



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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GAO BID PROTEST OVERVIEW

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Bid Protest Statistics for Fiscal Years 2009-2013

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Cases Filed ¹	2,429 (down 2% ²)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)	1,989 (up 20%)
Cases Closed	2,538 ³	2,495	2,292	2,226	1,920
Merit (Sustain + Deny) Decisions	509	570	417	441	315
Number of Sustains	87	106	67	82	57
Sustain Rate	17%	18.6%	16%	19%	18%
Effectiveness Rate ⁴	43%	42%	42%	42%	45%
ADR ⁵ (cases used)	145	106	140	159	149
ADR Success Rate ⁶	86%	80%	82%	80%	93%
Hearings ⁷	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)	12% (65 cases)

¹ All entries in this chart are counted in terms of the docket numbers (“B” numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same “B” number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate case for purposes of this chart.

² From the prior fiscal year.

³ Of the 2,538 cases closed in FY 2013, 259 are attributable to GAO’s bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

⁴ Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

⁵ Alternative Dispute Resolution.

⁶ Percentage of cases resolved without a formal GAO decision after ADR.

⁷ Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.

RECENT GAO DECISIONS

I. Evaluations and Source Selections

- **Agency Failed to Follow Evaluation Criteria**

Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258. Protest was sustained where the agency abandoned the solicitation's evaluation scheme, which provided for a qualitative evaluation of proposed personnel, by adopting a review that assessed only whether the proposed personnel met applicable requirements. Where a solicitation provides for award on a best-value basis, as opposed to selection of the lowest-priced, technically acceptable offer, the evaluation of proposals cannot be limited to determining whether a proposal was technically acceptable.

Coburn Contractors, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230. Protest that an agency used unstated evaluation criteria in assessing as a weakness the protester's failure to submit a list of subcontractors was sustained where the solicitation did not require offerors to identify proposed subcontractors.

Sayres & Assocs. Corp., B-408253, B-408253.2, Aug. 1, 2013, 2013 CPD ¶ 206. Protest was sustained where agency misevaluated clearly presented information in protester's proposal, assigned a weakness inconsistent with the solicitation.

Exelis Sys. Corp., B-407111.5 et al., May 20, 2013, 2013 CPD ¶ 123. Protest that an agency misevaluated the awardee's staffing plan was sustained where the solicitation required the agency to consider the level of effort proposed to perform a sample task, the awardee's proposed staffing for the option years was significantly lower than that proposed in the base year, and there was nothing in the record to show that the agency considered how the awardee would perform the same requirements in the option years with substantially less staff.

Nuclear Prod. Partners LLC; Integrated Nuclear Prod. Solutions LLC, B-407948 et al., Apr. 29, 2013, 2013 CPD ¶ 112. An agency's selection decision did not reasonably reflect the solicitation's evaluation criteria where the solicitation stated that the agency would evaluate the feasibility and size of offerors' proposed cost savings, but the agency failed to make meaningful assessments regarding the majority of offerors' proposed savings.

- **Agency Applied Unstated Evaluation Criterion**

Savvee Consulting, Inc., B-408416, B-408416.2, Sept. 18, 2013, 2013 CPD ¶ 231. Although agencies properly may apply evaluation considerations that are not expressly outlined in the solicitation where those considerations are reasonably and logically encompassed within the stated evaluation criteria, protest was sustained where there was not a clear nexus between the stated criteria and the unstated consideration.

- **Unequal Treatment**

IAP World Servs., Inc.; EMCOR Gov't Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171. Protest that an agency treated offerors unequally was sustained where the agency credited the awardee's proposal with a strength without similarly crediting the protester's proposal for the same feature.

Lockheed Martin Integrated Sys., Inc., B-408134.3, B-408134.5, July 3, 2013, 2013 CPD ¶ 169. Protest that an agency disparately evaluated the protester's and awardee's proposals was denied, where the firms proposed different approaches.

- **Evaluations and Source Selection Decisions Must Be Documented**

SRA Int'l, Inc., B-408624, B-408624.2, Nov. 25, 2013, 2013 CPD ¶ __. Protest challenging the agency's technical evaluation was sustained where the record failed to demonstrate a reasonable basis for several of the agency's evaluation findings.

IAP World Servs., Inc.; EMCOR Gov't Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171. Protest was sustained where the source selection authority failed to recognize and consider the features in the protester's proposals that resulted in those firms' higher evaluation ratings.

NOVA Corp., B-408046, B-408046.2, June 4, 2013, 2013 CPD ¶ 127. Protest was sustained where the record did not show that the source selection authority substantively considered or comparatively assessed the evaluated differences between the awardee's and protester's past performance records. Although the agency identified clear differences between the protester's higher-rated past performance record and the awardee's lower-rated record, the record did not provide a basis for the conclusion that the differences were not significant.

Trailboss Enters., Inc., B-407093, Nov. 6, 2012, 2013 CPD ¶ 232. Protest was sustained where a solicitation provided for a comparative qualitative evaluation, and the record contained no evidence that the agency's evaluators and source selection official qualitatively assessed the relative merits of the offerors' respective technical approaches.

- **Agencies Cannot Ignore Solicitation Requirements**

Bahrain Telecommunications Co., B.S.C., B-407682.2, B-407682.3, Jan. 28, 2013, 2013 CPD ¶ 71. Protest was sustained where the awardee took exception to material solicitation requirements and the agency did not reasonably explain how it concluded that the awardee's quotation met the requirements. A proposal or quotation that contains an ambiguity as to whether the offeror will comply with a material requirement of the solicitation renders the proposal unacceptable.

- **Evaluation Deficient**

Nexant, Inc., B-407708, B-407708.2, Jan. 30, 2013, 2013 CPD ¶ 59. Protest challenging an agency's technical evaluation was sustained where the evaluation was based on a flawed methodology and contained numerous unreasonable conclusions. The record did not contain any explanations as to how evaluators assigned their scores. In this regard, the record did not include a source selection plan with definitions of the scoring scheme used by the evaluators. While there is no requirement for a source selection plan or pre-established definitions for use in scoring proposals, such evaluation tools can prove useful to an agency in achieving consistency in its evaluation.

- **Late Proposal**

JV Derichebourg-BMAR & Assocs., LLC, B-408777, Nov. 20, 2013 CPD ¶ 269. Agency properly rejected protester's proposal as late where the protester submitted its proposal via e-mail but failed to include its price proposal as an attachment, and the agency did not receive the protester's price proposal until after the designated closing time for receipt of proposals.

- **Agency Failed to Respond to Protester's Arguments**

Grunley Constr. Co., Inc., B-407900, Apr. 3, 2013, 2013 CPD ¶ 182. An agency's evaluation of the protester's proposal was not reasonable where the evaluation appeared inconsistent with the record, and the agency failed to explain the inconsistencies or to adequately respond to the protester's assertions.

- **Prejudice**

IntegriGuard, LLC d/b/a HMS Federal-Protest and Recon, B-407691.3, B-407691.4, Sept. 30, 2013, 2013 CPD ¶ 241. Protest that an agency provided the protester with inadequate discussions was denied because the record did not establish competitive prejudice where the protester did not explain or allege that it would have changed its proposal in response to the discussions it thought it should have been provided.

Savvee Consulting, Inc., B-408416, B-408416.2, Sept. 18, 2013, 2013 CPD ¶ 231. The record demonstrated a reasonable possibility of prejudice where an agency's evaluation was flawed in several areas such that the errors raised the possibility that the protester's quotation might have been viewed by the agency as technically superior to the awardee's quotation, thereby requiring a price/technical tradeoff analysis as part of the selection determination.

Sentrillon Corp., B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207. Protester suffered prejudice from the agency's misleading discussions where the record did not support the agency's argument that it would have found the protester's proposal technically unacceptable based on other evaluation concerns, even if discussions had been properly conducted.

II. Price and Cost Evaluations

- **Evaluating or Comparing Relative Costs**

Axis Mgmt. Group LLC, B-408575, Nov. 13, 2013, 2013 CPD ¶ 247. An agency's price evaluation was unreasonable where the solicitation allowed offerors to propose a technical approach to satisfy the agency's requirements, and the agency improperly normalized labor hours and labor mix in its price evaluation, which had the effect of ignoring the protester's unique technical approach to satisfying the agency's requirements. Normalization is not proper where varying costs between competing proposals result from different technical approaches that are permitted by the solicitation.

- **Price and Cost Evaluations Must Be Consistent With Solicitation**

Emergint Technology, Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295. Protest was sustained where a solicitation for the issuance of a fixed-price time-and-materials task order did not provide for a price realism evaluation, yet the agency discounted the protester's low price in the selection decision based on the agency's conclusion that the protester's low price posed performance risk and reflected a lack of understanding.

Triad Int'l Maintenance Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208. An agency in its price evaluation unreasonably considered whether the protester's fixed price was too low for its approach where the solicitation did not provide for considering price realism.

- **Price Realism**

Optex Systems, Inc., B-408591, Oct. 30, 2013, 2013 CPD ¶ 244. Although there generally is no requirement for agencies to review prices for realism before competitively awarding a fixed-price contract, where a solicitation provides that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding and that the agency may reject proposals for offering prices that are too low, the agency is imposing on itself an obligation to review prices for realism.

Science Applications Int'l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310. Protest was sustained where a solicitation provided for evaluating offerors' prices for realism, the awardee's price proposal indicated that its low price was due to a particular technical approach, and the agency did not reasonably consider this technical approach in conducting its price realism assessment.

III. Discussions

- **Inadequate/Misleading Discussions**

Sentrillion Corp., B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207. Protest that an agency's discussions were not meaningful was sustained where the record showed that

the agency failed to inform the protester of a deficiency that was present in both the protester's initial and revised proposals.

Nexant, Inc., B-407708, B-407708.2, Jan. 30, 2013, 2013 CPD ¶ 59. An agency conducted misleading discussions where the agency failed to convey its actual concerns to the protester in a manner that would have enabled the protester to meaningfully respond to the evaluated weaknesses identified in its proposal.

- **Corrective Action**

Nuclear Prod. Partners, LLC, B-407948.9, Sept. 24, 2013, 2013 CPD ¶ 228. Protest of an agency's implementation of corrective action with respect to the adequacy of discussions and limitations on proposal revisions was dismissed as premature, based on the agency's representation that neither its requirements nor the evaluation scheme had changed, such that we did not view the ground rules of the procurement to have changed in a manner that warranted our pre-award review.

IV. Past Performance Evaluations

- **Past Performance Evaluations Must Be Consistent With Solicitation**

Silverback7, Inc., B-408053.2, B-408053.3, Aug. 26, 2013, 2013 CPD ¶ 216. Protest challenging the evaluation of the awardee's past performance record as not reflecting performance in every area of the solicitation's performance work statement was denied where the solicitation did not require offerors to demonstrate that they had performed the exact same requirements.

Supreme Foodservice GmbH, B-405400.3 *et al.*, Oct. 11, 2012, 2012 CPD ¶ 292. Protest challenging agency's assignment of highest possible experience/past performance rating to the awardee's proposal was sustained where solicitation called for comparison of offerors' most relevant prior contracts to a defined dollar threshold, on an individual basis, and the record showed that none of the awardee's contracts met the dollar threshold.

- **Past Performance Evaluations Must Be Documented**

Kollsman Inc., B-406990, B-406990.2, Oct. 15, 2012, 2013 CPD ¶ 2. Protest challenging the evaluation of the awardee's past performance as providing "substantial confidence" was sustained where there was no explanation in the record supporting the reasonableness of this rating in view of reported problems. The agency's *post hoc* arguments provided at a GAO hearing did not provide a reasonable basis for the agency's evaluation where they were contradicted by the record.

V. Federal Supply Schedule (FSS) Purchases

- **Agency Cannot Ignore Technical Requirements**

J. Squared Inc., dba University Loft Co., B-407302, Dec. 17, 2012, 2013 CPD ¶ 9. Agency's acceptance of a quotation that failed to conform to a material solicitation requirement was unreasonable; a technically unacceptable quotation may not form the basis for award.

VI. Organizational Conflicts of Interest (OCI)

- **Impaired Objectivity OCI**

Pragmatics Inc., B-407320.2, B-407320.3, March 26, 2013, 2013 CPD ¶ 83. Protest that the awardee had an unmitigable impaired objectivity OCI was denied where the agency reasonably concluded that the awardee's performance as a subcontractor on a prior software development contract would not affect its ability to render impartial advice to the government. The concern in impaired objectivity situations, including evaluation of products or services, is that a firm's ability to render impartial advice to the government will be undermined by its relationship to the product or service being evaluated.

- **Contracting Officer's Response to an OCI**

Networking & Eng'g Technologies, Inc., B-405062.4 et al., Sept. 4, 2013, 2013 CPD ¶ 219. Protest that the awardee should have been excluded from the competition based on an OCI was denied where the record showed a thorough investigation by the contracting officer that revealed no evidence to indicate the existence of a potential conflict.

- **OCI Waiver**

AT&T Gov't Solutions, Inc., B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45. Protest challenging the agency's evaluation of potential unequal access to information and impaired objectivity OCIs was dismissed as academic where the agency waived any OCI concerns under the authority granted by section 9.503 of the Federal Acquisition Regulation (FAR).

VII. Procedural and Jurisdictional Matters

- **Timeliness**

Gov't Acquisitions, Inc., B-408426, B-408426.2, Sept. 17, 2013, 2013 CPD ¶ __. A protester's comments and supplemental protest filed at 5:30 p.m. and 35 seconds on the tenth day after receipt of the agency's report was timely in accordance with GAO's Bid Protest Regulations that provide that a document is filed on a particular day when it is

received at GAO by 5:30 p.m. (eastern time) on that day. 4 C.F.R. § 21.0(f). For GAO filings, the time of filing will be viewed as 5:30 p.m., until the clock reaches 5:31 p.m.

- **Costs**

Marine Design Dynamics, Inc.--Costs, B-407816.2, July 3, 2013, 2013 CPD ¶ 168. GAO recommended reimbursement of protest costs where the procuring agency took corrective action after the submission of the agency's report and the parties were informed through alternative dispute resolution procedures that the protest would likely be sustained on a single ground; reimbursement was not recommended with regard to other protest grounds, because those grounds were severable from the clearly meritorious protest ground.

The Argos Group, LLC--Costs, B-406040.3, July 3, 2013, 2013 CPD ¶ 165. Protester's request that GAO recommend the amount that the agency should reimburse the protester for its protest costs was denied where the protester failed to submit a timely, adequately documented claim to the agency.

McConnell, Jones, Lanier & Murphy LLC--Costs, B-407706.3, May 28, 2013, 2013 CPD ¶ 125. Request for a recommendation that protest costs be reimbursed was denied where the agency did not delay taking corrective action in response to a clearly meritorious protest; GAO granted an extension to the original agency report due date to allow the agency to file a consolidated response to the initial and supplemental protests, and the agency took corrective action prior to the newly-established due date.

- **Jurisdiction**

Blue Origin, LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ __. GAO has jurisdiction to consider a protest challenging the terms of the solicitation for the award of a lease of federal property where the record showed that the agency would receive benefits--both tangible and intangible--in connection with the award of the lease, such that the agency was, in effect, conducting a procurement for goods and services.

Inchcape Shipping Servs. Holding, Ltd., B-402687.10, B-402687.11, Dec. 9, 2013, 2013 CPD ¶ __. Protest of the award of contracts under repurchase procedures was dismissed where the protester was suspended from contracting, and an agency may not award a contract to a suspended or debarred contractor. GAO does not review protests that an agency improperly suspended a contractor.

Controlled FORCE, Inc., B-408853, Sept. 18, 2013, 2013 CPD ¶ 226. Protest that an agency is violating the protester's intellectual property rights is dismissed because GAO lacks jurisdiction to consider disputes about infringement of intellectual property rights.

Cornishe Aviation & Maintenance, Ltd., B-408065, B-408065.2, June 7, 2013, 2013 CPD ¶ 143. Allegation that an agency's issuance of an order under, and within the scope of, a single-award, indefinite-delivery/indefinite-quantity contract reflected bias for the

contract holder concerned a matter of contract administration that was not within GAO's bid protest jurisdiction.

- **Interested Party**

DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259. Protester is not an interested party to challenge the terms of a solicitation for de facto sole-source award where the protester would not be able to provide a product satisfying the solicitation's specifications if the procurement were competed.

VIII. Task and Delivery Orders

- **Discussions**

Mission Essential Personnel, LLC, B-407474, B-407493, Jan. 7, 2013, 2013 CPD ¶ 22. Protest of the issuance of task orders was sustained where the agency identified two concerns with protester's proposal which led to its "No Go" rating, but the agency did not raise these concerns during discussions. Although FAR § 16.505 does not establish specific requirements for conducting discussions in task order competition, exchanges in that context, like other aspects of such a procurement, must be fair and not misleading.

IX. Protests concerning the Veterans Benefits, Health Care, and Information Technology Act of 2006

Phoenix Environmental Design Inc., B-407104, Oct. 26, 2012, 2012 CPD ¶ 299. Protest that the Department of Veterans Affairs (VA) violated Veterans Benefits Health Care, and Information Technology Act of 2006, and its implementing regulations when the VA issued an order to a small business concern, was sustained where the VA was aware of service-disabled veteran-owned small business (SDVOSB) concerns that appeared capable of performing the order, and the agency did not determine that it could not expect to receive two or more quotations from SDVOSB concerns at fair and reasonable prices.

X. Miscellaneous Issues

- **Brand Name**

Desktop Alert., Inc., B-408196, July 22, 2013, 2013 CPD ¶ 179. Solicitation for emergency mass notification software, products, and services that was limited to a particular brand-name product was overly restrictive where the agency failed to demonstrate a reasonable basis for the brand name restriction.

- **Brand Name or Equal**

Veterans Healthcare Supply Solutions, Inc., B-407223.2, Dec. 13, 2012, 2013 CPD ¶ 3. Agency unreasonably evaluated the protester's bid of an equal product under a brand name or equal solicitation conducted under simplified acquisition procedures where the

solicitation lacked salient characteristics and the equal product was not shown to be significantly different from the brand name product.

- **Nonappropriated Fund Instrumentality (NAFI)**

Asiel Enters., Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205. Protest of an agency's use of the public interest exception under 10 U.S.C. § 2304(c)(7) (2006) to justify transferring an appropriated fund mission essential requirement to a NAFI using a memorandum of agreement under the authority established by 10 U.S.C. § 2492 (2006) was sustained where the transfer was outside the scope of section 2492 and the public interest exception on which the agency relied was applicable only to procurements, and use of the memorandum of agreement was not a procurement.

- **Small Business Set-Aside**

TrustComm, Inc., B-408456, B-408456.2, Sept. 20, 2013, 2013 CPD ¶ 237. An agency reasonably did not terminate a contract in an acquisition set aside for small business concerns notwithstanding Small Business Administration (SBA) determination (almost 9 months after size status protest) that the awardee was other than small where there were countervailing circumstances that weighed against termination, including the delivery of required equipment that could not be obtained from the protester (the offeror next in line for award) without repeating extensive first article testing, and the resulting delay to an already delayed program would result in significant costs and adversely affect mission effectiveness.

Latvian Connection General Trading and Constr. LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 225. Protester's contention that the Small Business Act, 15 U.S.C. § 644(j)(1) (2006), requires agencies to set aside for small businesses located outside the United States, and its outlying areas, procurements valued under the simplified acquisition threshold, unless the agency is unable to obtain offers from two or more small business concerns at fair market prices, was denied where the Act is silent on its application outside the United States, and where the FAR expressly provides that the set-aside provisions of the Act apply only in the United States or its outlying areas; given the silence of the Act on its implementation outside the United States—and the silence of the SBA's regulations on the issue—GAO did not find that the validly-promulgated, long-standing regulation found at FAR § 19.000(b) was inconsistent with, or contrary to, the Small Business Act.

- **Cancellation versus Amending a Solicitation**

Latvian Connection LLC; Solution Managers Int'l—USA, LLC, B-408182.3, B-408182.4, Aug. 13, 2013, 2013 CPD ¶ 194. An agency acted reasonably in amending a solicitation, rather than canceling and reissuing the solicitation, where the nature and scope of the changes were not so substantial as to warrant the cancellation and reissuance of the solicitation.

- **Rejection for Failure to Acknowledge an Immaterial Amendment**

Infoshred LLC, B-407086, Oct. 26, 2012, 2012 CPD ¶ 298. An agency rejection of an awardee's quotation for failing to acknowledge an amendment was unreasonable where the amendment was immaterial and did not impose any legal obligations on the contractor in addition to those to which it had already agreed.

- **Randolph-Sheppard Act**

Cantu Servs., Inc., B-408012, B-408012.2, May 23, 2013 CPD ¶ 135. In a procurement conducted pursuant to the Randolph-Sheppard Act, 20 U.S.C. § 107d-3(e) (2006), an agency properly found the price offered by a state licensing agency (SLA) to be reasonable based on a comparison to a government estimate that was calculated primarily with data from the SLA's performance costs under a predecessor contract.

- **Contract Administration**

Ashland Sales & Serv. Co., B-408969, Nov. 1, 2013, 2013 CPD ¶ 256. Protest that an awardee was not enrolled in the employment eligibility verification (E-verify) system at time of contract award involves a matter of contract administration not subject to GAO's review.