

Beware The Timeliness Trap When Protesting At The GAO

By **Andrew Shipley and Philip Beshara** (March 25, 2022)

In a recent decision, the U.S. Government Accountability Office reinforced the rule that offerors who choose to defer a pre-award debriefing until after a source selection decision do so at their own peril.

Close observers of bid protest jurisprudence may be aware of the competitive range trap at the GAO. This doctrine arises from a line of cases holding that offerors who learn of their exclusion from a competitive range but choose to delay their Federal Acquisition Regulation Part 15 debriefings until after award give up their opportunity to protest at the GAO.

In *Battelle Memorial Institute*,^[1] the GAO reinforced a close cousin to the competitive range trap rule in the context of architect/engineering procurements conducted pursuant to the Brooks Act and FAR Subpart 36.6, dismissing a protest as untimely where an offeror not ranked as the "most highly qualified firm" in April deferred its debriefing and protest until after the ultimate award decision in November.

While it may seem premature to file a protest before an awardee is selected, deferring a debriefing until after award can leave a disappointed offeror without recourse at the GAO.



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The Competitive Range Trap

An offeror excluded from a competitive range may protest its exclusion. As alluded to above, however, many unwitting contractors have been caught in the competitive range trap and had their post-award protests dismissed as untimely.

At the GAO, a protest is timely if it is filed within 10 calendar days after "the basis of protest is known or should have been known (whichever is earlier)" or within 10 calendar days of the protester receiving a requested and required debriefing.^[2]

Under the Competition in Contracting Act, where an offeror is eliminated from a competitive range, the agency is required to provide a pre-award debriefing if requested by the offeror within three days of receiving notice of its exclusion.

But the FAR allows the offeror to request that the debriefing be delayed until after award.^[3] At first blush, deferring the debriefing may seem more advantageous to the offeror because the agency is required to provide more information in a post-award debriefing than it is in a pre-award debriefing.^[4]

The FAR, however, warns rather understatedly that "[d]ebriefings delayed pursuant to [the contractor's request] could affect the timeliness of any protest filed subsequent to the debriefing."^[5]

Under this rule, the GAO has consistently held that an offeror that learns of its exclusion from the competitive range but chooses to delay the debriefing until after award gives up its opportunity to protest.

The GAO reasons that delaying the debriefing reflects a failure "to diligently pursue any protest grounds which the protester would have discovered in that pre-award debriefing." [6] As a result, the GAO will dismiss protests that follow a delayed debriefing in such scenarios as untimely filed.

Thus, it is important for offerors to be aware of this trap and to request a pre-award debriefing whenever they think they may want to protest their exclusion from the competitive range. If the agency then determines it would rather delay the debriefing until after award, there will be no effect on the timeliness of the potential protest — but it must be the agency's choice to delay in order for the protest to be timely filed.

Architect/Engineering Procurements and Battelle

The competitive range timeliness trap is echoed by the rules for protesting an architect/engineering procurement. In an architect/engineering procurement, firms submit statements of qualifications to the procuring agency, which are then considered by the agency in ranking the firms it deems most qualified.

After the agency develops its ranking list, it begins negotiating with the most qualified firm — the one at the top of the list. If negotiations do not work out with the most qualified firm, the agency begins negotiating with the next most qualified firm, and so on, until a contract is awarded.

The GAO's recent decision in Battelle involved an architect/engineering procurement for a \$100 million maximum value contract with the U.S. Navy for environmental cleanup services of various federal sites. Battelle submitted its statement of qualifications and, in April 2021, received notice from the agency stating that it had selected Geosyntec Jacobs as the most qualified firm.

The notice included an offer for a pre-award or post-award debriefing, and while Battelle initially chose a pre-award debriefing, two days later it revised its request and asked for its debriefing to instead be provided post-award.

On Nov. 30 — almost seven months later — the agency awarded the contract to Geosyntec Jacobs. Battelle received notice of the award and a post-award debriefing on Dec. 1 and, within 10 days, filed a protest at the GAO challenging the agency's evaluation of its statement of qualifications.

The GAO dismissed the protest as untimely and rejected Battelle's argument that it first learned of its basis of protest on Dec. 1 when it first received notice of the award. The GAO pointed to its requirement that a protester is "required to diligently pursue information which may [form] the basis of its protest using the most expeditious approach available" and held, in Battelle's case, "that meant accepting the pre-award debriefing." [7]

The Takeaway

As with the competitive range trap, firms not selected as the most qualified in an architect/engineering procurement should promptly request a pre-award briefing with an eye to the calendar if they are considering protesting, as the 10-day clock begins to tick from the time notice of the disappointing ranking is received.

Importantly, because a debriefing is not required in FAR Subpart 36.6 procurements, any

GAO protest is due within 10 days of receiving notice of the most qualified selection — and not 10 days from the pre-award debriefing, if received.

Accordingly, prospective architect/engineering protesters should be mindful that while a pre-award debriefing will likely aid in their consideration or development of a protest, it will not toll the 10-day period to file at the GAO that begins from the notice.

Getting a protest timely filed within the 10 days should take first priority, and any information learned in the debrief could serve as the basis for a supplemental protest.

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[1] Battelle Mem'l Inst., B-420403, Mar. 10, 2022, 2022 WL 808145.

[2] 4 C.F.R. § 21.2(a)(2).

[3] FAR 15.505(a)(2)

[4] Compare FAR 15.506(d) (post-award debriefing requirements including information about the awardee) with FAR 15.505(f) (pre-award debriefing requirements).

[5] FAR 15.506(a)(4)(ii).

[6] See Loc Performance Prod., Inc., B-417431, Apr. 22, 2019, 2019 CPD ¶ 149.

[7] Battelle Mem'l Inst., B-420403, supra.