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Focus

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FEATURE COMMENT: An Analysis Of GAO's 2020 Bid Protest Statistics—Fewer Protests, More Success—Together With Last Year's Top Protest Decisions And Developments

The Government Accountability Office has released its bid protest statistics for fiscal year 2020. *GAO Bid Protest Annual Report to Congress for Fiscal Year 2020,* B-158766 (GAO-21-281SP), is available at *www.gao.gov/products/GAO-21-281SP*; 63 GC ¶ 2. Key takeaways: protest filings were down slightly but the success rate was way up, with the "effectiveness rate" cresting over one-half.

GAO's Reported Statistics—GAO received 2,052 and closed out 2,024 bid protests in FY 2020. (As many readers know, GAO counts protests by docket number, or "B-numbers," not by the number of procurements challenged; multiple B-numbers in one proceeding are common, especially with more complex or hotly contested procurements.) In FY 2018, GAO received 2,474 protests, so protest filings have decreased just over 17 percent in the past two years.

For FY 2020, GAO reported that task or delivery order procurements under indefinite-delivery, indefinite-quantity (IDIQ) contracts were at issue in 417 (up year-over-year from 373) or nearly 19.5 percent (up from 17 percent) of all cases closed. The steady flow of IDIQ contracting, and protests, continues. Will we see the percentage top 20 percent in FY 2021?

The past fiscal year, GAO employed alternative dispute resolution (ADR) a full 124 times, 102 times successfully (for a success rate of 82 percent). This is well up, comparing to totals of 40, 86 and 81 ADR attempts in the preceding three years, with the success rate ranging from 77 to 90 percent. There were 47 requests for reconsideration in FY 2020, down over one-quarter year-over-year; and there were no cases in which an agency disregarded GAO's recommendations, continuing the perfect record of the preceding four years.

There were only nine hearings in FY 2020, perhaps due in part to the onset of the COVID-19 pandemic mid-way through the fiscal year. Given that these nine cases were one percent of all "fully developed cases," that latter set (about 900) must have been about 44 percent of all protests. Conversely, of course, more than half of protests never attained full developed status. We can also derive that only about 60 percent of all fully developed cases resulted in a full sustain/deny decision on the merits (545/900).

The 545 protests that went all the way to a GAO sustain-or-deny decision in FY 2020 were about 27 percent of protests closed out—in comparison to 587 and 28.2 percent the year before. Of those 545 protests, 84 or 15 percent resulted in a sustained protest. This compares to the 77 sustained protests in FY 2019, for a sustain rate of 13 percent. For context, the 139 sustained protests in FY 2016, for a sustain rate of 23 percent, were the recent high-water mark.

As it does every year, GAO provided a list of the most frequent grounds for sustaining a protest. The top reason in FY 2020 (also first each of the past four years) was "unreasonable technical evaluation." The second-ranked reason in FY 2020 was "flawed solicitation," which has not appeared on recent annual lists. The third-ranked reason in FY 2020 was "unreasonable cost or price evaluation"—which fifth-ranked in FY 2019, second-ranked in FY 2018 and third-ranked in both FY 2017 and 2016. Fourth in FY 2020 was "unreasonable past performance evaluation."

Each year, GAO's report includes some version of the caveat from this year's report: "a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily

take corrective action in response to the protest rather than defend the protest on the merits." Most readers will be familiar with the phrase, but, for those who are not, voluntary corrective action (VCA) refers to an agency voluntarily deciding to reopen and redo at least some part of a procurement before GAO issues any decision in a protest, and usually before GAO has given any indication of the likely outcome.

For FY 2020, GAO reported an "effectiveness rate" of 51 percent, that is, of the 2,024 protests closed out, 51 percent (or 1,032 protests) resulted in either a sustain by GAO or VCA by the agency. That is a very high number! Given the number of sustained protests (84), that means agencies took VCA in a total of 948 protests—and the rate of voluntary corrective action alone was 46.8 percent. The preceding-year VCA totals were 838 in FY 2019 and an average of 1,048 per year from FY 2015–2018.

Given how GAO counts protests, the already-high 46.8 percentage for VCA probably understates the likelihood of any particular protested procurement resulting in such an outcome. This is because most VCA occurs within the first 30 days after a protest is filed and is assigned a single B-number but before the agency report is filed, as agency counsel examine the record and evaluate their chances of prevailing. In contrast, most supplemental protests, giving rise to many additional B-numbers that go into the denominator of the percentage, are filed shortly after receipt of the agency report. In FY 2020, the odds of VCA in the first month had to be close to, or perhaps even better, than 50 percent.

Sustained GAO Protests—For FY 2020, as we did for the first time last year, we conducted a statistical "deep dive" into GAO's *sustained* protests. The 84 sustains were encapsulated in only 42 decisions, one more than in FY 2019. An equal number of 42 additional B-numbers were adjudicated along with the main ones, so the sustains averaged two B-numbers, up about one-twelfth from FY 2019.

Of the 42 sustain decisions, only 32 came in post-award protests, and only two benefited more than a single protester. In the grand scheme of all protests filed, those percentages are quite slim. In terms of procurement size for sustained protests, the statistics reflected a bell curve, with the greatest number falling between $10 million and $100 million in size. Of the 42 sustain decisions, almost half came in negotiated (Federal Acquisition Regulation pt. 15) procurements. General Services Administration Federal Supply Schedule (FAR subpt. 8.4) and task/delivery order (FAR pt. 16) procurements combined for about one-quarter of the sustains. Small businesses were again winners more often than large businesses, claiming almost 60 percent of the sustain decisions.

The last component of our deep dive was into GAO's recommended corrective actions for sustained protests. Of the 32 sustain decisions in post-award protests, nine recommended redoing the entire procurement, and five called for the reopening of discussions and solicitation of proposal revisions. Another 27 called only for the re-evaluation of proposals; of those, none recommended the award of a contract to the protester, though two pointed to that possibility in the context of re-evaluation. Once again, in an entire fiscal year with over two thousand protests, none resulted directly in a contract award for the protester, and only 14 even afforded the protester "another bite at the apple" with an additional round of proposals.

Statistical Trends—What explains the decrease in protest filings *combined with* an increase in the success rate? There could be a number of factors at work here, but one seems by far the most likely: better debriefings. The FY 2018 National Defense Authorization Act (NDAA) instituted "enhanced debriefing" procedures for Department of Defense procurements, and non-statutory initiatives have since been adopted by various agencies to improve the accuracy and completeness of debriefings. With more information provided to disappointed offerors, it is likely that fewer protests are being filed "just to find out why we lost"—and with longer timelines in which to consider and file a protest, cooler heads may sometimes be prevailing. All in all, better debriefings appear to be making for more selectivity by would-be protesters and their counsel.

Even more than in recent years, VCA dominates the math at GAO. Increased use of ADR may have provided a tailwind for later-stage VCA last year. In FY 2020, protesters induced VCA close to half the time, and were more than 11 times more likely to obtain relief by voluntary corrective action (948 times) than by a sustained protest (84 times). Expressed differently, nearly 92 percent of "effective" outcomes (948/1032) came through VCA. One might now wonder whether there is *too much* VCA going on. Why are agencies that now have more time and reason than ever to provide more substantive debriefings still finding so many shortcomings in their own procurements once protests are filed? Are agencies taking back

too many protests from GAO, finding errors but not always material errors in procurements and source selection decisions?

We continue to conclude from these statistics that the GAO protest system is working very well. Protests remain statistically rare as a percentage of all procurements, ADR is on the rise, sustains are still infrequent, and agencies are still respecting and following GAO recommendations essentially all the time. The prevalence of VCA means the GAO protest system is fundamentally operating as a framework for agencies to find and fix their own errors and omissions. At the bottom line, we assess that the system as a whole is effectively advancing the overarching objective of "competition in contracting."

Top Decisions and Developments of 2020—As in prior years, we once again offer a qualitative assessment of what we see as the highest impact bid protest decisions (and developments) of the past year. For clarity, this compilation is for calendar year 2020 (not FY 2020) and covers both GAO and court protest decisions. In reverse order, here are our "top 10" bid protest decisions and developments of 2020:

10. NDAA Acquisition Reforms That Have Not Happened (Again): As in prior years, we begin our list with acquisition reforms that have not come to fruition. In fact, § 886 of the FY 2021 NDAA killed the "loser pays" pilot program that first appeared in the FY 2018 NDAA, whereby contractors would have been required to reimburse DOD for protest costs and which was set to begin in December 2020. See Schaengold, Schwartz, Prusock, and Muenzfeld, Feature Comment, "The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II," 63 GC ¶ 24. The Joint Explanatory Statement from Congress did direct DOD to undertake a new study to complete the study of bid protests that the RAND National Defense Research Institute had performed in response to the FY 2018 NDAA. As part of this new study, Congress also directed DOD to evaluate the agency-level bid protest process. It remains to be seen whether Congress will take up the other reforms to the bid protest process recommended by the FY 2016 NDAA § 809 Panel. For now, Congress appears to be content with further study rather than reform.

9. Requests for Partial Summary Dismissal at GAO: In recent years, requests for partial summary dismissal of speculative protest grounds have become more prevalent at GAO, and this year was no exception. Thus, for example, in the denied protest of *MicroTechnologies, LLC*, Comp. Gen. Dec. B-418894, 2020 CPD ¶ 325, GAO summarily dismissed speculative allegations challenging the evaluation of the awardee's proposal. See also *Int'l Ctr. for Language Stud., Inc.—Recon.*, Comp. Gen. Dec. B-418916.2, 2020 CPD ¶ 294 (same); *Perspecta Enter. Sols., LLC*, Comp. Gen. Dec. B-418533.2, B-418533.3, 2020 CPD ¶ 213; 63 GC ¶ 29 (same) (full disclosure: the authors were involved in this protest). Although agencies have most often filed such motions, intervenors too have been successful in filing such motions. See, e.g., *CoreCivic, Inc.*, Comp. Gen. Dec. B-418620, B-418620.2, 2020 CPD ¶ 230 (noting that GAO had granted the intervenor's request for summary dismissal of speculative protest grounds). These examples from the past year demonstrate that requests for partial summary dismissal have become a more commonplace— and effective—tool for agencies and intervenors to narrow the scope of protest grounds at GAO.

8. Unavailability of Key Personnel: The availability of key personnel prior to contract award has been a vexing and continuing source of uncertainty for contractors. In *M.C. Dean, Inc.*, Comp. Gen. Dec. B-418553, B-418553.2, 2020 CPD ¶ 206; 62 GC ¶ 204, GAO sustained a protest challenging the availability of the awardee's key personnel prior to contract award. The protester contended that the awardee had "actual knowledge" that its proposed program manager was unavailable to perform where the program manager was denied a security clearance prior to contract award. GAO rejected the agency's claim that the awardee lacked actual knowledge because the program manager could appeal the security clearance denial. Instead, GAO found that the awardee had merely "understood" that its proposed program manager would appeal the denial, but the record lacked any evidence demonstrating whether or why the awardee believed such an appeal would be successful in reversing the security clearance denial, let alone that it would be adjudicated prior to contract award.

In contrast to the *M.C. Dean* decision, in *MindPoint Grp., LLC*, Comp. Gen. Dec. B-418875.2, B-418875.4, 2020 CPD ¶ 309, GAO held that the awardee had no actual knowledge that one of its key personnel was unavailable prior to contract award. Deeming it a "close call," GAO noted that, while the awardee had "reason to question" its key personnel's availability where the individual had informed the awardee of his intention to pursue another offer, that

alone was insufficient to confer actual knowledge of unavailability on the awardee. Although GAO reached different conclusions in *M.C. Dean* and *MindPoint*, these decisions demonstrate GAO's willingness to parse out precisely what was known to the offerors regarding their key personnel's availability.

7. Impact of COVID-19 on 2020 Bid Protests: Anecdotally, the COVID-19 pandemic does not appear to have substantially curtailed the number of contract awards or bid protests—at least not after the initial shutdowns that began in March 2020. That said, we did see COVID-19 figure into some bid protest decisions. For example, in *Chronos Sols., LLC*, Comp. Gen. Dec. B-417870.2 et seq., 2020 CPD ¶ 306; 62 GC ¶ 313, GAO sustained a preaward protest challenging the terms of a solicitation because the agency had failed to take into account the impact of COVID-19 and the CARES Act foreclosure moratorium on its requirements for asset management services. In *Comprehensive Health Servs., LLC v. U.S.*, 151 Fed. Cl. 200 (2020), the Court of Federal Claims denied a challenge to a stay override following a GAO protest against a sole-source award. The COFC concluded that the agency's finding of unusual and compelling circumstances for overriding the stay of contract performance was supported because of the agency's requirement for COVID-19 testing services for the agency's employees.

6. District Court Jurisdiction (Or Not) Over Other Transaction Agreement Protests: For the past several years, we have tracked two protest cases implicating district court jurisdiction over other transaction authority (OTA) awards. After more than two years of litigation involving two different OTA awards in two different federal district courts, we still do not have a clear answer.

In one protest case, the protester filed an action under the Administrative Procedure Act in federal district court in Arizona, after GAO dismissed its protest for lack of jurisdiction in *MD Helicopters, Inc.*, Comp. Gen. Dec. B-417379, 2019 CPD ¶ 120; 61 GC ¶ 126; 62 GC ¶ 34. In its district court action, the protester sought to challenge its elimination from the first phase of an OTA prototype program. The district court dismissed the action for lack of jurisdiction, concluding that the plaintiff's challenge involved a "contract" and, therefore, the relief sought by the plaintiff was impliedly forbidden by the Tucker Act. See *MD Helicopters, Inc. v. U.S.*, 435 F. Supp. 3d 1003 (D. Ariz. 2020). The district court also rejected the Government's and the plaintiff's arguments that the court had jurisdiction because the OTA at issue was not a "procurement contract" and, accordingly, fell outside the exclusive jurisdiction of the COFC under 28 USCA § 1491(b). The district court found that the plaintiff's challenge had a sufficient connection to a "procurement" because the agency's multi-phased strategy was designed to down-select among potential competitors in anticipation of an eventual prototype procurement.

In the second case, the protester brought an APA challenge in federal district court in California to the Air Force's evaluation and award decision pursuant to DOD's other transaction authority under 10 USCA § 2371b. The protester's earlier bid protest action in *Space Exploration Techs. Corp. v. U.S.*, 144 Fed. Cl. 433 (2019); 61 GC ¶ 262, was dismissed for lack of jurisdiction, but the COFC agreed to transfer the case to federal district court. After full briefing, the district court dismissed the action, but the court did not directly address the question of federal district court jurisdiction over OTA procurements. See *Space Exploration Techs. Corp. v. U.S.*, 2020 WL 7344615 (C.D. Cal. Sept. 24, 2020).

5. The Future of DOD Cybersecurity Protests: In recent years, we have tracked the evolving exercise of bid protest jurisdiction over cybersecurity issues. As future solicitations incorporate DOD's Cybersecurity Maturity Model Certification (CMMC) standard and the policies and procedures in the new Defense FAR Supplement subpt. 204.75 are implemented, the impact of these changes on bid protests remains to be seen. Of particular interest, there is uncertainty as to how DOD—and perhaps eventually GAO and the COFC—will handle challenges by contractors who disagree with their CMMC assessments made by third-party assessors approved by the independent CMMC Accreditation Body. The interim CMMC rule published Sept. 29, 2020, 85 Fed. Reg. 61505, outlines a process for adjudicating such disputes with the Accreditation Body only, but details have not been provided about potential further recourse to the procuring agency or DOD if a dispute cannot be resolved to the contractor's satisfaction.

4. DOD Enhanced Debriefings: Our sense is that DOD's enhanced debriefing procedures have been a welcome—and rather noncontroversial—development. A very recent decision from the Federal Circuit, however, has highlighted a potential timeliness trap for disappointed bidders. In *NIKA Techs., Inc. v. U.S.*,

147 Fed. Cl. 690 (2020), the COFC confronted a situation where the protester had received a requested and required debriefing and had been given the opportunity by the Army Corps of Engineers under DOD's enhanced debriefing procedures to submit additional questions within two days of its debriefing. The written debriefing was provided on March 4, and the protester informed the agency on March 5 that it planned to submit additional questions. Thereafter, however, the protester elected not to submit additional questions and, instead, filed a GAO protest on March 10, requesting that the agency implement the automatic suspension of contract performance. The agency declined to do so because it deemed the protest to be untimely for imposing the stay. By not submitting additional questions, the agency reasoned, the protester's due date for filing a timely protest that would trigger the stay of performance had not been tolled by the enhanced debriefing procedures. When the agency refused to implement the automatic stay, the protester filed a protest action in the COFC. The COFC ruled that the protest was timely filed and that the protester was entitled to the automatic stay, agreeing with the protester that, under 10 USCA § 2305, an enhanced debriefing closes at the end of the two-day period for submitting questions if an offeror does not submit additional questions. But in a subsequent decision dated Feb. 4, 2021, the Federal Circuit reversed. See *NIKA Techs., Inc. v. U.S.*, 2021 WL 382203 (Fed. Cir. Feb. 4, 2021). Concluding that, under the plain meaning of the statutory scheme establishing the enhanced debriefing procedures, "when no additional questions are submitted, the 'debriefing date' is simply the date upon which the party receives its debriefing," the appellate court ruled that the five-day period for filing a timely protest for obtaining a stay of contract performance begins on the debriefing date, and not two days later.

3. COFC Protest Jurisdiction: Once again, the Federal Circuit affirmed its broad conception of what constitutes a "procurement" for purposes of the COFC's bid protest jurisdiction. In *Acetris Health, LLC v. U.S.*, 949 F.3d 719 (Fed. Cir. 2020); 62 GC ¶ 46, the Federal Circuit found the plaintiff's allegation that an agency was misinterpreting the restrictions on foreign-origin in the Trade Agreements Act of 1979 (TAA) and the FAR in such a way that the agency's interpretation would, in effect, exclude the plaintiff from future procurements on which it would be a likely bidder. Interpreting the term "procurement" in 28 USCA § 1491(b)(1), the Federal Circuit found that the agency's definitive position on the interpretation of the TAA and FAR "fit[] easily within" the definition of "procurement" in the statute, which "includes all stages of the process." Accord *LAX Elecs., Inc. v. U.S.*, 2020 WL 6437779 (Fed. Cir. Nov. 3, 2020) (nonprecedential) (finding that a contractor's challenge to an agency's removal from a Government-approved list of suppliers met the "in connection" requirement of 28 USCA § 1491(b)(1) because the agency's decision resulted in disqualification from future procurements in which the plaintiff was likely to bid). These decisions reflect the Federal Circuit's continued expansive view of the scope of bid protest jurisdiction.

2. Government Employee Conflicts of Interest: The whole procurement community has been tracking the protests challenging DOD's Joint Enterprise Defense Infrastructure (JEDI) award to Microsoft Corp., including the allegations of individual and organizational conflicts of interests (OCIs) arising out of the conduct of certain Government employees. With respect to those OCI allegations, the Federal Circuit's decision in *Oracle Am., Inc. v. U.S.*, 975 F.3d 1279 (Fed. Cir. 2020); 62 GC ¶ 257, represents a zenith for deference to agency determinations regarding the effect of such OCIs on the conduct of a procurement. Although the contracting officer determined that the actions of two of the three Government employees alleged to have engaged in misconduct did, in fact, result in OCIs, the CO concluded that those OCIs did not have any effect on the procurement. The COFC and, subsequently, the Federal Circuit concluded that the CO's investigation and "no effect" determination were reasonable, applying a "highly deferential" standard of review. On the other hand, GAO's decision this past year in another protest raising OCI issues may mark the nadir of deference to agency determinations regarding the effect of an alleged OCI on a procurement. In *Teledyne Brown Eng'g, Inc.*, Comp. Gen. Dec. B-418835 et seq., 2020 CPD ¶ 303; 62 GC ¶ 286, GAO sustained the protest, flatly rejecting the CO's OCI investigation conclusions regarding a Government employee's ongoing social relationship with an offeror's employees and concluding that the alleged OCI had not been adequately addressed by the agency. The resolution of alleged OCIs and their effects almost always turns on the particular facts and circumstances at issue, and these two decisions are no exception. Nonetheless, the starkly different outcomes are noteworthy.

1. Expansion of the Blue & Gold *Waiver Rule*: The top spot on our 2020 list should come as no surprise to readers: *Inserso Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020); 62 GC ¶ 180, has ushered in a significant expansion of the *Blue & Gold* waiver rule beyond the once settled and narrow confines of patent solicitation defects. In *Inserso*, the protester alleged that the agency had created an OCI and had treated offerors unequally by providing some, but not all offerors, post-award debriefings in a two-track procurement. Several offerors competing in both the small business track and the full-and-open competition received detailed post-award briefings after the full-and-open awards were made. The protester, which was competing only in the small business track, alleged that the information shared by the agency in the full-and-open debriefings provided the debriefed offerors an unfair competitive advantage and put the offerors competing only in the small business track at a disadvantage.

A divided panel of the Federal Circuit held that the protester had waived its claims, citing the *Blue & Gold* waiver rule. Stating that the waiver rule applies to all situations in which a protester has the opportunity to challenge a solicitation before award, the panel majority concluded that the protester had waived its claims by not challenging the solicitation before the competition concluded. The panel reasoned that, given the debriefing rules in FAR pt. 15, the protester "knew, or should have known, that [the agency] would disclose information to the bidders in the full-and-open competition at the time of, and shortly after, the notification of awards." In other words, "[t]he law and facts made patent that the solicitation allowed, and that there was likely to occur, the unequal disclosure regarding prices that [the protester] now challenges."

The majority's expansion of the scope of the *Blue & Gold* waiver rule to other procurement errors beyond patent solicitation defects is likely to have significant implications for defensive pre-award protests and sets up a conflict between the GAO and COFC rules concerning the need to file such protests against suspected OCI violations. See generally McCullough, Anstett, and Rodriguez, Practitioner's Comment, "*Blue & Gold* Bars Protest Where Protester Should Have Known Challenged Disclosure Of Information To Some Offerors Was Likely, Fed. Cir. Holds," 62 GC ¶ 180. More recently, the COFC confirmed in *Perspecta Enter. Sols. LLC v. U.S.*, 2020 WL 8182111, ___ Fed. Cl. ___ (Dec. 17, 2020); 63 GC ¶ 29 (full disclosure: the authors were involved in this case), that *Inserso* did indeed expand the waiver rule beyond its previously accepted bounds. Relying on *Inserso*, the COFC held that the protester had waived its OCI challenge because it knew or should have known, based on publicly available information, that the awardee had employed a former Government official. We will all be following with interest to see how far *Inserso*'s expansion of the waiver rule will take us.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Jerald S. Howe, Jr., Stephen S. Kaye, *and* Sandeep Kathuria *of Leidos, and* James J. McCullough, Michael J. Anstett, *and* Anayansi Rodriguez *of Fried Frank Harris Shriver & Jacobson LLP. The views expressed herein are those of the individual authors and not their firms.