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Getting an Automatic Stay in a GAO Bid Protest: Withholding of Award and Suspension of Contract Performance

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A major advantage of filing a protest with the GAO is the potential of an “automatic stay” or the requirement that the agency “withhold award and suspend contract performance. In order to trigger the withholding of award or suspension of performance (or an “automatic stay”) a protester must file its protest in advance of the period to file a protest after award or the required debriefing so that the GAO has time to notify the agency of the filing of the protest. It is this official notice by the GAO that triggers the suspension of performance or the withholding of award.

If a protest is timely filed with the GAO, the Bid Protest Regulations in 4 C.F.R. § 21.6 allow for the “withholding of award and suspension of contract performance” which in essence is an automatic stay.

4 C.F.R. 21.6 states, “Where a protest is filed with GAO, the contracting agency may be required to withhold award and to suspend contract performance. The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d).”

In order to obtain either a withholding of a contract award, or the suspension of contract performance, you must follow the strict time lines of the GAO. While it is clear that the Bid Protest Regulations allow 10 days to file a protest from when you knew or should have known of a contract award or protest grounds, or 5 days after a requested debriefing is held, what is not always understood is that you must file at least one day earlier in order to give the GAO the one day window to officially notify the agency. This official notification by the GAO to the agency is what triggers the “automatic stay” or in essence allows for the suspension of performance or the withholding of award.

4 C.F.R. § 21.3(a) states that within 1 day of receipt of the protest, GAO will telephone the agency to advise it that a protest has been filed.. That telephone call is important because it is the official notice that may trigger a statutory stay of the award or performance of a contract pending GAO’s decision.

If you file on the tenth or the fifth day, the GAO allows you to request that they contact the agency on the day of the filing. Prominently mark the protest documentation as a last day protest. GAO will attempt to provide expedited notice of the protest to the agency. The protester’s notice to the agency is not sufficient to trigger an automatic stay. The official GAO call to the agency is what triggers the automatic stay.

It is important to note that the timeliness requirement for the automatic stay is not the same as the timeliness requirement for the protest. A post award protest must be filed not later than 10 days after the protester knew or should have known about the basis of protest 4 C.F.R. 21.2(a)(2); or within 10 days after a required debriefing 4 C.F.R. 21.2(a)(2). However, to request a stay of contract performance, you must file within 5 days of the debriefing. 31 U.S.C. 3553(d)(4)(B).

Agencies do have the ability to override the automatic stay where such is in the best interests of the government, and GAO has no authority to review such overrides.

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