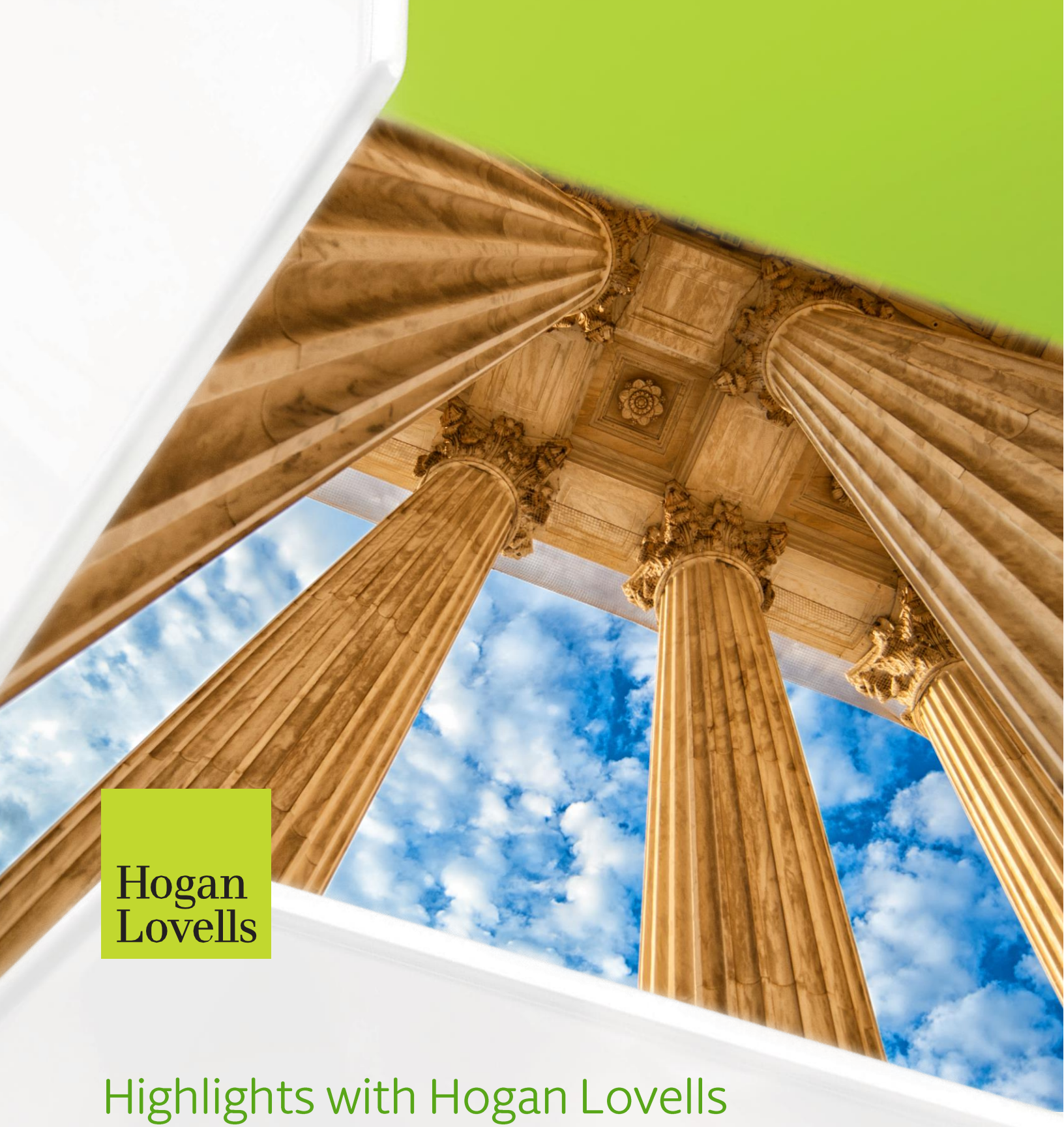

Hogan Lovells

Highlights with Hogan Lovells Bid Protest Digest Volume III

This issue of bid protest highlights includes decisions from the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims (COFC), and the U.S. Government Accountability Office (GAO). These decisions emphasize important legal principles addressing: (1) statutory standing; (2) System for Award Management registration requirements; (3) Government-wide Acquisition Contracts and Mentor-Protégé joint venture requirements; (4) when to hold discussions; (5) solicitation ambiguities; (6) the scope of corrective action; (7) price realism analysis; (8) timeliness; and (9) meaningful discussions.

U.S. Court of Appeals for the Federal Circuit

CACI, Inc.-Federal v. United States, 67 F.4th 1145 (Fed. Cir. 2023)

***Holding*:** The Federal Circuit held that (1) COFC erred in dismissing a protest after making a de novo determination that the protester had a disqualifying organizational conflict of interest (OCI) and therefore was not an interested party to protest, and (2) statutory standing, including interested party status, does not implicate the COFC's subject matter jurisdiction under Article III, and precedent to the contrary is no longer good law.

***Summary*:** The U.S. Department of the Army (Army) issued a solicitation for a Next Generation Load Device Medium to encrypt and decrypt sensitive information on the battlefield. Several offerors submitted proposals, including CACI. The Army found CACI's initial proposal was unacceptable because it failed to provide for two-factor authentication as required by the solicitation. Although CACI submitted a revised proposal that corrected the identified deficiency, the Army went on to assign CACI three new deficiencies related to its proposed two-factor authentication and found CACI ineligible for award on this basis.

The Army awarded contracts to Sierra Nevada Corporation and General Dynamics Mission Systems, Inc. CACI filed a COFC protest challenging the awards. During those proceedings, the Army asserted, for the first time, that CACI had an OCI that could not be waived or mitigated, and therefore CACI was not eligible for award and did not have standing to bring its complaint. In support of this position, the Army contracting officer submitted a declaration stating she had reviewed CACI's OCI statement and determined CACI would be ineligible for contract award due to the unmitigable OCI conflict. CACI countered that the Army's declaration did not follow Federal Acquisition Regulation (FAR) guidelines and asserted that the work that was the subject of the OCI complaint did not, in fact, create an OCI conflict.

The COFC determined that CACI's OCI statement and technical documents were prima facie evidence of an OCI that rendered CACI's proposal ineligible for award. Consequently, the COFC dismissed CACI's protest for lack of standing under the Tucker Act. The COFC also addressed the merits of CACI's challenges to its technical deficiencies and determined that, even if there were no OCI issue, the Army acted reasonably in assigning the technical deficiencies to CACI's proposal.

CACI appealed the decision to the Federal Circuit, which held that the COFC erred in dismissing the protest for lack of jurisdiction (lack of standing). The court explained that "statutory standing" (e.g., "interested party" status under the Tucker Act) is not jurisdictional and therefore does not implicate the COFC's subject-matter jurisdiction. Thus, the COFC erred in treating the issue of statutory standing as jurisdictional. Significantly, the Federal Circuit clarified that both prejudice and interested-party status are not jurisdictional issues, and decisions to the contrary "are no longer good law."

The Federal Circuit further held that the COFC erred in considering statutory standing de novo. The court noted that because a protester must be an "interested party," the COFC must sometimes make

a statutory standing determination (even though statutory standing is no longer regarded as a jurisdictional issue), i.e., when the plaintiff argues that the agency erred in evaluating another contractor's proposal. But the COFC is not required to make this initial determination before addressing the merits, and when it does, it is tasked only with making a preliminary determination ("substantial chance") – not a final merits determination of contract entitlement. Instead, remand to the agency is required to make that final determination (unless an exception applies, e.g., the issue to be decided is purely legal). The Federal Circuit addressed CACI's situation, which involved a challenge to the COFC's disqualification of CACI's own proposal, and observed that every merits issue to a bidder's qualifications is also a statutory standing issue. Where, as here, standing and substantive issues overlap, allowing the COFC to review the standing issue de novo would mean the court would have to determine the merits de novo as well. This, in turn, would contravene statute and regulation vesting the contracting officer with the authority to conduct OCI evaluations and make determinations in the first instance. Thus, in the absence of an exception, the COFC had no authority to conduct its own de novo review of CACI's alleged OCI based on a record developed during the protest proceedings.

Unfortunately for CACI, however, the Federal Circuit affirmed the COFC's conclusions as to the merits of CACI's challenge to a technical deficiency assigned to the proposal. The Federal Circuit agreed with the lower court that the Army had acted reasonably in evaluating CACI's proposal and identifying the deficiency, which rendered the proposal unawardable.

Court of Federal Claims

Myriddian, LLC v. United States, 165 Fed. Cl. 650 (2023)

***Holding*:** The COFC granted a protester's request for a preliminary injunction in a protest challenging the awardee's eligibility to receive the contract, where the awardee had a lapsed System for Award Management (SAM) registration and FAR 52.204-7, System for Award Management, required eligible offerors to maintain continuous registration in SAM. The court also found that the timing and duration of the registration lapses were irrelevant defenses to this requirement.

Summary: The U.S. Department of Health and Human Services (HHS) and Centers for Medicare & Medicaid Services (CMS) solicited bids for a small business set-aside, firm-fixed price contract to provide methodologies to ensure consistent Medicare and Medicaid claims coding under the National Correct Coding Initiative (NCCI) program. The agency conducted a best-value tradeoff and awarded the contract to Cloud Harbor Economics, LLC (Cloud Harbor). Myriddian filed a COFC protest challenging the award, asserting that Cloud Harbor did not meet the solicitation requirements due to lapses in its SAM registration during the proposal evaluation period.

In its motion for a preliminary injunction, Myriddian argued that the awardee violated FAR 52.204-7's requirement to be continuously registered in SAM and that Myriddian was prejudiced by the award decision. The Government argued that because the awardee was registered in SAM when it submitted the bid and when the agency issued the award, any lapse in SAM registration during the proposal evaluation period was immaterial. The court disagreed, however, and reasoned that the timing of the error – whether during the offer or acceptance stage or after – was inconsequential.

The Government next cited FAR 14.405's procedures allowing for the correction of "minor irregularities" in an offeror's proposal, but the court held that those procedures were inapplicable to this Part 15 negotiated procurement. Finally, the court held that Myriddian was prejudiced because the similarity in ratings between the two offerors meant that, but for the agency's error, Myriddian had a substantial chance of winning the award.

SH Synergy, LLC v. United States, 165 Fed. Cl. 745 (2023)

Holding: The COFC enjoined the General Services Administration (GSA) from evaluating proposals and awarding contracts under the small business Polaris Program after a pre-award protest that challenged the solicitation's violations of (1) Small Business Administration (SBA) regulations by applying the same evaluation criteria to assess relevant experience projects submitted by a protégé and by offerors generally, and (2) federal procurement law by excluding price as an evaluation factor at the indefinite-delivery, indefinite-quantity (IDIQ) level.

Summary: GSA sought to procure information technology (IT) services and solutions through the Polaris small business government-wide acquisition contract (GWAC) worth between US$60 billion to US$100 billion. GSA would procure these services or solutions from different pools of approved small business IT providers, including from a Small Business (SB) Pool; Women-Owned Small Business (WOSB) Pool; and Service-Disabled Veteran-Owned Small Business (SDVOSB) Pool.

The protest challenged the solicitations for these three pools, arguing GSA drafted them in a way that violated procurement laws. First, in arguing that the terms of the solicitations violated 13 C.F.R. § 125.8(e), the protesters alleged that GSA improperly required "the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors, generally." COFC agreed, holding that GSA violated 13 C.F.R. § 125.8(e) by applying the same evaluation criteria for "Relevant Experience" to the projects submitted by all offerors, including protégé firms. The COFC ultimately concluded that GSA's evaluation criteria did not incorporate any distinct evaluation criteria for evaluating protégé firm's individually submitted projects under Relevant Experience and would thus result in applying the same evaluation criteria to each project, including those submitted by protégé firms. Accordingly, the COFC held GSA must adjust its evaluation criteria as it applies to evaluating protégé firms' Relevant Experience Projects to be in compliance with the SBA regulations.

Second, the protesters also argued that GSA violated 41 U.S.C. § 3306(c)(3) in failing to consider price on the IDIQ level when evaluating offers. As explained by the COFC, title 41 requires agencies to consider price as an evaluation factor when awarding federal contracts, except for in narrow circumstances for "certain indefinite delivery, indefinite quantity multiple-award contracts …. for services acquired on an hourly rate basis" that will "feature individually competed tasks or delivery orders based on hourly rates." 41 U.S.C. § 3306(c)(1)(B). In interpreting this exception, the COFC determined that only time and materials (T&M) and labor hours (LH)-style task orders would only meet the exception. The COFC thus held that the Polaris solicitations did not qualify for the exception under 41 U.S.C. § 3306(c)(3) as there was no evidence that GSA would favor T&M or LH task order types over firm-fixed-price task orders. If GSA wished to use the IDIQ exception under 41 U.S.C. § 3306(c)(3), the COFC directed GSA to redo the solicitations to clearly feature T&M and LH task orders, or would otherwise need to forgo the exception and evaluate price.

Government Accountability Office

Life Science Logistics, LLC, B-421018.2, Apr. 19, 2023, 2023 CPD ¶ 103

Holding: GAO sustained a protest challenging the agency's evaluation process and decision not to reopen discussions after it took corrective action on a solicitation. Parties must be informed that prior submissions will not be reviewed as part of a reevaluation because the agency must allow an offeror the opportunity to provide a response to identified deficiencies, weaknesses, and adverse past performance information.

Summary: GSA, on behalf of the HHS, issued a solicitation for warehousing and deployment services of pharmaceutical products and disaster relief supplies and equipment. The agency received proposals from Life Science Logistics, LLC (LSL) and Integrated Quality Solutions, LLC (IQS) and held discussions with both. GSA conducted a best-value tradeoff and awarded IQS the contract,

which LSL protested on various grounds. The agency voluntarily took corrective action to amend the solicitation, solicit revised proposals, and conduct a new evaluation.

LSL timely submitted a revised proposal that was materially the same as its initial submission. The agency nonetheless assigned four significant weaknesses to LSL's technical approach and found LSL's proposal unacceptable on that basis. The agency awarded the contract to IQS without holding further discussions. LSL subsequently protested the award decision, alleging that LSL's revised proposal was materially unchanged from its initial proposal, GSA failed to raise the significant weaknesses during discussions when evaluating initial proposals, and GSA's discussions were not meaningful.

The agency disputed LSL's claim on two fronts. First, the agency claimed LSL's revised proposal was materially different from its initial proposal because the former contained an updated aerial photo and larger drawings that showed LSL could not provide the required access and egress points to the site. GAO rejected this argument and determined the agency could not justify the new technical rating because there was no material difference between LSL's revised proposal and its initial proposal. It also noted that the alleged deficiencies in LSL's technical approach were apparent even without the updated photo and larger drawings.

Second, the agency argued that it was not required to conduct discussions with LSL as part of the corrective action evaluation because GSA notified the parties in writing that it did not intend to conduct discussions, and because GSA's review of the revised proposals was de novo. GAO found the agency's position unavailing and reasoned that, at a minimum, the agency must hold meaningful discussion on all deficiencies, significant weaknesses, and adverse past performance information identified. Moreover, GAO found the agency failed to inform the parties that prior submissions would not be reviewed as part of the reevaluation and that the agency was merely attempting to avoid its obligation to provide meaningful discussions. Accordingly, GAO sustained the protest.

General Dynamics Information Technology, Inc., B-421525, May 26, 2023, 2023 CPD ¶ 131

Holding: GAO sustained a pre-award protest where the solicitation was ambiguous and noncompliant with applicable FAR requirements governing use of the firm-fixed-price, level-of-effort (LOE) term task order the agency contemplated awarding.

Summary: The Army issued a request for task order proposals under FAR subpart 16.5 seeking IT support services from ITES–3S IDIQ contract holders. The solicitation contemplated award of a single firm-fixed-price task order with LOE terms. The solicitation required performance of a number of IT tasks, including network operations, service desk, and application maintenance, which were to be performed by a set labor mix, i.e., a specified number of full-time equivalent employees (FTEs) in prescribed labor categories. Additionally, the solicitation established performance thresholds that had to be met in order to achieve an "Acceptable Quality Level (AQL)" for the required tasks.

General Dynamics Information Technology, Inc. (GDIT) filed a pre-award protest challenging the solicitation's terms. GDIT first asserted that the task order solicitation exceeded the scope of the underlying IDIQ contract, which provided that issued "task orders may be firm-fixed-price, time-and-materials, and/or cost-reimbursable in nature" and did not expressly allow for award of the distinct firm-fixed-price, LOE term order. GAO rejected this allegation, finding that the ITES–3S IDIQ contract language (1) was broad enough to encompass all types of firm-fixed-price task orders, including a firm-fixed-price, LOE term task order, and (2) sufficiently advised offerors of the potential for a firm-fixed-price, LOE term task order.

Next, GDIT alleged that the solicitation was not compliant with applicable regulatory requirements governing the use of firm-fixed-price, LOE term contracts. GAO agreed, citing FAR 16.207–3 and

observing that such contracts are appropriate only in circumstances where the required work cannot be clearly defined. GAO explained that the Army's solicitation required performance of a prescribed set of IT tasks to be performed by a set labor mix within set quality thresholds, and these requirements were clearly defined in the solicitation.

Finally, GDIT also claimed that the solicitation was patently ambiguous as to whether it actually established a fixed level of effort, which is required in order to utilize a firm-fixed-price, LOE term type of contract. GAO agreed, explaining that both the solicitation and the Army's responses to offerors' questions were ambiguous as to whether the 950,279 required labor hours per performance period actually reflected a fixed level of effort that the successful offeror would be obligated to perform or were intended to be an estimated ceiling number of hours to be used for proposal purposes and workload planning. GAO therefore concluded that the solicitation did not comport with the FAR's requirement that a specified level of effort must be agreed upon in advance as a prerequisite to using a firm-fixed-price, level-of-effort term type of contract.

Kupono Government Services, LLC; Akima Systems Engineering, LLC, B-421392.9 *et al.*, June 5, 2023, 2023 CPD ¶ 136

Holding: GAO sustained the protesters' challenges to the scope of the agency's proposed corrective action where the agency failed to explain or describe the concerns that gave rise to the agency's decision to take corrective action, which prevented GAO from determining whether the proposed corrective action was appropriate to remedy the agency's concerns.

Summary: The U.S. Department of Energy (DOE) issued an RFP for management and operation of its national training center. Following award to Eagle Harbor, LLC, three firms (Kupono Government Services, LLC, Akima Systems Engineering, LLC, and Chenega Reliable Services, LLC) protested. The protests challenged various aspects of DOE's evaluation of cost and non-cost proposals, as well as the adequacy of discussions and the reasonableness of the agency's source selection decision. In response to the protests, DOE elected to take corrective action, including soliciting, obtaining, and evaluating revised cost proposals, reviewing other areas of its evaluation and addressing issues as appropriate, and making a new source selection decision.

Kupono objected to the dismissal of its protest and alleged that the scope of DOE's proposed corrective action was too narrow because DOE did not commit to solicit and evaluate revised technical proposals. GAO observed that DOE's proposed corrective action included a representation that it would review other areas of its evaluation and address issues as appropriate. Concluding that this ultimately could lead DOE to solicit and evaluate revised technical proposals, GAO dismissed the three protests as academic.

Four days after GAO dismissed the protests, Kupono filed another protest based on the contents of DOE's dismissal request. Two weeks later, on March 10, DOE issued letters to the offerors that more specifically outlined its intended corrective action; Kupono filed a supplemental protest based on this new information. Akima also filed its own protest challenging the propriety of DOE's proposed corrective action on March 29, shortly before the deadline for submitting revised cost proposals.

Both protesters argued that DOE's proposed corrective action was improperly limited to the submission of revised cost proposals, despite the fact that offerors' cost and technical proposals were so inextricably intertwined that offerors would be required to revise both portions of their proposals.

GAO agreed with the protesters, concluding that DOE had erred by permitting offerors to revise only their cost proposals because DOE had failed to articulate what flaws existed in the procurement process beyond generic, undetailed statements. GAO explained that it could not tell from the record what concern(s) prompted DOE to take corrective action and therefore could not ascertain whether the proposed corrective action was appropriate to remedy the unidentified concerns. GAO also found that because the RFP contemplated award of a cost-reimbursable contract, changes to the

offerors' cost proposals would necessarily impact their respective technical approaches. GAO recommended that DOE give offerors the opportunity to revise any aspect of their proposals, or alternatively, if DOE chose to limit offerors' revisions to their costs proposals, permit offerors to revise any aspect of their proposals impacted by changes to their cost proposals.

IBM Corporation, IBM Consulting—Federal, B-421471, *et al.*, June 1, 2023, 2023 CPD ¶ 135

Holding: GAO sustained a protest challenging the reasonableness of the agency's price realism evaluation where the agency's underlying realism calculations relied on an understated Independent Government Estimate (IGE) that failed to account for the awardee's reallocation of work from one contract line item number (CLIN) to two others, resulting in "a classic apples to oranges comparison."

Summary: The Air Force Sustainment Center (AFSC) is one of six specialized centers assigned to the Air Force Materiel Command, a major command of the United States Air Force. AFSC is charged with maintaining and repairing the Air Force's assets, including performing aircraft and engine overhauls and maintenance, landing gear overhauls, avionics repairs, and commodities repairs and manufacturing. The Air Force issued a Fair Opportunity Proposal Request (FOPR) for a contractor to provide a solution-as-a-service one-time development and deployment of a localized on-site Industrial Internet of Things (IIoT) platform to provide real-time remote monitoring of industrial plant equipment at the AFSC's Oklahoma City–Air Logistics Complex. The FOPR contemplated the issuance of a single hybrid task order containing both fixed-price and cost-reimbursable CLINs, with a possible 5-year period of performance. Award would be made to the offeror whose proposal represented the best value to the Government, considering two factors: technical proposal and price, wherein technical proposal was more important than price.

Two offerors submitted proposals in response to the FOPR: awardee Accenture Federal Services, LLC (Accenture) and protestor IBM Corporation, IBM Consulting—Federal (IBM). The agency found both proposals acceptable but rated IBM's proposal as technically superior; however, Accenture's proposal cost half as much (US$24.5 million vs. US$50 million). IBM protested the agency's decision to make award to Accenture, arguing that (1) the agency unreasonably evaluated the awardee's technical proposal, (2) the solicitation contained latent ambiguities, (3) the agency unreasonably evaluated the awardee's price, (4) the agency conducted misleading discussions, and (5) the agency's best-value tradeoff analysis was flawed as a result of the associated errors.

GAO denied three of the protester's arguments, finding that (1) the agency's evaluation of the awardee's technical proposal was consistent with the solicitation and procurement law; (2) the allegations of latent ambiguity were untimely challenges to the terms of the solicitation where the protester perceived a lack of clarity in the solicitation prior to the receipt of proposals; and (3) the allegation regarding misleading discussions was untimely because IBM raised it more than 10 days after the supplemental document production that provided the basis for the protest ground. GAO also denied two subparts of the protester's arguments regarding the agency's evaluation of the awardee's price proposal, finding allegations the awardee failed to comply with certain fixed-price requirements as derivative of untimely challenges to the solicitation terms, and finding no prejudice by the agency's purported failure to enforce certain solicitation requirements regarding subcontractor information as to either offeror.

However, the GAO did agree with the protestor's third basis challenging the agency's evaluation of the awardee's price proposal. As noted, one aspect of the price proposals included a number of cost-reimbursable CLINs. In its proposal, Accenture deleted the costs for a certain CLIN (x008), claiming that work would be subsumed by two other CLINs (x002 and x006). IBM alleged that the agency failed to account for this additional work reallocated from CLIN x008 to CLINS x002 and x006 when performing the price realism analysis for CLINs x002 and x006, and as such, the Air Force

understated how much lower than the IGE the awardee's prices for those two CLINs actually were. GAO agreed and found that the record reflected that the agency evaluated the offerors' prices on a CLIN by CLIN basis, comparing them to an IGE the agency prepared for each CLIN, and that these comparisons were an integral part of the agency's price analysis. By failing to use a basis for comparison that matched the awardee's reallocation of work amongst the CLINS, the agency's realism evaluation "reflected a classic apples to oranges comparison." GAO recommended that the agency reevaluate the realism of the awardee's proposed prices and make a new selection decision as appropriate, in addition to recommending the protestor be reimbursed for its costs and fees.

Rotair Aerospace Corp., B-421381, B-421381.2, Apr. 19, 2023, 2023 CPD ¶ 99

Holding: GAO dismissed the protest as untimely where the protester's previous correspondence with the agency amounted to an agency-level protest, the agency's subsequent response constituted adverse agency action, and the protester did not file its protest with GAO within 10 calendar days of the adverse agency action.

Summary: The Defense Logistics Agency (DLA) published a presolicitation notice on the SAM website, SAM.gov seeking spare parts for the U.S. Army's AH-64 Apache Helicopter. The presolicitation notice stated that the requirement was restricted to Boeing, the original equipment manufacturer, pursuant to FAR 6.302-1 because Boeing was the only approved source for the required parts. The notice explained that the parts had to be purchased from Boeing because the Government did not own the rights to use the data needed to purchase the required parts from additional sources, and the parts could not be purchased, developed, or otherwise obtained. Despite the fact that the requirement was restricted to Boeing, the notice invited contractors that could produce the required items to identify themselves and seek source approval in order to compete for future solicitations.

On September 30, 2022, Rotair Aerospace Corporation (Rotair) sent DLA a self-styled "formal objection" letter objecting to the presolicitation notice and the information it contained. Specifically, Rotair objected to DLA's intention to award the contract to Boeing because: (1) DLA was allegedly mistaken in its belief that it did not have ownership rights to the complete technical data package required to manufacture the parts, and any claim by Boeing arguing otherwise was incorrect; (2) Rotair was in possession of the technical data package required to manufacture the parts, and was thus fully capable of producing the parts, therefore establishing it was an eligible approved source; and (3) DLA lacked justification for its decision to bundle the procurement of certain parts into the same procurement.

On the same day, DLA issued the formal solicitation for a sole-source contract to Boeing and a one-time buy of the spare parts citing FAR 6.302-1 as its basis for the sole-source award.

After two months of not hearing anything on the matter, Rotair emailed DLA on November 28, 2022, explaining that "[s]ince issuing the attached objection letter to the presolicitation of [the requisition number], we have noted that the solicitation has been issued. However, we did not receive a formal acknowledgement of our concerns addressed within the objection letter. Please advise." DLA responded via email on November 29, 2022 explaining that, although it was the procuring agency, the Army had sole authority to determine approved sources for the parts at issue. DLA also explained that all prospective offerors seeking to submit a proposal for the spare parts were required to be an Army-approved source, and any inquiries or concerns regarding the source approval should be directed to the Army. DLA also mentioned July 2022 correspondence between Rotair and the Army, in which the Army informed Rotair that it was no longer an approved source for the parts and could not bid on future solicitations because the Government does not have the ability to distribute a complete technical data package, as some components of the technical data package had been marked proprietary by Boeing.

Rotair filed its protest on January 9, 2023, one day prior to the RFP's closing date. On February 9, 2022, after DLA responded to Rotair's protest grounds in the agency report, Boeing filed a request for dismissal arguing that GAO should dismiss the protest as untimely because Rotair was required to file its protest with GAO within 10 days of adverse agency action with respect to its agency-level protest, i.e., within 10 days of November 29, 2022, when DLA responded to Rotair's formal objection letter.

GAO agreed, finding that Rotair's November 28, 2022 formal objection constituted an agency-level protest, and DLA's November 29, 2022 response was an adverse agency action. Thus, Rotair was required to file its protest with GAO by December 9, 2022 in order to be timely. Specifically, GAO found that Rotair's September 30, 2022 formal objection letter contained the hallmarks of a protest by expressing dissatisfaction with DLA's actions, and making a request for relief and corrective action. Rotair also reasserted its arguments in its November 28, 2022 follow-up email, which specifically mentioned the solicitation in addition to the presolicitation notice. GAO also explained that by November 28, 2022, the solicitation had been active for two months and encompassed the same requirements that Rotair objected to in the presolicitation notice. Further, GAO found that by the time Rotair sent its follow-up email on November 28, 2022 the presolicitation notice no longer had any significant bearing on the procurement such that Rotair's reasserted objections made at that time could only be construed as pertaining to the active solicitation.

GAO also held that DLA's November 29, 2022 response constituted an "adverse agency action" as defined in 4 C.F.R. § 21.0(e). Where DLA chose not to address any of the issues and instead directed Rotair to the Army as the proper source approval authority for the parts in question, GAO concluded that (1) DLA's response indicated that it would not grant the relief requested, and (2) was prejudicial where it indicated that DLA could not allow Rotair to compete under the solicitation as written because it was not an approved source.

BC Site Services, LLC, B-420797.4, B-420797.5, Mar. 21, 2023, 2023 CPD ¶ 73

Holding: GAO sustained the protest where the agency's discussions with the protester were not meaningful.

Summary: BC Site Services, LLC (BCSS), a small disadvantaged business, alleged that the U.S. Army Corps of Engineers (USACE) failed to give it a chance to address issues with its proposal, despite giving others that opportunity during discussions.

The solicitation at issue set forth a Two-Phase Design Build Process, and contemplated award of IDIQ, multiple-award task order contracts (MATOCs) for 8-year terms to the offerors whose proposals were determined to represent the overall best value to the Government. For phase one of the competition, offerors were required to submit proposals that addressed the following evaluation factors, listed in descending order of importance: (1) past performance; (2) construction execution approach; and (3) organization/management team. Based on the evaluation of phase one proposals, USACE would select the most highly qualified offerors and invite them to submit phase two proposals.

After receipt of phase one proposals, USACE engaged nine (9) offerors (including BCSS) in discussions through the issuance of evaluation notices. After receiving the offerors' responses to the evaluation notices, USACE identified 10 unrestricted offerors and 9 small business offerors as the most highly rated on May 24, 2022, and invited only those 19 offerors to submit phase two proposals. BCSS protested USACE's evaluation and exclusion of BCSS from phase two of the competition on June 3, 2022, which led to USACE taking corrective action and that protest being dismissed.

USACE conducted a new evaluation of BCSS's proposal and made a new down select decision, but BCSS was again not selected to compete in phase two. BCSS protested again, alleging among other

things that USACE's discussions with BCSS were neither equal or meaningful because it failed to discuss all areas of BCSS's proposal requiring "modification, amplification, or explanation" and did not allow BCSS to revise its proposal.

GAO agreed, finding that USACE had acted unreasonably where it informed one offeror that it did not include a vital letter of commitment from an insurance agency in its proposal and gave it the chance to supply the missing information, but denied BCSS a similar opportunity by failing to let it know it had not provided valid past performance questionnaires for four out of six past performance examples. Resultantly, USACE did not consider the quality of BCSS's performance under four out of six submitted projects under the past performance factor, the most important phase one evaluation factor pursuant to the solicitation's evaluation scheme. GAO recommended that USACE engage in meaningful discussions with all phase one offerors, including providing an opportunity for proposal revisions.

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