GAO DECISIONS MAY NOT BE BINDING, BUT THEY CANNOT BE IGNORED

Government contracts professionals know that the decisions on bid protests issued by the Government Accountability Office ("GAO") are only recommendations to procuring agencies, and therefore, are not technically binding on the agency. Indeed, the GAO issues an annual report to the Congress that identifies bid protest cases where an agency has not followed the GAO recommendation. (Decisions of the U.S. Court of Federal Claims, the other major protest adjudication body, are binding on the agencies.) But although GAO decisions are not binding legal precedent, the GAO generally applies similar principles in subsequent protests in order to promote clarity and certainty for the entire procurement community. The GAO believes that its bid protest cases have resulted in a uniform body of law applicable to the procurement process upon which the courts, agencies and the public rely. "Bid Protests at the GAO: A descriptive Guide at 1, 4. GAO-18-510-SP.

But every now and then, a protester comes to the GAO and attempts to convince it that a previous decision was wrong and should be reversed. It's rare, but it happens. *Leeward Const. Corp.,* B-420504, March 3, 2022 is such a case, where the GAO had previously opined on a bid protest issue, and Leeward expressed its disagreement with that decision, and stated that it was unreasonable for the agency to take action based solely on the prior GAO decision because it "is not based upon any subsequent case law or authoritative precedent from a Court of proper jurisdiction."

In *Leeward,* the protester stated that it had used an American Institute of Architects ("AIA") 310 Bid Bond in response to the bond requirements, and Leeward contended that its bid bond was consistent with FAR 52.228-1, which the solicitation required. In a previous case, *Pacific Dredge and Const., LLC,* B-418900, Sept. 18, 2020, 2020 CPD ¶ 299, the GAO denied protests that challenged responsiveness determinations based on the identical AIA 310 Bid Bond, because the bond failed to met the requirements of FAR 52.228-1. Specifically, FAR 52.228-1 permits, in case of default, the recovery of all excess reprocurement costs, including administrative costs of reprocurement or the costs of in-house government performance. The AIA bond limited the liability of the surety in case of default to the "the difference, not to exceed [the amount of the bond] between the amount specified in said bid and such larger amount for which the owner may in good faith contract with another party to perform the work covered by said bid." The contracting officer relied on *Dredge* to support his decision that this limitation was inconsistent with FAR 52.228-1.

Leeward's approach did not get far at the GAO, which concluded that "disregarding [GAO's] prior decisions…without intervening changes in controlling or persuasive authority or compelling, distinguishing legal or factual circumstances is antithetical to the Competition in Contracting Act's mandate [that GAO provide for an expeditious and inexpensive resolution of protests.] Thus the protester's disagreement with our prior decisions addressing the identical legal issues, without more, fails to state a legally or factually sufficient basis of protest." GAO dismissed the protest, rejecting all of the arguments put forth by the protester.

Takeaway. If there is an on-point GAO decision, you should rely on it as precent in a GAO bid protest. If you believe the GAO is wrong, you should take your protest to the Court of Federal Claims, which has (rarely) disagreed with GAO on a point of law. You might be able to convince the court to take action that is not consistent with the GAO position.

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