

Client Alert

April 2018

Changes in the Bid Protest World

Several changes have recently occurred that will affect the manner in which federal bid protests will be conducted. Companies that do work for the federal government—and the lawyers who represent them—need to be aware of those changes.

On April 2, 2018, the Government Accountability Office (GAO) published a final rule amending its bid protest regulations found at 4 CFR Part 21. 83 Fed. Regis. 13817. In 2014 Congress directed GAO to establish and operate an electronic filing and document dissemination system for filing bid protests. GAO published a proposed rule in 2016 that sought to establish the Electronic Protest Docketing System (EPDS). See 81 Fed. Regis. 22917. After receiving and evaluating numerous comments from interested parties, GAO's recent final rule made EPDS a reality. The effective date of EPDS is May 1, 2018.

Currently, bid protests can be filed by mail, facsimile, electronic mail or hand delivery. Beginning on May 1, all protests must be filed electronically in EPDS. The only exceptions will be if a protest contains classified information or if the protest contains documents that for reasons of size or format are not suitable for filing in EPDS. In that case, the EPDS instructions direct parties to contact GAO for guidance in filing the protest. A hard copy of the protest must also be sent to the contracting officer under separate cover.

When Congress directed GAO to establish EPDS, it also authorized GAO to “require each person who files a protest under this subchapter to pay a fee to support the establishment and operation of the electronic system under this subsection.” Consolidated Appropriations Act for Fiscal Year 2014, Section 1501. GAO has set the filing fee at \$350 per protest. The EPDS instructions explain how the fee must be paid. Additional fees will not be required for supplemental protests, requests for reconsideration and other requests. The \$350 fee is estimated to be sufficient to cover the cost of operating and maintaining EPDS. GAO will monitor these costs and will raise or lower the fee in the future, as necessary.

In addition to the new GAO final rule, the 2018 National Defense Authorization Act (NDAA), which was signed by President Trump on December 12, 2017, contains two sections that will impact bid protests.

Section 818 of the NDAA requires the Secretary of Defense to revise the Defense Federal Acquisition Regulations (DFARs) regarding post-award debriefings that are available to offerors. All offerors should request a debriefing after contract award, whether or not the offeror was selected. Many times, however, the debriefing is very limited and fails to address the questions of unsuccessful offerors. As a result, those offerors must file a protest in order to determine the actual reasons for the agency decision. This often results in a needless waste of time and money. The changes required by Section 818(a) are intended to address this problem. These changes include:

- If a contract award exceeds \$100,000,000, an offeror can request and the agency must disclose the source selection award determination document. The document will be redacted to protect the proprietary information of other offerors;

- If a contract award is between \$10,000,000 and \$100,000,000 with a small business or nontraditional contractor, the offeror can request and the agency must disclose the redacted source selection document;
- Debriefings will be available for all contract awards and task or delivery orders valued at \$10,000,000 or higher. Current practice does not require that debriefings be offered when certain contracting vehicles are used by the agency.

Section 818(b) provides an opportunity for a disappointed offeror to submit follow-up questions regarding the protest within two business days of the debriefing. If follow-up questions are submitted, the agency must respond to those questions within five business days of receipt. The debriefing is not concluded until the answers to the follow-up questions have been delivered to the disappointed offeror.

This is a significant change. Under current practice a protest must be filed no later than ten days after the date offered for debriefing. Such a compressed schedule makes it difficult to evaluate whether to file a protest. But by permitting follow-up questions and keeping the debriefing open until those questions have been answered, unsuccessful offerors will have up to seven additional business days to decide whether to file a protest. These extra days will provide additional opportunity to investigate the efficacy of filing a bid protest.

Finally, Section 827 of the NDAA directs the Secretary of Defense to “carry out a pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests.” The program will run from October 1, 2019, to September 30, 2022. It will apply only to parties with annual revenues in excess of \$250,000,000. Many commentators have argued that penalizing protestors for unsuccessful protests might reduce the number of protests and permit GAO to issue decisions more quickly. This pilot program appears to be an effort to test that hypothesis. Defense contractors with annual revenue over the \$250,000,000 threshold should monitor this program carefully.

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