

Corrective (Action) Lenses: Is 20/20 Hindsight Enough for Agencies when Taking Corrective Action in Response to a Protest?

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One need look no further than the Government Accountability Office (GAO) Bid Protest Annual Report to Congress to see just how prevalent corrective action has become as a tool to resolve—or avoid additional—bid protests. According to the Report, agencies took corrective action relative to approximately 42 percent of the 2,647 bid protests closed in fiscal year 2015. See GAO Bid Protest Annual Report to Congress for Fiscal Year 2015. But what was once seen as an almost surefire way for an agency to eliminate, or at the very least delay, a bid protest is no longer such a safe bet. With increasing frequency, protesters are challenging—and GAO and the U.S. Court of Federal Claims are recognizing—the limits on an agency's right to use corrective action to resolve protests and address alleged defects in procurements. This article surveys recent case law that articulates what it is that agencies, protesters,

and intervenors can and cannot challenge when corrective action has been announced or implemented. We examine three categories of issues relative to corrective action: (1) reasonableness, which explores the reasonableness standard to which agencies are held when pursuing corrective action; (2) scope, which covers how broadly or narrowly an agency is permitted to craft its corrective action to address perceived defects in a procurement; and (3) timeliness, which addresses the timing issues that a protester must keep in mind when challenging an agency's corrective action. A theme running through all three of these issues is the parties' constant challenges with the proverbial Goldilocks of corrective action: as an agency, to neither defend a defective procurement nor correct an arbitrary defect and risk the corrective action being labeled unreasonable and to craft corrective action that is neither too broad nor too narrow; and as a protester, to protest corrective action neither too early nor too late. These challenges rarely have bright-line rules and often have answers that turn on seemingly minute distinctions.

When May an Agency Take Corrective Action?

An agency may not arbitrarily take corrective action: *Systems Application & Technologies, Inc. v. United States*, 691 F.3d 1374, 1382 (Fed. Cir. 2012). An agency's discretion to invoke corrective action—long held to be nearly unrestricted—has increasingly come under scrutiny. The Federal Circuit's 2012 decision in *Systems Application & Technologies, Inc. v. United States*¹ (SA-TECH) changed the landscape of corrective action by opening the door for contractors to challenge an agency's use of corrective action. In SA-TECH, the Federal Circuit firmly established that (1) the Court of Federal Claims has jurisdiction under the Tucker Act to hear protests of allegedly

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unreasonable corrective action, (2) an awardee stripped of the award through agency corrective action has standing to protest the corrective action under certain circumstances, and (3) a challenge to an agency's corrective action is ripe for judicial review when certain conditions are met.

In *SA-TECH*, an unsuccessful offeror challenged the agency's award to SA-TECH at GAO. The GAO attorney provided informal outcome prediction through an e-mail to the parties in which he stated that he was likely to sustain the protest. In response, the agency took corrective action that included amending the solicitation and evaluating revised proposals. SA-TECH protested the corrective action at the Court of Federal Claims, challenging the reasonableness of the agency's decision to pull the award to SA-TECH to implement corrective action. The Court of Federal Claims agreed with SA-TECH that the agency's decision to pull SA-TECH's award to conduct a reprocurement was arbitrary and capricious. The agency appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

The Federal Circuit first addressed the issue of Tucker Act jurisdiction, agreeing with the court of Federal Claims that the Tucker Act's waiver of sovereign immunity covers a broad range of potential disputes arising in the course of a procurement process. Accordingly, the Federal Circuit found SA-TECH's challenge to the agency's announced decision to amend or revise the solicitation to be "an unambiguous objection 'to a solicitation' covered by the Tucker Act."² The Federal Circuit further found that the fact that the agency had not yet implemented its proposed corrective action had no bearing on the issue of jurisdiction. Citing its previous decision in *Turner Construction Co. v. United States*,³ the Federal Circuit noted that "[t]his court has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented."⁴

The Federal Circuit also affirmed the Court of Federal Claims' determination that SA-TECH, as the contract awardee, had standing as an "interested party" to protest the agency's corrective action. In order to satisfy the 28 U.S.C. § 1491(b)(1) definition of an "interested party," a party must establish that it has: (1) status as an actual or prospective bidder and (2) a direct economic interest in the outcome. In the preaward context of corrective action, a plaintiff must show "a non-trivial competitive injury which can be addressed by judicial relief" in order to satisfy the "direct economic interest" requirement.⁵ The Federal Circuit cited two factors supporting its determination that SA-TECH had shown a "non-trivial competitive injury." According to the Court, the agency's corrective action would require SA-TECH to (1) win the same award twice and (2) re-compete for a contract after its prices had been made public. As such, the Federal Circuit concluded, "SA-TECH will no longer have the pivotal competitive

advantage from the initial solicitation."⁶ The court found that such a disadvantage satisfied the requirement for a "direct economic interest" in the outcome.

Finally, the Federal Circuit examined whether a protest to corrective action could be ripe for judicial review. A claim is not ripe for judicial review "when it is contingent upon future events that may or may not occur."⁷ Whether an issue is "ripe" depends on two elements: (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.⁸ The Federal Circuit affirmed the Court of Federal Claims' determination that SA-TECH's claim met this standard. With regard to the first factor, the circuit court found the issue fit for judicial decision because the decision to undertake corrective action constituted a final agency action. In reaching this conclusion, the court pointed out the inherent unfairness that would result if an agency's corrective action could be deemed final enough to moot a previous protest, but not final enough to allow adjudication at the corrective action itself. Such a rule, the court noted, would make some agency actions "protest-proof."⁹ With regard to the second factor, the agency contended that the *announcement* of corrective action was merely an intermediate step of the process, and SA-TECH had therefore suffered no hardship. The circuit court rejected the agency's argument. Citing the reasoning from its "interested party" analysis, the court found that the agency's interpretation ignored the "competitive hardships SA-TECH suffers as a result of the Army's arbitrary decision to re-compete the contract."¹⁰

The Federal Circuit's decision in *SA-TECH* serves as an important reminder that an agency's decision to undertake corrective action is not "protest-proof" and cannot be arbitrarily invoked as a means to avoid a protest. Moreover, *SA-TECH* definitively established the right of an awardee to protest an agency's corrective action and also confirmed that an agency's decision to undertake corrective action may be ripe for judicial review prior to the agency's implementation of such action.

An agency's corrective action must be reasonable in light of the procurement defect: *Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010). In *Sheridan Corp. v. United States*, a precursor to the pivotal *SA-TECH* decision, the Court of Federal Claims explored the reasonableness of the specific corrective action chosen by the agency (rather than the preliminary decision to take corrective action).¹¹ *Sheridan* enunciated the principle that an agency must target its corrective action to cure an identified defect. Echoing themes that the Federal Circuit would reiterate several years later in *SA-TECH*, the Court of Federal Claims stressed that an agency may not arbitrarily pursue corrective action and must provide a lawful and rational reason for its proposed action. In *Sheridan*, the agency initially awarded a contract to plaintiff Sheridan Corporation for the construction of an aircraft maintenance hangar. The agency awarded the contract on the initial proposals received, without discussions. The agency notified the unsuccessful offerors

and informed them of Sheridan's winning price and past performance rating. An unsuccessful offeror protested the award, alleging that Sheridan received disparate treatment. The agency announced that it would pursue corrective action by expanding the "competitive range" to three offerors, including Sheridan. The agency then invited those three offerors to submit revised proposals. Sheridan protested the agency's corrective action. Sheridan asserted that, because none of the agency's solicitation requirements had changed, the agency's decision to invite revised proposals lacked a rational basis.

The Court of Federal Claims agreed with Sheridan. As an initial matter, the court noted that corrective action of any kind might have been arbitrary under these circumstances because "a careful review of the administrative record does not reveal any errors that required corrective action."¹² But even accepting the protester's assertions as true, the court determined, the agency improperly broadened the scope of any necessary corrective action. The court succinctly summarized its findings: "Simply put, the corrective action must target the identified defect. Here, the agency's concern related to the evaluation of the proposals. Any corrective action should have been targeted to that issue. Resoliciting new proposals was not a rational corrective action."¹³ The court acknowledged that flaws in the evaluation process might warrant a *reevaluation* of proposals, "but a resolicitation of the proposals compromises the integrity of the procurement system, especially where the winning price has been disclosed."¹⁴

An agency's corrective action must be rationally justified: *Raytheon Co. v. United States*, 809 F.3d 590 (Fed. Cir. 2015). The Federal Circuit recently provided another iteration of the reasonableness test for corrective action. In *Raytheon Co. v. United States*, the Federal Circuit reviewed an agency's decision to reopen a procurement pursuant to corrective action. Citing the legal standard, the court reiterated that "it is sufficient for us to conclude that the grounds relied on . . . rationally justified the reopening under governing law."¹⁵ In *Raytheon*, unsuccessful offerors Northrop and Lockheed protested the agency's award to Raytheon, challenging the agency's communications with Raytheon pertaining to the treatment of certain independent research and development (IR-&-D) costs. GAO advised the parties during outcome prediction that it would likely sustain the protest. Accordingly, the agency took corrective action by reopening discussions with all offerors. Raytheon protested the corrective action at the Court of Federal Claims, arguing that the agency's corrective action lacked a rational basis.

The Court of Federal Claims, and subsequently the Federal Circuit, both denied the protest. The Federal Circuit concluded that the agency's unequal communications—a defect determined by GAO in its outcome prediction—provided a rational basis for reopening the procurement:

We conclude, agreeing with the GAO attorney, Air Force,

and Court of Federal Claims, that the Air Force violated a regulation by its disparate communications regarding the treatment of costs as IR & D costs, a matter of potentially great importance to the bidder's final bidding decisions. That violation provides a rational basis for reopening.¹⁶

In sum, the Federal Circuit found that both GAO's outcome prediction and the agency's resultant corrective action were reasonable.

While *SA-TECH* and *Sheridan* serve as reminders that an agency may not arbitrarily pursue corrective action in order to avoid protest litigation, *Raytheon* reminds us that challenges to corrective action must still clear a high bar to prove that such action is arbitrary. As illustrated in *Raytheon*, an agency may be able to withstand a protest to corrective action taken to cure what GAO has rationally determined to be a procurement defect.

What Restrictions Are Placed on the Scope of Corrective Action an Agency May Pursue?

As discussed above, an agency does not have *carte blanche* to arbitrarily implement corrective action in order to avoid a protest. Taking the issue a step further, an agency not only faces restrictions regarding the circumstances in which it may reasonably take corrective action but also on what issues that corrective action may, or must, encompass. The decisions below emphasize that an agency must carefully craft the scope of its corrective action. The decision to take corrective action remains only one step in the process. Agencies then face what we again see as the proverbial Goldilocks of corrective action: propose a full-scale resolicitation, and a protester may label the corrective action too broad; propose a limited reevaluation, and a protester will insist the corrective action is too narrow. Both the Court of Federal Claims and GAO have analyzed the appropriate scope of corrective action in multiple decisions over the past few years.

An agency's corrective action may not be broader than is necessary to correct an identified defect: *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (2013). On one end of the spectrum, an agency faces a potential protest if its corrective action appears overbroad. *Amazon Web Services, Inc. v. United States*¹⁷ articulates this principle: Corrective action may be arbitrary if an agency does not narrowly tailor such action to target the defects the agency intended it to remedy. In *Amazon*, an unsuccessful offeror protested the agency's evaluation process and eventual award to Amazon Web Services, Inc. (AWS). GAO sustained the protest, identifying two discrete defects in the procurement: a price evaluation error and waiver of a material term of the solicitation for one of the offerors. The agency agreed to undertake GAO's recommended corrective action by reopening the negotiations with offerors, potentially amending the solicitation, and making a new award. AWS protested the agency's corrective action as overbroad and unreasonable.

The Court of Federal Claims agreed with AWS, finding

that the agency's decision to reopen the competition to correct two discrete defects constituted overly broad corrective action. While the court acknowledged an agency's broad discretion in pursuing corrective action, it also noted that "such corrective action must be reasonable under the circumstances and appropriate to remedy the impropriety."¹⁸ Citing its earlier holding in *Sheridan Corp. v. United States*, the court found that "even where a protest is justified, any corrective action must narrowly target the defects it is intended to remedy."¹⁹ Here, the court determined that neither of the two discrete defects identified by GAO necessitated reopening the entire procurement process. The first defect affected only one pricing scenario. As such, the court found "reopening the competition to include unaffected scenarios and proposal areas would be overbroad."²⁰ The court made a similar determination with regard to GAO's finding that the agency had waived a material term of the solicitation for one of the offerors: "[T]argeted correction of this defect would not require reopening the entire competition, but only addressing the affected aspects of the offerors' proposals."²¹ The court found that the agency's corrective action unreasonably expanded the scope of corrective action necessary to remedy these two defects.

The court's decision emphasized the unfairness in reopening a competition after an awardee's proprietary information has been disclosed. The court cited the considerable information already revealed in this case, including a 45-page debriefing, a question-and-answer session, and the awardee's price. After such disclosures, the court determined, the agency's corrective action would unfairly—and unnecessarily—prejudice the former awardee.

Amazon represents one end of the spectrum in the scope of corrective action—an overly broad approach that overreaches the bounds necessary to remedy the identified defect(s) in the procurement. While the standard for determining if an action is "narrowly tailored to address discrete procurement defects" remains fact-specific and somewhat subjective, the court's analysis in *Amazon* suggests that the answer hinges on if and to what extent the agency has revealed offerors' proprietary information.

An agency's corrective action may not be so narrow that it denies offerors the fair opportunity to compete: *Power Connector, Inc.*, B-404916.2, 2011 CPD ¶ 186 (Comp. Gen. Aug. 15, 2011). The court's decision in *Amazon* illustrates an agency's requirement to narrow the scope of its corrective action to the identified defect. Conversely, GAO's decision in *Power Connector, Inc.*²² demonstrates an agency's requirement to craft corrective action broad enough to cure the alleged defect and allow offerors a fair opportunity to compete. In *Power Connector*, the agency initially awarded a contract to offeror Newberger on the basis of three equally weighted evaluation factors: past performance, ability to meet specifications, and price. The agency informed the unsuccessful offerors that award had been made and disclosed the awardee's past performance rating and price.

Power Connector protested the agency's award to Newberger. The agency subsequently advised GAO that it would take corrective action by canceling the award, issuing a revised solicitation, and seeking revised proposals. In its amended proposal, the agency revised the criteria for evaluation of past performance and allowed offerors to submit new *technical* proposals. The agency, however, denied offerors the ability to revise their *price* proposals. *Power Connector* protested the agency's corrective action, arguing that it was unreasonable for the agency to preclude offerors from revising other aspects of their proposals, such as price.

GAO sided with the protester, finding that the agency unreasonably restricted the scope of its corrective action. GAO acknowledged an agency's broad discretion in the area of corrective action, noting that such discretion includes determining the proper scope of proposal revisions, but such discretion, GAO continued, does not allow an agency to restrict revisions to a discrete aspect of a proposal if the agency's corrective action could affect other portions of a proposal as well. GAO provided the standard that agencies must follow when corrective action involves the revision of solicitations:

[T]here are circumstances where an agency may reasonably decide to limit revisions offerors make to their proposals. However, where an agency amends a solicitation and permits offerors to revise their proposals, our Office has held that offerors should be permitted to revise any aspect of their proposals—including those that were not the subject of the amendment—*unless the agency demonstrates that the amendment could not reasonably have an effect on other aspects of the proposals, or that allowing such revisions would have a detrimental impact on the competitive process.*²³

GAO found no such reasonable basis in this case for restricting proposal revisions to the area of past performance.

First, GAO rejected the agency's argument that the proposal revision was a clarification of a requirement rather than a material change. In concluding that the revision created a material change, GAO explained that "the depth and quality of past performance contract experience that would be rated favorably was changed."²⁴ GAO similarly rejected the agency's argument that, even if the revision constituted a material change, the revision would not affect other areas of the offerors' proposals. GAO stated that such an argument failed to consider that an offeror may want to lower its price to increase its competitiveness in light of the revised past performance requirements, as the protester contended here. Most notably, GAO rejected the agency's argument that allowing price revisions would have a detrimental impact on the competitive process because it had already revealed the awardee's price to the unsuccessful offerors. Citing FAR 15.507(b)(2) and (c)(1), GAO explained that the proper way to remedy the unequal disclosures was to advise all offerors of the pricing information disclosed to each unsuccessful offeror during debriefing. Because the agency

failed to demonstrate that the solicitation amendment could not affect other aspects of the proposals, and similarly failed to demonstrate the necessity of limiting the scope of revisions to prevent a detrimental impact on the competitive process, GAO found the agency's limited scope of corrective action unreasonable.

While exceptions to the general rule exist, GAO's decision in *Power Connector* confirms that, in many cases, agencies should permit revisions to all aspects of proposals absent a reason for limiting such revisions. As illustrated by *Amazon*, agencies are advised to narrow the scope of their corrective action to those steps necessary to correct the procurement defect; however, *Power Connector* serves as a reminder that narrowing the scope of corrective action too much may disadvantage the protester or other offerors and open the door for subsequent protests.

An agency may have the ability to exceed the corrective action proposed: *Solution One Industries, Inc.*, B-409713.3, 2015 CPD ¶ 167 (Comp. Gen. Mar. 3, 2015). The protests above address the scope of corrective action an agency may propose and subsequently implement. As previously noted, an agency's corrective action must be broad enough to give all offerors a fair opportunity to compete, yet narrow enough to avoid revisions outside of the defective aspect(s) of the procurement. These issues can and should be adjudicated when the agency proposes its corrective action. But what are the limits on an agency's implementation of the proposed corrective action? More specifically, in implementing corrective action, what are the limits on an agency's ability to exceed the scope of corrective action originally proposed?

GAO addressed this issue in *Solution One Industries, Inc.*²⁵ In *Solution One*, the agency pursued the following corrective action in light of a protest to the reasonableness of its evaluation of the "key personnel" subfactor: "Although the Army reserves the right to seek clarifications or to open discussions, it does not promise to do [so], and is not planning to take actions that would result in permitting a change in the pricing proposals at this time."²⁶ None of the offerors protested the agency's proposed corrective action. The agency consequently pursued its corrective action by reevaluating proposals, engaging in discussions with the offerors, and soliciting FPRs (including revised price proposals). The agency determined that only two offerors, King George and Solution One, submitted technically acceptable proposals. The agency awarded to King George as the lowest-price offeror.

Solution One protested the agency's implementation of its corrective action. Solution One challenged multiple aspects of the implementation, including the agency's acceptance of proposals with revised prices. Solution One argued that this action improperly exceeded the corrective action initially proposed. GAO rejected Solution One's argument and determined that the agency's acceptance of revised price proposals appropriately remedied the procurement defect. GAO found that, in this case, expanding the scope of corrective action to include revised prices was

not unreasonable simply because the initial protest that caused the agency to take corrective action involved a defect in the evaluation of technical proposals. Noting the broad discretion given to agencies in exercising corrective action, GAO stated:

While the agency's initial concern was with its technical evaluation, this concern was overtaken by the agency's re-evaluation of technical proposals, which led the contracting officer to conclude that discussions were necessary in order to obtain acceptable proposals. The agency is not required to limit the scope of proposal revisions in such circumstances.²⁷

As such, GAO determined that the agency did not exceed the scope of its proposed corrective action and that its implementation of such corrective action was proper.

An agency has discretion in determining which aspects of a procurement to remedy with corrective action: *Onésimus Defense, LLC*, B-411123.3 *et al.*, 2015 CPD ¶ 224 (Comp. Gen. July 24, 2015); *Alliant Enterprise JV, LLC*, B-410352.4, 2015 CPD ¶ 82 (Comp. Gen. Feb. 25, 2015). To continue our examination of the appropriate scope of corrective action, we next turn to two related issues: What procurement defects may an agency correct and what defects must an agency correct? Turning first to the "may," *Onésimus Defense, LLC*²⁸ addressed the issue of whether an agency may take corrective action to fix a flaw in the procurement distinct from any protest ground. Two prior protests preceded GAO's decision in *Onésimus Defense*. In the first protest, *Onésimus* protested the agency's initial award decision, alleging that the agency conducted an inadequate price evaluation when it failed to consider the offerors' proposed travel costs. In light of the protest, the agency chose to take corrective action. The agency informed the parties that it would amend the price evaluation criteria, reopen negotiations, and conduct a new best-value determination. *Onésimus* filed a second protest in response to the agency's proposed corrective action. The protest claimed that the agency's corrective action failed to remedy the defect alleged in the original protest. The protest also claimed that it was unreasonable for the agency to amend the solicitation's pricing provisions, as the original provisions were not protested. As a result, the agency again notified the parties that it would take corrective action by amending the solicitation's pricing structure, methodology, and evaluation criteria. *Onésimus* then filed its third protest, arguing that the agency's corrective action in modifying the pricing provisions was unreasonable, as the initial provisions were never protested.

On its face, the protester's argument appears to follow the premise in *SA-TECH*: An agency cannot take corrective action simply to avoid a protest, barring some flaw in the original procurement. In this case, however, GAO deferred to the agency's "broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition."²⁹

Here, the agency stated that in the course of reviewing the solicitation requirements as part of its corrective action, it realized that the original pricing provision did not reflect the agency's intent. Consequently, the agency amended the provision as part of its corrective action.

In denying Onésimus's protest, GAO stated that "[i]n our view, [the agency's] determination that it could decrease risks and costs to the government provides an eminently reasonable basis for amending the RFP's travel pricing provisions."³⁰ While GAO did not address *SA-TECH* directly, the language of GAO's decision in *Onésimus Defense* can be distinguished from the Court of Federal Claims' and Federal Circuit's decisions in *SA-TECH*. Here, GAO emphasized that an agency may take corrective action outside the bounds of the procurement deficiencies identified by a protest if the agency has a reasonable basis for doing so:

A contracting agency has the discretion to determine its needs and the best method to accommodate them, and we will not question an agency's determination of its needs unless that determination has no reasonable basis. The adequacy of the agency's justification of its needs is ascertained through examining whether the agency's explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable.³¹

Protester's mere preference for the original provision, GAO determined, was not an adequate basis for finding the agency's revised provision unreasonable.

GAO took a similar stance in *Alliant Enterprise JV, LLC*.³² There, GAO explored the "must" issue: Must an agency address all (or any) alleged defects in its corrective action? Or, to state the inverse, can an agency take corrective action that fails to address any of the original protest issues? The agency in *Alliant* initially awarded a contract after evaluating technical approach, past performance, and price on a best-value basis. An unsuccessful offeror, Alliant Enterprise JV (AEJV) protested the agency's award, challenging the evaluation of vendors' quotations under all three factors. The agency informed GAO of its intent to take corrective action by reevaluating vendors' existing quotations or, alternatively, by amending the solicitation and seeking revised quotations. The agency subsequently sought clarification of the offerors' prices, requesting that each offeror submit additional narrative information explaining how its proposed price satisfied the performance work statement requirements.

AEJV protested the agency's corrective action, arguing that the corrective action failed to address any of AEJV's original protest issues and was therefore unreasonable. GAO rejected the protester's argument. GAO cited the general premise that "[GAO] generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take

corrective action."³³ Under the facts of this case, GAO determined that because it was not clear "whether each vendor's prices were consistent with the PWS requirements, the agency had a reasonable basis to seek clarifications."³⁴

Notably, GAO distinguished its decision from those in which GAO concluded that an agency's corrective action failed to address a protester's original allegations and was therefore deficient. The distinction, GAO determined, lay in the fact that AEJV possessed only "self-proclaimed meritorious" allegations.³⁵ The cases cited by AEJV involved circumstances in which GAO determined that the corrective action did not sufficiently address issues that GAO *itself* had previously concluded were meritorious. In AEJV's case, GAO had made no such determination. GAO found that the agency's failure to address protest allegations that had not previously been determined meritorious was not *per se* unreasonable: "Quite simply, an agency's corrective action is reasonable if it is appropriate to remedy the flaw which the agency believes exists in its procurement process."³⁶ In other words, it is sufficient for corrective action to address a flaw that the agency, not the protester, believes to exist.

When Must an Offeror Challenge Corrective Action?

A post-award protest may be too late: *Domain Name Alliance Registry, B-310803.2, 2008 CPD ¶ 168 (Comp. Gen. Aug. 18, 2008)*. A party wishing to protest an agency's corrective action must, as its first step, determine the appropriate time to protest. On one hand, the injury must be final enough (as discussed in *SA-TECH*) to be ripe for judicial review. On the other hand, however, if a party does not protest the corrective action at the appropriate stage, it risks dismissal of its protest as untimely. GAO's decision in *Domain Name Alliance Registry*³⁷ illustrates the necessity of protesting an agency's corrective action at the appropriate time.

Domain Name involved a series of protests. In the initial procurement, the agency received quotes from two offerors, DNAR and NeuStar. The agency excluded DNAR's quotation from the competitive range and conducted discussions only with NeuStar. The agency subsequently awarded to NeuStar. DNAR protested the award, arguing that the agency had improperly excluded DNAR from the competitive range without discussions, despite conducting discussions with NeuStar. The agency pursued corrective action by reevaluating the offerors' quotes. During its reevaluation, the agency excluded consideration of the prior discussions with NeuStar because the agency had posted NeuStar's quote after award. The agency concluded that discussions with DNAR would therefore prejudice NeuStar.

During the course of the reevaluation, specifically in the two weeks leading up to award, DNAR expressed concern to the agency regarding an agency attorney indication that award could be made without discussions. The agency did in fact proceed with the reevaluation without conducting discussions and once again selected NeuStar for award. Once again, DNAR protested the decision, arguing that the agency's decision to evaluate the offerors'

initial quotes without discussions was improper. DNAR argued that the agency could not properly reevaluate the offers without holding discussions with DNAR, as it did for NeuStar during the initial procurement. Alternatively, DNAR argued that the agency could not properly ignore the discussions that had taken place with NeuStar.

GAO dismissed DNAR's protest, finding that DNAR's prior notice of the agency's plan to award without discussions rendered its protest untimely. GAO found protester's challenge to the agency's proposed corrective action and recompetition analogous to a challenge to the terms of the solicitation, and therefore found that it should have been protested prior to the closing time for receipt of proposals. In its analysis, GAO cited a letter DNAR had received from the agency at the commencement of the recompetition, identifying the information DNAR should submit for agency review during the reevaluation. The letter requested certain financial statements as well as DNAR's initial proposal. GAO noted that "the letter nowhere mentions the possibility that the agency will open discussions, or seek additional submissions."³⁸ Furthermore, GAO noted, even if this initial letter had not been enough to put the protester on notice, the exchanges between DNAR and the agency several weeks before contract award "should have removed all doubt."³⁹ As such, GAO determined that "DNAR knew or should have known that the agency did not intend to hold discussions with DNAR, and, under the circumstances here, we think that DNAR could not reasonably await the agency's second award decision without raising any challenge."⁴⁰


A preaward protest may be too early: American K-9 Detection Services, Inc., B-400464.6, 2009 CPD ¶ 10 (Comp. Gen. May 5, 2009). In contrast, GAO reached the opposite conclusion under different circumstances in *American K-9 Detection Services, Inc.*⁴¹ In that case, after a series of protests and reevaluations, the agency limited its competitive range to two proposals, EODT and AK-9. In the midst of the recompetition, AK-9 protested the agency's implementation of corrective action based on its belief that the agency was conducting "results oriented" discussions rather than meaningful discussions. GAO dismissed the protest, finding that AK-9's protest was premature since the award decision had not yet been made. "If AK-9 is not selected for award," GAO stated, "it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time."⁴² The agency subsequently made award to EODT, at which point AK-9 challenged the agency's failure to conduct meaningful discussions.

GAO sustained AK-9's challenge to the agency's discussions. In doing so, GAO distinguished the circumstances from those in *Domain Name* above. The agency, citing *Domain Name*, argued that AK-9's protest of the discussions was untimely. The agency argued that it had previously advised AK-9 that discussions would be limited, and that AK-9 was therefore on notice that only certain aspects of its proposal would be discussed and revised. GAO

disagreed, explaining that in *Domain Name*, "the agency clearly announced the ground rules of the corrective action so as to make them part of the solicitation." In *American K-9*, by contrast, GAO found that the agency "did not clearly announce the ground rules of the corrective action and did not specifically indicate that no further discussions would be conducted."⁴³

The timing of a protest to corrective action, as illustrated by these two decisions, is determined by when the protester knew or should have known of the alleged defect in the corrective action. The decisions above serve as a reminder that a preaward protest to corrective action will not always be premature, nor will a post-award protest to corrective action automatically be untimely. Rather, the appropriate time to protest corrective action will depend heavily on if and when the agency clearly announces the scope of its corrective action.

Conclusion

Though the above review of recent corrective action case law is by no means comprehensive, it illustrates current legal standards and, perhaps more important, that appropriate use of corrective action remains a heavily fact-driven inquiry. It is impossible to couch reasonable corrective action in terms of what a party must do, can never do, or can only do before (or after) a certain point in time. These corrective action cases constantly cite and distinguish one another based on precise and sometimes minute details. We can draw only one conclusion with certainty: The increasing frequency with which offerors are challenging these agency actions that were once thought to be nearly "protest proof" will result in a body of corrective action case law that will continue to develop, and with these developments, the opportunities for parties to embrace the challenge to find the corrective action that is "just right." 

Endnotes

1. 691 F.3d 1374, 1382 (Fed. Cir. 2012).
2. *Id.* at 1381.
3. 645 F.3d 1377 (Fed. Cir. 2011).
4. SA-TECH, 691 F.3d at 1381.
5. *See id.* at 1382 (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1359, 1362 (Fed. Cir. 2009)).
6. *Id.* at 1383.
7. *Id.* (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).
8. *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).
9. *Id.* at 1384.
10. *Id.* at 1385.
11. *See Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010).
12. *Id.* at 153.
13. *Id.*
14. *Id.* at 154.
15. *Raytheon Co. v. United States*, 809 F.3d 590, 595 (Fed. Cir. 2015).
16. *Id.* at 596.
17. 113 Fed. Cl. 102 (2013).
18. *Id.* at 115 (internal quotation marks omitted).

19. *Id.*
20. *Id.*
21. *Id.* at 116.
22. B-404916.2, 2011 CPD ¶ 186 (Comp. Gen. Aug. 15, 2011).
23. *Id.* at 3 (emphasis added) (citation omitted).
24. *Id.*
25. B-409713.3, 2015 CPD ¶ 167 (Comp. Gen. Mar. 3, 2015).
26. *Id.* at 2 (alteration in original).
27. *Id.* at 3 (citation omitted).
28. B-411123.3 *et al.*, 2015 CPD ¶ 224 (Comp. Gen. July 24, 2015).
29. *Id.* at 3.
30. *Id.* at 4.
31. *Id.* (citations omitted).
32. B-410352.4, 2015 CPD ¶ 82 (Comp. Gen. Feb. 25, 2015).
33. *Id.* at 2.
34. *Id.*
35. *Id.* (emphasis added).
36. *Id.* at 3.
37. B-310803.2, 2008 CPD ¶ 168 (Comp. Gen. Aug. 18, 2008).
38. *Id.* at 5.
39. *Id.* at 6.
40. *Id.*
41. B-400464.6, 2009 CPD ¶ 10 (Comp. Gen. May 5, 2009).
42. *Id.* at 4.
43. *Id.* at 5 n.4.