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APRIL 9, 2018

The Bid Protest Process Changes After May 1: Here's What You Need to Know

By: Lawrence M. Prosen, Gunjan Talati, & Chris Henel

After much testing, inquiry of industry and rulemaking, the U.S. Government Accountability Office (GAO) has formally issued new rules that provide updated e-filing methods and systems as well as fees—yes, fees—for filing and prosecuting protests. Effective May 1, 2018, GAO's Final Rule as part of 4 C.F.R. Part 21, formally sets its plan for moving from the informal method of filing protests (using email, which superseded hand delivery post-9/11) to using a new formal docketing and document management system. These requirements arose out of the Consolidated Appropriations Act for FY 2014 §1501, enacted on January 14, 2014. Section 1501 required, amount other things, that the GAO create an e-filing and document dissemination system under which protests may be filed and all documents relating to the protest be distributable and made available to all parties to the protest.

As a result, GAO has developed its Electronic Protest Docketing System or EPDS (https://epds.gao.gov/login) which shall apply to all protests, with the sole exception of those protests involving classified information or data, filed on and after May 1, 2018. Not only will protests be filed via EPDS but all documents related thereto will be served via the same system. This system is not unlike the Federal Judiciary's PACER e-filing system which was implemented in 1988 and made internet accessible in 2001. The one discernable negative associated with EPDS is that, for the first time, a fee is chargeable for those filing a protest. Historically, protesting contractors have not had to pay a filing fee with a bid protest at the GAO. Now, in order to support the development and maintenance of the EPDS, a fee of $350.00 will be charged. In setting the fee, GAO expressly rejected requests to set a much higher fee aimed at preventing "frivolous" protests and made it clear that the fee was aimed only at addressing administrative expenses of EPDS and not to discourage contractors from pursing protests. Starting May 1, 2018, contractors pursuing protests should note the following changes to bid protest regulations:

1. All protests filed at GAO must be filed through EPDS (except for protests involving classified information or data).
2. Timeliness - A protest is not considered filed until the filing fee is paid (note that the same fee will apply to classified protests).
3. Timeliness – As we have regularly warned parties, the time for filing a protest is critical. Miss a deadline and you may not have a viable protest. As with the prior regulations, GAO has maintained

its rule that a protest must be filed by 5:30 pm eastern time to be considered filed on that date. Otherwise, it is deemed filed the next business day. We do believe this should have been revised to midnight or 11:59 pm as the system is now formal and electronic, but GAO has kept the rule the same as before.

4. Timeliness - The final rule also clarifies that in a situation where the "protest becomes known when there is no solicitation closing date or when no further submissions in response to the solicitation are anticipated" a protest must be brought within 10 days of when the basis of the protest becomes known or should have been known.
5. Automatic Stay Overrides - Where a protest is properly and timely filed under FAR Part 15 (negotiated procurements that call for debriefings), the CICA Automatic Stay may come into play. The new GAO regulations (4 C.F.R. §21.6) require agencies that elect to override the stay to file a notice of such decision along with either (a) a copy of the underlying determination and finding (D&F) substantiating that action or (b) a statement by the official who approved the D&F specifying the statutory basis for the override. While a relatively rare occurrence, when a stay is overridden, traditionally it has been very difficult for protesters to get copies of the D&F to see whether the override is proper. This new rule is a positive action by GAO from the protester's perspective because it gives them greater insight into an agency's override decision. This in turn helps protesters determine whether they want to challenge the override at the Court of Federal Claims.
6. Index of Documents - As before, an agency is required to file an index of documents the agency will produce with the Agency Report including the agency's response to any document requests made by the protester at least five days prior to issuing the Agency Report. That index is still due five days before the Agency Report is to be filed, but now, if that date falls on a weekend or holiday, the response must be filed on the last business day that *precedes* the weekend or federal holiday not the date after as before. While this was largely an unwritten rule in practice, it's nice to see it formalized and reduces confusions.
7. Redactions – As parties to a protest have experienced, if a protective order is in place, the party filing a document must provide within 1 day after filing the protected version proposed redactions to the other parties. Proposed redactions are *not* to be filed through EPDS. Instead, the party responsible for preparing the proposed reactions should email or fax the proposed redactions to the other parties. Only the final, fully agreed-upon redacted document must be filed within five days through EPDS. If redactions cannot be agreed upon, then procedures are in place for GAO to make those determination. Also, the new rules allow an exhibit to be proposed for full redaction.
8. Express and flexible alternative options - GAO has augmented Section 21.10 relating to express options, flexible alternative procedures, accelerated schedules, summary decisions, status and other conferences, to now require that parties request any express options within five days of the date a protest or supplemental protest is filed. If accepted by GAO, this shortens the time in which an agency has to file its agency report from 30 to 20 days and comments there on from 10 to 5 days

of receipt of the report.

9. Fee Petitions – Where an agency elects to take corrective action, the GAO may recommend that the agency reimburse protester for certain of its attorney's fees incurred. Such a request for costs shall be filed no more than 15 days after protester learned (or should have learned) that GAO has closed the protest based on the corrective action. If such a request is timely filed by the successful protester, the agency shall respond to the request within 15 days and the protester shall then file comments on that agency response within ten days of receipt of those comments. Failure to provide such comments shall result in the fee request being denied.

CONCLUSION:

This overhaul and "modernization" of the GAO regulations is a positive for all parties alike. While the traditional e-mail filing system worked adequately, the ability to now have a formal central repository for all protest-related records and documents creates a more streamlined "one stop" for all parties, agency and protester alike. This all being said, having intimate knowledge and understanding of the regulations and timelines associated with GAO bid protests is key to not only filing but prosecuting such protests.

A copy of the complete regulatory changes can be found at:
https://www.federalregister.gov/documents/2018/04/02/2018-06413/government-accountability-office-administrative-practice-and-procedure-bid-protest-regulations