

## THE GAO WILL NOT DECIDE PROTESTS CHALLENGING A SOLICITATION ON CONSTITUTIONAL GROUNDS

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Although the Government Accountability Office (“GAO”) is not a court in the federal system, in many ways it behaves in a similar way as a lower federal court of special jurisdiction. One important way is that, like a court of special jurisdiction, the GAO’s jurisdiction is limited to what the Congress has granted to it in federal law, which in the case of GAO’s jurisdiction includes the Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, the Competition in Contracting Act of 1984, and a small number of other procurement statutes. These statutes limit the cases on which the GAO can hear bid protests. Other federal courts of special jurisdiction include the U.S. Court of Federal Claims, the U.S. Tax Court, the U.S. Court of Appeals for the Armed Forces and the U.S. Court of Appeals for Veteran's Claims. *U.S. Federal Gov’t Resources: Lower Federal Courts*, see <https://guideslib.uw.edu/research/federal/lower-federal-courts>.

Just as in a court, if GAO lacks jurisdiction to hear a case, the case will be dismissed. In *Competitive Innovations LLC*, B-422500, June 27, 2024, the GAO dismissed a case alleging violation of a right to equal protection under the Constitution, the GAO dismissed the protest where there was no valid basis for the protest under GAO’s jurisdiction.

Competitive, a historically underutilized business zone (“HUBZone) small business, protested a solicitation issued by the Department of Homeland Security for administrative, clerical and technical services. There were two parts of the protest: an allegation that the solicitation improperly created an evaluation preference for HUBZone offerors, and second that the solicitation violated its constitutional right to equal protection by permitting extra evaluation credits for certain firms. To begin with, the GAO held that the solicitation did not improperly grant evaluation preferences for HubZone offerors.

Next, the GAO addressed the equal protection issue. Here the protest alleged that the solicitation permitted HubZone offerors that were also small business (8a) program participants to receive points for contracts that were awarded 8(a) set-asides. The protester asserted that the agency should not allow offerors that were admitted to the 8(a) program using the rebuttable presumption of social disadvantage to use 8(a) contracts under the experience and past performance scoring factor in the solicitation. The GAO declined to consider this challenge to the solicitation on constitutional grounds. GAO noted that “Under the Competition in Contracting Act, 31 USC § 3552 [the GAO] is authorized to decide protests concerning alleged violations of a procurement statute or regulation.” However, an equal protection challenge under the U.S. Constitution does not involve violation of a procurement statute or regulations, and this matter should be taken up at the courts, not at the GAO. The GAO dismissed the protest because there was not valid basis, and no statute or law that was alleged to have been violated.

Takeaway: If you submit a bid protest to the GAO, it should be based on alleged violations of a procurement statute or regulation. Allegations of unconstitutionality must be taken to the courts, not GAO.

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