

GAO breathes new life into the commonly denied ‘failure to award a strength’ protest ground

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Challenging an agency’s failure to award a “strength” for a proposal feature can prove to be an exercise in futility. GAO frequently characterizes this oft-rejected argument as mere disagreement and defers to the agency’s conclusions.

But, following GAO’s decision in *Tech Marine Business, Inc.*,¹ the tide may be turning. Agencies are now required to demonstrate that their decision not to award strength credit was reasonable and consistent with the stated evaluation criteria.

Agencies must justify their evaluation decision at some point, even if that occurs through post-protest explanations.

The protester, Tech Marine Business, Inc. (Tech Marine) alleged that the Navy failed to award Tech Marine a strength for its transition plan. The solicitation required the awardee to “begin work immediately and assume responsibility from the incumbent Contractor, if applicable, within 60 days after Task Order award.” Tech Marine, the incumbent contract, explained that its transition plan exceeded the Navy’s schedule for workload turnover and that transition would be completed “well in advance of the 60-day requirement.”

In response to the protest ground, the Navy argued that it did not assign Tech Marine a strength because the transition plan was merely “reasonable and consistent with the stated evaluation criteria” and therefore not strength worthy.

Additionally, relying on GAO’s decisional law that “an agency is not required to document all ‘determinations of adequacy’ or explain why a proposal did not receive a strength, weakness, or deficiency for a particular item,” the Navy contended that it “only documented aspects of [Tech Marine]’s proposal where it found strengths, weaknesses, significant weaknesses, or deficiencies” and that it had no reason to explain why Tech Marine’s plan did not merit a strength.

GAO rejected the Navy’s position, finding that the Navy’s argument rested on a “fundamental misunderstanding” of GAO’s decisional law. GAO explained that while agencies are not required to “prove

a negative” or document “determinations of adequacy (*i.e.*, why a proposal did *not* receive a strength or weakness),” when such challenges to an agency’s evaluation occur, they are subject to GAO’s review. Stated differently:

[W]hen a protester raises a challenge regarding why a proposal was not assigned a strength or weakness, we continue to review whether an agency’s explanation or documentation — contemporaneous or otherwise — demonstrates that the evaluation was reasonable and consistent with the stated evaluation criteria.

The distinction between GAO’s finding in *Tech Marine* and its reasoning in the “prove a negative” cases appears to rest on the phrase “contemporaneous or otherwise,” which GAO used twice in *Tech Marine*. Agencies must justify their evaluation decision at some point, even if that occurs through post-protest explanations. (GAO noted that it affords greater weight to contemporaneous materials.)

GAO will likely be taking a closer look at the “failure to award a strength” arguments and ensuring that agencies reasonably adhere to solicitation evaluation criteria.

Even when afforded the opportunity to provide post-protest explanations of its evaluation, the Navy did not offer any justification supporting its evaluation of Tech Marine’s transition plan. This allowed GAO to find the Navy’s evaluation (and source selection decision) inadequate and insufficiently documented.

This decision presents a few takeaways for would-be protesters. First, GAO will likely be taking a closer look at the “failure to award a strength” arguments and ensuring that agencies reasonably adhere to solicitation evaluation criteria.

Second, an agency’s lack of contemporaneous documentation will not automatically render the selection decision unreasonable. GAO

appears amenable to some *post-hoc* gap filling, provided the later-in-time justification is consistent with the contemporaneous record.

Finally, incumbents should take full advantage of the benefits offered by their incumbent status including with regard to accelerated transition schedule and risk reduction. In *Tech Marine*, GAO rejected the Navy's attempt to limit consideration of Tech

Marine's incumbent status to the past performance factor and noted that Tech Marine's incumbent work could be considered as part of another evaluation criterion.

Notes

¹ B-420872, Oct. 14, 2022, <http://bit.ly/3zYCeMG>

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