

*Protest decisions can provide valuable lessons learned to consider in crafting future acquisition strategies.*



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# Lessons Learned from Recent Protest Decisions

## Part 1: Acquisition Planning

*By Catherine Poole*

**P**rotest decision trends can provide an insightful window into federal acquisition processes and procedures. They provide important information about the concerns of private sector competitors, how regulations are being interpreted and applied, and where additional focus may be warranted by acquisition teams.

Protest decisions can provide valuable lessons learned to consider in crafting future acquisition strategies. This *Advisory* is the first of a two-part series examining lessons learned identified from our analysis of protest decisions and trends over the past year. The first will assess lessons critical to the acquisition planning stage, while the second will focus on post-solicitation issues.

### **Make reasonable efforts to identify small businesses**

Contracting officers are required—by Federal Acquisition Regulation (FAR) 19.502-2(b)—to set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns, and (2) award will be made at fair market prices. Of course, determining whether there are responsible small businesses available who can meet the government’s needs can be a challenge; developing a “reasonable expectation” of receiving at least two offers is even more so. The Government Accountability Office (GAO) has made it clear through recent protests, however, that it expects agencies to make “reasonable efforts” to do so.

GAO has historically held that it regards the determination to set aside (or not set aside) a procurement as a matter of “business judgment” within the contracting officer’s discretion; it would not sustain a protest challenging the determination “absent a showing that it was unreasonable.” In a recent case,<sup>1</sup> GAO did sustain such a protest, concluding that the agency did not take what GAO considers to be “reasonable efforts.” In making its decision not to set a requirement aside for small businesses, the agency did not, for example, consult the Central Contractor Registration (CCR) database (per FAR 13.102) to try to identify

small businesses nor did it solicit the recommendations of the agency's small business office (per FAR 19.202). Furthermore, the decision not to set the procurement aside was not revisited following the receipt of several small business' expressions of interest in response to a pre-solicitation notice. GAO has sustained similar protests on the same grounds—that the agency did not make “reasonable efforts” to identify small business competitors.<sup>2</sup>

Similarly, GAO recently sustained a protest<sup>3</sup> in which an agency should have set aside the requirement for HUBZone small businesses, but did not. The decision, according to GAO, was based on “insufficient facts to establish reasonableness of conclusion that HUBZone business concerns ... were not interested in, and/or not capable of performing the requirement.” In two of the recent decisions, the contracting officials described their efforts to use the Small Business Administration's (SBA's) PRO-Net system to identify potential contractors. GAO found, however, that in each case the agency personnel were not entering criteria as effectively as they could have to demonstrate a legitimate effort to identify small businesses.

**The lesson:** Make reasonable efforts to identify small businesses. Be diligent in trying to identify small businesses who can meet the government's needs. GAO will not prescribe any particular method that must be used, but will simply look for the assessment to be based on sufficient facts to establish the reasonableness. GAO expects agencies to be diligent in their efforts to identify small businesses. Contracting officers are wise to use the CCR database, tap the expertise of their agency small business staff, and to reconsider decisions as new information about small businesses becomes available.

The twist: Be sure that a “small business” that you award to is really a “small business.” Per

another recent GAO case,<sup>4</sup> if SBA sustains a protest regarding an awardee's size—concluding that they are no longer a small business—GAO has said that termination of the contract would be appropriate, unless there are countervailing circumstances that would weigh in favor of allowing the large business concern to continue performance.

## Consolidation is acceptable if necessary to meet the agency's needs

The Competition in Contracting Act (CICA) generally requires that solicitations encourage full and open competition and only contain restrictive provisions to the extent necessary to satisfy the needs of the agency. Since bundled or consolidated procurements combine separate, multiple requirements into one contract, GAO has acknowledged that they have the “potential for restricting competition by excluding firms that can furnish only a portion of the requirement.” It has further indicated that, because of the restrictive impact of bundling, it will sustain a protest challenging a bundled solicitation, “unless the agency has a reasonable basis for its contention that bundling is necessary.” Agencies must convince GAO that it does, in fact, have a reasonable basis for the consolidation.

Our analysis of several cases in this area reveals that, if competition would be restricted by the consolidation, GAO will rely on two primary tests to assess if the bundling is justifiable. First, the services must be related. Without this, the agency faces an uphill battle to pass the second test. Second, the consolidation must be necessary to meet the agency's needs. In interpreting CICA, GAO has considered whether an agency has a “reasonable basis for its contention that bundling is necessary,” and has sustained protests where no reasonable basis was demonstrated.

Supporting these two points, GAO sustained a 2003 protest<sup>5</sup> that alleged the agency *unduly* restricted competition when it combined food services with other logistics support functions including facility operations; oil analysis laboratory operations; storage, warehouse, and distribution operations; hazardous material control center operations; transportation motor pool services; and aircraft maintenance services, to name only some of the combined services. GAO looked to the agency to provide a “reasonable justification” of including food services in the same RFP with base, vehicle, and

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aircraft maintenance services. The agency’s justification that it would be administratively more convenient to manage one entity didn’t make the grade with GAO; “Administrative convenience is not a legal basis to justify bundling of requirements if the bundling of requirements restricts competition, as we believe it does here,” said GAO. Similarly, and more recently, GAO has ruled<sup>6</sup> that “Administrative convenience for agency contracting personnel” is not a legal basis to justify bundling requirements, if the bundling of requirements restricts competition.

GAO recently denied two similar protests in which the agency *did* provide a reasonable basis for consolidating the services. In the first case,<sup>7</sup> while the agency also cited administrative convenience—which GAO rejected—it successfully made the case that combining professional accreditation services and proficiency testing services for its medical laboratories was necessary to meet the agency’s needs for maintaining the laboratories. In the second case,<sup>8</sup> the agency made the case in an 80-page “linkage analysis” that significant management-related efficiencies would result from the consolidation of ground maintenance services with other civil engineering functions, maximizing “cross-utilization and cross-training opportunities between service areas.” GAO has recognized that bundling “may serve to meet an agency’s needs where the agency reasonably determines that consolidation will result in significant cost savings or efficiencies.”

**The Lesson:** Examine your procurement strategy to determine if consolidating the contract will restrict competition. If so, ensure—and be prepared to justify—that the consolidation is required to meet the agency’s needs. Based on previous GAO decisions, agency’s needs may include recognizing significant cost savings or efficiencies.

Of course, if the contract was previously performed by a small business, this is another issue.

Where there is a consolidation of two or more agency requirements, the Small Business Act requires that agencies avoid bundling them together where the result would be a single contract that is *likely to be unsuitable for award to a small business concern*. Interestingly, GAO has received protests<sup>9</sup> alleging a violation of the Act even when the procurement is set aside for small businesses! Protesters seem to be missing the point that the bundling is not permitted if it renders the resulting contract unsuitable for award to a small business. Bundling requirements together that are still suitable for award to small businesses is not considered a violation of the Act.

### **Sole source is reasonable if adequately justified and documented**

While the overriding mandate of the Competition in Contracting Act (CICA) is for full and open competition, it does allow noncompetitive—or sole source—acquisitions in certain circumstances, such as when only one responsible source is available that will satisfy the agency’s requirements. In this scenario, an agency is required—per FAR 6.302—to execute a written justification that details the supporting facts and rationale for the sole source procurement. The agency is also required to publish a notice to permit potential competitors an opportunity to challenge the agency’s decision. GAO will consider protests of proposed sole source procurements, focusing its review on the “adequacy of the rationale and conclusions set forth in the J&A [Justification & Approval document].” GAO has made its stance clear, “When the J&A sets forth a reasonable justification for the agency’s actions, we will not object to the award.”<sup>10</sup>

GAO denied three protests<sup>11</sup> in the past two years of proposed sole source procurements, finding that each agency was reasonable in concluding that only one responsible source could satisfy its needs. In two other cases, however, the agencies were less reasonable in their actions and GAO sustained protests against their sole source procurements. In one case,<sup>12</sup> the agency established a response period of only one and a half days for other sources to express their interest and submit capability statements. GAO concluded that the short timeframe was unreasonable as there was nothing driving it, and upon further investigation, it found little evidence to support the agency’s sole source determination. In a second case,<sup>13</sup> GAO sustained

a protest that the agency, via the synopsis, did not provide an “accurate description” of the services to be purchased—as required by FAR 5.203(c)—nor did it provide prospective alternate sources a meaningful opportunity to demonstrate their abilities. GAO found the synopsis text misleading and concluded that the protestor and other potential contractors were “denied any realistic opportunity to compete for the agency’s requirements.”

**The Lesson:** When contemplating a sole source procurement, ensure that there is legitimately only one source that can satisfy the agency’s needs and document the rationale thoroughly. When synthesizing the intent to award a sole-source contract, establish a reasonable period of time for other expressions of interest and provide a complete and accurate description of the requirements.

### Follow the preference for multiple awards (or adequately justify why you didn’t)

The Federal Acquisition Streamlining Act of 1994 (FASA) establishes a preference for awarding multiple task or delivery order contracts for the same or similar services or property as opposed to awarding a single contract. Implementing regulations in FAR 16.504(c) provide that the contracting officer must give preference to multiple awards, to the maximum extent practicable, during acquisition planning. The regulations also specify the circumstances in which multiple awards are not appropriate.

In one of the few cases that address the requirement for multiple awards, GAO recently sustained a protest<sup>14</sup> against an agency that made a single award; the protestor objected to the agency’s decision not to permit multiple awards under the solicitation. The solicitation was for the renovation, repair, and minor construction of various facilities across the United States. The agency decided during acquisition planning that a single award would be made and, in accordance with FAR 16.504(c), the contracting officer documented the rationale for the decision. Specifically, the reasons were documented as follows:

- More favorable terms and conditions could be obtained through a single award (FAR 16.504(c)(1)(ii)(B)(2));
- The cost of administering multiple

awards outweighed the expected benefit (FAR 16.504(c)(1)(ii)(B)(3));

- Orders are so integrally related that only one contractor could reasonably perform the work (FAR 16.504(c)(1)(ii)(B)(4)); and
- Multiple awards would not be in the best interest of the government (FAR 16.504(c)(1)(ii)(B)(6)).

GAO, however, found that these four conclusions were not supported by the record and, over the course of five pages, painstakingly unraveled each.

Regarding the first, GAO noted that the contracting officer did not identify any more favorable terms and conditions that would result from a single award; rather, he focused on the administrative convenience of issuing task orders under a single contract. GAO reiterated from a previous decision, “Nor do vague references to the prospect of obtaining greater economies of scale through a single award, without more supporting detail, overcome the preference for multiple awards in statute and regulation.”<sup>15</sup>

Regarding the second justification—that the cost of administering multiple awards outweighed the expected benefit—GAO found that the contracting officer provided “no meaningful support” for his conclusion. The agency produced additional reports to support its initial conclusion, but GAO found the analyses to be based on erroneous assumptions about the time differences in placing task orders under multiple versus single award contracts.

The third justification—that orders are so integrally related that only one contractor could reasonably perform the work—was also not reasonably supported; GAO noted “[I]t does not appear from the record that the contracting officer considered the latitude afforded him under the regulations to address integrally related tasks at a particular site.” GAO also found the fourth conclusion—best interest to the government—flawed and the rationale “insufficient.”

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GAO recommended that the agency reconsider whether the solicitation should be competed on a multiple-award basis and that it “document a well-supported rationale for the conclusion reached.”

**The Lesson:** Heed the preference for multiple award contracts. If multiple awards are not appropriate for the procurement at hand, document a well-supported rationale for that conclusion.

*If you write a clear solicitation and your actions are consistent with the solicitation and procurement statutes and regulations, GAO will not sustain a protest against the agency.*

## Write a clear solicitation, then follow the “rules” within it

If there is one key lesson to be learned from reviewing GAO protest decisions over time, it is this: If you write a clear solicitation and your actions are consistent with the solicitation and procurement statutes and regulations, GAO will not sustain a protest against the agency. Think of this rule as “Do what you say you were going to do.” GAO consistently denies protests where it finds that agencies acted consistently with the solicitation.

GAO has communicated its position unequivocally in several protest decisions:

In reviewing challenges to an agency’s evaluation of proposals, we will not substitute our judgment for that of the agency regarding the merits of proposals. We will examine the agency’s evaluation to ensure that it was reasonable and consistent with the solicitation’s evaluation criteria, and with procurement statutes and regulations.<sup>16</sup>

We review challenges to an agency’s evaluation only to determine whether the agency acted reasonably and in accord with the solicitation’s evaluation criteria and applicable procurement statutes and regulations.<sup>17</sup>

Where an evaluation is challenged, our office will not reevaluate proposals, but instead will examine the record to determine whether the agency’s judgment was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations.<sup>18</sup>

GAO will simply review a challenge to determine if the agency has acted reasonably and in accordance with the solicitation and applicable

statutes and regulations. In fact, it has denied several protests in recent months consistent with this methodology. GAO denied a protest<sup>19</sup> that contended that the protestor’s proposal was improperly excluded from consideration for award where the solicitation *clearly advised* that the agency intended to make award without discussions, if possible, on the basis of initial proposals. Similarly, GAO denied a protest<sup>20</sup> that asserted the agency improperly failed to conduct testing to assess the accuracy of the awardee’s night vision devices, where *such testing was not a requirement of the solicitation*.

Of course, if an agency fails to clearly communicate its requirements in the solicitation or neglects to follow the process it outlined, GAO will hold the agency accountable. GAO has consistently sustained protests where the solicitation was unclear or the agency acted inconsistent with the terms of the solicitation. In one recent case,<sup>21</sup> the protester argued successfully that the solicitation failed to disclose a key factor necessary for the firm to intelligently prepare its offer. The solicitation allowed offerors to indicate, from many choices, the port to which it would deliver its commodity; the agency would simultaneously—via a separate solicitation—procure transportation services from the ports listed to the final foreign destination. The solicitation failed to indicate, however, that if a port proposed by the commodity offeror was *not* proposed by a delivery offeror, no “match” could be made and the offeror would be ineligible for award. Had the offeror been aware of this, it would have offered to deliver to any number of ports. GAO sustained this protest since the agency did not provide all of the information necessary for offerors to compete intelligently and on an equal basis.

**The Lesson:** Write your solicitation in a manner that is as clear as possible in communicating the government’s needs and the planned evaluation methodology. Then, follow the methodology outlined in the solicitation.

## Consider potential conflicts of interest

Contracting officers are required—by FAR 9.504—to identify and evaluate potential organizational conflicts of interest as early as possible in the acquisition process. An organizational conflict of interest can occur when a contractor is unable, or potentially unable, to render impartial assistance or advice to the contracting agency. If the contracting officer detects a significant—or potentially significant—conflict, he or she must then find a way to “avoid, neutralize, or mitigate” that conflict prior to contract award.

GAO is holding contracting officers’ feet to the fire on this issue, as evidenced by a series of related protest decisions.<sup>22</sup> In one case,<sup>23</sup> a protester asserted that an agency failed to consider potential conflicts of interest when it awarded a contract for systems engineering services that included, among other services, the design and implementation of environmental surveys. The assertion was that, in fact, there was a conflict of interest inherent in this award; the firm that received the award owns and operates a variety of production and manufacturing facilities that produce hazardous materials subject to environmental regulations. Under the contract, the firm could be tasked with designing and implementing surveys on environmental issues in which the results could directly impact the firm’s operations and viability, thus impairing the contractor’s objectivity to perform the required task. While the firm had submitted a conflict of interest plan with its initial proposal, it did not disclose the potential conflict. Nor, GAO found, did the agency give any consideration to the potential conflict.

The agency’s acquisition team argued that it had no obligation to consider the impact that the offer’s ongoing environmentally-related activities may have on the contract at hand because the procurement was for “computer support/systems engineering services, not enforcement or regulatory advice.” However, upon questioning, agency staff acknowledged the possibility that the scope of work of the contract “could reasonably include” designing and implementing surveys about environmental regulatory compliance. GAO ultimately sustained the protest and ordered the agency to perform a thorough assessment of potential conflicts and establish a course of action to effectively avoid, neutralize, or mitigate the conflict. The agency did so, and GAO denied a subsequent protest,<sup>24</sup> by the same protestor, that asserted the agency’s corrective action was inadequate.

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In a similar case,<sup>25</sup> GAO sustained a protest that asserted an agency failed to properly evaluate potential organizational conflicts of interest when it awarded a contract for the evaluation of undersea warfare systems, when the awardee had manufactured 59 of the systems to be evaluated. While the agency claimed there were no potential conflicts of interest due to the completely objective means of evaluation, the language in the solicitation and historical evaluation reports suggested otherwise—that the evaluations would be more *subjective*. GAO recommended that the agency reopen discussions, request organizational conflict of interest (OCI) plans from offerors, and “meaningfully consider, evaluate, and document the frequency with which OCI issues will likely occur for each offeror, the actions necessary to address such issues, and the impact such actions will have on the quality of the offeror’s performance.”

**The Lesson:** Reasonably consider whether an offeror’s proposal presents potential conflicts of interest, *even if* the offeror’s OCI plan suggests there are none. In GAO’s words, “meaningfully consider, evaluate, and document” the impact of the potential issues and develop a plan to avoid, neutralize, or mitigate that conflict prior to contract award.

## Conclusion

The myriad decisions highlighted above provide valuable lessons learned from the challenges and successes of others. Keep these in mind when crafting your future acquisitions. And look for Part Two of this series, coming soon. ♦

## ENDNOTES

- <sup>1</sup> Information Ventures, Inc., B-294267; October 8, 2004; <http://www.gao.gov/decisions/bidpro/294267.pdf> (See page 1)
- <sup>2</sup> Rochester Optical Manufacturing Company, B-292247, B-292247.2; August 6, 2003; <http://www.gao.gov/decisions/bidpro/292247.pdf> (See page 2)
- <sup>3</sup>SWR, Inc., B-294266; October 6, 2004; <http://www.gao.gov/decisions/bidpro/294266.pdf> (See page 2)
- <sup>4</sup> Tiger Enterprises, Inc., B-292815.3; B-293439; January 20, 2004; [http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=2928153.pdf&directory=/diskb/wais/data/gao\\_comptroller\\_general](http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=2928153.pdf&directory=/diskb/wais/data/gao_comptroller_general) (See page 2)
- <sup>5</sup> EDP Enterprises, Inc., B-284533.6; May 19, 2003; <http://www.gao.gov/decisions/bidpro/2845336.pdf> (See page 2)
- <sup>6</sup> American College of Physicians Services, Inc., COLA; B-294881; B-294881.2; January 3, 2005; <http://www.gao.gov/decisions/bidpro/294881.pdf> (See page 3)
- <sup>7</sup> American College of Physicians Services, Inc., COLA; B-294881; B-294881.2; January 3, 2005; <http://www.gao.gov/decisions/bidpro/294881.pdf> (See page 3)
- <sup>8</sup> Teximara, Inc., B-293221.2; July 9, 2004; <http://www.gao.gov/decisions/bidpro/2932212.pdf> (See page 3)
- <sup>9</sup> Health & Human Services Group; B-294703; December 15, 2004; <http://www.gao.gov/decisions/bidpro/294703.pdf> (See page 3)
- <sup>10</sup> Originally in Global Solutions Network, Inc., B-290107; June 11, 2002; Cited as reference in Kearfott Guidance & Navigation Corporation, B-292895.2; May 25, 2004; <http://www.gao.gov/decisions/bidpro/2928952.pdf> (See page 3)
- <sup>11</sup> Kearfott Guidance & Navigation Corporation, B-292895.2; May 25, 2004; <http://www.gao.gov/decisions/bidpro/2928952.pdf>; MFVega & Associates, LLC, B-291605.3; March 25, 2003; <http://www.gao.gov/decisions/bidpro/2916053.pdf>; McKesson Automation Systems, Inc., B-290969.2; B-290969.3; January 14, 2003; [http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=2909692.pdf&directory=/diskb/wais/data/gao\\_comptroller\\_general](http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.88&filename=2909692.pdf&directory=/diskb/wais/data/gao_comptroller_general) (See page 3)
- <sup>12</sup> Information Ventures, Inc., B-293541; April 9, 2004; <http://www.gao.gov/decisions/bidpro/293541.pdf> (See page 3)
- <sup>13</sup> Information Ventures, Inc., B-293518; B-293518.2; March 29, 2004; <http://www.gao.gov/decisions/bidpro/293518.pdf> (See page 3)
- <sup>14</sup> One Source Mechanical Services, Inc.; Kane Construction; B-293692; B-293802, June 1, 2004; <http://www.gao.gov/decisions/bidpro/293692.htm> (See page 4)
- <sup>15</sup> From *WinSTAR Communications, Inc. v. United States*, 41 Fed. Cl. 748, 762 (1998) (See page 4)
- <sup>16</sup> Originally from M-Cubed Info. Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 5; reiterated in *Marriott Downtown*, B-294594; November 08, 2004; <http://www.gao.gov/decisions/bidpro/294594.pdf> (See page 5)
- <sup>17</sup> Originally from *PharmChem, Inc.*, B-291725.3 et al., July 22, 2003; reiterated in *American States Utilities Services, Inc.* B-291307.3; June 30, 2004; <http://www.gao.gov/decisions/bidpro/2913073.pdf> (See page 5)
- <sup>18</sup> Originally from *U.S. Facilities, Inc.*, B-293029, B-293029.2; Jan. 16, 2004, at 6; reiterated in *Manufacturing Engineering Systems, Inc.*, B-293299.3; B-293299.4; August 3, 2004; <http://www.gao.gov/decisions/bidpro/2932993.pdf> (See page 5)
- <sup>19</sup> *DynCorp International LLC*, B-294232; B-294232.2; September 13, 2004; <http://www.gao.gov/decisions/bidpro/294232.pdf> (See page 5)
- <sup>20</sup> *Optical Systems Technology, Inc.*, B-292743.2; November 12, 2004; <http://www.gao.gov/decisions/bidpro/2927432.pdf> (See page 5)
- <sup>21</sup> *Oregon Potato Company*, B-294839; December 27, 2004; <http://www.gao.gov/decisions/bidpro/294839.pdf> (See page 5)
- <sup>22</sup> *Marriott Downtown*, B-294594; November 08, 2004; <http://www.gao.gov/decisions/bidpro/294594.pdf>; *Manufacturing Engineering Systems, Inc.*; B-293299.3; B-293299.4; August 3, 2004; <http://www.gao.gov/decisions/bidpro/2932993.pdf>; *American States Utilities Services, Inc.*; B-291307.3; June 30, 2004; <http://www.gao.gov/decisions/bidpro/2913073.pdf>; *Northrop Grumman Systems Corporation*, B-293036.5; B-293036.6; B-293036.7; June 4, 2004; <http://www.gao.gov/decisions/bidpro/2930365.pdf>; *U S Positioning Group, LLC*, B-294027; June 21, 2004; <http://www.gao.gov/decisions/bidpro/294027.pdf> (See page 6)
- <sup>23</sup> *Science Applications International Corporation*, B-293601; B-293601.2; B-293601.3; May 3, 2004; <http://www.gao.gov/decisions/bidpro/293601.pdf> (See page 6)
- <sup>24</sup> *Science Applications International Corporation*, B-293601.5; September 21, 2004; <http://www.gao.gov/decisions/bidpro/2936015.pdf> (See page 6)
- <sup>25</sup> *Purvis Systems, Inc.*, B-293807.3; B-293807.4; August 16, 2004; <http://www.gao.gov/decisions/bidpro/2938073.pdf> (See page 6)



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