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POINT PAPER

12 June 2000

SUBJECT: Differences in Procedures During the Initial Phase of Bid Protests at the General Accounting Office and the Court of Federal Claims

PURPOSE: To brief the significant differences between the two

FACTS and Procedures:

o Disappointed offerors may file bid protests at the General Accounting Office (GAO), the Court of Federal Claims (COFC) or with the contracting officer or higher level officials within the agency. At the present time bid protests may also be filed in the federal district courts but their jurisdiction may end at the end of the year.

oo The GAO protest is started by filing a letter. There is an automatic stay of award or of contract performance if the protest is filed within specified time limits and GAO notifies the agency in a timely fashion. If it is not, GAO has no authority to order a stay. A firm which does not get an automatic stay must litigate in a federal court to convince a court that it is entitled to an injunction.

oo The COFC protest process is started by the filing and serving of a "Pre-filing Notice," with the court, DOJ and the contracting officer in accordance with the court's General Order 38. This is done prior to the filing of a complaint in order to enable DOJ to assign an attorney and to let that person quickly assemble its team and present a defense, as necessary, to any request for a temporary restraining order (TRO) or preliminary injunction (PI).

ooo The next step is a quick transmission of information about the procurement up the chain. The DOJ attorney represents the Government. Attorneys from DA Litigation Division, AMC Command Counsel and the MSC are part of the team. The court litigation may be a follow-on of a GAO or HQ, AMC-Level protest. Initial assessments must be made of what tack the protester will likely take and what position will be taken if the protestor requests a TRO or PI.

ooo Once the complaint is filed, there may be a request for a TRO or PI. The supporting briefs, memoranda and affidavits may run to a dozen or more separate documents. The judge may set the case up almost immediately for the initial status conference, which may be done whether in person or by teleconference. The most important matter is whether the protester wants a TRO or PI, and if so, whether the Army is willing to concede one.

ooo If a single contract which cannot be separated into component parts is involved, agreement on a TRO or PI may not be possible. If a task order/delivery order contract is involved, agreement may be possible if the Army is willing to forgo the issuance of additional

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delivery orders, and the protester is willing to let previously issued delivery orders proceed

ooo If agreement is not possible, the judge will quickly schedule a TRO or PI hearing. The Army/DOJ must select the most knowledgeable witness or witnesses and prepare him/her to testify at the hearing.

oo The COFC judge intensively manages a bid protest from the time the complaint is filed. A lot of work up front is devoted to the single issue of whether a TRO or PI should be granted. Once this is resolved, the case proceeds to submission of the record, briefings and discovery or a hearing, if permitted by the court

o As a general matter, things are much quieter up front at the GAO. The reason is that either the automatic stay falls into place or it doesn't. GAO has no jurisdiction over this question. There is a strict regulatory order for filing the administrative report and subsequent pleadings. There is a relatively short time allowed for decision on all GAO protests by statute, namely 100 days.

oo While there is less fury during the first week of a GAO protest, the short time frame involved for GAO to reach its decision means that there is always time pressure during the first 30 days of a GAO protest during the preparation of our Administrative Report. If GAO convenes a late hearing, the time pressure remains.

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