

BID PROTEST PRACTICE TIPS: A GAO PERSPECTIVE

**Presented by Sharon L. Larkin
United States Government Accountability Office**

May 14, 2009

The Government Accountability Office (GAO) handles over 1,300 protests each year and, in the course of resolving these protests, GAO encounters practitioners and agency procurement officials with varying bid protest experience. Whether you are an infrequent participant in bid protest litigation at GAO, or a seasoned practitioner, this paper provides a few “practice tips” to assist you with more effectively representing your clients in a protest action filed with GAO. Although our Office has published a descriptive guide to our bid protest process, which appears on our website,¹ this paper goes beyond what appears in that guide and provides useful, practical guidance for developing the record and responding to protest issues.

Practice Tip #1: Agencies Beware--Be Sure To Adequately Document The Record

An agency’s evaluation of proposals and source selection decision must be documented in sufficient detail to allow for a meaningful review of the merits of a protest. e-LYNXX Corp., B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8; Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283793.5, B-283793.6, Mar. 20, 2000, 2000 CPD ¶ 59 at 7. At a minimum, the evaluation record must explain the agency’s rationale for its source selection decision, including any tradeoffs made between competing offers. Federal Acquisition Regulation (FAR) § 15.308. Conclusory judgments, without any (or very little) supporting explanation, are often insufficient and may result in a sustained protest. Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc., *supra*, at 8-10. Also note that the requirement that the agency document its evaluation and source selection decision applies not only to formal FAR Part 15 acquisitions, but also to Federal Supply Schedule and simplified acquisition vehicles. See, e.g., Universal Bldg. Maint., Inc., B-282456, July 15, 1999, 99-2 CPD ¶ 32 at 4.

The act of documenting the evaluation introduces a discipline into the decisionmaking process that is likely to result in a better supported source selection decision. Evaluators and the source selection authority should not just state their summary conclusions in the evaluation reports and selection decision; they should provide explanations and meaningful comparisons between proposals to support their conclusions. Be sure to explain any significant changes between initial and final proposal evaluations, and any areas of significant disagreement among evaluators, or among the evaluators and the source selection authority. Always record oral presentations or document discussions; failure to do so may result in a sustained protest. See e-LYNXX Corp., *supra*, at 8-9.

¹ See Bid Protests at GAO: A Descriptive Guide (8th Ed. 2006), which may be found at www.gao.gov under “Legal Products.”

In addition, consider retaining contemporaneous evaluator worksheets or notes. Many agencies routinely destroy such documents immediately after the award decision has been made. If the contemporaneous judgment of the evaluators is challenged during a protest, these notes may be crucial to supporting an agency's decision. In destroying documents, the agency runs the risk that GAO will find that its evaluation conclusions are not adequately supported. See Securiguard/Group 4 Joint Venture, B-280429 et al., Sept. 30, 1998, 98-2 CPD ¶ 118 at 8-9 n.4.

Although the best support for an award decision is always the agency's contemporaneous explanation of the record, if the record appears incomplete, GAO may require further explanation or call a hearing to ask the agency to explain its award decision. Protesters often challenge GAO's consideration of the arguments and explanations provided during the development of the protest, arguing that these are self-serving statements provided in the heat of litigation that should be ignored, or given little weight, by GAO. Although it is true that GAO will not accept new conclusions and judgments offered by the agency during the heat of litigation, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, if an agency's explanations merely fill in the blanks of contemporaneously documented conclusions, we will consider these explanations so long as the explanations are credible and consistent with the contemporaneous record. Manassas Travel, Inc., B-294867.3, May 3, 2005, 2005 CPD ¶ 113 at 3. Greater weight, however, is accorded to contemporaneous evaluation and source selection material, rather than responses to protest contentions given during the development of the protest. Future-Tec Mgmt. Sys., Inc.; Computer & Hi-Tech Mgmt., Inc., *supra*, at 7.

Practice Tip #2: Agencies Get Prepared--Provide An Organized Agency Report And Consider Early Document Production

GAO's Bid Protest Regulations require that, in response to a protest, an agency provide a memorandum of law and the contracting officer's statement of facts (these may be combined) and all relevant documents. 4 C.F.R. § 21.3(d) (2006). The record documents should be provided in a logical, organized fashion. At a minimum, documents should be tabbed and indexed, and the pages should be numbered so that the parties can easily cite (and GAO can locate) the relevant portions of the documents. If the record consists of electronic media, you may also want to provide hard copies of critical documents (such as sections L and M of the RFP, final evaluation reports, and source selection decision) with the agency report. In addition, please contact the GAO attorney handling the protest if you intend to provide an electronic record, as this presents other special considerations.

Consider, also, producing the record documents early, as this will help narrow the issues, correct factual errors, and help identify any supplemental protests. GAO's policy is to resolve all supplemental protests within 100 calendar days from the initially filed protest. If supplemental protests are filed early in the case, then GAO will likely be able to give the agency and other parties more time to respond than if the supplemental protests are filed later in the case.

Practice Tip #3: Agencies Take Note--Adequately Respond To Protest Allegations

In responding to a protest, the contracting officer should substantively respond to each of the protest allegations; do not just brush off the protester's arguments as "mere disagreement" or dismiss as frivolous the protest grounds without any substantive response. (Remember, GAO has already made an initial decision to develop the issues.) Failure to respond to the protest could result in a sustained protest if the record does not apparently support the agency's award decision. See, e.g., Kellogg Brown & Root Servs., Inc., B-298694 et al., Nov. 16, 2006, 2006 CPD ¶ 160 at 9-10.

Remember, it is the agency's job to walk GAO through the record. If unique technology or difficult to understand concepts are at issue, spend some time explaining them to GAO. Marshall the facts in response to each protest allegation, as it is often the facts, not the law, that dictate GAO's decision.

Practice Tip #4: Protester's Response--Be Accurate, Be Clear, And Be Organized

To most effectively argue your case, lay out your arguments in a clear and organized fashion. Beware of overreaching arguments, hyperbole, and mischaracterizing the record; these tend to diminish a protester's credibility. Consider advancing your strongest arguments first. Do not feel compelled to argue every needle in the haystack; after reviewing the record, consider withdrawing arguments that are without merit and emphasizing those with a stronger likelihood of succeeding. There is no correlation between the length of the pleadings and GAO's decision.

Practice Tip #5: Citations, Citations, Citations!

All filings with GAO must contain citations to the record as appropriate. This includes agency legal memoranda, contracting officer's statements of fact, protester's and intervenor's comments, expert declarations, or any other declarations that parties submit to explain the record. A rule of thumb is that a record citation should be provided any time you are describing, characterizing, or citing to a document or making an assertion about the record in support of your argument. At a minimum, citations should include the agency report tab number and page number, and additional descriptive information if necessary to locate the document. General citations to tab numbers alone are, almost always, insufficient. If the document is particularly difficult to locate (such as an email in a tab containing 100 other emails), you may wish to consider attaching the document to your brief as an exhibit along with providing the record citation. Similarly, if your record contains electronic media, you may wish to attach critical documents (or excerpts of those documents) to your brief, while also providing the full record citation.

Practice Tip #6: Experts--How To Use Them Effectively

Experts can be an effective tool in bid protest litigation. They can assist the practitioner and GAO with understanding the complexities of a case. However, keep in mind that experts may have a difficult time articulating complex issues in a simplified, easy to

understand manner. If you cannot understand the expert's report and are unable to articulate it to GAO, then GAO will likely not understand it either. Work with your expert so that the report to GAO educates GAO on the necessary issues. Make sure that the report is supported with record citations to support the expert conclusions. If a hearing is necessary, prepare your expert as a witness so that he/she can walk GAO through the issues in a clear, logical manner.

Practice Tip #7: Disputes And Motions

Motions to dismiss are appropriate to address procedural defects, such as timeliness or lack of jurisdiction, but are not appropriate for requesting a summary decision on the merits. Motions to dismiss should be filed early in the case and well before the agency report is due. GAO will afford the protester an opportunity to respond and will need time to make a determination as to whether to dismiss the protest and write a dismissal decision. GAO will not likely delay the agency report while considering the motion to dismiss because it must decide the case within 100 calendar days.

Other disputes--such as document disputes, protective order application issues, etc.--should be brought to GAO's attention as soon as they are known. The GAO attorney handling the protest will advise the parties on how the dispute will be handled. However, even when advising GAO of the dispute, the parties should try and resolve the issues among themselves.

Practice Tip #8: Cooperation

While we recognize each party's role as a zealous advocate for its client, GAO appreciates when the parties cooperate with each other in the development of the record and in resolving disputes during the protest. Parties are encouraged to work together to provide redactions and requested documents, and to respond to inquiries from GAO or the other parties. Obstreperous litigation techniques do not benefit your client and directs GAO's time and attention away from the merit of the case. Given GAO's 100 calendar day deadline, the cooperation of the parties is essential to effective advocacy in our forum.