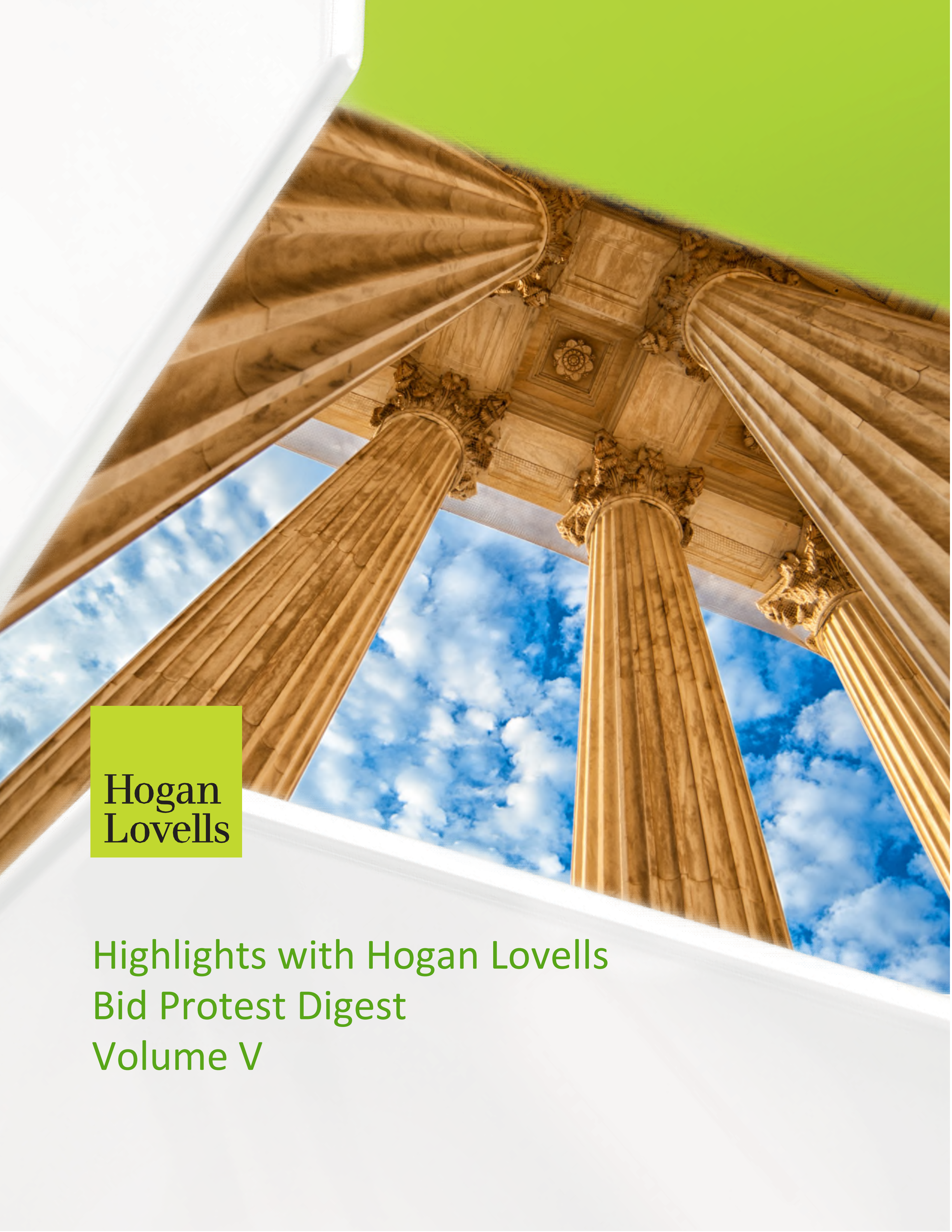

Highlights with Hogan Lovells Bid Protest Digest Volume V

This issue of bid protest highlights includes key takeaways from the U.S. Government Accountability Office's (GAO) Bid Protest Annual Report to Congress for Fiscal Year 2023, as well as bid protest decisions from the U.S. Court of Federal Claims (COFC) and the GAO. These decisions emphasize important legal principles addressing: (1) organizational conflict of interest investigations; (2) a procuring agency's duty to evaluate proposals evenhandedly and in accordance with solicitation terms; (3) allegations of bad faith on behalf of government officials; (4) the 8(a) "safe harbor" rule; (5) COFC's lack of jurisdiction over task order protests; and (6) unequal discussions.

GAO Bid Protest Annual Report to Congress for Fiscal Year 2023

On October 26, 2023, GAO released its *Bid Protest Annual Report to Congress for Fiscal Year (FY) 2023*. The report provides contractors with bid protest statistics for the past Government fiscal year and valuable insights into GAO's protest processes.

At first glance, the statistics on the number of cases filed seems particularly interesting. The report reflects a reversal of the multiple-year decline in the number of protests filed annually: GAO witnessed a 22% increase in FY 2023 compared to FY 2022. But, as GAO notes, this significant increase can be attributed to the hundreds of protests and supplemental protests that were filed challenging a single procurement; that is, the Department of Health and Human Services' Chief Information Officer-Solutions and Partners 4 (CIO-SP4) government-wide acquisition (we covered GAO's latest decision regarding this procurement in a prior edition of our newsletter).

The report also shows that 31% of bid protests were sustained, which is more than double the sustain rate for FYs 2019-2022. Again, this sharp increase stems from the 119 sustained CIO-SP4 protests. Removing these 119 sustained decisions from the FY 2023 statistics would result in 489 merit decisions and 69 sustained decisions, equaling a 14.1% sustain rate, which aligns more closely to historical numbers.

An arguably better indicator of protesters' success in any given year is the "effectiveness rate," which reflects how often a protester gets some form of relief (whether as a result of the agency taking corrective action or GAO sustaining the protest). The effectiveness rate for FY 2023 was 57%, the highest in decades. However, this number is also inflated as a result of the CIO-SP4 protests. The effectiveness rate would more closely align with historical effectiveness rates were the CIO-SP4 protests removed from consideration.

Also of note, GAO conducted hearings in 22 cases in FY 2023 up from a total of only 2 cases in FY 2022, demonstrating that GAO is returning to a frequency of hearings that is more in line with pre-COVID 19 pandemic levels.

Our final takeaway from the report is that the most successful grounds of protest were (1) unreasonable technical evaluation; (2) flawed selection decision; and (3) unreasonable cost or price evaluation.

The District Communications Group, LLC; CruxDCG LLC, B-421581.2, B-421581.3, Sept. 25, 2023, 2023 CPD ¶ 219

As experienced contractors and protest attorneys well know, GAO affords a high level of deference to procuring agencies' organizational conflict of interest (OCI) determinations. Such was the case in *District Communications Group*, where (notwithstanding the protesters' somewhat unique arguments) GAO declined to interfere with an agency's decision to exclude protesters from the competition on the basis of an actual or potential OCI.

The District Communications Group, LLC (District), and CruxDCG LLC (Crux), a joint venture, protested their exclusion from competition for a Department of Veterans Affairs (VA) contract for

commercial support services. The solicitation at issue sought proposals from service-disabled veteran-owned small businesses to provide commercial support services to assist the VA's efforts to reduce and prevent suicide in military and veteran populations through an evidence-based approach to an integrated care model that addressed medical, behavior, and social health. Separate from the procurement at issue in this protest, the VA awarded a task order to J.R. Reingold & Associates, Inc. (Reingold) to provide commercial general mental health and suicide prevention awareness and education outreach support services, under which District served as a subcontractor.

After the receipt of initial proposals, the VA amended the solicitation to exclude over a dozen companies—including District—that were performing as primes or subcontractors on related VA contracts. The VA was concerned that Reingold (and, by extension, District) had an actual or potential impaired objectivity OCI, because Reingold could advise the agency to obtain the mass media campaign services available under its existing task order rather than offer impartial advice to the agency.

The protesters argued that the solicitation improperly excluded them from the competition. First, they asserted that there was no potential for an OCI during the period of performance of the contract at issue because, if selected for award, the protesters would only provide advice (a feasibility analysis and implementation plan) to the VA at the conclusion of the contract. Thus, they argued, throughout performance they would not be able to advise the VA to obtain services under the Reingold task order. GAO disagreed, noting that any potential OCI would pose an ongoing threat throughout the time that the contract was performed; it was not a concern that would only arise when the final work product was delivered. The products and services under the Reingold task order would remain available after completion of the contract, and it thus would be possible for the protesters to recommend those products and services. GAO explained that the ongoing interrelationship between the two contracts, not simply the issuance of the final work product, gave rise to the concern.

Second, the protesters argued that there was no potential OCI because the contract would prohibit District from competing for any related work for three years, which would in turn prevent the protesters from advising the VA under the contract to obtain services available under the Reingold task order. GAO found no merit to this argument. Nothing in the language of the clause relied on by the protesters precluded Reingold from being awarded and performing related work under its task order. GAO also explained that there was no evidence that (1) Reingold and District had terminated their contractual relationship, (2) the nature of the work performed by District as a subcontractor to Reingold was separate and distinct from the principal work performed by Reingold, or (3) Reingold and District had proposed a mitigation strategy that could potentially eliminate the concern.

System Dynamics International, Inc. v. United States, 167 Fed. Cl. 780 (2023)

In this recent decision, the Court of Federal Claims (COFC) enjoined the Army's planned award of a small business set-aside indefinite-delivery, indefinite-quantity (IDIQ) contract for design and engineering support for unmanned aircraft systems. COFC agreed with the protester, System Dynamics International, Inc. (SDI), that the Army had unreasonably evaluated offerors' technical proposals.

Although four offerors responded to the solicitation, two were excluded based on technical unacceptability. This left only the awardee, Strata-G Solutions, LLC (Strata-G), and the protestor, SDI, remaining in the competition. Both Strata-G and SDI received a significant weakness under separate technical subfactors. The Army selected Strata-G for award because it determined SDI's significant weakness, which related to hazardous waste management, was "significantly more important" than Strata-G's significant weakness, which was based on the company's failure to meet the solicitation's minimum education requirements for all but a few labor categories. SDI filed an initial protest, after which the Court granted the Army's motion for a voluntary remand to reconsider

certain aspects of the evaluation. But the Army again concluded Strata-G was the proper awardee, and SDI protested again.

SDI raised several allegations, but COFC was interested in only one. The Court determined that the Army should have assigned Strata-G a deficiency (not just a significant weakness), rendering the company ineligible for award. Rejecting the Army's argument that Strata-G's failure to propose qualified personnel would only increase the risk of performance and therefore was appropriately identified as a significant weakness, the Court held that the issue reflected a deficiency, *i.e.*, a "material failure of a proposal to meet a Government requirement."

As *System Dynamics* shows, although agencies have considerable discretion in weighing the impact of identified weaknesses in proposals, they may not disregard the terms of the solicitation when doing so.

Bear Mountainside Realty LLC v. United States, 168 Fed. Cl. 179 (2023)

COFC's recent decision in *Bear Mountainside* underscores the many hurdles protesters must overcome should they choose to pursue a bad-faith allegation against a federal agency. Even if the protester thinks it has hit the jackpot after uncovering seemingly damning emails, it may not be enough to convince COFC that the agency failed to act in good faith.

Bear Mountainside Realty LLC (Bear Mountainside) protested the General Services Administration's (GSA) cancellation of a solicitation for an Internal Revenue Service (IRS) lease. Bear Mountainside—which had previously provided office space to the IRS under a long-term lease—asserted the Government's cancellation was motivated by animus toward the company. The Government countered that the needs of the IRS had changed.

Bear Mountainside alleged that emails between IRS officials (which the company obtained through a FOIA request) demonstrated bad faith and bias. The Court acknowledged that the emails reflected "some evidence of bad faith on the part of IRS employees." In particular, some employees had stated that Bear Mountainside's building was unacceptable to the agency and that they would refuse to occupy it, and the IRS had even tried to keep the property out of the delineated area for office space in the solicitation due to the plaintiff's propensity to protest.

Nevertheless, after a detailed analysis, the Court concluded that Bear Mountainside had not met the "clear and convincing evidence" test as required to establish improper agency motives or bad faith. The Court noted that there was no evidence the IRS and GSA decisionmakers held improper motives or acted based on others' such motives. Further, some of the Government employees' statements could have demonstrated a potentially legitimate reason to exclude the building from consideration, such as perceived inadequacies in the building that would not meet the IRS's office-space needs.

Thus, citing the long-standing principle that Government officials are presumed to act in good faith, the Court granted the Government's motion for judgment on the administrative record.

This case is a reminder that even when the record suggests potential bias, so long as there may be a *potentially* legitimate reason for the Government's actions, contractors will struggle to overcome the high bar to prove bad faith by clear and convincing evidence.

Unison Software, Inc. v. United States, 168 Fed. C. 160 (2023)

When considering forum options, it is important to be aware that COFC generally lacks jurisdiction over protests that are in connection with the issuance, or proposed issuance, of task or delivery orders. In *Unison Software, Inc.*, the Court reaffirmed that this jurisdictional bar extends to Government procurement actions—even alleged anticompetitive schemes—that are in connection with such procurements.

Unison Software, Inc. ("Unison") protested a Defense Logistics Agency (DLA) task order

procurement for contract-writing software requirements. Unison cited a 2020 DoD memorandum regarding the development of requirements for a contract-writing capability that would leverage an Air Force-deployed solution set. The Air Force's existing solution relied on programming language developed by one of Unison's main competitors, Appian, thereby convincing Unison that this meant the military would only be procuring Appian contract-writing software moving forward.

Following a Government motion to dismiss that raised COFC's lack of jurisdiction over task order protests, Unison amended its complaint to challenge broader military procurement conduct. Unison alleged that this conduct, when viewed in conjunction with two additional task order procurements for related requirements, demonstrated a military-wide scheme to procure only Appian contract-writing software. Unison sought injunctive relief to prevent the military from proceeding with the three task order procurements for such software.

The Court determined that it lacked jurisdiction to hear any of Unison's three claims challenging specific military procurements. The Federal Acquisition Streamlining Act (FASA) expressly limits the Court's jurisdiction in connection with task or delivery orders. Because each of the solicitations that Unison challenged was for a task or delivery order, and no demonstrated exception applied, all were subject to the FASA's task-order bar. The Court likewise had no jurisdiction to hear any of Unison's complaints about Government actions surrounding those procurements because such actions were directly and causally connected to—and therefore "in connection with"—the resulting task orders.

In an attempt to circumvent this jurisdictional bar, Unison insisted that its complaint did not protest any specific solicitation but rather challenged the military's broader scheme to procure only Appian software. According to Unison, the military's "standardization decision is so disconnected from the task orders as to be exempt from the FASA task-order bar."

The Court rejected this argument, finding that, rather than demonstrating any purported disconnect, Unison's arguments only proved that the Government conduct that Unison took issue with was, in fact, "in connection with" a task order. ***First***, Unison had only cited task orders to support its argument that the military was *carrying out procurements to implement the alleged standardization decision*. ***Second***, Unison's requested remedy—enjoining the Government from proceeding with the pending procurements—demonstrated a clear link between Unison's complaint and the challenged Government conduct. Because the Court has no jurisdiction over decisions to issue task orders, it also lacks jurisdiction to enjoin such task orders.

Finally, COFC dismissed Unison's remaining complaints because none challenged Government action that rose to the level of a procurement or proposed procurement. Statements suggesting the military "would like" to buy Appian software were not sufficiently concrete or connected to an existing or future procurement to be actionable. To the extent Unison merely raised general grievances about the Government's compliance with applicable law, this did not provide a valid basis for which the Court could grant any relief.

Karthik Consulting, LLC v. United States, 168 Fed. Cl. 95 (2023)

In *Karthik Consulting, LLC*, COFC highlighted the limited scope of the "safe harbor" rule that governs Section 8(a) program graduates' continuing eligibility to receive Section 8(a) task orders under multiple-award contracts.[1]

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[1] Although not addressed in the pleadings or the court's decision, the FASA jurisdictional bar on Court of Federal Claims task order protests does not extend to task orders placed under GSA Federal Supply Schedule procurements, which are conducted under a distinct statutory scheme and therefore considered beyond the reach of the FASA jurisdictional bar. The court therefore had subject matter jurisdiction to adjudicate this protest. *See Navarro Research and Eng'g, Inc. v. United States*, 94 Fed. Cl. 224 (2010); *Idea Int'l, Inc. v. United States*, 74 Fed. Cl. 129 (2006).

At issue was the award of a competitive Section 8(a) task order to provide critical cybersecurity support services to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS). The solicitation limited the competition to active Section 8(a) vendors under the unrestricted General Services Administration "Highly Adaptive Cybersecurity Services" (HACS) vehicle, with Section 8(a) eligibility to be determined at the time of quote submission. Karthik Consulting, LLC (Karthik), which was an eligible Section 8(a) contractor at the time it was awarded a GSA HACS contract but which had since graduated from the program, submitted a quote in response to the solicitation and represented itself as a Section 8(a) small business.

Following its evaluation of quotes, DHS identified Karthik as the prospective awardee for the task order. DHS then sought the Small Business Administration's (SBA) confirmation as to Karthik's Section 8(a) program status. The SBA determined that Karthik had graduated from the program prior to submitting its offer and therefore was not an eligible participant for award. DHS then rejected Karthik's quote as ineligible for award and made award to another vendor.

Following an untimely GAO protest, Karthik challenged the agency's decision to exclude it from the competition, arguing that FAR 19.804-6(d) provided a "safe harbor" for contractors that were awarded a multiple-award contract (MAC) as an eligible Section 8(a) participant but graduate from the program during the contract's base performance period. According to Karthik, this safe harbor permits such contractors to continue competing for and receiving Section 8(a) task order awards under previously awarded MACs.

The Court disagreed, finding that Karthik's argument was not supported by a plain reading of FAR 19.804-6. The Court determined that although the regulation provides a continued right to Section 8(a) contractors to compete for and receive Section 8(a) task order awards following their graduation from the program, the FAR limits that right to situations involving task orders issued under MACs that were set aside for exclusive competition among Section 8(a) contractors. In such a scenario, the SBA's acceptance of the contract "is valid for the term of the contract." FAR 19.804-6(a). In other circumstances (i.e., where the underlying MAC was not set aside for Section 8(a) contractors), FAR 19.804-6(a) expressly requires agencies to submit a "separate offer to the SBA for the individual task order and to obtain a separate acceptance from the SBA." Here, because only the task order—not the GSA HACS vehicle—had been set aside exclusively for Section 8(a) vendors, the Court concluded that FAR 19.804-6(d) did not provide a safe harbor to Karthik, which was ineligible to accept new orders. DHS therefore acted reasonably in accepting the SBA's determination that Karthik was not an 8(a) participant eligible to receive award, and COFC denied Karthik's protest.

Global Alliant, Inc., B-421859, et al., Nov. 7, 2023, 2023 CPD ¶ 253

As most seasoned government contractors know, procuring agencies are not permitted to engage in unequal discussions in FAR Part 15 procurements, *i.e.*, hold discussions with only one or a subset of offerors to the detriment of other offerors. This rule generally applies to other types of procurements (e.g., task order procurements pursuant to FAR Part 16) where negotiated procedures are being utilized and fairness dictates against "unequal" discussions. However, GAO's decision in *Global Alliant* recognized a limited exception to the prohibition against unequal discussions.

Initially, in attempting to get the protest dismissed, the agency attempted to dismiss the protest by alleging that the protester was not an interested party because one of its key personnel had become unavailable before award, rendering the proposal unacceptable. GAO sided with the protester on this issue, finding that the employee in question was employed by the protester's subcontractor at

the time of proposal submission and remained employed through the time of award.

Turning to the merits of the protest, the protester challenged various aspects of the evaluation of its quotation, and alleged that the agency engaged in unequal discussions by conducting discussions with only the awardee. GAO denied the unequal discussions protest ground for two reasons. First, GAO found the agency's decision to engage only the awardee in discussions was expressly permitted under the solicitation. Specifically, the solicitation reserved the agency's right to communicate only with the offeror determined to represent the "best value" to the government regarding both technical and price matters. Second, GAO emphasized that the procurement at issue was for an order under the Federal Supply Schedule program conducted pursuant to FAR Subpart 8.4, therefore FAR Part 15 discussions rules were not applicable.

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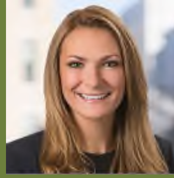

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