

The Foley & Lardner LLP Guide to Federal Procurement Protests

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History tells us, with a high degree of certainty, that each September — the last month of the federal government's fiscal year (FY) — federal contracting officers will rush to award contracts totaling tens of billions of dollars, thereby obligating current fiscal year funds, the availability of which would otherwise expire on October 1. Just as certainly, this flurry of federal contract awards will be followed by numerous bid protests during the ensuing months. This white paper explains the various administrative and judicial protest fora available to disappointed bidders seeking to challenge awards they contend were flawed, provides an outline of each forum's respective procedures, and examines the benefits and disadvantages of each forum. This white paper is designed to assist offerors and contractors contemplating whether and where to file a protest challenging a contract award to a competitor, or whether to intervene in a protest to protect a contract award, with an understanding of how the federal bid protest process operates.

Even before the current financial crisis, the U.S. government was considered the largest single procurer of goods and services in the world, and the inexorable growth of federal procurement in recent years has been nothing short of breathtaking. Since 2000, the rate of growth in federal contract procurement spending has exceeded the rate of U.S. inflation in every year, and cumulatively during the period of 2000 through 2006 grew at a rate *five times* the rate of U.S. inflation (Federal Procurement Data System, 2007). While this rate of growth is certainly not sustainable, annual federal procurement budgets in excess of \$400 billion, outside of financial-recovery-related spending, are now the reality, providing an attractive market opportunity for vendors in virtually every field of goods and services.¹

Notwithstanding a 20-year movement toward more commercialized approaches to federal procurement, selling to the government is always governed by federal statutes and regulations, and offerors invariably will invest considerable time and resources in responding to an agency solicitation. Consequently, vendors expect fair and even-handed consideration of their submissions, consistent with the terms of the solicitation and governing statutes and regulations. Additionally, Congress utilizes the federal acquisition marketplace to advance a variety of socio-economic goals, and those benefited by such policies, notably the small business community, insist on agency adherence to these policies in the acquisition process. Above all, the public expects an honest, competitive, and transparent procurement system that yields good value for taxpayer dollars. To those ends, the Obama

¹ In FY 2006 (October 1, 2005 to September 30, 2006), almost \$420 billion was spent on federal contracts, approximately 14.5 percent of 2006 total federal spending, with another \$488 billion awarded in grants (USASpending.gov (www.USASpending.gov)). In FY 2007, federal contract spending rose to \$430 billion, but federal grants declined to \$466 billion (*Id.*).



administration has signaled its intent to foster firm, fixed-price contracts in lieu of cost-based contracts, and to increase contracting oversight as well as its opposition to noncompetitive contract awards and outsourcing.

When procuring agencies fail to adhere to the terms of the solicitation and applicable law and regulation, which is the case with surprising frequency, the primary tool available to an offeror, potential or actual, to challenge the procuring agency's action and vindicate the offeror's expectations is the procurement protest. In the materials that follow, we will focus on the most common protest mechanism, the **bid protest**. Secondarily, there are protests dealing with aspects of the small business set-aside program administered by the Small Business Administration (SBA). The most common of these, the **size protest**, will be addressed in a separate Foley publication.

Bid Protests — Where Are They Filed?

The three federal bid protest fora, in ascending order of formality and expense, are:

- An agency-level protest filed with the agency conducting the procurement at issue
- A protest filed with the Government Accountability Office (GAO)
- A judicial action brought at the United States Court of Federal Claims (COFC)

To highlight the differences, advantages, and disadvantages among them, each will be discussed in turn.

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Agency-Level Bid Protests

The agency-level protest as a formally recognized procedural option dates from the mid-1990s and derives from an experimental program of the Army Materiel Command (AMC) first implemented in 1991. Government-wide regulatory guidance is now provided at Federal Acquisition Regulation (FAR) § 33.103. Most agencies supplement the FAR provision, to a greater or lesser degree, through their own regulations, and the regulations of the agency at issue should be reviewed before commencing an agency-level bid protest before that agency.

Who May Protest

A protest may be brought by an "interested party," defined to mean an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.



This is the same standard applied by the GAO. As regards the various issues that arise under this definition, see the discussion below dealing with GAO bid protests.

What May Be Protested — Matters of Jurisdiction

As a general matter, there are no jurisdictional limitations on an agency protest because an agency is deemed to have inherent authority to consider a protest dealing with all aspects of its own procurements. By statute (the Federal Acquisition Streamlining Act), however, an agency may not consider a protest of the issuance of task and delivery orders under already existing multiple-award task and delivery order contracts, where the agency has the ability to choose among several contractors when it seeks to place a specific order for goods or services. Instead, the aggrieved party must bring its complaint to the agency's task and delivery order ombudsman pursuant to FAR § 16.505(b)(4). An exception to this "no protest rule" is allowed with respect to orders that increase the scope, period, or maximum value of the contract under which the order is placed.

Agency-Level Timeliness Rules

Protests of apparent solicitation improprieties must be filed before bid opening or the closing date for receipt of proposals. In all other cases, the protest must be filed no later than 10 days after the basis for the protest is known or should have been known. Failure to satisfy these timeliness rules inevitably results in dismissal of the protest, although the FAR does allow the agency, for good cause shown, to consider the merits of an untimely protest, but that authority is seldom used.

Stay of Contract Award/Performance

- **Before contract award:** Upon receipt of a protest **before** award, the agency is required to withhold award pending resolution of the protest. However, the agency can **override** this stay by written justification that award is necessary for urgent and compelling reasons or is in the best interest of the federal government. Additionally, the agency is not required to stop the procurement processing short of award; thus, it may accept and evaluate proposals while the stay of award is in place.
- **After contract award/debriefing:** Upon receipt of a protest filed within 10 days **after** contract award or within five days after a debriefing to the protester given pursuant to a **timely, written** debriefing request, whichever is later, the contracting officer (CO) is to suspend performance pending resolution of the protest including any review by an independent higher-level official. Again though, the agency can **override** this stay by written justification that award is necessary for urgent and compelling reasons or is in the best interest of the federal government.



The Agency Protest Process.

- A protest is commenced by providing a written submission of the protest grounds to the CO.
- Depending upon the agency, the protest will be considered by the CO or by an independent decision authority at a level higher than the CO. If the protest is decided by the CO, the agency is to provide for appellate review of the CO's decision by an independent decision authority.
- The FAR imposes no requirement for a written agency report in an agency-level protest, although some agencies pursuant to their own rules do; nor under the FAR does the protestor have an opportunity to reply to whatever response the agency may make to the protest, although again some agencies allow that opportunity.
- There is no entitlement to seek documents relevant to the procurement. The FAR merely advises that the parties "may" exchange relevant information. Hence, there is no use of protective orders to control the treatment of protected information because protected information is not disclosed by the agency.
- There is no formal procedure available to allow the successful awardee or other offerors to "intervene" in the agency protest to present their views, although the agency could invite comments from them if it so desired.
- Best efforts are to be made to render a decision within 35 days. The decision is provided only to the protester; it is not published.

Available Relief

The agency may take any action or grant any remedy that could be recommended by the Comptroller General if the protest were instead filed with the GAO. (See the discussion below regarding available relief in a GAO bid protest.) Further, agencies may pay protest costs under the same standards that allow costs to be paid to a prevailing party in a GAO protest.

Why Bring an Agency-Level Protest

Advantages

- The forum is the least formal, least costly, and most quickly reaches a decision.
- There is the possibility that the protester may succeed in getting the agency to favorably resolve the issue, thereby dispensing with the need for further proceedings at the GAO and/or the COFC.
- The public "profile" of an agency protest is low, essentially limited to agency officials, because agency protest decisions are not published. This spares the procurement officials the public embarrassment that may result from publication of a decision detailing a flawed



procurement, and concomitantly reduces the risk of generating an adverse agency view of the protestor.

- Solicitation defect issues can be preserved for later challenge at the GAO, as the GAO will consider challenges of solicitation defect issues provided they were timely raised at the agency.
- A negative decision with respect to the protest does not have preclusive (*res judicata*) effect. The protestor can still file a subsequent protest on the same grounds at the GAO, so it gets “two bites at the apple.”

Disadvantages

- There is no access to procurement-related documents. Furthermore, in the great majority of instances, an agency report is not prepared and, when such a report is compiled, it may not be available to the protestor. At the GAO, it is not uncommon for the more persuasive grounds of protest to be developed upon review of documents produced in the agency report that responds to the initial protest. That opportunity is lacking in the case of an agency-level protest.
- The agency decision-maker frequently is the CO or someone within the CO’s supervisory chain. This, of course, raises concerns that the decision may be biased in favor of the agency. Because a protest typically asks an agency’s procuring officials to reverse their own decision or admit that a mistake was made, the odds of success are lowered if those procuring officials are rendering the decision.
- Because protest decisions are not published, there is no transparency to the process and, hence, a potential for arbitrary and capricious decision-making is fostered. Moreover, the lack of a record of “precedent” deprives future protesters of the benefit of the agency’s reasoning in prior decisions.
- Waiting for an agency-level protest decision can affect the timeliness of a subsequent GAO protest or affect the ability to obtain a stay of contract performance upon filing an otherwise timely GAO protest. This risk is heightened by the fact that the GAO’s timeliness rules are keyed to “initial adverse agency action,” not receipt of the agency’s actual decision. For example, if the agency-level protest relates to an alleged solicitation defect and the agency proceeds with receipt of proposals despite the agency-level protest but without having rendered a decision, the agency’s conduct (i.e., accepting proposals) is viewed by the GAO as notice of initial adverse agency action (meaning that the agency has implicitly denied the protest) which starts the clock running for purposes of determining the timeliness of a subsequent GAO protest.
- Finally, from the point of view of other interested offerors, seeking for example to defend a contract award, there is no assured opportunity to intervene in the proceedings.



Common Protest Grounds

In view of the disadvantages of agency-level protests, the protest grounds suitable for resolution in this forum are the more simple, straightforward, and less fact-dependent. As summarized by one commentator (Troff, 2005), these tend to be pre-award protests against solicitation terms and post-award protests relating to the timely receipt of bids, bid responsiveness, and mistakes in bids. Protests involving factually complex issues, extensive analysis, the evaluation of proposals, or comparisons between proposals are better left for the other two fora.

Agency-Level Protest Statistics

Very few agencies make available their agency-level bid protest statistics; therefore, government-wide data is lacking from which to track trends and draw conclusions as to agency handling of protests. One noteworthy exception is the AMC, which was the prototype for the current agency-level protest process. According to the AMC (as reported by Troff), its protest filings during the FY 1999 through FY 2004 period averaged 28 per year, a decline of nearly 60 percent in activity from the earlier years of the AMC program. By comparison, AMC procurements precipitated an average of 68 protests per year directly to the GAO between FY 1999 and FY 2004. The AMC took corrective action in 15 percent of the protests that came before it, although the nature of that corrective action is not necessarily equivalent to the results that would accrue in a sustained GAO protest. The AMC further reports that of the 633 protests it resolved between FY 1991 and FY 2004, 57 (or nine percent) were refiled at the GAO, and of those 57 protests, only four were sustained by the GAO. Because the AMC bid protest forum is staffed by independent legal professionals separate and apart from the CO and the agency's acquisition personnel, it is not unreasonable to expect that a protester's chances of success are even less at agencies other than the AMC.

GAO Bid Protests

The GAO has been involved with the resolution of disputes concerning the award of federal contracts since the early 1930s, its authority being derived, according to the GAO, from the GAO's role in reviewing questions of whether federally appropriated funds were properly spent. For many years, the GAO was the sole forum available to aggrieved offerors, although the precise source of its authority was clouded. However, any ambiguities were dispelled by the 1984 enactment of the Competition in Contracting Act (CICA) (31 U.S.C. §§ 3551 *et. seq.*), which provides a clear and explicit statutory mandate for the GAO's bid protest function. In furtherance thereof, the GAO has promulgated regulations governing the bid protest process, which are found at 4 C.F.R., Part 21.

Protests at the GAO are decided by the Procurement Law Control Group, consisting of approximately 30 attorneys, within the Office of the General Counsel. The



protester may, but is not required to, use legal counsel (either in-house or outside). However, as explained below, unless outside counsel is utilized, access to protected information (which is necessary to develop the protest record fully) will be embargoed. The procuring agency will be represented by agency counsel who, not infrequently, will have played a role in the procurement process. Where there has been an award of the protested contract, the awardee is entitled to intervene, although that does not always occur. From the awardee's standpoint, the better practice is for the awardee, represented by counsel, to intervene because the agency and the awardee do not always see eye-to-eye on how best to defend the award, with the consequence that the agency may fail to vigorously defend the award or be more inclined to undertake unilateral corrective action in response to the protest that rescinds the award.

Who May Protest

CICA extends the right to protest to an interested party, which it defines as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract. With respect to "prospective" bidders or offerors, the GAO looks to whether a successful protest would allow the contractor to participate as a bidder or offeror going forward, irrespective of whether the protester did so in the first round. If that test is satisfied, the protester qualifies as an interested party. Interested-party status will not be accorded to suppliers or subcontractors, associations, or organizations that do not perform contracts, and persons acting as private attorneys general, because such entities do not have a "direct economic interest." Further, with respect to direct economic interest, the protester must be in line for award or be able to compete for award if its position in the protest is sustained. The necessary showing required of the protester will depend on the type of competitive procedure being used and the point in the competition at which the protest is brought. A contractor that is ineligible for award does not have a direct economic interest in the award and, thus, is not an interested party unless its protest contests the matter of eligibility. Finally, where multiple contract awards are made in the same procurement, one awardee cannot protest a second award to another party.

What May Be Protested — Matters of Jurisdiction

The jurisdictional question has two facets. The first relates to the status of the entity conducting the procurement that is generating the protest. By statute (CICA), the GAO may consider protests of procurements of property or services by a "federal agency," as that term is defined at 40 U.S.C. § 102. Federal agency is defined to include an executive department or independent establishment in the executive branch, a wholly owned government corporation, and certain establishments in the legislative and judicial branches. The GAO's bid protest jurisdiction is no longer based on the procurement at issue involving the expenditure of appropriated funds. Therefore, the GAO will entertain protests relating to "no cost" contracts and



procurements undertaken by a federal agency that do not rely on appropriated funds for its operations such as Federal Prison Industries and the U.S. Mint.

The GAO will not consider protests involving procurements of entities that are not federal agencies such as “true” non-appropriated fund instrumentalities (for example, the exchange services of the military departments). Additionally, the GAO will decline to hear protests relating to procurements by federal agencies that have been exempted from CICA by their own authorizing legislation such as the U.S. Postal Service, the Federal Aviation Administration, the FDIC, and, for certain contract actions, the Centers for Medicare & Medicaid Services.

The second aspect of the jurisdictional question deals with the nature of the transaction being protested. Previously, we noted that an agency-level protest cannot be brought against the award of task or delivery orders issued under already-existing multiple-award task and delivery order contracts. This same restriction applied to the GAO’s protest jurisdiction until enactment of the National Defense Authorization Act for FY 2008. As a consequence of that enactment, effective May 27, 2008, the GAO is given exclusive jurisdiction over protests of task and delivery orders valued in excess of \$10 million. This jurisdiction is in the nature of a pilot project because it will expire after three years unless Congress acts to renew it. Note, however, that these limitations with respect to protest jurisdiction, both before and after May 27, 2008, do not apply to protests of task and delivery orders placed under General Services Administration (GSA) multiple-award schedule (MAS) contracts awarded as part of the Federal Supply Schedule (FSS), and the GAO regularly has entertained such protests.

Protests relating to grants and cooperative agreements are not entertained by the GAO because those vehicles are not considered procurements of property or services. Protests arising out of subcontractor procurements likewise are declined unless the agency that awarded the prime contract requests the GAO to hear the protest, or the ostensible prime contractor is actually an agent of the government such as federal research labs. Similarly, protests involving the sale of property by a federal agency will not be heard unless the agency agrees in writing to have the GAO decide the matter.

GAO Timeliness Rules

The GAO’s timeliness rules are found at 4 C.F.R. § 21.2. Their stringency is justified as being necessary to ensure that the impact of protests on the procurement process is minimized.

- Protests based on alleged improprieties in a solicitation, which improprieties are (or should be) apparent to the protester 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. By way of



example, if a qualified small business concern interested in submitting a proposal wished to protest the fact that the solicitation should have been set aside for small business but was not, the protest must be filed before the date set for receipt of initial proposals, because the fact that the procurement is not set aside is evident on the face of the solicitation.

- Protests not based on defects apparent on the face of a solicitation must be filed within 10 days after the basis of protest is known or should have been known to the protester, whichever is earlier. However, with respect to protests involving best value procurements under which a debriefing is requested and, when requested, is required to be given (meaning the debriefing was requested **in writing within three calendar days of learning of the contract award** (see below)), the protest will be timely if filed within 10 days after the debriefing is given.
- If an agency-level protest was previously filed, a subsequent protest to the GAO within 10 days of actual or constructive knowledge of initial adverse agency action will be timely, so long as the agency level protest was timely filed. Where the timely agency-level protest involved an alleged solicitation impropriety, a subsequent protest to the GAO will be timely if filed within this 10-day period, even if filed after bid opening or the closing time for receipt of proposals.

Stay of Contract Award/Performance

By statute (CICA), federal agencies are instructed to stay their hand pending a protest to the GAO, but with provision made for override of the “automatic stay” in certain narrowly drawn circumstances. The purpose of the stay is to ensure that effective relief can be obtained by a successful protester.

- If award has not been made, upon receipt of notice from the GAO that a protest has been filed, the agency is to refrain from making award while the protest is pending (31 U.S.C. § 3553(c)). **Override** — However, the head of the procuring activity within the agency may authorize award of the contract, notwithstanding the protest, upon a written finding that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the GAO’s decision in the protest.
- If award has been made, and if the protest has been filed and notice thereof received from the GAO within 10 days of the date of award or within five days after any debriefing that is requested and, when requested, is required, whichever is later, the agency is to direct the awardee to cease performance so long as the protest is pending (31 U.S.C. § 3553(d)). **Override** — However, the head of the procuring activity within the agency may authorize performance of the contract, notwithstanding the protest, upon a written finding that (i) performance of the contract is in the best interests of the United States, or (ii) urgent and compelling circumstances that significantly affect interests of the



United States will not permit waiting for the GAO's decision in the protest.

- A required debriefing is a creature of negotiated procurements and is a debriefing requested in writing by the unsuccessful offeror within three calendar days of notification from the agency (i) of exclusion from the competition (pre-award) (FAR § 15.505(a)), or (ii) of award to a competing offeror (post-award) (FAR § 15.506(a)).² If the debriefing is not requested in writing — or not within the three-calendar-day period — it is not a required debriefing, with the consequence that a protest filed based on the timing of the debriefing will not stay contract award.
- Note that even if a protester is complying with the GAO's timeliness rules for filing a protest, that will not necessarily ensure that the automatic stay will be entered in instances where contract award has been made and timeliness is keyed to the date of the debriefing. Further, even assuming the CICA time requirements will be met for entry of an automatic stay, best practices dictate that the protest be filed "a day early" if at all possible to insure adequate time for the GAO notification to the agency that a protest has been filed. It is the notification to the agency within the time requirements that triggers the automatic stay, not mere filing of the protest with the GAO. If the protest filing is being made on the "last day," the GAO should be advised of the need for expedition by prominently highlighting that fact on the first page of the protest; for example, "**EXPEDITED NOTICE TO AGENCY REQUESTED — LAST DAY FOR CICA STAY.**"

The Protest Process

- A protest is commenced by filing a protest with the GAO's Procurement Law Control Group. Filing may be accomplished by hand delivery, mail, commercial carrier, fax, or e-mail. Beyond setting forth the basic components of a protest (details of the solicitation, statement of the legal and factual grounds of protest, information establishing the protester's interested party status, information establishing the timeliness of the protest, and the form of relief requested), a protest filing typically requests the production of documents relevant to the procurement and the protest grounds, asks for entry of a protective order to govern the proceedings, and more often than not requests that a hearing be held. A copy of the protest must be served on the procuring agency within one day of filing at the GAO.

² In the post-award context, the debriefing is intended to explain the contract award decision. The agency, at a minimum, is to give the disappointed offeror (i) an identification of what the agency considered the debriefed offeror's significant weaknesses; (ii) the evaluated cost and technical ratings of the successful offeror versus the debriefed offeror and past performance information on the debriefed offeror; (iii) the overall rankings of all offerors; (iv) a summary of the rationale for award; and (v) reasonable responses to relevant questions about the source selection process and whether the applicable authorities were followed (FAR § 15.506(d)).



- GAO telephonic notice to the agency that the protest has been filed is to be accomplished within one day of the GAO's receipt of the protest.
- Presuming a protective order has been requested, the protester must file a redacted copy of the protest with the GAO and the contracting agency within one day of the initial filing. The redacted copy is used by the agency to notify potential intervenors of the protest.
- Thereafter in short order comes GAO acknowledgement of the protest, establishment of the deadline for filing the agency report, entry of a protective order, and subsequent processing of applications for entry to the protective order.
- A notice of intervention may be filed by other interested offerors, notably the successful awardee(s), if award has been made. Other unsuccessful offerors also may protest the same procurement, in which event the protests are "consolidated."
- Agency motion to dismiss some or all of the protest grounds is occasionally filed within the first 10 to 20 days, particularly if untimeliness of the protest is self-evident. If such a motion is filed, the protester is given an opportunity to respond, and then the GAO rules on the motion sufficiently in advance of the due date of the agency report.
- Shortly before filing the agency report, the agency will provide a listing of the documents it intends to produce in response to the protester's document requests. If documents are to be withheld, they will be so noted so that expedited proceedings may be held to resolve the production issue. Objections to agency withholding of requested documents must be filed within two days. It should be noted that under GAO rules, the agency can request documents of the protester, although this is atypical.
- The agency report and documents responsive to the protester's document requests are filed with the GAO and served on the protester and any intervenor 30 days after commencement of the protest. The agency report will consist of an affidavit/memorandum from the CO responding to the protest (sometimes with post-hoc rationalizations) and a legal memorandum from agency counsel.
- The protester then has 10 calendar days to file comments on the agency report and to raise any supplemental protest grounds of which the protester is first made aware by the agency report and the documents that have been produced. If the protester fails to respond to the agency's rebuttal of any protest issue, the GAO will consider that the protester has abandoned that issue. Further document requests also may be filed by the protester, but these are due within two days of becoming aware of the existence of the documents being sought. The GAO will grant modest extensions of the comment period. Note, however, that such an extension does **not** go to extend the 10-day period in which to raise new



or supplemental protest grounds, which deadline will not be extended by the GAO. Thus, in the event the protester secures a three-day extension within which to file its comments, and if those comments are accompanied by a supplemental protest, the supplemental protest will be dismissed as untimely because it was filed more than 10 days after the protester became aware of the basis for its supplemental protest grounds. Meanwhile, should the intervenor wish to file comments on the agency report, those comments also are due within 10 days. While denominated as comments on the agency report, in actuality the intervenor's comments are in opposition to the protest and typically in support of the agency.

- The agency then responds to the protester's comments, generally within 10 days, and, where applicable, to the new or supplemental protest grounds by way of a supplemental agency report. No specific time limit for the supplemental agency report is pre-ordained, but the timeline is dependent on the detail and complexity of the supplemental protest, although obviously no more than 30 days will be allowed. Theoretically, should the intervenor wish to file comments on the protester's comments and/or on the supplemental protest, it could do so within the time allotted to the agency. In practice, however, such filings by the intervenor are deferred until the next step in the process, described in the following bullet point.
- Last, the protester replies to the agency's response, typically within seven days. The intervenor also may comment on the agency's response and on the protester's comments that engendered the agency response. Where a supplemental protest has been filed, the protester comments on the agency's supplemental agency report, generally within seven to 10 days. The intervenor also may file comments on the supplemental agency report during this period, which comments also will encompass an opposition to the supplemental protest.
- Following completion of the comment period, the GAO may hold a hearing to take testimony on disputed factual issues. Hearings are held at the discretion of the GAO. They usually are limited to one day's duration, and are held at the GAO's hearing room.
- All parties are entitled to file comments on the hearing within five days after the transcript is produced, and the protestor must file comments or the protest will be dismissed.
- The GAO must issue a decision on the protest within 100 days of the protest filing. Where a supplemental protest has been filed, the GAO may extend the deadline by rolling the initial protest into the supplemental protest. However, this is seldom done. It is far more common for the GAO to decide the entire protest (initial and supplemental) within 100 days of the initial protest filing. Available statistics indicate an average decision time of less than 90 days.



- A party to the protest may seek reconsideration of a decision. The request must be filed within 10 days of rendition of the decision. Grounds for reconsideration are (i) failure of the GAO to consider evidence that should have been considered; (ii) newly discovered evidence that the party could not reasonably have furnished for the initial consideration; or (iii) errors of law in the decision. There is no deadline for issuance of a reconsideration decision, and there is no requirement on the part of the agency to withhold award or suspend performance during the pendency of the reconsideration.

Standard of Review and Competitive Prejudice

The GAO reviews the agency action to determine whether it complies with applicable statutory and regulatory requirements and is consistent with the terms of solicitation. Cost/technical tradeoffs in negotiated procurements are judged by the test of reasonableness and for consistency with the request for proposal's (RFP's) stated evaluation criteria. Even if there has been a violation of statute or regulation or some other defect is shown, the protester must demonstrate competitive prejudice to succeed. Thus, the protester must show that, but for the agency's actions being protested, it would have had a "substantial chance" or "reasonable likelihood" of award. What constitutes a substantial chance or reasonable likelihood again will depend on the type of competitive procedure being used, the point in the competition at which the protest is brought, and the nature of the procurement error involved. Thus, in some instances, the GAO speaks of prejudice being assumed.

Available Relief — Procedural

As previously noted, the protester is entitled to request documents relevant to the procurement and the selection process and to receive an agency report that responds to the protest grounds. Because the extent of information conveyed by a debriefing will be limited, the true details of the procurement process often are not revealed until this additional material is made available. Thereupon, the protester may file additional or supplemental protest grounds, which frequently become the primary focus of the protest.

Dissemination of this documentation would be impossible without the GAO's protective order regimen, because the contract file contains source selection information and offeror proprietary information. The protective order is the very keystone of the GAO bid protest process, as it allows counsel for the protester to learn the details of how the agency conducted the procurement and to assess independently the relative strengths and weaknesses of the awardee's proposal as compared to that of the protester. Only attorneys (generally outside counsel) and consultants retained by attorneys may be admitted to a protective order. Protected information may not be disclosed to someone not admitted to the protective order, meaning that a protester's or intervenor's counsel may not reveal such protected information to the



client. As the protest develops, the client is kept informed through means of redacted copies of comments and reports, for which the GAO's procedures make provision, and as to which all parties to the protest must agree before distribution. The GAO closely oversees the protective order process in order to protect the integrity of the bid protest system, and in the event of violations, may impose sanctions up to and including dismissal of the protest.

Available Relief — Substantive

If the GAO sustains a protest, it may **recommend** that the contracting agency implement any combination of the following remedies:

- Refrain from exercising options under the contract
- Terminate the contract
- Recompete the contract
- Issue a new solicitation
- Such other relief as the GAO determines necessary to promote compliance with statutory and regulatory requirements applicable to the procurement
- That the contracting agency pay the protester the costs of filing and pursuing the protest (including attorneys' fees and consultant fees) and, where no other substantive relief is possible, the protester's costs of bid and proposal preparation

By statute (CICA, 31 U.S.C. § 3554(e)(2)), the GAO must report to Congress each instance in which a federal agency fails to fully implement a GAO recommendation in connection with a bid protest. During the last 11 years (FY 1998 through FY 2008), the GAO has reported five such instances.

Corrective Action

If the contracting agency determines that its position in a protest is vulnerable, it may elect to take unilateral "corrective action" to remedy or address the alleged error(s) raised in the protest, or to address other errors the agency has discovered. Corrective action may be taken at any time before the protest is decided. Provided the corrective action adequately addresses the error that the agency says it is trying to correct, the GAO generally will dismiss the protest as moot or "academic." Other points to keep in mind regarding corrective action include:

- Corrective action may be, and often is, less remedial than what the protester is seeking, and it may be predicated on errors discovered by the agency rather than errors raised in the protest. Thus, the corrective action need not resolve the errors raised in the protest.
- The corrective action itself can be protested, either by the protester or by the intervenor. In the former situation, the protester argues that the corrective action does not adequately address the flaws in the



procurement that have been raised. In the latter event, the intervenor argues that the corrective action gives the protester more than that to which it is entitled.

- If the agency advises the GAO of its decision to take corrective action before the time for filing the agency report, the GAO considers the agency action to be prompt and will not recommend reimbursement of protest costs. But if the agency waits until later in the proceedings before taking corrective action, the GAO may and with some regularity does recommend that the protester be paid its reasonable protest costs.

Processing of Awards of Protest Costs

In a sustained protest, when the GAO recommends that the agency pay the protester the costs of filing and pursuing the protest, it leaves it to the parties to agree on the amount. The protester must submit its detailed and certified cost claim to the agency within 60 days after the GAO's recommendation that costs be paid. If the parties cannot reach agreement on amount within a reasonable time, the protester may then bring the matter to the GAO for decision. The Federal Acquisition Streamlining Act places a cap on attorneys' fees of \$150 per hour (adjusted for inflation), unless the agency determines, on the recommendation of the GAO, that a higher rate is justified. This cap, however, does not apply to a small business that has successfully protested. Where the agency has unduly delayed taking unilateral corrective action in a clearly meritorious protest, the protester must file its request for costs with the GAO within 15 days of notice of the corrective action.

Judicial Proceedings During Pendency of the Protest

If, while the GAO protest is pending, the protester commences an action at the COFC relating to the same procurement, the GAO will dismiss the protest before the GAO. Moreover, if another offeror in the same procurement commences a bid protest action at the COFC, the GAO will dismiss the protest of that procurement which is pending before the GAO. Note, however, that this rule does not extend to judicial challenges to agency overrides of the CICA automatic stay. Therefore, when a protest is filed at the GAO, and the agency determines to proceed with contract performance irrespective of the protest, if the protester brings an action in the COFC to enjoin the override of the stay, the GAO will continue to entertain the protest while the COFC decides whether the override was arbitrary and capricious. The GAO itself will not consider a protest of an agency override of the automatic stay.

Why Bring a GAO Protest

- The GAO is an independent, experienced administrative tribunal with decades of experience deciding bid protests.
- GAO decisions are published and constitute a recognized body of government contracts law.



- The forum is transparent and impartial.
- Protester's counsel can have access to offerors' proprietary information and agency source selection materials under protective order.
- At the GAO, it is sometimes possible to secure a hearing, at which live testimony is taken to facilitate resolution of significant factual disputes. By contrast, the COFC decides on the basis of the administrative record, which only rarely is supplemented with deposition testimony and/or affidavit.
- A GAO protest usually is less expensive than a COFC protest and, for those who care, somewhat less formal.
- If the protest is promptly filed, contract award/performance is stayed. By preserving the status quo ante, the protester's entitlement to reap the full fruits of a sustained protest is not diminished by ongoing contract performance of the apparent awardee that advances to such a degree that contract termination and resolicitation of the requirement becomes a practical impossibility.³
- A protester may obtain a second bite at the apple in the event of a prior unsuccessful agency protest.
- Attorneys' fees are awarded to the successful protester (albeit at capped rates), whereas at the COFC only small-net-worth entities are eligible for award under the more demanding requirements of the Equal Access to Justice Act.

Common Protest Grounds

Protest grounds are as varied as the procurements from which they arise and the multitude of statutory and regulatory provisions that govern. Therefore, enumeration of an exhaustive laundry list is not feasible in this white paper. A few of the more frequently encountered follow.

Less-Than-Full and Open Competition

- Unjustified sole source awards
- Restricting proposals to the original equipment manufacturer or a name brand

Solicitation Defects

- Failure to set aside the procurement for small business or, the obverse, improperly setting aside the procurement
- Unjustified bundling of requirements
- Unduly restrictive solicitation requirements

³ Moreover, should the protester be the incumbent contractor for the requirement, stayed performance of the new follow-on contract likely will result in an extension of the prior contract during the pendency of the protest.



Grounds Not Relating to Solicitation Defects

- Flawed competitive range determinations
- Evaluation inconsistent with the evaluation criteria specified in the solicitation
- Use of unstated evaluation criteria
- Failure to account for apparent adverse information regarding the awardee, including integrity-based challenges to CO determinations of contractor responsibility
- Improper past performance evaluation
- Lack of meaningful discussions
- Improper price/cost realism evaluation;
- Improper best value determination
- Unequal treatment
- Failure to adequately document or support the evaluation and award decision
- Latent ambiguity in the solicitation
- Organizational conflicts of interest:
- Unequal access to information — Where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract
- Biased ground rules — Where a firm as part of its performance of a government contract has in some sense set the ground rules for another government contract by, for example, writing the statement of work or the specifications for that other contract
- Impaired objectivity — Where a firm’s work under one government contract could entail the firm evaluating itself through either assessment of its own performance under another contract or evaluation of its own and/or competitors’ proposals in a procurement process
- Failure to satisfy the 50 percent small business concern prime contractor requirement (commonly referred to as the 50 percent subcontracting limitation) in a small business set aside procurement (15 percent in construction contracts)

GAO Protest Statistics

A detailed table of available GAO published statistics for FY 1995 through FY 2008 is included at the end of this white paper. Summarizing certain of the key indicators, overall protest activity appears to have “stabilized” in the



1,150- to 1,650-per-year range, which equates to five to six protests filed each business day.⁴ The number of cases closed each year closely tracks the number filed. Merits decisions (published opinions) are rendered in close to 25 percent of total dispositions.⁵ The balance is resolved by means of (i) summary dismissal, where, for example, the protest is untimely on its face or the protester is found not to be an interested party; (ii) dismissal for reasons of mootness where the agency takes unilateral corrective action; (iii) alternative dispute resolution (ADR), which occurs in approximately nine percent of cases; and (iv) voluntary withdrawal of the protest, where, for example, a settlement is reached between the protester and the procuring agency. Hearings are held, on average, in approximately 50 protests annually.

Of those protests that are the subject of a merits decision, the GAO during the past 10 years has sustained the protest on average 22 percent of the time. Recently, sustain rates as high as 29 percent (FY 2006) and 27 percent (FY 2007) have been recorded. The GAO also reports what it calls an “effectiveness rate” that is based on what is described as a protester obtaining some form of corrective action relief from the agency as reported to the GAO. The effectiveness rate averages 36 percent of cases closed, and reached as high as 42 percent in FY 2008. Thus, between protests that were sustained on the merits and corrective action, protesters have ultimately obtained some form of relief in 33 percent to 42 percent of the protests brought before the GAO since FY 2001.

Court of Federal Claims Bid Protests

Judicial consideration of bid protests, with accompanying power to grant injunctive relief, dates from the D.C. Circuit’s 1970 decision in *Scanwell Labs v. Shaffer*. There the court held that the Administrative Procedure Act gave bidders a right to bring an action in U.S. district court challenging agency action with respect to a procurement on the ground that the agency had an implied duty of good faith and fair dealing with offerors when considering their proposals submitted in response to an agency solicitation.⁶ In ensuing years, this jurisdiction was exercised in both pre-award and

⁴ This level of activity should not be equated with the number of procurements that are challenged, which is a lesser number. Where a protester files one or more supplemental protests or where multiple parties protest the same procurement action, new docket numbers are assigned by the GAO. Each of these docket numbers is deemed a separate protest for GAO statistical reporting purposes.

⁵ While this percentage is not calculated by the GAO, and is in fact inaccurate in view of how the GAO maintains its protest statistics (see preceding footnote), it is nonetheless referenced here because of its prevalence in the procurement literature. To illustrate the inaccuracy, the much-publicized 2008 Boeing tanker protest that the GAO sustained involved eight separate dockets, yet the decision counts as but one merits decision.

⁶ The Court of Claims, predecessor of both the United States Court of Appeals for the Federal Circuit (Federal Circuit) and the COFC, at around this time also began to exercise jurisdiction over certain contract award controversies under a theory of implied contract, the implied contract being one to consider bids and proposals fairly and honestly.



post-award bid protests. Upon reorganization of the Court of Claims in 1982, resulting in creation of the COFC and the Federal Circuit, the COFC was granted equitable jurisdiction over bid protest actions. However, the Federal Circuit, to which COFC appeals are taken, early on limited that jurisdiction to a limited class of pre-award protests. Then, with enactment of the Administrative Dispute Resolution Act (ADRA) in 1996, the COFC was granted full authority, coextensive with that of the district courts, over bid protest actions. Moreover, ADRA provided for the sunset of district court bid protest jurisdiction effective January 1, 2001. Consequently, the COFC is today the only court empowered to entertain federal bid protest actions, pursuant to the jurisdictional grant of 28 U.S.C. § 1491(b).

The COFC comprises 16 regularly sitting judges and, at this writing, eight active senior judges. Cases are randomly assigned. COFC decisions are reviewed by the Federal Circuit, which, absent Supreme Court review, has the last word in the matter. Thus, COFC judges are bound by Federal Circuit precedent. When the Federal Circuit has not spoken on the matter at issue, a COFC judge is not bound by the decisions of his/her fellow COFC judges who may previously have considered the point, although that judge will give those prior decisions careful consideration. Moreover, the COFC is not bound by GAO decisions that may have considered the issue. COFC judges, nonetheless, purport to accord GAO decisions a relatively high degree of deference, but point out that when the issue is a question of law, no deference need be given. (As discussed later herein, the interrelation between the COFC and the GAO becomes considerably more complicated when the court is called upon to consider a protest that already has been the subject of a GAO decision.) The protester must be represented by counsel who is a member of the bar of the court. The agency is represented by a U.S. Department of Justice (DOJ) attorney from the Civil Division, who generally is assisted by agency counsel. Where there has been contract award, the awardee is entitled to intervene and more often does than at the GAO.

Who May Protest

ADRA (28 U.S.C. § 1491(b)(1)) provides that the court has jurisdiction over protests of procurement-related actions brought by “interested parties.” Unlike CICA with respect to GAO protest jurisdiction, ADRA does not define interested party. The district courts, which had exercised protest jurisdiction for a number of years prior to ADRA (and which were given concurrent jurisdiction with the COFC for the period 1996 through 2000), applied the law of standing as developed under the Administrative Procedure Act (APA), a standard more “lenient” than the CICA definition of interested party. A majority of the COFC judges to consider the question in the first five years of its ADRA protest jurisdiction agreed with the district courts. Once concurrent district court jurisdiction expired in 2001, the Federal Circuit moved to squelch reliance on the APA concept of standing and adopted the more restrictive CICA definition already applicable to the GAO. Therefore, the previous discussion of who may protest at the GAO should be consulted. However, in application on a case-by-case basis, one could argue that the



Federal Circuit and the COFC have determined to define interested party more narrowly than GAO.

In a subsequent twist that has spawned needless confusion, the Federal Circuit has required proof of competitive prejudice in the standing (i.e., interested party) inquiry. Previously, a protester had to address competitive prejudice only in the context of relief on the merits. Questions of standing focus not on the merits, but on whether a party has the right to seek judicial review. But now “the prejudice issue must be reached before addressing the merits,” according to the Federal Circuit, which can require a mini-determination of the merits at the outset of the case, only to have to revisit the merits issues in the case in chief.

What May Be Protested — Matters of Jurisdiction

The court’s jurisdictional mandate provides for jurisdiction over an action “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” (28 U.S.C. § 1491(b)(1)). The boundaries of this jurisdictional grant have yet to be fully delineated by the Federal Circuit. Nonetheless, on its face, it appears broader than the GAO’s protest jurisdiction as spelled out in 31 U.S.C. § 3551(1). Federal agency is not defined by ADRA. Whether the Federal Circuit will opt for the CICA definition, as it did with respect to interested party, has yet to be definitively decided, although the inclination to date is to utilize the definition of agency found at 28 U.S.C. § 451. Individual judges of the COFC on occasion depart from GAO jurisdictional decisions with respect to certain types of procurements.⁷ As a precautionary measure, a protester should consult COFC and Federal Circuit precedent before bringing suit to confirm that there is jurisdiction over the procuring entity and over the type of procurement or procurement-related activity that it intends to protest.

Several discrete categories of procurement-related activity merit comment before moving on. Previously, we have highlighted the different ground rules that pertain to task and delivery orders issued under already existing agency ID/IQ contracts. The COFC has no protest jurisdiction over such matters, similar to the GAO before recent implementation of the three-year pilot project authorized by Congress in the FY 2008 National Defense Authorization Act. However, the COFC, like the GAO, does have jurisdiction over protests of task and delivery orders placed under GSA MAS contracts awarded as part of the FSS.

⁷ For example, the protest of a “true” non-appropriated fund instrumentality procurement has been entertained, irrespective of the GAO’s categorization of such an entity as not being a federal agency. On the other hand, the court has declined to hear a protest of a Small Business Innovation Research program award decision, although the GAO will consider such protests, albeit with respect to only a limited range of issues.



Second, there is the matter of agency override of the CICA automatic stay entered as a consequence of a timely filed GAO protest. The Federal Circuit has confirmed the COFC's jurisdiction to entertain these "protests" of agency determinations to override the CICA automatic stay, and such actions are now routinely heard. Another area unique to COFC protest jurisdiction involves protests of agency determinations to accept and adhere to GAO recommendations resulting from a successful GAO protest. In such an instance, it is the apparent awardee, who in all likelihood was an intervenor before the GAO, who brings the COFC action seeking to undo the GAO protester's victory. A final category of action, albeit extremely rare, that only the COFC could entertain involves the protest of an agency decision to disregard the GAO's recommendation resulting from a successful GAO protest.

COFC Timeliness Rules

The COFC has no bid protest specific statute of limitations. The general six-year statute of limitations (28 U.S.C. § 2501) presumably applies, but in practice is not relevant since the procurement activity being protested almost always will have long since passed. The Federal Circuit, however, has moved to impose a prudential timeliness rule that covers protests of solicitation defects. In its 2007 decision in *Blue & Gold Fleet*, the appeals court held that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the objection subsequently in a bid protest action in the Court of Federal Claims." Hence, with respect to solicitation defects, the COFC now operates under a timeliness rule analogous to that of the GAO. In the instance of a protester seeking another bite at the apple if his GAO protest of a solicitation defect proves unavailing: (i) a COFC protest will be dismissed as untimely if the earlier GAO protest was untimely, and (ii) if the GAO protest was timely but resolved unfavorably, the protester should file his COFC action immediately upon issuance of the adverse GAO decision and before contract award.⁸

As regards post-award protests, there has been no movement toward adoption of GAO's 10-day rule. Instead, the COFC looks to equitable doctrines such as laches and equitable estoppel when considering timeliness. Moreover, these doctrines are invoked most frequently in the context of whether to grant injunctive relief (which topic is the next to be addressed) rather than jurisdictionally.

⁸ The protester also will be well advised to submit a proposal or bid in response to the defective solicitation, pending resolution of its GAO protest, in order to maintain interested party status for purposes of any subsequent protest to the COFC. Failure to do so can result in dismissal of the COFC action.



Stay of Contract Award/Performance

The CICA automatic stay has no application to COFC bid protests. If the protester is to prevent contract award or performance, it must secure provisional injunctive relief, either a temporary restraining order and/or a preliminary injunction. When considering a request for preliminary injunctive relief, the COFC applies the four-factor test routinely used in federal district court litigation: (i) has the protester demonstrated a reasonable likelihood of success on the merits; (ii) will the protester suffer irreparable harm if injunctive relief is not granted; (iii) does the balance of hardships to the respective parties favor the grant of injunctive relief; and (iv) is it in the public interest to grant injunctive relief.

The practical consequence of factor one (likelihood of success on the merits) is that a bid protest seeking preliminary injunctive relief often is effectively concluded at a very early stage, because the substantive merits of the protest grounds are tested at this juncture.⁹ As adapted to bid protest litigation, factor two usually weighs in favor of the protester because monetary relief is inadequate, being limited to bid preparation and proposal costs. Thus, in a bid protest, a lost opportunity to compete on a level playing field for a contract (i.e., a lost opportunity to earn the profit that would have been made under the contract) is sufficient to prove irreparable harm.

Factor three entails balancing the harms to the protester, the agency, and, in the event of award, the contract awardee. In assessing this factor, the court generally will consider affidavits and may even take live testimony. It is in this context that the government often raises issues of timeliness on the protester's part — for example, why the protester did not protest at the GAO, in the event it did not, or, if there was a GAO protest, why the protester waited for “so long” after the GAO decision on its protest before coming to the COFC. The government also will argue the agency's pressing need for the item or service being procured. In weighing that contention, the court has demonstrated a willingness to consider the availability of alternative acquisition vehicles such as short-term follow-on contracts to the prior incumbent contractor or bridge contracts to tide the agency over during the pendency of the protest. Factor three and factor four (the public interest) are the point at which the government invokes 28 U.S.C. § 1491(b)(3), which instructs the COFC when deciding a bid protest to “give due regard to the interests of national defense and national security.” Also to be considered with respect to factor four, and somewhat offsetting the

⁹ The foregoing observation pertains to those instances where the protester vigorously pushes a claim for preliminary injunctive relief and the agency adamantly refuses to stay its hand. However, not all protests seeking preliminary injunctive relief follow this pattern; the agency may voluntarily stay its hand, in whole or in part, pending briefing on the case at the COFC, resulting in consideration of entitlement to injunctive relief on a more fully developed record that resolves the case on the merits.



effect of section 1491(b)(3), is the overriding public interest in preserving the integrity of the procurement process by requiring the procuring agency to follow applicable procurement statutes and regulations.

Grants of preliminary injunctive relief by the COFC are relatively rare. The court generally heeds the advice of the Federal Circuit that “equitable powers should be exercised in a way which best limits judicial interference in contract procurement.” Nonetheless, if preliminary injunctive relief is granted, the protester must be prepared to provide adequate security in an amount that the court considers proper to pay the costs and damages sustained by any party subsequently found to have been wrongfully enjoined. An informal survey of relevant COFC decisions shows bond requirements ranging between \$1,000 and \$100,000.

The Protest Process

A bid protest action at the COFC is resolved pursuant to the court’s rules (RCFC), like any other case prosecuted before the court. Those rules are modeled on the Federal Rules of Civil Procedure with modifications to account for the court’s non-jury nature and its unique jurisdictional grants. In addition, Appendix C to the RCFC sets forth standard practices to be followed in bid protest cases.

- At least 24 hours in advance of filing a complaint, protester’s counsel must provide advance notice thereof to the DOJ, the Clerk of the COFC, the procuring agency’s contracting officer, and, where there has been a contract award, the apparently successful offeror if plaintiff has received notice of the identity of the awardee. The pre-filing notification requirement is intended to expedite proceedings by permitting the DOJ to assign an attorney to the case who can address relevant issues promptly and the court to ensure the availability of judicial resources. Among other things, the notice is to address whether plaintiff contemplates requesting preliminary injunctive relief and whether there has been or is pending a GAO protest of the same procurement.
- The action commences by filing with the clerk’s office hard copies¹⁰ of the complaint, the filing fee (\$250), and in most protests a motion for leave to file under seal (with accompanying redacted copies of the complaint) and a motion for entry of a protective order. Where preliminary injunctive relief is sought, a motion for same with supporting brief (both unredacted and redacted) also will be filed.
- As soon as practicable thereafter, the judge assigned to the case will hold an initial status conference with the parties. This can occur as promptly as the day of filing and rarely takes place more than two

¹⁰ Thereafter, electronic filing takes over.



business days after filing. Matters treated include: (i) admission of the awardee as an intervenor if the awardee so elects; (ii) entry of a protective order if requested; (iii) where preliminary injunctive relief is sought, whether absent such relief the court's ability to afford effective final relief is likely to be prejudiced, whether the government will agree to suspend performance pending a hearing on the motion for preliminary injunction, whether the government will agree to suspend performance pending a final decision on the merits, entry of a schedule for completion of briefing on the motion for preliminary injunction, and whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits; (iv) the content of and time for filing the administrative record; (v) whether it may be appropriate to supplement the administrative record; and (vi) formulation of a schedule for all further proceedings.

- Filing of the administrative record usually occurs within two weeks of the initial status conference. Should the administrative record reveal additional grounds of protest, the protester should file an amended complaint.
- In the event of a motion for preliminary injunction, resolution of which is not deferred to a hearing on the merits, briefing will be completed and oral argument held, with a decision rendered from the bench or shortly after the hearing.
- Pursuant to RCFC 52.1, bid protests are resolved by motions for judgment on the administrative record, which in essence amounts to an expedited trial on a paper record. The order of briefing varies by judge, the most common being that the protester files first, the government and intervenor (if there is one) respond and cross-move, the protester replies and responds to the cross-motions, and the government and intervenor reply. At least one judge of the court has been known to reverse the order by requiring the government and intervenor to file first, while other judges employ simultaneous filings.
- Following the close of briefing, oral argument is held, an opinion is issued to the parties, agreement is reached as to redactions, and a public version of the opinion is issued.
- Upon entry of judgment, the unsuccessful party may appeal to the Federal Circuit. Appeals in bid protest cases, to the extent taken, usually are taken by the protester. Only rarely will the DOJ appeal an adverse decision, as its client agency is more interested in moving forward with the procurement.

Standard of Review and Competitive Prejudice

By statute (28 U.S.C. § 1491(b)(4)), the COFC's standard of review in a bid protest case is that prescribed in the APA (5 U.S.C. § 706) — whether the agency's decision is arbitrary, capricious, an abuse of discretion, or



otherwise not in accordance with law. The court looks to see if the procurement decision lacks a rational basis or if the agency's actions involved a violation of statute or regulation. A casual comparison with the GAO's standard of review would suggest that the two fora approach the matter in a similar manner, yet in practice that is not necessarily the case. COFC judges routinely stress, albeit in conformity with Federal Circuit guidance, the deference owed agency procurement decisions (speaking for example of the protester's "heavy burden") and emphasize, where discretionary judgments are at issue (as is the case in negotiated procurements), that the deference accorded the agency is further elevated. All in all, the COFC appears to apply a stricter standard of review, resulting in more deferential treatment of agencies' award decisions.

As for competitive prejudice, the COFC, like the GAO, requires that the protester show that but for the agency's actions, it would have had a substantial chance or reasonable likelihood of award. However, unlike the GAO, instances where prejudice is assumed because of the nature of the procurement error are exceedingly rare. In fact, certain of the judges have utilized the prejudice determination as an opportunity to prejudge the results of agency action that would have eventuated had the court remanded to the agency for correction of the procurement errors that it otherwise found.

Available Relief — Procedural

Unlike a GAO protest where the obligation is on the protester to request documents if they are to be produced, the court's Appendix C places the burden on the government to produce the administrative record and sets forth those categories of documents that are considered "core." With the court's decision to be made on the basis of the administrative record, resort to additional discovery (such as depositions) and supplementation of the administrative record with written documentation that post-dates the challenged procurement decision is rare, limited generally to prejudice issues. By further contrast with the GAO, hearings are not held to clarify or resolve disputed factual issues. In the event the COFC protest follows a GAO protest, the GAO protest record is made part of the administrative record. Like the GAO, the court relies upon and employs protective orders to protect disclosure of confidential bid and proposal information and agency source selection documentation except to counsel and any expert admitted to the protective order. Provision is made for redacted copies of filings and decisions in order to allow those not admitted to the protective order to be kept informed.

Available Relief — Substantive

By statute (28 U.S.C. § 1491(b)(2)), the COFC is empowered to award **any** relief that it "considers proper, including declaratory and injunctive relief, except that any monetary relief shall be limited to bid preparation and proposal costs." Moreover, the relief awarded is no mere recommendation,



but an enforceable judgment. Yet, to attain full relief, the protester in most situations must obtain entry of a permanent injunction, because there is no automatic stay of contract performance. Thus, even though the court may have determined to uphold the protest on the merits, it nonetheless proceeds to consider whether the protester has carried the day with respect to factors two, three, and four of the injunctive relief test before fashioning its award of relief.¹¹ The protester at the GAO faces no comparable burden.

Corrective Action.

There is scant information available as to the extent to which COFC protests are resolved by corrective action prior to court decision. Certainly, there is nothing to prevent the agency and the protester from agreeing to corrective action, thereby resulting in voluntary dismissal of the action. However, we suspect that that rarely occurs. On the other hand, there is minimal opportunity for the agency to employ unilateral corrective action, as it can at the GAO, and secure dismissal of the protest.

Awards of Protest Costs

A sustained protest at the COFC does **not** result in an award of protest costs except in limited situations that satisfy the requirements of the Equal Access to Justice Act (28 U.S.C. § 2412(d)). Attorney fees and expenses may only be awarded to individuals and entities that do not exceed the Equal Access Justice Act net worth ceiling (\$2 million and \$7 million, respectively) and in the case of entities have no more than 500 employees. Assuming those criteria are met, the protester must establish that it was the prevailing party and that the government's position in the litigation was not "substantially justified." Attorneys' fees are capped at \$125 per hour unless the court makes special findings justifying a higher fee. The fee application with supporting documentation must be submitted to the court within 30 days of final judgment.

Why Bring a COFC Protest

The foregoing discussion of COFC bid protest practice and procedure demonstrates the considerable advantages to the protester of proceeding before the GAO. To those advantages may be added cost considerations, namely that a protest at the GAO is less expensive than one before the COFC. Why, then, go to the court?

- An agency protest was pursued initially and was not decided until after the GAO 10-day period had expired. The only remaining available forum is the COFC.

¹¹ There is a split of authority among the judges of the COFC as to whether the protester's burden of proof is judged by the preponderance of the evidence standard or the more demanding clear and convincing evidence standard.



- The protester slept on its rights and only belatedly decides to protest. In other words, the protester took no action at the GAO within 10 days of notice of contract award or of elimination from the competitive range.
- The protester may have proceeded initially at the GAO without counsel (or with counsel unskilled in bid protests) and may have gotten itself into a morass offering little or no chance for success. Therefore, to get a fresh start, the protester dismisses the GAO protest and comes to the COFC with knowledgeable counsel.
- The protester has lost at the GAO, but desires a second bite at the apple, because the procurement is of great importance to its overall business.¹²
- The protest involves an issue of procurement law as to which the COFC's position is more favorable than the GAO's.
- Certain COFC judges are willing to retain continuing jurisdiction in order to monitor implementation of the corrective action that has been awarded in a successful protest.
- The protest involves a challenge to a CICA override, jurisdiction over which lies only in the COFC. Alternatively, in a related vein, the protest involves an agency's failure to implement the CICA automatic stay in the first place, notwithstanding timely GAO notification to the agency.
- The protest involves a challenge by the former apparent awardee to agency implementation of the GAO's recommendation in a sustained GAO protest.
- The procuring agency falls under the jurisdiction of the COFC but not the GAO (for example, the U.S. Postal Service).

Common Protest Grounds

The universe of the grounds of protest include those recounted earlier in the GAO discussion as well as those unique to the COFC, which have been highlighted in the foregoing discussion. Some, however, get little traction at the COFC such as those relating to improper or flawed past performance evaluations.

COFC Protest Statistics

By comparison with the GAO, the court's volume of bid protest business is meager, averaging 62 actions filed per year over the 10-year period FY 1999 through FY 2008. Nonetheless, FY 2008 saw a 33 percent increase in bid protest filings (92) over the prior year (67), which had been the second most active year to that point.¹³ Exclusive of vaccine cases (which are handled

¹² According to one study (Schaengold, Guiffre & Gill, 2008), 11 GAO protests were subsequently refiled at the COFC in 2005 and seven were refiled in 2006.

¹³ While FY 2008 saw a sharp increase in the number of protest filings, the level of increase in procurements protested was likely not as great. For example, the *Serco* decision involved nine separate protesters of one procurement, eight of whom filed in FY 2008, and the



almost exclusively by special masters rather than COFC judges), bid protests account for nine percent of the actions commenced at the COFC during the period of FY 1999 through FY 2008 (19 percent, however, in FY 2008). The celerity with which the court resolves bid protests, while not as expeditious as the GAO and not subject to a statutory deadline, is nonetheless respectable. On average, a bid protest case is resolved in approximately five months.

As for success rates, no court-compiled statistics are available nor, to our knowledge, has any private organization published any. Moreover, even if success rate statistics were available on a court-wide basis, they would be of far less utility than those pertaining to the GAO, for the reason that there is significant variability among the individual judges of the COFC with respect to their amenability to entertaining bid protest actions.

Conclusion

Bid protests enhance the integrity and transparency of the federal procurement process by providing offerors with an effective tool to challenge federal contract awards and thereby determine whether they conform to federal procurement law and regulation. Concomitantly, when a protest is brought, successful offerors must be prepared to intervene in the protest to defend their contract award. As the foregoing white paper explains, the three protest fora — the procuring agency, the GAO and the COFC — differ considerably as to their rules, procedures, scope of review, and available relief, and being well-versed on each forum's unique aspects can be essential to a successful outcome. To that end, Foley & Lardner LLP hopes this white paper has been of assistance to offerors and government contractors with an interest in federal bid protests.

Femme Comp decision disposed of five separate protests filed in FY 2008. In the event of multiple protests of the same procurement at the COFC, the actions are deemed directly related cases and all are assigned to the judge who was assigned the earliest-filed case.



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APPENDIX A — GAO BID STATISTICS

Fiscal Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	10 Yr. Ave. 1999- 2008
Procurements Challenged	1727	1549	1282	1006	873	780	700	807	854	877	871	791	865	1027	845
Filed -- Protests	2334	2092	1685	1398	1261	1108	1052	1101	1221	1329	1227	1212	1276	1504	1229
Cost Claims			22	29	29	44	32	38	48	58	58	58	42	59	47
Recons	195	194	145	139	109	68	62	65	83	98	71	57	93	89	80
Total	2529	2286	1852	1566	1399	1220	1146	1204	1352	1485	1356	1327	1411	1652	1355
Closed	2736	2335	1999	1600	1446	1275	1098	1133	1244	1405	1341	1274	1393	1581	1319
Merits Decisions			501	406	347	306	311	256	290	365	306	247	335	291	305
Number of Sustains			61	63	74	63	66	41	50	75	71	72	91	60	66
Sustain Rate %			12%	16%	21%	21%	21%	16%	17%	21%	23%	29%	27%	21%	22%
Days to Decide					88	86	79	79	79	80					
Effectiveness Rate %							33%	33%	33%	34%	37%	39%	38%	42%	
Number of Hearings					53	54	63	23	74	56	41	51	41	32	49
%			8%	13%	9%	9%	12%	5%	13%	9%	8%	11%	8%	6%	9%
Override Activity:															
Pre-Award Overrides	15	27	21	19	10	16	19	6							
Post-Award Overrides	34	104	142	84	89	108	76	65							
Total Overrides	49	131	163	103	99	124	95	71							
Pre-Award Sustains	0	1	1	1	1	2	1	0							
Post-Award Sustains	6	12	7	10	15	16	16	8							
Total Sustains	6	13	8	11	16	18	17	8							
Sustains as % Overrides	12%	10%	5%	11%	16%	15%	18%	11%							