

The Protest of Impact Resources, Inc.: A Study in Communication, Untimeliness and “Abandoned Arguments”

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Texts, tweets, statuses, emojis... In our digital society, communication is now easier – and more dangerous – than ever. While instant, unfettered communication may be desirable if you want everyone to stop what they are doing and check out the #nofilter sunset pic you just posted, it is far from helpful in the government contracts arena. When dealing with the Government during contract negotiations, words and actions have consequences. In such times, it behooves contractors to take a breath and consider their words before communicating with the procuring agency. This was the ultimate takeaway in the GAO’s decision in *Impact Resources, Inc.* In ruling on a challenge to the award of a post-deployment systems support services contract, the GAO provided three key points to any contractor pursuing a bid protest:

1. A written statement to the agency that expresses dissatisfaction with the agency’s actions and requests relief will likely constitute an agency-level protest;
2. An adverse agency action does not need to be an explicit denial of such a protest to start the clock under the GAO’s strict timeliness rules; and
3. If you make an argument in an initial protest, be sure to support that argument in comments to the agency report, or else the GAO may dismiss the argument as abandoned.

Sometimes the routine droning of contract negotiations and the all-too-informal dialogue to which we all often default numbs us to those times when more structured or, let’s say, “regulated,” communications are required. At its most fundamental, *Impact Resources, Inc.* demonstrates the importance of contractors taking heed of the mode, manner and timing of any communication with a procuring agency.

Watch the Clock – It May Start When You’re Not Looking!

The RFP in *Impact Resources, Inc.* sought post-deployment systems support services for the Marine Air-Ground Task Force Logistics Support Systems Program, for which the agency received 13 timely proposals. Months after submitting its proposal by the solicitation closing date of April 28, 2017, Impact Resources, Inc. (“IR Tech”), became aware that two of the systems contemplated by the solicitation were being replaced or retired by the agency. In response to this perceived change in

solicitation requirements, on November 28, 2017, IR Tech sent a letter to the Contracting Officer stating that the change in requirements should require a new solicitation and requested the agency amend the solicitation. IR Tech never received a substantive response to its letter but was notified of the apparent successful offeror on February 14, 2018; received notice of the award on February 16, 2018; and, following its debriefing, it filed a protest at the GAO on March 4, 2018.

In its protest, IR Tech revived its concern from November 2017 and argued that the agency failed to revise its RFP to reflect its changed requirements. In response, the agency argued that (1) IR Tech had effectively raised an agency level protest on November 28, 2017; and (2) the protest was effectively denied no later than February 16, 2018, when IR Tech received notice of the agency's award based on an unrevised solicitation. Therefore, the agency argued, the protest should have been filed within 10 days of February 16, 2018 – i.e., by February 26 – and the March 4 protest was therefore untimely.

The GAO sided with the agency, noting that its “strict rules for the timely submission of protests” require protests to be filed within 10 calendar days of “actual or constructive knowledge of initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). IR Tech insisted that its November 28, 2017 letter was not intended to be an agency level protest, arguing that if there were no protest, there could be no agency “denial” that started the clock. The contractor urged the GAO to recognize that a contractor’s communication to the Contracting Officer should not constitute a protest if that communication only expresses a “suggestion, hope, or expectation.” The GAO did not agree that was the case here and held that IR Tech’s letter checked all the boxes to constitute an agency-level protest in that it was: (1) a written statement (2) that conveyed the intent to protest (3) by a specific dissatisfaction with the agency’s actions (4) and requested relief.

This decision should serve as a reminder to contractors that if you are challenging an agency action – in any way – it does not take an explicit, formal denial from the agency to start the GAO’s protest clock. Contractors need to recognize that all communications with a Contracting Officer while offers are pending have consequences. If the contractor challenges a solicitation (and please note that “protest” and “challenge” are synonyms), the contractor should be prepared for a response – explicit or implicit. When the answer is known, be it again explicit or implicit, the contractor needs to be prepared to act. After all, the GAO measures the timeliness of a protest from the point at which the protester is on notice that the agency will not undertake the requested corrective action. Accordingly, in this case, the GAO concluded that the February 14, 2018, notification of the identity of the apparent successful offeror put IR Tech on notice that the agency would not undertake the requested revision of the solicitation. Therefore, the GAO found that the March 4, 2018, protest was untimely, as it was filed more than 10 days after February 14, when IR Tech knew or should have known of the agency’s adverse action.

If a Contractor Says Nothing, It Loses Everything!

Further emphasizing the importance of clear communication is the requirement that protesters need to address all salient arguments in their papers. In its protest, IR Tech also argued that the award was improper because the ratings assigned to the proposals were flawed, and advanced several arguments in support. The agency responded in a detailed report, that addressed each of IR Tech’s arguments. In its comments to the agency report, however, IR Tech failed to respond to the agency’s arguments. The GAO concluded from this silence that IR Tech had abandoned these protest grounds. Accordingly, rather than consider the substantive merits of IR Tech’s arguments, the GAO dismissed them outright.

The Impact of *Impact Resources, Inc.*

All is not lost if contractors can learn from the issues raised in this decision.

- First, use extreme caution when communicating with the agency during the procurement process. Recognize what you are doing, and seek counsel if you are not sure. You do not want to find that you submitted an agency-level protest unless you intended to do so.
- Second, remember that protests to the GAO must be filed within 10 days of actual or constructive knowledge (meaning “should have known”) of the initial adverse agency action – which consists of any action or inaction that is prejudicial to the positions taken in the agency-level protest.
- Third, remember to provide substantive responses to each argument articulated by the agency in its report filed in response to the arguments set forth in the underlying protest. If you fail to do so, the GAO may dismiss the affected protest grounds, even if otherwise meritorious.

Contract negotiations and the struggle to capture an opportunity, the *right* opportunity, are the lifeblood of federal contractors. However, contractors need to use their words carefully and understand that the regulations under which everyone is operating may give them legal effect without the speaker knowing. Take the time to communicate properly – or ask if you are communicating the right way. You can’t take back a protest by texting your Contracting Officer “jk lol!”