead GAO to dismiss protest
- Early dismissals eliminate need for report from agency
- Protesters frequently supplement their protests once they receive the agency report
- Alternative dispute resolution has been promoted in last 8 years & is now widely used


14



**Standard of Proof:
The Practice at GAO**

- GAO will be strict in insisting that agency follow ground rules laid out in solicitation & treat competing firms equally
- GAO will not substitute its judgment in place of agency technical assessments or judgments about cost/technical tradeoffs
- GAO will show more deference to agency needs if national security or life/safety equipment are involved
- GAO gives little weight to new rationales emerging during protest if there is no support in the contemporaneous record


15



**Protection of Confidences:
The Practice at GAO**

- GAO has legal authority to issue **protective orders** (essentially nondisclosure agreements)
- GAO allows independent persons (attorneys and experts) to apply for admission to protective order
- Individuals admitted to protective order may participate fully in hearings, conference calls, and review of documents
- Where party has no outside attorney, it receives a “redacted” (that is, edited) copy of agency documents


16



**Final Relief:
The Rules at GAO**

- 75% of protests are resolved without written decision—of those where a decision is issued, protester wins approximately 20%
- Decision on relief is a recommendation, but is followed 95+% of time
- Relief tailored to specific impropriety. Examples:
 - o Revisions to solicitation
 - o Re-evaluation of proposals
 - o Further negotiations with offerors
 - o Termination of contract & award to protester (rare)
 - o If no other relief possible: reimbursement of cost of competing
 - o Reimbursement of costs of protesting (with cap)

17



**Decisions:
The Practice at GAO**

- GAO publishes its decisions (including on Web) immediately
 - Competition-sensitive information is “redacted”
 - Public decision provides transparency
- Unsuccessful party may ask GAO to reconsider
- GAO decisions cannot be appealed
 - o Unsuccessful protester may go to Court of Federal Claims

18
