

ALERT

Federal Circuit Rejects “Narrowly Tailored” Standard of Review for Corrective Action

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WHAT: A recent decision by the United States Court of Appeals for the Federal Circuit reasserted the arbitrary and capricious standard of review for agency corrective action in response to a bid protest before the Government Accountability Office (GAO), rejecting a nascent line of cases applying a heightened standard of review to assess the reasonableness of an agency’s corrective action in the context of multiple award indefinite delivery indefinite quantity (IDIQ) contracts.

WHEN: The Federal Circuit publicly issued its decision in *Dell Federal Systems, L.P. v. United States*, No. 2017-2516, 2018 WL 4839542 (Fed. Cir. Oct. 5, 2018), on October 5, 2018.

WHAT DOES IT MEAN FOR INDUSTRY: Successfully challenging corrective action taken in response to a bid protest before GAO of awards under multiple award IDIQ contracts just got harder. Certain cases issued by the United States Court of Federal Claims (COFC) applied a “heightened standard” of review to agency corrective action in the context of multiple award IDIQ contracts, requiring that a reasonable “corrective action must narrowly target the defects it is intended to remedy.” See, e.g., *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102 (2013). Awardees of such contracts had begun to rely on the *Amazon* line of cases to challenge agency decisions not to defend GAO protests in such circumstances and simply allow the protesters back into the competition. The Federal Circuit explicitly rejected this narrowly tailored standard and applied the Administrative Procedures Act’s arbitrary and capricious standard, which is more deferential to the agency than the narrowly tailored test. As a result, successfully challenging the reasonableness of an agency’s corrective action in these situations will be more difficult, as

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the COFC will now apply a standard more deferential to agency action. The Federal Circuit thus made clear that protests of corrective action in the multiple award IDIQ context should be subjected to the same APA standards as other protests of agency action.

After 21 disappointed offerors filed bid protests at GAO of the awards to the nine offerors found to be technically acceptable, the Army took corrective action. The Army concluded that (1) ambiguities in its lowest price, technically acceptable solicitation confused offerors since it concluded that only nine proposals of the 55 proposals evaluated were technically acceptable, and (2) it should have conducted discussions because of the \$5 billion total contract value. The Army explained that corrective action would consist of opening discussions to all remaining offerors, requesting final revised proposals, and issuing a new award decision. To guard against the competitive disadvantage to the prior awardees whose price was released in the award decision, the Army circulated a list of all proposed prices it received and redacted the names of each offeror.

Several awardees sought to enjoin the Army's proposed corrective action at COFC, arguing that the corrective action was not narrowly tailored to resolve the procurement's defects and that allowing all offerors wholesale price revisions was prejudicial to the awardees, as the losing competitors now would know the prices to beat. The COFC applied the narrowly tailored test to hold that the Army's corrective action was overbroad and thus unreasonable. Because COFC considered the plaintiffs' success on the merits likely and found the other elements of the four-pronged permanent injunction test met, it granted the requested injunction.

On appeal, the Federal Circuit found no support for the narrowly tailored standard in regulation or precedent. It explicitly rejected COFC's analysis and the narrowly tailored test. Instead, it applied the less-demanding arbitrary and capricious standard of the Administrative Procedures Act. Under that standard, the Federal Circuit held that the agency's corrective action was reasonable because the corrective action was rationally related to the identified defects in the procurement. As a result, it reversed the COFC's decision below and lifted the injunction.

The decision is available [here](#).