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Focus

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FEATURE COMMENT: An Analysis Of GAO's 2022 Bid Protest Statistics—Yet Fewer Protests, Continuing High Rate Of Voluntary Corrective Action—Together With Last Year's Top Protest Decisions And Developments

The Government Accountability Office has released its bid protest statistics for fiscal year 2022. *GAO Bid Protest Annual Report to Congress for Fiscal Year 2022*, B-158766 (GAO-23-900462), is available at *www.gao.gov/products/GAO-23-900462*; 64 GC ¶ 326. This year's headlines: protest filings were down again, but the "effectiveness rate" once again topped one-half.

GAO's Reported Statistics—GAO received 1,595 and closed out three more bid protests in FY 2022. (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 well over one-third in the past four years.

For FY 2022, GAO reported that task or delivery order procurements under indefinite-delivery, indefinite-quantity (IDIQ) contracts were contested in 344 (down two years in a row) or in nearly 20.8 percent of all cases closed—thus topping one-fifth for the first time, as we posited last year. Without question, the IDIQ beat goes on, precisely as the procurement reformers of the 1990s intended.

There were but two hearings in FY 2022, reconfirming the rarity of trial-like proceedings at GAO. The past fiscal year, GAO employed alternative dispute resolution 74 times, 68 times successfully—for a success rate of 92 percent, the highest in at least the last five years. There were only 20 requests for reconsideration in FY 2022, down 50 percent year-over-year, continuing a sharply downward trend in recent years. There was a single instance last year where the agency disregarded GAO's recommendations, which was the first since 2015.

The 455 protests that went all the way to a GAO sustain-or-deny decision in FY 2022 (down 21.7 percent from 581 the year before) were about 28.5 percent of protests closed out. Of those 455 protests, 59 or 13 percent resulted in a sustained protest. This compares to the 84–85 sustained protests in FY 2020–21, so down just over 30 percent. The peak of 139 sustained protests in FY 2016, at a sustain rate of 23 percent, is but a dim memory.

As always, GAO provided a list of its most frequent grounds for sustaining a protest. The top reason in FY 2022 (also first in each of the past six years) was "unreasonable technical evaluation." Number two was "flawed selection decision," a reason that has not appeared as such in recent years and could embrace a multitude of sins. Coming in third was "flawed solicitation." Last year's second most prevalent reason, "flawed discussions," did not make the cut this year.

As in all prior years, GAO's FY 2022 report includes this caveat: "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." For newer readers, 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 2022, GAO reported an "effectiveness rate" of 51 percent: that is, of the 1,598 protests closed out, 51 percent (or 815 protests) resulted in either a sustain by GAO or voluntary corrective action by the agency. While the absolute number of effective outcomes was down from 927 in FY 2021, the percentage last year matched the recent high-water mark of 51 percent set in FY 2020. The three-year "effectiveness" average is essentially one-half! Given the relatively modest number of sustained protests (59), defending agencies took VCA in a total of 756 protests. That means the rate of voluntary corrective action alone was 47.3 percent. Given how GAO counts protests, the already-high percentage for VCA probably understates the likelihood of any one protested procurement resulting in such an outcome: 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 today's world, the odds of VCA in the first month must be better than even.

Sustained GAO Protests—For the fourth year in a row, we have conducted a statistical "deep dive" into GAO's *sustained* protests. The 59 sustains in FY 2022 were encapsulated in only 29 decisions. Another 30 B-numbers were adjudicated along with the main ones, so the total B-numbers more than doubled the number of written decisions. Please note that not all of the relevant attributes are evident on the face of the decisions, so not all categories will sum to 29.

In terms of procurement size for sustained protests, the greatest numbers once again fell in the two cohorts between $10 million and $100 million (11), and between $100 million and one billion (seven). Of the sustain decisions, somewhat over one-third (11/29) came in negotiated (Federal Acquisition Regulation pt. 15) procurements, down from 60 percent last year. Conversely, General Services Administration Federal Supply Schedule (FAR subpt. 8.4), GSA Blanket Purchasing Agreement, and task/delivery order (FAR pt. 16) procurements combined in FY 2022 for close to 60 percent (17/29) of the sustains—up from just over one-third and just under one-quarter in the prior two years. Large and small business shared equal percentages of wins in FY 2022, with 12 each. We found only one protest that was sustained on behalf of multiple protesters.

The last component of our deep dive is always into GAO's recommended corrective actions for protests sustained. One thing we noticed in FY 2022 was more "optionality" in GAO's recommended corrective actions: it seems to us that more often than in recent years, GAO laid out two or more possible courses of corrective action for the agency. In all or nearly all post-award protests, mere re-evaluation was recommended as the only or a possible means of correction. Disqualification of the awardee was recommended three times, at least as an option. There were only five sustains that recommended the reopening of discussions and/or solicitation of proposal revisions, down nearly two-thirds from FY 2021 but in line with prior years. In sum, protesters rarely got any dramatic form of corrective action—at least not from GAO, noting here that agencies sometimes expand corrective action on their own, following receipt of a sustain decision.

Statistical Trends—GAO's FY 2022 continued the paradoxical trend of decreased protest filings combined with increased protest success. If there has been any steady theme to be derived from GAO's bid protest statistics over the past decade, it has been *voluntary corrective action*. With the effectiveness rate hovering around 50 percent for the past three years taken together, and sustains still rare, VCA rules. In FY 2022, protesters were 12.8 times more likely to obtain relief by voluntary corrective action (756 times) than by a sustained protest (59 times). Put differently, almost 93 percent of "effective" outcomes (756/815) came through VCA. In effect, the GAO protest docket is providing a platform for agencies to find and fix their own errors and omissions. Procurement decisions made at lower levels of agencies, by less expert officials and lawyers, are being overturned once protests are filed and records are being re-examined at higher levels. Perhaps even too often, one might wonder?

As we wrote in this space last year, all things equal, one would think a higher winning percentage

by protesters would lead to even more protest filings. Thus, the now-persistent decrease in protests requires an explanation. What is the downward force offsetting the impetus provided by the higher success rate? We continue to believe that the most logical explanation lies in better debriefings. After all, one major and declared purpose of improved debriefings—whether congressionally mandated "enhanced debriefing" procedures for Department of Defense procurements or the various non-statutory initiatives adopted by other agencies—is to educate and dissuade award losers from filing bad protests. Whatever one might say about the rest of the American educational system, better debriefings seem to be working.

Top Decisions and Developments of 2022—We once again respectfully submit a qualitative assessment of what we see as the most impactful bid protest decisions and developments of the past year. For clarity, this compilation is for calendar year 2022 (not FY 2022) and covers both GAO and court protest decisions. In Letterman-style reverse order, these are our "top 10" for the year in review:

10. NDAA Acquisition Reforms That . . Wait For It . . Have Not Happened ... Again: It has become an annual tradition in recent years—we report in these pages yet another uneventful year in "bid protest reform." This year follows that trend, with no significant bid protest reforms materializing this past year. We note that the study of bid protests that Congress commissioned as part of the National Defense Authorization Act for FY 2021 process (see, e.g., 64 GC ¶ 36) has been completed by the Acquisition Innovation Research Center and was provided to DOD in November 2022, but DOD apparently has not yet transmitted that report to Congress or made it public.

9. Final Implementation of DOD's Enhanced Debriefing Rules: On March 18, 2022, the final version of DOD's enhanced debriefing rules took effect, adding a new Defense FAR Supplement provision, DFARS 215.506-70, and cementing the enhanced debriefing process that has been in place for large DOD procurements since March 2018. See, e.g., 61 GC ¶ 35. Although many of the open questions and potential procedural traps arising out of the implementation of DOD's enhanced debriefing process have now been addressed, either by the final rule or from guidance from the courts and GAO, the decision in *MP Sols., LLC*, Comp. Gen. Dec. B-420953, B-420953.2, 2022 CPD ¶ 289, is a reminder that the enhanced debriefing process can still present some procedural traps. In *MP Sols.*, GAO clarified that DOD's enhanced debriefing procedures apply only to *post-award* debriefings, and not to *preaward* debriefings.

8. Return of (the) JEDI?: We previously have reported on DOD's Joint Enterprise Defense Infrastructure (JEDI) cloud procurement (see 64 GC ¶ 36; 63 GC ¶ 40; 62 GC ¶ 34), which DOD eventually scrapped in June 2021 after several rounds and years of protest litigation. The originally planned $10 billion JEDI contract may be history, but in its place DOD awarded four IDIQ contracts under the multiple-award Joint Warfighting Cloud Capability (JWCC) contract in December 2022. As Yoda cautioned in *Star Wars: The Empire Strikes Back*, "Difficult to see; always in motion is the future," but, given the $9 billion total value of the JWCC contract, we see in DOD's (and GAO's) future many task order protests brought by the four fiercely competitive awardees.

7. Further Developments in Other Transaction Authority (OTA) Protest Jurisdiction: Jurisdiction over OTA bid protests remains a hotly debated and litigated issue. This past year, the Court of Federal Claims's decision in *Hydraulics Int'l, Inc. v. U.S.*, 161 Fed. Cl. 167 (2022); 64 GC ¶ 265, provided additional clarity concerning that court's jurisdiction in protests challenging a prototype OTA award. Although the court agreed with the Government that the OTA in question was not itself a "procurement" for purposes of establishing jurisdiction under 28 USCA § 1491(b)(1), the court concluded that the possibility of a future follow-on production contract arising from the OTA nonetheless established the court's jurisdiction over the protest of the OTA award. Relying on the Federal Circuit's decisions in *Distributed Sols., Inc. v. U.S.*, 539 F.3d 1340 (Fed. Cir. 2008); 50 GC ¶ 332, and *AgustaWestland N. Am., Inc. v. U.S.*, 880 F.3d 1326 (Fed. Cir. 2018); 60 GC ¶ 40, the court explained that § 1491(b)(1) "does not require an actual procurement" and "explicitly contemplates the ability to protest these kinds of pre-procurement decisions" by vesting the COFC with bid protest jurisdiction over "proposed procurements." Because the OTA in question "may result in the exclusion of plaintiff for consideration of 'a follow-on production contract,' " the COFC held that it had jurisdiction over the plaintiff's protest.

6. Hiring Former Government Officials—A Gathering Storm?: It certainly is not a new phenomenon that the hiring of former Government employees can give rise to unfair competitive advantage allegations in bid protests. See, e.g., *Health Net Fed. Servs., LLC*, Comp. Gen. Dec. B-401652.3, B-401652.5, 2009 CPD ¶ 220. What does strike us as remarkable, however, is the increased frequency in which these situations seem to be appearing in bid protest decisions over the past few years. Employing a former Government official can be an unfair competitive advantage minefield. Offerors and bidders in the market to hire a former Government official are well-advised to be prepared for a protest *before* it gets filed. Often, some of the very same reasons that make the hiring of that Government official attractive to your business may end up being the reasons that result in a disqualification from a major procurement opportunity. GAO's decision in *Serco, Inc.*, Comp. Gen. Dec. B-419617.2, B-419617.3, 2021 CPD ¶ 382, and its follow-on denial of reconsideration last year in *Booz Allen Hamilton, Inc.—Recon.*, Comp. Gen. Dec. B-419617.4, 2022 CPD ¶ 225, provide a cautionary tale. They also serve as recent—but by no means the only—reminders that, while a contracting officer's investigation may be reviewed for reasonableness, it is GAO's view that "there is no requirement for deference to a contracting officer's decision solely because the contracting officer has considered the facts surrounding the allegations of unfair competitive disadvantage." Id. at 7.

5. Beware the "Stealth" Agency-Level Protest: Several GAO decisions involving agency-level protests—whether intended as such or not—serve as cautionary tales to offerors and practitioners alike regarding the impact communications with an agency may have on the timeliness of subsequent protest allegations. FAR 33.103(d)(2) sets forth the requirements for what qualifies as an agency-level protest, and these requirements include a detailed statement of the legal and factual grounds for the protest and a request to the agency for some form of relief. Importantly, GAO has made clear that an agency-level protest "does not have to state explicitly that it is intended as a protest." *Masai Techs. Corp.*, Comp. Gen. Dec. B-400106, 2008 CPD ¶ 100 at 3. At the same time, a letter or email that "merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest." Id.

In *Sci. and Tech. Corp.*, Comp. Gen. Dec. B-420216, 2022 CPD ¶ 1, GAO concluded that the protester's pre-award "letter of concerns" to the agency complaining about the key personnel requirements in the solicitation qualified as an agency-level protest. In response to the protester's letter, the CO declined to change the key personnel requirements and then subsequently issued a solicitation amendment that did not revise those requirements. Because the protester had failed to file its GAO protest within 10 days of the initial adverse agency action on its agency-level protest, GAO held that the protester's subsequent challenge to the requirement was untimely.

In a similar vein, in *VSolvit, LLC*, Comp. Gen. Dec. B-421048, B-421048.2, 2022 CPD ¶ 310, GAO concluded that an email sent by the protester to the agency's senior procurement executive qualified as a "*de facto* agency-level protest" because "the gravamen" of that email was "an appeal to a higher agency authority concerning the contracting officer's interpretation of the solicitation," expressed "concern" regarding the CO's interpretation, and "request[ed] specific relief from the senior procurement executive." Because the protester's email had "all the hallmarks and trappings of an agency-level protest," GAO treated it as such and found that the protester's allegations were untimely because they had not been filed at GAO within 10 days of when the agency responded to the email and had declined to adopt the protester's contrary interpretation of the solicitation.

In contrast, the protesters in *CrowderGulf, LLC, et al.*, Comp. Gen. Dec. B-418693.9 et seq., 2022 CPD ¶ 90, and *The Ulysses Grp., LLC*, Comp. Gen. Dec. B-420566, 2022 CPD ¶ 123, sought to preserve the timeliness of their GAO protest allegations by characterizing communications as agency-level protests. In *CrowderGulf*, the protester argued that a letter it submitted to the agency seeking to ensure that it had received "all of the same information provided to other offerors" and a subsequent Q&A question it submitted asking how the agency would ensure the offerors did not have access to information that would give them an unfair competitive advantage qualified as agency-level protests that allowed it to renew those protest grounds in a post-award protest. And in *The Ulysses Grp.*, GAO concluded that the protester's email to the agency in that procurement did not request any specific

relief or ruling and, therefore, failed to qualify as an agency-level protest.

These decisions serve as a reminder that what constitutes an agency-level protest in the eyes of GAO should be "top of mind" when offerors are communicating with agencies about matters they may later wish to bring before GAO as protest grounds.

4. Proposals Rejected for Exceeding File Size Limitations: For as often as the jurisprudence from GAO and COFC judges generally align with each other in bid protest matters, there still are areas of disagreement. And, in some instances, those areas of disagreement may drive a protester's decision as to which protest forum to use. Two decisions in 2022 represent one such area of divergence—i.e., does an agency have to evaluate an emailed proposal that was rejected as being "late" because it exceeded file size limitations and, therefore, was never delivered? In *eSimplicity, Inc. v. U.S.*, 162 Fed. Cl. 372 (2022); 64 GC ¶ 314, the COFC concluded that the agency had applied unstated evaluation criteria in rejecting the protester's proposal for exceeding file-size limitations. Because the solicitation did not specify any file-size limitation for emailing proposals, the court found that it was arbitrary and capricious for the agency to reject the protester's proposal on that basis. In *Ace Elecs. Def. Sys., LLC*, Comp. Gen. Dec. B-420863, 2022 CPD ¶ 233, GAO reached the opposite conclusion. GAO denied the protest where the protester's proposal had been "bounced" by the destination server for exceeding size limits, explaining that "an offeror is not excused from complying with the size limits for electronic submissions even where the limits are not disclosed in the solicitation."

3. Giving Teeth to the Presumption for Conducting Discussions in Large Dollar Value DOD Procurements?: DFARS 215.306(c)(1) provides: "For acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." Ever since deciding *Sci. Apps. Int'l Corp.*, Comp. Gen. Dec. B-413501, B-413501.2, 2016 CPD ¶ 328, GAO has adhered to its rule that, even though DFARS 215.306(c) establishes an expectation that agencies conduct discussions in DOD procurements valued over $100 million, "agencies retain the discretion not to conduct discussions based on the particular circumstances of each procurement." *IAP Worldwide Servs.*, Comp. Gen. Dec. B-419647, B-419647.3, 2021 CPD ¶ 222 at 11; 63 GC ¶ 209. In this regard, GAO has advised, an agency's exercise of discretion under DFARS 215.306(c) "must be reasonable." *McCann-Erickson USA, Inc.*, Comp. Gen. Dec. B-414787, 2017 CPD ¶ 300 at 9 n. 10; 59 GC ¶ 310. As a practical matter, however, application of GAO's reasonableness standard has meant that GAO has never second-guessed—at least not in any published decision to date—an agency's choice not to hold discussions in a procurement covered by DFARS 215.306(c). See *Novetta, Inc.*, Comp. Gen. Dec. B-414672.4, B-414672.7, 2018 CPD ¶ 349; *Solers, Inc.*, Comp. Gen. Dec. B-414672.3, B-414672.8, 2018 CPD ¶ 350; *Omni2H, LLC*, Comp. Gen. Dec. B-418655, 2020 CPD ¶ 239; *IAP Worldwide Servs.*, Comp. Gen. Dec. B-419647, B-419647.3, 2021 CPD ¶ 222; 63 GC ¶ 209; *R&K Enters. Sols., Inc.*, Comp. Gen. Dec. B-419919.6 et seq., 2022 CPD ¶ 237; 64 GC ¶ 299.

Even though GAO has not been receptive to protester complaints under DFARS 215.306(c), a few COFC decisions now seem to be giving that provision more bite. Last year, we reported on Judge Solomson's decision in *Oak Grove Techs., LLC v. U.S.*, 155 Fed. Cl. 84 (2021), where the court sustained the protest after finding that the agency's failure to conduct discussions violated DFARS 215.306(c). In 2022, Judge Solomson sustained another protest, *IAP Worldwide Servs. Inc. v. U.S.*, 159 Fed. Cl. 265 (2022), based on the agency's failure to conduct discussions in violation of DFARS 215.306(c). Of course, COFC "decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court," *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994); 37 GC ¶ 31, so other COFC judges may reach different conclusions about the level of scrutiny to be applied with respect to DFARS 215.306(c). At the risk of getting ahead of ourselves for next year, however, we would note that Judge Bruggink followed suit in a decision issued at the start of this calendar year. See *SLS Fed. Servs., LLC v. U.S.*, 2023 WL 140970 (Fed. Cl. Jan. 3, 2023) (following *Oak Grove* and *IAP Worldwide* and finding that "the agency failed to adequately justify its decision not to use discussions").

2. A Departure from GAO's Rule on the Unavailability of Key Personnel: Another instance where at least one COFC judge (once again, Judge Solomson) has broken away from GAO precedent involves the conundrum of proposed key personnel who become unavailable after proposal submission

but before contract award. Practitioners will recall that, under well-established GAO precedent, offerors must advise agencies of material changes in proposed staffing, even after submission of proposals. See, e.g., *Gen. Rev. Corp. et al.*, Comp. Gen. Dec. B-414220.2 et al., 2017 CPD ¶ 106 at 22. Further, under GAO's rule: "When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal." Id.

In *Golden IT, LLC v. U.S.*, 157 Fed. Cl. 680 (2022); 64 GC ¶ 49, Judge Solomson criticized GAO's rule and declined to follow it, explaining that he was "unable to locate the basis for the GAO's rule" and would not "conjure up a rule ... requiring offerors or quoters to routinely update the Government when facts and circumstances change post-proposal or quote submission, during the course of the government's evaluation period." Rather, the court found that, although one of the awardee's proposed key personnel had left the company in the period between proposal submission and award, the protester could not prevail on its material misrepresentation claim because (i) there was no evidence that the awardee knew at the time of proposal submission that the employee intended to leave and (ii) there was no solicitation requirement that offerors update the agency regarding changes in key personnel. We will have to see if *Golden IT* represents the new vanguard at the COFC where key personnel become unavailable during a procurement.

1. The Ghosting of Inserso: Two years ago, we wondered whether the decision in *Inserso Corp. v. U.S.*, 961 F.3d 1343 (Fed. Cir. 2020); 62 GC ¶ 180; 64 GC ¶ 36, would herald an expansion of the *Blue & Gold* waiver rule by the Federal Circuit. It has not. In *Inserso*, the Federal Circuit appeared to articulate a broad view of the waiver rule, stating that it applies to all situations in which a protester has the opportunity to challenge a solicitation before award. As we noted last year, the Federal Circuit in *Harmonia Holdings Grp., LLC v. U.S.*, 20 F.4th 759 (Fed. Cir. 2021); 63 GC ¶ 376, issued a relatively narrow ruling rejecting a *Blue & Gold* waiver argument. In that decision, the court of appeals did not even cite to its prior *Inserso* decision in ruling that a timely filed agency-level protest, which the agency denied, had preserved the protester's pre-award challenge to the terms of the solicitation. The protester waited to raise that same solicitation challenge in a *post-award* action at the COFC, but the Federal Circuit found that the agency-level protest—as a "timely, formal challenge" to the solicitation—sufficed to preserve the protester's objection for purposes of the *Blue & Gold* waiver rule.

This past year, the Federal Circuit once again appears to have backed away from expanding on *Inserso*'s broad application of the *Blue & Gold* waiver rule. In *Sekri, Inc. v. U.S.*, 34 F.4th 1063 (Fed. Cir. 2022); 64 GC ¶ 163, the Federal Circuit held that, even though the protester had not submitted a proposal under a competitive solicitation prior to the close of the bidding process, the protester nonetheless had not waived its challenge to the terms of the solicitation. Rather, the Federal Circuit held, the protester preserved its challenge by giving notice to the agency prior to the close of the bidding process that it was a mandatory source of supply for this requirement under the Javits-Wagner-O'Day Act (which prioritizes the purchase of products from suppliers that employ blind individuals). Because the protester had advised the agency that it was required to acquire the items through the protester rather than through a competitive solicitation, the Federal Circuit held that the protester had not waived its right to challenge the contract award under the *Blue & Gold* waiver rule. Notably, the *Sekri* decision, like the decision in *Harmonia Holdings,* did not cite *Inserso*. That may be no accident: the same judge who authored the *Sekri* and *Harmonia Holdings* opinions was also on the panel that decided *Inserso*, and in that case he dissented from the application of the majority's application of the *Blue & Gold* wavier rule. The tenor of these more recent decisions from the Federal Circuit suggests that, at least in that court, *Inserso* may indeed be a paper tiger.

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