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# ¶ 23 Corrective Action And Voluntary Remand: Recent Developments At The GAO And The COFC

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As readers of this Report know well, winning a protest is not the same thing as winning a procurement. When a protester succeeds in establishing prejudicial error, the result is almost always that the agency is directed back to the drawing board to decide its next move. Neither the Government Accountability Office nor the U.S. Court of Federal Claims will usurp the agency's procurement function by dictating in the first instance how an agency should write its solicitation or which company should receive a contract award. This feeds a common critique that protests can be futile, because even if a protester identifies an error, the agency can often find a way to document a rationale for selecting the same awardee or issuing the same solicitation.

Nevertheless, protests can and often do achieve important objectives, including shaping critical solicitation terms, eliminating barriers to competition (even eliminating competitors), bringing important information to light, restructuring or abandonment of an acquisition strategy, and in some cases changing the award decision in the protester's favor. It is critical for contractors and their counsel to carefully think through the business case for filing any given protest; the analysis cannot be limited to the likelihood of prevailing in litigation but must also consider the probable outcome once the agency is back at the drawing board.

Of course, agencies are not required to wait until the GAO or the COFC issues a final decision to take matters back into their own hands. Agencies have significant leeway to take corrective action in response to a protest and, instead of investing time and resources in defending litigation, revisit their procurement decisions in light of the protest arguments. Although not formally defined, the term corrective action "in the bid protest context generally means agency action, usually taken after a protest has been initiated, to correct a perceived prior error in the procurement process, or, in the absence of error, to act to improve the competitive process." *Dellow Corp. v. United States*, 855 F.3d 1375 (Fed. Cir. 2017), 59 GC ¶ 143.

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Because an agency's decision to take corrective action often amounts to the same relief that the protester could win on the merits, there is an initial inclination by the protester to celebrate, followed by the sobering realization that the agency may be taking corrective action only to bolster its administrative record and reinforce the same decision that the protester challenged. This can be one of the most critical junctions of a bid protest, yet it is governed by an under-developed, unpublished, and internally inconsistent body of procedural norms and precedent. It is imperative for protest counsel to understand the rules and standards that apply to corrective action and remand activities at the GAO and the court. This area of procurement has been quite active over the past few years in both forums, with more developments likely.

## Corrective Action At The GAO

Once an agency announces an intent to take corrective action and reconsider a challenged procurement decision, the GAO will almost always dismiss the protest as academic. Agencies often file vague, cursory corrective action notices stating an intent to reconsider some or all issues raised in a protest that may or may not result in an amended solicitation or new award decision. Protesters regularly object to these notices, seeking additional detail as to what the agency will do in corrective action or asking the GAO to require the agency to take certain steps. Sometimes intervenors object as well, asserting that the protest allegations are meritless and do not warrant corrective action. While filing an objection to corrective action can serve an important purpose of documenting the parties' positions and preserving certain arguments, the GAO will rarely question an agency's decision to take corrective action or recommend how the agency should conduct its corrective action. Protesters and intervenors may file separate protest actions challenging the corrective action decision, but that is an issue for another article. See *Multiple Protests: A Contracting Officer's Nightmare*, 33 N&CR NL ¶ 41.

Notwithstanding the GAO's longstanding practice of granting dismissal requests based on corrective action, in late 2020 the GAO issued a rare decision detailing its reasons for denying a Library of Congress request to dismiss a protest through corrective action. In *Mythics, Inc.*, Comp. Gen. Dec. B-418785, 2020 CPD ¶ 295, 62 GC ¶ 299, the protesters challenged a solicitation on several grounds, including unjustified brand name restrictions. The agency attempted to avoid the GAO review by promising various forms of corrective action including future solicitation amendments, but the GAO found that, in the context of the challenges raised, the agency's vague promises of future action did not render the protest academic:

> [T]he proposed corrective action was either too vague to provide a basis for dismissal, or…failed to address one or more of the protest allegations.
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> * * *
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> For example, in responding to the allegation that the [Request for Proposals] impermissibly solicits the agency's requirements on a brand-name basis, the agency takes the overall position that the RFP, as amended, now permits competition on a brand-name-or-equal basis…but also states that the agency intends to issue an amendment that removes all references to brand names in connection with the agency's solicitation of the infrastructure as a services (IaaS) requirement. However, in the same passage, the agency states that it will continue to solicit software as a service (Saas) on a brand-name basis.…
>
> …In the context of a solicitation challenge, our Office must necessarily confine our review to the terms of the solicitation as actually-currently-issued. Vague, ambiguous, partial, or inadequate statements on the part of the agency to take corrective action at some indefinite point in the future—corrective action


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> that may or may not render the protest academic—do not provide a basis for dismissal of the protests. Additionally, in the absence of an actual solicitation provision, there is no basis for our Office to consider the undefinitized corrective action measures sketched out in the agency's pleadings in reviewing the propriety of the solicitation as written. [Internal citations omitted.]

Several protesters have attempted to leverage the *Mythics* decision to challenge proposed corrective actions. The GAO has, however, cabined *Mythics* to certain preaward protests, reaffirming the GAO's longstanding position in postaward protests that, once an agency announces an intent to take action that could potentially result in a different award decision, any protest challenging the initial award decision is academic, See *TEN21 Capital, LLC—Reconsideration*, Comp. Gen. Dec. B-418906.4, 2021 CPD ¶ 235, 2021 WL 2586775, stating:

> The fundamental distinction between our decision in *Mythics* and the dismissal at issue here—and the key to understanding the *Mythics* decision—is the fact that *Mythics* involved a pre-closing challenge to the terms of a solicitation, not a post-award challenge to an agency's evaluation of proposals and source selection decision....
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> In contrast to *Mythics* (or any other pre-closing protest), TEN21's protest involved a post-award challenge to the agency's evaluation of proposals and selection decision. TEN21's protest was rendered academic because the agency committed to conduct a reevaluation and make a new selection decision. Notwithstanding TEN21's insistence to the contrary, an agency's corrective action need not resolve every protest issue or provide the precise remedy sought by the protester; rather, it must only render the protest academic....
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> * * *
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> ...Put simply, when an agency decides to reevaluate proposals and make a new selection decision, continuing to resolve a dispute about the prior selection decision (which could change) serves no purpose—essentially, the decision would be gratuitous.

While the *Mythics* decision serves as an important reminder that the words "corrective action" will not necessarily result in dismissal of every protest, the GAO's subsequent holdings indicate that the GAO does not intend to depart from its longstanding practice of dismissing protests as academic once an agency announces corrective action.

### Voluntary Remand At The Court Of Federal Claims

Corrective action is also prevalent in the COFC's protests. It is not uncommon for the Government to announce an intent to take corrective action and seek dismissal of a case as moot after the protester submits its opening brief (*i.e.*, once the Government sees what arguments the protester has identified in the administrative record) or even after oral argument (*i.e.*, once the Government hears that the judge is inclined to rule for the protester). Even though these corrective action decisions are often indistinguishable from the remedy the protester would obtain if the court issued a final opinion, binding U.S. Court of Appeals for the Federal Circuit precedent generally precludes the court from awarding small businesses litigation fees under the Equal Access to Justice Act, 28 USCA § 2412, because without a formal court order, the protester is not technically a "prevailing party." *Dellow Corp.*; *Protest Costs: Interested Party v. Prevailing Party*, 16 N&CR ¶ 36.

In some cases, like *Dellow*, the Government's decision to conduct corrective action will be accompanied by a *motion to dismiss* arguing that the corrective action renders the protest moot. Often, however, the Government takes a more subtle approach, and instead of committing to a course of action that renders the protest moot, files a *motion for voluntary remand* asking for the court to stay the proceedings while the agency reconsiders its position.

Agencies asking courts to remand matters for further consideration is a common feature of administrative litigation, but the substantive and procedural rules are under-developed. In the leading appellate decision on voluntary remands, *SKF USA Inc. v. U.S.*, 254 F.3d 1022 (Fed. Cir. 2001), the Federal Circuit outlined five scenarios that may unfold in administrative litigation, the fourth being most relevant here:

- In the first two scenarios, the Government does not seek remand, and instead defends its decision on the grounds that the agency has articulated or based on grounds not previously articulated.
- In the third scenario, the Government seeks remand because of intervening events outside of the agency's control (e.g., new legislation). The Federal Circuit explained that remand is generally required in these circumstances.
- In the fourth scenario, the Government does not concede error or identify intervening events, but nevertheless seeks voluntary remand to reconsider its decision. Here, the Federal Circuit explained that a court has discretion and should grant the agency's request if it is "substantial and legitimate" but not if the request is "frivolous or in bad faith."
- Finally, the agency can concede that its original decision is incorrect and seek remand to change the result. Here, the Federal Circuit's guidance asks the lower court to discern whether the agency is seeking remand to consider an issue that Congress has already spoken to or to consider an issue that falls within the agency's discretion. If Congress has already unambiguously supplied the rule that governs the outcome of the case, remand may not be appropriate, compared to a scenario where Congress has delegated the agency with authority to decide an issue in the first instance.

Scenario 4 voluntary remand requests can be concerning from the protester's perspective—particularly when accompanied by vague and noncommittal explanations of what the agency plans to do on remand. These requests can leave the impression that the Government is nervous about its likelihood of success on the merits based on the existing record and would like to use the remand period to develop a more robust record that is more likely to withstand review. Until recently, there has been little precedent available to dispute these motions, as "most voluntary remand decisions are unpublished and unreasoned," and most courts seem to apply a "presumption in favor of voluntary remands." Joshua Revesz, *Voluntary Remands: A Critical Assessment*, 70 Admin. L. Rev. 361 (2018).

Triggering what appears to be a renaissance in voluntary remand analysis at the court, Judge Solomson's decision in *Keltner v. United States*, 148 Fed. Cl. 552 (2020), reviews the state of the law and denies a Government request for (scenario 4) voluntary remand on the basis that the Government's request does not meet the "substantial and legitimate" standard stated in *SKF*. Judge Solomson adopted a three-factor test from the Court of International Trade to determine when a remand request is substantial and legitimate: (1) the agency provides a compelling justification for the remand request, (2) the need for finality does not outweigh the justification for voluntary remand presented by the agency, and (3) the scope of the remand request is appropriate. In denying the motion, Judge Solomson's opinion expressed concern that "the government does not wish to 'reconsider' the original decision at all" but rather "seeks a remand simply so that the [Board] can bolster its reasons for denying Mr. Keltner's claim, presumably so that the [Board's] decision would then have a higher chance of withstanding subsequent judicial scrutiny."


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Several judges have subsequently followed *Keltner* in scrutinizing voluntary remand requests. Judge Hertling explained in *Rahman v. U.S.*, 149 Fed. Cl. 685 (2020), that Government “motions for voluntary remand to the agency for additional consideration should not simply be granted in a perfunctory manner” but rather “should be treated as with any other motion affecting the substantial rights of the plaintiff, by subjecting the government's position to careful analysis to ensure that the motion is properly supported and justified.” While *Keltner* and *Rahman* were veterans' benefits cases, Judge Tapp and Judge Solomson have since applied *Keltner* to deny Government motions for voluntary remand in bid protest cases. *Owens & Minor Distribution, Inc. v. United States*, 154 Fed. Cl. 349 (2021); *Amentum Services, Inc. v. United States*, No. 21-2029, 2021 WL 5871734 (Dec. 10, 2021).

Even those decisions that do not directly apply the three-factor standard adopted in *Keltner* nevertheless reflect careful review of Government remand requests, suggesting that for the foreseeable future the protest bar can expect more robust analysis and scrutiny of remand requests at the COFC. *See, e.g.*, *Thomassee v. U.S.*, No. 20-1481, 2022 WL 468127 (Feb. 15, 2022) (Schwartz, J.); *Sloan v. U.S.,* No. 21-1478, 2021 WL 6138921 (Dec. 29, 2021) (Holte, J.); *Yang v. U.S.*, 149 Fed. Cl. 277 (2020) (Lettow, J.).

While many voluntary remand requests will likely still warrant remand under the Federal Circuit's guidance in *SKF*, the *Keltner* decision provides a meaningful framework to scrutinize those requests and demonstrates the kind of thorough analysis that should accompany a request for voluntary remand.

### Concluding Thoughts

Whether before the GAO or the court, there are plenty of legitimate reasons for an agency to take corrective action in response to a protest, and good sense for the GAO or the court to allow agencies to proactively address issues raised in protests. But corrective action notices and accompanying requests for dismissal or remand can in some cases serve only to delay a final judicial decision while the agency bolsters its litigation defense, threatening to undermine the “important value[] of administrative law” to “instill[] confidence that the reasons given [by an agency] are not simply convenient litigating positions.” *Department of Homeland Security v. Regents of University of California*, 140 S. Ct. 1891, 1909 (2019). As contractors, agencies, and their counsel navigate the protest process, they should stay alert to the potential for corrective action and voluntary remand, and stay apprised of decisions like *Mythics*, *Keltner*, and their progeny. *Nathaniel Castellano*

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