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"First Impression" Ruling: Court May Review the Rationality of Emails Sent By GAO Attorneys

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In *Systems Application & Technologies, Inc. v. United States*, No. 11-280C (Fed. Cl. August 25, 2011), the Court of Federal Claims addressed an "issue of first impression" – whether the court can review an email message from a Government Accountability Office ("GAO") attorney in the same way that it reviews a formal GAO decision. In this instance, the court determined that the answer was "Yes."

The United States Army Aviation and Missile Life Cycle Management Command Contracting Center awarded a contract to Systems Application & Technologies, Inc. ("SA-TECH") for aerial target flight operations and maintenance services on February 1, 2011. This award was protested by an unsuccessful offeror. Following several rounds of filings, the GAO hearing officer assigned to the protest sent an email to the parties indicating that GAO likely would sustain the protest and recommend that the Agency take corrective action. Two days later, the Agency notified GAO that it intended to take corrective action. SA-TECH, the awardee, protested the Agency's proposed corrective action at the Court of Federal Claims.

As an initial matter, the court found it likely that the Agency based its decision to take corrective action on the email sent by the GAO attorney. The court then reviewed prior cases in which it had reviewed the reasonableness of a GAO recommendation to take corrective action, noting, "The decisional law reflects,

however, that as a general rule, courts have reviewed GAO recommendations only when they were included as part of a formal GAO decision." In this case, because there was no formal GAO decision, and citing its "broad mandate to entertain bid protests and review government procurement decisions," the court held that it could review the email from the GAO attorney in order to determine its rationality. It could review the email, however, "only because the Army relied upon the message" when deciding to take corrective action.

The court found that conclusions contained in the GAO attorney's email regarding the timeliness of the initial protest and alleged deficiencies in the source selection decision were irrational and, thus, the Agency's decision to take corrective action lacked a rational basis. In the alternative, the court held that the Agency's corrective action decision was irrational even if it was not based on the email from the GAO attorney. This was true because the court determined that "the source selection decision was a rational exercise of the Army's discretion" and so taking action to correct the source selection decision was unreasonable. Hence, apart from its "first impression" ruling, the *Systems Application* decision also is noteworthy due to the fact that the court has sustained challenges to proposed Agency corrective action in only a handful of cases over the past ten years.

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