



441 G St. N.W.
Washington, DC 20548

B-158766

December 10, 2015

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2015

Congressional Committees:

This letter responds to the requirements of the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (CICA), that the Comptroller General report to Congress each instance in which a federal agency did not fully implement a recommendation made by our Office in connection with a bid protest decided the prior fiscal year. We also provide data concerning our overall protest filings for the fiscal year. Finally, this letter addresses the requirement that our report “include a summary of the most prevalent grounds for sustaining protests” during the preceding year. Id.

Agency Failure to Fully Implement Recommendations

For fiscal year 2015, one federal agency declined to implement the recommendations made by our Office in connection with a bid protest. By letter dated September 28, 2015, we reported an occurrence involving the Department of State: Caddell Construction Company, Inc., B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132. As explained in our September 28 letter, in sustaining the protest, we reaffirmed our prior decision in Caddell Construction Company, Inc., B-298949.2, Jan. 10, 2007, 2007 CPD ¶ 119, holding that 22 U.S.C. § 4852(c)(2)(E) requires potential offerors for diplomatic construction projects to have achieved business volume equal to or exceeding the value of the project being solicited in each of three years of the 5-year period prior to issuance of the solicitation. The Department of State has taken the position that under 22 U.S.C. § 4852(c)(2)(E), three years of a firm’s receipts can be aggregated to achieve the required minimum business volume.

Enclosed for your information is a copy of our letter of September 28, 2015 reporting the Department of State’s failure to implement our recommendations.

Summary of Overall Protest Filings

During the 2015 fiscal year, we received 2,639 cases: 2,496 protests, 53 cost claims, and 90 requests for reconsideration. We closed 2,647 cases during the fiscal year: 2,522 protests, 44 cost claims, and 81 requests for reconsideration. Of the 2,647 cases closed, 335 were attributable to GAO’s bid protest jurisdiction over task orders. With this letter we have included a chart comparing bid protest activity for fiscal years 2011-2015.

Most Prevalent Grounds for Sustaining Protests

Of the protests resolved on the merits during fiscal year 2015, our Office sustained 12 percent of those protests. Our review shows that the most prevalent reasons for sustaining protests

during the 2015 fiscal year were: (1) unreasonable cost or price evaluation;¹ (2) unreasonable past performance evaluation;² (3) failure to follow evaluation criteria;³ (4) inadequate documentation of the record;⁴ and (5) unreasonable technical evaluation.⁵ It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.



Susan A. Poling
General Counsel

Enclosures

¹ E.g., Computer Sciences Corp.; HP Enterprise Servs., LLC; Harris IT Servs. Corp.; Booz Allen Hamilton, Inc., B-408694.7 et al., Nov. 3, 2014, 2014 CPD ¶ 331 (finding that the agency's cost realism analysis was unreasonable where the record failed to show the agency conducted an independent assessment of whether proposed labor hours, skill mix, and labor mix were sufficient to successfully perform the requirement).

² E.g., Al Raha Group for Technical Services, Inc.; Logistics Management International, Inc., B-411015.2; B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 (finding that the agency failed to consider available past performance information concerning key personnel).

³ E.g., Tantus Technologies, Inc., B-411608; B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 (finding that the 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 are available on an ongoing basis).

⁴ E.g., CFS-KBR Marianas Support Services, LLC; Fluor Federal Solutions LLC, B-410486, et al., Jan. 2, 2015, 2015 CPD ¶ 22 (finding that the 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).

⁵ E.g., US Investigations Services, LLC, B-410454.2, Jan. 15, 2015, 2015 CPD ¶ 44 (finding that the agency erred in concluding that the labor categories included on the awardee's Federal Supply Schedule contract encompassed the requirements of the task order).

List of Congressional Committees

The Honorable Thad Cochran
Chairman

The Honorable Barbara A. Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate

The Honorable John McCain
Chairman
The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Ron Johnson
Chairman
The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable David Vitter
Chairman
The Honorable Jeanne Shaheen
Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

The Honorable Harold Rogers
Chairman
The Honorable Nita M. Lowey
Ranking Member
Committee on Appropriations
House of Representatives

The Honorable Mac Thornberry
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable Jason Chaffetz
Chairman
The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Steve Chabot
Chairman
The Honorable Nydia M. Velázquez
Ranking Member
Committee on Small Business
House of Representatives

Bid Protest Statistics for Fiscal Years 2011-2015

	FY2015	FY2014	FY 2013	FY 2012	FY 2011
Cases Filed ¹	2,639 (up 3%) ²	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)
Cases Closed ³	2,647	2,458	2,538	2,495	2,292
Merit (Sustain + Deny) Decisions	587	556	509	570	417
Number of Sustains	68	72	87	106	67
Sustain Rate	12%	13%	17%	18.6%	16%
Effectiveness Rate ⁴	45%	43%	43%	42%	42%
ADR ⁵ (cases used)	103	96	145	106	140
ADR Success Rate ⁶	70%	83	86%	80%	82%
Hearings ⁷	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)

¹ 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. Cases include protests, cost claims, and requests for reconsideration.

² From the prior fiscal year.

³ Of the 2,647 cases closed in FY 2015, 335 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

⁴ 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.

⁵ Alternative Dispute Resolution.

⁶ Percentage of cases resolved without a formal GAO decision after ADR.

⁷ Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.



441 G St. N.W.
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B-411005.1, B-411005.2

September 28, 2015

Congressional Committees:

Subject: Caddell Constr. Co. Inc., B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132

This letter is submitted pursuant to 31 U.S.C. § 3554(e)(1), which requires our Office to report any case in which a federal agency fails to fully implement a recommendation from the Comptroller General in a bid protest decision. As required by that statute, this report includes a review of the procurement addressed in our decision, including the circumstances surrounding the failure of the contracting agency to implement the recommendation made in the decision. Also, as discussed below, we recommend that Congress consider clarifying the language of the statute at issue here.

The subject bid protest decision, Caddell Constr. Co., Inc., B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 (Caddell 2015), concerned a notice issued by the Department of State on February 3, 2014, requesting prequalification applications from potential offerors for construction of a U.S. embassy complex in Maputo, Mozambique, which has an estimated minimum value of \$160 million. Enclosure 1. As set forth below, this construction project is covered by certain requirements of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, as amended, Pub. L. 99-399 (Security Act), codified at 22 U.S.C. § 4852.

The Security Act provides that only firms that qualify as “United States persons” may submit an offer for a diplomatic construction project valued above \$10 million. The Security Act, in relevant part, defines a “United States person” as an entity that:

(E) with respect to a construction project under subsection (a)(1) of this section, has achieved total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i);

(F)

(i) employs United States citizens in at least 80 percent of its principal management positions in the United States,

(ii) employs United States citizens in more than half of its permanent, full-time positions in the United States, and

(iii) will employ United States citizens in at least 80 percent of the supervisory positions on the foreign buildings office project site; and

(G) has the existing technical and financial resources in the United States to perform the contract[.]

22 U.S.C. § 4852(c)(2).

In phase I of this procurement, the Department of State invited potential offerors to prequalify as United States persons by demonstrating fulfillment of the Security Act's provisions, noting that firms failing to do so would not be further evaluated. After the Department determined whether phase I applicants qualified as United States persons, the protester alleged that two successful prequalification applicants, Framaco International, Inc. and Pernix Group, Inc., did not in fact satisfy the Security Act criteria.

In reviewing the protest, our Office first concluded that the Department of State erred in finding that Framaco and Pernix possessed a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the issuance of the solicitation, as required by 22 U.S.C. § 4852(c)(2)(E). Second, we found that Department did not have a basis to conclude that Framaco possessed the existing technical and financial resources in the United States to perform the contract, as required by 22 U.S.C. § 4852(c)(2)(G). Based on the record, we recommended that the Department determine that Framaco and Pernix do not qualify as United States persons under the Security Act, and reimburse Caddell the cost of pursuing its protest.

By letter dated June 23, 2015, the Department of State notified our Office that it will not implement our recommendation to determine that Framaco and Pernix do not qualify as United States persons under the Security Act. Enclosure 2. The Department contends that GAO should have conformed its interpretation of 22 U.S.C. § 4852(c)(2)(E) to the interpretation reached by the Court of Federal Claims (COFC) in a 2007 decision, rather than following GAO's own precedent.¹ In the Department of State's view, because the GAO and the court have reached different conclusions about the meaning of the definition of a United States person, as set forth in 22 U.S.C. § 4852(c)(2)(E), a decision to follow GAO's recommendation would likely subject the Department to further litigation at the court.² Because our statute requires our Office to report any case in which a

¹ The Department of State did not specifically disagree with our conclusion that Framaco did not independently possess financial resources sufficient to perform the contract, as required by 22 U.S.C. § 4852(c)(2)(G). See generally Department of State Letter, June 23, 2015.

² GAO decisions are not binding on COFC, and COFC opinions are not binding on GAO or on later COFC opinions. In Pernix Grp., Inc. v. United States, 121 Fed. Cl. 592 (2015), dismissing as premature an initial attempt by Pernix to litigate this issue, the court stated:

(continued. . .)

federal agency fails to fully implement a recommendation from the Comptroller General in a bid protest decision, we are reporting this matter for your attention.³

As relevant here, the difference in the interpretation of this statute between GAO and the COFC arose from protests brought sequentially to both forums several years ago. First, in 2007, Caddell Construction protested to GAO a decision by the Department of State to prequalify an offeror as a United States person in a similar diplomatic construction procurement. In that protest, Caddell argued that the record demonstrated that the offeror had not achieved total business volume equal to or greater than the value of the project being bid in 3 years of the prior 5-year period, as required by 22 U.S.C. § 4852(c)(2)(E). Caddell Constr. Co., Inc., B-298949.2, June 15, 2007, 2007 CPD ¶ 119 at 10 (Caddell 2007). Enclosure 3. In response, the Department argued that 3 years of a firm's receipts could be aggregated to achieve the required minimum business volume. Id. at 9. Our Office concluded that the Department's interpretation of the Security Act had the effect of rendering meaningless the statute's requirement that a firm's business receipts equal the project's value in 3 of the previous 5 years. We also found that the legislative history of the Security Act did not support the agency's interpretation. Id. at 11-13.

(. . .continued)

This court, were it to reach the merits of Pernix's protest, would be bound by neither Grunley Walsh nor [Caddell 2015]. Decisions in other cases before [COFC] are not binding in this proceeding. See W. Coast Gen. Corp. v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) ("Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court.") (citations omitted). Nor do GAO decisions create binding precedent for this court. See, e.g., Allied Tech. Grp., Inc. v. United States, 649 F.3d 1320, 1331 n.1 (Fed. Cir. 2011) (stating that GAO decisions do not create binding precedent for the United States Court of Appeals for the Federal Circuit); XTRA Lease, Inc. v. United States, 50 Fed. Cl. 612, 618 (2001) (stating that "GAO decisions are not binding on this court") (citation omitted).

Id. n.3.

³ The State Department also refuses to follow our recommendation to pay the protester's costs of protest, explaining that the protester should have chosen the COFC instead of our Office as its bid protest forum in order to minimize litigation. See Department of State Letter, June 23, 2015, at 2, wherein the Department writes:

In these circumstances [e.g., differing historical statutory interpretations by the GAO and the COFC], the Department of State has concluded that [the protester] Caddell rather than the Department of State should be required to present GAO's position to the Court of Federal Claims. The Department believes Caddell should have presented its protest to the Court of Federal Claims in the first place.

Later that year, another construction firm, Grunley Walsh International, LLC, filed suit in the COFC challenging the Department of State's rejection of its prequalification application due to insufficient business volume--a decision that the Department explained was required by our Office's Caddell 2007 decision. The court concluded that 22 U.S.C. § 4852(c)(2)(E) allows aggregation of an offeror's business volume in any 3 of the previous 5 years in order to achieve the minimum required volume.⁴ Id. at 41-42. Based on this interpretation of the Security Act, the court ruled that the Department of State, in rejecting Grunley Walsh's prequalification application, unreasonably followed our Office's recommendation in Caddell 2007. Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 44 (2007). Enclosure 4.

In our recent Caddell 2015 decision, we did not adopt the analysis of the court in its 2007 decision in Grunley Walsh because we concluded that our analysis was more consistent with the language of the statute and what we understood to be the intent of Congress. However, the community of contractors interested in performing Department of State large-scale and/or security-sensitive diplomatic construction projects would benefit from Congressional guidance regarding the interpretation of 22 U.S.C. § 4852(c)(2)(E). Pursuant to the statutory directive set forth at 31 U.S.C. § 3554(e)(1)(B)(iv) that GAO recommend whether Congress should consider taking action on the matter, we recommend that Congress revisit the language in 22 U.S.C. § 4852(c)(2)(E) to clarify how it wishes the Department to determine historical total business volume.

Enclosed for your review are copies of our decision in the 2015 protest (Caddell 2015), our 2007 decision addressing the same question (Caddell 2007), a copy of Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35 (2007), and the Department of State's letter of June 23. If you, or your staff, have any questions about this letter, please contact either of the following Managing Associate General Counsels: Ralph O. White (202-512-8278) or Kenneth E. Patton (202-512-8205).

Sincerely yours,



Susan A. Poling
General Counsel

Enclosures - 4

⁴ For example, under the interpretation adopted by the court, a firm could satisfy the requirements of the Security Act even if its highest annual revenue was valued at one-third of the project's value in 3 of the prior 5 years. As a result, a firm which failed to demonstrate that it had ever achieved a business volume similar to the project in a single year could qualify if, in the aggregate, it had achieved a similar business volume over the course of 3 of the prior 5 years.