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Corrective Action Catch 22: Court of Federal Claims Holds Agency Action Must Be Rational Even If GAO Protest Decision Was Not.

By C. Joël Van Over and Alexander B. Ginsberg

The United States Court of Federal Claims' July 15, 2014 decision in RUSH Construction, Inc. v. United States*, reflects the unusual circumstance in which the court effectively sat in appellate review of an earlier bid protest decision by the Government Accountability Office (GAO) after the U.S. Army Corps of Engineers followed GAO's recommendation in that decision. The court ultimately overruled GAO when it found that it was arbitrary and capricious for the agency to follow GAO's irrational recommendation. In so doing, the court cited numerous flaws in GAO's reasoning and its reliance on inapposite case law. The* RUSH *decision, authored by the Court of Federal Claims' new chief judge, may foretell greater judicial scrutiny of agency corrective action and a shift at the court away from deference to GAO's bid protest recommendations.*

Background

Federal government contractors familiar with the bid protest process know that, in addition to challenging an agency's procurement decision at the agency itself, they have the options of protesting before both GAO and the Court of Federal Claims. GAO has long been the most common destination for protests, in part because contractors and their counsel know that they can get "two bites at the apple"—i.e. that filing a protest at GAO does not preclude the contractor from filing later with the court in the event of an adverse GAO decision.[1] A common misconception, however, is that GAO decisions may be *appealed* to the Court

[1] Many protesters also prefer to file at GAO to avail themselves of the automatic stay provisions of the Competition in Contracting Act, 31 U.S.C. § 3553, which compel an agency to stay the award or performance of a contract in response to a

of Federal Claims. On the contrary, the court generally does *not* sit in appellate review of a GAO decision. Rather, the court's inquiry in each protest brought before it—whether or not that protest started at GAO—is whether the *agency* in question acted rationally or whether the agency decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).[2] The court serves as the initial trier of fact and conducts a *de novo* review of the record. Thus, because the Court of Federal Claims is charged with evaluating the actions of the agency, rarely has the court had cause or otherwise opted to critique GAO's preceding decision in a protest involving the same procurement where the agency followed a GAO recommendation. Indeed, where the court has discussed such decisions, typically it has deferred to GAO.[3] *RUSH* in no way embodies this typical result.

The *RUSH* Decision

RUSH involved a post-award bid protest related to a procurement conducted by the U.S. Army Corps of Engineers (CoE) to repair a lock and barge canal in Florida. The procurement was conducted under Federal Acquisition Regulation (FAR) Part 14 and involved the submission of sealed bids. Bidders were required to submit a two-page bid document containing (on page one) a bid schedule for the solicitation's base work and (on page two) a bid schedule for the solicitation's option work. The solicitation incorporated FAR 52.214-3, which stipulates that "[b]idders shall acknowledge receipt of any amendment to this solicitation... ."

At bid opening, the contracting officer (CO) "discovered that Rush Construction's bid schedule's numbering sequence of line items did not match the numbering sequence of line items provided in the solicitation." Specifically, the line item numbering on page two of RUSH's bid was wrong. In addition, although RUSH acknowledged the five amendments to the solicitation, page two of RUSH's bid referenced the portion of Amendment 5 that applied only to the solicitation's *base* work, not the portion that applied to the option work. As RUSH later explained to the court, it had copied the bid schedule from page one of its bid—i.e., the schedule associated with the base work—into the bid schedule on page two of its bid. While it did adjust the quantities listed in the schedule on page two, RUSH failed to make the changes that would have fixed the foregoing errors. The CO, however, decided to waive the errors as "minor informalities" in accordance with FAR 14.405[4], and the CoE awarded the contract to RUSH, as the low bidder.

An unsuccessful bidder protested at GAO, contending that the errors rendered RUSH's bid ambiguous and non-responsive. *See C&D Const., Inc.*, B-408930.2, Feb. 14, 2014, 2014 CPD ¶ 69. GAO agreed, finding that RUSH's bid contained material deviations from the terms of the solicitation, which could not be waived. In reaching this conclusion, GAO's legal analysis was succinct—in fact, it was largely confined to one paragraph, wherein GAO stated:

timely filed GAO protest. By contrast, the Court of Federal Claims is not subject to these automatic stay provisions. Protesters at the court must either obtain the agency's voluntary consent to stay performance or file a motion for a preliminary injunction to enjoin the agency's performance pending the court's final decision on the protest.

[2] "Under the APA standard ... 'a bid award may be set aside if either (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure."' *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (citation omitted).

[3] *See*, *e.g.*, *Glenn Defense Marine (Asia) PTE Ltd. v. United States*, 97 Fed. Cl. 568, 577 n.17 (2011) ("Given the diverse factual scenarios that appear before [GAO], its decisions traditionally have been accorded a high degree of deference by the courts, particularly those involving bid protests. While GAO decisions are not binding upon this court, they may be considered as expert opinion, which [the court] should prudently consider.")

[4] FAR 14.405 provides, in relevant part: "[a] minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government."

> A bid that fails to include a price for every item required by the IFB generally must be rejected as nonresponsive. *HH & K Builders*, B–232140, Oct. 20, 1988, 88–2 CPD ¶379 at 2, *recon. denied,* B–232140.2, Nov. 30, 1988, 88 –2 CPD ¶537. This includes a bidder's failure to provide a responsive bid for optional contract line items, which thus renders the entire bid nonresponsive. *Massillon Constr. & Supply, Inc.,* B–407931, Mar. 28, 2013, 2013 CPD ¶85 at 3. This rule reflects the legal principle that a bidder who has failed to submit a price for an item generally cannot be said to be obligated to furnish that item. *United Food Servs.,* B–218228.3, Dec. 30, 1985, 85–2 CPD ¶727 at 3. Therefore, where a page in a bidder's schedule does not clearly indicate that the prices apply to an option that the IFB requires to be priced, the bid is ambiguous and thus, nonresponsive. *Thompson Metal Fab, Inc.,* B–293647, May 4, 2004, 2004 CPD ¶109 at 3.

GAO cited a fifth case—*Pro Alarm Co.,* B–240137, Sept. 20, 1990, 90–2 CPD ¶ 242—via footnote for the principle that a bidder's failure to "acknowledge an amendment may be waived where the amendment results in less stringent obligations on the bidder ... ." In sustaining the protest, GAO recommended that the CoE "reject RUSH's bid as nonresponsive, and ... identify the next lowest-priced responsive responsible bidder, and make award to that firm ... ." The CoE informed RUSH that it intended to "accept and adhere" to GAO's recommendation. RUSH, in turn, filed the instant protest, arguing that the errors in its bid were, in fact, minor informalities that did not affect its price, quantity or quality.

After acknowledging that it is charged with evaluating the *agency's* actions, the Court of Federal Claims explained: "As in the case at hand, where an agency simply implements a GAO recommendation, the inquiry focuses on the rationality of that GAO recommendation, even though the actual decision before the court is the agency decision ... and an inquiry into the rationality of the GAO decision is the same as an inquiry into whether the agency had a rational basis for its decision." (Internal quotations and citation omitted). The court then conducted a thorough analysis of each of the cases GAO cited, observing that the cases "fall into one of three lines of analysis—that is, either omitted price cases, unacknowledged solicitation amendment cases, or ambiguous bid cases." Ultimately, the court concluded that GAO failed with regard to all three of these "lines of analysis."

First, the court distinguished the "omitted price cases," reasoning that *RUSH* "is not like HH & K Builders, Massillon Construction, or United Food Services because RUSH omitted no prices from its bid. ... GAO has relied on the legal principles set forth in three cases involving the omission of a price. But it has offered no explanation as to how these legal principles support the decision it reached in this case." Next, the court stated: "By analyzing the omission of a bid schedule note under Pro Alarm Company, GAO equates such an omission with an unacknowledged solicitation amendment. But GAO offers no explanation for why it made this comparison. There is no obvious parallel between the two fact scenarios, and GAO does not attempt to analogize the facts of Pro Alarm Company to those of RUSH." The court also rejected GAO's case citation on the issue of ambiguity, writing: "GAO then cited to Thompson Metal Fab for the proposition that 'where a bidder's schedule does not clearly indicate that the prices apply to an option that the IFB requires to be priced, the bid is ambiguous and thus, nonresponsive.' ... GAO appears to have concluded summarily that RUSH's bid schedule was ambiguous, without examining its own case law that sets forth standards for evaluating bid ambiguity.") Because the court found that "GAO seems to have premised its decision on inapposite case law," the court held that "GAO's decision was not rational" and that the CoE's corrective action implementing GAO's recommendation necessarily was "arbitrary and capricious." Thus, the court granted RUSH's motion for judgment on the administrative record.

Conclusion

The *RUSH* case is notable for several reasons. First, the case is something of a curiosity in that the Court of Federal Claims' inquiry was focused squarely on the rationality of *GAO's* decision rather than the agency's. As described above, this inquiry resulted from the CoE's representation that its corrective action would simply "accept and adhere" to GAO's recommendation. While an agency's corrective action commonly involves the agency's pledge to "re-evaluate" bids or proposals, given GAO's decision, there appeared to be nothing to re-evaluate. Thus, at first blush, the CoE's decision to follow GAO's recommendation would seem reasonable. However, *RUSH* demonstrates that an agency's corrective action in such a situation is only as good as the GAO recommendation on which it is based.

Perhaps more interesting, *RUSH* demonstrates a clear willingness on the part of the Court of Federal Claims to conduct a detailed review of GAO's legal analysis when that analysis forms the basis of an award decision—and to take GAO to task when the court finds fault with that analysis. As many contractors and their counsel know, GAO bid protest decisions often are extremely *ad hoc*, focusing on the facts at hand, and rarely contain extensive case discussion. It is very common for GAO decisions to cite case law only for various general propositions. Indeed, that appears to be precisely what happened here. As described above, GAO cited a handful of cases for general points in essentially one paragraph of its decision, but it failed to explain how such cases supported its recommendation. *RUSH* signals that the Court of Federal Claims views such treatment as cursory and insufficient—and that GAO will be held to more exacting standards where the Court of Federal Claims has cause to review GAO's decisions.

Overall, *RUSH* suggests that potential protesters should not expect the Court of Federal Claims merely to defer to a prior GAO recommendation. Perhaps with new fervor, the court can be expected to conduct a thorough, independent review of the record and a *de novo* review of the relevant law. Where a contractor is unsuccessful in a protest before GAO, it may be a better time than ever to seek a second "bite at the apple," especially in those cases where GAO has not engaged in a clear and complete analysis of the application of relevant case law to the facts presented by the protest.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

C. Joël Van Over (bio)
Northern Virginia
+1.703.770.7604
joel.vanover@pillsburylaw.com

Alexander B. Ginsberg (bio)
Northern Virginia
+1.703.770.7521
alexander.ginsberg@pillsburylaw.com