





TREADING ON THE SAME RAKE

Learning from Agency
Mistakes Identified in
GAO Bid Protest Decisions

By RICHARD D. LIEBERMAN

THERE IS A LITTLE-KNOWN IDIOM THAT PERFECTLY DESCRIBES A SITUATION IN WHICH THE SAME MISTAKE IS REPEATED OVER AND OVER: "TREADING ON THE SAME RAKE."

While the idiom itself is somewhat lesser known, the situation it describes should be instantly familiar—i.e., a situation, often presented in cartoons or slapstick comedy, where a character will step on an upturned rake on the ground, which then swiftly swings upward and strikes him or her in the face. Dazed, the character will stumble around, only to step on the rake again (and again and again).

As evidenced by mistakes documented in Government Accountability Office (GAO) bid protest decisions, the U.S. federal government continues to tread on the same rake...

BACKGROUND

For more than 90 years, GAO and its predecessor, the General Accounting Office, have provided an independent, impartial, and objective forum for the resolution of disputes concerning the award of U.S. federal government contracts.

GAO's decisions on bid protests, published by its comptroller general, the head of GAO, have resulted in a body of law that is applicable to the procurement process and is relied upon by the Congress, the courts, agencies, and the public. The Procurement Protest System at GAO was set forth by the Competition in Contracting Act (CICA) and codified within the U.S. Code¹:

[A protest is] a written objection by an interested party to any of the following:

A. A solicitation or other request by

a federal agency for offers for a contract for the procurement of property or services;

- B. The cancellation of such a solicitation or other request;
- C. An award or proposed award of a contract;
- D. A termination or cancellation of an award of a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract; or
- E. Conversion of a function that is being performed by federal employees to private sector performance.²

GAO's bid protest regulations are promulgated in Title 4 of the Code of Federal Regulations.³

As per statute, to file a protest with GAO, a protester must state that there has been a violation of law or regulation by the agency in the procurement⁴ and that its economic interest would be affected by the award of a contract or by the failure to award a contract. Generally, this means that the protester was "prejudiced" by the agency's improper actions, and the protester would have had a substantial chance of receiving the award.⁵

Finally, it is important to note that GAO does not possess power to *order* agencies to correct any mistakes that are made in the procurement process. GAO is only empowered to *recommend* corrective action to an agency.⁶ If the agency fails to fully implement the recommendations of

the comptroller general, the agency is required to report such a failure to the comptroller general⁷ and, in turn, the comptroller general shall report the failure to the Congress in its "Annual Report on Bid Protests"⁸ for appropriate action, if warranted.

Regardless, however, as indicated by the Congressional Research Service (CRS) of the Library of Congress, agencies typically adopt GAO's recommendations in full. As the CRS states:

According to GAO's annual reports to Congress, in only seven cases between FY2001 and FY2011 did an agency decline to fully adopt GAO's recommendations. The number of cases is comparatively larger in FY2012 and FY2013. However, all but one of the cases reported in these two years involved the same issue of statutory interpretation, upon which the federal courts disagreed with GAO and which the Supreme Court [was] scheduled to hear in its October 2015 term.⁹

In fiscal year 2013, Congress added a new requirement for GAO's Annual Report—that the Report "include a summary of the most prevalent grounds for sustaining protests" during the preceding year.¹⁰ Since 2013, GAO's Annual Report has included excellent summaries of these "most prevalent grounds for sustaining protests" based on a finding of a violation of law or regulation. **FIGURE 1** on page 55 shows the seven grounds cited by GAO in its reports since this requirement was first implemented. The most important thing to note about these grounds is that they recur nearly every year, indicating that agencies are not learning from their mistakes or the mistakes of other agencies.

The following is a discussion of sample cases cited by GAO for each of the most

FIGURE 1. GAO: MOST PREVALENT GROUNDS FOR SUSTAINING PROTESTS, 2013–2018

	2013	2014	2015	2016	2017	2018
#1 UNREASONABLE TECHNICAL EVALUATION		✓	✓	✓	✓	✓
#2 UNREASONABLE PAST PERFORMANCE EVALUATION			✓	✓	✓	
#3 UNREASONABLE COST OR PRICE EVALUATION	✓		✓	✓	✓	✓
#4 INADEQUATE DOCUMENTATION OF THE RECORD	✓		✓		✓	
#5 FLAWED SELECTION DECISION		✓		✓	✓	✓
#6 FAILURE TO FOLLOW EVALUATION CRITERIA	✓	✓	✓			
#7 UNEQUAL TREATMENT OF OFFERORS	✓	✓				

prevalent grounds for sustaining protests to highlight the types of mistakes frequently made by agencies in their procurements.

#1. UNREASONABLE TECHNICAL EVALUATION (CITED IN FIVE OUT OF SIX YEARS)

Of the most prevalent grounds for sustaining protests tracked by GAO's Annual Report, "unreasonable technical evaluations conducted by agencies" made the list five out of six years. The following are two sample cases featuring an unreasonable technical evaluation.

CR/ZWS LLC¹¹

This case involved a U.S. Air Force solicitation for commercial solid waste management services. The source selection was based on best value, with technical proposals first being rated "acceptable" or "unacceptable" based on compliance with *Defense Federal Acquisition Regulation Supplement (DFARS)* 252.237-7024. This

DFARS section requires that an offeror's proposal address the following:

- Challenges associated with maintaining essential services during an extended event,
- Time lapses associated with acquisition of essential personnel and resources,
- Requirements for training personnel who can relocate to alternate facilities,
- Alert and notification procedures for mobilizing essential personnel, and
- The approach for communicating expectations to the contractor.

GAO noted that the awardee's proposal failed to address the second and third requirements,¹² and therefore should have been rated "unacceptable."

Native Resource Dev. Co.¹³

This case involved a procurement by the Federal Emergency Management Agency for facility operations and support services for a center in Alabama. The solicitation provided that the agency would consider the sufficiency of the following:

- The offeror's proposed staffing for addressing the tasks, merits, and realism of the proposed labor mix;
- The qualifications of the proposed key personnel; and
- The offeror's approach to recruiting, retaining, training, supervising, and coordinating its staff.

Although the solicitation did not provide offerors with a staffing estimate, the agency had an internally prepared estimate that was used in the evaluation.

GAO found that the protester's proposed staffing was determined to present a performance risk solely because the overall number of personnel was below an undisclosed agency estimate. GAO sustained the protest because the agency had not provided the protester with reasonable notice of, and the opportunity to address, the discrepancy between the agency's overall staffing estimate and its own (internally estimated) overall number—and without providing any analysis as to specific areas in which the protester's final staffing numbers were considered insufficient.

#2. UNREASONABLE PAST PERFORMANCE EVALUATION (CITED IN THREE OUT OF SIX YEARS)

“Unreasonable past performance evaluations conducted by agencies” was cited by GAO’s Annual Report three out of six years. The following are two sample cases featuring an unreasonable past performance evaluation.

*Rotech Healthcare, Inc.*¹⁴

This case involved a Department of Veterans Affairs solicitation for home oxygen and durable medical equipment with incidental services. The consensus ratings for the proposals of the eventual awardee and the protester were originally rated as “equal,” so the awardee was selected over the protester based on its lower proposed price. The solicitation required offerors to provide past performance information on contracts of similar size (in terms of number of patients or annual contract value), scope, and complexity of ongoing or completed contracts within the past three years.

Although the awardee cited 11 of its previous contracts, the agency received completed past performance surveys on only two of the awardee’s contracts—neither of which appeared to have been comparable in size. The protester argued that there was no evidence in the record that the evaluators considered whether the awardee’s contracts were actually similar in size to the solicited effort. Therefore, the awardee’s proposal should have been rated lower than the protester’s. GAO agreed, and sustained the protest.

*Al Raha Group for Tech Services, Log. Mgt. Int’l, Inc.*¹⁵

This case involved a U.S. Air Force award of a Foreign Military Sales contract to the Saudi Arabian government for F-15 fighter jet transportation support services for the Royal Saudi Air Force. The solicitation stated the agency would evaluate whether the scope, magnitude, and complexity

of efforts performed within the past five years reflected similar efforts as those in the solicitation.

GAO found that the awardee’s references were not comparable (amounting to only 0.14% of the estimated value of the solicitation). None of the other past performance information supported the agency’s past performance rating of the first unsuccessful offeror. GAO found that the agency’s negative assessment of another unsuccessful offeror’s past performance was not reasonable because, although the agency stated it could not verify the performance, the past performance questionnaires submitted to the agency actually included this information.

GAO recommended reevaluation of past performance, which could result in new ratings to displace the two improper ratings and could require a new source selection decision.

#3. UNREASONABLE COST OR PRICE EVALUATION (CITED IN FIVE OUT OF SIX YEARS)

Of the most prevalent grounds for sustaining protests tracked by GAO’s Annual Report, “unreasonable cost or price evaluation conducted by agencies” made the list five out of six years. The following are two sample cases featuring cost or price evaluations deemed by GAO to be “unreasonable.”

*Valor Healthcare, Inc.*¹⁶

This procurement was conducted by the Department of Veterans Affairs and sought outpatient clinic services. The solicitation included a price realism evaluation factor, which was to be “evaluated by assessing the compatibility of proposed costs with proposal scope and effort.”

GAO sustained the protest because the agency’s source selection evaluation record did not contain any assessment of the compatibility of the awardee’s proposed pricing—including the labor element—with

the scope and effort of the firm’s technical approach.

*Esegur—Empresa de Seguranca, SA*¹⁷

This case involved a procurement for unarmed security guard services in U.S. military family housing in Portugal. The solicitation stated that award would be made to the lowest price technically acceptable (LPTA) proposal. The solicitation also stated:

Unrealistically high, low, or unbalanced prices may serve as a basis for rejection of the proposal. The price evaluation will document the reasonableness and completeness of the total evaluated price.

GAO sustained the protest, finding that the agency failed to reject the awardee’s proposal as “unacceptable” because it had failed to perform a price realism evaluation of the awardee’s low price.

#4. INADEQUATE DOCUMENTATION OF THE RECORD (CITED IN THREE OUT OF SIX YEARS)

“Inadequate documentation of the record by agencies” was cited in three out of six years as one of the most prevalent grounds for sustaining a protest. The following are two sample cases featuring such inadequate documentation.

*CFS-KBR Marianas Support Services, LLC*¹⁸

This case involved a U.S. Navy procurement for base operations support services in Guam. This was a best value procurement where discussions were held. The agency initially identified the awardee’s staff as “inadequate,” but revised the ratings upward after discussions. The agency’s evaluators abandoned the initial government estimates, as well as their evaluation findings based upon those estimates, and never explained why they considered the offeror’s revised staffing adequate in light of its respective technical approaches.



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GAO found no basis to find the agency's reevaluation of proposals reasonable because the agency did not adequately document its evaluation results. Bottom line: if the record lacks documentation and GAO cannot understand the agency's evaluation conclusions, GAO will always sustain a protest challenging the agency's evaluation.

*Supreme Foodservice GmbH*¹⁹

This was a procurement by the Defense Logistics Agency for subsistence products to be provided to locations in Afghanistan. It was a best value procurement, where experience and past performance was the most important technical evaluation factor, and the solicitation stated that an evaluation would be made of the offeror's experience in fulfilling similar requirements of similar size and complexity. The agency credited the awardee with a 97% fill rate but failed to document the sources for the determination of this rate.

GAO sustained the protest, saying that when an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record to support the source selection decision.

#5. FLAWED SELECTION DECISION (CITED IN FOUR OUT OF SIX YEARS)

GAO's Annual Report cited "flawed selection decision by agencies" in four out of six years. The following are two examples.

*Calnet, Inc.*²⁰

This case involved a U.S. Navy procurement for support services to be provided to a Naval Data Center using a best value evaluation method. The agency evaluators identified specific strengths and weaknesses in the offerors' non-cost proposals and past performance information and expressly ranked the proposals. The findings were incorporated into the agency's source selection decision. However, the agency's conclusion that four of these proposals were equivalent under the non-cost evaluation factors was based entirely on the adjectival ratings assigned, rather than the detailed comparison of the strengths and weaknesses.

GAO noted that adjectival or point score evaluation ratings are merely guides to intelligent decision-making. Evaluators and source selection officials are required to consider the underlying bases for the ratings—including the advantages and disadvantages associated with the specific content of each proposal.

*Castro & Co.*²¹

This case involved an order to assist the work of the Federal Transit Administration in improving its financial management. After scoring the proposals, the contracting officer selected the awardee based on its higher numerical score, without documenting any consideration of the basis for the score, the merits of competing quotations, or whether any advantages of the awardee's quotation outweighed its higher price.

GAO noted that adjectival ratings and point scores are guides to, not substitutes for, intelligent decision-making. Scores and ratings do not mandate automatic selection of a particular proposal. The propriety of the price/technical tradeoff decision turns on whether the selection official's judgment concerning the significance of the difference in the technical ratings was reasonable and adequately justified.

#6. FAILURE TO FOLLOW EVALUATION CRITERIA (CITED IN THREE OUT OF SIX YEARS)

GAO cited "failure to follow evaluation criteria in the solicitation by agencies" in three out of six years. The following are two sample cases where this failure occurred.

*Tantus Tech.*²²

This case involved a Centers for Medicare and Medicaid Services procurement for testing support services for information technology systems. The solicitation stated that the agency would evaluate the extent to which the proposed staffing plan ensured that appropriately qualified staff would be available to meet the requirements of this contract on an ongoing basis.

However, the agency failed to consider whether the awardee's proposal to relocate a significant number of employees after the first year of the procurement order posed a risk to the awardee's ability to retain qualified staff.

*Logistics 2020, Inc.*²³

This case involved a National Geospatial-Intelligence Agency procurement for deployed logistics services. In this best value procurement, the solicitation stated that the agency would assign one of five adjectival ratings to proposals under the "technical/management" factor:

- “Outstanding,”
- “Good,”
- “Acceptable,”
- “Marginal,” or
- “Unacceptable.”

However, instead of using these adjectival ratings, the agency merely determined whether each proposal was “acceptable” or “not acceptable.” This was inconsistent with the scheme presented in the solicitation. Proposals must be evaluated to identify their relative qualities under the stated evaluation factors—including the degree to which technically acceptable proposals exceed the stated minimum requirements or will better satisfy the agency’s needs.

#7. UNEQUAL TREATMENT OF OFFERORS (CITED IN TWO OUT OF SIX YEARS)

“Unequal treatment of offerors by agencies” was cited in GAO’s Annual Report in two out of six years. These two cases are as follows.

*IAP Work Serus., Inc.; EMCOR Gov. Serus.*²⁴

This was a procurement by the U.S. Navy for operating support services in Maryland. In this best value procurement, the agency unreasonably credited only the awardee’s proposal with a technical strength (redacted from the decision) where the record showed that the protester proposed a similar strength.

GAO sustained the protest on that ground and noted that it examined whether the agency treated offerors equally in its evaluation of their respective proposals and did not disparately evaluate proposals with respect to the same requirements.

*Alutiiq Pacific, LLC*²⁵

This case involved a solicitation for commercial information technology services where award was to be made on a best value basis. The agency assigned the awardee’s proposal a significant strength

for its transition approach, and a separate strength for its proven track record of retaining a high percentage of the incumbent workforce. In contrast, when evaluating the protester’s proposal under the same evaluation subfactor, the agency assigned only a single significant strength (rather than two strengths) both for its proposed transition plan and its demonstrated ability to retain 100% of the incumbent workforce. The source selection authority based the selection decision, at least in part, on the fact that the awardee’s proposal had the most significant number of strengths.

GAO noted that agencies are required to evaluate proposals on a common basis and in accordance with the terms of the solicitation. Agencies are not to engage in disparate treatment of offerors in the evaluation of proposals.

CONCLUSION

The most striking aspect of GAO’s summaries of the “most prevalent grounds” for sustaining protests is the degree of recurrence of the same mistake. Agencies really need to improve their source selections.

There is a two-part way to avoid many, if not all, of these errors:

- 6 | First, agencies should draft solicitations that comply with *Federal Acquisition Regulation (FAR)* Subpart 15.2, “Solicitation and Receipt of Proposals and Information”;
- 7 | Second, agencies should pay particular attention to FAR Subpart 15.2, “Source Selection,” and ensure that all source selection planning and execution fully complies with the various sections contained therein.

Many similar types of mistakes by agencies are included in my book, *The 100 Worst Government Mistakes in Government Contracting*,²⁶ and should form the basis of “lessons learned” training for source selection officials in the federal government. **CM**

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ENDNOTES

1. 31 USC §§ 3551-3557.
2. 31 USC § 3551(1).
3. 4 CFR Part 21.
4. *As per* 31 USC § 3552(a).
5. To show prejudice, a protester must “demonstrate that, but for the agency’s actions, it would have had a substantial chance of receiving the award.” (*DataSavers of Jacksonville, Inc.*, B-415113.3 (August 24, 2018), 2018 CPD ¶ 290.)
6. *As per* 31 USC § 3554(b)(1).
7. *As per* 31 USC § 3554(b)(3).
8. Hereinafter, “Annual Report.”
9. Manuel & Schwartz, “GAO Bid Protests: An Overview of Time Frames and Procedures,” CRS Report R40228 (January 19, 2016).
10. 31 USC § 3554(e)(2).
11. B-414766 (September 13, 2017), 2017 CPD ¶ 288.
12. I.e., “time lapses associated with acquisition of essential personnel and resources” and “requirements for training personnel who can relocate to alternate facilities.”
13. B-409617 (July 21, 2014), 2014 CPD ¶ 217.
14. B-413024 *et al.* (August 17, 2016), 2016 CPD ¶ 225.
15. B-411015 (April 22, 2015), 2015 CPD ¶ 134.
16. B-412960 (July 15, 2016), 2016 CPD ¶ 206.
17. B-407947 (April 26, 2013), 2013 CPD ¶ 109.
18. B-410486 *et al.* (January 2, 2015), 2015 CPD ¶ 22.
19. B-405400 *et al.* (October 11, 2012), 2012 CPD ¶ 292.
20. B-413886 (October 28, 2016), 2016 CPD ¶ 318.
21. B-412398 (January 29, 2016), 2016 CPD ¶ 52.
22. B-411608 (September 14, 2015), 2015 CPD ¶ 299.
23. B-408543 (November 6, 2013), 2013 CPD ¶ 258.
24. B-407917 (July 10, 2013), 2013 CPD ¶ 171.
25. B-409584 (June 18, 2014), 2014 CPD ¶ 196.
26. Richard D. Lieberman, *The 100 Worst Government Mistakes in Government Contracting* (Ashburn, VA: NCMA, 2012).

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