

PROTEST TIMELINESS, BUSINESSMEN AND LAWYERS

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In a recent Government Accountability Office (“GAO”) bid protest, a contractor sought to be excused from the strict timeliness rules in filing bid protests at the GAO. *Asahi Gen'l Trading & Contr. Co*, B-417650, July 24, 2019. In denying the protest, the GAO, which adjudicates the vast majority of federal bid protests, reinforced its often-stated view that it strictly applies the rules, and grants no exceptions based on the status of the protester.

On April 23, 2019, Asahi, a 5-year incumbent contractor that had provided scrap sales services to the Defense Logistics Agency (“DLA”) met with the DLA and requested that it (Asahi) receive a contract extension instead of issuing a bridge contract to Royal Bridge, another contractor. DLA advised Asahi that no contract extension would be issued to it, and Royal Bridge would receive the bridge contract. On May 3, 2019, DLA emailed Asahi and confirmed the agency’s prior statement that Asahi’s contract would not be extended, and that DLA intended to award a 6 month bridge contract, pending the issuance of a competitive solicitation for the requirements. On May 23, 2019, Asahi submitted an agency level protest of the bridge contract to another contractor, asserting that the award lacked a valid legal basis. Receiving no immediate response to its agency level protest, Asahi filed a similar protest at the GAO on June 9, 2019.

The DLA requested that GAO dismiss the protest, noting that Asahi’s agency-level protest was not timely filed, a specific requirement of the GAO rules at 4 CFR § 21.2(a)(3), which state that any protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided that the agency protest was filed within 10 days after the basis of protest was known or should have been known. (It is quite clear that the May 23rd agency level protest was filed more than 10 days after Asahi knew or should have known of the basis for its protest, since DLA advised by email on May 3, 2019 that no extension would be awarded to Asahi.)

Asahi responded to the dismissal request by stating that Asahi personnel “are Kuwaiti businessmen, not lawyers,” and that its action in hiring a legal consultant on May 14, 2019 gave rise to the 10 day filing requirement—therefore its protest was timely.

The GAO did not accept Asahi’s argument at all. The facts showed that Asahi didn’t meet timeliness requirements, and the assertion that Asahi’s personnel were not lawyers did not constitute a basis for waiving the GAO’s timeliness rules. Asahi also requested review under the “significant issue” exception in GAO’s rules at 4 CFR § 21.2(c). However, GAO severely limits such consideration to issues that are widespread in the procurement community. Here, the GAO did not view the award of a 6 month sales contract pending issuance of a competitive solicitation as a “matter of widespread interest” in the procurement community.

Takeaway: (1) Always be sure to meet the GAO timeliness rules when protesting in that forum; and (2) the GAO’s “significant exception” is very limited and will only be used by GAO where there is an issue of widespread interest to the procurement community.

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