TABLE OF CONTENTS

ARTICLES >>
Acquisition Reform Ramps Up Early in 2016
By: Raymond Biagini and Jeff Bozman

Cybersecurity and Acquisition Reforms in the FY 2016 National Defense Authorization Act
By: Charles Fleischmann

GAO's Guide to Winning Bid Protests
By: Brian Waagner

NEWS AND ANNOUNCEMENTS >>
ABA Everyday
365 days of podcasts and publications for your benefit.

22nd Annual Federal Procurement Institute and PCL Section Council Meeting
March 9-12, Annapolis, MD
Sea Changes: Riding the Wave in Public Procurement

11th Annual State and Local Procurement Symposium
April 7-8, San Juan, PR

YLD Spring Conference
May 5-7, St. Louis, MO
Earn CLE, make connections, and participate in the YLD Assembly.
ARTICLES

Acquisition Reform Ramps Up Early in 2016
By: Raymond Biagini and Jeff Bozman

House Armed Services Committee Chairman Mac Thornberry is wasting no time in his efforts to build on last year’s reforms to the defense acquisition system. Less than a year after he launched his opening salvo in a new round of changes, Chairman Thornberry previewed the year ahead with a recent hearing and a presentation at the National Press Club.

Chairman Thornberry plans to circulate draft reform legislation and incorporate the finished product into the FY2017 National Defense Authorization Act (NDAA). Emphasizing (once again) the themes of agility and innovation, the hearing featured the senior acquisition executives from each of the military departments. Chairman Thornberry expressed particular interest in finding ways to support their drive for greater flexibility in experimentation and prototyping.

The Chairman’s remarks at the National Press Club focused on key areas where the Committee will direct its energy—and where defense contractors should devote some attention in the coming months. These objectives include adding muscle to the ideas articulated in the administration’s Third Offset Strategy; expanding the Committee’s oversight and engagement on cybersecurity issues; pushing for continued modernization of the nuclear triad; and defining the proper scope of employment for the country’s over-extended special operations forces.

Chairman Thornberry conceded that reform will be an ongoing task for succeeding Congresses, and that the presidential elections are likely to divert attention in the second half of this year. Still, his early start this year conveys optimism, commitment, and openness to ideas from industry. Contractors of all sizes—including non-traditional defense contractors the Defense Department has been courting—can benefit from offering constructive recommendations early and often in the coming months. Of course, Senator John McCain, Chairman of the Senate Armed Services Committee, also has a robust reform agenda. Whether McCain and Thornberry’s priorities align will be the story to watch in the coming weeks.

Raymond Biagini is a partner at Covington & Burling LLP and practices in Government Contracts, Litigation, Public Policy, and Insurance Coverage.

Jeff Bozman, an associate at Covington & Burling LLP, draws on his past experience as a Marine Corps officer to advise companies who do business with the United States Government.
Cybersecurity and Acquisition Reforms in the FY 2016 National Defense Authorization Act
By: Charles Fleischmann

The National Defense Authorization Act for Fiscal Year 2016 [pdf], signed into law just before Thanksgiving, authorizes $607 billion for Department of Defense activities in FY 2016. It also implements a number of acquisition reforms intended to enhance the Government’s cybersecurity efforts and streamline the various acquisition regulations. Here we break down some of the key acquisition provisions:

- **Rapid acquisition authority for cyber attacks.** Section 803 of the 2016 NDAA expands the DoD’s ability to employ rapid acquisition procedures established under the 2003 NDAA to enhance its ability to respond to combat emergencies and urgent operational needs. Under Section 803, rapid acquisition procedures may now be used to acquire “needed offensive or defensive cyber capabilities, supplies, and associated support services” to respond to a cyber attack that “has resulted in critical mission failure, the loss of life, property destruction, or economic effects.” The term “cyber attack” is broadly defined as including any “deliberate action to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information or programs” in those systems. Acquisitions made pursuant to this authority are subject to an aggregate limit of $200 million in each fiscal year.

- **U.S. Cyber Command acquisition authority and liability protection for cybersecurity contractors.** In addition to expanding DoD’s rapid acquisition authority to deal with cyber attacks, Section 807 of the NDAA provides new limited acquisition authority for the Commander of the United States Cyber Command (CYBERCOM). The Commander is authorized to procure “cyber operations-peculiar equipment and capabilities,” subject to an annual limit of $75 million for each fiscal year from 2016 through 2021. Section 1647 of the NDAA also requires the evaluation of cyber vulnerabilities of all major DoD weapons systems by the end of 2019. Section 1641 of the NDAA provides enhanced liability protection for reporting cyber incidents for both “cleared” and “operationally critical” contractors, so long as there is no willful misconduct.

- **Streamlining acquisition regulations.** Another major thrust of the 2016 NDAA was streamlining the acquisition process and eliminating redundant and duplicative requirements. Section 809 of the NDAA requires that the Secretary of Defense establish a nine-member advisory panel consisting of experts in acquisition and procurement policy, the objective of which is to review the DoD’s acquisition regulations and provide recommendations for streamlining the procurement process. The panel has 2 years to provide a final report of its recommendations and must provide interim reports at the 6-month and 18-month marks.

- **Cost overrun penalty.** The 2016 NDAA also emphasizes the need to monitor costs on major defense acquisition programs and to hold the DoD accountable for cost overruns. Under section 828 of the NDAA, beginning in FY 2015, the Secretary of each military department “shall pay a penalty for cost overruns” experienced on certain major defense acquisition programs. Cost overruns are defined as the difference between the current program acquisition cost and the program acquisition cost shown in the original baseline.
estimate. The penalty for cost overruns in a given fiscal year is 3% of the cumulative amount of overruns on all of the covered major defense acquisition programs for the respective military department.

- **Other acquisition provisions of note.** Section 816 of the NDAA raises the special emergency procurement threshold from $250,000 to $750,000 for purchases inside the U.S., and from $1 million to $1.5 million for purchases outside the U.S. Additionally, section 867 of the NDAA allows small businesses to better compete for large contracts by requiring that more weight be given to the past performances of teams and joint ventures. Congress also considered increasing several other acquisition thresholds, but those changes were omitted from the language that became law.

Charles is an Associate in Husch Blackwell LLP's Public Policy, Regulatory, and Government Affairs practice group. In addition to the NDAA, he has written about a variety of legislative and regulatory issues including U.S./Cuba relations, cybersecurity, food labeling, and 3D printing.
GAO’s Guide to Winning Bid Protests
By: Brian Waagner

The Government Accountability Office has been publishing its annual bid protest statistics report to Congress since fiscal year 1995. That year GAO received 2,334 new protests and closed 2,528. For FY 2015, GAO reports that it received 2,496 new protests and closed 2,647.

Given the changes in contract law and the significant increase in expenditures on federal contracts over the last 20 years, these figures are remarkably consistent.

For Fiscal Year 2015, GAO reports that protesters obtained some form of relief in 45 percent of cases closed, either as the result of an agency’s voluntary corrective action or a decision sustaining some or all of the protest grounds. This “effectiveness rate” is marginally higher than it has been in the previous several years, when it hovered between 42 percent and 43 percent.

Winning bases for bid protests

One interesting piece of data added to GAO’s annual report in the last couple of years is the summary of the “most prevalent grounds for sustaining protests.” This new data element is the result of a requirement in a 2013 amendment to the Competition in Contracting Act. See 31 U.S.C. § 3554(e)(2).

In FY 2015, GAO identified five grounds of protest as the most prevalent. Even though it is drawn from only a small subset of protests that are actually resolved on the merits, GAO’s list of reasons for sustaining protests provides a roadmap for future protesters. Here is GAO’s list, along with a brief summary of the decision that GAO cites to illustrate it.

1. Unreasonable cost or price evaluation
The decision in Computer Sciences Corp.; HP Enterprise Servs., LLC; Harris IT Servs. Corp.; Booz Allen Hamilton, Inc., B-408694.7 et al. (Nov. 3, 2014), involved the Air Force RFP for the “NETCENTS-2” contract. The Air Force received 21 proposals, of which 20 were evaluated as technically acceptable. The prices for a sample cost-reimbursable task order ranged from $34.8 million to $110 million. The Air Force awarded contracts to the “10 lowest-priced offerors with substantial confidence ratings.”

GAO sustained the protests filed by some of the unsuccessful offerors because the Air Force failed to conduct an adequate cost realism evaluation. As to the mix of labor rates and hours presented in the various proposals, the contracting officer asserted that the pricing was “fairly uniform” and that differences in the offerors’ hourly rates were offset by the number of proposed hours.

GAO found that the record did not support the contracting officer’s assertions. The number of proposed labor hours varied by more than 100 percent. Several offerors proposed hours lower than the agency’s minimum baseline. And nothing in the record showed how the agency reconciled these issues.
2. Unreasonable past performance evaluation


SupplyCore’s four reference contracts had an aggregate value of only $152,000 and an aggregate performance period of 19 months. One involved a $466 3-day contract involving automotive control assemblies. In its evaluation, the Air Force found SupplyCore’s references “somewhat relevant” and assigned a rating of “substantial confidence.” GAO sustained the protest of this rating, finding the government’s analysis “unsupportable.”

GAO also sustained LMI’s protest of its own past performance rating. Since LMI was a newly-formed company, it submitted references for its CEO and another senior official. The agency reviewed three past performance questionnaires submitted with LMI’s proposal, finding all of them directly relevant and one of them “sufficiently detailed.”

Rather than addressing its follow-up questions with the points-of-contact identified in LMI’s questionnaires, the Air Force contacted another individual who had never had day-to-day interactions with LMI’s CEO. Citing questions raised by this individual, the Air Force assigned LMI a past performance rating of “limited confidence.”

GAO found the Air Force’s conclusions as to LMI’s past performance unreasonable. The information in LMI’s questionnaires had been verified by knowledgeable agency officials. There was no justification to ignore this verified information in favor of unverified information offered by another government official.

3. Failure to follow evaluation criteria

The RFP in *Tantus Technologies, Inc.*, B-411608; B-411608.3 (Sept. 14, 2015), sought proposals for assistance with testing IT systems comprising the federally-operated health insurance exchanges established under the Affordable Care Act. CMS awarded the task order to Edaptive Systems LLC, which submitted a proposal with an evaluated price of approximately $70 million. Tantus, whose evaluated price was approximately $69 million, protested the evaluation that led to the award.

The protest focused on Edaptive’s proposal to use “incumbent staff”—individuals who were currently providing similar marketplace testing services to CMS—to perform the work. CMS identified this element of Edaptive’s proposal as a “significant strength.”

GAO concluded that CMS’s conclusion was not justified. Edaptive proposed to relocate a substantial portion of its workforce after the first year of performance. One of the evaluation factors identified in the RFP was “[t]he extent to which the proposed staffing plan ensures that appropriately qualified staff are available to meet the require requirements of this contract on an ongoing basis.” (Quotation from RFP; emphasis added by GAO.) GAO found that CMS failed to consider whether Edaptive’s proposed relocation plan would have affected its ability to have qualified staff available during the entire performance period.

© 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
4. Inadequate documentation of the record
The solicitation in CFS-KBR Marianas Support Services, LLC; Fluor Federal Solutions LLC, B-410486, et al. (Jan. 2, 2015), sought to award a cost-reimbursement contract to provide base operations support services on the island of Guam. After evaluating proposals, the Navy awarded a contract with an estimated value of $532 million to DSZP 21 LLC.

GAO’s decision on Fluor’s protest focuses on the Navy’s assessment of the cost impact of the staffing plans submitted by DSZP, CFS-KBR, and by Fluor. In discussions, the Navy asked all three of the offerors to review and revise their staffing plan by adding a specific number of full-time equivalents. The number identified in discussions corresponded to the difference between the staffing levels proposed by each offeror and those in the government’s estimate.

In its final offer, Fluor added the precise number of FTEs identified in the Navy discussion questions. CFS-KBR and DSZP also added FTEs, but not as many as the Navy had suggested. Fluor and DSZP both received outstanding ratings for staffing and resources. CFS-KBR received a good rating for staffing and resources. A note in the Navy’s technical evaluation report stated that “each firm’s proposed staffing was adequate in light of their technical approach.”

But that one note was the extent of the Navy’s analysis. GAO sustained the protest because there was insufficient documentation of the Navy’s decision. In GAO’s words, “there is no critical analysis or description of the offerors’ proposed staffing or unique technical approaches that led to these conclusory findings.”

5. Unreasonable technical evaluation
The procurement at issue in US Investigations Services, LLC, B-410454.2 (Jan.15, 2015), involved a request for quotations to provide personnel qualified to perform research and analysis services in connection with the FBI’s National Name Check program and its FOIA/Declassification program. The agency awarded a delivery order to FCi Federal, Inc., which submitted the lowest evaluated price of $13.3 million.

USIS’s protest asserted that FCi Federal was ineligible for award because the labor categories required to perform the FBI task order were not on FCi’s Federal Supply Schedule contract. The RFQ sought “research analysts, program managers, general consultants, and legal administrative specialists.” For three of these labor categories, FCi proposed to use “program management analysts.”

GAO sustained the protest because the RFQ made it clear that “the duties, responsibilities and qualifications of the types of employees solicited by the agency are not encompassed within FCi’s program management analyst category.” There was nothing in the agency record or in the FBI’s response to the protest that could adequately demonstrate how the agency could reasonably have reconciled the “divergence” between FCi’s labor categories and those identified in the RFQ.

Brian Waagner is a partner in the Washington, DC office of Husch Blackwell LLP.
NEWS AND ANNOUNCEMENTS

**ABA Everyday**
A CLE, podcast, publication, resource, or webinar for everyday of the year is available at http://www.abaeveryday.org/ because ABA membership is valuable everyday!

**22nd Annual Federal Procurement Institute and PCL Section Council Meeting**
March 9-12,
Loews Hotel
126 West Street
Annapolis, MD
The ABA Section of Public Contract Law's flagship program will focus on the significant federal procurement developments over the past year and provide valuable insight to chart the course ahead. The full two0day sessions will include fraud issues, judge's perspective, cybersecurity, bid protests, and more.

**11th Annual State and Local Procurement Symposium**
April 7-8, San Juan, PR
Three days of CLE, topical discussions, and networking in Puerto Rico. This event includes topics you are unlikely to find elsewhere, including working with municipalities, contracting with tribal governments, and Cuba issues and policies.

**YLD Spring Conference**
May 5-7
The Four Seasons
999 North 2nd Street
St. Louis, MO
Join the YLD for a conference designed to help you grow your practice and make a difference in your community and the legal profession. This three-day event is filled with CLE sessions, topical discussions, and opportunities to network with and learn from lawyers in varying practice areas from the U.S. and around the world.