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Electronic Filing of GAO Bid Protests Starts May 1: Are You Ready?

April 30, 2018

The US Government Accountability Office published a final rule effective May 1, 2018, implementing highly anticipated changes to its bid protest regulations. The two most significant regulatory amendments (a) implement GAO's new electronic filing system, mandating the electronic filing of all bid protests, and (b) require a $350 filing fee. Government contractors and counsel should familiarize themselves with the new system ahead of time to avoid any filing-day issues that could endanger a protest's timeliness.

GAO published its new final rule on April 2, 2018. See 83 Fed. Reg. 13817 (Apr. 2, 2018). As practitioners and companies familiar with GAO protests are keenly aware, GAO's current bid protest regulations require protests and other documents to "be filed by hand delivery, mail, commercial carrier, facsimile transmission …, or e-mail (protests@gao.gov)." 4 C.F.R. § 21.0(f). The final rule unveils a new filing system, called the Electronic Protest Docketing System. 83 Fed. Reg. at 13817. "As of the effective date of this final rule, EPDS will be the sole means for filing a bid protest at GAO (with the exception of protests containing classified information) and will enable parties to a bid protest and GAO to file and receive documents." *Id.* GAO has posted instructions and guidance for using EPDS on the EPDS landing page. *Id.* Importantly, "EPDS does not allow access to documents, redacted or otherwise, to non-parties." *Id.* at 13819. Thus, protesters must still provide a copy of the protest to the contracting officer.

GAO will now also require a $350 fee for filing a protest. *Id.* at 13818. "At this time, additional fees will not be required for supplemental protests, requests for reconsideration, requests for recommendation for reimbursement of costs, or requests for recommendation on the amount of costs." *Id.* This fee is uniform regardless of the subject of the protest or identity of the protester – there is no reduced fee or fee waiver for small businesses. *Id.* at 13819. Likewise, GAO will not automatically reimburse the filing fee if a protest is sustained, but it is a reimbursable cost of pursuing a protest recoverable from the agency if GAO recommends reimbursement of such costs pursuant to 4 C.F.R. 21.8(d)-(e), following sustainment or corrective action.

The final rule includes a few other notable changes in GAO's bid protest regulations. First, it clarifies that if an agency's deadline for responding to a protester's document requests falls on a weekend or federal holiday, the agency must file by the last preceding business day. *Id.* at 13820. Additionally, parties must provide a proposed redacted version of any protected document within two days, if another party requests one. *Id.* at 13820-21. Third, if an agency issues a determination and finding overriding a requirement to withhold award or suspend performance, it must either file the determination and finding document or file a statement by the approving official specifying the statutory basis for the override. *Id.* at 13821. Finally, where a protester requests that GAO recommend the agency reimburse its protest costs, the protester must file comments on the agency's response within 10 days, and failure to do so could result in dismissal of the request. *Id.* at 13821-22.

GAO's new electronic filing system should make it easier for parties to access filings in a protest, which will now be stored in a central location. As users become familiar with EPDS, early engagement with counsel and advanced planning are critical to ensuring your protest is docketed within GAO's timeliness rules.

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