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Welcome to Jenner & Block's Government Contracts Legal Round-Up, a biweekly update on important government contracts developments. This update offers brief summaries of key developments for government contracts legal, compliance, contracting, and business executives. Please contact any of the professionals at the bottom of the update for further information on any of these topics.

Protest Cases

1. *IAP Worldwide Services, Inc. v. United States*, No. 21-1570 (Fed. Cl. May 25, 2022)

- In what may prove among the most significant Court of Federal Claims bid protest opinions of 2022, Judge Solomson provides a thorough explanation of the various remedies available at the Court.
- In a prior decision as part of the same protest, the court found that the Army failed to comply with a DoD FAR Supplement (DFARS) provision requiring that DoD "should" open discussions before awarding contracts valued above \$100 million. Although the court found that the protester established prejudicial error on this point, the court could not determine the appropriate nature of relief, if any.
- After supplemental briefing, the court concluded that even though the protester could not demonstrate the irreparable harm necessary for a permanent injunction, it was nevertheless appropriate to remand the procurement back to the Army to comply with the DFARS provision in the first instance, whether by further explaining its initial decision to forego discussions, or preparing a new decision.

This opinion repays careful study. Protest practitioners should be careful to understand the various remedies available at COFC and craft their pleadings accordingly.

2. *AT&T Mobility LLC*, B-420494 (May 10, 2022) (Published May 23, 2022)

- GAO sustained a protest alleging errors in the evaluation of both non-price and price factors, as well as the source selection decision.
- First, GAO found that under the non-price factors, the agency assessed the proposals primarily on an acceptable/unacceptable basis without performing the kind of qualitative analysis required by the amended solicitation. Specifically, the solicitation contained provisions requiring offerors to provide, and the agency to assess, detailed narrative descriptions for many of the requirements. Instead of assessing these narrative descriptions, the agency improperly evaluated offerors on the basis of the pass/fail matrix that had been removed as a stand-alone evaluation factor.
- Next, GAO determined that the source selection decision was flawed because it converted the procurement methodology from best value to lowest-priced, technically acceptable. Here, the agency did not conduct a price/technical tradeoff because the selection authority did not see any discriminators in the protester’s proposal “worth considering for a trade-off in value over price.” However, GAO found that the record did not show that there was any qualitative discussion of the underlying merits of the proposals and why they should have been considered technically equivalent, and instead the selection authority unreasonably relied upon adjectival ratings.
- Finally, GAO held that the price evaluation was flawed because, contrary to the solicitation’s express terms, the agency excluded pricing for the transition portion of the base year and pricing for the optional CLINs from the price calculations used in the source selection decision. While as a standalone matter this may not have been prejudicial because the protester was still higher priced, GAO nonetheless sustained because it could not conclude with any certainty that, had the agency evaluated proposals consistent with the terms of the solicitation and performed a proper tradeoff analysis, that the selection authority would have made the same selection decision.

Agencies cannot establish one evaluation scheme yet follow another. Where debriefing materials indicate that the agency did not follow its own requirements, this can be a ripe avenue for protest.

3. *Sehlike Consulting, LLC, B-420494 (May 18, 2022) (Published May 25, 2022)*

- GAO sustained a protest arguing the awardee’s proposal was unacceptable due to the subsequent unavailability of a proposed key person.
- The solicitation, issued by the Department of Defense, National Reconnaissance Office (NRO), required offerors to provide resumes and letters of commitment for four specific key personnel positions, including a senior financial consultant.
- In selecting KPMG for award, the selection decision identified that “specifically KPMG’s exceptional response to [the] most important management factor Key Personnel” warranted the associated cost premium.

- The protester alleged that the agency should have evaluated the awardee's proposal as technically unacceptable when, prior to completing its evaluation of proposals and making its award decision, KPMG advised the agency that its proposed senior financial consultant had submitted a formal notice of resignation, thus putting the agency on notice that one of the company's proposed key personnel was unavailable to perform the contract as proposed.
- In response, NRO claimed that their evaluation was reasonable because despite the individual's pending departure and despite the agency's knowledge of the pending departure, the individual technically remained an employee of KPMG's subcontractor on the date the agency executed the source selection decision.
- GAO was not persuaded, finding that the agency could not ignore the pending departure of the key person. Unlike other cases, where a proposed key person's unavailability was not sufficiently definite, here the fact that the senior financial consultant unambiguously resigned to take a position with a different firm made it clear that the individual was unavailable. GAO therefore determined that it was unreasonable for the agency to base its evaluation on the awardee's offer of a senior financial consultant it had no realistic expectation would perform on the follow-on contract.

When assessing allegations regarding the unavailability of key personnel, GAO performs a fact-specific inquiry to determine whether the individual was actually unavailable and whether the agency had this knowledge prior to its award decision. GAO continues to maintain its position that when a key person becomes unavailable, agencies must either reevaluate proposals without reliance on this candidate for a required key person position, or open discussions and solicit revised proposals from all offerors.

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