



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

B-158766

January 2, 2014

Re: GAO Bid Protest Annual Report to Congress for Fiscal Year 2013

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 Failures to Fully Implement Recommendations

For fiscal year 2013, federal agencies have twice decided not to fully implement recommendations made by our Office in connection with bid protests. First, by letter dated December 12, 2012, a copy of which is enclosed, we reported one such occurrence involving the Department of Housing and Urban Development (HUD): Assisted Housing Services Corp., et al., B-406738 et al., August 15, 2012, 2012 CPD ¶ 236 (available on our website). As explained in our December 12 letter, we sustained the protests finding that HUD’s use of a notice of funding availability (NOFA) that results in the issuance of cooperative agreements, rather than a procurement instrument that results in the award of a contract, was improper because the “principal purpose” of the NOFA was to obtain contract administration services for HUD’s direct benefit and use, contrary to the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308.

Second, we sustained 16 protests in fiscal year 2013 finding that the use by the Department of Veterans Affairs (VA) of General Services Administration Federal Supply Schedule procedures, without first considering whether two or more service-disabled veteran-owned small business or veteran-owned small business concerns were capable of meeting the agency’s requirements at a reasonable price, was contrary to the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. §§ 8127-8128. In each instance, the VA declined to implement our recommendation.¹ All of these protests were addressed in two separate decisions available on our website. They are: Aldevra; Kingdomware Technologies, B-406950 et al., Oct. 9, 2012; and Aldevra, B-407312 et al., Nov. 21, 2012.

¹ GAO reported 18 similar cases in the FY 2012 Annual Report (GAO-13-162SP, Nov. 13, 2012). In light of actions by the VA and the Court of Federal Claims, we no longer hear protests where this is the only issue raised. Kingdomware Techs.-Recon., B-407232.2, Dec. 13, 2012.

Summary of Overall Protest Filings

During the 2013 fiscal year, we received 2,429 cases: 2,298 protests, 56 cost claims, and 75 requests for reconsideration. We closed 2,538 cases during the fiscal year: 2,389 protests, 55 cost claims, and 86 requests for reconsideration. Of the 2,538 cases closed, 259 were attributable to GAO's bid protest jurisdiction over task orders. Enclosed for your information is a chart comparing bid protest activity for fiscal years 2009-2013.

Most Prevalent Grounds for Sustaining Protests

For fiscal year 2013, Congress added a new requirement for our Annual Report for Bid Protests. This provision requires that the report "include a summary of the most prevalent grounds for sustaining protests" during the preceding year. 31 U.S.C. § 3554(e)(2).

Of the decisions resolved on the merits, our Office sustained 17 percent of the decisions issued. Our review shows that the most prevalent reasons for sustaining protests during the 2013 fiscal year were: (1) failure to follow the solicitation evaluation criteria²; (2) inadequate documentation of the record³; (3) unequal treatment of offerors⁴; and (4) unreasonable price or cost 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

The Honorable Barbara A. Mikulski
Chairwoman
The Honorable Richard C. Shelby
Vice Chairman
Committee on Appropriations
United States Senate

² E.g., Exelis Sys. Corp., B-407111 et al., Nov. 13, 2012, 2012 CPD ¶ 340 (finding that the agency's evaluation of the offerors' experience was inconsistent with the terms of the solicitation).

³ E.g., Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 (finding that the record did not show whether the agency reasonably evaluated offerors' past performance in numerous areas, in part because the agency did not retain an adequate record of its evaluation).

⁴ E.g., IAP Work Servs., Inc.; EMCOR Gov. Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171 (finding that the agency unreasonably credited only the awardee's proposal with a strength where the record shows that the protester proposed a similar strength).

⁵ E.g., Esegur-Empresa de Segurança, SA, B-407947, B-407947.2, Apr. 26, 2013, 2013 CPD ¶ 109 (finding that the agency failed to evaluate whether the awardee's low price was realistic, as it was required to do by the terms of the solicitation).

The Honorable Carl Levin
Chairman
The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate

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

The Honorable Mary L. Landrieu
Chair
The Honorable James E. Risch
Ranking Member
Committee on Small Business and Entrepreneurship
United States Senate

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

The Honorable Howard P. "Buck" McKeon
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

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

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

Bid Protest Statistics for Fiscal Years 2009-2013

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Cases Filed ¹	2429 (down 2% ²)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)	1,989 (up 20%)
Cases Closed	2,538 ³	2,495	2,292	2,226	1,920
Merit (Sustain + Deny) Decisions	509	570	417	441	315
Number of Sustains	87	106	67	82	57
Sustain Rate	17%	18.6%	16%	19%	18%
Effectiveness Rate ⁴	43%	42%	42%	42%	45%
ADR ⁵ (cases used)	145	106	140	159	149
ADR Success Rate ⁶	86%	80%	82%	80%	93%
Hearings ⁷	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)	10% (61 cases)	12% (65 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 2,538 cases closed in FY 2013, 259 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.



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United States Government Accountability Office
Washington, DC 20548

B-406738 et al.

December 12, 2012

Congressional Committees

Subject: Assisted Housing Services Corporation; North Tampa Housing Development Corporation; The Jefferson County Assisted Housing Corporation; National Housing Compliance; Southwest Housing Compliance Corporation; CMS Contract Management Services and the Housing Authority of the City of Bremerton; Massachusetts Housing Finance Agency, B-406738 et al., August 15, 2012

This letter is submitted pursuant to 31 U.S.C. § 3554(e)(1)(2006), 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.

The subject bid protest decision concerned the actions of the Department of Housing and Urban Development (HUD) with regard to its use of a notice of funding availability (NOFA) that will result in the issuance of cooperative agreements to obtain services for the administration of Project-Based Section 8 Housing Assistance Payment contracts. The protesters argued that HUD's use of a NOFA and the characterization of the annual contributions contracts that HUD seeks to award via this NOFA as cooperative agreements were improper. The protesters contended that HUD is seeking contract administration services that must be solicited through a procurement instrument that results in the award of contracts.

Our Office found that HUD's use of a NOFA that results in the issuance of cooperative agreements was improper because the "principal purpose" of the NOFA was to obtain contract administration services for HUD's direct benefit and use, which should be acquired under a procurement instrument that results in the award of a contract. In concluding that the use of cooperative agreements was improper, we pointed out that the Federal Grant and Cooperative Agreement Act (FGCAA) establishes the general criteria that agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality or other recipient for an authorized purpose. 31 U.S.C. §§ 6301-6308 (2006). In this regard, the FGCAA provides that an agency must use a procurement contract when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government,"

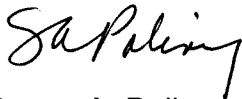
or the agency otherwise “decides in a specific instance that the use of a procurement contract is appropriate.” 31 U.S.C. § 6303.

We recommended that HUD cancel the NOFA and solicit the contract administration services for the Project-Based Section 8 rental assistance program through a procurement instrument that will result in the award of contracts. We also recommended that the agency reimburse the protesters their costs of filing and pursuing the protests.

By letter dated October 19, 2012, HUD notified our Office that it was “still in the process of assessing the [r]ecommendations” set forth in our decision, and that HUD would “continue its thorough and expeditious review of these issues.” On December 3, 2012, HUD informed our Office by email that it had announced on its website that HUD “had decided to move forward with the [NOFA],” and that it “plans to announce awards” of cooperative agreements under the NOFA on December 14, 2012. Because HUD’s announced action fails to implement our Office’s recommendation, we are reporting this matter to your attention.

Enclosed for your review are copies of our decision in the protest, HUD’s letter of October 19, HUD’s email of December 3, and the announcement on HUD’s website referenced above.

Sincerely yours,



Susan A. Poling
General Counsel

Enclosures:

cc: The Honorable Daniel K. Inouye
Chairman
The Honorable Thad Cochran
Vice Chairman
Committee on Appropriations
United States Senate

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Government Affairs
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The Honorable Harold Rogers
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Ranking Member
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The Honorable Darrell E. Issa
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House of Representatives