

Trends In Fiscal 2020 Bid Protests Sustained By GAO: Part 1

By **Joseph Berger and Thomas Mason**

The bid protest decisions sustained each year by the U.S. Government Accountability Office add to the cumulative case law that guides agencies on the conduct of their procurements and informs disappointed offerors or potential bidders on the potential grounds they may have to file a protest.

The protest decisions sustained by the GAO in fiscal year 2020 included a mix of the usual sustainable protest grounds, most often addressing proposal evaluations concerning technical, past-performance, cost or price issues, and/or reasoning of the award decision. The sustained grounds also included significant decisions on disparate treatment, key personnel, conflict of interest, corrective action, solicitation challenges, and the scope of contract award or eligibility of the awardee.

In part one of this two-part article, we summarize decisions involving the common sustained grounds addressing proposal evaluations based on technical, past-performance or corporate-experience factors, cost or price issues, and/or reasoning of the award decision.

In part two, we will summarize the remaining issues that formed the basis for sustained decisions in fiscal year 2020, including significant decisions on key personnel, conflict of interest, corrective action, solicitation challenges, and the scope of contract award or eligibility of the awardee.

By our informal survey, the GAO's sustained protests in fiscal year 2020 are accounted for by about 40 to 45 written GAO decisions, each addressing an individual procurement or competition — which may have involved multiple protests counted by docketed B numbers. The GAO's docket reflected about 80 B-numbered protests that were sustained.

At the end of the fiscal year, not all these decisions had been released publicly by the GAO. We summarize here — informally, and not counting by B number — the published sustained decisions released thus far and their sustained grounds.

As in most years, most sustained decisions involved a post-award protest concerning proposal evaluation. Among these, at least 18 decisions involved technical evaluations in a sustained ground; at least eight involved past performance or a similar corporate experience factor; and at least eight involved cost or price factors. Often these decisions involved multiple sustained grounds, which might encompass multiple evaluation factors.

At least four decisions involved the proposal and availability of key or incumbent personnel, a recurring issue that, when those personnel are or become unavailable during the competition, is problematic for proposing offerors and agency evaluators.

At least two decisions involved a conflict of interest, including one that addressed the implications of informal relationships between government and industry personnel.

At least three involved corrective action, an important issue due to its prevalence as an agency response to GAO protests — reflected in part by the GAO's effectiveness rate, which in fiscal year 2019 was 44%.



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At least seven decisions involved solicitation challenges, a relatively high number of written decisions that reflects a more commonly filed protest issue, and highlights the opportunity for offerors to improve the solicitations to which they respond by protesting the terms.

At least five other decisions were based on the scope of contract award or the eligibility of the awardee.

When fiscal year 2020 closed at the end of September, the GAO's protest docket reflected that the GAO had closed about 2,110 protests, counted by B-number. Of these, 80 were counted as sustained and 490 as denied — indicating decisions on the merits.

While the GAO has not yet released its annual report to Congress with official numbers for fiscal year 2020, the number of protests closed, as reflected on the docket, would be lower than fiscal year 2019's 2,200, which was the lowest number in a decade

Fewer protests closing in fiscal year 2020 would reflect in part the impact on the protest system of the COVID-19 pandemic, which slowed litigation filings and disputes in general during 2020.

A lower number of protests might reflect not only difficult times, but also the relatively high amount of total federal contract spending in fiscal year 2020, which may set a record high as a result of the pandemic, and related spending to fight the coronavirus and support the economy with stimulus measures.

When more contracting opportunities are available to companies with government business, the pressure to protest may be lower. Protest numbers may rise if total spending falls in future years.

We examine the sustained grounds in fiscal year 2020 decisions in more detail below.

Technical Evaluations

At least 18 GAO sustained decisions in fiscal year 2020 involved the evaluation of a technical proposal or a technical evaluation factor in a sustained ground.[1] Some of these decisions also involved cost/price, past performance or another related evaluation factor in a sustained ground. These decisions also often addressed, as a related matter, the reasoning of the award decision or best-value tradeoff.

The subject matter of these decisions, often involving U.S. Department of Defense departments and agencies, ranged from IT services to grounds maintenance and guard services at naval facilities, replacement digital-for-analog power inverters for U.S. Navy helicopters, logistics support for U.S. Army rotary aircraft in Afghanistan, and DOD fuel transportation services.

In IAP Worldwide Services Inc., involving an Army request for proposals for cyber support for emerging technologies and cyberspace research at an Army complex in Indiana, the GAO sustained a protest of technical evaluations based on two grounds.[2]

First, the GAO sustained a protest ground challenging a strength assigned to the awardee's experience recruiting local personnel in Afghanistan because, as part of the technical evaluation, the agency failed to document its basis for concluding this experience was relevant to the Army's requirement for the recruitment of highly qualified cybersecurity and

cyber-operations personnel in Indiana.

Second, the GAO sustained a protest ground challenging a strength assigned for the awardee's proposal to self-perform 100% of the work without subcontracting, because the agency did not provide a reasonable explanation that this aspect of the proposal warranted a strength.

This decision serves as a reminder that while the GAO will not reevaluate proposals, it will examine the record to determine whether the agency's conclusions were reasonable, sufficiently documented and consistent with the terms of the solicitation.

Other sustained challenges to technical evaluations in fiscal year 2020 included GAO decisions finding that the evaluation was inadequately documented, that the agency failed to evaluate a significant aspect of the proposal and that the agency unreasonably excluded portions of proposals.

Challenges to technical evaluations were also sustained in GAO decisions finding that there was no evidence in the record showing the agency performed a qualitative assessment of differing technical approaches, that the awardee's proposal failed to meet mandatory solicitation requirements, that the awardee's own technical proposal cast doubt on its assertions of compliance with solicitation technical requirements and that there were inconsistencies between the labor hours in the awardee's technical and price proposals.

The GAO also sustained challenges to technical evaluations where there were findings (discussed in part two of this article) concerning the availability of key personnel.

In Ohio KePRO Inc., a case concerning a competition by the Centers for Medicare & Medicaid Services for claim review services, the protester achieved a trifecta: The GAO sustained the protest grounds challenging the agency's evaluation of technical, cost realism and a separate experience factor.[3]

This pattern is not uncommon, in that protester arguments concerning evaluations of one evaluation factor are often related to other factors, and when the GAO sustains a protest, it is often based on more than a single ground or argument.

Past Performance Evaluations

At least eight GAO-sustained decisions involved the evaluation of a past performance factor, or similar corporate experience factor or issue, separate or distinct from a technical factor. Some of these decisions also involved technical or cost/price evaluations in a sustained ground.[4]

For example, in Business Integra Technology Solutions Inc., the GAO found that, in a U.S. State Department competition for IT support services, the agency's assessment of the highest past performance rating to the awardee was unreasonable because the solicitation required that to be considered relevant, prior contracts had to be similar in dollar value to the potential award and the awardee's prior contracts were valued at a small fraction of that amount.[5]

Past performance and corporate experience factors may be distinct from each other, and each may be included within a broader technical factor. Experience focuses on the degree to which an offeror has performed similar work, while past performance focuses on the quality of the work.

In Weston-ER Federal Services LLC, in a U.S. Army Corps of Engineers competition for environmental remediation services, the GAO found errors in weaknesses assigned in both the separate previous experience and past performance factors, resulting from undisclosed evaluation criteria and disparate treatment.[6]

Other past performance or corporate experience sustained decisions in fiscal year 2020 involved the role of affiliated entities and subsidiaries, unstated evaluation criteria and inconsistent standards for relevancy.

These decisions and many others demonstrate that past performance evaluations can be highly complex and highly fact-specific, and due to this complexity, may be prone to agency errors.

Cost or Price Evaluations

At least eight GAO sustained decisions involved the evaluation of a cost or price proposal. Some of these decisions also involved technical or past performance evaluations in a sustained ground.[7]

For example, in Sayres & Associates Corp., the GAO found that the agency's evaluation failed to reasonably evaluate the protester's proposed escalation rate as part of the cost realism analysis.[8]

While the request for proposals required offerors to substantiate their proposed escalation rate, the contemporaneous record did not explain why the agency viewed the information the company provided as inadequate.

In Tyonek Global Services LLC, another cost realism protest involving the Navy, the GAO found the agency's cost realism evaluation failed to reasonably evaluate the awardee's proposed overhead rates because the record did not demonstrate that the agency independently assessed the realism of those proposed rates.[9]

Other sustained cost or price decisions in fiscal year 2020 involved failure to evaluate direct labor rates and assess the realism of the proposed level of effort, an inappropriate upward adjustment by the agency in a fixed-price setting, failure to consider lower proposed cost in the award decision and, as noted above, inconsistencies between the labor hours in an awardee's technical and price proposals.

These decisions reflect the complexity of evaluations of cost reimbursement proposals and related cost realism evaluations, which can often be challenging for agencies and subject to challenges by protesters, and that price evaluation protest issues can arise even in fixed-price settings.

Disparate Treatment

Protests concerning proposal evaluations may turn on disparate treatment in any of the factors.

In Battelle Memorial Institute Inc., involving a contract in support of the U.S. Centers for Disease Control and Prevention's work on influenza epidemics and pandemics, the GAO sustained a protest primarily on grounds of disparate treatment.[10] The GAO found that in the technical evaluation, the protester received a weakness for failing to address a specific

solicitation requirement, but the awardee's proposal did not receive the same weakness for the same omission.

The requirement at issue was a subtask that required the offeror to investigate the role of CD8 T-cells in influenza infection, which the GAO found was not addressed by either the protester or the awardee's proposal.

With respect to competitive prejudice, an essential element of any viable protest, the GAO stated that "given the closeness of the two proposals in terms of technical merit and price, we cannot say what impact even just one evaluation error would have had on the CDC's best-value decision."

Award Decision and Best-Value Tradeoff

While as discussed above, many sustained decisions address the evaluation of technical, past performance or experience, or cost/price proposals and factors, and also often discuss the award decision or rationale as part of the sustained grounds, the GAO sometimes focuses on the reasoning of the award decision as the primary basis for the sustained decision.

For example, in Deloitte Consulting LLP, involving a contract for federal budget support for the U.S. Department of Housing and Urban Development, the GAO found that the award decision relied on point scores but failed to meaningfully consider each quotation's strengths and weaknesses, and therefore did not reasonably explain why the agency selected a lower-priced, lower technically rated quotation.[11]

Decisions such as this demonstrate that the reasoning of the agency's award decision should always be considered by the protester, agency and intervenors, in connection with the underlying protest arguments concerning proposal evaluation and prejudice.

Conclusion

The most frequently sustained protest grounds in fiscal year 2020, as in most years, involved technical evaluations, as well as past performance, corporate experience, and cost or price evaluations, which also formed the basis for relatively common grounds to be sustained.

Proposal instructions and evaluation criteria are usually defined by solicitation sections L and M, on which agencies are required to rely and adhere closely to, when conducting and documenting their evaluations. The GAO will look to and apply these same criteria when evaluating the protest allegations and agency responses.

However, as the decisions reflected last fiscal year, the GAO will not substitute its judgment for that of the agency. Offerors and bidders, when preparing their proposals, must take care to follow these proposal instructions and evaluation criteria closely if they want to win the contract award, as well as succeed in a potential protest, as either the protester or the intervenor.

The GAO decisions in fiscal year 2020 reflect the general principles that, while the GAO will not reevaluate proposals, any aspect of a proposal evaluation may be found to be inconsistent with the solicitation, evaluation criteria or applicable regulations, or otherwise not reasonably based, unequally applied, or undocumented by the record. The evaluation

criteria will guide offerors through their proposals, agencies through their evaluations, and the GAO through its protest decisions.

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[1] GAO decisions in fiscal year 2020 including technical factor evaluations in a sustained ground include at least B-416377.5 et al; B-416711.8 et al; B-417237.2 et al; B-417568.3 et al; B-417824 et al; B-417836 et al; B-417859 et al; B-417830; B-417988.2 et al; B-418012 et al; B-418034 et al; B-418047.3 et al; B-418128.2 et al; B-418377.7 et al; B-418553 et al; B-418604 et al; B-418635; and B-418784 et al.

[2] IAP Worldwide Services Inc., B-417824 et al., Nov. 13, 2019.

[3] Ohio KePRO Inc., B-417836 et al., Nov. 18, 2019.

[4] GAO decisions including past performance evaluations, or a similar corporate experience factor (separate or distinct from a technical factor) in a sustained ground include B-416377.5 et al; B-417188.2 et al; B-417859 et al; B-417804 et al; B-417836 et al; B-418377.7 et al; B-418475.4; and B-418509 et al.

[5] Business Integra Technology Solutions, B-418377.7 et al., July 7, 2020.

[6] Weston-ER Federal Services, B-418509 et al, June 1, 2020.

[7] GAO decisions including cost or price evaluations in a sustained ground include B-417188.2 et al; B-417237.2 et al; B-417415.2; B-417804 et al; B-417836 et al; B-418374; B-418377.7 et al; and B-418784 et al.

[8] Sayres & Associates, B-418374, March 30, 2020.

[9] Tyonek Global Services, B-417188.2, Oct. 4, 2019.

[10] Battelle Memorial Institute, B-418047.3 et al., May 18, 2020.

[11] Deloitte Consulting, B-417988.2 et al., March 23, 2020.