

## A CRITICAL REASSESSMENT OF THE GAO BID-PROTEST MECHANISM

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### I. INTRODUCTION

The 1996 Administrative Dispute Resolution Act (ADRA) marked a significant milestone in the “long and complicated” history of government-contracts litigation.<sup>1</sup> Prior to ADRA, bid-protest jurisdiction was scattered among various oversight and adjudicative

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1. *Impreza Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1330–31 (Fed. Cir. 2001).

bodies. Preaward protests could be brought under the Tucker Act in the United States Court of Federal Claims (COFC),<sup>2</sup> an Article I tribunal.<sup>3</sup> Postaward protests were actionable in federal district courts under the Administrative Procedure Act, as interpreted in the landmark *Scanwell Laboratories, Inc. v. Shaffer* case.<sup>4</sup> This division of authority between legislative and judicial courts and further fragmentation among the ninety-four federal district courts created “a general lack of uniformity in bid protest law”<sup>5</sup> and countless opportunities for forum shopping by disgruntled bidders.<sup>6</sup> The ADRA addressed this problem by expanding the COFC’s jurisdiction to encompass all bid protests and extinguishing the district courts’ *Scanwell* jurisdiction.<sup>7</sup> By 2001, the Court of Federal Claims became the “only judicial forum to bring any governmental contract procurement protest.”<sup>8</sup>

But while the self-professed goal of the ADRA was to “develop a uniform national law on bid protest issues and end the wasteful practice

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2. This court was known as the United States Court of Claims until 1982, when it was renamed the United States Claims Court. It became the Court of Federal Claims in 1992. See Peter Verchinski, Note, *Are District Courts Still a Viable Forum for Bid Protests?*, 32 PUB. CONT. L.J. 393, 396 n.20 (2003). For simplicity’s sake, this Article shall refer to the court by its current name.

3. Under the Tucker Act, bid protests were actionable on the theory that the government made an implied contract with prospective bidders to fairly consider their bids. See, e.g., *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956). The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), recognized this jurisdiction and allowed the Claims Court to provide injunctive and declaratory relief in addition to damages, but the Act limited jurisdiction to preaward protests.

4. 424 F.2d 859 (D.C. Cir. 1970).

5. *Impresa Construzioni*, 238 F.3d at 1332.

6. Pre-ADRA jurisdictional issues are further complicated by a circuit split regarding whether *Scanwell* jurisdiction was limited to postaward protests or included preaward protests as well. Compare *Price v. United States Gen. Servs. Admin.*, 894 F.2d 323, 324–25 (9th Cir. 1990), and *Rex Sys., Inc. v. Holiday*, 814 F.2d 994, 997–98 (4th Cir. 1987) (holding that the Federal Courts Improvement Act of 1982 stripped district courts of jurisdiction over preaward protests), with *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1057–58 (1st Cir. 1987), and *Coco Bros. v. Pierce*, 741 F.2d 675, 678–79 (3d Cir. 1984) (holding that the 1982 Act did not disturb district-court jurisdiction over preaward protests).

7. More specifically, the ADRA granted the COFC and the federal district courts concurrent jurisdiction over all bid protests for a period of five years. At the end of this period, the district courts’ jurisdiction would expire unless specifically reenacted by Congress. Congress took no further action, meaning that the district courts were stripped of jurisdiction to hear bid protests in 2001. See *Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1079–80 (Fed. Cir. 2001); *Novell, Inc. v. United States*, 109 F. Supp. 2d 22, 24–25 (D.D.C. 2000). Although some scholars argue that some residual *Scanwell* jurisdiction remains with the district courts, see Verchinski, *supra* note 2 at 394–400, no court has yet interpreted ADRA in this fashion.

8. *Emery*, 264 F.3d at 1080.

of shopping for the most hospitable forum,”<sup>9</sup> Congress only partially succeeded. The Act concentrated *judicial* review of bid protests in one forum but did not address the relationship between the COFC and the most popular bid-protest forum, the Government Accountability Office (GAO). The Competition in Contracting Act (CICA)<sup>10</sup> gives the GAO concurrent authority over bid protests as an inexpensive alternative to formal judicial proceedings. Although the GAO’s decisions are “recommendations” and lack the force and effect of law, agencies rarely fail to implement these recommendations.<sup>11</sup> Moreover, during the era before ADRA, federal district courts hearing bid protests routinely deferred to the GAO’s “accumulated experience and expertise” in the field of government contracts.<sup>12</sup>

This Article focuses on the relationship between the COFC and the GAO and questions whether the GAO should continue to serve as the forum of choice for complex and high-value procurement-award controversies. As a corollary, this Article suggests that decisions of the GAO need not receive the deference that agencies have historically afforded them. The Article recognizes that the GAO bid-protest mechanism succeeds in resolving thousands of government-contracts disputes each year. This convenience and efficiency, however, is not without cost, as the GAO operates without many of the safeguards of traditional judicial process. The GAO owes its record of deference not necessarily to the quality of its decisions but also to its relationship with Congress. In contrast, the COFC has developed as a *judicial* forum with specialized procurement-law expertise. It has procedural strengths that contrast favorably with the GAO’s more informal adjudicative mechanism. These and other considerations suggest that federal agencies (and the COFC) reconsider the deference they traditionally pay to GAO bid-protest decisions. Moreover, as informed by a close examination of the GAO process, this Article’s view is that the GAO should consider changes to its bid-protest regulations to improve the efficacy of the Comptroller General’s decisions while maintaining the efficiency of the GAO bid-protest process.

Part II chronicles the development of the GAO protest mechanism and discusses the bid-protest regime, as established by CICA, which explains the present dominance of the GAO as the primary federal bid-

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9. 142 CONG. REC. S6156 (statement of Senator Cohen).

10. 31 U.S.C. §§ 3551–56 (2000).

11. See 31 U.S.C. § 3554; *infra* text accompanying note 156.

12. *M. Steintal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971). *But see* *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201–02 (D.C. Cir. 1984) (rejecting the government’s argument that the court must defer to the GAO’s decision in a case unless that decision lacks a rational basis).

protest forum. Part III traces the rise of the COFC and asserts that it operates as a true foil to the GAO. Part IV examines the perceived strengths and weaknesses of the GAO in comparison to the COFC's alternative model. Part V, taking into account critical judgments about the GAO process, encourages federal agencies (and private parties) to reconsider the preference extended to the GAO in filing bid protests and the deference often given those decisions. Finally, Part VI highlights potential changes to the GAO protest model that could be accomplished without substantially sacrificing the organization's efficiency.

## II. OVERVIEW OF GAO BID-PROTEST JURISDICTION

### A. *The Murky Origins of the GAO Bid-Protest System*

The historical antecedents of the GAO go back almost as far as the Republic itself. The Act of September 2, 1789 created the Department of the Treasury, including a Comptroller of the Treasury charged with "superintend[ing] the adjustment and preservation of the public accounts" by reviewing and countersigning all warrants drawn by the Secretary of the Treasury.<sup>13</sup> Recognizing the increasing complexity of overseeing a growing federal budget, Congress in 1921 transferred the Comptroller's powers to the General Accounting Office, a new independent agency under the legislative branch and headed by the Comptroller General.<sup>14</sup> Although the agency has since changed its name to the Government Accountability Office,<sup>15</sup> its statutory mandate remains substantively identical to that described in the original 1921 act:

The Comptroller General shall:

- (1) investigate all matters related to the receipt, disbursement, and use of public money;

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13. Act of Sept. 2, 1789, ch. 12, sec. 3, 1 Stat. 65, 66 (1789), *quoted in* John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 352 (1970).

14. Budget and Accounting Act of 1921, ch. 18, sec. 301, 42 Stat. 20, 23 (1921) (current version at 31 U.S.C. §§ 701–12 (2000)).

15. Congress renamed the agency as part of the GAO Human Capital Reform Act of 2004, Pub. L. No. 108–271, sec. 8, 118 Stat. 811, 814 (2004). According to the Comptroller General, the purpose of the name change was to better reflect the GAO's actual duties and to correct the misconception that the office existed largely to audit the government's financial statements. *See* David M. Walker, *GAO Answers the Question: What's in a Name?*, ROLL CALL, July 19, 2004, *available at* <http://www.gao.gov/about/rollcall07192004.pdf>.

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(2) estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations the Comptroller General considers desirable;

(3) analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and expended economically and efficiently;

(4) make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures; and

(5) give a committee of Congress having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests.<sup>16</sup>

Under this aegis, the GAO has assumed responsibility for a broad range of tasks related to oversight of congressional expenditures. From the GAO's earliest days, these tasks have included consideration of individual disputes concerning the award of federal contracts. The source of such authority is far from clear.<sup>17</sup> The GAO initially claimed that bid-protest adjudication stemmed from its "settlement powers," a loose collection of statutes authorizing it to settle and adjust claims against the government and to certify and revise public accounts.<sup>18</sup> These statutes, however, "do not on their face grant the GAO the authority to decide bid protests," and no court has ever explicitly endorsed the notion that the GAO's settlement powers alone allow it to pass judgment upon the conduct of executive-branch procurement officials.<sup>19</sup>

Despite this obscure statutory authority, bid protests became a sizeable part of the GAO's duties, in large part because for many years it was the only venue available to frustrated bidders. In 1940, the

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16. 31 U.S.C. § 712.

17. See, e.g., Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 HARV. J. ON LEGIS. 399, 402–03 (1992); James McKay Weitzel, Jr., Comment, *GAO Bid Protest Procedures Under the Competition in Contracting Act: Constitutional Implications after Buckley and Chadha*, 34 CATH. U. L. REV. 485, 487–88 (1985).

18. See Tomaszczuk & Jensen, *supra* note 17, at 402–03; Weitzel, *supra* note 17, at 486.

19. Tomaszczuk & Jensen, *supra* note 17, at 403. As the authors note, the GAO itself recognized that its pre-CICA bid-protest powers stemmed from "dubious statutory authority." *Id.* (citing 36 Comp. Gen. 513, 514 (1957)).

Supreme Court held in *Perkins v. Lukens Steel Co.*<sup>20</sup> that a disappointed bidder lacked standing to sue the government in federal court because procurement law “was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.”<sup>21</sup> Six years later Congress passed the Administrative Procedure Act (APA), which permitted judicial review of final executive-agency actions.<sup>22</sup> But it was not until 1970 that the D.C. Circuit in *Scanwell* interpreted that statute to provide for judicial resolution of bid protests.<sup>23</sup>

Undoubtedly, the public interest demands some independent forum to review allegedly illegal procurement activity. After the Supreme Court deprived federal courts of that responsibility in *Perkins*, the GAO became, by default, the means through which a frustrated bidder might seek relief. Even after *Scanwell* opened the door to bid protests in federal courts, the GAO’s accumulated expertise in the area of government contracts and its comparatively inexpensive, informal procedures helped it retain its role as the primary locus for independent review of bid-protest claims.<sup>24</sup>

#### *B. CICA and Current GAO Bid-Protest Procedures*

In 1984, Congress resolved much of the ambiguity surrounding the GAO’s adjudication of bid protests. Under CICA, the GAO for the first time acquired explicit statutory authority to preside over “protest[s] concerning an alleged violation of a procurement statute or regulation.”<sup>25</sup> Such protests include written objections to a solicitation for offers for a procurement contract, cancellation of a solicitation, the

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20. 310 U.S. 113 (1940).

21. *Id.* at 126, 127–28 (“Judicial restraint of those who administer the Government’s purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.”).

22. 5 U.S.C. §§ 551–59, 701–06 (2000).

23. *See Scanwell Labs., Inc. v. Schafer*, 424 F.2d 859, 865–69 (D.C. Cir. 1970).

24. *See* Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 755–56 (2003) (“[T]he GAO still receives twenty protests for each disappointed offeror suit filed in the COFC.”). The GAO received 1327 protest filings in Fiscal Year 2006 and closed 1274 cases, deciding 249 of those on the merits. *See* Letter from Gary L. Keplinger, General Counsel, GAO, to J. Dennis Hastert, Speaker of the House of Representatives (Nov. 15, 2006), *available at* <http://www.gao.gov/special.pubs/bidpro06.pdf>. Although the COFC does not publish similar statistics, a Westlaw search reveals forty-one COFC bid-protest decisions rendered in the same period.

25. 31 U.S.C. § 3552.

award of a contract, or even the termination or cancellation of a contract if the termination or cancellation is based at least in part upon improprieties relating to the initial award.<sup>26</sup> To file a protest, an interested party<sup>27</sup> need only file with the GAO a signed statement setting forth the “legal and factual grounds of the protest” together with documentation of the protester’s identity, standing, and timeliness.<sup>28</sup> Upon a showing of necessity, a protester may simultaneously request a protective order, specific documents, or a hearing.<sup>29</sup> GAO regulations explicitly state that “[n]o formal briefs or other technical forms of pleading or motion are required,”<sup>30</sup> which is consistent with Congress’s mandate that the Comptroller General “provide for the inexpensive and expeditious resolution of protests” to “the maximum extent practicable.”<sup>31</sup>

Once a protest is filed, the GAO immediately notifies the agency by telephone, which then notifies the awardee or (if no award has been made) other bidders and offerors.<sup>32</sup> Within thirty days, the agency must file a report containing a statement of facts, memorandum of law, and all agency documents relevant to the procurement decision.<sup>33</sup> The protester then has ten days to file written comments upon the agency report, the absence of which results in dismissal of the protest.<sup>34</sup> Filing a protest also triggers an automatic stay of the disputed contract for the duration of the GAO proceedings, subject to a possible agency override for “urgent and compelling circumstances which significantly affect interests of the United States.”<sup>35</sup>

The GAO may order a hearing on the protest, either sua sponte or upon motion with cause from one of the parties, although hearings are “the exception rather than the rule.”<sup>36</sup> The GAO typically orders

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26. *Id.* § 3551(1).

27. The term “interested party” is defined as “an 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.” *Id.* § 3551(2)(A) (Supp. 2007).

28. 4 C.F.R. § 21.1(c) (2007).

29. *Id.* § 21.1(d).

30. *Id.* § 21.1(f).

31. 31 U.S.C. § 3554(a)(1).

32. 4 C.F.R. § 21.3(a). In a preaward protest, the agency is only required to notify those offerors with a “substantial prospect of receiving the award.” *Id.*

33. *Id.* § 21.3(d).

34. *Id.* § 21.3(i).

35. 31 U.S.C. § 3553(c).

36. Jerome S. Gabig, Jr., *Fighting over Government Contracts*, 66 ALA. LAW. 39, 42 (2005). In Fiscal Years 2002 to 2006, the GAO granted hearings on between five and thirteen percent of cases decided on the merits. GAO, BID PROTEST STATISTICS FOR FISCAL YEARS 2002–2006 (n.d.), available at <http://www.gao.gov/special.pubs/bidpro06.pdf>.

hearings to resolve factual disputes in the record and offer the parties the opportunity to supplement the agency report with additional testimony. These hearings are relatively informal affairs: the GAO hearing officer exercises significant discretion, including determining the procedures to be used, the issues to be addressed, the witnesses to be presented, and the parties permitted to attend.<sup>37</sup> The parties must file posthearing comments within five days, citing specific testimony and admissions in the record to support their arguments.<sup>38</sup>

The GAO must issue a decision within one hundred days after the filing of the protest.<sup>39</sup> The GAO will sustain a protest if it finds that the agency acted in violation of a procurement statute or regulation<sup>40</sup> or if “the record clearly shows that the evaluation does not have a reasonable basis or is inconsistent with the evaluation criteria listed in the [Request for Proposals].”<sup>41</sup> In recent years, the GAO has sustained between sixteen and twenty-nine percent of protests decided on the merits.<sup>42</sup> In the event that a protest is sustained, CICA permits the GAO to recommend an appropriate remedy “to promote compliance with procurement statutes and regulations,” which may include ordering a new solicitation, terminating the contract, limiting the existing contract to bring it into compliance with procurement law, or awarding the protester its bid-preparation and bid-protest costs.<sup>43</sup>

Importantly, however, the GAO’s rulings do not legally bind the parties involved in a bid protest. CICA makes clear that the

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37. See 4 C.F.R. § 21.7(b), (d); Gabig, *supra* note 36, at 42.

38. 4 C.F.R. § 21.7(g)–(h).

39. 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a). The statute permits use of an expedited procedure under which a decision must issue in sixty-five days. 31 U.S.C. § 3554(a)(2); 4 C.F.R. § 21.9–.10. The statute makes a partial exception to the one hundred-day period if an amendment to the protest adds a new ground to the complaint, although it still commands that the GAO should decide the case within the initial one-hundred days “to the maximum extent practicable.” 31 U.S.C. § 3554(a)(3). If this is not practicable, the amended protest should be resolved using the sixty-five-day expedited procedure. *Id.*

40. 31 U.S.C. § 3552(a) (Supp. 2007).

41. *McWane & Co.*, B-270374 (Comp. Gen. Mar. 1, 1996), citing *Engineering, Inc.*, B-257822.5 (Comp. Gen. Aug. 18, 1995). The GAO allows itself to “question evaluations and award decisions where they are not reasonably based or are inadequately documented, even if they are otherwise consistent with the evaluation criteria.” *Moheat Env. Servs.*, B-270538 (Comp. Gen. Nov. 20, 1996). It notes, however, that “mere disagreement with the agency’s evaluation does not render the evaluation unreasonable.” *Baker Support Sys.*, B-257054.2 (Comp. Gen. Jan. 20, 1995).

42. GAO, *supra* note 36. Interestingly, the sustain rate has climbed steadily each year since 2002. *Id.* at n.2. The GAO also reports an “effectiveness rate,” based upon “a protester’s obtaining some form of relief from the agency as reported to the GAO,” of between thirty-three and thirty-nine percent, depending on the year. *Id.*

43. 31 U.S.C. § 3554.

Comptroller General may only “recommend” a remedy upon finding a procurement violation.<sup>44</sup> If an agency chooses not to implement a GAO recommendation, the agency’s procurement officer must report that decision to the Comptroller General within sixty days of the GAO decision.<sup>45</sup> The Comptroller General must then file a report with the relevant congressional committees containing a comprehensive review of the bid protest and a recommendation regarding what remedy, if any, Congress should consider taking.<sup>46</sup> The Comptroller General also must file a report with Congress at the end of each year summarizing all instances of agency noncompliance with GAO recommendations in the preceding year.<sup>47</sup>

CICA explicitly provides that “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 COFC.<sup>48</sup> Should a frustrated bidder refile a protest in that forum, CICA provides that the GAO decision and the agency record produced for the GAO protest “shall be considered to be part of the agency record subject to review.”<sup>49</sup> In 2006, the COFC published seven decisions involving

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44. *Id.* § 3554(b)–(c); see *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341 (1997) (“Neither the agency nor this court is bound by the determination of the GAO.”).

45. 31 U.S.C. § 3554(b)(3).

46. *Id.* § 3554(e)(1). Typically, the GAO recommends that Congress consider a formal inquiry into the agency’s decision not to comply with its protest decision. See, e.g., Letter from Anthony H. Gamboa, General Counsel, GAO, to J. Dennis Hastert, Speaker of the House of Representatives (Jan. 30, 2004), available at <http://www.gao.gov/special.pubs/bidpro03.pdf>.

47. *Id.* § 3554(e)(2). As discussed below, these end of year reports explain that there have been six instances of agency refusal to comply with a GAO bid-protest decision since 1995. See *infra* text accompanying notes 156–67.

48. 31 U.S.C. § 3556.

49. *Id.* In the event that the GAO sustains the protest but the agency chooses not to comply with the GAO recommendation, the GAO’s report to Congress is also incorporated into the agency record for GAO purposes. *Id.* In addition, a party to a COFC bid protest may move to supplement the administrative record, which is typically granted if “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); see also *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338–39 (Fed. Cir. 2001) (“[E]ven if the agency is not obligated to provide reasons, a court may nonetheless order the agency to provide explanation if such an explanation is required for meaningful judicial review.”); *Precision Standard, Inc. v. United States*, 69 Fed. Cl. 738, 745 (2006) (“In particular, the court will supplement the administrative record to fill gaps concerning the factors the contracting officer considered in reaching his decision.”).

protests brought by frustrated bidders seeking a second bite at the apple after the GAO denied them relief.<sup>50</sup>

### III. ADRA AND THE RISE OF THE COURT OF FEDERAL CLAIMS

CICA constituted a significant milestone in the development of government-contracts law.<sup>51</sup> Congress formalized the GAO's decades-long bid-protest system and endorsed its accumulated experience in the field, while adding safeguards to increase the odds that a successful protester would receive meaningful relief. Disappointed bidders overwhelmingly preferred the GAO to alternative bid-protest forums; they were drawn by CICA's automatic-stay provision, the GAO's accumulated expertise in procurement law, and the forum's comparatively inexpensive and rapid procedures. In sheer numbers alone, the years following CICA confirmed the GAO's preeminent status among the multitude of forums involved in bid protests.<sup>52</sup>

With ADRA, however, Congress upset this balance of competing institutions in a way that should prompt reconsideration of the GAO's relative advantages as a bid-protest forum. For the first time, a specialized *judicial* forum was responsible for procurement-law decisions and therefore was capable of developing accumulated expertise to rival that of the GAO. Nearly any GAO protest filed today

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50. Automation Tech., Inc. v. United States, 73 Fed. Cl. 617 (2006); NVT Tech., Inc. v. United States, 73 Fed. Cl. 459 (2006); Securenet Co. v. United States, 72 Fed. Cl. 800 (2006); KSD, Inc. v. United States, 72 Fed. Cl. 236 (2006); PHT Supply Corp. v. United States, 71 Fed. Cl. 1 (2006); RISC Mgt. Joint Venture v. United States, 69 Fed. Cl. 624 (2006); CC Dists., Inc. v. United States, 69 Fed. Cl. 277 (2006). This figure is down from eleven in 2005.

51. Although this Article is focused upon the GAO bid-protest mechanism codified by CICA, it is worth noting that this mechanism was a small part of the statute's attempt to overhaul and improve government contracting as a whole. The Competition in Contracting Act of 1984, which was passed as Title VII of the omnibus Deficit Reduction Act of 1984, included several amendments to the law governing federal procurement that were designed to improve "full and open competition through the use of competitive procedures." See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

52. See William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 484 (1995) ("Measured by their grasp of government contract law, the GAO and the GSBCA are generally seen as the most competent of the protest forums. The judges of the [COFC] hear more government-contracts cases than the typical federal district judge and have more familiarity with government procurement issues. Thus, the GAO and GSBCA are overwhelmingly the forums of choice for protesters, with the [COFC] and district courts ranking third and fourth, respectively.") (internal citation omitted). Note that the article was written before the ADRA sunset provisions extinguished district-court jurisdiction over bid protests.

could instead be brought at the COFC and, as noted above, several GAO protests each year ultimately are refiled at the COFC.<sup>53</sup>

Some critics have questioned the extent to which the court has actually developed the expertise that Congress envisioned in the enactment of ADRA.<sup>54</sup> It is, of course, difficult to determine the proper metric by which to measure a court's expertise. In the years immediately following ADRA, the court drew largely upon GAO cases for general principles and guidance. This is unsurprising because the court, owing to its newly conferred jurisdiction, lacked COFC-generated procurement case law beyond a few pre-ADRA preaward protest cases. But as the court's body of case law has grown, so has its proficiency and confidence in its expertise. This growth is evident in the court's increasing reliance upon its own prior opinions rather than GAO decisions. More importantly, it is seen in the court's increasing willingness to engage settled GAO precedent and challenge the Comptroller General's conclusions. The COFC has twice in the span of one recent month held that an agency acted irrationally in relying upon GAO decisions that were inconsistent with the governing statute or regulation.<sup>55</sup> Compared to the pre-ADRA era, when inexpert district courts routinely deferred to the Comptroller General's decisions, this willingness to engage the GAO on its turf evinces a court increasingly confident in its own precedent and experience with manipulating the core doctrines of procurement law. This increased confidence has, in turn, prompted the Federal Circuit to rely more prominently upon COFC cases in its bid-protest decisions.<sup>56</sup>

In his article advocating the abolition of the COFC, Professor Steven Schooner argues that the court's "hodge-podge" of jurisdictional issues damages its claim to procurement-law specialization.<sup>57</sup> Schooner argues that because the court also considers tax-refund suits, takings cases, and other categories of suits against the sovereign, it lacks sufficient opportunity to develop the requisite expertise in procurement law to justify ADRA's exclusive jurisdiction.<sup>58</sup> But this argument somewhat misses the mark: the court's expertise comes from exposure to government-contracts cases. That it also has exposure to other cases neither denies nor dilutes the expertise it has acquired in the course of a

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53. See *supra* text accompanying note 50.

54. See Schooner, *supra* note 24, at 719–34.

55. See *Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 44 (2007); *Geo-Seis Helicopters v. United States*, 77 Fed. Cl. 633, 645 (2007).

56. See, e.g., *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1314–15 (Fed. Cir. 2007) (relying upon both GAO and COFC precedent to support a holding on an issue of first impression and quoting several COFC decisions at length).

57. See Schooner, *supra* note 24, at 717.

58. See *id.*

decade of decisions on bid protests and other federal contract controversies. With a handful of exceptions,<sup>59</sup> the COFC receives every government-contracts case presented to *any* court each year.<sup>60</sup> As Schooner himself points out, these cases constitute the largest component of COFC filings, comprising thirty-five percent of all cases filed during 2006.<sup>61</sup> There is no reason to believe that the court derives less than the optimal institutional expertise generated by this concentration of filings simply because it fills the balance of its docket with other types of litigation against the government.<sup>62</sup>

Schooner also criticizes the court for exercising overlapping jurisdiction with several other tribunals.<sup>63</sup> This critique is more properly focused at Congress than the COFC, as the court's bid-protest jurisdiction was the direct result of a specific Congressional act. Moreover, this argument is beside the point: the existence of overlapping jurisdiction may suggest that procurement law would be better served by a single exclusive forum, but it does not imply (much less support) a value judgment as to which of these competing forums

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59. The most notable of these exceptions is maritime bid-protest cases, which are brought under the Suits in Admiralty Act rather than the Tucker Act and therefore are not bound by the latter's jurisdictional limitations. *See Asta Eng'g v. United States*, 46 Fed. Cl. 674, 675-76 (2000).

60. This truth flows from the fact that following the enactment of ADRA's sunset provision, the Tucker Act vests exclusive jurisdiction in the COFC for actions "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 14919(b)(1) (2000); *see Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1079-80 (Fed. Cir. 2001); *Novell, Inc. v. United States*, 109 F. Supp. 2d 22, 24-25 (D.D.C. 2000).

61. *See* JAMES C. DUFF, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 308 tbl.G-2A (2006), *available at* <http://www.uscourts.gov/judbus2006/appendices/g2a.pdf>. For purposes of this analysis, the total number of "contract" and "Declaratory Judgments (Contract)" cases are calculated as a percentage of the court's total new filings. There were 373 new contracts cases filed in 2006, or seventeen for each of the thirteen active members of the court (although the actual number assigned to each active judge is slightly less, as ten senior judges share a portion of the court's workload). It is worth noting that vaccine compensation, which is the second-largest category of new filings, makes up nearly sixty-nine percent of the court's backlog of 7,760 pending cases, the remnants from a flurry of vaccine-related filings in 2003 and 2004. By comparison, government-contracts cases comprise only twelve percent of that total. This vaccine-related backlog is somewhat misleading, however, as these cases are largely handled by special masters, with the COFC playing a limited review role. *See Schooner*, *supra* note 24, at 733-34 & n.60.

62. At another point, Professor Schooner criticizes the court for its small overall docket, stating that it would be a trivial endeavor to eliminate the court and divide its burden over myriad other tribunals. *See id.* at 736. Thus Schooner seemingly criticizes the court both for being too busy and not busy enough.

63. *See id.* at 757.

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ought to be eliminated. Schooner correctly notes that protesters bring more cases to the GAO and the Boards of Contract Appeals (now consolidated into a single Civilian Board of Contract Appeals) than the COFC and that if the COFC were to be eliminated, the Board could handle the court's dispute docket and the GAO could handle the court's protest cases.<sup>64</sup> The ability to handle volume, while a useful quantitative metric, implies nothing as to qualitative distinctions.

Moreover, as Professor Joshua Schwartz has pointed out, the COFC's unique jurisdiction over both contract-award protests and contract-performance disputes gives it a unique perspective, allowing principles from one area of procurement law to inform its decisions in the other.<sup>65</sup> Finally, even allowing that the COFC is not a resource well suited for mass production of bid-protest disputes, there are benefits to the concurrent jurisdiction that the COFC shares with its administrative counterpart. As discussed below, choice of forum allows a putative protester to choose between the very different value propositions offered by each tribunal, while the existence of concurrent forums creates an informal feedback mechanism whereby erroneous decisions by one forum may be flagged and critiqued by the other.

#### IV. REASSESSING THE RELATIVE ADVANTAGES OF THE GAO BID-PROTEST FORUM

In light of the narrowed expertise gap between the GAO and the COFC, it is helpful to identify more precisely the unique value proposition that the GAO brings to bid-protest adjudication. The GAO offers two noteworthy advantages that attract practitioners. First, the automatic-stay provision prevents the award of the disputed contract while the protest is adjudicated. This provision ostensibly safeguards the protester's rights by assuring that a successful protester will be able to realize its victory. Second, the GAO is thought to produce its decisions more quickly than the COFC, and at substantially lower cost, due to its rigid deadlines and informal procedures.<sup>66</sup> Upon further

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64. *See id.*

65. *See generally* Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863 (2003).

66. The GAO's attorneys' fee provisions constitute a third advantage in favor of this forum. Under title 4, section 21.8 of the Code of Federal Regulations, the GAO may recommend that the agency pay a successful bidder's "costs of . . . [f]iling and pursuing the protest, including attorneys' fees and consultant and expert witness fees" if the agency changes its position in response to a protest. By comparison, under the Equal Access to Justice Act (applicable in COFC Tucker Act protests), only certain low-net-worth protesters may receive "reasonable" attorneys' fees. These fees are only recoverable if the court granted relief on the merits and did not find that "the position of the United States was substantially justified or that special circumstances make an

reflection, however, it is unclear whether either of these purported advantages weighs as strongly in the GAO's favor as one might expect.

*A. The GAO Automatic-Stay Provision*

As noted above, CICA contains a provision staying the award of any contract subject to a GAO bid protest for the duration of the proceeding.<sup>67</sup> Prior to CICA, the GAO had little power to stop a contract award or suspend contract performance while a protest was pending,<sup>68</sup> meaning that “most procurements became *faits accomplis* before they could be reviewed.”<sup>69</sup> With CICA's automatic-stay provision, “Congress attempted to provide effective review of bid challenges, and in the process to encourage competition in contracting.”<sup>70</sup>

Appearances notwithstanding, the stay is not as much of a boon to either the protester or the public as it initially seems. CICA allows the agency to override the stay upon certifying that “urgent and compelling circumstances which significantly affect interests of the United States” require immediate performance or that “performance of the contract is in the best interests of the United States.”<sup>71</sup> To challenge this override, a protester must file a separate Tucker Act complaint in the COFC, seeking an injunction reinstating the stay for the duration of the GAO proceeding.<sup>72</sup> Since the COFC complaint must comply with that court's more stringent procedures, this satellite litigation can prove costly to a protester who presumably selected the GAO due to its relatively inexpensive and rapid resolution of protests. Moreover, the COFC will enjoin the agency's override only if the protester can show the override

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award unjust.” 28 U.S.C. § 2412 (2000). These differences make fee awards much easier in GAO actions and, at the margin, can lead a putative protester to choose the GAO bid-protest mechanism over the COFC alternative.

67. See *supra* note 35 and accompanying text.

68. See H.R. Rep. No. 98-1157, at 24 (1984).

69. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 879 (3d Cir. 1986).

70. *Id.*

71. 31 U.S.C. § 3553(c), (d)(3)(C). To override a GAO stay in a preaward protest, the agency must invoke the “urgent and compelling circumstances” rationale. In a postaward protest, the agency may rely upon either the “urgent and compelling circumstances” or the “best interests” rationale. *Id.* For a discussion of case law developing these two rationales, see Young Cho, *Judicial Review of “The Best Interests of the United States” Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?*, 34 PUB. CONT. L.J. 337 (2005) and Sandeep Kathuria, *Challenges to CICA Overrides in Court of Federal Claims: A Guide for Agencies, Contractors*, PROCUREMENT LAW., Fall 2005, at 3, 3.

72. See *RAMCOR Servs. Group v. United States*, 185 F.3d 1286, 1289 (Fed. Cir.1999); *Spherix, Inc. v. United States*, 62 Fed. Cl. 497, 503 (2004).

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was arbitrary or capricious.<sup>73</sup> This standard affords substantial deference to the agency's determination of compelling circumstances or the best interests of the United States, particularly in cases involving national defense or national security.<sup>74</sup>

Moreover, it is far from clear that an automatic stay serves the public interest. By staying the contract pending the protest, CICA implicitly assumes that the agency is at fault until the GAO determines otherwise once the protest process is concluded. A losing bidder can enjoin a competitor's contract award for up to one hundred days<sup>75</sup> simply by mailing a statement to the Comptroller General outlining the basis of its protest. This is in stark contrast to the standard for a preliminary injunction in the COFC, which typically only issues upon the plaintiff's showing that the likelihood of success, irreparable harm, a balance of hardships, or the public interest favors an injunction.<sup>76</sup> This assumption of agency fault and the multimonth delay prompted by a GAO stay is particularly puzzling given that the GAO typically sustains only one third of protests decided on the merits.<sup>77</sup> This means that in approximately two thirds of the decided protests the GAO stay delays legitimate procurement awards, forcing government agencies to extend less effective legacy contracts, pursue expensive temporary stopgap measures, or delay the functions that prompted the procurement.

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73. 28 U.S.C. § 1491(b); *see Spherix*, 62 Fed. Cl. at 503.

74. *See generally* Cho, *supra* note 71. It is worth noting that the decision to override a GAO stay is not without risk for the agency either: If the COFC enjoins the override and the case is later presented on the merits to the COFC (either because the protester was denied GAO relief or the agency chose not to follow the GAO's recommendations), the merits decision could be assigned as a related case to a COFC judge who has already issued a decision adverse to the agency. Also, if the override is granted and the protest is then sustained at the GAO, it is potentially unwieldy and expensive for the agency to "unwind" a procurement that is already in process.

75. As noted above, 31 U.S.C. § 3554(a)(1) requires that the GAO decide a protest within one hundred days. *See supra* note 39 and accompanying text.

76. *See, e.g.*, *Protection Strategies, Inc. v. United States*, 76 Fed. Cl. 225, 233 (2007). The COFC has "jurisdiction to render judgment on an action by an interested party objecting to . . . the award of a contract" by a federal agency. 28 U.S.C. § 1491(b)(1). In order "[t]o afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief." *Id.* § 1491(b)(2). Injunctive relief is appropriate where the plaintiff has established: (1) actual success on the merits, (2) that it will suffer irreparable injury if injunctive relief were not granted, (3) that the harm to the plaintiff outweighs the harm to the Government and third parties if the injunction were not granted, and (4) that granting the injunction serves the public interest. *See Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303, 320–21 (2000). No single factor is to be treated as dispositive. *See FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

77. *See supra* text accompanying note 42.

As a consequence, the federal procurement system—whether employed for modest civil needs or major programs of importance to homeland security or defense—suffers from the frequent interruption of the “automatic stay” without any predicate showing of entitlement and without any consideration of the public interest or weighing of comparative harm. Most participants in the market for public contracts are repeat players for whom “both filing and defending against protests have become routine features of doing business with the government.”<sup>78</sup> These public-contract-law veterans presumably understand that even if a GAO stay delays receipt of a putative awardee’s contract, that awardee may benefit from the delay imposed upon a competitor in a future competition and protest.

Moreover, the possibility exists that such companies may “game” the process, using the stay to exact concessions from agencies and to disrupt the earned business opportunities of rivals who bested them in competition.<sup>79</sup> For example, an incumbent contractor that loses the competition for a new contract may file a protest simply to stay performance of the new contract and extend its current contract for the duration of the GAO protest. As long as the marginal profit earned by extending the legacy contract exceeds the cost of the protest—and this is usually the case given the GAO’s intentionally inexpensive procedures—the temptation to engage in strategic behavior is always present. Alternatively, a failed bidder may stay the award through a GAO protest and then seek settlement with the awardee by getting a portion of the contract as a subcontractor.

Undoubtedly the automatic-stay procedure benefits some contractors by preserving the opportunity for resolution of a meritorious protest.<sup>80</sup> But it is far from clear that these benefits outweigh the delays, disruption, and increased costs that the procedure imposes upon legitimate contract awards, particularly in light of the fact that the GAO denies two thirds of filed protests.<sup>81</sup>

The COFC also can grant injunctive relief to suspend procurement activity pending the litigation. Following the general federal model, the COFC will enjoin an award for the duration of the protest if the protester can show: (1) likelihood of success or irreparable injury, (2) balance of hardships tipping toward the protester, and (3) public

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78. See Tomaszczuk & Jensen, *supra* note 17, at 400–01.

79. See Amy Butler, *Win or Whine?*, AVIATION WEEK & SPACE TECH., Sept. 10, 2007, at 48, 48–50.

80. Or alternatively, the stay saves the agency from the cost and disruption of having to terminate a wrongly awarded contract after several months of performance.

81. See *supra* note 42 and accompanying text.

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interest favoring injunctive relief.<sup>82</sup> By requiring the protester to make a showing on the merits, this procedure reduces the likelihood that a frivolous or nuisance protest will unnecessarily delay the government's pursuit of the public's needs. From a public-interest perspective, the COFC's preliminary-injunction standard seems far superior to the GAO's automatic-stay provision and largely negates this oft-touted advantage of the GAO as a bid-protest forum.

*B. Inexpensive and Rapid Protest Resolution*

The GAO is also appreciated for its ability to decide a protest cheaper and more quickly than judicial forums. There is no reason to question the truth of this proposition in most cases: the informal procedures allow a losing bidder to prosecute a case in the GAO at a fraction of the cost of litigation. Also, as noted above, the GAO must decide a case within one hundred days of filing.<sup>83</sup> Six months or more may be required to resolve a case at the COFC.<sup>84</sup> Undoubtedly, as a general proposition, rapid conflict resolution benefits the public interest. However, equating speed with quality, if the latter is sacrificed for the former, may confuse motion for progress. As to comparative expense, this value loses its significance when large, well-financed companies exercise the GAO process. It is also questionable whether it is a virtue to employ an inexpensive and expedited review of contract awards involving complex systems or services with values rising to hundreds of millions of dollars or more. While an expedited process may be suitable and beneficial for smaller companies and smaller contracts, in protests involving large and complex contracts, efficiencies may be outweighed by the hazards of an informal process and by the relative absence of rigor, rules, and process.

The COFC has at least five features that differentiate it and that increase the efficacy of its decisions vis-à-vis the GAO: (1) more robust procedures, including discovery and evidentiary rules; (2) Senate confirmation of its presiding officers; (3) broader jurisdiction over government contracts; (4) appellate-review and (5) power to enforce its judgments.

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82. See *supra* note 75.

83. See *supra* note 39 and accompanying text.

84. See, e.g., *McKing Consulting Group v. United States*, 78 Fed. Cl. 715, 716 (2007) (deciding preaward protest six months after oral argument and ten months after underlying agency action). To be fair, the court has shown a remarkable ability to act quickly when circumstances so demand. See, e.g., *Manson Constr. Co. v. United States*, 2007 U.S. Cl. LEXIS 332 (deciding the case sixteen days after protest was filed).

Although these differences render the COFC more costly and time consuming than the GAO, they also improve the utility of its decisions, both in terms of the accuracy of the immediate protest decision and the impact of the decision upon procurement law generally.

#### 1. PROCEDURES

Perhaps the most important difference between the two forums is the greater formality of the COFC throughout the bid-protest process. At the COFC, a protester must draft, file, and serve upon the United States a formal complaint to which the agency responds with a formal answer and a certified copy of the agency record.<sup>85</sup> Typically, a protester follows with a motion for judgment on the administrative record and a statement of facts, which prompts agency briefs in opposition and a counterstatement of facts.<sup>86</sup> By comparison, a GAO protester need only submit a “detailed statement of the legal and factual grounds of protest” and proof of standing and timeliness.<sup>87</sup> GAO regulations explicitly state that “[n]o formal briefs or other technical forms of pleading or motion are required.”<sup>88</sup> As discussed above, the COFC will enjoin a contract pending litigation only where the protester successfully moves for a preliminary injunction,<sup>89</sup> whereas in the GAO such relief is automatic (assuming the protest is timely under CICA) and requires no showing of the protest’s merits.<sup>90</sup> Should a factual dispute be presented, the COFC proceeds to a formal trial guided by the Federal Rules of Evidence.<sup>91</sup> The GAO, at most, may convene an informal hearing whose nature, course, and participants are determined by the hearing officer assigned to the case.<sup>92</sup>

The additional procedures separating the COFC from the GAO help reduce the risk of arbitrary or erroneous decisions. The COFC’s formal procedures constrain the discretion of the presiding judge, helping assure that similar cases will be treated similarly regardless of the judge assigned to the case. While each GAO decision purports to be a decision of the Comptroller General, in practice individual cases are assigned to GAO hearing officers who have substantial discretion

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85. Cl. Ct. R. 3, 5, 52.1 (rules titled “filing complaint,” “service of process,” and “administrative record”).

86. *Id.* R. 5, 52.1.

87. 4 C.F.R. § 21.1 (2006).

88. *Id.*

89. Cl. Ct. R. 65; *see, e.g.*, *Reilly’s Wholesale Produce v. United States*, 73 Fed. Cl. 705, 709 (2006).

90. 31 U.S.C. § 3553(c) (2000); 4 C.F.R. § 21.6.

91. Cl. Ct. R. 43.

92. 4 C.F.R. § 21.7.

regarding, for example, the propriety of admitting a particular strand of witness testimony.<sup>93</sup> With increased discretion comes increased opportunity for deviations among individual cases, which raises at least the specter of a less consistent and more erratic or arbitrary jurisprudence. The GAO attempts to solve this problem through an internal-review process, whereby one official in the GAO General Counsel's office reviews each draft decision prior to publication.<sup>94</sup> Given the thousands of protests decided by the Comptroller General each year, it seems unlikely that this single sentry at the end of the process serves as an adequate substitute for a comprehensive and uniform set of rules guiding the deliberation process.<sup>95</sup> COFC procedures constrain these tendencies, helping assure the public that its decisions are accurate assessments of individual disputes and offer more consistent guidance to agencies during future solicitations.

## 2. SELECTION PROCESS FOR PRESIDING OFFICERS

Although the COFC is an Article I, not an Article III tribunal, its judges are subject to nomination and confirmation procedures similar to those governing other courts. The President nominates a COFC judge for a renewable fifteen-year term, subject to the advice and consent of the Senate.<sup>96</sup> As with other judicial appointments, a nominee's qualifications are scrutinized by the public, debated within the Senate Judiciary Committee, and voted upon by the Senate. COFC nominees generally receive more attention than a typical district-court nomination in part because of the court's role in deciding takings cases, which lie at the politically charged intersection of regulatory power and property rights.<sup>97</sup>

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93. See text accompanying note 37.

94. See *Schooner*, *supra* note 24, at 757 n.159.

95. Even assuming this post hoc review catches all prejudicial errors in the process, there remains the problem that such corrections occur behind closed doors, while a hearing officer's procedural errors are open for the litigants to see. Such a system at least suggests due process concerns. *Cf. Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (“[T]he appearance of evenhanded justice . . . is at the core of due process.”); *In re Murchison*, 349 U.S. 133, 136 (1955) (“[J]ustice must satisfy the appearance of justice.” (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))).

96. 28 U.S.C. §§ 171–72.

97. In the typical regulatory takings case, a property owner affected by federal land-use regulations (such as environmental conservation) seeks compensation from the government for the decreased value of his or her land after the regulation takes effect. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 133 (1978). Although most regulations are legitimate exercises of government power that do not constitute a taking, the Supreme Court has indicated that compensation may be owed if a regulation goes “too far.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922). The

For example, Senate Democrats blocked Judge Victor Wolski for nearly seven months before confirming him by a narrow 54–43 vote on July 9, 2003.<sup>98</sup> His confirmation hearings were contentious, marked by close scrutiny of his prior work as an attorney with the Pacific Legal Foundation (which actively prosecutes takings cases against federal and state governments and thus regularly challenges Congress’s regulatory authority).<sup>99</sup> The Senate used the Wolski and three other contemporaneous nominations to examine the work of the COFC as a whole, in addition to the merits of its prospective members.<sup>100</sup> This intense scrutiny assures that before a COFC judge hears a single case, his or her qualifications have been vetted by two separate branches of government in a process designed to promote competence and fairness on the bench.

GAO hearing officers are not subjected to the same rigorous vetting process. The staff attorneys who preside over bid protests are selected by the GAO’s Office of the General Counsel with no formal input from other branches of the government.<sup>101</sup> (The Comptroller General, in whose name bid-protest decisions are announced, is subject to Senate confirmation.)<sup>102</sup> This point is not made to impugn the qualifications of individual staff attorneys, many of whom either rose through the ranks on the merits of their performance or joined the GAO following distinguished careers in procurement law. But by subjecting potential judicial appointees to external public scrutiny on the record, the Senate confirmation process helps assure the competence of those appointed to the COFC bench. All other factors being equal, the

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nature of this amorphous test gives judges substantial discretion in determining whether a particular law is a legitimate exercise of governmental power or an intrusion requiring compensation. *Cf.* Penn. Central, 438 U.S. at 123–24. As a result, Congress has taken substantial interest in the composition of the COFC, which has exclusive jurisdiction to consider takings claims against the federal government.

98. 149 Cong. Rec. S9083–85 (2003).

99. *See, e.g., id.* at S9084 (statement of Senator Lautenberg) (discussing Judge Wolski’s work history and statements made in a letter to the editor of the San Francisco Examiner). Senator Nelson, a moderate Democrat, noted during reelection that Judge Wolski was the only Bush nominee he ever voted against confirming. *See, e.g.,* Don Walton, *Nelson Says He Stands on His Judicial Voting Record*, LINCOLN J. STAR, Jan. 4, 2005, available at <http://www.journalstar.com/articles/2005/01/04/local/doc41db7dfe4b783874635843.txt>.

100. *See, e.g.,* Jennifer H. Dlouhy, *Senate Critics Question Need To Fill Court of Federal Claims*, 61 C.Q. WEEKLY 1686 (2003); *GOP Aims To Claim Back Judge*, LEGAL TIMES, July 7, 2003, at 27.

101. *See* GAO.gov, Career Paths at GAO, <http://www.gao.gov/careers/attorneys.html> (last visited Jan. 23, 2008) (describing various roles played by attorneys employed within the Office of General Counsel).

102. 31 U.S.C. § 703(a)(1) (2000).

relative lack of scrutiny of GAO applicants constitutes an additional advantage in the COFC's favor.

### 3. SCOPE OF JURISDICTION

The scope of the COFC's jurisdiction gives it a further structural advantage over its GAO counterpart. As noted above, the COFC is the only forum with jurisdiction over both contract-formation and contract-performance disputes.<sup>103</sup> The GAO, by comparison, has procurement experience confined to the narrower subfield of bid protests. The COFC judges thus acquire an understanding of procurement controversies—ab initio as well as ad hominem (and, in taking cases, ad valorem)—that produces a more complete perspective than the narrower view that a GAO examiner may acquire of procurement issues.

Professor Joshua Schwartz notes that procurement law as a whole struggles with the issue of when a dispute with the sovereign should be treated like a private-contract problem and when the government's unique status demands specialized treatment.<sup>104</sup> Because this tension traverses all areas of procurement law, decisions involving one aspect of government-contracts law may benefit from accumulated experience in other areas. Schwartz offers the example of *Krygoski Construction Co. v. United States*,<sup>105</sup> in which the Federal Circuit was presented with the question whether, given changed circumstances following a contract award, the government should be permitted to terminate the contract and solicit new bids.<sup>106</sup> The plaintiff sought to limit the government's remedy to modification of the existing contract.<sup>107</sup> The court disagreed, and relied in part upon CICA's commitment to full and open competition to fulfill the government's needs.<sup>108</sup> In other words, the court drew upon a law and policy directed to contract *formation* to determine how to resolve a dispute over contract *performance*. One may easily imagine a case in which the latter could inform the former as well. Because they are limited to bid protests, GAO examiners may lack comparable experience to engage in such comparative analysis. The COFC therefore is in a relatively better position to analyze individual cases with an eye toward the broader principles that transcend and unite the various components of procurement law.

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103. See generally Schwartz, *supra* note 65.

104. *Id.* at 863–64.

105. 94 F.3d 1537 (Fed. Cir. 1996).

106. *Id.* at 1542–44.

107. *Id.* at 1540.

108. *Id.* at 1542–44.

## 4. APPELLATE REVIEW

GAO decisions are not subject to any direct appellate review. In rare instances, the GAO may engage in reconsideration of a decision.<sup>109</sup> In this respect, the decisions of the GAO, a nonjudicial tribunal, receive greater deference than any trial court in the state or federal system. By contrast, COFC decisions may be appealed to the Court of Appeals for the Federal Circuit<sup>110</sup> and, potentially, the United States Supreme Court. The Federal Circuit may also become involved in interlocutory proceedings where, for example, a writ or other form of expedited relief is sought.<sup>111</sup> In most cases, the COFC resolves a bid protest by granting one of the parties' cross-motions for summary adjudication on the administrative record.<sup>112</sup> In such cases, the Federal Circuit reviews the decision *de novo*, applying the same standard of review as the COFC.<sup>113</sup> Thus, a controversy brought before the COFC bid is subject to two layers of review by Senate-confirmed judges. Appellate review helps assure that a COFC decision is in accordance with prior precedent and not otherwise erroneous. The COFC, in turn, uses the feedback mechanism of appellate review to guide its future decisions, thus enhancing the court's predictability and assuring that each new opinion fits comfortably within the larger procurement-law latticework.

Like its COFC counterpart, the GAO purports to decide cases consistently with its earlier cases. But without a check on individual decisions apart from internal reviews that precede release of a decision,

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109. Under title 4, section 21.14 of the Federal Code of Regulations, any participant in the protest may request reconsideration of a bid protest within ten days of the decision. It is general GAO practice to reassign the case to a different hearing officer to decide the request for reconsideration. See OFFICE OF GENERAL COUNSEL, GAO, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 39 (8th ed. 2006), available at <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>. Gabig notes that it is "uncommon for the GAO to change its recommendation" upon reconsideration. Gabig, *supra* note 36, at 42; see also Thomas K. Gump, *Rationalizing the Procurement Dispute Process*, FEDERAL LAWYER, Feb. 1995, at 20, 22 ("Although requests for reconsideration of GAO decisions may be made, reversals on reconsideration are extremely rare.").

110. The Federal Circuit has exclusive jurisdiction to review any final decision of the COFC. 28 U.S.C. § 1295(a)(3) (2000).

111. Under the All Writs Act, 28 U.S.C. § 1651(a), "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." See, e.g., *In re United States*, 463 F.3d 1328, 1329 (Fed. Cir. 2006) (granting United States' writ of mandamus and directing COFC to dismiss Tucker Act claim for lack of jurisdiction).

112. See, e.g., *Dysart v. United States*, 369 F.3d 1303, 1310 (Fed. Cir. 2004).

113. *Id.*

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there is no guarantee that a particular protest comports with prior precedent, and there are no means available to a protester (whether successful or not) to insist that an appellate body review the tribunal's final determination.<sup>114</sup> This potential for irremediable inconsistency renders GAO procurement law less predictable, often leaving agency contracting officials with conflicting guidance when facing procurement disputes. For example, in *Interstate Rock Products, Inc. v. United States*,<sup>115</sup> a bidder challenged the Federal Highway Administration's rejection of its bid due to omission of the penal sum on the required bid bond.<sup>116</sup> The agency supported its decision by citing a line of GAO decisions finding that this omission renders a bid nonresponsive.<sup>117</sup> The protester responded by citing another line of GAO decisions holding that a bid is responsive despite this omission and further argued that this inconsistency rendered the GAO's decisions and the agency's reliance upon them irrational.<sup>118</sup> While the COFC refrained from "examin[ing] the entire body of GAO precedent concerning bid bonds to ascertain whether this body of precedent was as a whole rational and consistent," it noted the possibility that "some of the decisions to which plaintiff cites were in fact wrongly decided and aberrations" from the general rule.<sup>119</sup> A GAO appellate-review mechanism might have caught this inconsistency before it became a live issue delaying the Federal Highway Authority's mission and consuming the court's limited resources.

## 5. ENFORCEMENT MECHANISM

Of course, the most obvious difference between the two forums is the extent to which the tribunal's decision binds the parties to the dispute. A final COFC decision binds both protester and agency, subject to appellate review.<sup>120</sup> When the COFC enjoins a contract, the

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114. Indeed, one may question whether it is necessary to do so, given that those prior precedents were themselves developed in a vacuum and not subjected to scrutiny by an independent board of review. It is worth noting that, while no *formal* GAO appellate mechanism exists, a protester who loses at the GAO can refile the same claim for readjudication in the COFC. See 31 U.S.C. § 3556. An agency that loses at the GAO cannot seek review before the COFC, but it can decline to follow the GAO's recommendation, at which point the successful protester may refile its claim in the COFC. *Id.*

115. 50 Fed. Cl. 349 (2001). The company brought a simultaneous bid protest before the GAO, which was dismissed when the COFC claim was filed. *Id.* at 353.

116. *Id.* at 349.

117. *Id.* at 358.

118. *Id.* at 366.

119. *Id.*

120. See *supra* note 114 and accompanying text.

agency is powerless to go forward with its original award. When it awards damages, those funds must be paid. If the agency fails to comply, the court can use its contempt power to enforce its decision by fine or imprisonment.<sup>121</sup> When the court denies a bid protest, the protester's claim is extinguished and cannot be resurrected in another forum.

By comparison, GAO decisions lack the force of law and are not binding upon anyone, not even the parties to the dispute.<sup>122</sup> As noted above, if the Comptroller General finds a bid protest meritorious, the decision is limited to recommending that the agency undertake a particular remedy.<sup>123</sup> If the agency chooses not to follow that recommendation, the GAO must entrust enforcement of its decision to Congress, whose busy members may or may not choose to take action against the agency.<sup>124</sup> If the GAO finds that a protest lacks merit, CICA prevents its dismissal from impacting the protester's right to seek a second bite at the apple through a COFC complaint.<sup>125</sup>

In other words, whether the Comptroller General dismisses or sustains a protest, much of the cost and time savings achieved by GAO procedures depend upon the willingness of the parties to accept the GAO's reasoning and their voluntary compliance with the GAO's recommendation. If a protester is unsatisfied with a GAO dismissal, it may refile the claim at the COFC and start the protest anew. If the agency declines to abide by a GAO decision sustaining a protest, the protester must lobby Congress or refile in the COFC to obtain the result suggested by the GAO decision. Either way, the value of the GAO decision (and benefit of its process) is diminished or even destroyed, quite possibly placing the protester in a worse position than if it had elected not to pursue a GAO protest.

Similarly, the COFC is favored considering the interests of the party selected for award whose victory is contested by a GAO protest. The putative winner at the GAO is an "interested party" with a right to participate in the proceeding, but it has no right whatsoever to object or

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121. 28 U.S.C. § 2521(b) (2000); *see, e.g.*, *Unico Servs., Inc. v. United States*, 71 Fed. Cl. 464, 466 n.4 (2006) (highlighting court's contempt powers). To support a finding of contempt, the moving party must show by clear and convincing evidence that the offending party: (1) violated an order of the Court; (2) the violation was more than technical or de minimis; and (3) "the violation was not based on a good faith *and* reasonable interpretation of the judgment." *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1322 (9th Cir. 1997) (emphasis added).

122. *See* 31 U.S.C. § 3554.

123. 31 U.S.C. § 3554(b)-(c).

124. *Id.* § 3554(e)(1); *see also infra* Part V.A (examining six such instances, and Congress's response). Should Congress decline to act, the protest may be refiled at the COFC. *See infra* text accompanying notes 135-46.

125. 31 U.S.C. § 3556.

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appeal should the GAO uphold a protest and deny it the fruits of the competition. At the COFC, upon intervention, an interested party is accorded the same rights as all other parties.<sup>126</sup> Should the protest be denied, then the interested party is assured that there will be no second bite attempted other than through appeal to the Federal Circuit. Should the protest be upheld, the interested party can bring an appeal to the Federal Circuit.<sup>127</sup>

## V. RETHINKING THE EFFECTS OF GAO DECISIONS

Although Congress explicitly precluded the GAO from issuing binding decisions,<sup>128</sup> as a matter of historical practice agencies overwhelmingly have elected to abide by GAO decisions. And the COFC has extended substantial deference to GAO rulings. This level of de facto deference warrants reconsideration by agencies, bidders, the COFC, and Congress. The rise of the COFC as a specialized procurement-law tribunal calls into question the historical rationale for deference to the GAO, particularly in light of the structural limitations highlighted above. This is not to deny the GAO any role in resolving procurement-award controversies. Absent congressional action to modify or limit the statute, the GAO retains the authority conferred to it by CICA in 1984. Greater scrutiny of GAO rulings is warranted, however, as is a willingness to employ the authority, also granted by CICA, for agencies to opt out of GAO recommendations.

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126. See Cl. Ct. R. 24.

127. Although the authors have found no instances in which an intervenor-awardee has appealed an adverse decision in the absence of government action, bid protests before the Federal Circuit clearly establish that such an intervenor can appeal a decision alongside the government. See, e.g., *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1107 (Fed. Cir. 2004) (indicating that intervenor-awardee and United States together appeal COFC decision sustaining a bid protest).

128. Indeed, such a provision would arguably have been unconstitutional. See, e.g., *Tomaszczuk & Jensen*, *supra* note 17, at 413; *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.3d 979 (3rd Cir. 1986), *cert. granted*, 485 U.S. 958 (1987). *But see* John M. Holloway III, Note, *The Evolution of Quasi-Judicial Activism in the Legislative Branch: Canadian Commercial Corp./Heroux, Inc.*, 28 U. RICH. L. REV. 787 (1994) (supporting constitutionality of bid-protest mechanism). The Supreme Court granted certiorari in *Ameron*, which would have determined the related question of whether CICA unconstitutionally permitted the Comptroller General to shorten or lengthen the stay of a contract, but before the case was argued, Congress and the executive branch negotiated a compromise settlement and Justice withdrew its petition. See *Tomaszczuk & Jensen*, *supra* note 17, at 419.

*A. Agencies*

Agencies should recognize the possibility that a GAO decision on a bid protest can be wrongly decided and that the GAO may have granted relief that would not be available in a judicial forum. In either case, it may be a prudent decision—one that serves both the public trust and fiscal interests—for an agency to decline to accept a GAO recommendation.

As a historical practice, the GAO's decisions are nearly always adopted. Agencies thus seem to have lost sight of the fact that the power to disregard such decisions is an explicit and important component of the bid-protest system designed by Congress. As noted above, CICA limits the Comptroller General to providing "recommendations" to resolve protests; Congress never intended for the GAO to have the last word in every procurement dispute.<sup>129</sup> While the GAO serves as Congress's procurement-law expert, the Administrative Procedures Act (APA) generally entrusts substantial latitude to agency decision making, subject to a limited test for rationality,<sup>130</sup> and the Tucker Act extends that latitude to the agency's views of its procurement needs and the vendors who should meet them.<sup>131</sup> Should a GAO decision be blatantly erroneous, fail to respect the statutory deference afforded agency decisions by the APA, or cause the agency or public to suffer more harm than good by adhering to the Comptroller General's recommendation, the public interest may be better served by proceeding with the challenged award and program than by submission to the recommendations accompanying a poorly reasoned GAO decision.<sup>132</sup>

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129. Each executive agency remains the ultimate expert in matters delegated to it by Congress. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

130. *See* 5 U.S.C. § 706.

131. *See* 28 U.S.C. § 1491(b).

132. Indeed, a recent COFC opinion found irrational an agency's decision to abandon its own well-reasoned interpretation of a procurement requirement in favor of a GAO recommendation to the contrary. *See Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 36–37 (2007). Of course, this Article does not lightly recommend that agencies disregard the GAO, nor does this Article believe it responsible or proper for an agency to consider only its programmatic and budgetary interests in deciding to proceed with award notwithstanding a GAO decision upholding a protest. Rather, this Article's proposition is that an agency first should evaluate whether there is a basis to conclude that the GAO decision was erroneous. The agency then should consider how the Court of Claims would consider the issues addressed by the GAO decision and on the record as augmented with the GAO decision and its record. The agency also may consider matters of the public interest and comparative harm to evaluate whether the COFC would grant relief. Very likely, agencies would elect to proceed other than as recommended by the GAO in only a small percentage of

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That is not to say that agencies should treat the Comptroller General's advice with anything other than due appreciation and regard. The likelihood is that any given GAO decision will be "right," and where it might not be, the opt out will not be justified either by the risk or the putative benefit. In many protests, the record shows that the GAO acts as a valuable arbiter of procurement-award questions and as a useful ombudsman. Available to smaller bidders and others not possessed of the resources to merit a COFC effort, GAO proceedings frequently highlight flaws that can be resolved inexpensively on the basis of its recommendations.<sup>133</sup> From the perspective of the agency, a powerful check against unwarranted disregard of the GAO, or even benign neglect, is that all GAO "recommendations" implicitly carry the threat of enforcement through Congress's power of the purse.<sup>134</sup> Therefore, when deciding whether to exercise its authority to disregard a GAO recommendation, the agency must assess factors along two axes: the magnitude of the GAO decision's substantive flaws and how the case would fare at the COFC in addition to whether the agency has sufficient political capital to weather a congressional storm should it challenge the GAO and force relitigation at the COFC.

Should the agency proceed with the contract award despite the GAO's advice to the contrary, the protester may refile at the COFC. The Tucker Act jurisdiction of the COFC accommodates actions not only where a protester fails at the GAO but also where it succeeds and the agency declines to follow the GAO's recommendations.<sup>135</sup> On a refiled action, the GAO decision is "considered to be part of the agency record."<sup>136</sup> Although the COFC has readily acknowledged "the expertise of the GAO in procurement matters," it also repeatedly makes clear that in a Tucker Act bid protest "[i]t is [the agency] decision and not the GAO recommendation that is subject to review."<sup>137</sup>

A refiled protest at the COFC is no mere replay of the first. The GAO may take its own evidence on the procurement decision as an aid

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cases. That percentage, however, should not hover near "zero," as has been the historical practice.

133. *See, e.g.*, GlassLock, Inc., B-299931 (Comp. Gen. Oct. 10, 2007) (sustaining protest where agency considered past performance references of winning bidder beyond those permitted under the solicitation).

134. *See supra* Part II.A.

135. 28 U.S.C. § 1491(b). Needless to say, this remedy is also available to a frustrated bidder whose protest was denied at the GAO.

136. 31 U.S.C. § 3556. The inclusion of the GAO decision in the agency record may be seen as "artificial" in that the Tucker Act standard of review addresses agency action and not the perspective of another body, even the GAO, regarding those actions. *See id.*

137. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 341-42 (1997).

to determining the merits of the protest.<sup>138</sup> The COFC generally does not do so: in accordance with general agency-law principles, the COFC focuses upon the agency's decision as reflected in the record and eschews post hoc rationalizations.<sup>139</sup> The Federal Circuit recently clarified that the COFC's special rules permitting Motions for Judgment on the Administrative Record in bid protest cases<sup>140</sup> are designed "to provide for trial on a paper record."<sup>141</sup> In addition, the standard of review differs: the COFC reviews an agency's procurement decision under the APA standard,<sup>142</sup> under which agency action is set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>143</sup> This standard is, at least conceptually, more deferential to the agency than the GAO's "reasonableness" review.<sup>144</sup> Finally, whereas the GAO typically amends a solicitation or blocks an award upon finding an agency violation, the COFC requires

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138. See 4 C.F.R. § 21.7 (2007).

139. See, e.g., *Rig Masters, Inc. v. United States*, 70 Fed. Cl. 413, 424 (2006) (explaining that "our review is confined to the administrative record already in existence" and therefore "[w]e . . . cannot accept any post hoc rationalizations offered as the basis for the decision") (internal quotations and citation omitted). The court only accepts supplements to the record if the additional material "assist[s] the court in understanding an agency decision when the record has not adequately explained it" or "place[s] in the record material that, by its very nature, would not be contained in it, such as evidence of bias or bad faith." *Id.*

140. Cl. Ct. R. 52.1 (formerly Cl. Ct. R. 56.1).

141. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1356–57 (Fed. Cir. 2005) ("The Court of Federal Claims . . . when making a prejudice analysis in the first instance, is required to make factual findings under [the rule] from the record evidence as if it were conducting a trial on the record."). It is worth noting, however, that once the court finds on the record that the agency erred in a way that prejudiced the protester, it can take additional evidence on the propriety of relief to be awarded. See *Idea Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 138 (2006).

142. 28 U.S.C. § 1491 (2000).

143. 5 U.S.C. § 706(2)(A). In bid-protest cases, the COFC has interpreted this standard to mean that an award is set aside only "if the plaintiff demonstrates that (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Consolidated Eng'g Servs., Inc. v. United States*, 64 Fed. Cl. 617, 623 (2005) (quoting *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)). Before ADRA, the Court of Claims reviewed preaward protests under *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974), which reversed an agency decision if (1) there was subjective bad faith on the part of procurement officials; (2) there was not a reasonable basis for the procurement decision; (3) the procuring officials abused their discretion; and (4) pertinent statutes or regulations were violated. There is a superficial similarity between the "reasonable-basis" factor used by the Court of Claims in cases following *Keco* and its brethren. These now are purely of historical interest, however, as the Federal Circuit in *Impresa* specifically discussed the four *Keco* factors and explicitly distinguished them to the extent that they were inconsistent with the post-ADRA standard. *Impresa*, 238 F.3d at 1333.

144. See *infra* text accompanying notes 197–98.

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the protester to show: (1) it was prejudiced by the violation and (2) injunctive relief is warranted under the traditional balancing test for equitable relief.<sup>145</sup> The court has “characterized the award of injunctive relief as ‘extraordinary’ and only to be granted in limited circumstances.”<sup>146</sup>

Therefore, it is entirely possible that the same set of facts will yield different outcomes before the GAO and the COFC. To the extent that the following factors are present, they weigh in favor of disregarding a GAO recommendation and challenging the protester to refile its case at the court: (1) the COFC can be expected to affirm an agency’s procurement decision where the GAO decision contains a legal error that the court declines to countenance or that depends upon GAO internal precedent at odds with statutes, regulations, or COFC precedent; (2) to the extent that a GAO decision turns on a misweighing of the evidence or the introduction of post hoc evidence that the court would not afford similar weight, the court would be more likely to ratify the original agency action; (3) should the GAO decision rest on a judgment as to the “reasonableness” of a procurement action, the agency may benefit from review employing the more deferential “rational-basis” standard of the Tucker Act; and (4) even if the agency erred, the COFC can consider other circumstances and decide to limit relief to bid-preparation costs and not injunction.

While an agency should begin its evaluation of a GAO bid-protest result with evaluation of the merits and errors of the decision, it also must anticipate the reaction of Congress. Under CICA, the Comptroller General must promptly report to Congress any instance of agency noncompliance with a GAO recommendation along with a recommendation regarding what remedy (if any) Congress should consider taking.<sup>147</sup> Given congressional authority over authorization and appropriations, this mechanism will cause agencies to act carefully before deciding not to accept a GAO bid-protest ruling.<sup>148</sup>

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145. *See* PGBA, LLC v. United States, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004); *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 286–87 (2006) (reciting standards for injunctive relief).

146. *See Textron*, 74 Fed. Cl. at 286 (internal citation omitted). Where the agency has violated the Act but injunctive relief is inappropriate, the court may award monetary damages, but the Tucker Act limits these damages to bid-preparation and bid-proposal costs. 28 U.S.C. § 1491(b)(2) (2000); *see also* *Naplesyacht.com, Inc. v. United States*, 60 Fed. Cl. 459, 478 (2004).

147. 31 U.S.C. § 3554(e).

148. The calculus of Capitol Hill’s response turns upon several factors which an agency undoubtedly will consider. Certainly, the agency will assess the urgency of the project and the priority assigned to it in the eyes of Congress. A related consideration will be whether project funding is exposed or will be lost should a project be delayed. Of course, other political considerations include the constituencies affected

But the CICA reporting requirement is a somewhat “noisy” signaling mechanism, in that there is no guarantee that Congress will either notice or act upon the Comptroller General’s report. While many demands compete for congressional attention, the prudent agency will consult its legislative liaison and test prospective reaction by consultation with key staff members. Some instances of contemplated nonadherence will go no further. In those instances where the agency determines not to follow the GAO, there are many ways in which Congress may respond short of formal action by either body. Should there be strong congressional reaction, this can be communicated formally or informally and in time to change or even reverse an agency’s decision.<sup>149</sup> Nevertheless, agencies should not presume congressional ire each and every time that the Comptroller General reports a bid-protest decision that an agency has determined not to follow. The legislative scheme anticipates the situation and affords Congress the latitude either to react or not, as warranted.<sup>150</sup>

The reality is that agencies obey the GAO as much because of the Comptroller General’s implied political power as his procurement-law expertise. But an otherwise erroneous decision by the GAO should not command obedience merely because of the threat of sanction. Considering the structural flaws identified above—flaws that recommend against assuming an irrefutable presumption of correctness to GAO decisions—the GAO’s mission may also be to identify potential issues for congressional investigation. In any given bid protest, this mission is better served by suggestions for change and improvement than by complacency. Given the reality that GAO mistakes will occur, good government cannot mean—and Congress should not require—absolute or unquestioning compliance with every GAO-protest decision. Where the agency can demonstrate GAO error and determines that the public interest is best served by proceeding with an award, the agency should be prepared to accept the risk of congressional scrutiny. Congress, for its part, should not presume that an agency acts improperly should it decline to follow a GAO recommendation.

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by the outcome of a contested award and the relative power and position of members of Congress who may act on behalf of the particular interests of their constituents.

149. Indeed, because members of Congress and agencies are repeat players in the game of budgetary politics, congressmen have a reputational interest in declining to cut the budget of an agency that adheres to Congress’s mandates. If an agency complies with Congress’s desires and suffers a budget cut anyway, it is less likely to cooperate with future congressional requests: the power of the purse to compel action is most effective if the sanction is deployed only after the threat alone fails to change the agency’s course.

150. Of course, an agency that acquires a reputation for routinely testing Congress’s resolve in this fashion is likely to earn greater long-term scrutiny of all its decisions by congressional oversight committees.

This Article's perspective, therefore, rests on the plain language of CICA and does not resort to the so-called "unitary executive" theory that the Constitution limits Congress's power to compel executive agencies to action.<sup>151</sup> This Article takes no position in that debate but instead relies on a number of pragmatic judgments that individually are very difficult to challenge.

First, the GAO may err on the merits of a bid-protest decision or in recommendations as to relief.

Second, Congress recognized a tension between expedient resolution of bid-protest controversies (a factor favoring the GAO) and the benefits of a more rigorous judicial process (favoring the COFC), as it created coextensive jurisdiction.<sup>152</sup>

Third, the public interest may be served, in certain circumstances, by proceeding with a contested procurement notwithstanding a GAO bid-protest decision. Congress explicitly requires consideration of the public interest in the grant of relief at the COFC, with the necessary implication that the court may decline to interrupt a procurement even if it finds an error in the conduct of the competition.<sup>153</sup>

Fourth, CICA rendered the Comptroller General's decisions "recommendations."<sup>154</sup> So understood, an agency that determines not to follow a GAO decision that it concludes is erroneous acts not in defiance of congressional control but in conformance with congressional intent.<sup>155</sup>

The limited empirical evidence available supports the observations outlined above. Although agencies almost universally adopt GAO bid-protest recommendations, there have been at least six instances in the past decade in which an agency has declined to accept a GAO recommendation sustaining a protest.<sup>156</sup> In each of these cases, the

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151. See generally Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

152. See *supra* Part III.

153. See *supra* note 76 and accompanying text.

154. See *supra* note 44 and accompanying text.

155. The GAO bid-protest mechanism was only one part of the Competition in Contracting Act, whose overall purpose was to promote the efficient procurement of the government's needs through a system of open competition. See *supra* note 51. By granting a legitimate award rather than submitting to an erroneous GAO decision, the agency furthers the ultimate purposes of federal procurement law, even as it sacrifices the lesser goal of promoting adherence to the Comptroller General's recommendations. Also to be noted is the not immaterial interest of the private party that won the competition which prompted a protest to the GAO. It benefits the procurement process where the legitimate fruits of victory in competition are restored—as occurs when an agency proceeds to award notwithstanding an erroneous GAO decision.

156. Pemco Aeroplex, Inc., B-280397 (Comp. Gen. Sept. 25, 1998); Aberdeen Tech. Servs., B-283727.2 (Comp. Gen. Feb. 22, 2000); Rockwell Elec. Commerce

Comptroller General reported the agency's decision to the relevant congressional oversight committees, both in a letter immediately following the decision and in a year-end summary of agency noncompliance. In just one of these cases, *Symplicity*,<sup>157</sup> did Congress compel the agency to accede to the GAO's recommendation.

*Symplicity* contested the Office of Personnel Management's award to TMP Worldwide ("TMP") of a contract to implement Recruitment One-Stop, an online federal-employment information database.<sup>158</sup> The GAO sustained *Symplicity*'s protest on the ground that the agency had not evaluated the bids equally.<sup>159</sup> When OPM declined to implement the GAO recommendation, Representative Tom Davis of the House Government Reform Subcommittee on Technology and Procurement Policy held a series of meetings with OPM personnel and threatened to withhold funding of Recruitment One-Stop unless the agency reopened the bidding process in accordance with the GAO recommendation.<sup>160</sup>

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Corp., B-286201, .2, .3, (Comp. Gen. Dec. 14, 2000); Consolidated Eng'g Servs., Inc., B-291345, .2 (Comp. Gen. Dec. 23, 2002); *Symplicity Corp.*, B-291902 (Comp. Gen. Apr. 29, 2003); and *Spherix, Inc.*, B-294572.3, .4 (Comp. Gen. Oct. 20, 2005). This list is based primarily upon the Comptroller General's annual reports to Congress on bid-protest noncompliance. See Letter from Gary L. Kepplinger, General Counsel, GAO, to J. Dennis Hastert, Speaker of the House of Representatives (Nov. 15, 2006), available at <http://www.gao.gov/special.pubs/bidpro06.pdf>. In the interests of full disclosure, the authors served as counsel to ReserveAmerica, the winning bidder in the *Spherix* protest and an intervener in both the GAO protest and the follow-on protest to the COFC.

157. It should be noted that Congress showed some interest, short of definitive action, in two of the six cases. In *Pemco Aeroplex*, the GAO ruled that the Air Force inappropriately bundled two different services into one solicitation to limit the number of companies capable of bidding for the contract. B-280397 (Comp. Gen. Sept. 25, 1998). Congress asked the GAO whether, notwithstanding this bundling, the solicitation otherwise violated procurement law. The GAO responded that it did not, and Congress took no further action. GAO/NSIAD-99-42 (Nov. 23, 1998). In *Rockwell Electronic Commerce Corp.*, the GAO found that the Social Security Administration had not evaluated all the bids equally in a solicitation for call-answering services and recommended resolicitation. B-286201 (Comp. Gen. Dec. 14, 2000); see *Rockwell Wins GAO Protest of Price Evaluation for SSA Network Services Contract*, 75 FED. CONT. REP. 381 (2001). Representative Davis, Chairman of the House Government Reform Subcommittee on Technology and Procurement Policy, asked the agency to explain whether it intended to comply with the GAO's decision. COMM. DAILY (Apr. 23, 2001), available at 2001 WLNR 5641554. The agency reopened discussions but did not amend the solicitation, ultimately awarding the contract again to MCI. *Rockwell Wins Protest of SSA's Corrective Action on Network Services Contract*, 76 FED. CONT. REP. 319 (2001). Rockwell again protested, and the GAO again sustained the protest. But Congress took no other action on the matter. *Rockwell Elec. Commerce Corp.*, B-286201.6 (Comp. Gen. Aug. 30, 2001).

158. *Symplicity Corp.*, B-291902 (Comp. Gen. Apr. 29, 2003).

159. *Id.*

160. See Jason Miller, *OPM Blinks, Revisits USAJobs Buy*, GOV'T COMPUTER NEWS, Apr. 19, 2004, available at [http://www.gcn.com/print/23\\_8/25609-1.html](http://www.gcn.com/print/23_8/25609-1.html).

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The agency acceded, reopened the solicitation, and again chose TMP as the winning bidder.<sup>161</sup> Thus, Congress intervened in only one of six cases where the agency ignored a GAO recommendation. And even then the agency ultimately awarded the contract to the vendor it originally selected through competition and with no permanent adverse effects.

Of the six cases reported above, only two were refiled as Tucker Act claims. In *Pemco Aeroplex*, the GAO sustained a protest where the Air Force bundled two services into a single solicitation without explanation, which had the effect of limiting the number of bidders who could compete for the contract.<sup>162</sup> Pemco sued in the Federal District Court for the Northern District of Alabama seeking to enjoin enforcement of the contract.<sup>163</sup> The court ultimately granted summary judgment to the agency.<sup>164</sup> In *Spherix*, the GAO sustained a protest of the contract award to manage the National Recreation Reservation Service, an electronic reservation system for the government's national parks and other public lands.<sup>165</sup> When the agency decided to disregard the GAO ruling, the disappointed bidder (Spherix) that had prevailed at the GAO brought suit in the COFC.<sup>166</sup> While cross-motions for summary judgment were pending, the parties settled the litigation.<sup>167</sup> In both cases, the agency succeeded in awarding the contract to the vendor it selected through an open procurement process.

*B. Bidders*

While it is the agency's decision to adopt or decline to follow a GAO recommendation, the prospective bidders—the other stakeholders in the protest—also have an important role to play. The role of the protester is obvious: where an agency demurs, the protester must

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161. See Jason Miller, *OPM Settles—Again—on Monster for USAJobs Web site*, *Gov't Computer News*, Aug. 1, 2005, available at [http://www.gcn.com/online/vol1\\_no1/36566-1.html](http://www.gcn.com/online/vol1_no1/36566-1.html).

162. B-280397 (Comp. Gen. Sept. 25, 1998).

163. See *Court Won't Stop Boeing/Ogden Work Pending Outcome of Pemco Aeroplex Trial*, 70 FED. CONT. REP. 580 (1998). At the time, venue was proper under *Scanwell* because the ADRA sunset provision had not yet been triggered. See *supra* note 60.

164. See BNA, *Court Rules for Air Force in Pemco Case*, 72 FED. CONTS. REP. 410 (1999).

165. *Spherix, Inc.*, B-294572.3, .4 (Comp. Gen. Oct. 20, 2005).

166. See *Spherix, Inc. v. United States*, No. 06-55C (Fed. Cl. filed January 24, 2006).

167. See Press Release, Spherix, *Spherix Agrees to \$6 Million Settlement to Drop Protest Over Award of National Park Service Contract* (Oct. 26, 2006), available at <http://www.spherix.com/pressRelease/pr102606--NRRS.pdf>.

decide whether to refile its protest at the COFC. Less obvious, but equally important, is the role of the other interested party in the procurement—the awardee who prevailed in the agency’s competition but whose victory is threatened by the GAO’s decision.<sup>168</sup> While the GAO typically permits the awardee to participate as an “interested party” in a protest, the proceeding focuses primarily upon the conflict between the protester and the agency.<sup>169</sup> In the event that a GAO protest is sustained, the awardee is exposed to forfeiture of its award and preparation of another expensive round of competition, ordinarily without recovering the bid and protest costs sustained during the challenged round.<sup>170</sup> Despite this exposure to the ramifications of the Comptroller General’s recommendation, the awardee is powerless to determine whether that recommendation will be enforced. This discretion lies solely with the agency.

The awardee need not suffer in silence pending an adverse GAO outcome. The awardee should promptly prepare and offer analysis and press the agency to evaluate the merits of the GAO decision and how it would be received at the COFC. The awardee, in particular, is well positioned to examine the accuracy of evidentiary judgments, and it can conduct a critical examination of the legal merits of the decision without the same political concerns that may color an agency’s assessment. The awardee also may have the resources to furnish, in circumstances that are time sensitive, analysis (and advocacy) that may not be available to the agency. At the very least, if the awardee has a sound basis to object to the GAO result, it should submit its position to the agency and the agency should consider its merits. The ultimate

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168. It is a painful irony that the victor in the procurement competition is at a comparative disadvantage in the follow-on protest drama. Its competitive victory is threatened for reasons that ordinarily have little to do with the bidder’s actions and everything to do with the agency’s conduct. An exception, of course, are protests that involve “procurement integrity” where the awardee’s conduct is at issue. *See infra* note 219 and accompanying text.

169. Although the awardee-intervenor and the agency are ostensibly on the same side, their ultimate interests may diverge. The awardee seeks to preserve its award and naturally will be unreceptive to any disposition, including settlement, that sets the award aside. The agency, however, may agree to settle or even to rescind an award following the filing of a GAO protest. Expediency may lead to “compromise” or even capitulation irrespective of the merits. In practice, agency counsel are wary of working too closely with the awardee in protest litigation. *See* Steven R. Patoir, *Bid Protests: An Overview for Agency Counsel*, 2002 ARMY LAWYER 29, 35 (2002) (“If the GAO rules in favor of the protester and against the intervenor, the intervenor can quickly become the government’s adversary.”).

170. Together with the presumptive stay of procurement, this asymmetry in outcome, disfavoring the winner of competition for supplies and services for the public good, further suggests that the present regime of deference to GAO decisions deserves some skepticism.

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decision whether to accept the GAO's recommendations remains committed to the discretion of the agency.

*C. Court of Federal Claims*

As more agencies exercise their statutory authority to reject GAO recommendations, the COFC will be forced to examine more critically its own treatment of the Comptroller General's bid-protest decisions. Currently, the court maintains a policy of measured deference toward bid-protest decisions of the Comptroller General. First, the court's decisions often cite GAO decisions for general points of law upon which no COFC case law yet exists.<sup>171</sup> This use of the GAO stems from the proposition that "although GAO decisions are not binding on this Court, the Court 'recognizes GAO's longstanding expertise in the bid protest area and accords its decisions due regard.'"<sup>172</sup> Second, the court has tended to show deference to GAO decisions in cases where a protester that was denied relief at the GAO filed a Tucker Act complaint to seek a second bite at the apple before a different forum. In such cases, the court has explained:

Neither the agency nor this court is bound by the determination of the GAO. Nevertheless, the recommendation of the GAO is made a part of the record here by statute. Moreover, while acknowledging the "advisory nature" of such a recommendation, in view of the expertise of the GAO in procurement matters, this court may rely upon such a decision for general guidance to the extent that it is reasonable and persuasive in light of the administrative record. Thus, it may be an aid to the court in better understanding and evaluating the procurement.<sup>173</sup>

As noted above, the COFC has not yet ruled upon a case in which a protester was granted relief at the GAO and must refile following an agency decision to disregard the Comptroller General's recommendation. Both *Pemco Aeroplex* and *Spherix* involved judicial

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171. See, e.g., *Dyncorp Int'l v. United States*, 76 Fed. Cl. 528, 539–40 (2007) (citing a GAO opinion to support a holding that procuring agency has the discretion to decline to enter into clarifications with an offeror, even if the agency has engaged in clarifications with another offeror); *Idea Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 136 (2006).

172. *Idea Int'l*, 74 Fed. Cl. at 136 n.11 (quoting *PHT Supply Corp. v. United States*, 71 Fed. Cl. 1, 9 n.6 (2006)).

173. *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341–42 (1997) (citations omitted).

attempts to enforce a GAO recommendation, but the former was filed in a federal district court under the since-eliminated *Scanwell* doctrine<sup>174</sup> while the latter settled before the court could render a decision.<sup>175</sup> But it is only a matter of time before the court will again be presented with this scenario in a manner that forces it to engage the GAO recommendation on the merits where the agency decides to opt out.

When this occurs, the court will face an interesting institutional dilemma. As in the “second-bite” cases, comity and institutional respect for the GAO’s expertise in the field suggest that the court should give substantial deference to the Comptroller General’s decision. Yet the Tucker Act requires the court to give substantial deference to an agency’s decision-making processes and incorporates the APA standard of review, which mandates that the court uphold the agency’s decision unless that decision is “arbitrary, irrational, an abuse of discretion, or otherwise not in accordance with law.”<sup>176</sup> Moreover, even a meritorious protester may be limited to damages if the balance of hardships to the respective parties or the public interest favors performance of the current award.<sup>177</sup>

In the usual case where a bidder attempts a second bite after being denied relief at the GAO, there is no conflict between these two guiding principles: because the GAO found in favor of the agency and awarded no relief, both deference to the GAO and deference to agency decision making suggest that the award should be upheld. But these principles are in tension in cases such as *Pemco* and *Spherix*, where deference to the GAO would sustain a protest but deference to the agency would not. The operative question then becomes: precisely how should the COFC treat the Comptroller General’s ruling where the protester succeeded at the GAO but must relitigate?

It may be tempting to analogize the GAO to a procurement-law arbitrator. Like an arbitrator, the GAO serves as an alternative-dispute-resolution mechanism that sacrifices formality in favor of inexpensive, rapid decision making. The view through this lens suggests that a GAO decision sustaining a bid protest should receive a strong presumption of correctness before the reviewing court. Federal law strongly encourages arbitration as a tool to improve judicial efficiency: the Federal Arbitration Act allows the prevailing party to petition the court to confirm the arbitrator’s award, which will be confirmed unless the

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174. See *supra* notes 170–71 and accompanying text.

175. See *supra* notes 174–75 and accompanying text.

176. See *supra* notes 149–50 and accompanying text.

177. See *PGBA, LLC v. United States*, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004); see *supra* note 153.

award is “completely irrational” or exhibits “manifest disregard of the law.”<sup>178</sup> Under the manifest-disregard standard, the court must defer to an arbitrator’s conclusions even when based upon errors of fact or of law; the award can be vacated only where the arbitrator correctly stated the law and then proceeded to ignore it.<sup>179</sup> Arguably that the Act’s rule of deference to the arbitrator is only strengthened in the procurement-law context, where the arbitrator is also an expert in the substantive law governing the case.<sup>180</sup>

Upon closer examination, however, there is a significant distinction between GAO proceedings and arbitration; once laid bare, the analogy unravels. Arbitration is a creature of contract, and its existence turns upon the *ex ante* consent of both parties to the provisions of the contract’s arbitration clause: “It is axiomatic that arbitration is a matter of contract and a party cannot be required to submit any dispute which he has not agreed so to submit.”<sup>181</sup> Courts permit the arbitrator to sacrifice formality for cost and time savings, even at the risk of an erroneous decision, because this is the regime the parties agreed would govern future conflicts between them. In the bid-protest situation, neither the agency nor the winning bidder consented to being haled before the GAO. The right of the disappointed bidder to bring the protest arises purely as a function of the CICA statute.<sup>182</sup> Absent that consent, it is more difficult to justify sacrificing substantive and procedural protections otherwise available both to agencies and the interested parties favored by agency selection, even in the interests of judicial efficiency.

A more useful approach is for the court to treat a GAO opinion as akin to an amicus brief or an expert opinion filed to aid the court in deciding the issues presented in the protest. Under this approach, the court would be free to consider the GAO’s opinion as the view of an

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178. *See, e.g.*, *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 960 (9th Cir. 2007) (internal citation omitted).

179. *See, e.g.*, *Coutee v. Barington Capital Group*, 336 F.3d 1128, 1133 (9th Cir. 2003); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991).

180. ADRA, 5 U.S.C. §§ 571–84 (2000), reflects Congress’s commitment to Alternative Dispute Resolution (ADR), eliminating many previous barriers that inhibited use of ADR by federal agencies and those they regulate and with whom they contract. The Federal Acquisitions Regulation (FAR) encourages federal agencies to “use ADR procedures to the maximum extent practicable.” 48 C.F.R. § 33.204 (2007). ADR is available for use in government contract controversies, however, only if all parties agree. 5 U.S.C. § 572(a). Thus, ADR in government contracting is voluntary and supplements, rather than limits, other available agency dispute-resolution techniques. *Id.* § 572(c).

181. *Sanford*, 483 F.3d at 962 (internal quotations omitted) (quoting *AT&T Tech., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

182. *See* 31 U.S.C. §§ 3551–56.

expert in procurement law familiar with the case and to credit that view to the extent that it is persuasive and reflects a careful application of correct legal principles to the facts. The court would have no obligation, however, to defer to an opinion that it finds erroneous or which conflicts with the decision the court would otherwise reach under its more deferential standard of review.

The amicus-expert paradigm more accurately reflects the statutory scheme created by the interplay of CICA and ADRA. As the court has noted many times in “second-bite” cases, under the Tucker Act “[i]t is [the agency] decision and not the GAO recommendation that is subject to review here.”<sup>183</sup> The Comptroller General’s opinion is one among many tools that the court may use to assist it in deciding the case. The existence of this opinion, however, does not alleviate the court’s obligation to determine whether the agency’s decision was unlawful, arbitrary, capricious, or an abuse of discretion.<sup>184</sup>

The amicus-expert model is precisely the approach adopted by then-Judge Antonin Scalia in *Delta Data Systems Corp. v. Webster*,<sup>185</sup> one of the most prominent *Scanwell*-era cases to consider the question of deference to a GAO decision rejected by the agency. Delta Data Systems Corporation challenged the FBI’s award to Burroughs Corporation of a contract for computer equipment that would form part of the FBI’s nationwide information and communications system.<sup>186</sup> The GAO sustained Delta Data’s protest on the ground that the FBI improperly considered Delta Data’s financial condition when evaluating the technical merits of the competing proposals, and Burroughs’ bid was sufficiently ambiguous to question whether it was completely responsive to the solicitation requirements.<sup>187</sup> When the FBI declined to adopt the GAO’s recommendation that the agency reevaluate Delta Data’s proposal, the protester filed an APA suit under *Scanwell* in the

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183. *Cubic Applications*, 37 Fed. Cl. at 341. By extension, it is the agency’s procurement decision, not the disposition of the GAO recommendation or the rationale that explains it, that is reviewed by the court.

184. Somewhat puzzlingly, CICA mandates that the GAO decision be “considered to be part of the agency record” in a subsequent COFC complaint. 31 U.S.C. § 3556. But this artificial augmentation of the record with post hoc analysis does not change the reviewing court’s focus. The Tucker Act explicitly incorporates the APA procedures under which agency decisions are generally reviewed. It is a “fundamental rule of administrative law” that “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

185. 744 F.2d 197 (D.C. Cir. 1984).

186. *Id.* at 198.

187. *Id.* at 200.

District Court for the District of Columbia, which sustained the protest and enjoined the award to Burroughs.<sup>188</sup>

On appeal before the D.C. Circuit, Delta Data argued that “every decision of the GAO should be adopted and enforced by the court unless that decision lacks a rational basis.”<sup>189</sup> The court disagreed, citing CICA’s provisions labeling the GAO decision a “recommendation” and specifically stating that a GAO decision shall not affect the right to file a later judicial action.<sup>190</sup> The remedy for violating a GAO decision lies with Congress, not the courts: “In short, we regard the assessment of the GAO as an expert opinion, which we should prudently consider but to which we have no obligation to defer.”<sup>191</sup> Unlike the GAO and the lower court, the D.C. Circuit denied the protest.<sup>192</sup>

Under the amicus-expert model, the GAO opinion is helpful only to the extent that it is persuasive. Thus, before the court accepts the GAO recommendation in a case, it should look behind the decision with a critical eye to the validity of the recommendation. The following is a partial list of factors the court should consider in deciding the weight to be afforded the GAO decision before the court:

*Consistency with Prior Precedent.* The court should assure itself that the legal principles driving the GAO recommendation comport with the court’s and the GAO’s prior precedent. As noted in Part III.B.4, the lack of a formal appellate process means that no feedback mechanism exists to assure that any given GAO decision is consistent with prior decisions. To the extent that the GAO’s reasoning contradicts or ignores earlier case law, particularly that of the Federal Circuit or COFC, its opinion should not be entitled to deference.

*Based Upon Proper Evidence.* The court should also look critically at the evidence relied upon by the GAO in reaching its decision. As discussed in Part III.B.1, the GAO may hold hearings on a protest and may take evidence, subject primarily to the hearing officer’s discretion. Such evidence may affect the GAO’s view of the case. By comparison, a COFC bid protest is typically decided on the agency record alone, supplemented where applicable by the GAO decision. If the court permits the parties to supplement the record, those supplements are governed by the Federal Rules of Evidence. To the extent that the GAO

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188. *Id.*

189. *Id.* at 201–02.

190. *Id.* at 201; *see* 31 U.S.C. § 3556 (2000).

191. *Delta Data Sys.*, 744 F.2d at 201.

192. *Id.* at 206.

opinion is based upon evidence outside the agency record, its opinion should be suspect, particularly where that evidence is inadmissible in the COFC. The court should be “mindful that it must critically examine any post hoc rationalization” suggested by the evidence presented before the GAO and “that it is not empowered to substitute its judgment for that of the agency.”<sup>193</sup> The court’s focus at all times should be whether on the record that depicts the agency’s action (and not after-the-fact supplementation) the agency considered the relevant factors and made a rational determination.<sup>194</sup>

*Standard of Review.* The court must also consider the differences in the standards of review. As noted above, the 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”<sup>195</sup> while the COFC sustains an award unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>196</sup> 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

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193. PGBA, LLC v. United States, 60 Fed. Cl. 196, 204 (2004) (internal quotations and citations omitted).

194. *Id.*; see also *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057–58 (Fed. Cir. 2000). The Court’s review in a bid-protest case is “based on an examination of the ‘whole record’ before the agency; that is, *all* the material that was developed and considered by the agency in making its [award] decision.” *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997) (emphasis added). An agency may not “retroactively delineate the scope of review” by selectively producing only those documents it desires the Court to consider. *Mike Hooks, Inc. v. United States*, 39 Fed. Cl. 147, 155–56 (1997). Hence, on occasion the COFC has ordered agencies to produce additional materials, but this is not to add post hoc materials so much as to assure that the record before the court is complete. The administrative record “*must* . . . include *all* materials upon which the agency relied in awarding the contract at issue.” *Cubic*, 37 Fed. Cl. at 343 (1997) (emphasis added). Where the Government has failed to satisfy this requirement, the COFC has compelled the production of documents improperly omitted from the administrative record. See, e.g., *Aero Corp. v. United States*, 38 Fed. Cl. 408, 412 (1997) (compelling production of improperly redacted document).

195. See, e.g., *Forest City Comm’ns, LLC*, B-299577 (Comp. Gen. June 29, 2007) (citing *Shumaker Trucking & Excavating Contractors, Inc.*, B-290732 (Comp. Gen. Sept. 25, 2002)).

196. See, e.g., *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 n.5 (Fed. Cir. 2001) (quoting 5 U.S.C. § 706).

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choice of the “fair” or “right” answer. The Tucker Act standard leaves that authority firmly in the hands of the agency’s procurement officer.

*Choice of Remedy.* As suggested above, the court should also evaluate whether the relief recommended by the GAO would have been granted by the court had the same protest first been brought to the COFC. Obtaining injunctive relief is a separate hurdle at the COFC without counterpart at the GAO, and it requires a plaintiff to address each of four factors: (1) success on the merits, (2) irreparable harm to the plaintiff if injunctive relief is not granted, (3) balance of hardships favors such relief, and (4) public interest in granting such relief.<sup>197</sup> Allowing that the first ordinarily is satisfied where the COFC has decided to uphold a bid protest, each of the other factors present questions which the COFC, but not the GAO, must consider.<sup>198</sup>

The fourth factor, public interest, has led the COFC to decline relief and therefore limited a successful protester to bid-preparation-and-proposal costs, primarily in cases where urgent national-defense interests favor the award.<sup>199</sup>

Overall, the amicus-expert model reminds the court that while the GAO is an expert in procurement law, its views should not preempt the court’s mandate to review the agency’s procurement decision on the administrative record, while applying the standard imposed by the

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197. See *PGBA*, 389 F.3d at 1228–29.

198. The second factor, irreparable injury, is not especially daunting. A contractor typically suffers irreparable harm where it has been denied the opportunity to compete for an award and has thereby been deprived of potential profits under the contract. *Ellsworth Assocs. v. United States*, 45 Fed. Cl. 388, 398 (1999); see also *United Int’l Investigative Servs., Inc. v. United States*, 41 Fed. Cl. 312, 323 (1998) (“The opportunity to compete for a contract and secure any resulting profit has been recognized to constitute significant harm.”). But the COFC has occasionally declined to find irreparable harm where the foregone profits were small and plaintiffs could not prove any additional harm. See *Naplesyacht.com, Inc. v. United States*, 60 Fed. Cl. 459, 476 (2004) (holding that errors in procurement of prototype boat did not create irreparable injury because protester lost only the profit it would have made on one boat and had not shown that losing this procurement hindered its chances of competing for future contracts).

199. See, e.g., *Rockwell Int’l Corp. v. United States*, 4 Cl. Ct. 1, 3–5, 6 (1983) (denying injunctive relief, even though the agency’s procurement decision lacked a reasonable and rational basis, because of the urgent national defense interests involved in the communication systems at issue). Mere assertion of “national defense” considerations, however, is not sufficient to preclude relief where a protest is successful on the merits. The COFC has explained, while it “certainly must give serious consideration to national defense concerns and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public.” *ATA Def. Indus. v. United States*, 38 Fed. Cl. 489, 506 (1997).

Tucker Act. This causes the COFC to focus upon the agency's decision and employs a more deferential standard that sets a de facto presumption in favor of upholding the award. Thus the interesting dilemma posed above is solved: as between the two, the court's deference to the agency is mandated by statute and should generally (although not always) trump a contradictory view proffered by the protester in a prior proceeding and adopted by the GAO.

#### VI. IMPROVEMENTS TO THE GAO PROCESS

The GAO plays an important role in resolving bid protests. There is value in permitting a putative protester to choose between the GAO's efficiency and the court's formality and finality: this choice allows the protester to calibrate the protest more precisely by matching the value and cost of the protest to a range of potential government responses. Also, many protests involve smaller businesses that cannot afford to file formal litigation in a Washington court or contracts for small amounts that do not justify the cost of litigation.<sup>200</sup>

Nonetheless, the COFC produces results of comparatively superior accuracy. Since both the COFC and the GAO will remain and overlap in jurisdiction, however, this Article offers suggestions to improve the quality and efficacy of GAO decisions without material impairment to the GAO's advantage of efficiency and comparatively low cost.

First, the GAO should assure assure that its legal judgments conform to judicial precedent. In particular, GAO hearing officers should recognize decisions of the Federal Circuit and COFC that address questions undecided by the GAO or that have produced inconsistent results. The COFC has evolved as an expert in procurement law and can be called upon to resolve protests where the GAO recommendation is not definitive. Accordingly, there is no reason for the GAO to neglect judicial precedent when it renders bid-protest decisions.

Second, the GAO should avoid reliance on internally developed doctrines that are at odds with judicial interpretation of procurement statutes and regulations. As recently demonstrated in *Geo-Seis Helicopters v. United States*,<sup>201</sup> certain GAO doctrines offer confusing guidance to agencies and bidders trying to abide by the law. In *Geo-*

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200. These issues are alleviated somewhat by the procurement regime's separate small-business rules, the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (2000), and the fee award provisions of the Equal Access to Justice Act, 28 U.S.C. § 2412. The implications of these separate provisions lay beyond the scope of this Article.

201. *Geo-Seis Helicopters v. United States*, 77 Fed. Cl. 633, 641 (2007); see *supra* text accompanying note 55.

*Seis*, the Navy relied upon internal GAO precedent permitting post hoc solicitation amendments to extend the filing deadline for purposes of accommodating a late bidder.<sup>202</sup> The COFC found that this internal precedent contradicted the Federal Acquisition Regulation's "late is late" rule<sup>203</sup> and sustained the protest notwithstanding the agency's reliance on a line of GAO precedent to the contrary. Thus noncompliance with an internal GAO doctrine may cause the Comptroller General to sustain a protest but compliance with the same doctrine may be found "arbitrary and capricious" by the COFC.<sup>204</sup> By considering COFC precedent, incorporating it in GAO decisions, and bringing its own internal precedent into alignment with those decisions, the GAO can avoid conflicting guidance and facilitate more unified procurement-law jurisprudence, as envisioned by ADRA.

Third, the GAO should adopt procedures to improve the internal consistency of its decisions. For example, the GAO's bid-protest regulations currently leave to the hearing officer's discretion issues such as whether to grant a hearing, what additional evidence to consider, and how much weight to afford it. To constrain that discretion, the GAO should revise its bid-protest regulations to add formality and regularity to the bid-protest proceeding. In particular, the GAO regulations should be more rigorous in the instructions that govern the receipt and weight of evidence, and the GAO should consider again whether the value of evidentiary hearings outweighs the risk of confusion or obfuscation. As noted, APA review concerns the paper record of the agency action, not a post hoc reconstruction.<sup>205</sup> Restrictions on the permitted subject areas of testimony and clear and consistent rules on the conduct of evidentiary hearings would minimize the risk that procurement decisions will turn upon the ability of a government employee to survive hostile examination by skilled counsel of a protester.

CICA affords an automatic stay to any protester except those where the agency employs the override procedure.<sup>206</sup> Even in the absence of legislative change, the GAO can prevent abuse of the stay without action on the part of the affected agency. Under its rules, the GAO may dismiss an entire protest which lacks "a detailed statement of

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202. *Geo-Seis Helicopters*, 77 Fed. Cl. at 641. The opinion cites several GAO decisions that support this internal rule, including *Ivey Mech. Co.*, No. B-272764 (Comp. Gen. Aug. 23, 1996), *Varicon Int'l, Inc.*, No. B-255808, .2 (Comp. Gen. Apr. 6, 1994), *Fort Biscuit Co.*, 71 Comp. Gen. 392, 394 (May 12, 1992), and *Institute for Advanced Safety Studies*, No. B-221330.2 (Comp. Gen. July 25, 1986).

203. Fed. Acquisition Reg. § 52.215-1(c)(3)(ii)(A) (2005).

204. *See Geo-Seis Helicopters*, 77 Fed. Cl. at 641.

205. *See supra* notes 146–48 and accompanying text.

206. *See supra* note 35 and accompanying text.

the legal and factual grounds of protest” or which fails “to clearly state legally sufficient grounds of protest.”<sup>207</sup> Under CICA, the stay remains in effect “while the protest is pending.”<sup>208</sup> By adopting a more rigorous threshold review of the adequacy of a filed protest, the GAO can limit the procurement actions that are subject to a stay. A rapid dismissal of “nuisance” protests avoids the disruptive and costly effects of an unwarranted stay. GAO regulations establish the pleading elements necessary for sufficiency; for example, title 4, section 21.4(c)(8) of the Code of Federal Regulations requires a statement of the “form of relief requested.” The GAO should consider interpreting this rule, or amending it if necessary, to require some showing that the relief is justified and in the public interest. Since the stay is a predicate, if not integral, to the relief, the GAO may consider a protester’s *prima facie* assertions in support of relief in deciding whether to dismiss a protest for pleading inadequacy or legal insufficiency.<sup>209</sup>

Finally, the GAO should conduct a more robust inquiry into the relief warranted in the event it finds a violation of procurement law. The Comptroller General often proceeds directly to invalidate an award, or require recompetition, where it finds an agency’s decision unreasonable. The more nuanced COFC approach recognizes that the public interest is not always served by delaying a procurement to correct minor defects in a solicitation or errors in the conduct of a competition. GAO regulations at least suggest such an inquiry is appropriate: under title 4, section 21.8(b) of the Federal Code of Regulations, the Comptroller General is to “consider all circumstances surrounding the procurement” including “the seriousness of the

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207. 4 C.F.R. § 21.5(f) (2007). The GAO has relied upon this regulation to dismiss protests that are insufficiently specific as to the grounds for the protest. *See* Matter of Fed. Comp. Int’l Corp., B-257618 (Comp. Gen. July 14, 1994) (“Protesters must provide more than a bare allegation; the allegation must be supported by some explanation that establishes the likelihood that the protester will prevail in its claim of improper agency action.”). It has also invoked this clause to dismiss alternative arguments included in a protest, which the GAO has found patently meritless. *See, e.g.*, Impregilo Edilizia S.p.A., B-292468.4 (Comp. Gen. Nov. 25, 2003) (“Impregilo also notes that the agency’s reevaluation resulted in La Termica’s overall technical rating being increased from “satisfactory+” to good. While Impregilo may have disagreed with this change, its mere disagreement, absent any factual or legal basis indicating why La Termica’s rating was improper, does not present an adequate basis for protest.”); R.L. Sockey Real Estate & Const., Inc., B-286086 (Comp. Gen. Nov. 17, 2000) (“In addition, Sockey raises a number of complaints concerning the solicitation and evaluation process that do not allege any violation of regulation or statute, and thus do not state a valid basis of protest for our consideration.”).

208. 31 U.S.C. § 3553(c)(1) (2000).

209. Alternatively, we recommend that Congress consider amending CICA’s stay provision, 31 U.S.C. § 3553(c), to incorporate a threshold showing of the merits before a stay issues.

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 contracting agency's mission." These factors are rarely discussed at length in bid-protest decisions: a Westlaw search indicates that this provision was cited in only five decisions since 1997.<sup>210</sup> The GAO should develop an additional layer of scrutiny to the question of relief through case-by-case adjudication under the principles set forth in this regulation. This change would help to assure that the GAO's decisions highlight agency violations but also respect Congress's overarching goal of preserving an efficient procurement regime.

## VII. CONCLUSION

The preceding discussion has critically analyzed the GAO as a forum to resolve bid protests. The Comptroller General's adjudicative model has seeming allure due to cost and time savings, but it also has less desirable consequences regarding the robustness and accuracy of its decisions and the disruption it creates in federal procurement actions. In practice, the GAO bid-protest mechanism has engendered strategic gaming of the protest process that can delay agency action and thus defer the public's receipt of benefits of agency procurement for months at a cost little greater than postage. Given these incentives and the efficacy gap that exists between the GAO and its judicial counterpart, the Comptroller General's bid-protest mechanism imposes a cost upon the public and the procurement process that at times will be greater than the benefits achieved.

Given these institutional questions, this Article encourages reconsideration of deference owed to GAO bid-protest recommendations. While most GAO decisions are correctly decided, agencies have the right to exercise their statutory authority to disregard GAO decisions that they conclude are erroneous or contrary to the public interest. Awardees whose victories are threatened by GAO action should assist agencies in their assessment of GAO reasoning and

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210. Johnson Controls Security Sys., LLC., B-296490.6, .7 (Comp. Gen. May 31, 2007) (Request for Modification of Remedy); Lockheed Martin Sys. Integration, B-287190.2, .3 (Comp. Gen. May 25, 2001); Todd Pacific Shipyards Corp., B-281383 (Comp. Gen. Feb. 1, 1999); Comp. Sci. Corp., B-278466.2, .3 (Comp. Gen. May 11, 1998) (Reconsideration and Modification of Remedy); Department of the Navy, B-274944.4 (Comp. Gen. July 15, 1997) (Modification of Remedy). As the case titles indicate, in some of these cases the GAO considered its duty to conform its recommendation to the circumstances of the protest only after the agency prompted it to do so in a motion for reconsideration.

in the difficult decision of whether to disregard the Comptroller General's advice. While the COFC must consider GAO's decision during a follow-on-Tucker Act protest, that decision should be treated as an expert opinion or akin to an amicus brief, rather than as definitive authority entitled to presumed deference. Finally, the GAO should improve the quality of its decisions by recognition of COFC and Federal Circuit decisions and by improvements to its process.

All actors on the contemporary procurement stage, however, extend the GAO a largely unquestioned deference that now is an anachronism, at best. This practice is a holdover from an era in which generalist district courts looked to the Comptroller General as virtually the only source of accumulated expertise to navigate a difficult and sometimes obscure area of the law. ADRA's creation of the COFC as a judicial expert in the field, however, disrupts legacy habits and justifies rescission of such obedient deference. This Article also proposes improvements to the GAO process that should narrow any gap that separates the forums. These views are in line with the congressional intent reflected in both CICA and ADRA and reflect practical judgments drawn from a decade of experience with concurrent forums.

Congress has wisely chosen both to encourage use of the GAO as a prompt and relatively inexpensive means to answer procurement disputes and to assign the COFC as the exclusive judicial authority over almost all forms of federal-contract controversies (including bid protests). This Article's objective is to better reconcile the operation and effect of these two forums and to assure that the public interest is best served by consistency and accuracy in the adjudication of public-contract-award controversies.