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FEATURE COMMENT • Has The Court Of Federal Claims Changed Bid Protests?

Starting in 1997, the Court of Federal Claims has exercised jurisdiction over both pre- and post-award bid protests, concurrent with the jurisdiction of the General Accounting Office (see 38 GC ¶ 465). A review of the statistics covering the first year of the Court's new bid protest jurisdiction and the latest year of protests at GAO shows that the chances of succeeding at both forums are considerably different. Specifically, while the sustain rate for protests at GAO remains where it has been historically, the sustain rate at the Court for postaward protests is significantly higher than GAO's overall rate, and somewhat higher than the Court's rate for pre-award protests in previous years. However, the number of postaward protests at the Court is small, and these results, while striking, may not indicate a future trend.

This FEATURE COMMENT analyzes the variations between the two forums. It concludes that apart from the varying success rates, there have been only moderate changes over the past year in bid protest jurisprudence. Many of the Court's decisions have been consistent with GAO principles and rules. The COMMENT addresses the most significant changes, which involve the Court of Federal Claims' granting additional discovery beyond the written administrative record, and holding hearings and oral arguments, which are rare in protests before GAO. It then suggests that the increased use of these tools for gaining information could affect the outcome of protests.

Court Has Three Times GAO Sustain Rate— In 1997, GAO sustained 12% of all its merit protests, while the Court of Federal Claims sustained 36% of its postaward protests. The accompanying chart compares GAO's most recent five-year protest history with 1997 postaward protests at the Court of Federal Claims.

GAO: Fiscal Year 1997 was a typical year for GAO in its disposition of "merit protests" (protests where GAO issues a written decision on the merits). In that year, GAO closed 1,834 protests. Of these, 501 were merit protests. Of the merit protests, 12% (61 protests) were sustained, while 88% (440 protests) were denied by GAO. The percentage of sustained protests at GAO is relatively constant during the entire five-year period, and is similar to all years since enactment of the Competition in Contracting Act of 1984.

GAO's "protester effectiveness rating"—which tabulates all cases sustained by GAO as well as those where GAO believed some corrective action was taken by the agency—also has remained relatively constant. This rate, which includes an estimate of how many protesters received some form of relief in cases where neither the protester nor the agency reported the reason for disposition, was 39% in FY 1997, a slight drop from the 40% figure in FY 1996. The FY 1997 rate for cases in which some form of relief actually was reported to GAO was 22%, while the FY 1996 rate was 25%.

Last year was notable for GAO's successful use of ADR. In FY 1997, ADR was used in 90 cases; 77 of the cases were resolved without a GAO decision. In 36% (32 protests) of these cases, the agency took corrective action.

An increase in information technology protests also was noted at GAO last year, undoubtedly caused by the elimination of the General Services Administration Board of Contract Appeals as an IT bid protest forum (see 38 GC ¶ 69). In FY 1997, 167 IT protests were closed, of which 68 were merit protests. Fifteen percent (10) of the merit protests were sustained; the other 58 were denied. This compares with FY 1996, during which 123 IT protests were closed (31 of those were merit protests). Thirteen percent (four) of the merit protests were sustained, and the other 87% (27 protests) were denied. (See 40 GC ¶ 41 for a further discussion of GAO's statistics for 1997.)

Court of Federal Claims: As shown in the accompanying chart, the Court sustained 36% of all postaward protests on which it issued a reported decision. Reported decisions at the Court of Federal Claims are equivalent to "merit protests" at GAO; that is, the Court has fully developed the case and published a decision. The sustain rate for postaward protests at the Court in calendar year 1997 was three times the sustain rate at GAO for all decisions.

A total of 17 postaward protests were closed at the Court during 1997 (out of 28 cases initially

Comparison Of General Accounting Office And Court Of Federal Claims Protest Statistics

	GAO (all protests)					COFC (postaward)
	FY 93	FY 94	FY 95	FY 96	FY 97	CY 97
Initial Cases Closed[1]	3,219	2,669	2,528	2,161	1,834	17
Merit Protests: Total	805	716	709	572	501	11
–Sustained	100	79	75	73	61	4
–Denied	705	637	634	499	440	7
Percent Merit Sustained	12%	11%	11%	13%	12%	36%
Overall "Protester Effectiveness Rate"[2]	43%	43%	42%	40%	39%	
–Cases where relief was reported	N/A	N/A	N/A	25%	22%	
Cases Using ADR	N/A	N/A	N/A	N/A	90	
–Resolved without GAO decision	N/A	N/A	N/A	N/A	77	
–Agency took corrective action	N/A	N/A	N/A	N/A	32	
IT Protests Closed	N/A	N/A	N/A	123	167	
IT Merit Protests	N/A	N/A	N/A	31	68	
–IT Merit Protests Sustained	N/A	N/A	N/A	4	10	
–IT Merit Protests Denied	N/A	N/A	N/A	27	58	
Percent IT Merit Sustained	N/A	N/A	N/A	13%	15%	

Sources: GAO Annual Report to the Congress Pursuant to the Competition in Contracting Act of 1984, 31 USC § 3554(e)(2); Clerk, Court of Federal Claims

NOTES: 1. Initial cases closed excludes requests for consideration at the GAO
2. Protester Effectiveness Rate includes all cases sustained by GAO as well as those where GAO believed some corrective action was taken by the agency

filed). Six of these 17 cases were closed without a reported opinion, while in 11 cases, the Court issued a written opinion. (In two cases a separate opinion was written on injunctive relief and on the merits, but for purposes of this COMMENT, they are treated as one and the same case). The Court sustained 36% (four) of these merit protests, and denied 64% (seven protests). (See 40 GC ¶ 31 for a further discussion of the Court's statistics for 1997.)

Court vs. GAO (Similarities and Differences)—The substantially greater sustain rate at the Court (36% compared with 12% at GAO) most likely is not due to the two forums applying different principles, since the decisions reveal that the Court has adopted many of the same general principles of bid protest law that GAO has used for many years. Instead, it could be a result of the small number of Court cases actually considered and reported, or simply an anomaly. As more cases are filed at the Court, there will be a larger pool and a larger time period from which to draw conclusions. The differences in sustain rates also could be due to the fact that the Court grants more discovery, oral arguments, and hearings than GAO has ever granted, notwithstanding the fact that both the Court and GAO are required to rely on an administrative record.

Following GAO Principles: During the initial year of its new jurisdiction, the Court endorsed many similar principles and rules applied by GAO. For example, the Court acknowledged it had jurisdiction to consider allegations that an agency had issued modifications that were outside the scope of a contract, and refused to dismiss the protest as solely a matter of alleged contract administration. *CCL, Inc. v. U.S.*, 16 FPD ¶ 156 (Fed. Cl. 1997), 40 GC ¶ 60.

Also like GAO, the Court adopted similar notions of standing, for example, by holding in *ATA Defense Industries, Inc. v. U.S.*, 16 FPD ¶ 82, 38 Fed. Cl. 489 (1997), that regardless of whether it brings the protest before or after award, a prospective bidder is an interested party. Furthermore, the Court last year held that where a contractor claims that the Government violated CICA by refusing to hold a competitive procurement, a plaintiff has standing to bring a protest if it shows it likely would have competed if there had been a competition. *CCL, Inc. v. U.S., supra*. Finally, in two cases, *Allied Technology Group, Inc. v. U.S.*, 16 FPD ¶ 113, 39 Fed. Cl. 125 (1997) and *CC Distributors, Inc. v. U.S.*, 16 FPD ¶ 109, 38 Fed. Cl. 771 (1997), the Court held that any objections to matters on the face of a solicitation must be raised prior to submission of proposals. All of these holdings are consistent with a long line of GAO cases.

Prior GAO Activity: The Court has considered numerous cases where there was prior GAO activity; there were prior GAO protests in seven of the 11 reported Court cases. In four of these cases, the protest grounds at both GAO and the Court were similar. They are: *Cubic Applications, Inc. v. U.S.*, 16 FPD ¶ 10, 37 Fed. Cl. 339 (1997), 39 GC ¶ 57, and 16 FPD ¶ 28, 37 Fed. Cl. 345 (1997), 39 GC ¶ 106; *Cincom Systems, Inc. v. U.S.*, 16 FPD ¶ 46, 37 Fed. Cl. 663 (1997), 39 GC ¶ 442 (Note); *Analytical & Research Technology, Inc. v. U.S.*, 16 FPD ¶ 119, 39 Fed. Cl. 34 (1997); and *Lyons Security Services v. U.S.*, 16 FPD ¶ 118, 38 Fed. Cl. 783 (1997). In three cases (*Cubic Applications, Cincom Systems*, and *Analytical & Research Technology*), both GAO and the Court denied the protests. The Court explicitly rejected GAO's decision in only one case, *Lyons Security*, and sustained a protest that had been denied by GAO. In two cases, GAO dismissed the cases on procedural grounds (*ATA Defense Industries* and *CC Distributors*), never reaching the merits. In one case, *Graphicdata v. U.S.*, 16 FPD ¶ 54, 37 Fed. Cl. 771 (1997), 39 GC ¶ 442, the same procurement had been protested at GAO on numerous grounds by both the protester and the interested party; however, the protest at the Court was based on an issue different from any of the prior protests. Although the Court is not an appellate forum for disappointed protesters at GAO, it appears to have served in that capacity at times during 1997.

Court More Liberal with Evidence Presentation: Compared to GAO, the Court of Federal Claims has taken a more liberal approach in terms of what evidence it will consider in reviewing source selection decisions. The Court, which must apply the standards set out by the Administrative Procedure Act, 5 USC §§ 701-706, bases its inquiry on an examination of the "whole record" before the agency. That is, it reviews all the material that was developed and considered by the agency in making its decision. *Cubic Applications*, 37 Fed. Cl. at 342, citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

In contrast, at GAO the precise documents that the agency is required to produce are clearly laid out. The agency must produce "all relevant documents" including the bid or proposal submitted by the protester, the bid or proposal of the firm which is being considered for award or whose bid or proposal is being protested, all evaluation documents, the solicitation (including the specification), and the abstract of bids or offers. 4 CFR § 21.3(d) (1997).

The Court has been willing to go beyond the administrative record to include "extra-record" evidence in limited situations. These situations were identified in the first reported postaward protest, *Cubic Applications, supra*. The Court in that case adopted the standards identified in *Esch v. Yeutter*, 876 F. 2d 976 (D.C. Cir. 1989), and stated that "extra-record" evidence would be permitted under the following circumstances:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising using the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

The Court in *Cubic Applications* agreed to include the entire GAO "record," including the

post-protest statements of various selection officials, as part of the administrative record. However, the Court stated it would view post-decisional materials not as evidence, but as argument. The Court similarly treated the protester and intervenor's comments and attached statements as part of the record, but noted that none of them had evidentiary weight under the *Esch* exceptions.

The Court also has permitted the parties to take depositions, such as the deposition of the Contracting Officer which was ordered in *Cubic Applications*. Such depositions are not permitted by GAO's protest rules. The Court has also permitted other discovery, such as was afforded to the protester in *Delbert Wheeler Const., Inc. v. U.S.*, 16 FPD ¶ 129, 39 Fed. Cl. 239 (1997) although the specific type of discovery was not described in the opinion.

Another significant difference between the two forums is the opportunity for hearing and oral argument at the Court of Federal Claims. The Court has given protesters an opportunity for one or more hearings and oral arguments in nearly all of its reported postaward protests. The cases reported the following: *CCL, Inc., supra* (oral argument); *Day & Zimmerman Services, supra* (five-day hearing including receipt of extensive evidence); *Lyons Security Services, supra* (no hearing or oral argument mentioned; apparently decided on the record); *ATA Defense Industries, supra* (hearing, including testimony from the CO); *Cubic Applications, supra* (hearing and oral argument); *Cincom Systems, supra* (oral argument); *Allied Technology Group, supra* (no hearing or oral argument mentioned; apparently decided on the record); *Graphicdata, supra* (hearings and oral argument); *Analytical & Research Technology, supra* (oral argument but no hearing; Court quoted from GAO hearing held on the same matter); *Delbert Wheeler, supra* (oral argument); and *CC Distributors, supra* (no hearing; apparently decided on the record).

GAO's rules, on the other hand, do not permit oral argument, but require written submissions. Although GAO does permit hearings, they are infrequent and seldom mentioned in the GAO decisions.

The opportunity for oral argument and hearings (including the examination of COs) may account for the higher sustain rate of protests at the Court compared to GAO. The additional information may reveal more problems in the procurements. At a minimum, protesters probably believe their objections are being given more careful consideration and evaluation than the more record-oriented approach taken by GAO.

Conclusion—In its postaward cases during 1997, the first year the Court of Federal Claims exercised its new jurisdiction, the Court adopted several significant rules and guidelines that have been used for many years by GAO. The Court also adopted the *Esch v. Yeutter* standard on supplementation of the record, and actually followed this principle by allowing depositions, document production, and testimony, as it deemed appropriate. This stands in contrast to GAO, which allows no depositions, holds few hearings, but does permit protesters to request additional documents. The Court's significantly higher sustain rate—36% compared to GAO's 12%—may relate to the greater opportunity at the Court for depositions, hearings, and oral argument. As the Court decides more postaward protests, experience will bear out whether the Court is a more favorable forum for protesters.

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Lockheed Martin Leads DOD's Top 100 Contractors List For Third Straight Year

Lockheed Martin Corp. has been ranked the largest U.S. defense contractor in Fiscal Year 1997, maintaining its number-one ranking for three consecutive years. The ranking appears in the Department of Defense's latest annual report, *100 Companies Receiving the Largest Dollar Volume of Prime Contract Awards*. For a description of last year's rankings, see 39 GC ¶ 263.

As a result of acquiring McDonnell Douglas Corp. last year, The Boeing Co. leaped from eighth