

# Protesting A Procurement As A Non-Offeror

By **Paul Bowen, Amy Conant Hoang, Erica Bakies and Jenna Lorence** (August 22, 2018)

The U.S. Government Accountability Office's recent decision in Oracle America Inc.[1] has garnered attention from the government contracts community for its review of an acquisition conducted pursuant to the U.S. Department of Defense's Other Transaction Authority. In the decision, the GAO examined the propriety of the DOD's award of a production OTA (P-OTA) following award of a prototype OTA. The decision does warrant notice in this regard, as solicitations for and awards of OTAs generally fall outside the GAO's bid protest jurisdiction, because they generally are not a "contract for the procurement of property or services." [2] However, the decision deserves notice in another regard: its analysis of why the protester remained an interested party to challenge the P-OTA despite declining to submit an offer in the underlying prototype OTA procurement.



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Under the Competition in Contracting Act of 1984, the GAO has jurisdiction to hear protests filed by an "interested party." [3] The GAO's bid protest regulations mirror the language in CICA defining who qualifies as an "interested party," stating that to be considered an interested party, a protester must demonstrate that it is an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." [4] In most cases, a protester satisfies this standard by submitting a proposal in the procurement at issue and alleging in its protest that there is a reasonable possibility that its proposal would be in line for award should the GAO sustain the protest. [5]



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As the GAO reminded us in the Oracle decision, however, under some circumstances a protester may satisfy the interested party standard even absent participation in the procurement at issue. In Oracle, the GAO stated that "even a protester who did not respond to a solicitation may be an interested party if it has a direct economic interest in the competition of the procurement if its protest is sustained." [6] Oracle alleged that it would have submitted a solution brief in the prototype OTA competition (which served as the predecessor for the follow-on P-OTA at issue) had the agency reasonably and accurately described the intended procurement. The GAO concluded that Oracle satisfied the interested party standard for the P-OTA procurement, even though it failed to submit a solution brief in the prototype OTA competition. In support of its conclusion, the GAO cited to both "material differences" in the subject matter of the prototype OTA and follow-on P-OTA as well as the agency's failure to advise potential prototype OTA contractors of its intention to award a follow-on P-OTA. The GAO explained that:



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[w]here, as here, a protest involves an award which is allegedly defective because it was not made with appropriate authority, a protester's economic interest in a competed solicitation if the protest is sustained is sufficient for it to be considered an interested party even if the protester has not competed under the allegedly defective solicitation. [7]



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The Oracle decision reminds us that a failure to submit a proposal is not necessarily dispositive to the interested party analysis. Below, we discuss several other circumstances

in which the GAO or the U.S. Court of Federal Claims may find a non-offeror protester to be an interested party, as well as common pitfalls for potential protesters.

### **Sole-Source or Bridge Contracts**

An agency may issue a sole-source contract to a particular entity when, for example, that entity is the only responsible source and no other supplies or services will satisfy agency requirements or when circumstances require unusual and compelling urgency. Bridge contracts, which are a particular type of sole-source contract, are either an extension or a short-term sole-source contract issued to an incumbent contractor when a follow-on contract for the same services is not yet ready to be awarded.

Under either of these circumstances, parties other than the awardee generally would not be afforded an opportunity to submit a proposal in response to the procurement. However, the GAO has concluded that in these types of procurements, a protester is considered an interested party if it could have competed for the contract but for the fact that the award was a sole source or bridge contract.[8]

For example, the Court of Federal Claims' recent decision in *Global Dynamics* addresses the interested party status of a protester challenging a fifth bridge contract.[9] In that case, the agency had continuously awarded bridge contracts instead of completing the procurement for a follow-on contract.[10] The protester, who had submitted a proposal in response to the initial solicitation, eventually submitted a protest in response to the agency's award of a fifth bridge contract, even though it had not, and could not have, submitted a proposal. The court concluded that the protester was an interested party because the protester could have submitted a proposal if the government had competed the procurement instead of awarding yet another bridge contract.

Of course, as with all procurements, a protester must pay careful attention to the GAO's deadlines for timely submission of a protest. In *Western Star Hospital Authority Inc.*, the protester lost its ability to protest the award of a sole-source contract after it filed its protest only one day late (11 days after it learned of the agency's award).[11] However, as long as the protester adheres to the GAO's timeliness rules, it may protest either a sole-source award or a bridge contract where the protester could otherwise have submitted a proposal in response to a solicitation for the requested goods or services.

### **Small Business Set-Asides**

A procurement set-aside for small businesses (or a subset of small businesses such as service-disabled veteran-owned small businesses) necessarily prohibits large businesses from submitting proposals for consideration of award. Accordingly, as a general rule, a large business is not an interested party to challenge an award under a solicitation set aside for small businesses. However, the GAO has explicitly recognized two exceptions to that general rule.

First, the GAO will consider a large business' challenge of an award made under a small business set-aside when there is only one small business bidder and the large business alleges that award was made at an unreasonable price.[12] Second, and a more common exception, is a large business' challenge to the validity of the decision to set aside the procurement. The GAO will recognize a large business as an interested party to challenge an agency's decision to set aside a procurement for small businesses provided that the protester: (1) submits its protest prior to the due date for proposals, and (2) alleges that it could have submitted a proposal had the procurement been subject to fair and open

competition.[13]

Notably, the GAO will strictly enforce its timeliness rules in a challenge to the validity of the set aside. For example, in *Synchrogenix Information Strategies*, GlobalSubmit, a small business, submitted a proposal in response to a solicitation set aside exclusively for small businesses.[14] GlobalSubmit protested the agency's initial award to a competitor, and the agency responded by taking corrective action. While the agency engaged in corrective action, a large business, Synchrogenix, acquired GlobalSubmit. The agency eventually requested new proposals as a result of corrective action and required offerors to resubmit certifications of their status as a small business. Because GlobalSubmit was no longer a small business and could not properly resubmit the small business certification, Synchrogenix protested the validity of the set-aside decision, claiming that the agency no longer had a reasonable expectation that two or more small businesses would submit responsive proposals. However, the GAO concluded that because Synchrogenix had not submitted a protest prior to the original deadline for proposals, it was not an interested party, even though Synchrogenix had not yet acquired GlobalSubmit.

In dismissing the protest, the GAO recognized the "unique factual circumstances" but explained that if it permitted Synchrogenix to protest after the original due date for proposals, the GAO would "render meaningless" the requirement for large businesses to protest a small business set-aside prior to the deadline for receipt of proposals. Therefore, even though a large business protester may protest a small business set-aside without submitting a proposal, the applicable filing deadlines for a pre-award protest (i.e., prior to the deadline for receipt of initial proposals) will be dispositive.

The GAO's decision in *Synchrogenix Information Strategies* also highlights an important nuance in large business challenges to small business set-asides: Even when the GAO recognizes a large business as an interested party for purposes of challenging a set-aside decision, the GAO will limit its consideration solely to that issue. In other words, the GAO will consider the large business to be an interested party for purposes of challenging the set-aside but will not consider the large business to be an interested party to raise issues extraneous to the set-aside decision.[15]

### **Unduly Restrictive Specifications**

The GAO has held that a protester is an interested party to challenge a restriction in a solicitation if the protester would have been able to compete but for the restrictive requirement.[16] In *Commercial Land Title of San Antonio Inc.*, a protester could not compete under an invitation for bids soliciting real estate services for the U.S. Department of Housing and Urban Development because the invitation for bids restricted competition to attorneys licensed in Texas.[17] Even though the protester had not submitted a bid because of this restriction, the GAO recognized the protester as an interested party.[18] The GAO agreed with the protester that the requirement for a Texas bar license unduly restricted competition because the protester could conduct all of the required services itself or through subcontractors.[19]

If a protester actually can meet the requirement it claims is unduly restrictive, the GAO has generally held that the protester is not an interested party if it did not submit a proposal, because such a challenge "would be, in essence, on behalf of other potential suppliers who are economically affected by the specification's restrictive nature." [20] However, the GAO has also held that if the protester is an established manufacturer of an otherwise responsive item excluded by the restrictive requirement, the protester is an interested party despite its ability to meet the requirement.[21]

For example, in *J. Squared Inc.*, a protester claimed that the agency's requirement that the items it sought be oak-constructed was unduly restrictive since the protester's preferred environmentally friendly timber also met the agency's needs.[22] The protester recognized that it technically could provide oak-constructed furniture to the agency but claimed that it was precluded from competing in this solicitation due to the prohibitive cost of oak material as compared to environmentally friendly timber material.[23] The GAO agreed, concluding that the protester's direct economic interests were in fact prejudiced by the oak requirement. Therefore, the protester was an interested party.[24]

As mentioned above in regard to sole-source contracts, a protester must pay careful attention to deadlines when attempting to challenge a solicitation's unduly restrictive requirements. A protester generally must raise such a challenge prior to the deadline for the receipt of proposals.[25] In *Esterhill Boat Service Corporation*, the court found that a protester had waived its claim that a requirement of a U.S. Department of Veterans Affairs solicitation was unduly restrictive because it did not file a protest before the bids were opened and considered by the agency.[26] Even though the contractor had raised concerns about the requirement to the contracting officer and the GAO,[27] it missed its opportunity to protest by not filing a challenge before the deadline for proposal submission.

### **Key Takeaways**

- **Timing is everything:** Potential protesters should be aware of when a non-offeror may challenge a procurement, which in many circumstances will be prior to the deadline for proposal submission.
- **Standing is limited:** A protester may be an interested party to challenge a specific aspect of the procurement without having standing to challenge extraneous issues (e.g., a large business challenging a set-aside decision may not also challenge unrelated solicitation defects).
- **The devil is in the details:** Determining whether a non-offeror is an interested party is a fact-specific analysis. While these cases provide general guidelines, the GAO will consider the specific circumstances of each challenge (e.g., finding a non-offeror an interested party to challenge the oak-construction requirement even though the non-offeror had the ability to meet the requirement at a higher cost).

The decisions discussed above demonstrate that protesting an award or solicitation as a non-offeror may be an uphill battle. These decisions also demonstrate, however, that a non-offeror may succeed not only in establishing interested party status but in ultimately causing the agency to reconsider the limitations that initially precluded the non-offeror protester.

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*The authors thank summer associate Sarah Burgart for her contributions to this article.*

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[1] Oracle America, Inc., B-416061, May 31, 2018, 2018 CPD ¶ 180.

[2] 31 U.S.C. § 3553(1)(a); see also Rocketplane Kistler, B-310741, Jan. 28, 2008, 2008 CPD ¶ 22 at 3.

[3] 31 U.S.C. § 3553.

[4] 4 C.F.R. § 21.0(a)(1).

[5] TENICA & Assocs., LLC, B-411173.10, et al., Mar. 2, 2016, 2016 CPD ¶ 79 at 7.

[6] Oracle America, Inc., B-416061 (citing Helionix Sys., Inc., B-404905.2, May 26, 2011, 2011 CPD ¶ 106 at 3).

[7] Id.

[8] Piedmont Propulsion Sys., LLC, B-410914.2, Mar. 17, 2015, 2015 CPD ¶ 119. However, the protester still must be otherwise eligible to submit a proposal. See Interoperability Clearinghouse, B-416001, Mar. 12, 2018, 2018 CPD ¶ 108. For example, a company that is not a member of the Small Business Administration's 8(a) Business Development program may not protest a program 8(a) set-aside, regardless of the protester's interest in providing the work requested in the solicitation.

[9] Glob. Dynamics, LLC v. United States, 137 Fed. Cl. 772 (2018).

[10] Id. at 774.

[11] Western Star Hospital Authority, Inc., B-414198.2, B-414198.3, June 7, 2017, 2017 CPD ¶ 183.

[12] Black Hills Refuse Serv., B-228470, Feb. 17, 1988, 88-1 CPD ¶ 151 at 2-3.

[13] See, e.g., Adams and Assocs., Inc., B-409680, B-409681, Apr. 22, 2014, 2014 CPD ¶ 131.

[14] Synchrogenix Information Strategies, LLC, B-414068.6, Dec. 22, 2017, 2018 CPD ¶ 8.

[15] Id. (citing Coleman Transfer and Storage, Inc., B-182420, Oct. 17, 1975, 75-2 CPD ¶ 238 at 2).

[16] Commercial Land Title of San Antonio, Inc., B-249969, Dec. 8, 1992, 92-2 CPD ¶ 400 at 2 (citing Remtech, Inc., B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; H.V. Allen Co., Inc., B-225326, et al., Mar. 6, 1987, 87-1 CPD ¶ 260).

[17] Id.

[18] *Id.* at 2.

[19] *Id.* at 4.

[20] *J. Squared Inc., d/b/a Univ. Loft Co.*, B-408388, Aug. 27, 2013, 2013 CPD ¶ 201 at 3 (citing *Westinghouse Elec. Corp.*, B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479 at 3; *Am. Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503).

[21] *Id.* (citing *Gould, Inc.*, B-224365, Oct. 17, 1986, 86-2 CPD ¶ 464).

[22] *Id.* at 2.

[23] *Id.* at 3.

[24] *Id.* GAO ultimately concluded that the oak requirement was not unduly restrictive, but that analysis did not negate the finding that the protester had standing as an interested party. *Id.* at 6–7.

[25] 4 C.F.R. § 21.2 (2018) (“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”); see also *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (holding that a party who could have objected to the terms of a solicitation containing a patently obvious error, but who failed to do so prior to the close of the bidding process, waived its ability to raise that objection in a subsequent bid protest).

[26] *Esterhill Boat Serv. Corp. v. United States*, 91 Fed. Cl. 483, 488–89 (Fed. Cl. 2010).

[27] *Id.* at 488.