GAO Holds That Contractor’s Letters Are, In Fact, Agency-Level Protests

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By sending a letter to the contracting officer, did I unwittingly file a pre-award, agency-level bid protest? That is a question a contractor might ask after reading Coulson Aviation (USA), Inc., B-411525 (Aug. 14, 2015), which reiterates the U.S. Government Accountability Office’s (“GAO”) view that a contractor’s subjective intent is not determinative as to whether its written correspondence with a contracting officer constitutes an agency-level protest. Instead, the pertinent inquiry is whether the correspondence expresses dissatisfaction with the agency’s actions and requests relief. Thus, even an informal, non-confrontational letter could potentially amount to an agency-level protest.

In Coulson, a contractor sent two letters to an Air Force contracting officer objecting to the agency’s decision to employ Federal Acquisition Regulation (“FAR”) Part 15 procedures in a recently released Request for Proposal (“RFP”). The contracting officer responded to each letter, stating in both responses that the agency did not intend to amend the RFP. Months later, the contractor filed a pre-award, GAO bid protest challenging the RFP’s use of FAR Part 15 procedures. Consistent with GAO’s general rule that challenges to the terms of a solicitation are timely if filed before the deadline for receipt of initial proposals, the protester filed its protest before the proposal submission deadline.

Nevertheless, GAO dismissed the Coulson protest as untimely based on a limited exception to the general timeliness rule. This exception provides that, if a contractor files a pre-award, agency-level protest and receives an unfavorable answer, the contractor must file any subsequent GAO protest raising that same issue within 10 days of gaining actual or constructive knowledge of that unfavorable answer. According to GAO, both of the contractor’s prior letters constituted agency-level protests. Thus, the contractor’s GAO protest was plainly untimely because it was filed months after the contractor received the Air Force’s unfavorable responses to its earlier letters.

Notably, the contractor insisted that it never intended its earlier letters to be protests. According to the contractor, these letters were “attempt[s] to resolve [.] concerns through ‘frank and open discussions,’ as anticipated under FAR 33.103(b), rather than [.] agency-level protests under FAR 33.103(d).” GAO rejected this argument, stating that “subjective intent is not determinative as to whether a written request constitutes a protest.” Citing prior decisions, GAO reiterated its view that, to be considered a protest, correspondence need only convey “a specific expression of dissatisfaction with the agency’s actions and a request for relief.”

Coulson is an important reminder to contractors that they must be mindful of how their correspondence could be interpreted by the contracting officer and GAO. If they do not wish to lodge an agency-level protest, they must take care not to include statements that could possibly be construed as expressions of dissatisfaction with the agency’s actions and/or requests for relief. Otherwise, like the protester in Coulson, they could unwittingly trigger the 10-day deadline for filing a timely pre-award bid protest at GAO.

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