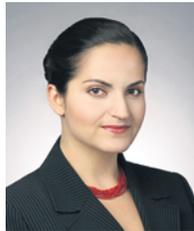


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## Bid Protests

### **View from RJO: GAO's Neglected § 21.8(b): How it Can be Used to Address Concerns That Bid Protests are too Costly and Disruptive**



BY ROBERT S. METZGER AND OLIYA S. ZAMARAY

**E**ven when it finds that a procuring agency has committed a violation of law or regulation, the U.S. Court of Federal Claims (“CFC”) may limit or even deny relief to a meritorious protester. A permanent injunction is considered “extraordinary relief.” *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). A demanding four-factor test is applied, as the CFC must consider (1) success on the merits, (2) irreparable harm, (3) balance of hardships and (4) the public interest. *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009). No one factor is dispositive, but the first two factors often are said to be most critical, and it is the plaintiff’s burden to clearly demonstrate its entitlement to relief.

Not infrequently, a successful protester at the CFC, even one that has suffered some irreparable injury, is not awarded injunctive relief. In *Filtration Dev. Co., LLC v. United States*, 60 Fed. Cl. 371, 388 (Fed. Cl. 2004), for example, CFC found that the Army violated pertinent organizational conflict of interest regulations but determined that national security and national defense considerations prevented it from permanently en-

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joining the contract in its entirety. *See also J.C.N. Constr., Inc. v. United States*, 107 Fed. Cl. 503, 518 (2012) (protester awarded bid preparation and proposal costs where the equitable relief was inappropriate because the challenged contract had been substantially completed).

The CFC’s limitations on remedy, while very frustrating to successful protesters, serve an important public purpose. Bid protests can be disruptive, may have a costly impact on the public acquisition process, and can delay receipt by government agencies of supplies or services that they need. Just as there is a public interest in a procurement system that is fair to bidders, and accountable for mistakes, there also is a public interest in the prompt and effective accomplishment of acquisition objectives.

In some quarters, the GAO bid protest remedy has been criticized as being susceptible to manipulation by protesters who use it to frustrate the results of competition. Another criticism is that the benefits to the procurement system from sustained protests may not, in all instances, justify the costs to the public that result from interruption and corrective action. GAO believes it can deal with the risk of “frivolous” protests by early disposition of protests that lack merit.<sup>2</sup> But some meritorious

<sup>2</sup> GAO believes it can disincentivize protests by dismissing protests that fall under the rubric “frivolous as filed” because they are untimely, fail for lack of standing, or fail to assert a valid legal basis for protest. *See Report to Congress on Bid*

protests arise in circumstances where relief would be ill-advised and contrary to the public interest.

Though it may surprise some, GAO already has the authority and the regulations in place to scrutinize and tailor remedy as distinct from its decision on the merits of an alleged violation of procurement law. GAO has used this authority only sparingly. Should this change?

**I. GAO's Rarely Invoked Regulation at § 21.8(b).** GAO regulations at § 21.8(a) prescribe the types of remedies it may recommend should it find that the protested procurement does not comply with statute or regulation. At § 21.8(b), the regulations go on to say that:

[i]n determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the *seriousness* of the procurement deficiency, the degree of *prejudice* to other parties or to the integrity of the competitive procurement system, the *good faith* of the parties, the *extent of performance*, the *cost* to the government, the *urgency* of the procurement, and the *impact* of the recommendation(s) on the agency's mission.

4 C.F.R. § 21.8(b) (emphasis added). GAO's regulations, therefore, expressly provide for a separate inquiry into remedy distinct from the determination of the merits of a protest.

Review of decisions in recent years, however, reveals that GAO rarely invokes § 21.8(b) and that the recommendation factors enumerated in the regulation are rarely discussed. GAO's regular practice is not to document its analysis of the § 21.8(b) factors (provided that analysis occurs at all). The few instances where GAO discusses § 21.8(b) factors arise in motions for reconsideration, where GAO often asserts that it considered all of the § 21.8(b) factors at the time it made its original recommendation. In *Dept. of Transportation, CSC, B-278466.2; B278466.3, Recon., 98-1 Comp. Gen. Proc. Dec. ¶ 140*, GAO cited § 21.8(b) to explain that "[i]n determining the appropriate recommendation in cases where we find a violation of procurement laws or regulations, we consider all the circumstances surrounding the procurement". Although GAO may invoke § 21.8(b) to support denial of reconsideration, separate discussion of the factors in the underlying decision is far from the norm. For example, in *Department of Justice, B-400760.6, Recon., 2010 Comp. Gen. Proc. Dec. ¶ 153*, where GAO had previously sustained the protest without specifically documenting its § 21.8(b) analysis, the agency complained on reconsideration that GAO failed to take account of the extent of performance and substantial expense already incurred. GAO replied, "[t]he agency is incorrect in asserting that in fashioning our recommendation, we failed to consider the potential cost to the agency of terminating" the award. Moreover, GAO explained, "the potential cost to the government of terminating the [award] was not the only factor that [GAO] considered" in making its recommendation. GAO then provided an overview of the § 21.8(b) analysis it had undertaken in crafting its recommendation in the initial protest.

Protests Involving Defense Procurements, B-401197, 2009 CPD ¶ 101, at 11, available at <http://www.gao.gov/decisions/bidpro/401197.pdf>.

**II. Comparing GAO's § 21.8(b) Analysis to the Test for Injunctive Relief at the CFC.** There are parallels between GAO's § 21.8(b) analysis and the factors CFC considers when it decides whether to grant injunctive relief. Where the CFC considers likelihood of success on the merits, GAO considers the "seriousness" of the procurement deficiency as well as the impact to the "integrity of the competitive procurement system." The CFC evaluates the likelihood of "irreparable harm" while GAO considers "the degree of prejudice" to the parties and to the competitive procurement system.<sup>3</sup> The "balance of equities" factor at the CFC has a counterpart in GAO's consideration of "prejudice to the parties" and the "good faith of the parties." And the "public interest" criteria at the CFC is mirrored by GAO's obligation to consider "extent of performance," "cost to the government," "urgency of the procurement" and "impact . . . on the agency's mission."

Despite similarities in factors to be considered, GAO and CFC could hardly be more different in process. Even though § 21.8(b) states that GAO "shall" consider "all circumstances surrounding the procurement" when it determines what to recommend for remedy, GAO does not regularly document its determination of the factors, conveying the impression that after a protester succeeds in establishing a violation of statute or regulation, recommendation of a corrective remedy is all but "automatic."

The contrast to the adjudicative process at the CFC is stark. There, representative bid protest decisions examine at great length each of the four factors that must be satisfied in order to obtain injunctive relief. Apart from success on the merits, it is the protester's burden to show irreparable harm in the absence of relief, such that the balance of hardships is in the plaintiff's favor, and to establish that the public interest will be served by the relief requested. These factors may be intensely litigated by the parties, and CFC decisions go to great lengths to review the evidence and supporting authorities, and to explain and justify the court's conclusions on each of the factors.

GAO and CFC, of course, represent very different approaches to the same objective of providing a means for disappointed bidders to contest a procurement or proposed procurement.<sup>4</sup> GAO is an expedited forum that must issue a decision within 100 days after a protest is filed. 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a). GAO's ability to separately address the factors enumerated by § 21.8(b) may be constrained by time pressure and limited resources.<sup>5</sup> But the plain words of § 21.8(b) require

<sup>3</sup> Prejudice is an essential element of a viable protest at GAO, as a protester must demonstrate "that, but for the agency's actions, it would have had a substantial chance of receiving the award." *Diebold, Inc.*, B-404823, 2010 CPD ¶ 117 at 5. When the evaluation of a proposal is found to be flawed, however, GAO has said that it will resolve any doubt regarding prejudice in favor of a protester. *Kellogg, Brown & Root Servs. Inc.*, Recon., B-309752.8, 2008 CPD ¶ 84.

<sup>4</sup> See generally Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225 (2007).

<sup>5</sup> GAO's ability to address the § 21.8(b) factors would be improved if Congress would increase its funding so that more staff can be hired into the Procurement Law Division. GAO's caseload has increased substantially over recent years – from 1,411 cases filed (FY2007) to 1,989 (FY2009) and to 2,429 (FY2013). Its hiring has not kept pace.

that they be considered. Moreover, there are reasons to believe that public policy interests would be served by giving more attention to the factors governing GAO's recommendations. Renewed attention to § 21.8(b) might improve the "balance" in the bid protest process between the interests of the protester, on the one hand, and, on the other hand, those of the procuring agency and the intervenor who seeks to defend what it considers an earned award.

**III. How to Elevate and Apply § 21.8(b).** GAO need not replicate CFC's demands on the subject of relief. It can change the way it acts upon the existing authority of § 21.8(b) when the regulation is invoked by parties to a protest. The initiative must rest with the parties, and the principal opportunity to invoke the regulation ordinarily would follow production of the agency record, as parties should be expected to adduce evidence to prove any contentions that arise from the § 21.8(b) factors.

For illustration, in its initial response to a protest filing, an agency might consider raising the issue of whether the circumstances of a particular procurement warrant limited (or any) relief, citing the § 21.8(b) fac-

tors. One can envision each of the parties raising arguments arising from § 21.8(b) in the comments filed after review of the agency record. Again for illustration, a protester might cite factors to argue for stronger recommendations, just as an agency might contend that any violation (if proved) was not serious or that certain forms of relief would be excessively costly to the government and harmful to the agency's mission. Where GAO's internal deliberations prompt questions about the application of the factors, GAO can ask the parties to discuss or even brief the subject.

In sum, § 21.8 is a tool that is on the books and thus already available to the GAO and to all the parties. Increased consideration of its purpose and potential applications can serve to better inform GAO's decision-making and to afford all parties further opportunities to present their contentions to GAO. Prudential employment of the regulation also can assist GAO in assuring that the public's interests in an efficient and effective acquisition process are fully respected and that there is not disproportionate cost or impact upon agency operations.