What's An Agency To Do?

The dilemmas Government agencies face today when navigating the confusing – and sometimes contradictory – act of taking corrective action.

By
Susan Colarco
Assistant General Counsel, Central Intelligence Agency Office of General Counsel
B.A., May, 1996, University of Nebraska at Kearney
J.D., May, 2000, Creighton University School of Law

A Thesis submitted to

The Faculty of
The George Washington University Law School
In partial satisfaction of the requirements
for the degree of
Master of Laws, August 31, 2014

Thesis directed by
Daniel I. Gordon
Associate Dean for Government Procurement Law Studies

Acknowledgements

The author wishes to thank Peter and Amelia Colarco for their constant support and encouragement throughout this process; Elizabeth McDermott for lending an ear whenever necessary; Matthew Miller for maintaining Friday morning mentoring sessions; and Professor Karen Thornton for having confidence when I did not. And finally, the author wishes to thank A. Larry Passar for his words of wisdom, guidance, reassurance, optimism, and advocacy throughout the pursuit of this Master of Laws.

Disclaimer

All Statements of fact, opinion, or analysis expressed are those of the author and do not reflect the official positions or views of the Central Intelligence Agency (CIA) or any other U.S. Government agency. Nothing in the contents should be construed as asserting or implying U.S. Government authentication of information or CIA endorsement of the author's views.

Abstract

What's An Agency To Do?
The dilemmas Government agencies face today when navigating the confusing – and sometimes contradictory – act of taking corrective action.

This thesis will discuss the dilemmas faced by Government agencies today when considering taking corrective action. Whether in response to an offeror's initial protest, alternative dispute resolution, or a sustained protest determination, this thesis will show that agencies are frequently finding themselves in a lose-lose position when corrective action issues arise. Trying to address the need to ensure fair and impartial competition, remedy identified deficiencies, and keep the best interests of the Government in mind, agencies are faced with a maze of recommendations and opinions from the Government Accountability Office and the Court of Federal Claims. These recommendations and opinions often confuse, more than clarify, appropriate agency considerations. Through exploration of the legal authorities and procedures related to agency corrective action; consideration of the unsteady state of corrective action today from the academic vantage point; and examination of the inconsistency of opinions expressed by the Government Accountability Office and the Court of Federal Claims, this thesis will explore not just the difficulties associated with taking corrective action, but best practices Government agencies may wish to employ when the need to take corrective action arises.

Table of Contents

Introduction 1

I. A Baseline Review of Bid Protest Authorities and Procedures in Three Distinct Areas 5

A. The Government Accountability Office's bid protest authorities and procedures with a specific focus on the manner in which corrective action issues arise within that forum 5

B. The Court of Federal Claims' bid protest authorities and procedures with a specific focus on the manner in which corrective action issues arise within that forum. 12

C. The relationship and interplay between GAO and COFC with respect to corrective issues 15

II. The Contentious, Confusing, and Polarizing State of Corrective Action as Viewed Through the Lens of Today's Government Contracts Practitioners and Scholars 21

III. The Rollercoaster Ride of GAO and COFC Opinions and the Most Prevalent Corrective Action Challenges Facing Agencies Today. 27

A. The deference said to be afforded to agency corrective action decisions at GAO and COFC versus the actual deference afforded to those agency corrective action decisions 27

B. The conundrum agencies face when attempting to determine the appropriate scope and nature of corrective action 30

i. The appropriate scope and nature of agency corrective action as seen through the eyes of GAO 31

ii. The appropriate scope and nature of agency corrective action as seen through the eyes of COFC 42

C. The lose-lose position in which agencies find themselves when compelled to defend a decision before COFC that was originally opposed before GAO 55

D. The dilemma faced by agencies when deciding whether to act or rely upon GAO outcome prediction or less formal GAO communications 65

IV. Making Successes out of Flaws – How Agencies Must Approach Corrective Action to Minimize the Risk of Further Scrutiny by Protesters, GAO, and COFC Alike 72

Recommendations 73

Conclusion 77

If, during the course of the game, it be discovered that any error or illegality has been committed in the moves of the pieces, the moves must be retraced, and the necessary correction made . . .[1]

Introduction:

Much like the game of chess, Government contracting can prove to be a challenging collection of moves, motives, missteps and successes. Within the complex back-and-forth of contract competitions, pieces are positioned, paths are plotted, and ultimately one player walks away a winner while the other simply walks away. But even the most entertaining or thought-provoking games of chess are not always without fault. One may predict the moves of an opponent only to be mistaken; a slight slip in concentration may be the difference between success and failure. And so, as with chess, when errors are made by Government procurement players – and corrections are necessary – the Government is charged with implementing such corrections in an efficient, effective, timely, and meaningful manner.

Determining and then implementing the appropriate corrections however –termed "corrective action" in the realm of Government contracting – is not always an easy task. Odds are often calculated, mixed signals from decision makers may be received, and external perceptions and scrutiny are often in play. With so many considerations in

---

[1] Henry Chadwick, THE GAME OF CHESS. A WORK DESIGNED EXCLUSIVELY FOR NOVICES IN CHESS at 45. (Spalding's Home Library, The American Sports Publishing Co., Vol. 1, No. 1, July, 1895).

place, agencies may find themselves faced with any number of difficult decisions when taking corrective action.

And so begins the discussion of the dilemmas faced by the Government when the need to take corrective action arises. This thesis will discuss the precarious position agencies find themselves in today when taking corrective action. Whether in response to an offeror's initial protest, alternative dispute resolution such as "outcome prediction", or a sustained protest determination, this thesis will show that agencies are frequently finding themselves in a lose-lose position. Trying to address the need to ensure fair and impartial competition, remedy identified deficiencies, and keep the best interests of the agency in mind, agencies are faced with a maze of recommendations and opinions from the Government Accountability Office (GAO) and the Court of Federal Claims (COFC) that confuse, more than clarify, appropriate agency considerations. This discussion of the precarious position agencies find themselves in today below will proceed in four discrete parts:

- Part I will provide a baseline review of bid protest authorities and procedures in three distinct areas. Those areas include:
    - GAO's bid protest authorities and procedures with a specific focus on the manner in which corrective action issues arise within that forum;
    - COFC's bid protest authorities and procedures with a specific focus on the manner in which corrective action issues arise within that forum; and

    - The relationship and interplay between GAO and COFC with respect to corrective action issues.

- Part II will then introduce the unsteady state of corrective action considerations today from the 30,000 foot level. Viewed initially through the lens of recent journal articles, blogs, newspaper articles, and position papers, the reader will be introduced to the contentious, confusing, and even polarizing state of corrective action considerations amongst today's Government contracts practitioners and scholars.
- Part III will shift this paper's focus from the opinions of practitioners and scholars to the rollercoaster of opinions issued by GAO and COFC relevant to corrective action concerns. Decisions issued by both forums will be explored with a specific focus on some of the most prevalent corrective action challenges faced by agencies today to include:
    - The deference said to be afforded to agency corrective action decisions at GAO and COFC versus the actual deference afforded to those agency corrective action decisions.
    - The conundrum agencies face when attempting to determine the appropriate scope and nature of corrective action in conjunction with (or, perhaps, in spite of) the varied and ever-changing standards articulated by GAO and COFC.

    - The lose-lose position in which agencies find themselves when compelled to defend a decision before COFC that was originally opposed before GAO; and
    - The dilemma faced by agencies when deciding whether to act or rely upon GAO outcome prediction or less formal GAO communications.
- Finally, Part IV will conclude this thesis where it began – by discussing the moves that must be employed by agencies when taking corrective action to ensure they are best situated to win the game of chess known as Government procurement.

Let's start at the very beginning . . . it's a very good place to start.[2]

PART I

A BASELINE REVIEW OF BID PROTEST AUTHORITIES AND PROCEDURES IN THREE DISTINCT AREAS

To understand the difficulties agencies face when determining whether, or to what extent, corrective action should be taken in response to a protest, one must first understand the unique nature of each of the two forums most involved in the protest process. The first being the Government Accountability Office (GAO) and the second being the United States Court of Federal Claims (COFC).

A. THE GOVERNMENT ACCOUNTABILITY OFFICE'S BID PROTEST AUTHORITIES AND PROCEDURES WITH A SPECIFIC FOCUS ON THE MANNER IN WHICH CORRECTIVE ACTION ISSUES ARISE WITHIN THAT FORUM.

Established in 1921, the GAO[3] is an independent agency within the legislative branch headed by the Comptroller General of the United States.[4] Known today as "the investigative arm of Congress" or the "congressional watchdog", GAO is generally charged with examining how taxpayer dollars are spent and advising lawmakers and agency heads on how to make Government work better.[5] GAO also supports congressional oversight in a variety of ways to include issuing legal decisions in response

---

[2] *The Sound of Music*. (Twentieth Century Fox Film Corporation, 1965).
[3] The GAO was initially known as the General Accounting Office. Its name was changed to the Government Accountability Office pursuant to the Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811 (2004).
[4] Budget and Accounting Act of 1921, 67 Cong. Ch. 18, Sec. 301, 42 Stat. 20, 23.
[5] "GAO at a Glance" Information Brochure, http://www.gao.gov/about/gao_at_a_glance_2010_english.pdf (last visited May 7, 2014).

to bid protests alleging violation of a procurement statute or regulation.[6] Though GAO's ability to hear bid protests is unquestioned today, its role in this regard has not always been so clear.

Upon initial establishment, the GAO was charged with, amongst other things:

- Settling or adjusting "[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor";[7]
- Providing "for the payment of accounts or claims adjusted and settled in the General Accounting Office through disbursing officers of the several departments and establishments, instead of by warrant";[8]
- Prescribing "the forms, systems, and procedure for administrative appropriation and fund accounting . . . and for the administrative examination of fiscal officers' accounts and claims against the United States";[9] and
- Investigating, "at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds . . .".[10]

Despite these somewhat sweeping directives, GAO's bid protest function was not clearly anticipated or expressed at GAO's inception. Nonetheless, GAO began hearing

---

[6] *Id*.; 31 U.S.C. §3552.
[7] Budget and Accounting Act of 1921, §305.
[8] *Id*. at §307.
[9] *Id*. at §309.
[10] *Id*. at §312.

bid protests in the early 20th century "on the theory that its authority to settle and adjust 'all claims and demands' against the United States encompassed bid protests."[11] And, with the exception of a few agencies that occasionally heard protests, [12] prior to 1970, GAO was the only forum available to hear bid protests.[13] However, it wasn't until the implementation of the Competition in Contracting Act of 1984 (CICA)[14] that GAO explicitly received authority to hear bid protests.[15] And now, based on its long-standing history of handling bid protests and unique bid protest process, GAO has become "the primary locus for federal bit protests" today.[16]

These protests, made by actual or prospective bidders in a Government procurement, may challenge either the terms of a solicitation or the award of a contract.[17] The standard of review imposed at GAO is whether the solicitation at issue, proposed award, or award complies with statute and regulation.[18] And, under CICA, GAO is charged with providing "inexpensive and expeditious resolution of protests" within 100 calendar days.[19]

---

[11] CRS Report R40228, *Historical Development of Federal Bid-Protest Mechanisms*, Kate M. Manuel and Moshe Schwartz (June 30, 2011) at 2. *See also* Amy Laderberg O'Sullivan, Jonathan M. Baker, Olivia Lunch, Contributing Editors, *Government Contract Bid Protests: A Practical and Procedural Guide; 2013-2014 Edition*. (Thomson Reuters, 2013) (citing Tomaszcuk & John E. Jensen, *The Adjudicatory Arm of Congress – the GAO's Sixty-Year Role in Deciding Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 Harv. J. on Legis. 339, 402-03 (1992).)
[12] CRS Report R40228 at 3.
[13] *See Scanwell Labs., Inc. v. Schafer*, 424 F.2d 859 (D.C. Cir. 1970) which interpreted the Administrative Procedures Act (P.L.79-404, 60 Stat. 237 (1946)) to provide for judicial resolution of bid protests thus establishing jurisdiction beyond the GAO.
[14] Pub. L. No. 98-369, 98 Stat. 1175 (codified throughout Titles 10, 31, and 41 United States Code).
[15] CRS Report R40228 supra note 11, at 3.
[16] *Id*.
[17] 31. U.S.C. §§3551-3554 (2009).
[18] *Id*. at §3554 (b)(1).
[19] *Id*. at §3554(a), (e).

Within that 100 day timeframe, a protest to GAO may be concluded in one of four manners – (1) a protest may be withdrawn by the protester; (2) the protest may be denied because GAO found no merit to the arguments; (3) the protest may be sustained because GAO agreed with at least one of the protesters' arguments; or (4) the protest may be dismissed because the GAO found a technical or procedural flaw (such as lack of timeliness) or because the agency took corrective action that addressed the protest.[20] That corrective action is the primary focus of this thesis.

Though GAO broadly defines corrective action as "an agency's voluntary decision to address an issue in response to a protest,"[21] the actual manner or timeframe in which this corrective action is implemented can vary greatly. For example, an agency may elect to re-evaluate proposals when a flaw in the initial evaluation process is identified.[22] An agency may also determine that an amendment to the solicitation is the most appropriate manner in which the identified flaw or defect may be remedied.[23] Other

[20] Bid Protest FAQs, U.S. Government Accountability Office, http://gao.gov/legal/bids/bidfaqs.html (last visited May 27, 2014).
[21] *Id*. at note 18.
[22] *See e.g., Prism Maritime, LLC*, B-409267.2, B-409267.3 (April 7, 2014) where the GAO recommended, in a decision sustaining the protest, that the Government reevaluate proposals after finding that the initial evaluation, amongst other things, failed to adequately consider the realism of the offerors' proposed costs. *See also Navarro Research and Engineering, Inc. v. United States*, 106 Fed. Cl. 386 (Aug. 17, 2012) where the court discusses the history of the protest at hand and the fact that NASA previously sua sponte determined that reevaluation of Navarro's proposal to ensure consistency with the evaluation terms set forth in the RFP was appropriate.
[23] *See e.g., Solers Inc.*, B-409079, B-409079.2 (Jan. 27, 2014) where GAO recommended, in a decision sustaining the protest, that the Government consider whether the solicitation clearly advised offerors of the type of advantages the Government was seeking under their technical approaches and, if not, recommended the agency amend the RFP and provide offerors the opportunity to submit new proposals.

methods of taking corrective action may include reopening discussions[24] or reinstating competitors to the competitive range after having initially excluded them.[25] At times, even cancellation of the solicitation may be viewed as the most appropriate corrective action to address the identified concerns.[26] Regardless of the structure, whatever provides some form of relief sought by the protester may be found to be corrective action.[27]

In addition to the varied forms of corrective action utilized by agencies, the timing of an agency's decision to take corrective action may vary as well. In fact, corrective action may be taken at any time during a protest.[28] For example, an agency may decide, upon receipt of a protest and after a full analysis of the merits of the protest, to take corrective action sua sponte. [29] Such action will typically result in dismissal of the protest by GAO as academic.[30]

On the other hand, an agency may take corrective action in response to Alternative Dispute Resolution (ADR).[31] ADR may encompass a variety of means of

---

[24] *See e.g., West Sound Services Group, LLC,*, B-406583.5 (July 9, 2014) in which GAO speaks to the fact that the Department of the Navy reopened discussions and requested revised proposals for all offerors in the competitive range in an effort to remedy the defects identified in a previous protest.
[25] *See e.g., Main Building Maintenance, Inc*., B-279191.3 (Aug. 5, 1998) in which GAO discusses that, after the Air Force determined discussions were not meaningful, it properly reinstated a previous protester to the competitive range.
[26] *See e.g., Hyperbaric Technologies, Inc*. B-293047.3 (Feb. 11, 2004) where GAO speaks to the Department of Veterans Affairs previous decision to cancel the solicitation when the agency determined, among other things, that the technical evaluation factors needed to be clarified which, in turn, changed the agency's need so substantially that resolicitation was warranted.
[27] Bid Protest FAQs and note 18.
[28] *Id*.
[29] *See e.g., Eagle Collaborative Computing Servs., Inc*., B-401043.3 (Jan. 28, 2011) *citing* GAO's previous decision at B-401043.2 (Aug. 10, 2009) where, upon receipt of communication from HUD counsel stating corrective action would be taken, the GAO dismissed the protest as academic.
[30] *Id*.
[31] 4 C.F.R. 21.0(g).

resolving cases expeditiously and without a written decision.[32] Such ADR techniques include (1) outcome prediction,[33] "where the GAO attorney advises the parties of the attorney's view of the likely outcome based on the record, so that the likely unsuccessful party may take appropriate action to resolve the protest;[34] and (2) negotiation assistance,[35] "where the GAO attorney offers to assist the parties in reaching agreement on resolution of the matter."[36] In either an instance of outcome prediction or negotiation assistance, a formal GAO opinion will not be issued.[37] And, so long as the agency provides some form of relief sought by the protester, corrective action will be deemed to have been taken.[38]

Finally, in those instances where the GAO agrees with a protester that the agency violated a procurement law or regulation in a prejudicial manner, GAO will issue a decision sustaining the protest and recommend the agency address the violation through appropriate corrective action.[39] An agency is not per se obligated to take corrective action at the recommendation of GAO.[40] Rather, taking corrective action in response to a

---

[32] *Id*.
[33] *Id*.
[34] *Id*.; U.S. Government Accountability Office, GAO-09-471SP, Bid Protests at GAO: A Descriptive Guide at 7 (9th ed. 2009) [Hereinafter, GAO Bid Protest Guide].
[35] 4 C.F.R. 21.0(g).
[36] GAO Bid Protest Guide at 7.
[37] Bid Protest FAQs *supra note* 20.
[38] *Id*.
[39] *Id*.
[40] *See* FAR 33.104(g) which states, "If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency."; *See also* 31 U.S.C. §3554(b)(3).

GAO recommendation is a discretionary act.[41] Despite this supposed discretion to take corrective action, should an agency choose to not implement GAO's recommendation, such a "failure" must be reported for further passage by GAO to Congress.[42]

Even in those instances where an agency does indeed choose to implement GAO's recommended corrective action, this act alone will not shield the agency from further scrutiny. In addition to hearing challenges to the terms of a solicitation or contract award, GAO will hear protests specifically challenging an agency's decision to take corrective action or the nature and scope of that corrective action.[43] Thus, corrective action – and challenges of that action – may arise in a number of ways before GAO.

Regardless of the form of the corrective action taken, or the timing of the decision to take corrective action– voluntary agency action, corrective action in response to ADR, or corrective action in response to a GAO recommendation rendered by written decision – the GAO is said to offer agencies "broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition."[44] This apparent broad discretion – as well as the general frequency of corrective action in response to bid protests – will be discussed in greater detail in Parts II and III below.

---

[41] *Id.*
[42] *Id.*; *See also* U.S. Government Accountability Office, GAO-14-276SP, GAO Bid Protest Annual Report to Congress for Fiscal Year 2013, Jan 2, 2014.
[43] *See e.g.*, *Power Connector, Inc.*, B- 404916.2 (Aug. 15, 2011) in which GAO sustained a protest where, in response to an earlier protest, the agency took corrective action by amending the solicitation to change a material requirement under its past performance evaluation scheme, but in GAO's opinion improperly precluded offerors from thereafter making revisions to all aspects of their proposals, including price.
[44] *Crewzers Fire Crew Transport, Inc.*, B-406601 (Jul. 11, 2012) at 7 (citing *Northrop Grumman Info. Tech., Inc.*, B-404263.6 (Mar. 1, 2011) at 3; *Greentree Transp. Co., Inc.*, B-403556.2 (Dec. 7, 2010) at 2.)

B. THE COURT OF FEDERAL CLAIMS' BID PROTEST AUTHORITIES AND PROCEDURES WITH A SPECIFIC FOCUS ON THE MANNER IN WHICH CORRECTIVE ACTION ISSUES ARISE WITHIN THAT FORUM.

Though both GAO and COFC[45] presently have the ability to hear bid protests, COFC's bid protest history, authorities, and standards differ greatly from those of GAO. As discussed above, prior to 1970 GAO was essentially the only forum available to hear bid protests. In fact, after GAO first began hearing bid protests, the federal courts held that they, themselves, lacked the jurisdiction to hear such protests.[46]

In *Perkins v. Lukens Steel Company*, the Supreme Court ruled that federal courts could not hear bid protests because the procurement laws existing at that time did not confer standing on actual or potential bidders or offerors who had been disappointed in their dealings with the Federal Government.[47] The Court further stated that the procurement laws in place at the time were strictly "for the purpose of keeping [the government's] own house in order."[48] It wasn't until several decades after *Perkins* that the United States Court of Appeals, District of Columbia Circuit finally came to hold in

[45] This court was known as the United States Court of Claims until 1982. In 1982, it was renamed the United States Claims Court. Then, in 1992, it became the currently-titled Court of Federal Claims. *See* Peter Verchinski, Note, "Are District Courts Still a Viable Forum for Bid Protests?", 32 Pub. Cont. L.J. 393, 396 n.20 (2003).
[46] CRS Report R40228 at 2-3.
[47] *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 132 (1940).
[48] *Id*. at 127.

Scanwell Labs, Inc. that the Administrative Procedures Act (APA)[49] did indeed give federal courts jurisdiction to hear bid protests.[50]

After the groundbreaking *Scanwell* decision, preaward protests could be brought under the Tucker Act[51] in COFC while postaward protests were actionable in federal district courts under the APA.[52] This division – though intended to create uniformity in the treatment of bid protest challenges – acted instead to create "a general lack of uniformity in bid protest law."[53] This lack of uniformity – across the federal courts at least – was addressed via the Administrative Dispute Resolution Action of 1996 (ADRA).[54] ADRA worked to amend the Tucker Act[55] to specifically grant COFC jurisdiction over bid protests[56] and, by 2001, COFC was "the only judicial forum to bring any governmental contract procurement protest."[57]

The ADRA's standard of review for agency procurement decisions adopted that standard of review set forth in the APA. Therefore, COFC has the authority under the APA to set aside only those agency actions found to be "arbitrary, capricious, an abuse of

---

[49] 5 U.S.C. §706 (2006); 28 U.S.C. §1491(b)(4) (2011)
[50] Although Congress enacted the APA in 1946, it was not until 1970 that the United States Court of Appeals, District of Columbia Circuit actually held that the APA gave them jurisdiction to hear bid protests. *See Scanwell Labs., Inc.*, 424 F.2d 859 (D.C. Cir. 1970).
[51] 28 U.S.C. §1491(b)(1) (2006).
[52] Robert S. Metzger, Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, WISC. L.REV., 1225, 1226 note 3 (2008), stating, "bid protests were actionable on the theory that the government made an implied contract with prospective bidders to fairly consider their bids. *See, e.g., Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), recognized this jurisdiction and allowed the Claims Court to provide injunctive and declaratory relief in addition to damages, but the Act limited jurisdiction to preaward protests."
[53] *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed.Cir. 2001)
[54] Publ.L. No. 104-320, §12, 100 Stat. 3870 (codified at 28 U.S.C. §1491(b)).
[55] 28 U.S.C. §1491(b)(1) (2006).
[56] *See Rec. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1243 (Fed.Cir. 2010); *Impresa Construzioni Geom. Domenico Garufi* 238 F.3d at 1330-32.
[57] *Emery Worldwide Airlines, v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001).

discretion, or otherwise not in accordance with law."[58] Accordingly, as stated by the Federal Circuit, "[a] bid protest proceeds in two steps."[59] First, the court determines if, under the arbitrary and capricious standard, the agency in question acted either (1) without rational basis, or (2) contrary to law.[60] Second, if the court finds that the agency acted in violation of the APA standard, "then it proceeds to determine, as a factual matter, if the bid protester was prejudiced by that conduct."[61] In either case, the plaintiff bears the "heavy burden" of proving this lack of rational basis or violation of the law by a preponderance of the evidence.[62]

Agency action is considered to be arbitrary or capricious when it does not have a rational basis for its decision.[63] A rational basis requires "the contracting agency [to] provide[ ] a coherent and reasonable explanation of its exercise of discretion."[64] COFC's role in a bid protest, including determining whether a rational basis for the decision rendered exists, is not to be a substitute judgment for the agency.[65] Rather, the agency generally is afforded great discretion in evaluating bids; COFC is not to substitute its judgment for that of the agency.[66] And, much like the broad discretion GAO is said to afford agencies when making corrective action decisions, the deference afforded to

---

[58] 5 U.S.C. §706(2)(A); *see also PGBA, LLC v. United States*, 289 F.3d 1219, 1224-28 (Fed.Cir. 2004)(clarifying that ADRA incorporates the arbitrary and capricious standard of the APA to review procurement decisions).
[59] *Bannum, Inc. v. United States,* 404 F.3d 1346, 1351 (Fed.Cir.2005).
[60] *Id.*; see also *Sierra Nevada Corp. v. United States,* 107 Fed.Cl. at 145 (2012).
[61] *Bannum Inc.*, 404 F.3d at 1351.
[62] *Construzioni Geom. Domenico Garufi*, 238 F.3d at 1333.
[63] *Id.*
[64] *Id*. (internal quotation marks omitted)
[65] *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1046 (Fed.Cir.1994); *see also Camp v. Pitts*, 411 U.S. 138, 142–43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (stating that courts should review facts to determine if agency's decision is supported by rational basis).
[66] *Id.*

agency decisions in negotiated procurements is also recognized by COFC to be " 'relatively high.' "[67]

Finally, the United States Court of Appeals for the Federal Circuit "has made clear that bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented."[68] This means that, in addition to hearing challenges to agency actions at the initial bid protest stage, COFC may also hear challenges to corrective action taken by the agency either sua sponte, in response to a sustained GAO protest, or in response to some form of GAO-provided ADR. COFC's apparent deference to agency decisions, and recognition of a CO's broad discretion, therefore is said to extend to the decision to pursue corrective action during the course of a procurement.[69] Parts II and III below will discuss further the extent of this discretion as well as related challenges faced by agencies before COFC.

C. THE RELATIONSHIP AND INTERPLAY BETWEEN GAO AND COFC WITH RESPECT TO CORRECTIVE ACTION ISSUES.

Though the differences between the administrative forum of GAO and judicial forum of COFC are great, they still hold commonalities rooted in their independent abilities to hear bid protests. And, though it may be argued that one should not exist – or at least receive the deference that it does – when the other perhaps serves the same

---

[67] *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct.Cl.1980) (quoted in *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed.Cir.2004)).
[68] *Systems Application & Technologies, Inc. v. United States* 100 Fed. Cl. 687 (2011), aff'd, 691 F.3d 1374 (Fed. Cir. 2012) citing *Turner Constr. Co. v. United State,s* 645 F.3d 1377 (Fed.Cir. 2011).
[69] *See Wildflower Int'l, Ltd. v. United States*, 105 Fed.Cl. 362, 385–86 (2012).

purpose,[70] they both wield a powerful pen when opining on bid protest issues. That said, despite these commonalities, the interplay between GAO and COFC, with respect to corrective action issues in particular, is often challenging, confusing, or downright contradictory to protesters and agencies alike.

For example, though COFC may hear a challenge to a decision rendered by the GAO, COFC makes clear its determinations are made independent of GAO's previously-issued findings and recommendations.[71] Rather, COFC has stated that GAO decisions are accorded a high degree of deference before the court, but are certainly not binding upon it.[72] This deference to GAO is said to remain even in those instances where GAO's recommendation differs from the CO's initial decision.[73] In fact, the Federal Circuit has stressed that "the controlling inquiry [made by COFC is] whether the GAO's decision was a rational one" and that a court must not "impermissibly [undertake] its own independent *de novo* determination" of the matter at issue.[74]

---

[70] *See e.g.*, Steven L. Schooner, The Future: Scrutinizing the Empirical Case for the Court of Federal Claims, 71, GEO. WASH. L. REV. 714, in which it is suggested that the COFC is not the proper recipient of ADRA's exclusive jurisdiction as it lacks expertise in procurement law, but rather, is spread thin by its practice in multiple areas of law to include tax-refund suits and takings cases. *But see*, Metzger and Lyons, *supra* note 52 which proposes GAO opinions should not receive the deference they are often afforded by agencies and questions altogether whether the GAO should continue to serve as "the forum of choice for complex and high-value procurement-award controversies."

[71] *See e.g., SP Sys. Inc. v. United States*, 86 Fed. Cl. 1 (2009) where the Court that it is "of course" not bound by the decision of the Comptroller General; *See also Burroughs Corp. v. United States*, 617 F. 2d at 597.

[72] *Grunley Walsh Int'l, LLC* v. United States, 78 Fed.Cl. 35, 44 (2007).

[73] *Honeywell, Inc. v. United States,* , 870 F.2d 644, 648 (Fed.Cir. 1989).

[74] *Honeywell Inc.,* 870 F.2d at 647. *See also Centech Group,* 554 F.3d at 1039 (affirming the viability of *Honeywell Inc*.); *SP Sys.Inc.*, 86 Fed.Cl. at 14 (noting that "[t]he cases continue to reaffirm the viability of *Honeywell* long after the passage of the ADA" and that "[i]f the GAO makes a rational recommendation and the agency simply implements that recommendation, then the agency action itself has a rational basis").

This limitation on COFC is in place because, where an agency's action is based solely upon a GAO decision and recommendation, the proper inquiry as to the rationality of that decision is whether there exists a rational basis for the agency's acts.[75] Therefore, if, in the course of taking corrective action, an agency simply implements a GAO recommendation, COFC will explore whether the underlying GAO recommendation was rational – even though the actual decision before the court is the agency decision.[76]

This second-guessing of sorts can, and does, create conflict between the two forums. The impact of this conflict is further amplified by confusion surrounding the legal standards to be applied when determining the appropriateness of an agency's corrective action and questions regarding whether COFC does indeed afford deference to GAO as advertised. These topics will be further discussed in Part III below.

Supplementation of the record is another area of intersection and, therefore, conflict between these two forums. GAO will generally not limit its review to contemporaneous evidence presented by the parties.[77] Rather, it will consider all information provided, including a party's arguments and explanations.[78] And, while GAO will generally give little-to-no weight to reevaluations and judgments prepared in the midst of the adversarial process,[79] post-protest explanations providing a detailed rationale for agency conclusions – which simply work to fill in previously unrecorded

---

[75] *SP Sys.Inc.*, 86 Fed.Cl. at 14.
[76] *Id*.
[77] *See Serco, Inc.*, B-406683, B-406683.2 (Aug. 3, 2012).
[78] *Id*.
[79] *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3 (Sept. 29, 1997).

details – will generally be considered in GAO's review so long as those explanations are credible and consistent with the contemporaneous record.[80]

In fact, GAO requires agencies to provide a written summary, or "agency report", of the relevant facts of the protest.[81] This requirement, in and of itself, constitutes a requirement that the agency submit documents – not contemporaneous in nature – for consideration in the course of deciding the outcome of a protest.[82] Therefore, in the course of considering the appropriateness of an agency's chosen corrective action, GAO will not only accept, but in fact requires, that the agency offer a post hoc rationale for its chosen approach.[83]

In contrast, COFC admission to the administrative record of post-award statements from the protester, without first determining whether the existing record provided for effective judicial review, was found to be impermissible by the Federal Circuit.[84] Noting that COFC's review should be focused upon "the administrative record already in existence, not some new record made initially in the reviewing court"[85] the Federal Circuit held that "supplementation of the record should be limited to cases in which the omission of extra-record evidence precludes effective judicial review."[86] Further, COFC must decide "whether supplementation of the record [is] necessary in

---

[80] *NWT, Inc.; PharmChem Labs., Inc*., B-280988, B-280988.2, (Dec. 17, 1998).
[81] 4 C.F.R. §21.3(c), (d).
[82] *Id*.; *see also* 4 C.F.R. §21.3(i), (j) which, in turn, require the protester to provide comments on the agency's provided record and allow for the submission of "additional statements by the parties and by other parties participating in the protest as may be necessary for the fair resolution of the protest."
[83] *See* 4. C.F.R. §21.3(i), (j).
[84] *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009).
[85] *Id*. at 1379.
[86] *Id*. at 1381.

order not to frustrate effective judicial review."[87] This limitation of supplementation of the record as expressed by the Federal Circuit is intended to guard against the court using newly-submitted information to "convert the ' 'arbitrary and capricious' standard into effectively de novo review.'"[88]

Though sensible in some respect, this limitation of supplementation of the record puts COFC in the undesirable position of having to presume an agency's motivations behind taking a particular form of corrective action rather having certainty in the agency's approach.[89] Therefore, should COFC choose to not supplement the record with information contemporaneous to the agency's reasoning and purposes behind the corrective action taken, COFC may never know the agency's motivations or undocumented alternative basis for the chosen corrective action.[90]

---

[87] *Id*. (internal quotations omitted); *but see CW Government Travel, Inc. v. United States*, 110 Fed.Cl. 463, 483-484 (Mar. 27 2013) which took exception to the *Axiom* decision stating, " 'The limited scope of the court's APA review and the cautionary note of *Axiom* address this court's examination of the reasonableness of the challenged agency action. Evidence respecting relief, however, rests on a separate and distinct footing.' Such evidence 'necessarily would not be before an agency decision-maker effecting a procurement decision such as a source selection award, ... but would necessarily post-date and flow from such agency decision.' Accordingly, such evidence is admitted, not as a supplement to the administrative record, but as part of this court's record." (internal citations omitted).

[88] *Axiom Resource Mgmt., Inc*. at 1379-83 (quoting *Murkami v. United States*, 46 Fed. Cl, 731, 735 (2000), aff'd 398 F. 3d 1342 (Fed. Cir. 2005)) (citations omitted).

[89] *See e.g. Systems Application & Technologies, Inc. v. United States* 100 Fed. Cl. 687 (2011), aff'd, 691 F.3d 1374 (Fed. Cir. 2012) where COFC found it was "reasonable to assume that the [agency's corrective action] decision was based, at least in part, on the GAO attorney's April 20, 2011 electronic-mail message." (emphasis added).

[90] *See* Jonathan Kang, THE EFFECT OF THE COURT OF FEDERAL CLAIMS' DECISION IN *SYSTEMS APPLICATION & TECHNOLOGIES, INC. V. UNITED STATES* ON CONTRACTING OFFICER DISCRETION TO TAKE CORRECTIVE ACTION IN RESPONSE TO PROTESTS BEFORE THE GAO, 42 Pub. Cont. L.J. 585, 600 (2013) citing generally *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009). [Hereinafter "Kang Article"]. The author wishes to acknowledge Mr. Kang and his extremely helpful discussion and analysis of the *Systems Application & Technologies, Inc*. case and accompanying issues raised as a result of the decision.

How then is an agency to navigate the waters of bid protests heard at GAO versus COFC? And, when corrective action in particular is at issue, how is an agency to determine the proper scope and nature of that corrective action when the two forums responsible for determining the appropriateness of this action often conflict with each other? These challenges, and some suggested best practices that may combat these challenges, are discussed in greater detail below.

PART II

THE CONTENTIOUS, CONFUSING, AND POLARIZING STATE OF CORRECTIVE ACTION AS VIEWED THROUGH THE LENS OF TODAY'S GOVERNMENT CONTRACTS PRACTITIONERS AND SCHOLARS

Having established that both GAO and COFC have the ability to hear initial bid protests as well as challenges to corrective action (taken either proactively by the agency or in response to a GAO decision or ADR), one may believe that many of the questions surrounding corrective action have already been asked and addressed. However, that is not the case. In fact, a number of GAO opinions, COFC opinions, dueling journal articles, blogs, and newspaper articles over the last year seem to have raised the significance of the topic of corrective action to a fever pitch. The comments and opinions found within these various media, though not unified in many respects, work to collectively demonstrate corrective action issues within the Federal contracting arena are undeniably linked in one significant manner. That is, the nature of agencies' corrective action decisions, in conjunction with the rulings of both GAO and COFC, are unquestionably causing confusion with respect to the appropriate scope, nature, and effectiveness of corrective action in the bid protest arena today.

For example, a prevailing theme peeking through this cloud of confusion over the past year has been that the frequency or true impact of corrective action is unknown.[91] Given GAO "does not publicly disclose any information about the cases that it closes due

[91] *See* Daniel I. Gordon, Bid Protests: The Costs Are Real, But the Benefits Outweigh Them, 42 Pub. Cont. L.J. 489 (Spring 2013) in which the author discusses the premise that protests are rare in nature and that protesters often lose more often than they win. And, because of the manner in which GAO tracks cases, there is no way to know whether protesters ultimately obtained the contracts that were the subject of the protests and corrective action.

to agencies' voluntary corrective action" tracking successes or failures associated with agency corrective action is virtually impossible.[92] Further, to the extent that information is made publicly available through GAO's annual report to Congress, it paints an incomplete picture.[93]

Specifically, GAO's publicized "effectiveness rate" does little to demonstrate just how "effective" agency corrective action measures may be.[94] In fact, the effectiveness rate is in no way intended to actually represent "what occurs after [GAO] issues a decision sustaining a protest or dismissing one due to agency 'voluntary corrective action' – the two categories of cases that together form GAO's effectiveness rate." [95] Rather, it is simply acknowledged that "there are understandable limits to transparency provided by GAO['s annual bid protest reports]" which suggests a certain level of acceptance or perhaps apathy with respect to GAO's incomplete reporting.[96] And given the nearly-herculean efforts required to piece together an accurate tally of agency corrective action taken in any given year – or the impact of that corrective action on protesters, initial awardees, or other interested parties – it is unlikely than any clarity will

---

[92] *Id*. at 500-501. It should be noted that what may constitute "success" or "failure" is most certainly in the eye of the beholder, so to speak. A contractor's success may be viewed as the Government's failure – or vice versa.
[93] *Id*.
[94] *See Id*. Though numerous protest-related statistics are available to account for, for example, the number of sustained cases at GAO in any given fiscal year, the number of GAO hearings held in any fiscal year, and the number of cases closed by GAO in a fiscal year, these statistics fail to offer a complete picture of just how protests are resolved as the numbers do not account for instances where corrective action was taken. *See also, http://gao.gov/assets/660/659993.pdf (last visited May 8, 2014)* which describes the formulation of GAO's "effectiveness rate" to be, "Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year."
[95] The Government Contractor, Daniel I. Gordon, Feature Comment, "Dissecting GAO's Bid Protest 'Effectiveness Rate'," 56 No. 4, GC ¶ 25 (January, 2014).
[96] *Id*.

be offered in this area anytime soon.[97] As such, whether disappointed offerors receiving a second bite at the apple by way of agency corrective action ultimately benefit from this opportunity is questionable at best.[98]

Adding confusion to this "effectiveness" issue is the methodology – or perhaps manipulation – employed when compiling statistics associated with the frequency of, or "successes" associated with, agencies' corrective action measures. Though it has been suggested that "less than 1 percent of roughly 1,600 protested awards" resulted in the disappointed offeror ultimately receiving award after corrective action is employed, this number is notably questionable.[99] Contrary to this extremely conservative pronouncement, some practitioners have suggested, "it is [instead] reasonable to assume that the ultimate success rate of protesters obtaining early relief through voluntary corrective action is roughly equivalent to the ultimate success rate for protesters that obtain corrective action after a decision on the merits."[100] And these practitioners posit that,

> . . . the small number of protests that reach a decision on the merits do so because the agency fundamentally disagrees with the protester's position, whereas an agency taking voluntary corrective action has already concluded that there is an error that demands correction. Thus, one might conclude that an agency taking voluntary corrective action is more likely

---

[97] *See Id*. A cadre of six law students was utilized to assist with the corrective action research at the foundation of this comment. Efforts to gather numbers and piece together "the rest of the story" in relation to corrective action issues were accomplished through the use of agency FOIA requests, requests to GAO directly, surveys of fedbizopps.gov and fpds.gov, and direct contact with protesters and awardees (or their respective counsel).

[98] *Id*.

[99] Kathleen Miller, "Protests Rarely Result in U.S. Contract reversals, Study Shows", *The Washington Post*, Mar. 11, 2013.

[100] The Government Contractor, Thomas Papson, Jason Carey, and Luke Meier, Feature Comment, "The Odds Of Winning A Contract After Protesting Are Higher Than You Think," 55 No. 16, GC ¶ 126.

> to change its thinking about the proper outcome of a procurement than an agency that has fought a protester to the bitter end.[101]

Though this conclusion about the motivations behind voluntary agency corrective action is presumptive at best, it does work to prove a larger point.[102] That is, the corrective action statistics making news are, at least to some extent, ultimately in the eye of the beholder.

The confusion surrounding corrective action today does not end with the debates about effectiveness and statistics. Rather, as evidenced by recent critical statements from within the contracting community, the confusion simply continues to flourish. Criticism suggesting COFC delivered a "juicy decision" involving a "tongue lashing to the United States"[103] or a federal agency "has its head in the cloud"[104] have worked to paint agencies as inept at taking appropriate and effective corrective action. And yet, simultaneously, respected practitioners have acknowledged that, "[t]he differences between the way that the GAO and the COFC review corrective agency action . . . create potential risks for an

---

[101] *Id*.

[102] Though this conclusion may be based on a logical presumption, it cannot be said that the private bar is positioned to speak for the inner motivations of Government agencies at the center of these protests. Issues such as a change in requirements since initial release of the solicitation, discovery of errors not raised by the protester, and the like are equally plausible motivating factors behind an agency's decision to take corrective action. *See also*, CRS Report R40227, *GAO Bid Protests: Trends and Analysis*, Moshe Schwartz, Kate M. Manual, and Lucy P. Martinez (Aug. 9, 2013), at 5 stating in part, "In many cases, voluntary action by an agency could indicate that the agency believes a given protest has merit. However, there may be instances when an agency takes corrective action even when it believes the procurement was done properly . . . ."

[103] ContractsProf Blog, http://lawprofessors.typepad.com/contractsprof_blog/2011/08/court-of-federal-claims-delivers-tongue-lashing-to-the-united-states.html, (Aug. 29, 2011) (last visited, May 22, 2014)discussing *Systems Application & Technologies, Inc. v. United States* 100 Fed. Cl. 687 (2011), aff'd, 691 F.3d 1374 (Fed. Cir. 2012).

[104] Bryan R. King, Material Post-Award Change to Requirements Requires a Solicitation Amendment, Bid Protest Weekly, http://www.bidprotestweekly.com/material-post-award-change-to-requirements-requires-a-solicitation-amendment/, (Jun. 20, 2013)(last visited, May 9, 2014) discussing *Amazon Web Services, Inc. v. United States* 113 Fed. Cl. 102 (2013).

agency".[105] Regardless of the root of this corrective action confusion, cases such as *WHR Group, Inc. v. United States*[106] and *Sierra Nevada Corp. v. United States*[107] will do nothing to offer relief or clarity in corrective action matters to practitioners and scholars alike anytime soon. After all, surely the appropriate approach to corrective action will remain elusive to those within the Government procurement professions when even the standard of review used at COFC is in question.[108]

So what do these dueling articles, critical comments, and inconsistencies within COFC and GAO represent at the 30,000 foot level? If nothing else, they represent that one cannot say, with any certainty, how often corrective action is taken, the nature of the corrective action taken, or the ultimate impact of such corrective action. Further, in those instances where the nature and scope of corrective action is actually known and then challenged, whether the corrective action is ultimately deemed appropriate and rational may depend on the forum, distinctions without a difference, and inconsistencies within an adjudicative system. With these mixed signals of sorts, the timing and approach to taking corrective action may be so nuanced that agencies find themselves unable to determine the appropriate path at any given time.

So what is an agency to do in the damned-if-you-do, damned-if-you-don't world of corrective action? A discussion of four areas in particular – (1) the deference said to be afforded to agency corrective action decisions at GAO and COFC, versus the actual

---

[105] Kang Article at 605.
[106] *WHR Group, Inc. v. United States*, No. 13-515C, 2014 WL 1377819 (Fed. Cl. March 21, 2014).
[107] *Sierra Nevada Corp. v. United States*, 107 Fed.Cl. 745 (2012).
[108] *See e.g., Sierra Nevada Corp.,*107 Fed.Cl. at 750 stating COFC "has *more or less* settled on a standard for review of challenges to corrective action." (Emphasis added).

deference afforded to those agency corrective action decisions; (2) the conundrum agencies face when attempting to determine the appropriate scope and nature of corrective action in conjunction with (or, perhaps, in spite of) the varied and ever-changing standards articulated by GAO and COFC; (3) the lose-lose position in which agencies find themselves when compelled to defend a decision before COFC that was originally opposed before GAO; and (4) the dilemma faced by agencies when deciding whether to act or rely upon GAO outcome prediction or less formal GAO communications – will work to address just that question.

I feel as if I had been through something very exciting and rather terrible, and it was just over, and yet nothing in particular has happened. [109]

PART III

THE ROLLERCOASTER RIDE OF GAO AND COFC OPINIONS AND THE MOST PREVALENT CORRECTIVE ACTION CHALLENGES FACING AGENCIES TODAY

A. THE DEFERENCE SAID TO BE AFFORDED TO AGENCY CORRECTIVE ACTION DECISIONS AT GAO AND COFC VERSUS THE ACTUAL DEFERENCE AFFORDED TO THOSE AGENCY CORRECTIVE ACTION DECISIONS.

As discussed in Part I above, COFC and GAO have stated time and again that contracting officers, and agencies as a whole, are given broad discretion to take corrective action.[110] However, in application, their deference to the nature and extent of that discretion has varied greatly over time. As such, agencies are faced with challenges when determining exactly what type of corrective action should be taken so as to address the issues raised – either in the course of a protest or as a result of a GAO determination sustaining the protest – while still staying within the bounds of this supposed broad discretion.

As a general rule, GAO has advised that contracting officers, and the agencies in which they serve, have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition.[111] GAO has further consistently offered that the specific nature of an agency's

---

[109] Kenneth Grahame, *The Wind in the Willows* , p.81 (Modern Library Classics 2005) (1908).
[110] *See e.g., Amazon Web Services, Inc.*, 113 Fed. Cl. 102 (Oct. 31, 2013); *DGS Contract Serv., Inc. v. United States*, 43 Fed.Cl. 227 (1999); *Intermarkets Global*, B-400660.10 (Feb. 2, 2011).
[111] *See e.g., Intermarkets Global*, B-400660.10 (Feb. 2, 2011).

implementation of corrective action is within the "sound discretion and judgment of the contracting agency."[112] GAO will generally not object to the nature or scope of corrective action taken, so long as it is appropriate to remedy the concern that caused the agency to take corrective action.[113] Moreover, GAO will also generally not object to the nature or scope of an agency's corrective action "where the agency discovers an obvious error in the evaluation of offers and corrects that error by reassessing offers." [114]

COFC in turn has stated that a similar level of deference will be afforded to an agency when reviewing a challenge to an agency's corrective action approach. Noting that it must "'determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made,'"[115] COFC has acknowledged that its review must be "highly deferential".[116] To afford an agency this deference, COFC's position is that "a reviewing court [must] sustain an agency action evincing rational reasoning and consideration of relevant factors."[117]

Despite this deference, COFC acknowledges that, in some circumstances, an agency's decision should be overturned. Instances when the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

---

[112] *Crewzers Fire Crew Transport, Inc*., B-406601 (Jul. 11, 2012) at 7 *citing KNAPP Logistics Automation, Inc.--Protest and Costs*, B-404887.2, B-404887.3 (July 27, 2011) at 3; *Partnership for Response and Recovery*, B-298443.4 (Dec. 18, 2006) at 3.
[113] *See Partnership for Response and Recovery,* B-298443.4 at 3.
[114] *Crewzers Fire Crew Transport, Inc*., B-406601 *citing Mid Pacific Envtl*., B-283309.2, (Jan. 10, 2000)
[115] *Turner Const. Co., Inc. v. United States*, 94 Fed.Cl. 561 (2010) *citing Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 104, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).
[116] *Id. citing Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed.Cir.2000).
[117] *Id*.

evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" warrant such action.[118] That said, so long as COFC "finds a reasonable basis for the agency's actions, [COFC will] stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations."[119]

This advertised broad discretion and deference to agency corrective action decision making is not necessarily all that it seems. In fact, at times, this supposed recognition of, and deference to, agency discretion is nothing more than a confusing or contradictory promise made without much support to back it up. In reality, agencies are certainly not afforded the unfettered ability to make corrective action decisions that would seem to remedy the identified procurement issue while exercising broad discretion. Rather, with their discretion and deference tucked away, agencies are forced to navigate the dips and loops of GAO and COFC decision making often without knowing what might lie around the next bend.

This difficulty is perhaps most visible when attempting to determine the appropriate scope or nature of corrective action an agency should take. In other words, how broad or narrow should an agency's "fix" be such that the issue warranting corrective action is addressed? How is the agency to accomplish this while remaining safely within the bounds of the standards and nuances of GAO and COFC? And

---

[118] *Id.citing Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).*
[119] *Honeywell, Inc. v. United States,* 870 F.2d 644, 648 (Fed.Cir.1989) (quotation marks omitted).

ultimately, how much freedom does the agency have to take action *beyond* that required to remedy the alleged defect?

B. THE CONUNDRUM AGENCIES FACE WHEN ATTEMPTING TO DETERMINE THE APPROPRIATE SCOPE AND NATURE OF CORRECTIVE ACTION.

Generally, GAO is said to not object to the nature or scope of corrective action taken, so long as such action is appropriate to remedy the concern that caused the agency to take corrective action.[120] And COFC is said to generally not object to the nature or scope of corrective action so long as such action bears a rational connection between the facts found and the choice made.[121] These propositions seem to suggest therefore, that an agency's approach to corrective action would generally be unobjectionable before both GAO and COFC if well-reasoned and effective in addressing the identified procurement defect. In reality, that is not the case.

In some instances, these basic principles have permitted an agency to limit – or narrow – the scope of the corrective action by restricting offerors' proposal revisions to only those areas "aimed at correcting a specific procurement impropriety".[122] This is especially true in instances where the procurement impropriety would not reasonably affect other areas of the evaluation of proposals.[123] And yet, in other instances, taking

---

[120] *See Partnership for Response and Recovery*, B-298443.4 (Dec. 18, 2006).
[121] *See Turner Const. Co., Inc. v. United States*, 94 Fed.Cl. 561 (2010) *citing Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 104, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).
[122] *See e.g., Rel-Tek Sys. & Design, Inc*., B-280463.7 (July 1, 1999) discussed in greater detail in the following subsection.
[123] *Id*.

this narrow approach has been found to be altogether unallowable.[124] Therefore, issues such as the forum, the nature of the protest, the nature of the procurement flaw being remedied through corrective action, and the anticipated remedy itself must all be considered. Striking this balance while navigating a maze of nuances – both within each forum as well as across their "borders" – can prove challenging.

i. THE APPROPRIATE SCOPE AND NATURE OF AGENCY CORRECTIVE ACTION AS SEEN THROUGH THE EYES OF GAO.

To understand GAO's position today regarding the scope and nature of corrective action, one must first step back a few years. Only with this vantage point will a practitioner fully appreciate the nuances of this area and at least some history of the difficulties faced by agencies when making corrective action decisions. To that end, a worthy starting point for this discussion lies within *Rel-Tek Systems & Design*.[125]

In this 1999 GAO case, Rel-Tek challenged the manner in which the Defense Finance and Accounting Service (DFAS) implemented GAO's recommended corrective action in response to a previously-sustained protest.[126] In that previous protest, to remedy the agency's acquisition errors, GAO recommended DFAS conduct discussions with all offerors whose proposals were in the competitive range at the time of award, request best and final offers, and proceed with the source selection process.[127]

---

[124] *See e.g.*, *Lockheed Martin Systems Integration-Oswego*, B-299145.5 (Aug. 30, 2007) also discussed in greater detail in the following subsection.
[125] *Rel-Tek Systems & Design*, B-280463.7 (July 1, 1999)
[126] See *Rel-Tek Sys. & Design, Inc*., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2, in which GAO sustained Rel-Tek's protest of an award to Oracle Corporation for accounting software and related services.
[127] *Id*.

In response to GAO's recommendations, DFAS limited its implementation of the corrective action recommendations to the three solicitation requirements with which the initially-successful offeror's proposal failed to unambiguously comply.[128] Specifically, the agency reopened discussions, but limited those discussions to only three proposal areas.[129] After those limited discussions, DFAS requested that each offeror in the competitive range submit a best and final offer limiting any proposal revisions to those same three specified areas.[130]

Rel-Tek objected to this narrow approach stating it did not offer effective relief with respect to the previously-sustained decision.[131] Rather, Rel-Tek believed DFAS' corrective action should have taken a more broad approach by allowing for changes to additional areas of Rel-Tek's proposal to ensure it was more competitive.[132] Rel-Tek therefore requested that GAO modify its previously-issued corrective action recommendations to specify that unrestricted discussions and final offers must be permitted.[133] DFAS countered that the restrictive terms of its request for new best and final offers were necessary to avoid an improper auction in violation of FAR 15.610(2) and would have advantaged some offerors over others.[134]

In determining that DFAS's narrow approach was appropriate, GAO stated that corrective action measures are within the sound discretion and judgment of the

---

[128] *Rel-Tek Sys. & Design, Inc. – Modification of Remedy*, B-280463.7 (July 1, 1999).
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.

contracting agency.[135] GAO also stated it would not question an agency's corrective action so long as it remedies the initial procurement impropriety.[136] GAO further determined that where the procurement impropriety which prompted the need for corrective action is limited in nature, does not reasonably affect other areas of the evaluation of proposals, and the agency's requirements have not changed, a narrow corrective action approach is allowable.[137] The decision is Rel-Tek seemed to set the tone for GAO's approach to the scope of corrective action – but not for long.

Having established its general acceptance of agencies taking a narrow corrective action approach in *Rel-Tek*, GAO faced a similar issue just a few years later in *Computer Associates International, Inc.*[138] There, Computer Associates (CA) protested the United States Department of Agriculture's (USDA) award of a software contract to CA's competitor.[139] CA specifically alleged that

> (1) the agency improperly evaluated CA's technical quote, by employing the use of an unstated minimum requirement for an integrated multiple platform support solution; (2) the agency improperly evaluated CA's price quote; and (3) the agency failed to follow the solicitation's stated source selection criteria and failed to make a proper best value determination.[140]

In light of CA's claims, the agency stated it would seek clarification from CA regarding its price quote, and once the clarification was received, the agency would perform a new

---

[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Computer Associates International, Inc*, B–292077.2, Sept. 4, 2003, 2003 CPD ¶. 157.
[139] *Id*.
[140] *Id*.

price/technical tradeoff to make a new source selection decision.[141] Given the agency's planned corrective action, CA withdrew its protest.[142]

The agency then issued an amendment seeking price clarifications and instructing vendors to submit detailed, standardized price templates; vendors were not permitted to submit new technical quotes however.[143] CA again filed a protest, this time arguing that it was necessary for the agency to amend the solicitation to, amongst other things, permit vendors to submit new price *and* technical quotes; GAO disagreed.[144]

In reaching its conclusion that the USDA's narrow corrective action approach was permissible, GAO again noted that contracting officers are granted broad discretion to take corrective action.[145] GAO found it was reasonable for the agency to limit vendors' submissions and reiterated it would not question an agency's decision to restrict proposal revisions when taking corrective action so long as such action was reasonable and remedied the established or suspected procurement impropriety.[146] In fact, GAO went so far as to acknowledge that this narrow approach was beneficial to all parties by having "the added benefit of reducing further cost and delay in procurement."[147]

Both *Rel-Tek* and *Computer Associates* would seem to lead one to reasonably believe that limiting the scope of revisions – or taking a narrow corrective action approach – is acceptable to GAO; such actions merely fall within the contracting officer's

---

[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Id. citing SMS Data Prods. Group, Inc*., B–280970.4, Jan 29, 1999; *Patriot Contract Servs., LLC, et al.*, B–278276.11 et al., Sept. 22, 1998.
[146] *Id*. at 4.
[147] *Id*.

broad discretion to take corrective action. And, so long as the identified defect is remedied, GAO will not question the agency's approach to that remedy. Unfortunately, this is not always the case; agencies may still find themselves confused by seemingly-different opinions based on what appear to be very similar circumstances.

Take, for example, GAO's 2005 opinion in *Cooperativa Murator Riuniti*.[148] In *Cooperativa*, the Department of the Navy (Navy) issued a request for proposals for the construction of two facilities in Italy.[149] After initial award was made, Cooperativa protested to GAO, arguing that the Navy's initial evaluation and resulting award was flawed and unreasonable.[150] Cooperativa's protest was sustained in part and GAO recommended corrective action in the form of reevaluating the past performance and organizational experience factors as they related to Cooperativa.[151] GAO further recommended the Navy terminate the initially-awarded contract and instead make award to Cooperativa, if, after reevaluation, Cooperativa was found to be the best value.[152]

In response to GAO's recommendations, the Navy stated it would clarify a section of the RFP, reevaluate past performance, and request revised proposals for reevaluation of both past performance and organizational experience.[153] The contracting officer further notified offerors that because the agency was implementing GAO's recommendation, revisions to the schedule would not be accepted.[154] Offerors were also

---

[148] *Cooperativa Murator Riuniti*, B-294980.5 (July 27, 2005).
[149] *Id*.
[150] *Cooperativa Muratori Riuniti*, B–294980, B–294980.2 (Jan. 21, 2005).
[151] *Id*.
[152] *Id*.
[153] *Cooperativa Muratori Riuniti*, B-294980.5 (July 27, 2005).
[154] *Id*.

advised that due to protest process delays, language in the RFP pertaining to the time periods for exercise of options was being changed, and, as a result, price proposal revisions would also be allowed.[155]

Cooperativa protested the Navy's planned corrective action, arguing in part that, because the Navy allowed offerors to revise their prices, offerors should also be permitted to revise their schedules.[156] The Navy however argued that, because it made no revisions to the RFP affecting the scheduling, there was no reason to permit offerors to revise their schedules.[157] As such, the Navy argued that, consistent with *Rel-Tek* and *Computer Associates*, limiting proposal revisions was reasonable and within the agency's corrective action discretion.[158] GAO disagreed.

In sustaining this portion of Cooperativa's protest, GAO distinguished this case from *Rel-Tek* and *Computer Associates*. Stating that, where "price revisions are permitted, offerors *should* be allowed to revise *any* portions of their technical proposals that could have an impact on their pricing, which clearly would include schedule," GAO concluded the Navy's corrective action was too narrow.[159] And, despite GAO's stated deference to the agency's chosen scope and nature of corrective, GAO disagreed with the Navy's position that the amendments had no impact on the schedule.[160]

As a consequence of this decision, *Cooperativa* worked to expand GAO's reach while apparently narrowing an agency's discretion simultaneously. GAO stated that an

---

[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Cooperativa Muratori Riuniti*, B-294980.5 (July 27, 2005).
[159] *Id*. (emphasis added)
[160] *Id*.

agency cannot limit the scope of proposal revisions after corrective action "*unless* the agency offers evidence that the amendment could not reasonably have any effect on other aspects of proposals, or that allowing such revisions would have a detrimental impact on the competitive process."[161] This newly-required affirmative step on the part of the agency offered a blow to the notion of GAO providing agencies deference; instead, it began to chip away at that very deference.

Two years later, citing *Cooperativa*, in *Lockheed Martin Systems Integration-Oswego* GAO essentially reaffirmed its stance that offerors should be permitted to revise *any* aspect of their proposal *unless* the agency offers evidence that the amendment could not reasonably have an effect of the other aspects of the proposals.[162] In its decision, GAO contrasted prior cases where GAO found that agencies could limit the extent to which proposals could be revised.[163] Specifically, GAO noted that, in this case, the agency offered no reasonable explanation or response to the assertions that the corrective action, by its very nature, would require modifications to other areas outside of the scope of the narrow direction given.[164] Therefore, when questions surrounding the appropriateness of the scope of an agency's corrective action arise, *Lockheed Martin Systems Integration-Oswego* seemed to suggest that absent this affirmative undertaking by the agency, GAO will more likely favor an offeror's desire to make broad revisions

---

[161] *Id*.
[162] *Lockheed Martin Systems Integration-Oswego*, B-299145.5 (Aug. 30, 2007).
[163] *Id*.
[164] *Id*.

over an agency's narrow approach.[165] This, despite GAO's advertised deference to agency corrective action decision making.[166]

With this slow and somewhat painful progression in place, agencies were driven to take broad corrective action whenever a defect in the procurement was identified. In other words, agencies were forced into the position of allowing offerors to amend any number of proposal portions so as to remedy the defect while still offering the most wiggle room to offerors. Long gone were the days of agencies being able to exercise their discretion; whether a particular section of a proposal truly warranted revision appeared to be well outside the purview of the very agency responsible for drafting that requirement.

Yet two years after *Lockheed Martin Systems Integration-Oswego*, GAO seemed to shift its stance in a more agency-friendly direction. Without any mention of affirmative obligations on the part of the agency or the notion that an offeror should be permitted to revise *any* aspect of its proposal, in *Honeywell Tech. Solutions, Inc*.[167] GAO found the narrow corrective action approach to once again be appropriate.[168]

In *Honeywell Tech. Solutions, Inc*., in response to an "outcome prediction" conference, GAO advised NASA its past performance reevaluation was not reasonable and Honeywell's protest would likely be sustained.[169] Upon this revelation, NASA opted

---

[165] *Id*.
[166] *Id*.
[167] *Honeywell Tech. Solutions, Inc., B-400771.6 (Nov. 23, 2009).*
[168] *Id*.
[169] *Id.*

to take corrective action and Honeywell's protest was dismissed as academic.[170] NASA announced its intent to take corrective action in the form of conducting discussions with offerors regarding past performance, permitting offerors to submit FPRs *limited to* past performance information, reevaluating the past performance of both offerors, and making a new source selection decision.[171]

Honeywell challenged this approach alleging that the corrective action was insufficient.[172] Honeywell further argued that the agency's announced corrective action discounted the fact that offerors' proposals had become stale and failed to consider that past performance was "inextricably linked" to other elements of offerors' proposals.[173] As such, Honeywell argued, limiting revisions to only past performance was inappropriate and ineffective corrective action.[174]

In determining that NASA's narrow corrective action approach was appropriate, GAO revived its previously-weakened stance that the contracting officer is permitted broad discretion in determining the appropriate corrective action when such action is necessary to ensure a fair and impartial competition.[175] GAO further recognized that an agency may reasonably decide to limit the revisions offerors may make to their proposals.[176] GAO offered that decisions such as NASA's limiting the scope of the

---

[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.
[174] *Id*.
[175] *Id*. *citing Domain Name Alliance Registry*, B–310803.2, Aug. 18, 2008; *Computer Assocs. Int'l*, B–292077.2, Sept. 4, 2003.
[176] *Id*. citing *Computer Assocs. Int'l*,B–292077.2, Sept. 4, 2003*; Rel–Tek Sys. & Design, Inc.-Modification of Remedy*, B–280463.7, July 1, 1999.

revisions to the FPRs are within the "sound discretion and judgment" of the agency.[177] And, so long as an agency's corrective action works to remedy the issue that was the basis for the corrective action, there are situations where an agency may reasonably limit revisions offerors may make to their proposals.[178]

With agencies likely cheering behind the scenes, this opinion seemed to reinstate broad agency discretion in corrective action decision making. And, accompanying this shift, perhaps the most interesting attribute of *Honeywell Tech. Solutions, Inc*., was that it was devoid of any mention of *Cooperativa* or *Lockheed Martin Systems Integration-Oswego*.[179] Instead, GAO reached this decision relying on the propositions set forth some time earlier in *Rel-Tek* and *Computer Associates.*[180]

The confusion surrounding the appropriate scope of corrective unfortunately did not stop there, however. Even more recent cases seem to have created, at times, distinctions without a difference at GAO. For example, in *Power Connector, Inc.*, the Department of Justice, Federal Prison Industries, Inc. (UNICOR) amended its solicitation after an initial protest to clarify the criteria to be used for past performance evaluations.[181] Taking this updated past performance criteria into account, UNICOR requested that all offerors submit their revised proposals but stated that no new pricing proposals were requested.[182]

---

[177] *Id*.
[178] *Id*.; *see also Honeywell Tech. Solutions, Inc*., B-400771.6 (Nov. 23, 2009); *Computer Assoc. Int'l, Inc*. B-292077.2 (Sept. 4, 2003).
[179] *Id*.
[180] *Id*.
[181] *Power Connector, Inc.*, B-404916.2 (Aug. 15, 2011).
[182] *Id*.

Power Connector, Inc. protested this narrow corrective action approach arguing that the revised past performance requirement resulted in the need to revise price proposals.[183] Despite UNICOR's strong arguments to the contrary, GAO opined that the revised past performance requirements resulted in a material change such that price revisions would be necessary.[184] Relying on *Cooperativa*, *Lockheed Martin Systems Integration-Oswego*, and *Computer Associates* collectively – and again offering little deference to the agency's position that the changes merely clarified the past performance requirements – GAO stated that the agency lacked a reasonable basis to limit proposal revisions.[185] Therefore, GAO opined, offerors should be permitted to revise any aspects of their proposals in response to the revised solicitation.[186] The broad approach to corrective action once again prevailed.

So just what is the appropriate approach to agency corrective action in the GAO? Are agency corrective action decisions truly offered great deference? May an agency take a narrow approach to limit revisions to only those necessary to remedy the defect in the procurement? Or rather, must offerors be afforded the ability to revise any aspect of their proposals when corrective action is warranted?

These are the questions that are being asked by agencies today. And yet, little clarity can be offered. Though GAO will consistently say that agencies are afforded deference, this deference quickly erodes for unknown or inconsistent reasons. And

---

[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.

though the cases discussed above work to establish, perhaps, the outer limits of these considerations, much of the middle ground remains unclear.

As a result of this broad-versus-narrow ping-pong game, agencies are forced to – at best – guess as to how much deference they will be afforded if challenged at GAO despite the agencies' clear superior knowledge of the requirements at issue.

Perhaps surprisingly to the reader – but certainly not to agency attorneys charged with advising on the scope and nature of corrective action that should be taken – this game of ping-pong is not unique to the GAO forum. Rather, issues related to the appropriate scope of corrective cause agencies to struggle before COFC as well.

ii. THE APPROPRIATE SCOPE AND NATURE OF AGENCY CORRECTIVE ACTION AS SEEN THROUGH THE EYES OF COFC.

As discussed in the opening of this section, the apparent deference and discretion afforded to agencies when taking corrective action is not unique to GAO; COFC touts this approach as well. This is not, however, the only similarity between GAO and COFC when exploring corrective action issues. Perhaps not surprisingly, much of the confusion present at GAO regarding the appropriate scope and nature of corrective action may also be seen at COFC. The broad-versus-narrow corrective action discussion continues and the confusion surrounding the standards imposed – and chipping away at agency deference – appears to be just as prevalent at COFC as it is at GAO.

For example, in *ManTech Telecommunications & Info. Sys. Corp. v. United States*[187] Mantech protested the Army's proposed corrective action after it had filed a

[187] *ManTech Telecommunications & Info. Sys. Corp. v. United States,*49 Fed. Cl. 57 (Feb. 1, 2001).

protest at GAO. Mantech challenged, among other things, the agency's ability to amend the technical portion of the solicitation when only the evaluation of price proposals had originally been challenged. Mantech argued that it was unfair to allow the other offeror to improve its technical proposal after Mantech had been prejudiced by errors in the evaluation of price.[188]

Relying on a GAO case, Judge Allegra's opinion recognized the position that, as a general rule, offerors may "revise any aspect of their proposals they see fit, *including portions that were not the subject of the amendment and discussion*."[189] This case thus set the tone for agencies and protesters alike. Taking a broad approach to corrective action – allowing offerors the opportunity to revise even those portions of their proposals that were not a part of the initial dispute – appear to be preferred at COFC. However, much like GAO, the opinion of COFC's judges in this regard have certainly not been consistent.

Nearly 10 years after *ManTech Telecommunications* appeared to establish COFC's preference towards broad corrective action, Judge Wheeler took just the opposite approach in *Sheridan Corp. v. United States*.[190] There, the United States Property and Fiscal Office of Maine, National Guard Bureau (National Guard) awarded a contract for construction of an aircraft maintenance hangar to Sheridan.[191] However, following a debriefing, JCN Construction Company (JCN) challenged award to Sheridan by filing a

---

[188] *Id*. at 74-75.
[189] *Id*. at note 29 *citing Krueger Int'l Inc.*, B–260953.4. (emphasis added)
[190] *Sheridan Corp. v. United States*, 95 Fed.Cl. 141(2010).
[191] *Id*. at 144-145.

bid protest at GAO.[192] JCN alleged that Sheridan had unfairly benefitted from the agency's disparate treatment of proposals and, as such, JCN was disadvantaged.[193]

Upon receipt of the GAO protest, the National Guard announced its intent to take corrective action.[194] The National Guard's corrective action entailed enlarging the competitive range to include the top three proposals from the initial submission.[195] Sheridan, JCN, and a third competitor were then permitted to submit revised proposals.[196] In response to the agency's planned corrective action Sheridan filed suit at COFC.[197]

In challenging the nature of the corrective action, Sheridan argued that the act of expanding the competitive range and allowing for revised proposals was unlawful and lacked a rational basis.[198] Sheridan further argued that, by allowing the two previously-unsuccessful offerors a second chance to receive award impermissibly harmed Sheridan given its winning price had already been disclosed.[199]

In agreeing with Sheridan's arguments, Judge Wheeler sustained Sheridan's protest on the ground that the authority to take corrective action does not broadly include the authority "to resolicit proposals because of a perceived evaluation error."[200] Rather, he explained, in light of the APA's standards "corrective action must target the identified

---

[192] *Id*.
[193] *Id*.
[194] *Id*. at 147. GAO dismissed the protest as academic upon notification that the agency planned to take corrective action.
[195] *Id.*
[196] *Id*. at 145.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*. at 153.

defect."[201] He concluded that, because "the agency's concern related to the evaluation of the proposals, [the corrective action] should have been targeted to that issue."[202] In COFC's view, the agency's decision to take corrective action was not reasonable under the circumstances given the resolicitation "had no relation" to an identified defect in the procurement.[203] The result of Judge Wheeler's decision provided the framework for the proposition that, rather than taking a broad approach to corrective action, agencies must utilize a narrow approach more tailored to address the specific procurement flaw at issue.[204]

With the competing corrective action approaches of *ManTech* and *Sheridan* in place but not necessarily in harmony, the next significant decision in this area did little to clarify COFC's desired corrective action approach to agencies. That case, *Sierra Nevada v. United States*, again involved an agency's decision to conduct a revised solicitation.[205] However, this time, COFC's opinion – written by Judge Miller – attempted to distinguish

---

[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] *Id*.; *but see MCII Generator & Elec., Inc. v. United States*, 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002) where Chief Judge Baskir (citing *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed.Cir. 1999)) compared the analysis involved with determining the appropriateness of an agency's corrective action to the decision making utilized when determining whether a termination for the convenience of the Government is appropriate by stating, "Even termination for convenience of the Government, for which the widest latitude is given, requires a finding that the facts support a reasonable inference that the Contracting Officer acted in furtherance of full and open competition." To the extent that COFC judges may suggest that a targeted approach must be utilized when taking corrective action, one must reasonably conclude that COFC is imposing a higher standard on agencies when taking corrective action than that applied when a solicitation is cancelled altogether.
[205] *Sierra Nevada v. United States*, 107 Fed. Cl. 735 (2012).

the circumstances set forth in *Sheridan* from those seemingly-similar circumstances found in *Sierra Nevada*.[206]

Sierra Nevada was again a post-award bid protest involving corrective action – this time taken by the United States Air Force (Air Force).[207] After its award decision was challenged, the Air Force determined that corrective action was necessary based on an incomplete record and evidence that bias on the part of the program manager tainted the procurement.[208] In determining that the Air Force's decision to cancel the award and conduct a revised solicitation was appropriate, Judge Miller reasoned that, "[w]hile the award in Sheridan was made on the basis of evaluation of initial proposals only, the award in this case was made after extensive post-proposal discussions between the Air Force and the offerors."[209] Based upon this logic, the Air Force's untargeted approach was found to be acceptable in spite of *Sheridan's* clear preference towards a targeted approach.[210]

While one might find comfort in a distinction permitting broad corrective action in *Sierra Nevada*, while still managing to keep *Sheridan's* somewhat-recent preference towards narrow corrective action intact, much of the rest of the *Sierra Nevada* opinion provided no such comfort. For example, Judge Miller stated that the standards set forth in *Sheridan* "should not be exported to [ ] more nuanced" circumstances such as those

---

[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*. at 755.
[210] *Id*.

found in *Sierra Nevada*.[211] He went on to state, in a less-than-resounding endorsement of COFC's position, "[t]he Court of Federal Claims *has more or less settled on a standard for review* of challenges to corrective actions. It must be reasonable under the circumstances."[212] And, he concluded that no single factor can be transmuted into a magical golden "talisman for assessing whether the corrective action was reasonable in the circumstances."[213] Rather than working to clarify COFC's position on the appropriate scope of corrective action, these statements most certainly led to head-scratching amongst Government agencies and their respective procurement staffs.

The head-scratching prompted by the *Sierra Nevada* decision became perhaps even more apparent after two different COFC judges issued two seemingly-quite-different opinions about the appropriate scope of corrective action just months later. The cases, *Quest Diagnostics, Inc. v. United States*[214] issued in May, 2013 with an opinion written by Judge Bruggink and *Amazon Web Services, Inc. v. United States*[215] issued in October, 2013 with an opinion written by Judge Wheeler, again reached very different conclusions.

In *Quest Diagnostics, Inc*., Quest Diagnostics, Inc. (Quest) made a number of challenges to the award decision made by the United States Department of the Army Medical Command, Center for Health Care Contracting (MEDCOM) for a contract to

---

[211] *Id*. at 751.
[212] *Id*. (emphasis added)
[213] *Id*. at 751 referencing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940) (Justice Frankfurter commenting on the balance between personal liberty and Government), overruled on other grounds by *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).
[214] *Quest Diagnostics, Inc. v. United States*, 110 Fed. Cl. 716 (May 1, 2013).
[215] *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (Oct. 31, 2013).

provide clinical reference laboratory services.[216] After an initial award to Quest, Laboratory Corporation of America (LabCorp) filed a protest at GAO and MEDCOM decided to take corrective action.[217] Offerors submitted revised proposals and, after a new evaluation, LabCorps was selected as the awardee.[218] Quest then filed a GAO protest challenging the award decision, prompting the agency to take corrective action for a second time.[219] After another reevaluation, MEDCOM again made award to LabCorp.[220] Quest then filed a second protest at GAO; the protest was denied prompting Quest to file a protest with COFC.[221]

Quest argued that several aspects of MEDCOM's evaluation and award decision were flawed and that MEDCOM improperly allowed LabCorp to amend its proposal after the first round of corrective action.[222] Specifically, Quest stated that MEDCOM's first corrective action only addressed pricing questions thus restricting offerors from revising anything but their price proposals.[223] Quest noted that LabCorp, when revising its proposal in response to the first corrective action, took that opportunity to revise its technical proposal as well as its price proposal.[224] Quest argued these technical updates

---

[216] *Quest Diagnostics, Inc. v. United States*,110 Fed. Cl. 716, 719 (May 1, 2013).
[217] *Id*. at 722.
[218] *Id*. at 722-723.
[219] *Id.*
[220] *Id*. at 723.
[221] *Id*.
[222] *Id*. at 724-725.
[223] *Id*.
[224] *Id*.

made were outside the scope of the corrective action and therefore should not have been considered by the agency in its reevaluation.[225]

Though COFC agreed with Quest in that MEDCOM's first corrective action did address only pricing, Judge Bruggink noted that MEDCOM did not explicitly prohibit offerors from revising others aspects of their proposals.[226] Judge Bruggink went on to explain that, in line with *Power Connector, Inc.*, when an agency takes corrective action that invites proposal revisions, the agency is essentially reopening the solicitation as a whole.[227] As such, offerors are allowed to make any modifications to proposals as they deem appropriate.[228] Thus, COFC concluded, when an agency issues an amendment to a solicitation as part of corrective action, absent an explicit restriction to the contrary, offerors have the broad ability to revise any part of their proposals to include those not necessarily the subject of the amendment.[229]

Judge Bruggink's opinion would seem to lead one to the logical conclusion, therefore, that an agency may make the conscious decision to allow for broad corrective action even when only a narrow concern is identified. However, this logic did not seem to carry weight just six months later before Judge Wheeler in the *Amazon* case.[230]

---

[225] *Id*.
[226] *Id*. at 724-726
[227] *Id*. at 724 citing *Power Connector, Inc*., B404916.2 (Aug. 15, 2011), 2001 CPD ¶ 186 at 3-4.
[228] *Id*.
[229] *Id*.
[230] *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (Oct. 31, 2013).

In *Amazon,* the Central Intelligence Agency's (CIA) acquisition of "cloud computing services" was at issue.[231] Though the underlying facts in this case are more fully discussed in subsection C below, for purposes of the immediate issue, one must know that, upon learning of CIA's award to Amazon and after receiving a debriefing, IBM filed a protest with GAO.[232]

After conducting a full review of the parties' arguments – to include a full hearing – GAO sustained IBM's protest on two grounds. First, GAO determined that the agency's evaluation of the protester's price under one of the solicitation's price scenarios was not calculated in a manner that resulted in evaluation on a common basis.[233] Second, GAO determined that during post-selection negotiations allowed under the terms of the RFP to resolve matters not material to the source selection decision, the agency materially relaxed a solicitation term involving software certification which in turn resulted in unequal treatment amongst offerors.[234] Based upon these findings, GAO recommended the agency "reopen the competition and amend the RFP as necessary to ensure that proposals are prepared and evaluated on a common basis, consistent with the issues discussed in [GAO's] decision."[235] GAO further recommended the agency

---

[231] *IBM-U.S. Federal* B-407073.3 et. al. (June 6, 2013) (Defining cloud computing services generally as services used to deliver computing services via various networks thus allowing IT service more quickly and at a lower cost.)
[232] *Id*. at 5.
[233] *Id*. at 9.
[234] *Id*. at 12.
[235] *Id*. at 16.

"conduct discussions with offerors, obtain and evaluate revised proposals, and make a new source selection decision."[236]

In response to GAO's recommendation CIA took corrective action.[237] However, rather than simply reopening the competition to address the narrow aspects of offerors' proposals affected by the alleged improper price evaluation and improper waiver of the software certification requirement, CIA took the opportunity to amend other aspects of the solicitation.[238] As a result, Amazon promptly filed suit at COFC alleging the CIA's corrective action was "overbroad, unreasonable, and in violation of federal law and regulation."[239] Amazon further alleged that the underlying GAO decision lacked a rational basis and that IBM suffered no prejudice.[240] Thus, Amazon argued, award to Amazon was proper, IBM suffered no prejudice, and IBM lacked standing because it had no substantial chance of receiving contract award.[241]

In assessing Amazon's contentions, Judge Wheeler found that GAO's recommended corrective action was indeed overbroad and therefore irrational.[242] Judge Wheeler further ruled that the agency reopening the competition, to include modifying scenarios and other RFP areas unaffected by the protest challenge, was also considered to be overbroad.[243] Specifically, the opinion stated that, because only a narrow portion of

---

[236] *Id*. at 16.
[237] *See Amazon Web Services, Inc.*, 113 Fed. Cl. 102 (Oct. 31, 2013).
[238] *Id*.
[239] *Id*. at 105.
[240] *Id*.
[241] *Id*.
[242] *Id*.; *see also IBM-U.S. Federal*, B-407073.3 et. al. (June 6, 2013).
[243] *Id*. at 115-116 *citing Sheridan Corp. v. United States*, 95 Fed. Cl. 141 at 153 (2010), ("[T]his Court has rejected corrective action to resolicit proposals because of a perceived evaluation error." (*citing Delaney*

the RFP contained the noted pricing error, the appropriate corrective action would have been to limit revisions to the "Scenario 5" price evaluation – the narrow portion of the RFP containing the noted pricing error.[244]

Judge Wheeler went on to state that the CIA's decision to "elect[] to use [corrective action] as an opportunity to amend other aspects of the solicitation, despite the fact that no 'other aspects' were at issue" was inappropriate.[245] Citing *Sheridan Corp. v. United States*, Judge Wheeler unequivocally stated that ". . . any corrective action must *narrowly* target the defects it is intended to remedy."[246] Therefore, because the CIA acted on GAO's irrational recommendation and implemented broad corrective action, it too acted irrationally.[247]

Judge Wheeler's pronouncements in, first *Sheridan* and then *Amazon*, seem to make clear that at least this COFC judge will only consider narrow corrective action measures to be rational and appropriate. These opinions also seem to suggest that the broad approach to corrective action called for under *ManTech*, employed in *Sierra Nevada*, and allowed under *Quest Diagnostics, Inc*. is not generally accepted after all.

As if these decisions haven't caused enough confusion for agencies simply trying to remedy identified procurement defects, Judge Block, in the recent opinion in *WHR Group, Inc. v. United States* seemed to put a final nail in the coffin of agency corrective

---

Constr. Corp. v. United States, 56 Fed.Cl. 470, 476 (2003); *MCI Generator & Elec. Inc. v. United States*, No. 1:02-CV-85, 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002)).
[244] *Id*.
[245] *Id*. at 116.
[246] *Id*. (emphasis added)
[247] *Id*.

action dilemmas.[248] Noting that, "[the] case is procedurally convoluted" and runs the risk of drawing the reader "into a black hole of confusion," Judge Block delved into the issue of whether the there was a rational basis to the Federal Bureau of Investigation's (FBI) corrective action – entering into an agreement to provide a Blanket Purchase Agreement to a disappointed offeror.[249]

However, in enjoining the FBI from taking any of its planned corrective action steps, Judge Block found that the agency failed to state a rational basis for its corrective action decisions.[250] And, in reaching this conclusion, Judge Block relied upon what he termed to be the "Sheridan II and MCII Targeting Tests."[251] These targeting tests set forth the propositions that, (1) an agency's decision to resolicit proposals will be found to be unreasonable when such an act "had no relation" to the identified defect in the procurement;[252] and (2) an agency's inability to identify a clear defect in the solicitation renders the agency decision to resolicit unreasonable; corrective action taken must be "rationally related to the defect that is identified".[253]

Though Judge Block's opinion clearly articulated these so-called "targeting tests", it bears noting that these tests are not as well established as the reader might believe.[254]

---

[248] *WHR Group, Inc. v. United States,* No. 13-515C, 2014 WL 1377819 (Fed. Cl. March 21, 2014).
[249] *Id*. at 389.
[250] *Id*. at 402.
[251] *Id*. at 397. Here, the court cited *Sheridan Corp. v. United States ("Sheridan II"),* 95 Fed.Cl. 141 (2010) and *MCII Generator & Elec., Inc. v. United States,* 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002).
[252] *Id*. at 396 citing *Sheridan Corp.,* 95 Fed.Cl. 141, 154 (2010)
[253] *Id*. at 396 stating, with regard to *MCII Generator & Elec., Inc.* at 1, "[t]he court found that the record did not show that the Army had clearly identified a defect and that the court's 'speculation' as to what the defect might be was 'not enough to save the decision'".
[254] *Id*.; *see also* generally *MCII Generator & Elec., Inc, Sheridan Corp.,* and *Sierra Nevada Corp*. which, as discussed in the proceeding sentences, discuss the establishment and evolution – or perhaps lack thereof – of the "MCII Targeting Test."

Nor is the application of these tests a clearly-accepted proposition amongst COFC judges.[255] In fact, the *MCII* decision made no mention of a "targeting test" itself.[256] Rather, it spoke more generally to the difficulty of determining the appropriateness of an agency's voluntary corrective action when there is little information available on the record to speak to the agency's underlying thought process.[257] It wasn't until the *Sheridan Corp.* decision that Judge Wheeler first made mention of *MCII* establishing some sort of formalized test.[258] And even there, it may be argued that Judge Wheeler's extrapolation of this targeting test was misdirected.[259]

Though Judge Block seemed to adopt Judge Wheeler's application of the *MCII* targeting test in *WHR,* it is yet to be seen whether these targeting tests have any longevity at COFC or universal acceptance amongst all of the judges. And, despite the questionable nature of – or general acceptance of – the articulated tests in *WHR*, the parties were left with some meaningful final words of wisdom.[260] Offering, "there can be no universal test as to what constitutes appropriate corrective action", Judge Block expressed perhaps the most straight-forward assessment of this corrective action dilemma yet.[261]

---

[255] *See e.g,. Sierra Nevada Corp*. at 751 where Judge Miller, in citing the proposition of the "targeting standard" set forth in *MCII Generator & Elec., Inc.* stated, "[t]he butterfly effect of holding that 'the corrective action must target the identified defect,' should not be exported to a more nuanced case, such as the case at bar." (internal citation omitted).
[256] *See generally MCII Generator & Elec., Inc.*
[257] *Id*.
[258] *Sheridan Corp*. at 153.
[259] See *Sierra Nevada Corp*. at 751.
[260] *WHR Group, Inc.* at 397.
[261] *Id*.

Though additional agency concerns surrounding the *WHR*, *Amazon*, and *Systems Application* cases will be discussed further in the next section, for purposes of this discussion regarding the extent of deference an agency is truly afforded when determining the nature and scope of corrective action take, one can clearly see that reliance on COFC's previous opinions can be risky. The same may be said with respect to GAO. The broad-versus-narrow positions taken by COFC and GAO in recent years can, at best, be seen as somewhat schizophrenic in nature. And, unfortunately, because of these inconsistencies, confusion surrounding the true extent of deference afforded to an agency when taking corrective action – or the appropriate scope of such corrective action – abounds.

C. THE LOSE-LOSE POSITION IN WHICH AGENCIES FIND THEMSELVES WHEN COMPELLED TO DEFEND A DECISION BEFORE COFC THAT WAS ORIGINALLY OPPOSED BEFORE GAO.

Though "disagreement is normal,"[262] disagreements aren't necessarily always surmountable. This concern becomes especially pertinent when discussing the differing – and oftentimes unpredictable – approaches to corrective action issues at GAO and COFC. In fact, Ralph White, Managing Associate General Counsel, Procurement Law at GAO has described recent disagreements between these two forums as "the clash of two tectonic plates."[263] Unfortunately, Government agencies lie at the center of these clashes.

---

[262] Melissa Mathison quoting the Dalai Lama, *A Conversation with the Dalai Lama*, ROLLING STONE, July 21, 2011 (http://www.rollingstone.com/politics/news/a-conversation-with-the-dalai-lama-20110721 last visited July 17, 2014).

[263] Dietrich, Knauth, "5 Questions For GAO's Bid Protest Head Ralph White." Law360, August 23, 2013. (http://www.law360.com/articles/466325/5-questions-for-gao-s-bid-protest-head-ralph-white, last visited 25 June).

The concerns agencies face due to lack of consistent direction demonstrated by both GAO and COFC continue to wreak havoc. In one breath COFC clearly holds GAO opinions in high regard, while in the next it does just the opposite.[264] And though the relationship between GAO and COFC is perhaps customarily cordial, differences in opinion between the two forums place agencies in a precarious position.

It is well-recognized that "[a]gencies traditionally have deferred to GAO recommendations, and as a general policy have acceded to the views of the GAO even when those views conflicted with the agency's original position."[265] However, where an agency chooses to follow a GAO recommendation, such a decision will be found to lack a rational basis if it works to implement a GAO recommendation that is itself

---

[264] *See e.g,. Systems Application & Technologies, Inc. v. United States* 100 Fed. Cl. 687 (2011), aff'd, 691 F.3d 1374 (Fed. Cir. 2012) where COFC rejected the Government's argument that it may always take corrective action so long as it is done "in good faith". Rather, COFC ruled that a number of its previous decisions were flawed because the underlying case upon which the previous application of the good faith standard relied – *Federal Security Systems, Inc.*, B-281745 (Apr. 29, 1999) – was a GAO case. COFC made clear that a standard established by the GAO was certainly not the standard that applied at COFC. Noting that, because the COFC applies an arbitrary and capricious standard when determining whether a procuring agency's actions violated a statute or regulation, the GAO's standard does not apply; "an agency acting in good faith may still violate this standard". (fn 21, page 716). COFC's departure from standards first articulated in GAO cases would suggest that COFC and GAO do not apply the same standards or approach when determining whether the scope of an agency's corrective action is appropriate. But see, *Quest Diagnostics, Inc .v. United States,*110 Fed. Cl. 716 (Apr. 9, 2013) where, without any mention of its previous efforts to distinguish itself from GAO, COFC appeared to suggest it was in lockstep with GAO. COFC pointed directly to *Power Connector, Inc.*, B–404916.2, 2011 CPD ¶ 186 (Comp.Gen. Aug. 15, 2011) and *Cooperative Muratori Riuniti,* B–294980.5, 2005 CPD ¶ 144 (Comp.Gen. July 27, 2005) as providing the controlling legal principles in this area and in fact provided a consolidated overview of where both COFC and the GAO were said to be aligned with respect to the appropriate scope of corrective action.

[265] *Honeywell, Inc. v. United States*, 870 F. 2d 644 (Fed. Cir. 1989).

irrational.[266] As a result, agencies "[m]ay be required to defend a decision before the COFC that [they] originally resisted before the GAO."[267]

Again consider the CIA's acquisition of "cloud computing services" in *Amazon Web Services, Inc. v. United States*[268] and its corresponding GAO case, *IBM-U.S. Federal*.[269] *Amazon Web Services, Inc.*, discussed briefly above, involved CIA's solicitation for a single, fixed-price indefinite-delivery/indefinite-quantity (IDIQ) contract for commercially-managed cloud computing services for the Intelligence Community; the contract was to be awarded on a best value basis.[270] The contractor was to generally provide the Government a copy of its existing public cloud (with modifications where necessary).[271]

After initial proposals were submitted and two early protests were resolved through corrective action,[272] a competitive range consisting of IBM, Amazon, and a third offeror was established.[273] Discussions with the competitive range offerors were then held and final proposal revisions (FPRs) were requested.[274]

---

[266] *Amazon Web Serv. v. United States*, 113 Fed. Cl. 102 (2013) *citing Turner Const. Co., Inc. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011); see also *Honeywell, Inc*. at 648; Rush Const., Inc. v. United States, COFC No. 14-202C, July 15, 2014.
[267] Kang Article at 604.
[268] *Amazon Web Services, Inc.*, 113 Fed. Cl. 102 (Oct. 31, 2013).
[269] *IBM-U.S. Federal*, B-407073.3 et. al. (June 6, 2013).
[270] *Id*. at 2.
[271] *Id*.
[272] *Id*. at 3; Five offerors, including IBM and Amazon, submitted timely proposals. Two offerors (AT&T Corporation and Microsoft Corporation) then filed protests with GAO challenging certain requirements, and a third offeror withdrew its proposal. The agency took corrective action by amending the RFP to and, as such, both initial protests were dismissed as academic (B-407073, B-473073.2, Aug. 17, 2012).
[273] *Id*. at 4.
[274] *Id*.

In its evaluation of FPRs, the CIA's technical/management evaluation team "assigned a deficiency to IBM's proposal under the demonstration element (within the technical approach subfactor) as a result of language in the firm's FPR that appeared to indicate that its existing public cloud could not provide auto-scaling for applications provided by the consumer."[275] IBM also received a significant weakness under the written element of the technical approach subfactor due to its "failure to make clear in its proposal how IBM would modify its existing commercial cloud to provide the required auto-scaling capability for the intelligence community."[276] And, because of materially different interpretations of the scenario requirements, price adjustments were made to each offeror's price proposal to "'provide a common basis for comparing price'."[277]

The adjustment made resulted in an overall increase to IBM's price.[278] Comparing the "normalized" IBM price to Amazon's price, the source selection authority (SSA) concluded that Amazon's proposal represented the best overall value to the Government.[279] In reaching this conclusion, the SSA reasoned, although IBM's proposal may have offered a price advantage over a 5 year period, that advantage was outweighed by Amazon's superior technical solution.[280] Upon learning of award to Amazon and after receiving a debriefing, IBM filed a protest with GAO.[281]

---

[275] *Id*.
[276] *Id*.
[277] *Id*. at 4 *citing* the CIA's Source Selection Decision at 1.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*. at 5

GAO sustained IBM's protest on two grounds. First, GAO determined that the agency's evaluation of the protester's price under one of the solicitation's price scenarios was not calculated in a manner that resulted in evaluation on a common basis.[282] And second, GAO determined that during post-selection negotiations allowed under the terms of the RFP to resolve matters not material to the source selection decision, the agency materially-relaxed a solicitation term involving software certification which in turn resulted in unequal treatment amongst offerors.[283]

Based upon these findings, GAO recommended that the agency "reopen the competition and amend the RFP as necessary to ensure that proposals are prepared and evaluated on a common basis, consistent with the issues discussed in [GAO's] decision."[284] GAO further recommended that the agency "conduct discussions with offerors, obtain and evaluate revised proposals, and make a new source selection decision."[285]

With GAO's recommendation in hand – and despite its arguments to the contrary in the course of the GAO litigation – CIA did indeed decide to take corrective action in response to the sustained protest.[286] Specifically, CIA reopened the competition to allow for proposal revisions – even revision to those areas of the proposals that were not the

---

[282] *Id*. at 9.
[283] *Id*. at 12.
[284] *Id*. at 16.
[285] *Id*.
[286] *See Amazon Web Services, Inc.*, 113 Fed. Cl. 102 (Oct. 31, 2013).

subject of IBM's initial protest at GAO.[287] Further, in response to GAO's determination that CIA waived a material term of the original solicitation for one of the offerors (but not all), CIA took a broad approach.[288] Rather than simply reopening the competition to address the narrow aspects of offerors' proposals affected by this improper waiver and pricing scenario, CIA took the opportunity to amend other aspects of the solicitation.[289] As a result of these actions, Amazon filed suit at COFC.[290]

Amazon specifically alleged that the CIA's corrective action was "overbroad, unreasonable, and in violation of federal law and regulation."[291] Amazon further alleged that the underlying GAO decision lacked a rational basis and that IBM suffered no prejudice.[292] Thus, Amazon argued, award to Amazon was proper, IBM suffered no prejudice, and IBM lacked standing because it had no substantial chance of receiving contract award.[293]

CIA was thus placed in a precarious position. Though it originally opposed IBM's arguments before GAO, given GAO sustained the initial protest, CIA chose to follow GAO's recommendations to take corrective action. Having afforded due consideration to the rationale and guidance of GAO, CIA found itself in the uncomfortable position of having to defend its corrective action decisions before COFC

---

[287] *See Id*. at 105; Though "scenario 5" was the only pricing matter at issue during the course of the GAO protest, CIA, in taking corrective action, allowed for the revision of proposals beyond that single pricing issue.
[288] *Id*. at 105.
[289] *Id*.
[290] *Id*.
[291] *Id*. at 105.
[292] *Id*.
[293] *Id*.

when the need for any corrective action at all was originally opposed at GAO. Having fully considered GAO's recommended corrective action and, as discussed above, a body of caselaw lacking in clarity with respect to the appropriate scope of corrective action, CIA argued its broad approach was rational and appropriate. Judge Wheeler disagreed.[294]

In assessing Amazon's contentions, Judge Wheeler noted that, when considering the reasonableness of CIA's corrective action, it first had "to evaluate the rationality of GAO's decision."[295] He went on to reinforce the Federal Circuit's position that "an agency's decision lacks a rational basis if it implements a GAO recommendation that is itself irrational."[296] COFC then determined that GAO's recommendation for corrective action in this case was irrational.[297]

Judge Wheeler found that, though defects in the acquisition were present, none warranted reopening the entire competitive process.[298] Reopening a competition, to include scenarios and proposal areas unaffected by the protest challenge, was considered to be overbroad.[299] He further ruled that the CIA's decision to "elect[] to use [corrective action] as an opportunity to amend other aspects of the solicitation, despite the fact that no 'other aspects' were at issue" was inherently overbroad.[300]

---

[294] *See generally Id*. at 116.
[295] *Id*. at 106 citing *Turner Constr. Co., Inc. v. United States*, 645 F.3D 1377, 1383 (Fed.Cir 2011).
[296] *Id*.
[297] *Id*. at 115.
[298] *Id*.
[299] *Id*. at 115-116 *citing Sheridan Corp. v. United States*, 95 Fed. Cl. 141 at 153 (2010), ("[T]his Court has rejected corrective action to resolicit proposals because of a perceived evaluation error." (*citing* Delaney Constr. Corp. v. United States, 56 Fed.Cl. 470, 476 (2003); MCI Generator & Elec. Inc. v. United States, No. 1:02-CV-85, 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002)).
[300] *Id*. at 116.

Judge Wheeler then concluded, "[t]here is no such thing as a perfect procurement. Thus, a bid protester must show prejudice, not mere error."[301] Noting IBM never met its burden of proving error in the procurement process and GAO neglected to address this concern adequately, Judge Wheeler wrote that even if IBM had made persuasive arguments regarding the alleged price evaluation error, "it remains implausible that there would be any effect of the outcome of the procurement."[302] Judge Wheeler closed his opinion stating that if any prejudice was present, it was against Amazon as "the unfairness inherent in [reopening the competition] is that the winner must resubmit a new proposal with the information from its original offer already disclosed. In effect, [Amazon] would have to bid against its own winning proposal."[303]

Though *Amazon* is perhaps the most notable case in recent memory to demonstrate this predicament due to its rare insight into Intelligence Community contracting, the CIA is not alone. In *Turner Const. Co., Inc. v. United States*, the Army encountered the same concern of having to defend before COFC actions it initially opposed at GAO.[304] There, the Army's award of a contract for design and construction of a hospital in Fort Benning, Georgia was challenged at GAO.[305] Finding that a "biased ground rules" organizational conflict of interest existed, GAO partially sustained the protest.[306] Though the Army clearly argued against GAO determining that this

---

[301] *Id*. at 116.
[302] *Id*.
[303] *Id*. at 117.
[304] *Turner Const. Co., Inc. v. United States*, 94 Fed.Cl. 561(Fed.Cl. 2010); aff'd, 645 F.3d 1377 (Fed. Cir. 2011).
[305] *McCarthy/Hunt, JV*, B-402229.2 (Feb. 16, 2010).
[306] *Id*.

organizational conflict of interest existed, the Army ultimately decided to implement GAO's recommended corrective action to address and resolve the concern GAO noted.[307]

After review at COFC, Judge Futey determined that GAO's decision lacked a rational basis as it "conducted a *de novo* review without giving the contracting agency the deference it was due."[308] Judge Futey also found that GAO's recommendation that the Army eliminate one contractor from the competition and, consistent with the terms of the RFP, make a new award decision lacked a rational basis as well.[309] Therefore, COFC found, the Army's implementation of GAO's recommended corrective action – stripping the contractor of the originally-awarded contract – was found to be arbitrary and capricious.[310] Here again, despite original opposition before GAO, the Army was placed in the precarious position of having to defend before COFC its corrective action – the very corrective action it had originally and unsuccessfully opposed at GAO.

Grunley Walsh Intern., LLC provides a third example of an agency having to defend before COFC the very position it opposed before GAO.[311] There, the Department of State (DOS) withdrew plaintiff's and intervenor's pre-qualifications to bid based upon a sustained GAO protest and the resulting corrective action recommendation.[312] COFC determined however that GAO's decision was irrational because it misread both the

---

[307] *Id*.
[308] *Turner Const. Co., Inc. v. United States*, 94 Fed.Cl. 561, 586 (Fed.Cl. 2010); aff'd, 645 F.3d 1377 (Fed. Cir. 2011).
[309] *Id*.
[310] *Id*.
[311] *Grunley Walsh Intern., LLC*, 78 Fed. Cl. 35 (2007).
[312] *Id*.; *see also Caddell Const. Co., Inc*., B-298949.2 (June 15, 2007).

actual language of the statute and the legislative history.[313] Therefore, in COFC's view, the DOS's adoption of the GAO's recommended interpretation was afforded no deference because it plainly lacked a reasonable basis; it was thus arbitrary and capricious.[314]

This damned-if-you-do-damned-if-you-don't dilemma illustrated in these cases makes for a nearly-insurmountable challenge for agencies when deciding whether to follow GAO recommendations. On the one hand, if the recommendation for corrective action is followed, in theory, the issue originally challenged will be resolved. That is, unless COFC concludes that GAO's underlying recommendation was irrational and therefore the agency's reliance on that recommendation was arbitrary and capricious.

On the other hand however, should an agency determine that GAO's recommendation lacks a rational basis, and thus choose to not implement that recommendation, the agency is faced with having to provide notice to GAO.[315] This "failure" to fully implement GAO's recommendation is then made a part of GAO's annual report to Congress.[316] Therefore, agencies may find themselves in the position of having to decide whether to follow GAO's recommendation and risk the potential that COFC may second-guess that decision. Or, alternatively, not follow GAO's

---

[313] *Id*. at 43.
[314] *Id*.at 44.
[315] FAR 33.104(g), "If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency."
[316] In its GAO Bid Protest Annual Report to Congress for Fiscal Year 2013 (dated January 2, 2014), the General Counsel reported two instances of an agency decision to not fully implement GAO's recommendations. These determinations are termed "Agency *Failures* to Fully Implement Recommendations". (*Emphasis added*).

recommendation and risk scrutiny by Congress – the very body capable of funding agencies and their procurement endeavors.[317]

D. The dilemma faced by agencies when deciding whether to act or rely upon GAO outcome prediction or less formal GAO communications.

As discussed throughout this paper, agencies may be confronted with any number of difficult decisions in the course of determining whether, or to what extent, corrective action measures should be employed. Another such challenge faced by agencies today is determining whether taking corrective action in reliance of GAO outcome prediction – or less formal GAO guidance – is advisable. Though GAO offers this alternative dispute process as a means to "advise[] the parties of the [GAO] attorney's view of the likely outcome based on the record, so that the likely unsuccessful party may take appropriate action to resolve the protest,"[318] this is not a fail-safe approach. Recall, for example, the circumstances set forth in *WHR Group, Inc*. mentioned briefly above.[319] In addition to applying "targeting tests" never utilized before and concluding that "there can be no universal test as to what constitutes appropriate corrective action,"[320] this case speaks directly to the risks faced by agencies when taking corrective action in response to GAO outcome prediction.

---

[317] *Id*.
[318] GAO Bid Protest Guide at 7.
[319] *See WHR Group, Inc. v. United States, No. 13-515C, 2014 WL 1377819 (Fed. Cl. March 21, 2014)*
[320] *Id*. at 397.

For further background, this case involved an FBI solicitation seeking to award a number of Blanket Purchase Agreements (BPAs) for relocation services.[321] After evaluation of proposals, the FBI determined that seven offerors met the technical requirements.[322] The three lowest priced offerors were awarded BPAs and Brookfield, as the incumbent, filed a protest having not received an award.[323]

Brookfield argued that the FBI failed to properly consider and analyze documentation offerors provided regarding their abilities to provide 100 percent of the relocation services sought.[324] Brookfield further argued that, to the extent that the FBI failed to do this, the agency had improperly waived a 100 percent financial capability requirement.[325] The FBI disagreed with Brookfield's assertions and put forth its arguments to the GAO.[326]

Although GAO did not reach a formal decision, it did issue an informal opinion by way of outcome prediction during a teleconference of all involved parties.[327] Due to the informal nature of this opinion however, no record of the GAO attorney's statements, rationale for reaching his or her conclusion, or discussion between the parties was available.[328] Rather, the only existing record was found to be a GAO email scheduling the conference call.[329] Despite the dearth of concrete information surrounding the nature

---

[321] *Id*. at 390.
[322] *Id*. at 391.
[323] *Id*.
[324] *Id*.
[325] *Id*.
[326] *Id*.
[327] *Id*. at 391-392.
[328] *Id*.
[329] *Id*.

and content of this call however, involved parties agreed that, "(1) the GAO did not issue a final decision, (2) the essence of the GAO's prediction was that Brookfield's protest would be sustained, and (3) the GAO stated that it would recommend that the FBI examine the supporting documentation to evaluate offerors' financial capability."[330]

Following GAO's outcome prediction, the FBI entered into a settlement agreement with Brookfield and, as a result, GAO dismissed Brookfield's protest as academic.[331] This agreement – and specifically FBI's decision to award a fourth BPA to Brookfield – led to a flurry of additional protests; further corrective action in the form of (1) canceling the awarded BPAs, (2) conducting a new procurement pursuant to a revised solicitation, and (3) extending Brookfield's current contract for the duration of the litigation; and ultimately a consolidation of protests before COFC.[332]

The court, in enjoining the FBI from taking any of the planned corrective action steps, found that the agency failed to state a rational basis for its corrective action decisions.[333] In reaching this conclusion, the court relied upon the previously-mentioned "Sheridan II and MCII Targeting Tests" and determined that FBI's planned corrective action lacked a rational relationship to the identified defect.[334]

Though the facts of this case – as well as the extensive chronology – may be quite unique, an important lesson to agencies was handed down. That is, reliance upon GAO's predicted finding will not absolve agencies of making poorly reasoned corrective action

---

[330] *Id*.
[331] *Id*.
[332] *Id*.
[333] *Id*. at 402.
[334] *Id*. at 397. Here, the court cited *Sheridan Corp v. United States ("Sheridan II"),* 95 Fed.Cl. 141 (2010) and *MCII Generator & Elec., Inc. v. United States*, 2002 WL 32126244 (Fed.Cl. Mar. 18, 2002)

decisions. And, in fact, acting on GAO outcome prediction without more formal guidance (e.g.; a specific form of corrective action recommended by GAO as a result of a sustained protest) may be the riskiest move of all.

Even more risky for an agency perhaps, is relying on less-formal GAO communications. Possibly the most striking recent example of an agency taking this risk to its detriment may be found in the *Systems Application & Technologies, Inc. v. United States* case.[335] In that case, the corrective action at issue was premised on a pre-decisional e-mail sent by a GAO attorney which, in fact, fell short of any actual GAO "outcome prediction."[336]

The contract at issue in *Systems Application & Technologies, Inc.* was awarded to Systems Application & Technologies, Inc. (SA) by the United States Army Aviation and Missile Life Cycle Management Command Contracting Center (Army).[337] As a disappointed offeror, Kratos Defense & Solutions, Inc. (Kratos) protested the award of the contract to GAO.[338]

Kratos argued generally that the Army failed to properly evaluate offerors' compliance with the collective bargaining agreement in place and the Army's evaluation approach "improperly converted the 'best-value determination into a lower-price, technically acceptable evaluation'".[339] After reviewing the responses to the agency

---

[335] *Systems Application & Technologies, Inc. v. United States*, 100 Fed. Cl. 687 (2011), aff'd, 691 F.3d 1374 (Fed. Cir. 2012); *See also* Kang Article which discusses, from a broad perspective, just how impactful the outcome of this case may prove to be over time.
[336] *Systems Application & Technologies, Inc. v. United States* at 701.
[337] *Id*. at 693.
[338] *Id*. at 698.
[339] *Id*. at 698-700 (internal citations omitted).

report, the GAO attorney assigned to the case, via email, stated he was "interested in whether, in light of the protester's challenges to the agency's technical evaluation, the agency [was] more inclined to continue to defend the protest or take corrective action."[340] The GAO attorney went on to say "that, on the face of it, the protester offer[ed] a straight forward argument as to why the agency's evaluation of the technical portions of the proposals were unreasonable" and then offered the Army the opportunity to "determin[e] appropriate next steps" and "respond[] accordingly."[341]

The Army did not respond to the GAO's advice immediately.[342] Instead, SA responded to Kratos' allegations set forth in a supplemental protest and requested that GAO dismiss the supplemental protest grounds while the Army responded to Kratos' original protest.[343] After this exchange, the GAO attorney sent what ultimately became the key correspondence in this case – an email communication to all involved parties.[344]

That email expressed to all involved parties that the GAO attorney felt that an awarded rating at issue "seem[ed] unreasonable."[345] The email went on to provide that the source selection failed to acknowledge or appreciate certain concerns raised through the protest. Ultimately, the email stated that, based on the evidence provided, "GAO would 'likely sustain this protest . . .'"[346]

---

[340] *Id*. at 700 (internal citations omitted).
[341] *Id*.
[342] *Id*.
[343] *Id*.
[344] *Id*. at 701.
[345] *Id*.
[346] *Id*.

This pronouncement, though plainly decisive in nature, was not officially deemed to be GAO outcome prediction.[347] In fact, the Army, in acknowledging the points raised by GAO, responded to the GAO attorney that same day indicating the GAO attorney's "discussion" was "clear". And, the Army stated, it did not anticipate "request[ing] outcome prediction."[348] Rather, two days later, the Army informed GAO it intended to take corrective action by terminating the contract award, amending and reopening the solicitation, allowing for revisions, and then reevaluating proposals.[349] Based on this pronouncement, GAO dismissed the protest.[350] However, dissatisfied with the Army's planned corrective action, SA filed a protest with COFC.[351]

In granting SA's motion for judgment on the administrative record and enjoining the Army from implementing its proposed corrective action, COFC made a number of findings. One finding was that, though the record was not clear as to whether the Army's decision to take corrective action was predicated on the GAO attorney's email advice, it was "reasonable to assume that the decision was based, at least in part, on [such advice]."[352] COFC further ruled that the GAO attorney's findings were irrational for a number of reasons.[353] Consequently, "to the extent that the Army's decision to take

---

[347] *Id*.
[348] *Id*. (internal citations omitted)
[349] *Id*. at 701-702.
[350] *Id*. at 702.
[351] *Id*.
[352] *Id*. at 712.
[353] *Id*. at 712-713 .

corrective action [was] based upon the [GAO attorney's email] message, it lack[ed] a rational basis and was therefore arbitrary capricious, and an abuse of discretion."[354]

COFC went on to state that, despite the Army's "troubling" lack of explicit rationale discussing the decision making or analysis behind the corrective action decision, "the court infer[ed] that it was the Army's intent to take corrective action in response to all of the issues raised in Kratos's GAO protest."[355] Further, COFC ruled, even if the Army's decision to take corrective action was made independent of the GAO attorney's email correspondence, the Army's award decision "was a rational exercise of the Army's discretion."[356] Therefore, any judgment made by the Army thereafter that the selection decision was flawed – regardless of whether that decision was dependent upon, or independent of, the GAO attorney's email correspondence – was irrational.[357]

Both *Systems Application & Technologies, Inc.* as well as *WHR Group, Inc.* highlight a number of issues faced by agencies today when taking corrective action. In both instances, again, the true discretion afforded to agencies by COFC when making corrective action decisions is called into question. Additionally, these cases work to reinforce the notion that GAO and COFC are most certainly not on the same page when it comes to determining whether an agency's chosen corrective action path is indeed rational. However, perhaps most importantly, these cases demonstrate that an agency

---

[354] *Id*. at 715-716. COFC went on to state that, though it was reasonable to assume that the Army's decision to take corrective action was based on the GAO attorney's communications, the administrative record did not speak to this issue. Therefore, to the extent that the Army's decision was made independent of the GAO attorney's communications, COFC would still utilize the arbitrary and capricious standard to determine whether the decision lacked a rational basis or involved a statutory or regulatory violation.
[355] *Id*. at 716.
[356] *Id*. at 719.
[357] *Id*.

relies on GAO outcome prediction – or less formal GAO advice – at its own peril. Choosing a particular path forward without documenting how that decision was reached or why that decision was determined to appropriately address the identified procurement defect leaves will prove risky for agencies if the decisions made – and the underlying rationale upon which they are based – are questioned at COFC.

PART IV

MAKING SUCCESSES OUT OF FLAWS – HOW AGENCIES MUST APPROACH CORRECTIVE ACTION TO MINIMIZE THE RISK OF FURTHER SCRUTINY BY PROTESTERS, GAO, AND COFC ALIKE.

Undoubtedly, protests will persist as long as Government procurements are accomplished. As a result of the inevitable flaws that even the most diligent agencies will encounter, the need to take corrective action will arise from time to time. After all, one cannot reasonably expect every procurement will be flawless or every disappointed offeror will be satisfied with the explanations received during debriefings. Whether that corrective action is taken proactively by the agency, as a result of GAO outcome prediction or ADR, or in response to a sustained GAO protest, the nature and scope of the corrective action will surely be scrutinized.

Regardless of whether the offerors, GAO, or COFC offer that scrutiny, agencies must endeavor to take corrective action in an effective and appropriate manner. The challenge in doing this however is that what constitutes effective and appropriate corrective action is a conundrum not yet solved by agencies themselves. This conundrum is underscored by the oftentimes-inconsistent and mixed messages handed down by GAO

and COFC. How then is an agency supposed to ensure fair and impartial competition, uphold the procurement needs of the agency, and take effective corrective action so as to remedy the identified procurement flaw when those who write the rules cannot seem to agree on how this must be accomplished? They must, without fail, take a targeted, well-documented, and well-reasoned approach to all corrective action decisions they make.

RECOMMENDATIONS

1. Go Narrow. Though the broad-versus-narrow scope of corrective action question will persist, agencies will be better situated overall by targeting their chosen corrective action to the specific identified flaws. Taking this narrow tactic best demonstrates that agencies are approaching their corrective action decisions in a thoughtful and deliberate fashion. By targeting the actual identified flaws, one may not argue that the agency is taking advantage of a second bite at the apple and changing its entire procurement approach – which would more likely disadvantage offerors by changing the rules of the game so to speak rather than working to fix something identified as broken.

To counter any concern that GAO or COFC may suggest that the targeted approach to corrective action chosen by the agency is too narrow, agencies must ensure that they exercise due diligence in ensuring that the impact of the targeted corrective action measures is fully scrutinized across the entirety of the procurement at issue. In other words, agencies must examine closely whether, and to what extent, any changes made as a result of corrective action will impact other portions of the procurement not subject to that corrective action. And, if agencies ultimately determine that the targeted

and narrow approach is indeed most appropriate to address the flaws at hand, the agencies must ensure that the reasoning, logic, and justification associated with this decision is contemporaneously documented and available in the event that the decision is called into question at a later time.

Finally, to the extent an agency may choose to take a more broad approach to corrective action, the logic accompanying that approach must be fully explained and documented. The agency's documentation supporting broad corrective action must provide an explanation – independent to any portion of the corrective action that expounds beyond any minimum requirement – as to why the broad approach is appropriate. Such an explanation would include, for example, that the Government's requirements have been updated to account for the passage of time, compliance with newly-issued Executive Orders, and the like.

2. <u>Document Early And Document Often</u>. Given COFC in particular will not generally look at an agency's post hoc rationale to provide a justification for decisions made, agencies do themselves no favors by reaching conclusions hastily and documenting the thought process at some later time. Though agencies may feel pressed to take corrective action swiftly so as to avoid the possibility of paying protester litigation costs, this often-hasty decision may be more harmful than helpful down the line. Regardless of the agency's motivation for taking corrective action, GAO and COFC will both question whether a flaw in the procurement exists and whether the planned corrective action addresses that flaw. Only with its rationale well-documented will an agency have any chance of prevailing if questioned about the underlying flaw or

accompanying proposed relief. "In the absence of evidence in the record to support an identified reason supporting the [corrective action], the Plaintiff [will be] entitled to an injunction."[358] Though there may indeed be a legitimate justification to support an agency's action, without such a justification on the record, the agency's motivations will not be assumed.[359]

3. <u>Do Not Rely Or Act Upon GAO Outcome Prediction</u>. To the extent that documentation will benefit agencies, making corrective action decisions based on GAO outcome prediction or less formal GAO advice is ill-advised. Reliance upon GAO outcome prediction or pre-decisional advice does little to protect agencies from future scrutiny. Without a record produced or a rationale expressly provided, reliance upon GAO outcome prediction forces future scrutiny by COFC to be subject to presumptions, best-guesses, pieced-together references, spotty memories of the protest participants, and an otherwise-lacking record. Agencies will better benefit by taking these less-formal recommendations under advisement and pressing on with litigation. If a protest is indeed sustained, agencies – and any future scrutiny – will be advantaged greatly by the formal decision issued, the accompanying documented recommendations, and the underlying rationale upon which these recommendations are based.

That said, though the documentation provided as a result of a GAO decision will clearly speak to the underlying reasoning behind an agency's corrective action decision

---

[358] *MCII* at 5.
[359] *See MCII* at 4-5 stating that the analysis afforded to the Army in that case was "far more generous than what the Administrative Record supports" and that, though "there may be ways and means" to support the Army's corrective action decision, they were not articulated in the record before the court.

making process, as discussed above, this documentation alone is not dispositive. Rather, agencies must still ensure that their corrective action decisions – above all else – are well reasoned. Naked conclusions without any supporting documentation will not supply a rational basis for any agency's instant decision.[360]

4. <u>Scrutinize GAO Recommendations Set Forth in Sustained Protests Fully Before Implementing</u>. Because reliance on GAO recommendations alone will not justify an agency's corrective action decisions, agencies must scrutinize these recommendations fully prior to choosing to implement. To the extent that GAO's recommendations are indeed rational, an agency will benefit from conducting this analysis. Not only will such analysis assist in justifying following GAO's recommendations, but it will also assist the agency in taking those targeted corrective action steps necessary to remedy the identified flaw.

On the other hand, if an agency determines that the GAO recommendations are not rational in nature, the agency must choose to not implement this corrective action. Though such an act surely invites the scrutiny of Congress, agencies must feel empowered to make this decision regardless of that threat.

Finally, should the agency, contrary to recommendation 3. above, wish to act based on GAO outcome prediction, surely the same level of scrutiny discussed here would be appropriate in that context.

---

[360] *See, e.g., Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 103 S.Ct. 2856 (1983) (holding that an agency decision must be supported by evidence in the record and that the court "may not supply a reasoned basis for the agency's action that the agency itself has not given" (*quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947))).

CONCLUSION

Often the corrective action sought by the contractor or recommended by the GAO does not necessarily correlate with the Government agency's desires. Or, the corrective action taken does not actually present a true solution to the issues presented. Whatever the circumstances, when corrective action is taken in the course of a Government procurement, the approach the agency chooses is not without consequence. Therefore, to the extent that agencies can plot their moves, think ahead, and document fully, the more likely the corrective action will withstand scrutiny in the end.