Assessing the Timeliness Requirements to Protest an Agency's Corrective Action

By Amy Conant Hoang and Erica L. Bakies

Amy Conant Hoang

Erica L. Bakies

An agency's decision to take corrective action in response to a protest can set off a series of reactions for interested parties. The protester's first reaction may be relief that an agency has recognized possible flaws in the procurement (while, for an intervenor, it likely would be frustration). The second reaction may be concern that the proposed corrective action may not remedy the flaws in the procurement (or, as an intervenor, concern that the corrective action may introduce new flaws). Finally, the protester's third reaction may be confusion regarding what can be done to challenge the corrective action and, perhaps most importantly, *when* to raise that challenge. If a protester raises its concerns too early, it risks dismissal of the protest as premature. If a protester raises its grounds too late, it could lose the opportunity to ever have a protest forum address its concerns.

Assessing the timeliness requirements for protesting an agency's corrective action can prove more difficult than it first may seem. Corrective action notices usually provide few specifics as to why an agency is taking corrective action, the deficiencies an agency identified, and how the agency intends to resolve them. Due to their obscure nature, corrective action notices can make it difficult for an offeror challenging corrective action to discern when, under U.S. Government Accountability Office (GAO) bid protest regulations, it knew or "should have known" of an adverse agency action.[1] As a result, offerors sometimes struggle to determine when to challenge perceived improper actions that the agency takes or fails to take during its implementation of the outlined corrective action. In this article, we discuss a number of GAO and U.S. Court of Federal Claims (COFC) decisions to illustrate the difficulty in assessing the timeliness of a corrective action protest. We also propose a new way to categorize these challenges in order to clarify the filing deadlines.

Standards for Timely Corrective Action Challenges

Challenges to corrective action filed at GAO must comply with GAO's bid protest regulations, which state that a protest based on other than alleged improprieties in a solicitation must "be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier)."[2] When a protester challenges an agency's corrective action, GAO's timeliness analysis turns on whether the corrective action alters the ground rules for the competition.[3] GAO has stated that a challenge to corrective action that alters the ground rules of the competition "is analogous to a challenge to the terms of a solicitation," which, like a challenge to the terms of a solicitation, "must be filed prior to the deadline for submitting revised proposals."[4] Likewise, "in those instances where the agency's proposed corrective action does not alter the ground rules for the competition, [GAO has] considered a protester's preaward challenge to be premature."[5] For example, in *Accenture Federal Services, LLC*,

continued on page 17

Amy Conant Hoang and Erica L. Bakies are associates in the Washington, D.C., office of K&L Gates LLP.

continued from page 1

GAO considered a corrective action challenge protested *before* the agency outlined the scope of its reevaluation.[6] GAO concluded that the protest was prematurely filed because, at that point, the agency had not altered the ground rules of the competition.[7]

In the other bid protest forum, the COFC evaluates the timeliness of a corrective action challenge using the standard outlined in *Blue & Gold Fleet, L.P. v. United States*.[8] When reviewing corrective action challenges, the COFC adheres to the principle that vendors cannot "sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive award and then, if unsuccessful, claim the solicitation was infirm."[9] Under the *Blue & Gold Fleet* standard, some corrective action challenges must be raised prior to the due date for proposal submission (or, as is often the case when the agency takes corrective action, resubmission).[10] The analysis is fact-specific, turning on the precise nature of the error alleged. For instance, in *i3 Cable & Harness LLC v. United States*, the COFC determined that while one post-award challenge to the agency's price evaluation—the agency's failure to reveal estimated quantities to the offerors during the course of corrective action—constituted an untimely challenge to the terms of the solicitation, another post-award challenge to the agency's price evaluation—application of those estimated quantities in conducting its price evaluation—constituted a timely protest to the agency's evaluation.[11]

With regard to premature corrective action challenges, the COFC applies its typical ripeness standard. The COFC will generally consider a corrective action challenge "even when such action is not fully implemented."[12] At the same time, to be ripe for judicial review, the challenged aspect of the corrective action must constitute "a final agency action."[13] To be considered final, the agency action must

(1) "mark the 'consummation' of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature" and (2) "be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[14] In simpler terms, as the court summarized in *Sheridan Corp. v. United States*, is the protester challenging the *implementation* of corrective action or the *results*?[15]

Determining When to Challenge an Agency's Corrective Action

While a helpful starting point, GAO's "ground rules versus not" and the COFC's "implementation versus results" litmus tests are not as black and white as they may seem. Instead, challenges to corrective action contain a sizable gray area when various aspects of an agency's corrective action must be protested. To more clearly analyze timeliness issues when it comes to corrective action challenges, it can be helpful to divide the agency action into three categories rather than two: (1) the agency's *election* to take corrective action, (2) the agency's *scope* of corrective action, and (3) the agency's *execution* of corrective action.

As discussed below, in most cases, challenges to category one and category two must be raised as pre-award protests and will be found untimely if protested after a new award has been made. Additionally, category one challenges filed at GAO may be found untimely if not raised within 10 days of when the protester knew or should have known of the agency's election. Category three challenges can only be raised post-award and generally will be found premature if protested earlier. Utilizing these categories can help a protester determine what specific aspect of an agency's corrective action it seeks to challenge and when that challenge must be filed in order to be considered by GAO or the COFC.

Category One: Agency's Election to Take Corrective Action

Challenges to an agency's election to take corrective action occur when a protester alleges that an agency's election to take *any corrective action at all* is improper, regardless of what specific actions the agency in fact proposes to undertake. In other words, an election challenge addresses *if* the agency should be able to take corrective action in the first place. The Federal Circuit's decision in *Systems Application & Technologies, Inc. v. United States* (*SA-TECH*) provides the quintessential example of a challenge to an agency's election to take corrective action. There, the Federal Circuit concluded that "[a]n arbitrary decision to take corrective action without adequate justification forces a winning contractor to participate in the process a second time and constitutes a competitive injury to that contractor."[16] Therefore, a challenge to an agency's election to take corrective action must be raised as a pre-award protest, before the agency implements its proposed corrective action.

Both GAO and the COFC are likely to conclude that such challenges are untimely if raised after the agency has implemented the corrective action and awarded a new contract. Under the COFC's less stringent filing deadline, a protester is generally safe to challenge an agency's election to take corrective action any time prior to the deadline for proposal resubmission,[17] provided the protester does not unreasonably delay to the point of triggering the doctrine of laches.[18] When, precisely, a protester must file its pre-award protest at GAO presents a trickier issue. At GAO, it is not always clear whether election to take corrective action constitutes a challenge to the ground rules of the competition (which is required to be raised prior to the deadline for proposal resubmission under 4 C.F.R. § 21.2(a)(1)) or an action "other than those covered by paragraph (a)(1)" (to be raised within 10 days of when the protester knew or should have known of its grounds for protest under 4 C.F.R. § 21.2(a)(2)).

For example, in *Sumaria Systems, Inc.*,[19] protester

Sumaria challenged its "technically unacceptable" rating, prompting the agency to take corrective action that included revising the solicitation and seeking revised proposals. Sumaria then filed an agency-level protest challenging the agency's election to take allegedly overbroad corrective action, instead of simply correcting its initial evaluation error and awarding to Sumaria. The agency denied the protest and issued a revised solicitation. Sumaria next filed a protest at GAO, challenging (1) the agency's decision to take corrective action and (2) the terms of the revised solicitation issued as part of the agency's corrective action as unduly restrictive. Sumaria filed its protest prior to the due date for proposal resubmission, but more than 10 days after the adverse agency-level decision.

GAO dismissed Sumaria's first protest ground, the challenge to the agency's decision to take corrective action, as untimely under 4 C.F.R. § 21.2(a)(3), which requires an agency-level protester to file at GAO within 10 days of actual or constructive knowledge of an initial adverse agency action.[20] GAO rejected Sumaria's argument that the agency's decision to reissue the solicitation constituted a change to the ground rules of the competition subject to the timeliness requirements of 4 C.F.R. § 21.2(a)(1). Instead, GAO concluded that "Sumaria challenges the agency's corrective action, and not any particular changes to the ground rules of the procurement or to any alleged improprieties on the face of the solicitation."[21] Because GAO's timeliness rules required Sumaria to protest within 10 days after it learned of the adverse agency action, GAO dismissed Sumaria's first protest ground as untimely. In contrast, GAO found that Sumaria's second ground of protest challenging the revised solicitation terms was subject to the § 21.2(a)(1) standard for challenges to the terms of the solicitation and therefore timely.

Protesters who take their corrective action challenges to the COFC do not have to be concerned with the differing timeliness standards that GAO employs for election and scope challenges.

The *Sumaria Systems* decision demonstrates an important distinction between challenges to an agency's election to take corrective action and challenges to the scope of the corrective action. The protester attempted to challenge what was clearly the agency's *election* to take corrective action by characterizing its protest as a challenge to the agency's *scope* of corrective action. Despite Sumaria's attempt to characterize its protest ground as a timely challenge to the scope of corrective action, GAO determined that, in reality, Sumaria's protest constituted an untimely challenge to the agency's election to take corrective action.

It should be noted that the timeliness analysis in *Sumaria Systems* turned on the protester's obligation to challenge the agency's adverse decision in Sumaria's agency-level protest within 10 days. The decision does not address whether, barring the agency-level protest, Sumaria's challenge to the decision to take corrective action, GAO would have held Sumaria's protest to the § 21.2(a)(1) standard (allowing a protester to file any time prior to the due date for proposal resubmission) or the § 21.2(a)(2) standard (requiring a protester to file within 10 days of when it knew or should have known of the agency's election to take corrective action). This distinction is crucial for the many corrective action challenges lodged not with the agency but instead with GAO.

Luckily, GAO indirectly addressed this distinction in *Enhanced Veterans Solutions, Inc.*[22] There, GAO dismissed a challenge to the agency's election to take corrective action, which the protester had raised for the first time in its comments in a post-award protest. While the decision did not turn on the nuance between a scope challenge and an election challenge (because the protester would have been untimely under either standard), GAO still noted that a challenge to the agency's election to take corrective action should have been raised within 10 days of the protester's knowledge under § 21.2(a)(2) rather than prior to the deadline for proposal resubmission under § 21.2(a)(1):

> We view this argument as an untimely challenge to the agency's decision, announced in a letter dated December 19, 2016, to take corrective action in response to FMI's protest of the original award to EVS. In these circumstances, our Bid Protest Regulations require a protester to raise an issue within 10 days of when it knew or should have known the basis for protest.[23]

These decisions highlight why, at least at GAO, it is important to distinguish between category one election challenges and category two scope challenges: While we have yet to identify a case specifically addressing whether an election challenge would be considered untimely if raised more than 10 days after the agency's announced decision but prior to the deadline for proposal resubmission, several GAO decisions contain the same reference as *Enhanced Veterans Solutions* with regard to the 10-day limit.[24]

Protesters who take their corrective action challenges to the COFC do not have to be concerned with the differing timeliness standards that GAO employs for election and scope challenges. As discussed above, the COFC does not employ a 10-day filing deadline and therefore employs the *Blue & Gold Fleet* standard for both election and scope challenges. Nevertheless, the timeliness assessment still may not be black and white.

Protesters at the COFC may not need to distinguish between election and scope challenges (because both

challenges are governed by the same filing deadline), but they must still distinguish between election and execution challenges. For instance, in *Centech Group, Inc. v. United States*, the COFC rejected the defendant's argument that the protester's *election* challenge was a premature *execution* challenge.[25] The COFC determined that the possibility that the protester may still receive the contract award did not render its election challenge premature. The COFC noted that challenges to an agency's election to take corrective action were "distinct from any future evaluation and award and give rise to different controversies than those which may arise from the new evaluation and award in the post-award landscape."[26] It therefore concluded that the protester's election challenge was not premature, and was ripe for judicial review.[27]

In contrast, in *Square One Armoring Service, Inc. v. United States*,[28] the protester structured its pre-award protest as a challenge to the agency's *election* to take corrective action, alleging that the agency's election to take corrective action was a pretext to find a way to award the contract to another offeror. The COFC noted that the challenge raised "purely hypothetical arguments about future events that [might] or [might] not occur."[29] In other words, the protester was actually challenging how the agency would carry out its corrective action (i.e., the agency's *execution* of the corrective action). Accordingly, the COFC dismissed the protest as premature, determining that "[i]f at the conclusion of the re-procurement process, the record establishes that GSA 'did not properly carry out the corrective action,' Square One will have the opportunity to challenge the new award decision."[30]

In short, while the COFC's standard for election challenges may be slightly less stringent than GAO's standard, challenges to the agency's election to take corrective action require protesters to carefully consider what specific agency action they are challenging to ensure that they timely file category one election challenges in accordance with each forum's rules.

Category Two: Scope of Agency's Corrective Action

Category two of corrective action protests consists of challenges to the scope of the agency's proposed corrective action—generally, whether such action goes too far, or not far enough, in remedying the identified defects in the initial procurement. A protest to the scope of the agency's corrective action addresses not *whether* the agency should take corrective action, but rather *what* specific action it should undertake to cure the identified procurement defects.

Challenges to the scope of the agency's corrective action generally must be filed prior to the deadline for proposal resubmission, regardless of the protest forum. At GAO, scope challenges fall into the "ground rules" category of protests that GAO finds "analogous to a challenge to the terms of the solicitation,"[31] and therefore must be protested prior to the deadline for proposal resubmission. The COFC will employ, as it does for election challenges, the Federal Circuit's *Blue & Gold Fleet* standard for timeliness (requiring patent errors in a solicitation to be raised prior to the close of the bidding process). In other words, as stated in our favorite expression of the *Blue & Gold Fleet* principle, "if there is a patent, i.e., clear, error in a solicitation known to the bidder, the bidder cannot lie in the weeds hoping to get the contract, and then if it does not, blindside the agency about the error in a court suit."[32]

Additionally, both forums provide for an exception to their pre-proposal submission deadlines when the agency's proposed corrective action does not provide for the submission of revised proposals. At GAO, such challenges must be raised within 10 days of when the scope of corrective action was known or should have been known.[33] At the COFC, such challenges should be raised as early as possible and, at a minimum, prior to the contract award.[34]

Category two scope challenges are a frequent subject of corrective action protests, as evidenced most recently by the Federal Circuit's decision in *Dell Federal Systems, L.P. v. United States*.[35] Because so many challenges to corrective action center on the scope of the agency's chosen path forward, GAO and the COFC have had considerable opportunity to discuss timeliness issues associated with such protests.

Both forums will generally dismiss scope protests on timeliness grounds under one of two circumstances: (1) when a *pre*-award protest characterized by the protester as a challenge to the *scope* of corrective action is, in reality, a challenge to the *execution* of the corrective action (and is therefore premature) and, conversely, (2) when a *post*-award protest characterized by the protester as a challenge to the *execution* is, in reality, a challenge to the *scope* of corrective action (and therefore untimely).

GAO recently tackled the first circumstance, where a protester mischaracterized its challenge as an issue with the *scope* of the agency's chosen corrective action, when in reality the protester's concern constituted a challenge to the agency's *execution* of the corrective action. In *Accenture Federal Services, LLC*,[36] the agency took corrective action following a protest that alleged, among other issues, misleading discussions and/or a lack of meaningful discussions. The corrective action notice indicated that the agency would correct an error in its prior evaluation notices by soliciting clarifications from one offeror. In the corrective action notice, the agency also explained that if the clarification failed to remedy the error, the agency could still open discussions. An offeror submitted a pre-award protest in response to the agency's corrective action notice, arguing that the corrective action was improper because the error could *only* be fixed by conducting discussions and soliciting revised proposals. GAO concluded that the challenge was premature "because the agency has not yet made a new source selection decision, and has indicated that it has not ruled out the possibility that it might need to open discussions."[37]

The *Accenture* decision distinguished a prior GAO decision, *Domain Name Alliance Registry*, in which GAO

dismissed as untimely a post-award challenge to an agency's failure to conduct discussions.[38] In its analysis, GAO cited a letter protester 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 "[t]he letter nowhere mentions the possibility that the agency will open discussions, or seek additional submissions," and that, at that point, DNAR knew or should have known that the agency did not plan on considering opening discussions as part of its corrective action.[39] GAO also explained that 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."[40] 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."[41] In *Accenture*, GAO distinguished the earlier decision, explaining that in *Domain Name*, "the agency's actions—from the time it initiated the corrective action until the second award decision—clearly indicated that the agency did not contemplate holding discussions."[42] In other words, the two protests are seemingly different because in *Accenture*, the agency did not rule out having discussions, while in *Domain Name*, it did.

As evidenced by *Accenture* and *Domain Name*, the issue of when to challenge an agency's discussions—or lack thereof—proves particularly challenging. GAO's decision *American K-9 Detection Services, Inc.*[43] further highlights this difficulty. 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."[44] The agency subsequently made award to EODT, at which point AK-9 challenged the agency's failure to conduct meaningful discussions. The agency, citing *Domain Name*, 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."[45] In *American K-9*, by contrast, GAO concluded 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."[46] Accordingly, GAO declined to dismiss the protest as untimely. GAO ultimately went on to sustain AK-9's protest regarding unequal discussions.

Corrective action protests filed before the agency implements its intended corrective action do not always fail as premature, however, provided that the challenge does in fact address *what* the agency proposes to do (scope) rather than *how* the agency might do it (execution). In *Jacobs Technology Inc. v. United States*, the COFC determined that a protester's challenge to the agency's announced corrective action was ripe for judicial review even though the agency had not yet implemented its plan to reevaluate revised proposals and make a new source selection decision.[47] The COFC determined that the protest amounted to a challenge to the scope of the agency's proposed corrective action and was therefore properly raised pre-award. The defendant argued that because the agency could still change course at any time prior to undertaking the proposed corrective action, the proposal could not constitute a "final agency action." However, the COFC did not find the defendant's argument persuasive: "The fact that the Army could change course in the future by, for example, amending or canceling the solicitation, does not render [the protester's] claim unripe."[48] The COFC then distinguished its earlier decision in *Square One* (discussed above) and again highlighted the distinction between a *scope* challenge and an *execution* challenge: "In contrast [to *Square One*], [the protester] is not challenging the Army's execution of the corrective action . . . . Instead, [the protester] is challenging the scope of the Army's corrective action itself, arguing that it is not broad enough to address the Army's alleged bias."[49] Because the protester challenged the scope rather than the outcome of the corrective action, the COFC concluded that the protest was not premature.

On the other end of the spectrum we find the second set of circumstances that give rise to an unsuccessful scope challenge: the post-award protest characterized by the protester as a challenge to the agency's *execution* of corrective action, when, in reality, the protest constituted a challenge to the *scope* of corrective action. In essence, these protests are synonymous with challenges to the terms of the solicitation raised during a post-award protest, which are notoriously dismissed as untimely. For example, in *Veterans Evaluation Services, Inc.*, in taking corrective action, the agency explained that it would not solicit or accept revised technical proposals, but would limit revised submissions to offerors' price and past performance.[50] The agency also stated that it would utilize its previous technical evaluation as part of its new source selection decision. After the agency implemented its corrective action and awarded the contract, an unsuccessful offeror submitted a protest, alleging that the agency had committed errors in its technical evaluation. Dismissing the protest as untimely, GAO observed that "[a]lthough couched in terms of a challenge to the agency's technical evaluation, these allegations actually are a challenge to the scope of the

agency's proposed corrective action; [the protester] is alleging that the agency misevaluated technical proposals, and requesting that we recommend that the agency reevaluate those proposals."[51] As a result, GAO characterized the protest as a "challenge to the scope of the agency's proposed corrective action relating to the solicitation and evaluation of revised technical proposals."[52] GAO explained that had the protester timely filed prior to the deadline for receipt of proposals, it "would have afforded the agency a timely opportunity to consider the propriety of its chosen course of action before soliciting revised proposals, engaging in discussions and evaluating final proposal revisions."[53] Because the protester chose to delay until after award, GAO found the protest untimely.

The COFC engaged in a similar analysis in *Sonoran Technology & Professional Services, LLC v. United States*.[54] In that case, the agency took corrective action by referring an offeror to the Small Business Administration (SBA) for a certificate of competency determination. When a protester attempted to challenge that corrective action decision after a new contract award had been made, the COFC dismissed the challenge as untimely. The COFC determined that while the agency did not formally open a second round of proposal submissions, its decision to take corrective action by referring an offeror to the SBA "is akin to a reevaluation of proposals for the initial contract."[55] In other words, the court determined that Sonoran's protest constituted a challenge to the *scope* of corrective action rather than a challenge to the *execution* of corrective action. Accordingly, the COFC found that "Sonoran was not permitted to wait for the Air Force to complete the corrective action to see if its award was upheld," and dismissed the challenge as untimely.[56]

Category Three: Agency's Execution of Corrective Action

Category three of corrective action protests consists of challenges to an agency's *execution* of its corrective action. Unlike a scope protest, which challenges *what* an agency intends to do to correct an identified deficiency, an execution protest challenges *how* the agency carries out its stated intention. For example, a challenge to an agency's stated intention to conduct a price realism analysis as part of its corrective action constitutes a scope protest; a challenge to the results of that price realism evaluation constitutes an execution protest.[57]

In determining whether an execution challenge may be premature, the COFC will employ its ripeness standard to assess whether the claim "is premised upon contingent future events."[58] Specifically, the COFC will review whether the protester's challenge is "contingent on how the agency executes the corrective action."[59] If so, the COFC will find such a challenge premature if raised prior to award. GAO, on the other hand, will employ its "ground rules" test to determine if a pre-award protest addresses the ground rules of the competition (a timely scope challenge) or an evaluation error (a premature execution challenge).[60] Though protesters may only raise execution challenges after a new award has been made, many protesters (perhaps in an abundance of caution) attempt to raise these allegations as pre-award protests challenging how the agency *may* improperly conduct its corrective action. Accordingly, the timeliness risks associated with execution protests typically stem from challenges raised too *early*, rather than challenges raised too *late*. We addressed this issue to some extent already in the section on scope challenges above. The cases below address additional nuances in the distinction between scope challenges and execution challenges.

As noted above in the section addressing scope challenges, the fine line between scope challenges and execution challenges is often tested in the context of discussions, with protesters challenging what the agency may or may not address in discussions undertaken in the course of corrective action. *Nuclear Production Partners, LLC*[61] highlights this principle. Protester NPP filed a pre-award protest challenging the agency's limited discussions. In carrying out its corrective action, the agency sent discussion letters to offerors addressing their cost savings approaches but did not allow proposal revisions outside of this issue "unless specifically invited to do so by discussion letter from the Contracting Officer."[62] NPP contended that offerors should have been permitted to revise all aspects of their proposals. GAO dismissed the protest as premature, citing the fact that the agency had stated that it may engage in "further communications with offerors." GAO again distinguished the facts from those of *Domain Name*: "Based on the agency's representation that neither its requirements nor the evaluation scheme have changed, we do not view the ground rules of this procurement to have been changed in a manner that warrants our pre-award review."[63] GAO therefore found the protester's challenge premature.

GAO's decision in *Hewlett Packard Enterprise Co.*[64] provides another example of the fine line between scope and execution challenges. As noted above, a supposedly clear-cut example of the distinction between scope and execution challenges is a price realism challenge: A protest to the agency's decision to conduct such an analysis must be raised pre-award, whereas a protest to the results of the analysis can only be raised post-award. In *Hewlett Packard*, however, a protester was faced with a situation in which it was unclear whether the agency intended to conduct a price realism analysis. In light of an initial protest to the agency's failure to conduct a price realism analysis, the agency elected to take corrective action to "conduct discussions with the technically-acceptable offerors, request revised price proposals compliant with the terms of the solicitation from those offerors, re-evaluate and issue an award decision."[65] The protester then challenged the proposed corrective action as insufficient because "the agency will likely conduct an unreasonable price realism analysis."[66] GAO dismissed this ground of protest, finding that "[t]o the extent the protester contends that the Army will not conduct a reasonable price realism evaluation as part of the agency's corrective action, this argument is

premature as it merely anticipates that the agency will evaluate proposals unreasonably and in a manner inconsistent with the terms of the [request for proposal]."[67]

Notably, in reaching this conclusion, GAO cited to the *agency's response to the protest*, in which it confirmed that the agency would conduct a price realism analysis as part of its corrective action, which is information the protester did not have at the outset. It is unclear whether the protester here took issue with the fact that the agency's proposed scope of corrective action did not specifically confirm that it would conduct a price realism analysis, but nothing in the initial notice of corrective action (at least the excerpts included in the GAO decision) confirmed that the agency would do so. Assuming the protester did harbor concerns regarding the agency's failure to confirm that it would conduct a price realism analysis, it would seem that the protester here had no other option than to file a pre-award protest. If the agency had not intended to conduct a price realism analysis, it is possible that a post-award protest would be found untimely under *Domain Name*, in which GAO found a challenge to the agency's failure to hold discussions untimely because the agency's initial letter to offerors "nowhere mentions the possibility that the agency will open discussions." Similarly, if the protester here had not raised its price realism challenge pre-award, it seems that the agency would have been able to challenge a later protest because its initial corrective action notice "nowhere mentions the possibility that the agency will [conduct a price realism analysis]." These cases demonstrate that, particularly in the area of discussions, occasionally only a fine (and fact-specific) line exists between a premature and untimely challenge to corrective action.

Outside of the discussions context, issues regarding category three corrective action protests (execution challenges) arise most often when a challenger becomes aware of a concrete fact about how the agency *intends* to carry out its corrective action (normally a scope issue) but that nevertheless does not alter the "ground rules" of the procurement, and therefore still falls within the category of execution challenges. GAO's decision in *SOS International, Ltd.*[68] presents a helpful example. In that case, protester SOSi filed a protest challenging the agency's evaluation of offerors' proposals under the technical, past performance, and price factors. In response to that protest, the agency advised GAO that it intended to reevaluate offerors' price proposals and make a new source selection decision. SOSi protested the agency's corrective action, arguing that the proposed corrective action alleged deficiencies relating to the evaluation of proposals under the technical and past performance evaluation factors. While GAO acknowledged that "where the agency's proposed corrective action alters or fails to alter the ground rules for the competition (i.e., aspects that apply to all offerors), we have considered a protester's challenge of such to be analogous to a challenge to the terms of a solicitation," it ultimately concluded that "the agency's decision not to reexamine various aspects of the evaluation as part of its corrective action does not effectively incorporate them into the ground rules for the competition."[69] In other words, GAO determined this issue to be a scope challenge rather than an execution challenge. Accordingly, GAO dismissed the protest as premature.

GAO addressed the issue again recently in *Deque Systems, Inc.*, in which a protester challenged the agency's proposed corrective action (reevaluating both offerors) as improper because the procurement was set aside for small businesses and one of the offerors had been determined to be other-than-small for the procurement.[70] The protester argued that the agency's proposed corrective action would lead to an improper evaluation of an other-than-small business in a procurement set aside for small businesses. GAO disagreed that such a protest constituted a challenge to the "ground rules" of the competition: "[T]he agency has represented that neither the solicitation's small business set-aside requirement nor the evaluation scheme has changed. Thus, we do not view the ground rules of this procurement to have been changed in a manner that warrants our preaward review."[71] Instead, GAO characterized the protest as a premature challenge to the reasonableness of the agency's eventual evaluation and award decision.

Again, these decisions highlight the fine line, and a fact-specific, flexible one at that, between the "ground rules" of the competition (which must be protested pre-award) and the agency's evaluation under those ground rules (which can only be protested post-award). The COFC noted as much in *Sotera Defense Solutions, Inc. v. United States*, in which it declined to rely on what it perceived as "an obscure distinction between a 'proposed corrective action [that] alters or fails to alter the ground rules for the competition (i.e., aspects that apply to all offerors),' and a 'proposed corrective action [that] does not alter the ground rules for the competition.'"[72] The COFC concluded that "[t]his GAO doctrine, in the court's view, relies overmuch on determining whether the 'ground rules' of the competition have been altered, however those ground rules might be defined."[73]

Even under the COFC's standards, however, the issue of discussions can lead to uncertainty over when to challenge corrective action. For instance, in *Texas v. United States*, the State of Texas challenged the agency's implementation of corrective action.[74] In that case, the agency took corrective action to an earlier challenge by revising its earlier competitive range determination to include Texas. The agency then conducted discussions with multiple offerors, including Texas. Texas then protested the agency's implementation of its corrective action, arguing that once Texas was included in the competitive range, it was entitled to automatically receive the contract award under the Randolph-Sheppard Act and that the agency should not be allowed to conduct negotiations with other offerors in the competitive range. The protester framed its challenge as an objection to the scope of the agency's corrective action and asserted that its protest was ripe for judicial review because it was challenging the "implementation of the Air Force's corrective action which seeks to

negotiate with, and solicit final proposal revisions from, offerors not otherwise eligible for award."[75]

The COFC dismissed the challenge as premature. In concluding that the protest was not ripe for judicial review, the court noted that because the agency's evaluation was ongoing, it was unclear whether Texas should receive priority under the Randolph-Sheppard Act. The COFC therefore found the challenge to be one of execution and not scope and that the challenge was premature: "Because the Air Force has not yet made a contractor selection decision, and may not take any action to which protestors even want to assert violations of the Randolph-Sheppard Act, the protest is not ripe."[76] Protesters should familiarize themselves with these "close call" distinctions between scope and execution challenges.

Conclusion

As evidenced by these cases, the timeliness standards for corrective action result in a highly fact-specific analysis—the stereotypical "it depends" response. However, categorizing the agency's action into one of these three categories—(1) the *election* to take corrective action, (2) the *scope* of the corrective action, or (3) the *execution* of the corrective action—provides additional parameters to guide offerors to the proper time to protest. Carefully reviewing a protester's concerns and identifying what precise agency action the protester seeks to challenge could affect not only whether a protest is timely, but also which forum the protester must file in. As corrective action becomes more prevalent (in our experience), we expect both the COFC and GAO to discuss their standards and ultimately provide protesters with additional guidance for ensuring the timeliness of their protests, which will, in turn, save everyone time and resources. For now, if this article demonstrates anything, it is that the timeliness section in a protest, especially one that challenges corrective action, deserves as much serious consideration and analysis as the merits of the issues. PL

Endnotes

1. 4 C.F.R. § 21.2(a)(2).
2. *Id.*; *see also* Povolny Grp., B-414532.3, 2017 CPD ¶ 293 (Comp. Gen. Sept. 21, 2017) (applying the standard to a corrective action challenge).
3. *See, e.g.*, Northrop Grumman Info. Tech., Inc., B-400134.10, 2009 CPD ¶ 167 (Comp. Gen. Aug. 18, 2009).
4. Veterans Evaluation Servs., Inc., B-412940.26 et al., 2017 CPD ¶ 17 (Comp. Gen. Jan. 5, 2017) (concluding that a challenge to the agency's failure to conduct a technical evaluation during corrective action was untimely because the protester was put on notice prior to submitting a revised proposal).
5. SOS Int'l, Ltd., B-407778.2, 2013 CPD ¶ 28, at 2 (Comp. Gen. Jan. 9, 2013) (citing Alliant Techsystems, Inc., B-405129.3, 2012 CPD ¶ 50, at 2 n.1 (Comp. Gen. Jan. 23, 2012); Northrop Grumman Tech. Servs., Inc., B404636.11, 2011 CPD ¶ 121, at 4 (Comp. Gen. June 15, 2011)).
6. B-414268.3 et al., 2017 CPD ¶ 175 (Comp. Gen. May 30, 2017).
7. *Id.*
8. 492 F.3d 1308, 1313 (Fed. Cir. 2007).
9. NVE, Inc. v. United States, 121 Fed. Cl. 169, 179 (2015) (citing *Blue & Gold Fleet*, 492 F.3d at 1313).
10. *Id.* at 173.
11. 132 Fed. Cl. 495, 512 (2017).
12. Sys. Application & Techs., Inc. v. United States (*SA-TECH*), 691 F.3d 1374, 1381 (Fed. Cir. 2012).
13. *Id.* at 1384.
14. *Id.* (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1997)).
15. 95 Fed. Cl. 141, 150 (2010).
16. *SA-TECH*, 691 F.3d at 1382.
17. NVE, Inc. v. United States, 121 Fed. Cl. 169, 173 (2015) (applying the *Blue & Gold Fleet* standard to a challenge to the agency's election to take corrective action as well as a challenge to the scope of that corrective action and concluding that the protester should have challenged both actions before the deadline for revised proposals).
18. *See* Glob. Dynamics, LLC v. United States, 137 Fed. Cl. 105, 116 (2018) (applying the doctrine of laches to bar the protester's challenge to the agency's election to follow GAO's recommended corrective action because although the agency had not yet requested revised proposals (the technical deadline for protesting), the protester waited nearly a year to challenge the election to take corrective action).
19. B-413508.2, 2016 CPD ¶ 14 (Comp. Gen. Dec. 29, 2016).
20. *Id.* at 4.
21. *Id.* at 5.
22. B-414189.2, 2017 CPD ¶ 246 (Comp. Gen. July 25, 2017).
23. *Id.* at 7 (citing 4 C.F.R. § 21.2(a)(2)).
24. *See, e.g.*, Integrity Consulting Eng'g & Sec. Sols., LLC, B-405199.3, 2011 CPD ¶ 41, at 3 (Comp. Gen. Dec. 8, 2011) ("ICESS submitted this protest to our Office on September 1. ICESS first contended that the agency's basis for the corrective action was unreasonable. On September 26, we dismissed this protest basis as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2011), because ICESS was aware of the corrective action on June 28, but did not file its protest until September 1."); Tero Tek Int'l, Inc., B-242743, 91-2 CPD ¶ 288, at 2 (Comp. Gen. Oct. 3, 1991) ("TTI basically challenges the agency's corrective action. ITT's underlying allegations that its initial award was proper and that the agency's corrective action adversely affected the firm are untimely. Our Bid Protest Regulations require protests to be filed no later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1991).").
25. 78 Fed. Cl. 496, 505 (2007).
26. *Id.*
27. *Id.*
28. 123 Fed. Cl. 309, 321 (2015).
29. *Id.*
30. *Id.*
31. Northrop Grumman Info. Tech., Inc., B-400134.10, 2009 CPD ¶ 167, at 10 (Comp. Gen. Aug. 18, 2009).
32. DGR Assocs., Inc. v. United States, 690 F.3d 1335, 1343 (Fed. Cir. 2012).
33. For instance, in *Delta Risk, LLC*, B-416420, 2018 CPD ¶ 305 (Comp. Gen. Aug. 24, 2018) (citations omitted), GAO noted: "A protest allegation that challenges the ground rules that the agency has announced for performing corrective action and recompetition is analogous to a challenge to the terms of the solicitation and must be filed prior to the deadline for submitting revised proposals. Where, as here, no further submissions are anticipated, such challenges must be raised within 10 days of when the scope of the agency's corrective action was known or should have been known." Additionally, in *EA Engineering, Science & Technology, Inc.*, B-411967.2 et al., 2016 CPD ¶ 106 (Comp. Gen. Apr. 5, 2016), GAO determined that a challenge to an agency's decision

to conduct a new price realism analysis as part of its corrective action, which did not involve soliciting revised proposals, was untimely when not raised within 10 days of when the agency confirmed that it would conduct a new price realism analysis. *See id.* at 5 ("Consequently, as of October 1, EA knew that the agency would conduct a price realism analysis, and if it had objections to the agency's conduct, it was required to raise those objections to our Office no later than October 12."). Similarly, in *Earth Resources Technology, Inc.*, B-403043.2 et al., 2010 CPD ¶ 248 (Comp. Gen. Oct. 18, 2010), an agency took corrective action by eliminating one offeror, ERT, from the competitive range and awarding to the one remaining offeror. GAO characterized the ERT's subsequent protest to the agency's failure to reopen discussions during corrective action as a challenge to the ground rules of the competition. GAO concluded that "because ERT knew or should have known of this basis of protest as a consequence of ERT's counsel receiving the June 25 letter, ERT should have, at the latest, protested the agency's decision not to hold to discussions within 10 days of receiving the June 25 letter, or by July 6." *Id.* at 6. GAO likely used the 10-day standard because the corrective action did not involve resubmission of proposals.

34. COMINT Sys. Corp. v. United States, 700 F.3d 1377, 1382 (Fed. Cir. 2012). In that case, an agency amended the solicitation after proposal submission and a protester waited until after award to challenge the revisions. The Federal Circuit acknowledged that the offeror could not have protested prior to the deadline for proposal submissions but found that the prejudiced offeror was obliged to raise its objection as early as possible and, at a minimum, prior to contract award.

35. 906 F.3d 982 (Fed. Cir. 2018).

36. B-414268.3 et al., 2017 CPD ¶ 175 (Comp. Gen. May 30, 2017).

37. *Id.* at 4.

38. B-310803.2, 2008 CPD ¶ 168, at 7 (Comp. Gen. Aug. 18, 2008).

39. *Id.*

40. *Id.* at 8.

41. *Id.*

42. *Accenture*, B-414268.3, at 4 n.5.

43. B-400464.6, 2009 CPD ¶ 10 (Comp. Gen. May 5, 2009).

44. *Id.* at 5.

45. *Id.* at 6 n.4.

46. *Id.* at 6–7 n.4.

47. 131 Fed. Cl. 430 (2017).

48. *Id.* at 446.

49. *Id.* at 448.

50. B-412940.26 et al., 2017 CPD ¶ 17 (Comp. Gen. Jan. 5, 2017).

51. *Id.* at 15.

52. *Id.* at 16.

53. *Id.* at 16–17.

54. 135 Fed. Cl. 28 (2017).

55. *Id.*

56. *Id.*

57. *See, e.g.*, i3 Cable & Harness LLC v. United States, 132 Fed. Cl. 495, 512 (2017).

58. Bannum, Inc. v. United States, 56 Fed. Cl. 453, 462 (2003) (quoting Texas v. United States, 523 U.S. 296, 300 (1998)); *see also* Sheridan Corp. v. United States, 95 Fed. Cl. 141, 149 (2010) (applying the standard in *Bannum* to a corrective action challenge).

59. XPO Logistics Worldwide Gov't Servs., LLC v. United States, 133 Fed. Cl. 162, 177 (2017), *aff'd*, 713 F. App'x 1009 (Fed. Cir. 2018).

60. *See, e.g.*, Northrop Grumman Tech. Servs., Inc., B404636.11, 2011 CPD ¶ 121 (Comp. Gen. June 15, 2011).

61. B-407948.9, 2013 CPD ¶ 228 (Comp. Gen. Sept. 24, 2013).

62. *Id.* at 5 (citing RFP amendment issued during corrective action).

63. *Id.* at 7.

64. B-413444.4 et al., 2017 CPD ¶ 29 (Comp. Gen. Jan. 18, 2017).

65. *Id.* at 3.

66. *Id.* at 3–4.

67. *Id.* at 5.

68. B-407778.2, 2013 CPD ¶ 28 (Comp. Gen. Jan. 9, 2013).

69. *Id.* at 2.

70. B-415965.4, 2018 CPD ¶ 226 (Comp. Gen. June 13, 2018).

71. *Id.* at 5.

72. 118 Fed. Cl. 237, 257 (2014) (citing *SOS Int'l*, B-407778.2).

73. *Id.*

74. 134 Fed. Cl. 8, 15 (2017).

75. *Id.* at 18.

76. *Id.*