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Ensuring Your Victory Is Not Pyrrhic: Options Following a GAO Sustainment or Voluntary Corrective Action

Government Accountability Office

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BY BRIAN WALSH AND CARA LASLEY

The Government Accountability Office (GAO) doesn't often sustain a protest. Even with the increase in sustain rate for fiscal 2016, not even one-quarter of the protests that were filed were sustained. When the GAO does sustain a protest, it can be exciting for the protester, disappointing for the awardee, and full of uncertainties for both. Moreover, more than 45 percent of protesters obtained some form of relief based on protests filed at the GAO in fiscal 2016 — *i.e.*, in those cases where a protest is not sustained, the agency takes voluntary corrective action. Facing a sustained GAO protest, or an agency taking voluntary corrective action in response to a protest, many contractors are left wondering what happens next.

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Because of the flurry of contracting activity that generally takes place at the end of the fiscal year, the GAO receives more protests in October than in any other month. With the GAO's 100-day deadline looming for October protests, many contractors may be concerned about what to do if the GAO sustains the protest. An awardee may disagree with the GAO's decision. A successful protester may feel that the recommended corrective action doesn't go far enough. Unhappy with the outcome at the GAO, either party can file a protest at the Court of Federal Claims (COFC) (so long as the protest is one over which the COFC has jurisdiction). Knowing the basics of such a protest can help ease uncertainties, guide decision making, and help either to ensure a protest win is not pyrrhic, or to snatch victory from the jaws of a protest loss.

When Can a Protest Be Filed?

Generally a protest cannot be filed immediately after the GAO issues its decision. Rather, a protester must wait until the agency has announced that it will implement the GAO's recommendation. Likewise, if an agency takes voluntary corrective action in response to a protest, a party generally must wait until the agency announces the substance of its corrective action before it may protest the decision to take voluntary corrective action.

The COFC has jurisdiction to review an agency's procurement decision, but it does not have jurisdiction to review the GAO's review of that agency procurement decision. See *The Centech Grp., Inc. v. United States*, 78 Fed.Cl. 496, 507 (2007). According to 31 U.S.C. § 3554, the Comptroller General, as head of the GAO, is authorized to "determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency" take corrective action. 31 U.S.C. § 3554(b)(1). Any recommendation by the GAO, however, is not binding on an agency. Section 3554 recognizes this, providing that when an agency does not follow the GAO's recommendation, the GAO must report that to Congress. See 31 U.S.C.A. § 3554(e).

Thus, while agencies generally follow the GAO's recommendation if a protest is sustained, they are not required to do so. In a notable example of an agency repeatedly refusing to follow the GAO's recommendation, the Department of Veterans Affairs (VA) declined to follow the GAO's recommendation on 34 separate protests of the same issue. See Cong. Committees, B-158766, GAO-13-162SP, Nov. 13, 2012; see also GAO Bid Protest Annual Report to Congress for Fiscal Year 2013, B-158766, Jan. 2, 2014. With that said, it is extraordinarily rare for an agency to decline to follow the GAO's recommendation — it has only happened 46 times in the past 20 years (with the VA's refusal to follow the GAO's recommendation accounting for 34 of the 46 instances).

Because the GAO's recommendation is not binding, where "the agency has done nothing other than receive a non-binding recommendation from the GAO, there is no agency action to be protested." *SP Sys., Inc. v. United States*, 86 Fed. Cl. 1, 14-15 (2009). Thus, a contractor that is unhappy with the GAO's decision must wait until the agency announces how it intends to respond to the GAO's recommendation before filing a protest.

Who Can Protest?

Both the original awardee and the protester at the GAO can protest the agency's corrective action. For a protest of corrective action, where the protest is filed before the corrective action is completed, a protest can be filed by a prospective bidder with a non-trivial competitive injury. This standard is almost always met by the original awardee because the awardee is being forced to re-compete for an award it has already won. For example, in *Jacobs*, following the protest of an award to Jacobs, the agency announced it was taking voluntary corrective action by amending the solicitation and evaluating revised proposals. The court found that Jacobs had suffered a non-trivial competitive injury because the agency's corrective action required it to com-

pete again for the award, and thus had standing to protest the agency's intended corrective action. *Jacobs Tech. Inc.*, 100 Fed. Cl. at 177.

A challenge to proposed corrective action, whether taken voluntarily by the agency or in response to a GAO sustainment, may encounter problems. The court has found that an unsuccessful offeror can protest where the corrective action requires the offeror to re-compete for an award "that it had a substantial chance of winning but for what it alleges was an improper corrective action." *Profl Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 201 (2016). But the court has also concluded that an unsuccessful offeror cannot protest because the unsuccessful offeror actually benefits from the corrective action and so has not been harmed. In *Square One*, after reviewing a GAO protest filed by Square One, the agency announced it would take corrective action by revising the solicitation and evaluating revised proposals. Square One then challenged the agency's corrective action at the COFC, arguing that the proposed corrective action was inadequate and improper. The court found that the agency's corrective action afforded Square One the opportunity to compete for the contract, which it did not before the corrective action. Thus, because Square One had not been harmed by the corrective action, it could not protest. *Square One Armoring Serv., Inc.*, 123 Fed. Cl. 309, 327-28.

Once the agency has completed its corrective action, a protest can be filed by any offeror that had a substantial chance at award. For example, in *Davis Boat Works*, the agency took corrective action by re-evaluating proposals. After re-evaluating proposals, the agency selected the same offeror for the award, and Davis protested at the COFC. The court found that Davis was a qualified offeror whose proposal was found to be technically acceptable and within the competitive range. Therefore, Davis had a substantial chance at award, and thus could file a protest. *Davis Boat Works, Inc.*, 111 Fed. Cl. at 348.

What Can Be Protested?

Both the agency's decision to take corrective action and the results of the corrective action can be protested, but only the agency's decision to take certain corrective action can be protested immediately after the agency announces its decision. This is because a challenge to the agency's decision to take corrective action is treated as a pre-award protest, while a challenge to the agency's actions during the corrective action is treated as a post-award protest. See *The Centech Grp., Inc.*, 78 Fed. Cl. 496, 505.

In protests challenging the agency's decision to take corrective action, the protester generally argues that the agency's decision to follow the GAO's recommendation was arbitrary and capricious because the underlying GAO decision was arbitrary and capricious. Thus, an offeror who disagrees with the GAO's decision can essentially "appeal" that decision at the COFC, and the COFC will look at the GAO's decision to determine if it was rational. See *Turner Const. Co. v. United States*, 94 Fed. Cl. 561, 572 (2010), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011).

The expected conduct of the agency's corrective action cannot be protested until the agency completes its corrective action and announces the award. For example, in *Tenica*, in response to the GAO's recommendation, the agency decided to re-evaluate proposals

consistent with the terms of the solicitation. While the agency was re-evaluating proposals, Tenica filed a protest in the COFC, challenging the re-evaluation of proposals. The court found that because the re-evaluation had not yet been completed, Tenica's concerns about the re-evaluation were only speculative, and as such, the court dismissed the protest. *Tenica & Assocs., LLC*, 123 Fed. Cl. 166, 171-72.

The agency taking corrective action or a sustained protest at the GAO is not always the end of the story. A contractor has the option of protesting the agency's corrective action and may find meaningful relief at the

court. There are options for successful protesters that feel the relief they have obtained will not help them win the contract — the endgame of any protest — and awardees who believe the GAO either got it wrong or the agency too quickly took corrective action and don't want the contract they have already won to be put at risk during corrective action. The key is knowing when to take advantage of those options, which often means keeping protester counsel up to date on any action taken by an agency after a GAO sustainment or an agency's pronouncement that it will be taking voluntary corrective action.