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The Shutdown, GAO and CICA—The Sky May Not Be Falling

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While many have voiced concerns that the shutdown will deprive contractors of their ability to either file a timely protest at U.S. Government Accountability Office or, if a protest is timely filed, obtain an automatic stay under the Competition in Contracting Act, the consequences of the shutdown may not prove to be as dire as predicted.

While there is limited precedent about what happens when the procurement law division shuts down indefinitely (this branch of the GAO was deemed “essential” during the last government shutdown), the GAO’s rules, CICA, and the Federal Acquisition Regulations suggest that protesters seeking to take advantage of the GAO and its automatic stay provision may not be doomed by the failure to pass a budget—especially in procurements where a debriefing is required, which is most of them.

The GAO’s rules provide that a post-award protest must be filed not later than 10 days after the basis of protest is known or should have been known or if a debriefing is timely requested and required, no later than 10 days after the date on which the debriefing is held. Similarly, for purposes of obtaining the stay, a protest must be filed 10 days from award or five days from the timely requested/required debriefing—again, whichever is later.

And while the government may be closed indefinitely, both the timeliness of a protest and the date for filing a protest for purposes of obtaining a stay should be tolled by the GAO’s closure. This may be of little help in situations where the awardee can ship all of its

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product before the GAO reopens and the stay can go into effect, but in many procurements, it is likely sufficient.

Under CICA, the GAO's rules must provide for a "roll over" to the next day if conditions cause the GAO to be closed. In particular CICA provides that "in the computation of any period described in this subchapter—(1) the day of the act, event, or default from which the designated period of time begins to run not be included; and (2) the last day after such act, event, or default be included, unless—(A) such last day is a Saturday, a Sunday, or a legal holiday; or (B) in the case of a filing of a paper at the [GAO] or a Federal agency, such last day is a day on which weather or other conditions cause the closing of the [GAO] or Federal agency, in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included."

The GAO's timeliness rules reflect CICA's language when, after discussing the "roll over" to the next business day if the last day is a Saturday, Sunday, or federal holiday, they note that: "when the Government Accountability Office (GAO), or another Federal agency where a submission is due, is closed for all or part of the last day, the period extends to the next day on which the agency is open." The FAR is also similar in computing/defining "days." Thus, every day the GAO is closed because of the shutdown is essentially a snow day or weekend day—rolling over the due date for both timeliness and stay purposes to the next day the GAO is open, whenever that may be.

Given CICA's definition of "day," the GAO's rules, the FAR and the practical fact that there is no one at the GAO to make CICA calls during the shutdown notifying the agency of the protest (which is what triggers the stay), were an agency to take the position that a protest filed the next day the GAO opens does not satisfy either the GAO's timeliness rules or CICA's deadline for obtaining a stay, it may well have a hard time defending that position before the Court of Federal Claims.

Both the plain language of the relevant statute and regulations and equity suggest that the court should hold the "roll over" rule applies for purposes of determining whether a filed protest triggers the CICA stay provision. Accordingly, especially in procurements where a debriefing is required, the closure of the GAO should not prevent a potential protester from ultimately being able to timely file a protest or obtain a stay—especially if the required debriefing is not held until after the government, and the GAO, reopens.

Procurements where there is no required debriefing, such as GSA Schedule buys under FAR Part 8.4, create more difficulty, because they have to be filed within 10 days of contract award. But again, given the CICA, GAO and FAR definitions of "day" to include a "roll over," there is a solid argument that for any protest where award was made less than 10 days before the shutdown, the day the GAO reopens is the 10th day.

Another concern is the potential chaos on the first day the GAO reopens. To trigger the stay, the GAO will have to make agency notifications by the end of that first day back. Given the volume of potential protests that likely will be sitting in the GAO's inbox by then, this could prove logistically challenging. Hopefully, the GAO will have anticipated this issue and assigned sufficient personnel to accomplish that task.

Overall, while fears may be overstated in terms of the impact of the shutdown on protest timeliness and the ability to obtain an automatic stay, there still may be situations in which disappointed offerors may determine they are better off protesting at the Court of Federal Claims, which is open for business during the shutdown.