

Trends In Fiscal 2020 Bid Protests Sustained By GAO: Part 2

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 summarized 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.



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Key Personnel and Incumbent Employees

At least four of the GAO's sustained decisions involved the proposal of key or incumbent personnel — which may be considered as part of a technical evaluation.

In M.C. Dean Inc., involving support to the National Security Agency for its physical security system, the GAO sustained a protest because prior to the award, the awardee had actual knowledge that one of its proposed key personnel was unavailable to perform but failed to notify the NSA of the material change in circumstances.[1]

The issue was the security clearance of the program manager, which the NSA denied shortly after the submission of final proposal revisions.

The GAO held that the offeror had an obligation to inform the agency that its program manager was unavailable, consistent with the GAO's case law that holds that "offerors are obligated to advise agencies of material changes in proposed staffing, even after submission of proposals."

As explained in M.C. Dean, when the agency is so notified, it has two options: Evaluate the proposal without the proposed key employee — likely resulting in rejection of the proposal as technically unacceptable — or open discussions to permit the offeror to amend its proposal.

The GAO found that here the awardee had actual knowledge that its proposed program manager was unavailable, and thus had an obligation to inform the agency, but failed to do

so.

Peraton Inc. also involved key personnel, and, as discussed further below, also concerned corrective action. GAO sustained the protest because the agency had decided to reopen discussions to allow offerors to revise their proposals to substitute key personnel, but limited other proposal revisions, which GAO found was an unreasonable limitation.[2]

This decision may discourage agencies from allowing substitutions of key personnel because the agency might be required, via a protest, to permit full proposal revisions. Alternatively, the decision may remind agencies that they should permit full revisions where appropriate when allowing substitutions, even if that process lengthens the evaluation timeline. An offeror faces a risk and must inform the agency when a proposed key person becomes unavailable, but if the agency permits substitutions, it must also permit appropriate proposal revisions as required by GAO's decisions.

In another protest concerning the proposal of named individuals as key personnel, IT Objects LLC, the GAO sustained a protest challenging the U.S. Department of Commerce's award decision where the awardee's proposal did not provide a letter of commitment for an individual proposed for a key personnel position, as required by the solicitation.[3] In this case the GAO did not find a misrepresentation, but the sustained decision demonstrates additional hurdles that offerors face when proposing individuals for key positions.

The proposal of incumbent personnel poses additional challenges. In T3I Solutions LLC,[4] for training services for the U.S. Air Force, the GAO sustained a protest that the awardee had misrepresented the availability of incumbent staff where the record showed that the awardee did not have a reasonable basis to propose a named individual for a required position, and the misrepresentation had a material effect on the evaluation of the proposal as technically acceptable.

The GAO further found that "an offeror may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good on its representation." This decision reflects the hurdles that rivals may face when attempting to propose incumbent personnel.

Given the difficulties bidders face in proposing key personnel and named individuals and maintaining their availability through a lengthy evaluation process, protests involving these issues will continue to highlight the challenges they pose in the bidding process, for both offerors and agencies.

Conflicts of Interest

Decisions on conflicts of interest examined both government conflicts and contractor conflicts.

In Teledyne Brown Engineering Inc., the GAO found that a government employee with extensive involvement in an acquisition competition and award by NASA for operations services at the Marshall Space Flight Center in Huntsville, Alabama, had an apparent conflict of interest, and the record showed the agency had recognized the apparent conflict but failed to adequately investigate and mitigate it.[5]

Teledyne argued that the current NASA employee, referred to by the GAO as Mr. X, had an ongoing personal relationship, reflected by weekly, informal social gatherings with a larger group of people, with a high-level employee of the predecessor prime contractor, which was

a major subcontractor to the awardee, as well as with another person who was an employee of the awardee.

The GAO found that NASA's attempts to mitigate the effect of the relationships, which included an opinion by a NASA ethics counsel and other measures, were insufficient to avoid the appearance of a conflict.

With respect to prejudice, the GAO concluded:

[Where] the record establishes that a conflict or apparent conflict of interest exists, and the agency did not resolve the issue, to maintain the integrity of the procurement process, we will presume that the protester was prejudiced, unless the record includes clear evidence establishing the absence of prejudice.

The GAO found that the circumstances here created at least the appearance of a conflict of interest and "created a concern that the integrity of the acquisition process as a whole [had], or may have been, compromised."

This decision in a major procurement may herald greater scrutiny of informal personal relationships between government and industry personnel during the course of competitions and bid protests, where the appearance of a conflict, and sufficiency of any agency response, may become critical issues.

In addition to potential conflicts among government employees, the GAO considered organizational conflicts of interest among contractors. In *Inquiries Inc.*, the GAO sustained a protest that the awardee had disqualifying organizational conflict of interest, where the record did not show that the agency meaningfully considered the potential conflicts arising from the awardee's subcontractor's prior and ongoing work on other contracts.[6]

In this case involving an award by the Defense Security Service for support of the Defense Vetting Directorate, the contracting officer undertook an organizational conflict of interest analysis to address the allegations. But the GAO agreed with the protester that the agency's conflicts analysis did not meaningfully or reasonably consider the significant potential for impaired objectivity related to OCIs identified by the protester.

This decision serves to highlight the potential for organizational conflicts of interest among offerors that have a history of contracting with the awarding agency in potentially conflicting roles.

Corrective Action

At least three of the GAO's decisions concerned corrective action.

In *Peraton Inc.*, the protest challenged agency corrective action where the agency had decided to reopen discussions to allow offerors to revise their proposals to substitute key personnel, but limited other proposal revisions.[7] The GAO found that the substitution of key personnel would materially impact other aspects of technical proposals the agency had not permitted to be revised, and the GAO recommended that the agency allow unrestricted revisions to technical proposals.

Addressing a similar issue in *Computer World Services Corp.*, the GAO sustained the protest against corrective action where the agency intended to materially change its method for evaluating proposals without allowing offerors an opportunity to submit revised

proposals.[8]

These decisions, both in cases involving technology support services, demonstrate that corrective action can be challenged and that although the GAO normally defers to agency discretion when taking corrective action, it will consider the argument that an agency's proposed corrective action must allow for revisions to proposals where the action would otherwise be unreasonably restrictive, as stated in Peraton.

And as the GAO stated in Computer World Services, "it is axiomatic that, where an agency makes a material change to the terms of a solicitation, it is required to issue an amendment to the solicitation and afford competing firms an opportunity to revise their proposals."

The GAO decisions concerning corrective action are increasingly important, given that agencies may take corrective action in more than one-third of all GAO protests.

In the context of the solicitation protest of Mythics Inc.; Oracle America Inc.,[9] the GAO issued a decision after an unusual denial of an agency request to take corrective action. In the decision, the GAO found that a solicitation by the Library of Congress for cloud computing services was unduly restrictive of competition, including inappropriate brand-name provisions that favored the protesters' competitors.

Prior to that decision, the agency had proposed in a letter to the GAO to take corrective action. The GAO sought clarification, and following a second letter by the agency proposing corrective action, the GAO declined to dismiss the protests. The GAO found that the proposed corrective action was too vague or that it failed to address one or more protest allegations, and that it did not inform the GAO and the protesters exactly which course of action the agency would take.

This decision indicates that the GAO may in some circumstances more closely scrutinize an agency's proposed corrective action, an important development, given the prevalence of agency corrective action taken in response to GAO protests. The GAO's decision stated:

In the context of a solicitation challenge, our [o]ffice necessarily must confine our review to the terms of the solicitation as actually — currently — issued. Vague, ambiguous, partial, or inadequate statements on the part of the agency to take corrective action at some indefinite point in the future — corrective action that may or may not render the protest academic — do not provide a basis for dismissal of the protests.

Solicitation Challenges

At least seven fiscal year 2020 GAO sustained decisions primarily involved a challenge to the terms of a solicitation.

For example, as noted above, in the protest of Mythics; Oracle America, the GAO found that a solicitation by the Library of Congress for cloud computing services was unduly restrictive of competition, including inappropriate brand-name provisions that favored the protesters' competitors.

In Booz Allen Hamilton Inc.,[10] Booz Allen challenged the terms of a task order solicitation issued by the U.S. Marine Corps for financial statement audit support services. The GAO found the solicitation requirement that the prime contractor be a certified independent

public accountant was unduly restrictive of competition because the specifications, which would have excluded Booz Allen, were not reasonably necessary to meet the agency's needs.

In Blue Origin Florida LLC,[11] the protester challenged an Air Force solicitation for national security space launch services. The GAO found the solicitation's basis of award, which was predicated on the agency's determination of which combination of two independently developed proposals offered the best value, did not provide an intelligible, common basis on which offerors would fairly compete and be evaluated.

Four other decisions also sustained challenges to agency solicitations.[12]

While seven sustained decisions is a relatively high number for solicitation challenges, many more solicitation protests are filed with the GAO each year, many of which may result in corrective action. Many more are filed as agency protests, based on a protester's belief that an agency may be more willing to fairly consider arguments that the solicitation is flawed or unduly restrictive, and consider revising it.

The GAO's sustained decisions in fiscal year 2020 serve as a reminder that solicitation challenges are a viable ground of protest and in the right circumstances may be sustained by the GAO, if an agency does not take corrective action, especially where the solicitation is unduly restrictive of competition.

Scope of Contract Award or Eligibility of Awardee

Several other sustained decisions involved primarily the permissible scope of a contract award or the eligibility of the awardee.

For example, Steel Point Solutions LLC concerned a procurement contract for a term greater than the undelivered term remaining on the terminated contract.[13] NCS Technologies Inc. concerned a blanket purchase agreement established under a federal supply schedule contract that had an insufficient period of performance to cover the duration of the blanket purchase agreement.[14] Leupold Stevens Inc. involved a contract modification beyond the scope of the underlying contract.[15]

In Knight Point Systems LLC, the GAO disagreed with a conclusion by the U.S. Coast Guard that a quotation had been submitted by the parent company of the protesting bidder — which held the required GSA schedule contract — and that the bidder was ineligible for award.[16] The GAO found the agency's conclusion was not supported by the record or the request for quote terms.

And in ASRC Federal Data Network Technologies LLC, the GAO found a small business innovation research phase III award was improper because the awardee had not performed a prior phase I or II award, and was thus ineligible.[17]

Conclusion

The sustained solicitation challenges in fiscal year 2020 reflect a proactive approach by offerors willing to challenge an agency on the terms of its solicitation even before proposals are submitted and evaluated. Solicitation protests are in no way new, but they remain an effective tool for offerors who have a strong basis to challenge a solicitation, especially if it is unduly restrictive of competition.

The sustained bid protests last fiscal year also reflect certain current and emerging issues that will continue to arise in protests. Key personnel and incumbent employees present one such set of issues. The proposal and evaluation process is frequently challenged by the reality of individual circumstances that may render proposed personnel unavailable. Agencies have increased their reliance on professional services, and competitions for services often turn on key and incumbent personnel. Offerors and agencies must follow GAO guidance on these issues, and conduct their proposal and evaluation responsibilities accordingly.

While personal and organizational conflicts of interest aren't new, they continue to create a steady stream of issues for contractors and agencies as they try to navigate and avoid those conflicts. The GAO broke new ground last year with a decision that illuminates the informal friendships that may exist among government and contractor personnel, and which could create a conflict or the appearance of a conflict of interest. While these personal relationships may be common, when they impact an acquisition in the unavoidable, and potentially unmitigable, manner addressed by the GAO in Teledyne, protests will be more likely to result after this decision.

The GAO's decisions in fiscal year 2020 also reflect that agency corrective action is an increasingly important protest issue. Agencies take corrective action in more than a third of all GAO protests, and the GAO often defers to agency discretion when corrective action is protested. But in its decisions last year, GAO has demonstrated a willingness to sustain corrective action protests under certain circumstances, including when the proposed corrective action is vague and does not identify the agency's proposed course of action.

New Protests in Fiscal Year 2021

While the summary in this article is confined to the protests sustained by the GAO in fiscal year 2020, the protests sustained — about 80 B-numbers — are a small fraction of the protests closed by the GAO — about 2,110, which contained a much wider variety of protest allegations.

Potential avenues of protest available to disappointed offerors and potential bidders also include agency protests, protests to the U.S. Court of Federal Claims and, following a Federal Claims Court protest, appeal to the U.S. Court of Appeals for the Federal Circuit.

Thus, the potential grounds for protest are much wider and more numerous than those reflected in the sustained decisions summarized above from fiscal year 2020. In fiscal year 2021, new and different grounds of protest will likely find their way to agencies, the GAO and the Federal Claims Court, as part of a bid protest process that is ultimately in support of the government mission.

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[1] M.C. Dean Inc., B-418553, June 15, 2020.

- [2] Peraton Inc., B-416916.8 et al., Aug. 3, 2020.
- [3] IT Objects, B-418012 et al., Jan. 2, 2020.
- [4] T3I Solutions, B-418034 et al., Dec. 13, 2019.
- [5] Teledyne Brown Engineering, B-418835 et al., Sept. 25, 2020.
- [6] Inquiries Inc., B-417415.2, Dec. 30, 2019.
- [7] Peraton Inc., B-416916.8 et al., Aug. 3, 2020.
- [8] Computer World Services Corp., B-418287.3, June 29, 2020.
- [9] Mythics Inc.; Oracle America Inc., B-418785 et al., Sept. 9, 2020.
- [10] Booz Allen Hamilton Inc., B-418449, May 18, 2020.
- [11] Blue Origin Florida LLC, B-417839, Nov. 18, 2019.
- [12] The solicitation decisions sustained also include B-418085.4 et al; B-418141; B-418223 et al; and B-418570 et al.
- [13] Steel Point Solutions LLC, B-418224, Jan. 31, 2020.
- [14] NCS Technologies Inc., B-417956 et al., Dec. 13, 2019.
- [15] Leupold Stevens Inc., B-417796, Oct. 30, 2019.
- [16] Knight Point Systems LLC, B-418746, Aug. 24, 2020.
- [17] ASRC Federal Data Network Technologies LLC, B-418028, Dec. 26, 2019.