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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# Court of Federal Claims: Offeror on a GSA Lease Lacks Standing to Raise Appropriations Issues

*By Anuj Vohra and Evan Sherwood\**

*In its pre-award bid protest, Cleveland Assets alleged that the General Services Administration had not obtained Congressional approval of its request for lease proposals because it had failed to include information in a lease prospectus required by 40 U.S.C. § 3307(a). Although the Court of Federal Claims acknowledged those requirements, it held that, at least in the pre-award context, contractors have no interest in enforcement of that statute. The authors of this article discuss the court's dismissal of Cleveland Assets' claim.*

The Court of Federal Claims recently announced that a pre-award protestor lacked standing to challenge the legality of a request for lease proposals (“RLP”) under an appropriations statute.<sup>1</sup> In its pre-award bid protest, Cleveland Assets alleged that GSA had not obtained Congressional committee approval of its RLP because it had failed to include information in a lease prospectus required by 40 U.S.C. § 3307(a). This statute generally requires committee approval of GSA’s prospectus as a pre-condition to appropriations for large leases. Although the court acknowledged those requirements, it held that, at least in the pre-award context, contractors have no interest in enforcement of that statute and therefore lack standing to raise the issue in a protest. Accordingly, the court dismissed Cleveland Assets’ claim that GSA had violated Section 3307.

*Cleveland Assets* is notable because it provides a rare judicial interpretation of Section 3307—an essential element of GSA lease procurements. It also provides further clarification of the court’s bid protest jurisdiction under the Tucker Act.

## **SECTION 3307 AND THE FACTS OF *CLEVELAND ASSETS***

Pursuant to the Public Buildings Act of 1959 (as codified at Section 3307) GSA may use appropriated funds for leases exceeding \$2.85 million per year

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<sup>1</sup> *Cleveland Assets, LLC v. United States*, 17-277C, 132 Fed. Cl. 264 (Fed. Cl. May 22, 2017).

“only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose for which the appropriation is made.”<sup>2</sup> To obtain that approval, GSA must submit a prospectus to those committees explaining the location, rent, and other information relevant to a lease.<sup>3</sup>

In *Cleveland Assets*, GSA presented Congress with a lease prospectus for a new FBI office in Cleveland, Ohio. The committees approved the prospectus, and GSA published the RLP.

In its protest, Cleveland Assets argued that the RLP contained several requirements (including, for example, a visitor screening facility and a concrete foundation for hazardous materials) that were not identified in the prospectus GSA sent to Congress, thereby violating Section 3307.<sup>4</sup> Cleveland Assets sought a court order either directing GSA to issue a new RLP or to go back to Congress with a new prospectus.

The court dismissed the protest, holding that Cleveland Assets did not fall within the “zone of interests” of Section 3307 to give it standing to enforce the statute.<sup>5</sup> Under the U.S. Supreme Court’s “zone of interests” test, a plaintiff may allege a violation of statute under the Administrative Procedure Act only if that plaintiff is within the zone of interests protected by that statute.<sup>6</sup> In the court’s view here, the purpose of Section 3307 is to not to protect contractors, but to “allow the Congress, through the appropriate committees, to exercise a degree of control over leasing arrangements[.]”<sup>7</sup> The court noted that the statute did not “mention private parties or government contractors,” and that budgetary statutes generally are not enforceable by private parties.<sup>8</sup>

While *Cleveland Assets* ruled out pre-award protests alleging violations of Section 3307, the decision left the door open to *post-award* allegations implicating the same issues under different statutes. In a footnote, the court found that “to the extent that the legal violation occurs when the lease is

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<sup>2</sup> See 40 U.S.C. § 3307(a), (h) (the Public Buildings Act of 1959); *GSA Annual Prospectus Thresholds*, General Services Administration, (Apr. 25, 2017), <https://www.gsa.gov/portal/content/101522> (establishing this limit).

<sup>3</sup> 40 U.S.C. § 3307(b)(1)–(8).

<sup>4</sup> *Cleveland Assets*, 132 Fed. Cl. at 274 n 11.

<sup>5</sup> *Cleveland Assets*, 132 Fed. Cl. at 277.

<sup>6</sup> See *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

<sup>7</sup> *Cleveland Assets*, 132 Fed. Cl. at 277.

<sup>8</sup> *Id.*

awarded or executed, Cleveland Assets' claim is not ripe for review[.]”<sup>9</sup> The court elaborated that “the prohibition in § 3307 affects whether Congress will appropriate funds for the lease at issue, not GSA’s authority to solicit proposals for a lease.”<sup>10</sup> That commentary by the court suggests that a post-award challenge could implicate different statutory interests, such as the interests embodied in the Anti-Deficiency Act.

Notably, the court has previously declared a lease void as contrary to Section 3307 because it lacked appropriations.<sup>11</sup>

### LESSONS FROM *CLEVELAND ASSETS*: FORUM MATTERS

While *Cleveland Assets* instructs that the Court of Federal Claims will dismiss a pre-award protest alleging that GSA’s lease solicitation violated Section 3307, the U.S. Government Accountability Office has demonstrated a willingness to consider such arguments.<sup>12</sup> The court’s decision will not necessarily disrupt this line of cases. Notably, GAO has not previously applied the “zone of interests” test. And, GAO’s Procurement Law Group—the office that decides bid protests—has rejected arguments that it lacks jurisdiction to consider appropriations laws.<sup>13</sup>

### CONCLUSION

The Court of Federal Claims will likely dismiss pre-award protests challenging GSA’s compliance with committee resolutions under Section 3307. However, offerors may still protest this issue at GAO or potentially raise it as a post-award protest ground.

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<sup>9</sup> *Id.* at n. 13.

<sup>10</sup> *Id.*

<sup>11</sup> See *Springfield Parcel C, LLC v. United States*, 124 Fed. Cl. 163, 189 (2015); but see *210 Earll, LLC v. United States*, 77 Fed. Cl. 710, 718 (2006) (determining protestor was an interested party to challenge lease award, even though its offer did not comply with GSA’s prospectus, because this statute “does not operate as a bar to award of such a lease”).

<sup>12</sup> See, e.g., *The Charles E. Smith Companies*, B-277391, Sept. 25, 1997, 97-2 CPD ¶ 88 (considering protest arguing violation of Section 3307 and finding it untimely); *JBG/Naylor Station I, LLC*, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 6 & n.5 (finding solicitation’s requirement that offerors obtain building permits was not inconsistent with GSA prospectus approved by Congress).

<sup>13</sup> See *Dep’t of the Navy—Reconsideration*, B-401102.3, Aug. 6, 2009, 2009 CPD ¶ 162 at 4 n.2.