

## GAO: AGENCY MISTAKES IN BID PROTESTS

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For nearly a century the Government Accountability Office (“GAO”) and its predecessor, the General Accounting Office, have provided an independent, impartial and objective forum for bid protests on federal government solicitations and contracts. A bid protest is a written objection by an [interested party](#) to:

- (1) A solicitation or other request by a [Federal agency](#) for offers for a contract for the procurement of property or services;
- (2) The cancellation of such a solicitation or other request;
- (3) An award or proposed award of a contract;
- (4) 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
- (5) Conversion of a function that is being performed by Federal employees to private sector performance. 31 U.S.C. § 3551(1).

A protester must state that there has been a violation of law or regulation by the agency in the procurement, 31 U.S.C. § 3552(a), 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. 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.” See *DataSavers of Jacksonville, Inc.*, B-415113.3, Aug. 24, 2018.

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 empowered to *recommend* corrective action to an agency. If the agency fails to implement fully the recommendations of the Comptroller General, the agency is required to report such a failure to the Comptroller General (GAO), and in turn, the Comptroller General reports the failure to the Congress in its “Annual Report on Bid Protests,” for appropriate action if warranted.

The Congressional Research Service (“CRS”) of the Library of Congress has indicated that “Agencies typically fully adopt GAO recommendations...” The CRS stated that

[a]ccording 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. See Manuel & Schwartz, “GAO Bid Protests: An Overview of Time Frames and Procedures,” CRS Report R40228, Jan 19, 2016

In fiscal year 2013, Congress added a new requirement for the GAO’s Annual Report. The report must “include a summary of the most prevalent grounds for sustaining protests” during the preceding year. 31 U.S.C. § 3554(e)(2). These annual reports now give an excellent summary of the basic errors made by agencies that cause GAO to “sustain” protests, based on a finding of a violation of law or regulation. The table below 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 and the mistakes of other agencies.

**GAO's Annual Bid Protest Report-Most Prevalent Grounds for Sustaining Protests**

	<b>2017</b>	<b>2016</b>	<b>2015</b>	<b>2014</b>	<b>2013</b>
<b>(1) Unreasonable technical evaluation</b>	X	X	X	X	
<b>(2) Unreasonable past performance evaluation</b>	X	X	X		
<b>(3) Unreasonable cost or price evaluation</b>	X	X	X		X
<b>(4) Inadequate documentation of the record</b>	X		X		X
<b>(5) Flawed selection decision</b>	X	X		X	
<b>(6) Failure to follow evaluation criteria</b>			X	X	X
<b>(7) Unequal treatment of offerors</b>				X	X

The following is a sample of cases cited by the GAO for each of these most prevalent grounds for sustaining protests. This indicates the types of mistakes made by agencies in their procurements.

**1. Unreasonable technical evaluation (cited in four out of five years)**

- a. *CR/ZWS LLC*, B-414766, Sept. 13, 2017, 2017 CPD ¶ 288 (agency failed to find the awardee’s proposal unacceptable where its technical proposal failed to satisfy the minimum requirements of the solicitation).
- b. *Native Resource Dev. Co.*, B-409617, July 21, 2014, 2014 CPD ¶ 217 (agency mechanically applied internal staffing estimates when evaluating proposals).

**2. Unreasonable past performance evaluation (cited in three out of five years)**

- a. *Rotech Healthcare, Inc.*, B-413024 et al, Aug. 17, 2016, 2016 CPD ¶ 225 (agency failed to consider and document the similarity of the awardee’s past performance contracts to the requirement being solicited)
- b. *Al Raha Group for Tech Services, Log. Mgt. Int’l, Inc.* B-411015, Apr. 22, 2015, 2015 CPD ¶ 134 (agency failed to consider available past performance information concerning key personnel).

**3. Unreasonable cost or price evaluation (cited in four out of five years)**

- a. *Valor Healthcare, Inc.*, B-412960, July 15, 2016, 2016 CPD ¶ 206 (agency failed to evaluate the realism of protester's proposed pricing in accordance with the solicitation).
- b. *Esegur-Empresa de Seguranca, SA*, B-407947, Apr. 26, 2013, 2013 CPD ¶ 109 (agency failed to evaluate whether the awardee's low price was realistic, as required by the terms of the solicitation).

**4. Inadequate documentation of the record (cited in three out of five years)**

- a. *CFS-KBR Marianas Support Services, LLC*, B-410486 et al, Jan. 2, 2015, 2015 CPD ¶ 22 (agency failed to document why it changed its ratings where the offerors did not increase proposed staffing levels commensurate with the agency's discussion questions).
- b. *Supreme Foodservice GmbH*, B-405400 et al, Oct. 11, 2012, 2012 CPD ¶ 292 (Record did not show whether the agency reasonably evaluated offerors' past performance in numerous areas, in part because the agency did not retain an adequate record of its evaluation).

**5. Flawed selection decision (cited in three out of five years)**

- a. *Calnet, Inc.*, B-413886, Oct. 28, 2016, 2016 CPD ¶ 318 (agency's best value tradeoff decision relied entirely on adjectival ratings in finding proposals equivalent under the non-cost evaluation factors, rather than considering the identified strengths and weaknesses and evaluators' ranking of proposals).
- b. *Castro & Co.* B-412398, Jan. 29, 2016, 2016 CPD ¶ 52 (In making the selection decision, agency only considered point scores and failed to meaningfully consider the merits of the evaluations or proposed prices).

**6. Failure to follow evaluation criteria (cited in three out of five years)**

- a. *Tantus Tech*, B-411608, Sept. 14, 2015, 2015 CPD ¶ 299 (agency unreasonably failed to consider whether the awardee's proposal to relocate employees posed a risk inconsistent with the solicitation requirement to evaluate the extent to which the proposed staffing plan ensured that appropriately qualified staff would be available on an ongoing basis).
- b. *Logistics 2020, Inc.*, B-408543, Nov. 6, 2013, 2013 CPD ¶ 258 (agency's evaluation of offerors' proposed personnel failed to include a qualitative assessment as required by the solicitation).

## 7. Unequal treatment of offerors (cited in two out of five years)

- a. *IAP Work Servs., Inc.; EMCOR Gov. Servs.*, B-407917, July 10, 2013, 2013 CPD ¶ 171 (agency unreasonably credited only the awardee's proposal with a strength where the record showed that the protester proposed a similar strength).
- b. *Alutiiq Pacific, LLC*, B-409584, June 18, 2014, 2014 CPD ¶ 196 (agency disparately assigned strengths to awardee's and protester's proposal for offering essentially the same feature).

**The Takeaway:** The most striking aspect of the GAO reports on “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 of these errors cited by the GAO. First, agencies should draft solicitations that comply with FAR Subpart 15.2, Solicitation and Receipt of Proposals and Information. 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 made by agencies are included in my book, “The 100 Worst **Government** Mistakes in Government Contracting (NCMA 2012)” and should form the basis of “lessons learned” training for source selection officials in the federal government.

**For other helpful suggestions on government contracting, visit:**  
Richard D. Lieberman's FAR Consulting at <https://www.richarddlieberman.com/>, and Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes/>.