



United States Government Accountability Office  
Washington, DC 20548

# **GAO BID PROTEST OVERVIEW**

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Updated December 2012

**Bid Protest Statistics for Fiscal Years 2008-2012**

	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008
Cases Filed <sup>1</sup>	2,475 <sup>2</sup> (up 5% <sup>3</sup> )	2,353 (up 2%)	2,299 (up 16%)	1,989 (up 20%)	1,652 (up 17%)
Cases Closed <sup>4</sup>	2,495	2,292	2,226	1,920	1,582
Merit (Sustain + Deny) Decisions	570	417	441	315	291
Number of Sustains	106	67	82	57	60
Sustain Rate	18.6%	16%	19%	18%	21%
Effectiveness Rate <sup>5</sup>	42%	42%	42%	45%	42%
ADR <sup>6</sup> (cases used)	106	140	159	149	78
ADR Success Rate <sup>7</sup>	80%	82%	80%	93%	78%
Hearings <sup>8</sup>	6.17% (56 cases)	8% (46 cases)	10% (61 cases)	12% (65 cases)	6% (32 cases)

<sup>1</sup> All entries in this chart are counted in terms of the docket numbers (“B” numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same “B” number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate case for purposes of this chart.

<sup>2</sup> Of the 2,475 cases filed in FY 2012, 209 are attributable to GAO’s bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

<sup>3</sup> From the prior fiscal year.

<sup>4</sup> Cases closed include protests, cost claims, and requests for reconsideration.

<sup>5</sup> Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

<sup>6</sup> Alternative Dispute Resolution.

<sup>7</sup> Percentage of cases resolved without a formal GAO decision after ADR.

<sup>8</sup> Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.

# RECENT GAO DECISIONS

## I. Evaluations And Source Selections

- **Relaxation of Requirements**

Tipton Textile Rental, Inc., B-406372, May 9, 2012, 2012 CPD ¶ 156. Protest that the agency misevaluated awardee's quotation was sustained where the solicitation required a barrier wall to achieve physical separation of soiled linens from cleaned linens, and awardee's quotation failed to comply with this requirement.

Tipton Textile Rental, Inc., B-406372, May 9, 2012, 2012 CPD ¶ 156. To make an award under a set-aside for small businesses, the contracting officer must have a representation from the awardee of its status as a small business. The award to a vendor whose quotation represented that the firm "is not" a small business concern was therefore improper, notwithstanding the contracting officer's belief that the vendor was confused by the layout of the small business representation and the contracting officer's retrieval of a central contractor registry listing for a firm having a slightly different name, in which that firm was described as a small business.

Asiel Enters., Inc., B-406780, B-406836, Aug. 28, 2012, 2012 CPD ¶ 242. Protest challenging the Air Force's use of a Nonappropriated Fund Instrumentality (NAFI) to provide mission essential food services was sustained where the Air Force transferred mission essential food service requirements to the NAFI on a noncompetitive basis and failed to otherwise justify the NAFI's provision of this requirement on a sole-source basis. By its terms, 10 U.S.C. § 2492 (2006) limits such agreements to those in support of morale, welfare, and recreation (MWR). Because mission essential food services--supported entirely with appropriated funds--are not within the MWR system, the transfer of such requirements to a NAFI without obtaining competition, or justifying an award to the NAFI on a sole-source basis, was in contravention of the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR).

- **Agency Failed to Follow Evaluation Criteria**

IBM Global Bus. Servs., B-404498, B-404498.2, Feb. 23, 2011, 2012 CPD ¶ 36. Protest that the agency evaluated proposal using an unstated evaluation consideration was sustained where record shows that agency gave awardee (but not protester) evaluation credit for proposing to achieve full operating capability (FOC) on an accelerated basis, but the solicitation neither defined FOC nor included a schedule for achieving it.

Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93. Protest of an agency's evaluation of the awardee's proposal under a key personnel experience evaluation factor was sustained where the agency did not evaluate the experience of the awardee's proposed key personnel in a manner consistent with the solicitation's stated evaluation criteria.

Rocamar Eng'g Servs., Inc., B-406514, June 20, 2012, 2012 CPD ¶ 187. Protest of the rejection of the protester's proposal of a modular bastion wall defense systems for failing a fire/burn test conducted by the agency was sustained where the record showed that the test was unfair and unreasonable.

Orion Tech., Inc.; Chenega Integrated Mission Support, LLC, B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268. Protest was sustained where the record showed that the agency mechanically and unequally applied undisclosed staffing estimates in evaluating the offerors' proposed staffing plans to determine whether proposals were acceptable or unacceptable. While an agency properly may rely on its own estimates of the manning levels necessary for satisfactory performance, absolute reliance on estimates can have the effect of arbitrary and unfairly penalizing an innovative or unusually efficient offeror.

- **Unequal Treatment**

The Emergence Group, B-404844.5, B-404844.6, Sept. 26, 2011, 2012 CPD ¶ 132. Protest sustained where the agency evaluated the protester's proposal under several factors unreasonably and in a manner unequal to how the awardees' proposals were evaluated.

- **Evaluations And Source Selection Decisions Must Be Documented**

ITT Sys. Corp., B-405865, B-405865.2, Jan. 6, 2012, 2012 CPD ¶ 44. In considering an agency's evaluation of cost and technical proposals in a cost reimbursement setting, the agency's evaluation must be adequately documented, such that the record reflects the agency's reconciliation of its technical and cost evaluation conclusions.

NikSoft Sys. Corp., B-406179, Feb. 29, 2012, 2012 CPD ¶ 104. Protest was sustained where the agency failed to provide meaningful explanation of its evaluation of the protester's past performance.

Clark/Foulger-Pratt JV, B-406627, B-406627.2, July 23, 2012, 2012 CPD ¶ 213. In a negotiated procurement which provided for award on a best value basis, a source selection official's (SSA) selection of a lower-priced proposal over a higher-rated proposal on the basis that the two offers were essentially technically equal was not reasonable where the SSA's judgment as to why the two offers were essentially equal was not adequately explained in the record, and was otherwise inconsistent with the contemporaneous evaluation record. Protest challenging the awardee's evaluation ratings was sustained, where there was inadequate documentation to establish why the awardee's ratings had been increased.

TriWest Healthcare Alliance Corp., B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191. In making a best value source selection decision, an agency may properly rely on a single evaluation factor—even a lower-weighted factor—if it is determined to be a key discriminator.

- **Best Value Tradeoff Ignored Price**

NikSoft Sys. Corp., B-406179, Feb. 29, 2012, 2012 CPD ¶ 104. Protest challenging the source selection decision in a best-value procurement was sustained where the agency selected awardee's higher-rated quotation without meaningfully considering the protester's lower price.

J.R. Conkey & Assoc., Inc. dba Solar Power Integrators, B-406024.4, August 22, 2012, 2012 CPD ¶ 241. Protest was sustained where, in making the award decision, the agency conducted a tradeoff only between the three proposals with the highest point scores and did not consider the lower prices offered by other apparently technically-acceptable lower-rated offerors, including the protester. A proper tradeoff decision must provide a rational explanation of why a proposal's evaluated technical superiority warrants paying a premium.

- **Agency's Evaluation Must Be Reasonable And Consistent With Stated Evaluation Criteria**

TriWest Healthcare Alliance Corp., B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191. Protest that the agency misevaluated proposals and made an unreasonable source selection decision was denied where the record showed that the agency's evaluation and source selection was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. Protest alleging that the agency's evaluation of the protester's proposal unreasonably ignored information that was "too close at hand" was denied where the protester failed to demonstrate that the information in question was relevant, or that the agency evaluators knew or should have known of the information.

- **Agencies Cannot Ignore Solicitation Requirements**

Philips Healthcare Informatics, B-405382.2 *et al.*, May 14, 2012, 2012 CPD ¶ 220. Protest was sustained where the agency improperly waived a material solicitation requirement for awardee, and protester had shown a reasonable possibility that it was prejudiced. Although the agency asserted that a particular solicitation requirement was merely a "goal," the requirement was stated in two different sections of the solicitation, and described as something with which vendors must "guarantee" compliance.

- **Evaluation Deficient**

IBM Global Bus. Servs., B-404498, B-404498.2, Feb. 23, 2012, 2011 CPD ¶ 36. As a general rule, a procuring agency must provide sufficient information in a solicitation so that offerors can compete intelligently and on a relatively equal basis.

- **No Specific Request for Final Proposal Revisions (FPRs)**

OMNIPLEX World Servs. Corp., B-406251, B-406251.2, Mar. 14, 2012, 2012 CPD ¶ 113 . Where an amendment to a solicitation did not specifically request that offerors submit FPRs, language giving notice to all offerors of a common cutoff date for receipt of offers has the intent and effect of requesting final proposal revisions.

- **Late FPRs**

Philips Healthcare Informatics, B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220. An FPR was properly rejected as late where it was received by the agency after the time set for submission.

NCI Info. Sys., Inc., B-405745, Dec. 14, 2011, 2011 CPD ¶ 280. An FPR was properly late where deadline was set as “close of business,” but no particular time was specified. The “close of business” means end of the official workday. Where, as here, an agency does not have officials working hours, then pursuant to FAR § 52.215-1(c)(3)(i), 4:30 p.m. local time was considered to be the close of business where the solicitation did not state specific time for receipt of proposals.

- **Agency Failed to Respond to Protester’s Arguments**

TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52. A challenge to the evaluation of a protester’s technical evaluation was sustained where the agency did not meaningfully respond to the protester’s arguments.

## **II. Price And Cost Evaluations**

- **Evaluating or Comparing Relative Costs**

DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136. While it is up to the agency to decide upon some appropriate, reasonable method for proposal evaluation, the method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror’s proposal would be more or less costly than another’s. Where estimates are not reasonably available, an agency may establish a notional estimate, consistent with the RFP requirements, to provide a common basis for comparing the relative costs of the proposals.

TriWest Healthcare Alliance Corp., B-401652.12, B-401652.13, July 2, 2012, 2012 CPD ¶ 191. The agency’s decision not to credit the protester’s proposal with approximately \$200 million in cost savings for the firm’s additional network discount guarantee related to active duty service member beneficiaries was reasonable where the agency analyzed all of the information regarding the discount and concluded that the additional guarantee would not result in quantifiable cost savings above those already obtained by operation of law as a result of the offeror’s primary discount.

- **Price And Cost Evaluations Must Be Consistent With Solicitation**

Emergint Technologies, Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295. Protest was sustained where the solicitation for the issuance of a fixed-price time-and-materials task order did not provide for a price realism evaluation, yet the agency discounted the protester’s lower price in its best value tradeoff decision based on its conclusion that the

protester's low pricing posed performance risk and reflected a lack of understanding of the agency's requirements.

- **Government Estimates**

Baltimore Gas and Elec. Co., B-406057 et al., Feb. 1, 2012, 2012 CPD ¶ 34. For the award of a contract for privatization of an electric utility system, the agency reasonably calculated its government "should cost" estimate used in the economic analysis required by 10 U.S.C. § 2688 (2009) to determine whether the privatization of an electric utility system would reduce the long-term cost to the government of the utility system. Based on this economic analysis, the agency reasonably concluded that the awardee's proposal provided the required long-term cost reduction, and determined that the protester was ineligible for award because its proposal did not reduce the long-term cost to the government.

- **Cost Reimbursement Contract**

ITT Sys. Corp., B-405865, B-405865.2, Jan. 6, 2012, 2012 CPD ¶ 44. Protest that the agency misevaluated proposals for a cost reimbursement contract was sustained where the record showed that there was no logical connection between the agency's technical evaluation and its most probable cost evaluation, and there was no information in the record to explain the apparent discrepancies between the technical and cost evaluations.

Data and Analytic Solutions, Inc., B-405278.2, Feb. 27, 2012, 2012 CPD ¶ 103. In a negotiated procurement for the award of a cost reimbursement contract where offerors were provided a range of estimated monthly workloads, and where offerors based their cost proposals upon differing workload assumptions, the agency reasonably normalized the cost proposals to the same workload estimate, where the anticipated workload was not dependent upon an offeror's approach and would be the same regardless of which offeror performed the contract.

- **Price Realism**

Digital Techs., Inc., B-406085, B-406085.2, Feb. 6, 2012, 2012 CPD ¶ 94. Protest challenging agency's price realism evaluation was sustained where the agency failed to consider proposed prices from all offerors in its analysis (as required by the terms of the solicitation) and agency's rationale for finding protester's prices unrealistic was not supported by the record.

Lifecycle Constr. Servs., LLC, B-406907, Sept. 27, 2012, 2012 CPD ¶ 269. Protest that the agency improperly rejected protester's proposal as unreasonably low priced was sustained where the agency based its conclusion on a comparison of the protester's price to the median price proposed by other offerors—including offerors whose proposals were determined to be unacceptable, ineligible for award, or priced unreasonably high.

- **Cost Realism**

TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52. Protest was sustained where the agency's evaluation of the offerors costs was not supported by an adequate record. The agency provided an inadequate and, apparently incomplete, contemporaneous record, and also failed to provide meaningful testimony in a hearing called for the purpose of addressing gaps in the agency's documentation.

KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175. The agency failed to conduct an adequate cost realism analysis of proposals where the record was devoid of any meaningful basis for the agency's acceptance as realistic of the awardee's cost proposal, and record showed that, beginning a year into performance, the firm's cost savings depended on replacement of staff whose resumes were relied upon for the awardee's higher technical ratings.

### **III. Discussions**

- **Inadequate/Misleading Discussions**

Unisys Corp., B-406326 et al., Apr. 18, 2012, 2012 CPD ¶ 153. Discussions were not misleading where the agency advised the protester that it believed that the protester's proposed staffing was insufficient, further advised the protester that it had provided no justification for the staffing level it proposed, and finally noted that the protester had not proposed any automation tools that might lead to staffing efficiencies.

KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175. The agency conducted misleading discussions where it advised protester during discussions that it should provide resumes for all proposed personnel for the lifespan of the contract, but later asserted that the RFP did not require such submission of resumes.

- **Agency Must Treat Offerors Fairly**

ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101. Protest that the agency should have requested clarifications from protester was sustained, where the record demonstrates that the agency improperly conducted discussions only with the awardee.

Unisys Corp., B-406326 et al., Apr. 18, 2012, 2012 CPD ¶ 153. The agency provided equal discussions where the discussions were tailored to each offeror's proposal and, similar to the questions presented to the protester, the agency identified various aspects of the awardee's proposal that appeared to be inadequately staffed.

- **What Constitutes Discussions**

MANCON, B-405663, Feb. 9, 2012, 2012, CPD ¶ 68. Where acceptability of a small business subcontracting plan is a responsibility issue, exchanges between the agency and an offeror concerning such plans are not discussions.

Tipton Textile Rental, Inc., B-406372, May 9, 2012, 2012 CPD ¶ 156. Protest was sustained where the agency used simplified acquisition procedures, but also negotiated



procurement procedures that resulted in unequal discussions. Exchanges that the agency characterized as “informal shop talk” during the site visit constituted discussions, and the protest was sustained where the agency failed to consider the information that the protester provided in response to discussions in the evaluation of the protester’s proposal.

CH2M Hill Antarctic Support, Inc., B-406325 et al., Apr. 18, 2012, 2012 CPD ¶ 142. Exchanges with the awardee were clarifications, and not discussions, where the agency requested that the awardee confirm a mistake that was apparent from the face of the proposal.

#### **IV. Past Performance Evaluations**

- **Past Performance Evaluations Must Be Consistent With Solicitation**

The Emergence Group, B-404844.5, B-404844.6, Sept. 26, 2011, 2012 CPD ¶ 132. The agency’s evaluation of past performance was unreasonable and inconsistent with the solicitation, where the record shows that the agency did not meaningfully assess the relevance of the offerors’ prior contracts. See also The Emergence Group, B-404844.7, Feb. 29, 2012, 2012, CPD ¶ 133.

Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216. The agency reasonably attributed past performance and experience of affiliated entities to the awardee where its proposal demonstrated a significant nexus to the affiliates, including a statement that the parent company had declared the program a top corporate priority and indicated that the awardee would rely on the personnel and managerial resources of its affiliated entities in performance of the contract.

Philips Healthcare Informatics, B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220. Protest that the agency’s evaluation of past performance was unreasonable was sustained where the record did not contain any evidence that the agency performed a substantive review the strengths and weaknesses associated with the offeror’s past performance. In fact, it appeared that the past performance factor was eliminated from consideration or, at best, was converted to a pass/fail assessment.

Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292. Protest challenging the agency’s assignment of the highest possible experience/past performance rating to the awardee’s proposal under the size and complexity evaluation element was sustained where the solicitation called for comparison of the offerors’ most relevant prior contracts to a defined dollar threshold, on an individual basis, and the record showed that none of the awardee’s contracts met the dollar threshold.

- **Past Performance Evaluations Must be Documented**

TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52. Challenge to the evaluation of the awardee’s past performance was sustained where the record provided by the agency did not explain how it evaluated the relevance of offerors’

past performance, or whether its proposed subcontractors merited consideration under the terms of the solicitation.

Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292. Protest challenging the evaluation of favorable past performance data obtained internally by the agency, which conflicted with adverse past performance information provided in the awardee's proposal, was sustained where the record did not permit meaningful review of whether the agency's evaluation was reasonable.

## **V. Federal Supply Schedule (FSS) Purchases**

- **Terms of the Solicitation**

Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260. Protest that challenged the terms of a solicitation for commercial products and services under vendors' FSS contracts was sustained where the record did not show that the agency performed adequate market research to demonstrate that the terms were consistent with customary commercial practice, as required by the rules applicable to commercial item procurements set forth in the FAR at Part 12.

- **Evaluations and Source Selections Must be Documented**

NikSoft Sys. Corp., B-406179.2, Aug. 14, 2012, 2012 CPD ¶ 233. Protest concerning a procurement conducted under FSS procedures where a statement of work was included is sustained where the agency improperly made upward adjustments to the protester's level. The record provided no basis for the agency's determination that the protester's level of effort was insufficient or that the protester's level of effort should have been increased to the same level proposed by the successful vendor.

Cyberdata Techs., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230. Protester's argument that its technically-acceptable quotation was excluded from the competition without consideration of price in a best value acquisition under the FSS was sustained where FAR subpart 8.4 requires that price be considered in establishing BPAs under the FSS, and where the record shows that the agency "downsized" the pool of vendors, by excluding some of them, like the protester, who was technically acceptable, without consideration of their lower prices. See also Glotech, Inc., B-406761; B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248.

The Clay Group, LLC, B-406647, B-406647.2, July 30, 2012, 2012, CPD ¶ 214. Protest challenging agency's procurement of bathroom paper products was sustained where the record reflected that the evaluation methodology utilized by the agency was inconsistent with the terms of the solicitation rating to the relative importance of evaluation factors. Protest was also sustained where the record did not support a finding that the agency reasonably evaluated quotations under evaluation factors set forth in the solicitation, and the record showed that the source selection decision was based on a mechanical comparison of the firms' point scores.

## **VI. Organizational Conflicts Of Interest (OCI)**

- **Impaired Objectivity OCI**

Cognosante, LLC, B-405868, Jan. 5, 2012, 2012 CPD ¶ 87. Protest against exclusion of protester from the competition was denied where the contracting officer reasonably determined that the protester's dual role as both a state and federal audit contractor with respect to the Medicaid program would pose an impaired objectivity OCI that would not be adequately mitigated by protester's proposed firewall. GAO notes that it has held that a firewall arrangement is virtually irrelevant to an OCI involving potentially impaired objectivity, because the conflict pertains to the organization, and not the individual employees.

Guident Technologies, Inc., B-405112.3, June 4, 2012, 2012 CPD ¶ 166. Protest that the awardee had an unmitigated impaired objectivity organizational conflict of interest was timely filed after the agency selected the awardee for award, notwithstanding the fact that the protester knew, prior to award, that the awardee was competing under the solicitation, and the basis for the alleged conflict.

- **Timing of a Contracting Officer's Response to an OCI**

McTech Corp., B-406100, B-406100.2, Feb. 8, 2012, 2012 CPD ¶ 97. An agency may provide further information and analysis regarding the existence of an OCI at any time during the course of a protest, and GAO will consider such information in determining whether the contracting officer's OCI determination was reasonable.

- **Unfair Access to Information OCI**

NikSoft Sys. Corp., B-406179, Feb. 29, 2012, 2012 CPD ¶ 104. An agency's decision to exclude an offeror from a competition based on a conflict of interest arising from unequal access to information must be supported by "hard facts," that is, the agency must specifically identify competitively useful, non-public information to which the offeror had access.

- **OCI Mitigated**

TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52. Protest that the award was tainted by an OCI was denied where the record showed that the agency reasonably concluded that the potential areas of concern were adequately addressed by a mitigation plan that included details and milestones.

- **OCI Premature**

McKissack-URS Partners, JV, B-406489.2 et al., May 22, 2012, 2012 CPD ¶ 162. Protest is dismissed as premature where the agency had not made a final determination concerning an alleged conflict of interest.

## VII. Procedural and Jurisdictional Matters

- **Timeliness**

UnitedHealth Military & Veterans Servs., LLC, B-401652.8 et al., June 14, 2011, 2012 CPD ¶ 83. Where the record demonstrated that the protester had all of the information necessary to make an argument, but instead made a different argument, GAO will not consider the subsequently-advanced assertion. Allowing the protester to argue--after agency corrective action--in a manner flatly contradicted by the arguments in the earlier proceeding would undermine the overriding goals of GAO's bid protest forum to produce fair and equitable decisions based on consideration of all parties' arguments on a fully-developed record. Accordingly, such subsequently raised arguments will not be considered by GAO, whether presented in a request for reconsideration, or in a new protest.

Millennium Space Sys., Inc., B-406771, Aug. 17, 2012, 2012 CPD ¶ 237. A debriefing in a procurement conducted as a Broad Agency Announcement pursuant to FAR § 6.102(d)(2) and FAR § 35.016 did not fall within the exception to GAO's general timeliness rules at 4 C.F.R. § 21.2(a)(2), because such a procurement was not a procurement conducted on the basis of competitive proposals, under which a debriefing was requested and, when requested, was required.

Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260. Protest challenging the terms of a solicitation was timely where the solicitation expressly permitted offerors to take exception to its terms, the agency did not advise the protester that it could not take exception to certain terms until after the receipt of initial quotations, and the protester challenged the disputed terms after the agency rejected these exceptions and prior to the subsequent time for the receipt of revised quotations.

- **Significant Issue Exception to Timeliness Rule**

Cyberdata Techs., Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230. Where a protest raises an untimely issue that has not been previously decided and is potentially of widespread interest to the procurement system, GAO may consider the issue pursuant to the significant issue exception in its timeliness rules, 4 C.F.R. § 21.2(c) (2012). Here, GAO invoked the significant issue exception and sustained the protest; however, since the protester did not raise the issue in a timely manner--when it clearly could have done so--GAO did not recommend reimbursement of protest costs.

- **Reconsideration Request**

Department of Veterans Affairs--Recon., B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73. GAO modified its recommended remedy in a reconsideration response that the agency reimburse the protester's costs of pursuing its protest, where the record showed that the protester failed to disclose a material fact concerning its status as an interested party. Failure to make all arguments or submit all information available during the course of

the initial protest undermines the goals of GAO's bid protest forum to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record, and cannot justify reconsideration of a prior decision.

King Farm Assoc., LLC, B-404896.16, May 30, 2012, 2012 CPD ¶ 179. GAO will not grant request for reconsideration to vacate protest decision based on new information where the protester has not demonstrated any nexus between the newly-disclosed information and the procurement at issue.

- **Costs**

A1 Procurement, JVG--Costs, B-404618.2, Apr. 4, 2012, 2012 CPD ¶ 139. Where GAO has recommended the reimbursement of protest costs, the appropriate rate for reimbursement of time incurred pursuing the protest by the protester's chief executive officer (CEO), who is also an attorney, should be based upon the CEO's salary and not a billing rate for outside legal counsel.

Odle Mgmt. Group, LLC--Costs, B-404855.2, Mar. 26, 2012, 2012 CPD ¶ 122. Reimbursement of protest costs is not recommended with respect to issues concerning evaluation of proposals and source selection decision where such issues were readily severable from challenge to agency's conduct of misleading discussions, the only issue found to be clearly meritorious at GAO's outcome prediction alternative dispute resolution conference.

Blackstone Consulting, Inc., B-405909.2, Jan. 31, 2012, 2012 CPD ¶ 168. GAO recommended reimbursement of the costs of filing and pursuing protest challenging the agency's failure to evaluate firm's past performance questionnaires as part of the past performance evaluation where the issue was clearly meritorious but the agency unduly delayed taking corrective action. Protest costs need not be allocated between clearly meritorious protest issue and other protest issues where all issues were intertwined parts of protester's basic objection that the agency's past performance evaluation was improper.

Shaka, Inc.--Costs, B-405552.2, May 17, 2012, 2012 CPD ¶ 160. GAO recommended that the protester's claim for attorneys' fees be reimbursed, where the attorneys' hours charged were documented and reasonable, and the agency had not identified any specific hours as excessive or articulated a reasonable analysis as to why payment for such hours should have been disallowed. In addition, attorneys' fees incurred by the subcontractor of the protester in pursuit of the protest may be reimbursed where the fees were incurred in concert with, and on behalf of, the protester pursuant to an agreement between the protester and subcontractor to split the legal costs of pursuing the protest.

URS Federal Servs., Inc.-Costs, B-406140.4, July 17, 2012, 2012 CPD ¶ 223. GAO recommended that agency reimburse protester for the costs of filing and pursuing its protest, where the agency did not take corrective action in response to the protest until after the submission of the agency report and the protester's comments, and the protest was clearly meritorious.

- **Jurisdiction**

Assisted Housing Servs. Corp., et al., B-406738 et al., Aug. 15, 2012, 2012 CPD ¶ 236. Protest challenging the Department of Housing and Urban Development's (HUD) use of a notice of funding availability (NOFA) that would result in the issuance of a cooperative agreement to obtain services for the administration of Project-Based Section 8 Housing Assistance Payment contracts is sustained. If HUD had properly used a cooperative agreement then GAO would have no jurisdiction under the CICA to hear disputes about this agreement. However, if the use of a procurement instrument was required, then GAO would have jurisdiction and would consider whether HUD had complied with applicable procurement laws and regulations. Here the protest was sustained because the "principal purpose" of the NOFA was to obtain contract administration services for HUD's direct benefit and use, which should have been acquired under a procurement instrument that resulted in the award of a contract.

Asiel Enters., Inc., B-406780, B-406836, Aug. 28, 2012, 2012 CPD ¶ 242. While GAO generally does not review protests of the award of agreements other than procurement contracts pursuant to its bid protest jurisdiction under CICA, 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R. § 21.1(a), GAO will review a timely protest that an agency has improperly used a non-procurement instrument, such as a memorandum of agreement, where a procurement contract was required, to ensure that the agency was not attempting to avoid the requirements of procurement statutes and regulations.

Complere Inc., B-406553, June 25, 2012, 2012 CPD ¶ 189. GAO will not review an agency's decision not to enter into a noncompetitive phase III funding agreement under the Small Business Innovation Research Program.

- **Interested Party**

ITT Elec. Sys., B-406405, B-406405.2, May 21, 2012, 2012 CPD ¶ 174. Unincorporated division of the corporate parent that submitted a proposal was an interested party to file a protest, notwithstanding a corporate restructuring that occurred after the submission of proposals, whereby the unincorporated division and assets committed to contract performance were transferred to new, stand-alone corporate entity.

- **Corrective Action**

EOD Tech., Inc., B-406978.2, B-406978.3, Aug. 20, 2012, 2012 CPD ¶ 239. Protest challenging the agency's determination that the protester was nonresponsible was premature where the agency had not yet made a new finding--as part of corrective action in response to an earlier protest--concerning the protester's responsibility.

## **VIII. Task And Delivery Orders**

- **Jurisdiction**

Serco Inc., B-406061, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61. For purposes of determining GAO's jurisdiction over a challenge to an award of a task order, the value of an option to extend services under FAR § 52.217-8 was included in task order value where that value was part of total price that the agency considered in the award decision.

## **IX. Protests concerning the Veterans Benefits, Health Care, and Information Technology Act of 2006**

Kingdomware Techs.-Recon, B-407232.2, Dec. 13, 2012, 2012 CPD ¶ \_\_. In light of actions by the Department of Veterans Affairs (VA) and a recent decision by the U.S. Court of Federal Claims, GAO will no longer hear protests arguing solely that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 VA Act), 38 U.S.C. §§ 8127-28 (2006) requires the VA to consider setting aside a procurement for service-disabled veteran-owned small businesses, or veteran-owned small businesses, before procuring its requirements under the FSS. This decision effectively means that GAO will no longer hear protests based on its ruling in Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183, as it relates to the FSS. GAO will, however, continue to hear other protests concerning the 2006 VA Act.

Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183. The plain meaning of the 2006 VA Act requires the VA to conduct market research concerning its requirements and determine whether there are two or more SDVOSBs (or VOSBs) capable of performing the requirements, and if so, to set the requirement aside exclusively for SDVOSB (or VOSB) concerns. The VA must consider whether to set aside the procurement for SDVOSBs (or VOSBs) prior to conducting a procurement on an unrestricted basis under the FSS. See also; Aldevra, B-406774 et al., Aug. 21, 2012, 2012 CPD ¶ 240); Aldevra, B-406608 et al., July 13, 2012, 2012 CPD ¶ 207; Kingdomware Tech., B-406507, May 30, 2012, 2012 CPD ¶ 165; Aldevra, B-406331, B-406391, Apr. 20, 2012, 2012 CPD ¶ 144.

Legatus6, LLC, B-405618 et al., Dec. 5, 2011, 2011 CPD ¶ 86. Protests arguing that solicitations should be set aside for SDVOSBs were denied where record showed that, on the basis of adequate market research, the VA concluded that it did not have a reasonable expectation of receiving proposals from at least two SDVOSBs at fair and reasonable prices.

Alternative Contracting Enters., LLC; Pierce First Med., B-406265 et al., Mar. 26, 2012, 2012 CPD ¶ 124. Protests that the Department of Veterans Affairs violated the 2006 VA Act by failing to consider whether the procurements should be set aside for SDVOSB concerns before purchasing from an AbilityOne organization are denied, where the agency reasonably read the 2006 VA Act and the Javits-Wagner-O'Day Act together to avoid conflict.

Crosstown Courier Serv., Inc., B-406336, Apr. 23, 2012, 2012 CPD ¶ 146. Protest that the VA improperly set aside an FSS task order acquisition for a SDVOSB was denied where the record showed that the agency's actions were an unobjectionable exercise of its

authority to acquire goods and services using “other than competitive procedures” pursuant to 38 U.S.C. § 8127(b).

Phoenix Env'tl. Design Inc., B-407104, Oct. 26, 2012, 2012 CPD ¶ 299. Protest that the VA violated the 2006 VA Act and its implementing regulations when the VA issued a non-FSS order to a small business concern, was sustained where the VA was aware of SDVOSB concerns that appeared capable of performing the order, and the agency did not determine that it could not expect to receive two or more quotations from SDVOSB concerns at fair and reasonable prices.

## **X. Miscellaneous Issues**

- **Responsibility**

MANCON, B-405663, Feb. 9, 2012, 2012, CPD ¶ 68. Because the requirement for an acceptable small business subcontracting plan is generally applicable to the “apparently successful offeror,” this requirement relates to an offeror’s responsibility, even where the solicitation requests the offeror to submit its plan with its offer.

- **Simplified Acquisition Procedures**

ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012, CPD ¶ 101. Although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures. See also Tipton Textile Rental, Inc., B-406372, May 9, 2012, 2012 CPD ¶ 156.

Sea Box, Inc., B-405711.2, Mar. 19, 2012, 2012 CPD ¶ 116. The fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation’s requirements and evaluation criteria, is equally applicable to simplified acquisitions. GAO will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation.

- **Small Business Set-Aside**

DNO Inc., B-406256, B-406256.2, Mar. 22, 2012, 2012 CPD ¶ 136. Protest challenging the agency’s decision not to set aside for small business concerns a contract for a pilot program to compile a list of approved fruit and vegetable vendors for domestic food nutrition assistance programs was sustained where the agency did not conduct the level of market research necessary to make a reasonable determination about whether two responsible small business concerns would submit offers.

- **Architect/Engineering Services**



McKissack-URS Partners, JV, B-406489.2 et al., May 22, 2012, 2012 CPD ¶ 162. A debriefing provided pursuant to an architect-engineer procurement conducted under the Brooks Act, 40 U.S.C. §§ 1102-1104 (2006), did not fall within the exception to GAO's general timeliness rules at 4 C.F.R. ¶ 21.2(a)(2), because such a procurement was not a procurement conducted on the basis of competitive proposals, under which a debriefing was requested and, when requested, was required.

- **Military Family Housing Privatization**

Arcus Props., LLC, B-406189, Mar. 7, 2012, 2012 CPD ¶ 107. The agency characterized the use of privatization in this procurement as a "non-FAR real estate transaction." Where the FAR does not apply, GAO will review the actions taken by an agency to determine whether they were reasonable.

- **Two-Phase Design-Build Selection Procedures**

Linc Gov't. Servs., LLC, B-404783.2, B-404783.4, May 23, 2011, 2012 CPD ¶ 128. There is nothing in the regulations concerning Phase I of the Design-Build Selection Procedures, FAR § 36.303-1, that makes the discussions requirements of FAR part 15 applicable to the first phase of a FAR subpart 36.3 procurement. For this reason, GAO will not import the discussions requirements--absent a provision in the solicitation that does so. Therefore, the agency's decision in a design/build construction procurement to hold discussions with only the higher rated phase I offerors as part of the process of determining the most highly qualified Phase I offerors to be invited to participate in Phase II was unobjectionable.

- **Procurement Integrity Act**

Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93. Protest based on an alleged violation of the Procurement Integrity Act was denied, where, consistent with FAR requirements, the agency investigated the alleged disclosure of information by an agency employee to another offeror and found that the documents provided were publicly available and not procurement sensitive and where the protester has not shown that it was competitively prejudiced.