

## For Corrective Action Protests, Early Is Not On Time

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(November 16, 2018, 2:27 PM EST)

We've all heard some iteration of the adage, "Early is on time, on time is late, and late is unacceptable." In the legal field, however, the saying does not always hold true, and not only because lawyers are notoriously late for everything. Litigants are often barred for initiating litigation too late. Similarly, litigants are often barred, with good reason, from raising issues too early. Bid protests, and specifically challenges to corrective action undertaken by an agency in response to a prior protest, prove no exception.

A corrective action challenge raised too early or too late risks dismissal as premature or untimely, respectively. Understandably, many protesters focus on the latter concern (protesting too late). Protesting too early, however, while safer, may also detrimentally affect a protester; a premature protest may result in unnecessary legal fees, and may sour a protester's relationship with an agency mid-acquisition.

Unfortunately, sometimes only a narrow gap exists between a premature and untimely corrective action challenge, as evidenced by the U.S. Government Accountability Office's recent decision, *360 IT Integrated Solutions*. In that case, the GAO concluded that an offeror had prematurely protested the agency's implementation of corrective action.[1] One of the protesters, 360 IT Integrated Solutions, challenged the discussions undertaken during the agency's implementation of corrective action.[2] Specifically, the protester alleged that the U.S. Department of Homeland Security treated vendors unequally by providing some vendors an opportunity to remedy "legitimately identified defects," while requiring 360 IT IS to remedy defects that had no basis in the content of its quotation.[3] The GAO found this challenge premature:

In our judgment, an allegation, like the one raised here, that an agency's actions are inconsistent with the terms of a solicitation is not a challenge to the meaning of the solicitation terms, or an assertion that some solicitation ambiguity exists, but is instead a challenge to the agency's evaluation judgments.[4]

Based on its analysis, the GAO concluded that "[b]ecause the agency has not yet made an award decision, the protest of these evaluation judgments is premature." [5] The GAO similarly found that "allegations that amount to assertions of unequal or other than meaningful discussions are also



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premature, where they are raised prior to award.”[6]

The 360 IT IS decision also raised another interesting timeliness issue by dismissing what appears to be a challenge to the scope of the agency’s corrective action as premature, even though scope challenges generally must be raised prior to the agency’s new award: A second protester, VariQ, also challenged the agency’s corrective action, alleging that the corrective action failed to address VariQ’s concerns regarding the agency’s documentation and evaluation of “substantial strengths.”[7] On one hand, it is unsurprising that the GAO would deny such a challenge, as the GAO has consistently held that an agency need not address every defect identified by a protester, it need only address the defects that the agency believes are legitimate.[8] On the other hand, it is somewhat surprising that the GAO would dismiss what appears to be a challenge to the scope of the agency’s corrective action as premature.[9]

The 360 IT Integrated Solutions decision highlights what can be a very fine line between a premature and an untimely challenge to an agency’s corrective action. Challenges to corrective action must comply with the GAO’s bid protest regulations, which state that “[a] protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for the protest, whichever is earlier.”[10] When a protester challenges an agency’s corrective action, the GAO analyzes whether the corrective action “alters the ground rules for the competition.”[11] As such, a challenge to corrective action “is analogous to a challenge to the terms of the solicitation and [] must be filed prior to the deadline for submitting revised proposals.”[12] According to the GAO, the same standard applies when analyzing whether a protester has prematurely filed a corrective action challenge: “[I]n those instances where the agency’s proposed corrective action does not alter the ground rules for the competition, [the GAO has] considered a protester’s preaward challenge to be premature.”[13]

Of course, when protesting corrective action, it is better to be safe than sorry (i.e., better to be too early than too late). In order to avoid an unnecessary premature protest, however, protesters are advised to carefully consider what aspect of the corrective action they are in fact challenging and whether, under the existing case law, the GAO considers that aspect to be part of the “ground rules” of competition. Because in contrast to the popular saying, when protesting corrective action, if you’re early ... well, you’re early.

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[1] 360 IT Integrated Solutions, VariQ Corp., B-414650.19, et al., Oct. 15, 2018, 2018 WL 5292741.

[2] Id. at 5.

[3] Id. at 10 (citing 360 IT IS comments).

[4] Id.

[5] Id. (citing Computer Associates Int’l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157 at 4).

[6] *Id.* at 11.

[7] *Id.* at 5.

[8] See, e.g., *Alliant Enter. JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82 at 4.

[9] See *360 IT Integrated Solutions*, B-414650.19 at 5.

[10] 4 C.F.R. § 21.2(a)(2); see also *The Povolny Group*, B-414532.3, Sept. 21, 2017, 2017 CPD ¶ 293 at 5 (applying the standard to a corrective action challenge).

[11] See, e.g., *Northrup Grumman Info. Tech., Inc.*, B-400134.10, Aug. 18, 2009, 2009 CPD ¶ 167.

[12] *Veterans Evaluation Servs., Inc., QTC Med. Servs., Inc., VetFed Res., Inc.*, B-412940.26, et al., Jan. 5, 2017, 2017 CPD ¶ 17 at 15–17 (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).

[13] *SOS Int’l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2 (citing *Alliant Techsystems, Inc.*, B-405129.3, Jan. 23, 2012, 2012 CPD ¶ 50 at 2 n.1; *Northrop Grumman Tech. Servs., Inc.*, B404636.11, June 15, 2011, 2011 CPD ¶ 121 at 4).