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GAO's Close At Hand Doctrine In Light Of Triad Decision

Law360, New York (May 21, 2014, 12:52 PM ET) -- Last September, the U.S. Government Accountability Office issued its opinion in Triad International Maintenance Corp., B-408374, 2013 CPD ¶ 208 (Sept. 5, 2013), in which the GAO sustained Triad's protest of an award by the U.S. Coast Guard. The GAO sustained the protest, in part, by applying a doctrine known as "close at hand."[1]

This article examines that doctrine by providing (1) background analysis of the GAO's close at hand jurisprudence preceding Triad, including a proposed three-prong framework for litigating future close at hand protests; (2) a discussion of Triad informed by this analysis; and (3) conclusions concerning Triad's significance in litigating the second prong in the proposed close at hand framework.

Background Analysis of GAO's Close at Hand Jurisprudence and a Proposed Framework for Litigating Close at Hand Protests

Protesters may raise the close at hand doctrine in order to assert that a contracting agency insufficiently considered relevant past performance information.[2] See Shaw-Parsons Infrastructure Recovery Consultants LLC, B-401679.4 et al., 2010 CPD ¶ 77 at 7-10 (March 10, 2010). Although the GAO recognizes "there is no legal requirement that all past performance references be included in a valid review of past performance," it also recognizes a limited range of information that "is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information." Int'l Bus. Sys. Inc., B-275554, 97-1 CPD ¶ 114 at 5 (Mar. 3, 1997).

In short, the close at hand doctrine operates to override an agency's general discretion to consider past performance information with a limited set of circumstances in which the agency must consider such information. See New Orleans Support Servs. LLC, B-404914, 2011 CPD ¶ 146 at 5 (June 21, 2011).

The following may be thought of as a three-prong test for successfully identifying that limited set of circumstances. As discussed in greater detail below, the first prong of this test, "relevancy," is a rather straightforward, objective, inquiry. However, the second prong, "knowledge and exclusivity of access,"

requires a more complicated legal analysis, and is where proper distillation of GAO case law likely would have the largest impact in terms of winning or losing a close at hand protest. It is this second prong that Triad primarily addresses.

The third prong, "reasonableness," need only be reached if a protester satisfies the first two prongs. That said, it is a case-specific inquiry, turning largely on the specific facts of the case rather than on analogies to or distinctions from prior GAO decisions. For these reasons, the significance of Triad, which we discuss infra under Subheading C, pertains above else to our second proposed prong.

Based on our review of the pertinent GAO case law, a protester likely would need to satisfy all three of the below prongs in order to prevail on a close at hand protest:

1. Whether the past performance information at issue was "relevant," an inquiry that turns, albeit nonexclusively, on whether the information relates to "contracts for the same services with the same procuring activity," see New Orleans Support Servs., B-404914, at 6;

2. Whether the agency had (a) knowledge of and (b) exclusivity of access to the information, see FN Mfg. LLC, B-407936 et al., 2013 CPD ¶ 105 at 4 (April 19, 2013); New Orleans Support Servs., B-404914, at 6; and

3. Whether the sufficiency of the agency's consideration was "reasonable," see Bilfinger Berger Gov't Servs. GmbH, B-402944, 2010 CPD ¶ 228 at 6-7 (Aug. 19, 2010).

With respect to the first prong, "relevancy," it is important to note that the close at hand doctrine may be applied only to past performance information, see, e.g., Career Training Concepts, B-311429 et al., at 5, with the limited, largely undeveloped, exception of "corporate experience" that is noted supra in Footnote 2. Technical or price information, therefore, would not meet the doctrine's relevancy test. Moreover, the close at hand doctrine does not apply if the past performance information at issue falls outside of the time period provided for in the solicitation. See Am. Apparel Inc., B-407399.2, 2013 CPD ¶ 113 at 5 (April 30, 2013). In such a scenario, out-of-range information also would not be relevant.

With respect to the first component of the second prong, the GAO's inquiry into the agency's "knowledge" is strictly limited to (1) past performance information referenced in the protester's proposal; (2) other past performance information actually in the agency's possession; (3) the protester's past performance as an incumbent for the same agency performing the same activities; or (4) past performance information otherwise known to the agency's evaluator from the evaluator's prior, personal involvement on the contract to which the information pertains. See TriWest Healthcare Alliance Corp., B-401652.12 et al., 2012 CPD ¶ 191 at 33 (July 2, 2012).

With respect to the second component of the second prong, protesters have successfully established "exclusivity of access" by showing that an agency failed to consider a pertinent Contractor Performance Assessment Reporting System ("CPARS") reference.[3] See, e.g., Contrack Int'l Inc., B-401871.5 et al., 2010 CPD ¶ 126 at 6-7 (May 24, 2010). That said, for comparison purposes, the GAO has refused to

credit a protester's argument that "surely, one or more of the dozens of [agency] personnel ... must subscribe to Consumer Reports." See TriWest, B-401652.12, at 33; see also id. at 32-34 (declining similarly to credit the protester's argument that the agency should have considered other "publicly-available publications, articles, and reports that disclose numerous ... performance problems, fines, and other legal problems" involving the awardee).

This distinction may be understood to turn on the fact that every agency has access to CPARS, whereas Consumer Reports is just one of many "publicly-available publications, articles, and reports" to which an agency's evaluator might have access. Additionally, with respect to the information from Consumer Reports, the protester itself could have accessed the publication in advance and provided the publication's contents in its proposal. Cf. Great Lakes Towing Co., B-408210, 2013 CPD ¶ 151 at 8 (June 26, 2013) (stating that the close at hand doctrine "is not intended to remedy an offeror's failure to include [past performance] information in its proposal" and that, where the offeror "was in control of what it included in its proposal and exercised its own judgment not to include" particular past performance details, "there was no inequity in the agency's decision to base its evaluation on [the] proposal — as written — instead of supplementing it with the agency's understanding of the [offeror's] experience under prior projects").[4]

Protesters have also successfully established "exclusivity of access" by demonstrating that they were reliant upon third parties to submit past performance questionnaires ("PPQs") required by the solicitation, which the protester had requested and the contracting agency had received.[5] See, e.g., Shaw-Parsons, B-401679.4 et al., at 8. As discussed below, this issue of reliance upon third parties to submit PPQs played a central role in the Triad decision.

With respect to the third prong, "reasonableness," an agency's altogether failure to consider relevant past performance information of which it had knowledge and exclusivity of access will render its award per se unreasonable. See Shaw-Parsons, B-401679.4 et al., at 8. That said, the inquiry becomes more complex where either "knowledge" or "exclusivity of access" is in dispute — an issue that is not present in a case like Shaw-Parsons where the agency requests the submission third-party PPQs, demonstrating clear knowledge and exclusivity of access, but then wholly fails to consider them.

A Discussion of Triad in Light of the Above

Triad involved the U.S. Coast Guard's unification of two, formerly separate, maintenance services contracts for HC-130 series aircraft. B-408374, at 2. Triad and a competitor, DRS, had been the incumbents under the prior, dual-contract structure. Id. The unified solicitation stated that "relevant past performance" was the second-most important of four evaluation criteria. Id. After considering proposals by four offerors, the Coast Guard awarded the unified contract to DRS. Id. at 3-4. Triad protested, asserting the close at hand doctrine. Id. at 4-5.

Triad noted that for its past two HC-130 maintenance contracts as an incumbent, the Coast Guard had provided it with only one performance evaluation, which was titled an "in-progress report." Id. at 5-6. Thus, notwithstanding its incumbent status, this had been the only on-point past performance

information Triad could submit with its proposal, which relied heavily on its experience as an incumbent to satisfy the past performance factor.

As in Shaw-Parsons, B-401679.4 et al., the solicitation had called for offerors to submit PPQs. Triad, B-408374, at 3. Triad complied with this solicitation requirement and, importantly, provided express notice to the agency in its proposal that its PPQs were forthcoming. Id. at 6 n.8. While the agency did receive and consider two PPQs for past Triad contracts — one for maintenance services on the U.S. Air Force's KC-10 aircraft and the other for propeller overhauls on unrelated Coast Guard aircraft — neither PPQ was for Triad's two incumbent maintenance services contracts on Coast Guard HC-130 aircraft. Id. at 6.

Accordingly, the Coast Guard did not consider any PPQs pertaining to Triad's past work performing (1) aircraft maintenance services (2i) for the Coast Guard despite the agency's contemporaneous knowledge from Triad's proposal that Triad had regularly performed such work on at least two consecutive contracts for the Coast Guard as an incumbent on the same contract now being procured.

In deciding to award to DRS, the Coast Guard stated that the in-progress report, alone, was insufficient to assess Triad's past performance, but that "it was difficult to judge the reliability of [Triad's] past performance assertions without further customer feedback." Id. The agency continued that "there was minimal customer feedback to substantiate [Triad's] past performance." Id. at 7.

The GAO sustained Triad's protest, holding that "the Coast Guard's decision not to substantiate [Triad's] performance on a contract for essentially the same service as here ... was improper." Id. at 7-8. The GAO explained that even though the agency had not received the PPQs, as the agency had in Shaw-Parsons, Triad had provided notice the PPQs would be forthcoming. See id. at 6 n.8.

Therefore, the agency had an obligation to obtain the PPQs before awarding to Triad's competitor on a stated basis that the PPQs could have directly addressed. See id. at 7-8. The GAO noted that this was especially so since the agency's evaluators had affirmatively sought out DRS's PPQs.[6] Id. at 8 n.9. The GAO concluded its close at hand analysis with a reminder that "an agency may not ignore contract performance by an offeror involving the same agency, the same services, and the same contracting officer, simply because an agency official fails to complete the necessary assessments or paperwork." Id. at 7-8.

Conclusions Concerning Triad's Significance in Litigating Agency "Knowledge and Exclusivity of Access"

Using the above-provided framework for litigating close at hand protests, we suggest that Triad be thought of as a useful case study in how the GAO will approach our second proposed prong: agency "knowledge and exclusivity of access." In general, this prong will be the most precedent-dependent.

After all, the first prong, "relevancy," is generally satisfied so long as the purportedly close at hand information pertains to past performance, and not technical or price information, and falls within the range of information identified for consideration by the solicitation's ground rules. These generally are

questions of fact, not law. Therefore, this first prong is not particularly dependent on the GAO's close at hand case law.

While the third prong, "reasonableness," is more subjective than the first prong, it too will turn primarily on case-specific factors. This is because, at bottom, whether an agency sufficiently considered past performance information is a question of agency judgment that likely would be subject to administrative deference so long as the agency afforded the information at least some consideration, backed up by at least some contemporaneous explanation as to why the information did not alter its award decision.

In light of administrative deference, the third prong primarily turns on the straightforward questions of whether the agency considered the information at all and, if it did, whether the agency provided any contemporaneous explanation.[7] While there always will be some litigation at the margins concerning the sufficiency of an agency's contemporaneous explanation, and whether the agency may provide additional, post-hoc explanation in support thereof, these are not issues specific to close at hand protests. Accordingly, the third prong also will not turn on the GAO's close at hand precedents.

For the foregoing reasons, it is our second proposed close at hand prong where legal skill will be at a premium either to cite to or distinguish prior GAO case law concerning "knowledge and exclusivity of access." Triad thus joins (1) TriWest, B-401652.12 et al.; (2) Contrack International, B-401871.5 et al.; and (3) Shaw-Parsons, B-401679.4 et al., as touchstone cases a protester must familiarize itself with before filing a protest raising the close at hand doctrine. Ultimately, the success of a close at hand protest likely will turn on skilled counsel's ability to compare or contrast his or her protest from these four decisions.

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[1] The U.S. Court of Federal Claims has also applied the close at hand doctrine but, in doing so, has often recognized that it is borrowing the doctrine from the GAO. See, e.g., Career Training Concepts Inc. v. United States, 83 Fed. Cl. 215, 232 (2008) (quoting Career Training Concepts Inc., B-311429 et al., 2009 CPD ¶ 97 at 5 (June 27, 2008) (advisory op.), and stating that "[s]ince [the protester] relies on GAO rules and GAO cases, we can let the GAO speak for itself"); see also Int'l Res. Recovery Inc. v. United States, 64 Fed. Cl. 150, 163 (2005); Vantage Assocs. v. United States, 59 Fed. Cl. 1, 21 (2003). For purposes of this article, we narrow our focus to the GAO's close at hand jurisprudence.

[2] In another recent decision, the GAO suggested that the doctrine might also extend to information concerning "corporate experience," in addition to past performance, so long as the solicitation does not specifically limit such consideration. See Nuclear Prod. Partners LLC, B-407948 et al., 2013 CPD ¶ 112, at 20 & n.50 (April 29, 2013). That said, while Nuclear Production Partners resulted in a partial sustain, the GAO denied the protesters' corporate experience protest ground on the specific facts of that case.

Subsequently, the GAO has yet to provide further guidance on when and how corporate experience information can be too close at hand to ignore. Accordingly, we limit our focus only to the more typical scenario of a protest based on allegedly close at hand past performance information.

[3] The applicable regulations governing CPARS procedures state that an agency's CPARS evaluations "shall be provided to the contractor as soon as practicable after completion of the evaluations" and that "[t]hese evaluations may be used to support future award decisions." See 48 C.F.R. ("FAR") § 42.1503(d). The regulations also state that procuring agencies "shall" use CPARS past performance information of which they have knowledge, so long as that information "is within three years ... of the completion of performance of the evaluated contract or order." See FAR) § 42.1503(g).

[4] Thus, our second prong can be thought of as a waiver inquiry. The burden is on an offeror to put the agency on notice in its proposal as to all pertinent past performance information to which the offeror had access at the time of submission. The offeror may do this by, at a minimum, referencing the pertinent contracts on which it has previously performed. To the extent the offeror fails to reference prior contracts, it waives the argument that past performance information concerning those unreferenced contracts was too close at hand for the agency to ignore. As in all protests, prejudice also remains a backstop. Even if the agency fails to consider particular past performance information, close at hand or not, that failure will not result in a sustained protest in that the offeror already cited its strongest past performance references in its proposal, and the contemporaneous record reflects that the agency did consider those references.

[5] PPQs are past performance references provided directly by third-party agencies (or, in the case of an incumbent offeror, the same agency) to the contracting agency as the exclusive recipient.

[6] Thus, there arguably was a disparate treatment issue as well, in addition to the close at hand issue, with respect to the Coast Guard's disparate consideration of Triad and DRS's respective sets of PPQs. For purposes of comparison, there was no such disparate treatment of PPQs in Shaw-Parsons; in that case, the agency had failed to consider the PPQs of all parties. See B-401679.4 et al., at 8. While the GAO addressed a separate disparate treatment issue in its Triad decision, concerning technical capability, the GAO did not specifically address disparate treatment with respect to PPQs. See B-408374, at 11-12 (noting that the Coast Guard "had not meaningfully responded to" Triad's disparate treatment arguments concerning technical capability but, rather than addressing those arguments on the merits, directing the Coast Guard to reconsider the issue upon reevaluation). The GAO did not need to address disparate treatment with respect to the consideration of PPQs because it could sustain Triad's protest on the basis of close at hand alone, as well as on the basis of a price realism protest ground that is not pertinent to this article. See id. at 8-11.

[7] The relative dearth of published close at hand precedents may be a function of the extreme facts necessary to satisfy our proposed third prong. It is precisely those cases — where the contemporaneous record reflects an agency's failure to consider relevant past performance information at all, or to provide any contemporaneous explanation as to why the information did not alter its award decision — where the agency is most likely to take corrective action (thereby mooting the protest) upon either the protester's initial filing or upon learning of adverse GAO outcome prediction.
