

No Protest, No Stay, No Dice: Filling the Gap in CICA Created by the GAO's Bid Protest Regulations

By NATHANIEL CANFIELD AND JAMES BOLAND



Nathaniel Canfield



James Boland

Government contractors are well aware that if they lose a follow-on contract and believe the agency's evaluation and award decision were flawed, the disappointed offerors can file a protest with the Government Accountability Office (GAO) and obtain a stay of contract performance under a provision of the Competition in Contracting Act (CICA) commonly known as a "CICA stay."¹ The stay will last throughout the GAO's consideration of the protest, typically more than three months. The CICA stay is essential for ensuring a meaningful bid protest process and, for understandable reasons, is a critical feature of the protest process for incumbents.

Consider, however, the scenario when the incumbent contractor loses an award, but the agency informs the incumbent that the government will quickly transition and begin performance of the follow-on contract in just seven days. The incumbent strongly believes that the agency's award decision is flawed and plans to file a bid protest with the GAO to obtain the CICA stay. There is an obstacle, however. The follow-on procurement was conducted under procedures pursuant to Part 15 of the Federal Acquisition Regulation (FAR), which require the agency to provide offerors a post-award debriefing if requested. Under such circumstances, the GAO's bid protest procedures prohibit the filing of a bid protest prior to the debriefing. Furthermore, despite the fact that the incumbent immediately requests a debriefing upon receiving the notice of contract award, the agency waits until three days after the incumbent's debriefing request to respond, and then offers the incumbent a debriefing date 14 days after contract award, a full week after performance of the follow-on contract is scheduled to begin. Because the agency's first-offered debriefing date is well

Nathaniel Canfield is an associate and James Boland is a partner in the Tysons Corner, VA, office of Venable LLP.

after the start of contract performance, the GAO's bid protest regulations would seem to prevent the incumbent from obtaining a CICA stay before contract turnover begins, after which point the agency might simply disregard any later GAO decision in favor of the incumbent because of the cost of retransition.

Although this scenario may not seem common, it is not unprecedented. The incumbent's difficult position is the result of a small, but significant, difference between the GAO's rules for the timeliness of a protest filing and CICA's deadlines for obtaining a stay of contract performance. As discussed below, it is not clear that the GAO considered the CICA stay implications of its rule requiring contractors to wait until they receive their debriefing to file a bid protest. The resulting disparity between the GAO's regulations and CICA arguably puts the GAO in the position of thwarting the will of Congress. While the GAO could amend its regulations to address this problem, there appears to be a less radical solution within the GAO's existing timeliness framework.

Obtaining a Stay under CICA

CICA requires that if an agency receives notice of a bid protest within specified time frames, it must stay performance of the awarded contract. As the U.S. Court of Federal Claims noted in *E-Management Consultants, Inc. v. United States*, the stay provision of CICA is "the keystone that ensures that the various provisions of CICA work to promote competitive contracting."² Recounting the legislative history of CICA, the court quoted a House of Representatives report published a year after the enactment of CICA that reiterated the importance of the automatic stay provision:

The act also establishes, for the first time in statute, a strong enforcement mechanism through which contracts are held in abeyance while contractors appeal to the General Accounting Office [now Government Accountability Office] (GAO) when they believe they have been unlawfully denied the opportunity to compete for the award of Government contracts. Congress included these bid protest provisions to help ensure that the mandate for competition would be followed and that vendors wrongly excluded from Federal contracts would receive fair relief.³

The court further pointed out that the House report's explicit reasoning for including the stay provision in CICA was to remedy the inability of a disappointed offeror to stop contract performance while a protest was pending:

Agencies, therefore, often proceeded with their contracts, simply ignoring the protest process. As a result, vendors were confronted with a *fait accompli* and often did not receive fair and equitable relief even when GAO decided in their favor. . . .

A key element of the Competition [in Contracting] Act—an automatic stay of contract award or performance pending the Comptroller General’s protest decision—was included [in CICA] to preclude such *faits accomplis* and to facilitate a fair and equitable remedy to vendors who are illegally denied Government contracts.⁴

In other words, the automatic stay provision of CICA is meant not only to prevent the horse from leaving the barn, but also to prevent the agency from actively throwing the barn doors wide open and then later claiming that it is simply too difficult to return the horse to its stable. Thus, the ability of an offeror to obtain a stay of contract performance while its bid protest is pending is central to CICA’s aim of enhancing competition in government contracting, as it provides a mechanism by which an offeror can maintain the status quo until the GAO decides whether the protest has merit.

Under its stay provision, CICA requires that if the agency receives notice of a bid protest “during the period described in [31 U.S.C. § 3553(d)(4)],” then during the pendency of that protest, the contracting officer may not authorize the start of contract performance or, if performance has already begun, the contracting officer must immediately direct the suspension of performance.⁵ Section 3553(d)(4), in turn, describes the relevant period for agency receipt of notice of a protest as

the period beginning on the date of the contract award and ending on the later of—

- (A) the date that is 10 days after the date of the contract award; or
- (B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.⁶

Accordingly, under CICA’s plain language, the period during which an offeror can obtain a stay of contract performance runs, uninterrupted, from the date of contract award through the later of the date 10 days after contract award or the date five days after the date offered for a requested and required debriefing. If the agency receives notice of a protest within that period, CICA obligates it to stay contract performance.

The GAO’s Bid Protest Regulations

The incumbent’s dilemma described in the introduction results from the GAO’s regulations regarding the time in which a protest must be filed. Echoing the two time frames set up by CICA, the GAO’s timeliness regulation states first that “[p]rotests other than those [based on

alleged solicitation improprieties] shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier).⁷ The regulation excludes from that time frame “protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.”⁸ For those protests, the regulation states:

In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.⁹

Thus, where a debriefing is requested and required, a protest filed before the debriefing is premature under the GAO’s bid protest regulations, despite the fact that it would be filed within the time frame that obligates an agency to stay contract performance under CICA. This is a subtle difference between CICA and the GAO’s regulations, but it has significant consequences for the offeror that cannot obtain a debriefing before the agency authorizes the commencement of contract performance.

Accounting for the Disparity

The question that naturally arises from this difference is why the GAO’s timeliness regulation differs from CICA’s stay provisions at all. The GAO’s bid protest regulations began taking their current form in response to the Federal Acquisition Streamlining Act of 1994 (FASA).¹⁰ FASA required post-award debriefings in procurements involving competitive proposals, setting a deadline for offerors to request debriefings within three days after notification of contract award and mandating that agencies provide the debriefing “within, to the maximum extent practicable, five days after receipt of the request by the agency.”¹¹ FASA also amended CICA’s stay provisions to provide for the time frames discussed above, allowing for additional time to obtain a stay until after a required debriefing.¹²

In the GAO’s proposed bid protest regulations implementing FASA, the timeliness provision made no distinction with respect to protests of procurements involving required debriefings. Rather, all protests other than those based on alleged solicitation improprieties were to be filed “not later than 14 days after the basis of protest is known or should have been known, whichever is earlier.”¹³ A commenter took issue with the proposed rule, arguing that it was contrary to Congress’s intention in CICA to “provide meaningful relief to an unsuccessful offeror which filed a protest within 5 calendar days after a required debriefing, thus obviating the unsuccessful offeror’s need to file a ‘defensive’ protest prior to receiving all information to which it is entitled pursuant to a statutorily required debriefing.”¹⁴ As reported by the GAO, the commenter elaborated on the point:

In light of the 14-calendar-day rule for filing timely protests, the commenter argued that if a protest is based on information discovered before a required debriefing, the protester cannot wait to file its protest until after it is debriefed since, at that point, the 14-calendar-day period for filing a timely protest may have expired, although the protest may still be timely for the purpose of requiring the agency to suspend contract performance.¹⁵

In other words, the commenter argued that the proposed rule raised the possibility that the period for filing a protest under the GAO's regulations might run before CICA's statutory deadline for obtaining a stay. For example, a contractor may learn of a basis for protest as a result of its award notification, but it may not receive its debriefing until more than 14 days after that date. This puts the contractor in a difficult position. On the one hand, the contractor can file an initial protest based on the information contained in its award notification and later supplement with additional grounds arising from the debriefing, which the commenter argued was contrary to Congress's intention in CICA to obviate the need for such "defensive" protests. On the other hand, the contractor can wait and file a protest after the debriefing, at which point any protest the basis of which the contractor knew or should have known as a result of its award notification would be untimely, thereby effectively limiting the contractor to only those protest grounds arising from the debriefing.

Although the GAO found that the commenter's argument warranted further consideration, it did not make any changes to the rule as initially proposed.¹⁶ Instead, the GAO stated that it would "evaluate the protest practice which evolves in response to the implementation of the new debriefing requirements of FASA. If experience shows that a revision to our timeliness rules would be beneficial to the bid protest system, we will consider further rulemaking."¹⁷

It did not take long for the GAO to revisit its bid protest timeliness regulations, as only six months later it issued an advance notice of proposed rulemaking in which it invited comments on changes to its timeliness rules.¹⁸ In the advance notice, the GAO cited not only FASA's debriefing requirements, but also the National Defense Authorization Act for Fiscal Year 1996 (1996 NDAA), which reduced the period in which the GAO was to resolve bid protests from 125 days to 100 days.¹⁹ Thereafter, the GAO issued a proposed new rule that attempted to harmonize its rules with the time frames contemplated by CICA:

Except for protests [based on alleged solicitation improprieties], protests filed by a party that has received a debriefing required by law shall be filed not later than 5 days after the debriefing, and in all other cases, not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.²⁰

Under this proposed rule, any protest filed five days after a required debriefing would be timely under the

GAO's rules. Notably, that is not precisely in line with CICA, which requires that a protest be filed within five days of the date *offered* for a requested and required debriefing. The GAO's proposed rule therefore was more permissive than CICA, as its deadline was keyed to actual receipt of the debriefing, not the date offered by the agency. Additionally, the proposed rule did not prohibit the filing of a protest prior to debriefing, and instead simply required that where a contractor received a debriefing, it had to file its protest "not later than 5 days after the debriefing."

After a comment period, the GAO published its final rule regarding timeliness of protests, which took its present form:

Protests other than those [based on alleged solicitation improprieties] shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.²¹

It was only in this final rule that the GAO prohibited protests prior to a debriefing, and importantly it prohibited such protests *regardless* of whether the basis was "known or should have been known either before or as a result of the debriefing." Thus, the final rule eliminated the potential that existed under the proposed rule for a contractor to file protests both prior to and after debriefing.

The GAO's stated reasoning for this change harkened back to the comments it received when it first amended its bid protest regulations in response to FASA:

Moreover, to address concerns regarding strategic or defensive protests, and to encourage early and meaningful debriefings, GAO provides in paragraph (a)(2) of § 21.2 that protesters shall not file an initial protest prior to the debriefing date offered to the protester, but must file the initial protest not later than 10 days after the date on which the debriefing is held. In order to administer this rule, our Office may close a file without prejudice on any protest which has been filed before a statutorily required debriefing, upon appropriate notice by an agency that the statutorily required debriefing date has been offered. We anticipate that this debriefing will normally occur on the first date offered by the agency. However, in the event that the agency subsequently agrees to another date, the debriefing held on that date will be used as the basis for determining the timeliness of the protest. While we recognize that this places a potential burden on an agency's procurement cycle time, the agency has within its control the ability to minimize this period by offering early and meaningful debriefings consistent with congressional intent.²²

This statement indicates that the GAO's intention was to allow a contractor that has a right to a debriefing to preserve any grounds of protest of which the contractor knew or should have known prior to its debriefing, without the need to file a "defensive" protest prior to the debriefing. It is not clear, however, why the GAO found it necessary to alter the wording from the proposed rule, which simply provided that a party that had received a debriefing had until five days after that debriefing to file a protest. No defensive protest was needed under the proposed rule, as the contractor's bid protest clock did not begin until the debriefing. Given that this second round of rulemaking was prompted not only by FASA, but also by the 1996 NDAA's shortening of the GAO's time to decide a protest from 125 days to 100 days, the GAO understandably may have had an eye on its own clock. If a contractor could file a protest prior to debriefing, that would start the GAO's time to decide the protest earlier than if the contractor were required to wait until after the debriefing.

The GAO's stated intention to "encourage early and meaningful debriefings" appears grounded in the earlier version of the rule, which simply required that protests be filed within 14 days of when their basis was known or should have been known. Under that version of the rule, agencies might be incentivized to push debriefings later, thereby rendering protests based on information known prior to debriefing untimely under the GAO's bid protest regulations, though not under CICA. As the GAO elaborated:

Under this rule and consistent with the statutory language in FASA, a protester may file a timely protest on any issue within 5 days of a statutorily required debriefing, as well as obtain a stay, thus eliminating the existing anomaly that a protester may be eligible for a stay based on a filing which does not constitute a timely protest.²³

Thus, by extending the time for filing a protest based on any ground, whether known before or as a result of debriefing, the GAO seems to have been attempting to discourage any gaming of debriefing dates by agencies.

A Solution Within the Existing Regulations

The history of the GAO's bid protest regulations reflects the GAO's desire to ensure that a protest that would be timely for CICA stay purposes also would be timely under the GAO's rules. After the GAO published its first set of proposed rules in response to FASA, it received comments expressing concern that the blanket 14-day rule would, under some circumstances, result in a protest that was timely for CICA stay purposes but late under the GAO's rules. Under the final version of the rule that emerged, that is no longer the case. Moreover, it is possible for a protest to be timely under the GAO's rules but late for CICA stay purposes.²⁴

Ironically, the GAO's efforts to ensure that its bid protest regulations do not deprive contractors of the benefits of a CICA stay nevertheless, under the right circumstances, do just that. In procurements that require debriefings, CICA

allows a contractor to obtain a stay during the period running from the date of contract award through the date five days after an offered debriefing. By precluding contractors from filing a protest prior to the debriefing, the GAO's bid protest regulations effectively limit the statutory period for obtaining a CICA stay after the contractor has requested a debriefing to the last five days of that statutory period. Furthermore, the GAO's prohibition on protests prior to the debriefing effectively can deprive a contractor of the benefits of the stay if contract performance begins prior to the debriefing.²⁵ Even if the contractor later obtains a stay of performance after its debriefing, the agency ultimately may be tempted to disregard a GAO decision sustaining the protest, citing the cost and effort of transitioning the work. In those circumstances, the contractor would be entitled only to its bid and proposal costs, a cold comfort compared to the potential lost profits on the contract. In this way, the bid protest regulations actually may incentivize agencies to delay debriefings under certain circumstances, directly counter to the GAO's stated intention to "encourage early and meaningful debriefings."


There are several potential solutions to this problem. The bid protest rules prohibit filing a protest prior to a debriefing only where a debriefing is *requested* and *required*. Thus, a contractor concerned about a quick start to contract performance could opt to forgo its debriefing in favor of obtaining a CICA stay. It would contradict the will of Congress for the GAO's regulations to dictate this course of action, however, given that debriefings are a statutory requirement and therefore reflect Congress's view of their importance. The GAO could amend its regulations to revert to the proposed version of the current rule, under which a protest filed by a party that has received a debriefing required by law was to be filed simply "not later than 5 days after the debriefing," and therefore did not preclude the filing of a protest prior to the debriefing. Such action would require a rulemaking, however, including a notice and comment period. In light of the likely infrequency of the situation described in the introduction, this seems a burden not worth the effort, to say nothing of the possibility of unanticipated consequences. Likewise, Congress could amend FASA to require agencies to provide debriefings before they can begin contract performance. This, too, would require a substantial effort, and also may prove an unnecessarily blunt tool to correct what is likely an infrequent issue.

The GAO's current bid protest regulations offer a potential solution that would not require contractors to forfeit their right to a debriefing, the GAO to amend its regulations, or Congress to act. Under the regulations, the GAO has provided for exceptions to its timeliness rules: "GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest."²⁶ While it appears that the GAO has invoked this timeliness exception only in cases where a protest was filed *after* the time frames set forth in the bid protest regulations,²⁷ the

regulation uses the term “untimely” rather than “late.” Accordingly, a plain reading of the regulation would seem to encompass protests that would be premature under the GAO’s rules. Thus, the GAO could rely on this rule in limited circumstances to accept as timely a protest filed prior to a requested and required debriefing, where the agency has signaled its intention to commence contract performance before providing that debriefing.

With respect to the latter of the two exceptions, the GAO “generally regard[s] a significant issue as one of widespread interest to the procurement community and that has not been previously decided.”²⁸ It is perhaps arguable whether the timeliness of a protest itself can be a significant issue of widespread interest to the procurement community. Moreover, prior decisions that have invoked the “significant issue” exception turn on whether the merits of the protest, not its procedural aspects, are of widespread interest.²⁹

The “good cause” exception therefore may be the more proper vehicle. As the GAO has noted, “[t]he ‘good cause’ exception is limited to circumstances where some compelling reason beyond the protester’s control prevents the protester from filing a timely protest.”³⁰ Where an agency will begin contract performance before it offers a debriefing, there is a compelling reason beyond the protester’s control that prevents it from filing a timely protest, namely, the agency’s quick commencement of performance and the GAO’s own bid protest regulations, which in these limited circumstances conflict with the congressional intent expressed by CICA. If the GAO were to permit the filing of protests under such circumstances, it would align its regulations with CICA and eliminate the conflict that currently exists.³¹ Moreover, as it becomes known within the agencies that the GAO will not dismiss protests in such circumstances, it is not unreasonable to think that agencies will move more expeditiously to offer debriefings prior to commencing contract performance, which is fully in keeping with the GAO’s stated goal of encouraging early and meaningful debriefings.

The GAO’s bid protest regulations must juggle several competing requirements. Contractors must be able to preserve the status quo while their concerns are addressed. Agencies must be encouraged to provide, and contractors must be encouraged to seek, early and meaningful debriefings. The GAO must bear in mind its statutory obligation to resolve protests within 100 days. It is perhaps inevitable, then, that some cases will fall through the cracks. Fortunately, the GAO’s existing regulations are flexible enough to address those circumstances without significant further action from the GAO or Congress. The incumbent described in the introduction can obtain the full benefit of the relief fashioned by Congress in CICA, and the GAO need only apply its own rules to ensure that result. 

Endnotes

1. 31 U.S.C. § 3553.

2. 84 Fed. Cl. 1, 5 (2008).

3. *Id.* at 6 (alteration in original) (quoting H.R. REP. NO. 99-138, at 4 (1985)).

4. *Id.* (alterations in original) (quoting H.R. REP. NO. 99-138, at 5).

5. 31 U.S.C. § 3553(d)(3)(A).

6. *Id.* § 3553(d)(4).

7. 4 C.F.R. § 21.2(a)(2).

8. *Id.*

9. *Id.*

10. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

11. *Id.* §§ 1014, 1064.

12. *Id.* § 1402(b).

13. 60 Fed. Reg. 5871, 5873 (Jan. 31, 1995).

14. 60 Fed. Reg. 40,737, 40,738 (Aug. 10, 1995).

15. *Id.*

16. *Id.*

17. *Id.*

18. 61 Fed. Reg. 6579 (Feb. 21, 1996).

19. *Id.* at 6579.

20. 61 Fed. Reg. 19,205, 19,207 (May 1, 1996) (proposed 4 C.F.R. § 21.2(a)(2)).

21. 61 Fed. Reg. 39,039, 39,043 (July 26, 1996) (final 4 C.F.R. § 21.2(a)(2)).

22. *Id.* at 39,040.

23. *Id.*

24. *See id.* (“[P]otential protesters should be aware that, even after this compromise (and as is currently also the case), a protester’s initial filing may qualify as a timely protest, but may not entitle the protester to a stay.”).

25. Additionally, as at least one other commentator has noted, an incumbent also may face the loss of employees to a new awardee in the absence of the ability to obtain a stay prior to contract performance. *See* Daniel S. Koch, *How Delayed Debriefings Cause Contractors to Lose Valuable Contracts and Key Personnel*, in *THE IMPACT OF RECENT CHANGES IN GOVERNMENT CONTRACTS* (2011), 2011 WL 4443363.

26. 4 C.F.R. § 21.2(c).

27. *See, e.g., id.*; Cyberdata Techs., Inc., B-406692, 2012 CPD ¶ 230, at 3–4 (Comp. Gen. Aug. 8, 2012); Tiger Truck, LLC, B-400685, 2009 CPD ¶ 19, at 7 n.9 (Comp. Gen. Jan. 14, 2009); Celadon Labs., Inc., B-298533, 2006 CPD ¶ 158, at 4 (Comp. Gen. Nov. 1, 2006); Pyxis Corp., B-282469, B-282469.2, 99-2 CPD ¶ 18, at 4 (Comp. Gen. July 15, 1999). Interestingly, the timeliness of the protest in *Celadon* turned on whether the procurement at issue was conducted on the basis of competitive proposals, and therefore whether the debriefing provided to the protester was required. *See* 2006 CPD ¶ 158, at 4. The GAO held that regardless of whether the procurement was conducted on the basis of competitive proposals, it nevertheless would consider the merits pursuant to the “significant issue” exception. *See id.*

28. DRS Technical Servs., Inc., B-411573.2 *et al.*, 2015 CPD ¶ 363, at 10 (Comp. Gen. Nov. 9, 2015) (citing *Satilla Rural Elec. Membership Corp.*, B-238187, 90-1 CPD ¶ 456, at 3 (Comp. Gen. May 7, 1990)).

29. *See supra* note 27.

30. *Baldt, Inc.*, B-402596.3, 2010 CPD ¶ 139, at 2 (Comp. Gen. June 10, 2010) (citing *Dontas Painting Co.*, B-226797, 87-1 CPD ¶ 484, at 2 (Comp. Gen. May 6, 1987)).

31. This interpretation of the “good cause” exception also would be analogous to the GAO’s apparent willingness to bend its timeliness rules with respect to protests filed under the rules of the North American Free Trade Agreement (NAFTA), which have a 10-working-day timeliness requirement, as opposed to the GAO’s 10-calendar-day requirement. *See* 61 Fed. Reg. 39,039, 39,041 (July 26, 1996) (“When NAFTA was implemented, we consulted the United States Trade Representative who advised that the minor inconsistency between NAFTA’s and GAO’s timeliness requirements would not pose any problems. We are cognizant of the inconsistency and believe that, because of the flexibility of our timeliness rules, we will be able to afford a NAFTA protester all treaty rights for purposes of the timely filing of a protest.”).