# Most Important Bid Protest Decisions Issued in the First Half of 2022

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# Overview

Both the U.S. Government Accountability Office and U.S. Court of Federal Claims have issued numerous bid protest decisions that every government contractor and their counsel should be aware of.

Decisions have been issued that implicate key personnel issues, particularly an offeror's duty to disclose the unavailability of key persons, an agency's improper conversion of a best-value procurement to a lowest-price technically acceptable basis, agency discretion to cancel a solicitation, timeliness of proposal submissions and bid protests, bid protest prejudice requirements, and many other important issues.

We will provide a brief overview, along with key takeaways from a handful of these cases.

# Definition of "professional employee"

- The GAO sustained the protest challenging the awardee's proposed professional employee compensation plan, where the evaluation relied on an unreasonable interpretation of the term "professional employee" to exclude certain categories of workers.
- Sabre Systems, Inc. protested the Navy's award of an IDIQ contract to American Systems Corporation alleging multiple grounds, including that the Navy failed to evaluate American Systems' total compensation plan as required by FAR provision 52.222-46, specifically, that the agency improperly excluded a large number of labor categories from its professional compensation evaluation.
- The GAO concluded that the agency's evaluation of total compensation plans under FAR 52.222-46 was flawed where it was based on an unreasonable interpretation of the term "professional employee."
- The agency determined that only a fraction of the solicitation's LCATs met the definition of "professional employee," claiming that while subpart D of part 541 provided the definition for "professional employees," that other subparts of part 541 also provided definitions for other categories of employees, which the agency read to mean that each subpart of part 541 constituted a mutually exclusive "bucket" of employee categories.
- The GAO agreed with the protester, holding that the plain language of the applicable FAR provision unambiguously requires agencies to evaluate the compensation plan for all proposed employees meeting the definition of "professional employees" as defined in subpart D of part 541, regardless of whether that employee also meets another part 541 labor category definition.

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# Unavailability of Key Personnel

The U.S. Court of Federal Claims (COFC) split from GAO precedent, holding that unless a solicitation includes a requirement that offerors update the government regarding the availability of key personnel if one of the key personnel becomes unavailable after proposal submission but prior to award, offerors are not required to provide such an update.

In *Golden IT, LLC v. United States*, No. 21-1966C (Feb. 4, 2022), the awardee Spatial Front, Inc. proposed an individual ("Mr. JH") as a key employee. At the time of submission, Mr. JH was an SFI employee, but departed the company a few weeks after proposal submission and prior to contract award. Golden IT alleged that SFI's proposal misrepresented his availability. Thus, the company's proposal should have been assigned a weakness.

The COFC found that the protestor had not met its burden of proving that SFI had any knowledge prior to proposal submission that Mr. JH intended to leave the company. Thus, there was no evidence that this was a deliberate misrepresentation by SFI.

# *Golden IT, LLC v. United States*, 157 Fed.Cl. 680 (2022)

Addressing the GAO rule requiring offerors to alert agencies of changes in proposed staffing after proposal submission — the COFC declined to follow that line of GAO decisions, finding the GAO rule to be "without legal basis" and "unfair."

The COFC noted that "[a] proposal is submitted at a point in time and is evaluated over what is often a lengthy period. The Court agrees, of course, that an offeror must have a reasonable basis for all facts and representations made in its proposal — and may not knowingly or recklessly include false statements of material fact. A court's assessment of an offeror's knowledge of facts and representations, however, is made with respect to the point in time at which the offeror submitted its proposal."

While this is a somewhat novel concept and could be beneficial to contractors that have key personnel who become unavailable between proposal submission and award, the *Golden IT* decision is not binding on other COFC judges, nor is it binding on the GAO.

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# Discussions in Large Department of Defense Procurements

*IAP Worldwide Services Inc. v. U.S.*, No. 21-1570C (Mar. 28, 2022)

- The Court deviated from GAO's precedent by holding that the Army unreasonably failed to conduct discussions in a billion-dollar procurement despite the default rule in favor of discussions created by Department of Defense (DoD) regulations.
- According to DFARS 215.306, "[f]or acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions."
- The GAO has held that while discussions are expected in DoD procurements valued at over $100 million pursuant to DFARS 215.306(c), agencies retain the discretion not to do so if it is deemed reasonable under a three-part test: "(1) the record showed there were deficiencies in the protester's proposal; (2) the awardee's proposal was evaluated as being technically superior to the other proposals; and (3) the awardee's price was reasonable." The Court rejected the GAO's three-part test and held that the DFARS presumption in favor of conducting discussions cannot be overcome by an agency's merely conclusory assertions.
- The Court noted that an agency is ***not*** obligated to conduct discussions (1) in procurements valued under $100 million; or (2) with a technically unacceptable offeror where the agency has made a competitive range determination excluding that offeror.

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# Misrepresentations Regarding Key Personnel

*Insight Technology Solutions, Inc.*, B-420133.2 et al. (Dec. 20, 2021) (Published Jan. 20, 2022)

- The GAO sustained protest alleging that awardee misrepresented that one of its key personnel had 9 years of experience and exceeded the solicitation's 5-year minimum requirement.
- Protester's initial argument relied on the proposed personnel's LinkedIn profile which listed fewer than 5 years work experience at the time of proposal submission.
- After requesting additional information from the awardee, the GAO determined that the proposed individual had only 11 months of relevant management experience.
- The GAO held that the awardee's misrepresentation was material because the agency relied on that misrepresentation in making the award.
- GAO recommended disqualification of the awardee, because "exclusion of an offeror from a competition is warranted where the offeror made a material misrepresentation in its proposal and where the agency's reliance on the misrepresentation had a material effect on the evaluation results."

# Failure to Adhere to the Solicitation's Terms

- In *AT&T Mobility LLC,* B-420494 (May 10, 2022), the GAO sustained a protest wherein the protester alleged that the agency failed to follow the solicitation's evaluation criteria by improperly converting the best value tradeoff procurement into an LPTA competition.
- The solicitation mandated that the award would be made on a best-value trade-off basis with a breakdown of: "(1) technical (40 percent); (2) transition (40 percent); and (3) corporate experience (20 percent), which included the key personnel experience element." Price was less important than the technical factors. AT&T's total evaluated price was $19,998,857 and Verizon's total evaluated price was $17,928,540.
- The protester argued that the evaluation scheme and adjectival ratings included in the solicitation indicated that the agency would qualitatively assess whether proposals failed to meet, met, or significantly exceeded requirements.
- The GAO sustained the protest based on the agency's use of a pass/fail analysis under the technical, transition, and corporate experience factors, where the solicitation required the use of a best-value tradeoff evaluation rather than selection based on a low price and technical acceptability.

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# Agency Discretion to Cancel a Solicitation

- In *Seventh Dimension, LLC v. United States*, 160 Fed. Cl. 1 (2022), the Court sustained a protest challenging the cancellation of a SDVOSB set-aside solicitation where the agency did not meet its obligations under FAR 15.206.
- The Army claimed it canceled the solicitation pursuant to FAR 15.206(e) because budget cuts had resulted in significant changes to the requirements. FAR 15.206(e) permits the government to cancel a solicitation if it issues an amendment that changes the solicitation's requirements so dramatically that additional offerors would have likely submitted bids if they knew of the change:
  - "(e) If, in the judgment of the contracting officer, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition."
- The Court held that the phrase "based on market research or otherwise" means "based on market research ***or evidence similar to market research,"*** such that some amount of evidence is required.

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# Timeliness of Proposal Submissions

- In *VERSA Integrated Solutions, Inc.*, B-420530 (April 13, 2022), the GAO denied a protest filed by VERSA because the agency did not receive its proposal in a timely manner consistent with the terms of the solicitation.
- The RFP provided for the submission of proposals in two parts. The agency would evaluate part one submissions first, and then send a notification to offerors who submitted a timely proposal, advising them as to whether the agency recommended that they submit a proposal for part two.
- The contract specialist and the contracting officer received twenty proposals via email by the November 12 deadline, not including Versa's. The evaluation period for part one proposals concluded on January 24, 2022, and the agency sent advisory notifications to the twenty offerors on January 26. On February 8, a Versa representative emailed the CO requesting an update on its proposal for part one, as Versa had not received an advisory notification. In response, the CO informed Versa that it had not received Versa's part one submission.
- Ultimately, the agency had received Versa's part one proposal via email, but the email was quarantined by the agency's server.
- Subsequently, Versa filed its protest arguing that the agency unreasonably rejected its proposal as late because Versa submitted its proposal prior to the deadline, and the agency had control of its proposal following that submission.
- The GAO disagreed, noting an offeror's duty to deliver their proposal to the proper place by the proper time. GAO also emphasized that the RFP included FAR 52.212-1, which provided that proposals not received by the contracting officer and contracting specialist by the exact time specified would be "late" and not evaluated.

# Timeliness of GAO Bid Protests

*K&K Industries, Inc.*, B-420422; B-420422.2 (March 7, 2022)

- The GAO dismissed the protest as untimely because it was filed more than 10 days after the agency unambiguously stated that the protester's enhanced debriefing had concluded.
- Generally, a protest must be filed within 10 days of when a debriefing is held. For DoD enhanced debriefings, the 10-day period begins once the debriefing has concluded—generally after one round of questions and answers.
- Here, the protester and the agency underwent three rounds of communications after award. Protester argued that each round of communications continued the debriefing and extended the protest deadline.
- The GAO held that the debriefing unequivocally concluded after the second round of communications.
- The agency's voluntary responses to the third round of questions, sent to the protester after the time to protest had expired, did not revive the untimely protest.

# Timeliness of GAO Bid Protests

*Battelle Memorial Institute, B-420403 et al.* (March 10, 2022)

- The GAO dismissed the protest as untimely where protester was not chosen as the "most highly qualified" firm, was offered a pre-award debriefing, elected to defer the debriefing until after the agency negotiated a contract, with the most highly qualified firm, and then filed a protest after receiving award notice.
- Under FAR subpart 36.6 procedures for architectural and engineering services, the agency evaluated proposals and notified offerors it had identified the most highly qualified offeror.
- Protester initially requested a pre-award debriefing after the notice of the most highly qualified offeror, but later changed its request to a post-award debriefing.
- Several months later, after negotiating with the highly qualified offeror, the agency formally awarded the contract to that offeror. Protester received its debriefing and filed the protest the next day.
- The GAO dismissed the protest because the protester should have filed its protest within 10 days of the "most highly qualified" decision, not months after the actual award.

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# Timeliness of GAO Bid Protests

*U.S. Marine Management Inc.*, B-420268 (April 14, 2022)

- Protester submitted three proposals in response to the solicitation. After discussions, the protester submitted one revised proposal, reaffirmed another proposal without revisions, and withdrew its third proposal.
- Agency informed protester that, although its third proposal was ultimately withdrawn, it had been included in the competitive range. Its remaining proposals, which it did not withdraw, were excluded from the competitive range.
- Several weeks later, the agency informed protester it had awarded the contract to another offeror.
- The notice of award informed unsuccessful offerors of their right to request a debriefing, which protester requested and received for the proposal it withdrew.
- Protester alleged the agency relaxed or waived solicitation requirements for the awardee, and that the awardee's technical and price evaluation was unreasonable.
- GAO held protester was not an interested party because if it sustained the challenges to the awardee's evaluation, the remedy would be for the agency to reevaluate proposals and make a new award decision. This would not involve consideration of any of protester's proposals, because two were excluded from the competitive range and one was withdrawn.
- The protest was also untimely because it was filed more than 10 days after the basis of protest was known. Since protester had withdrawn its proposal, it was not considered an unsuccessful offeror entitled to a post-award debriefing. The post-award debriefing was merely a courtesy that did not toll the 10-day period to file a protest.

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# Imposition of Unstated Evaluation Criteria

*Eccalon LLC*, B-420297, B-420297.2 (Jan. 24, 2022)

- The GAO sustained the protest of agency's evaluation because the Source Selection Authority's findings had no nexus to the stated evaluation criteria.
- Agency found that the protester's higher-rated proposal was only somewhat superior to that of the awardee because the protester's higher ratings related to its experience and not necessarily to innovation.
- Notably, neither experience nor innovation was listed as evaluation criteria in the solicitation—only understanding, practicality, feasibility, and reliability.
- GAO found the agency's decision to decrement protester's proposal because of a lack of innovation raised a consideration not reasonably encompassed by the stated evaluation criteria.

# Proving Prejudice Before COFC

*G4S Secure Integration LLC v. United States*, No. 21-1817C (Jan. 24, 2022)

- The Court denied the protest for lack of prejudice because the protester benefitted from the same alleged evaluation error that benefitted awardee.
- Protester alleged the awardee, a joint venture (JV), was ineligible for award because it did not register with the System for Award Management (SAM).
- While the JV members were registered on SAM, the JV itself was not.
- The Court agreed that the FAR requires JVs to separately register with SAM.
- The protester, however, was also a joint venture that had not registered with SAM, meaning it benefited from the same error.

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# Questions?

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# Have More Questions? Contact us

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