

Protesting At ODRA: Learning The Lay Of The Land

Law360, New York (September 27, 2011, 5:13 PM ET) -- Your company submitted a proposal to the Federal Aviation Administration (FAA) to provide widgets and related services. The opportunity had corporate visibility and was critical to your sector's bottom line. After several agonizing months of waiting for an award decision, you learn that the FAA made an award to your competitor. You immediately accept the first debriefing date offered by the agency.

As that date approaches, you begin to strategize and weigh your options — should you file the bid protest at the Government Accountability Office or the Court of Federal Claims? The answer — neither.

When the FAA makes an award, any protest must be filed with the Office of Dispute Resolution for Acquisition — otherwise known as ODRA. There are several similarities and differences between, on the one hand, the GAO and the Court of Federal Claims, and, on the other hand, ODRA.

First, you are entitled to an automatic stay of performance if you timely file your protest at the GAO (unless the stay is overridden by the agency). To obtain a stay of performance at the Court of Federal Claims, you will most likely need to prevail on a motion for a temporary restraining order or a preliminary injunction. It is very difficult, however, to obtain a stay of performance at ODRA.

ODRA presumes that performance will continue pending resolution of the protest, and a protestor must separately brief the issue of whether a stay should be granted. Unless the protester can demonstrate “a compelling reason to suspend or delay all or part of the procurement activities,” ODRA will allow performance to continue. 14 C.F.R. § 17.13(g); 14 C.F.R. § 17.15(d). A review of ODRA's suspension decisions shows that stays of performance are rarely granted. In other words, you should expect that ODRA will not grant a stay of performance.

Second, FAA procurements are not governed by the Federal Acquisition Regulation (FAR). Rather, the FAA is subject to the Acquisition Management System (AMS), which “establishes the policies, guiding principles, and internal procedures for the FAA's acquisition system.” 14 C.F.R. § 17.3(c). While the FAR and the AMS share some overlapping concepts, there are notable differences between the two. For example, the AMS does not recognize the FAR's distinction between “discussions” and “clarifications,” and instead categorizes all exchanges as “communications.”

Furthermore, the AMS encourages communications with potential offerors, including one-on-one communications, stating that they “should take place throughout the source selection process” to “ensure that there are mutual understandings between the FAA and the offerors about all aspects of the procurement, including the offerors’ submittals/proposals.” AMS § 3.2.2.3.1.2.2. ODRA has routinely denied protests where a disappointed offeror has claimed to have been the subject of unfair treatment when the FAA only communicated with one offeror. See, e.g., Consolidated Protests of Consecutive Weather, Eye Weather Windsor Enterprises, and IBEX Group Inc., 02-ODRA-00254.

Third, ODRA has a robust alternative dispute resolution program that is central to its resolution of bid protests. ODRA makes a variety of ADR techniques available to the parties, including mediation, neutral evaluation and mini-trials. 14 C.F.R. § 17.31(b). Additionally, ODRA’s rules were amended recently to place an even greater emphasis on ADR. The new rule officially instructs parties to use ADR as the primary means for settling protests and disputes, and allows parties to file “predisputes” so that they may engage in nonbinding, confidential discussions. 76 Fed. Reg. 55217 (Sept. 7, 2011) (to be codified at 14 C.F.R. Part 17). Although you can decline to participate in ODRA’s ADR program, it is well worth your time and resources to consider pursuing this option.

Fourth, you should be aware of the various procedural rules at ODRA, as they differ from those of the GAO. Most notably, ODRA spurns the GAO standard of calendar days for business days (thereby excluding weekends and federal holidays). In this regard, a party must file its post-award protest within (1) seven business days of when it knew or should have known of the basis for its protest, or (2) not later than five business days from the date of the debriefing. 14 C.F.R. § 17.15(a)(3).

Once filed, a contractor should be prepared to act — the FAA’s response to the protest is due 10 business days after the initial status conference, and the contractor’s comments on the FAA’s response are due five business days later. 14 C.F.R. § 17.17(e); 14 C.F.R. § 17.37(c). Contractors can also expect ODRA to issue a decision relatively quickly, as the ODRA dispute resolution officer assigned to the case must issue a decision within 30 business days of the FAA’s response to the protest. 14 C.F.R. § 17.37(a),(i).

In conclusion, ODRA differs markedly from the GAO and the COFC as a bid protest forum. An understanding of those differences is critical to the preservation and pursuit of your bid protest rights. Since ADR at ODRA has resulted in some form of agency corrective action in roughly 40 percent of the cases filed at the ODRA from 1997 to 2007, a failure to appreciate the differences in the rules and the consequent forfeiture of your protest rights can be highly prejudicial. See here.

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