

Bid Protest Spotlight: Key New Decisions And 2020 Highlights

By **Victoria Angle and Michaela Thornton** (January 5, 2021, 4:46 PM EST)

This installment of the bid protest spotlight examines four recent protest decisions from the U.S. Government Accountability Office, discusses a few key takeaways from the GAO's fiscal year 2020 annual report and provides a year-end review of key bid protest decisions from 2020.

The 2020 GAO report is particularly interesting because the "effectiveness rate," which is the percentage of protests that result in the protester obtaining some form of relief from the agency — either as a result of voluntary agency corrective action or the GAO sustaining the protest — rose to 51% in fiscal year 2020. In other words, over half of all protests closed in fiscal year 2020 resulted in a win.



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IDS International Government Services

The decision in IDS International Government Services LLC demonstrates that protests are likely to succeed where the agency's stated evaluation criteria are inconsistent with the rating descriptions for proposal evaluation set forth in a solicitation.[1]

In this pre-award protest before the GAO, IDS International Government Services, the incumbent contractor, protested the terms of the U.S. Department of the Army, Corps of Engineers' solicitation for future operations and maintenance services at facilities in Afghanistan. IDS protested the solicitation on six grounds, primarily regarding ambiguities surrounding the basis for award, certain evaluation factors and differences between types of work to be performed.

Protests on five of these grounds were denied where the GAO looked to the plain language of the solicitation and failed to find reasonable ambiguities. The GAO sustained the protest only on the ground that the experience factor was ambiguous due to discrepancies between the stated evaluation criteria and evaluation ratings.

In the experience factor solicitation instructions, the Corps of Engineers asked that offerors submit documentation of projects they had completed, stating that certain projects, including those that had

been performed for the U.S. government in Afghanistan and those that featured simultaneous work across multiple locations, would be given greater weight in the agency's evaluations.

The agency also included a chart detailing the color and adjectival ratings the agency would use and associated descriptions, which focused on the strengths and risks associated with a given offeror's approach and understanding of the requirements.[2]

The GAO found the inconsistency between the documentation requirements and rating descriptions significant because it was "unclear whether offerors [would] be evaluated based solely on the information requested for this evaluation factor — i.e., experience — or whether offerors [would] also be evaluated based on different information concerning their understanding and approach to the requirements." [3]

The GAO disagreed with Corps of Engineers' claim that the descriptions were sufficiently linked to the experience information requested. Therefore, the GAO recommended that the agency amend the solicitation to clarify what offerors should address in their proposals and how the agency would evaluate proposals.

This decision highlights the proposition that even seemingly small discrepancies within a single solicitation may create protest opportunities where offerors are not clearly able to understand what information the agency is requesting and how it will be considered.

Pasha Hawaii Holdings LLC

Latent ambiguities coming to light following contract award also remain strong bases for protest, particularly where, as in the solicitation at issue in Pasha Hawaii Holdings LLC,[4] those ambiguities lead to significant differences in offerors' proposed prices.

This GAO protest involved a solicitation conducted by the U.S. Department of Transportation, Maritime Administration, seeking an indefinite-delivery, indefinite-quantity contract with one vessel acquisition manager.

A vessel acquisition manager would support the Maritime Administration's Ready Reserve Force by acquiring, operating and maintaining replacement vessels as necessary, including providing crew resources for the vessels when they are operating.

The GAO sustained the protest of Pasha Hawaii Holdings on the grounds that the solicitation contained a latent ambiguity regarding minimum crew requirement. This ambiguity and other concerns led the agency to perform an improper price realism evaluation of the successful offer from Crowley Government Services Inc., and the agency did not evaluate the offerors' past performance or technical proposals consistently with the terms of the solicitation.

The record supported Pasha's contentions that Crowley's price was unreasonably low and was based upon a misunderstanding of solicitation requirements. Most of the difference between the two offerors' prices was attributable to the contract line item number for crewing of vessels, and could be explained by the fact that Crowley had proposed significantly smaller minimum crews for vessels.

The GAO sustained Pasha's protest on this ground because the agency did not explicitly address whether Crowley's proposed minimum crews would be sufficient or realistic to perform the work.

Relatedly, the GAO sustained the protest regarding the crew size ambiguity where it found Pasha's reliance on minimum crew requirements suggested in attachments to the solicitation reasonable, despite the agency maintaining that the solicitation left crew numbers to offerors' discretion.

Because of this latent ambiguity, the GAO recommended that the agency clarify the requirement so that offerors can compete on an equal basis and afford offerors an opportunity to submit proposals based on the clarified requirement.

Finally, the GAO sustained the protest on grounds that the agency improperly conducted past performance and technical evaluations. For these reasons, the GAO recommended that the agency revise the solicitation, clarify the requirements, request revised proposals, and evaluate the new proposals consistently with its decision.

AES UXO LLC

In AES UXO LLC, AES succeeded in part on its protest of the terms of a solicitation issued by the Army for unexploded ordnance clearance services at Fort McCoy, Wisconsin.[5]

AES primarily took issue with the solicitation's evaluation scheme and instructions pertaining to relevant experience and past performance. The solicitation requested that offerors submit "two ... examples of recent, relevant projects that the offeror completed and served as the prime contractor or in ... [joint ventures] for similar requirements to this project." [6]

In other words, the solicitation precluded evaluation of an offeror's relevant experience and past performance to the extent that such experience or past performance was gained while performing as a subcontractor. AES argued that this requirement unduly restricted from competition offerors who, like AES, had performed recent, relevant work only as subcontractors.

The GAO found that the Army misinterpreted its own solicitation in arguing that this requirement was meant to ensure successful performance by eliminating from consideration firms that had not actually performed relevant work. The GAO pointed out that, contrary to that argument, AES had actually performed the relevant work as a subcontractor, and therefore could not reasonably be excluded under this justification.

While the Army argued that AES nonetheless could have submitted an offer on the solicitation's terms because there was no explicit requirement that an offeror must have performed past contracts as a prime contractor or as part of a joint venture, the GAO maintained that AES was inherently prejudiced by its inability to meet this improperly justified evaluation criteria. Therefore, the GAO recommended that the Army revise the solicitation and accept revised quotations in response.

AES' second protest ground, that the Army's requirement for similar past experience improperly limited competition, was denied because this term was within the government's discretion and justified to minimize performance risks.

A clear theme arises from the three protest decisions above: Inconsistencies and improperly justified criteria in solicitations are taken seriously by the GAO and are likely to constitute successful protest grounds.

Raytheon Company

Finally, in Raytheon Company,[7] the GAO dismissed Raytheon's post-award protest as premature where it was not yet clear what result would be produced by the procuring agency's proposed corrective action.

The Space Development Agency issued a request for proposals, seeking "wide-field-of-view space vehicles deployed in low-earth orbit designed to detect hypersonic missile threats." [8] The agency made awards to two offerors, which Raytheon protested following its Space Development Agency debriefing.

Raytheon's original grounds for protest primarily alleged that the agency failed to properly evaluate proposals in the manner set forth in the request for proposals.[9] Before its responding agency report was due, the Space Development Agency notified the GAO that it would take corrective action, which would include reevaluating proposals and making a new award decision if necessary.

When Raytheon objected to this proposed corrective action as insufficient, the agency further clarified that it would reassess its needs, determine whether the request appropriately accounted for those needs, and resolicit proposals via an amended request for proposals if it did not.

The agency maintained that it would reevaluate proposals and make a new award decision whether or not it amended the request for proposals and resolicited proposals. The GAO dismissed the protest as academic because the agency had already committed to reevaluating proposals.

Upon receiving notice from the Space Development Agency that the agency did not intend to request proposal revisions from offerors, Raytheon filed the instant protest challenging the scope of the corrective action taken by the agency in an effort to require the Space Development Agency to amend the request for proposals and allow offerors to submit proposal revisions.

Specifically, Raytheon argued that the agency's corrective action was improper because the agency had not committed to amending the request and soliciting revised proposals before performing any new proposal evaluation and making a new selection decision.

Additionally, Raytheon argued that the current request for proposals failed to provide for consideration of the agency's budget constraints in connection with the evaluation of proposals, and also failed to reflect the agency's alleged preference for multiple overhead persistent infrared bands.

To support its arguments, Raytheon pointed to public statements made by an agency official and argued that the statements demonstrated that the current request for proposals did not reflect the agency's requirements.

The GAO dismissed this protest on all grounds. In doing so, the GAO pointed out that, while some public statements by Space Development Agency officials may have been contrary to solicitation evaluation criteria, such public statements are not binding on agencies in procurement decisions. Further, the GAO found Raytheon's protest to be premature where no wrong had yet arisen from the Space Development Agency's decision not to request proposal revisions based on an analysis of its needs.

Finally, the GAO went into significant detail to differentiate the presently proposed corrective action from the protest at issue in Mythics Inc.; Oracle America Inc.[10] In Mythics, the protest occurred prior

to award, and involved issues that remained unresolved by the proposed corrective action, preventing full and open competition in response to the solicitation.

In contrast, Raytheon's post-award protest here did not raise any issue that required resolution before the Space Development Agency undertakes its proposed corrective action.

This case serves as a useful reminder that the GAO will only consider challenges to an agency's proposed corrective action after the agency has taken some concrete action that either does — or does not — create a basis for challenging the terms of a reopened acquisition. Otherwise, the protest is premature.

Year in Review

The following provides a snapshot of the GAO's activity over the past year. According to the GAO Bid Protest Annual Report to Congress for Fiscal Year 2020, the GAO received 2,149 cases in fiscal year 2020.[11] Of those cases, there were 2,052 protests, 56 cost claims, and 41 requests for reconsideration.

The 2,052 protests filed at that GAO in fiscal year 2020 represented a modest decrease from the 2,071 protests filed in fiscal year 2019, a decrease potentially attributable to the general slowing of business due to the COVID-19 pandemic. Fiscal year 2020 also marked the second year of decrease in total protests from the 2,474 filed at the GAO in fiscal year 2018.

As mentioned above, the effectiveness rate, which is the percentage of protests that result in the protester obtaining some form of relief — either as a result of voluntary agency corrective action or GAO sustaining the protest — rose from 44% in fiscal year 2019 to 51% in fiscal year 2020.

This means that in half of all protests closed in fiscal year 2020, there were serious enough problems in the procurement to cause the agency to take corrective action — either voluntarily or as a result of a GAO decision. While this does not necessarily mean the protester received the contract, it does mean that the protester won the protest.

The GAO's annual report provided the following list of the most prevalent reasons for sustaining protests in fiscal year 2020:

- Unreasonable technical evaluation
- Flawed solicitation
- Unreasonable cost or price evaluation
- Unreasonable past performance evaluation

With this in mind, here are five key protests to remember from 2020, ordered by date and not by significance.

- Noble Supply & Logistics Inc. put contractors on notice that highest-technically rated, reasonably priced proposal evaluation is not a Competition in Contracting Act compliant method for establishing blanket purchase agreements under the U.S. General Services Administration's federal supply schedule.[12]
- In *Office Design Group v. U.S.*, the U.S. Court of Appeals for the Federal Circuit adopted the U.S. Court of Federal Claims' substantially indistinguishable test for deciding disparate-treatment allegations.[13]

- In *Insero Corp. v. U.S.*, the Federal Circuit expanded the boundaries of the long-standing Blue & Gold Fleet protest timeliness rule.[14]
- This year's bid protest spotlight would not be complete without a case based on the impact of the coronavirus. In *Chronos Solutions LLC*, the GAO held it was unreasonable for an agency to construct its procurement without considering the major economic changes resulting from the ongoing COVID-19 pandemic.[15]
- Finally, in *DynCorp International LLC*, the GAO highlighted the importance of contractors maintaining clearly identifiable commercial and government entity codes to avoid improprieties when undergoing conversions from corporations to limited liability companies while solicitations are ongoing.[16]

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[1] *IDS Int'l Govt. Servs. LLC*, B-419003, B-419003.2, Nov. 18, 2020, 2020 WL 7139935.

[2] *Id.* at *4-5.

[3] *Id.* at *5.

[4] *Pasha Hawaii Holdings LLC*, B-419020, B-419020.2, B-419020.3, Nov. 25, 2020, 2020 WL 7427489.

[5] *AES UXO LLC*, B-419150, Dec. 7, 2020, 2020 WL 7319340.

[6] *Id.* at *1.

[7] *Raytheon Co.*, B-419393.5, B-419393.6, Dec. 22, 2020, 2020 WL 7643493.

[8] *Id.* at *1.

[9] *Raytheon Co.*, B-419393.2 et al., Nov. 30, 2020 (unpublished decision).

[10] *Mythics Inc.; Oracle America Inc.*, B-418785, B-418785.2, Sept. 9, 2020, 2020 CPD ¶ 295.

[11] <https://www.gao.gov/assets/720/711556.pdf>.

[12] Read more at https://govcon.mofo.com/protests-litigation/january-2020-bid-protest-roundup/#_ednref3.

[13] Gain further insight here: <https://govcon.mofo.com/protests-litigation/march-bid-protest-roundup-law360-spotlight/>.

[14] Find additional commentary here: <https://govcon.mofo.com/protests-litigation/june-2020-bid-protest-roundup/>.

[15] Learn more here: <https://govcon.mofo.com/protests-litigation/october-2020-bid-protest-roundup-law360-spotlight/>.

[16] Read our analysis here: <https://govcon.mofo.com/protests-litigation/a-rose-by-any-other-name-offeror-remained-the-same-entity-for-bidding-purposes-despite-converting-from-a-corporation-to-a-limited-liability-company/>.