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WASHINGTON DC

# Choice of Forum for Federal Government Contract Bid Protests\*

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## Introduction

A “disappointed offeror” for a U.S. Government Executive Branch contract ordinarily has three major options for contesting the award of a contract to a competitor or its failure to be awarded a contract.<sup>1</sup> The disappointed offeror may file a “bid protest” with (1) the agency (i.e., an agency-level bid protest resolved by the Contracting Officer (“CO”) or at a level above the CO), (2) the Government Accountability Office (“GAO”), or (3) the U.S. Court of Federal Claims (“COFC”).<sup>2</sup> Similarly, a prospective offeror that files a bid protest before the submission of bids or proposals (e.g., with respect to the terms of the solicitation)—or some other form of preaward protest—also has the choice of these three forums to file a preaward protest.<sup>3</sup> In addition, in certain situations, a contractor may receive protest-like relief from a board of contract appeals or, possibly, the COFC in a case that is not a bid protest.<sup>4</sup> Finally, one commentator has contended that in spite of the January 1, 2001 elimination by the Administrative Dispute Resolution Act of 1996 (“ADRA”) of U.S. district court bid protest jurisdiction<sup>5</sup>, certain bid protests may still be brought before the district courts.<sup>6</sup> Nevertheless, a discussion of the district courts as a potential protest forum, which the authors deem an unlikely oc-

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\* This Article is a revised version of Briefing Papers No. 08-11 (Thomson Reuters/West Oct. 2008) and is published with permission of Thomson Reuters/West.

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<sup>1</sup> *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218, 223 (2005).

<sup>2</sup> *Id.* at 224.

<sup>3</sup> *Id.* at 223–24.

<sup>4</sup> *E.g.*, *L-3 Commc’ns Corp.*, ASBCA 54920, 08-1 BCA ¶ 33,857 (2008).

<sup>5</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875.

<sup>6</sup> *See* Peter Verchinski, Note, *Are District Courts Still a Viable Forum for Bid Protests?*, 32 *PUB. CONT. L.J.* 393 (2003).

currence—at least outside of the possible context of maritime Government contract protests—is beyond the scope of this Article.<sup>7</sup>

Since there is no administrative “exhaustion” requirement with respect to contractors obtaining protest relief at the agency level, ordinarily contractors may initially file their protests before any one of the three forums.<sup>8</sup> However, the forum that a contractor initially selects may affect its ability to file a subsequent protest at one of the other forums should the initial protest be denied.<sup>9</sup> For example, filing a protest initially at the COFC will ordinarily prevent a contractor from subsequently filing a GAO or agency-level protest, while initially protesting before the GAO will prevent the later filing of an agency-level protest but will not ordinarily prevent the subsequent filing of a COFC protest.<sup>10</sup> If a disappointed offeror files a protest at the agency level, it may then ordinarily file a subsequent protest before either the GAO or the COFC and, if it chooses the GAO, it may then ordinarily file another subsequent protest before the COFC.<sup>11</sup>

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<sup>7</sup> A review of the resolution of protests by the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition is beyond the scope of this Article because the Federal Acquisition Regulation (FAR) is not applicable to FAA procurements and the GAO does not have jurisdiction over FAA protests. *See* Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-50, § 348, 109 Stat. 436, 460–61 (1995) (codified at 49 U.S.C. § 40110(d)(2)(F) (2006)); Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, 119 Stat. 2064, 2084, tit. V, § 515 (2005); 48 C.F.R. § 17.1 (2008). *See generally* Clancy, “FAA Protest & Contract Dispute Resolution Procedures,” Briefing Papers No. 99-07 (June 1999). In addition, a review of protests related to public-private competitions under OMB Circular A-76 and the Federal Activities Inventory Reform (FAIR) Act is also beyond the scope of this Article.

<sup>8</sup> *S.K.J. & Assocs.*, 67 Fed. Cl. at 223–24.

<sup>9</sup> 48 C.F.R. § 1833.103(d) (2008) (“[The National Aeronautics and Space Administration] shall summarily dismiss and take no further action upon any protest to the Agency if the substance of the protest is pending in judicial proceedings or the protester has filed a protest on the same acquisition with [GAO] prior to receipt of an Agency protest decision.”); *id.* § 2933.103(n) (“Proceedings on an agency protest may be dismissed or stayed if a protest on the same or similar basis is filed with a protest forum outside of the Department of Labor.”).

<sup>10</sup> 48 C.F.R. § 1833.103(d); *id.* § 2933.103(n); 31 U.S.C. § 3556 (2006) (“This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims.”). As discussed in this Article, there are certain circumstances where a timely preaward bid protest filed with GAO will not necessarily confer standing to bring a protest in the COFC. *E.g.*, *Shirlington Limousine & Transp., Inc. v. United States*, 77 Fed. Cl. 157, 167 (2007), *reconsid. denied*, 78 Fed. Cl. 27 (2007).

<sup>11</sup> FAR § 33.103(f)(4) (2008); *id.* 33.104; *see* 31 U.S.C. § 3556.

To assist the contractor in selecting the most appropriate forum(s) for favorably resolving its bid protest, this Article provides the contractor with important and current information about the three principle forums—plus references to similar information concerning the boards of contract appeals—and then discusses: (a) the sometimes confusing sources of jurisdiction for bid protests before the various forums; (b) some protest grounds that raise special jurisdictional issues or that may be filed in only certain forums; (c) the relief available in bid protests at the various forums; (d) some prefiling and timing considerations that may be factors in the contractor’s forum choice; (e) the similarities and differences between the rules, procedures, and practices of the various forums; and (f) whether protests may be maintained at more than one of the forums and whether appellate review or subsequent review of the bid protest decision may be obtained at another forum.

## **I. The Forums**

### **A. Agency Level**

As discussed in more detail below, agency-level protests are typically decided by the CO or an official at least one level above the CO (and sometimes by very high-ranking agency officials) and may or may not be resolved by an agency official who is not involved in the procurement.<sup>12</sup>

### **B. Government Accountability Office**

It has been long recognized that the GAO<sup>13</sup> plays a crucial role in the resolution of contested federal procurements.<sup>14</sup> Since the early part of the 20th century, the GAO has provided expertise concerning the resolution of procurement disputes to virtually all of the agencies and departments in the Federal Government.

The GAO was established by the Budget and Accounting Act of 1921.<sup>15</sup> The GAO is an independent, non-partisan agency headed by the Comptroller General of the United States that “investigate[s] all matters related to the receipt, disbursement, and use of public money.”<sup>16</sup> The United States Court of

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<sup>12</sup> FAR § 33.103(d).

<sup>13</sup> In 2004, the name of the General Accounting Office was changed to the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814.

<sup>14</sup> *John Reiner & Co. v. United States*, 325 F.2d 438, 439 (Ct. Cl. 1963); *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1308 (D.C. Cir. 1971); *Honeywell, Inc. v. United States*, 870 F.2d 644, 645 (Fed. Cir. 1989).

<sup>15</sup> Budget and Accounting Act, 1921, Pub. L. No. 67-13, § 301, 42 Stat. 20, 23.

<sup>16</sup> 31 U.S.C. § 712(1) (2006).

Appeals for the Federal Circuit (“Federal Circuit”) has described the GAO as “an Article I administrative forum.”<sup>17</sup> The GAO’s Office of General Counsel is responsible for providing legal opinions to Congress, its committees, and members and legal decisions to officers and heads of executive agencies.<sup>18</sup>

Within the Office of General Counsel, the Procurement Law Control Group has presided over disputes concerning the award of federal contracts for several decades, although this jurisdiction was not statutorily authorized until the Competition in Contracting Act of 1984 (“CICA”).<sup>19</sup> These disputes, generally referred to as bid protests, are considered by attorneys within the Procurement Law Control Group and issued in the name of the Comptroller General.<sup>20</sup> The attorneys determine whether federal agencies have complied with statutes and regulations controlling Government procurements.<sup>21</sup>

Although they are not judges, all of the attorneys within the Procurement Law Control Group have specific expertise in Government procurement matters.<sup>22</sup> Moreover, the only matters they consider are those that concern federal procurement. As a result, the bid protest decisions issued by the GAO have resulted in a generally uniform body of law applicable to the procurement process upon which Congress, the courts, contracting agencies, and the public rely.<sup>23</sup>

### **C. Court of Federal Claims**

The Federal Courts Improvement Act of 1982 established the United States Claims Court pursuant to Article I of the United States Constitution.<sup>24</sup> The Claims Court inherited the trial jurisdiction of its predecessor, the United States Court of Claims, although the Claims Court’s jurisdiction was extended

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<sup>17</sup> *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 n.7 (Fed. Cir. 2001).

<sup>18</sup> GAO Order No. 0130.1.10 (Apr. 5, 2004).

<sup>19</sup> Competition in Contracting Act of 1984, Pub. L. 98-369, § 2741, 98 Stat. 490, 1175, 1199–1203 (codified at 31 U.S.C. §§ 3551–3556).

<sup>20</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-797SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 33, 42 (8th ed. 2006) [hereinafter GAO BID PROTEST GUIDE].

<sup>21</sup> *Id.* at 6.

<sup>22</sup> For a list (including contact information) of the GAO attorneys involved in resolving bid protests, see U.S. Gov’t. Accountability Office, Procurement Law’s Organization Chart, [http://www.gao.gov/decisions/ogc\\_prolawteledir\\_8.5x11-v3.pdf](http://www.gao.gov/decisions/ogc_prolawteledir_8.5x11-v3.pdf) (last visited Feb. 8, 2009).

<sup>23</sup> GAO BID PROTEST GUIDE, *supra* note 20, at 5.

<sup>24</sup> Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, sec. 105(a), §§ 171–77, 96 Stat. 25, 27–28; *see Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990).

to include *preaward* bid protests.<sup>25</sup> Pursuant to the Federal Courts Administration Act of 1992, Congress changed the court's name to the Court of Federal Claims ("COFC").<sup>26</sup> The ADRA added postaward bid protests to the court's jurisdiction<sup>27</sup> and made the court the exclusive judicial forum for the resolution of bid protests as of January 1, 2001.<sup>28</sup>

The COFC has national jurisdiction and may hold court at any place within the United States.<sup>29</sup> In addition, the Federal Courts Administration Act authorizes the court to conduct proceedings outside of the United States.<sup>30</sup> Other changes made by that statute include providing the court with the authority to tax costs, the authority to assess attorney's fees and costs for unreasonable and vexatious litigation, and contempt powers.<sup>31</sup>

The COFC is composed of 16 active judges who are nominated by the President, confirmed by the Senate, and serve 15-year terms.<sup>32</sup> At present, there are also 8 senior judges,<sup>33</sup> which may suggest that the court has extra capacity that could allow for the prompt resolution of its cases. The President designates one of the active judges to serve as chief judge until that person reaches the age of 70 or until the President designates another judge to serve as chief judge.<sup>34</sup> At the expiration of their term of office, judges may be reappointed—subject to nomination by the President and confirmation by the Senate—or they may take senior status and continue to adjudicate cases.<sup>35</sup> The judges of the COFC generally issue written decisions in bid protest cases.<sup>36</sup>

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<sup>25</sup> 28 U.S.C. § 1491(a)(3) (1994), *repealed by* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874; *see* United States v. John C. Grimberg Co., 702 F.2d 1362, 1365–69 (Fed. Cir. 1983) (interpreting Claims Court power to issue injunctive relief in bid protests to be limited to preaward claims).

<sup>26</sup> Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4506, 4516.

<sup>27</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §12(a), 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491(b)).

<sup>28</sup> *Id.* §12(d), 110 Stat. at 3875.

<sup>29</sup> 28 U.S.C. §§ 173, 2505 (2006).

<sup>30</sup> Federal Courts Administration Act of 1982, Pub. L. No. 102-572, § 906, 106 Stat. at 4517–18 (amending 28 U.S.C. § 798).

<sup>31</sup> *Id.* §§ 908, 909, 910, 106 Stat. at 4519–20 (amending 28 U.S.C. §§ 1919, 2503, 2521).

<sup>32</sup> 28 U.S.C. §§ 171(a), 172(a).

<sup>33</sup> U.S. Court of Federal Claims, *Judges – Biographies*, <http://www.uscfc.uscourts.gov/judges-biographies> (last visited Jan. 31, 2009).

<sup>34</sup> 28 U.S.C. § 171(b).

<sup>35</sup> *See* 28 U.S.C. § 178.

<sup>36</sup> *See, e.g.,* Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533 (2003).

In contrast to GAO and agency-level protest decisions, there is no time limit on the issuance of COFC protest decisions.<sup>37</sup>

Because COFC judges are not required to have Government contracts experience, it is possible for a bid protest to be heard by a judge who does not have a formal Government contracts background.<sup>38</sup> Nevertheless, virtually all of the current judges have substantial Government contracts and bid protest experience.<sup>39</sup> As the statistics noted below indicate, in a typical year, procurement cases constitute roughly one third of the COFC's docket.<sup>40</sup> COFC judges also hear a variety of nonprocurement cases including tax, Fifth Amendment takings, patent, civilian and military pay, congressional reference, vaccine, and Indian cases.<sup>41</sup> The active judges of the court are authorized to employ two law clerks while senior judges typically have one law clerk.<sup>42</sup> A single COFC judge will hear and decide the bid protest.<sup>43</sup> Cases are randomly assigned; however, "directly-related cases" are assigned to the judge who was assigned the earliest filed case on the matter.<sup>44</sup> The parties have a continuing duty to inform the court of any pending directly related cases filed in the court.<sup>45</sup>

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<sup>37</sup> While agency bid protests are to be resolved within thirty-five days, FAR § 33.103(g), and GAO protests within 100 days, FAR § 33.104(f), the COFC authorization to hear bid protests places no time constraint on the resolution of bid protests. 28 U.S.C. § 1491.

<sup>38</sup> Compare 28 U.S.C. § 171 (requiring no subject matter expertise for COFC appointment) with 41 U.S.C. § 607(b)(1) (2006) (requiring five years of public contract experience for agency board positions).

<sup>39</sup> See U.S. Court of Federal Claims, *Judges – Biographies*, <http://www.uscfc.uscourts.gov/judges-biographies> (last visited Jan. 31, 2009).

<sup>40</sup> See *infra* Part I.F.(c).

<sup>41</sup> U.S. Court of Federal Claims, *About the Court*, <http://www.uscfc.uscourts.gov/about-court> (last visited Jan. 31, 2009).

<sup>42</sup> See 28 U.S.C. § 794.

<sup>43</sup> 28 U.S.C. § 174(a).

<sup>44</sup> R.C.F.C. 40.1, 40.2(a); see also R.C.F.C. 40.2(b) (providing mechanism for possible reassignment of "indirectly-related cases").

<sup>45</sup> R.C.F.C. 40.2(a). Conversely, for indirectly related cases, a party is not required to, but may, inform the court of such cases. R.C.F.C. 40.2(b). The chief judge of the COFC has the authority to "reassign any case" if the chief judge "deems such action necessary for the efficient administration of justice." R.C.F.C. 40.1(c). Then-Chief Judge Smith exercised this authority when approximately 120 thrift cases were filed at the court. Plaintiffs in *All Winstar-Related Cases at the Court v. United States*, 35 Fed. Cl. 707, 707–08 (1996). A case may also be "transferred by order of the assigned judge to another judge upon the agreement of both judges." R.C.F.C. 40.1(b).

### **D. Former Forums: U.S. District Courts and General Services Board of Contract Appeals**

(1) *U.S. District Courts*. In 1970, the U.S. Court of Appeals for the District of Columbia Circuit issued *Scanwell Laboratories Inc. v. Shaffer*,<sup>46</sup> which provided U.S. district courts jurisdiction to hear challenges to Government contract award decisions (i.e., bid protests) under the Administrative Procedure Act.<sup>47</sup> Thus, beginning in 1970, the district courts could hear most preaward and all postaward protests based on “*Scanwell*” jurisdiction.<sup>48</sup>

The jurisdiction of the district courts over protests was affected by the passage of the Federal Courts Improvement Act of 1982,<sup>49</sup> which established the Claims Court (renamed the COFC)<sup>50</sup> and provided it jurisdiction over preaward protests.<sup>51</sup> Specifically, that act allowed the Claims Court “to afford complete relief on any contract claim brought before the contract is awarded.”<sup>52</sup> This created confusion as to whether the Claims Court then possessed exclusive jurisdiction—or shared such jurisdiction with the district courts—to hear preaward protests. Postaward judicial protest authority remained with the district courts.<sup>53</sup>

The ADRA remedied this confusion by granting the COFC and the U.S. district courts concurrent jurisdiction to entertain preaward and postaward bid protest cases.<sup>54</sup> However, the ADRA provided that bid protest jurisdiction

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<sup>46</sup> 424 F. 2d 859 (D.C. Cir. 1970).

<sup>47</sup> *Id.* at 868–869.

<sup>48</sup> *Id.*

<sup>49</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, sec. 105(a), §§ 171–77, 96 Stat. 25, 27–28.

<sup>50</sup> Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

<sup>51</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, sec. 133, § 1491, 96 Stat. 25, 39–40.

<sup>52</sup> *Id.* (“To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.”).

<sup>53</sup> *See* *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1365–69 (Fed. Cir. 1983) (interpreting Claims Court power to issue injunctive relief in bid protests to be limited to preaward claims).

<sup>54</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (codified at 28 U.S.C. § 1491(b) (“Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any



in the district courts would expire on January 1, 2001, unless extended by Congress.<sup>55</sup> Congress did not renew the jurisdiction of the district courts over protests; thus, the COFC is now the exclusive judicial forum for virtually all preaward and postaward bid protests.<sup>56</sup>

It is unclear where protests related to maritime Government contracts should be filed. Certain COFC decisions, issued after the passage of the ADRA but before the sunset of district court protest jurisdiction, state that the district court is the proper forum.<sup>57</sup> However, in at least one later case, the COFC heard a maritime bid protest case (although without expressly addressing the issue of maritime protest jurisdiction).<sup>58</sup> Moreover, at least one district court decision—issued after the January 1, 2001 sunset of district court protest jurisdiction—ruled that the district court has no jurisdiction over maritime protests and transferred the protest to the COFC.<sup>59</sup> Another post-sunset district court decision assumed jurisdiction over a maritime bid protest<sup>60</sup> before the case was vacated by the Federal Circuit, which did not reach the merits of

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alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.”)).

<sup>55</sup> *Id.* § 12(d), 110 Stat. at 3875 (“SUNSET.—The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection.”). See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD/OGC-00-72, BID PROTESTS: CHARACTERISTICS OF CASES FILED IN FEDERAL COURTS 1–2 (2000).

<sup>56</sup> *But see* Verchinski, *supra* note 6, at 393–94.

<sup>57</sup> *E.g.*, *Asta Eng’g, Inc. v. United States*, 46 Fed. Cl. 674, 675–77 & n.\* (2000) (“In light of the long history of exclusive district court admiralty jurisdiction, over maritime contract matters, the Tucker Act [bid protest] amendments, codified in 28 U.S.C. § 1491(b), cannot be held to confer concurrent Suits in Admiralty Act jurisdiction on the [COFC] [for maritime bid protests]. In short, absent specific legislation granting the [COFC] admiralty jurisdiction covering bid protests on maritime contracts, [COFC] jurisdiction over the instant matter is lacking.”); *COFC’s Concurrent Jurisdiction with U.S. District Courts Over Bid Protests Does not Extend to Maritime Contracts*, 42 THE GOV’T CONTRACTOR ¶ 249 (2000); see *Bayship Mgmt., Inc. v. United States*, 43 Fed. Cl. 535, 536–37 (1999) (“The parties do not seriously contend that the contracts . . . are not maritime contracts. Therefore, plaintiff should have filed the instant complaint in the district court.”).

<sup>58</sup> *Transatlantic Lines LLC v. United States*, 68 Fed. Cl. 48, 50–52 (2005).

<sup>59</sup> *Sealift, Inc. v. Reilly*, 496 F. Supp. 2d 52, 53–54 (D.D.C. 2007).

<sup>60</sup> *Patriot Contract Servs. v. United States*, 388 F. Supp. 2d 1010, 1017 (N.D. Cal. 2005).

maritime bid protest jurisdiction in the district courts.<sup>61</sup> Furthermore, what constitutes a maritime contract is not always clear.<sup>62</sup> Thus, a potential protester of a maritime contract may find it advisable to protest initially to the GAO or at the agency level, and, if unsatisfied with that outcome, the protester should study the most up-to-date case law to determine if a district court in its regional circuit or the COFC would assume jurisdiction over the protest.<sup>63</sup>

(2) *GSBCA*. The 1965 passage of the Brooks Automatic Data Processing Act<sup>64</sup> gave the General Services Administration (“GSA”) exclusive authority over the procurement of automated data processing equipment (“ADPE”) for federal Executive Branch agencies.<sup>65</sup> Under the Brooks Act, Congress provided the GSA authorization to coordinate and provide for the efficient purchase, lease, and maintenance of ADPE by federal agencies.<sup>66</sup>

From 1984 to 1996, the General Services Administration Board of Contract Appeals (“GSBCA”) had jurisdiction to hear protests concerning the procurement of ADPE.<sup>67</sup> CICA amended the Brooks Act to vest the GSBCA with jurisdiction to “review any decision by a contracting officer alleged to violate a statute or regulation”<sup>68</sup> arising “in connection with any procurement [conducted] that is subject to [the Brooks Act].”<sup>69</sup> As amended, the Brooks Act allowed protests to be filed with the GSBCA by “an interested party” in connection with such procurements.<sup>70</sup>

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<sup>61</sup> *Patriot Contract Servs., LLC v. United States*, 154 Fed. App’x. 202 (Fed. Cir. 2005); see *Puglia Eng’g v. U.S. Coast Guard*, No. C 04-04794 CRB, 2005 WL 106785, \*5–6 (N.D. Cal. Jan. 18, 2005) (same district court judge assumed jurisdiction over another Suits in Admiralty Act bid protest).

<sup>62</sup> See *Marine Hydraulics Int’l, Inc. v. United States*, 43 Fed. Cl. 664, 665 (1999).

<sup>63</sup> See James McCullough, Catherine Pollack & Steven Alerding, *Bid Protest Practice in the Court of Federal Claims*, BRIEFING PAPERS No. 00-10, Sept. 2000, at footnotes 56–59 and accompanying text.

<sup>64</sup> Brooks Data Processing Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified at 40 U.S.C. § 759).

<sup>65</sup> *Id.*, 79 Stat. at 1127–29.

<sup>66</sup> *Id.* § 111(b)(1), 79 Stat. at 1127.

<sup>67</sup> See generally John Tolle & James Duffy, *GSBCA Bid Protests*, BRIEFING PAPERS No. 87-4, Mar. 1987, at 1; Shnitzer, *Bid Protests: GAO vs. GSBCA*, BRIEFING PAPERS No. 89-12, Nov. 1989, at 1. ADPE was not defined in the statute codifying the Brooks Act. See *Electronic Data Sys. Fed. Corp. v. GSBCA*, 792 F.2d 1569 (Fed. Cir. 1986).

<sup>68</sup> Competition in Contracting Act of 1984, Pub. L. No. 98-369, Div. B, tit. VII, § 2713, 98 Stat. 1175.

<sup>69</sup> 40 U.S.C. § 759(f)(1) (1994), *repealed by* Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680.

<sup>70</sup> *Id.*

The Clinger-Cohen Act of 1996 repealed the GSA's acquisition and management authority over ADPE.<sup>71</sup> In so doing, the act also eliminated the jurisdiction of the GSBCA over ADPE protests.<sup>72</sup> As a result of the ADRA and the repeal of the Brooks Act, information technology-related protests may now be brought before the GAO, the COFC, or in agency-level protests. In 2007, the GSBCA was consolidated into the Civilian Boards of Contract Appeals and no longer exists.<sup>73</sup>

### **E. Precedential Authority**

The COFC is bound by the decisions of the United States Supreme Court, the precedential (i.e., published) decisions of the Federal Circuit, and the published decisions of the Federal Circuit's predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals.<sup>74</sup> COFC judges are not bound by the decisions of other COFC judges,<sup>75</sup> the GAO,<sup>76</sup> or the boards

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<sup>71</sup> Clinger-Cohen Act of 1996, Pub. L. No. 104-106, title LI, § 5101, 110 Stat. 186, 680 (repealing 40 U.S.C. § 759).

<sup>72</sup> *Id.*

<sup>73</sup> See generally Michael J. Schaengold & Robert S. Brams, *A Guide to the Civilian Board of Contract Appeals*, BRIEFING PAPERS No. 07-8, July 2007, at 2.

<sup>74</sup> *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (adopting as precedent the decisions of the predecessor Court of Claims and Court of Customs and Patent Appeals); see, e.g., *Gevyn Constr. Corp. v. United States*, 827 F.2d 752, 754 n.2 (Fed. Cir. 1987) (decisions of the Court of Claims are binding on the Federal Circuit). Cf. FED. R. APP. P. 32.1 (allowing citation of nonprecedential or unpublished decisions of the U.S. Court of Appeals of the Federal Circuit that are "issued on or after January 1, 2007").

<sup>75</sup> See *Casa De Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1364 n.1 (Fed Cir. 2002).

<sup>76</sup> *Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007) ("Because the Comptroller General may only 'recommend' a remedy upon finding a procurement violation, GAO's rulings do not legally bind the parties to a bid protest." (quoting U.S.C. § 3554(b), (c))); *Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 39 (2007), ("Although decisions of the GAO are treated as 'expert opinions,' they are not binding on this court.") (quoting *Consol. Eng'g Servs., Inc. v. United States*, 64 Fed. Cl. 617, 623 (2005)); *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218, 223-24 (2005) ("Should a bidder pursue its challenge to the bid award with GAO, GAO's ultimate determination is not binding upon the agency or this court; rather, it serves as a recommendation that becomes a part of the administrative record."). While not bound by GAO decisions, the COFC will follow such decisions where persuasive and has acknowledged "the expertise of the GAO in procurement matters." See *Ideal Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 136 n.11 (2006) ("Although GAO decisions are not binding on this Court, the Court 'recognizes GAO's longstanding expertise in the bid protest area and accords its decisions due regard."); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341-42 (1997) ("[T]his court may rely upon such a decision for general guidance to the extent that it is reasonable and persuasive in light of

of contract appeals.<sup>77</sup> The COFC, however, has no authority to deviate from the mandate issued by the Federal Circuit in a particular case.<sup>78</sup>

While the GAO is not bound by the decisions of the COFC or the Federal Circuit, the GAO typically will adjust its precedent to follow decisions of the Federal Circuit<sup>79</sup> and will sometimes follow persuasive decisions of the COFC.<sup>80</sup> Absent unusual circumstances, the GAO will typically follow its own precedent.<sup>81</sup>

These rules concerning binding authority may have a significant, and sometimes controlling, effect on a contractor's choice of a protest forum. Before choosing the forum in which to file its protest, the contractor should research the key legal issues affecting its case. If the Federal Circuit or one of its predecessors has ruled on these issues, those decisions are binding on

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the administrative record. Thus, it may be an aid to the court in better understanding and evaluating the procurement.”) (citation omitted).

<sup>77</sup> *West Coast Gen. Corp. v. United States*, 19 Cl. Ct. 98, 101 n.\* (1989).

<sup>78</sup> See *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 892 (Fed. Cir. 1988); *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988); *N. Helex Co. v. United States*, 634 F.2d 557, 560 (Ct. Cl. 1980).

<sup>79</sup> For example, the GAO has changed its regulations and case law to conform with certain Federal Circuit decisions. See, e.g., *FN Mfg., Inc.*, B-297172 et. al, 2005 CPD ¶ 212 (Comp. Gen. Dec 2005) (citing 67 Fed. Reg. 79,833, 79,834, 79,836 (2002)). Conversely, where persuasive, the Federal Circuit has adopted or followed GAO precedent. For example, in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007), the Federal Circuit formally adopted GAO timeliness rule for COFC protests of errors apparent on the face of a solicitation; such errors must be protested at COFC prior to the closing date for receipt of proposals (as at GAO), or the protest will be dismissed as untimely. *Ending Ambiguity—The Federal Circuit Ends the COFC Debate On When A Bid Protest Challenging the Terms of a Solicitation Must Be Filed*, 49 THE GOV'T CONTRACTOR ¶ 320, Aug. 22, 2007; see also *American Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (ruling that CICA's definition of “interested party” for GAO protests applies to COFC protests under 28 U.S.C. § 1491(b)(1)).

<sup>80</sup> *E.g. Pyxis Corp.*, B-282469, B-282469.2, 99-2 CPD ¶ 18 (Comp. Gen. July 15, 1999); see also *Up Front: Non-FSS “Incidentals” Cannot Be Included in FSS Purchase Orders; GAO Reverses Precedent and Agrees With COFC*, 41 THE GOV'T CONTRACTOR ¶ 332, Aug. 4, 1999.

<sup>81</sup> While GAO decisions are not subject to direct or formal appellate review, reconsideration may be requested of a GAO protest decision, 4 C.F.R. § 21.14 (2008), and suit may be filed in the COFC of a protest for which a GAO decision has been issued. However, as discussed in this Article, it is the agency decision and not the GAO recommendation that is reviewed by the COFC. *E.g., Cubic Applications, Inc.*, 37 Fed. Cl. at 341–42. If the GAO rules against a Government agency, that agency cannot seek review by the COFC but can decline to implement the GAO decision, which may cause the protester to file suit in the COFC.

the COFC.<sup>82</sup> In addition, the contractor should determine how the COFC interprets such binding decisions.

If there are no rulings from the Federal Circuit or its predecessors on the key issues, then the contractor must explore the decisions of the COFC. It is not unusual to find differing legal interpretations among the COFC judges, and COFC judges also sometimes disagree with GAO decisions and board decisions.<sup>83</sup> In summary, a protester must review the case law of the GAO and the Federal Circuit/COFC carefully—and compare this case law—because a case that may be a certain loser in one jurisdiction may have a substantial chance of success in the other forum. It is often important for the potential protester to review the protest case law of the district courts and the GSBCA because, while these tribunals no longer have protest jurisdiction, their decisions may be persuasive to the current protest tribunals, particularly if the relevant issues have only been considered by the district courts or the GSBCA.

## F. Statistics

(a) *Agency Protests*. Unfortunately, no comprehensive statistics exist that summarize the number of protests at the agency level or the success rates of such protests.<sup>84</sup> Only a very small number of agencies maintain some form of statistics concerning their agency-level protests, including the U.S. Army

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<sup>82</sup> *Coltec Indus. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (“There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court [the Federal Circuit], and our predecessor court, the Court of Claims.”). While one COFC opinion views the decisions of the Temporary Emergency Court of Appeals (TECA), whose jurisdiction was transferred to the Federal Circuit in 1993, as binding precedent on the COFC, *Yankee Atomic Electric Co. v. United States*, 54 Fed. Cl. 306, 310 n.5 (2002), the prevailing view appears to be to the contrary. See, e.g., *Jade Trading, LLC v. United States*, 65 Fed. Cl. 487, 496 (2005) (stating that TECA rulings on evidentiary privilege were not binding on the Federal Circuit; such rulings are only binding to the extent that the Federal Circuit is sitting as successor to TECA).

<sup>83</sup> E.g., *Grunley Walsh Int’l, LLC v. United States*, 78 Fed. Cl. 35, 39 (2007); *COFC to Consider Whether Agency Corrective Action Following Comp. Gen. Recommendation Was Appropriate*, 49 THE GOV’T CONTRACTOR ¶ 410, Oct. 24, 2007.

<sup>84</sup> See Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F.L.REV. 113, 146 n.170 (2005).

Materiel Command<sup>85</sup> and the U.S. Army Corps of Engineers.<sup>86</sup> In 2005, one commentator stated that “the [agency-level bid protest] forum has seen declining use in recent years.”<sup>87</sup>

(b) GAO. For Fiscal Years (“FY”) 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, 1,146, 1,204, 1,352, 1,485, 1,356, 1,327, 1,411, and 1,652 protests were filed at the GAO.<sup>88</sup> For FYs 2001, 2002, 2003, 2004,

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<sup>85</sup> For example, in an undated website posting, AMC states that “[i]n 5 years AMC has resolved over 400 protests within the agency, avoiding the time-consuming, expensive litigation process before the [GAO]. The Office of Federal Procurement Policy . . . named this program as one of the Top Ten Government Procurement Practices. . . . Users of the AMC-level protest program have their disputes resolved in approximately 15 days rather than the GAO’s 75 day average.” Office of the Army General Counsel, Recent ADR Achievements <http://www.hqda.army.mil/ogc/referenc/adrachieve.htm> (last visited Jan. 31, 2009); see also Troff, *Agency-Level Bid Protest Reform: Time for a Little Less Efficiency?* reprinted in 14 THE CLAUSE (Summer 2005), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA433545&Location=U2&doc=GetTRDoc.pdf> (“Over the years, AMC has resolved protests in an average of 17 working days.”); Ralph C. Nash & John Cibinic, *The Year of the Ombudsmen: A New Wrinkle on Protests*, 10 NASH & CIBINIC REP. ¶ 1 (Jan. 1996) (average decision time by AMC is 15 days since 1991). The standard AMC contract clause relating to protests states that the “AMC protest decision goal is to resolve protests within 20 working days from filing.” U.S. Army Materiel Command, Office of the Command Counsel, [http://www.amc.army.mil/amc/command\\_counsel/protestlink.htm](http://www.amc.army.mil/amc/command_counsel/protestlink.htm) (last visited Jan. 31, 2009).

<sup>86</sup> For a summary of protest statistics for the AMC and the Corps, see Troff, *supra* note 84, at 1 n.4, 2 n.8, 4, 13–14. Some agencies have a requirement for an annual agency bid protest report, which requires heads of contracting activities to compile, review, and forward data on bid protest activity (e.g., data on number of protests, assessment of the causes of such protests, summary of corrective action taken, and the distribution of such protests by Contracting Office). See, e.g., Army Federal Acquisition Regulation Supplement (AFARS) 5133.103-90 [hereinafter AFARS].

<sup>87</sup> Troff, *supra* note 84, at 148.

<sup>88</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2001, available at <http://www.gao.gov/special.pubs/bidpro01.pdf> [hereinafter GAO BID PROTEST REPORT 2001]; U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2002, available at <http://www.gao.gov/special.pubs/bidpro02.pdf> [hereinafter GAO BID PROTEST REPORT 2002]; U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2003, available at <http://www.gao.gov/special.pubs/bidpro03.pdf> [hereinafter GAO BID PROTEST REPORT 2003]; U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2004, available at <http://www.gao.gov/special.pubs/bidpro04.pdf> [hereinafter GAO BID PROTEST REPORT 2004]; U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2005, available at <http://www.gao.gov/special.pubs/bidpro05.pdf> [hereinafter GAO BID PROTEST REPORT 2005]; U.S. GOV’T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2006, available at <http://www.gao.gov/special.pubs/bidpro06.pdf> [hereinafter GAO BID PROTEST REPORT 2006]; U.S. GOV’T ACCOUNTABILITY OFFICE,

2005, 2006, 2007, and 2008, respectively, 1,098, 1,133, 1,244, 1,405, 1,341, 1,274, 1,393, and 1,581 protests were closed by the GAO.<sup>89</sup> Of those closed protests, for FYs 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, 311, 256, 290, 365, 306, 249, 335, and 291 were resolved on the merits.<sup>90</sup> For those same years, 66 (i.e., 21% of the GAO merits decisions), 41 (16%), 50 (17%), 75 (21%), 71 (23%), 72 (29%), 91 (27%), and 60 (21%) protests were sustained, either in whole or in part.<sup>91</sup> For FYs 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, the protesters' "effectiveness rate" (i.e., those protests in which the protester received some

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ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2007, available at <http://www.gao.gov/special.pubs/bidpro07.pdf> [hereinafter GAO BID PROTEST REPORT 2007]; U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2008, available at <http://www.gao.gov/special.pubs/bidpro08.pdf> [hereinafter GAO BID PROTEST REPORT 2008]. For each fiscal year, the total number of protests filed at GAO includes cost claims and requests for reconsideration. For example, for FY 2007, the 1411 protests filed at GAO included 42 cost claims and 93 requests for reconsideration of GAO protest decisions. GAO BID PROTEST REPORT 2007. Of the 1,652 protests filed in FY 2008, 87 are attributable to the GAO's expanded bid protest jurisdiction over: task orders (49 filings), *see infra* text accompanying notes 241-51, A-76 protests (30 filings), and Transportation Security Administration protests (8 filings). Even if these expanded jurisdiction protests are subtracted from the FY 2008 total, the result is 1,565 protests filed, which is a 10.9% increase over FY 2007. GAO BID PROTEST REPORT 2008.

<sup>89</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88. For each fiscal year, the total number of protests closed by GAO includes cost claims and requests for reconsideration. For example, for FY 2006, the 1274 protests closed by GAO included 52 cost claims and 50 requests for reconsideration of GAO protest decisions. GAO BID PROTEST REPORT 2006, *supra* note 88.

<sup>90</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88.

<sup>91</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88.

form of relief—e.g., corrective action<sup>92</sup>—from the agency) was 33%, 33%, 33%, 34%, 37%, 39%, 38%, and 42% of the protests filed at the GAO.<sup>93</sup>

For FYs 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, alternative dispute resolution was used in 150 (with 84% of those protests being resolved through such ADR), 145 (84%), 120 (92%), 123 (91%), 103 (91%), 91 (96%), 62 (85%), and 78 (78%) protests.<sup>94</sup> Finally, for FYs 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, the GAO held hearings in 12% (i.e., 63 protests), 5% (23), 13% (74), 9% (56), 8% (41), 11% (51), 8% (41), and 6% (32) of its fully developed decisions.<sup>95</sup>

In FYs 2004 through 2007, no federal agency failed to implement the GAO's protest recommendation.<sup>96</sup> In FY 2003, two federal agencies initially declined to implement the GAO protest recommendations.<sup>97</sup> In each of FYs

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<sup>92</sup> Corrective action can "include [the procuring agency] revising the solicitation, re-opening discussions and re-evaluating offers." Jerome S. Gabig, Jr., "Fighting Over Government Contracts," 66 ALA. LAW. 39, 40 (2005).

<sup>93</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88.

<sup>94</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88.

<sup>95</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; GAO BID PROTEST REPORT 2002, *supra* note 88; GAO BID PROTEST REPORT 2003, *supra* note 88; GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88; GAO BID PROTEST REPORT 2008, *supra* note 88.

<sup>96</sup> GAO BID PROTEST REPORT 2004, *supra* note 88; GAO BID PROTEST REPORT 2005, *supra* note 88; GAO BID PROTEST REPORT 2006, *supra* note 88; GAO BID PROTEST REPORT 2007, *supra* note 88.

<sup>97</sup> GAO BID PROTEST REPORT 2003, *supra* note 88 (DOD and OPM each declined to implement the GAO recommendation; however, after a House Hearing, OMB reconsidered its position and ultimately implemented the GAO recommendation); *see generally* Consolidated Eng'g Servs., Inc., B-291345, B-291345.2, 2002 CPD ¶ 220 (Comp. Gen., Dec. 23, 2002); Symplicity Corp., B-291902, 2003 CPD ¶ 89 (Comp. Gen., April 29, 2003).



1998,<sup>98</sup> 2001,<sup>99</sup> and 2002,<sup>100</sup> there was one agency failure to implement a GAO protest recommendation, while in FYs 1995, 1996, 1997, 1999, and 2000, no federal agency failed to implement a GAO protest recommendation.<sup>101</sup> Consequently, during the last 13 years, federal agencies have failed to implement the GAO protest recommendations in only five protests.<sup>102</sup> The GAO must inform Congress if a federal agency fails to fully implement a GAO recommendation<sup>103</sup> and recommend what action Congress should take.<sup>104</sup>

(c) *Court of Federal Claims*. For FYs 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007, respectively, 6.8% (54 cases), 7.3% (57), 2.6% (39), 1.8% (55), 2.9% (69), 3.6% (61), 6.8% (73), and 6.4% (70) of the complaints filed at the COFC involved bid protests.<sup>105</sup> Interestingly, through September

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<sup>98</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1998, available at <http://www.gao.gov/special.pubs/bidpro98.pdf> [hereinafter GAO BID PROTEST REPORT 1998]; see *Air Force Disregards GAO Decision in Awarding Depot Work Contract*, 40 THE GOV'T CONTRACTOR ¶ 476, Oct. 21, 1998; see generally *Pemco Airplex, Inc.*, B-280397, 98-2 CPD ¶ 79 (Comp. Gen., Sept. 25, 1998).

<sup>99</sup> GAO BID PROTEST REPORT 2001, *supra* note 88; see generally *Aberdeen Tech. Servs., Inc.*, B-283727.2, 2000 CPD ¶ 46 (Comp. Gen., Feb. 22, 2000).

<sup>100</sup> GAO BID PROTEST REPORT 2002, *supra* note 88; see generally *Rockwell Elec. Commerce Corp.*, Comp. Gen. Dec. B-286201.6, 001 CPD ¶ 162 (Comp. Gen., Aug. 14, 2001); *Rockwell Elec. Commerce Corp.*, B-286201, B-286201.2, B-286201.3, 2001 CPD ¶ 65 (Comp. Gen., Dec. 14, 2000).

<sup>101</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1995, available at <http://www.gao.gov/special.pubs/bidpro95.pdf> [hereinafter GAO BID PROTEST REPORT 1995]; U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1996, available at <http://www.gao.gov/special.pubs/bidpro96.pdf> [hereinafter GAO BID PROTEST REPORT 1996]; U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1997, available at <http://www.gao.gov/special.pubs/bidpro97.pdf> [hereinafter GAO BID PROTEST REPORT 1997]; U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 1999, available at <http://www.gao.gov/special.pubs/bidpro99.pdf> [hereinafter GAO BID PROTEST REPORT 1999]; U.S. GOV'T ACCOUNTABILITY OFFICE, ANNUAL REPORT TO THE CONGRESS FOR FISCAL YEAR 2000, available at <http://www.gao.gov/special.pubs/bidpro00.pdf> [hereinafter GAO BID PROTEST REPORT 2000].

<sup>102</sup> See *supra* notes 95–100 and accompanying text.

<sup>103</sup> 31 U.S.C. § 3554(e)(1) (2006).

<sup>104</sup> § 3554(e)(1)(B).

<sup>105</sup> See LEONIDAS R. MECHAM, 2000 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2000), available at <http://www.uscourts.gov/judbus2000/appendices/g2absep00.pdf> [hereinafter MECHAM 2000]; LEONIDAS R. MECHAM, 2001 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2001), available at <http://www.uscourts.gov/judbus2001/appendices/g2asep01.pdf> [hereinafter MECHAM 2001]; LEONIDAS R. MECHAM, 2002 ANNUAL REPORT OF THE

12, 2008 (and with more than 2 weeks left in the fiscal year), 85 bid protests had been filed at the COFC for FY 2008.<sup>106</sup> For FYs 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007, respectively, 5.6% (49 cases), 6.0% (64), 4.7% (41), 5.1% (45), 7.1% (67), 5.5% (58), 8.5% (71), and 6.5% (69) of the dispositions for those years involved bid protests.<sup>107</sup> In contrast, for FYs 2001, 2002, 2003, 2004, 2005, 2006, and 2007, respectively, approximately 27%, 13%, 5.4%, 17.9%, 23.4%, 28.1%, and 22% of the complaints filed involved (nonprotest) monetary contract dispute problems<sup>108</sup> while, for those same years, approximately 22.1%, 28.2%, 29%, 19.3%, 28.8%, 22.7%, and 28.3% of the dispositions involved monetary contract disputes.<sup>109</sup> In recent years, the vaccine compensation cases, over which the COFC has jurisdiction under 42 U.S.C. § 300aa-1–300aa-34, have constituted the largest number

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DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2002), *available at* <http://www.uscourts.gov/judbus2002/appendices/g2asep02.pdf> [hereinafter MECHAM 2002]; LEONIDAS R. MECHAM, 2003 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2003), *available at* <http://www.uscourts.gov/judbus2003/appendices/g2a.pdf> [hereinafter MECHAM 2003]; LEONIDAS R. MECHAM, 2004 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2004), *available at* <http://www.uscourts.gov/judbus2004/appendices/g2a.pdf> [hereinafter MECHAM 2004]; LEONIDAS R. MECHAM, 2005 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2005), *available at* <http://www.uscourts.gov/judbus2005/appendices/g2a.pdf> [hereinafter MECHAM 2005]; JAMES C. DUFF, 2006 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2006), *available at* <http://www.uscourts.gov/judbus2006/appendices/g2a.pdf> [hereinafter DUFF 2006]; JAMES C. DUFF, 2007 ANNUAL REPORT OF THE DIRECTOR, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl. G2-A (2007), *available at* <http://www.uscourts.gov/judbus2007/appendices/G02ASep07.pdf> [hereinafter DUFF 2007]. Additional data provided by Hon. John Buckley, Acting Clerk of the Court of Federal Claims (Sept. 16, 2008).

<sup>106</sup> Interview with Hon. John Buckley, Acting Clerk, U.S. Court of Fed. Claims (Sept. 16, 2008).

<sup>107</sup> See MECHAM 2000, *supra* note 105, at tbl. G2-A; MECHAM 2001, *supra* note 105, at tbl. G2-A; MECHAM 2002, *supra* note 105, at tbl. G2-A; MECHAM 2003, *supra* note 105, at tbl. G2-A; MECHAM 2004, *supra* note 105, at tbl. G2-A; MECHAM 2005, *supra* note 105, at tbl. G2-A; DUFF 2006, *supra* note 105, at tbl. G2-A; DUFF 2007, *supra* note 105, at tbl. G2-A.

<sup>108</sup> See MECHAM 2001, *supra* note 105, at tbl. G2-A; MECHAM 2002, *supra* note 105, at tbl. G2-A; MECHAM 2003, *supra* note 105, at tbl. G2-A; MECHAM 2004, *supra* note 105, at tbl. G2-A; MECHAM 2005, *supra* note 105, at tbl. G2-A; DUFF 2006, *supra* note 105, at tbl. G2-A; DUFF 2007, *supra* note 105, at tbl. G2-A.

<sup>109</sup> See MECHAM 2001, *supra* note 105, at tbl. G2-A; MECHAM 2002, *supra* note 105, at tbl. G2-A; MECHAM 2003, *supra* note 105, at tbl. G2-A; MECHAM 2004, *supra* note 105, at tbl. G2-A; MECHAM 2005, *supra* note 105, at tbl. G2-A; DUFF 2006, *supra* note 105, at tbl. G2-A; DUFF 2007, *supra* note 105, at tbl. G2-A.

of cases on the court's docket.<sup>110</sup> There were 4,847 of these cases pending in the court at the end of FY 2004, as compared to 684 contract claims (the second largest category of cases), and only 26 bid protests.<sup>111</sup> At the end of FYs 2005, 2006, and 2007, respectively, 5,291, 5,347, and 5,520 vaccine compensation cases were pending in the court compared to 770, 875, and 846 contract claims, and 29, 31, and 31 bid protests for those same years.<sup>112</sup> Because the COFC has seven special masters devoted to the management and adjudication of vaccine cases,<sup>113</sup> and because COFC judges perform limited reviews of these cases, the substantial increase in volume of the vaccine cases has, most likely, only moderately slowed the court's resolution of other cases on its docket.<sup>114</sup>

### G. Representation

In agency-level and GAO protests, the federal agencies are represented by attorneys from their own staffs.<sup>115</sup> These agency attorneys frequently handle only Government contract cases and often become involved with a procurement long before the contract award.<sup>116</sup> Some agencies use the same attorneys who assisted the contracting activity in the solicitation and award process as counsel before the GAO.<sup>117</sup>

In the COFC, the Department of Justice ("DOJ") represents the Government.<sup>118</sup> The DOJ attorney will rarely—if ever—have been involved in the

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<sup>110</sup> See, e.g., MECHAM 2004, *supra* note 105, at tbl. G2-A; MECHAM 2005, *supra* note 105, at tbl. G2-A; MECHAM 2005, *supra* note 105, at tbl. G2-A; DUFF 2006, *supra* note 105, at tbl. G2-A; DUFF 2007, *supra* note 105, at tbl. G2-A.

<sup>111</sup> MECHAM 2004, *supra* note 105, at tbl. G2-A.

<sup>112</sup> See MECHAM 2005, *supra* note 105, at tbl. G2-A; DUFF 2006, *supra* note 105, at tbl. G2-A; DUFF 2007, *supra* note 105, at tbl. G2-A.

<sup>113</sup> U.S. Court of Federal Claims, Vaccination Program, <http://www.uscfc.uscourts.gov/special-masters-biographies> (last visited Feb. 2, 2009).

<sup>114</sup> See Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1236 n.61 ("[COFC's] vaccine-related backlog is somewhat misleading, however, as these cases are largely handled by special masters, with the COFC playing a limited review role.").

<sup>115</sup> See, e.g., Rockwell Electronic Commerce Corp., B-286201, B-286201.2, B-286201.3, 2001 CPD ¶ 65 (Comp. Gen., Dec. 14, 2000) (Social Security Administration attorneys representing the agency).

<sup>116</sup> This statement is based on the authors' experience as practitioners.

<sup>117</sup> This statement is based on the authors' experience as practitioners.

<sup>118</sup> See Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 T.Fed. Cir. B.J. 312-13 (2008); 28 U.S.C. §§ 516, 519. One exception, which has been rarely invoked, could be where a government agency has independent litigating authority.

procurement at the agency level and will also have responsibility for a variety of non-Government contract cases.<sup>119</sup> Ordinarily, an agency attorney will serve of counsel to the DOJ attorney, and the agency attorney may take an active role in a protest action before the COFC.<sup>120</sup>

In agency-level and GAO protests, contractors may represent themselves pro se.<sup>121</sup> Thus, a sole proprietor contractor can appear and handle the protest him or herself, a partner can represent a partnership, and an officer of the corporation can represent the corporation. Before the GAO, an attorney admitted to practice in the highest court of any state may also represent contractors.<sup>122</sup> In contrast, the COFC permits an individual to appear pro se or to represent a member of the individual's immediate family, but requires any other party or organization, including corporations, partnerships, and joint ventures, to be represented by counsel.<sup>123</sup> An attorney must be admitted to the COFC's bar to practice before the court.<sup>124</sup> The COFC's rules require that "[a] party may have only one attorney of record in a case at any one time."<sup>125</sup> All other attorneys representing a party are designated as of counsel.<sup>126</sup>

## II. Agency-Level Protests

In October 1995, President Clinton issued Executive Order No. 12979,<sup>127</sup> which—for the first time—required all federal executive departments and agencies to formally establish agency-level protest procedures.<sup>128</sup> This Executive Order mandated federal agencies to “prescribe *administrative procedures* for the resolution of protests to the award of their procurement contracts *as an alternative to protests in fora outside the procuring agencies.*”<sup>129</sup> In January 1997, the Federal Acquisition Regulation (“FAR”) was modified to implement the Executive Order;<sup>130</sup> before this FAR modification and the Executive

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<sup>119</sup> See Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 Fed. Cir. B.J. 312-13 (2008).

<sup>120</sup> This statement is based on the authors' experience as practitioners. See also *id.*

<sup>121</sup> See 4 C.F.R. §§ 21(a)(1), 21.0(a) (2008); see also GAO BID PROTEST GUIDE, *supra* note 20, at 8.

<sup>122</sup> See GAO BID PROTEST GUIDE, *supra* note 20, at 8; see also 4 C.F.R. § 21.4(c) (describing how counsel for protester may request access to protected material).

<sup>123</sup> R.C.F.C. 83.1(c)(8).

<sup>124</sup> R.C.F.C. 83.1(a).

<sup>125</sup> R.C.F.C. 83.1(c)(1).

<sup>126</sup> *Id.*

<sup>127</sup> Exec. Order No. 12979, 60 Fed. Reg. 55,171 (Oct. 27, 1995).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis added).

<sup>130</sup> 62 Fed. Reg. 270 (Jan. 2, 1997) (amending FAR 33.103).

Order, agency-level protests had no formal statutory or FAR basis and had been typically considered at the CO level.<sup>131</sup> Some agency FAR supplements provide detailed guidance—in addition to that provided in the FAR—with respect to agency-level protests while other agency FAR supplements have very limited or no guidance on this topic.<sup>132</sup> Significantly, an agency-level protest is *not* a prerequisite to the filing of a protest before the GAO or the COFC.<sup>133</sup>

The FAR implementation of the Executive Order actually provides pre-agency-level protest guidance: “Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested

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<sup>131</sup> JOHN CIBINIC, JR. & RALPH C. NASH JR., *FORMATION OF GOVERNMENT CONTRACTS* 1484 (3d ed. 1998); Troff, *supra* note 84, at 144.

<sup>132</sup> For example, the EPA, 48 C.F.R. § 1533.103 (2008); Department of Transportation, 48 C.F.R. § 1233.103; and the Department of Homeland Security, 48 C.F.R. pt. 3033; each only have a short paragraph describing the process, while the Department of Interior, 48 C.F.R. ch. 14, has no guidance. See Ralph C. Nash & John Cibinic, *Dateline January 2005*, 19 NASH & CIBINIC REP. ¶ 5 (Jan. 2005) (“[I]t is our impression that many agencies have not adopted effective procedures to carry out [the] mandate” of “Executive Order 12979, . . . as implemented by Federal Acquisition Regulation 33.103” to create agency-level bid protest systems.”).

<sup>133</sup> FAR § 33.102(e) (“An interested party wishing to protest is encouraged to seek resolution within the agency (see FAR 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR Part 21).”); see also 31 U.S.C. § 3556 (2006) (“[N]othing contained in [CICA] shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the [COFC].”); U.S. Gen. Servs. Admin., Gen. Servs. Admin. Acquisition Manual § 533.103-71(p) [hereinafter GSAM] (“GSA may dismiss or stay proceedings on an agency protest if a protest on the same or similar basis is filed with a protest forum outside of GSA.”); 48 C.F.R. § 1833.103(d) (“NASA shall summarily dismiss and take no further action upon any protest to the Agency if the substance of the protest is pending in judicial proceedings or the protester has filed a protest on the same acquisition with the [GAO] prior to receipt of an Agency protest decision.”); *id.* § 2833.103(n) (“Proceedings on an agency protest may be dismissed or stayed if a protest on the same or similar basis is filed with a protest forum outside of the [DOJ].”); *id.* § 833.103(a)(3)(viii) (“The [Department of Veterans Affairs] will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction.”); *id.* § 2933.103(n) (“Proceedings on an agency protest may be dismissed or stayed if a protest on the same or similar basis is filed with a protest forum outside of the Department of Labor.”); *id.* § 733.103-73(d) (Agency for International Development Acquisition Regulation) (“Protests filed with the GAO will not be reviewed.”); *id.* § 733.103-73(g) (“Protests will not be considered when the matter involved is the subject of litigation before a court of competent jurisdiction or when the matter involved has been decided on the merits by a court of competent jurisdiction.”).

party at the contracting officer level through open and frank discussions.”<sup>134</sup> With respect to agency-level protests, the FAR states that “[t]he agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency’s personnel are acceptable protest resolution methods.”<sup>135</sup> The FAR’s agency-level protest procedures “are established to resolve agency protests effectively, to build confidence in the Government’s acquisition system, and to reduce protests outside of the agency.”<sup>136</sup>

### A. Substantive Protest Requirements

While agency-level protests are typically fairly straight-forward documents and need not be signed or filed by counsel,<sup>137</sup> they must be “concise and logically presented to facilitate review by the agency” and must include, among other items, a “[d]etailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester,” a “[r]equest for a ruling by the agency,” and a “[s]tatement as to the form of relief requested.”<sup>138</sup> Agency-level protests must also include (1) the “name, address and fax and telephone numbers of the protester,” (2) the “[s]olicitation or contract number,” (3) “[c]opies of relevant documents,” (4) “[a]ll information establishing that the protester is an interested party for the purpose of filing a protest,” and (5) “[a]ll information establishing the timeliness of the protest.”<sup>139</sup> Finally, all agency-level protests “will be addressed to the contracting officer or other official designated to receive protests.”<sup>140</sup>

The failure to “substantially comply” with these and certain other requirements “may be grounds for dismissal of the protest.”<sup>141</sup> In this regard, the GAO

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<sup>134</sup> FAR § 33.103(b); *see also* CIBINIC & NASH, *supra* note 131, at 1489 (“This guidance indicates that a potential offeror can obtain the contracting officer’s review of any concern regarding the procurement. In particular, this type of ‘protest’ would be appropriate when a potential offeror has questions about the meaning of a solicitation or concerns that a solicitation is not properly drafted.”).

<sup>135</sup> FAR § 33.103(c).

<sup>136</sup> *Id.* § 33.103(d).

<sup>137</sup> *See, e.g.*, GSAM § 533.103-71(k); 48 C.F.R. § 2833.103(i) (DOJ Acquisition Regulation); *id.* § 2933.103(h) (DOL Acquisition Regulation).

<sup>138</sup> FAR § 33.103(d)(1), (2).

<sup>139</sup> FAR § 33.103(d)(2). Certain agencies add (typically modest) additional requirements, such as statements regarding whether the offeror requests the CO to make the decision or the Agency Protest Official and whether the offeror requests oral argument. *E.g.*, GSAM § 533.103-71(d); 48 C.F.R. § 2833.103(c) (2008) (DOJ).

<sup>140</sup> FAR § 33.103(d)(3).

<sup>141</sup> *Id.* § 33.103(d)(1).

has ruled that an agency-level protest must be in writing and “convey[] the intent to protest” by including both “an expression of dissatisfaction and a request for corrective action.”<sup>142</sup> If the submission can be fairly characterized as simply raising or identifying questions about the procurement or merely making “suggestions or requests for clarification,” it will not likely be considered an agency-level protest.<sup>143</sup>

### **B. Protest Timing Requirements and Suspension of Contract Award/Performance**

Agency-level protests “based on alleged apparent improprieties in a solicitation” must be filed “before bid opening or the closing date for receipt of proposals.”<sup>144</sup> “In all other cases,” protests must be filed “no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.”<sup>145</sup> The agency, however, “for good cause shown, or where it determines that a protest raises issues significant to the agency’s acquisition system, may consider the merits of any protest which is not timely filed.”<sup>146</sup> Thus, agency-level protests generally must be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames.<sup>147</sup> Protesters are cautioned not to rely on an agency’s authority to review an otherwise late protest because agencies rarely exercise this discretionary authority.<sup>148</sup>

Upon an agency’s receipt of a preaward protest, “a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government.”<sup>149</sup> Such “justification or determination” must be “approved at a level above the contracting officer, or by another official pursuant to agency procedures.”<sup>150</sup> If a contract award is withheld pending agency resolution of the protest, the CO must “inform

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<sup>142</sup> Federal Marketing Office—Recons., B-249097, 93-1 CPD ¶ 4 (Comp. Gen., Jan. 5, 1993).

<sup>143</sup> Constantine N. Polites & Co.—Recons., B-233935.2, 89-1 CPD ¶ 173 (Comp. Gen., Feb. 17, 1989).

<sup>144</sup> FAR § 33.103(e).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See 4 C.F.R. § 21.2(a)(3) (2008); Orbit Advanced Techs., Inc., B-275046, 96-2 CPD ¶ 228 (Comp. Gen., Dec. 10, 1996) (protest dismissed where protester’s agency-level protest was untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, 96-2 CPD ¶ 169 (Comp. Gen., Nov. 4, 1996) (same).

<sup>148</sup> *Orbit Advanced*, 96-2 CPD ¶ 228.

<sup>149</sup> FAR § 33.103(f)(1).

<sup>150</sup> *Id.*

the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation.”<sup>151</sup> If the CO is unable to obtain such an extension, “consideration should be given to proceeding with award pursuant to . . . urgent and compelling reasons . . . [or] the best interest of the Government.”<sup>152</sup>

Similarly, upon an agency’s receipt of a protest, “within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request . . . whichever is later,” the CO must “immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government.”<sup>153</sup> The “justification or determination” must likewise be “approved at a level above the contracting officer, or by another official pursuant to agency procedures.”<sup>154</sup>

Significantly, “[p]ursuing an agency protest does not extend the time for obtaining a stay at GAO.”<sup>155</sup> The FAR provides, however, that agencies “may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.”<sup>156</sup>

### C. Agency Protest Decisions and Independent Review

While the FAR provides that agencies “shall make their best efforts to resolve agency protests within 35 days after the protest is filed,”<sup>157</sup> a number of agency FAR supplements call for the agency to make its “best effort” to issue a decision in a shorter period of time.<sup>158</sup> For example, DOJ’s “deciding official must make a best effort to issue a decision on the protest within

<sup>151</sup> *Id.* § 33.103(f)(2).

<sup>152</sup> *Id.* § 33.103(f)(1), (f)(2).

<sup>153</sup> *Id.* § 33.103(f)(3).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 33.103(f)(4).

<sup>156</sup> *Id.* For example, the DOL Acquisition Regulation provides that:

If the [agency-level] protest is denied, and contract performance has been suspended . . . the contracting officer will not lift such suspension until five (5) days after the protest decision has been issued, to allow the protester to file a protest with the [GAO], unless the [head of the contracting activity] makes a new finding under FAR 33.103(f)(3). The contracting officer shall consider allowing such suspension to remain in effect pending the resolution of any GAO proceeding.

48 C.F.R. § 2933.103(m) (2008).

<sup>157</sup> FAR § 33.103(g).

<sup>158</sup> 48 C.F.R. § 2833.103(k) (DOJ); GSAM § 533.103-71(m).



twenty (20) days after the filing date,”<sup>159</sup> while GSA’s “deciding official must make a best effort to issue a decision on the protest within twenty-eight (28) days after the filing date.”<sup>160</sup>

The FAR only requires that agency-level protest decisions “be well-reasoned,” “explain the agency position,” and “be provided to the protester using a method that provides evidence of receipt,”<sup>161</sup> while certain agency FAR supplements add that the decision “may be oral or written.”<sup>162</sup> If the decision is oral, these agencies require the deciding official to “send a confirming letter within three (3) days after the decision” using a method that would provide evidence of receipt, such as facsimile or postal return-receipt.<sup>163</sup>

Under the FAR, agency-level protesters “may request an independent review of their protest at a level above the contracting officer.”<sup>164</sup> Agencies must designate a Government official senior to the CO to conduct this “independent review,” but that official “need not be within the contracting officer’s supervisory chain.”<sup>165</sup> Since the FAR only provides that “[w]hen practicable,” such official “should not have had previous personal involvement in the procurement,”<sup>166</sup> protesters should recognize that the possibility exists that a Government official who has been involved in the procurement will conduct the “independent review.”<sup>167</sup>

The FAR further requires that “[a]gency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest

<sup>159</sup> 48 C.F.R. § 2833.103(k).

<sup>160</sup> GSAM § 533.103-71(m); *see also* 48 C.F.R. § 2933.103(j) (DOL) (20 days). The AMC reports that “[u]sers of the AMC-level protest program have their disputes resolved in approximately 15 days.” *See* Office of the Army General Counsel, Recent ADR Achievements, <http://www.hqda.army.mil/ogc/referenc/adrachieve.htm> (last visited Jan. 31, 2009). In this regard, AMC protest decision goal is to resolve protests “within 20 working days after the filing of the protest.” *See* U.S. Army Materiel Command, Office of the Command Counsel, [http://www.amc.army.mil/amc/command\\_counsel/protestlink.htm](http://www.amc.army.mil/amc/command_counsel/protestlink.htm) (last visited Jan. 31, 2009). *But see* 48 C.F.R. § 933.103(k) (“[DOE deciding official will make a determination] within 35 calendar days, unless a longer period of time is determined to be needed.”).

<sup>161</sup> FAR § 33.103(h).

<sup>162</sup> 48 C.F.R. § 2833(k) (DOJ); *id.* § 2933.103(j) (DOL); GSAM § 533.103-71(m).

<sup>163</sup> 48 C.F.R. § 2833.103(k) (DOJ); 48 C.F.R. § 2933.103(j), (k) (DOL); GSAM § 533.103-71(m).

<sup>164</sup> FAR § 33.103(d)(4).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *See* Jeffrey Kessler, *Feature Comment: Tips for Agencies in Establishing Protest Procedures, and Factors Potential Protesters Should Consider in Selecting a Forum*, 39 THE GOV’T CONTRACTOR ¶ 81, Feb. 19, 1997, at 3–4.

or is available as an appeal of a contracting officer decision on a protest.”<sup>168</sup> For example, the Air Force FAR Supplement states that “[a]n agency protest is usually filed with the contracting officer. Offerors are encouraged to file at the lowest level to resolve the issues concerned. . . . When an agency protest is denied, an offeror may request an independent review at a level above the contracting officer.”<sup>169</sup> The Department of Housing and Urban Development Acquisition Regulation appears only to allow the filing and resolution of a protest with the CO, which may be followed by an appeal to the Head of the Contracting Activity.<sup>170</sup>

Some agencies, however, do not specify whether the independent review is available in the first instance or only on appeal from a CO’s protest decision.<sup>171</sup> In contrast, agency-level protests of The Department of Education (“DOE”) contract awards are decided at a level above the CO (i.e., by the Head of the Contracting Activity or the Procurement Executive), unless they can be resolved by negotiations between the offeror and the CO or through ADR.<sup>172</sup> While the Army FAR Supplement provides that protests “received at a level higher than the contracting office must be referred to the contracting office for resolution,” it continues that “[p]rotests requesting an independent review at a level above the contracting officer will be handled” by certain designated senior officials.<sup>173</sup> Thus, the Army FAR Supplement appears to provide for initial agency review at a level above the CO.

For a GSA procurement, the protester “filing an agency protest has the choice of requesting either that [the CO] or the Agency Protest Official for GSA decide the protest,” which means that the “independent” review can be conducted in the first instance and “is an alternative to a decision” by the CO.<sup>174</sup> The GSA Agency Protest Official will not consider appeals of the CO’s protest decisions.<sup>175</sup> For National Aeronautics and Space Administration (“NASA”) procurements, an offeror may, in the first instance, request independent review and when an offeror “submits an Agency protest to NASA to the contracting officer or alternatively requests an independent review, the decision of the contracting officer or the independent review of-

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<sup>168</sup> FAR § 33.103(d)(4).

<sup>169</sup> Air Force Federal Acquisition Regulation Supplement, 48 C.F.R. § 5333.103(d)(3), (4) [hereinafter AFFARS].

<sup>170</sup> 48 C.F.R. § 2433.103(d)(2), (4)(i) (2008).

<sup>171</sup> *E.g.*, Navy Marine Corps Acquisition Regulation Supplement, 48 C.F.R. § 5233.103 [hereinafter NMCARS]; 48 C.F.R. § 633.103 (Department of State Acquisition Regulation); 48 C.F.R. § 1233.103 (DOT Acquisition Regulation).

<sup>172</sup> *See* 48 C.F.R. § 933.103(i)(1), (j), (k).

<sup>173</sup> AFARS § 5133.103(d)(3), (4).

<sup>174</sup> GSAM § 533.103-71(b), (e).

<sup>175</sup> *Id.* § 533.103-71(e).

ficial shall be final and is not subject to any appeal or reconsideration within NASA.”<sup>176</sup> The Department of Veterans Affairs (“VA”) provides—in the first instance—the choice of either CO or higher-level, independent review of an agency-level protest and of an appeal from a CO’s protest decision.<sup>177</sup> The VA, which encourages the use of ADR for agency-level protests, may also request a decision from the GAO.<sup>178</sup> The Department of Labor provides—in the first instance—the choice of either CO or higher-level, independent review, but does not offer the right of an appeal within the agency.<sup>179</sup> Similarly, the Defense Logistics Agency Acquisition Directive explicitly requires that it provide a higher-level, independent protest procedure as an alternative to filing a protest with the contracting officer so that “a separate, independent decision” may be reached.<sup>180</sup>

Where “independent review” by a Government official is only available as “an agency appellate review of the contracting officer’s decision on the protest,” the GAO’s timeliness requirements will not be extended to take into consideration the pendency of the disappointed offeror’s agency-level protest appeal.<sup>181</sup> This means that if an appeal is available within the agency and is taken, unless it is decided very quickly, the appeal will almost certainly eliminate the protester’s ability to file a protest before the GAO because of the requirement that such a protest be filed within 10 days of the denial of an agency-level protest.<sup>182</sup> Therefore, in certain agency-level protests, the protester can only obtain “independent review” at a level above the CO if the protester is willing to almost certainly waive its right to proceed before the GAO.<sup>183</sup>

For postaward GAO protests following the denial of a postaward agency-level protest, the automatic suspension of contract performance is not available at the GAO, unless the offeror is able to file its GAO protest within 10 calendar days of the contract award, or 5 calendar days of a timely requested briefing (and the GAO has sufficient time to provide notice of such protest

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<sup>176</sup> 48 C.F.R. § 1833.103(d)(4).

<sup>177</sup> *Id.* § 833.103(a)(1), (e), (f).

<sup>178</sup> *Id.* § 833.103(b), (d), (e)(3).

<sup>179</sup> *Id.* § 2933.103(c).

<sup>180</sup> Defense Logistics Acquisition Directive § 33.103 (d)(4) [hereinafter DLAD].

<sup>181</sup> FAR § 33.103(d)(4) (“If there is an agency appellate review of the contracting officer’s decision on the protest, it will not extend GAO’s timeliness requirements.”).

<sup>182</sup> See 4 C.F.R. § 21.2(a)(3) (2008) (“If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered[.]”).

<sup>183</sup> See, e.g., 48 C.F.R. § 833.103(f) (VA) (“Appeals do not extend GAO’s timeliness requirements for appeals to GAO. By filing an appeal as provided in this paragraph, an interested party may waive its rights to further appeal to the Comptroller General at a later date.”).

to the federal agency).<sup>184</sup> Ordinarily, it will be very difficult to file a GAO protest within these time constraints.

#### D. Remedies

In connection with an agency-level protest, if the agency head “determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may [t]ake any action that could have been recommended by the Comptroller General had the protest been filed with [the GAO.]”<sup>185</sup> As a result of a meritorious protest, the GAO

shall recommend that the contracting agency implement any combination of the following remedies: (1) Refrain from exercising options under the contract; (2) Terminate the contract; (3) Recompete the contract; (4) Issue a new solicitation; (5) Award a contract consistent with statute and regulation; or (6) Such other recommendation(s) as GAO determines necessary to promote compliance.<sup>186</sup>

Notably, some agencies treat the deciding official’s corrective action determination as a “recommendation”—similar to a GAO recommendation resolving a protest—that does not necessarily have to be implemented by the contracting agency.<sup>187</sup> For example, the DOJ Acquisition Regulation states that “[i]f the Agency Protest Official sustains a protest, then within 30 days after receiving the Official’s recommendations for relief, the Contracting Officer must either: (1) Fully implement the recommended relief; or (2) Notify

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<sup>184</sup> FAR § 33.103(f)(3); see 31 U.S.C. § 3553(c)–(d) (2006); see also 48 C.F.R. § 2933.103(m) (“The [DOL] contracting officer shall consider allowing such [agency-level protest] suspension [of contract performance] to remain in effect pending the resolution of any GAO proceeding.”).

<sup>185</sup> FAR § 33.102(b)(1). “Because this provision is permissive, there appears to be no restrictions preventing the agency from granting other requested relief following review of an agency-level protest.” CIBINIC & NASH, *supra* note 131, at 1491. The FAR’s apparent designation of the phrase—“does not comply with the requirements of law or regulation”—as the standard of review for agency-level protests appears to be a

too narrow statement of the standard of review that will be applied to formal agency[-level] protests, because such protests will also consider whether the actions of the contracting agency are reasonable (as that requirement is construed by the Comptroller General and the courts). In addition, agencies may adopt broader standards of review in accordance with their own internal procedures.

*Id.* at 1489.

<sup>186</sup> 4 C.F.R. § 21.8(a) (2008). Some agency FAR Supplements provide similar guidance on the available relief. See, e.g., 48 C.F.R. § 1333.103(d) (Department of Commerce); 48 C.F.R. § 2933.103(k) (DOL); GSAM 533.103-71(n); 48 C.F.R. § 2833.103(l) (DOJ).

<sup>187</sup> See 48 C.F.R. § 2933.103(k)(3)(i) (DOL); 48 C.F.R. § 2833.103(l)(1) (DOJ).

the Agency Protest Official in writing if any recommendations have not been implemented and explain why.”<sup>188</sup>

Although the FAR provides that agencies may award the cost of filing and pursuing the agency-level protest (including reasonable attorney, consultant, and expert witness fees and bid and proposal preparation costs) to a prevailing protester under the same basis as in a GAO protest,<sup>189</sup> at least three agency FAR supplements specifically prohibit this practice.<sup>190</sup> Since these agency FAR supplements appear to contradict the FAR, they may be of doubtful validity.<sup>191</sup>

Finally, remedies are available to the Government for sustained postaward protests where the awardee acted improperly.<sup>192</sup> In this regard, the FAR provides that the agency head may require the awardee to reimburse the Government’s costs

where a postaward protest is sustained as the result of an awardee’s intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of [FAR] Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.<sup>193</sup>

### E. Advantages to an Agency-Level Protest

Typically, agency-level protests are the least expensive, least formal,<sup>194</sup> and the simplest and quickest,<sup>195</sup> method for resolving a bid protest.<sup>196</sup> The agency-level protest review may (and, ideally, should) be (1) conducted by experienced procurement professionals<sup>197</sup> and (2) less (or even non-) adversarial in nature

<sup>188</sup> § 2833.103(m). The GSAM § 533.103-71(o), and the DOL Acquisition Regulation, 48 C.F.R. § 2933.103(l), contain substantially the same language.

<sup>189</sup> F.A.R § 33.102(b)(2); *see also id.* § 33.104(h).

<sup>190</sup> GSAM § 533.103-71(k); 48 C.F.R. § 2833.103(i) (DOJ); *id.* § 2933.103(h) (DOL).

<sup>191</sup> *See* FAR § 1.302 (limiting agency acquisition regulations to those necessary to implement and supplement the FAR); *see generally* FAR subpt. 1.4 (concerning “Deviations From the FAR”).

<sup>192</sup> *See* FAR § 33.102.

<sup>193</sup> *Id.* § 33.102(b)(3).

<sup>194</sup> *See* Kessler, *supra* note 167, at 5–6.

<sup>195</sup> The agency-level goal of resolving protests within 35 calendar days or sooner compares favorably to GAO’s 100-calendar-day limit. *Compare* FAR § 33.103(g) to 4 C.F.R. § 21.9(a) (1) *and* FAR § 33.104(f). As discussed below, while the COFC does not have a time limit for the issuance of protest decisions, the agency-level goal is almost always faster than the COFC.

<sup>196</sup> *See* Kessler, *supra* note 167, at 5–6.

<sup>197</sup> *See* Kessler, *supra* note 167, at 4. (“[W]hoever acts as the protest decision authority must not only have experience in the field of Government contracting (although not necessarily as a CO) and knowledge of the FAR, but also knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by

as compared to the GAO or COFC protest review.<sup>198</sup> As discussed above, resolution of agency-level protests is designed to be substantially quicker and more efficient than the GAO or COFC protests and may succeed in resolving the issue without the need of resorting to a more expensive, adversarial, and time-consuming GAO and/or COFC protest.<sup>199</sup> Furthermore, an agency override of the automatic stay should very rarely, if ever, occur in an agency-level protest—as compared to an override involving a GAO protest—because of the short time period allowed for issuing protest decisions.<sup>200</sup>

One commentator has argued that, as a matter of “customer relations,” it is advisable for a contractor to file its protest first before the agency to provide the agency (i.e., the customer) the opportunity to correct its own errors and avoid the spotlight of an unfavorable GAO or COFC decision.<sup>201</sup> While this point has some merit, it may overlook the fact that protests at Federal Government agencies have long been standard operating procedure.<sup>202</sup> That same commentator further contends:

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these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in which this person typically acts.”).

<sup>198</sup> See *id.* at 5. (“[As] a matter of reciprocal customer relations . . . you [should] . . . consider that agency to be a customer . . . . By filing your initial protest at the agency level, you are providing the agency with the opportunity to review your protest and take corrective action, if warranted, without being in the limelight of a sustained GAO protest.”).

<sup>199</sup> See Troff, *supra* note 84, at 147–48; Troff, *supra* note 85, 1–2, 13–14; Joan K. Fiorino & Steven W. Feldman, *The Agency-Level Protest: An Idea Whose Time Has Come*, 75 Fed. Cont. Rep. (BNA) 243 (Feb. 27, 2001) (“[A]n agency-level protest is less confrontational than a GAO or judicial protest, which means that the agency might be more willing to compromise or settle. Agency-level protests are less public than a GAO or COFC protest, which the agency knows will result in a widely-distributed decision that could reflect poorly on the agency if the challenge is sustained.”).

<sup>200</sup> Kessler, *supra* note 167, at 5 (“[Overrides] are rare in GAO litigation. They also should almost never be necessary in an agency protest in light of the short time span for issuing decisions”); Troff, *supra* note 85, at 10 n.43.

<sup>201</sup> Kessler, *supra* note 167, at 5. This commentator further states that

[i]n the prebid opening or preclosing stage of a procurement, there is no question that any disagreement or suggestion as to the terms of the solicitation should initially be brought to the CO. This provides the CO with the potential to correct an error without the need for higher-level involvement. It is only after a negative response (or a lack of a response) from the CO that a potential bidder or offeror should take its complaint to a higher level for resolution. If the problem is not solved to the satisfaction of the potential offeror, steps should be taken to initiate a timely bid protest appeal either to a higher level agency protest forum, the GAO, or the courts.

*Id.* at 3.

<sup>202</sup> See *id.*

Significant substantive reasons also favor selecting a higher[-]level agency protest program. The first is that GAO and the courts must review a protest based upon statute and regulation. However, many procurement problems do not obviously violate either statute or regulation, and may thus not be a basis for a decision in favor of the protester in these forums. Such problems may not be recognized by the CO or the working level team of evaluators, but may cause corrective action if brought to the attention of a higher[-]level agency protest decision authority. This is especially the case regarding prebid opening or preclosing matters, usually involving evaluation factors, specifications, or the statement of work.

A protest to GAO of an apparently minor aspect of the evaluation factors, specification or statement of work, which might appear insignificant to an inexperienced observer, could easily result in a decision that the agency may define its own needs. However, review by higher[-]levels within the agency by persons with expertise in the area may generate different results, especially since these are the people responsible for defining the agency's needs. Corrective action in such situations, when the matter is timely raised, is a low cost method of correcting the problem for the Government.

Timeliness concerns also favor filing at the agency. If a protest is not timely filed at the GAO, it will not be heard. Agencies, however, are free to review protests and take corrective action *at any time*. If a protest is clearly meritorious, and the protest is only slightly untimely, chances of relief are enhanced, especially in a pre-award mode.<sup>203</sup>

While the authors of this Article do not agree with some of the above-quoted statement (and particularly warn against any expectation of having an untimely agency-level protest considered on the merits), these are all issues that should be considered in the selection of a bid protest forum. However, the prevailing wisdom in the bid protest bar appears to be that it is usually worth bringing an agency-level protest only for the most egregious and obvious of Government procurement errors and/or where the CO (or other member of the source selection team) is clearly acting outside of the scope of his authority or so improperly that a higher-level agency official will be shocked or embarrassed when informed of such actions. This general precept suggests that the agency-level protests only be brought when the procurement error is clear from the face of the documents in the protester's possession and that the protester not rely on what the protester speculates to be the contents of internal Government documents, to which the protester will not ordinarily have access.<sup>204</sup>

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<sup>203</sup> *Id.* at 7–8; see CIBINIC & NASH, *supra* note 131, at 1489–91. Regarding the statement that that the GAO and the courts must review a protest based upon statute and regulation, it is not clear how this standard differs from FAR 33.102(b), which provides for corrective action in an agency-level protest where the agency head “determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation.” FAR § 33.102(b).

<sup>204</sup> See Troff, *supra* note 87, 148 n.181 (“Although disappointed offerors make use of the [U.S. agency-level protest] system in fairly large numbers, it appears that they are willing

## F. Disadvantages to an Agency-Level Protest

Perhaps the major disadvantage to filing an agency-level protest is that, unlike a GAO or COFC protest, the protester has no right to discovery.<sup>205</sup> Although the FAR provides that, for an agency-level protest, “[t]o the extent permitted by law and regulation, the parties may exchange relevant information,”<sup>206</sup> this infrequently leads to a protester receiving the equivalent of any significant discovery and, in fact, some agency FAR supplements specifically state that their agency-level protest procedures “do not provide for any discovery.”<sup>207</sup> Thus, for this reason and because there is typically no mechanism to exchange documents pursuant to a protective order, in agency-level protests the protester is typically denied access to the complete record and, as a result, the agency is denied the benefit of the protester’s comments on the complete record.<sup>208</sup> Consequently, the decision regarding where to file a protest may be strongly influenced by whether the protester believes that it needs discovery.

Another significant disadvantage is that protesters that have obtained an automatic stay of contract performance pending the disposition of the agency-level protest ordinarily have no right—because of the GAO’s strict timeliness requirements—to have the stay continue at the GAO if they lose their agency-level protest and then file a protest before the GAO.<sup>209</sup> As one commentator has noted:

[t]his is a matter which should be dealt with through negotiations prior to filing the agency protest. The potential protester should specifically request that the agency agree to continue the stay if the agency dismisses or denies the protest, and the protester

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to do so only in those cases where the alleged procuring agency errors are easily discernable from the face of the solicitation or bid documents or relate to clearly defined procedural requirements.”); Troff, *supra* note 88, at 18 (“[Agency-level protests] primarily attract[] those bid protests that contractors regard as candidates for efficient (i.e., prompt and inexpensive) resolution.” They “tend to be the less ‘information intense’ protests, such as preaward protests against solicitation terms and post-award protests relating to the timely receipt of bids, bid responsiveness, and mistakes in bids.”).

<sup>205</sup> Kessler, *supra* note 167, at 8.

<sup>206</sup> FAR § 33.103(g).

<sup>207</sup> *E.g.*, GSAM § 533.103-71(h)(2) (2004); 48 C.F.R. § 2833.103(g) (DOJ) (2008); *id.* § 2933.103(f) (DOL); see Troff, *supra* note 84, at 149 (“[A]gencies rarely open their procurement files to agency-level protestors . . .”).

<sup>208</sup> See Kessler, *supra* note 167, at 8 (“[T]he cornerstone of the decision regarding where to file the initial protest will frequently boil down to the question of whether the protester feels that it needs a protective order and full administrative report.”); Troff, *supra* note 84, at 149; Troff, *supra* note 85, at 19; Gabig, *supra* note 92, at 40 n.6.

<sup>209</sup> FAR § 33.103(f)(3), (4); see also Fiorino & Feldman, *supra* note 199.



[then pursues a protest before the] GAO. The agency's decision on continuing the stay will be a factor in the protester deciding where to file its initial protest."<sup>210</sup>

Potential protesters are cautioned that it is often difficult to obtain such an agreement—particularly given the time constraints associated with filing a timely protest—and that it may be difficult to enforce such an agreement. Finally, as discussed above, waiting for an independent agency-level review of a contracting officer's protest decision can make it difficult to file a timely follow-on GAO protest.

Another substantial disadvantage to the agency-level protest is the lack of independence—or at least the perceived lack of independence—of the agency official issuing the protest decision. As noted above, if the agency official rendering the decision is at least at a level above the CO, it is still possible that such official had some involvement in the procurement.<sup>211</sup> Furthermore, even if that official had no involvement in the procurement, agency-level protests almost always involve one Government official reviewing the work of a colleague in the same agency.<sup>212</sup> Consequently, unlike a protest before the GAO or the COFC, there are very limited safeguards with respect to the impartiality or independence of the agency-level protest decisionmaker.<sup>213</sup> Remember that an agency-level protest is requesting an agency to reverse its own decision or admit it made a mistake, which is a path some agencies are unwilling to take because of, among other things, the time and effort already invested in the procurement.<sup>214</sup> As one prominent commentator stated, the use of the agency-level protest mechanism “depends on the stature and standing of the individuals who are given the responsibility of providing an independent review of the procurement. It also depends on agencies acknowledging when they have not conducted a procurement properly and affording some meaningful remedy when possible.”<sup>215</sup>

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<sup>210</sup> Kessler, *supra* note 167, at 8; *see also* Troff, *supra* note 84, at 147; 48 C.F.R. § 2933.103(m) (“The [DOL] contracting officer shall consider allowing such [agency-level protest] suspension [of contract performance] to remain in effect pending the resolution of any GAO proceeding.”).

<sup>211</sup> *See* FAR § 33.103(d)(4).

<sup>212</sup> *See id.* § 33.103.

<sup>213</sup> *See id.*

<sup>214</sup> *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN L.J. AM. U. 461, 470 (1995).

<sup>215</sup> Nash & Cibinic, *supra* note 85; *see* Kovacic, *supra* note 214, at 470; Troff, *supra* note 84, at 148; Kessler, *supra* note 167, at 4–5; Gabig, *supra* note 92, at 40 n.6.

### III. Protests Before the Government Accountability Office

#### A. GAO Protest Jurisdiction

The jurisdiction for the GAO to hear bid protest matters arises from the CICA, which authorizes the GAO to adjudicate bid protests of federal procurements.<sup>216</sup> Before the CICA, there was no specific statutory authority providing the GAO the jurisdiction to consider federal procurement challenges.<sup>217</sup> With the enactment of the CICA, Congress formally codified and strengthened the bid protest functions that were then currently in operation at the GAO.<sup>218</sup> The CICA states that “[a] protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.”<sup>219</sup> The CICA also authorizes the GAO to “prescribe such procedures as may be necessary to the expeditious decision of protests.”<sup>220</sup> The GAO’s bid protest system and procedures are set forth in Part 21 of Title 4 of the Code of Federal Regulations and in FAR Subpart 33.1.<sup>221</sup>

The GAO’s Bid Protest Regulations specify that:

An interested party may protest a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; and a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.<sup>222</sup>

Although the GAO has broad authority to decide bid protests, the GAO has set forth in its implementing regulations specific examples of protests that it will dismiss without consideration.<sup>223</sup>

(a) *Compliance with Protest Procedures.* The GAO generally will not consider protests that fail to meet the applicable procedural requirements.<sup>224</sup> For example, the GAO will dismiss protests that are not filed before either the GAO or the agency within the required time limits.<sup>225</sup> Similarly, the GAO will

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<sup>216</sup> 31 U.S.C. §§ 3551–3556 (2006).

<sup>217</sup> See *supra* note 18 and accompanying text.

<sup>218</sup> See H.R. CONF. REP. NO. 98-861, at 1435, *reprinted in* 1984 U.S.C.C.A.N. 697, 2123.

<sup>219</sup> 31 U.S.C. § 3552(a).

<sup>220</sup> 31 U.S.C. § 3555(a).

<sup>221</sup> 4 C.F.R. § 21 (2008); 48 C.F.R. § 33.104 (2008). Agency FAR supplements contain regulatory procedures for managing GAO protests. See *generally* AFARS 5133.104; AFFARS 5333.104; NMCARS § 5233.104; DLAD 33.104.

<sup>222</sup> 4 C.F.R. § 21.1(a).

<sup>223</sup> *Id.* § 21.5.

<sup>224</sup> *Id.* § 21.5(e)–(f).

<sup>225</sup> *Id.* § 21.5(e) (citing 4 C.F.R. § 21.2 (specifying time limits)).

dismiss a protest that lacks a detailed statement of the legal or factual grounds for the protest, or fails to clearly state legally sufficient grounds for protest.<sup>226</sup>

(b) *Protests Concerning Contract Administration Issues.* The GAO will not consider protests of contract administration issues because the administration of a contract is within the discretion of the CO and any disputes are to be resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978.<sup>227</sup> For example, the GAO has declined to consider protests involving contract modifications,<sup>228</sup> terminations for default,<sup>229</sup> registration or licensing requirements,<sup>230</sup> and decisions to novate contracts rather than re-compete them.<sup>231</sup> Although they could be classified as contract administration disputes, the GAO has heard protests concerning an agency's exercise of an option<sup>232</sup> and an agency's acceptance of nonconforming supplies.<sup>233</sup> The GAO may also decide a protest concerning a contract modification constituting a cardinal change to, or that is outside the scope of, the original contract requirements.<sup>234</sup>

(c) *Task/Delivery Order Protests.* The question whether protests are permitted against the issuance of orders under a task or delivery order contract has been ripe for debate in recent years. A task or delivery order contract means, respectively, a "contract for [services or property] that does not procure or specify a firm quantity of [services or property] (other than a minimum or maximum quantity) and that provides for the issuance of orders for the [performance of tasks or the delivery of property] during the period of the contract."<sup>235</sup> Until recently, the Federal Acquisition Streamlining Act of 1994 ("FASA") expressly prohibited most protests of the issuance of orders under such contracts, stating that "[a] protest is not authorized in connection with

<sup>226</sup> *Id.* § 21.5(f) (citing 4 C.F.R. § 21.1(c)(4), (f)); see MCI Telecomms. Co., B-276659.2, 97-2 CPD ¶ 90, at \*12 (Comp. Gen., Sept. 29, 1997).

<sup>227</sup> 4 C.F.R. § 21.5(a) (citing 41 U.S.C. §§ 601–613); see FAR § 52.233-1 (citing 41 U.S.C. §§ 601–613).

<sup>228</sup> Zafer Constr. Co., B-295903, B-295903.2, 2005 CPD ¶ 458 (Comp. Gen., May 9, 2005).

<sup>229</sup> B&M Constr., Inc.—Recons., B-246108.2, 92-1 CPD ¶ 458 (Comp. Gen., Nov. 13, 1991).

<sup>230</sup> Health Care Waste Servs., B-266302, 96-1 CPD ¶ 13 (Comp. Gen., Jan. 19, 1996).

<sup>231</sup> Bosma Mach. & Tool Corp., B-257433.2., B-257433.3, 94-2 CPD ¶ 143 (Comp. Gen., Oct. 17, 1994).

<sup>232</sup> Sippican, Inc., B-257047, B-257047.2, 95-2 CPD ¶ 220 (Comp. Gen., Nov. 13, 1995).

<sup>233</sup> Marvin J. Perry & Assocs., B-277684, B-277685, 97-2 CPD ¶ 128 (Comp. Gen., Nov. 4, 1997).

<sup>234</sup> HG Props. A, LP, B-290416, B-290416.2, 2002 CPD ¶ 128 (Comp. Gen., July 25, 2002).

<sup>235</sup> 10 U.S.C. § 2304d (2006); 41 U.S.C. § 253k (2006); 10 U.S.C. § 2304d.

the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.”<sup>236</sup> The FASA provided for disputes—as opposed to protests—of task or delivery orders to be heard by an agency ombudsman.<sup>237</sup>

The GAO consistently held fast to the ban against task or delivery order protests unless there was a challenge to an order that increased the scope, maximum value, or period of the underlying contract.<sup>238</sup> However, the GAO has somewhat narrow jurisdiction over protests of orders placed under the GSA Federal Supply Schedule program<sup>239</sup> and challenges in procurements where a “downselection” of offerors occurred as the result of the issuance of an order under a task and delivery order contract.<sup>240</sup>

The GAO’s jurisdiction over delivery and task order protests was substantially expanded upon enactment of the National Defense Authorization Act for Fiscal Year 2008.<sup>241</sup> Section 843 of the Act imposed new competition requirements for task and delivery order contracts and authorized the filing of protests “in connection with the issuance or proposed issuance of a task or delivery order . . . valued in excess of \$10,000,000.”<sup>242</sup> Significantly, the GAO has exclusive jurisdiction to decide such protests.<sup>243</sup> These bid protest provisions became effective on May 27, 2008, and they will remain in effect for three years.<sup>244</sup>

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<sup>236</sup> 10 U.S.C. § 2304c(d) (amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(a), 122 Stat. 3, 237–38); 41 U.S.C. § 253j(d) ((amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(b), 122 Stat. 3, 238–39).

<sup>237</sup> 10 U.S.C. § 2304c(e) (amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(a), 122 Stat. 3, 237–38); 41 U.S.C. § 253j(e) (amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843(b), 122 Stat. 3, 238–39).

<sup>238</sup> Cartographics, LLC, B-297121, 2005 CPD ¶ 207 (Comp. Gen., Nov. 15, 2005).

<sup>239</sup> See *Severn Co.*, B-275717, B-275717.2, 97-1 CPD ¶ 181, at \*2–3 n.1 (Comp. Gen., April 28, 1997).

<sup>240</sup> *Teledyne-Commodore, LLC—Recons.*, B-278408.4, 98-2 CPD ¶ 121 (Comp. Gen., Nov. 23, 1998) (overruling *Electro-Voice, Inc.*, B-278319, B-278319.2, 98-1 CPD ¶ 23 (Comp. Gen., Jan. 15, 1998)); see *Reversing Itself; GAO Finds Jurisdiction Over Protests of Task Orders Issued Under Multiple Awards Contracts*, 40 THE GOV’T CONTRACTOR ¶ 562, Dec. 16, 1998.

<sup>241</sup> Defense Authorization Act for Fiscal Year 2008, § 843.

<sup>242</sup> *Id.*, 122 Stat. at 139 (amending 41 U.S.C. § 253j).

<sup>243</sup> *Id.*, 122 Stat. at 139.

<sup>244</sup> *Id.*, 122 Stat. at 3, 139.

Section 843's grant of exclusive protest jurisdiction to the GAO has created several unresolved issues.<sup>245</sup> First, it has not yet been determined whether a task or delivery order constitutes a "contract" for purposes of the Government's obligation to automatically suspend award or performance upon receiving notice of a timely protest. The CICA states that, absent a proper suspension override determination, "a contract" may not be awarded after the agency has received notice of a protest from the GAO.<sup>246</sup> If the "contract" has already been awarded, the agency must suspend performance while the protest is pending.<sup>247</sup> The CICA does not define the term "contract."<sup>248</sup> FAR § 2.101 broadly defines "contract,"<sup>249</sup> but separately defines the terms "delivery order" and "task order" as orders "placed against an established contract."<sup>250</sup> In light of this distinction, it could be argued that task and delivery orders do not constitute contracts under the FAR and therefore the timely protest of a task or delivery order does not mandate the automatic suspension of award or performance.<sup>251</sup>

Second, it is unclear whether an offeror can avail itself of the agency-level protest procedures in FAR § 33.103 to protest the issuance of a task or delivery order. The authors of this Article view an agency-level protest of a task or delivery order award as likely to be dismissed for lack of jurisdiction.

Third, there are no established standards to determine whether a task or delivery order exceeds \$10 million in value for purposes of establishing GAO jurisdiction to decide a protest.<sup>252</sup> For example, it is unclear whether valua-

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<sup>245</sup> See generally James J. McCullough, Deneen J. Melander & William S. Speros, *Acquisition Reform Revisited—Section 843 Protests Against Task and Delivery Order Awards at GAO*, 50 THE GOV'T CONTRACTOR ¶ 75, Mar. 5, 2008.

<sup>246</sup> 31 U.S.C. § 3553(c) (2006).

<sup>247</sup> *Id.* § 3553(d).

<sup>248</sup> McCullough *et al.*, *supra* note 245.

<sup>249</sup> The term "contract" is defined as "a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds . . ." FAR § 2.101.

<sup>250</sup> *Id.* Perhaps creating additional ambiguity, the term "single contract," as used in the definition of "bundling," includes "[a]n order placed against an indefinite quantity contract under a . . . [t]ask-order contract or delivery-order contract awarded by another agency (i.e., Governmentwide acquisition contract or multi-agency contract)." *Id.*

<sup>251</sup> If an agency refrains from suspending performance pending resolution of a protest, a protester may seek an injunction from the COFC pending GAO's decision on the merits of the protest. See *Ramcor Servs. Group, Inc. v. U.S.*, 185 F.3d 1286, 1287 (Fed. Cir. 1999); *Federal Circuit Rules That COFC Has Jurisdiction to Enjoin Agency's Override of CICA Stay*, 41 THE GOV'T CONTRACTOR ¶ 361, Aug. 18, 1999.

<sup>252</sup> See 10 U.S.C. § 2304c(e) (2006); 41 U.S.C. § 253j(e) (2006).

tion can be based on the awarded price, the protester's quote, other bidders' quotes, the agency's valuation based on market research, or some combination of these or other factors. If one method results in a valuation of more than \$10 million (e.g., the protester quoted over \$10 million), but another method values the order at less than \$10 million, the GAO's authority to decide the protest could be challenged.<sup>253</sup>

(d) *Responsibility Determinations*. The FAR states that the Government may only award contracts to or make purchases from responsible contractors.<sup>254</sup> Therefore, a CO must make an affirmative determination that a bidder or offeror is capable of performing a contract before making a purchase or award.<sup>255</sup> Until recently, the GAO would not consider a protest challenging an affirmative determination of responsibility because a responsibility determination is largely committed to the CO's discretion.<sup>256</sup> Although the GAO still generally will not consider protests of responsibility determinations, the GAO revised its regulations in 2002 to hear specific categories of affirmative responsibility protests.<sup>257</sup>

The GAO will now hear affirmative responsibility protests where the solicitation contains definitive responsibility criteria that were allegedly not met.<sup>258</sup> The GAO will also decide protests that identify evidence raising serious concerns that the CO unreasonably failed to consider available relevant information or otherwise violated a statute or regulation when making the responsibility determination.<sup>259</sup> For example, if the protest "includes specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible," the GAO will consider the merits of the protest and not dismiss it outright.<sup>260</sup>

(e) *Procurements by Nonfederal Agencies*. The GAO will summarily dismiss protests of procurements by agencies other than federal agencies.<sup>261</sup> For purposes of the GAO's bid protest jurisdiction, the term "federal agency" means

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<sup>253</sup> See 10 U.S.C. § 2304c(e); 41 U.S.C. § 253j(e).

<sup>254</sup> FAR § 9.103(a).

<sup>255</sup> *Id.* § 9.103(b).

<sup>256</sup> FN Mfg., Inc., B-297172, B-297172.2, 2005 CPD ¶ 212 (Comp. Gen. Dec. 1, 2005).

<sup>257</sup> General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, Government Procurement, 67 Fed. Reg. 79,833, 79,833 (Dec. 31, 2002).

<sup>258</sup> 4 C.F.R. § 21.5(c) (2008).

<sup>259</sup> *Id.*; T.F. Boyle Transp., Inc., B-310708, B-310708.2, 2008 CPD ¶ 52 (Comp. Gen. Jan. 29, 2008).

<sup>260</sup> 67 Fed. Reg. at 79,834; Transcontinental Enters., Inc., B-294765, 2004 CPD ¶ 240 (Comp. Gen. Nov. 30, 2004).

<sup>261</sup> 4 C.F.R. § 21.5(g).

“any executive department or independent establishment in the executive branch, including any wholly owned government corporation,<sup>[262]</sup> and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.”<sup>263</sup> The GAO regulations specify that the GAO will not hear protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities.<sup>264</sup>

The GAO may take jurisdiction over protests of nonfederal agency procurements on a case-by-case basis if the protester can demonstrate that a federal agency was involved to such an extent that it effectively was a procurement by a federal agency.<sup>265</sup> The GAO will also hear the merits of a protest that alleges that a nonfederal agency was acting as a conduit for a federal agency to circumvent applicable procurement statutes.<sup>266</sup> Finally, the GAO will consider a protest involving a nonfederal agency if the agency involved agrees in writing to have the protest decided by the GAO.<sup>267</sup> Note, however, that the nonfederal agency has no obligation to automatically suspend contract award or performance upon receiving notice of a timely protest.<sup>268</sup>

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<sup>262</sup> Wholly owned Government corporations, such as the Overseas Private Investment Corporation, are identified in 31 U.S.C. § 9101(3). The GAO will not decide protests of procurements by partially owned Government (i.e., mixed ownership) corporations identified in 31 U.S.C. § 9101(2), such as the Federal Deposit Insurance Corporation or the former Resolution Trust Corporation. *Cablelink*, Comp. Gen. Dec. B-250066, 92-2 CPD ¶ 135 (Comp. Gen. Aug. 28, 1992); *Kennan Auction Co.*, Comp. Gen. Dec. B-248965, 92-1 CPD ¶ 503 (Comp. Gen. June 9, 1992).

<sup>263</sup> 4 C.F.R. § 21.0(c); *see also* 31 U.S.C. § 3551(3); 40 U.S.C. § 102 (2006); *Court Reporting Servs., Inc.*, B-259492, 94-2 CPD ¶ 236 (Comp. Gen. Dec. 12, 1994).

<sup>264</sup> 4 C.F.R. § 21.5(g); *see Americable Int'l, Inc.*, B-251614, B-251615, 93-1 CPD ¶ 336 (Comp. Gen. Apr. 20, 1993). A nonappropriated fund instrumentality (NAFI) is “a special breed of federal instrumentality, which cannot be fully analogized to the typical federal agency supported by federal funds.” *Cosme Nieves v. Deshler*, 786 F.2d 445, 448 (1st Cir. 1986). Examples of NAFIs include the Federal Prison Industries and various Morale, Welfare, and Recreation activities of the military departments. *USA Fabrics*, B-295737, B-295737.2, 2005 CPD ¶ 82 (Comp. Gen. Apr. 19, 2005); *Sodexho Mgmt., Inc.*, B-289605.2, 2002 CPD ¶ 111 (Comp. Gen. July 5, 2003).

<sup>265</sup> *See LDDS Worldcom*, B-270109, 96-1 CPD ¶ 45 (Comp. Gen. Feb. 6, 1996); *Americable Int'l*, 93-1 CPD ¶ 336; *Artisan Builders*, B-220804, 86-1 CPD ¶ 85 (Comp. Gen. Jan. 24, 1986).

<sup>266</sup> *LDDS Worldcom*, 96-1 CPD ¶ 45.

<sup>267</sup> 4 C.F.R. § 21.13(a).

<sup>268</sup> *Id.* § 21.13(b) (citing 31 U.S.C. § 3553(c), (d)).

(f) *Small Business Administration Issues.* The GAO has limited jurisdiction to decide protests relating to Small Business Administration (“SBA”) related issues.<sup>269</sup> The SBA has exclusive jurisdiction to decide “[c]hallenges of established size standards or the size status of particular firms.”<sup>270</sup> The GAO will not review protests relating to the issuance of, or refusal to issue, a small business certificate of competency unless the protest (1) “show[s] possible bad faith on the part of government officials,” (2) alleges “that the SBA failed to follow its own published regulations,” or (3) alleges that the SBA “failed to consider vital information bearing on the firm’s responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency.”<sup>271</sup> Finally, the GAO will not review an agency’s decision to place or not to place a procurement under the Small Business Act § 8(a) program “absent a showing of possible bad faith on the part of government officials or that regulations may have been violated.”<sup>272</sup>

(g) *Subcontract Protests.* The GAO generally will not decide any protest of the award or proposed award of a subcontract.<sup>273</sup> The GAO will consider subcontract protests at the request of the agency awarding the prime contract.<sup>274</sup> The GAO may also consider a subcontract protest if the agency handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the Government.<sup>275</sup> The CICA requirements concerning the suspension of award or performance pending determination of a protest do not apply to subcontract protests.<sup>276</sup>

(h) *Suspensions and Debarments.* The GAO will not review challenges to the suspension or debarment of contractors.<sup>277</sup>

(i) *Procurement Integrity.* The GAO will dismiss any protest based on a violation of the Procurement Integrity Act unless the protester reported the

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<sup>269</sup> *Id.* § 21.5(b).

<sup>270</sup> 4 C.F.R. § 21.5(b)(1); 15 U.S.C. § 637(b)(6) (2006); *e.g.* Premier Cleaning Sys., Inc., Comp. Gen. Dec. B-249179.3, 92-2 CPD ¶ 51 (Comp. Gen. July 27, 1992).

<sup>271</sup> 4 C.F.R. § 21.5(b)(2).

<sup>272</sup> 4 C.F.R. § 21.5(b)(3); *see* 15 U.S.C. § 637(a).

<sup>273</sup> 4 C.F.R. § 21.5(h).

<sup>274</sup> *Id.* §§ 21.5(h), 21.13(a); *e.g.* RGB Display Corp., B-284699, 2000 CPD ¶ 80, (Comp. Gen. May 17, 2000); Compugen, Ltd., Comp. Gen. Dec. B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103.

<sup>275</sup> *RGB Display*, 2000 CPD ¶ 80; *Subcontractor Cannot Protest Change Order for Competitor’s Product if Change Order Was Integral to Prime Contract*, 42 THE GOV’T CONTRACTOR ¶ 221, June 21, 2000.

<sup>276</sup> 4 C.F.R. § 21.13(b) (citing 31 U.S.C. § 3553(c), (d)).

<sup>277</sup> *Id.* § 21.5(i); *see also* Logan, LLC, B-294974.6, 2006 CPD ¶ 188 (Comp. Gen. Dec. 1, 2006). *See generally* Joseph D. West et al., *Suspension & Debarment*, BRIEFING PAPERS No. 06-9, Aug. 2006.



alleged offense to the procuring agency within 14 days after discovering the possible violation.<sup>278</sup> No such requirement expressly exists for a COFC protest or an agency-level protest.<sup>279</sup>

(j) *Competitive Range Determinations*. The GAO “will not consider protests asserting that the protester’s proposal should not have been included or kept in the competitive range.”<sup>280</sup>

(k) *Public-Private Competition*. The GAO “will not review the decision of an agency tender official to file or not to file a protest on behalf of federal employees in connection with a public-private competition.”<sup>281</sup>

(l) *Judicial Proceedings*. The GAO will dismiss a protest if it involves a matter that is the subject of ongoing litigation before, or has been decided on the merits by, a court of competent jurisdiction.<sup>282</sup> If requested by a court, the GAO may issue an advisory opinion on a bid protest issue that is before the court.<sup>283</sup>

## B. Standing to File or Intervene in a Protest

Only an “interested party” may protest a procurement action before the GAO.<sup>284</sup> The CICA defines an interested party as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”<sup>285</sup> To qualify as an interested party before the due date for bids or proposals, a protester must be a prospective bidder or offeror with a direct economic interest in the award of, or failure to award, a contract.<sup>286</sup>

<sup>278</sup> 4 C.F.R. § 21.5(d); see 41 U.S.C. § 423(g) (2006); FAR § 33.102(f); FAR § 3.104; see also SRS Techs., B-277366, 97-2 CPD ¶ 42 (Comp. Gen. July 30, 1997).

<sup>279</sup> See 41 U.S.C. § 423(g); *id.* § 423(h)(7) (preserving remedies).

<sup>280</sup> 4 C.F.R. § 21.5(j).

<sup>281</sup> *Id.* § 21.5(k).

<sup>282</sup> *Id.* § 21.11(b); e.g. Warvel Prods., Inc., B-281051.5, 99-2 CPD ¶ 13, at 8–9 (Comp. Gen. July 7, 1999); Cecile Indus., Inc., B-211475.4, 83-2 CPD ¶ 367 (Comp. Gen. Sept. 23, 1983).

<sup>283</sup> 4 C.F.R. § 21.11(b); Patriot Contract Servs.—Advisory Opinion, B-294777.3, 2005 CPD ¶ 97 (Comp. Gen. May 11, 2005); TEAC Am. Corp., Inc., B-259831, B-259831.2, B-259831.3, 95-1 CPD ¶ 273 (Comp. Gen. May 3, 1995).

<sup>284</sup> 31 U.S.C. § 3553(a) (2006); 4 C.F.R. § 21.1(a).

<sup>285</sup> 31 U.S.C. § 3551(2)(A); 4 CFR § 21.0(a)(1). The term “interested party” “also includes the official responsible for submitting a federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76,” who in the authors’ experience is one individual designated as an agent by a majority of the affected employees. 31 U.S.C. § 3551(2)(B); 4 C.F.R. § 21.0(a)(2).

<sup>286</sup> 4 C.F.R. § 21.0(a)(1); see Total Procurement Servs., Inc., B-272343, 96-2 CPD ¶ 92 (Comp. Gen. Aug. 29, 1996); D.J. Findley, Inc., B-221096, 86-1 CPD ¶ 121 (Comp.

After the due date for bid opening or the submission of proposals, a protester must be an actual bidder or offeror with a direct economic interest.<sup>287</sup> Generally, a bidder or offeror must be “next in line” for and eligible to receive the award to be an interested party.<sup>288</sup> One who could be next in line but for the alleged agency error is also an interested party.<sup>289</sup> For example, a protester that is not the second ranked offeror based on an allegedly improper technical evaluation is nevertheless an interested party if it could have received the award based on a proper technical evaluation.<sup>290</sup> Similarly, a bidder or offeror who is not next in line for the award is an interested party if it would regain the opportunity to compete if its protest is sustained.<sup>291</sup>

Other bidders and offerors who have a direct economic interest in the outcome of a protest may be permitted to intervene in the protest.<sup>292</sup> Before award, a bidder or offeror may intervene if it has a “substantial prospect” of receiving the award if the protest is denied.<sup>293</sup> After award, the GAO generally will only allow the awardee to intervene in the protest.<sup>294</sup>

### C. Time Limits to File a Protest

A protester must include in its protest sufficient information to establish that the protest is timely.<sup>295</sup> The GAO may dismiss any protest that is untimely on its face, and will not permit a protester to establish the timeliness of its protest after-the-fact in a request for reconsideration.<sup>296</sup>

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Gen. Feb. 3, 1986).

<sup>287</sup> 4 C.F.R. § 21.0(a)(1).

<sup>288</sup> See *Ogden Support Servs., Inc.*, B-270354.2, 97-1 CPD ¶ 135 (Comp. Gen. Oct. 29, 1996) (no standing when another offeror has a lower cost and higher technical score); *Watkins Sec. Agency, Inc.*, B-248309, 92-2 CPD ¶ 108 (Comp. Gen. Aug. 14, 1992) (highest priced of three technically equal bidders was not an interested party).

<sup>289</sup> See, e.g., *Bendix Field Eng'g Corp.*, B-246236, 96-1 CPD ¶ 227 (Comp. Gen. Feb. 22, 1992) (offeror with third lowest proposal has standing to allege that the agency miscalculated its proposal).

<sup>290</sup> See *Int'l Data Prods., Corp.*, B-274654 et al., 97-1 CPD ¶ 34 (Comp. Gen. Dec. 26, 1996) (protesters that offered lower prices than the awardee and alleged improper technical evaluations were interested parties); *Government Tech. Servs., Inc.*, B-258082 et al., 94-2 BCA ¶ 93 (Comp. Gen. Aug. 1994) (protester not an interested party because it did not allege that higher-ranked offers were improperly evaluated).

<sup>291</sup> See *Teltara, Inc.*, B-245806, 92-1 CPD ¶ 128 (Comp. Gen. Jan. 30, 1992); *Remtech, Inc.*, B-240402, B-240402.5, 91-1 CPD ¶ 35 (Comp. Gen. Jan. 4, 1991).

<sup>292</sup> See 4 C.F.R. § 21.0(b).

<sup>293</sup> *Id.* § 21.0(b)(1).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* § 21.2(b).

<sup>296</sup> *Id.*

A protest based upon “alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals” must be filed prior to bid opening or the time set for receipt of initial proposals.<sup>297</sup> A protest based on improprieties in a solicitation that is filed prior to bid opening or the time set for receipt of initial proposals is timely regardless of how long the protester was aware of the improprieties.<sup>298</sup> When an amendment to a solicitation provides the basis for the protest, then the protest must be filed by the next due date for proposals.<sup>299</sup>

Any other protest must be filed “not later than 10 days after the basis of protest is known or should have been known (whichever is earlier).”<sup>300</sup> However, in the case of competitive proposals, if a debriefing is requested and required,<sup>301</sup> the protest cannot be filed before the debriefing date and must be filed not later than 10 days after the date on which the debriefing is held.<sup>302</sup> Although for procurements conducted under the basis of competitive proposals a protester has 10 days after a debriefing to file its protest, the protest must be filed within five days of the debriefing to obtain an automatic stay of contract performance pending the GAO’s protest decision.<sup>303</sup>

If a protester initially files an agency-level protest, it must file any subsequent protest at the GAO “within 10 days of actual or constructive knowledge of initial adverse agency action” on the protest.<sup>304</sup> Oral notice of an adverse agency decision is sufficient to trigger the 10-day protest period.<sup>305</sup> The protester also must have filed the initial agency-level protest within the same time limits specified for protests initially filed at the GAO, “unless the contracting agency imposes a more stringent time for filing, in which case the agency’s deadline

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<sup>297</sup> *Id.* § 21.2(a)(1); *e.g.* Carter Indus., Inc., B-270702, 96-1 CPD ¶ 99 (Comp. Gen. Feb. 15, 1996).

<sup>298</sup> MadahCom, Inc.—Recons., B-297261.2, 2005 CPD ¶ 209; *GAO Reverses Decision Dismissing Protest as Untimely*, 48 THE GOV’T CONTRACTOR ¶ 9, Jan. 11, 2006).

<sup>299</sup> 4 C.F.R. § 21.2(a)(1).

<sup>300</sup> *Id.* § 21.2(a)(2). Under the GAO bid protest rules, “[d]ays are calendar days.” *Id.* § 21.0(e). That same rule continues that “[t]he day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday.” *Id.*

<sup>301</sup> See FAR §§ 15.505, 15.506; Mil Corp., B-297508, B-297508.2, 2006 CPD ¶ 34 (Comp. Gen. Jan. 26, 2008); 4 C.F.R. § 21.2(a)(2).

<sup>302</sup> 4 C.F.R. § 21.2(a)(2); see also The Real Estate Center, B-274081, 96-2 CPD ¶ 74 (Comp. Gen. Aug. 20, 1996).

<sup>303</sup> 31 U.S.C. § 3553(d)(4)(B) (2006); FAR § 33.104(c).

<sup>304</sup> 4 C.F.R. § 21.2(a)(3).

<sup>305</sup> Consolidated Mgmt. Servs., Inc., B-270696, 96-1 CPD ¶ 76 (Comp. Gen. Dec. 15, 1995).

will control.”<sup>306</sup> When an alleged solicitation impropriety “is timely protested to a contracting agency, any subsequent protest to GAO will be considered timely if filed within” 10 days of the initial adverse agency action, “even if filed after bid opening or the closing time for receipt of proposals.”<sup>307</sup> As noted above, seeking agency-level independent review of a CO’s adverse protest decision does not toll the time limits to file a subsequent protest at the GAO.<sup>308</sup>

The GAO has the discretion to consider a late protest if it involves an issue “significant to the procurement system.”<sup>309</sup> In general, the protest issue must be one of first impression and of widespread interest to the procurement community.<sup>310</sup> The GAO may also consider an untimely protest “for good cause shown,” or when a compelling reason beyond the protester’s control prevented the timely filing of the protest.<sup>311</sup> However, the GAO rarely exercises the authority to consider late or untimely protests.<sup>312</sup>

#### D. The “CICA Stay” and the “CICA Override”

Congress has enacted specific restrictions—often referred to as a “CICA stay”—on an agency’s ability to proceed with a procurement or contract performance until the GAO decides a timely protest.<sup>313</sup> If the GAO notifies an agency of a timely filed protest before award of a contract, the agency may not award the contract until the protest is decided.<sup>314</sup> An agency must direct the awardee to cease performance upon receiving notice of a postaward protest from the GAO within 10 days of the date of contract award, or within five days of the date offered for a properly requested postaward debriefing, whichever

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<sup>306</sup> 4 C.F.R. § 21.2(a)(3); *see also* Orbit Advanced Techs., Inc., B-275046, 96-2 CPD ¶ 228 (Comp. Gen. Dec. 10, 1996) (enforcing agency’s more stringent time limits even though the protest would have been timely under GAO rules).

<sup>307</sup> 4 C.F.R. § 21.2(a)(3).

<sup>308</sup> Telestar Int’l Corp.—Recons., B-247029, B-247029.2, 92-1 CPD ¶ 69 (Comp. Gen. Jan. 14, 1992).

<sup>309</sup> 4 C.F.R. § 21.2(c); *see* Pyxis Corp., Comp. Gen. Dec. B-282469 et al., B-282469.2, 99-2 CPD ¶ 18 (Comp. Gen. July 15, 1999) (invoking the “significant issue exception” to hear a late claim to resolve a conflict between GAO and COFC caselaw); *see also Up Front: Non-FSS “Incidentals” Cannot Be Included in FSS Purchase Orders; GAO Reverses Precedent and Agrees With COFC*, 41 THE GOV’T CONTRACTOR ¶ 332, Aug. 4, 1999.

<sup>310</sup> *See Pyxis*, 99-2 CPD ¶ 18.

<sup>311</sup> 4 C.F.R. § 21.2(c); *see* A.R.E. Mfg. Co., Dec. B-246161, 92-1 CPD ¶ 210 (Comp. Gen. Feb. 21, 1992); ABC Appliance Repair Serv., B-221850, 86-1 CPD ¶ 215 (Comp. Gen. Feb. 28, 1986).

<sup>312</sup> *See, e.g., A.R.E. Mfg.*, 92-1 CPD ¶ 210; *ABC Appliance*, 86-1 CPD ¶ 215.

<sup>313</sup> 31 U.S.C. § 3553(c), (d) (2006).

<sup>314</sup> *Id.* § 3553(c); 4 C.F.R. § 21.6; FAR § 33.104(b).

is later.<sup>315</sup> Only notice from the GAO triggers the automatic stay.<sup>316</sup> These 10 day and 5 day time limits for the applicability of the CICA stay, however, may be subject to the statutory requirement that GAO has one day to notify the agency of the protest (by telephone) after the filing of a protest.<sup>317</sup> Thus, in spite of an apparent GAO rule to the contrary, some agencies interpret these time limits to be, in effect, 9 and 4 days (or less), respectively, in order to receive the CICA stay because the protester must allow for the fact that GAO has one day to make the phone call to the agency.<sup>318</sup> The GAO also must promptly send a written confirmation to the agency and an acknowledgment to the protester.<sup>319</sup> A protester also must furnish a copy of its protest to the agency within one day after it files the protest with the GAO.<sup>320</sup>

Congress recognized that there could be urgent circumstances requiring an agency to proceed with contract award and performance even though a protest is pending.<sup>321</sup> However, an agency is supposed to meet stringent requirements to override the automatic stay.<sup>322</sup> An agency may not award a contract while a protest is pending unless: the head of the procuring activity authorizes the award of the contract “upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision;” the GAO is notified of that finding; and, the agency is likely to award the contract within 30 days of the written override determination.<sup>323</sup>

After a contract is awarded, an agency may only authorize the contractor to proceed with performance if the head of the procuring activity issues a written finding that either “performance of the contract is in the best interests of the United States” or “urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of

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<sup>315</sup> 31 U.S.C. § 3553(d)(4)(A)–(B); 4 C.F.R. § 21.6; FAR § 33.104(c).

<sup>316</sup> See Florida Professional Review Org., Inc., B-253908.2, 94-1 CPD ¶ 17 (Comp. Gen. Jan. 10, 1994) (notice by protester is insufficient to trigger automatic stay).

<sup>317</sup> 31 U.S.C. § 3553(b)(1); 4 C.F.R. § 21.3(a); FAR § 33.104(a).

<sup>318</sup> 31 U.S.C. § 3553(b)(1); 4 C.F.R. § 21.3(a); FAR § 33.104(a).

<sup>319</sup> 31 U.S.C. § 3553(b)(1); 4 C.F.R. § 21.3(a); see 4 C.F.R. § 21.0(e); see generally U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, CONTRACT ATTORNEYS COURSE DESKBOOK (2006), Chapter 13, at 21.

<sup>320</sup> FAR § 33.104(a)(1).

<sup>321</sup> 31 U.S.C. § 3553(c),(d); FAR § 33.104(b), (c).

<sup>322</sup> For example, the Army requires that the override be approved by the Deputy Assistant Secretary of the Army (Policy and Procurement). AFARS 5133.104(b).

<sup>323</sup> 31 U.S.C. § 3553(c).

the Comptroller General concerning the protest,” and the GAO is notified of that finding.<sup>324</sup>

The GAO will not review an agency’s decision to override the automatic stay.<sup>325</sup> However, a protester may file a separate action at the COFC to reinstate a stay while the GAO protest is pending.<sup>326</sup> The protester would have to show that the agency’s override decision was arbitrary and capricious and the COFC affords substantial deference to the agency’s decision, particularly if matters of national security are involved.<sup>327</sup>

### E. Scope of Review

The GAO’s mandate is to “determine whether the solicitation, proposed award, or award complies with statute and regulation.”<sup>328</sup> The GAO will also sustain a protest if it finds that “the record clearly shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria listed in the [solicitation].”<sup>329</sup> The GAO may also sustain a protest where the agency’s award decision is not adequately documented.<sup>330</sup> The GAO accords substantial deference to agency decisionmaking and will not substitute its judgment for that of the agency based on a “mere disagreement” with the agency’s decision.<sup>331</sup> For example, “cost/technical tradeoffs are governed only

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<sup>324</sup> 31 U.S.C. 3553(d)(3)(C); *see also* AFARS 5133.104(b) (requiring DASA(P&P) approval).

<sup>325</sup> Banknote Corp. of Am., Inc., B-245528, B-245528.2, 92-1 CPD ¶ 53 (Comp. Gen. Jan. 13, 1992); *see also* 4 C.F.R. § 21.6 (2008).

<sup>326</sup> *See* RAMCOR Servs. Group v. United States, 185 F.3d 1286, 1289 (Fed. Cir.1999); Cigna Gov’t Servs., LLC v. United States, 70 Fed. Cl. 100 (2006); *Reilly’s Wholesale Produce v. United States*, 73 Fed. Cl. 705 (2006).

<sup>327</sup> 28 U.S.C. § 1491(b) (2006); *Reilly’s Wholesale Produce*, 73 Fed. Cl. at 709; *Kropp Holdings, Inc. v. United States*, 63 Fed. Cl. 537, 549 (2006) (“[W]here legitimate ‘interests of national defense and national security’ have been asserted and established to the court’s satisfaction, it is ‘not necessary’ for the court to reach the merits of whether 31 U.S.C. §3553(d)(3)(C)(i) is violated.” (quoting 28 U.S.C. § 1491(b)(1))).

<sup>328</sup> 31 U.S.C. § 3554(b)(1).

<sup>329</sup> *McWane & Co.*, B-270374, 96-1 CPD ¶ 121 (Comp. Gen. Mar. 1, 1996); *see also* *Forest City Military Communities, LLC*, B-299577, 2007 CPD ¶ 128 (Comp. Gen. June 29, 2007); *Secure Servs. Tech., Inc.*, B-238059, 90-1 CPD ¶ 421 (Comp. Gen. Apr. 25, 1990) (agency’s evaluations of proposals were inconsistent).

<sup>330</sup> *E.g.*, *Moheat Envtl. Servs.*, B-270538 et al., 96-2 CPD ¶ 194 (Comp. Gen. Nov. 20, 1996).

<sup>331</sup> *Baker Support Sys.*, B-257054, B-257054.2, 95-1 CPD ¶ 29 (Comp. Gen. Jan. 20, 1995).

by the test of rationality and consistency with the [solicitation's] stated evaluation criteria."<sup>332</sup>

The protester generally has the burden of demonstrating that the agency action is unlawful or unreasonable.<sup>333</sup> This is particularly true if the protester alleges that the agency acted in bad faith, in which case the protester must present "well-nigh irrefragable proof," or the equivalent, of the agency's malicious conduct.<sup>334</sup> If a protester alleges that a solicitation unduly restricts competition, the agency bears the initial burden to make a prima facie case that the restriction is necessary to meet its actual or minimum needs; thereafter, the protester bears the burden to demonstrate that the agency's justification is unreasonable.<sup>335</sup>

A protester must also establish that the agency's unreasonable action competitively prejudiced it.<sup>336</sup> General allegations of prejudice are insufficient.<sup>337</sup> The protester must show that but for the agency error, it would have had a reasonable chance of receiving the award.<sup>338</sup>

Although the GAO may dismiss any protest that is untimely on its face, the Government bears the burden when it challenges the timeliness of a protest.<sup>339</sup> The GAO will generally conclude that a protest is timely if there is any doubt whether the protest was filed in time.<sup>340</sup>

## F. Procedures and "Discovery"

(1) *Content and Delivery of the Protest.* All protests to the GAO must be in writing and signed by the protester.<sup>341</sup> As compared to the COFC, the GAO does not require "formal briefs or other technical forms of pleading or motion."<sup>342</sup> However, all protests must include (a) the name and contact information of the protester, (b) the agency and solicitation and/or contract number, (c) "a

<sup>332</sup> Red River Serv. Corp., B-253671 et al., 94-1 CPD ¶ 385 (Comp. Gen. Apr. 22, 1994).

<sup>333</sup> Cottage Grove Land Surveying, B-223207, 86-2 CPD ¶ 291 (Comp. Gen. Sept. 13, 1986).

<sup>334</sup> Seaward Int'l, Inc., B-224497, 86-2 CPD ¶ 507 (Comp. Gen. Oct. 31, 1986).

<sup>335</sup> Mossberg Corp., B-274059, 96-2 CPD ¶ 189 (Comp. Gen. Nov. 18, 1996); Morse Boulger, Inc., B-224305, 86-2 CPD ¶ 715 (Comp. Gen. Dec. 24, 1986).

<sup>336</sup> Lithos Restoration Ltd., B-247003, B-247003.2, 92-1 CPD ¶ 379 (Comp. Gen. Apr. 22, 1992).

<sup>337</sup> MCI Constructors, Inc., B-274347, B-274347.2, 96-2 CPD ¶ 210 (Comp. Gen. Dec. 3, 1996).

<sup>338</sup> Bath Iron Works Corp., B-290470, B-290470.2, 2002 CPD ¶ 133 (Comp. Gen. Aug. 19, 2002); McDonald-Bradley, B-270126, 96-1 CPD ¶ 54 (Comp. Gen. Feb. 8, 1996).

<sup>339</sup> See 4 C.F.R. § 21.2(b) (2008).

<sup>340</sup> Packaging Corp. of Am., B- 225823, 87-2 CPD ¶ 65 (Comp. Gen. July 20, 1987).

<sup>341</sup> 4 C.F.R. § 21.1(b)–(c).

<sup>342</sup> *Id.* § 21.1(f).

detailed statement of the legal and factual grounds of protest including copies of relevant documents,” (d) statements establishing that the protester is an interested party and has standing to file the protest, and (e) information establishing the timeliness of the protest.<sup>343</sup> The protest must specifically “request a ruling” by the GAO and “state the form of relief requested.”<sup>344</sup> At its option, a protester may also include requests for a protective order, specific documents relevant to the protest, and a hearing.<sup>345</sup> The GAO may dismiss a protest for failure to comply with these requirements.<sup>346</sup>

When it sets forth the legal and factual grounds for its protest, a protester must make a prima facie case that the agency acted improperly.<sup>347</sup> A protester cannot meet this burden by making generalized allegations or allegations “on information and belief.”<sup>348</sup> The GAO may summarily dismiss a protest that it determines “is frivolous or which, on its face, does not state a valid basis for protest.”<sup>349</sup>

A protester can submit its protest to the GAO by mail, e-mail, or messenger or overnight delivery service.<sup>350</sup> The protester also must provide a complete copy of the protest to the agency no later than one day after filing the protest with the GAO.<sup>351</sup> Although the GAO may dismiss a protest if the protester fails to meet this requirement, it generally will not do so where the CO “has actual knowledge of the basis of protest, or the agency, in the preparation of its report, was not prejudiced by the protester’s noncompliance.”<sup>352</sup>

The GAO must notify the agency by telephone within one day after the filing of a protest.<sup>353</sup> As noted above, it is this notice by the GAO that triggers the CICA stay prohibiting any award or performance while the protest is pending.<sup>354</sup> In practice, the GAO generally provides telephonic notice the same day it receives a protest. However, a protester is cautioned not to assume

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<sup>343</sup> *Id.* § 21.1(c).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* § 21.1(d).

<sup>346</sup> *Id.* § 21.1(i).

<sup>347</sup> Brackett Aircraft Radio, B-244831, 91-2 CPD ¶ 585 (Comp. Gen. July 25, 1991).

<sup>348</sup> Siebe Envtl. Controls, B-275999, B-275999.2, 97-1 CPD ¶ 70 (Comp. Gen. Feb. 12, 1997); *see also* 4 C.F.R. §§ 21.1(c)(4), 21.5(f).

<sup>349</sup> 31 U.S.C. § 3554(a)(4) (2006).

<sup>350</sup> 4 C.F.R. § 21.1(b); U.S. GAO – Bid Protest Filings by E-Mail, <http://www.gao.gov/decisions/moreinfo.html> (last visited Feb. 4, 2009).

<sup>351</sup> 4 C.F.R. § 21.1(e); FAR § 33.104(a); *e.g.*, Rocky Mountain Ventures, B-241870, B-241870.4, 91-1 CPD ¶ 169 (Comp. Gen. Feb. 13, 1991).

<sup>352</sup> 4 C.F.R. § 21.1(i); *see* FAR 33.104(a).

<sup>353</sup> 31 U.S.C. § 3553(b)(1); 4 C.F.R. § 21.3(a).

<sup>354</sup> 31 U.S.C. § 3553(c)(1), (d)(3).



that the GAO will provide same-day notice to the agency and, therefore, to file its protest one day in advance of the deadline to trigger the CICA stay.

(2) *Agency Report and Document Production.* The agency must file a report on the protest with the GAO within 30 days of receiving telephonic notice of the protest from the GAO.<sup>355</sup> The “agency may request an extension of time for the submission” of the agency report, which will be granted on a case-by-case basis.<sup>356</sup> Subject to any protective order, discussed below, the agency also must provide copies of the agency report to the protester and any intervenors.<sup>357</sup> The report must include the CO’s “statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced.”<sup>358</sup> The following documents are generally considered to be relevant: “the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm that is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; [and] the abstract of bids or offers.”<sup>359</sup>

(3) *Additional Document Production.* If the protester has filed a request for specific documents, the agency must respond to the request for documents in writing at least five days before filing its agency report.<sup>360</sup> The agency’s response must identify whether the requested documents exist, which documents it intends to produce, and the basis for not producing any requested documents.<sup>361</sup> Parties to the protest must file any objection to the scope of the agency’s proposed disclosure or nondisclosure of documents within two days of receiving the agency’s response.<sup>362</sup>

After receiving the agency report, the protester may request additional documents.<sup>363</sup> However, “[e]xcept when authorized by GAO, any request for additional documents must be filed with GAO and the contracting agency not later than [two] days after their existence or relevance is known or should have been known, whichever is earlier.”<sup>364</sup> The agency must “provide the requested documents . . . and a list to GAO and the other parties within [two] days or explain why it is not required to produce the documents.”<sup>365</sup>

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<sup>355</sup> 4 C.F.R. § 21.3(c); FAR § 33.104(a)(3)(i).

<sup>356</sup> 4 C.F.R. § 21.3(f).

<sup>357</sup> *Id.* § 21.3(e).

<sup>358</sup> 4 C.F.R. § 21.3(d); FAR § 33.104(a)(3)(iv).

<sup>359</sup> 4 C.F.R. § 21.3(d); FAR § 33.104(a)(3)(ii).

<sup>360</sup> 4 C.F.R. § 21.3(c); FAR § 33.104(a)(3)(iii).

<sup>361</sup> 4 C.F.R. § 21.3(c); FAR § 33.104(a)(3)(iii).

<sup>362</sup> 4 C.F.R. § 21.3(c); FAR § 33.104(a)(3)(iii).

<sup>363</sup> 4 C.F.R. § 21.3(g).

<sup>364</sup> 4 C.F.R. § 21.3(g); FAR § 33.104(a)(4)(ii)(A).

<sup>365</sup> 4 C.F.R. § 21.3(g); FAR § 33.104(a)(4)(ii).

“In appropriate cases, the contracting agency may request that the protester produce relevant documents, or portions of documents, that are not in the agency’s possession.”<sup>366</sup>

(4) *Protective Orders*. The GAO is authorized to issue protective orders controlling the treatment of protected information both upon request and sua sponte.<sup>367</sup> It is generally the responsibility of the protester’s counsel to request the issuance of the protective order.<sup>368</sup> Protected information “may include proprietary, confidential, or source-selection-sensitive material, as well as other information[,] the release of which could result in a competitive advantage to one or more firms.”<sup>369</sup> The protective order safeguards protected information by establishing procedures for applying to gain access to protected information and by providing redacted documents.<sup>370</sup> Individuals seeking access to protected information may not be involved in the competitive decisionmaking process of the protester or interested party.<sup>371</sup> If the terms of a protective order are violated, the GAO may impose sanctions, including referring the matter to the individual’s bar association, restricting the individual’s practice before the GAO, prohibiting the individual’s participation in the remainder of the protest, and dismissing the protest.<sup>372</sup>

(5) *Comments on the Agency Report and Supplemental Submissions*. The protester must respond to the agency report, providing a copy of its response to the agency and other parties, within 10 days of receiving the report.<sup>373</sup> Otherwise, the protest will be dismissed unless the GAO grants an extension.<sup>374</sup> The GAO will assume that the protester received the agency report by the due date specified in the GAO’s acknowledgment of receipt of the protest, unless advised to the contrary.<sup>375</sup> The GAO may, either through its own request or an interested party’s request, allow the submission of additional statements

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<sup>366</sup> See 4 C.F.R. § 21.3(d).

<sup>367</sup> 4 C.F.R. § 21.4(a); FAR § 33.104(a)(5).

<sup>368</sup> 4 C.F.R. § 21.4(a).

<sup>369</sup> *Id.*; FAR § 33.104(a)(5).

<sup>370</sup> 4 C.F.R. § 21.4(a); see FAR § 33.104(a)(5).

<sup>371</sup> 4 C.F.R. § 21.4(c); *Robbins-Gioia, Inc.*, B-274318 et al., 96-2 CPD ¶ 222 (Comp. Gen. Dec. 4, 1996) (in-house counsel may have access to protected material, in certain circumstances, even if they have regular contact with individuals involved in competitive decisionmaking).

<sup>372</sup> 4 C.F.R. § 21.4(d); FAR § 33.104(a)(5)(iv); see *PWC Logistics Services Co.*, B-310559 (Comp. Gen. Jan. 11, 2008).

<sup>373</sup> 4 C.F.R. § 21.3(i); FAR § 33.104(a)(6).

<sup>374</sup> 4 C.F.R. § 21.3(i); e.g. *Keymiae Aero-Tech, Inc.*, B-274803, B-274803.2, 97-1 CPD ¶ 153 (Comp. Gen. Dec. 20, 1996).

<sup>375</sup> 4 C.F.R. § 21.3(i).

“as may be necessary for the fair resolution of the protest.”<sup>376</sup> The GAO may disregard materials submitted by the parties without prior approval.<sup>377</sup>

(6) *Hearings*. The GAO is authorized to conduct a hearing in connection with a protest, again, either on its own initiative or at a party’s request.<sup>378</sup> In order to receive a hearing, a party must justify its necessity.<sup>379</sup> The GAO, which has the discretion to determine whether to hold a hearing and the scope of such hearing, in a typical year holds hearings in less than 10% of its fully developed cases.<sup>380</sup> Generally, the GAO does not hold hearings unless there is a factual dispute requiring assessment of witness credibility, or the GAO determines that a hearing would be more efficient and less burdensome than proceeding on written submissions only.<sup>381</sup> Although hearings are usually held at the GAO in Washington, D.C., they may be conducted elsewhere or by telephone at the GAO’s discretion.<sup>382</sup>

(7) *Options to Accelerate Protest Decisions*. An expedited decision is available upon the GAO’s determination that the protest is “suitable for resolution within 65 days.”<sup>383</sup> The party must submit a written request for the express option to the GAO no later than five days after the protest or supplemental/amended protest is filed.<sup>384</sup>

If the express option is used, the agency must file a complete report with the GAO and the parties within 20 days after it receives notice from the GAO that the express option will be used.<sup>385</sup> The protester must file comments on the agency report within 5 days after receipt of the report.<sup>386</sup> The GAO has the discretion to establish a different schedule for submissions.<sup>387</sup>

The GAO may also consider using “flexible alternative procedures to promptly and fairly resolve a protest,” such as ADR, accelerating the decision schedule, or issuing a summary decision.<sup>388</sup>

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<sup>376</sup> *Id.* § 21.3(j).

<sup>377</sup> *Id.*

<sup>378</sup> 4 C.F.R. § 21.7(a); FAR § 33.104(e).

<sup>379</sup> 4 C.F.R. § 21.7(a).

<sup>380</sup> *Omega World Travel, Inc.*, B-271262.2, 96-2 CPD ¶ 44, at n.7 (Comp. Gen. July 25, 1996); *see supra* text accompanying note 95 (statistics on GAO’s holding of hearings).

<sup>381</sup> *E.g.*, *Southwest Marine, Inc.*, B-265865 et al., 96-1 CPD ¶ 56 (Comp. Gen. Jan. 23, 1996); *Jack Faucett Assocs.—Recons.*, B-254421, B-254421.3, 94-2 CPD ¶ 72 (Comp. Gen. Aug. 11, 1994).

<sup>382</sup> 4 C.F.R. § 21.7(c).

<sup>383</sup> *Id.* § 21.10(a)–(b).

<sup>384</sup> *Id.* § 21.10(c).

<sup>385</sup> *Id.* § 21.10(d)(1).

<sup>386</sup> *Id.* § 21.10(d)(2).

<sup>387</sup> *Id.* § 21.10(d)(3).

<sup>388</sup> *Id.* § 21.10(e).

## G. Remedies

The GAO must issue a decision on a protest within 100 days after it is filed.<sup>389</sup> In protests where the GAO uses the express option procedures, the GAO must issue a decision on a protest within 65 days after it is filed.<sup>390</sup> The GAO, to the maximum extent practicable, must resolve a timely supplemental protest, which adds new grounds to an existing protest, within the time limit for decision on the initial protest.<sup>391</sup>

Agencies are not obligated to take any corrective action or afford the protester any relief if the GAO sustains a bid protest because the GAO decisions are only “recommendations.”<sup>392</sup> However, agencies rarely fail to comply with a GAO decision.<sup>393</sup> If an agency fails to implement the GAO’s recommendations within 60 days after receiving the recommendations, the head of the procuring activity must report the failure to the GAO.<sup>394</sup> The GAO reports to Congress any case in which an agency fails to implement fully its recommendations.<sup>395</sup>

If the GAO sustains a protest, it may recommend that the agency: “(A) refrain from exercising any of its options under the contract; (B) recompute the contract immediately; (C) issue a new solicitation; (D) terminate the contract; (E) award a contract consistent with the requirements of such statute and regulation; (F) implement any combination” of the above, or, any other recommendations that the GAO determines necessary under principles of sound procurement law and practice.<sup>396</sup>

The GAO is directed to “consider all circumstances surrounding the procurement or proposed procurement” to determine an appropriate recommendation.<sup>397</sup> These circumstances include”

the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the contracting agency’s mission.<sup>398</sup>

However, if notwithstanding the pending protest, the head of the procuring activity decides to override the CICA stay -- on the basis that contract

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<sup>389</sup> 31 U.S.C. § 3554(a)(1) (2006); 4 C.F.R. § 21.9(a); FAR § 33.104(f) (2008).

<sup>390</sup> 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.9(b); FAR § 33.104(f).

<sup>391</sup> 31 U.S.C. § 3554(a)(3); 4 C.F.R. § 21.9(c); FAR § 33.104(f).

<sup>392</sup> 31 U.S.C. § 3554(b)(1); *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30 (2006).

<sup>393</sup> *See supra* notes 95–100 and accompanying text.

<sup>394</sup> 31 U.S.C. § 3554(b)(3); FAR § 33.104(g).

<sup>395</sup> 31 U.S.C. § 3554(e).

<sup>396</sup> 31 U.S.C. § 3554(b)(1); 4 C.F.R. § 21.8(a).

<sup>397</sup> 4 C.F.R. § 21.8(b).

<sup>398</sup> *Id.*

performance is in the “government’s best interests” -- the “GAO shall make its recommendation(s) . . . without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.”<sup>399</sup>

If the GAO finds that a solicitation, proposed award, or award violates statute or regulation, it may also recommend that the agency pay the protester the costs of filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees, and bid and proposal preparation.<sup>400</sup> The recovery of protest costs is intended “to relieve protesters of the financial burden of vindicating the public interest.”<sup>401</sup>

Congress has capped the amount of recoverable attorney and expert witness fees.<sup>402</sup> First, no party other than a small business concern may be paid costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government.<sup>403</sup> Second, attorneys’ fees cannot exceed \$150 per hour unless the agency determines, based on the GAO’s recommendation, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.<sup>404</sup> However, the GAO has found rates significantly in excess of the benchmark to be reasonable where the rates are consistent with the customary rates charged for similar work in the same geographical area.<sup>405</sup>

The protester must file any request that the GAO recommend that costs be paid within 15 days of the date on which the protester learned or should have learned that the GAO had closed the protest based on the agency’s decision to take corrective action.<sup>406</sup> If the GAO recommends that the agency pay the protester its costs, the protester must file its claim for costs with the agency within 60 days after receiving the GAO recommendation or risk forfeiture

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<sup>399</sup> *Id.* § 21.8(c); e.g. Department of the Navy—Modification of Remedy, B-274944.4, 97-2 CPD ¶ 16 (Comp. Gen. July 15, 1997); see also *CICA Required that Comp. Gen. Corrective Action Ignore Cost and Disruption Impact on Agency*, 40 THE GOV’T CONTRACTOR ¶ 61, Feb. 4, 1998.

<sup>400</sup> 31 U.S.C. § 3554(c)(1); 4 C.F.R. § 21.8(d).

<sup>401</sup> Security Consultants Group, Inc.—Costs, B-293344.6, 2004 CPD ¶ 228 (Comp. Gen. Nov. 4, 2004).

<sup>402</sup> 31 U.S.C. § 3554(c)(2).

<sup>403</sup> 31 U.S.C. § 3554(c)(2)(A); FAR § 33.104(h)(5); see 5 U.S.C. § 3109 (2006) (employment of experts and consultants); 5 C.F.R. pt. 304 (expert and consultant appointments).

<sup>404</sup> 31 U.S.C. § 3554(c)(2)(B); FAR § 33.104(h)(5).

<sup>405</sup> Blue Rock Structures, Inc.—Costs, B-293134.2, 2005 CPD ¶ 190 (Comp. Gen. Oct. 26, 2005).

<sup>406</sup> 4 C.F.R. § 21.8(e) (2008).

of its right to recover costs.<sup>407</sup> If the agency and protester fail to agree on the amount of costs to be paid, the GAO may recommend an amount, as well as payment of the protester's costs to pursue its claim for costs before the GAO.<sup>408</sup>

The GAO generally will not award costs if the agency takes prompt remedial action.<sup>409</sup> In this regard, the GAO considers how promptly the agency acted after the filing of the protest, rather than how much time has passed since the agency's alleged improper action.<sup>410</sup> If the agency takes corrective action before its agency report is due, the GAO considers the remedial action to be prompt and generally will deny any award of costs.<sup>411</sup>

## H. "Appeals" of GAO Protest Decisions

Protesters, intervenors, and agencies can seek reconsideration of GAO decisions.<sup>412</sup> A request for reconsideration must be filed at the GAO within 10 days after the basis for reconsideration is known or should have been known, which ever is earlier.<sup>413</sup> Like an initial protest, the GAO will not consider a request for reconsideration that does not contain a detailed statement of the factual and legal basis for relief—in this case, reversal or modification.<sup>414</sup> To obtain reconsideration, the requesting party "must show that [the GAO's] prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of [the] decision."<sup>415</sup> The GAO generally will not reconsider protest decisions based on factual information that could have been raised in the initial protest.<sup>416</sup> Similarly, simply rehashing or reiterating previous arguments will not be fruitful.<sup>417</sup> A request for reconsideration is usually considered by a different

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<sup>407</sup> 4 C.F.R. § 21.8(f)(1); FAR § 33.104(h)(2); Dual, Inc.—Costs, B-280719.3, 2000 CPD ¶ 76 (Comp. Gen. Apr. 28, 2000).

<sup>408</sup> 31 U.S.C. § 3554(c)(4); 4 C.F.R. § 21.8(f)(2).

<sup>409</sup> See, e.g., J.A. Jones Mgmt. Servs., Inc.—Costs, B-284909.4, 2000 CPD ¶ 123 (Comp. Gen. July 31, 2000).

<sup>410</sup> LORS Medical Corp., B-270269.2, 96-1 CPD ¶ 171 (Comp. Gen. Apr. 2, 1996).

<sup>411</sup> Kertzman Contracting, Inc., B-259461 et al., 95-1 CPD ¶ 226 (Comp. Gen. May 3, 1995); GAO BID PROTEST GUIDE, *supra* note 20, at 36.

<sup>412</sup> 4 C.F.R. §21.14(a).

<sup>413</sup> *Id.* §21.14(b); see Speedy Food Serv., Inc.—Recons., B-274406, 97-1 CPD ¶ 5 (Comp. Gen. Jan. 3, 1997).

<sup>414</sup> *Id.* § 21.14(a).

<sup>415</sup> *Id.* §21.14(c).

<sup>416</sup> Consultants on Family Addiction—Recons., B-274924.3, 97-1 CPD ¶ 213 (Comp. Gen. June 12, 1997).

<sup>417</sup> 4 C.F.R. §21.14(c); see, e.g., Banks Firefighters Catering, B-257547 et al., 95-1 CPD ¶ 129 (Comp. Gen. Mar. 6, 1995); Windward Moving & Storage Co.—Recons., B-247558, 92-1 CPD ¶ 326 (Comp. Gen. Mar. 31, 1992).

GAO attorney than the attorney that presided over the original protest.<sup>418</sup> Significantly, the filing of a request for reconsideration at the GAO does not require the withholding of contract award or the suspension of contract performance.<sup>419</sup>

In a protest filed at the COFC after the issuance of a GAO decision on that same procurement, it is the agency contract award decision—not the GAO’s recommendation—that is subject to review by the COFC.<sup>420</sup> Because the GAO decision is a “recommendation,” it is not controlling or dispositive for judicial review of the agency’s actions.<sup>421</sup> Thus, the COFC “does not sit in appellate review of GAO decisions.”<sup>422</sup>

### I. GAO vs. COFC Protests

(a) *Automatic Stay of Award and Performance.* One of the most important advantages of pursuing a bid protest at the GAO is the automatic CICA stay prohibiting the agency from awarding a contract or continuing performance pending resolution of the protest, unless the agency follows strict procedures to override the stay.<sup>423</sup> Stopping the agency from advancing with the procurement can help the protester preserve the opportunity to obtain more comprehensive relief if it is successful in its protest. For example, if the

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<sup>418</sup> See GAO BID PROTEST GUIDE, *supra* note 20, at 39.

<sup>419</sup> See 4 C.F.R. § 21.6.

<sup>420</sup> *E.g.*, *Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007), 49 GC ¶ 410 (“[28 U.S.C.A. §] 1491(b) gives this Court jurisdiction to review an agency procurement decision, not the GAO’s review of that agency procurement decision.”).

<sup>421</sup> *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218, 224 (2005) (“Should a bidder pursue its challenge to the bid award with GAO, GAO’s ultimate determination is not binding upon the agency or this court; rather, it serves as a recommendation that becomes a part of the administrative record.”) (citing *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989)).

<sup>422</sup> *University Research Co., LLC v. United States*, 65 Fed. Cl. 500, 501 n.2 (2005) (citing *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 383 n.4 (2005)). But, in *Centech* the COFC stated:

Although GAO’s actions are not reviewable in this Court, this does not mean that the Court cannot consider GAO’s decision at all. Indeed, CICA requires that the GAO decision be part of the administrative record in the Court’s protest action. Further, to the extent that the agency relied upon GAO’s decision as a basis for taking corrective action, GAO’s decision is pivotal for the Court’s review of the agency’s procurement decision.

*Centech*, 78 Fed. Cl. at 507 (citations omitted). However, the issue in *Honeywell* was not a review of the underlying procurement, only a review of the agency’s action after the GAO recommendation. See *Honeywell*, 870 F.2d at 648.

<sup>423</sup> 31 U.S.C. § 3553(c)(1) (2006).

awardee is permitted to proceed with performance while the protest is pending, performance could advance to such a stage that it becomes more difficult to establish that terminating the contract and resoliciting the procurement is an appropriate remedy.

In contrast to the automatic stay at the GAO, if a protester files its protest at the COFC, it must meet the standards for a preliminary injunction to obtain a stay.<sup>424</sup> Thus, the protester must demonstrate that it is likely to succeed in its protest, it will suffer irreparable harm unless an injunction is granted, the agency will not suffer a greater harm if the injunction is granted, and the public interest favors an injunction.<sup>425</sup> Having to seek a preliminary injunction is more costly and certainly more risky for the protester if it chooses to pursue its protest at the COFC rather than at the GAO.<sup>426</sup>

(b) *Time to Protest Decision.* The GAO's statutory obligation to render a protest decision within 100 days means that a protester can generally obtain a protest decision more quickly by filing its protest at the GAO rather than at the COFC, which has no particular deadlines.<sup>427</sup>

(c) *Enforceability of Decisions.* The COFC has the power to enforce its judgments.<sup>428</sup> In contrast, the GAO cannot force an agency to adopt its recommendations.<sup>429</sup> Note that this is a two-way street. Just as a GAO recommendation is not binding on an agency, it also is not binding on the protester, who can file a follow-on protest at the COFC if it is disappointed with the GAO's decision.<sup>430</sup>

(d) *Protest Costs.* In general, a protester will incur lower costs by pursuing a protest at the GAO rather than at the COFC, largely due to the GAO's less formal procedures.<sup>431</sup> For example, there is no particular requirement for pleading a protest before the GAO.<sup>432</sup> In contrast, a protester at the COFC must prepare a formal complaint and, if it wants to seek a stay of the procurement, a motion for preliminary injunction.<sup>433</sup>

(e) *Jurisdiction.* As discussed above, the GAO has exclusive jurisdiction to decide protests of the issuance of a task or delivery order valued in excess

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<sup>424</sup> See *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).

<sup>425</sup> See *id.*

<sup>426</sup> Compare *id.* with 31 U.S.C. § 3553(c)(1).

<sup>427</sup> Compare 31 U.S.C. § 3554(a)(1) with Metzger & Lyons, *supra* note 114, at 1241 & n.84 (2007) (“Six months or more may be required to resolve a [protest] case at the COFC.”).

<sup>428</sup> See 28 U.S.C. § 1491 (2006).

<sup>429</sup> 4 C.F.R. § 21.8(a) (2008).

<sup>430</sup> 28 U.S.C. § 1491(b).

<sup>431</sup> See Metzger & Lyons, *supra* note 114, at 1237.

<sup>432</sup> 4 C.F.R. § 21.1.

<sup>433</sup> Metzger & Lyons, *supra* note 114, at 1242; *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).



of \$10 million.<sup>434</sup> Beyond this exclusive jurisdiction, however, the GAO has more limited jurisdiction to decide protests than the COFC, which has broad jurisdiction to hear contract formation and performance disputes.<sup>435</sup>

(f) *Expertise.* The GAO specializes in and has a long history of deciding bid protests, and although its decisions are not binding, agencies have historically granted substantial deference to the GAO and rarely choose to disregard its decisions.<sup>436</sup> Although the COFC decides a much broader range of disputes, many of which are unrelated to Government contracts, it too has substantial expertise in deciding protests.<sup>437</sup> In addition, a judge confirmed by the U.S. Senate decides protests at the COFC.<sup>438</sup> GAO protests are decided by staff attorneys who are very skilled, particularly in the area of Government contracts, but have not undergone the confirmation process.<sup>439</sup>

(g) *Standard of Review.* The GAO reviews agency procurement decisions for “reasonableness,” whereas the COFC reviews agency decisions under the Administrative Procedure Act (“APA”) standard.<sup>440</sup> As a result, the COFC may be more deferential to an agency’s award decision, which it will set aside only if the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>441</sup>

(h) *Evidence.* As compared to the GAO, the COFC has a more restrictive view of the evidence that it can consider; the COFC is limited to conducting an APA review of the administrative record (which does not ordinarily include postaward, after-the-fact evidence).<sup>442</sup> The GAO is not so limited in its review of the evidence.<sup>443</sup> Thus, contractors may want to protest to the GAO first because the protester may receive access to, and the GAO may consider, certain documents, information, or testimony that would not be available or admissible in the COFC.<sup>444</sup> However, this approach can also be a negative for the contractor if the documents, information, or testimony

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<sup>434</sup> 41 U.S.C. § 253j(e) (2006); 10 U.S.C. § 2304c(e) (2006).

<sup>435</sup> Metzger & Lyons, *supra* note 114, at 1244.

<sup>436</sup> See *supra* notes 95–100 and accompanying text.

<sup>437</sup> See *supra* notes 37–40 and accompanying text.

<sup>438</sup> COFC judges are appointed under Article 1 of the Constitution and serve 15-year terms. 28 U.S.C. §§ 171(a), 172(a) (2006). At the conclusion of a judge’s 15 year term, he/she may be reappointed by the President (subject to Senate confirmation) for another 15 year term or may take senior status and continue to adjudicate cases. 28 U.S.C. § 178.

<sup>439</sup> See Metzger & Lyons, *supra* note 114, at 1244–45.

<sup>440</sup> Forest City Military Communities, LLC, B-299577, 2007 CPD ¶ 128 (Comp. Gen. June 29, 2007).

<sup>441</sup> 5 U.S.C. § 706(2) (2006).

<sup>442</sup> See *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 424 (2006).

<sup>443</sup> See 4 C.F.R. § 21.7 (2008).

<sup>444</sup> See *infra* notes 469–471 and accompanying text.

actually detracts from the protester's case (and, if this occurs, the contractor may want to subsequently file a COFC protest because, as explained below, the COFC might exclude this evidence).<sup>445</sup> Significantly, before the GAO, the contracting agency can request documents from the protester.<sup>446</sup>

(i) *Remedies.* The GAO will often recommend that an agency amend its solicitation or terminate the awardee's contract and recompetes the procurement if it sustains a protest.<sup>447</sup> In contrast, a successful protester must convince the COFC that it was prejudiced by the agency's wrongful conduct and that injunctive relief is appropriate based on the standard four-part test.<sup>448</sup> As a result, a protester may be more likely to recover only bid preparation costs if it pursues its protest at the COFC instead of at the GAO.

#### IV. Court of Federal Claims Protests

In general, the COFC has exclusive judicial jurisdiction over preaward and postaward bid protests concerning federal agency contracts.<sup>449</sup> More specifically, the ADRA,<sup>450</sup> which amended the Tucker Act, provides the COFC with jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.<sup>451</sup>

As the Federal Circuit has observed, this language is very broad in scope,<sup>452</sup> and it may provide the COFC jurisdiction over certain protests for which

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<sup>445</sup> See *infra* notes 469–471 and accompanying text.

<sup>446</sup> 4 C.F.R. § 21.3(d).

<sup>447</sup> *Id.* § 21.8.

<sup>448</sup> *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).

<sup>449</sup> *PGBA*, 389 F.3d at 1227 (Fed. Cir. 2004); see *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340 (Fed. Cir. 2008); *Federal Circuit Acknowledges Pre-Procurement Jurisdiction*, 50 THE GOV'T CONTRACTOR ¶ 332, Sept. 10, 2008. As discussed above, *supra* notes 57–63 and accompanying text, it is unclear whether maritime Government contract protests should be filed in U.S. District Court or the COFC and, therefore, it may be wise in that situation to protest initially to GAO or at the agency-level. For a general discussion of COFC bid protest practice, see McCullough, Pollack & Alerding, *supra* note 63.

<sup>450</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874.

<sup>451</sup> 28 U.S.C. § 1491(b)(1) (2006).

<sup>452</sup> *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999) (“The phrase ‘in connection with’ is very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply [COFC bid protest] jurisdiction.”); see *LABAT-Anderson, Inc. v. United States*, 65 Fed. Cl. 570, 574 (2005) (even though the protest did not involve review of a solicitation or award, it involved a Government decision not to conduct a solicitation and, thus, was a challenge to

the GAO would not have jurisdiction.<sup>453</sup> For example, the Federal Circuit recently ruled that the statute

does not require an actual procurement. The statute explicitly contemplates the ability to protest these kinds of pre-procurement decisions [e.g., the use of a request for information process, which led to the Government tasking the prime contractor to make subcontract awards instead of having the Government procure the requirements directly] by vesting jurisdiction in the Court of Federal Claims over “proposed procurements.” A proposed procurement, like a procurement, begins with the process for determining a need for property or services.<sup>454</sup>

While other areas exist where it appears that the COFC’s protest jurisdiction is broader than the GAO’s,<sup>455</sup> in certain situations, the GAO’s protest

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an “alleged violation of statute or regulation in connection with a procurement”); *see also* Knowledge Connections, Inc. v. United States, 79 Fed. Cl. 750, 759758 (2007) (“[COFC] does not lose jurisdiction over a bid protest ‘because [an agency] allegedly only violated the APA, not a procurement statute’”) (quoting *RAMCOR*, 185 F.3d at 1290”). In addition, the Federal Circuit has broadly construed other aspects of the COFC’s protest jurisdiction statute. *See e.g.*, *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (broadly construing the definition of “procurement” by adopting the definition in 41 U.S.C. § 403(2)). The COFC

has found jurisdiction proper not only where an actual procurement is being challenged, but also where the claim is that a government agency is “procuring goods and services through a process that should have been the subject of competition; and that the failure to compete the procurement is in violation of law.”

*Savantage Fin. Servs., Inc. v. United States*, 81 Fed. Cl. 300, 304 (2008) (quoting *CCL, Inc. v. United States*, 39 Fed. Cl. 780, 789 (1997)).

<sup>453</sup> *E.g. Distributed Solutions*, 539 F.3d at 1346 (COFC jurisdiction was proper in reviewing decision not to solicit bids); *Advanced Sys. Technology, Inc. v. United States*, 69 Fed. Cl. 474, 481 (2006) (COFC found jurisdiction to review APA claims involving a determination by other than the procuring agency and constitutional claims); *Client Network Servs., Inc. v. United States*, 64 Fed. Cl. 784 (2006); *see also Reel-O-Matic Systems, Inc. v. United States*, 16 Cl. Ct. 93, 99 (1989) (citing *Cavalier Clothes, Inc. v. United States*, 810 F.2d 1108 (Fed. Cir. 1987)) (COFC has jurisdiction to review protester’s challenge to SBA’s refusal to issue a Certificate of Competency); *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 390 (1984).

<sup>454</sup> *Distributed Solutions*, 539 F.3d at 1346; *see also Catholic Univ. of Am. v. United States*, 49 Fed. Cl. 795, 796, 799 (2001) (ADRA’s amendment of the Tucker Act broadened COFC’s scope of postaward protests to include solicitation for sale or lease of real property).

<sup>455</sup> For example, with respect to responsibility determinations, it appears that the COFC may have broader jurisdiction than GAO. In *FN Mfg., Inc.*, the GAO stated that

our Bid Protest Regulations were revised to [allow review of] protests “that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.” This change was made in light of a seminal decision from the United States Court of Appeals for the Federal Circuit . . . which held that affirmative determinations of responsibility by contracting

jurisdiction is apparently broader than the COFC's.<sup>456</sup> Furthermore, since the definition of Government "agency" governing bid protests at the COFC is not the same as the definition for that term in GAO protests,<sup>457</sup> the COFC and the GAO do not always have jurisdiction over protests from the same agencies.<sup>458</sup>

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officers are reviewable by the Court of Federal Claims under the "arbitrary and capricious" standard applicable under the Administrative Procedure Act. We explained in the preamble to the revision that it was "intended to encompass protests where, for example, the protest includes specific evidence that the contracting officer may have ignored information that by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible."

FN Mfg., Inc., B-297172, B-297172.2, 2005 CPD ¶ 212 (Comp. Gen. Dec. 1, 2005) (citations & footnotes omitted); see 67 Fed. Reg. 79,833–834 (2002) ("The language [in the changes to 4 C.F.R. § 21.5(c)] providing for expanded GAO review in this area was prompted by the desire for consistency between our standard and the Court of Appeals for the Federal Circuit's standard for reviewing affirmative responsibility determination protests."). Nevertheless, in spite of this change commentators have questioned whether GAO's jurisdiction is really coterminous with that of the COFC. *E.g.*, James J. McCullough, Deneen J. Melander & Abram J. Pafford, *GAO's Revised Bid Protest Regulations: In Search of a More Efficient and Effective Process*, 79 Fed. Cont. Rep. (BNA) 224 (2003).

<sup>456</sup> See, e.g., *R&D Dynamics Corp. v. United States*, 80 Fed. Cl. 715, 721–22, 724 (2007) (COFC declined to assume jurisdiction over a postaward protest related to the Army's Small Business Innovation Research Program because the plaintiff's claim did not arise "in connection with a procurement or proposed procurement" despite plaintiff's argument that the GAO has routinely held that it has jurisdiction over protest actions related to the SBIR program); *McRae Indus., Inc. v. United States*, 53 Fed. Cl. 177, 180 (2002) (COFC declined to find that protester had standing in a case where GAO found that the protester had standing).

<sup>457</sup> Compare 4 C.F.R. § 21.0 (2008) ("Any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction.") with 28 U.S.C. § 451 (2006) ("[A]ny department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."); See 31 U.S.C. § 3551(3) (2006) (incorporating for GAO protests the definition of "Federal agency" from 40 U.S.C. § 102); *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001) (the definition of "agency" found in 28 U.S.C. § 451 controls the meaning of "federal agency" for purposes of the Tucker Act, including protests); *Federal Circuit Says Postal Service is a "Federal Agency" Under the Tucker Act; COFC Has Bid Protest Jurisdiction*, 43 THE GOV'T CONTRACTOR ¶ 351, Sept. 12, 2001.

<sup>458</sup> *E.g. Emery Worldwide Airlines*, 264 F.3d at 1080, (while the COFC has jurisdiction over USPS protests, USPS is not subject to GAO protest jurisdiction); *Novell, Inc. v. United States*, 46 Fed. Cl. 601, 612–13 (2000) (considering whether the Administrative Office of the U.S. Courts is subject to COFC bid protest jurisdiction); *USA Fabrics, Inc., B-295737 et al.*,

### A. Standard of Review and Burden Of Proof

The GAO's standard of review in a protest requires the assessment of whether the contracting agency's decision was "reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations."<sup>459</sup> In contrast, the COFC reviews the agency's procurement decision under the APA and will set aside a contract award if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>460</sup> In a COFC protest, this standard means that "a procurement decision may be set aside if it lacked a rational basis or if the agency's decision-making involved a violation of regulation or procedure."<sup>461</sup> "In short, the [c]ourt must

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2005 CPD ¶ 82, (Comp. Gen. Apr. 19, 2005) (GAO has jurisdiction to hear Federal Prison Industry bid protest because it is not a nonappropriated fund activity); 4 C.F.R. § 21.5(g) ("Protests of procurements or proposed procurements by agencies such as the U.S. Postal Service, the Federal Deposit Insurance Corporation, and nonappropriated fund activities are beyond GAO's bid protest jurisdiction as established in 31 U.S.C. 3551–3556."); *Southern Foods, Inc. v. United States*, 76 Fed. Cl. 769, 774–75 (2007) (ruling that COFC had jurisdiction over protest of a nonappropriated fund instrumentality procurement).

<sup>459</sup> *E.g.*, *Domain Name Alliance Registry*, B-310803.2, 2008 WL 4224768 (Comp. Gen. Aug. 18, 2008); *Forest City Military Communities, LLC*, Comp. Gen. Dec. B-299577, 2007 CPD ¶ 128 (Comp. Gen. June 29, 2007).

<sup>460</sup> 5 U.S.C. § 706(2)(A) (2006); 28 U.S.C. § 1491(b)(4); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001); *Savantage Fin. Servs. v. United States*, 81 Fed. Cl. 300, 303–04 (2008); *KSD, Inc. v. United States*, 72 Fed. Cl. 236, 250 (2006); *see Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312 (Fed. Cir. 2007); *Cigna Gov't Servs., LLC v. United States*, 70 Fed. Cl. 100, at 109–10 (2006) ("in order to prevail, the protestor must show by a preponderance of the evidence that the agency's actions were either without a reasonable basis or in violation of applicable procurement law"). The protester, of course, bears the burden of proving the arbitrary and capricious nature of the award. *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996) (citing *CACI Field Servs., Inc. v. United States*, 854 F.2d 464, 466 (Fed. Cir. 1988)).

<sup>461</sup> *A&D Fire Protection Inc. v. United States*, 72 Fed. Cl. 126, 132 (2006) (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)); *PGBA, LLC v. United States*, 389 F.3d 1219, 1225 (Fed. Cir. 2004); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004). In *Benchmark Knife Co. v. United States*, the COFC said:

When a challenge is brought on the first ground, the test is whether 'the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.' *Banknote*, 365 F.3d at 1351; *Impresa*, 238 F.3d at 1332–33 ('[C]ontracting officers are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process.') (internal citations omitted). When a challenge is brought on the second ground, the disappointed bidder must show a clear violation of an applicable statute or regulation. *Impresa*, 238 F.3d at 1333. In contrast to the rational

look to see whether the agency considered the relevant factors and made a rational decision based on those factors.”<sup>462</sup>

The difference between the COFC and GAO standards of review, while not frequently (or necessarily easily) articulated,<sup>463</sup> can mean that a protest will be sustained under the GAO’s standard of review but denied under the COFC’s more difficult to fulfill—and more deferential to the agency—standard.<sup>464</sup> As sometimes characterized, before the COFC, the protester bears the “heavy burden of proving the lack of a rational basis or a violation of law by a preponderance of the evidence.”<sup>465</sup> One commentator noted:

[t]he difference between a [GAO] ‘reasonableness’ standard and a [COFC] ‘rationality’ standard is subtle but important. At least semantically, the GAO standard asks whether the tribunal itself finds the agency’s action reasonable. The COFC standard asks whether anyone could have so found. While the GAO standard reflects some deference to agency decision making, it leaves more room for the examining officer’s personal values and preferences to affect the choice of the ‘fair’ or ‘right’ answer. The [COFC] standard leaves that authority firmly in the hands of the agency’s procurement officer.<sup>466</sup>

The COFC protester bears the burden of proving the arbitrary and capricious nature of the award.<sup>467</sup> While the weight of authority and the sounder

basis analysis, an agency has no discretion regarding the mandate of applicable laws and regulations.”

79 Fed. Cl. 731, 735 (2007).

<sup>462</sup> *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30 (2006). As further explained in *Automation Techs., Inc. v. United States*, 72 Fed. Cl. 723, 727 (2006),

[t]he court’s role is to determine if the agency relied on factors Congress did not intend for the agency to consider; failed entirely to consider an important aspect of the problem; offered an explanation for its decision which is not supported by the evidence before it; or, whether the agency’s decision is simply too implausible. [citing *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. at 30.]

In addition, the “agency must present a full and reasoned explanation for its decision, to enable courts to perform a meaningful review.” *In re Sang-Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002); *see also ViroMed Labs., Inc. v. United States*, 62 Fed. Cl. 206, 212 (2004) (“[T]he court should review the basis for the agency decision to see if was legally permissible, reasonable, and supported by the facts.”).

<sup>463</sup> For example, under the APA, the COFC “‘may not substitute its judgment for that of the agency’ if the agency’s decision is reasonable.” *Benchmark Knife*, 79 Fed. Cl. at 735 (quoting *R&W Flammann GmbH v. United States*, 339 F.3d 1320, 1322 (Fed. Cir. 2003)).

<sup>464</sup> *See Metzger & Lyons, supra* note 114, at 1252–53 (noting that “it is entirely possible that the same set of facts will yield different outcomes before the GAO and the COFC”).

<sup>465</sup> *Benchmark Knife*, 79 Fed. Cl. at 735; *OSG Prod. Tankers LLC v. United States*, 82 Fed. Cl. 570, 574 (2008); *see Impresa*, 238 F.3d at 1332–33; *Blue & Gold Fleet, L.P. v. United States*, 70 Fed. Cl. 487, 493 (2006), *aff’d*, 492 F.3d 1308 (Fed. Cir. 2007).

<sup>466</sup> *Metzger & Lyons, supra* note 114, at 1264–65.

<sup>467</sup> *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996) (citing *CACI Field Servs., Inc. v. United States*, 854 F.2d 464, 466 (Fed. Cir. 1988)); *A&D Fire*

rule apply the “preponderance of the evidence” standard for issuance of an injunction (and other relief) in a bid protest, some COFC decisions apply the more difficult “clear and convincing evidence” standard.<sup>468</sup> The COFC has further stated that a protester’s burden of proof may increase if the applicable statutes and regulations afford procurement officials greater discretion.<sup>469</sup> Thus, protesters may face a higher burden in negotiated procurements.<sup>470</sup>

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Protection, Inc. v. United States, 72 Fed. Cl. 126, 132 (2006).

<sup>468</sup> In *Career Training Concepts, Inc. v. United States*, 83 Fed. Cl. 215 (2008), the COFC stated that “[t]here is some disagreement on the standard of proof required for injunctive relief, with some Court of Federal Claims opinions citing a preponderance of the evidence and others citing clear and convincing evidence as the test.” *Id.* at 218. See *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 287 (2006) (reviewing both lines of cases and concluding that the standard is a preponderance of the evidence); *Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 723–24 (2004) (the same judge reviewing both lines of cases and concluding that the standard is a preponderance of the evidence).

See *Shields Enters. v. United States*, 28 Fed. Cl. 615, 622 (1993) (protester’s recovery of bid preparation costs “may be had only upon showing of ‘clear and convincing proof’ that award of the contract to another was arbitrary and capricious”); see also *Ellsworth Assocs. v. United States*, 45 Fed. Cl. 388, 392 (1999); *ECDC Envtl., L.C. v. United States*, 40 Fed. Cl. 236, 41 (1998), 40 GC 183; *Vanguard Sec., Inc. v. United States*, 20 Cl. Ct. 90 (1990).

<sup>469</sup> *California Marine Cleaning, Inc. v. United States*, 42 Fed. Cl. 281, 292, 291–92 n.20, 293 (1998); see *R.R. Donnelley & Sons, Co. v. United States*, 38 Fed. Cl. 518, 522 (1997).

<sup>470</sup> *CCL Serv. Corp. v. United States*, 48 Fed. Cl. 113, 120 (2000); *Alfa Laval Separation, Inc. v. United States*, 40 Fed. Cl. 215, 220 (1998); *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 782 (1991). In *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338 (2004), the COFC stated that:

[b]ecause of the deference courts will accord to discretionary procurement decisions, ‘the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis.’ *Impresa Costruzioni*, 238 F.3d at 1333.... And in cases such as this, when a negotiated procurement is involved and at issue is a performance evaluation, the greatest deference possible is given to the agency—what our Court has called a ‘triple whammy of deference.’ *Overstreet Electric Co. v. United States*, 59 Fed. Cl. 99, 117 (2003) (citing the deference to agency decisions under *Information Technology & Applications Corp v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003); the greater deference under *LaBarge Products, Inc v. West*, 46 F.3d 1547, 1555 (Fed. Cir. 1995) and *Lockheed Missiles & Space Co. v. Bentsen*, 4 F.3d 955, 958 (Fed. Cir. 1993); and even greater deference under *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996)); see also *id.* at 102 (characterizing the standard of review as ‘near draconian’); *id.* at 108. In a bid protest involving performance standards, ‘procurement officials have substantial discretion to determine which proposal represents the best value for the government.’ *E.W. Bliss Co.*, 77 F.3d at 449 (citing *Lockheed*, 4 F.3d at 958).

*Id.* at 351.

## B. COFC Rules and Procedures

The Rules of the Court of Federal Claims (“RCFC”) are modeled after the Federal Rules of Civil Procedure, which govern proceedings before the U.S. district courts.<sup>471</sup> The COFC’s rules include procedures similar to those in the local rules of the various U.S. district courts and have the effect of conforming the Federal Rules to the nature of practice before the COFC. The Foreword to the COFC’s Rules states that “[t]he Federal Rules of Civil Procedure applicable to civil actions tried by a United States district court sitting without a jury have been incorporated into the following rules to the extent appropriate for proceedings in this court.”<sup>472</sup> COFC judges “may regulate practice [in an individual case] in any manner consistent with federal law or rules.”<sup>473</sup>

Appendix C to the RCFC, which is entitled “Procedures in Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(b),”<sup>474</sup> should be studied carefully by any party considering filing a protest before the COFC. While the COFC’s other Rules remain fully applicable to bid protests, Appendix C describes standard practices in COFC bid protest cases.<sup>475</sup>

Appendix C requires that protester’s “counsel must (except in exceptional circumstances to be described in moving papers) provide at least 24-hour advance notice of filing a protest” to the DOJ’s Commercial Litigation Branch, the COFC Clerk, the procuring agency, and the apparently successful offeror(s) (if any).<sup>476</sup> The COFC’s rules state that this requirement is in place “[i]n order to expedite proceedings.”<sup>477</sup> “The prefiling notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis and to permit the court to ensure the availability of appropriate court resources.”<sup>478</sup> While “[f]ailure to provide pre-filing notification will not preclude the filing of the case[, it] is likely to delay the initial processing of the case”<sup>479</sup> and will not be viewed favorably

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<sup>471</sup> Foreword to the R.C.F.C.; *Cutright v. United States*, 15 Cl. Ct. 576, 577 (1988), *rev’d on other grounds*, 953 F.2d 619 (Fed. Cir. 1992); *White Mountain Apache Tribe v. United States*, 5 Cl. Ct. 288 (1984).

<sup>472</sup> Foreword to the R.C.F.C.

<sup>473</sup> R.C.F.C. 83(b); *see* R.C.F.C. 83 Rules Committee Note; Foreword to the R.C.F.C.

<sup>474</sup> R.C.F.C. app. C.

<sup>475</sup> *Id.* at R.C.F.C. app. C(1).

<sup>476</sup> *Id.* at app. C(2).

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Id.* App. C(3) also provides that the prefiling notice must state, *inter alia*, “(d) whether plaintiff contemplates requesting temporary or preliminary injunctive relief pursuant to R.C.F.C. 65; (e) whether plaintiff has discussed the need for temporary or preliminary injunctive relief with Department of Justice counsel and the response, if any[.]”



by the judge. This is different from GAO or agency-level protest practice, where there is no requirement to provide any advance notice that a protest is about to be filed.<sup>480</sup>

Appendix C also includes detailed instructions concerning the filing of a protest complaint under seal, requests for a protective order, the initial status conference (which shall be held “as soon as practicable” after the filing of the complaint), and the content and filing of the administrative record.<sup>481</sup> With respect to injunctive relief, Appendix C provides that “[t]he court’s practice is to expedite protest cases to the extent practicable and to conduct hearings on motions for preliminary injunctions at the earliest practicable time. Accordingly, when a plaintiff seeks a preliminary injunction, it may not need to request a temporary restraining order.”<sup>482</sup> Furthermore, “[e]xcept in an emergency, the court will not consider *ex parte* applications for a temporary restraining order.”<sup>483</sup> The discussion in Appendix C of the contents and filing of the administrative record is important and places the burden on the Government to file the administrative record (including the core documents) “as promptly as circumstances will permit.”<sup>484</sup> In this regard, Appendix C states that “[e]arly production of relevant core documents may expedite final resolution of the case” and provides a detailed list of the “core documents”—which includes “the record of any previous administrative [i.e., GAO or agency-level] or judicial proceedings relating to the procurement, including the record of any other protest of the procurement”—that are likely to be relevant to a protest case.<sup>485</sup> Protesters should review this list carefully and make sure that these documents, when relevant, are contained in the administrative record, or should have the Government represent that such documents, if relevant, do not exist.

Generally, the COFC’s review of an agency protest decision is based on “the administrative record already in existence, not some new record made initially by the reviewing court.”<sup>486</sup> However, as the COFC has explained:

[I]n most bid protests, the ‘administrative record’ is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review. This is true in the contract

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<sup>480</sup> See *supra* Part III.C.

<sup>481</sup> R.C.F.C. app. C(4–8, 16–24).

<sup>482</sup> *Id.* at app. C(9).

<sup>483</sup> *Id.* at app. C(14).

<sup>484</sup> *Id.* at app. C(23).

<sup>485</sup> *Id.* at app. C(22), (23).

<sup>486</sup> *Aero Corp., S.A. v. United States*, 38 Fed. Cl. 408, 411 (1997); see *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 424 (2006) (the COFC’s “review is confined to the administrative record already in existence” and the COFC “cannot accept any post hoc rationalizations offered as the basis for the decision”).

award context if for no other reason than that, due to the absence of a formal record, the agency has to exercise some judgment in furnishing the court with the relevant documents. In order to preserve a meaningful judicial review, the parties must be able to suggest the need for other evidence, and possibly limited discovery, aimed at determining, for example, whether other materials were considered, or whether the record provides an adequate explanation to the protester or the court as to the basis of the agency action. It follows that discovery as well as the breadth of the court's review has to be tailored in each case. Whether testimony is needed to frame the issues is likewise dependent on the particular circumstances. Consequently, this court has adopted a flexible approach both in putting together the evidence that will be considered and in discovery, balancing the limited nature of the court's review with the competing need to recognize potential exceptions to treating the agency's submissions as the four corners of the inquiry.<sup>487</sup>

While the COFC frequently avoids considering after-the-fact (e.g., postaward and particularly post-protest) evidence or justifications, it has well-established case law that allows for supplementing the administrative record, which also makes it clear that, in a COFC protest, traditional discovery is rarely available.<sup>488</sup> The "limited situations [in which] the court may consider 'extra-record' evidence" include:

- (1) when the agency's action is not adequately explained in the record before the court;
- (2) when the agency failed to consider factors which are relevant to its final decision;
- (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.<sup>489</sup>

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<sup>487</sup> *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 349–350 (1997), quoted in *Aero Corp.*, 38 Fed. Cl. at 411, and *Graphicdata, LLC v. United States*, 37 Fed. Cl. 771, 780 (1997); *Savantage Fin. Servs. v. United States*, 81 Fed. Cl. 300, 310–11 (2008) (same); *Precision Standard, Inc. v. United States*, 69 Fed. Cl. 738 (2006); *Four Points by Sheraton v. United States*, 63 Fed. Cl. 341 (2004) (administrative record not limited to documents considered by the CO but must reflect all of the information considered by the agency officials involved in the evaluation of offers); *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 386–88 (2005); see *Graphicdata*, 37 Fed. Cl. at 779–780 (“a judge confronted with a bid protest case should not view the administrative record as a immutable boundary that defines the scope of the case”).

<sup>488</sup> See *Rig Masters*, 70 Fed. Cl. at 424 (noting the two principal purposes for allowing supplementation of administrative record); *Ala. Aircraft Indus. v. United States*, 82 Fed. Cl. 757, 765–66, 771, 773–74 (2008).

<sup>489</sup> *Aero Corp.*, 38 Fed. Cl. at 411; see *Knowledge Connections, Inc. v. United States*, 79 Fed. Cl. 750, 760 (2007); *Rig Masters*, 70 Fed. Cl. at 424 (deciding that COFC only accepts record supplements if the additional material “assist[s] the court in understanding an agency decision when the record has not adequately explained it” or “place[s] in the record material that, by its very nature, would not be contained in it, such as evidence of bias or bad faith.”).

The COFC has also stated that, if discovery is determined to be necessary, it “must tailor discovery in bid protest cases as narrowly as the context of the procurement allows to fill gaps in the record and explain actions taken.”<sup>490</sup>

The COFC is bound by the Federal Rules of Evidence when, for example, a trial is necessary to resolve a factual dispute.<sup>491</sup> In this regard, most COFC protests are resolved under RCFC 52.1,<sup>492</sup> which allows motions for judgment on the administrative record<sup>493</sup> and which is without counterpart in the Federal Rules of Civil Procedure. This rule provides for an expedited trial “on the paper record,” where the court will “make fact findings where necessary.”<sup>494</sup> Significantly, once the COFC rules that, on the administrative record, the agency erred in a prejudicial manner, it can take additional evidence on the propriety of the form of relief.<sup>495</sup>

The COFC’s rules and procedures are substantially more detailed, formal, and burdensome than the agency-level or GAO protest rules and procedures. COFC protest litigation requires that more pleadings, motions, and other papers be filed than in agency-level or GAO protests and, as a result, COFC protests are almost always more expensive—and sometimes substantially more expensive—than the alternative forums for protests.<sup>496</sup> Finally, while there is no requirement for a written decision, the COFC usually issues written deci-

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<sup>490</sup> *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338, 348 (2004) (citing *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211, 219 (2001)); see also R.C.F.C. 52.1, Rules Committee Notes, 2006 Adoption.

<sup>491</sup> 28 U.S.C. § 2503(b) (2006); see R.C.F.C. 43(a).

<sup>492</sup> *E.g., Sealift, Inc. v. United States*, 82 Fed. Cl. 527, 536 (2008).

<sup>493</sup> R.C.F.C. 52.1(c)(1).

<sup>494</sup> *L-3 Global Commc’ns Solutions, Inc. v. United States*, 82 Fed. Cl. 604, 607–08 (2008) (citing *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005)); see also *Dyonyx, L.P. v. United States*, 83 Fed. Cl. 460 (2008) (R.C.F.C. 52.1 “provides a procedure allowing the court to expedite a trial by using a paper record to conduct fact finding. Unlike a motion for summary judgment, a genuine dispute of material fact does not preclude a judgment on the administrative record.”); *Tip Top Constr., Inc. v. United States*, 2008 WL 3153607 (Fed. Cl. Aug. 1, 2008); *Weeks Marine, Inc. v. United States*, 79 Fed. Cl. 22, 28 (2007); *Forest City Military Communities, LLC v. United States*, 79 Fed. Cl. 373 (2007) (“summary judgment standards are not pertinent to judicial review upon an administrative record”); see also *Information Scis. Corp. v. United States*, 73 Fed. Cl. 70, 97–98 (2006) (citing *Bannum*, 404 F.3d at 1355).

<sup>495</sup> *E.g., Idea Int’l, Inc. v. United States*, 74 Fed. Cl. 129, 138 (2006); see *PGBA, LLC v. United States*, 60 Fed. Cl. 567, 568 n.1 (2004) (“It is the responsibility of this Court, not the administrative agency, to provide for factual proceedings directed toward, and to find facts relevant to, irreparability of harms or prejudice to any party or to the public interest through grant or denial of injunctive relief.”).

<sup>496</sup> See Gabig, *supra* note 92, at 40; Metzger & Lyons, *supra* note 114, at 1237, 1269.

sions in bid protest cases.<sup>497</sup> Unlike GAO and agency-level protest decisions, the COFC has no time limit on the issuance of protest decisions.<sup>498</sup>

### C. Protest Timing Requirements and “Suspension of Contract Performance”

The COFC does not have most of the strict filing deadlines that are required in GAO or agency-level protests because no such specific time limits exist in the Tucker Act (as amended by the ADRA).<sup>499</sup> For example, the 10-day filing requirement found at the GAO and in agency-level protests does not exist at the COFC.<sup>500</sup> The Federal Circuit, however, essentially adopted the GAO’s timeliness rule for a COFC protest of errors apparent on the face of a solicitation so that such errors must be protested at the COFC prior to the closing date for receipt of proposals (as at the GAO) or the protest will be dismissed as untimely.<sup>501</sup> More specifically, the Federal Circuit ruled that the protester’s failure to object to a patent solicitation error “prior to the close of the bidding process” resulted in a waiver of its ability to raise the issue in a COFC protest, even though the jurisdictional grant of 28 U.S.C. § 1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding.<sup>502</sup> The Federal Circuit stated that this rule furthered the statutory mandate of 28 U.S.C. § 1491(b)(3), which requires that the COFC “give due regard to . . . the need for expeditious resolution of the [protest] action,” and found further support for the rule in the GAO’s similar timeliness rule for bid protests<sup>503</sup> requiring that protests based upon alleged improprieties

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<sup>497</sup> This statement is based on the authors’ experience as practitioners and the fact that the Rules of the Court of Federal Claims do not require that a written decision must be issued for a bid protest.

<sup>498</sup> Compare 31 U.S.C. § 3554(a)(1) (2006) with Rules of the Court of Federal Claims.

<sup>499</sup> See *Griffy’s Landscape Maint. LLC v. United States*, 46 Fed. Cl. 257, 257–58 (2000) (sustaining protest where GAO had previously dismissed the protest as untimely); *Heritage of Am., LLC v. United States*, 77 Fed. Cl. 66, 72 (2007) (and cases cited therein) (rejecting Government’s argument that the court should dismiss the plaintiff’s protest as untimely, noting that the timeliness requirement was based on GAO rules, not on the COFC’s jurisdictional statutes or rules); but see *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (decided subsequent to *Heritage of Am., LLC v. United States*, 77 Fed. Cl. 66, 72 (2007)).

<sup>500</sup> See *Blue & Gold Fleet*, 492 F.3d at 1314–15.

<sup>501</sup> *Id.* at 1313.

<sup>502</sup> *Id.*

<sup>503</sup> 4 C.F.R. § 21.2(a)(1) (2008).

apparent in a solicitation be filed prior to the time set for receipt of initial proposals, and in the doctrines of laches and equitable estoppel.<sup>504</sup>

If a protester is unable to comply with the strict filing deadlines—e.g., 10 days from when the protester knew or should have known of the protestable issue—for agency-level and GAO protests, the protester may desire to file its protest at the COFC. In fact, the COFC has sustained protests that the GAO considered untimely.<sup>505</sup> However, delay before the COFC is dangerous even if certain strict GAO and agency-level protest deadlines do not apply. For example, the COFC has found that delay in filing a protest can be prejudicial to a protester's case.<sup>506</sup>

To prevail in a meaningful manner, the COFC protester may require a temporary restraining order or a preliminary injunction to prevent the awardee's contract performance from progressing to the point that the court will feel constrained from providing the full relief desired by the protester because of the amount of work already performed on the contract. Unlike at the GAO, where the CICA automatic stay of contract performance applies, at the COFC, the protester must satisfy the traditional four-part test required for injunctive relief,<sup>507</sup> which is not necessarily easy to fulfill. In deciding whether a preliminary injunction should issue, the COFC considers: (1) the plaintiff's likelihood of success on the merits of the case; (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive

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<sup>504</sup> See *Blue & Gold Fleet*, 492 F.3d at 1313; see also *Allied Materials & Equip. Co. v. United States*, 81 Fed. Cl. 448 (2008); *Benchmade Knife Co. v. United States*, 79 Fed. Cl. 731,737 (2007); *Moore's Cafeteria Servs. v. United States*, 77 Fed. Cl. 180, 185 (2007); *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 175 n.14 (2005); *N.C. Div. of Servs. for the Blind v. United States*, 53 Fed. Cl. 147, 165 (2002).

<sup>505</sup> E.g., *Griffy's Landscape Maint. LLC v. United States*, 46 Fed. Cl. 257, 258 (2000).

<sup>506</sup> See *Wit Assocs., Inc. v. United States*, 62 Fed. Cl. 657, 662 n.5 (2004) (“[I]n some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.”); *Software Testing Solutions, Inc. v. United States*, 58 Fed. Cl. 533, 535–36 (2003) (stating that delay may be “considered in the multi-factored analysis of whether injunctive relief is warranted” or in “the application of equitable doctrines such as laches”); *Hawpe Constr., Inc. v. United States*, 46 Fed. Cl. 571, 582 (2000); *United Int'l Investigative Servs., Inc. v. United States*, 42 Fed. Cl. 73, 75 (1998). See also *CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559, 568–69 (2004); *Mississippi Dep't of Rehab. Servs. v. United States*, 58 Fed. Cl. 371, 372–73 (2003); RALPH NASH ET AL., *COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS* 874 (2d ed. 1999).

<sup>507</sup> *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004); *Bannum, Inc. v. United States*, 56 Fed. Cl. 453, 456 (2003); *Miss. Dep't of Rehab. Servs.*, 58 Fed. Cl. at 373.

relief; and (4) whether it is in the public interest to grant injunctive relief.<sup>508</sup> Thus, the lack of an automatic stay at the COFC is a significant difference from a GAO protest that may cause certain protesters to file at the GAO (at least initially).<sup>509</sup> In addition, if the COFC enters a preliminary injunction in favor of the protester, it is highly likely that the protester will have to furnish a bond to the court, which can be expensive and which the protester may lose if the protest is denied.<sup>510</sup> This is a significant distinction from GAO protest practice, where no such bond must be posted.<sup>511</sup>

If a protester files a GAO protest and obtains the CICA automatic stay of contract performance, but the agency subsequently decides to lift or override the automatic stay, the protester may file a lawsuit in the COFC for the limited purpose of having the CICA stay reinstated.<sup>512</sup> In this situation, the GAO protest continues while the COFC decides whether the agency's decision to override the stay was arbitrary and capricious and whether to reinstate the stay through declaratory or injunctive (i.e., through the standard four-part test) relief.<sup>513</sup>

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<sup>508</sup> *PGBA*, 389 F.3d at 1228; *see, generally*, Matthew H. Solomson, *The Keys to the Kingdom: Obtaining Injunctive Relief in Bid Protest Cases Before the U.S. Court of Federal Claims*, Briefing Papers No. 08-13, Dec. 2008.

<sup>509</sup> Occasionally, the Government will agree to voluntarily stay contract award or performance. *E.g.*, *Advanced Systems Technology, Inc. v. United States*, 69 Fed. Cl. 474, 486 (2006); *see R.C.F.C. app. C(15)(c), (d)*.

<sup>510</sup> *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 717 (2006); R.C.F.C. 65(a),(c) ("No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant [i.e., protester], in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."); *see R.C.F.C. app. C(15)(f); R.C.F.C. Appendix of Forms, Forms 11–13*.

<sup>511</sup> *See supra* Part III.

<sup>512</sup> *Reilly's Wholesale Produce*, 73 Fed. Cl. at 715–16 (reinstating automatic stay and finding agency override to be arbitrary and capricious); *Cigna Gov't Servs., LLC v. United States*, 70 Fed. Cl. 100, 100–01 (2006); *RAMCOR Servs. Group v. United States*, 185 F.3d 1286, 1289 (Fed. Cir.1999).

<sup>513</sup> *Reilly's Wholesale Produce*, 73 Fed. Cl. at 709–11 (2006); *see* Mason & Dean, "Living the Life of Reilly's: Recent U.S. Court of Federal Claims Decisions Highlight Need for Improved Regulatory Guidance in CICA Override Determinations," 87 Fed. Cont. Rep. (BNA) 90 (Jan. 23, 2007); Matthew H. Solomson, *The Keys to the Kingdom: Obtaining Injunctive Relief in Bid Protest Cases Before the U.S. Court of Federal Claims*, Briefing Papers No. 08-13, Dec. 2008, at 7-10; Pompeo, "Feature Comment: Establishing Trends in Override Case Law," 49 THE GOV'T CONTRACTOR ¶ 87 (Mar. 7, 2007); Young Cho, "Judicial Review of 'The Best Interests of the United States' Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?," 34 PUB. CONT. L.J. 337 (2005).

### D. Relief Available

To prevail in a COFC protest, the protester “must show not only a significant error in the procurement process, but also that the error prejudiced it.”<sup>514</sup> To demonstrate prejudice, the protester must establish that, absent the procurement error, the protester had a substantial chance of receiving the award.<sup>515</sup>

In bid protests, 28 U.S.C. § 1491(b)(2) provides that the COFC “*may award* any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.”<sup>516</sup> This statutory language, “through the use of the permissive ‘may,’ provides the Court of Federal Claims with discretion in fashioning relief.”<sup>517</sup> The Federal Circuit has held that 28 U.S.C. § 1491(b)(4), which incorporates the APA standard of review, “does not deprive [the COFC] of its equitable discretion in deciding whether injunctive relief is appropriate” and that, “in a bid protest action, section 1491(b)(4) does not automatically require a court to set aside an arbitrary, capricious, or otherwise unlawful

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<sup>514</sup> *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996); *Consol. Eng’g Servs. v. United States*, 64 Fed. Cl. 617, 623 (2005).

<sup>515</sup> *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996); *Consol. Eng’g Servs.*, 64 Fed. Cl. at 623; *see Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003) (“In other words, the [protester’s] chance of securing the award must not have been insubstantial.”); *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1370 (2002). For preaward protests, a protester will only be required to demonstrate that “an unreasonable agency decision ‘created a non-trivial competitive injury which can be redressed by judicial relief.’” E.g., *Allied Materials & Equip. Co. v. United States*, 81 Fed. Cl. 448 (2008); *Weeks Marine, Inc. v. United States*, 79 Fed. Cl. 22, 35 (2007); *Winstar Commc’ns. Inc. v. United States*, 41 Fed. Cl. 748, 763 (1998).

<sup>516</sup> 28 U.S.C. § 1491(b)(2) (2006) (emphasis added); *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 385 (2005). The COFC has observed that a

claim for proposal preparation costs is not a measure of damages for an unlawful procurement, but, rather, an independent cause of action with a different burden of proof. . . . [T]he legal standards for injunctive relief and proposal preparation costs are not identical. For injunctive relief plaintiff must demonstrate arbitrary, capricious, or unreasonable action by the agency or action that is in violation of a procurement statute or regulation that substantially prejudices the offeror. *See, e.g., Ellsworth Assocs., Inc. v. United States*, 45 Fed. Cl. 388, 392 (1999), 42 GC ¶ 19 (citing cases). The use of the disjunctive ‘or’ is of import. For recovery of proposal preparation costs, plaintiff must demonstrate arbitrary, capricious, or unreasonable actions. *See E.W. Bliss Co. v. United States*, 77 F.3d 445, 447 (Fed. Cir. 1996).

*Alfa Laval* 47 Fed. Cl. at 311 (internal quotations omitted).

<sup>517</sup> *PGBA, LLC v. United States*, 389 F.3d 1219, 1226 (Fed. Cir. 2004).

contract award.”<sup>518</sup> In other words, if the COFC rules that the agency award decision was arbitrary and capricious, that does not require the COFC to enjoin performance of the contract by the awardee.<sup>519</sup>

Unlike in a GAO protest, to prevail fully in a COFC protest, the protester ordinarily must receive a permanent injunction.<sup>520</sup> The Federal Circuit has ruled that satisfaction of the standard four-part test for a permanent injunction is required to receive such relief.<sup>521</sup> Thus, to obtain a permanent injunction from the COFC (and fully prevail in a COFC protest), a protester has to fulfill requirements that are not necessary to prevail in a GAO protest.<sup>522</sup> Finally, while the weight of authority and the sounder rule apply the preponderance of the evidence standard for issuance of an injunction and other relief in connection with a bid protest, there are some COFC decisions stating that the more difficult clear and convincing evidence standard applies.<sup>523</sup>

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<sup>518</sup> *PGBA*, 389 F.3d at 1225–26 n.4; *see id.* at 1225 (“Under Scanwell, if a contract award was determined to be improper, injunctive relief did not issue as a matter of course. Rather, courts considered other relevant factors, such as the public interest in granting injunctive relief.”) (internal quotations omitted). *See B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 730 (2d Cir. 1983).

<sup>519</sup> *PGBA*, 389 F.3d at 1231; *Axiom Res. Mgmt. v. United States*, 80 Fed. Cl. 530, 535 (2008).

<sup>520</sup> *See supra* Part IV.C.

<sup>521</sup> *PGBA*, 389 F.3d at 1228–29; *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 647 (2007); *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 654 (2003); *Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303, 320–21 (2000). *PGBA*, 389 F.3d at 1229 (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”); *see* Matthew H. Solomson, *The Keys to the Kingdom: Obtaining Injunctive Relief in Bid Protest Cases Before the U.S. Court of Federal Claims*, Briefing Papers No. 08-13, Dec. 2008, at 4-5.

<sup>522</sup> *Metzger & Lyons, supra* note 114, at 1265 (“Obtaining injunctive relief is a separate hurdle at the COFC without counterpart at the GAO.... Allowing that the first [factor of the four-factor injunctive relief test] ordinarily is satisfied where the COFC has decided to uphold a bid protest, each of the other [three] factors present questions which the COFC, but not the GAO, must consider.”); *see* Kovacic, *supra* note 214, at 481 (“[A]vailability of an automatic stay [at GAO] stands in sharp contrast to the comparatively demanding standards that a claimant must satisfy to obtain a preliminary injunction before the CFC”). It is true that no one factor of the injunctive relief test is dispositive and “the weakness of the showing of one factor may be overborne by the strength of others.” *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 654 (2003) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)).

<sup>523</sup> In *Career Training Concepts, Inc. v. United States*, 83 Fed. Cl. 215 (2008), the COFC stated that



The COFC “has discretion to fashion awards that include a mixture of injunctive relief and bid preparation and proposal costs” and has done so in numerous cases.<sup>524</sup> Similarly, the COFC has:

- ordered termination of an awarded contract and allowed the Government to resolicit bids;<sup>525</sup>
- enjoined the continued performance of a legally defective procurement and authorized reprourement in a flexible manner so as to avoid harm to military readiness;<sup>526</sup>
- enjoined the exercise of a contract’s options and ordered resolicitation for a new contract award after expiration of the contract’s base period;<sup>527</sup>
- set-aside a contract award and enjoined the agency from awarding another contract until discussions were held with the protester and, as appropriate, other offerors;<sup>528</sup>
- vacated a contract award and directed the agency to reevaluate the proposals and make a new award;<sup>529</sup>

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[t]here is some disagreement on the standard of proof required for injunctive relief, with some Court of Federal Claims opinions citing a preponderance of the evidence and others citing clear and convincing evidence as the test. *See* *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 287 (reviewing both lines of cases and concluding that the standard is a preponderance of the evidence); *Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 723–24 (2004) (the same judge reviewing both lines of cases and concluding that the standard is a preponderance of the evidence).

*Id.* at 218. *See also* *Shields Enters. v. United States*, 28 Fed. Cl. 615, 622 (1993) (protester’s recovery of bid preparation costs “may be had only upon showing of ‘clear and convincing proof that award of the contract to another was arbitrary and capricious’”); *ECDC Envtl., L.C. v. United States*, 40 Fed. Cl. 236, 240–41 (1998); *Ellsworth Assocs. v. United States*, 45 Fed. Cl. 388, 392 (1999); *ECDC Envtl., L.C. v. United States*, 40 Fed. Cl. 236, 240–41 (1998); *Vanguard Sec., Inc. v. United States*, 20 Cl. Ct. 90 (1990).

<sup>524</sup> *CNA Corp. v. United States*, 83 Fed. Cl. 1, 10 (2008); *see* *MVM, Inc. v. United States*, 47 Fed. Cl. 361, 366 (2000) (“plain language of 28 U.S.C. § 1491(b)(2) permits the grant of proposal and preparation costs as well as injunctive relief. The statute contains no condition that if injunctive relief has already been granted, monetary damages are not available.”); *see, e.g., Geo-Seis Helicopters*, 77 Fed. Cl. at 650; *United Payors & United Providers Health Servs., Inc. v. United States*, 55 Fed. Cl. 323, 334 (2002); *Seattle Sec. Servs. v. United States*, 45 Fed. Cl. 560, 573 (2000).

<sup>525</sup> *See* *United Payors*, 55 Fed. Cl. at 334; *126 Northpoint Plaza L.P. v. United States*, 34 Fed. Cl. 105, 112 (1995).

<sup>526</sup> *See* *ATA Def. Indus. v. United States*, 38 Fed. Cl. 489, 509 (1997).

<sup>527</sup> *See* *United Int’l Investigative Servs., Inc. v. United States*, 41 Fed. Cl. 312, 324 (1998); *Seattle Sec. Servs.*, 45 Fed. Cl. at 572–73.

<sup>528</sup> *See* *Day & Zimmerman Servs. v. United States*, 38 Fed. Cl. 591, 611 (1997); *Emerald Coast Finest Produce Co. v. United States*, 75 Fed. Cl. 549, 555–56 (2007).

<sup>529</sup> *See* *126 Northpoint Plaza*, 34 Fed. Cl. at 112; *Grippy’s Landscape Maint. L.L.C. v. United States*, 46 Fed. Cl. 257, 261 (2000); *Informatics Corp. v. United States*, 40 Fed. Cl.

- ordered the reinstatement of the procurement's original solicitation;<sup>530</sup>
- remanded bid protests to the agency for further determinations as required by the COFC opinions;<sup>531</sup>
- dismissed protesters' claims without prejudice while retaining jurisdiction "to monitor discrete issues" relating to the procurement;<sup>532</sup>
- vacated a CO's disqualification of the protester during the pendency of the COFC protest;<sup>533</sup> and
- ordered the recovery by a losing competitor of its reasonable bid preparation and proposal costs where it established that the Government's consideration of the proposal submitted was arbitrary or capricious or in violation of applicable statute or regulation.<sup>534</sup>

The COFC, however, has declined to direct the Government to:

- make a contract award to the protester;<sup>535</sup>
- enjoin contract performance by any entity except the protester (and the Government);<sup>536</sup>
- accept the protester's request that the court retain jurisdiction to oversee the reprocurement process (as it was beyond the COFC's power

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508, 519 (1998).

<sup>530</sup> See *Mark Dunning Indus. v. United States*, 64 Fed. Cl. 374, 380 (2005).

<sup>531</sup> See *Knowledge Connections, Inc. v. United States*, 76 Fed. Cl. 6, 22 (2007).

<sup>532</sup> See *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 281–82 (2006).

<sup>533</sup> See *Systems Plus, Inc. v. United States*, 69 Fed. Cl. 757, 775 (2006).

<sup>534</sup> *United Payors*, 55 Fed. Cl. at 334; *ATA Defense Indus., Inc. v. United States*, 38 Fed. Cl. 489, 509 (1997); *Knowledge Connections, Inc. v. United States*, 76 Fed. Cl. 6 (2007); *Beta Analytics Int'l, Inc. v. United States*, 75 Fed. Cl. 155, 158–59 (2007); *Emerald Coast Finest Produce Co. Inc. v. United States*, 75 Fed. Cl. 549 (2007); *Systems Plus, Inc. v. United States*, 69 Fed. Cl. 757 (2006); *IDEA Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 143 (2006); *Textron, Inc. v. United States*, 74 Fed. Cl. 11 (2006); *Mark Dunning Indus.*, 64 Fed. Cl. 374; *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 656 (2003); *Day & Zimmermann Servs. v. United States*, 38 Fed. Cl. 591, 611 (1997); *CSE Constr. Co.*, 58 Fed. Cl. 230 (2003); *Seattle Sec. Servs.*, 45 Fed. Cl. at 572–73; *United Int'l Investigative Servs., Inc. v. United States*, 41 Fed. Cl. 312, 324 (1998), *Griffy's Landscape Maint.*, 46 Fed. Cl. at 261; *126 Northpoint Plaza*, 34 Fed. Cl. 105; see *Informatix Corp. v. United States*, 40 Fed. Cl. 508, 519 (1998). See generally Metzger & Lyons, *supra* note 114, at 1268–69 (“[The GAO] often proceeds directly to invalidate an award, or require recompitation, where it finds an agency’s decision unreasonable. The more nuanced COFC approach recognizes that the public interest is not always served by delaying a procurement to correct minor defects in a solicitation or errors in the conduct of a competition.”).

<sup>535</sup> *Mangi Envtl. Group, Inc. v. United States*, 47 Fed. Cl. 10, 20 (2000); see *CIBNIC & NASH*, *supra* note 131, at 1555 (court direction for contractor to receive award “is granted in only the rarest of cases”).

<sup>536</sup> *MVM, Inc. v. United States*, 46 Fed. Cl. 137, 144–45 (2000). *But see also* *Alfa Laval Separation, Inc. v. United States*, 47 Fed. Cl. 305, 315 (2000).

and competence to direct the scope and evaluation methodology of a solicitation);<sup>537</sup> or

- award lost profits to a disappointed offeror on a contract improperly awarded to another party.<sup>538</sup>

The COFC may award attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA") to certain lower net worth, successful protesters.<sup>539</sup> More specifically, under the EAJA, such an award of fees and expenses is available only to individuals whose net worth did not exceed \$2 million at the time of the protest's filing, and to any owner of an unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7 million (or 500 employees) at the time of the protest's filing.<sup>540</sup>

If a protester satisfies these requirements, the EAJA still provides significant obstacles to the recovery of fees and expenses. An award of such fees and expenses will occur only if: (1) the protester was a "prevailing party;" (2) the Government's position was not "substantially justified;" (3) no special circumstances make an award unjust; and (4) the protester submitted, within 30 days of final judgment, an application, under oath, supported by an itemized statement from the protester's counsel stating the actual time expended and rate at which the fees and other expenses were computed.<sup>541</sup> Consequently, a major difference between COFC and GAO protests is that a prevailing GAO protester is more likely to receive an award of attorneys' fees and expenses and that, unlike at the COFC, the net worth or size of the protester is not relevant to the recovery of fees and expenses before the GAO.<sup>542</sup> Nevertheless, because of restrictions on the hourly rate for reimbursement of fees and expenses, it is highly unlikely that in either forum a prevailing

<sup>537</sup> *Beta Analytics*, 69 Fed. Cl. at 432. *But see Textron*, 74 Fed. Cl. at 281–82.

<sup>538</sup> *La Strada Inn, Inc. v. United States*, 12 Cl. Ct. 110, 115 (1987); *see Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1202 (Ct. Cl. 1974).

<sup>539</sup> *Axiom Res. Mgmt., Inc. v. United States*, 80 Fed. Cl. 530, 540 (2008); *Dubinsky v. United States*, 44 Fed. Cl. 360, 365 (1999); *see Metzger & Lyons, supra* note 114, at 1237 n.66 ("[U]nder the Equal Access to Justice Act (applicable in COFC Tucker Act Protests), only certain low-net-worth protesters may receive 'reasonable' attorney's fees").

<sup>540</sup> 28 U.S.C. § 2412(d)(2)(B) (2006); *see NASH, ET AL., supra* note 506, at 891–92; *see generally* Paul L. Whalen, "Equal Access to Justice Act: Recent Developments," BRIEFING PAPERS No. 02-5, at 3 (Apr. 2002).

<sup>541</sup> 28 U.S.C. § 2412(d) (2006); R.C.F.C. 54(d); R.C.F.C. app., Forms 4 & 5; *see Whalen, supra* note 540.

<sup>542</sup> *See Kovacic, supra* note 214, at 482 ("availability of attorneys' fees for successful protests before the GAO ... has been an important factor accounting for [its] popularity"); *Metzger & Lyons, supra* note 114, at 1237 n.66 ("GAO's attorneys' fee provisions constitute a[n]... advantage in favor of this forum [as compared to the COFC[]]").

protester will recover all (or even most) of its attorneys' fees and expenses. In fact, it is likely that the prevailing protester will only recover a modest—but not insignificant—percentage of its fees and expenses.

The COFC may award certain other costs to successful protesters.<sup>543</sup> The court may award a prevailing party the costs listed in 28 U.S.C. § 1920, which include (a) docket fees, (b) fees for the clerk, marshal, court reporter, printing, witnesses, and exemplification and copies of papers, (c) compensation for court-appointed experts and interpreters, and (d) the salaries, fees, expenses, and costs for special interpretation services.<sup>544</sup>

The Tucker Act states that “[i]n exercising jurisdiction under this subsection, the [COFC] shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”<sup>545</sup> In ruling that this language was not a bar to the court’s jurisdiction, the COFC has noted that “[w]hen considering national security interests in procurement cases, the court has typically done so in determining whether to provide injunctive relief after exercising jurisdiction and adjudicating the merits.”<sup>546</sup> However, based on the “priority and placement” of the restrictive national security language in 28 U.S.C § 1491(b)(3), at least one COFC judge has reasoned that, where legitimate national security interests have been established, it is not necessary for the COFC to reach the merits of a protest dispute.<sup>547</sup> In deciding whether to issue an injunction, the COFC reviews the national security and national defense considerations as part of its analysis

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<sup>543</sup> 28 U.S.C. § 1491(a)(1) (2006); 28 U.S.C. § 1920 (2006); *Dubinsky*, 44 Fed. Cl. at 363.

<sup>544</sup> 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1920; *Dubinsky*, 44 Fed. Cl. at 363.

<sup>545</sup> 28 U.S.C. § 1491(b)(3); *see* *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 650 (2007).

<sup>546</sup> *EOD Tech., Inc. v. United States*, 82 Fed. Cl. 12, 18 (2008) (emphasis added). The COFC has relied on 28 U.S.C. § 1491(b)(3)’s national defense/national security considerations to deny or limit injunctive relief in an otherwise meritorious protest. *E.g.*, *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 656 (2003) (“Plaintiff has not met its burden of demonstrating that injunctive relief is warranted, given the urgency of this procurement for the nation’s military.”); *Geo-Seis Helicopters*, 77 Fed. Cl. at 650 (national security considerations caused the injunction to be limited in scope); *Filtration Dev. Co. v. United States*, 60 Fed. Cl. 371, 385–88 (2004) (granting limited injunctive relief in light of national defense considerations); *Computer Scis. Corp. v. United States*, 51 Fed. Cl. 297, 323 (2001) (because of national security concerns, injunctive relief would be denied even if the plaintiff could have succeeded on the merits); *see* *Cincom Sys. v. United States*, 37 Fed. Cl. 266, 269 (1997) (plaintiff’s application for a temporary restraining order and motion for a preliminary injunction are denied for national security reasons); *Protection Strategies, Inc. v. United States*, 76 Fed. Cl. 225, 237–38 (2007).

<sup>547</sup> *Maden Tech Consulting, Inc. v. United States*, 74 Fed. Cl. 786, 793 (2006); *Kropp Holdings, Inc. v. United States*, 63 Fed. Cl. 537, 548–49 (2005).

of the “balance of hardships” and “the public interest,” i.e., factors three and four of the standard test for a permanent injunction.<sup>548</sup>

### E. Protesting at the COFC after a GAO Protest Decision

Under the Tucker Act, the COFC ordinarily has jurisdiction over a bid protest both where the protester lost at the GAO and where the protester won but the agency failed to implement the GAO’s decision.<sup>549</sup> In a refiled, or “second bite at the apple,” COFC protest,<sup>550</sup> the agency’s procurement award decision—not the GAO’s recommendation—is subject to review by the COFC.<sup>551</sup> Thus, the COFC “does not sit in appellate review of GAO decisions.”<sup>552</sup> In such a refiled action, in spite of the fact that the COFC is conducting its review of the agency’s award decision under the APA, the

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<sup>548</sup> *Gentex*, 58 Fed. Cl. at 655–56; *Geo-Seis Helicopters*, 77 Fed. Cl. at 650.

<sup>549</sup> 28 U.S.C. § 1491(b); see *Metzger & Lyons*, *supra* note 114, at 1251.

<sup>550</sup> Seven GAO protests were subsequently refiled at the COFC in 2006, while in 2005 the COFC received 11 protests that had been previously filed at GAO. The seven GAO protests refiled at the COFC in 2006 included *Automation Tech., Inc. v. United States*, 73 Fed. Cl. 617 (2006); *NVT Tech., Inc. v. United States*, 73 Fed. Cl. 459 (2006); *Securenet Co. v. United States*, 72 Fed. Cl. 800 (2006); *KSD, Inc. v. United States*, 72 Fed. Cl. 236 (2006); *PHT Supply Corp. v. United States*, 71 Fed. Cl. 1 (2006); *RISC Mgmt. Joint Venture v. United States*, 69 Fed. Cl. 624 (2006); *CC Dists., Inc. v. United States*, 69 Fed. Cl. 277 (2006). See *Metzger & Lyons*, *supra* note 114, at 1234 n.50.

<sup>551</sup> *E.g.*, *Centech Group, Inc. v. United States*, 78 Fed. Cl. 496, 507 (2007) (“[28 U.S.C. § 1491(b)] gives this Court jurisdiction to review an agency procurement decision, not the GAO’s review of that agency procurement decision.”); *Advanced Constr. Servs., Inc. v. United States*, 51 Fed. Cl. 362, 365 (2002) (“Construing § 1491(b)(1) in the expansive manner advocated by [the protester] would violate the well-settled principle that it is the agency’s decision, not the decision of the GAO that is the subject of judicial review when a bid protestor protests an award previously reviewed by the GAO.”); see *Benchmade Knife Co. v. United States*, 79 Fed. Cl. 731, 735 (2007); *Biospherics, Inc. v. United States*, 48 Fed. Cl. 1, 8 (2000); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341–42 (1997).

<sup>552</sup> *University Research Co., LLC v. United States*, 65 Fed. Cl. 500, 501 (2005) (citing *Arch Chemicals, Inc. v. United States*, 64 Fed. Cl. 380, 383 n.4 (2005)); *Cubic Applications*, 37 Fed. Cl. at 343. *But see Centech*, 78 Fed. Cl. at 507, stating that:

Although GAO’s actions are not reviewable in this Court, this does not mean that the Court cannot consider GAO’s decision at all. Indeed, CICA requires that the GAO decision be part of the administrative record in the Court’s protest action. See 31 U.S.C. § 3556. Further, to the extent that the agency relied upon GAO’s decision as a basis for taking corrective action, GAO’s decision is pivotal for the Court’s review of the agency’s procurement decision. See, e.g., *Honeywell*, 870 F.2d at 648 (stating that in deciding whether an agency justifiably followed GAO’s recommendation, this court’s controlling inquiry is whether GAO’s decision was rational and cautioning the court not to undertake a de novo review of the underlying issue).

postaward GAO recommendation is “considered to be part of the agency record.”<sup>553</sup> The GAO will, at times, receive postaward (i.e., after-the-fact) evidence, such as hearing testimony or affidavits, to assist in its resolution of the protest.<sup>554</sup> The COFC ordinarily—but not always—avoids considering such evidence, as it reviews the CO’s award decision as documented in the administrative record and avoids after-the-fact (e.g., postaward and particularly post-protest) evidence or justifications.<sup>555</sup> Although the COFC is bound by the Federal Rules of Evidence (when, for example, a trial is necessary to resolve a factual dispute), the GAO is not.<sup>556</sup> In this regard, RCFC 52.1, which allows motions for judgment on the administrative record in bid protests, is designed “to provide for trial on a paper record.”<sup>557</sup> Finally, while the GAO typically recommends that a solicitation be amended or an award

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<sup>553</sup> 31 U.S.C. § 3556 (2006) states:

[i]n any such action based on a procurement or proposed procurement with respect to which a [GAO] protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

R.C.F.C. app. C(22) provides that “[t]he core documents relevant to a protest case may include, as appropriate, . . . the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.” This should include the GAO agency record. It is not clear how the COFC would rule if the GAO agency report included inadmissible evidence, which was then objected to by a party during a COFC protest.

<sup>554</sup> See, e.g., 4 C.F.R. § 21.7 (2008).

<sup>555</sup> *Cubic Applications*, 37 Fed. Cl. at 349–50; *Aero Corp., S.A. v. United States*, 38 Fed. Cl. 408, 410 (1997); *Graphicdata, LLC v. United States*, 37 Fed. Cl. 771, 780 (1997); *Four Points by Sheraton v. United States*, 63 Fed. Cl. 341 (2004); *Arch Chemicals*, 64 Fed. Cl. at 386–88; *Precision Standard, Inc. v. United States*, 69 Fed. Cl. 738 (2006); *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 424 (2006); *Savantage Fin. Servs. v. United States*, 81 Fed. Cl. 300, 310–11 (2008). The situations in which the COFC may consider “extra-record” evidence and may supplement the administrative record are also discussed above. See *Aero Corp.*, 38 Fed. Cl. at 411; *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338, 348 (2004) (citing *Emery Worldwide Airlines, Inc v. United States*, 49 Fed. Cl. 211, 219 (2001); *Rig Masters*, 70 Fed. Cl. at 424; *Knowledge Connections, Inc. v. United States*, 79 Fed. Cl. 750, 760 (2007)).

<sup>556</sup> 28 U.S.C. § 2503(b) (2006); 4 C.F.R. § 21.7 (2008); see R.C.F.C. 43(a).

<sup>557</sup> *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356–57 (Fed. Cir. 2005) (“when making a prejudice analysis in the first instance, [the COFC] is required to make factual findings under [the rule] from the record evidence as if it were conducting a trial on the record”); *Tip Top Constr., Inc. v. United States*, 2008 WL 3153607, at \*7 (Fed. Cl. Aug. 1, 2008); see also *Info. Scis. Corp. v. United States*, 73 Fed. Cl. 70, 97–98 (2006). Significantly, once the COFC rules that, on the administrative record, the agency erred in a prejudicial manner,

be overturned upon finding an agency violation of statute or regulation and prejudice to the protester, the COFC usually—but not always—requires the additional ruling that injunctive relief, which the COFC characterizes as “extraordinary,” is warranted under the traditional four-part balancing test for equitable relief.<sup>558</sup> Even if the COFC agrees with a GAO recommendation that the agency erred in its award decision, the COFC may consider other circumstances (e.g., the interests of national defense and national security and the need for expeditious resolution of the action) and limit the protester’s relief to bid preparation and proposal costs.<sup>559</sup>

In a protest originally filed at the GAO and, subsequent to a GAO decision, refiled at the COFC, the COFC has observed that

[n]either the agency nor this court is bound by the determination of the GAO. Nevertheless, the recommendation of the GAO is made a part of the record here by statute. Moreover, while acknowledging the ‘advisory nature’ of such a recommendation, in view of the expertise of the GAO in procurement matters, this court may rely upon such a decision for general guidance to the extent that it is reasonable and persuasive in light of the administrative record. Thus, it may be an aid to the court in better understanding and evaluating the procurement.<sup>560</sup>

In another protest, the COFC further stated that it is

not bound by prior decisions of the GAO with respect to the instant solicitation, or its holdings in similar protests. Nonetheless, this court recognizes the special expertise of the GAO in the arena of procurement protests. Moreover, we are ‘especially reluctant to interfere with the procurement process when, as here, the GAO has upheld the contracting officer’s decision.’ Thus, to the extent that we find such decisions ‘reasonable and persuasive in light of the administrative record,’ we shall accord such decisions deference.<sup>561</sup>

Despite this statement, the COFC has not hesitated to sustain protests that were denied by the GAO.<sup>562</sup> Furthermore, the COFC may find that an

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it can take additional evidence on the propriety of the form of relief. *E.g.*, *Idea Int’l, Inc. v. United States*, 74 Fed. Cl. 129, 138 (2006).

<sup>558</sup> *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004); *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 286–87 (2006) (injunctive relief standard). Where injunctive relief is inappropriate, the court may award monetary damages, but the Tucker Act limits these damages to bid preparation and proposal costs. 28 U.S.C. § 1491(b)(2); *see also* *Naplesyacht.com, Inc. v. United States*, 60 Fed. Cl. 459, 478 (2004).

<sup>559</sup> 28 U.S.C. § 1491(b)(2), (3).

<sup>560</sup> *Cubic Applications*, 37 Fed. Cl. at 341–42 (citations omitted); *see* *Consol. Eng’g Servs. v. United States*, 64 Fed. Cl. 617, 623 (2005).

<sup>561</sup> *Consol. Eng’g Servs.*, 64 Fed. Cl. at 623 (citations omitted).

<sup>562</sup> *E.g.*, *GenTex Corp. v. United States*, 58 Fed. Cl. 634, 636 n.3 (2003) (recognizing GAO’s longstanding expertise in the bid protest arena, but sustaining a protest ground that GAO had denied where an allegation was more fully developed before the COFC); *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 645 n.28 (2007), (sustaining COFC

agency's procurement decision lacks a rational basis, even if the agency complies with a GAO recommendation in a bid protest.<sup>563</sup> If the GAO sustains a protest, the agency follows the GAO's recommendation (or contends that it did so), and the initial awardee, for example, then files a protest with the COFC, the COFC will review the agency's implementation of the GAO's recommendation (i.e., the corrective action taken by the agency), which may also involve review of the GAO's recommendation.<sup>564</sup>

Filing a timely preaward bid protest with the GAO does not necessarily confer standing to bring a COFC protest. In one case,<sup>565</sup> before filing a COFC protest, the protester filed two preaward GAO protests—one of which it filed prior to the proposal submission deadline—concerning the same procurement, and the GAO denied both on the merits.<sup>566</sup> In the subsequent COFC protest, the court ruled that the protester lacked standing because it did not timely submit a proposal after the GAO denied its preaward protests and, therefore, the protester was not an actual offeror and could not establish interested party status.<sup>567</sup>

In reviewing the protester's standing and "prospective offeror" status, the COFC stated that when the protester "chose GAO as the forum of resolution, [it] effectively relinquished the ability to file a timely protest in the [COFC]" and, consequently, the protester's GAO protest did not "confer 'prospective offeror' status for purposes of standing" in the COFC.<sup>568</sup> The COFC further stated that "requiring a litigant to be bound by the choice between the GAO and [the COFC], does not result in 'obvious' or 'manifest' injustice, but merely requires a plaintiff to weigh litigating options when selecting a

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protest despite GAO protest denial where GAO ruling nullified the FAR's late-is-late rule); *see also* Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35 (2007) (agency's reliance on GAO decision in a related procurement was arbitrary and capricious because GAO decision was "not in accordance with law and lacked a rational basis").

<sup>563</sup> *See* Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n.7 (1995); Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271–72 (1996); *see also* Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). *But see* Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) ("usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the [GAO]").

<sup>564</sup> Lyons Sec. Servs., Inc. v. United States, 38 Fed. Cl. 783, 785–86 (1997); *Honeywell Int'l*, 870 F.2d at 648; *see also* Centech Group, Inc. v. United States, 78 Fed. Cl. 496, 507 (2007).

<sup>565</sup> Shirlington Limousine & Transp., Inc. v. United States, 77 Fed. Cl. 157 (2007), *aff'd on recons.*, 78 Fed. Cl. 27 (2007).

<sup>566</sup> *Id.* at 161–63.

<sup>567</sup> *Id.* at 167–68.

<sup>568</sup> *Id.* at 167–68; *see* Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307–08 (Fed. Cir. 2006); Infrastructure Def. Techs., LLC v. United States, 81 Fed. Cl. 375, 385 (2008).



forum.”<sup>569</sup> Finally, the COFC stated that the protester could have preserved its ability to pursue a COFC protest by “submitting a bid” even though the protester believed that the case involved a “flawed solicitation.”<sup>570</sup> The COFC remarked that this is

but an added expense that a plaintiff may choose to incur to ensure standing in multiple forums. In addition, a government contractor that initiates a protest at GAO challenging a ‘flawed solicitation’ only needs to submit a bid if the contractor estimates a high likelihood of failure at GAO, in which case the contractor may have been better off filing with the [COFC initially, rather than with the GAO].<sup>571</sup>

### F. Advantages and Disadvantages to a COFC Protest

As discussed above and summarized here, there are advantages and disadvantages to filing a protest at the COFC instead of at the GAO or at the agency level. The COFC rules and procedures are more complex and formal than those at the agency level and at the GAO and thus, COFC protests are typically more expensive and require more work, including more filings before the court.<sup>572</sup> In COFC protests, the protester will almost always have several in-person and telephonic appearances before the judge, including oral argument, while formal hearings before the GAO and at the agency level may not occur.<sup>573</sup> Although COFC protests offer the possibility of discovery (e.g., depositions), this rarely occurs and most COFC protests are decided on the administrative record without supplementation for postaward and post-protest events.<sup>574</sup> At times, GAO and agency protests involve the consideration of evidence (e.g., affidavits or testimony) that the COFC would not consider.<sup>575</sup>

While COFC protests are decided by judges—who are appointed by the President and subject to Senate confirmation and who decide many types of cases unrelated to bid protests or Government contracts—GAO protests are decided by attorneys who are hired by the GAO General Counsel and who generally only perform bid protest related functions.<sup>576</sup> Unlike GAO and agency decisions, COFC protests can be directly appealed (to the Federal Circuit) and COFC decisions have the force and effect of law and can be enforced by the COFC, as opposed to GAO decisions and some agency protest deci-

<sup>569</sup> *Shirlington Limousine*, 78 Fed. Cl. at 31.

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

<sup>572</sup> Compare 4 C.F.R. § 21.1 (2008) with Rules of the United State Court of Federal Claims, available at [http://www.uscfc.uscourts.gov/sites/default/files/court\\_info/rules/nov032008.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/rules/nov032008.pdf). (last visited Feb. 8, 2009).

<sup>573</sup> This statement is based on the authors’ experience as practitioners.

<sup>574</sup> See *supra* notes 486-495 and accompanying text.

<sup>575</sup> See *id.*; see *supra* notes 443-446 and accompanying text.

<sup>576</sup> See 28 U.S.C. § 171 (2006).

sions, which are considered to be recommendations that do not have to be followed.<sup>577</sup> COFC protests generally take longer to resolve<sup>578</sup> than GAO and agency-level decisions, which operate under strict deadlines.<sup>579</sup>

COFC protests are not subject to the 14-day notice requirement to the procuring activity of procurement integrity violations, which if not fulfilled from when the protester first learned of the alleged violation, prevents the GAO from assuming jurisdiction over the protest.<sup>580</sup> As compared to GAO protests, only certain small entities can recover attorneys' fees for COFC protests.<sup>581</sup> Even if a contractor prevails in its COFC protest and is a small business, there are still significant obstacles to recovering fees and expenses in the COFC.<sup>582</sup> While many agencies prohibit the recovery of fees and expenses by protesters, on rare occasions, a protester may receive its fees and expenses for a successful agency-level protest.<sup>583</sup> Usually any fees recovered at any of the protest forums are well below the hourly rate charged by the protester's counsel. Additionally, the COFC has a filing fee (\$250) for its cases, while the GAO does not.<sup>584</sup> In general before the COFC, a protester must be represented by counsel, who must be a member of the COFC Bar, at least by a time shortly after the filing of the protest complaint (which also costs \$250); counsel is not required for GAO and agency-level protests.<sup>585</sup>

Unlike in GAO and agency-level protests, there is no automatic stay of contract performance before the COFC.<sup>586</sup> Instead, the protester must

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<sup>577</sup> 28 U.S.C. § 1295(a)(3); 4 C.F.R. 21.8(d); *see generally* 28 U.S.C. § 1491.

<sup>578</sup> *E.g.*, Metzger & Lyons, *supra* note 114, at 1241 & n.84 ("Six months or more may be required to resolve a [protest] case at the COFC."). Preaward and postaward protests, respectively, were "closed" in the following time periods for the following fiscal years at the COFC: FY 2002 (preaward-84 days and postaward-107 days), 2003 (106 and 113 days), 2004 (249 and 158 days), 2005 (137 and 128 days), 2006 (208 and 134 days), 2007 (91 and 136 days), and 2008 (79 and 112 days). Data provided by Hon. John Buckley, Acting Clerk of the Court of Federal Claims (Oct. 28, 2008). The number of days listed here reflects the number of days between a protest being filed and being closed at the COFC. Sometimes, the COFC issues a decision resolving the protest in a shorter period of time than it took to "close" the protest because the closing date was delayed by an issue outside of the court's control.

<sup>579</sup> 4 C.F.R. § 21.9(a).

<sup>580</sup> *See supra* Part III.A(j).

<sup>581</sup> *Compare* 4 C.F.R. § 21.8(e) *with* 28 U.S.C. § 2412(d)(2)(B).

<sup>582</sup> *See supra* Part IV.D.

<sup>583</sup> This statement is based on the authors' experience as practitioners.

<sup>584</sup> United States Court of Federal Claims Fee Schedule, *available at* [http://www.uscfc.uscourts.gov/.sites/default/files/fee\\_charges.pdf](http://www.uscfc.uscourts.gov/.sites/default/files/fee_charges.pdf).

<sup>585</sup> *See* R.C.F.C. 90–91, 149.

<sup>586</sup> *See supra* notes 487–491 and accompanying text.

qualify for a preliminary injunction under the traditional four-part test for injunctive relief, which can be difficult to satisfy.<sup>587</sup> In addition, if a COFC protester receives a preliminary injunction, the protester will most likely have to post a bond, which can be expensive and which may not be returned if the protester does not prevail on the merits of the protest.<sup>588</sup> No such bond requirement exists before the GAO or at the agency-level.<sup>589</sup> The COFC is less likely to consider after-the-fact evidence than the GAO and has a more difficult standard of review to prevail in the protest.<sup>590</sup> Based on national security reasons, the COFC may limit the protest relief that it provides or, on fairly rare occasion, the court may not consider the protest.<sup>591</sup> Unlike GAO or agency-level protests, the COFC requires protesters to give 24 hours notice of the filing of a protest to the court, the Government, and the apparently successful offerors.<sup>592</sup>

## V. Protest-Like Relief Under the Contract Disputes Act at the Boards and the COFC

In a recent Armed Services Board of Contract Appeals (“ASBCA” or “Board”) case, *L-3 Communications Corp.*,<sup>593</sup> the Air Force awarded 11 contracts under an indefinite-delivery, indefinite-quantity (“IDIQ”) procurement.<sup>594</sup> These contracts included an Air Force clause that provided that “[a]ll multiple award contractors shall be provided a fair opportunity to be considered for each order” and designated a delivery order ombudsmen with responsibility for “ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders.”<sup>595</sup> The ASBCA found “it fundamentally unfair for the government, without notice in the [Request for Order Proposal], to use an offeror’s technical/management proposal roadmap costs to evaluate the realism of [certain of] its [other] costs that were required to be based on government-estimated hours.”<sup>596</sup> As a result, the Board found that L-3 was denied a fair opportunity to compete for the delivery order (in breach of contract language quoted above) and that L-3 was “entitled to

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<sup>587</sup> See *supra* notes 487–491 and accompanying text.

<sup>588</sup> See *supra* notes 487–491 and accompanying text.

<sup>589</sup> See *supra* notes 487–491 and accompanying text.

<sup>590</sup> See *supra* Section IV.D.

<sup>591</sup> See *supra* Section IV.D.

<sup>592</sup> See *supra* Section IV.D.

<sup>593</sup> *L-3 Commc’ns Corp.*, 2006 WL 2349233 (A.S.B.C.A.), ASBCA 54920, 08-1 BCA ¶ 33,857.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

recover its costs of preparing and submitting its delivery order proposal as reliance damages resulting from the breach.”<sup>597</sup> Although the Board further ruled that L-3’s “claim for lost profits, employee severance[,] and relocation costs fails the proximate causation test” for lack of proof that the delivery order would have been awarded to L-3,<sup>598</sup> this ruling strongly suggests that such costs could be recovered in an appropriate case where the contractor fulfills its burden of proof.

In an earlier opinion in this case, in denying the Government’s motion to dismiss for lack of jurisdiction because the case was, in reality, a protest of a delivery order award—which is prohibited by statute, the FAR, and the IDIQ contract<sup>599</sup>—the ASBCA stated that

[t]he same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a ‘protest’ seeking to cancel or modify the award and a ‘claim’ for damages for breach of the Awarding Orders clause of the contract. These are separate and distinct forms of relief with ‘protests’ governed by FAR Subpart 33.1 and ‘claims’ by FAR Subpart 33.2.”<sup>600</sup>

Because L-3’s claim sought damages, but not cancellation or modification of the award, and since the statute, the FAR, and the contract clause prohibited only “protests,” the ASBCA ruled that it had jurisdiction under the Contract Disputes Act (“CDA”).<sup>601</sup>

In a COFC bid protest case, where a CDA claim was neither filed nor alleged, one COFC judge rejected the concept of CDA relief for breach of the “fair opportunity to compete”:

Although plaintiff has not alleged jurisdiction under any authority other than [the COFC’s bid protest jurisdiction of] 28 U.S.C. § 1491(b), the court has also considered whether this court’s jurisdiction under the Contract Disputes Act of 1978 (CDA) and the Tucker Act... would allow this court to reach the merits of this case. First, the court reads the task order bid protest bar of 41 U.S.C. § 253j(d) to squarely deny the

<sup>597</sup> *Id.*

<sup>598</sup> *Id.*

<sup>599</sup> See 10 U.S.C. § 2304c(d) (2006); 41 U.S.C. § 253j(d); FAR 16.505(a). Effective May 27, 2008, the National Defense Authorization Act for FY 2008, § 843, Pub. L. No. 110-181, 122 Stat. 3, allows GAO protests of awards of IDIQ orders valued in excess of \$10 million.

<sup>600</sup> *L-3 Commc’ns Corp.*, 2006 WL 2349233 (A.S.B.C.A.), ASBCA 54920, 08-1 BCA ¶ 33,857.

<sup>601</sup> *Id.*; see *In re Community Consulting Int’l*, ASBCA 53489, 02-2 BCA ¶ 31,940, at 157,786–87; Ralph C. Nash, *Task Order Contracts: The Breach of Loss of the Fair Opportunity To Compete*, 16 NASH & CIBINIC REP. ¶ 49 (Oct. 2002) (“Taking a case to the agency board of contract appeals appears to be a viable way to contest the lack of a fair opportunity to compete for task orders.”); see also *Data Monitor Sys. v. United States*, 74 Fed. Cl. 66, 71–72 (2006). With certain exceptions, FAR 16.505(b)(1)(i) requires the CO to “provide each awardee a fair opportunity to be considered for each order exceeding \$3,000 issued under multiple delivery-order contracts or multiple task-order contracts.”

right of plaintiff to contest, in this court, the project's award to intervenor-defendant. Second, as a general matter, the court does not agree with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency board of contract appeals. Such a stratagem attempts to evade the bar of task order bid protests clearly enunciated in Section 253j(d). The court does not find that this type of bid protest action would fall within its CDA jurisdiction.<sup>602</sup>

Since this discussion is most likely dicta and the issue does not appear to have been briefed or raised by the parties, and because the decision predates the second *L-3* opinion and does not reference the first *L-3* opinion,<sup>603</sup> there is a reasonable chance that other COFC judges will not follow it. As discussed above, COFC judges are not bound by the decisions of other COFC judges.<sup>604</sup> However, because certain COFC judges may follow this opinion and because the ASBCA has ruled to the contrary, this provides an example of a situation where it may be safer to file a case involving this issue at the Board, since the ASBCA will ordinarily follow its previous decisions on a particular issue.

## VI. Appellate Review of COFC Protest Decisions

The Federal Circuit has jurisdiction over appeals from the COFC.<sup>605</sup> An appeal must be filed within 60 days from the date of entry of the judgment or order.<sup>606</sup> The Federal Circuit freely reviews COFC decisions for errors of law but will not set aside its findings of fact unless they are "clearly erroneous."<sup>607</sup> However, because in most bid protests the COFC resolves the case on motions for judgment on the administrative record, the Federal Circuit reviews the bid protest decision de novo, which means that the Federal Circuit will freely review the entire opinion (without any deference to the COFC) and applies the same standard of review as the COFC.<sup>608</sup> For the Government to appeal a COFC decision, it must obtain the approval of the Attorney General, who has delegated this function to the Solicitor General.<sup>609</sup>

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<sup>602</sup> *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 135 (2006) (citations omitted).

<sup>603</sup> *Id.*

<sup>604</sup> See *supra* note 75 and accompanying text.

<sup>605</sup> 28 U.S.C. § 1295(a)(3) (2006); See generally Shea & Schaengold, *A Guide to the Court of Appeals for the Federal Circuit*, BRIEFING PAPERS NO. 90-13 (Dec. 1990).

<sup>606</sup> 28 U.S.C. § 2522; FED. R. APP. P. 4(a)(1); R.C.F.C. 72.

<sup>607</sup> *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed. Cir. 1999); *Yancey v. United States*, 915 F.2d 1534, 1537 (Fed. Cir. 1990); *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1540 (Fed. Cir. 1996); *Atlas Corp. v. United States*, 895 F.2d 745, 749 (Fed. Cir. 1990); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

<sup>608</sup> See *Dysart v. United States*, 369 F.3d 1303, 1310 (Fed. Cir. 2004).

<sup>609</sup> 28 U.S.C. § 1295(b); 41 U.S.C. § 607(g)(1)(B) (2006).

Statistics with respect to COFC appeals reveal that, from the establishment of the Federal Circuit in 1982 through June 30, 1988, the Federal Circuit affirmed approximately 73 percent of the Claims Court appeals (which included many non-Government contract cases).<sup>610</sup> For the court years ending in June 1988, June 1989, and June 1990, the Federal Circuit affirmed 81 percent, 76 percent, and 88 percent of the Claims Court appeals, respectively, either “in whole or in part”.<sup>611</sup> Unfortunately, there are no statistics based solely on the reversal rate of COFC Government contract or bid protest decisions. However, the Federal Circuit’s reversal rates for COFC decisions generally (including many non-Government contract cases) from 1997 to 2007 are as follows: 23% (1997); 15% (1998); 21% (1999); 21% (2000); 37% (2001); 18% (2002); 28% (2003); 11% (2004); 12% (2005); 19% (2006); and 14% (2007).<sup>612</sup>

## Guidelines

These Guidelines are intended to assist a prospective Government contractor in determining which protest forum—the COFC, the GAO, or the agency—is most appropriate for resolving its bid protest. They are not, however, a substitute for professional representation in any situation.

1. In general, a prospective contractor can file its initial protest at the agency level or before the GAO or the COFC.
2. If a protester wants the opportunity for more than “one bite at the apple” (i.e., the opportunity to protest at more than one forum if the initial protest decision is unfavorable), the protester should first file at the agency level or the GAO. If the protest is denied there, the protester can ordinarily proceed from the agency level to a protest at either the GAO or the COFC, and then can ordinarily proceed from the GAO to the COFC.
3. While a contractor ordinarily can file a subsequent protest at the COFC after an adverse GAO decision, the COFC does not sit as an appellate body reviewing the GAO decision. Instead, the COFC reviews the agency contract award decision under the APA standard of review.

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<sup>610</sup> MARKEY, *THE FIRST TWO THOUSAND DAYS: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1982–1988*, at 27 (1988).

<sup>611</sup> MARKEY, *THE SEVENTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1988–89*, at 13 tbls. 5–6 (1989); MARKEY, *THE EIGHTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1989–1990*, at 15 tbl. 6 (1990).

<sup>612</sup> United States Court of Appeals for the Federal Circuit, *Appeals Filed, Terminated, and Pending for 1997–2007*, <http://www.cafc.uscourts.gov/statistics.html> (last visited Sept. 19, 2008).

4. GAO decisions are recommendations that are not binding on the COFC or the agency. Agency-level protest decisions are not binding on the GAO or the COFC. Furthermore, agency-level protest decisions may not always be considered binding on the agency. COFC decisions are binding on the agency, unless the Federal Circuit or Supreme Court reverses or vacates on appeal.
5. The GAO and the COFC have different standards of review for the agency contract award decision. In general, although both forums will overrule agency decisions that violate statute or regulation, the GAO's standard of review requires the assessment of whether the contracting agency's decision was "reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations." The COFC reviews the agency's procurement decision under the APA and will set aside a contract award if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."
6. If a contractor files its initial protest at the agency level, because of strict GAO deadlines, the contractor will almost always lose the ability to file a subsequent protest before the GAO *and* receive the GAO's automatic stay of contract performance or contract award.
7. If a contractor "appeals" an adverse agency-level protest decision within the agency (e.g., to a level higher than the CO), because of strict GAO deadlines, the contractor will almost always lose the ability to file a subsequent protest before the GAO.
8. With the exception of certain preaward protests (e.g., solicitation defects apparent on the face of the solicitation), the COFC does not have the strict protest filing deadlines found in GAO or agency-level protests. However, delay in the filing of a COFC protest can prejudice a protester's ability to receive a temporary restraining order or preliminary injunction with respect to the award or performance of a contract, as well as certain other remedies, such as termination of an improperly awarded contract.
9. Agency-level protests are usually less costly, less adversarial, more informal, simpler (procedurally), decided quicker, and require fewer (and less complicated) submissions by the protester as compared to GAO or COFC protests. However, agency-level protests are typically decided by a less independent official, do not provide the protester access to potentially crucial agency documents or the use of a protective order, and usually prevent the application of the CICA automatic stay of contract award or contract performance in a subsequent GAO protest.
10. GAO protests are usually less costly, more informal, simpler (procedurally), decided quicker, and require fewer (and less complicated) submissions by the protester as compared to a COFC protest. GAO protests, unlike COFC protests, offer the opportunity for the CICA

automatic stay of contract award or performance. Both GAO and COFC protests can be the subject of very similar protective orders that will usually allow only protester's outside counsel (and possibly certain outside consultants or experts) access to crucial Government and awardee documents.

11. COFC protests are usually more expensive than GAO (or agency-level) protests and sometimes are considerably more expensive. COFC protests are decided by a single COFC judge who has been nominated by the President and confirmed by the Senate, and are reviewed by an independent member of the judiciary. The CICA automatic stay is not available before the COFC and the generally more difficult preliminary and permanent injunction standards apply. A COFC protest requires more detailed and complicated filings (e.g., complaint, motion for a temporary restraining order and/or preliminary injunction, motion for judgment on the administrative record, and various other motions) as compared to practice before the GAO. While COFC protests almost always involve at least one hearing before the judge, GAO protests usually do not involve a hearing. Unlike GAO recommendations, COFC decisions—subject to appellate review—are binding on the parties.
12. A winning protester has a better chance of recovering some of its attorneys' fees before the GAO than the COFC. A COFC recovery of such fees is limited to certain small businesses under the Equal Access to Justice Act, and the Government may contend—unlike in a GAO protest—that its position was “substantially justified” and therefore be relieved of the responsibility of paying attorneys' fees. A prevailing protester rarely—if ever—receives attorneys' fees in an agency-level protest.