

## CAN YOU “APPEAL” A BID PROTEST DECISION OF THE GAO?

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Our readers are aware that many disappointed bidders submit their initial bid protest to the GAO, but if they lose, they can take their case to the Court of Federal Claims (“COFC”). But is this an appeal? The short answer is “no,” because the GAO is not a court nor are its decisions statutorily appealable, but a little background is helpful in understanding the questions.

### Who is the Comptroller General?

The Comptroller General of the United States is the director of the Government Accountability Office (“GAO,” formerly, the “General Accounting Office” but renamed in 2004), an investigative arm of Congress that examines all matters relating to the receipt, disbursement, and use of public funds. Established by the Budget and Accounting Act of 1921 (31 U.S.C. §§ 701, et seq.) the GAO audits government agencies. The GAO is an independent agency within the Legislative Branch. *Bowsher v. Synar*, 478 U.S. 714, 731 (U.S. 1986). The GAO also performs an important bid protest function.

### What is the Comptroller General’s authority with respect to bid protests?

In the early days, GAO had no explicit authority to adjudicate bid protests. It began to hear protests from disappointed bidders, and one of the earliest cases was 10 Comp. Gen 480. A-36067 (1931), where the GAO asserted that its bid-protest adjudication stemmed from its “settlement powers,” statutes authorizing it to settle and adjust the accounts of accountable officers and to render decisions on the legality of payments. Only in 1984, with the passage of the Competition in Contracting Act (“CICA”), was GAO given specific authority to hear bid protests. 31 USC §§ 3551 et seq.

CICA’s crucial section states:

(b) (1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency--

(A) refrain from exercising any of its options under the contract;

(B) recompute the contract immediately;

[setting forth other recommendations possible]

(H) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

□

(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period. 31 USC § 3554

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Therefore, the Comptroller General can only make *recommendations*, which agencies must follow or report their failure to follow. These decisions are only recommendations, and are not authorized by law to be appealed.

### What is the COFC's Authority to Decide Bid Protests and how does it decide them?

The COFC has separate and independent statutory authority under 28 U.S.C. § 1491(b)(1) to hear protests in connection with a procurement of a federal agency, i.e. bid protests. COFC does not perform an appellate review process. Some protests are docketed at the COFC *without ever going to the GAO, and some are docketed after GAO has issued a decision on the same or similar protest.*

The COFC reviews bid protests to see if the agency's procurement decision was reasonable, and the agency justifiably relied on it. If there is a GAO decision, it becomes part of the administrative record that the COFC reviews (under the Administrative Procedures Act).

The COFC realizes that because of its expertise in procurement matters, a GAO decision can be quite helpful, but it is not dispositive. A GAO decision does not bind the COFC, and is merely an advisory opinion that is not controlling on the parties or binding on this court.

A recent COFC decision, *Innovative Management Concepts, Inc.*, No. 14-100C (COFC Feb. 6, 2014) is an example of a protester's mistake in this area. The protester requested that the COFC rule that the GAO decision in a prior bid protest lacked a rational basis and violated the Administrative Procedure Act. The COFC noted that it was "not bound by a GAO advisory opinion nor does it review GAO decisions for clear error." However, the court noted that it [likely] may have jurisdiction over a bid protest complaint that alleged the Source Selection Authority's decision was unlawful or otherwise violated the Administrative Procedure Act, but this complaint never made that allegation, and was therefore dismissed. .

### Can COFC decisions be appealed?

COFC bid protest decisions are appealable to the Court of Appeals for the Federal Circuit, just like any other decision of the COFC on other subject matter areas.

#### Tip

You should treat the COFC separately and independently from the GAO. Any prior GAO decisions must be mentioned, and explained, distinguished or urged upon the court as rational. But recognize that the COFC will perform its own review.