

## **“DEFINITE KNOWLEDGE” OF A BASIS OF PROTEST, COMPARED WITH SPECULATION, CONJECTURE OR INFERENCE**

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There is a line between speculation, conjecture or inference, and “imperfect knowledge,” meaning something you know and understand but cannot provide any factual (usually written) evidence. *Magnum Multimedia*, B-420227, November 2, 2021, is an example of a bid protest that should have been filed when the protester first had reasonable, but imperfect knowledge of its basis of protest. Instead, the protester waited until notice was published in the Federal Procurement Data System (definite and perfect knowledge) of the basis of its protest.

On August 25, 2021, the protester, Magnum, was advised by the contracting officer’s representative that the agency was combining task orders and providing them to Insignia for the work then being performed by Magnum’s existing contract. Magnum waited when it learned this fact, and ultimately filed a protest that the task orders awarded later to Insignia were out of scope of the underlying Insignia contract. Magnum’s protest was not filed until October 4, 2021 (following the notice in the Federal Procurement Data System), well past the Government Accountability Office (“GAO”) deadline of within 10 days of when you “knew or should have known the basis of the protest.” The GAO said the following, in dismissing the protest as untimely.” [O]ur timeliness rules do not hinge on whether a protester “definitely knew” of the basis for its protest but rather, [] require that a protest be based on [] what the protester knew or should have known of the basis for protest, whichever is earlier.

The important GAO rule sections on this are as follows:

4 CFR § 21.1(c)(4). Protests must set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents.

4 CFR § 21.1(f) Protests [] should clearly state legally sufficient grounds of protest

4 CFR §21.5(f) The following protests should be dismissed: Protests that lack a detailed statement of the legal and factual grounds of protest as required by § 21.1(c)(4), or that fail to clearly state legally sufficient grounds of protest as required by § 21,1(f)

Here are three examples of protests that fall into the category of “speculation, conjecture or inference.” Protests based on these grounds are likely to be dismissed by the GAO:

- (1) We likewise dismiss this allegation as failing to state a valid basis of protest. Any protest allegation which relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference. [citation omitted]. Here, INNOVIM’s allegation is both speculative and relies on the erroneous assumption that [Earth Resources Technology, Inc., the awardee] could not possibly have proposed a superior approach without the incumbent’s level of experience. This allegation does not

identify any factual evidence demonstrating unequal treatment. Accordingly, we dismiss it. *INNOVIM, LLC*, B-419912, Sept. 21, 2021

- (2) Protester alleged that the agency unreasonably evaluated BAE System's proposal as acceptable under the operating plan factor because BAE relied on independent contractors or subcontractors as opposed to current employees. Based on the record, we dismiss the allegation because it does not provide a valid basis of protest. Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. § 21.1(c)(4), (f). A protest allegation which relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference. [citation omitted] Here, the allegation, as filed in the initial protest, is speculative because it is not supported by any evidence showing that BAE systems [awardee] relied on independent contractors or subcontractors. Protest at 12. Thus, the allegation amounts to little more than conjecture and does not provide a valid basis of protest. *Raytheon Blackbird Technologies, Inc.* B-417522, July 11, 2019
- (3) Protester alleged that awardee's quotation clearly set forth an intent not to comply with the limitations on subcontracting clause, FAR 52.214-9, which was included in the GSA Federal Supply Schedule. This clause requires at least 50 percent of the cost of contract performance incurred for personnel to be expended for employees of the offering concern. The protester alleged that two major subcontractors will each perform at least 25 percent of the requirements in dollars. The GAO found that the protester had not shown that the awardee's quote, on its face took exception to the limit on subcontracting or demonstrated an intent not to comply with it. All that the protester alleged to GAO were "assumptions, inferences and speculation" which are generally insufficient to demonstrate noncompliance. GAO noted that "overcoming the presumption of compliance [with a clause in the contract] is challenging in cases where the protester does not have the benefit of information indicating the anticipated cost of contract performance incurred for personnel." GAO denied the protest. *Blueprint Consulting Servs, LLC, d/b/a Excelicon et al*, B-420190 et al, Dec. 30, 2021.

Takeaway: Protesters can never wait for the "perfect" set of facts to protest, when their protest is known to them, as the basis of protest was known when the agency's contracting officer's representative stated orally that Magnum's contractual work would be folded into another company (Insignia's) contract. If Magnum had filed such a protest within 10 days after Magnum learned this, the protest would not have been based on "speculation, conjecture or inference" and would not have been dismissed by GAO. However, if Magnum learned the basis of protest through unsubstantiated rumors, it should have attempted to substantiate them (if possible in writing) before protesting, or else any protest would be based on speculation or conjecture, and would have likely been dismissed by the GAO. (Note: a statement from an official in the contracting office is not "speculation or conjecture.")

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