

YOUR PROTEST MUST BE TIMELY AT BOTH THE AGENCY AND GAO

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It is essential that a bid protest submitted in any forum must be timely in accordance with that forum's rules. If a protester previously files a timely agency level protest where a timely agency protest was previously filed, any subsequent protest to the Government Accountability Office ("GAO") must be filed within 10 days of constructive knowledge of initial adverse agency action on the agency level protest. But the agency level protest must be timely. In *DSoft Tech., Eng'rg & Analysis*, B-422254, Feb. 26, 2024, the protester failed to meet the agency timeliness filing, and the GAO dismissed the protest as untimely.

Here is what happened. On October 3, 2023, the Department of Veterans Affairs provided DSoft with an award notice (i.e. award to another contractor) in a procurement for support to application systems. On October 5, 2023, the agency provided DSoft with a brief explanation of the basis of award, in addition to information previously provided in the award. DSoft requested further clarification of the explanation on Oct. 13, 2023, but apparently did not receive it. DSoft then filed an agency level protest on October 16, 2023, asserting that it was timely filed within 10 days of the agency's response to DSoft's request for clarification on October 13, 2023.

The GAO noted that the FAR, which governs agency level protests, requires that they be filed within 10 days after the basis of protest is known or should have been known. DSoft asserted that its protest was timely, because of the requested clarifications (which was a form of a request for a debriefing). GAO will not consider a protest if the protester has filed an untimely protest at the agency first.

The GAO noted first that the FAR rules govern an agency level protest. Further, GAO noted that the "debriefing exception" does not apply to agency level protests. The debriefing exception is a protest which challenges a procurement conducted on the basis of competitive proposals under which a debriefing is requested, and when requested is required. In those cases where a debriefing is required, the protest must be filed at the agency no later than 10 days after the date on which the debriefing is held. 4 CFR § 21.2(a)(2). Since no debriefing was required in this procurement, the time calculation was based on the agency level protest on October 16, more than 10 days after receipt of the award notice or publicly available information that the protest was based on.

Takeaway. Any GAO protest must comply with GAO's timeliness rules. There is no debriefing exception in the rules for agency level protests, so they must be submitted within 10 days after award or constructive notice of award. Further, if your protest is untimely at the agency, you cannot "rescue" it by submitting a protest at GAO in a subsequent filing.

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