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THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 61, No. 6 **February 13, 2019**

Focus

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FEATURE COMMENT: An Analysis Of GAO's 2018 Bid Protest Statistics—Regression Toward The Mean

The Government Accountability Office has released its bid protest statistics for fiscal year 2018. *GAO Bid Protest Annual Report to Congress for Fiscal Year 2018* (GAO-19-248SP) is available at *www.gao.gov/products/GAO-19-248SP*; 60 GC ¶ 370. In past years, the recurring major headline has been the increase in agency voluntary corrective action, with a special headline in FY 2016 marking a dramatic increase in GAO's bid protest "sustain" rate. In the recently concluded FY 2018, the main theme was regression toward the mean.

From an overall statistical perspective, the key measures for FY 2018 were "normal" within the experience of recent years—one might say "down the middle of the fairway." As detailed below, the number of GAO bid protest filings was within two percent of the prior year. The number of sustained protests came in within nearly two percent of the five-year average, the sustain rate came within one percent of the five-year average, and the effectiveness rate fell within one percent of the five-year average. Yet the observer should not necessarily conclude that "nothing much changed" in FY 2018. To the contrary, as elaborated below, we believe this year's statistical stasis is better understood as a mathematical stalemate of countervailing forces within the bid protest system.

GAO's Reported Statistics—GAO received 2,474 and closed out 2,505 bid protests in FY 2018. (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 for more complex or hotly contested procurements.) In FY 2017, GAO received 2,433 protests, so the FY 2018 protest filings increased 1.7 percent, following a downturn the year before. Bid protests are not at their all-time peak, but remain on a high plateau.

For FY 2018, GAO reported 86 cases in which alternative dispute resolution was employed, 66 times successfully (for a success rate of 77 percent), as compared to totals of 81 and 69 ADR cases in the prior two years. Hearings were held in only five cases, down sharply from 17 and 27 in the preceding two years. There were 84 requests for reconsideration, generally in line with prior years—still a remarkably high amount of head-banging given the near-impossible odds of reconsideration success.

GAO also reported that 356 (up 100) or 13.4 percent (up from 9.6 percent) of all cases closed in FY 2018 involved task or delivery order procurements under indefinite-delivery, indefinite-quantity contracts. But it is important to recall that in the beginning of FY 2017, from Oct. 1 through Dec. 14, 2016, GAO's jurisdiction lapsed temporarily over protests involving civilian task/delivery orders. See McCullough, Howe, Anstett and Tucker, Feature Comment, "Bid Protest Update from the 2017 NDAA: Is This Just the Beginning?," 58 GC ¶ 441.

That lapse artificially depressed the number of task/delivery order protests in FY 2017. Bouncing back from that one-time event, the numbers for task/delivery order protests in FY 2018 came in much closer to those in FY 2016, at 375 and 13.7 percent. To place this figure in its proper business context, one source reports that federal spending on IDIQ task/delivery order contracts outpaced obligations on definitive contracts by about $34 billion in FY 2018. See "Federal Contract Spending Trends: Five Years in Five Charts," *about.bgov.com/news/federal-contract-spending-trends-charts/*.

Of GAO's 622 protest cases that went all the way to a sustain-or-deny decision in FY 2018 (once again less than one-quarter of protests closed out), 92 or 15 percent resulted in a sustained protest. This com-

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pares closely to the 99 sustained protests in FY 2017, or a sustain rate of 17 percent. More and more, the 139 sustained protests in FY 2016, for a sustain rate of 23 percent, appear to be the anomaly in the sequence.

As every year, GAO provided a list of the most frequent grounds for sustaining a protest. The top reason in FY 2018 (also first in FY 2017 and 2016) was "unreasonable technical evaluation." The second-ranked reason in FY 2018 was "unreasonable cost or price evaluation"—third in both FY 2017 and 2016. The third-ranked reason in FY 2018 was "flawed selection decision"—fifth in 2017, along with the related "inadequate documentation of the record," which came in fourth in that same year.

Missing from the list in FY 2018, but presumably not too far behind since it finished second in each of the prior three years, was "unreasonable past performance evaluation." GAO's reasons for sustaining protests show remarkable consistency over the years, and provide useful guidance for would-be protesters in what does and does not work. GAO also confirmed, as in FY 2016 and 2017, that there were *no* instances in FY 2018 in which the agency did not fully implement GAO's recommendation in a sustained protest.

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. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.

Most readers will be familiar with the phrase, but "voluntary corrective action" 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 2018, GAO reported an "effectiveness rate" of 44 percent, that is, of all protests closed out, 44 percent resulted in either a sustained protest or voluntary corrective action by the agency. Given the number of sustained protests (92 out of 2,505), that means the rate of voluntary corrective action was 40.3 percent. Agencies elected to take voluntary corrective action in 1,010 protests, or close to 20 per week. The prior-year voluntary corrective action totals were 1,062 in FY 2017, 1,051 in FY 2016, and 1,067 in FY 2015, so the most recent year saw a decrease of about 50, or one-half of one percent. As we have noted in prior years, these effectiveness percentages may be understated because of how GAO counts protests: most voluntary corrective action occurs within 20–30 days after a protest is filed, as agency counsel are examining the record and evaluating their chances of prevailing; most supplemental protests, giving rise to additional B- numbers, are filed shortly after receipt of the agency report.

Statistical Trends—How should one interpret GAO's bid protest statistics for FY 2018? We believe there is more dynamic change below the surface than the relatively average or "flat" statistics would suggest. To begin, the number of bid protests filed at GAO was 2,474 versus 2,433 the year before, a modest increase of 1.7 percent year over year. (One should note that the increase in new protest filings exceeded the increase in all "case" filings, which was only 11, or 0.4 percent.) The uptick in protest filings amounts to an average of 47.6 per week versus 46.8 per week the year before. Beneath that stability, though, we believe there are countervailing forces at work—"headwinds" and "tailwinds" for overall protest filings.

Let us examine headwinds first—the forces militating against protest filings. First, since the signing of the 2017 National Defense Authorization Act (NDAA), P.L. 114-328, on Dec. 23, 2016, GAO's jurisdiction over protests involving defense task/delivery orders has been restricted to those exceeding $25 million in value, compared to the lower threshold of $10 million previously in effect and still in effect for civilian task/delivery orders. The Department of Defense issues a multitude of task/delivery orders valued between $10 million and $25 million, and those are no longer subject to the GAO bid protest pipeline.

Second, as compared to FY 2016 and before, the system is missing about 150 meritless protests per year that were being filed by one serially abusive protester that GAO suspended from further protest filings. See *Latvian Connection LLC,* Comp. Gen. Dec. B-413442, 2016 CPD ¶ 194; 58 GC ¶ 308; *Latvian Connection LLC—Recon.*, Comp. Gen. Dec. B-415043.3, 2017 CPD ¶ 354 (suspending the company and its principal for an additional two years); 59 GC ¶ 379.

Third, we tentatively assess that the dawn of debriefing reform is reducing the level of bid protest filings—more on that later.

What then, are the countervailing tailwinds—the forces tending to increase protest filings especially

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over the longer term? First, the stigma of protesting has diminished over the years: Although there are still some customers (particularly in the intelligence community) who strike fear in the hearts of would-be protesters about diminished prospects for future competitions, most agencies and more companies are accustomed to and accept the inevitability of some protests.

Second, there are fierce competitive processes in play when agencies solicit long-term, sweeping IDIQ contracts; losers are justifiably afraid of being locked out of entire markets for five to 10 years, and so they are more willing to protest such exclusions.

Third, defense appropriations and spending increased considerably in the latter half of FY 2018, with the relaxation of sequestration caps, and consequently the sheer dollar volume of procurement increased. (Civilian appropriations also increased in the second half of FY 2018, but contract outlays lagged that increase on the civilian side—another story entirely.)

Fourth, on the whole, bid protests have had a relatively high success rate with the overall effectiveness rate ranging in the mid- to high-forties range (more below), and this no doubt encourages would-be protesters who may otherwise be on the fence about going to GAO.

On GAO-sustained protests, we wrote last year that "protest counsel should probably be steering their clients' expectations towards sustain rates in the upper, rather than lower teens." See Howe, McCullough and Anstett, Feature Comment, "Cutting Through the Fog of Award—An Analysis of GAO's 2017 Bid Protest Statistics," 60 GC ¶ 32. For FY 2018, the sustain rate came in at 15 percent, slightly down from 17 percent in FY 2017 and significantly down from the anomalous 23 percent in FY 2016. The five-year average is now 16 percent. Thus, it would seem that client counseling on sustain-or-deny odds should probably be centered around that roughly one-sixth probability.

Yet as we have emphasized year after year, the better focal point for decision-making than the sustain rate is the effectiveness rate, which accounts for the voluntary corrective action rate as well. GAO's reported effectiveness rate for FY 2018 was 44 percent, versus the prior year rate of 47 percent and the five-year average of 45 percent. After backing out sustained protests, that 44-percent effectiveness rate implies a voluntary corrective action rate of 40.3 percent. That is down slightly from prior years, but still, few legal and administrative systems of redress offer such a high rate of return.

As between the two types of effective outcomes, voluntary corrective action still came about almost 11 times more than sustains. And one wonders whether the downtick in voluntary corrective action last year may be related to the tighter review of agency voluntary corrective action in so-called "reverse protests" by the U.S. Court of Federal Claims in recent years—and if so, whether the voluntary corrective action rate will increase again, now that the U.S. Court of Appeals for the Federal Circuit has loosened the reins on agencies that choose to take that route. See below, *Dell Fed. Sys., L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018).

Debriefing Reform—Last year we wrote that there was no real evidence "point[ing] to an excess of protests being brought," but that the best hope of reducing the incidence of protests is improvement in the quality of agency debriefings. See Howe, McCullough and Anstett, Feature Comment, "Cutting Through the Fog of Award—An Analysis of GAO's 2017 Bid Protest Statistics," 60 GC ¶ 32.

Our observation is that FY 2018 was a year of initial progress in debriefings. There was indeed great room for improvement: In the words of the landmark RAND study, the "worst debriefings [are] characterized as being skimpy, adversarial, and evasive." "Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers" at 69, available at *www.rand.org/pubs/research_reports/RR2356.html*; 60 GC ¶ 18. Inadequate debriefings sometimes force disappointed bidders to protest, simply to find out how and why they lost.

But § 818 of the 2018 NDAA expanded on certain agency best practices—including required release of a redacted version of the source selection award determination for all contract awards over $100 million, and extended question-and-answer exchanges in all DOD debriefings. See P.L. 115-91; see also Schaengold, Prusock and Muenzfeld, Feature Comment, "The Fiscal Year 2018 NDAA's Significant Impact On Federal Procurement Law—Part I," 60 GC ¶ 1.

There is no scientific evidence available yet on the impact of the NDAA provision and other agency-specific types of debriefing reform (e.g., the Air Force's enhanced postaward debriefing process), but we have taken an anecdotal survey among some leading bid protest practitioners. The results are interesting and in some ways surprising.

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There is little sentiment that initial written debriefings have been improved in quality or depth. But where applicable, the new DOD Q&A process has often allowed would-be protesters to gain better insights into how and why they lost—more clarity and less confusion. (Perversely, some feel the enhanced written Q&A process has discouraged oral Q&A or dialogue as part of debriefings.) Protest counsel generally report that they are being asked to file fewer "nose under the tent" and/or "kitchen sink" protests, and that filed protests are more focused.

Probably the most important effect of the nascent DOD debriefing reform has been the *slowing down* of the decision-making process, allowing for more and better legal and business deliberations. Instead of having to file a protest within five days of the standard debriefing (to obtain the Competition in Contracting Act automatic stay), a would-be protestor can now buy additional time (as well as information) by triggering the Q&A process with the agency. The mad dash is calmed, cooler heads sometimes prevail, some marginal protests are killed before filing, and the protests that reach GAO are better conceived and articulated. In all, the first full year of bid protest reform has been promising. In our view, the precepts of DOD's enhanced debriefing procedures should be expanded across the board to all agencies, and down the ladder of procurement size.

Top Decisions of 2018—As in prior years, we once again offer a qualitative assessment of what we see as the most impactful bid protest decisions (and one set of developments) of this last calendar year. For clarity, this compilation is for calendar year 2018 (not FY 2018) and covers both GAO and court protest decisions. In reverse order, here are our "top 10" bid protest decisions and developments of 2018.

10. We begin our list, as we did last year, with developments in "bid protest reform." This year there were a few concrete changes to the bid protest system. Most significantly, 2018 saw the implementation of GAO's long-anticipated Electronic Protest Docketing System (EPDS), which came online May 1, 2018. With this new electronic filing system, GAO also implemented a new $350 filing fee and issued revised bid protest regulations to reflect these new developments. As discussed above, this last year also saw the implementation of the new enhanced debriefing procedures for DOD procurements mandated by the FY 2018 NDAA. On March 22, 2018, DOD issued Class Deviation 2018-O0011—"Enhanced Post Award Debrief Rights" to implement these new debriefing provisions, which afford disappointed offerors the opportunity to ask additional questions in writing within two days of their debriefing and extend the debriefing pending the receipt of the agency's responses. See 60 GC ¶ 99. Other developments in bid protest reform in the FY 2019 NDAA were relatively minor—namely, Congress commissioning a study of so-called "second bite of the apple" protests brought at GAO and the COFC and the development of a DOD program for expedited resolution of protests in small dollar value procurements under $100,000—likely due to a combination of the loss of Sen. John McCain (R-Ariz.), the insights gained from the RAND report commissioned by Congress in the FY 2017 NDAA, and the anticipation of gaining further insights and recommendations from the Section 809 Panel. This past year, however, may have been the calm that preceded the coming storm of legislative bid protest reform, given the Section 809 Panel's final report, which was issued on January 15. See 61 GC ¶ 29. The final report makes several recommendations for reforming the bid protest system, including eliminating so-called "second bite" protests, imposing deadlines for the COFC to decide protests when the court has enjoined the award, and limiting bid protest jurisdiction for GAO and the COFC to procurements valued over $75,000. We will have to wait to see whether, and how quickly, Congress takes up the panel's various reform measures this year.

9. Alexis de Tocqueville observed, "There is hardly any political question in the U.S. that sooner or later does not turn into a judicial question." One might also posit that every new wrinkle in Government contracting ends up in bid protests. That has recently been proven true in the case of new cybersecurity requirements. For example, in *Jardon & Howard Techs., Inc.*, Comp. Gen. Dec. B-415330.3 et al., 2018 CPD ¶ 195, and *IPKeys Techs. LLC*, Comp. Gen. Dec. B-414890 et al., 2017 CPD ¶ 311, GAO considered protests challenging the evaluation of the awardees' respective cybersecurity approaches and compliance with cybersecurity regulations. While this does not necessarily represent a novel legal development in bid protest jurisdiction, we expect it is the beginning of a new line of bid protest precedent. As cybersecurity requirements multiply in solicitations, so will GAO's role in reviewing compliance with those requirements. Will agencies apply pass/fail or adjectival or numerically scored evaluation criteria? How deferential will GAO be to agency evaluations, and how high will the bar be set for documentation of such evaluations? This is definitely an area to watch.

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8. As the number of task and delivery order procurements continues to rise, and as the availability of a protest forum for these procurements continues to shrink, GAO's decision in *NTT DATA Servs. Fed. Gov't, Inc.*, Comp. Gen. Dec. B-416123 et al., 2018 CPD ¶ 215, is a reminder that the "fair opportunity" rules of the road for task and delivery order competitions conducted under Federal Acquisition Regulation 16.505 are different than the rules applicable to FAR pt. 15 procurements. Here, GAO rejected the protester's complaint that the agency had not established a competitive range and had engaged in additional rounds of discussions with other offerors. In observing that the agency did not adhere to all of the procedural requirements of FAR 15.306, GAO nonetheless rejected the protester's arguments because those procedural protections are not required in FAR 16.505 procurements.

7. One of the more vexing questions for contractors and their counsel is this: When must you file a protest challenging an agency's interpretation of a solicitation? The equally vexing answer: It depends. GAO has acknowledged that its decisions addressing such pre-award or "defensive" protests have come to "fact-specific conclusions." In other words, it depends on the facts and circumstances of each protest, and, thus, timeliness must be determined on a case-by-case basis. In *Sikorsky Aircraft Corp.*, Comp. Gen. Dec. B-416027 et al., 2018 CPD ¶ 177, GAO held that a challenge to an agency's interpretation of the solicitation was untimely because the agency "clearly advanced an interpretation of the solicitation during discussions that is contrary to the protester's understanding of the solicitation," and the protester challenged that interpretation in an agency-level protest and received a substantive contrary response from the agency. In those circumstances, GAO determined, a protest must be filed within 10 days of the adverse decision in the agency-level protest. As so stated, the rule may appear straightforward enough. But as the circumstances in the *Sikorsky* decision illustrate, knowing how to apply the rule in practice is not.

6. Recall that last year the COFC in *Dell Fed. Sys., L.P. v. U.S.*, 133 Fed. Cl. 92 (2017); 59 GC ¶ 229, found that although an agency could take corrective action to address protest allegations that were untimely, the agency's proposed corrective action was nonetheless overbroad and not tailored to correcting the procurement defects identified by the agency. The COFC's *Dell Federal Systems* decision, along with the recent uptick in the number of so-called "reverse protests" decided at the COFC, merited a spot on our list of Top Decisions of 2017. To the extent protesters perceived a more stringent standard applicable to corrective action protests developing in the COFC jurisprudence, the Federal Circuit has now made clear that the standard of review in corrective action cases should be no different from the standard applied in other bid protests. In *Dell Fed. Sys., L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018); 60 GC ¶ 323, the court of appeals rejected the COFC's "narrowly tailored" standard and, instead, reiterated that agency corrective action must be reviewed using a "rational basis" standard. With this more lenient standard of review, it remains to be seen whether the flow of "reverse protests" challenging the scope or implementation of corrective action at the COFC will be diminished. (Full disclosure: The authors have been involved in this litigation.)

5. Organizational conflict of interest (OCI) protests may be making something of a comeback. Such protests often founder on the protester's inability to identify and marshal the "hard facts" needed to establish the existence or potential existence of a conflict. In *Archimedes Global, Inc.*, Comp. Gen. Dec. B-415886.2, 2018 CPD ¶ 179, however, GAO found that it was the Government's OCI analysis that was lacking the "hard facts" needed to justify the disqualification of the protester from the competition. In contrast, in *Dell Servs. Fed. Gov't, Inc.*, Comp. Gen. Dec. B-414461.3 et al., 2018 CPD ¶ 213; 60 GC ¶ 234, GAO found that the agency had the opposite problem. In the *Dell* protest, the agency's OCI analysis was focused too narrowly on access to proprietary or source selection sensitive types of information, and failed to appreciate, let alone evaluate, whether access to other types of non-public, competitively useful information gave rise to a potential unfair competitive advantage. Together, these two decisions serve as a reminder that, although agencies have wide discretion when evaluating alleged OCIs, those judgments will be set aside by GAO if they are based on unreasonable determinations of the underlying facts.

4. As we noted last year, GAO's decisional law regarding corporate transactions continues to evolve. For 2017, we highlighted that GAO placed the burden on protesters to establish that an agency unreasonably evaluated the effect of a corporate transaction and had rejected post hoc attacks on agency determinations regarding the effect of a

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transaction. This year's decision follows a similar theme, but with a different protagonist. In *Enter. Servs. LLC*, Comp. Gen. Dec. B-415517 et al., 2018 CPD ¶ 83, GAO rejected the agency's post hoc questioning about the impact a corporate transaction had on a protester's proposal where those questions were not reflected in the contemporaneous evaluation record. In this protest, the protesting entity was involved in a name change and subsequent corporate spin-off and merger during the course of the procurement, but the same legal entity that had submitted the initial proposal had survived the corporate transaction as a complete successor-in-interest. As such, GAO found that the protester was an interested party to protest, and it declined to entertain the agency's arguments, raised for the first time in response to the protest, that the corporate transaction had fundamentally altered how the offeror would perform the contract.

3. In what appears to be a break from the Federal Circuit's long-standing approach to interpreting the jurisdictional grant of the Administrative Disputes Resolution Act (ADRA), the court of appeals in *Cleveland Assets, LLC v. U.S.*, 883 F.3d 1378 (Fed. Cir. 2018); 60 GC ¶¶ 87, 368 (Note), held that the COFC's bid protest jurisdiction under 28 USCA § 1491(b)(1) extends only to alleged violations of *procurement* statutes. In the underlying pre-award protest, the plaintiff sought to challenge the terms of a General Services Administration request for lease proposals on the ground that the contemplated procurement action exceeded the scope of GSA's authority to solicit offers under 40 USCA § 3307, which requires GSA to seek approval of the cognizant Senate and House committees before obligating funds on a lease exceeding a threshold amount. The Federal Circuit held that the COFC lacked jurisdiction over the protest action because the alleged violation of § 3307 involved an *appropriations* statute, rather than a procurement statute. Looking to the text and structure of § 3307, the Federal Circuit found that it "says nothing of how GSA must run its procurement once the appropriation is made." Fearing that reading § 3307 as a procurement statute would turn "every appropriations bill and rider" into a "potential source of challenge" in a bid protest, the panel affirmed the dismissal of the protest. Dissenting from the denial of rehearing en banc, Judge Wallach, joined by Judge Newman, countered that "the panel improperly narrow[ed]" protest jurisdiction to require a violation of a "procurement statute." *Cleveland Assets, LLC v. U.S.*, 897 F.3d 1332 (Fed. Cir. 2018), (Wallach, J., dissenting from denial of rehearing en banc) (citing 28 USCA § 1491(b)(1)); 60 GC ¶ 248.

2. The Federal Circuit's decision in *Palantir USG, Inc. v. U.S.*, 904 F.3d 980 (Fed. Cir. 2018); 60 GC ¶ 287, is near the top of our list for several reasons. For one, the decision is a relatively rare instance of an unsuccessful Government appeal in a bid protest case. But more substantially, how will this decision affect acquisition planning when potential commercial solutions may be available? As the court's main critique of the agency was that it had not adequately explained in the record why its needs could not be met by commercial items, the practical impacts of this decision may be to extend the timeline for market research and procurement planning, and to increase the paperwork burden on contracting officers. The court's analysis also points to a potentially important development in the nature of "rational basis" review in bid protest actions. Although the court of appeals acknowledged that there were no statutory or regulatory requirements for agencies to document their commercial-item determinations, the court nevertheless carefully examined the administrative record and found the documentation of the agency's judgments here to be too conclusory to permit meaningful judicial review. What is more, the court flatly rejected the Government's alternative argument that the presumption of regularity attached to agency action should have filled in any perceived gaps in the administrative record with regard to the agency's judgments. Whether the court's treatment of the record in this case ushers in a new, more searching type of rational basis review remains to be seen.

1. Our top bid protest decision for 2018 probably comes as no surprise to readers, as it has received great publicity. GAO's groundbreaking decision in *Oracle Am., Inc.*, Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180; 60 GC ¶¶ 195, 340, 362, has set the stage for future challenges to the use of other transaction agreements (OTAs), and it may spur legislative changes to agency OTA authority. In finding that it had jurisdiction to review this protest against the Army's use of an OTA for a follow-on production acquisition, GAO held that, although OTAs are not "procurement contracts" and GAO generally does not review protests concerning the solicitation or award of OTAs, GAO does have jurisdiction over and will review a timely protest alleging that

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an agency is improperly using its OTA authority under 10 USCA § 2371b. GAO reviewed several grounds of protest, sustained two, denied others, and set still others aside for another day. Although the holding in *Oracle America* was narrowly drawn, the decision has sparked a broader debate within the procurement community about the use and limits of OTAs. The all-too-common myth that "OTAs cannot be protested" has certainly been exploded.

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