



**NEXT LEVEL
LEADERSHIP**

SOARING TO NEW HEIGHTS

BID PROTESTS: 2019 UPDATE

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January 16, 2019: Protest Sustained for BERS

Background

- RFP for environmental remediation and munitions response.
- Agency rejects Bristol's proposal:
 - Bristol's proposed "U/D" or "lot" size was too large to accomplish sampling to render site acceptable for "UU/UE"
 - Bristol's means/methods of excavating munitions trench and removing UXO (by hand) was unacceptable

Decision

- **Regarding *Sampling*:** "We agree with the protester that the record reflects apparent **disparate treatment** of the offerors by the agency in its evaluation of proposals for this aspect of the sample project. . . . [B]oth offerors were criticized for the adequacy of their sampling protocols. Notwithstanding this apparent

fact, the agency ultimately made award to one firm while eliminating the other firm from award consideration.

- **Regarding *UXO Removal*:** The record thus establishes that the protester's proposal was compliant with the express terms of the RFP. The agency therefore either **unreasonably assigned the weakness** to the Bristol proposal or failed adequately to inform the protester during discussions of its true concern, namely, that the explosive nature of the BLU-107 munitions would require use of robotic equipment. Under these circumstances, **we sustain this aspect of Bristol's protest.**

Bristol Environmental Remediation Services, LLC, B-416980.2, 2019 CPD ¶ 62 (Jan. 16, 2019)



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Key Trends

GAO: Key Trends

Bid Protest Statistics for Fiscal Years 2014-2018

	FY2018	FY2017	FY2016	FY2015	FY2014
Cases Filed ¹	2607 (less than 1% increase) ²	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)	2561 (up 5%)
Cases Closed ³	2642	2672	2734	2647	2458
Merit (Sustain + Deny) Decisions	622	581	616	587	556
Number of Sustains	92	99	139	68	72
Sustain Rate	15%	17%	23%	12%	13%
Effectiveness Rate ⁴	44%	47%	46%	45%	43%
ADR ⁵ (cases used)	86	81	69	103	96
ADR Success Rate ⁵	77%	90%	84%	70%	83%
Hearings ⁷	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)	4.70% (42 cases)

GAO: Most Prevalent Grounds for Sustaining Protests

- **Unreasonable technical evaluation**, e.g., *AdvanceMed Corp.*, B-415062, B-415062.2, Nov. 17, 2017, 2017 CPD ¶ 362 (finding that the agency unreasonably found the awardee's proposal was technically acceptable, where the acceptable rating was contingent on remediation of several issues that were not remediated)
- **Unreasonable cost or price evaluation**, e.g., *ENSCO, Inc.*, B-414844.4, et al., July 5, 2018, 2018 CPD ¶ 260 (finding that the agency's evaluation and adjustment of direct labor rates for only those employees for which government-verified rates were available was inadequate to assess the realism of the offerors' cost proposals)
- **Flawed selection decision**, e.g., *VariQ Corp.*, B-414650.11, B-414650.15, May 30, 2018, 2018 CPD ¶ 199 (finding that the selection official failed to demonstrate a reasonable basis for finding that awardee's strengths to be beneficial while not finding similar strengths of protester to be similarly beneficial)

GAO: Successful Protests Involving 8(a) Contractors (2019)

- Agency **failed to look behind the adjectival ratings** in making its selection decision; evaluation **record contained no explanation** for why the proposals were determined to be technically equal.
- Agency's **price realism analysis was unreasonable** where the record did not show that the agency considered awardee's lower pricing in the context of the firm's technical approach. Also, agency's **selection decision is flawed** where the record shows that the source selection authority found the proposals technically equal by **simply comparing adjectival ratings without qualitatively assessing the underlying merits** of the technical proposals.
- Protest that the agency unreasonably found a protester's proposal unacceptable based on the failure to submit a password prior to the proposal due date to decrypt a required document in the proposal is sustained where the encrypted document related solely to responsibility and where **the agency had both the document and the password in its possession prior to evaluating the protester's proposal.**
- Protester challenging the agency's past performance evaluation is sustained where the agency **failed to consider the relevancy of vendors' prior efforts.**

GAO: Successful Protest Grounds (2019)

- Improper interpretation of solicitation
- Inadequate evaluation documents
- Disparate treatment of offerors
- Unmitigated OCI of awardee's sub
- Failure to consider awardee's non-compliance with testing requirements
- Failure to document risks of awardee's proposal
- Flawed/absent tradeoff analysis
- Flawed/absent price reasonableness analysis
- Agency applied "different levels of scrutiny"
- Waiver of material requirement not transmitted to all offerors
- Competitive prejudice: awardee's sub hired former government employee that made oral presentation
- Failure to document bases for corrective action
- Misleading protester regarding price during discussions
- Failure to consider protester's satisfaction of facility clearance requirements
- Improper/unreasonable application of evaluation criteria
- Failure to reserve procurement opportunities for SDVOSBs
- Flawed cost realism analysis
- Flawed cost/price evaluation based on unreasonable "selective sample"
- Failure to document best value determination and award to higher price technically superior proposal

Bid Protests at the Court of Federal Claims: Standards and Stats

- A court may set aside a corrective action if it “lack[s] a rational basis”
- The rational basis standard is highly deferential; “a court is not to substitute its judgment for that of the agency”
- An agency need only provide a “coherent and reasonable explanation” for its action
- A court will uphold even an agency “decision of less than ideal clarity if the agency's path may reasonably be discerned”

Emergency Planning Mgmt. Inc. v. United States, No. 19-1024, 2019 WL 4854372, at *2 (Fed. Cl. Oct. 2, 2019)

Table 5.3
DoD Bid Protest Outcome Measures at COFC, CYs 2008–2016

Outcome Measures	All Cases
Observations	459 ^a
Sustained rate	9%
Appeals rate	12%
Percentage of appealed cases sustained	20%

SOURCE: RAND analysis of COFC data.

^a The number of observations for cases with decisions is lower than in Table 4.3 because some cases were not yet decided.

- Between 2008-2016, sustained cases in any year ranged from one to nine
- Sustained rate appears to be declining



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10 Decisions in 20 Minutes

GAO Defers to SBA's Interpretation of Runway Extension Act – 3 Years Is Still the Rule

Background

- Runway Extension Act amended Small Business Act to change receipts-based size standards from a 3 year to 5 year lookback calculation, without affecting how receipts are calculated
- June 24, 2019, SBA published a proposed rule implementing Act (after taking position that Act did not apply to SBA)

The Protest

- **OASIS Solicitation.** GSA takes position that until SBA issues further direction, it will apply the previous 3-year standard
- Protesters allege that GSA's solicitation does not comply with the Act because the Act took effect immediately. Per Supreme

Court precedent: “absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment”

- GAO granted “deference to SBA's interpretation of Small Business Act, particularly with regard to its role in establishment, amendment, and interpretation of small business size standards”

Takeaway

- Act is ineffective or at least inapplicable until SBA issues a final rule formally promulgating regulations implementing Runway Extension Act

TechAnax, LLC; Rigil Corp., B-408685.22; B-408685.25 (Aug. 16, 2019)

Satisfying Small Business Participation – Be Careful With Your Calculation

Background

- Peraton protests award to Engility Corporation for failing to meet required small business participation percentage
- RFP included “25 percent minimum requirement for small business participation to be evaluated on a pass/fail basis”
- RFP required offerors to specify “cost,” “fee” and “price” for SB subcontractors and prime
- Air Force argues that “total small business expenditure” means cost to the Government, including prime fee
- Peraton argues that including prime fee allows prime to pay less to SB subcontractors

Decision

- GAO agrees with protester:

- “[I]t is readily apparent that the purpose of a small business subcontracting requirement is to assess the extent to which an offeror proposes small businesses to actually perform, and be paid for, the work required under a solicitation. Therefore, we find that the agency’s interpretation of the term “total small business expenditures”—that is, **allowing money charged to the government as fees for the large business prime to be counted as payment to small businesses for work performed by small businesses—is plainly unreasonable**”
- GAO also rejects Engility’s argument that allowing LB offerors to count fees will incentivize LBs to subcontract with small business

Peraton, Inc., B-417358; B-417358.2
(June 11, 2019)

GAO Affords Agency High Level of Deference in Review of Sole Source J&A

Background

- RFP for aerial drop systems: “JPADS 2K”
- Army receives 2 responses to notice of solicitation, concludes that Wamore’s responses are insufficient
- Army prepares sole source J&A
- J&A must have “sufficient facts and explanation” to support use of sole source award
- Wamore protests, asserts:
 - it owns data rights to JPADS 2K system (relies on lawsuit pending relating to that challenge)
 - Army’s J&A was not reasonable

Decision

- GAO concludes that Army CO performed reasonable inquiry to justify sole source
 - CO investigated data rights, funding of prior JPADS projects, updates to JPADS systems
 - GAO determines CO did enough to conclude which party could supply rights to system

Takeaway

- GAO will defer to agency technical determinations, analysis, inquiry
- GAO will not postpone protest based on concurrent, private dispute

Wamore, Inc., B-417450; B-417450.2
(July 9, 2019)

Contractors May Hire Former Government Employees to Advise on Procurements

Background

- Marine Corps IDIQ MATOC for multiple Marine Corps programs
- RFP called for offerors to show acceptable technical approach addressing 220 page “Marine-Air Ground Task Force Staff Training Program” (“MSTP”), which included an oral presentation
- Obsidian’s proposal included subcontractor whose briefing team included a former MSTP official
- CO concludes that if MSTP officials appears at presentation, Obsidian will be excluded
- Obsidian uses official at presentation, CO excludes Obsidian from competition, protest follows

Decision

- GAO disagrees with exclusion:
 - a person’s **familiarity** with the work required by a solicitation is not, by itself, evidence of an unfair competitive advantage; there must be “**hard facts**” showing that the person had

access to non-public information that could provide an **unfair advantage**

- offerors were not competing for a single award; each qualified offeror would receive an IDIQ contract; Obsidian did **not diminish the potential for the Corps to find other offerors’ proposals acceptable**
- “record fails to establish that the protester had **access to competitively useful non-public information** that would justify excluding the company from the competition”

Note:

- GAO reached this conclusion even though the former official supposedly had knowledge about the recent MSTP revision, MSTP’s budget, and the incumbent contractor’s performance
- Before leaving Government service, former ethics official obtained ethics letter from DAEO that he could represent Obsidian

Obsidian Solutions Group, LLC, B-417134;
B-417134.2 (March 1, 2019)

Diligently Pursue the Debriefing

Background

- Army RFP for armor hardware, turret systems, platform integration kits
- Loc excluded from competitive range on Sept. 11, requests a pre-award debriefing
- Army offers a post-award debriefing alternative because “different information would be available”
- Loc declines pre-award debriefing
- Feb 7, Loc learns of award, Army provides debrief on March 22, Loc protests
- Loc asserts it first learned bases of protest at March 22 protest, therefore timely

Rule

- The Competition in Contracting Act requires **pre-award debriefing** if requested by the offeror within **three days** of the notice of exclusion
- GAO requires offerors to protest within ten days of when they first knew or should have known the

basis for protest—**or** within ten days of a required debriefing

GAO’s Decision

- Loc’s debriefing was not a “required debriefing” under the law—and therefore, Loc’s protest was untimely
- “[Our reasoning] does not suggest that protesters may not file protests on the basis of information learned in non-required debriefings, but rather concludes narrowly that a protester **fails to diligently pursue its protest** when it declines to receive a required pre-award debriefing, and instead waits until after award to receive a debriefing. In effect, a **protester should have known**, prior to award, about any grounds of protest that it would have discovered had it requested a required pre-award debriefing”

Loc Performance Products, Inc., B-417431
(April 22, 2019)

Reliance Upon Past Performance of Corporate Affiliate Reaffirmed: “Meaningful Involvement”

Background

- DHS RFP for commercial protective security officer services allowed submission of 3 past performance references; for offerors proposing a teaming arrangement, RFP permitted 3 additional references for partners and subcontractors
- In discussions, Agency asks Triple Canopy (“TC”) how Centerra will have “meaningful involvement” in performing work
- Centerra was acquired by Triple Canopy prior to RFP, making TC and Centerra corporate affiliates
- Through discussions, Agency reasons that TC will have meaningful involvement through personnel who performing incumbent contract
- Protester asserts that Agency:
 - conducted unequal discussions
 - erred in attributing Centerra’s past performance to TC because TC did not include Centerra past performance information in proposal

Decision

- Discussions were equal and tailored to each offeror
- “The past performance of an affiliated company may be attributed to an offeror where its proposal demonstrates that the resources of the affiliate will affect the performance of the offeror”
- “The relevant consideration is whether the resources of the affiliated company, particularly its workforce, management, facilities or other resources, will be provided or relied upon for contract performance, such that the affiliate will have **meaningful involvement in contract performance**”

Universal Prot. Serv., LP DBA Allied Universal Sec. Servs., B-417376.2 (June 20, 2019); see also Carolina Linkages, Inc. d/b/a Safe Ports, Inc., B-417079 (Jan. 24, 2019) (Protest challenging agency's evaluation of joint venture's past performance based on past performance examples performed by the constituent members of the joint venture is denied where nothing in the solicitation prohibited the agency from evaluating those examples)

8(a) Status: Determined at Time of Order, Not Time of Contract Award

Background

- Incumbent MIRACORP protests award by DOE of delivery order to RiVidium, an 8(a) SB, under GSA schedule contract
- Agency argues that protester not an interested party because protester graduated from 8(a) program by due date for offers
- Protester responds that because it was 8(a) at time of contract award, it should retain 8(a) status for all solicitations
 - **13 CFR 121.404:** “If the business is small at the time of offer for the Multiple Award Contract, it is small for each order issued against the contract, unless the contracting officer requests a new size certification in connection with a specific order”

Note: *Set aside was at order level, not schedule contract level*

- SBA chimes in, orders under the contract only can be awarded to firm verified as 8(a) at time offers are due on the order

- Relies on regulation that applies when orders set aside for 8(a) participants, but contract was not

Decision

- **GAO agrees:** “Although MIRACORP held a PSS contract, its PSS contract was not reserved for 8(a) participants” and it was therefore “not an interested party for the purposes of challenging DOE’s evaluation and award determination”

Takeaway

- A company’s small business status is usually based on the date of the initial proposal for the underlying Schedule contract itself, although there are exceptions, and recertification is required after five years
- For 8(a) purposes, **eligibility is determined as of the date for offers on the order**

MIRACORP, Inc., B-416917 (January 2, 2019)

Prohibiting MP JV Reliance on Subcontractors is “Unduly Restrictive of Competition”

Background

- GSA RFP for multiple award IDIQ OASIS contracts, set aside for SBs
- RFP requires offerors to submit relevant experience
- For MP JVs, offerors may identify projects performed by individual JV members, but limits number of projects that may be identified by large JV member
- Ekagra protests:
 - the RFP unreasonably limits extent to which MP JV offerors can rely on the experience of the LB mentor firm
 - the RFP improperly prohibits JV offerors from forming a contractor teaming arrangement whereby the offeror relies on the experience of subcontractors that are not one of the JV members

Note: SBA weighs in: rules do not specifically address “the relative consideration that an agency must give to the past performance of a large business mentor in a mentor-protégé joint venture, as compared to a small business protégé”

Decision

- Agency had rational basis for limitation on experience of LB firm
- “[W]e conclude that the solicitation’s limitation on the ability of a joint venture to submit a proposal as a CTA that relies on the experience of subcontractors that are not members of the joint venture is unduly restrictive of competition”

Ekagra Partners, LLC, B-408685.18
(Feb. 15, 2019)

Challenges to Omissions, Ambiguities in Solicitation Must Be Timely Protested

Background

- **Sept. 6:** Army IFB for FFP K for maintenance and dredging work
- **Nov. 1:** Cashman, 4 other bidders submit timely bids; all bids exceed IGE by 25%
- **Dec. 11:** Cancels IFB, converts to negotiated procurement
- **March 19:** Cashman asks Corps to provide time to perform test digs
- **April 10:** Agency declines request
- **April 12:** Cashman protests that solicitation fails to provide sufficient geotechnical data (due date for proposals is April 17)
- **April 18:** Agency amends solicitation clarifying basis of award: price is only evaluation factor; proposal deadline extended to April 23
- **April 22:** Cashman files supplemental protest that ambiguity in basis of award not resolved
- **April 23:** Cashman, 4 other firms submit response to solicitation
- Agency argues that Cashman's protest is

untimely, should have been raised before submission of initial bid, prior to Nov. 1

- **Cashman:** “full scope of solicitation’s failure to include geotech data was not immediately apparent”

Decision

- “The adequacy of the agency's technical data remained the same before and after bid opening. To the extent the agency-supplied data ‘was a source of concern’ for the protester as it prepared its bid, Cashman was required to have raised this protest argument with our Office prior to the November 1, 2018, bid opening”
- Protest regarding agency’s failure to provide test dig also deemed untimely
- GAO also concludes Basis of Award is not flawed: “there is nothing incompatible, with awarding to a firm with the lowest price and who represents the best value to the agency”

Cashman Dredging & Marine Contracting Co., LLC, B-417213.3 (July 19, 2019)

Possible Limitation on Recovery of Fees

Background

- AF RFP for transport of bulk fuel — offerors required to provide 5 barges of certain size
- Protester argues:
 - incumbent awardee’s barges are too large (**technical** grounds)
 - Incumbent’s **past performance** rating is not reasonable because it has been using barges that are too small
- AF responds that protester’s reading is “too narrow,” only one barge of proper size is needed
- Then after protest proceeds, AF decides to take corrective action
- Protester argues entitlement to fees because AF unduly delayed taking corrective action on face of clearly meritorious protest

Decision

- **GAO agrees:** General rule is that protesters be “reimbursed the costs incurred with respect to all the issues **pursued**, not merely those upon which it has **prevailed**”
 - **But** when certain arguments are “so clearly severable” from the successful ones, those costs should not be paid
- GAO recommends fee reimbursement for technical argument, but not for past performance arguments
 - Possible limitation on general rule
 - What does “clearly severable” really mean in practice?

Harley Marine Services, Inc. – Costs, B-416033.4, March 15, 2019



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Protest Reform

Department of Defense Section 809 Panel Recommendations – Bid Protest Reform

- **Rec. 66:** Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured
- **Rec. 67:** Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed
- **Rec. 68:** Limit the jurisdiction of GAO and

COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, \$75,000

- **Rec. 69:** Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing

Takeaway

Although not specific to ANCs, these reform efforts are largely positive. Meritorious protests will be encouraged; bid protest processes will become more streamlined.

2020 National Defense Authorization Act

Increased Transparency for Agency Awards

- For any task order between SAT and \$5.5M issued under an IDIQ, the contracting officer shall “upon written request from an unsuccessful offeror, provide a brief explanation as to why such offeror was unsuccessful”
- Explanation would include:
 - Summary of rationale for award
 - Evaluation of significant weak or deficient factors in offeror’s offer

Changes to “Loser Pays” Pilot Program Penalty for Contractors

- 2018 NDAA proposed rule to penalize certain contractors who lose GAO protests by requiring contractor to pay Government’s costs to process protest

- Applied to contractors with revenues greater than \$250M
- Pilot program slated to start in Dec. 2019, end in Dec. 2022
- Proposed amendment to 2020 NDAA would
 - narrow penalty to “direct costs incurred by the Department in support of hearings to adjudicate covered protests”
 - delay start of pilot program to “60 days after the Secretary of Defense certifies in writing to the congressional defense committees that the Department of Defense has business systems that have been independently audited and that can accurately identify the direct costs incurred by the Department of Defense in support of hearings to adjudicate covered protests”

Thank you!



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