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## BID PROTESTS AT THE COURT OF FEDERAL CLAIMS AND THE GENERAL ACCOUNTING OFFICE:

### A Comparison

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#### INTRODUCTION

One of the most important developments in bid protests in 1996 was the expansion of the jurisdiction of the Court of Federal Claims ("COFC")<sup>1</sup> to include post-award bid protests in addition to its previous jurisdiction over pre-award bid protests. The COFC could become a forum of choice, diverting significant numbers of bid protests from the General Accounting Office ("GAO"), which has historically considered more bid protests than all other forums combined. This may be the case for practitioners seeking a forum that is more sympathetic to protesters. The historical outcomes data in these two forums indicate that protesters were twice as likely to be granted relief, i.e., have their protests sustained or obtain procedural relief, at the COFC when compared to protesters at the GAO. Potential protesters should consider these data, along with other important factors (cost, discovery options, availability of "automatic stays" to stop award or performance, and differences in rules) when determining which of the two forums is most appropriate for them.<sup>2</sup>

#### I. Developments in Protest Forums in 1996

During 1996, there were at least six important legislative and regulatory developments in bid protests, including a change in the number of forums available. At present there are four forums which have jurisdiction to adjudicate bid protests: the agency, the GAO, the COFC, and the U.S. district courts. Changes in the number, jurisdiction and operations of the forums within the past year were significant, as summarized below.

(1) The jurisdiction of the General Services Board of Contract Appeals ("GSBCA") to consider information technology ("IT" — computers, software and related services) protests was eliminated. Clinger-Cohen (formerly Federal Acquisition Reform) Act of 1996 ("FARA"), PL 104-106, § 5602, 110 Stat. 679 (1996). FARA repealed 40 USC § 759 (the "Brooks Act"), which granted jurisdiction to the GSBCA.

(2) The jurisdiction of the COFC was expanded as of Jan. 1, 1997 to include post-award bid protests as well as its previous jurisdiction to consider only pre-award protests. The standard of review for all bid protests ("arbitrary and capricious") was designated as that set forth in 5 USC § 706, (the Administrative Procedure Act).<sup>3</sup> District courts considering bid protest actions were also ordered to use this same standard of review. Administrative Dispute Resolution Act of 1996 ("ADRA"), PL 104-320, § 12, 110 Stat. 3870 (1996).

(3) The President issued Executive Order 12988 on Feb. 5, 1996, 61 Fed. Reg. 4729. This Executive Order sought to significantly improve the agency level protest process by permitting protesters to request that a Contracting Officer's ("CO") adverse decision be reviewed by the CO's supervisor rather than by the CO personally.

(4) The GAO's statutory time limit for issuing its written decision on a protest was reduced

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from 125 days to 100 days. FARA § 5501. There also was a reduction from 35 days to 30 days in the amount of time agencies were given to submit their report on each GAO protest. *Id.* 4 CFR § 21. 61 Fed. Reg. 39039 (July 26, 1996). GAO's jurisdiction to consider all pre-award and post-award bid protests remained unchanged. 31 USC §§ 3551-3556.

(5) The jurisdiction of the United States district courts to consider both pre- and post-award bid protests under the doctrine of *Scanwell Laboratories Inc. v. Shaffer*, 424 F.2d 859 (CA DC 1970) was explicitly made concurrent with the jurisdiction of the COFC.<sup>4</sup> This jurisdiction of the district courts, however, was set by law to end on Jan. 1, 2001, unless Congress affirmatively extends the jurisdiction by legislation. ADRA § 12(a).

(6) The GAO was ordered to study whether concurrent bid protest jurisdiction between the COFC and the district courts was necessary, and to report no later than Dec. 31, 1999. ADRA § 12(c).

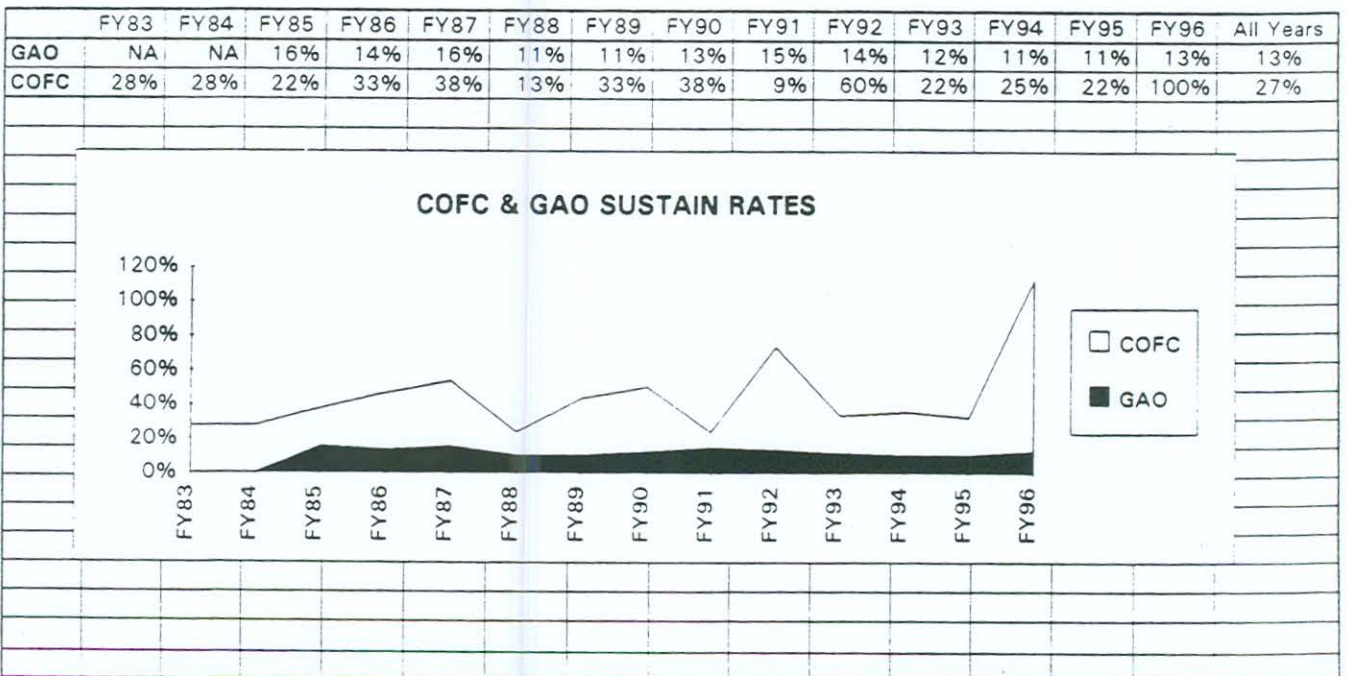
From a practitioner's standpoint, the first development (the elimination of GSBICA bid protest jurisdiction) and the second (the expansion of COFC jurisdiction) are probably the most significant because the GSBICA had the highest "sustain rate" of all bid protest forums, including the GAO, district courts and the COFC. The "sustain rate" is the percentage of protests in any year where the forum grants relief

to the protester. In the courts, it includes not protests sustained on their merits, but those where protester wins a significant procedural ruling, such as the granting of a temporary restraining order, preliminary injunction, or the denial of a government motion for summary judgment.

For many years, the GAO has had the lowest sustain rate of all the government-wide forums. R. Lieberman, "Scorekeeping Bid Protests in Forums," 63 Fed. Cont. Rep. Supp. (BNA) 1 (1/27, 1995) ("1995 Scorekeeping Article"). With loss of the GSBICA's bid protest jurisdiction, protesters will probably desire to find other forums which may be more receptive to their allegations than GAO, assuming they are willing to forgo the relative simplicity and low cost of a GAO protest. The COFC may provide at least a partial answer and a more receptive—although at a likely higher cost—bid protest forum than the GAO.

This article does not analyze agency protests (which are generally considered to be heavily weighted in the agency's favor because of agency predilections to sustain their own prior decisions), or district court *Scanwell* actions, which have been studied in the past and will be studied again by the GAO pursuant to the ADRA requirement set forth above. Rather, this article summarizes the last 14 years of pre-award bid protests at the COFC and compares the outcomes with those at the GAO since the enactment of the Competition in Contracting Act of 1984 ("CICA"), 41 USC § 253, *et seq.*, PL 98-369, Title VII, 98 Stat. 1175 (1994). It discusses categories of

CHART 1 - PROTEST SUSTAIN RATES AT THE COURT OF FEDERAL CLAIMS AND THE GAO



protests at both forums, presents the statistical outcomes, and explains the significant data limitations. It also compares the rules for consideration of protests by both forums.

**II. Historical Summary**

**A. Sustain Rate Trend Since 1983 At the COFC and the GAO**

The first chart shows the published sustain rate at the COFC since 1983, when the COFC first obtained jurisdiction over pre-award bid protests only, and the sustain rate at the GAO since FY 1985, after CICA was enacted. The COFC sustained an average of 27 percent of all protests, while the GAO sustained an average of 13 percent. Thus, protesters at the COFC were approximately twice as likely to obtain some relief than protesters at the GAO, within the limitations of these data as explained below.

(See Chart 1)

**B. Reported Protest History at the GAO Since 1985**

The reported protest history at the GAO is shown in the second chart. The GAO receives approximately 2,600 protests per year, of which fewer than one-third are actually adjudicated. Those adjudicated are known as "merit protests" and become the subject of a formal reported GAO decision. The balance are withdrawn, dismissed or summarily denied. The pro-

test sustain rate, which is based only on report decisions, was 13 percent between 1985 and 1996. The GAO also reports a "protester effectiveness rate." This is the percentage of protests either sustained or where GAO believed the agency took some corrective action. Finally it should be noted that if the number of sustained protests were compared to the total number of protests filed, the sustain rate would decline to 4 percent at the GAO.

(See Chart 2)

**C. Reported Protest History at the COFC Since 1983**

The published protest history at the COFC since 1983 is shown on the third chart. The COFC received approximately 25 protests per year between 1983-1996, all of which were pre-award protests because of the COFC's limited jurisdiction during that period. Approximately one half of these protests became the subject of formal opinions in the COFC and Claims Court reporters. During these years, the published protest sustain rate at the COFC was 27 percent. If the number of sustained protests were compared to the total number of protests filed, the sustain rate would drop to 15 percent at the COFC, or approximately four times greater than the similarly calculated sustain rate at the GAO.

(See Chart 3)

**CHART 2 - REPORTED PROTEST HISTORY AT THE GENERAL ACCOUNTING OFFICE**

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96	FY 85-96
Initial Cases Closed 1/	2,370	2,520	2,624	2,573	2,653	2,507	2,805	2,875	3,219	2,669	2,528	2,161	31,504
Merit Protests: Total	657	731	786	834	860	856	799	824	805	716	709	572	9,149
--Sustained	106	101	122	90	90	115	116	119	100	79	75	73	1,186
--Denied	551	630	664	744	770	741	683	705	705	637	634	499	7,963
Per Cent Merit													
Protests Sustained	16%	14%	16%	11%	10%	13%	15%	14%	12%	11%	11%	13%	13%
Overall "Protester Effectiveness Rate" 2/	19%	24%	25%	22%	25%	35%	29%	34%	43%	43%	42%	40%	32%
Source: GAO Annual Reports to the Congress pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. 3554(e)(2) (1988).													
NOTES:													
1/ Initial cases closed excludes requests for reconsideration.													
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.													

CHART 3 - PUBLISHED PROTEST HISTORY AT THE COURT OF FEDERAL CLAIMS/CLAIMS COURT

	FY83	FY84	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY95	FY96	FY83-96
Cases Filed	63	39	35	17	18	7	23	19	17	22	20	13	12	18	323
Cases Reported -total	39	36	23	6	13	8	6	8	11	5	9	8	9	1	182
--Sustained/pro. relief	11	10	4	2	5	1	2	3	1	3	2	2	2	1	49
--Denied	28	26	17	4	8	7	4	5	10	2	7	6	7	0	131
Per Cent Sustain/relief	28%	28%	17%	33%	38%	13%	33%	38%	9%	60%	22%	25%	22%	100%	27%
Source: Clerk, Court of Federal Claims; Court of Federal Claims Reporter, Claims Court Reporter															

### D. Data Limitations

The data in both forums have certain limitations. At the GAO, it is possible to determine with precision how many protests were filed, "developed" and adjudicated (i.e., where the GAO issued a written decision) and how many were sustained and denied. It is not possible to verify or audit the "protester effectiveness rate" because it is an estimate, and the GAO does not release actual data supporting the figure.

Data for the COFC is readily available in two places: (1) the Clerk's office, which keeps track of the number of bid protest cases filed and disposed of each year; and (2) the COFC and the Claims Court reporters, which publish the actual decisions. It would be time-consuming to obtain the *unpublished* dispositions of the COFC cases, and impossible in many cases to determine exactly why a case was dismissed. The lack of the unpublished dispositions makes it impossible to achieve the same level of statistical certainty that exists with the GAO data.

However, the number of bid protests filed at COFC is maintained by the Clerk of the Court, and this is analogous to the total number of initial cases closed at the GAO. That is, both represent the number of protesters who initially seek to use the forum. The GAO figures on "merit protests" represent the total number of *published* decisions. This figure *excludes* all those whose protests were summarily dismissed, summarily denied or who withdrew their protest for whatever reason (either because relief was granted or the protester chose not to pursue it). The GAO's figure of "merit protests" is comparable to the number of COFC protests published in the official reporter. Therefore, even though there are some limitations in the data, both the GAO and the COFC statistics show how many protesters initially sought to use the forum and how many remained there for a published decision on the merits. Thus, there is a reasonable comparability between the sustain rates in both forums.

The most significant difference between the GAO and the COFC statistics is that all "sustains" in the

GAO figures are true sustains, where the protester was adjudicated to have demonstrated at least one prejudicial violation of law or regulation. The COFC "sustains" include all cases where the protester was adjudicated to have demonstrated a prejudicial violation of law or regulation, as well as procedural victories for the protester where the court granted a temporary restraining order ("TRO") or preliminary or permanent injunction, the court denied a government motion for dismissal or summary judgment, or the court permitted discovery that was opposed by the government. The final outcome of many of these cases is not published, and the reader cannot easily determine whether the protest ultimately was sustained or denied on the merits. However, the court's refusal to grant summary judgment is at least an indication that there may have been some merit in the protest, because summary judgment motions are not granted where "the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury [judge] could return a verdict for the nonmoving party". *Commodities Recovery Corp. v. U.S.*, 34 Fed. Cl. 282, 287 (1995). The same is true for discovery rulings favorable to a protester, which imply that the agency's actions will not be accepted by the court without further scrutiny. Therefore, for the purpose of the analysis, the protester's published procedural victories are counted in the sustain rate.

### III. Comparison Between Rules at The GAO and the COFC

There are significant differences between the requirements of the GAO rules and the COFC rules ("RCFC"). COFC rules, for the most part, are similar to the Federal Rules of Civil Procedure, have been used since 1982 for the adjudication of pre-award protests, and generally reflect the complexity associated with a motions and trial practice in the federal courts. (COFC rules with decimals, e.g., Rule 65.1, represent modifications to the Federal Rules.) The GAO, on the other hand, has a well developed set of rules that are less rigid than the COFC rules, and

permit protesters and interested parties to make relatively simple filings within very tight deadlines. The GAO rules explicitly cover protest situations prior to submission of offers, prior to award, and after award. The COFC rules were not specifically written to cover bid protests, and must be adapted and interpreted by the court.<sup>5</sup> The differences in the rules are highlighted below.

### 1. Interested party

In both forums, only an interested party may file a protest. The GAO defines this as "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." 4 CFR § 21.0(a). The COFC has "jurisdiction to render judgment on an action by an interested party objecting to" a solicitation, proposed award or alleged violation of statute. 28 USC § 1491(b)(1). Although the statute does not define the term "interested party," the COFC Guidelines state that the term "is defined in 31 USC § 3551(2)," which defines it in precisely the same terms as the GAO.

### 2. Intervenors

Intervenors are specifically permitted in both forums. However, the GAO limits intervenors to "an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied." 4 CFR § 21.0(b). This limits the intervenor to the awardee, if an award has been made, or permits as intervenors only those parties that are likely to win, i.e., have the next lower bid on a sealed bid procurement or are ranked very high in a negotiated procurement. At the COFC, intervenors are permitted under RCFC 24. This rule provides for both intervention of right and permissive intervention. Intervention of right is mandatory when a statute of the United States confers an unconditional right to intervene or when the applicant for intervention claims an interest relating to the property or transaction which is the subject of the action, and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. RCFC 24(a). In most cases, the federal government may not be able to represent a putative intervenor's interest adequately, and intervention will be required.

Permissive intervention is allowed at the COFC when a statute confers a conditional right to intervene or when an applicant's claim or defense and the main action have a question of law or fact in common. RCFC 24(b). The court exercises its discretion in permissive intervention, and considers whenever the intervention will unduly delay or prejudice the adjudication or the rights of the original parties.

### 3. Notification

The GAO requires that the protester furnish a complete copy of the protest to the contracting agency designated in the solicitation or to the contracting officer. 4 CFR § 21.1(e). The GAO itself is required by its rules to notify a contracting agency by telephone and confirm in writing the filing of a protest. 4 CFR § 21.3(a).

At the COFC, RCFC 65(f)(2) requires that the protester notify the apparently successful bidder's attorney by telephone and serve that party with any application for injunctive relief. The protester also must serve the Attorney General and provide two copies of all pleadings by hand delivery to the Department of Justice, Commercial Litigation Branch, Civil Division. RCFC 65(f)(1). (The Guidelines also recommend that protesters telephone the Civil Division at (202) 514-7300 and state that they are filing for injunctive relief, in order to expedite the assignment of an attorney).

### 4. Mandatory Items in a Protest

At the COFC, a protest is initiated with the filing of a complaint. RCFC 3(a). In addition, most protesters will file an application for a temporary restraining order or preliminary injunction, along with the complaint. RCFC 65. The application must be accompanied by the proposed order, affidavits, supporting memoranda and other documents on which the protester intends to rely. RCFC 65(f). The form and content of briefs and the number of copies (original plus two copies) required are set forth in RCFC 82 and 83. Generally, the initial brief requires a table of contents or index, a list of exhibits, a table of authorities, a succinct statement of each question involved, a concise statement of the case, the stipulation of facts, the pertinent portions of statutes and regulations, the argument and a conclusion indicating relief sought. RCFC 83.1.

The GAO does not require formal briefs or technical forms of pleading. 4 CFR § 21.1(f). However, each protest must: (1) include the name, address, telephone and facsimile numbers of the protester; (2) be signed by the protester or its representative; (3) identify the contracting agency and the solicitation and/or contract number; (4) set forth a detailed statement of the legal and factual grounds of protest, including relevant documents; (5) set forth all information establishing the protester is an interested party for the purpose of filing the protest; (6) set forth all information establishing the timeliness of the protest; (7) specifically request a ruling by the Comptroller General; and (8) state the form of relief requested. 4 CFR § 21.1(c). In addition, the protester may (1) request a protective order; (2) request specific documents, explaining their relevance to the protest; and (3) request a hearing, explaining why it is needed. 4 CFR § 21.1(d).

### 5. Jurisdiction

The GAO's jurisdiction is expansive, and with its new grant of jurisdiction, the COFC's jurisdiction appears similarly expansive. The COFC has jurisdiction over "any claim against the United States founded either upon the Constitution or any act of Congress or upon any express or implied contract with the United States." 28 USC § 1491(a). Its mandate specifically includes "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. [T]he United States Court of Federal Claims . . . shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded." PL 104-230 § 12 (1996) (to be codified at 28 USC § 1491(b)(1)).

Under CICA, the GAO may consider a protest concerning an alleged violation of a procurement statute or regulation. 31 USC § 3552. This includes a protest of any solicitation or other request by any federal agency for the procurement of property or services, the cancellation of such a solicitation or request, an award or proposed award of such a contract, and a termination of such a contract, if the protest alleges that the termination was based on improprieties in award of the contract. 31 USC § 3551(1); 4 CFR § 21.1(a). A "federal agency" is defined in CICA as any executive branch agency or any establishment in the legislative or judicial branch except the Senate, House of Representatives or Architect of the Capitol, as set forth in 40 USC § 472.

GAO's rules state that it shall not consider the following bases of protest: (1) contract administration; (2) Small Business Administration issues (including size and Standard Industrial Classification challenges, Certificates of Competency and 8(a) set-aside decisions); (3) affirmative determinations of responsibility by a CO; (4) procurement integrity; (5) procurement by agencies other than federal agencies defined in 40 USC § 472 (e.g., U.S. Postal Service, nonappropriated fund activities, Federal Deposit Insurance Corp.); and (6) protests of awards of subcontracts. 4 CFR § 21.5.

### 6. Time for Filing

There is no timeliness requirement for filing a protest at the COFC. A protest could presumably be considered moot after a protested contract had been performed, but there is no hard and fast rule. The GAO, on the other hand, has very tight timeliness requirements in 4 CFR § 21.2. Protests based on improprieties in a solicitation which are apparent prior to bid opening or the time set for submission of initial proposals must be filed prior to the bid opening

or submission of initial proposals. Any other protests must be filed not later than 10 calendar days after the basis of the protest is known or should have been known (whichever is earlier), except a competitively negotiated procurement where a debriefing is both required or requested. In such cases, the protest must be filed after the debriefing, but not later than 10 days after that debriefing.

### 7. Agency Response to Protest

The government is required to respond to a complaint and any motions by protesters at the COFC in a traditional way, through a responsive pleading including an answer. RCFC 7, 8, 9, 10, 11 and 12. Unless otherwise provided, an answer is due from the United States 60 days after a complaint is filed. RCFC 12. However, responses to written motions must be filed within 14 days after service. Motions to dismiss under RCFC 12(b), 12(c), and summary judgment motions unless under RCFC 56 must be filed within 28 days after service. See RCFC 83.2(c).

At the GAO, an agency may file a request for dismissal as soon as practicable. 4 CFR § 21.3(b). If not dismissed, the agency must file a report on the protest within 30 days of receipt of notice of the protest from the GAO. 4 CFR § 21.3(c). The report must include the Contracting Officer's statement of facts, a best estimate of contract value, a statement of law, and a list and copy of supporting documents. Protesters are permitted to comment on the agency report. 4 CFR § 21.3(d).

### 8. Discovery

Discovery at the COFC is somewhat limited by the Administrative Procedure Act, which indicates the decision should be made on the agency record. 5 USC § 706; *Camp v. Pitts*, 411 U.S. 138 (1973). However, there are exceptions where discovery is permitted and the agency record may be supplemented. Indeed, in the first decision of the COFC considering a post-award bid protest, the court acknowledged the need to examine the administrative record already in existence, but noted that supplementation of the record would be appropriate for the COFC in 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 under the National Environmental Policy Act; and
- (8) in

cases where relief is at issue, especially at the preliminary injunction stage.

*Cubic Applications, Inc. v. U.S.*, 1997 WL 34483 at \*2 (Fed. Cl. Jan. 29, 1997); citing *Esch v. Yeutter*, 876 F.2d 976 (CA DC 1989). In the past, as indicated in a later section of this article, the COFC has permitted depositions pursuant to RCFC 30, interrogatories pursuant to RCFC 33, and document production pursuant to RCFC 34.

At the GAO, discovery is severely limited. Protesters may request specific documents and explain their relevancy, 4 CFR § 21.1(d)(2), or may request additional documents within two days after examining the agency report. 4 CFR § 21.3(g).

### 9. Protective Orders

RCFC 26(c) permits the COFC to issue protective orders either to prevent discovery or to prevent disclosure of discovered material outside of court proceedings. Protective orders are issued based upon a motion by a party and for good cause shown. RCFC 26(c). Although there is no formal protective order at the COFC as there is at the GAO (*see below*), the court has used such orders in the past to protect confidential, proprietary and source selection material. Protests may be filed under seal if they contain material which must be protected, and are accompanied by an appropriate motion. COFC Guidelines ¶ 5.

The GAO issues protective orders at the request of a party or on its own initiative, in order to control proprietary, confidential or source selection information, the release of which could result in a competitive advantage to one or more firms. Both counsel and consultants may be admitted to the protective order. Protests may be filed with information to be withheld by providing GAO with both a complete and a redacted copy, along with an appropriate statement. 4 CFR § 21.1(g).

### 10. Hearings

RCFC 39 through 43 govern trials at the COFC. "All contested issues of fact and law shall be tried" by the court. RCFC 39(a). Therefore, trial is mandatory unless the case is appropriate for summary judgment. Subpoenas are specifically permitted. RCFC 45. The COFC has frequently held teleconferences on pre-trial matters in the past. Furthermore, if the matter goes to trial, the COFC is required to hold trial where it is most convenient and least expensive for the public. 28 USC § 173. The court frequently requests post-hearing briefs from the parties.

At the GAO, a protester may request a hearing, but is not entitled to one, and hearings are held infrequently. 4 CFR § 21.1(d)(3). The GAO may hold hearings at the request of a party or on its own initiative. 4 CFR § 21.7(a). Furthermore, the rules permit the GAO to hold teleconferences, and it has

frequently held them in the past. The GAO grants parties an opportunity to file post-hearing comments. 4 CFR § 21.7(g). The GAO has no subpoena power, however, and witnesses are limited to those who appear voluntarily.

### 11. Withholding of Award Or Suspension of Performance

Protesters at the COFC may prevent contract award or stop contract performance only by obtaining from the court a TRO or a preliminary injunction. The burden of persuasion rests with the protester. Once injunctive relief has been ordered, only the courts may relieve an agency from compliance with the court order.

Protesters at the GAO have a simpler and more efficient way to prevent award or suspend performance. Pursuant to CICA, whenever a protest is filed either prior to award, or if a contract has already been awarded, within 10 days of award or within five days of a required debriefing, an agency is required to withhold award or suspend performance. 31 USC § 3553(c) and 31 USC § 3553(d). These are known as the "automatic stay" provisions of CICA, and are a highly effective method of placing pressure on the agency.

However, the head of the procuring activity may "override" the automatic stay and proceed to make award if "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting" for the GAO decision. 31 USC § 3553(c)(2)(A). Similarly, if an award has already been made, the head of the procuring activity may authorize contract performance, notwithstanding a GAO protest, upon a written finding that performance of the contract is in the "best interest" of the United States or "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the GAO decision." 31 USC § 3553(d)(3)(C). The GAO will *not* review the override either before or after an award, and the only forum for review of the override is a U.S. district court. *See, e.g. Dairy Maid Dairy Inc. v. U.S.*, 837 F.Supp. 1370 (DC EVa 1993); *Shel-Ken Properties Inc.*, B-261443.3, May 20, 1996, 96-1 CPD ¶ 243; *Mark Group Partners*, B-255762, March 30, 1994, 94-1 CPD ¶ 224.

### 12. Time for Decision

The COFC has no specific time frame for ruling on any bid protest or other decision related to a bid protest. The GAO must issue its decision within 100 calendar days after a protest is filed, or 65 days if the express option is used. 4 CFR § 21.9; *see also* 4 CFR § 21.10 (express option timetable).

### 13. Remedies

The COFC rules do not specify the remedies which the court may grant. However, all potential remedies



are generally within the court's discretion, based on the court's judgment. The court's decision is normally accompanied by an order which must be obeyed by the parties, absent a stay or an appeal.

The GAO may recommend (but has no authority to order) the following remedies to be taken by the agency:

- (1) refrain from exercising options under the contract;
- (2) terminate the contract;
- (3) recompute the contract;
- (4) issue a new solicitation;
- (5) award a contract consistent with statutes and regulations or
- (6) such other recommendations as GAO deems necessary to promote compliance. 4 CFR § 21.8(a).

The GAO also may recommend that the contracting agency pay the protester its costs of filing and pursuing the protest, including attorney and consultant and expert witness fees, and bid and proposal preparation costs. 4 CFR § 21.8(d).

#### 14. Effect of Judicial Proceedings

The COFC has no jurisdiction to consider a protest if the plaintiff has a similar claim pending in any other court in a suit against the United States. 28 USC § 1500. However, a prior GAO adjudication is no impediment to bringing the protest before the COFC (*see next section*). At the GAO, a protester must immediately advise the GAO of any court proceeding that involves the subject matter of a pending protest. The GAO will dismiss any protest which is pending before a court, or which has been adjudicated by a court. At the request of a court, GAO may issue an advisory opinion on a bid protest issue that is before a court. 4 CFR § 21.11.

#### 15. Reconsideration and Appeals

Decisions of the COFC may only be appealed to the Court of Appeals for the Federal Circuit. 28 USC § 1295(a)(3). There is no appeal from GAO decisions. However, a party may request reconsideration by the GAO based upon errors of law or upon factual information not previously considered by the GAO. 4 CFR § 21.14(a). Frequently, a protester that is dissatisfied with a GAO decision will take the matter into either a U.S. district court or the COFC, neither of which is precluded from considering the procurement after the GAO has issued its decision.

#### 16. Pro Se Representation

Companies or corporations may designate an officer or non-attorney to represent them in a bid protest before the GAO, but they must have counsel to bring a protest before the COFC. (RCFC 81(a) permits only attorneys who are members of the COFC bar to practice before the court.) RCFC 81(d)(8) permits pro se representation of a person for himself or for an immediate family member, but specifically states that

all other parties, including all corporations, must be represented by counsel.

#### 17. Posting of Bonds and Securities

The GAO requires no posting of bond or security when filing a protest. The COFC rules, however, require that no restraining order or preliminary injunction be issued unless the applicant gives security in a sum determined by the court. This security is for the payment of costs and damages that may be incurred or suffered by any party that is found to have been unlawfully enjoined or restrained. RCFC 65(c). The security requirement applies only if the government does not agree to withhold award or performance. (No order is required if the government agrees to withhold award or performance). COFC Guidelines ¶ 6. Only acceptable sureties may be used. RCFC 65.1.

#### 18. Cost of Prosecuting the Protest

Although cost is not strictly a matter of forum rules, the preceding discussion of the rules indicates that they will tend to drive a protester's costs up or down in a relative sense. A simple protest not requiring a protective order is likely to be considerably less expensive if pursued at the GAO rather than the COFC. At the COFC, where counsel is required, there is likely to be more discovery than at the GAO, and more likely to be a hearing. As a result, costs will probably be higher at the COFC for most protests. Furthermore, the government frequently responds to the protest at the COFC with procedural motions (such as a motion to dismiss for lack of jurisdiction) or summary judgment motions, all of which are likely to drive up the protester's costs for preparation of opposition memoranda.

Although unlikely, a GAO action prosecuted by an attorney that included extensive motions, a mass of protected material, multiple protests based on information contained in agency report(s), and an extensive hearing at the GAO, could conceivably be more expensive than a COFC protest of the same subject matter.

### IV. Sustained Protests at the COFC During FY 1983-96

Sustained protests at the COFC between fiscal years 1983-96 can be grouped into 8 different categories of decisions for the purposes of analysis. This section analyzes COFC sustained protests using categories similar to those used in the 1995 Scorekeeping Article, with explanations as appropriate. Because that article provided detailed analysis of the cases at the GAO (which do not appear to vary significantly in categories from year to year), no discussion of protests sustained by the GAO is included herein.

There is a significant difference in the categories of protests sustained by the GAO and the COFC. More

than half of the GAO decisions were sustained because of improper actions in the evaluation and negotiation of negotiated procurements or by the acceptance of nonconforming proposals or nonresponsive bids (or not awarding to conforming or responsive ones). See 1995 Scorekeeping Article at 10. Partially because of the procedural tactics employed by the Justice Department in seeking the swift dismissal of protests at the COFC through summary judgment motions, and partially because COFC protests scored herein were all pre-award protests, more than 80 percent of the COFC decisions fall into four categories:

- (1) improper acceptance of nonconforming proposals or nonresponsive bids or not awarding to conforming or responsive ones (20 percent);
- (2) improper suspension or debarment (14 percent);
- (3) other improper actions (10 percent); and
- (4) procedural victories for protesters (a new category not included in the 1995 Scorekeeping Article, where the protester was granted discovery or survived a government summary judgment motion) (39 percent).

Readers should keep in mind that the distribution among categories is likely to have been heavily influenced by the limited jurisdiction of the COFC (pre-award protests only) during the time period analyzed. Potential protesters frequently only learn of a potential wrongdoing in many of the categories used in the 1995 Scorekeeping Article *after* an award has been made, thereby making it impossible to have protested at the COFC prior to Dec. 31, 1996. A

comparison of all protest grounds at the GAO and the COFC by category is shown on Chart 4.

(See Chart 4)

The categories and protests at the COFC are discussed below.

#### A. Improper Actions in Evaluation And Negotiation

Significant differences of opinion frequently arise about the relative merits of proposals during the evaluation stage of negotiated procurements, and protesters frequently allege that agencies failed to follow the evaluation criteria in the solicitation, conducted discussions improperly, conducted unrealistic cost realism analyses, improperly excluded them from the competitive range, or conducted an improper "best value" (cost/technical) tradeoff. Because the offeror generally learns of these problems only after award, there are few protests in the COFC. However, agencies are required to notify an unsuccessful offeror "at the earliest practicable time" that its proposal is no longer eligible for award, i.e., that its offer has been excluded from the competitive range. FAR 15.609. Because of this early referral, there are two sustained protests at the COFC, both relating to improper exclusion from the competitive range.

In *Rockwell Int'l Corp. v. U.S.*, 8 Cl. Ct. 662 (1985), the court awarded damages, i.e., bid preparation costs, when the agency's decision to exclude the

CHART 4 - COMPARISON OF SUSTAINED PROTEST GROUNDS AT GAO AND THE COFC BY CATEGORIES AND SUBCATEGORIES

	GAO	('92-'94)	COFC	('83-'96)
	No.	(%)	No.	(%)
<b>A. Improper Actions in Evaluation and Negotiation</b>	90	35%	2	4%
<b>B. Improper Acceptance of Nonconforming Proposals or Nonresponsive Bids</b>	44	17%	10	20%
<b>C. Improper Actions Involving Solicitations or Requirements</b>	22	9%	3	6%
<b>D. Improper Actions Involving Small Business</b>	28	10%	2	4%
<b>E. Improper Restrictions on Competition</b>	42	16%	1	2%
<b>F. Improper Suspension or Debarment</b>	0	0%	7	14%
<b>G. Other Improper Actions</b>	31	12%	5	10%
<b>H. Procedural Victory for Protester</b>	0	0%	19	39%
<b>TOTAL</b>	<b>255</b>	<b>100%</b>	<b>49</b>	<b>100%</b>

protester's proposal from the competitive range lacked any rational or reasonable basis. Even though the court had denied a temporary restraining order and a preliminary injunction, [reported in a previous decision,<sup>5</sup>] the court based its decision on deposition testimony taken subsequent to the initial hearing on the preliminary injunction. In *Isometrics Inc. v. U.S.*, 5 Cl. Ct. 420 (1984), the court granted a preliminary injunction against any award when the plaintiff's proposal was treated unfairly by being rejected without benefit of discussions, clarifications or negotiations, which had been granted to a similarly situated competitor.

### B. Improper Acceptance of Nonconforming Proposals or Nonresponsive Bids or Not Awarding to Conforming or Responsive Ones

In procurements awarded through sealed bidding, awards may only be made to a responsive bid, i.e., a bid that provides an unequivocal offer to tender the exact thing called for in the invitation for bids ("IFB"). In negotiated procurements, any proposal that fails to conform to material terms and conditions of a solicitation should be considered unacceptable, and may not form the basis for award. There were ten protests sustained by the COFC in this category.

The COFC sustained four protests where agencies improperly accepted nonconforming offers, or failed to accept conforming offers. In *Aerolease Long Beach v. U.S.*, 31 Fed. Cl. 342 (1994) aff'd, 39 F.3d 1198 (CA FC 1994), the Court granted summary judgment to the plaintiff and enjoined the agency from awarding a contract to an offeror that submitted a late best and final offer ("BAFO"). Injunctive relief against the agency was also granted in *Isratex Inc. v. U.S.*, 25 Cl. Ct. 223 (1992), where an offeror was improperly excluded from a competition because the agency insisted that the product demonstration model of a military parka pass a hydrostatic test, but failed to include this requirement in the solicitation. The court in *Honeywell Inc. v. U.S.*, 16 Cl. Ct. 173 (1989), granted injunctive relief because it found an ambiguity concerning the identity of the apparent successful bidder in a two-step procurement which rendered its bid nonresponsive.<sup>7</sup> The decision was reversed on appeal, *Honeywell Inc. v. U.S.*, 370 F.2d 644 (CA FC 1989) (finding a rational basis for the GAO's decision that the bidder's identity was clear and the bid was responsive). Finally, in *S-M-M-S v. U.S.*, 1 Cl. Ct. 188 (1982), the court held that the government had improperly denied award of a cost-type contract to a joint venture based on a Defense Acquisition Regulation ("DAR") provision prohibiting award of a cost-type contract to a contractor that was also performing a fixed-price contract at the same site. The court concluded that the DAR provision did not preclude award of a cost-type contract to a joint venture, one of whose members was concurrently performing a fixed-

price contract on the site, because the joint venture and individual member were considered separate and distinct legal entities, and not one and the same "contractor."

The court sustained two protests because the apparent low bid was nonresponsive. In *Firth Construction Co. Inc. v. U.S.*, 36 Fed. Cl. 268 (1996), disagreeing with a previous GAO decision,<sup>8</sup> the court sustained the protest and issued a permanent injunction because the agency sought to award to a bidder whose bid package contained no signature, no commitment to furnish a performance and payment bond, no period within which the bid was valid, no signed amendment, and no signed bid bond. (The GAO decision had treated these defects as having been cured elsewhere in the bid or as mere "minor informalities or irregularities.") In *Grade-Way Construction v. U.S.*, 7 Cl. Ct. 263 (1985), the court again disagreed with a GAO decision,<sup>9</sup> and determined that a low bid was nonresponsive because it failed to acknowledge an amendment which contained a modified Davis-Bacon Act<sup>10</sup> wage determination, even though the dollar amount of the upward wage determination was *de minimis*.

The court sustained four protests where the agency improperly deemed bids nonresponsive. In *DeMat Air Inc. v. U.S.*, 2 Cl. Ct. 197 (1983), the court issued a TRO and permanent injunction against award to another bidder because the contracting officer was arbitrary and unreasonable in that he failed to consider plaintiff's timely filed, signed proposal. Specifically, upon learning of the absence of a signature on DeMat's proposal, the contracting officer failed at least to telephone or write to inquire and clarify whether DeMat intended to be bound. In *Mack Trucks Inc. v. U.S.*, 6 Cl. Ct. 68 (1984), the court issued a permanent injunction against the Postal Service where the protester certified that it would comply with all dimensions for truck tractors in the IFB, but designated an overall shipping length of 260 inches, a dimension not specified in the IFB, and one which arguably would have exceeded the permissible length for the Postal Service. The Postal Service concluded that plaintiff's bid would not comply with "in-service length," and deemed the bid nonresponsive. The court disagreed, noting that Mack had certified its intention to comply with all specifications, and "[s]hipping length means shipping length, not in-service length..."

In *Laboratory Supply Corp. of America v. U.S.*, 4 Cl. Ct. 136 (1983), the court issued a permanent injunction against award of the contract to any other offeror where the Navy's rejection of the low bid for packaging film and foam trays as nonresponsive was deemed arbitrary and capricious because Laboratory Supply's notation on the solicitation form did not clearly indicate that it was offering anything other than the brand name products required by the IFB. In

*Essex Electro Engineers Inc. v. U.S.*, 3 Cl. Ct. 277 (1983), essentially reversing a GAO decision,<sup>11</sup> the court enjoined the Federal Aviation Administration ("FAA") from awarding a contract to other bidders in a procurement for generators where the FAA had decided that Essex's bid was ambiguous on its face based on the data submitted with its bid. The descriptive literature showed that neither of Essex's generators could operate at the IFB-required 1200 RPM without modification, and the FAA irrationally refused to consider contemporaneously available literature which showed that the generators could be modified to work at 1200 RPM.

### C. Improper Actions Involving Solicitations Or Requirements

Agencies may take improper actions in the solicitation process or in connection with statements of agencies' requirements. These include improper cancellation of a solicitation. In three cases, the COFC sustained protests against wrongful cancellations of solicitations.

In *126 Northpoint Plaza Limited Partnership v. U.S.*, 34 Fed. Cl. 105 (1995), dismissed without opinion, 73 F.3d 379 (CA FC 1995), the court sustained a protest against the cancellation of a solicitation for lease of a building where the government's decision to cancel was based on the impermissible desire of the government tenant (the Immigration and Naturalization Service) to eliminate one offeror's proposed building, and the agency campaigned to eliminate that particular building regardless of whether or not it qualified under the solicitation. In *Arthur Forman Enterprises Inc. v. U.S.*, 22 Cl. Ct. 816 (1991), vacated and remanded (based on settlement), 960 F.2d 154 (CA FC 1991), the court rejected as arbitrary and capricious the cancellation of a solicitation for the sale of surplus fabric because the price was alleged to be "insufficient" by the contracting officer. The court ordered reinstatement of the canceled solicitation. In *Bean Dredging Corp. v. U.S.*, 19 Cl. Ct. 561 (1990), the court granted injunctive relief against the cancellation of an IFB for dredging, where the agency sought to convert the sealed bidding into a negotiated procurement. The court held that the Army Corps of Engineers ("COE") had failed to prepare a reasonable cost estimate and the COE's unreasonable adjustments made all bids exceed a statutory cost ceiling, thereby improperly requiring cancellation of the IFB.

### D. Improper Actions Involving Small Businesses

The court sustained two protests where agencies took improper actions with respect to small businesses. In *Y.S.K. Construction Co. Inc. v. U.S.*, 30 Fed. Cl. 449 (1994), the court remanded the protest to the Small Business Administration ("SBA"), hold-

ing that only the SBA (not the Department of Defense) could determine whether the low bidder on a Small Disadvantaged Business ("SDB") set-aside was really an SDB pursuant to DFARS 219.502-170 in accordance with § 1207 of the FY 1987 Defense Authorization Act, PL 99-661. In *Commercial Energies Inc. v. U.S.*, 20 Cl. Ct. 140 (1990), the court held that the Air Force's application of a 10 percent SDB preference to only two line items in a contract for supply of natural gas (instead of all four line items on which the award would be made) was irrational and without basis in law. A GAO decision had ruled against the protester.<sup>12</sup>

### E. Improper Restrictions on Competition

Improper restrictions on competition, which undermine the full and open competition goal of CICA, include general restrictions and improper sole-source awards. In *Magnavox Electronic Systems Co. v. U.S.*, 26 Cl. Ct. 1373 (1992), the court enjoined the Navy from awarding a sole source contract for fuses when the Navy decided (after the plaintiff had formally expressed a desire to compete on the fuses) to award a sole source contract without investigating the plaintiff's stated capabilities to produce the fuse and conducting a pre-award survey of the plaintiff.

### F. Improper Suspension or Debarment

In seven cases the court sustained protests where a contractor was improperly suspended or debarred and where the government had refused to consider the protester's offer. In *Sterlingwear of Boston Inc. v. U.S.*, 11 Cl. Ct. 879 (1987), on a contract for women's clothing, despite the evidence of new and disputed material facts in a debarment proceeding on one bidder, the agency failed to hold a fact-finding hearing pursuant to FAR 9.406-3. In an earlier case involving the same solicitation, *Sterlingwear of Boston Inc. v. U.S.*, 10 Cl. Ct. 644 (1986), the court granted a preliminary injunction where the agency regulations denied due process by providing for a *post* instead of *pre*-suspension hearing on charges that an affiliated company had engaged in improper conduct. The court found that fairness dictated that plaintiffs be allowed a full hearing to rebut proposed debarment charges prior to their suspension from contracting. In *ATL Inc. v. U.S.*, 4 Cl. Ct. 374 (1984), *aff'd in part and rev'd in part*, 736 F.2d 677 (CA FC 1984), the court enjoined award by the Navy and held that suspension of the plaintiff bidder was constitutionally inadequate because the Navy had failed to give the plaintiff sufficiently specific notice so as to enable it to rebut the charges against it. Previously, in *ATL Inc. v. U.S.*, 3 Cl. Ct. 259 (1983), the court enjoined the Navy from awarding contracts pursuant to four solicitations because due process demanded that plaintiff be provided a hearing, and not be precluded from receiving four awards in the event it was excul-

pated of the charges underlying its suspension. In *ATL Inc. v. U.S.*, 3 Cl. Ct. 49 (1983), another action on the same four solicitations, the court temporarily restrained the Navy from awarding the four contracts at issue because the Navy's delays in failing to act on ATL's bid prior to issuance of a formal notice of suspension represented a de facto suspension or debarment prior to the time when the Navy had adequate evidence to support such action.

In *Electro-Methods Inc. v. U.S.*, 3 Cl. Ct. 500 (1983), aff'd in part and rev'd in part, 728 F. 2d 1471 (CA FC 1984), the court held that, with respect to a jet engine parts contractor that had submitted bids on Air Force solicitations, an Air Force notice which failed to require a specific date to hear the contractor and had been given ex parte, was violative of the contractor's due process rights. Finally, in *Related Industries Inc. v. U.S.*, 2 Cl. Ct. 517 (1983), the court held that a small business contractor whose president and sole owner was a consultant to a former contractor which had been rejected on previous solicitations for lack of integrity, tenacity and perseverance and a poor performance record, had been deprived of due process because the contractor had been debarred without having been notified by the agency of the specific detailed allegations of fact upon which the decision was made.

### G. Other Improper Actions

The five cases in this category are not readily classifiable into the above categories, but represent substantive sustained protests for the protesters rather than procedural victories, which are discussed in the next category.

Two cases involved a conflict of interest where the court granted injunctions. In *TRW Environmental Safety Systems Inc. v. U.S.*, 18 Cl. Ct. 33 (1989), the court enjoined award of a contract for development and management of a nuclear waste repository because the chairman of the Department of Energy ("DOE") Source Evaluation Board had a conflict of interest in that he violated 42 USC § 7216<sup>13</sup> by serving in this and other positions at DOE within a one-year restricted period. Similarly, in *CACI Inc.—Federal v. U.S.*, 1 Cl. Ct. 352 (1983), rev'd, 719 F. 2d 1567 (CA FC 1983) the court issued an injunction against award of an automated data processing and litigation support services contract to a bidder whose vice president had been chief of the Information Systems Support Group in the agency (Department of Justice), had professional and social relationships in some degree with each of four of five members of the technical evaluation board reviewing proposals, and was responsible for employing two of them.

In *AT&T Technologies Inc. v. U.S.*, 18 Cl. Ct. 315 (1989), the court held that a bidder was entitled to recover proposal preparation costs after a solicitation

was canceled because of serious technical errors and improprieties in the procurement admitted by the government but not set forth in detail in the opinion. In *NKF Engineering Inc. v. U.S.*, 9 Cl. Ct. 585 (1986), vacated, 805 F. 2d 372 (CA FC 1986), the court enjoined the Navy from making an award to any bidder other than NKF on an engineering services contract, where the Navy had disqualified NKF because it presumably obtained a competitive advantage by hiring as a consultant a former deputy director of the same Navy sub-group concerned with the contract award in question. The court held that the contracting officer's decision failed to consider relevant factors in the disqualification of NKF, and therefore was arbitrary and capricious.

In *International Graphics v. U.S.*, 4 Cl. Ct. 515 (1984), the court held that the bid acceptance period on a solicitation for publication of the Commerce Business Daily, which had expired during a protest, would remain open as long as bidders, through litigation or otherwise, had actually or constructively expressed their intent to accept the award.

### H. Procedural Victory for Protester

The cases in this category do not involve substantive victories for the protester, but are counted as "sustains" because the protester withstood a motion that most likely would have precluded any possibility of victory, such as summary judgment for the government, denial of a motion to vacate an injunction, summary dismissal of the case, or a government request to prohibit discovery.

#### 1. Denial of Summary Judgment

The court denied summary judgment requested by the government in *TRW Inc. v. U.S.*, 28 Fed. Cl. 155 (1993) (summary judgment denied in action seeking bid and proposal costs; no evidence indicated that the costs had already been paid under bidder's advance agreements with the Department of Defense); *Health Systems Marketing & Development Corp. v. U.S.*, 26 Cl. Ct. 1322 (1992) (summary judgment denied in action by Agency for International Development to terminate negotiations with protester on sole source contract); *International Graphics v. U.S.*, 4 Cl. Ct. 186 (1983) (court found genuine issue of material fact existed as to correctness of government's alleged \$1.2 million cost saving asserted as basis for canceling solicitation and performing activity in-house); *Drexel Heritage Furnishings Inc. v. U.S.*, 4 Cl. Ct. 162 (1983) (genuine issue of fact existed as to whether General Services Administration had relaxed specifications on furniture for some offerors and had treated all offerors equally); and *P. Francini & Co. v. U.S.*, 2 Cl. Ct. 1 (1983) (genuine issues of fact existed as to whether GSA's cancellation of bids for modernization of U.S. courthouse was unlawful, illegal and void).

## 2. Denial of Government Motion to Dismiss

The court denied government motions to dismiss and asserted the court's jurisdiction in the following cases: *IMS Services Inc. v. U.S.*, 32 Fed. Cl. 388 (1994) (court refused to dismiss; jurisdiction found to consider whether reopening of procurement process for telecommunications services by the Navy would result in an impermissible auction); *Unified Industries v. U.S.*, 24 Cl. Ct. 570 (1991) (court had jurisdiction to consider injunction requiring Navy to consider plaintiff for follow-on contract for automatic data processing system even though plaintiff had acquired access to proprietary computer information of initial contractor); *National Forge Co. v. U.S.*, 7 Cl. Ct. 530 (1985) (jurisdiction found to consider cancellation of bids for propeller shafts after bids had been opened); *Standard Manufacturing Co. Inc. v. U.S.*, 7 Cl. Ct. 54 (1984), overruled as stated in *Garchik v. U.S.*, 37 Fed. Cl. 52 (1996) (court had jurisdiction to consider an allegedly unlawful sole source procurement of trailers); and *Kinetic Structures Corp. v. U.S.*, 2 Cl. Ct. 343 (1983) (court had jurisdiction to consider reinstatement of solicitation for reconditioning of partitions which the government had canceled).

## 3. Discovery Ordered Despite Government Objection

In the following cases, the court ordered discovery, albeit limited: *Metric Systems Corp. v. U.S.*, 13 Cl. Ct. 504 (1987) (bidder whose proposal for threat emitters was evaluated as having "significant design flaws and omissions" and which had been excluded from the competitive range in negotiated procurement, was entitled to information it would receive as if it were in the competitive range); *CACI Field Services Inc. v. U.S.*, 12 Cl. Ct. 680 (1987) (in negotiated procurement for operation of GSA distribution and supply centers, discovery of source selection plan and points assigned in accordance therewith was permitted); *CACI Field Services Inc. v. U.S.*, 12 Cl. Ct. 440 (1987) (in same action as previously discussed, offeror was entitled to some discovery with respect to extent of discussions held with other offerors, in order to establish that it had been denied meaningful discussions); *La Strada Inn Inc. v. U.S.*, 12 Cl. Ct. 110 (1987) (in procurement of meals and lodging for armed forces applicants, lowest bidder was entitled to discovery to substantiate its claim that standards applied to its facilities during a pre-award survey differed from standards that had been applied to the successful bidder); *Drexel Heritage Furnishings Inc. v. U.S.*, 4 Cl. Ct. 169 (1983) (without discussion of the case, court ordered discovery of 10 documents which represented analyses made by the Source Evaluation Board.); *CACI Inc.—Federal v.*

*U.S.*, 1 Cl. Ct. 350 (1983) (government agreed to limited discovery; depositions permitted).

## 4. Denial of Motion to Vacate Injunction Previously Ordered

In two cases, the court denied a government motion to vacate a previously ordered injunction: *Sterlingwear of Boston Inc. v. U.S.*, 11 Cl. Ct. 517 (1987) (court refused to vacate pending injunction where plaintiff had been debarred without procedural due process); *CACI*, 1 Cl. Ct. 367 (1983) (court refused to grant stay of injunction pending appeal; court deemed this a government request for reconsideration).

## 5. Other

*International Computaprint Corp. v. U.S.*, 3 Cl. Ct. 542 (1983) (plaintiff, after having been awarded a printing contract which it had initially sought to enjoin, moved for dismissal without prejudice and government sought dismissal with prejudice and costs. The court held that the case was moot, and dismissed it without prejudice).

## V. Conclusion

Although there are limitations in the data, during the past eleven years, protesters at the COFC were twice as likely to be granted relief, i.e., have their protests sustained or obtain procedural relief, compared with protesters at the GAO. The protests in both forums can be grouped with the same general categories and generally reflect the special nature of the forums (i.e., the GAO's wide pre- and post-award jurisdiction, the COFC's more limited jurisdiction prior to 1997, and the more procedural and motions practice at the COFC). However, there are significant differences between the COFC and the GAO which must be considered when selecting a forum. A properly timed GAO protest results in an automatic stay preventing contract award or suspending contract performance if award has been made, except in special circumstances. At the COFC, the regular procedures for obtaining injunctive relief apply, and are likely to be more cumbersome and time consuming. Finally, the protester is more likely to obtain discovery and a hearing at the COFC than at the GAO. This attraction may be outweighed by likely higher costs of protesting at the COFC compared with the costs at the GAO.

In conclusion, protesters must compare forum sustain rates, rules complexity and cost when making a forum selection. These are no hard and fast ground rules, and each protest should be considered on its own merits. The actual performance of the COFC using its new post-award bid protest authority may influence future decisions on forum choice. Other procedural issues pose challenges in each forum.

### Endnotes

<sup>1</sup> The COFC was formerly the United States Claims Court. The Court of Federal Claims Technical and Procedural Improvements Act of 1992, Title IX of PL 102-572, Oct. 29, 1992, changed the court's name so that it "properly reflects the actual federal jurisdiction of the Claims Court, is faithful to the historic name of the court and will also reduce confusion between this court and small claims courts in various jurisdictions." H. R. Rep. No. 102-1006, 102d Cong., 2d Sess, reprinted in 1992 USCCAN 3936. Any reference to the COFC in this article also includes a reference to the U.S. Claims Court, if appropriate.

<sup>2</sup> Two other forums remain available for bid protests, the agencies and the U.S. district courts. This article does not address these forums in any detail.

<sup>3</sup> This provision states that the scope of review is as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 USC § 706.

<sup>4</sup> The previous language in 28 USC § 1491(a)(3), derived from the Federal Courts Improvement Act of 1982, granted the COFC "exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief" as it deemed proper on "any contract claim before the contract [was] awarded." This language had caused a split in the courts of appeals on whether the district courts retained *Scanwell* jurisdiction over pre-award protests. The Fourth and Ninth Circuits held that district courts did not have *Scanwell* jurisdiction before contract award, while the First and Third Circuits have held that district courts have such jurisdiction. "Of those courts of appeals that have confronted the issue, two have held that jurisdiction over pre-award challenges is exclusive in the Claims Court, see *J.P. Francis & Assoc. v. U.S.*, 902 F.2d 740 (CA 9 1990); *Rex Systems Inc. v. Holiday*, 814 F.2d 994, 997-98 (CA 4 1987); two have said as much in dicta, see *F. Alderete General Contractors Inc. v. U.S.*, 715 F.2d 1476, 1478 (CA FC 1983); *B.K. Instrument Inc. v. U.S.*, 715 F.2d 713, 721 n. 4 (CA 2 1983), and two have found concurrent jurisdiction in the district courts, see *Ulstein Maritime Ltd. v. U.S.*, 833 F.2d 1052, 1057-58 (CA 1 1987) (district courts have 'concurrent power to award injunctive relief in pre-award contract cases'); *Coco Bros. Inc. v. Pierce*, 741 F.2d 675, 677-79 (CA 3 1984)." *Cubic Corp. v. Cheney*, 914 F.2d 1501, 1503 (CA DC 1990)."

<sup>5</sup> On Dec. 11, 1996, the COFC issued "Court Approved Guidelines For Procurement Protest Cases" ("COFC Guidelines"), which were intended to familiarize practitioners with the procedures used by the COFC in suits to enjoin the award or performance of Government Contracts. The COFC Guidelines explain the application of existing COFC rules; they do not add any new rules or procedures.

<sup>6</sup> *Rockwell Int'l. Corp. v. U.S.*, 4 Cl. Ct. 1 (1983).

<sup>7</sup> This decision essentially reversed a finding made by the GAO that the identity of the bidder was clear. *Haz-Tad Inc.* B-232025, Nov. 17, 1988, 88-2 CPD ¶ 486.

<sup>8</sup> *M.R. Dillard Constr.*, B-271518.2, June 28, 1996, 96-2 CPD ¶ 154.

<sup>9</sup> *U.S. Dep't of the Interior*, B-217303, Jan. 11, 1985, 85-1 CPD ¶ 34.

<sup>10</sup> 40 USC § 276a.

<sup>11</sup> *Introl Corp.*, B-209096, June 9, 1983, 83-1 CPD ¶ 633.

<sup>12</sup> *Hudson Bay Natural Gas Corp.*, B-237264, Feb. 5, 1990, 90-1 CPD ¶ 151.

<sup>13</sup> This section provided that "[f]or a period of one year after terminating any employment with any energy concern, no supervisory employee shall knowingly participate in any Department proceeding in which his former employer is substantially, directly or materially involved. . . ."