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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association, Inc.

The President's Column Susan Warshaw Ebner

Dear BCABA, Inc., Members:

It's been a busy year for the BCABA, Inc.! Our co-sponsored Annual Reception In Honor Of The Boards of Contract Appeals Judges on July 13 was a rousing success. The event provided a wonderful opportunity for new and aspiring lawyers, experienced practitioners and BCA judges to meet and discuss some of the latest developments in government contracting and dispute resolution, as well as share stories about what it's like to practice government contracts.

Mark your calendars for three very exciting upcoming BCABA, Inc., events planned for September and October. They will provide excellent educational opportunities for new and experienced practitioners: On September 22nd, we will host our Colloquium, "Buying Federal Information Technology - The Next Steps," in conjunction with the GWU Law School Government Procurement Law Program. On September 16th, we will host a Trial Practicum for new and less experienced practitioners to gain practical insights and pointers on the litigation of government contract disputes from a panel of learned BCA judges and practitioners. And last, but certainly not least, our Annual Conference and Meeting will take place on October 7th. This

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President's Column (cont'd):

all day conference will cover significant recent developments that will improve your understanding and ability to handle government contracting matters. We are applying to Virginia for 5 hours of CLE credit for this event. Information on these events and registration forms can be found in this issue and/or on our website, www.bcaba.org. More events are in the works, including our Executive Forum. Please stay tuned!

Membership renewal notices have been sent out. Note that our newly incorporated Section 501 (c)(6) professional organization is called the BCABA, Inc. [With regard to the original BCABA, in response to our communications, the IRS has confirmed the tax exempt status of the BCABA. Contributions to the BCABA and the BCABA, Inc. are not deductible as neither are section 170(c) organizations. More information on the BCABA wind-down and BCABA, Inc., will be provided at our Annual Meeting on October 7th.]

Gold Member status is available to those firms, companies and organizations in which all of the government contracts lawyers in the government contracts practice group are members of the BCABA, Inc. Please let us know if your firm, company or organization satisfies the requirements for Gold Member status and we will include you on our list.

Any one can take advantage of our reduced membership fees by signing up for membership in conjunction with registering to attend the Annual Conference. See the Annual Conference flyer for more information.

On a very sad note, we sent out a notice earlier this summer regarding the passing of retired Judge Eileen Fennessy. A memorial service celebrating her life will be held on Friday September 24 at 2:00 pm at St. Mary's Church, 301 South Royal St., Alexandria, Virginia. A reception will follow at Landini Brothers, 115 King Street, Alexandria, Virginia. If you plan to attend the reception, please send your RSVP to me at susan.ebner@bipc.com. I am compiling a list to forward to Judge Fennessy's family. Her obituary is included in this edition.

Whether you are just starting out, have been practicing for decades, or fall somewhere in-between, we welcome your involvement in our activities and hope you will contribute worthwhile articles for publication in *The Clause*.

Best wishes for a safe summer and inspiring year ahead.

Best regards,

Susan Warshaw Ebner
President, BCABA, Inc.

Annual Dues Reminder

This is to remind everyone about the BCABA, Inc., dues procedures:

- ☺ Dues notices were emailed on or about August 1st.
- ☺ Annual dues are \$30 for government employees, and \$45 for all others.
- ☺ Dues payments are due NLT September 30th.
- ☺ There are no second notices.
- ☺ Gold Medal firms are those that have all their government contract practitioners as members.
- ☺ Members who fail to pay their dues by September 30th do not appear in the Directory and do not receive *The Clause*.
- ☺ The Membership Directory is maintained on the website.



Bored of Contract Appeals (a.k.a. The Editor's Column)

by

Peter A. McDonald

C.P.A., Esq.

(A nice guy . . . basically.)

Leading this issue is a thoughtful and well-written article by Ray Saunders and Pat Butler about the need for corrective legislation to have consistent filing times for bid protests. The next article is Judge Scott's scholarly review of latent defects cases, followed by Dave Nadler's timely article concerning the D.C. Circuit's decision on the retroactivity of FERA. On the other end of the quality spectrum is an article about data holes.

The Clause will reprint, with permission, previously published articles. We are also receptive to original articles that may be of interest to government contracts practitioners. But listen, everybody: Don't take all this government contract stuff too seriously. In that regard, we again received some articles that were simply unsuitable for publication, such as: "ASBCA Goes on Facebook!"; "Pete Caught in Bait Car Video!!"; and "Enraged CBCA Converts T4C to T4D!!!"

In Memoriam Judge Eileen Fennessy

Eileen Patricia Fennessy passed away Friday, July 9th, at Inova Alexandria Hospital in Alexandria, Virginia, after a brave two-year battle with leukemia. Her family members, sister Mary Ellen, and companion of ten years, Peter McCahill, and his daughter, Scarlette, were with her when she passed. In remission for 18 months and despite suffering from chronic neuropathy, she lived her last year with her typical zest for life, thoroughly enjoying and appreciating her family, her companion, Peter, and each and every one of her many devoted friends.

Eileen was born in Lowell, Massachusetts, on November 22, 1948, the loving daughter of Patrick F. Fennessy and Mary E. (Howard) Fennessy.

She graduated from St. Mary's High School in Lawrence, Massachusetts, going on to Emmanuel College in Boston, where she received a B.A in 1970. She then earned a Juris Doctor from Suffolk University Law School in 1973, where she was a member of the Law Review. Eileen embarked on her law career in Boston and in 1976 joined the Office of General Counsel, Department of the Navy in Washington, D.C. This started her successful career in Washington, which spanned 35 years; she held various positions with the Department of the Navy and the Department of Justice, culminating in her appointment as a judge for the Department of Transportation Board of Contract Appeals in 1988. During her exceptional career Eileen received many awards and commendations, such as the Department of Justice Special Commendations for outstanding service.

Eileen absolutely loved her law career and felt she had reached the pinnacle of her professional life once becoming a judge. Her illness forced her to retire in 2009, a decision she held off making until the very last day the paper work was due.

Eileen was a member of the American Bar Association - Public Contracts Section, the Board of Contract Appeals Judges' Association, and the Association of Women Judges as well as the Massachusetts, Virginia, and Washington, D.C. bars. She was the Vice Chair and Deputy Chief Judge of the U.S. Department of Transportation Board of Contract Appeals from 1988 to 2007.

During these exciting and rewarding years, many of Eileen's colleagues became devoted lifelong friends. She had many groups of overlapping friends with whom she socialized often and traveled extensively.

Additionally, she maintained very close friendships with her Emmanuel classmates, gathering when she would return home for visits, traveling to visit some who lived in other states, taking trips, and always returning for their reunions. Eileen recently attended her 40th reunion in June and had a wonderful time. At that time she was also able to attend her cousin Kara's baby shower, and enjoy her favorite summer spot, Hampton Beach, New Hampshire, with her family and beach friends at the seasonal business her family has owned for 45 years with longtime friend and business partner, Michael Marcoux. Eileen never missed a family gathering or a major holiday with her family at home.

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In Memoriam, Judge Fennessy (cont'd):

Eileen was a voracious reader who also loved gardening, shopping, cooking, entertaining friends, singing, and traveling. She was a member of the Alexandria Choir from 1999 to 2005, performing regularly in their semi-annual concerts. She was fortunate to travel throughout Europe, Japan, China, and Russia, in addition to frequent visits to Ireland and England with her family and Paris with friends. She had hoped to return to Paris this fall.

Over the last few days, each and every family member and her many, many friends echoed the same sentiment. She was the best friend anyone could ever have, a rock that never faltered, always interested in others, genuine, charming, and feisty yet graceful, with a great sense of humor and a smile like no other. She loved her family, her friends, her career, and a good time. She lived life to the fullest. Eileen told everyone who saw her in the hospital not to be sad and that she had a wonderful life.

Eileen's family sincerely thanks her home health aides Memuna Conceh of Alexandria, Virginia, and Maima Kolokoh of District Heights, Maryland, for the wonderful care and support they provided her during her illness.

Eileen was so appreciative of their help, along with the love and support provided by her friends and family.

In addition to her partner, Peter, of Alexandria, and her mother, Mary E. Fennessy, she is survived by her loving sister, Mary Ellen Fennessy McDermott, and her husband William McDermott of North Andover, Massachusetts; her beloved nephew, Patrick McDermott of North Andover; and Peter's adored daughter, Scarlett McCahill of Philadelphia, Pennsylvania. She also leaves many first and second cousins with whom she was very close, in addition to her wonderful friends.

Her funeral mass was celebrated on Monday, July 19th, 2010 at 11:00 a.m. in Saint Michael Church in North Andover, Massachusetts. Her burial followed in Saint Mary's Cemetery in Tewksbury, Massachusetts.

Memorial contributions may be made to: Leukemia and Lymphoma Society of the National Capital Area, 5845 Richmond Highway, Suite 800, Alexandria, Virginia 22303 (703-399-2900). The POC is Alyssa and you can mail or call and use a credit card.

A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims

by

*Raymond M. Saunders and Patrick Butler**

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I. Introduction

Both pre-award and post-award bid protest jurisdiction have been shared by the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) since the passage of the Administrative Dispute Resolution Act (ADRA) of 1996.¹ Under the existing statutory arrangement, a protester may file a GAO protest, litigate it fully, and, if disappointed, commence the entire process anew before the COFC. There, for a number of reasons, a protester may obtain the success that eluded it before the GAO. In recent years, this has been happening with increasing frequency.

Other articles have exhaustively addressed the relative advantages of these available for a to potential protesters, and factors to take into consideration when selecting one over the other.² This article, however, focuses on the policy implications for the protest system of having two parallel for a in which one protest forum follows strict timeliness rules but the other does not.

The legislative history of the ADRA shows that Congress's intent in passing that legislation was to strengthen uniformity and predictability in the bid protest process.³ Unfortunately, by failing to harmonize the timeliness requirements of the COFC and the GAO, that objective is not being accomplished. Also, this asymmetry unnecessarily absorbs time, effort, and expense from the GAO, agencies, protesters, and intervenors. The impact on the procurement system is not trivial; a disappointed offeror can file a protest at the GAO that can be mooted at any point (by itself or by another protester)—before or after GAO renders a decision—simply by filing the same protest at the COFC. This means that a protester can fully avail itself of the GAO protest process, thereby staying a federal procurement for 100 days,⁴ and, if unsuccessful, it can then recommence the entire process before the COFC.

Routinely affording disappointed offerors multiple bites at the apple before these two for a does not appear to be what Congress intended when it enacted the ADRA. This article explores the development of this phenomenon since the passage of ADRA, and analyzes its impact by reference to reported cases. To remedy this situation, this article suggests that Congress should amend the ADRA to impose timeliness rules at the COFC that mirror those of the GAO. Proposed legislative language to accomplish that goal is attached to this article.

II. A Brief History of Bid Protest Jurisdiction

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A Timely Reform (cont'd):

A. Overview

To provide context for the argument in favor of amending the COFC's timeliness rules for filing protests, we briefly examine how we have arrived at the current protest system.⁵ The GAO began hearing bid protests very soon after its creation in 1921.⁶ The federal courts, on the other hand, were late arrivals on the scene. The earliest court decision affording a bid protest remedy came in 1956 when the former Court of Claims issued its decision in *Heyer Products Co. v. United States*.⁷ The court in *Heyer*, however, determined that the available remedy was limited to money damages in an amount equal to the cost incurred by the plaintiff in preparing its bid.⁸

This changed in 1970 with the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") decision in *Scanwell Laboratories v. Schaffer*.⁹ In *Scanwell* the court held that disappointed offerors could challenge the Federal Government's contract awards under the Administrative Procedure Act (APA).¹⁰ This case, which was soon followed in other circuits, dramatically increased the number of venues available to disappointed offerors seeking to challenge the award of a government contract.¹¹ Further, unlike the limited remedy available under *Heyer*, an APA challenge provided disappointed bidders with the potential remedy of overturning a contract award through injunctive relief.

Congress later passed legislation that further defined the bid protest landscape. The three key statutes in this regard are (1) the Federal Courts Improvement Act of 1982;¹² (2) the Competition in Contracting Act ("CICA") of 1984;¹³ and (3) the ADRA, enacted in 1996.¹⁴ The combined effect of these three statutes was first to strengthen the GAO as a protest forum and, second, following the "sun-setting" of district court jurisdiction on January 1, 2001, to make the Court of Federal Claims the single judicial forum with jurisdiction to adjudicate both pre-award and post-award protests.¹⁵

B. GAO's History as a Bid Protest Forum

The predecessor of the GAO¹⁶ was created by the Budget and Accounting Act of 1921.¹⁷ It began hearing procurement protests soon after its inception. According to the GAO's official history:

GAO was created because federal financial management was in disarray after World War I. Wartime spending had driven up the national debt, and Congress saw that it needed more information and better control over expenditures. The act made GAO independent of the executive branch and gave it a broad mandate to investigate how federal dollars are spent.¹⁸

Often referred to as the "congressional watchdog," the GAO soon assumed the role of deciding bid protests lodged against federal contract awards. Despite the lack of any specific statutory grant of this jurisdiction, the GAO maintained that its power to hear bid protests was

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A Timely Reform (cont'd):

an implied authority stemming from its authority to “settle[] and adjust[]” claims against the United States.¹⁹ These protest cases were recorded in an official recorder called the “Decisions of the Comptroller General” that provides an early body of case law to guide Government and industry. From 1921 until the 1956 decision in *Heyer*, the GAO provided the only external forum for bid protests. The GAO gained express statutory authority to resolve bid protests in 1984 with the enactment of CICA, which also authorized the GAO to promulgate bid protest regulations.²⁰

C. The Federal Courts’ Case Law on Bid Protest Jurisdiction—Perkins to Heyer to Scanwell

The U.S. Supreme Court (“Supreme Court”) in *Perkins v. Lukens Steel*,²¹ a 1940 landmark case, clearly stated that plaintiffs lacked standing to challenge the executive branch’s procurement decisions. The underlying dispute in *Perkins* focused on a disagreement between seven steel and iron manufacturing companies and the secretary of labor over the wage determination to be included in their government contracts. In *Perkins* the Supreme Court granted certiorari to review a D.C. Circuit decision upholding an injunction that precluded the Federal Government from including a specific wage determination in government contracts with that industry.

In *Perkins* the Supreme Court vacated the injunction “upon reasons deeply rooted in the constitutional divisions of authority in our system of Government.”²² The Supreme Court stated:

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, And to fix the terms and conditions upon which it will make needed purchases.²³

The Supreme Court went on to explain that judicial interference with the executive branch’s procurement decisions would result in “confusion and disorder” and that “[t]he bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.”²⁴

In 1946, six years after *Perkins*, Congress passed the APA.²⁵ Interestingly, disappointed offerors did not use the newly enacted APA to challenge the executive branch’s contract award decisions until the *Scanwell* decision in 1970.²⁶ Rather, disappointed offerors occasionally filed suit in the federal courts arguing that the Government violated a procurement statute. These challenges met with a predictable fate: they were dismissed in line with the Supreme Court’s reasoning in *Perkins*.²⁷

In 1956, protesters won a significant victory at the Court of Claims in *Heyer Products Co. v. United States*.²⁸ In that case the protester alleged that the Government’s decision to award a contract for low-voltage circuit testers was made in bad faith and was a retaliatory act

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A Timely Reform (cont'd):

for the plaintiff's testimony against the agency in a Senate hearing.²⁹ In ruling on the Government's motion to dismiss, the Court of Claims held that *Perkins* was still good law and therefore the plaintiff could not maintain a claim for lost profits, but the court ruled that the Government enters into an "implied contract" with a bidder who submits a bid at the Government's request. The court stated:

It was an implied condition of the request for offers that each of them would be honestly considered, and that that offer which in the honest opinion of the [CO] was most advantageous to the Government would be accepted.³⁰

The court ruled that if the Government breaches this implied condition, which a plaintiff must show by "clear and convincing proof,"³¹ the plaintiff is entitled to reimbursement of its bid preparation costs.³² Therefore, the Court of Claims judicially created a bid protest right joined with monetary relief.

In 1970, a company called Scanwell Laboratories filed a lawsuit against the Federal Aviation Administration arguing that its bid for instrument landing systems should have been accepted over that of the awardee.³³ In response the Government filed a motion to dismiss arguing that the protester did not have standing, relying in part on the Supreme Court's holding in *Perkins*.³⁴ The D.C. Circuit denied the motion. Instead it traced the evolution of the law of standing and recognized that the judicial trend was away from the stringent "legal right" approach as espoused in *Perkins* towards the more expansive "person aggrieved" approach.³⁵ The *Scanwell* court explained:

When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest. These are the people who will really have the incentive to bring suit against illegal government action, and they are precisely the plaintiffs to insure a genuine adversary case or controversy.³⁶

The court then went on to examine the APA in light of this judicial trend towards more expansive standing rights for parties alleging illegal government action. The court dismissed *Perkins* as being "decided during the heyday of the legal right doctrine, and before the passage of the [APA]."³⁷ The court determined that the APA and its legislative history provided "liberation from the bonds of *stare decisis*."³⁸ As such, the *Scanwell* court held that a disappointed bidder had standing under the APA to challenge the Government's contract award decision. *Scanwell* was soon followed by several circuit courts,³⁹ thereby making most of the federal district courts available as venues for post-award bid protests in addition to the GAO. This jurisdictional structure remained in place until 2001 when the sunset provision of ADRA extinguished district court jurisdiction over bid protests.⁴⁰

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A Timely Reform (cont'd):

D. The Federal Courts Improvement Act of 1982

In 1982 Congress passed the Federal Courts Improvement Act (FCIA).⁴¹ This legislation was primarily concerned with the creation of a new appellate court that would be known as the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”)⁴² and the reorganization of the Court of Claims into the U.S. Claims Court.⁴³ The change essentially promoted the sixteen trial “commissioners” from the old Court of Claims to Article I judges in the new Claims Court.⁴⁴ In terms of bid protest jurisdiction, the FCIA vested the new Claims Court with “exclusive jurisdiction” to grant declaratory judgments and other equitable relief “on any contract claim brought before the contract is awarded.”⁴⁵

The boundaries of that jurisdictional grant were almost immediately tested by two protesters in the case of *United States v. John C. Grimberg Co.*⁴⁶ In that case, the newly created Claims Court was presented with what the plaintiffs thought was a pre-award protest. After filing suit, however, the protesters learned that the contract had already been awarded. As such, the Claims Court examined the express language of the FCIA, which granted the court “exclusive jurisdiction” over “any contract claim brought *before* the contract is awarded.”⁴⁷ Consequently the court determined that it lacked jurisdiction over the complaint because it was not brought before the contract was awarded. The Federal Circuit affirmed this decision after performing an exhaustive review of FCIA’s language and legislative history.⁴⁸

Following the *Grimberg* case, the judicial review of bid protests became what one appellate judge called a “zany scheme”⁴⁹ whereby the Claims Court could rule on pre-award protests, but not post-award protests, except for “implied contract” protests that were capped at the amount of the plaintiff’s bid preparation costs. Judicial review of post-award protests could still be filed in the district courts under *Scanwell*. Therefore, with the advent of FCIA, protesters’ rights regarding post-award protests were essentially the same as prior to the enactment of the statute. This jurisdictional scheme would stay in place until the passage of the ADRA in 1996.

E. 1984—The Competition in Contracting Act

Congress’s next piece of legislation further defining the bid protest system was the Competition in Contracting Act (“CICA”) of 1984.⁵⁰ As the name implies, CICA was focused on increasing the use of “full and open” competition in the awarding of government contracts.⁵¹ In terms of bid protest jurisdiction, CICA codified and strengthened the bid protest powers of the GAO. CICA supplied the express statutory authority for the GAO to hear both pre- and post-award bid protests. Further, CICA instituted a powerful mechanism known as the “CICA stay.” Under this mechanism an agency is required to stay a proposed contract award in pre-award protests and, if already awarded, stay performance of the contract until the GAO rules on the protest.⁵²

When facing an automatic CICA stay, the agency has the option to “override” the stay.⁵³
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A Timely Reform (cont'd):

To support an override in the case of a post-award protest, the agency must demonstrate either that contract performance will be in the best interests of the Government or that the existence of urgent and compelling circumstances that significantly affect the interests of the Government will not permit waiting for the GAO's decision.⁵⁴ Although the GAO cannot prevent an agency from overriding a CICA stay, an override decision can be challenged at the COFC under the APA standard of review.

CICA also created a new protest forum within the General Services Board of Contract Appeals (GSBCA).⁵⁵ Under CICA, the GSBCA was empowered to hear protests of automated data processing and telecommunication equipment ("ADPTE"), i.e., procurements that were subject to the Brooks Act.⁵⁶ Under CICA, the GSBCA's bid protest jurisdiction was set up for a three-year trial period; it was made permanent, however, by the Paperwork Reduction Reauthorization Act of 1986.⁵⁷ A protest of an ADPTE contract could be filed at the COFC, the GAO, the district courts, or the GSBCA. If the protester filed with the GSBCA, however, that protester could not simultaneously maintain a protest before the GAO and vice versa.⁵⁸ The Federal Circuit heard appeals of GSBCA decisions.⁵⁹ Congress later repealed the Brooks Automatic Data Processing Act in 1996, which eliminated the GSBCA as a protest forum for these ADPTE procurements.⁶⁰

F. 1994—The Federal Acquisition Streamlining Act

In 1994, in an effort to streamline and simplify the Federal Government's contracting process, Congress passed the Federal Acquisition Streamlining Act (FASA).⁶¹ In terms of bid protests, FASA's main impact was a statutory bar, with certain narrow exceptions, to protests of task and delivery orders within multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts.⁶² As such, protesters could only file a protest on the grounds that the Government's task order or delivery order award violated the scope, period, or maximum value of the contract under which the order was issued.⁶³

G. 1996—The Administrative Dispute Resolution Act

In 1996 Congress significantly altered judicial jurisdiction over bid protests by passing the ADRA.⁶⁴ The legislative history demonstrates that Congress was concerned about "a general lack of uniformity in bid protest law" based on the multiple overlapping jurisdictions over bid protests.⁶⁵ In terms of bid protest jurisdiction, the ADRA instituted a system whereby the federal district courts and the Court of Federal Claims would share jurisdiction over bid protests until 2001, at which time the jurisdiction of the district courts would cease absent congressional action to extend it. This "sunset" provision effectively terminated the federal district courts' bid protest jurisdiction because Congress did not act to extend it.⁶⁶ Currently all judicial protests must be filed in the Court of Federal Claims as a result. The legislation did not, however, amend the GAO's parallel jurisdiction over protests.

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A Timely Reform (cont'd):

III. The Goals of a Bid Protest Mechanism Within the Federal Procurement System

Our federal bid protest system is shaped by two powerful, yet competing, policy goals: (1) ensuring accountability in the procurement process while at the same time (2) expeditiously resolving bid protests. It is not surprising that a procurement system that results in the obligation of hundreds of billions of dollars annually has vocal advocates in both the “accountability” camp and the “expeditious” camp. Those favoring accountability focus on the need for transparency and accountability in the awarding of government contracts.⁶⁷ Those favoring expeditious resolution focus on the ability of the Government to take swift and decisive action in carrying out its many missions. One observer has stated: “In a protest system, the overarching tension can be viewed as the tension between the desire to exhaustively investigate any complaint, on the one hand, and the need to let the procurement process move forward, on the other.”⁶⁸

Expeditious resolution of protests is an express requirement of COFC and GAO jurisdiction. Title 31 U.S.C., section 3554(a)(1) states, “the Comptroller General shall provide for the inexpensive and *expeditious* resolution of protests”⁶⁹ and 28 U.S.C. §1491(b)(3) states that “[i]n exercising jurisdiction under this subsection, [the COFC] shall give due regard to the interests of national defense and national security and the need for *expeditious* resolution of the action.”⁷⁰ Advocates of expeditious resolution see a strong need for a bid protest mechanism that can quickly separate “the meritorious sheep from the capricious goats.”⁷¹ In the meritorious cases, the Government should be able to take rapid corrective action to cure the problem.

Despite the tension, there is also significant common ground shared by both camps. Both sides benefit from an external check on government sloth, mistakes, ineptitude, and/or corruption—evils that detract from the goals of both camps. Bid protests supply an effective mechanism to deter such conduct in the first place, and, if undeterred, to expose and correct it. Additionally, both camps have a common interest in fostering inexpensive and efficient protest procedures. Inexpensive procedures for protesters generally increase the likelihood that a protest will be filed (a positive for the accountability camp), while efficient procedures also cut down on the delays involved in a government procurement.

These philosophical considerations come into sharp focus when we consider the functioning of our current protest system. It has become increasingly common for a protester to fully litigate its protest before the GAO, and if unsuccessful, commence the process again before the COFC. In such cases the protest period is doubled, or on occasion extended even further. In some instances the overall outcome remains unchanged, while in others the outcome changes markedly with unforeseen consequences for the procurement process. The question to be addressed is whether the additional oversight afforded by serial protests adds value to the protest process, or whether it mainly adds delay and confusion.

In the view of the authors, the latter is the case. This situation calls for reform. In our

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A Timely Reform (cont'd):

view, amending the COFC's timeliness rules to mirror those of the GAO is a sensible reform that would promote efficiency while still providing for the appropriate amount of accountability within the government procurement system. This reform would effectively force protesters to choose one of these two fora at the start of the protest process, and to be bound with that choice regardless of the outcome of the protest. The need for this reform becomes evident when one reviews the protest trends before the COFC over the past few years.

IV. The Lack of Symmetrical Timeliness Rules at the GAO and COFC Detract from the Goals of an Orderly Bid Protest Process

A. The Number of Protests Potentially Affected by a Change in the COFC Timeliness Rules

A good starting point in examining the policy implications of our proposal for symmetrical timeliness rules for the two fora is a look at the volume of protests likely to be affected by a change in the timeliness rules. Information on the volume of GAO protests is readily available in the GAO's annual report to Congress.⁷² Over the past five fiscal years, those numbers were reported as shown in Figure 1.

Figure 1: Bid Protest Statistics for Fiscal Years 2004 –2008

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004
Cases Filed	1,652 (up 17%)	1,411 (up 6%)	1,327 (down 2%)	1,356 (down 9%)	1,485
Cases Closed	1,581	1,393	1,274	1,341	1,405
Merit (Sustain + Deny) Decisions	291	335	249	306	365
Number of Sustains	60	91	72	71	75
Sustain Rate	21%	27%	29%	23%	21%
Effectiveness Rate (reported)	42%	38%	39%	37%	34%
ADR (cases used)	78	62	91	103	123
ADR Success Rate	78%	85%	96%	91%	91%
Hearings	6% (32 cases)	8% (41 cases)	11% (51 cases)	8% (41 cases)	9% (56 cases)

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A Timely Reform (cont'd):

Even after discounting for claims for protest costs, requests for reconsideration, and supplemental protests that follow upon the heels of an initial protest filing, Figure 1 shows a robust caseload of roughly 1,000 protests per year. Of those cases that go to a final decision, the GAO has denied between 177 and 290 protests a year during this period. It is these denied protests that could potentially be affected by a change to the COFC timeliness rules. Based on the historical number of protests filed, the number of GAO protests potentially affected by a change in the COFC timeliness rules is relatively small—ranging from roughly 13 to 20 percent of the total number of GAO protests filed for the years examined.

B. An Analysis of the COFC Numbers

In the seven years from 2001 to 2007, an analysis of reported COFC cases conducted by the Congressional Research Service⁷³ shows the following:

Figure 2: An Analysis of COFC Cases for Years 2001–2007

Calendar Year	Total Bid Protest Decisions	Bid Protest Decisions with Prior GAO Decisions
2001	33 total (31 unique) ⁷⁴	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)

Of interest in the data in Figure 2 is that they suggest that in recent years about half of the protests annually decided by the COFC originated before the GAO. These protests likely resulted in additional uncertainty in the Government's procurement, and where the COFC ordered the Government to stay award of performance of a contract, additional delay. Of most importance to this article is the number of protesters that were disappointed before the GAO that subsequently prevailed before the COFC. These protests resulted in both the delay and a different outcome after a second review. An analysis by the authors of the COFC decisions between 2004 and 2008 is shown in Figure 3.

Figure 3: An Analysis of COFC Decisions Between 2004 and 2008

Calendar Year	Denied at GAO/Relief Granted at COFC
2004	0
2005 ⁷⁵	2
2006 ⁷⁶	1
2007 ⁷⁷	3
2008 ⁷⁸	6

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A Timely Reform (cont'd):

Most significant, this analysis demonstrates that the vast majority of protests brought both to the GAO and COFC resulted in identical results. Thus, it appears that the loss of an expeditious resolution of the protest was offset by very little benefit from the additional “accountability.” Despite the additional review (and delay) resulting from the second COFC protest, the outcome was the same.

In addition, these data disclose an interesting recent trend. While the rough numbers of issued COFC decisions pertaining to post-award protests over the period from 2004 through 2008 are relatively stable, the number of decisions granting relief, in whole or part, in protests previously denied at the GAO has recently increased. In this regard, the results in 2008 are especially noteworthy, with six decisions issued that differed from previous decisions in the GAO.⁷⁹

This trend could forecast an emerging willingness by the COFC to resolve protests in a manner completely different from the resolution of the same matter before the GAO. At one level, this is hardly surprising. COFC decisions have long noted that while the COFC will accord some degree of weight to GAO decisions that are well reasoned, the COFC is not bound by GAO decisions.⁸⁰ Although the COFC has made clear that it does not review preceding GAO decisions, but rather the underlying agency action at issue, this distinction is academic from the perspective of both agencies whose source selection decisions are enjoined by the COFC and awardees whose awards are set aside. All they know is that they prevailed before the GAO, incurring costs and delay in the process, only to lose before the COFC after incurring further delay and costs.

C. The Effect of Seriatim Protests

Before the GAO, the timeliness of a protest is an all-important consideration. The reason for this, of course, is that Congress has mandated that the GAO must decide any protest no later than 100 days from the date the protest is filed. To meet this deadline, the GAO has imposed its strict timeliness rules on protesters. The balance struck by the GAO has been described as follows:

Affording vendors an avenue to challenge contract awards is a mainstay of good [G]overnment. Even though only a small percentage of procurements are protested and only a small percentage of those are sustained, the presence of an independent forum for disappointed bidders enhances the accountability of procurement officials and agencies, opens a window of transparency into how the procurement system operates, and protects the integrity and legitimacy of a competitive and robust federal procurement process.

That is not to say that GAO does not recognize, and seek to balance, the competing interests and goals of the procurement process. We are keenly aware that at the heart of this balancing act is the tension between ensuring

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that procurements can proceed without undue disruption while holding agencies accountable and protecting aggrieved offerers' rights to fair treatment.

Congress in the 1984 law recognized and addressed this tension. To protect the protest process, Congress directed an automatic stay or suspension of the Federal acquisition process when a protest is filed in a timely manner at GAO. Yet Congress recognized the potential for protests to disrupt an agency's procurement of needed goods or services. Hence, there are strict time frames built into the process—a protester typically must file a protest within 10 days of learning of their complaint and GAO must resolve the protest not more than 100 days after it is filed. In particularly urgent procurements, agencies may override the stay where the mission of the agency requires moving ahead with the procurement.

In keeping with our statutory mandate to act expeditiously, and recognizing the need for agencies to conduct their business, our office remains vigilant about dismissing protests early in the process when we conclude that protests are not filed in a timely manner, are procedurally deficient, or fail to state a valid basis of protest.⁸¹

While the GAO has traditionally embraced the notion of timeliness as a bedrock principle in the resolution of protests, the COFC has been less enthusiastic about the concept. The ADRA imposes no objective timeliness standards upon the COFC beyond a generalized admonition that “the court shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”⁸² Therefore, it is perhaps understandable that the COFC has been reluctant to adopt timeliness rules analogous to those of the GAO. Also, the COFC does many other things besides adjudicate protests; hence its scope of interest is broader than that of the GAO. As one commentator has noted, although the COFC is referred to as a specialty court, in fact it really is not:

[T]he court is not truly a specialized court. While the term “specialty court” has no legal definition, “[p]resumably this is a court that handles one branch of law with a limited class of cases and a well defined subject matter.” The COFC’s current hodge-podge of jurisdiction and disinclination to enforce subspecialization demonstrates that courts of general jurisdiction are fully capable of resolving the issues that animate the court’s caseload. In the alternative, if a legislator or a litigant preferred having certain types of matters resolved by a specialty court, the COFC is not that fora [sic].⁸³

In many areas of the court’s jurisdiction, e.g., vaccine cases, constitutional takings, etc., time is not particularly of the essence. It is perhaps understandable, therefore, that the COFC would be reluctant to impose meaningful timeliness rules upon litigants in one of its jurisdictional areas, but not others. That is not to say that the COFC does not strive diligently to resolve a protest once filed, and in the main it succeeds. But from the perspective of the COFC,

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a protest starts only when it is filed with the clerk. From the perspective of an agency and an affected awardee that successfully weathered a GAO protest by a disappointed offeror, the matter is stale by the time it gets to the COFC. From the agency's perspective, allowing a protester to file a COFC protest on the heels of a GAO protest negates the policy objective that protests be resolved quickly. Simply put, serial protests are the antithesis of rapid protest resolution. Agencies habitually follow GAO recommendations because they are perceived as being legitimate. There are only three reported instances of agencies not following GAO recommendations between 2001 and 2007.⁸⁴ Yet, two recent COFC decisions have criticized agencies for implementing GAO recommendations.⁸⁵ Consequently it is fair to speculate whether agencies will continue to routinely implement GAO recommendations if they risk having their actions later characterized by the COFC as arbitrary and capricious.

Also, based upon the disproportionately large numbers of protests filed each year with the GAO relative to the numbers filed directly with the COFC, protesters too have generally viewed GAO decisions as legitimate. Yet if disappointed protesters can "appeal" an adverse GAO decision to the COFC, any decision of the GAO arguably has diminished legitimacy unless and until it receives the stamp of approval from the COFC.

1. Pre-award Protests

Although the COFC has been reluctant to adopt protest timeliness rules, the same cannot be said of the Federal Circuit. The Federal Circuit's decision in *Blue & Gold Fleet, L.P. v. United States* began the process of aligning COFC practice with that of the GAO in the area of pre-award timeliness.⁸⁶ This decision has materially restored predictability to that portion of the procurement process. It is nonetheless instructive to review the uncertainty that the procurement system endured until the *Blue & Gold Fleets* decision aligned COFC and GAO pre-award practice.

A number of COFC decisions prior to *Blue & Gold Fleet* did in fact decline to review untimely challenges to solicitations. The rationales advanced for doing so varied.⁸⁷ In *Software Testing Solutions, Inc. v. United States*, the COFC reviewed a pre-award protest that had been dismissed as untimely by the GAO pursuant to 4 C.F.R. §21.2(a)(1).⁸⁸ As a preliminary matter, the court noted:

Defendant initially argues that this protest is untimely as a matter of law, irrespective of the application of the four injunctive factors discussed below. Specifically, it contends that this court ought to apply the "GAO timeliness rule" under which a protestor must file its protest based on errors on the face of a solicitation prior to the time for receipt of initial proposals. 4 C.F.R. §21.2(a)(1) (2003). Of course, this is the rule invoked by the GAO in dismissing plaintiff's administrative protest. Defendant asserts, with clear support, that several decisions of this court have applied this timeliness requirement in "appropriate circumstances." See, e.g., *ABF Freight*

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System, Inc. v. United States, 55 Fed. Cl. 392, 399 (2003) (quoting *N.C. Div. of Servs. for Blind v. United States*, 53 Fed. Cl. 147, 165 (2002)); see also *EDP Enters., Inc. v. United States*, 56 Fed. Cl. 498, 500 (2003).

Recognizing that there may be several ways to read these opinions, this court, with all due respect, fails to see how a GAO rule that self-limits that agency's advisory role constitutes a limit, either legally or prudentially, on this court's exercise of jurisdiction. In this regard, 28 U.S.C. §1491(b)(1) (2000) explicitly provides that this court shall have bid protest jurisdiction "without regard to whether suit is instituted before or after the contract is awarded." In this court's view, while delay in bringing a protest undoubtedly may be considered in the multi-factored analysis of whether injunctive relief is warranted, absent the application of equitable doctrines such as laches, such delay does not constitute an independent legal ground for rejecting a request for injunctive relief. See *Miss. Dept. of Rehabilitation Servs. v. United States*, No. 03-2038C at 3–5, 58 Fed. Cl. 371, 372–73 (Nov. 20, 2003) (adopting a similar position). Indeed, were this court to rule otherwise, it seemingly would have to apply the entire GAO rule, which includes exceptions to the timeliness requirement for "good cause shown" or if a protest raises "issues of significance." 4 C.F.R. 21.2(c). This court cannot imagine that Congress intended this court's bid protest jurisdiction (or the prudential exercise thereof) to rise or fall on such squishy considerations. As the Supreme Court has said, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383, 70 S. Ct. 207, 94 L. Ed. 171 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29–30 (1926) (Cardozo, J.)); see also *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1373 (Fed. Cir. 2001).⁸⁹

As opposed to the rejectionist approach in *Software Testing Solutions*, a somewhat nuanced approach was announced in *TransAtlantic Lines LLC v. United States*.⁹⁰ There, although the solicitation was set aside for small businesses, the Contracting Officer ("CO") had failed to check a block incorporating FAR 52.219-14. The agency successfully argued before the GAO that if the protester believed that the block should have been checked and compliance with that FAR provision evaluated as a function of the award decision, that issue was clear on the face of the solicitation and should have been raised prior to the date set for receipt of proposals.⁹¹ The COFC, however, chose to review the same matter as a violation of procurement law, which apparently triggered some level of heightened scrutiny. Reacting to the CO's assertion that the matter simply had not been an issue before award, and that the protester could have raised it had it wished, the COFC observed: "This may comport with GAO procedure, but we do not review alleged violations of statutes and regulations in this matter."⁹²

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Both *TransAtlantic* and *Software Testing Solutions* implicitly recognize that by the time a protest first reviewed by the GAO arrives on the COFC's doorstep, the procurement at issue has already been delayed. In both these decisions, this delay was a factor to consider in determining whether injunctive relief was appropriate, but would not preclude review of the substantive challenge to the solicitations at issue.⁹³ Understandably, from the perspective of stakeholders in the procurement process, all of this created great uncertainty. Precisely when were the terms of a solicitation safely past the possibility of protest? There simply was no objective way to determine when that point in time had arrived, other than when the COFC so announced to the litigants.

The Federal Circuit decision in *Blue & Gold Fleet* therefore injected some much needed certainty in this area. After analyzing various rationales advanced for rejecting dilatory challenges to the terms of a solicitation, e.g., doctrine of patent ambiguity, laches, equitable estoppel, the Federal Circuit held:

[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims. This is an issue of first impression for this court. Section 1491(b) of title 28 U.S. Code provides the Court of Federal Claims with "jurisdiction to render judgment on an action by an interested party Objecting to a solicitation by a Federal agency." 28 U.S.C. §1491(b)(1). In doing so, the statute mandates that "the courts shall give due regard to the interests of national defense and national security and *the need for expeditious resolution of the action.*" Id. §1491(b)(3) (emphasis added). Recognition of a waiver rule, which requires that a party object to solicitation terms during the bidding process, furthers this statutory mandate. . . .

Therefore, while it is true that the jurisdictional grant of 28 U.S.C. §1491(b) contains no time limit requiring a solicitation to be challenged before the close of bidding, the statutory mandate of §1491(b)(3) for courts to "give due regard to . . . the need for expeditious resolution of the action" and the rationale underlying the patent ambiguity doctrine favor recognition of a waiver rule. Recognition of this rule finds further support in the GAO's bid protest regulations and in our analogous doctrines. Accordingly, a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a §1491(b) action in the Court of Federal Claims.⁹⁴

Has the *Blue & Gold* decision reduced to a historical artifact the confusion and unpredictability arising from disparate COFC and GAO pre-award protest decisions? Not entirely. It is still possible for a party to file a pre-award protest challenging its elimination

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from a competitive range, litigate the matter fully before the GAO, and, if disappointed, start anew before the COFC. A case in point is *L-3 Communications EOTech, Inc.*⁹⁵ There L-3 challenged its elimination from a U.S. Army competitive negotiation procurement for optical rifle sights. The L-3 sample sight failed a test called “endurance-live fire,” which required the sample sight to “withstand a 6,000 [sic] round endurance firing with no physical damage, and maintain a ‘zero within 1 Gunner’s mil upon completion of [the] endurance test.’”⁹⁶ L-3’s sample failed this test and was eliminated from the competitive range. In its GAO protest, L-3 argued that the test was flawed because the Army improperly attached the sight to the rifle used to perform the testing. Specifically, the Army had finger-tightened a nut that secured the sight to the rifle.⁹⁷ L-3 argued that this nut should have been tightened with a hand tool, not finger-tightened. Further, L-3 argued that the Army should have engaged in clarifications about this matter rather than eliminating its sample from the competition.⁹⁸

The GAO disagreed, finding that under the circumstances, the Army’s decision to tighten the nut with fingers, not a tool, was reasonable.⁹⁹ The GAO found no obligation on the part of the Army to engage in clarifications.¹⁰⁰ L-3 also complained that the sole remaining offeror in the competitive range, like itself, also experienced test failures, so L-3 should not have been eliminated.¹⁰¹ In response, the GAO concluded:

However, the test failures experienced by the Aimpoint bid sample occurred with the “rated criteria,” which, as defined by the RFP, were only evaluated after the bid sample passed all of the “essential criteria”; Aimpoint’s bid sample passed all of the “essential criteria.” In contrast, L-3’s failure occurred under the “essential criteria” and required no further evaluation. The agency has persuasively explained why the Aimpoint test failures were easily correctible without a need to retest the optical sight under these “essential criteria,” and, since the RFP allowed for discussions to occur on “rated criteria” failures, we find no error in the agency’s actions here.¹⁰²

Disappointed in this outcome, L-3 immediately protested anew to the COFC. There, on the same facts, L-3 secured a completely different outcome. Unlike the GAO, the COFC was greatly troubled by the notion that the sole offeror in the competitive range would be allowed to potentially modify its sample to address “rated criteria” deficiencies, and that there would be no need to repeat “essential criteria” testing. The notion of a competitive range of one also disturbed the court. The COFC stated:

This allegedly disparate treatment is the result of the Army’s decision to Create a competitive range of one offeror, which necessarily permits Aimpoint to revise Aimpoint A through discussions, and the Army’s decision to permit the reconfigured Aimpoint A to proceed to award without being subjected to Endurance-Live Fire Essential Criteria testing.

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As discussed below, the court views this series of decisions by the Army to constitute a relaxation of the solicitation requirement that eliminated EO Tech from further consideration. Furthermore, there were enough departures from the evaluation plan described in the solicitation to cast a shadow upon this procurement, when these irregularities are properly placed in context. Finally, the Army's decision to secure EO Tech's gooseneck mount to the M16A2 by finger-tightening cannot be judged to be fundamentally fair or rational, []. The cumulative effect of these procurement errors invalidates the Army's competitive range determination and its proposed plan to select the modified Aimpoint A without a retest of the Endurance-Live Fire criteria. If these procurement procedures were allowed to stand, the Army's upcoming "best value" decision would be fundamentally flawed, arbitrary and capricious, and would not reflect full and open competition.¹⁰³

The question to be asked from a policy perspective is, where is value added to the procurement system by allowing a protester to first seek the view of the GAO on its elimination from a competitive range, and if dissatisfied with that opinion, protest the exact same matter to the COFC? The "judicial review" provided by the COFC does not focus on the preceding GAO decision, but rather on the underlying agency action. Thus, one must inquire whether it is an efficient use of scarce resources to have two expert fora review the same matter seriatim. Where is the enhanced transparency, accountability, and legitimacy in such a process? In *L-3 Communications*, the protester got a great deal of all three while before the GAO. It simply did not like the GAO's decision. It achieved success before the COFC, but that success does not mean the preceding GAO decision was wrong, that the agency was not held accountable for its actions before the GAO, or that the procurement process was not made transparent via the GAO protest process.

Why should a protester that wants judicial review, as opposed to GAO review, not be required to protest to the COFC in the first instance? Conversely, if an offeror eliminated from a competitive range decides to take its protest to the GAO, why should it not later be barred from attempting to raise the same protest to the COFC?

It is clear from the *L-3 Communications* pre-award protest that the *Blue & Gold Fleet* decision does not preclude all pre-award serial protests. Consequently, we suggest that 28 U.S.C. §1491(b) be amended to impose pre-award timeliness rules that prevent this from happening. Specifically, an offeror eliminated from a competitive range should, after notice and a debriefing, be allowed to protest to either the GAO or the COFC, but not both.¹⁰⁴

2. Post-award Protests

As a general rule, post-award bid protests at the GAO must be filed "not later than 10

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days after the basis of the protest is known or should have been known (whichever is earlier)” or “not later than 10 days after the date on which [a required] debriefing is held” assuming such a debriefing is requested.¹⁰⁵ At the complete opposite end of the timeliness spectrum, the COFC can entertain post-award protests “without regard to whether suit is instituted before or after the contract is awarded.”¹⁰⁶ In other words, there are no timeliness rules at the COFC for post-award protests.

As demonstrated previously, the number of COFC post-award protests is growing, and it is increasingly common for a protester to first try its luck at the GAO, and, if unsuccessful there, to try again at the COFC.¹⁰⁷ An illustrative case is *Axiom Resource Management, Inc v. United States*.¹⁰⁸ Axiom challenged an award to Lockheed Martin Federal Healthcare, Inc. (“Lockheed”) to perform program management services for the Department of Defense’s Tricare Management Agency. Axiom argued that the award should be set aside because Lockheed was precluded by various organizational conflicts of interest (“OCIs”) from receiving the award.¹⁰⁹

These same allegations had previously been made before the GAO.¹¹⁰ There, on two separate occasions, in response to two GAO protests, the agency had taken corrective action to analyze the various OCI allegations raised by Axiom.¹¹¹ After preparing and documenting a highly detailed OCI analysis, the CO concluded that the alleged OCIs could be avoided or mitigated.¹¹² He affirmed award to Lockheed, and Axiom promptly filed a third GAO protest, which was denied.¹¹³ The GAO reviewed the CO’s analysis of each of the various OCIs alleged. The GAO ultimately concluded:

In our view, once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. *Alion Science & Tech. Corp.*, B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶146 at 8; *SRS Techs.*, 492 F.3rd 1308. In this regard, COs are expected to exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to address it. FAR [] 9.505. While the protester disagrees with the agency’s determinations here, we have reviewed the extensive analysis and comprehensive approach used to addressing [sic] any conflicts that may arise, and we find no basis to conclude that the [CO]’s determination was unreasonable.¹¹⁴

Before the COFC, however, Axiom fared much better. There, the court placed little weight on the CO’s detailed OCI analysis, implicitly criticized his repeated corrective actions, and posited that certain provisions of the awardee’s mitigation plan might in some broad sense be “anticompetitive.”¹¹⁵ The COFC stated:

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Although the CO ultimately cured a prior failure to identify and analyze a potential “unequal access to information” conflict the CO did not identify the potential “impaired objectivity” conflict, as required by FAR 9.504(a). In addition, the Administrative Record does not evidence that the CO exercised sound discretion in developing an appropriate mitigation plan, as required by FAR [] 9.504(e). To be sure, the Government arguably could rescind the contract if it was not satisfied with Lockheed Martin’s mitigation efforts. Nevertheless, under the proposed mitigation plan, Lockheed Martin is not barred from performing “non-purchase” Category 3 contracts; TMA’s “Policy” and Lockheed Martin’s “OCI Mitigation Plan and Competitive Analysis” have no binding effect at law; and certain mitigation efforts, such as non-disclosure agreements, may be anticompetitive.¹¹⁶

What the court meant by the phrase “no binding effect at law” was clarified in a subsequent decision, wherein it granted the plaintiff partial injunctive relief. Specifically the court stated:

Therefore, the Government and Lockheed Martin’s offer to incorporate the Proposed mitigation plan as a modification to the contract, without affording the court the ability to insure compliance by an independent auditor, likely will prove illusory. Given the fact that the CO repeatedly failed properly to identify or mitigate the OCIs at issue in this case, the court has little confidence that the CO will identify and properly mitigate potential or actual OCIs in the future. Surprisingly, the Government argues that a compliance auditor would usurp the CO’s function to administer the contract. The court does not view an independent auditor as interfering with the CO’s responsibilities to administer the contract, because the auditor’s function is to ensure compliance with the court’s order. The Government, however, has stated that it would *prefer* that the court set aside the award, rather than have an independent auditor oversee compliance with Lockheed Martin’s Proposed mitigation plan. Accordingly, the court has determined that the public interest weighs in favor of injunctive relief.¹¹⁷

The fact that *Axiom I* and *Axiom II* were directly at odds with the preceding GAO decision has obviously troubling implications for the predictability of assessing OCI concerns when awarding government contracts because agency officials have no way of knowing whether a matter will be challenged before the GAO, the COFC, or both. Before the GAO, the standard for assessing the reasonableness of an agency’s OCI analysis is relatively clear in light of the long and consistent line of precedent in this area.¹¹⁸ Before the COFC, in light of the *Axiom I* and *Axiom II* decisions, agencies could not confidently predict the outcome of a protest involving an OCI allegation. For example, taking corrective action to assess the validity of an

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OCI allegation is a reasonable step in response to a GAO protest, yet in *Axiom I* and *Axiom II* that same action suggested to the court that the CO at issue had not discharged his duties under FAR Part 9, and would not do so prospectively.¹¹⁹ Before the GAO, a CO's OCI determination will be upheld if it is reasonable, but *Axiom II* advanced the proposition that before the COFC a CO's OCI assessment might be accorded little weight if not accompanied by a mitigation plan that is somehow under the supervision of the court.

On appeal, the Federal Circuit reversed *Axiom II*. The Federal Circuit found that the COFC erred in allowing supplementation to the record that was before the agency when the OCI determination at issue was made; that is, the COFC erred by not reviewing the agency's action under the arbitrary or capricious standard.¹²⁰ The Federal Circuit determined that the CO's OCI determination was not arbitrary or capricious.¹²¹ Arguably this reversal allays the predictability concerns raised by *Axiom I* and *Axiom II*. It understandably does nothing, however, in terms of ensuring that protests are resolved expeditiously. The various phases of the *Axiom* protest litigation spanned a period of almost two years.

On the issue of predictability, it is instructive to contrast the analysis in *Axiom I* and *Axiom II* with the analysis in *MASAI Technologies Corp. v. United States*, where the COFC also reviewed various OCI allegations brought by a disappointed offeror seeking a U.S. Army contract.¹²² Indeed, the procedural history of these two protests was remarkably similar. In *MASAI*, the allegations considered by the COFC had been raised previously at the GAO, and there, as in *Axiom*, the agency took corrective action on three occasions in order to fully analyze the various OCI allegations.¹²³ Ultimately the agency affirmed its award decision, and *MASAI* protested to the GAO. The GAO denied the protest, stating:

Here, as documented extensively in the agency record, the agency gave thorough and comprehensive consideration to the prior activities of [the awardee] and its subcontractors, as well as [protester] and its subcontractors, in order to assess whether those activities created OCIs. Specifically, the [CO] performed an analysis of the work that would be required under the solicitation at issue—that is, operational sustainment of the TEWLS system. The [CO] then turned to documenting an extensive review regarding the activities previously performed by [the awardee] and its subcontractors, and [protester] and its subcontractors, under prior contracts.

...
 . . . Based on the agency's review of the offerors' prior activities, the [CO] Concluded that [the awardee] did not have an unfair competitive advantage in this procurement.

We have reviewed the entire record, including documentation of the [CO's] review and analysis of the offerors' prior activities, and conclude that the agency's review was thorough and comprehensive; in this regard,

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[protester] has not identified any material flaw in the agency's review. Further, we find no basis to question the agency's conclusions drawn from its review. Finally, we view [protester's] protest to be based on an interpretation of the law which would, in effect, exclude virtually any government contractor (including [protester] in this procurement) from competing for procurements that in any way relate to the contractor's prior contract performance. FAR subpart 9.5 does not establish such a sweeping exclusionary rule.¹²⁴

Unhindered by any post-award timeliness rules, MASAI tried again before the COFC. The COFC, however, saw matters much as the GAO had seen them. It denied the protest, stating in pertinent part:

In response to the first GAO bid protest, in which [protester] took issue With the participation of BP as a subcontract or to [awardee], the [CO] took the following actions: (1) he required that all contractors submit an OCI certification; (2) he solicited and received a detailed response to the MTC protest from [awardee]; (3) he surveyed three [g]overnment technical experts, exploring the potential for an OCI with respect to BP due to its participation in prior contracts; and (4) he interviewed the TEWLS Program Manager and Competency Center Director/ Deputy Program Manager. In response to the second GAO bid protest, the [CO] re-investigated the issue whether BP's participation constituted an OCI. He also analyzed the participation of CompQSoft as a subcontractor to [awardee] and analyzed whether [protester's] participation as a prime contractor gave rise to an OCI. The record shows that the [CO] performed two thorough and comprehensive investigations and carefully documented his conclusion that no OCI existed.

....

The [CO] undertook a detailed analysis of the work performed by [protester], BP and CompQSoft pursuant to prior contracts and reached the conclusion that their work in performing those contracts did not provide either [protester] or [awardee] with unequal access to information that would provide a competitive advantage with respect to the procurement at issue. [Protester], on the other hand, makes broad, vague assertions that prior contracts related to the TEWLS program gave the sub-contractors access to information relating to the Government's "plans and requirements" with respect to TEWLS. [Protester] has not Specified what relevant non-public information, if any, [awardee] gained as a result of its relationship with BP and CompQSoft. Furthermore, [protester] has not demonstrated how such non-public information, assuming it was obtained, provided [awardee] with an unfair competitive advantage in the procurement at issue. Thus, the Court finds that

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[protester] has failed to meet its burden of proof with respect to its OCI allegations.¹²⁵

As explained earlier, the Federal Circuit's reversal of *Axiom I* and *Axiom II* has settled the issues of the proper standard of review to be applied to a CO's OCI determination and when supplementation of the agency record is appropriate.

Does this mean that, henceforth, when an agency successfully defends an OCI allegation before the GAO it can expect to prevail before the COFC, as was the case in *MASAI*? The question is a critical one, given the increasing prevalence of OCIs. The answer will reveal itself only with the passage of time.

Measured against the policy goal to quickly resolve protests, however, both *Axiom* and *MASAI* were failures. *Axiom*'s initial GAO protest was filed on September 25, 2006.¹²⁶ After two rounds of corrective actions, and repeated stop work orders by the CO, the third and final GAO protest was filed by *Axiom* on April 3, 2007, and was denied by the GAO on July 12, 2007.¹²⁷ Litigation before the COFC commenced shortly thereafter, and the Federal Circuit entered limited injunctive relief in favor of *Axiom* on February 28, 2008.¹²⁸ Ultimately, the Federal Circuit reversed this decision on May 4, 2009.¹²⁹ The *MASAI* case had a similar protracted history. It was first filed at the GAO on September 27, 2006,¹³⁰ decided by the GAO after multiple corrective actions on September 10, 2007,¹³¹ protested anew to the COFC on October 4, 2007,¹³² and decided by the COFC on November 14, 2007. Thus more than a year was consumed with resolving these serial protests.

The history of these two protests shows that while either protest forum in isolation can do an effective job in expeditiously resolving a protest, once joined in a serial protest situation, neither can implement Congress's intent that protests be speedily resolved. In each instance the underlying GAO protest went full term, and the GAO complied with its 100-day decision requirement pursuant to 31 U.S.C. §3554(a)(1). The COFC, too, moved with reasonable promptness to resolve these protests once they became COFC protests. The cumulative impact of the procurement delay associated with serial GAO and COFC protests was nonetheless significant. As serial protests become more common—which they are, according to the statistics discussed in Parts IV.A–B, *supra*—delays on this scale will become increasingly routine.¹³³

Yet another example of a post-award serial protest is *Wackenhut Services, Inc. v. United States*.¹³⁴ *Wackenhut* challenged an award decision made by NASA for security guard services, potential fire-fighting/prevention services, and potential medical emergency response services. *Wackenhut* first challenged the award by filing a GAO protest on May 20, 2008. That protest was denied on September 10, 2008, exactly 100 days after the GAO protest was filed.¹³⁵ If the statutory timeliness reform urged in this article were in effect, that decision would have

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completely resolved the protest, and NASA would have been free to commence performance of the contract.

Instead, on September 17, 2008, Wackenhut filed anew with the COFC. Although the COFC resolved the protest with promptness—the administrative record was filed on September 29, all responses and cross motions were filed by October 24, and the decision was issued by December 15¹³⁶—the fact is that this latter protest extended the 100 days to resolve the GAO protest by another ninety days, for a total protest-related delay of over six months. Further the completely favorable outcome for the agency before the GAO was effectively “reversed” by the COFC. There, the protest was sustained on a number of grounds and NASA was ordered to “appoint a re-constructed SEB,” “appoint a new SSA,” re-evaluate the proposals, and make a new award decision.¹³⁷

Wackenhut was free to go to the COFC in the first instance, yet elected not to do so. Instead it first protested to the GAO, delaying the procurement for 100 days; denying the awardee of the benefits of its contract award for 100 days; and absorbing GAO time, expense, and assets in resolving its protest. Only after losing before the GAO did Wackenhut turn to the COFC for relief. There, with at least one materially different fact, it prevailed.

While any protester that succeeds in snatching victory from the jaws of defeat by protesting to the COFC would be understandably pleased, the question must be asked whether there exists a compelling policy reason for posturing the COFC, itself a trial-level tribunal, as a de facto appellate body over the GAO.

What are the benefits to the protest system and what are the detriments? The benefits to parties like Wackenhut are clear: the system as currently structured provides it with two chances to win. For other stakeholders in the procurement system the positives are less clear. Protests that used to last only 100 days before the GAO can routinely consume six months or more. A legal proposition that is clearly predictable before the GAO is much less predictable if the same matter is before the COFC.¹³⁸ Without predictability, of course, an agency cannot make informed decisions about when to take corrective action in response to a protest. Further, the expense to all parties in terms of money and time to get to the “right” answer is clearly increased when a protest commenced in the GAO goes to the COFC. If a key goal of the protest system is to expeditiously resolve protests with a high degree of consistency, that objective is not being achieved with serial protests.

The lack of timeliness rules at the COFC also can permit disruption of procurements even when no decision is issued by the GAO. The procedural history in *Femme Comp Inc. v. United States* illustrates this point.¹³⁹ That protest involved a multiple-award IDIQ contract for program-management support services.¹⁴⁰ Multiple disappointed offerors protested, some because they were eliminated from the competitive range, and others because, after discussions, they were not selected for award. The initial disappointed offeror filed a GAO protest on April

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11, 2008, and others filed on April 14 and 21.¹⁴¹ In response, the agency filed three agency reports at the GAO on May 12, 14, and 22.¹⁴² Consequently four protesters filed supplemental protests, and two of these also filed second supplemental protests.¹⁴³ In light of these efforts by the parties, these GAO protests were fully developed and had consumed enormous resources on the part of the GAO, the agency, the protesters, and the intervenors.

While all this activity was occurring, *Femme Comp*, a disappointed offeror that had been eliminated from the competitive range, filed an agency level protest on April 14.¹⁴⁴ The agency denied that protest on May 19, and on June 3 *Femme Comp* protested to the COFC.¹⁴⁵ The result was a mass exodus from the GAO to the COFC because the GAO will not consider “any case where the matter is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction.”¹⁴⁶ As the court in *Femme Comp* explained:

Beginning April 1, 2008, six unsuccessful offerors, including four of the plaintiffs here, filed protests with the GAO. TAPE filed a protest on April 11, 2008; L-3 Services filed a protest on April 14, 2008; and Data Systems and Bearing Point filed protests on April 21, 2008. The Army submitted its agency reports to the GAO in response to the protests, along with a statement by the [CO], on May 12, 2008, (protest of TAPE); May 14, 2008, (protest of L-3 Services); and May 22, 2008, (protests of Bearing Point and Data Systems). Thereafter, TAPE, L-3 Services, Data Systems, and Bearing Point filed supplemental protests, TAPE and L-3 Services filed second supplemental protests, and L-3 Services filed a third supplemental protest.

While the six unsuccessful offerors were pursuing their protests before the GAO, *Femme Comp* decided to pursue an agency-level protest, filing a protest with the Army on April 14, 2008. In response to the protest, the [CO] prepared a statement dated May 7, 2008, and legal counsel for the Source Selection Evaluation Board prepared an agency report dated May 9, 2008. The Army, in a decision prepared by the Principal Assistant Responsible for Contracting on May 19, 2008, Denied *Femme Comp*'s protest. Thus, on June 3, 2008, *Femme Comp* filed the instant protest in the [COFC]. As a result, two days later, the GAO dismissed all of the protests concerning this procurement, indicating that it was not permitted to “decide a protest where the matter involved is the subject of litigation before a court of competent jurisdiction.”¹⁴⁷

Femme Comp's protest would have been clearly untimely had it attempted to protest to the GAO. Where a protester first files an agency protest, its subsequent GAO protest is timely if filed within ten days of notice of the agency's adverse action.¹⁴⁸ *Femme Comp* did not meet

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this timeliness standard. Yet it could—and did—protest to the COFC where no post-award timeliness rules exist.¹⁴⁹ The ramifications for the other parties of this action were immediate. Under 4 C.F.R. §21.11 the GAO will not consider a matter that is before a court of competent jurisdiction.¹⁵⁰ The GAO has interpreted the phrase “same matter” broadly.¹⁵¹ Although Femme Comp was challenging its elimination from the competitive range, while other protesters were challenging the award decision, in the view of the GAO this involved the same matter. The GAO thus dismissed all the pending protests.¹⁵²

Ironically Femme Comp, the most dilatory of all the protesters, was the one that determined the choice of forum. The waste of resources inherent in a process that allows such chaotic proceedings is obvious. Had the timeliness reforms urged in this article existed, Femme Comp would have been unable to protest to the COFC and the GAO would have retained jurisdiction over all the protests filed timely before it and would have provided a decision on all of them within 100 days of April 11.¹⁵³

D. The Solution

Clearly the time has come for a sensible tweak to the system. Had the timeliness rules proposed in this article been in place, none of the above COFC protests could have been brought. By harmonizing the timeliness rules between the COFC and the GAO, a protester would be forced to make a choice of forum in deciding where to bring its protest. The advantages to the protest system include (1) reduction in the possible amount of time that could be consumed by a protest, (2) conservation of scarce judicial resources by ensuring that two separate trial-level fora do not review the same matter, and (3) preservation of accountability and transparency for protesters no matter which forum they elected. Congressional action to amend the ADRA as urged in this article would achieve these goals by imposing an election requirement upon protesters. All that is required is to amend the ADRA to include statutory filing timelines that mirror those of the GAO for both pre-award and post-award protests.

We do not propose a statutory time period for issuing COFC protest decisions, analogous to the GAO 100-day rule. Although desirable, the more limited timeliness reforms recommended herein will greatly reduce the processing time for resolving a COFC protest because, by definition, it will not be preceded by GAO protest(s).

Our proposed statutory language is set forth in the appendix to this article. If enacted, this reform will require a bit of thought by protesters at the inception of a protest. If a protester does not wish to retain counsel, wishes to reduce its costs, and wants a CICA stay while its protest is being decided, filing with the GAO would seem advisable. Where a protester desires judicial review and the opportunity for appeal, or the opportunity to possibly depose agency officials, or where the matter in issue is arguably not reviewable by the GAO (such as a pre-procurement decision where no solicitation has been issued),¹⁵⁴ and where the need to retain counsel is no great impediment, filing with the COFC would be appropriate.

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1. Certain Protests Already Require a Choice of Forum

There is no injustice in requiring a choice of forum in this regard. Indeed, it happens routinely in the situation where a party timely challenges a solicitation before the GAO without first submitting a proposal. If it is unsuccessful before the GAO, and the date set for receipt of proposal passes during the GAO deliberations, that protester is barred from thereafter challenging the same solicitation before the COFC. This was precisely the situation in *Shirlington Limousine v. United States*.¹⁵⁵

Shirlington initially protested the terms of the solicitation at issue to the GAO.¹⁵⁶ While that protest was ongoing, the date set for the receipt of proposals passed, and, believing that Shirlington had failed to submit a proposal, the agency moved to dismiss the protest, arguing that Shirlington lacked standing. Shirlington then filed a second bid protest challenging the agency's refusal to accept its late bid.¹⁵⁷ Both these protests were denied.

Shirlington raised these same protest grounds anew at the COFC. The COFC, noting Shirlington's failure to submit a proposal, concluded that Shirlington lacked standing to protest.¹⁵⁸ Shirlington then filed a request for reconsideration. In part, it argued that it was unfair to force a protester to make a choice of forum between GAO and the COFC. The COFC disagreed:

Plaintiff contends that this ruling will force prospective pre-award bid protest plaintiffs to choose between filing cases with GAO or with the [COFC]. Plaintiff argues that this contradicts the current practice, where plaintiffs initially may file with GAO and effectively appeal to the [COFC] for *de novo* review.

....

Requiring a litigant to be bound by the choice between GAO and the [COFC], does not result in "obvious" or "manifest" injustice, but merely requires a plaintiff to weigh litigating options when selecting a forum.¹⁵⁹

We agree. Requiring protesters to choose between the GAO and the COFC is not unfair. Further, no valid purpose is served by requiring these two fora to hear the same protest seriatim. This practice undoubtedly serves the interests of some protesters, but it delays procurements, interjects uncertainty into the process for both agencies and awardees, and adds little in terms of transparency, accountability, or legitimacy. There is no question that the GAO protest process provides a rapid and expert means for reviewing agency procurement decisions while affording protesters with an extensive degree of transparency into the agency decision process. There is no compelling policy reason why, at the conclusion of the GAO protest process, the same protest should be reinitiated before the COFC. Affording a disappointed protester the opportunity to obtain a different outcome is not a valid policy imperative, especially when the first outcome is generally fair and cogent.¹⁶⁰ As long as the procurement system has two fora deciding bid protests, differences in the approach of each to particular factual issues is probably unavoidable. What is avoidable, however, is the incoherence that
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results from having these two for a opening upon the same protest seriatim.

2. Requiring a Choice of Forum Is Consistent with the Dispute Resolution Structure of the Contract Disputes Act

A choice of forum has prevailed for years under the Contract Disputes Act in regard to contract disputes.¹⁶¹ Under that statutory scheme, a contractor in receipt of a CO's final decision has a choice.¹⁶² The contractor may appeal to a board of contract appeals within ninety days.¹⁶³ If it fails to so file within ninety days, its only recourse is to appeal to the COFC by filing within one year of the final decision.¹⁶⁴ The advantages of this scheme are obvious. It avoids the possibility of two fora deciding the same issue seriatim, with potentially conflicting holdings. Also it enhances predictability in government procurement. The holdings of both fora are appealable only to the Federal Circuit, which further enhances predictability in contract law.

It is true that if a similar election of forum requirement existed in the bid protest system, a protester before the COFC would be entitled to a judicial appeal to the Federal Circuit, but the same would not be true for a protester before the GAO. Other than the GAO's reconsideration procedures, there is no appeal possible from a GAO decision.¹⁶⁵ Does this limitation make a protest forum election unfeasible? As explained below, we do not believe so.

3. The Proposed Timeliness Rule Does Not Prohibit Judicial Review of Agency Decisions

The question then must be asked: would such a scheme harm the notion that there should be judicial review of agency procurement actions? To answer that question, it would be useful to survey the landscape that existed when Congress last affirmatively spoke on the issue of judicial review of agency procurement actions. We can pick up the trail in the language of CICA, the statutory provision that authorizes the GAO to review executive branch procurement decisions. Specifically 31 U.S.C. §3556 states:

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Claims Court [United States Court of Federal Claims]. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.¹⁶⁶

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The origin of this language can in turn be traced back to the legislative history of CICA, which states in pertinent part:

The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for [g]overnment contracts receive equitable relief. To accomplish this, the conference substitute adds a new subchapter to chapter 35 of Title 31, United States Code which codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO). The provisions of this section become effective on January 15, 1985. The conference substitute establishes an enforcement mechanism keyed to the procedures contained in the Senate amendment for solicitation, notice, evaluation, and award. The procurement protest system further relies on record Requirements in the Senate amendment, as expanded in the conference substitute, to insure the availability of information needed not only by the Comptroller General to make determinations in procurement protests, but also by interested parties to identify, and initiate action against, solicitations and awards which they believe are unlawful.

The Comptroller General is not given exclusive authority to hear protests. The conferees do not intend, for example, that the GAO decide matters dealing with the Small Business Administration's responsibilities under the Small Business Act to establish industry size standards or to issue Certificates of Competency to small businesses. Finally, interested parties with recourse to the General Services Administration Board of Contract Appeals in disputed computer procurements may not protest the same action to both the GAO and the GSA board.

...
The subchapter regarding bid protests does not alter the current rights of any person to seek administrative or judicial review of any alleged violation of a procurement statute or regulation. Further, documents related to a Comptroller General's decision on a procurement and the agency's response to such decision must be made a part of the agency record and be made available to the courts in the event a suit is filed against the agency involving the procurement.¹⁶⁷

It is perhaps useful to ask how generally, in the time period when CICA was drafted, GAO decisions fared when reviewed by courts.

What follows is a brief survey of some judicial protest decisions in the years immediately preceding the passage of CICA. The year 1982 is relevant recent history, informing the drafting of CICA in 1983. A search of bid protest cases decided by district courts

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in 1982 (as explained earlier, the COFC was limited to pre-award protest jurisdiction until the passage of the ADRA in 1996) provides some very interesting information. Searching on the key term “Scanwell” produces a list of fourteen decisions. Of these, nine 168 make no mention of any preceding GAO action while six do contain such a mention.¹⁶⁹ Of the six, almost all note great deference to GAO decisions. In two decisions involving Aero Corporation and the U.S. Department of the Navy, a district court found a Navy procurement illegal, relying heavily upon advisory opinions prepared by the GAO for the court and parties.¹⁷⁰ In *Bayou State Security Services, Inc. v. Dravo Utility Constructors, Inc.*, a district court denied a protest brought by a perspective subcontractor without finding a need to review an earlier GAO decision on the same matter.¹⁷¹

In *Gull Airborne Instruments, Inc. v. Weinberger*, the D.C. Circuit decided an appeal from a district court decision denying challenges to both the award of a contract and the administration thereof by the agency.¹⁷² The court affirmed the denial of the latter challenge, finding that the appellant had no statutory standing to challenge a contract’s administration, but reversed the dismissal of the underlying bid protest, disagreeing with the district court that the protest was barred by laches.¹⁷³ Part of the delay was caused by the appellant’s repeated recourse to the GAO.¹⁷⁴ The D.C. Circuit was reluctant to penalize a party for pursuing its administrative remedies.¹⁷⁵ In dicta, the court stated, “Indeed, we have suggested that because of the GAO’s competence and experience in procurement activities, district courts should consider, under the doctrine of primary jurisdiction, deferring review of the merits of a challenge to a procurement decision pending a GAO ruling.”¹⁷⁶

Finally, in *J.H. Rutter Rex Manufacturing Co. v. United States*, the plaintiff challenged the implementation of small business set-asides by the Defense Department.¹⁷⁷ The district court cited as conclusive a GAO decision on a similar protest brought by the plaintiff that raised the same issue regarding a Defense Logistics Agency procurement.¹⁷⁸

This whirlwind tour of 1982 highlights that judicial review at the time that CICA was enacted entailed a great deal of deference to GAO decisions.¹⁷⁹ From this we can infer that when Congress insisted that judicial review be unhindered by GAO statutory authority to review executive branch procurements, Congress anticipated a high degree of judicial deference to GAO rulings. The world has changed markedly since 1982. Deferring to the competence and experience of the GAO in procurement is a thing of the past. A perusal of recent COFC decisions, both pre-award and post-award, makes this abundantly clear.¹⁸⁰ A chasm is beginning to open between GAO precedent and COFC decisions, which is not particularly healthy for the procurement system because it degrades predictability of procurement decisions.

The legislative history of ADRA is devoid of any indication that Congress intended to place the COFC in a position of primacy over the GAO in the bid protest system.¹⁸¹ Conversely in enacting 31 U.S.C. §3556 Congress was quite careful to note that the GAO has no primacy in the bid protest system.¹⁸² What is absolutely clear from the legislative history is that at all times

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Congress wanted consistency in the procurement system.¹⁸³ The timeliness reform proposed herein supports that vision.

Most recently, Congress provided for no judicial review of certain bid protest decisions. As part of the 2008 National Defense Authorization Act, Congress inserted section 843, which provides a protest right to disappointed offerors on task and delivery order competitions valued in excess of \$10 million.¹⁸⁴ This provision altered the previous FASA-created rule that barred protests of task or delivery orders under multiple award IDIQ contracts.¹⁸⁵ Such protests, however, can only be made to the GAO.¹⁸⁶

Clearly the lack of judicial review did not deter Congress in granting this exclusive jurisdiction to the GAO. One may speculate on Congress's reasoning in this regard, but it is likely that Congress is fully confident in the GAO's demonstrated skill to expertly resolve bid protests. Whatever the reason, it is unlikely that Congress would be deterred from imposing time limits on COFC protests merely because there is no right of judicial review of GAO decisions.

Moreover, there never has been direct judicial review of GAO decisions by the COFC. As explained above, the COFC reviews the underlying agency action, not any preceding GAO decision.¹⁸⁷ As the COFC has described, "Protests can be brought before the GAO under 31 U.S.C. §§3551–3556. [The COFC] does not sit in appellate review of GAO decisions."¹⁸⁸ In a protest before the COFC, the GAO decision is simply a part of the administrative record, and what is under review is the agency action.¹⁸⁹ If a protester values judicial review of the agency action, under our proposal it can obtain judicial review, provided it acts quickly and files a timely COFC protest.

Some commentators have posited that the COFC plays a therapeutic role by correcting mistakes made by the GAO. One observes: "[T]he existence of concurrent forums creates an informal feedback mechanism whereby erroneous decisions from one forum may be flagged and critiqued by the other."¹⁹⁰ The Axiom decisions, however, would not seem to support this proposition. The *Wackenhut* decision does highlight a mistake in fact uncovered after the issuance of the GAO decision, but, as mentioned, that fact was not dispositive in the COFC outcome. More importantly, a decision by a single COFC judge does not bind the rest of the COFC judges.¹⁹¹ Only Federal Circuit decisions are binding upon all judges of the COFC, and hence no GAO decision can be meaningfully "flagged and critiqued" by a subsequent COFC decision.

Further, even though there is no formal appeal of a GAO decision, the GAO carefully considers Federal Circuit decisions and conforms its practices to important Federal Circuit precedent.¹⁹² This is critical since COFC judges, while not bound in any manner by the decisions of other COFC judges, are bound by Federal Circuit rulings.¹⁹³ It is important for the procurement system that there is uniformity in protest decisions. The periodic adjustment by

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the GAO to conform its protest rules to important Federal Circuit rulings furthers that important goal. Given the GAO's proactive adjustments in this area, there is little danger of the protest system developing materially different bodies of law if the reforms urged in this article are adopted.

Protesters would simply have to factor the lack of judicial review from a GAO decision into their analysis when selecting the protest forum that best meets their needs. It is entirely probable that a protester would be much more concerned with obtaining an automatic CICA stay while the GAO decides its protest than in a right of appeal should its protest be denied. Conversely, if a protester is concerned about obtaining judicial review of an agency's action, it should protest to the COFC and use its best efforts to attempt to obtain a temporary restraining order from the COFC while the matter is under consideration. Under our proposed amendments to ADRA, there would be no possibility of filing serial post-award protests at all. Importantly, in either forum, the protester would receive an expert review of its allegations while disrupting the federal procurement system for only as long as required to resolve the protest.

V. Conclusion

Serial protests delay individual procurements and harm the procurement system by making bid protest decisions less predictable. These disadvantages are not offset by any meaningful increase in accountability or transparency for the protest system. The cure is both obvious and simple: amend the timeliness rules at the COFC to mirror those of the GAO. Such a change would still hold procurement officials responsible for their actions, but would eliminate unnecessary delay and expense for the GAO, the agency, the protesters, and the intervenor. This reform will require a protester to make a thoughtful forum choice at the inception of its protest—just as it is required to do after award if it chooses to litigate a contract claim.

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Appendix

PROPOSED LEGISLATION TO AMEND THE COFC'S TIMELINESS RULES FOR BID PROTESTS

Title 28 U.S.C., section 1491(b)(1) grants the Court of Federal Claims jurisdiction to hear bid protests. As stated earlier in this article, it is our position that the timeliness rules for filing a bid protest at the COFC should mirror those at the GAO. Accordingly, this article recommends the following changes to that section of the statute:

28 U.S.C. §1491(b).

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party protesting a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.

(2) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Any protest meeting these time limitations which was previously filed with the Government Accountability Office will not be reviewed.¹⁹⁴

(3) Protests other than those covered by paragraph (2) of this section shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(4) If a timely agency-level protest was previously filed, any subsequent protest to the United States Court of Federal Claims filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered, provided the agency-level protest was filed in accordance with paragraphs (2) and (3) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the United States Court of Federal Claims will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals. A prospective offeror is an interested party to protest a solicitation before the United States Court of Federal Claims if it meets the time limitations in this paragraph.¹⁹⁵

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(5) Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.

(6) The United States Court of Federal Claims, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest. Under no circumstances, however, may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the U.S. Government Accountability Office.

(7) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party challenging an agency's decision to override a stay of contract award or contract performance that would otherwise be required by 31 U.S.C. §3553.

Endnotes

1. Pub. L. No. 104-320, § 12(b), 110 Stat. 3870, 3875 (1996). Protesters also may avail themselves of agency protest procedures pursuant to the FAR. *See* FAR 33.103. This article, though, focuses upon the interrelationship of the Government Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) and will not address in any detail agency protest procedures.
2. *See generally* Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. B.J. 243 (2009) (discussing three principal fora and related considerations).
3. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).
4. GAO bid protests must be resolved no later than 100 days after the date on which a protest is filed. 31 U.S.C. §3554(a)(1) (2006).
5. *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. U. 461, 469–74 (1995).
6. The first GAO bid protest, *Comptroller General McCarl to the Governor, the Panama-Canal*, was a protest by an automobile dealer arguing that the Government's specifications were too narrowly drawn so as to describe a specific make of truck. *See* 5 Comp. Gen. 712, A-11259 (1926).
7. 140 F. Supp. 409 (Ct. Cl. 1956).
8. *Id.* at 413–14.
9. 424 F.2d 859 (D.C. Cir. 1970).
10. *Id.* at 873; *see also* 5 U.S.C. §702 (1994).
11. Between 1970 and 1975, five circuits adopted the reasoning set forth in *Scanwell*. *See* *Airco, Inc. v. Energy Research & Dev. Admin.*, 528 F.2d 1294, 1296 (7th Cir. 1975); *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402, 403 (9th Cir. 1975); *Cincinnati Elec. Corp. v. Kleppe*, 509 F.2d 1080, 1086 (6th Cir. 1975); *William F. Wilke, Inc. v. Dep't of Army*, 485 F.2d 180, 182–83 (4th Cir. 1973); *Merriam v. Kunzig*, 476 F.2d 1233, 1242 (3d Cir. 1973).
12. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

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A Timely Reform (cont'd):

Endnotes (cont'd)

13. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., and 41 U.S.C.).
14. Administrative Dispute Resolution Act (ADRA) of 1996, 5 U.S.C. §§571–583 (1996).
15. ADRA, Pub. L. No. 104-320, §12(d), 110 Stat. 3870, 3875 (1996); see U.S. Gov't Accountability Office, GAO/GGD/OGC-00-72, *Bid Protests, Characteristics of Cases Filed in Federal Courts 1–5* (2000) [hereinafter *Characteristics of Cases Filed in Federal Courts*].
16. Effective July 7, 2004, the GAO changed its legal name from the General Accounting Office to the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, §8, 118 Stat. 811, 814.
17. Budget and Accounting Act of 1921, Pub. L. No. 67-13, § 301, 42 Stat. 20, 23.
18. See U.S. GAO, The History of GAO—GAO's Start, <http://www.gao.gov/about/history/> (last visited Feb. 3, 2010).
19. Pub. L. No. 67-13, § 305, 42 Stat. at 24. See David R. Hazelton, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Area Summary: The Federal Circuit's Emerging Role in Bid Protest Cases*, 36 Am. U. L. Rev. 919, 924 (1987); Kovacic, *supra* note 5, at 470.
20. 4 C.F.R. §21 (2009).
21. 310 U.S. 113 (1940).
22. *Id.* at 132.
23. *Id.* at 127.
24. *Id.* at 130–31.
25. 5 U.S.C. §702 (2006).
26. The portions of the Administrative Procedure Act (APA) on which the plaintiff relied in *Scanwell* were in the original text of the 1946 Act.
27. As late as 1968, the U.S. District Court for the Northern District of California cited *Perkins* as relevant, noting:

The relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of government. It does not require much imagination to anticipate the chaos which would be caused if the bidding procedure under every government contract was subject to review by court to ascertain if it was fairly and properly done, and the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision. Therefore, the Court there is any strong likelihood that they would succeed in their action.

Lind v. Staats, 289 F. Supp. 182, 186 (N.D. Cal. 1968).
28. 135 Ct. Cl. 63 (1956).
29. *Id.* at 65.
30. *Id.* at 69.
31. *Id.* at 71.
32. Interestingly, in the subsequent trial of the *Heyer* case, it was proven that the Government was correct in its evaluation of Heyer's circuit testers. The Court of Claims found that the samples Heyer submitted were defective and that the Government was justified in its decision not to award the contract to Heyer despite its lower-priced bid. See *Heyer Prods. Co. v. United States*, 147 Ct. Cl. 256, 263 (1959).
33. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 860–61 (D.C. Cir. 1970).
34. *Id.* at 866.
35. *Id.* at 863.
36. *Id.* at 864.
37. *Id.* at 866.
38. *Id.* at 867.
39. See *supra* note 11.
40. ADRA, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1990). The Act became effective December 31, 1996.

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A Timely Reform (cont'd):

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41. Federal Courts Improvement Act (FCIA) of 1982, Pub. L. No. 97-164, 96 Stat. 25. The Act became effective October 1, 1982.
42. *See id.* (creating federal appellate court with exclusive subject matter jurisdiction for, inter alia, patent cases).
43. *See generally* Philip R. Miller, *The New United States Claims Court*, 32 Clev. St. L. Rev. 7 (1983) (explaining the creation of the Claims Court); William M. Wiecek, *The Origin of the United States Court of Claims*, 20 Admin. L. Rev. 387 (1968) (providing background on the court).
44. *See* Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 Am. U. L. Rev. 385, 389 (1984).
45. 28 U.S.C. §1491(a)(3) (1994). The FCIA noted, "To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to, injunctive relief." *Id.*
46. 1 Cl. Ct. 253 (1982).
47. *Id.* at 254 (emphasis added).
48. *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1374 (Fed. Cir. 1983).
49. *Id.* at 1379.
50. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175.
51. *Id.*
52. *See* 31 U.S.C. §3553 (2006).
53. *See id.* §3553(d)(3)(C).
54. *Id.*
55. Pub. L. No. 98-369, § 2713, 98 Stat. at 1182.
56. *See* Pub. L. No. 89-306, 79 Stat. 1127 (1965).
57. Pub. L. No. 99-500, § 824, 100 Stat. 1783, 1784-344 (1986).
58. 40 U.S.C. §759(f)(1) (1988 & Supp. V 1993).
59. 28 U.S.C. §1295(a)(10), (b) (2006).
60. *See* National Defense Authorization for Fiscal Year 1996, Pub. L. No. 104-106, §5101, 110 Stat. 186, 680.
61. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243.
62. FASA, as enacted, states, "A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." 41 U.S.C. §253j(d) (2006). This statute was modified by the National Defense Authorization Act for Fiscal Year 2008, allowing for protests of task or delivery orders valued in excess of \$10 million. *See* 41 U.S.C. §253j(e).
63. FAR 16.505(a)(9)(i).
64. ADRA, Pub. L. No. 104-320, §12(d), 110 Stat. 3870, 3874-75 (1996).
65. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).
66. Congress requested a report from the GAO to aid it in deciding whether to allow the sunset provisions of ADRA to take effect. *See Characteristics of Cases Filed in Federal Courts*, *supra* note 15, at 9-11 (noting the perceived advantages and disadvantages of permitting district court jurisdiction to expire). *But see* *Albuquerque v. U.S. Dep't of the Interior*, 379 F.3d 901, 911 (10th Cir. 2004) (holding that a district court has jurisdiction when a bid protest is brought by a party other than an actual or potential bidder).
67. *See generally* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (2001) (arguing that efficiency and discretion come at the expense of transparency, integrity, and competition).
68. Daniel I. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 Pub. Cont. L.J. 427, 430 (2006).
69. 31 U.S.C. §3554(a)(1) (2006).
70. 28 U.S.C. §1491(b)(3) (2006) (emphasis added).
71. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970).

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A Timely Reform (cont'd):

Endnotes (cont'd)

72. U.S. Gov't Accountability Office, GAO-09-251R, *GAO Bid Protest Annual Report to the Congress for Fiscal Year 2008*, at 2 (2008).

73. Kate M. Manuel & Moshe Schwartz, Cong. Research Serv., Report No. R40228, *GAO Bid Protests: An Overview in Timeframes and Procedures* 20 tbl.7 (2009). Interestingly these figures do not appear to correlate with those reported by the clerk of the COFC:

Calendar Year	Total	Pre-Award	Post-Award
2000	51	9	42
2001	52	15	37
2002	42	13	29
2003	64	23	41
2004	68	20	48
2005	68	16	52
2006	64	9	55
2007	84	18	66
2008	81	24	57

One of the difficulties in tracking COFC statistics is the lack of readily accessible statistics, such as those the GAO reports annually. Another obstacle is that a single COFC protest may involve multiple published decisions, some of which only address procedural matters. *Id.* (“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.”). The figures reported by the clerk show that in each of the past nine years, the bulk of COFC protests have involved post-award protests. The pre-award protests reported above are not segregated into protests that actually challenged the terms of a solicitation as opposed to those that only sought a temporary restraining order (TRO) in response to an agency CICA-stay override. Therefore, without a case-by-case review of issued COFC opinions, it is not possible to determine how many of its pre-award decisions substantively resolved a protest.

74. The term “unique” seems to address the fact that the COFC may issue multiple decisions on a single case, some of which resolve procedural, not substantive, issues. Thus it appears that the term “unique” is a shorthand way of communicating that multiple, nondispositive opinions relate to a single protest.

75. *TransAtlantic Lines LLC v. United States*, 68 Fed. Cl. 48, 50 (2005); *Hosp. Klean of Tex., Inc. v. United States*, 65 Fed. Cl. 618, 625 (2005).

76. *210 Earll, L.L.C. v. United States*, 77 Fed. Cl. 710, 711 (2006) (regarding a GSA lease case where agency action before the GAO rendered the protest moot, but before the GAO the same protest was sustained).

77. *Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 81 (2007); *Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 36–37 (2007); *Heritage of Am., LLC v. United States*, 77 Fed. Cl. 66, 68 (2007).

78. *Wackenhut Servs., Inc. v. United States*, 85 Fed. Cl. 273, 275–76 (2008); *Labatt Food Servs., Inc. v. United States*, 84 Fed. Cl. 50, 66 (2008); *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 83 Fed. Cl. 666, 703 (2008); *L-3 Commc'ns EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 644 (2008); *Klinge Corp. v. United States*, 82 Fed. Cl. 127, 128 (2008); *Axiom Res. Mgmt., Inc. v. United States*, 80 Fed. Cl. 530, 539 (2008).

79. The *Axiom* litigation before the COFC spanned 2008 and 2009. The agency action was arbitrary in 2008, but injunctive relief was stayed until 2009.

80. *See MTB Group, Inc. v. United States*, 65 Fed. Cl. 516, 524–25 (2005) (“In fact, while the Court of Federal Claims affords deference to a GAO decision and does not conduct review *de novo*, the court’s charge is to determine, based on the record before the contracting officer, whether an agency’s procurement decision was reasonable.”) (footnote omitted; citation omitted). Other COFC decisions have made clear that the court will not defer to patterns of GAO decisions.

Even though only one GAO decision is relied on in this case, the court should disassociate itself from the proposition that following “ ‘a reasonably consistent pattern of GAO determinations’ ” renders a procurement

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decision reasonable. See *All Seasons Constr. v. United States*, 55 Fed. Cl. 175, 180 (2003) (quoting *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1272 (5th Cir. 1978)).

The *locus classicus* of this proposition is *Kinnett*, which was decided before the Court of Federal Claims came into existence and was not endorsed by the United States Court of Claims nor later the Federal Circuit. Determining whether GAO decisions are “reasonably consistent” invites subjectivity into a legal analysis. It is sufficiently difficult to determine whether the rule of GAO decisions is reasonable without hinging that determination on whether a line of decisions is reasonably consistent. This court proceeds merely to determine what the GAO decisions say and whether they are reasonable.

In any event, the heightened deference to GAO decisions suggested by *Kinnett* is suspect. The Fifth Circuit in *Kinnett* cited one of its cases, *Hayes Int’l Corp. v. McLucas*, 509 F.2d 247, 258 n.17 (5th Cir. 1975), for the proposition that deference should be given to GAO and board of contract appeals decisions as manifesting “accepted agency practice.” 580 F.2d at 1271 n.22. The Fifth Circuit in *Hayes* cited decisions from the United States Court of Appeals for the District of Columbia Circuit— *Wheelabrator Corp. v. Chaffee*, 147 U.S. App. D.C. 238, 455 F.2d 1306, 1314–15 (D.C. Cir. 1971), and *M. Steinthal & Co. v. Seamans*, 147 U.S. App. D.C. 221, 455 F.2d 1289, 1301 (D.C. Cir. 1971). The court in *M. Steinthal* did not state, as *Hayes* represents, that “courts must pay particular respect” to agency procurement decisions. *Hayes*, 509 F.2d at 258, n.17. The D.C. Circuit admonished in *M. Steinthal* that a court should exercise with restraint its power to enjoin a procurement, taking into account not only the discretion reposed in the contracting officer, but also, *inter alia*, rulings of the Comptroller General—an altogether more modest proposition. In summarizing the footnote in *Hayes*, which itself had attempted to summarize *M. Steinthal*, *Kinnett* brought forth the notion that, when actions of procurement officials are “in compliance with a reasonably consistent pattern of GAO determinations, the courts should be extremely reluctant to overturn such actions.” 580 F.2d at 1272. *Hawaiian Dredging Constr. Co. v. United States*, 59 Fed. Cl. 305, 311 n.5 (2004).

81. Gary Kepplinger, *Commentary: GAO’s Bid Protest Role*, Fed. Times, Jan. 23, 2009, <http://www.federaltimes.com/article/20090118/ADOP06/90118032/-1/RSS>.

82. 28 U.S.C. §1491(b)(3)(2006).

83. Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 714, 717–18 (2003) (citing S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 Am. U. L. Rev. 853, 858 (1990)).

84. Manuel & Schwartz, *supra* note 73, at 16. Many GAO decisions provide examples of such recommendations. See, e.g., *Symplicity Corp.*, Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶89, at 9; *Consol. Eng’g Servs., Inc.*, Comp. Gen. B-291345.2, Dec. 23, 2002, 2002 CPD ¶220, at 14; *Rockwell Elec. Commerce Corp.*, Comp. Gen. B-286201.6, B-286201.8, Aug. 30, 2001, 2001 CPD ¶162, at 7–8. More recently, in response to several GAO decisions holding that HUBZone set-asides had priority over other categories of small business set-asides, the Office of Management and Budget issued a directive dated July 10, 2009, entitled “Recent Government Accountability Office Decisions Concerning Small Business Programs.” The directive instructed federal agencies to effectively ignore the two decisions pending further “legal review” and instead to “continue to give active consideration to each small business program pursuant to their pre-existing contracting practices and ‘parity’ policies.” Memorandum from Peter Orszag, Dir., Office of Mgmt. and Budget, to Heads of Executive Dep’ts & Agencies (July 10, 2009); see *Mission Critical Solutions*, Comp. Gen. B-401057, May 4, 2009, 2009 CPD ¶93 at 3; *Int’l Program Group, Inc.*, Comp. Gen. B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶172, at 5.

85. See *TransAtlantic Lines LLC v. United States*, 68 Fed. Cl. 48, 52, 52–53 (2005); *Software Testing Solutions, Inc. v. United States*, 58 Fed. Cl. 533, 535 (2003).

86. 492 F.3d 1308, 1313 (Fed. Cir. 2007). Arguably, the rule in *Blue & Gold Fleet* is more stringent than the GAO rule because it has no exception for hearing an untimely protest based on good cause. See 4 C.F.R. §21.2(c) (2009) (“GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest.”).

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87. See *ABF Freight Sys., Inc. v. United States*, 55 Fed. Cl. 392, 399–400 (2003) (quoting *N.C. Div. of Servs. for the Blind v. United States*, 53 Fed. Cl. 147, 165 (2002)) (applying the GAO timeliness rule); *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342, 358 (1994) (citing *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 789 (1991) (declining to accept the GAO bid protest regulations as controlling all cases concerning the timeliness of an objection to solicitation terms, but accepting the “utility of the GAO rule in the bid protest arena”); see also *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 175 n.14 (2005) (declining to adopt the GAO rule, while nonetheless stating, “[T]his court is simply recognizing the reality that, for meaningful relief to be fashioned, challenges to the solicitation must be made before offers are due.”); *EDP Enters., Inc. v. United States*, 56 Fed. Cl. 498, 500 (2003); *MVM, Inc. v. United States*, 46 Fed. Cl. 126, 130 (2000) (citing *Allied Tech. Group, Inc. v. United States*, 39 Fed. Cl. 125, 145 (1997)).
88. 58 Fed. Cl. 533, 535 (2003).
89. *Id.* at 535–36.
90. 68 Fed. Cl. 48, 52–53 (2005).
91. *TransAtlantic Lines LLC*, B-296245, B-296245.2, July 14, 2005, 2005 CPD ¶147, at 4–5.
92. *TransAtlantic Lines*, 68 Fed. Cl. at 53.
93. *Id.* at 57 (considering delay in the procurement process in the balance of hardships prong of injunctive relief); *Software Testing Solutions*, 58 Fed. Cl. at 535 (considering delay “in the multifaceted analysis of whether injunctive relief is warranted”).
94. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313, 1315 (Fed. Cir. 2007) (citations omitted).
95. *Comp. Gen. B-311453*, B-311453.2, July 14, 2008, 2008 CPD ¶ 139.
96. *Id.* at 2.
97. *Id.*
98. *Id.* at 4 n.7.
99. *Id.* at 3.
100. *Id.* at 4 n.7.
101. *Id.* at 5.
102. *Id.*
103. *L-3 Commc’ns EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 651 (2008).
104. Even if this pre-award timeliness reform was implemented, we recognize that scenarios will still exist where the same matter can indirectly find its way before both the GAO and the COFC. For example, a party might successfully challenge the terms of a solicitation before the GAO, thereby prompting the agency to amend the solicitation. A second offeror might find that amendment to be objectionable and timely protest to the COFC, i.e., within ten days of the announced agency corrective action. Thus, both tribunals in essence will review the agency’s action. This variant of multiple protests is unavoidable, and in fact is consistent with the theme of this article. In each instance each party makes a binding forum choice for itself. The fact that one chooses the GAO and the other the COFC is entirely appropriate—even if the resulting decisions are contradictory. What should be precluded, however, is allowing a party to avoid any binding forum choice at all, thus allowing it to avail itself of multiple *fora* in an effort to obtain an outcome favorable to itself at the cost of unnecessarily delaying the discharge of government business and subjecting successful offerors to repetitive bouts of litigation.
105. 4 C.F.R. §21.2(a)(2) (2009).
106. 28 U.S.C. §1491(b)(1) (2006).
107. See chart *supra* Part IV.B.
108. 564 F.3d 1374 (Fed. Cir. 2009) [hereinafter *Axiom III*].
109. *Id.* at 1376.
110. *Id.* at 1377.
111. *Id.*
112. *Id.*

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A Timely Reform (cont'd):

Endnotes (cont'd)

113. *Id.* at 1378.
114. Axiom Res. Mgmt., Inc., Comp. Gen. B-298870.3, B-298870.4, July 12, 2007, 2007 CPD ¶117, at 8–9.
115. Axiom Res. Mgmt., Inc. v. United States, 78 Fed. Cl. 576, 600 (2008) [hereinafter *Axiom I*] (withholding ruling on injunctive relief pending the submission of further filings from the parties and the U.S. Federal Trade Commission).
116. *Id.* (footnotes omitted).
117. Axiom Res. Mgmt., Inc. v. United States, 80 Fed. Cl. 530, 539 (2008) [hereinafter *Axiom II*] (footnotes omitted; citations omitted). *Axiom II* was reversed the following year. *Axiom III*, 564 F.3d 1374 (Fed. Cir. 2009).
118. *See, e.g.*, VRC, Inc., Comp. Gen. B-310100, Nov. 2, 2007, 2007-2 CPD ¶202, at 3; Alion Sci. & Tech. Corp., Comp. Gen. B-297022.4, B-297022.5, Sept. 26, 2006, 2006 CPD ¶146, at 7–8; Alion Sci. & Tech. Corp., Comp. Gen. B-297022.3, Jan. 9, 2006, 2006 CPD ¶2, at 5–6; Lucent Techs., Comp. Gen. B-295462, Mar. 2, 2005, 2005 CPD ¶55, at 4–5.
119. *See Axiom II*, 80 Fed. Cl. at 535–37. The reluctance of the COFC in *Axiom II* to accord any deference to the judgment of the CO is noteworthy, especially because some commentators have suggested that the COFC APA standard of review is more deferential to the agency than is the GAO’s reasonableness standard. According to two commentators:
- [T]he GAO reviews a protest to determine if the agency’s decision was “reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations” while the COFC sustains an award unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” The difference between a “reasonableness” standard and a “rationality” standard is subtle but important. At least semantically, the GAO standard asks whether the tribunal itself finds the agency’s action reasonable. The COFC standard asks whether anyone could have so found. While the GAO standard reflects some deference to agency decision making, it leaves more room for the examining officer’s personal values and preferences to affect the choice of the “fair” or “right” answer. The Tucker Act standard leaves that authority firmly in the hands of the agency’s procurement officer.
- Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225, 1264–65 (footnotes omitted).
120. Before the trial court, the appellants argued that the court’s task under the APA was to determine whether the CO acted reasonably in awarding the contract to Lockheed. The court, however, disagreed. In the court’s view, “reasonableness” was the proper standard of review “when the court’s evaluation is made under the APA’s ‘arbitrary and capricious’ prong, but [not] where the record contains substantial evidence that one or more FAR provisions have been violated.” *Axiom I*, 78 Fed. Cl. at 599. Because the court believed that the CO had violated FAR 9.504, it defined its task as “determin[ing] whether or not there may be [a] potential violation of law and, if so, [if] the mitigation proposal [is] an actual remedy” *Id.* at 594–95.
121. *Axiom III*, 564 F.3d at 1383.
122. 79 Fed. Cl. 433, 436–40 (2007). MASAI raised other challenges to the agency’s evaluation that are not relevant here.
123. *Id.*
124. MASAI Techs. Corp., Comp. Gen. B-298880.3, B-298880.4, Sept. 10, 2007, 2007-2 CPD ¶179, at 8–10 (citations omitted).
125. *MASAI Techs. Corp.*, 79 Fed. Cl. at 449–52 (citations omitted).
126. *Axiom I*, 78 Fed. Cl. 576, 582 (2008).
127. *Id.* at 585.
128. *Axiom II*, 80 Fed. Cl. 530 (2008).
129. *Axiom III*, 564 F.3d 1374, 1384 (Fed. Cir. 2009).
130. MASAI Techs. Corp. v. United States, 79 Fed. Cl. 433, 436 (2007).
131. *Id.* at 440.
132. *Id.*
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A Timely Reform (cont'd):

Endnotes (cont'd)

133. The trend toward delay of procurements caused by serial protests is evident in two other recent Federal Circuit decisions. *Ala. Aircraft Indus., Inc.–Birmingham v. United States*, 586 F.3d 1372 (Fed. Cir. 2009); *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375 (Fed. Cir. 2009). In *Labatt*, the Federal Circuit reversed a COFC decision granting injunctive relief to a disappointed offeror whose proposal, in the view of the agency, was submitted late. *Labatt* initially protested to the GAO, arguing that its proposal was timely, but that if it was not, all offers should have been rejected because they were all submitted electronically, which, under the terms of the solicitation at issue, was not an authorized method for submitting proposals. The GAO concluded that *Labatt*'s proposal was indeed late. Further, the GAO rejected *Labatt*'s argument that all the proposals should have been rejected because *Labatt* had submitted its proposal by e-mail, and hence could not show how it was harmed by the agency's acceptance of e-mail submissions. *Labatt Food Serv., Inc.*, Comp. Gen. B-310939.6, Aug. 18, 2008, 2008 CPD ¶162.

The COFC saw matters differently. It agreed with *Labatt* that none of the offers should have been accepted because they were submitted by e-mail. *Labatt Food Serv., Inc. v. United States*, 84 Fed. Cl. 50, 64 (2008). It rejected government arguments that the method of transmission was a minor informality, and that, in any event, *Labatt* was not prejudiced by the method of transmission since it itself had employed e-mail as its method of transmission. *Id.* at 60, 62. The COFC concluded that *Labatt* had standing notwithstanding its late proposal submission, and therefore "vacated" the procurement. *Id.* at 66 (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001)).

In reversing, the Federal Circuit concluded that even if the agency had erred by allowing e-mail submittals, *Labatt* had not shown that this irregularity "interfered with its ability to receive the award." *Labatt Food Service, Inc.*, 577 F.3d at 1381. As to *Labatt*'s late submission, the Federal Circuit noted that "[a]ll errors are not equal." *Id.* A late proposal, in the view of the Federal Circuit, was tantamount to no proposal at all. *Id.* Hence *Labatt* lacked standing to challenge the award and the COFC "had no jurisdiction to vacate the award." *Id.* The Federal Circuit decision placed the parties in the same positions they occupied after the GAO decision, but only after a delay of about a year in the procurement process.

Alabama Aircraft Industries similarly resolved a hotly litigated serial protest that followed upon the heels of two GAO decisions. Before the GAO, the protester—at that time known as Pemco Aeroplex, Inc.—challenged an Air Force award for programmed depot maintenance ("PDM") for KC-135 aerial refueling tankers. After a sustained protest (*Pemco Aeroplex, Inc.*, Comp. Gen. B-310372.3, Dec. 27, 2007, 2008 CPD ¶2) and an Air Force corrective action, Pemco, among other things, challenged the agency's price realism analysis. The GAO found it to be reasonable and denied the protest. *Pemco Aeroplex, Inc.*, Comp. Gen. B-310372.3, June 13, 2008, 2008 CPD 126.

The COFC, however, disagreed. Although the Air Force had deliberately structured a three-part pricing scheme that did not directly take into account aging aircraft, the COFC concluded that it should have done so because, in the COFC's view, "the aging-aircraft issue was critical to the price realism analysis." *Ala. Aircraft Indus., Inc.–Birmingham v. United States*, 83 Fed. Cl. 666, 698 (2008). Concluding that the solicitation did not put offerors on notice that "the Air Force was seeking to receive proposals that were premised upon a non-aging KC-135 fleet," *id.* at 700, and that the Air Force's pricing scheme as stated in the RFP "could not account adequately for the increasing demands for PDM work on an aging fleet," *id.*, the COFC concluded that the Air Force's pricing scheme was arbitrary and capricious.

The Federal Circuit reversed. In unusually blunt language it stated:

The trial court's duty was to determine whether the agency's price-realism analysis was consistent with the evaluation criteria set forth in the RFP . . . , not to introduce new Requirements outside the scope of the RFP. The court's attempt to rewrite the RFP to account for the impact of aging aircraft in the manner the court preferred went beyond the scope of the court's review, and amounted to an impermissible substitution of the

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court's judgment for the agency's with regard to how the contract work should be designed.

Ala. Aircraft Indus., Inc.–Birmingham, 586 F.3d at 1375–76 (citations omitted). This ruling returned the parties to precisely the same positions they occupied upon the GAO's final ruling. The only effect of the COFC decision on the process was to delay it for more than a year following the final GAO decision.

134. 85 Fed. Cl. 273 (2008).

135. *Id.* at 285

136. *Id.* at 273, 285.

137. *Id.* at 312–13.

138. The *Axiom* and *MASAI* decisions make our point. Before the GAO, the outcomes of both protests were completely predictable once the agency took corrective action to analyze the organizational conflicts of interest at issue. Yet before the COFC, the agency was only successful in half of the cases brought.

139. 83 Fed. Cl. 704, 726 (2008).

140. *Id.* at 709.

141. *Id.* at 726.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Bid Protest Regulations, 4 C.F.R. §21.11(b)(2009).

147. *Femme Comp Inc. v. United States*, 83 Fed. Cl. 704, 726 (2008)(citations omitted).

148. *Id.* (citing 4 C.F.R. § 21.2(a)(3) (2009)).

149. *See id.*

150. *Id.*

151. *See Oahu Tree Experts, Comp. Gen. B-282247*, Mar. 31, 1999, 99-1 CPD ¶69, at 2 (dismissing on the basis that the same facts were at issue before the GAO and the federal court).

152. *Femme Comp*, 83 Fed. Cl. at 726.

153. Although *Femme Comp* was able to thoroughly disrupt the proceedings before the GAO by filing with the COFC, the COFC ultimately determined that *Femme Comp* had been properly eliminated from the competitive range. *Id.* at 734.

154. *See Distributed Solutions v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008) (“While the [G]overnment ultimately decided not to procure software itself from the vendors, but rather to add that work to its existing contract with SRA, the statute does not require an actual procurement. The statute explicitly contemplates the ability to protest these kinds of pre-procurement decisions by vesting jurisdiction in the [COFC] over ‘proposed procurements.’ A proposed procurement, like a procurement, begins with the process for determining a need for property or services.”).

155. *Shirlington Limousine & Transp., Inc. v. United States*, 78 Fed. Cl. 27, 27–29 (2007).

156. *Shirlington Limousine & Transp., Inc., Comp. Gen. B-299241*, Mar. 13, 2007, 2007 CPD ¶52.

157. *Shirlington Limousine & Transp., Inc., Comp. Gen. B-299241.2*, Mar. 30, 2007, 2007 CPD ¶67.

158. *See Shirlington Limousine & Transp., Inc. v. United States*, 77 Fed. Cl. 157, 167 (2008)(quoting *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1308 (Fed. Cir. 2006)) (“It is not relevant to [plaintiff’s] status that it filed a pre-award agency protest[.]”).

159. *Shirlington Limousine*, 78 Fed. Cl. at 29, 31.

160. We recognize that the *Geo-Seis* decision regarding EAJA fees criticized the GAO precedent of allowing an untimely offeror to compete in instances where the agency subsequently amends the date set for receipt of proposals as being contrary to FAR 52.215-1(c)(3)(ii)(A). The COFC concluded that the agency decision to implement the GAO recommendation in that regard was not substantially justified, hence making the agency liable

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A Timely Reform (cont'd):

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- for EAJA fees. *Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 79 (2007). The GAO's precedent regarding this issue could have been avoided by Geo-Seis by filing its protest with the COFC in the first instance.
161. 41 U.S.C. §§601–613 (2006).
 162. *Id.* §606.
 163. *Id.*
 164. *See id.* §609(a)(1).
 165. *See* 4 C.F.R. §21.14 (2009).
 166. 31 U.S.C. §3556 (2006).
 167. H.R. Rep. No. 98-861, at 1435–37 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 1445, 2123–25.
 168. *Lombard v. United States*, 690 F.2d 215, 217 (D.C. Cir. 1982); *Howes Leather Co. v. Carmen*, 680 F.2d 818, 819–20 (D.C. Cir. 1982); *Gross v. United States*, 676 F.2d 295, 297–98 (8th Cir. 1982); *Am. Elec. Power Serv. Corp. v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1226, 1231 (D.C. Cir. 1982); *Lee Constr. Co. v. Fed. Reserve Bank of Richmond*, 558 F. Supp. 165, 168–69 (D. Md. 1982); *Group Health Inc. v. Schweiker*, 549 F. Supp. 135, 138–39 (S.D. Fla. 1982); *Naartex Consulting Corp. v. Watt*, 542 F. Supp. 1196, 1198 (D.D.C. 1982); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 534 F. Supp. 1139, 1152 (D.D.C. 1982).
 169. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838 (D.C. Cir. 1982); *Bayou State Sec. Servs., Inc. v. Dravo Util. Constructors, Inc.*, 674 F.2d 325 (5th Cir. 1982); *Aero Corp. v. Dep't of the Navy*, 549 F. Supp. 39 (D.D.C. 1982); *Aero Corp. v. Dep't of the Navy*, 540 F. Supp. 180 (D.D.C. 1982); *Int'l Ass'n of Firefighters, Local F-100 v. Dep't of the Navy*, 536 F. Supp. 1254 (D.R.I. 1982); *J.H. Rutter Rex Mfg. Co. v. United States*, 534 F. Supp. 331 (E.D. La. 1982).
 170. *See Aero Corp.*, 549 F. Supp. at 46–47; *Aero Corp.*, 540 F. Supp. at 184–85.
 171. 674 F.2d at 327 n.1.
 172. 694 F.2d at 840.
 173. *Id.*
 174. *Id.* at 844.
 175. *Id.*
 176. *Id.* at 844 n.7.
 177. 534 F. Supp. 331, 332 (1982).
 178. *Id.* at 339.
 179. A review of 1983 decisions shows only one instance where a court disagreed with the GAO. *See Essex Electro Eng'rs, Inc. v. United States*, 3 Cl. Ct. 277, 285–87 (1983) (enjoining the agency from awarding a contract consistent with an earlier GAO decision that determined the plaintiff had submitted a nonresponsive bid). Although the court enjoined the agency, it did not directly criticize the agency for implementing the GAO decision. *Id.* at 281 (“Although a [CO] must ‘put his own mind to the problems and render his own decisions . . .,’ accommodation by the [CO] and agency to positions formally taken by the GAO is the usual policy, if not obligatory.”) (citations omitted). Interestingly the *Essex Electro* decision mentions an apparently unpublished decision regarding a companion case involving a different plaintiff, but the same procurement. *See id.* at 283 n.7 (citing *Forster Enters. v. United States*, No. 443-83C (Cl. Ct. July 21, 1983) (finding the plaintiff nonresponsive). The *Essex Electro* court later denied the plaintiff's claim for Equal Access to Justice Act (EAJA) fees. *Essex Electro Eng'rs, Inc. v. United States*, 4 Cl. Ct. 463, 469 (1984). The year 1983 featured several other notable cases. *See, e.g., B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 717 (2d Cir. 1983) (explaining that protester first protested to the GAO, but the court commenced judicial review before any merits decision was issued); *Baird Corp. v. John O. Marsh, Jr.*, 579 F. Supp. 1158, 1159 (D.D.C. 1983) (entertaining a request for an injunction while an underlying bid protest was resolved by the GAO); *Cnty. Econ. Dev. Corp. v. United States*, 577 F. Supp. 425, 428 (D.D.C. 1983) (“It is also worthy of note that the [GAO] has made a determination upholding the procurement official on the merits of all the issues before this Court. That circumstance increases this Court's reluctance to interfere with GSA's procurement decisions. . . . The GAO has special concern with and supervision over the competitive bidding aspect of procurement, and it has an accumulated experience and expertise regarding

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bid protest cases.”); *Inter-Con Sec. Sys., Inc. v. Orr*, 574 F. Supp. 250, 251–52 (D.D.C. 1983) (failing to discuss any GAO decision on the merits because while protestor’s GAO protest was ongoing, it also sought a preliminary injunction to prevent the Air Force from commencing performance); *Ga. Gazette Publ’g Co. v. U.S. Dep’t of Def.*, 562 F. Supp. 1000, 1002 (S.D. Ga. 1983)(noting that protest was initially filed with the GAO but dismissed because the contract did not involve direct expenditure appropriated funds); *Aero Corp. v. Dep’t of the Navy*, 558 F. Supp. 404, 409 (D.D.C. 1983) (pertaining to contempt allegations against the agency and request for fees); *Harris Data Commc’ns, Inc. v. United States*, 2 Cl. Ct. 229, 232 (1983) (plaintiff first filed at the GAO but then filed at the COFC before any GAO decision was issued); *Big Bud Tractors, Inc. v. United States*, 2 Cl. Ct. 188, 189, 195 (1983)(both the Claims Court protest and the GAO protest were denied); *CACI, Inc.–Fed. v. United States*, 1 Cl. Ct. 352, 361 (1983) (referring to an earlier protest at GAO but not mentioning a decision).

180. *See, e.g., Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 78 (2007).

181. Some writers have suggested that by the force of its protest experience since the passage of ADRA, the COFC should be viewed as the more expert of the two forums. Metzger & Lyons, *supra* note 119, at 1234, 1237. It is beyond the scope of this article to make such judgments. Rather, this article assumes each forum is expert in the field of bid protests, albeit with different scopes of review, standards of review, and procedures.

182. 31 U.S.C. §3556 (“This subchapter does not give the Comptroller General exclusive jurisdiction over bid protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Claims Court.”).

183. *See, e.g.,* 142 Cong. Rec. 25,522, 26,645 (1996) (statement of Sen. Cohen)(“The resulting disparate bodies of law between the circuits has created a situation where there is no national uniformity in resolving these disputes.”).

184. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §843, 122 Stat. 3, 236 (codified as amended in scattered sections of 28 U.S.C.).

185. Protests regarding scope, period, or maximum value of the contract under which the order was issued were not barred.

186. Pub. L. No. 110-181, §843, 122 Stat. at 237.

187. *Univ. Research Co. v. United States*, 65 Fed. Cl. 500, 501 n.2 (Fed. Cl. 2005).

188. *Arch Chems., Inc. v. United States*, 64 Fed. Cl. 380, 383 n.4 (Fed. Cl. 2005) (citing *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341, 343 (1997)).

189. 31 U.S.C. §3556 (2006). Although the point is clear, the COFC does on occasion review GAO’s actions a bit more directly. *See Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 78 n.4 (2007). In *Geo-Seis Helicopters*, in resolving an application for EAJA fees, the court characterized an agency’s reliance upon a precedent GAO recommendation as arbitrary and capricious, stating, “As the court previously noted, the ‘GAO precedents reflect “one of those Comptroller-General-created rules that is not reflected in the FAR.” ’ ” *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed. Cl. 633, 645 (quoting Ralph C. Nash Jr. & John Cibinic Jr., *Late Final Proposal Revisions: The Final Straw!* 18 Nash & Cibinic Rep. ¶16, Apr. 2004, at 16). The pertinent GAO line of decisions seemingly was premised on an ipse dixit, without any basis in law or regulations.

190. Metzger & Lyons, *supra* note 119, at 1237.

191. *See Dyonyx, L.P. v. United States*, 83 Fed. Cl. 460, 469 (2008).

192. *See General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts*, 67 Fed. Reg. 61,542, 61,543 (2002)(to be codified in 4 C.F.R. pt. 21). In proposing this rule the GAO quoted *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001). In that case, the Federal Circuit reversed a COFC decision regarding the reviewability of a CO’s affirmative responsibility decision. The Federal Circuit held that affirmative responsibility determinations were reviewable under the “arbitrary and capricious” standard. *Id.* at 1340. Thereafter, the GAO revised its bid protest regulations to align them with this Federal Circuit holding.

193. There would be no point in conforming GAO decisions to accord with COFC decisions, which have no weight as *stare decisis*. *See Dyonyx*, 83 Fed. Cl. at 469.

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A Timely Reform (cont'd):**Endnotes (cont'd)**

194. Although the *Blue & Gold* decision imposed a pre-award timeliness rule for COFC protests, it does not preclude the possibility of seriatim pre-protests before the GAO and COFC. The above language fills that gap.

195. This language harmonizes the right to file an agency-level protest with the choice of forum requirement advocated in this article. Ordinarily a party that does not submit a proposal cannot be in line for award, and hence is not an interested party to file a pre-award protest before the COFC. *Control Data Sys., Inc. v. United States*, 32 Fed. Cl. 520, 524 (1994). Yet no similar rule precludes a prospective offeror from filing an agency level protest. FAR 33.101 (noting that interested parties include prospective offerors). Under our proposed language, a nonofferor could be an interested party to file a pre-award protest with the COFC, provided it first filed a timely pre-award protest with the agency.



Kiewit and Other Latent Defects Cases

by

*Administrative Judge Cheryl L. Scott**

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In *Peter Kiewit Sons' Co.*,¹ the Interior Board of Contract Appeals (IBCA) denied appellant's motion for partial summary judgment with regard to the Bureau of Reclamation's (BOR) assertion of latent defects in siphons many years after acceptance. A lengthy hearing before the IBCA began in 2000 but was suspended when the presiding judge was appointed to the Armed Services Board of Contract Appeals (ASBCA) in 2001. At the parties' request, the judge then conducted an alternative disputes resolution (ADR) proceeding in 2001 that resolved matters between them, but insurance issues remain. Appellant's counsel recently noted that, at the time of *Kiewit*, the contracting community was concerned that BOR's latent defects claims might portend a spate of such claims. This did not occur.

Inspection Clauses and Definition of Latent Defects

The contracts at issue typically contain Inspection clauses derived from those in the Federal Acquisition Regulation (FAR), or, as in *Kiewit*, their predecessors. Currently, FAR 52.246-2, Inspection of Supplies—Fixed Price (Aug. 1996), provides at paragraph (k) that “[a]cceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.” Paragraph (l) provides, in brief, that if acceptance is not conclusive for any reasons in (k), then, in addition to any remedies under the law or the contract, the government may require the contractor, at no price increase, to correct or replace the defective supplies or to repay an equitable portion of the contract price. FAR 52.246-12, Inspection of Construction (Aug. 1996), provides at paragraph (f) that the contractor is to replace or correct non-conforming work without charge unless the government consents in the public interest to accept it with an adjustment in contract price. Similarly to FAR 52.246-2 (k), paragraph (i) of the Inspection of Construction clause states that “[a]cceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee.” The FAR defines a latent defect as one that “exists at the time of acceptance but cannot be discovered by a reasonable inspection,”² similarly to the Court of Claims's oft-quoted definition in *Kaminer Constr. Corp. v. United States* that a latent defect is one “which cannot be discovered by observation or inspection made with ordinary care.”³

Latent Defects Cases Preceding *Kiewit*

In *Soutwest Welding & Mfg. Co. v. United States*, another oft-cited latent defects
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decision,⁴ relied upon by the appellant in *Kiewit*, the Court of Claims reversed decisions by the U.S. Corps of Engineers Board of Contract Appeals (ENGBCA) that had denied the contractor's claim for an equitable adjustment after the Corps of Engineers had required it to repair alleged defects under its contract to construct penstocks and surge tanks in power plant units of the Garrison Dam project in North Dakota. The penstocks conveyed water from an artificial lake to a turbine used to generate electricity. The steel plate supplier provided certified mill test reports that the plate conformed to the contract's specifications. Based on the reports, and visual and physical tests required by the specifications, government inspectors at the mill had approved the plate. After the steel was shipped and after welding, government inspectors radiographically inspected and approved various units. Later, after conflicting expert reports and more tests, including ones the court found did not relate to the contract's requirements, the contractor was directed to replace or repair some welds and other parts of the units due to alleged defects. After two hearings, the record was very large and included comprehensive fact stipulations. (The trial commissioner, whose opinion the court adopted, deemed the dispute to involve issues of law and found the huge record "surprising."⁵)

The court stated that the government had ordered work beyond the contract's requirements, in effect questioning its own design specifications; the contract was not "zero defects"; alleged defects were not rejectable under the contract; the government's mere suspicion did not warrant the replacement it had directed; and because the government bore the burden of proof, it had to elevate its suspicion to fact.⁶ The court noted that the items had passed inspection, which was final under the contract's Inspection clause, except for latent defects and other exceptions that did not apply. It concluded that the defects were not latent because the parties were aware of them well before installation, or they were readily discoverable by any reasonable inspection prescribed by the contract, or both.⁷

In 1993, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that the ASBCA had properly exercised jurisdiction under the Contract Disputes Act of 1978 (CDA)⁸ over a contractor's appeals from contracting officers' decisions under many contracts that, in pertinent part, had directed the contractor to repair or replace allegedly defective jet engine parts and had vitiated the U.S. Navy's prior acceptance.⁹ Each of the decisions purported to be a final decision and included appeal rights. None of them involved contractor claims or sought monetary relief for the government except for one "ancillary demand" in one decision that the contractor return funds the Navy had paid it under a separate program to investigate the engine failures, which the ASBCA noted was not implicated in the jurisdictional question at hand.¹⁰ The Navy contended that its assertions of its post-acceptance rights were nonmonetary administrative matters that the ASBCA did not have jurisdiction to consider. The majority of ASBCA's Senior Deciding Group disagreed, concluding that they were government claims under the CDA.¹¹ In its decision on the merits, a three-judge panel held that the Navy had established a latent defect in one appeal, but not otherwise.¹²

The *Kiewit* Case

Peter Kiewit Sons appealed on its own behalf and that of its subcontractor, Ameron,
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Inc., from the contracting officer's September 1995 final decisions demanding payment from Kiewit in the amounts of \$32,114,382 and \$7,390,544 under contracts it had entered into with BOR in June 1975 and February 1978. The contracts, in the initial amounts of \$34,256,637 and \$13,498,933, called for the construction of earthwork and structures for 21-foot-diameter reinforced concrete pipe siphons, several miles long, that were part of the Central Arizona Project's (CAP) Hayden Rhodes Aqueduct, which conveys Colorado River water to the Salt-Gila Pumping Plant about 25 miles east of Phoenix, Arizona. Under each contract (CAP I and CAP II), Kiewit subcontracted with Ameron to fabricate and lay the prestressed concrete pipes (PCPs) for the siphons. During construction, about 24,000 miles of wire were used. BOR accepted the contracts as complete effective September 1978 and June 1980. The contracting officer's payment demands were based on alleged latent defects in the pipes.

The contracts contained Inspection and Tests by Government clauses stating that, in addition to tests in the specifications, the government reserved the right to inspect and test materials, equipment, and workmanship "during the life of the contract," in accordance with the Inspection and Acceptance clause in the contracts' general provisions. The specifications provided that materials furnished by the contractor, specified by reference to federal specifications or standards, or other standard specifications or codes, were to comply with the latest editions or revisions. If materials were not covered by federal or other specifications, they were to be of standard commercial quality.

The contracts' specifications referred to detailed pipe drawings, which included mortar encasement in the section containing circumferential prestressing wire, which was the PCP's primary load carrying element. Pipe acceptability was through inspection during and after manufacture to ascertain whether it conformed to the contracts' specifications, "including design, freedom from defects, and the results of the physical test requirements."¹³ Circumferential pipe reinforcement was to be steel wire, hard drawn for PCP in accordance with American Society for Testing and Materials (ASTM) A 648-73 (1973 edition), which contained manufacturing, physical, workmanship, finish, and appearance requirements for the wire. These included chemical requirements, a tension test, and a wrapping test specified in ASTM A 370-74. The wire's surface was to be smooth and free from cross-checking or torn surface, with no "serious die marks, scratches, pits, or seams."¹⁴ The specifications also contained cement mortar coating requirements, to be applied after the steel wire reinforcement had been wound around the pipe.

The contracts contained Material and Workmanship clauses, providing that all material incorporated into the work was to be and of the most suitable grade for the purposes intended, and the case of the CAP II contract, that the contractor was responsible for the accurate manufacture and fabrication of equipment in accord with "the best modern practice."¹⁵ Inspection and Acceptance clauses stated that the government's acceptance of the work was to be final and conclusive except for latent defects, and that its inspection and testing during contract performance did not affect its continuing rights after acceptance with regard to latent

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defects, the Inspection and Acceptance clause in the CAP II contract added that inspection and testing was for the government's sole benefit and did not relieve the contractor from providing quality control to ensure that the work strictly complied with contract requirements. The contracts' Rejection clauses stated that the pipe would be subject to rejection due to failure to conform to any specification or because of detrimental defects.

BOR accepted daily certifications, submitted by Kiewit from the wire manufacturers, that the wire satisfied ASTM A 648-73. BOR also visually inspected wire. Although it mostly accepted wire based on the certifications, it sent a few random samples to a private company for testing, which reported that the wire met specifications.

In a 1976 report, citing a 1965 engineering article, Ameron had stated that the "service life of properly designed, produced and installed prestressed pipe has been estimated to be in excess of 100 years."¹⁶ After PCP supplied by Ameron ruptured in 1984 on another of BOR's CAP projects, BOR investigated, and in 1987 began a corrosion monitoring program. In 1990, an investigative excavation program of selected pipe sections revealed some corroded prestressed wire. During 1991 and 1992, BOR, Ameron, and consultants evaluated the problems, which BOR feared could rupture the siphons, with catastrophic effect. BOR found that corroded wire from distressed sites contained physical surface defects, but nonetheless passed certain mechanical and chemical tests. The majority of test samples met mechanical requirements even after having been in service for over a decade. The wire also generally passed the tension and wrapping tests and the chemical analysis specified by ASTM A 648-73. However, BOR performed certain tests that revealed that, among other things, at the time of final contract acceptance, the prestressing wire wound on the siphons contained longitudinal cracks or splits, edge cracks, seams, laps, and planes of weakness, and the wire exhibited a propensity to split when subject to torsion testing and was incapable of blunting or halting the continued growth of preexisting sharp-tipped cracks.

In October 1992, the contracting officer asserted to Kiewit that the siphons' material, workmanship, and construction did not conform to contract requirements; unknown to BOR, defects had been present when they were constructed; and BOR could not have detected the defects by reasonable inspection at time of acceptance. BOR alleged, among other things, that defective steel prestressing wire used on the siphons for circumferential reinforcement did not comply with ASTM A 648-73 and was a principal cause of siphon deterioration. Citing the contracts' Inspection and Acceptance clauses, BOR revoked its acceptance of the siphons and demanded that Kiewit repair or replace them without charge. Kiewit denied that there were latent defects in the siphons and that it had any responsibility to repair or replace them. It alleged that design flaws, for which BOR was responsible, were the most likely cause of the siphon issues.

BOR completed internal reports in 1992 and 1995, which the contracting officer used as the basis for her final decisions. She concluded that the principal causes of the siphons'

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problems were (1) defective prestressing wire, and (2) pH corrosion cell caused by (a) carbonation of the concrete and intermediate mortar surfaces over which the prestressing wiring was wrapped and (b) incomplete casement of the wire with portland cement slurry and mortar coating. Relying in part on alleged trade custom and usage, the contracting officer also determined that the wire violated ASTM A 648-73's requirement for a smooth surface. She concluded that the material Kiewit had delivered did not meet specifications, was not the most suitable grade, and was latently defective. On appeal, BOR alleged at least two latent defects: "serious seams" prohibited by ASTM A 648-73, and inherent splits and weakness from a manufacturing process known as "strain-aging," said to be proscribed by the ASTM industry standard.

BOR did not hold BOR or Ameron responsible for some carbonation problems, which the contracting officer identified as the first in a series of events leading to wire corrosion. She acknowledged that the contracts' specifications did not require certain treatment of the concrete core, or of intermediate pipe surfaces, prior to wire wrapping, but she inferred that, because Ameron had applied a cement slurry prior to wire wrapping, it had suspected a potential problem. She asserted that, which the contracts required that cement slurry and mortar coating be applied over and completely encase each layer of wire, the subcontractor's application was ineffective, such that the failure of the slurry and coating to completely encase the wire, resulting in voids, was a principal cause of the siphons' distress, which BOR's inspectors could not have discovered. The contracting officer also charged Kiewit with other alleged latent defects, but did not blame it for several factors contributing to siphon distress, including that it was unknown, under then-state-of-the-art technology, that the contracts' ASTM tests would not reveal wire manufacturing defects. The contracting officer concluded that there was no clear way to measure each party's liability and assessed Kiewit with 50 percent of BOR's costs to replace the siphons.

Kiewit's Appeal to the IBCA and Motion for Partial Summary Judgment

On appeal to the IBCA, the parties requested and were granted an unusually long discovery periods due to the appeals' complexity and problems envisioned because of the many years that had passed since contract completion. Kiewit filed its motion for partial summary judgment after some discovery had occurred, but more was ongoing. It sought dismissal of BOR's claims regarding the two alleged principal causes of siphon pipe deterioration: defective prestressing wire and incomplete encasement of wire with cement slurry and mortar coating. It also sought dismissal of BOR's claims concerning alleged contributing factors, said to depend on a finding of defective wire that BOR could not establish. Kiewit contended that BOR could not meet its burden to prove the two alleged principal latent defects because they did not violate the contracts' requirements; the alleged wire defects were not latent because standard industry tests would have disclosed them; and, although the tests were not in the contracts, and thus not Kiewit's responsibility, BOR could have conducted them as part of a reasonable inspection. For purposes of its motion, Kiewit did not dispute that, if the siphons contained the alleged latent defects, they required pipe replacement. BOR alleged, among other things, that there

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were material facts in dispute that precluded summary judgment and it sought additional discovery.

The IBCA noted that the BOR bore the burden to prove a latent defect, and liability, causation, and resultant injury, by a preponderance of the evidence.¹⁷ BOR had to show that a defect proscribed by the contract existed at the time of contract acceptance, was latent, and caused the damages it claimed.¹⁸ It could not apply a more severe inspection procedure or acceptance standard than the contract imposed.¹⁹ If work complied with the specifications, it was not defective within the meaning of the Inspection and Acceptance clause.²⁰ Unless the material facts were undisputed and only legal issues of contract interpretation remained,²¹ the inquiry into whether a latent defect exists was fact-based.²²

Indeed, latent defects disputes are “fact laden and difficult to resolve on summary judgment.”²³ The Energy Board of Contract Appeals (EBCA) granted summary judgment to the contractor in a breach of warranty/latent defect case, but described the record as “comparable in size to a full-fledged hearing,” and the circumstances as “rare,” noting that the government did not seek more discovery.²⁴ The following are some of the undisputed facts in *Kiewit*.

The parties disputed whether there were defects proscribed by the contract, whether the wire supplier’s testing complied with contract specifications, and which ASTM standards were relevant. The IBCA noted that other tribunals had referred to subsequent ASTM provisions, or to different or revised specifications, in connection with latent defect cases,²⁵ but it reserved consideration of the weight, if any, that it would give to any ASTM revision or specification that was not part of the contracts.

Kiewit pointed out that, during the siphon investigations, wire known to be defective had passed the ASTM tension and wrapping tests and it cited cases for the proposition that the government could rely on extra-contractual tests only to the extent that they revealed non-compliance with contract standards,²⁶ and it could not rely on them if they could and should have been incorporated into the contracts.²⁷ The IBCA distinguished those cases and deemed that the issues of whether certain tests should have been incorporated into the contract, or what their effect would have been, invoked factual inquiries.

The parties disputed whether the wire satisfied physical requirements apart from those associated with tension and wrapping tests. BOR alleged that, even if ASTM tests did not reveal the defects, that did not mean that wire with serious seams, or strain-aged wire, was acceptable under the ASTM standard. It contended that the failure to conform to industry standards and contract requirements was the basis for its latent defect claims and cited an ASBCA case for the proposition that the nature of tests “is irrelevant if it is determined that appellant’s failure to meet the contract requirements caused a latent defect.”²⁸ The IBCA agreed with BOR that, at the summary judgment stage, whether wire passed ASTM tests was not dispositive and that the contracts required more than compliance with physical tests.

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Kiewit and Other Latent Defects Cases (cont'd):

BOR contended that it was entitled to receive pipe suitable for its intended purpose, which was to transport water for decades as part of the critical CAP project. The IBCA noted that the ENGBCA had applied an “intended purpose” analysis in concluding that blockage of an underground closed circuit television conduit, undetectable other than by a dragline or tests that the contract did not specify, constituted a latent defect.²⁹

Among other things, BOR also claimed that the wire supplier had not followed standard industry practices. Kiewit disputed that trade practice was relevant to interpreting the contracts, and alleged that the contracts were unambiguous regarding test requirements. BOR replied that the lack of a specified test did not mean that industry standards were to be ignored; and evidence of trade practice in the wire industry was essential to an understanding of the parties’ intent. The IBCA considered the possible materiality or trade practice and its potential use in contract interpretation in latent defect cases.³⁰ For instance, the ASBCA, after a hearing, had sustained the contractor’s appeal from a government claim that it was entitled to revoke final acceptance of cylinder assemblies and to recover the price paid on the ground that porous areas in metal forming the cylinder walls constituted a latent defect. The ASBCA found that, while the porous areas may have been a latent condition, they were not proved to have been a latent defect that caused cylinders to malfunction.³¹ The ASBCA also pointed out that “neither the contract nor an industry standard was referenced as a guide . . . Thus there is no valid norm against which we can evaluate the degree of porosity found in these cylinders.”³² The IBCA added that, in denying summary judgment to a contractor on a latent defects claim, the Court of Federal Claims (COFC) had cited tribunals’ common application of trade meaning in interpreting contract language and had noted that “where one party seeks to employ evidence of trade usage, summary judgment is inappropriate because trade usage is a ‘factual issue which must be proven.’”³³

The IBCA identified additional factual issues pertaining to whether the alleged siphon defects existed when BOR accepted the contracts and to whether they were latent. The IBCA noted that certificates of compliance produced by a contractor can negate a claim that defects are patent,³⁴ but that Kiewit alleged that excessively high tensile strengths, which BOR identified as a problem after acceptance, were reflected on its certificates and readily discoverable.

Citing the EBCA’s summary judgment decision,³⁵ Kiewit contended that there was no factual issue concerning what constituted a reasonable inspection because, if tests were standard, BOR should have performed them as a part of a reasonable inspection. BOR claimed that “reasonable inspection” did not mean that it was required to do shop testing that should have been performed by the wire producer during manufacturing; it did not have readily available testing facilities or capacity at the time; both parties relied upon Ameron’s record as an industry leader and upon its extensive experience with PCP fabrication; and BOR reasonably relied upon it to provide a quality product.

The IBCA noted that, in the EBCA case, the government had called for readily

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Kiewit and Other Latent Defects Cases (cont'd):

available testing in other, similar, contracts, but had not required it in the contract at issue. The EBCA had compared the relative expertise of the parties and found it significant that the contractor had no expertise in the design or technical requirements of insulators used on high voltage transmission lines and had relied entirely on the specifications' accuracy and adequacy, the government's expertise, and the contract's testing provisions. The IBCA also distinguished an ASBCA case relied upon by the EBCA in which, after a hearing, the ASBCA had denied the government's latent defect claims.³⁶ The ASBCA stated that contract-required preproduction tests prepared by the contractor and approved and witnessed by the government were also not conducted during contract performance but should have been. The ASBCA found that most of the alleged defects were discoverable by visual inspection or regular test procedures, which the contract had prescribed, or the parties had adopted from the outset, and which had been used during performance, at the discretion of the government's inspector. The ASBCA also found the circumstances to be unique in that, among other things, the government had a laboratory readily available to conduct the tests at issue and it had conducted them.

The IBCA referred to another ASBCA case and to one decided by the General Services Administration Board of Contract Appeals (GSBCA) in which latent defect claims had been rejected because, although not required by contract, the government could have performed simple tests that would have revealed the defects.³⁷ The IBCA distinguished *Southwest Welding*, noting, among other things, that there the parties had stipulated that alleged defects were readily discoverable and known to them at all times.³⁸ The IBCA also addressed *Kaminer*, in which the court, after a hearing, held that the contractor was liable for latent defects in derricks.³⁹ The contract in *Kaminer*, like the CAP I and CAP II contracts, did not define the extent or nature of inspections or tests the government was to perform. The court stated that, despite potential nonvisual inspection procedures noted or incorporated into the contract, it did not impose upon the government the duty to conduct all-inclusive tests and the government's visual inspection had been reasonable. The court stressed that the government's right to inspect did not imply a duty to inspect. Rather, the contractor had the primary duty to ensure that work conformed to contract requirements.⁴⁰

The IBCA noted that the ASBCA had held a defect to be latent when "contractor performance of required contract tests did not detect it and an adequate contractor maintained inspection system was contractually mandated."⁴¹ The IBCA stated that, although the Inspection clauses in the CAP I and CAP II contracts did not contain the language of those in certain ASBCA cases that required contractors to maintain their own inspection systems, the CAP contracts required the contractor to supply a product that conformed to contract requirements, and they provided that inspection, or waiver thereof, was not conclusive in that regard.

Lastly, in *Kiewit*, the parties disputed whether the alleged defects caused BOR's damages. They disputed whether design inadequacies, rather than defects in design construction and material for which the contractor was responsible, were the principal causes

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Kiewit and Other Latent Defects Cases (cont'd):

of the siphons' distress. BOR acknowledged that it warranted the sufficiency of its design specifications for their intended purpose, if their requirements were met,⁴² but it asserted that its warranty did not extend to the workmanship of the contractor's materialman. It challenged the sufficiency of the workmanship in the manufacture of the prestressing wire, stating that ASTM A 648-73 did not contain detailed manufacturing steps and listed only the finished product, not the body of wire manufacturing practices that were acceptable at the time. The IBCA concluded that there were genuine issues of material fact in dispute, which precluded summary judgment.

Latent Defects Cases After Kiewit

Except for an unpublished Rule 36 affirmance of an ASBCA decision addressed below, the author is unaware of any relevant post-Kiewit latent defects opinions by the Federal Circuit.⁴³ The most recent post-Kiewit board of contract appeals or COFC latent defects decision was issued by the ASBCA in April 2010.⁴⁴ The ASBCA held that it lacked jurisdiction to entertain the contractor's appeal from a contracting officer's letter that, citing the Inspection of Supplies clause, revoked acceptance of primers based upon gross mistake amounting to fraud and latent defects. The letter stated that the government reserved the right to submit the dollar amount of its demand at a later time. It was not denominated a "final decision" and it did not include appeal rights. The ASBCA concluded that the revocation of acceptance alone, in conjunction with the reservation of the government's right to submit a monetary claim, did not constitute a government claim under the CDA. The ASBCA stated that the letter did not demand payment of money in a sum certain or seek an adjustment or interpretation of contract terms or other relief arising under or relating to the contract, and thus did not satisfy the definition of a "claim" set forth in the contract's Disputes clause, FAR 52.233-1 (July 2002).

The ASBCA's June 2009 decision in *American Renovation & Constr. Co.*, a "gross mistakes" case, in which appellant's motion for reconsideration is now pending,⁴⁵ was issued after a hearing, including expert evidence, on appeals from a contracting officer's decisions revoking acceptance in two design/build contracts for military housing at a U.S. Air Force base in Montana, and terminating the contracts for default. Although the decision rested largely on the "gross mistakes amounting to fraud" aspect of the Inspection of Construction clause, it cited some cases pertinent to latent defects issues, including for the principles that, when latent defects in manufactured articles cannot be discovered by ordinary diligence, action to revoke acceptance may be taken within a reasonable time after the latent defects become known,⁴⁶ and that there is no precise formula for finding "reasonableness," which is determined on a case-by-case basis.⁴⁷

For example, in 1979 the ASBCA found the government to have acted reasonably when it delayed revocation of acceptance by 10 months in order to determine conclusively that supplies did not comply with contractual specifications, or when it worked with a contractor to

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Kiewit and Other Latent Defects Cases (cont'd):

solve the problem.⁴⁸ In 2000, the COFC found revocation more than six years after the government learned of alleged latent defects to be unreasonable as a matter of law and granted summary judgment to the contractor.⁴⁹

In 2007, after a trial that included expert evidence, the COFC entered judgment for the plaintiffs on their appeal under the CDA from a default termination.⁵⁰ Plaintiff Moreland had contracted with the Department of Veterans Affairs (VA) to construct a building in Las Vegas, Nevada, and lease it to the VA for use as a medical clinic. With regard to the latent defects aspects of the case, the lease contained a FAR Inspection of Construction clause, the FAR 52.246-21 Warranty of Construction clause, and a VA Guaranty clause. Construction was completed in 1997 and the VA took occupancy and began monthly rental payments under a 15-year lease. The VA terminated the lease for default in September 2002, on the grounds that Moreland had failed timely to repair structural deficiencies and the building was unsafe for continued occupancy. However, the VA continued to occupy the building until June 2003, when it ceased its rental payments. The COFC found that the alleged defects were largely cosmetic and could have been easily repaired if the VA had permitted Moreland to do so prior to termination.⁵¹ It stated that the deficiencies most closely fit the FAR's definition of "latent defects." The court found that, upon the parties' reasonable inspections of the building at construction completion, they were unaware of the defects and had begun the lease term without knowledge of them, even though some probably could have been identified by trained inspectors looking specifically for them. The court stated that the VA's remedies for latent defects were in the three clauses listed above, but that only the Inspection clause allowed for default termination, and then, only in the event of pre-acceptance inspections of construction.⁵²

In 2004, after an extensive hearing and record, the ASBCA sustained portions of each of a contractor's four appeals after the U.S. navy had required it to rebuild thousands of defective transducers that an inspector had accepted. The Federal Circuit affirmed the decision in an unpublished Rule 36 judgment.⁵³ In addition to addressing other latent defects law mentioned above, the ASBCA noted that the contractor's liability for a latent defect survived the two-year time limit in the contract's Warranty clause,⁵⁴ and that "the specifications are the touchstone of a latent defect claim and a testing procedure or standard for demonstrating compliance more stringent than that set forth in the contract generally may not be used to establish a defect."⁵⁵ In affirming its decision on reconsideration, the ASBCA addressed the government's burden of proof with respect to rejection of work under the Inspection and Warranty clauses.⁵⁶

In 2000, the ASBCA denied a contractor's appeal, submitted under Rule 11, from the government's partial default termination of a delivery order (DO) to perform custom dive boat modifications, under which the government had accepted the modifications and had approved \$68,242 for payment.⁵⁷ The basic ordering agreement under which the DO had been issued had incorporated the FAR Inspection of Supplies clause, which the contracting officer cited in revoking acceptance due to an alleged latent defect and in seeking a \$31,876 equitable adjustment. The parties were unable to resolve the matter and the partial default termination ensued. The ASBCA found that the government had established a latent defect by a

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Kiewit and Other Latent Defects Cases (cont'd):

preponderance of the evidence for which it was entitled to seek correction under the Inspection clause and that the default termination was justified.

This is only a sampling of post-*Kiewit* decisions, although decisions involving post-acceptance latent defects claims by the government are relatively few.

* - Cheryl L. Scott has been a member of the Armed Services Board of Contract Appeals since 2001. Immediately before that, she was the chief administrative judge of the Department of the Interior Board of Contract Appeals, to which she had been appointed in 1990. The views expressed herein are hers, and not those of the ASBCA, the IBCA, or of the Department of Defense or Interior or their components.

Endnotes

1. IBCA Nos. 3535-95, 3540-95, 99-2 BCA ¶30,401.
2. FAR 2.101 (previously FAR 46.101).
3. 488 F.2d 980, 984 (Ct. Cl. 1973)(citing Black's Law Dictionary 1026 (4th Ed. 1968)).
4. 413 F.2d 1167 (Ct. Cl. 1969).
5. *Id.* at 1169.
6. *Id.* at 1184-85.
7. *Id.* at 1186.
8. 41 U.S.C. §§601-613.
9. *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 748-49 (Fed. Cir. 1993).
10. *General Electric Co.*, ASBCA Nos. 36005, 38152, 91-2 BCA ¶23,958, at 119,940-41.
11. *Id.* at 119,940.
12. *General Electric Co.*, ASBCA Nos. 36005, 38152, 91-3 BCA ¶24,353. *See also, e.g.*, *Santa Barbara Research Center*, ASBCA No. 27831, 88-3 BCA ¶21,098 (Navy failed to meet burden to prove alleged latent defects in laser diodes in missile optical target detectors existed at time of acceptance); John Cibinic, Jr., Ralph C. Nash, Jr., James F. Nagle, *Administration of Government Contracts*, at 848-82 (4th Ed. 2006)(discussion of post-acceptance rights, addressing pre- and post-*Kiewit* cases).
13. 99-2 BCA ¶30,401 at 150,293.
14. *Id.* at 150,294.
15. *Id.* at 150,296.
16. *Id.* at 150,297.
17. *Roberts v. United States*, 357 F.2d 938, 948-49 (Ct. Cl. 1966); *Santa Barbara Research*, 88-3 BCA ¶21,098 at 106,515.
18. *Southwest Welding*, 413 F.2d at 1183, 1186; *Santa Barbara Research*, 88-3 BCA ¶21,098 at 106,515; *Jo-Bar Mfg. Corp.*, ASBCA No. 18292, 73-2 BCA ¶10,353 at 48,898-99.
19. *Southwest Welding*, 413 F.2d at 1185.
20. *Sentell Bros.*, DOTCAB No. 1824, 89-3 BCA ¶21,904 at 110,226, 110,228; *M.A. Mortenson Co. v. United States*, 40 Fed. Cl. 389, 423 (1998).
21. *E.g.*, *Southwest Welding*, 413 F.2d at 1169.
22. *United States v. Lembke Constr. Co.*, 786 F.2d 1386, 1387 (9th Cir., 1986)("Because of the nature of the inquiry required when applying the relevant rule of law to the facts is essentially factual, a determination of latency is treated as factual."); *Kaminer*, 488 F.2d at 985.

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Kiewit and Other Latent Defects Cases (cont'd):

Endnotes (cont'd)

23. M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82, 94 (1993)(*Mortenson I*)(pipe for hydrant fueling system at Air Force base ruptured after acceptance; court denied summary judgment to contractor despite extensive stipulations, affidavits, and expert opinions, finding genuine issues of material fact, such as whether pipe was defective; identification of industry standards; whether any defect was latent; and whether any latent defect caused pipe failure.)
24. Bart Assocs., Inc. , EBCA Nos. C-9211144, C-9312163, 96-2 BCA ¶28,479 at 142,228, 142,234.
25. H.B. Zachry Co., ASBCA No. 42266, 95-2 BCA 27,616 (hydrant fueling pipe system ruptured after acceptance; contractor's summary judgment motion denied); *Bart*, 96-2 BCA ¶28,479 at 142,233-34. M.A. Mortenson Co. v. United States, 40 Fed. Cl. 389, 420, 421 (1998)(follow-on to *Mortenson I*; after trial, court considered changes to specifications in subsequent procurements but accorded them little weight).
26. *Southwest Welding*.
27. *Bart*, 96-2 BCA ¶28,479.
28. Milton Machine Corp., ASBCA No. 15397, 72-1 BCA ¶9204 at 42,702.
29. Tricon-Triangle Contractors, ENGBCA No. 5553, 92-1 BCA ¶24,667 at 123, 084.
30. 99-2 BCA at 150,303 (citing Metric Constructors v. NASA, 169 F.3d 747, 752 (Fed. Cir. 1999)).
31. *Jo-Bar*, 73-2 BCA ¶10,353 at 48,899.
32. *Id.*
33. *Mortenson I*, 29 Fed. Cl. at 97 (citation omitted).
34. Citing Harrington & Richardson, ASBCA No. 9839, 72-2 BCA 9507 at 44,296.
35. *Bart*, 96-2 BCA ¶28,479.
36. Herley Indus., ASBCA NO. 13727, 71-1 BCA ¶8888.
37. Solid State Elecs. Corp., ASBCA No 23041, 80-2 BCA ¶14,702; Ahern Painting Contractors, Inc., GSBCA No. 7912 *et al.*, 90-1 BCA ¶22,291 (also stating discovery of deficiency after acceptance, which was unknown at time of acceptance, does not automatically equate to latent defect, citing *Metalstand Co.*, GSBCA No. 4682, 77-1 BCA ¶12,418).
38. 99-2 BCA at 150,305.
39. *Kaminer*, 488 F.2d 980.
40. *Id.*, 488 F.2d at 986-87.
41. *Zachry*, 95-2 BCA ¶27,616 (citing Wickham Contracting, ASBCA No. 32392, 88-2 BCA ¶20,559).
42. *See* United States v. Spearin, 248 U.S. 132 (1918).
43. The court has issued decisions on appeals from the United States Court of International Trade involving products with latent defects and a decision mentioning latent defects in the context of insurance clauses.
44. Hanley Indus., Inc., ASBCA No. 56976, slip op. (Apr 22, 2010).
45. ASBCA Nos. 53723, 54038, 09-2 BCA ¶34,199 (*motion for reconsideration pending*).
46. *Id.* at 169,057, citing Bar Ray Prods., Inc. v. United States, 162 Ct. Cl. 836, 837-38 (1963).
47. 09-2 BCA ¶34,199 at 169,057, citing Perkin-Elmer Corp. v. United States, 47 Fed. Cl. 672, 677 (2000); *see also* Lee Lewis Constr., Inc. v. United States, 54 Fed. Cl. 88, 92-93 (2002)(summary judgment for plaintiff granted in part, but decision on latent defects issues, including timeliness of government's notice, deferred for further proceedings).
48. Jung Ah Indus., ASBCA No. 22632, 79-1 BCA ¶13,643 at 66,929, *aff'd on reconsideration*, 79-2 BCA ¶13,916.
49. *Perkin-Elmer*, 47 Fed. Cl. At 672.
50. Moreland Corp. v. United States, 76 Fed. Cl. 268 (2007).
51. *Id.* at 270.
52. *Id.* at 285-86.
53. Northrop Grumman Corp., ASBCA No. 52178, et al., 04-2 BCA ¶32,804, *aff'd*, Winter v. Northrop Grumman Corp., 206 Fed. Appx. 991 (2006)(unpub.).

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Kiewit and Other Latent Defects Cases (cont'd):**Endnotes (cont'd)**

54. 04-2 BCA ¶32,804 at 162,250 (citing Keco Indus., ASBCA No. 13271, 71-1 BCA ¶8727 at 40,539).
55. *Id.* (citing United Techs Corp. v. United States, 27 Fed. Cl. 393, 397 (1992); Stewart & Stevenson Servs, Inc., ASBCA No. 52140, 00-2 BCA ¶31,041).
56. Northrop Grumman Corp., ASBCA No. 52178, et al., 05-2 BCA ¶32,992 at 163,525-526 (citing *Southwest Welding*; Ace Precision Indus., ASBCA No. 40307, 93-2 BCA ¶25,629 at 127,552; Dale Ingram, Inc., ASBCA No. 12152, 74-1 BCA ¶10,436; Ed Dickson Contracting Co., ASBCA No. 27205, 84-1 BCA ¶16,950 at 84,311-12 (Warranty clause).
57. Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶31,143.



***U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.* — D.C. Circuit
Joins the Retroactivity Debate Over FERA**

by
David M. Nadler
and
*David Yang**

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U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.,
2010 WL 2487962 (D.C. Cir. June 22, 2010)

Introduction

The passage of the Fraud Enforcement and Recovery Act of 2009 (FERA), P.L. 111-21, marked the most significant overhaul of the False Claims Act (FCA), 31 U.S.C.A. §3729 et seq., in the last 20 years. Although most of FERA's provisions were slated to apply prospectively to conduct on or after the statute's May 20, 2009 effective date, Congress intended certain provisions under FERA to apply on a retroactive basis. However, Congress' attempt at retroactivity has been met with opposition, with numerous courts having been pressed upon to determine whether the provisions may be applied retroactively.

Although most of the dispute to date has taken the form of a statutory debate concerning the types of conduct that fall within the retroactivity provisions, courts have also more broadly held that any retroactive application of the FCA, regardless of its statutory construction, would be unconstitutional under the Ex Post Facto Clause of the Constitution. See *U.S. ex rel. Sanders v. Allison Engine Co.*, 667 F.Supp.2d 747 (S.D. Ohio 2009). However, in *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 2010 WL 2487962 (D.C. Cir. June 22, 2010), the U.S. Court of Appeals for the D.C. Circuit apparently rejected this position. In addressing a limited, procedural defense raised by the defendants in that case, the D.C. Circuit broadly held that the retroactive application of the FCA in any context does not violate the Ex Post Facto requirements. Whether this expansive holding was intentional, given the narrow issue that was before the court, the ruling nevertheless sows confusion as to the constitutional permissibility of retroactive FCA liability and perhaps even creates the potential for a circuit split on this important issue.

U.S. ex rel. Sanders v. Allison Engine Co.

In *Allison Engine*, Judge Rose held that the FCA could not be applied retroactively pursuant to the Ex Post facto Clause because it was a punitive statute in both purpose and effect. See Nadler and Yang, Feature Comment, "A Look Back — Judicial Review of the Retroactivity Provisions of the Fraud Enforcement and Recovery Act of 2009," 52 G.C. ¶69.

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Miller v. Bill Harbert Int'l Constr., Inc. (cont'd):

With regard to the punitive purpose behind the FCA, Judge Rose determined that there was ample evidence in the legislative history of the statute pointing to Congress' intent that the FCA should serve a primarily punitive objective. *Allison Engine*, 667 F.Supp2d at 753—755. Likewise, regarding the FCA's effects, Judge Rose concluded that the majority of the factors laid out by the U.S. Supreme Court for assessing whether a statute is punitive or remedial in nature demonstrate that, on balance, the FCA is more punitive than civil in application. *Id.* at 756—758. Accordingly, as the FCA is a punitive statute in both purpose and effect, Judge Rose held that any retroactive application of the FCA would violate the Ex Post Facto Clause's prohibition against the passage of laws that punish individuals for past acts.

In December 2009, the relator, joined by the U.S. (which intervened for this limited purpose), moved the court to certify its decision that the retroactive application of the FCA is unconstitutional for interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit. On February 19, Judge Rose granted the motions for certification. Judge Rose stated that a "substantial ground for difference of opinion exists" regarding the retroactivity of the FCA, as "courts have said that the FCA is punitive in nature and they have, in other instances, said that the FCA is remedial in nature." *See U.S. ex rel. Sanders v. Allison Engine Co.*, Case No. 1:95-cv-970 (S.D. Ohio), doc. No. 737 (Feb 19, 2010) at 4. On July 2, the Sixth Circuit granted the U.S.' and relator's petitions for permission to appeal Judge Rose's interlocutory order. The matter is pending before the Sixth Circuit (doc. nos. 10-0303/0304).

U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.

Miller involved a qui tam action under the FCA, in which the U.S. subsequently intervened, alleging that the defendants engaged in a bid-rigging scheme to overcharge on contracts funded by the U.S. Agency for International Development. *Miller*, 2010 WL 2487962, and *1—2. The defendants argued that the Government's claims were time-barred under the FCA's statute of limitations because the events giving rise to the claims occurred more than six years before the claims were asserted. *Id.* at *4. In response, the Government argued that its claims were not untimely under the relation-back doctrine provided under the Federal Rules of Civil Procedure. The district court agreed, holding that the Government's claims related back to the relator's initial complaint, which had been timely filed.

On appeal, the D.C. Circuit affirmed, but noted that the relation-back doctrine was no longer based on procedural grounds because it was now rooted in the FCA itself. The D.C. Circuit noted that after the trial concluded, but before the case was briefed on appeal, Congress amended the FCA through FERA to expressly provide for relation back in FCA cases. Thus, the provision was retroactively available to all cases pending as of the date of FERA's enactment. *Miller*, 2010 WL 2487962, at *4. For its part, the defendant contended, among other arguments, that FERA's amendments could not be applied retroactively without violating the Ex Post Facto Clause.

The D.C. Circuit disagreed, concluding that the Ex Post Facto Clause applies only to

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Miller v. Bill Harbert Int'l Constr., Inc. (cont'd):

penal legislation. *Id.* At *5. Although the D.C. Circuit could have addressed the issue more narrowly, the court went beyond that task by broadly holding that because the FCA is not a criminal statute, it is not penal. Accordingly, the Court appears to have pronounced that *any* retroactive application of the FCA is permissible under the Constitution. However, in so holding, the D.C. Circuit seems to have ignored the well-settled tenet recognized by Judge Rose in *Allison Engine* that even civil statutes can be deemed punitive (and hence penal) if they are sufficiently punitive in purpose and effect that they are tantamount to a criminal sanction. Indeed, the D.C. Circuit's holding is peculiar also because the primary case on which it relies — *Hudson v. U.S.*, 522 U.S. 93 (1997) — acknowledged this point. Moreover, in *Hudson*, the Supreme Court did not conclude that the retroactive application of the FCA is permissible under Ex Post Facto Clause requirements. *Hudson*, 522 U.S. at 100—103. Most importantly, however, in *Miller* the D.C. Circuit skipped altogether the detailed and well-supported analysis articulated in *Allison Engine* that correctly concluded that the FCA is so fundamentally punitive in both purpose and effect that any retroactive application would be constitutionally impermissible. *Miller*, 2010 WL 2487962, at *5.

Although the D.C. Circuit's failure to address the *Allison Engine* retroactivity analysis may have been due to the fact that the procedural matter before the Court differed from the substantive, liability-driven issues that were before Judge Rose, the expansive language employed by the D.C. Circuit is nevertheless unqualified and could also be construed as applicable to any retroactive application of FCA liability. As noted, Judge Rose has certified his decision for interlocutory appeal to the Sixth Circuit, and the appeal is presently pending. Accordingly, at a minimum, the *Miller* decision has muddied the waters regarding the retroactive reach of FCA liability and possibly even laid the groundwork for a circuit split on this important issue.

Conclusion

In *Allison Engine*, Judge Rose meticulously examined the intent and application of the FCA under applicable Supreme Court precedent to conclude that the act is punitive in both respects and, thus, cannot be applied retroactively under the Ex Post Facto Clause of the Constitution. The D.C. Circuit, in taking an apparent contrary position in *Miller*, entirely bypassed the *Allison Engine* analysis by seizing solely on the fact that the FCA is not a criminal statute to conclude that its retroactive application does not implicate constitutional concerns. However, this conclusion ignores that fact that history, objective and remedies of the FCA all speak to the punishment of individuals who violate its provisions as opposed to any solely remedial purpose to compensate the Government for the losses it incurs. Finally, as *Allison Engine* has been certified for interlocutory appeal to the Sixth Circuit, the D.C. Circuit's entrance into the fray may well have also set the stage for a circuit split that will require the Supreme Court's intervention to resolve.

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Data Holes

by

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The term “data hole” is unfamiliar to nonaccountants, but accountants use it to refer to financial data for which the source documentation is missing. Unfortunately, data holes have become a source of increasing friction between Government auditors and contractors—and needlessly so, because data recovery is a field of accounting that has enjoyed significant growth in recent years. Indeed, some certified public accountants are data recovery specialists.

Perhaps the easiest way to obtain a basic understanding of this topic is to quickly motor through a few examples. Suppose you are looking through the documentation for a company’s office rent payments in 2007. The rent was \$1,000 per month as shown by the canceled checks for each month, except August. The canceled check for August is missing. That is a data hole. Or assume that on the night before payday, a factory burns to the ground, and all the payroll records are completely burned to ashes. After the fire is put out, a flash flood hits the factory site and all the ashes are washed downstream. Then after the flash flood subsides, an earthquake hits the region and the soggy ashes of the payroll records fall into a deep chasm in the earth. In this hypothetical, on payday morning there are no payroll records. None. So the entire factory payroll for that period is a data hole.

Now that you have an elementary grasp on what a data hole is, consider how accountants deal with the problems data holes present. To begin with, data holes are not rare events. To the contrary, they are everyday occurrences. For commercial contractors, the amounts involved are usually immaterial and therefore generate little attention. In fact, in commercial accounting data holes are generally glossed over without even being particularly noted. For Government contractors, however, the problem of data holes is different, because of both the considerably lower materiality threshold, and the provisions of Federal Acquisition Regulation 31.201-2(d), which provides,

A contractor is responsible for accounting for costs appropriately and for maintaining records, *including supporting documentation*, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. *The contracting officer may disallow all or part of a claimed cost that is inadequately supported.* [Emphasis added.]

This FAR provision is the basis on which Government auditors apparently challenge

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Data Holes (cont'd):

(with increasing frequency) the allowability of costs that are data holes, thus generating more disputes.

The position of Government auditors is fairly straightforward. Under FAR 31.201-2(d), the contractor bears the burden of documenting its costs. If the contractor cannot document its costs, for whatever reason, then it has failed to meet its burden, and the costs are unallowable. As discussed below, this strict interpretation of FAR 31.201-2(d) under all circumstances sometimes leads to irrational results.

Let's return to the two data hole examples presented earlier. The first example involved office rent, and the second example was payroll. Regarding the office rent, it could be concluded that the office rent for August 2007 was \$1,000. This is indicated by the monthly rent for all the other months that year being \$1,000. Stated differently, *the available source documentation is sufficient to cover the data hole*. This technique of using existing documentation to establish costs for periods for which documentation is unavailable is widely used in accounting. Also, the fact that the monthly rental payments after August 2007 were also \$1,000 shows that the tenant incurred no penalties under the lease. This is corroborative information supporting the conclusion that the August 2007 rent was timely and fully paid.

The example of the missing payroll documents presents a more complex but similar situation. In this case, there is no source documentation. Nonetheless, all is not lost. Accountants know that the entire payroll can be reconstructed by resorting to the employer's last state and federal tax filings. By using a process of reverse engineering, the payroll amounts for each employee can be calculated in a fairly short period of time, and probably within a dime of accuracy. In these types of circumstances, the accounting question is whether costs can be determined in the absence of any source documentation. The answer is that accountants will turn to whatever collateral documentation is available to create a cost construct. This task is easier than it sounds, because in our economy it is rarely the case that financial data exist in only one location. Financial data and relevant information are at geographically scattered points, so even if disaster strikes at one office (fire, flood, earthquake—or all three, as in my example) the missing financial data can be recreated from associated records. (For accountants, this is child's play.)

Notwithstanding the ample basis on which the costs in both examples are substantiated, many (possibly most) Government auditors would still disallow these costs because, in their view, the contractor has not provided documentation of the costs consistent with their reading of FAR 31.201-2(d). In the opinion of adversely affected contractors, such a strict interpretation of FAR 31.201-2(d) generates contract disputes that are unnecessary.

In other data reconstruction episodes, accountants routinely use much more sophisticated techniques. For example, in some instances data holes may be covered by various

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Data Holes (cont'd):

statistical formulae. To briefly elaborate, accountants use mathematical relationships among the known data to establish probabilities for the unknown amount(s). To illustrate, what is the likelihood that the office rent for August 2007 is \$1,000? Since all the other 2007 monthly rents (i.e., data points) are \$1,000, the statistical chances are obviously very high that the August 2007 monthly rent is \$1,000 too. In fact, the likelihood is so high that it amounts to a reasonable certainty.

Of course, there are times when the available information does not permit a reasonable certainty, so accountants use less-resounding verbiage such as “reasonable likelihood,” “probable,” “more likely than not” or similar phraseology. Government accountants can be expected to prey on such language, and will use it to argue that the contractor does not have “supporting documentation, adequate to demonstrate that costs claimed have been incurred” in accordance with their interpretation of FAR 31.201-2(d).

In such challenges by Government auditors, the dispute is essentially one of reasonableness. On that point, the difficulty some contractors have in challenging cost disallowances related to data holes is that reasonableness is subjective. Accordingly, knowledgeable individuals—such as Government auditors—can in good faith have a different opinion of what is reasonable. In other words, regardless of the methodology chosen by the contractor to address the data hole, the contractor’s submission is generally determined to be unreasonable by Government auditors (and administrative COs).

The real objective, then, for a contractor with data holes should be to prepare alternative documentation that will be found reasonable on appeal. Government trial attorneys have to take these cases to court or an agency board of contract appeals. As a rule, Government attorneys do not like taking cases to court if the Government’s position appears petulant or foolish, even to them. Be that as it may, contractors who end up in litigation need to show a reasonable basis on which the costs for which they have no documentation may be allowed by the trier of fact. As discussed above, costs related to data holes may be substantiated indirectly in different ways: by using other source documentation, by reference to collateral documentation or by employing statistically derived cost models. Moreover, accountants have many other tools of the trade that this brief article does not mention.

In sum, when data holes occur, accountants usually can establish the missing values. In some circumstances, the data can be recreated with a high degree of confidence; in other instances, there is less certainty. The reasonableness of these efforts may sometimes be debated, but the point is that in many (if not most) cases, accountants can cover data holes.

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