

Chapter 18A
Bid Protests



2014 Contract Attorneys Deskbook

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CHAPTER 18A

BID PROTESTS

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CHAPTER 18A

BID PROTESTS

"The laws and regulations that govern contracting with the federal government are designed to ensure that federal procurements are conducted fairly. On occasion, bidders or others interested in government procurements may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that they have been unfairly denied a contract or an opportunity to compete for a contract."

*OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE,
BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (9th ed. 2009)*

I. REFERENCES

- A. Competition in Contracting Act (CICA), 31 U.S.C. §§3551-3556.
- B. Tucker Act, 28 U.S.C. §1491.
- C. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. §1491(a)(3).
- D. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, §12, 110 Stat. 3870, 3874 (1996), 28 U.S.C. §1491(b)(1).
- E. Government Accountability Office (GAO) Protest Regulations, 4 C.F.R. Part 21.
- F. Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 33.1.
- G. Agency FAR Supplements. See Appendix A for listing.
- H. Rules of the United States Court of Federal Claims (RCFC), available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf
- I. Bid Protests at GAO: A Descriptive Guide (9th ed. 2009), Office of General Counsel, U.S. GAO (GAO-09-471SP). Available at <http://www.gao.gov/products/GAO-09-471SP>.

II. INTRODUCTION

- A. **Protest Defined.** A “protest” is a written objection by an interested party to a solicitation or other agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. FAR 33.101.
- B. **Background.** The protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by Government Accountability Office (GAO) Bid Protest Regulations is designed to provide for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD ¶ 133.
- C. **Jurisdiction.** Multiple fora. An interested party may protest to the agency, the GAO, or the United States Court of Federal Claims (COFC). See Appendix B. Section III of this outline addresses protests filed with the agency, Section IV addresses protests filed with the GAO, and Section V addresses protests filed with the COFC.
- D. **Remedies.**
 - 1. Generally, protest fora can recommend or direct such remedial action as will bring the procurement into compliance with relevant acquisition laws and regulations. Normally however, neither directed contract award nor lost profits is available. Remedies are discussed further in Section IV, paragraph K, *infra*.
 - 2. Injunctive or Similar Relief. Whether the filing of a protest to challenge a contract solicitation or an award creates an automatic stay or suspension of any work on the procurement is of critical importance and varies from forum to forum. Such relief is discussed in the Section for the relevant forum, *infra*.

III. AGENCY PROTESTS.

A. **Background and Policy.** In late 1995, President Clinton issued an Executive Order directing all executive agencies to establish alternative disputes resolution (ADR) procedures for bid protests. The order directs agency heads to create a system that, “to the maximum extent possible,” will allow for the “inexpensive, informal, procedurally simple, and expeditious resolution of protests.” Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). FAR 33.103 implements this Order.

1. Open and frank discussions. Prior to the submission of a protest, all parties shall use “their best efforts” to resolve issues and concerns raised by an “interested party” **at the contracting officer level**. “Best efforts” include conducting “open and frank discussions” among the parties.
2. Objectives. FAR 33.103(d). The goal of an effective agency protest system is to:
 - a. resolve agency protests effectively;
 - b. help build confidence in the federal acquisition system; and
 - c. reduce protests to the GAO and other judicial protest fora.

B. Authority.

1. Agency protests are protests filed¹ directly with the contracting officer or other cognizant government official within the agency. These protests are governed by FAR 33.103, and agency supplements such as AFARS 5133.103, NMCARS 5233.103, AFFARS 5333.103. See Appendix A for a complete list of agency FAR supplement protest references.
2. Contracting officers **must consider all protests and seek legal advice** regarding all protests filed with the agency. FAR 33.102(a).

C. Procedures.

1. Procedures tend to be informal and flexible.
 - a. Protests must be clear and concise. Failure to submit a coherent protest may be grounds for dismissal. FAR 33.103(d)(1).

¹FAR 33.101 defines “filed” to mean:

[t]he complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.

- b. “Interested parties” may request review at a “level above the contracting officer” of any decision by the contracting officer that allegedly violated applicable statute or regulation and, thus, prejudiced the offeror. FAR 33.103(d)(4). Agencies are responsible for implementing procedures for this review.
2. Timing of Protests.
- a. Protests challenging the propriety of a solicitation must be filed **prior to bid opening or the closing date for receipt of proposals**. FAR 33.103(e).
 - b. In all other cases, the protests must be filed with the agency **within 10 days of when the protester knew or should have known of the basis for the protest**. For “significant issues” raised by the protester, however, the agency has the discretion to consider the merits of a protest that is otherwise untimely. FAR 33.103(e).
3. Suspension of Procurement - Regulatory Stay.
- a. Pre-Award Stay. The contracting officer **shall not** make award if an agency protest is filed before award. FAR 33.103(f)(1) imposes an administrative stay of the contract award.
 - (1) The agency may override the stay if one of the following applies:
 - (a) contract award is justified in light of “urgent and compelling” reasons; or
 - (b) a prompt award is in “the best interests of the Government.”
 - (2) The override decision must be made in writing and then approved by an agency official “at a level above the contracting officer” or another official pursuant to agency procedures. FAR 33.103(f)(1).
 - (3) If the contracting officer elects to withhold award, he must inform all interested parties of that decision. If appropriate, the contracting officer should obtain extensions of bid/proposal acceptance times from the offerors. If the contracting officer cannot obtain extensions, he should consider an override of the stay and proceed with making contract award. FAR 33.103(f)(2).

- b. Post-Award Stay. If the agency receives a protest within 10 days of contract award or 5 days of a “required” debriefing date offered by the agency,² the contracting officer shall suspend contract performance immediately. FAR 33.103(f)(3).
 - (1) The agency may override the stay if one of the following applies:
 - (a) contract performance is justified in light of “urgent and compelling” reasons; or
 - (b) contract performance is in “the best interests of the Government.”
 - (2) The override determination must be made in writing and then approved by an agency official “at a level above the contracting officer” or another official pursuant to agency procedures. FAR 33.103(f)(3).
- 4. Protesters are **not required** to exhaust agency administrative remedies.

D. Processing Protests.

- 1. Protesters generally present protests to the contracting officer, but they may also request an independent review of the protest at a level above the contracting officer, in accordance with agency procedures. Solicitations should advise offerors of this option. FAR 33.103(d)(4).
 - a. Agency procedures shall inform the protester whether this independent review is an alternative to consideration by the contracting officer or an “appeal” of a contracting officer’s protest decision.
 - b. Agencies shall designate the official who will conduct this independent review. The official need not be in the supervisory chain of the contracting officer. However, “when practicable,” the official designated to conduct the independent review “should” not have previous “personal involvement” in the procurement.
 - c. **NOTE:** If this “independent review” is an appeal of the contracting officer’s initial protest decision, it does **NOT** extend GAO’s timeliness requirements. *See infra* paragraph IV.E.1.g.

² See FAR 15.505 and FAR 15.506.

2. Agencies “shall make their best efforts” to resolve agency protests within 35 days of filing. FAR 33.103(g).
3. Discovery. To the extent permitted by law and regulation, the agency and the protester may exchange information relevant to the protest. FAR 33.103(g).
4. The agency decision shall be “well reasoned” and “provide sufficient factual detail explaining the agency position.” The agency must provide the protester a written copy of the decision via a method that provides evidence of receipt. FAR 33.103(h).

E. **Remedies.** FAR 33.102.

1. Failure to Comply with Applicable Law or Regulation. FAR 33.102(b). If the agency head determines that, as a result of a protest, a solicitation, proposed award, or award is improper, he may:
 - a. take any action that the GAO could have “recommended,” had the protest been filed with the GAO; and,
 - b. award costs to the protester for prosecution of the protest.
2. Misrepresentation by Awardee. If, as a result of awardee’s **intentional** or **negligent** misstatement, misrepresentation, or miscertification, a post-award protest is sustained, the agency head may require the awardee to reimburse the government’s costs associated with the protest. The government may recover this debt by offsetting the amount against **any** payment due the awardee under **any** contract between the awardee and the government.³ This provision also applies to GAO protests. FAR 33.102(b)(3).
3. Follow-On Protest. If unhappy with the agency decision, the protester may file its protest with either the GAO or COFC (see Appendix B). If the vendor elects to proceed to the GAO, it must file its protest within 10 days of receiving notice of the agency’s **initial adverse action**.⁴ 4 C.F.R. § 21.2(a)(3).

³ In determining the liability of the awardee, the contracting officer shall take into consideration “the amount of the debt, the degree of fault, and the costs of collection.” FAR 33.102(b)(3)(ii).

⁴ In its Descriptive Guide, the GAO advises that it applies a “straightforward” interpretation of what constitutes notice of adverse agency action. Specific examples include: bid opening; receipt of proposals; rejection of a bid or proposal; or contract award. OFFICE OF GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (9th ed. 2009). Available at: <http://www.gao.gov/assets/210/203631.pdf>.

IV. GOVERNMENT ACCOUNTABILITY OFFICE (GAO).

- A. **Statutory Authority.** The Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56, is the current statutory authority for GAO bid protests of federal agency procurements. 31 U.S.C. § 3533 authorizes GAO to issue implementing regulations.
- B. **Regulatory Authority.** The GAO's bid protest rules are set forth at 4 C.F.R. Part 21. FAR provisions governing GAO bid protests are at FAR 33.104. Agency FAR supplements contain regulatory procedures for managing GAO protests. See generally AFARS 5133.104; AFFARS 5333.104; NMCARS 5233.104; DLAD 33.104. See also Appendix A, listing all agency FAR supplement protest references.
- C. **Who May Protest?**
1. 31 U.S.C. § 3551(1) and 4 C.F.R. § 21.1(a) provide that an “interested party” may protest to the GAO.
 2. An “**interested party**” 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.” 31 U.S.C § 3551(2); 4 C.F.R. § 21.0(a)(1).
 - a. **Before** bid opening or proposal submission due date, a protester must be a **prospective bidder or offeror with a direct economic interest**. A prospective bidder or offeror is one who has expressed an interest in competing. Integral Sys., Inc., B-405303, Aug. 16, 2011, 2011 CPD ¶ 161. ITT Elec. Sys., Inc., B-406405, B-406405.2, May 21, 2012, 2012 CPD ¶ 174.
 - b. **After** bid opening or the submission of proposals, a protester must be an **actual bidder or offeror with a direct economic interest**.
 - (1) Next-in-Line. A bidder or offeror who is “**next-in-line**” for award is most likely an interested party. However, if a protester cannot receive award if it prevails on the merits, it is not an interested party. Comspace Corp., B-274037, Nov. 14, 1996, 96-2 CPD ¶ 186 (contractor not in line for award where electronic quote not properly transmitted); Ogden Support Servs., Inc., B-270354.2, Oct. 29, 1996, 97-1 CPD ¶ 135 (protester not an interested party where an intervening offeror has a higher technical score and a lower cost); Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 (highest priced of three technically equal bidders was not in line for award); International Data

Prods., Corp., B-274654, Dec. 26, 1996, 97-1 CPD ¶ 34 (protesters rated eighth and ninth in overall technical merit were interested parties because improper technical evaluation alleged and lower-priced than awardee); Recon Optical, Inc., B-272239, July 17, 1996, 96-2 CPD ¶ 21 (recipients of multiple award contracts may not protest the other's award); Metson Marine Servs., Inc., B-299705, July 20, 2007, 2007 CPD ¶ 159 (offeror reasonably found to be ineligible for award lacks interested party status).

- (2) A high-priced bidder may be able to demonstrate that all lower-priced bidders would be ineligible for award, thus becoming the next-in-line. Professional Medical Prods., Inc., B-231743, July 1, 1988, 88-2 CPD ¶ 2.
 - (3) In a “best value” negotiated procurement, the GAO determines whether a protester is an interested party by examining the probable result if the protest is successful. Government Tech. Servs., Inc., B-258082, Sept. 2, 1994, 94-2 BCA ¶ 93 (protester not an interested party where it failed to challenge higher-ranked intervening offerors); Rome Research Corp., B-245797, Sept. 22, 1992, 92-2 CPD ¶ 194.
 - (4) Opportunity to Compete. An actual bidder, not next-in-line for award, is an interested party if it would **regain the opportunity to compete** if the GAO sustains its protest. This occurs if the GAO could recommend resolicitation. Teltara, Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128 (eventual 11th low bidder protested – before bid opening - the adequacy of the solicitation's provisions concerning a prior collective bargaining agreement; remedy might be resolicitation); Remtech, Inc., B-240402, Jan. 4, 1991, 91-1 CPD ¶ 35 (protest by nonresponsive second low bidder challenged IFB as unduly restrictive – filed before bid opening; interested party because remedy is resolicitation).
3. **Intervenors.** Immediately after receipt of the protest notice, the agency must notify the awardee (post-award protest) or all offerors who have a “substantial prospect” of receiving award if the protest is denied (pre-award protest). 4 C.F.R. § 21.0(b), § 21.3(a). Generally if award has been made, GAO will only allow the awardee to intervene. If award has not been made, GAO will determine whether to allow a specific firm to intervene upon its request.

D. What May Be Protested?

1. The protester must allege a violation of a procurement statute or regulation. 31 U.S.C. § 3552. The GAO will also review allegations of unreasonable agency actions. S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288 (simplified acquisition using defective FACNET system failed to promote competition “to the maximum extent practicable” in violation of CICA). This includes the termination of a contract where the protest alleges the government’s termination was based upon improprieties associated with contract award (sometimes referred to as a “reverse protest”). 4 C.F.R. § 21.1(a) (2005); Severn Cos., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181.
2. The GAO generally will NOT consider protests on the following matters:
 - a. **Contract Administration.** 4 C.F.R. § 21.5(a). Health Care Waste Servs., B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13 (registration or licensing requirement a performance obligation and not one of responsibility); JA & Assocs., B-256280, Aug. 19, 1994, 95-1 CPD ¶ 136 (decision to novate contract to another firm rather than recompet); Caltech Serv. Corp., B-240726, Jan. 22, 1992, 92-1 CPD ¶ 94 (modification of contract, unless it is a cardinal change thus requiring competition); Casecraft, Inc., B-226796, June 30, 1987, 87-1 CPD ¶ 647 (decision to terminate a contract for default); but see Marvin J. Perry & Assocs., B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128 (GAO asserts jurisdiction over agency acceptance of different quality office furniture that was shipped by mistake); Sippican, Inc., B-257047, Nov. 13, 1995, 95-2 CPD ¶ 220 (GAO will review agency exercise of contract option); CACI Tech., Inc., B-408858, B-408858.2, Dec. 5, 2013, 2013 CPD ¶ 283 (whether key personnel perform on contract is matter of contract administration, absent “bait and switch.”).
 - b. **Small Business Size and Industrial Classification Determinations.** 4 C.F.R. § 21.5(b)(1). Challenges to size or status of small businesses are left to exclusive review by the Small Business Administration. 15 U.S.C. 637(b)(6). Lawyers Advantage Title Group, Inc., B-275946, Apr. 17, 1997, 97-1 CPD ¶ 143; Columbia Research Corp., B-247073, June 4, 1992, 92-1 CPD ¶ 492; Sea Box, Inc., B-408182.5, Jan. 10, 2014, 2014 CPD ¶ 27 (GAO will consider protester challenging agency’s decision not to refer matter to SBA, when proposal, on its face, shows offeror not small business).
 - c. **Small Business Certificate of Competency (COC) Determinations.** 4 C.F.R. § 21.5(b)(2). Issuance of, or refusal to

issue, a certificate of competency will generally not be reviewed by GAO. Exceptions, interpreted narrowly in deference to the SBA, are: (1) protests which show bad faith by government officials, (2) protests that allege that the SBA failed to follow its own regulations, or (3) protests that allege that the SBA failed to consider vital information.

- d. **Procurements Under Section 8(a) of the Small Business Act** (i.e., small disadvantaged business contracts). 4 C.F.R. § 21.5(b)(3). The GAO will review a decision to place a procurement under the 8(a) program only for possible bad faith by agency officials or a violation of applicable law or regulation. See Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178. See also Security Consultants Group, Inc., B-276405.2, June. 9, 1997, 97-1 CPD ¶ 207 (protest sustained where agency failed to provide complete and accurate information of all vendors eligible for an 8(a) award).
- e. **Affirmative Responsibility Determinations.** 4 C.F.R. § 21.5(c). The determination that a bidder or offeror is capable of performing is largely committed to the KO's discretion. Imaging Equip. Servs., Inc., B-247197, Jan. 13, 1992, 92-1 CPD ¶ 62. GAO will not review contracting officer's determination, even for reasonableness, as such a review would accord too little weight to the agency's discretion in this area. SumCo Eco-Contracting LLC, B-409434, B-409434.2, Apr. 15, 2014, 2014 CPD ¶ 129
- (1) Exception: Where definitive responsibility criteria in the solicitation were not met. King-Fisher Co., B-236687, Feb. 12, 1990, 90-1 CPD ¶ 177.
 - (2) Exception: Where protester alleges fraud or bad faith. HLJ Management Group, Inc., B-225843, Mar. 24, 1989, 89-1 CPD ¶ 299. But See Impresa Construzione Geom. Domenico Garufi v. U.S., 238 F.3d 1324 (Fed. Cir. 2001) (the CAFC held that the COFC's standard of review for responsibility determinations would be those set forth in the Administrative Procedures Act, i.e., would include one requiring lack of rational basis or a procurement procedure involving a violation of a statute or regulation).
 - (3) Exception: Where there is evidence that the contracting officer failed to consider available relevant information, or otherwise violated a pertinent statute or regulation. PMO Partnership Joint Venture, B-401973.3, B-401973.5, Jan. 14, 2010, 2010 CPD ¶ 29.

- f. **Procurement Integrity Act Violations.** 4 C.F.R. § 21.5(d); 41 U.S.C. § 423. The protester must first report information supporting allegations involving violations of the Procurement Integrity Act to the agency within 14 days after the protester first discovered the possible violation. See, e.g., SRS Techs., B-277366, July 30, 1997, 97-2 CPD ¶ 42. Y&K Maint., Inc., B-405310.6, Feb. 2, 2012, 2012 ¶ 93.
- g. **Procurements by Non-Federal Agencies** (e.g., United States Postal Service, Federal Deposit Insurance Corporation (FDIC), nonappropriated fund activities [NAFIs]). 4 C.F.R. § 21.5(g). The GAO will consider a protest involving a non-federal agency if the agency involved has agreed in writing to have the protest decided by the GAO. 4 C.F.R. § 21.13. The GAO will also consider such a protest if agency officials were involved to such an extent that it really was a procurement “by” an executive agency. Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 (considered whether NAIFI used as a conduit to circumvent CICA).
- h. **Subcontractor Protests.** The GAO will not consider subcontractor protests unless requested to do so by the procuring agency. 4 C.F.R. § 21.5(h). See RGB Display Corporation, B-284699, May 17, 2000, 2000 CPD ¶ 80. See also Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103. However, the GAO will review subcontract procurements where the subcontract is “by” the government. See supra RGB Display Corporation (subcontract procurement is “by” the government where agency handles substantially all the substantive aspects of the procurement and the prime contractor acts merely as a conduit for the government).
- i. **Debarment & Suspension Issues.** 4 C.F.R. §21.5(i). The GAO does not review protests that an agency improperly suspended or debarred a contractor. See Shinwha Electronics, B-290603, Sept. 3, 2002, 2002 CPD ¶ 154.
- j. **Judicial Proceedings.** 4 C.F.R. §21.11. The GAO will not hear protests that are the subject of pending federal court litigation unless requested by the court. SRS Techs., B-254425, May 11, 1995, 95-1 CPD ¶ 239; Snowblast-Sicard, Inc., B-230983, Aug. 30, 1989, 89-2 CPD ¶ 190. The GAO also will not hear a protest that has been finally adjudicated, e.g., dismissed with prejudice. Cecile Indus., Inc., B-211475, Sept. 23, 1983, 83-2 CPD ¶ 367.

k. **Task and Delivery Orders.** Section 843 of the FY 2008 NDAA authorized protests exclusively to the GAO when (1) the order increases the scope, period, or maximum value of the contract under which the order is issued; or (2) the order is valued in excess of \$10,000,000 (this provision has been extended indefinitely by the FY 2013 NDAA for Title 10 contracts, but only until 30 September 2016 for Title 41 contracts per FY 2012 NDAA). (See Appendix C) Previously, the Federal Acquisition Streamlining Act (FASA) (pertinent portions codified at 10 U.S.C. § 2304c and 41 U.S.C. §253j) prohibited protests associated with the issuance of a task or delivery order except when the order “increases the scope, period, or maximum value” of the underlying contract. See, e.g., Military Agency Services Pty., Ltd., B-290414, Aug. 1, 2003, 2002 CPD ¶ 130. See also A&D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126 (2006). The GAO, however, has held that it has protest jurisdiction over task and delivery orders placed under Federal Supply Schedule (FSS) contracts. Severn Co., Inc., B-275717.2, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2-3, n.1. The COFC also decided that protests of FSS orders are not prohibited by the FASA. Idea International, Inc. v. United States, 74 Fed. Cl. 129 (2006). Additionally, the GAO will hear cases involving the “downselect” of multiple awardees, if that determination is implemented by the issuance of task and delivery orders. See Electro-Voice, Inc., B-278319; Jan. 15, 1998, 98-1 CPD ¶ 23. See also Teledyne-Commodore, LLC - - Reconsideration, B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121.

3. **Procurement.** GAO only considers protests of “procurements.”

- a. A procurement of property or services by a federal agency. 31 U.S.C. § 3551. New York Tel. Co., B-236023, Nov. 7, 1989, 89-2 CPD ¶ 435 (solicitation to install pay phones is an acquisition of a service). The transaction, however, must relate to the agency’s mission or result in a benefit to the government. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (Navy agreement with a bank to provide on-base banking services not a procurement). See also Starfleet Marine Transportation, Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (GAO holding that it had jurisdiction of a mixed transaction involving both the "sale" of a business opportunity and the procurement of services); Government of Harford County, Md., B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81.
- b. Sales of government property are excluded. Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (sale of property by FHA not a procurement of property or services); Columbia Communications

Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services). The GAO will consider protests involving such sales, however, if the agency involved has agreed in writing to allow GAO to decide the dispute. 4 C.F.R. § 21.13(a) (2005); Assets Recovery Sys., Inc., B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67. See also Catholic University of America v. United States, 49 Fed. Cl. 795 (2001) (COFC holding that the Administrative Dispute Resolution Act's (ADRA) amendment to the Tucker Act broadened its scope of post-award protests to include solicitation of government assets).

- c. The GAO has also considered a protest despite the lack of a solicitation or a contract when the agency held "extensive discussions" with a firm and then decided not to issue a solicitation. Health Servs. Mktg. & Dev. Co., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247. Accord RJP Ltd., B-246678, Mar. 27, 1992, 92-1 CPD ¶ 310.
- d. A "Federal Agency" includes executive, legislative, or judicial branch agencies. 31 U.S.C. § 3551(3) (specifically refers to the definition in the Federal Property and Administrative Services Act of 1949 at 40 U.S.C. § 102); 4 C.F.R. § 21.0(c) (2005). However, it excludes:
 - (1) The Senate, House of Representatives, the Architect of the Capitol, and activities under his direction. 40 U.S.C. § 472(b); 4 C.F.R. § 21.0(c) (2005). Court Reporting Servs., Inc., B-259492, Dec. 12, 1994, 94-2 CPD ¶ 236.
 - (2) Government corporations identified in 31 U.S.C. § 9101 that are only partially owned by the United States, e.g., FDIC. 31 U.S.C. § 3501; Cablelink, B-250066, Aug. 28, 1992, 92-2 CPD ¶ 135. This exclusion does not apply to wholly government-owned corporations, e.g., TVA. See Kennan Auction Co., B-248965, June 9, 1992, 92-1 CPD ¶ 503 (Resolution Trust Corporation); Monarch Water Sys., Inc., B-218441, Aug. 8, 1985, 85-2 CPD ¶ 146. See also 4 C.F.R. § 21.5(g) (2005).
 - (3) The United States Postal Service (USPS). 4 C.F.R. § 21.5(g) (2005). The USPS is not a federal agency under procurement law; therefore, the GAO does not hear USPS protests. But See Emery WorldWide Airlines, Inc. v. Federal Express Corp., 264 F.3d 1071 (2001) (the **Court of Appeals for the Federal Circuit** held that the USPS was a federal agency as specified by the Administrative Dispute

Resolution Act of 1996, not federal procurement law, therefore the Postal Service is not exempt from the court's bid protest jurisdiction as it is from GAO's).

- e. Generally, the GAO does not view procurements by nonappropriated fund instrumentalities (NAFIs) as "agency procurements." 4 C.F.R. § 21.5(g) (2005). The Brunswick Bowling & Billiards Corp., B-224280, Sept. 12, 1986, 86-2 CPD ¶ 295.
- (1) The GAO **will** consider procurements conducted by federal agencies (i.e., processed by an agency contracting officer) on behalf of a NAFI, even if no appropriated funds are to be obligated. Premier Vending, Inc., B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.
 - (2) The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement of federal agency personnel in the procurement and the NAFI is acting merely as a conduit for the federal agency. Asiel Enterprises, Inc., B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 (considered whether NAFI used as a conduit to circumvent CICA).
 - (3) GAO has jurisdiction to consider protest challenging terms of solicitation for the award of a lease of federal property where the record shows that the agency will receive benefit in connection with the award of the lease, such that the agency is, in effect, conducting a procurement for goods and services. Blue Origin LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289.
- f. Procurements subject to the Federal Aviation Administration's (FAA) Acquisition Management System (AMS) are specifically exempt from GAO jurisdiction. 49 U.S.C. §40110(d)(2)(F). This exemption originally covered only procurements of equipment, supplies, and materials; thus, the GAO maintained jurisdiction and decided protests filed concerning the procurement of services. Congress has since extended the exemption to cover services also. Pub. L. No. 109-90, 119 Stat. 2064 *et seq*, Title V, Sec. 515. Procurements by the Transportation Security Administration (TSA) are covered by the AMS; GAO has no jurisdiction over TSA procurements. Knowledge Connections, Inc., B-298172 (2006).

E. When Must a Protest Be Filed?

1. Time limits on protests are set forth in 4 C.F.R. § 21.2.⁵

- a. **Defective Solicitation.** GAO must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals.** 4 C.F.R. § 21.2(a)(1); Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 (untimely challenge of agency failure to include mandatory clause indicating whether agency will conduct discussions prior to making award). Protests filed prior to bid opening or closing date for receipt of initial proposals are timely even when protester learned the basis of its protest more than ten days prior to protest filing. MadahCom, Inc.-Recon., B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209.
- b. Protesters **challenging a Government-wide point of entry (GPE) notice of intent** to make a sole source award must **first** respond to the notice in a timely manner. See Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32 (unless the specification is so restrictive as to preclude a response, the protester must first express interest to the agency); see also PPG Indus., Inc., B-272126, June 24, 1996, 96-1 CPD ¶ 285, fn. 1 (timeliness of protests challenging Commerce Business Daily (CBD) notices discussed). Only publication in the official public medium [Federal Business Opportunities (FedBizOpps)] will constitute constructive notice. Worldwide Language Resources, Inc.; SOS Int'l Ltd., B-296993 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (publishing notice of procurement on DefenseLink.mil will NOT provide constructive notice.)
- c. When an **amendment to a solicitation** provides the basis for the protest, then the protest must be filed by the next due date for revised proposals. 4 C.F.R. § 21.2(a)(1). This rule applies even with tight timelines. WareOnEarth Commc'ns, Inc., B-298408, Jul. 11, 2006, 2006 CPD ¶ 107 (protest not timely filed when filed after revised due date from amendment despite only four days between solicitation amendment and proposal due date.)

⁵Under the GAO bid protest rules, "days" are calendar days. In computing a period of time for protest purposes, do not count the day on which the period begins. When the last day falls on a weekend day or federal holiday, the period extends to the next working day. 4 C.F.R. § 21.0(e).

- d. **Required Debriefing.** Procurements involving competitive proposals carry with them the obligation to debrief the losing offerors, if the debriefing is timely requested. See FAR 15.505 and 15.506. In such cases, protesters may not file a protest prior to the debriefing date offered by the agency. 4 C.F.R. §21.2(a)(2). The protester, however, must file its protest no later than 10 days “after the date on which the debriefing is held.” 4 C.F.R. § 21.2(a)(2); Fumigadora Popular, S.A., B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151 (protest filed four days after debriefing of **sealed bid procurement** not timely); The Real Estate Center, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74.
- e. **Government Delay of Pre-Award Debriefings.** The agency may delay pre-award debriefings until after award when it is in “the government’s best interests.” If the agency decides to delay a pre-award debriefing that is otherwise timely requested and required, the protester is entitled to a post-award debriefing and the extended protest time frame. Note that if a protester files its protest within five days of the offered debrief, protester will also be entitled to stay contract performance. 31 U.S.C. § 3553(d)(4)(B); FAR 33.104(c). Global Eng’g & Constr. Joint Venture, B-275999, Feb. 19, 1997, 97-1 CPD ¶ 77 (protest of exclusion from competitive range).
- f. Protests based on **any other matter** must be submitted within 10 days after receiving actual or constructive (whichever is earlier) knowledge of the basis for protest. 4 C.F.R. § 21.2(a)(2). Learjet, Inc., B-274385, Dec. 6, 1996, 96-2 CPD ¶ 215 (interpretation of solicitation untimely); L. Washington & Assocs., Inc., B-274749, Nov. 18, 1996, 96-2 CPD ¶ 191 (untimely protest of elimination from competitive range); SNAP, Inc., B-409609, B-409609.3, June 20, 2014, 2014 WL 2873756 (protest grounds untimely when protester should have known protest ground from debriefing, but waited until comments to file supplemental protest).
- g. Protests initially filed with the agency:
- (1) If the protester previously filed a timely agency protest, a subsequent GAO protest must be filed within 10 days of actual or constructive (whichever is earlier) knowledge of the initial adverse agency decision. 4 C.F.R. § 21.2(a)(3) (2005). Consolidated Mgt. Servs., Inc.--Recon., B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76 (oral notice of adverse agency action starts protest time period.) **Continuing to pursue agency protest after initial adverse decision does not toll the GAO time limitations.** Telestar Int’l Corp.--

Recon., B-247029, Jan. 14, 1992, 92-1 CPD ¶ 69. See also Raith Engineering and Manufacturing Co, W.L.L., B-298333.3 (2007). Adverse agency action includes a determination by the agency that it lacks jurisdiction over protest issue. Logis-Tech, Inc., B-407687, Jan. 24, 2013, 2013 CPD ¶ 41.

- (2) The agency protest must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has established more restrictive time frames. 4 C.F.R. § 21.2(a)(3). Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228 (protest dismissed where protester's agency-level protest untimely even though it would have been timely under GAO rules); IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169.
2. Protesters must use due diligence to obtain the information necessary to pursue the protest. See Automated Medical Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 (protest based on FOIA-disclosed information not timely where protester failed to request debriefing); Products for Industry, B-257463, Oct. 6, 1994, 94-2 CPD ¶ 128 (protest challenging contract award untimely where protester failed to attend bid opening and did not make any post-bid attempt to examine awardee's bid); Adrian Supply Co.--Recon., B-242819, Oct. 9, 1991, 91-2 CPD ¶ 321 (use of FOIA request rather than the more expeditious document production rules of the GAO may result in the dismissal of a protest for lack of due diligence and untimeliness). **But see** Geo-Centers, Inc., B-276033, May 5, 1997, 97-1 CPD ¶ 182 (protest filed three months after contract award and two months after debriefing is **timely** where the information was obtained via a FOIA request that was filed immediately after the debriefing).
3. Exceptions for otherwise untimely protests. 4 C.F.R. § 21.2(c).
 - a. **Significant Issue Exception:** The GAO may consider a late protest if it involves an issue significant to the procurement system. See Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18; Premier Vending, Inc., B-256560, Jul. 5, 1994, 94-2 CPD ¶ 8. Cyberdata Techs, Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230.
 - b. Significant issues generally: 1) have not been previously considered; and 2) are of widespread interest to the procurement community. Pyxis Corp., B-282469, B-282469.2, Jul. 15, 1999, 99-2 CPD ¶ 18. DynCorp, Inc., B-240980, Oct. 17, 1990, 90-2 CPD ¶ 310. Matter of: Tiger Truck, LLC, B-400685, Jan 14, 2009, 2009 CPD ¶ 19.

- c. The GAO may consider a protest if there is good cause, beyond the protester's control, for the lateness. A.R.E. Mfg. Co., B-246161, Feb. 21, 1992, 92-1 CPD ¶ 210; Surface Combustion, Inc.--Recon., B-230112, Mar. 3, 1988, 88-1 CPD ¶ 230.
- F. "The CICA Stay"—Automatic Statutory Stay. 31 U.S.C. § 3553(c) and (d).
1. Pre-award Protests: An agency may not award a contract after receiving notice **FROM THE GAO** of a timely-filed protest. 31 U.S.C. § 3553(c); 4 C.F.R. § 21.6; FAR 33.104(b).
 2. Post-award Protests: The contracting officer shall suspend contract performance immediately when the agency receives notice **FROM THE GAO** of a protest filed **within 10 days of the date of contract award or within five days AFTER THE DATE OFFERED for the required post-award debriefing**. The CICA stay applies under either deadline, whichever is the later. 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6; FAR 33.104(c).
 3. The automatic stay is triggered **only** by notice from GAO. See McDonald Welding v. Webb, 829 F.2d 593 (6th Cir. 1987); Survival Technology Inc. v. Marsh, 719 F. Supp. 18 (D.D.C. 1989). See also Florida Professional Review Org., B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award [Friday] but GAO notified agency of protest on eleventh day after award [Monday]). Note that the FASA changed the rules, now allowing for a deadline falling on a weekend or holiday to extend to the next business day.
 4. "Proposed Award" Protests: An agency's decision to cancel a solicitation based upon the determination that the costs associated with contract performance would be cheaper if performed in-house (i.e., by federal employees) may be subject to the CICA stay. See Inter-Con Sec. Sys., Inc. v. Widnall, No. C 94-20442 RMW, 1994 U.S. Dist. LEXIS 10995 (D.C. Cal. July 11, 1994); Aspen Sys. Corp., B-228590, Feb. 18, 1988, 88-1 CPD ¶ 166. In reviewing a protest of an in-house cost comparison, the GAO will look to whether the agency complied with applicable procedures in selecting in-house performance over contracting. DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543.
- G. "The CICA Override"—Relief From The CICA Stay. 31 U.S.C. § 3553(c) and (d); FAR 33.104(b) and (c); AFARS 5133.104; AFFARS 5333.104. While paragraphs (1) and (2) below provide the *general* approval authority, the Army requires the override to be approved by the Deputy Assistant Secretary of the Army (Policy and Procurement). AFARS 5133.104.

1. Pre-Award Protest Stay: The head of the contracting activity (HCA) may, on a nondelegable basis, authorize the award of a contract:
 - a. Upon a written finding that urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General; **AND**
 - b. The agency is likely to award the contract within 30 days of the written override determination.

2. Post-Award Protest Stay: The HCA may, on a nondelegable basis, authorize **continued performance** under a previously awarded contract upon a written finding that:
 - a. Continued performance of the contract is **in the best interests of the United States**; or
 - b. Urgent and compelling circumstances that significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.

NOTE: If a protest is sustained where the agency authorized continued performance under the best interests exception, GAO will make recommendations without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2).

3. In either instance, if the agency is going to override the automatic stay, it must notify the GAO. 31 U.S.C. 3553(c). See also Banknote Corp. of America, Inc., B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53 (GAO will not review the override decision).

4. Override decisions **are** subject to judicial review at the COFC. See Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005) (Court upheld override after stating that overrides are reviewable by the Court). See also, Cigna Gov't Services, LLC v. United States, 70 Fed. Cl. 100 (2006) (reinstating the CICA Stay finding that the override was arbitrary and capricious); Advanced Systems Development, Inc. v. United States, 72 Fed. Cl. 25 (2006) (same); Automation Technologies, Inc v. United States, 72 Fed. Cl. 723 (2006) (same). See also, URS Federal Services, Inc. v. United States, COFC No. 11-790, Filed December 30, 2011, where the COFC reviewed an override determination considering four factors: (1) whether significant adverse consequences will necessarily occur if the stay is not overridden, (2) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented, (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 the Competition in Contracting Act.

5. An agency's decision to override a CICA stay based upon its determination that such action is in the "best interests" of the United States is subject to judicial review. Alion Science and Technology Corp. v. United States, 69 Fed. Cl. 14 (2005).

H. **Availability of Funds.** The "end-of-fiscal-year spending spree" results in a large volume of protest action during the August-November time frame. To allay concerns about the loss of funds pending protest resolution, 31 U.S.C. § 1558 provides that funds will not expire for 100 days following resolution of the bid protest.⁶ FAR 33.102(c).

I. Scope of GAO Review.

1. The scope of GAO's review of protests is similar to that of the Administrative Procedures Act. 5 U.S.C. § 706. GAO does not conduct a *de novo* review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuse of discretion. New Breed Leasing Corp., B-274201, Nov. 26, 1996, 96-2 CPD ¶ 202 (agency violated CICA due to lack of reasonable advanced planning); current GAO case law reviews agency actions for reasonableness, consistency with the solicitation, applicable procurement statutes and regulations. See, e.g., Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶263.
2. Burden of Proof. The protester generally has the burden of demonstrating the agency action is clearly unreasonable. The Saxon Corp., B-232694, Jan. 9, 1989, 89-1 CPD ¶ 17.
3. Agency Record. When conducting its review, the GAO will consider the **entire** record surrounding agency conduct, to include statements and arguments made in response to the protest. AT&T Corp., B-260447, Mar. 4, 1996, 96-1 CPD ¶ 200. The agency may not, however, for the first time in a protest, provide its rationale for the decision in a request for reconsideration. Department of the Army—Recon., B-240647, Feb. 26, 1991, 91-1 CPD ¶ 211. GAO will give little weight to post-protest documents that constitute reevaluations and redeterminations prepared in the heat of an adversarial process. Boeing Sikorsky Aircraft Support,

⁶This authority applies to protests filed with the agency, at the GAO, or in a federal court. 31 U.S.C. § 1558. See also OFFICE OF THE GENERAL COUNSEL, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Principles of Federal Appropriations Law 5-89 (3d ed. 2004).

B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91. However, GAO will consider post-protest explanations of the record that are credible and consistent with the contemporaneous record. Mgmt Sys. Int'l, Inc., B-409415, B-409415.2, Apr. 10, 2014, 2014 CPD ¶ 117.

4. **Substantive Review.** As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency determinations or award decisions. See, e.g., Redstone Tech. Servs., B-259222, Mar. 17, 1995, 95-1 CPD ¶ 181; Secure Servs. Tech., Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421 (GAO conducted a comparative analysis of competitors' proposals and the alleged deficiencies in them and sustained the protest when it determined that the agency had not evaluated the proposals in a consistent manner); Frank E. Basil, Inc., B-238354, May 22, 1990, 90-1 CPD ¶ 492 (GAO reviewed source selection plan).
5. **Bad Faith.** Government officials are presumed to act in good faith. Allegation of bias or bad faith must be supported by convincing proof. GAO will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111; Empire Veteran Group, Inc., B-408866.2, B-408866.3, Dec. 17, 2013, 2013 CPD ¶ 294.
6. **Timeliness Issues.**
 - a. The GAO will generally resolve factual disputes regarding timeliness of protest filing in favor of the protester if there is at least a reasonable degree of evidence to support protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65 (disagreement over when protester knew or should have known of basis for protest).
 - b. The protester is required to include "all the information needed to demonstrate timeliness." 4 C.F.R. § 21.2(b); Foerster Instruments, Inc., B-241685, Nov. 18, 1991, 91-2 CPD ¶ 464.
 - c. When there is a doubt as to whether a protest is timely, GAO will generally consider the protest. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 405.
7. **Unduly Restrictive Requirement.** Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. J. Squared Inc., d/b/a University Loft Co., B-408388, Aug. 27, 2013, 2013

CPD ¶ 201. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

8. Prejudice. To prevail, a protester must demonstrate prejudice. To meet this requirement, a protester must show that but for the agency error, there existed “a substantial chance” that the offeror would have been awarded the contract. Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). See, e.g., Bath Iron Works Corp., B-290470, Aug. 19, 2002, 2002 CPD ¶ 133 (denying protester's use of a decommissioned destroyer for at-sea testing, while at the same time accepting awardee's proposed use constituted unequal treatment, but did not result in competitive prejudice). GAO will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54. GAO resolves any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.-Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84.

J. Bid Protest Procedures.

1. The Protest. 4 C.F.R. § 21.1.
 - a. Protests must be **written**. E-Mail filings are accepted.
 - b. Although the GAO does not require formal pleadings submitted in a specific technical format, a protest, at a minimum, shall:
 - (1) include the name, address, email, telephone and facsimile (fax) numbers of the protester (or its representative);
 - (2) be signed by the protester or its representative;
 - (3) identify the contracting agency and the solicitation and/or contract number;
 - (4) **provide a detailed legal and factual statement of the grounds of protest, to include copies of relevant documents;**
 - (5) provide all information demonstrating the protester is an interested party and that the protest is timely;

- (6) specifically request a decision by the Comptroller General; and
 - (7) state the form of relief requested.
- c. If appropriate, the protest may also include:
- (1) a request for a protective order;
 - (2) a request for specific documents relevant to the protest; and,
 - (3) a request for a hearing.
- d. The GAO may dismiss a protest which is frivolous, or which does not state a valid ground for a protest. 31 U.S.C. ¶ 3554(a)(4); Federal Computer Int'l Corp.--Recon., B-257618, July 14, 1994, 94-2 CPD ¶ 24 (mere allegation of improper agency evaluation made “on information and belief” not adequate); see also Siebe Env'tl. Controls, B-275999, Feb. 12, 1997, 97-1 CPD ¶ 70 (“information and belief” allegations not adequate even though government delayed debriefing regarding competitive range exclusion); BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 (knowledge of awardee proposal not required, but the protester must provide some basis to support its allegation of improper agency action).
- (1) At a minimum, a protester must make a *prima facie* case asserting improper agency action. Brackett Aircraft Radio, B-244831, Dec. 27, 1991, 91-2 CPD ¶ 585. Protester must present either allegations or evidence sufficient, if uncontradicted, to establish the likelihood of the protester's claim of improper agency action. Systems Dynamics Int'l, Inc.--Recon., B-253957.4, Apr. 12, 1994, 94-1 CPD ¶ 251.
 - (2) Generalized allegations of impropriety are not sufficient to sustain the protester's burden under the GAO's Bid Protest Rules. See 4 C.F.R. § 21.5(f); Bridgeview Mfg., B-246351, Oct. 25, 1991, 91-2 CPD ¶ 378; Palmetto Container Corp., B-237534, Nov. 5, 1989, 89-2 CPD ¶ 447.
 - (3) The protester must show material harm. Tek Contracting, Inc., B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90 (protest that certification requirement was unduly restrictive is denied where protester's product was not certified by any entity); IDG Architects, B-235487, Sept. 18, 1989, 89-2 CPD ¶ 236.

- e. The protest must include sufficient information to demonstrate that it is timely. The GAO will not permit protesters to introduce for the first time, in a motion for reconsideration, evidence to demonstrate timeliness. 4 C.F.R. § 21.2(b) (2005). Management Eng'g Assoc.--Recon., B-245284, Oct. 1, 1991, 91-2 CPD ¶ 276.
2. The protester must provide the contracting activity timely notice of the protest. This notification allows the agency to prepare its administrative report for the protest.
 - a. The agency must receive a complete copy of the protest and all attachments no later than one day after the protest is filed with the GAO. 4 C.F.R. § 21.1(e); Rocky Mountain Ventures, B-241870.4, Feb. 13, 1991, 91-1 CPD ¶ 169 (failure to give timely notice may result in dismissal of the protest).
 - b. The GAO will not dismiss a protest, absent prejudice, if the protester fails to timely provide the agency a copy of the protest document. Arlington Pub. Schs., B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16 (although protester late in providing agency protest documents, agency already knew of protest and its underlying bases).
3. The GAO generally provides immediate telephonic notice of a protest to the agency's protest litigation division. **It is this notice by the GAO that triggers the CICA stay**, discussed above. 4 C.F.R. § 21.3(a).
4. Agency List of Documents. 4 C.F.R. §21.3(c). In response to a protester's request for production of documents, the agency must provide to all interested parties and the GAO **at least five days prior to submission of the administrative report** a list of:
 - a. Documents or portions of documents which the agency has released to the protester or intends to produce in its report; and
 - b. Documents which the agency intends to withhold from the protester and the reasons underlying this decision.
 - c. Parties to the protest must then file any objections to the agency list within two days of receipt of the list.
5. Agency's Administrative Report. The agency must **file an administrative report within 30 days** of telephonic notice by the GAO. 4 C.F.R. § 21.3(c); FAR 33.104(a)(3)(i). Subject to any protective order, discussed below, the agency will provide copies of the administrative report simultaneously to the GAO, protester(s), and any intervenors. 4 C.F.R. § 21.3(e).

- a. Contents of an agency report, as relevant to the protest grounds alleged. 4 C.F.R. § 21.3(d).
 - (1) The protest.
 - (2) The protester's proposal or bid.
 - (3) The successful proposal or bid.
 - (4) The solicitation.
 - (5) The abstract of bids or offers.
 - (6) A statement of facts by the contracting officer.
 - (7) All evaluation documents.
 - (8) All relevant documents.
 - (9) Documents requested by the protester.
 - (10) **A legal memorandum suitable for forwarding to GAO;**
 - (11) An index of all relevant documents provided under the protest.

- b. Agencies must include all relevant documents in the administrative report. See Federal Bureau of Investigation-Recon., B-245551, June 11, 1992, 92-1 CPD ¶ 507 (incomplete report misled GAO about procurement's status).

- c. Late agency reports. Given the relatively tight time constraints associated with the protest process, the GAO will consider agency requests for extensions of time on a case-by-case basis. 4 C.F.R. § 21.3(f).

6. Document Production.⁷ Except as otherwise authorized by GAO, all requests for documents must be filed with GAO and the contracting agency no later than two days after their existence or relevance is known or should have been known, whichever is earlier. The agency then must either provide the documents or explain why production is not appropriate. 4 C.F.R. § 21.3(g).

⁷ **PRACTICE TIP:** Keep in mind that the government has every right to request relevant documents from the protester. See 4 C.F.R. 21.3(d) (2005). See also "GAO Orders Protester to Comply With Agency's Document Request," 61 FED. CONT. REP. 409 (1994).

7. Protective Orders. Either on its own initiative or at the request of a party to the protest, the GAO may issue a protective order controlling the treatment of protected information. 4 C.F.R. § 21.4.
- a. The protective order is designed to limit access to trade secrets, confidential business information, and information that would result in an unfair competitive advantage.
 - b. The request for a protective order should be filed as soon as possible. It is the responsibility of protester's counsel to request issuance of a protective order and submit timely applications for admission under the order. 4 C.F.R. § 21.4(a).
 - c. Individuals seeking access to protected information may not be involved in the competitive decision-making process of the protester or interested party. 4 C.F.R. § 21.4(c).
 - (1) Protesters may retain outside counsel or use in-house counsel, so long as counsel is not involved in the competitive decision-making process. Robbins-Gioia, Inc., B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222 (access to protected material appropriate even though in-house counsel has regular contact with corporate officials involved in competitive decision-making); Mine Safety Appliance Co., B-242379.2, Nov. 27, 1991, 91-2 CPD ¶ 506 (retained counsel).
 - (2) The GAO grants access to protected information upon application by an individual. The individual must submit a certification of the lack of involvement in the competitive decision-making process and a detailed statement in support of the certification. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.
 - (3) The GAO may report violations of the protective order to the appropriate bar association of the attorney who violated the order, and may ban the attorney from GAO practice. Additionally, a party whose protected information is disclosed improperly retains all of its remedies at law or equity, including breach of contract. 4 C.F.R. § 21.4(d). See also "GAO Sanctions 2 Attorneys for Violating Terms of Protective Order by Releasing Pricing Info," 65 FED. CONT. REP. 17 (1996). GAO may dismiss protests for violation of the protective order. PWC Logistics Sers Co. KSC(c), B-310559, Jan. 11, 2008, 2008 CPD ¶ 25.

- (4) If the GAO does not issue a protective order, the government has somewhat more latitude in determining the contents of the administrative report. If the government chooses to withhold any documents from the report, it must include in the report a list of the documents withheld and the basis for not producing the documents. The agency must furnish all relevant documents and all documents specifically requested by the protester to the GAO for *in camera* review. 4 C.F.R. § 21.4(b).
 - d. If the agency fails to produce all relevant or requested documents, the GAO may impose sanctions. Among the possible sanctions are:
 - (1) Providing the document to the protester or to other interested parties.
 - (2) Drawing adverse inferences against the agency. Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (GAO refused to draw an adverse inference when an agency searched for and was unable to find a document that protester speculated should be in the files).
 - (3) Prohibiting the government from using facts or arguments related to the unreleased documents.
8. Protester must comment on the agency report within 10 days of receipt. Failure to comment or request a decision on the record will result in dismissal. 4 C.F.R. § 21.3(i). Keymiaee Aero-Tech, Inc., B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153; Piedmont Sys., Inc., B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305 (agency's office sign-in log used to establish date when protester's attorney received agency report); Aeroflex Int'l, Inc., B-243603, Oct. 7, 1991, 91-1 CPD ¶ 311 (protester held to deadline even though the agency was late in submitting its report); Kinross Mfg. Co., B-232182, Sept. 30, 1988, 88-2 CPD ¶ 309.
9. Hearings. On its own initiative or upon the request of the protester, the government, or any interested party, the GAO may conduct a hearing in connection with a protest. The request shall set forth the reasons why the requester believes a hearing is necessary and why the matter cannot be resolved without oral testimony. 4 C.F.R. § 21.7(a).

- a. The GAO officer has the discretion to determine whether or not to hold a hearing and the scope of the hearing.⁸ Jack Faucett Assocs.-Recon., B-254421, Aug. 11, 1994, 94-2 CPD ¶ 72.
- (1) As a general rule, the GAO conducts hearings where there is a factual dispute between the parties which cannot be resolved without oral examination or without assessing witness credibility, or where an issue is so complex that developing the protest record through a hearing is more efficient and less burdensome than proceeding with written pleadings only. Southwest Marine, Inc., B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (as a result of improper destruction of evaluation documentation by agency, GAO requested hearing to determine adequacy of agency award decision); see also Allied Signal, Inc., B-275032, Jan. 17, 1997, 97-1 CPD ¶ 136 (protest involving tactical intelligence system required hearing and technical assistance from GAO staff).
- (2) Absent evidence that a protest record is questionable or incomplete, the GAO will not hold a hearing “merely to permit the protester to reiterate its protest allegations orally or otherwise embark on a fishing expedition for additional grounds of protest” since such action would undermine GAO’s ability to resolve protests expeditiously and without undue disruption of the procurement process. Town Dev., Inc., B-257585, Oct. 21, 1994, 94-2 CPD ¶ 155.
- b. The GAO may hold pre-hearing conferences to resolve procedural matters, including the scope of discovery, the issues to be considered, and the need for or conduct of a hearing. 4 C.F.R. § 21.7(b).
- c. Note that the GAO may draw an adverse inference if a witness fails to appear at a hearing or fails to answer a relevant question. This rule applies to the protester, interested parties and the agency. 4 C.F.R. § 21.7(f).
10. Alternative Dispute Resolution. The GAO has three available forms of alternative dispute resolution (ADR) – Negotiation Assistance, Litigation Risk Assessment and Outcome Prediction.

⁸According to the GAO’s procedural rules, hearings are ordinarily conducted in Washington, D.C. The rule further notes that hearings may also be conducted by telephone. 4 C.F.R. § 21.7(c).

- a. Negotiation Assistance. The GAO attorney will assist the parties with reaching a “win/win” situation. This type of ADR occurs usually with protests challenging a solicitation term or a cost claim.
 - b. Litigation Risk Assessment. The GAO attorney will identify risks with respect to the positions of each party to the protest. Generally, less formal than outcome prediction and can be conducted at an earlier stage in the protest.
 - c. Outcome Prediction. The GAO attorney will inform the parties of what he or she believes will be the protest decision. The losing party can then decide whether to withdraw or continue with the protest. Outcome prediction may involve an entire protest or certain issues of a multi-issue protest. The single most important criterion in outcome prediction is the GAO attorney’s confidence in the likely outcome of the protest.
11. The GAO will issue a decision within 100 days after the filing of the protest.⁹ 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a).
 12. Express Option. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10.
 - a. Decision in 65 days.
 - b. The protester, agency, or other interested party may request the express option in writing within five days after the protest is filed. The GAO has discretion to decide whether to grant the request. The GAO may also use the express option on its own initiative. Generally, the GAO reserves use of this expedited procedure for protests involving relatively straightforward facts and issues.
 - c. The following schedule applies under the express option (4 C.F.R. § 21.10(d)):
 - (1) Agency Report due within 20 days after notice from GAO of express option;
 - (2) Protester’s comments on Agency Report due within 5 days of receiving Agency Report;

⁹**PRACTICE TIP:** Parties to the protest may check on the status of their protest by calling GAO's bid protest status line at (202) 512-5436. Additionally, quick access to newly issued decisions can be obtained from the GAO Internet Homepage at: <http://www.gao.gov>.

- (3) GAO may alter the schedule if the case becomes no longer appropriate for the express option.

K. Remedies.

1. GAO decisions are “recommendations.” 31 U.S.C. § 3554; Rice Servs., Ltd. v. United States, 25 Cl. Ct. 366 (1992); Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).
2. Agencies that do not implement GAO’s recommendations fully within 60 days of a decision must report this fact to the GAO. FAR 33.104(g). The GAO, in turn, must report all instances of agency refusal to accept its recommendation to Congress. 31 U.S.C. § 3554(e).
3. The GAO may recommend that an agency grant the following remedies (4 C.F.R. § 21.8):
 - a. Refrain from exercising options under an existing contract;
 - b. Terminate an existing contract;
 - c. Recompete the contract;
 - d. Issue a new solicitation;
 - e. Award the contract consistent with statute and regulation; or
 - f. Such other recommendation(s) as the GAO determines necessary to promote compliance with CICA.
4. Impact of a Recommended Remedy. In crafting its recommendation, the GAO will consider all circumstances surrounding the procurement, to include: the seriousness of the deficiency; the degree of prejudice to other parties or the integrity of the procurement process; the good faith of the parties; the extent of contract performance; the cost to the government; the urgency of the procurement; and the impact on the agency’s mission. 4 C.F.R. § 21.8(b).
5. CICA Override. However, where the head of the contracting activity decides to continue contract performance because it represents the best interests of the government, the GAO “shall” make its recommendation “without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.” 4 C.F.R. § 21.8(c). Department of the Navy – Modification of Remedy, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 (Navy contends that “it may not be able to afford” costs associated with GAO recommendation).

L. Protest Costs, Attorneys Fees, and Bid Preparation Costs.

1. The GAO will issue a declaration on the entitlement to costs of pursuing the protest, to include attorneys fees, in each case after agencies take corrective action. 4 C.F.R. § 21.8(d). The recovery of protest costs is neither an “award” to protester nor is it a “penalty” imposed upon the agency, but is “intended to relieve protesters of the financial burden of vindicating the public interest.” Defense Logistics Agency-Recon., B-270228, Aug. 21, 1996, 96-2 CPD ¶ 80.
 - a. In practice, if the agency takes remedial action promptly, GAO generally will not award fees. See J.A. Jones Management Servs., Inc.-Costs B-284909.4, Jul. 31, 2000, 2000 CPD ¶ 123 (GAO declined to recommend reimbursement of costs where agency took corrective action promptly to supplemental protest allegation); Tidewater Marine, Inc.-Costs, B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81 (the determination of when the agency was on notice of error is “critical”); see also LORS Medical Corp., B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171 (timely agency action measured from filing of initial protest, not time of alleged improper action by agency). The GAO has stated that, in general, if the agency takes corrective action by the due date of the agency report, such remedial action is timely. Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency’s decision to take corrective action one day before agency report due was “precisely the kind of prompt reaction” GAO regulations encourage); Holiday Inn - Laurel-Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took corrective action five days after comments filed by protester).
 - b. If the agency delays taking corrective action unreasonably, however, the GAO will award fees. Griner’s-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41, (corrective action taken two weeks following filing of agency administrative report found untimely). The GAO will consider the complexity of the protested procurement in determining what is timely agency action. Lynch Machiner Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester’s request for costs denied where agency corrective action taken three months following filing of protest complaint).
 - c. GAO will not award costs unless the protest was clearly meritorious, even if the agency does not take timely corrective action. Professional Security Corporation-Costs, B-407022.5, March 10, 2014, 2014 CPD ¶ 96.

- d. GAO may limit recommendation of costs to meritorious protest issues where unsuccessful protest issues are clearly severable from the successful issues as to essentially constitute a separate protest. Carney, Inc.-Costs, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82.
 - e. Agency corrective action must result in some competitive benefit to the protester. Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100 (protester not entitled to fees and costs where the agency cancels a competitive solicitation and proposes to replace it with a sole source acquisition; no corrective action taken in response to the protest).
 - f. Protester must file its request for declaration of entitlement to costs with the GAO within 15 days after learning (or when it should have learned) that GAO has closed the protest based on the agency's decision to take corrective action. 4 C.F.R. § 21.8(e). Dev Tech Sys., Inc., B-284860.4, Aug. 23, 2002, CPD ¶ 150.
2. If the GAO determines that the protester is entitled to recover its costs:
- a. The protester must submit a claim for costs within 60 days of the receipt of the GAO decision. Failure to file within 60 days may result in forfeiture of the right to costs. 4 C.F.R. § 21.8(f). See Aalco Forwarding, Inc., B-277241.30, July 30, 1999, 99-2 CPD ¶ 36 (protesters' failure to file an **adequately** supported initial claim within the 60-day period resulted in forfeiture of right to recover costs). See also Dual Inc. - - Costs, B-280719.3, Apr. 28, 2000 (rejecting claim for costs where claim was filed with contracting agency more than 60 days after protester's counsel received a protected copy of protest decision under a protective order).
 - b. If the agency and protester fail to agree on the amount of costs the agency will pay, the protester may request that GAO recommend an amount. In such cases, GAO may also recommend payment of costs associated with pursuing this GAO amount recommendation. 4 C.F.R. § 21.8(f)(2) (2005); DIVERCO, Inc.-Claim for Costs, B-240639, May 21, 1992, 92-1 CPD ¶ 460.
3. Interest on costs is not recoverable. Techniarts Eng'g-Claim for Costs, B-234434, Aug. 24, 1990, 90-2 CPD ¶ 152.
4. Amount of attorney's fees and protest costs is determined by reasonableness. See, e.g., JAFIT Enters., Inc. – Claim for Costs, B-266326.2, Mar. 31, 1997, 97-1 CPD ¶ 125 (GAO allowed only 15% of protest costs and fees). Equal Access to Justice Act (EAJA) standards do

not apply. Attorneys' fees (for other than small business concerns) are limited to not more than \$150 per hour, "unless the agency determines based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 31 U.S.C. § 3554(c)(2)(B). See also Sodexho Mgmt., Inc.-Costs, B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136. Similarly, fees for experts and consultants are capped at "the highest rate of compensation for expert witness paid by the Federal Government." 31 U.S.C. § 3554(c)(2); FAR 33.104(h).¹⁰ This amount is equal to GS15 Step 10, not the highest amount paid by any federal agency for any expert in any forum at any time. Dept of the Army; ITT Federal Services Int'l Corp., B-296783.4, B-296783.5, Apr. 26, 2006, 2006 CPD ¶ 72.

5. Unlike the EAJA, a protestor need not be a "prevailing party" where a "judicial imprimatur" is necessary to cause a change in the legal relationship between the parties. Georgia Power Company, B-289211.5, May 2, 2002, 2002 CPD ¶ 81 (rejecting the agency's argument that the Supreme Court's holding in Buckhannon Bd. and Care Home, Inc., v. W. VA. Dep't of HHR, 532 U.S. 598 (2001) rejecting the "catalyst theory" to fee-shifting statutes, applied to the Competition in Contracting Act).
6. As a general rule, a protester is reimbursed costs incurred with respect to all protest issues pursued, not merely those upon which it prevails. AAR Aircraft Servs.-Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100. Department of the Army-Modification of the Remedy, B-292768.5, Mar. 25, 2004, 2004 CPD ¶ 74. The GAO has limited award of costs to successful protesters where part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest. TRESP Associates, Inc.-Costs, B-258322.8, Nov. 3, 1998, 98-2 CPD ¶ 108 (no need to allocate attorneys' fees between sustained protest and those issues not addressed where all issues related to same core allegation that was sustained); Interface Flooring Sys., Inc.-Claim for Attorneys Fees, B-225439.5, July 29, 1987, 87-2 CPD ¶ 106.
7. A protester may recover costs on a sustained protest despite the fact that the protester did not raise the issue that the GAO found to be dispositive. The GAO may award costs even though the protest is sustained on a theory raised by the GAO *sua sponte*. Department of Commerce-Recon., B-238452, Oct. 22, 1990, 90-2 CPD ¶ 322.

¹⁰ The FAR refers to 5 U.S.C. § 3109 and Expert and Consultant Appointments, 60 Fed. Reg. 45649, Sept. 1, 1995, citing 5 C.F.R. § 304.105.

8. The protester must document its claim for attorney's fees. Consolidated Bell, Inc., B-220425, Mar. 25, 1991, 91-1 CPD ¶ 325 (claim for \$376,110 reduced to \$490 because no reliable supporting documentation). See also Galen Medical Associates, Inc., B-288661.6, July 22, 2002, 2002 CPD ¶ 56 (GAO recommending that the agency reimburse the protestor \$110.65 out of the \$159,195.32 claim due to a lack of documentation).
9. Bid Preparation Costs. 4 C.F.R. § 21.8(d)(2).
 - a. GAO has awarded bid preparation costs when no other practical relief was feasible. See, e.g., Tri Tool, Inc.-Modification of Remedy, B-265649.3, Oct. 9, 1996, 96-2 CPD ¶ 139.
 - b. As with claims for legal fees, the protester must document its claim for bid preparation and protest costs. A protester may not recover profit on the labor costs associated with prosecuting a protest or preparing a bid. Innovative Refrigeration Concepts-Claim for Costs, B-258655.2, July 16, 1997, 97-2 CPD ¶ 19 (protester failed to show that claimed rates for employees reflected actual rates of compensation).
10. **Anticipatory profits are not recoverable.** Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784 (1970); DaNeal Constr., Inc., B-208469, Dec. 14, 1983, 83-2 CPD ¶ 682.

M. "Appeal" of the GAO Decision.

1. Reconsideration of GAO Decisions. 4 C.F.R. §21.4(b). The request for reconsideration must be submitted to the GAO within 10 days of learning of the basis for the request or when such grounds should have been known, whichever is earlier. Speedy Food Serv., Inc.-Recon., B-274406, Jan. 3, 1997, 97-1 CPD ¶ 5 (request for reconsideration untimely where it was filed more than 10 days after protester noted the initial decision on GAO's Internet site). The requester must state the factual and legal grounds upon which it seeks reconsideration. 4 C.F.R. § 21.14. Rehashing previous arguments is not fruitful. Banks Firefighters Catering, B-257547, Mar. 6, 1995, 95-1 CPD ¶ 129; Windward Moving & Storage Co.-Recon., B-247558, Mar. 31, 1992, 92-1 CPD ¶ 326.
2. Requests for reconsideration must be based upon new facts, unavailable at the time of the initial protest. The GAO does not allow piecemeal development of protest issues. Consultants on Family Addiction -Recon., B-274924.3, June 12, 1997, 97-1 CPD ¶ 213; Department of the Army - Recon., B-254979, Sept. 26, 1994, 94-2 CPD ¶ 114.
3. The GAO will not act on a motion for reconsideration if the underlying procurement is the subject of federal court litigation, unless the court has

indicated interest in the GAO's opinion. Department of the Navy, B-253129, Sept. 30, 1993, 96-2 CPD ¶ 175.

4. Judicial Appeal.

- a. A protester always may seek judicial review of an agency action under the Administrative Procedures Act. Courts may, however, give great deference to the GAO in light of its considerable procurement expertise. Shoals American Indus., Inc. v. United States, 877 F.2d 883 (11th Cir. 1989). But see California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).
- b. This deference is not absolute. A court may still find an agency decision to lack a rational basis, even if the agency complies with the GAO's recommendations in a bid protest. Firth Constr. Co. v. United States, 36 Fed. Cl. 268, 271-72 (1996); Advanced Distribution Sys., Inc. v. United States, 34 Fed. Cl. 598, 604 n. 7 (1995); see also Mark Dunning Indus. v. Perry, 890 F. Supp. 1504 (M.D. Ala. 1995) (court holds that "uncritical deference" to GAO decisions is inappropriate). But see Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Federal Circuit notes that "it is the usual policy, if not the obligation, of procuring departments to accommodate themselves to positions formally taken by the Government Accountability Office").

V. UNITED STATES COURT OF FEDERAL CLAIMS.

A. Statutory Authority.

1. Tucker Act. The Tucker Act grants the U.S. Court of Federal Claims (COFC) jurisdiction to decide any claim for damages against the United States founded upon the Constitution, Act of Congress, agency regulation, or express or implied-in-fact contract with the United States not sounding in tort. 28 U.S.C. § 1491.
2. Federal Courts Improvement Act of 1982. The COFC also was granted authority by the Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3), "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper" (i.e., injunctive relief).

3. Administrative Dispute Resolution Act of 1996. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) [hereinafter “ADRA”]. Effective December 31, 1996, ADRA provides jurisdiction to the Court of Federal Claims to hear pre-award and post-award bid protests. Specifically, the COFC has jurisdiction to hear protests by interested parties that object to a solicitation, proposed award, or alleged violation of statute. 28 U.S.C. § 1491(b)(1).

- a. The ADRA directs the COFC to “give due regard” to national security/defense interests and “the need” for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)).
- b. The COFC has indicated that it will apply bid protest law developed by the U.S. District Court of the District of Columbia under the “Scanwell doctrine.” (Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970)). See United States Court of Federal Claims, Court Approved Guidelines for Procurement Protest Cases (Dec. 11, 1996).
- c. The ADRA also gave jurisdiction to the federal district courts, but this jurisdiction included a sunset provision of 1 January 2001. Congress did not act to extend the federal district court jurisdiction.

B. **COFC Rules.** The COFC issued rules (RCFC), which prescribe the conduct of cases before the Court. Available at <http://www.uscfc.uscourts.gov/rules.htm>. Appendix C of the RCFC provides procedural guidance specifically tailored for bid protest litigation to enhance the overall effectiveness of protest resolution at the COFC. (The guidance provided by Appendix C of the RCFC is cited throughout the remainder of this outline section.)

C. **Who May Protest?**

1. Interested Party. The COFC appears to follow the same definition as that used in GAO protests. CC Distribs., Inc. v. United States, 38 Fed.Cl. 771 (1997); but see CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (noting that “there is not a perfect joinder between the GAO’s definition of interested party and the Tucker Act’s jurisdictional waiver”). The **Court of Appeals for the Federal Circuit (CAFC)** has apparently resolved the issue of who is an “interested party” by adopting the GAO definition. See Am. Fed.’n Gov’t Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (Construing that Section 1491(b)(1) did not adopt the APA’s liberal standing standards, but rather the narrow standards set forth in Section 3551(2)). See also, Myers Investigative & Sec Serv., Inc. v United States, 2002 U.S. App. LEXIS 237 (January 8, 2002).

2. **Intervenors.** The COFC allows parties to intervene as a matter of right and allows permissive intervention. RCFC 24.
 - a. Intervention of Right. Allowed when the right of intervention is mandated by statute or the applicant for intervention has an interest relating to the property or transaction that is the subject of the protest. RCFC 24(a). Case law developed by the U.S. District Court of the District of Columbia suggests that the protester must be able to demonstrate some “injury-in-fact” or otherwise be within the “zone of interest” of the statute or regulation to have standing before the court. See Scanwell Lab. Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970). See also Control Data Corp. v. Baldridge, 655 F.2d 283 (D.C. Cir. 1981).
 - b. Permissive Intervention. The COFC may allow permissive intervention by parties with a claim or question of law or fact that is “in common” with that of the main action. The court will consider whether such intervention will “unduly delay or prejudice the adjudication” of the main action. RCFC 24(b).
 - c. Intervention by the Proposed Awardee. An “apparent successful bidder” may enter an appearance at any hearing on an application for injunctive relief. RCFC C12. But see Anderson Columbia Envtl., Inc., 42 Fed. Cl. 880 (1999) (holding that contract awardee was not permitted to intervene as its interests were represented adequately by an existing party, i.e., the government).
 3. Effect of GAO Proceedings. A protester may file its protest with the COFC despite the fact that it was the subject of a GAO protest.
- D. **What May Be Protested?** The ADRA of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).
1. An “interested party” may challenge the terms of a solicitation, a proposed award, the actual contract award, or any alleged violation of statute or regulation associated with a procurement or proposed procurement. 28 U.S.C. § 1491(b). See CCL Inc. v. United States, 39 Fed. Cl. 780 (1997) (protester has standing to challenge out-of-scope contract change).
 2. The COFC has jurisdiction to hear both pre- and post-award protests. 28 U.S.C. § 1491(b)(1). It will not, however, review a protest alleging that GAO did not follow its own bid protest procedures. Advance Construction Services, Inc., v. U.S., 51 Fed. Cl. 362 (2002).
- E. When Must a Protest Be Filed?

1. Unlike protests filed with the GAO, the COFC currently has no specific timeliness requirement. Generally, however, one would expect protests to be filed very quickly in order to demonstrate the immediate and irreparable harm necessary to obtain injunctive relief. Hence, the COFC will typically schedule a temporary restraining order (TRO) hearing as soon as practicable following the filing of the TRO application. RCFC C9.
2. Defective Solicitation. The COFC appears to have adopted the GAO rule that the agency must receive protests based on alleged improprieties or errors in a solicitation that are apparent on the face of the solicitation, i.e., patent ambiguities or defects, **prior to bid opening or the closing date for receipt of initial proposals**. See Aerolease Long Beach v. United States, 31 Fed. Cl. 342 (1994), aff'd 39 F.3d 1198 (Fed. Cir. 1994); see also ABF Freight System Inc. v. U.S., 2003 U.S. Claims LEXIS 36, Feb. 26, 2003; see generally 4 C.F.R. § 21.2(a)(1) (1998).
3. Absent a need to show immediate and irreparable harm, actions must be commenced within six years of the date the right of action first accrues. 28 U.S.C. § 2401(a).

F. Temporary Restraining Orders and Preliminary Injunctions.

1. RCFC C9-C15 provide for Temporary Restraining Orders and Preliminary Injunctions. The court applies the traditional four-element test. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 41 CCF ¶ 77,078 (Fed.Cl. 1997); Magnavox Elec. Sys., Co. v. United States, 26 Cl. Ct. 1373, 1378 (1992); We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567 (Fed. Cir. 1991); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983). These elements are:
 - a. Likelihood of success on the merits; Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997) (court considered fact that plaintiff lost in earlier GAO protest);
 - b. Degree of immediate irreparable injury if relief is not granted; Magellan Corp. v. United States, 27 Fed. Cl. 446, 448 (1993) (no irreparable harm if protester will have other opportunities to supply product);
 - c. Degree of harm to the party being enjoined if relief is granted; Magellan Corp. v. United States, 27 Fed.Cl. 446, 448 (1993); Rockwell Int'l Corp. v. United States, 4 Cl. Ct. 1, 6 (1983) (injunctive relief should be denied when national security and defense concerns are raised); and,

d. Impact of the injunction on public policy considerations. Cincom Sys., Inc. v. United States, Feb. 13, 1997, 37 Fed. Cl. 266 (1997), citing Southwest Marine, Inc. v. United States, 3 Cl. Ct. 611, 613 (1983) (public policy places national security/defense interests over public interest in fair and open competition).

2. Posting of Bonds and Securities. A protester must post bond via an “acceptable surety” in order to obtain a preliminary injunction. The COFC determines the sum of the bond security. This security covers the potential costs and damages incurred by the agency if the court subsequently finds that the government was unlawfully enjoined or restrained. RCFC 65(c).

G. Standard of Review.

1. The COFC will review the agency’s action pursuant to the Administrative Procedures Act (APA). 5 U.S.C. § 706. The court looks to whether the agency acted arbitrarily, capriciously, or not otherwise in accordance with law. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 342 (1997). See also Impresa Construzioni Geom. Domenico Garufi v. United States, 283 F.3d 1324 (Fed. Cir. 2001) (allowing for review of a contracting officer’s affirmative responsibility determination if there has been a violation of a statute or regulation, *or alternatively, if the agency determination lacked a rational basis*).

2. The plaintiff must demonstrate either that the agency decision-making process lacks a rational basis or that there is a clear and prejudicial violation of applicable statutes or regulations. Data General Corp. v. Johnson, 78 F.3d 1556 (Fed. Cir. 1996); Magellan Corp. v. United States, 27 Fed. Cl. 446 (1993); RADVA Corp. v. United States, 17 Cl. Ct. 812 (1989). The court will consider any one, or all, of the following four factors in determining whether the agency abused its discretion or acted in an arbitrary or capricious manner:

a. Subjective bad faith on the part of the agency official;

b. Absence of a reasonable basis for the agency decision or action;

c. Amount of discretion given by procurement statute or regulation to the agency official; and

d. Proven violation of pertinent statutes or regulations. See Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988).

3. To obtain a permanent injunction, the plaintiff must show by a preponderance of the evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation. See Isratex,

Inc. v. United States, 25 Cl. Ct. 223 (1992); see also Logicon, Inc., 22 Cl. Ct. 776 (1991) (plaintiff need only demonstrate likelihood of success on the merits for temporary restraining order).

4. The court may give decisions by the Government Accountability Office great deference. Honeywell, Inc. v. United States, 870 F.2d 644 (Fed Cir. 1989). This deference, however, is not absolute. See Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322 (1992); California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281 (1998) (COFC overturned GAO decision finding that GAO's decision was irrational, that GAO misapplied the late bid rule, and that it failed to consider all relevant evidence).

H. Agency Administrative Record. The court accomplishes its review "based upon an examination of the 'whole record' before the agency." Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997). RCFC C22 encourages early production of the "core documents" of the administrative record to "expedite the final resolution of the case."

1. Core Documents. The "core documents" of the Administrative Record include, as appropriate, the:
 - a. Agency's procurement request, purchase request, or statement of requirements;
 - b. Agency's source selection plan;
 - c. Bid abstract or prospectus of bid;
 - d. Commerce Business Daily or other public announcement of the procurement (this will most likely be the FedBizOpps announcement, but the RCFC still refers to the CBD);
 - e. Solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers (BAFO) (the RCFC still refers to BAFO);
 - f. Documents and information provided to bidders during any pre-bid or pre-proposal conference;
 - g. Agency's responses to any questions about or requests for clarification of the solicitation;
 - h. Agency's estimates of the cost of performance;
 - i. Correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

- j. Records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;
 - k. Records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;
 - l. Protester's, awardees', and other interested parties' offers, proposals, or other responses to the solicitation;
 - m. Agency's competitive range determination, including supporting documentation;
 - n. Agency's evaluations of the protester's, awardees', or other interested parties' offers, or other responses to the solicitation, proposals, including supporting documentation;
 - o. Agency's source selection decision, including supporting documentation;
 - p. Pre-award audits, if any, or surveys of the offerors;
 - q. Notification of contract award and executed contract;
 - r. Documents relating to any pre- or post-award debriefing;
 - s. Documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;
 - t. Justifications, approvals, determinations and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and
 - u. The record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.
2. Supplementing the Administrative Record. The COFC may allow supplementation of the administrative record in limited circumstances. Cubic Applications, Inc. v. United States, 37 Fed.Cl. 339, 342 (1997) citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) ("little weight" given "*post hoc* rationalizations by the agency"); Graphicdata, LLC v. United States, 37 Fed. Cl. 771, 779 (1997). The reasons recognized by the COFC for supplementing the administrative record include:

- a. When the agency action is not adequately explained in the record before the court;
- b. When the agency failed to consider factors which are relevant to its final decision;
- c. When the agency considered evidence not included in the record;
- d. When the case is so complex that additional evidence will enhance understanding of the issues;
- e. Where evidence arising after the agency action shows whether the decision was correct;
- f. Cases where the agency is sued for failure to take action;
- g. Cases arising under the National Environmental Policy Act; and
- h. Cases where relief is at issue, particularly with respect to injunctive relief.

I. Procedures.

- 1. The court conducts a civil proceeding without a jury, substantially similar to proceedings in federal district courts. As noted above, the court has its own rules of procedure.
- 2. The RCFC incorporate the Federal Rules of Civil Procedure (FRCP) applicable to civil actions tried by a federal district court sitting without a jury to the extent practicable.
- 3. Additionally, the plaintiff must be represented by counsel who is admitted to practice before the court. RCFC 83.1. Finast Metal Prods., Inc. v. United States, 12 Cl. Ct. 759 (1987). RCFC C25 allows counsel who are not yet members of the COFC bar to make initial filings in a bid protest case (i.e., complaint and other accompanying pleadings), “conditioned upon counsel’s prompt pursuit of admission to practice” before the COFC.
- 4. Notification. The protester must hand deliver two copies of all pleadings to the Department of Justice (DOJ), Commercial Litigation Branch, Civil Division. Additionally, the protester must notify by telephone and serve counsel for the “apparent successful bidder” any application for injunctive relief.
- 5. Requirement for Pre-Filing Notification. The COFC requires the protester to provide **at least** 24-hours advance notice of the protest filing to the DOJ, the COFC, the procuring agency, and any awardee(s). This

requirement allows DOJ time to assign an attorney to the case and permits the COFC to identify the necessary assets to process the case. Although failure to provide pre-filing notice is not jurisdictional, it is “likely to delay the initial processing of the case.” RCFC C2.

6. Initial Filings. As stated above, the protester generally initiates the COFC protest process with the filing of an application for injunctive relief. Specifically, the protest commences with the filing of a complaint. RCFC 3(a). Generally, the complaint is accompanied by the application for injunctive relief. RCFC 65, C10. Additionally, any application must have with it the proposed order, affidavits, supporting memoranda, and other documents upon which the protester intends to rely. RCFC C10.
7. Initial Status Conference. The COFC will conduct an initial status conference to address pre-hearing matters, to include: identification of interested parties; any requests for injunctive relief and protective orders; the administrative file; and establishing a timetable for resolution of the protest. The COFC will schedule the initial status conference as soon as practicable following the filing of the complaint.
8. Agency Response. The government must respond to the protester’s complaint within 60 days of filing. RCFC 12. Responses to motions must be accomplished within 14 days of service. RCFC 7.2(a). Responses to Rule 12(b) and 12(c) motions and summary judgment motions must be filed within 28 days of service. RCFC 7.2(c).
9. Discovery. The APA mandates that the court’s decision should be based upon the agency record. 5 U.S.C. § 706; Camp. v. Pitts, 411 U.S. 138 (1973). Yet, the COFC has authorized limited discovery. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339 (1997) (deposition of contracting officer allowed); Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997) (in light of contemporaneous written explanations supporting procurement decision, deposing procurement officials improper).
10. Protective Orders. The COFC may issue protective orders upon motion by a party to either prevent discovery or to protect proprietary/source selection sensitive information from disclosure. RCFC C4-C7. But see Modern Technologies Corp. v. United States, 44 Fed. Cl. 319 (1998) (parties ordered to make available to the public documents that were filed previously under seal pursuant to a protective order because the proprietary and source-selection information had “minimal current value”).
11. Sanctions. The COFC may impose sanctions under RCFC 11(c) if a “[p]leading, motion or other paper is signed in violation this rule. . .”

RCFC 11(c). See Miller Holzwarth, Inc v. United States and Optex Sys., 44 Fed. Cl. 156 (1999) (protester and its representative “effectively misled” the court, the government, and the awardee/intervenor by failing to disclose that it possessed source-selection information at the time that it filed its pleading).

J. Remedies.

1. Equitable relief, i.e., temporary restraining orders, preliminary injunctions, permanent injunctions, and declaratory judgment, is available. Protesters commencing action in this court usually seek injunctive relief.
2. Reasonable bid preparation costs are recoverable. Rockwell Int’l Corp. v. United States, 8 Cl. Ct. 662 (1985).
3. Anticipatory profits are not recoverable. Heyer Prods. Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995).
4. The cost of preparing for performance of an anticipated contract is not recoverable. Celtech, Inc. v. United States, 24 Cl. Ct. 269 (1991).
5. The cost of developing a prototype may be recovered. Coflexip & Servs., Inc. v. United States, 961 F.2d 951 (Fed. Cir. 1992).

K. Attorneys Fees and Protest Costs.

1. The court may award attorneys fees and protest costs pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(1)(A); Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991); Bailey v. United States, 1 Cl. Ct. 69 (1983).
2. Only those attorneys fees associated with the litigation are recoverable. Cox v. United States, 17 Cl. Ct. 29 (1989). See also Levernier Constr. Co. v. United States, 21 Cl. Ct. 683 (1990), rev’d 947 F.2d 497 (Fed. Cir. 1991) (costs associated with hiring an expert witness to pursue a claim with the contracting officer, prior to the litigation, not recoverable).
3. The Demise of the “**Catalyst Theory**.” Need more than a “voluntary change in the defendant’s conduct” to qualify as a “prevailing party.” Now there must be a “judicially sanctioned change in the parties’ relationship” to be considered a “prevailing party” under fee-shifting statutes. See Brickwood Contractors, Inc. v. U.S., 288 F.3d 1371 (Fed. Cir. 2002) (holding the Supreme Court’s decision in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of HHR, 532 U.S. 598 (2001) was applicable to EAJA).

- L. **Appeals.** Appeals from decisions of the Court of Federal Claims are taken to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(3).

VI. FEDERAL DISTRICT COURTS.

Prior to ADRA, federal district courts reviewed challenges to agency procurement decisions pursuant to the Administrative Procedures Act. 5 U.S.C. § 702. This authority was popularly known as the “Scanwell Doctrine.” Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

The ADRA granted the federal district courts jurisdictional authority to hear pre-award and post-award bid protests. As with the COFC, the ADRA directed the district courts to “give due regard” to national security/defense interests and “the need” for expeditious processing of protests. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (adding 28 U.S.C. § 1491(b)(3)). However, the ADRA also provided for the “sunset” of the district courts bid protest jurisdiction as of 1 January 2001, unless Congress acted affirmatively to extend the jurisdiction. Congress did not extend the bid protest jurisdiction.

Note however, that the United States Court of Appeals for the Federal Circuit recently held that federal district courts retained their implied-in-fact jurisdiction over nonprocurement solicitations. Resource Conservation Group, LLC v. U.S., 597 F.3d 1238, (Fed.Cir. 2010).

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APPENDIX A AGENCY FAR SUPPLEMENTS

The following Supplements contain provisions addressing protests:

1. Army FAR Supplement (AFARS), 48 C.F.R. Subpart 5133.1.
2. Navy Marine Corps Acquisition Regulation Supplement (NMCARS), 48 C.F.R. Subpart 5233.1.
3. Air Force FAR Supplement (AFFARS), 48 C.F.R. Subpart 5333.1.
4. Defense Logistics Acquisition Directive (DLAD), 48 C.F.R. Subpart 5433.1
5. Special Operations Command FAR Supplement (SOFARS), 48 C.F.R. Subpart 5633.1.
6. Department of Agriculture Acquisition Regulation (AGAR), 48 C.F.R. Subpart 433.1.
7. US Agency for International Development (USAID) Acquisition Regulation (AIDAR), 48 C.F.R. Subpart 733.1.
8. Department of Commerce Acquisition Regulation (CAR), 48 C.F.R. Subpart 1333.1.
9. Department of Energy Acquisition Regulation (DEAR), 48. C.F.R. Subpart 933.1.
10. Department of the Interior Acquisition Regulation (DIAR), 48 C.F.R. Subpart 1433.1.
11. Department of Labor Acquisition Regulation (DOLAR), 48 C.F.R. Subpart 2933.1.
12. Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Subpart 633.1.

13. Department of the Treasury Acquisition Regulation (DTAR), 48 C.F.R. Subpart 1033.1.
14. Department of Education Acquisition Regulation (EDAR), 48 C.F.R. Subpart 3433.1.
15. Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. Subpart 1533.1.
16. General Services Administration Acquisition Regulation (GSAR), 48 C.F.R. Subpart 533.1.
17. Department of Health and Human Services Acquisition Regulation (HHSAR), 48 C.F.R. 333.1.
18. Department of Housing and Urban Development Acquisition Regulation (HUDAR), 48 C.F.R. 2433.1.
19. Justice Acquisition Regulation (JAR), 48 C.F.R. Subpart 2833.1.
20. National Aeronautics and Space Administration (NASA) FAR Supplement (NFS), 48 C.F.R. Subpart 1833.1.
21. Nuclear Regulatory Commission Acquisition Regulation (NRCAR), 48 C.F.R. Subpart 2033.1.
22. Department of Transportation Acquisition Regulation (TAR), 48 C.F.R. Subpart 1233.1.
23. Veterans Affairs Acquisition Regulation (VAAR), 48 C.F.R. Subpart 833.1.