



Contract Award Protest Rulings

Highlights From the GAO Report for 2019

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Every year, the Government Accountability Office (GAO) reports to Congress on its most prevalent basis for sustaining protests. It also advises Congress if any agency failed to follow GAO's recommendations. No agency failed to follow GAO recommendations during the last fiscal year.

The GAO "sustains" a protest when it recommends that the protestor receive some form of relief. The GAO's report for Fiscal Year (FY) 2018 revealed that the rate by which the U.S. Government sustained protests decreased from 17 percent in FY 2017 (99 cases) to 15 percent (92 cases).

Note: The author's examination of the GAO rulings for FY 2016 was published in the January-February 2018 issue of the *Defense Acquisition's* predecessor, *Defense AT&L*, pages 38-43; the rulings for FY 2017 appeared in the May-June 2018 *Defense AT&L*, pages 43-49; the rulings for 2018 appeared in *Defense Acquisition* magazine's July-August 2019 issue, pages 40-46.

IN FY 2019, GAO SUSTAINED (FOUND FOR THE protestor) 13 percent of the protests filed, down 2 percent from FY 2018. GAO provides its most prevalent grounds for why it sustained protests last fiscal year, they are:

- Unreasonable technical evaluation
- Inadequate documentation of the record
- Flawed selection decision
- Unequal treatment
- Unreasonable cost or price evaluation

GAO submitted its annual report to Congress for Fiscal Year 2019 in November 2019. GAO remained operational during the 35-day government shutdown between December 2018 and January 2019. The partial shutdown did not affect filing deadlines for protestors and private parties.

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Deadlines affecting agency filings were tolled during the shutdown and GAO established revised filing deadlines for those agencies affected when the appropriation lapse was resolved. Eight protests had their decisions extended due to the shutdown.

GAO provided example cases for its most prevalent grounds, as follows.

Unreasonable Technical Evaluation

GAO cites Native Energy and Technology, Inc. B-416783, as its example case for where an agency performed an unreasonable technical evaluation. In this case, the agency, United States Customs and Border Protection, sought proposals for preventative maintenance and repairs of equipment at some of its facilities. The solicitation contemplated that an Indefinite-delivery, Indefinite-quantity contract with a one 1-year base and four 1-year options would be awarded. The solicitation also informed offerors that they would be evaluated on price and three non-price factors listed in descending order of importance:

- Technical approach, which included overall technical approach and experience with overall technical approach being more important than experience
- Overall management approach
- Methodology and past performance

The solicitation informed offerors that the non-price factors when combined were significantly more important than price. The agency received nine proposals, including one from the protestor and one from the incumbent. The protestor's price was lower than the incumbent's. The agency rated the incumbent higher than the protestor in the non-price factors and awarded the contract to the incumbent (hereafter awardee). The government gave protestor a debriefing and protestor filed its protest. The GAO sustained the protest based on two of the protestor's arguments: (1) the agency unreasonably evaluated the awardee's technical proposal and (2) the award decision was unreasonable.

GAO found that the agency unreasonably evaluated the awardee's technical proposal by finding strengths that did not exist in its proposal. The agency argued that it could use its own knowledge of awardee's performance based on the prior contract it had with the agency. According to GAO, evaluation generally is limited to the proposal; however, an agency can in some circumstances use extrinsic information it is aware of such as past performance, experience, or technical acceptability in supplementing its evaluation. An agency may not assume or infer that an offeror will use a technical approach it does not provide in its proposal. An agency may also not use the inferred technical approach as a discriminator when it makes award. An agency may not give a favorable evaluation based on an

assumption that an incumbent would perform the contract in a superior manner to any other offeror.

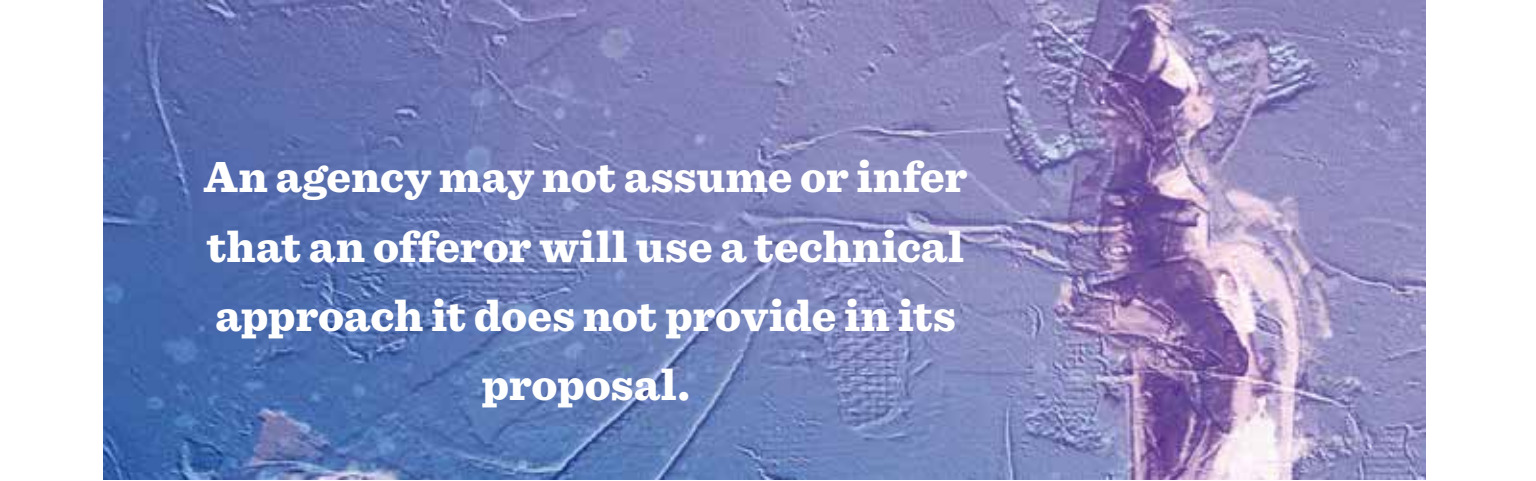
There were three discriminators in this case where the GAO found the agency improperly inferred or assumed the awardee included information in its technical approach. In the first discriminator, the Request for Proposal directed offerors to include a comprehensive preliminary Preventative Maintenance Schedule. Awardee failed to provide this schedule but the Contracting Officer assumed it would provide one each week, based on its performance in the incumbent contract.

In the second discriminator, the agency also assumed awardee would act similarly in its performance of the previous contract by uploading information in a Web-based tracking system. GAO disagreed with the agency's argument that it acted reasonably in assuming or inferring that awardee would perform the same as it did on the incumbent contract.

In the third discriminator, the agency assumed the proposal submitted by awardee included training required by the performance work statement (PWS). The Contracting Officer asserted that awardee's failure to expressly address training did not affect the award decision. GAO found no basis for this assertion since the PWS requirement was mandatory and therefore was likely to impact the award decision. GAO determined that the agency also improperly used the more favorable phrase of "real time" as it applied to the second and third discriminators when describing awardee's providing access to information as opposed to the "near real time" the awardee actually proposed. The agency was aware of the two different terms used but was unable to explain its belief that "real time" and "near real time" meant the same thing.

The agency award decision was found to have been unreasonable and that there was competitive prejudice against the protestor because of the improper evaluation of the three discriminators previously mentioned and not because of protestor's argument. The protestor's argument held that the Contracting Officer improperly relied on the technical evaluation team's report and the Source Selection Advisory Counsel's award recommendation. GAO concluded that the Contracting Officer exercised independent judgment despite not performing an independent review of the proposals and that independent analysis was sufficient.

The protestor lost on the other two arguments it raised. One argument was that the agency incorrectly evaluated its proposal. The GAO found that protestor failed to cite anything specific and that its arguments on how it was evaluated were untimely and not detailed. The other unsuccessful argument was that the agency failed to



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consider the negative past performance information of the awardee. GAO disagreed and determined that the agency did consider awardee's negative past performance and that awardee improved its performance. The agency considered the improvement in forecasting awardee's likely success in performing the contract. GAO cited the agency's discretion in this matter as well as what FAR 15.305(a)(2) says should be considered; that is the currency and relevance of the past performance information, the source of the information, context of the data, and the general trends in the contractor's performance.

Inadequate Documentation

GAO cites NavQSys, LLC, B-417028.3 as its example case where an agency inadequately documented the record. In this case, the Department of the Army, Army Materiel Command (AMC), took voluntary corrective action after the previous protestor challenged the award. Corrective action occurs when the agency informs GAO that it will attempt to resolve the issues brought by a protest filer to avoid GAO having to resolve them. In a significant number of protests, the agency employs voluntary corrective action. The agency is not required to disclose why it chooses to engage in corrective action. The agency's corrective action in this case was to terminate awardee's contract for convenience and to award it to the former protestor. As a result, the former awardee who had its contract terminated filed a protest (hereafter referred to as protestor) claiming that the corrective action was unreasonable and inadequately documented.

The protestor asked clarification questions about the facility clearance requirement prior to the initial award. The agency never responded to those inquiries. Protestor indicated it had conversations with the agency and as a result believed it was determined ineligible for award because its joint venture did not have its own facility clearance. The agency did not address the conversations with protestor but broadly claimed it was not eligible to compete. It was unclear from the record whether the agency determined the protestor was ineligible to compete for the contract or the protestor's proposal was technically unacceptable. GAO reviewed agency internal e-mails that indicated the corrective action was prompted by protestor's inability

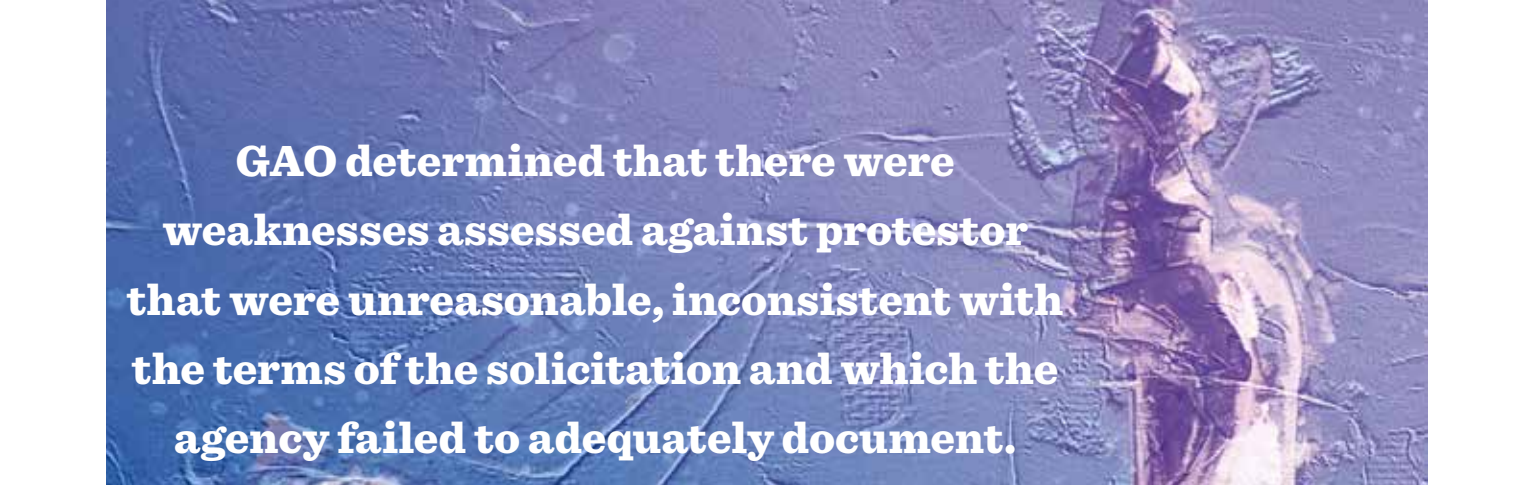
to meet the facility clearance solicitation requirement. The record had no documentation about the agency's determination of protestor's competitive eligibility so the GAO requested additional documentation relating to the agency's conclusion that protestor did not meet the facility clearance solicitation requirement. The agency stated that there were no additional documents.

GAO found that the agency did not clearly interpret the facilities clearance provision or explain how it applied to the protestor's proposal. The agency reevaluated proposals when it said it would not, then failed to document its findings. As a result, the GAO was unable to conclude that the agency had a reasonable basis for its corrective action (the termination of protestor's award).

Flawed Selection Decision

GAO cites Harmonia, Holdings Group, LLC, B-417475 as its example case of a flawed selection decision. In this case, the agency, the Department of Agriculture's Animal and Plant Health Inspection Service, issued a Request for Quotation as a small business set-aside to vendors holding contracts under the General Services Administration Federal Supply Schedule (FSS) for Information Technology. The award was for a task order to three software systems with an estimated value of \$15 million and a ceiling of \$19 million over a base and four option years. The protestor lost the competition and brought a protest asserting several arguments to include issues with the agency's cost/price evaluation; the agency's past performance evaluation; the agency's assessment of weaknesses to protestor's quotation and the agency's best value trade-off decision.

GAO sustained part of protestor's challenge of the agency's cost/price evaluation. It dismissed protestor's claim that the agency conducted an improper price realism analysis but it did agree that the agency's evaluation of its optional contract line item numbers (CLINs) was unreasonable. The agency reviewed hourly labor rates of five key personnel positions located on CLINs in reaching its conclusion that awardee's cost was lower. Using the five rates to draw the conclusions about the total cost of performance of a 5-year task order was what GAO



GAO determined that there were weaknesses assessed against protestor that were unreasonable, inconsistent with the terms of the solicitation and which the agency failed to adequately document.

considered unreasonable. GAO pointed to the lack of clarity in the contemporaneous record as to why the agency only selected five of the six key personnel to evaluate and how those five represented the overall proposals. The methodology the agency used failed to consider the structure of each offeror's proposed hourly rates and proposed positions. The agency did not consider the estimated level of effort such as the number of hours for each labor category or specific tasks that would be performed under the optional CLINs.

The GAO disagreed with the agency's argument that it was clear in how it would evaluate the cost/price since the solicitation's plain language provided for a general evaluation of the cost/price factor and did not have a specific methodology for evaluating the optional CLINs. The plain language of the solicitation directed offerors to provide hourly rates but to not provide total amounts for the optional CLINs because they were to be priced separately at the time the option was exercised. The solicitation as it was written did not enable the agency to use the optional CLINs to conduct a reasonable evaluation of total price.

GAO disagreed with protestor's argument that the awardee's quotation should be disqualified as noncompliant for failing to identify past performance references similar in size scope and complexity to the contract requirements because the solicitation used non-mandatory language in that the references provided "should" be similar in size, scope, and complexity. GAO did agree with the protestor's argument that the evaluation was inconsistent with the solicitation. The agency was to evaluate the past performance in part upon the degree that the past performance examples reflected performance of projects similar in size, scope and complexity to the prospective contract. Awardee was scored higher than protestor in its past performance but there was no documentation justifying the evaluation to support the higher rating. There was nothing in the record to support whether or how the agency evaluated the past performance as required by the solicitation (the degree to which the references provided by offerors were similar in size, scope and complexity to the solicitation requirements). The only discussion on the agency's evaluation was in the award determination where it stated that the

technical evaluation board completed the initial past performance ratings based on past performance information included in the offeror's proposals. The awardee was assessed a strength for working on "larger, better systems before" without documentation showing the basis or reference used to conclude the existence of this strength.

The agency tried to justify its evaluation through its use of additional information from other sources such as the Past Performance Information Retrieval System and firsthand knowledge of two key personnel of awardee and of a prior contract held by the protestor. This failed as none of this additional information was relevant to evaluating the degree to which the past performance examples given reflect performance of projects similar in size, scope, and complexity to the requirements of the solicitation.

Weaknesses assessed: GAO sustained the protestor's arguments on some of the weaknesses it asserts were unreasonably assessed to its proposal under all four of the non-cost/price factors. GAO determined that there were weaknesses assessed against protestor that were unreasonable, inconsistent with the terms of the solicitation, and which the agency failed to adequately document. It found that the agency's responses were vague and did not meaningfully explain the assessment of the weaknesses given. The first weakness GAO determined was improperly assessed against protestor was under the technical and management approach factors and was for its failure to show it was the best approach. The solicitation did not require an offeror to show it was the best. The second weakness that GAO found was improperly assessed against the protestor was the weakness given for protestor lacking "soft skills." The Technical Evaluation Board (TEB) assessed this weakness under the management approach factor whereas the selection official assessed the weakness under the technical approach factor. The agency could not provide an explanation for this discrepancy. It did provide an explanation to why the weakness was assessed under the management approach factor but did not explain how that related to the technical approach factor requirements.

GAO found for the protestor because the discrepancy between the selection official and the TEB was

undocumented and because the agency record did not support the claim that the weakness was reasonably related to either the technical or management approach. The third weakness GAO determined was improperly assessed was in the experience factor and was attributed to an inadequate number of full-time equivalents that protestor proposed for help desk. GAO found it improper that the agency looked to its own estimates of staffing levels required for performance to be satisfactory but did not disclose its overall staffing estimates to the protestor. The agency also failed to conduct discussions regarding the discrepancy and did not look beyond the bottom-line numbers when evaluating. The overall staffing was not addressed by the TEB but only by the selection official in the award determination. The fourth weakness GAO determined was improperly assessed against protestor was under the management approach factor and was for protestor showing a lack of diligence in its initial quotation even though it revised the quotation and, according to the agency, was able to show a better understanding. GAO found that the agency acted unreasonably considering there were discussions and the initial quotation was revised.

Best value trade-off: Finally, GAO sustained protestor's argument that the agency's best-value tradeoff decision and award was unreasonable and inadequately documented. Its basis was that there were numerous evaluation errors addressed in the protest and the agency failed to adequately document its decision. For the most part, the record failed to show any discussion about the qualitative aspects of the quotations. The GAO could not see where the agency looked meaningfully at awardee's quote as being the best value. It was the higher-priced quote and there was simply no evidence to support award of the price premium

Unequal Treatment

GAO cited ManTech Advanced Systems International, Inc., B-416734 for its example of where an agency, Department of Homeland Security, U.S. Immigration and Customs Enforcement, exhibited unequal treatment. In this case, GAO sustained the protestor's argument that the agency unequally evaluated its quote. The agency evaluation assigned awardee and protestor acceptable ratings under the non-price factors. Award was not made to protestor even though its quote was approximately \$1.2 million less than awardee because the agency thought that the awardee offered the best value. The work required the contractor to provide senior-, mid-, and junior-level intelligence analysts, and there were experience requirements and clearance requirements for each. The offerors were required to demonstrate competitive methods of personnel retention for junior personnel and then as a separate requirement were to demonstrate competitive methods of personnel retention for qualified and cleared personnel. Protestor's quote

did not detail retention techniques that were specific to any type of personnel but that seemed to apply to any of its employees. GAO found that the agency was reasonable in determining this to be a weakness. GAO also found that the agency acted reasonably in determining the second weakness, which was protestor's use of career development as a retention technique. The agency acted improperly when it did not assess the same weakness to awardee who also used company-wide benefits as retention techniques for cleared personnel. GAO determined that the agency did not have a basis to evaluate the quotations disparately and this resulted in competitive prejudice.

GAO dismissed the protestor's argument that the agency improperly made its source selection decision. Protestor's argument was that its lower price was a determining factor because the quotes were equally rated under the staffing approach factor. GAO found that the solicitation did not indicate price was a determinative factor in any scenario. The language in the solicitation that "price becomes more important" did not mean "becomes determinative."

Unreasonable Cost or Price Evaluation

GAO cited Shearwater Mission Support, LLC, B-416717 as its example case of an unreasonable cost or price evaluation. In this case, the GAO determined that the agency, the Department of the Navy, Naval Facilities Engineering Command, performed an improper price realism analysis leading it to conduct misleading discussions with the protestor. The solicitation was for an 8-year fixed-price contract consisting of a 1-year base period and seven 1-year option periods. The solicitation advised offerors that there were five non-price factors that would be evaluated: recent, relevant experience of the firm; technical approach; management approach; safety; and past performance on recent, relevant projects. The first four factors were of equal importance to the past performance factor and all when combined were approximately equal to price. The protestor argued that the evaluation terms of the solicitation authorized a price reasonableness evaluation, not a price realism analysis. GAO agreed citing ERIMAX, Inc. B-410682 (January 22, 2015) for the premise that agencies are not required or permitted to conduct a price realism analysis evaluation when awarding a fixed-price contract unless there is a solicitation provision providing for one. In this case, the solicitation did not allow for a price realism analysis.

The agency believed that it did not perform a price realism analysis. GAO disagreed based on how the agency conducted its evaluation. In its evaluation, the agency compared proposed prices (called annexes) to the Independent Government Cost Estimate (IGCE). It applied a percentage variance to determine if a proposed price was unreasonably low or high. The agency conducted the same evaluation when it received final proposal revisions (FPRs),

resulting in its requesting second FPRs. GAO deferred to the contemporaneous evaluation record, which is of note as it gives GAO a window into the decision-making thoughts and processes of an agency during an acquisition process. Therefore, it is given significant deference. In this case, the contemporaneous record showed that some of protestor's prices were considered unreasonably low because of the concern that they were "unrealistic" and "may increase performance risk or indicate an inherent lack of understanding," which are features of a price realism evaluation. In contrast, a price reasonableness evaluation does not determine whether a price is too low.

Misleading discussions: The protestor responded to discussion questions with the agency regarding its initial proposal and FPR that led the protestor to increase the prices that were identified as unreasonably low. The price adjustments ultimately resulted in its proposal being greater than awardee's. The higher price was the primary reason the protestor was not selected for the contract award. GAO found for protestor as it could prove that its

price was increased as a direct result of the discussion questions, which were based on an improper price realism analysis. The protestor's price increases directly correlated to its price being higher than awardee's. As a result, protestor was misled to its disadvantage.

Conclusion

From year to year, we face consistent themes on how evaluations should be conducted. It is sometimes difficult to see where our evaluations may not comply with GAO expectations. The example cases provide a few scenarios that may be useful to compare with our current procurements. Taking these decisions into account, we can perhaps avoid making some of the same errors in our evaluations and award decisions. Creating a fair and transparent procurement environment, affording meaningful discussions, and adequately documenting the record are a few of the repeated best practices that we can hope will reduce the number of future protests sustained by GAO.

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