

## **AGENCY FAILED TO DOCUMENT CORRECTIVE ACTION**

Copyright 2019 Richard D. Lieberman, Consultant & Retired Attorney

Frequently, when an agency procurement has been protested at the Government Accountability Office (“GAO”), the agency can decide to take corrective action, and simply communicate its intention to the GAO, who will then dismiss the protest. In an unusual protest, where the Army advised GAO that its corrective action would be to terminate a contract and make award to another offeror, the original awardee protested, and the GAO sustained the protest because the agency failed to adequately document the basis for its decision. *NavQSys, LLC*, B-417028.3, March 27, 2019.

The Army sought systems engineering and technical assistance at Aberdeen Proving Ground. The Army initially made award to NavQSys but based on a protest by Semper Valens Solutions, the Army advised that it would take corrective action by terminating the contract to NavQSys and awarding to Semper Valens. GAO then dismissed the protest, but NavQSys challenged the reasonableness of the corrective action, and GAO sustained the protest.

The solicitation required that offerors have a valid top secret facility clearance in order to submit an offer. After award to NavQSys, Semper Valens obtained a debriefing, and filed a protest stating that NavQSys should have been disqualified because it failed to hold a top secret facility clearance at the time of proposal submission.

The GAO dismissed Semper Valens’ protest as academic on the basis of Army’s announced corrective action. However, NavQSys challenged the corrective action. GAO normally considers the details of a corrective action within the discretion and judgment of the contracting agency. However, the GAO will consider and sustain a protest if the agency’s conclusions are inconsistent with the solicitation’s evaluation criteria or are not reasonably based—and the basis must be adequately documented.

The GAO found that the agency record contained no documentation concerning the agency’s determination that NavQSys was ineligible to submit an offer, other than a simple conclusory statement. The Army confirmed the lack of the documentation supporting its rationale. While the Army asserted that it “determined that NavQSys was not actually eligible to compete” for this procurement, it produced no document to the GAO containing such an analysis. The GAO concluded that the agency did not have a reasonable basis for its corrective action, and recommended that the Army document the basis for its decision to reject NavQSys’s proposal, as well as reimburse the protester’s cost of filing and pursuing the protest.

Takeaway. It is very difficult to challenge an agency’s corrective action. In this case, the Army notified GAO of its exact basis for the corrective action—but this basis was never documented in the agency filings to the GAO, hence the protest was sustained.

**For other helpful suggestions on government contracting, visit:  
Richard D. Lieberman’s FAR Consulting & Training at <https://www.richarddlieberman.com/>, and  
Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes>**