

The logo for K&L GATES, featuring the text "K&L GATES" in white, uppercase letters on an orange rectangular background. The background of the slide is a blue bokeh pattern with light spots.

K&L GATES

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# Corrective Action Presentation

*United States Geospatial Intelligence Foundation*

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# OVERVIEW

## ■ **Corrective Action Statistics**

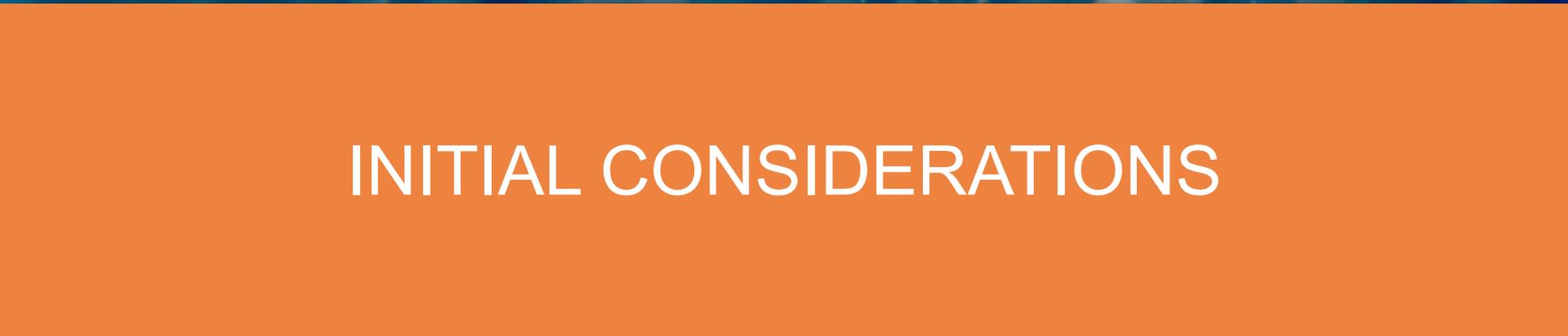
- For FY 2016, GAO reported an “effectiveness rate” of 46 percent of 2,586 protests filed.
- Given the number of sustained protests (139), that means the rate of voluntary corrective action was 40.6 percent, or 1,051 protests.

## ■ **Why do agencies take corrective action?**

- The record as it stands is insufficient to support the decision (fix the record, keep the same result, and avoid protest costs).
- The agency committed a prejudicial error during the evaluation (re-evaluate and potentially change award decision).
- Address flaws apart from those raised by protest.
- In response to GAO outcome prediction/decision recommending corrective action.
- Not yet prepared to produce agency report.



# INITIAL CONSIDERATIONS



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- **Considerations as a protester**
  - Limited options - GAO will moot protest regardless of corrective action proposed.
  - If action taken after agency report, protester can pursue costs for “clearly meritorious” grounds.
  
- **Considerations as an intervenor**
  - Encourage agency to defend protest rather than take corrective action.
  - If the agency decides to take corrective action, try to limit the scope of the corrective action.
    - Generally, intervenors should encourage the agency to limit its corrective action to a re-evaluation rather than soliciting new proposals, as the intervenor’s prices and ratings will have previously been disclosed to unsuccessful offerors.
    - If the agency re-opens the competition, encourage a level playing field (try to convince the agency to release of all offerors’ cost/pricing).

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# STANDARD OF REVIEW FOR CORRECTIVE ACTION PROTESTS

# STANDARD OF REVIEW FOR CORRECTIVE ACTION PROTESTS

## ■ Court of Federal Claims Standard

- The Court of Federal Claims will review the decision to undertake corrective action under the APA arbitrary and capricious standard. See *generally Systems Application & Techs., Inc. v. United States*, 691 F.3d 1374 (Fed. Cir. 2012).
  - Corrective action must target the identified defect. *Sheridan Corp. v. United States*, 95 Fed.Cl. 141, 151 (2010).
  - Corrective action must be “reasonable under the circumstances.” *Sierra Nevada Corp. v. United States*, 107 Fed. Cl. 735, 750 (2012).
- DOJ must approve corrective action. See 28 U.S.C. § 516.
  - “Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”

# STANDARD OF REVIEW FOR CORRECTIVE ACTION PROTESTS

## ■ Government Accountability Office Standard

- At GAO, must show that the corrective action is not appropriate to **remedy the concern that caused the agency to take corrective action**. *Jones Lang LaSalle Americas, Inc.*, B-406019.2, Feb. 14, 2012, 2012 CPD ¶ 98.
- GAO will weigh the harm to the integrity of the procurement process against the harm to the former awardee of having its price disclosed.
- GAO will **object** to an agency's corrective action if the record establishes either that there was **no impropriety** in the original evaluation and award decision, or where there was an actual impropriety, but it was **not prejudicial** to any of the offerors. See *Security Consultants Grp., Inc.*, B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53.
- Agency determines appropriate corrective action (does not require DOJ approval)..



# WHAT TO PROTEST



# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Scope of Corrective Action - Overly Broad**

- The Court may find the decision to undertake corrective action to be arbitrary if it is not narrowly tailored corrective action. An agency's corrective action may not be broader than is necessary to correct an identified defect. *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (2013).
  - The Court found that the Agency's decision to reopen the competition to correct two discrete defects constituted overly broad corrective action. While the Court acknowledged an agency's broad discretion in pursuing corrective action, it also noted that "such corrective action must be reasonable under the circumstances and appropriate to remedy the impropriety."
  - Decision suggests analysis might hinge on if and to what extent the Agency has revealed offerors' proprietary information.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Scope of Corrective Action - Overly Broad (cont.)**
  - An agency's corrective action must be reasonable in light of the procurement defect. *Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010).
    - Court found that corrective action resoliciting new proposals was not rational given that the identified defect concerned the evaluation of the proposals and none of the solicitation requirements had changed.
    - "Passage of time" is **not** a rational basis for soliciting new proposals when the solicitation requirements have not changed.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Scope of Corrective Action - Overly Broad (cont.)**
  - **BUT** in implementing corrective action, an agency may be able to exceed the scope of the initial corrective action proposed. *Solution One Industries, Inc.*, B-409713.3, Mar. 3, 2015, 2015 CPD ¶ 167.
    - Agency pursued corrective action in light of a protest to the reasonableness of its evaluation of the “key personnel” subfactor, and noted in proposed corrective action that agency was “not planning to take actions that would result in permitting a change in the pricing proposals at this time.”
    - The Agency subsequently pursued its corrective action by reevaluating proposals, engaging in discussions with the offerors, and soliciting FPRs (including revised price proposals).
    - GAO found that, in this case, expanding the scope of corrective action to include revised prices was not unreasonable simply because the initial protest that caused the agency to take corrective action involved a defect in the evaluation of technical proposals.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

## ▪ Scope of Corrective Action - Overly Restrictive

- An agency's corrective action may not be so narrow that it denies offerors the fair opportunity to compete. *Power Connector, Inc.* B-404916.2, August 15, 2011, 2011 CPD ¶ 186.
  - 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, GAO found the agency's limited scope of corrective action unreasonable.
  - “[W]here 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.”

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Scope of Corrective Action - Overly Restrictive (cont.)**
  - Corrective action may not impose unreasonably restrictive limitations on scope of proposal revisions. *Deloitte Consulting, LLP, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355.*
    - GAO sustained protest of corrective action in which offerors were prohibited from revising proposal information materially impacted by the corrective action.
    - Although the government's decision to limit proposal revisions to areas affected by improprieties in the prior award decision was unobjectionable, it could not prohibit offerors from revising related areas of their proposals that were materially impacted.
    - GAO will examine whether the revisions “are expected to have a ***material impact*** on other areas of the offerors' proposals.”

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

## ■ Canceling Solicitation

- *Starry Associates, Inc. v. United States*, 127 Fed. Cl. 539, 549 (2016).
  - Agency lacked rational basis for canceling solicitation rather than undertaking corrective action recommended by GAO in response to prior protests.
  - Court determined that the agency had not justified its decision to cancel the solicitation because there was no evidence in the record of any meaningful review of its needs.
- *SCB Solutions, Inc.--Reconsideration*, B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255.
  - GAO initially dismissed protest as academic upon receiving notice from the agency that it was terminating the awarded contract. In reality, agency ordered full quantity of goods from awardee after learning of protest, prior to staying the contract award.
  - On reconsideration, GAO determined it had failed to consider the consequences of the agency's termination. GAO found that in a case such as this one, the protest is not academic where the corrective action provides no meaningful remedy. 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.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Amending Solicitation to Conform with Offeror's Proposal Without Explanation.**
  - *Professional Service Industries Inc. v. United States*, No. 16-1038C (Fed. Cl. Nov. 15, 2016).
    - In response to a protest, the agency informed GAO that it would take corrective action to amend technical requirements for key personnel and seek revised proposals.
    - Court found that, while an agency has broad discretion to “water down” requirements, an agency must do so in good faith.
    - The greatest concern to the Court was that the agency had changed its solicitation in a manner that precisely conformed to initial awardee's proposal. The Court did not find anything in the record to reasonably explain the need for the changed solicitation. Accordingly, the Court determined the amended solicitation to be arbitrary and capricious and must be set aside.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Corrective action to fix flaws not substantiated by the record.**
  - *MacAulay-Brown, Inc. v. United States*, 125 Fed. Cl. 591 (2016).
    - 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.
    - Court found that mere ***appearance*** of impropriety is not a valid basis for undertaking corrective action.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY BE SUCCESSFULLY PROTESTED?

- **Agency decision to follow irrational GAO recommendation.**
  - *Turner Const. Co., Inc. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).
    - Federal Circuit held that the Agency acts arbitrarily if it follows a GAO recommendation that is itself irrational.
  - *Systems Application & Techs., Inc., v. United States*, 100 Fed. Cl. 687 (2011) *aff'd*, 691 F.3d 1374 (Fed. Cir. 2012).
    - Court ruled that informal e-mail by GAO decision writing attorney suggesting the agency take corrective action was irrational because it ignored GAO's own timeliness rules and misinterpreted the source selection memorandum.
    - "An 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."
  - *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 105 (2013).
    - Court held GAO recommendation was irrational because GAO did not consider whether protester was prejudiced and therefore did not consider whether the protester had standing to bring its protest.



# WHAT NOT TO PROTEST

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY *NOT* BE SUCCESSFULLY PROTESTED?

- Agency decision to follow rational GAO recommendation.
  - *Raytheon Co. v. United States*, 2015 WL 6405390 (Fed. Cir. 2015).
    - Federal Circuit upheld Court's denial of protester's corrective action challenge.
    - Unsuccessful offerors protested the Agency's award to Raytheon, challenging the Agency's communications with Raytheon pertaining to the treatment of certain IR & D costs. GAO advised the parties during outcome prediction that it would likely sustain the protest. Accordingly, the Agency took corrective action by reopening discussions with all offerors. Raytheon protested the corrective action at the Court of Federal Claims, arguing that the Agency's corrective action lacked a rational basis.
    - The Court of Federal Claims, and subsequently the Federal Circuit, both denied the protest. The Federal Circuit concluded that the agency's unequal communications — a defect determined by GAO in its outcome prediction — provided a rational basis for reopening the procurement.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY *NOT* BE SUCCESSFULLY PROTESTED?

- **Delay in conducting corrective action.**
  - *Computer Cite*, B-412162.3, Jul. 15, 2016, 2016 CPD ¶ 186.
    - GAO indicated that no procurement law or regulation governs the length of time an agency may take to conduct corrective action and that the GAO cannot offer relief to protesters arguing that corrective action is not being conducted in a prompt or timely manner.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY *NOT* BE SUCCESSFULLY PROTESTED?

- Failure to address “self-proclaimed meritorious” protest allegations.
  - *Alliant Enterprise JV, LLC*, B-410352.4, Feb. 25, 2015, 2015 CPD ¶ 82.
    - GAO held that corrective action is sufficient if it remedies the flaws that the **agency** believes to exist in the procurement; corrective action does not have to remedy flaws that the **protester** believes exist.
    - AEJV protested agency corrective action, arguing that the corrective action failed to address any of AEJV’s original protest issues and was therefore unreasonable. GAO rejected the protester’s argument.
    - GAO distinguished its decision from those in which GAO concluded that an agency’s corrective action failed to address a protester’s original allegations and was therefore deficient. The distinction, GAO determined, lay in the fact that AEJV possessed only “**self-proclaimed** meritorious” allegations. The cases cited by AEJV, involved circumstances in which GAO determined that the corrective action did not sufficiently address issues that *GAO itself* had previously concluded were meritorious. In AEJV’s case, GAO had made no such determination.

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY *NOT* BE SUCCESSFULLY PROTESTED?

- Fixing flaws in the procurement distinct from those raised in the initial protest.
  - *Onesimus Defense, LLC*, B-411123.3 et al., July 24, 2015, 2015 CPD ¶ 224.
    - Protester Onesimus alleged that the agency conducted an inadequate price evaluation when it failed to consider the offerors' proposed travel costs. In light of the protest, the agency took corrective action by *amending* the price evaluation criteria rather than simply re-evaluating the offerors under the original criteria.
    - Onesimus protested the corrective action, arguing that it was unreasonable for the agency to amend the solicitation's pricing provisions, as the original provisions were not protested.
    - In denying Onesimus's protest, GAO stated that "in our view, [the Agency's] determination that it could decrease risks and costs to the government provides an eminently reasonable basis for amending the RFP's travel pricing provisions."

# WHAT ASPECTS OF AN AGENCY'S CORRECTIVE ACTION MAY *NOT* BE SUCCESSFULLY PROTESTED?

- Reasonable reevaluation that results in findings similar to those in the initial, flawed evaluation.
  - *Research Analysis & Maintenance, Inc.*, B-410570.6, B-410570.7, Jul. 22, 2015, 2015 CPD ¶ 239.
    - GAO determined that where an agency's corrective action consists of a reevaluation, the fact that the subsequent findings are similar to the initial evaluation findings does not demonstrate that the agency failed to reevaluate and render a new decision.



TIMING IS EVERYTHING



# WHEN MUST A PARTY BRING A CORRECTIVE ACTION PROTEST?

## ■ Standard

- On one hand, the injury must be final enough (as discussed in *SA-TECH*) to be ripe for judicial review.
  - A claim is not ripe for judicial review “when it is contingent upon future events that may or may not occur.” *SA-TECH*, 691 F.3d 1374, 1382 (Fed. Cir. 2012) (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)).
  - But, as noted in *SA-TECH*, this does not always mean waiting until corrective action has been implemented.
- On the other hand, however, if a party does not protest the corrective action at the appropriate stage, it risks dismissal of its protest as untimely.
- Will turn on whether a protester is challenging the **results** of the corrective action, or the **implementation**.

# WHEN MUST A PARTY BRING A CORRECTIVE ACTION PROTEST?

- **Examples of premature protests to corrective action**
  - *See Eskridge Research Corp. v. United States*, 92 Fed. Cl. 88 (2010).
    - Claims speculating that the agency will make new procurement errors in a corrective action are not ripe.
  - *Boston Harbor Dev. Partners, LLC*, 103 Fed. Cl. 499 (2012).
    - Court found that a protester lacked standing to allege an agency would be biased during a corrective action because the bias was purely conjecture and contrary to the required assumption that the agency would carry out the proposed corrective action in good faith.

# WHEN MUST A PARTY BRING A CORRECTIVE ACTION PROTEST?

- **Examples of premature protests to corrective action (cont.)**
  - *American K-9 Detection Services, Inc.*, B-400464.6, May 5, 2009, 2009 CPD ¶ 10
    - In the midst of 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, it may raise whatever evaluation errors it deems appropriate, including unequal discussions, at that time.”
  - *Hewlett Packard Enterprise Company*, B-413444.4, Jan. 18, 2017, 2017 CPD ¶ 29
    - Protest arguing that the agency will not conduct a price realism analysis in a reasonable manner during corrective action is dismissed as premature.
    - GAO assumes that agencies will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and will not consider a protest allegation which merely speculates that an agency did otherwise. In the event the protester is not the successful offeror following the agency’s corrective action, it may file a protest challenging the price realism evaluation.

# WHEN MUST A PARTY BRING A CORRECTIVE ACTION PROTEST?

- **Examples of untimely protests to corrective action**
  - *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168.
    - 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.”
  - *Mistral Inc.*, B-411291.4, Feb. 29, 2016, 2016 CPD ¶ 166.
    - Where the agency implemented corrective action and equalized competitive advantages stemming from prior award announcement by disclosing the total evaluated prices of the initial competitive range offerors, a protest to the agency’s refusal to also disclose the technical and past performance ratings of the offerors was untimely when not filed prior to the time established for receipt of proposals or no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier.



# RECENT DEVELOPMENTS



# RECENT DEVELOPMENTS

- 2017 NDAA Section 885: Report on Bid Protests
  - Within 270 days of the FY 2017 NDAA's enactment, § 885(a) mandates that the secretary of defense “shall enter into a contract with an independent research entity that is a not-for-profit entity or a federally funded research and development center” to perform a “comprehensive study on the prevalence and impact of bid protests on [DOD] acquisitions, including protests filed with contracting agencies, the [GAO], and the Court of Federal Claims.” Within one year of the NDAA's enactment, the entity shall provide a report including, among other elements:
    - “A summary of the results of protests in which the contracting agencies took unilateral corrective action, including—(A) at what point in the bid protest process the agency agreed to take corrective action; (B) the average time for remedial action to be completed; and (C) a determination regarding—(i) whether or to what extent the decision to take the corrective action was a result of a determination by the agency that there had been a probable violation of law or regulation; or (ii) whether or to what extent such corrective action was a result of some other factor.”

# RECENT DEVELOPMENTS

- Additional Recent Corrective Action Decisions
  - *Phoenix Mgmt. v. U.S.*, 125 Fed. Cl. 170 (2016) (finding an agency's decision to take corrective action does not revive the ability to protest other aspects of a procurement).
  - *Ripple Effect Communications Inc.*, B-413722.2, Jan. 17, 2017, 2017 CPD ¶ 27 (finding that the agency was not required to include price realism in corrective action to a fixed-price contract, even when initial evaluation suggested one offeror's pricing was too low).
  - *SOS International LLC v. United States*, 127 Fed. Cl. 576, 590 (2016) (concluding that the agency's proposed corrective action of amending the solicitation and reopening the competition to offerors was reasonable in light of an ambiguity regarding page limits in the solicitation).
  - *Trandes Corp.*, B-411742.4, Feb. 22, 2016, 2016 CPD ¶ 61 (concluding that corrective action limited to changes in connection with a revision of qualifications for a particular staffer was reasonable, even though it allowed the awardee to fix its otherwise unacceptable proposal, because the protester failed to show how it had been excluded from meaningful competition).

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