



United States Government Accountability Office
Washington, DC 20548

GAO BID PROTEST OVERVIEW

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Updated December 2008

Bid Protest Statistics for Fiscal Years 2004-2008

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004
Cases Filed ¹	1,652 ² (up 17% ³)	1,411 (up 6%)	1,327 (down 2%)	1,356 (down 9%)	1,485
Cases Closed	1,581	1,393	1,274	1,341	1,405
Merit (Sustain + Deny) Decisions	291	335	249	306	365
Number of Sustains	60	91	72	71	75
Sustain Rate	21%	27%	29%	23%	21%
Effectiveness Rate (reported) ⁴	42%	38%	39%	37%	34%
ADR ⁵ (cases used)	78	62	91	103	123
ADR Success Rate ⁶	78%	85%	96%	91%	91%
Hearings ⁷	6% (32 cases)	8% (41 cases)	11% (51 cases)	8% (41 cases)	9% (56 cases)

¹ All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate protest for purposes of this chart.

² Of the 1,652 cases filed in FY 2008, 87 are attributable to expanded bid protest jurisdiction over task orders (49 filings), A-76 protests (30 filings), and Transportation Security Administration protests (8 filings). If these expanded jurisdiction protests are subtracted from the FY 2008 total, the result is 1,565 cases filed, which represents a 10.9% increase over FY 2007.

³ From the prior fiscal year.

⁴ Based on a protester obtaining some form of relief from the agency, as reported to GAO.

⁵ Alternative Dispute Resolution.

⁶ Percentage resolved without a formal GAO decision.

⁷ Percentage of fully developed decisions in which GAO conducted a hearing.

RECENT DEVELOPMENTS⁸

Task And Delivery Order Protests

Section 843 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008) expanded GAO's jurisdiction over protests of the issuance or proposed issuance of certain task and delivery orders under certain indefinite-delivery/indefinite-quantity contracts. See 10 U.S.C. § 2304c(e) and 41 U.S.C. § 253j(e). The new authority went into effect on May 27, 2008. GAO's authority to consider such protests does not extend to task and delivery orders valued below \$10 million, absent an allegation that the order increases the scope, period, or maximum value of the underlying contract. See GAO's Final Rule, 73 Fed. Reg. 32,427 (June 9, 2008).

Public-Private Competitions Conducted Pursuant To The A-76 Circular

Section 326 of the National Defense Authorization Act for Fiscal Year 2008 expanded the definition of an "interested party" in an A-76 public-private competition, see 31 U.S.C. § 3551(2), to include not only the official responsible for submitting the federal agency tender, but also any one individual, designated as the agent by a majority of the federal employees performing the activity or function subject to the public-private competition, who represents the affected employees. See 73 Fed. Reg. 32,427-29. The statute also deleted the then-existing restriction that limited protests of A-76 competitions to those competitions involving 65 or more full-time equivalent employees of a federal agency.

Protests Involving The Transportation Security Administration (TSA)

The Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, was enacted on December 26, 2007. That law repealed TSA's authority to use the FAA's acquisition management system, made TSA subject to the Federal Acquisition Regulation (FAR), and provided jurisdiction for GAO to consider protests challenging TSA procurements. In accordance with the effective date under the statute, GAO determined that it had authority to hear protests of TSA/FAR-based procurements covered by TSA solicitations issued on or after June 23, 2008. See 73 Fed. Reg. 32,427.

⁸ Prepared by Katherine I. Riback, Senior Attorney

SELECTED RECENT GAO BID PROTEST DECISIONS

Evaluations And Source Selections

- **Evaluations And Source Selection Decisions Must Be Documented**

Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 (protest that the agency's evaluation and source selection decisions were unreasonable was sustained where the agency described the protester's demonstration as "problem plagued," but the agency's record lacked adequate documentation to support its findings and, as a result, GAO could not determine if the agency's evaluation was reasonable).

Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2, aff'd, Pemco Aeroplex, Inc.—Recon., B-310372.2, Feb. 1, 2008, 2008 CPD ¶ 24 (where the solicitation required that the agency perform a price realism analysis and risk assessment and identified the particular data that would be considered, protest was sustained due to the absence of any agency documentation reflecting the required analysis of the awardee's final proposal revisions).

Carahsoft Tech. Corp.; Allied Tech. Group, B-311241; B-311241.2, May 16, 2008, 2008 CPD ¶ 119 (protest was sustained where, in a competition for human resources Federal Supply Schedule contracts, the contemporaneous record failed to adequately document the basis for the agency's decision to exclude compensation management services from the awards made to the protesters, and the agency's explanation of its reasoning, in its responses to the protests, was inconsistent with the limited contemporaneous record).

Helicopter Transport Servs. LLC, B-400295; B-400295.2, Sept. 29, 2008, 2008 CPD ¶ 180 (protest that the agency improperly evaluated the protester's past performance was sustained where the record contained no contemporaneous documentation of the oral discussions that the agency stated provided the basis for the evaluation, and the evaluators relied on unidentified written documents).

- **Agency's Evaluation Must Be Reasonable And Consistent With Stated Evaluation Criteria**

Apptis, Inc., B-299457 et al., May 23, 2007, 2008 CPD ¶ 49 (protest was sustained where the agency's consideration of an offeror's record of past performance—as part of assessing the risk of the offeror's technical approach—was improper where past performance was not relevant and was not reasonably related to the agency's assessment of the risk associated with an offeror's technical approach risk as defined in the solicitation).

Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 (in a negotiated procurement for award on a "best value"

basis, which provided for the evaluation of the degree to which offerors' proposals met or exceeded requirements, protest was sustained where the agency failed to qualitatively assess the merits of the offerors' differing approaches).

DRS C3 Sys., LLC, B-310825; B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103 (where the record showed that: (1) the findings in the agency's evaluation report were not consistent with the information upon which the findings were based; (2) the agency evaluators could not remember whether they evaluated and gave proper consideration to adverse past performance information regarding the awardee; and, (3) the agency did not properly assess the relevance of the offeror's prior contracts, protest was sustained where the past performance evaluation was determined to be unreasonable).

Consolidated Eng'g Servs., Inc., B-311313, June 10, 2008, 2008 CPD ¶ 146 (protest was sustained where the source selection decision was based on a flawed technical evaluation and where the agency considered an undisclosed evaluation criterion—transition risk—in assuming that any non-incumbent contractor would likely cause mistakes in performance that would result in costs for the agency).

The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 (protest was sustained where: (1) the agency, in making the award decision, did not assess the relative merits of the proposals in accordance with the evaluation criteria identified in the solicitation, which provided for a relative order of importance for the various technical requirements, and where the agency did not take into account the fact that one of the proposals offered to satisfy more "trade space" technical requirements than the other proposal, even though the solicitation expressly requested offerors to satisfy as many of these technical requirements as possible; (2) the agency violated the solicitation's evaluation provision that "no consideration [would] be provided for exceeding KPP [key performance parameter] objectives" when it recognized as a key discriminator the fact that the awardee proposed to exceed a KPP objective related to aerial refueling to a greater degree than the protester; (3) the record did not demonstrate the reasonableness of the agency's determination that the awardee's proposed aerial refueling tanker could refuel all current Air Force fixed-wing tanker-compatible receiver aircraft in accordance with current Air Force procedures, as required by the solicitation; and, (4) the agency unreasonably determined that the awardee's refusal to agree to a specific solicitation requirement that it plan and support the agency to achieve initial organic depot-level maintenance within 2 years after delivery of the first full-rate production aircraft was an "administrative oversight" and the agency improperly made award, despite the clear exception taken by the awardee to a material solicitation requirement).

Trammell Crow Co., B-311314.2, June 20, 2008, 2008 CPD ¶ 129 (protest was sustained where the agency improperly credited the awardee's proposed building with the availability of certain future amenities; while the solicitation required third-party evidence that the amenities "[would] exist" by the date of occupancy, the awardee only provided in its proposal its own commitment that it would provide the amenities in its building by the occupancy date).

- **Offerors Cannot Ignore Solicitation Requirements**

Contingency Mgmt. Group, LLC; IAP Worldwide Servs., Inc., B-309752 *et al.*, Oct. 5, 2007, 2008 CPD ¶ 83 (the agency's favorable evaluation of an awardee's proposal, submitted in response to a solicitation for logistics support on a global basis, was unreasonable and evidenced unequal treatment where the proposal stated that it was predicated upon assumptions that expressly differed from the assumptions set forth in the solicitation's scenario on which proposals were to be based and there was nothing in the contemporaneous evaluation record indicating that the agency considered, or was even aware of, the proposal's stated assumptions).

Price And Cost Evaluations

- **Price And Cost Evaluations Must Be Consistent With Solicitation**

IBM Corp., B-299504; B-299504.2, June 4, 2007, 2008 CPD ¶ 64 (protest challenging the agency's evaluation of offerors' price and cost proposals was sustained where the agency improperly adjusted upward portions of the protester's fixed-price proposal; an agency may account for concerns regarding an offeror's understanding of a requirement in the form of a performance risk evaluation, but may not adjust a fixed-price for purposes of the evaluation).

Joint Venture Penauille/BMAR & Assocs., LLC, B-311200; B-311200.2, May 12, 2008, 2008 CPD ¶ 118 (protest challenging the agency's price evaluation was sustained where the agency unreasonably determined that the protester's lower-priced line items for a small portion of the work created an "extremely high" performance risk and based its decision on an erroneous belief that the contractor could reject work that was ordered).

MCT JV, B-311245.2; B-311245.4, May 16, 2008, 2008 CPD ¶ 121 (as a general matter, while a decision about an awardee's ability to perform a contract at rates capped below actual costs involves a matter of an offeror's responsibility, where, as here, the solicitation expressly instructed offerors not to submit unrealistically low costs or prices, the risk stemming from an offeror's decision to propose unrealistically low capped rates was a matter for the agency's consideration in the context of the evaluation of proposals and the source selection decision process).

- **Life-Cycle Cost Evaluations**

The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 (an agency's life-cycle cost evaluation need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate to provide some measure of confidence that the agency's conclusions about the most probable costs under an offeror's proposal were realistic in view of other cost information reasonably available to the agency at the time of its evaluation; where anticipated requirements cannot be reasonably ascertained, an agency may establish a reasonable hypothetical, or notional, plan to provide for a common basis for evaluating costs; protest was sustained where the agency improperly added costs to an element of cost (non-recurring engineering costs) in calculating the protester's most probable life-cycle costs to account for the risk associated with the protester's failure to satisfactorily explain the basis for how it priced this cost element, but the agency had not determined that the protester's proposed costs for that element were unrealistically low).

Discussions

- **Improper/Misleading Discussions**

MCT JV, B-311245.2; B-311245.4, May 16, 2008, 2008 CPD ¶ 121 (discussions with the protester regarding the allocation of labor hours in its cost proposal were not meaningful where the discussions did not communicate that the agency was concerned about the protester's inconsistent allocation of labor hours between its technical proposal and its cost proposal).

New Jersey & H St., LLC, B-311314.3, June 30, 2008, 2008 CPD ¶ 133 (protest that the agency failed to engage in meaningful discussions was sustained where the agency failed to raise during discussions significant weaknesses associated with access to amenities in or near the protester's proposed office building).

Burchick Constr. Co., B-400342, Oct. 6, 2008, 2008 CPD ¶ 203 (the agency failed to conduct meaningful discussions in a negotiated procurement where discussions conducted with offerors were limited to cost proposals and did not identify significant weaknesses or deficiencies that the agency had identified in the protester's proposal).

- **Agency Must Treat Offerors Fairly, If Not Equally**

The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 (protest was sustained where the agency conducted misleading and unequal discussions with the protester by informing the protester that it had fully satisfied a KPP (key performance parameter) objective related to operational utility, but later determined that the protester only partially met this objective, without advising the offeror of this change in its assessment and while continuing to conduct discussions with the awardee related to its satisfaction of the same KPP objective).

Past Performance Evaluations

- **Past Performance Evaluations Must Be Consistent With Solicitation**

Doyon-American Mech., JV; NAJV, LLC, B-310003; B-310003.2, Nov. 15, 2007, 2008 CPD ¶ 50 (where the solicitation provided that the evaluation of an offeror's experience would be based on the offeror's submission of previously performed projects, and specifically provided that only projects for which the offeror or a primary teaming partner was the prime contractor should be submitted, the awardees' submission of projects that were performed by the awardees' parent/affiliate corporations, and the agency's reliance on such projects in evaluating the awardees' experience, was improper).

ASRC Research & Tech. Solutions, LLC, B-400217; B-400217.2, Aug. 21, 2008, 2008 CPD ¶ 202 (the agency's evaluation of the awardee's past performance was unreasonable since the agency did not consider the substantial difference in size between the awardee's past performance references and the size of the contemplated contract, as required by the solicitation).

Federal Supply Schedule (FSS) Purchases

- **Non-FSS Products And Services May Not Be Purchased Using FSS Procedures**

Seaborn Health Care, Inc., B-400429, Oct. 27, 2008, 2008 CPD ¶ 197 (in an FSS acquisition, where the request for quotations required that competing vendors offer non-FSS services (specific on-site supervisory personnel) as part of their quotations, protest was sustained since non-FSS products and services may not be purchased using FSS procedures).

Organizational Conflicts Of Interest

Savannah River Alliance, LLC, B-311126 et al., Apr. 25, 2008, 2008 CPD ¶ 88 (allegation that a key personnel reference had a personal conflict of interest that tainted the evaluation of key personnel was denied where the reference, provided by the offeror, did not have an official role in the procurement and the information provided by the reference had no impact on the evaluation).

Superlative Techs., Inc., B-310489.4, June 3, 2008, 2008 CPD ¶ 123 (where the agency canceled a solicitation on the basis of concerns regarding procurement integrity (PI) violations and/or organizational conflicts of interest (OCI) and where the agency subsequently reopened the procurement under another contract vehicle, the agency was required to comply with Federal Acquisition Regulation requirements regarding the identification and resolution of PI issues and/or OCIs).

AT&T Gov't Solutions, Inc., B-400216, Aug. 28, 2008, 2008 CPD ¶ 170 (protest of a firm's elimination from the competition due to a perceived organizational conflict of interest (OCI) was sustained where the agency failed to evaluate the protester's proposed

mitigation plan, failed to consider whether the protester would actually be in a position to evaluate its own products, and failed to give the protester notice of, and an opportunity to respond to, OCI findings prior to the firm's disqualification).

Protests

- **Timeliness**

Rhonda Podojil–Agency Tender Official, B-311310, May 9, 2008, 2008 CPD ¶ 94 (protest by the agency tender official (ATO) challenging the result of a competition conducted pursuant to OMB Circular A-76 was dismissed as untimely where the ATO filed the protest more than 10 days after the ATO knew, or should have known, of the basis of protest; while the debriefing exception to GAO's timeliness rules applies to A-76 competitions conducted on the basis of competitive proposals, the protest nevertheless was untimely because the ATO did not timely request a debriefing, which is a predicate to invoking the exception).

The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 (the protester was not required to file a "defensive protest" where, during the procurement, it was apprised of the agency's evaluation judgments with which it disagreed or where it believed the evaluation was inconsistent with the solicitation's evaluation scheme because GAO's Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2008), require that where the protest involves a procurement conducted on the basis of competitive proposals, under which a debriefing was requested and, when requested, was required, these protest grounds can only be raised after the offered debriefing).

Domain Name Alliance Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 (protest arguing that the agency could not properly complete a reevaluation, pursuant to an earlier corrective action, without holding discussions with the protester and allowing it to submit a revised proposal, was dismissed as untimely where the protester waited until the second award decision to challenge the lack of an opportunity for discussions, despite the fact that the agency's actions—from the time it initiated the corrective action until the second award decision—clearly indicated that the agency did not contemplate holding discussions).

Armorworks Enters., LLC, B-400394; B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 (to be timely, a challenge to a solicitation amendment—which was issued after initial proposals had been submitted and which did not provide offerors with an opportunity to submit revised proposals—should have been filed within 10 days after the issuance of the amendment).

- **Protective Orders**

Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 (admission of a consultant to a GAO protective order was appropriate, over the objection that the consultant once held a position with the protester and that the consultant's daughter was currently employed by the protester,

where the record showed that the consultant had no continuing interest in the protester and the consultant's daughter held a relatively low-level position with the protester in a division that was unrelated to the work to be performed under the protested contract).

PWC Logistics Servs. Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25 (protest was dismissed because of a violation of the terms of the GAO protective order issued in connection with the protest and other actions by the protester inconsistent with maintaining the integrity of GAO's bid protest process).

- **Reverse Discovery**

The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 (in an appropriate case, an agency may request, under GAO's Bid Protest Regulations, 4 C.F.R. § 21.3(d) (2008), that a protester provide specific relevant documents, of which the agency was aware and did not itself possess, but this does not allow for "wide-open" document requests by an agency of broad categories of documents).

- **Bare Assertions/Speculation**

View One, Inc., B-400346, July 30, 2008, 2008 CPD ¶ 142 (where the protester did not challenge the agency's conclusion that its proposal reflected only a "very slight technical superiority" over the awardee's proposal, and where the agency concluded that such technical merit did not outweigh the protester's cost/price premium, the protester's bare allegations that the agency "failed to perform a proper price/technical tradeoff," with neither evidence nor explanation to support its theory, failed to comply with GAO's requirement that a protest include a detailed statement of the legal and factual grounds for asserting that a violation of statute or regulation had occurred).

Coffman Specialties, Inc., B-400706.2, Nov. 12, 2008, 2008 CPD ¶ 211 (protest based on speculation was dismissed because the protester failed to state sufficient legal and factual grounds for protest as a direct result of not making a timely request for a post-award debriefing).

Task And Delivery Orders

- **Jurisdiction**

Delex Sys., Inc., B-400321; B-400402, Aug. 5, 2008, 2008 CPD ¶ 154 (GAO does not have jurisdiction over protests challenging the proposed issuance of task or delivery orders under multiple-award, indefinite-delivery/indefinite-quantity contracts where the orders are valued at less than \$10 million).

Delex Sys., Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 (the set-aside provisions of Federal Acquisition Regulation § 19.502-2(b) apply to competitions for task and delivery orders issued under multiple-award contracts).

- **Scope Of Review**

Triple Canopy, Inc., B-310566.4, Oct. 30, 2008, 2008 CPD ¶ 207 (the authority in the National Defense Authorization Act for Fiscal Year 2008 for GAO to consider protests of task or delivery orders in excess of \$10 million extends to protests asserting that an agency's award decision failed to reasonably reflect the ground rules established for the task or delivery order competition).

OMB Circular A-76

- **Interested Party**

Mark Whetstone--Designated Employee Agent, B-311284, May 9, 2008, 2008 CPD ¶ 93 (protest filed by the Designated Employee Agent challenging the agency's decision to issue a solicitation for processing a backlog of Freedom of Information Act requests without conducting a public-private competition was dismissed where the protester represented a class of employees whose positions were not at risk as a consequence of a contract awarded under the solicitation, *i.e.*, there was no prejudice).

Gary M. Williamson--Agency Tender Official, B-400153, Aug. 1, 2008, 2008 CPD ¶ 151 (the agency tender official was not an interested party to protest the agency's actions, other than the final selection of the source of performance with regard to a pending public-private competition to be conducted pursuant to OMB Circular A-76, which was initiated prior to enactment of the National Defense Authorization Act for Fiscal Year 2008).

Miscellaneous Issues

- **Relationship Between Historically Underutilized Business Zone (HubZone) And Service-Disabled Veteran-Owned Small Business Concern (SDVOSBC) Programs**

International Program Group, Inc., B-400278; B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 (given the unambiguous language of the applicable statutes regarding the HUBZone and SDVOSBC programs, the contracting agency, before proceeding with an SDVOSBC set-aside, must first reasonably consider whether the conditions for a HUBZone set-aside exist and, if they do, the agency must proceed with a HUBZone set-aside; to interpret the statutes otherwise, as in effect creating parity between the programs, would fail to give effect to the clear language of the HUBZone statute, which uses the mandatory term “shall,” not (as in the SDVOSBC statute) the discretionary term “may”).

- **Randolph-Sheppard Act (RSA)**

Maryland State Dep’t of Educ., B-400583; B-400583.2, Nov. 7, 2008, 2008 CPD ¶ 209 (protester, citing Kentucky, Educ. Cabinet, Dept. for the Blind v. U.S., 424 F.3d 1222 (Fed. Cir. 2005), argued that GAO should consider its protest because the protest did not allege a violation of the RSA, but rather, raised standard procurement issues that had been addressed by GAO numerous times in prior bid protest decisions and that were independent of the application of the RSA; however, GAO declined to consider the protest because the protest implicated a potential violation of the RSA and its implementing regulations through the Army’s alleged improper elimination of the state licensing agency’s proposal from the competitive range—mandatory binding arbitration procedures are provided for under the RSA to resolve the protest complaint).