

Put It In Prospectus: Reviewing the Congressional Lease Approval Process in Light of the Upcoming Lower Manhattan SEC Lease

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With the General Services Administration's ("GSA") recent issuance of a prospectus in connection with its [announced plan](#) to acquire new office space for the Securities and Exchange Commission ("SEC") in lower Manhattan, now is a good time for a quick refresher about the congressional lease approval process under 40 U.S.C. § 3307, which potentially gives rise to a pre-award bid protest claim that is viable at the Government Accountability Office ("GAO") but likely not at the Court of Federal Claims.

Under section 3307, appropriations for federal leases^[1] are available "only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose for which the appropriation is made[.]" 40 U.S.C. § 3307(a). To obtain such approval, GSA must submit a prospectus to the committees explaining its proposed lease, including the geographic location, square footage, cost, and a general description of the premises. 40 U.S.C. § 3307(b).

Any lease solicitation must be consistent with the terms of the resolution that authorized it. See GSA Leasing Desk Guide, Ch. 11-8 (Sept. 2011) (requiring contracting officers to ensure that lease proposals conform with resolutions of approval). GAO will generally entertain a pre-award bid protest alleging an inconsistency between a lease solicitation and the terms of its congressional authorization. See *JBG/Naylor Station I, LLC*, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 6 & n.5 (finding solicitation's requirement that offerors obtain building permits was consistent with a congressional resolution under Section 3307).

Such a pre-award protest would likely **not** be viable at the Court of Federal Claims. Earlier this year, the U.S. Court of Appeals for the Federal Circuit held that the Court of Federal Claims did not have jurisdiction to decide whether the terms of a solicitation for a new Federal Bureau of Investigation office violated Section 3307 because that statute was an "appropriations" statute, and not a "procurement" statute under 28 U.S.C. § 1491(b). *Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1382 (Fed. Cir. 2018), *petition for en banc reviewed denied*, 897 F.3d 1332 (Fed. Cir. 2018).^[2] Notably, the Federal Circuit's holding was based on an alleged violation of statute, leaving open the possibility that such claims could proceed on the basis of a solicitation's terms or other agency action.

GSA has recently posted on its web site the prospectus for the contemplated SEC lease and will likely publish the final solicitation soon. See [here](#) (last visited 9/17/18) (showing no prospectus transmitted to Congress regarding this procurement). When it does, potential lessors should carefully review that solicitation to ensure that it is consistent with congressional resolutions of approval. If it is not, they may want to bring a pre-award protest at GAO.

[1] Section 3307 applies to all leases with a net annual rent exceeding \$3.095 million.

[2] Conversely, GAO has rejected arguments that it lacks jurisdiction to consider appropriations laws. See *Dep't of the Navy - Reconsideration*, B-401102.3, Aug. 6, 2009, 2009 CPD ¶ 162 at 4 n.2.

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