
CHAPTER 6

Federal Bid Protests

ADAM K. LASKY

I. Introduction

This chapter discusses the background and history of the federal bid protest forums, and provides a procedural guide for bringing a federal bid protest. Currently, an eligible bidder/proposer may choose to file a protest challenging a federal contract award, in its choice of three forums: (1) the agency whose procurement is being challenged, (2) the Government Accountability Office (GAO),¹ or, (3) the Court of Federal Claims (COFC). In some circumstances a protest may also be brought in a federal district court, although the extent of district court jurisdiction is both tenuous and unclear.

II. History and Background of Bid Protest Forums

A. Agency-Level Protests

Although agency-level bid protests have taken place for many years, it was not until the mid-1990s that any government-wide regulations were enacted to regulate such protests.² The current system was initiated by President Clinton in 1995 when, in an effort to “reduce litigation and increase cooperation between the Government and industry in the procurement process,”³ he issued Executive Order 12979.⁴ By this order, federal agencies were required

1. Originally titled the General Accounting Office, GAO was renamed the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814 (2004). The name was changed to more accurately reflect GAO’s true role. See James F. Nagle & Bryan A. Kelly, *Federal Forums for Government Contracts*, 2 J. AM. COLL. CONSTR. L. 189, 204 (2008).

2. JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1484 (3d ed. 1998); Eric 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, 144 (2005).

3. *Up Front: Clinton Tells Agencies to Take a Greater Role in Handling Protests*, 37 GOV’T CONTRACTOR ¶ 554 (Nov. 1, 1995).

4. Exec. Order No. 12,979, 60 Fed. Reg. 5517 (Oct. 25, 1995).

to proscribe bid protest procedures that (a) require all parties to use their “best efforts” to resolve the matter with agency contracting officers; (b) wherever possible to make available forums, such as alternative dispute resolution and mediation, that provide for inexpensive and expeditious resolutions to bid protests; (c) allow actual or prospective bidders or offerors whose direct economic interests would be affected by the award or failure to award the contract to request a review of any decision by a contracting officer at a level above that contracting officer; and (d) except in emergencies, to stay contract award or performance while a timely protest is pending before the agency.⁵

B. GAO Protests

Created by the Budget and Accounting Act of 1921,⁶ the GAO became the first external forum for federal bid protests.⁷ The GAO was established as an independent governmental agency under the control and direction of the Comptroller General for the United States.⁸ Even though the statutes giving the GAO jurisdiction to hear bid protests were not enacted until the mid-1980s, the GAO has been hearing bid protests since the 1920s.⁹ GAO is the most commonly used protest forum, with 2,781 protests filed at GAO in Fiscal year 2016.¹⁰ Although only a 6 percent increase from the previous year,¹¹ the number of protests filed annually at GAO has more than doubled in the past ten years.¹²

5. *Id.*

6. Pub. L. No. 67-13, 42 Stat. 20 (1921).

7. The GAO originally derived its authority to resolve bid protests from the language in Section 305 of the Budget and Accounting Act of 1921. Pub. L. No. 67-13, 42 Stat. 20, 24 (1921) (“All claims and demands whatever by the Government of the United States or against it . . . shall be settled and adjusted in the General Accounting Office.”); see 31 U.S.C. §§ 3702, 3526. Prior to 1921, this authority was vested in the Accounting Office of the Treasury Department. See *Globe Indem. Co. v. United States*, 291 U.S. 476, 479–80 (1934).

8. Pub. L. No. 67-13, 42 Stat. 20, 23 (1921).

9. Congress expressly granted bid protest jurisdiction to GAO when it enacted the Competition in Contracting Act (CICA) of 1984. See GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 3 (2016), available at <https://www.fas.org/sgp/crs/misc/R40228.pdf>. GAO’s bid protest jurisdiction is now provided by 31 U.S.C. § 3553 (“the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party”); See also SECTION OF PUB. CONTRACT LAW, AM. BAR ASS’N, COMMENTS REGARDING U.S. GENERAL ACCOUNTING OFFICE STUDY OF CONCURRENT PROTEST JURISDICTION 7 n.4 (1999), [hereinafter COMMENTS RE GAO STUDY], printed in U.S. GEN. ACCOUNTING OFFICE, GAO/GGD/OGC-00-72, BID PROTESTS: CHARACTERISTICS OF CASES FILED IN FEDERAL COURTS app. viii, at 58 (2000) [hereinafter BID PROTESTS CHARACTERISTICS]; OFFICE OF GEN. COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-471SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (9th ed. 2009) [hereinafter DESCRIPTIVE GUIDE].

10. GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2016 1 (Dec. 15, 2016) [hereinafter GAO ANNUAL REPORT FY2016], available at <http://www.gao.gov/assets/690/681662.pdf>.

11. *Id.*

12. Compare *id.* with GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2007 1 (Dec. 10, 2007), available at <http://www.gao.gov/assets/100/95277.pdf>. In Fiscal Year 2016, there were 2,789

C. Federal Court Protests

The Court of Claims was created in 1885 to adjudicate private claims against the federal government.¹³ In 1887, Congress expanded the court's jurisdiction with the passage of the Tucker Act, allowing the court to adjudicate all claims against the government except tort, equitable, and admiralty claims.¹⁴

The origin of judicial bid protests can be traced back to the 1950s, when the Court of Claims held that a bidder for a government contract enters into an implied contract under which the government promises to consider its bid fairly and honestly.¹⁵ However, prior to 1970, very few bid protests were heard by federal courts¹⁶ because the protesting party had "no standing to sue because he had no 'right' to a government contract which could be invaded by improper governmental action," and the federal procurement agency often had sovereign immunity protection.¹⁷ This changed with the 1970 landmark decision of *Scanwell Laboratories, Inc. v. Shaffer*.¹⁸ In *Scanwell*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Administrative Procedure Act (APA)¹⁹ gave bidders standing to challenge agency action.²⁰ The *Scanwell* decision embraced "the basic presumption of judicial review to one suffering legal wrong because of agency action,"²¹ and held that "one who has a prospective beneficial relationship has standing to challenge the illegal grant of a contract to another."²² Other federal circuits subsequently confirmed that disappointed bidders had standing to protest a government procurement award in district court.²³

protests filed at GAO. See GAO ANNUAL REPORT FY2016, *supra* note 10, at 4. Of those protests, 616 were decided on the merits (sustain or deny). *Id.* A total of 139 protests were sustained, resulting in a "sustain rate" (percentage of merits decisions that are sustains) of 22.56%, up over 10% from the year before. *Id.* The "effectiveness rate" (percentage of protests filed at GAO where the protester obtaining some form of relief from the agency, either as a result of voluntary agency corrective action or GAO sustaining the protest) was 46% in Fiscal Year 2016. *Id.*

13. See COURT OF FED. CLAIMS BAR ASS'N, *DESKBOOK FOR PRACTITIONERS* 1 (5th ed. 2008). Prior to 1855, private claims against the federal government were submitted directly to Congress by petition. See Nagle & Kelley, *supra* note 1, at 194.

14. See *DESKBOOK FOR PRACTITIONERS*, *supra* note 13, at 3.

15. See COMMENTS RE GAO STUDY, *supra* note 9, at 7 (citing *Heyer Prods. Co. v. United States*, 135 Ct. Cl. 63, 69 (1956)).

16. See *Bid Protests Characteristics*, *supra* note 9, at 5.

17. Richard E. Speidel, *Judicial and Administrative Review of Government Contract Awards*, 37 *LAW & CONTEMP. PROBS.* 63, 74 (1972).

18. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

19. 5 U.S.C. § 702.

20. See *FORMATION OF GOVERNMENT CONTRACTS*, *supra* note 2, at 1561.

21. *Scanwell*, 424 F.2d at 866 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)).

22. *Id.* at 870.

23. *City of Albuquerque v. United States Dep't of the Interior*, 379 F.3d 901, 908 (10th Cir. 2004). Although the vast majority of bid protests in the district courts pursuant to *Scanwell* were brought by disappointed bidders, some district courts granted standing to non-bidders. *Id.* (citations omitted).

In 1982, the COFC gained the power to grant injunctive relief in pre-award bid protests.²⁴ The Administrative Dispute Resolution Act of 1996 (ADRA)²⁵ significantly amended the COFC's bid protest jurisdiction.²⁶ The ADRA gave the COFC and federal district courts concurrent jurisdiction to adjudicate all pre-award and post-award federal bid protests brought by an "interested party,"²⁷ including the right to "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."²⁸ The ADRA contained a sunset provision on concurrent jurisdiction, so that district courts' ADRA jurisdiction over bid protests would lapse on January 1, 2001, in the absence of any act of Congress to extend that jurisdiction.²⁹

When Congress did not act to extend the district courts' jurisdiction, a schism arose among the federal courts as to whether the district courts retained jurisdiction to adjudicate bid protests pursuant to *Scanwell*.³⁰ The majority of courts hold that the COFC became the exclusive judicial forum for the adjudication of federal bid protest disputes as of January 1, 2001.³¹ However, some courts have held that district courts retain *Scanwell* jurisdiction under the APA to adjudicate bid protests, so long as they are not initiated by

24. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25 (codified at 28 U.S.C. § 1491(b) until amended by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870); see FORMATION OF GOVERNMENT CONTRACTS, *supra* note 2, at 1536.

25. Pub. L. No. 104-320, § 12, 110 Stat. 3870.

26. ADRA § 12, 28 U.S.C. § 1491(b).

27. ADRA § 12, 28 U.S.C. § 1491(b)(1).

28. ADRA § 12, 28 U.S.C. § 1491(b)(2).

29. See ADRA § 12(d) (sunset provision).

30. Even before January 2001, some in the legal community recognized that it was unclear whether district courts would retain jurisdiction of bid protests under the *Scanwell* doctrine after the ADRA sunset provision came into effect. See COMMENTS RE GAO STUDY, *supra* note 9, at 6 n.2.

31. See ADRA § 12(d) (sunset provision); see also *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079–80 (Fed. Cir. 2001) ("the Court of Federal Claims is the only judicial forum to bring any governmental contract procurement protest"); *DESKBOOK FOR PRACTITIONERS*, *supra* note 13, at 24 (same); *Goodwill Indus. Servs. Corp. v. Comm. for Purchase from People Who Are Blind or Severely Disabled*, 378 F. Supp. 2d 1290, 1297 (D. Colo. 2005) (sunset provision of the ADRA "confers exclusive jurisdiction of the COFC to hear government contract procurements protests by interested parties"); *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr. Philadelphia*, 489 F. Supp. 2d 30, 37 (D.D.C. 2007) ("Congress intended to eliminate the *Scanwell* jurisdiction of the district courts and channel all procurement protests into the Court of Federal Claims when it enacted the ADRA."); *Hi-Tech Bed Sys. Corp. v. United States Gen. Servs. Admin.*, No. 11-CV-293-S, 2012 WL 12871622, at *8 (D. Wyo. Mar. 8, 2012) (the Court of Federal Claims has exclusive jurisdiction over procurement-related disputes, and pre-ADRA case law cannot be relied upon to argue otherwise); *Sys. Application & Techs., Inc., v. United States*, 100 Fed. Cl. 687, 704 (2011), *aff'd*, 691 F.3d 1374 (Fed. Cir. 2012) ("there is no question" that Congress intended for the ADRA to consolidate bid protest jurisdiction in a single forum); *Fire-Trol Holdings, LLC v. United States Dep't of Agric. Forest Serv.*, No. CV-03-2039-PHX-JAT, 2004 WL 5066232, at *5–6 (D. Ariz. Aug. 13, 2004) (District Courts lack jurisdiction to hear any procurement protest brought by an actual or prospective bidder); see also *Validata Chem. Servs. v. United States Dep't of Energy*, 169 F. Supp. 3d 69, 75 (D.D.C. 2016) (reviewing the development of federal bid protest).

“interested parties.”³² The basis for this argument is that the sunset provision only affects actions described in the ADRA, namely protests brought by an “interested party.”³³ An “interested party” for purposes of the ADRA is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”³⁴ Therefore, one court has reasoned:

the [ADRA] did not affect the district court’s ability to hear cases challenging the government’s contract procurement process so long as the case is brought by someone other than an actual or potential bidder. The district court retains subject matter jurisdiction over cases brought by non-bidders under 28 U.S.C. § 1331 and the waiver of sovereign immunity in the Administrative Procedure Act.³⁵

A minority of courts have even held that district courts have jurisdiction under the APA to adjudicate bid protests brought by “interested parties,”³⁶ particularly if the bid protest does not involve a “procurement.”³⁷

32. See generally *City of Albuquerque*, 379 F.3d 901; see also *Nat’l Treasury Employees Union v. IRS*, No. Civ. A. 04-CV-0820, 2006 WL 416161, at *3 (D.D.C. Feb. 22, 2006) (holding that the ADRA did not deprive the court of jurisdiction over parties that are not actual or prospective bidders or offerors); *Inlandboatmen’s Union of Pac., Marine Div., ILWU v. Mainella*, No. C 06-2152-CW, 2006 WL 2583678, at *2 (N.D. Cal. Sept. 7, 2006) (District Court had subject-matter jurisdiction over government contract procurement protest brought by a non-bidding party).

33. See *City of Albuquerque*, 379 F.3d at 911.

34. *Am. Fed’n of Gov’t Employees Local 1482 v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (adopting the definition of “interested party” set forth in the Competition in Contracting Act, 31 U.S.C. § 3551(2)); *City of Albuquerque*, 379 F.3d at 910 (adopting Federal Circuit’s interpretation of the term “interested party”); *DESKBOOK FOR PRACTITIONERS*, *supra* note 13, at 25.

35. See *City of Albuquerque*, 379 F.3d at 911 (noting that the court expresses no view on whether *Scanwell* doctrine and APA would allow an interested party to bring a protest in district court).

36. See, e.g., *Am. Cargo Transp., Inc. v. Natsios*, 429 F. Supp. 2d 139, 146 (D.D.C. 2006); *Am. Cargo Transp., Inc. v. United States*, No. C05-393JLR, 2007 WL 3326683, at *3 (W.D. Wash. Nov. 5, 2007) (“Under the law governing procurement decisions, a disappointed bidder may challenge a government contract award under the APA.”); see also *State of Kansas v. United States*, No. 15-CV-04907-DDC-KGS, 2016 WL 3458913, at *6 (D. Kan. June 24, 2016) (Federal Circuit does not have exclusive jurisdiction over procurement challenges that fall within the arbitration provisions of the Randolph-Sheppard Act); *Puglia Eng’g v. United States Coast Guard*, No. C 04-04794 CRB, 2005 WL 106785, at *2 (N.D. Cal. Jan. 18, 2005) (maritime bid protests are governed by the Suits In Admiralty Act, which vests jurisdiction in the federal district courts). At least one court, prior to the sunset of concurrent jurisdiction under the ADRA, held that, based on the *Scanwell* doctrine, district courts had subject matter jurisdiction to entertain a bid protest by a disappointed bidder (i.e., an “interested party”). See *Iceland S.S. Co., Ltd.-Eimskip v. United States Dep’t of Army*, 201 F.3d 451, 453 (D.C. Cir. 2000).

37. *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1246 (Fed. Cir. 2010) (“a disappointed bidder in a nonprocurement case could also theoretically bring its bid protest challenge in a federal district court, since the ADRA only repealed jurisdiction over procurement cases”); *Eco Tour Adventures, Inc. v. Jewell*, 174 F. Supp. 3d 319, 328 (D.D.C. 2016) (district court could grant declaratory and injunctive relief in nonprocurement dispute brought initially at the Court of Federal Claims).

Today, the general jurisdiction of the COFC, as outlined in 28 U.S.C. § 1491, commonly referred to as the Tucker Act, covers most suits against the federal government, including bid protests.³⁸ The COFC acts as a finder of both fact and law, and adjudicates disputes without a jury.³⁹ Unlike GAO, the COFC is not required to report its annual bid protest statistics to Congress. However, the COFC reported that 124 protests were filed at the COFC in 2016.⁴⁰

III. Procedural Guide to Federal Bid Protests

A. Agency-Level Protests

The first option available to a disappointed bidder in a federal procurement is to file its bid protest with the procuring agency. This option is the least expensive and most informal. Agency-level protests are governed by FAR 33.103, in conjunction with each procurement agency's regulations.⁴¹

1. Filing the Protest

Any "interested party" may file an agency-level bid protest.⁴² Protests filed with the procuring agency should be directed to either the contracting officer or the official "at a level above the contracting officer" designated by the agency to independently review the protest.⁴³ Depending on the agency, "independent review" is available either as an alternative to consideration by the contracting officer or as an appeal of the contracting officer's decision on the protest.⁴⁴ The protest must be concise and logical,⁴⁵ and must include all of the following information:

- (i) Name, address, and fax and telephone numbers of the protester.
- (ii) Solicitation or contract number.
- (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.
- (iv) Copies of relevant documents.

³⁸ DESKBOOK FOR PRACTITIONERS, *supra* note 13, at 7–8.

³⁹ *Id.* at 4.

⁴⁰ See West Government Contracts Year in Review—Covering 2016—Conference Briefs 6–10 (Thompson Reuters 2017).

⁴¹ See, e.g., 48 C.F.R. §§ 333.102, 333.103 (HHSAR); 48 C.F.R. § 433.103 (Agric. Dep't FAR); 48 C.F.R. § 533.103-1 (GSAR); 48 C.F.R. § 633.103 (DOSAR); 48 C.F.R. §§ 733.103–70, 733.103–71 (AIDAR); 48 C.F.R. § 833.103 (VAAR); 48 C.F.R. § 933.103 (DEAR); 48 C.F.R. § 1333.103 (CAR); 48 C.F.R. § 1533.103 (EPAAR); 48 C.F.R. § 1833.103 (NASA FAR); 48 C.F.R. § 2433.103 (HUDAR); 48 C.F.R. § 2933.103 (DOLAR); 48 C.F.R. § 3433.103 (EDAR).

⁴² FAR 33.103(d). For more information regarding who is considered an "interested party," see sections III.B.1 and III.C.5 in this chapter.

⁴³ FAR 33.103(d)(3)–(4). The agency official designated to conduct independent review "need not be within the contracting officer's supervisory chain." FAR 33.103(d)(4). When possible, this official should not have had any "previous personal involvement in the procurement." *Id.*

⁴⁴ FAR 33.103(d)(4).

⁴⁵ FAR 33.103(d)(1).

- (v) Request for a ruling by the agency.
- (vi) Statement as to the form of relief requested.
- (vii) All information establishing that the protester is an interested party for the purpose of filing a protest.
- (viii) All information establishing the timeliness of the protest.⁴⁶

Failure to provide any of the preceding information may be grounds for dismissal of the protest.⁴⁷

Despite the preceding requirements, the GAO has applied a less formal standard as to what written correspondence constitutes an agency-level protest. GAO has held that: “to be regarded as [an agency-level] protest, a written statement need not state explicitly that it is or is intended to be a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency’s actions and a request for relief.”⁴⁸ Thus, a contractor writing a letter to a contracting officer may end up filing an agency-level protest without intending to do so.⁴⁹ As discussed later in the chapter, this can have significant impacts on the timeliness of a later GAO protest.⁵⁰

2. Timeliness of Protest

A party should act expeditiously when filing an agency-level protest. Failure to file in a timely manner can limit the relief available or eliminate the agency as a viable forum for the protest. The time limitations for when a protest may be filed depend in part on what aspect of the procurement is being protested. Where a protest is based on alleged improprieties in a solicitation, the protest must be filed before bid opening or the closing date for receipt of proposals.⁵¹ In all other cases, protests must be filed no later than ten calendar days after the basis of protest is known or should have been known, whichever is earlier.⁵² The procuring agency is not required to consider protests that are not

46. FAR 33.103(d)(2).

47. FAR 33.103(d)(1) (requires that the protester “substantially comply” with the requirements of FAR 33.103(d)(2)).

48. See *Coulson Aviation (USA), Inc.*, B-411525, B-411525.2, 2015 CPD ¶ 272, 2015 WL 5157336, at *5 (Comp. Gen. Aug. 14, 2015); *Mackay Commc’ns-Request for Reconsideration*, B-238926, B-238926.2, 90-1 CPD ¶ 426, 1990 WL 277976, at *1 (Comp. Gen. Apr. 25, 1990) (“Even though Mackay claims it never intended to lodge an agency-level protest, its November 15 letter, alleging bad faith and requesting an investigation, clearly conveyed dissatisfaction with the agency’s decision to cancel and requested corrective action and, thus, constituted an initial protest. In this regard, even if a letter to an agency does not explicitly state that it is intended to be a protest, our Office nevertheless will consider it as such where, as here, it conveys an expression of dissatisfaction and a request for corrective action.”); *MorphoTrust USA, LLC*, B-412711, 2016 CPD ¶ 133, 2016 WL 2908322, at *7 n.7 (Comp. Gen. May 16, 2016) (“Although not labeled as such, we find that MorphoTrust’s submission here met the requirements of an agency-level protest, i.e., a specific expression of dissatisfaction with the agency’s actions and a request for relief.”).

49. See, e.g., *Coulson Aviation (USA), Inc.*, 2015 WL 5157336, at *7 (“a protester’s subjective intent is not determinative as to whether a written request constitutes a protest”).

50. See *infra* notes 98–99.

51. FAR 33.103(e).

52. *Id.*

timely filed. However, the agency may still consider the merits of an untimely protest if “good cause” is shown, or the “protest raises issues significant to the agency’s acquisition system.”⁵³

Pursuing an agency protest does not extend the timeliness requirements for obtaining a CICA stay of award/performance at the GAO.⁵⁴

3. *Actions of Agency upon Receiving a Timely Protest*

a. Pre-award Protests—Withholding of Award

If a pre-award protest is filed in a timely manner, the contracting officer may not award the contract in question until the agency protest is resolved.⁵⁵ The contracting officer must inform all bidders who “might become eligible for award of the contract” that award is being withheld pending resolution of a bid protest to the agency, and, if appropriate, request the bidders extend the time for acceptance of their bids to avoid the need for resolicitation.⁵⁶ However, the contract may be awarded while the protest is pending if an agency official at a level above the contracting officer makes a determination “in writing” that the “contract award is justified . . . for urgent and compelling reasons or is determined . . . to be in the best interest of the Government.”⁵⁷

b. Post-award Protests—Suspension of Performance

Upon receipt of a post-award protest to the agency, the contracting officer is required to immediately suspend performance of the protested contract, pending the agency’s resolution of the protest, so long as the agency received the protest within ten days after contract award or within five days after a debriefing date offered to the protester where the debriefing was timely requested and required, whichever is later.⁵⁸ Just as in pre-award protests, the “urgent and compelling reasons” or “best interest of the government” exceptions can be invoked to continue performance of the contract while the agency-level protest is pending.⁵⁹

53. *Id.*

54. FAR 33.103(f)(4). However, some agencies’ regulations call for the contracting officer to consider instituting a “voluntary suspension period” to remain in effect pending the resolution of any GAO proceeding that follows the denial of an agency level protest. FAR 33.103(f)(4); *see, e.g.*, 48 C.F.R. § 2933.103(m) (Dep’t of Labor protest regulations call for the contracting officer to leave the suspension in place until five days after the agency’s protest decision has been issued to allow time for filing a protest at GAO, and if a GAO protest is filed for the contracting officer to consider allowing the suspension to remain in effect pending the resolution of any GAO proceeding).

55. FAR 33.103(f)(1).

56. FAR 33.103(f)(2). “In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.” FAR 33.103(f)(2).

57. FAR 33.103(f)(1) (“Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.”).

58. FAR 33.103(f)(3). The automatic stay provision contained in Section (f)(3) applies regardless of whether the protest is lodged with the contracting officer or with the agency official designated to provide independent review. *ES-KO, Inc. v. United States*, 44 Fed. Cl. 429, 434–35 (1999).

59. FAR 33.103(f)(3).

4. Agency Decision

The FAR requires agencies to make their “best efforts to resolve agency protests within 35 days after the protest is filed.”⁶⁰ The agency is required to provide the protester with a written decision that is “well-reasoned, and explain[s] the agency position.”⁶¹

To prevail in an agency-level protest, the burden is on the protester to show that “a solicitation, proposed award, or award does not comply with the requirements of law or regulation.”⁶² Should the contracting officer or reviewing officer determine that there is noncompliance, the agency may: (1) refrain from exercising options under the contract, (2) terminate the contract, (3) recompetite the contract, (4) issue a new solicitation, (5) award a contract consistent with statute and regulation, (6) any other action the agency determines necessary to promote compliance with statute and regulation, or (7) any combination of these actions.⁶³ The agency may also award the protester its costs associated with filing and pursuing the successful protest.⁶⁴ Furthermore, where a post-award protest is sustained as the result of an awardee’s “intentional or negligent misstatement, misrepresentation, or mis-certification,” and the government pays the protester’s costs, the agency may require the awardee to reimburse the government for these costs.⁶⁵

5. Review of Agency-Level Protests

If a party’s agency-level bid protest is unsuccessful, the protester may begin the protest anew by filing a timely protest with the GAO or COFC.⁶⁶ However, the GAO is only a viable forum for a subsequent protest if the underlying agency protest was timely filed, and the GAO protest is filed within ten

60. FAR 33.103(g).

61. See FAR 33.103(h).

62. See FAR 33.102(b); see also *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996) (“A protestor bears the burden of proving error in the procurement process sufficient to justify relief.”).

63. See FAR 33.102(b)(1), together with 4 C.F.R. § 21.8(a).

64. See FAR 33.102(b)(2), together with FAR 33.104(h) (costs may include “the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs”).

65. FAR 33.102(b)(3) (“Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.”). See also *Proposed Regulations Entitle Government to Recover “Costs” for Misrepresentations by Awardees*, 37 Gov’t CONTRACTOR ¶ 178 (Mar. 29, 1995) (According to the lead drafter of this regulation, “the drafting team did not intend to permit the Government to recover its own protest costs. Rather, the proposed rule is intended to permit the Government to recover the protest costs that an agency has paid to a protester.”). A similar provision applies to protests sustained for these reasons at GAO. See FAR 33.104(h)(8); *ACS Gov’t Servs., Inc.*, B-293014, 2004 CPD ¶ 18, 2004 WL 178143, at *9 n.16 (Comp. Gen. Jan. 20, 2004).

66. See, e.g., *West Sound Services Group, LLC*, B-406583.2, B-406583.3, 2013 CPD ¶ 276, 2013 WL 6247506, at *6 (Comp. Gen. July 3, 2013) (successful protest filed at GAO after agency-level protest was denied). In addition, some agency-specific regulations permit the protester to seek a higher-level review of the protest within the agency. See, e.g., 48 C.F.R. § 2033.103; 48 C.F.R. § 833.103(f).

days of actual or constructive knowledge of “initial adverse agency action.”⁶⁷ GAO has broadly defined “adverse agency action” to include:

any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.⁶⁸

Unfortunately for protesters, it is not always obvious when an agency has taken initial adverse action in response to an agency-level protest. In many cases, the initial adverse agency action will occur without the agency ever formally denying the protest. As a result, a contractor filing an agency-level protest must keep its eyes out for anything that looks like “action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency.” If, after filing the protest with the agency, anything happens that could conceivably be construed as an action prejudicial to a position taken in the protest, the contractor must assume its clock for filing a protest at GAO has commenced.

B. GAO Protests

Filing a protest at GAO comes with a critical advantage that is provided in no other forum—the CICA stay. To preserve one’s right to a CICA stay and GAO review, a protester must be extremely vigilant and knowledgeable regarding the rules of the road (which are not always straightforward) at GAO. Unlike any other adjudicative forum, GAO has essentially a no tolerance policy for protesters (i.e., plaintiffs) failing to abide by its procedural rules. Any failure, however slight, will usually lead to GAO dismissing the protest.⁶⁹ The procedures for GAO protests are outlined at 4 C.F.R. Part 21.

67. See 4 C.F.R. § 21.2(a)(3); FAR 33.103(d)(4).

68. See 4 C.F.R. § 21.0(e).

69. For example, protests not filed within the time limits set forth in 4 C.F.R. § 21.2, or that lack a detailed statement of the legal and factual grounds of protest as required by 4 C.F.R. § 21.1(e)(4), or that fail to clearly state legally sufficient grounds of protest as required by 4 C.F.R. § 21.1(f), shall be dismissed. 4 C.F.R. §§ 21.5(e)–(f). See, e.g., *Mid-Continent Adjustment Co.*, B-219397, 85-2 CPD ¶ 285, 1985 WL 53358, at *1 (Comp. Gen. Sept. 11, 1985) (“This strict initial filing requirement was necessitated by other CICA provisions that require [GAO] to notify the contracting agency of a protest within 1 day after its filing and further require that the agency generally furnish [GAO] with a report responding to the protest within 25 working days after such notice. 31 U.S.C. § 3553(b). Permitting the subsequent filing of an additional detailed statement in support of a protest would hamper contracting agencies’ ability to comply with the statutorily imposed time limitation for filing a report.”).

1. Standing to Protest

To have standing to bring a bid protest at the GAO, the protester must be an “interested party,” that is, 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.”⁷⁰ “Whether a protester is an interested party is determined by the nature of the issues raised and direct or indirect benefit or relief sought.”⁷¹

The protester has the burden of setting forth all information establishing that it is an interested party for the purpose of filing a protest.⁷²

2. What Can Be Protested

An interested party may protest any of the following at GAO:

- (a) a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services;
- (b) the cancellation of such a solicitation or other request;
- (c) an award or proposed award of such a contract; and
- (d) a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of the contract.⁷³

Generally, the GAO lacks jurisdiction to consider protests that are based on any of the following grounds: the administration of existing contracts, most Small Business Administration issues, an affirmative determination of responsibility by the contracting officer, Procurement Integrity Act violation not brought to the attention of the agency responsible for the procurement within 14 days after the protester first discovered the possible violation, challenges to the suspension or debarment of contractors, protests asserting that the protester’s proposal should not have been included or kept in the competitive range, or the decision by an agency tender official of whether or not to file a protest in connection with a public-private competition.⁷⁴ Except under

70. 4 C.F.R. § 21.0(a)(1); *Precise Mgmt., LLC-Reconsideration*, B-410912.2, 2015 CPD ¶ 193, 2015 WL 3955197, at *4 (Comp. Gen. June 30, 2015). Notably, GAO has concluded that in a procurement where the government awards IDIQ contracts to multiple offerors, an awardee is not an interested party to protest a contract award to another offeror. See *Aegis Def. Servs., LLC*, B-412755, 2016 CPD ¶ 98, 2016 WL 1237962, *2–3 (Comp. Gen. Mar. 25, 2016); *National Air Cargo Group, Inc.*, B-411830.2, 2016 CPD ¶ 85, 2016 WL 1055743, *3 (Comp. Gen. Mar. 9, 2016). However, the COFC has reached the opposite conclusion, ruling that an IDIQ contract awardee is an interested party to challenge other IDIQ contract award in the same procurement. *National Air Cargo Group, Inc. v. United States*, 126 Fed. Cl. 281, 289–97 (2016).

71. *Coulson Aviation (USA), Inc.*, B-411306 et al., 2015 CPD ¶ 214, 2015 WL 4184108, at *6 (Comp. Gen. July 8, 2015).

72. 4 C.F.R. § 21.1(c)(5); *Total Procurement Servs., Inc.*, B-272891, et al., 96-2 CPD ¶ 92, 1996 WL 491790, at *3 (Comp. Gen. Aug. 29, 1996); *Inspace 21 LLC*, B-410852.4, 2015 CPD ¶ 124, 2015 WL 1544867, at *2 (Comp. Gen. Apr. 3, 2015).

73. 4 C.F.R. § 21.1(a).

74. 4 C.F.R. § 21.5.

a few discrete exceptions,⁷⁵ a protest brought on any of these grounds will be summarily dismissed.⁷⁶ Furthermore, unless the procurement agency gives written consent, the GAO will not consider protests concerning (1) awards of subcontracts by or for a federal agency, (2) sales by a federal agency, or (3) procurement actions by government entities that do not fall within the strict definition of federal agencies in 4 C.F.R. § 21.0(c).⁷⁷ In addition, GAO's jurisdiction to decide protests concerning task or delivery order awards is limited to only those awards that exceed certain dollar values set by Congress, or orders that would increase the scope, period, or maximum value of the contract under which the order is issued.⁷⁸

3. *Protest Content*

Protests must be in writing,⁷⁹ and must include:

- (1) the name, street address, electronic mail address, and telephone and facsimile numbers of the protester;
- (2) the signature of the protester or its representative;
- (3) the identity of the agency and the solicitation and/or contract number;
- (4) a detailed statement of the legal and factual grounds of the protest, including copies of relevant documents;
- (5) all information establishing that the protester is an interested party for the purpose of filing a protest;
- (6) all information establishing the timeliness of the protest;
- (7) a specific request for a ruling by the Comptroller General of the United States; and
- (8) a statement of the form of relief requested.⁸⁰

75. A few exceptions do exist. For example, GAO will consider challenges to an affirmative determination of responsibility if the protester alleges that a "definitive responsibility criteria" in the solicitation was not met or if the protester identifies 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. 4 C.F.R. § 21.5(c). A "definitive responsibility criteria" is a specific and objective standard designed to measure a prospective contractor's ability to perform the contract. J2A2 JV, LLC, B-401663.4, 2010 CPD ¶ 102, 2010 WL 1937102, at *3 (Comp. Gen. Apr. 19, 2010).

76. 4 C.F.R. § 21.5.

77. 4 C.F.R. §§ 21.5, 21.13(a).

78. See 10 U.S.C. § 2304c(e)(1)(B) (Department of Defense orders valued in excess of \$25 million); 41 U.S.C. § 4106(f) (civilian agency orders value in excess of \$10 million).

79. 4 C.F.R. § 21.1(b).

80. 4 C.F.R. § 21.1(c). GAO's Bid Protest Regulations "require that a protest include a detailed statement of the legal and factual grounds for the protest. This requirement contemplates that protesters will provide, at a minimum, either allegations or evidence sufficient for [GAO] to reasonably conclude that a violation of statute or regulation has occurred. Bare assertions that an award was improper, with neither evidence nor explanation of the protester's theory regarding the alleged violation, are insufficient to satisfy [GAO]'s requirements." *View One, Inc.*, B-400346, 2008 CPD ¶ 142, 2008 WL 2927660, at *2 (Comp. Gen. July 30, 2008) (internal citations omitted); see also *Ervin & Assocs.*,

Failure to comply with any of the preceding requirements may be grounds for dismissal of the protest.⁸¹

A protest may also include a request for a protective order, for production by the agency of specific documents relevant to the protest, and/or for a hearing.⁸²

4. Filing Procedures

Currently, the filing process at GAO is rather simple and rudimentary. Protests can be delivered to the GAO by hand, mail, commercial carrier, facsimile, or e-mail, and no filing fee is required.⁸³ However, in Section 1501 of the Consolidated Appropriations Act of 2014, Congress authorized GAO to establish and operate an electronic filing system (in the same vein as the U.S. Federal Courts) and impose a protest filing fee.⁸⁴ On April 15, 2016, the GAO published proposed rules for the creation of its electronic filing system, entitled Electronic Protest Docketing System (EPDS).⁸⁵

It is anticipated that EPDS will be in place beginning sometime in 2017 or 2018. According to GAO's proposed rules, once EPDS is in place, protesters will be required to file all protest documents (including the initial protest itself) through EPDS—submissions by hand, mail, commercial carrier, facsimile, or e-mail will no longer be accepted.⁸⁶ In addition to the rules concerning EPDS to be set forth in 4 C.F.R. Part 21, GAO will publish additional guidelines and instructions for using EPDS on the GAO website.⁸⁷ Once EPDS is in place, it is anticipated that GAO will require a \$350 bid-protest filing fee.⁸⁸

Within one day after filing the protest with the GAO, the protester must furnish the contracting agency whose decision is being challenged a copy of the GAO protest, including all attachments.⁸⁹

Where a protester believes that its protest contains information that is proprietary, confidential, or otherwise not releasable to the public, and makes a request for a protective order in its protest, the protest should be clearly labeled with a statement that the protest contains protest information not to

Inc., B-278850, 98-1 CPD ¶ 89, 1998 WL 126843, at *5 (Comp. Gen. Mar. 23, 1998) (“A protest grounded upon mere speculation or rumor provides no basis for questioning the propriety of a procurement.”).

81. 4 C.F.R. § 21.1(i).

82. See DESCRIPTIVE GUIDE, *supra* note 9, at 9.

83. See 4 C.F.R. § 21.0.

84. Pub. L. No. 113-76, § 1501, 128 Stat. 5, 433-34 (codified as amended at 31 U.S.C. § 3555(e)).

85. See Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 81 Fed. Reg. 22197 (proposed Apr. 15, 2016) (to be codified at 21 C.F.R. pt. 21).

86. See 81 Fed. Reg. 22197, 22197 (“EPDS will be the sole means for filing a bid protest at GAO (with the exception of protests containing classified information), and will enable parties to a bid protest and GAO to file and receive documents.”).

87. See 81 Fed. Reg. 22197, 22197-98, 22200-01 (to be codified at 21 C.F.R. §§ 21.0(f), 21.3). GAO published an initial set of EPDS instruction in June 2016. See GAO, ELECTRONIC PROTEST DOCKETING SYSTEM INSTRUCTIONS (Version 1.0 June 2016), available at <http://www.gao.gov/assets/680/678895.pdf>.

88. See 81 Fed. Reg. 22197, 22197.

89. 4 C.F.R. § 21.1(e).

be disclosed.⁹⁰ The protester must then file a redacted copy of the protest, which omits the protected information, within one day of the initial protest filing.⁹¹ This redacted filing is a public document, which the agency will distribute to potentially interested parties.⁹² The unredacted initial filing will not be publically released, except to individuals covered by a protective order.⁹³

5. *Timeliness of Protest*

Protests based upon alleged improprieties in a solicitation must be filed before bid opening or the time established for receipt of the proposals, unless the alleged impropriety is not apparent before that time.⁹⁴

Most other bid protests must be filed no later than ten calendar days after the basis of the protest is known or should have been known, whichever is earlier.⁹⁵ An exception exists for “protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.”⁹⁶ In those cases, once a required debriefing is requested, the protest may not be filed until after the debriefing is provided, and the protest must be filed no later than ten days after the debriefing has been conducted.⁹⁷

Where the protest is initially filed with the contracting agency, special timeliness rules apply. In those cases, any subsequent protest to the GAO must be filed not later than ten days after the protester learns of the “initial adverse agency action.”⁹⁸ Additionally, if the agency-level protest is untimely filed, any subsequent protest to the GAO is also untimely.⁹⁹

90. 4 C.F.R. § 21.1(g).

91. 4 C.F.R. § 21.1(g).

92. *See* 4 C.F.R. § 21.3(a); FAR 33.104(a)(2)(ii).

93. *See* 4 C.F.R. §§ 21.1(g), 21.3(a), 21.4.

94. 4 C.F.R. § 21.2(a)(1).

95. 4 C.F.R. § 21.2(a).

96. 4 C.F.R. § 21.2(a)(2). A debriefing requested pursuant to FAR 15.506 is not a required debriefing unless the request is made within three days after the date on which that offeror received notification of contract award in accordance with FAR 15.503(b). *See* FAR 15.506(a)(1). Nor is a debriefing in a procurement not conducted on the basis of “competitive proposals.” *See* McKissack-URS Partners, JV, B-406489.2 et al., 2012 CPD ¶ 162, 2012 WL 1862018, at *2–4 (Comp. Gen. May 22, 2012). Nevertheless, “even where a disappointed offeror does not secure a required debriefing, it retains its right to file a protest within 10 days after it learns, as here, or should have learned, of the basis for its protest, provided it has diligently pursued the matter. This includes the right to file a timely protest based on information obtained during a debriefing that was not required.” Optimum Mgmt. Sys., LLC, B-299322.3, 2007 CPD ¶ 106, 2007 WL 1703677, at *4 n.3 (Comp. Gen. May 23, 2007).

97. 4 C.F.R. § 21.2(a)(2). Where there is ambiguity as to whether the debriefing remained open, the ambiguity is construed in favor of the protester. Harris IT Servs. Corp., B-406067, 2012 CPD ¶ 57, 2012 WL 387908, at *4 (Comp. Gen. Jan. 27, 2012).

98. 4 C.F.R. § 21.2(a)(3).

99. 4 C.F.R. § 21.2(a)(3); *see also* M2 Glob. Tech., Ltd., B-400946, 2009 CPD ¶ 13, 2009 WL 50372, at *2 (Comp. Gen. Jan. 8, 2009).

“A document is *filed* on a particular day when it is received by GAO by 5:30 p.m., Eastern Time, on that day.”¹⁰⁰ The burden is on the protester to include all information establishing timeliness at the time the protest is filed.¹⁰¹

“Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces the timeliness requirements.”¹⁰² Untimely protests will be dismissed,¹⁰³ unless “good cause” is shown, or where GAO determines that a protest raises “issues significant to the procurement system.”¹⁰⁴ The “good cause” exception is limited to circumstances where “some compelling reason beyond the protester’s control prevents the protester from filing a timely protest,” whereas the “significant issue” exception is limited to untimely protests that “raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a prior decision.”¹⁰⁵

6. Automatic CICA Stay

a. Triggering the CICA Stay

After the agency has received telephonic notice of the protest from the GAO, the agency may not award the contract, or, if the contract has already been awarded, must suspend performance of the contract.¹⁰⁶ This stay of award or suspension of performance is commonly referred to as the “CICA stay.”¹⁰⁷

The CICA stay is automatically triggered upon the filing of a pre-award protest.¹⁰⁸ In a post-award protest, the CICA stay is only triggered if the procuring agency receives notice of a protest from the GAO within ten days after contract award, or within five days after the debriefing date offered to the protester for a debriefing required by FAR 15.505 or 15.506, whichever is later.¹⁰⁹

100. See 4 C.F.R. § 21.0 (emphasis added).

101. 4 C.F.R. § 21.2(b).

102. See DESCRIPTIVE GUIDE, *supra* note 9, at 10; see also 4 C.F.R. § 21.2(c) (“GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.”).

103. 4 C.F.R. §§ 21.2(b), 21.5(e)

104. 4 C.F.R. § 21.2(c).

105. See *Choctaw Staffing Sols., Inc.*, B-412152.3, 2016 CPD ¶ 228, 2016 WL 4474148, at *4 (Comp. Gen. Aug. 24, 2016); see also *Celadon Labs., Inc.*, B-298533, 2006 CPD ¶ 158, 2006 WL 3154971, at *4 (Comp. Gen. Nov. 1, 2006) (invoking the significant issue exception to decide a protest issue that GAO had previously not decided and that it expected to arise in future procurements).

106. 31 U.S.C. § 3553(c)–(d).

107. See, e.g., *Favor Techconsulting, LLC v. United States*, 129 Fed. Cl. 208, 211 (2016).

108. See FAR 33.104(b)(1) (“When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded.”).

109. See FAR 33.104(c)(1). Pursuant to FAR 33.104(c)(1), the protest notice that triggers the CICA stay is not the notice from the protester, but is instead the notice to the agency from the GAO that protest has been filed. While, in practice, the GAO will provide this notice to the agency within minutes or hours of the protest being filed, technically, the GAO has a full day after the protest is filed before giving notice to the agency. See 4 C.F.R. § 21.3(a). Therefore, to ensure that the automatic stay

On occasion, an agency will decline to implement an automatic CICA stay because it believes the protester did not satisfy the special timeliness requirements to trigger the stay. Although GAO will not review an agency's decision not to implement a CICA stay,¹¹⁰ a protester may commence a separate action at the COFC to require the agency to implement the stay, while the protest remains pending at GAO.¹¹¹

b. Agency Override of Automatic CICA Stay

Under certain very limited circumstances, the agency may override the automatic CICA stay. The head of the procuring activity responsible for award of a contract may override the stay by giving notice to GAO "that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General,"¹¹² or "performance of the contract is in the best interests of the United States."¹¹³ However, the later override justification is not available if the CICA stay was triggered prior to award.¹¹⁴

In order to assert the "urgent and compelling circumstances" justification for an override, the agency must consider the following four factors:

- (1) "whether significant adverse consequences will necessarily occur if the stay is not overridden;"
- (2) "whether reasonable alternatives to override exist;"
- (3) "how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare[] to the benefits associated with the approach being considered for addressing the agency's needs;"
- and (4) "the impact of the override on competition and the integrity of the procurement system, as reflected in CICA."¹¹⁵

provision is triggered, it is best to file a post-award protest the day before the deadline. If filing the protest the same day as the deadline, it is highly recommended that you call GAO's protest status line (202-512-4788) a few hours after filing the protest to confirm that GAO has provided notice to the agency to trigger the CICA stay.

110. See 4 C.F.R. § 21.6 ("GAO does not administer the requirements to stay award or suspend contract performance under CICA."); *Precise Mgmt., LLC-Reconsideration*, 2015 WL 3955197, at *5 ("an agency's failure to adhere to the stay requirement . . . is [not] a valid basis of protest . . . whether the agency failed to comply with the stay of performance is not a matter for consideration by GAO").

111. See *Favor Techconsulting, LLC v. United States*, 129 Fed. Cl. 208, 211, 217 (2016).

112. 31 U.S.C. §§ 3553(c)(2), (d)(3)(C)(i)(II).

113. 31 U.S.C. § 3553(d)(3)(C)(i)(I).

114. See *PMTech, Inc. v. United States*, 95 Fed. Cl. 330, 344 (2010) ("CICA permits only 'urgent and compelling' overrides in pre-award situations" (citing 31 U.S.C. §§ 3553(c)(2)(A))).

115. *Nortel Gov't Solutions v. United States*, 84 Fed. Cl. 243, 247 (2008) (quoting *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 711 (2006)); see also *URS Fed. Services, Inc. v. United States*, 102 Fed. Cl. 664, 670–71 (2011) (referring to these as the "Reilly factors"); *Superior Helicopter LLC v. United States*, 78 Fed. Cl. 181, 188–89 (2007).

The agency must render findings with respect to all of these factors and those findings must not run counter to the evidence before the agency.¹¹⁶ The “[f]ailure by the agency to consider just one of these factors is fatal to an override decision based on urgent and compelling circumstances.”¹¹⁷

On the other hand, if the agency notifies GAO that it is overriding the stay based on “best interests” then there “must be some rationale asserted by the agency that is above and beyond its original purpose when it solicited bidders for the procurement, and ‘that absolves the agency of its obligation to await the GAO’s recommendation.’”¹¹⁸ Simply stating that the new contract is better or more cost effective is not enough to justify overriding the stay.¹¹⁹ While the agency has a lower burden when asserting a “best interests” justification than an “urgent and compelling circumstances” justification, there are ramifications at GAO from the agency’s choice of that rationale. If the CICA stay is overridden based on “best interests,” and GAO later sustains the protest, GAO will recommend relief “without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.”¹²⁰

Importantly, GAO will not review an agency’s decision to override the automatic CICA stay.¹²¹ Instead, a protester seeking to challenge an agency’s override decision must commence an action at the COFC, which will review the merits of the override decision, while the merits of the protest remain pending before GAO.¹²²

7. Notice to the Agency and Interested Parties

Upon receiving a protest, unless the protest is summarily dismissed, the GAO must provide notice of the protest to the contracting agency within one day after the protest is filed.¹²³ Upon receiving notice from GAO, the agency must give notice of the protest to potential intervenors, and the agency must also provide them with copies of the redacted protest submission.¹²⁴

116. *Reilly’s Wholesale Produce*, 73 Fed. Cl. at 711.

117. *Nortel Gov’t Solutions*, 84 Fed. Cl. at 247.

118. *Nortel Gov’t Solutions*, 84 Fed. Cl. at 247–48 (quoting *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 31).

119. *Nortel Gov’t Solutions*, 84 Fed. Cl. at 247–48, 251–52 (quoting *Advanced Sys. Dev.*, 72 Fed. Cl. at 31).

120. 31 U.S.C. § 3554(b)(2).

121. *See* *OCR Services, Inc.*, B-290946, 2003 CPD ¶ 38, 2002 WL 31999215, at *5 n.4 (Comp. Gen. Oct. 21, 2002) (“we do not review the adequacy of an agency’s determination to override the statutory stay and proceed with performance of a contract”).

122. *See* *URS Fed. Services, Inc. v. United States*, 102 Fed. Cl. 664, 670 (2011). For further information on CICA stay override litigation at the COFC see *supra* III.B.6.b.

123. 4 C.F.R. § 21.3(a).

124. *Id.*

8. Intervention

Other interested parties may be permitted by the GAO to participate in the protest as “intervenor.”¹²⁵ GAO regulations define an “intervenor” as “an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.”¹²⁶ An interested party wishing to intervene under the circumstances should file a notice of intervention with the GAO, copied to the protester and the agency.¹²⁷

9. Summary Dismissal

If the agency and/or any intervenor discovers a reason why summary dismissal would be appropriate, it should file a request for dismissal as soon as practicable.¹²⁸ When a request is filed, the GAO will generally permit the protester to file a brief in opposition to the dismissal request, and the GAO will thereafter promptly address the dismissal request.¹²⁹ Summary dismissal may be appropriate at any time that the GAO has information to determine that the protest is deficient on procedural or jurisdictional grounds.¹³⁰

10. Protective Orders

If the record in a protest contains “protected” information—such as “proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage”¹³¹—that information cannot be made public.¹³² In the vast majority of protests the key documents will contain protected information. Thus, in order to facilitate the pursuit of a protest, GAO will issue a protective order allowing protester’s counsel limited access to protected information relevant to a protest.¹³³

The GAO views it as the responsibility of the protester’s counsel in the first instance to request a protective order and to submit timely applications

125. See DESCRIPTIVE GUIDE, *supra* note 9, at 17 (citing 4 C.F.R. § 21.0(b)).

126. 4 C.F.R. § 21.0(b)(1). On occasion, GAO will also request the views of another agency, and thereby allow for the limited quasi-intervention of that additional agency in the protest. This most commonly occurs when a protest concerns the interpretation/application of another agency’s regulations. See, e.g., Inforeliance Corp., B-413298, 2016 CPD ¶ 263, 2016 WL 5050841, at *3 n.5 (Comp. Gen. Sept. 19, 2016) (“Because the legal issues raised by the protest relate to the Small Business Act, as well as the FSS program which is administered by the GSA, our Office solicited the views of both the Small Business Administration (SBA) and the GSA.”).

127. See DESCRIPTIVE GUIDE, *supra* note 9, at 17 (“The notice of intervention can be a brief letter that includes the name, address, and telephone and fax numbers of the intervenor or its representative, if any, and advises GAO and all other parties of the intervenor’s status.”).

128. 4 C.F.R. § 21.3(b).

129. See DESCRIPTIVE GUIDE, *supra* note 9, at 18.

130. 4 C.F.R. § 21.5; see also 4 C.F.R. §§ 21.1(i), 21.2(b), and 21.11(b).

131. 4 C.F.R. § 21.4(a).

132. See DESCRIPTIVE GUIDE, *supra* note 9, at 18.

133. 4 C.F.R. § 21.4(a).

for admission to access protected material under the order.¹³⁴ If no protective order is issued, the agency may withhold from the parties those portions of the agency report that would ordinarily be subject to a protective order.¹³⁵

After a protective order has been issued, only counsel for the parties, or consultants retained by counsel, may apply for admission to access material under the protective order.¹³⁶ For this reason, it is crucial that the protester be represented by counsel in a GAO bid protest. If the protester is not represented by counsel, issuing a protective order serves no useful purpose since the protester cannot apply for access to the protected material.¹³⁷ If the protester refuses to obtain counsel, any portions of the record that the GAO determines cannot be released without a protective order will not be released at all.¹³⁸ In limited circumstances, in-house counsel for a protester may be admitted to the protective order; however, in-house counsel must have no involvement or participation in the protester's bidding process.

"The protective order strictly controls who has access to protected material and how that material is labeled, distributed, stored, and disposed of at the conclusion of the protest."¹³⁹ If a protester's or intervenor's attorney is granted access to protected material, the protective order prohibits disclosure of any protected information to those not admitted under the protective order.¹⁴⁰ This creates the unusual circumstance where the protester's and intervenor's attorneys are precluded from disclosing the majority of information concerning the protest to their clients.

134. See DESCRIPTIVE GUIDE, *supra* note 9, at 18–21; 4 C.F.R. § 21.4(a) (GAO can issue an order on its own initiative); see also 81 Fed. Reg. 22197, 22199 ("GAO proposes to revise paragraph (a) of 4 CFR 21.4 to reflect that GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not. This revision reflects GAO's longstanding practice of generally permitting the protester's decision whether to retain counsel to dictate whether GAO will issue a protective order. This practice is consistent with GAO's statutory mandate to provide for an inexpensive protest forum. 31 U.S.C. 3554(a)(1). Notwithstanding this general practice, GAO may, if circumstances warrant, issue a protective order where the protester is not represented by counsel.").

135. See 4 C.F.R. § 21.4. But see 81 Fed. Reg. 22197, 22198 ("GAO proposes to revise paragraph (e) of 4 CFR 21.3 to provide that where a protester or intervenor does not have counsel admitted to a protective order, and documents are withheld from the protester or intervenor on that basis, the agency must provide appropriately-redacted documents that adequately inform the protester or intervenor of the basis for the agency's arguments in response to the protest.").

136. See 4 C.F.R. § 21.4. Generally, other parties to the protest have two days to object to an application for admission under a protective order. See *id.* If there is no objection, the GAO will generally admit the applicant under the protective order. See DESCRIPTIVE GUIDE, *supra* note 9, at 19.

137. See *Vistron, Inc.*, B-277497, 97-2 CPD ¶ 107, 1997 WL 643303, at *3 n.2 (Comp. Gen. Oct. 17, 1997); DESCRIPTIVE GUIDE, *supra* note 9, at 19.

138. *Am. Indian Law Ctr., Inc.*, B-254322, 94-1 CPD ¶ 165, 1993 WL 522144, at *3 n.1 (Comp. Gen. Dec. 9, 1993). However, the agency still must provide the protester with documents adequate to inform the protester of the basis of the agency's position. 4 C.F.R. § 21.3(e).

139. See DESCRIPTIVE GUIDE, *supra* note 10, at 18. The protective order shall include procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. 4 C.F.R. § 21.4(a).

140. See 4 C.F.R. § 21.4; DESCRIPTIVE GUIDE, *supra* note 9, at 19.

If the terms of the protective order are violated, both counsel and client are subject to a variety of sanctions, including dismissal of the protest.¹⁴¹

Material to which parties gain access under a GAO protective order may be used in a subsequent bid protest filed at the COFC without GAO's prior authorization, provided that the information is filed under seal with the COFC, that the COFC is informed of GAO's protective order, and that the Court is requested to issue its own protective order to cover the protected material.¹⁴² A party needs express prior written authorization from GAO before using material covered by a GAO protective order in any other forum.¹⁴³

11. Document Production

The agency's formal response in opposition to a GAO protest is called the "agency report." In addition to arguments, the agency report will include a list and a copy of all relevant documents, or portions of documents, not previously produced by the agency.¹⁴⁴ If the protest includes a request for specific documents, then, at least five days prior to the filing of the agency report, the agency must provide a written response to the protester that, at a minimum, identifies whether the requested documents exist, which of the requested documents or portions thereof the agency intends to produce, which of the requested documents or portions thereof the agency intends to withhold, and the basis for not producing any of the requested documents or portions thereof.¹⁴⁵ The protester then has two days to file any objection with GAO to the scope of the agency's proposed disclosure or non-disclosure of documents.¹⁴⁶

141. See 4 C.F.R. § 21.4. "GAO's experience is that violations have been rare and have, in most cases, been unintentional. There have, however, been a handful of cases where GAO has imposed sanctions, such as barring the person found to have violated the protective order from having access to information covered by a GAO protective order for a defined period of time, and in one case dismissing the protest. In addition, GAO has referred several violations of protective orders to the state bar of the attorneys involved." See MICHAEL GOLDEN, MANAGING ASSOC. GEN. COUNSEL, GAO, NOTICE REGARDING CHANGES TO PROTECTIVE ORDER 1-2 (Apr. 7, 2008), <http://www.gao.gov/assets/670/667825.pdf>; see also PWC Logistics Servs. Co. KSC(c), B-310559, 2008 CPD ¶ 25, 2008 WL 495867, at *8-9 (Comp. Gen. Jan. 11, 2008) (GAO dismissed bid protest after protester's attorney admitted under protective order revealed protected information to the protester).

142. See OFFICE OF GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-770SP, GUIDE TO GAO PROTECTIVE ORDERS 13, 22 (June 2009).

143. See *id.* ("Requests for authorization to use protected material in other fora . . . must be made in writing to GAO, with notice to all parties, and must establish that protected material will be safeguarded, e.g., by the forum's issuance of a protective order.")

144. See 4 C.F.R. § 21.3(d). While GAO's Bid Protest Regulations "only require agencies to produce documents in response to a protest that are relevant to the allegations raised," an agency's overly aggressive efforts to limit document production can backfire and result in a protest being sustained if GAO is unable to determine from the limited production that the agency had a reasonable basis for its procurement decision. See Cortek, Inc., B-412047 et al., 2015 CPD ¶ 397, 2015 WL 9311589, at *3-5 (Comp. Gen. Dec. 17, 2015) (protest sustained where agency produced only selected and heavily redacted documents and as a result the record lacked adequate documentation for GAO to review the propriety of an agency's evaluation).

145. See 4 C.F.R. § 21.3(c).

146. See 4 C.F.R. § 21.3(c).

If the protester objects to the agency's withholding of any requested documents, the GAO must decide whether the agency is required to produce the withheld documents, or portions of documents, and whether this should be done under a protective order.¹⁴⁷ The purpose of requiring the agency to submit this five days before filing the agency report is to allow GAO to resolve any objections to the scope of the agency's production before the agency report is produced.¹⁴⁸

After the agency report is filed, the protester may file a request for any additional documents which are relevant to a protest argument but had not been previously requested. Such a request is only permitted if made within two days of the protester having actual or constructive notice of the document's existence or relevance, whichever is earlier.¹⁴⁹

12. Agency Report

Once the agency receives telephone notice of the protest, it has 30 days to file at GAO a complete written report responding to the protest: the "agency report."¹⁵⁰ The report must include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, copies of all relevant documents (or portions of documents) not previously produced, and a list of the aforementioned documents.¹⁵¹ Although the report is to be simultaneously provided to the protester and any intervenors, "[t]he agency may omit documents, or portions of documents, from the copy of the report provided to the parties if the omitted information is protected and a party receiving the report is not represented by counsel admitted under a protective order."¹⁵²

13. Comments on the Agency Report

A protester's reply brief in support of its protest is referred to as the protester's "comments" on the agency report.¹⁵³ However, comments on the agency report are materially different from a reply brief that would be filed in an ordinary court proceeding. In a normal court proceeding, the movant would have access to all the relevant evidence prior to filing its motion. In a GAO proceeding, the protester usually will not have access to all the relevant evidence prior to submitting its protest. As a result, the protester's comments

147. 4 C.F.R. § 21.3(h).

148. See DESCRIPTIVE GUIDE, *supra* note 9, at 22.

149. 4 C.F.R. § 21.3(g). The agency must produce the requested documents, or explain why it is not required to do so, within two days of such a request. *Id.* GAO may grant the protester leave to make requests for documents outside the two-day window. *Id.*

150. 4 C.F.R. § 21.3(c); see DESCRIPTIVE GUIDE, *supra* note 9, at 21–22. If GAO determines that fast-tracking the case is appropriate, then the agency must issue the agency report within 20 days after receiving notice from GAO that the express option will be used. 4 C.F.R. § 21.10(d)(1).

151. 4 C.F.R. § 21.3(d).

152. See DESCRIPTIVE GUIDE, *supra* note 9, at 23 (citing 4 C.F.R. § 21.3(e)).

153. See 4 C.F.R. § 21.3(i).

should not only respond to the arguments raised by the agency, but also must demonstrate how the documents produced in the agency report support the previously filed protest arguments.

After receipt of the agency report, the protester has ten days to submit its comments to the GAO. If the protester does not submit comments within the ten-day period, the GAO will dismiss the protest.¹⁵⁴ Comments consisting solely of general statements requesting that the GAO review the protest on the existing record generally are not sufficient to rebut the agency report.¹⁵⁵ In fact, GAO will dismiss any protest allegation or argument where the agency report responds to the allegation or argument, but the protester's comments fail to address that response.¹⁵⁶

In addition to the protester, the intervenor may also submit comments on the agency report. The intervenor's comments are also due ten days after receipt of the agency report.¹⁵⁷

Following the comment period, neither the agency nor any other party may submit additional statements for the record without GAO's permission.¹⁵⁸

14. Supplemental Protests

It is not uncommon for a protester to learn of new protest arguments based on information in the agency report or in documents produced by the agency during the course of the protest. When a protester discovers new protest arguments during the course of the protest, it may file a supplemental protest with GAO.¹⁵⁹ In order to be timely, a supplemental protest must be filed within ten days of when the protester knew or should have known its basis for the supplemental protest.¹⁶⁰

154. 4 C.F.R. § 21.3(i). On a case-by-case basis, GAO may modify the time period for comments. *Id.* If the express option is used, the parties have five days to submit comments. 4 C.F.R. § 21.10(d)(2).

155. See DESCRIPTIVE GUIDE, *supra* note 9, at 24 ("protests are rarely sustained where the protester does not file substantive comments on the report").

156. See *Encompass Grp., LLC*, B-409975, 2014 CPD ¶ 296, 2014 WL 4854489, at *4 n.4 (Comp. Gen. Sept. 30, 2014) ("The protester's comments on the agency report, however, did not address the agency's response. Where an agency provides a detailed response to a protester's allegations and the protester fails to rebut or otherwise substantively address the agency's arguments in its comments, the protester provides us with no basis to conclude that the agency's position with respect to the issue in question is unreasonable or improper. . . . Therefore, we dismiss this allegation because we consider Encompass to have abandoned this protest ground."); see also 81 Fed. Reg. 22197, 22199, 22201 ("New paragraph [4 C.F.R. 21.3](i)(3) provides that a protest allegation or argument shall be dismissed where the agency report responds to the allegation or argument, but the protester's comments do not address the agency's response. New paragraph (i)(3) reflects a longstanding practice by GAO, described in numerous GAO bid protest decisions.").

157. See 4 C.F.R. § 21.3(i).

158. 4 C.F.R. § 21.3(j).

159. See DESCRIPTIVE GUIDE, *supra* note 9, at 13.

160. See *id.*; see also *Vigor Shipyards, Inc.*, B-409635, 2014 CPD ¶ 170, 2014 WL 2567831, at *4 (Comp. Gen. June 5, 2014) ("Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, since our Regulations do not contemplate the piecemeal presentation or development of protest issues."); 4 C.F.R. § 21.2(a)(2).

In the event a supplemental protest is filed, and not dismissed, GAO will set a schedule for the agency to submit a supplemental agency report, and for the protester (and any intervenor) to submit comments on the supplemental agency report. These timelines are generally shorter than the 30 days and 10 days provided for the original agency report and comments thereto.¹⁶¹

15. *Alternative Dispute Resolution (ADR)*

“GAO, on its own initiative or upon request by the parties, may use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution, establishing an accelerated schedule, and/or issuing a summary decision.”¹⁶² The most commonly used ADR at GAO is called outcome prediction, where, after the parties have fully briefed the protest, the GAO attorney advises the parties (through counsel admitted under the protective order) of the attorney’s view of the likely outcome based on the record, so that the likely unsuccessful party may take appropriate action to resolve the protest without a written decision.¹⁶³

A GAO attorney will engage in outcome prediction ADR “only if she or he has a high degree of confidence regarding the outcome,”¹⁶⁴ and “the parties indicate in advance a willingness, if identified as the likely unsuccessful party, to seriously consider taking appropriate action to resolve the protest—typically, corrective action by the agency or withdrawal of the protest by the protester.”¹⁶⁵

Although an outcome prediction reflects the views of the GAO attorney, and generally that of a supervisor as well, it is not an opinion of GAO, and does not bind GAO should issuance of a written decision remain appropriate.¹⁶⁶

16. *Hearings*

At the request of a party or on its own initiative, the GAO may conduct a hearing in connection with a protest.¹⁶⁷ A protester requesting a hearing should do so in the initial protest filing, setting forth the reasons why a hearing is

The majority of supplemental protest arguments are discovered from a review of documents produced with the Agency Report, and as a result most supplemental protests are filed together with the protester’s comments on the Agency Report, which are also due ten days after receipt of the report. *See* 4 C.F.R. § 21.3(i). However, on occasion GAO will grant the protester an extension of time to submit its comments on the Agency Report. It is important to remember that any such extension does not extend the time to file a supplemental protest based on information first discovered in the Agency Report. *See* Exelon Servs. Fed. Grp., B-291934, 2003 CPD ¶ 86, 2003 WL 21039374, at *6 n.4 (Comp. Gen. Apr. 23, 2003).

161. *See* DESCRIPTIVE GUIDE, *supra* note 9, at 13.

162. 4 C.F.R. § 21.10(e); *see also* 4 C.F.R. § 21.0.

163. *See* DESCRIPTIVE GUIDE, *supra* note 9, at 7.

164. Devtech Sys., Inc., B-284860.4, 2002 CPD ¶ 150, 2002 WL 1968426, at *6 n.3 (Comp. Gen. Aug. 23, 2002) (“the willingness to predict that a protest will be sustained is an indication that the protest is viewed as clearly meritorious”).

165. *See* DESCRIPTIVE GUIDE, *supra* note 9, at 28.

166. Devtech Sys., Inc., 2002 WL 1968426, at *6 n.3.

167. 4 C.F.R. § 21.7(a).

necessary to resolve the protest.¹⁶⁸ Because of the increased cost and burden associated with a hearing, they are rarely held.¹⁶⁹ If the GAO grants a hearing, it usually holds a prehearing conference to resolve procedural issues.¹⁷⁰

The hearing is presided over by the GAO attorney assigned to the protest. Parties must submit a list of expected attendees to the GAO at least one day before the hearing, and the presiding GAO attorney may restrict access to the hearing to prevent the improper disclosure of protected information.¹⁷¹

If a witness whose attendance has been requested by the GAO fails to attend the hearing or fails to answer a relevant question, the GAO may infer that the witness's testimony would have been unfavorable to the party for whom the witness would have testified.¹⁷²

Within five days after the hearing, parties should submit comments to the GAO.¹⁷³ If the protester fails to submit comments, the protest is dismissed.¹⁷⁴

17. GAO Decision

GAO must issue a decision on the protest within 100 days after the protest is filed, unless GAO finds the protest appropriate for fast-tracking.¹⁷⁵ Once signed, a copy of the decision is generally available on the GAO's website within 24 hours, and is distributed to the parties.¹⁷⁶ If the decision contains protected information, it will only be distributed to the agency and individuals admitted under the protective order, and, if possible, a redacted version will be made available to the public.¹⁷⁷

168. 4 C.F.R. §§ 21.1(d)(3), 21.7(a).

169. See DESCRIPTIVE GUIDE, *supra* note 9, at 25. In Fiscal Year 2016, hearings were only conducted in 2.51% of fully developed cases at GAO. GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2016 4 (Dec. 15, 2016), available at <http://www.gao.gov/assets/690/681662.pdf>.

170. 4 C.F.R. § 21.7(b); see DESCRIPTIVE GUIDE, *supra* note 9, at 25–26.

171. See 4 C.F.R. § 21.7(d); DESCRIPTIVE GUIDE, *supra* note 9, at 25–26.

172. 4 C.F.R. § 21.7(f); Dep't of Commerce—Recon., B-277260, B-277260.4, 98-2 CPD ¶ 35, 1998 WL 431704, at *3 (Comp. Gen. July 31, 1998); Du & Assocs., Inc., B-280283.3, 98-2 CPD ¶ 156, 1998 WL 892043 at *6 (Comp. Gen. Dec. 22, 1998).

173. 4 C.F.R. § 21.7(g). These comments are in addition to those comments submitted after the agency report. See DESCRIPTIVE GUIDE, *supra* note 9, at 26.

174. 4 C.F.R. § 21.7(g).

175. 4 C.F.R. § 21.9. If GAO believes the case is suitable for resolution within 65 days, it may adopt the "express option," in which case GAO is required to issue an opinion within 65 days after the protest is filed. 4 C.F.R. §§ 21.9(b), 21.10. Requests for the express option shall explain in writing why the case is suitable for resolution within 65 days, and must be received by GAO not later than five days after the protest or supplemental/amended protest is filed. 4 C.F.R. § 21.10(c); see, e.g., B & S Transp., Inc., B-299144, 2007 CPD ¶ 16, 2007 WL 152635, at *2 n.1 (Comp. Gen. Jan. 22, 2007) (granted agency's request to use the express option, where agency contended that fast-tracking would allow it to meet its deadlines in the Army's Base Realignment and Closure plan); Ashbritt Inc., B-297889, B-297889.2, 2006 CPD ¶ 48, 2006 WL 707305, at *14 (Comp. Gen. Mar. 20, 2006) (express option used pursuant to agency request).

176. 4 C.F.R. § 21.12(b); see DESCRIPTIVE GUIDE, *supra* note 9, at 30.

177. 4 C.F.R. § 21.12(a).

If the GAO determines that the agency's procurement activities did not comply with statute or regulation, and such noncompliance prejudiced the protester, the GAO will sustain the protest, and recommend such remedial action as it "determines necessary to promote compliance."¹⁷⁸ Though technically GAO decisions are merely recommendations and an agency is not bound to follow the decision,¹⁷⁹ in practice it is very rare for an agency to choose not to implement GAO's recommendation.¹⁸⁰

18. Reimbursement of Costs

Generally, if a protest is sustained, the GAO will recommend that the agency reimburse the protester's costs incurred in filing and pursuing the protest, including attorney, consultant, and expert witness fees.¹⁸¹ If the protest is sustained, but the protester is deprived of an opportunity to compete for the

178. 4 C.F.R. § 21.8(a); *see also* Centech Group, Inc. v. United States, 554 F.3d 1029, 1039 (Fed. Cir. 2009) ("Pursuant to 31 U.S.C. § 3554(b)(1), GAO is required to recommend that an agency take specific corrective action if an award does not comply with a statute or regulation, including terminating the contract and awarding a contract consistent with the requirements of the statute and regulations." (citing Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989))). "In determining the appropriate recommendation(s), GAO shall . . . consider all circumstances surrounding the procurement or proposed procurement including 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." 4 C.F.R. § 21.8(b).

179. *See* 4 C.F.R. § 21.8(a); *see also* The 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." (citing 31 U.S.C. § 3554(b), (c))).

180. For example, GAO reported that in Fiscal Year 2016 no agency failed to fully implement a recommendation in a GAO protest decision. *See* GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2016 4 (Dec. 15, 2016), available at <http://www.gao.gov/assets/690/681662.pdf>. "Congress contemplated and intended that procurement agencies normally would follow the Comptroller General's recommendation. Congress viewed an agency's failure to do so as sufficiently unusual as to require the agency to report such noncompliance to the Comptroller General and to require the latter annually to inform Congress of any instances of noncompliance." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989).

181. 4 C.F.R. § 21.8(d)(1); *see, e.g.*, Prof'l Serv. Indus., Inc., B-412721.2 et al., 2016 CPD ¶ 234, 2016 WL 4582238, at *9 (Comp. Gen. July 21, 2016). "With respect to claims for protest costs, the Competition in Contracting Act caps reimbursement of attorneys' fees at \$150 [per] hour, except in instances where the protester is a small business and a higher fee is justified." Cascadian Am. Enterprises—Costs, B-412208.6, 2016 CPD ¶ 180, 2016 WL 3610820, at *4 n.1 (Comp. Gen. July 5, 2016) (citing 31 U.S.C. § 3554(c)(2)(B)); *see also* FAR 33.104(h)(5)(ii). On occasion, GAO has allowed other than small businesses to obtain reimbursement of attorneys' fees at rates over \$150 per hour if the protester requests an upward adjustment based on an increase in the cost of living. *See* Sodexo Mgmt., Inc.—Costs, B-289605.3, 2003 CPD ¶ 136, 2003 WL 21910567, at *31–35 (Comp. Gen. Aug. 6, 2003); Transportation Sec. Admin.—Costs, B-400340.8, 2010 CPD ¶ 119, 2010 WL 2090932, at *1–2 (Comp. Gen. May 20, 2010). Reimbursement of protest costs associated with the use of consultants or expert witnesses is limited to the highest rate of pay for expert witnesses paid by the federal government pursuant to 5 U.S.C. § 3109 and 5 C.F.R. § 304.105. *See* 31 U.S.C. § 3554(c)(2)(A), together with FAR 33.104(h)(5)(i); *see also* Dep't of the Army; ITT Fed. Servs. Int'l Corp.—Costs, B-296783.4, B-296783.5, 2006 CPD ¶ 72, 2006 WL 1170159, at *3 (Comp. Gen. Apr. 26, 2006).

contract at issue, GAO will likely recommend the agency reimburse the protester's bid and proposal preparation costs.¹⁸² GAO may also recommend the agency reimburse the protester's bid and proposal preparation costs if changes in circumstances render a proposal that was previously submitted no longer relevant.¹⁸³ But "even where an offeror has been wrongfully denied award of a contract, there is no legal basis for allowing recovery of lost profits."¹⁸⁴

If the protest is closed as a result of the agency taking corrective action prior to the GAO's final ruling, the protester may seek, and GAO may recommend the agency pay, its protest costs.¹⁸⁵ GAO will recommend the agency pay the protester's costs where "the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief."¹⁸⁶

After the GAO recommends that the protester be awarded its costs, the protester has 60 days to file with the agency a detailed claim for costs, certifying the time expended and costs incurred in pursuing the protest.¹⁸⁷ The claim must be supported by adequate documentation.¹⁸⁸

182. See 4 C.F.R. § 21.8(d)(2); see, e.g., Fed. Builders, LLC-the James R. Belk Trust-Costs, B-409952.3, 2016 CPD ¶ 126, 2016 WL 2620430, at *3 (Comp. Gen. May 6, 2016) (protester awarded proposal preparation costs where protest of lease was sustained but awarded lease lacked a termination clause); Boines Constr. & Equip. Co., Inc., B-279575, 98-1 CPD ¶ 175, 1998 WL 344250, at *5 (Comp. Gen. June 29, 1998) ("We recommend that HUD terminate its contract with Pierce, if feasible, and award the contract to Boines, the next low bidder, if Boines's bid is otherwise responsive and Boines responsible. . . . If termination of the contract with Pierce is not feasible because of the extent of contract performance, we recommend that HUD instead pay Boines its bid preparation costs.").

183. See Cobro Corp., B-287578.2, 2001 CPD ¶ 181, 2001 WL 1356489, at *7 (Comp. Gen. Oct. 15, 2001) ("Normally we do not recommend preparation costs where a protester is given an opportunity to compete under a corrected solicitation. . . . Here, however, nearly 2 years have elapsed since the initial 1999 closing date. The protester expended substantial cost and effort on a proposal which may have virtually no value under a recompetition, particularly since the reissued solicitation is likely to represent a requirement that is fundamentally different from that which was presented under the defective solicitation. Under these circumstances, we recommend that COBRO be reimbursed for its proposal preparation costs.").

184. Al Long Ford, B-297807, 2006 CPD ¶ 68, 2006 WL 1319564, at *7 n.12 (Comp. Gen. Apr. 12, 2006).

185. See 4 C.F.R. § 21.8(e). "The protester shall file any request that GAO recommend that costs be paid within 15 days of the date on which the protester learned (or should have learned, if that is earlier) that GAO had closed the protest based on the agency's decision to take corrective action. The protester shall furnish a copy of its request to the agency, which may file a response within 15 days after receipt of the request, with a copy furnished to the protester." *Id.*

186. See Chase Supply, Inc.-Costs, B-411849.3, 2016 CPD ¶ 134, 2016 WL 2984857, at *4 (Comp. Gen. May 17, 2016) (citing 31 U.S.C. § 3554(c)(1)(A); 4 C.F.R. § 21.8(e)).

187. 4 C.F.R. § 21.8(f)(1). Absent a "compelling reason beyond the control of the protester [that] prevented the protester from timely filing the claim," failure to file an adequately substantiated cost claim within the 60-day window will result in the forfeiture of the protester's right to recover costs. See Keeton Corr., Inc.-Costs, B-293348.3, 2004 CPD ¶ 213, 2004 WL 2389926, at *2 (Comp. Gen. Oct. 25, 2004).

188. See, e.g., Malco Plastics, B-219886, B-219886.3, 86-2 CPD ¶ 193, 1986 WL 63904, at *2 (Comp. Gen. Aug. 18, 1986) (denying protester's request for attorney's fees where protester failed to provide adequate documentation of these fees).

19. Request for Reconsideration

Any party involved in the bid protest, including intervenors, may request reconsideration of the GAO decision.¹⁸⁹ A party must file the request “not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier,” and the request must “contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.”¹⁹⁰ Unlike the initial protest, a request for reconsideration will not result in an automatic stay of contract award or performance.¹⁹¹ Requests for reconsideration are very rarely granted by GAO.

20. Subsequent Protest to the COFC

Where the protester fails to obtain its desired relief from the GAO, or where the GAO’s decision to sustain the protest and grant relief to the protester is not implemented by the procuring agency, the protester can seek relief by filing a new protest at the COFC.¹⁹² In fact, a protester need not wait until the conclusion of its case at GAO before switching tactics and filing a protest at the COFC.¹⁹³

If a bid protest is filed at the COFC concerning the same procurement as a protest pending at GAO, the protest pending at GAO will be dismissed “so long as the disposition of the case pending before [the] court could render the protest before [GAO] academic.”¹⁹⁴

C. COFC Protests

The U.S. Court of Federal Claims (COFC) was created by the Federal Courts Improvement Act of 1982.¹⁹⁵ The COFC inherited the jurisdiction formerly exercised by the U.S. Court of Claims. Title 28 U.S.C. § 2503(b) authorizes the U.S. Court of Federal Claims to prescribe rules of practice and procedure for its proceedings. The Rules of the Court of Federal Claims (RCFC) incorporate

189. 4 C.F.R. § 21.14(a); *Stay, Inc. v. Cheney*, 940 F.2d 1457, 1460 (11th Cir. 1991) (“Any interested party is also entitled to seek reconsideration of the GAO’s decision.”).

190. 4 C.F.R. § 21.14.

191. See DESCRIPTIVE GUIDE, *supra* note 9, at 31.

192. See, e.g., *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 221–22 (2016).

193. See, e.g., *Metro. Van & Storage, Inc. v. United States*, 92 Fed. Cl. 232, 243–44 (2010).

194. See *Colleague Consulting, LLC-Reconsid.*, B-413156.18, 2016 CPD ¶ 257, 2016 WL 4752573, at *2 (Comp. Gen. Sept. 12, 2016); 4 C.F.R. § 21.11; see, e.g., *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, 2010 CPD ¶ 231, 2010 WL 3994253, at *4 n.2 (Comp. Gen. Sept. 10, 2010) (“During the course of this protest, another firm, not a party to this protest, filed suit in the Court of Federal Claims challenging the issuance of five of the eight task orders that are the subject of this action. The issues raised in that action were unrelated to the question of whether the agency had unreasonably determined that HMBI’s offer failed to comply with the requirements of the solicitation and challenged task orders for geographic areas 2P, 3P, 1A, 1D and 2D. Because the Court’s disposition of the lawsuit could render a decision by our Office academic, we dismissed the protest with respect to those five areas.”).

195. Pub. L. No. 97-164, 96 Stat. 25 (1982).

the Federal Rules of Civil Procedure applicable to civil actions tried by a district court sitting without a jury, to the extent appropriate.¹⁹⁶ Appendix C of the RCFC, entitled “Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(B),” acts to supplement the RCFC, and provides step-by-step guidance for filing a bid protest action in the COFC.¹⁹⁷ Appendix C, along with the RCFC, should be referenced by any party filing a bid protest with the COFC.¹⁹⁸

1. *Commencing a Protest*

At least 24 hours before filing a protest with the COFC, the protester must provide pre-filing notice to the court, the Department of Justice (DOJ),¹⁹⁹ the procuring agency’s contracting officer, and the awardee.²⁰⁰ The pre-filing notice must state, among other things, whether the plaintiff contemplates requesting temporary or preliminary injunctive relief, and whether the plaintiff has discussed the need for temporary or preliminary injunctive relief with DOJ counsel.²⁰¹ Failure to provide pre-filing notice is not grounds for dismissal, but may delay the initial processing of the case.²⁰²

In addition to the filing of a complaint (which is usually filed under seal),²⁰³ a protester’s initial filings will usually also include a motion to seal, a motion for a protective order, a proposed redacted complaint, a case cover sheet (COFC Form 2), and a Rule 7.1 disclosure statement. Some protesters will also include a motion for a temporary restraining order and preliminary injunction (and supporting memorandum) with their initial filings. However, because the need for temporary/preliminary injunctive relief is not usually known at the time of the initial filing, it sometimes makes more sense to wait

196. See RCFC Refs & Annos.

197. See RCFC app. C.

198. In addition, in August 2015, the COFC created new procedures available to attorneys to file their initial pleadings to commence a bid protest action electronically (previously the initial pleadings had to be filed in person at the clerk’s office). These new procedures make the process of filing a new protest at the COFC much more efficient, however it does require attorneys to pay careful attention to these new rules. A guide for this electronic filing is available on the COFC’s website. See U.S. COURT OF FEDERAL CLAIMS, ATTORNEY GUIDE FOR FILING COMPLAINTS & PETITIONS IN CM/ECF (Aug. 2015), available at http://www.uscfc.uscourts.gov/sites/default/files/150811-Attorney-Complaint-Filing-Instructions_0.pdf.

199. Unlike at GAO, where the government is represented by agency counsel, at the COFC the government is represented by DOJ counsel.

200. RCFC app. C, ¶ II. The contents of the pre-filing notice should comply with RCFC app. C, ¶ II(3), and be transmitted in accordance with RCFC app. C, ¶ II(2).

201. RCFC app. C, ¶ II.3.

202. RCFC app. C, ¶ II.2.

203. If the protester believes that its complaint, or material filed with the complaint, contains confidential or proprietary information, and wishes to protect that information from public view, the protester must file a motion together with the complaint for leave to file the complaint under seal. RCFC app. C, ¶ III.4. The procedures for filing documents under seal is detailed in RCFC 5.5(d) and RCFC app. C, ¶¶ III.5–7.

on filing a motion for temporary/preliminary injunctive relief until after the initial status conference.

Shortly after the complaint is filed, the case will be assigned to one of the COFC judges, who will (generally within 24 hours) contact the parties to schedule an initial status conference to address relevant procedural and evidentiary issues,²⁰⁴ including requests for temporary or preliminary injunctive relief²⁰⁵ and motions for protective orders.²⁰⁶ Usually, prior to the status conference, the DOJ counsel assigned to represent the agency in the protest will contact the protester to discuss a potential briefing schedule, as well as the need for temporary or preliminary injunctive relief during the pendency of the protest (i.e., whether the agency will agree to voluntarily stay award/performance of the protested contract during the pendency of the protest). Generally, at the initial status conference the assigned COFC judge will discuss the need for temporary or preliminary injunctive relief and need for a protective order, and set the date for production of the administrative record, the briefing schedule and hearing date.

2. Temporary/Preliminary Injunctive Relief

Unlike protests filed at GAO, there is no automatic CICA stay that applies to protests filed at the COFC. Instead, a protester wishing for the procurement or award to be halted during the pendency of the protest has two avenues of relief: (1) the agency agrees to voluntarily stay contract performance/award during the pendency of the protest, or (2) seek a temporary restraining order or preliminary injunction from the COFC enjoining contract performance/award during the pendency of the protest.²⁰⁷

“On a motion for temporary injunctive relief, the court must weigh four factors: ‘(1) immediate and irreparable injury to the movant; (2) the movant’s likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all the parties.’”²⁰⁸ No one factor is necessarily dispositive, as

204. See RCFC app. C, ¶ IV.

205. RCFC app. C, ¶¶ IV(8)(c), V.

206. RCFC App. C, ¶¶ IV(8)(d), VI. Protective orders are the “principal vehicle relied upon by the court to ensure protection of sensitive information.” Motions for protective orders must meet the requirements of RCFC 10, and are issued at the court’s discretion. Once a protective order is issued, individuals who seek access to protected information—with the exception of the Court, the procuring agency, and the DOJ—must file an appropriate application to be admitted to the protective order. If admitted to the protective order, an individual becomes subject to the terms of the order. RCFC app. C, ¶ VI. Forms for protective orders, and applications for admission to the order, are available in the RCFC Appendix of Forms. See RCFC Forms 8, 9, and 10.

207. Fortunately for protesters, agencies will commonly agree to voluntarily stay award/performance of a protested contract during the pendency of a protest at the COFC. However, protesters should not take for granted that an agency will agree to a voluntary stay, and should weigh the chances of obtaining, and the need for, a TRO when choosing whether to file their protest at GAO or the COFC.

208. *Favor Techconsulting, LLC v. United States*, No. 16-1365C, 2016 WL 6123571, at *1 (Fed. Cl. Oct. 19, 2016) (quoting *U.S. Ass’n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344,

“the weakness of the showing regarding one factor may be overborne by the strength of the others.”²⁰⁹

3. *Timeliness of Protest*

In most cases there is no deadline, other than the applicable statute of limitations, for bringing a bid protest at the COFC.²¹⁰ However, the COFC has applied the doctrines of waiver and laches to bar protests in some limited circumstances.

The doctrine of waiver acts to bar any protest filed at the COFC premised upon patent errors in a solicitation, if the protester did not first raise these errors to the agency “before the close of the bidding process.”²¹¹ The COFC has also applied the waiver rule to bar challenges to agency corrective action decisions, where the protest was filed after the due date for proposal resubmission following the challenged corrective action.²¹² However, the waiver rule has been held not to apply in cases where the protester lacked knowledge of the alleged defect in the solicitation until after the close of bidding.²¹³

In addition, in a few rare cases, the COFC has applied the doctrine of laches to bar a post-award protest, where the protester delayed in bringing its protest for an unreasonable and inexcusable length of time from the time after the protester knew or reasonably should have known of its basis for protest, and that delay caused economic prejudice to, or prejudice the defense of, the defendant.²¹⁴ Absent “extraordinary circumstances,” the COFC will not

1347–48 (Fed. Cir. 2005)). *But see* *Continental Servs. Grp., Inc. v. United States*, 130 Fed. Cl. 798, 800–1 (2017) (granting temporary restraining order in favor of a protester without a showing of likelihood of success on the merits—“since the Government has not yet produced the Administrative Record and the parties have not had an opportunity to brief the merits of this bid protest, the court is not in a position to decide Continental Services’ likelihood of success”).

209. *Favor Techconsulting*, 2016 WL 6123571, at *1 (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)); *see also* *Somerset Pharms., Inc. v. Dudas*, 500 F.3d 1344, 1346 (Fed. Cir. 2007) (“To establish entitlement to a preliminary injunction a movant must establish a reasonable likelihood of success on the merits.”).

210. *See* *PlanetSpace, Inc. v. United States*, 92 Fed. Cl. 520, 531 (2010) (“This bid protest is properly before the court pursuant to 28 U.S.C. § 1491(b) and thus is governed by the Tucker Act’s six-year statute of limitations set forth at 28 U.S.C. § 2501.”); *see also* *AgustaWestland N. Am., Inc. v. United States*, 127 Fed. Cl. 793, 808–09 (2016) (dismissing protest on statute of limitations grounds where complaint filed eight years after award). *But see* *CW Gov’t Travel, Inc. v. United States*, 61 Fed. Cl. 559, 569 (2004) (“Had Congress wanted to set a statute of limitations on bid protest actions, it would have done so. Because Congress did not so limit the jurisdiction of this court to hear such actions, we would be reluctant to invoke laches except under extraordinary circumstances that are not present in this case.”).

211. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). The “close of the bidding process” has been interpreted as the closing date for receipt of proposals. *See* *Allied Materials & Equip. Co., Inc. v. United States*, 81 Fed. Cl. 448, 459 (2008).

212. *NVE, Inc. v. United States*, 121 Fed. Cl. 169, 173 (2015).

213. *See* *Allied Materials*, 81 Fed. Cl. at 459–60.

214. *See* *Nat’l Telecommuting Inst., Inc. v. United States*, 123 Fed. Cl. 595, 602–3 (2015); *Reilly v. United States*, 104 Fed. Cl. 69, 80 (2012); *Aircraft Charter Sols., Inc. v. United States*, 109 Fed. Cl. 398, 409 (2013).

invoke laches to bar a protest.²¹⁵ However, even though a post-award protest at the COFC will rarely be denied or dismissed as untimely, the availability of injunctive relief is significantly diminished if the protest is not brought in a prompt manner.²¹⁶

4. Intervention

When a bid protest action is brought at the COFC, other interested parties, specifically the awardee, may be permitted to intervene pursuant to RCFC 24(a). If a motion is timely filed,²¹⁷ the COFC must permit anyone to intervene “who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”²¹⁸ “In considering a motion to intervene under RCFC 24(a), the [COFC] must construe the rule’s requirements in favor of intervention.”²¹⁹

5. Jurisdiction and Standing

The COFC has “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.”²²⁰ To afford such relief, 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.”²²¹

215. *PlanetSpace*, 92 Fed. Cl. at 531. In fact, some COFC judges have held that any “economic prejudice” predicated on the COFC issuing injunctive relief in the protest is not sufficient to invoke laches, because injunctive relief is not the only available remedy to the protester. *See id.*; *Furniture by Thurston v. United States*, 103 Fed. Cl. 505, 516–17 (2012).

216. *See Furniture by Thurston*, 103 Fed. Cl. at 517, 521–22; *CW Gov’t Travel, Inc. v. United States*, 61 Fed. Cl. at 570, 578–79.

217. *Ne. Military Sales, Inc. v. United States*, 100 Fed. Cl. 100, 101–2 (2011) (denying awardee’s motion to intervene, filed nearly two months after this protest and less than 48 hours before oral argument); *Excelsior Ambulance Serv., Inc. v. United States*, 126 Fed. Cl. 69 (2016) (awardee’s motion to intervene denied where motion was brought after judgment had been entered in favor of the protester).

218. RCFC 24(a)(2).

219. *Northrop Grumman Info. Tech., Inc. v. United States*, 74 Fed. Cl. 407, 412 (2006). *But see Nevada Site Sci. Support & Techs. Corp. v. United States*, 128 Fed. Cl. 337, 337–38 (2016) (denying motions to intervene by disappointed bidders in a bid protest by a former awardee challenging the agency’s decision to rescind that award based on ownership issues involving protester, even though if the plaintiff’s protest was denied the potential intervenors might receive the subsequent award; the COFC held that the disappointed bidders did not have an “interest” in the protest as defined by RCFC 24, reasoning that “the simple fact that a party might benefit from another’s legal misfortune does not lead to an understanding that said party should have a role in occurrence of that legal misfortune”).

220. 28 U.S.C. § 1491(b)(1).

221. 28 U.S.C. § 1491(b)(2).

To possess standing to bring a bid protest, a plaintiff must be an “interested party,” which encompasses any “actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”²²² In a pre-award bid protest, the protester has “direct economic interest” if it has suffered a “non-trivial competitive injury which can be redressed by judicial relief.”²²³ In a post-award bid protest, the protester has a “direct economic interest” if it “would have had a ‘substantial chance’ of winning the award ‘but for the alleged error in the procurement process.’”²²⁴ This showing of “allegational prejudice” turns entirely on “the impact that the alleged procurement errors had on a plaintiff’s prospects for award, taking the allegations as true.”²²⁵ In other words, to have standing “a plaintiff must show that it would have had a substantial chance of being awarded the contract but for the combined impact of all agency decisions alleged to be unlawful.”²²⁶

6. Standard of Review

a. Standard of Review in General

The COFC “reviews challenges to procurement decisions under the same standards used to evaluate agency actions under the Administrative Procedure Act, 5 U.S.C. § 706.”²²⁷ “Thus, to successfully challenge an agency’s procurement decision, a plaintiff must show that the agency’s decision was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”²²⁸ Accordingly, the COFC may set aside a procurement action if “(1) the procurement official’s decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.”²²⁹

When a bid protest is brought on the basis that the procurement procedure involved a violation of regulation or procedure, the disappointed bidder must show a “clear and prejudicial violation of applicable statutes or regulations.”²³⁰ This requires the protester to “show not only significant error in the procurement process, but also that the error prejudiced it.”²³¹

222. *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

223. *CGI Federal Inc. v. United States*, 779 F.3d 1346, 1351 (Fed. Cir. 2015) (quoting *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1361–62 (Fed. Cir. 2009)); *Prof'l Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 201 (2016).

224. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 200–1 (quoting *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1319 (Fed. Cir. 2003)).

225. *Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 695 (2010).

226. *Linc*, 96 Fed. Cl. at 696 (italics in original).

227. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 202 (citing 28 U.S.C. § 1491(b)(4)).

228. *Id.*

229. *Nat'l Air Cargo Grp., Inc. v. United States*, 127 Fed. Cl. 707, 717 (2016) (quoting *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

230. *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009); *Precision Images, LLC v. United States*, 79 Fed. Cl. 598, 615 (2007).

231. *See Galen Med. Associates, Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (quoting *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996)); *McConnell Jones Lanier & Murphy LLP v. United States*, 128 Fed. Cl. 218, 238 (2016).

In order to demonstrate prejudice, the protester “must show that it would have had a substantial chance of being awarded the contract but for the combined impact of any agency decisions adjudged to be unlawful.”²³² In this context, a protester need not establish with certainty that, but for the alleged error, it would have won the contract.²³³ Rather, the “substantial chance of award” requirement is instead satisfied where, “but for the government’s alleged error, the protestor would have been ‘within the zone of active consideration.’”²³⁴

When a bid protest is brought on the basis that the procurement official’s decision lacked a rational basis, the COFC reviews the procurement “to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis.”²³⁵ An agency decision lacks a rational basis (i.e., is arbitrary and capricious) where “the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²³⁶ “Despite this highly deferential standard, ‘the [COFC] must still conduct a careful review to satisfy itself that the agency’s decision is founded on a rational basis.’”²³⁷

There appears to be a difference of opinion between some COFC judges as to whether a protester must demonstrate APA prejudice if it has demonstrated that an irrational or arbitrary and capricious agency action has occurred. Whereas some judges, after deeming agency action to be arbitrary, have still denied protests because the protester failed to demonstrate it was prejudiced

232. *Linc*, 96 Fed. Cl. at 696.

233. *Overstreet Elec. Co., Inc. v. United States*, 47 Fed. Cl. 728, 743 (2000).

234. *Preferred Systems Solutions, Inc. v. United States*, 110 Fed. Cl. 48, 57 (2013) (quoting *Allied Tech. Group, Inc. v. United States*, 94 Fed. Cl. 16, 37 (2010), *aff’d*, 649 F.3d 1320 (Fed. Cir. 2011)). This inquiry into prejudice (“APA prejudice”) is distinct from the inquiry into prejudice for standing (“allegational prejudice”). See *Linc*, 96 Fed. Cl. at 695–96.

235. *Centech Grp.*, 554 F.3d at 1037; *Sys. Dynamics Int’l, Inc. v. United States*, 136 Fed. Cl. 499, 514 (2017); *Linc Gov’t Servs., LLC v. United States*, 108 Fed. Cl. 473, 488 (2012); see also *Precision Images*, 79 Fed. Cl. at 614 (“courts have recognized that contracting officers are ‘entitled to exercise discretion upon a broad range of issues confronting them’ in the procurement process.” (citations omitted)).

236. *Algeese 2 s.c.a.r.l. v. United States*, 128 Fed. Cl. 7, 10 (2016) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Precision Images*, 79 Fed. Cl. at 614; see also *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058 (Fed. Cir. 2000) (standard of review is “highly deferential” and requires the reviewing court to sustain agency action “evinced rational reasoning and consideration of relevant factors” (citing *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 283 (1974))); *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989) (Where the court finds a reasonable basis for an agency’s action, it “stay[s] its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.” (quoting *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971))).

237. *Precision Images*, 79 Fed. Cl. at 615 (quoting *AmerisourceBergen Drug Corp. v. United States*, 60 Fed. Cl. 30, 35 (2004)).

by the agency's arbitrary or irrational action,²³⁸ other judges have held that "APA prejudice is presumed when the Government acts irrationally."²³⁹

b. Review after GAO Decisions

When a protester files a bid protest at the COFC after its protest is denied at GAO, the subject of the COFC's review is the agency decision, not the GAO decision.²⁴⁰ In such cases, the COFC, recognizing GAO's "longstanding expertise in the bid protest area" will give "due regard" to GAO's decision.²⁴¹

238. *See, e.g., Archura LLC v. United States*, 112 Fed. Cl. 487, 498 (2013) ("This leads the court to conclude that the government arbitrarily treated Archura differently when it failed to consider Archura's proposal in its final best value determination. . . . Nonetheless, for the reasons that follow, the court finds that the government's failure to formally consider Archura in the best value evaluation did not prejudice Archura and thus Archura is not entitled to relief."); *HWA, Inc. v. United States*, 78 Fed. Cl. 685, 702–04 (2007) (holding that even though protester had shown the agency lacked a rational basis in its evaluation of the protester's personal qualifications, the agency's error was not prejudicial and therefore the protest was denied).

239. *See, e.g., Caddell Constr. Co. v. United States*, 125 Fed. Cl. 30, 50 (2016) (citing *Centech Grp*, 554 F.3d at 1037; *Banknote Corp. of Am. Inc. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004)); *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 329 (2006) ("[The APA] prejudice analysis, however, should be reached only when the protestor has shown violation of an applicable procurement regulation. If the court finds that the Government has acted arbitrarily and capriciously, the analysis stops at that finding. There should be no need to continue to prejudice, because a finding that the Government has acted arbitrarily and capriciously necessarily invalidates the procurement, and the court must enjoin the procurement award or enjoin performance under an award already made, and the court also may enjoin award to any proposer than the protestor.").

240. *See Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341 (1997); *Analytical & Research Tech. v. United States*, 39 Fed. Cl. 34, 41 & n.7 (1997); *Nilson Van & Storage v. United States*, No. 10-716C, 2011 WL 477704, at *1 (Fed. Cl. Feb. 7, 2011) ("When this court exercises jurisdiction over a bid protest under 28 U.S.C. § 1491(b), it considers the protest independently of any prior protests that may have occurred before the agency or before GAO."); *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 339 (2012) ("When the GAO denies a bid protest, and finds the agency decision reasonable, the GAO decision drops out of the equation when a subsequent protest is brought in our court."); *see also Innovative Mgmt. Concepts, Inc. v. United States*, 114 Fed. Cl. 257, 257–58 (2014) (the COFC dismissed the plaintiff's protest for failure to state a claim for which relief may be granted, where the plaintiff's complaint requested relief in the form of the COFC ruling that GAO's earlier decision, denying the plaintiff's protest, lacked a rational basis and violated the applicable laws and regulations).

241. *See Gentex Corp. v. United States*, 58 Fed. Cl. 634, 636 n.3 (2003); *Nilson Van & Storage*, 2011 WL 477704, at *2 ("The court in rendering its decision on a protest takes any prior GAO decision into account but does not accord it weight apart from its power to persuade."); *Data Mgmt. Servs. Joint Venture v. United States*, 78 Fed. Cl. 366, 371 n.5 (2007) ("While we give serious consideration to GAO's reasoned explications of procurement law, its decision with respect to any particular procurement is given no deference."); *One Largo Metro, LLC v. United States*, 109 Fed. Cl. 39, 85 (2013) ("Decisions of the GAO are treated as expert opinions, which the court should 'prudently consider.'"); *S.K.J. & Assocs., Inc. 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."). However, the weight of GAO's decision is greatly diminished where the record at the COFC materially differs from the record before GAO, or where the protest arguments were not fully developed at GAO. *See, e.g., Gentex*, 58 Fed. Cl. at 636 n.3 ("In this case, Gentex's allegation regarding the unfair evaluation of Scott's noncompliant battery solution and CAIV tradeoff was not as fully developed at GAO as it has been in this forum."); *Fed. Acquisition Servs. Team, LLC v. United States*, 124 Fed. Cl. 690, 707

However, the story is different where the Agency takes corrective action based upon a recommendation from GAO. In such cases, the review of a subsequent protest at the COFC challenging the agency's corrective action will focus on the rationality of the underlying GAO recommendation.²⁴² Under this review, "an agency's decision lacks a rational basis if it implements a GAO recommendation that is itself irrational."²⁴³ On the other hand, where the Agency elects to take corrective action following a GAO decision sustaining a protest, but the agency's corrective action does not fully implement GAO's recommendation, and a subsequent protest is filed at the COFC challenging the corrective action, then it is the agency's corrective action decision that is the subject of judicial review, not the GAO recommendation.²⁴⁴

Finally, in the rare case where the GAO sustains a protest but the agency chooses not to take any corrective action (i.e., disregards GAO's recommendation), and the protester files a subsequent protest at the COFC, "the agency's initial procurement decision (not the decision to eschew the recommendation) would be the topic of a resulting bid protest in court, and the deference given the agency's decision is not reduced due to the GAO's disagreement."²⁴⁵

(2016) ("Although not necessary for FAST to prevail, the Court concludes that the agency's failure to disclose to the GAO the full extent of problems encountered by offerors in e-mailing their proposals, and its application of the Government Control exception to the benefit of another offeror, was to plaintiff's prejudice by preventing a fully informed consideration of the protest grounds raised by FAST.").

242. See *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 106 (2013) (citing *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377, 1383 (Fed. Cir. 2011)); *PricewaterhouseCoopers Pub. Sector, LLP v. United States*, 126 Fed. Cl. 328, 352 (2016) (observing that "[g]enerally, an agency's decision to take corrective action in order to implement a GAO recommendation is proper unless the GAO decision itself is irrational." (citing *Raytheon Co. v. United States*, 809 F.3d 590, 595–96 (Fed. Cir. 2015); *Centech Grp.*, 554 F.3d at 1039); *Analytical & Research Tech. v. United States*, 39 Fed. Cl. 34, 41 n.7 (1997) ("The Federal Circuit reviewed the propriety of the GAO's decision, as well as the decision of the agency, because the agency had changed its conduct in response to the GAO's recommendation." (citing *Honeywell, Inc. v. United States*, 870 F.2d 644, 647–49 (Fed. Cir. 1989))). "[I]t makes no difference whether the GAO's recommendation was made in a written decision sustaining a protest, in an electronic-mail message addressing the merits of a protest, or during an outcome prediction conference . . . because the GAO's recommendations, in any form, are never binding on a procuring agency." *Raytheon Co. v. United States*, 121 Fed. Cl. 135, 152, *aff'd*, 809 F.3d 590 (Fed. Cir. 2015).

243. See *Amazon*, 113 Fed. Cl. at 106 (quoting *Turner Constr.*, 645 F.3d at 1383); *Rush Constr., Inc. v. United States*, 117 Fed. Cl. 85, 92 (2014) (citing *Honeywell*, 870 F.2d at 647); *Navarro Research & Eng'g, Inc. v. United States*, 106 Fed. Cl. 386, 404, (2012); see also *Prof'l Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 203 (2016) ("a procuring agency's decision to follow GAO's recommendation is proper, even where that recommendation differs from the contracting officer's initial decision, 'unless [GAO's] decision itself was irrational.'" (quoting *Centech Grp.*, 554 F.3d 1039).

244. See *Prof'l Serv. Indus.*, 129 Fed. Cl. at 203–4 (an agency cannot assert the rationality of a GAO recommendation as a defense to its corrective action where the record fails to establish the agency's corrective action implemented GAO's recommendation); *Starry Assocs., Inc. v. United States*, 127 Fed. Cl. 539, 546–50 (2016). Similarly, where the Agency elects to take corrective action in response to a GAO protest, but before GAO issues a recommendation, and a subsequent protest is filed at the COFC challenging that corrective action, it is the agency's corrective action decision that is the subject of judicial review. See *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 151–54 (2010).

245. *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 340 (2012).

c. Review of Protests Challenging Corrective Action

Where a protester challenges a corrective action taken by the agency, the COFC's review will focus on the rationality of the agency's decision to take corrective action, or, where applicable, the rationality of GAO's recommendation for that corrective action.²⁴⁶ In order to "survive review, an agency's corrective action must be 'reasonable under the circumstances and appropriate to remedy the impropriety.'"²⁴⁷ "To be reasonable, the agency's corrective action must be rationally related to the defect to be corrected."²⁴⁸ The corrective action will not be reasonable if the rationale for the corrective action taken is not apparent from, and supported by, the administrative record.²⁴⁹

7. Scope of the Record on Review

a. The Administrative Record

The scope of the COFC's review is generally confined to the administrative record, that is, to the record before the decision maker when the final award decision was made.²⁵⁰ The COFC's rules enumerate a list of "core documents" as examples of the type of documents to be included in the administrative record.²⁵¹ However, this list is not exhaustive. The administrative record should include all "the information relied upon by the agency as it made its decision, as well as documentation of the agency's decision-making

246. See section III.C.6.b in this chapter.

247. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 203 (2016) (quoting *Amazon*, 113 Fed. Cl. at 115).

248. See *Sheridan*, 95 Fed. Cl. at 151. There appears to be some disagreement between COFC judges as to how closely tailored the corrective action must be to the defect to be correct. Compare *Amazon*, 113 Fed. Cl. at 115–16 (holding that GAO's recommendation to reopen the competitive process based on two discrete defects pertaining to the evaluation of proposal, especially after considerable information regarding the competition and agency's evaluation of winning bid had been disclosed to party filing the bid protest, was overbroad and undermined integrity of procurement process, and agency's decision to follow the GAO's recommendation was arbitrary and capricious—"even where a protest is justified, any corrective action must narrowly target the defects it is intended to remedy"), with *Prof'l Serv. Indus.*, 129 Fed. Cl. at 203 ("PSI argues nonetheless that the Court should apply a 'narrow targeting' or 'narrow tailoring' requirement to an agency's decision to take a particular corrective action. This argument, however, is unpersuasive. Legal standards that impose narrow tailoring or narrow targeting requirements on government action are employed in cases where courts apply heightened scrutiny to such actions. Because protested procurement actions are reviewed under a deferential reasonableness standard, it would not be appropriate to apply a narrow targeting or tailoring requirement to an agency's decision to take corrective action. Therefore, the Court will consider whether FHWA's corrective action was reasonable under the circumstances and whether it is supported by the administrative record." (internal citation omitted)); see also Ralph C. Nash, *Corrective Action after Losing a Protest: When Can an Agency Resolicit Offers?*, 30 No. 7 NASH & CIBINIC REP. NL ¶ 36 (July 2016).

249. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 204; *Sheridan Corp.*, 95 Fed. Cl. at 151.

250. *Advanced Data Concepts, Inc. v. United States*, 43 Fed. Cl. 410, 416 (1999) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *Rotech Healthcare, Inc. v. United States*, 121 Fed. Cl. 387, 395, (2015). See also *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))).

251. RCFC app. C, ¶ VII.22.

process.”²⁵² The administrative record must be certified by the agency and filed with the court.²⁵³

b. Supplementing the Administrative Record

“In limited circumstances, a court may grant a party’s request to supplement the administrative record.”²⁵⁴ Supplementation of the record is only permitted in cases where “the omission of extra-record evidence precludes effective judicial review.”²⁵⁵ Although supplementation of the administrative record is not common, “it is not prohibited and may be used when it is necessary for the COFC to gain a complete understanding of the issues before it.”²⁵⁶ Generally, the COFC will grant a motion to supplement the administrative record when supplementation is “necessary for a full and complete understanding of the issues.”²⁵⁷ In order to permit supplementation, the COFC must first determine that supplementation of the record is “necessary in order not ‘to frustrate effective judicial review.’”²⁵⁸

“One of the basic reasons a record may be insufficient is when it is missing ‘relevant information that by its very nature would not be found in an agency record—such as evidence of bad faith, information relied upon but omitted from the paper record, or the content of conversations.’”²⁵⁹ Effective judicial review is not possible when the administrative record lacks such information.²⁶⁰

252. *Kerr Contractors, Inc. v. United States*, 89 Fed. Cl. 312, 335 (2009); *see also* *MG Altus Apache Co. v. United States*, 102 Fed. Cl. 744, 752 (2012) (“The [administrative record] should contain all relevant information on which the agency relied or allegedly should have relied in making the challenged decision.”). The broad scope of the administrative record in a COFC protest is major advantage for a protester at the COFC, when compared to the document production requirements at GAO. At GAO, the agency report is only required to include the documents relevant to protest arguments raised, *see supra* note 144, whereas the scope of the administrative record is not limited by relevancy.

253. RCF 52.1. At the initial status conference, the COFC will generally set a deadline for the government to file the administrative record. The deadline will vary based on the need for temporary injunctive relief, the history of the procurement, and the scope and breadth of the record at issue, but is generally set for a few weeks after the status conference.

254. *E-Mgmt. Consultants, Inc. v. United States*, 84 Fed. Cl. 1, 11 (2008) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)).

255. *Axiom*, 564 F.3d at 1380 (Fed. Cir. 2009) (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff’d*, 398 F.3d 1342 (Fed. Cir. 2005)); *Starry Associates, Inc. v. United States*, 125 Fed. Cl. 613, 621 (2015) (supplementation of the administrative record “is warranted only when it is necessary to ensure effective judicial review”).

256. *Dyncorp Int’l, LLC v. United States*, 125 Fed. Cl. 1, 2 (2016).

257. *Id.*

258. *Axiom*, 564 F.3d at 1381 (quoting *Camp*, 411 U.S. at 142–43).

259. *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 237 (2016) (quoting *Tech Sys., Inc. v. United States*, 97 Fed. Cl. 262, 265 (2011)).

260. *Starry*, 125 Fed. Cl. at 621–22 (As this court has recognized on several occasions, “rare indeed would be the occasions when evidence of bad faith will be placed in an administrative record.” . . . Courts have therefore “traditionally considered extra-record evidence in assessing alleged bias or bad faith.” (internal citations omitted)).

While determining whether to permit supplementation of the administrative record requires a very fact-specific inquiry, there are certain types of information that are commonly at the heart of motion to supplement: materials that were before the GAO in a preceding protest; information that the agency should have, but did not, consider in making the protested procurement decision; where the protester has made a threshold showing to support an allegation of bad faith or bias; and expert submissions/testimony on technical or complex matters that is necessary for a full and complete understanding of the issues.²⁶¹

In connection with a motion to supplement the administrative record, a protester may also seek additional discovery, such as taking the deposition of, or propounding interrogatories to, the contracting officer or other agency officials involved with the source selection.²⁶² The COFC “does not lightly order discovery in a bid protest,”²⁶³ and it would be “unusual” for the COFC to order discovery by deposition.²⁶⁴ However, the COFC may authorize discovery in a bid protest “if necessary for effective judicial review” or if the “existing record cannot be trusted.”²⁶⁵ With respect to supplementing the record through additional discovery concerning government bias or bad faith, a protester is entitled to investigate bias if it can make a threshold showing of “motivation for the Government employees in question to have acted in bad faith or conduct that is hard to explain absent bad faith,” and that “discovery could lead to evidence which would provide the level of proof required to overcome the presumption of regularity.”²⁶⁶ In the event a request for additional discovery

261. See Jonathan D. Shaffer, et al., *Establishing the Record in Court of Federal Claims Bid Protests*, 12–10 BRIEFING PAPERS 1, 7–14 (Sept. 2012).

262. See *Midwest Tube Fabricators, Inc. v. United States*, 104 Fed. Cl. 568, 574 (2012) (granting motion to supplement the administrating record by taking deposition of contracting officer); *Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 88, 99–100 (2011) (granting motion to supplement the administrating record by taking deposition of contracting officer’s technical representative); *Pitney Bowes Gov’t Sols., Inc. v. United States*, 93 Fed. Cl. 327, 332–36 (2010) (granting motion to supplement the administrating record by taking deposition of contracting officer and members of the technical evaluation panel); *Fed. Acquisition Servs. Team, LLC v. United States*, No. 15-78C, 2015 WL 892444, at *2–3 (Fed. Cl. Feb. 24, 2015) (requiring contracting officer to respond to limited interrogatories from the protester).

263. *Diversified Maint. Sys., Inc. v. United States*, 93 Fed. Cl. 794, 804 (2010).

264. *Starry*, 125 Fed. Cl. at 621.

265. See *Diversified Maint. Sys.*, 93 Fed. Cl. at 802 (citing *Axiom*, 564 F.3d at 1380); *Pitney Bowes*, 93 Fed. Cl. at 332 (“allowing for deposition testimony of the contracting officer or other governmental official in a bid protest, where appropriate, ‘may enable the court to satisfy its statutory duty to give due regard to the need for expeditious resolution of the action.’ (quoting *Asia Pac. Airlines v. United States*, 68 Fed. Cl. 8, 18–19 (2005)).

266. *Starry*, 125 Fed. Cl. at 622 (quoting *Beta Analytics Intern., Inc., v. United States*, 61 Fed. Cl. 223, 226 (2004)).

is granted, the discovery should be targeted at “relevant information that by its very nature would not be found in an agency record.”²⁶⁷

It is important to distinguish between supplementing the administrative record, and correcting/amending the administrative record. In situations where documents should have been included in the administrative record (because they were before the agency at the time it made the challenged procurement decision, or document that decision), but were initially omitted, a party may simply move to amend/correct the administrative record.²⁶⁸

c. Consideration of Evidence Respecting Relief

In addition to evidence in the administrative record, the COFC will also consider evidence respecting relief, such as evidence pertaining to prejudice and the factors governing injunctive relief.²⁶⁹ Such evidence is admitted not as a supplement to the administrative record, but as part of the trial court’s record of the case.²⁷⁰

8. Motions for Judgment on the Administrative Record and Hearings

Generally, bid protests are adjudicated by the COFC under its RCFC 52.1 procedure for cross-motions for judgment on the administrative record (MJAR), “a procedure for parties to seek the equivalent of an expedited trial on a

267. *Diversified Maint. Sys., Inc.*, 93 Fed. Cl. at 802 (quoting *L-3 Commc’ns Integrated Sys., L.P. v. United States*, 91 Fed. Cl. 347, 354 (2010)).

268. *See, e.g., ACC Constr. Co., Inc. v. United States*, 122 Fed. Cl. 663, 664 (2015); *Sci. & Mgmt. Res., Inc. v. United States*, 117 Fed. Cl. 54, 63 (2014); *Linc Gov’t Servs., LLC v. United States*, 108 Fed. Cl. 473, 486 n.6 (2012); *MORI Assocs., Inc. v. United States*, 98 Fed. Cl. 572, 575 (2011); *PlanetSpace, Inc. v. United States*, 90 Fed. Cl. 1, 10–11 (2009) (granting motion to correct administrative record to add an inter-agency memorandum that was directly relied upon by the agency to reach its source selection decision).

269. *See Ashbritt Inc. v. United States*, 87 Fed. Cl. 344, 367 (2009) (“Evidence directed at prejudice and remedy necessarily would not be before an agency decision maker effecting a procurement decision such as a source selection award.”); *State of N. Carolina Bus. Enterprises Program v. United States*, 110 Fed. Cl. 354, 362 (2013) (“the court has permitted the use of extrinsic evidence to prove matters that were not before the agency but that are nonetheless properly before the court—matters such as prospective relief and prejudice”); *CW Gov’t Travel, Inc. v. United States*, 110 Fed. Cl. 462, 483–84 (2013); *PlanetSpace, Inc., 90 Fed. Cl. at 5–10.*

270. *See Ashbritt*, 87 Fed. Cl. at 367; *CW Gov’t Travel*, 110 Fed. Cl. at 483–84; *PlanetSpace*, 90 Fed. Cl. at 5; *see also McAfee, Inc. v. United States*, 111 Fed. Cl. 696, 714 n.18 (2013) (“In a bid protest, the parties build a factual record respecting equitable relief that largely exists independently from the administrative record of the procurement. . . . The court accordingly admits into the record of the case those declarations that pertain to prejudice and injunctive relief.”); *East West, Inc. v. United States*, 100 Fed. Cl. 53, 57–58 (2011) (admitting declaration from protester’s vice president, which “purports to explain how the allegedly misleading communications from the agency induced East West to make competitively-fatal changes to its proposal,” as a “part of the court’s record for purposes of any prejudice determinations”).

‘paper record, allowing fact-finding by the trial court.’”²⁷¹ At the initial status conference, the COFC generally will set a briefing schedule for the parties’ MJARs.²⁷² “Unlike a summary judgment proceeding, genuine issues of material fact will not foreclose judgment on the administrative record.”²⁷³ When deciding a MJAR, the COFC’s inquiry is whether, “given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.”²⁷⁴ The court resolves questions of fact by reference to the administrative record.²⁷⁵

In most cases, shortly after the completion of MJAR briefing, the COFC will hold a hearing whereby the parties will present oral argument on the merits of the protest.²⁷⁶

9. *Reliance on GAO Decisions at the COFC*

GAO handles approximately 25 times as many protests per year as the COFC,²⁷⁷ and as a result has a much more extensive library of protest case law than the COFC. Though it is preferable to cite to COFC (or Federal Circuit) cases when litigating a protest at the COFC, there are situations where there is a dearth of COFC case law on a protest issue, but a number of GAO decisions directly on point. When citing GAO decisions to the COFC, it is important to remember that while the majority of COFC judges have “high regard for GAO decisions,” the COFC is not bound by decisions of the GAO.²⁷⁸ In some cases

271. *Elec. On-Ramp, Inc. v. United States*, 104 Fed. Cl. 151, 158 (2012) (quoting *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005)).

272. In most cases, the COFC will require the protester to file its MJAR first, usually a few weeks after the filing of the administrative record. The next deadline, usually a few weeks later, will be for the government (and any intervenor-defendant) to file its cross-MJAR and response to the protester’s MJAR. The protester will then have an opportunity to file a reply/response, which is followed finally by the government (and any intervenor-defendant) filing its reply. However, some COFC judges in certain cases will set the briefing schedule such that all parties must file their MJARs and cross-MJARs simultaneously, and then all file their responses and replies simultaneously as well.

273. *Strategic Bus. Sols., Inc. v. United States*, 129 Fed. Cl. 621, 627 (2016) (citing *Bannum*, 404 F.3d at 1356).

274. *Parcel 49C Ltd. P’ship v. United States*, 130 Fed. Cl. 109, 120 (2016) (quoting *A & D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 131 (2006)).

275. *Elec. On-Ramp*, 104 Fed. Cl. at 158 (2012) (citing *Bannum*, 404 F.3d at 1355–56).

276. *See, e.g., KWR Constr., Inc. v. United States*, 124 Fed. Cl. 345, 349 (2015) (“Briefing was completed on October 19, 2015 and oral argument was held on October 29, 2015.”).

277. *See* sections II.B and II.C in this chapter.

278. *See Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218, 222 n.4 (2016); *Constellation W., Inc. v. United States*, 125 Fed. Cl. 505, 553 n.16 (2015); *see also Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 (Fed. Cir. 2009) (“While not binding authority on this court, the decisions of the Comptroller General are instructive in the area of bid protests.”). Technically, COFC judges are not bound by other COFC decisions either. *See Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 186, 190 n.5 (2011) (“decisions of the Court of Federal Claims . . . are not binding on this Court. These cases will inform this Court’s judgment, but they will not direct it.”); *see also 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, [the Federal Circuit], and our predecessor court, the Court of Claims.”).

the COFC will adopt or rely heavily on GAO precedents,²⁷⁹ while in other cases the COFC will not.²⁸⁰

10. COFC Decisions and Relief

The COFC has discretion to 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.”²⁸¹ In limited circumstances, the COFC may also award attorneys’ fees and expenses to the “prevailing party.”²⁸²

a. Declaratory and Injunctive Relief

In the vast majority of protests, the primary relief sought by the protester will be a (1) declaration from the court that the protested agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and (2) a permanent injunction.²⁸³ The protester has the burden of establishing entitlement to injunctive relief by a preponderance of the evidence.²⁸⁴ To determine if a permanent injunction is warranted, the court must consider whether:

- (1) the plaintiff has succeeded on the merits;
- (2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief;
- (3) the balance of hardships to the respective parties favors the grant of injunctive relief; and,
- (4) the public interest is served by a grant of injunctive relief.²⁸⁵

“No individual factor is dispositive, but the Court must weigh each factor against the magnitude of the injunctive relief requested.”²⁸⁶ “The Court is not

279. *See, e.g.,* *Excel Mfg., Ltd. v. United States*, 111 Fed. Cl. 800, 808 (2013) (“The court recognizes the GAO’s expertise in this area and defers to its interpretation of FAR 52.219–14(c)(2).”); *Wit Assocs., Inc. v. United States*, 122 Fed. Cl. 1, 14 (2015) (“Indeed, GAO has treated solicitations, like the one at issue here, that incorporate limitations periods analogous to FAR 52.212–1(12) as setting a thirty-day period for acceptance of an offer (or bid).”); *McConnell Jones Lanier & Murphy LLP v. United States*, 128 Fed. Cl. 218, 239–40 & n.9 (2016) (adopting GAO case law on cost realism); *Ceres Env’tl. Servs., Inc. v. United States*, 97 Fed. Cl. 277, 303–06 (2011) (relying heavily on GAO case law concerning price realism).

280. *See, e.g.,* *Insight Sys. Corp. v. United States*, 110 Fed. Cl. 564, 578–80 n.23 (2013) (rejecting GAO’s interpretation of the Government Control exception).

281. 28 U.S.C. § 1491(b)(2).

282. *Id.* § 2412(d)(1).

283. *See, e.g.,* *Prof’l Serv. Indus., Inc. v. United States*, 129 Fed. Cl. 190, 200 (2016).

284. *See* *Caddell Constr. Co. v. United States*, 125 Fed. Cl. 30, 54 (2016).

285. *Centech Grp.*, 554 F.3d at 1037 (citing *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004)); *Caddell Constr.*, 125 Fed. Cl. at 54.

286. *Caddell Constr.*, 125 Fed. Cl. at 54 (citing *Standard Havens Prods. v. Gencor Indus.*, 897 F.2d 511, 513 (Fed. Cir. 1990)).

required to weigh each factor equally, and a strong showing of success on the merits can overcome weaknesses with respect to the other four factors.”²⁸⁷

b. Monetary Relief

Courts have conclusively held that protesters cannot recover expectation damages, such as lost profits, in a bid protest.²⁸⁸ However, a protester “may recover the costs of preparing its unsuccessful proposal if it can establish that the Government’s consideration of the proposals submitted was arbitrary or capricious,”²⁸⁹ or “where an agency conducted a procurement in violation of an applicable statute prejudicing the offeror.”²⁹⁰ To recover its bid and proposal costs, a protester must show that: “(1) the agency committed a prejudicial error in conducting a procurement; (2) the error caused the protester to incur unnecessary bid preparation and proposal costs; and (3) the protester shows that the costs it seeks to recover were reasonable and allocable.”²⁹¹ Though it is within the COFC’s discretion to award bid and proposal costs in addition to injunctive relief,²⁹² the COFC will generally only award bid and proposal costs where the protester succeeds on the merits of its protest and injunctive relief is not appropriate.²⁹³

287. *Id.* (citing *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)).

288. *See* *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 119–21 (2002); *Ala. Aircraft Indus., Inc.–Birmingham v. United States*, 85 Fed. Cl. 558, 563 (2009) (“Precedents conclusively established that a disappointed offeror did not have a right to recover *lost profits* from the government in a bid protest.”); *Rotech Healthcare Inc. v. United States*, 71 Fed. Cl. 393, 430 (2006) (unsuccessful bidder could not recover lost profits since contract under which bidder would have made such profits never came into existence (citing *Keco Indus., Inc. v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970))); *La Strada Inn, Inc. v. United States*, 12 Cl. Ct. 110, 115 (1987) (lowest bidder had no right to recover lost profits bidder expected if it had been awarded contract; “the law grants damages to the disappointed bidder based on his reliance interest, not his expectation interest.”).

289. *CNA Corp. v. United States*, 83 Fed. Cl. 1, 5 (2008) (quoting *E.W. Bliss Co. v. United States*, 77 F.3d 445, 447 (Fed. Cir. 1996)); *see also* *Cal. Indus. Facilities Res., Inc. v. United States*, 80 Fed. Cl. 633, 640 (2008) (for an award of bid preparation and proposal costs, there must be finding of unreasonable action by the procuring agency).

290. *CMS Contract Management Services v. United States*, 123 Fed. Cl. 534, 536 (2015); *see also* *Caddell Constr.*, 125 Fed. Cl. at 52 (characterizing bid and proposal costs as “reliance damages”).

291. *CMS Contract Mgmt. Servs.*, 123 Fed. Cl. at 536 (citing *Reema Consulting Servs., Inc. v. United States*, 107 Fed. Cl. 519, 532 (2012)); *see also* *Caddell Constr.*, 125 Fed. Cl. at 52 (bid and proposal costs are recoverable if the disappointed bidder “wasted its costs because the Government breached its obligation to consider the [protester’s] proposal fairly, thus implicating the harm or prejudice caused by such a wasteful loss of effort and expense.”). *See also* *Rothe Development Corp. v. U.S. Dept. of Defense*, 262 F.3d 1306, 1316 (Fed. Cir. 2001) (“Under the Tucker Act, an unsuccessful bidder can recover its bid preparation costs from the government on the theory that failure to evaluate a ‘bid honestly and fairly’ breaches an implied-in-fact contract of fair dealing.”).

292. *See* *CMS Contract Mgmt. Servs.*, 123 Fed. Cl. 534, 537 (2015) (citing 28 U.S.C. § 1491(b)(2)).

293. *See* *Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 369 (2009); *J.C.N. Const., Inc. v. United States*, 107 Fed. Cl. 503, 518 (2012) (awarding bid preparation and proposal costs to protester that succeeded on the merits of its protest, but was not entitled to injunctive relief because the protested contract had been nearly completed during the pendency of the protest); *KWR Construction, Inc. v. United States*, 124 Fed. Cl. 345, 364 (2015) (“bid preparation and proposal costs . . . are not appropriate where a party has achieved its goal in a bid protest because the costs have not been wasted. . . . The court finds that bid preparation and proposal costs are not warranted in this case,

Beyond bid preparation costs, the Equal Access to Justice Act (EAJA) authorizes the COFC to award attorneys' fees and expenses to a limited class of prevailing protesters.²⁹⁴ In order to prevail on an EAJA motion for fees and expenses, five conditions must be met:

(1) the fee application must be submitted within 30 days of final judgment in the action and be supported by an itemized statement; (2) at the time the civil action was initiated, the applicant, if a corporation, must not have been valued at more than \$7,000,000 in net worth or employed more than 500 employees; (3) the applicant must have been the "prevailing party" in a civil action brought by or against the United States; (4) the Government's position must not have been "substantially justified;" and (5) there cannot exist any special circumstances that would make an award unjust.²⁹⁵

Although very rarely exercised, the COFC also has the authority to order the agency to pay the protester's attorneys' fees under the court's authority to sanction a party or attorney.²⁹⁶

despite the government's errors in rejecting KWR's offer multiple times, because KWR is entitled to injunctive relief and may yet receive an award."); *Reema Consulting*, 107 Fed. Cl. At 532–33 (disappointed bidder could not show that bid preparation and proposal costs it incurred in creating its first proposal were rendered unnecessary by arbitrary, capricious, or otherwise erroneous actions committed by the agency); *Insight Sys. Corp. v. United States*, 115 Fed. Cl. 734, 739 (2014) (successful bid protester who obtained a permanent injunction precluding the agency from proceeding with procurement absent complying with the terms of the injunction was not entitled to recover its bid preparation and proposal costs, since its costs were not rendered unnecessary by the agency's prior error; it was clear that protester could simply have used materials prepared for the first procurement in the second). *But see CMS Contract Mgmt. Servs.*, 123 Fed. Cl. at 537 (awarding bid and proposal costs, in addition to injunctive relief, where the protester would need to significantly revise its existing proposal based if the agency re-initiated the procurement in conformance with the injunction, and the agency essentially caused the incurrence of the proposal preparation costs by requiring offerors to go forward with their proposals while protests were pending at the GAO); *Guzar Mirbachakot Transp. v. United States*, 104 Fed. Cl. 53, 68–69 (2012) (post-award bid protester would be awarded partial bid and proposal costs; court imposed injunction requiring government to evaluate protester's original proposal, so protester would have the opportunity to compete using the proposal it had already submitted, but costs protester incurred in reorganizing its original proposal and resending it to eliminate "zip" files in an attempt to timely submit proposal to government were recoverable, since costs represented unnecessary and wasted efforts incurred because of ambiguity in solicitation language.); *Red River Holdings, LLC v. United States*, 87 Fed. Cl. 768, 792 (2009) (where protest was sustained on the merits, but due to national security concerns the court only ordered partial injunctive relief, the protester was also entitled to recover bid preparation costs since protester would have no opportunity to re-compete for a portion of the work).

294. See 28 U.S.C. § 2412 (Equal Access to Justice Act, providing for attorney's fees and costs for successful protesters whose net worth and/or workforce do not exceed statutory limits).

295. *WHR Grp., Inc. v. United States*, 121 Fed. Cl. 673, 676 (2015) (citing 28 U.S.C. § 2412(d)(1)(A), (B)); *Dellew v. United States*, 127 Fed. Cl. 85, 87 (2016).

296. See *Sigmattech, Inc. v. United States*, 126 Fed. Cl. 388, 126 Fed. Cl. 618 (2016) (ordering the agency to the protester \$55,714 in attorney fees as a sanction for failing to produce an accurate and complete administrative record until 55 days after it was due and after the protester had completed briefing); *Coastal Env'tl. Grp., Inc. v. United States*, 118 Fed. Cl. 15, 38 (2014) (sanctioning agency and

11. *Jurisdiction to Review Agency's Override of Automatic CICA Stay*

When a bid protest is pending at the GAO, and the procurement agency overrides the automatic CICA stay of award/performance, the protester may seek immediate review from the COFC of the agency's override decision.²⁹⁷ To obtain this review, a protester should immediately file a complaint at the COFC alleging that the override of the automatic stay is arbitrary, capricious, an abuse of discretion and/or a violation of regulation or procedure, and seeking injunctive relief and declaratory relief, and also file a motion for a temporary restraining order and/or preliminary injunction.²⁹⁸ In such cases, the COFC has jurisdiction to review the agency's decision to override the stay, but the merits of the protest remain before the GAO.²⁹⁹

12. *Appeal of COFC Decisions*

The Federal Circuit has jurisdiction over an appeal from a final decision of the COFC pursuant to 28 U.S.C. § 1295(a)(3).³⁰⁰ On appeal, the Federal Circuit reviews the COFC's findings of fact for clear error; however, the Federal Circuit reviews the COFC's "determination on the legal issue of the government's conduct, in a grant of judgment upon the administrative record, without deference."³⁰¹ This means that the Federal Circuit reviews anew questions of whether the procurement decision of the agency was arbitrary and capricious under the APA.³⁰² With respect the COFC's decision to grant or deny injunctive relief, the Federal Circuit will give deference to the COFC "only disturbing its decision if it abused its discretion."³⁰³

requiring it to pay a portion of protester's attorneys' fees and expenses as a result of misconduct during the protest by the contracting officer in preparing an inaccurate backdated document, and including that document in the supplemental administrative record, and falsely certifying that the supplemental administrative record was an accurate).

297. DESKBOOK FOR PRACTITIONERS, *supra* note 13, at 28 (citing RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1287 (Fed. Cir. 1999)); Nortel Gov't Solutions, Inc. v. United States, 84 Fed. Cl. 243, 247 (2008) ("This court therefore has jurisdiction to review an agency's override decision issued under 31 U.S.C. § 3553(d)(3)(C).").

298. *See, e.g.,* Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705, 708 (2006).

299. DESKBOOK FOR PRACTITIONERS, *supra* note 13, at 28–29. For a further discussion of the legal standard applied in override cases, *see* section III.B.6.b in this chapter.

300. *Centech Grp.*, 554 F.3d at 1037.

301. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1351, 1354 (Fed. Cir. 2005); *see also* *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312 (Fed. Cir. 2007) ("Where the Court of Federal Claims makes factual findings from the administrative record in the first instance, however, 'this court reviews such findings for clear error,' 'like any finding in a bench trial.'" (quoting *Bannum*, 404 F.3d at 1357)).

302. *See Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1309 (Fed. Cir. 2016); *Centech Grp.*, 554 F.3d at 1037 ("This means that we apply the 'arbitrary and capricious' standard of [the APA] anew, conducting the same analysis as the Court of Federal Claims.").

303. *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1388 (Fed. Cir. 2011) (citing *PGBA, LLC*, 389 F.3d at 1223).