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GAO: No Bid Protest Jurisdiction over USPTO's Use of a Request For Information to Limit Participation in Future Procurement

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Contractors responding to a Request for information (“RFI”) issued pursuant to the U.S. Patent and Trademark Office’s (“USPTO”) Alternative Competition Method may be surprised to learn that they may have no opportunity to challenge the agency’s decision to exclude them from bidding on a future procurement. Such was the case in a recent Government Accountability Office (GAO) bid protest decision, *CGI Federal, Inc; Ascendant Servs., LLC*, B-418807.1; B-418807.2, 2020 WL 4901733 (Comp. Gen. Aug. 18, 2020).

In *CGI*, the USPTO issued an RFI under its Alternative Competition Method procurement authority, set forth in 35 U.S.C. § 2(b)(4)(A) and in Section 6.1.1 of the USPTO Acquisition Guidelines (“PTAG”), for a forthcoming business-oriented software solutions (BOSS) solicitation with an estimated value of over \$2 billion. The RFI informed vendors that “[b]ased on market research, including the responses to [the] RFI, the [USPTO] would determine a pool of vendors that are deemed most likely to successfully meet the agency’s needs and will invite those companies to participate in a PTAG Alternative Competition.”

After receiving over 220 responses to the RFI, the USPTO issued a “Competitive Synopsis” listing the vendors selected to participate in the BOSS procurement. Following their exclusion from the Competitive Synopsis, CGI and Ascendant filed separate bid protests before GAO, each challenging various aspects of the USPTO’s evaluation of their respective submittals. GAO dismissed CGI’s and Ascendant’s bid protests, however, concluding that the protests failed to qualify under the Competition in Contracting Act (“CICA”).

CICA defines the term “protest” as a “written objection by an interested party to . . . [a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.” 33 U.S.C. § 3551(1)(A). In dismissing CGI’s and Ascendant’s bid protests, GAO noted that the RFI expressly stated that it was “not a solicitation and does not constitute a request for quotation or proposal,” and that USPTO was “not seeking or accepting unsolicited proposals.” Although CGI and Ascendant argued that the RFI resulted in a *de facto* down-select, GAO further concluded that the USPTO Alternative Competition Method creates an exemption to the general requirements for obtaining full and open competition.

Jurisdictional issues involving bid protests are often tricky, especially when agencies utilize unique and unconventional procurement authorities. GAO’s decision in *CGI* exposes a potential jurisdictional void regarding bid

protests challenging competitive decisions under the USPTO's Alternative Competition Method.