



GAO Bid Protests: An Overview of Timeframes and Procedures

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Summary

Bid protests, especially bid protests filed with the Government Accountability Office (GAO), have recently received increased congressional scrutiny due to protests of high-profile awards and reports that the number of protests is increasing. The potential delay of contract award or performance triggered by a GAO protest, coupled with the increasing number of GAO protests, has also prompted concerns about the impact of protests upon agency operations, especially in the Department of Defense.

GAO, the contracting agencies, and the Court of Federal Claims all have authority to hear bid protests; however, GAO hears more protests annually than the Court of Federal Claims, the only other forum for which data are readily available. GAO's bid-protest process includes some unique features—most notably, the stay of contract award or performance commonly triggered by a GAO protest—that make GAO a desirable forum for disappointed bidders and offerors.

Legislation and regulations establish what issues may be protested with GAO and who may bring a protest. GAO may hear claims of alleged illegalities or improprieties in solicitations, cancellations of solicitations, or awards or proposed awards of contracts. It is, however, barred from hearing certain issues, such as challenges to small business size certifications. Any “interested party”—or actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award it—may file a protest.

Procedures for bringing and conducting GAO protests are designed to ensure “the inexpensive and expeditious resolution of [bid] protests.” Protesters need not file formal briefs or technical pleadings, can represent themselves, and can have protests decided without hearings. All protests are to be resolved within 100 calendar days of their filing, and deadlines for mandatory and optional events within the GAO bid-protest process ensure decisions can be reached within this timeframe.

Filing a GAO protest generally triggers an automatic stay of contract award or performance during the pendency of the protest. A similar stay does not result when protests are filed with the Court of Federal Claims. Agencies can, however, override stays because urgent and compelling circumstances will not permit waiting for GAO's decision, or because performance of the contract is in the best interests of the United States. Agencies must inform GAO of their override decisions, but GAO cannot prevent an agency override.

GAO may deny or sustain a protest. A denial allows the agency to proceed with the challenged award. When GAO sustains a protest, it also makes recommendations to the agency about the challenged award, such as re-competing the contract or issuing a new solicitation. GAO's recommendations are not legally binding upon the agency because the “separation of powers” doctrine precludes legislative branch agencies, such as GAO, from controlling the actions of executive branch agencies. However, the agency is to notify GAO if it does not fully implement GAO's recommendations. GAO is, then, to inform Congress of agency noncompliance. Agencies comply with GAO recommendations in most protests. However, compliance with GAO recommendations, or reliance on GAO precedent, does not immunize agencies from court challenges to their procurement actions.

Protesters disappointed with GAO's decision can seek reconsideration from GAO. They can also “appeal” GAO's decision by filing a bid protest with the Court of Federal Claims.

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Introduction

Protests of high-profile awards and reports that the number of protests is increasing have recently prompted congressional and public interest in bid protests, particularly bid protests filed with the Government Accountability Office (GAO). The number of protests filed with GAO increased by 17% between FY2007 and FY2008 and by 20% between FY2008 and FY2009, in part because of GAO's recently expanded jurisdiction over task and delivery order, A-76, and Transportation Security Administration protests.¹ Some of these protests involved high-profile procurements, such as the Air Force's aerial refueling tanker and combat, search, and rescue (CSAR-X) helicopter,² and prompted congressional hearings or proposed legislation.³ The Department of Defense (DOD) has also expressed concerns about the effects that the delay of contract award or performance frequently triggered by a GAO protest have upon DOD operations.⁴ Partly in response to DOD's concerns, the House Armed Services Committee of the 110th Congress requested, when authorizing DOD's budget for FY2009, that GAO investigate and report on the impact of bid protests on DOD.⁵ GAO issued its report on April 9, 2009, finding that its existing authorities were sufficient to deal with allegedly frivolous protests and that further attempts to discourage such protests could "have the unintended consequences of discouraging participation in federal contracting and, in turn, limiting competition."⁶ However, despite GAO's report, concerns about "frivolous" GAO protests have recently been increasing, particularly among contractors.⁷

This report is one of two providing Congress with background on the GAO bid-protest process. It provides an overview of the timeframes and procedures in a GAO bid protest, including (1) what issues can be protested with GAO; (2) who can file or be a party to a GAO protest; (3) the procedures for bringing and resolving GAO protests; (4) the timeframes involved in GAO protests; (5) the automatic stay of contract award or performance triggered by a GAO protest, as

¹ GAO, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2009*, Jan. 8, 2010, available at <http://www.gao.gov/special.pubs/bidpro09.pdf> (noting that GAO handled 1,989 cases in FY2009). This includes 91 requests for reconsideration and 168 protests filed as a result of GAO's expanded jurisdiction.

² See, e.g., Dana Hedgepeth & Robert O'Harrow, Jr., Air Force Faulted over Handling of Tanker Deal, *Washington Post*, June 19, 2008, at A1; Michael Fabey, Lockheed Martin Files Another CSAR-X Protest, *Aviation Week*, June 12, 2007, available at <http://www.aviationweek.com/aw/generic/story.jsp?id=news/CSAR061207.xml&headline=Lockheed%20Martin%20Files%20Another%20CSAR-X%20Protest&channel=defense>.

³ See, e.g., Air Force Aerial Refueling Tanker Replacement: Hearing before the House Committee on Armed Services, July 10, 2008; KC-X Tanker Recompete Act, H.R. 6426, 110th Congress, at § 2(a).

⁴ Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Aug. 24, 2007, available at <http://acquisition.navy.mil/rda/content/download/5263/23838/file/enhancing%20competition%201-18-2008.pdf> (describing bid protests as "extremely detrimental to the warfighter and taxpayer" and stating that "[t]he Defense Department must take steps in an effort to avoid these protest situations").

⁵ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009: Report of the Committee on Armed Services, House of Representatives, on H.R. 5658, at 394-95 (2008).

⁶ GAO, *Report to Congress on Bid Protests Involving Defense Procurements*, Apr. 9, 2009, available at <http://www.gao.gov/decisions/bidpro/401197.pdf>.

⁷ See, e.g., Industry's Wish List for Procurement Reform, *Wash. Tech.*, Nov. 20, 2009, available at <http://washingtontechnology.com/blogs/editors-notebook/2009/11/gordon-ofpp-wish-list.aspx> (listing "address[ing] the growing number of contract protests" as one of industry's top wishes); TSA Infrastructure Contract Enters the Ridiculous Zone, *Wash. Tech.*, Nov. 19, 2009, available at <http://washingtontechnology.com/blogs/editors-notebook/2009/11/tsa-stops-work-again.aspx> (describing how work on one particular contract was started, stopped, resumed, and stopped a second time due to protest activity).

well as the basis for agency overrides of automatic stays and judicial review of agency override determinations; (6) the basis and effects of GAO decisions; and (7) reconsideration and “appeal” of GAO decisions. Its companion report is CRS Report R40227, *GAO Bid Protests: Trends, Analysis, and Options for Congress*, by Moshe Schwartz and Kate M. Manuel, which analyzes recent trends in bid protests filed with GAO, particularly protests involving DOD.⁸

Background

A bid protest is a formal, written objection to an agency’s solicitation for bids or offers, cancelation of a solicitation, or award or proposed award of a contract.⁹ Bid protests only became part of the federal procurement system in the early 20th century, more than 100 years after the federal government began purchasing goods and services. However, Congress has authorized bid protests in recognition of their role in providing redress to disappointed bidders and offerors and in ensuring the integrity of the federal procurement process. Congress has thus authorized three administrative and judicial forums to hear bid protests against the federal government.

Historical Development of Federal Bid-Protest Mechanisms

GAO first began hearing bid protests in the early 20th century on the theory that its authority to settle and adjust “all claims and demands” against the United States encompassed bid protests.¹⁰ The federal courts did not then hear protests, although at least some agencies did. In fact, after GAO first began hearing bid protests, the federal courts held that they lacked jurisdiction to hear them. In *Perkins v. Lukens Steel Company*, the Supreme Court said that federal courts could not hear bid protests because the existing procurement laws did not confer standing on actual or potential bidders or offerors who had been disappointed in their dealings with the federal government.¹¹ The Court said that these procurement laws were strictly for the government’s benefit, “for the purpose of keeping its own house in order.”¹²

Several decades later, the federal courts came to hold that the Administrative Procedure Act (APA) authorized them to hear bid protests,¹³ and Congress later explicitly granted bid protest jurisdiction to GAO with the Competition in Contracting Act (CICA) of 1984.¹⁴ However, GAO’s long history of handling bid protests, coupled with several unique aspects of the GAO bid-protest process, most notably the stay of contract award or performance that generally results from the filing of a GAO protest, make it the primary locus for federal bid protests.

⁸ For more on the GAO generally, see CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

⁹ 31 U.S.C. § 3551(1)(A)-(D).

¹⁰ The Budget and Accounting Act of 1921, P.L. 67-13, § 305, 42 Stat. 20, 24 (June 10, 1921).

¹¹ 310 U.S. 113, 132 (1940).

¹² *Id.* at 127.

¹³ Congress passed the APA in 1946, but it was not until 1970 that the federal courts held that the APA gave them jurisdiction to hear bid protests. *See Scanwell Labs., Inc. v. Schafer*, 424 F.2d 859, 865-69 (D.C. Cir. 1970).

¹⁴ CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§ 2701-2753, 98 Stat. 1175 (1984) (codified, in part, at 31 U.S.C. § 3556). Certain specific issues relating to the award of federal contracts are to be protested to other agencies, rather than the bid-protest forums. Size certification determinations for small businesses, for example, are to be protested with the Small Business Administration. *See* 13 C.F.R. § 121.1001.

Purposes of Bid-Protest Processes

Although disappointed bidders or offerors would generally have no right to protest if Congress did not provide for this right, Congress has chosen to authorize several administrative or judicial forums to hear bid protests for several reasons. First, protest mechanisms ensure that entities doing business with the government can air their complaints about governmental contracting processes and obtain relief. Without such mechanisms, certain frustrations that citizens have with their government could remain unaddressed. Additionally, absent such mechanisms, entities might be less willing to do business with the government, which could diminish competition for government contracts and drive up prices. Second, protest mechanisms enhance the accountability of procurement officials and government agencies by highlighting and correcting mistakes and misconduct. This accountability helps to ensure the integrity of the procurement system. If the government's procurement system were perceived as corrupt or ineffective, contractors might be less willing to compete for government contracts, and the price at which the government acquires goods and services could increase. A corrupt or ineffective procurement system could also waste taxpayers' money.

These benefits of bid protests are not costless, however; protests can impede the prompt and efficient acquisition of goods and services needed by the government. Particularly when award or performance of a contested contract is stayed by the filing of a bid protest, as happens with many GAO protests, protests can delay agency procurement actions. Protests also require agency officials to spend time in explaining their conduct to disappointed bidders and offerors and in defending their conduct before administrative or judicial forums. Moreover, fear of possible protests may increase the time and energy that agencies expend in documenting their procurement decisions. Congress has, however, historically viewed the benefits of bid protests as outweighing these costs.

The GAO Bid-Protest Process

CICA charges GAO with "provid[ing] for the inexpensive and expeditious resolution of [bid] protests" to "the maximum extent practicable."¹⁵ GAO has attempted to meet these goals through the use of timeframes and procedures partly prescribed by statute and partly established by administrative rule making.¹⁶

What Issues Can be Protested with GAO?

Under CICA, disappointed bidders or offerors can protest¹⁷ to GAO about alleged illegalities or improprieties in (1) solicitations or other requests by federal agencies for offers for contracts for goods or services, (2) cancellations of solicitations or other requests for offers by federal agencies, (3) awards or proposed awards of contracts by federal agencies, or (4) terminations or cancellations of contract awards by federal agencies *if* the protest alleges that the termination or

¹⁵ 31 U.S.C. § 3554(a)(1).

¹⁶ Compare 31 U.S.C. § 3554(a)(1) (establishing 100-day timeframe for GAO decision) with 4 C.F.R. § 21.2(a)(2) (establishing that protests must generally be filed within 10 days after the basis for protesting was known or should have been known).

¹⁷ A protest is, by definition, a written objection. 31 U.S.C. § 3551(1).

cancellation was based on improprieties in the contract's award.¹⁸ The alleged and protested illegality or impropriety can exist prior to the contract award, as when a contractor claims that some aspect of the solicitation would improperly disadvantage it in competing for the contract. Alternately, the alleged and protested illegality or impropriety can arise with the contract, as when a contractor claims that the government failed to follow the rules for the competition or otherwise acted improperly in awarding the contract to the protestor's competitor. Starting in FY2008, under additional jurisdiction granted to GAO by Congress, protested illegalities or improprieties could include matters relating to agencies' issuance of task orders, contracting out under Office of Management and Budget (OMB) Circular A-76, and Transportation Security Administration contracts.¹⁹

GAO regulations, however, exclude certain issues from GAO protests even when these issues are integrally linked to the formation of a government contract. These issues include the following:

- challenges to small business size standards and standard industrial classifications; issuance of or refusal to issue certificates of competency under Section 8(b)(7) of the Small Business Act; and determinations to procure particular requirements through the Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program);²⁰
- alleged procurement integrity violations which the protester did not report to the agency responsible for the alleged violations within 14 days of discovering them;²¹
- procurements by agencies other than federal agencies as defined in Section 3 of the Federal Property and Administrative Services Act;²²
- awards or proposed awards of subcontracts, unless the agency awarding the prime contract had requested in writing that subcontract protests be handled by GAO as non-statutory protests;²³
- suspensions or debarments of contractors by agencies;²⁴ or
- decisions by agency tender officials to file or not file protests in connection with public-private competitions.²⁵

¹⁸ 31 U.S.C. § 3551(1)(A)-(D).

¹⁹ See *Bid Protest Annual Report*, *supra* note 1.

²⁰ These issues are generally protested with the Small Business Administration (SBA). For more information on the 8(a) Program, see CRS Report R40744, *The "8(a) Program" for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by John R. Luckey and Kate M. Manuel.

²¹ Such violations include the release of source selection information or contractor bid or proposal information by the agency; undisclosed contacts between employees involved in procurements over \$100,000 and bidders or offerors regarding future employment; or employment by the contractor of former agency officials who were involved in procurements or administration of contracts valued at \$10 million or more within one year of their involvement. See 41 U.S.C. § 423.

²² P.L. 81-152, 63 Stat. 377 (1949). Examples of such agencies include the U.S. Postal Service and the Federal Deposit Insurance Corporation.

²³ An agency can agree in writing to have other protests—known as non-statutory protests—decided by GAO. 4 C.F.R. § 21.13(a).

²⁴ For more on debarment and suspension, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

²⁵ 4 C.F.R. § 21.5(a)-(k). For more on public-private competitions, see CRS Report RL32833, *Competitive Sourcing* (continued...)

Who Can File or Be a Party to a GAO Protest?

By statute, a GAO bid protest may be filed by any “interested party,”²⁶ or any “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”²⁷ This focus upon direct economic interest in determining who is an interested party means that a larger number of contractors can bring pre-award protests than can bring post-award protests. Prior to the award, contractors who are considering bidding or offering generally qualify as interested parties. After an award, however, only contractors who bid on the contract or submitted offers qualify as interested parties because only they were eligible for the award.²⁸ Moreover, because of the focus on *direct* economic interest, GAO often requires that contractors both (1) have bid or offered and (2) be next in line for the award if the protest is sustained for them to be recognized as interested parties.²⁹ Because they lack these direct economic interests, non-contractors—such as concerned citizens—are not interested parties who can bring GAO bid protests.

In addition to prospective or actual bidders or offerors, other parties to GAO bid protests include the agency conducting the challenged procurement and, potentially, one or more intervenors. Intervenors enter protests to protect their status as awardees or potential awardees under the protested procurement. When the contract has not yet been awarded, GAO permits all bidders or offerors who “appear to have a substantial prospect of receiving an award if the protest is denied” to intervene.³⁰ Similarly, when the contract has been awarded, GAO permits the winning bidder or offeror to intervene.³¹

Procedures for Bringing and Resolving GAO Protests: “Inexpensive Resolution”

“No formal briefs or other technical forms of pleading or motion are required” for an interested party to file a GAO bid protest.³² For GAO to consider its protest, a protestor need only (1) identify the contracting agency and the solicitation or contract number; (2) set forth a detailed statement of the legal and factual grounds of protest, including copies of relevant documents; (3) establish that the protestor is an interested party making a timely protest; and (4) state the relief

(...continued)

Statutes and Statutory Provisions, by L. Elaine Halchin.

²⁶ 31 U.S.C. § 3553(a).

²⁷ 31 U.S.C. § 3551(2)(A).

²⁸ GAO, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide 5* (8th ed. 2006), available at [http://meetings.abanet.org/webupload/commupload/PC402000/relatedresources/GAOGuidetoBidProtests\(EighthEditionMay2006\).pdf](http://meetings.abanet.org/webupload/commupload/PC402000/relatedresources/GAOGuidetoBidProtests(EighthEditionMay2006).pdf).

²⁹ See, e.g., Arora Group, B-288127 (Comp. Gen. Sept. 14, 2001) (recognizing a bidder whose proposal was ranked fifth as an interested party only because its protest challenged the agency’s application of the evaluation criteria in general and, if successful, could have placed the contractor in line for the award).

³⁰ 4 C.F.R. § 21.0(b)(1).

³¹ *Id.*

³² 4 C.F.R. § 21.1(f).

requested (e.g., termination or re-competition of a contract).³³ In their filings, protesters may also request protective orders, specific documents from the agency, or a hearing before GAO.³⁴

GAO allows contractors to represent themselves in bid protest proceedings and to have their protests resolved based on paper filings without a hearing. Although they may use the services of an attorney in preparing or prosecuting a GAO protest, protesters are not required to do so³⁵ and can avoid the costs of attorneys' fees by representing themselves. Similarly, resolution of the protest based upon documents filed by the protester and the agency, as opposed to by hearing, allows protesters to avoid the costs of traveling to Washington, D.C., where GAO is located, for hearings.³⁶ Hearings are relatively rare in GAO protests. Between FY2005 and FY2009, only 6%-12% of GAO cases annually entailed hearings.³⁷ Moreover, when held, hearings are less formal than hearings in federal court, with the parties and GAO determining at a pre-hearing conference what procedures will be followed, what issues will be considered, and what witnesses will testify.³⁸

All these factors, as well as the strict timeframes for resolving GAO protests, described below, can make GAO a less expensive venue in which to conduct bid protests than the Court of Federal Claims. Protesters in the Court of Federal Claims are, in contrast, generally more likely to be represented by attorneys and have hearings on their protests.³⁹ Their protests can also take longer to resolve.⁴⁰ However, some commentators have wondered (1) whether GAO's comparatively quicker and less formal procedures make GAO more likely than the Court of Federal Claims to issue erroneous decisions and (2) whether GAO is the best forum for "awards involving complex systems or services with values rising to the hundreds of millions of dollars or more."⁴¹

Timeframes Involved in GAO Protests: "Expeditious Resolution"

GAO is to adhere to strict timeframes—resolving protests within 100 calendar days of their filing—to ensure that protesters receive prompt resolution of their claims and to prevent bid protests from delaying the procurement of necessary goods and services by government agencies.⁴² A protester who files a bid protest with the Court of Federal Claims could, in contrast, potentially wait over 100 days before the court hears its case⁴³ and would not have the award or

³³ 4 C.F.R. § 21.4(c)(1)-(8).

³⁴ 4 C.F.R. § 21.1(d)(1)-(3).

³⁵ *Bid Protests at GAO*, *supra* note 28, at 3. However, only attorneys admitted under protective orders are permitted to see another company's proprietary information, or the agency's source-selection-sensitive information, during a GAO protest. *Id.* at 5-6.

³⁶ 4 C.F.R. § 21.7(a) (allowing parties to a bid protest to request a hearing). *See also* 4 C.F.R. § 21.7(c) (noting that, although hearings are generally conducted in Washington, D.C., they can sometimes be conducted in other locations, by telephone, or by other electronic means).

³⁷ *Bid Protest Annual Report*, *supra* note 1.

³⁸ 4 C.F.R. § 21.7(b).

³⁹ Robert S. Metzger & Daniel A. Lyons, A Critical Reassessment of the GAO Bid-Protest Mechanism, 6 *Wis. L. Rev.* 1225, 1232 (2007).

⁴⁰ *Id.*

⁴¹ *Id.* at 1241.

⁴² *Bid Protests at GAO*, *supra* note 28, at 7.

⁴³ Metzger & Lyons, *supra* note 39, at 1232. In many cases, judges on the Court of Federal Claims hold some sort of hearing on the merits within 60 to 90 days of the protest's filing. The court does not always render its decision at the (continued...)

performance of the contract stayed for the duration of the protest, as generally happens with GAO protests. This section outlines the timeframes for the main steps in GAO bid protests.

Initial Filings by Interested Parties

The timeframes within which interested parties must, by regulation, file bid protests with GAO depend upon the circumstances prompting the protest. Alleged improprieties in solicitations that are apparent prior to bid opening or the time set for receipt of initial proposals must be protested before the bid opening or the time set for receipt of initial proposals.⁴⁴ Other alleged improprieties must be protested no later than 10 calendar days after they become known, or should have become known, whichever is earlier, unless the protest challenges “a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required.”⁴⁵ Protests filed after these deadlines are untimely, and GAO generally dismisses them.⁴⁶ GAO considers untimely protests only when the protester shows good cause for its late filing or when GAO determines that the protest raises “issues significant to the procurement system.”⁴⁷ Would-be protesters that miss GAO filing deadlines can still file bid protests with the Court of Federal Claims within six years of the events prompting the protest, however.⁴⁸

GAO Notice to the Agency

Once a protest is filed with GAO, it must notify the federal agency whose contracting activities are being protested within one working day of receiving the protest.⁴⁹ This notice is important for two reasons. First, the agency’s receipt of GAO’s notice generally marks the beginning of an automatic stay of the award or performance of the contract. Under CICA, if a protest is filed within 10 days of the contract award or within 5 days of a debriefing, a federal agency that has been notified of a GAO bid protest may not award or authorize performance of the contested contract until GAO decides the protest.⁵⁰ Second, the agency’s receipt of GAO’s notice marks the beginning of the 30-calendar-day period within which the agency must generally respond to the GAO protest.⁵¹

(...continued)

same time as the hearing, however. The decision could come weeks or months later.

⁴⁴ 4 C.F.R. § 21.2(a)(1). When the alleged improprieties did not exist in the initial solicitation, but were subsequently incorporated into it, the protest must be filed prior to the next closing time for receipt of proposals following the incorporation. *Id.*

⁴⁵ 4 C.F.R. § 21.2(a)(2). A debriefing is a meeting between unsuccessful bidders or offerors and agency officials wherein agency officials explain why the proposal of the bidder or offeror was not selected. When contractors protest with the GAO after an earlier protest with the contracting agency, that protest must also be filed with GAO within 10 calendar days of the agency’s denying this protest unless the agency had set a shorter timeframe for protesters’ “appeal” of agency decisions to GAO. 4 C.F.R. § 21.2(a)(3).

⁴⁶ 4 C.F.R. § 21.2(b)-(c).

⁴⁷ 4 C.F.R. § 21.2(c).

⁴⁸ 28 U.S.C. § 2401(a).

⁴⁹ 31 U.S.C. § 3553(b)(1). The protester must also submit a copy of the protest to the agency within one working day of filing the protest with GAO. 4 C.F.R. § 21.1(e).

⁵⁰ 31 U.S.C. § 3553(c)(1) & (d)(1).

⁵¹ 31 U.S.C. § 3553(b)(2)(A). This 30-day response period can be lengthened when the Comptroller General determines, based upon the agency’s written request, that the circumstances of the protest require a longer period. 31 U.S.C. § 3553(b)(2)(B). The response period can also be shortened to 20 days when the Comptroller General (continued...)

Agency's Response and Protester's Reply

When responding to a GAO bid protest, the agency must file a report with GAO, generally within 30 calendar days of receiving notice of the protest.⁵² Under GAO regulations, this report must include

... the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposals submitted by the protester; the bid or proposal of the firm which is being considered for the award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.⁵³

The agency can avoid filing this report only when it, or an intervenor, requests and is granted dismissal of the protest by GAO before the report is due.⁵⁴

After the agency's report is filed, the protester then has 10 calendar days to submit written comments on the agency's report to GAO.⁵⁵ If the protester fails to submit such comments, GAO is required, by its own regulations, to dismiss the protest.⁵⁶

Issuance of GAO's Decision on a Protest

GAO generally must issue its final decision on a bid protest within 100 calendar days of the protest's filing.⁵⁷ This timeframe can be shortened to 65 calendar days if the Comptroller General determines, either at the request of a party or upon his or her own initiative, that the protest should be treated under the "express option," which allows for faster-than-usual decisions.⁵⁸ GAO can also dismiss a protest that is frivolous, or that does not state, on its face, a valid basis for protest, at any time,⁵⁹ even before the agency files its report with GAO.⁶⁰ GAO can similarly issue a summary decision on a protest at any time.⁶¹

The importance that Congress attaches to the expeditious resolution of protests by GAO is indicated by the fact that GAO would have to report to Congress on any instance in which GAO

(...continued)

determines that the protest is suitable for "express" resolution and notifies the agency of this determination. 31 U.S.C. § 3553(b)(2)(C).

⁵² 31 U.S.C. § 3553(b)(2)(A).

⁵³ 4 C.F.R. § 21.3(c).

⁵⁴ 4 C.F.R. § 21.3(b).

⁵⁵ 4 C.F.R. § 21.3(i). In protests decided under the "express option," this timeframe is reduced to five days. 4 C.F.R. § 21.10(d).

⁵⁶ 4 C.F.R. § 21.3(i).

⁵⁷ 31 U.S.C. § 3554(a)(1). GAO must also resolve timely supplemental or amended protests within this timeframe, if possible. 4 C.F.R. § 21.9(c).

⁵⁸ 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.10.

⁵⁹ 31 U.S.C. § 3554(a)(4).

⁶⁰ 31 U.S.C. § 3553(b)(3).

⁶¹ 4 C.F.R. § 21.10(e).

fails to issue its final decision on a protest within 100 calendar days of the protest’s filing. According to GAO, GAO has never had to make such a report to Congress.

Table I. Timeframes of Important Events in the GAO Bid-Protest Process

For Protests Other than Those Based on Improprieties in Solicitations That Were Apparent Prior to the Bid Opening or the Time Set for Receipt of Initial Proposals

Event	Normal Timeframes	Express Timeframes
Filing of protest with GAO	No more than 10 calendar days after the protested conduct	No more than 10 calendar days after the protested conduct
Notice of the protest sent from GAO to the agency	Within 1 working day of the protest’s being filed	Within 1 working day of the protest’s being filed
Agency’s report on the protested procurement sent to GAO	Within 30 calendar days of the agency’s receiving notice of the protest	Within 20 calendar days of the agency’s receiving notice of the protest
Protester’s reply to the agency’s report	Within 10 calendar days of the filing of the agency report	Within 5 calendar days of the filing of the agency report
GAO’s decision on the protest	Within 100 calendar days of the protest’s being filed	Within 65 calendar days of the protest’s being filed

Source: Congressional Research Service

Timeframes for Other Optional Events in the GAO Bid-Protest Process

Similarly short timeframes apply to other optional events in the GAO bid protest process:

- protesters must request expedited review under GAO’s “express option” within five calendar days of filing the protest;⁶²
- protesters who want GAO to hold hearings on the protest must request a hearing “as early as possible in the protest process”;⁶³
- protesters must request any additional documents whose existence or relevance becomes evident only after the filing of the agency report within two calendar days of discovering their existence;⁶⁴ and
- parties must file written comments on any hearing within five calendar days of the hearing.⁶⁵

⁶² 4 C.F.R. § 21.10(c).

⁶³ *Bid Protests at GAO*, *supra* note 28, at 20.

⁶⁴ 4 C.F.R. § 21.3(g).

⁶⁵ 4 C.F.R. § 21.7(g). If the protester fails to timely file these comments, GAO must, under its own regulations, dismiss the protest.

Automatic Stays of Contract Award or Performance During GAO Protests

Under CICA, the filing of a bid protest with GAO generally triggers an automatic stay, or postponement, of contract award or performance. With pre-award bid protests, an agency may not award the contested contract until the protest has been resolved.⁶⁶ Similarly, with post-award bid protests, the agency must withhold authorization of performance under the contract while the protest is pending.⁶⁷ If authorization has not been withheld, the agency must “immediately direct the contractor to cease performance under the contract” until the protest is resolved.⁶⁸

These bid-protest stays, sometimes called “CICA stays,” are a key aspect of the GAO bid-protest process,⁶⁹ which Congress intended to strengthen.⁷⁰ Congress did not provide for similar stays when bid protests are filed with the Court of Federal Claims. Rather, bid protesters filing suit in the Court of Federal Claims must meet the court’s customary requirements for temporary restraining orders or preliminary injunctions in order to effect a delay of the agency’s procurement activities similar to that generally occurring automatically when a GAO protest is filed.⁷¹ This difference between bid protests at GAO and those at the Court of Federal Claims has prompted some commentators to worry that the stays triggered by GAO protests encourage contractors to “game the system.” Such commentators worry that contractors knowingly file meritless protests with GAO in order to harass their competitors and delay awards to them, or in the hopes of obtaining short-term contracts from the government during the pendency of the GAO protest.⁷² These commentators also worry that the public interest, as embodied in the contract to be awarded or performed, is neglected during the stay.⁷³

⁶⁶ 31 U.S.C. § 3553(c)(1).

⁶⁷ 31 U.S.C. § 3553(d)(1).

⁶⁸ *Id.*

⁶⁹ *See, e.g.,* PGBA, LLC v. United States, 57 Fed. Cl. 655, 657 (2003) (describing the stays as central to the GAO bid protest process).

⁷⁰ *See, e.g.,* *Competition in Contracting Act of 1984: H.R. Rep. No. 1157, 98th Cong., 2d Sess. 24-25 (1984)* (explaining that, prior to CICA, many agencies would proceed with the award during the protest, making the GAO’s decision irrelevant in the face of a contractual *fait accompli*).

⁷¹ A temporary restraining order bars a party to litigation from taking certain action(s) while the court decides to issue a preliminary injunction. In deciding whether to issue a temporary restraining order or a preliminary injunction, the Court of Federal Claims applies the same four-part test, looking at (1) whether the plaintiff is likely to succeed on the merits of the case, (2) whether the plaintiff will suffer irreparable harm if the court withholds the requested relief, (3) whether the balance of hardships to the parties favors the grant of the requested relief, and (4) whether it is in the public interest to grant the requested relief. *See, e.g.,* Career Training Concepts, Inc. v. United States, 83 Fed. Cl. 215, 218 (2008).

⁷² Metzger & Lyons, *supra* note 39, at 1239. A disappointed bidder or offeror who is the incumbent contractor could obtain another 100 days worth of business from the agency by filing a protest with the GAO because agencies often continue incumbent contractors during the pendency of GAO protests. *See* 31 U.S.C. § 3553(d)(3)(C); *see also* Keeton Corrections, Inc. v. United States, 59 Fed. Cl. 753 (2004) (overruling the Bureau of Prisons’ override of a CICA stay because the incumbent contractor could continue to provide correction services during the protest). Alternately, a disappointed bidder or offeror who is not the incumbent contractor could obtain temporary contracts with the agency during the protest.

⁷³ *Id.* at 1269.

Agency Override of Bid-Protest Stays

Even if it takes the maximum time, a GAO bid protest does not necessarily delay contract award or performance for up to 100 calendar days. This is in part because CICA also provides grounds for agency overrides of automatic bid-protest stays.⁷⁴ Agencies may override bid-protest stays upon two grounds: (1) “urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General,”⁷⁵ or (2) “performance of the contract is in the best interests of the United States.”⁷⁶ Only “urgent and compelling circumstances” may be asserted when GAO bid protests are filed prior to the award of the contract.⁷⁷ Either “urgent and compelling circumstances” or the “best interests of the United States” may be asserted when GAO bid protests are filed after the award of the contract.⁷⁸

Beyond when the grounds may be asserted, few other differences are apparent between the circumstances in which agencies can invoke “urgent and compelling circumstances” and those in which they can invoke the “best interests of the United States,” as **Table 2** illustrates.⁷⁹ Some courts and commentators have suggested, however, that an agency’s invocation of “urgent and compelling circumstances” has more serious overtones and ought to receive more deference than an agency’s invocation of the “best interests of the United States.”⁸⁰

Any agency override, upon any basis, requires a written finding that grounds for the override exist, and the Comptroller General must be notified of this finding.⁸¹

Table 2. Examples of Procurements Involving “Urgent and Compelling Circumstances” or the “Best Interests of the United States”

Urgent and Compelling Circumstances	Best Interests of the United States
<ul style="list-style-type: none"> Canine services for Army Special Forces in Afghanistan: agency record showed adverse consequences, in the form of security breaches at military installations, without the override; the override was only for a bridge contract, with the 	<ul style="list-style-type: none"> Cockpit video recording systems recorders for F/A-18 aircraft: agency record showed that the agency conducted a proper evaluation in making the initial award; the override involved a 1 year contract; failure to override would interfere with the aircraft’s

⁷⁴ 31 U.S.C. § 3553(c)(1) & (d)(3). See *Ameron, Inc. v. U.S. Army Corp. of Eng’rs*, 607 F. Supp. 962, 974 (D.N.J. 1985) (describing the override as a “built-in safety value to prevent undue harm” to the government).

⁷⁵ 31 U.S.C. § 3553(c)(2)(A) & (d)(3)(C)(II).

⁷⁶ 31 U.S.C. § 3553(d)(3)(C)(II).

⁷⁷ 31 U.S.C. § 3553(c)(2).

⁷⁸ 31 U.S.C. § 3553(c) & (d).

⁷⁹ The key determinant of the agency’s success in invoking either grounds for overriding a CICA stay is the agency’s record of the procurement and its decision making. The agency must be able to demonstrate that its override determination was not arbitrary, capricious, or an abuse of discretion based upon the evidence in the record before it at the time the determination was made. See, e.g., *Protection Strategies, Inc. v. United States*, 76 Fed. Cl. 225, 233-34 (2007) (discussing reviewing courts’ focus upon agency records as they existed at the time of the override determination); U.S. Army Acquisition Corps, *CICA Automatic Stay Override Guide 2* (2004), available at http://www.aca.army.mil/docs/Community/aca_ovrid_gd.doc (suggesting that agency contracting officers should prepare their files so as to have strong records for judicial scrutiny).

⁸⁰ Robert M. Hansen, *CICA Without Enforcement: How Procurement Officials and Federal Court Decisions Are Undercutting Enforcement Provisions of the Competition in Contracting Act*, 6 *Geo. Mason L. Rev.* 131, 155 (1997) (“If an action is in the ‘best interest of the United States,’ it certainly must be ‘urgent and compelling,’ and if it is ‘urgent and compelling,’ it very likely will be in the country’s ‘best interest.’”).

⁸¹ 31 U.S.C. § 3553(c)(1) & (d)(3).

Urgent and Compelling Circumstances	Best Interests of the United States
<p>agency planning a new solicitation within a year; and the only alleged harm to the protester was the dissatisfaction of its employees.^a</p> <ul style="list-style-type: none"> • Maintenance & refuse services at Navy housing facility: agency record showed that services under the contract were essential to the health, safety, and morale of military personnel; the protester's allegations of harm were speculative; and the public interest would be harmed if the protester, which was not a small business, got an award set aside for a small business.^b • Maintenance & support services for Border Patrol academy: agency record showed that the protester, who was the incumbent contractor, had performed inadequately and could not continue to perform during the protest; and time pressures required the award of a new contract.^c 	<p>deployment to Bosnia and troop training; and the public interest required that the troops be well equipped.^d</p> <ul style="list-style-type: none"> • Training services for a "top gun" school: protester alleged only speculative harm, claiming it would never "get on base again" if it lost the protest; the agency record showed that the contract was key to the success of a weapons school whose operations had already been interrupted; and protecting national security by ensuring adequate training was in the public interest.^e • Spectrum management engineering services: agency record showed that performance under the protested contract was time-critical and that the winning offeror was only source with personnel qualified to perform the work.^f

Source: Congressional Research Service

Notes: All examples are taken from federal court cases in which the courts found that the agency had acted reasonably in overriding a CICA stay upon the grounds of "urgent and compelling circumstances" or the "best interests of the United States."

- a. EOD Tech., Inc. v. United States, 82 Fed. Cl. 12 (2008).
- b. Superior Services, Inc. v. Dalton, 851 F. Supp. 381 (S.D. Cal. 1994).
- c. Ramcor Servs. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999).
- d. Teac Am., Inc. v. U.S. Dep't of the Navy, 876 F. Suppl. 289 (D.D.C. 1995).
- e. SDS Int'l Inc. v. United States, 55 Fed. Cl. 363 (2003).
- f. Alion Science & Tech. Corp. v. United States, 69 Fed. Cl. 14 (2005).

GAO and Agency Override Determinations

Although agencies are required by law to inform GAO of their override determinations, GAO does not review the agency's override determination and cannot reverse it. GAO lacks authority and jurisdiction to keep the agency from proceeding to award or authorize performance of the contract under the override. All GAO can do is report on agency overrides to Congress, as it did in its annual reports until FY2002.⁸² Potential congressional awareness of agency override determinations may act as a brake on agency overrides.

Judicial Review of Agency Override Determinations

Outside of the agency itself, the only entity that can reverse an agency override determination and reinstate the delay of contract award or performance that a GAO bid protest triggers is a federal

⁸² Compare GAO, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2003*, Jan. 30, 2004, available at <http://www.gao.gov/special.pubs/bidpro03.pdf> (not reporting on agency override determinations) with GAO, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2002*, Jan. 29, 2003, available at <http://www.gao.gov/special.pubs/bidpro02.pdf> (reporting on agency override determinations).

court—currently the Court of Federal Claims⁸³—acting on the petition of the protester. To achieve such an outcome, the court would have to grant the protester’s motion to restrain or enjoin the government from awarding the contract or authorizing performance under it.⁸⁴

Although courts once exempted agency determinations as to the “best interests of the United States” from judicial review⁸⁵ and gave substantial deference to agency determinations as to “best interests” and “urgent and compelling circumstances,”⁸⁶ the Court of Federal Claims has not infrequently enjoined agency overrides after subjecting the agency’s override determination to “searching inquiry.”⁸⁷ Override determinations based on considerations of national security or national defense sometimes receive greater deference from the Court of Federal Claims,⁸⁸ but not even these considerations guarantee victory for agencies.⁸⁹

⁸³ Since *Ramcor Services Group, Inc. v. United States*, 183 F.3d 1286 (Fed. Cir. 1999), all such suits have been brought in the Court of Federal Claims.

⁸⁴ Because the case comes to the court on a motion for a temporary restraining order or preliminary injunction, the court applies its customary test, examining (1) whether the protester is likely to succeed on the merits, (2) whether the protester will suffer irreparable harm if the court denies the requested relief, (3) whether the balance of hardships favors the grant of the requested relief, and (4) whether the requested relief would further the public interest. See, e.g., *Career Training Concepts*, 83 Fed. Cl. at 218. The court’s analysis of whether the protester is likely to succeed on the merits, in turn, focuses upon whether the agency’s override determination was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” in violation of the Administrative Procedure Act (APA). See 5 U.S.C. § 706(2)(A) (scope of review under the APA); *Superior Helicopter LLC v. United States*, 78 Fed. Cl. 181, 186-87 (2007) (application of APA to agency overrides). In this analysis, the court focuses upon whether significant adverse consequences would have resulted if the agency had not overridden the stay; whether the agency had reasonable alternatives to the override; how the benefits of the override compare to its potential costs, including the possibility that the protester might prevail in the GAO bid protest; and the impact of the override on competition and the integrity of the procurement system. See, e.g., *Reilly’s Wholesale Produce, Inc. v. United States*, 73 Fed. Cl. 705, 711 (2006).

⁸⁵ *Topgallant Group, Inc. v. United States*, 704 F. Supp. 265, 266 (D.D.C. 1988) (holding that determination of what is in the “best interests of the United States” is committed to agency discretion and unreviewable). *Topgallant* was followed by *SDS International, Inc. v. United States*, 55 Fed. Cl. 363 (2003); *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993); and other federal court decisions. The Court of Federal Claims rejected the logic of *Topgallant* shortly after its *SDS International* decision in *PGBA, Inc.*

⁸⁶ See, e.g., *Mark Dunning Indus., Inc. v. Perry*, 890 F. Supp. 1504, 1511 (M.D. Ala. 1995) (stating that courts are to apply a particularly deferential standard of review in determining agency rationality in override determinations); *Stay, Inc. v. Cheney*, 940 F.2d 1457, 1463 (11th Cir. 1991) (same).

⁸⁷ The standard of “searching inquiry” is that from *Citizens to Preserve Overton Park v. Volpe*, 41 U.S. 402, 416 (1971). Commentators have noted that the Court of Federal Claims has been less deferential to agency override determinations since 2006, when it issued its decision in *Reilly’s Wholesale Produce*. See, e.g., Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides Are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 *A.F. L. Rev.* 91, 93 (2006) (describing 2006 as a “watershed” year).

⁸⁸ See, e.g., *SDS Int’l*, 55 Fed. Cl. at 366 (stating that courts must give “due regard” to the interests of national defense and national security when deciding bid protests); *Maden Tech Consulting Inc. v. United States*, 74 Fed. Cl. 786, 790 (2006) (“Where legitimate ‘interests of national defense and national security’ [are] asserted and established to the court’s satisfaction, the court will not ‘reach the merits of whether [CICA] is violated.’”).

⁸⁹ *Compare* *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 655-56 (2003) (stating that assertions of national security and national defense get more deference but the court still examines their merits) *and* *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 650 (2007) (focusing upon national security concerns in tailoring injunctive relief, not in deciding on the merits of the case) *with* *Hughes Missile Sys. Co. v. Dep’t of Air Force*, No. 96-937, slip. op. at 77 (E.D. Va. 1996), quoted in Hansen, *supra* note 80, at 154, (upholding an agency’s override without reaching the merits of the plaintiff’s argument even though the agency conceded that it prepared its findings justifying the override determination after the fact).

Basis and Effects of GAO Decisions

GAO is charged by statute with “deciding” all bid protests filed in accordance with GAO regulations.⁹⁰ When deciding a protest, GAO is not to substitute its judgment for the agency’s, or conduct *de novo* review of agency procurement activities and processes.⁹¹ Rather, GAO is to consider only whether the agency complied with procurement statutes or regulations, as well as had reasonable bases and adequate documentation, in its decision making.⁹²

Denials, Sustainments, and GAO Recommendations

When GAO finds no illegalities or other problems, it is to deny the protest, leaving the agency free to award the contract, or authorize performance under it, barring a court order to the contrary. When GAO finds illegalities or other problems, however, it would sustain the protest and may recommend that the agency (1) refrain from exercising its options under the contract, (2) re-compete the contract, (3) issue a new solicitation, (4) terminate the contract, (5) award the contract consistent with the requirements of statutes or regulations, or (6) implement any other recommendation that the “Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.”⁹³ In deciding which of these options to recommend, GAO considers all the circumstances surrounding the procurement or proposed procurement.⁹⁴ This includes the seriousness of the agency’s procurement deficiency, the degree of prejudice to the other parties and the integrity of the procurement system, the extent of performance, the cost to the government, the urgency of the procurement, and the potential impact of any GAO recommendation upon the agency’s mission.⁹⁵ Because GAO is a legislative branch agency, it could not constitutionally “compel” executive branch agencies to “obey” its recommendations because of the separation of powers doctrine.⁹⁶

Along with its recommendations sustaining the protest, GAO can also recommend that the agency conducting the procurement pay to the protester the costs of filing and pursuing the protest, including reasonable attorneys’ fees; the fees for consultants and expert witnesses; and the expenses of preparing the bid or protest.⁹⁷ When GAO recommends that an agency pay costs, the agency must either pay the costs promptly or report to the Comptroller General its reasons for not paying.⁹⁸ The agency must also attempt to reach an agreement with the protester on the costs to be

⁹⁰ 31 U.S.C. § 3552(a).

⁹¹ See, e.g., Baker Support Sys., B-257054.2 (Comp. Gen. Jan. 20, 1995).

⁹² See, e.g., 31 U.S.C. § 3552(a) (agency compliance with statutes and regulations); *McWane & Co.*, B-280374 (Comp. Gen. Mar. 1, 1996) (agency evaluation’s having a reasonable basis and being consistent with evaluation criteria in the request for proposals); *Moheat Env. Servs.*, B-270538 (Comp. Gen. Nov. 20, 1996) (agency evaluation’s having a reasonable basis and adequate documentation even if otherwise inconsistent with the evaluation criteria).

⁹³ 31 U.S.C. § 3554(b)(1)(A)-(G).

⁹⁴ 4 C.F.R. § 21.8(b).

⁹⁵ *Id.*

⁹⁶ See *Ameron, Inc. v. United States Army Corps of Eng’gs*, 809 F.2d 979, 986 (3d Cir. 1986).

⁹⁷ 31 U.S.C. § 3554(c)(1)(A)-(B). The Court of Federal Claims, in contrast, has ruled that it does not have jurisdiction over bid protest costs. *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218 (2005).

⁹⁸ 31 U.S.C. § 3554(c)(3)(A)-(B). Where GAO recommends fees for consultants, expert witnesses, or attorneys, no party other than a small business concern within the meaning of Section 3(a) of the Small Business Act may be paid costs for consultant- or expert-witness-fees that exceed the highest rate of compensation for expert witnesses paid by the federal government, or costs for attorneys’ fees that exceed \$150 per hour, unless the agency determines that an (continued...)

paid.⁹⁹ If agreement cannot be reached, the protester can request that GAO recommend to the agency an amount to be paid.¹⁰⁰

Legal Effect of GAO Recommendations

Even when GAO finds that the agency engaged in illegal or improper conduct and sustains the protest, however, the agency is not legally required to implement the recommendations in GAO's decision. GAO recommendations lack the force of law and are not binding upon the parties. In fact, a decision by GAO on a protest does not preclude a protester from later filing suit on the same matter in the Court of Federal Claims.¹⁰¹

Agencies typically fully adopt GAO recommendations, nonetheless, as **Table 3** illustrates. According to GAO's annual reports to Congress, in only four cases between FY2001 and FY2009 did an agency decline to fully adopt GAO's recommendations. However, GAO reports are based on statutory requirements focused upon a procuring agency's implementation of specific recommendations regarding a particular solicitation, proposed award, or award within a relatively short time frame (65 days):

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.¹⁰²

The reports thus do not necessarily capture decisions whose underlying logic the executive branch disagrees with at a later date. GAO issued such a decision, which is not addressed in either its FY2008 or FY2009 reports to Congress, on September 19, 2008, in *International Program Group, Inc.*¹⁰³ This decision was the first of two—the second of which was issued on May 4, 2009¹⁰⁴—in which GAO construed the Small Business Act to require that set-asides for Historically Underutilized Business Zone (HUBZone) small businesses take “precedence” over set-asides for other categories of small businesses.¹⁰⁵ It was only after the second decision that the Obama Administration indicated that it would not accord HUBZone set-asides precedence over set-asides for service-disabled veteran-owned and 8(a) small businesses because it disagrees with GAO's construction of the Small Business Act.¹⁰⁶ However, the Obama Administration's

(...continued)

increase in the cost of living or a special factor justifies a higher fee. 31 U.S.C. § 3554(c)(2)(A)-(B).

⁹⁹ 31 U.S.C. § 3554(c)(4).

¹⁰⁰ *Id.*

¹⁰¹ Metzger & Lyons, *supra* note 39, at 1232, 1248. GAO, in contrast, will not hear protests that have been the subject of litigation or have been decided on the merits by a court of competent jurisdiction. 4 C.F.R. § 21.11(b).

¹⁰² 31 U.S.C. § 3554(b)(3).

¹⁰³ B-400278; B-400308, 2008 U.S. Comp. Gen. LEXIS 193 (September 19, 2008).

¹⁰⁴ Mission Critical Solutions, B-410057, 2009 U.S. Comp. Gen. LEXIS 86 (May 4, 2009).

¹⁰⁵ For more on *International Program Group*, *Mission Critical Solutions*, and the executive branch's response, see CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by Kate M. Manuel.

¹⁰⁶ See Executive Office of the President, Office of Mgmt. & Budget, Recent Government Accountability Office Decisions Concerning Small Business Programs, July 10, 2009, available at <http://www.whitehouse.gov/omb/assets/> (continued...)

discretion regarding whether to comply with GAO’s recommendations on HUBZone and 8(a) set-asides was effectively removed on March 2, 2010, when the Court of Federal Claims held that HUBZone set-asides have precedence over 8(a) set-asides.¹⁰⁷ If this decision is not reversed on appeal and Congress does not enact proposed legislation that would amend the HUBZone Act (H.R. 3729, S. 1489), agencies must use HUBZone set-asides instead of 8(a) set-asides whenever possible.

Table 3. Number of Cases in Which Agencies Did Not Fully Adopt GAO Recommendations Per Fiscal Year
2001-2009

Fiscal Year	Number of Cases
2001	0
2002	1 ^a
2003	2 ^b
2004	0
2005	0
2006	0
2007	0
2008	0
2009	1 ^c

Source: Congressional Research Service using data from GAO

- a. Rockwell Elec. Commerce Corp., B-286201.6, .8 (Comp. Gen. Aug. 30, 2001 and Mar. 5, 2002).
- b. Consolidated Eng'g Servs., Inc., B-291345, .2 (Comp. Gen. Dec. 23, 2002); Symplicity Corp., B-291902, Apr. 29, 2003.
- c. Mission Critical Solutions, B-401057 (Comp. Gen. Dec. May 4, 2009).

The high degree of agency deference to GAO recommendations arguably reflects the scrutiny that Congress gives to agency decisions not to fully implement GAO recommendations. By statute, agencies have 60 calendar days within which to fully adopt GAO recommendations. Any agency that does not do so must promptly notify GAO, which then promptly notifies four congressional committees.¹⁰⁸ Once aware that an agency is not fully adopting GAO’s recommendations,

(...continued)

memoranda_fy2009/m09-23.pdf (directing agencies not to give HUBZone set-asides precedence over set-asides for service-disabled veteran-owned and 8(a) small businesses until OMB instructs otherwise); Office of Legal Counsel, Department of Justice, Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs, Aug. 21, 2009, available at <http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf> (disagreeing with GAO and finding that Small Business Administration regulations, which provide for parity, not precedence, among the set-aside programs, constitute a reasonable interpretation of the Small Business Act entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*).

¹⁰⁷ *Mission Critical Solutions v. United States*, 2010 U.S. Claims LEXIS *36 (Mar. 2, 2010).

¹⁰⁸ 31 U.S.C. § 3554(b)(3). The agency has five calendar days after the end of the 60-day period to notify GAO. The congressional committees to which GAO reports this information are the Senate Committee on Homeland Security and Governmental Affairs, the Senate Committee on Appropriations, the House Committee on Oversight and Government Reform, and the House Committee on Appropriations. When notifying these congressional committees, GAO must (continued...)

Congress can exercise oversight or take legislative action compelling agency compliance, if it so chooses.¹⁰⁹

Compliance with GAO Precedent or Recommendations as a Violation of the Administrative Procedure Act

Compliance with GAO precedent or recommendations does not necessarily immunize the agency from all future legal challenges to its actions or liability. Two recent Court of Federal Claims decisions illustrate how an agency could be found to have acted arbitrarily, capriciously, and in abuse of discretion, in violation of the Administrative Procedure Act (APA), by following GAO precedents or adopting GAO recommendations.

In the first case, *Geo-Seis Helicopters, Inc. v. United States*, the Military Sealift Command (MSC) accepted amendments to the winning bid after the bid closing date in reliance on GAO precedent allowing agencies to issue amendments that extend the closing date after the closing date has passed—but arguably contrary to the “late is late” rule of Federal Acquisition Regulation Section 52.215-1(c)(3)(ii)(A).¹¹⁰ A losing bidder protested the MSC’s actions to GAO and then filed suit in the Court of Federal Claims after GAO denied the protest.¹¹¹ The Court of Federal Claims found that the MSC violated the APA by relying on GAO precedent: “The refusal of the [MSC’s] Contracting Officer to adhere to the categorical reality of the ‘late is late’ rule renders arbitrary her decision to accept [the winning bidder’s] first and second revised proposals.”¹¹²

In the second case, *Grunley Walsh International, LLC v. United States*, as a result of GAO recommendations, the State Department adopted GAO’s interpretation of a statutory business-volume requirement for bidders on embassy construction contracts in place of its own previous interpretation.¹¹³ Under GAO’s interpretation, a bidder that had pre-qualified under the State Department’s interpretation had its pre-qualification withdrawn.¹¹⁴ This bidder filed suit against the State Department in the Court of Federal Claims alleging that the State Department’s actions violated the APA even if they comported with GAO’s recommendations.¹¹⁵ The Court of Federal Claims found for the bidder, noting that the GAO recommendation “was ... irrational because it

(...continued)

provide a comprehensive review of the challenged procurement and a recommendation as to whether Congress should consider (1) private relief legislation, (2) legislative rescission or cancellation of funds, (3) further investigation by Congress, or (4) other action to correct an inequity or preserve the integrity of the procurement process. 31 U.S.C. § 3554(e)(1)(A)-(B). GAO must also submit an annual report to Congress including, among other things, a summary of each instance in which an agency did not fully implement a GAO recommendation. 31 U.S.C. § 3554(e)(2).

¹⁰⁹ See, e.g., Jason Miller, OPM Blinks, Revisits USAJobs Buy, *Gov’t Computer News*, Apr. 19, 2004, available at http://mobile.gcn.com/articles/23_8/25609-1.html (reporting that the chairman of the House Government Reform Committee threatened the Office of Personnel Management (OPM) with loss of funding for the project after OPM failed to adopt GAO’s recommendation to re-compete the contract).

¹¹⁰ *Geo-Seis Helicopters*, 77 Fed. Cl. at 636-38 (Fed. Cl. 2007). FAR Section 52.215-1(c)(3)(ii)(A) says that “[a]ny proposal, modification, or revision, received at the Government office designated in the solicitation after the exact time specified for receipt of offers is ‘late’ and will not be considered.”)

¹¹¹ 77 Fed. Cl. at 638.

¹¹² *Id.* at 646.

¹¹³ *Grunley Walsh Int’l, LLC v. United States*, 78 Fed. Cl. 35, 37-38 (Fed. Cl. 2007).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

misread both the actual language of the statute and the legislative history” and the State Department acted irrationally in adopting it.¹¹⁶

Although the Court of Federal Claims and other courts had reversed GAO decisions in other cases,¹¹⁷ as discussed below, prior courts did not so explicitly link following GAO’s recommendations with violations of the APA.¹¹⁸ *Geo-Seis Helicopters* and *Grunley Walsh* thus highlight more clearly than previous cases agencies’ dilemmas in complying with CICA. Failure to fully implement GAO recommendations triggers reporting to Congress and possible congressional oversight, while complying with GAO recommendations could leave agencies vulnerable to charges of having violated the APA.

Reconsideration and “Appeal” of GAO Decisions

Much like agencies can decline to fully implement GAO recommendations that they are dissatisfied with, protesters who are dissatisfied with GAO decisions can also potentially avoid them by (1) requesting reconsideration from GAO or (2) “appealing” to the Court of Federal Claims. Disappointed agencies and intervenors can also request reconsideration from GAO, but need not “appeal” to the Court of Federal Claims because the agency can always decline to follow GAO recommendations.

Reconsideration of GAO Decisions

Any party to a GAO protest can request reconsideration of GAO’s decision from GAO.¹¹⁹ Such a request must be made within 10 calendar days after the basis for reconsideration is known or should be known, whichever is earlier.¹²⁰ GAO does not consider requests for reconsideration that lack detailed statements of the factual or legal grounds upon which reversal or modification is sought, “specifying any errors of law made or information not previously considered.”¹²¹ GAO will also summarily dismiss any reconsideration requests that fail to state valid bases for reconsideration or are untimely.¹²² Filing a request for reconsideration with GAO does not stay award or performance of a disputed contract like filing a bid protest with GAO does.¹²³

As **Table 4** illustrates, GAO receives far fewer requests for reconsideration than bid protests each year, and GAO seldom changes its recommendations upon reconsideration.¹²⁴

¹¹⁶ *Id.* at 44.

¹¹⁷ *See, e.g.,* *Transatlantic Lines LLC v. United States*, 68 Fed. Cl. 48 (2005) (finding for the protester after the GAO had denied the protest); *Blue DOT Energy Co. v. United States*, 76 Fed. Cl. 783 (2004) (same).

¹¹⁸ Prior cases tended to avoid language suggesting agency “violations” of the APA even when finding such violations in their analysis of the merits of the protest. *See, e.g.,* *Arora Group, Inc. v. United States*, 2004 US Claims LEXIS 267 (Aug. 31, 2004) (using the protester’s language, which mentioned “violations” of the APA, only when stating the plaintiff’s allegations and not when deciding the merits of the case).

¹¹⁹ 4 C.F.R. § 21.14(a).

¹²⁰ 4 C.F.R. § 21.14(b).

¹²¹ 4 C.F.R. § 21.14(a).

¹²² 4 C.F.R. § 21.14(c).

¹²³ *Id.*

¹²⁴ *See, e.g.,* *Jerome S. Gabig, Jr., Fighting over Government Contracts*, 66 *Ala. L. Rev.* 39, 42 (2005).

Table 4. Comparative Number of Requests for Reconsideration and Protests Received and Closed by GAO Per Fiscal Year
2001-2009

Fiscal Year	Protests		Reconsideration Requests	
	Received	Closed	Received	Closed
2001	1084	1040	62	58
2002	1139	1072	65	61
2003	1269	1181	83	63
2004	1387	1334	98	71
2005	1285	1285	71	56
2006	1270	1224	57	50
2007	1318	1300	93	93
2008	1563	1506	89	71
2009	1898	1822	91	96

Source: Congressional Research Service using data from GAO

“Appeal” of GAO Decisions

In addition to requesting reconsideration from GAO, disappointed protesters can effectively “appeal” GAO’s decisions to the Court of Federal Claims by filing suit alleging that the agency’s procurement activities were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” in violation of the Administrative Procedure Act (APA).¹²⁵ The focus of the suit in the Court of Federal Claims is the agency’s procurement activities, not GAO’s decision *per se*. However, GAO’s decision makes up part of the agency record that is reviewed by the Court of Federal Claims,¹²⁶ and the Court of Federal Claims gives some deference to GAO decisions on questions of fact.¹²⁷

¹²⁵ 5 U.S.C. § 706(2)(A); Superior Helicopter LLC, 78 Fed. Cl. at 186-87 (application of APA to agency procurement activities). Not all bid protests in the Court of Federal Claims following GAO protests directly “appeal” GAO decisions, however. In some cases, the protester makes a different argument in the Court of Federal Claims than it made at GAO. *See, e.g.,* J&H Reinforcing & Structural Erectors, Inc. v. United States, 50 Fed. Cl. 570 (2001). In other cases, the GAO protest ended without a decision on merits from GAO. *See, e.g.,* Ezenia!, Inc. v. United States, 80 Fed. Cl. 60 (2007) (protester withdrew its GAO protest after filing suit in the Court of Federal Claims); Heritage of Am., LLC v. United States, 77 Fed. Cl. 66 (2007) (GAO protest dismissed as untimely).

¹²⁶ 31 U.S.C. § 3556. Parties to bid protests at the Court of Federal Claims are not strictly limited to the administrative record from the agency or GAO. They can move to supplement the record, and the court will typically grant such motions when the “record does not contain sufficient information for the court to render a decision.” *Comp. Health Servs., Inc. v. United States*, 70 Fed. Cl. 700, 720 (2006). This includes “fill[ing] gaps concerning the factors the contracting officer considered in reaching his decision.” *Precision Standard, Inc. v. United States*, 69 Fed. Cl. 738, 745 (2006).

¹²⁷ *See, e.g.,* MTB Group v. United States, 65 Fed. Cl. 516 (2005). The Court of Federal Claims will affirm GAO on questions of fact, or questions that must be answered by facts and evidence, or inferences therefrom, unless the GAO decision is arbitrary, capricious, or so grossly erroneous as to imply bad faith. However, on questions of law, or questions that must be answered by applying relevant legal principles, the Court of Federal Claims gives no deference to GAO and conducts *de novo* review. Because most bid protests do not hinge upon factual questions, this means that most Court of Federal Claims decisions entail independent determinations on the legality of agency contracting (continued...)

In reviewing the agency's action, the court does not substitute its judgment for that of the agency.¹²⁸ Rather, it looks at the agency's record of the procurement to determine whether the procurement official's decision lacked a rational basis, or the procurement procedure involved a violation of law or procedure.¹²⁹ In determining whether the procurement official's decision had a rational basis, the court considers whether (1) the agency relied on factors Congress did not intend it to consider in making its decision; (2) failed to consider an important aspect of the problem; or (3) offered an explanation for its action contrary to the evidence before it, or so implausible it could not be ascribed to a difference of opinion or the product of agency expertise.¹³⁰

As **Table 5** illustrates, comparatively few of the hundreds of bid protests that GAO hears per year are "appealed" to the Court of Federal Claims. Many of the bid protests that the Court of Federal Claims hears are, according to CRS research, filed directly with it without prior GAO protests.

**Table 5. Comparison of the Total Number of Bid Protests and the Number of Bid Protests "Appealing" GAO Decisions Resulting in Published Opinions of the Court of Federal Claims Per Calendar Year
2001-2007**

Year	Total Bid-Protest Decisions	Bid-Protest Decisions with Prior GAO Decisions
2001	33 total (31 unique) ^a	12 total (11 unique)
2002	19 total (17 unique)	6 total (6 unique)
2003	33 total (31 unique)	17 total (17 unique)
2004	49 total (41 unique)	20 total (19 unique)
2005	46 total (40 unique)	23 total (22 unique)
2006	46 total (40 unique)	25 total (24 unique)
2007	50 total (42 unique)	23 total (19 unique)

Source: Congressional Research Service

Notes: Not all Court of Federal Claims cases result in a published opinions. The Court of Federal Claims is estimated to issue one published opinion for every five matters disposed of. Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 *Geo. Wash. L. Rev.* 714, 751(2003).

- a. Some bid protests result in multiple published decisions from the court when, for example, the court decides on motions for temporary restraining orders or injunctions; requests for dismissal; requests for summary judgment; the merits of the case; and motions for attorneys fees, or sanctions for filing frivolous lawsuits.

A Court of Federal Claims protest, even one "appealing" a prior GAO decision, does not trigger an automatic stay of the agency's award of the contract or authorization of performance under it.

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activities.

¹²⁸ *Bendix Field Eng'g Corp. v. United States*, 1991 U.S. Dist. LEXIS 19778, at *6 (D.D.C. Nov. 15, 1991).

¹²⁹ *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

¹³⁰ *Alion Science & Tech. Corp. v. United States*, 69 Fed. Cl. 14, 25 (2005) (quoting *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983)).

Rather, a bid protester in the Court of Federal Claims must file and prevail upon a motion for a temporary restraining order or preliminary injunction to effect a delay of the agency's procurement actions similar to that generally occurring automatically when a GAO protest is filed.

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