

**TIMELINESS IN SUBMITTING  
BID PROTESTS  
AT THE  
GENERAL ACCOUNTING OFFICE**

The Competition in Contracting Act, 31 U.S.C. §3551-56, is the authority under which the General Accounting Office (GAO) is established as a forum for settling disputes regarding the award of federal contracts. The GAO is authorized by 31 U.S.C. §3555 to promulgate regulations governing the bid protest process at the GAO. Those regulations are set forth in 4 C.F.R. Part 21; 4 CFR 21.2 governs the timeliness of protest filings at the GAO. The Federal Acquisition Regulation (FAR) 33.104 et.seq. governs protests submitted to the GAO.

Although the official name of the process is the “Bid Protest Process,” issues arising under both Invitations for Bids (IFB) and Requests for Proposals (RFP) can be resolved through the GAO using this process. Although most protests involve acceptance of a bid or proposal or the award of a contract, the GAO also provides resolutions for other types of disputes. The GAO considers issues such as alleged defective solicitations, the cancellation of a solicitation and post-award matters such as alleged failure of the agency to comply with stated evaluation criteria. All protest actions submitted to the GAO are affected by the timeliness rules. It is important to note that in negotiated procurements, the scheduling of debriefings conducted pursuant to the FAR can affect the timeliness of filing protests.

In terms of the regulations and timely filing, the definition of “day” is important and it is defined in great detail at 4 C.F.R. § 21.0(e). In general, days are calendar days. The first day is not counted and the last day must not be a Federal holiday, a Saturday, or a Sunday. A document is “filed” on a particular day when it is received by GAO by 5:30 p.m., eastern time, on that day.

There are basically four scenarios to consider with regard to timely filing. First, there are pre-award issues, which typically involve allegedly defective solicitations. Second, there are post-award issues that frequently involve alleged agency failure to comply with stated evaluation criteria. Third, there is an exception to the rules that control in the first two scenarios; the exception provides a different rule for timeliness when there is a required debriefing for a disappointed offeror(s) in a negotiated procurement. Fourth, adverse responses to prior timely filed agency-level protests can be protested to the GAO.

**Defective Solicitations**

Protests that allege improprieties on the face of an IFB must be filed prior to the bid opening. A protest that alleges a defect that was not apparent on the face of the solicitation must be filed not later than 10 days after the defect became apparent.

Protests that allege improprieties on the face of an RFP must be filed prior to the time set for receipt of initial proposals. A protest that alleges a defect not apparent on the face of the solicitation must be filed not later than 10 days after the defect became apparent. In negotiated

procurements, there are often amendments to the RFP. Where an alleged defect arises in the solicitation by virtue of the amendment, a protest based on that alleged defect must be filed before the next time set for receiving proposals.

### **All Other Matters, Except for Required Debriefing Situations**

In all cases other than those where the grounds for the protest involve alleged defects in the solicitation, protests must be filed not later than 10 days after the protester knew or should have known the basis for the protest.

### **The Exception to the Rules: Required Debriefing Situations**

This is the area where FAR Part 15 regarding debriefings and the GAO bid protest regulations are connected. The first step in understanding the GAO timely filing rules for these situations is to understand the FAR provisions for debriefings. FAR 15.505 addresses pre-award debriefings and FAR 15.506 provides for post-award debriefings.

FAR 15.505 states that offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award. The request must be submitted within three days after receipt of the notice of exclusion from the competition. If the offeror does not submit a timely request, neither a pre-award nor a post-award debriefing is required. The contracting officer may refuse the request for a pre-award debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct the debriefing at that time. If the contracting officer delays the debriefing in this situation, the debriefing shall be conducted post-award in accordance with FAR 15.506.

FAR 15.506 requires a debriefing be held for any offeror that requests it in writing within three days of notification of the award. Post-award debriefings should be conducted within five days after receipt of the written request, to the extent practicable. This section also provides that an agency may accommodate untimely debriefing requests; however, this accommodation of the untimely request does not automatically extend the deadlines for timely filing of any protest, including a protest to the GAO.

The GAO protest rules state:

Protests other than those covered by paragraph (a)(1) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, 4 C.F.R. 21.2 (a)(2).

A “required” debriefing occurs in two cases, based on FAR 15.505 and 15.506. Offerors that are excluded from the competition prior to award are entitled to a debriefing, either at the time of their timely request, or post-award, if the contracting officer determines that a pre-award debriefing is not in the best interests of the Government, FAR 15.505. Offerors whose proposals were in the competitive range but were not selected for award are entitled to a post-award debriefing subject to a timely request, FAR 15.506

In the case where there is a statutorily required debriefing and there is a protest of the award, the protest to GAO cannot be filed before the debriefing, and must be filed within 10 days after the date of the debriefing. Therefore, timely filing of the protest to the GAO is related to the date of the debriefing.

The Comptroller General stated this principle as follows:

“As stated in our timeliness rules, a post-debriefing protest will be considered timely if filed as late as 10 days after the debriefing, even as to issues that should have been known before the debriefing, if that debriefing is “required.” As noted above, Congress specifically addressed the issue of when agencies are required to give post-award debriefings to offerors excluded from the competitive range, stating that such debriefings are required ‘only if that [excluded] offeror requested and was refused a pre-award debriefing.’ ” Matter of: United International Investigative Services, Inc., B-286327, October 25, 2000.

### **Caution: Pre-award Request for Delayed Debriefing**

There is a notable wrinkle in FAR 15.505 that is important for offerors. FAR 15.505 states: “Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing.” FAR 15.505(a)(2) states: “At the offeror’s request, this debriefing may be delayed until after award . . . Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing.”

In the Matter of: United International Investigative Services, the day after receiving the notice of elimination from the competitive range, the offeror, UIIS requested a debriefing but requested delay of the debriefing until after award. Their letter request stated: “In accordance with [Federal Acquisition Regulation] FAR 15.505, United Investigative Services, Inc. requests a debriefing in response to the Government’s determination of exclusion of UIIS from the competitive range . . . As provided in FAR 15.505(a)(2), UIIS requests that this debriefing be delayed until after award.” *Citing Matter of: UIIS, B-286327, October 25, 2000.*

The agency conducted a post-award debriefing within one week of award and three days later, UIIS protested to the GAO. The agency argued that UIIS failed to pursue its basis for protest in a diligent manner when it requested delay of the debriefing. The GAO denied the protest and upheld the agency’s position.

The GAO opinion stated that the protest was not timely filed. For a protest to be timely, it must be filed within 10 days of a “required debriefing.” The Competition in Contracting Act requires a contracting officer to provide a post-award debriefing to an excluded offeror only if that offeror is refused a pre-award debriefing. In this case, since the contracting officer did not refuse the pre-award debriefing, but rather the offeror requested delay of the debriefing until after award, the debriefing was not considered to be “required.” Therefore, in this case, the offeror falls within the rule which requires that all protests must be filed within 10 days after the basis for the protest is known or should have been known, rather than falling within the exception to the rule.

The important point here is that, even though the language of FAR 15.505(a)(2) may appear to invite offerors to request a delay in receiving debriefings when they have been eliminated from the competitive range, such a request could, and most likely will, affect the timeliness of a protest to the GAO.

### **Protest of Adverse Agency Action**

Protests regarding contract actions may first be filed with the agency. The timeliness of an agency protest is measured by either the GAO rules or an agency's rules, whichever is stricter. If a timely agency-level protest was previously filed and there was an adverse agency response, any subsequent protest to the GAO must be filed within 10 days of actual or constructive knowledge of the agency action.

### **Summary**

The rules for the timely filing of bid protests with the GAO are stated at 4 C.F.R. Part 21. The deadlines fall within four basic scenarios. First, protests may be based on pre-award issues, which typically involve alleged defective solicitations. Second, protests may be based post-award issues that frequently involve alleged agency failure to comply with stated evaluation criteria. Third, protests may be based on information gained in a "required" debriefing. Fourth, protests may be based on the adverse action of an agency in response to a timely filed agency-level protest.

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