

White Paper
Recommendations for the
Bid Protest Group
of the
United States Court of Federal Claims
Advisory Council
Submitted by the
Inter-Agency Working Group on
Federal Court Disappointed Offeror Litigation
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I. Introduction.

In light of the recent amendments to 28 U.S.C. § 1491, See footnote 1 Chief Judge Loren Smith established the Bid Protest Group of the United States Court of Federal Claims Advisory Council. The group includes Judges of the Court and members of the private and public bars. On March 4, 1997, the group held its first meeting. The group intends to gather and review information on disappointed offeror litigation practice and procedure and submit a report to the Advisory Council.

At the request of the Bid Protest Group, the Inter-Agency Working Group on Federal Court Disappointed Offeror Litigation submits this White Paper. The White Paper contains recommendations and analysis on a broad range of issues related to disappointed offeror litigation before the Court. The White Paper reflects the general consensus of a diverse group of experienced government attorneys rather than the specific views of any given agency. See footnote 2

We intend this information to assist the various subcommittees of the Bid Protest Group in completing their work. We also encourage the liberal copying and use of any information contained in this White Paper, without need for attribution, in any related educational or instructional materials.

II. There Is A Need For Court Guidance.

Initially, we believe the Court generally should process disappointed offeror litigation in a manner similar to the traditional administrative protest forum, the General Accounting Office (GAO). GAO has extensive experience with protests and has established the benchmark against which any judicial forum inevitably will be measured. In addition, both Government and civilian practitioners are familiar with the administrative protest practice, and procedures are in place to respond to such protests without undue difficulty.

One of the most attractive features of GAO practice is the clear legal procedural guidance promulgated by GAO. Extensive rules and helpful GAO guidelines are readily available to the public, in both the Code of Federal Regulations and through a GAO publication. We believe that all parties will benefit if the Court is able to communicate similar information, whether through rules or guidance, to the public. Publication of this information could reduce the number of improperly filed suits, the amount of inefficient jurisdictional motions practice, the resources devoted to procedural disputes, and the cumulative disruption to the Federal procurement system.

We further encourage the Court, to the extent possible, to closely track GAO's published bid protest rules and precedent. Maintaining consistent administrative and judicial precedent is essential to the orderly conduct of the Government's business. The substantial body of existing bid protest decisional precedent affects millions of procurement actions taken each year. Disparity in jurisdictional matters can potentially disrupt the conduct of procurements in ways that are not readily apparent. Commerce functions most efficiently when rules are clear and are applied in a consistent manner. People engage in market transactions based upon certain expectations regarding the process. To the extent that the Court diverges significantly from established precedent, uncertainty will result, at the expense of the orderly conduct of the Government's business.

III. The Court Should Clearly Articulate The Standard And The Scope of Review.

- A. The Court's Standard Should Require Demonstration of Prejudicial Error With A Clear and Convincing Showing That The Plaintiff Had a Reasonable Likelihood of Receiving Award But For the Alleged Agency Error.

The new statute prescribes that the United States Court of Federal Claims (the Court) and the Federal district courts are to review the agency's procurement decision pursuant to the Administrative Procedure Act standard set forth in 5 U.S.C. § 706. Thus, the new statute adopts the established standard of judicial review of administrative agency actions. Consequently, the Court should only set aside an agency procurement action when it is necessary to correct a clear and prejudicial abuse of discretion or a clear and prejudicial failure on the part of the agency to comply with procurement laws and regulations. Absent such an abuse or failure to comply with the law, the Court should defer to the judgment of the agency official

who made the challenged decision. In resolving these matters, the Court should bear in mind that the agency decision need not be the only reasonable one or the decision the Court would have reached if it had been responsible for the action.

Deference to the agency is the norm in judicial review of many types of agency actions. In applying this standard to procurement decisions, such deference is particularly appropriate because the agency is essentially making a business decision directed toward fulfilling an agency requirement. Disappointed offeror litigation does not arise from the adjudication of an entitlement or right.

To constitute an abuse of discretion, the agency decision must be determined to have been arbitrary and capricious, that is, "wholly without reason." The Court applied this standard in its February 25, 1997 decision on the merits in *Cubic Applications, Inc. v. United States*, No. 97-29C, 1997 WL 76781 (Fed. Cl., Feb. 25, 1997). The Court also used this standard in pre-award cases in exercising its jurisdiction before the new statute expanded the Court's jurisdiction to hear post-award protests. See *Compubahn, Inc. v. United States*, 33 Fed. Cl. 677 (1995) (considering a protest of non-selection of claimant's proposal for an award as an alleged breach of implied contract to fairly consider the proposal). If an agency decision is not arbitrary and capricious, it should not be reversed, even if the Court would have reached a different conclusion. Cf. *TRW Inc. v. Widnall*, 98 F.3d 1325, 1327 (Fed. Cir. 1996) (reversing GSBICA decision wherein the Board substituted its judgment for that of the agency). See also *Widnall v. B3H Corp.*, 75 F.3d 1577 (Fed. Cir. 1996) (same result; the Board should have deferred to the reasonable decision of the Source Selection Authority).

To establish either a reversible abuse of discretion or a reversible violation of procurement laws or regulations, a plaintiff must show not simply a significant error in the procurement process but also that the error was prejudicial. The plaintiff must convincingly demonstrate that, but for the alleged error, there was a "substantial chance" it would have received the award. See *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996) (ruling that the "reasonable likelihood" standard articulated by the court in *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996), was virtually synonymous with the "substantial chance" standard).

The Court has often applied a "clear and convincing" burden of proof upon the plaintiffs in actions of this sort. See, e.g., *Court of Federal Claims Gearing Up for New Protest Authority, Questions Arise*, 66 Fed. Cont. Rep. 449 (November 4, 1996). Such a rigorous standard should be met before setting aside an agency's procurement decision. A lesser standard of proof could result in undue interference by disgruntled or disappointed offerors with the efficient acquisition of government goods and services. Thus, for a plaintiff to sustain its burden of proving that it had a "substantial chance" (or a reasonable likelihood) of receiving an award but for an error in the procurement process, it must make this showing clearly and convincingly.

B. The Court Should Define The Scope of Protestable Matters.

The new statute now provides that the Court's disappointed offeror jurisdiction extends to objections to solicitations, objections to awards and proposed awards of contracts, and objections to alleged violations of statute or regulation in connection with a procurement or a proposed procurement. 28 U.S.C. § 1491(b)(1). Although the wording is not identical to the language that defines the GAO's jurisdiction, there is a high correlation. (GAO's bid protest jurisdiction, under 31 U.S.C. § 3551, extends to objections to solicitations and objections to awards and proposed awards of contracts. Under 31 U.S.C. § 3552, the objections raised by protesters must concern alleged violations of a procurement statute or regulation.) Thus, it appears that, in amending 28 U.S.C. § 1491, Congress generally intended to permit the Court to consider similar issues that are

protestable at the GAO. Congress did not clearly express an intent to provide offerors with the opportunity to litigate, before this Court, an expanded array of procurement issues.

We encourage the Court to publish guidance or establish rules that clearly define those matters subject to review under its new jurisdiction. GAO summarily dismisses protests or specific protest allegations that are not properly before GAO for a number of reasons. GAO includes, as part of its published Bid Protest Regulations, a list of "protest issues not for consideration." 4 C.F.R. 21.5, 61 Fed. Reg. 39039 (July 26, 1996). This list includes eight broad issues which GAO will not consider. We encourage the Court to consider publishing similar guidance. Attachment 1 to this White Paper is a list of issues which the Court might discourage litigants from raising under 28 U.S.C. § 1491(b).

We are mindful that, unlike the GAO, the Court has additional jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, to review matters arising under or related to a contract. See footnote 3. Because the procedures and standards of review are necessarily different for review of bid protest matters as opposed to CDA matters, we recommend that the Court clearly identify in its rules which issues it will consider under each jurisdictional grant.

IV. Consistent With The APA, The Court's Review Should Rely Primarily Upon The Administrative Record.

A. The Court Should Review A Limited Administrative Record.

Discovery should be limited to what has generally been considered the "record," as defined in bid protest practice before the GAO. Accordingly, we encourage the Court to publish guidance for litigants that describes the anticipated scope of the administrative record. Under this practice, documents considered to be part of the record, and thus discoverable, would include, where appropriate:

- * The solicitation with all amendments thereto;
- * The rating plan or instructions to evaluators concerning how proposals should be evaluated;
- * The plaintiff's and awardee's initial proposals;
- * Documents reflecting the agency's evaluation of the plaintiff's and awardee's initial proposals;
- * Correspondence between the agency and the plaintiff or awardee;
- * The agency's competitive range determination;
- * A record of "discussions" with the plaintiff and awardee;
- * The agency's request for submission of best and final offers (BAFOs);
- * The plaintiff's and awardees BAFOs (not to include other offerors);
- * Documents reflecting the agency's evaluation of the plaintiff's and awardee's BAFOs, including technical and cost or price evaluations;
- * DCAA (or other agency audit organization) audits of proposals where there are issues concerning the cost or price evaluation;
- * The government's cost estimate of the procurement;
- * The source selection statement;

- * The executed contract;
- * Notice of award; and
- * Prior agency-level protests, filed by the plaintiff, which concern the same procurement, and any agency response to such protests.

B. Discovery Should Be Limited.

To the extent that the new statute envisions record review, we encourage the Court to limit permissible discovery. Discovery into matters outside of the administrative record, as a general rule, is irrelevant and unnecessary.

In the Court's first published decision under its recently expanded jurisdiction, the Court determined that discovery, while available, is subject to greater limitations than in a de novo proceeding. *Cubic*, 1997 WL 76781, citing, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). We agree with the Court's finding, as applied to the facts in that case, that: "Although discovery may be appropriate as a necessary means to understand the agency's action, it normally would not be likely to lead to relevant evidence given the truncated nature of the court's review."

We appreciate the Court's decision in *Cubic* to disapprove four of the five requests for dispositions. However, we encourage the Court to go further. Where the Court believes that examination of the agency record alone is insufficient to determine whether the agency properly awarded the contract, the Court could direct that the agency supplement, to the extent possible, the existing record with additional documents that are not ordinarily part of the record.

C. Where There Has Been a Prior GAO Protest, the Court Should Consider The Agency Report As Part of The Administrative Record.

When the Court reviews a bid protest matter that was subject to a prior GAO protest, 31 U.S.C. § 3556 mandates that the Court consider -- as part of the agency record subject to review -- the report that was submitted by the agency to GAO in accordance with 31 U.S.C. § 3553(b)(2). That report includes all relevant documents, including a post-decisional explanation by the contracting officer of the relevant facts in response to the protester's allegations. 4 C.F.R. 21.3. See footnote 4

We believe that documents included in the agency report to GAO should be viewed as a part of the administrative record, rather than as a supplement to the record. At this point, the Court is not simply reviewing an initial agency decision, but is essentially reviewing the agency's ultimate action in response to the GAO recommendation -- often in compliance with that recommendation, but not always. Certainly, if compliance with the GAO's recommendation caused the agency to select a different awardee from the one originally selected, and the Court action is being brought by that originally proposed awardee to preclude award to another, the entire record of the GAO proceedings must be considered to evaluate fairly the agency's action in response to the GAO recommendation. Even if such a change in the agency's position did not occur, its reaffirmation of its initial decision during and after the GAO proceedings should be considered the decision that the Court is being called upon to review, and the full existing record of its justification for its actions should be considered by the Court.

D. In Limited Circumstances, Particularly Absent A Prior GAO Protest, Agency Supplementation of the Administrative Record May Prove Appropriate.

We recognize, as did the Court in *Cubic*, *supra*, citing *Camp v. Pitts*, 411 U.S. 138 (1973), that judicial review of an administrative decision ordinarily is based upon the administrative record in existence at the time of the decision. The Court considers the material the agency developed and considered in making its decision, rather than a new record made in the

course of the litigation before the Court. We also recognize that "post hoc" rationalizations of an agency's action may not be sufficient, standing alone, to show that the agency's action was grounded in reason and otherwise proper. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

Nevertheless, we urge the Court to recognize that there may be instances in which the Court may require the agency to provide limited supplementation of the administrative record that originally was assembled during the conduct of the procurement. We believe that such supplementation of the record would be justifiable under the standards articulated in *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989).

While the record of a procurement action ordinarily reflects the significant and key considerations underlying the agency decision, it may be helpful to the Court to allow additional written explanation of whether, how, and why the agency handled the issue that is now being subjected to a "post-decisional attack" or whether the agency considered evidence not apparent on the face of the record. This written explanation may provide the Court with a clearer understanding of what transpired during the procurement process. This may be particularly necessary if the Court is the first forum in which the agency action is being challenged.

In such instances, the appropriate remedy for the Court to obtain the required information should be a remand to the contracting officer. When necessary, the Court could direct the contracting officer to consider the issue or matter not addressed in the administrative record. See footnote 5 Remand, in these limited circumstances, may expedite a resolution, especially where the decision being reviewed was not previously subject to an administrative protest.

E. Limited, Appropriate Supplementation of The Administrative Record Should Not Lead to Unfettered Discovery.

There may be instances where it may be appropriate for the agency to supplement the record, when it is deemed necessary for a clear understanding of what transpired during the procurement process. Where supplementation of the administrative record is required, it should not normally "open the door" to discovery, particularly cross-examination of the decision-makers by depositions or in court testimony. To the extent that discovery is allowed, it should not be permitted to exceed the scope of the area or areas for which supplementation of the record was authorized by the Court. See, e.g., *Cubic*, supra. See footnote 6

F. The Court Should Provide Guidance Regarding Protective Orders.

In soliciting bids and proposals from private sources, the Government frequently requires offerors to furnish proprietary information. Proposals routinely include an offeror's prices, labor rates, overhead costs, proprietary processes and methodologies, staffing plans, etc. This information is considered proprietary and offerors routinely insist that the release of such information would injure their competitive capabilities.

Congress has recognized that proprietary information should be protected from disclosure to the public or a company's competitors, and has enacted a number of statutes which prohibit federal employees from disclosing such information. See, e.g., the Trade Secrets Act, 18 U.S.C. § 1905, the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423, See footnote 7 and the exemption from release of proprietary information in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See footnote 8 Unauthorized release of such information risks both criminal and civil penalties. The statutes thus permit offerors to freely disclose proprietary information to the Government, for its consideration in evaluating proposals, with a measure of assurance that an offeror's proprietary information will not be disclosed to its competitors.

See footnote 9

In addition to proprietary information which is generated by an offeror, the Government generates confidential commercial information such as source selection information, which is not publicly releasable or disclosed to the competing offerors. Such information is particularly sensitive during the procurement and evaluation process as it includes the Government's "cook book" (or rating system) which is used in evaluating proposals, the actual evaluation scores and narratives, etc. See footnote 10

Obviously, this situation, in which the Government cannot disclose information, conflicts with the general principles of public proceedings and the right of a party/litigant to discover and present evidence to the fact finder. The common means by which these apparently conflicting public policies has been resolved is through the use of protective orders issued by a court or administrative body.

The orders permit counsel for disappointed offerors to discover and present in evidence any proprietary or source selection information relevant to the allegations pertinent to a protested procurement. As the release of such information would be injurious to the competitive position of the offerors, such information cannot be revealed or discussed by counsel with his or her client. Further, because of the sensitivity of such information, the proceedings frequently must be closed, in whole or in part, to the public and, more specifically, the litigant/clients (including the party bringing the action or an interested party intervenor, such as an awardee) in order to prevent the release of proprietary or source selection information. To the extent counsel cannot adequately analyze financial or technical matters, the party can obtain an expert to review the documents, if access is granted by the court or administrative body, to provide advice and assistance to counsel.

The protective order thus functions like a tent. During the evaluation process, the Government reviews (and generates) proprietary and source selection information within the tent, but cannot disclose it, with few exceptions, to parties outside the tent. As a result of the protective order, the court and all counsel who are authorized access to the information, can enter the tent, and are free to review and analyze the information. The proceedings essentially take place within the tent. Within that context, all the parties, to include the decision-maker (whether a court or administrative body) can freely discuss the protected information. The only inhibition is that the information cannot be disclosed to parties outside the tent.

Protective orders and this process of protecting and restricting the release and use of information are peculiar to post-award proceedings, precisely because the critical information which is the subject of the proceeding involves proprietary or source selection information. The fact that the award has been made, however, does not ameliorate the need for continued protection of the information. The need for continued protection derives from the remedies the court or administrative body may consider. Protection of the information is particularly important if the court determines that the Government violated a procurement law or regulation in such a manner as to prejudice the plaintiff. Frequently, the remedy or order will direct the Government to re-evaluate the proposals, or to conduct discussions and permit the submission of another round of offers, etc. Thus, the inadvertent or other release of proprietary or source selection information during a proceeding will irreparably affect the ability of the Government to maintain the competitive process, as competing offerors will be privy to pricing or other proprietary information of the other offerors, the Government's "cook book" for evaluating proposals, etc.

Protective orders and their related processes have been de rigueur for proceedings before GAO. GAO permits disappointed offerors full access to and use of all pertinent source selection and proprietary information in proceedings. The early issuance of protective orders is more critical at the

Court than it is at the GAO, as the Government has up to 30 days to provide the parties and the GAO with its report. Given the nature of the equitable relief sought before the Court, and the need to make even earlier production of the administrative record, the immediate issuance of a protective order by the Court would facilitate the litigation by permitting the parties to obtain documents much sooner (particularly in those cases in which a protest was not previously filed with the GAO).

Various courts have recognized the place and role of protective orders and related procedures. See, e.g., Fed. R. Civ. P. 26(c)(7). These procedures constitute an appropriate balance of the divergent public policies of protecting information and the right of a disappointed offeror to "have his day in court" by permitting his or her counsel (and where appropriate, his or her experts), to discover and present all relevant facts in proceedings before the Court. See, e.g., ITT Electro-Optical Prods. Div. of ITT Corp. v. Electronic Tech. Corp., 161 F.R.D. 228 (D.C. Mass. 1995).

Therefore, we encourage the Court to establish standing procedures and to adopt a model protective order, which can be tailored by the Court and the parties, as appropriate. We urge the adoption of procedures used before the GAO as those procedures have been accepted by the Government and the private bar, the parties are familiar with them, and they are essentially incorporated in whole or in part in the proposed protective orders submitted to the Court by the private bar. See footnote 11

V. The Court Should Resolve Disappointed Offeror Cases Promptly And Efficiently.

A. The Court Should Resolve These Cases Expeditiously.

The new statute mandates that the Court "give due regard to the need for expeditious resolution of the action" in exercising its new jurisdiction. 28 U.S.C. § 1491(b)(3). In accordance with this requirement, we encourage the Court to adopt rules to ensure that actions are processed as quickly as possible.

Executive agencies conducting procurements, as well as interested parties to those procurements, benefit from a uniform standard with regard to processing time. Time and resources could be apportioned more beneficially, by all parties, if it is known that a decision will be received no later than a certain date. In general, we encourage the Court to strive to meet or beat the GAO protest processing time.

For example, GAO is required to render a decision within 100 calendar days. 31 U.S.C. § 3554(a)(1). This rule also indicates that the GAO time limit was established to facilitate the "expeditious resolution of protests." Similarly, the new statute mandates that the Court "give due regard to the need for expeditious resolution of the action." Absent extraordinary circumstances, the Court should be able to meet or exceed the speed with which GAO disposes of protests.

B. Prompt Resolution Should Be Tempered With The Need For Understanding and Preparation.

Although we encourage prompt resolution of these actions, we encourage the Court to be mindful of the benefits associated with permitting the opportunity for preparation prior to holding an initial hearing. Specifically, we recommend that the Court allow a reasonable period of time before the initial conference on a temporary restraining order (TRO) or preliminary injunction (PI), should such relief be requested. In post-award procurement actions, the Government must assess the harm to the agency should the TRO be granted. In making that determination, the Government frequently must obtain an assessment from the contract awardee regarding what costs it has incurred and what costs it will charge the Government should the TRO be granted. Furthermore, some complaints involve procurements in different areas of the United States and overseas. In addition, counsel

for the Government (from the Department of Justice) will be seeing the complaint for the first time. The agency counsel and contracting officer(s) need some time to read and discuss, with appropriate procurement officials, the complaint and the potential harm to the Government. We recommend that the conference with the Court be conducted no earlier than seventy-two hours after the complaint has been served on the Department of Justice. If a complaint is served on a Friday, or the last business day of the week, we recommend that the initial conference be conducted no sooner than 1:00 p.m. on the third business day of the following week.

Further, we recommend that the Court adopt as one of its rules a requirement for the plaintiff to furnish a copy of its complaint to the contracting officer by hand (or such other means that will provide immediate notice of the filing). This rule would parallel a similar rule at the GAO. GAO does not notify the contracting officer of the protest, nor do we propose that this responsibility be imposed upon the Clerk of the Court.

A rule for notifying the contracting officer would not be onerous, as it would impose the burden upon the plaintiff, who already knows the identity and location of the contracting officer whose actions are usually the subject of the complaint. As post-award proceedings are time-sensitive, providing a copy of the complaint to the contracting officer will facilitate the compilation of the administrative record, particularly in procurements which have not previously been protested to the GAO. Notice to the contracting officer will trigger the agency's assembly and reproduction of the administrative record and will ensure that documents which address the issues raised in the complaint are included in the record. This rule would benefit all parties by speeding the production of the administrative record and permitting the Court and the parties to quickly address the merits of the complaint. Finally, notice to the contracting officer would also lead to a more informed Government position at the initial conference called to consider the need for TROs or PIs.

Similarly, in the spirit of judicial efficiency, and consistent with the Court's and the Government's support for Alternative Dispute Resolution (ADR), we would support a Court requirement for a mandatory meeting of counsel prior to the initial conference. (Logically, the utility of such a meeting would depend upon a minimal, yet sufficient, amount of time for the contracting officer, agency counsel, and the Department of Justice to read, consider, and discuss the complaint.) This meeting could be accomplished by telephone conference.

C. The Court Should Apply The Appropriate Legal Standard For Issuing TROs and PIs; "Automatic Stays" Are Inappropriate.

We believe that the issue of post award stays of performance is not an area where agencies ought to routinely be asked to voluntarily halt contract performance, nor should TROs or injunctions be routine. We encourage the Court, in a manner similar to the Federal district courts, to continue to place a heavy burden on any party that seeks injunctive relief in bid protests.

In its "Court Approved Guidelines" dated December 11, 1996, the Court states that the assigned judge will enter an order on the TRO "[i]f the Government does not agree to defer action until the matter is resolved." We are concerned by, and would object to, any implication that there is a presumption that the Government, as a matter of practice, should defer action.

The implications of this statement likely grew out of the Court's experience with the Government's greater willingness to defer action in preaward protests. We note, however, that the manner in which stays should be conducted is different depending on whether the protest concerns a preaward or post award matter. The administrative protest practice is for preaward activity to be allowed up to the point of award. During that period, agencies typically are more willing and able to agree not to make an

award in the face of a protest. Conversely, a post award protest often presents impediments to any voluntary stay of performance by the Government.

Clearly, agencies consider deferral in all appropriate cases. After consideration, in some cases, agencies may conclude that a stay in performance is in the Government's interests. In many other cases, however, contract performance must commence. The Court should clarify that there is no presumption that the Government should defer action simply because a plaintiff applies for injunctive relief.

D. Suits Must Be Promptly Filed; The Doctrine of Laches May Assist The Court.

The new statute does not require that disappointed offeror suits be filed within any particular time period. This lack of certainty, regarding when such an action may be considered timely, could disrupt the procurement process, and appears to be at odds with the current emphasis on attaining greater efficiencies in that process.

Generally, post award bid protests at the GAO must be filed within ten days after specific events. 4 C.F.R. § 21.2. If the agency does not receive a protest within that time frame, it can reasonably conclude that a timely protest is unlikely to be filed. This allows the agency to make resource and personnel decisions without the fear that these decisions will be disturbed by a subsequent bid protest. The absence of specific filing deadlines for disappointed offeror suits filed with the Court is likely to frustrate the efficient utilization of resources and personnel. Therefore, we encourage the Court to impose specific filing deadlines, similar to those at the GAO, in order to eliminate this uncertainty. In the alternative, we encourage the Court to at least presume that any suit filed beyond those widely recognized administrative protest deadlines has been inexcusably delayed, with material prejudice to the Government.

Such a decision is not unheard of in the courts. In *Saco Defense Sys. Div. v. Wienberger*, 629 F. Supp. 385 (D. Me.), *aff'd*, 806 F.2d 308 (1st Cir. 1986), both the district and circuit courts cited the GAO rules and found the plaintiff's delay in filing a suit alleging a defect in the solicitation precluded it from raising the issue following contract award. The court's rationale in *Saco* was that "[i]f they [the protester] had wanted to challenge the ten percent [evaluation] factor, they should have done it before the close of bidding, at a time when its correction, if necessary, could be effected without necessitating the undoing of all the spare parts cost evaluation performed by the Defendants." 629 F. Supp. at 387-88. Similarly, in *Airco, Inc. v. Energy Research & Dev. Admin.*, 528 F.2d 1294 (7th Cir. 1975), the court found that the plaintiff had waived its right to challenge the change in the specifications because it failed to raise the issue in a timely fashion. Again, the Court applied the GAO rules for timely filing of the protest. See also, *Alliant Techsystems v. United States Dep't of the Navy*, 837 F. Supp. 730, 737 (E.D. Va. 1993) ("It is well established that bidders who fail to make timely protests regarding improper bid solicitations waive their ability to protest.").

Furthermore, the Court has recognized the utility of this pragmatic limitation. In *Aerolease Long Beach v. United States*, 31 Fed. Cl. 342 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994), the Court stated:

In short, the defendant asks this Court to apply the requirements of the GAO bid protest regulations. See 4 C.F.R. § 21.2(a)(1) (1992) [quoted regulation omitted.] While this Court declines to accept this regulation as controlling in all cases, the defendant persuasively demonstrates the utility of the GAO rule in the bid protest arena. See *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 789 (1991) (finding favor with the timeliness regulations of the GAO for bid protests). If an offeror recognizes an ambiguity or other problem in the solicitation, proper procedure dictates that the offeror challenge the problem before submission of an offer. If the offeror declines to challenge the problem, the reviewing tribunal may find

that the offeror waived its right to protest. . . . In circumstances such as these, this Court finds the application of the GAO rule fitting, based not on adoption of the regulation but on the wide discretion afforded the contracting officer to conduct negotiations pursuant to the terms of the SFO.

31 Fed. Cl. at 358. Thus, although the Court declined to adopt the timeliness regulations of the GAO, it recognized the utility of the rules and effectively implemented them. Case-by-case acceptance of such rules, however, is neither orderly nor efficient.

Although Congress intended to expand the Court's jurisdiction, there is no reason to believe that Congress intended to provide disappointed offerors with a means to evade reasonable time limits within which a suit must be filed. The recent acquisition reform statutory changes, from which these guidelines are extracted, give considerable weight to the importance of Government acquisition by imposing tight, yet realistic, limits on the time window within which a protest must be resolved. These statutory time frames, in conjunction with implementing regulations, are effectively a statute of limitation on a frustrated bidder's attempt to right an alleged wrong, which a court of equity ought to honor in deciding whether an equitable proceeding, seeking injunctive relief will lie.

The same time limitations applied to administrative protests should also apply where an action is initially filed in the Court. Similarly, where a plaintiff has previously attempted to seek relief, through the contracting officer, the agency, or the GAO, then the applicable time frames should be those applied by regulation to determine the timeliness of a protest filed with GAO after an agency-level protest was previously filed. GAO's bid protest regulations, 4 C.F.R. § 21.2(a)(3), allow protests to be filed within ten days of an agency's initial adverse action on an agency protest.

Sound reasons justify applying these limits. During the early stages of a procurement, the time lost by the Government in defending a court suit can often be made up by accelerating later stages of the acquisition process. However, after initial proposal submission, as competition proceeds to the latter stages (and award), the Government's ability to make up for time lost in defending litigation becomes increasingly compromised. Thus, it is incumbent upon protesters or plaintiffs to surface any complaints soon after they become apparent, rather than waiting until the procurement has gone further down the track and the prejudice to the Government, and to other competitors, becomes manifest.

Prejudice resulting from delay in filing may take many forms. The damage to the Government from a delayed filing may not be confined only to the protested procurement but may well also affect previous and contemporary procurements and the Government's ability to keep projects on schedule via future procurements. A late filing may also disrupt the Government's budgeting and fiscal expenditure process and could easily result in funding for projects being reduced or canceled. Particularly in the rapidly-changing area of computer and telecommunication technology, delay caused by a late filing may prevent the Government from acquiring the latest technology without either reopening the procurement or beginning the procurement anew.

Prejudice may extend beyond the Government. See footnote 12 The contract awardee can be prejudiced if it has commenced contract performance or has placed orders for long-lead items. A late filing will also necessarily increase bid and proposal costs of the awardee, and other offerors, impacting their indirect rate charges and, thus, their ability to compete successfully in other acquisitions. Offerors can suffer further prejudice from a late filing by having to maintain their proposal team in place, thereby preventing them from working on other acquisitions. Further, a late filing may well place undue burdens on the careers of employees expecting to perform the contract, either forcing them to accept a period of unemployment or possibly abandon their commitment to the project and seek work elsewhere. Naturally, any loss of proposed employees may severely disrupt an offeror's

ability to perform.

Finally, we note that no administrative protest forum has ever allowed more than two weeks from the discovery of the basis of the protest, for a protest to be filed. Therefore, we encourage the Court to establish a special rule that parallels the GAO's timeliness regulations at 4 C.F.R. § 21.2. Issuing such rules would implement the clear intent of Congress, and at the same time, establish a clear, bright line that would aid in the uniform treatment of cases.

E. The Court Should Require The Posting of Security.

Pursuant to the Rules of the Court of Federal Claims (RCFC) 65(c), we expect that agencies will seek, and the Court will require, security in cases where there are real costs to the Government attendant on delay due to an injunction. The costs to agencies associated with delays attendant to injunctions are quite serious, even if difficult to calculate. The Government, even in a preaward situation, must absorb the costs of delay if the contract cannot be awarded or executed on schedule. Attention should be paid to losses in efficiency, operating capacity, and the calculation of costs thereof by the agency, and security should be based accordingly. Such costs are difficult, but not impossible to approximate. If necessary, agencies should be willing to produce affidavits on these issues.

In general, seeking an injunction from the Court should not be a cost free exercise. This is particularly true where the plaintiff is the incumbent contractor and would benefit, through extended contract performance, from delays resulting from the litigation. The Government (and, accordingly, the taxpayer) pays a real price for every contract or award that is enjoined.

In post award protests, contract awardees often incur costs that must be reimbursed by the procuring agencies. A contractor may pass on to the Government storage costs for equipment and supplies ordered, cancellation charges, or certain employee compensation. Additionally, the incumbent contractor's costs often rise due to the uncertainty of its employees and subcontractors, who cannot know how the suit will be resolved; in the meantime, equipment leases may become more expensive (for example, equipment originally leased for a year may convert to a month-to-month basis).

VI. The New Statute Limits The Available Monetary Relief.

Section 12(b)(2) of the Administrative Dispute Resolution Act of 1996, codified at 28 U.S.C. § 1491(b)(2), provides:

To afford relief in such action, the courts 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.

(Emphasis added.) We believe that Congress meant what it said. The only monetary relief the Court may award in an action under Section 1491(b), is bid preparation and proposal costs. Other forms of monetary relief, that might formerly have been considered available cannot be awarded by the Court.

Attachment 1

Suggested Issues "Not For Consideration"

1. Contract administration issues. Contract administration issues are more properly subject to review under the CDA. That act provides for remedies and review procedures which afford an exclusive means of addressing

contract administration issues.

2. Small Business Administration (SBA) issues. Size classifications of businesses are within the sole discretion of the SBA.

3. Affirmative responsibility determinations. Challenges to determinations of a would-be contractor's responsibility are matters necessarily subject to agency discretion.

4. Protests filed in other jurisdictions. Out of comity, it would be beneficial to the orderly conduct of litigation if the Court would defer to actions already filed in other fora, such as the district courts. See, e.g., 28 U.S.C. § 1500. Similarly, the Court should hesitate to take cognizance over a suit involving the same issues that are being raised at the GAO.

5. Untimely protests. Protest issues that are not raised and addressed expeditiously can unnecessarily disrupt the procurement process, and, thereby jeopardize the fulfillment of critical government requirements. The Court should adopt timeliness rules substantially similar to those used by the GAO. The GAO adopted its timeliness rules based on the critical importance of beginning performance on a new contract. Unlike the adjudication of claims, a stay or restraining order affects the ability of the Government to obtain new goods or services and to perform essential missions. Delays in contract performance can jeopardize the fielding of critical weapons systems and considerably increase the cost of performance, as contractors incur storage costs on equipment, maintain commitments to subcontractors, and pay for idle employees.

6. Suits not brought by interested parties. Both the Court and the GAO jurisdictional statutes limit the availability of protest relief to interested parties. We suggest that the Court adopt the Federal Circuit's definition of an interested party in determining who may bring an action under the Court's new jurisdiction. The Federal Circuit has held recently that for a plaintiff to establish prejudice, and thus to show that it is an interested party, it must demonstrate "a reasonable likelihood, not just a reasonable possibility," that it would have received the contract award but for the improper government action. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1563 (Fed. Cir. 1996).

7. Subcontract protests. Protest recourse should be limited to parties with privity (or potential privity) of contract with the Government, and not be available to subcontractors or potential subcontractors.

8. Premature protests based on anticipated agency action. Matters that are not yet ripe for litigation should not be subject to protest.

9. Academic protests. Protests regarding matters that are moot (i.e., no relief is possible), should not be permitted.

10. Reprocurements. Because of the wide discretion given to contracting officers allowing them to use any appropriate acquisition method in a reprocurement (FAR 49.402-6), and permitting them to conduct reprocurements obtaining competition only "to the extent practicable," no meaningful standard of review applies to reprocurements, and therefore they should not be subject to protest.

11. Actions that involve criminal allegations. Any procurement action that is potentially subject to criminal investigation and prosecution by the Department of Justice, to include violations of the Anti-kickback, Anti-trust, or Anti-dumping statutes, should not be subject to protest.

12. Debarments. The GAO will look at procedural issues related to a debarment, but will not look at the merits of the debarment decision. Substantive debarment matters should not be adjudicated pursuant to the new statute.

13. Other agency actions under statutes providing broad grants of discretion (e.g., attorney selections by the Attorney General under the Criminal Justice Act). These are matters again for which there is no applicable standard of review, due to the broad discretion exercised by agencies regarding these matters. See 5 U.S.C. § 701(a)(2).

14. Complaints lacking sufficient detail or failing to state a ground for relief. Protests based on indeterminable issues should be dismissed either sua sponte or at the motion of the Government. See, e.g., RCFC 12(b)(4), similar to Fed. R. Civ. P. 12(b)(6).

15. Agency overrides of GAO bid protest automatic stays. The GAO has historically not reviewed the override decisions of an agency, See footnote 13 based on the clear legal authority of agencies to make such discretionary decisions. However, under the Administrative Procedure Act, Federal district courts sometimes have reviewed agency override decisions in the past. See, e.g., Dairy Maid Dairy v. United States, 837 F. Supp. 1370 (E.D. Va. 1993). Nothing in the amended 1491(b) indicates that this Court should exercise jurisdiction over agency stay decisions. Because the statute permits a disappointed offeror to seek relief in this Court, the need for a challenge to an agency override is not apparent.

FOOTNOTES

Footnote: 1 The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320.

Footnote: 2 The group recognizes the particularly significant contributions of a number of our members and offers its thanks to: Gena Cadieux, LTC Doug DeMoss, Thomas Duffy, LTC Richard Hatch, Craig Hodge, Clarence D. Long, III, LTC Larry Passar, Jared Silberman, and Jerry Walz.

Footnote: 3 The GAO's review authority is generally limited to contract formation, i.e., agency procurement actions leading to and including the award of a contract. Conversely, contract administration matters are generally reviewed under the CDA jurisdictional authority of the Court or an agency board of contract appeals (BCA). While the Court's de novo review of CDA actions is appropriate, it should not be expanded to contracting officers' highly discretionary decisions regarding the award of contracts. In disappointed offeror litigation, the Court is not interpreting a binding agreed-upon contractual document. Rather, the Court will determine whether contracting officials exercised discretion (regarding business decisions) in a rational manner.

Footnote: 4 Inclusion in the administrative record of this limited post-decisional explanation by the contracting officer (or, when necessary, by another member of the procurement) is appropriate. (Argument, such as a legal memorandum, can be distinguished from statements of fact.) We discourage the Court from adopting a position that all post-decisional explanations are "post hoc" rationalizations. For the Court to deem these post-decisional explanations unworthy of evidentiary weight would, in effect, nullify the mandate in 31 U.S.C. § 3556, that the Court consider the agency report to the GAO as part of the administrative record.

Footnote: 5 In a typical administrative decision or adjudication that a court must review, the agency had collected information on the specific issues raised for the agency's consideration; the agency had the opportunity to hear the views of interested parties; the interested parties may have presented evidence and advocated their positions before an administrative adjudicator; and the agency decision was based upon the issues and facts framed during that process. In contrast, a procurement action arises from a business process. That process -- especially in a negotiated procurement -- typically involves many assessments, determinations, and judgments that

culminate in the final procurement decision. It is often impossible to know which of those many discretionary actions later will be objected to by an interested party and subject to judicial scrutiny. The issues frequently are raised for the first time after the procurement decision has been made and the "administrative record" assembled.

Footnote: 6 While we recognize that there may be instances where supplementation is required, we suggest that, in most instances, remand would be the more appropriate remedy and preferred course of action.

Footnote: 7 This legislation resulted in large part due to the "Ill Wind" investigations and convictions which involved the disclosure (and even sale) of proprietary and source selection information to competitors during the course of procurements.

Footnote: 8 Proprietary information is exempt from disclosure where the release would cause substantial harm to the competitive position of a company, or impair the Government's ability to obtain similar information in the future. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Footnote: 9 In practical terms, agencies require offerors to specifically mark with a restrictive legend those portions of their proposals which contain proprietary information. See, e.g., Federal Acquisition Regulation 52.215-12, which requires offerors to place restrictive legends on the portions of proposals which offerors do not want to be disclosed publicly "for any purpose" or to be used by the Government "except for evaluation purposes."

Footnote: 10 The Supreme Court similarly has recognized the legitimate need of the Government to safeguard confidential commercial information from public disclosure during the course of a procurement. Federal Open Mkt. Comm. of the Federal Reserve Sys. v. Merrill, 443 US 340 (1979).

Footnote: 11 We note that the private bar supports protective orders based upon the proposed orders, such as the one submitted by the Federal Bar Association. Moreover, we believe private industry would object to any proceeding which permitted its competitors to obtain proprietary information, or which permitted the public release of such information. This result would increase suits whose primary purpose would be to improperly obtain proprietary information.

Footnote: 12 We note, however, that the delay and expense incurred by the contract awardee during a protest is often absorbed, eventually, by the Government. Particularly in cost reimbursement contracts, the contractor's increased cost of doing business, due to a late start or interrupted performance (caused by a stay), will be passed on to the Government.

Footnote: 13 Agency override issues arise infrequently. An agency override issue arises only if an agency continues with contract performance during the pendency of a GAO protest.

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