The 6 Most Important Bid Protest Decisions Of 2022

By **Aron Beezley, Patrick Quigley and Sarah Osborne** (December 21, 2022)

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In 2022, the U.S. Court of Federal Claims and the U.S. Government Accountability Office issued six bid protest decisions worthy of particular note.

- ASRC Federal Data Solutions LLC[1]
- ESimplicity Inc. v. U.S.[2]
- Hydraulics International Inc. v. U.S.[3]
- IAP Worldwide Services Inc. v. U.S.[4]
- MP Solutions LLC[5]
- Trace Systems Inc.[6]

This article provides a brief overview of these six cases and discusses how they might shape the bid protest landscape going forward.

1. ASRC Federal Data Solutions

The Facts

The ASRC Federal Data Solutions GAO protest involved an allegation that the awardee had misrepresented the availability of a required key person.

The procurement was for a blanket purchase agreement under the General Services Administration Federal Supply Schedule for information technology services for the National Institute of Environmental Health Sciences.

Under the personnel technical capabilities and qualifications evaluation factor, vendors were to submit information detailing the experience, qualifications, accomplishments and abilities for three labor categories deemed by the agency to be critical to the success of the blanket purchase agreement requirements.

The request for quotes advised vendors that the substitution of key personnel would require agency consent. Upon learning that the agency had awarded the blanket purchase agreement to Arlluk Technology Solutions LLC, ASRC protested to the GAO.

ASRC argued, in part, that Arlluk had misrepresented the availability of two of its proposed key personnel, both of whom were employees of one of ASRC's sister companies.

Each person had already signed a commitment letter with ASRC for the procurement, which stated that no other company could use their names in its proposal.

For its part, Arlluk did not have commitment letters from the two key personnel, but it stated that it had contingent offers of employment for the proposed key personnel.

Although both employees had accepted contingent employment offers from Arlluk months earlier, approximately one year later, just before quotes were due, one of these employees

rejected an updated contingent employment offer from Arlluk.

The GAO sustained the protest because it determined that Arlluk did not have a reasonable basis on which to expect that it would be able to furnish for contract performance the ASRC employee who had rejected the updated contingent employment offer from Arlluk.

Based on the employee's refusal to allow Arlluk to include them in the quote, the GAO concluded that Arlluk's proposal included a misrepresentation regarding the availability of key personnel.

In response to the argument that any dispute between ASRC and Arlluk about the availability of an employee was a private matter regarding the enforceability of a noncompete agreement, the GAO disagreed, stating that the issue was simply one of whether Arlluk had a reasonable basis to include in its quotation the résumé of the ASRC employee who said that she was exclusively committed to ASRC and that no other company could use her résumé.

The agency relied on the misrepresentation, which had a material effect on the evaluation results where Arlluk received a strength for its quote under the personnel technical capabilities and qualifications evaluation factor, a strength that was considered favorably in the best-value determination.

The GAO sustained the protest and recommended exclusion of Arlluk's quote from the competition. The GAO noted that it considers such factors as the degree of negligence or intentionality associated with the offeror's misrepresentations, as well as the significance of the misrepresentation to the evaluation. Here, exclusion was appropriate largely because of the significance of the misrepresentation to the evaluation.

The Takeaway

Procurements involving the identification of required key personnel have been a risky proposition for contractors for some time, particularly given an established line of bid protest cases holding that a contract generally cannot be awarded to an offeror that was aware that a proposed key person had become unavailable but that failed to notify the agency of the change in circumstances.[7]

This issue has perhaps become more of a problem now in a tight labor market with many employers experiencing more frequent employee turnover, coupled with the lengthy amount of time that many agencies take for contract award decisions.

It might be prudent for agencies to assume that they will need to allow for key personnel replacement via discussions, especially in lengthier procurements.

Another way agencies could help minimize these issues is by allowing for submission of alternate key personnel candidates with a proposal. Otherwise, failing to plan for the issue could result in delays relating to bid protests on the key personnel availability issue.

2. ESimplicity

The Facts

In eSimplicity, the Court of Federal Claims analyzed the contours of the late-is-late rule when applied to the electronic submission of procurement proposals.

Under the late-is-late rule, proposals received even moments after the submission deadline are disqualified unless they meet certain limited exceptions in Federal Acquisition Regulation 52.212-1:

> (2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and —
>
> (A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or
>
> (B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or
>
> (C) If this solicitation is a request for proposals, it was the only proposal received.[8]

The first of these exceptions is often called the electronic commerce exception. The second is often called the government control exception.

ESimplicity emailed its proposal to the Navy before the April 25 submission deadline, and its email application confirmed delivery to the government server. ESimplicity, however, never received a confirmation of receipt or a delivery failure notification. ESimplicity subsequently learned that its proposal had not arrived in the Navy recipient's email account.

An agency investigation concluded that the proposal had been received by a government-managed server and queued for delivery but was bounced back by the destination server because it exceeded the maximum file size.

The Navy then advised ESimplicity that its proposal was late and would not be considered because it had not been received by the time specified in the solicitation, and that the requirements for the electronic commerce exception to the late-is-late rule were not met.

ESimplicity filed its protest at the court, arguing that the Navy's solicitation did not specify a file-size limit for proposals and, therefore, the Navy's rejection of the proposal due to its size constituted the application of an unstated evaluation criterion.

ESimplicity likely elected the court instead of the GAO for its protest because the GAO has a relatively severe rule that the government control exception does not apply to electronically submitted quotations.[9]

The court agreed with eSimplicity, concluding that the Navy arbitrarily rejected the proposal. The court remanded the matter to the Navy to determine whether the government control exception applied.

As context for its remand order, the court provided a detailed analysis of the late-is-late rule in the modern proposal submission context — i.e., the electronic submission context — and concluded that the government control exception encompasses electronically submitted

proposals, unlike the GAO's view that the government control exception does not apply to electronically submitted proposals at all.

The court's holding is consistent with the majority of the court's cases addressing this issue.

The court's remand order directed the Navy to consider whether the four elements of the government control exception had been met:

1. The offer must be received before the award is made;

2. The contracting officer must determine that accepting the late offer would not unduly delay the acquisition;

3. There must be acceptable evidence to establish that the offer was received at the government installation designated for receipt of offers; and

4. The offer must have been under the government's control prior to the time set for receipt of offers.[10]

The Takeaway

The eSimplicity case is noteworthy for several reasons.

First, the protester's framing of its argument as one of an agency's application of an unstated evaluation criterion as to proposal file size is novel and is likely to be imitated by protesters in the future when file sizes are not specified in solicitations.

Second, protesters are also likely to rely on the court's detailed reasoning for why the government control exception applies to electronic proposal submissions.

Third, the case is yet another example of disagreement with the GAO's position that the government control exception does not apply to electronic proposal submissions.

Fourth, this case further reinforces the perception that the court is more receptive to an equitable argument on the late-is-late rule than the GAO, and that protesters might have more luck with the court when faced with a similar situation.

3. Hydraulics International

The Facts

In Hydraulics International, the Court of Federal Claims elaborated on the scope and extent of its jurisdiction over bid protests challenging awards of Other Transaction Authority agreements, or OTAs.

The protest involved an upgrade to military helicopter aviation ground power units used to service Army helicopters. The government selected an OTA as the purchasing vehicle to accomplish the aviation ground power unit upgrade.

OTAs are transactions other than contracts, cooperative agreements and grants that are generally used for advanced research projects.[11]

The Army utilized an OTA with the objective of avoiding obstacles related to the regulation

of procurements, and reducing risk and cost for the overall project.

The Army awarded an OTA to the Aviation and Missile Technology Consortium, a public-private academic collaboration, which is managed by Advanced Technology International.

In January 2021, Advanced Technology International issued a request for enhanced white papers, inviting white paper submissions for various projects, including the aviation ground power unit upgrade.

The request provided:

> Upon a determination that this competitively awarded prototype project has been successfully completed, this project may result in the award of a follow-on production contract for over 150 AGPUs without the use of competitive procedures.

Hydraulics submitted a white paper in response to the request but was not selected for award. Hydraulics filed a bid protest with the court in March, challenging the Army's evaluation.

The government moved to dismiss Hydraulic's complaint for lack of subject matter jurisdiction, alleging that the complaint was not "in connection with a procurement or a proposed procurement."[12]

Specifically, the government argued that the OTAs at issue were not in connection with a proposed procurement because any follow-on production from the OTAs was conditional and may never occur, and may still not be a procurement even if it were to occur.

The court rejected the government's jurisdictional challenge, stating that if the aviation ground power unit OTAs are part of the Army's "process for determining a need for acquisition," then they are in connection with a proposed procurement, and the court thus has jurisdiction over Hydraulic's protest.

The court noted that while OTAs are exempt from certain federal laws and regulations, that exemption does not necessarily mean that they are exempt from the court's jurisdiction.

Next, the court found that two recent decisions — one from the court and one from the U.S. District Court for the District of Arizona — contradicted the interpretation advanced by the government of the OTA statutes and of the Tucker Act.

In its 2021 Kinemetrics Inc. v. U.S. decision,[13] the court held that it has protest jurisdiction over an OTA so long as the OTA has a direct effect on the award of a procurement contract.

In MD Helicopters Inc. v. U.S.,[14] the District of Arizona's 2020 decision dismissed a claim against the Army for an OTA prototype project because the OTA "took place within the 'process of determining a need for acquisition' of advanced helicopters."

Based on these decisions, the court in Hydraulics found that it was immaterial whether the follow-on procurement ever occurred and held that, "where an OTA can result in the exclusion of a bidder for consideration of a follow-on production contract, the OTA is in connection with a procurement or a proposed procurement."

The court distinguished 2019 previous decision in Space Exploration Technologies Corp. v.

U.S.,[15] noting that the OTA competition in the SpaceX case was not for goods or services, and the phase two procurement there was predetermined to be a separate FAR-based competition, fully open to bidders excluded from the OTA competition.

Accordingly, the court held that the aviation ground power units OTAs at issue in Hydraulics were part of the Army's "process for determining a need for acquisition" and thus are in connection with a proposed procurement, giving the court jurisdiction to hear the protest.

The Takeaway

The Hydraulics case is noteworthy because this decision is the most recent in a line of cases that have begun to reveal, with some clarity and consistency, the contours of the court's jurisdiction over OTA protests.

While the government is increasingly turning away from traditional procurements in favor of OTAs, it is now apparent that the court tends to find that it has jurisdiction over OTA award challenges where an OTA can result in the exclusion of a bidder from consideration for a follow-on production contract.

Further, this decision is noteworthy because the court found that the OTA language at issue — i.e., "may result in a production contract" — is sufficient for the court to possess jurisdiction over a protest of an OTA award. This language is fairly standard in the OTA context, and the court's decision may have the effect of encouraging future OTA protests.

4. IAP Worldwide Services

The Facts

In IAP, the court addressed the discretion afforded to an agency to not conduct discussions under the Defense Federal Acquisition Regulation Supplement, expressly rejecting the GAO's treatment of the question in the preceding protest of the same procurement, as well as rejecting the test set forth by the GAO in its 2016 Science Applications International Corporation, or SAIC, bid protest decision.[16]

IAP involved a $1 billion procurement for the Army, which found IAP's proposal unacceptable and awarded the contract instead to Vectrus Systems Corporation, without discussions.

IAP argued that the administrative record contained little rationale for the Army's decision to award without discussions. IAP protested unsuccessfully at GAO.[17]

IAP then filed a complaint with the court, raising a number of arguments regarding the evaluation, most of which the court rejected.

The court did, however, agree with IAP that the administrative record failed to demonstrate a rational basis for the Army's decision to award without discussions.

The DFARS provision at issue, DFARS 215.306(c)(1), states that, for "acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions."

The court, as it had in the 2019 case Oak Grove v. U.S.,[18] concluded that the use of the word "should" in DFARS 215.306(c)(1) "creates a presumption in favor of an agency's conducting discussions." The court stated that, while the Army had the discretion to decline

discussions under DFARS 215.306, the DFARS "presumption favoring discussions must be overcome with reasoned decision-making not reflected in the administrative record."

In the court's view, the administrative record failed to evidence the requisite reasoned decision making regarding whether to conduct discussions, containing only off-hand assumptions and conclusory statements. The court held that, because a correct application of DFARS 215.306 might have kept IAP in the competition, IAP was prejudiced.

The court also analyzed whether the three-part test set out in the GAO protest, SAIC, about the reasonableness of an agency's decision to award without discussions should be applied.

The court, however, rejected the SAIC test for procurements subject to DFARS 215.306, stating that, although the SAIC decision recognized that DFARS 215.306 made discussions "the default procedure for source selections for procurements at or above $100 million," SAIC's three-part test relied on precedent that predated the implementation of DFARS 215.306 and otherwise embraced unfettered agency discretion about whether to conduct discussions.

As such, given the regulatory presumption to conduct discussions found in DFARS 215.306, the court concluded that the SAIC test was inapplicable to procurements subject to DFARS 215.306.

After supplemental briefing and in a separate opinion — notable for its discussion of available equitable relief in protests — the court ordered a limited remand for the "Army to decide in the first how to apply DFARS 215.306 given this Court's interpretation of that provision and the facts and circumstances of the procurement at issue."[19]

The Takeaway

IAP is notable because it is another case addressing the standard that the court has found an agency must meet to justify a decision to award without discussions for procurements subject to DFARS 215.306, which involves a documented rationale requirement from the agency that GAO protest decisions have not required.

5. MP Solutions

The Facts

In MP Solutions, the GAO clarified that the enhanced debriefing procedures of the U.S. Department of Defense apply only to post-award debriefings and not to preaward protests.

The Missile Defense Agency conducted a procurement for specialized engineering analysis services. The agency received two proposals and, after conducting its evaluation, determined that one — that of the protester — was unacceptable.

Thus, the agency eliminated MP Solutions' proposal from the competitive range. The protester then requested a preaward debriefing.

The agency provided the preaward debriefing on Aug. 1, and indicated that the protester could ask additional questions about the procurement and the agency's evaluation by Aug. 3.

The protester submitted questions by that deadline. The protester then filed its GAO protest

on Aug. 11, within 10 days of the date that the protester had received its debriefing, but before the agency responded to the protester's questions.

The agency filed a dismissal request at the GAO, arguing that the protest was premature because the debriefing had not yet concluded.

The agency argued that the DOD enhanced debriefing process, in concert with GAO regulations, dictated "that a post-award debriefing is not considered concluded until the agency delivers its written responses to the unsuccessful offeror's debriefing questions."

The agency contended that the same rule should be applied in the pre-award debriefing context.

The GAO rejected the agency's argument, stating that Section 818 of the National Defense Authorization Act for fiscal year 2018,[20] which established the statutory basis for the DOD's enhanced debriefing process, had amended the law regarding post-award debriefings only. It did not mandate that similar amendments be made to preaward debriefing requirements.

As such, by its plain language, the statute establishing the DOD's enhanced debriefing procedures applies only to post-award and not preaward debriefings.

The GAO also noted that there was no affirmative indication from the agency that it would only consider the debriefing to be concluded once it had responded to the protester's questions.

To the contrary, the GAO found that the agency's actions in accepting additional questions created an ambiguity that led the protester to reasonably believe its debriefing was closed. As such, the GAO found that the protest was timely and not premature.

The Takeaway

While it was the agency in MP Solutions that argued that the DOD's enhanced debriefing procedures should apply to preaward debriefings, protesters should also take note of the GAO's decision, and should understand that their preaward debriefings may not necessarily be extended by the DOD's enhanced debriefing procedures.

Protesters, therefore, would be wise to err on the side of caution and file their GAO protests within 10 days of receiving their debriefings, even if the agency has allowed them to ask additional questions.

6. Trace Systems

The Facts

In Trace Systems, before eventually remanding the case to the Defense Information Systems Agency, or DISA, the Court of Federal Claims analyzed the meaning of "whole administrative record" and directed the agency to either complete or recertify completion of the administrative record after the government initially produced very few relevant pages.

Trace filed a bid protest at the court challenging DISA's decisions to cancel a solicitation and a related task order that had been awarded to Trace, and also challenged the award of a related sole source contract.

The government filed the administrative record, to which Trace objected via a motion styled as a motion to compel and for leave to conduct discovery. Trace argued that the government's production was incomplete because, of 22,838 pages submitted by the government, only six pages were relevant to the protest.

The agency opposed the motion, asserting, inter alia, that it was not required to include internal, predecisional or deliberative documents.

The agency also produced additional documents in response to Trace's motion, resulting in a total of only thirteen relevant pages addressing the protest issues.

Despite the government's representations that there existed no other documents that should have been included, the court directed the government to conduct additional diligence to either complete or recertify the completeness of the record.

The court's opinion and order on Trace's motion to compel provides a fulsome discussion of the scope of an administrative record and reemphasized that "it is axiomatic that the administrative record needs to be 'complete' so that the Court" can execute its review function. After a lengthy discussion, the court stated the following:

> [T]he "whole administrative record," within the meaning of the Administrative Procedure Act, "is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record"; rather, the "whole administrative record ... consists of all documents and materials directly or indirectly considered by agency decision-makers," including "evidence contrary to the agency's position."

Within three days of the court's opinion and order on the motion, the government filed a motion for voluntary remand, which the court granted.[21]

The Takeaway

Trace Systems is important not because it breaks new ground with respect to how the court defines the scope of the administrative record, but because it highlights what appears to be a growing trend in bid protest litigation where agencies appear reluctant to produce an administrative record as broad as protesters believe is appropriate.

This trend is most evident in the increasing disconnect between the scope of the record required to be produced in bid protest litigation before the GAO and the court.

The GAO has increasingly permitted agencies to produce fewer and fewer documents in response to bid protest litigation, which in turn has resulted in increased document disputes and the rise of piecemeal supplemental protests, as documents and information trickles out over the course of a protest.

Some would argue that this trend has spilled over into litigation before the court, resulting in decisions like Trace where the court has had to remind parties forcefully what the "whole administrative record" is.

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[1] ASRC Fed. Data Sols., LLC, B-421008 et al., 2022 CPD ¶---, 2022 WL 17505197 (Comp. Gen. Dec. 2, 2022).

[2] eSimplicity Inc. v. U.S., 162 Fed. Cl. 372 (2022).

[3] Hydraulics Int'l Inc. v. U.S., 161 Fed. Cl. 167 (2022).

[4] IAP Worldwide Servs., Inc. v. U.S., 159 Fed. Cl. 265 (2022).

[5] MP Solutions LLC, GAO B-420953 et al., 2022 CPD ¶ 289 (Comp. Gen. Nov. 21, 2022).

[6] Trace Sys. Inc. v. U.S., 160 Fed. Cl. 691 (2022).

[7] See, e.g., M.C. Dean Inc., B-418553 et al., 2020 CPD ¶206 (Comp. Gen. June 15, 2020); see also Ashlin Mgmt. Group, B-419472.3 et al., 2021 CPD ¶357 (Comp. Gen. Nov. 4, 2021).

[8] Federal Acquisition Regulations (FAR) 52.212-1(f)(2).

[9] See Sea Box Inc., B-291056, 2002 CPD ¶181 (Comp. Gen. Oct. 31, 2002); see also People, Tech. & Processes LLC, B-419385 et al., 2021 CPD ¶100 (Comp. Gen. Feb. 2, 2021); see also VERSA Integrated Solutions Inc., B-420530, 2022 CPD ¶98 (Comp. Gen. Apr. 13, 2022).

[10] eSimplicity Inc v. U.S., 162 Fed. Cl. at 386 (citing FAR 52.212-1(f)(2)(i)).

[11] 10 U.S.C. §§4021-22.

[12] 28 U.S.C. §1491(b)(1).

[13] Kinemetrics Inc. v. U.S., 155 Fed. Cl. 777 (2021).

[14] MD Helicopters Inc. v. U.S., 435 F. Supp. 3d 1003 (D. Ariz. 2020).

[15] Space Expl. Techs. Corp. v. U.S., 144 Fed. Cl. 433 (2019).

[16] Sci. Applications Int'l Corp., B-413501 et al., 2016 CPD ¶ 328 (Comp. Gen. Nov. 9, 2016).

[17] IAP Worldwide Servs., Inc., B-419647 et al., 2021 CPD ¶ 222 (Comp. Gen. June 1, 2021).

[18] Oak Grove Technologies v. U.S., 155 Fed. Cl. 84 (2021). Oak Grove is pending appeal before the United States Court of Appeals for the Federal Circuit.

[19] IAP Worldwide Servs., Inc. v. United States, 160 Fed. Cl. 57 (2022).

[20] Enhanced Post-Award Debriefing Rights, Nat'l Defense Authorization Act, 2018, Pub. L. No. 115-91, 131 Stat 1283 (Dec. 12, 2017).

[21] Trace Sys. Inc. v. United States, No. 22-404C, 2022 WL 2963486 (Fed. Cl. July 26, 2022).