

BRIEFING PAPERS® SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Should We Protest?

Achieving Success In The Bid Protest Process

By Robert Nichols, Jason C. Lynch, Andrew Victor, and Adrian Wigston*

Over the past decade, the Federal Government has spent between \$439 billion and \$558 billion annually on procurement contracts.¹ Government agencies have a legal and a moral duty to be fair and transparent in how they spend taxpayer dollars. For more than a century, the bid protest system has played the important role of providing contractors the means of challenging perceived unfairness in the procurement process.² Yet, over the past few years, federal agencies—believing many protests to be frivolous and frustrated by the expense and delays they cause—have sought to curtail the bid protest process.³ Additionally, many contractors (usually smaller ones) have decided not to employ the protest process, even when they find an agency evaluation error, for fear of harming customer relations.

This BRIEFING PAPER is designed to inform contractors seeking to decide whether to protest any particular procurement action and, more broadly, to determine their internal postures toward this legal process. It includes three areas of inquiry:

- First, the PAPER describes the objectives underlying the protest system and different perspectives around whether the present process succeeds in these objectives.
- Next, the PAPER provides a quantitative examination of bid protests over the past decade—and the astounding rates at which agencies have made mistake that have led to “redos” in the procurement process. This analysis is based on data collected from the Government Accountability Office (GAO), the U.S. Court of Federal Claims (COFC), and secondary sources.
- The PAPER’s third line of inquiry presents a survey of the types of

*Robert Nichols is a partner, Andrew Victor and Jason C. Lynch are associates, and Adrian Wigston is a cost accountant at Nichols Liu LLP, a specialized Government contracts law firm in Washington, D.C.

IN THIS ISSUE:

Achieving Success In The Bid Protest Process	1
The Bid Protest System: Objectives & Perspectives	2
Defining Bid Protests	2
Objectives Of The Protest System	3
Differing Perspectives	3
A Data-Driven Analysis Of Bid Protests	4
Most Common Agency Mistakes Leading To Corrective Action	4
Errors In The Solicitation	5
Cancellations & Revisions To An Already Issued Solicitation	6
The Agency Failed To Enforce Solicitation Criteria	6
Evaluations Were Unreasonable	7
Inadequate Or Misleading Discussions	12
Organizational Conflicts Of Interest	12
Inadequate Documentation	14
Corrective Action Challenges	15
Prejudice	16
Guidelines: Case-Specific Considerations On Whether To Protest	16
Factual Questions	16
Business Questions	16
Legal Questions	17



agency mistakes that have most often led to corrective action. It is based on the authors' review of several 100 decisions at the GAO and the COFC as well as discussions with the COFC, the GAO, the U.S. Department of Justice, and peer practitioners in the area.

Together, these three lines of analysis make a compelling case that the bid protest process, on the whole, *succeeds* in holding federal agencies to standards of fairness and transparency. This BRIEFING PAPER concludes with several key factual, legal, and business questions to assist contractors in deciding "go/no go" for any particular protest opportunity.

The Bid Protest System: Objectives & Perspectives

Defining Bid Protests

Federal procurements are governed by a complex web of regulations and standards, so it is no surprise that agencies regularly err in conducting them. When an interested party⁴ for a particular procurement believes that an agency has made a mistake that put it at a competitive disadvantage, it has the right to invoke the bid protest process to challenge the perceived unfairness.⁵ To prevail, the protester must demonstrate both the existence of an agency mistake and that the error prejudiced its competitive chances.

Errors can occur in how the agency sets up the procurement (the terms and conditions of a solicitation), evaluates proposals, and selects an awardee.⁶ Protests about a solicitation, such as ambiguities that may affect how a contractor formulates its proposal,

are deemed "preaward" protests and must be filed before the closing date for bids or proposals.⁷ Post-award protests typically challenge perceived errors and mistakes in the agency's evaluation of proposals and selection of the awardee by arguing that the agency violated procurement law, regulations, or policies; failed to follow the solicitation's evaluation criteria; awarded the contract to a nonqualified offeror (i.e., was not an eligible small business); or acted arbitrarily and capriciously or abused its discretion.

The current forums for filing a bid protests include the COFC,⁸ the GAO,⁹ and the procuring agency itself.¹⁰ Each forum has the ability to review the alleged error and to address actions to correct the mistake, as appropriate. The COFC can direct particular corrective action, the GAO can recommend corrective action to the agency, and the agency can voluntarily take corrective action on its own accord. The COFC and the GAO maintain public dockets of bid protest cases and publish their decisions,¹¹ whereas agency-level protests typically are not public.

When there is a decision finding an error—by the COFC or the GAO or by the agency itself—the agency will usually perform a "do over" of some fashion to fix the mistake. Such "corrective action" may involve amending the solicitation, reevaluating the same proposals, seeking clarifications or reopening discussions, seeking new or amended proposals, or making a new award decision.

A successful bid protest is one that causes an agency to correct its mistake, thereby releveling the field of competition for ensuring a proper procurement.

Editor: Valerie L. Gross

©2019 Thomson Reuters. All rights reserved.

For authorization to photocopy, please contact the **West's Copyright Clearance Center** at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8600 or **West's Copyright Services** at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Briefing Papers® (ISSN 0007-0025) is published monthly, except January (two issues) and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Customer Service: (800) 328-4880. Periodical Postage paid at St. Paul, MN. POSTMASTER: Send address changes to Briefing Papers, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

Objectives Of The Protest System

The modern bid protest system developed through a hodgepodge of statutes, regulations, and policies.¹² As such, there is no single organic document defining the objectives of the system. The primary theory supporting the system is that the Government has a moral duty to maintain fairness in how it awards taxpayer-funded contracts. Public funds come with an expectation of high standards of morality and transparency. Taxpayers expect procurements to be conducted competitively, fairly, and transparently. The bid protest process helps to ensure the Government meets these obligations.¹³ It also corrects mistakes, guards against fraud and abuse, and pushes agencies to improve their procurements.

Bid protests at the COFC and the GAO also provide effective third-party monitoring. Contractors make significant investments in competing for Government procurements. Having a system for lodging complaints with a neutral third party, rather than depending on an agency to monitor itself, helps to “deter and punish ineptitude, sloth, or corruption of public purchasing officials.”¹⁴

Differing Perspectives

Industry generally views bid protests as a healthy component of the procurement process. The fact that nearly half of all bid protests result in some form of corrective action to fix a flaw in the procurement demonstrates the necessity of this oversight function. Without this third-party assurance of fairness and transparency, companies would likely make fewer bids.

According to published studies, contractors report that they are most likely to file a bid protest when they perceive a serious mistake in the process that harmed their competitive position. This is borne out by the high effectiveness rate of bid protests. Other reasons cited for protesting include inadequate explanations from the agency as to why the contractor lost, or when a cost-benefit analysis shows that protesting makes sense. They typically avoid protesting when they do not have good protest arguments and/or when protest-

ing has the potential for creating “ill will.”¹⁵ Some contractors have a policy against protesting for customer relations purposes, although contractors that do protest frequently rarely see lasting, negative impacts from their customers.

Not surprisingly, Government personnel express dissatisfaction with the bid protest system. A recent article indicates that “[a]cquisition officials loathe the receipt of a bid protest” and refers “to the severely negative attitude toward receiving a bid protest as a ‘fear of protest.’”¹⁶ At the same time, there is no doubt that protests have some positive effects on the procurement system as a whole. As one study indicated, “[e]vidence suggests that agencies sometimes change their acquisition strategies due to fear of protests,” such as by:

- building in sufficient lead times to plan fair competitions,
- improving training for their procurement workforces,
- assigning more experienced officials to more important procurements,
- performing more market research to inform their requirements and evaluation criteria,
- ensuring their teams are following the rules to make justifiable decisions in the source selection process,
- engaging in multiple rounds of discussions that level the playing field of competitors,
- thoroughly documenting and substantiating their proposal evaluations and tradeoff decisions,
- making consensus-based decisions, and
- taking voluntary corrective action when they make mistakes.¹⁷

Some sophisticated agencies also engage in extended or enhanced postaward debriefings with contractors also to explain their decisions. This can include providing source selection documents that would normally be available only as part of a protest record. Both the U.S. Air Force and the Federal Avia-

tion Administration have adopted these processes in the hopes of dissuading contractors from protesting.¹⁸

A Data-Driven Analysis Of Bid Protests

Bid protests statistics show just how common agencies make mistakes that require corrective action. The following chart summarizes data on the GAO’s publicly available bid protests dating back to FY 2009.¹⁹

	FY18	FY17	FY16	FY15	FY14	FY13	FY12	FY11	FY10	FY09
Cases Filed	2,607	2,596	2,789	2,639	2,561	2,429	2,475	2,353	2,299	1,989
Merit Decisions	622	581	616	587	556	509	570	417	441	315
Sustains	92	99	139	68	72	87	106	67	82	57
Sustain Rate	15%	17%	22.56%	12%	13%	17%	18.6%	16%	19%	18%
Effectiveness Rate	44%	47%	46%	45%	43%	43%	42%	42%	42%	45%

These figures show a few interesting trends. First, protests filings have generally increased by about 30% over the past 10 years. Second, the GAO’s statistic on the number of merits decisions is less than 25% of cases filed because one decision can cover more than one protest, agencies frequently take voluntary corrective action, and protesters occasionally withdraw their challenges. Third, the GAO’s statistic on the sustain rate shows that the GAO finds mistakes that require correction in an average of 16.8% of the merits decisions it reaches. However, the much higher average effectiveness rate of 43.9% indicates that agencies take *involuntary and voluntary* corrective action much more frequently.

A separate quantitative analysis of GAO protests, conducted by leading practitioners, has shown that filing a supplemental protest increases the odds of a protest being sustained increased by approximately 80%.²⁰ This is likely because contractors file supplemental protests after receiving an agency report, which puts the entire procurement under a microscope and exposes more errors to scrutinizing protest counsel.²¹

In contrast, the COFC keeps less informative statistics for its bid protests, showing only the number of protests filed and decisions issued.²²

	FY18	FY17	FY16	FY15	FY14	FY13	FY12	FY11	FY10
Total Protests Filed	179	129	124	126	110	84	99	98	88
Preaward	52	41	31	35	35	20	42	29	19
Post-award	127	88	93	91	75	64	57	69	69
Protest Decisions	75	74	65	87	65	64	78	82	71
Published Decisions	67	70	64	63	58	61	66	73	64
Unpublished Decisions	8	4	1	24	7	3	12	9	7

Comparing these two tables shows that protesters file actions much more frequently at the GAO than at the COFC. This is almost certainly because filing at the GAO can automatically “stay” the contract award while the protest is pending,²³ whereas filing at the COFC requires the protester to meet the standard for obtaining a temporary restraining order and preliminary injunction to stay the contract during the protest.²⁴ Notably, there are no statistics available for agency-level protests.

Post protest, there is a dearth of readily accessible information on outcomes for contractors. It is unclear how often a protester actually wins the award that was subject to a protest, though the frequency is estimated to be quite low. Also, although agencies take corrective action and boost the “effectiveness rate,” data analyzing whether the corrective action is meaningful to the protester is not available.²⁵

Of course, high-level statistics never tell the whole story. They do not differentiate a “loss” between a pro se party that filed an untimely protest versus a well-crafted protest filed by seasoned counsel, much less account for case-specific details that can be determinative of a particular protest. Nevertheless, these figures do demonstrate that agencies frequently make mistakes that lead to a “redo” of all or parts of a procurement.

Most Common Agency Mistakes Leading To Corrective Action

Several years ago, BRIEFING PAPERS explored which protest arguments have proven most likely to be sustained.²⁶ This PAPER updates and greatly expands upon that analysis with a qualitative survey of several 100 bid protest decisions and reports from Government sources.²⁷ While not an encyclopedic listing of

every sustained protest basis over the years, this discussion and the collected citations represent a helpful guide to the array of common procurement mistakes that lead to corrective action.

Errors In The Solicitation

As described below, solicitation errors generally take a few different forms: the solicitation fails to comply with applicable laws and regulations, contains ambiguities, or is unduly restrictive.

(1) *Compliance With Laws and Regulations.* Successful protests have been made where the solicitation fails to comply with all applicable law or regulation, for example:

- the agency improperly ignored the Federal Acquisition Streamlining Act's mandate to consider whether commercial items were available;²⁸
- the agency conducted inadequate market research as required by the Federal Acquisition Regulation (FAR) or federal statutes;²⁹
- the agency issued an order outside the scope of an underlying blanket purchase agreement;³⁰
- the agency issued a request for quotations in violation of the simplified acquisition procedures set forth in FAR Subpart 12.6;³¹
- the agency improperly used a cooperative agreement instead of a procurement contract, violating the Federal Grant and Cooperative Agreement Act;³²
- the agency improperly waived the requirement that commercial item procurements address commercial market practices of FAR 12.302;³³ and
- the agency misconstrued the "Trade Agreements" clause at FAR 52.225-5.³⁴

For these procurement errors, corrective action usually results in a change to the solicitation to address the particular legal requirement that was not met.³⁵

(2) *Ambiguities.* Protesters can sometimes show that the solicitation is ambiguous in communicating the

objectives and relevant requirements of the procurement. An ambiguity occurs when two or more reasonable interpretations of the solicitation are possible.³⁶ Protests have been sustained where:

- the solicitation did not clearly communicate whether objectives were optional or required;³⁷
- the agency ambiguously described categories of Contractor Performance Assessment Reporting System (CPARS) scores for past performance references;³⁸
- the latent ambiguity concerned mandatory wage rates in a collective bargaining agreement;³⁹ and
- a request for proposals lacked a sufficiently detailed description of engineering services sought by the agency.⁴⁰

If the ambiguity is obvious, gross, or glaring (*e.g.*, where solicitation provisions appear inconsistent on their face), it is "patent" and must be protested prior to the solicitation's deadline.⁴¹ A latent ambiguity is more subtle and can be protested post award when an agency's and an offeror's divergent interpretations of the solicitation become apparent. Corrective action for ambiguities can require amendment of the solicitation or reevaluation of the proposal with the alternative interpretation.⁴²

(3) *Unduly Restrictive.* Solicitations cannot be restrictive of competition in an unnecessary way. Protestors have had success where the solicitation was found to be unduly restrictive in the following ways:

- the solicitation unduly restricted teaming arrangements;⁴³
- the solicitation unduly restricted application of exceptions to the Berry Amendment, which requires acquisition of domestically produced products;⁴⁴
- the solicitation was unduly restrictive by making demands that offerors be certified under certain industry quality standards at the time of proposal submission, rather than at the time of award or performance, which exceeded the agency's reasonable needs;⁴⁵ and

- the solicitation unduly restricted past performance and experience requirements without a supportive agency explanation.⁴⁶

Corrective action to cure unduly restrictive provisions can involve the agency reassessing its need for the restriction and, if none exists, amending the solicitation to remove it.⁴⁷

Cancellations & Revisions To An Already Issued Solicitation

Once a solicitation has been issued, the agency may not arbitrarily cancel or revise it, even if it intends to re compete the award, such as when:

- the agency’s “slipshod” and scant administrative record did not adequately support cancellation of solicitation;⁴⁸
- the record failed to demonstrate a reasonable basis for the Contracting Officer’s (CO’s) conclusion that competition under the original solicitation was inadequate;⁴⁹
- the evidence demonstrated that the agency had failed to meaningfully review its needs;⁵⁰ and
- the agency failed to engage in reasonable and adequate advance planning, issued a solicitation without detailed requirements, then cancelled the solicitation despite having documented the need for a detailed solicitation years prior to the solicitation’s release.⁵¹

Corrective action for these errors generally involves the agency reviewing its needs and making a new selection decision⁵² or preparing a new solicitation.⁵³ But if the agency later realizes that its needs are materially different than the assumptions underlying the solicitation, it has a *duty* to cancel or amend the solicitation. For example, in one case, the GAO sustained a protest when the agency knew, *prior to award*, that its anticipated schedule for task orders was materially different from the assumptions set forth in the solicitation, upon which the offerors were required to base their proposals.⁵⁴ The GAO recommended that the agency reevaluate its requirements, revise the so-

licitation accordingly, conduct discussions, and re-evaluate proposals.⁵⁵

The Agency Failed To Enforce Solicitation Criteria

The agency must enforce the mandatory solicitation requirements against all offerors. Generally, there are two types of common errors in this context: the agency bungles the receipt of an offeror’s proposal, and the agency fails to enforce the solicitation’s requirements against an offeror.

(1) *Improper Handling of Proposals*. Agencies have the responsibility to accept proposals in accordance with the FAR and the governing solicitation and must reject proposals submitted late or containing material errors. Agencies, however, cannot arbitrarily or capriciously reject a proposal for a minor irregularity, especially if doing so diminishes competition. Instructive cases follow:

- the agency unreasonably rejected a proposal when, despite the solicitation stating that proposals had to be uploaded to a Government website, the offeror had timely submitted the proposal by email with permission from the contract specialist;⁵⁶
- the agency improperly rejected a quotation where the offeror had not acknowledged the first amendment to the solicitation but had acknowledged the second amendment, which superseded the first amendment;⁵⁷
- the agency could not disqualify an offeror after informing the offeror that the agency would waive late delivery of a proposal by FedEx as inconsequential because the offeror had timely tendered its proposal to FedEx;⁵⁸
- the agency improperly rejected an indefinite-delivery, indefinite-quantity (IDIQ) contract proposal that was submitted in the wrong location on the FedConnect web portal, when the offeror submitted a complete proposal, the proposal could not be altered by the offeror after submission, and acceptance would enhance competition

because the agency planned to make multiple IDIQ awards;⁵⁹

- the agency improperly refused to allow the protester to revive its expired bid when (1) the revival would not prejudice the other offerors or the competitive system; and (2) the acceptance period, which originally expired on a Saturday, was extended by the offeror on the next Monday;⁶⁰ and
- the agency unreasonably rejected an offeror's timely proposal because one of its minor subcontractors failed to submit proposal information timely when the offeror's proposal contained the same relevant information as the subcontractor's late proposal.⁶¹

Corrective action for improperly handling a proposal involves reinstating the proposal for the competition⁶² and, if appropriate, reevaluating proposals.⁶³

(2) *Offeror Deviations From Mandatory Solicitation Requirements.* A proposal or quotation that deviates from the solicitation or contains an ambiguity as to whether the offeror will comply with a material requirement of the solicitation can result in a sustained protest. The following decisions demonstrate that agencies cannot overlook offeror deviations from mandatory solicitation requirements:

- the agency improperly substituted a reference provided by the awardee in final proposal revision that violated terms of the solicitation;⁶⁴
- the agency awarded a contract on a basis fundamentally different from what the solicitation provided;⁶⁵
- the awardee failed to propose loaded labor rates for 20 categories required by the solicitation;⁶⁶
- during clarifications, the awardee took exception to material performance requirements, but the agency accepted the proposal anyway;⁶⁷
- when the awardee notified the agency that two key personnel would not perform under the contract, the agency improperly waived key personnel requirements of the solicitation;⁶⁸

- where the solicitation required a barrier wall to achieve physical separation of soiled linens from cleaned linens, the agency erred by not requiring the awardee's quotation to comply with this requirement;⁶⁹
- the agency waived a material solicitation requirement, styled as a provision that vendors had to "guarantee" compliance;⁷⁰
- the agency did not evaluate the awardee in accordance with a solicitation requirement for a plan addressing the criteria of Defense FAR Supplement (DFARS) 252.237-7024 ("Notice of Continuation of Essential Contractor Services" solicitation provision);⁷¹ and
- the agency improperly made an award to an offeror for leasing of office space by ignoring material requirements of the solicitation that limited offers to 625,000 rentable square feet.⁷²

The corrective action may be to seek a clarification from the offeror or render the proposal unacceptable,⁷³ or to reopen discussions, obtain revised proposals, and make a new selection decision.⁷⁴

Evaluations Were Unreasonable

Agencies must conduct reasonable evaluations. Where the solicitation prescribes a method for evaluation, the agency must follow it. There are myriad instances in which agencies improperly deviated from solicitation evaluation criteria:

- the agency failed to consider one of the evaluation factors established by the terms of the solicitation;⁷⁵
- the agency erred by accepting a blanket statement of compliance instead of specific product literature addressing specifications as required by the solicitation;⁷⁶
- the agency failed to reconcile an assigned strength to the awardee with the underlying evaluation;⁷⁷
- the agency excluded offerors' references when-

ever it did not have one of the six areas of the experience required by the solicitation, even though the solicitation only required that offerors' references "collectively" demonstrate experience in the required areas;⁷⁸

- the agency failed to consider both the variety and quantity of amenities offered under an access-to-amenities subfactor, as required by the solicitation;⁷⁹
- an agency cannot downgrade an offeror that does not provide information not required by the solicitation's evaluation scheme;⁸⁰
- the agency unreasonably found the awardee's proposal was technically acceptable, when the acceptable rating was contingent on remediation of several issues that were not remediated;⁸¹
- the agency failed to evaluate the awardee's proposal under the solicitation's experience factor with the terms of the solicitation, which only permitted consideration of the experience of the offeror itself and, since the awardee had no experience as a joint venture, its proposal should have been found unacceptable under the experience factor;⁸²
- when a solicitation mandates a best value decision, the agency may not merely consider whether the proposal was technically acceptable;⁸³
- the agency failed to compare offerors equally;⁸⁴
- the agency mechanically and unequally applied undisclosed staffing estimates in evaluating the offerors' proposed staffing plans to determine whether proposals were acceptable or unacceptable;⁸⁵
- when the solicitation provided certain evaluation criteria, the agency could not add unstated evaluation criteria to that list;⁸⁶
- any criterion not expressly stated in the solicitation must have a clear nexus to the stated criteria;⁸⁷
- an agency cannot assign weaknesses inconsistent with the solicitation;⁸⁸
- the agency applied undisclosed evaluation criteria in the source selection plan for ratings under the experience factor that would not be reasonably expected by offerors;⁸⁹
- an agency must abide by the prescribed relative importance of evaluation factors;⁹⁰
- if the evaluation scheme calls for it, the agency must evaluate for the entire period of performance and not just an offeror's ability to perform the base year where options might make future performance more difficult;⁹¹
- the agency employed discriminators to differentiate between two proposals, but the discriminators were not reasonable and did not withstand scrutiny;⁹²
- a comparative source selection may not merely mechanically compare technical ratings, but must instead meaningfully consider any evaluated differences in the offerors' proposals;⁹³
- selection official failed to demonstrate a reasonable basis for finding that awardee's strengths to be beneficial while not finding similar strengths of protester to be similarly beneficial;⁹⁴ and
- the agency's conclusion regarding the impact of an assigned strength to the protester's proposal was inconsistent with the underlying evaluation and the agency identified strengths in other offerors' proposals, but unreasonably failed to recognize similar strengths in the protester's proposal.⁹⁵

Similarly, an agency conducting a best value procurement cannot ignore elements of the tradeoff in rendering its source selection decision:

- in a best value tradeoff, an agency cannot ignore lower priced offers that are technically acceptable and must document its reasons for choosing a higher priced technically superior offer;⁹⁶

- an agency cannot ignore price in a best value tradeoff;⁹⁷
- an agency cannot overemphasize adjectival ratings to find proposals equivalent, but must consider identified strengths and weaknesses and the evaluators' ranking of proposals to render its tradeoff;⁹⁸
- an agency cannot only consider point scores and not meaningfully consider the merits of the evaluations or proposed prices;⁹⁹ and
- the agency conducted an unreasonable evaluation where weaknesses expressly relied on by the selection official for not choosing the protester's proposal were resolved after discussions and were not found in the final proposal.¹⁰⁰

(1) *Technical.* In evaluating technical proposals, the GAO and the COFC will not independently evaluate proposals, but will examine whether the agency's scoring methodology and evaluation conclusions are reasonable and consistent with the terms of the solicitation, as well as applicable procurement statutes and regulations. The cases below provide examples of how protesters have demonstrated that an agency's technical evaluation was flawed or unreasonable:

- the agency unreasonably evaluated offerors—among other errors—by using a scoring system that could not be explained, assessed strengths and weaknesses to offerors from an individual in contravention of a consensus technical evaluation committee (TEC) effort, and the TEC's own evaluation had unexplained internal inconsistencies;¹⁰¹
- if key personnel are required by the solicitation, the agency must ensure that proposed key personnel meet the solicitation's minimum requirements;¹⁰²
- an agency cannot make an award to an offeror that misrepresents key personnel as available when they are not (“bait and switch”);¹⁰³
- even if no key personnel are required, the agency cannot make an award to an offeror that does not

provide individuals capable of accomplishing tasks under a performance work statement, if required by the solicitation;¹⁰⁴

- the agency failed to consider a significant design flaw in the awardee's technical submission that demonstrated the awardee lacked technical understanding;¹⁰⁵
- the agency improperly made award to an offeror whose proposal contained a technical approach previously rejected by the agency;¹⁰⁶ and
- the agency improperly accepted a proposal that assumed that the agency would provide on-site work space and equipment when the agency had stated that it would not provide on-site space and the solicitation did not identify agency-provided equipment.¹⁰⁷

(2) *Price/Cost.* Like technical evaluations, agencies must conduct cost and price analysis in accordance with the solicitation. The following cases demonstrate the ways in which agencies have failed to apply such analyses in line with the requirements of a procurement:

- an agency cannot apply price realism—analysis that seeks to determine whether an offeror's price is so low as to endanger contract performance—where the solicitation does not provide for one;¹⁰⁸
- although the solicitation provided that the agency would assess the realism of the offerors' loaded labor rates, the agency failed to do so;¹⁰⁹
- although the solicitation provided that the agency would assess the realism of the offerors' time and materials, the agency failed to do so;¹¹⁰
- where price or cost realism is called for, the agency must consider the offeror's particular technical proposal and how it may be affected by the price or cost;¹¹¹
- if required by the solicitation, agencies must consider proposed prices from all offerors in its analysis;¹¹²
- the agency failed to perform a reasonable cost

realism evaluation and compounded its error by not using the results of that evaluation in its source selection decision but improperly used offerors' proposed—as opposed to evaluated—costs to make its source selection decision;¹¹³

- conducting a price realism analysis may also be required by other FAR provisions and must be done correctly to give effect to those regulations, such as FAR 52.222-6 (“Construction Wage Rate Requirements”)¹¹⁴ and FAR 52.222-46 (“Evaluation of Compensation for Professional Employees”);¹¹⁵
- agencies must properly apply cost realism, particularly if the solicitation provides the manner¹¹⁶ or level of cost detail in which they are to conduct it;¹¹⁷
- agencies have erred in cost realism by limiting analysis to Government-verified labor rates, which is insufficient to assess cost realism;¹¹⁸
- the agency conducted an improper cost realism evaluation where the agency failed to recognize that the awardee proposed to significantly reduce the labor rates of personnel during the option years of the task order;¹¹⁹
- agencies cannot apply an evaluation factor not found in the solicitation to its cost realism assessment;¹²⁰
- even where the agency reasonably determines that an offeror has proposed unrealistically low costs, the agency may not adjust those costs to an unreasonable extent;¹²¹
- the agency erred in its cost analysis by misinterpreting substantiating data, specifically uncompensated overtime, in the protester’s cost proposal;¹²² and
- when deciding whether an offeror has an unreasonably low price, the agency should only compare that offeror to actual competitors—not to offerors whose proposals are unacceptable, ineligible for award, or priced unreasonably high.¹²³

Agencies can make other material errors in their cost or price analyses, as demonstrated by these cases:

- the agency failed to demonstrate that an awardee’s low price was consistent with its proposed technical approach;¹²⁴
- the agency mechanically applied a Government estimate without taking into consideration an offeror’s unique technical approach;¹²⁵ and
- on a cost-reimbursement contract, the agency failed to ensure that its evaluation of technical and cost proposals is logically connected.¹²⁶

Agencies also cannot employ a price evaluation scheme that produces misleading results,¹²⁷ such as in the following cases:

- agencies cannot simply assume adequate price competition exists upon receipt of multiple proposals if they must compare prices in accordance with price reasonableness requirements under FAR 15.404-1;¹²⁸
- the agency failed to notice that an awardee did not propose discounts required by the solicitation, thereby providing the awardee a substantial price advantage;¹²⁹
- the agency unreasonably focused on a single contract line item for a cost reasonableness analysis, but did not evaluate the overall cost of performance;¹³⁰
- the agency failed to evaluate the awardee’s proposed line items as required by the solicitation;¹³¹
- the agency failed to amend the price evaluation scheme notwithstanding the fact that it knew, prior to award, that the scheme did not reasonably reflect the agency’s changed ordering strategy;¹³² and
- the agency intended to issue cost-reimbursement task orders but did not require offerors to propose cost-reimbursable labor rates resulting in the agency not being able to evaluate offers meaningfully.¹³³

Corrective action for evaluation errors typically involves reevaluation of proposals as required by the solicitation and preparation of a new source selection decision with appropriate consideration given to all evaluation factors,¹³⁴ but can also include reopening discussions and obtaining revised cost or price proposals.¹³⁵

(3) *Past Performance*. Agencies occasionally encounter pitfalls when evaluating past performance. The straightest route to protest victory appears when the agency does not conduct, or does not document, a past performance evaluation. Protesters have been successful in various instances, such as the following:

- the agency could not produce contemporaneous documentation indicating to what extent, if at all, the agency had considered the “unsatisfactory” and “marginal” ratings assigned to the awardee under a particular past performance reference;¹³⁶
- the agency failed to provide a meaningful explanation of its evaluation of the protester’s past performance;¹³⁷
- the agency failed to document *its own* analysis of offeror’s past performance;¹³⁸
- the agency failed to document oral discussions on which it based its past performance evaluation and cited written documents that were never identified;¹³⁹ and
- the agency failed to analyze the relevance of offerors’ past performance.¹⁴⁰

Agencies generally have discretion to evaluate both relevance and weight of offerors’ past performance, but when an agency assesses past performance, it must do so in accordance with the solicitation, as demonstrated by these cases:

- the agency evaluated past performance inconsistently with the solicitation;¹⁴¹
- the agency failed to consider the management team’s past performance as required by solicitation;¹⁴²
- the solicitation provided for the evaluation of

projects that were similar in scope and complexity, and there was no explanation in the record of why the awardee’s smaller value past performance projects were similar in scope and complexity;¹⁴³

- the agency mistakenly weighed all past performances equally, whereas the solicitation required an evaluation of each performance’s relevance;¹⁴⁴
- the solicitation had limited relevant past performance to a defined dollar threshold, on an individual basis, and the record showed that none of the awardee’s contracts met the dollar threshold;¹⁴⁵
- the agency effectively eliminated the past performance criterion by treating it as a pass/fail assessment;¹⁴⁶
- the agency improperly considered the past performance of an offeror’s subcontractor which did not fit the criteria of the solicitation;¹⁴⁷ and
- the agency improperly labeled an offeror’s past performance as “unknown” in contravention of the solicitation when the agency had past performance information.¹⁴⁸

Not only must the evaluation of past performance adhere to the solicitation, it must not be unreasonable or irrational on its face. This includes for example:

- conducting a past performance evaluation free of material errors;¹⁴⁹
- the agency unreasonably assessed past performance by not considering adverse past performance information that was “close at hand” or of which it was aware;¹⁵⁰
- the agency unreasonably credited offerors for *relevant* past performance but not the *quality* of that performance and credited offerors for *positive* performance without considering whether such performance was *relevant*;¹⁵¹
- the agency erred by relying upon incorrect past performance questionnaire ratings;¹⁵²

- the protester demonstrated an inconsistency in an agency's approach to past performance where it credited the awardee for the past performance of a specialty subcontractor but not similarly crediting the protester for the *same* subcontractor;¹⁵³
- the agency failed to document its past performance evaluation adequately, credited the awardee for positive performance without considering the relevance of that performance, and did not credit the protester for its performance as the incumbent;¹⁵⁴
- the agency unreasonably considered the past performance of a firm that was not proposed to perform any portion of the work;¹⁵⁵
- the agency failed to consider and document the similarity of the awardee's past performance contracts to the requirement being solicited;¹⁵⁶
- the agency never explained why it found information technology and healthcare contracts relevant to different work—call center and appointment desk contracts;¹⁵⁷
- the agency penalized an offeror with *relevant* experience for also having *irrelevant* experience, as the effect was to equalize the weight given to both categories;¹⁵⁸
- the agency improperly excluded an offeror from the competitive range based solely on neutral past performance rating;¹⁵⁹
- the agency unreasonably compared offerors' past performance in a way that minimized differences and relied upon a mechanical application of adjectival ratings to determine that offerors' past performance was the same;¹⁶⁰ and
- the agency erred by evaluating performance in a manner that unreasonably credited relevancy and not quality producing misleading results.¹⁶¹

Corrective action for failure to evaluate past performance typically results in reevaluation of the offerors' proposals,¹⁶² but can also include reopening discussions, obtaining revised proposals, reevaluation, and a new source selection decision.¹⁶³

Inadequate Or Misleading Discussions

Discussions with the agency can also open the door to a flawed technical evaluation. The essential point is that the agency must treat all offerors fairly and equally. A discussion may be unfair if the agency:

- conducted discussions inconsistent with the requirement of the solicitation;¹⁶⁴
- failed to inform the protester of a deficiency in its proposal;¹⁶⁵
- inaccurately expressed its concerns to an offeror;¹⁶⁶
- inaccurately expressed its concerns with a *revised* proposal;¹⁶⁷
- relied on faulty information when assessing weaknesses and discussing them with the protester;¹⁶⁸ and
- did not raise with an offeror a newly identified weakness in a reevaluation of the offer.¹⁶⁹

A discussion may be unequal if the agency:

- conducted discussions in an unequal manner;¹⁷⁰
- held discussions only with the awardee, and not the protester;¹⁷¹
- allowed the awardee, but not the protester, to submit a revised proposal;¹⁷² and
- gave some, but not all, offerors an opportunity to address significant weaknesses in their proposals.¹⁷³

When an agency fails to conduct appropriate discussions, corrective action typically involves reopening of all discussion and obtaining revised proposals.¹⁷⁴

Organizational Conflicts Of Interest

FAR 2.101 provides that an organizational conflict of interest (OCI) arises in three circumstances: (1) the existence of biased ground rules, (2) a contractor having impaired objectivity, or (3) a contractor having an unfair competitive advantage from the unequal access to information.¹⁷⁵

In a biased ground rules OCI, a company, as part of its performance of a Government contract, has in some sense set the ground rules for the competition for another Government contract.¹⁷⁶ This type of OCI occurs in varying circumstances as demonstrated in these cases:

- the agency did not adequately investigate whether a company had a biased ground rules OCI where the company had assisted the agency in developing an approach for the acquisition that was protested;¹⁷⁷
- the agency unreasonably determined that the awardee did not have a biased ground rules OCI where a company advised on the procurement, including drafting the solicitation, for the agency and appeared to skew competition in favor of the awardee's subcontractor, which was later acquired by the company;¹⁷⁸ and
- the agency unreasonably reversed an initial decision barring a contractor from competing for a task order where the contractor had provided procurement planning services to the agency and could have skewed the competition in its favor.¹⁷⁹

An impaired objectivity OCI arises when a contractor's participation in work could affect its own interests or the interests of its competitors.¹⁸⁰ This type of OCI occurs in various scenarios:

- the agency failed to evaluate adequately whether an awardee's wholly owned subsidiary would review decisions on appeal from the parent company's own claims decisions;¹⁸¹
- the agency failed to evaluate adequately whether the awardee would be able to perform without a conflict of interest, where the awardee's parent company held other contracts subject to review of the awardee;¹⁸²
- the agency's one sentence assessment of the awardee's amended mitigation plan of evaluating its parent corporation failed to provide adequate analysis on review;¹⁸³
- the agency's OCI investigation was unreason-

able because it failed to meaningfully consider whether the awardee's performance of a portion of the work required under a task order would result in an impaired objectivity OCI;¹⁸⁴

- the agency failed to evaluate reasonably apparent impaired objectivity, where the agency planned to use only a generalized OCI mitigation plan not tailored to the circumstance of the awardee that would maintain information technology infrastructure supplied by the awardee's parent company;¹⁸⁵ and
- the agency failed to address thoroughly potential impaired objectivity from the awardee's assessment and oversight of its major subcontractor's performance on another contract.¹⁸⁶

Lastly, in an unequal access to information OCI, a firm has access to nonpublic information as part of its performance of a Government contract and that information may provide the firm an unfair competitive advantage in a later competition for a Government contract.¹⁸⁷ Unequal access to nonpublic information about a competitor, whether or not that information is proprietary, may nevertheless create an unequal access OCI. Protesters have been successful in the following instances:

- the agency failed to evaluate potential unequal access to information arising from the relationship between the awardee and one of its subsidiaries;¹⁸⁸
- the agency did not reasonably evaluate potential unequal access to information arising from the relationship between the awardee and one of its subcontractors;¹⁸⁹
- the agency failed to explain why an individual—who had access to competitively useful nonpublic information about the protester and participated in the preparation of the awardee's proposal—did not constitute an unequal access to information OCI;¹⁹⁰
- the protester provided evidence in the form of "hard facts" demonstrating that former agency

official, who had been hired by the awardee, had access to competitively useful nonpublic information and the CO failed to analyze the extent of the former official's involvement in the procurement;¹⁹¹ and

- the CO recognized an apparent conflict of interest but failed to investigate or mitigate where the agency's program manager had actively engaged in procurement-related activities.¹⁹²

Corrective actions for these kinds of protests involve the agency determining whether an OCI exists, taking appropriate action to avoid, neutralize, or mitigate the OCI, and documenting its effort.¹⁹³

Inadequate Documentation

Agencies have wide latitude in conducting evaluations of offers, and the GAO or the COFC will not substitute its judgment for an agency's if the agency's rationale is reasonable and consistent with the solicitation. But when an agency fails to document adequately the basis of its selection decision, protesters can point to that gap in the contemporaneous procurement record and argue that the agency's evaluation was unreasonable, such as in the following instances;

- the agency simply did not sufficiently document its evaluation for the GAO's review;¹⁹⁴
- the agency failed to document why it did not find strengths of the protester to be of significant benefit to the agency unlike the awardee's assigned strengths;¹⁹⁵
- the agency assessed numerous weaknesses to the protester's proposal, but the record did not reasonably support such an assessment;¹⁹⁶
- the agency failed to reconcile conflicting conclusions of evaluators;¹⁹⁷
- the agency produced a record with heavily redacted documents that prevented the GAO from reviewing the agency's decisional process;¹⁹⁸ and
- the agency assigned numerical scores to each

vendor's quotation but lacked documentation to support the assignment of such scores.¹⁹⁹

Similarly, agencies must adequately document selection decisions. Cases where protesters have been successful have included the following:

- the agency failed to provide a sufficient rationale and documentation for its award decision;²⁰⁰
- the agency could not produce evidence that it qualitatively assessed the relative merits of the offerors' respective technical approaches;²⁰¹
- the source selection decision lacked documentation establishing why the awardee's ratings had been increased;²⁰²
- the agency failed to provide adequate support for its evaluation of the protester's oral presentation because of unresolved discrepancies regarding the unrecorded portion of the oral presentation;²⁰³
- even where the agency identifies clear differences between the protester's higher rated past performance record and the awardee's lower rated record, the record must provide a basis for the conclusion that the differences were not significant;²⁰⁴
- despite summarizing strengths and weaknesses, the source selection decision document evidenced that the agency made an award based on a mechanical comparison of total technical scores;²⁰⁵
- the source selection decision was unreasonable where it was based solely on a comparison of adjectival ratings without meaningful consideration of individual proposal strengths and weaknesses and price advantages;²⁰⁶
- the best value tradeoff failed to address the protester's lowest priced proposal;²⁰⁷ and
- the agency issued a task order to the awardee under a contract, but the record was so limited that the GAO could not conclude that the protested task order was within the scope of the contract.²⁰⁸

Corrective action for these procurement errors typically involves reevaluation and adequate documentation so that the agency can arrive at a supported conclusion.²⁰⁹

Corrective Action Challenges

Even after an agency takes corrective action, protesters can sometimes successfully challenge that action if it is not reasonable or not tailored to the previously identified procurement errors. Protests of corrective action are highly fact-specific to the underlying procurement, procurement deficiencies, and agency responses to correct such deficiencies. Representative examples of winning protest arguments targeting corrective action include the following circumstances:

- the agency improperly took corrective action of resoliciting proposals when the record demonstrated that the agency's concerns could have been addressed by reevaluation of already received proposals;²¹⁰
- the agency improperly amended a solicitation so that it impacted offerors more broadly than the intended scope of the corrective action;²¹¹
- the agency amended the solicitation but improperly precluded offerors from revising their proposals, including price;²¹²
- the agency failed to evaluate relevant bridge contracts performed during the pendency of bid protests;²¹³
- the agency improperly invited the awardee to amend its proposal to moot the protester's claims without providing the protester opportunity to amend its proposal;²¹⁴
- the agency excluded the protester because it could not meet heightened technical requirements not contemplated by the solicitation;²¹⁵
- the agency incorrectly assumed that it was required to ignore the passage of time between its initial evaluation and its post-corrective-action reevaluation;²¹⁶
- the agency reopened discussions in an unduly limited way;²¹⁷
- the agency improperly permitted an offeror to revise its proposal outside the scope of its initial corrective action with substitutions of key personnel;²¹⁸
- following corrective action of reevaluating offerors, the agency failed to follow solicitation criteria and did not substantiate its new award decision;²¹⁹
- the agency's corrective action did not take into account that, since the initial award decision, the awardee had been sold to another company with potential impacts on performance;²²⁰
- the source selection authority failed to reconcile the evaluation made for the initial award decision, which differed starkly from the evaluation made as part of the agency's corrective action;²²¹
- the protester identified a potential OCI arising from the agency's corrective action plan that the agency had failed to address;²²²
- the agency took corrective action in response to statements made by a GAO attorney in an email to the parties in a GAO bid protest that the COFC found to be irrational;²²³
- the agency improperly took corrective action on the mere assumption that awards were tainted by an OCI when it lacked facts of any such circumstance and had adequately accounted for a potential OCI in drafting the solicitation;²²⁴
- the agency improperly terminated a contract in response to agency-level protest on the assumption that the award decision was tainted by an OCI, when the agency lacked facts to support such a conclusion;²²⁵ and
- the agency's termination of a contract in accordance with a GAO recommendation regarding a potential OCI was overturned by the COFC because the record demonstrated a lack of hard facts.²²⁶

Successful protests of corrective action generally result in GAO recommendations and COFC decisions that require the agency to take the necessary steps to cure its errors, or, in other words, more corrective action.²²⁷

Prejudice

Competitive prejudice is an essential bid protest element. In other words, a protester cannot just show that an error occurred during the procurement; the protester must also demonstrate that the error also harmed the protester's chances to secure a contract. Cases have fleshed out this critical concept as follows:

- protesters must demonstrate a reasonable possibility of prejudice by an agency's actions;²²⁸
- if there are any doubts regarding prejudice, they are resolved in favor of the protester because a reasonable possibility of prejudice is a sufficient basis to sustain a protest;²²⁹
- the threshold for prejudice is lower in the OCI context; if an OCI is deemed to exist, then prejudice is presumed;²³⁰
- pervasive errors in the evaluation record that materially impact the source selection decision tilt in favor of a finding of prejudice;²³¹ and
- a finding of prejudice can be implied, such as when it is presumed that a GAO attorney will apply the law correctly during an outcome prediction conference where the record showed that the agency had provided disparate information to the awardee and the protester.²³²

Guidelines: Case-Specific Considerations On Whether To Protest

The analysis of the bid protest system presented in this BRIEFING PAPER is intended to assist contractors in understanding the statistical frequency of protests and corrective action and which protest arguments most often succeed. It can guide executives in developing their general inclinations about pursuing protests. On the other hand, a "go/no go" decision for a particular

protest opportunity should depend upon the answers to several key factual, legal, and business questions unique to each procurement.²³³ Thus, this PAPER's *Guidelines* are in the form of a series of questions providing case-specific considerations in deciding whether to protest. They are not, however, a substitute for professional consideration in any specific situation.

Factual Questions

1. What was the agency's rationale for selecting the awardee's proposal over the contractor's proposal?
2. How does the company's evaluated cost/price compare to the awardee's evaluated cost/price?
3. Was the contractor's offer ranked high enough to have a chance of winning with proper corrective action?
4. How complete was the debriefing and does it suggest that the administrative record would provide far more additional protest grounds?
5. What is the procuring agency's track record on taking voluntary corrective action?

Business Questions

1. How reluctant is the contractor to fight with its customer—in light of this source selection decision and the broader relationship?
2. How important is winning this contract to the company's stakeholders?
3. What is the strategic value of the contract to the contractor's business objectives?
4. How strongly does the company believe it presented the best proposal to the Government in light of the stated evaluation criteria?
5. What percentage of the work will be performed by the contractor versus its subcontractors?
6. Are there other objectives that the contractor is likely to achieve through the bid protest process (i.e., extending the incumbent's performance during the pendency of the protest)?

7. How likely is it that the protesting contractor can achieve an additional prime contract award (in a multiple award procurement) or a subcontract from the awardee?

8. How much of the desire to protest is based on the frustration and disappointment of losing an important competition versus a reasoned assessment of the potential business risks and reward?

9. Realistically, how would a protest affect the contractor's business with this customer given that protests are a normal part of the acquisition process?

10. How expensive will the protest be—in both absolute terms and as a final stage of the broader competitive effort—and are those costs fully or partially recoverable if the protest succeeds?

Legal Questions

1. Was the mistake the agency apparently made of the type that typically lead to corrective action?

2. Was the contractor “prejudiced” by the agency's mistakes (i.e., has the contractor suffered competitive harm)?

3. Is the evidence to support a protest argument already available or likely to be in the administrative record?

4. What type of corrective action may occur based on the possible protest grounds and is it likely to change the ultimate source selection decision?

5. What odds does seasoned counsel place on the likelihood of prevailing?

ENDNOTES:

¹Data collected from [USASpending.gov](https://www.usaspending.gov) by total obligated amount for contracts by fiscal year for 2009–2018.

²The first statute allowing companies to pursue contract actions against the Federal Government was the Tucker Act (Mar. 3, 1887, ch. 359, 24 Stat. 505 (current version codified at 28 U.S.C.A. § 1491)).

³See, e.g., Charles S. Clark, “Conferees Will Determine Fate of Defense Bill Provision To Deter

Frivolous Contractor Bid Protests,” Gov't Exec., Oct. 13, 2017; Christian Davenport, “Senate Proposes Measure To Curb Protests Over Pentagon Contract Awards,” Wash. Post, Oct. 8, 2017.

⁴For a definition of “interested party,” see GAO, *Bid Protests at GAO: A Descriptive Guide* (10th ed. 2018), available at <https://www.gao.gov/products/GAO-18-510SP>; 4 C.F.R. § 21.0; see also *CGI Fed., Inc. v. United States*, 779 F.3d 1346, 1348 (Fed. Cir. 2015) (an “interested party” is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract” (quoting 31 U.S.C.A. § 3551(2))).

⁵See FAR 33.101 (defining “protest”).

⁶Errors can also occur in a decision to cancel a solicitation or award, although those are beyond the scope of this Briefing Paper.

⁷See 4 C.F.R. 21.2(a)(1) (“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”).

⁸See 28 U.S.C.A. § 1491(b).

⁹See 31 U.S.C.A. §§ 3551–3557; 4 C.F.R. pt. 21 (GAO Bid Protest Regulations).

¹⁰See FAR 33.103.

¹¹See <http://www.uscfc.uscourts.gov/>; <https://www.gao.gov/legal/bid-protests>.

¹²William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” 9 *Admin. L.J. Am. U.* 461, 469–74 (1995). See generally Schaengold, Guiffre & Gill, “Choice of Forum for Bid Protests,” 08-11 Briefing Papers 1 (Oct. 2008).

¹³See Mark V. Arena, Brian Persons, Irv Blickstein, Mary E. Chenoweth, Gordon T. Lee, David Luckey & Abby Schendt, RAND National Defense Research Institute, *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers 11–12* (2018), available at https://www.rand.org/pubs/research_reports/RR2356.html [hereinafter Rand Study].

¹⁴See William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” 9 *Admin. L.J. Am. U.* 461, 466–69 (1995).

¹⁵See Rand Study at 19–21.

¹⁶See Timothy G. Hawkins, Cory Yoder & Michael J. Gravier, “Federal Bid Protests: Is the Tail Wagging the Dog?,” 16 *J. Pub. Procrmt.* 152, 154 (Summer 2016).

¹⁷See Timothy G. Hawkins, Cory Yoder & Michael J. Gravier, “Federal Bid Protests: Is the Tail Wagging the Dog?,” 16 *J. Pub. Procrmt.* 152, 154 (Summer

2016).

¹⁸See Rand Study at 65.

¹⁹GAO publishes its statistics annually in its report to Congress. See, e.g., GAO Bid Protest Annual Report to Congress for Fiscal Year 2018, B-158766 (Nov. 27, 2018), <https://www.gao.gov/assets/700/695707.pdf>; see also 60 GC ¶ 370.

²⁰Paul F. Khoury, Brian Walsh & Gary S. Ward, “A Data-Driven Look at the GAO Protest System,” Wiley Rein LLP (Dec. 19, 2016), <https://www.wileyrein.com/newsroom-articles-A-Data-Driven-Look-at-the-GAO-Protest-System.html>.

²¹See Paul F. Khoury, Brian Walsh & Gary S. Ward, “A Data-Driven Look at the GAO Protest System,” Wiley Rein LLP (Dec. 19, 2016), <https://www.wileyrein.com/newsroom-articles-A-Data-Driven-Look-at-the-GAO-Protest-System.html> (observing that “when protesters prepare supplemental protests, their counsel does so with the benefit of the contemporaneous evaluation record” and “that protesters tend to be more successful when they raise challenges based on what they discover in the contemporaneous evaluation record”).

²²See Thomson Reuters’ Government Contracts Year in Review Conference Briefs Covering 2011–2018.

²³31 U.S.C.A. § 3553(c)(1).

²⁴See Rand Study at 9 (providing contrast of protest process at GAO and the COFC).

²⁵See Daniel I. Gordon, “Bid Protests: The Costs Are Real, But the Benefits Outweigh Them,” 42 Pub. Cont. L.J. 489 (Spring 2013).

²⁶See, e.g., Kipa, Szeliga & Madon, “Identifying Viable Preaward Bid Protest Allegations at the GAO,” 10-6 Briefing Papers 1 (May 2010); Szeliga, Kipa & Marcinak, “Identifying Viable Postaward Bid Protest Allegations at the GAO,” 09-4 Briefing Papers 1 (Mar. 2009).

²⁷E.g., GAO Bid Protest Annual Report to Congress for Fiscal Year 2018, B-158766 (Nov. 27, 2018), <https://www.gao.gov/assets/700/695707.pdf>; GAO Bid Protest Annual Report to Congress for Fiscal Year 2017, B-158766 (Nov. 13, 2017), <https://www.gao.gov/assets/690/688362.pdf>; GAO Bid Protest Annual Report to Congress for Fiscal Year 2016, B-158766 (Dec. 15, 2017), <https://www.gao.gov/assets/690/681662.pdf>.

²⁸Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018), 60 GC ¶ 287.

²⁹Red River Waste Sols., LP, Comp. Gen. Dec. B-411760.2, 2016 CPD ¶ 45; Fire Risk Mgmt., Inc., Comp. Gen. Dec. B-411552, 2015 CPD ¶ 259, 57 GC

¶ 299; Triad Isotope, Inc., Comp. Gen. Dec. B-411360, July 16, 2015, 2015 CPD ¶ 220; Aldevra, Comp. Gen. Dec. B-406950 et al., Oct. 9, 2012, 2014 CPD ¶ 2; DNO Inc., Comp. Gen. Dec. B-406256 et al., Mar. 22, 2012, 2012 CPD ¶ 136, 54 GC ¶ 154.

³⁰Tempus Nova, Inc., Comp. Gen. Dec. B-412821, June 14, 2016, 2016 CPD ¶ 161, 58 GC ¶ 273.

³¹Bluehorse Corp., Comp. Gen. Dec. B-413533, Oct. 28, 2016, 2016 CPD ¶ 302.

³²CMS Contract Mgmt. Servs. v. Mass. Housing Fin. Agency, 745 F.3d 1379 (Fed. Cir. 2014), 56 GC ¶ 104.

³³U.S. Foodservice, Inc. v. United States, 100 Fed. Cl. 659 (2011); Verizon Wireless, Comp. Gen. Dec. B-406854, Sept. 17, 2012, 2012 CPD ¶ 260, 54 GC ¶ 364.

³⁴Acetris Health, LLC v. United States, 138 Fed. Cl. 579 (2018).

³⁵See, e.g., Aldevra, Comp. Gen. Dec. B-406950 et al., Oct. 9, 2012, 2014 CPD ¶ 2 (recommending that the agency conduct further market research).

³⁶CWTSatoTravel, Comp. Gen. Dec. B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

³⁷CWTSatoTravel, Comp. Gen. Dec. B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

³⁸Millennium Corp., Comp. Gen. Dec. B-416485.2, Oct. 1, 2018, 2018 CPD ¶ 329, 60 GC ¶ 344.

³⁹Coastal Int’l Sec., Inc., Comp. Gen. Dec. B-411756 et al., Oct. 19, 2015, 2015 CPD ¶ 340.

⁴⁰Global Tech. Sys., Comp. Gen. Dec. B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335.

⁴¹Office Design Grp., Comp. Gen. Dec. B-415411, Jan. 3, 2018, 2018 CPD ¶ 43, 60 GC ¶ 50 (apparently the only protest alleging a patent ambiguity sustained by GAO in the past 10 years).

⁴²See, e.g., Millennium Corp., Comp. Gen. Dec. B-416485.2, Oct. 1, 2018, 2018 CPD ¶ 329, 60 GC ¶ 344; CWTSatoTravel, Comp. Gen. Dec. B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

⁴³Ekagra Partners, LLC, Comp. Gen. Dec. B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83.

⁴⁴Mechanix Wear, Inc., Comp. Gen. Dec. B-416704 et al., Nov. 19, 2018, 2018 CPD ¶ 395.

⁴⁵USA Jet Airlines, Inc., Comp. Gen. Dec. B-404666, Apr. 1, 2011, 2011 CPD ¶ 91, 53 GC ¶ 201.

⁴⁶Iyabak Constr., LLC, Comp. Gen. Dec. B-409196, Feb. 6, 2014, 2014 CPD ¶ 62, 56 GC ¶ 79.

⁴⁷See, e.g., Ekagra Partners, LLC, Comp. Gen. Dec. B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83.

- ⁴⁸FMS Invest. Corp. v. United States, 139 Fed. Cl. 221 (2018).
- ⁴⁹JER 370 Third St., LLC, Comp. Gen. Dec. B-402025.2 et al., June 1, 2010, 2010 CPD ¶ 120, 52 GC ¶ 218.
- ⁵⁰Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539 (2016).
- ⁵¹XTec, Inc., Comp. Gen. Dec. B-410778.3, Oct. 1, 2015, 2015 CPD ¶ 292, 57 GC ¶ 327.
- ⁵²Starry Assocs., 127 Fed. Cl. at 549.
- ⁵³XTec, Inc., Comp. Gen. Dec. B-410778.3, Oct. 1, 2015, 2015 CPD ¶ 292, 57 GC ¶ 327.
- ⁵⁴Global Computer Enters., Inc., Comp. Gen. Dec. B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69.
- ⁵⁵Global Computer Enters., Inc., Comp. Gen. Dec. B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69.
- ⁵⁶ICI Servs., Inc., Comp. Gen. Dec. B-409231.2, Apr. 23, 2014, 2014 CPD ¶ 132.
- ⁵⁷Infoshred LLC, Comp. Gen. Dec. B-407086, Oct. 26, 2012, 2012 CPD ¶ 298, 54 GC ¶ 384.
- ⁵⁸T-Square Logistics Servs. Corp. v. United States, 134 Fed. Cl. 550 (2017).
- ⁵⁹AECOM Tech. Servs., Inc., Comp. Gen. Dec. B-411862, Nov. 12, 2015, 2015 CPD ¶ 353.
- ⁶⁰Ocean Servs., LLC, Comp. Gen. Dec. B-404690, Apr. 6, 2011, 2011 CPD ¶ 73, 53 GC ¶ 155.
- ⁶¹SafeGuard Servs., LLC, Comp. Gen. Dec. B-404910, June 28, 2011, 2011 CPD ¶ 132.
- ⁶²See, e.g., SafeGuard Servs., LLC, Comp. Gen. Dec. B-404910, June 28, 2011, 2011 CPD ¶ 132; AECOM Tech. Servs., Inc., Comp. Gen. Dec. B-411862, Nov. 12, 2015, 2015 CPD ¶ 353, 57 GC ¶ 394; Ocean Servs., LLC, Comp. Gen. Dec. B-404690, Apr. 6, 2011, 2011 CPD ¶ 73, 53 GC ¶ 155.
- ⁶³See, e.g., Infoshred LLC, Comp. Gen. Dec. B-407086, Oct. 26, 2012, 2012 CPD ¶ 298, 54 GC ¶ 384.
- ⁶⁴ANHAM FZCO, Comp. Gen. Dec. B-415969 et al., May 8, 2018, 2018 CPD ¶ 184.
- ⁶⁵Sys. Studies & Simulation, Inc., Comp. Gen. Dec. B-409375.2 et al., May 12, 2014, 2014 CPD ¶ 153, 56 GC ¶ 233.
- ⁶⁶Raytheon Tech. Servs. Co. LLC, Comp. Gen. Dec. B-404655.4 et al., Oct. 11, 2011, 2011 CPD ¶ 236, 53 GC ¶ 411.
- ⁶⁷Bahrain Telecomms. Co., B.S.C., Comp. Gen. Dec. B-407682.2 et al., Jan. 28, 2013, 2013 CPD ¶ 71, 55 GC ¶ 116.
- ⁶⁸Paradigm Techs., Inc., Comp. Gen. Dec. B-409221.2 et al., Aug. 1, 2014, 2014 CPD ¶ 257, 56 GC ¶ 335.
- ⁶⁹Tipton Textile Rental, Inc., Comp. Gen. Dec. B-406372, May 9, 2012, 2012 CPD ¶ 156.
- ⁷⁰Philips Healthcare Informatics, Comp. Gen. Dec. B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220.
- ⁷¹CR/ZWS LLC, Comp. Gen. Dec. B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.
- ⁷²Springfield Parcel C, LLC v. United States, 124 Fed. Cl. 163 (2015).
- ⁷³See, e.g., Bahrain Telecomms. Co. B.S.C., Comp. Gen. Dec. B-407682.2 et al., Jan. 28, 2013, 2013 CPD ¶ 71, 55 GC ¶ 116.
- ⁷⁴See, e.g., CR/ZWS LLC, B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.
- ⁷⁵Mission Essential Personnel, LLC, Comp. Gen. Dec. B-404218.2 et al., June 14, 2011, 2011 CPD ¶ 120, 53 GC ¶ 283.
- ⁷⁶Export 220 Volt, Inc., Comp. Gen. Dec. B-412303.2, Jan. 20, 2016, 2016 CPD ¶ 25.
- ⁷⁷Solers, Inc., Comp. Gen. Dec. B-414672.3 et al., Oct. 9, 2018, 2018 CPD ¶ 350.
- ⁷⁸Raytheon Co., Comp. Gen. Dec. B-404998, July 25, 2011, 2011 CPD ¶ 232, 54 GC ¶ 31.
- ⁷⁹One Largo Metro LLC, Comp. Gen. Dec. B-404896 et al., June 20, 2011, 2011 CPD ¶ 128, 53 GC ¶ 255.
- ⁸⁰Veteran Tech. Integrators, LLC, Comp. Gen. Dec. B-415716.3, June 20, 2018, 2018 CPD ¶ 295, 60 GC ¶ 333; McCann-Erickson USA, Inc., Comp. Gen. Dec. B-414787, Sept. 8, 2017, 2017 CPD ¶ 300, 59 GC ¶ 310.
- ⁸¹AdvanceMed Corp., Comp. Gen. Dec. B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.
- ⁸²Quality Servs. Int'l, LLC, Comp. Gen. Dec. B-410156 et al., Nov. 3, 2014, 2014 CPD ¶ 330.
- ⁸³Logistics 2020, Inc., Comp. Gen. Dec. B-408543 et al., Nov. 6, 2013, 2013 CPD ¶ 258.
- ⁸⁴J.C.N. Constr., Inc. v. United States, 107 Fed. Cl. 503 (2012); BayFirst Sols., LLC v. United States, 102 Fed. Cl. 677 (2012); ManTech Advanced Sys. Int'l, Inc., Comp. Gen. Dec. B-416734, Nov. 27, 2018, 2018 CPD ¶ 408; Transworld Sys., Inc., Comp. Gen. Dec. B-414090.13 et al., Dec. 22, 2017, 2019 CPD ¶ 2; Emergence Grp., Comp. Gen. Dec. B-404844.5 et al., Sept. 26, 2011, 2012 CPD ¶ 132, 54 GC ¶ 155.
- ⁸⁵Orion Tech., Inc., Comp. Gen. Dec. B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268, 54 GC ¶ 326.
- ⁸⁶EFS Ebrex SARL, Comp. Gen. Dec. B-416076, June 4, 2018, 2018 CPD ¶ 201; SURVICE Eng'g Co.,

LLC, Comp. Gen. Dec. B-414519, July 5, 2017, 2017 CPD ¶ 237, 59 GC ¶ 265; Premiums & Specialties, Inc., Comp. Gen. Dec. B-410247, Nov. 13, 2014, 2014 CPD ¶ 340; Native Res. Dev. Co., Comp. Gen. Dec. B-409617.3, July 21, 2014, 2014 CPD ¶ 217, 56 GC ¶ 284; Risk Analysis & Mitigation Partners, Comp. Gen. Dec. B-409687 et al., July 15, 2014, 2014 CPD ¶ 214, 56 GC ¶ 285; AeroSage LLC, Comp. Gen. Dec. B-409627, July 2, 2014, 2014 CPD ¶ 192, 56 GC ¶ 243; McGoldrick Constr. Servs. Corp., Comp. Gen. Dec. B-409252.2, Mar. 28, 2014, 2014 CPD ¶ 114, 56 GC ¶ 167; Coburn Contractors, LLC, Comp. Gen. Dec. B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230, 55 GC ¶ 345; IBM Global Bus. Servs., Comp. Gen. Dec. B-404498 et al., Feb. 23, 2011, 2012 CPD ¶ 36.

⁸⁷Savvee Consulting, Inc., Comp. Gen. Dec. B-408416 et al., Sept. 18, 2013, 2013 CPD ¶ 231, 55 GC ¶ 353.

⁸⁸Sayres & Assocs. Corp., Comp. Gen. Dec. B-408253 et al., Aug. 1, 2013, 2013 CPD ¶ 206.

⁸⁹EFS Ebrex SARL, Comp. Gen. Dec. B-416076, June 4, 2018, 2018 CPD ¶ 201.

⁹⁰Clay Group, LLC, Comp. Gen. Dec. B-406647 et al., July 30, 2012, 2012 CPD ¶ 214, 54 GC ¶ 291.

⁹¹Exelis Sys. Corp., Comp. Gen. Dec. B-407111.5 et al., May 20, 2013, 2013 CPD ¶ 123, 55 GC ¶ 213.

⁹²WAI-Stoller Servs., LCC, Comp. Gen. Dec. B-408248.6 et al., May 22, 2014, 2014 CPD ¶ 164.

⁹³IAP World Servs., Inc., Comp. Gen. Dec. B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171, 55 GC ¶ 269.

⁹⁴VariQ Corp., Comp. Gen. Dec. B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

⁹⁵Solers, Inc., Comp. Gen. Dec. B-414672.3 et al., Oct. 9, 2018, 2018 CPD ¶ 350.

⁹⁶J.R. Conkey & Assoc., Inc. dba Solar Power Integrators, Comp. Gen. Dec. B-406024.4, Aug. 22, 2012, 2012 CPD ¶ 241, 54 GC ¶ 309; Sys. Eng'g Int'l, Inc., Comp. Gen. Dec. B-402754, July 20, 2010, 2010 CPD ¶ 167, 52 GC ¶ 273.

⁹⁷NikSoft Sys. Corp., Comp. Gen. Dec. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104, 54 GC ¶ 121.

⁹⁸CALNET, Inc., Comp. Gen. Dec. B-413386.2 et al., Oct. 28, 2016, 2016 CPD ¶ 318.

⁹⁹Castro & Co., Comp. Gen. Dec. B-412398, Jan. 29, 2016, 2016 CPD ¶ 52.

¹⁰⁰Celta Servs., Inc., Comp. Gen. Dec. B-411835 et al., Nov. 2, 2015, 2015 CPD ¶ 362.

¹⁰¹Nexant, Inc., Comp. Gen. Dec. B-407708 et al., Jan. 30, 2013, 2013 CPD ¶ 59, 55 GC ¶ 83.

¹⁰²Prof. Serv. Indus., Inc., Comp. Gen. Dec.

B-412721.2 et al., July 21, 2016, 2016 CPD ¶ 234, 58 GC ¶ 332; Deloitte Consulting, LLP, Comp. Gen. Dec. B-412125.2 et al., Apr. 7, 2016, 2016 CPD ¶ 119; Y&K Maint., Inc., Comp. Gen. Dec. B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93.

¹⁰³Sev1Tech, Inc., Comp. Gen. Dec. B-416811 et al., Dec. 18, 2018, 2018 CPD ¶ 429, 61 GC ¶ 19; Patricio Enters. Inc., Comp. Gen. Dec. B-412738, 2016 CPD ¶ 145; ACS Gov't Servs., Inc., Comp. Gen. Dec. B- 293014, 2004 CPD ¶ 18, 46 GC ¶ 92.

¹⁰⁴Starry Assocs., Inc., Comp. Gen. Dec. B-410968.2, Aug. 11, 2015, 2015 CPD ¶ 253.

¹⁰⁵Jacobs Tech., Inc., Comp. Gen. Dec. B-413389 et al., Oct. 18, 2016, 2016 CPD ¶ 312.

¹⁰⁶Glacier Tech. Sols., LLC, Comp. Gen. Dec. B-412990.2, Oct. 17, 2016, 2016 CPD ¶ 311.

¹⁰⁷Kratos Def. & Rocket Support Servs., Inc., Comp. Gen. Dec. B-413143 et al., Aug. 23, 2016, 2016 CPD ¶ 227.

¹⁰⁸W.P. Tax & Accounting Grp., Comp. Gen. Dec. B-411899, Nov. 13, 2015, 2015 CPD ¶ 331, 57 GC ¶ 375; Lily Timber Servs., Comp. Gen. Dec. B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246; Emergint Techs., Inc., Comp. Gen. Dec. B-407006, Oct. 18, 2012, 2012 CPD ¶ 295, 54 GC ¶ 393.

¹⁰⁹I.M. Sys. Group, Comp. Gen. Dec. B-404583 et al., Feb. 25, 2011, 2011 CPD ¶ 64, 53 GC ¶ 137.

¹¹⁰Iron Vine Sec., LLC, Comp. Gen. Dec. B-409015, Jan. 22, 2014, 2014 CPD ¶ 193.

¹¹¹Target Media Mid Atl., Inc., Comp. Gen. Dec. B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358, 59 GC ¶ 9 (cost realism); GiaCare & MedTrust JV, LLC, Comp. Gen. Dec. B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321 (price realism); Smartronix, Inc., Comp. Gen. Dec. B-411970 et al., Nov. 25, 2015, 2015 CPD ¶ 373 (cost realism); Sci. Applications Int'l Corp., Comp. Gen. Dec. B-407105 et al., Nov. 1, 2012, 2012 CPD ¶ 310 (price realism).

¹¹²Digital Techs., Inc., Comp. Gen. Dec. B-406085 et al., Feb. 6, 2012, 2012 CPD ¶ 94, 54 GC ¶ 156.

¹¹³Prism Maritime, LLC, Comp. Gen. Dec. B-409267.2 et al., Apr. 7, 2014, 2014 CPD ¶ 124, 56 GC ¶ 175.

¹¹⁴SURVICE Eng'g Co. LLC, Comp. Gen. Dec. B-414519, July 5, 2017, 2017 CPD ¶ 237, 59 GC ¶ 265.

¹¹⁵A-P-T Research, Inc., Comp. Gen. Dec. B-41373.2, Apr. 3, 2017, 2017 CPD ¶ 112; MicroTechnologies, LLC, Comp. Gen. Dec. B-413091 et al., Aug. 11, 2016, 2016 CPD ¶ 219, 58 GC ¶ 322.

¹¹⁶Valor Healthcare, Inc., Comp. Gen. Dec. B-412960 et al., July 15, 2016, 2016 CPD ¶ 206.

¹¹⁷AdvanceMed Corp., Comp. Gen. Dec. B-414373, May 25, 2017, 2017 CPD ¶ 160, 59 GC ¶ 190.

¹¹⁸ENSCO, Inc., Comp. Gen. Dec. B-414844.4, et al., July 5, 2018, 2018 CPD ¶ 260.

¹¹⁹Tantus Techs., Inc., Comp. Gen. Dec. B-411608 et al., Sept. 14, 2015, 2015 CPD ¶ 299.

¹²⁰Triad Int'l Maint. Corp., Comp. Gen. Dec. B-408374, Sept. 5, 2013, 2013 CPD ¶ 208, 55 GC ¶ 328.

¹²¹MPRI, Div. of L-3 Servs, Inc., Comp. Gen. Dec. B-402548 et al., June 4, 2010, 2011 CPD ¶ 108, 53 GC ¶ 238.

¹²²Gen. Dynamics Advanced Info. Sys., Inc., Comp. Gen. Dec. B-411771 et al., Oct. 20, 2015, 2015 CPD ¶ 322, 57 GC ¶ 355.

¹²³Lifecycle Constr. Servs., LLC, Comp. Gen. Dec. B-406907, Sept. 27, 2012, 2012 CPD ¶ 269.

¹²⁴NCI Info. Sys., Inc., Comp. Gen. Dec. B-412870.2, Oct. 14, 2016, 2016 CPD ¶ 310.

¹²⁵CFS-KBR Marianas Support Servs., LLC, Comp. Gen. Dec. B-410486, Jan. 2, 2015, 2015 CPD ¶ 22, 57 GC ¶ 73.

¹²⁶ITT Sys. Corp., Comp. Gen. Dec. B-405865 et al., Jan. 6, 2012, 2012 CPD ¶ 44, 54 GC ¶ 102.

¹²⁷Raymond Express Int'l, Comp. Gen. Dec. B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317, 56 GC ¶ 375; 6K Sys., Inc.-Protest and Costs, Comp. Gen. Dec. B-408124.3 et al., Dec. 9, 2013, 2014 CPD ¶ 347.

¹²⁸Technatomy Corp., Comp. Gen. Dec. B-414672.5, Oct. 10, 2018, 2018 CPD ¶ 353, 61 GC ¶ 104.

¹²⁹Red River Computer Co., Comp. Gen. Dec. B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7.

¹³⁰David Jones CPA PC, Comp. Gen. Dec. B-414701, Aug. 25, 2017, 2017 CPD ¶ 265.

¹³¹KWR Constr., Inc. v. United States, 24 Fed. Cl. 345, 358–59 (2015).

¹³²CGI Fed. Inc., Comp. Gen. Dec. B-410330.2, Dec. 10, 2014, 2014 CPD ¶ 366.

¹³³CACI, Inc.-Fed., Comp. Gen. Dec. B-413028 et al., Aug. 3, 2016, 2016 CPD ¶ 238, 58 GC ¶ 352.

¹³⁴See, e.g., Solers, Inc., Comp. Gen. Dec. B-414672.3 et al., Oct. 9, 2018, 2018 CPD ¶ 350; AdvanceMed Corp., Comp. Gen. Dec. B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

¹³⁵See, e.g., CR/ZWS LLC, Comp. Gen. Dec. B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.

¹³⁶DRS C3 Sys., LLC, Comp. Gen. Dec. B-310825

et al., 2008 CPD ¶ 103, 50 GC ¶ 301.

¹³⁷NikSoft Sys. Corp., Comp. Gen. Dec. B-406179, Feb. 29, 2012, 2012 CPD ¶ 104, 54 GC ¶ 121; Solers, Inc., Comp. Gen. Dec. B-404032.3 et al., Apr. 6, 2011, 2011 CPD ¶ 83, 53 GC ¶ 212.

¹³⁸Kollsman Inc., Comp. Gen. Dec. B-406990, Oct. 15, 2012, 2013 CPD ¶ 2, 55 GC ¶ 27.

¹³⁹Helicopter Transp. Servs. LLC, Comp. Gen. Dec. B-400295 et al., 2008 CPD ¶ 180, 50 GC ¶ 379.

¹⁴⁰Clean Harbors Env'tl. Servs., Inc., Comp. Gen. Dec. B-296176.2, 2005 CPD ¶ 222, 48 GC ¶ 10.

¹⁴¹US21, Inc., Comp. Gen. Dec. B-415045.9, Sept. 10, 2018, 2018 CPD ¶ 404; Halbert Constr. Co., Comp. Gen. Dec. B-413213, Sept. 8, 2016, 2016 CPD ¶ 254.

¹⁴²East Coast Utility Contractors, Ltd., Comp. Gen. Dec. B-415493 et al., Jan. 16, 2018, 2018 CPD ¶ 30, 60 GC ¶ 51.

¹⁴³US Info. Techs. Corp., Comp. Gen. Dec. B-404357 et al., Feb. 2, 2011, 2011 CPD ¶ 74, 53 GC ¶ 166; Al Raha Grp. for Tech. Servs., Inc., Comp. Gen. Dec. B-411015.2 et al., Apr. 22, 2015, 2015 CPD ¶ 134.

¹⁴⁴DRS C3 Sys., LLC, Comp. Gen. Dec. B-310825 et al., 2008 CPD ¶ 103, 50 GC ¶ 301.

¹⁴⁵Supreme Foodservice GmbH, Comp. Gen. Dec. B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292, 54 GC ¶ 385.

¹⁴⁶Philips Healthcare Informatics, Comp. Gen. Dec. B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220.

¹⁴⁷CIGNA Gov't Servs., LLC, Comp. Gen. Dec. B-401062.2 et al., May 6, 2009, 2010 CPD ¶ 283, 53 GC ¶ 24.

¹⁴⁸CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 386 (2010).

¹⁴⁹Ace Info Sols, Inc. Comp. Gen. Dec. B-414650.10 et al., May 21, 2018, 2018 CPD ¶ 189.

¹⁵⁰Ne. Mil. Sales, Inc., Comp. Gen. Dec. B-404153, Jan. 13, 2011, 2011 CPD ¶ 2, 53 GC ¶ 49; Contrack Int'l, Inc., Comp. Gen. Dec. B-401871.5 et al., May 24, 2010, 2010 CPD ¶ 126, 52 GC ¶ 264; Shaw-Parson Infrastructure Recovery Consultants, LLC, Comp. Gen. Dec. B-401679.4 et al., Mar. 10, 2010, 2010 CPD ¶ 77, 52 GC ¶ 163.

¹⁵¹TOTE Servs., Inc., Comp. Gen. Dec. B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182.

¹⁵²VariQ Corp., Comp. Gen. Dec. B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

¹⁵³Brican Inc., Comp. Gen. Dec. B-402602, June 17, 2010, 2010 CPD ¶ 141, 52 GC ¶ 245.

¹⁵⁴Global Language Ctr., Comp. Gen. Dec.

B-413503.8, June 1, 2017, 2017 CPD ¶ 238, 59 GC ¶ 288.

¹⁵⁵MLU Servs., Inc., Comp. Gen. Dec. B-414555.3 et al., July 17, 2017, 2017 CPD ¶ 225.

¹⁵⁶Rotech Healthcare, Inc., Comp. Gen. Dec. B-413024 et al., Aug. 17, 2016, 2016 CPD ¶ 225.

¹⁵⁷KMR, LLC, Comp. Gen. Dec. B-292860, 2003 CPD ¶ 233, 46 GC ¶ 113.

¹⁵⁸United Paradyne Corp., Comp. Gen. Dec. B-297758, 2006 CPD ¶ 47, 48 GC ¶ 128.

¹⁵⁹Xtreme Concepts, Inc., Comp. Gen. Dec. B-413711, Dec. 19, 2016, 2016 CPD ¶ 372.

¹⁶⁰EFW Inc., Comp. Gen. Dec. B-412608 et al., Apr. 7, 2016, 2016 CPD ¶ 304, 59 GC ¶ 7.

¹⁶¹Computer Scis. Corp., Comp. Gen. Dec. B-408694.7 et al., Nov. 3, 2014, 2014 CPD ¶ 331.

¹⁶²See, e.g., TOTE Servs., Inc., Comp. Gen. Dec. B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182.

¹⁶³See, e.g., CIGNA Gov't Servs., Comp. Gen. Dec. B-401062.2 et al., May 6, 2009, 2010 CPD ¶ 283, 53 GC ¶ 24.

¹⁶⁴Shearwater Mission Support, LLC, Comp. Gen. Dec. B-416717, Nov. 20, 2018, 2018 CPD ¶ 402, 60 GC ¶ 384 (agency conducted discussions based on results of price realism analysis that was inconsistent with solicitation).

¹⁶⁵Q Integrated Cos., LLC v. United States, 133 Fed. Cl. 479 (2017) (agency failed to disclose to protester in discussions that certain past performance was deemed “not relevant” and that the agency was concerned about the impartiality of certain past performance questionnaires); Sentrillion Corp., Comp. Gen. Dec. B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207, 55 GC ¶ 318.

¹⁶⁶EFS Ebrex Sarl, Comp. Gen. Dec. B-416076, June 4, 2016, 2016 CPD ¶ 201; Paragon Tech. Grp., Comp. Gen. Dec. B-412636, Apr. 22, 2016, 2016 CPD ¶ 113, 58 GC ¶ 195; EFW Inc., Comp. Gen. Dec. B-412608 et al., Apr. 7, 2016, 2016 CPD ¶ 304, 59 GC ¶ 7 (agency framed its discussion questions in a manner that did not reflect the breadth of its concerns); CFS-KBR Marianas Support Servs. LLC, Comp. Gen. Dec. B-410486 et al., Jan. 2, 2015, 2015 CPD ¶ 22, 57 GC ¶ 73 (agency's discussions were based on irrational evaluation of proposals and thus framed the questions in a manner that misinformed the offeror of the real problems with its proposal).

¹⁶⁷Sentrillion Corp., Comp. Gen. Dec. B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207, 55 GC ¶ 318.

¹⁶⁸Vencore Servs. & Sols., Inc., Comp. Gen. Dec. B-412949 et al., July 18, 2016, 2016 CPD ¶ 346, 58

GC ¶ 450 (agency relied on a significantly inflated estimate of the likely cost of performance to advise the protester that its labor rates were too low; agency subsequently revised its flawed cost estimate but did not reopen discussions).

¹⁶⁹Northrop Grumman Sys. Corp., Comp. Gen. Dec. B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309.

¹⁷⁰YMCA of Greater Los Angeles, Comp. Gen. Dec. B-414596 et al., July 24, 2017, 2017 CPD ¶ 245.

¹⁷¹Int'l Waste Indus., Comp. Gen. Dec. B-411338, July 7, 2015, 2015 CPD ¶ 196, 57 GC ¶ 233 (agency engaged in discussions with the awardee, permitting it to address pricing terms, but did not hold discussions with protester); Marathon Med. Corp., Comp. Gen. Dec. B-408052, June 4, 2014, 2014 CPD ¶ 162, 56 GC ¶ 214 (agency allowed the awardee, but not the protester, to submit information to demonstrate that its proposal was acceptable); ERIE Strayer Co., Comp. Gen. Dec. B-406131, Feb. 21, 2012, 2012 CPD ¶ 101, 54 GC ¶ 129 (agency held discussions with only the awardee).

¹⁷²Rotech Healthcare, Inc., Comp. Gen. Dec. B-413024 et al., Aug. 17, 2016, 2016 CPD ¶ 225.

¹⁷³Raytheon Co., Comp. Gen. Dec. B-404998, July 25, 2011, 2011 CPD ¶ 232, 54 GC ¶ 31 (protester was not afforded an opportunity to address its significant weaknesses even though one of the awardees was).

¹⁷⁴See, e.g., YMCA of Greater Los Angeles, Comp. Gen. Dec. B-414596 et al., July 24, 2017, 2017 CPD ¶ 245 (holding second round of discussions only with the awardee).

¹⁷⁵C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁷⁶FAR 9.505-1, 9.505-2.

¹⁷⁷Dell Servs. Fed. Gov't Inc., Comp. Gen. Dec. B-414461 et al., June 21, 2017, 2017 CPD ¶ 192, 59 GC ¶ 246.

¹⁷⁸B.L. Herbert-Brasfield & Gorrie, JV, Comp. Gen. Dec. B-402229, Feb. 16, 2010, 2010 CPD ¶ 69; McCarthy/Hunt, JV, Comp. Gen. Dec. B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68, 52 GC ¶ 138.

¹⁷⁹L-3 Servs., Inc., Comp. Gen. Dec. B-400134.11 et al., Sept. 3, 2009, 2009 CPD ¶ 171, 51 GC ¶ 338.

¹⁸⁰FAR 9.505.

¹⁸¹C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁸²AdvanceMed Corp., Comp. Gen. Dec. B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

¹⁸³Cahaba Safeguard Admins., LLC, Comp. Gen. Dec. B-401842.2, 2010 CPD ¶ 39, 52 GC ¶ 77; C2C

Sols., Inc., Comp. Gen. Dec. B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38.

¹⁸⁴DRS Tech. Servs., Inc., Comp. Gen. Dec. B-411573.2 et al., Nov. 9, 2015, 2015 CPD ¶ 363.

¹⁸⁵NCI Info. Sys., Inc., Comp. Gen. Dec. B-4128670.2, 2016 CPD ¶ 310.

¹⁸⁶A-P-T Research, Inc., Comp. Gen. Dec. B-413731.2, Apr. 3, 2017, 2017 CPD ¶ 112, 59 GC ¶ 144.

¹⁸⁷FAR 9.505(b).

¹⁸⁸C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁸⁹AT&T Gov't Sols. Inc., Comp. Gen. Dec. B-413012 et al., July 28, 2016, 2016 CPD ¶ 237.

¹⁹⁰Dell Servs. Fed. Gov't, Inc., Comp. Gen. Dec. B-414461.3 et al., June 19, 2018, 2018 CPD ¶ 213, 60 GC ¶ 234.

¹⁹¹Int'l Res. Grp., Comp. Gen. Dec. B-409346.2 et al., Dec. 11, 2014, 2014 CPD ¶ 369, 57 GC ¶ 8; PCCP Constrs., JV, Comp. Gen. Dec. B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156, 53 GC ¶ 327.

¹⁹²Satellite Tracking of People, LLC, Comp. Gen. Dec. B-411845 et al., Nov. 6, 2015, 2015 CPD ¶ 347.

¹⁹³C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁹⁴TOTE Servs., Inc., Comp. Gen. Dec. B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182; Deloitte Consulting, LLP, Comp. Gen. Dec. B-412125.2 et al., Apr. 15, 2016, 2016 CPD ¶ 119; SRA Int'l, Inc., Comp. Gen. Dec. B-408624 et al., Nov. 25, 2013, 2013 CPD ¶ 275, 55 GC ¶ 401; TriCenturion, Inc., Comp. Gen. Dec. B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52, 54 GC ¶ 128; Irving Burton Assocs., Inc., Comp. Gen. Dec. B-401983.3, Mar. 29, 2010, 2010 CPD ¶ 92, 52 GC ¶ 209; Navistar Def. LLC, Comp. Gen. Dec. B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258, 52 GC ¶ 36; Bruce Bancroft, Comp. Gen. Dec. B-400404.7 et al., Nov. 17, 2009, 2010 CPD ¶ 9.

¹⁹⁵VariQ Corp., Comp. Gen. Dec. B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

¹⁹⁶DRS ICAS, LLC, Comp. Gen. Dec. B-401852.4 et al., Sept. 8, 2010, 2010 CPD ¶ 261, 52 GC ¶ 406.

¹⁹⁷Novetta, Inc., Comp. Gen. Dec. B-414672.4 et al., Oct. 9, 2018, 2018 CPD ¶ 349 (agency failed to document why source selection board removed a strength assigned by technical evaluation board); Immersion Consulting, LLC, Comp. Gen. Dec. B-415155 et al., Dec. 4, 2017, 2017 CPD ¶ 373, 60 GC ¶ 49 (source selection authority did not document removal of strengths and weaknesses assigned by source selection evaluation board to awardee); Arcanum Grp., Inc., Comp. Gen. Dec. B-413682.2 et al., Mar. 29, 2017,

2017 CPD ¶ 270 (source selection authority did not explain why he disagreed with source selection evaluation board's conclusions about awardee's past performance).

¹⁹⁸CORTEK, Inc., Comp. Gen. Dec. B-412047, Dec. 17, 2015, 2015 CPD ¶ 397, 58 GC ¶ 49.

¹⁹⁹C&B Constr., Inc., Comp. Gen. Dec. B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1, 52 GC ¶ 26.

²⁰⁰Dynaxys LLC, Comp. Gen. Dec. B-414459.4, Apr. 18, 2018, 2018 CPD ¶ 152, 60 GC ¶ 173; Swets Info. Servs., Comp. Gen. Dec. B-410078, Oct. 20, 2014, 2014 CPD ¶ 311, 56 GC ¶ 376; Solers Inc., Comp. Gen. Dec. B-409079 et al., Jan. 27, 2014, 2014 CPD ¶ 74, 56 GC ¶ 114.

²⁰¹Trailboss Enters., Inc., Comp. Gen. Dec. B-407093, Nov. 6, 2012, 2013 CPD ¶ 232, 55 GC ¶ 382.

²⁰²Clark/Foulger-Pratt JV, Comp. Gen. Dec. B-406627 et al., July 23, 2012, 2012 CPD ¶ 213.

²⁰³Res. Dimensions, LLC, Comp. Gen. Dec. B-404536, Feb. 24, 2011, 2011 CPD ¶ 50, 53 GC ¶ 111.

²⁰⁴NOVA Corp., Comp. Gen. Dec. B-408046 et al., June 4, 2013, 2013 CPD ¶ 127, 55 GC ¶ 197.

²⁰⁵W. Coast Gen. Corp., Comp. Gen. Dec. B-411916.2, Dec. 14, 2015, 2015 CPD ¶ 392.

²⁰⁶Metis Sols., LLC, Comp. Gen. Dec. B-411173.2 et al., July 20, 2015, 2015 CPD ¶ 221, 57 GC ¶ 264.

²⁰⁷Arcadis U.S., Inc., Comp. Gen. Dec. B-412828, June 16, 2016, 2016 CPD ¶ 198.

²⁰⁸Threat Mgmt. Grp., LLC, Comp. Gen. Dec. B-413729, Dec. 21, 2016, 2017 CPD ¶ 9.

²⁰⁹See, e.g., Arcadis U.S., Inc., Comp. Gen. Dec. B-412828, June 16, 2016, 2016 CPD ¶ 198; W. Coast Gen. Corp., Comp. Gen. Dec. B-411916.2, Dec. 14, 2015, 2015 CPD ¶ 392.

²¹⁰Sheridan Corp. v. United States, 95 Fed. Cl. 141, 153 (2010).

²¹¹Castro & Co., LLC, Comp. Gen. Dec. B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74, 60 GC ¶ 77; Immersion Consulting, LLC, Comp. Gen. Dec. B-415155.4 et al., May 18, 2018, 2018 CPD ¶ 187, 60 GC ¶ 235.

²¹²Power Connector, Inc., Comp. Gen. Dec. B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186, 53 GC ¶ 398.

²¹³DZSP 21 LLC v. United States, 139 Fed. Cl. 110 (2018).

²¹⁴Centerra Grp. LLC v. United States, 138 Fed. Cl. 407 (2018).

²¹⁵ARxIUM, Inc., 136 Fed. Cl. 188 (2018).

²¹⁶DRS ICAS, LLC, Comp. Gen. Dec. B-401852.4 et al., Sept. 8, 2010, 2010 CPD ¶ 261, 52 GC ¶ 406.

²¹⁷American K-9 Detection Servs., Inc., Comp. Gen. Dec. B-400464.6, 2009 CPD ¶ 107, 51 GC ¶ 312.

²¹⁸Deloitte Consulting, LLP, Comp. Gen. Dec. B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355, 59 GC ¶ 29.

²¹⁹Logistics Mgmt. Int'l, Inc. Comp. Gen. Dec. B-411015.4 et al., Nov. 20, 2015, 2015 CPD ¶ 356.

²²⁰FCi Fed., Inc., Comp. Gen. Dec. B-408558.7 et al., Aug. 5, 2015, 2015 CPD ¶ 245, 57 GC ¶ 298.

²²¹eAlliant, LLC, Comp. Gen. Dec. B-407332.6 et al., Jan. 14, 2015, 2015 CPD ¶ 58.

²²²McTECH Corp. v. United States, 105 Fed. Cl. 726 (2012), 54 GC ¶ 275 (denying Government motion to dismiss).

²²³Sys. Application & Techs., Inc. v. United States, 100 Fed. Cl. 687, 711-19 (2011).

²²⁴MacAulay-Brown, Inc. v. United States, 125 Fed. Cl. 591 (2016), 58 GC ¶ 82.

²²⁵VSE Corp., Comp. Gen. Dec. B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, 54 GC ¶ 80.

²²⁶Turner Constr. Co. v. United States, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245.

²²⁷See, e.g., DZSP 21, LLC v. United States, 137 Fed. Cl. 38 (2018) (ordering agency to reevaluate proposals or to conduct new solicitation); DZSP 21, LLC v. United States, 139 Fed. Cl. 110 (2018) (order-

ing amendment to solicitation); Castro & Co., LLC, Comp. Gen. Dec. B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74, 60 GC ¶ 77 (recommending agency to revise solicitation again).

²²⁸Red River Computer Co., Comp. Gen. Dec. B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7; McGoldrick Constr. Servs. Corp., Comp. Gen. Dec. B-409252.2, Mar. 28, 2014, 2014 CPD ¶ 114, 56 GC ¶ 167.

²²⁹Red River Computer Co., Comp. Gen. Dec. B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7; Piquette & Howard Elec. Serv., Inc., Comp. Gen. Dec. B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8, 56 GC ¶ 78; Sentrillion Corp., Comp. Gen. Dec. B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207, 55 GC ¶ 318.

²³⁰C2C Innovative Sols., Inc., Comp. Gen. Dec. B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

²³¹CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 390 (2010); TOTE Servs., Inc., Comp. Gen. Dec. B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182; Savvee Consulting, Inc., B-408416 et al., Sept. 18, 2013, 2013 CPD ¶ 231, 55 GC ¶ 353.

²³²Raytheon Co. v. United States, 809 F.3d 590 (Fed. Cir. 2015), 57 GC ¶ 334.

²³³Many of these questions were expertly laid out in a prior Briefing Paper. See Richard P. Rector, C. Bradford Jorgensen & Daniel J. Cook, "To File or Not To File: Key Issues When Deciding To Protest," 15-3 Briefing Papers 1 (Feb. 2015).

NOTES:

NOTES:

NOTES:

BRIEFING PAPERS