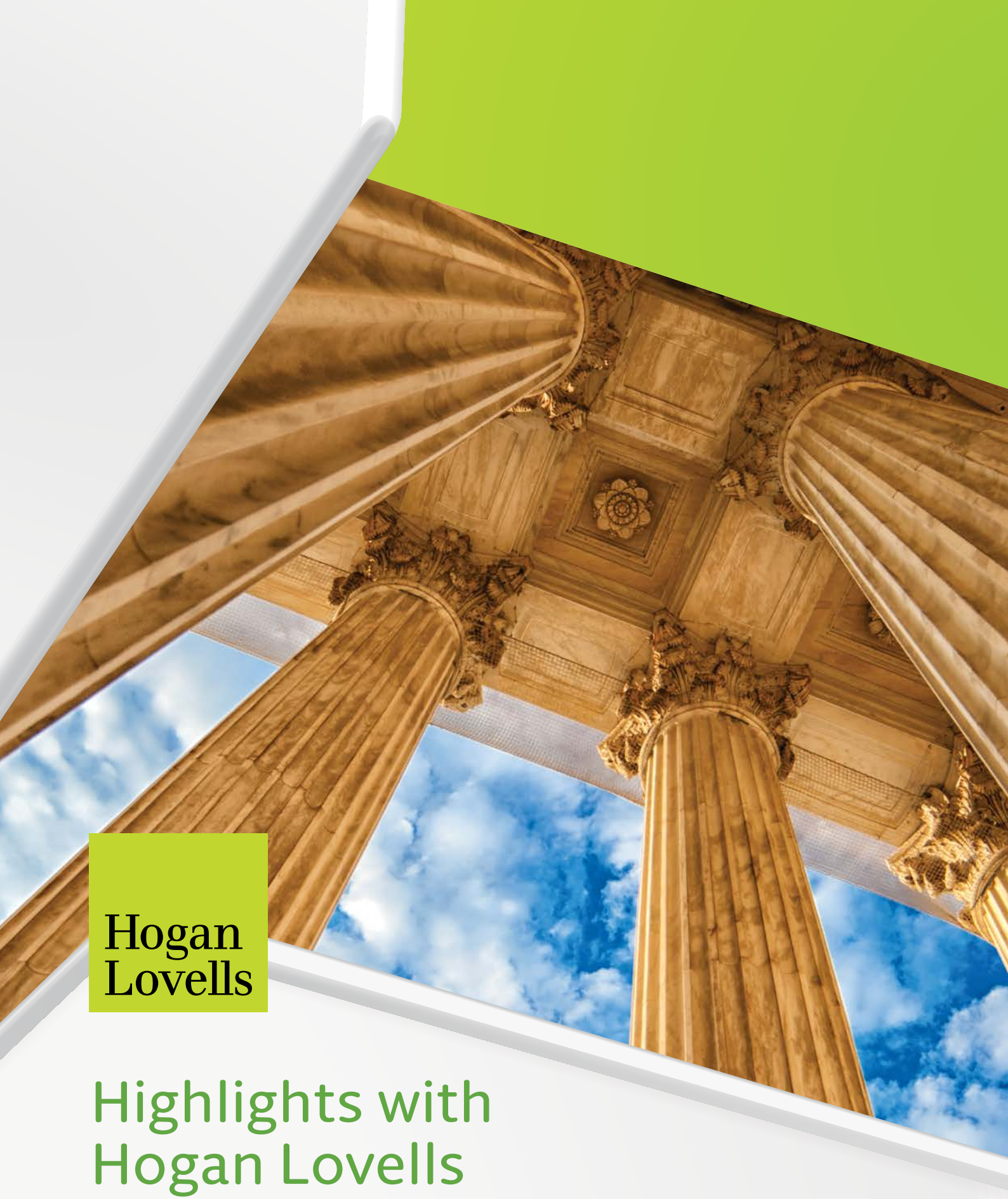

Hogan Lovells

Highlights with Hogan Lovells Bid Protest Digest

Volume VI

Authored by Michael Mason, Stacy Hadeka, Christine Reynolds, Thomas Hunt, Taylor Hillman, Lauren Olmsted, and Lauren Colantonio.

Recent decisions by the Government Accountability Office (GAO), Court of Federal Claims (COFC), and the U.S. Court of Appeals for the Federal Circuit highlight significant developments in bid protest law. These cases offer insights into various aspects of the procurement process, ranging from jurisdictional thresholds for task order protests, to evaluation impacts relating to organizational conflicts of interest, and the consideration of unstated salient characteristics in brand name or equal procurements. Furthermore, they underscore the importance of agencies' adherence to procedural requirements, such as adequately documenting evaluations and the rules applicable to an agency's inadvertent disclosure of sensitive information. Understanding these recent decisions is essential for both government contractors and procuring agencies to navigate the evolving landscape of bid protests effectively.

ELS, Inc., B-421989, B-421989.2, Dec. 21, 2023, 2023 CPD 11

Most government contractors are aware that there are strict statutory jurisdictional thresholds applicable to task order protests. GAO's decision in *ELS, Inc.* offers an important clarification to protesters about how task order value is calculated for purposes of determining whether GAO has jurisdiction.

ELS, Inc. (ELS) protested a Navy task order award for administrative and engineering support services, alleging the agency unreasonably evaluated proposals. The Navy sought dismissal of the protest for lack of jurisdiction. Pursuant to 10 U.S.C. § 3406(f)(1), GAO has jurisdiction over Department of Defense (DoD) task order protests only if: (i) the protest alleges that the task order increased the scope, period, or maximum value of the underlying indefinite-delivery indefinite-quantity (IDIQ) contract; or (ii) the task order value exceeds $25 million. The Navy asserted the $25 million jurisdictional threshold was not met because the value of the task order as awarded was only $24.8 million. Moreover, although the task order was awarded on a cost-plus-fixed-fee basis and included several cost-reimbursable line items, the task order's inclusion of FAR 52.232-20, "Limitation of Cost," meant that the Navy was not obligated to reimburse any contractor costs incurred that exceeded the amount stated in the contract.

ELS countered that the appropriate measure of task order value for jurisdictional purposes is the total anticipated funds that the agency expected to pay the awardee (i.e., total evaluated cost), particularly in the case of cost-reimbursable task orders where the agency must reimburse contractors for their actual and allowable performance costs. ELS insisted that because the Navy's total evaluated cost of the awardee's quotation was approximately $25.1 million, the order value was above the jurisdictional threshold required for GAO to hear the protest.

GAO rejected the protester's attempt to evade dismissal, emphasizing that the "determining factor" when calculating task order value for jurisdictional purposes is the total contractual amount including all options, not the total evaluated cost. It was irrelevant that the cost-reimbursable line items pushed the awardee's total evaluated price above the jurisdictional threshold because any costs that exceeded the awarded value did not have to be reimbursed under FAR 52.232-20. Finally, while a given procurement may involve unusual or unconventional evaluation techniques that warrant departure from this general rule (such as basing award value on the sale of scrap rather than award price), GAO found such circumstances were not present in this case. GAO therefore dismissed the protest for lack of jurisdiction because the task order value did not exceed $25 million.

Deloitte Consulting LLP, B-422094, B-422094.2, January 18, 2024, 2024 WL 402292

GAO's recent decision in *Deloitte Consulting* underscores the requirement that agencies must reasonably consider the impact that mitigation of an organizational conflict of interest (OCI) might have on an offeror's ability to perform the solicited requirements as proposed.

At issue was the Department of Homeland Security's (DHS) award of an order for technical systems integration support services to CGI Federal Inc. (CGI). During the quotation evaluation phase, CGI had cut ties with one of its proposed teaming partners in order to mitigate a potential OCI raised by DHS.

In its post-award protest, Deloitte Consulting LLP (Deloitte) alleged that DHS had failed to consider the material impact the teaming partner's elimination had on CGI's technical approach. Because CGI's quotation touted the team member as a significant and unique contributor to performance, the removal of that team member necessarily affected CGI's ability to perform the requirements as proposed. However, the contemporaneous evaluation record lacked any evidence that DHS considered this fact, rendering its evaluation and award decision unreasonable.

GAO agreed and sustained the protest, finding no support for DHS's claim that the team member's elimination did not materially impact CGI's quotation. Indeed, the contemporaneous evaluation record offered "no indication"

that DHS evaluated the lost performance benefits stemming from the team member's removal— worse, the record reflected at least one strength assigned to CGI specifically on the basis of its former team member's experience. GAO rejected DHS's attempt to circumvent these evaluation errors by relying on declarations that it properly considered the team member's elimination on CGI's proposed approach to performance. GAO found that, rather than "fill[ing] in gaps in the record" as declarations sometimes can, DHS's declarations "attempt[ed] to create a record" where there otherwise was none and therefore would be afforded little weight. Based on DHS's unreasonable evaluation of CGI's quotation, GAO sustained the protest.

As *Deloitte Consulting* shows, the removal of a key team member can, and often does, materially impact an offeror's ability to perform requirements as proposed. The agency's failure to consider these ramifications during the evaluation phase can provide fertile protest grounds for disappointed offerors.

American Material Handling, Inc., B-422171, Jan. 22, 2024, 2024 CPD 23

In *American Material Handling*, GAO sustained a protest challenging the manner in which the International Boundary and Water Commission (IBWC) conducted its brand name or equal procurement, finding the agency unreasonably evaluated American Material Handling, Inc.'s (AMH) quotation against specifications that were not initially included in the Request for Quotations (RFQ).

The IBWC's RFQ sought quotations for wheel loader equipment that either met "salient features or specifications of the Caterpillar 980" or exceeded those provided in the RFQ's specification sheet. Two offerors responded to the RFQ: Caterpillar, which offered its brand-name Caterpillar 980, and AMH, which proposed its Volvo L220H. After receiving the two quotations, the agency added additional characteristics to its evaluation form that were not present in the solicitation. It then proceeded to conduct technical evaluations based on those new characteristics. AMH's Volvo L220H did not meet the agency's new horsepower or weight requirements, and because the Caterpillar 980 did, the IBWC decided Caterpillar's offer was technically acceptable and AMH's was not.

AMH initially sought relief through an agency-level protest, arguing the Volvo L220H met the salient characteristics as set forth in the RFQ, *i.e.*, prior to the agency's addition of new unstated requirements after it had already accepted the offerors' quotations. The agency denied the protest, explaining that "the specification sheet was not the sole determining factor" and that technical acceptability was also determined by other criteria.

AMH then filed a protest at GAO, which sustained on the grounds that the agency improperly considered "unstated salient characteristics" when evaluating the two offers. GAO was unpersuaded by the agency's argument that the additional salient characteristics were incorporated by reference into the RFQ because they were accessible on Caterpillar's website.

With this decision, GAO offers a reminder that in a brand name or equal acquisition, the agency must inform vendors of the essential characteristics that the "equal" product must meet—and cannot require products to meet unstated features of the brand-name product to be considered "equal" and eligible for award.

SierTeK-Peerless JV LLC, B-422085, B-422085.2, 2024 CPD 1

GAO's decision in *SierTeK-Peerless JV LLC* emphasizes an agency's obligation to adequately document its substantive analysis of proposals against all aspects of the solicitation requirements, including in FAR part 16 procurements.

The Transportation Security Administration (TSA) issued a solicitation to firms holding IDIQ contracts under the General Services Administration's One Acquisition Solution for Integrated Services (OASIS) Governmentwide Acquisition Contract. The solicitation sought proposals for technical and administrative property management support services to support the maintenance of TSA's property management program.

The solicitation provided that Prior Experience was the most important evaluation factor. The solicitation required TSA to consider both the size and scope of offerors' prior experience projects compared to the anticipated contract. In evaluating awardee Strativia LLC's (Strativia) proposal, TSA assigned the proposal the highest possible rating, High Confidence, under the Prior Experience factor. TSA found that Strativia had demonstrated prior experience that was relevant in terms of both size and scope.

GAO agreed with the protester that the agency's evaluation was unreasonable. GAO determined that the evaluation record did not demonstrate that TSA evaluated whether the size of the awardee's prior experience examples were similar to the anticipated contract such that they were relevant. Specifically, GAO found that the evaluation report contained (1) "little, if any, discussion of any indicia of the size" of at least one submitted project, and (2) unsupported

statements that the other projects were similar in size to the anticipated contract—without any discussion of why or how the agency reached those conclusions.

Because the agency's evaluation under the Prior Experience factor was focused almost entirely on the scope of Strativia's prior experience projects rather than the size, it was unreasonable. And, given that Prior Experience was the most important evaluation factor, the protester established it was prejudiced by the flawed evaluation. GAO could not "say with certainty what the agency's conclusion would have been had it meaningfully evaluated the size of Strativia's prior experience examples." In light of these errors, GAO recommended that TSA reevaluate proposals and make a new source selection decision.

Associated Energy Group, LLC, B-420857.6; B-420857.7, 2024 CPD 23

As most government contractors know, the Procurement Integrity Act (PIA) prohibits government agencies from knowingly disclosing bid or proposal information. However, the type of behavior that actually rises to the level of a PIA violation is not always clear.

In *Associated Energy Group, LLC*, GAO considered Associated Energy Group LLC's (AEG) allegation that the Defense Logistics Agency (DLA) violated the PIA by disclosing an internal agency memorandum to rival bidder Kropp Holdings Inc. (KHI) during the course of a procurement for commercial payment card solutions and transaction processing services. GAO ultimately found that AEG had failed to establish that DLA should have disqualified KHI from the competition.

During the course of corrective action taken in response to an earlier protest filed by KHI, DLA had issued a solicitation amendment that provided historical sales data for fiscal years 2021 and 2022. Around the same time, the contracting officer also generated a memorandum explaining the rationale for the amendment. In this memorandum, the contracting officer explained that the request for this historical data was reasonable because the previously provided sales data for fiscal years 2013 through 2020 was stale. The memorandum also explained how both AEG and KHI's merchant fees and refund rates were based in part on the projected volume of sales in the contract and therefore changes in the recent sales volume could impact the proposed rates and fees. The agency inadvertently provided this memorandum to KHI while attempting to transmit the amendment.

AEG alleged that the disclosed memorandum contained procurement-sensitive information that, combined with the agency's earlier disclosure of AEG's pricing information during a debriefing, provided KHI with an unfair competitive advantage with respect to forthcoming price proposal revisions. AEG also claimed that DLA's post-disclosure investigation and remedial actions were inadequate. Based on these allegations, AEG claimed that KHI should have been disqualified from the competition.

GAO disagreed, determining that DLA's disclosure of the memorandum concerning the issuance of the amendment to KHI did not violate the PIA because the disclosure was not made "knowingly or intentionally," *i.e.*, it was inadvertent. GAO also found that the disclosure that both offerors used historical sales data in developing their pricing did not constitute competitively useful information because KHI was not provided with the specifics of how AEG would use the provided data in its proposal.

Additionally, GAO found reasonable DLA's conclusion that the disclosed material was not competitively useful and that AEG had failed to demonstrate how KHI would gain insight as to how AEG would prepare or otherwise price its proposal from the disclosed historical pricing information.

Global K9 Protection Group LLC v. United States, 169 Fed. Cl. 116 (Fed. Cl. Dec. 27, 2023)

The Court of Federal Claims (COFC) recently held that the administrative record in a protest could be supplemented with materials containing information related to an awardee's past performance, as well as documentation of the contracting officer's review of that information, to determine whether an offeror's proposal contained material misrepresentations.

Plaintiffs Global K9 Protection Group, LLC and Michael Stapleton Associates, Ltd. brought post-award bid protests against the United States Postal Service (USPS) challenging the agency's award of a contract for U.S. airport mail package explosive detection services to American K-9 Detection Services, LLC. Among other things, the protesters asked the court to permit supplementation of the administrative record with evidence of the awardee's deficient

past performance— which was not available to USPS at the time of the award—to substantiate the protesters' claims that the awardee misrepresented its past performance in its proposal. Finding that the omission of the proposed supplementation would preclude "effective judicial review," the court permitted the supplementation of the administrative record with both the documents evidencing the protesters' misrepresentation claims and reflecting the USPS's post hoc review of those materials.

Rev, LLC v. United States, 91 F.4th 1156 (Fed. Cir. Jan. 29, 2024)

In this case, the U.S. Court of Appeals for the Federal Circuit held that a disappointed offeror has standing to challenge a contract award if the protest demonstrates the offeror had a "greater than insubstantial chance" of securing the award but for the agency's alleged errors.

Plaintiff REV, LLC (REV) provides software consulting services to private and public entities. In response to a Department of Veterans Affairs (VA) solicitation, REV participated in a bid process in hopes of joining the vendor pool for the VA's Transformation Twenty-One Total Technology-Next Generation (T4NG) program. Through the acquisition, the VA intended to add seven vendors to its existing vendor pool. The VA conducted a two-step evaluation of the bids it received. A total of 33 offerors, including REV, survived the first stage. After the second stage, the VA awarded contracts to nine of the 33 offerors remaining—REV did not receive an award.

REV's COFC protest challenged, among other things, the proposals and evaluation of six offerors rated ahead of REV. The court dismissed the protest for lack of standing, finding REV had failed to show prejudice because the "VA's evaluation of the [rival] proposals, whether inappropriately revised or missing required components, did not affect the VA's evaluation of [REV's] proposal."

The Federal Circuit reversed, however, holding that assuming REV's challenges to the proposals and evaluations of six bidders rated ahead of REV were successful, REV would have had a "not insubstantial chance" of being selected for award. This, the appellate court found, was sufficient to confer standing.

Contacts

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

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

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

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

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

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

Lauren Colantonio
Associate | Washington, D.C.
T +1 202 637 6417
E: lauren.colantonio@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Berlin
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
Philadelphia
Riyadh
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Warsaw
Washington, D.C.

*Our associated offices

www.hoganlovells.com