



441 G St. N.W.
Washington, DC 20548

B-158766

November 18, 2014

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2014

Congressional Committees:

This letter responds to the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (CICA), that the Comptroller General report to Congress each instance in which a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest decided the prior fiscal year, and to describe each instance in which a final decision of a protest was not issued within 100 days of when the protest was filed with our Office. We also provide data concerning our overall protest filings for the fiscal year. Finally, this letter addresses the requirement that our report “include a summary of the most prevalent grounds for sustaining protests” during the preceding year. Id.

Agency Failure to Fully Implement Recommendations

For fiscal year 2014, one federal agency declined to implement the recommendations made by our Office in connection with a bid protest. By letter dated December 18, 2013, we reported an occurrence involving the Department of the Air Force: Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205. As explained in our December 18, 2013, letter, we sustained the protest regarding the Air Force’s efforts to implement its Food Transformation Initiative without following applicable competitive procurement procedures. Under this initiative, the Air Force transferred mission essential feeding functions, an appropriated fund activity, at two of its installations to a non-appropriated fund instrumentality using a memorandum of agreement (MOA). In this regard, the protester argued that the head of the agency, citing the public interest exception to competition, 10 U.S.C. § 2304(c)(7) (2012), unreasonably justified use of the MOA to implement the Food Transformation Initiative.

In sustaining the protest, our Office found that the Air Force’s use of the public interest exception under 10 U.S.C. § 2304(c)(7) was improper for two reasons. First, the Air Force improperly relied on 10 U.S.C. § 2492 as its authority for entering into the MOA. Section 2492 provides authority for agencies and instrumentalities that support the operation of the morale, welfare, and recreation (MWR) system to enter into contracts or other agreements to provide or obtain goods and services beneficial to the efficient management and operation of that MWR system. We concluded that the agreement is not for the benefit of the MWR system, as the statute contemplates. Instead, the MOA provides for transferring appropriated funds to the Air Force Mission Essential Feeding Fund to implement the Air Force’s mission essential feeding requirement, a non-MWR activity. Second, we concluded that the Secretary of the Air Force’s determination and finding supporting the use of the public interest exception under 10 U.S.C. § 2304(c)(7) to avoid the applicable competitive procurement procedures was improper because the public interest exception to competition can only be used to justify procurement actions, and the MOA is not a procurement.

Effect of Government Shutdown

For 16 days in October 2013, GAO, like most of the rest of the United States Government, ceased operations and shut down as the result of a delay in the enactment of appropriations to fund operations for fiscal year 2014. When the government shut down, we posted on our website, www.gao.gov, an explanation of how the shutdown would affect bid protest activities and how we would proceed when the government resumed operations. We explained that we would extend the bid protest deadlines one day for each day that GAO was shut down. When the federal government shut down on October 1, there were 280 active bid protest cases in progress. Because the government shutdown lasted for 16 days, the bid protest deadlines were extended for a maximum of 16 days.

Despite this extension, we endeavored to decide all of the 280 cases within 100 calendar days from when they were filed, and we were able to resolve all but 39 cases within that time frame. In only 5 of the 39 cases (12.82 percent) were we actually compelled to extend resolution of the protests for the maximum 16 calendar days. As a result, GAO decided all protests within 100 calendar days for the period that the government was funded. Enclosed for your information is a chart detailing each of the 39 cases (Enclosure I).

Summary of Overall Protest Filings

During the 2014 fiscal year, we received 2,561 cases: 2,445 protests, 50 cost claims, and 66 requests for reconsideration. We closed 2,458 cases during the fiscal year: 2,351 protests, 49 cost claims, and 58 requests for reconsideration. Of the 2,458 cases closed, 292 were attributable to GAO's bid protest jurisdiction over task orders. Enclosed for your information is a chart comparing bid protest activity for fiscal years 2010-2014 (Enclosure II).

Most Prevalent Grounds for Sustaining Protests

In fiscal year 2013, Congress added a new requirement for our Annual Report on Bid Protests. This provision requires that the report "include a summary of the most prevalent grounds for sustaining protests" during the preceding year. 31 U.S.C. § 3554(e)(2).

Of the decisions resolved on the merits during fiscal year 2014, our Office sustained 13 percent. Our review shows that the most prevalent reasons for sustaining the protests during the 2014 fiscal year were: (1) failure to follow the evaluation criteria;¹ (2) flawed selection decision;² (3) unreasonable technical evaluation;³ and (4) unequal treatment.⁴ It is important to note that a

¹ E.g., Logistics 2020, Inc., B-408543, B-408543.3, Nov. 6, 2013, 2013 CPD ¶ 258 (finding that the agency's evaluation of offerors' proposed personnel failed to include a qualitative assessment as required by the solicitation).

² E.g., IBM U.S. Federal, a division of IBM Corp.; Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 (finding that source selection authority improperly considered information contained in pages that exceeded established page limitation).

³ E.g., Native Resource Dev. Co., B-409617.3, July 21, 2014, 2014 CPD ¶ 217 (finding that agency mechanically applied internal staffing estimates when evaluating proposals).

significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.



Susan A. Poling
General Counsel

Enclosures

The Honorable Barbara A. Mikulski
Chairwoman
The Honorable Richard C. Shelby
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Carl Levin
Chairman
The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Thomas R. Carper
Chairman
The Honorable Tom Coburn
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Maria Cantwell
Chairwoman
The Honorable James E. Risch
Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

⁴ E.g., Alutiiq Pacific, LLC, B-409584, B-409584.2, June 18, 2014, 2014 CPD ¶ 196 (finding that agency disparately assigned strengths to awardee's and protester's proposal for offering essentially the same feature).

The Honorable Harold Rogers
Chairman
The Honorable Nita M. Lowey
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Howard P. "Buck" McKeon
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Darrell E. Issa
Chairman
The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Sam Graves
Chairman
The Honorable Nydia M. Velázquez
Ranking Member
Committee on Small Business
House of Representatives

Enclosure I

Impact of Government Shutdown¹

B-Number	Protester	Disposition	Original Due Date	Date Closed	# Days Extended by Shutdown
B-408516	Dyncorp International, LLC	Denied	10/15	10/29	14
B-408519	Deval, LLC	Denied	10/15	10/25	10
B-408521	M Squared Design	Dismissed	10/16	10/30	14
B-408534	Choctaw Contracting Services	Dismissed	10/21	10/31	10
B-408535	Star Food Service, Inc.	Denied	10/21	11/1	11
B-408541	Reyna-Capital Joint Venture	Denied	10/21	11/1	11
B-408543	Logistics 2020, Inc.	Sustained	10/21	11/6	16
B-407797.3	Serco, Inc.	Denied	10/23	11/8	16
B-408548	Worldwide Information Network Systems, Inc.	Denied	10/23	11/1	9
B-408546.2	Harris IT Services Corp.	Denied	10/23	10/31	8
B-408552	CACI Technologies, Inc.	Denied	10/24	11/1	8
B-408558	CMI Management, Inc.	Denied	10/24	11/8	15
B-408080.2	L&G Technology Services, Inc.	Denied	10/25	11/6	12
B-408565	BAE Systems Information and Electronic Systems Integration, Inc.	Sustained	10/28	11/13	16
B-408575	AXIS Management Group, LLC	Sustained	10/28	11/13	16
B-408584	Streit USA Armoring, LLC	Denied	10/30	11/5	6
B-408585	IMR Development Corp.	Denied	10/30	11/13	14
B-408624	SRA International, Inc.	Sustained	11/8	11/25	16
B-405417.2	Mark Dunning Industries, Inc.	Denied	11/14	11/19	5
B-408682	Emergency Vehicle Installations Corp.	Denied	11/18	11/27	9
B-408683	Government Logistics Support Services, LLC	Sustained	11/18	12/3	15
B-408683.2			11/21		12
B-408708	AMEC Programs, Inc.	Denied	11/21	12/4	13
B-408124.4	6K Systems, Inc.	Sustained	11/27	12/9	12
B-408708.2	Bechtel National, Inc.	Denied	11/27	12/4	7
B-408269.2	TeleCommunication Systems, Inc.	Denied	12/4	12/13	9
B-408810	PTZ Insurance Agency, LTD	Dismissed	12/9	12/11	2
B-407273.17	ICF Incorporated, LLC	Denied	12/12	12/19	7

¹ The government shutdown in October 2013 resulted in GAO extending bid protest deadlines up to 16 days (the period of the shutdown) for cases in progress at the time the government shut down. GAO decided all protests within 100 calendar days for the period the government was funded.

B-Number	Protester	Disposition	Original Due Date	Date Closed	# Days Extended by Shutdown
B-408814	Carson Industries, Inc.	Dismissed	12/12	12/13	1
B-408112.2	Wyle Laboratories, Inc.	Sustained	12/12	12/27	15
B-407975.2	Navistar Defense, LLC	Denied	12/12	12/19	7
B-407975.4			12/18		1
B-408825	HP Enterprise Services, LLC	Denied	12/12	12/23	11
B-407975.3	AM General, LLC	Denied	12/12	12/19	7
B-408862	Planning Systems, Inc.	Dismissed	12/18	12/20	2
B-408877	XYZ Corporation	Denied	12/18	1/2	15
B-408919	HRCI-MPSC PASS, LLC	Denied	12/27	1/8	12
B-408925	Professional Performance Development Group, Inc.	Denied	12/30	12/31	1
B-409004	DM Petroleum Operations Company	Denied	1/8	1/15	7

Enclosure II

Bid Protest Statistics for Fiscal Years 2010-2014

	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010
Cases Filed ¹	2,561 (up 5% ²)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)
Cases Closed	2,458 ³	2,538	2,495	2,292	2,226
Merit (Sustain + Deny) Decisions	556	509	570	417	441
Number of Sustains	72	87	106	67	82
Sustain Rate	13%	17%	18.6%	16%	19%
Effectiveness Rate ⁴	43%	43%	42%	42%	42%
ADR ⁵ (cases used)	96	145	106	140	159
ADR Success Rate ⁶	83%	86%	80%	82%	80%
Hearings ⁷	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)

¹ All entries in this chart are counted in terms of the docket numbers (“B” numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same “B” number are assigned (*i.e.*, .2, .3). Each of these numbers is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.

² From the prior fiscal year.

³ Of the 2,458 cases closed in fiscal year 2014, 292 are attributable to GAO’s bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

⁴ Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

⁵ Alternative Dispute Resolution.

⁶ Percentage of cases resolved without a formal GAO decision after ADR.

⁷ Percentage of fully-developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.