Roadmap to Bid Protests at the U.S. Court of Federal Claims

By Adam Lasky

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Despite the fact that the U.S. Court of Federal Claims (COFC) has concurrent jurisdiction with the U.S. Government Accountability Office (GAO) over the vast majority of federal bid protests, GAO is the primary forum utilized by protesters—and by a wide margin. GAO handles approximately twenty-five times as many protests per year as the COFC.[1] While GAO does have certain advantages that attract protesters to that forum, this wide margin is likely less a result of the actual advantages provided to protesters in that forum and more a result of the misconceptions and lack of familiarity with the COFC protest process and the advantages of that forum.[2] This article sheds light on the bid protest process at the COFC, providing a guide on protest practice and procedure at that forum.[3]

COFC Protest Practice and Procedure

The Rules of the Court of Federal Claims (RCFC) incorporate the Federal Rules of Civil Procedure applicable to civil actions tried by a district court sitting without a jury, to the extent appropriate.[4] Appendix C of the RCFC, entitled "Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(B)," acts to supplement the RCFC and provides step-by-step guidance for filing a bid protest action in the COFC.[5]

Commencing a Protest

At least 24 hours before filing a protest with the COFC, the protester must provide prefiling notice to the court, the Department of Justice (DOJ),[6] the procuring agency's contracting officer, and the awardee.[7] The prefiling notice must state, among other things, whether the plaintiff contemplates requesting temporary or preliminary injunctive relief and whether the plaintiff has discussed the need for temporary or preliminary injunctive relief with DOJ counsel.[8] Failure to provide prefiling notice is not grounds for dismissal but may delay the initial processing of the case.[9]

In addition to the filing of a complaint (which is usually filed under seal),[10] a protester's initial filings will usually also include a motion to seal, a motion for a protective order, a proposed redacted complaint, a case cover sheet (COFC Form 2), and a Rule 7.1 disclosure statement. Some protesters also will include a motion for a temporary restraining order and preliminary injunction (and supporting memorandum) with their initial filings. However, because the need for temporary/preliminary injunctive relief is not usually known at the time of the initial filing, it sometimes makes more sense to wait on filing a motion for temporary/preliminary injunctive relief until after the initial status conference.

Shortly after the complaint is filed, the case will be assigned to one of the COFC judges, who will (generally within twenty-four hours) contact the parties to schedule an initial status conference to address relevant procedural and evidentiary issues,[11] including requests for temporary or preliminary injunctive relief[12] and motions for protective orders.[13] Usually, prior to the status conference, the DOJ counsel assigned to represent the agency in the protest will contact the protester to discuss a potential briefing schedule, as well as the need for temporary or preliminary injunctive relief during the pendency of the protest (i.e., whether the agency will agree to voluntarily stay award/performance of the protested contract during the pendency of the protest). Generally, at the initial status conference, the assigned COFC judge will discuss the need for temporary or preliminary injunctive relief and need for a protective order, and set the date for production of the administrative record, the briefing schedule and hearing date.

Temporary/Preliminary Injunctive Relief

When a protest is filed at GAO, and if that protest meets certain special timeliness requirements, the agency may not award the contract and/or must suspend performance of the contract during the pendency of the GAO protest.[14] This automatic stay of award or suspension of performance is commonly referred to as the "CICA stay."[15]

Unlike protests filed at GAO, there is no automatic CICA stay that applies to protests filed at the COFC. Instead, a protester wishing for the procurement or award to be halted during the pendency of the protest has two avenues of relief: (1) the agency agrees to voluntarily stay contract performance/award during the pendency of the protest or (2) the protester seeks a temporary restraining order or preliminary injunction from

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the COFC enjoining contract performance/award during the pendency of the protest.[16]

"On a motion for temporary injunctive relief, the court must weigh four factors: '(1) immediate and irreparable injury to the movant; (2) the movant's likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all the parties.'"[17] No one factor is necessarily dispositive, as "the weakness of the showing regarding one factor may be overborne by the strength of the others."[18]

Timeliness of Protest

In most cases there is no deadline, other than the applicable statute of limitations, for bringing a bid protest at the COFC.[19] However, the COFC has applied the doctrines of waiver and laches to bar protests in some limited circumstances.

The doctrine of waiver acts to bar any protest filed at the COFC premised upon patent errors in a solicitation, if the protester did not first raise these errors to the agency "before the close of the bidding process."[20] The COFC also has applied the waiver rule to bar challenges to agency corrective action decisions where the protest was filed after the due date for proposal resubmission following the challenged corrective action.[21] However, the waiver rule has been held not to apply in cases where the protester lacked knowledge of the alleged defect in the solicitation until after the close of bidding.[22]

In addition, in a few rare cases, the COFC has applied the doctrine of laches to bar a post-award protest, where the protester delayed in bringing its protest for an unreasonable and inexcusable length of time from the time after the protester knew or reasonably should have known of its basis for protest, and that delay caused economic prejudice to, or prejudiced the defense of, the defendant.[23] Absent "extraordinary circumstances," the COFC will not invoke laches to bar a protest.[24] However, even though a post-award protest at the COFC will rarely be denied or dismissed as untimely, the availability of injunctive relief is significantly diminished if the protest is not brought in a prompt manner.[25]

Intervention

When a bid protest action is brought at the COFC, other interested parties, specifically the awardee, may be permitted to intervene pursuant to RCFC 24(a). If a motion is timely filed,[26] the COFC must permit anyone to intervene "who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."[27] "In considering a motion to intervene under RCFC 24(a), the [COFC] must construe the rule's requirements in favor of intervention."[28]

While there is no requirement that an awardee (or other party eligible) intervene in a protest, choosing not to intervene is an extremely risky move, especially in light of a recent COFC decicion charging a contractor with constructive knowledge of information it would have learned had it intervened in an earlier protest involving the same procurement—and as a result, that contractor's later protest challenging corrective action was dismissed as untimely.[29]

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Jurisdiction and Standing

The COFC has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[30] To afford such relief, the COFC may "award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[31]

To possess standing to bring a bid protest, a plaintiff must be an "interested party," which encompasses any "actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[32] In a pre-award bid protest, the protester has "direct economic interest" if it has suffered a "non-trivial competitive injury which can be redressed by judicial relief."[33] In a post-award bid protest, the protester has a "direct economic interest" if it "would have had a 'substantial chance' of winning the award 'but for the alleged error in the procurement process.'"[34] This showing of "allegational prejudice" turns entirely on "the impact that the alleged procurement errors had on a plaintiff's prospects for award, taking the allegations as true."[35] In other words, to have standing, "a plaintiff must show that it would have had a substantial chance of being awarded the contract but for the combined impact of all agency decisions *alleged* to be unlawful."[36]

Standard of Review

In General

The COFC "reviews challenges to procurement decisions under the same standards used to evaluate agency actions

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under the Administrative Procedure Act, 5 U.S.C. § 706."[37] "Thus, to successfully challenge an agency's procurement decision, a plaintiff must show that the agency's decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[38] Accordingly, the COFC may set aside a procurement action if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure."[39]

When a bid protest is brought on the basis that the procurement procedure involved a violation of regulation or procedure, the disappointed bidder must show a "clear and prejudicial violation of applicable statutes or regulations."[40] This requires the protester to "show not only significant error in the procurement process, but also that the error prejudiced it."[41]

In order to demonstrate this "APA prejudice," the protester "must show that it would have had a substantial chance of being awarded the contract but for the combined impact of any agency decisions *adjudged* to be unlawful."[42] In this context, a protester need not establish with certainty that, but for the alleged error, it would have won the contract.[43] Rather, the "substantial chance of award" requirement is instead satisfied where, "but for the government's alleged error, the protestor would have been 'within the zone of active consideration.'"[44]

When a bid protest is brought on the basis that the procurement official's decision lacked a rational basis, the COFC reviews the procurement "to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion, and the disappointed bidder bears a heavy burden of showing that the award decision had no rational basis."[45] An agency decision lacks a rational basis (i.e., is arbitrary and capricious) where "the agency entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[46] "Despite this highly deferential standard, 'the [COFC] must still conduct a careful review to satisfy itself that the agency's decision is founded on a rational basis.'"[47]

There appears to be a difference of opinion between some COFC judges as to whether a protester must demonstrate APA prejudice if it has demonstrated that an irrational or arbitrary and capricious agency action has occurred. Some judges, after deeming agency action to be arbitrary, still have denied protests because the protester failed to demonstrate it was prejudiced by the agency's arbitrary or irrational action,[48] whereas other judges have held that "APA prejudice is presumed when the Government acts irrationally."[49]

"Second Bite" Protests

Where the protester fails to obtain its desired relief from GAO, the protester can seek relief by filing a new protest at the COFC.[50] These protests serve as a "second bite" at the apple.[51] In these cases, the subject of the COFC's review is the agency decision, not the GAO decision.[52] While the COFC, recognizing GAO's "longstanding expertise in the bid protest area," will give "due regard" to GAO's decision,[53] that decision has no binding effect on the COFC and "is given no deference."[54] In fact in some cases, where the record at the COFC materially differs from the record before GAO, or where the protest arguments were not fully developed at GAO, the COFC will give little if any weight to GAO's decision.[55]

Protests Challenging Corrective Action

In recent years, there has been a spike in protests challenging agency corrective action, in both frequency and success, and thus far the COFC has proved to be a more inviting forum for these protests than GAO.[56] Where a protester challenges a corrective action taken by the agency, the COFC's review will focus on the rationality of the agency's decision to take corrective action or, where applicable, the rationality of GAO's recommendation for that corrective action.

In order to "survive review, an agency's corrective action must be 'reasonable under the circumstances and appropriate to remedy the impropriety.'"[57] "To be reasonable, the agency's corrective action must be rationally related to the defect to be corrected."[58] The corrective action will not be reasonable if the rationale for the corrective action taken is not apparent from, and supported by, the administrative record.[59] Notably, some COFC judges have held that, to be reasonable, the agency's corrective action "must narrowly target the defects it is intended to remedy," while other COFC judges have not.[60] This difference in opinion as to the proper standard of review may be resolved by the Federal Circuit in 2018, where an appeal is currently pending involving this issue.[61]

Where the Agency takes corrective action based upon a recommendation from GAO, the review of a subsequent protest at the COFC challenging the agency's corrective action will focus on the rationality of the underlying GAO recommendation.[62] In such cases, "an agency's decision lacks a rational basis if it implements a GAO recommendation that is itself irrational."[63]

On the other hand, where the agency elects to take corrective action following a GAO decision sustaining a protest, but the agency's corrective action does not fully implement GAO's recommendation, and a subsequent protest is filed at the COFC challenging the corrective action, then it is the agency's corrective action decision that is the subject of judicial review, not the GAO recommendation.[64]

Finally, in the rare case where GAO sustains a protest, but the agency chooses not to take any corrective action (i.e., disregards GAO's recommendation[65]), and the protester files a subsequent protest at the COFC, "the agency's initial procurement decision (not the decision to eschew the recommendation) would be the topic of a resulting

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bid protest in court, and the deference given the agency's decision is not reduced due to the GAO's disagreement."[66]

Scope of the Record on Review

The Administrative Record

The scope of the COFC's review is generally confined to the administrative record, that is, to the record before the decision maker when the final award decision was made.[67] The COFC's rules enumerate a list of "core documents" as examples of the type of documents to be included in the administrative record.[68] However, this list is not exhaustive. The administrative record should include all "the information relied upon by the agency as it made its decision, as well as documentation of the agency's decision-making process."[69] The administrative record must be certified by the agency and filed with the court.[70]

Supplementing the Administrative Record

"In limited circumstances, a court may grant a party's request to supplement the administrative record."[71] Supplementation of the record is only permitted in cases where "the omission of extra-record evidence precludes effective judicial review."[72] Although supplementation of the administrative record is not common, "it is not prohibited and may be used when it is necessary for the COFC to gain a complete understanding of the issues before it."[73] Generally, the COFC will grant a motion to supplement the administrative record when supplementation is "necessary for a full and complete understanding of the issues."[74] In order to permit supplementation, the COFC first must determine that supplementation of the record is "necessary in order not 'to frustrate effective judicial review."[75]

"One of the basic reasons a record may be insufficient is when it is missing 'relevant information that by its very nature would not be found in an agency record—such as evidence of bad faith, information relied upon but omitted from the paper record, or the content of conversations.'"[76] Effective judicial review is not possible when the administrative record lacks such information.[77]

While determining whether to permit supplementation of the administrative record requires a very fact-specific inquiry, there are certain types of information that are commonly at the heart of a motion to supplement: materials that were before GAO in a preceding protest; information that the agency should have, but did not, consider in making the protested procurement decision; where the protester has made a threshold showing to support an allegation of bad faith or bias; and expert submissions/testimony on technical or complex matters that is necessary for a full and complete understanding of the issues.[78]

In connection with a motion to supplement the administrative record, a protester also may seek additional discovery, such as taking the deposition of, or propounding interrogatories to, the contracting officer or other agency officials involved with the source selection.[79] The COFC "does not lightly order discovery in a bid protest,"[80] and it would be "unusual" for the COFC to order discovery by deposition.[81] However, the COFC may authorize discovery in a bid protest "if necessary for effective judicial review" or if the "existing record cannot be trusted."[82] With respect to supplementing the record through additional discovery concerning government bias or bad faith, a protester is entitled to investigate bias if it can make a threshold showing of "motivation for the Government employees in question to have acted in bad faith or conduct that is hard to explain absent bad faith" and that "discovery could lead to evidence which would provide the level of proof required to overcome the presumption of regularity."[83] In the event a request for additional discovery is granted, the discovery should be targeted at "relevant information that by its very nature would not be found in an agency record."[84]

It is important to distinguish between supplementing the administrative record and correcting/amending the administrative record.

It is important to distinguish between supplementing the administrative record and correcting/amending the administrative record. In situations where documents should have been included in the administrative record (because they were before the agency at the time it made the challenged procurement decision or document that decision), but were initially omitted, a party may simply move to amend/correct the administrative record.[85]

Consideration of Evidence Respecting Relief

In addition to evidence in the administrative record, the COFC also will consider evidence respecting relief, such as evidence pertaining to prejudice and the factors governing injunctive relief.[86] Such evidence is admitted not as a supplement to the administrative record, but as part of the trial court's record of the case.[87]

Motions for Judgment on the Administrative Record and Hearings

Generally, bid protests are adjudicated by the COFC under its RCFC 52.1 procedure for cross-motions for judgment on the administrative record (MJAR), "a procedure for parties to seek the equivalent of an expedited trial on a 'paper record, allowing fact-finding by the trial court.'"[88] At the initial status conference, the COFC generally will set a briefing schedule for the parties' MJARs.[89]

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"Unlike a summary judgment proceeding, genuine issues of material fact will not foreclose judgment on the administrative record."[90] When deciding a MJAR, the COFC's inquiry is whether, "given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record."[91] The court resolves questions of fact by reference to the administrative record.[92]

Unlike at GAO where hearings are extremely rare,[93] in most COFC protests the COFC will hold a hearing whereby the parties will present oral argument on the merits of the protest, shortly after the completion of MJAR briefing.[94]

COFC Decisions and Relief

The COFC has discretion to award "any relief that the court considers proper, including declaratory and injunctive relief, except that any monetary relief shall be limited to bid preparation and proposal costs."[95] In limited circumstances, the COFC also may award attorneys' fees and expenses to the "prevailing party."[96]

Declaratory and Injunctive Relief

In the vast majority of protests, the primary relief sought by the protester will be a (1) declaration from the court that the protested agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and (2) a permanent injunction.[97] The protester has the burden of establishing entitlement to injunctive relief by a preponderance of the evidence.[98] To determine if a permanent injunction is warranted, the court must consider whether

(1) the plaintiff has succeeded on the merits;

(2) the plaintiff will suffer irreparable harm if the court withholds injunctive relief;

(3) the balance of hardships to the respective parties favors the grant of injunctive relief; and,

(4) the public interest is served by a grant of injunctive relief.[99]

"No individual factor is dispositive, but the Court must weigh each factor against the magnitude of the injunctive relief requested."[100] "The Court is not required to weigh each factor equally, and a strong showing of success on the merits can overcome weaknesses with respect to the other four factors."[101]

Monetary Relief

The COFC has conclusively held that protesters cannot recover expectation damages, such as lost profits, in a bid protest.[102] However, a protester "may recover the costs of preparing its unsuccessful proposal if it can establish that the Government's consideration of the proposals submitted was arbitrary or capricious"[103] or "where an agency conducted a procurement in violation of an applicable statute prejudicing the offeror."[104] To recover its bid and proposal costs, a protester must show that "(1) the agency committed a prejudicial error in conducting a procurement; (2) the error caused the protester to incur unnecessary bid preparation and proposal costs; and (3) the protester shows that the costs it seeks to recover were reasonable and allocable."[105] Though it is within the COFC's discretion to award bid and proposal costs in addition to injunctive relief,[106] the COFC will generally only award bid and proposal costs where the protester succeeds on the merits of its protest and injunctive relief is not appropriate.[107]

Beyond bid preparation costs, the Equal Access to Justice Act (EAJA) authorizes the COFC to award attorneys' fees and expenses to a limited class of prevailing protesters.[108] In order to prevail on an EAJA motion for fees and expenses, five conditions must be met:

> (1) the fee application must be submitted within 30 days of final judgment in the action and be supported by an itemized statement; (2) at the time the civil action was initiated, the applicant, if a corporation, must not have been valued at more than $7,000,000 in net worth or employed more than 500 employees; (3) the applicant must have been the "prevailing party" in a civil action brought by or against the United States; (4) the Government's position must not have been "substantially justified;" and (5) there cannot exist any special circumstances that would make an award unjust.[109]

Although very rarely exercised, the COFC also has the authority to order the agency to pay the protester's attorneys' fees under the court's authority to sanction a party or attorney.[110]

Bottom Line

While the natural inclination of a prospective protester may be to file a protest at GAO, prospective protesters need to take the time to meaningfully weigh the advantages and disadvantages of both forums to their particular protest, as there will be plenty of circumstances where the advantages of filing at the COFC (particularly the scope of discovery) outweigh the benefits of filing at GAO. This will be particularly true in the event that bid protest reform legislation, similar to that proposed in the past few years,[111] were to be enacted, as this legislation would likely significantly curtail major advantages to filing a protest at GAO.

Endnotes

1. The COFC reported that 124 protests were filed at the COFC in 2016, *see* West Government Contracts Year in Review—Covering 2016—Conference Briefs 6–10 (Thompson Reuters 2017), compared with 2,781 protests filed in FY 2016 at GAO. *See* GAO Bid Protest Annual Report to Congress for Fiscal Year 2016 (Dec. 15, 2016), *available at* http://www.gao.gov/assets/690/681662.pdf.

2. For a discussion of the comparative advantages of the COFC and GAO, see Adam K. Lasky, *Choosing the Best Forum for Filing Your Bid Protest—GAO vs. Court of Federal Claims*, Procurement Playbook (Feb. 2, 2017), https://www.procurementplaybook.com/2017/02/choosing-the-best-forum-for-filing-your-bid-protest-gao-vs-court-of-federal-claims.

3. For a discussion of the history of judicial bid protests

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and COFC's bid protest jurisdiction, see Adam K. Lasky, *Federal Bid Protests*, in Federal Government Construction Contracts 157–60 (Michael A. Branca et al. eds., 3d ed. 2017).

4. *See* R. Ct. Fed. Cl. Refs. & Annos.

5. *See id.* app. C.

6. Unlike at GAO, where the government is represented by agency counsel, at the COFC the government is represented by DOJ counsel.

7. R. Ct. Fed. Cl. app. C, ¶ II. The contents of the prefiling notice should comply with *id.* ¶ II(3) and be transmitted in accordance with *id.* ¶ II(2).

8. *Id.* ¶ II(3).

9. *Id.* ¶ II(2).

10. If the protester believes that its complaint, or material filed with the complaint, contains confidential or proprietary information and wishes to protect that information from public view, the protester must file a motion together with the complaint for leave to file the complaint under seal. *Id* ¶ III(4). The procedures for filing documents under seal is detailed in *id.* R. 5.5(d) and app. C, ¶¶ III(5)–(7).

11. *See id.* app. C, ¶ IV.

12. *Id.* ¶¶ IV(8)(c), V.

13. *Id.* ¶¶ IV(8)(d), VI. Protective orders are the "principal vehicle relied upon by the court to ensure protection of sensitive information." Motions for protective orders must meet the requirements of RCFC 10 and are issued at the court's discretion. Once a protective order is issued, individuals who seek access to protected information—with the exception of the court, the procuring agency, and the DOJ—must file an appropriate application to be admitted to the protective order. If admitted to the protective order, an individual becomes subject to the terms of the order. *Id.* ¶ VI. Forms for protective orders, and applications for admission to the order, are available in the RCFC Appendix of Forms. *See id.* Forms 8, 9, 10.

14. 31 U.S.C. § 3553(c)–(d).

15. *See* Favor Techconsulting, LLC v. United States, 129 Fed. Cl. 208, 211 (2016).

16. Fortunately for protesters, agencies will commonly agree to voluntarily stay award/performance of a protested contract during the pendency of a protest at the COFC. However, protesters should not take for granted that an agency will agree to a voluntary stay and should weigh the chances of obtaining, and the need for, a TRO when choosing whether to file their protest at GAO or the COFC.

17. Favor Techconsulting, LLC v. United States, No. 16-1365C, 2016 WL 6123571, at *1 (Fed. Cl. Oct. 19, 2016) (quoting U.S. Ass'n of Importers of Textiles & Apparel v. United States, 413 F.3d 1344, 1347–48 (Fed. Cir. 2005)). *But see* Cont'l Servs. Grp., Inc. v. United States, 130 Fed. Cl. 798, 800–01 (2017) (granting temporary restraining order in favor of a protester without a showing of likelihood of success on the merits—"since the Government has not yet produced the Administrative Record and the parties have not had an opportunity to brief the merits of this bid protest, the court is not in a position to decide Continental Services' likelihood of success").

18. *Favor Techconsulting*, 2016 WL 6123571, at *1 (quoting FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993)).

19. *See* PlanetSpace, Inc. v. United States, 92 Fed. Cl. 520, 531 (2010) ("This bid protest is properly before the court pursuant to 28 U.S.C. § 1491(b) and thus is governed by the Tucker Act's six-year statute of limitations set forth at 28 U.S.C. § 2501."); *see also* AgustaWestland N. Am., Inc. v. United States, 127 Fed. Cl. 793, 808–09 (2016) (dismissing protest on statute of limitations grounds where complaint was filed eight years after award). *But see* CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 569 (2004) ("Had Congress wanted to set a statute of limitations on bid protest actions, it would have done so.").

20. Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007).

21. NVE, Inc. v. United States, 121 Fed. Cl. 169, 173, 179 (2015) ("A party who participates in a second round of proposal submissions rather than protesting cannot subsequently challenge an agency's decision to reopen discussions or reevaluate proposals." (quoting Sheridan Corp. v. United States, 95 Fed. Cl. 141, 149–150 (2010))). However, in a recent case, the COFC extended this waiver principle to situations where the corrective action included involved action "akin to a reevaluation" of proposals, but no resubmission of proposals. *See* Sonoran Tech. & Prof'l Servs., LLC v. United States, No. 17-711C, 2017 WL 4640140, at *6–7 (Fed. Cl. Oct. 11, 2017).

22. *See* Allied Materials & Equip. Co. v. United States, 81 Fed. Cl. 448, 459–60 (2008).

23. *See* Nat'l Telecommuting Inst., Inc. v. United States, 123 Fed. Cl. 595, 602–03 (2015); Reilly v. United States, 104 Fed. Cl. 69, 80 (2012); Aircraft Charter Sols., Inc. v. United States, 109 Fed. Cl. 398, 409 (2013).

24. *PlanetSpace,* 92 Fed. Cl. at 531. In fact, some COFC judges have held that any "economic prejudice" predicated on the COFC issuing injunctive relief in the protest is not sufficient to invoke laches because injunctive relief is not the only available remedy to the protester. *See id.*; Furniture by Thurston v. United States, 103 Fed. Cl. 505, 516–17 (2012).

25. *See Furniture by Thurston*, 103 Fed. Cl. at 517, 521–22; CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 570, 578–79 (2004).

26. Ne. Military Sales, Inc. v. United States, 100 Fed. Cl. 100, 101–02 (2011) (denying awardee's motion to intervene, filed nearly two months after this protest and less than 48 hours before oral argument); Excelsior Ambulance Serv., Inc. v. United States, 126 Fed. Cl. 69 (2016) (awardee's motion to intervene denied where motion was brought after judgment had been entered in favor of the protester).

27. R. Ct. Fed. Cl. 24(a)(2).

28. Northrop Grumman Info. Tech., Inc. v. United States, 74 Fed. Cl. 407, 412 (2006). *But see* Nevada Site Sci. Support & Techs. Corp. v. United States, 128 Fed. Cl. 337, 337–38 (2016) (denying disappointed bidders' motion to intervene, even though if the plaintiff's protest was denied, the potential intervenors might receive the subsequent award, reasoning that "the simple fact that a party might benefit from another's legal misfortune does not lead to an understanding that said party should have a role in occurrence of that legal misfortune").

29. *See* Sonoran Tech. & Prof'l Servs., LLC v. United States, No. 17-711C, 2017 WL 4640140, at *6–7 (Fed. Cl. Oct. 11, 2017); *see also* Adam K. Lasky, *The U.S. Court of Federal Claims Just Changed the Calculus for Deciding Whether to Intervene in a Bid Protest*, Procurement Playbook (Oct. 24, 2017), https://www.procurementplaybook.com/2017/10/the-u-s-court-of-federal-claims-just-changed-the-calculus-for-deciding-whether-to-intervene-in-a-bid-protest/.

30. 28 U.S.C. § 1491(b)(1).

31. *Id.* § 1491(b)(2).

32. Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

33. CGI Fed. Inc. v. United States, 779 F.3d 1346, 1351 (Fed. Cir. 2015) (quoting Weeks Marine, Inc. v. United States, 575 F.3d 1352, 1361–62 (Fed. Cir. 2009)); Prof'l Serv. Indus., Inc. v. United States, 129 Fed. Cl. 190, 201 (2016).

34. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 200–01 (quoting Info. Tech. & Applications Corp. v. United States, 316 F.3d 1312, 1319 (Fed. Cir. 2003)).

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35. Linc Gov't Servs., LLC v. United States, 96 Fed. Cl. 672, 695 (2010).

36. *Id.* at 696 (italics in original).

37. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 202 (citing 28 U.S.C. § 1491(b)(4)).

38. *Id.*

39. Nat'l Air Cargo Grp., Inc. v. United States, 127 Fed. Cl. 707, 717 (2016) (quoting Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

40. Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009); Precision Images, LLC v. United States, 79 Fed. Cl. 598, 615 (2007).

41. *See* Galen Med. Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (quoting Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996)); McConnell Jones Lanier & Murphy LLP v. United States, 128 Fed. Cl. 218, 238 (2016).

42. Linc Gov't Servs., LLC v. United States, 96 Fed. Cl. 672, 696 (2010).

43. Overstreet Elec. Co., Inc. v. United States, 47 Fed. Cl. 728, 743 (2000).

44. Preferred Sys. Solutions, Inc. v. United States, 110 Fed. Cl. 48, 57 (2013) (quoting Allied Tech. Group, Inc. v. United States, 94 Fed. Cl. 16, 37 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011)). This inquiry into prejudice ("APA prejudice") is distinct from the inquiry into prejudice for standing ("allegational prejudice"). See *Linc*, 96 Fed. Cl. at 695–96.

45. *Centech Grp.*, 554 F.3d at 1037; Sys. Dynamics Int'l, Inc. v. United States, 136 Fed. Cl. 499, 514 (2017); Linc Gov't Servs., LLC v. United States, 108 Fed. Cl. 473, 488 (2012); *see also Precision Images*, 79 Fed. Cl. at 614 ("courts have recognized that contracting officers are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process" (citations omitted)).

46. Algese 2 s.c.a.r.l. v. United States, 128 Fed. Cl. 7, 10 (2016) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); *Precision Images*, 79 Fed. Cl. at 614); *see also* Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1058 (Fed. Cir. 2000) (standard of review is "highly deferential" and requires the reviewing court to sustain agency action "evincing rational reasoning and consideration of relevant factors" (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 283 (1974))); Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) (Where the court finds a reasonable basis for an agency's action, it "stay[s] its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations." (quoting M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1301 (D.C. Cir. 1971))).

47. *Precision Images*, 79 Fed. Cl. at 615 (quoting AmerisourceBergen Drug Corp. v. United States, 60 Fed. Cl. 30, 35 (2004)).

48. *See, e.g.*, Archura LLC v. United States, 112 Fed. Cl. 487, 498 (2013) ("This leads the court to conclude that the government arbitrarily treated Archura differently when it failed to consider Archura's proposal in its final best value determination. . . . Nonetheless, for the reasons that follow, the court finds that the government's failure to formally consider Archura in the best value evaluation did not prejudice Archura and thus Archura is not entitled to relief."); HWA, Inc. v. United States, 78 Fed. Cl. 685, 702–04 (2007) (holding that even though protester had shown the agency lacked a rational basis in its evaluation of the protester's personal qualifications, the agency's error was not prejudicial and therefore the protest was denied).

49. *See, e.g.*, Caddell Constr. Co. v. United States, 125 Fed. Cl. 30, 50 (2016) (citing *Centech Grp*, 554 F.3d at 1037; Banknote Corp. of Am. Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004)); Textron, Inc. v. United States, 74 Fed. Cl. 277, 329 (2006) ("[The APA] prejudice analysis, however, should be reached only when the protestor has shown violation of an applicable procurement regulation. If the court finds that the Government has acted arbitrarily and capriciously, the analysis stops at that finding. There should be no need to continue to prejudice, because a finding that the Government has acted arbitrarily and capriciously necessarily invalidates the procurement, and the court must enjoin the procurement award or enjoin performance under an award already made, and the court also may enjoin award to any proposer [other] than the protestor.").

50. *See, e.g.*, Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 221–22 (2016).

51. *See* The Ravens Grp., Inc. v. United States, 79 Fed. Cl. 100, 115 (2007) ("Bid protest jurisprudence permits a disappointed bidder to have a second bite in this forum if its GAO challenge is not successful.").

52. *See* Cubic Applications, Inc. v. United States, 37 Fed. Cl. 339, 341 (1997); Analytical & Research Tech. v. United States, 39 Fed. Cl. 34, 41 & n.7 (1997); Nilson Van & Storage v. United States, No. 10-716C, 2011 WL 477704, at *1 (Fed. Cl. Feb. 7, 2011) ("When this court exercises jurisdiction over a bid protest under 28 U.S.C. § 1491(b), it considers the protest independently of any prior protests that may have occurred before the agency or before GAO."); CBY Design Builders v. United States, 105 Fed. Cl. 303, 339 (2012) ("When the GAO denies a bid protest, and finds the agency decision reasonable, the GAO decision drops out of the equation when a subsequent protest is brought in our court."); *see also* Innovative Mgmt. Concepts, Inc. v. United States, 114 Fed. Cl. 257, 257–58 (2014) (the COFC dismissed the plaintiff's protest for failure to state a claim for which relief may be granted, where the plaintiff's complaint requested relief in the form of the COFC ruling that GAO's earlier decision, denying the plaintiff's protest, lacked a rational basis and violated the applicable laws and regulations).

53. *See* Gentex Corp. v. United States, 58 Fed. Cl. 634, 636 n.3 (2003).

54. *See* Data Mgmt. Servs. Joint Venture v. United States, 78 Fed. Cl. 366, 371 n.5 (2007) ("While we give serious consideration to GAO's reasoned explications of procurement law, its decision with respect to any particular procurement is given no deference."); *Nilson Van & Storage*, 2011 WL 477704, at *2 ("The court in rendering its decision on a protest takes any prior GAO decision into account but does not accord it weight apart from its power to persuade."); One Largo Metro, LLC v. United States, 109 Fed. Cl. 39, 85 (2013) ("Decisions of the GAO are treated as expert opinions, which the court should 'prudently consider.'"); S.K.J. & Assocs., Inc. v. United States, 67 Fed. Cl. 218, 224 (2005) ("Should a bidder pursue its challenge to the bid award with GAO, GAO's ultimate determination is not binding upon the agency or this court; rather, it serves as a recommendation that becomes a part of the administrative record."); *see also* Sigmatech, Inc. v. United States, 130 Fed. Cl. 792, 794 (2017) ("the United States Court of Federal Claims has ruled in approximately thirty cases that the GAO decision was erroneous").

55. *See, e.g., Gentex*, 58 Fed. Cl. at 636 n.3 ("In this case, Gentex's allegation regarding the unfair evaluation of Scott's noncompliant battery solution and CAIV tradeoff was not as fully developed at GAO as it has been in this forum."); Fed. Acquisition Servs. Team, LLC v. United States, 124 Fed. Cl. 690, 707 (2016) ("Although not necessary for FAST to prevail, the Court concludes that the agency's failure to disclose to the GAO the full extent of problems encountered by offerors in

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e-mailing their proposals, and its application of the Government Control exception to the benefit of another offeror, was to plaintiff's prejudice by preventing a fully informed consideration of the protest grounds raised by FAST.").

56. *See* Stuart B. Nibley & Amy M. Conant, *Corrective Action Update: The Expanding Universe of Possible Grounds to Protest Agency Corrective Action*, Procurement Law., Fall 2017, at 1, 17.

57. Prof'l Serv. Indus., Inc. v. United States, 129 Fed. Cl. 190, 203 (2016) (quoting Amazon Web Servs., Inc. v. United States, 113 Fed. Cl. 102, 115 (2013)).

58. *See* Sheridan Corp. v. United States, 95 Fed. Cl. 141, 151 (2010).

59. *Prof'l Serv. Indus.*, 129 Fed. Cl. at 204; *Sheridan Corp.*, 95 Fed. Cl. at 151.

60. *Compare Amazon*, 113 Fed. Cl. at 115–16 (holding that GAO's recommendation to reopen the competitive process based on two discrete defects pertaining to the evaluation of proposal, especially after considerable information regarding the competition and agency's evaluation of the winning bid had been disclosed to the party filing the bid protest, was overbroad and undermined the integrity of the procurement process, and the agency's decision to follow GAO's recommendation was arbitrary and capricious), *and* Dell Fed. Sys., L.P. v. United States, 133 Fed. Cl. 92, 104–06 (2017) ("In sum, it was irrational for the Army to fail to consider clarifications and reevaluation of proposals as a more natural expedient for the minor clerical errors it had identified. The Army instead opened wide-reaching discussions with all remaining offerors and allowed all offerors to submit modified proposals with new prices, despite having disclosed the awardees' winning prices. This is manifestly overbroad; in fact, it is akin to killing an ant with a sledgehammer when a rolled-up newspaper would have sufficed. Therefore, the Court finds that the Army's corrective action is not rationally related to any procurement defects."), *with Prof'l Serv. Indus.*, 129 Fed. Cl. at 203 ("PSI argues nonetheless that the Court should apply a 'narrow targeting' or 'narrow tailoring' requirement to an agency's decision to take a particular corrective action. This argument, however, is unpersuasive. Legal standards that impose narrow tailoring or narrow targeting requirements on government action are employed in cases where courts apply heightened scrutiny to such actions. Because protested procurement actions are reviewed under a deferential reasonableness standard, it would not be appropriate to apply a narrow targeting or tailoring requirement to an agency's decision to take corrective action. Therefore, the Court will consider whether FHWA's corrective action was reasonable under the circumstances and whether it is supported by the administrative record." (internal citation omitted)). *See also* Novak Birch, Inc. v. United States, 132 Fed. Cl. 578, 602 (2017) (discussing conflicting standards).

61. *See* Dell Fed. Sys., L.P. v. HPI Fed., LLC, Nos. 2017-2516, 2017-2535, 2017-2554 (Fed. Cir.) (appealing *Dell Fed. Sys*, 133 Fed. Cl. 92).

62. *See Amazon*, 113 Fed. Cl. at 106 (citing Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1383 (Fed. Cir. 2011)); PricewaterhouseCoopers Pub. Sector, LLP v. United States, 126 Fed. Cl. 328, 352 (2016); Analytical & Research Tech. v. United States, 39 Fed. Cl. 34, 41 n.7 (1997) ("The Federal Circuit reviewed the propriety of the GAO's decision, as well as the decision of the agency, because the agency had changed its conduct in response to the GAO's recommendation." (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647–49 (Fed. Cir. 1989))). "[I]t makes no difference whether the GAO's recommendation was made in a written decision sustaining a protest, in an electronic-mail message addressing the merits of a protest, or during an outcome prediction conference . . . because the GAO's recommendations, in any form, are never binding on a procuring agency." Raytheon Co. v. United States, 121 Fed. Cl. 135, 152, *aff'd*, 809 F.3d 590 (Fed. Cir. 2015).

63. *See Amazon*, 113 Fed. Cl. at 106 (quoting *Turner Constr.*, 645 F.3d at 1383); *see also Prof'l Serv. Indus*., 129 Fed. Cl. at 203 ("a procuring agency's decision to follow GAO's recommendation is proper, even where that recommendation differs from the contracting officer's initial decision, 'unless [GAO's] decision itself was irrational.'" (quoting Centech Grp., Inc. v. United States, 554 F.3d 1029, 1039 (Fed. Cir. 2009))).

64. *See Prof'l Serv. Indus.*, 129 Fed. Cl. at 203–04 (an agency cannot assert the rationality of a GAO recommendation as a defense to its corrective action where the record fails to establish the agency's corrective action implemented GAO's recommendation); Starry Assocs., Inc. v. United States, 127 Fed. Cl. 539, 546–50 (2016). Similarly, where the agency elects to take corrective action in response to a GAO protest, but before GAO issues a recommendation, and a subsequent protest is filed at the COFC challenging that corrective action, it is the agency's corrective action decision that is the subject of judicial review. *See Sheridan Corp*., 95 Fed. Cl. at 151–54.

65. Though technically GAO decisions are merely recommendations and an agency is not bound to follow the decision—*see* 4 C.F.R. § 21.8(a); The Centech Grp., Inc. v. United States, 78 Fed. Cl. 496, 507 (2007)—in practice it is very rare for an agency to choose not to implement GAO's recommendation. For example, GAO reported that in Fiscal Year 2016, no agency failed to fully implement a recommendation in a GAO protest decision. *See* GAO Bid Protest Annual Report, *supra* note 1, at 4. "Congress contemplated and intended that procurement agencies normally would follow the Comptroller General's recommendation. Congress viewed an agency's failure to do so as sufficiently unusual as to require the agency to report such noncompliance to the Comptroller General and to require the latter annually to inform Congress of any instances of noncompliance." *Honeywell*, 870 F.2d at 648.

66. CBY Design Builders v. United States, 105 Fed. Cl. 303, 340 (2012).

67. Advanced Data Concepts, Inc. v. United States, 43 Fed. Cl. 410, 416 (1999) (citing Camp v. Pitts, 411 U.S. 138, 142 (1973)); Rotech Healthcare, Inc. v. United States, 121 Fed. Cl. 387, 395, (2015). *See also* Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1379 (Fed. Cir. 2009) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973))).

68. R. Ct. Fed. Cl. app. C, ¶ VII(22).

69. Kerr Contractors, Inc. v. United States, 89 Fed. Cl. 312, 335 (2009); *see also* MG Altus Apache Co. v. United States, 102 Fed. Cl. 744, 752 (2012) ("The [administrative record] should contain all relevant information on which the agency relied or allegedly should have relied in making the challenged decision."). The broad scope of the administrative record in a COFC protest is a major advantage for a protester at the COFC, in contrast to GAO, where the agency report is only required to include the documents relevant to protest arguments raised. *See* 4 C.F.R. § 21.3(d).

70. R. Ct. Fed. Cl. 52.1. At the initial status conference, the COFC will generally set a deadline for the government to file the administrative record. The deadline will vary based on the need for temporary injunctive relief, the history of the procurement, and the scope and breadth of the record at issue, but is generally set for a few weeks after the status conference.

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71. E-Mgmt. Consultants, Inc. v. United States, 84 Fed. Cl. 1, 11 (2008) (citing Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)).

72. *Axiom*, 564 F.3d at 1380 (quoting Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)); Starry Assocs., Inc. v. United States, 125 Fed. Cl. 613, 621 (2015) (supplementation of the administrative record "is warranted only when it is necessary to ensure effective judicial review").

73. Dyncorp Int'l, LLC v. United States, 125 Fed. Cl. 1, 2 (2016).

74. *Id.*

75. *Axiom*, 564 F.3d at 1381 (quoting Camp v. Pitts, 411 U.S. 138, 142–43 (1973)).

76. Palantir USG, Inc. v. United States, 129 Fed. Cl. 218, 237 (2016) (quoting Tech Sys., Inc. v. United States, 97 Fed. Cl. 262, 265 (2011)).

77. *Starry*, 125 Fed. Cl. at 621–22 (As this court has recognized on several occasions, "rare indeed would be the occasions when evidence of bad faith will be placed in an administrative record." . . . Courts have therefore "traditionally considered extra-record evidence in assessing alleged bias or bad faith." (internal citations omitted)).

78. *See* Jonathan D. Shaffer et al., *Establishing the Record in Court of Federal Claims Bid Protests*, Briefing Papers, no. 12-10, Sept. 2012, at 1, 7–14.

79. *See* Midwest Tube Fabricators, Inc. v. United States, 104 Fed. Cl. 568, 574 (2012) (granting motion to supplement the administrative record by taking deposition of contracting officer); Vanguard Recovery Assistance v. United States, 99 Fed. Cl. 81, 88, 99–100 (2011) (granting motion to supplement the administrative record by taking deposition of contracting officer's technical representative); Pitney Bowes Gov't Sols., Inc. v. United States, 93 Fed. Cl. 327, 332–36 (2010) (granting motion to supplement the administrative record by taking deposition of contracting officer and members of the technical evaluation panel); Fed. Acquisition Servs. Team, LLC v. United States, No. 15-78C, 2015 WL 892444, at *2–3 (Fed. Cl. Feb. 24, 2015) (requiring contracting officer to respond to limited interrogatories from the protester).

80. Diversified Maint. Sys., Inc. v. United States, 93 Fed. Cl. 794, 804 (2010).

81. *Starry*, 125 Fed. Cl. at 621.

82. *See Diversified Maint. Sys.*, 93 Fed. Cl. at 802 (citing Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1380 (Fed. Cir. 2009)); *Pitney Bowes*, 93 Fed. Cl. at 332 ("allowing for deposition testimony of the contracting officer or other governmental official in a bid protest, where appropriate, 'may enable the court to satisfy its statutory duty to give due regard to the need for expeditious resolution of the action'" (quoting Asia Pac. Airlines v. United States, 68 Fed. Cl. 8, 18–19 (2005))).

83. *Starry*, 125 Fed. Cl. at 622 (quoting Beta Analytics Int'l, Inc., v. United States, 61 Fed. Cl. 223, 226 (2004)).

84. *Diversified Maint. Sys., Inc.*, 93 Fed. Cl. at 802 (quoting L–3 Commc'ns Integrated Sys., L.P. v. United States, 91 Fed. Cl. 347, 354 (2010)).

85. *See, e.g.*, ACC Constr. Co., Inc. v. United States, 122 Fed. Cl. 663, 664 (2015); Sci. & Mgmt. Res., Inc. v. United States, 117 Fed. Cl. 54, 63 (2014); Linc Gov't Servs., LLC v. United States, 108 Fed. Cl. 473, 486 n.6 (2012); MORI Assocs., Inc. v. United States, 98 Fed. Cl. 572, 575 (2011); PlanetSpace, Inc. v. United States, 90 Fed. Cl. 1, 10–11 (2009) (granting motion to correct administrative record to add an interagency memorandum that was directly relied upon by the agency to reach its source selection decision).

86. *See* Ashbritt Inc. v. United States, 87 Fed. Cl. 344, 367 (2009) ("Evidence directed at prejudice and remedy necessarily would not be before an agency decision maker effecting a procurement decision such as a source selection award."); State of N.C. Bus. Enterprises Program v. United States, 110 Fed. Cl. 354, 362 (2013) ("the court has permitted the use of extrinsic evidence to prove matters that were not before the agency but that are nonetheless properly before the court—matters such as prospective relief and prejudice"); CW Gov't Travel, Inc. v. United States, 110 Fed. Cl. 462, 483–84 (2013); *PlanetSpace, Inc.*, 90 Fed. Cl. at 5–10.

87. *See Ashbritt*, 87 Fed. Cl. at 367; *CW Gov't Travel*, 110 Fed. Cl. at 483–84; *PlanetSpace*, 90 Fed. Cl. at 5; *see also* McAfee, Inc. v. United States, 111 Fed. Cl. 696, 714 n.18 (2013) ("In a bid protest, the parties build a factual record respecting equitable relief that largely exits independently from the administrative record of the procurement. . . . The court accordingly admits into the record of the case those declarations that pertain to prejudice and injunctive relief."); East West, Inc. v. United States, 100 Fed. Cl. 53, 57–58 (2011) (admitting declaration from protester's vice president, which "purports to explain how the allegedly misleading communications from the agency induced East West to make competitively-fatal changes to its proposal," as a "part of the court's record for purposes of any prejudice determinations").

88. Elec. On-Ramp, Inc. v. United States, 104 Fed. Cl. 151, 158 (2012) (quoting Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005)).

89. In most cases, the COFC will require the protester to file its MJAR first, usually a few weeks after the filing of the administrative record. The next deadline, usually a few weeks later, will be for the government (and any intervenor-defendant) to file its cross-MJAR and response to the protester's MJAR. The protester will then have an opportunity to file a reply/response, which is followed finally by the government (and any intervenor-defendant) filing its reply. However, some COFC judges in certain cases will set the briefing schedule such that all parties must file their MJARs and cross-MJARs simultaneously, and then all file their responses and replies simultaneously as well.

90. Strategic Bus. Sols., Inc. v. United States, 129 Fed. Cl. 621, 627 (2016) (citing *Bannum*, 404 F.3d at 1356).

91. Parcel 49C Ltd. P'ship v. United States, 130 Fed. Cl. 109, 120 (2016) (quoting A & D Fire Prot., Inc. v. United States, 72 Fed. Cl. 126, 131 (2006)).

92. *Elec. On-Ramp*, 104 Fed. Cl. at 158 (2012) (citing *Bannum*, 404 F.3d at 1355–56).

93. In Fiscal Year 2016, hearings were only conducted in 2.51% of fully developed cases at GAO. *See* GAO Bid Protest Annual Report, *supra* note 1.

94. *See, e.g.*, KWR Constr., Inc. v. United States, 124 Fed. Cl. 345, 349 (2015) ("Briefing was completed on October 19, 2015 and oral argument was held on October 29, 2015.").

95. 28 U.S.C. § 1491(b)(2).

96. *Id.* § 2412(d)(1).

97. *See, e.g.*, Prof'l Serv. Indus., Inc. v. United States, 129 Fed. Cl. 190, 200 (2016).

98. *See* Caddell Constr. Co. v. United States, 125 Fed. Cl. 30, 54 (2016).

99. Centech Grp., Inc. v. United States, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citing PGBA, LLC v. United States, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004)); *Caddell Constr.*, 125 Fed. Cl. at 54.

100. *Caddell Constr.*, 125 Fed. Cl. at 54 (citing Standard Havens Prods. v. Gencor Indus., 897 F.2d 511, 513 (Fed. Cir. 1990)).

101. *Id.* (citing FMC Corp. v. United States, 3 F.3d 424,

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427 (Fed. Cir. 1993)).

102. *See* Ala. Aircraft Indus., Inc.–Birmingham v. United States, 85 Fed. Cl. 558, 563 (2009) ("Precedents conclusively established that a disappointed offeror did not have a right to recover *lost profits* from the government in a bid protest."); Rotech Healthcare Inc. v. United States, 71 Fed. Cl. 393, 430 (2006) (unsuccessful bidder could not recover lost profits because contract under which bidder would have made such profits never came into existence).

103. CNA Corp. v. United States, 83 Fed. Cl. 1, 5 (2008) (quoting E.W. Bliss Co. v. United States, 77 F.3d 445, 447 (Fed. Cir. 1996)).

104. CMS Contract Mgmt. Servs. v. United States, 123 Fed. Cl. 534, 536 (2015); *see also Caddell Constr.*, 125 Fed. Cl. at 52 (characterizing bid and proposal costs as "reliance damages").

105. *CMS Contract Mgmt. Servs.*, 123 Fed. Cl. at 536 (citing Reema Consulting Servs., Inc. v. United States, 107 Fed. Cl. 519, 532 (2012)); *see also Caddell Constr.*, 125 Fed. Cl. at 52 (bid and proposal costs are recoverable if the disappointed bidder "wasted its costs because the Government breached its obligation to consider the [protester's] proposal fairly, thus implicating the harm or prejudice caused by such a wasteful loss of effort and expense").

106. *See CMS Contract Mgmt. Servs.*, 123 Fed. Cl. at 537 (citing 28 U.S.C. § 1491(b)(2)).

107. *See* Afghan Am. Army Servs. Corp. v. United States, 90 Fed. Cl. 341, 369 (2009); J.C.N. Constr., Inc. v. United States, 107 Fed. Cl. 503, 518 (2012); KWR Constr., Inc. v. United States, 124 Fed. Cl. 345, 364 (2015); *Reema Consulting*, 107 Fed. Cl. at 532–33; Insight Sys. Corp. v. United States, 115 Fed. Cl. 734, 739 (2014). *But see CMS Contract Mgmt. Servs.*, 123 Fed. Cl. at 537 (awarding bid and proposal costs, in addition to injunctive relief, where the protester would need to significantly revise its existing proposal based on whether the agency re-initiated the procurement in conformance with the injunction, and the agency essentially caused the incurrence of the proposal preparation costs by requiring offerors to go forward with their proposals while protests were pending at the GAO); Guzar Mirbachakot Transp. v. United States, 104 Fed. Cl. 53, 68–69 (2012) (post-award bid protester would be awarded partial bid and proposal costs; court imposed injunction requiring government to evaluate protester's original proposal, so protester would have the opportunity to compete using the proposal it had already submitted, but costs protester incurred in reorganizing its original proposal and resending it to eliminate "zip" files in an attempt to timely submit proposal to government were recoverable because costs represented unnecessary and wasted efforts incurred because of ambiguity in solicitation language.); Red River Holdings, LLC v. United States, 87 Fed. Cl. 768, 792 (2009) (where protest was sustained on the merits, but due to national security concerns the court only ordered partial injunctive relief, the protester also was entitled to recover bid preparation costs because protester would have no opportunity to recompete for a portion of the work).

108. *See* 28 U.S.C. § 2412 (Equal Access to Justice Act, providing for attorneys' fees and costs for successful protesters whose net worth and/or workforce do not exceed statutory limits).

109. WHR Grp., Inc. v. United States, 121 Fed. Cl. 673, 676 (2015) (citing 28 U.S.C. § 2412(d)(1)(A), (B)); Dellew v. United States, 127 Fed. Cl. 85, 87 (2016).

110. *See* Sigmatech, Inc. v. United States, 126 Fed. Cl. 388, 126 Fed. Cl. 618 (2016) (ordering the agency to pay the protester $55,714 in attorneys' fees as a sanction for failing to produce an accurate and complete administrative record until 55 days after it was due and after the protester had completed briefing); Coastal Envtl. Grp., Inc. v. United States, 118 Fed. Cl. 15, 38 (2014) (sanctioning agency and requiring it to pay a portion of protester's attorneys' fees and expenses as a result of misconduct during the protest by the contracting officer in preparing an inaccurate backdated document and including that document in the supplemental administrative record, and falsely certifying that the supplemental administrative record was accurate).

111. The Senate proposed language in its versions of the NDAA for FY 2017 and FY 2018 that would require a large protester (over $100 million in annual revenue) to pay the government's protest costs if their protest is denied by GAO, would put a hold on any payments (other than incurred costs) that an incumbent protester earned from a bridge contract received as result of a *GAO protest*, and would not release those payments unless/until the protest is sustained by GAO or the agency takes corrective action. *See* NDAA FY 2017, S. 2943, § 821 (as passed by Senate, June 21, 2016); NDAA FY 2018, S. 1519, § 821 (as placed on Senate calendar, July 10, 2017). To date, the only reform that has been enacted is a limited version of the Senate's proposal to have protest losers pay the government's protest costs (the Department of Defense will conduct a three year pilot program, likely to start in late 2019, to determine the effectiveness of requiring contractors with annual revenues over $250 million to reimburse the Department of Defense for costs incurred in processing GAO protests concerning Department of Defense procurements that are denied by GAO in their entirety). See NDAA FY 2018, H.R. 2810, § 827 (Enrolled Bill). However, the Senate could very well re-propose the other protest reforms in the future.

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