





DOCUMENTATION **Remains the Key** in GAO Protests

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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 government sustained protests decreased from 17 percent in FY 2017 (99 cases) to 15 percent (92 cases).

(Editor's 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, and the rulings for FY 2017 appeared in the May-June 2018 *Defense AT&L*, pages 43-49.)

Yet, the number of cases filed increased from 2,596 in FY 2017 to 2,607 in FY 2018, indicating that the GAO receiving more protests is not a corollary to its granting relief to protestors. The most frequently cited reasons for sustaining protests in FY 2018 were:

- Unreasonable technical evaluation
- Unreasonable cost or price evaluation
- Flawed selection decision

These three reasons were among the four top reasons in FY 2017 for sustaining protests.

A reading of the example opinions provided by the GAO reveals that inadequate documentation remains a common underlying issue concerning the sustenance of protests. Reading each example opinion will help government agencies determine correct procedure and what procedures to avoid or improve upon to reduce the number of sustained protests.

1 AdvanceMed Corp.

The GAO provides AdvanceMed Corp. (B-415062, B-415062.2, 2017 CPD ¶ 362) as an example of an unreasonable technical

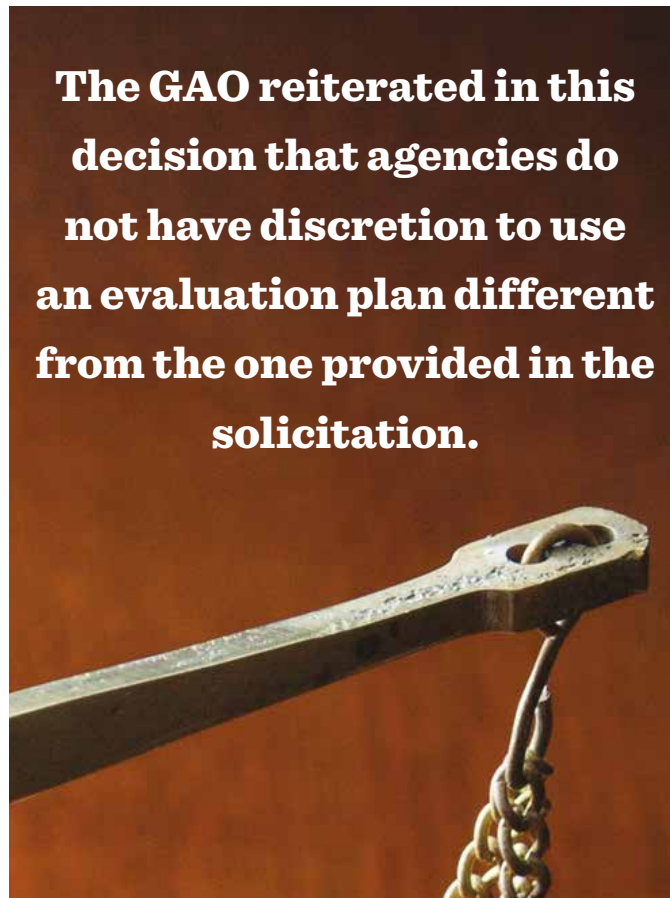
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evaluation. In AdvanceMed Corp., the solicitation issued by the Department of Health and Human Services (HHS) was for a cost-plus award fee task order for program integrity audit and investigation work for Medicare and Medicaid operations. The GAO was able to hear this task order protest because the task order exceeded \$10 million. The GAO has jurisdiction to hear a task order protest on the ground that the order increases the scope, period or maximum value of the contract under which the order is issued; or if the order exceeds \$10 million for civilian agencies (this amount changes to \$25 million for Department of Defense (DoD) order contracts). The basis of the protestor's claim was that the agency did not meaningfully consider the awardee's disclosed organizational conflict of interest (OCI) and that the awardee's proposal was not technically acceptable.

Organizational Conflict of Interest

The protestor argued in its OCI claim that the express language of the solicitation precluded award to the awardee when there is an OCI. The solicitation required offerors to disclose conflicts of interest among other things. It was clear by the solicitation language that disclosure of conflicts of interest was "material" to contract award. The disclosure requirement extended to current and future nonforeign contracts involving the offeror, its parent company and any affiliates that might result in an actual, potential or apparent OCI. The solicitation provided examples of what would be considered actual, potential or apparent OCIs, specifically indicating that performing same or similar functions as the Medicare Administrative Contractor (MAC) or Medicaid Management Information Systems (MMIS) for a state at any time in the jurisdiction where it holds a Unified Program Integrity Contractor (UPIC) contract would also be considered a conflict. In this case, the awardee had such a conflict of interest because it was both a MMIS and a UPIC.

The GAO agreed with the protestor that the agency did not perform a meaningful OCI evaluation. The awardee



was honest in that its proposal did disclose the contracts held by its parent company where there may be an OCI, however, the awardee summarily concluded that there was not an OCI and that mitigation was not required. The agency contracting officer had a few conference calls with the awardee in an effort to clear up the "perceived conflict." The "perceived conflict" language used by the agency bothered the GAO because it conflicted with the language in the solicitation. The solicitation language clearly indicated that the awardee had a conflict.

The GAO noted in its opinion that an agency is obliged to determine if conflicts exist in each procurement, regardless

of whether there was consideration for a similar type of conflict in awarding a task order in a different jurisdiction. It also found that the agency did not provide documentation required in its decision making to show it conducted a proper analysis of the conflict of interest concerns. For example, the contracting officer did not document the conference calls, which disallowed the fulfillment of the duty to identify, evaluate and determine whether there was an OCI.

Technical Evaluation

The other part of the protest in this case involved a claim of an unreasonable technical evaluation. The solicitation provided for a trade-off evaluation with non-cost evaluation factors being significantly more important than cost when combined. One of the non-cost evaluation factors was compliance with Section 508, which requires agencies to make information and communication technology accessible to disabled individuals. The solicitation required that offerors proposing electronic and information technology (EIT) supplies and/or services conform to Section 508 accessibility standards. For an offeror's proposal to be acceptable, it had to include a HHS Section 508 Product Assessment Template (PAT) and demonstrate its ability to meet Section 508 standards for the proposed EIT supplies and/or services. The technical evaluation panel evaluated

all factors except the Section 508 factor. The Section 508 compliance officer evaluated the Section 508 factor. The Section 508 compliance officer did not find any concerns with the protestor's proposal but found that five of the awardee's PATs were unacceptable and required remediation. The protestor asserts that the awardee was to be compliant prior to award, and the GAO agreed.

The agency argued that the solicitation did not require full compliance with Section 508 at the time of contract award, just a demonstrated ability to meet the standards of Section 508. The GAO looked to the solicitation as a whole because the two sides disagreed on its interpretation. The GAO determined that the agency's interpretation was unreasonable since the solicitation used mandatory language. The agency's solicitation made it clear that for an offeror to be technically acceptable, its proposed EIT supplies and/or services must conform to applicable Section 508 standards.

Overall, there were conflicts in the solicitation, and the GAO had to make an interpretation for it to make sense. The agency provided an alternate argument that Section 508 did not apply since the noncompliant EIT supply tool was not going to be used by the Centers for Medicare and Medicaid Services and/or the public. The GAO looked to the solicitation language again and rejected the agency's argument. The GAO reiterated in this decision that agencies do not have discretion to use an evaluation plan different from the one provided in the solicitation. The GAO found the technical evaluation panel and the contracting officer's conclusion unreasonable since the agency based the acceptability rating given to the awardee on remediation that did not take place. In its opinion, the GAO repeated a common phrase that it is a "fundamental procurement principle" that agencies evaluate proposals consistent with the solicitation and that it will question an evaluation when it is unreasonable, inconsistent with the solicitation or not documented.

2 **Ensco, Inc.**

The GAO provides the decision in *Ensco, Inc.*, B-414844.4 et al., 2018 CPD ¶ 260 as an example of an unreasonable cost or price evaluation. The protest resulted from a solicitation issued by the Defense Threat Reduction Agency for support services on a cost-plus fixed-fee contract.

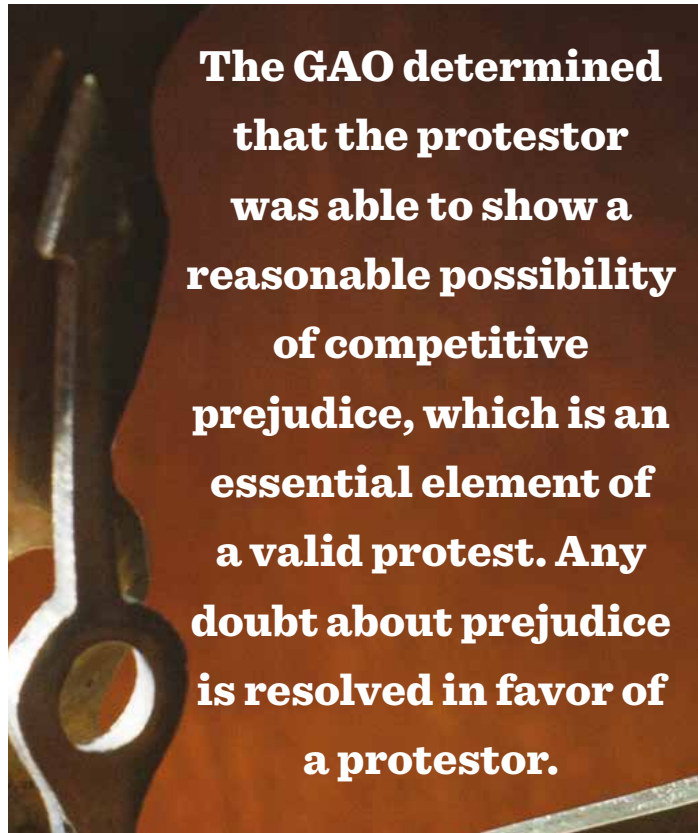
Proposals were evaluated using trade-off considering in descending order of importance: mission capability, past performance and cost. Mission capability and past performance when combined were significantly more important than cost. Cost was to be evaluated using cost realism and cost reasonableness while also considering cost completeness.

The agency used what it called the most probable cost (MPC) to determine best value to the government. The MPC would adjust an offeror's proposed cost and fee when the agency determines it is appropriate to increase or decrease cost elements to what it considered realistic levels based on its cost realism analysis. The source selection authority used the MPC to determine that the awardee offered the best value to the government. The incumbent then protested to the GAO. The agency responded by voluntarily taking corrective action. Voluntary action is where the GAO does not hear the protest because the agency is working to resolve the issue(s) on its own. It is a common reaction for the agency to take corrective action when a protest is filed with the GAO. The agency allowed for limited proposal revisions and reevaluated the offerors who elected to remain in the competition. The protestor received the highest mark in its management approach and past performance but was rated evenly with the awardee on its technical approach. The protestor's cost was approximately 28 percent higher than that of the awardee. After accomplishing the MPC, the agency increased the protestor's cost estimate for evaluation purposes to be 29.18 percent higher than the awardee. The source selection authority determined that there was not enough value in the protestor's proposal to justify paying the higher price and determined again that the awardee offered the best value to the government. The incumbent protested again, alleging an unreasonable cost realism evaluation.

Specifically, the protestor argued that the agency treated it differently than the other offerors by increasing the proposed direct labor rates verified by the Defense Contract Audit Agency (DCAA) and by not adjusting the proposed rates not verified by DCAA. The rate adjustment adversely impacted the protestor because it was the incumbent. As a result, DCAA had many of the protestor's direct rates verified but did not have many of the other offerors' rates verified. Essentially, this allowed the other offerors greater freedom in proposing unrealistic prices. Those proposed unrealistic prices went unchecked by DCAA and the agency. The protestor argued that the cost-price evaluation was unreasonable because the awardee anticipated recruiting the protestor's employees but their direct rates for those employees were proposed lower than the protestor's proposal and therefore were not realistic. The protestor also argued that the agency ignored its 3 percent proposed cost-saving rate reduction. The agency failed to accept the rate reduction proposed because there was inadequate support to accept it.

The GAO found that it was arbitrary and unreasonable to evaluate and adjust direct labor rates for just those employees for which DCAA verified rates without conducting any other analysis. This limited analysis was not adequate to assess cost realism of the proposals and it

was unreasonable for the agency to assess a greater confidence in the awardee's approach to recruit incumbent personnel without performing an analysis on how the lower direct rates proposed would affect the awardee's ability to recruit. The GAO went through the steps the agency took in determining reasonableness, realism and completeness. It agreed that an offeror's proposed costs are not dispositive because, ultimately, the government is required to pay the contractor actual and allowable costs in a cost reimbursement contract, which is why there had to be a cost realism analysis.



by other offerors and the agency's failure to use the individual rate information in the IGCE to evaluate proposed rates.

The GAO determined that the protestor was able to show a reasonable possibility of competitive prejudice, which is an essential element of a valid protest. Any doubt about prejudice is resolved in favor of a protestor. The protestor was able to show prejudice because cost was the least important of the three evaluation factors and the protestor was superior in the two more important evaluation criteria (mission capability and past performance). The reasoning in the GAO's decision was that the awardee's MPC would

The GAO determined that the agency conducted its evaluation of reasonableness, realism and completeness prior to making MPC adjustments. It found that the agency correctly evaluated cost reasonableness using the average total cost of the submitted proposals and the independent government cost estimate (IGCE). There was no disagreement on the development of the IGCE, which considered the rates from the last period of performance of the then current contract and a General Services Administration labor category tool. The GAO noted that the rates included in the IGCE were higher than the awardee's proposed rates, which was important to the GAO, considering there was some room in the pricing for consideration.

The GAO found that, overall, the agency did not conduct a reasonable cost realism analysis. The agency's use of historical direct labor rates verified by DCAA as part of a cost realism evaluation was reasonable, as was its decision to adjust rates to match those currently being performed on other contracts. Therefore, the GAO found that the agency's decision to reject the protestor's proposed 3 percent rate reduction was reasonable. The error that the GAO found was with the agency's exclusive use of DCAA-verified rates without any documentation to explain its lack of analysis or adjustment to the awardee's proposed rates for employees it anticipated recruiting from the protestor, considering the awardee's technical approach. The GAO also questioned the lack of comparison of rates proposed

be greater if the agency evaluated all of the proposed direct labor rates. A cost realism might also find as unrealistic the low rates the awardee proposed to pay possible recruited employees. These evaluations might then affect the agency's overall decision, considering the solicitation's stated relative importance of each evaluation factor and the protestor's superiority under the non-cost factors.

3 VariQ Corp. VariQ Corp., (B-414650.11, B-414650.15, 2018 CPD ¶ 199) illustrated the GAO's third most prevalent ground for sustaining protests—flawed selection decision. In VariQ Corp., the protest was of a task order for information technology (IT) operations support services solicited through a request for quotations. The task order exceeded \$10 million, which allowed the GAO to hear this case. The solicitation informed offerors that evaluation of their quotes considered four factors, in descending order of importance: management approach, technical approach, past performance and price. The nonprice factors, when combined, were significantly more important than price.

After award, the agency received several protests. The agency responded by taking corrective action, which was followed by another protest. The agency responded by amending its corrective action to allow final quotes. Evaluation of the final quotes resulted in the awardee having fewer strengths than the protestor in the management and

technical approach. The awardee had a past performance rating of substantial confidence and the protestor had a past performance rating of satisfactory confidence. The protestor's price was lower than the awardee. The Source Selection Authority (SSA) determined that the awardee's quote was superior under both the management approach and the technical approach evaluation factors even though the awardee received fewer strengths than the protestor. The SSA supported this decision describing the awardee's strengths as "substantial strengths." After award the protestor filed its protest to the GAO, which looked to the agency's solicitation to consider what evaluation was to consist of with respect to the management approach, technical approach and past performance.

Management Approach

Each offeror's management approach was evaluated to determine if that offeror showed the practical level of understanding of the operating environment and management methods needed to accomplish the tasks and deliverables of the Performance Work Statement (PWS)—considering risk and cost-effective ideas. Offerors provided resumés and letters of intent for six key personnel positions, which needed to show that the key personnel proposed possessed the education, expertise, abilities, experience and other relevant technical expertise to do the work successfully. The solicitation provided that a quote may be found unacceptable and the offeror ineligible for award if it did not meet the key personnel qualifications. The solicitation advised offerors that the agency would reject a quote that is not compliant with all of the solicitation requirements. The protestor argued that the agency unreasonably and disparately evaluated the offers and ignored the fact that one of the awardee's proposed key personnel failed to meet the PWS requirements. The GAO agreed, considering the solicitation requirement that the team lead was to have a deep understanding of "high availability" for Microsoft Exchange and database replication strategies as indicated in the PWS. The awardee's proposed team lead had experience with the Army in supervising the quality assurance environment. However, there was no indication in the proposal that the team lead had a deep understanding of "high availability" for Microsoft Exchange and database replication strategies.

The agency argued that a technical evaluation team member had personal knowledge of the Army's quality assurance (QA) team and that the Army QA team was responsible for testing all configurations before they went into production. Therefore, the awardee's proposed team lead had to have a deep understanding of Exchange and its interworking parts. The GAO looked at the evaluation record and found no documentation, particularly its preferred contemporaneous documentation, to support the agency's finding that the awardee had a deep understand-

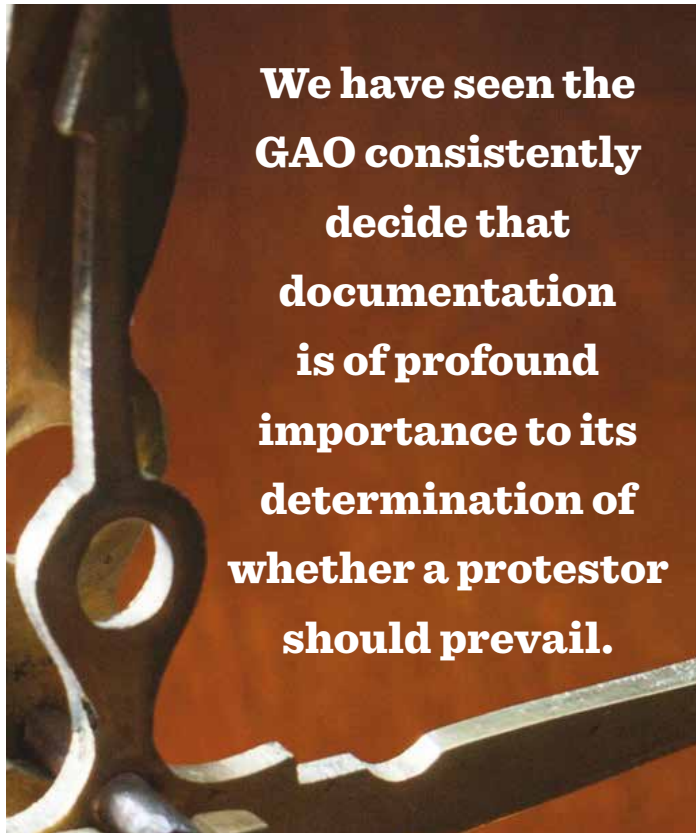
ing of Exchange and its interworking parts. The GAO reasoned that a QA environment that included Microsoft Exchange would not necessarily include an Exchange environment configured for high availability like that required in the PWS. The GAO determined that the record provided no support for the technical evaluation team member's statements about the experience and knowledge of the awardee's proposed team lead—qualities relied on by the technical evaluation team. There was no personal knowledge of the proposed team lead's past experience with or understanding of Exchange or knowledge of the work actually performed. The agency's conclusion about the awardee's proposed team lead constituted what the GAO referred to as "educated guesswork."

The agency argued that it waived the requirement for the team lead to have a deep understanding of "high availability" for Microsoft Exchange and database replication strategies indicated in the PWS and that the protestor did not suffer prejudice. The GAO disagreed, noting that an agency may waive compliance of a material solicitation requirement in awarding a contract when it concludes the requirement is not necessary to meet the agency's actual needs and where there would be no resulting prejudice. The GAO found that the agency did not waive the requirement and did not determine that the requirement was unnecessary to meet its needs.

Technical Approach

Evaluation of each offeror's technical approach was intended to determine if the offeror demonstrated the knowledge, skill and ability to fulfill certain PWS requirements; demonstrated understanding of IT operations challenges and proposed resolution of those challenges; and had offered recommendations for improvements in knowledge management, remote support, and user self-help. The protestor argued that the agency unreasonably and disparately evaluated quotations under this factor. In particular, "substantial strengths" were more important than number of strengths, and the agency justified award to the awardee under the management approach and technical approach evaluation factors after making a blanket assertion that the awardee had more "substantial strengths." In the protestor's view the issuance of "substantial strengths" were unequally applied because it did not receive a "substantial strength" after showing similar strengths to the awardee. The agency was able to substantiate some of the strengths it determined were the awardee's "substantial strengths" in its contemporaneous documentation but were unable to show that others were valid because of failure to document. The agency's inadequate documentation prevented the GAO's evaluation of the agency's judgment or the reasonableness of the decision in determining whether a strength was a "substantial strength." Lack of documentation also

impacted an assessment of whether the strength was just a strength or a “substantial strength.” For example, there was no documented explanation when the agency noted similar benefits to the protestor and the awardee approaches to shift flexibility but only granted the awardee a substantial strength. The Source Selection Decision Memorandum did not list all of the substantial strengths of the protestor and the awardee even though the justification of award was based on the awardee receiving more “substantial strengths” than the protestor. The GAO ultimately found that there was unequal treatment and that the agency did not adequately document its source selection decision.



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protestor a “satisfactory confidence” rating after another evaluation. The GAO’s conclusion was based on the fact that the agency rated the awardee with “substantial confidence” after receiving an “outstanding” rating on a contract reference only partially similar in size, scope and complexity and because the protestor’s other two contract references were rated as “substantial confidence.”

The GAO found that the protestor was prejudiced in that the protestor would have had a substantial chance of winning the contract but for the agency’s actions. The GAO based its finding of prejudice on its review of the facts, the contemporaneous record and the changes that the GAO determined to be likely after a reasonable evaluation by the agency.

Past Performance

The agency’s evaluation of each offeror’s past performance was to determine the breadth and depth of each offeror’s relevant experience on projects of similar size, scope and complexity from the last 3 years performed by the offeror, its subcontractor or both. The protestor argued that the agency incorrectly gave it a satisfactory confidence based on a typographical error indicating the protestor received a “good” rating for a contract reference. In fact, the protestor received an “outstanding” rating, which the agency noted in its Past Performance Evaluation Team (PPET) report.

The agency asserted that the typographical error did not impact the evaluation and that the contract reference would remain as “satisfactory confidence.” The GAO determined that the error was an evaluation mistake and not just a typographical error because the “good” rating was located in the “finding” section of the PPET. This was the contemporaneous record and it clearly stated that the protestor received the “satisfactory confidence” rating because of the “good” rating it received on its contract reference. The GAO also considered the SSA statement in the best-value determination, another contemporaneous record, that the protestor received a “good” rating. The GAO was not convinced that the agency would assign the

contemporaneous record and the changes that the GAO determined to be likely after a reasonable evaluation by the agency.

Conclusion

The GAO consistently highlights the flaws in the evaluation process that have been frequent reasons for agency protests. Many protests can be avoided by exercising caution in the evaluation process—such as the agency ensuring that it takes appropriate measures to resolve potential OCIs and evaluating only what was provided as evaluation factors and documenting rationale and results. We have seen the GAO consistently decide that documentation is of profound importance to its determination of whether a protestor should prevail. The GAO will rely on the contemporaneous record, established at the time of the award, over a record supplemented during a protest. The contemporaneous record is more reliable and is less likely to have been modified to bolster the government’s defense.

Documenting an evaluation and including all evaluations are required in order to defend against a protest but are also parts of good recordkeeping. Having a business culture of consistently documenting rationale and conducting fair evaluations are large steps toward reducing the number of future and sustained protests.

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