

Current & Emerging Trends in Bid Protests with GAO

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Bid Protest Statistics for Fiscal Years 2008 to 2012

	FY2012	FY2011	FY2010	FY2009	FY2008
Filed	2,475	2,353	2,299	1,989	1,652
Increase Over Previous Year	5%	2%	16%	20%	17%
Closed	2,495	2,292	2,226	1,920	1,582
Effectiveness Rate	42%	42%	42%	45%	42%
Hearings	6.17%	8%	10%	12%	6%

GAO Protests: Who May Protest

- Interested parties:
 - An actual or prospective bidder.
 - Economically affected.
 - By the award or failure to award a contract.
- Before submitting proposal or bid.
 - Any person expressing an interest in competing.
- After submitting proposal or bid.
 - An actual bidder.
- After award:
 - Reasonable chance of award upon re-opening

GAO Protest—Intervenors

- Third-party that is able to participate.
- After award: the awardee.
- Before award:
 - All bidders who appear to have substantial prospect of award.
- Participation:
 - Intervenors may file a motion to dismiss.
 - Comment on the agency report.

GAO Timeliness

- Improproprieties or errors in solicitation apparent on their face:
 - Before bid opening or final submission of proposal
 - Example: failure to hold discussions.
- Protest grounds other than patent errors in the solicitation:
 - No later than 10 days after the date the basis was known or should have been known.

GAO Automatic Stay

- GAO must provide notice of protest to the agency within 1 day of receipt.
- Pre-award protest:
 - Agency may not award the contract while protest is pending.
- Post-award protest:
 - Agency must suspend performance if—
 - Agency receives notice of protest within 10 days of award.
 - Note: Effect on protest deadline.
 - Within 5 days of a required debriefing.

GAO Timeliness of Debriefing

- Where a debriefing is both requested—
 - In writing within 3 days of notice and
 - Required by law (FAR Part 15).
- Protest must be filed no later than 10 days of date debriefing is held.
- Automatic stay is only applicable if agency receives protest within 5 days after debriefing (assuming past 10-day original deadline).

Day 1:
Protest filed.

Day 30:
Deadline for
agency to file
report on
protest.

Day 40: Deadline for protester to file
comments in response to agency
report.
No comments = dismissal of protest.

Day 100: Deadline for GAO
to issue decision.

Day 1 to 30

Day 40 to 100

During this period, GAO may—

- Request additional information.
- Conduct alternative dispute resolution.
- Hold a hearing.



GAO Process

- Filing of protest document.
 - Must set out sufficient legal and factual basis for protest.
- Summary dismissal.
 - Not an interested party.
 - Untimely.
 - Not a Federal agency:
 - TVA, USPS, FAA
 - Grounds outside GAO jurisdiction:
 - Determinations of responsibility.

GAO Process

- Summary dismissal.
 - Grounds outside of GAO jurisdiction.
 - SBA Issues (size determination, etc.).
 - PIA violations (unless contractor within 14 days of learning of potential violation disclosed the same to agency).
 - Debarment or suspension.
 - Orders less than \$10M in value.

GAO Process

- Agency report: agency's position on the protest.
- Protestor must respond to agency report within 10 days of receipt.
- GAO will issue decision within 60 days of receipt of protestor's response.

GAO Process

- Within 30 days of filing, agency required to provide the agency report and requested and relevant agency documents.
 - Agency required to provide document list 5 days before date of delivery.
 - Protestor may object within 2 days of document list.
 - Protestor may request additional documents within 2 days.

GAO Process

- Protective orders.
 - Generally issued in any GAO protest.
 - Necessary to review proprietary material.
 - Only counsel may be admitted to the protected order.
 - Results in odd situation where attorney cannot communicate certain information to the client.
 - Order will require that all submitted documents have redacted versions to become publicly available.

GAO Process

- Possible outcomes:
 - Corrective action.
 - Agency may on its own initiative correct issues.
 - Deny.
 - Sustain.

Remedies

If you win your bid protest, GAO may recommend agency—

- Refrain from exercising options under the contract.
- Terminate the contract.
- Recompete the contract.
- Issue a new solicitation.
- Award a contract consistent with statute and regulation.
- Do something else to assure compliance.

Remedy is usually a mulligan.



Protest Grounds

- Violation of procurement statute or regulation.
- Agency acted unreasonably or inconsistently with stated evaluation criteria.
- Defective solicitation:
 - Unduly restrictive.
 - Inconsistent.
 - Ambiguous.

Protest Grounds

■ Specific Grounds:

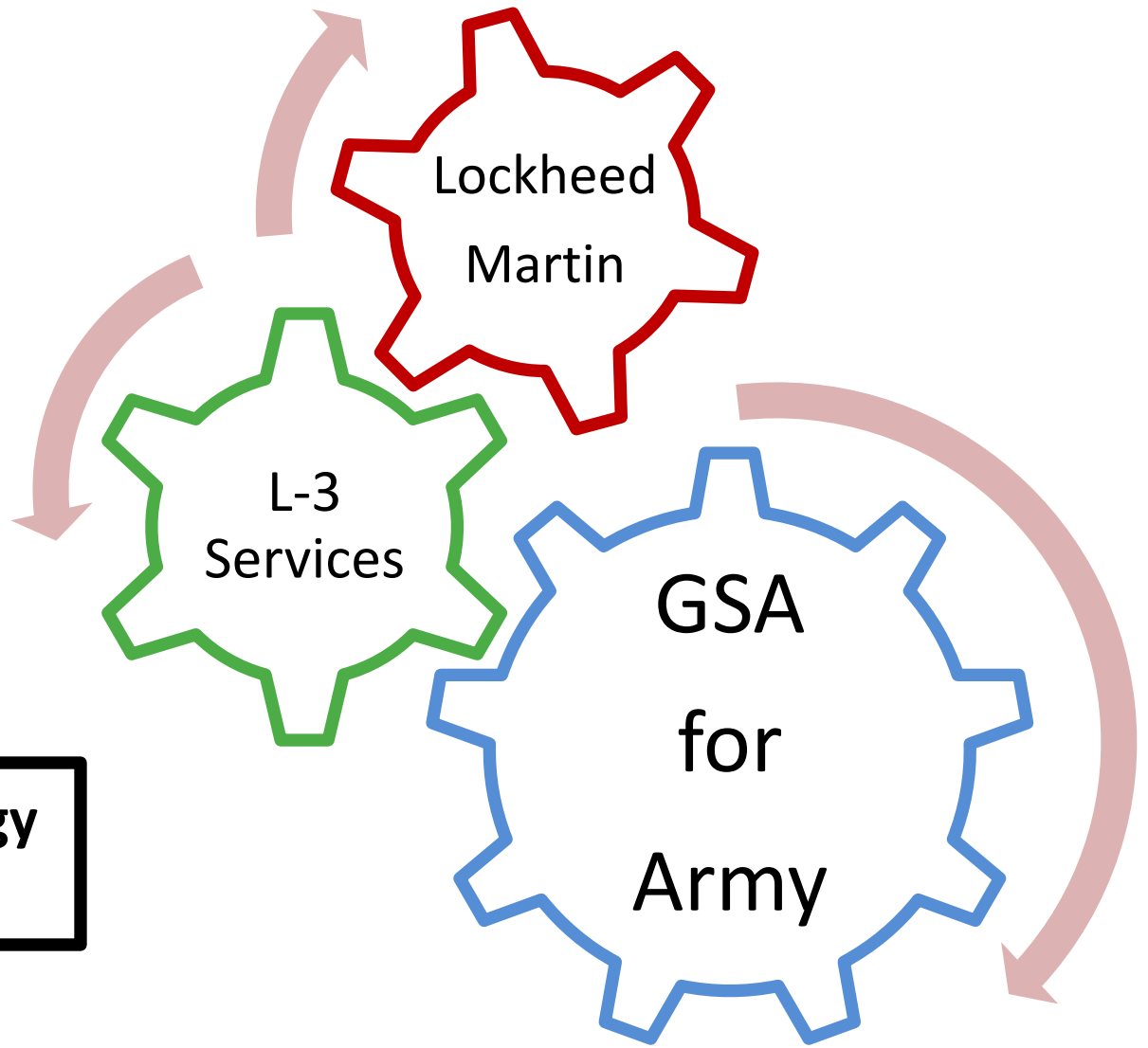
- Improper technical or price evaluation.
- Relaxation of the RFP or RFQ requirements.
- Failure to follow the stated evaluation grounds.
- Addition of an undisclosed evaluation ground.
- Improper cost-technical trade-off decision (the additional technical advantage of the awardee does not justify the high-price premium paid).
- Improper or incomplete discussions.
- Organizational or personal conflict of interest.

Government Agency

Protester

Intervenor

Information Technology
Support Services



Protest Ground

- Lockheed protests:
 - The agency's technical evaluation of its proposal as unreasonable.
 - The selection of L-3's higher priced proposal.

How Decision To Be Made

- Best-value basis (most important to least important):
 - Technical approach.
 - Key personnel and project staffing.
 - Management approach.
 - Past performance.
 - Cost (first four factors more important than cost).

Results of Evaluation

Criteria	L-3	Lockheed
Technical Approach	Excellent	Good
Management Approach	Excellent	Acceptable
Past Performance	Excellent	Excellent
Overall	Excellent	Good
Cost	\$362,008,060	\$358,918,288

Result: L-3 wins bid. L-3 wins protest.

Rationale for denying protest

- Protester's disagreement with agency's judgment is not sufficient to establish that agency acted unreasonably.
- Agency had adequately documented rationale for its decision. Documentation must be sufficient to establish that agency was aware of relative merits and costs and had a reasonable basis for decision.
- Agency's evaluation must be consistent with the solicitation. GAO will (generally) not second-guess agency's technical evaluation.

Take Away

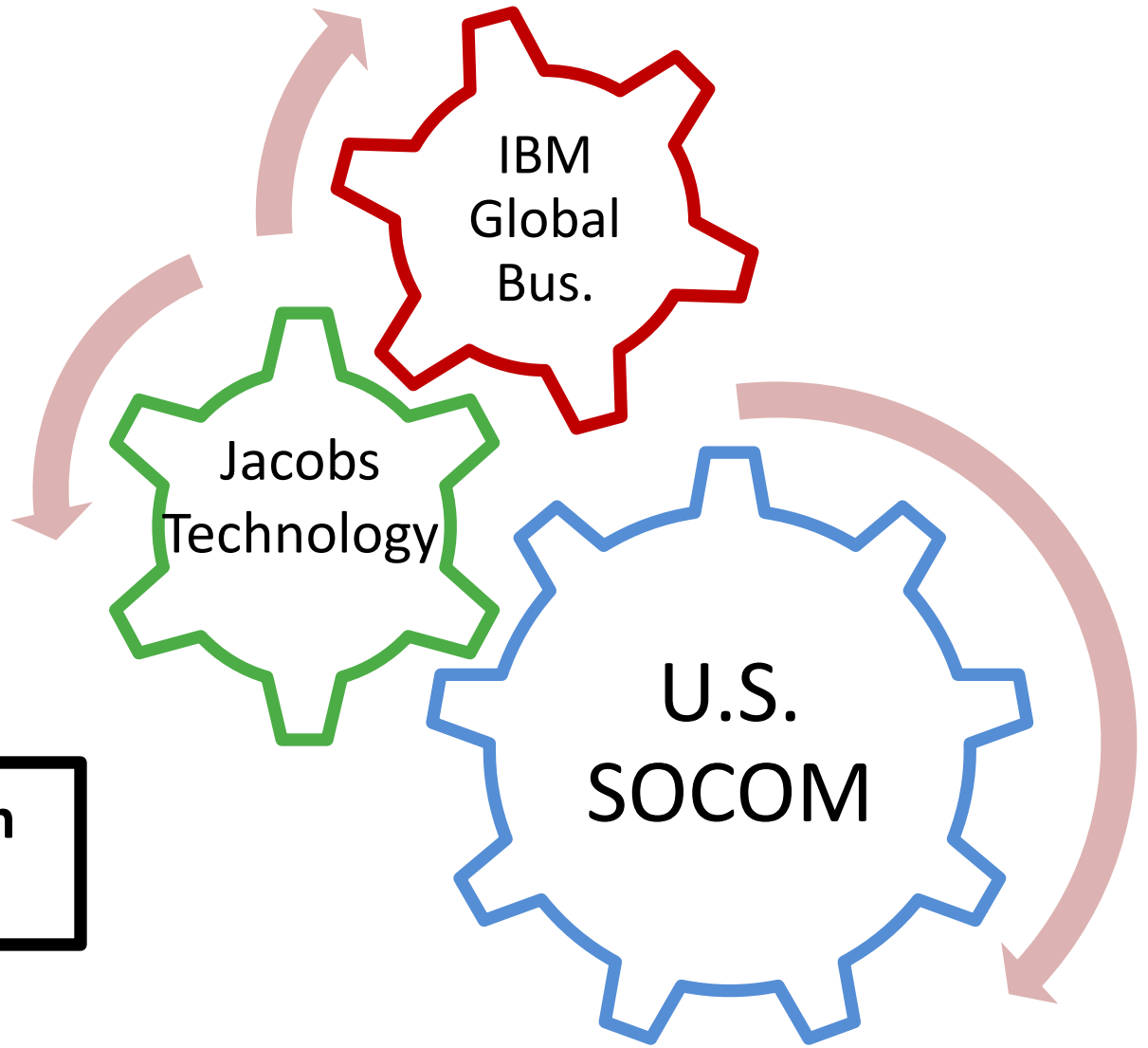
- Must have some basis for protest other than a general disagreement with the agency's decision.
- Every bidder believes its technical approach is superior.

Government Agency

Protester

Intervenor

**Integrated IT Platform
and Services**



Protest Grounds

- Agency awarded to Jacobs in large part due to Jacobs commitment to reach **full operating capability** (FOC) ahead of schedule.
- Solicitation did not define FOC, nor did it provide a date for achieving FOC.

Rationale for Sustaining Protest

- The record thus shows that the evaluators and SSA acted on the assumption that there was a schedule for implementing FOC included in the RFP, and that Jacob's evaluated advantage with respect to achieving FOC represented the principal technical discriminator between the IBM and Jacobs proposals. However, as noted, the RFP did not define or specifically refer to FOC; did not establish a schedule for achieving FOC; and did not provide for evaluation of offerors' schedules for FOC.
- For the reasons discussed above, we sustain IBM's protest that the agency improperly applied an unstated evaluation factor. As a final matter, as noted, the agency and IBM disagree concerning what constitutes FOC and whether or not IBM proposed to achieve it by a certain point in time.

Take Away

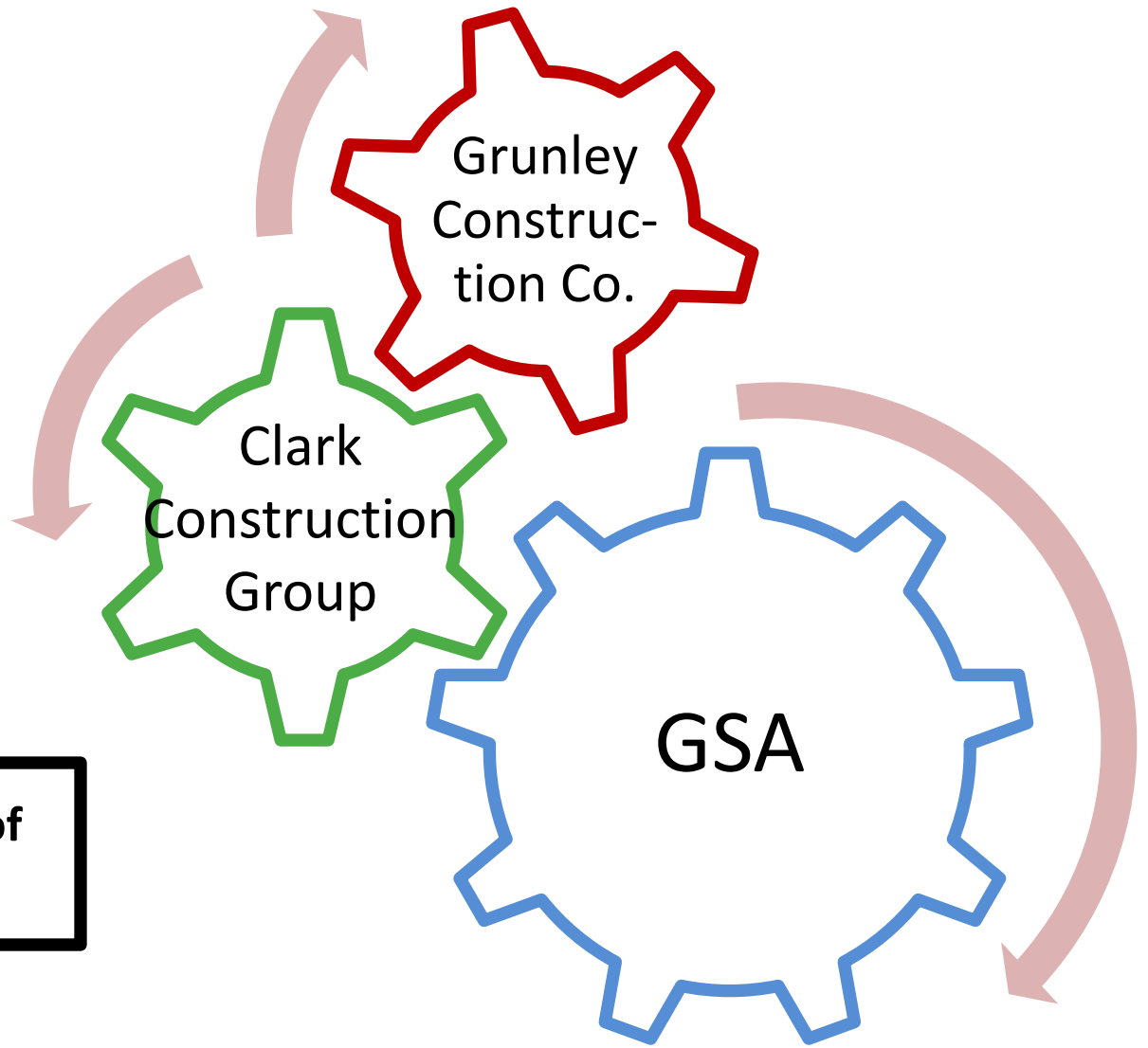
- An effective protest strategy is demonstrating that an agency either did not follow its own solicitation or evaluated the proposals based on criteria not stated in the solicitation.

Government Agency

Protester

Intervenor

**Design and Construction of
Building Improvements**



Protest Grounds

- Grunley argues that GSA's evaluation of its proposal under the project-management-approach evaluation factor was unreasonable.
- Agency stated that proposal contained a weakness because it did not address “float time”—unforeseen circumstances—and did not have an adequate shift transition plan.

Grounds Continued

- Grunley was able to show that—
 - Agency actually listed its shift transition plan as a strength (in addition to a weakness).
 - Its proposal specifically addressed “float time” issues.
- Factual error.
- Internal inconsistency.

Result

- In sum, we cannot find this aspect of the agency's evaluation of Grunley's proposal to be reasonable, given the apparent inconsistency in the record regarding this aspect of the agency's evaluation, and the agency's failure during the course of this protest to meaningfully respond to the protester's arguments.

Take Away

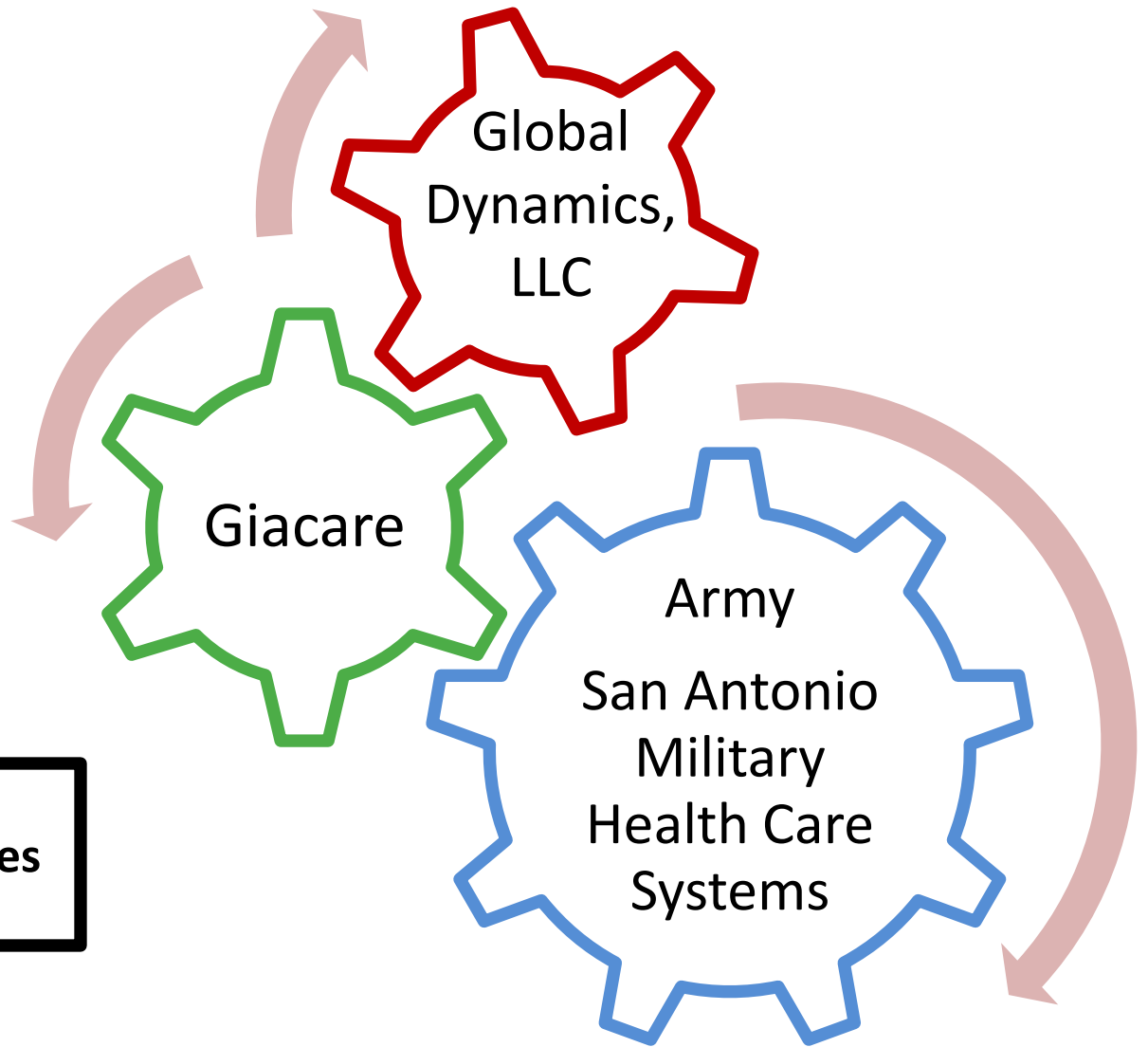
- A protestor that can show that the agency's basis for a negative evaluation is not supported has a strong chance of success.
- Where an agency's evaluation is internally inconsistent, GAO has held that such evaluations are unreasonable.

Government Agency

Protester

Intervenor

Provision of Nursing Services



Protest Grounds

- Agency removed Global from competitive range because its proposal did not—
 1. Adequately define a plan to retain incumbent personnel.
 2. Adequately define an employee recruitment plan.
- Protestor argues that its proposal did adequately address both issues.

Result

- GAO sustains protest because—
 - Proposal provided for meeting with incumbent employees, providing those employees information about employment.
 - Proposal discusses a national recruiting strategy.

Take Away

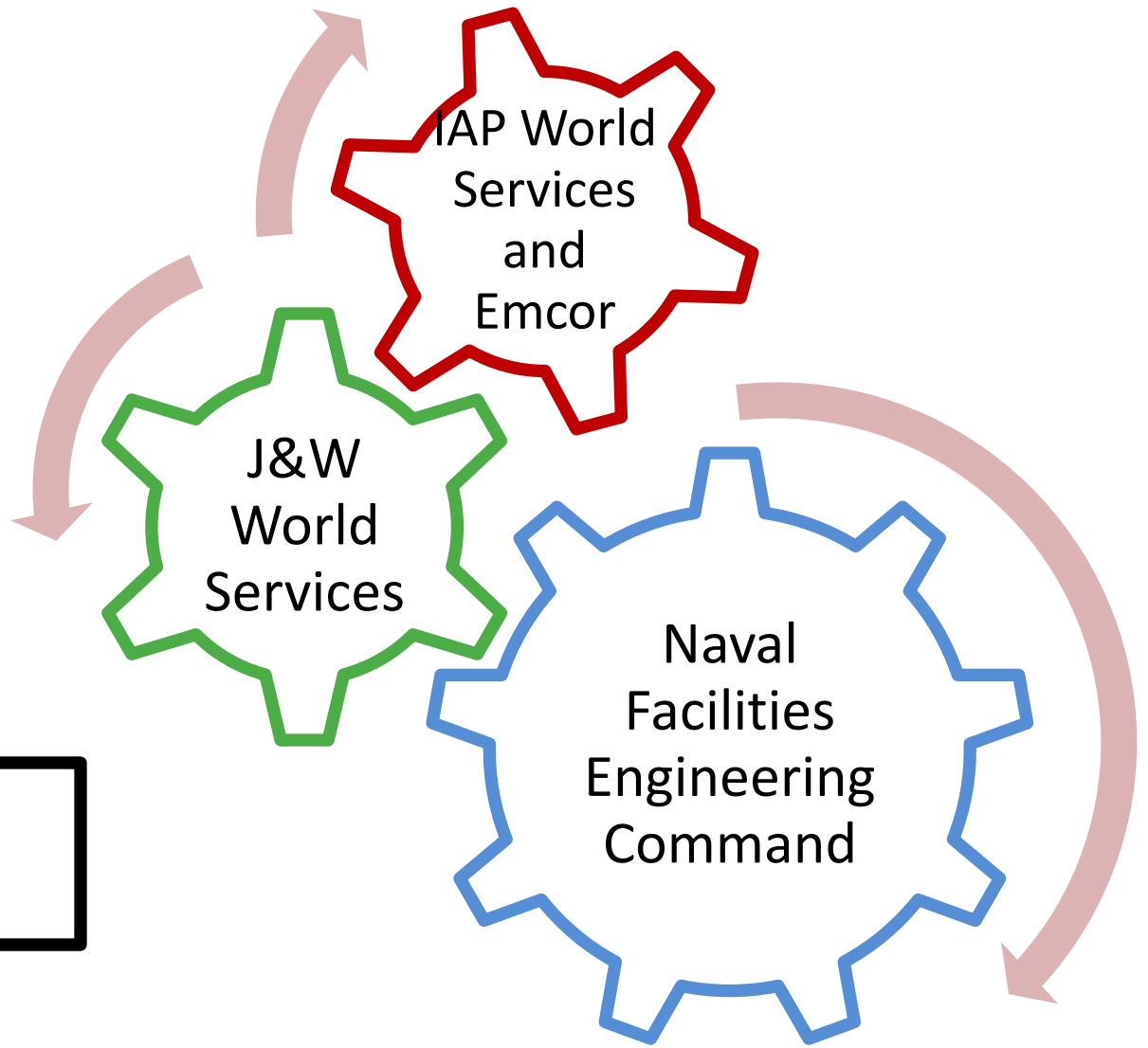
- Its not always easy to distinguish a simple disagreement between the protestor and the agency on the validity of the technical approach (unsuccessful) from a case where the agency has unreasonably evaluated the protestor's technical approach.
- Protestor probably gets more leeway in an exclusion from the competitive range.

Government Agency

Protester

Intervenor

Base Support Services



Background

- The awardee was a joint venture (JV) comprised of three companies.
- Past performance was a major evaluation factor and RFP stated that actual offeror PP would carry more weight than that of subs and key personnel.
- Award was to be made by best-value approach.
- Awardee had lower-rated, lower-priced proposal.

IAP Tech. Protest Grounds

- Protestor argues that agency unreasonably credited awardee with PP of two subsidiaries of one of the JV partners.
- Protestor argues that the awardees' proposal does not provide any commitment that these subsidiaries will perform any part of the contract or contribute to the work.

Result

- GAO sustains the protest because the awardees' proposal does not demonstrate that the subsidiaries would be involved in the performance of the contract.
- Accordingly, the Navy's credit of the sub's PP was unreasonable.

EMCOR Tech. Protest Ground and Result

- Agency assessed awardees' proposal with a strength, but did not assess a strength to EMCOR's proposal for having the same feature.
- Navy's failure to accord the same rating to similar approaches is not rational.

Protestors' Best-Value Argument

- Protestors' argue that agency did not demonstrate in its decision how the awardees' proposal represented the best value to the government.
- GAO noted that the selection decision did not have any discussion of why the awardees' lower rated proposal represented the best value. GAO noted that the protestors' proposals were rated much better than that of the awardee, which may justify payment of a higher price.

Take Away

- The agency must adequately document its decision; failure to do so is sufficient grounds to sustain a protest.
- The agency cannot read into a proposal elements that are not present. An offeror is only entitled to have the proposal it submitted evaluated.



How To Waste Money With Bid Protests

- Protest the technical evaluation.
- Fail to follow directions in solicitation.
- Don't respond to requests for clarification or additional information and then protest.
- Submit bids that are unresponsive and then protest selection.
- Protest something you can't prove.

Strategies for Success

- Facts are critical to winning or losing a protest.
- Maintain records of conversations with agency officials including dates.
- Ensure proposal is complete and responsive.
- Make sure everything is part of written proposal.
 - Answer all questions agency asks.
 - Address past performance.

Strategies for Success

- Consult counsel early in the process.
 - Bid protest filings often require extensive document review, research, and production.
 - Filing deadlines require early engagement.
- Submit written requests for debriefing.
 - Debriefing can identify whether there are sufficient grounds to protest.
 - Can improve proposal writing in the future.

Questions?

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