

**CRISIS MANAGEMENT  
AND FIRST AID: WHEN  
GOVERNMENT  
CONTRACTORS ARE  
THE HEADLINERS**

**WELCOME**

**OOPS** 2014

# SHIFTING TIDES ON THE BID PROTEST FRONT

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OOPS <sup>2014</sup>

# GAO Protest Statistics

<b>Fiscal Year</b>	<b>2013</b>	<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
Cases Filed	2,429	2,475	2,353	2,299	1,989	1,652	1,411	1,326
Cases Closed	2,538	2,495	2,292	2,226	1,920	1,582	1,394	1,275
Merits Decision	509	570	417	441	315	291	335	251
Sustains	87	106	67	82	57	60	91	72
Sustain Rate	17%	18.6%	16%	19%	18%	21%	27%	29%
Effectiveness Rate (reported)	43%	42%	42%	42%	45%	42%	38%	39%
ADR (cases used)	145	106	140	159	149	78	62	91
ADR Success Rate	86%	80%	82%	80%	93%	78%	85%	96%

# Court of Federal Claims Protest Statistics

<b>Calendar Year</b>	<b>2013</b>	<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
Protests Filed	84	99	98	88	74	79	81	64
<i>Pre-award</i>	20	42	29	19	22	23	18	9
<i>Post-award</i>	64	57	69	69	52	56	63	55
Protest Decisions	64	78	82	71	57	39	53	74
<i>Published</i>	61	66	73	64	50	38	50	55
<i>Un-published</i>	3	12	9	7	7	1	3	19

# Bid Protest Statistics

- Number of GAO protests filed decreased from the year before – for the first time since 2006
- Decrease in GAO decisions on the merits
  - Effect of the shutdown? Effect of corrective action?
- Decrease in COFC protests over past year
  - Percentage of pre-award protests decreased
- Notable FY13 statistic: GAO had hearings in 3.36% of fully developed cases, *i.e.* GAO held 31 hearings
  - In comparison: 6.17% in FY12 (56 cases), 8% in FY11 (46 cases), 10% in FY10 (61 cases), and 12% in FY09 (65 cases)

# Wild World of Corrective Action

- FY13: approximately 1,100 cases resulted in either GAO sustain or voluntary corrective action – no clear rules
- Most voluntary corrective action is undertaken prior to GAO's initial agency report deadline (monetary incentive)
- COFC corrective action less frequent and more complicated as it requires DOJ approval
- Statement to GAO re proposed corrective action is generally not specific and limited, but includes statement that agency will reconsider the award decision in order to trigger dismissal of protest
- Narrow post-award corrective action often leads to subsequent round(s) of protests
- If corrective action includes opportunity for new proposals, awardee/intervenor should seek a level playing field to offset debriefing information received by offerors.

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# Wild World of Corrective Action

- Original awardee can challenge agency corrective action pursuant to GAO sustain at COFC
  - Can challenge GAO decision – although a difficult standard of review, this has not prevented success – reinstatement of awards has occurred, *see Amazon Web Services v. United States*, 113 Fed. Cl. 102 (2013); *Turner Construction Co., Inc. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011)
  - Protester can also “up the ante” by seeking more relief from COFC, *see Jacobs Tech., Inc. v. United States*, 100 Fed. Cl. 198 (2011)

# Wild World of Corrective Action

- Protester or Intervenor can challenge scope of corrective action
  - Significant differences among COFC judges
    - Limit corrective action to that necessary to remedy error found, *see WHR Group, Inc., et al. v. U.S.*, Nos. 13-515C and 13-541C, Apr. 8, 2014, 2014 WL 1377819; *Amazon Web Services v. United States*, 113 Fed. Cl. 102 (2013); *Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010)
    - Much broader agency discretion, *see CBY Design Builders v. United States*, 105 Fed. Cl. 303 (2012); *Sierra Nevada Corp. v. United States*, 107 Fed. Cl. 735 (2012)
  - GAO generally allows an agency to expand relief so long as it cures the error, *see Northrop Grumman Info. Tech., Inc.*, B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65; but also allows agencies to restrict re-evaluation to prior FPR despite the passage of time and expiration of proposals effectiveness, *see Logistics 2020, Inc.*, B-408543.4, Feb. 28, 2014, 2014 WL 1430321
  - GAO generally allows agency even to restrict scope of revised proposals, *see Evergreen Helicopters of Alaska, Inc.*, B-409327.3, Apr. 14, 2014, 2014 WL 1466617; *but see Power Connector, Inc.*, B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186

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## Wild World of Corrective Action – CICA Stays

- CICA stay expires at end of GAO protest even if sustain or voluntary corrective action taken
  - Can agency allow awardee to perform during corrective action? *Solutions by Design Alliant Joint Venture, LLC v. United States*, No. 13-331-C, 2013 WL 2457279 (Fed. Cl. May 23, 2013)
  - Does timely-filed protest challenging re-affirmation of original award trigger new CICA stay? *Supreme Foodservice GmbH v. United States*, 109 Fed. Cl. 369 (2013)

## Wild World of Corrective Action – Timeliness Issues

- Preservation/waiver of protest issues
  - If agency’s announced corrective action creates or does not correct a “ground rules” violation, post-award protest will likely be untimely. *See Sherman Plaza, Inc.*, B-402310.6, Aug. 4, 2010, 2010 CPD ¶ 188
  - Issues lost or missed during first GAO protest cannot be raised in GAO protest after corrective action. *See Loyal Source Government Servs., LLC*, B-407791.5, Apr. 9, 2014, 2014 WL 1652484
  - GAO sustain – protester can go to COFC on issues it lost at GAO after corrective action
    - *Vanguard Recovery Assistance JV v. United States*, 99 Fed. Cl. 81 (2011)

## Protest Consideration in the Age of Austerity

- More lowest-priced, technically acceptable procurements or more/greater weight given to cost/price in evaluation criteria?
- New twists on cost/price requirements and evaluations (cost/price ceilings, reliance on market research for compensation levels)
- Impact on duration of evaluation cycles and interim sole-source awards?
- Conversion of best-value to LPTA, *see Logistics 2020, Inc.*, B-408543, Nov. 6, 2013, 2013 CPD ¶ 258

# Protest Consideration in the Age of Austerity

- In FY13, GAO was very active with decisions on price realism
  - When price realism evaluation is/is not required
  - Ensuring consideration of unique technical approaches
- GAO clarified in *DynCorp Int'l LLC*, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 that it will find that a price realism evaluation is necessary even if RFP does not explicitly call for this type of evaluation if:
  - (1) the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, AND
  - (2) the RFP states that a proposal can be rejected for offering low prices

# Highlights of Changes and Key Developments

## Discussions

- CO abused her discretion in failing to seek a clarification where the offeror had been excluded as technically unacceptable based on an omission, *see BCPeabody Construction Services v. United States*, 112 Fed. Cl. 502 (2013)
- The non-relevance of past performance references need not be included in discussions in order for discussions to be meaningful, *see Maywood Closure Co., LLC*, B-408343, B-408343.3, B-408343.4, B-408343.6, Aug. 23, 2013, 2013 CPD ¶ 199

# Highlights of Changes and Key Developments

## Post-FPR Discussions

- Agency did not engage in post-FPR, pre-award discussions with awardee where no unilateral exchanges favored the awardee, *see Supreme Foodservice GmbH v. United States*, 112 Fed. Cl. 402 (2013)
- Agency's review of "head start program" reports regarding certain pre-award efforts submitted by the awardee after the closing date for discussions/FPR deadline but before award, although improper, did not impact the evaluation and did not require discussions to be re-opened, *see BAE Systems Information and Electronic Systems Integration Inc.*, B-408565, *et al.*, Nov. 13, 2013, 2013 CPD ¶ 278

# Highlights of Changes and Key Developments

## OCI Waivers

- Following an ADR conference where GAO advised parties that it would sustain the protest because the agency failed to meaningfully consider OCIs, the agency waived any OCIs – three days before the GAO decision was due – leading to protest dismissal, *see AT&T Government Solutions, Inc.*, B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45
- At the COFC's request, GAO issued an advisory opinion that GSA's OCI waiver was not arbitrary or capricious and that, had a waiver not been executed, the protester's OCI allegation would have been untimely as the protester was aware of the basis for the OCI allegation 10 months before first raising it, *see GAO Advisory Opinion to COFC in the matter of SRA Int'l, Inc. v. United States*, No. 13-969 C

# Questions?

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