

PROTEST TO GAO IS UNTIMELY IF PRIOR AGENCY LEVEL PROTEST WAS UNTIMELY

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The Government Accountability Office (“GAO”) bid protest rules have tight deadlines for submitting timely protests. These rules also state that that a matter initially protested to the contracting agency will be considered by the GAO only if the agency protest was filed within the time limits in the GAO protest rules, unless the contracting agency imposes a more stringent time for filing, in which the agency’s time for filing will control. 4 CFR Sec. 21.2(a)(3). For a post-award protest, the protester is generally required to file an agency level protest within ten days of when it knew or should have known of the basis of its protest.

In *Alamo Strategic Mfg. Inc*, B-420716, July 27, 2022, the protester filed an untimely agency level protest, which the agency denied. The protester then sought to file a GAO protest, but GAO dismissed it as untimely. Here’s the timeline.

The Defense Logistics Agency (“DLA”) issued a solicitation for knee and elbow pads. The solicitation required product demonstration models (“PDMs) to be submitted with offerors’ proposals, which were due by December 1, 2021. The solicitation stated that failure to submit PDMs by that date “may be cause for rejection of the entire offer.” Alamo’s PDM’s did not arrive until December 3, 2022. DLA notified Alamo on January 5, 2022 that its PDM submission was received late and would not be considered.

DLA awarded the contract to Forum Industries on March 15, 2022, and Alamo filed a protest with the agency on March 25, 2022 challenging DLA’s determination that its PDM submission was late. DLA denied Alamo’s protest on April 19, 2022, explaining that Alamo’s challenge to the PDM issue was late because it was not filed within 10 days after the basis of protest was known or should have been known. Alamo filed its GAO protest on the PDM issue on April 29, 2022.

The GAO noted that Alamo knew or should have known on January 5, 2022 that its PDM was received late and would not be considered. The March 25th agency level protest was not filed within 10 days of Jan. 5, 2022 and was therefore untimely. GAO concluded that Alamo’s untimely agency level protest made the GAO protest untimely as well, and dismissed the protest.

Takeaway. Be sure that any agency protest and subsequent protest to GAO comply with the GAO rules. Unless an agency states otherwise, GAO’s protest rules govern the timeliness of an agency submission. By waiting longer than 10 days after January 5, 2022 to protest at the agency, both the agency protest and the GAO protest were untimely and were dismissed.

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