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Cover Page Footnote

I would like to thank my wife, Nikki, for her support not only during the writing of this Comment and throughout law school, but also throughout my career. I would also like to thank Matthew Walker for his exceptionally helpful feedback throughout the writing process.

THE COURT OF FEDERAL CLAIMS, THE GOVERNMENT ACCOUNTABILITY OFFICE, AND "TWO BITES AT THE APPLE" BID PROTESTS

*Andrew Ferguson**

I. INTRODUCTION

Imagine, after hours of research and years of saving, a homeowner is finally ready to remodel a hopelessly outdated kitchen. After agonizing over every decision, from granite countertops to subway-tiled backsplashes, and after speaking with many general contractors, the homeowner finally decides on one contractor as a clear choice for providing the best new kitchen for the money. Once the homeowner completes a contract with the chosen contractor

and informs the other contractors that they would not be winning the contract, one of the losing contractors immediately files a protest of the homeowner's decision. As part of this protest, the losing contractor files suit in court, because the contractor does not think the homeowner's decision to choose the other contractor was reasonable. Then, even after the homeowner effectively defends the original decision in one court, the losing contractor is for some reason permitted to bring the same claim in a different venue, with different jurisdiction. In the end, even if the original decision was perfectly reasonable, the homeowner wasted months defending this decision and spent thousands on court and attorney fees. Now, imagine instead of a $10,000 kitchen remodel, the contract is for multi-billion-dollar military technology or government-service agreements; instead of a homeowner, the decision maker is the government; and the losing contractor is taking up multiple years of the government's time.

In a nutshell, this hypothetical describes one of the worst ways that the federal government's procurement bid protest process can go wrong. The United States government is one of the largest buyers of goods and services in the world; the federal procurement process is the system by which it acquires those goods and services.[1] Federal procurement is the method by which federal agencies acquire the goods and services they need from private sector contractors.[2]

Fortunately, the kitchen remodel scenario would not happen to the average homeowner and would only be realistic if a federal agency were the one remodeling the kitchen, because unlike private entities, the federal government is required to follow strict contracting guidelines that ensure "full and open competition."[3] These strict guidelines are outlined in the Competition in Contracting Act of 1984 ("CICA") and the Federal Acquisition Regulations ("FAR").[4] "Full and open competition" requires that an unsuccessful offeror have the option to file what is known as a "bid protest" against an agency.[5] This protest can be filed before or after an agency contract is awarded, and alleges that something improper or unreasonable was done

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[1] The White House, *The Benefits of Increased Equity in Federal Consulting*, (Dec. 1, 2021), https://www.whitehouse.gov/cea/written-materials/2021/12/01/the-benefits-of-increased-equity-in-federal-contracting/.

[2] *Id.*

[3] 41 U.S.C. § 3301 (2018).

[4] 41 U.S.C. § 3301 (2018); 48 C.F.R. 6.101(2021).

[5] *Bid Protests in Government Contracts (GAO),* LEXISNEXIS, https://plus.lexis.com/document/ (Oct. 20, 2022).

during the agency's offering or awarding of that government contract.[6]

The contractor may file its protest in one of three venues, each of which enjoy original jurisdiction over bid protests.[7] First, the contractor may file a protest with the agency itself.[8] Second, the contractor may file with the Government Accountability Office ("GAO").[9] Third, the contractor may file with the Court of Federal Claims ("COFC"), which as of 2001, is the only court with original jurisdiction over procurement bid protest claims.[10] This Comment will focus solely on claims brought before the GAO and in the COFC, and the interplay between the two venues.[11]

One unique aspect of the bid protest system is that a disappointed government contractor has the option to first try for a positive outcome using the administrative GAO procurement review process, and then if the contractor is not satisfied, it may bring the same allegations in the COFC.[12] These serial bid protests, involving the same contract, that are filed first at the GAO and then at the COFC are referred to as "second bite" or "two bites at the apple protests."[13]

Over the past decade, substantial discourse has taken place between procuring government agencies and Congress on the effects of second bite protests.[14] Discussion has centered on whether the process needs to be

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[6] *Id.*

[7] *See* S.K.J. & Assocs. v. United States, 67 Fed. Cl. 218, 223–224 (2005).

[8] 48 C.F.R. 33.103 (2021).

[9] 48 C.F.R. 33.103 (2021). These statutes refer to the "comptroller general," who is the head of the GAO. *Id.*

[10] 28 U.S.C. § 1491(b) (2018). The ADRA also gave the COFC post-award bid protest jurisdiction, which it did not have previously. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3875 (Oct. 19, 1996).

[11] Agency decisions are typically handled by the agency Contracting Officer and can vary depending on the agency and executive department. Michael J. Schaengold, et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. BAR J. 243, 243, 245 (2009). While these agency-level protests can result in a favorable outcome for both the agency and the contractor, the data on them is hard to track. *See id.* at 271 (stating "[t]ypically, agency-level protests are the least expensive, least formal, and the simplest and quickest, method for resolving a bid protest."). An agency-level protest is not a prerequisite for bringing a protest before the GAO or COFC. *Id*. at 262.

[12] *See* S.K.J. & Assocs. v. United States, 67 Fed. Cl. 218, 223–224 (2005).; Schaengold et al., *sup*ra note 11 at 318.

[13] Amy Fuentes, *2019 NDAA Analysis: Bid Protest Changes Affecting Government Contracts*, HOLLAND & KNIGHT GOV'T CONT. BLOG, (Feb. 15, 2019) https://www.hklaw.com/en/insights/publications/2019/02/2019-ndaa-analysis-bid-protest-changes-affecting-g.

[14] *See* James G. Peyster, *Proposed Revisions to the Tucker Act Would Dramatically Change the Bid Protest Landscape,* CROWELL & MORING LLP (May 15, 2012), https://www.governmentcontractslegalforum.com/2012/05/articles/bid-protest/proposed-revisions-to-the-tucker-act-would-dramatically-change-the-bid-protest-landscape. In 2012, the DoD proposed a statutory amendment that would have imposed a ten-day filing time limit from when the potential contractor should have known the basis for a bid protest claim in the COFC. *Id*. This proposal was not incorporated into the final bill or statutory language. *Id; see infra* Part IV(A); s*ee also* MARK V. ARENA ET AL., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS iii (2018). In the 2017 NDAA, Congress authorized a study "intended to inform Congress and U.S. defense leaders about the effectiveness of current procurement policies and processes to reduce bid protests." *Id.*; *see also* Fuentes, *supra* note 13; *see* Stuart W. Turner, *The 809 Panel's Bid Protest Reform Recommendations*, ARNOLD & PORTER (Jan. 24, 2019),

adjusted to prevent the extensive time and money spent that can come with review in both fora.[15] Most recently, in the 2019 National Defense Authorization Act ("NDAA"), Congress authorized the Department of Defense ("DoD") to conduct a study examining second bite protests.[16] The bid protest is certainly a necessary tool for maintaining accountability and confidence in government procuring agencies, and there are even good reasons to have both an administrative forum and a judicial forum in which a bid protest can be brought.[17] However, few defenses exist for a contractor's ability to bring the same bid protest claim in both venues sequentially.[18] While some have gone so far as to argue that second bite protests amount to a super-charged form of "forum shopping," it is clear that second bite protests can deplete government agency resources and result in multi-year delays to procurement programs.[19] The law should be changed with respect to the COFC litigation process, making it impossible for a contractor to bring a bid protest claim first in the GAO and then in the COFC if the contractor does not like the GAO result. This Comment will discuss why the law should be changed with respect to GAO-COFC concurrent jurisdiction and further explore second bite bid protests and their practical ramifications.

Part II of this Comment will provide background on the CICA-governed GAO bid protest process, the American Dispute Resolution Act of 1996 ("ADRA")-governed COFC bid protest litigation. Part III will explore whether second bite protests are problematic from both a statistical and allegorical standpoint. Part IV will discuss the historical national discourse and proposed solutions to second bite protests in the past decade. It will also propose a simple revision to the bid protest process, using the Contract Disputes Act of 1978 as a baseline.

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https://www.arnoldporter.com/en/perspectives/publications/2019/01/the-809-panels-bid-protest-reform-recs.

[15] Peyster, *supra* note 14; Fuentes, *supra* note 13.

[16] Fuentes, *supra* note 13. Results from this study are not yet available to the general public, but Congress directed the DoD to study the frequency and effects of bid protests filed in both venues as part of this study. *Id.*; *see also infra* Part IV(A). The 2019 NDAA also instructed the DoD to build and maintain a database consisting of information on future bid protests and contract awards. Fuentes, *supra* note 13.

[17] Daniel I. Gordon, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them,* 42 PUB. CONT. L.J. 489, 507–08 (2013).

[18] *See generally id.* (stating that the situations in which COFC review after GAO final decision might be helpful are generally situations where the same claim isn't being brought, e.g., the agency does not follow GAO recommendation, or additional information comes to light after GAO adjudication).

[19] *See* Major T. Aaron Finley, *Once Bitten, Twice Shy: How the Department of Defense Should Finally End its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests,* 2016 THE ARMY L. 6, 9 (2016) (describing the DoD's arguments in its 2013 NDAA proposal to reform second bite protests.).

II. BACKGROUND

A. The GAO Process

When a federal contract offeror has reason to believe that a contract has been, or is about to be awarded improperly, one potential avenue for relief is the GAO, which is a federal agency that is part of the legislative branch.[20] While the GAO is typically known for auditing and reporting on executive government agencies, the GAO bid protest process is an adjudicative process based on a body of law developed throughout years of bid protest decisions.[21]

One of the main advantages to the GAO process is that it is a relatively quick, inexpensive, less formal process than litigation.[22] While the GAO requires the protestor to file its protest allegations "not later than 10 days after the basis of protest is known or should have been known (whichever is earlier) . . . ,"[23] the GAO itself is required to "issue a decision on a protest within 100 days after it is filed."[24] On request by one of the parties, the GAO may even decide a protest within 65 days if it deems the matter suitable for expedition.[25] Additionally, the main requirements for filing a GAO protest are simple and informal: the disappointed contractor need only file a signed statement identifying the contract number in dispute, the grounds for the protest, and a request for ruling and relief by the Comptroller General.[26] The GAO does not necessarily require formal briefs or pleadings, nor does the filing require the services of an attorney.[27] A potential contractor can still employ the services of an attorney when bringing a claim at the GAO, helping to ensure it is treated fairly in what can be a complicated area of procurement law.[28] Further, oral hearings, which can increase both time and cost to pursue,

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[20] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, 1 (2018). A bid protest can be brought against contract award for a multitude of reasons. *What are the Grounds for Bringing a Bid Protest?*, BECKER (Aug. 15, 2018), https://beckerlawyers.com/what-are-the-grounds-for-bringing-a-bid-protest/. These reasons include: untimely proposal submission by the awardee, missing information in the awardee's proposal, flawed evaluation of the proposal by the procuring agency, unreasonable price in the awardee's proposal, improper discussions between the awardee and the procuring agency, collusion between the awardee and the agency, and the awardee not meeting certain small business requirements. *Id.*

[21] BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, *supra* note 20, at 1. The first GAO bid protest decision was published by the GAO in 1926. *Id.* In fact, the GAO was the sole forum in which to bring a bid protest until 1970, when the U.S. District Court of Appeals for the D.C. Circuit held that bid protest actions could be brought under the APA in U.S. District Courts. Scanwell Lab'ys, Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970).

[22] BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, *supra* note 20, at 4.

[23] 4 C.F.R. § 21.2(a)(1) (2019).

[24] *Id*. § 21.9(a).

[25] *Id*. § 21.10(a–b).

[26] BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, *supra* note 20, at 8.

[27] *Id.* at 4, 8.

[28] *Id*. at 6–7.

are relatively rare at the GAO.[29]

Another main advantage to bringing a bid protest with the GAO is the statutory restriction known as the "CICA stay;" it is known as such because it is instituted by the Competition in Contracting Act.[30] As long as the offeror filed a timely protest, the CICA stay is triggered once the procuring agency receives notice of the protest from the GAO (notice is automatically sent within one day of filing a protest).[31] Per CICA, the agency must then refrain from awarding the contract if the protest was filed pre-award, or refrain from authorizing performance of the contract if the protest was filed post-award.[32] This stay is desirable to a losing contractor, because if the protest is sustained in the end, the contractor will be starting again without any major advantage gained by the winning contractor via partial performance.

From the protestor's point of view, the main drawback to a GAO protest is that agencies are not obligated to take any sort of corrective action based on a GAO finding; GAO findings are technically just recommendations.[33] However this is not necessarily a drawback, because agencies rarely ignore a GAO decision.[34] If an agency does not comply with the GAO's recommendation, it must report the failure to the GAO, which reports to Congress annually on agency failures to comply.[35] In fact, there were no instances of a federal agency failing to comply with a GAO recommendation in the five years leading up to the publication of this comment.[36] With respect to recommendations that the GAO can make if it sustains a protest, it may recommend that the agency:

(A) refrain from exercising any of its options under the contract;

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[29] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-21-281SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2020 (noting that, in FY20, of the 2149 cases filed at GAO, only 9 cases (1%) had a hearing).

[30] Schaengold et al., *supra* note 11, at 285.

[31] 48 C.F.R. § 33.104(c) (2021). A "timely" protest for purposes of the CICA stay is "within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later . . . ." *Id.*

[32] 31 U.S.C § 3553(d).

[33] Schaegold et al., *supra* note 11, at 293. "Recommendations" are made by GAO government procurement law attorneys, who "have specific expertise in Government procurement matters[]" and consider only matters of federal procurement. *Id.* at 246. As a result of these consistent "adjudicatory" lawyers at the GAO, bid protest cases have resulted in a uniform body of law applicable to the procurement process upon which the Congress, the courts, agencies, and the public rely. BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, *supra* note 20, at 4.

[34] Schaengold et al., *supra* note 11, at 293.

[35] *Id.*

[36] *Government Contracts: GAO's 2019 Bid Protest Report to Congress Highlights Protest Effectiveness,* JONES DAY (Nov. 2019), https://www.jonesday.com/en/insights/2019/11/government-contracts-gaos-2019-bid-protest-report; Letter from Thomas H. Armstrong, GAO Bid Protest Annual Report to Congress for Fiscal Year, to Congressional Committees, U.S. Gov't Accountability Off., GAO-21-281SP (Dec. 23, 2020). In reality, the Congressional reporting requirement impliedly gives significant teeth to the GAO's recommendations. James W. Nelson, *GAO--COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 598 (2014). Since Congress controls agency funding, the GAO can always recommend to Congress to pull noncompliant agency funds if the agency does not follow a GAO decision. *Id.*

(B) recompete the contract immediately;

(C) cancel the solicitation . . . ;

(D) issue a new solicitation;

(E) terminate the contract;

(F) award a contract consistent with the requirements of such statute and regulation;

(G) implement any combination [of the above] . . . ; or

(H) implement such other recommendations as the [GAO] determines to be necessary . . . .[37]

Finally, the GAO standard of review is simple. Statutorily, the GAO is required to "determine whether the solicitation, proposed award, or award complies with statute and regulation."[38] In reviewing a protest against an agency's evaluation of proposals or an agency's contract award, the GAO "examine[s] the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria . . . ."[39] "Mere disagreement with the agency's evaluation does not render the evaluation unreasonable."[40] In addition to proving that an agency acted unreasonably, a protester must also establish that it was competitively prejudiced by the agency's unreasonableness.[41]

In summary, the GAO process is a proven, informal, and relatively quick process for an aggrieved contractor to bring a bid protest action. Agencies are not technically required by law to follow GAO recommendations, but they almost always do. The GAO uses a reasonableness standard in reviewing agency decision-making and may recommend a wide range of remedies based on its findings.

B. The Court of Federal Claims Process

Since 2001, the COFC has been the sole judicial forum in which a disappointed contractor may bring a bid protest claim.[42] The COFC has national jurisdiction to hear bid protest claims, may hold court anywhere in the United States, and is composed of sixteen presidentially nominated,

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[37] 31 U.S.C. § 3554(b)(1); *see also* 4 C.F.R. § 21.8(a).

[38] 31 U.S.C. § 3554(b)(1).

[39] Schumaker Trucking and Excavating Contractors, Inc., B-290732, 2002 U.S. Comp. Gen. LEXIS 151, *5–6 (Comp. Gen. Sept. 25, 2002).
See also Firma Hermann Leis, B-295956, B-295956.2, 2005 U.S. Comp. Gen. LEXIS 97, *7 (Comp. Gen. May 19, 2005).

[40] Baker Support Services, Inc., B-257054.2, 1995 U.S. Comp. Gen. LEXIS 31, *7 (Comp. Gen. Jan. 20, 1995).

[41] Lithos Restoration, Ltd., B-247003.2, 1992 U.S. Comp. Gen. LEXIS 501, *9–10 (Comp. Gen. Apr. 22, 1992).

[42] Schaengold et al., *supra* note 11, at 247.

senatorially confirmed, active judges who serve fifteen-year terms.[43]

Because the COFC is a federal court, its bid protest process is more formal and complicated than the GAO process and as such, generally requires attorney representation for both parties to bring a claim.[44] Claims before the COFC must comply with the strict requirements set forth in the Rules of the United States Court of Federal Claims ("RCFC").[45] In fact, bid protest claims have their own set of rules in the RCFC, which is expressed in Appendix C, Procedure and Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(b).[46]

Additionally, there are no strict timing requirements like the ten-day GAO filing deadline or the 100-day GAO decision deadline.[47] The COFC has sustained multiple protests that the GAO would have considered untimely.[48] Generally, the only timing requirement is that the protestor meet the six-year COFC statute of limitations and does not unreasonably delay bringing a claim.[49] The COFC has no strict timeline under which it must decide a bid protest case.[50]

Another major difference between the GAO bid protest process and a COFC bid protest case is the COFC's lack of an automatic CICA stay of performance. For the losing contractor to prevent the winning contractor from performing the government contract, the losing contractor must seek a preliminary injunction from the COFC.[51] This injunction is far from automatic; in order to qualify for at least preliminary injunctive relief, the unsuccessful offeror must address the following factors:

> (1) the plaintiff has succeeded on the merits of the case; (2) whether the plaintiff will suffer irreparable harm if the court withholds injunctive relief; (3) whether the balance of hardships to the respective parties favors the grant of injunctive relief; and (4) whether it is in the public interest to grant injunctive relief.[52]

While the court has stated that "[n]o one factor, taken individually, is

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[43] 28 U.S.C. §§ 171-173.

[44] R. FED. CL. 83.1(a)(3).

[45] *See generally* R. FED. CL.

[46] *See* R. FED. CL. app. C. § 1.

[47] *See* Heritage of Am., LLC v. United States, 77 Fed. Cl. 66, 72 (2007) (holding that the court would not dismiss the plaintiff's protest as untimely, noting that the timeliness requirement was based on GAO rules and not on the COFC's statutes or rules); *see generally* R. FED. CL.

[48] *See, e.g.,* Griffy's Landscape Maint. LLC v. United States, 46 Fed. Cl. 257, 258 (2000).

[49] *See* 28 U.S.C. § 2501; *see also* Software Testing Sols., Inc. v. United States, 58 Fed. Cl. 533, 536 (2003) (stating that the laches doctrine may apply to protestors who bring a bid protest claim unreasonably late in the COFC).

[50] Nicholas T. Solosky, *GAO and Court of Federal Claims Bid Protests: Strategic Planning to Optimize Litigation Success Rates* 25, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://foxrothschild.gjassets.com/content/uploads/2020/10/BOK_GAO-and-Court-of-Federal-Claims-Bid-Protests.pdf. This lack of timeline is what the DoD focuses on in its second bite bid protest proposal. *See infra* Part IV(A).

[51] *See* PGBA v. United States, 389 F.3d 1219, 1228–29 (Fed. Cir. 2004).

[52] *Id*. at 1229.

necessarily dispositive[,]" it has also stated that "the absence of an adequate showing with regard to any one factor may be sufficient . . . to justify the denial."[53] This injunctive relief also has the downside of requiring the protestor to give security that would be "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[54] The aforementioned GAO CICA stay requires no such bond or security.[55]

Under the APA, the COFC standard of review in a bid protest case obliges the court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[56] "Under this standard, a procurement decision may be set aside if it lacked a rational basis or if the agency's decision-making involved a violation of regulation or procedure."[57]

While the COFC description of the standard of review may appear similar to the one applied by the GAO, it subtly varies from the GAO standard, and even varies as applied by the COFC itself.[58] Despite differences in how the COFC has applied this standard over the years, it can generally be summarized as "'highly deferential' rational basis review[]" of the agency's decision.[59] For this standard related to agency decision-making, the Supreme Court of the United States has stated that:

> [the Court] will not vacate an agency's decision unless [the agency] "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[60]

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[53] FMC Corp. v. United States, 3 F.3d 424, 427 (Fed.Cir.1993).

[54] R. FED. CL. 65 (c)..

[55] *See supra* notes 30–32 and accompanying text.

[56] 5 U.S.C. § 706(2)(A).

[57] Sotera Def. Sols. v. United States, 118 Fed. Cl. 237, 249 (2014)..

[58] *See, e.g.*, Sys. Application & Techs., Inc. v. United States, 100 Fed. Cl. 687, n.21 (2011) ("The GAO, however, applies a different standard of review to bid protests than does the Court of Federal Claims."). Additionally, as an example of the COFC itself applying different standards of review, the agency in *Systems Application* argued that the COFC had applied a "good faith" standard to agency decisions in the past, and that because the agency had acted in good faith in the present case, the COFC should not sustain the bid protest. *Id.* However, while the court noted that a good faith standard had been applied in multiple COFC bid protest cases, it questioned the standard's usefulness, and refused to apply it in the present case. *Id* (citing Ceres Gulf, Inc. v. United States, 94 Fed.Cl. 303, 318 (2010); Metro. Van & Storage, Inc. v. United States, 92 Fed. Cl. 232, 252–53 (2010); Seaborn Health Care, Inc. v. United States, 55 Fed. Cl. 520, 527 (2003); Griffy's Landscape Maint. LLC v. United States, 51 Fed. Cl. 667, 675 (2001)).

[59] CHE Consulting, Inc. v. United States, 552 F.3d 1351, 1354 (Fed. Cir. 2008); *see also* Pricewaterhouse Coopers Pub. Sector, LLP v. United States, 126 Fed. Cl. 328, 350 (2016) (reviewing multiple past COFC and Court of Appeals for the Federal Circuit decisions and concluding that the "arbitrary and capricious" standard amounts to extremely deferential rational basis review).

[60] Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

This standard must be highly deferential to the agency, because agency contracting officers ("COs") "are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process[,]" and must be given the opportunity to exercise that discretion without fear of litigation.[61] This COFC "rational basis" standard at least conceptually provides for more deference to the agency than the "reasonableness" standard of the GAO.[62] While the GAO standard does allow for deference to the agency, the GAO tribunal evaluates the agency decision from an objective, reasonable standpoint.[63]

In contrast, the COFC's rational basis standard is subjective, and permits the court to take into account the contracting officer's personal values and preferences in making the final contractual decision.[64] Agencies may be afforded even higher levels of discretion by the COFC in instances where the applicable statutes and regulations explicitly allow for that discretion.[65] However, this distinction often is not as clear in practice, because the COFC can and will apply a version of the reasonableness standard in some of its holdings.[66]

To be granted relief by the COFC, such as in protests before the GAO, a "protestor must show not only a significant error in the procurement process, but also that the error prejudiced [the protestor]."[67] The ADRA provides that the COFC "may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[68] The court has discretion in determining the relief; just because it may find an award "arbitrary and capricious," it does not necessarily have to set aside or provide injunctive relief to the contractor for that award.[69] In fact, to provide permanent injunctive relief, the court weighs the same factors as those required for preliminary relief, except the first factor requires final success on the merits

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[61] Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

[62] Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1264–65 (2007).

[63] *Id*.

[64] *Id.*

[65] *See* California Marine Cleaning, Inc. v. United States, 42 Fed. Cl. 281, 293 (1998) (discussing the "high[er] degree of discretion[]" given to contracting officers in negotiated contracts as compared to sealed bidding contracts).

[66] *See, e.g.*, Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989) ("If the court finds a reasonable basis for the agency's [procurement decision], the court should stay its hand even though it might, as an original proposition, have reached a different conclusion . . . ."); *see also* Sys. Application & Techs., Inc. v. United States, 100 Fed. Cl. 687, 711 ("Accordingly, the test for reviewing courts is to determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion . . . .") (citing Impresa onstruzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1331 (Fed. Cir. 2001)).

[67] Gentex Corp. v. United States, 58 Fed. Cl. 634, 648 (2003).

[68] 28 U.S.C. § 1491(b)(2).

[69] PGBA v. United States, 389 F.3d 1219, 1225–26 (Fed. Cir. 2004).

of the case.[70] "The Federal Circuit has characterized the award of injunctive relief as 'extraordinary' and only to be granted in limited circumstances."[71] This again contrasts with the GAO, where the extra injunctive relief factors are not required.[72] Also in contrast to the GAO, as with courts with jurisdiction across the United States, COFC decisions are binding on the parties—both the agency and the protestor.[73]

In summary, the COFC process is a more formal and time-intensive process than the GAO process.[74]The COFC has no strict timing requirements and requires the use of an attorney to bring and defend a claim. The COFC generally uses a rational basis standard in reviewing agency decision-making, although this standard is not always consistently applied across the board.[75] The COFC may order specific remedies as detailed by the ADRA, but to issue both a preliminary and final injunction, it demands the protestor meet extra requirements. Agencies are required by law to obey COFC rulings.

III. ANALYSIS

A. Statistical Analysis of the Past Five Years – How Many Second Bites Have There Been?

To understand the impact of second bite protests on the overall bid protest system and on government procurement in general, it is helpful first to analyze the quantitative numbers of second bite protests as compared to protests in general. This can be done by examining the number of protests adjudicated by the GAO and by the COFC, and by examining the results of these cases.[76]

First, GAO protest numbers are easily researchable via the GAO Bid Protest Annual Report to Congress, as required by CICA.[77] Table 1 lists the number of cases filed and closed with the GAO, the number of "merit"

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[70] PGBA, 389 F.3d at 1226–29; *see also* FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir.1993).

[71] Textron, Inc. v. United States, 74 Fed. Cl. 277, 286 (2006).

[72] *See* 4 C.F.R. § 21.8 (a)(2).

[73] 28 U.S.C. § 1491.

[74] Note that the parties to a COFC case may stipulate to an expedited review which can somewhat reduce the time-intensity of the COFC process. R. FED. CL. Appx. A. If agreed to beforehand by both parties, the expedited trial at the COFC will take just under 100 days. *Id.*

[75] PAE Applied Techs., LLC v. United States, 154 Fed. Cl. 490 511, 18 (2021).

[76] This section will focus on statistics of bid protest cases in just the GAO and the COFC, and not those occurring at the agency level. *See supra* text accompanying note 11. The reader should note that the data presented in this section is by no means a comprehensive picture of historical second bite protests and is intended only to give the reader a general idea of the volume of GAO and COFC bid protest cases. While the method for data collection using Westlaw's database presented below results in a good depiction of this general volume of second bites based on publicly available case results, because no single database that houses second bite data exists, there is no way to guarantee an all-inclusive list of second bite cases.

[77] *See* 31 U.S.C. § 3554(e)(2) (explaining "Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully implement a recommendation of the Comptroller General. . . . The report shall also include a summary of the most prevalent grounds for sustaining protests during such preceding year.").

outcomes (outcomes where the GAO considered the merits of the case and either sustained or denied the protest), the number of GAO sustain decisions, and the rate at which sustain decisions occurred for the past six years.[78] The GAO defines a "sustain" decision as any decision where the GAO found that an agency violated a procurement law or regulation in a prejudicial manner.[79] The sustain decision includes a recommendation for "appropriate corrective action[,]" which could include "a re-evaluation of proposals, a new award decision, an amendment to a solicitation, or other actions."[80]

Table 1: GAO Bid Protest Statistics from Fiscal Year (FY) 2017-2021[81]

Year	Cases Filed	Cases Closed	Merit Outcomes (Sustain + Deny Decisions)	Sustain Outcomes	Sustain Rate
FY 2016	2789	2734	616	139	23%
FY 2017	2596	2672	581	99	17%
FY 2018	2607	2642	622	92	15%
FY 2019	2198	2200	587	77	13%
FY 2020	2149	2137	545	84	15%
FY 2021	1897	2017	581	85	15%

While the GAO's accounting system over-reports the number of actual unique bid protest cases filed, it is safe to assume that there are at least as many unique cases as merit outcomes.[82] This puts the number of GAO unique protests each year in the multiple hundreds, if not thousands.

Table 2 lists COFC bid protests filed, split into pre-award and post-award protests, as well as protest decisions. The COFC does not report on the outcome (sustain or deny) of each decision in the aggregate; the outcomes are individually documented in each opinion.[83]

[78] U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-900379, LETTER TO: CONGRESSIONAL COMMITTEES, RE: GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2021 (2021).
It is important to note that the GAO reports cases via the "docket number," which can skew the case count higher than the actual number of unique protests filed with the GAO. *Id.* at 4, n.1. "Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same [docket] number are assigned (*i.e.*, .2, .3). . . . Each of these numbers is deemed a separate case for purposes of this chart." *Id.* One commentator found that there were approximately 1.6 docket number filings per unique protested procurement based on 2008 protest numbers. Gordon, *supra* note 17, at 496.

[79] *FAQs*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/legal/bid-protests/faqs (last visited Oct. 18, 2022).

[80] *Id.*

[81] U.S. Gov't Accountability Off., *supra* note 78; U.S. Gov't Accountability Off., *supra* note 29.

[82] 31 U.S.C. § 3554(e)(2). There are likely many more unique cases than merit outcomes, as cases filed with the GAO can be closed via voluntary corrective action or alternative dispute resolution before the GAO has a chance to decide a case on the merits. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 78.

[83] *See, e.g.*, U.S. CT. OF FED. CLAIMS, 2017 BID PROTEST OVERVIEW—PART II: SUMMARIES OF BID PROTEST DECISIONS IN THE COURTS, GOV'T CONTRACTS YEAR IN REVIEW BRIEFS (2018).

Table 2: COFC Bid Protest Statistics from Calendar Year (CY) 2016-2021[84]				
Year	Protests Filed	Pre-Award	Post-Award	Protest Decisions
2016[85]	124	31	93	65
2017[86]	129	41	88	74
2018[87]	179	52	127	75
2019[88]	142	46	96	68
2020[89]	117	41	76	57

While the COFC statistics are presented per calendar year and the GAO are per fiscal year, the takeaway is still clear. In recent history, the GAO has dealt with multiple more bid protest cases than the COFC. Using the GAO "Merit Outcomes" metric, on average the GAO adjudicates 589 bid protests per year, while the COFC adjudicates on average 68 bid protests per year. Clearly, the GAO is the preferred forum for disappointed offerors to bring their claims.

However, another trend is apparent from just the number of cases in the past five years: cases filed in the COFC are rising, and cases filed in the GAO are falling.[90] While this trend may not be indicative of the second bite protest occurring more or less frequently, it does show that protestors seem to be exhibiting a new preference for COFC litigation over the GAO informal process. Whether this trend continues or not, the COFC has a long way to go to catch up to the GAO in bid protest cases as even in its most prolific year of 2018, it decided only 11% of the bid protests that the GAO decided.[91]

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[84] At the time of writing this Comment, the COFC had not yet released its statistics for Calendar Year 2021. As such, 2016 statistics are included for comparison's sake to Tables 1 and 3 and to provide a solid statistical database for five years of cases. For this Comment's illustrative purposes, the exact year for case numbers is not as relevant as the aggregate case numbers at the COFC and GAO. In any case, as presented, Table 1 and 2 numbers overlap already due to the GAO's reporting per fiscal year and the COFC's reporting per calendar year.

[85] U.S. Ct. of Fed. Claims, 2016 Bid Protest Overview—Part II: Summaries of Bid Protest Decisions in the Courts, Gov't Contracts Year in Review Briefs (2017).

[86] U.S. Ct. of Fed. Claims, *supra* note 83.

[87] U.S. Ct. of Fed. Claims, Bid Protest Overview—Part II: Summaries of Bid Protest Decisions in the Courts, Gov't Contracts Year in Review Briefs (2019).

[88] U.S. Ct. of Fed. Claims, 2019 Bid Protest Overview—Part II: Summaries of Bid Protest Decisions in the Courts, Gov't Contracts Year in Review Briefs (2020).

[89] Eleni M. Roumel & Patricia E. Campbell-Smith, U.S. Ct. of Fed. Claims, 2020 Bid Protest Overview—Part II: Summaries of Bid Protest Decisions in the Courts, Gov't Contracts Year in Review Briefs (2021).

[90] 2020 case numbers did not rise at the COFC, though 2020 numbers may not be representative of the trend as a whole, due to Covid-19 disruption starting in March 2020. The COFC went through several disruptive changes as the Covid-19 pandemic developed, which likely limited the possible caseload of the COFC in 2020. *See Coronavirus (Covid-19) Announcements,* U.S. CT. OF FED. CLAIMS, https://www.uscfc.uscourts.gov/coronavirus-announcements (last visited Oct. 25, 2022).

[91] The COFC made 75 protest decisions, while the GAO had 622 merit outcomes. *See supra* tbls 1 & 2.

Taking the analysis a step further, understanding the number of second bite protests, specifically requires an aggregate analysis of COFC decisions.[92] Searching Westlaw's COFC decision database between Calendar Year ("CY") 2017 and CY 2021 (January 1, 2017 through January 1, 2022) for the term "bid protest" yields 579 cases.[93] These cases can then be narrowed to those in which the term "Government Accountability Office" and "bid protest" appear in the same paragraph.[94] From there, an individualized review is required to further narrow down to only second bite cases.[95] The results of this review are presented in Table 3.

Table 3: COFC Second Bite Bid Protest Statistics from Calendar Years 2017-2021

Year	Number of COFC Bid Protests that Originated at GAO	Serial Protests (COFC review of GAO decision on the merits)	Corrective Action Challenges (COFC review of corrective action driven by GAO)	Disparate Serial Protests or Corrective Action Results
2017	21	10	7	1
2018	17	10	3	2
2019	20	10	7	2
2020	18	13	2	2
2021	22	9	7	3
Total	98	52	26	10

Table 3 makes it abundantly clear that the great majority of COFC bid protest cases that are a review of either the GAO's final decision on the merits ("Serial Protests") or a review of corrective actions undertaken by the

[92] Nelson, *supra* note 36, at 608 nn.178–79. The Nelson article describes a way to use Westlaw's Court of Federal Claims search database to determine an accurate number of COFC bid protest cases that have already been through GAO review (i.e. second bite protests). *Id.* at 607. This article uses that methodology to examine second bite protests in the past five years (the Nelson article analyzed only two years in 2011 and 2012). *Id.* at 608. Some of the basic search methodology is described in the text and following footnotes of this article—for a more in depth understanding of the statistical search method used, refer to the Nelson article. *Id.* at 607 nn.171–75.

[93] This number is higher than the cases reported by the COFC as official bid protests in Table 2, because this number includes cases that may refer to a bid protest but are not actually a bid protest. For instance, it includes cases where a contractor challenges an agency's override of the CICA stay for a case brought before the GAO. *See, e.g.,* Technica LLC v. United States, 142 Fed. Cl. 149 (2019).

[94] This includes cases where the court states that one of the parties filed a bid protest with the GAO in the procedural history but eliminates some of the cases where the GAO is discussed in terms of precedent and standards of review.

[95] Inapplicable cases include those where a protestor challenged an agency's decision to override the CICA stay, cases where the GAO issued an advisory opinion to the court pursuant to 4 C.F.R. § 21 .11(b), and cases where the protestor decided to change fora before the GAO reached a final decision. Nelson, *supra* note 36, at 608 n. 175; *see, e.g.*, Technica LLC, 142 Fed. Cl. at 156 (holding that the agency decision to override the CICA-stay was arbitrary and capricious); Fluor Intercontinental, Inc. v. United States, 147 Fed. Cl. 309, 318–19 (2020) (permitting the submittal of a GAO advisory opinion); Vsolvit, LLC v. United States, 151 Fed. Cl. 678, 684 (2020) (deciding a case where the protestor brought the case originally in the GAO but decided to bring the case in the COFC, which prompted GAO dismissal).

agency in response to the GAO ("Corrective Action Challenges") are just upholding the GAO result, making the follow-on claim in the COFC redundant. Ten of ninety-eight total claims in the past five years resulted in a non-redundant result for the contractor and agency. This made for eighty-eight total redundant claims brought first in the GAO, and then re-decided by the COFC in the past five years. In each of these cases, government resources—and consequently, taxpayer dollars—were expended both in the COFC on the litigation itself and by the government agency defending its claim.

These numbers serve only as an introductory illustration intended to contextualize the number of bid protests and second bite protests brought each year. More detailed information on bid protests is updated on both the GAO and COFC websites, as well as in other legal databases.[96] While the statistics do serve to highlight that many redundant protests occur each year, this redundancy must be analyzed further to understand whether it is bringing anything of value to the bid protest system. Moreover, any proposal intended to avert the needlessness of the redundant second bite protests must also factor in the fact that there do exist disparate outcome protests, no matter how few there are. A proposal must ensure that disappointed contractors at least get their fair *original* bite at the apple, as well as a chance to challenge a potentially legally improper or misapplied opinion.

B. Analogical Analysis – What Effects do Bid Protests and Second Bite Protests Have on Government Procurement?

i. The Purpose of the Bid Protest

The bid protest as it is known today has existed in some form for nearly 100 years.[97] The GAO, known at the time as the Government Accounting Office, issued the first bid protest decision in 1926, declaring the procurement of a truck for use at the Panama Canal to be unlawful.[98] Since then, while bid protest forums and processes have changed over time, allegedly aggrieved government contractors have always had an opportunity to challenge an agency's contract award decisions.[99] While this Comment focuses on one of the negative aspects of the bid protest system today—the second bite protest—the bid protest process overall serves a vital purpose in

[96] Bid Protests, U.S GOVERNMENT ACCOUNTABILITY OFFICE, https://www.gao.gov/legal/bid-protests; Bid Protest Information, UNITED STATES COURT OF FEDERAL CLAIMS, https://www.uscfc.uscourts.gov/bid-protest-info.

[97] Gordon, *supra* note 17, at 489–90.

[98] U.S. GOV'T ACCOUNTABILITY OFF., A-11259, 5 COMP. GEN. 712 (March 9,1926). The GAO found that the government using the exact specifications for an existing truck in its request for proposal "limits competition" and that specifications should "stipulate only the essential features necessary to meet the requirements . . . ." *Id.*

[99] Gordon, *supra* note 17, at 489–92.

the realm of government procurement.

The bid protest ensures accountability for the billions of taxpayer dollars spent annually procuring goods and services.[100] This accountability is key to a functioning democracy and increases both the public's and contractors' confidence in the integrity of the public procurement process.[101] The transparency provided by both the GAO and COFC in comprehensive written decisions allows the public to delve deeply into agency action and thought-process as the agency spends the public's tax dollars.[102] Contractor confidence in government procurement is essential, because fair and open competition entices more potential competitors, which in turn translates into lower prices and higher quality supplies and services.[103]

As a system, the bid protest is relatively efficient, making contractors the government watchdogs, essentially playing the role of "private attorneys general."[104] Contractors are the parties who decide when they believe a procurement rule has been broken; contractors decide when to bring a bid protest action.[105] The alternative would be for the government to implement a wide-ranging and burdensome audit system, making sure there is some level of oversight for every agency action.[106] Under the bid protest system, if a contractor does not bring the protest, government resources are not expended overseeing the contracting action.[107] Overall, the bid protest promotes government transparency and accountability and serves a vital role in ensuring the integrity of federal acquisition.

ii. Second Bite Case Study: AAR Manufacturing, Inc. v. United States

a. AAR Case Summary at the GAO and COFC

Armed with knowledge of the volume of second bite bid protests occurring on a yearly basis, and with a basic understanding of the purpose for the bid protest process, it follows next to analyze a real-world example of a second bite protest. This will contextualize the issue, illuminating the effect of second bite protests on governmental agencies as well as the level of value

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[100] *Bid Protest in Government Contracts (GAO),* LEXISNEXIS PRACTICE NOTE (June 7, 2021), https://plus.lexis.com/document/?pdmfid=1530671&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5MSS-KB61-JWBS-600J-00000-00&crid=511cd422-36de-432e-b3c3-3b8127ce74b5.

[101] Gordon, *supra* note 17, at 508.

[102] *Id.* at 508–10.

[103] *Id.* at 508.

[104] Steven L. Schooner, *Pear of Oversight: The Fundamental Failure of Businesslike Government,* 50 AM. U. L. REV. 627, 680 (2001).

[105] *Id. See also Bid Protests in Government Contracts (GAO),* LEXISNEXIS, https://plus.lexis.com/document/ (Oct. 20, 2022).

[106] Schooner, *supra* note 104 . at 680–81.

[107] *Id.* at 681.

provided to the American taxpayer by the existence of the second bite system.

AAR Manufacturing, Inc. v. United States is a simple, recent example of the redundancy involved in a second bite bid protest and is one of the thirteen 2020 "serial protests" listed in the third column of Table 3.[108] *AAR* involved a bid protest action brought by AAR Manufacturing, Inc. ("AAR") against the United States Air Force.[109] In 2012, before AAR brought its bid protest, the Air Force initiated an effort to update its supply of cargo airplane shipping pallets, which had not been updated since the 1960s.[110] For that purpose, the Air Force started the "Next-Gen" pallet development program, which was a study conducted by the University of Dayton Research Institute ("UDRI") to design and develop the new pallets.[111] UDRI contracted with three subcontractors, who participated in the development of a technical data package, which would serve as the eventual basis for the specification used to procure the new all-aluminum pallets.[112]

Upon completion of the UDRI study and after conducting additional market research, the Air Force issued a solicitation, seeking a contractor to manufacture and produce the Next-Gen pallets, using a technical data package based on the one developed under the UDRI study.[113] Then, as the solicitation's deadline for proposal submission was approaching, AAR protested the solicitation itself with the GAO on December 11, 2019.[114]

AAR alleged that Taber Extrusions, LLC ("Taber"), one of the contractors who had participated in the UDRI study, had three different organizational conflicts of interest ("OCI").[115] An OCI, if "sufficiently significant to provide [a contractor] with a competitive advantage . . ." and if unmitigated, can be enough to disqualify a contractor from winning a government contract.[116] Specifically, AAR alleged that Taber's participation in the UDRI study had allowed it to shape the ground rules of the Next-Gen procurement contract, and that it had provided Taber with unequal access to nonpublic information.[117] AAR also alleged that Taber's participation in the study essentially allowed it to assess the quality of its own pallet design,

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[108] AAR Mfg, Inc. v. United States, 149 Fed. Cl. 514 (2020).
[109] *Id.* at 518.
[110] *Id.* at 518–19.
[111] *Id.* at 519.
[112] *Id.*
[113] *Id*. Government agencies use "solicitations" to communicate the government's requirements to prospective contractors and to solicit those contractor's proposals. *Phase 2: Solicitation,* ACQNOTES PROG. MGMT. TOOL FOR AEROSP. (July 23, 2021), https://acqnotes.com/acqnote/careerfields/phase-2-solicitation. "At a minimum, solicitations shall describe the Government's requirement, anticipated terms and conditions that will apply to the contract, information required in the offeror's proposal, and . . . the criteria that will be used to evaluate the proposal and their relative importance." *Id.*
[114] AAR Mfg., 149 Fed. Cl. at 520.
[115] *Id.*
[116] *Id.* at 522. Per the FAR, government agencies are supposed "avoid, neutralize, or mitigate significant potential [OCI]s before contract award." 48 C.F.R. § 9.504(a)(2).
[117] AAR Mfg. Inc., B-418339, 2020 U.S. Comp. Gen. LEXIS 85, *6.

which should be done by the government and not the contractor.[118]

In March 2020, the GAO denied AAR's protest, finding that "AAR [had] failed to show that the [government agency and] contracting officer improperly evaluated Taber's potential OCIs."[119] Following the GAO denial, AAR immediately turned around and filed a protest with the COFC, alleging existence of the exact same three OCIs, effectively taking its second bite at the apple.[120] In July 2020, the COFC denied AAR's protest just as the GAO had done four months earlier, finding "the contracting officer reasonably determined that an exception to the biased-ground-rules OCI applies, and that there are no unequal-access-to-information or impaired-objectivity OCIs . . . ."[121]

The COFC opinion and the GAO opinion are remarkably similar and categorically highlight how redundant the second bite system is. Both opinions cite to the same cases and the same regulations in their discussion of the OCI rule, using almost the exact same language.[122] The COFC states that "the identification of OCIs and the evaluation of mitigation proposals are fact-specific inquiries that require the exercise of considerable discretion."[123] It further states that per FAR 9.504, agency contracting officers "are required to 'identify and evaluate potential conflicts of interest as early in the acquisition process as possible; and [a]void, neutralize, or mitigate significant potential conflicts before award.'"[124] Finally, the COFC asserts that "[i]n the context of a contracting officer's OCI determination, '[t]o demonstrate that such a determination is arbitrary or capricious, a protester must identify "hard facts"; a mere inference or suspicion of an actual or apparent conflict is not enough.'"[125]

Employing a similar analysis, the GAO also states that "the identification of conflicts of interest is a fact-specific inquiry that requires the exercise of considerable discretion."[126] It also cites to FAR 9.504: "[t]he Federal Acquisition Regulation (FAR) requires a contracting officer to '[a]void, neutralize, or mitigate significant potential conflicts of interest before contract award . . . .'"[127] Finally, the GAO also maintains that "[a] protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential

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[118] *Id.*
[119] AAR Mfg., 149 Fed. Cl. at 521.
[120] *Id.*
[121] *Id.* at 529.
[122] *Id.* at 522; AAR Mfg. Inc., B-418339, 2020 U.S. Comp. Gen. LEXIS 85, *6.
[123] AAR Mfg., 149 Fed. Cl. at 522 (citing Axiom Res. Mgmt. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009)).
[124] *Id.* at 523 (citing 48 C.F.R. 9.504(a)).
[125] *Id.* at 522. (quoting PAI Corp. v. United States, 614 F.3d 1347, 1351 (Fed. Cir. 2010)).
[126] AAR Mfg. Inc., B-418339, 2020 U.S. Comp. Gen. LEXIS 85, *6 (citing Axiom Res. Mgmt. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009)).
[127] *Id*. (quoting 48 C.F.R. 9.504(a)(2)).

conflict is not enough."[128]

Because the GAO and the COFC applied nearly the same rule, they also came to the same conclusion: the Air Force contracting officer acted reasonably and correctly concluded that none of the three alleged OCIs existed with regard to Taber.[129] First, both the GAO and the court found that Taber fell under the "development and design work" exception to a potential "biased ground rules OCI."[130] Second, both the GAO and the court found that the contracting officer reasonably determined there was no "Unequal-Access-to-Information OCI" as the contracting officer thoroughly investigated what Taber did have access to, and AAR had failed to allege any specific prohibited information violation.[131] Finally, both the GAO and the court found that AAR was only able to speculate about what Taber would do if awarded the contract; AAR could point to no hard facts showing that Taber would be evaluating itself.[132] As such, both forums concluded that no "Impaired-Objectivity OCI" existed either.[133]

b. The Upshot of the AAR Second Bite

In the end, AAR's bringing the protest in the COFC after being denied at the GAO furthered none of the goals of the bid protest system as discussed above. First, having a second, almost identical, opinion dealing with the same three of Taber's potential OCIs failed to further inform the public about the Air Force's thought process in its Next-Gen pallet solicitation. The public could have found all the required information from just the initial GAO opinion.

Second, for the same reason, any potential contractor would not have been instilled with more confidence in the acquisition system by having access to the COFC's reasoning. AAR could have gleaned all it needed from the GAO opinion; the GAO provided ample explanation of why the Air Force had acted reasonably and the solicitation was fair pursuant to the requirements of the FAR.[134] If anything, AAR's second COFC protest likely eroded contractor confidence in the system. As the subject of a bid protest will often do, Taber was compelled to intervene in the COFC case on behalf of the United States.[135] This case shows any potential government contractor that other disgruntled contractors can bring a COFC claim even after losing at the

[128] *Id.* (citing Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011)).
[129] *Id.* at *10; *AAR Mfg*., 149 Fed. Cl. at 523.
[130] *Id.* at 6; *AAR Mfg, Inc*, 149 Fed. Cl. at 528.
[131] *AAR Mfg*., 149 Fed. Cl. at 529; *AAR Mfg. Inc.*, B-418339, 2020 U.S. Comp. Gen. LEXIS 85, *16.
[132] *AAR Mfg*., 149 Fed. Cl. at 528 (2020); AAR Mfg. Inc., B-418339, 2020 U.S. Comp. Gen. LEXIS 85 at *8–10 (Comp. Gen. Mar. 17, 2020).
[133] *AAR Mfg*., 149 Fed. Cl. at 528 (2020); AAR Mfg. Inc., B-418339, 2020 U.S. Comp. Gen. LEXIS 85 at *8–10 (Comp. Gen. Mar. 17, 2020).
[134] *See generally AAR Mfg. Inc.*, B-418339, 2020 U.S. Comp. Gen. LEXIS 85.
[135] *AAR Mfg*., 149 Fed. Cl. at 518.

GAO. Additionally, the case illustrates that the potential contractor may have to participate in and pay for litigation to defend its contract award. This may disincentivize potential contractors from bidding for a contract in the first place.[136] A high likelihood of litigation can certainly be a deterrence to any action and must play into the calculus for any economic decision.[137]

Finally, the inherent efficiency of a contractor-led accountability system for government acquisition is missing from *AAR* as well. Any efficiency gained from a lack of need for comprehensive government oversight of the Air Force is overcome by forcing the government to expend time and resources adjudicating AAR's protest twice.

This is especially true for the Air Force (the agency) in forcing it to defend its actions twice. The Air Force's contracting officer and technical team in the *AAR* case undoubtedly had to spend a significant portion of their time during the four months of the COFC trial attending to the tasks required by the litigation. Not only would the public's tax dollars have been paying for the team's time, but the contracting officer and the technical team would have been kept away from working their main tasks; namely, executing the Next-Gen pallet procurement contract. Often, the technical team of engineers and program managers in DoD procurement contracts are relatively small, and thus it is impossible to ascertain what tasks were being neglected by the Air Force during the *AAR* litigation.[138]

iii. The Second Bite System Needs to Change

The *AAR* case is a simple yet illuminating example of what often occurs in a second bite serial bid protest. The extra litigation amounted to only about four months of delay, which is near the average length of 133 days for a COFC bid protest.[139] Yet one can imagine the amount of wasted time and money, as well as impact to administration of the newly-awarded contract, within the Air Force caused by the extra litigation. This impact is multiplied when considering the number of annual bid protests as presented in Part III(A) of this Comment. An average of sixteen of these serial protests with the same COFC and GAO outcome occur every year, which amounts to years of

[136] Fewer contractors competing for government contracts would drive up costs and reduce competition, thereby decreasing value to the American taxpayer.

[137] *See, e.g.*, Will Kenton, *Litigation Risk*, INVESTOPEDIA (July 2, 2021), https://www.investopedia.com/terms/l/litigation-risk.asp; Mark D. Taylor, et al., *Baker McKenzie: Reducing Litigation Risk*, ETHISPHERE MAG. (last visited Mar. 13, 2022), https://magazine.ethisphere.com/bakermckenzie_s2020/ (many resources exist that are geared toward avoiding and minimizing litigation risk for corporations, small business owners, and individuals).

[138] This assertion stems from the author's own experience as an acquisition engineer employed by the United States Air Force. Source selections, contract solicitations, contract awards, and contract execution are time-consuming tasks that require significant manpower and often the focus of many DoD team members. Any time spent re-defending a solicitation or contract award pulls that manpower and focus away from those important government tasks.

[139] ARENA ET AL., *supra* note 14, at 53.

aggregate time wasted annually by government agencies like the Air Force.[140]

Proponents of the second bite system may admit that redundant serial protests like *AAR* with the same COFC and GAO holding account for the majority of second bites each year. Nevertheless, they will point to those one to two disparate COFC and GAO outcomes each year to claim that the second bite must be available to contractors for the sake of fairness.[141] However, any change to the system need not eliminate one of the two forums; any change should just eliminate the ability to bring the same protest in *both* forums.

Because the COFC does often end up recreating the GAO analysis, as illustrated in the AAR case, it is *not* acting as an appellate venue to the GAO's decision. Typically, a federal appellate court will give some level of deference to the decision below depending on whether the issue under appeal is an issue of law or fact.[142] Even when an appellate court is reviewing an issue *de novo*, unless the issue is purely a question of legal interpretation, it will apply an intermediate standard of review, giving some deference to the trial court.[143] In contrast, the COFC gives zero deference to the GAO in a serial protest, and re-decides every issue already decided by the GAO, even if the issue is purely a finding of fact.[144]

The *AAR* case is a great example of this, where the COFC plainly stated that it would make findings of fact, and that conflict-of-interest analysis, which was the focal point of the case, was a "fact-specific inquir[y] that require[s] the exercise of considerable discretion."[145] If the COFC were hearing an appeal of the GAO's decision, it would defer to the GAO's findings of fact, and would not set them aside unless they were clearly erroneous.[146] As evidenced by the GAO-to-COFC *AAR* case discussion comparison above, instead, the COFC performs a nearly identical application of the law to the facts, with modifications based on the small differences between the COFC and GAO law and precedent.[147] Thus, any argument that

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[140] *See supra* tbl.3.

[141] *See generally*, WaveLink, Inc. v. United States, 154 Fed. Cl. 245 (2021); Anham FZCO v. United States, 144 Fed. Cl. 697 (2019).

[142] Kevin Casey, et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 320 (2001).

[143] *Id.* at 292 (citing Lee v. Dayton-Hudson Corp., 838 F.2d 1186, 1189 (Fed. Cir. 1988)). "Certainly, some types of law application have the characteristics or both law-making and fact-finding. . . . Specifically, the Federal Circuit has said that a trial tribunal 'is presumed to have applied the law correctly, absent a clear showing to the contrary.'" *Id.*

[144] *See, e.g.*, Mortg. Contr. Servs., LLC v. United States, 153 Fed. Cl. 89, 133 n.9 (2021) ("Although Judges of the United States Court of Federal Claims . . . have high respect for the expertise of the GAO, and often consider the reasoning included in GAO decisions when reaching their own opinions, GAO decisions are not binding on the United States Court of Federal Claims.").

[145] AAR Mfg. v. United States, 149 Fed. Cl. 514, 522 (2020).

[146] *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ."). Accordingly, the "clearly erroneous" or "clear error" standard is how the U.S. Court of Appeals for the Federal Circuit, which is the appellate venue for COFC decisions, reviews COFC findings of facts. *See, e.g.*, Spindelfabrik Suessen-Schurr Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft, 828 F.2d 1075, 1077 (1987).

[147] *See supra* notes 120–131 and accompanying text.

the second bite protest must be available to contractors for the sake of fairness holds little water, because the COFC does not at all perform an appellate-like function to the GAO.

In any proposal to change the second bite system, contractors could still avail themselves of either the GAO process or the COFC process. The contractor would simply make an initial decision of which forum to bring the protest based on the differences between the two. In those relatively few disparate cases, the contractor could have strategically decided initially to bring the claim in the COFC and obtained the same result. As will be discussed in the next section, other legal systems for government contracting work exactly the same way.

In the end, there are no obvious benefits gained from the COFC's second redundant review of a bid protest and there are multiple problems of government inefficiency and waste caused by it. The *AAR* case illustrates both this lack of benefit and increased inefficiency. The annual GAO and COFC data show that cases like AAR occur multiple times a year. Therefore, the law should be changed with respect to the COFC litigation process to make it impossible for a contractor to bring a bid protest claim first in the GAO and then in the COFC.

IV. PROPOSAL: RESTRUCTURE THE GAO-COFC RELATIONSHIP TO THE "EITHER-OR" RELATIONSHIP EVIDENCED IN THE CONTRACT DISPUTES ACT

A. Current National Attention Regarding Bid Protests

During the 2010s, the Federal Government—specifically Congress and the DoD— devoted resources to studying the efficiency and effectivity of the bid protest system and even specifically attempted to address the second bite protest. This section gives an overview of this national-level discussion, as well as the already-proposed, unsuccessful fixes to the second bite protest.

In 2012, the DoD submitted a proposal to Congress for inclusion in the 2013 NDAA attempting to remove the second bite protest.[148] This proposal would have revised 28 U.S.C. § 1491 to add a ten-day timeliness deadline to post-award bid protest filings at the COFC, among other timeliness changes.[149] In submitting this proposal, the DoD argued that the change would eliminate "forum shopping" between the GAO and COFC for bid protests, effectively eliminating the second bite.[150] The DoD's logic in attempting to eliminate the second bite was similar to the conclusion presented in this Comment: the second bite is an unnecessary inefficiency,

[148] Peyster, *supra* note 14.

[149] Finley, *supra* note 19, at 9; Peyster, *supra* note 14. Recall that the COFC's general statute of limitation is six years. 28 U.S.C. § 2501 (2014).

[150] Finley, *supra* note 19, at 9.

and eliminating it would provide savings to federal agencies and specifically to the DoD.[151] In the end, Congress did not include the proposed language in the 2013 NDAA.[152]

After its failure to convince Congress to enact a change in the 2013 NDAA, the DoD again proposed the same timeliness language for inclusion in the 2014 NDAA.[153] This time, as a supporting documentation, the DoD included a case analysis of *Axiom Res. Mgmt., Inc. v. United States*, which was similar to the AAR analysis presented above.[154] The *Axiom* case was an even more extreme example of the second bite gone awry, and to the DoD at least, was a great case study for why the second bite needed to be eliminated.[155] The DoD proposal also included examples of other cases where the second bite had caused inefficiencies and spending of federal resources for little realistic gain.[156] Once again,Congress ultimately declined to include the proposal in the 2014 NDAA.[157] The DoD proposal, while simple in nature, called for a "significantly revised" version of 28 U.S.C. § 1491, which could have been a reason why it was not ultimately adopted.[158] Thus, any renewed proposal should err on the side of being as simple as possible to make it easier for Congress to enact the change. The proposal in this Comment is extremely simple for this reason.

Since the 2013 and 2014 NDAA proposals, Congress has initiated a pair of studies to further investigate the efficiency of the bid protest system. The first was a report called for by Congress in the 2017 NDAA and completed by the RAND Corporation in 2018.[159] This report did not specifically address second bite protests but did call for "comprehensive study on the prevalence and impact of bid protests on DoD acquisitions."[160] In 2018,

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[151] *Id*. "Under the existing statutory arrangement, a protester may file a GAO protest, litigate it fully, and if disappointed, commence the entire process anew before the COFC. . . . [T]his chaotic process greatly lengthens the time required to resolve a protest, which translates into increased costs for the procuring agency." Peyster, *supra* note 14.

[152] Finley, *supra* note 19, at 9.

[153] *Id.* at 10.

[154] *Id.*

[155] *Id.* In *Axiom*, the protestor had received a denial of its protest at the GAO and proceeded to file at the COFC. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1377–78 (Fed. Cir. 2009). The COFC then sustained the protest, only to have the sustainment overturned upon appeal to the Court of Appeals for the Federal Circuit (CAFC). *Id.* at 1384. The federal agency had spent two years defending its contract award in court, just to end up in exactly the same spot it had been in after the relatively short GAO protest. Finley, *supra* note 19, at 10.

Finley, *supra* note 19, at 10.

[156] *See* Finley, *supra* note 19, at 10.

[157] *Id.* at 9.

[158] *Id.*

[159] ARENA ET AL., *supra* note 14, at iii.

[160] *Id.* at xi. This report sought to research four main questions: "(1) [w]hen bid protests are filed, what is the nature and value of these contracts, and what is their share of total defense procurement contract dollars? (2) What are the outcomes of bid protests? (3) How do protesters perceive post-award debriefings in which the reasons for the contract award are explained? (4) When a protester is successful, how often is voluntary corrective action taken by the DoD contracting agency?" Synopsis of *Assessing Bid Protests of U.S. Department of Defense Procurements:*
Identifying Issues, Trends, and Drivers

the RAND Corporation concluded generally that bid protest numbers overall remained small and that at least the GAO process was working.[161]

However, despite RAND's conclusion about bid protests in general, Congress is still considering changing specifically the second bite system at the time of the writing of this Comment. This is evidenced in part by its commissioning a study on "the frequency and effects of bid protests filed at both the U.S. General Accountability Office (GAO) and the U.S. Court of Federal Claims (COFC) . . . ."[162] This study compared GAO and COFC bid protest outcomes for specifically the DoD and came to the same conclusion and timeliness recommendation that the DoD offered in the 2013 and 2014 NDAAs.[163]

Despite this repeated recommendation by the DoD, as of the writing of this Comment, Congress has declined to implement the DoD's proposed COFC timeliness rules.[164] As such, this Comment presents an even simpler solution to the second bite problem based on the Contract Disputes Act of 1978 ("CDA"), outlined in the following sections.

B. Bringing Claims under the CDA

The CDA sets up the dispute resolution process for "any express or implied contract . . . made by an executive agency for—(1) the procurement of property, other than real property in being; [or] (2) the procurement of services . . . ."[165] The CDA process allows a government contractor to bring a claim challenging an executive agency action related to a government

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RAND CORP., https://www.rand.org/pubs/research_reports/RR2356.html (last visited Oct. 26, 2022). *See also* ARENA ET AL., *supra* note 14, at xvii–xviii.

[161] *See id.* at xiii, xvii–xviii.

[162] Fuentes, *supra* note 13.

[163] *See generally Report on Department of Defense Contracting Dispute Matters*, U.S. DEP'T OF DEF. OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION AND SUSTAINMENT (July 2019), https://publicprocurementinternational.com/wp-content/uploads/2021/08/DoD-2019-Report-TAB-A1-Sec-822-RTC-Final-10-Jul-2019-3.pdf. The data presented in this report was obtained by the DOD from a variety of sources, including those within the COFC, GAO, and the DOD, as well as data from polling of the protestors themselves. *See generally id.* The results of the report serve as a good comparison to the data presented in Part III(A), even though they cover only DoD protests. Also, because the DoD had access to sources not publicly available, the comparison is not necessarily an "apples-to-apples" comparison, but the results do generally match. *See id.* at 3–4. For instance, the DoD found an average of 28 serial protests in 2016–2018 and found that the numbers of different outcomes were in only the low single digits for each of those years. *Id.* These results are on the order of those presented in Part III(A) of this Comment, which is to be expected considering the greater number of sources the DoD had to pull from as offset by the fact that these were DoD-only protest numbers, not including other federal agencies. Finally, the DoD openly admits in its report that its data collection for the report was "complicated" and that a majority of the data "was not maintained in any existing data system." *Id.* at 2. It even admits that some of its data "cannot be verified." *Id.* This further reinforces the point made in footnote 76 above; data collection to understand the full extent of the second bite issue is complicated, and any level of data presented by any entity is unlikely to represent the complete picture. *See supra* note 76.

[164] Finley, *supra* note 19, at 9.

[165] 41 U.S.C. § 7102(a).

contract.[166] A claim under the CDA is a "written demand or written assertion by one of the contracting parties seeking . . . the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to [a federal] contract."[167] The key for CDA applicability is that a contract exists, and the party bringing the claim is actually the contractor performing the contract.[168]

The first step to bringing a claim under the CDA is for the contractor to submit the claim to the applicable executive agency's CO for adjudication at the agency level.[169] Recall that under the FAR, the agency CO is one of three *options* for an aggrieved contractor to bring a bid protest; here, under the CDA, the contractor is *required* to first bring the claim to the CO, before availing itself of further adjudicatory forums, like the COFC.[170] Once a CO has made what is known as an adverse "final decision" on a contract claim, then the contractor has the right to choose one of two forums to litigate its claim.[171]

These two forums are the COFC and what is known as an "Agency Board of Contract Appeals."[172] If the contractor files the claim in the COFC, the claim will be reviewed "[*de novo*] in accordance with the rules of the appropriate court."[173] Overall, the COFC functions similarly in hearing CDA

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[166] Michael J. Schaengold & Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 FED. CIR. BAR J. 279, 279 (2008); *see also* 41 U.S.C. § 7103(a).

[167] 48 C.F.R. § 52.233-1(c). Often, these claims are for actions by the government that have caused additional expenses for the contractor during the performance of the contract. Christoph A. Mlinarchik, *Fields of Practice: Crafting Compelling Contracting Officer's Final Decisions*, 40 REP. 55, 55 (2013). An example of one of these claims is that a contractor may incur additional expenses (in maintaining personnel, storing goods, etc.) if the government issues a stop work order for an extended period of time. *Id.*

[168] *See Difference Between a Bid Protest and a Contract Dispute,* WATSON & ASSOCIATES, LLC: FED. GOV'T CONTS. BLOG, https://blog.theodorewatson.com/what-difference-between-bid-protest-contract-dispute/ (last visited Oct. 26, 2022); *see* 41 U.S.C. §§ 7102–03 (restraining applicability to an active express or implied contract, with a claim brought by an existing government contractor). The CDA applies only to *contractual* disputes relating to government contracts. CIV. ACTIONS AGAINST THE U.S., ITS AGENCIES, OFFICERS AND EMPS., §5:2 (West Group 2d ed. 2002) (1992). If a claim does not arise from a contractual dispute between a plaintiff and the government, the CDA will not be applicable, and the plaintiff will likely need to file the claim within the requisite venue, as they would for any regulatory or statutory claim. *See id*. This contrasts with a bid protest in that for the bid protest, the only entity with a contract is the awardee, who will not have any incentive to bring the protest. *Difference Between a Bid Protest and a Contract Dispute, supra* note 168. The party bringing the claim in a bid protest then is one who has *no* contract with the government. *Id.*

[169] Schaengold & Brams, *supra* note 166, at 279; 41 U.S.C. § 7103(a)(1).

[170] *See id.*; *see also* 48 C.F.R. 33.103; *see supra* notes 8 and 11 and accompanying text.

[171] Schaengold & Brams, *supra* note 166, at 279; 41 U.S.C. §§ 7103–04. This "final decision" serves as the government's first response to a contractor's claim and is binding and conclusive on the issue unless the contractor appeals it. Mlinarchik, *supra* note 167, at 55; 41 U.S.C. § 7103(g). The written decision from the CO must include: "(i) [a] description of the claim or dispute; (ii) [a] reference to the pertinent contract terms; (iii) [a] statement of the factual areas of agreement and disagreement; (iv) [a] statement of the contracting officer's decision, with supporting rationale . . . ;" and (v) a statement advising the contractor of its appeal rights. 48 C.F.R. § 33.211(a)(4)(i–v).

[172] 41 U.S.C. § 7104. Currently, there are four separate agency review boards with separate jurisdictions: the Armed Services Board, the Civilian Board, the Tennessee Valley Authority Board, and the Postal Service Board. *Id.* § 7105.

[173] *Id.* § 7104(b).

claims to how it functions in hearing bid protests as described in Part II(B).

If the contractor appeals the decision to the appropriate Review Board, the Board will "provide informal, expeditious, and inexpensive resolution of [the] dispute[,]" and will "issue a decision in writing or take other appropriate action on each appeal submitted."[174] The Boards were designed to "function as quasi judicial bodies. . . . Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. . . . In performing this function *they do not act as a representative of the agency* . . . ."[175] The COFC and Agency Board's jurisdictions on contract disputes are nearly identical; contractors may choose between the COFC and the Boards of Contract Appeals in virtually all CDA litigation resulting from adverse agency decisions.[176]

If the contractor wishes to further contest the decision made by either the COFC or the Agency Board, it may appeal the decision to the appropriate appellate court—the United States Court of Appeals for the Federal Circuit ("CAFC")—just as a party typically would for an appeal in any jurisdiction.[177] While this Comment will not delve further into the processes, rules, and regulations regarding the CDA, one rule for governing the CDA stands out: a contractor may choose to file an appeal of the agency's final decision *either* with the appropriate Board of Contract Appeals or appeal directly to the COFC.[178] "Thus, once a contractor makes a binding election to appeal the CO's final decision to a board of contract appeals or to the Court of Federal Claims, the contractor can no longer pursue its claim in the other forum."[179]

C. The CDA and Bid Protests

Similarities between the CDA contractual dispute claim process and the bid protest process are numerous. From a high level, both concern the adjudication of issues related to federal acquisition contracts.[180] Both involve the use of three separate forums for issue adjudication: (1) the federal agency

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[174] *Id.* § 7105. The CDA gave agency boards jurisdiction over "*all contractor claims* based upon a valid contractual theory . . . ." LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995). The agency board functions like an actual court; it may "administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal . . . ." *Id.*

[175] Boeing Petroleum Servs., Inc. v. Watkins, 935 F.2d 1260, 1261 (Fed. Cir. 1991) (quoting S. Rep. No. 1118., 95th Cong., 2d Sess. 26).

[176] Schaengold & Brams, *supra* note 162, at 280.

[177] 41 U.S.C. § 7107 (2011).

[178] *See, e.g.*, Palafox St. Assocs., L.P. v. United States, 114 Fed. Cl. 773, 781 (Fed. Cl. 2014); Bonneville Assocs. v. United States, 43 F.3d 649, 653 (Fed. Cir. 1994); Glenn v. United States, 858 F.2d 1577, 1580 (Fed. Cir. 1988); National Neighbors, Inc. v. United States, 839 F.2d 1539, 1542 (Fed. Cir. 1988) (emphasis added).

[179] Bonnerville, 43 F.3d at 653 (citing National Neighbors, Inc. v. United States, 839 F.2d 1539, 1542 (Fed.Cir.1988)). In fact, "if a contractor files actions based on the same contract at both the CFC and a[n agency] board, the contractor risks consolidation of the cases in one forum without any control over which forum receives its cases." Schaengold & Brams, *supra* note 162, at 282–83.

[180] *See supra* notes 3–6, 130 and accompanying text.

that is a party to the contract or potential contract in question, (2) an administrative organization, whether it is an independent Agency Board for the CDA or the GAO for bid protests, and (3) the COFC.[181] For both also, the administrative forum is made available to the contractor for the purposes of efficiency, simplicity, and expediency of the process for resolving the contractor's allegation.[182]

However, a key difference between the CDA and bid protest processes is the fact that the contractor may bring a claim in only *one* of either the COFC or the Agency Board under the CDA, while a contractor may bring a protest in *both* the COFC and the GAO under CICA and the APA.[183] Capability to bring the bid protest to the GAO and then to the COFC is what gives rise to the second bite protest, whereas the CDA completely precludes this ability. Therefore, the inefficiency generated by the second bite protest system described in Part III(B)(iii) of this Comment would be fixed by simply adjusting the bid protest process to reflect the "either-or," tried-and-true, CDA system.[184]

D. Rule Changes for Bid Protests to Accommodate the CDA System

In order to accommodate the CDA's Agency Board-or-COFC system, only one rule in place for bid protests needs to be adjusted to align with the CDA. The intent of the suggestions enumerated in this section is to offer Congress minimal potential insertions into, or re-writes of, the statutory language governing the bid protest system, which is scattered across CICA, the APA, and 28 U.S.C. § 1491.[185] While statutory adjustment would be required to change the high-level skeleton of the bid protest system, adjustments to the FAR would need to follow suit to flesh out the finer details.[186] This Comment offers suggestions for this minimal statutory adjustment and rule change but does not delve into the finer details of the multiple regulations that would potentially need adjustment.[187]

The main and only truly necessary change for eliminating the second bite would be to provide the either-or option for the contractor. This could match the CDA's "Contractor's right of appeal from decision by contracting

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[181] *See supra* notes 7–10, 134–37 and accompanying text.

[182] *See supra* notes 22, 139 and accompanying text.

[183] *See supra* notes 12–13, 174–75 and accompanying text.

[184] *See supra* Section III(B)(iii) (describing the government inefficiency and waste generated by the second bite protest).

[185] Recall that the CICA (codified at 31 U.S.C §§ 3551–3556) governs the GAO bid protest, the APA (codified at 5 U.S.C. §§ 551–559) governs general rules for agency procedures and regulation development, and 28 U.S.C. § 1491 bestows bid protest jurisdiction upon the COFC.

[186] Recall also that many of the lower-level regulations governing bid protests show up in the FAR, specifically in 48 C.F.R. 33.1.

[187] Conveniently, however, administrative regulations governing the CDA are located in the very next subpart after the bid protest section, 48 C.F.R. 33.2, and could be used as an excellent guideline for potential changes to bid protest regulations.

officer" section, which would make for a simple insertion and would not require Congress to completely re-draft the statutory language.[188] For example, the following is a potential "either-or" provision, borrowing language from both the CDA and the bid protest federal regulations:

> (a) Bid Protest before the GAO. A contractor or potential contractor, not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), may file its protest action with the GAO.
>
> (b) Bringing a Bid Protest *De Novo* in Federal Court.
>
> (1) In general. In lieu of filing its protest with the GAO, a contractor or potential contractor may bring an action directly in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.
>
> (2) Time for filing. A contractor shall file any action under paragraph (1) within 12 months from the date the basis of protest is known or should have been known (whichever is earlier) on a bid protest action of this title.
>
> (3) *De Novo*. An action under paragraph (1) shall proceed de novo in accordance with the rules of the appropriate court.[189]

A version of this section enacted for bid protests would ensure that the second bite is eliminated on its own, but there may—or may not—also need to be some changes to the GAO protest. These changes would accommodate the fact that the GAO would now be serving as a litigation-surrogate for aggrieved contractors. The following are discussions of other CDA provisions and whether they should or should not be applied to the second bite elimination proposal.

First, at the start of the bid protest process, there would be no reason to match the CDA's statutory requirement under 41 U.S.C. § 7103 that first, "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision."[190] This could remain an optional step for bid protests, as some protests do currently start with the GAO or COFC, essentially skipping any agency investigation. If protests were required first to be analyzed and decided upon by the agency COs, the bid protest timeline would be extended unnecessarily, negating the efficiency gained by eliminating the second bite. Further, changes to the current bid protest system should be minimized, giving Congress fewer

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[188] 41 U.S.C. § 7104(a)(1).

[189] 41 U.S.C. § 7104(a)(1); *see generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, (2018).

[190] 41 U.S.C. § 7103.

changes that would need to be agreed upon to become law.

Second, a closer question is whether GAO decisions would need to be made binding, which is accomplished straightforwardly by the CDA for agency board decisions: in general, "[t]he decision of an agency board is final . . . ."[191] While this may seem like a major change, recall that in reality, GAO recommendations are almost always followed and have the full weight of congressional funding to enforce them in the current system.[192] An official switch to legally enforceable GAO decisions would be a switch in name only. Thus, there would likely be no requirement for a change to make GAO decisions officially enforceable to go along with the elimination of the second bite—if they are almost always followed already, why go to the trouble of changing the law?

Third is the question of whether these GAO decisions would need to be made appealable to ensure contractors and agencies would both have the opportunity to have their case reviewed if they feel the GAO has misapplied the law. This is also easily accomplished by the CDA:

> (A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or
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> (B) if an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within 120 days from the date the agency receives a copy of the decision.[193]

Again, however, this change may not be necessary. If the GAO decision were not appealable, a contractor would just have one more strategic factor to consider in determining whether to bring a protest before the GAO or the COFC. The contractor would need to weigh the benefits of the GAO bid protest—like the speed, informality, and CICA stay—against the fact that an unfavorable GAO decision would be final. This may result in fewer protests brought before the GAO, and Congress would only need to weigh such a potential outcome against the complications resulting from enacting legislation that represents a bigger change from the status quo.

A major reason to make the GAO appealable, however, is that the government agency would not (and currently *does* not) have the option to decide which venue—the GAO or COFC—in which the bid protest is brought. If the GAO decision were unappealable, the federal agency could be

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[191] *Id.* § 7107(a)(1). For example, the decision of the GAO is final.
[192] *See supra* notes 35–36 and accompanying text.
[193] 41 U.S.C. § 7107(a)(1).

bound by the decision of an informal process for which it had no say in choosing; the contractor would be the one to choose between the GAO and COFC for bringing a bid protest. However, if GAO decisions remained technically non-binding, it may be easier for Congress to refrain from providing an appeal process, knowing at least that parties to a GAO bid protest decision were not required by law to follow the decision. This Comment endorses the addition of an appeal process for the GAO, with the understanding that Congress may wish to leave such a process out of any potential statutory change for simplicity's sake.[194]

And that, ultimately, is all that would be required. After the either-or addition to the United States Code, the bid protest process would be adjusted to eliminate the second bite, and the bid protest system would be streamlined, with a clear appellate process for a contractor and the federal agency to follow.

Beyond these additions, there would not need to be any other major changes to the way the GAO or COFC currently treat protests. The GAO could retain the CICA stay, its informal procedures, and its strict timeline requirements. Little change would be required for how the COFC operates, because the COFC for a bid protest currently functions very similarly to how the COFC functions for a contract dispute under the CDA.[195] The two venues could also retain their current similar, but slightly distinct, rules when it comes to bid protests; the contractor would then have to strategically choose between the two with respect to where to bring its protest, just like the aggrieved contractor does currently for CDA disputes.

Proponents of the status quo may argue that this updated system would hamper a contractor's ability to raise a separate issue about the same contract award with the COFC from the one that was raised with the GAO, as can occasionally happen in the current system. However, these "separate issue" protests are not really "second bites," because they are not the redundant claims as presented in the *AAR* case; they are not included in the second bite numbers presented in Table 3.[196] In this new system, these cases would be treated similarly; each issue would need to be raised anew, just as

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[194] Note that there is a pseudo-appellate process already in place for the GAO, known as a "Request for Reconsideration." 4 C.F.R. § 21.14. This reconsideration process occurs completely within the GAO and does not allow for review by a separate, independent entity, like a judicial appeal would and therefore isn't fully, judicially "appellate." *Id*. However, it is certainly a factor Congress could contemplate if it were considering instituting a GAO appellate process to the CAFC.

[195] 28 U.S.C. § 1491(b)(1). The COFC is granted its jurisdiction over bid protests and contract disputes in the same sentence within the United States Code. *Id.* ("[T]he United States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.").

[196] *See supra* notes 92, 94. This footnote provides examples of cases where the same contract was protested in both the GAO and COFC, but the issues raised for that protest were different. These examples are not true second bite cases.

the contractor would do currently.[197]

V. CONCLUSION

The bid protest is a necessary tool that ensures accountability for the billions of taxpayer dollars spent annually procuring goods and services.[198] Overall, it accomplishes this accountability efficiently, and increases both the public's and contractors' confidence in the integrity of the public procurement process.[199] It is necessary, or at least highly beneficial, for a contractor to have the option to bring a protest with the GAO, and not just the COFC, where a number of benefits such as the CICA stay, informal procedure, and a quick timeline are available.

However, clearly the second bite protest, where a contractor brings the same protest first in the GAO and then in the COFC, rarely, if ever, serves to promote the purposes of the bid protest system as a whole. Moreover, the second decision by the COFC is often redundant, using the same or extremely similar language and having the same result as the GAO decision that came before it.[200] Over the past five years, there have been an average of 16 redundant second bite bid protests and an approximate 2,394 days of court, agency, and contractor time squandered on second bite protests per year.[201] Congress, executive agencies, and even the public, recognize the need for changes to the bid protest system to eliminate second bite protests, as evidenced by the DoD's NDAA proposals and Congress's bid protest studies throughout the past ten years.[202]

In view of the evidence presented here that the bid protest system needs to change; Congress should enact a law that would model bid protests after the CDA. With only minimal changes to the United States Code, the bid protest system should be revamped to work like the CDA, where a contractor would have the choice to bring its protest with either the GAO or with the COFC, but not both. The system could still be instantiated to allow for either party to appeal the decision, and the benefits of keeping both the GAO and the COFC available as venues to bring a protest would remain.

In the end, everyone, including federal contractors, deserve their day in court and one bite at the proverbial apple. However, no one should have the right to a second bite at that same apple, especially not at the expense of

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[197] 41 U.S.C. § 7103. Just as each separate contract dispute must be raised with the agency first under the CDA, even if the disputes concern the same government contract. *Id*.

[198] *See* Part III(B)(i).

[199] *See i* Part III(B)(i).

[200] *See supra* pt. III(B)(ii)(b) (explaining the GAO-COFC redundancy in the *AAR* case).

[201] *See supra* notes 94–95, 166 and accompanying text. This average is based on the numbers presented in Table 3 and the average 133-day length for a bid protest.

[202] *See supra* Part IV(A).

so many other parties, including the American taxpayer. The simple modifications to the rules outlined in this Comment eliminate this second bite but retain all the many benefits inherent in the federal bid protest system.