Bid Protests: Continued March on Washington

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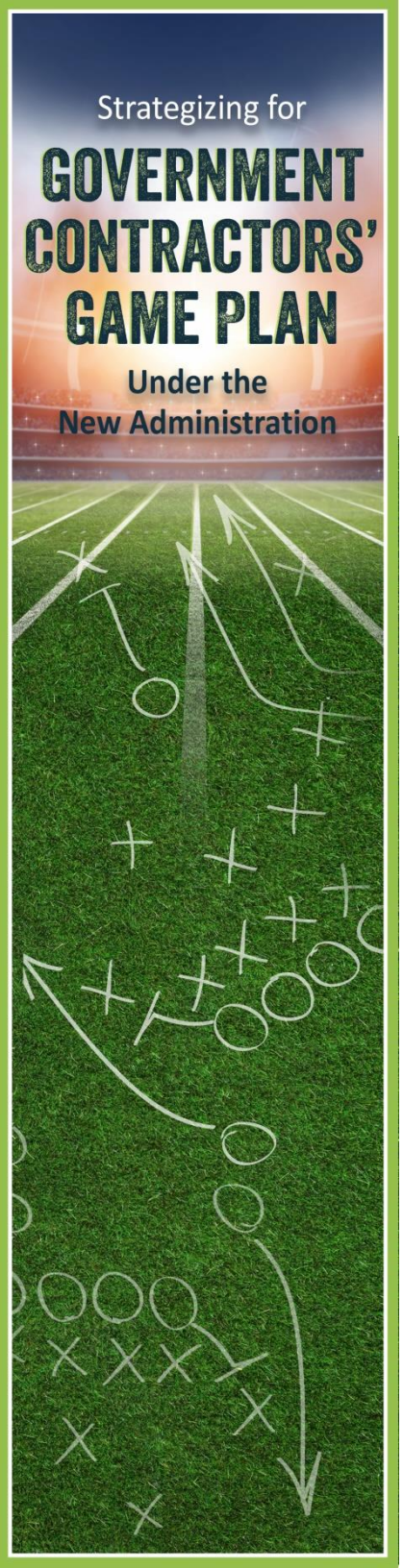

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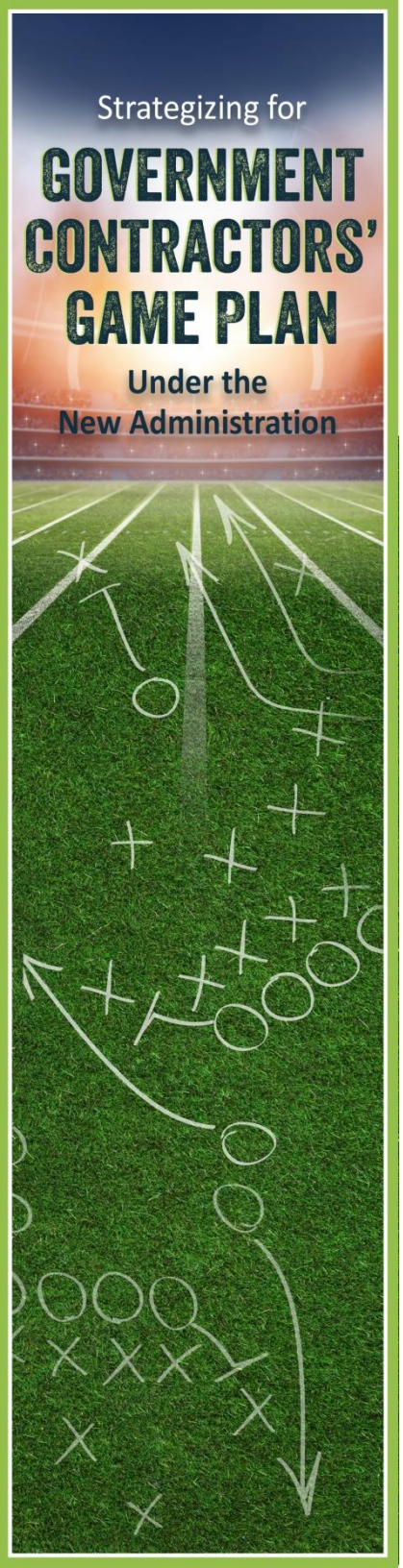
Protests Persist Despite Spending Shifts

- 2789 cases filed in FY16
  - Up 6% from FY15
  - Up from a low of 2429 cases in FY13
- Sustains: 139 in FY16 for a sustain rate of 22.56%
  - FY15: only 68 sustains
  - FY13: the second-highest number of sustains in the past 5 years (106), but sustain rate was only 18.6%



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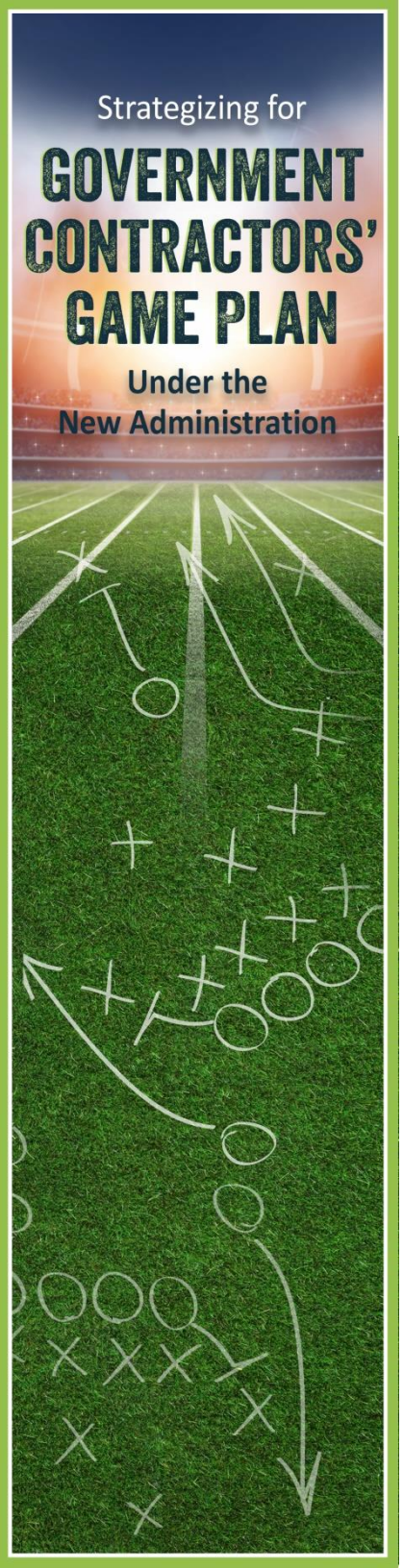
Protests Persist Despite Spending Shifts

- Effectiveness rate has remained relatively level
  - FY16: 46%
  - During the prior four years, the effectiveness rate rose from 42% to 45%
- ADR used less than in prior years
  - ADR only used in 69 cases as compared to 103 in FY15
- Delayed impact of budget shifts on protest litigation – increased acquisition timelines, multiple rounds of awards/litigation
- Agencies looking for "quick" solutions or those less vulnerable to challenges (8(a) sole source awards, bridge contracts, GWACs, MAS, OASIS)



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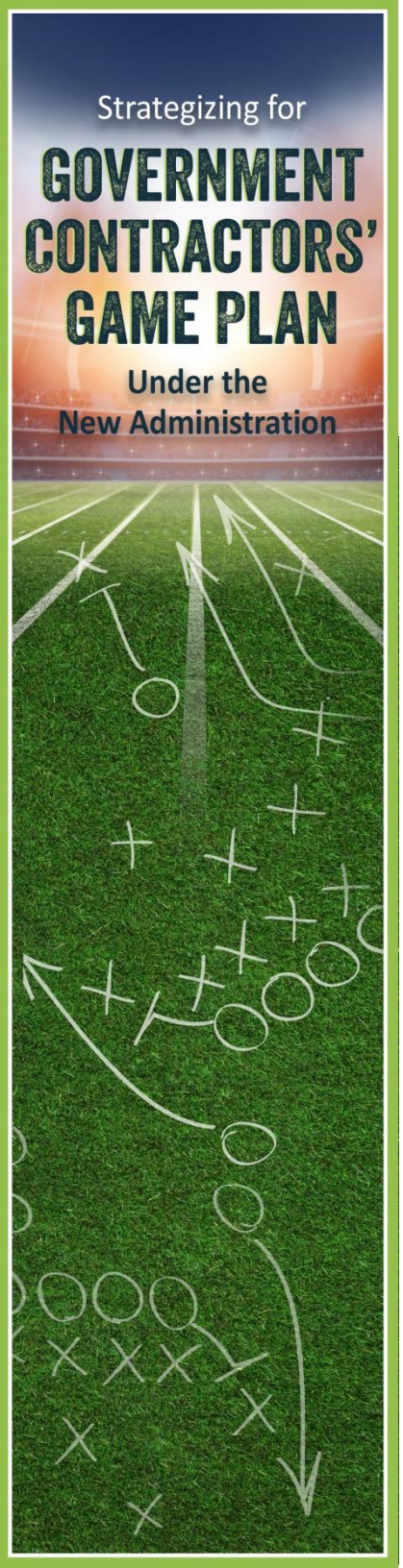
Corrective Action: Background

GAO's lens on voluntary corrective action:

- Agencies have broad discretion to take corrective action where determined to be necessary
- GAO will not object to corrective action, so long as appropriate to remedy the concern causing corrective action
- GAO generally limits review to whether the agency's corrective action is appropriate to remedy the flaw prompting corrective action
- Agencies are not required to identify the flaw in its notice of corrective action
- GAO often dismisses protests over objections on scope of corrective action



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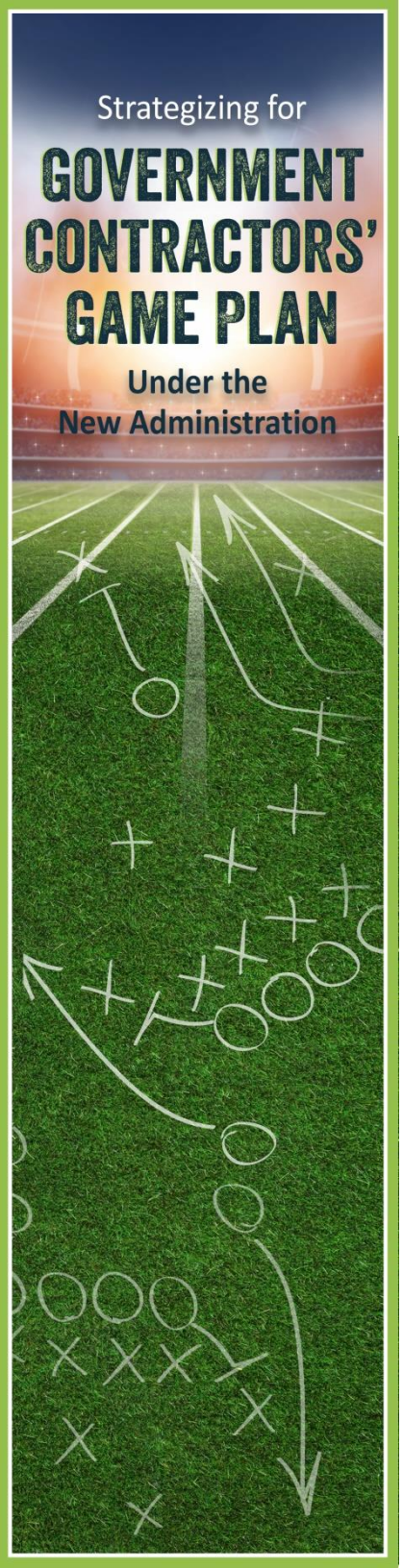
Corrective Action: Procedural Questions

- How does a protester preserve its challenges?
  - Challenges to the ground rules of corrective action are not timely filed after agency completes corrective action and announces new award decision
    - *Domain Name Alliance Registry,* B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168
  - Highlights importance of keeping protest counsel apprised of the steps taken by the agency during corrective action
- What impact does GAO's dismissal of a protest over an objection have on a protester's ability to later file a standalone protest to the corrective action?
  - GAO has heard such cases on the merits
    - *XYZ Corporation*, B-413243.2, Oct. 18, 2016, 2016 CPD ¶ 296



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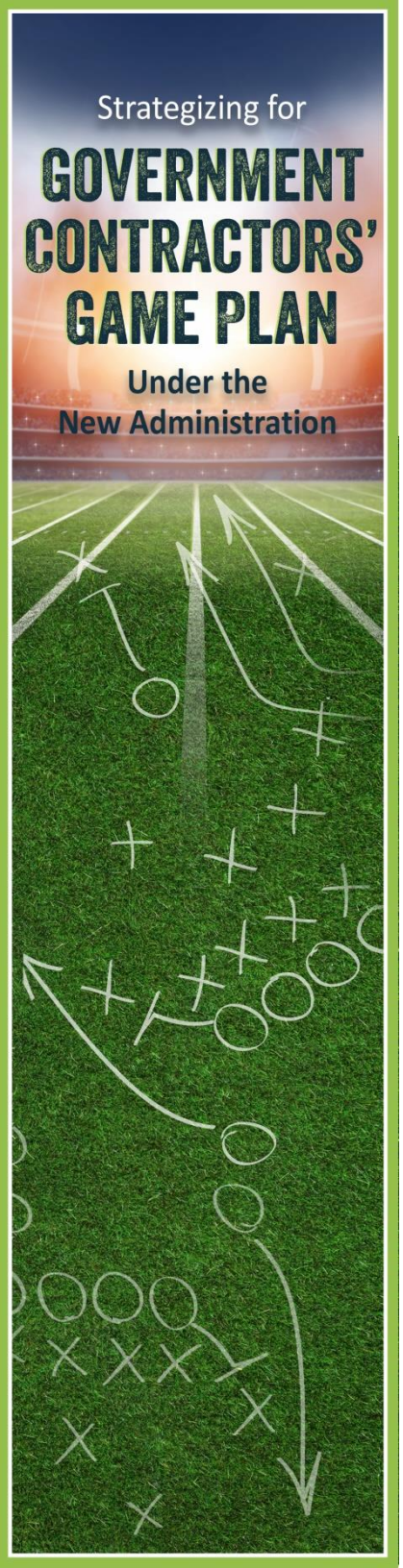
Corrective Action: Challenging the Scope of Corrective Action

- Such challenges include:
  - Propriety of agency's decision to take voluntary corrective action in the first place;
  - Propriety of amendments to the RFP;
  - Whether discussions and/or clarifications should be allowed;
  - Scope of proposal revisions
- Both protesters and awardees can challenge the scope of corrective action
- Can be brought before GAO or COFC



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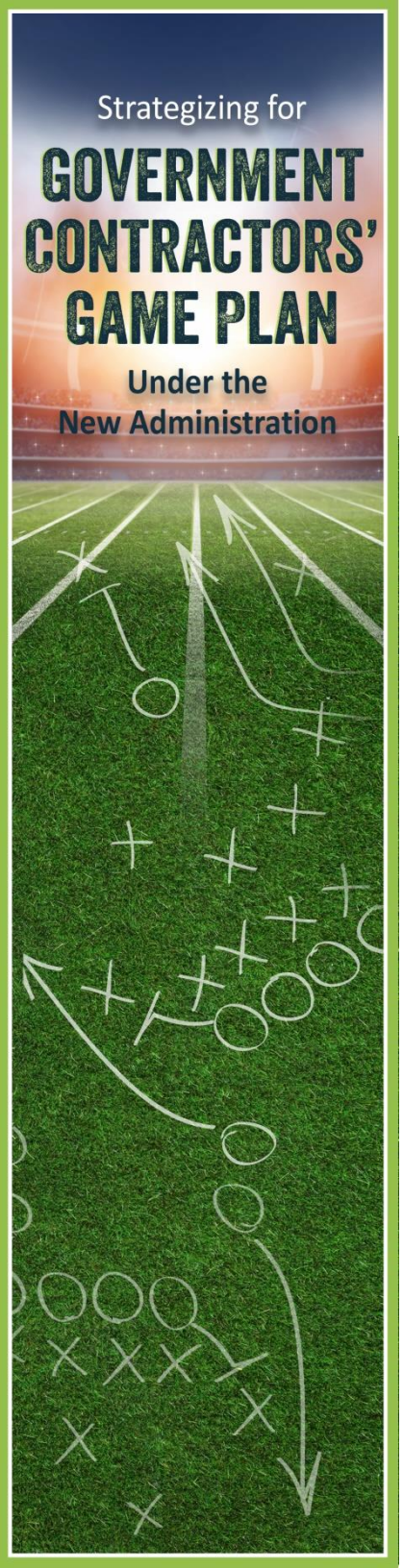
Corrective Action: Scope of Proposal Revisions

- *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355:
  - In sustaining initial protest, GAO recommended agency reopen discussions
  - Agency sought FPRs limited to past performance and key personnel
    - Protester challenged the agency's conduct of the corrective action
    - GAO held outcome prediction ADR and agency took corrective action again
  - Agency revised FPR instructions but protester again challenged that it excluded proposal revisions "inextricably linked" to key personnel substitutions permitted in response to the discussions



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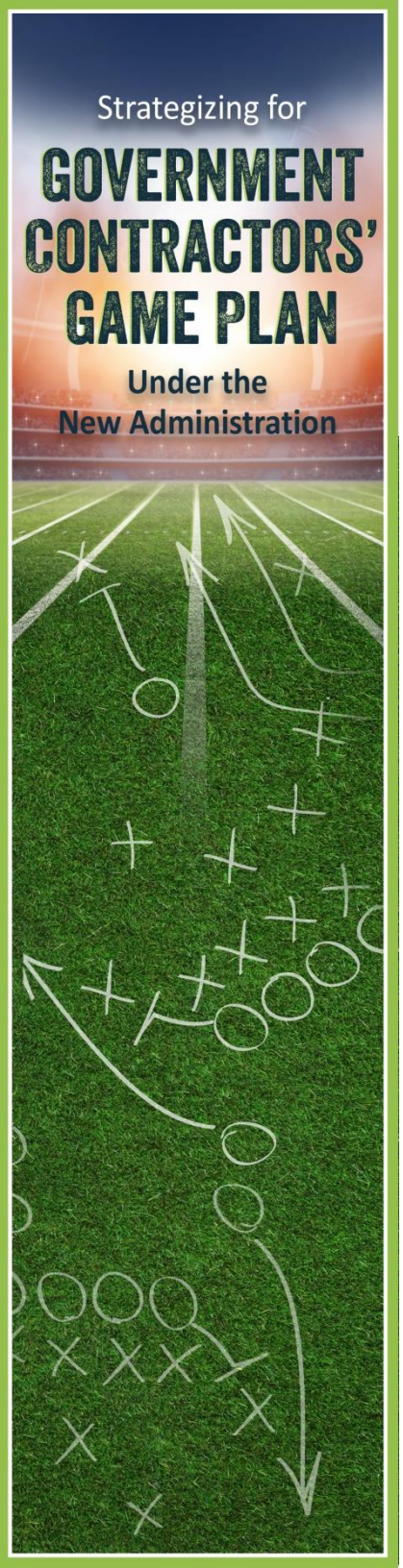
Corrective Action: Scope of Proposal Revisions

- *Deloitte Consulting, LLP*, B-412125.6, Nov. 28, 2016, 2016 CPD ¶ 355 (cont'd):
  - The Agency contended that it was trying to prevent unwarranted "augmentation" of offerors' technical approaches
    - GAO held this was not the appropriate test
  - Even where an agency is justified in restricting discussions responses in corrective action, the agency may not prohibit offerors from revising related areas of their proposals which are materially impacted
    - In this case, the FPR instructions were unreasonable to the extent they prohibit proposal revisions arising out of the material impact of changes in key personnel



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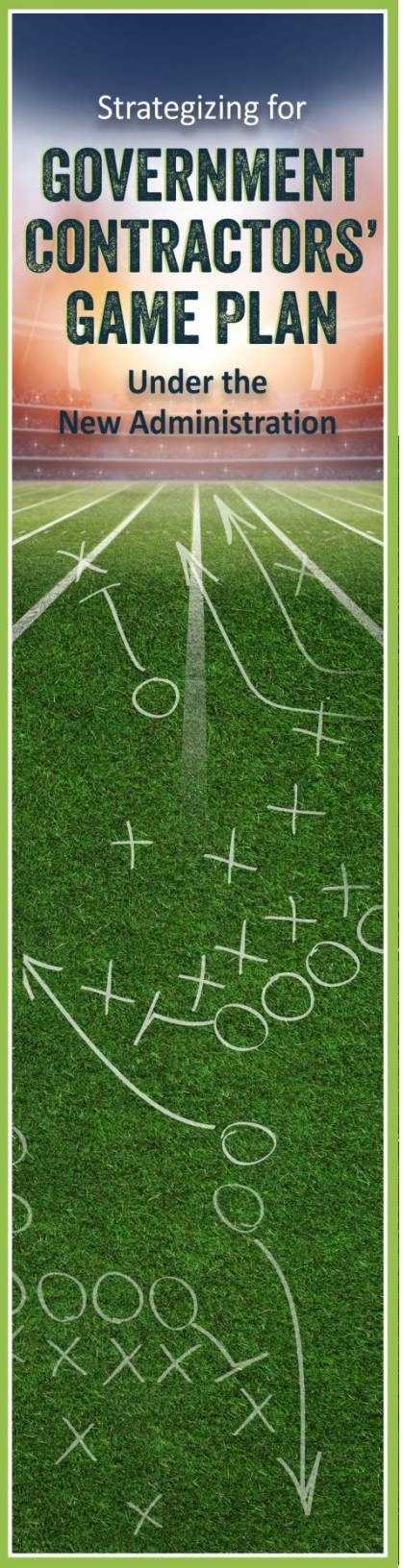
Corrective Action: Amendment to the RFP

- *Professional Service Industries, Inc. v. United States*, 129 Fed. Cl. 190 (2016):
  - GAO sustained protest that agency improperly overlooked the fact that the awardee's proposed program manager did not meet mandatory minimum experience requirements
  - Agency took corrective action to amend the RFP, stripping out exactly those qualifications that awardee's Program Manager lacked
  - Protester challenged this corrective action at COFC arguing:
    - The agency's corrective action was not "narrowly targeted" to address the error which could have been fixed by reevaluating against the original RFP; and
    - Alternatively, that the agency had never made a determination that its needs for a program manager had changed



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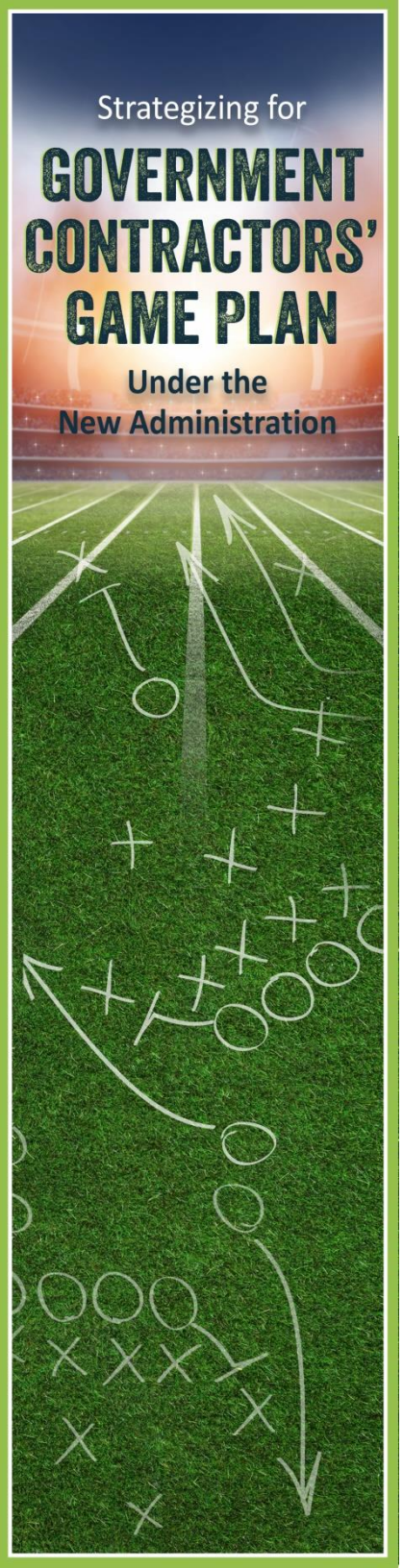
Corrective Action: Amendment to the RFP

- *Professional Service Industries, Inc. v. United States*, 129 Fed. Cl. 190 (2016) (cont'd):
  - COFC concluded that the agency's action was arbitrary and capricious:
    - No evidence in the record explained why original RFP Program Manager qualifications were overstated or why new "watered down" qualifications met the agency's needs;
    - Agency could not satisfy requirement that "a reasoned explanation is needed for disregarding facts and circumstances that underlay [the prior requirement]"
  - COFC noted two concerns:
    - "[C]hanges in responsibilities and qualifications that [the agency] proposed have the effect of conforming the solicitation precisely to the experience and qualifications of [awardee's] proposal;"
    - "Rather than ensuring that an offeror's proposal conform strictly to the requirements of the solicitation, the agency has changed the solicitation to conform to an offeror's proposal"



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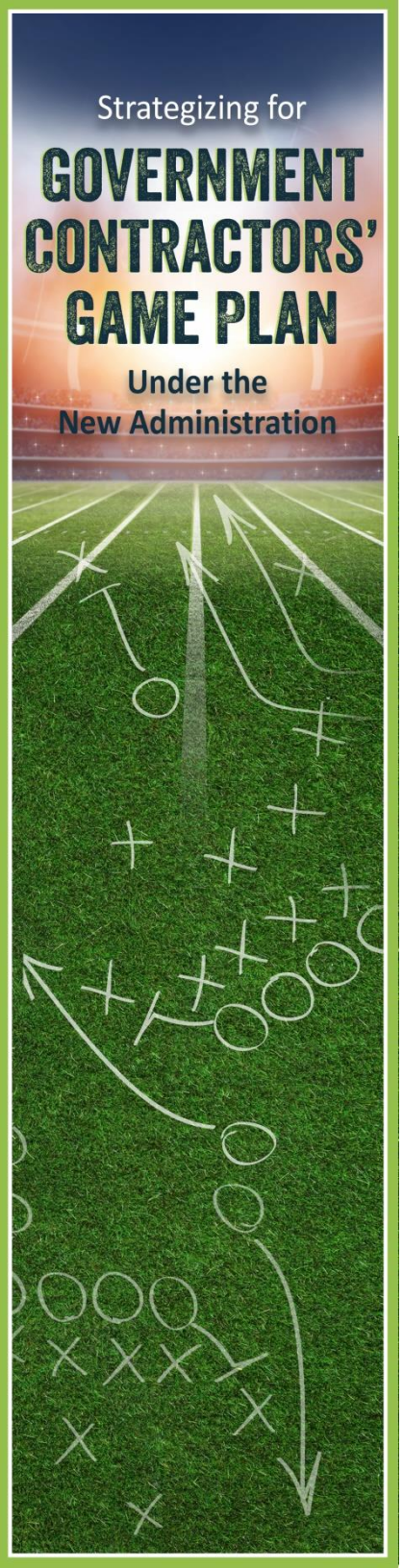
Corrective Action: Propriety of Taking Voluntary Corrective Action

- *Jacobs Technology, Inc. v. United States*, Nos. 16-1602C, 17-88C (Apr. 7, 2017)
  - Agency took corrective action in response to protest filed at GAO
  - Awardee challenged the agency's decision to take corrective action at COFC, arguing:
    - The decision to take corrective action was flawed because the error identified was not prejudicial
  - COFC rejected the attempt to impose a prejudice requirement



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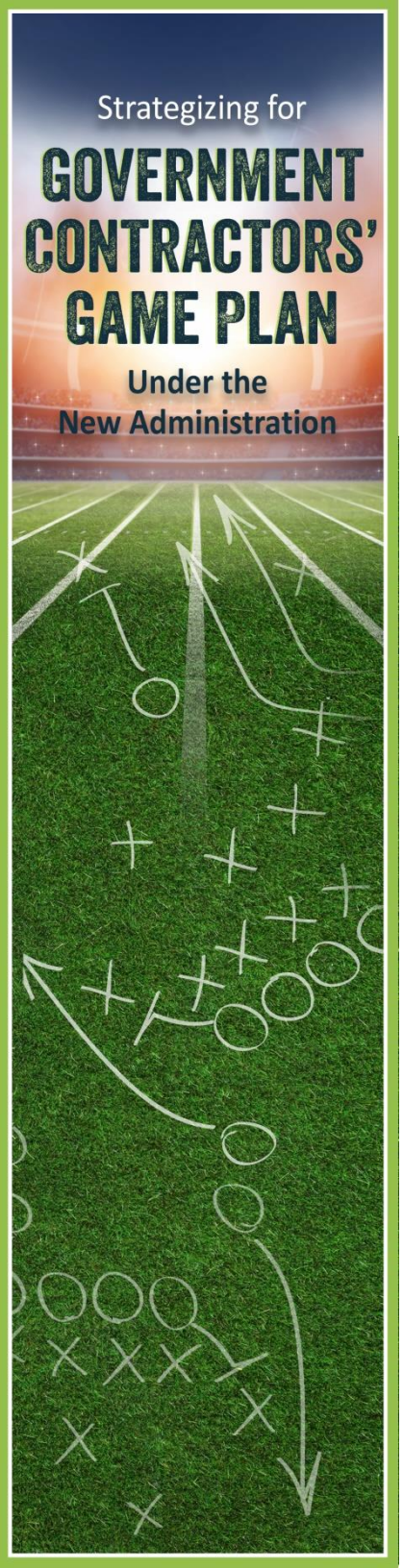
Key Personnel – Background for Harsh New GAO Rule for Mid-Procurement Departures

- Background – Bait and Switch
  - Involves knowing misrepresentation of the availability of proposed key personnel; must be known at time of proposal submission
- *Greenleaf Constr. Co., Inc.*, B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19
  - Analogous to "bait and switch" when an offeror learns of the unavailability of key personnel after proposal submission but "fails to disclose" that knowledge to agency before award
  - After reasonable passage of time, non-disclosure begins to share some hallmarks of a misrepresentation; proposal non-compliant



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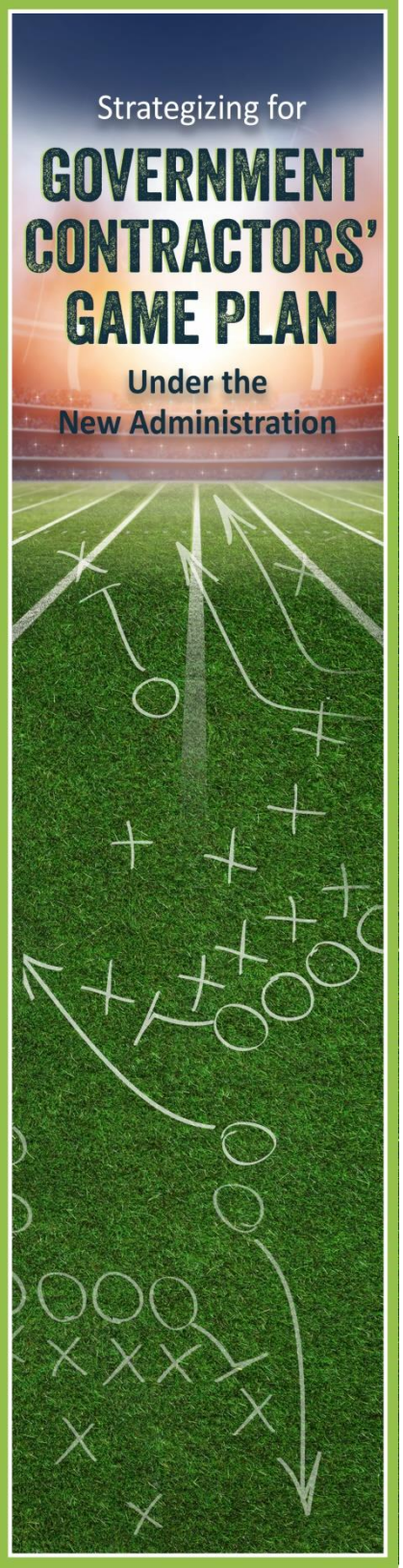
Key Personnel – Background Cont'd

- *Pioneering Evolution, LLC*, B-412016, Dec. 8, 2015, 2015 CPD ¶ 385:
  - One of protester's key personnel departs unexpectedly after FPR submission; protester discloses departure in accordance with *Greenleaf* rule and attempts to submit substitute personnel
  - Agency disqualifies protester due to materially incomplete proposal on account of unfilled mandatory key personnel position
  - GAO agrees with agency that protester cannot substitute key personnel without discussions; agency was not required to re-open discussions to accommodate; protest denied



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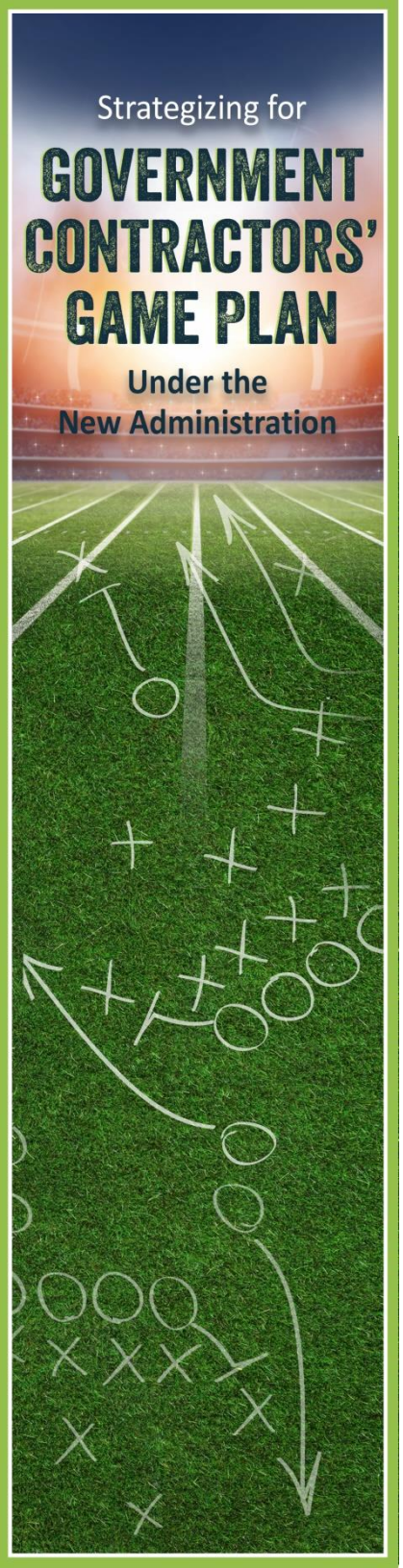
Key Personnel – New Proposal Risk Cont'd

- *General Revenue Corp. et al.*, B-414220.2 *et al.*, Mar. 27, 2017, 2017 WL 1316186:
  - First case applying *Greenleaf* and *Pioneering Evolution* rules in same decision to find a contract award was unlawful due to unavailability of key personnel
  - Numerous awardees (and protesters) in large-scale multiple-award procurement saw departure of key personnel during lengthy evaluation period
  - None of the offerors disclosed departures; agency never considered the issue



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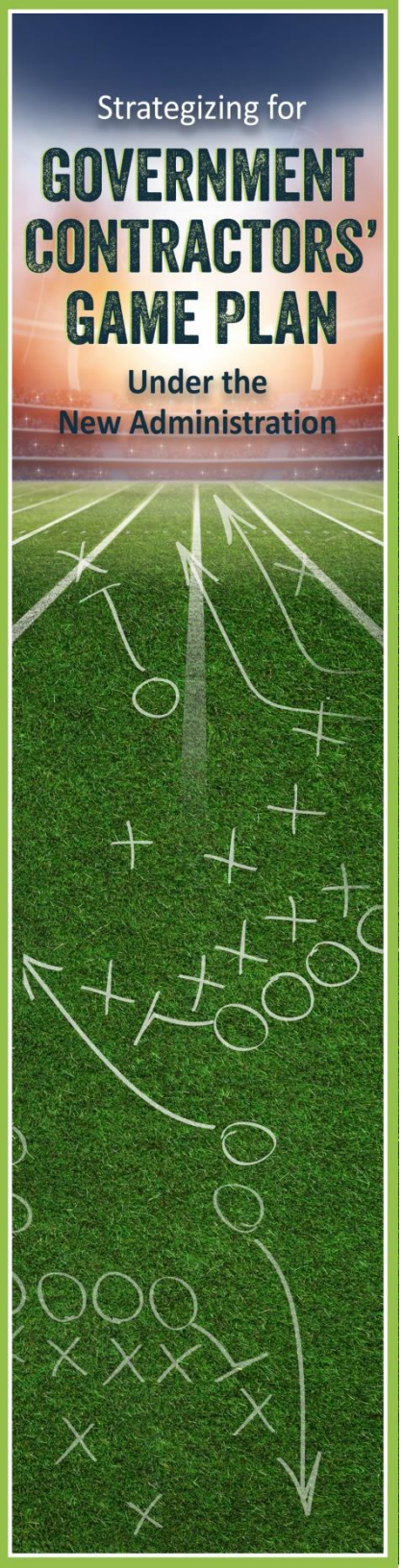
Key Personnel – New Proposal Risk Cont'd

- *General Revenue Corp. et al.* holding:
  - Offerors should have disclosed; if they had, would have been ineligible
  - "When the agency is notified of the withdrawal of a key person, it has two options: either evaluate the proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or open discussions to permit the offeror to amend its proposal."
  - Rule applies even when offerors are free to choose what positions are "key"
    - If designated as key by offeror, must be treated as such
  - Agency must go back and figure out how it wants to fix the problem:
    - Either open discussions, or
    - Disqualify all incomplete proposals



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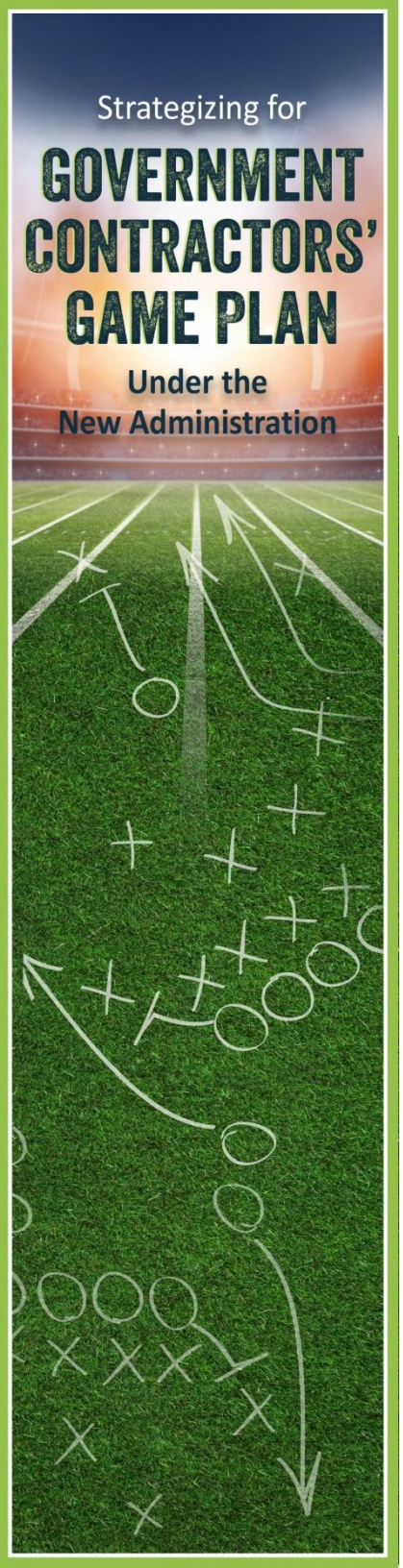
Implications of *General Revenue Corp.*

- Extremely difficult for agencies to manage this issue without altered approach to discussions (last minute refresh opportunities)
- Companies must constantly monitor their personnel and provide disclosures
- Disclosures will lead to disqualifications unless discussions are conducted
- Must monitor competitors for loss of known key personnel
- Similar rule for team members and subcontractors?
- How does the rule function in corrective action if personnel were lost after award during pendency of a protest?



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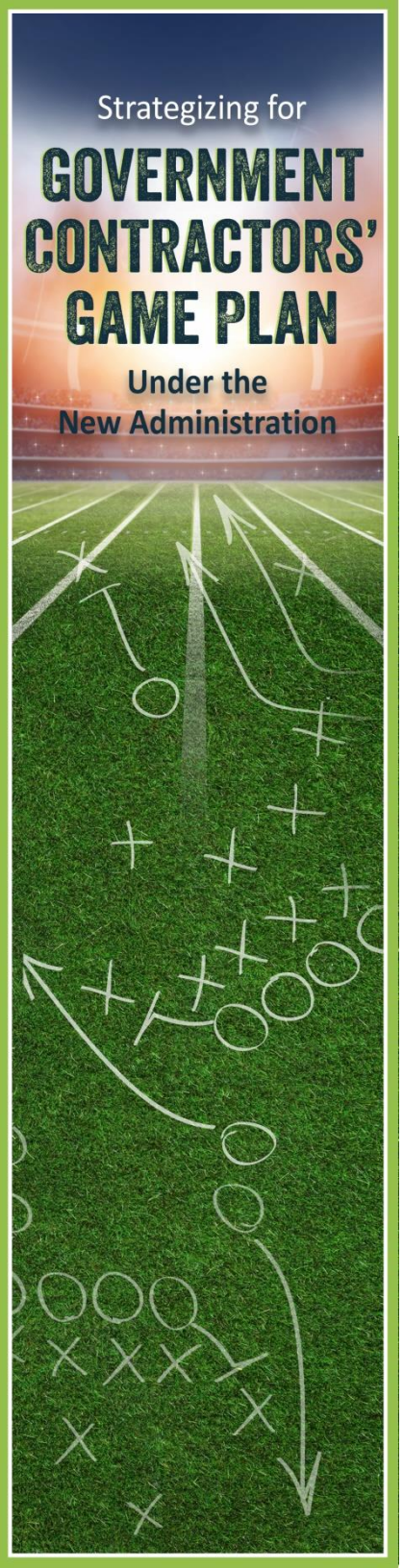
New Precedent Requiring Opportunity to Fix Clerical Errors in Proposals

- Can an agency abuse its discretion not to conduct clarifications or discussions with offerors, even when the RFP advises offerors of the possibility of award based on initial proposals?
- GAO: No - not reviewable
- COFC in *Level 3 Communications, LLC v. United States*, 129 Fed. Cl. 487 (2016): Yes



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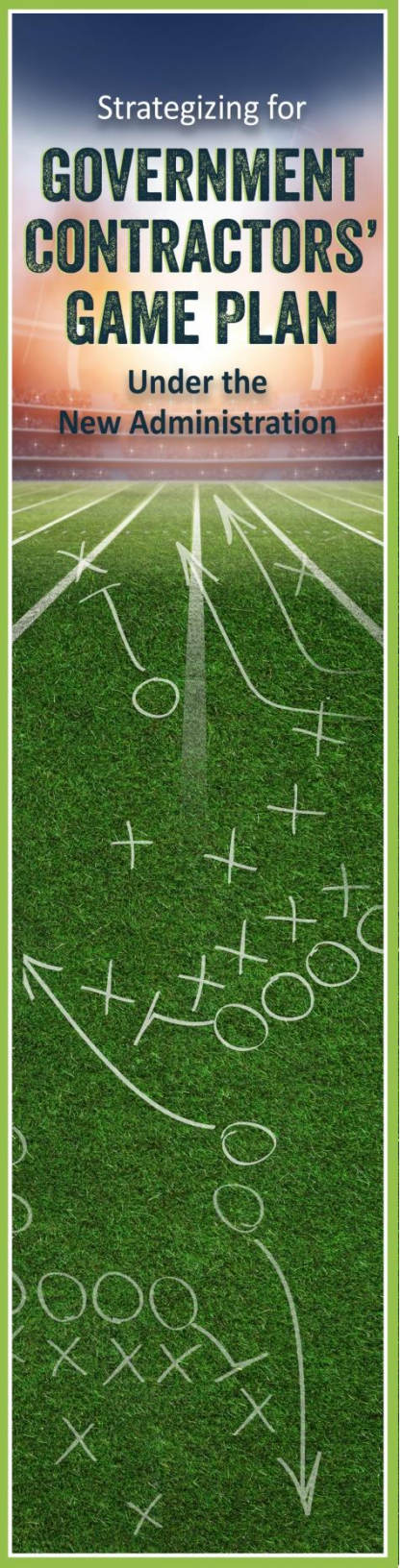
Changing Law on Clarifications and Discussions?

Evolution of GAO's Rule

- Prior to 1993, rule is unclear
- *The Jonathan Corp.; Metro Mach. Corp.*, B-251698.3, May 17, 1993, 93-2 CPD ¶ 174:
  - "Even where solicitation states that the agency intends to award a contract without holding discussions unless discussions are necessary, the decision that discussions are not necessary must be reasonably based on the particular circumstances of the procurement, including consideration of the proposals received and the basis for the selection decision."
  - Protest sustained where discussions were unreasonably bypassed



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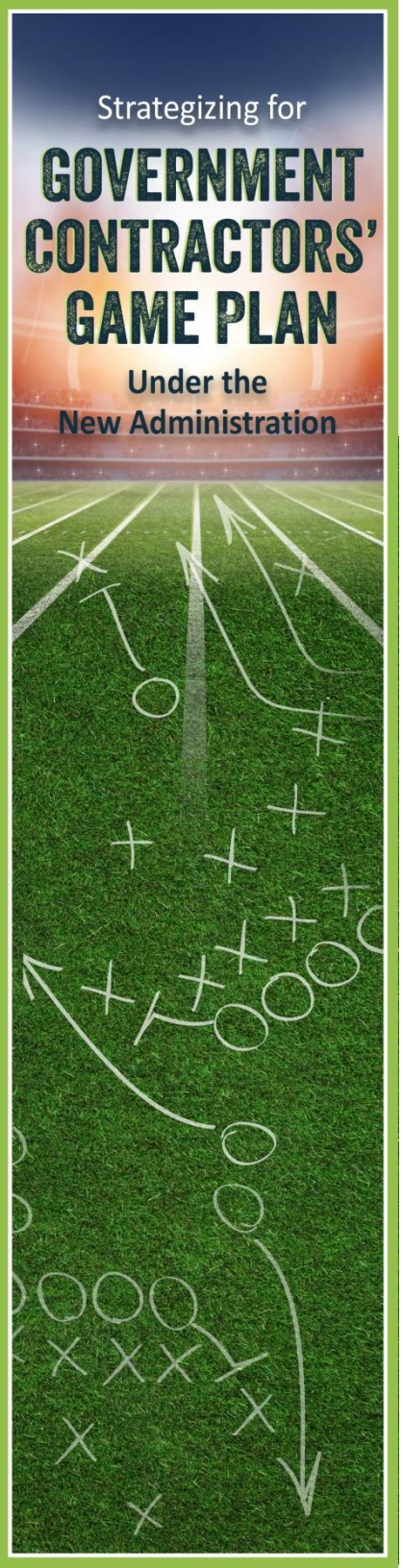
Evolution of GAO Discussions Rule

- Since 1993, GAO distancing from *The Jonathan Corp.*
- In 2012, officially repudiated the holding:
  - "An agency's decision not to initiate discussions is a matter we generally will not review. To the extent our decision in *The Jonathan Corp.*, establishes a different rule, it will no longer be followed." *Booz Allen Hamilton, Inc.*, B-405993, Jan. 19, 2012, 2012 CPD ¶ 30 (citations omitted).
- GAO simply will not consider this issue



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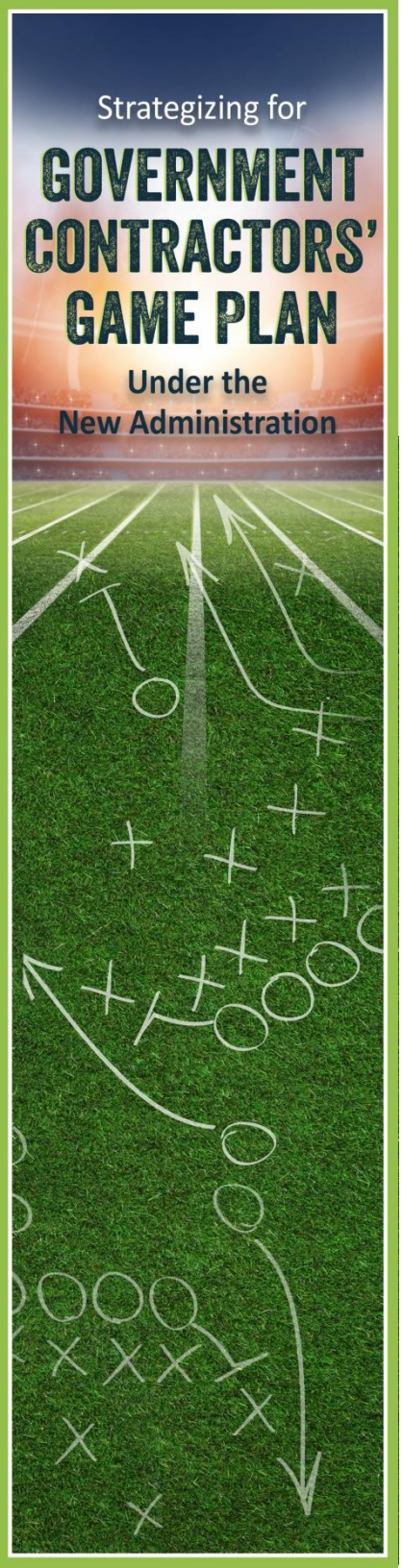
GAO on Clarifications

- Similar rules regarding less-invasive clarifications process for addressing clerical errors. Common GAO refrain:
  - "It is well-settled that an offeror has the obligation to submit a well written proposal free of ambiguity regarding its merits or compliance with solicitation requirements and that an offeror fails to do so at its own risk."
  - "In a FAR Part 15 procurement, an agency may, but is not required to, engage in clarifications and give offerors an opportunity to clarify certain aspects of their proposals or to resolve minor or clerical errors; the agency has broad discretion to decide whether to engage in clarifications with an offeror."
  - GAO has never found a circumstance where agency's "broad discretion" has been abused



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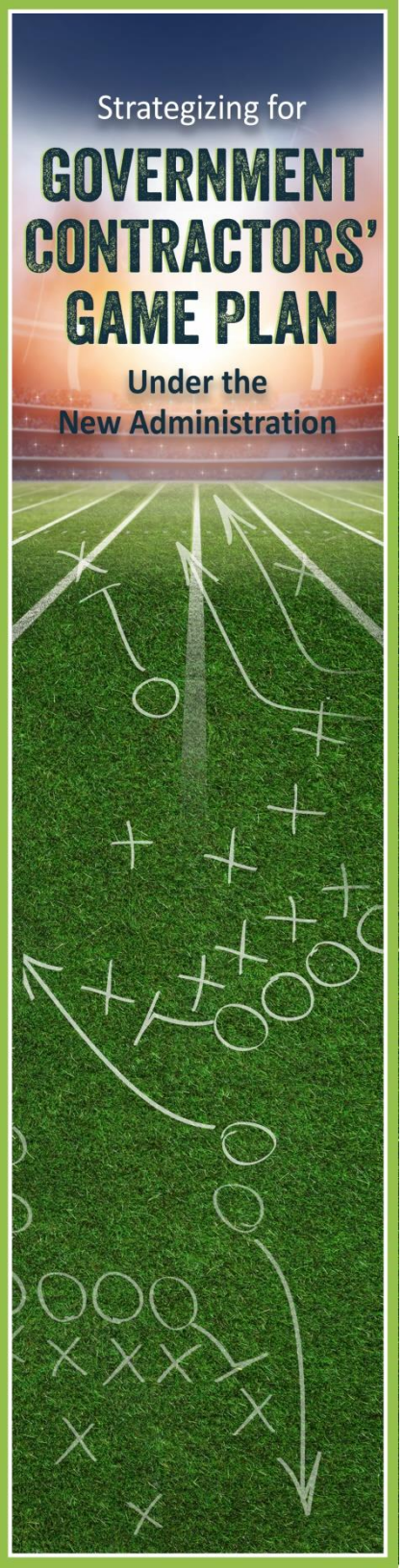
COFC Takes Different Position on Clarifications

- *BCPeabody Construction Services, Inc. v. United States*, 112 Fed. Cl. 502 (2013):
  - Protest sustained where simple clerical error which could easily be resolved was left unresolved and led to agency disqualifying protester's higher rated, lower cost proposal
  - "The FAR allows, but does not require, such exchanges to take place. Taken at face value, this court concurs with such a statement, but it cannot accept the implication that there are never situations in which a contracting officer's discretion would be abused by a failure to seek clarification."
  - Decision does not address discussions, only clarifications
- GAO has explicitly declined to follow *BCPeabody*



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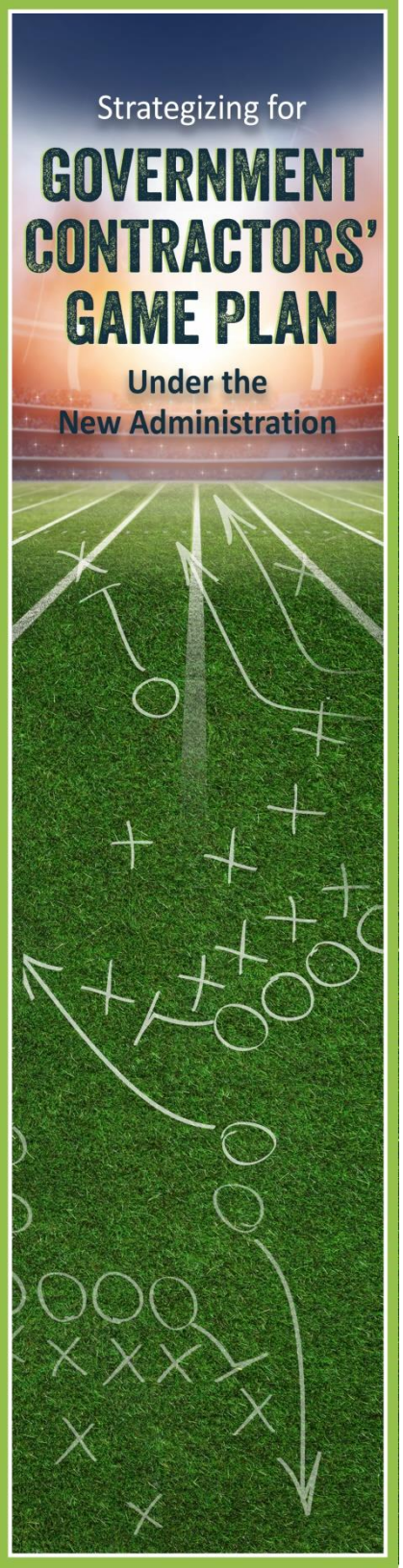
COFC on Clerical Errors

- *Level 3 Communications, LLC v. United States*, 129 Fed. Cl. 487 (2016):
  - First case to adopt *BCPeabody* holding on failure to conduct clarifications
  - Agency knew it was clerical error and what offeror actually intended; relied on the error and passed up $38M in savings rather than clarify
  - "In this case, as in BCPeabody, the CO had virtually overwhelming cause to seek clarification from Level 3, because of its significantly lower price." (Emphasis added)
  - Clear disagreement with GAO on reviewability



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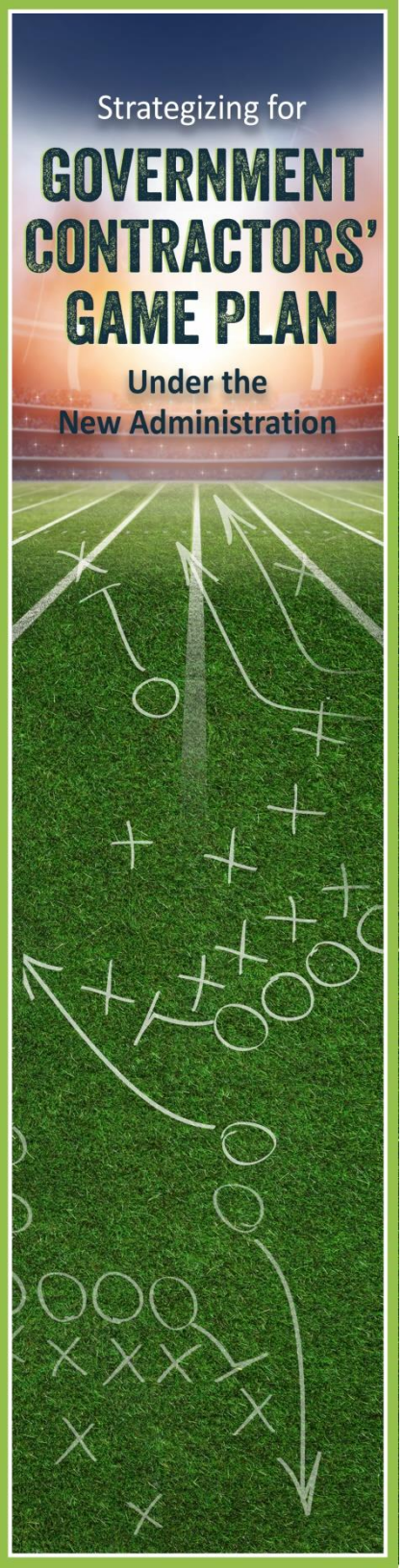
COFC: Mandatory Discussions?

- *Level 3 Communications*
  - Goes beyond *BCPeabody:* even if correction of obvious clerical error would rise to "discussions" instead of "clarifications," agency still abused its discretion not to conduct discussions
  - "In this case, the CO failed to consider an important aspect of the problem: the fact that Level 3's offer was approximately $38.6 million less than Verizon's. Under these circumstances, the CO should have entered into negotiations with offerors, since [the RFP] expressly reserves that right."
- Is this aspect of the holding less likely to be followed?
  - Difficult to draw bright lines



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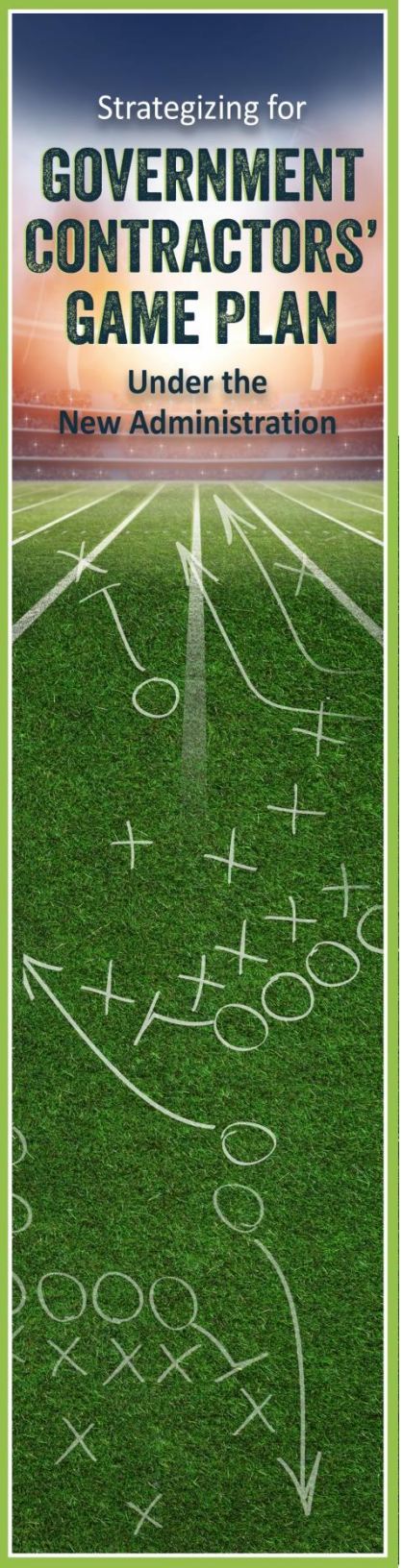
Developments in Timeliness Rules for Raising Certain OCI Allegations

The Concourse Group, LLC v. United States, No. 17-129 (Mar. 13, 2017):

- Introduces major difference in interpretation by COFC v. GAO on when many OCI allegations must be timely raised
- If new approach is adopted by GAO, will create new pressure on companies and in-house counsel to identify and advance OCI concerns earlier in the procurement process



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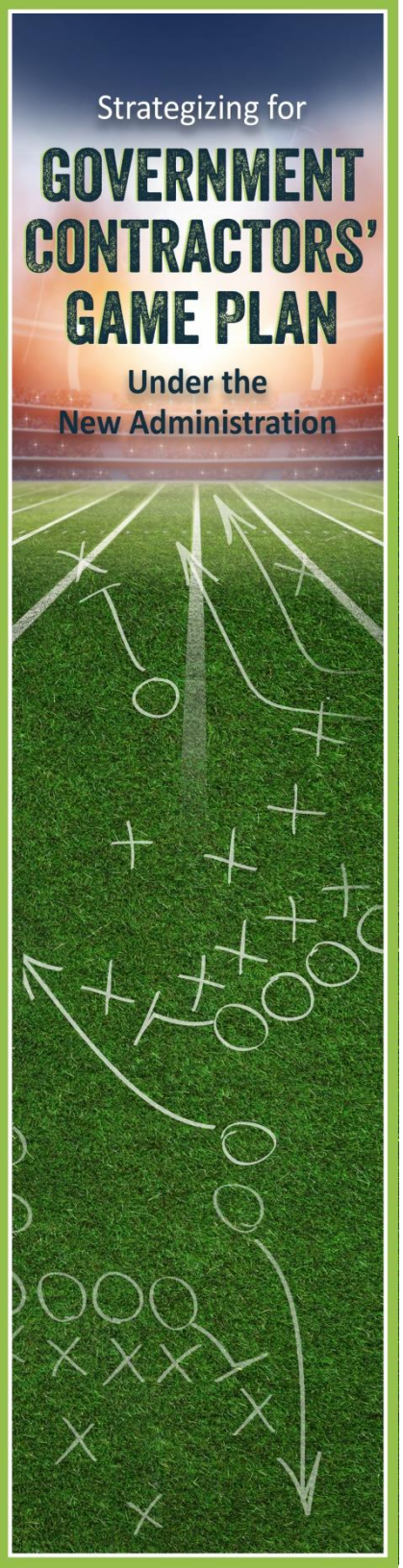
New Law on OCI Protest Timeliness

Background on GAO's OCI timeliness rules:

- "As a general rule, a protester is not required to protest an agency's OCI determination until after contract award." *See, e.g., REEP, Inc.*, B-290688, Sept. 20, 2002, 2002 CPD ¶ 158
- However, OCI allegations must be raised pre-award:
  - (1) "where the protester is aware of the operative facts regarding the existence of an actual or potential OCI regarding a prospective offeror," AND
  - (2) "the protester has been advised by the agency of the agency's position on the offeror's eligibility to compete." *See, e.g., Honeywell Tech. Solutions, Inc.*, B-400771, B-400771.2, Jan. 27, 2009, 2009 CPD ¶ 49



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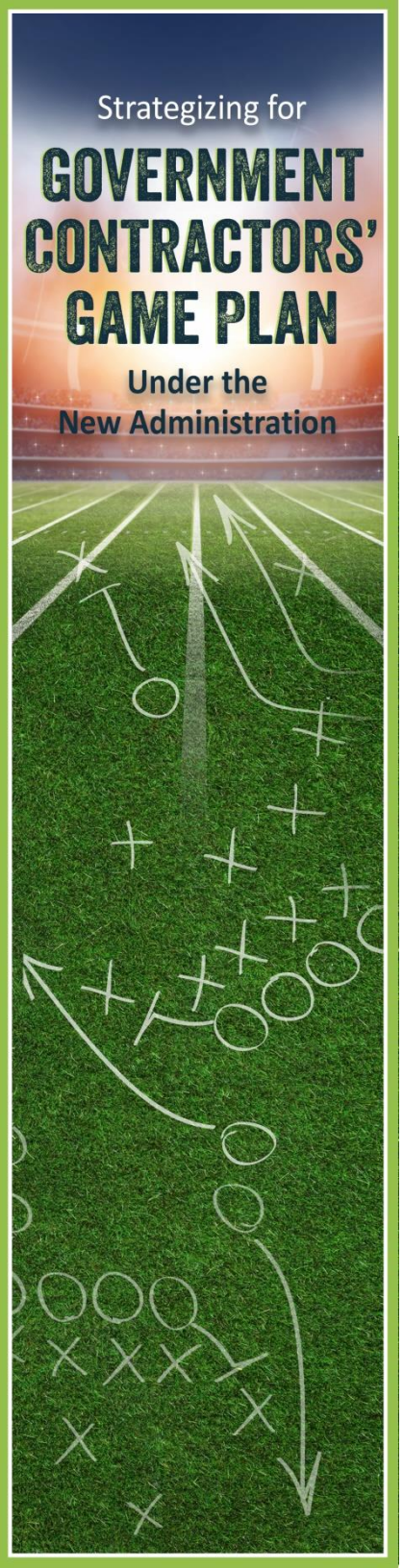
New Law on OCI Protest Timeliness

- COFC has limited case law on OCI timeliness and has not previously directly engaged with the GAO rule
- In *The Concourse Group, LLC v. United States*, the COFC found:
  - Documents indicating incumbent-awardee's interest in procurement were "easily recognizable or obvious" facts;
  - Basis of OCI allegation was know to protester pre-award
  - Court holds: "Concourse failed to timely raise its OCI claims prior to the award of the contract despite the opportunity to do so and its easy access to the knowledge upon which it now relies. As a result, Concourse's OCI claims are waived."



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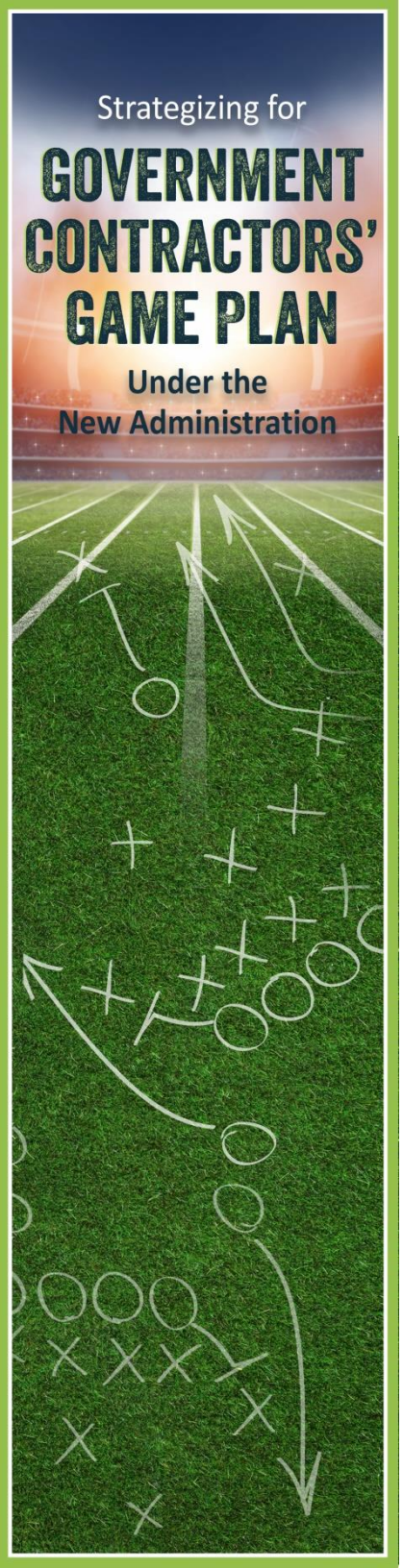
New Law on OCI Protest Timeliness

- Is *Concourse* a COFC repudiation of GAO's timeliness approach?
  - GAO would almost certainly have ruled differently because agency never provided indication of its view on the OCI issue prior to proposal submission;
  - COFC never mentions GAO rule;
  - Grounds decision in *Blue & Gold Fleet* waiver doctrine under the Tucker Act, not CICA timeliness rules that are applicable to GAO;
  - However, no clear basis for distinction under the two statutes;
  - Analysis of COFC's precedent in *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 712 (2011), *aff'd*, 475 F. App'x 341 (Fed. Cir. 2012) overlooks key distinction points



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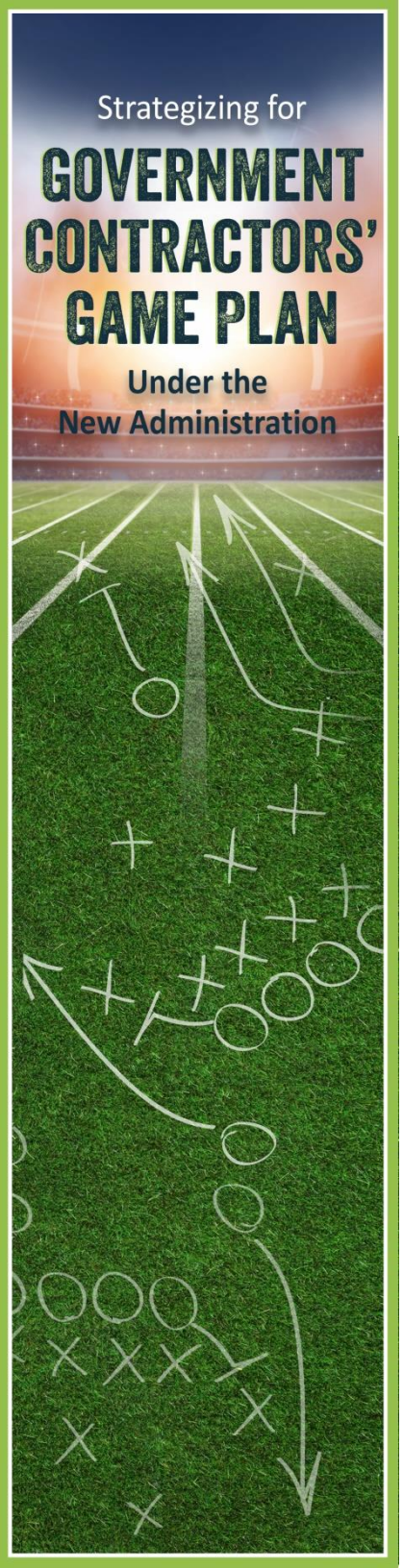
New Law on OCI Protest Timeliness

- What is the COFC's vision for OCI protests?
  - If a firm knows that a competitor has a likely unequal access OCI, but does not know if mitigation has been implemented, *Concourse* suggests a protest must still be raised
  - What agency action is the Government defending? Agency has not even had a chance to investigate the matter or review a mitigation plan
  - What is the Court going to review if such a protest is raised pre-award? (There is no record)
  - What remedy will the Court issue?



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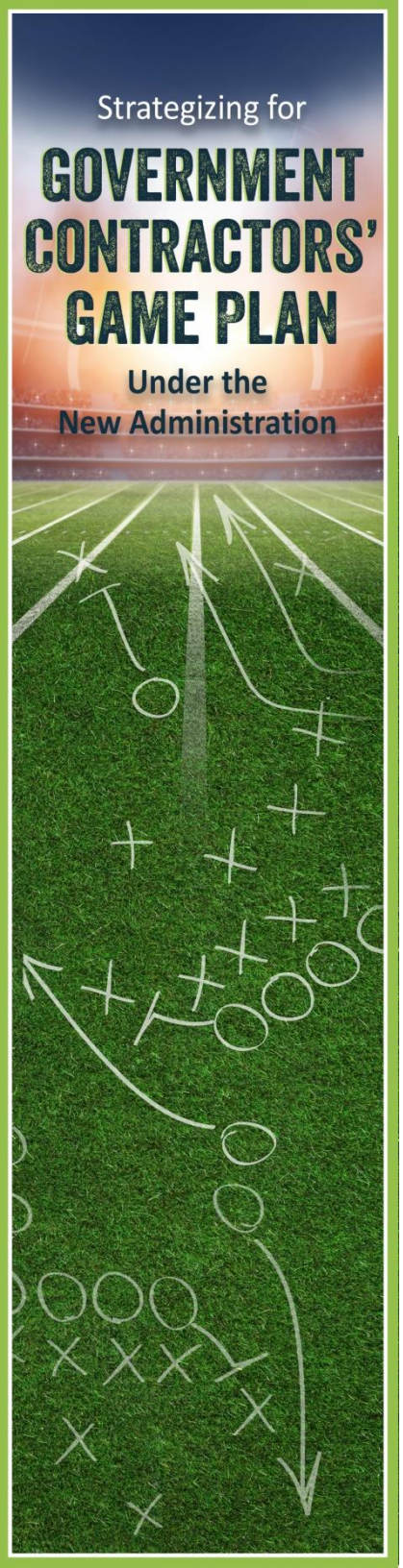
New OCI Protest Rules: Industry Impact

- Potential Impact for Industry and In-House Counsel:
  - For now, no indication GAO is backing down from its rule, so protests can still be raised at GAO post award
  - Ability to raise certain post-award OCI allegations at the COFC may be limited
  - If GAO adopts *Concourse* approach, companies must be aggressive challenging eligibility of competitors pre-award or forfeit right later
    - Increased burden on in-house counsel to help contracts personnel to identify OCI and convince management to approve preemptive litigation
    - Added costs and more challenges of piecemeal litigation



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