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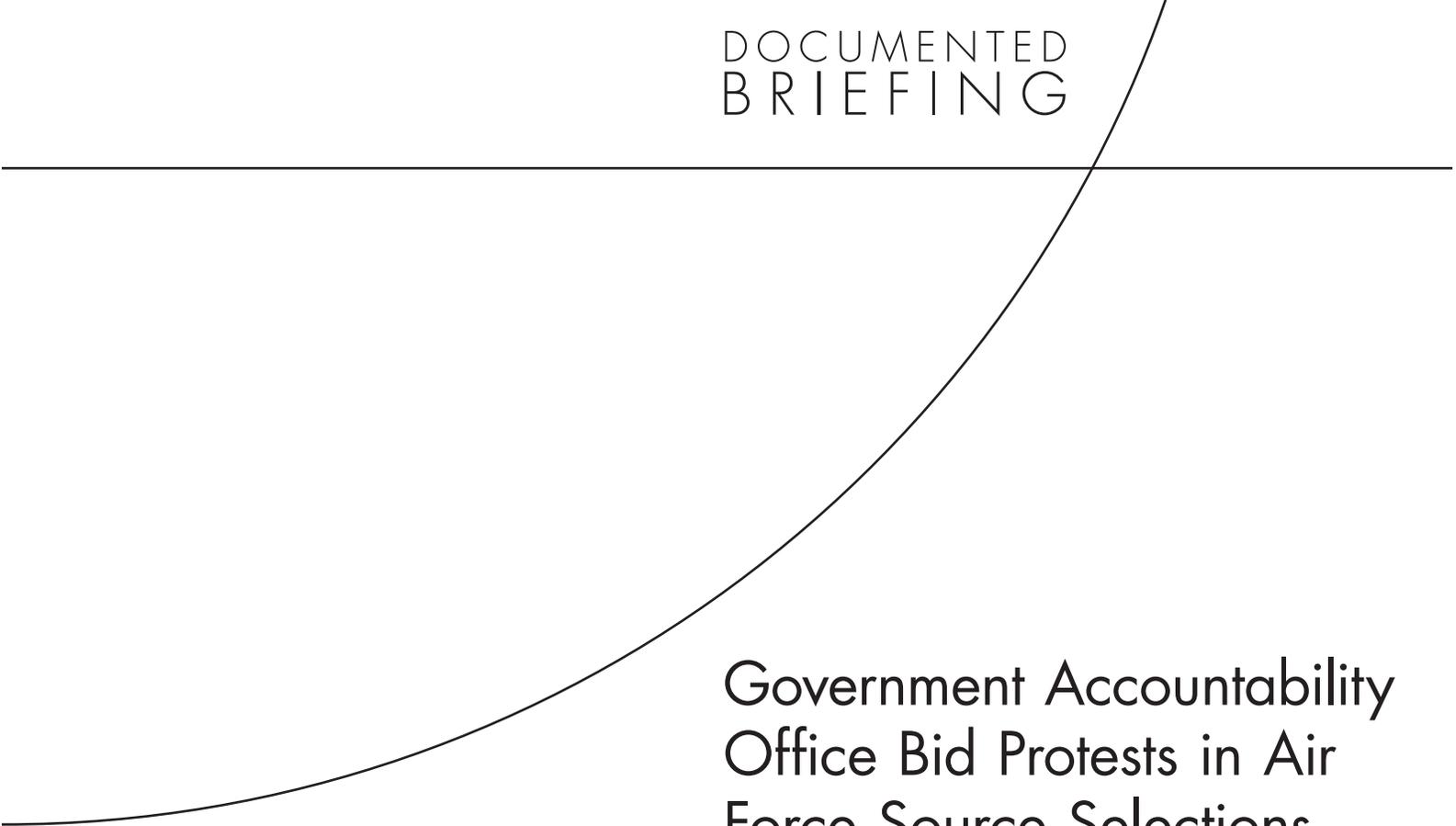
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Government Accountability Office Bid Protests in Air Force Source Selections

Evidence and Options

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Summary

When an offeror in an Air Force source selection believes that the Air Force has made an error that is large enough to change the outcome of the source selection, the offeror can file a protest with the Office of General Counsel of the GAO. Following review, if GAO agrees that a significant error has occurred, it can suggest how the Air Force should correct the error. GAO cannot force the Air Force to follow its recommendation, but if the Air Force does not, GAO must report this to Congress. The Air Force almost always follows GAO recommendations when GAO sustains a bid protest.

GAO sustained protests in two recent, large, and highly visible Air Force acquisitions—the CSAR-X helicopter program in 2007 and the KC-X aircraft program in 2008. Both precipitated broad criticism of how the Air Force conducts source selections. OSD temporarily suspended the Air Force’s control of the KC-X source selection. Complications caused by the CSAR-X protest sustainments ultimately helped lead OSD to cancel the program. The Air Force and OSD began a series of intense reviews of Air Force source selection policies and practices. As part of this effort, during the summer of 2008, the Office of the Air Force’s Service Acquisition Executive asked PAF to identify specific changes in policies and practices that could improve Air Force performance in GAO bid protests. The Air Force asked PAF to give special attention to how the Air Force conducts source selections in large acquisitions. This documented briefing reports the findings of that PAF analysis.

Corrective Actions and Sustained Protests Both Impose Costs on the Air Force

Although broad criticism of the Air Force has emphasized recent protests sustained by GAO, they are only part of the picture. When a protest occurs, the Air Force can offer corrective action to correct any error. For example, it can offer to reevaluate proposals submitted, to reopen evaluation and give offerors an opportunity to adjust their proposals, to change the offerors included in the source selection, to rewrite the request for proposal (RFP) and start the source selection from scratch, or even to change a final source selection decision and award a contract to a different winner. If a protester accepts such action, there is no further need for GAO to review the protest. During 2000–2008, the Air Force experienced 836 protests—about 93 a year. It offered corrective action that offerors accepted in 273, or 33 percent, of these. It ultimately suffered sustained protests in only 29, or 3 percent, of these.

What can we make of this pattern? Presumably, the Air Force offers a corrective action when it believes that GAO will sustain a protest and suggest a corrective action at least as onerous as the one the Air Force offers. A protester accepts a corrective action early when it believes

that GAO will offer nothing better. That is, an early corrective action is likely to prevail if the protester and Air Force have similar beliefs about how GAO would treat a protest. Under these circumstances, corrective actions accepted up front are likely, on average, to impose costs comparable to corrective actions suggested by GAO at the end of a review.

That said, the Air Force need not offer such proactive corrective action unless it determines that GAO is likely to sustain the protest. GAO has denied 86 percent of the protests that it reviewed when the Air Force did not offer early corrective action. As a result, there are good reasons to believe the Air Force (1) will offer less early corrective action than GAO would require if it ruled against the Air Force and (2) will not offer early corrective action on uncertain cases where corrective action would impose large costs on it, even though going to a GAO review imposes its own administrative costs and delays. Hence, although no reliable cost data are available to verify this, on average, we believe that the costs to the Air Force of an observed sustained protest probably exceed those of an observed early corrective action. Nonetheless, because early corrective action is so much more common, both impose significant costs. The Air Force leadership should track both.

Overall Air Force Experience with Bid Protests Has Been Positive

To keep protests in perspective, it is useful to express them in terms of the total number of contract awards the Air Force makes. The number of protests as a percentage of total contract awards fell fairly steadily from about 1.7 percent in 1995 to 0.5 percent in 2008. Sustained protests are so unusual that they hardly register relative to the total number or the value of contract awards. On average, during 2000 to 2008, GAO sustained one protest for every \$20 billion the Air Force spent in acquisitions. So few sustained protests have occurred that it is impossible to discern any trend in them. On the other hand, the Air Force has offered corrective actions in noticeable numbers. Through the 1990s, it offered corrective actions in about 0.3 percent of contract awards. From 2001 to 2008, the percentage fell fairly steadily, ending well under 0.2 percent of contract awards. All of these trends point to steady improvement over time, resulting in a need to adjust fewer than 0.2 percent of the source selections associated with contract awards by 2008.

Significant Trouble Will Persist in a Small Number of Sophisticated Protests

All that said, the Air Force continues to experience serious protests in large, complex acquisitions that present high stakes to their participants. The CSAR-X and KC-X acquisitions are examples of such acquisitions, but they are not entirely representative of the acquisitions where we expect continuing trouble. Two special characteristics of these acquisitions made protests and sustainments more likely than usual. (1) They both use preexisting designs with characteristics that are relatively well known to all potential offerors. This has made it difficult for the Air Force to state its source selection criteria clearly without foreclosing more than one offer and so preventing a successful competition. Lack of clarity ultimately provided one of the grounds for the sustained protest in the KC-X program. (2) They both involve foreign offerors. The Air Force never expressed any preferences for an American source in these acquisitions so

long as the award complied with the Buy American Act,¹ but the possibility that an Air Force decision might push jobs outside the United States significantly increased the political heat surrounding these acquisitions. High political interest at a minimum complicated decisionmaking by drawing more pointed external attention than usual to these acquisitions.

But these acquisitions share two other characteristics that we expect to see repeatedly in a small number of Air Force acquisitions for the future. (1) They are both large. The net revenues associated with large acquisitions are likely to encourage any loser in a source selection to launch an aggressive protest, even if the cost of that protest is substantial. (2) The winner of either of these source selections could expect to dominate the global market for similar systems for the foreseeable future. That is, losing a source selection such as one of these has profound strategic implications for a global company that, again, are likely to encourage any loser to launch an aggressive protest.

The experience of the CSAR-X and KC-X protests also suggests that large firms are learning how to launch successful, sophisticated protests. They and their outside counsel can surge protest resources, imposing a heavy burden on the Air Force to respond effectively to a surge. They may see a growing opportunity in large, sophisticated protests designed to stretch Air Force capabilities. As their outside counsel learns how to do this, we expect them to offer this capability to other companies with smaller stakes when they lose Air Force competitions. All of these factors point to the likelihood that the Air Force will continue to face aggressive protests in a small number of large, complex acquisitions that present high stakes to the participants.

Proactive Defenses Are Available

The Air Force should focus on changing source selection policies and practices in ways that help it counter such sophisticated protests. As it does so, it should be cautious not to make changes that could hurt its long-term success in dealing with the vast majority of GAO bid protests. It should also be cautious about focusing too much on issues specific to the CSAR-X and KC-X protests. Rather, it should seek proactive defense against sophisticated protests in large, complex acquisitions that present particularly high stakes to the participants. We see opportunities to make changes in five areas. The Air Force Acquisition Improvement Plan (AIP) has already begun to implement changes that move the Air Force in the direction we suggest here. But several opportunities exist to refine the AIP or move beyond it.

Increase Awareness of Finely Tuned GAO Bid Protest Rules

Air Force personnel are often puzzled by GAO's arm's-length stance during bid protests. GAO basically believes that Congress has given it the authority and responsibility to protect the integrity of the federal acquisition system by acting as a counterweight to federal agencies that buy things, such as the Air Force. Where the Air Force gives close attention to the needs of the warfighter as it enforces federal regulations within its own acquisition system, GAO focuses

¹ The Buy American Act (BAA 41 U.S.C. § 10a–10d, passed in 1933) exempts contractors in “qualifying countries” from the BAA, treating them the same as U.S. companies for contract award purposes. U.S. firms are treated (reciprocally) as domestic contractors in procurements that occur in qualifying countries.

on the regulations themselves and deliberately keeps its distance from any substantive issues in Air Force acquisitions where protests arise. By the very nature of its mission, GAO is likely to see protests differently from most Air Force personnel when protests occur. Air Force personnel will be more successful in bid protests the more they understand about how GAO views these protests.

In its reviews of bid protests, GAO sees itself as simply applying legislative language to the specific facts relevant to each new protest. Over the course of time, however, GAO has developed a history of decisions that it draws on as precedents in new decisions. These historical decisions provide an implicit set of rules that can be summarized in terms of three core questions:²

- Did the agency follow the evaluation criteria in the RFP?
- Were the agency determinations reasonable and properly documented?
- Did the agency violate any statute or regulation?

With appropriate understanding of how these rules apply in any particular setting, the Air Force could use them to (1) design and execute source selections to avoid protests and (2) make better informed decisions about when to offer corrective action when protests occur to avoid GAO review. Two of the ten grounds for protests sustained in the CSAR-X and KC-X source selections occurred because, despite close vetting by Air Force attorneys, senior Air Force officials misread the implicit rules GAO used to make decisions. The better Air Force decision-makers understand how GAO applies these implicit rules in practice, the easier it should be to avoid protest sustainments.

Simplify and Clarify Requirements and Priorities

GAO's most common ground for sustaining a protest is a mismatch between the criteria stated in the RFP and the evaluation of these criteria later in the source selection. This accounted directly for three of the ten grounds for the protests sustained in the CSAR-X and KC-X source selections. The simpler and the clearer the criteria and priorities among criteria presented in the RFP, (1) the less ambiguous these will be when GAO reviews them and (2) the easier it will be for evaluators to execute and document their evaluation in a way that complies with GAO's expectations. Ambiguity in the CSAR-X and KC-X requests for proposal gave GAO large openings to impose its own judgment about what a "reasonable" person would think the Air Force intended in its RFP.

The AIP has given this goal close attention and is moving the Air Force in the right direction. The draft RFP for the new round of the KC-X source selection reflects this new guidance. It dramatically reduced the number of factors included in the trade space for the trade-off among requirements. It stated the relative importance of different requirements far more clearly. And, in choosing which requirements to give the most attention to in the evaluation, it considered not only which factors matter most to the Air Force but also which are most likely to discriminate among proposals in the new round of the KC-X source selection.

² We thank James A. Hughes, Jr., Air Force Deputy General Counsel for Acquisition (SAF/GCQ), for this succinct summary.

Focus Formal Cost Estimates on the Instant Contract

The Air Force has a strong interest in understanding the likely life cycle cost (LCC) of any new system and gives this close attention in its general oversight of any new program. But the only costs relevant to a source selection are those that will help the Air Force discriminate among proposals. So, for example, if the Air Force expects the cost of its own organic support of a new system to be the same, no matter which proposal it chooses, that cost is not relevant to the source selection. Where it does expect future costs to differ among proposals, uncertainties about the future can create ambiguities about how the Air Force intends to evaluate future costs or raise GAO objections that the Air Force's treatment of future costs is unreasonable. Such concerns accounted directly for two of the ten grounds for sustained protests in the CSAR-X and KC-X source selections and contributed directly to a third.

The AIP has responded by focusing formal cost estimation on the costs of the "instant contract"—the contract for the deliverables specifically identified in the RFP. Where it expects future costs to differ among proposals, it captures engineering information about the future supportability of each system offered and evaluates this information as part of its technical evaluation. This allows the Air Force to infer likely LCC implications of different proposals without raising potentially problematic issues about how it views the uncertain future environment in which systems will operate. Naval Air Systems Command (NAVAIR) has used this approach successfully in the past and it appears to be appropriate for the Air Force.

When taking this approach, the Air Force should anticipate the potential for confusion about how it defines cost in a source selection. In particular, OSD requires the Air Force to estimate the LCC of a new system as part of a Defense Acquisition Board (DAB) process that runs in close parallel with the source selection process the Air Force uses to choose the source of that system. LCC includes forecast development, production, operating and support, and disposal costs. Application of the approach prescribed in the AIP will lead the Air Force to use one cost estimate in the DAB process and another narrower estimate in the source selection. GAO has obtained access to such DAB cost estimates in recent source selections. The Air Force should expect it to again and, in anticipation, explain clearly in the RFP why the cost estimate used in the source selection differs from that used in the DAB process.

Tighten Discipline Throughout the Source Selection

The nature of GAO's implicit rules means that small errors during a source selection can have large consequences. Small errors directly produced three of the ten grounds for protest in the CSAR-X and KC-X source selection. The Air Force could have avoided these errors only by maintaining close and tight control over the whole source selection to ensure that all parts of the RFP were internally consistent and that every one of hundreds of evaluation issues opened during the source selection were properly closed and disposed of. But the relatively inexperienced personnel in the two source selections attempted to complete the source selections too quickly to sustain such control.

The AIP recognizes this problem and seeks to make future source selection less schedule-driven and more event-driven. We encourage the Air Force to take additional steps to improve quality control in the design of the RFP, execution of the evaluation phase, and justification of the final decision. Just-in-time on-the-job training, based on playing the roles that relatively inexperienced participants will have in an upcoming source selection, can help them anticipate the challenges they will face and learn from mistakes in a setting where the mistakes do not impose real costs on the Air Force. Maintenance of technically skilled and experienced mentor-

coaches through the duration of the source selection can back-stop inexperienced staff to some degree, catching more errors in time to allow effective solutions. And tools designed formally to link requirements to data requested and to evaluation methods applied can clarify the Air Force's intent early in a source selection and facilitate the execution of evaluation in a way that in fact instantiates the intent stated in the RFP. Although the Air Force has such tools, the CSAR-X and KC-X source selections did not use them; the second round of the KC-X source selection is using one.

Tailor Quality Assurance to the Needs of a Less-Experienced Source Selection Workforce

One way to address the problems of quality control within a source selection that are described above is to enhance external quality assurance. The AIP proposes this in the form of more effective external review teams. But for the most part, the Air Force applied this approach in the CSAR-X and KC-X source selection. Their high visibility led to intense oversight by the Air Force and OSD, oversight that in effect provided a test of the external review process proposed in the AIP. GAO sustained ten grounds for protest in these two source selections despite this intense external oversight. That is part of the reason we favor greater emphasis on enhanced quality control within the source selection; only such close attention is likely to identify the errors that can lead GAO to sustain protests.

But enhanced external quality assurance remains important. Our review of the experience of the CSAR-X and KC-X source selections suggests that such oversight is more likely to be effective if it displays the following four characteristics:

1. It is timely. It occurs early enough so that the source selection evaluation team can correct errors discovered in the RFP, the evaluation process, or the justification for the final decision.
2. It is well informed. External reviewers arrive fully briefed on the current status of the source selection and do not have to burden the source selection team while getting smart enough to provide useful oversight.
3. It is technical. Reviewers are familiar with the nuances of the GAO bid protest process and understand how they play in a practical setting.
4. It is hands-on. It seeks the closest possible understanding of the details of the source selection to help the source selection team identify the kinds of small errors discussed above.

A full-time oversight team within a source selection is more likely than an external quality assurance team to have all of these characteristics. But an external team can potentially bring a second set of eyes as well as capabilities that are too costly to commit to a source selection for its full duration.