BID PROTESTS: LESSONS, TRENDS, AND OBSERVATIONS

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I. GAO and Court of Federal Claims Protest Statistics

A. GAO Statistics

GAO Bid Protest Statistics (in fiscal years)	**2009**	**2008**	**2007**	**2006**	**2005**
Cases Filed	1989	1652	1411	1326	1356
Cases Closed	1920	1582	1394	1275	1341
Merits Decision	315	291	335	251	306
Sustains	57	60	91	72	71
Sustain Rate	18%	21%	27%	29%	23%
Effectiveness Rate (reported)	45%	42%	38%	39%	37%
ADR (cases used)	149	78	62	91	103
ADR Success Rate	93%	78%	85%	96%	91%

B. Court of Federal Claims Statistics

Court Bid Protest Statistics (Dec. 2008 - Dec. 2009)	2009	2008	2007	2006	2005
Protests Filed	74	79	81	64	68
Pre-award	22	23	18	9	16
Post-award	52	56	63	55	52
Protest Decisions	57	39	53	74	
Published	50	38	50	55	
Unpublished	7	1	3	19	

II. Significant Case Developments

A. Organizational Conflicts of Interest ("OCI") Remain a Hot Issue

- OCIs continue to vex agencies and contractors in bid protests. In particular, contractors must be alert to possible OCIs created by negotiations for mergers or acquisitions. In *McCarthy/Hunt JV*, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68, GAO found an OCI to exist because *the parent company* of an acquisition support contractor had entered into negotiations to acquire a company that attended a bidders' conference for the acquisition for which it was providing advice. GAO rejected the offeror's argument that the relationship between its parent and the company to be acquired was too attenuated to be an OCI. This case illustrates the challenges faced by large organizations in attempting to identify potential OCIs.

B. Be Careful About Gaining an Unfair Competitive Advantage By Hiring a Former Government Employee

1. Contractors need to exercise caution when hiring former government employees who had access to confidential, proprietary, or source selection information during their

government service. Such a hire resulted in the disqualification of an offeror found to have gained an unfair competitive advantage thereby – notwithstanding his having obtained "clean" letters from an agency ethics official. In *Health Net Federal Services, LLC*, B-401652.3, .5, Nov. 4, 2009, 2009 CPD ¶ 220 (a protest brought by Crowell & Moring), GAO sustained a protest that the awardee gained an unfair competitive advantage by hiring a former high-level agency employee – who had access to the protester's proprietary information during his government service – and putting him to work preparing its proposal. The "clean" letters from the agency ethics official did not cure the problem because the contracting officer had an independent obligation to evaluate the former employee's conduct for the protection of the integrity of the procurement. GAO sustained the protest, holding that the employee's use of the confidential information was presumed and need not be actually proved by the protester.

2. This protest also establishes that an unfair competitive advantage protest ground can be distinct from an alleged Procurement Integrity Act ("PIA") violation.

C. Task/Delivery Order Protests: The Rules Are Still Evolving

1. The 2008 National Defense Authorization Act ("NDAA") expanded GAO's bid protest jurisdiction to include review of task and delivery order awards exceeding $10 million under multiple award ID/IQ contracts. Pub. L. No. 110-181, 122 Stat. 3, 236-39 (2008).

2. The rules governing task/delivery order award protests continue to evolve.

   a. Timeliness. An offeror must challenge the terms of a task/delivery order solicitation by the due date for submission of proposals, even though the protester may not be certain that the order will exceed the $10 million jurisdictional threshold. In *Innovative Technologies Corporation*, B-401689 *et al.*, Nov. 9, 2009, 2009 CPD ¶ 235, the protester argued that it could not have known that the order would exceed the $10 million threshold until it was actually issued, therefore its protest challenging the

solicitation terms, filed after award, was timely. GAO held that the protester knew or should have known upon receipt of the RFP that the task order would exceed $10 million, because it was the incumbent and the RFP included a description of the required level of effort.

b. Valuation. GAO will review agency valuations of task/delivery orders – to a point – providing modest comfort that agencies do not have unfettered discretion to "game" the valuation so as to avoid a protest.

- In *ESCO Marine, Inc.*, B-401438, Sept. 4, 2009, 2009 CPD ¶ 234, GAO held that the value of the task order included the estimated proceeds of scrap sales, which increased the value of the task order from the agency's assessed value of $.06 to more than $13 million.

- There are limits to GAO's willingness to second-guess agency valuations. In *Armorworks Enterprises, LLC*, B-401671.3, Nov. 6, 2009, 2009 CPD ¶ 225, GAO rejected an allegation that the agency had split its requirements into three separate RFQs as a pretext to avoid the $10 million jurisdictional threshold. GAO held that it will not aggregate separate orders, for the purpose of establishing the $10 million jurisdictional threshold, absent a clear showing that the agency's decision to issue separate orders was made *solely* to evade its protest jurisdiction.

c. Blanket Purchase Agreements ("BPA"). BPAs are not ID/IQ contracts, so the new task/delivery order jurisdiction does not include task/delivery orders under BPAs. In *C & B Construction, Inc.*, B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1, GAO held that it did not have jurisdiction to consider a protest of a task order issued under a BPA. Because a BPA does not require the government to order a minimum quantity, it is not a contract.

d. Open Questions. It remains yet to be decided to what extent GAO will import FAR Part 15 standards to evaluate task and delivery order protests, such as those that apply to discussions, if the RFP does not expressly do so. We have seen agencies begin to explore different approaches to

task/delivery order competitions, with unusual RFP provisions.

D. Past Performance: How to Make Affiliates Relevant

1. To take advantage of the past performance of a parent and/or affiliates, contractors should specifically explain in their proposals what role those entities will play in contract performance. In *Health Net Federal Services, LLC*, B-410652.3, the agency improperly credited the awardee with the past performance of its parent and affiliates where the proposal did not identify which affiliates were involved in performing the prior contracts nor whether those affiliates would have a role in the competed contract. Sharing a similar name is not sufficient. *AMI-ACEPEX, Joint Venture*, B-401560, is an example of an offeror that did a good job describing the role of its affiliate and therefore gained appropriate credit for the affiliate's past performance. Its proposal stated that it would transition personnel from the current contract performed by the affiliate; had the capability to tap more than 6000 affiliate employees worldwide; would rely on the expertise of experts who had served on affiliate's related contract; would rely on the parent to provide accounting, human resources, IT services, and assistance with hiring employees, meeting security requirements, and purchasing equipment.

2. Pay close attention to the RFP definitions of "relevant" past performance. In *Health Net Federal Services, LLC*, B-401652.3, GAO found the agency improperly gave the awardee the highest past performance rating even though the awardee's prior contracts were very small – most less than 3% – in relation to the size of the proposed effort and therefore inadequate to predict successful contract performance. In *Caddell Construction Company, Inc.*, B-401596, Sept. 21, 2009, 2009 CPD ¶ 187, GAO found unreasonable the aggregation of many small projects to equal the value of the proposed construction project. GAO explained that "combining the values of a list of projects does not demonstrate the necessary skills to complete and manage" a single larger, more complex construction project.

E. There Are No Free Lunches in Bid Protests

1. A contractor cannot circumvent Federal Supply Schedule ("FSS") rules by pricing non-schedule items at $0 and then including the price for the non-FSS items in the price of other CLINS. It has long been the rule that if a contractor is competing for a FSS contract order, all of the required CLINS must be on its schedule contract. Now we know that a contractor cannot circumvent this requirement by pricing a required CLIN at less than the $3,000 micro-purchase threshold. In *Rapiscan Systems, Inc.,* B-401773.2, .3, Mar. 15, 2010, 2010 CPD ¶ 60, GAO sustained a protest that the FSS contract held by the successful vendor, SAIC, did not include all required items. The agency conceded that one of the required CLINs, freight, was not included in the awardee's FSS contract, but argued that it properly issued the purchase order because the price for freight did not exceed the $3,000 micro-purchase threshold. GAO found that SAIC's price for freight – $0 – was "illusory" because the actual price for freight was included in the price of an FSS item and the actual price was well above micro-purchase threshold.

2. If the government benefits, it's probably an acquisition contract, not a concessions contract. Normally, GAO lacks jurisdiction to entertain protests of concessions contracts. However, in *Public Communications Services, Inc.*, B-400058, .3, July 18, 2008, 2008 CPD ¶ 154, (a protest brought by Crowell & Moring), GAO highlighted an important basis for distinguishing acquisition contracts from concessions contracts. The protester challenged the award of a contract for detainee telephone services by the Bureau of Immigration and Customs Enforcement ("ICE"). ICE challenged GAO's authority to hear the protest given the solicitation involved a no-cost contract. Here, as a component of the contract, the contractor was required to provide pro bono phone services, which advance ICE's mission. Because the contract resulted in a benefit to the government, GAO characterized it as an acquisition for services and held that it had jurisdiction. It distinguished this situation from a protest challenging a "pure" concession contract, that is, a no-cost contract that authorizes a concessionaire to provide goods or services to the public, as opposed to the government.

In a related decision, GAO awarded attorney's fees and costs to PCS, a small business, rejecting the agency's arguments that the legal fees incurred were excessive. *Public Communications Services, Inc. -- Costs*, B-400058.4, June 25, 2009, 2009 CPD ¶ 131.

F. Important Procedural Developments

1. The implied-in-fact contract jurisdiction is alive and well in the Court of Federal Claims ("COFC"). Answering a theoretical question that has puzzled bid protest junkies ever since the enactment of the Administrative Dispute Resolution Act of 1996, the Federal Circuit definitively held that the Court of Federal Claims has jurisdiction to entertain "nonprocurement" protests under the old theory that there is an implied-in-fact contract to have bids fairly and honestly considered. In *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238 (Fed. Cir. 2010), the Circuit held that the COFC has jurisdiction to review a competition held to lease Navy real property. While the Circuit's holding clarified aspects of the COFC's bid protest jurisdiction, it also raises questions. For instance, the Circuit's decision in *Resource* does not foreclose the opportunity for a protester to challenge a "nonprocurement" protest in a federal district court.

2. The Federal Circuit clarified the standing requirements for pre-award protests. In *Weeks Marine, Inc., v. United States*, 575 F.3d 1352 (Fed. Cir. 2009), the Circuit set the standard for establishing standing in a pre-award challenge to the terms of a solicitation. To demonstrate that it is an "interested party," a protester always must establish that it "(1) is an actual or prospective bidder and (2) possess[es] the requisite direct economic interest." In *Weeks*, the Circuit addressed the second prong, *i.e.*, what it means to have a "direct economic interest," in a pre-award protest. The Circuit held that a protester must allege "a non-trivial competitive injury which can be redressed by judicial relief." The protester in *Weeks* met this standard because it established an interest in bidding, when it sent in complaints and concerns, noted its contracting ability, and suggested it would likely receive a substantial percentage of the contracts in sealed bidding.

G. Public Agency Squabble Erupts Over HUB Zone Rules: GAO and COFC Hold that SBA Regulations Are Wrong; DOJ Sides With SBA; Federal Circuit Showdown Soon To Follow

Last May, GAO held that the Small Business Act requires agencies to give preference to HUB Zone set-asides, as against other socioeconomic set-aside programs, thereby ruling that SBA regulations, requiring parity between socioeconomic programs, to be invalid. *Mission Critical Solutions*, B-401057, May 4, 2009, 2009 CPD ¶ 93. SBA took the unusual, but not unprecedented, step of notifying GAO that it did not intend to follow GAO's recommendation. OMB then issued a memorandum directing agencies to disregard GAO's decision, pending review by the DOJ Office of Legal Counsel. Subsequently, DOJ OLC issued an opinion that SBA's interpretation is permissible and that GAO's decision is not binding on Executive Branch agencies. The successful GAO protester then filed the case at the COFC. Chief Judge Hewitt sided with GAO, holding SBA parity regulations to be inconsistent with the statute. *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010). Judge Hewitt upped the ante by enjoining SBA from awarding the contract in a manner inconsistent with the COFC's interpretation of the Small Business Act. This unusual public squabble pits two Executive Branch entities, DOJ and SBA, against the two Legislative Branch entities, GAO and the COFC. The COFC's decision has been appealed to the Federal Circuit.

III. Looking Forward: Potential Impact of New Statutes/Regulations on Bid Protests

A. American Recovery and Reinvestment Act of 2009 ("ARRA")

- Failure to consider past non-compliance with ARRA disclosure requirements
    - Section 1512 of ARRA contains the public reporting requirements for federal contractors. Implemented at FAR 4.15, American Recovery and Reinvestment Act – Reporting Requirements, and FAR 52.204-11, American Recovery and Reinvestment Act—Reporting Requirements, will be inserted in solicitations and contracts, funded in whole or in part by the Recovery Act, including orders and modifications to existing contracts or orders.
- Sole source awards using ARRA funds – what standard applies?

    - Section 1554 of ARRA states that to the maximum extent possible, contracts funded by ARRA shall be awarded through the use of competitive procedures and requires the government to post contracts not awarded using competitive procedures. Located in FAR Part 5.7, Publicizing Requirements Under the American Recovery and Reinvestment Act of 2009.
- Awards to companies that do not comply with ARRA's Buy American requirement
    - Section 1605 of ARRA requires use of American iron, steel, and other manufactured goods used as construction material in construction of a public building or public work. Implemented at FAR Subpart 25.6 and solicitations and contracts will contain clauses found in FAR 52.225.

B. Federal Awardee Performance and Integrity Information System (FAPIIS")

- Failure to consider adverse past performance information
- Failure to consider information bearing on responsibility
- Lack of meaningful discussions regarding adverse past performance information in FAPIIS to which offeror has yet to have opportunity to respond

See Duncan Hunter National Defense Authorization Act of 2009, Pub. L. 110-417, § 872, 122 Stat. 4356, 4555-57, Oct. 14, 2008. The new requirements are located in FAR Subpart 9.1. Solicitations will insert FAR clauses 52.209-7 and 52.209-8.

C. New Organizational Conflict of Interest ("OCI") Rules under the Weapons System Acquisition Reform Act of 2009 ("WSARA")

- Pre-award: failure to consider potential OCIs during preparation of solicitation
- Post-award: failure to consider potential OCIs during evaluation
- Challenge to adequacy of mitigation plan – what does it mean to minimize OCI to an "acceptable level"?
- Failure of awardee to make required pre-award and/or post-award disclosures

Proposed rules, found at 75 Fed. Reg. 20954-65 (Apr. 22, 2010), would implement § 207 of the Weapon Systems Acquisition Reform Act of 2009 ("WSARA"), Pub. L.

111-23, §207(b), 123 Stat. 1704, 1728-29 (2009). The proposed OCI rules would be included in a new DFARS Subpart 203.12.