

BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

MULTIPLE AWARD SCHEDULE PROTESTS

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Traditional competition for federal contracts is a zero-sum game: when one competitor wins, all other competitors lose. This is not the case with Multiple Award Schedule (MAS) contracting, where all vendors have the opportunity to sell their commercial products on the Federal Supply Schedule (FSS). The resulting absence of disappointed bidders creates an environment where bid protests are unusual. However, they are not unknown. Since the inception of the MAS Program, at least a few Schedule vendors have found reason to pursue their complaints before the General Services Administration (GSA), the Government Accountability Office (GAO), or the federal courts, and these protests have helped shape the boundaries of the current MAS Program.

The Competition in Contracting Act of 1984 (CICA) defines “protest” as “a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or . . . to a proposed award or the award of such a contract.”¹ The Federal Acquisition Streamlining Act of 1994 expanded this definition to make clear that the term “protest” encompassed a challenge to any of the following agency actions:

- (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of such solicitation or other request.
- (C) An award or proposed award of such a contract.
- (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.²

Currently, the Federal Acquisition Regulations (FAR) and the GAO’s own regulations incorporate the foregoing definition.³

Notwithstanding the statutory and regulatory definition of “protest,” the GAO

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historically has taken a somewhat narrow view of the aspects of a MAS procurement that can be protested. This view derives, in part, from the fact that purchases of supplies and services from the Schedule are considered to be made pursuant to full and open competition and thus are excepted from the competition requirements of CICA and FAR Part 15.⁴ In this regard, the Schedule process involves the negotiation of reasonable prices from each vendor⁵ and requires vendors to treat purchasers under the Schedule as most favored customers.⁶ Since the equivalent of full and open competition has already been achieved through the negotiation of reasonable prices, some have argued that there is no basis for protesting a Schedule procurement.⁷ In recent years, however, the GAO has evidenced a much greater willingness to hear certain types of protests brought by Schedule vendors. This upswing in Schedule protest activity has escaped some vendors, which are so accustomed to GAO's traditional aversion toward Schedule bid protests that they fail to consider this avenue for relief even when a protest may be warranted. In light of GAO's recent shift, new attention to this area of dispute resolution is important. Indeed, a thorough understanding of the rules and regulations that govern bid protests is essential for Schedule vendors both from an offensive and a defensive point of view. To that end, this BRIEFING PAPER discusses the forums where MAS vendors can protest, including their advantages and disadvantages, and then explores what MAS-related issues may be addressed in protests.

Where Can MAS Vendors Protest?

A MAS vendor, like most Government contractors, can initiate a bid protest in three different forums: the GAO (sometimes referred to as the Comptroller General), the U.S. Court of Federal Claims (COFC), or the agency itself. Historically, bid protests also could be lodged with the General Services Board of Contract Appeals (GSBCA) or with a

federal district court, but the GSBCA's authority to hear bid protests was eliminated in 1996⁸ and the district courts' statutory protest authority was eliminated in 2001.⁹

Of the two protest forums outside of the agency, the GAO offers the least expensive and most efficient alternative. Additionally, the GAO possesses the greatest experience—and thus, many would say, the greatest expertise—in resolving protest matters. However, this is not to say that the GAO necessarily should be the protest forum of choice for every aggrieved Schedule vendor. Each forum offers advantages and disadvantages, as discussed below.

Agency-Level Protests

Both the FAR and the agency supplements to the FAR and/or related agency guidance, *e.g.*, the GSA Acquisition Regulation (GSAR) and GSA Acquisition Manual (GSAM), set forth procedures for protests that are filed directly with the agency. Agency protest procedures are relatively fast, flexible, and informal. Some typical highlights of those procedures are discussed below. However, readers should review carefully the requirements of the cognizant agency, *e.g.*, GSAM 533.103, before filing any protest. In general, agency-level protests should be filed with the agency that issued the relevant Request for Quotations (RFQ) or, if no RFQ was issued, with the agency issuing the relevant order.

(1) *Timeliness and content.* The mechanics of filing a protest with an agency are governed in the first instance by the FAR, which is applicable to all executive branch agencies. The FAR requires that protests of solicitation improprieties (any problem related to the solicitation itself, for example, an agency's decision to limit a competition to Schedule vendors, or the agency's statement of its requirements) be filed before the solicitation's scheduled closing date. Protests of anything other than solicitation improprieties (generally, issues that arise after the closing date) must

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be filed no later than 10 calendar days after the basis of protest is known or should have been known, whichever is earlier.¹⁰ The FAR and agency guidance set forth specific information that the protester must provide, including solicitation information, point-of-contact information, and a detailed factual and legal statement of the protest grounds.¹¹ Any protest received after 4:30 p.m. will be considered filed on the next business day.¹²

(2) *Where to file.* The GSA's rules note that a protest is "filed" when it is received in the office designated in the solicitation for receipt of protests.¹³ This designation is usually made in a solicitation provision entitled "Service of Protest."¹⁴ In many, but not all, cases, the designated office is the same one listed on the front page of the RFQ or relevant order.

(3) *Automatic stay of award or performance.* The FAR requires the contracting agency, upon receipt of a protest, to refrain from awarding a contract (in the case of a preaward protest) or to suspend performance of the contract (in the case of a postaward protest). However, the agency may proceed with award or performance of the contract by executing a written determination that award or performance is justified by urgent and compelling reasons or is in the best interest of the Government.¹⁵ This written determination must be executed at a level above the Contracting Officer (CO).¹⁶ It should be noted that some agencies may take the position that the automatic stay of award does not apply to orders issued under a GSA MAS contract.

(4) *Procedural requirements and time frames.* The agency-level process is designed to move quickly; for example, the GSAM provides that the deciding official must conduct a scheduling conference with the protester as soon as practicable after the protest is filed to establish deadlines for oral or written arguments by the protester and by agency officials.¹⁷ The GSA's procedures encourage, but do not require, the parties to exchange information they submit to the deciding official, except that, the agency must respond in writing to the protest within 10 days unless another date is set by the deciding official and it must provide a copy of the response to the protester.¹⁸ If the agency wants to redact or withhold any information in the response from the protester, it must identify and provide the information to the deciding official for *in camera* review.¹⁹

(5) *The protest decision.* The deciding official is required to make "best efforts" to render a decision within 35 calendar days after the protest is filed.²⁰ Specific agency

rules may shorten this time period. However, there is no requirement that the decision be in writing.²¹ The GSAM, however, requires the decision be in writing and provide a rationale for the conclusions reached therein.²²

(6) *Advantages and disadvantages.* The advantages of filing a protest with the agency are that such protests are decided much more quickly than in other forums, they are relatively inexpensive, and the agency action may be automatically stayed until a decision is rendered. In addition, at the GSA, as at some other agencies, there is no provision for intervention by a third party (*e.g.*, an awardee whose contract is being protested). The disadvantages are that there is no discovery of evidence that could support the protester's case, there is no reimbursement for legal fees, and the relative informality of the proceedings may not allow for complex legal issues to be explored and resolved effectively. In addition, there is a procedural wrinkle that may be a strong deterrent to an agency-level protest: once the agency acts on the protest, the automatic stay of award or performance ends. If the protest is denied, and the protester chooses to pursue relief at the GAO, the protester will not be able to obtain the benefit of the GAO's automatic stay.

Government Accountability Office

Of the three bid protest venues—the contracting agency, the COFC, and the GAO—the GAO is by far the most popular. This is primarily due to the GAO's accessibility, relative speed, and long-standing reputation for expertise in procurement matters. Although the GAO process usually is not as speedy, informal, or inexpensive as the agency-level process, it provides protesters with an independent, impartial review of the agency's procurement action.

The GAO's protest procedures are set forth in its Bid Protest Regulations, found in the Code of Federal Regulations at 4 C.F.R. Part 21. Some of these requirements also are included in the FAR.²³ Again, vendors should review these requirements carefully prior to filing any protest rather than relying on the discussion in this PAPER, particularly with respect to the requirements setting forth the information that the protest must contain. In addition, vendors contemplating a protest may also wish to review the GAO's publication, *Bid Protests at GAO: A Descriptive Guide*, GAO-18-510SP (10th ed. 2018), which can be obtained through the GAO's website at <http://www.gao.gov>. This guide includes the text of the Bid Protest Regulations, along with a discussion of the regulatory requirements and helpful "practice tips."

On May 1, 2018, the GAO implemented a mandatory new electronic filing system Electronic Protest Docketing System (EPDS).²⁴ A protest filed on the new system will trigger a “notice” to the procuring agency, thereby automatically and immediately securing a CICA stay to the protester as long as the protest was timely filed.²⁵ Accompanying the new system is a \$350 filing fee for new protests, which will be used to fund EPDS.²⁶ Subsequent filings and supplemental protests do not require a filing fee.²⁷

While the GAO has been reviewing and deciding bid protests for almost 100 years, its current statutory authority to render bid protest decisions is based on CICA.²⁸ The GAO’s mandate under CICA is to ensure that statutory requirements for “full and open competition” are met. Understanding this fundamental concept can help a protester or prospective protester understand the GAO’s approach to carrying out its bid protest function.

(1) *Standing to protest.* To have a protest considered by the GAO, the protester must qualify as an “interested party.” The GAO defines “interested party” as an “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”²⁹ In other words, the interested party must potentially suffer an injury as a result of losing the contract or receive a benefit if the protest is sustained.³⁰ For example, depending on the nature of the issues raised in the protest, the GAO may find that a non-Schedule holder is not an interested party allowed to challenge the award of an order to a Schedule holder.³¹

(2) *Protective orders.* If the protest contains proprietary or confidential information that should be withheld from persons outside the Government, the protester may request a protective order or the GAO may issue such an order on its own initiative.³² Protesters need to know, however, that the issuance of a protective order usually has the effect of limiting the information to which the protester itself (as opposed to its counsel) will have access. This is because only a protester’s outside counsel, and in some cases in-house counsel and consultants, may apply for access to protected material.³³ When an agency deems material produced in response to the protest to be protected, as is generally the case with competitive proposals, evaluation documents, and source selection information, only the individuals admitted under the protective order will have access to those protected materials. That is, the protester itself (as opposed to its counsel) will not be able to see much of the agency’s response to the protest. This can be problematic in cases where

the protester elects to file and pursue its protest without counsel. In such cases, the GAO makes efforts to ensure that the agency provides the protester with enough information to argue its case, but such *pro se* protesters still cannot gain access to information such as other offerors’ proposals or the agency’s evaluations of those proposals.

(3) *Timeliness requirements.* It is critical to understand the GAO’s timeliness requirements for two reasons: (1) some of the deadlines are very short and therefore are easy to miss, and (2) the GAO almost never waives its timeliness rules.

The basic timeliness rules are the same as at the agency level: protests of solicitation improprieties must be filed before the solicitation’s scheduled closing date,³⁴ and protests of anything other than solicitation improprieties must be filed within 10 calendar days after the protester knew or should have known of the basis for protest.³⁵ There is one exception to the latter requirement. Where the protest concerns a procurement conducted on the basis of “competitive proposals” under which a debriefing is requested and required, the protest must be filed no later than 10 calendar days after the debriefing (even if the protester knew of at least some of its protest grounds before the debriefing).³⁶ The purpose of this rule is twofold: to preclude protesters from unnecessarily filing “protective” protests before they are fully informed about the basis for the agency’s procurement decision and to encourage agencies to provide thorough, informative debriefings that may resolve a potential protester’s concerns so that there is no need for a protest.³⁷ The GAO, however, has determined that procurements conducted under the GSA FSS pursuant to FAR Subpart 8.4 do not involve the use of “competitive proposals” and therefore do not qualify for the GAO timeliness exception for “requested and required” debriefings.³⁸

The GAO has a further requirement where the protest challenges the agency’s denial of an agency-level protest: such a protest must be filed within 10 calendar days after the protester knew or should have known of the agency’s initial adverse action on the agency-level protest.³⁹ In addition to dismissing protests that do not comply with these requirements, the GAO applies these requirements to protest grounds that are newly raised during the course of an ongoing protest. Thus, if information provided by the agency during a protest raises a new protestable issue, the protester must protest to the GAO within 10 calendar days of learning of the new information or forfeit that protest basis.

(4) *Automatic stay of award or performance.* The filing

of a timely protest at the GAO may require the agency to suspend or “stay” contract award or performance while the protest is pending.⁴⁰ In general, the filing of a protest before award requires the agency to refrain from making award until after the protest is resolved, and the filing of a post-award protest either within 10 calendar days after award or within five calendar days after a “requested and required” debriefing requires the suspension of contract performance.⁴¹

As is the case in agency-level protests, agencies may authorize award or continued performance in the face of the protest by executing a written determination that award or performance is justified by urgent and compelling reasons or is in the best interest of the Government.⁴² This written determination must be made by the head of the contracting activity.⁴³ In general, agencies have conformed with CICA’s automatic stay requirements with respect to protests challenging the award of orders under GSA MAS contracts where the protest is filed within 10 days of the award of the order. However, there is at least one decision holding that CICA’s stay provisions did not apply to the protest of a blanket purchase agreement (BPA) awarded under GSA MAS contracts because the debriefing provided in the procurement was not a “required” debriefing within the meaning of CICA.⁴⁴

(5) *Agency report, protester’s comments, and further proceedings.* The GAO’s electronic notice also triggers the “agency report” requirement—that is, the agency must produce a report responding to the protest allegations within 30 calendar days following the GAO’s telephonic notice.⁴⁵ The report must include any documents that are relevant to the protest and that support the agency’s position, as well as any relevant documents that are specifically requested by the protester.⁴⁶ The agency must provide copies of the report to the protester and any intervenors.⁴⁷ The protester’s and intervenor’s responses, which are called “comments” in GAO parlance, must be filed within 10 calendar days after receipt of the report.⁴⁸ In many cases, the GAO closes the record after receiving the protester’s comments. However, if the protester’s comments set forth new protest issues, the agency must respond with a supplemental agency report. In other cases, agencies simply request leave to respond to arguments raised in the protester’s comments, or the GAO itself may ask the agency to do so. The GAO establishes expedited schedules for such supplemental filings on a case-by-case basis. Finally, the GAO may decide that it cannot render a protest decision based on the written record and

may convene a hearing to obtain testimony from witnesses, such as the source selection official.⁴⁹ The GAO generally requires all parties to file posthearing comments, generally within five calendar days after the hearing.⁵⁰

(6) *GAO’s decision.* The GAO is required by statute to issue a decision on the protest within 100 calendar days after the protest was filed.⁵¹ There are several possible outcomes: the protest can be dismissed, denied, or sustained. As an initial matter, the GAO will only sustain a protest if it finds that the protester was *prejudiced* by any improper agency action—that is, but for the agency’s improper action, the protester would have a substantial chance of receiving the award. In many cases, the GAO finds that the agency acted improperly but denies the protest because the protester would not have been awarded a contract in any case.⁵²

If the GAO sustains the protest, it will recommend that the agency take some type of corrective action.⁵³ It is important to note that the GAO can only recommend a remedy; it does not have the authority to direct a contracting agency to take any particular action.⁵⁴ However, it is extremely rare for agencies to ignore the GAO’s recommendation. The statute requires that the agency report to the GAO on the implementation of its corrective action within 60 calendar days of the decision. If the agency declines to implement the GAO’s recommendation, it must so inform the GAO.⁵⁵ The GAO then reports the matter to Congress.⁵⁶ Since agencies do not want to put themselves in the position of having to answer congressional inquiries concerning their failure to implement the GAO’s recommendations, they nearly always follow the recommendations.⁵⁷

However, the GAO’s recommendation often leaves the agency with some latitude in implementing corrective action. For example, if the protest involved the agency’s failure to apply the evaluation criteria set forth in the Request for Proposals, the GAO may give the agency the option of either reevaluating proposals in accordance with the stated criteria or amending the solicitation to reflect the actual evaluation criteria and allowing offerors to submit revised proposals. So long as the agency’s corrective action does not itself violate procurement laws or regulations, it generally is not subject to further challenge.

(7) *Protest costs, attorneys’ fees, and bid and proposal costs.* In connection with sustaining a protest, the GAO generally awards the protester the costs of filing and pursuing its protest, including reasonable attorneys’ fees.⁵⁸ These

costs and fees must be documented in a detailed claim to the CO within 60 calendar days after receipt of the protest decision.⁵⁹ If it is not possible for the agency to take corrective action that puts the protester in a position to be considered for award, the GAO will also recommend that the agency reimburse the protester's costs of bid and proposal preparation.⁶⁰ Note that for protesters that are not small business concerns, the recovery of attorneys' fees generally is capped at \$150 per hour.⁶¹ At the end of 2019 and running for three years, the Department of Defense (DOD) will implement a pilot program to determine the effectiveness of requiring contractors with revenues in excess of \$250 million during the previous year to reimburse the DOD for costs incurred in processing bid protests denied in an opinion by the GAO.⁶² At the conclusion of the pilot program, the DOD will report to Congress on the feasibility of making the program permanent.⁶³

(8) *Alternative dispute resolution.* The GAO's regulations also provide for the use of "flexible alternative procedures," including establishing accelerated schedules or issuing summary decisions.⁶⁴ One other technique that the GAO frequently has employed is a dispute resolution process known as "outcome prediction."⁶⁵ In an outcome prediction case, the parties agree that the GAO will render an oral opinion as to the likely outcome of the protest, usually in a telephone conference conducted after the agency report is filed.⁶⁶ If the GAO informs the parties that it is likely to sustain the protest, the agency has the opportunity to take corrective action before the GAO issues a formal written opinion. If the GAO informs the parties that it is likely to deny the protest, the protester has the opportunity to withdraw the protest before it expends additional resources in pursuit of a losing protest.

(9) *Advantages and disadvantages.* As the foregoing points illustrate, the GAO offers protesters a number of advantages over the agency-level process, including the automatic stay, standardized procedures, the opportunity for protester's counsel to review and respond to the agency's position on the protest, and a vast body of published case law that helps protesters know what to expect. In addition, the GAO offers certain advantages over the COFC process, including generally lower costs, a statutorily mandated timeframe for resolution, and decisionmakers with extensive experience in procurement law. On the other hand, the GAO process is usually more costly and time-consuming than the agency-level process; it is difficult to pursue a protest involving protected material without counsel admitted under

a protective order; and there is no discovery beyond the documents in the agency's written record, with the possible exception of oral testimony at a hearing.

U.S. Court Of Federal Claims

The COFC is the only judicial forum in the United States currently authorized by statute to resolve bid protests.⁶⁷ The COFC's jurisdiction is limited by statute to (a) objections to a solicitation, a proposed award of a contract, or an award of a contract and (b) alleged violations of a statute or regulation in connection with a procurement or a proposed procurement.⁶⁸

As at the GAO, only "interested parties" may file protests at the COFC. The term "interested party" has the same meaning at the COFC as it does at the GAO—that is, an actual or prospective offeror with a direct economic interest in the award or failure to award a contract.⁶⁹ The term "federal agency," however, does not have the same meaning at the COFC as it does at the GAO. The COFC defines "federal agency" more broadly than the GAO, so that COFC has jurisdiction over Government entities that the GAO does not. For example, the COFC will hear a protest concerning a U.S. Postal Service procurement,⁷⁰ while the GAO will not.⁷¹ As discussed below, there are other significant differences between protests at the COFC and protests at the GAO.

(1) *Representation by counsel.* Unlike the GAO, which allows parties to represent themselves without counsel, the COFC requires that companies be represented by counsel. Individual plaintiffs, however, may represent themselves.⁷²

(2) *Timeliness requirements.* The COFC does not have stringent timeliness requirements like the GAO, and in a number of cases, the COFC explicitly rejected efforts to import the GAO's strict timeliness rules and was willing to consider the issue of a solicitation's improprieties after a solicitation's closing date.⁷³ However, in other decisions, the COFC held that improprieties apparent on the face of a solicitation must be protested before the solicitation's closing date, just as at the GAO.⁷⁴ This stricter timeliness rule was affirmed by the U.S. Court of Appeals for the Federal Circuit in 2007.⁷⁵ Protesters should be aware that if they wait until after award to complain about an obvious solicitation defect, they will now be unable to obtain relief at the COFC.

(3) *COFC procedures generally.* The COFC follows the Federal Rules of Civil Procedure. However, the COFC also has its own set of rules and there are some differences be-

tween the Rules of the Court of Federal Claims (RCFC) and the Federal Rules of which protesters should be aware.⁷⁶

(4) *Filing a protest.* The filing of a protest at the COFC is more complicated than at the GAO or the agency. First, the protester must file a “prefiling notice” at least 24 hours before filing a protest action in the court.⁷⁷ Then the protest is filed, in the form of a complaint⁷⁸ accompanied by a “cover sheet.”⁷⁹ If the protester is seeking the withholding of contract award or suspension of contract performance, the protester should file a motion for a temporary restraining order (TRO) and/or a motion for preliminary injunction (PI), as appropriate, with the complaint. As with most motions, the motion for TRO and/or the motion for PI should be accompanied by a memorandum in support, proposed orders, and any affidavits or other documents upon which the protester intends to rely.⁸⁰ Unlike CICA stays at the GAO, court-issued TROs and PIs are not automatic. A TRO or PI will issue only if the protesting party has shown (1) a likelihood of success on the merits, (2) balance of the hardships tipping in favor of issuing a TRO or PI, (3) irreparable harm in the absence of a TRO or PI, and (4) that a TRO or PI is in the public interest.⁸¹ In addition, unlike the GAO, which requires no security in exchange for the issuance of a CICA stay, the court must require the protester to give “security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”⁸² All documents must be served on the appropriate parties in accordance with RCFC Appendix C.⁸³

(5) *Protective orders.* Like the GAO, the COFC has a protective order procedure. The COFC model protective order is similar to the GAO’s standard protective order. Again, however, the COFC procedure is more complicated. If the protester wishes to protect any information in the complaint or other pleadings, the protester must file with those documents a motion for leave to file under seal and redacted versions of the pleadings for public release.⁸⁴ The protester also should file a motion for a protective order.⁸⁵

(6) *Intervention.* Intervention in a COFC protest—e.g., by an awardee or another offeror—is not automatic as it is at the GAO. For example, while an awardee of a contract may simply inform the GAO that it is intervening in a protest because of its status as awardee, at the COFC the awardee must file a motion for leave to intervene.⁸⁶ At least one COFC judge has denied motions by awardees to intervene, although such a party may be allowed to participate in the proceedings as an *amicus curiae* (“friend of the court”).⁸⁷

(7) *Discovery and supplementation of the record.* COFC bid protests are subject to the requirements of the Administrative Procedure Act of 1996 (APA).⁸⁸ The APA generally requires that actions filed in a federal court pursuant to the APA be decided based on the “administrative record”—the record that was before the agency at the time the agency made the decision being challenged.⁸⁹ However, a court may allow the record to be supplemented in order to conduct a meaningful review.⁹⁰ The COFC in some cases has allowed parties to put additional evidence into the record through the discovery process—for example, by taking depositions⁹¹—or through the submission of sworn affidavits.⁹²

On the issue of record supplementation, in *Axiom Resource Management, Inc. v. United States*, the Federal Circuit held, consistent with the APA standard of review, that a party’s ability to supplement the administrative record is limited to those circumstances where judicial review would otherwise be frustrated and the proper role of the court is to review the agency decision “based on the record the agency presents to the reviewing court.”⁹³ The court explained that “[t]he purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to ‘convert the ‘arbitrary and capricious’ standard into effectively de novo review.’”⁹⁴ In so doing, the court affirmed the discretion given to COs and reversed a COFC decision relying on the eight “exceptions” to the rule against supplementation of the administrative record the COFC adopted from the D.C. Circuit’s decision in *Esch v. Yeutter*.⁹⁵ Forgoing the exceptions, the court held that supplementation of the record should be permitted only “if the existing record is insufficient to permit meaningful review consistent with the APA.”⁹⁶

(8) *Standard of review.* By statute, the COFC applies the APA standard of review to bid protests.⁹⁷ The APA standard provides, in part, that a court shall set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁹⁸ The COFC, therefore, has indicated that there are two general categories of protest grounds. First, a protester may allege that an agency *violated an applicable procurement statute or regulation*. Second, a protester may allege that an agency’s actions were *arbitrary, capricious, or an abuse of discretion*. Most protests in the COFC will involve an application of the “arbitrary, capricious. . . abuse of discretion” standard of review.⁹⁹ This standard is highly deferential to the agency and requires the court to uphold any agency action that is reasonably based on a consideration of the relevant

information.¹⁰⁰ In either case, as in a GAO protest, it is not enough to demonstrate that the agency acted improperly; the protester also must establish that it was prejudiced by the agency's improper action.¹⁰¹

(9) *Remedies.* One difference between a COFC protest and GAO or agency-level protests is that the COFC's decision is binding on the agency. If the COFC determines that the protester is entitled to relief, the agency must comply with the remedy that the COFC provides or risk sanctions for contempt of court. The COFC may award any nonmonetary relief that it considers proper, including declaratory judgments and injunctive relief.¹⁰² In addition, the COFC, by statute, may award bid and proposal preparation costs.¹⁰³

However, unlike the GAO, the COFC generally is not inclined to award attorneys' fees to prevailing protesters.¹⁰⁴ The COFC is only required to award attorneys' fees to a prevailing party when the party meets certain specific requirements of the Equal Access to Justice Act (EAJA).¹⁰⁵ Generally, EAJA awards of attorneys' fees (and other costs, such as expert witness costs) are only available to parties that do not exceed maximum net worth limitations,¹⁰⁶ that meet the strict EAJA definition of "prevailing party,"¹⁰⁷ and that submit, under oath, the required application and supporting statements.¹⁰⁸ In addition, the agency must fail to show that its litigation position was "substantially justified."¹⁰⁹

(10) *Appeals to the Federal Circuit.* Another difference between COFC protests and those filed in the GAO or at the contracting agency is the availability of an appeal from a COFC protest. A party wishing to appeal a COFC decision must file a notice of appeal at the U.S. Court of Appeals for the Federal Circuit within 60 calendar days after the COFC's decision is entered.¹¹⁰ The Federal Circuit's decision is binding on the COFC and the contracting agency.

(11) *Advantages and disadvantages.* To summarize, the COFC offers some potential advantages over the GAO and agency-level processes, including the possibility of obtaining discovery and the binding nature of the COFC's remedies. It should be noted that a protester may pursue a protest first at the GAO and then, if unsuccessful, file a second challenge to the agency action in the COFC.¹¹¹ Some cases also may benefit from the more exhaustive and formal procedures in the federal court setting. However, corporate plaintiffs must be represented by counsel; and, if the corporation uses outside rather than in-house counsel, the process can be expensive.

What MAS-Related Issues May Be Addressed In Protests?

The universe of possible protest issues is vast, and all protestable issues cannot be addressed here. However, certain procedural and substantive issues either are unique to MAS procurements or have arisen in MAS protests in the past and, therefore, warrant some brief exploration. This discussion may be helpful in an assessment of the likelihood of success of a protest (but it should not be substituted for legal advice).

(1) *Non-Schedule vendor protests against Schedule procurements.* Although an agency's decision to purchase a product or service from the Schedule instead of conducting an off-Schedule competition for that product or service generally is not protestable by a non-Schedule vendor,¹¹² and an agency's decision to conduct a competition only among Schedule vendors instead of opening the competition to all potential offerors is similarly nonprotestable,¹¹³ there are exceptions to these general principles. For example, a protester may allege that a Schedule purchase does not meet the agency's actual requirements¹¹⁴ or that an agency intends to order products or services that are beyond the scope of a vendor's MAS contract.¹¹⁵

(2) *Timeliness.* As discussed above, protests of alleged solicitation defects must be filed before the solicitation closes (or, where an alleged defect is incorporated into a solicitation after the initial closing date, the next closing date after the defect is incorporated). Sometimes, however, it is difficult to determine whether the defect was apparent on the face of the solicitation and therefore subject to the "closing date rule." If the defect is not apparent on the face of the solicitation, the agency and GAO "10-day rule" applies—that is, the protester must raise the protest allegation within 10 calendar days after the protester "knew or should have known" of the basis for protest. Thus, where a solicitation issued to MAS vendors did not properly state the agency's basis for award, but the protester could not have known that until after award, the GAO has held that the protest was timely.¹¹⁶ Similarly, in the COFC, any protest against a known defect in the solicitation must be filed prior to "the close of the bidding process."¹¹⁷

(3) *Standing to protest.* In some cases, a non-Schedule vendor has tried to protest some aspect of an agency's attempt to purchase supplies or services from a Schedule. In such cases, the Government may take the position that a non-Schedule vendor is not an "interested party" as defined

by CICA and therefore does not have standing to protest. If the non-Schedule vendor would not be eligible for an order even if it had a Schedule contract (because, for example, it did not offer a product meeting the agency's needs), it is not an interested party able to challenge the procurement.¹¹⁸

(4) *Agency's failure to solicit a vendor.* When an agency decides to conduct a competition among Schedule vendors, it may be required to furnish a copy of the RFQ to certain vendors or to a certain number of vendors. For example, the GAO sustained a protest where the GSA sent copies of the RFQ to only two of 13 vendors of furniture systems, even though the applicable Schedule required the GSA to furnish copies of the RFQ to all vendors for whom it had brochures on hand.¹¹⁹ The GAO also has sustained a protest where an agency issued a Schedule order to a company that was the only vendor on one particular Schedule, but where identical services were available at a lower price from the protester on a different Schedule.¹²⁰

On the other hand, the GAO has held that an agency meets applicable statutory and regulatory competition requirements when it solicits quotations from at least three FSS contractors and that it is not required to solicit the incumbent FSS contractor.¹²¹ In addition, if an agency properly determines that only one Schedule vendor offers a product that meets its needs, the agency is not required to solicit any other vendors or to seek further competition.¹²² A disappointed vendor may protest the agency's determination of what its needs are, but the protester has the burden of demonstrating that its product can meet the agency's needs at the lowest overall price.¹²³

(5) *GSA failure to award Schedule contract.* Just as the GAO generally will review an agency's rejection of a vendor's proposal pursuant to a competitive solicitation, the GAO also will review the GSA's rejection of a vendor's proposal pursuant to a MAS solicitation.¹²⁴ In one such case, where the GSA rejected the protester's offer after lengthy negotiations because the protester failed to provide information establishing the reasonableness of its offered prices, the GAO stated that it will question an agency's determination of price reasonableness "only where it is clearly unreasonable or there is a showing of bad faith or fraud."¹²⁵

(6) *Non-Schedule purchases disguised as Schedule purchases.* Agency purchases from Schedules are not subject to statutory "full and open competition" requirements. In at least one case, a protester turned this proposition around to argue that a procurement was not really a Schedule procure-

ment as claimed by the contracting agency and that the procurement therefore was subject to competition requirements that were not met.¹²⁶ The protester did not succeed, as the procurement was properly conducted as a MAS procurement and was not subject to competition requirements.¹²⁷

(7) *Reasonableness of vendor selection.* The GAO will review an agency determination for reasonableness.¹²⁸ As discussed above, the COFC reviews agency determinations to determine whether they were "arbitrary and capricious" or in violation of law and regulation. In practice, the COFC's "arbitrary and capricious" standard is essentially the same as the GAO's "reasonableness" standard: both are extremely deferential to the agency.¹²⁹ However, the GAO occasionally has found an agency's decision to be unreasonable.¹³⁰

(8) *Reasonableness of time given to respond to solicitation.* The GAO has held that there may be circumstances where an agency's failure to afford offerors a reasonable amount of time to respond to a solicitation may support a bid protest.¹³¹

(9) *Agency's use of a particular schedule.* In some cases involving requirements for services, the services an agency needs are not described precisely by any one Schedule, and the agency selects the Schedule that most closely describes its needs. A vendor that is not on the selected Schedule, but is on a different Schedule, may wish to protest the agency's choice of Schedule. In one such case at the COFC, the court found the agency's determination of the appropriate schedule to be reasonable.¹³² On the other hand, the GAO has sustained a protest where an agency failed to review similar offerings available under a different Schedule.¹³³

(10) *Blanket purchase agreement (BPA) awards.* A BPA is a simplified agreement that allows an agency to satisfy recurring needs by placing successive orders with a Schedule vendor.¹³⁴ While BPAs can make repetitive ordering easier for the agency, they can mean fewer orders for the Schedule vendors that are not holders of such BPAs. Therefore, vendors sometimes bring protests against BPA awards. However, a protest against the award of a BPA itself is not likely to be successful at either the GAO or the COFC since there are virtually no restrictions on an agency's award of a BPA,¹³⁵ and a BPA award involves a discretionary agency decision.¹³⁶

(11) *Defining the agency's requirements.* Whether or not an agency is making a purchase against a Schedule, it must properly define its needs to ensure that it identifies vendors

that can meet those needs and that the vendors can compete intelligently and fairly.¹³⁷ Vendors that can prove their product could satisfy the agency's requirements have been successful in protesting the agency's decision not to consider their product. Thus, the GAO has held that, where an agency decides not to consider a particular vendor's product because the agency concludes that the product does not meet its needs, the vendor whose product was excluded from consideration may protest the exclusion, and the GAO will determine whether the agency had a reasonable basis for determining that the excluded product did not meet its needs.¹³⁸ Similarly, the GAO has sustained a protest against an agency's failure adequately to define what it meant by "technically acceptable."¹³⁹

(12) *Purchase of non-Schedule items in connection with a Schedule purchase.* When an agency conducts a competition among Schedule vendors, the vendors may not offer items that are not included in their Schedule contracts. An agency's purchase of such non-Schedule items as part of a purchase from a Schedule vendor violates the competition requirements of CICA.¹⁴⁰ Thus, items that are not on a Schedule must be procured separately using the competitive procedures appropriate to that purchase. While this issue most often historically arose in the context of product procurements, recent case law makes clear that the GAO will strictly examine the nature of services offered as well. For example, in *US Investigations Services, Professional Services Division, Inc.*, the GAO sustained a challenge to an agency's issuance of a task order under the awardee's FSS contract where the agency failed to give meaningful consideration to whether the awardee's FSS contract labor categories, offered in response to the solicitation, encompassed the task order requirements.¹⁴¹ The GAO was especially critical of the agency's narrow focus on the RFQ's educational and experience requirements, to the exclusion of the substance of the labor category descriptions and their divergence from the solicitation requirements.¹⁴² Both the GAO and the COFC have sustained protests challenging agency attempts to purchase "nonschedule" items in connection with Schedule purchases.¹⁴³

The GAO further emphasized the importance of contractors' labor categories aligning with the work to be performed in *Allworld Language Consultants, Inc.*¹⁴⁴ Here, Allworld protested the award of a linguistics contract to SOS International, Ltd. (SOSI). The solicitation called for the awardee to provide both written and oral translation services. SOSI proposed a single labor category from its FSS contract,

"Translator Written Translation," to perform all duties in the Performance Work Statement, despite the category not explicitly including oral translation services. The GAO sustained Allworld's protest, stating SOSI's proposed labor category did not "align precisely" with the work to be performed. The GAO further stated that "the labor categories identified and described in each firm's underlying FSS contract are fixed, discrete, specific labor category descriptions that are contractually binding and not subject to alteration."¹⁴⁵ Some commentators view this decision as presenting two options for contractors going forward: (1) draft labor categories so broad as to encompass all potential work to be bid over the life of the FSS contract or (2) include as many specific labor categories as possible in its FSS contract to ensure it can always bid a specific labor category to encompass the work to be performed. Of course, it is also possible that future protest decisions will restore additional balance to the situation. Additionally, if the value of the incidental items is less than the \$3,500 micro-purchase threshold, the agency may procure those items from the Schedule vendor or any other supplier without regard to any other competition requirements.¹⁴⁶

More recently, one "flavor" of MAS bid protests involving non-Schedule products that has received a lot of attention involves the procurement of products that do not meet the requirements of the Trade Agreements Act.¹⁴⁷ Products that are not TAA-compliant may not be purchased through the GSA Schedule program. Accordingly, offers of such products will be reviewed by the GAO, and, depending upon the facts, may form the basis for a successful bid protest.¹⁴⁸ *Klinge Corp. v. United States*¹⁴⁹ provides an apt illustration of this principle.

Klinge involved a bid protest that started at the GAO but ended at the COFC. The case involved an agency's evaluation (or, in the protester's view, its failure to evaluate) the awardee's compliance with the Trade Agreements Act. While not taking issue with the general principle that an agency is entitled to rely on an offeror's TAA certification, the court nonetheless sustained the protest, finding that, upon the facts before it, the agency should have gone further in its inquiry since it had "reason to believe that the firm will not provide compliant products."¹⁵⁰ Having failed to question the offeror's TAA certification when it had reason to do so, the agency's evaluation was unreasonable.¹⁵¹

(13) *Applicability of FAR Part 15 requirements.* FAR Part 15 sets forth detailed procedural requirements for procurements based on the submission and evaluation of competi-

tive proposals. While an agency generally is not required to comply with the procedural requirements of FAR Part 15 when it makes a Schedule purchase,¹⁵² if it holds itself out as following such rules, it must abide by them.¹⁵³ Thus, some protesters have attempted to argue that an ordering agency failed to comply with certain FAR Part 15 requirements, such as rules for selecting the “best value” proposal,¹⁵⁴ conducting discussions with offerors,¹⁵⁵ or adhering to stated evaluation criteria.¹⁵⁶

(14) *Agency evaluation of past performance.* Agencies conducting competitive acquisitions under the FAR must consider vendors’ past performance in evaluating proposals for award. This is true even if the vendors are Schedule vendors. Thus, agency past performance evaluations are a frequent subject of protests. At the GAO, past performance evaluations are reviewed only to determine whether the agency’s evaluation was reasonable.¹⁵⁷ For example, in one case involving the past performance of Schedule vendors, the GAO found an agency’s past performance evaluation unreasonable where it was based on a mechanical comparison of past performance scores for incumbent vendors that was unfair to nonincumbents.¹⁵⁸ The agency reevaluated the proposals in accordance with the GAO’s recommendation, and the GAO found the reevaluation reasonable.¹⁵⁹

Conclusion

Although the GSA’s MAS procedures are modeled on commercial practices in many ways, the MAS process does offer vendors the opportunity—unavailable in the commercial world—to challenge a buyer’s ordering decision, especially where the buying agency chooses to conduct a competition among Schedule vendors. Indeed, such vendors should be cognizant of the available protest alternatives—not only so that they can exercise their protest rights if necessary, but also so that they can operate within the protest framework if they find that their receipt of a task or delivery order award puts them on the receiving end of a protest.

Guidelines

These *Guidelines* are intended to assist MAS vendors in understanding the rules and regulations governing bid protests, the advantages and disadvantages of the available forums, and the types of issues related to MAS procurements that may be addressed in a protest. They are not however, a substitute for professional representation in any specific situation.

1. *Whether To Protest.* Whether to protest a Schedule or-

der or BPA, obviously, is a business decision that involves multiple factors and considerations. While a protest always is somewhat of an uphill climb due to the great discretion the law gives a federal agency’s award decision, the GAO’s statistics make clear many protests are successful. In fact, according to the GAO, in fiscal year 2017, the “effectiveness rate” (i.e., the rate by which the protester receives some relief, either in the form of corrective action or the GAO sustaining the protest) of a GAO protest was 47%.

2. *What To Protest.* Protesters of GSA Schedule orders can raise most of the same issues as most other protesters, including unreasonable evaluations, failure to adhere to the solicitation, and failure to provide meaningful discussions (where discussions were contemplated by the solicitation). One particular ground quite common to Schedule protests, however, is the agency’s purchase of a product or service not on the awardee’s Schedule contract. Such protest grounds are routinely granted at the GAO.

3. *Where To Protest.* There are three potential venues for filing a GSA MAS protest: agency-level, the GAO, and the COFC, each having different procedural rules and pros and cons. The decision *where* to file a protest is far more objective, and therefore easier to make, than the decision *whether* to file a protest.

4. *Agency-Level Protests.* The agency-level protest is the simplest, fastest, and least antagonistic to the agency, but protesters generally are not provided access to information in the record that will help them fully understand the agency’s procurement decision. Further, it is the view of many practitioners that, when the grounds of protest are not black and white, protesters receive a fairer shake at GAO and the court than at the agency.

5. *GAO Protests.* The GAO process is substantially more time-consuming and costly than an agency protest, and the timeliness requirements are strict. On the other hand, the GAO’s process may result in an automatic stay of award or performance, it provides the protester and/or the protester’s lawyer with a record of the procurement and the agency’s decisionmaking process, and it results in a detailed written decision explaining the basis for the GAO’s conclusions.

6. *Court of Federal Claims Protests.* Similar to the GAO, the COFC provides procedural safeguards (without the automatic stay, but with the opportunity to request a preliminary injunction) plus the opportunity to request discovery from the agency and the prospect of a binding judicial

remedy. Also, a protester may file at the COFC after being denied relief at the GAO.

7. *Timeliness Traps for the Unwary.* FAR 8.405-2(d) postaward “brief explanations” are not “requested and required debriefings” pursuant to a competitive proposals process and do not fall within the exception to GAO timeliness rules. In other words, requesting a debriefing from the agency does not toll the ticking of the timeliness clock for a FAR Subpart 8.4 protest filing.

8. *Applicability of FAR Part 15 Procedures to FAR Subpart 8.4 Procurements.* FAR Part 15 procedures are not technically applicable to GSA MAS task and delivery order procurements. However, the GAO will look to the standards in FAR Part 15 for guidance, for example, in deciding whether exchanges with offerors were fair and equitable.

9. *Ancillary Items.* For years, the GSA has struggled with what rules should govern the purchase of ancillary items, in other words, items not on an offeror’s Schedule but necessary for performance of the underlying task. Recently, the GSA attempted to add structure to such purchases by creating a new category of item called Order-Level Materials (OLM). Purchases of OLMs could prove to be an additional ground for protest in the future.

ENDNOTES:

¹Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199 (1984) (codified as amended at 31 U.S.C.A. § 3551(1)).

²Pub. L. No. 103-355, § 1401, 108 Stat. 3243, 3287 (1994) (codified as amended at 31 U.S.C.A. § 3551(1)).

³FAR 33.101; 4 C.F.R. § 21.1(a).

⁴41 U.S.C.A. § 152(3); FAR 6.102(d)(3); see also, e.g., *Computer Universal, Inc.*, Comp. Gen. Dec. B-291890 et al., 2003 CPD ¶ 81 (“The procedures established for the FSS program satisfy the general requirement for full and open competition.”).

⁵FAR 15.402(a).

⁶48 C.F.R. § 538.270-1(c).

⁷Note that § 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, imposes additional competition requirements for DOD orders for services exceeding \$150,000. See 48 C.F.R. § 208.404(a)(i).

⁸From 1985 to 1996, the Brooks Act, 40 U.S.C.A. § 759, as amended by CICA, gave the GSBICA the authority to resolve bid protests involving procurements for automated data processing equipment and related services. In 1996, the Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 679, 680 (1996), abolished the GSBICA’s bid protest jurisdiction, leaving the

GAO, the district courts, the COFC, and the contracting agency as possible protest forums.

⁹From 1970 to 1997, district courts exercised jurisdiction over postaward bid protests under the doctrine set forth in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). District courts in some federal judicial circuits also took jurisdiction over preaward protests, while the COFC entertained preaward, but not postaward, protests. From 1997 to 2001, the Administrative Dispute Resolution Act of 1996 (ADRA) gave the district courts and the COFC concurrent jurisdiction over both preaward and postaward bid protests. 28 U.S.C.A. § 1491(b). The ADRA called for the expiration, or sunset, of the district courts’ statutory bid protest jurisdiction on January 1, 2001, arguably leaving the COFC as the only judicial forum for bid protests.

¹⁰FAR 33.103(e).

¹¹FAR 33.103(d)(2); GSAM 533.103-1.

¹²GSAM 533.103-1(c).

¹³GSAM 533.103-1(c).

¹⁴See FAR 52.233-2.

¹⁵FAR 33.103(f)(1), (f)(3).

¹⁶FAR 33.103(f)(1), (f)(3).

¹⁷GSAM 533.103-2(a)(2).

¹⁸GSAM 533.103-1(e)(3) to (5).

¹⁹GSAM 533.103-1(e)(5).

²⁰FAR 33.103(g).

²¹FAR 33.103(h).

²²GSAM 533.103-2(e) (2004).

²³FAR 33.104.

²⁴83 Fed. Reg. 13817 (Apr. 2, 2018) (amending 4 C.F.R. pt. 21).

²⁵4 C.F.R. § 21.3(a).

²⁶See 83 Fed. Reg. 13817; <https://www.gao.gov/legal/bid-protests/file-a-bid-protest>.

²⁷83 Fed. Reg. at 13818.

²⁸The portion of CICA relating to the GAO’s bid protest jurisdiction is codified at 31 U.S.C.A. §§ 3551 to 3556. However, contractors should keep in mind that GAO’s jurisdiction to hear protests is not unfettered, and the GAO will routinely refrain from hearing cases for which it has no jurisdictional authority to render a decision. See, e.g., *Herman Miller, Inc.*, Comp. Gen. Dec. B-407028, 2012 CPD ¶ 296 (declining to decide (1) the protester’s challenge to agency’s use of a particular North American Industry Classification System (NAICS) code, and (2) the protester’s challenge that the agency’s acquisition approach implicated certain Small Business Administration regulations). See also 4 C.F.R. § 21.5.

²⁹4 C.F.R. § 21.0(a)(1).

³⁰*J. Squared Inc., d/b/a Univ. Loft Co.*, Comp. Gen. Dec. B-408388, 2013 CPD ¶ 201, 2013 WL 4536698, at *3 (finding interested party status where the protester’s economic interests were prejudiced by the agency’s decision to restrict

the procurement to oak constructed furniture, as the protester could compete more effectively if permitted to offer furniture constructed of another type of wood).

³¹See, e.g., Draeger Safety, Inc., Comp. Gen. Dec. B-285366 et al., 2000 CPD ¶ 139, B-285366, at *8 (Schedule holder that does not have a Schedule product that meets the agency's needs is not an "interested party" to raise issues with regard to the agency's cost evaluation and request for a price decrease from the awardee); see also FitNet Purchasing Alliance, Comp. Gen. Dec. B-309911, 2007 CPD ¶ 201, 2007 WL 3257012, at *2 (protester is not an interested party allowed to challenge the terms of a solicitation issued under the FSS program where the protester does not hold an FSS contract); Technical Assocs., Inc., Comp. Gen. Dec. B-406524, 2012 CPD ¶ 185, 2012 WL 2177132, at *2 (same).

³²4 C.F.R. §§ 21.1(d)(1), 21.4.

³³See 4 C.F.R. § 21.4(d).

³⁴4 C.F.R. § 21.2(a)(1); MSC Indus. Direct Co., Comp. Gen. Dec. B-409585 et al., 2014 CPD ¶ 175, 2014 WL 2925202, at *6 ("To be timely, any objection to the clearly articulated price evaluation scheme would have needed to be raised prior to the closing date for receipt of quotations."); see also Bridges Sys. Integration, LLC, Comp. Gen. Dec. B-411020, 2015 CPD ¶ 144, 2015 WL 2084755, at *4 ("To be timely, a challenge to the terms of this solicitation had to be raised prior to submitting a proposal under the terms of that solicitation. . . . [In] keeping with the purpose of our timeliness rules, we conclude that challenges to the terms of a standing FSS solicitation are untimely, with respect to the application of these terms to the evaluation of an offeror's proposal, if the protest is filed after the protester has submitted a proposal under that solicitation.").

³⁵4 C.F.R. § 21.2(a)(2).

³⁶4 C.F.R. § 21.2(a)(2).

³⁷To that end, the National Defense Authorization Act for Fiscal Year 2018 enhanced debriefings for DOD procurements. Pub. L. No. 115-91 § 818, 131 Stat 1283, 1463-64 (2017). Disappointed offerors may submit written questions related to the postaward debriefing within two business days of the postaward debriefing. 10 U.S.C.A. § 2305(b)(5)(B)(vii). The agency must respond to the questions within five business days; the debriefing is concluded upon the agency's response. 10 U.S.C.A. § 2305(b)(5)(C).

³⁸See IR Tech., Comp. Gen. Dec. B-414430.2 et al., 2017 CPD ¶ 162, 2017 WL 2570952, at *4 ("FSS procurements conducted pursuant to FAR subpart 8.4 are not procurements conducted on the basis of competitive proposals, and the debriefing exception to [the GAO's] timeliness rules does not apply to such procurements."); MIL Corp., Comp. Gen. Dec. B-297508 et al., 2006 CPD ¶ 34, 2006 WL 305965, at *5 (same); McKissack-URS Partners, JV, Comp. Gen. Dec. B-406489.2 et al., 2012 CPD ¶ 162, 2012 WL 1862018, at *4 (debriefing conducted under the Brooks Act in a procurement for architect-engineer services does not fall within the exception to the GAO's general timeliness rules because such a procurement is not a "procurement conducted on the basis of competitive proposals, under which a debriefing is requested and, when requested, is

required"). It should be noted, however, that new information learned at a debriefing, whether or not the debriefing was "requested and required," may support a protest if challenged in a timely fashion. See, e.g., Sumaria Sys., Inc., Comp. Gen. Dec. B-299517 et al., 2007 CPD ¶ 122. Additionally, it is worth noting that a failure to give a debriefing, or giving an inadequate debriefing, is not protestable. See, e.g., Para Scientific Co., Comp. Gen. Dec. B-299046.2, 2007 CPD ¶ 37, at 2007 WL 491793, at *1 n.3 ("Whether or not an agency provides a debriefing and the adequacy of a debriefing are issues that [the GAO] will not consider, because the scheduling and conduct of a debriefing is a procedural matter that does not involve the validity of an award.").

³⁹4 C.F.R. § 21.2(a)(2), (a)(3).

⁴⁰31 U.S.C.A. § 3553(c), (d); 4 C.F.R. § 21.6.

⁴¹31 U.S.C.A. § 3553(c), (d); 4 C.F.R. § 21.6.

⁴²31 U.S.C.A. § 3553(d)(3)(c)(i).

⁴³FAR 33.104(b), (c)(2).

⁴⁴See, e.g., Sys. Plus, Inc. v. United States, 68 Fed. Cl. 206, 209-10 (2005).

⁴⁵4 C.F.R. § 21.3(c). The timeframes discussed here apply to the GAO's standard procedures. The GAO has an alternative "express option" procedure that has shorter timeframes, leading to a decision on the protest within 65 calendar days. 4 C.F.R. § 21.10(b).

⁴⁶4 C.F.R. § 21.3(d).

⁴⁷4 C.F.R. § 21.3(e). The regulations define an intervenor as "an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied." 4 C.F.R. § 21.0(b)(1).

⁴⁸4 C.F.R. § 21.3(i).

⁴⁹4 C.F.R. § 21.7. While any party may request a hearing, the GAO alone decides whether or not one is needed.

⁵⁰4 C.F.R. § 21.7(g).

⁵¹31 U.S.C.A. § 3554(a); 4 C.F.R. § 21.9.

⁵²See, e.g., Data Recognition Corp., Comp. Gen. Dec. B-411767.7, 2016 CPD ¶ 24, 2016 WL 358960, at *4 (denying protest where, although the "record appears to show an error in the procurement" the protester "has not shown that there is any reasonable possibility that it was prejudiced by this procurement error").

⁵³4 C.F.R. § 21.8.

⁵⁴31 U.S.C.A. § 3554(b).

⁵⁵31 U.S.C.A. § 3554(b)(3).

⁵⁶31 U.S.C.A. § 3554(e); see GAO Bid Protest Annual Reports to Congress, <https://www.gao.gov/legal/bid-protest-annual-reports/about>.

⁵⁷A recent exception to this trend is exemplified by March 30, 2012 and November 13, 2012 letters from the GAO to Congress, wherein the GAO identified a total of 18 instances in which the Department of Veterans Affairs (VA) declined to implement the GAO's recommendations follow-

ing successful protests. See 2012 WL 5510908, at *1 (noting that the GAO had sustained protests in Kingdomware Techs., Comp. Gen. Dec. B-405727, 2011 CPD ¶ 283; Aldevra, Comp. Gen. Dec. B-406205, 2012 CPD ¶ 112; Crosstown Courier Serv., Inc., Comp. Gen. Dec. B-406262, 2012 CPD ¶ 119; and 15 subsequent protests filed by Aldevra and Kingdomware). The protests at issue all related to whether the VA's use of the GSA's FSS procedures without first considering whether two or more service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) concerns were capable of meeting the agency's requirements at a reasonable price contravened the requirements of the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C.A. §§ 8127–8128. In each protest, the GAO held that the VA's use of the FSS procedures contravened the requirements of the Act. 2012 WL 5510908, at *1. Two weeks after the GAO's November 13, 2012, letter to Congress, the COFC ruled that the VA's interpretation of the Act was reasonable, a decision that was affirmed on appeal at the Federal Circuit but was later reversed by the U.S. Supreme Court. *Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226 (2012), *aff'd*, 754 F.3d 923 (Fed. Cir. 2014), *rev'd and remanded*, 136 S. Ct. 1969 (2016).

⁵⁸31 U.S.C.A. § 3554(c)(1); 4 C.F.R. § 21.8(d).

⁵⁹4 C.F.R. § 21.8(f)(1).

⁶⁰31 U.S.C.A. § 3554(c)(1); 4 C.F.R. § 21.8(d).

⁶¹31 U.S.C.A. § 3554(c)(2)(B); FAR 33.104(h)(5)(ii). The GAO may authorize payment of fees above \$150 per hour based on cost of living or special factors such as the limited availability of qualified attorneys. FAR 33.104(h)(5)(ii). See *Sodexo Mgmt., Inc.—Costs*, Comp. Gen. Dec. B-289605.3, 2003 CPD ¶ 136 (granting request for cost of living adjustment based on U.S. Department of Labor's Consumer Price Index).

⁶²National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat 1283, 1467 (2017).

⁶³Pub. L. No. 115-91 § 827.

⁶⁴4 C.F.R. § 21.10(e).

⁶⁵See 4 C.F.R. § 21.0(h).

⁶⁶*WHR Group, Inc. v. United States*, 115 Fed. Cl. 386, 392 n.8 (2014) (“An outcome prediction is a ‘flexible’ alternative dispute resolution procedure wherein ‘GAO will advise the parties of the likely outcome of the protest in order to allow the party likely to be unsuccessful to take the appropriate action to resolve the protest without a written decision.’”).

⁶⁷The COFC's current statutory authorization to hear and decide bid protests comes from the Administrative Dispute Resolution Act of 1996. 28 U.S.C.A. § 1491(b)(1). One apparent exception to this exclusive judicial jurisdiction involves bid protests regarding maritime contracts. Exclusive jurisdiction over maritime contract disputes, including bid protests, historically has been vested in the U.S. district courts under the Suits in Admiralty Act. See *Asta Eng'g, Inc. v. United States*, 46 Fed. Cl. 674, 676 (2000), *abrogated by Red River Holdings, LLC v. United*

States, 87 Fed. Cl. 768, 796 (2009) (concluding maritime procurements are exclusive to COFC but disputes over performance of maritime contracts belong in district court).

⁶⁸28 U.S.C.A. § 1491(b)(1); see also, e.g., *Galen Medical Assocs., Inc. v. United States*, 369 F.3d 1324, 1328 (Fed. Cir. 2004).

⁶⁹See *Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001); *Alaska Cent. Exp., Inc. v. United States*, 50 Fed. Cl. 510, 515 (2001); *Three S Consulting v. United States*, 104 Fed. Cl. 510 (2012). *Hughes Group, LLC v. United States*, 119 Fed. Cl. 221 (2014) (finding that the protester lacked standing to bring the protest because it did not have a substantial chance to receive the contract); *Octo Consulting Group, Inc. v. United States*, 124 Fed. Cl. 462, 468 (2015) (“Therefore [plaintiff] has not shown a ‘direct economic interest’ in the procurement, because it cannot ‘show that it had a ‘substantial chance’ of winning the contract.’”); *Che Consulting, Inc. v. United States*, 125 Fed. Cl. 234, 246 (2016) (“Plaintiff therefore did not have a substantial chance of being awarded the contract. Consequently, plaintiff does not possess the necessary direct economic interest that would qualify it as an interested party.”).

⁷⁰*Hewlett-Packard Co. v. United States*, 41 Fed. Cl. 99, 103, (1998).

⁷¹4 C.F.R. § 21.5(g).

⁷²RCFC Rule 83.1(a)(3).

⁷³See, e.g., *Consolidated Eng'g Servs., Inc. v. United States*, 64 Fed. Cl. 617 (2005).

⁷⁴*CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 736 (2014) (noting that a protester was barred “from raising objections to patent errors or ambiguities in the terms of a solicitation after the closing of bidding if such errors or ambiguities were apparent on the face of the solicitation”).

⁷⁵*Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007).

⁷⁶The COFC has promulgated specific bid protest procedures at RCFC, Appendix C, “Procedure in Procurement Protest Cases Pursuant to 28 U.S.C.A. § 1491(b).”

⁷⁷RCFC App. C, ¶ 2.

⁷⁸See RCFC Rule 3, 10.

⁷⁹See RCFC Form 2.

⁸⁰See RCFC Rule 7(b); see also RCFC App. C, § V.

⁸¹*Centech Group, Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009).

⁸²RCFC Rule 65(c).

⁸³See RCFC App. C, § V.

⁸⁴RCFC App. C, ¶¶ 4–7, 16–17; RCFC Form 8.

⁸⁵See RCFC App. C, § VI; RCFC Rule 10.

⁸⁶See RCFC App. C, ¶ 12; RCFC Rule 24(a), (c).

⁸⁷See, e.g., *Envirocare of Utah, Inc. v. United States*, 44 Fed. Cl. 474, 476 (1999), *dismissed*, 217 F.3d 852 (Fed. Cir. 1999); *Advanced Data Concepts, Inc. v. United States*, 43 Fed. Cl. 410, 413 n.3 (1999), *aff'd*, 216 F.3d 1054 (Fed. Cir. 2000).

⁸⁵U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(1), (4); see, e.g., *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

⁸⁹See *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 349–50 (1997).

⁹⁰See, e.g., *Impresa Construzioni Geom. Domenico Garufi*, 238 F.3d 1324, 1338 (Fed. Cir. 2001).

⁹¹See, e.g., *Antarctic Support Assocs. v. United States*, 46 Fed. Cl. 145, 148 (2000), *aff'd*, 251 F.3d 171 (Fed. Cir. 2000); *Ellsworth Assocs., Inc. v. United States*, 45 Fed. Cl. 388, 392 (1999), *dismissed*, 6 Fed. Appx. 867 (Fed. Cir. 2001); *CCL Serv. Corp. v. United States*, 43 Fed. Cl. 680, 682–83 (1999).

⁹²See, e.g., *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 288, 294–95 (2000); *Ryan Co. v. United States*, 43 Fed. Cl. 646, 651 n.3 (1999).

⁹³*Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379–80 (Fed. Cir. 2009).

⁹⁴564 F.3d at 1380.

⁹⁵*Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), *rejected* by *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009)).

⁹⁶564 F.3d at 1381.

⁹⁷28 U.S.C.A. § 1491(b)(1), (4).

⁹⁸5 U.S.C.A. § 706(2)(a).

⁹⁹See, e.g., *Archura LLC v. United States*, 112 Fed. Cl. 487, 496 (2013) (“In a bid protest case, the inquiry is whether the agency’s action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, whether the error was prejudicial.”); *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 930 (Fed. Cir. 2014) (“In reviewing an agency’s action in a bid protest case, we generally apply the Administrative Procedure Act’s ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or ‘without observance of a procedure required by law’ standard of review”), *rev’d* on other grounds, 136 S. Ct. 1969 (2016); *IBM Corp. v. United States*, 119 Fed. Cl. 145, 153 (2014) (articulating standard).

¹⁰⁰See *Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1057 (Fed. Cir. 2000); *Mangi Envtl. Group, Inc. v. United States*, 47 Fed. Cl. 10, 14–15 (2000); *Distributed Solutions, Inc. v. United States*, 104 Fed. Cl. 368 (2012).

¹⁰¹See *MVM, Inc. v. United States*, 46 Fed. Cl. 137, 141–42 (2000) (citing *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996)); *Lab. Corp. of Am. Holdings v. United States*, 116 Fed. Cl. 643, 654 (2014) (“Before the Court can grant injunctive relief, the plaintiff must show that the agency’s irrational procurement process caused plaintiff to suffer prejudice.”).

¹⁰²28 U.S.C.A. § 1491(b)(2).

¹⁰³28 U.S.C.A. § 1491(b)(2).

¹⁰⁴See *MVM, Inc. v. United States*, 47 Fed. Cl. 361, 363–65 (2000).

¹⁰⁵28 U.S.C.A. § 2412(d).

¹⁰⁶28 U.S.C.A. § 2412(d)(2)(B).

¹⁰⁷See 28 U.S.C.A. § 2412(d)(2)(H); RCFC Rule 54(d); see also RCFC Form 5.

¹⁰⁸See 28 U.S.C.A. § 2412(d)(1)(B); RCFC Rule 54(d); see also RCFC Form 5.

¹⁰⁹See 28 U.S.C.A. § 2412(d)(1)(A); RCFC Rule 54(d); see also RCFC Form 5.

¹¹⁰See Fed. R. App. P. 4(a)(B).

¹¹¹See, e.g., *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 348–49 (1997).

¹¹²See, e.g., *Advance Bus. Sys., Comp. Gen. Dec. B-237728*, 90-1 CPD ¶ 300, on reconsideration, 90-2 CPD ¶ 78 (agency was not required to accept protester’s unsolicited offer rather than purchase item from Schedule, even where protester offered a lower price than Schedule vendor).

¹¹³See, e.g., *Sales Resources Consultants, Inc., Comp. Gen. Dec. B-284943 et al.*, 2000 CPD ¶ 102 (protester that did not have Schedule contract for required item was not an interested party to challenge agency’s conduct of a limited competition among Schedule vendors for the required item). The reason MAS procurements generally are not protestable is because GSA is considered to have already conducted a competitive process by awarding Schedule contracts in the first instance. Therefore, ordering agencies are not required to conduct further competition for products or services that may be ordered from a Schedule in accordance with the terms (e.g., the maximum order limitation) of a vendor’s Schedule contract.

¹¹⁴See, e.g., *Intelligent Decisions, Inc., Comp. Gen. Dec. B-274626 et al.*, 97-1 CPD ¶ 19, 1996 WL 756871, at *4.

¹¹⁵See, e.g., *Marvin J. Perry & Assocs., Comp. Gen. Dec. B-277684 et al.*, 97-2 CPD ¶ 128; *Information Ventures Inc., Comp. Gen. Dec. B-293743*, 2004 CPD ¶ 97 (agency attempt to procure database bibliographic services under Information Technology (IT) Schedule was improper because such services were beyond the scope of the IT Schedule); *Am. Sec. Programs, Inc., Comp. Gen. Dec. B-402069 et al.*, 2010 CPD ¶ 2 (sustaining protest where required services were outside the scope of the vendor’s Schedule contract); *Mobile Medical Int’l Corp. v. United States*, 95 Fed. Cl. 706 (2010) (awardee offered non-FSS items in response to RFQ but error did not prejudice protester).

¹¹⁶*COMARK Fed. Sys., Comp. Gen. Dec. B-278343 et al.*, 98-1 CPD ¶ 34.

¹¹⁷*Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007); see also *Allied Materials & Equip. Co. v. United States*, 81 Fed. Cl. 448 (2008).

¹¹⁸See *CHE Consulting, Inc. v. United States*, 47 Fed. Cl. 331 (2000); *Mobile Medical Int’l Corp. v. United States*, 95 Fed. Cl. 706 (2010) (non-FSS contractor can challenge award of non-FSS items in FSS order where protester could have provided the items but must also show would have prevailed in competitive procurement); *FitNet Purchasing Alliance, Comp. Gen. Dec. B-406075*, 2012 CPD ¶ 64, 2012 WL 376746, at *1 (dismissing protest where the protester was not an interested party to protest the FSS procurement).

because it did not hold an FSS contract).

¹¹⁹Knoll N. Am., Inc., Comp. Gen. Dec. B-259112 et al., 95-1 CPD ¶ 141; see also Savantage Fin. Servs., Inc., Comp. Gen. Dec. B-292046, 2003 CPD ¶ 113; GMA Cover Corp., Comp. Gen. Dec. B-288018, 2001 CPD ¶ 144. But see FAR 8.405-2(c)(4) requiring that “the ordering activity shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it.”

¹²⁰REEP, Inc., Comp. Gen. Dec. B-290665, 2002 CPD ¶ 156 (GAO found that the agency had knowledge that the services were available under the second schedule and, since it was supposed to review “information reasonably available” before awarding a Schedule delivery order, it should have reviewed the prices available on the second schedule.). But see Computer Universal, Inc., Comp. Gen. Dec. B-291890 et al., 2003 CPD ¶ 81 (denying protest alleging protester was not fairly given an opportunity to compete under FSS acquisition, where protester did not hold schedule contract to provide requested services and agency reasonably determined that protester was not capable of providing such services).

¹²¹Allmond & Co., Comp. Gen. Dec. B-298946, 2007 CPD ¶ 8; Technical Prof’l Servs., Inc., Comp. Gen. Dec. B-410640, 2015 CPD ¶ 48 (same).

¹²²See Card Tech. Corp., Comp. Gen. Dec. B-275385 et al., 97-1 CPD ¶ 76.

¹²³Card Tech. Corp., Comp. Gen. Dec. B-275385 et al., 97-1 CPD ¶ 76.; see also Delta Int’l, Inc., Comp. Gen. Dec. B-284364.2, 2000 CPD ¶ 78; Computer Universal, Inc., Comp. Gen. Dec. B-291890 et al., 2003 CPD ¶ 81, 2003 WL 1857393, at *2 (“Here, we find that the agency reasonably determined that [protester] could not meet its needs. . . [Protester] does not currently have a contract under the schedule for program management services, and therefore could not have submitted a quote under the RFQ.”).

¹²⁴See, e.g., Applied Visual Tech., Inc., Comp. Gen. Dec. B-401804.3, 2015 CPD ¶ 261 (denying protest of GSA’s rejection of protester’s proposal pursuant to MAS solicitation).

¹²⁵Concepts Bldg. Sys., Inc., Comp. Gen. Dec. B-281995, 99-1 CPD ¶ 95, 1999 WL 311687, at *3. It is extremely difficult to maintain a claim of “bad faith” against a Government official. See, e.g., Allworld Language Consultants, Inc., Comp. Gen. Dec. B-291409.3, 2003 CPD ¶ 31, 2003 WL 245597, at *2 (“In order for a protester to succeed in a claim of bias on the part of a contracting official, the record must establish that the official intended to harm the protester, since government officials are presumed to act in good faith; [the GAO] will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Moreover, in addition to producing credible evidence of bias, the protester must show that the agency bias translated into action that unfairly affected the protester’s competitive position”) (citing Docusort, Inc., Comp. Gen. Dec. B-254852 et al., 1995 WL 75800, at *3); Computer Universal, Inc., Comp. Gen. Dec. B-291890 et al., 2003 CPD ¶ 81, 2003 WL 1857393, at *2 (“Because contracting

officials are presumed to act in good faith, [protester’s] speculation provides us with no basis to conclude that the failure to solicit [protester] was due to bad faith.”).

¹²⁶See, e.g., Intelligent Decisions, Inc., Comp. Gen. Dec. B-274626 et al., 97-1 CPD ¶ 19.

¹²⁷Intelligent Decisions, Inc., Comp. Gen. Dec. B-274626 et al., 97-1 CPD ¶ 19, 1996 WL 756871, at *3.

¹²⁸See, e.g., Immersion Consulting, LLC, Comp. Gen. Dec. B-415155 et al., 2017 CPD ¶ 373; Brooks Range Contract Servs., Inc., Comp. Gen. Dec. B-405327, 2011 CPD ¶ 216, 2011 WL 5223971, at *3 (“When an agency conducts a formal competition under the FSS program, we will review the agency’s evaluation of vendor submissions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation.”); Spacesaver Sys., Inc., Comp. Gen. Dec. B-284924 et al., 2000 CPD ¶ 107; Amdahl Corp., Comp. Gen. Dec. B-281255, 98-2 CPD ¶ 161 (agency’s technical evaluation of vendor quotations on computer systems was reasonable where performed in accordance with stated evaluation criteria and based on valid assessments of proposed systems); Design Contempo, Inc., Comp. Gen. Dec. B-270483, 96-1 CPD ¶ 146 (agency reasonably determined that only the awardee’s Schedule items met its minimum needs); OfficeMax, Inc., Comp. Gen. Dec. B-299340, 2007 CPD ¶ 158, 2007 WL 2255096, at *4 (“Where, as here, an agency conducts a formal competition under the FSS program for the issuance of a BPA or task order, we will review the agency’s actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations.”); LS3 Techs. Inc., Comp. Gen. Dec. B-407459 et al., 2013 CPD ¶ 21, at 2013 WL 311338, at *3 (“Where, as here, an agency issues an RFQ to FSS contractors under Federal Acquisition Regulation (FAR) subpart 8.4 and conducts a competition, we will review the record to ensure that the agency’s evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations.”); Research Analysis & Maintenance, Inc., Comp. Gen. Dec. B-409024, 2014 CPD ¶ 39, 2014 WL 334182, at *3 (“In reviewing protests of an agency’s evaluation and source selection decision in procurements conducted under Federal Supply Schedule procedures (i.e., FAR § 8.4), we do not conduct a new evaluation or substitute our judgment for that of the agency. Rather, we examine the record to ensure that the agency’s evaluation is reasonable and consistent with the terms of the solicitation.”); Council for Logistics Research, Inc., Comp. Gen. Dec. B-410089.2 et al., 2015 CPD ¶ 76 (articulating standard); K & V Limousine Serv., LLC, Comp. Gen. Dec. B-409668, 2014 CPD ¶ 209 (same); Starry Assocs., Inc., Comp. Gen. Dec. B-410968.2, 2015 CPD ¶ 253, 2015 WL 4999934, at *5 (“Where, as here, an agency issues an RFQ to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency’s evaluation is reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations; [the GAO] will not reevaluate the quotations”); Beltway Transp. Servs., Comp. Gen. Dec. B-411458, 2015 CPD ¶ 225, 2015 WL 4537787, at *2 (same).

¹²⁹See Davis Boat Works, Inc. v. United States, 111 Fed. Cl. 342 (2013).

¹³⁰See *Delta Int'l, Inc., Comp. Gen. Dec. B-284364.2*, 2000 CPD ¶ 78. In one of the most extreme cases of the GAO involving itself in a Schedule procurement, the GAO sustained Delta's protest challenging the FBI's determination that it needed a digital rather than a digital/analog portable X-ray system. The GAO found unreasonable the FBI's assumptions concerning its needs and Delta's alleged inability to meet those needs. See also *Haworth, Inc., Comp. Gen. Dec. B-297077 et al.*, 2005 CPD ¶ 215; *GlassLock, Inc., Comp. Gen. Dec. B-299931 et al.*, 2007 CPD ¶ 216; *NikSoft Sys. Corp., Comp. Gen. Dec. B-406179*, 2012 CPD ¶ 104, at 2012 WL 860934, at *6 (sustaining protest where the agency selected the awardee's higher-rated quotation without meaningfully considering the protester's lower price); *PricewaterhouseCoopers LLP, Comp. Gen. Dec. B-409537 et al.*, 2014 CPD ¶ 255, 2014 WL 4384605, at *9 (sustaining protest where the agency's source selection decision improperly deviated from the solicitation's stated evaluation scheme).

¹³¹*Warden Assocs. Inc., Comp. Gen. Dec. B-291440 et al.*, 2002 CPD ¶ 223, 2002 WL 31894882, at *2-3 ("FAR Subpart 8.4 does not require that vendors be permitted a specific minimum amount of time to respond to an RFQ; what is reasonable and sufficient depends on the facts and circumstances of the case. We recognize that issuing a solicitation late on Friday, September 27, 2002, and requiring submission by midday on the next business day (Monday, September 30) allows very little time, particularly where, as here, a technical proposal is sought. There could be circumstances where such action by an agency would lead us to sustain a protest. . . . Here, the RFQ's call for technical proposals due on the next business day may well have been objectionable in other circumstances. In the context of the unique facts of this case, however, we do not find the agency's actions to be objectionable.").

¹³²*DSD Labs., Inc. v. United States*, 46 Fed. Cl. 467 (2000). See also *Phoenix Env'tl. Design, Inc., Comp. Gen. Dec. B-414743*, 2017 CPD ¶ 268.

¹³³*REEP, Inc., Comp. Gen. Dec. B-290665*, 2002 CPD ¶ 156 (GAO found that the agency had knowledge that the services were available under the second schedule and, since it was supposed to review "information reasonably available" before awarding a Schedule delivery order, it should have reviewed the prices available on the second schedule.). But see *Lockmasters Sec. Inst., Inc., Comp. Gen. Dec. B-299456*, 2007 CPD ¶ 105 (upholding agency decision to limit competition to one Schedule only).

¹³⁴See *Aronie & Chierichella, GSA Schedule Handbook ch. 15* (Thomson Reuters 2018-2019 ed. forthcoming).

¹³⁵See *Cibinic, "Contracting Methods: Square Pegs and Round Holes," 15 Nash & Cibinic Rep. ¶ 48* (Sept. 2001).

¹³⁶See, e.g., *Labat-Anderson, Inc., Comp. Gen. Dec. B-287081 et al.*, 2001 CPD ¶ 79; *Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99 (2001); *Sys. Plus, Inc., Comp. Gen. Dec. B-297215 et al.*, 2006 CPD ¶ 10; *Seaborn Health Care, Inc. v. United States*, 101 Fed. Cl. 42 (2011) (denying protests against award of BPAs by VA); *MIRACORP, Inc., Comp. Gen. Dec. B-410413.2*, 2015 CPD ¶ 98 (denying protest against award of BPA by the Department of Energy);

see also *Canon USA, Inc., Comp. Gen. Dec. B-311254 et al.* 2008 CPD ¶ 113 (GAO denied Canon's protest, finding that the agency properly cancelled its order due to the expiration of Canon's FSS contract prior to issuance of the order); *Mark G. Anderson Consultants, Comp. Gen. Dec. B-403250 et al.*, 2010 CPD ¶ 241 (denying protest of BPA award because protester failed to submit subcontractor information required by RFQ); *NCS Techs., Inc. Comp. Gen. Dec. B-403435*, 2010 CPD ¶ 281 (sustaining protest of BPA agreement for off-the-shelf computers because solicitation requirements of single manufacturer and use of Intel-based microprocessors overly restrictive). But see *IBM U.S. Fed., a division of IBM Corp., Comp. Gen. Dec. B-409806 et al.*, 2014 CPD ¶ 241 (sustaining, in part, a protest challenging the establishment of a BPA); *Glotech, Inc., B-406761 et al.*, 2012 CPD ¶ 248 (sustaining protest against establishment of a BPA and noting that "the agency gave no meaningful consideration to cost/price in selecting the BPA recipients, in violation of the requirement at FAR § 8.405-3(a)(2) that price be meaningfully considered in establishing BPAs").

¹³⁷See *Draeger Safety, Inc., Comp. Gen. Dec. B-285366 et al.*, 2000 CPD ¶ 139; *Smith & Nephew, Inc., Comp. Gen. Dec. B-410453*, 2015 CPD ¶ 90, 2015 WL 1275375, at *4 ("In preparing a solicitation, a contracting agency is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete.").

¹³⁸*Delta Int'l, Inc., Comp. Gen. Dec. B-284364.2*, 2000 CPD ¶ 78.

¹³⁹*Garner Multimedia, Inc., Comp. Gen. Dec. B-291651*, 2003 CPD ¶ 35.

¹⁴⁰*Savannah Cleaning Sys., Inc., Comp. Gen. Dec. B-415817*, 2018 CPD ¶ 119 (in a schedule procurement, an offeror cannot offer products not listed on its Schedule, even if it has a related similar item on its contract); *Pyxis Corp., Comp. Gen. Dec. B-282469 et al.*, 99-2 CPD ¶ 18; *T-L-C Sys., B-285687.2*, 2000 CPD ¶ 166; *CDM Group, Inc., B-291304.2*, 2002 CPD ¶ 221, 2002 WL 31869253, at *2 ("An agency cannot properly select an FSS vendor for an order of items on the vendor's schedule and then include in the order items not included in that vendor's FSS contract where, as here, the non-FSS items are priced above the micro-purchase threshold.") (citing *T-L-C Sys., B-285687.2*, 2000 CPD ¶ 166, 2000 WL 1460193, at *3); *American Sys. Consulting, Inc., Comp. Gen. Dec. B-294644*, 2004 CPD ¶ 247 (protest sustained where award of BPA in competition between FSS vendors included service not covered award-ee's by FSS contract); *KEI Pearson, Inc., Comp. Gen. Dec. B-294226.3 et al.*, 2005 WL 1457668 (Jan. 10, 2005) (protest sustained where task order issued to vendor whose quotation improperly included products outside of FSS contract); *Seaborn Health Care, Inc., Comp. Gen. Dec. B-400429*, 2008 CPD ¶ 197 (sustaining protest where RFQ in GSA Schedule procurement required that vendors offer non-Schedule services as part of their quotations). In *Science Applications Int'l Corp., Comp. Gen. Dec. B-401773*, 2009 CPD ¶ 229 (Nov. 10, 2009), the GAO sustained a protest involving a solicitation that limited the competition to vendors holding FSS contracts for required items because

two of the required items were not on the awardee's FSS contract. Interestingly, the awardee added the two missing items to its Schedule contract prior to the required delivery date. Nonetheless, the GAO found the modification insufficient to overcome the basic rule that, in a Schedule procurement, all items must be available through the vendor's schedule contract as a precondition to receiving the order. But see *Sea Box, Inc.* Comp. Gen. Dec. B-401523 et al., 2009 CPD ¶ 190 (issuance of an FSS order to a vendor was found to be proper even though the ordered items were not initially on the awardee's Schedule); *AmeriGuard Sec. Servs., Inc.*, Comp. Gen. Dec. B-411513.2, 2015 CPD ¶ 308, 2015 WL 6332668, at *4 (denying protest where awardee's FSS contract was modified—via a modification that was requested, but not signed by the GSA CO, prior to issuance of the challenged task order—to include the RFQ required labor categories, explaining that “applicable GSA regulations. . .state that where a vendor requests modification of its FSS contract, generally ‘[t]he effective date for any modification is the date specified in the modification’”).

¹⁴¹*US Investigations Servs., Prof'l Servs. Div., Inc.*, Comp. Gen. Dec. B-410454.2, 2015 CPD ¶ 44.

¹⁴²*US Investigations Servs., Prof'l Servs. Div., Inc.*, Comp. Gen. Dec. B-410454.2, 2015 CPD ¶ 44; see, e.g., *American Sys. Consulting, Inc.*, Comp. Gen. Dec. B-294644, 2004 CPD ¶ 247 (labor categories offered to schedule customer must match precisely the labor categories listed on Schedule); *Tri-Starr Mgmt. Servs., Inc.*, Comp. Gen. Dec. B-408827.2 et al., 2015 CPD ¶ 43, 2015 WL 455934, at *4 (“When a concern arises that a vendor is offering services outside the scope of its schedule contract, the relevant inquiry is whether the services offered are actually included on the vendor's contract, as reasonably interpreted.”). But see *HomeSource Real Estate Asset Servs., Inc. v. United States*, 94 Fed. Cl. 466, 486 (2010), *aff'd*, 418 Fed. Appx. 922 (Fed. Cir. 2011) (finding awardee's job positions to be within scope of FSS contract labor rate scales even though titles and qualifications differed between awardee's FSS contract and the solicitation). In a variation on this fact pattern, the GAO held, in a recent decision, that an agency improperly found a bidder's quotation technically acceptable where the awardee proposed a noncompliant labor category, notwithstanding that there were other labor categories under its FSS contract that were qualified to perform the RFQ requirements but were not quoted. *AllWorld Language Consultants, Inc.*, Comp. Gen. Dec. B-411481.3, 2016 CPD ¶ 12, 2016 WL 358949, at *5 (“To the extent a quoted labor category description under a firm's FSS contract does not, in the words of GSA, ‘align precisely’ with the requirements of a given solicitation, the firm may not properly alter the underlying labor category description through the terms of its quotation. Rather, where a firm's quoted labor category description does not align with the requirements of the solicitation, it means that the quoted labor category does not meet the requirements of the solicitation, and therefore cannot serve as the basis for issuing a task order to the firm.”). Notably, the GAO has clarified that exchanges limited to clarifying whether the items proposed are on offerors' GSA schedules do not constitute discussions, but are rather clarifications, which FAR Part 15 defines as “limited exchanges” that agencies may use to al-

low offerors to clarify certain aspects of their proposals or to resolve minor clerical errors. See *Konica Minolta Bus. Solutions U.S.A., Inc.*, Comp. Gen. Dec. B-411888, 2015 CPD ¶ 352.

¹⁴³See *American Sys. Consulting, Inc.*, Comp. Gen. Dec. B-294644, 2004 CPD ¶ 247. In *Pyxis Corp.*, Comp. Gen. Dec. B-282469 et al., 99-2 CPD ¶ 18, and *T-L-C Sys.*, Comp. Gen. Dec. B-285687.2, 2000 CPD ¶ 166, the GAO reversed its earlier position, illustrated in *Vion Corp.*, Comp. Gen. Dec. B-270569 et al., 97-1 CPD ¶ 53, that agencies may procure non-Schedule items that are incidental to the Schedule items so long as the items as a total package meet the needs of the ordering agency at the lowest overall cost. However, it should be noted that the GSA published a new rule in January 2018 making it much easier for federal agencies to acquire not only products and services that are on certain GSA Schedule contracts but also the associated ancillary items required to make use of them, i.e., so-called “Order-Level Materials.” See 83 Fed. Reg. 3275 (Jan. 24, 2018), amending the GSAR to add a new Subpart 538.72 and a new clause at GSAR 552.238-82.

¹⁴⁴*AllWorld Language Consultants, Inc.*, Comp. Gen. Dec. B-411481.3, 2016 CPD ¶ 12, 2016 WL 358949.

¹⁴⁵*AllWorld Language Consultants, Inc.*, Comp. Gen. Dec. B-411481.3, 2016 CPD ¶ 12, 2016 WL 358949, at *5.

¹⁴⁶See *SMS Sys. Maint. Servs., Inc.*, Comp. Gen. Dec. B-284550.2, 2000 CPD ¶ 127; *Homecare Prods., Inc.*, Comp. Gen. Dec. B-408898.2, 2014 CPD ¶ 98, 2014 WL 988944, at *2 (“Contracting agencies may only place orders with an FSS vendor whose schedule contract contains the goods or services sought by the government. . . . The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of [\$3,500] since such items may be purchased outside the normal competition requirements.”); *Desktop Alert, Inc.*, Comp. Gen. Dec. B-408196, 2013 CPD ¶ 179, 2013 WL 3803965, at *3 n.3 (“[W]here an agency announces its intention to order from an existing FSS, all items quoted and ordered are required to be on the vendor's schedule as a precondition to its receiving the order. . . . The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of [\$3,500], since such items may be purchased outside the normal competition requirements.”). But see *Rapiscan Sys., Inc.*, Comp. Gen. Dec. B-401773.2 et al., 2010 CPD ¶ 60, 2010 WL 1003027, at *2 (concluding that the awardee's \$0 price for freight was “illusory” because it resulted from no more than the “shifting of the initially quoted price” between line items.).

¹⁴⁷19 U.S.C.A. §§ 2501–2581.

¹⁴⁸See *Tiger Truck, LLC*, Comp. Gen. Dec. B-400685, 2009 CPD ¶ 19, 2009 WL 130118, at *5 (“[T]he agency failed to determine whether Tiger's vehicles complied with the TAA and made award based on a quotation for non-TAA compliant vehicles without first obtaining a non-availability determination from the head of the contracting activity. We sustain the protest on these bases.”); *Wyse Tech., Inc.*, Comp. Gen. Dec. B-297454, 2006 CPD ¶ 23, 2006 WL 177590, at *4 (“Award may not be based upon a proposal, where, as here, the offeror declines to certify compliance, as

required, with a material term of the solicitation, in this case the TAA, such that the proposal consequently fails to establish a legal obligation to comply with that material term.”). But see *Klinge Corp.*, Comp. Gen. Dec. B-309930.2, 2008 CPD ¶ 102, 2008 WL 2264491, at *4, where the GAO denied a protest alleging that the agency failed to evaluate TAA compliance properly, reasoning: “If prior to award an agency has reason to believe that the firm will not provide compliant products, the agency should go beyond the firm’s representation of compliance with the Act; however, where the contracting officer has no information prior to award that would lead to such a conclusion, the agency may properly rely upon an offeror’s representation without further investigation. . . . Where an agency is required to investigate further, we will review the evaluation and resulting determination regarding compliance with the requirements of the Act to ensure that they were reasonable.” See also *Kipper Tool Co.*, Comp. Gen. Dec. B-409585.2 et al., 2014 CPD ¶ 184 (denying protest where record failed to support the protester’s allegations that successful vendors offered an item manufactured in a country not on the Trade Agreements Act designated country list).

¹⁴⁹*Klinge Corp. v. United States*, 82 Fed. Cl. 127 (2008).

¹⁵⁰82 Fed. Cl. at 135.

¹⁵¹The *Klinge* protest is particularly notable because the COFC reached the opposite result from the GAO on the company’s earlier protest. See *Klinge Corp.*, Comp. Gen. Dec. B-309930.2, 2008 CPD ¶ 102. For an excellent comparison of the COFC decision and the GAO decision, see Nash, “Interpreting the Trade Agreements Act: Conflicting Decisions,” 22 *Nash & Cibinic Report* ¶ 45 (Aug. 2008).

¹⁵²See *Harmonia Holdings Group, LLC v. United States*, 136 Fed. Cl. 298, 306 (2018); *Ellsworth Assocs., Inc. v. United States*, 45 Fed. Cl. 388 (1999), dismissed, 6 Fed. Appx. 867 (Fed. Cir. 2001); see also *KPMG Consulting LLP*, Comp. Gen. Dec. B-290716 et al., 2002 CPD ¶ 196, 2002 WL 31643787, at *8 (“Under the FSS program, an agency is not required to issue a solicitation to request quotations, but rather may simply review vendors’ schedules and, using business judgment to determine which vendor’s goods or services represent the best value and meet the agency’s needs at the lowest overall cost, may directly place an order under the corresponding vendor’s FSS contract.”) (citing *OSI Collection Servs., Inc.*, Comp. Gen. Dec. B-286597.3, 2001 CPD ¶ 103).

¹⁵³*Digital Sys. Group, Inc.*, Comp. Gen. Dec. B-286931 et al., 2001 CPD ¶ 50; *Uniband Inc.*, Comp. Gen. Dec. B-289305, 2002 CPD ¶ 51, 2002 WL 393059, at * (“Where an agency intends to use the FSS vendors’ responses to a solicitation as the basis of a detailed technical evaluation and price/technical tradeoff, it may elect, as INS did here, to use an approach that is like a competition in a negotiated procurement. When an agency takes such an approach, and a protest is filed, we will review the protested agency actions to ensure that they were reasonable and consistent with the terms of the solicitation.”) (citing *Labat-Anderson, Inc.*, Comp. Gen. Dec. B-287081 et al., 2001 CPD ¶ 79, 2001 WL 410356, at *5); *KPMG Consulting LLP*, Comp. Gen. Dec. B-290716 et al., 2002 CPD ¶ 196, 2002 WL 31643787, at *8 (“While we recognize that the procedures of Federal

Acquisition Regulation (FAR) Part 15, governing contracting by negotiation, do not govern competitive procurements under the FSS program, *Computer Products, Inc.*, Comp. Gen. Dec. B-284702, May 24, 2000, 2000 CPD ¶ 95, at 4, where the agency has conducted such a competition and a protest is filed, we will review the record to ensure that the evaluation is reasonable and consistent with the terms of the solicitation and with standards generally applicable to negotiated procurements.”) (citing *OSI Collection Servs., Inc.*, Comp. Gen. Dec. B-286597.3, 2001 CPD ¶ 103; *Amdahl Corp.*, Comp. Gen. Dec. B-281255, 98-2 CPD ¶ 161); see also *COMARK Fed. Sys.*, Comp. Gen. Dec. B-278343 et al., 98-1 CPD ¶ 34, 1998 WL 31363, at *4-5; *Warden Assocs.*, Comp. Gen. Dec. B-291238, 2002 CPD ¶ 223; *KPMG Consulting LLP*, Comp. Gen. Dec. B-290716 et al., 2002 CPD ¶ 196; *OSI Collection Servs., Inc.*, Comp. Gen. Dec. B-286597 et al., 2001 CPD ¶ 18; *Verizon Fed., Inc.*, Comp. Gen. Dec. B-293527, 2004 CPD ¶ 186.

¹⁵⁴*Computer Prods., Inc.*, Comp. Gen. Dec. B-284702, 2000 CPD ¶ 95 (agency announced a “best value” evaluation, but then made award to the low-cost, technically acceptable offeror; GAO sustained protest, holding that the evaluation must be consistent with the terms of the solicitation); see also *Harmonia Holdings, LLC*, Comp. Gen. Dec. B-413464 et al., 2017 CPD ¶ 62 (agency failed to conduct price/technical tradeoff before making “best value” award).

¹⁵⁵See *OfficeMax, Inc.*, Comp. Gen. Dec. B-299340.2, 2007 CPD ¶ 158, 2007 WL 2255096, at *6 n.1 (“This procurement was conducted under the FSS provisions of FAR subpart 8.4, and thus the negotiated procurement provisions of FAR part 15 do not directly apply. However, [the GAO] has held that where agencies use the negotiated procurement techniques of FAR part 15 in FSS buys, such as discussions, [the GAO] will review the agency’s actions under the standards of negotiated procurements to ensure that offerors are treated reasonably and fairly. *Digital Sys. Group, Inc.*, B-286931, B-286931.2, Mar. 7, 2001, 2001 CPD para. 50 at 6.”); see also *BTG, Inc. v. Riley*, No. 00-1069-AA (E.D. Va. Sept. 22, 2000) (unpublished); *Kardex Remstar, LLC*, Comp. Gen. Dec. B-409030, 2014 CPD ¶ 1, 2014 WL 293546, at *3 (“There is no requirement in FAR subpart 8.4 that an agency conduct discussions with vendors. . . . However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable; [the GAO] has looked to the standards in FAR part 15 for guidance in making this determination.”); *Ricoh USA, Inc.*, Comp. Gen. Dec. B-411888.2, 2015 CPD ¶ 355, 2015 WL 7294466, at *4 (“As a preliminary matter, we note that this competition was limited to FSS vendors. As we have previously noted in our decisions, the procedures of FAR part 15 governing contracting by negotiation—including those concerning exchanges with offerors after receipt of proposals—do not govern competitive procurements under the FSS program.”); see also *Centerra Group, LLC v. United States*, No. 18-219C, 2018 WL 2731236 (Fed. Cl. June 7, 2018); *Paragon Tech. Group*, Comp. Gen. Dec. B-412636 et al., 2016 CPD ¶ 113 (FAR Part 15 standards for discussions apply where agency conducts discussions).

¹⁵⁶*OSI Collection Servs., Inc.*; Comp. Gen. Dec. B-286597.3, 2001 CPD ¶ 103.

¹⁵⁷SoBran, Inc., Comp. Gen. Dec. B-408420 et al., 2013 CPD ¶ 221, 2013 WL 5304027, at *3 (“Where, as here, an agency issues an RFQ to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency’s evaluation is reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations.”); Diamond Info. Sys., LLC, Comp. Gen. Dec. B-410372.2 et al., 2015 CPD ¶ 122, 2015 WL 1612076, at *6 (“Regarding the relative merits of vendors’ past performance information, this matter is generally within the broad discretion of the contracting agency, and our Office will not substitute our judgment for that of the agency.”); Fox RPM Corp., Comp. Gen. Dec. B-409676.2 et al., 2014 CPD ¶ 310, 2014 WL 5378525, at *2 (“An agency’s evaluation of past performance, which includes its consideration of the relevance, scope, and significance of an offeror’s performance history, is a matter of agency discretion which we will not disturb unless the agency’s assessments are unreasonable, inconsistent with

the solicitation criteria, or undocumented.”); Duluth Travel, Inc., Comp. Gen. Dec. B-410967.3, 2015 CPD ¶ 207, 2015 WL 4154175, at *3 (“The evaluation of an offeror’s past performance, including the agency’s determination of the relevance and significance of an offeror’s performance history, is a matter of agency discretion, which we will not find improper unless it is inconsistent with the solicitation’s evaluation criteria”).

¹⁵⁸OSI Collection Servs., Inc., Comp. Gen. Dec. B-286597 et al., 2001 CPD ¶ 18.

¹⁵⁹OSI Collection Servs., Inc., Comp. Gen. Dec. B-286597.3, 2001 CPD ¶ 103; see also MIL Corp., Comp. Gen. Dec. B-297508 et al., 2006 CPD ¶ 34; Solers, Inc., Comp. Gen. Dec. B-404032.3 et al., 2011 CPD ¶ 83 (sustaining GSA Schedule protest where record did not permit a meaningful review of whether agency’s past performance evaluation was reasonable).

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BRIEFING PAPERS