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Navigating GAO Bid Protests In 2020

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Agenda

- Bid Protest Statistics
- Effect of COVID-19 on GAO Bid Protests
- Maximizing the value of Enhanced Debriefings
- Avoiding late proposal disqualification
- Jurisdiction over OTAs and Cooperative Agreements
- Other Key Protest Decisions

Bid Protest Statistics - GAO

	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed ¹	2198 (down 16%) ²	2607 (less than 1% increase) ³	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)
Cases Closed ⁴	2200	2642	2672	2734	2647
Merit (Sustain + Deny) Decisions	587	622	581	616	587
Number of Sustains	77	92	99	139	68
Sustain Rate	13%	15%	17%	23%	12%
Effectiveness Rate ⁵	44%	44%	47%	46%	45%
ADR ⁶ (cases used)	40	86	81	69	103
ADR Success Rate ⁷	90%	77%	90%	84%	70%
Hearings ⁸	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)

Effect of COVID-19 on GAO Bid Protests

- Limited impact on GAO
 - All electronic filings via EPDS
 - GAO holds few hearings
- Procuring agencies have experienced some impact
 - Some agencies cannot allow telework for security reasons
 - Reduced and staggered work hours complicated coordination
 - Agencies encouraging more intervenor assistance
- Volume of protests seems steady as agencies are still awarding contracts

Maximizing the Value of Enhanced Debriefings

- Required debriefings per FAR 15.506 and 16.505(b)(6)
 - Request within 3 calendar days
 - Oral or written
 - Include significant weaknesses or deficiencies
 - Overall evaluated cost or price and technical rating for awardee and debriefed offeror
 - Summary of rationale for award

Maximizing the Value of Enhanced Debriefings

- DOD Class Deviation – Enhanced Postaward Debriefing Rights
 - Applies to DoD agencies providing FAR 15.506 debriefing
 - Debriefing must explain enhanced debriefing rights
 - Opportunity to submit additional questions
 - Within two business days of debriefing
 - Agency shall respond within five days
 - No limit on number of questions
 - Offeror can protest within five days of receiving enhanced debriefing responses and CICA stay applies

Maximizing the Value of Enhanced Debriefings

- Advantages of Enhanced Debriefing
 - Opportunity to gain much more information
 - Written debriefings are often incomplete or cryptic
 - Evaluators may have not considered or addressed aspects of proposal
 - Evaluation findings may raise questions

Maximizing the Value of Enhanced Debriefings

- Advantages of Enhanced Debriefing *(cont'd)*
 - Additional time to consider and prepare protest
 - After FAR 15.506 debriefing, offeror may have only 1-3 business days to:
 - decide to protest
 - retain counsel and have counsel run conflicts check
 - educate counsel on acquisition and concerns
 - draft protest

Maximizing the Value of Enhanced Debriefings

- Advantages of Enhanced Debriefing *(cont'd)*
 - Additional time to consider and prepare protest *(cont'd)*
 - With enhanced debriefing, have 2-7 additional business days to file protest for CICA stay
 - Better development of protest grounds
 - More time to consider whether to protest

Maximizing the Value of Enhanced Debriefings

- Enhanced Debriefing Best Practices
 - Clarify all questions raised by debriefing
 - Explore facts needed for possible protest grounds
 - Involve counsel in formulating and drafting questions
 - Draft questions requesting specific answers to prevent agency from avoiding your concern
 - Ask a reasonable number of questions
 - Do not ask for information prohibited by FAR 15.506

Avoiding Late Proposal Disqualification

- GAO's "Late is Late" Rule
- Limited Exceptions
 - "Government Control" Exception
 - Excuses a "late" proposal when there is "acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers"
 - GAO views this exception in terms of physical proposal delivery
 - GAO does not apply this exception to proposals submitted by email
 - Court of Federal Claims does apply this exception to proposals submitted by email

Avoiding Late Proposal Disqualification

- Limited Exceptions *(cont'd)*:
 - “Electronic Commerce” Exception
 - Excuses a “late” proposal “if it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers”
 - “Only Proposal” Exception
 - Excuses a “late” proposal if “it was the only proposal received”

Avoiding Late Proposal Disqualification

- Best Practices
 - Submit your proposal early – preferably one day early
 - Identify backup filers
 - Confirm receipt of proposal submission
 - If issues arise:
 - Email full copy of proposal to contracting officer before deadline
 - Document all calls and emails to agency representatives
 - Get counsel involved ASAP

Avoiding Late Proposal Disqualification

- **Protesting Disqualification**
 - Before you protest, contact the contracting officer
 - Agency has authority, even after the due date has passed, to extend the closing time for receipt of proposals to avoid bid protests or to enhance competition for an acquisition
 - Protest at GAO
 - Low likelihood of success on the merits
 - But, low cost and may lead to corrective action
 - Protest at Court of Federal Claims
 - Applies “Government Control” exception to proposals submitted by email
 - “Minor Informality” Rule
 - Opportunity for expanded record

Jurisdiction over OTAs and Cooperative Agreements

- “Other Transaction Agreements” are legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts.
- These instruments are used for various purposes by federal agencies that have been granted statutory authority permitting their use.
- For example, Congress granted the Department of Defense authority to enter into OTAs for prototype projects.

Jurisdiction over OTAs and Cooperative Agreements

- “Cooperative Agreements” are legal instruments that are used when the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by the United States Government.
- For example, the State Department has used Cooperative Agreements for programs to improve community security and access to justice in Syria.

Jurisdiction over OTAs and Cooperative Agreements

- Under CICA and GAO's Bid Protest Regulations, GAO is authorized to review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards.
- Thus, since OTAs and Cooperative Agreements are not procurement contracts, GAO typically does not review protests of the award or solicitations for the award of OTAs or Cooperative Agreements.
- But, GAO will review protests alleging that an agency is improperly using an OTA or Cooperative Agreement in lieu of using a procurement contract.

Jurisdiction over OTAs and Cooperative Agreements

- We have seen increased usage of OTAs and Cooperative Agreements during COVID-19.
- GAO will only review timely pre-award protests asserting that an agency is improperly using an OTA or Cooperative Agreement.
- Get counsel involved early if you believe an agency may be misusing an OTA or Cooperative Agreement.

Other Key Protest Decisions

- *Inquiries, Inc.*, B-417415.2, Dec. 30, 2019, 2020 CPD ¶ 54
 - The death of OCI protests at the GAO has been exaggerated.
- *Peraton Inc.*, B-416916.8 *et al.*, Aug. 3, 2020, 2020 CPD ¶ 248
 - GAO issues rare sustain of protest challenging corrective action.
- *Sumaria Systems, Inc.*, B-418796, Sept. 9, 2020, 2020 CPD ¶ 296
 - Agencies may use highest-technically rated reasonably-priced methodology in FAR Subpart 16.5 procurements.

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Litigation at the Court of Federal Claims (“COFC”) – A Quick Primer

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Presentation Roadmap

- Current roster of Judges
- History of the Court of Federal Claims (COFC)
- COFC Jurisdiction
- Key COFC Rules and Procedures
- COFC Practice Tips
- Contract Disputes Act (CDA) Cases
- Alternative Dispute Resolution (ADR)
- Advantages/Disadvantages of Litigating at the COFC



COFC Composition*

1. Chief Judge Eleni M. Roumel
 2. Judge Patricia Elaine Campbell-Smith
 3. Judge Lydia Kay Griggsby
 4. Judge Richard A. Hertling
 5. Judge Ryan T. Holte
 6. Judge Elaine D. Kaplan
 7. Judge Matthew H. Solomson
 8. Judge Margaret M. Sweeney
 9. Judge David. A. Tapp
 10. Judge Thomas C. Wheeler
 11. Judge Edward H. Meyers
(confirmed Sept. 22)
- *Active judges

History of the COFC

- The COFC is the direct successor of the U.S. Court of Claims (founded in 1855).
- The COFC was founded under Article I of the Constitution.
- The COFC is referred to as “the Keeper of the Nation’s Conscience” and “the People’s Court” since the federal government stands as the defendant and may be sued by citizens seeking monetary redress.
- In 1887, Congress passed the Tucker Act, which significantly expanded the court’s jurisdiction to include all claims against the government except tort, equitable, and admiralty claims.
- But the COFC remains a court of limited jurisdiction, and DOJ assiduously opposes any expansion of that jurisdiction.

History of the COFC (*cont.*)

- The Federal Courts Improvement Act of 1982 created the modern court and in 1992 the Claims Court name was changed to the Court of Federal Claims.
- High-profile cases: The savings and loan crisis of the 1980s, the World War II internment of Japanese-Americans, and damages cases resulting from the failure of DOE to establish a repository for spent nuclear fuel.
- The COFC as now constituted consists of 16 judges, appointed by the President and subject to confirmation by the Senate for terms of 15 years.



History of the COFC

History of the COFC (*cont.*)

- After a judge has served his or her 15-year term of active service, he or she may retire or be appointed to serve another 15-year term upon the advice and consent of the U.S. Senate.
- A judge that elects to retire upon completion of his or her 15-year term receives the title of “senior judge.” Acts and decisions of a senior judge performing judicial duties at the court have the same force and effect as those of judges in regular active service. Senior judges are not counted in the 16 judgeships authorized.
 - As of today, there are 11 senior judges at the COFC.



History of the COFC

COFC Jurisdiction



- Nationwide jurisdiction
- COFC has jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States.
 - *See* 28 U.S.C. § 1491 (the Tucker Act)
- Types of suits at the COFC include Government Contracts, Copyright/Patent, Vaccine Cases, Takings Clause, and Military/Civilian Pay.

Key COFC Rules and Procedures

- The Rules of the Court of Federal Claims (RCFC) have been adapted from the Federal Rules of Civil Procedure and substitute for those rules in cases heard by the COFC.
- Case is triggered by filing Complaint per RCFC 3 (this is more than the Notice of Appeal required to initiate Board proceedings in CDA cases)



Key COFC Rules (cont.)

- Filing fee \$450
- New civil cover sheet
- Corporate disclosure statement
- Notice of related cases
- Per RCFC 12(a), USG has 60 days to answer
- The filing of answer triggers various deadlines and requirements under Appendix A, Case Management Procedure

In The United States Court of Federal Claims
Cover Sheet

Plaintiff(s) or Petitioner(s)

Names: _____

Location of Plaintiff(s)/Petitioner(s) (city/state): _____

(If this is a multi-plaintiff case, pursuant to RCFC 20(a), please use a separate sheet to list additional plaintiffs.)

Name of the attorney of record (See RCFC 83.1(c)): _____

Firm Name: _____

Contact information for pro se plaintiff/petitioner or attorney of record:

Post Office Box: _____

Street Address: _____

City-State-ZIP: _____

Telephone Number: _____

E-mail Address: _____

Is the attorney of record admitted to the Court of Federal Claims Bar? Yes No

Nature of Suit Code: _____ Agency Identification Code: _____
Select only one (three digit) nature-of-suit code from the attached sheet.

Amount Claimed: \$ _____ Number of Claims Involved: _____
Use estimate if specific amount is not pleaded.

Bid Protest Case (required for NOS 13S and 140):
Indicate approximate dollar amount of procurement at issue: \$ _____

Is plaintiff a small business? Yes No

Was this action preceded by the filing of a protest before the GAO? Yes No Solicitation No. _____

If yes, was a decision on the merits rendered? Yes No

Income Tax (Partnership) Case:
Identify partnership or partnership group: _____

Takings Case:
Specify Location of Property (city/state): _____

Vaccine Case:
Date of Vaccination: _____

Related Case:
Is this case directly related to any pending or previously filed case(s) in the United States Court of Federal Claims? If yes, you are required to file a separate notice of directly related case(s). See RCFC 40.2. Yes No

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RCFC Appendix A Requirements

- Initial disclosures due under RCFC 26 within 14 days after early meeting of counsel (required per Appendix A)
 - Need to identify relevant witnesses
 - Need to identify relevant documents
 - Provide computation of damages
 - There is no analog at the Boards – more like U.S. District Court procedures
- JPSR due 49 days after answer or reply to counterclaim
 - JPSR should lay out discovery plan and schedule (including need for experts)

RCFC Appendix A Requirements (cont.)

- Court will schedule preliminary conference after the JPSR is filed
- Post-discovery conference
- Pre-trial briefing and witness/exhibit lists
- Trial (can be bifurcated on liability and damages)
- Post-trial briefing
- Closing argument

RCFC Appendix C Requirements

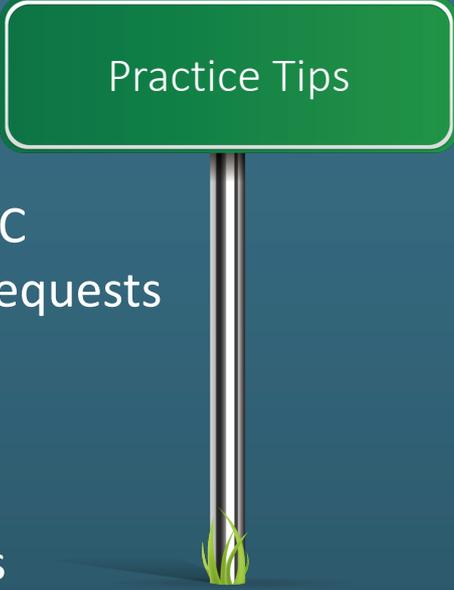
- Specific procedures for procurement protest cases – *i.e.*, “bid protests.”
- Various pre-filing notice requirements.
- Procedures for filing under seal and for obtaining a protective order to protect confidential and proprietary information.

RCFC Appendix C Requirements (cont.)

- Procedures for DOJ’s production of the Administrative Record, to include all documents relevant to the procurement (not a limited record like at GAO).
- Procedures for expedited requests for injunctive relief.
 - No “automatic stay” of award or performance like at GAO.

COFC Practice Tips

- The COFC follows the Federal Rules of Evidence
- USG often seeks extension of time to comply with RCFC deadlines, and Court will grant reasonable extension requests
- No right to a jury trial
- Judges not bound by decisions of other COFC judges
- Can render jury verdict-type judgment, but rarely does
- Need to prove damages with reasonable certainty
- USG likes to dispose of cases by motion to dismiss or motion for summary judgment



Practice Tips

CDA Cases at the COFC



CDA Cases

- One year to file vs. 90 days at the Board
- Must have Contracting Officer's final decision for COFC to exercise jurisdiction
- Recent Federal Circuit authority indicates compelling need to include all likely defenses in request for Contracting Officer's final decision
- Standard of review is *de novo* (like at the Board)

ADR at the COFC

- ADR Options:
 - Mediation
 - Neutral Evaluation
 - Early Neutral Evaluation
 - Mini-Trials



ADR at the COFC (cont.)

- ADR Procedure:
 - Any procedures agreed to by the parties and adopted by the settlement judge or third-party neutral may be used, however, the following rules must be followed:
 - The parties must develop and execute a memorandum of understanding
 - Complete confidentiality
 - File periodic status reports with the presiding judge
 - Presiding judge is not ADR judge



Litigating at the COFC – Advantages

- Court's expertise
- Government always represented by DOJ
 - Institutional interest
 - Not personally invested
- Broader jurisdiction than the Boards (can litigate contract and takings claim in one proceeding)
- Nationwide subpoena power
- Judges can come to you for trial



Litigating at the COFC – Disadvantages

- Enhanced risk of False Claims Act counterclaims
- COFC is forgiving to the Government on schedule and procedural issues
- Claims and disputes fall behind the queue of bid protests
- More formal than the Boards, and thus, more expensive (and perhaps slower)



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Questions?



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