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GAO Bid Protests: An Overview of Time Frames and Procedures

Kate M. Manuel
Legislative Attorney

Moshe Schwartz
Specialist in Defense Acquisition

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Summary

For purposes of federal law, a *bid protest* involves a written objection to the conduct of government agencies in acquiring supplies and services for their direct use or benefit. Such conduct can include (1) soliciting or otherwise requesting offers; (2) cancelling such solicitations or requests; (3) awarding or proposing to award a contract; (4) terminating or cancelling a contract due to improprieties involving its award; or (5) converting functions performed by government employees to private sector performance. Bid protests are of perennial interest to Congress, in part, because of the effects of protests on agency missions and operations. Congressional interest can also be prompted by notable protests, as well as by agency determinations not to follow any nonbinding recommendations made by the Government Accountability Office (GAO) in deciding protests.

GAO is not the only forum with authority to hear bid protests involving federal acquisitions. The procuring agency and the U.S. Court of Federal Claims can also hear bid protests. However, GAO hears more protests than the Court of Federal Claims, the only other forum for which data are readily available. Thus, its protest procedures—which can differ somewhat from those of the procuring agencies and the Court of Federal Claims—are the focus of this report.

Legislation and regulations establish what issues may be protested with GAO and who may bring a protest. As previously noted, by statute, GAO may hear complaints alleging violations of federal procurement law in federal acquisitions. However, it is expressly barred by regulation from hearing certain issues, such as challenges to small business size certifications. Any *interested party*—an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of, or failure to award, a contract—may file a protest.

GAO is required by statute to provide for the "inexpensive and expeditious" resolution of protests, "[t]o the maximum extent practicable." Its practices permit "inexpensive" resolution, in part, by enabling interested parties to represent themselves, rather than rely on attorneys. For example, GAO does not require "formal briefs" or "other technical forms" of pleadings or motions. It is also subject to statutory mandates that promote "expeditious" resolution, in part, by requiring GAO to issue final decisions within 65 to 100 days after the protest was filed.

Filing a GAO protest may trigger an automatic stay of contract award or performance that lasts for the duration of the protest. Such automatic stays are unique to bid protests filed with GAO and help account for GAO's popularity as a protest forum. Agencies may, however, override these stays upon determining that urgent and compelling circumstances will not permit waiting for GAO's decision, or performance of the contract is in the best interests of the United States.

GAO may dismiss, deny, or sustain a protest. When a protest is dismissed or denied, the procuring agency may generally proceed with the challenged action. In contrast, when a protest is sustained, GAO may recommend specific actions (e.g., amending the solicitation, reevaluating proposals). Such recommendations are not legally binding because the separation of powers doctrine precludes legislative branch agencies, such as GAO, from controlling the actions of executive branch agencies. However, the procuring agency is required by statute to notify GAO if GAO's recommendations are not fully implemented, and GAO, in turn, must notify Congress.

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

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Bid protests—or written objections to certain actions, described below,[1] taken by federal agencies when acquiring supplies or services for their direct use or benefit—are of perennial interest to Congress. In some cases, this interest arises from reported increases in the number of bid protests filed annually and the effects that such protests can have on agency missions and operations.[2] In other cases, congressional interest can be prompted by notable protests,[3] or by agency determinations not to follow any nonbinding recommendations made to federal agencies by the Government Accountability Office (GAO) in bid protest decisions.[4]

GAO is not the only forum with authority to hear bid protests involving federal acquisitions.[5] The procuring agency and the U.S. Court of Federal Claims can also hear bid protests. However, GAO hears more protests than the Court of Federal Claims, the only other forum for which data are readily available.[6] Thus, its protest procedures—which can differ somewhat from those of the procuring agencies and the Court of Federal Claims—are the focus of this report.

The report is one of two providing Congress with background on the GAO bid-protest process. It provides an overview of the time frames and procedures in a GAO bid protest, including (1) what issues can be protested with GAO; (2) who can file or be a party to a GAO protest; (3) the

[1] *See infra* "Background."

[2] *See, e.g.*, David Hansen, *Rise in Bid Protests Will Continue, Analysts Say*, 104 FED. CONTR. REP. 1262 (Dec. 14, 2015) (reporting that the number of protests (a term which here includes cost claims and requests for reconsideration) filed with GAO was 2,639 in FY2015, which was 3% more than the 2,561 protests filed in FY2014, but that rate of protests sustained in FY2015 dropped to 12%, down from 13% in FY2014). Because the filing of a protest with GAO may trigger an automatic stay of contract award or performance, such protests can be said to "disrupt" agency operations. *See, e.g.*, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, August 24, 2007, *available at* http://acquisition.navy.mil/rda/content/download/5263/23838/file/enhancing%20competition%201-18-2008.pdf (describing bid protests as "extremely detrimental to the warfighter and taxpayer" and stating that "[t]he Defense Department must take steps in an effort to avoid these protest situations").

[3] *See, e.g.*, Mike Gruss, *SpaceX Formally Protests Initial EELV Block Buy Contracts*, SPACENEWS, April 26, 2014, *available at* http://www.spacenews.com/article/military-space/40343spacex-formally-protests-initial-eelv-block-buy-contracts.

[4] As discussed below (see "Legal Effect of GAO Recommendations"), the recommendations that GAO makes when sustaining protests are not legally binding upon federal agencies. Agencies often comply with these recommendations. However, in certain cases, they do not. For example, in 2011-2013, the Department of Veterans Affairs (VA) declined to adopt the recommendations made by GAO in a series of 35 bid protests. In deciding these protests, GAO had construed certain amendments made to the Veterans Benefits Act in 2006 as barring VA from purchasing supplies or services through the Federal Supply Schedules without first considering or, where appropriate, using a "set aside" for veteran-owned small businesses. *See, e.g.*, Aldevra, B-405271; B-405524 (October 11, 2011); Kingdomware Techs., B-405727 (December 19, 2011); Crosstown Courier Serv., Inc., B-406262 (March 21, 2012). The VA disagreed, and refused to modify its procurement practices. GAO noted the VA's noncompliance in a November 13, 2012, report to Congress. *See* GAO Bid Protest Annual Report to the Congress for Fiscal Year 2012, November 13, 2012, *available at* http://www.gao.gov/assets/650/649957.pdf. However, shortly thereafter, a federal court adopted an alternate interpretation of the statutory provisions in question. *See* Kingdomware Techs., Inc. v. United States, 107 Fed. Cl. 226 (2012), *aff'd, on other grounds*, 754 F.3d 923 (Fed. Cir. 2014). The Supreme Court has granted review, and is scheduled to hear oral arguments in the case on February 22, 2016. Supreme Court of the United States, October Term 2015, Calendar for the Session Beginning February 22, 2016, *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFebruary2016.pdf.

[5] *See* 31 U.S.C. §3556 ("This subchapter does not give the Comptroller General [i.e., the head of GAO] 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 Court of Federal Claims.").

[6] The Court of Federal Claims reported the filing of 95 cases in the "Contract/Injunction" category, which includes "pre-award or post-award bid protest injunction cases," in 2014. *See* Table G-2A, U.S. Court of Federal Claims—Cases Filed, Terminated, and Pending for the 12-Month Period Ending September 30, 2014, *available at* http://www.uscourts.gov/statistics/table/g-2a/judicial-business/2014/09/30.

procedures for bringing and resolving GAO protests; (4) the time frames involved in GAO protests; (5) the automatic stay of contract award or performance triggered by a GAO protest, as well as the basis for agency overrides of automatic stays and judicial review of agency override determinations; (6) the basis and effects of GAO decisions; and (7) reconsideration and "appeal" of GAO decisions. A companion report, CRS Report R40227, *GAO Bid Protests: Trends and Analysis*, by Moshe Schwartz and Kate M. Manuel, analyzes recent trends in bid protests filed with GAO, particularly protests involving the Department of Defense.[7]

Background

Under federal law, a *bid protest* is a written objection by an "interested party"—a term whose meaning is discussed further below (see "Who Can File or Be a Party to a GAO Protest?")—to the conduct of a federal agency in acquiring supplies or services for its own direct use and benefit. This conduct can include

> (A) [a] solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
>
> (B) [t]he cancellation of such a solicitation or other request.
>
> (C) [a]n award or proposed award of such a contract.
>
> (D) [a] termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
>
> (E) [c]onversion of a function that is being performed by Federal employees to private sector performance.[8]

Bid protests only became part of the federal procurement system in the early 20th century, more than 100 years after the federal government began purchasing supplies and services. However, Congress currently authorizes bid protests in three separate forums—the procuring agency, GAO, and the Court of Federal Claims—in recognition of protests' role in providing redress to disappointed bidders and offerors and ensuring the integrity of the federal procurement process.[9]

Historical Development of Federal Bid-Protest Mechanisms

GAO first began hearing bid protests in the early 20th century on the theory that its statutory authority to settle and adjust "all claims and demands" against the United States encompassed bid protests.[10] The federal courts did not hear protests at that time. Indeed, in its 1940 decision in *Perkins v. Lukens Steel Company*, the Supreme Court found that actual or potential bidders who had been disappointed in their dealings with the federal government lacked standing to challenge alleged violations of federal procurement laws by government agencies.[11] The Court reached this conclusion because it viewed these federal procurement laws as having been enacted strictly for the government's benefit, "for the purpose of keeping its own house in order," and thus not

[7] For more on GAO generally, see archived CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

[8] 31 U.S.C. §3551(1)(A)-(E).

[9] The jurisdiction of the federal district courts over bid protests expired on January 1, 2001. *See* Administrative Dispute Resolution Act of 1996, P.L. 104-320, §12(d), 110 Stat. 3875 (October 19, 1996).

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

[11] 310 U.S. 113, 132 (1940).

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A Practical Guide to the Legislative Process in the U.S. Congress

Richard A. Arenberg

Foreword by Alan S. Frumin

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enforceable against the government by private parties.[12] However, several decades later, beginning with the 1970 decision by the U.S. Court of Appeals for the District of Columbia in *Scanwell Laboratories, Inc. v. John H. Shaffer*, the federal courts came to hold that the Administrative Procedure Act (APA) of 1946 authorized them to hear bid protests.[13]

Congress later expressly granted bid protest jurisdiction to GAO when it enacted the Competition in Contracting Act (CICA) of 1984.[14] GAO's long history of handling bid protests, coupled with several unique aspects of the GAO bid-protest process, most notably the stay of contract award or performance that may result from the filing of a GAO protest,[15] make it a primary locus for federal bid protests.[16]

Purposes of Bid-Protest Processes

Although disappointed bidders or offerors would generally have no right to protest if Congress did not provide for this right with either CICA or the APA, Congress has chosen to authorize several judicial and other forums to hear bid protests for several reasons.[17] First, protest mechanisms ensure that entities doing business with the government can air their complaints about government contracting processes and obtain relief. Without such mechanisms, certain frustrations that citizens have with their government could remain unaddressed. Additionally, absent such mechanisms, entities might be less willing to do business with the government, which could diminish competition for government contracts and drive up prices.[18] Second, protest mechanisms enhance the accountability of procurement officials and government agencies by highlighting and correcting mistakes and misconduct. This accountability helps to ensure the integrity of the procurement system. If the government's procurement system were perceived as corrupt or ineffective, contractors might be less willing to compete for government contracts, and the price at which the government acquires goods and services could increase. A corrupt or ineffective procurement system could also waste taxpayers' money.

These benefits of bid protests are not costless, however; protests can impede the prompt and efficient acquisition of goods and services needed by the government. Particularly when contract award or performance is stayed due to the filing of a bid protest, as may happen with GAO protests,[19] protests can delay agency procurement actions. Protests also require agency officials to spend time explaining their conduct to disappointed bidders and offerors, and in defending their conduct before judicial or other forums. Moreover, fear of possible protests may increase the time

[12] *Id*. at 127.

[13] 424 F.2d 859, 865-69 (D.C. Cir. 1970). Although Congress enacted the APA in 1946, it was not until 1970 that the federal district courts held that the APA gave them jurisdiction to hear bid protests.

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

[15] *See* "Automatic Stays of Contract Award or Performance."

[16] *See supra* note 6 as to the number of bid protests filed annually with the Court of Federal Claims. It is not known how many protests are filed annually with the procuring agencies. However, this number may be not insignificant, since some have expressed the view that protesting with the agency (as opposed to another forum) is a way to preserve a good relationship with the agency whose actions are being challenged.

[17] As previously noted, the procuring agencies and the Court of Federal Claims may also hear bid protests.

[18] For more on the benefits to the government of competition in the source-selection process, see generally CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by Kate M. Manuel.

[19] *See* "Automatic Stays of Contract Award or Performance."

and energy that agencies expend in documenting their procurement decisions. Congress has, however, historically viewed the benefits of protests as outweighing these costs.

The GAO Bid-Protest Process

When it enacted CICA, Congress charged GAO with "provid[ing] for the inexpensive and expeditious resolution of [bid] protests" to "the maximum extent practicable."[20] GAO has attempted to meet these goals through the use of time frames and procedures partly prescribed by statute and partly established by administrative rulemaking.[21] These time frames and procures are discussed below.

What Issues Can Be Protested with GAO?

Under CICA, disappointed bidders or offerors can protest to GAO about an "alleged violation of ... procurement statute or regulation" by a federal agency in (1) soliciting or otherwise requesting offers; (2) cancelling such solicitations or requests; (3) awarding or proposing to award a contract; (4) terminating or cancelling a contract due to improprieties involving its award; or (5) converting functions performed by government employees to private sector performance.[22] The alleged violation may arise prior to contract award, as when a contractor claims that some aspect of the solicitation would impermissibly disadvantage it in competing for the contract. Alternately, the alleged violation may arise with the contract, as when a contractor claims that the government failed to follow the rules for the competition or otherwise acted improperly in awarding the contract to the protestor's competitor(s). Starting in FY2008, under additional jurisdiction granted to GAO by Congress, GAO may also hear alleged violations pertaining to agencies' issuance of task or delivery orders under multiple-award contracts,[23] or contracting out under Office of Management and Budget (OMB) Circular A-76.[24] It can also hear protests involving Transportation Security Administration contracts,[25] which had formerly been excluded from GAO review.

GAO regulations, however, bar GAO from considering certain issues, even when these issues are implicated in the formation of a government contract. These issues generally include the following:

- disputes between a contractor and an agency regarding the terms and performance of an existing contract;
- challenges to small business size standards and standard industrial classifications;[26]

[20] 31 U.S.C. §3554(a)(1).

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

[22] 31 U.S.C. §3551(1)(A)-(E).

[23] Task and delivery orders are awarded under existing contracts. They are not themselves contracts. *See generally* Harris IT Servs. Corp., B-411699, B-411796 (Oct. 2, 2015) (distinguishing between contracts and task orders issued under a contract).

[24] *See* Bid Protest Annual Report to the Congress for Fiscal Year 2012, *supra* note 4.

[25] *Id.*

[26] These issues are generally protested with the Small Business Administration (SBA).

- issuance of or refusal to issue certificates of competency under Section 8(b)(7) of the Small Business Act;[27]
- determinations to procure particular supplies or services through the Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program);[28]
- challenges to agency determinations that a prospective contractor is affirmatively "responsible" for purposes of the award of a contract;[29]
- alleged procurement integrity violations which the protester did not report to the agency responsible for the alleged violations within 14 days of discovering them;[30]
- procurements by agencies that are not "federal agencies" as defined in Section 3 of the Federal Property and Administrative Services Act (40 U.S.C. §102);[31]
- awards or proposed awards of subcontracts, unless the agency awarding the prime contract has requested in writing that subcontract protests be handled by GAO as "non-statutory protests";[32]
- the debarment and suspension of government contractors;[33]
- protests asserting that the protester's proposal should not have been included or kept in the competitive range; and
- decisions by "agency tender officials" regarding whether to file protests in connection with "public-private competitions," which are competitions conducted to determine whether the "commercial functions" of federal agencies are performed using government personnel or contractor employees.[34]

[27] The issuance of certificates of competency is part of the process of determining whether certain would-be government contractors are "responsible." For more on responsibility determinations, see CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

[28] For more information on the 8(a) Program, see CRS Report R40744, *The "8(a) Program" for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by Kate M. Manuel.

[29] Federal agencies generally cannot award a contract without having determined that the contractor is affirmatively "responsible" for purposes of the award of the proposed contract. *See generally* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

[30] Such violations include the release of source selection information or contractor bid or proposal information by the agency; undisclosed contacts between employees involved in procurements over $150,000 and bidders or offerors regarding future employment; or employment by the contractor of former agency officials who were involved in procurements or administration of contracts valued at $10 million or more within one year of their involvement. *See* 41 U.S.C. §§2101-2107.

[31] This definition encompasses any executive agency or establishment in the legislative or judicial branch other than the Senate, the House of Representatives, and the Architect of the Capitol (or any activities under the direction of the Architect of the Capitol). GAO regulations further note that the acquisitions of the U.S. Postal Service, the Federal Deposit Insurance Corporation, and non-appropriated fund activities (NAFIs) are excluded from GAO's protest jurisdiction. 4 C.F.R. §21.5(g).

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

[33] For more on debarment and suspension, see CRS Report RL34753, *Procurement Debarment and Suspension of Government Contractors: Legal Overview*, by Kate M. Manuel.

[34] 4 C.F.R. §21.5(a)-(k). For more on public-private competitions, see out of print CRS Report RL32833, *Sourcing Policy: Statutes and Statutory Provisions*, by L. Elaine Halchin, available from the author.

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

By statute, a GAO bid protest may be filed by any *interested party*,[35] or any "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[36] This focus upon direct economic interest in determining who is an interested party means that a larger number of contractors can generally bring pre-award protests than can bring post-award protests. Prior to contract award, contractors who are considering bidding or offering generally qualify as interested parties. In contrast, after contract award, only contractors who bid on the contract or submitted offers may generally qualify as interested parties because only they are eligible for the award.[37] Moreover, because of the focus on *direct* economic interest, GAO may require that contractors *both* have bid or offered on the contract *and* be next in line for its award if the protest is sustained for them to qualify as interested parties.[38] Given their lack of "direct economic interests," concerned citizens are not interested parties who may bring GAO bid protests. Subcontractors on federal contracts also generally lack standing to bring a GAO protest unless the contracting agency has requested that GAO hear such protests.

In addition to prospective or actual bidders or offerors, other parties to GAO bid protests include the agency responsible for the alleged violations of federal procurement law and, potentially, one or more intervenors. Intervenors enter protests to protect their status as awardees or potential awardees. When the contract has not yet been awarded, GAO regulations permit all bidders or offerors who "appear to have a substantial prospect of receiving an award if the protest is denied" to intervene.[39] When the contract has been awarded, only the winning bidder or offeror may generally intervene.

Procedures for the "Inexpensive" Resolution of Protests

GAO has adopted various regulations and practices to ensure that it resolves protests "inexpensively," as required by statute. Among other things, it increases the feasibility of interested parties filing protests on their own behalf, without legal representation,[40] by providing that "[n]o formal briefs or other technical forms of pleading or motion are required."[41] Rather, for GAO to consider a protest, a protestor need only

- identify the contracting agency and the solicitation or contract number;
- set forth a detailed statement of the legal and factual grounds of protest, including copies of relevant documents;

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[35] 31 U.S.C. §3553(a).

[36] 31 U.S.C. §3551(2)(A). *Interested party* is defined somewhat differently for purposes of challenges involving public-private competitions. *See generally* 31 U.S.C. §3551(2)(B).

[37] GAO, Office of General Counsel, Bid Protests at GAO: A Descriptive Guide 6 (9th ed. 2009), *available at* http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf.

[38] *But see* Arora Group, B-288127 (September 14, 2001) (recognizing a bidder whose proposal was ranked fifth as an interested party because its protest challenged the agency's application of the evaluation criteria in general and, if successful, could have placed the contractor in line for the award).

[39] 4 C.F.R. §21.0(b)(1).

[40] Bid Protests at GAO, *supra* note 37, at 4. However, only attorneys admitted under protective orders are permitted to see another company's proprietary information, or the agency's source-selection-sensitive information, during a GAO protest. *Id*. at 5-6.

[41] 4 C.F.R. §21.1(f).

- establish that the protester is an interested party making a timely protest; and
- state the relief requested (e.g., termination or re-competition of a contract).[42]

GAO also allows protesters to avoid the costs of traveling to Washington, DC, where GAO is located, by providing for the resolution of protests based upon documents filed by the protester and the agency, as opposed to in-person hearings.[43] Hearings are relatively rare in GAO protests. Between FY2011 and FY2014, 3% to 8% of GAO cases annually entailed hearings.[44] Moreover, when held, hearings are generally less formal than hearings in federal court, with GAO and the parties determining at a pre-hearing conference what procedures will be followed, as well as what issues will be considered and which witnesses will testify.[45]

These factors, as well as the strict time frames for resolving GAO protests, described below, can make GAO a less expensive venue in which to conduct bid protests than the Court of Federal Claims. Protesters in the Court of Federal Claims are, in contrast, generally more likely to be represented by attorneys and have hearings on their protests.[46] Their protests can also take longer to resolve.[47] However, some commentators have wondered whether GAO's comparatively quicker and less formal procedures make GAO more likely than the Court of Federal Claims to issue erroneous decisions.[48] There have also been questions about whether GAO, with its comparatively informal procedures, is the best forum for "awards involving complex systems or services with values rising to the hundreds of millions of dollars or more."[49]

Time Frames for the "Expeditious Resolution" of Protests

Federal statutes and regulations also provide for the "expeditious" resolution of protests by requiring GAO to adhere to strict time frames, including resolving protests within 65 to 100 days after they are filed. These time frames help ensure that protesters receive prompt resolution of their claims, and prevent bid protests from delaying the procurement of necessary supplies and services by federal agencies.[50] A protester who files a bid protest with the Court of Federal Claims, in contrast, could potentially wait over 100 days before the court hears the case,[51] and would not necessarily have the award or performance of the contract stayed for the duration of the protest, as generally happens with GAO protests. The specific time frames for the key stages in the GAO protest process are described below.

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[42] 4 C.F.R. §21.1(c)(1)-(8). Protesters may also, if they so wish, request protective orders, specific documents from the agency, or a hearing before GAO. *See* 4 C.F.R. §21.1(d)(1)-(3).

[43] 4 C.F.R. §21.7(a) (allowing parties to a bid protest to request a hearing). *See also* 4 C.F.R. §21.7(c) (noting that, although hearings are generally conducted in Washington, DC, they can sometimes be conducted in other locations, by telephone, or by other electronic means).

[44] GAO Bid Protest Annual Report to Congress for Fiscal Year 2014, December 10, 2015, *available at* http://www.gao.gov/assets/680/674134.pdf.

[45] 4 C.F.R. §21.7(b).

[46] Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 6 WIS. L. REV. 1225, 1232 (2007).

[47] *Id.*

[48] *Id.* at 1241.

[49] *Id.*

[50] *Bid Protests at GAO*, *supra* note 37, at 6.

[51] Metzger & Lyons, *supra* note 46, at 1232. In many cases, judges on the Court of Federal Claims hold some sort of hearing on the merits within 60 to 90 days of the protest's filing. The court does not always render its decision at the same time as the hearing, however. The decision could come weeks or months later.

Initial Filings by Interested Parties

The time frames within which interested parties must, by regulation, file bid protests with GAO depend upon the circumstances prompting the protest. Alleged violations that are apparent prior to bid opening or the time set for receipt of initial proposals must be protested before the bid opening or by the specified time.[52] Other alleged violations must be protested no later than 10 calendar days after they become known, or should have become known, whichever is earlier, unless the protest challenges "a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required."[53] Protests filed after these deadlines are untimely, and GAO generally dismisses them.[54] GAO generally considers untimely protests only when the protester shows good cause for its late filing or when GAO determines that the protest raises "issues significant to the procurement system."[55] However, would-be protesters that miss GAO filing deadlines can sometimes still file bid protests with the Court of Federal Claims, provided they meet the court's timeliness requirements.[56]

GAO Notice to the Agency

Once a protest is filed with GAO, GAO is required by statute to notify the federal agency whose contracting activities are being protested within one working day of receiving the protest.[57] This notice is important for two reasons. First, the agency's receipt of the GAO notice often marks the beginning of an automatic stay of the award or performance of the contract. This is because, under CICA, federal agencies which have been notified of GAO bid protests that were filed within 10 days of contract award (or within 5 days of a debriefing) may not award or authorize performance of the contract until the protest is decided.[58] Second, the agency's receipt of GAO's notice marks the beginning of the 30-calendar-day period within which the agency must generally respond to the GAO protest.[59]

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[52] 4 C.F.R. §21.2(a)(1). When the alleged improprieties did not exist in the initial solicitation, but were subsequently incorporated into it, the protest must be filed prior to the next closing time for receipt of proposals following the incorporation. *Id*.

[53] 4 C.F.R. §21.2(a)(2). A *debriefing* is a meeting between unsuccessful bidders or offerors and agency officials wherein agency officials explain why the proposal of the bidder or offeror was not selected. When contractors protest with GAO after an earlier protest with the contracting agency, that protest must also be filed with GAO within 10 calendar days of the agency's denying this protest unless the agency had set a shorter time frame for protesters' "appeal" of agency decisions to GAO. 4 C.F.R. §21.2(a)(3).

[54] 4 C.F.R. §21.2(b)-(c).

[55] 4 C.F.R. §21.2(c). In its January 28, 2014, decision in *Motorola Solutions, Inc.*, GAO found that a protest was timely when the record showed that the agency delayed furnishing the protester with information that was critical to its argument; the protester diligently pursued this information; and the protester filed within 10 days of being provided the information that had been improperly withheld. It is unclear whether and how the *Motorola* "exception" might be applied in other circumstances.

[56] *But see* Blue & Gold Fleet L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007) (holding that a party that has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so before the close of bidding waives its right to raise the same objection in a bid protest).

[57] 31 U.S.C. §3553(b)(1). The protester must also submit a copy of the protest to the agency within one working day of filing the protest with GAO. 4 C.F.R. §21.1(e).

[58] 31 U.S.C. §3553(c)(1) & (d)(3).

[59] 31 U.S.C. §3553(b)(2)(A). This 30-day response period can be lengthened when GAO determines, based upon the agency's written request, that the circumstances of the protest require a longer period. 31 U.S.C. §3553(b)(2)(B). The response period can also be shortened to 20 days when GAO determines that the protest is suitable for "express" resolution and notifies the agency of this determination. 31 U.S.C. §3553(b)(2)(C).

Agency's Response and Protester's Reply

When responding to a GAO bid protest, the agency is required by statute to file a report with GAO, generally within 30 calendar days of receiving notice of the protest.[60] Under GAO regulations, this report must include

> the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposals submitted by the protester; the bid or proposal of the firm which is being considered for the award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.[61]

The agency can avoid filing this report only when it (or an intervenor) requests and is granted dismissal of the protest before the report is due.[62]

After the agency's report is filed, the protester then has 10 calendar days to submit written comments on the agency's report to GAO.[63] If the protester fails to submit such comments, GAO is required, by its own regulations, to dismiss the protest.[64]

Issuance of GAO's Decision on a Protest

GAO generally is required to issue its final decision on a bid protest within 100 calendar days of the protest's filing.[65] This time frame can be shortened to 65 calendar days if GAO determines, either at the request of a party or upon its own initiative, that the protest should be treated under the "express option."[66] GAO can also dismiss a protest that is frivolous—or that does not state, on its face, a valid basis for protest—at any time,[67] even before the agency files its report with GAO.[68] GAO can similarly issue a summary decision on a protest at any time.[69]

The importance that Congress attaches to the expeditious resolution of protests by GAO is indicated by the fact that GAO is required by statute to report to Congress on any instance in which GAO fails to issue its final decision on a protest within 100 calendar days of the protest's filing.[70] Prior to FY2014, GAO apparently never had any such instances, and thus never had to make such a report to Congress. However, the 16-day-long government shutdown at the beginning of FY2014 prompted GAO to "extend the bid protest deadlines one day for each day

[60] 31 U.S.C. §3553(b)(2)(A).

[61] 4 C.F.R. §21.3(d).

[62] 4 C.F.R. §21.3(b).

[63] 4 C.F.R. §21.3(*i*). In protests decided under the "express option," this time frame is reduced to five days. 4 C.F.R. §21.10(d).

[64] 4 C.F.R. §21.3(*i*) ("The protest shall be dismissed unless the protester files comments within the 10-day period, except where GAO has granted an extension or has established a shorter period in accordance with §21.10(e).").

[65] 31 U.S.C. §3554(a)(1). GAO regulations also call for GAO to resolve timely supplemental or amended protests within this time frame, if possible. 4 C.F.R. §21.9(c).

[66] 31 U.S.C. §3554(a)(2); 4 C.F.R. §21.10(b).

[67] 31 U.S.C. §3554(a)(4).

[68] 31 U.S.C. §3553(b)(3).

[69] 4 C.F.R. §21.10(e).

[70] 31 U.S.C. §3554(e)(1).

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that GAO was shutdown."[71] 280 protests were reportedly affected by this extension.[72] Of these, GAO reports that 241 were resolved within 100 days without any extension, and the remaining 39 were resolved within 100 "calendar days for the period that the government was funded" (i.e., 100 days plus the 16-day extension).[73]

Table 1. Time Frames of Important Events in the GAO Bid-Protest Process

Event	Normal Time Frames	Express Time Frames
Filing of protest with GAO	Prior to the bid opening or the time set for receipt of initial proposals, in the case of pre-award protests; no more than 10 calendar days after the protested conduct, in the case of post-award protests	Prior to the bid opening or the time set for receipt of initial proposals, in the case of pre-award protests; no more than 10 calendar days after the protested conduct, in the case of post-award protests
Notice of the protest sent from GAO to the agency	Within 1 working day of the protest's being filed	Within 1 working day of the protest's being filed
Agency's report on the protested procurement sent to GAO	Within 30 calendar days of the agency's receiving notice of the protest	Within 20 calendar days of the agency's receiving notice of the protest
Protester's reply to the agency's report	Within 10 calendar days of the filing of the agency report	Within 5 calendar days of the filing of the agency report
GAO's decision on the protest	Within 100 calendar days of the protest's being filed	Within 65 calendar days of the protest's being filed

Source: Congressional Research Service, based on various sources cited *supra* "Time Frames for the "Expeditious Resolution" of Protests."

Time Frames for Optional Events in the GAO Bid-Protest Process

Similarly short time frames apply to optional steps in the GAO bid-protest process. Here, GAO regulations require protesters to

- request expedited review under GAO's "express option" within five calendar days of filing the protest;[74]
- request a hearing "as early as possible in the protest process";[75]
- request any additional documents whose existence or relevance becomes evident only after the filing of the agency report within two calendar days of discovering their existence;[76] and
- file written comments on any hearing within five calendar days of the hearing.[77]

[71] GAO Bid Protest Annual Report to the Congress for Fiscal Year 2014, November 18, 2014, at 2, *available at* http://www.gao.gov/assets/670/667024.pdf.

[72] *Id.*

[73] *Id.*

[74] 4 C.F.R. §21.10(c).

[75] *Bid Protests at GAO*, *supra* note 37, at 24.

[76] 4 C.F.R. §21.3(g).

[77] 4 C.F.R. §21.7(g). If the protester fails to timely file these comments, GAO must, under its own regulations, dismiss the protest.

Automatic Stays of Contract Award or Performance

Under CICA, the filing of a bid protest with GAO may trigger an automatic stay (or postponement) of contract award or performance. With pre-award bid protests, an agency may not award the contested contract until the protest has been resolved.[78] Similarly, with post-award bid protests, the agency must withhold authorization of performance under the contract while the protest is pending.[79] If authorization has not been withheld, the agency must "immediately direct the contractor to cease performance under the contract" until the protest is resolved.[80]

These bid-protest stays—commonly known as "CICA stays"—are a key aspect of the GAO bid-protest process,[81] which Congress mandated in order to strengthen GAO's protest function.[82] Congress did not provide for similar stays when bid protests are filed with the Court of Federal Claims. Rather, protesters filing suit in the Court of Federal Claims must meet the court's usual requirements for temporary restraining orders or preliminary injunctions in order to affect a delay of the agency's procurement activities similar to that which generally occurs automatically when a GAO protest is filed.[83] This difference between bid protests at GAO and those at the Court of Federal Claims has prompted some commentators to worry that the stays triggered by GAO protests encourage contractors to "game the system." Such commentators worry that contractors knowingly file meritless protests with GAO in order to harass their competitors and delay awards to them, or in the hopes of obtaining short-term contracts from the government during the pendency of the GAO protest.[84] These commentators also worry that the public interest, as embodied in the contract to be awarded or performed, is neglected during the stay.[85] However, agencies' authority to override CICA stays, discussed below, may diminish the significance of such concerns. An override could permit an agency to proceed with contract award or performance while a protest is pending.[86]

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[78] 31 U.S.C. §3553(c)(1).

[79] 31 U.S.C. §3553(d)(3)(A).

[80] 31 U.S.C. §3553(d)(3)(A)(ii).

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

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

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

[84] Metzger & Lyons, *supra* note 46, at 1239. A disappointed bidder or offeror who is the incumbent contractor could obtain another 100 days' worth of business from the agency by filing a protest with GAO because agencies often continue incumbent contractors during the pendency of GAO protests. *See* 31 U.S.C. §3553(d)(3)(C); *see also* Keeton Corrections, Inc. v. United States, 59 Fed. Cl. 753 (2004) (overruling the Bureau of Prisons' override of a CICA stay because the incumbent contractor could continue to provide correction services during the protest). Alternately, a disappointed bidder or offeror who is not the incumbent contractor could obtain temporary contracts with the agency during the protest.

[85] Metzger & Lyons, *supra* note 46, at 1269.

[86] *See, e.g.*, Ameron, Inc. v. U.S. Army Corp. of Eng'rs, 607 F. Supp. 962, 974 (D.N.J. 1985) (describing the override as a "built-in safety value to prevent undue harm" to the government).

Agency Override of Bid-Protest Stays

CICA expressly authorizes agencies to override the automatic stay of contract award or performance that may be triggered by the filing of a GAO protest when

- "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General";[87] or
- "performance of the contract is in the best interests of the United States."[88]

Only "urgent and compelling circumstances" may be asserted when GAO bid protests are filed prior to the award of the contract.[89] However, either "urgent and compelling circumstances" or the "best interests of the United States" may be asserted when GAO bid protests are filed after the award of the contract.[90]

Beyond when the grounds may be asserted, few other differences are apparent between the circumstances in which agencies can invoke "urgent and compelling circumstances" and those in which they can invoke the "best interests of the United States," as **Table 2** illustrates.[91] Some courts and commentators have suggested, however, that an agency's invocation of "urgent and compelling circumstances" has more serious overtones and ought to receive more deference than an agency's invocation of the "best interests of the United States."[92]

Any agency override, upon any basis, requires a written finding that grounds for the override exist, and the agency is required by statute to notify GAO of this finding.[93]

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

Urgent and Compelling Circumstances	Best Interests of the United States
• Canine services for Army Special Forces in Afghanistan: agency record showed adverse consequences, in the form of security breaches at military installations, without the override; the override was only for a bridge contract, with the agency planning a new solicitation within a year; and the only alleged harm to the protester was	• Cockpit video recording systems recorders for F/A-18 aircraft: agency record showed that the agency conducted a proper evaluation in making the initial award; the override involved a one-year contract; failure to override would interfere with the aircraft's deployment to Bosnia and troop training; and the public interest required that the troops be well

[87] 31 U.S.C. §3553(c)(2)(A) & (d)(3)(C)(i)(II).

[88] 31 U.S.C. §3553(d)(3)(C)(i)(I).

[89] 31 U.S.C. §3553(c)(2).

[90] 31 U.S.C. §3553(c) & (d).

[91] The key determinant of the agency's success in invoking either grounds for overriding a CICA stay is the agency's record of the procurement and its decision making. The agency must be able to demonstrate that its override determination was not arbitrary, capricious, or an abuse of discretion based upon the evidence in the record before it at the time the determination was made. *See, e.g.*, Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 233-34 (2007) (discussing reviewing courts' focus upon agency records as they existed at the time of the override determination); U.S. Army Acquisition Corps, CICA Automatic Stay Override Guide 2 (2004) (copy on file with the authors).

[92] Robert M. Hansen, *CICA Without Enforcement: How Procurement Officials and Federal Court Decisions Are Undercutting Enforcement Provisions of the Competition in Contracting Act*, 6 GEO. MASON L. REV. 131, 155 (1997) ("If an action is in the 'best interest of the United States,' it certainly must be 'urgent and compelling,' and if it is 'urgent and compelling,' it very likely will be in the country's 'best interest.'").

[93] 31 U.S.C. §3553(c)(1) & (d)(3).

Urgent and Compelling Circumstances	Best Interests of the United States
the dissatisfaction of its employees.[a]	equipped.[d]
• Maintenance & refuse services at Navy housing facility: agency record showed that services under the contract were essential to the health, safety, and morale of military personnel; the protester's allegations of harm were speculative; and the public interest would be harmed if the protester, which was not a small business, got an award set aside for a small business.[b]	• Training services for a "top gun" school: protester alleged only speculative harm, claiming it would never "get on base again" if it lost the protest; the agency record showed that the contract was key to the success of a weapons school whose operations had already been interrupted; and protecting national security by ensuring adequate training was in the public interest.[e]
• Maintenance & support services for Border Patrol academy: agency record showed that the protester, who was the incumbent contractor, had performed inadequately and could not continue to perform during the protest; and time pressures required the award of a new contract.[c]	• Spectrum management engineering services: agency record showed that performance under the protested contract was time-critical and that the winning offeror was only source with personnel qualified to perform the work.[f]

Source: Congressional Research Service.

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

a. EOD Tech., Inc. v. United States, 82 Fed. Cl. 12 (2008).

b. Superior Servs., Inc. v. Dalton, 851 F. Supp. 381 (S.D. Cal. 1994).

c. Ramcor Servs. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999).

d. Teac Am., Inc. v. U.S. Dep't of the Navy, 876 F. Supp. 289 (D.D.C. 1995).

e. SDS Int'l Inc. v. United States, 55 Fed. Cl. 363 (2003).

f. Alion Science & Tech. Corp. v. United States, 69 Fed. Cl. 14 (2005).

GAO and Agency Override Determinations

Although agencies are required by law to inform GAO of their override determinations, GAO does not review the agency's override determination and cannot reverse it. GAO lacks authority and jurisdiction to keep the agency from proceeding to award or authorize performance of the contract under the override. All that GAO can do is report on agency overrides to Congress, as it did in at least some of its annual reports until FY2002.[94]

Judicial Review of Agency Override Determinations

Outside of the agency itself, the only entity that can reverse an agency override determination and reinstate the delay of contract award or performance that a GAO bid protest triggers is a federal court—currently the Court of Federal Claims[95]—acting on the petition of the protester. To achieve such an outcome, the court would have to grant the protester's motion to restrain or enjoin the government from awarding the contract or authorizing performance under it.[96]

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

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

[96] Because the case comes to the court on a motion for a temporary restraining order or preliminary injunction, the court applies its customary test, examining (1) whether the protester is likely to succeed on the merits, (2) whether the (continued...)

Although courts once exempted agency determinations as to the "best interests of the United States" from judicial review[97] and gave substantial deference to agency determinations as to "best interests" and "urgent and compelling circumstances,"[98] the Court of Federal Claims has recently enjoined agency overrides after subjecting the agency's override determination to "searching inquiry."[99] Override determinations based on considerations of national security or national defense sometimes receive greater deference from the court,[100] but not even these considerations guarantee victory for federal agencies.[101]

Basis and Effects of GAO Decisions

GAO is charged by statute with "deciding" all bid protests filed in accordance with GAO regulations.[102] When deciding a protest, GAO does not substitute its judgment for the agency's, or conduct *de novo* review of agency procurement activities and processes.[103] Rather, GAO

(...continued)

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

[97] Topgallant Group, Inc. v. United States, 704 F. Supp. 265, 266 (D.D.C. 1988) (holding that determination of what is in the "best interests of the United States" is committed to agency discretion and unreviewable). *Topgallant* was followed by *SDS International, Inc. v. United States*, 55 Fed. Cl. 363 (2003); *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993); and other federal court decisions. The Court of Federal Claims rejected the logic of *Topgallant* shortly after its *SDS International* decision in *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 657 (2003).

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

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

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

[101] *Compare* Gentex Corp. v. United States, 58 Fed. Cl. 634, 655-56 (2003) (stating that assertions of national security and national defense get more deference but the court still examines their merits) *and* Geo-Seis Helicopters, Inc. v. United States, 77 Fed. Cl. 633, 650 (2007) (focusing upon national security concerns in tailoring injunctive relief, not in deciding on the merits of the case) *with* Hughes Missile Sys. Co. v. Dep't of Air Force, No. 96-937, slip. op. at 77 (E.D. Va. 1996), quoted in Hansen, *supra* note 92, at 154, (upholding an agency's override without reaching the merits of the plaintiff's argument even though the agency conceded that it prepared its findings justifying the override determination after the fact).

[102] 31 U.S.C. §3552(a).

[103] *See, e.g.*, Baker Support Sys., B-257054.2 (January 20, 1995).

considers only whether the agency complied with procurement statutes or regulations, as well as had reasonable bases and adequate documentation, in its decision making.[104]

Denials, Sustainments, and GAO Recommendations

When GAO finds no violation of federal procurement statutes or regulations, it denies the protest, leaving the agency free to award the contract, or authorize performance under it, barring a court order to the contrary. When GAO finds a violation, however, it sustains the protest and may recommend that the agency

- refrain from exercising its options under the contract;
- re-compete the contract;
- issue a new solicitation;
- terminate the contract;
- award the contract consistent with the requirements of statutes or regulations; or
- implement any other recommendation that the "Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations."[105]

In deciding which of these options to recommend, GAO is required, by regulation, to consider all the circumstances surrounding the procurement or proposed procurement.[106] This includes (1) the seriousness of the agency's procurement deficiency, (2) the degree of prejudice to the other parties and the integrity of the procurement system, (3) the extent of performance, (4) the cost to the government, (5) the urgency of the procurement, and (6) the potential impact of any GAO recommendation upon the agency's mission.[107]

Along with its recommendations sustaining the protest, GAO can also recommend that the agency conducting the procurement pay to the protester the costs of filing and pursuing the protest, including reasonable attorneys' fees; the fees for consultants and expert witnesses; and the expenses of preparing the bid or protest.[108] When GAO recommends that an agency pay costs, the agency is required by statute to either pay the costs promptly, or report to GAO its reasons for not paying.[109] The agency is also required to attempt to reach an agreement with the protester on the

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

[105] 31 U.S.C. §3554(b)(1)(A)-(H). In determining what to recommend when it finds a violation of federal procurement statutes or regulations, GAO is required by regulation to consider "all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission." 4 C.F.R. §21.8(b). Some commentators have asserted that this provision can help lessen the costs and delays that GAO bid protests can impose upon the procurement process. *See* Robert S. Metzger & Oliya S. Zamaray, *GAO's Neglected §21.8(b): How It Can Be Used to Address Concerns That Bid Protests Are Too Costly and Disruptive*, 102 FED. CONT. REP. 219 (August 12, 2014).

[106] 4 C.F.R. §21.8(b).

[107] *Id.*

[108] 31 U.S.C. §3554(c)(1)(A)-(B). The Court of Federal Claims, in contrast, has ruled that it generally does not have jurisdiction over bid protest costs. S.K.J. & Assocs. v. United States, 67 Fed. Cl. 218 (2005).

[109] 31 U.S.C. §3554(c)(3)(A)-(B). For more on the amount of such fees, see generally 31 U.S.C. §3554(c)(2)(A)-(B).

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costs to be paid.[110] If agreement cannot be reached, the protester can request that GAO recommend to the agency an amount to be paid.[111]

Legal Effect of GAO Recommendations

Even when GAO finds that the agency violated federal procurement law and sustains the protest, however, the agency is not legally required to implement the recommendations in GAO's decision. This is because GAO is a legislative branch agency and cannot constitutionally compel executive branch agencies to implement its recommendations because of the separation of powers doctrine.[112]

Agencies typically fully adopt GAO recommendations, nonetheless, as **Table 3** illustrates. According to GAO's annual reports to Congress, in only seven cases between FY2001 and FY2011 did an agency decline to fully adopt GAO's recommendations.[113] The number of cases is comparatively larger in FY2012 and FY2013. However, all but one of the cases reported in these two years involved the same issue of statutory interpretation, upon which the federal courts disagreed with GAO and which the Supreme Court is scheduled to hear in its October 2015 term.[114] Thereafter, the number of cases in which an agency declined to follow GAO's recommendations declined to one in each of FY2014 and FY2015.

[110] 31 U.S.C. §3554(c)(4).

[111] *Id*.

[112] *See* Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 986 (3d Cir. 1986).

[113] It is important to note, however, that GAO reports are based on statutory requirements focused upon a procuring agency's implementation of specific recommendations regarding a particular solicitation, proposed award, or award within a relatively short time frame (65 days). 31 U.S.C. §3554(b)(3). Thus, the reports do not necessarily capture decisions whose underlying logic the executive branch repudiates at a later date. GAO issued such a decision, which is not addressed in either its FY2008 or FY2009 reports to Congress, on September 19, 2008, in *International Program Group, Inc*. B-400278; B-400308 (September 19, 2008). This decision was the first of several in which GAO construed the Small Business Act to require that set-asides for Historically Underutilized Business Zone (HUBZone) small businesses take "precedence" over set-asides for other categories of small businesses. *See* Mission Critical Solutions, B-410057 (May 4, 2009). It was only after the second such decision that the Obama Administration indicated that it would not accord HUBZone set-asides precedence over set-asides for service-disabled veteran-owned and 8(a) small businesses because it disagreed with GAO's construction of the Small Business Act. *See* Executive Office of the President, Office of Mgmt. & Budget, Recent Government Accountability Office Decisions Concerning Small Business Programs, July 10, 2009, *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-23.pdf; Office of Legal Counsel, Department of Justice, Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs, August 21, 2009, *available at* http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf. Congress later enacted legislation that amended the statutory text that formed the basis for GAO's recommendations. *See* Small Business Jobs Act of 2010, P.L. 111-240, §1347, 124 Stat. 2546-47 (September 27, 2010).

[114] *See generally supra* note 4 and CRS Legal Sidebar WSLG1322, *UPDATED: Supreme Court Postpones Oral Arguments in Challenge to the Department of Veterans Affairs' Practices as to Contracting "Set-Asides" for Veteran-Owned Small Businesses*, by Kate M. Manuel.

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

(2001-2014)

Fiscal Year	Number of Cases
2001	0
2002	1[a]
2003	2[b]
2004	0
2005	0
2006	0
2007	0
2008	0
2009	1[c]
2010	3[d]
2011	0
2012	18[e]
2013	17[f]
2014	1[g]
2015	1[h]

Source: Congressional Research Service using data from GAO.

a. Rockwell Elec. Commerce Corp., B-286201.6, B-286201.8 (August 30, 2001 and March 5, 2002).

b. Consolidated Eng'g Servs., Inc., B-291345, B-291345.2 (December 23, 2002); Symplicity Corp., B-291902 (April 29, 2003).

c. Mission Critical Solutions, B-401057 (May 4, 2009).

d. Rice Servs., Inc., B-402966.2 (September 16, 2010); Rice Servs., Inc., B-403746 (September 16, 2010); DGR Assocs., Inc., B-402494 (May 14, 2010).

e. The U.S. Court of Appeals for the Federal Circuit later affirmed a Court of Federal Claims decision rejecting the statutory interpretation that GAO had relied upon in issuing these decisions.

f. Sixteen of the 17 decisions noted in FY2013 involved the same question of statutory interpretation that was at issue in the cases in FY2012. The other case was Assisted Housing Services Corporation; North Tampa Housing Development Corporation; The Jefferson County Assisted Housing Corporation; National Housing Compliance; Southwest Housing Compliance Corporation; CMS Contract Management Services and the Housing Authority of the City of Bremerton; Massachusetts Housing Finance Agency, B-406738,B-406738.2,B-406738.3,B-406738.4,B-406738.5,B-406738.6,B-406738.7,B-406738.8 (August 15, 2012). The agency here proceeded with the challenged actions, which were then protested to the Court of Federal Claims. The Court of Federal Claims found for the agency. However, this decision was overturned on appeal by the U.S. Court of Appeals for the Federal Circuit, which relied upon the same reasoning that GAO had adopted. *See* CMS Contract Mgmt. Servs. Corp. v. United States, 745 F.3d 1379 (Fed. Cir. 2014), *rev'g* 110 Fed. Cl. 537 (2013).

g. Asiel Enters., Inc., B-408315.2 (Sept. 5, 2013).

h. Caddell Constr. Co., Inc., B-411005.1, B-411005.2 (Apr. 20, 2015). It is worth noting that this is another case in which the GAO's interpretation of a procurement statute has differed from that of the federal courts. *See id.* ("The U.S. Court of Federal Claims and our Office have issued decisions with different interpretations of the meaning of 'total business volume' as used in 22 U.S.C. § 4852(c)(2)(E).").

The high degree of agency deference to GAO recommendations arguably reflects the scrutiny that Congress gives to agency decisions not to fully implement GAO recommendations. By statute,

agencies have 60 calendar days within which to fully adopt GAO recommendations. Any agency that does not do so is required by statute to promptly notify GAO, which is then to notify four congressional committees.[115] Once aware that an agency is not fully adopting GAO's recommendations, Congress could exercise oversight or take legislative action compelling agency compliance, if it so chooses.[116]

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

Compliance with GAO precedent or recommendations does not necessarily immunize the agency from all future legal challenges to or liability for its actions. Since 2007, the Court of Federal Claims has issued several decisions which suggest that an agency could be found to have acted arbitrarily, capriciously, and in abuse of discretion, in violation of the Administrative Procedure Act (APA), by following GAO precedents or adopting GAO recommendations. For example, in *Geo-Seis Helicopters, Inc. v. United States*, the court found that the Military Sealift Command violated the APA by relying on GAO precedent allowing agencies to issue amendments that extend the bid closing date after such date has passed.[117] According to the court, this precedent was contrary to the "late is late" rule of Federal Acquisition Regulation Section 52.215-1(c)(3)(ii)(A),[118] and the contracting officer's reliance on this precedent "render[ed] arbitrary her decision to accept [the winning bidder's] first and second revised proposals."[119] Similarly, in *Grunley Walsh International, LLC v. United States*, the court found that GAO's interpretation of the statutory business-volume requirement for bidders on embassy construction contracts was "irrational because it misread both the actual language of the statute and the legislative history," and the State Department acted irrationally in adopting this interpretation.[120]

Although GAO decisions had been reversed in other cases,[121] prior courts had not so explicitly linked following GAO's recommendations with violations of the APA.[122] *Geo-Seis Helicopters*,

[115] 31 U.S.C. §3554(e)(1). The agency has five calendar days after the end of the 60-day period to notify GAO. The congressional committees to which GAO reports this information are the Senate Committee on Homeland Security and Governmental Affairs, the Senate Committee on Appropriations, the House Committee on Oversight and Government Reform, and the House Committee on Appropriations. When notifying these congressional committees, GAO must provide a comprehensive review of the challenged procurement and a recommendation as to whether Congress should consider (1) private relief legislation, (2) legislative rescission or cancellation of funds, (3) further investigation by Congress, or (4) other action to correct an inequity or preserve the integrity of the procurement process. 31 U.S.C. §3554(e)(1)(A)-(B). GAO must also submit an annual report to Congress including, among other things, a summary of each instance in which an agency did not fully implement a GAO recommendation. 31 U.S.C. §3554(e)(2).

[116] *See, e.g.*, Follow-Up Hearing on the U.S. Department of Veterans Affairs Service-Disabled Veteran-Owned Small Business Certification Process: Hearing Before the House Committee on Veterans' Affairs, November 30, 2011 (discussing GAO's decision in the *Aldevra* bid protest, B-405271, B-405524 (October 10, 2011), which found that the Department of Veterans Affairs is required to procure from veteran-owned small businesses in certain circumstances).

[117] *Geo-Seis Helicopters*, 77 Fed. Cl. at 636-38 (Fed. Cl. 2007).

[118] *Id.* at 638. *See also* 48 C.F.R. §52.215-1(c)(3)(ii)(A) ("Any proposal, modification, or revision, received at the Government office designated in the solicitation after the exact time specified for receipt of offers is 'late' and will not be considered.... ").

[119] *Geo-Seis Helicopters*, 77 Fed. Cl. at 646.

[120] Grunley Walsh Int'l, LLC v. United States, 78 Fed. Cl. 35, 37-38, 44 (Fed. Cl. 2007).

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

[122] Prior cases tended to avoid language suggesting agency "violations" of the APA even when finding such violations in their analysis of the merits of the protest. *See, e.g.*, Arora Group, Inc. v. United States, No. 04-366C, 2004 US Claims LEXIS 267 (August 31, 2004) (using the protester's language, which mentioned "violations" of the APA, only (continued...)

Grunley Walsh, and related cases[123] thus highlight agencies' dilemmas in complying with CICA more clearly than previous cases did. Failure to fully implement GAO recommendations triggers reporting to Congress and possible congressional oversight, while complying with certain GAO recommendations that courts later determine were irrational could leave agencies vulnerable to charges of having acted arbitrarily.

Reconsideration and "Appeal" of GAO Decisions

Much like agencies can decline to fully implement GAO recommendations that they are dissatisfied with, protesters who are dissatisfied with GAO decisions can also potentially avoid them by requesting reconsideration from GAO, or filing a bid protest with the Court of Federal Claims, effectively appealing a GAO decision.[124] (Disappointed agencies and intervenors could also request reconsideration from GAO, but need not resort to filing in the Court of Federal Claims because the agency can always decline to follow the GAO recommendations.)

Reconsideration of GAO Decisions

Any party to a GAO protest can request reconsideration of GAO's decision from GAO.[125] Such a request must be made within 10 calendar days after the basis for reconsideration is known or should be known, whichever is earlier.[126] Pursuant to its regulations, GAO does not consider requests for reconsideration that lack detailed statements of the factual or legal grounds upon which reversal or modification is sought, "specifying any errors of law made or information not previously considered."[127] These regulations also provide for GAO to summarily dismiss any reconsideration request that fails to state valid bases for reconsideration or are untimely.[128]

Filing a request for reconsideration with GAO does not stay contract award or performance like filing a bid protest with GAO does.

As **Table 4** illustrates, GAO receives far fewer requests for reconsideration than bid protests each year, and GAO seldom changes its recommendations upon reconsideration.[129]

(...continued)

when stating the plaintiff's allegations and not when discussing the merits of the case).

[123] *See, e.g.*, Amazon Web Servs. v. United States, 113 Fed. Cl. 102, 106 (2013) ("[A]n agency's decision lacks a rational basis if it implements a GAO recommendation that is itself irrational.") (internal citations omitted); Turner Constr. Co. Inc. v. United States, No. 10-195C, 2010 U.S. Claims LEXIS 468 (July 8, 2010) (finding that GAO's recommendation lacked a rational basis and the agency was not justified in following it).

[124] Metzger & Lyons, *supra* note 46, at 1232, 1248. GAO, in contrast, will not hear protests that have been the subject of litigation or have been decided on the merits by a court of competent jurisdiction. 4 C.F.R. §21.11(b).

[125] 4 C.F.R. §21.14(a).

[126] 4 C.F.R. §21.14(b).

[127] 4 C.F.R. §21.14(a).

[128] 4 C.F.R. §21.14(c).

[129] *See, e.g.*, Jerome S. Gabig, Jr., *Fighting over Government Contracts*, 66 ALA. L. REV. 39, 42 (2005).

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

(2001-2014)

	Protests		Reconsideration Requests	
Fiscal Year	**Received**	**Closed**	**Received**	**Closed**
2001	1084	1040	62	58
2002	1139	1072	65	61
2003	1269	1181	83	63
2004	1387	1334	98	71
2005	1285	1285	71	56
2006	1270	1224	57	50
2007	1318	1300	93	93
2008	1563	1506	89	71
2009	1898	1822	91	96
2010	2299	2226	79	94
2011	2286	2219	72	73
2012	2339	2371	89	84
2013	2298	2389	75	86
2014	2445	2458	66	58
2015	2496	2522	90	81

Source: Congressional Research Service using data from GAO.

Note: The numbers given here do not include cost claims and requests for consideration, filings which are included in the numbers given in GAO's bid protest annual reports to Congress.

"Appeal" of GAO Decisions

In addition to requesting reconsideration from GAO, disappointed protesters can effectively "appeal" GAO's decisions to the Court of Federal Claims by filing suit alleging that the agency's procurement activities were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" in violation of the Administrative Procedure Act (APA).[130] The focus of the suit in the Court of Federal Claims is the agency's procurement activities, not GAO's decision *per se*. However, GAO's decision makes up part of the agency record that is reviewed by the Court of Federal Claims,[131] and the Court of Federal Claims has historically given some deference to GAO decisions on questions of fact.[132]

[130] 5 U.S.C. §706(2)(A); *Superior Helicopter LLC*, 78 Fed. Cl. at 186-87 (application of APA to agency procurement activities). Not all bid protests in the Court of Federal Claims following GAO protests directly "appeal" GAO decisions, however. In some cases, the protester makes a different argument in the Court of Federal Claims than it made at GAO. *See, e.g.*, J&H Reinforcing & Structural Erectors, Inc. v. United States, 50 Fed. Cl. 570 (2001). In other cases, the GAO protest ended without a decision on merits from GAO. *See, e.g.*, Ezenia!, Inc. v. United States, 80 Fed. Cl. 60 (2007) (protester withdrew its GAO protest after filing suit in the Court of Federal Claims); Heritage of Am., LLC v. United States, 77 Fed. Cl. 66 (2007) (GAO protest dismissed as untimely).

[131] 31 U.S.C. §3556. Parties to bid protests at the Court of Federal Claims are not strictly limited to the administrative (continued...)

In reviewing the agency's action, the court does not substitute its judgment for that of the agency.[133] Rather, it looks at the agency's record of the procurement to determine whether the procurement official's decision lacked a rational basis, or the procurement procedure involved a violation of law or procedure.[134] In determining whether the procurement official's decision had a rational basis, the court considers whether the agency (1) relied on factors Congress did not intend it to consider in making its decision; (2) failed to consider an important aspect of the problem; or (3) offered an explanation for its action contrary to the evidence before it, or so implausible it could not be ascribed to a difference of opinion or the product of agency expertise.[135]

A Court of Federal Claims protest, even one "appealing" a prior GAO decision, does not trigger an automatic stay of the agency's award of the contract or authorization of performance under it. Rather, a bid protester in the Court of Federal Claims must file and prevail upon a motion for a temporary restraining order or preliminary injunction to effect a delay of the agency's procurement actions similar to that generally occurring automatically when a GAO protest is filed.

Author Contact Information

Kate M. Manuel
Legislative Attorney
kmanuel@crs.loc.gov, 7-4477

Moshe Schwartz
Specialist in Defense Acquisition
mschwartz@crs.loc.gov, 7-1463

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record from the agency or GAO. They can move to supplement the record, and the court will typically grant such motions when the "record does not contain sufficient information for the court to render a decision." Comp. Health Servs., Inc. v. United States, 70 Fed. Cl. 700, 720 (2006). This includes "fill[ing] gaps concerning the factors the contracting officer considered in reaching his decision." Precision Standard, Inc. v. United States, 69 Fed. Cl. 738, 745 (2006).

[132] *See, e.g.*, MTB Group v. United States, 65 Fed. Cl. 516 (2005). The Court of Federal Claims will affirm GAO on questions of fact, or questions that must be answered by facts and evidence, or inferences therefrom, unless the GAO decision is arbitrary, capricious, or so grossly erroneous as to imply bad faith. However, on questions of law, or questions that must be answered by applying relevant legal principles, the Court of Federal Claims gives no deference to GAO and conducts *de novo* review.

[133] Bendix Field Eng'g Corp. v. United States, No. 91-2723, 1991 U.S. Dist. LEXIS 19778, at *6 (D.D.C. November 15, 1991).

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

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

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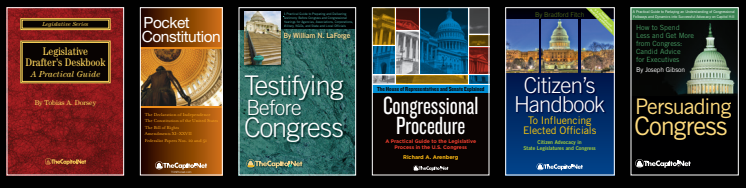
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