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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## IDENTIFYING VIABLE POSTAWARD BID PROTEST ALLEGATIONS AT THE GAO

By Keith R. Szeliga, Marko W. Kipa, and Daniel J. Marcinak

The Government Accountability Office denies more than three-quarters of all bid protests decided on the merits.<sup>1</sup> Certain categories of protests, however, tend to be more successful than others. The distinguishing feature of these protests is that they raise clear objective or procedural errors in the agency's evaluation and source selection decision, rather than expressing the protester's subjective disagreement with the agency's judgment.

This BRIEFING PAPER assists protesters and their counsel in identifying viable postaward bid protest allegations. It identifies the most common categories of successful bid protest grounds and describes the circumstances under which each ground is most likely to prevail. This analysis is reinforced with a discussion of illustrative GAO bid protest decisions.

### IN BRIEF

Flawed Technical Evaluation	Other Than Full & Open Competition
Flawed Past Performance Evaluation	Out-Of-Scope Modification
Flawed Cost Evaluation	Failure To Amend Solicitation
Flawed Price Analysis	Organizational Conflicts Of Interest
Deviation From Stated Evaluation Criteria	Flawed Responsibility Determination
Flawed Discussions	Small Business Issues
Disparate Treatment	Prejudice
Flawed Best Value Decision	

### Flawed Technical Evaluation

An agency has broad discretion in performing its technical evaluation.<sup>2</sup> The GAO's review is limited to determining whether the agency's evaluation was reasonable and consistent with

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the terms of the solicitation and applicable law.<sup>3</sup> The protester bears the burden to prove that an agency's technical evaluation was flawed, and mere disagreement with an agency's judgment cannot meet that burden.<sup>4</sup>

The GAO's standard of review is particularly narrow in certain types of cases. An agency's technical judgment is entitled to "great weight" where complex technical supplies or services are involved.<sup>5</sup> The GAO also affords "particular deference" to an agency's technical expertise in judgments that involve matters of human life and safety.<sup>6</sup> Even in these types of cases, however, the GAO will sustain a protest where the agency's technical evaluation was not reasonably based or its standards were disparately applied.<sup>7</sup>

Given the GAO's deferential standard of review, you should focus on identifying areas in which the agency's evaluation may have been inconsistent with the terms of the solicitation or the contents of offerors' proposals. Protests challenging an agency's subjective technical judgments with countervailing technical judgments will not prevail.

#### ■ Waiver Of Material Requirement

A proposal that fails to comply with a material solicitation requirement is technically unacceptable and cannot form the basis for an award.<sup>8</sup> The GAO may sustain a protest if an agency waived a technical requirement for your competitor without amending the solicitation and providing you with an opportunity to submit a revised proposal.<sup>9</sup> For example, the GAO has sustained protests where an agency issued an award to an

offeror that failed to comply with the solicitation's product specifications,<sup>10</sup> delivery schedule,<sup>11</sup> or place of performance.<sup>12</sup> If your competitor received an award, despite its failure to meet these or any other material solicitation requirements, the likelihood of a successful protest increases. Beware, however, if your own proposal likewise fails to meet that requirement. In these circumstances, the GAO will not look favorably on your argument and will find that there is a lack of competitive prejudice.

#### ■ Blanket Offer Of Compliance

An agency may not accept at face value an offeror's promise to meet a material solicitation requirement where there is "significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the offeror will or can comply with that requirement."<sup>13</sup> For example, the GAO sustained a protest where the agency had accepted the awardee's certification of compliance with the Berry Amendment (a domestic preference statute), even though the awardee previously had proposed to manufacture its product in China and advised the agency that domestic manufacturing facilities were not available.<sup>14</sup> The GAO found that, based on the awardee's representations, the agency had reason to question whether the awardee would comply with the Berry Amendment and therefore had an obligation to verify compliance before award.<sup>15</sup>

As this example illustrates, the key to challenging an agency's reliance on blanket offers of compliance is establishing that agency evaluators had actual knowledge of information that should have created doubt regarding your competitor's ability or willingness to comply with a requirement.

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## BRIEFING PAPERS

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In the absence of such knowledge, this protest ground is unlikely to be successful.

### ■ Missing Information

An agency may not issue an award to an offeror that has failed to provide information required by the solicitation. The GAO applied this rule in sustaining a protest where the solicitation required a detailed security plan, but the awardee simply agreed to comply with the solicitation's security requirements.<sup>16</sup> In another case, the GAO sustained a protest challenging an award under a "brand name or equal" procurement where the awardee claimed that its product had the same attributes as the brand name product but failed to provide the necessary supporting data.<sup>17</sup>

In both protests, the awardee had failed to provide information expressly required by the solicitation. In the more common situation, where your competitor has submitted a vague but technically acceptable proposal, a protest on this basis is less likely to prevail.

### ■ Evaluation Inconsistent With Proposal

You may have a viable protest where an agency's evaluation ignored, or was plainly inconsistent with, the offerors' proposals. For example, the GAO has sustained protests where an agency assessed weaknesses that relied on mischaracterizations of the protester's proposal,<sup>18</sup> awarded strengths based on features that the awardee did not actually propose,<sup>19</sup> failed to evaluate portions of the protester's proposal,<sup>20</sup> and failed to identify inaccuracies or other errors in the awardee's proposal.<sup>21</sup> The key to prevailing on these types of protest allegations is identifying objective inconsistencies between the agency's evaluation and the offerors' proposals, rather than questioning the agency's technical judgment.

### ■ Mechanical Evaluation

Several GAO opinions have held that an agency may not evaluate an offeror's technical proposal based on a mechanical application of an undisclosed Government estimate. In one case, the GAO sustained a protest where the agency downgraded the protester's proposal for proposing significantly less staffing than the independent Government

estimate because the agency had not analyzed whether the protester's technical approach would require less staffing.<sup>22</sup> The GAO found that the agency's mechanical application of the Government staffing estimate was unreasonable because it failed to assess whether the protester's proposed workforce was particularly skilled and efficient, or whether, because of a unique approach, the protester could perform the work with different staffing than that estimated by the agency.<sup>23</sup>

## Flawed Past Performance Evaluation

Agencies generally have broad discretion in evaluating an offeror's past performance, including the relevance and weight to be afforded to each past performance reference.<sup>24</sup> Nevertheless, the GAO may sustain your protest if you can establish that an agency's past performance evaluation was unreasonable, inconsistent with the terms of the solicitation, failed to consider information that was close at hand, or was not adequately documented.<sup>25</sup> The "critical question," according to the GAO, is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation's evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination regarding the offerors' past performance.<sup>26</sup>

### ■ Common Errors

In many ways, the GAO's review of an agency's past performance evaluation is similar to its standard for reviewing an agency's technical evaluation. For example, the GAO has sustained several protests on the basis that an agency's past performance evaluation was inconsistent with the terms of the solicitation or contradicted by an offeror's past performance references. A recent GAO decision illustrates the convergence of these errors.<sup>27</sup> In that case, there was no contemporaneous documentation indicating to what extent, if at all, the agency had considered the "unsatisfactory" and "marginal" ratings assigned to the awardee under a particular negative past performance reference.<sup>28</sup> The record also demonstrated that the agency had weighed all past performance references equally, rather than evaluating the relevance of those references in accordance with

the terms of the solicitation.<sup>29</sup> In addition, the agency's past performance evaluation suffered from several other material errors and inaccuracies, including mischaracterizations of the ratings actually assigned to the awardee by various past performance references.<sup>30</sup> The GAO sustained the protest on each of these bases, holding that the agency failed to comply with its obligation to evaluate performance reasonably and in a manner consistent with the solicitation.<sup>31</sup>

The GAO also has sustained a number of protests arising from an agency's failure to document the basis for its past performance evaluation. In one case, for example, the GAO sustained a protest where there was no contemporaneous documentation of oral discussions that purportedly served as the basis for the agency's past performance evaluation, and the evaluators claimed to have relied on unidentified written documents.<sup>32</sup>

#### ■ Relevance

As noted above, agencies have broad discretion in evaluating the relevance of offerors' past performance. This is due, in significant part, to the inherent subjectivity of relevance determinations. Nevertheless, the GAO may sustain your protest if you can establish that an agency's relevance analysis was unreasonable or inconsistent with the terms of the solicitation.

For example, your likelihood of a successful protest may be relatively high if the solicitation advised offerors that the agency would analyze the relevance of their past performance references, but the agency failed to conduct such an analysis.<sup>33</sup> Similarly, a protest is likely to be sustained where the solicitation expressly defined the circumstances under which past performance would be considered relevant, but the agency did not apply that definition in evaluating offerors' proposals.<sup>34</sup>

Although more difficult to establish, the GAO also will sustain a protest based on relevance determinations that are plainly unreasonable. In one case, for example, the GAO sustained a protest where the record failed to explain why the agency believed that the awardee's past contracts relating to information technology and healthcare services would be relevant to a contract requiring

the operation of call centers and appointment desks.<sup>35</sup>

#### ■ Irrational Method

You also may have a viable protest if you can establish that an agency's past performance evaluation method was overly mechanical or otherwise irrational. In one case, for example, the agency had assigned performance confidence ratings that improperly penalized offerors with relevant experience for their nonrelevant experience and that effectively gave equal weight to highly relevant and nonrelevant performance. The GAO sustained the protest, describing this method as "clearly irrational."<sup>36</sup> In another case, the GAO sustained a protest where the agency's past performance evaluation under a solicitation for freight service was based on the absolute number of past performance problems reported, without considering, for each offeror, the number of shipments that offeror had made in the relevant time period.<sup>37</sup>

#### ■ "Close At Hand"

An agency generally is not required to review all past performance references, even if they are listed in your proposal.<sup>38</sup> On the other hand, the GAO has explained that "some information is simply too close at hand to require offerors to shoulder the inequities that spring from the agency's failure to obtain, and consider, the information."<sup>39</sup> Where an agency has failed to consider such directly relevant information, you may have a viable basis for protest.

For example, the GAO sustained a protest where an agency ignored the protester's performance under a contract for the same services with the same agency—despite the protester's specific request that the agency consider that contract—simply because no one in the agency had completed and returned the necessary forms.<sup>40</sup> In another case, the GAO sustained a protest where the agency ignored highly relevant past performance information personally known to the evaluators.<sup>41</sup>

It should be noted, however, that the "close at hand" doctrine is not without its limits. In one case, for example, the GAO suggested that the

doctrine is limited to “contracts for the same services, with the same procuring activity, or at least information personally known to the evaluators.”<sup>42</sup> In another case, the GAO declined to apply the doctrine to information contained in a prior published court decision because the agency had considered issues similar to those discussed in that court decision when evaluating the awardee’s past performance.<sup>43</sup>

#### ■ Lack Of Past Performance

An agency may not downgrade your proposal based on a lack of past performance information.<sup>44</sup> Instead, offerors without relevant past performance must receive a “neutral” rating.<sup>45</sup> An agency’s failure to comply with this requirement is likely to result in your protest being sustained.<sup>46</sup>

### Flawed Cost Evaluation

When an agency evaluates a proposal for the award of a cost-reimbursement contract, it must perform a cost realism analysis.<sup>47</sup> A cost realism analysis is the process of independently reviewing and evaluating whether each offeror’s estimated proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror’s proposal.<sup>48</sup> An offeror’s proposed cost must be adjusted upward or downward, based on the results of the agency’s cost realism analysis, to reflect the most probable cost of the offeror’s proposal to the Government.<sup>49</sup>

An agency is not required to verify every element of an offeror’s proposed cost or to achieve scientific certainty in its cost realism analysis.<sup>50</sup> The method used, however, must be reasonably adequate and provide some measure of confidence that the costs proposed are reasonable and realistic in view of the cost information available to the agency.<sup>51</sup>

The GAO’s review of an agency’s cost realism analysis is limited to determining whether it was “reasonably based and not arbitrary.”<sup>52</sup> In deciding whether you may have a viable protest under this deferential standard, you should consider, among

other things, whether the agency conducted a cost realism evaluation in accordance with the terms of the solicitation, whether that evaluation was based on each offeror’s individual technical solution, and whether the agency relied on any factually inaccurate or plainly irrational assumptions.

#### ■ Failure To Evaluate Most Probable Cost

Your likelihood of a successful protest may be relatively high where an agency has failed to conduct a cost realism analysis, failed to adjust cost elements determined to be unrealistic,<sup>53</sup> or failed to use each offeror’s evaluated most probable cost in conducting its best value analysis.<sup>54</sup> You may also have a viable protest where an agency has conducted a cost realism analysis but failed to evaluate the realism of significant elements of offerors’ proposed costs.<sup>55</sup>

#### ■ Material Errors Or Flawed Assumptions

A cost evaluation that reflects “material errors or flawed assumptions” is inherently unreasonable.<sup>56</sup> For example, the GAO will sustain a protest where an agency’s cost realism analysis contains mathematical errors or omits significant elements of offerors’ proposed costs.<sup>57</sup> A strong protest allegation also may exist if you can establish that an agency made cost realism adjustments based on inaccurate information or a comparison of offerors’ proposed costs with those incurred under materially different circumstances.<sup>58</sup>

For example, the GAO sustained a protest where the agency failed to include the awardee’s fee in calculating its most probable cost.<sup>59</sup> The GAO also found that it was unreasonable for the agency to compare the protester’s proposed other direct costs to those incurred in the prior year, since the level of direct labor for the prior year was higher than the level projected for the contract period and the protester’s other direct costs would vary in proportion to the number of labor hours performed.<sup>60</sup>

A viable protest also may exist if you can establish inconsistencies between an agency’s cost realism evaluation and the content of offerors’ proposals. For example, the GAO sustained a protest where the agency’s cost realism analysis

was based on the awardee's current salary structure even though the awardee had proposed to match the higher salaries of incumbent personnel.<sup>61</sup> The GAO sustained another protest where the agency's cost realism analysis was based on a work allocation inconsistent with the awardee's technical proposal.<sup>62</sup>

### ■ Mechanical Evaluation

An agency's cost realism analysis must be based on each offeror's particular approach.<sup>63</sup> Accordingly, the GAO may sustain a protest if the agency's cost realism analysis was limited to a mechanical comparison of offerors' proposed cost elements to an independent Government estimate that was not based on each offeror's proposed technical solution.<sup>64</sup> The GAO also has sustained a number of protests based on the adjustment of all offerors' proposed costs to the independent Government estimate, without considering each offeror's proposed method of performance.<sup>65</sup>

There are circumstances, however, under which an agency may "normalize" certain cost elements. Specifically, an agency may apply a common "should have bid" estimate where (1) there is no logical basis for an element of cost to vary between offerors or (2) the agency has insufficient information to evaluate a particular cost element.<sup>66</sup> The GAO applied the first exception in denying a protest challenging an agency's decision to normalize offerors' copying and shipping costs where the agency reasonably determined that there should not be significant differences between offerors with respect to those costs.<sup>67</sup> In another case, the GAO applied the second exception in denying a protest where an agency used estimated wages in its cost evaluation because offerors' proposals omitted certain wage information.<sup>68</sup>

## Flawed Price Analysis

### ■ Price Reasonableness

Before awarding a fixed-price contract, an agency must determine that an offeror's price is fair and reasonable.<sup>69</sup> Agencies have broad discretion in conducting their price reasonableness evaluations.<sup>70</sup> Adequate price competition, standing alone, may be sufficient to establish price reasonableness.<sup>71</sup> The

mere fact that a competitor's prices are significantly higher than yours is unlikely to result in a successful protest, provided the agency has documented its analysis.<sup>72</sup>

On the other hand, the GAO may sustain a protest if an agency failed to consider the basis for significant price disparities. In one case, the GAO sustained a protest based on an agency's failure to document its rationale for determining that the awardee's price was reasonable, despite an extraordinary increase over prior contract prices.<sup>73</sup> The GAO found that "some analysis or explanation for the higher current prices" was required in light of the fact that all prices were significantly higher than (at least double) the prior contract price.<sup>74</sup>

### ■ Price Realism

An agency may, but is not required, to conduct a price realism analysis to assess whether offerors' prices are so low that they reflect a lack of understanding of the agency's requirements or create a risk of unsuccessful performance.<sup>75</sup> Unless the solicitation specifies a particular method, the nature and extent of an agency's price realism analysis are matters within the agency's discretion.<sup>76</sup> The GAO's review is limited to determining whether the agency's price realism analysis was reasonable and consistent with the solicitation.<sup>77</sup>

Protests challenging an agency's price realism evaluation are an uphill battle. A viable protest may exist, however, if a solicitation required a price realism analysis and the agency simply failed to conduct one.<sup>78</sup> An agency's price realism analysis also is unlikely to withstand scrutiny if the agency deviated from the solicitation's disclosed method, or simply concluded, without analysis or documentation, that your competitor's significantly lower price is realistic.<sup>79</sup> Conversely, a protest may be successful if an agency eliminated your proposal based on your low prices, without analyzing whether those prices reflect a lack of understanding of the agency's requirements or create performance risk.<sup>80</sup> Finally, while a price realism analysis may affect an agency's technical evaluation, it cannot affect the evaluated price of offerors' proposals, since an agency's obligation to pay will be limited to the fixed price of the contract.<sup>81</sup>

### ■ Indefinite-Quantity Contracts

When an agency evaluates a proposal for a definite-quantity contract, calculating an offeror's total price simply requires multiplying its unit price by a known quantity of supplies or services. The situation is different with indefinite-quantity contracts, since the Government does not know in advance the volume of the various categories of supplies or services to be ordered. While an agency has broad discretion in selecting an appropriate method for evaluating the price of an indefinite-quantity contract, the method chosen must include some reasonable basis for comparing the relative costs of proposals and may not produce misleading results.<sup>82</sup>

The GAO has sustained several categories of protests involving the pricing of indefinite-quantity contracts. One of the most promising protest grounds arises where an agency simply neglects to evaluate the price of indefinite-quantity line items. Although exact quantities cannot be determined in advance, the GAO has held that an agency must use some reasonable method—such as estimated quantities or sample task orders—to compare the cost of offerors' proposals.<sup>83</sup>

A viable protest also may exist if an agency relied exclusively on offerors' proposed unit prices without considering the quantity that it is likely to order under each line item. In one case, the GAO sustained a protest where the solicitation contemplated the award of a fixed-price, indefinite-quantity contract and the agency's price evaluation was based solely on each offeror's average hourly labor rates for six labor categories.<sup>84</sup> The GAO reasoned that this method was inadequate to establish whether one offeror's proposal was more or less costly than another.<sup>85</sup> For example, the method was not sensitive to the fact that a low price for a high-volume labor category could more than offset a high price for a low-volume labor category.

Another potentially successful protest ground arises where an agency has evaluated the price of indefinite-quantity line items using a sample task order but failed to ensure that your competitor proposed an appropriate labor mix and adequate staffing or that its pricing for the sample task order was consistent with its pricing for the contract as

a whole. The GAO may sustain a protest where, for example, your competitor offered special discounts or used a pricing structure different from that set forth in its schedule, since there is no guarantee that the agency will receive the benefit of such one-time discounts in future task orders.<sup>86</sup>

## Deviation From Stated Evaluation Criteria

### ■ Unstated Criteria

“An agency may not induce offerors to prepare and submit proposals based on one premise, then make source selection decisions based on another.”<sup>87</sup> Thus, where an agency has failed to apply the evaluation criteria stated in the solicitation or applied previously unannounced factors in its evaluation, your protest may be sustained.

Your best chances for success arise where the agency has made a wholesale departure from the terms of the solicitation. For instance, the GAO will sustain a protest where the agency advertised that it would conduct a pass/fail evaluation but then excluded an offeror from the competitive range based on a best value analysis, or vice versa.<sup>88</sup>

These cases, however, represent the more egregious examples of agency violations. You are more likely to encounter a situation where the agency appears to have applied an evaluation factor you do not recall seeing in the solicitation. It is more difficult to prevail in this context because an agency is not required to identify explicitly each factor it will consider in its evaluation. Rather, an agency may consider factors that are “reasonably and logically encompassed within the stated evaluation criteria” as long as there is a “clear nexus between the stated evaluation criteria and the unstated consideration.”<sup>89</sup>

Any protest in this area will encounter a landscape of case law denying protests on the basis that the protester's so-called “unstated evaluation factor” was actually a factor that was reasonably related to, or logically encompassed by, the stated evaluation criteria and, hence, did not need to be disclosed by the agency. For instance, the GAO permitted an agency to consider whether key

personnel were employees or independent contractors because employment status was relevant to availability, which was “logically encompassed” by the contractor qualifications evaluation factor.<sup>90</sup> In another instance, the GAO concluded that an agency reasonably evaluated the proximity of offerors’ facilities to Government sites where the solicitation required information regarding offerors’ response times.<sup>91</sup> In addition, the GAO has consistently held that an agency “may always consider risk intrinsic to the stated evaluation criteria,” even where the solicitation does not expressly include performance risk as an evaluation factor.<sup>92</sup>

Nevertheless, agency discretion in this area is subject to constraints, and the GAO will sustain a protest where the undisclosed factor was not reasonably related or logically encompassed by the stated evaluation criteria. For example, the GAO sustained a protest where the solicitation only required that a facility be constructed within the boundaries of a certain geographic area, but the agency rejected the offeror’s proposed site within the designated area based on security concerns and visual considerations, neither of which was among the stated evaluation criteria.<sup>93</sup>

To further strengthen your argument that a factor considered by the agency was not logically encompassed within the stated evaluation criteria, you also should consider the degree of detail sought by the solicitation. If the solicitation only requested general information, the GAO may find it improper for the agency to consider detailed, unstated subfactors.<sup>94</sup> On the other hand, if the solicitation sought detailed technical proposals and set forth weighted evaluation criteria, the GAO may give the agency additional leeway.<sup>95</sup>

Lastly, even if the undisclosed factor is reasonably related to or logically encompassed by a stated evaluation factor, you should examine whether the unstated factor can be deemed “significant.” An agency must set forth in the solicitation each significant factor and subfactor.<sup>96</sup> The GAO will sustain a protest where the agency failed to apprise offerors of significant factors or subfactors regardless of whether the undisclosed factor was reasonably related to, or logically encompassed by, the stated evaluation criteria.<sup>97</sup>

### ■ Improper Weight

An agency must disclose the relative importance assigned to each significant factor and subfactor and adhere to those stated weights in its evaluation.<sup>98</sup> “An agency’s obligation to conduct an evaluation consistent with the evaluation scheme set forth in the [request for proposals] includes the importance or weighting of factors.”<sup>99</sup> Thus, if you learn that an agency has exaggerated or minimized the importance of a particular factor or subfactor or deviated from the weights assigned the factors and subfactors in the solicitation, you may have a legitimate argument that the agency’s evaluation was improper.

For instance, the GAO sustained a protest where the solicitation stated that the technical approach factor was the most important evaluation factor, but the agency treated the technical approach and management plan factors as equal.<sup>100</sup> Likewise, the GAO sustained a protest where the solicitation called for a descending-order-of-importance weighting scheme, but the agency applied equal weight to all criteria.<sup>101</sup>

### Flawed Discussions

Where a solicitation reserves the right to issue an award without discussions, agencies have broad discretion in determining whether to conduct discussions with offerors.<sup>102</sup> Discussions occur when the Government communicates with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal or provides the offeror with an opportunity to modify its proposal.<sup>103</sup> Clarifications, in contrast, are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal and do not provide an offeror the opportunity to modify its proposal.<sup>104</sup>

While clarifications may be requested from just one offeror, if an agency conducts discussions with any offeror, it must hold discussions with all offerors in the competitive range.<sup>105</sup> Such discussions must be meaningful, equal, and not misleading.<sup>106</sup> If an agency conducted discussions in a manner inconsistent with these requirements, you may have a viable protest ground.

### ■ Lack Of Meaningful Discussions

An agency is not required to spoon-feed an offeror with every element of its proposal that could be improved to obtain a higher score.<sup>107</sup> Nor is an agency required to advise an offeror of a weakness that is not considered significant, even where that weakness subsequently becomes a determinative factor in the award determination.<sup>108</sup>

On the other hand, an agency must point out all significant weaknesses and deficiencies that must be corrected for an offeror to have a reasonable chance for award.<sup>109</sup> A “significant weakness” is a flaw that appreciably increases the risk of unsuccessful performance.<sup>110</sup> A “deficiency” is a material failure to meet a Government requirement or a combination of significant weaknesses that increases the risk of unsuccessful performance to an unacceptable level.<sup>111</sup>

The most straightforward example of a lack of meaningful discussions occurs where an agency fails to advise you of a proposal feature that it has labeled as a significant weakness or deficiency. The GAO has held that an agency must advise offerors of all significant weaknesses and deficiencies and may not, for example, limit discussions to particular evaluation factors or proposal sections.<sup>112</sup>

There are circumstances, however, under which an agency is not required to advise you of significant weaknesses and deficiencies. For example, an agency need not advise you of significant weaknesses and deficiencies first introduced in your final proposal revisions,<sup>113</sup> is not required to hold “successive rounds of discussions” until all defects in your proposal have been corrected,<sup>114</sup> and has no obligation to advise you whether significant weaknesses and deficiencies identified during discussions have been corrected or still remain.<sup>115</sup>

The GAO has sustained protests, however, based on an agency’s failure to identify its concerns with sufficient specificity. While discussions need not be extremely specific or all encompassing, an agency must lead you into its general areas of concern.<sup>116</sup> In other words, the agency must impart sufficient information to afford you a

fair and reasonable opportunity to identify and correct the deficiencies, excesses, or mistakes in your proposal.<sup>117</sup>

In one case, an agency advised the protester during discussions that it was responsible for making its proposal responsive, clear, and accurate.<sup>118</sup> The GAO characterized this general admonition as unreasonably vague and held that it was insufficient to advise the protester of the agency’s concern with the protester’s lack of definitiveness in describing its processes.<sup>119</sup> In another case, the GAO sustained a protest where the agency had determined that the protester’s entire quality control plan was a significant weakness but identified only two specific aspects of the plan during discussions.<sup>120</sup>

### ■ Misleading Discussions

An agency may not mislead you, through the framing of a discussion question or an answer to a question, into responding in a manner that does not address the agency’s concerns.<sup>121</sup> An agency also may not misinform you about a problem with your proposal or misinform you about the Government’s requirements.<sup>122</sup>

A misleading discussions allegation can be particularly compelling where an agency’s discussions convey the opposite of its true concerns. For example, the GAO sustained a protest where the agency did not inform the protester that it considered the protester’s price to be unrealistically low but instead encouraged the protester to reduce its pricing to what the agency ultimately found to be an unrealistic level.<sup>123</sup>

A viable misleading discussions allegation also may exist where information provided by an agency is or later becomes incorrect. For example, the GAO sustained a protest where the agency expressly advised an offeror that certain fully loaded labor rates were unreasonably high or unrealistically low when, in fact, the offeror’s labor rates for other labor categories deviated from the independent Government estimate by an even wider margin than those raised in discussions.<sup>124</sup> The GAO sustained another protest where an agency advised an offeror that its proposal fully complied with a requirement but

subsequently changed its mind without informing the offeror.<sup>125</sup>

The GAO has found that an agency's silence regarding its concerns also can be misleading. For example, the GAO sustained a protest where the agency advised the protester of one, but not all, of the areas in which its staffing plan was found to lack sufficient detail, thereby misleading the protester to believe that the other areas of its plan did not require revision.<sup>126</sup>

### ■ Unequal Discussions

An agency may not conduct discussions in a manner that favors one offeror over another.<sup>127</sup> The failure to comply with this requirement may result in a successful protest.

Most successful unequal discussions allegations involve procedural inequalities. For example, while an agency is not required to advise offerors whether they have corrected previously identified deficiencies, if an agency does so for one offeror, it must do so for all offerors.<sup>128</sup> Similarly, while an agency is not required to conduct successive rounds of discussions, the GAO will sustain a protest where an agency conducts an additional round of discussion with some offerors but not others.<sup>129</sup>

The GAO also has sustained protests based on substantive inequalities in discussions, although this protest allegation can be more difficult to establish, since agencies are encouraged to tailor discussions to each offeror's proposal.<sup>130</sup> For example, the GAO sustained a protest where the agency had similar concerns regarding the protester's and awardee's proposals, downgraded both proposals under the same subfactor and to the same degree, and discussed its concerns with the awardee but not the protester.<sup>131</sup> The GAO sustained another protest where the protester and awardee initially proposed comparable levels of effort and, during discussions, the agency provided the awardee, but not the protester, with detailed advice regarding the need to increase its staffing.<sup>132</sup> As these cases illustrate, an allegation that discussions were substantively unequal is most likely to prevail where an agency had the same concern regarding your proposal and your competitor's proposal but only addressed those concerns with your competitor.

## Disparate Treatment

An agency must treat all offerors equally.<sup>133</sup> It must evaluate offerors' proposals against the same criteria, using the same procedures and standards and applying those standards in the same manner to all offerors.<sup>134</sup>

Procedural inequalities serve as one potential basis for a disparate treatment allegation. For example, the GAO has sustained protests challenging an agency's extension of proposal page limitations or proposal deadlines for only one offeror.<sup>135</sup> The GAO also sustained a protest where the agency made more extensive efforts to contact the awardee's past performance references than it made to contact the protester's past performance references.<sup>136</sup>

A straightforward case of disparate treatment also may exist where an agency fails to apply the same evaluation criteria to all offerors. For example, the GAO sustained a protest where the agency downgraded the incumbent contractor for failing to propose improvements but did not apply this undisclosed factor to any of the other offerors.<sup>137</sup> In another case, the GAO sustained a protest where the agency considered the experience of key personnel in evaluating corporate experience for the awardee but not for the protester.<sup>138</sup>

An agency's failure to follow the same procedures or to apply the same evaluation criteria to all offerors is objectively determinable and not subject to the defense that such inequalities resulted from the agency's perception of differences in the offerors' proposals. On the other hand, the GAO also has sustained disparate treatment allegations based on more substantive, and arguably more subjective, inequalities.

For example, the GAO has sustained several protests based on the agency's use of more exacting standards of specificity in evaluating the protester's proposal.<sup>139</sup> The GAO also has sustained a number of protests based on an agency's decision to downgrade the protester's proposal, but not the awardee's proposal, despite the fact that it found both proposals to include similar weaknesses. For example, the GAO sustained a protest where the agency assigned a high proposal risk

rating to the protester based on unrealistic hourly labor rates but did not assess any risk against the awardee's proposal based on unrealistically low staffing.<sup>140</sup>

## Flawed Best Value Decision

The GAO reviews an agency's best value decision to ensure that it is reasonable, consistent with the stated evaluation criteria, and adequately documented.<sup>141</sup> While a source selection authority generally is afforded broad discretion,<sup>142</sup> there nevertheless are instances where the GAO will find that an agency's best value decision was flawed.

### ■ Failure To Document

While the SSA may rely on reports and analyses prepared by others,<sup>143</sup> the SSA's decision must be reasonable, consistent with the stated evaluation criteria, and adequately documented.<sup>144</sup> An agency that fails to document adequately its source selection decision runs the risk that the GAO will be unable to determine whether its award decision was proper.<sup>145</sup> Thus, if you can show that the source selection decision was not adequately documented, your protest may be sustained.

The GAO will analyze the reasonableness of an agency's source selection decision in light of the entire record, including agency statements made in response to a protest.<sup>146</sup> However, the GAO will afford greater weight to the contemporaneous evaluation record than to explanations proffered in the heat of litigation, and it will give virtually no weight to post-hoc rationalizations that contradict the agency's contemporaneous analysis.<sup>147</sup>

Your protest may be successful where an agency has improperly relied on general statements in its source selection decision or otherwise failed to explain the basis for its price/technical trade-off analysis. For instance, in one case, the GAO sustained a protest where the SSA concluded, in a cursory fashion and without documenting his rationale, that the higher-rated, higher-priced proposal offered "no discernible benefits" that offset the "significant advantage" of the lower-priced offeror.<sup>148</sup> Similarly, your protest may be successful if the agency failed to document adequately its rationale for concluding that your

higher-rated, higher-priced proposal was not worth the price premium over a lower-rated awardee<sup>149</sup> or, conversely, why the higher-rated, higher-priced awardee was worth the price premium over your lower-rated proposal.<sup>150</sup>

On the other hand, even where the source selection decision does not recite the specific technical or price differences between offerors, your protest may be denied if the SSA reviewed and relied on underlying evaluation materials that did address and analyze such differences.<sup>151</sup> Specifically, the GAO may deny your challenge to the adequacy of the source selection decision if it finds that the reports and analyses relied upon by the SSA were adequately documented.<sup>152</sup>

### ■ Inaccurate Information

The evaluation of offerors' proposals and the determination as to which proposal represents the best overall value to the Government must be based on the true and correct differences between proposals and not on erroneous or misleading information.<sup>153</sup> If you can show that an agency's best value decision was based on inaccurate information, there is a high likelihood that your protest will be sustained.<sup>154</sup>

For instance, the GAO will sustain a protest where the agency's cost/technical tradeoff was based on a defective technical evaluation.<sup>155</sup> The GAO also has sustained a protest where the SSA was not cognizant of evaluated strengths/advantages in an offeror's proposal.<sup>156</sup> A flawed underlying evaluation can thus go a long way in undermining the agency's award.

However, simply raising a "cumulative" argument does have its risks. If the GAO holds that the agency's underlying evaluations were conducted properly, your argument that the best value decision was flawed will be rejected as well.<sup>157</sup> To protect against this result, you should focus not only on such "derivative" arguments, but also on identifying independent challenges to the agency's best value decision.

### ■ Deviation From Stated Evaluation Criteria

As discussed previously, an agency must conduct its evaluation of proposals in accordance

with the terms of the solicitation.<sup>158</sup> If you can show that an agency's best value decision was inconsistent with the stated evaluation criteria, there is a good possibility that your protest will be sustained.

For example, the GAO held that a best value decision was not reasonable where the SSA failed to give proper weight to an evaluation factor.<sup>159</sup> Similarly, the GAO sustained a protest where the SSA considered subfactors in descending order of importance even though the solicitation assigned them equal weight.<sup>160</sup>

The GAO also may sustain your protest where an agency advertised that it would make an award on a best value basis but then actually decided to issue an award to the technically acceptable offeror who proposed the lowest price.<sup>161</sup> When raising this argument, you should ascertain whether there was any meaningful discussion or comparison of technical merit and whether offerors received nearly identical ratings.<sup>162</sup> The absence of any variations in technical ratings and any discussion of offerors' strengths and weaknesses may suggest that an agency issued an award solely on the basis of price.<sup>163</sup>

### ■ Independent Judgment

Another area where you may be able to expose prejudicial errors in the agency's evaluation arises in the relationship between evaluator conclusions and the agency's best value decision. The SSA may rely on reports and analyses prepared by others, but the ultimate decision must be reached through independent judgment.<sup>164</sup> The requirement for independent judgment, however, does not mean that the SSA must restate every element of the underlying evaluation.<sup>165</sup> The GAO will not sustain a protest simply because the SSA adopted or concurred with the evaluators' conclusions rather than rewriting those conclusions in his own words.<sup>166</sup> This is especially so if the SSA was actively involved throughout the acquisition process, received and reviewed the evaluation materials, and was briefed on the underlying evaluation results.<sup>167</sup>

The GAO also has made it clear that differences of opinion between and among evaluators and the SSA do not render an evaluation

unreasonable.<sup>168</sup> Given the subjective nature of an evaluation, it is expected that evaluators may possess reasonable differences of opinion.<sup>169</sup> A protest based on such disagreements is unlikely to prevail, particularly when the SSA considered the dissenting evaluator's opinion and explained why it should not carry the day.<sup>170</sup>

On the other hand, your protest may be successful where the evaluation record does not reflect any consideration of the differences in opinion between evaluators and the SSA. Although the SSA has broad discretion, "[t]he independence granted selection officials...does not equate to a grant of authority to ignore, without explanation, those who advise them on selection decisions."<sup>171</sup> Thus, the GAO may sustain a protest where the SSA has rejected an evaluation panel's conclusions without documenting the basis for doing so.<sup>172</sup>

### ■ Adjectival Ratings

Agencies commonly use adjectival ratings to rank offerors' proposals under non-cost/price evaluation factors. While such a scoring scheme is widely used, adjectival ratings are "merely guides for intelligent decision making."<sup>173</sup> Proposals that receive the same adjectival ratings are not necessarily equal in merit, and proposals with higher adjectival ratings are not automatically selected for award.<sup>174</sup>

A protest based on a mere comparison of adjectival ratings assigned to your proposal against those assigned to the awardee's proposal will not be successful.<sup>175</sup> In fact, the GAO has gone as far as to characterize such arguments as "essentially inconsequential."<sup>176</sup> However, just as you may not rely solely on adjectival ratings to support your protest, an agency likewise is not permitted to rely solely on adjectival ratings when making its award decision. The agency must look beyond the ratings and consider the offerors' strengths, weaknesses, and risks.<sup>177</sup> Thus, you may have a successful basis for protest if the agency's award decision relied solely on adjectival ratings without any qualitative analysis of the relative differences between offerors' proposals.<sup>178</sup>

## Other Than Full & Open Competition

The Competition in Contracting Act generally requires agencies to seek full and open competition when acquiring goods or services.<sup>179</sup> However, there are seven recognized exceptions to this requirement.<sup>180</sup> An agency must follow certain rules when exercising its authority under each such exception. Although the GAO will “closely scrutinize” sole-source procurements, it typically defers to an agency’s actions and conclusions if they are in “substantial compliance” with CICA’s requirements and provide a reasonable justification for the agency’s decision to exercise one of the exceptions.<sup>181</sup>

This section of the PAPER highlights common protest grounds raised in connection with an agency’s reliance on the most frequently invoked exceptions to the requirement for full and open competition—“one responsible source” and “unusual and compelling urgency.”

### ■ Notice & Synopsis

When you learn that an agency has issued a sole-source award to your competitor, your initial step should be to ascertain whether the agency published a notice of its intent to issue such an award on the Government-wide point of entry (i.e., the FedBizOpps website).<sup>182</sup> If you can show that an agency failed to publish the required notice, your protest may be sustained.<sup>183</sup>

Even where the required notice was published, you may be able to challenge its adequacy.<sup>184</sup> The GAO has sustained protests where the agency’s notice failed to describe accurately its requirements.<sup>185</sup> You also may be able to argue that the agency did not afford you a sufficient opportunity to respond or did not adequately consider any response that you provided.<sup>186</sup>

You should be aware, however, that there are certain exceptions to the requirement for a FedBizOpps notice.<sup>187</sup> For example, if an agency invokes the unusual and compelling urgency exception, it is not required to submit a notice if it would be seriously injured by complying with the required timeframe for potential offerors to respond.<sup>188</sup> Even if a FedBizOpps notice was required, the GAO may deny your protest if you were aware of the contemplated sole-source award through

other channels but did not take reasonable steps to follow through with the agency.<sup>189</sup>

### ■ Lack Of Advanced Planning

An agency must take steps to promote competition affirmatively and may not remain passive where steps could have been taken to avoid the need for a sole-source procurement.<sup>190</sup> While an agency’s planning efforts need not be error-free, they must be reasonable.<sup>191</sup> Thus, if an agency’s desire to make a sole-source award resulted from its own lack of advanced planning, your protest may be successful.<sup>192</sup>

For instance, the GAO sustained a protest where the agency knew for several months that a competitive procurement would be canceled but only considered a sole-source extension of the incumbent’s contract to bridge the gap in services.<sup>193</sup> The GAO also sustained a protest where the agency did not timely prepare performance specifications, which led to the agency’s urgent requirements.<sup>194</sup> Conversely, your protest may not be successful if the agency attempted to engage in advance planning to promote competition, but its efforts were not successful, did not pan out as intended, or were the result of unanticipated events.<sup>195</sup>

### ■ Funding Concerns

An agency may not use funding considerations as a basis for failing to comply with the requirement for full and open competition.<sup>196</sup> For example, the GAO sustained a protest where the agency concluded that only one source could perform the work in accordance with a delivery schedule that did not reflect the agency’s actual requirements but was motivated instead by the timeframe for obtaining funding from another agency.<sup>197</sup> Similarly, the GAO sustained a protest where the agency made a sole-source award to prevent the loss of current year funding.<sup>198</sup>

### ■ Failure To Solicit From As Many Sources As Practicable

Even when an agency uses other than full and open competition, it generally must solicit offers from as many potential sources as is practicable, unless the agency reasonably determines that only

one source is capable of satisfying its requirements.<sup>199</sup> If the agency made a sole-source award without adequately soliciting proposals, your protest may be successful. You will need to show that the agency was aware or should have been aware of your capabilities and did not adequately justify your exclusion from consideration.<sup>200</sup> For instance, the GAO sustained a protest where the excluded offeror had previously performed the same services for the agency and informed the agency of its ability and willingness to perform any such future work.<sup>201</sup> The GAO also sustained a protest where the agency's justification and approval for using other than full and open competition identified five potential sources, but the agency only solicited an offer from one source.<sup>202</sup>

The fact that an agency solicited offers from a certain number of sources should not deter you from raising this protest ground. For instance, the GAO sustained a protest where the agency did not solicit an offer from a source capable of meeting the agency's requirements because the agency erroneously believed that it had satisfied its obligation by soliciting offers from three other sources.<sup>203</sup> As this case illustrates, an agency's obligation to solicit proposals from as many sources as practicable is not relinquished after a certain number of sources are solicited if other capable and qualified sources are readily known and available.

However, this protest ground may not be successful if the agency can provide an adequate justification for why it did not solicit an offer from you—such as urgent time constraints<sup>204</sup> or a finding that you may not have been able to deliver the required supplies or services in a timely fashion.<sup>205</sup> For instance, the GAO upheld an agency's decision not to solicit a proposal from the protester where the agency reasonably concluded that the protester would have unreasonably prolonged the delivery schedule.<sup>206</sup>

#### ■ Exceeding Minimum Requirements

Where an agency invokes an exception to full and open competition, it is only permitted to acquire enough goods and services to satisfy its immediate, minimum requirements.<sup>207</sup> Also, the

invocation of an exception “should not continue for more than a minimum time.”<sup>208</sup> Thus, the GAO may sustain your protest if the agency failed to limit its J&A to its immediate needs.<sup>209</sup>

For instance, the GAO sustained a protest where a second source could have been approved in a matter of months, but the agency's sole-source award spanned two years.<sup>210</sup> Likewise, the GAO reduced an agency's sole-source award from 89 new antenna masts to 30 masts because only 30 masts needed to be replaced immediately.<sup>211</sup>

#### ■ Adequacy Of J&A

The GAO's review of an agency's use of other than full and open competition focuses on the adequacy of the rationale and conclusions set forth in the J&A.<sup>212</sup> The GAO may sustain a protest where an agency failed to prepare a J&A<sup>213</sup> or issued a J&A that does not provide a reasonable justification for the use of other than full and open competition.<sup>214</sup> Mere disagreement with the agency's judgment, however, will not form the basis of a valid protest.<sup>215</sup>

One of the more frequently used sole-source exceptions involves an agency's determination that only one responsible source can satisfy its needs.<sup>216</sup> Your basis for challenging the adequacy of a J&A that invokes this exception may vary depending on which particular subpart of this exception the agency applied. For example, you may be able to argue successfully that the J&A was unreasonable where you can demonstrate that you are qualified and can meet the delivery schedule or that you would have become qualified and approved in a timely fashion.<sup>217</sup> Where the agency has awarded a sole-source follow-on contract to the incumbent, you may be able to prevail by showing that the agency's J&A fails to establish that there would be a substantial duplication of costs that would not be recovered through competition or that there would be an unacceptable delay in fulfilling the agency's needs.<sup>218</sup> You also may be able to overturn a sole-source award where the J&A is so riddled with inaccuracies and inconsistencies that it simply cannot be reasonable.<sup>219</sup>

Agencies also frequently rely on the unusual and compelling urgency exception to justify a

sole-source award.<sup>220</sup> When the agency invokes this exception, it is allowed to prepare the J&A after contract award if preparation of the J&A before award would unreasonably delay the procurement.<sup>221</sup> Thus, the mere absence of a prepared J&A at the time of contract award would not provide a basis upon which to protest the use of other than full and open competition.

Several common arguments have been raised against an agency's reliance on the unusual and compelling urgency exception. You should begin by examining whether the J&A is facially valid. For instance, the GAO sustained a protest where the agency only provided "check marks" on a pre-existing form, relied on conclusory statements, and did not demonstrate what harm would result from a delay.<sup>222</sup>

You also should confirm that the agency's urgency is legitimate. Many arguments identified in this section of the PAPER can be used to challenge the adequacy of that conclusion. While this is a difficult task to accomplish, it becomes more difficult when a military agency invokes the exception. The GAO has stated that "a military agency's assertion that there is a critical need related to human safety and which impacts military operations carries considerable weight."<sup>223</sup>

Nevertheless, there may be instances where challenging the substance of the J&A would advance your protest. For instance, the GAO sustained a protest where the agency's award was made eight months after the J&A was executed and deliveries under the contract were scheduled to be made between 16 months and four years after contract award.<sup>224</sup> The GAO also sustained a protest where there was a two-year delay between the issuance of the solicitation and the award and where the agency delayed the procurement seven months to determine whether an offeror would be required to undergo first article testing (even though first article testing could have been completed in five months).<sup>225</sup>

As these cases illustrate, your chances for success will increase if, rather than challenging an agency's subjective judgment, you point to objective criteria that undermine the adequacy of the agency's analysis.

## Out-Of-Scope Modification

The GAO generally will not review contract modifications because it views such matters as pertaining to contract administration.<sup>226</sup> However, the GAO will review a protest alleging that a modification exceeded the scope of the underlying contract.<sup>227</sup>

To prevail in such a protest, you will need to show that there was a material difference between the contract as awarded and the contract as modified.<sup>228</sup> You should focus on demonstrating that the nature and purpose of the work has materially or substantially changed.<sup>229</sup> Relevant factors include changes in the type of work, performance period, and cost.<sup>230</sup> Further, you should be prepared to show that the change was neither contemplated by the solicitation nor reasonably anticipated by offerors<sup>231</sup> and that it would have materially changed the field of competition for the procurement.<sup>232</sup> For instance, the GAO sustained a protest where the original contract called for lease and recycling of plastic media, whereas the modification permitted lease and disposal of such media, the cost of the contract decreased by 50%, the protester demonstrated that four additional offerors would have bid on the contract had the recycling requirement not been imposed, and the solicitation did not contemplate that offerors would be relieved of the recycling requirement.<sup>233</sup>

While it is in your interest to show material changes under each factor, you will want to pay particular attention to the nature and purpose of the work.<sup>234</sup> The GAO focuses on the breadth of the original solicitation to determine whether a modification was "out of scope."<sup>235</sup> As such, it is more likely that a modification will be considered "out of scope" if you can define the original solicitation narrowly as calling for specific and defined goods or services.<sup>236</sup> The type of contract at issue<sup>237</sup> and the agency's procurement history also may play a role in shaping how narrowly you can frame the underlying procurement.<sup>238</sup>

The use of a broad solicitation, however, does not always immunize an agency against challenges to an out-of-scope modification. For example, in one case, the GAO sustained a protest and found a modification to be "out of scope," despite

recognizing the “broad nature” of the procurement and fact that offerors “clearly contemplated that extensive modifications” would be issued.<sup>239</sup>

You also may find yourself in certain situations that make it less likely that the GAO will sustain your protest.<sup>240</sup> For instance, if you cannot show that there were changes to the nature and purpose of the work, changes in price alone may not be sufficient to render a modification beyond the scope of the initial award.<sup>241</sup> The GAO has also denied protests where the method of performance changed, but the fundamental purpose and nature of the contract remained the same.<sup>242</sup> Further, extensions of time may not provide sufficient grounds for sustaining your protest, unless time was a critical element in defining the parties’ obligations.<sup>243</sup> Finally, you may not be successful if the modification was directed toward addressing unforeseen difficulties encountered by the parties during contract performance.<sup>244</sup>

## Failure To Amend Solicitation

### ■ Changed Requirements

Where an agency’s requirements change after a solicitation has been issued, the agency must issue an amendment to bring the solicitation in line with its changed needs and to afford offerors an opportunity to submit revised proposals.<sup>245</sup> If an agency has failed to do so, your protest may be sustained.<sup>246</sup> There are several key factors to keep in mind when determining whether to pursue a protest alleging that an agency failed to amend the solicitation to reflect its changed requirements.

The agency’s obligation to amend the solicitation and accept revised proposals extends until the time of award.<sup>247</sup> The GAO has enforced this rule by, for example, sustaining a protest where, one day before contract award, the agency entered into a memorandum of understanding making it significantly less likely that the agency would exercise any options.<sup>248</sup>

To have a reasonable chance of success, you will need to show that an agency’s requirements have changed materially. For instance, the GAO sustained a protest where the agency’s new re-

quirements represented a three-fold increase in one item and a concomitant 90% decrease in another.<sup>249</sup> Similarly, the GAO sustained a protest where the agency lost \$7 million in funding, resulting in a 3,219-unit decrease in the number of required items.<sup>250</sup> If, however, an agency can show that the change was only temporary or that there was not, or will not be, a significant deviation in agency requirements, your protest is unlikely to be successful.<sup>251</sup>

Further, you should look not only for concrete changes in requirements, but also for developments that give rise to a significant probability that the agency’s requirements will change. For instance, the GAO sustained protests where the agency learned before award that it was “very unlikely” that options would be exercised<sup>252</sup> and where, as discussed above, a memorandum of understanding made it “significantly less likely” that options would be exercised.<sup>253</sup> However, the GAO denied a protest where the change in requirements was only a “possibility.”<sup>254</sup>

### ■ Award With Intent To Modify

As noted previously, the GAO generally will not review a protest concerning a contract modification.<sup>255</sup> The GAO will, however, review a protest alleging that an agency awarded a contract with the intent of modifying its terms or requirements, since this is “tantamount to an improper sole-source award.”<sup>256</sup>

The GAO is particularly vigilant with respect to substantial modifications issued at or near the time of contract award. For instance, the GAO sustained a protest where an agency issued a modification on the day performance was scheduled to begin, which changed the number of garbage disposal containers that would be available in connection with a refuse collection contract.<sup>257</sup> Similarly, the GAO sustained a protest where an agency issued a modification, simultaneous with the notice to proceed on a sanitary sewer construction contract, that changed the alignment of the sewer system, reduced the amount and difficulty of the work, and decreased the contract price.<sup>258</sup>

You also should be aware that anything short of an actual contract modification probably will not result in a sustained protest. The GAO denied

a protest where an agency discussed issuing a modification but never followed through on those intentions.<sup>259</sup> Likewise, the GAO denied a protest where the protester was merely speculating that the agency would relax contract requirements and did not show that the agency actually modified the contract.<sup>260</sup>

## Organizational Conflicts Of Interest

Protests involving organizational conflicts of interest allegations have become increasingly common. An OCI arises where, because of other activities or business relationships, a contractor is unable, or potentially unable, to render impartial assistance or advice to the Government or has an unfair competitive advantage.<sup>261</sup> An agency must identify potential OCIs as early as possible in the procurement process.<sup>262</sup> The Contracting Officer must exhibit “common sense, good judgment, and sound discretion” in determining whether an OCI exists and, if so, whether and how that OCI can be avoided, neutralized, or mitigated.<sup>263</sup>

The GAO is likely to sustain a protest if you can show that an agency failed to identify and evaluate a significant potential OCI.<sup>264</sup> The GAO also will sustain a protest where an agency’s judgment regarding an OCI is unreasonable or not adequately documented.<sup>265</sup>

There are three general categories of OCIs that you should consider in evaluating whether your competitor may have been ineligible for award: (1) “unequal access to information,” (2) “biased ground rules,” and (3) “impaired objectivity.”

### ■ Unequal Access To Information

An “unequal access to information” OCI may exist if your competitor has obtained access to nonpublic information under another contract and that information places your competitor at an unfair competitive advantage in competing for an award.<sup>266</sup> For example, the GAO may sustain a protest if your competitor has obtained your proprietary information in providing advisory services to the Government. The GAO also has sustained a number of protests based on a contractor’s unequal access to source selection information, such as information relating to the specifications

or statement of work, for a procurement.<sup>267</sup> In addition, the GAO may sustain a protest where the performance of another Government contract has allowed your competitor to obtain access to other types of nonpublic information, beyond that available to a typical incumbent contractor, that would provide your competitor with an unfair advantage.<sup>268</sup>

There are a number of circumstances, however, under which an “unequal access to information” allegation is unlikely to prevail. For example, a competitor’s acquired expertise and access to information obtained as the result of performing the incumbent contract, or another similar contract, does not create an OCI.<sup>269</sup> The GAO also is unlikely to sustain a protest challenging an alleged OCI based on your competitor’s mere proximity to sensitive information. In one case, for example, the GAO held that the protester failed to establish an OCI where the awardee had served as a support services contractor at the facility where the solicitation was developed, but there was no proof that it had obtained access to any sensitive information.<sup>270</sup> Finally, the GAO will deny a protest where the agency reasonably determined that your competitor had in place an adequate mitigation plan, such as organizational, physical, and electronic barriers sufficient to ensure that its proposal team did not have access to competitively useful nonpublic information obtained by other business units under separate contracts.<sup>271</sup>

### ■ Biased Ground Rules

A “biased ground rules” OCI arises where your competitor has somehow established the ground rules for a procurement in which it is competing.<sup>272</sup> Such an OCI may exist if, for example, your competitor prepared “complete specifications” (but not partial specifications) for the procurement.<sup>273</sup> A protest also may be sustained if your competitor prepared the statement of work or materials that lead “directly, predictably, and without delay” to such a work statement.<sup>274</sup> You should be aware, however, that there are circumstances under which a contractor may compete in a procurement for which it has drafted the specifications or statement of work, such as where the contractor has designed or developed the products being procured.<sup>275</sup>

Another important category of “biased ground rules” OCIs, and one that should result in categorical disqualification from a procurement, applies specifically to contractors that provide systems engineering and technical direction services. Specifically, if your competitor has provided systems engineering and technical direction services for a system for which it does not have overall contractual responsibility, then it may not supply that system or any components of that system.<sup>276</sup> An agency’s violation of this rule is likely to result in a successful protest.<sup>277</sup>

### ■ Impaired Objectivity

An “impaired objectivity” OCI typically arises where a contractor’s work under one Government contract could entail evaluating itself, its affiliates, or its competitors under a separate contract. For example, your competitor may be ineligible for award if its personnel, or those of its subcontractors, are members of any of the evaluation or source selection teams for the procurement.<sup>278</sup> Likewise, your competitor may be ineligible for the award of a contract that will require it to evaluate its own performance under other contracts, unless it has an OCI mitigation plan that provides for the performance of such work by another entity.<sup>279</sup>

An impaired objectivity OCI also may exist if your competitor will be required to recommend policies that could have a substantial impact on its financial interests. In one case, for example, the GAO found that an OCI arose where the contract would have required the awardee to perform analysis and make subjective judgments regarding the formulation of policies and regulations that would have affected the sale and use of its commercial products.<sup>280</sup>

### ■ Inadequate Mitigation Plan

An agency may issue an award to a contractor with an OCI if the agency reasonably determines that the contractor has an adequate OCI mitigation plan. However, you may have a valid basis for protest if you can establish that your competitor’s mitigation plan is inadequate or is not being enforced.

In one case, for example, the GAO concluded that the performance of tasks by a “firewalled”

subcontractor was unlikely to mitigate an “impaired objectivity” OCI because the tasks to be performed under the contract were so interrelated that it would have been difficult to identify in advance those tasks that would be likely to create an OCI.<sup>281</sup> In another case, the GAO sustained a protest where the awardee had implemented a firewall policy to mitigate an “unequal access to information” OCI, but there were several actual and attempted breaches of that policy by the awardee’s personnel.<sup>282</sup>

### ■ Improper Disqualification

Most OCI-related protests involve allegations that the awardee had an OCI that the agency did not properly resolve. However, you also may have a valid protest ground if an agency has inappropriately excluded you from a competition based on the purported existence of an OCI. For example, the GAO sustained a protest where an agency disqualified the protester from a procurement based on information obtained under a Freedom of Information Act request when a less extreme measure, such as providing the same information to all offerors, would have mitigated the OCI.<sup>283</sup> Similarly, a viable protest may exist if an agency disqualifies you from participating in a competition without even considering your OCI mitigation plan.<sup>284</sup>

## Flawed Responsibility Determination

The determination that an offeror is responsible, i.e., capable of performing its contract obligations, is a matter of business judgment over which an agency has broad discretion.<sup>285</sup> The GAO will consider a protest challenging an agency’s affirmative responsibility determination only where a protester (a) identifies evidence that the Contracting Officer failed to consider available relevant information or otherwise violated a statute or regulation or (b) alleges that a definitive responsibility criterion in the solicitation was not met.<sup>286</sup>

### ■ Failure To Consider Relevant Information

In most cases, a responsibility determination is based on general standards of responsibility, such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record

of past performance, ethics, and integrity.<sup>287</sup> The GAO will not consider protests challenging an affirmative responsibility determination based on these general standards absent specific evidence that the agency ignored information that, by its very nature, would be expected to have a strong bearing on whether the awardee should be found to be responsible.<sup>288</sup>

Protesters have had little success challenging an agency's affirmative responsibility determination based on this exception. Nevertheless, the GAO has found the exception to apply in at least two particularly egregious cases. In the first case, the GAO sustained a protest where the agency failed to consider the awardee's record of integrity and business ethics, including the fact that the awardee's controlling shareholders had been indicted, as well as the fact that charges had been brought against those shareholders and the awardee's parent company by the Securities and Exchange Commission.<sup>289</sup> In another case, the GAO sustained a protest where the Contracting Officer's determination that the awardee possessed adequate financial resources was based on the resources of a related company, and the Contracting Officer ignored the fact that the awardee would be required to divest that company under the solicitation's OCI provision.<sup>290</sup>

#### ■ Waiver Of Definitive Responsibility Criteria

Definitive responsibility criteria are specific and objective standards established by an agency, as a precondition to award, that are designed to measure a prospective contractor's ability to perform the contract.<sup>291</sup> Because definitive responsibility criteria limit the competition to those who can meet them, and because compliance is not a matter of subjective business judgment but can be determined objectively, the GAO will review a protest challenging an agency's waiver of a definitive responsibility criterion.<sup>292</sup> While the relative quality of the evidence is a matter within the Contracting Officer's judgment, the GAO will sustain a protest absent "adequate, objective evidence" that a definitive responsibility criterion has been met.<sup>293</sup>

The key to prevailing in a protest challenging the waiver of a definitive responsibility criterion is ensuring that the requirement at issue is, in

fact, a definitive responsibility criterion. There are two characteristics that a solicitation requirement must meet to qualify.

First, a requirement must be both specific and objectively determinable. For example, the GAO found that the requirement to possess a written certification from a local zoning board was a definitive responsibility criterion because the requirement was very specific and offerors' compliance with that requirement, i.e., submission of the written certification, could be determined objectively.<sup>294</sup> In contrast, the GAO held that a general requirement to comply with "local zoning laws" was not sufficiently specific to constitute a definitive responsibility criterion.<sup>295</sup> Likewise, the GAO concluded that a solicitation provision requiring awardees to demonstrate the ability to pass a particular type of audit could not be determined objectively, and thus it did not constitute a definitive responsibility criterion.<sup>296</sup>

Second, the solicitation must expressly identify the requirement as a precondition for award. For example, the GAO held that a provision requiring offerors to submit past performance information regarding up to three contracts was not a definitive responsibility criterion because the solicitation did not state that the similarity and magnitude of the work were preconditions for award.<sup>297</sup> In another case, the GAO held that a solicitation requirement to be registered as a medical waste transporter was a performance requirement, not a definitive responsibility criterion, because the solicitation did not require registration before award.<sup>298</sup>

#### Small Business Issues

With limited exceptions, the GAO generally will not review small business-related allegations raised in a protest.<sup>299</sup> Rather, the GAO finds that such arguments are more properly handled by the Small Business Administration.<sup>300</sup> Nevertheless, there are several discrete areas where protesters have had some measure of success—two of which are highlighted in this section of the PAPER.

First, you may be able to prevail in a bid protest if you can show that an agency improperly failed to refer an unfavorable responsibility determination

to the SBA for Certificate of Competency proceedings.<sup>301</sup> The key to prevailing is to distinguish between responsibility and responsiveness/acceptability.

For instance, your protest may be successful if you can show that the agency questioned your ability to furnish necessary parts or to perform in the number of days specified in your proposal but did not forward the matter to the SBA.<sup>302</sup> Likewise, your protest may be successful if you can show that the agency questioned your capability to comply with a subcontracting limitation during contract performance but did not forward the matter to the SBA.<sup>303</sup> These cases serve as examples of responsibility determinations, which should have been forwarded to the SBA.

However, your protest may be denied if it was clear from the face of your proposal that you would not comply with the subcontracting limitation or, for that matter, a material term or condition of the solicitation.<sup>304</sup> Likewise, your protest may be denied where the agency only questioned the manner in which you proposed to perform.<sup>305</sup> These cases serve as examples of responsiveness/acceptability findings, which do not need to be forwarded to the SBA.

In sum, to prevail on this protest ground, you will need to show that the agency questioned your ability to perform the contract, as opposed to the manner in which you proposed to perform, and did not forward the matter to the SBA.

Second, you also may be successful if you can show that the SBA failed to consider vital information during its COC proceedings because the agency provided inaccurate, incomplete, or misleading information.<sup>306</sup> For instance, the GAO sustained a protest where the SBA's decision not to issue a COC was based on incorrect information, provided by the Army, about the period of performance.<sup>307</sup> Similarly, the GAO sustained a protest where the protester was the low bidder, but the agency incorrectly informed the SBA that the protester's price was \$1 million above the Government estimate.<sup>308</sup>

However, the GAO may dismiss your protest if you—not the agency—provided the SBA with inaccurate or incomplete information.<sup>309</sup> In addition,

the GAO may dismiss your protest if you challenge the awardee's size status under the guise of a challenge to SBA's COC determination.<sup>310</sup> Also, your protest may not be successful where you did not correct inaccurate information or you are merely disagreeing with the SBA's conclusions.<sup>311</sup>

Thus, given the GAO's limited review of small business issues and its deference to the SBA, you may face an uphill battle persuading the GAO to sustain your protest on these grounds. Nevertheless, there are several discrete target points that, if present in your procurement, could result in a sustained protest.

## Prejudice

Prejudice is an essential element of any bid protest.<sup>312</sup> Even if the procurement suffers from a deficiency, the GAO will deny your protest if you cannot establish that, but for the agency's actions, you would have had a substantial chance of receiving the award.<sup>313</sup>

In certain cases, the GAO will presume that prejudice occurred, such as where improper discussions took place,<sup>314</sup> where there was an OCI,<sup>315</sup> or where the awardee was ineligible for award and there were no intervening offers.<sup>316</sup> But exercise caution: even in these types of cases, the GAO may deny your protest if there was no possibility of prejudice.<sup>317</sup>

On the other hand, several categories of protests are commonly denied based on a lack of prejudice. For example, if your proposal is technically unacceptable, the GAO will not entertain your allegations about potential improprieties in the agency's evaluation of the awardee's proposal.<sup>318</sup> Prejudice also is unlikely to be found if you cannot establish that, but for the agency's error, you would have fared better than the awardee in at least one aspect of the agency's evaluation. For example, if you are rated as inferior to the awardee under all of the non-cost factors, and your protest is limited to a cost allegation that could not have resulted in your proposal being found to be less expensive than that of the awardee, a finding of prejudice is highly unlikely.<sup>319</sup> The GAO also may deny a protest for lack of prejudice if an alleged evaluation error would not have changed an agency's

overall evaluation of your proposal.<sup>320</sup> Finally, a protest is likely to be denied if another offeror (an “intervening offeror”) would have been in line for award, and you are unable to establish any errors that could have resulted in your proposal being rated as superior to that of the intervening offeror.<sup>321</sup>

As a practical matter, where you have evidence of a procurement impropriety, you should be prepared to demonstrate, through affidavit or otherwise, what you would have done differently if the impropriety never occurred.<sup>322</sup> In one case, a protester convinced the GAO that it would have revised its technical proposal and undertaken

other measures to address agency concerns if the agency had properly conducted discussions.<sup>323</sup> In another case, a protester demonstrated that it would have submitted materially revised cost and technical proposals had it been aware of the agency’s changed requirements.<sup>324</sup> Without rescoring proposals, you also should pay careful attention to the agency’s ratings and rankings. In particular, you should focus on showing that your ratings or rankings would have improved vis-à-vis an awardee.<sup>325</sup> Further, you should emphasize the closeness of the competition and the impact of the agency’s error on the discriminating factor or factors for award.<sup>326</sup>

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## GUIDELINES

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These *Guidelines* are intended to assist you in identifying viable postaward bid protest allegations. They are not, however, a substitute for professional representation in any specific situation.

1. The GAO’s standard of review is very deferential. The GAO will sustain your protest only if the agency’s evaluation was unreasonable, inconsistent with the terms of the solicitation or applicable procurement law, or inadequately documented.

2. The key to a viable bid protest is identifying objective or procedural errors in the agency’s evaluation. The GAO will not sustain a protest based on subjective disagreement with the agency’s judgment.

3. You may have a compelling technical protest allegation if your competitor’s proposal failed to meet a material solicitation requirement, did not include information expressly required by the solicitation, or made unsubstantiated promises to comply with the solicitation requirements. A viable protest also may arise where an agency has relied on assumptions contradicted by the offerors’ proposals or failed to evaluate each offeror’s proposal based on its particular technical solution.

4. Agencies have broad discretion in evaluating past performance, including the relevance of offerors’ past performance references. Nevertheless, the GAO may sustain your protest if you can identify objective errors in the agency’s past

performance evaluation. For example, a viable protest may exist if the agency’s past performance evaluation was inconsistent with the terms of the solicitation, contradicted by the materials provided by the offerors’ past performance references, or simply undocumented. In addition, the GAO may sustain a protest if the agency’s method for evaluating past performance was purely mechanical or otherwise arbitrary.

5. When evaluating proposals for a cost-reimbursement contract, an agency must conduct a cost realism analysis to determine the most probable cost of each offeror’s proposal. You may have a basis for protest if the agency failed to conduct such an analysis or ignored that analysis in making its best value decision. The GAO also is likely to sustain a protest where the agency’s cost analysis was based on the mechanical application of undisclosed estimates or otherwise inconsistent with what each offeror actually proposed.

6. In a procurement for a fixed-price or fixed-price level-of-effort contract, you may have a viable protest if the agency failed to conduct a price reasonableness evaluation (as well as a price realism analysis where required by the terms of the solicitation) or if the agency’s price analysis was inconsistent with the solicitation. If the solicitation involves an indefinite-quantity contract, you also should consider whether the agency’s evaluation method provides a reasonable basis for distinguishing between the likely cost of offerors’ proposals.

7. An agency must evaluate proposals solely in accordance with the terms of the solicitation. You may have a compelling protest allegation where an agency has deviated from the solicitation's disclosed evaluation scheme or applied unstated evaluation criteria that were not reasonably related to those disclosed in the solicitation. Further, you may prevail if you can show that an agency disregarded the weighting scheme identified in the solicitation.

8. If an agency chooses to conduct discussions with one offeror, it must conduct discussions with all offerors in the competitive range. The GAO may sustain a protest if the agency failed to disclose all significant weaknesses and deficiencies in your proposal, misled you into failing to address its concerns, or treated you unequally.

9. An agency must treat all offerors equally and apply common evaluation standards. A viable protest may exist if an agency treated you less favorably than your competitor, such as where an agency has waived procedural requirements for your competitor or applied a more stringent standard in evaluating your proposal.

10. The agency's best value decision must be reasonable, consistent with the stated evaluation criteria, and adequately documented. You may have a viable protest ground if you can show that the best value decision was not adequately documented or was based on inaccurate information. Likewise, the GAO may sustain your protest if you can demonstrate that the best value decision was inconsistent with the stated evaluation criteria, failed to look beyond adjectival ratings, or did not reconcile the evaluators' divergent conclusions.

11. Where an agency relies on an exception to the requirement for full and open competition, it must substantially comply with CICA's requirements and provide a reasonable justification for its actions. The GAO may sustain your protest if you can show that the agency's actions were the result of a lack of advanced planning or were related to funding concerns. You also may prevail if you can show that the agency failed to issue a proper notice, exceeded its minimum requirements, failed to solicit offers from as many sources as practicable under the circumstances, or failed

to provide a reasonable justification for its use of other than full and open competition.

12. The GAO generally will not review contract modifications because it views such matters as pertaining to contract administration. However, the GAO will review a contract modification if you allege that the modification exceeded the scope of the contract. Your protest may be successful if you can show that the modification resulted in material changes to the nature and type of work, period of performance, and costs. The GAO also will consider whether the change was contemplated by the solicitation or anticipated by offerors, and whether the field of competition would have changed as a result of the modification.

13. Where an agency's requirements have materially changed, the agency must amend the solicitation and to allow offerors an opportunity to submit revised proposals. The GAO may sustain a protest if you can establish that the agency was aware that its requirements were likely to change but failed to amend the solicitation accordingly. Likewise, the GAO may sustain your protest if you can establish that an agency awarded a contract with the intent of significantly modifying it shortly after award.

14. An OCI arises where, because of other activities or business relationships, an offeror is unable, or potentially unable, to provide the Government with impartial advice and assistance or has obtained access to inside information (beyond that available to a typical incumbent contractor) that places the offeror at an unfair competitive advantage in obtaining a contract. You may have a viable basis for protest if an agency has failed to identify and evaluate a significant potential OCI, made an unreasonable determination regarding the existence of an OCI or the adequacy of your competitor's mitigation plan, or reflexively disqualified you from a competition without conducting a thorough OCI analysis.

15. The GAO will not review an agency's affirmative responsibility determination unless you allege that the awardee failed to meet a definitive responsibility criterion or there is evidence suggesting that the agency failed to consider available relevant information regarding your

competitor. Protests based on the “available relevant information” exception rarely prevail. If, on the other hand, the solicitation included a definitive responsibility criterion that your competitor failed to meet, your protest may be successful.

**16.** The GAO generally will not review small business-related issues. However, you may have a viable protest if you can show that an agency made a finding of nonresponsibility and failed to refer the matter to the SBA for a COC determination. Similarly, the GAO may sustain your protest if you can show that the agency provided

the SBA with misleading, inaccurate, or incomplete information during its COC proceedings.

**17.** Prejudice is an essential element of any protest. The GAO will not sustain your protest unless you can establish that, but for the agency’s evaluation errors, you would have had a substantial chance of receiving an award. Accordingly, before filing a protest, you should consider whether your fact pattern falls into any of the categories of protests commonly denied for a lack of prejudice. In addition, your protest should explain how the agency’s errors could have cost you the contract.

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- 88/ Mnemonics Inc., Comp.Gen.Dec. B-290961, 2003 CPD ¶ 39; see also L-3 Commc'ns Titan Corp., Comp. Gen. Dec. B-299317 et al., 2007 CPD ¶ 66, 49 GC ¶ 218.
- 89/ Consolidated Eng'g Servs., Inc., Comp.Gen. Dec. B-311313, 2008 CPD ¶ 146.
- 90/ PMC Solutions, Inc., Comp. Gen. Dec. B-310732, 2008 CPD ¶ 20.
- 91/ Laidlaw Envtl. Servs., Inc., Comp.Gen.Dec. B-271903, 96-2 CPD ¶ 75.
- 92/ Metro Mach. Corp., Comp. Gen. Dec. B-311245.5, 2008 CPD ¶ 167.
- 93/ Federal Props. of R.I., Inc., Comp.Gen.Dec. B-218192.2, 85-1 CPD ¶ 508.
- 94/ St. Mary's Hosp. & Med. Center of San Francisco, Ca., Comp. Gen. Dec. B-243061, 91-1 CPD ¶ 597.
- 95/ ManTech Sec. Tech. Corp., Comp.Gen.Dec. B-297133.3, 2006 CPD ¶ 77.
- 96/ 10 U.S.C.A. § 2305(a)(2)(A)(i); 41 U.S.C.A. § 253a(b)(1)(A).
- 97/ Lloyd H. Kessler, Inc., Comp. Gen. Dec. B-284693, 2000 CPD ¶ 96, 42 GC ¶ 274 (sustaining protest and concluding that unstated factor that accounted for 40% of agency's evaluation was required to be disclosed in solicitation even if it was reasonably related to stated evaluation criteria).
- 98/ 10 U.S.C.A. § 2305(a)(2)(A)(ii); 41 U.S.C.A. § 253a(b)(1)(B).
- 99/ York Bldg. Servs., Inc., Comp. Gen. Dec. B-296948.2 et al., 2005 CPD ¶ 202, 47 GC ¶ 537.
- 100/ York Bldg. Servs., Inc., Comp. Gen. Dec. B-296948.2 et al., 2005 CPD ¶ 202, 47 GC ¶ 537.
- 101/ M&S Farms, Inc., Comp. Gen. Dec. B-290599, 2002 CPD ¶ 174.
- 102/ Modern Techs. Corp., Comp. Gen. Dec. B-278695 et al., 98-1 CPD ¶ 81, 40 GC ¶ 222 (denying protest where solicitation reserved agency's right to award without discussions).

- 103/** FAR 15.306(d); see also TDS, Inc., Comp. Gen. Dec. B-292674, 2003 CPD ¶ 204, 45 GC ¶ 501 (sustaining protest and finding that discussions occurred where agency permitted offerors to revise proposals in areas raised by agency personnel during oral presentations).
- 104/** FAR 15.306(a).
- 105/** Gulf Copper Ship Repair, Inc., Comp. Gen. Dec. B-293706.5, 2005 CPD ¶ 108, 47 GC ¶ 329 (sustaining protest and finding that discussions occurred where awardee was permitted to furnish additional past performance information necessary for reevaluation of its proposal).
- 106/** Multimax, Inc., Comp. Gen. Dec. B-298249.6 et al., 2006 CPD ¶ 165 (sustaining protest where agency conducted misleading and unequal discussions).
- 107/** PWC Logistics Servs., Inc., Comp. Gen. Dec. B-299820 et al., 2007 CPD ¶ 162 (denying protest alleging that agency failed to conduct discussion regarding aspect of protester's proposal rated as "highly acceptable").
- 108/** Hines Chicago Invs., LLC, Comp. Gen. Dec. B-292984, 2004 CPD ¶ 5 (denying protest and concluding that agency was not required to hold discussions regarding areas of protester's proposal that were weak but acceptable).
- 109/** CitiWest Props., Inc., Comp. Gen. Dec. B-274689.4, 98-1 CPD ¶ 3 (sustaining protest where agency failed to identify specific weaknesses and deficiencies that resulted in protester not being selected for award).
- 110/** FAR 15.001.
- 111/** FAR 15.001.
- 112/** Burchick Constr. Co., Comp. Gen. Dec. B-400342, 2008 CPD ¶ 203 (sustaining protest where agency limited discussions to offerors' cost proposals).
- 113/** Kalman & Co., Comp. Gen. Dec. B-287442.2, 2002 CPD ¶ 63 (denying protest challenging failure to advise protester of weaknesses first created in final proposal revision).
- 114/** Kalman & Co., Comp. Gen. Dec. B-287442.2, 2002 CPD ¶ 63.
- 115/** American States Utils. Servs., Inc., Comp. Gen. Dec. B-291307.3, 2004 CPD ¶ 150 (denying protest alleging agency conducted misleading discussions by failing to advise protester that it had not corrected weakness previously identified in discussions).
- 116/** CitiWest Props., Inc., Comp. Gen. Dec. B-274689.4, 98-1 CPD ¶ 3.
- 117/** N.J. & H St. LLC, Comp. Gen. Dec. B-311314.3, 2008 CPD ¶ 133 (sustaining protest and concluding that general advice that amounted to mere restatement of evaluation criteria did not satisfy agency's obligation to conduct meaningful discussions).
- 118/** Lockheed Martin Simulation, Training & Support, Comp. Gen. Dec. B-292836.8 et al., 2005 CPD ¶ 27.
- 119/** Lockheed Martin Simulation, Training & Support, Comp. Gen. Dec. B-292836.8 et al., 2005 CPD ¶ 27.
- 120/** Spherix, Inc., Comp. Gen. Dec. B-294572 et al., 2005 CPD ¶ 3, 47 GC ¶ 39.
- 121/** Metro Mach. Corp., Comp. Gen. Dec. B-281872 et al., 99-1 CPD ¶ 101 (sustaining protest where agency misled protester to believe that its proposed approach was acceptable).
- 122/** Metro Mach. Corp., Comp. Gen. Dec. B-281872 et al., 99-1 CPD ¶ 101.
- 123/** Biospherics, Inc., Comp. Gen. Dec. B-278278, 98-1 CPD ¶ 161.
- 124/** Multimax, Inc., et al., Comp. Gen. Dec. B-298249.6 et al., 2006 CPD ¶ 165.
- 125/** Boeing Co., Comp. Gen. Dec. B-311344 et al., 2008 CPD ¶ 114, 50 GC ¶ 230.
- 126/** AT&T Corp., Comp. Gen. Dec. B-299542.3 et al., 2008 CPD ¶ 65, 50 GC ¶ 186.
- 127/** FAR 15.306(e)(1).
- 128/** Boeing Co., Comp. Gen. Dec. B-311344 et al., 2008 CPD ¶ 114, 50 GC ¶ 230 (sustaining protest where agency afforded one offeror, but not another, continued discussions regarding partial satisfaction of solicitation requirement).
- 129/** Front Line Apparel Group, Comp. Gen. Dec. B-295989, 2005 CPD ¶ 116, 47 GC ¶ 330 (sustaining protest where agency conducted a second round of discussions with awardee but not protester).
- 130/** Pan Am World Servs., Inc., Comp. Gen. Dec. B-231840 et al., 88-2 CPD ¶ 446.
- 131/** M&S Farms, Inc., Comp. Gen. Dec. B-290599, 2002 CPD ¶ 174.
- 132/** Chemonics Int'l, Inc., Comp. Gen. Dec. B-282555, 99-2 CPD ¶ 61.
- 133/** BAE Tech. Servs., Inc., Comp. Gen. Dec. B-296699, 2006 CPD ¶ 91 (sustaining protest where agency applied more exacting standard in evaluating adequacy of substantiation for protester's proposed initiatives than it did in evaluating awardee's substantiation).
- 134/** BAE Tech. Servs., Inc., Comp. Gen. Dec. B-296699, 2006 CPD ¶ 91.
- 135/** Electronic Design, Inc., Comp. Gen. Dec. B-279662.2 et al., 98-2 CPD ¶ 69, 40 GC ¶ 513 (waiver of page limitations); CPT Text-Computer GmbH, Comp. Gen. Dec. B-222037.2, 86-2 CPD ¶ 29 (extension of demonstration date).
- 136/** Family Entm't Servs., Comp. Gen. Dec. B-298047.3, 2007 CPD ¶ 59, 49 GC ¶ 207.
- 137/** Global Analytic Info. Tech. Servs., Inc., Comp. Gen. Dec. B-298840.2, 2007 CPD ¶ 57, 49 GC ¶ 173.
- 138/** Ashe Facility Servs., Inc., Comp. Gen. Dec. B-292218.3 et al., 2004 CPD ¶ 80, 46 GC ¶ 192.
- 139/** Lockheed Martin Info. Sys., Comp. Gen. Dec. B-292836 et al., 2003 CPD ¶ 230 (sustaining protest where agency applied more exacting standards of specificity to protester's proposal than it applied to awardee's proposal).

- 140/ Wiltex Inc., Comp. Gen. Dec. B-297234.2 et al., 2006 CPD ¶ 13, 48 GC ¶ 60.
- 141/ AIU N. Am., Inc., Comp. Gen. Dec. B-283743.2, 2000 CPD ¶ 39, 42 GC ¶ 135.
- 142/ Raytheon Co., Comp. Gen. Dec. B-291449, 2003 CPD ¶ 54.
- 143/ FAR 15.308.
- 144/ AIU N. Am., Inc., Comp. Gen. Dec. B-283743.2, 2000 CPD ¶ 39, 42 GC ¶ 135.
- 145/ Matrix Int'l Logistics, Inc., Comp. Gen. Dec. B-272388.2, 97-2 CPD ¶ 89.
- 146/ Beacon Auto Parts, Comp. Gen. Dec. B-287483, 2001 CPD ¶ 116.
- 147/ Beacon Auto Parts, Comp. Gen. Dec. B-287483, 2001 CPD ¶ 116.
- 148/ Johnson Controls World Servs., Inc., Comp. Gen. Dec. B-289942 et al., 2002 CPD ¶ 88.
- 149/ Preferred Sys. Solutions, Inc., Comp. Gen. Dec. B-292322 et al., 2003 CPD ¶ 166, 45 GC ¶ 424 (sustaining protest where "the SSA's and [source selection advisory council's] source selection documents reflecting the agency's best-value analysis did not include any meaningful analysis of the differentiating features of the two proposals upon which the SSA based the cost/technical tradeoff").
- 150/ Opti-Lite Optical, Comp. Gen. Dec. B-281693, 99-1 CPD ¶ 61, 41 GC ¶ 242 (sustaining protest where agency's tradeoff was mechanical comparison of total point scores).
- 151/ Comprehensive Health Servs., Inc., Comp. Gen. Dec. B-310553, 2008 CPD ¶ 9 (denying protest where SSA reviewed "the [source selection evaluation board] consensus report, the SSEB chairperson's report, and the [source selection advisory council's] recommendation memorandum").
- 152/ E.L. Hamm & Assocs., Inc., Comp. Gen. Dec. B-290783 et al., 2002 CPD ¶ 177.
- 153/ Keeton Corrs., Inc., Comp. Gen. Dec. B-293348, 2005 CPD ¶ 44, 47 GC ¶ 155 (sustaining protest where SSA was provided inaccurate information about evaluation of offerors' proposals).
- 154/ Eigen, Comp. Gen. Dec. B-249860, 92-2 CPD ¶ 426 (sustaining protest where cost/technical tradeoff was not based on actual price difference).
- 155/ Ashland Sales & Serv. Co., Comp. Gen. Dec. B-291206, 2003 CPD ¶ 36, 45 GC ¶ 116.
- 156/ Coastal Maritime Stevedoring, LLC, Comp. Gen. Dec. B-296627, 2005 CPD ¶ 186, 47 GC ¶ 507.
- 157/ BAE Sys. Norfolk Ship Repair Inc., Comp. Gen. Dec. B-297879, 2006 CPD ¶ 75 (denying challenge to best value decision where underlying challenge to cost and technical evaluations was rejected).
- 158/ Professional Landscape Mgmt. Servs., Inc., Comp. Gen. Dec. B-286612, 2000 CPD ¶ 212.
- 159/ ProTech Corp., Comp. Gen. Dec. B-294818, 2005 CPD ¶ 73, 47 GC ¶ 239 (sustaining protest where agency did not afford evaluation factor weight disclosed in solicitation).
- 160/ Bio-Rad Labs., Inc., Comp. Gen. Dec. B-297553, 2007 CPD ¶ 58, 49 GC ¶ 198.
- 161/ Bio-Rad Labs., Inc., Comp. Gen. Dec. B-297553, 2007 CPD ¶ 58, 49 GC ¶ 198 (sustaining protest where agency awarded contract to lowest-priced, technically acceptable offeror).
- 162/ Colonial Storage, Co., Comp. Gen. Dec. B-253501.5 et. al., 93-2 CPD ¶ 234, 35 GC ¶ 749.
- 163/ Colonial Storage, Co., Comp. Gen. Dec. B-253501.5 et. al., 93-2 CPD ¶ 234, 35 GC ¶ 749; see also Technical Support Servs., Inc., Comp. Gen. Dec. B-279665 et al., 98-2 CPD ¶ 26.
- 164/ FAR 15.308.
- 165/ Comprehensive Health Servs., Inc., Comp. Gen. Dec. B-310553, 2008 CPD ¶ 9.
- 166/ U.S. Facilities, Inc., Comp. Gen. Dec. B-293029 et al., 2004 CPD ¶ 17 (denying protest where SSA simply adopted the technical evaluation panel's final report by signing it).
- 167/ U.S. Facilities, Inc., Comp. Gen. Dec. B-293029 et al., 2004 CPD ¶ 17.
- 168/ T.J. Lambrecht Constr., Inc., Comp. Gen. Dec. B-294425, 2004 CPD ¶ 198.
- 169/ Gracon Corp., Comp. Gen. Dec. B-293009 et al., 2004 CPD ¶ 58 (denying protest where protester relied on minority reports filed by certain evaluators).
- 170/ Regional Lab. for Educ. Improvements of the NE. & Islands, Inc., Comp. Gen. Dec. B-270774 et al., 96-1 CPD ¶ 204 (denying protest where SSA identified reasons for rejecting lone dissenter's conclusions).
- 171/ University Research Co., LLC, Comp. Gen. Dec. B-294358 et al., 2004 CPD ¶ 217, 46 GC ¶ 450.
- 172/ DynCorp Int'l, LLC, Comp. Gen. Dec. B-289863 et al., 2002 CPD ¶ 83.
- 173/ Command Mgmt. Servs., Inc., Comp. Gen. Dec. B-310261 et al., 2008 CPD ¶ 29.
- 174/ Pueblo Envtl. Solution, LLC, Comp. Gen. Dec. B-291487 et al., 2002 CPD ¶ 14; Oceaneering Int'l, Inc., Comp. Gen. Dec. B-287325, 2001 CPD ¶ 95, 43 GC ¶ 279.
- 175/ Karrar Sys. Corp., Comp. Gen. Dec. B-310661.3 et al., 2008 CPD ¶ 55 (denying protest where protester focused almost entirely on adjectival ratings).
- 176/ Business Consulting Assocs., LLC, Comp. Gen. Dec. B-299758.2, 2007 CPD ¶ 134.
- 177/ Redstone Tech. Servs., Comp. Gen. Dec. B-259222 et al., 95-1 CPD ¶ 181 (sustaining protest where agency looked only to adjectival ratings in making award decision).

- 178/** Redstone Tech. Servs., Comp. Gen. Dec. B-259222 et al., 95-1 CPD ¶ 181.
- 179/** 10 U.S.C.A. § 2304(a)(1)(A); 41 U.S.C.A. § 253(a)(1)(A); FAR 6.101(a).
- 180/** 10 U.S.C.A. § 2304(c), (d); 41 U.S.C.A. § 253(c), (d); FAR subpt. 6.3. See generally Edwards, "Sole-Source ('No Bid') Contracting," Briefing Papers No. 08-6 (May 2008).
- 181/** SEMCOR, Inc., Comp. Gen. Dec. B-279794 et al., 98-2 CPD ¶ 43, 40 GC ¶ 501.
- 182/** 10 U.S.C.A. § 2304(f)(1)(C); 41 U.S.C.A. § 253(f)(1)(C); FAR 6.302-1(d)(2), 5.201.
- 183/** World-Wide Sec. Serv., Inc., Comp. Gen. Dec. B-224277 et al., 87-1 CPD ¶ 35.
- 184/** See FAR 5.207(c) (providing the general format for the synopsis).
- 185/** M.D. Thompson Consulting, LLC, Comp. Gen. Dec. B-297616 et al., 2006 CPD ¶ 41, 48 GC ¶ 108 (sustaining protest where agency's notice failed to describe accurately its needs so as to allow offerors to make an informed business judgment).
- 186/** Audio Intelligence Devices, Comp. Gen. Dec. B-224159, 86-2 CPD ¶ 670 (sustaining protest where agency failed to consider offeror's response to notice); Sanchez Porter's Co., Comp. Gen. Dec. B-238106 et al., 90-1 CPD ¶ 433 (sustaining protest where agency solicited offers one day before sole-source contract extension).
- 187/** FAR 5.202 (setting forth the instances where an agency is not required to issue a notice).
- 188/** FAR 5.202(a)(2).
- 189/** SEMCOR, Inc., Comp. Gen. Dec. B-279794 et al., 98-2 CPD ¶ 43, 40 GC ¶ 501 (denying protest alleging that agency failed to provide required notice because protester knew about award and had attempted unsuccessfully to persuade agency that it could meet its requirements).
- 190/** VSE Corp., Comp. Gen. Dec. B-290452.3 et al., 2005 CPD ¶ 103, 47 GC ¶ 312 (sustaining protest where agency's sole-source extension contract resulted from lack of advanced planning).
- 191/** VSE Corp., Comp. Gen. Dec. B-290452.3 et al., 2005 CPD ¶ 103, 47 GC ¶ 312.
- 192/** VSE Corp., Comp. Gen. Dec. B-290452.3 et al., 2005 CPD ¶ 103, 47 GC ¶ 312; see also 10 U.S.C.A. § 2304(f)(4)(A); 41 U.S.C.A. § 253(f)(4)(A); FAR 6.301(c) (explaining that lack of advance planning does not provide basis for contracting without full and open competition).
- 193/** VSE Corp., Comp. Gen. Dec. B-290452.3 et al., 2005 CPD ¶ 103, 47 GC ¶ 312.
- 194/** Signals & Sys., Inc., Comp. Gen. Dec. B-288107, 2001 CPD ¶ 168, 43 GC ¶ 397.
- 195/** Bannum, Inc., Comp. Gen. Dec. B-289707, 2002 CPD ¶ 61 (denying protest where agency's urgency resulted from unanticipated events); Polar Power, Inc., Comp. Gen. Dec. B-270536, 96-1 CPD ¶ 57 (denying protest where agency program failed).
- 196/** 10 U.S.C.A. § 2304(f)(4)(A); 41 U.S.C.A. § 253(f)(4)(A); FAR 6.301(c).
- 197/** Lockheed Martin Sys. Integration—Owego, Comp. Gen. Dec. B-287190.2 et al., 2001 CPD ¶ 110.
- 198/** Magnavox Elec. Sys. Co., Comp. Gen. Dec. B-230297, 88-1 CPD ¶ 618.
- 199/** 10 U.S.C.A. § 2304(e); 41 U.S.C.A. § 253(e); FAR 6.301(d); Olympic Marine Servs., Inc., Comp. Gen. Dec. B-246181 et al., 92-1 CPD ¶ 205.
- 200/** Olympic Marine Servs., Inc., Comp. Gen. Dec. B-246181 et al., 92-1 CPD ¶ 205.
- 201/** Olympic Marine Servs., Inc., Comp. Gen. Dec. B-246181 et al., 92-1 CPD ¶ 205.
- 202/** Data Based Decisions, Inc., Comp. Gen. Dec. B-232663 et al., 89-1 CPD ¶ 87.
- 203/** Kahn Indus., Inc., Comp. Gen. Dec. B-251777 et al., 93-1 CPD ¶ 356.
- 204/** Daylight Plastics, Inc., Comp. Gen. Dec. B-225057, 87-1 CPD ¶ 269.
- 205/** Dayton-Granger, Inc., Comp. Gen. Dec. B-245450, 92-1 CPD ¶ 37 (denying protest where agency reasonably found that protester's product was unacceptable).
- 206/** Indus. Refrigeration Serv. Corp., Comp. Gen. Dec. B-220091, 86-1 CPD ¶ 67; Daylight Plastics, Inc., Comp. Gen. Dec. B-225057, 87-1 CPD ¶ 269.
- 207/** Signals & Sys., Inc., Comp. Gen. Dec. B-288107, 2001 CPD ¶ 168, 43 GC ¶ 168 (stating that agency must "take reasonable steps to accurately determine its needs and describe them").
- 208/** Tri-Ex Tower Corp., Comp. Gen. Dec. B-239628, 90-2 CPD ¶ 221.
- 209/** Signals & Sys., Inc., Comp. Gen. Dec. B-288107, 2001 CPD ¶ 168, 43 GC ¶ 168 (sustaining protest where Army made no effort to identify how many units would need to be replaced).
- 210/** Barnes Aerospace Group, Comp. Gen. Dec. B-298864 et al., 2006 CPD ¶ 204, 49 GC ¶ 62.
- 211/** Tri-Ex Tower Corp., Comp. Gen. Dec. B-239628, 90-2 CPD ¶ 221.
- 212/** National Aerospace Group, Inc., Comp. Gen. Dec. B-282843, 99-2 CPD ¶ 43, 41 GC ¶ 400; see also FAR 6.303-6.305.
- 213/** VSE Corp., Comp. Gen. Dec. B-290452.3 et al., 2005 CPD ¶ 103, 47 GC ¶ 312 (sustaining protest where agency failed to prepare J&A).
- 214/** SEMCOR, Inc., Comp. Gen. Dec. B-279794 et al., 98-2 CPD ¶ 43, 40 GC ¶ 501.
- 215/** Eaton Corp., Comp. Gen. Dec. B-235603, 89-2 CPD ¶ 238 (denying protest based on mere disagreement with agency's conclusions).
- 216/** 10 U.S.C.A. § 2304(c)(1); 41 U.S.C.A. § 253(c)(1); FAR 6.302-1.

- 217/** Audio Intelligence Devices, Comp. Gen. Dec. B-224159, 86-2 CPD ¶ 1670 (sustaining protest where agency failed to show that protester's products would not meet its minimum needs).
- 218/** Sperry Marine, Inc., Comp. Gen. Dec. B-245654, 92-1 CPD ¶ 111 (explaining that undocumented and unsupported assertion of significant cost savings is insufficient).
- 219/** Sabreliner Corp., Comp. Gen. Dec. B-288030 et al., 2001 CPD ¶ 170, 43 GC ¶ 420 (sustaining protest where agency misstated services to be acquired, dollar value of acquisition, length of contract, and that only one contractor could perform work).
- 220/** 10 U.S.C.A. § 2304(c)(2); 41 U.S.C.A. § 253(c)(2); FAR 6.302-2.
- 221/** 10 U.S.C.A. § 2304(f)(2); 41 U.S.C.A. § 253(f)(2); FAR 6.302-2(c)(1).
- 222/** National Aerospace Group, Inc., Comp. Gen. Dec. B-282843, 99-2 CPD ¶ 43, 41 GC ¶ 400.
- 223/** McGregor Mfg. Corp., Comp. Gen. Dec. B-285341, 2000 CPD ¶ 151 (denying protest where agency showed that products, if not obtained, would compromise mission readiness and have adverse effect on operational capabilities).
- 224/** Honeycomb Co. of Am., Comp. Gen. Dec. B-227070, 87-2 CPD ¶ 209 (sustaining protest where delivery time lapses were incompatible with urgency determination).
- 225/** Arrow Gear Co., Comp. Gen. Dec. B-235081, 89-2 CPD ¶ 135.
- 226/** 4 C.F.R. § 21.5(a); Poly-Pacific Tech., Inc., Comp. Gen. Dec. B-296029, 2005 CPD ¶ 105, 47 GC ¶ 288.
- 227/** Makro Janitorial Servs., Inc., Comp. Gen. Dec. B-282690, 99-2 CPD ¶ 39, 41 GC ¶ 387.
- 228/** Neal R. Gross & Co., Comp. Gen. Dec. B-237434, 90-1 CPD ¶ 212 (listing factors GAO considers when determining whether modification is "out of scope").
- 229/** Neal R. Gross & Co., Comp. Gen. Dec. B-237434, 90-1 CPD ¶ 212.
- 230/** Neal R. Gross & Co., Comp. Gen. Dec. B-237434, 90-1 CPD ¶ 212.
- 231/** American Air Filter Co., Comp. Gen. Dec. B-188408, 78-1 CPD ¶ 433.
- 232/** American Air Filter Co., Comp. Gen. Dec. B-188408, 78-1 CPD ¶ 433.
- 233/** Poly-Pacific Tech., Inc., Comp. Gen. Dec. B-296029, 2005 CPD ¶ 105, 47 GC ¶ 288; Neal R. Gross & Co., Comp. Gen. Dec. B-237434, 90-1 CPD ¶ 212 (sustaining protest where modification significantly changed character of services and substantially increased costs, and agency previously procured services contemplated by modification under separate contract).
- 234/** Sprint Commc'ns Co., Comp. Gen. Dec. B-278407.2, 98-1 CPD ¶ 60, 40 GC ¶ 302.
- 235/** Techno-Sciences, Inc., Comp. Gen. Dec. B-277260.3, 98-1 CPD ¶ 138, 40 GC ¶ 290 (broadly defining statement of work in concluding that nature and purpose of work were not materially different).
- 236/** Makro Janitorial Servs., Inc., Comp. Gen. Dec. B-282690, 99-2 CPD ¶ 39, 41 GC ¶ 387 (finding that housekeeping services were not within scope of contract to provide work for "Real Property Inventory (RPI), Demand Maintenance Repairs, and surveys of Medical Facilities").
- 237/** DOR Biodefense, Inc., Comp. Gen. Dec. B-296358.3 et al., 2006 CPD ¶ 35.
- 238/** Stoehner Sec. Servs., Inc., Comp. Gen. Dec. B-248077.3, 92-2 CPD ¶ 285 (sustaining protest where added guard services previously had been procured under separate contract).
- 239/** MCI Telecommc'ns Corp., Comp. Gen. Dec. B-276659.2, 97-2 CPD ¶ 90, 39 GC ¶ 498.
- 240/** Safety-Kleen Corp., Comp. Gen. Dec. B-274176 et al., 96-2 CPD ¶ 200 (denying protest where only 8% of parts were affected by modification, there was no increase in price, and no allegation that field of competition would have changed).
- 241/** Defense Sys. Group, Comp. Gen. Dec. B-240295 et al., 1990 WL 293536 (upholding price increase of 120%); DOR Biodefense, Inc., Comp. Gen. Dec. B-296358.3 et al., 2006 CPD ¶ 35 (upholding price increase of 57%).
- 242/** Atlantic Coast Contracting, Inc., Comp. Gen. Dec. B-288969.4, 2002 CPD ¶ 104; DOR Biodefense, Inc., Comp. Gen. Dec. B-296358.3 et al., 2006 CPD ¶ 35.
- 243/** DOR Biodefense, Inc., Comp. Gen. Dec. B-296358.3 et al., 2006 CPD ¶ 35.
- 244/** Defense Sys. Group, Comp. Gen. Dec. B-240295 et al., 1990 WL 293536 (Nov. 6, 1990).
- 245/** FAR 15.206(a); Northrop Grumman Info. Tech., Inc., Comp. Gen. Dec. B-295526 et al., 2005 CPD ¶ 45, 47 GC ¶ 158.
- 246/** International Data Sys., Inc., Comp. Gen. Dec. B-277385, 97-2 CPD ¶ 96.
- 247/** Northrop Grumman Info. Tech., Inc., Comp. Gen. Dec. B-295526 et al., 2005 CPD ¶ 45, 47 GC ¶ 158.
- 248/** Northrop Grumman Info. Tech., Inc., Comp. Gen. Dec. B-295526 et al., 2005 CPD ¶ 45, 47 GC ¶ 158.
- 249/** United Tel. Co. of the NW, Comp. Gen. Dec. B-246977, 92-1 CPD ¶ 374.
- 250/** Symetrics Indus., Inc., Comp. Gen. Dec. B-274246.3, 97-2 CPD ¶ 59.
- 251/** Bendix Field Eng'g Corp., Comp. Gen. Dec. B-246236, 92-1 CPD ¶ 227.
- 252/** Occu-Health, Inc., Comp. Gen. Dec. B-270228.3, 96-1 CPD ¶ 196.
- 253/** Northrop Grumman Info. Tech., Inc., Comp. Gen. Dec. B-295526 et al., 2005 CPD ¶ 45, 47 GC ¶ 158.
- 254/** Multimax, Inc., Comp. Gen. Dec. B-298249.6 et al., 2006 CPD ¶ 165.

- 255/** Moore Serv., Inc., Comp. Gen. Dec. B-200718, 81-2 CPD ¶ 145; 4 C.F.R. § 21.5(a).
- 256/** Hoechst Marion Roussel, Inc., Comp. Gen. Dec. B-279073, 98-1 CPD ¶ 127, 40 GC ¶ 289.
- 257/** Moore Serv., Inc., Comp. Gen. Dec. B-200718, 81-2 CPD ¶ 145.
- 258/** Brumm Constr. Co., Comp. Gen. Dec. B-201613, 81-2 CPD ¶ 280; see also Falcon Carriers, Inc., Comp. Gen. Dec. B-232562.2, 89-1 CPD ¶ 96 (sustaining protest where agency modified delivery schedule contemporaneous with contract award).
- 259/** Quadrex HPS, Inc., Comp. Gen. Dec. B-223943, 86-2 CPD ¶ 545.
- 260/** Color Dynamics, Inc., Comp. Gen. Dec. B-250398, 93-1 CPD ¶ 56.
- 261/** FAR 2.101. See generally Cantu, "Organizational Conflicts of Interest/Edition IV," Briefing Papers No. 06-12 (Nov. 2006).
- 262/** FAR 9.504(a).
- 263/** FAR 9.504–9.506.
- 264/** Alion Sci. & Tech. Corp., Comp. Gen. Dec. B-297022.4 et al., 2006 CPD ¶ 146 (sustaining protest where agency failed to identify and reasonably evaluate potential OCIs).
- 265/** Alion Sci. & Tech. Corp., Comp. Gen. Dec. B-297022.4 et al., 2006 CPD ¶ 146.
- 266/** Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15, 95-2 CPD ¶ 129, 36 GC ¶ 2.
- 267/** GIC Agric. Group, Comp. Gen. Dec. B-249065, 92-2 CPD ¶ 263 (sustaining protest where awardee had access to project paper, including budget estimates, on which solicitation was based).
- 268/** Johnson Controls World Servs., Inc., Comp. Gen. Dec. B-286714.2, 2001 CPD ¶ 20, 43 GC ¶ 76.
- 269/** Snell Enters., Comp. Gen. Dec. B-290113 et al., 2002 CPD ¶ 115, 44 GC ¶ 305 (denying protest alleging that OCI arose from performance of incumbent contract).
- 270/** Mechanical Equip. Co., Comp. Gen. Dec. B-292789.2 et al., 2004 CPD ¶ 192.
- 271/** LEADS Corp., Comp. Gen. Dec. B-292465, 2003 CPD ¶ 197 (denying protest where awardee had implemented adequate OCI mitigation plan).
- 272/** Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15, 95-2 CPD ¶ 129, 36 GC ¶ 2.
- 273/** FAR 9.505-2(a); see also Lucent Techs. World Servs., Inc., Comp. Gen. Dec. B-295462, 2005 CPD ¶ 55, 47 GC ¶ 190 (denying protest alleging improper disqualification from procurement where protester had prepared complete specifications).
- 274/** FAR 9.505-2(b); see also GIC Agric. Group, Comp. Gen. Dec. B-249065, 92-2 CPD ¶ 263.
- 275/** FAR 9.505-2(a)(3), (b)(3).
- 276/** FAR 9.505-1(a).
- 277/** Filtration Dev. Co. v. United States, 60 Fed. Cl. 371 (2004), 46 GC ¶ 237 (sustaining protest where awardee would have been required to provide components of a system for which it served as a systems engineering and technical direction services contractor).
- 278/** Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15, 95-2 CPD ¶ 129, 36 GC ¶ 2 (sustaining protest where affiliate of awardee's subcontractor was a member of the proposal evaluation team).
- 279/** PURVIS Sys., Comp. Gen. Dec. B-293807.3, 2004 CPD ¶ 177, 46 GC ¶ 362 (sustaining protest where contract would have required awardee to evaluate systems that it had designed or manufactured under other contracts).
- 280/** Alion Sci. & Tech. Corp., Comp. Gen. Dec. B-297342, 2006 CPD ¶ 1, 48 GC ¶ 29.
- 281/** Alion Sci. & Tech. Corp., Comp. Gen. Dec. B-297342, 2006 CPD ¶ 1, 48 GC ¶ 29.
- 282/** Johnson Controls World Servs., Inc., Comp. Gen. Dec. B-286714.2, 2001 CPD ¶ 20, 43 GC ¶ 76.
- 283/** KPMG Peat Marwick, Comp. Gen. Dec. B-251902.3, 93-2 CPD ¶ 272.
- 284/** AT&T Gov't Solutions, Inc., Comp. Gen. Dec. B-400216, 2008 CPD ¶ 170, 50 GC ¶ 378.
- 285/** Nilson Van & Storage, Inc., Comp. Gen. Dec. B-310485, 2007 CPD ¶ 224 (dismissing protest where protester failed to establish that agency had waived definitive responsibility criterion or ignored available relevant information).
- 286/** Nilson Van & Storage, Inc., Comp. Gen. Dec. B-310485, 2007 CPD ¶ 224 (citing 4 C.F.R. § 21.5(c)).
- 287/** FAR 9.104-1.
- 288/** Southwestern Bell Tel. Co., Comp. Gen. Dec. B-292476, 2003 CPD ¶ 177, 45 GC ¶ 433 (quoting preamble to GAO bid protest regulations at 67 Fed. Reg. 79,833–34 (2002)).
- 289/** Southwestern Bell Tel. Co., Comp. Gen. Dec. B-292476, 2003 CPD ¶ 177, 45 GC ¶ 433.
- 290/** Greenleaf Constr. Co., Comp. Gen. Dec. B-293105.18 et al., 2006 CPD ¶ 19, 48 GC ¶ 87.
- 291/** Charter Envtl., Inc., Comp. Gen. Dec. B-297219, 2005 CPD ¶ 213, 47 GC ¶ 536 (sustaining protest where awardee failed to meet definitive responsibility criterion for particular corporate experience).
- 292/** Mary Kathleen Collins Trust, Comp. Gen. Dec. B-261019.2, 96-1 CPD ¶ 164, 32 GC ¶ 276.

- 293/** Charter Env'tl., Inc., Comp. Gen. Dec. B-297219, 2005 CPD ¶ 213, 47 GC ¶ 536.
- 294/** Mary Kathleen Collins Trust, Comp. Gen. Dec. B-261019.2, 96-1 CPD ¶ 164, 32 GC ¶ 276.
- 295/** Public Facility Consortium I, LLC, Comp. Gen. Dec. B-295911, 2005 CPD ¶ 170.
- 296/** T.F. Boyle Transp., Inc., Comp. Gen. Dec. B-310708 et al., 2008 CPD ¶ 52.
- 297/** Nilson Van & Storage, Inc., Comp. Gen. Dec. B-310485, 2007 CPD ¶ 224.
- 298/** Health Care Waste Servs., Comp. Gen. Dec. B-266302, 96-1 CPD ¶ 13.
- 299/** 4 C.F.R. § 21.5(b)(1)-(3).
- 300/** Navarro Res. & Eng'g, Inc., Comp. Gen. Dec. B-299981 et al., 2007 CPD ¶ 195.
- 301/** Liberty Power Corp., Comp. Gen. Dec. B-295502, 2005 CPD ¶ 61, 47 GC ¶ 227.
- 302/** Fabritech, Inc., Comp. Gen. Dec. B-298247 et al., 2006 CPD ¶ 112; Tessa Structures, LLC, Comp. Gen. Dec. B-298835, 2006 CPD ¶ 199, 49 GC ¶ 11.
- 303/** Liberty Power Corp., Comp. Gen. Dec. B-295502, 2005 CPD ¶ 61, 47 GC ¶ 227.
- 304/** TYBRIN Corp., Comp. Gen. Dec. B-298364.6 et al., 2007 CPD ¶ 51, 49 GC ¶ 197 (denying protest where protester's proposal clearly indicated that it would not meet subcontracting limitation).
- 305/** Capitol CREAG, LLC, Comp. Gen. Dec. B-294958.4, 2005 CPD ¶ 31 (denying protest where agency's determination was not based on protester's capabilities, but rather on its proposed approach to performance).
- 306/** COSTAR, Comp. Gen. Dec. B-240980, 90-2 CPD ¶ 509 (sustaining protest where SBA's decision was based on purported fact that protester did not have quality assurance program in place, but agency failed to inform SBA that such a program was not required to be in place before contract award).
- 307/** RBE, Inc., Comp. Gen. Dec. B-252635, 93-2 CPD ¶ 27.
- 308/** American Indus. Contractors, Inc., Comp. Gen. Dec. B-236410.2, 89-2 CPD ¶ 557.
- 309/** Joanel Labs., Inc., Comp. Gen. Dec. B-242415.16, 93-1 CPD ¶ 207.
- 310/** Holiday Inn N. Raleigh, Comp. Gen. Dec. B-276389.2, 97-2 CPD ¶ 8 (dismissing protest where protester argued that agency's COC determination was improper because SBA failed to consider awardee's affiliation with two large businesses).
- 311/** Fastrax, Inc., Comp. Gen. Dec. B-232251.3, 89-1 CPD ¶ 132.
- 312/** CW Constr. Servs. & Materials, Inc., Comp. Gen. Dec. B-279724, 98-2 CPD ¶ 20.
- 313/** McDonald-Bradley, Comp. Gen. Dec. B-270126, 96-1 CPD ¶ 54, 38 GC ¶ 136 (denying protest because awardee still would have received award if procurement impropriety had not occurred).
- 314/** National Med. Staffing, Inc., Comp. Gen. Dec. B-259402 et al., 95-1 CPD ¶ 163 (stating that GAO "will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester").
- 315/** Aetna Gov't Health Plans, Inc., Comp. Gen. Dec. B-254397.15, 95-2 CPD ¶ 129, 36 GC ¶ 2.
- 316/** Science Sys. & Applications Inc., Comp. Gen. Dec. B-236477, 89-2 CPD ¶ 558.
- 317/** Northrop Worldwide Aircraft Servs., Inc.—Recons., Comp. Gen. Dec. B-262181.3, 96-1 CPD ¶ 263 (denying protest where protester failed to show its ratings would have improved but for improper discussions).
- 318/** Main Bldg. Maint., Inc., Comp. Gen. Dec. B-291950 et al., 2003 CPD ¶ 103.
- 319/** Wyle Labs., Inc., Comp. Gen. Dec. B-288892 et al., 2002 CPD ¶ 12, 44 GC ¶ 77 ("Accordingly, given our conclusion that the technical evaluation of the two proposals was reasonable, [the protester] would remain the higher-cost, lower-rated offeror, and thus would not be in line for award even if we agreed that the remaining costs should be adjusted as [the protester] contends.").
- 320/** Alutiq Global Solutions, Comp. Gen. Dec. B-299088 et al., 2007 CPD ¶ 34 (denying protest where alleged error in evaluation of one factor would not have altered overall rating assigned to protester's proposal under non-cost factors and protester's proposed price was significantly higher than awardee's).
- 321/** Alutiq Global Solutions, Comp. Gen. Dec. B-299088 et al., 2007 CPD ¶ 34.
- 322/** Diverco, Inc., Comp. Gen. Dec. B-259734, 95-1 CPD ¶ 209 (denying protest where protester failed to show it "could or would have lowered its price sufficiently to be in line for award").
- 323/** Cygnus Corp., Inc., Comp. Gen. Dec. B-292649.3 et al., 2004 CPD ¶ 162, 46 GC ¶ 361.
- 324/** Occu-Health, Inc., Comp. Gen. Dec. B-270228.3, 96-1 CPD ¶ 196.
- 325/** Northrop Worldwide Aircraft Servs., Inc.—Recons., Comp. Gen. Dec. B-262181.3, 96-1 CPD ¶ 263 (denying protest where protester failed to show its ratings would have improved but for improper discussions).
- 326/** Advanced Sys. Dev., Inc., Comp. Gen. Dec. B-298411 et al., 2006 CPD ¶ 137, 48 GC ¶ 384.

# BRIEFING PAPERS