



32nd Annual

**OUNCE OF
PREVENTION
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Thinking Strategically About Bid Protests: Frequently Overlooked Considerations

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Roadmap

- *Before* the Protest: Stepping Stones and Stumbling Blocks
- *After* the Protest: Corrective Action, Follow-on Protests, and the Impact of Acquisitions, Novations, and Restructurings



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Stepping Stones and Stumbling Blocks Before Filing a Bid Protest

1. Critical Importance of the Q&A Process
2. Timeliness Traps
3. Making Effective Use of the Debriefing Process



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How to Use the Q&A Process to Your Advantage

- Clarify Ambiguities
- Advocate for Change
- Frame Pre-Award Protest Issues
- Escalate Concerns



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Timeliness Traps to Avoid

- Narrow protest windows
- Pre-proposal protests are not limited to challenging RFP terms
- Elements triggering OCI protests
 - Risks of asking offeror-specific OCI questions during Q&A
 - Extension of OCI timeliness trigger to other eligibility issues?
- Timeliness following competitive range eliminations



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Making Effective Use of Your Debriefing

- Timely (within 3 days, in writing) request a debriefing, and take the first date offered!
- Engage outside counsel quickly
- Submit questions – even if not requested by the agency



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Making Effective Use of Your Debriefing

- Always ask for a debriefing, *even if you're the awardee*
- Keep debriefing open, if expecting further information
- Information provided varies by agency, contract to contract, and even what is provided after initial award v. post-corrective action
 - But know your rights: FAR 15.505(e) (pre-award), FAR 15.506(d) (post-award)



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After the Protest: Corrective Action, Remedies, and Follow-on Protests

1. *Current Trend*: Increased Use of Corrective Action
2. Challenging Corrective Action
3. Post-Corrective Action
Unpredictability
4. Impact of Changed Corporate Structure During Corrective Action

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Corrective Action on the Rise

	FY2015	FY2014	FY 2013	FY 2012	FY 2011
Cases Filed ¹	2,639 (up 3%) ²	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)
Cases Closed ³	2,647	2,458	2,538	2,495	2,292
Merit (Sustain + Deny) Decisions	587	556	509	570	417
Number of Sustains	68	72	87	106	67
Sustain Rate	12%	13%	17%	18.6%	16%
Effectiveness Rate ⁴	45%	43%	43%	42%	42%
ADR ⁵ (cases used)	103	96	145	106	140
ADR Success Rate ⁶	70%	83	86%	80%	82%
Hearings ⁷	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)



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Challenging Corrective Action: at GAO

- Typical timing of corrective action at GAO
- Are original protest grounds rendered academic?
 - Even if not, difficulties of challenging at GAO
- What has the agency committed to do?
- What information has been disclosed?
- Make sure the original award is stayed, and watch out for issuance of notifications on bridge contracts!
- Ensure extension of deadline to destroy protected material



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Challenging Corrective Action: at the COFC

- Essentially all forms of corrective action challenges that can be raised at the GAO can also be raised at the COFC
- Two additional categories of corrective action challenges available that GAO will not hear
 - Challenges to overbroad corrective action
 - Challenges to implementation of corrective action based on the agency's adherence to an unreasonable GAO remedial recommendation



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Challenging Corrective Action: at the COFC

- *Sheridan Corp. v. United States*, 95 Fed. Cl. 141 (2010)
 - Awardees suffer harm from having to re-compete for an award, especially after its price has been revealed
 - Need to correct legal error will always trump awardee's harm
 - However, unnecessarily broad corrective action cannot be justified in light of harm to the awardee
 - Cannot reopen proposal revisions when only legal error can be resolved through a reevaluation of previously-submitted proposals

Challenging Corrective Action: at the COFC (cont.)

- *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186 (2011); 100 Fed. Cl. 198 (2011)
 - Protester raised multiple issues at GAO and won on some
 - Awardee challenged reasonableness of agency's implementation of the GAO recommendation; essentially an appeal in effect
 - GAO protester also challenged corrective action by re-raising those issues that it lost at GAO and arguing that corrective action should have addressed those alleged flaws in the procurement



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Post-Corrective Action Unpredictability

- Narrow vs. Broad Corrective Action?
 - Agencies have wide discretion
 - Difficult to challenge broad corrective action. *E.g., American Sys. Corp., B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91* (agency resolicited requirements and awarded bridge contract to incumbent)
 - Agency can perform additional steps on corrective action beyond what was proposed



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Post-Corrective Action Unpredictability

- New evaluation team?
 - *Compare MILVETS Sys. Tech., Inc.*, B-409051.7, B-409051.9, Jan. 29, 2016, 2016 CPD ¶ 53 (new technical evaluation panel and SSA free to reach new conclusions)
 - *with eAlliant, LLC*, B-407332.6, B-407332.10, Jan. 14, 2015, 2015 CPD ¶ 229 (same SSA reaching different conclusions is problematic)

Post-Corrective Action Unpredictability

- Other Recent Issues
 - What happens to the original award?
 - *SCB Solutions, Inc.—Reconsideration*, B-410450.2, Aug. 12, 2015, 2015 CPD ¶ 255 (original award only terminated *after* full performance)
 - Protests of multiple award procurements
 - The Easy Fix: additional awards
 - *But see Nat’l Air Cargo Grp., Inc. v. U.S.*, No. 16-362C, 2016 WL 1719258 (Fed. Cl. Apr. 28, 2016) (potential COFC jurisdiction over protests of additional awards)
 - Keep protest counsel informed!



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The Impact of Acquisitions, Novations, and Restructurings

- Corrective action lengthens the procurement lifecycle
 - Greater likelihood of corporate changes impacting proposal, evaluation, and even identity of offeror
 - What should contractors do when only specific types of revisions are allowed during corrective action?
- Factors to consider:
 - Agency must evaluate offerors on the manner in which the contract would be performed;
 - Offerors must alert agency of material changes;
 - Dangers of post-FPR discussions



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The Impact of Acquisitions, Novations, and Restructurings

- *FCi Federal Inc.*, B-408558.7, B-408558.8, Aug. 5, 2015, 2015 CPD ¶ 245:
 - Agency undertook corrective action 9 months after its initial award decision
 - Awardee had been sold to another company following GAO’s initial decision that the agency had conducted a flawed responsibility determination
 - Agency did not solicit revised proposals and considered only the awardee’s responsibility
 - The sale “materially and significantly” altered the awardee’s approach to contract performance
 - GAO sustained



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The Impact of Acquisitions, Novations, and Restructurings

- *Universal Prot. Serv., LP v. United States*, No. 16-126C, 2016 WL 1696761 (Fed. Cl. Apr. 7, 2016):
 - During corrective action taken in response to ABM Security Services, Inc.’s protests, ABM’s parent sold ABM to Universal
 - Universal argued that it bought all assets, meaning that ABM’s proposed facilities, resources, and personnel would be the same under Universal
 - Court examined if Universal is:
 - The complete successor-in-interest to ABM, and
 - If Universal can offer an identical proposal and all of the assets and services promised in the proposal by ABM
 - ABM proposal’s repeated reliance on availability of resources of ABM’s original parent convinced the court that Universal lacks all of the resources articulated by ABM
 - The Court ruled that Universal is not a complete successor-in-interest to ABM and, therefore, did not have standing to challenge the award



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Major Procedural Changes on the Horizon?

- Senate Armed Services Committee Markup of the 2017 NDAA proposes major changes to deter bid protests:
 - Automatic loser-pays provision for unsuccessful protests by companies with over \$100M in annual revenue
 - Escrowing of all profits earned by an incumbent through a bridge contract obtained due to delay from a bid protest filed by that incumbent
 - Complete removal of GAO's IDIQ task/delivery order protest jurisdiction
- Likelihood of passage uncertain at this time

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