

## **“THE BENEFIT OF THE DOUBT” AT THE GOVERNMENT ACCOUNTABILITY OFFICE**

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A recent Government Accountability Office (“GAO”) bid protest decision held that the source selection authority did not meaningfully explain the decision rationale in the written record, and the rationale appeared inconsistent with the contemporaneous evaluation record and the solicitation. *Immersion Consulting, LLC*, B-415155; B-415155.2, Dec. 4, 2017. The procurement was for program management services, and was issued by the Department of Defense Human Resources Activity. The GAO noted that competitive prejudice is an element of every viable protest. (A protester must demonstrate that but for the agency’s actions, it would have had a substantial chance of receiving the award). In this protest, GAO did not know what the ultimate source selection might have been if the source selection flaws had not occurred. GAO said “[in] such circumstances, we resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest.”

A search for previous GAO decisions on this matter of the “benefit of the doubt” found that the earliest appeared to be *Logitek Inc., Reconsideration*, B-238773 et al, Nov. 19, 1990, 90-2 CPD ¶ 401. There the GAO sustained a protest of a Defense Logistics Agency Procurement where the agency had improperly engaged in discussions with only one offeror. The offeror had unilaterally relaxed the delivery terms in the RFP and the agency had accepted the noncompliant offer. GAO said there was a “potential for prejudice” because Logitek had, in the past, reduced its price in response to best and final requests, and if the agency had not relaxed the delivery terms, GAO was “left to guess how much lower Logitek’s price might have been had it been given the opportunity to respond to the relaxed delivery terms and submit a best and final offer. Since [GAO] found a clear violation of applicable regulations by the agency, we resolved any doubt concerning the prejudicial effect of the agency’s violation in favor of the protester.”

An important question seems to this author to be: When will the GAO resolve doubt in favor of the agency, and when will it resolve doubt in favor of the protester? Not surprisingly, there are many more decisions where the doubt is resolved in favor of the agency. There seem to be only two clear cut situations where GAO will resolve doubt in favor of the protester: (1) competitive prejudice (described above); and (2) timeliness.

With regard to timeliness, in *Harris IT Services Corp.*, B-406067, January 27, 2012, 2012 CPD ¶ 57, the GAO considered a protest where Harris properly requested a debriefing, received a written debriefing from the agency, but then the agency continued to make oral debriefing comments on the source selection for several days. Harris submitted its protest based on the date when the oral agency comments ended, not on the date when the written debriefing was provided. The GAO held that the protest was timely, stating that the oral agency comments “reflected, at a minimum, considerable ambiguity as to whether the agency’s debriefing process was continuing. Given this ambiguity, and considering that we resolve doubts regarding timeliness in favor of protesters, [] we find that the protester’s challenges to the agency’s evaluation are timely when filed within 10 days of the agency’s conclusion of what Harris refers

to as its “oral debriefing”... The GAO has resolved similar doubts in other cases in favor of a protester, see, e.g., *Fort Mojave/Hummel*, B-296961, Oct. 18, 2005, 2005 CPD ¶ 181 n.7.

### **When does GAO Resolve Doubts in favor of the Agency (Government)?**

The two most significant issues resolved in favor of the government are factual doubts and agency evaluations of proposals.

**Factual doubts:** The GAO has frequently noted that “without any probative evidence other than statements from each side [government and protester], we are required to accept the administrative [agency] version of the facts.” *Ordnance Research, Inc.* B-177397, June 27, 1973. See similar situations and language concerning resolution of factual disagreements in *Phelps Protection Sys., Inc.*, B-181148, Nov. 7, 1974, and *I.C.E.S., Inc.*, B-169474, Aug. 19, 1970.

Clearly, resolving doubts in favor of the government is far more important than resolving competitive prejudice or timeliness in favor of the protester.

**Evaluation of proposals:** For many years, the GAO has stated that “in reviewing a protest challenging an agency's evaluation, [GAO] will not re-evaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. *Analytical Innovative Solutions, LLC*, B-408727, Nov. 6, 2013, 2013 CPD ¶263. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *Id.* See also *Matter of: Mckean Def. Grp., LLC*, B-415254.2, Dec. 19, 2017, 2017 WL 6729284, and *ManTech Advanced Sys. Int'l, Inc.*, B-413717, Dec. 16, 2016, 2016 CPD ¶370.

This resolution of doubt in favor of the agency is a strong presumption that unless the statutes or regulations were violated, GAO will not overturn a source selection based on improper proposal evaluation.

In addition, GAO resolves doubts in favor of agencies in the following two situations:

**Cost Realism Evaluations:** GAO has consistently stated that its “review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. *Jacobs COGEMA, LLC*, B-290125.2, B-290125.3, Dec. 18, 2002, 2003 CPD ¶16. Agencies are given broad discretion to conduct cost realism evaluations, thus GAO’s review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary.

**Past Performance evaluations:** Here, the GAO has frequently stated that “in reviewing a protester's challenge to an agency's evaluation of vendors' past performance, our Office does not independently evaluate quotations; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. *CSR, Inc.*, B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶64. The GAO also

notes that the agency's rationale must be “adequately documented.” *DynCorp Int'l LLC*, B-406523.2, B-406523.3, Dec. 16, 2013, 2014 CPD ¶7.

The Takeaway is that GAO is a tough forum for protesters, but there is a reason for it. GAO recognizes that the agencies must live with their source selection decisions and the contractors who are selected to perform the work. The GAO therefore generally resolves “doubts” against the protester with regard to:

- Factual issues (where there is no written probative evidence)
- Agency evaluations of proposals, provided that the evaluation is reasonable and consistent with the solicitation’s evaluation criteria and with applicable procurement statutes and regulations
- Cost realism evaluations
- Past performance evaluations

Only with respect to timeliness and competitive prejudice will the GAO resolve doubts in favor of the protester.

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