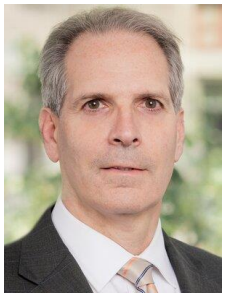
How Claims Court Ruling May Alter High-Dollar Procurements

By **Andrew Shipley, Philip Beshara and Jessica Aldrich** (April 15, 2022, 2:26 PM EDT)



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For the second time in recent weeks, the Court of Federal Claims issued a ruling that broke from U.S. Government Accountability Office precedent. In IAP Worldwide Services Inc. v. U.S., Judge Matthew H. Solomson faulted the U.S. Army for failing to conduct discussions in a billion-dollar procurement despite the default rule in favor of discussions created by U.S. Department of Defense regulations.[1]

Judge Solomson held that Section 215.306 of the Defense Federal Acquisition Regulation Supplement creates a regulatory presumption in favor of conducting discussions in acquisitions over $100 million by which U.S. Army evaluators failed to abide in assuming an unsuccessful offeror could not remedy deficiencies in its proposal.[2]

Just a few weeks earlier, in Golden IT LLC v. U.S.,[3] Judge Solomson criticized the GAO's precedent that offerors must advise procuring agencies of changes in key personnel arising prior to award, even if such changes occurred after final proposal submissions, stating that the GAO's rule was "without legal basis and 'unfair.'"

In IAP, Judge Solomson reiterated his key-personnel holding from Golden IT and specifically rejected the GAO's three-factor test for determining whether an agency must conduct discussions under DFARS 215.306. According to Judge Solomson, applying the GAO's test — commonly known as the SAIC test, after the 2016 decision in Matter of Science Applications International Corp. — would "swallow the DFARS 215.306 presumption whole."[4]

The IAP decision provides the most detailed discussion of this important DOD regulation to date and may give potential protesters a reason to skip the GAO and file directly at the COFC when challenging a DOD agency's failure to conduct discussions in high-dollar procurements.

It also invites a renewed discussion within the DOD —and at the GAO — regarding the limits on agency discretion with respect to discussions.

Army Procurement and the GAO Protest

The Army procurement at issue in IAP involved the award of a billion-dollar contract for the operations, maintenance and defense of Army communications in Southwest Asia and Central Asia. Multiple offers were received in response to the solicitation and the Army ultimately issued award to the incumbent contractor over IAP, the plaintiff protester whose proposal the Army found unawardable based on a failure to address — and meet — solicitation requirements in support of U.S. Army sites within Iraq.

In particular, the record reflected a conclusion by Army evaluators that IAP would be unlikely to rectify the Iraq issue via discussions but lacked any documented rationale for that determination. Subsequently, the Army skipped discussions with IAP and selected a competing offeror for award. IAP protested its nonselection, first at the GAO, alleging,

among other things, that the Army erred in awarding the contract without conducting discussions.

The GAO denied the protest, finding that the Army reasonably awarded the contract without discussions. The GAO acknowledged that DFARS 215.306(c) "establishes an expectation that discussions will be conducted in Department of Defense procurements valued over $100 million," but sided with the Army on the rationale that "agencies retain the discretion not to conduct discussions based on the particular circumstances of each procurement."

Second-Bite COFC Protest

Following its defeat at the GAO, IAP filed a second-bite protest at the COFC — again challenging the Army's failure to comply with DFARS 215.306 and conduct discussions. This time IAP prevailed, with Judge Solomson holding that the plain language of DFARS 215.306 creates a presumption in favor of conducting discussions, and that the Army lacked any recorded justification for its decision to proceed otherwise.

The decision centered around DFARS 215.306(c), which provides that in "acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions." Judge Solomson drew heavily from the U.S. Court of Appeals for the Federal Circuit's decision in Dell Federal Systems LP v. U.S.[5] — and the more recent Solomson-issued COFC decision in Oak Grove Technologies LLC v. U.S.[6] — in emphasizing that the operative question, in light of the regulatory expectation established by the DFARS provision, is whether DOD agencies document an adequate reason for not conducting discussions.

The plain language giving rise to this expectation, Judge Solomson explained, is manifestly derived from the use of the word "should" in the provision — which the opinion artfully describes as "a term synonymous with neither 'may' nor 'shall.'" Judge Solomson pointed to the Federal Acquisition Regulation's separate definitions for the three words: "May denotes the permissive"; "Shall denotes the imperative"; and "Should means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance."[7]

Accordingly, the court concluded that the use of "should" in DFARS 215.306 creates a strong presumption — and generally requires — DOD agencies to engage in discussions in applicable acquisitions, and does not mean that the regulation is somehow optional. Allowing an agency to proceed as if "should" denoted optionality would, as the opinion states, "be tantamount to giving the government virtually plenary, 'may'-level discretion."

With this interpretive backdrop, the court looked to the record presented by the government and found that the so-called conclusory assertion offered by the Army — simply that discussions would be unlikely to rectify IAP's proposal deficiencies — failed to meet the requirement of DFARS 215.306 that discussions are normally to take place in DOD acquisitions over $100 million.

The COFC on the GAO's SAIC Test

After deciding that the record failed to justify the Army's decision to skip discussions, the court addressed the awardee-intervenor's argument that the government deserved deference in its decision because the Army satisfied the GAO's three-part SAIC test.

In SAIC, the GAO explained that it has previously "found an agency's decision not to conduct discussions to be reasonable where the record showed (1) there were deficiencies

in the protester's proposal, (2) the awardee's proposal was evaluated as being technically superior to the other proposals, and (3) the awardee's price was reasonable."[8]

Acknowledging in SAIC that the cases it cited for these three factors — ranging from 1994 to 1997 — predated DFARS 215.306, the GAO stated that it nonetheless found the principle applicable in interpreting the more recent DOD regulation. Judge Solomson, however, strongly disagreed, writing in IAP:

> The Court simply does not understand how that SAIC test, derived from cases that predate DFARS 215.306 — and thus could not possibly have applied a regulation specifying a "default procedure" — should govern a procurement to which the DFARS provision applies.

The GAO's announced standard in SAIC, Judge Solomson went on, "would all but swallow the DFARS provision" and effectively replace a should-based presumption with may-level discretion.

Takeaways

The IAP decision presents one of the most detailed analyses of DFARS 215.306 to date and presents a stark divide between the GAO and the COFC on an important regulation governing the most high-value — and typically hotly contested — DOD acquisitions. There are several key takeaways from this decision to be considered by government contractors and DOD procurement officials, as well as the GAO.

For unsuccessful offerors considering protesting a DOD agency's decision not to engage in discussions, IAP should be a primary consideration in determining whether and where to file a bid protest.

Protesters often file first at the GAO for a number of reasons, including the ability to obtain an automatic stay, the shorter time to decision offered by the GAO's 100-day clock, the typically lower prosecution costs of a less formal proceeding and the option to have a second shot — or bite at the apple — at the COFC.

The COFC is typically seen as a more formal, more expensive and more time-consuming forum in which to litigate a protest. On the other hand, it appeals to protesters seeking to obtain a more complete record, the power of a court judgment — the GAO issues recommendations, not orders — and the right to appeal an adverse decision.

While the GAO's agency reports are confined to documents deemed relevant to protest grounds, at the COFC, the government typically produces comprehensive administrative records that span the entire procurement to include full proposal and evaluation records, even if unrelated to specific grounds of protest.

A stay of performance is not guaranteed at the COFC, however, which could lead to substantive motions practice over a preliminary injunction, in addition to the multiple rounds of briefing from the initial complaint to motions for judgment on the administrative record. As a result, protesters often first try their hand at the GAO — with the assumption that generally consistent standards will be applied.

The IAP decision, however, makes clear that for certain issues, protesters may find a more receptive audience at the COFC. Protesters should be mindful, however, that the decisions of one COFC judge are not binding on the other judges. Thus, protesters cannot necessarily

count on a protest at the COFC adopting Judge Solomson's holding.

For DOD agencies, IAP should serve as a reminder that DFARS 215.306 provides more than merely optional guidance for their consideration. Rather, conducting discussions with offerors should be the norm in procurements valued over $100 million absent legitimate reasons to proceed otherwise.

If there is a reasoned basis to proceed without discussions, DOD agencies should document their decision making. If no such reasons exist — or are not adequately documented — the decision to forego discussions is likely to result in a sustained protest.

In IAP, Judge Solomson summarized the inquiry as follows: "given that '[t]he regulatory expectation in this procurement was that the Army would conduct discussions,' does the administrative record adequately explain a 'reason not to do so'?"

For the GAO, although COFC decisions are not binding on the GAO — and GAO opinions aren't binding on the COFC[9] — IAP should serve as a call for the GAO to consider whether SAIC and its progeny, which rely on decisions that predate DFARS 215.306, remain good law for interpreting agency discretion in DOD procurements valued over $100 million.

Despite Judge Solomson's rejection of the SAIC test, the GAO's reasoning would not require a comprehensive overhaul to accommodate should-level versus may-level agency discretion. The GAO acknowledged in its IAP decision that DFARS 215.306(c) "establishes an expectation that discussions will be conducted" in DOD procurements valued over $100 million and that the particular circumstances of each procurement inform whether an agency justified its decision.[10]

While at a legal level, the difference is whether discussions or deference constitutes the default position, at a practical level this translates into the level of deference granted to the agency. Where the GAO deferred to the Army's conclusion that discussions were unlikely to rectify the issues with IAP's proposal, as noted above, Judge Solomson required a reason-based, documented justification for foregoing discussions.

For industry, generally, the takeaway is watch for a potentially broader trend of divergence between the GAO's and the COFC's interpretation of the law. The COFC has often been deferential to prior GAO decisions because of the GAO's government contracting expertise.

Judge Solomson's recent decisions in IAP and Golden IT, however, signal that the COFC — or at least Judge Solomson — is willing to take a hard look at GAO precedent and the reasoning behind it. This may make the COFC a more attractive bid protest forum for arguments based in law or regulation that have otherwise fallen on deaf ears at the GAO.

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[1] IAP Worldwide Services Inc. v. U.S. , No. 21-1570C, 2022 WL 1021781 (Fed. Cl. Mar.

28, 2022) (Published April 5, 2022).

[2] Specifically, DFARS 215.306 provides: "For acquisitions with an estimated value of $100 million or more, contracting officers should conduct discussions. Follow the procedures at FAR 15.306(c) and (d)."

[3] Golden IT LLC v. U.S. , No. 21-1966C, 2022 WL 334369 (Fed. Cl. Jan. 18, 2022) (Filed Feb. 4, 2022).

[4] Science Applications International Corp. , B-413501, Nov. 9, 2016, 2016 CPD ¶ 328.

[5] Dell Fed. Sys. LP v. U.S. , 906 F.3d 982 (Fed. Cir. 2018).

[6] Oak Grove Techs. LLC v. U.S. , 155 Fed. Cl. 84, 108–14 (2021).

[7] FAR 2.101.

[8] B-413501, supra.

[9] Caddell Constr. Co. v. U.S. , 111 Fed. Cl. 49 (2013) ("This court respects the expertise of the GAO, and considers GAO decisions instructive. GAO decisions, however, are not binding on this court."); DNC Parks & Resorts at Yosemite Inc. , B-410998, Apr. 14, 2015, 2015 CPD ⁋ 127 ("[W]e respect the court's decisions ... However, our Office is not bound by decisions of the Court of Federal Claims.").

[10] IAP Worldwide Servs. Inc. , B-419647, June 1, 2021, 2021 CPD ⁋ 222.