

BRIEFING PAPERS[®] SECOND SERIES

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

Should We Protest? Achieving Success In The Bid Protest Process/Edition II

By Robert Nichols and Carla Weiss*

Over the past decade, the Federal Government has spent between \$430 billion and \$745 billion annually on procurement contracts.¹ Government agencies have a legal and a moral duty to be fair and transparent in how they spend taxpayer dollars. For more than a century, the bid protest system has played the important role of providing contractors a way to challenge perceived unfairness and impropriety in the procurement process.² Yet, over the past few years, federal agencies—believing many protests to be frivolous and frustrated by the expense and delays they cause—have sought to curtail the bid protest process.³ Additionally, many contractors (usually smaller ones) have skipped the protest process entirely, even when they find an agency evaluation error, for fear of harming customer relations.

This BRIEFING PAPER is designed to inform contractors considering whether to protest any particular procurement action, and, more broadly, how to establish their company's engagement with this legal avenue.⁴ It includes three areas of inquiry:

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

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GAO and the COFC as well as discussions with the COFC, the GAO, the U.S. Department of Justice, and peer practitioners in the area.

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

The Bid Protest System: Objectives And Perspectives

Defining Bid Protests

Federal procurements are governed by a complex web of regulations and standards, so it is no surprise that agencies regularly err in conducting them. When an interested party⁵ for a particular procurement believes that an agency has made a mistake that put it at a competitive disadvantage, it has the right to invoke the bid protest process to challenge the perceived impropriety.⁶ To prevail, the protester must demonstrate both the existence of an agency mistake and that the error prejudiced its competitive chances.

An agency can commit errors in how it sets up the procurement (the terms and conditions of a solicitation), evaluates proposals, and selects an awardee.⁷ Protests challenging the solicitation, such as ambiguities that may affect how a contractor formulates its proposal, are deemed “preaward” protests and must be filed before the closing date for bids or proposals.⁸ Postaward protests typically challenge perceived er-

rors and mistakes in the agency’s evaluation of proposals and selection of the awardee because the agency violated procurement law, regulations, or policies; failed to follow the solicitation’s evaluation criteria; awarded the contract to a nonqualified offeror (e.g., was not an eligible small business); or acted arbitrarily and capriciously or abused its discretion.

The current fora for filing a bid protests include the COFC,⁹ the GAO,¹⁰ and the procuring agency itself.¹¹ Each forum has the ability to review the alleged error and to address actions to correct the mistake, as appropriate. The COFC can direct particular corrective action,¹² the GAO can recommend corrective action to the agency,¹³ and the agency can voluntarily take corrective action on its own accord. The COFC and the GAO maintain public dockets of bid protest cases and publish their decisions,¹⁴ whereas agency-level protests typically are not public.

When a protest is sustained—i.e., there is a decision finding a prejudicial error—the agency will usually perform a “do over” of some fashion to fix the mistake. Such “corrective action” may involve amending the solicitation, reevaluating the same proposals, seeking clarifications or reopening discussions, seeking new or amended proposals, or making a new award decision.

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

Objectives Of The Protest System

The modern bid protest system developed through a hodgepodge of statutes, regulations, and policies.¹⁵ As

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such, there is no single organic document defining the objectives of the system. The primary theory supporting the system is that the Government has a moral duty to maintain fairness in how it awards taxpayer-funded contracts. Public funds come with an expectation of high standards of morality and transparency. Taxpayers expect procurements to be conducted competitively, fairly, and transparently. The bid protest process helps to ensure the Government meets these obligations.¹⁶ It also corrects mistakes, guards against fraud and abuse, and pushes agencies to improve their procurements.

Bid protests at the COFC and the GAO also provide effective third-party monitoring. Contractors make significant investments in competing for Government contracts. Having a system for lodging complaints with a neutral third party, rather than depending on an agency to monitor itself, helps to “deter and punish ineptitude, sloth, or corruption of public purchasing officials.”¹⁷

Differing Perspectives

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

According to published studies, contractors report that they are most likely to file a bid protest when they perceive a serious mistake in the process that harmed their competitive position. This is borne out by the high effectiveness rate of bid protests. Other reasons cited for protesting include inadequate explanations from the agency as to why the contractor lost, or when a cost-benefit analysis shows that protesting makes sense. Companies typically avoid protesting when they do not have good protest arguments and/or when protesting has the potential for creating “ill will.”¹⁸ Some contractors have a policy against protesting for customer relations reasons, although contractors that do protest frequently rarely see lasting, negative impacts from their customers.

Not surprisingly, Government personnel express dissatisfaction with the bid protest system. One commentator stated that “[a]cquisition officials loathe the receipt of a bid protest” and referred “to the severely negative attitude toward receiving a bid protest as a ‘fear of protest.’”¹⁹ At the same time, there is no doubt that protests have some positive effects on the procurement system as a whole. As one study indicated, “[e]vidence suggests that agencies sometimes change their acquisition strategies due to fear of protests,” such as by:

- building in sufficient lead times to plan fair competitions,
- improving training for their procurement workforces,
- assigning more experienced officials to more important procurements,
- performing more market research to inform their requirements and evaluation criteria,
- ensuring their teams are following the rules to make justifiable decisions in the source selection process,
- engaging in multiple rounds of discussions that level the playing field of competitors,
- thoroughly documenting and substantiating their proposal evaluations and tradeoff decisions,
- making consensus-based decisions, and
- taking voluntary corrective action when they make mistakes.²⁰

In 2022, the Department of Defense (DOD) finalized a rule implementing an enhanced postaward debriefing process that includes a round of questions following the written or oral debriefing.²¹ Additionally, the DOD must provide a copy of the written source selection when the award exceeds \$100 million, or when requested by a small business or nontraditional defense contractor for awards between \$10 million and \$100 million.²² The Federal Aviation Administration and other sophisticated agencies have adopted similar

processes in the hopes of dissuading contractors from protesting.²³

A Data-Driven Analysis Of Bid Protests

Bid protests statistics show just how common agen-

	FY23	FY22	FY21	FY20	FY19	FY18	FY17	FY16	FY15	FY14
Cases Filed	2,025	1,658	1,897	2,137	2,198	2,607	2,596	2,789	2,639	2,561
Merit Decisions	608	455	581	545	587	622	581	616	587	556
Sustains	188	59	85	84	77	92	99	139	68	72
Sustain Rate	31%	15%	15%	15%	13%	17%	17%	22.56%	12%	13%
Effectiveness Rate	57%	51%	48%	51%	44%	44%	47%	46%	45%	43%

These figures show a few interesting data points for protest watchers. First, protest filings have fallen after a high-water mark in 2018. Second, the GAO reaches a merits decision in less than 25% of cases filed because one decision can cover more than one protest, agencies frequently take voluntary corrective action, and protesters occasionally withdraw their challenges. Third, the GAO’s sustain rate shows that the GAO finds mistakes that require correction in an average of 17% of the merits decisions it reaches.²⁵ However, the much higher average effectiveness rate of 43.2% indicates that agencies take *involuntary and voluntary* corrective action much more frequently.

A separate quantitative analysis of GAO protests, conducted by leading practitioners, has shown that filing a supplemental protest increases the odds of a protest being sustained increased by approximately 80%.²⁶ This is likely because contractors file supplemental protests after receiving an agency report, which puts the entire procurement under a microscope and exposes more errors to scrutinizing protest counsel.²⁷

Unlike the GAO, the COFC does not publish statistics for its bid protests, with practitioners only able to glean protest information conveyed in speeches.²⁸ In calendar year 2022, there were 135 COFC protests, two more than were filed in 2021. Of the cases filed in 2022, 38 were preaward protests and 97 were post-award challenges, and 127 protests were denied. In

2021, the COFC heard 133 protests and denied 124 of them. With 27 sustains and 251 denials over the course of 2021 and 2022, the COFC’s sustain rate appears to be approximately 9.7%.

Attempting to directly compare the GAO’s and the COFC’s statistics is impossible due to differences in how the two fora maintain statistics. The GAO counts each individual protester for any given procurement, as well as each supplemental protest for that procurement, as a distinct protest; in contrast, it is impossible to discern the number of protest filings from a given COFC decision. Also, tracking COFC decisions does not provide information about what voluntary corrective action may have occurred, so the effectiveness rate of COFC protests is unknown (at least to the public). What is clear, though, is that there is substantially more protest activity at the GAO than at the COFC.

While protesters file actions much more frequently at the GAO than at the COFC, anecdotally there has been an uptick in COFC protests. Three potential reasons may explain the shift: first, while filing at the GAO has long offered an automatic “stay” of contract award while the protest is pending,²⁹ more recently the Government has been agreeing to a voluntary stay so the protester is not subject to the standard for obtaining a temporary restraining order and preliminary injunction. Second, the COFC requires the Government to produce the full administrative record, whereas

the record at the GAO is based upon relevance, so companies seeking more fulsome information may elect to go to the COFC. Finally, as the Government increases the number of procurements conducted through large multiple award contracts, just one protester filing at the COFC will force all protesters there since the GAO will not maintain concurrent jurisdiction. Notably, there are no statistics available for agency-level protests.

Following a successful protest, there is a dearth of readily accessible information on outcomes for contractors. It is unclear how often a protester actually wins the award that was subject to a protest, though the frequency is estimated to be quite low. Also, although agencies take corrective action and boost the “effectiveness rate,” data analyzing whether the corrective action is meaningful to the protester is not available.³⁰

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

Most Common Agency Mistakes Leading To Corrective Action

Several years ago, BRIEFING PAPERS explored which protest arguments have proven most likely to be sustained.³¹ This PAPER updates and greatly expands upon that analysis with a qualitative survey of several hundred bid protest decisions and reports from Government sources.³² While not an encyclopedic listing of every sustained protest basis over the years, this discussion and the collected citations represent a helpful guide to the array of common procurement mistakes that lead to corrective action.

Errors In The Solicitation

As described below, solicitation errors generally take a few different forms: the solicitation fails to

comply with applicable laws and regulations, contains ambiguities, or is unduly restrictive.

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

- the agency improperly ignored the Federal Acquisition Streamlining Act’s mandate to consider whether commercial items were available;³³
- the agency conducted inadequate market research as required by the Federal Acquisition Regulation (FAR) or federal statutes;³⁴
- the agency failed to follow requirements reserving contracting opportunities for veteran-owned businesses;³⁵
- the agency issued an order outside the scope of an underlying blanket purchase agreement;³⁶
- the agency issued a request for quotations in violation of the simplified acquisition procedures set forth in FAR Subpart 12.6;³⁷
- the agency improperly used a cooperative agreement instead of a procurement contract, violating the Federal Grant and Cooperative Agreement Act;³⁸
- the agency improperly waived the requirement that commercial item procurements address commercial market practices of FAR 12.302;³⁹ and
- the agency applied misconstrued the “Trade Agreements” clause at FAR 52.225-5.⁴⁰

For these procurement errors, corrective action usually results in a change to the solicitation to address the particular legal requirement that was not met.⁴¹

(2) *Ambiguities.* Protesters can sometimes show that the solicitation is ambiguous in communicating the objectives and relevant requirements of the procurement. An ambiguity occurs when two or more reasonable interpretations of the solicitation are possible.⁴² If the ambiguity is obvious, gross, or glaring (e.g., where solicitation provisions appear incon-

sistent on their face), it is “patent” and must be protested prior to the solicitation’s deadline.⁴³ A latent ambiguity is more subtle and can be protested post award when an agency’s and an offeror’s divergent interpretations of the solicitation become apparent. Protests have been sustained where:

- the solicitation did not clearly communicate whether objectives were optional or required;⁴⁴
- the agency ambiguously described categories of Contractor Performance Assessment Reporting System (CPARS) scores for past performance references;⁴⁵
- the latent ambiguity concerned mandatory wage rates in a collective bargaining agreement;⁴⁶ and
- a request for proposals lacked a sufficiently detailed description of engineering services sought by the agency.⁴⁷

Corrective action for ambiguities can require amendment of the solicitation or reevaluation of the proposal with the alternative interpretation.⁴⁸

(3) *Unduly Restrictive*. Solicitations cannot restrict competition unless the restrictions are necessary to satisfy an agency’s legitimate need. Protesters have had success where the solicitation was found to be unduly restrictive in the following ways:

- the solicitation unduly restricted teaming arrangements;⁴⁹
- the solicitation required protégé members of a mentor-protégé joint venture have the same level of experience as other offerors;⁵⁰
- the solicitation unduly restricted application of exceptions to the Berry Amendment, which requires acquisition of domestically produced products;⁵¹
- the solicitation was unduly restrictive by making demands that offerors be certified under certain industry quality standards at the time of proposal submission, rather than at the time of award or performance, which exceeded the agency’s reasonable needs;⁵²

- the solicitation improperly included a Randolph-Sheppard Act preference for employing qualified blind individuals to operate vending facilities in federal buildings;⁵³ and
- the solicitation unduly restricted past performance and experience requirements without a supportive agency explanation.⁵⁴

Corrective action to cure unduly restrictive provisions can involve the agency reassessing its need for the restriction and, if none exists, amending the solicitation to remove it.⁵⁵

Cancellations And Revisions To An Already Issued Solicitation

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

- the agency does not have market research to support that a change is so substantial that other companies would have submitted offers under those terms;⁵⁶
- the agency invoked cancellation on the basis of a solicitation amendment but failed to identify a proposed amendment that triggered the cancellation mandate;⁵⁷
- the agency’s “slipshod” and scant administrative record did not adequately support cancellation of solicitation;⁵⁸
- the record failed to demonstrate a reasonable basis for the contracting officer’s conclusion that competition under the original solicitation was inadequate;⁵⁹
- the evidence demonstrated that the agency had failed to meaningfully review its needs;⁶⁰ and
- the agency failed to engage in reasonable and adequate advance planning, issued a solicitation without detailed requirements, and then cancelled the solicitation despite having documented the need for a detailed solicitation years prior to the solicitation’s release.⁶¹

Corrective action for these errors generally involves the agency reviewing its needs and making a new selection decision⁶² or preparing a new solicitation.⁶³ But if the agency later realizes that its needs are materially different than the assumptions underlying the solicitation, it has a *duty* to cancel or amend the solicitation. For example, in one case, the GAO sustained a protest when the agency knew, *prior to award*, that its anticipated schedule for task orders was materially different from the assumptions set forth in the solicitation, upon which the offerors were required to base their proposals.⁶⁴ The GAO recommended that the agency reevaluate its requirements, revise the solicitation accordingly, conduct discussions, and reevaluate proposals.⁶⁵

The Agency Failed To Enforce Solicitation Criteria

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

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

- the agency unreasonably rejected a timely submitted proposal where the Government's server did not accept receipt due to file size and but never sent a notification of delivery failure;⁶⁶
- the agency unreasonably rejected a proposal when, despite the solicitation stating that proposals had to be uploaded to a Government website, the offeror had timely submitted the proposal by email with permission from the contract specialist;⁶⁷
- the agency unreasonably rejected a proposal

because of the failure to submit a password prior to the proposal due date to decrypt a required document where the encrypted document related solely to responsibility and where the agency had both the document and the password in its possession prior to evaluating the protester's proposal;⁶⁸

- the agency improperly rejected a quotation where the offeror had not acknowledged the first amendment to the solicitation but had acknowledged the second amendment, which superseded the first amendment;⁶⁹
- the agency could not disqualify an offeror after informing the offeror that the agency would waive late delivery of a proposal by FedEx as inconsequential because the offeror had timely tendered its proposal to FedEx;⁷⁰
- the agency improperly rejected an indefinite-delivery, indefinite-quantity (IDIQ) contract proposal that was submitted in the wrong location on the FedConnect web portal, when the offeror submitted a complete proposal, the proposal could not be altered by the offeror after submission, and acceptance would enhance competition because the agency planned to make multiple IDIQ awards;⁷¹
- the agency improperly refused to allow the protester to revive its expired bid when (a) the revival would not prejudice the other offerors or the competitive system; and (b) the acceptance period, which originally expired on a Saturday, was extended by the offeror on the next Monday;⁷² and
- the agency unreasonably rejected an offeror's timely proposal because one of its minor subcontractors failed to submit proposal information timely when the offeror's proposal contained the same relevant information as the subcontractor's late proposal.⁷³

Corrective action for improperly handling a proposal involves reinstating the proposal for the competition⁷⁴ and, if appropriate, reevaluating proposals.⁷⁵

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

- the agency improperly substituted a reference provided by the awardee in final proposal revision that violated terms of the solicitation with an earlier version;⁷⁶
- the agency awarded a contract on a basis fundamentally different from what the solicitation provided;⁷⁷
- the awardee failed to propose loaded labor rates for 20 categories required by the solicitation;⁷⁸
- an awardee made an assumption inconsistent with the material terms of the solicitation;⁷⁹
- during clarifications, the awardee took exception to material performance requirements, but the agency accepted the proposal anyway;⁸⁰
- where the solicitation required a barrier wall to achieve physical separation of soiled linens from cleaned linens, the agency erred by not requiring the awardee's quotation to comply with this requirement;⁸¹
- the agency waived a material solicitation requirement, styled as a provision that vendors had to "guarantee" compliance;⁸²
- the agency did not evaluate the awardee in accordance with a solicitation requirement for a plan addressing the criteria of Defense FAR Supplement (DFARS) 252.237-7024 ("Notice of Continuation of Essential Contractor Services" solicitation provision);⁸³ and
- the agency improperly made an award to an offeror for leasing of office space by ignoring material requirements of the solicitation that limited offers to 625,000 rentable square feet.⁸⁴

The corrective action may be to seek a clarification from the offeror or render the proposal unacceptable⁸⁵ or to reopen discussions, obtain revised proposals, and make a new selection decision.⁸⁶

Evaluations Were Unreasonable

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

- the agency failed to consider one of the evaluation factors established by the terms of the solicitation;⁸⁷
- the agency erred by accepting a blanket statement of compliance instead of specific product literature addressing specifications as required by the solicitation;⁸⁸
- the agency unreasonably found the awardee's proposal was technically acceptable, when the acceptable rating was contingent on remediation of several issues that were not remediated;⁸⁹
- the agency mechanically and unequally applied undisclosed staffing estimates in evaluating the offerors' proposed staffing plans to determine whether proposals were acceptable or unacceptable;⁹⁰
- the agency added unstated evaluation criteria without a clear nexus to the stated criteria;⁹¹
- the agency applied undisclosed evaluation criteria in the source selection plan for ratings under the experience factor that would not be reasonably expected by offerors;⁹²
- the agency failed to evaluate for the entire period of performance and not just an offeror's ability to perform the base year where options might make future performance more difficult, inconsistent with the solicitation;⁹³ and
- the agency engaged in disparate treatment in the assignment of strengths and weaknesses in of-

ferors' proposals despite the proposals being "substantively indistinguishable."⁹⁴

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

- the agency had no basis to provide a favorable rating of the awardee's quotation where it failed to address one of the technical evaluation factors;⁹⁵
- the agency evaluated technical proposals on a pass/fail basis rather than performing the required qualitative evaluation;⁹⁶
- the agency unreasonably evaluated offerors by using a scoring system that could not be explained, assessed strengths and weaknesses to offerors from an individual in contravention of a consensus technical evaluation committee (TEC) effort, and the TEC's own evaluation had unexplained internal inconsistencies;⁹⁷
- nothing in the agency record explained why the protester's management approach was identified as having some level of risk, which limited its overall technical rating to Good;⁹⁸
- the agency failed to consider a significant design flaw in the awardee's technical submission that demonstrated the awardee lacked technical understanding;⁹⁹
- the agency unequally evaluated quotations when both the awardee and the protester did not propose certain retention techniques but only the protester's quotation was assigned a weakness on that basis;¹⁰⁰
- the agency improperly made award to an offeror whose proposal contained a technical approach previously rejected by the agency;¹⁰¹ and

- the agency improperly accepted a proposal that assumed that the agency would provide on-site work space and equipment when the agency had stated that it would not provide on-site space and the solicitation did not identify agency-provided equipment.¹⁰²

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

- in procurements for fixed-price contracts, an agency cannot apply price realism—analysis that seeks to determine whether an offeror's price is so low as to endanger contract performance—where the solicitation does not provide for one;¹⁰³
- in procurements for cost-reimbursement contracts, an agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed;¹⁰⁴
- where price or cost realism analysis is called for, the agency must consider the offeror's particular technical proposal and how it may be affected by the price or cost;¹⁰⁵
- agencies must properly apply price or cost realism analysis, particularly if the solicitation provides the manner¹⁰⁶ or level of cost detail in which they are to conduct it;¹⁰⁷
- the agency failed to perform a reasonable cost realism evaluation and compounded its error by using proposed—as opposed to evaluated—costs to make its source selection decision;¹⁰⁸
- the agency conducted an improper cost realism evaluation where the agency failed to recognize that the awardee proposed to significantly reduce the labor rates of personnel during the option years of the task order;¹⁰⁹
- even where the agency reasonably determines that an offeror has proposed unrealistically low

costs, the agency may not adjust those costs to an unreasonable extent;¹¹⁰

- the agency erred in its cost analysis by misinterpreting substantiating data, specifically uncompensated overtime, in the protester's cost proposal;¹¹¹
- when deciding whether an offeror has an unreasonably low price, the agency should only compare that offeror to actual competitors—not to offerors whose proposals are unacceptable, ineligible for award, or priced unreasonably high;¹¹² and
- conducting a price realism analysis may also be required by other FAR provisions and must be done correctly to give effect to those regulations, such as FAR 52.222-6 (“Construction Wage Rate Requirements”)¹¹³ and FAR 52.222-46 (“Evaluation of Compensation for Professional Employees”);¹¹⁴

Agencies also cannot employ a price evaluation scheme that produces misleading results,¹¹⁵ such as in the following cases:

- agencies cannot simply assume adequate price competition exists upon receipt of multiple proposals if they must compare prices in accordance with price reasonableness requirements under FAR 15.404-1;¹¹⁶
- the agency failed to notice that an awardee did not propose discounts required by the solicitation, thereby providing the awardee a substantial price advantage;¹¹⁷
- the agency unreasonably focused on a single contract line item for a cost reasonableness analysis, but did not evaluate the overall cost of performance;¹¹⁸
- the agency failed to evaluate the awardee's proposed line items as required by the solicitation;¹¹⁹
- the agency failed to amend the price evaluation scheme notwithstanding the fact that it knew,

prior to award, that the scheme did not reasonably reflect the agency's changed ordering strategy;¹²⁰ and

- the agency intended to issue cost-reimbursement task orders but did not require offerors to propose cost-reimbursable labor rates, resulting in the agency not being able to evaluate offers meaningfully.¹²¹

Corrective action for evaluation errors typically involves reevaluating price proposals as required by the solicitation and preparing a new source selection decision,¹²² but it can also include reopening discussions and obtaining revised cost or price proposals.¹²³

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

- the agency could not produce contemporaneous documentation indicating to what extent, if at all, the agency had considered the “unsatisfactory” and “marginal” ratings assigned to the awardee under a particular past performance reference;¹²⁴
- the agency failed to provide a meaningful explanation of its evaluation of the protester's past performance;¹²⁵
- the agency failed to evaluate the awardee's proposal under the solicitation's experience factor with the terms of the solicitation, which only permitted consideration of the experience of the offeror itself and, since the awardee had no experience as a joint venture, its proposal should have been found unacceptable under the experience factor;¹²⁶ and
- the agency failed to document oral discussions on which it based its past performance evaluation and cited written documents that were never identified.¹²⁷

Agencies generally have discretion to evaluate both relevance and weight of offerors' past performance,

but when an agency assesses past performance, it must do so in accordance with the solicitation, as demonstrated by these cases:

- the agency favorably rated awardee’s past performance on the basis of contracts deemed relevant despite being much smaller than the current order;¹²⁸
 - the solicitation provided for the evaluation of projects that were similar in scope and complexity, and there was no explanation in the record of why the awardee’s smaller value past performance projects were similar in scope and complexity;¹²⁹
 - the agency failed to consider the management team’s past performance as required by solicitation;¹³⁰
 - the agency excluded offerors’ references whenever it did not have one of the six areas of the experience required by the solicitation, even though the solicitation only required that offerors’ references “collectively” demonstrate experience in the required areas;¹³¹
 - the agency unreasonably weighed all past performances equally without considering relevance;¹³²
 - the agency effectively eliminated the past performance criterion by treating it as a pass/fail assessment;¹³³
 - the agency improperly considered the past performance of an offeror’s subcontractor that did not fit the criteria of the solicitation;¹³⁴ and
 - the agency improperly labeled an offeror’s past performance as “unknown” in contravention of the solicitation when the agency had past performance information.¹³⁵
- the agency unreasonably assessed past performance by not considering adverse past performance information that was “close at hand” or of which it was aware;¹³⁷
 - the agency unreasonably credited offerors for relevant past performance but not the quality of that performance and credited offerors for positive performance without considering its relevance;¹³⁸
 - the agency erred by relying upon incorrect past performance questionnaire ratings;¹³⁹
 - the agency’s approach improperly credited the awardee for the past performance of a specialty subcontractor without similarly crediting the protester for the *same* subcontractor;¹⁴⁰
 - the agency failed to credit the protester for its performance as the incumbent;¹⁴¹
 - the agency unreasonably considered the past performance of an affiliate that was not proposed to perform any portion of the work;¹⁴²
 - the agency penalized an offeror with *relevant* experience for also having *irrelevant* experience, as the effect was to equalize the weight given to both categories;¹⁴³
 - the agency improperly excluded an offeror from the competitive range based solely on neutral past performance rating;¹⁴⁴ and
 - the agency unreasonably compared offerors’ past performance in a way that minimized differences and relied upon a mechanical application of adjectival ratings to determine that offerors’ past performance was the same;¹⁴⁵

Corrective action for failure to evaluate past performance typically results in reevaluation of the offerors’ proposals,¹⁴⁶ but it can also include reopening discussions, obtaining revised proposals, reevaluation, and a new source selection decision.¹⁴⁷

(4) *Key Personnel*. When offerors are required to submit key personnel, agencies must consider these candidates substantively, and also their availability to

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

- conducting a past performance evaluation free of material errors;¹³⁶

perform. The cases below provide examples of how protesters have successfully raised key personnel issues:

- if key personnel are required by the solicitation, the agency must ensure that proposed key personnel meet the solicitation's minimum requirements;¹⁴⁸
- if proposed key personnel become unavailable during the competition, the agency must either reopen discussions for all offerors¹⁴⁹ or downgrade the proposal;¹⁵⁰
- an agency cannot make an award to an offeror that misrepresents key personnel as available when they are not ("bait and switch");¹⁵¹ and
- even if no key personnel are required, the agency cannot make an award to an offeror that does not provide individuals capable of accomplishing tasks under a performance work statement, if required by the solicitation.¹⁵²

(5) *Award Decision*. In making its award decision, the agency must determine an awardee based upon the evaluation scheme established in the solicitation. When conducting a best value procurement, the selection official cannot ignore elements of the tradeoff in rendering its decision:

- in a best value tradeoff, an agency cannot ignore lower priced offers that are technically acceptable and must document its reasons for choosing a higher priced technically superior offer;¹⁵³
- a comparative source selection may not merely mechanically compare technical ratings, but must instead meaningfully consider any evaluated differences in the offerors' proposals;¹⁵⁴
- the agency cannot improperly convert a best value tradeoff competition into a lowest-priced, technically acceptable competition;¹⁵⁵
- an agency must abide by the prescribed relative importance of evaluation factors;¹⁵⁶
- the selection official must demonstrate a reason-

able basis to find awardee's strengths to be beneficial while not finding similar strengths of protester to be similarly beneficial;¹⁵⁷

- the selection official cannot employ unreasonable discriminators to differentiate between two proposals;¹⁵⁸
- the selection authority must explain why he or she reached conflicting conclusions with the evaluators;¹⁵⁹
- the selection official must compare offerors equally;¹⁶⁰ and
- the selection decision cannot be based upon weaknesses resolved after discussions that were not found in the final proposal.¹⁶¹

Improper Discussions

Discussions with the agency can also open the door to a flawed evaluation. The essential point is that discussions, if held, must be meaningful, equitable, and not misleading. Discussions may not be meaningful if the agency:

- conducted discussions inconsistent with the requirement of the solicitation;¹⁶²
- failed to inform the protester of a deficiency or significant weakness in its proposal;¹⁶³
- failed to alert protester to information missing from its proposal in most important evaluation factor;¹⁶⁴
- failed to notify the protester that its prices were deemed unreasonably high;¹⁶⁵
- relied on faulty information when assessing weaknesses and discussing them with the protester;¹⁶⁶ and
- did not raise with an offeror a newly identified weakness in a reevaluation of the offer.¹⁶⁷

Discussions may be unequal if the agency:

- conducted discussions in an unequal manner;¹⁶⁸

- held discussions with the only awardee and not the protester;¹⁶⁹ and
- allowed the awardee, but not the protester, to submit a revised proposal to address proposal issues.¹⁷⁰

Discussions may be misleading if the agency:

- fails to alert protester to the true area of concern with its proposal;¹⁷¹
- identifies only some areas of concern in a manner that misled the protester into believing a revision in only those areas would increase its chances for award;¹⁷²
- inaccurately expressed its concerns to an offeror;¹⁷³ and
- inaccurately expressed its concerns with a *revised* proposal;¹⁷⁴

When an agency fails to conduct appropriate discussions, corrective action typically involves reopening of discussions and obtaining revised proposals.¹⁷⁵

Inadequate Documentation

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

- the agency failed to document or explain the basis for the evaluation of the protester's technical proposal;¹⁷⁶
- the agency failed to document why it did not find strengths of the protester to be of significant benefit to the agency unlike the awardee's assigned strengths;¹⁷⁷
- the agency assessed numerous weaknesses to the

protester's proposal, but the record did not reasonably support such an assessment;¹⁷⁸

- the agency insufficiently documented its evaluation;¹⁷⁹
- the agency failed to keep a record of oral presentations;¹⁸⁰
- the agency failed to provide adequate support for its evaluation of the protester's oral presentation because of unresolved discrepancies regarding the unrecorded portion of the oral presentation;¹⁸¹
- the agency produced a record with heavily redacted documents that prevented the GAO from reviewing the agency's decisional process.¹⁸²

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

- the agency failed to provide a sufficient rationale and documentation for its award decision;¹⁸³
- the agency could not produce evidence that it qualitatively assessed the relative merits of the offerors' respective technical approaches;¹⁸⁴
- the source selection decision lacked documentation establishing why the awardee's ratings had been increased;¹⁸⁵
- where the agency identifies clear differences between the protester's higher rated past performance record and the awardee's lower rated record, the record must provide a basis for the selection official's conclusion that the differences were not significant;¹⁸⁶ and
- the agency issued a task order to the awardee under a contract, but the record was so limited that the GAO could not conclude that the protested task order was within the scope of the contract.¹⁸⁷

Corrective action for these procurement errors typically involves reevaluation and adequate documentation so that the agency can arrive at a supported conclusion.¹⁸⁸

Conflicts Of Interest

An organizational conflicts of interest (OCI) can arise in three circumstances: (1) the existence of biased ground rules, (2) a contractor having impaired objectivity, or (3) a contractor having an unfair competitive advantage from the unequal access to information.¹⁸⁹

In a biased ground rules OCI, a company, as part of its performance of a Government contract, has in some sense set the ground rules for the competition for another Government contract.¹⁹⁰ This type of OCI occurs in varying circumstances as demonstrated in these cases:

- the agency did not adequately investigate whether a company had a biased ground rules OCI where the company had assisted the agency in developing an approach for the acquisition that was protested;¹⁹¹
- the agency failed to reasonably consider the conflict of interest created by a Government employee who developed specifications for solicitation while simultaneously engaging in employment negotiations with firm who was the ultimate awardee;¹⁹²
- the agency unreasonably determined that the awardee did not have a biased ground rules OCI where a company advised on the procurement, including drafting the solicitation, for the agency and appeared to skew competition in favor of the awardee's subcontractor, which was later acquired by the company;¹⁹³ and
- the agency unreasonably reversed an initial decision barring a contractor from competing for a task order where the contractor had provided procurement planning services to the agency and could have skewed the competition in its favor.¹⁹⁴

An impaired objectivity OCI arises when a contractor's participation in work could affect its own interests or the interests of its competitors.¹⁹⁵ This type of OCI occurs in various scenarios instances:

- the agency failed to evaluate adequately whether an awardee's wholly owned subsidiary would

review decisions on appeal from the parent company's own claims decisions;¹⁹⁶

- the agency failed to evaluate adequately whether the awardee would be able to perform without a conflict of interest, where the awardee's parent company held other contracts subject to review of the awardee;¹⁹⁷
- the agency's analysis mistakenly focused upon whether two work efforts were similar in size and scope rather than whether the awardee would be in a position to review its own work;¹⁹⁸
- the agency failed to meaningfully consider whether the awardee's performance of a portion of the work required under a task order would result in an impaired objectivity OCI;¹⁹⁹
- the agency's one sentence assessment of the awardee's amended mitigation plan of evaluating its parent corporation failed to provide adequate analysis on review;²⁰⁰
- the agency failed to evaluate reasonably apparent impaired objectivity, where the agency planned to use only a generalized OCI mitigation plan not tailored to the circumstance of the awardee that would maintain information technology infrastructure supplied by the awardee's parent company;²⁰¹
- the agency unreasonably concluded that a firewall mitigated an OCI where the firewall would only cover part of the work;²⁰² and
- the agency failed to address thoroughly potential impaired objectivity from the awardee's assessment and oversight of its major subcontractor's performance on another contract.²⁰³

Lastly, in an unequal access to information OCI, a firm has access to nonpublic information as part of its performance of a Government contract and that information may provide the firm an unfair competitive advantage in a later competition for a Government contract.²⁰⁴ Unequal access to nonpublic information about a competitor, whether or not that information is proprietary, may nevertheless create an unequal access

OCI. Information can also be shared through the hiring of former Government officials. Protesters have been successful in the following instances:

- the agency failed to evaluate potential unequal access to information arising from the relationship between the awardee and one of its subsidiaries;²⁰⁵
- the agency did not reasonably evaluate potential unequal access to information arising from the relationship between the awardee and one of its subcontractors;²⁰⁶
- during corrective action following a protest, the agency reasonably had conflict of interest concerns where a former Government official who was the “godfather” of the predecessor contract was hired to help with proposal drafting;²⁰⁷
- the agency failed to explain why an individual—who had access to competitively useful nonpublic information about the protester and participated in the preparation of the awardee’s proposal—did not constitute an unequal access to information OCI;²⁰⁸
- the agency unreasonably concluded that the information to which the former officials had access, as well as information that was demonstrably provided to the awardee, did not constitute non-public, competitively useful information;²⁰⁹ and
- the CO recognized an apparent conflict of interest but failed to investigate or mitigate where the agency’s program manager had actively engaged in procurement-related activities.²¹⁰

Other conflicts of interest can also arise through the revolving door between Government and private industry, or where there is a personal relationship between the Government and offerors. The following instances have led to successful outcomes for protesters:

- the agency unreasonably concluded that the hiring of a former Government employee by the protester’s subcontractor, and his appearance at an oral presentation on behalf of the protester

(shortly after his retirement from the agency), created an unfair competitive advantage;²¹¹

- the agency did not adequately address the apparent conflict of interest of chairman of evaluation board who was a former employee of the awardee;²¹² and
- the agency failed to adequately investigate or mitigate apparent conflict of interest arising from an ongoing personal relationship between agency employee (who was extensively involved in virtually every aspect of the agency’s acquisition process) and an employee of predecessor prime that was also subcontractor to winning bidder.²¹³

Corrective actions for these kinds of protests involve the agency determining whether a conflict of interest exists, taking appropriate action to avoid, neutralize, or mitigate the conflict, and documenting its effort.²¹⁴

Corrective Action Challenges

While agencies are not required to narrowly tailor their corrective action to address the defects it is intended to remedy,²¹⁵ protesters can sometimes successfully challenge that action if it is not reasonable or introduces other procurement errors. Protests of corrective action are highly fact specific. Representative examples of winning protest arguments targeting corrective action include the following circumstances:

- the agency’s corrective action failed to correct the original infirmity;²¹⁶
- the agency improperly amended a solicitation so that it impacted offerors more broadly than the intended scope of the corrective action;²¹⁷
- the agency amended the solicitation but improperly precluded offerors from revising their proposals, including price;²¹⁸
- the agency’s corrective action was unreasonably limited to revising cost proposals where cost and technical proposals were closely linked so that changes to one likely would necessitate changes to the other;²¹⁹
- the agency failed to evaluate relevant bridge

contracts performed during the pendency of bid protests;²²⁰

- the agency improperly invited the awardee to amend its proposal to moot the protester's claims without providing the protester opportunity to amend its proposal;²²¹
- the agency changed its interpretation of the solicitation to require heightened technical requirements but excluded the protester without providing an opportunity to demonstrate it could meet the changed requirements;²²²
- the agency incorrectly assumed that it was required to ignore the passage of time between its initial evaluation and its post-corrective-action reevaluation;²²³
- the agency reopened discussions in an unduly limited way;²²⁴
- the agency improperly permitted an offeror to revise its proposal outside the scope of its initial corrective action with substitutions of key personnel;²²⁵
- following corrective action of reevaluating offerors, the agency failed to follow solicitation criteria and did not substantiate its new award decision;²²⁶
- the agency's corrective action did not take into account that, since the initial award decision, the awardee had been sold to another company with potential impacts on performance;²²⁷
- the source selection authority failed to reconcile the evaluation made for the initial award decision, which differed starkly from the evaluation made as part of the agency's corrective action;²²⁸
- the protester identified a potential OCI arising from the agency's corrective action plan that the agency had failed to address;²²⁹
- the agency took corrective action in response to statements made by a GAO attorney in an email to the parties in a GAO bid protest that the COFC found to be irrational;²³⁰

- the agency improperly took corrective action on the mere assumption that awards were tainted by an OCI when it lacked facts of any such circumstance and had adequately accounted for a potential OCI in drafting the solicitation;²³¹
- the agency improperly terminated a contract in response to agency-level protest on the assumption that the award decision was tainted by an OCI, when the agency lacked facts to support such a conclusion;²³² and
- the agency's termination of a contract in accordance with a GAO recommendation regarding a potential OCI was overturned by the COFC because the record demonstrated a lack of hard facts.²³³

Successful protests of corrective action generally result in GAO recommendations and COFC decisions that require the agency to take the necessary steps to cure its errors, or, in other words, more corrective action.²³⁴

Prejudice

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

- protesters must demonstrate a reasonable possibility of prejudice by an agency's actions;²³⁵
- if there are any doubts regarding prejudice, they are resolved in favor of the protester because a reasonable possibility of prejudice is a sufficient basis to sustain a protest;²³⁶
- the threshold for prejudice is lower in the OCI context; if an OCI is deemed to exist, then prejudice is presumed;²³⁷
- pervasive errors in the evaluation record that materially impact the source selection decision tilt in favor of a finding of prejudice;²³⁸ and
- a finding of prejudice can be implied, such as

when it is presumed that a GAO attorney will apply the law correctly during for an outcome prediction conference where the record showed that the agency had provided disparate information to the awardee and the protester.²³⁹

Guidelines: Case-Specific Considerations On Whether To Protest

The analysis of the bid protest system presented in this BRIEFING PAPER is intended to assist contractors in understanding the statistical frequency of protests and corrective action and which protest arguments most often succeed. It can guide executives in developing their general inclinations about pursuing protests. On the other hand, deciding a “go/no go” decision for a particular protest opportunity should depend upon the answers to several key factual, legal, and business questions unique to each procurement.²⁴⁰ Thus, this PAPER’s *Guidelines* are in the form of a series of questions providing case-specific considerations in deciding whether to protest. They are not, however, a substitute for professional consideration in any specific situation.

Factual Questions

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

Business Questions

1. How reluctant is the contractor to fight with its

customer in light of this source selection decision and the broader relationship?

2. How important is winning this contract to the company’s stakeholders?
3. What is the strategic value of the contract to the contractor’s business objectives?
4. How strongly does the company believe it presented the best proposal to the Government in light of the stated evaluation criteria?
5. What percentage of the work will be performed by the contractor versus its subcontractors?
6. Are there other objectives that the contractor is likely to achieve through the bid protest process (i.e., extending the incumbent’s performance during the pendency of the protest)?
7. How likely is it that the protesting contractor can achieve an additional prime contract award (in a multiple award procurement) or a subcontract from the awardee?
8. How much of the desire to protest is based on the frustration and disappointment of losing an important competition versus a reasoned assessment of the potential business risks and reward?
9. Realistically, how would a protest affect the contractor’s business with this customer given that protests are a normal part of the acquisition process?
10. How expensive will the protest be—in both absolute terms and as a final stage of the broader competitive effort—and are those costs fully or partially recoverable if the protest succeeds?

Legal Questions

1. Was the mistake the agency apparently made of the type that typically leads to corrective action?
2. Was the contractor “prejudiced” by the agency’s mistakes (i.e., has the contractor suffered competitive harm)?

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

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

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

ENDNOTES:

¹Data collected from USASpending.gov by total obligated amount for contracts by fiscal year for 2015–2024.

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

³See, e.g., Vernon J. Edwards, “Postscript: The Protest Process,” 38 Nash & Cibinic Rep. NL ¶ 37 (June 2024); Stephanie Barna, Michele Pearce & Kayleigh Scalzo, “Proposal Would Make Losers Pay for Bid Protests,” Nat’l Def. Mag. (Oct. 2, 2023), <http://www.nationaldefensemagazine.org/articles/2023/10/2/proposal-would-make-losers-pay-for-bid-protests>.

⁴This PAPER updates our 2019 article on this topic. See Robert Nichols, Jason C. Lynch, Andrew Victor & Adrian Wigston, “Should We Protest? Achieving Success in the Bid Protest Process,” 19-7 Briefing Papers 1 (June 2019).

⁵For a definition of “interested party,” see GAO, Bid Protests at GAO: A Descriptive Guide (10th ed. 2018), available at <https://www.gao.gov/products/GAO-18-510SP>; 4 C.F.R. § 21.0; see also *CGI Fed., Inc. v. United States*, 779 F.3d 1346, 1348 (Fed. Cir. 2015) (an “interested party” is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract” (quoting 31 U.S.C.A. § 3551(2))).

⁶See FAR 33.101 (defining “protest”).

⁷Errors can also occur in a decision to cancel a solicitation or award, although those are beyond the scope of this Briefing Paper.

⁸See 4 C.F.R. 21.2(a)(1) (“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”).

⁹See 28 U.S.C.A. § 1491(b).

¹⁰See 31 U.S.C.A. §§ 3551–3557; 4 C.F.R. pt. 21 (GAO Bid Protest Regulations).

¹¹See FAR 33.103.

¹²See 28 U.S.C.A. § 1491(b)(2).

¹³See 31 U.S.C.A. § 3554(b); 4 C.F.R. § 21.8.

¹⁴See <http://www.uscfc.uscourts.gov/>; <https://www.gao.gov/legal/bid-protests>.

¹⁵William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” 9 Admin. L.J. Am. U. 461, 469–74 (1995). See generally Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, “Choice of Forum for Bid Protests,” 08-11 Briefing Papers 1 (Oct. 2008).

¹⁶See Mark V. Arena, Brian Persons, Irv Blickstein, Mary E. Chenoweth, Gordon T. Lee, David Luckey & Abby Schendt, RAND National Defense Research Institute, Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers 11–12 (2018), available at https://www.rand.org/pubs/research_reports/RR2356.html [hereinafter RAND Study].

¹⁷See William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” 9 Admin. L.J. Am. U. 461, 466–69 (1995).

¹⁸See RAND Study at 19–21.

¹⁹See Timothy G. Hawkins, Cory Yoder & Michael J. Gravier, “Federal Bid Protests: Is the Tail Wagging the Dog?,” 16 J. Pub. Procrmt. 152, 154 (Summer 2016).

²⁰See Timothy G. Hawkins, Cory Yoder & Michael J. Gravier, “Federal Bid Protests: Is the Tail Wagging the Dog?,” 16 J. Pub. Procrmt. 152, 154 (Summer 2016).

²¹87 Fed Reg. 15808 (Mar. 18, 2022) (adding DFARS 215.506-70). See generally Kara M. Sacilotto, “Recognizing and Maximizing Debriefing Opportunities,” 22-7 Briefing Papers 1 (June 2022).

²²DFARS 215.506(d).

²³See RAND Study at 65. See generally Jason A. Carey, Kayleigh Scalzo & Carl Wiersum, “Flying in Friendly Skies: The Federal Aviation Administration’s Unique Bid Protest Forum,” 19-10 Briefing Papers 1 (Sept. 2019).

²⁴GAO publishes its statistics annually in its report to Congress. See, e.g., GAO Bid Protest Annual Report to Congress for Fiscal Year 2023, B-158766 (Oct. 26, 2023), 2023 WL 7126776, <https://www.gao.gov/assets/870/862404.pdf>; see also 66 GC ¶ 25.

²⁵GAO’s 31% sustain rate in Fiscal Year 2023 was an aberration due to two procurements resulting in 119 sustained protests and supplemental protests.

²⁶Paul F. Khoury, Brian Walsh & Gary S. Ward, “A Data-Driven Look at the GAO Protest System,” Wiley Rein LLP (Dec. 19, 2016), <https://www.wileyrein.com/newsroom-articles-A-Data-Driven-Look-at-the-GAO-Protest-System.html>.

²⁷See Paul F. Khoury, Brian Walsh & Gary S. Ward, “A Data-Driven Look at the GAO Protest System,” Wiley Rein LLP (Dec. 19, 2016), <https://www.wileyrein.com/newsroom-articles-A-Data-Driven-Look-at-the-GAO-Protest-System.html> (observing that “when protesters prepare supplemental protests, their counsel does so with the benefit of the contemporaneous evaluation record” and “that protesters tend to be more successful when they raise challenges based on what they discover in the contemporaneous evaluation record”).

²⁸See “Court of Federal Claims Reveals 2022 Protest Statistics,” Crowell & Moring (Mar. 2, 2023), <https://www.governmentcontractslegalforum.com/2023/03/articles/bid-protest/court-of-federal-claims-reveals-2022-protest-statistics>.

²⁹31 U.S.C.A. § 3553(c)(1).

³⁰See Daniel I. Gordon, “Bid Protests: The Costs Are Real, But the Benefits Outweigh Them,” 42 Pub. Cont. L.J. 489 (Spring 2013).

³¹See, e.g., Marko W. Kipa, Keith R. Szeliga & Jessica M. Madon, “Identifying Viable Preaward Bid Protest Allegations at the GAO,” 10-6 Briefing Papers 1 (May 2010); Keith R. Szeliga, Marko W. Kipa & Daniel J. Marcinak, “Identifying Viable Postaward Bid Protest Allegations at the GAO,” 09-4 Briefing Papers 1 (Mar. 2009).

³²E.g., GAO Bid Protest Annual Report to Congress for Fiscal Year 2023, B-158766 (Oct. 26, 2023), 2023 WL 7126776, <https://www.gao.gov/assets/870/862404.pdf>; GAO Bid Protest Annual Report to Congress for Fiscal Year 2022, B-158766 (Nov. 1, 2022), <https://www.gao.gov/assets/730/723608.pdf>; GAO Bid Protest Annual Report to Congress for Fiscal Year 2021, B-158766 (Nov. 16, 2021), 2021 WL 5365825, <https://www.gao.gov/assets/gao-22-900379.pdf>.

³³Palantir USG, Inc. v. United States, 904 F.3d 980 (Fed. Cir. 2018), 60 GC ¶ 287.

³⁴Westwind Computer Prods., Inc., B-420119, Dec. 8, 2021, 2021 CPD ¶ 384; Red River Waste Sols., LP, B-411760.2, 2016 CPD ¶ 45; Fire Risk Mgmt., Inc., B-411552, 2015 CPD ¶ 259, 57 GC ¶ 299; Triad Isotope, Inc., B-411360, July 16, 2015, 2015 CPD ¶ 220, 57 GC ¶ 258; DNO Inc., B-406256 et al., Mar. 22, 2012, 2012 CPD ¶ 136, 54 GC ¶ 154.

³⁵Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016), 58 GC ¶ 227; Veterans4You, Inc., B-417340, June 3, 2019, 2019 CPD ¶ 207, 61 GC

¶ 200.

³⁶Tempus Nova, Inc., B-412821, June 14, 2016, 2016 CPD ¶ 161, 58 GC ¶ 273.

³⁷Bluehorse Corp., B-413533, Oct. 28, 2016, 2016 CPD ¶ 302.

³⁸CMS Contract Mgmt. Servs. v. Mass. Housing Fin. Agency, 745 F.3d 1379 (Fed. Cir. 2014), 56 GC ¶ 104.

³⁹Orlans PC, B-420905, Oct. 25, 2022, 2022 CPD ¶ 269, 64 GC ¶ 345; U.S. Foodservice, Inc. v. United States, 100 Fed. Cl. 659 (2011); Verizon Wireless, B-406854, Sept. 17, 2012, 2012 CPD ¶ 260, 54 GC ¶ 364.

⁴⁰Acetris Health, LLC v. United States, 138 Fed. Cl. 579 (2018); Acetris Health, LLC v. United States, 949 F.3d 719 (Fed. Cir. 2020).

⁴¹See, e.g., Westwind Computer Prods., Inc., B-420119, Dec. 8, 2021, 2021 CPD ¶ 384 (recommending that the agency conduct further market research).

⁴²CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

⁴³General Dynamics Info. Tech., Inc., B-421525, May 26, 2023, 2023 CPD ¶ 131; Office Design Grp., B-415411, Jan. 3, 2018, 2018 CPD ¶ 43, 60 GC ¶ 50.

⁴⁴CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

⁴⁵Millennium Corp., B-416485.2, Oct. 1, 2018, 2018 CPD ¶ 329, 60 GC ¶ 344.

⁴⁶Coastal Int’l Sec., Inc., B-411756 et al., Oct. 19, 2015, 2015 CPD ¶ 340.

⁴⁷Global Tech. Sys., B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335.

⁴⁸See, e.g., Millennium Corp., Comp. Gen. Dec. B-416485.2, Oct. 1, 2018, 2018 CPD ¶ 329, 60 GC ¶ 344; CWTSatoTravel, Comp. Gen. Dec. B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87.

⁴⁹Ekagra Partners, LLC, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83.

⁵⁰Innovate Now, LLC, B-419546, Apr. 26, 2021, 2021 CPD ¶ 178, 63 GC ¶ 139.

⁵¹Mechanix Wear, Inc., B-416704 et al., Nov. 19, 2018, 2018 CPD ¶ 395.

⁵²USA Jet Airlines, Inc., B-404666, Apr. 1, 2011, 2011 CPD ¶ 91, 53 GC ¶ 201.

⁵³JW Mills Mgmt., LLC, B-420416, Mar. 24, 2022, 2022 CPD ¶ 82.

⁵⁴Iyabak Constr., LLC, B-409196, Feb. 6, 2014, 2014 CPD ¶ 62, 56 GC ¶ 79.

⁵⁵See, e.g., Ekagra Partners, LLC, B-408685.18, Feb. 15, 2019, 2019 CPD ¶ 83.

⁵⁶Seventh Dimension, LLC v. United States, 160 Fed. Cl. 1 (2022).

⁵⁷Rockwell Collins, Inc. v. United States, 169 Fed. Cl. 436 (2024).

⁵⁸FMS Invest. Corp. v. United States, 139 Fed. Cl. 221 (2018).

⁵⁹JER 370 Third St., LLC, B-402025.2 et al., June 1, 2010, 2010 CPD ¶ 120, 52 GC ¶ 218.

⁶⁰Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539 (2016).

⁶¹XTec, Inc., B-410778.3, Oct. 1, 2015, 2015 CPD ¶ 292, 57 GC ¶ 327.

⁶²Starry Assocs., 127 Fed. Cl. at 549.

⁶³XTec, Inc., B-410778.3, Oct. 1, 2015, 2015 CPD ¶ 292, 57 GC ¶ 327.

⁶⁴Global Computer Enters., Inc., B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69, 53 GC ¶ 119.

⁶⁵Global Computer Enters., Inc., B-404597 et al., Mar. 9, 2011, 2011 CPD ¶ 69, 53 GC ¶ 119.

⁶⁶eSimplicity, Inc. v. United States, 162 Fed. Cl. 372 (2022), 64 GC ¶ 314.

⁶⁷ICI Servs., Inc., B-409231.2, Apr. 23, 2014, 2014 CPD ¶ 132, 56 GC ¶ 168.

⁶⁸Chags Health Info. Tech., LLC, B-413104.30 et al., April 11, 2019, 2019 CPD ¶ 145, 61 GC ¶ 158.

⁶⁹Infoshred LLC, B-407086, Oct. 26, 2012, 2012 CPD ¶ 298, 54 GC ¶ 384.

⁷⁰T-Square Logistics Servs. Corp. v. United States, 134 Fed. Cl. 550 (2017).

⁷¹AECOM Tech. Servs., Inc., B-411862, Nov. 12, 2015, 2015 CPD ¶ 353, 57 GC ¶ 394.

⁷²Ocean Servs., LLC, B-404690, Apr. 6, 2011, 2011 CPD ¶ 73, 53 GC ¶ 155.

⁷³SafeGuard Servs., LLC, B-404910, June 28, 2011, 2011 CPD ¶ 132.

⁷⁴See, e.g., SafeGuard Servs., LLC, B-404910, June 28, 2011, 2011 CPD ¶ 132; AECOM Tech. Servs., Inc., B-411862, Nov. 12, 2015, 2015 CPD ¶ 353, 57 GC ¶ 394; Ocean Servs., LLC, B-404690, Apr. 6, 2011, 2011 CPD ¶ 73, 53 GC ¶ 155.

⁷⁵See, e.g., Infoshred LLC, B-407086, Oct. 26, 2012, 2012 CPD ¶ 298, 54 GC ¶ 384.

⁷⁶ANHAM FZCO, B-415969 et al., May 8, 2018, 2018 CPD ¶ 184.

⁷⁷Sys. Studies & Simulation, Inc., B-409375.2 et al., May 12, 2014, 2014 CPD ¶ 153, 56 GC ¶ 233.

⁷⁸Raytheon Tech. Servs. Co. LLC, B-404655.4 et al., Oct. 11, 2011, 2011 CPD ¶ 236, 53 GC ¶ 411.

⁷⁹Deloitte Consulting, LLP, B-421801.2 et al., Jan. 20, 2024, 2024 CPD ¶ 41; Innovative Mgmt. & Tech.

Approaches, Inc., B-418823.3, Jan. 8, 2021, 2021 CPD ¶ 18.

⁸⁰Bahrain Telecomms. Co., B.S.C., B-407682.2 et al., Jan. 28, 2013, 2013 CPD ¶ 71, 55 GC ¶ 116.

⁸¹Tipton Textile Rental, Inc., B-406372, May 9, 2012, 2012 CPD ¶ 156.

⁸²Philips Healthcare Informatics, B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220.

⁸³CR/ZWS LLC, B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.

⁸⁴Springfield Parcel C, LLC v. United States, 124 Fed. Cl. 163 (2015).

⁸⁵See, e.g., Bahrain Telecomms. Co. B.S.C., B-407682.2 et al., Jan. 28, 2013, 2013 CPD ¶ 71, 55 GC ¶ 116.

⁸⁶See, e.g., CR/ZWS LLC, B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.

⁸⁷Mission Essential Personnel, LLC, B-404218.2 et al., June 14, 2011, 2011 CPD ¶ 120, 53 GC ¶ 283.

⁸⁸Export 220 Volt, Inc., B-412303.2, Jan. 20, 2016, 2016 CPD ¶ 25.

⁸⁹AdvanceMed Corp., B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

⁹⁰Orion Tech., Inc., B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268, 54 GC ¶ 326.

⁹¹Veteran Tech. Integrators, LLC, B-415716.3, June 20, 2018, 2018 CPD ¶ 295, 60 GC ¶ 333; EFS Ebrex SARL, B-416076, June 4, 2018, 2018 CPD ¶ 201; McCann-Erickson USA, Inc., B-414787, Sept. 8, 2017, 2017 CPD ¶ 300, 59 GC ¶ 310; SURVICE Eng'g Co., LLC, B-414519, July 5, 2017, 2017 CPD ¶ 237, 59 GC ¶ 265.

⁹²EFS Ebrex SARL, B-416076, June 4, 2018, 2018 CPD ¶ 201.

⁹³Exelis Sys. Corp., B-407111.5 et al., May 20, 2013, 2013 CPD ¶ 123, 55 GC ¶ 213.

⁹⁴Office Design Grp. v. United States, 951 F.3d 1366 (Fed. Cir. 2020), 62 GC ¶ 82; Deloitte Consulting, LLP, B-421801.2 et al., Jan. 30, 2024, 2024 CPD ¶ 41; Insight Tech. Sols., LLC, B-421764.2 et al., Sept. 29, 2023, 2023 CPD ¶ 224, 65 GC ¶ 303; Mayvin, Inc., B-419301.6, June 29, 2021, 2021 CPD ¶ 249; Digi-flight, Inc., B-419590, May 24, 2021, 2021 CPD ¶ 206, 63 GC ¶ 193; Solers, Inc., B-414672.3 et al., Oct. 9, 2018, 2018 CPD ¶ 350.

⁹⁵Wash. Bus. Dynamics, LLC, B-421953, Dec. 18, 2023, 2023 CPD ¶ 286, 66 GC ¶ 30.

⁹⁶AT&T Mobility LLC, B-420494, May 10, 2022, 2022 CPD ¶ 115, 64 GC ¶ 181.

⁹⁷Nexant, Inc., B-407708 et al., Jan. 30, 2013, 2013

CPD ¶ 59, 55 GC ¶ 83.

⁹⁸Chugach Logistics & Facility Servs. JV, LLC, B-421451.3, Sept. 8, 2023, 2023 CPD ¶ 270.

⁹⁹Jacobs Tech., Inc., B-413389 et al., Oct. 18, 2016, 2016 CPD ¶ 312.

¹⁰⁰ManTech Advanced Sys. Int'l, Inc., B-416734, Nov. 27, 2018, 2018 CPD ¶ 408.

¹⁰¹Glacier Tech. Sols., LLC, B-412990.2, Oct. 17, 2016, 2016 CPD ¶ 311.

¹⁰²Kratos Def. & Rocket Support Servs., Inc., B-413143 et al., Aug. 23, 2016, 2016 CPD ¶ 227.

¹⁰³Shearwater Mission Support, LLC, B-416717, Nov. 20, 2018, 2018 CPD ¶ 402, 60 GC ¶ 384; W.P. Tax & Acct. Grp., B-411899, Nov. 13, 2015, 2015 CPD ¶ 331, 57 GC ¶ 375; Lily Timber Servs., B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246; Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295, 54 GC ¶ 393.

¹⁰⁴TRAX Int'l Corp, B-420361.7, June 28, 2023, 2023 CPD ¶ 162; Apprio, Inc., B-420627, June 30, 2022, 2022 CPD ¶ 170.

¹⁰⁵Criterion Corp., B-422309, Apr. 16, 2024, 2024 CPD ¶ 96 (price realism); Target Media Mid Atl., Inc., Dec. 6, 2016, 2016 CPD ¶ 358, 59 GC ¶ 9 (cost realism); GiaCare & MedTrust JV, LLC, B-407966.4, Nov. 2, 2016, 2016 CPD ¶ 321 (price realism); NCI Info. Sys., Inc., B-412870.2, October 14, 2016, 2016 CPD ¶ 310 (price realism); Smartronix, Inc., B-411970 et al., Nov. 25, 2015, 2015 CPD ¶ 373 (cost realism); Sci. Applications Int'l Corp., B-407105 et al., Nov. 1, 2012, 2012 CPD ¶ 310 (price realism).

¹⁰⁶Valor Healthcare, Inc., B-412960 et al., July 15, 2016, 2016 CPD ¶ 206; Digital Techs., Inc., B-406085 et al., Feb. 6, 2012, 2012 CPD ¶ 94, 54 GC ¶ 156; I.M. Sys. Grp., B-404583 et al., Feb. 25, 2011, 2011 CPD ¶ 64, 53 GC ¶ 137.

¹⁰⁷ENSCO, Inc., B-414844.4 et al., July 5, 2018, 2018 CPD ¶ 260; AdvanceMed Corp., B-414373, May 25, 2017, 2017 CPD ¶ 160, 59 GC ¶ 190.

¹⁰⁸Prism Maritime, LLC, B-409267.2 et al., April 7, 2014, 2014 CPD ¶ 124, 56 GC ¶ 175.

¹⁰⁹Tantus Techs., Inc., B-411608 et al., Sept. 14, 2015, 2015 CPD ¶ 299.

¹¹⁰Conti Fed. Servs., LLC, B-422162 et al., Feb. 1, 2024, 2024 CPD ¶ 31, 66 GC ¶ 86; MPRI, Div. of L-3 Servs, Inc., B-402548 et al., June 4, 2010, 2011 CPD ¶ 108, 53 GC ¶ 238.

¹¹¹Gen. Dynamics Advanced Info. Sys., Inc., B-411771 et al., Oct. 20, 2015, 2015 CPD ¶ 322, 57 GC ¶ 355.

¹¹²Lifecycle Constr. Servs., LLC, B-406907, Sept.

27, 2012, 2012 CPD ¶ 269, 54 GC ¶ 347.

¹¹³Federal Builders, LLC—The James R. Belk Trust, B-409952 et al., 2014 CPD ¶ 285, 56 GC ¶ 344.

¹¹⁴BAE Sys. Tech. Sols. & Servs. Inc., B-420860.4 et al., June 18, 2024, 2024 CPD ¶ 144; Sabre Sys., Inc., B-420090.3, June 1, 2022, 2022 CPD ¶ 137, 64 GC ¶ 205; SURVICE Eng'g Co. LLC, B-414519, July 5, 2017, 2017 CPD ¶ 237, 59 GC ¶ 265; A-P-T Research, Inc., B-413731.2, Apr. 3, 2017, 2017 CPD ¶ 112; MicroTechnologies, LLC, B-413091 et al., Aug. 11, 2016, 2016 CPD ¶ 219, 58 GC ¶ 322.

¹¹⁵Raymond Express Int'l, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317, GC ¶ 375; 6K Sys., Inc.—Protest & Costs, B-408124.3 et al., Dec. 9, 2013, 2014 CPD ¶ 347.

¹¹⁶Technatomy Corp., B-414672.5, Oct. 10, 2018, 2018 CPD ¶ 353.

¹¹⁷Red River Computer Co., B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7.

¹¹⁸David Jones CPA PC, B-414701, Aug. 25, 2017, 2017 CPD ¶ 265.

¹¹⁹KWR Constr., Inc. v. United States, 124 Fed. Cl. 345, 358–59 (2015).

¹²⁰CGI Fed. Inc., B-410330.2, Dec. 10, 2014, 2014 CPD ¶ 366.

¹²¹CACI, Inc.-Fed., B-413028 et al., Aug. 3, 2016, 2016 CPD ¶ 238, 58 GC ¶ 352.

¹²²See, e.g., Solers, Inc., B-414672.3 et al., Oct. 9, 2018, 2018 CPD ¶ 350; AdvanceMed Corp., B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

¹²³See, e.g., CR/ZWS LLC, B-414766 et al., Sept. 13, 2017, 2017 CPD ¶ 288, 59 GC ¶ 318.

¹²⁴DRS C3 Sys., LLC, B-310825 et al., 2008 CPD ¶ 103, 50 GC ¶ 301.

¹²⁵NikSoft Sys. Corp., B-406179, Feb. 29, 2012, 2012 CPD ¶ 104, 54 GC ¶ 121; Solers, Inc., B-404032.3 et al., Apr. 6, 2011, 2011 CPD ¶ 83.

¹²⁶Quality Servs. Int'l, LLC, B-410156 et al., Nov. 3, 2014, 2014 CPD ¶ 330.

¹²⁷Helicopter Transp. Servs. LLC, B-400295 et al., 2008 CPD ¶ 180, 50 GC ¶ 379.

¹²⁸Business Integra Tech. Sols., Inc., B-418377.7 et al., July 7, 2020, 2020 CPD ¶ 228; US21, Inc., B-415045.9, Sept. 10, 2018, 2018 CPD ¶ 404.

¹²⁹General Dynamics Info. Tech., Inc., B-421290, Mar. 1, 2023, 2023 CPD ¶ 60; U.S. Info. Techs. Corp., B-404357 et al., Feb. 2, 2011, 2011 CPD ¶ 74, 53 GC ¶ 166; Al Raha Grp. for Tech. Servs., Inc., B-411015.2 et al., Apr. 22, 2015, 2015 CPD ¶ 134.

¹³⁰East Coast Utility Contractors, Ltd., B-415493

et al., Jan. 16, 2018, 2018 CPD ¶ 30, 60 GC ¶ 51.

¹³¹Raytheon Co., B-404998, July 25, 2011, 2011 CPD ¶ 232, 54 GC ¶ 31.

¹³²Vertex Aerospace, LLC, B-421835 et al., Nov. 1, 2023, 2023 CPD ¶ 249.

¹³³Philips Healthcare Informatics, B-405382.2 et al., May 14, 2012, 2012 CPD ¶ 220.

¹³⁴CIGNA Gov't Servs., LLC, B-401062.2 et al., May 6, 2009, 2010 CPD ¶ 283, 53 GC ¶ 24.

¹³⁵CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 386 (2010).

¹³⁶Ace Info Sols, Inc., B-414650.10 et al., May 21, 2018, 2018 CPD ¶ 189.

¹³⁷DKW Commc'ns, Inc., B-411182, June 9, 2015, 2015 CPD ¶ 178, 57 GC ¶ 206; Ne. Mil. Sales, Inc., B-404153, Jan. 13, 2011, 2011 CPD ¶ 2, 53 GC ¶ 49; Contract Int'l, Inc., B-401871.5 et al., May 24, 2010, 2010 CPD ¶ 126, 52 GC ¶ 264; Shaw-Parson Infrastructure Recovery Consultants, LLC, B-401679.4 et al., Mar. 10, 2010, 2010 CPD ¶ 77, 52 GC ¶ 163.

¹³⁸TOTE Servs., Inc., B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182.

¹³⁹VariQ Corp., B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

¹⁴⁰Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141, 52 GC ¶ 245.

¹⁴¹Global Language Ctr., B-413503.8, June 1, 2017, 2017 CPD ¶ 238, 59 GC ¶ 288.

¹⁴²MetroStar Sys., Inc., B-416377.5, Apr. 2, 2020, 2020 CPD ¶ 135; MLU Servs., Inc., B-414555.3 et al., July 17, 2017, 2017 CPD ¶ 225.

¹⁴³United Paradyne Corp., B-297758, Mar. 10, 2006, 2006 CPD ¶ 47, 48 GC ¶ 128.

¹⁴⁴Xtreme Concepts, Inc., B-413711, Dec. 19, 2016, 2016 CPD ¶ 372.

¹⁴⁵EFW Inc., B-412608 et al., Apr. 7, 2016, 2016 CPD ¶ 304, 59 GC ¶ 7.

¹⁴⁶See, e.g., TOTE Servs., Inc., B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182.

¹⁴⁷See, e.g., CIGNA Gov't Servs., B-401062.2 et al., May 6, 2009, 2010 CPD ¶ 283, 53 GC ¶ 24.

¹⁴⁸MVM, Inc., B-421788.3, Mar. 5, 2024, 2024 CPD ¶ 63, 66 GC ¶ 95; Prof. Serv. Indus., Inc., B-412721.2 et al., July 21, 2016, 2016 CPD ¶ 234; Deloitte Consulting, LLP, B-412125.2 et al., Apr. 7, 2016, 2016 CPD ¶ 119; Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 CPD ¶ 93.

¹⁴⁹YWCA of Greater Los Angeles, B-414596 et al., July 24, 2017, 2017 CPD ¶ 245.

¹⁵⁰Sehlke Consulting, LLC, B-420538, May 18, 2022, 2022 CPD ¶ 119.

¹⁵¹ASRC Fed. Data Sols., LLC, B-421008 et al., Dec. 2, 2022, 2022 CPD ¶ 294, 65 GC ¶ 18; Sev1Tech, Inc., B-416811 et al., Dec. 18, 2018, 2018 CPD ¶ 429, 61 GC ¶ 19; Patricio Enters. Inc., B-412738, 2016 CPD ¶ 145, 58 GC ¶ 228; ACS Gov't Servs., Inc., B-293014, 2004 CPD ¶ 18, 46 GC ¶ 92.

¹⁵²Starry Assocs., Inc., B-410968.2, Aug. 11, 2015, 2015 CPD ¶ 253.

¹⁵³KPMG LLP, B-420949, Nov. 7, 2022, 2022 CPD ¶ 280; Harmonia Holdings Grp., LLC, B-413464, Nov. 4, 2016, 2017 CPD ¶ 62, 59 GC ¶ 77; Arcadis U.S., Inc., B-412828, June 16, 2016, 2016 CPD ¶ 198.

¹⁵⁴CharDonnay Dialysis, LLC, B-420910, Oct. 27, 2022, 2022 CPD ¶ 273, 64 GC ¶ 353; R&K Enter. Sols., Inc., B-419919.6 et al., Sept. 12, 2022, 2022 CPD ¶ 237, 64 GC ¶ 299.

¹⁵⁵Patriot Sols., LLC, B-413779, Dec. 22, 2016, 2016 CPD ¶ 376.

¹⁵⁶WHR Grp., Inc., B-420776, Aug. 30, 2022, 2022 CPD ¶ 230.

¹⁵⁷VariQ Corp., B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

¹⁵⁸WAI-Stoller Servs., LCC, B-408248.6 et al., May 22, 2014, 2014 CPD ¶ 164.

¹⁵⁹AT&T Corp., B-421195, Jan. 17, 2023, 2023 CPD ¶ 26; Novetta, Inc., B-414672.4 et al., Oct. 9, 2018, 2018 CPD ¶ 349; Immersion Consulting, LLC, B-415155 et al., Dec. 4, 2017, 2017 CPD ¶ 373, 60 GC ¶ 49; Arcanum Grp., Inc., B-413682.2 et al., Mar. 29, 2017, 2017 CPD ¶ 270.

¹⁶⁰J.C.N. Constr., Inc. v. United States, 107 Fed. Cl. 503 (2012); BayFirst Sols., LLC v. United States, 102 Fed. Cl. 677 (2012); ManTech Advanced Sys. Int'l, Inc., B-416734, Nov. 27, 2018, 2018 CPD ¶ 408; Transworld Sys., Inc., B-414090.13 et al., Dec. 22, 2017, 2019 CPD ¶ 2.

¹⁶¹Celta Servs., Inc., B-411835 et al., Nov. 2, 2015, 2015 CPD ¶ 362.

¹⁶²Shearwater Mission Support, LLC, B-416717, Nov. 20, 2018, 2018 CPD ¶ 402, 60 GC ¶ 384.

¹⁶³Q Integrated Cos., LLC v. United States, 133 Fed. Cl. 479 (2017); Life Science Logistics, LLC, B-421018.4, Feb. 27, 2024, 2024 CPD ¶ 66; Sunglim Eng'g & Constr. Co., B-419067.3, Aug. 6, 2021, 2021 CPD ¶ 278.

¹⁶⁴BC Site Servs., LLC, B-420797.4, Mar. 21, 2023, 2023 CPD ¶ 73, 65 GC ¶ 85.

¹⁶⁵Science Applications Int'l Corp., B-420005 et al., Oct. 27, 2021, 2021 CPD ¶ 372, 64 GC ¶ 10.

¹⁶⁶Vencore Servs. & Sols., Inc., B-412949 et al., July 18, 2016, 2016 CPD ¶ 346, 58 GC ¶ 450.

¹⁶⁷Northrop Grumman Sys. Corp., B-410990.3, Oct. 5, 2015, 2015 CPD ¶ 309.

¹⁶⁸YMCA of Greater Los Angeles, B-414596 et al., July 24, 2017, 2017 CPD ¶ 245.

¹⁶⁹TRAX Int'l Corp, B-420361.7, June 28, 2023, 2023 CPD ¶ 162; Rice Sols., LLC, B-420475, Apr. 25, 2022, 2022 CPD ¶ 102, 64 GC ¶ 155; Int'l Waste Indus., B-411338, July 7, 2015, 2015 CPD ¶ 196, 57 GC ¶ 233; Marathon Med. Corp., B-408052, June 4, 2014, 2014 CPD ¶ 162, 56 GC ¶ 214.

¹⁷⁰AECOM Mgmt. Servs., Inc., B-418828.4 et al., Mar. 17, 2021, 2021 CPD ¶ 152, 63 GC ¶ 167; Innovative Mgmt. & Tech. Approaches, Inc., B-418823.3, Jan. 8, 2021, 2021 CPD ¶ 18.

¹⁷¹Tyonek Eng'g & Agile Mfg., LLC, B-421547, May 26, 2023, 2023 CPD ¶ 125, 65 GC ¶ 166.

¹⁷²Total Home Health, B-417283, Apr. 26, 2019, 2019 CPD ¶ 166.

¹⁷³EFS Ebrex Sarl, B-416076, June 4, 2016, 2016 CPD ¶ 201; Paragon Tech. Grp., B-412636, Apr. 22, 2016, 2016 CPD ¶ 113, 58 GC ¶ 195; EFW Inc., B-412608 et al., Apr. 7, 2016, 2016 CPD ¶ 304, 59 GC ¶ 7; CFS-KBR Marianas Support Servs., LLC, B-410486 et al., Jan. 2, 2015, 2015 CPD ¶ 22, 57 GC ¶ 73.

¹⁷⁴Sentrillion Corp., B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207, 55 GC ¶ 318.

¹⁷⁵See, e.g., Life Sci. Logistics, LLC, B-421018.4, Feb. 27, 2024, 2024 CPD ¶ 66.

¹⁷⁶Tech Marine Bus., Inc., B-420872 et al, Oct. 14, 2022, 2022 CPD ¶ 260, 64 GC ¶ 324.

¹⁷⁷VariQ Corp., B-414650.11 et al., May 30, 2018, 2018 CPD ¶ 199.

¹⁷⁸Harmonia Holdings Grp., LLC, B-417475.3, Sept. 23, 2019, 2019 CPD ¶ 333; DRS ICAS, LLC, B-401852.4 et al., Sept. 8, 2010, 2010 CPD ¶ 261, 52 GC ¶ 406.

¹⁷⁹Starlight Corp., B-420267.3, Mar. 14, 2022, 2022 CPD ¶ 65, 64 GC ¶ 119, 64 GC ¶ 119.; Soft Tech Consulting, Inc., B-416934, Jan. 15, 2019, 2019 CPD ¶ 60; TOTE Servs., Inc., B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182; Deloitte Consulting, LLP, B-412125.2 et al., Apr. 15, 2016, 2016 CPD ¶ 119; SRA Int'l, Inc., B-408624 et al., Nov. 25, 2013, 2013 CPD ¶ 275, 55 GC ¶ 401; TriCenturion, Inc., B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52, 54 GC ¶ 128.

¹⁸⁰HomeSafe All., LLC, B-418266.5 et al., Oct. 21, 2020, 2020 CPD ¶ 350.

¹⁸¹Res. Dimensions, LLC, B-404536, Feb. 24, 2011, 2011 CPD ¶ 50, 53 GC ¶ 111.

¹⁸²CORTEK, Inc., B-412047, Dec. 17, 2015, 2015

CPD ¶ 397, 58 GC ¶ 49.

¹⁸³Dynaxys LLC, B-414459.4, Apr. 18, 2018, 2018 CPD ¶ 152, 60 GC ¶ 173; Swets Info. Servs., B-410078, Oct. 20, 2014, 2014 CPD ¶ 311, 56 GC ¶ 376; Solers Inc., B-409079 et al., Jan. 27, 2014, 2014 CPD ¶ 74, 56 GC ¶ 114.

¹⁸⁴Alpha Omega Integration, LLC, B-419812, Aug. 10, 2021, 2021 CPD ¶ 302; Trailboss Enters., Inc., B-407093, Nov. 6, 2012, 2013 CPD ¶ 232, 55 GC ¶ 382.

¹⁸⁵Clark/Foulger-Pratt JV, B-406627 et al., July 23, 2012, 2012 CPD ¶ 213.

¹⁸⁶NOVA Corp., B-408046 et al., June 4, 2013, 2013 CPD ¶ 127, 55 GC ¶ 197.

¹⁸⁷Threat Mgmt. Grp., LLC, B-413729, Dec. 21, 2016, 2017 CPD ¶ 9.

¹⁸⁸See, e.g., Arcadis U.S., Inc., B-412828, June 16, 2016, 2016 CPD ¶ 198; W. Coast Gen. Corp., B-411916.2, Dec. 14, 2015, 2015 CPD ¶ 392.

¹⁸⁹C2C Innovative Sols., Inc., B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁹⁰FAR 9.505-1; FAR 9.505-2.

¹⁹¹Dell Servs. Fed. Gov't Inc., B-414461 et al., June 21, 2017, 2017 CPD ¶ 192, 59 GC ¶ 246.

¹⁹²Northrop Grumman Systems Corp.—Mission Sys., B-419560.3 et al., Aug. 18, 2021, 2021 CPD ¶ 305.

¹⁹³B.L. Herbert—Brasfield & Gorrie, JV, B-402229, Feb. 16, 2010, 2010 CPD ¶ 69; McCarthy/Hunt, JV, B-402229.2, Feb. 16, 2010, 2010 CPD ¶ 68, 52 GC ¶ 138.

¹⁹⁴L-3 Servs., Inc., B-400134.11 et al., Sept. 3, 2009, 2009 CPD ¶ 171, 51 GC ¶ 338.

¹⁹⁵FAR 9.505.

¹⁹⁶C2C Innovative Sols., Inc., B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

¹⁹⁷AdvanceMed Corp., B-415062 et al., Nov. 17, 2017, 2017 CPD ¶ 362, 59 GC ¶ 388.

¹⁹⁸Guidehouse LLP, B-419848.3 et al., June 6, 2022, 2022 CPD ¶ 197.

¹⁹⁹DRS Tech. Servs., Inc., B-411573.2 et al., Nov. 9, 2015, 2015 CPD ¶ 363, 59 GC ¶ 113.

²⁰⁰Cahaba Safeguard Admins., LLC, B-401842.2, 2010 CPD ¶ 39, 52 GC ¶ 77; C2C Sols., Inc., B-401106.5, Jan. 25, 2010, 2010 CPD ¶ 38.

²⁰¹NCI Info. Sys., Inc., B-412870.2, Oct. 14, 2026, 2016 CPD ¶ 310.

²⁰²A Square Grp., LLC, B-421792.2, June 13, 2024, 2024 CPD ¶ 139.

²⁰³A-P-T Research, Inc., B-413731.2, Apr. 3, 2017, 2017 CPD ¶ 112, 59 GC ¶ 144.

²⁰⁴FAR 9.505(b).

²⁰⁵C2C Innovative Sols., Inc., B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

²⁰⁶AT&T Gov't Sols. Inc., B-413012 et al., July 28, 2016, 2016 CPD ¶ 237.

²⁰⁷Trace Sys. Inc. v. United States, 165 Fed. Cl. 44 (2023).

²⁰⁸Dell Servs. Fed. Gov't, Inc., B-414461.3 et al., June 19, 2018, 2018 CPD ¶ 213, 60 GC ¶ 234.

²⁰⁹Serco Inc., B-419617.2, Dec. 6, 2021, 2021 CPD ¶ 382; Int'l Res. Grp., B-409346.2 et al., Dec. 11, 2014, 2014 CPD ¶ 369, 57 GC ¶ 8; PCCP Constrs., JV, B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156, 53 GC ¶ 327.

²¹⁰Satellite Tracking of People, LLC, B-411845 et al., Nov. 6, 2015, 2015 CPD ¶ 347.

²¹¹Obsidian Sols. Grp., LLC, B-417134, Mar. 1, 2019, 2019 CPD ¶ 156, 61 GC ¶ 182.

²¹²Guidehouse, Inc., B-421740, Sept. 18, 2023, 2023 CPD ¶ 217, 65 GC ¶ 294.

²¹³Teledyne Brown Eng'g, Inc., B-418835 et al., Sept. 28, 2020, 2020 CPD ¶ 303, 62 GC ¶ 286.

²¹⁴C2C Innovative Sols., Inc., B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

²¹⁵Dell Fed. Sys., L.P. v. United States, 906 F.3d 982 (Fed. Cir. 2018), 60 GC ¶ 323.

²¹⁶Softrams, LLC, B-419927.4 et al., Feb. 7, 2022, 2022 CPD ¶ 57.

²¹⁷Castro & Co., LLC, B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74, 60 GC ¶ 77; Immersion Consulting, LLC, B-415155.4 et al., May 18, 2018, 2018 CPD ¶ 187, 60 GC ¶ 235.

²¹⁸Power Connector, Inc., B-404916.2, Aug. 15, 2011, 2011 CPD ¶ 186, 53 GC ¶ 398.

²¹⁹Kupono Gov't Servs., LLC, B-421392.9 et al., June 5, 2023, 2023 CPD ¶ 136, 65 GC ¶ 190.

²²⁰DZSP 21 LLC v. United States, 139 Fed. Cl. 110 (2018).

²²¹Centerra Grp. LLC v. United States, 138 Fed. Cl. 407 (2018).

²²²ARxIUM, Inc., v. United States, 136 Fed. Cl. 188 (2018).

²²³DRS ICAS, LLC, B-401852.4 et al., Sept. 8, 2010, 2010 CPD ¶ 261, 52 GC ¶ 406.

²²⁴Am. K-9 Detection Servs., Inc., B-400464.6, 2009 CPD ¶ 107, 51 GC ¶ 312.

²²⁵Deloitte Consulting, LLP, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355, 59 GC ¶ 29.

²²⁶Logistics Mgmt. Int'l, Inc., B-411015.4 et al., Nov. 20, 2015, 2015 CPD ¶ 356.

²²⁷FCi Fed., Inc., B-408558.7 et al., Aug. 5, 2015, 2015 CPD ¶ 245, 57 GC ¶ 298.

²²⁸eAlliant, LLC, B-407332.6 et al., Jan. 14, 2015, 2015 CPD ¶ 58, 57 GC ¶ 265.

²²⁹McTECH Corp. v. United States, 105 Fed. Cl. 726 (2012), 54 GC ¶ 275 (denying Government motion to dismiss).

²³⁰Sys. Application & Techs., Inc. v. United States, 100 Fed. Cl. 687, 711-19 (2011), 53 GC ¶ 373.

²³¹MacAulay-Brown, Inc. v. United States, 125 Fed. Cl. 591 (2016), 58 GC ¶ 82.

²³²VSE Corp., B-404833.4, Nov. 21, 2011, 2011 CPD ¶ 268, 54 GC ¶ 80.

²³³Turner Constr. Co. v. United States, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245.

²³⁴See, e.g., DZSP 21, LLC v. United States, 137 Fed. Cl. 38 (2018) (ordering agency to reevaluate proposals or to conduct new solicitation); DZSP 21, LLC v. United States, 139 Fed. Cl. 110 (2018) (ordering amendment to solicitation); Castro & Co., LLC, B-415508.4, Feb. 13, 2018, 2018 CPD ¶ 74, 60 GC ¶ 77 (recommending agency to revise solicitation again).

²³⁵Red River Computer Co., B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7, 62 GC ¶ 298; McGoldrick Constr. Servs. Corp., B-409252.2, Mar. 28, 2014, 2014 CPD ¶ 114, 56 GC ¶ 167.

²³⁶Red River Computer Co., B-414183.8 et al., Dec. 22, 2017, 2018 CPD ¶ 7, 62 GC ¶ 298; Piquette & Howard Elec. Serv., Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8, 56 GC ¶ 78; Sentrillion Corp., B-406843.3 et al., Apr. 22, 2013, 2013 CPD ¶ 207, 55 GC ¶ 318.

²³⁷C2C Innovative Sols., Inc., B-416289 et al., July 30, 2018, 2018 CPD ¶ 269.

²³⁸CRAssociates, Inc. v. United States, 95 Fed. Cl. 357, 390 (2010); TOTE Servs., Inc., B-414295 et al., Apr. 25, 2017, 2017 CPD ¶ 158, 59 GC ¶ 182; Savvee Consulting, Inc., B-408416 et al., Sept. 18, 2013, 2013 CPD ¶ 231, 55 GC ¶ 353.

²³⁹Raytheon Co. v. United States, 809 F.3d 590 (Fed. Cir. 2015), 57 GC ¶ 334.

²⁴⁰Many of these questions were expertly laid out in a prior Briefing Paper. See Richard P. Rector, C. Bradford Jorgensen & Daniel J. Cook, "To File or Not To File: Key Issues When Deciding To Protest," 15-3 Briefing Papers 1 (Feb. 2015).

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BRIEFING PAPERS