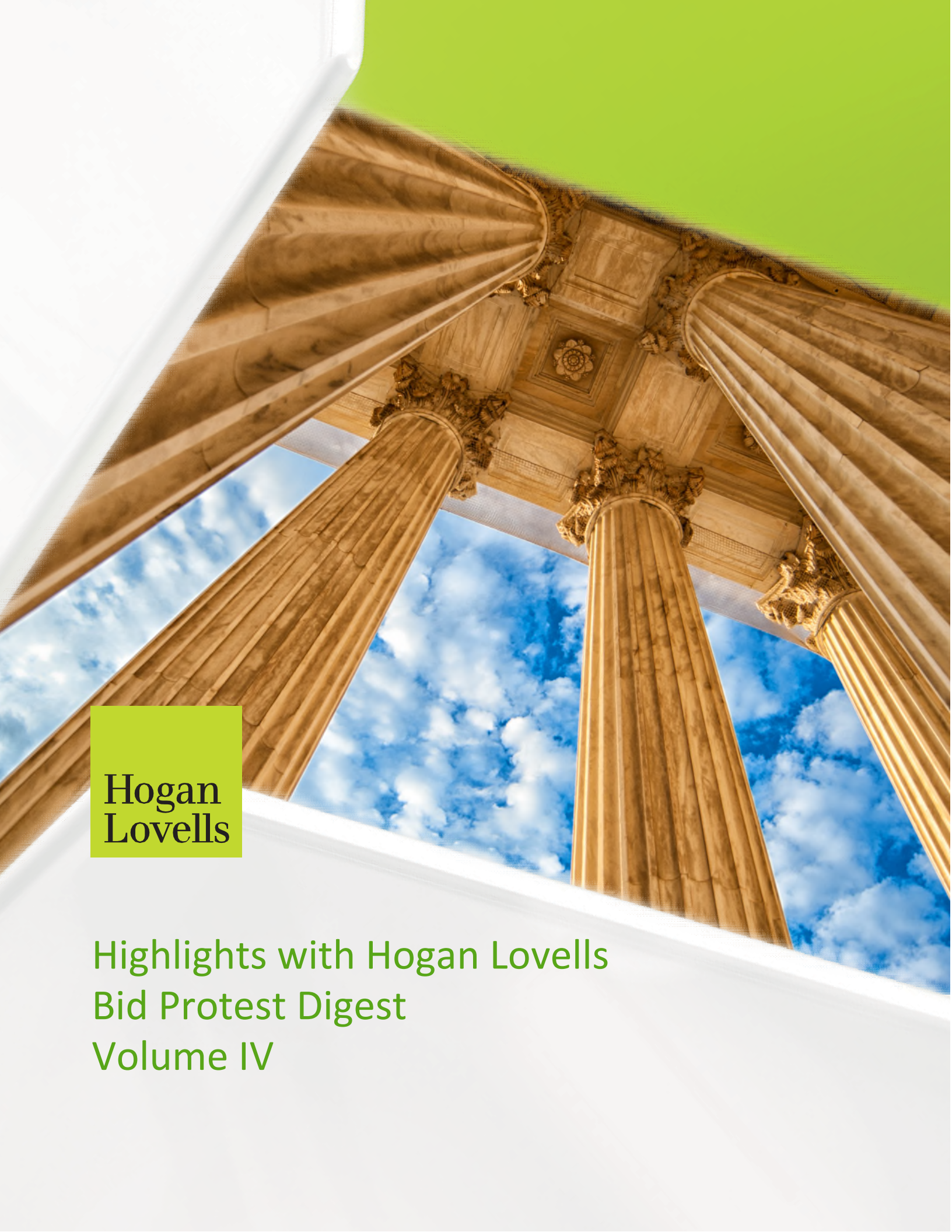

Hogan Lovells

Highlights with Hogan Lovells Bid Protest Digest Volume IV

This issue of bid protest highlights includes decisions from the U.S. Court of Federal Claims (COFC) and the U.S. Government Accountability Office (GAO). These decisions emphasize important legal principles addressing: (1) organizational conflict of interest investigations; (2) Buy American Act waivers; (3) a procuring agency's obligation to adequately document price realism evaluations; (4) timeliness of bid protests; (5) a procuring agency's duty to evaluate proposals evenhandedly and in accordance with solicitation terms; (6) the scope of corrective action; and (7) exclusion based on unfair competitive advantage gained via use of a former government employee in connection with proposal activity.

MANDEX, Inc. B-421664, et al., 2023 WL 5393491 (Aug. 16, 2023)

As seasoned contractors and protest attorneys well know, GAO affords a high level of deference to agencies' organizational conflict of interest (OCI) determinations. But GAO's decision in *MANDEX, Inc.* is a reminder that an agency's investigation must still be reasonable and comprehensive—and not based on unsupported assumptions.

In *MANDEX*, GAO sustained two OCI allegations: one related to alleged unequal access to information and another involving impaired objectivity concerns. First, with respect to the unequal access OCI, GAO found that although the Navy conducted an OCI investigation before awarding a $58 million task order to the awardee, this analysis was not reasonable because the contracting officer failed to meaningfully consider the possibility of potential OCIs arising from the awardee's performance of a related task order awarded shortly before proposals were submitted under the solicitation for the order at issue. The contracting officer's determination that no OCI existed was based on the fact that the related task order was awarded only 15 days before proposals were due, and the awardee had not performed substantive work during that period (instead only performing transition-in tasks). Relying on this distinction between transition-in tasks and "substantive performance," the contracting officer concluded that the awardee did not have an opportunity to gain unequal access to competitively useful information prior to submitting its proposal.

GAO agreed with the protester that the contracting officer's focus had been misplaced, and he had erred in failing to actually address whether the awardee had ***access*** to any nonpublic or source selection information, or whether any such information was competitively useful. Instead, the contracting officer ***assumed*** that no OCI existed simply because the awardee's related, recently awarded task order was in a transition period of performance, and all substantive work was still being performed by the incumbent contractor.

Second, GAO also ruled that the awardee's proposal suffered from an impaired objectivity OCI. This decision, too, was based on inadequacies in the contracting officer's investigation, which GAO found had been "unduly focused" on the protester's specific allegations at the expense of "a meaningful, comprehensive review of the potential for conflicts posed by the [relevant] task orders."

The *MANDEX* decision highlights that OCI allegations remain a real threat to award decisions—even, at times, where an agency has conducted an investigation and determined there are no concerns. In *MANDEX*, the contracting officer's ultimate conclusion that no OCIs existed may well have been the right call. But without facts and documentation to support the contracting officer's assumptions regarding unequal access—and faced with an overly narrow impaired objectivity investigation—GAO would not accept the results of the investigation.

There are several important takeaways from this decision. It offers a reminder that government contractors should implement internal processes and procedures to effectively identify and mitigate potential OCIs as early as possible in the procurement process and provide the agency with all documentation needed to ensure the agency can conduct a robust investigation. And, protest counsel should be on alert for holes in an agency's OCI analysis—even if the conclusions sound

reasonable on their face, what is supporting them? Is the agency's determination based on well-founded facts and the agency's careful review of those facts, or just assumptions about what the agency suspects might have occurred?

Unico Mechanical Corp., B-420355.6, B-420355.7, 2023 WL 5170623 (Aug. 1, 2023)

In recent years, the federal government has engaged in well-publicized efforts to increase domestic production throughout various industries. This push has included implementation of strengthened domestic preferences under the Buy American Act (BAA), which has led to increased scrutiny surrounding BAA waivers. In *Unico Mechanical Corp*., GAO sustained a protest challenging a U.S. Army Corps of Engineers (USACE) waiver of the BAA for awardee McMillen, LLC (McMillen). USACE sought to award a construction contract for the replacement of certain butterfly valves and associated control systems at the Cougar Dam in Oregon. The solicitation incorporated the requirements of the BAA without exception. Prior to the initial submission of proposals, one potential offeror submitted a request for a BAA waiver, asserting that no domestic manufacturers could produce the required butterfly valves. In response, the contracting officer contacted six manufacturers and inquired as to whether they could perform the contract in compliance with the BAA. Two of these manufacturers indicated that they could produce the required valves in compliance with the BAA, two stated they could possibly produce the valves with additional cost or time implications, and two responded that they could not comply.

Based on this market research, the contracting officer concluded that sufficient resources existed to enable contractors to comply with the BAA. Nine offerors, including McMillen, submitted proposals in response to the solicitation. Because McMillen's proposal relied on the use of foreign materials for the required butterfly valves, the company requested a BAA waiver, which USACE denied. McMillen submitted additional information in support of its request following USACE's denial, but GAO found no record evidence that USACE considered this new information before making award to McMillen.

Shortly after award, the agency modified McMillen's contract to add the butterfly valves to the list of material exempted from the BAA's domestic material requirement. Unsuccessful offeror Unico Mechanical Corporation (Unico) protested USACE's apparent grant of a BAA waiver and its evaluation of the offerors' proposals—prompting USACE to take corrective action. During that process, USACE reconsidered McMillen's BAA waiver request. The contracting officer found that, in furtherance of its waiver request, McMillen had conducted its own market survey, upon which the contracting officer relied to conclude that only one firm could produce BAA-compliant parts. Notwithstanding the fact that McMillen's market survey did not include any information about Unico, the contracting officer determined that Unico was not a domestic supplier, concluding—for the first time—that Unico had provided insufficient pricing information in its proposal to determine its domestic supplier capabilities. USACE reaffirmed the award to McMillen based on this reevaluation.

Unico again protested. This time, GAO sustained, finding that (1) USACE's BAA waiver was unreasonable because the agency failed to explain its basis for changing its position that sufficient domestic suppliers could provide the valves (as noted, it had previously determined that at least two could do so), and (2) no reasonable basis existed for the agency's new conclusion that Unico was not a domestic supplier due to a perceived lack of necessary price information. GAO also explained that, as the entity requesting the waiver, McMillen was responsible for providing the agency with a reasonable market survey, and McMillen failed to meet that obligation by neglecting to include Unico in its market survey.

Unico is a good reminder that contractors should review their internal BAA waiver policies and procedures to ensure future waiver requests will satisfy the heightened level of scrutiny agencies are employing when reviewing such requests. And protesters disappointed by an agency's waiver

decision should ensure their counsel closely scrutinize the market research on which the agency relied.

MPZA, LLC, B-421568, B-421568.2, 2023 CPD ¶ 165 (July 3, 2023)

A common theme in sustained GAO protests is agencies' failure to adequately document their evaluation records. Although GAO grants some leeway to agencies if the contemporaneous record is silent but the agency is able to offer supporting testimony to fill in the gaps (consistent with whatever record does exist), sometimes there just isn't any documentation—contemporaneous or created in response to the protest—to support the agency's evaluation.

Such was the case in *MPZA, LLC*. There, protester MPZA, LLC (MPZA) alleged that (1) the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) failed to perform a proper price comparison between proposals, and (2) the awardee's proposed price was unrealistic. The solicitation established an estimated number of 1,912 labor hours per full-time equivalent (FTE) and provided estimated numbers of FTEs needed in various labor categories. As such, the solicitation required offerors to propose fixed hourly, fully burdened labor rates for FTEs in each labor category, but it also permitted offerors to submit proposals outside of the estimated amount of personnel. If offerors took the latter approach, the agency was required to assess whether the proposed level of effort and labor mix were appropriate for the requirements of the solicitation so as to ensure successful performance. ATF also had to evaluate whether the proposed hourly rates were reasonable. The solicitation reserved the agency's right to consult a price realism analysis in order to determine whether proposed prices were realistic, not too low, and mitigate any risk of poor performance on the contract.

The awardee proposed its own labor mix and level of effort rather than using the estimates provided by ATF, and the agency opted to conduct a price-realism analysis, as permitted by the solicitation. GAO observed that the record of ATF's evaluation of the awardee's price realism was threadbare, offering only conclusory statements that the company had provided adequate rationale for its labor-hour adjustments, that its proposed level of effort and labor mix seemed appropriate, and that its proposed prices appeared to be realistic. GAO found unreasonable the fact that the contemporaneous record was devoid of any explanation as to how the agency had arrived at these determinations and did not reflect analysis of the awardee's hours, labor mix, or prices. And the agency did not fill in the blanks during the protest proceedings, either: it focused its briefing on responding to the protester's allegations about formatting and mathematical errors in the awardee's price proposal, rather than addressing head-on the reasonableness of the price-realism evaluation by offering detail to support that a meaningful analysis was actually performed.

GAO concluded that "[h]aving chosen to evaluate price realism, ATF was obligated to document its evaluation adequately." Because the agency failed to do this, GAO had no basis to conclude that the evaluation was reasonable. It sustained the protest on this basis.

Beckman Coulter, Inc., B-421748, 2023 CPD ¶ 180 (July 28, 2023)

Contractors that have participated in bid protests before GAO are familiar with the stringent timeliness requirements applicable to an initial protest filing. GAO's decision in *Beckman Coulter* serves as a cautionary tale to government contractors and their counsel alike: interpret the timeliness requirements conservatively and do not delay filing a bid protest, even if you are still waiting on the government to provide potentially relevant information.

In this case, Beckman Coulter, Inc. (Beckman Coulter) protested the Army's award of a contract for laboratory equipment and maintenance services for flow cytometry testing to Sysmex America, Inc. (Sysmex), alleging that Sysmex should have been found technically unacceptable. Rather than reach the merits of the protest, GAO dismissed it because Beckman Coulter had filed the protest more than 10 days after learning its basis for protest. According to the agency, because the protester knew

or should have known of the basis for protest on May 3, 2023 (when the award decision was announced), GAO's bid protest regulations required the protester to file no later than May 15 (accounting for weekends). Beckman Coulter disagreed, arguing that it did not know the basis of the protest until May 11, the date on which it received a response email from the Army answering certain questions Beckman Coulter had submitted that same day. Thus, the protester insisted, its May 19 protest filing was timely.

GAO agreed with the Army, explaining that upon receiving the unsuccessful offeror notice identifying Sysmex as the awardee on May 3, Beckman Coulter knew the basis for its allegation that Sysmex was technically unacceptable. Because award was made on a lowest-priced, technically acceptable (LPTA) basis, Beckman Coulter knew that the Army had found Sysmex acceptable—otherwise, it could not have received award. Beckman Coulter alleged that it did not have enough information to protest as of May 3 because it could not tell whether the alleged violation was attributable to the Army relaxing requirements or another error that protester could not identify. GAO found no merit to this argument, noting that Beckman Coulter's correspondence with the Army did not elicit any new information that was not already apparent from the agency's notice of award.

This decision offers a stark reminder that when it comes to questions of timeliness at GAO, it is always advisable to err on the side of caution. It is often better to timely file a protest that might be missing some detail (which can be obtained later and then included in a supplemental filing) than to wait for additional information and risk having the protest dismissed as untimely.

Sys. Plus, Inc. et al., B-419956.184 et al., 2023 CPD ¶ 163 (June 29, 2023); Phoenix Data Security, Inc. et al., B-419956.200 et al., 2023 CPD ¶ 172 (July 10, 2023)

Continuing the challenges affecting what is perhaps the most widely watched and protest-plagued acquisition this year, GAO recently upheld 98 protests challenging disappointed offerors' elimination from competition for the 10-year, $50 billion National Institutes of Health (NIH) Chief Information Officer-Solutions and Partners 4 (CIO-SP4) governmentwide acquisition contract for information technology services.

The Phase 1 competition required offerors to self-score certain aspects of their proposals related to experience and other capabilities, such as possessing specific certifications or clearances. NIH committed to validate offerors' self-scoring such that only the highest-rated offerors would advance to Phase 2. To support this determination, NIH would establish a cutline, based on the agency-validated self-scores, for each socioeconomic category of offerors to decide which proposals would advance to the next phase. Nearly a hundred offerors protested the agency's latest decision to exclude their proposals from the competition as the result of the offerors' Phase 1 evaluations—just the most recent in a series of challenges to these evaluations, which have previously caused the agency to take corrective action to reassess the cutlines and address procurement inconsistencies.

GAO sustained the latest protests in two merits decisions (one covering protesters that had retained outside counsel, and the other relevant to the *pro se* protesters). The crux of the issue, GAO found, was NIH's approach to validating offerors' claimed self-scores. Although the solicitation did not explain precisely how the agency would do this, it nonetheless expressly stated that such validation ***would*** occur and that the validated scores would inform the cutlines to determine which proposals advanced to Phase 2. The protesters argued, and GAO agreed, that neither the contemporaneous record nor the agency's protest responses demonstrated that NIH reasonably validated all 1,150 offerors' proposed self-scores or that the agency reasonably relied on the validated scoring to establish the cutlines.

In its decisions, GAO first disagreed with NIH's claims that it validated all offerors' self-scores as required by the solicitation. Instead, the agency's inconsistent and misleading protest responses, which were supported only by incomplete and inconclusive documentation, failed to reasonably

demonstrate that the agency in fact validated the self-scores for all 1,150 offerors as the solicitation required. Because GAO could not determine whether the required validation occurred, GAO sustained the protests on this basis.

GAO next concluded that NIH had unreasonably established the cutlines that would determine which proposals advanced to Phase 2. The agency tried to assure GAO that, per the solicitation, it determined the cutlines based on the agency-validated self-scores of the proposals. But the record contradicted these claims and instead showed that the agency simply relied on offerors' ***unvalidated*** and unadjusted self-scores to establish the cutlines. GAO found the record suggested that the agency's initial "validation" of scores merely confirmed whether an offeror had submitted documentation supporting its claimed self-score. Based on those self-scores, NIH then established the initial cut-offs for each socioeconomic category and eliminated any proposal that fell below that cut-off. It was only ***after*** establishing the cutline that the agency performed a "hard" validation on a limited subset of offerors who were above the initial cutlines. The result: NIH apparently never validated or adjusted the scoring for any of the proposals that fell below the cutline, thereby possibly excluding from contention offerors whose validated scoring might have qualified them to advance to Phase 2. The agency failed to use validated scores to establish the cutlines as the solicitation required, and GAO sustained the protests on this basis as well.

This latest CIO-SP4 decision is a crucial reminder that agencies must evaluate proposals evenhandedly and in accordance with the solicitation's terms—and if they want to avoid a sustained protest (or 98), they cannot cut corners in an effort to advance an acquisition that has been significantly (and repeatedly) delayed. Following the GAO decisions, NIH confirmed that it would take corrective action to reevaluate all proposals, including a reassessment of the cutlines, and extend the predecessor CIO-SP3 vehicle through April 29, 2024. It remains to be seen whether the agency's corrective action will impact which offerors ultimately are selected to advance to Phase 2. Regardless of the result, it is a fair bet that another wave of protests will follow.

Kupono Govt. Servs., LLC; Akima Sys. Eng'g, LLC B-421392.9 et al., 2023 CPD ¶ 136 (June 5, 2023)

Kupono Government Services, LLC; Akima Systems Engineering, LLC is another recent case highlighting both the bounds of agency discretion and how critically important it is for an agency to maintain a robust record to support its procurement decisions. In this decision, GAO sustained a pair of protesters' challenges to the scope of the Department of Energy's (DOE) planned corrective action, which DOE had agreed to take to resolve several protests challenging its award of a contract for the management and operation of the agency's national training center. The proposed corrective action limited revisions to cost proposals only, however, and committed DOE to simply "review" other areas of its evaluation and make a new source selection decision. Following GAO's dismissal of the initial protests as academic, two of the original protesters filed new protests challenging the limited scope of DOE's intended corrective action. Both protesters argued that, given the inherent nature of cost-reimbursement contracts, their cost and technical proposals were "inextricably intertwined." Therefore, according to the protesters, DOE's plan to refuse to solicit or accept revised technical proposals was unreasonable.

GAO agreed. As an initial matter, GAO acknowledged the broad discretion afforded agencies to determine the scope and implementation of corrective action—so long as the corrective action is reasonable in relation to the concerns that prompted it. This means that, although in appropriate circumstances an agency can limit proposal revisions to specific aspects of offerors' proposals, an agency cannot prohibit offerors from revising related aspects of their proposals that are materially impacted by the agency's corrective action.

Against this backdrop, GAO sustained the protests for two reasons. First, GAO criticized DOE for failing to articulate the specific flaws in its procurement process (specifically, its evaluation of the

offerors' cost and technical proposals) that necessitated taking corrective action. The contracting officer's declarations on this point provided no substantive details or explanations as to the nature of the procurement flaws, the purported impact on the evaluation, or how the proposed corrective action would remedy any agency errors. Instead, it offered only what GAO described as "generic references" to "mathematical errors" and "errors in certain assumptions," as well as vague references to "'some areas where the evaluations did not follow the applicable provisions of the solicitation and regulations as fully as they could have.'" The rest of the record also didn't include any meaningful information that would shed light on these questions. Second, GAO found that because it could not discern the precise concerns underlying DOE's decision to take corrective action, it could not assess whether the agency's decision to restrict proposal revisions was an appropriate remedy for those unstated concerns. Moreover, both protesters convincingly demonstrated that their respective cost and technical proposals were inextricably intertwined, such that any revisions to the cost proposal would necessarily implicate the protesters' technical approach to, for example, personnel recruitment, retainment, and employee benefits.

Accordingly, GAO concluded that DOE erred in limiting its corrective action to cost proposal revisions only and recommended that offerors be permitted to revise any aspect of their proposals or, in the alternative, any aspect of their proposals impacted by revisions to their cost proposal.

*Accelgov, LLC v. United States, No. 23-693C, 2023 WL 5091196, at *1 (Fed. Cl. Aug. 8, 2023)*

An agency's intent to take corrective action may not be a basis to dismiss a protest, delay a protest pending the completion of the corrective action, or preclude a plaintiff from challenging the intended corrective action before the corrective action occurs.

In May 2023, Plaintiffs AccelGov, LLC (AccelGov) and ISI-Markon JV, LLC (ISI) filed separate protest actions in the Court of Federal Claims challenging the same procurement. The Court consolidated the claims, and the Government moved to dismiss, arguing the agency's anticipated corrective action mooted the pending complaints. The Court denied the motion and directed the parties to submit a joint status report proposing a schedule for further proceedings. The parties submitted three competing proposals. The Court rejected the Government's proposal (not allowing plaintiffs to challenge the corrective action but instead forcing them to file amended complaints after the corrective action had been taken) and AccelGov's proposal (challenging the corrective actions by opposing a motion to dismiss). Instead, adopting ISI's proposal, the Court held that if plaintiffs sought to preemptively challenge the intended corrective action they were free to file amended complaints to do so. Relying largely on *Systems Application & Technologies, Inc. v. United States (SA-Tech)*, 691 F.3d 1374 (Fed. Cir. 2012), the Court determined that immediate challenges to the intended corrective action were appropriate because 1) the Court had jurisdiction to hear a challenge to intended corrective action and there was no reason to delay the exercise of that jurisdiction; 2) even if the Court could delay the challenge to the intended corrective action, the Government failed to address the possible prejudice caused by forcing the parties to recompete for the contract; and 3) denying plaintiffs the ability to challenge the intended corrective action would limit their case for injunctive relief.

*CACI, Inc. v. United States, No. 23-324C, 2023 WL 4624485, at *1 (Fed. Cl. July 20, 2023)*

An offeror's exclusion, one hour before the issuance of a final solicitation, on the basis of unfair competitive advantage, was upheld when that offeror hired as a consultant the agency employee who previously ran the incumbent contract program office, and among other things, oversaw cost, schedule, and performance of the incumbent contract; approved incumbent task order requests which included proprietary cost, rate, and technical information; chaired the Source Selection Advisory Council; and had access to "competition sensitive" information about incumbent hardware designs.

Plaintiff CACI, Inc. – Federal (CACI) challenged the Army's award of CHS-6—the upcoming, next generation of an Army contract to buy commercial-off-the-shelf computer technology, accessories, and related services—to incumbent Intervenor GDIT, Inc. (GDIT). CACI claimed the Army's decision to exclude CACI from the competition procedurally violated the FAR and the Administrative Procedures Act (APA), substantively was arbitrary and contrary to law, and contravened the Competition in Contracting Act (CICA).

The Army released three requests for information for the CHS-6 project—on February 2020, January 2021, and July 2021. Draft solicitations followed on January 14 and March 29, 2022. The final solicitation was released October 7, 2022. Contractor proposals were due on November 22, 2022 and the Army planned to award the CHS-6 in August 2023 (it was awarded Sept. 1).

On October 7, 2022, "barely an hour" before the final solicitation was released, the contracting officer notified CACI of its exclusion from the procurement for an "unfair competitive advantage." The contracting officer faulted CACI for hiring the former Army employee who managed the predecessor CHS-5 procurement and performance (he chaired the SAAC and managed the CHS-5 execution) as an independent contractor to help prepare its bid because his knowledge and previous access to proprietary GDIT documents gave CACI "at a minimum, an appearance of an unfair competitive advantage." The contracting officer had twice notified CACI about concerns with the company's apparent unfair competitive advantage in an April 2022 notice of concern (which CACI refuted), and in an August 2022 preliminary determination of exclusion (in repsonse to which CACI declined to propose a mitigation plan or ask for the evidence underlying the CO's conclusions).

CACI protested its exclusion with GAO and submitted an offer for CHS-6 pending the protest resolution. GAO denied the protest, finding the Army reasonably excluded CACI and that the Army properly warned CACI of its concerns.

The Court rejected CACI's protest entirely, finding that 1) the Army complied with the FAR by not unduly delaying action and by providing CACI meaningful opportunity to respond; 2) the Army's investigation and exclusion was not arbitrary, contrary to the requirements of the APA, or violative of APA due process requirements; 3) the substantive decision to exclude CACI complied with the law and CICA.

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh
City Hong Kong
Houston Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Munich New
York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo Ulaanbaatar*
Warsaw
Washington, D.C.

*Our associated offices Legal Services Center: Berlin

Mike Mason
Partner | Washington, D.C.
T +1 202 637 5499
E: mike.mason@hoganlovells.com

Stacy Hadeka
Counsel | Washington, D.C.
T +1 202 637 3678
E: stacy.hadeka@hoganlovells.com

Christine Reynolds
Senior Associate | Washington, D.C.
T +1 202 637 5798
E: christine.reynolds@hoganlovells.com

Taylor Hillman
Senior Associate | Washington, D.C.
T +1 202 637 6424
E: taylor.hillman@hoganlovells.com

Thomas Hunt
Senior Associate | Northern Virginia
T +1 703 610 6120
E: thomas.hunt@hoganlovells.com

Lauren Olmsted
Associate | Washington, D.C.
T +1 202 637 5772
E: lauren.olmsted@hoganlovells.com

www.hoganlovells.com