

Chapter 18B
CDA Litigation at COFC



2014 Contract Attorneys Deskbook

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CHAPTER 18B

CONTRACT DISPUTES ACT AND BID PROTEST

LITIGATION AT THE COURT OF FEDERAL CLAIMS (COFC)

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CHAPTER 18B

CONTRACT DISPUTES ACT AND BID PROTEST

LITIGATION AT THE COURT OF FEDERAL CLAIMS (“COFC”)

I. INTRODUCTION.

- A. Court of national jurisdiction, established in 1855 to handle certain types of claims against the United States.
- B. Jurisdiction – Suits primarily for money, arising out of money-mandating statutes, Constitutional provisions, Executive orders, Executive agency regulations, and contracts.¹
 - 1. 26% - Government contracts (10% bid protests).
 - 2. 8% - Civilian and military pay.
 - 3. 8% - tax refunds (concurrent jurisdiction with United States district courts).
 - 4. 5% - Fifth Amendment takings, including environmental and natural resource issues.
 - 5. 42% - Vaccine compensation claims. 42 U.S.C. § 300aa-12.
 - 6. 11% - Miscellaneous.
 - a. Various claims pursuant to statutory loan guarantee or benefit programs, including those brought by states and localities, and foreign governments.
 - b. Congressional reference cases. 28 U.S.C. § 1492.
 - c. Intellectual property claims against the United States (and its contractors). 28 U.S.C. § 1498.
 - d. Indian Tribe claims. 28 U.S.C. § 1505.
- C. Limitation on Remedies

¹ Most recent available data for Fiscal Year (FY) 2012, located at:
<http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/G02ASep12.pdf>

1. Generally, money damages. However, monetary relief in a bid protest is limited to bid preparation and proposal costs. 28 U.S.C. § 1491(b)(2)
2. Pursuant to the Tucker Act, the Court may provide limited forms of equitable relief, including:
 - a. Reformation in aid of a monetary judgment, or rescission instead of monetary damages. John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Rash v. United States, 360 F.2d 940 (1966).
 - b. “[T]o grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief” in bid protest cases. 28 U.S.C. § 1491(b)(2).
 - c. Records correction incident to a monetary award, such as correcting military records to reflect a Court finding of unlawful separation. See 28 U.S.C. § 1491(a)(2).
 - d. Pursuant to the Contract Disputes Act (“CDA”), the COFC also may entertain certain nonmonetary disputes.
3. The Court may award Equal Access to Justice Act (“EAJA”) attorney fees. 28 U.S.C. § 2412.

D. Composition. 28 U.S.C. §§ 171-172.

1. Composed of 16 judges (currently 10 judges, also 7 senior judges).
2. Chief Judge is Patricia Elaine Campbell-Smith.
3. President appoints judges for 15-year term with advice and consent of the Senate. President may reappoint after initial term expires.
4. The Court of Appeals for the Federal Circuit (“CAFC”) may remove a judge for incompetence, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

E. Location.

1. 717 Madison Place, N.W., Washington, D.C. (across from White House and Treasury).
2. Routinely schedules trials throughout the country, 28 U.S.C. §§ 173 (“times and places of the sessions of the [COFC] shall be prescribed with a view to securing reasonable opportunity to citizens to appear ... with as

little inconvenience and expense to citizens as is practicable”), 2503(c) (“[h]earings shall, if convenient, be held in the counties where the witnesses reside”), and 2505 (“Any judge of the [COFC] may sit at any place within the United States to take evidence and enter judgment.”) The Court also conducts telephonic hearings, motions, and status conferences.

3. Unlike the boards for contract appeals (“BCAs”), however, prior to 1992, the COFC could not conduct trials in foreign countries. 28 U.S.C. § 2505; In re United States, 877 F.2d 1568 (Fed. Cir. 1989). The Federal Courts Administration Act (“FCAA”) of 1992 remedied this. See 28 U.S.C. § 798(b).

F. Case Load.

1. FY 2012, the COFC terminated 3,391 cases. The total amount claimed was \$46,408,652,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of \$810,147,115. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of \$3,542,332. The Court had 91 bid protests.
2. FY 2008, the COFC disposed of 872 complaints (including Congressional Reference) and 294 vaccine petitions. The total amount claimed was \$10,108,961,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of \$1,287,014,725.40 of which \$31,835,607.84 carried interest. The Court had 92 bid protests.
3. In FY 2006, the Court rendered judgments in more than 900 cases and awarded \$1.9 billion in damages.
4. In FY 2003, the Court disposed of 732 complaints, including 45 bid protests, and awarded judgments totaling \$ 878 million on claims totaling \$ 40 billion against the Government.
5. Web site (includes judges’ bios): <http://www.uscfc.uscourts.gov/>

II. HISTORY OF THE COURT.

A. Pre-Civil War.

1. Before 1855, Government contractors had no forum in which to sue the United States.
2. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612.

3. However, the service secretaries continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

B. Civil War Reforms.

1. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765.
2. In 1887, Congress passed the Tucker Act to expand and clarify the Court's jurisdiction. Act of March 3, 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491).
 - a. The court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). For the first time, a Government contractor could sue the United States as a matter of right.
 - b. Note: district courts have concurrent jurisdiction with COFC to the extent such claims do not exceed \$10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act).

C. Agencies Respond.

1. Agencies responded to the Court of Claim's increased oversight by adding clauses to Government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact.
2. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878).
3. The tension between the agencies' desire to decide contract disputes without outside interference and the contractors' desire to resolve disputes in the Court of Claims continued until 1978.
4. This tension resulted in considerable litigation and a substantial body of case law.

D. The Supreme Court Weighs In.

1. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual and legal decisions issued under disputes clauses by agency boards of contract appeals.
 2. The Supreme Court further held that the Court of Claims could not review board decisions de novo.
- E. Congress Reacts.
1. In 1954, Congress passed the Wunderlich Act, 41 U.S.C. §§ 321-322, to reaffirm the Court of Claims' authority to review factual and legal decisions by agency boards of contract appeals.
 2. At about the same time, Congress changed the Court of Claims from an Article I (legislative) court to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953).
- F. The Supreme Court Weighs In Again.
1. In United States v. Carlo Bianchi & Co, 373 U.S. 709 (1963), the Supreme Court held that boards of contract appeals were the sole forum for considering de novo disputes "arising under" a remedy granting clause in the contract.
 2. Three years later, the Supreme Court reaffirmed its conclusion in Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).
 3. As a result, agency boards of contract appeals began to play a more significant role in the resolution of contract disputes.
- G. The Contract Disputes Act (CDA) of 1978.
1. Pub. L. No. 95-563, 92 Stat. 2383 (codified, as amended, at 41 U.S.C. § 7101 et seq.).
 2. In 1978, Congress passed the CDA to make the claims and disputes process more consistent and efficient.
 3. The CDA replaced the previous disputes resolution system with a comprehensive statutory scheme.
- H. Federal Courts Improvement Act of 1982.
1. Pub. L. No. 97-164, 96 Stat. 25 (codified 28 U.S.C. §§ 171 et seq., 1494-97, 1499-1503).

2. In 1982, Congress overhauled the Court of Claims and created a new Article I (legislative) court -- named the United States Claims Court -- from the old Trial Division of the Court of Claims. Congress then merged the old Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit ("CAFC").

I. Federal Courts Administration Act of 1992

1. Pub. L. No. 102-572, 106 Stat. 4506. For legislative history, see, inter alia, S. Rep. No. 102-342, 102d Cong., 2d Sess. (July 27, 1992); H. Rep. No. 102-1006 (October 3, 1992); Senator Heflin's remarks, Volume 138 Cong. Rec. No. 144, at S17798-99 (October 8, 1992).
2. In 1992, Congress changed the name of the Claims Court to the United States Court of Federal Claims ("COFC").
3. Congress expanded the jurisdiction of the COFC to include the adjudication of nonmonetary disputes.

The COFC has jurisdiction "to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)).

J. The Federal Acquisition Streamlining Act of 1994 ("FASA")

1. Pub. L. No. 103-355, 108 Stat. 3243 (1994), slightly altered the Court's jurisdiction.
2. The COFC may direct that the contracting officer render a decision formerly, only the boards of contract appeals (BCAs) previously could. FASA § 2351(e), amending 41 U.S.C. § 605(c)(4) (now § 7103.)
3. District courts may request advisory opinions from BCAs. On matters concerning contract interpretation (any issue that could be the proper subject of a contracting officer's final decision), district courts may request that the appropriate agency BCA provide (in a timely manner) an advisory opinion. FASA § 2354, amending 41 U.S.C. § 609 (now 7107(f)). FASA does not permit Federal district courts to request an advisory opinion from the COFC.)

- K. The Administrative Dispute Resolution Act of 1996 (“ADRA”)
1. Pub. L. No. 104-320, § 12 (1996), significantly altered COFC and U.S. District Court “bid protest jurisdiction.” 28 U.S.C. § 1491(b) permits COFC to “render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”
 2. Jurisdiction extends to actions “in connection with a procurement or proposed procurement,” has been interpreted broadly by the court, to include such actions as agency CICA stay overrides. RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1289 (Fed.Cir.1999).
 3. Statutorily-Prescribed Standing Requirement(“interested party”).
 - a. “Interested party” has same meaning as in CICA (actual or prospective bidder whose direct economic interest would be affected by an award). AFGE, AFL-CIO v. United States, 258 F.3d 1294 (2001).
 - b. This means protester must submit a bid/proposal, Impresa Construcioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334 (Fed. Cir. 2001); not be a bidder ranked below second in an agency's evaluation, United States v. IBM Corp., 892 F.2d 1006 (Fed. Cir. 1989); and be responsive. Ryan Co. v. United States, 43 Fed. Cl. 646 (1999) (citing IBM), and MCI Telecom. Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)).
 4. Empowered the Court to grant declaratory and injunctive relief to fashion a remedy. Monetary relief, however, is limited to bid preparation and proposal costs.
 5. Granted same jurisdiction to district courts until January 1, 2001, unless jurisdiction was renewed.
 6. Administrative Procedures Act (APA) standard of review, i.e. “arbitrary, capricious, an abuse of discretion.” 5 U.S.C. § 706(2)(A).

III. PRACTICAL EFFECTS ON LITIGATION.

- A. The Judge.
1. 28 U.S.C. § 173.

2. One judge presides and decides - NO JURY TRIALS. Rules of the Court of Federal Claims (“RCFC”) 38 & 39.
- B. The Plaintiff.
1. RCFC 17.
 2. Individuals may represent themselves or members of their immediate family. Any other party must be represented by an attorney who is admitted to practice in the COFC. RCFC 83.1(a)(3).
 3. Note: at ASBCA atty. not required.
- C. The Defendant = “The United States.”
1. Counsel = Department of Justice (“DOJ”). 28 U.S.C. §§ 516, 518-519. The DOJ has plenary authority to settle cases pending in the COFC. See 28 U.S.C. § 516; see also Executive Business Media v. Dept. of Defense, 3 F.3d 759 (4th Cir. 1993).
 2. The National Courts Section of the Civil Division’s Commercial Litigation Branch, located in Washington, D.C., represents the Government in all contract actions.
- D. Practical Effect Upon Agency Once Case If Filed.
1. The agency loses authority over the case’s disposition.
 2. The contracting officer loses authority to decide or settle claims arising out of the same operative facts. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993).
 3. The agency counsel, because there is only one “attorney of record” per party, appears “of counsel,” and plays a different role than s/he would at the board or even a district court, where SAUSA appointments are commonplace.
 4. Effect of “United States” as defendant. Who is DOJ’s client?
- E. Applicable Law.
1. Statutes and Federal common law, unless matter controlled by state law, e.g., property rights.
 2. Stare Decisis.

- a. Supreme Court.
- b. United States Court of Appeals for the Federal Circuit.
- c. United States Court of Claims. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) (en banc).
- d. Judges not bound by the decisions of the other COFC judges.
- e. Unpublished decisions may be cited.

3. Procedural Rules

- a. The Rules of the Court of Federal Claims (“RCFC”), which are based upon the Federal Rules of Civil Procedure, are published as an appendix to Title 28 of the United States Code.
- b. Special Orders – The old version of RCFC 1 permitted the judges to “regulate the applicable practice in any manner not inconsistent with these rules.” Thus, most judges adopted specialized procedural orders, regulating enlargements of time, dispositive motions in lieu of answers, other dispositive motion requirements, mandatory disclosure, joint preliminary status reports, preliminary status conferences, discovery, experts, and submissions. Although the new rules do not specifically address this practice, many judges still issue special orders.

F. Electronic docket.

- 1. Public Access to Court Electronic Records (“PACER”) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet.
- 2. CM/ECF stands for Case Management / Electronic Case Files. It is a joint project of the Administrative Office of the U.S. Courts and the Federal courts to replace existing case management systems with a new system based on current technology, new software and increased functionality. This new system allows us to offer web access to the Court’s docket 24 hours a day, 7 days a week and to allow electronic document filing in designated cases.
- 3. Electronic docket basically mandates that the agency have scanning capabilities.

IV. COFC JURISDICTIONAL ISSUES.

A. Waiver of Sovereign Immunity.

Tucker Act waives sovereign immunity, but the “substantive right” claimed, whether it be the Constitution, an Act of Congress, a mandatory provision of regulatory law, or a contract, must be one which “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).

B. Tucker Act - General.

1. Must be brought within six years of date claim arose. 28 U.S.C. § 2501; Soriano v. United States, 352 U.S. 270, 273 (1956); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988). This is jurisdictional.
2. Equitable tolling: Irwin v. Veterans Admin., 498 U.S. 89 (1990) (rebuttable presumption that equitable tolling may be applied against the United States in the same manner as against private parties); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). But see, John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) (holding that 28 U.S.C. § 2501 is jurisdictional and thus equitable tolling and estoppel do not extend the six-year statute of limitations embedded in 28 U.S.C. § 2501).
3. NAFIs:
 - a. **OLD RULE:** Generally must involve an appropriated fund activity. AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir.2004); Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001); El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999)(finding that Tucker Act jurisdiction over NAFIs is limited to claims based upon a contract, but holding that jurisdiction may be supplied through another statute waiving sovereign immunity, such as the FLSA).
 - b. **NEW RULE:** Federal Circuit just held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).
4. Money claimed must be presently due and payable. United States v. King, 395 U.S. 1, 3 (1969).
5. May not also be pending in any other court. 28 U.S.C. § 1500; Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).
6. May not grow out of or be dependent upon a treaty. 28 U.S.C. § 1502.

7. May not be brought by a subject of a foreign government unless the foreign government accords to citizens of the United States the right to prosecute claims against that government in its courts. 28 U.S.C. § 2502; Zalcmanis v. United States, 146 Ct. Cl. 254 (1959).

C. Tucker Act - Claims Founded Upon Contract.

1. Must demonstrate elements necessary to establish the existence of a contract (e.g., meeting of minds, consideration). E.g., Somali Dev. Bank v. United States, 205 Ct. Cl. at 751, 508 F.2d at 822; Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); ATL, Inc. v. United States, 4 Cl. Ct. 672, 675 (1984), *aff'd*, 735 F.2d 1343 (Fed. Cir. 1984).
2. Must demonstrate that it was entered into by authorized Government official. E.g., City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990).
3. Must demonstrate “privity of contract.” Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983); *see* Cienega Gardens, et al. v. United States, 162 F.3d 1123, 1129-30 (Fed. Cir. 1998).
4. If “implied,” must be implied-in-fact, not implied- in-law. Merritt v. United States, 267 U.S. 338, 341 (1925); Tree Farm Dev. Corp. v. United States, 218 Ct. Cl. 308, 316, 585 F.2d 493, 498 (1978); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1256 (1970).
5. Cannot be for the performance of covert or secret services; not all “agreements” within Congress' contemplation of contract claims under Tucker Act. Totten v. United States, 92 U.S. 105 (1875); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988).
6. “Grants” which create formal obligations have been found sufficient for jurisdiction even though they do not appear to satisfy all elements necessary for a contract; however, Government bound only by its express undertakings. Missouri Health & Med. Organization v. United States, 226 Ct. Cl. 274 (1981); Thermalon Indust., Ltd. v. United States, 34 Fed. Cl. 411 (1995).

D. Claims Founded Upon Statute Or Regulation.

1. Civilian personnel pay claims: e.g., Equal Pay Act, 5 U.S.C. § 5101; Federal Employment Pay Act, 5 U.S.C. § 5542 et seq.; Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

2. Military personnel pay claims: A service member's status in the armed forces is defined by the statutes and regulations which form the member's right to statutory pay and allowances. Bell v. United States, 366 U.S. 393 (1961).
- E. Claims for Money Unlawfully Exacted Or Retained. Jurisdiction to entertain claim for return of money paid by claimant under protest upon grounds illegally exacted or retained. Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996).
- F. Constitutional Provisions and Statutes That Do Not Waive Sovereign Immunity
1. 1st, 4th, and 5th Amendments (except Takings Clause).
 2. Administrative Procedure Act. Califano v. Sanders, 430 U.S. 99, 107 (1977)
 3. Declaratory Judgment Act (28 U.S.C. § 2201). United States v. King, 395 U.S. 1, 5 (1969).

V. BID PROTESTS AT THE COURT OF FEDERAL CLAIMS

- A. COFC jurisdiction to entertain a bid protest must be “in connection with a procurement.”
1. The Tucker Act, 28 U.S.C. § 1491(b), as amended by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (October 19, 1996), section 12, provides the Court “jurisdiction to render judgment on an action by an interested party objecting to a **solicitation** by a Federal agency for bids or proposals for a proposed contract or a **proposed award** or the **award** of a contract or any **alleged violation of statute or regulation** in connection with a procurement or a proposed procurement.”
 2. This jurisdictional mandate has been broadly construed by the Federal Circuit. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), Weeks Marine, Inc. v. United States, 575 F.3d 1352 (Fed. Cir. 2009), and Resource Conservation Group, LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010).
 3. COFC bid protest jurisdiction includes pre-award and post-award protests.
 - a. Pre-award: protests can challenge such things as: an agency's anticipated contract award to an identified low bidder or apparent successful offeror; requirements in a solicitation; alleged de facto sole source specifications; elimination of an offeror from (or improper inclusion of an offeror in) a competitive range; responsiveness and responsibility determinations; any change or

amendment to a solicitation that is alleged to prejudice the litigant; any purported illegality or regulatory violation within the solicitation process; etc.

- b. Post-award: protests generally can raise the same challenges as a pre-award protest and, in addition, can challenge the award decision. However, “a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action.” Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007). Moreover, post-award, the relief available may be limited, as a practical and equitable matter, if a protest is filed long after award. This does not, however, necessarily make the protest untimely.

4. Relief.

- a. COFC injunctive authority allows Court to issue temporary restraining orders for a maximum of 28 days, a preliminary or permanent injunction, and may award bid and proposal preparation costs if the plaintiff is successful on the merits. PGBA, LLC v. United States, 389 F.3d 1219, 1225-27 (Fed. Cir. 2004). Purely declaratory relief is usually of minimal significance in bid protests. Any coercive order of the court requiring an agency to do, or not do, something in connection with a procurement is treated as injunctive relief and requires weighing the equities. PGBA, 389 F.3d at 1228.
- b. Court’s grant of relief may include ordering the termination of a contract that has been awarded, the court cannot order a contract award to a particular bidder. United Int’l Investig. Servs., Inc. v. United States, 41 Fed. Cl. 312, 323-24 (1998) (citing Hydro Eng’g, Inc. v. United States, 37 Fed. Cl. 448, 461 (1997), and Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970)).

Practice Tip: Pursuant to RCFC 65(c) the Court must have plaintiff post a bond if a TRO/PI is issued. However, the Court has discretion on the amount of the bond, so we have the burden of establishing the amount of damages that will be incurred during the pendency of the injunction. Plan to have a declaration by the contracting officer addressing the costs, and any other harm the agency will suffer, in the event the procurement is enjoined.

5. Override of the automatic stay in CICA.

- a. The Competition in Contract Act (“CICA”), 31 U.S.C. § 3553, requires the agency to suspend performance of the contract during the pendency of the GAO protest. 31 U.S.C. § 3553(d)(3)(A) and (B). However, CICA permits agency to override the stay provision if agency finds in a determination and findings (“D & F”) that continued performance is (1) in the best interests of the United States, or (2) urgent and compelling circumstances that significantly affect interests of the United States will not permit delay. Id. at § 3353(d)(3)(C).
- b. COFC may review. RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1291 (Fed. Cir. 1999); Unisys Corp. v. United States, 2009 WL 5098195 *6 (Fed. Cl. 2009); Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503-04 (2003).
- c. Override decisions are highly scrutinized by the Court. Recent decisions have applied the “arbitrary and capricious” standard rather than those announced in Reilly’s Wholesale Produce v. United States, 73 Fed. Cl. 705 (2006). See PMTech, Inc. v. United States, 95 Fed. Cl. 330 (2010), Planetspace, Inc. v. United States, 86 Fed. Cl. 566 (2009), The Analysis Group, LLC v. United States, 2009 WL 3747171, 3 Fed. Cl. (2009), and Frontline Healthcare Workers Safety Foundation, Ltd. v. United State, 2010 WL 637790, 1, Fed. Cl. (2010).
- d. If your agency is considering an override, contact us before the D & F is finalized.

B. Standard of Review.

1. Limited to Administrative Record.

- a. The scope of the review is limited to the administrative record. Bannum, Inc. v. United States, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005) (the court resolves issues of law and decides all necessary issues of fact based upon the administrative record created before the agency); see also, Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (the proper focus of the court’s scrutiny is the agency’s articulated rationale for the decision, and the administrative record underlying it); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 671 (1997).
- b. RCFC 52.1(b) provides the standard for review of agency action on the basis of the administrative record. See, A & D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126, 131 (2006).

- c. Pursuant to RCFC 52,1(b), the court decides whether “given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.” Id. (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005).
 - d. The plaintiff bears the burden of meeting this standard by a preponderance of the evidence. Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393, 401 (2006).
2. Administrative Procedure Act.
- a. Judicial review of the agency’s actions in a bid protest is not a de novo proceeding.
 - b. In the bid protest context, the Court resolves challenges to agency actions under the standards provided in the Administrative Procedure Act, 5 U.S.C. § 706. *See* 28 U.S.C. § 1491(b)(4) (incorporating by reference Administrative Procedure Act’s standard of review); Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005); Impressa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).
 - c. The Court’s standard of review in bid protests is “highly deferential.” Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057 Fed. Cir. 2000).
 - d. An agency’s contracting decision may be set aside only if it is “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.” The Centech Group, Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009); Impressa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001); *see also*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds by, Califano v. Sanders, 430 U.S. 99 (1977); The Cube Corp. v. United States, 46 Fed. Cl. 368, 374 (2000).
 - e. Pursuant to this standard, the court may set aside a procurement decision upon the protester’s showing that “(1) the procurement official’s decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.” Impressa Costruzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001); Galen Med. Assoc., Inc. v. United States, 369 F.3d 1324, 1329-31 (Fed. Cir. 2004) (decision set aside only if there has been a “clear and prejudicial” violation of law or the agency’s decision lacks a rational basis).
3. Presumption of Regularity.

- a. In evaluating an agency’s decision, the court “is not empowered to substitute its judgment for that of the agency.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (quotations omitted) (“If the court finds a reasonable basis for the agency’s action, the Court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.”)
 - b. An agency’s procurement decisions are entitled to a “presumption of regularity,” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and the Court should not substitute its judgment for that of the agency. Redland Genstar, Inc. v. Untied States, 39 Fed. Cl. 220 (1997); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 672 (1997).
 - c. The disappointed bidder “bears a heavy burden” and the procurement officer is “entitled to exercise discretion upon a broad range of issues confronting [her].” Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).
 - d. This burden “is not met by reliance on [the] pleadings along, or by conclusory allegations and generalities.” Bromley Contracting Co. v. United States, 15 Cl. Ct. 100, 105 (1988); see also Campbell v. United States, 2 Cl. Ct. 247, 249 (1983).
4. Agency Action In Response to GAO Recommendation
- a. Where an agency follows a GAO recommendation, even if the GAO recommendation is different from the initial decision of the contracting officer, the agency’s decision shall be deemed “proper unless the [GAO’s] decision was itself irrational.” Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989); see also The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1039 (Fed. Cir. 2009).
 - b. The Court will only “inquire whether the GAO decision was rational and the agency justifiably relied upon it.” SP Sys., Inc. v. United States, 86 Fed. Cl. 1, 13 (2009) (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647 (Fed. Cir. 1989)).
 - c. GAO decisions are “traditionally treated with a high degree of deference, especially in bid protest actions.” Grunley Walsh Int’l LLC v. United States, 78 Fed. Cl. 35, 39 (2007) (citations omitted).

Even upon the demonstration of a significant error, a protester must still establish that it was prejudiced and that, but for the error, there was a substantial chance that it would have received the award. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (citing Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).

C. Standard for injunctive relief.

1. Four elements:
 - a. Plaintiff is likely to succeed on the merits;
 - b. Plaintiff will suffer irreparable harm;
 - c. Plaintiff's harm outweighs the harm to the government; and
 - d. Public interest favors equitable relief.
2. Only difference in a preliminary and permanent injunction is a plaintiff must show likelihood of success on merits for a preliminary injunction and actual success on the merits for a permanent injunction.
3. In a recent case, Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010), the Supreme Court held that the "drastic and extraordinary remedy" of injunctive relief should not be "granted as a matter of course." Id. at 2761. Importantly, the Supreme Court further held "is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test[.]" Id.

D. The Administrative Record.

1. What is included:
 - a. Appendix C, RCFC, contains the Court's procedures in bid protest proceedings. Paragraph VII of Appendix C provides a fairly comprehensive list of the information that should be included in the record.

Practice tip: Be familiar with the requirements of Appendix C. As soon as you *think* a procurement may result in a COFC protest, begin to compile the material listed in Appendix C for inclusion in the administrative record. The agency is responsible for organizing the documents and providing an index.

- b. The agency should compile the full administrative record that was before it at the time it made the decision under review. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).
- c. The Court should generally have before it the same information that was before the agency when it made its decision. Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 154 (1997).
- d. Thus, the administrative record should consist of the material that the agency developed and considered, directly or indirectly, in making the challenged decision. Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002); Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs., 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Pac. Shores Subdiv., Cal. Water Dist. v. U. S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)); Tafas v. Dudas, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008).
- e. The agency should include all materials that might have influenced its decision, not just the documents upon which it relied. Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (include materials considered or relied upon); Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76 (D. Colo. 2010) (If decision based upon the work of subordinates, include the materials considered by the subordinates).
- f. GAO proceedings – Appendix C ¶ 22 of the Rules of the Court of Federal Claims enlarges the usual scope of an administrative record by including the entire record of a timely protest with the GAO, pursuant to the Competition in Contracting Act, 31 U.S.C. § 3553(d)(3). This can include, among other things, post hoc testimony and evidence.
- g. An agency may not exclude from the administrative record documents that reflect pertinent but unfavorable information. Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

However, the administrative need not include underlying source documents that were not themselves considered by the agency. Sequoia Forestkeeper v. U. S. Forest Serv., No. 09-392, 2010 WL 2464857, at *6 (E.D. Cal. June 12, 2010).

- 2. What is NOT included:

- a. The administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1457-58 (1st Cir. 1992); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) (“Judicial review of agency action should be based on an agency’s stated justifications, not the predecisional process that led up to the final, articulated decision.”).

- b. The general rule is that these documents are not logged as withheld because they are not part of the administrative record. Amfac Resorts LLC v. Dept. of Interior, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) (“deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record”); New York v. Salazar, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) (“as a matter of law, privileged documents are not part of the administrative record”); Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007); *but see* Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76, n.10 (D. Colo. 2010) (requiring privilege log); Miami Nation of Indians of Ind. v. Babbitt, 979 F. Supp. 771, 778 (N.D. Ind. 1996) (requiring the Government to seek a protective order to assert deliberative process privilege).

- c. **Internal memoranda** (e.g., e-mail messages and draft documents) made during the **decisional process** are not included in a record. Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947); *see* San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 45 (D.C. Cir.) (en banc) (“We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions.”), cert. denied, 479 U.S. 923 (1986). There are exceptions to this rule. New York v. Salazar, 701 F. Supp. 2d 224, 238 (N.D.N.Y. 2010) (where decision-making process is itself the subject of the litigation); In re Subpoena Duces Tecum Served on the Office of the Comptroller, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *see also* National Courier Ass’n v. Bd. of Governors, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

- d. EXCEPTION: Internal and deliberative memoranda may be required in an administrative record where a protestor makes an initial showing to support an allegation of bad faith; *i.e.*, when the

Court has determined the plaintiff has made a well-grounded attack upon the decision-making process itself.

3. Supplementation

a. Definitions.

- (1) Supplement. A protester seeks to supplement, or go beyond, the record when the protester moves to include material in the administrative record that was not before the decision maker, *i.e.*, material that does not belong in the record. Supplementing the administrative record with extra-record evidence is different from correcting or completing the administrative record.
- (2) Correct or Amend. A protester seeks to complete, or correct, the record when the protester moves to include in the administrative record material that *should have been* included, but was nonetheless inadvertently omitted.

b. General Rule. Courts generally deny requests to supplement the administrative record.

- (1) Supplementation is not permitted because extra-record or ex-post facts and opinions simply are not relevant to the Court's inquiry. See, e.g., *Emerald Coast Finest Produce, Inc. v. United States*, 76 Fed. Cl. 445, 448-49 (2007) (refusing to add to the record declarations not considered by the agency when making its award decision); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (court considers only those materials that were "before the decision-making authority at the time of its decision."); *Axiom Resource Management, Inc. v. United States*, 564 F.3d 1374, 1379 (2009) (judicial review is generally limited to "the administrative record already in existence, not some new record made initially in the reviewing court"); *L-3 Communications EOTech, Inc. v. United States*, 87 Fed. Cl. 656, 672 (2009) (no "unfettered right to submit declarations giving its commentary on every aspect of the ... process, and to have those declarations included in the administrative record[.]").
- (2) Supplementing the administrative record is "an unusual action that is rarely appropriate." *Weiss v. Kempthorne*, No. 08-1031, 2009 WL 2095997, at *3 (W.D. Mich. July

13, 2009); Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008); Medina Co. Env'tl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010).

c. Supplementation Post-Axiom:

- (1) In Axiom, CAFC reiterated the restrictive approach to supplementing the administrative record.²
- (2) Supplementation of the administrative record is **available only** when “the omission of extra-record evidence precludes **effective judicial review**.” Axiom, 564 F.3d at 1379; see also Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), aff'd, 398 F.3d 1342 (Fed. Cir. 2005) (“exceptions to the general rule against extra-record evidence are based on necessity, rather than convenience, and should be triggered only where the omission of extra-record evidence precludes effective judicial review.”)
- (3) Allowing supplementation of the record, without first evaluating whether the record is sufficient to permit meaningful review is an abuse of discretion. Axiom, 564 F.3d at 1380 (“the trial court abused its discretion in this case” by failing “to make the required threshold determination of whether additional evidence was necessary.”)
- (4) Therefore, before any supplementation is allowed, the Court first makes a threshold determination of “whether supplementation of the record [is] necessary in order not ‘to frustrate effective judicial review.’” Axiom, 564 F.3d at 1379 (quoting Camp v. Pitts, 411 U.S. 138, 142-43 (1973)).

E. What to Expect After Protest Is Filed.

1. Process starts with 24 hour advance notice filed by plaintiff.

² Before Axiom, this court “frequently . . . adopted and applied [eight] exceptions to the review of outside evidence” based on the District of Columbia Circuit’s decision in Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 234 (2007). In Axiom, the Federal Circuit repudiated the Esch factors and described a far more restrictive approach to supplementation. 564 F.3d at 1380.

- a. Appendix C, ¶ 3, RCFC, requires plaintiff to file a 24-hour notice with our office that identifies the procuring agency, contact information for the contracting officer and agency counsel, whether plaintiff is seeking a TRO or preliminary injunction (“TRO/PI”), whether plaintiff has discussed the TRO/PI with our office, whether there was a GAO protest, and whether a protective order will be needed.
- a. Failure to file 24-hour notice is not a jurisdictional defect.
2. Upon receipt of the 24-hour notice, the case is assigned to a DOJ trial attorney, who will contact the contracting officer and agency counsel directly prior to filing a notice of appearance (“NOA”) with COFC.
3. This is time-sensitive matter and COFC will act with a sense of urgency and hold a scheduling teleconference for either the same day or the day after the NOA is filed.
 - a. Agency counsel and, in some cases, the contracting officer, should expect to participate in the initial teleconference.
 - b. Court typically concerned with:
 - (1) Addressing TRO/PI if raised by plaintiff (will agency voluntarily stay proceedings?);
 - (2) Status of the procurement (pre or post award?);
 - (3) Determining if there will be an intervenor;
 - (4) Setting a briefing schedule, which includes filing of the administrative record; and
 - (5) Did protester initially file at the GAO?

Practice Tip: If there was a GAO protest, please send the legal memorandum and contracting officer statement directly to the assigned trial attorney as soon as possible to expedite the learning curve.

F. Protective Orders:

1. Order limiting the disclosure of source selection, proprietary, and other protected information to those persons admitted to that order. The order also governs how such information is to be identified and disposed of

when the case is over. The COFC regularly issues these orders, although in at least one case, the COFC denied the request of the government and the apparent awardee to issue a protective order and ordered the release of the government's evaluation documentation relating to the protester's proposal to the protester. See Pike's Peak Family Housing, Inc. v. United States, 40 Fed. Cl. 673 (1998).

2. Once the order is issued, one gets admitted to the order by submitting an appropriate application. Form 8 of the RCFC Appendix contains a model protective order and Form 9 of the RCFC Appendix is a model application for access by outside counsel, inside counsel, and outside experts.
3. Ordinarily, objections must be made within 2 business days of receipt of a given application. If no objections are made within 2 business days, the applicant is automatically admitted to the protective order.
4. COFC, DOJ, and agency personnel are automatically admitted.
5. Most judges request or accept proposed redactions from court orders and opinions and decide what protected information to redact. See, e.g., WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750 n.1 (1998). Recently, COFC has scrutinized proposed redactions closely. See, e.g., Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009).

VI. THE CONTRACT DISPUTES ACT OF 1978. 41 U.S.C. §§ 7101-7109.

A. Applicability.

1. 41 U.S.C. § 7102.
2. The CDA applies to all express or implied contracts an executive agency enters into for:
 - a. The procurement of property, other than real property in being;
 - b. The procurement of services;
 - c. The procurement of construction, alteration, repair or maintenance of real property; or

- d. The disposal of personal property.
3. It has been the law that the CDA does not normally apply to contracts funded solely with nonappropriated funds (NAFs), with the exception of contracts with the exchanges listed in the Tucker Act. 41 U.S.C. § 7102(a); 28 U.S.C. 1491(a)(1). Recently, however, the Federal Circuit has held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).
- B. Jurisdictional prerequisites:
1. Contractor has submitted a proper claim to the contracting officer, or
 2. The Government has submitted a proper claim (e.g., termination, LDs, demand for money).
 3. The contracting officer has issued a final decision, or is deemed by inaction to have denied the claim. Tri-Central, Inc. v. United States, 230 Ct. Cl. 842, 845 (1982); Paragon Energy Corp. v. United States, 227 Ct. Cl. 176 (1981).
 4. The COFC considers the case de novo. 41 U.S.C. § 7104(b)(4). A contracting officer's findings are not binding on the Court, or the Government, nor are omissions by the contracting officer. Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir.1994). Thus, so long as the information was available to the Government, the COFC may consider it in reviewing the contracting officer's decision. For example, a termination for default may be sustained at the COFC upon any ground existing at the time of termination, even one not then known to the contracting officer. See Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir. 2004).
 5. The CDA is a waiver of sovereign immunity for the payment of interest. Interest accrues from the date the contracting officer receives the claim until the contractor receives its money.
 6. Not limited to monetary damages.
 - a. COFC possesses jurisdiction to render judgments in "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued" pursuant to the CDA. 28 U.S.C.A. § 1491(a).
 - b. In recent years, COFC has used this authority to review questions of contract administration, such as performance evaluations. See

Todd Const. L.P. v. United States, 85 Fed. Cl. 34 (2008), 94 Fed. Cl. 100 (2010); BLR Group of America, Inc. v. United States, 84 Fed. Cl. 634 (2008).

7. Subcontractors:

- a. Generally cannot directly bring a CDA challenge, because there is no privity of contract with the United States, unless the prime contractor is a “mere government agent.” United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550-51 (Fed. Cir. 1983).
- b. While subcontractors that were third-party beneficiaries of the contract between the Government and the prime contractor cannot proceed under the CDA, they may bring a similar claim in COFC under the Tucker Act. Winter v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009).

Sureties: CDA or Equitable Subrogation. National Surety v. United States, 118 F.3d 1543 (Fed. Cir. 1997); Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990).

C. Statute of Limitations.

1. For contracts awarded on or after October 1, 1995, a contractor must submit its claim within six years of the date the claim accrues. 41 U.S.C. § 7103(a)(4). This statute of limitations provision does not apply to Government claims based on contractor claims involving fraud.
2. Complaint filing. The contractor must file its complaint in the COFC within 12 months of the date it received the contracting officer’s final decision. 41 U.S.C. § 7104(b)(3). See Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991).
3. Reconsideration by the Contracting Officer. A timely request made to the contracting officer for reconsideration of a decision, that results in an actual reconsideration, suspends the “finality” of the decision, and provides a new statute of limitations period. See Bookman v. United States, 197 Ct. Cl. 108, 112 (1972).
4. “Deemed Denied.” No statute of limitations?
 - a. Under the CDA, upon receipt of a written claim from a contractor, a contracting officer must issue a final decision within sixty days. 41 U.S.C. § 7103(f). If the Contracting Officer fails to issue a decision within the requisite time period, the claim may be deemed denied. 41 U.S.C. § 7103(f)(5).

- b. If no decision is issued, the Court of Federal Claims has held that CDA's one-year statute of limitations does not begin to run and the Tucker Act's six year statute of limitations does not apply, because the claim remains a CDA claim. See Environmental Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77 (2010); System Planning v. United States, 95 Fed. Cl. 1 (2010).

D. Consolidation of Suits.

If two or more actions arising from one contract are filed in COFC and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, COFC may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved. 41 U.S.C. § 7107(d).

E. Relationship Between COFC and the Boards

1. 41 U.S.C. §§ 7104(a),(b)(1).
2. The CDA provides alternative forums for challenging a contracting officer's final decision.
3. Once a contractor files its appeal with a particular forum, this election is normally binding and the contractor may no longer pursue its claim in the other forum. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).
4. The "election doctrine" does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. See Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989) (holding that the contractor's untimely appeal to the Agriculture Board of Contract Appeals did not preclude it from pursuing a timely suit in the Claims Court).
5. Decisions of the boards of contract appeals are not binding upon the COFC. See General Electric Co., Aerospace Group v. United States, 929 F.2d 679, 682 (Fed. Cir. 1991).

VII. CONCLUSION.

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