

## Corrective Action Update: The Expanding Universe of Possible Grounds to Protest Agency Corrective Action

By **STUART B. NIBLEY** AND **AMY M. CONANT**



**Stuart B. Nibley**



**Amy M. Conant**

This article builds on an article we authored for *The Procurement Lawyer* in 2016. In our 2016 article, we addressed the topic of challenges of protesting agency corrective action that is taken in response to a bid protest: *Corrective (Action) Lenses: Is 20/20 Hindsight Enough for Agencies When Taking Corrective Action in Response to a Protest?* That article provided an overview of the primary considerations when a party pursues a protest challenging agency corrective action: jurisdiction, standing, timeliness, and protest grounds. In this update, we analyze the wide variety of issues that face protesters, award-ees, and agencies when a party has protested agency corrective action. We examine how the U.S. Court of

Federal Claims (the Court), the U.S. Court of Appeals for the Federal Circuit (the Federal Circuit), and the Government Accountability Office (GAO) have responded to the various types of issues. Our analysis revisits some decisions we discussed in our prior article and supplements the discussion with more recent decisions, and we offer new angles on the analysis. What grounds of protest are most likely to succeed at the GAO, and what grounds at the Court? What standards does each forum employ?

We begin by offering some comments about the broad topic of agency corrective action and its encroaching role into the federal procurement process. No bid protest issue seems to be more central and important to participants involved with a protested procurement than that of agency corrective action. The GAO announced in its year-end statistics that the effectiveness rate (sustained protests and protests in which an agency took corrective action in response to a protest) jumped to 46 percent in 2016, considerably the highest rate in recent history. In simplistic terms, “corrective action” involves an agency’s response to a bid protest when the agency, either at a bid

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*Stuart B. Nibley is a partner and government contracts practice chair with K&L Gates LLP, and, in addition to holding a number of current positions in the Section of Public Contract Law, is a past chair of the Section. Amy M. Conant is an associate with K&L Gates and holds a number of positions in the Section, including the Young Lawyer Council Member.*

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## CORRECTIVE ACTION

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protest forum's prodding or on its own, decides or agrees to address perceived defects in a procurement by an agency. Corrective action is stimulated in three ways: (1) voluntarily by an agency, before any decision or recommendation is issued by the GAO or the Court; (2) in response to a GAO or Court decision sustaining all or a portion of a protest; or (3) in response to a GAO recommendation before the GAO has issued a decision, for example, following outcome prediction or an informal conference.

One of the authors of this article is currently reading a book about the formation of the universe (which is both fascinating and daunting). Accordingly, analogies that compare the evolution of principles that govern the implementation of corrective action to the expansion of the universe seem, if not appropriate, at least useful, at this moment. Prior to the Federal Circuit's affirmation of the Court's decision in the seminal case *Systems Application &*

*Technologies, Inc. v. United States (SA-Tech)*,<sup>1</sup> participants in a bid protest lived in a dark, uncertain environment in which unannounced, sometimes random, actions could change the course of a procurement in seconds and plunge the procurement into a black hole for months, sometimes years. How? By invocation of the magic words "corrective action." Prior to *SA-Tech*, the GAO, and usually the Court as well, required virtually no explanation from an agency as to why it was taking corrective action in response to a protest. Once an agency announced it would be taking "corrective action," the GAO routinely ruled that the protest had been rendered academic and moot. The agency was free to take the procurement back, while the awardee(s) and protester(s) went back to their proposal rooms and speculated what might be happening, where the procurement might be going, and when that might occur. Agencies were not required to explain why they

were taking corrective action, what procurement defects they perceived and intended to address, or how the corrective action proposed was designed to address the perceived procurement defects. And because agencies were not required to explain their plans when announcing they were taking back a procurement to implement “corrective action,” they were not tethered to a roadmap when they actually implemented corrective action. The agencies had explained nothing when the protests were dismissed—they could move in any direction once they pulled back a procurement, or move in no direction but merely reinstate the original award with a somewhat bolstered record. Offerors and bidders often thought this was unfair and inefficient. Offerors spend significant time, effort, and money preparing proposals, only to have to start over (many times) under unannounced rules. Agencies have been equally frustrated.

The Federal Circuit’s decision in *SA-Tech* took a significant step toward changing this and established a beacon for assessing the rationality of agency corrective action. In this decision, discussed more fully below, the Federal Circuit stated that agencies must identify and document a rational basis to support specific corrective action. *SA-Tech* and subsequent decisions pointed out that merely stating that corrective action will be taken does not provide a rational basis. If we pick up on our expanding universe theme, we can see that the *SA-Tech* decision represents the “Big Bang” regarding the evolution of principles that govern the implementation of corrective action. But the corrective action “universe” remains immature and in need of additional expansion.

In response to *SA-Tech* and subsequent decisions, the Court and the GAO began to analyze both proposed and actual instances of agency corrective action with greater scrutiny. The forums now require agencies to explain, at least in broad strokes, the parameters of anticipated corrective action before they agree to dismiss a protest. However, this remains a low, unexacting, standard. Agencies often opt to announce a smorgasbord of possible actions the agency *might*, or *might not*, take—reevaluation of proposals; revision of the solicitation if appropriate and possible resubmission of proposals; termination of the awarded contract or confirmation of the original award; and a new best value determination or a supplemented record for the award decision and others. The GAO rarely finds an agency’s broad statement of possible corrective action unreasonable and very rarely finds that the corrective action an agency in fact implemented was unreasonable, as long as the agency attempts to document some explanation for its actions.

Analysis of the decisions of the Court when compared to those of the GAO demonstrates that the Court applies a more demanding scrutiny when assessing the reasonableness of both (1) agency proposed corrective action and (2) agency implemented corrective action. The dichotomy between the Court and the GAO approaches seems to stem from the different constitutions of the two forums

and their respective powers. The Court, of course, has injunctive and declaratory powers. The GAO does not. The Court issues orders; the GAO makes recommendations. The GAO reviews agency corrective action fully aware of its limited authority to make the agencies do more. The GAO is very careful not to try to stop an agency from taking back a procurement for reassessment even when the agency has given less than full explanation of its reasons for doing so or intentions going forward.

Recent comments by GAO bid protest attorneys, however, show encouraging recognition of a need to require agencies to provide more fulsome articulations of (1) the specific procurement defects the agency hopes to address by taking corrective action in response to a protest and (2) the specific actions the agency intends to take to address those specific defects—*before* the GAO rules that

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***For now, the Court has shown greater willingness than the GAO to apply scrutiny to both proposed and implemented agency corrective action.***

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“corrective action” proposed by an agency renders a protest academic or moot. This is due, in part, to the GAO’s increased recognition that once the GAO dismisses a protest, it has virtually no ability to steer or instruct the agency regarding its obligations. The horse is out of the barn by then. And, sure, the parties can relitigate the issues in a later protest, and then another, and then another, and so on. Is this judicial efficiency or procurement efficiency? The GAO does not have the power to direct any federal agency to take, or not take, any action. But, we submit, the GAO does have the power to retain a protest when an agency does not provide a clear explanation regarding how it intends to address specific procurement defects it has identified.

For now, the Court has shown greater willingness than the GAO to apply scrutiny to both proposed and implemented agency corrective action (again, arguably because the Court is secure in knowing its powers, while the GAO always remains somewhat cautious in exercising its bid protest authority given its rather limited quiver of remedial options). However, the dramatic rise in agency implementation of corrective action in response to protests has led both the Court and the GAO to a more vigorous assessment of the need to enhance protest, and perhaps overall procurement, efficiency. Perhaps allowing

all parties to have a clearer picture of where a procurement is likely to go before a protest is dismissed as being moot may promote not only indicial but also procurement efficiency.

In any case, it is an expanding “universe” we examine—the principles that govern agency implementation of corrective action. We examine below, through past and recent decisional law, a current snapshot of the universe, which leaves us to speculate where that universe has yet to go.

### Challenging the Scope of Agency-Proposed Corrective Action

More protests challenging an agency corrective action address the scope of that action than probably any other ground of protest. Challenges to the scope of agency corrective action fall into two categories: (1) the correction action was overly broad or (2) the corrective action was overly restrictive. While the standards and language used at the Court and the GAO differ, the practical considerations are, for the most part, similar: has the agency tailored the corrective action to the identified defect(s) and does the action provide offerors with a fair opportunity to compete?

**Overly Broad Corrective Action.** The Court may find specific agency corrective action to be arbitrary if it is not narrowly, or appropriately, tailored to fit the procurement defects an agency has identified. As stated in one of the leading Court cases regarding this issue, *Sheridan Corp. v. United States*: “Simply put, the corrective action must target the identified defect.”<sup>2</sup> In *Sheridan*, the Court determined that resoliciting new proposals was not a rational corrective action where the agency’s concern (the identified defect) related to the *evaluation* of proposals.<sup>3</sup> In 2013, the Court reiterated that an agency’s corrective action may not be broader than is necessary to correct an identified defect.<sup>4</sup> In this case, *Amazon Web Services, Inc. v. United States*, the Court found that an 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.’”<sup>5</sup> The GAO reached a similar conclusion in *Security Consultants Group, Inc.*,<sup>6</sup> finding that the reopening of a competition after award was not appropriate corrective action to remedy the identified defect of failing to reflect in the solicitation evaluation factor weights because there was no evidence that offerors were prejudiced by the defect.

While the *Sheridan* and *Amazon* “targeting” test sets the standard for overly broad corrective action at the Court, other Court decisions suggest that for some of the judges at the Court, the analysis may be fact-dependent. For instance, the Court used a slightly different standard in *Sierra Nevada Corp. v. United States*, distinguishing *Sheridan* and suggesting that the corrective action need only be “reasonable under the circumstances.”<sup>7</sup>

Moreover, the standards set forth above do not prohibit

an agency from exceeding the scope of the corrective action initially proposed. In *Solution One Industries, Inc.*, an agency pursued corrective action in response to a protest challenging the reasonableness of its evaluation of the “key personnel” subfactor and noted in proposed corrective action that the agency was “not planning to take actions that would result in permitting a change in the pricing proposals at this time.”<sup>8</sup> The agency subsequently pursued its corrective action by reevaluating proposals, engaging in discussions with the offerors, and soliciting final proposal revisions (including permitting submissions of revised price proposals). The GAO determined that under these circumstances, 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 rather than a defect in the solicitation. In short, an agency’s corrective action may be broader than that initially proposed, provided it is not broader than necessary to cure identified defects.

**Overly Restrictive Corrective Action.** At the other end of the spectrum, protests also frequently challenge proposed corrective action as being overly restrictive. Corrective action must be tailored to the identified procurement defects; however, it may not be so narrow that it denies offerors the fair opportunity to compete. This principle arises most often when an agency attempts to restrict what portions of proposals offerors may revise in the course of corrective action. For instance, in *Power Connector, Inc.*,<sup>9</sup> an agency allowed offerors to revise technical proposals but not price proposals. 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, the GAO found the agency’s limited scope of corrective action unreasonable. The GAO determined that

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.<sup>10</sup>

The GAO reached a similar conclusion in *Deloitte Consulting, LLP*,<sup>11</sup> once again finding that corrective action may not impose unreasonably restrictive limitations on the scope of proposal revisions. In this case, the GAO sustained a corrective action protest because the agency’s limitations on key personnel substitutions unreasonably restricted proposal revisions. The GAO determined that although the agency’s decision to limit proposal revisions to areas affected by improprieties in the prior award decision was unobjectionable, the agency could not prohibit

offerors from revising related areas of their proposals that were *materially impacted*. The GAO found that the protester “demonstrated that due to the inherently different qualifications, capabilities, and experience of key personnel, substitutions with respect to these individuals materially impact[ed] the protester’s proposal in a broad manner, in ways that need[ed] to be revised beyond merely substituting names and resumes for the individuals to be replaced.”<sup>12</sup> The *Deloitte Consulting* decision clarified the standard for overly restrictive corrective action at the GAO: whether revisions “are expected to have a material impact on other areas of the offeror’s proposal.”<sup>13</sup>

These cases provide a general rule of thumb that when an agency revises a solicitation during implementation of corrective action, it must give offerors the chance to revise aspects of their proposals materially impacted by the revisions. These cases do not, however, provide a blanket rule that agencies *must* allow offerors the opportunity to revise their proposal any time corrective action results in a solicitation revision. The GAO’s recent decision in *NCS Technologies, Inc.*,<sup>14</sup> demonstrates this principle. In *NCS Technologies*, an agency determined that the solicitation’s instructions regarding what information the vendors were required to provide in order to demonstrate compliance should have been made clearer. Consequently, the agency undertook corrective action by revising instructions in the solicitation and providing an

updated compliance matrix for offerors to complete. An offeror challenged the agency’s corrective action, arguing that offerors should be permitted to revise all aspects of their proposals. The GAO denied the protest, finding that the agency could remedy the defect that caused it to take corrective action without allowing offerors to revise their original proposals. The GAO therefore concluded that “the limitations on revising quotations were reasonable as the agency did not amend the solicitation requirements or the evaluation methodology.”<sup>15</sup>

### Agency Decision to Cancel Solicitation

In some instances—and for a variety of reasons—agencies may take corrective action in response to a protest by canceling a procurement. When the agency does so, offerors may challenge whether the agency had a reasonable basis for the cancellation. Generally, an agency has broad discretion in deciding whether to cancel a solicitation.<sup>16</sup> Given the deferential standard, the Court and the GAO rarely sustain challenges to an agency’s decision to cancel a solicitation. Reasonable bases to cancel include when an agency concludes that a solicitation does not accurately reflect its needs,<sup>17</sup> when an agency determines that a solicitation has been drafted without sufficiently detailed evaluation criteria to permit a fair and equal evaluation of all quotations,<sup>18</sup> or when none of the proposals received were evaluated as technically acceptable.<sup>19</sup>



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In a recent decision, *Tien Walker*,<sup>20</sup> the GAO reiterated an agency's broad discretion when deciding whether or not to cancel a solicitation. In *Tien Walker*, a protester alleged that the agency's cancellation was merely a pretext to avoid awarding a contract on a competitive basis and to avoid resolving the protest. The agency argued that the initial protest and stay of award preceding its corrective action caused the agency's requirements to change. Specifically, the agency alleged that delay caused by the initial protest made it impossible to complete the required two waves of fieldwork (an Afghan public opinion survey), properly spaced apart, prior to the Afghan winter season. The GAO denied the protest, finding that the record supported the agency's rationale for canceling the solicitation. The GAO rejected the protester's argument that the agency's simultaneous publication of a "sources sought" notice for identical work contradicted the agency's rationale for canceling the solicitation, stating, "the agency's decision to plan for possible future Afghan public opinion survey requirements does not alter the fact that the present Afghan public opinion survey requirement had changed."<sup>21</sup>

While the GAO will give agencies broad discretion to cancel a procurement in response to a protest, that discretion is not unbounded. For instance, in *Walker Development & Trading Group, Inc.*,<sup>22</sup> the GAO sustained a challenge to an agency's decision to cancel a solicitation when the agency failed to produce an agency report that coherently articulated its rationale for cancellation. In *Starry Associates, Inc. v. United States*,<sup>23</sup> the GAO and the Court disagreed, as they have on a number of issues relating to challenges to agency correction action. The Court found that an agency lacked a rational basis for canceling a solicitation rather than undertaking the corrective action recommended by the GAO in response to prior protests. The GAO in *Starry Associates* initially upheld the agency's decision to cancel the solicitation as reasonably justified, as the agency claimed that its requirements had changed and it no longer needed two of the services solicited in the original solicitation. The Court, however, determined that the agency had not justified its decision to cancel the solicitation because there was no evidence in the record that the agency had taken meaningful steps to reassess its needs prior to canceling the solicitation. In *SCB Solutions, Inc.—Reconsideration*,<sup>24</sup> the GAO initially dismissed a protest as academic upon receiving notice from the agency that it was terminating the awarded contract. In fact, the agency ordered the full quantity of goods from the original awardee after learning of the protest and prior to staying contract performance. Therefore, the agency had no need to resolicit the requirement after terminating the contract. On reconsideration, the GAO determined it had failed to consider the consequences of the agency's termination of the original award. The GAO found that in a case such as this one, the protest is not academic where the corrective action provides no meaningful remedy to the protester. The GAO agreed with the protester that the agency's corrective action did not remedy the concern raised in the protest and reversed its dismissal of the protest as academic.

## Corrective Action Absent an Assessment of Agency Needs

The cases addressing agency decisions to cancel solicitations highlight the need for agencies to assess, and document, their needs before setting their courses of corrective action. The same principle applies when an agency decides to revise rather than cancel a solicitation in response to a protest. In *Professional Service Industries, Inc. v. United States*,<sup>25</sup> the protester challenged the agency's decision to revise its solicitation as part of its corrective action following a sustained GAO protest. Specifically, the agency revised the requirements of the project manager position. The Court found that the administrative record contained little to no evidence that the agency conducted an assessment of its needs after the GAO had sustained the initial protest. According to the GAO, the record did not show sufficient evidence that the agency has identified meaningful reasons why it needed to revise the requirements for the project manager position as part of its corrective action. The Court also pointed out the need for an agency to provide a reasoned explanation for disregarding facts and circumstances that underlay the agency's original needs assessment.

In the *Professional Service Industries* case, the particular facts and circumstances surrounding the corrective action undoubtedly colored the Court's decision. Specifically, the Court expressed concern over the fact that the agency had changed its solicitation in a manner that precisely conformed to the original awardee's proposal. The Court did not find anything in the record that provided a reasonable explanation of a need to revise the solicitation. Accordingly, the Court determined that the agency's amendments were arbitrary and capricious.

The GAO reached a different conclusion in *Systems Plus, Inc.*<sup>26</sup> In this case, a protester argued that the agency's proposed solicitation amendments improperly favored the original awardee. But in *Systems Plus*, the agency produced a record demonstrating that the agency made its decision in good faith and without the specific intent to change a particular vendor's technical rankings or to avoid making award to a particular vendor.

Facts and circumstances differ from protest to protest. This makes it difficult to articulate a general rule regarding how the Court views certain issues compared to how the GAO views the same issues. In *Professional Service Industries* (Court) and *Systems Plus* (GAO), while the results differed, a common rule emerged: the reasonableness of an agency's decision to amend a solicitation generally will hinge on the ability of the agency to produce documentation demonstrating that the corrective action implemented reflects the agency's reassessment of its needs. In each case, the agency revised its solicitation arguably to the benefit of one offeror. In *Systems Plus*, however, the agency produced sufficient documentation to support its rationale for amending the solicitation and could therefore overcome the protester's challenge.

## Corrective Action in Light of an “Appearance” of Impropriety

Agencies should be diligent in pursuing corrective action when procurement defects are perceived. Such diligence, however, does not mean that an agency should take corrective action merely because a protester has alleged a procurement defect. *MacAulay-Brown, Inc. v. United States*<sup>27</sup> underscores the importance of meaningful agency review of protest allegations before taking corrective action in response to a protest. In *MacAulay-Brown*, an agency took corrective action in response to allegations that it had not properly evaluated potential organizational conflicts of interest. The Court held that the agency’s corrective action was unreasonable under the circumstances because it was based on an assumption, *not supported by the record*, that the procurement had been tainted by organizational conflicts of interest. In fact, the record reflected that the agency had considered and rejected organizational conflict of interest concerns while drafting the solicitation. In sustaining the protest to the agency’s proposed corrective action, the Court found that mere *appearance* of impropriety was not a valid basis for undertaking corrective action.

## Rationality of a GAO Corrective Action Recommendation

Several notable Court cases address the rationality of an agency’s corrective action when the action is based on a GAO decision or recommendation. In *Turner Construction Co. v. United States*,<sup>28</sup> the Federal Circuit set the seminal precedent in corrective action protests for reviewing the rationality of an underlying GAO recommendation. In *Turner*, the Federal Circuit affirmed the lower court’s decision<sup>29</sup> that an agency irrationally followed recommendations the GAO articulated when it sustained a protest. The Federal Circuit, while acknowledging its practice of reviewing a GAO decision with deference, nonetheless affirmed the lower court’s determination that the GAO had failed to defer to the contracting officer’s conclusion. The contracting officer concluded during the GAO protest that no organizational conflicts of interest existed. The Federal Circuit agreed with the Court’s finding that “GAO’s determination was not based on hard facts but rather was based on ‘mere suspicion and innuendo.’”<sup>30</sup> Accordingly, it found that the agency’s corrective action based on the GAO’s decision was unreasonable.

As we discussed at the outset of this article, *SA-Tech*<sup>31</sup> is perhaps the most important decision in the constellation of the Court and the GAO corrective action decisions. Prior to *SA-Tech*, the GAO dismissed protests as academic (or moot) any time agencies used the magic words “corrective action.” Agencies were not required to explain why they were taking corrective action, what procurement defects they perceived, and how the corrective action they proposed could be designed to address the perceived defects. This meant, of course, that in implementing corrective action, agencies had no roadmap; they could move in any

unannounced direction. Offerors and bidders often thought this unfair and inefficient. They spend significant time, effort, and money preparing proposals only to have to start over, many times, under announced rules. The Federal Circuit affirmed the Court’s ruling that an informal e-mail by the GAO decision writing attorney suggesting the agency take similar corrective action was irrational because it ignored the GAO’s own timeliness rules and misinterpreted the source selection memorandum. 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.”<sup>32</sup> A year later in *Amazon* (discussed earlier in this article), the Court held that a GAO recommendation in a sustained protest was irrational because the GAO did not consider whether the protester was prejudiced and therefore did not consider whether the protester had standing to bring its protest in the first place. The Court reiterated the principle from *Turner* that “an agency’s decision lacks a rational basis if it implements a GAO recommendation that is itself irrational.”<sup>33</sup> The Court concluded that “the GAO’s decision recommending corrective action lacks a rational basis, and therefore the agency’s decision to follow the GAO’s recommendation also lacks a rational basis.”<sup>34</sup>

On the other hand, *Raytheon Co. v. United States*<sup>35</sup> reminds us that overturning a GAO recommendation of corrective action remains the exception and not the norm. In *Raytheon*, unsuccessful offerors protested the agency’s award, challenging the agency’s communications with Raytheon pertaining to the treatment of certain independent research and development (IR&D) costs. The 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. The awardee (Raytheon) protested the corrective action at the Court, arguing that the agency’s corrective action lacked a rational basis.

The Court and subsequently the Federal Circuit both denied the protest. The Federal Circuit concluded that the grounds informally set forth by the GAO during outcome prediction were rational and provided a reasonable basis to justify the agency’s corrective action. Specifically, the Federal Circuit found that the agency’s unequal communications regarding IR&D accounting provided a rational basis to reopen the bidding process.<sup>36</sup> Notably here, particularly in contrast to the exacting review of the GAO’s findings in the decisions discussed above, the Federal Circuit found it proper in the absence of a written decision from the GAO to *infer* that the GAO was relying on the proper legal standards when determining its outcome prediction. Consequently, the Federal Circuit concluded that “it was proper for the Court of Federal Claims to infer that the GAO attorney implicitly found that the violation was prejudicial.”<sup>37</sup> The Federal Circuit did note that the “presumption finds confirmation in this case because notes from the outcome-prediction

conference refer to the GAO attorney's remarks about prejudice in discussing at least one of the protests at issue.<sup>38</sup> Nevertheless, the presumption of the application of correct legal standards for outcome prediction suggests that protesters will likely have better luck challenging the rationality of written GAO decisions than implicit findings issued during outcome prediction.

### Delay in Conducting Corrective Action

The delays to contract award resulting from corrective action frustrate offerors and agencies alike, particularly when the corrective action results in further protests to the corrective action itself. No procurement law or regulation governs the time an agency may take to conduct its corrective action. As the GAO's decision in *Computer Cite*<sup>39</sup> reiterates, the lack of governing statutes or regulations results in all but protest-proof delays to agency implementation of corrective action. In *Computer Cite*, protester Computer Cite (CCite) challenged the agency's initial award, prompting the agency to take corrective action. Seven months later, the original awardee expressed significant concerns to the agency regarding the duration of the agency's corrective action. The awardee requested that the agency provide a timeline for completing its corrective action. The agency responded that it anticipated making an award within 10 to 12 weeks. The original awardee then filed a protest at the GAO arguing that the agency had unreasonably delayed implementing its corrective action and that the delay resulted in the original awardee losing almost the entire base year of contract performance. The awardee claimed that the agency completed its initial evaluation in two months and provided no explanation as to why the reevaluation was taking significantly longer.


The GAO dismissed the protest, finding that the protester "failed to allege a cognizable basis of protest."<sup>40</sup> The GAO noted that the protester failed to identify any procurement law or regulation that the agency violated by delaying its corrective action. Specifically, the GAO found that "[i]n this respect, the protester has not alleged that the agency was required to have completed its corrective action by an earlier date, nor has the protester asserted that any alleged delay is contrary to law or regulation."<sup>41</sup> The GAO concluded: "Quite simply, CCite prefers that [the agency] accelerate its implementation of corrective action, but CCite provides no basis for us to sustain its protest in that regard."<sup>42</sup> The *Computer Cite* result, while unsurprising, serves as a reminder that not all agency actions in the context of a procurement are appropriate for resolution through the bid protest process.

### Release of Offerors' Prices and Ratings During Recompetition

GAO and Court decisions often address the issue of fairness to initial awardees: Does the proposed corrective action unreasonably harm the original awardee by forcing

that awardee to recompete for an award after its price and adjectival ratings have been revealed? The Federal Circuit expressed concern over this issue in the *SA-Tech* decision: "The publication of its price alone places SA-TECH in the unenviable position of competing against itself."<sup>43</sup> To mitigate this harm, agencies have the ability to release all offerors' prices and ratings prior to recompetition in order to level the playing field. While neither the GAO nor the Court will force an agency to release this information, a recent GAO decision reiterates that the GAO will, in appropriate instances, allow agencies to do so voluntarily. In *Systems Plus*, the agency initially awarded a contract to LOUi Consulting Group, Inc. (LCGI), and released LCGI's price and ratings to the unsuccessful offerors.<sup>44</sup> When several unsuccessful offerors protested the agency's award to LCGI, the agency undertook voluntary corrective action. In order to ensure a level playing field, the agency released the prices and factor ratings of all offerors. Unsuccessful offeror Systems Plus challenged the agency action, alleging that the release of ratings and prices turned the protest into an auction. The GAO denied the protest, finding that "[a]n agency may decide to release vendors' prices in a recompetition in an effort to remedy the potential competitive advantage (even if not improperly obtained) held by the other vendors in the competition whose prices were not disclosed."<sup>45</sup> Original awardees should keep this principle in mind when forced to recompete after an agency undertakes corrective action.

### And Where to Now?

As the summary of decisional law above demonstrates, the universe of issues the Court and the GAO must face when considering protests of agency corrective action is expanding considerably. Like astronomers of the physical universe, we can see nuances, ripples, developments, and, occasionally, an explosion that signals a significant new piece to the universe of corrective action. The Court has sustained a greater percentage of protests challenging agency corrective action than the GAO has. However, the GAO leaders appear poised to consider new protocols regarding how much information agencies should be required to provide when they invoke the magic words "corrective action." 

### Endnotes

1. 100 Fed. Cl. 687 (2011), *aff'd*, 691 F.3d 1374 (Fed. Cir. 2012).
2. 95 Fed. Cl. 141, 153 (2010).
3. *Id.* at 141, 153.
4. Amazon Web Servs., Inc. v. United States, 113 Fed. Cl. 102 (2013).
5. *Id.* at 115.
6. B-293344.2, 2004 CPD ¶ 53 (Comp. Gen. Mar. 19, 2004).
7. Sierra Nev. Corp. v. United States, 107 Fed. Cl. 735, 750 (2012).
8. B-409713.3, 2015 CPD ¶ 167, at 2 (Comp. Gen. Mar. 3, 2015).
9. B-404916.2, 2011 CPD ¶ 186 (Comp. Gen. Aug. 15, 2011).
10. *Id.* at 3.
11. B-412125.6, 2016 CPD ¶ 355 (Comp. Gen. Nov. 28, 2016).
12. *Id.* at 10.
13. *Id.* at 6.
14. B-413500.2, 2017 CPD ¶ 123 (Comp. Gen. Feb. 14, 2017).
15. *Id.* at 5.



16. SupplyCore Inc., B-411015.8, 2016 CPD ¶ 153, at 3 (Comp. Gen. May 27, 2016).
  17. Tien Walker, B-414623.2 et al., 2017 WL 2954445, at 2 (Comp. Gen. July 10, 2017); MedVet Dev. LLC, B-406530, 2012 CPD ¶ 196, at 2–3 (Comp. Gen. June 18, 2012).
  18. Kingdomware Techs., B-407389, 2012 CPD ¶ 348, at 3 (Comp. Gen. Dec. 4, 2012); Progressive Servs. Corp., B-404183 et al., 2011 CPD ¶ 18, at 3 (Comp. Gen. Jan. 11, 2011).
  19. Knight's Armament Co., B-299469, 2007 CPD ¶ 85, at 3 (Comp. Gen. Apr. 7, 2007).
  20. 2017 WL 2954445.
  21. *Id.* at 4.
  22. B-413924, 2017 CPD ¶ 21 (Comp. Gen. Jan. 12, 2017).
  23. 127 Fed. Cl. 539, 549 (2016).
  24. B-410450.2, 2015 CPD ¶ 255 (Comp. Gen. Aug. 12, 2015).
  25. 129 Fed. Cl. 190 (2016).
  26. B-413703.8, 2017 CPD ¶ 141 (Comp. Gen. May 10, 2017).
  27. 125 Fed. Cl. 591 (2016).
  28. 645 F.3d 1377 (Fed. Cir. 2011).
  29. *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561 (2010).
  30. *Turner*, 645 F.3d at 1385 (quoting *Turner*, 94 Fed. Cl. at 580–81).
  31. We discussed this decision in greater detail in our 2016 article.
  32. *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1382 (Fed. Cir. 2012).
  33. *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 106 (2013) (quoting *Turner*, 645 F.3d at 1383).
  34. *Id.* at 106–07.
  35. 809 F.3d 590 (Fed. Cir. 2015).
  36. *Id.* at 596.
  37. *Id.*
  38. *Id.* at 597.
  39. B-412162.3, 2016 CPD ¶ 186 (Comp. Gen. July 15, 2016).
  40. *Id.* at 4.
  41. *Id.*
  42. *Id.* at 5.
  43. *Sys. Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1383 (Fed. Cir. 2012).
  44. B-413703.8, 2017 CPD ¶ 141 (Comp. Gen. May 10, 2017).
  45. *Id.* at 8 (citing *Ocean Servs., LLC*, B-292511.2, 2003 CPD ¶ 206, at 4–6 (Comp. Gen. Nov. 6, 2003); *Networks Elec. Corp.*, B-290666.3, 2002 CPD ¶ 173, at 3 (Comp. Gen. Sept. 30, 2002); *Cowperwood Co.*, B-274140.2, 96-2 CPD ¶ 240, at 2–3 (Comp. Gen. Dec. 26, 1996)).
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