

## **If Past is Prologue – What Made Protests Successful in Fiscal Year 2023?**

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Ever wonder what it takes to win a protest?

With [GAO's statistics for Fiscal Year 2023](#) ("FY 23") just released, we thought now is the perfect time to share some insights we gained by reading every published decision in which GAO sustained a protest during FY 23. GAO saw a rise in cases in Fiscal Year 2023 – up 22% from last year, or 2,025 cases, and it conducted hearings in 22 cases, compared to only two last year. GAO's statistics from Fiscal Year 2022 showed a relatively steady sustain rate percentage hovering between 13% and 15% of the decisions on the merits. This year GAO reports a sustain rate of 31%, listing the number of sustained cases at 188, versus 59 last year. GAO explains the higher number of sustains is, at least in large part, due to "an unusually high number of protests challenging a single procurement," namely the Department of Health and Human Services' ("HHS") Chief Information Officer-Solutions and Partners 4 ("CIO-SP4") acquisition, in which GAO sustained 119 protests on primarily one ground. Taking this one

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procurement out of the mix, there are 69 remaining sustains, which would equate to a sustain rate of about 14% – much more in line with GAO’s historic rate over the prior 4 years of 13% to 15%.

Just looking at the numbers, between 2019 and 2023, the protester lost between 69% to 87% of the merits based decisions. These numbers are a bit deceptive insofar as there is an “Effectiveness rate,” that combines sustained cases and those for which the agency took corrective action, and that rate hovers between 44% and 57% — much better odds. Swinging the other direction, if you look at the percentage of the sustains versus cases filed over the last five years, then the sustain rate was only between about 0.4% to 0.9%.

But these are just numbers and although numbers are interesting and empirical, they do not tell the whole story. As a result, we read every published decision from GAO sustaining a protest in FY23 to help us all understand what wins, and more specifically, what won this past year. The wins break down into ten basic categories: (1) Improper Technical/Past Performance Evaluations; (2) Flawed Best Value Analyses; (3) Unreasonable Price/Cost Realism Analyses; (4) Solicitation Improprieties; (5) Misleading Or Unequal Discussions; (6) Failure To Reasonably Evaluate Total Professional Employee Compensation; (6) Inadequate OCI/COI Analyses; (7) Material Misrepresentation Of Key Personnel Availability; (8) Task Order Award Beyond The GSA FSS Contract; and (10) Improperly Limited Corrective Action.

We will save you a tedious detailing of every case in which GAO sustained a protest and, instead, below provide some key examples of what won and why.

## **Improper Technical/Past Performance Evaluations**

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Unsurprisingly, topping the list with the most sustains were challenges to the evaluation of the technical or past performance evaluations. Although there are outliers, the three main categories of sustains are summarized below.

GAO sustained protests where the contemporaneous evaluation materials did not support the agency's conclusions or were insufficient. This is in line with many prior lines of cases. For example, in the case that drove GAO's anomalous results, GAO sustained 119 protests where the contemporaneous evaluation record did not demonstrate that the agency conducted the evaluation it specified it would undertake. In *Systems Plus, Inc.* and *Phoenix Data Security, Inc.*, GAO sustained protests filed by 91 offerors challenging their elimination from the competition, because the solicitation required the agency to validate each offeror's self-scores and "the lack of documentation, combined with misleading and contradictory explanations regarding how the validation occurred, precludes us from finding that the phase 1 evaluation was reasonable."<sup>[i]</sup>

GAO also sustained protests where the agency ignored or excused an awardee's failure to submit required information or meet a material requirement. Again, this is a classic basis for sustaining a protest. In *Aptim-Amentum Alaska Decommissioning, LLC*, for example, the solicitation required submission of a key personnel retention plan.<sup>[ii]</sup> Noting that only a proposal that meets all material requirements may serve as the basis for award (sound familiar?), GAO found the awardee's failure (1) to submit a required key personnel retention plan and (2) to otherwise address retention of key personnel in its proposal rendered it ineligible for award.<sup>[iii]</sup>

Lastly, GAO sustained protests where the agency's conclusions were either based on mistakes or conclusions that were

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inconsistent with the contents of proposals or underlying evaluations. For example, in *Unico Mechanical Corporation*, the GAO sustained the protest where the agency unreasonably assessed a weakness (1) notwithstanding the proposal met the solicitation's stated minimum requirement, and (2) for a mistaken finding that the offeror did not address a feature in its proposal.[\[iv\]](#)

## **Flawed Best Value Analyses**

In addition to overturning best value decisions based on flawed technical evaluations[\[v\]](#), GAO also reaffirmed its view that a Source Selection Authority's ("SSA's") reliance solely on adjectival ratings without consideration of lower rated but acceptable proposals, with lower relative prices, was improper.[\[vi\]](#) Further, an SSA's decision that proposal strengths are essentially equal without qualitatively comparing them is unreasonable.[\[vii\]](#) Also unreasonable was an SSA's determination to remove 33 of the strengths the evaluators identified without a contemporaneously documented explanation.[\[viii\]](#) Ignoring risks identified in the awardee's proposal was also found improper.[\[ix\]](#) And an SSA's dismissal of a technical advantage as "short lived" without support was also improper.[\[x\]](#)

## **Unreasonable Price/Cost Realism Analysis**

In the area of challenges to cost realism analyses, GAO reaffirmed that although an agency is not required to evaluate every element of an offerors proposed costs or develop an empirically accurate most probable cost, it cannot blindly rely upon an offeror's business judgement.[\[xi\]](#) GAO also reinforced the requirements to document the evaluation of offerors' proposed prices[\[xii\]](#) and ensure that all elements of the price are included and are the correct figures.[\[xiii\]](#) Finally, GAO found an agency's price realism

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analysis must include an assessment of the offerors' entire price and ensure that all CLINS and associated costs are addressed.[xiv]

## **Solicitation Improprieties**

GAO's sustains in response to challenges to solicitation terms and conditions show its willingness to delve into the propriety of contract types and what terms and conditions are suitable for FAR Part 12 procurements. For example, in *General Dynamics Information Technology, Inc.*, GAO determined that the use of a Fixed Price Level of Effort contract type was inappropriate where the work was clearly defined, including both staffing and performance requirements, and there was no level of effort agreed upon, rather the hours set forth for each period were either a ceiling or estimate.[xv] In *Orlans PC*, a FAR Part 12 procurement for nationwide default management services, the protester alleged the pricing terms for property preservation and maintenance services and the invoicing terms for foreclosure services were contrary to customary commercial practice.[xvi] GAO agreed, finding that FAR §12.301(a) was violated where the agency did not specifically request information on commercial practices and, instead, relied on other government agency contracts and the absence of objections as support for its view the solicitation included customary commercial practice.

## **Misleading Or Unequal Discussions**

In response to challenges to the conduct of discussions, GAO reaffirmed that the requirement to disclose all deficiencies, adverse past performance data, and significant weaknesses holds true even if the agency only discovers the deficiency or significant weakness in the reevaluation of a materially unchanged proposal.[xvii] In the area of defining what constitutes discussions, GAO affirmed the

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acid test for discussions, finding that exchanges with offerors during phase 1 of procurement constituted discussions because the agency allowed an offeror to submit a required letter of commitment, considered that letter in its evaluation, and permitted other offerors to submit additional materials to make their proposals acceptable.[xviii]

## **Failure To Reasonably Evaluate Total Professional Employee Compensation**

Included in the sustains this year are cases in which GAO took a dim view of agencies' noncompliance with the requirement to evaluate the total professional employee compensation pursuant to FAR 52.222-46.[xix] In these cases, the agency relied upon assumptions regarding escalated rates that were inconsistent with the offeror's proposal, did not commonly evaluate proposals, considered all labor categories rather than just professional employees, and departed from stated evaluation criteria regarding the need to consider nationally competitive compensation.

## **Material Misrepresentation Of Key Personnel Availability**

In reaffirming that material misrepresentations in proposals will not be tolerated, GAO sustained ASRC Federal Data Solutions, LLC's protest and recommended exclusion of the awardee from the competition where the awardee knew, before the submission of its offer, that one of its two proposed key employees had withdrawn her authorization to include her as a proposed key person – despite the earlier acceptance of a contingent offer of employment.[xx] GAO explained that “[i]n determining an appropriate remedy in misrepresentation cases, we typically consider such factors as the degree of negligence or intentionality associated with the offeror's misrepresentations, as well as the



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significance of the misrepresentation to the evaluation.” Here, GAO found that not only had the awardee misrepresented the availability of the proposed key person, but also the agency relied on it in both evaluating the proposal and award determination, thus prompting its recommended exclusion.

## **Task Order Award Beyond The GSA FSS Contract**

In confirming that awards of task orders under the GSA FSS contracts may not include open market products or services unless permitted by the solicitation, GAO sustained a protest where the awardee had mapped its FSS labor categories (“LCATs”) to the RFQ’s LCATs but the positions and functions were seemingly quite different. GAO found the agency failed to evaluate or document any assessment of the mismatched labor mapping to determine whether the proposed FSS LCATs encompassed the types of services required by the RFQ’s LCATs and whether the services were within the awardee’s FSS contract.[\[xxi\]](#)

## **Improperly Limited Corrective Action**

And as a final example, GAO confirmed this year that not all corrective action is protest proof. In *Kupono Government Services, LLC; Akima Systems Engineering, LLC*, in taking corrective action in response to several protests, the agency allowed only changes to cost proposals but neither explained the precise defects they were remedying nor explained why changes to the cost proposals under a cost type award would not impact the offerors’ technical proposals.[\[xxii\]](#) The protesters contended, and GAO agreed, that cost and technical proposals typically are “inextricably intertwined” and, absent an explanation of the defects being remedied, GAO could not determine that the limitation on changes to the proposal was reasonable.

Overall, GAO's sustains this year reflect its continued willingness to look behind post-protest explanations, and to take a hard look at the facts. By far, the most successful protests continue to be those for which the documented record is woefully inadequate or clearly shows material mistakes or failures to enforce or abide by clear solicitation requirements.

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## FOOTNOTES

[i] See *Systems Plus, Inc., et al*, B-419956.184, *et seq.*, June 29, 2023, 2023 CPD ¶ 163; *Phoenix Data Security, Inc., et al*, B-419956.200, *et seq.*, July 10, 2023, 2023 CPD ¶ 172; see also *Tyonek Engineering & Agile Mfg, LLC*, B-421547; B-421547.2, May 26, 2023, 2023 CPD ¶ 125 (price evaluation of largely disparate prices was inadequately documented and internally inconsistent); *RemedyBiz, Inc.*, B-421196, Jan. 17, 2023, 2023 CPD ¶ 29 (documentation insufficient where consisted solely of conclusory chart and no contemporaneous documentation of the agency's distinction between proposals); *Tech Marine Business, Inc*, B-420872, *et seq.*, Oct. 14, 2022, 2022 CPD ¶ 260 (documentation inadequate where there is no explanation, contemporaneous or in response to the protest, supporting agency's conclusions).

[ii] *Aptim-Amentum Alaska Decommissioning, LLC*, B-420993.3, Apr. 26, 2023, 2023 CPD ¶ 107.

[iii] See also *TRAX International Corp.*, B-420361.7; B-420361.8, June 28, 2023, 2023 CPD ¶ 162 (Agency unreasonably ignored awardee's failure to submit required documentation); *BOF GA Lenox Park, LLC*, B-421522, June 20, 2023, 2023 CPD ¶ 152 (agency failed to evaluate awardee's compliance with material solicitation requirement); *Federal Information Systems, Inc.*,



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B-421567, *et seq.*, July 5, 2023, 2023 CPD ¶ 153 (Agency ignored awardee's failure to propose labor categories that met all required functional responsibilities).

[iv] *Unico Mechanical Corp.*, B-420355.6, August 1, 2023, 2023 WL 5170623; *see also AttainX, Inc.*, B-421216, *et seq.*, Jan. 23, 2023, 2023 CPD ¶ 45 (evaluation of experience of joint venture is unreasonable where all references related to only one member of joint venture and agency miscalculated the number of FTEs proposed by awardee); *Insight Technology Solutions, LLC*, B-421764, Sept. 20, 2023, 2023 WL 6656271 (TET found only 3 of 4 references were highly relevant but then mistakenly stated all 4 were highly relevant and SSA relied on that mistake); *IDEMIA National Security Solutions, LLC*, B-421418, *et seq.*, May 1, 2023, 2023 CPD ¶ 96 (assessment of weaknesses were inconsistent with contents of proposal).

[v] *Sparksoft Corp.*, B-421458, May 22, 2023, 2023 CPD ¶ 122.

[vi] *KPMG LLP*, B-420949, *et seq.*, Nov. 7, 2022, 2022 CPD ¶ 280.

[vii] *CharDonnay Dialysis, LLC*, B-420919, Oct. 27, 2022, 2022 CPD ¶ 312.

[viii] *AT&T Corp.*, B-421195, *et seq.*, January 17, 2023, 2023 CPD ¶ 26.

[ix] *AttainX, Inc.*, B-421216, *et seq.*, Jan. 23, 2023, 2023 CPD ¶ 45.

[x] *Sparksoft Corp.*, B-429944.2, *et seq.*, Dec. 27, 2022, 2022 CPD ¶ 12.

[xi] *TRAX International Corp.*, B-420361.7; B-420361.8, June 28,

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2023, 2023 CPD ¶ 162.

[xii] *MPZA, LLC*, B-421568, July 3, 2023, 2023 CPD ¶ 165; *Tyonek Engineering & Agile Mfg., LLC*, B-421547, B-421547.2, May 26, 2023, 2023 CPD ¶ 125.

[xiii] See *RTD Middleburg Heights, LLC*, B-421477, May 31, 2023, 2023 CPD ¶ 125; *AttainX, Inc.*, B-421216, *et seq.*, January 23, 2023, 2023 CPD ¶ 45.

[xiv] *IBM Corp., IBM Consulting – Federal*, B-421471, *et seq.*, June 1, 2023, 2023 CPD ¶ 135.

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

[xvi] *Orlans PC*, B-420905, October 25, 2022, 2022 CPD ¶ 269.

[xvii] *Life Science Logistics, LLC*, B-421018.2, *et seq.*, Apr. 19, 2023, 2023 CPD ¶ 103; see also *TRAX International Corp.*, B-420361.7, B-420361.8, June 28, 2023, 2023 CPD ¶ 162 (agency conducted misleading discussions by advising protester that some of its rates were viewed as unrealistic but not disclosing all of the unrealistic rates – a finding agency made after discussions were completed but for labor rates that were in initial proposal).

[xviii] *BC Site Service, LLC*, B-420797.4, Mar. 21, 2023, 2023 CPD ¶ 73; see also *TRAX International Corp.*, B-420361.7, B-420361.8, June 28, 2023, 2023 CPD ¶ 162 (agency improperly conducted final round of discussions only with awardee so as to make awardee's offer contractually binding, resulting in significant price drop that eliminated protester's price advantage, and then relied upon that price advantage in the best value analysis).

[xix] *TRAX International Corp.*, B-420361.7; B-420361.8, June 28, 2023 CPD ¶ 162 (agency failed to reasonably evaluate professional employee compensation by incorrectly assuming PMO personnel would receive escalated rates where proposal reflected a de-escalation of such rates); *Veterans Management Services, Inc.*, B-421070.4, May 8, 2023, 2023 CPD ¶ 111 (agency's evaluation was unreasonable because, despite receiving salary and benefit information, it considered only the Total Evaluated Price, fully burdened labor rates, and included all labor categories for professional compensation rather than just professional employees); *Guidehouse LLP; Jacobs Technology, Inc.*, B-420860.1, *et seq.*, October 13, 2022, 2022 CPD ¶ 257 (agency failed to undertake a reasonable comparison of offerors' rates to the incumbent contractor's rates, used an analysis tool it knew was flawed, did not compare proposed costs on a common basis, departed from the solicitation's requirement for nationally competitive compensation, misunderstood awardee's proposed recruitment and retention plan, and mistakenly concluded awardee's plan applied to an entire set of personnel when it had a more limited application).

[xx] *ASRC Federal Data Solutions, LLC*, B-421008, *et seq.*, Dec. 2, 2022, 2022 CPD ¶ 294.

[xxi] *Spatial Front, Inc.*, B-420921.2, *et seq.*, December 21, 2022, 2022 CPD ¶ 7.

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

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