

When Not to Pass Go and Go Directly to GAO: Decision Highlights Risk of Protesting Purchase Orders and Other Time-Sensitive Contracts at the Agency Level

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For contractors who are concerned that filing a bid protest in the Government Accountability Office or Court of Federal Claims may alienate their customer, agency-level protests are a welcome, less-confrontational alternative that allows them to raise their concerns in a discreet, non-public fashion. But as shown by GAO's recent decision in [GovSmart, Inc. - Protest and Costs, B-415871.3 et al., Apr. 19, 2018, 2018 CPD ¶ ___](#), an agency-level protest of a proposed purchase order or other time-sensitive contract may ultimately preclude an offeror from obtaining meaningful relief in a subsequent GAO protest of that same procurement.

In late December 2017, the Navy was negotiating with Crown Point Systems for the issuance of a sole-source purchase order to renew firmware/software licenses and hardware maintenance subscriptions from numerous vendors on behalf of the agency. Under the contemplated contract, Crown Point would purchase the licenses and subscriptions and sell them to the Navy, resulting in an agreement between the original equipment manufacturers and the agency.

Incumbent GovSmart, Inc. filed a pre-award agency protest on December 23, 2017,

alleging that Navy officials had acted in bad faith during prior negotiations with GovSmart, and had violated the Procurement Integrity Act. That protest triggered a stay of award during the pendency of the protest pursuant to Federal Acquisition Regulation 33.103(f)(1). The Navy denied GovSmart's protest on December 29 and, minutes later, awarded the purchase order to Crown Point. GovSmart filed a GAO protest later that afternoon, thereby triggering the Competition in Contracting Act's automatic stay of performance. See 31 U.S.C. § 3553(d)(3)(A).

The Navy contacted Crown Point on December 29 to discuss suspending performance and was told that Crown Point had fulfilled most of the purchase order within an hour of award. By the time the Navy formally directed Crown Point to stop performance on the following business day (*i.e.*, January 2), all but one of the 38 line items had been purchased.

The Navy advised GAO on January 12 that it intended to take corrective action by terminating the unperformed portion of Crown Point's purchase order — a single line item valued at approximately \$5,000.

GovSmart then filed a supplemental protest challenging the scope of that corrective action, contending that the agency should, in effect, reverse delivery of the licenses and subscriptions that had been obtained through Crown Point and conduct a new competition. It also argued that the Navy should have immediately stopped or discontinued any order that had been processed as soon as it received GovSmart's protest on December 29. GovSmart sought to recover its protest costs as well.

GAO dismissed GovSmart's supplemental protest in part and denied the remainder of it. GAO refused to entertain GovSmart's challenge to the Navy's failure to implement the automatic stay in a timely fashion, explaining that "an agency's failure to adhere to the stay is not a valid basis of protest." GAO also concluded that the corrective action was within the Navy's sound discretion and judgment, explaining that it found nothing objectionable about the agency's refusal to reverse the renewals which purportedly would have resulted in significant penalties. And because the Navy agency took corrective action before filing the agency report, GAO did not award protest costs to GovSmart. Thus, despite its successful initial GAO protest, GovSmart will, at best, have an opportunity to compete for a \$5,000 purchase order.

GovSmart shows that when challenging purchase orders or other contracts that can be substantially or completely performed in a matter of hours or days, the safest course of action is generally to protest — whether pre-award or post-award — at GAO in the first instance, and not to file an agency-level protest. Had GovSmart done so, the Navy would almost certainly have given its claims more rigorous consideration from the outset, and its voluntary corrective action would have provided GovSmart an opportunity to compete for the whole purchase order. Instead, the Navy apparently synchronized the award to Crown Point with the denial of GovSmart's agency-level protest, thereby ensuring that the contract was almost fully performed by the time GovSmart protested at GAO later that afternoon.

Finally, it is worth noting that the Court of Federal Claims would probably have been a more hospitable forum for GovSmart's supplemental protest than GAO. Unlike GAO, the Court will entertain challenges to an agency's implementation of the

automatic stay. See, e.g., *Favor TechConsulting, LLC v. United States*, 129 Fed. Cl. 208 (2016). Similarly, the Court has sustained a number of protests challenging the scope of agency corrective action over the last several years, suggesting that it may be less deferential to agency corrective action decisions than GAO. See, e.g., *Dell Federal Systems, L.P. v. United States*, 133 Fed. Cl. 92 (2017); *Macaulay-Brown, Inc. v. United States*, 125 Fed. Cl. 591 (2016).

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