

BRIEFING PAPERS[®]

WEST[®] SECOND SERIES

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

TURNING SILVER INTO GOLD: RECOVERING PROTEST COSTS OR BID & PROPOSAL COSTS IN PROCUREMENT PROTESTS

By Daniel S. Herzfeld and Evan D. Wesser

Recovery of protest costs and bid and proposal costs in a bid protest are often seen as a secondary remedy. When protesting an award, a protester generally favors equitable remedies (such as injunctive and declaratory relief) directing an agency to correct errors in the procurement process that could eventually lead to the protester receiving the contract award. The potential recovery of some monetary relief—either alone or in tandem with equitable relief—still provides some incentive for protesters to challenge errors in the procurement process and violations of law.¹

This BRIEFING PAPER provides an overview of the recovery of protest and bid and proposal costs at the three most commonly used protest fora: (1) the Government Accountability Office, (2) the U.S. Court of Federal Claims, and (3) the Office of Dispute Resolution for Acquisition in the Federal Aviation Administration. This PAPER does not discuss agency-level protests because generally the

Federal Acquisition Regulation provides that the same remedies applicable to the GAO are allowed in an agency-level protest² (although several agency FAR supplements contradictorily prohibit an agency official from awarding any costs).³ For each forum, this PAPER (a) presents a brief history of the forum's jurisdictional underpinnings, focusing primarily on the forum's ability to award protest or bid and proposal costs, (b) describes the circumstances that will lead the forum to award any costs, and (c) explains the

IN BRIEF

Government Accountability Office

- When Does The GAO Award Protest Costs
- When Does The GAO Award Bid & Proposal Costs
- Claim For Costs Submission Process
- Cost Recovery Standards & Limitations

U.S. Court Of Federal Claims

- When Will The COFC Award Costs
- Cost Recovery Process
- Standards For Recoverability Of Bid Preparation & Proposal Costs

FAA Office Of Dispute Resolution For Acquisition

- When Will ODRA Award Bid & Proposal Costs
- Process For Recovery Of Bid & Proposal Costs

Daniel S. Herzfeld is a counsel and Evan D. Wesser is an associate in the Government Contracts & Disputes group resident in the Northern Virginia office of Pillsbury Winthrop Shaw Pittman LLP. The authors gratefully thank their colleagues Alex D. Tomaszczuk and John E. Jensen for their helpful comments on this PAPER.

procedures and standards for recovering costs once the forum has issued a recommendation or order to the agency to pay protest or bid and proposal costs.

Government Accountability Office

The Government Accountability Office (until 2004 known as the General Accounting Office)⁴ is an arm of Congress that has been adjudicating bid protests almost since it was established in 1921.⁵ It is the oldest federal forum to hear bid protests and continues to be the most used,⁶ hearing an average of more than 1,500 protests per year in the last five years including close to 2,000 protests in Fiscal Year 2009.⁷

Despite the GAO's lengthy tenure hearing bid protests, for the first 60 years, there was no clear statutory authority specifically allowing it to do so.⁸ The authority was justified by relying on an assortment of statutes allowing the GAO to settle and adjust accounts concerning the Government, to revise public accounts, and to render a decision on a question submitted by a Government disbursing official or agency head.⁹ Within its original hazy statutory web of authority over bid protests, for a long time the GAO recommended only equitable remedies for protesters.

In 1974, the GAO recognized for the first time its authority to award bid and proposal costs.¹⁰ The GAO explained that it would award bid and proposal costs in appropriate cases because the U.S. Court of Claims' standards of arbitrary and capricious behavior for awarding such costs then matched the GAO's standards for adjudicating protests.¹¹ In the same decision, however, the

GAO refused to award protest costs, including attorneys' fees.¹²

In 1984, Congress passed the Competition in Contracting Act, which finally provided the GAO with explicit statutory authority to adjudicate bid protests.¹³ CICA also sets forth various forms of equitable relief and, as pertinent here, monetary relief that the GAO can recommend.¹⁴ In particular, CICA states:¹⁵

If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

(B) bid and proposal preparation.

CICA thus expanded the GAO's ability to recommend the award of monetary relief, including for the first time allowing the GAO to award protest costs, including attorneys' fees. The GAO's Bid Protest Regulations then implemented CICA's remedies, including allowing the GAO to recommend the award of protest costs and bid and proposal costs.¹⁶

■ When Does The GAO Award Protest Costs

The GAO has stated that its award of protest costs "is intended to relieve protesters with valid claims of the burden of vindicating the public interest which Congress seeks to promote; it is not intended as a reward to prevailing protesters or as a penalty imposed upon the government."¹⁷ There are two primary circumstances where the

WEST®

BRIEFING PAPERS

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

BRIEFING PAPERS® (ISSN 0007-0025) is published monthly except January (two issues) and copyrighted © 2010 ■ Valerie L. Gross, Editor ■ Periodicals postage paid at St. Paul, MN ■ Published by Thomson Reuters / 610 Opperman Drive, P.O. Box 64526 / St. Paul, MN 55164-0526 ■ <http://www.west.thomson.com> ■ Customer Service: (800) 328-4880 ■ Postmaster: Send address changes to Briefing Papers / PO Box 64526 / St. Paul, MN 55164-0526

BRIEFING PAPERS® is a registered trademark used herein under license. All rights reserved. Reproduction, storage in a retrieval system, or transmission of this publication or any portion of it in any form or by any means, electronic, mechanical, photocopy, xerography, facsimile, recording or otherwise, without the written permission of Thomson Reuters is prohibited. For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, (978)750-8400; fax (978)646-8600 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651)687-7551.

GAO will recommend an award of protest costs. First, it will almost always do so when it issues a published decision sustaining a protest. Second, the GAO will often award protest costs before it can issue a decision where it determines the agency has unduly delayed in taking corrective action. At the GAO, as discussed in detail below, protest costs include primarily attorneys' fees, expert witness fees, and internal labor costs.

Generally, whenever the GAO issues a decision sustaining a protest, it will recommend that an agency award the protester its protest costs, including attorneys' fees, usually along with a recommendation for other appropriate equitable relief.¹⁸ This necessarily means that a protester has shown a prejudicial violation of a procurement statute or regulation.¹⁹ For example, the GAO does not reserve the award of costs for only those cases where it recommends minimal equitable relief but will recommend the award of protest costs even when it also recommends that the agency award a contract to the protester.²⁰ Thus, if the GAO issues a decision sustaining a protest, then the protester generally is entitled to its protest costs.

The GAO's rules specifically state that it may also recommend the award of protest costs even if the agency takes corrective action before the GAO has an opportunity to render a written decision.²¹ Unlike the situation when the GAO issues a decision sustaining a protest, when the agency takes corrective action, the GAO does not always immediately award protest costs. A protester, however, must request that it be awarded its protest costs within 15 days from the time it learns (or should have learned) that the GAO closed the protest based on an agency's decision to take corrective action.²² The GAO will recommend the award of protest costs if it determines the agency "unduly delayed taking corrective action in the face of a clearly meritorious protest."²³ Thus, this standard generally requires that a protester show that (1) the agency unduly delayed taking corrective action, and (2) the protester would have clearly prevailed on the merits.

The GAO generally uses the submission of the agency report as the dividing line for determining whether an agency has "unduly delayed" in taking

corrective action.²⁴ If an agency takes corrective action any time before filing an agency report in response to a protest, the GAO will generally not award protest costs because the GAO does not consider the agency to have unduly delayed taking corrective action.²⁵ On the other hand, if an agency fails to take corrective action until after the agency submits its report, the GAO will frequently award protest costs.²⁶

The GAO defines a "clearly meritorious protest" as one in which the protester would have been successful had the agency not taken corrective action.²⁷ Aside from a written decision, where the GAO conducts an alternative dispute resolution outcome prediction conference (often by telephone), the GAO will frequently award protest costs.²⁸ In these ADR outcome prediction conferences, the GAO identifies deficiencies in the agency's conduct of the procurement, recommends that the agency take corrective action, and usually informs the parties that the GAO will issue a decision sustaining the protest if the agency refuses to take corrective action pursuant to the ADR outcome prediction conference.²⁹ (On occasion, the GAO uses the ADR outcome prediction process to inform the protester of deficiencies in its protest and recommend that the protester withdraw its protest.)³⁰ However, an ADR outcome prediction conference recommending agency corrective action is not the only circumstance where the GAO will find that a protest is clearly meritorious short of a written decision.³¹ For example, where an agency takes corrective action any time after issuing its report, a protester may request the GAO to determine whether a protester filed a "clearly meritorious" protest justifying the award of protest costs.³²

Finally, as a general rule, the GAO normally does not limit the award of protest costs to any particular successful protest issue, concluding that such a limitation would contradict the broad remedial intent of CICA.³³ However, in certain circumstances, the GAO will limit the award of costs where it finds that the successful protest grounds are "clearly severable"—for example, where the initial and supplemental protests raise completely different protest grounds based on unrelated core facts.³⁴ But, in most circumstances, the GAO will find that various protest grounds are

intertwined, justifying the award of protest costs for a protester's pursuit of the entire protest.

■ When Does The GAO Award Bid & Proposal Costs

In contrast to protest costs, which relate to the costs incurred by a contractor in pursuing a protest, bid and proposal costs relate to the costs incurred by a contractor in preparing its bid or proposal in response to a solicitation. While the GAO almost automatically awards protest costs where it issues a written decision sustaining a protest, it has limited the circumstances when it will award bid and proposal costs. Given the comparatively similar language in CICA (quoted above), it is surprising that the GAO would not award both protest costs and bid and proposal costs more frequently. In its guide to its bid protest process, the GAO has noted that it "occasionally" will award bid and proposal costs "where there is no other relief available."³⁵

The GAO has justified the rarity of awarding bid and proposal costs by contrasting CICA's permissive statutory language that the GAO "may" award such costs to CICA's mandatory language that the GAO "shall recommend" certain equitable remedies if it finds a violation of procurement statute or regulation.³⁶ Yet, CICA includes the same discretionary language regarding protest costs (as quoted above), but the GAO regularly awards protest costs. Thus, it does not appear that CICA's statutory language explains the GAO's different use of the two cost remedies.

Also, although the GAO will award protest costs where the agency takes corrective action before the GAO's issuance of a decision, it will not award bid and proposal costs.³⁷ The GAO has refused to award bid and proposal costs in these circumstances because its regulations list only the recovery of protest costs as an appropriate remedy where the agency takes corrective action.³⁸

Notwithstanding the GAO's infrequent recommendation to award bid and proposal costs, there are at least three circumstances where it will do so: (1) where changed circumstances render no longer relevant a proposal that was previously submitted, (2) where appropriate corrective ac-

tion may not be implemented, and (3) where the agency unduly delays taking corrective action.³⁹

First, the GAO has awarded bid and proposal costs where "changed circumstances" render a protester's prior proposal no longer relevant.⁴⁰ An example of changed circumstances that might render a prior proposal irrelevant arises when the agency cancels the solicitation at issue and issues a new solicitation or performance work statement that represents new requirements that are "fundamentally different" from those in the protested solicitation.⁴¹

Second, the GAO has allowed the recovery of bid and proposal costs where its recommended corrective action may not be implemented. For example, where the protested contract is fully performed during the pendency of a GAO protest (presumably because the CICA stay either never came into effect or the agency successfully overrode the stay), the GAO will recommend the award of bid and proposal costs.⁴² Also, the GAO has awarded bid and proposal costs where the protest challenges an award of a lease of real property that already has been executed.⁴³ Usually, long-term leases for real property with the Federal Government lack a termination for convenience clause, and the GAO will not read a termination for convenience clause into leases because, unlike other Government contracts, leases do not require that clause.⁴⁴ Finally, the GAO will award costs where an agency simply refuses to follow the GAO's recommended corrective action.⁴⁵ Agencies rarely refuse to follow the GAO's recommendations,⁴⁶ in part because CICA requires the GAO to report promptly to Congress regarding any case where an executive agency fails to follow the GAO's recommendations.⁴⁷ But, if the agency fails to do so, the GAO will award bid and proposal costs.⁴⁸

Third, the GAO has recommended the award of bid and proposal costs where "the agency unduly delays taking corrective action."⁴⁹ While this standard sounds similar to the one the GAO uses when it awards protest costs, it is not. As noted above, GAO will award protest costs regularly when the agency unduly delays taking corrective action in the face of a clearly meritorious protest. To the contrary, GAO will award bid and proposal costs only after an agency unduly delays taking the

corrective action recommended by the GAO in a decision sustaining a protest. For example, the GAO awarded bid and proposal costs where an agency cancelled the solicitation in response to a GAO decision, but the agency later acknowledged it would be unable to issue a new solicitation for “some 2 years” after the GAO’s original decision and recommendation.⁵⁰

■ Claim For Costs Submission Process

Once the GAO issues its decision awarding bid and proposal costs or protest costs, a protester has 60 days to submit its claim for costs directly to the agency.⁵¹ A protester can forfeit its ability to recover its costs if it fails to file a timely claim for costs within 60 days.⁵²

A protester should submit its claim for costs with documentary support. The GAO generally states that the protester “must submit evidence sufficient to support its claim that those costs were incurred and properly attributable” to either bid or proposal preparation or the filing and pursuit of its GAO protest.⁵³ However, the GAO recognizes that a protester should be allowed “some supplementation and elaboration” of its claim beyond the 60-day initial period.⁵⁴

After the protester submits its claim for costs, CICA, the FAR, and the GAO’s Bid Protest Regulations contemplate that the protester and the agency will attempt to reach an agreement on the amount of costs.⁵⁵ Many times an agency will simply review the claim for costs—particularly for protest costs—and pay the protester within several weeks (or sometimes months) without challenging any part of the claim for costs. In other circumstances, the agency may seek clarification or additional documentation regarding costs from the protester.⁵⁶ As part of this process, the GAO expects the protester to provide and the agency to request such supplemental documentation as part of the parties’ required “reasonable effort” to reach an agreement before a protester returns to the GAO to seek reimbursement of costs.⁵⁷ Where the parties agree to an amount or the agency consents to the amount claimed, the agency often will deposit the protester’s costs in the protester’s bank account by electronic funds transfer based on the information a protester has previously provided to the Government agency

(or that is provided by the protester after it has submitted its claim for costs).⁵⁸ In some circumstances, an agency may seek to have the parties execute a settlement agreement or some type of release before payment of the claim.

If the agency and the protester cannot reach agreement after reasonable effort regarding the quantum of the claim for costs, the protester may submit its claim for costs to the GAO for a recommendation regarding the amount of costs the agency should pay.⁵⁹ Additionally, the GAO may award the protester the costs of pursuing its claim for costs before the GAO, but generally it does not allow the costs of pursuing the cost claim before the agency.⁶⁰

■ Cost Recovery Standards & Limitations

CICA and GAO decisions set forth the standards for and limitations on a protester’s recovery of claimed costs. Some of the most common costs sought are attorneys’ fees, consultant or expert fees, internal labor, and other direct costs. Generally, all such costs are allowed as long as they are “adequately documented” and reasonable, which the GAO defines as a cost that “in its nature and amount...does not exceed that which would be incurred by a prudent person” in preparing a proposal or pursuing a protest.⁶¹

(a) *Attorneys’ Fees*—Attorneys’ fees usually are the primary component of a claim for protest costs. Where an attorney’s services have been rendered as part of preparing a bid or proposal, they are also properly recoverable as part of the bid and proposal costs claim.⁶² (Limitations on the participation of competitive decisionmakers under GAO’s protective order rules, however, significantly reduce the likelihood that attorneys who substantially participated in the preparation of the protester’s proposal will also be significantly involved in the protest.)⁶³ Generally, the GAO accepts the number of attorney hours claimed unless the agency questions the hours as excessive and the agency articulates a “reasoned analysis” as to why the costs should be disallowed.⁶⁴

CICA places no cap on the hourly rate for the reimbursement of attorneys’ fees for a small business concern,⁶⁵ which is defined as a business that is “independently owned and operated and

which is not dominant in its field of operation” that meets the size standards established by the Small Business Administration.⁶⁶ The SBA has established size standards by specifying the maximum number of employees (often 500) or the maximum amount of annual receipts (often \$750,000) at which an entity will still be considered small on an industry-by-industry basis using the North American Industry Classification System.⁶⁷ The NAICS code appears in the solicitation.⁶⁸ Notwithstanding the lack of a fee cap for a small business concern’s attorneys’ fees, the GAO will consider whether the rates charged by an attorney “are consistent with customary rates for similar work” and will look to surveys of area law firms’ hourly rates, the reputation, experience, and ability of the practitioner, the complexity of the protest at issue, and the GAO’s own prior findings of whether a particular rate was reasonable.⁶⁹ To date, GAO decisions have approved hourly rates of up to \$705 per hour.⁷⁰

For large businesses, CICA imposes a fee cap of \$150 per hour that may be adjusted based on the cost of living⁷¹ (assuming the attorneys’ hourly rate exceeds \$150 per hour). The statute also states that a “special factor,” such as the “limited availability of qualified attorneys for the proceedings involved,” may justify raising the rates.⁷² The GAO regularly adjusts the \$150-per-hour fee for cost-of-living adjustments, and agencies generally honor the adjustment if the claim uses the GAO’s method for calculating the adjustment. The GAO has stated that the cost-of-living adjustment should use the Department of Labor’s “Consumer Price Index for All Urban Consumers, U.S. City Average for All Items (CPI-U),” which is the same rate that is used in similar cost-of-living adjustments under the Equal Access to Justice Act.⁷³ The GAO has found that “an upward departure from the \$150 cap is *self-evident* if the claimant asserts that the cost-of-living has increased, as measured by” the Department of Labor’s CPI.⁷⁴ To recover the adjusted hourly rate, the GAO requires that a protester need only request an adjustment and present the CPI-U as the basis for the adjustment.⁷⁵ For the purposes of calculating the cost-of-living adjustment to the fee cap, the GAO has stated that the base for the calculation should be October 1995, which the GAO chose as the base because that is when it implemented

the fee cap first added to CICA by the Federal Acquisition Streamlining Act of 1994.⁷⁶ The end point for the cost-of-living adjustment calculation adjusting the \$150 ceiling rate is the arithmetic mean of the time period over which legal fees were incurred during the protest.⁷⁷

Additionally, a cost claim may recover the work of support staff such as paralegals, but not library services, which the GAO deems more appropriately to be overhead.⁷⁸

(b) *Labor Costs*—A protester’s internal labor costs for preparing a bid or proposal and assisting outside counsel with a protest may be recovered where the rates reflect “actual rates of compensation plus reasonable overhead and fringe benefits.”⁷⁹ However, a protester may not recover profit.⁸⁰ A protester may reasonably show the hours spent by employees through a general explanation of the tasks each of its employees conducted and an estimate of the time spent by those employees in their efforts.⁸¹ In this regard, there is no requirement that a protester contemporaneously enter its time, but merely that its reconstruction of its time reasonably explains the tasks performed to justify the hours spent by the employees.⁸² This can be done using a declaration and presenting other documentation that reasonably justifies the time spent in preparing a proposal or working on a protest. Nonetheless, to ensure recovery of all internal labor costs, companies should attempt to keep contemporaneous time records if possible so that costs are not reduced or disallowed by an agency or the GAO for lack of proof.⁸³

(c) *Outside Consultants & Expert Witnesses*—Generally, a protester may receive reimbursement for its use of experts during a protest and consultants and contractors and for other direct costs incurred in the preparation of a proposal.⁸⁴ As in the case of the award of attorneys’ fees, CICA places a cap on the hourly rate that can be awarded to a consultant if the party is not a small business concern.⁸⁵ In particular, CICA states that no party other than a small business concern may recover “costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government.”⁸⁶ The GAO has adopted the FAR’s construction of this CICA provision; the FAR limits such compensation to that “paid

by the Government pursuant to [5 U.S.C.A. § 3109] and [5 C.F.R. § 304.105].”⁸⁷ The GAO has concluded that this standard limits the hourly fee a consultant or expert can be paid to the hourly rate of compensation for a federal employee at GS-15, step 10.⁸⁸

(d) *Time Period for Which Costs May Be Sought*—Generally, protest costs can be pursued for the time period from when a protester began pursuing its protest, including time spent by an attorney reviewing a debriefing (as long as the attorney is preparing a protest, not determining *whether* to file a protest) until the GAO renders its decision (or, in some circumstances, after the GAO renders its decision).⁸⁹ For the recovery of bid and proposal costs, the GAO generally has avoided a “bright line test” regarding the time period during which a protester may recover such costs.⁹⁰ The GAO has allowed recovery of costs even before a solicitation has been issued, as long as the “claimed costs were incurred in anticipation of competing for the specific contract at issue.”⁹¹

U.S. Court Of Federal Claims

Generally, the U.S. Court of Federal Claims (and its predecessor courts) have been governed by the jurisdictional limitations of the Tucker Act.⁹² Prior to 1982, the Tucker Act did not allow the award of injunctive relief in bid protests.⁹³ However, during this time period, the COFC’s predecessor court—the Court of Claims—found a right for protesters to recover bid preparation and proposal costs.⁹⁴ The Court of Claims premised jurisdiction on an implied-in-fact contract theory.⁹⁵

During this same time period, U.S. District Courts heard bid protests under the Administrative Procedure Act—known as “*Scanwell*” jurisdiction based on the case that set forth the justification for district court jurisdiction, *Scanwell Laboratories, Inc. v. Shaffer*.⁹⁶ Unlike the Court of Claims, which was then limited by the Tucker Act to awarding monetary damages, the district courts could award equitable forms of relief such as injunctive and declaratory relief—including directing an award of a contract.⁹⁷ District courts also had authority to award bid preparation and proposal costs

under the Little Tucker Act⁹⁸—which limits any recovery to damages under \$10,000.⁹⁹ In some circumstances, a district court awarded both equitable and monetary relief.¹⁰⁰

In 1982, Congress passed the Federal Courts Improvement Act, which amended the Tucker Act to explicitly provide jurisdiction over preaward bid protests at what became the current-COFC and to allow injunctive relief to be awarded in such cases for the first time under the Tucker Act.¹⁰¹ The Federal Courts Improvement Act amended the Tucker Act to state: “To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.”¹⁰² The COFC, however, continued to have the power to award bid preparation and proposal costs.¹⁰³ The COFC also concluded during this period that protesters could recover protest costs, including attorneys’ fees and costs, in addition to bid preparation and proposal costs.¹⁰⁴

In 1996, Congress enacted the Administrative Dispute Resolution Act, which amended the Tucker Act with provisions that superseded the previously added provisions in the Federal Courts Improvement Act of 1982.¹⁰⁵ ADRA significantly revised the COFC’s jurisdiction over bid protests, including phasing out the district courts’ *Scanwell* jurisdiction on January 1, 2001, and making the COFC the only remaining court with jurisdiction over federal bid protests.¹⁰⁶ ADRA clearly enunciated the relief the COFC could provide in bid protest actions.¹⁰⁷

To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

■ When Will The COFC Award Costs

Generally, like a protester at the GAO, to succeed on the merits, a protester at the COFC must show that the agency’s actions lacked a rational basis or violated law or regulation and that the protester was prejudiced by the agency’s action.¹⁰⁸ A protester’s failure to prove its case on the merits dooms any chance of a protester recovering

bid preparation and proposal costs.¹⁰⁹ Once a protester has succeeded on the merits, the COFC has broad discretion to award any combination of declaratory, injunctive, or monetary relief (but solely in the form of bid preparation and proposal costs).¹¹⁰

The COFC has generally concluded that protest costs, including attorneys' fees, are no longer available based on the clear language of the Tucker Act (as amended by ADRA), which now limits monetary relief to bid preparation and proposal costs.¹¹¹ However, notwithstanding ADRA, the COFC has awarded attorneys' fees in a bid protest under the separate Equal Access to Justice Act.¹¹² However, EAJA limits any award to an entity with a net worth of less than \$7 million or 500 employees and where it is shown that "(1) the claimant [is] a 'prevailing party;' (2) the government's position was not 'substantially justified;' (3) no 'special circumstances make an award unjust;' and (4) any fee application [is] submitted to the court within 30 days of final judgment in the action and...supported by an itemized statement."¹¹³ Thus, for many protesters, no recovery will be available under EAJA. And, even for those that qualify as an entity with a net worth less than \$7 million, the remaining hurdles often prevent recovery.¹¹⁴

Additionally, the COFC has awarded nonattorney fees and costs that are subject to the very limited amounts recoverable as part of the formal "Bill of Costs"—Form 4 in the Appendix of Forms to the Rules of the Court of Federal Claims.¹¹⁵ These limited costs include, among other things, the cost of filing the case, the cost of a court reporter for any hearings, some very limited copying costs for dispositive briefs, and some capped witness fees (as applicable).¹¹⁶

Notably, while the type of monetary relief is limited, the COFC has concluded that the Tucker Act (as amended by ADRA) gives the COFC discretion to award both equitable and monetary relief (again, in the form of bid preparation and proposal costs).¹¹⁷ It has become common practice for the COFC to exercise its discretion by awarding both injunctive and monetary relief in appropriate circumstances in bid protests.¹¹⁸ For example, the COFC has awarded bid preparation and proposal costs even when it has entered injunctions order-

ing an agency (a) to recompet the same requirements after the improper awardee has performed for an initial period,¹¹⁹ (b) to reconsider an ethics determination,¹²⁰ (c) to amend a solicitation and allow offerors in the competitive range to submit amended proposals,¹²¹ (d) to terminate a current contract and resolicit the same requirements,¹²² or (e) to consider some combination of these remedies.¹²³ It should not be controversial that the COFC may award both equitable and monetary relief in a bid protest given that the Department of Justice's U.S. Attorneys' Civil Resource Manual notes that "[i]f the implied duty to consider a bid fairly is breached, *in addition to seeking injunctive relief, a bidder may seek damages* because the claimant was put to needless expenses in preparing its bid."¹²⁴

Ultimately, the COFC and the GAO are almost diametrically opposed in practice when it comes to the types of costs a successful protester is likely to be awarded. The GAO generally recommends that an agency award protest costs, including attorneys' fees (capped for entities that do not qualify as small businesses), along with any equitable relief to a successful protester but does not regularly award bid and proposal costs along with equitable relief. On the other hand, the COFC will not award protest costs to a successful protester but has broad discretion to award bid preparation and proposal costs along with any equitable relief.¹²⁵

■ Cost Recovery Process

Once the COFC has awarded bid preparation and proposal costs, the process for seeking and recovering costs at the COFC is less stringent than the one to recover costs at the GAO—i.e., there is no strict 60-day requirement that a cost claim be submitted to an agency as is required at the GAO (discussed above).¹²⁶ In some respects, however, the Rules of the Court of Federal Claims provide some incentive for the parties to seek a quick resolution to the quantum determination because under RCFC 54, no final judgment may be entered before the specific amount of damages is determined.¹²⁷ This requirement may have the effect of delaying an adversely affected party from immediately appealing any declaratory relief awarded or withheld by the court, thus giving

an incentive to agree to the quantum quickly. But, awaiting entry of final judgment consistent with RCFC 54 for bid preparation and proposal costs would *not* necessarily delay an immediate interlocutory appeal to the U.S. Court of Appeals for the Federal Circuit to challenge the COFC's award or failure to award injunctive relief, which is specifically permitted by federal statute.¹²⁸

The award of bid preparation and proposal costs also presents a different paradigm of presenting damages claims than most actions at the COFC. Bid protests generally (although not always)¹²⁹ center around an agency's administrative record to determine liability of the Federal Government, not on the claimant's proofs as is usually found in breach of contract cases.¹³⁰ For example, in breach of contract cases heard by the COFC under other provisions of the Tucker Act (including under the Contract Disputes Act), some basis of the underlying damages would be required to be divulged early in the litigation under RCFC 26's initial disclosure requirements.¹³¹ As the COFC has noted, however, "It would be a waste of time both for a plaintiff and for the court, as well as the opposing party, to require submission and review of a detailed cost statement prior to a determination of the merits of the bid protest. If plaintiff loses, bid preparation and proposal costs would never be an issue."¹³² Thus, the protester submits a cost statement detailing bid preparation and proposal costs after the COFC already has determined the agency will be liable for such costs (and often after award of equitable relief has been determined). This is much like the procedure at the GAO, discussed above.

The COFC has taken slightly different approaches to how it requires the protester to submit its claim for bid preparation and proposal costs. In some cases, the COFC has ordered the protester to submit its claim for costs directly to the agency for an "audit" with the expectation that the parties will submit a stipulated quantum without the need for the COFC to further act before entering judgment.¹³³ In some cases, the COFC formally "remands" the case to the agency pursuant to RCFC 52.2, which states, "In any case within its jurisdiction, the court, on motion or on its own, may order the remand of appropriate matters to an administrative or executive body

or official."¹³⁴ Often when the COFC remits the parties to stipulate regarding the quantum, it acknowledges that additional proceedings and briefing of any differences might be necessary.¹³⁵ If necessary, the COFC will hear briefing on disputed costs after the parties have attempted but failed to stipulate the quantum.¹³⁶ On the other hand, sometimes the COFC will conduct briefing without remitting the protester or remanding the case to the agency for an audit of its costs.¹³⁷

In most cases the parties can expect that the COFC will attempt—at least initially—to have the parties stipulate the quantum of bid preparation and proposal costs before the COFC has to weigh in. And, if the parties cannot reach agreement regarding the quantum, the COFC will weigh the facts and resolve any disputes between the parties.

■ Standards For Recoverability Of Bid Preparation & Proposal Costs

COFC decisions (and a pre-ADRA Federal Circuit decision) have generally applied the FAR cost principles to determine the recoverability of bid preparation and proposal costs.¹³⁸ The COFC, on at least one occasion, has noted that its use of the FAR cost principles was not based on the FAR being "authoritative" in these circumstances, but simply providing "guidance" in awarding bid preparation and proposal costs under ADRA.¹³⁹ Whether authoritative or merely used for guidance, the COFC has looked to the FAR cost principle titled, "Independent research and development and bid and proposal costs."¹⁴⁰ That FAR cost principle generally defines bid and proposal costs to include "costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts."¹⁴¹ And, consistent with other language from this cost principle, the COFC has noted that for a claimed cost to be allowable it must be "allocable" to the solicitation at issue and "reasonable."¹⁴²

Allocability of a cost is dependent on, among other things, whether such a cost was "incurred specifically" for the proposal at issue or "can be distributed" to the proposal "in reasonable proportion to the benefits received" in the bid preparation process.¹⁴³ For example, any costs

incurred in the preparation of initial and revised proposals may be recovered as allocable to the bid preparation and proposal costs.¹⁴⁴ Like the GAO, the COFC has acknowledged that a protester may recover its costs for working on its proposal even before the agency issued the solicitation.¹⁴⁵ Any such costs—like any recoverable bid preparation and proposal costs—must be shown to be incurred for the proposal eventually submitted in response to the solicitation at issue in the protest.¹⁴⁶

“A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.”¹⁴⁷ As would be expected with such a standard, the COFC has not necessarily adopted a *per se* test. But, as part of the reasonableness assessment, the COFC may compare the bid preparation and proposal costs incurred with the likely value of an awarded contract.¹⁴⁸

As with any damages claim, a protester must submit evidence detailing its costs. Like a claim for costs at the GAO, a claim for costs at the COFC may require substantial documentation.¹⁴⁹ As would be expected, the COFC has awarded many of the same categories of bid preparation and proposal costs as the GAO and explained what is (or is not required) to meet this burden.

(1) *Internal Labor Costs*—The COFC has commented that contemporaneous billing records are unnecessary; most private companies neither need nor require detailed time entry records like the average attorney.¹⁵⁰ If explicit time records for those employees who worked on a bid or proposal do not exist, such costs can be reconstructed from e-mails and other contemporaneous documents along with the memory of a knowledgeable individual that explain the incurred costs in a declaration regarding the bid preparation and proposal effort.¹⁵¹ Nonetheless, the preparation of a cost claim after a successful protest will be less challenging if a protester has the foresight to contemporaneously record the time and the basis for it. And, the protester will be less likely to forget any costs it incurred (and should rightfully recover).

(2) *Overhead and Fringe Benefits*—As part of the recovery of internal labor rates, the COFC has indicated that a protester may recover its burdened

labor rates.¹⁵² A protester may show, among other ways, that its fringe benefit and overhead rates are reasonable if, as part of its regular business with the Federal Government, it receives annually approved rates by a federal agency (e.g., the Defense Contract Audit Agency).¹⁵³ While the COFC allows recovery of overhead, similar to the GAO, the COFC generally will not allow the recovery of profits in a claim for bid preparation and proposal costs.¹⁵⁴

(3) *Consultant and Vendor Fees and Other Costs*—The COFC regularly awards costs incurred in using consultants in the preparation of bids and proposals.¹⁵⁵ As with other costs, the COFC will look to vendor invoices and other evidence to ensure that specific costs by a consultant were incurred pursuant to work on the proposal or bid at issue in the protest.¹⁵⁶ The COFC has also approved the recovery of other direct costs, which often include airfare, meals, mileage, per diem rates, print shop usage, and other such costs incurred in the preparation of a bid or proposal.¹⁵⁷

The COFC has denied a protester’s attempted recovery of bid preparation and proposal costs incurred by teaming partners.¹⁵⁸ However, in the case where the COFC denied these costs, it noted that the protester’s teaming agreements did not obligate it to compensate its teammates for bid preparation and proposal costs.¹⁵⁹ Thus, had the teaming agreements required the protester to reimburse its teammates, there is a possibility that the COFC might have allowed recovery of the costs.

Finally, as to the COFC, payment by the agency is made through the Judgment Fund, which pays all judgments against the United States at the COFC.¹⁶⁰ This means that any recovery must be approved by the Department of Justice before damages are issued—usually money is forthcoming when the parties have reached a final disposition after pursuing any appeal rights.¹⁶¹

FAA Office Of Dispute Resolution For Acquisition

Before April 1, 1996, the Federal Aviation Administration was subject to the bid protest jurisdiction of both the GAO and the COFC.¹⁶²

However, Congress determined that procurement statutes and regulation, such as CICA and the FAR, generally were having a “deleterious effect” on the FAA’s efforts to modernize the air traffic control system and conduct other procurements.¹⁶³ In response to these concerns, Congress effectively exempted the FAA from all federal procurement laws including, among other applicable laws, CICA and the FAR.¹⁶⁴

Instead, Congress directed the FAA to implement an “acquisition management system” to make the FAA’s acquisitions more “timely and cost-effective” and to create a system to resolve, among other matters, all bid protests involving FAA procurements.¹⁶⁵ In response to this statutory authority, the FAA promulgated its Acquisition Management System,¹⁶⁶ which sets forth the acquisition procedures for the FAA. By statute, the FAA Administrator “may conduct proceedings in a way conducive to justice and the proper dispatch of business.”¹⁶⁷

The FAA Administrator formally delegated authority “to conduct dispute resolution proceedings concerning acquisition matters” to the Office of Dispute Resolution for Acquisition.¹⁶⁸ Under the AMS, ODRA is an independent organization with the authority to adjudicate bid protests on behalf of the FAA Administrator (and necessarily can promulgate rules of procedure and issue orders and decisions).¹⁶⁹ Thus, based on the FAA’s statutory authority and the Administrator’s delegation of authority to it, ODRA has exclusive jurisdiction over protests of the FAA procurements covered by Screening Information Requests (SIRs),¹⁷⁰ which is the FAA’s terminology for solicitations and other procurement actions.¹⁷¹

ODRA is afforded broad discretion in recommending remedies for successful protests,¹⁷² although the FAA Administrator retains final authority to impose a remedy for protests of procurements in excess of \$5 million.¹⁷³ ODRA can provide broad equitable relief similar to the COFC and the GAO, including directing an award to a protester.¹⁷⁴ And, as pertinent to this PAPER, ODRA may also award monetary relief, including bid and proposal costs.¹⁷⁵

However, as at the COFC, the recovery of attorneys’ fees at ODRA are limited to recovery

under EAJA.¹⁷⁶ ODRA, upon the determination of the FAA Administrator, has held that EAJA is the sole means for recovery of attorneys’ fees and protest costs under the AMS;¹⁷⁷ Congress has also confirmed that ODRA’s resolution of bid protests is subject to EAJA.¹⁷⁸ ODRA has rejected protesters’ arguments that it may recommend the award of attorneys’ fees and protest costs under other federal acquisition laws or ODRA’s broad remedial authority.¹⁷⁹ Thus, as at the COFC, only companies with a net worth of less than \$7 million or fewer than 500 employees and meeting the stringent requirements of EAJA may recover attorney’s fees at ODRA.¹⁸⁰ ODRA may also recommend the award of “fees and other expenses,” including incidental costs paid to attorneys such as long-distance telephone, telecopying, photocopying, air courier services, secretarial overtime, and computerized legal research costs.¹⁸¹

■ When Will ODRA Award Bid & Proposal Costs

As noted above, the AMS specifically authorizes ODRA to recommend the award of bid and proposal costs as a protest remedy.¹⁸² ODRA has recommended the award of bid and proposal costs in various circumstances, including awarding such relief in conjunction with equitable relief.

Generally, ODRA will recommend limiting a remedy to bid and proposal costs (without an accompanying equitable remedy) where it is either infeasible or costly to recommend an equitable remedy. In this regard, ODRA considers cost when recommending remedies, in contrast to CICA’s mandate to recommend corrective action “without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.”¹⁸³ Additionally, ODRA will not recommend the recovery of bid and proposal costs when the FAA takes prompt corrective action and there is no evidence of bad faith.¹⁸⁴ Some examples of situations where ODRA opted to only award bid and proposal costs (without an accompanying equitable remedy) include where (1) termination of an awarded contract was infeasible because time was of the essence in performing a contract—an underlying congressional rationale,

as noted above, for authorizing the FAA to have a separate procurement system,¹⁸⁵ (2) a recompetition was found inappropriate because the SIR had “generate[d] vigorous competition” and “the underlying requirement ha[d] not changed from that which was solicited,”¹⁸⁶ (3) a protester’s “unclean hands” contributed to the FAA’s erroneous source selection, and, therefore, the protester was limited to recovering only its bid and proposal costs,¹⁸⁷ (4) the FAA failed to inform offerors that reliance on an exception to the Service Contract Act would essentially eliminate an offeror’s proposal from consideration,¹⁸⁸ and (5) the offerors’ prices were released by the FAA and, thus, a recompetition was deemed infeasible.¹⁸⁹

ODRA is also empowered to recommend the award of bid and proposal costs in addition to other remedies.¹⁹⁰ For example, ODRA has recommended that an offeror receive the opportunity to address adverse past performance information in future procurements (but not as part of a recompetition) in addition to recovering bid and proposal costs.¹⁹¹ Also, ODRA has recommended the award of bid and proposal costs as an alternative remedy. For example, ODRA has recommended that the FAA reassess its requirements and either (a) terminate award and recompet if it concluded the awarded contract did not satisfy its actual requirements or (b) award bid and proposal costs if the original awardee, in fact, met the agency’s actual requirements.¹⁹²

■ Process For Recovery Of Bid & Proposal Costs

Although ODRA has not issued a large volume of published bid and proposal cost claim decisions, several important principles can be distilled from existing case law. ODRA’s standard of review for bid and proposal cost claims is similar to the GAO’s and the COFC’s standards. Notably, the claimant must submit sufficient evidence in support of its claim and the claim must be reasonable, “*i.e.*, it must not exceed the costs that would be incurred by a prudent person in preparation of its bid and proposal.”¹⁹³ The supporting documentation need only enable a fair and reasonable approximation of the damages incurred.¹⁹⁴ The successful protester and the FAA may elect to negotiate voluntarily.¹⁹⁵ If the parties cannot successfully negotiate a settlement, the parties may request ODRA either to provide ADR services or to adjudicate the claim.¹⁹⁶

Protesters may recover bid and proposal costs beginning on the date that the protester had sufficient information to have permitted a reasonable contractor to begin to prepare a response.¹⁹⁷ The appropriate cutoff date for bid and proposal costs is generally the date on which the protester submitted its response to the SIR.¹⁹⁸ Costs incurred after the submission of a response to the SIR are generally dispute-related costs that are subject to, if anything, a request for protest costs—which at ODRA would be limited to protesters that may recover under EAJA.¹⁹⁹

GUIDELINES

These *Guidelines* are intended to assist you in understanding the recovery of protest costs and bid and proposal costs at the GAO, the COFC, and the FAA’s ODRA. They are not, however, a substitute for professional representation in any specific situation.

1. Set up a system that will allow you to capture your costs of preparing a bid or proposal and to keep track of time and the costs of working on a protest. This should be done prospectively—too often successful protesters must reconstruct time and efforts and will not get reimbursed for the full effort because of an inability to account accurately for all the time spent on a protest.

2. For recovery of labor costs, attempt to capture the hours as you prepare a bid or proposal. While the various fora may not require billing records similar to the detailed records of an outside attorney, often having some contemporaneous billing information will help. At the very least, be prepared to account for such costs in a declaration or affidavit.

3. Be prepared to explain what each employee or consultant contributed to your effort of preparing a bid or proposal. For consultants, it is helpful to have detailed invoices and backup information to assure an agency, the GAO, the COFC, or ODRA that you incurred these costs

for the purpose of preparing the proposal or bid for this competition.

4. For loaded labor costs, while not necessarily required, it will help to have approval by the Defense Contract Audit Agency or another federal auditor that shows your overhead costs have been found to be reasonable. An agency that has to pay for these overhead costs will be less likely to challenge rates that a federal auditor has already approved.

5. For recovery of attorneys' fees, it is a good rule of thumb to create a separate client-matter or billing code to capture the costs of your attorneys' efforts—whether using in-house counsel or an outside law firm.

6. When seeking attorneys' fees for bid and proposal costs or protest costs at the GAO, remember to seek the cost-of-living adjusted rate rather than the flat \$150 rate. And, if you are a small business, you should be able to recover the full costs of your attorneys' fees, assuming

they are within a reasonable rate of what other practitioners charge.

7. After the GAO has awarded costs and remitted the protester to file a claim with an agency, the protester should compile a claim with supporting documents within the 60-day timeframe for filing such a claim. However, both CICA and the GAO rules contemplate that the parties will attempt to work out differences before returning to the GAO over contested costs. Therefore, particularly for bid and proposal cost claims, the agency should be open to receiving supplemental information and the protester should be open to responding to questions the agency may have about the claim, including providing supplemental supporting information (if available).

8. When filing at the COFC, remember to add a request for bid preparation and proposal costs in your prayer for relief, or at least a request for "such other relief as the Court deems appropriate," because the COFC may award both injunctive and monetary relief in bid protests.

★ REFERENCES ★

- 1/ See Kovacic, "Procurement Reform and the Choice of Forum in Bid Protest Disputes," 9 Admin. L.J. 461, 486 (1995) ("Not only does the protest mechanism give interested private parties a central enforcement role, but it also supplies strong incentives to exercise the enforcement function.... [T]he protest machinery provides powerful remedies, including the issuance of an injunction to cease performance of a challenged contract and the award of attorneys fees to protestors who obtain relief.").
- 2/ See FAR 33.102(b)(1).
- 3/ See Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11, at 10 (Oct. 2008); 48 C.F.R. § 533.103-1(f) (General Services Administration); 48 C.F.R. § 2833.103(i) (Department of Justice); 48 C.F.R. § 2933.103(h) (Department of Labor).
- 4/ See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814 (2004) ("The General Accounting Office is hereby redesignated the Government Accountability Office.").
- 5/ Tomaszczuk & Jensen, "The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack By the Department of Justice," 29 Harv. J. Legis. 399, 402 (1992).
- 6/ See Metzger & Lyons, "A Critical Reassessment of the GAO Bid-Protest Mechanism," 2007 Wis. L. Rev. 1225, 1230.
- 7/ See GAO, Bid Protest Annual Report to the Congress for Fiscal Year 2009, at 2 (B-158766 (Jan. 8, 2010), available at <http://www.gao.gov/special.pubs/bidpro09.pdf>). See generally 52 GC ¶ 39; Nash, "Government Accountability Office Protest Statistics: Good News," 24 Nash & Cibinic Rep. ¶ 11 (Mar. 2010).
- 8/ See Tomaszczuk & Jensen, "The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack By the Department of Justice," 29 Harv. J. Legis. 399, 402 (1992).
- 9/ See Tomaszczuk & Jensen, "The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack By the Department of Justice," 29 Harv. J. Legis. 399, 402-03 (1992) (noting the various statutes included the predecessor
- statutes for 31 U.S.C.A. §§ 3526, 3529, 3702); see also Cibinic & Nash, *Formation of Government Contracts* 1491-92 (3d ed. 1998).
- 10/ See T&H Co., Comp. Gen. Dec. B-181261, June 9, 1975, 54 Comp. Gen. 1021, 1022 ("Our conclusion as to [the protester's] entitlement to bid preparation costs is the first GAO decision allowing recovery...."); see also Tieder & Tracy, "Forums & Remedies for Disappointed Bidders on Federal Government Contracts," 10 Pub. Cont. L.J. 92, 104 (1978).
- 11/ T&H Co., Comp. Gen. Dec. B-181261, June 9, 1975, 54 Comp. Gen. 1021, 1022-23.
- 12/ T&H Co., Comp. Gen. Dec. B-181261, June 9, 1975, 54 Comp. Gen. 1021, 1027.
- 13/ Deficit Reduction Act of 1984, Pub. L. No. 98-369, Div. B, tit. VII, § 2741, 98 Stat. 494, 1175, 1199 (1984) (codified as amended at 31 U.S.C.A. §§ 3551-3556).
- 14/ 31 U.S.C.A. § 3554(b)-(c).
- 15/ 31 U.S.C.A. § 3554(c)(1)(A)-(B).
- 16/ 4 C.F.R. § 21.8(d).

- 17/ See *Int'l Program Group, Inc.—Costs, Comp. Gen. Dec. B-400278.4 et al.*, June 22, 2009, 2009 CPD ¶ 128, at 3.
- 18/ See *GAO, Bid Protests at GAO: A Descriptive Guide 28* (GAO-09-471SP, 9th ed. 2009) (“If the protest is sustained, GAO generally will recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees.”); see, e.g., *Velos, Inc.*, Comp. Gen. Dec. B-400500 et al., Nov. 28, 2008, 2010 CPD ¶ 3, at 13, 52 GC ¶ 68; *Bio-Rad Labs., Inc.*, Comp. Gen. Dec. B-297553, Feb. 15, 2006, 2007 CPD ¶ 58, at 14–15, 49 GC ¶ 198; *Dismas Charities, Inc.*, Comp. Gen. Dec. B-292091, June 25, 2003, 2003 CPD ¶ 125, at 10–11, 45 GC ¶ 310; *DevTech Sys., Inc.*, Comp. Gen. Dec. B-284860.2, Dec. 20, 2000, 2001 CPD ¶ 11, at 6; *CRAssociates, Inc.*, Comp. Gen. Dec. B-282075.2 et al., Mar. 15, 2000, 2000 CPD ¶ 63, at 10.
- 19/ *GAO, Bid Protests at GAO: A Descriptive Guide 7, 28* (GAO-09-471SP, 9th ed. 2009).
- 20/ See *Adams Indus. Servs., Inc.*, Comp. Gen. Dec. B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56, at 5, 40 GC ¶ 460; *For Your Info., Inc.*, Comp. Gen. Dec. B-278352, Dec. 15, 1997, 97-2 CPD ¶ 164, at 5.
- 21/ 4 C.F.R. § 21.8(e) (“If the agency decides to take corrective action in response to a protest, GAO may recommend that the agency pay the protester the reasonable costs of filing and pursuing the protest, including attorneys’ fees and consultant and expert witness fees.”).
- 22/ 4 C.F.R. § 21.8(e).
- 23/ See, e.g., *Pond Security Group Italia JV—Costs, Comp. Gen. Dec. B-400149.2*, Mar. 19, 2009, 2009 CPD ¶ 61, at 4; *PADCO, Inc.—Costs, Comp. Gen. Dec. B-289096.3*, May 3, 2002, 2002 CPD ¶ 135, at 3.
- 24/ See *GAO, Bid Protests at GAO: A Descriptive Guide 29* (GAO-09-471SP, 9th ed. 2009) (“GAO does not contemplate reimbursement of protest costs in every case in which an agency takes corrective action, but rather, only where an agency unduly delays taking corrective action (i.e., corrective action is taken after the due date for the submission of the agency report) in the face of a clearly meritorious protest, that is, a protest that is not a close question.”).
- 25/ See *KAES Enters., LLC—Protest & Costs, Comp. Gen. Dec. B-402050.4*, Feb. 12, 2010, 2010 CPD ¶ 49, at 4, 52 GC ¶ 96 (“[W]hile we consider corrective action to be prompt if it is taken before the due date for the agency report responding to the protest, we generally do not consider it to be prompt if it is taken after that date.”).
- 26/ See *Pond Security Group Italia JV—Costs, Comp. Gen. Dec. B-400149.2*, Mar. 19, 2009, 2009 CPD ¶ 61, at 4 (“We generally do not consider corrective action to be prompt if it is taken after the due date for the agency report responding to the protest.”) (citing *CDIC, Inc.—Costs, Comp. Gen. Dec. B-277526.2*, Aug. 18, 1997, 97-2 CPD ¶ 52, at 2); *Shindong-A Express Tour Company, Ltd.—Costs, Comp. Gen. Dec. B-292459.3*, Mar. 25, 2004, 2004 CPD ¶ 75, at 8.
- 27/ See *Georgia Power Co.*, Comp. Gen. Dec. B-289211.5 et al., May 2, 2002, 2002 CPD ¶ 81, at 9.
- 28/ See, e.g., *Core Tech Int'l Corp.*, Comp. Gen. Dec. B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59, at 7 (“[W]e note that our willingness to inform the parties through outcome prediction ADR that a protest is likely to be sustained, as we did here as a result of the deficiencies in the technical evaluation and conduct of discussions, is generally an indication that the protest is viewed as clearly meritorious, and satisfies the ‘clearly meritorious’ requirement for purposes of recommending reimbursement of protest costs.”); *York Bldg. Servs., Inc.*, Comp. Gen. Dec. B-282887.10 et al., Aug. 29, 2000, 2000 CPD ¶ 141, at 4 (“[A] GAO attorney will inform the parties through outcome prediction ADR that a protest is likely to be sustained only if she or he has a high degree of confidence regarding the outcome, so that the GAO attorney’s willingness to do so is generally an indication that the protest is viewed as clearly meritorious.”).
- 29/ See, e.g., *Superlative Technologies, Inc.*, Comp. Gen. Dec. B-310489.4, June 3, 2008, 2008 CPD ¶ 123, at 11 n.21 (“In ‘outcome prediction’ ADR, the GAO attorney handling the case convenes all of the participating parties, usually by teleconference, and advises them of what he or she believes the likely outcome will be and the reasons for that belief.”); see also *Core Tech Int'l Corp.*, Comp. Gen. Dec. B-400047.2, Mar. 11, 2009, 2009 CPD ¶ 59, at 7; *York Bldg. Servs., Inc.*, Comp. Gen. Dec. B-282887.10 et al., Aug. 29, 2000, 2000 CPD ¶ 141, at 4.
- 30/ See *GAO, Bid Protests at GAO: A Descriptive Guide 27* (GAO-09-471SP, 9th ed. 2009).
- 31/ See, e.g., *Salvation Army Cmty. Corrections Program—Costs, Comp. Gen. Dec. B-298866.3*, Aug. 29, 2007, 2007 CPD ¶ 165, at 6–7 (awarding costs when agency did not elect to take corrective action until after the protester filed its comments on the agency report and the GAO informed the parties that a hearing would be conducted); *EBSCO Publ'g, Inc.—Costs, Comp. Gen. Dec. B-298918.4*, May 7, 2007, 2007 CPD ¶ 90, at 2 (awarding costs when agency did not take corrective action until after the filing of the agency report).
- 32/ See, e.g., *Salvation Army Cmty. Corrections Program—Costs, Comp. Gen. Dec. B-298866.3*, Aug. 29, 2007, 2007 CPD ¶ 165, at 6–7 (awarding costs when agency did not elect to take corrective action until after the protester filed its comments on the agency report and the GAO informed the parties that a hearing would be conducted); *EBSCO Publ'g, Inc.—Costs, Comp. Gen. Dec. B-298918.4*, May 7, 2007, 2007 CPD ¶ 90, at 2 (awarding costs when agency did not take corrective action until after the filing of the agency report).
- 33/ See, e.g., *Salvation Army Cmty. Corrections Program—Costs, Comp. Gen. Dec. B-298866.3*, Aug. 29, 2007, 2007 CPD ¶ 165, at 7 (“[W]e generally consider all issues concerning the evaluation of proposals to be intertwined—and thus not severable—and therefore generally will recommend reimbursement of the costs associated with both successful and unsuccessful evaluation challenges.”); *AAR Aircraft Servs.—Costs, Comp. Gen. Dec. B-291670.6*, May 12, 2003, 2003 CPD ¶ 100, at 9 (“As a general rule, we consider a successful protester should be reimbursed the costs incurred with respect to all issues pursued, not merely those upon which it prevails. While we have limited the award of protest costs to successful protesters where a part of their costs is allocable to a protest issue that is so clearly severable as to essentially constitute a separate protest, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial congressional purpose behind the cost reimbursement provisions of CICA.”) (internal citations omitted); see also *Burns & Roe Servs. Corp.*, Comp. Gen. Dec. B-310828.2, Apr. 28, 2008, 2008 CPD ¶ 81, at 2–3.
- 34/ See *Panacea Consulting, Inc.—Costs, Comp. Gen. Dec. B-299307.3*, July 24, 2007, 2007 CPD ¶ 133, at 4 (“Here, [the protester’s] initial bases for protest (which, as our Office’s attorney advised the parties, appeared to be without merit) are clearly severable from its two supplemental protest grounds (which, as our attorney indicated, appeared to be meritorious). The initial and subsequent arguments were based on entirely distinct core sets of facts and legal theories.”); see also *Honeywell Tech. Solutions, Inc.—Costs, Comp. Gen. Dec. B-296860.3*, Dec. 27, 2005, 2005 CPD ¶ 226, at 4.

- 35/ GAO, Bid Protests at GAO: A Descriptive Guide 28 (GAO-09-471SP, 9th ed. 2009).
- 36/ See Lockheed Martin Corp.—Costs, Comp. Gen. Dec. B-295402.2, Nov. 1, 2005, 2005 CPD ¶ 192, at 3 (contrasting 31 U.S.C.A. § 3554(b)(1) (“shall recommend”) with 31 U.S.C.A. § 3554(c)(1) (“may recommend”).
- 37/ See Mapp Bldg. Servs.—Costs, Comp. Gen. Dec. B-289160.2, Mar. 13, 2002, 2002 CPD ¶ 60, at 2 (citing 4 C.F.R. § 21.8(e)); see also Moon Eng’g Co.—Request for Declaration of Entitlement to Costs, Comp. Gen. Dec. B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129, at 6–7.
- 38/ 4 C.F.R. § 21.8(e); see also Mapp Bldg. Servs.—Costs, Comp. Gen. Dec. B-289160.2, Mar. 13, 2002, 2002 CPD ¶ 60, at 2 (“[O]ur Regulations do not provide for recovery of such costs where an agency has taken corrective action.”) (citing 4 C.F.R. § 21.8(e)).
- 39/ Rockwell Elec. Commerce Corp., Comp. Gen. Dec. B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47, at 2 (“Although [GAO] normally do[es] not recommend reimbursement of proposal preparation costs where a protester is given the opportunity to compete under a corrected solicitation, [GAO] may recommend reimbursement where changed circumstances render no longer relevant a proposal that was previously submitted, where appropriate corrective action may not be implemented, or where the agency unduly delays taking corrective action.”).
- 40/ See Rockwell Elec. Commerce Corp., Comp. Gen. Dec. B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47, at 2; see also COBRO Corp., Comp. Gen. Dec. B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181, at 9, 43 GC ¶ 459.
- 41/ See COBRO Corp., Comp. Gen. Dec. B-287578.2, Oct. 15, 2001, 2001 CPD ¶ 181, at 9, 43 GC ¶ 459 (recommending award of bid preparation and proposal costs where “protester expended substantial cost and effort on a proposal which may have virtually no value under a recompetition, particularly since the reissued solicitation is likely to represent a requirement that is fundamentally different from that which was presented under the defective solicitation”); cf. Jones/Hill J.V., Comp. Gen. Dec. B-286194.4 et al., Dec. 5, 2001, 2001 CPD ¶ 194, at 22, 43 GC ¶ 479 (recommending that agency reimburse proposal preparation costs where agency’s corrective action would include preparing a new performance work statement).
- 42/ See Bosco Contracting, Inc., Comp. Gen. Dec. B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140, at 4, 38 GC ¶ 280.
- 43/ See New Jersey & H St., LLC, Comp. Gen. Dec. B-311314.3, June 30, 2008, 2008 CPD ¶ 133, at 9; Trammell Crow Co., Comp. Gen. Dec. B-311314.2, June 20, 2008, 2008 CPD ¶ 129, at 9; Peter N.G. Schwartz Cos. Judiciary Square L.P., Comp. Gen. Dec. B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353, at 11.
- 44/ See Patio Pools of Sierra Vista, Inc.—Recons., Comp. Gen. Dec. B-228187.2 et al., Apr. 7, 1988, 88-1 CPD ¶ 345, at 2 (concluding that GAO will not read a termination for convenience clause into a lease). See generally Tomaszczuk & Herzfeld, “Should GSA Add a Limited Termination for Convenience Clause to Its Leases? Some Recent Decisions Counsel That it Should,” Gov’t Leasing News, Winter 2008.
- 45/ Rockwell Elec. Commerce Corp., Comp. Gen. Dec. B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47, at 2.
- 46/ See Metzger & Lyons, “A Critical Reassessment of the GAO Bid-Protest Mechanism,” 2007 Wis. L. Rev. 1225, 1250 (“As a historical practice, the GAO’s decisions are nearly always adopted.”).
- 47/ See 31 U.S.C.A. § 3554(e)(1).
- 48/ Rockwell Elec. Commerce Corp., Comp. Gen. Dec. B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47, at 2.
- 49/ Rockwell Elec. Commerce Corp., Comp. Gen. Dec. B-286201.8, Mar. 5, 2002, 2002 CPD ¶ 47, at 2.
- 50/ See Aberdeen Tech. Servs.—Modification of Recommendation, Comp. Gen. Dec. B-283727.3, Aug. 22, 2001, 2001 CPD ¶ 146, at 2.
- 51/ 4 C.F.R. § 21.8(f)(1); FAR 33.104(h)(2).
- 52/ 4 C.F.R. § 21.8(f)(1); FAR 33.104(h)(2).
- 53/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 9, 28, 45 GC ¶ 330.
- 54/ Al Long Ford—Costs, Comp. Gen. Dec. B-297807.2, Oct. 18, 2007, 2007 CPD ¶ 189, at 4 (“While we do not believe that the 60-day timeframe should be applied in so harsh a manner that a protester receives no reimbursement merely because its initial, timely claim required some supplementation or elaboration, where the timely submission is of little or no value in supporting the claim, we will consider the claim untimely and regard it as forfeited.”).
- 55/ 31 U.S.C.A. § 3554(c)(4); FAR 33.104(h)(3); 4 C.F.R. § 21.8(f)(2).
- 56/ Al Long Ford—Costs, Comp. Gen. Dec. B-297807.2, Oct. 18, 2007, 2007 CPD ¶ 189, at 4; Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 10, 45 GC ¶ 330.
- 57/ Al Long Ford—Costs, Comp. Gen. Dec. B-297807.2, Oct. 18, 2007, 2007 CPD ¶ 189, at 4.
- 58/ See FAR subpt. 32.11.
- 59/ 31 U.S.C.A. § 3554(c)(4); 4 C.F.R. § 21.8(f)(2); FAR 33.104(h)(3).
- 60/ 4 C.F.R. § 21.8(f)(2); Celadon Labs., Inc.—Costs, Comp. Gen. Dec. B-298533.2, Nov. 7, 2008, 2008 CPD ¶ 208, at 8.
- 61/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 9, 28, 45 GC ¶ 330.
- 62/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 25–26, 45 GC ¶ 330.
- 63/ See GAO, Guide to GAO Protective Orders 6 (GAO-09-770SP, June 2009).
- 64/ See BAE Tech. Servs, Inc.—Costs, Comp. Gen. Dec. B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122, at 4.
- 65/ 31 U.S.C.A. § 3554(c)(2)(B); see also T Square Logistics Servs. Corp.—Costs, Comp. Gen. Dec. B-297790.6, June 7, 2007, 2007 CPD ¶ 108, at 12.
- 66/ See 15 U.S.C.A. § 632(a)(1), (2).
- 67/ See 13 C.F.R. § 121.201; FAR 19.102.
- 68/ See, e.g., FAR 52.219-1 (clause for small business representations); see also FAR 52.212-3 (representations and certifications clause for commercial items contracts).
- 69/ See Pub. Commc’ns Servs. Inc.—Costs, Comp. Gen. Dec. B-400058.4, June 25, 2009, 2009 CPD ¶ 131, at 11–15; Blue Rock Structures, Inc., Comp. Gen. Dec. B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190, at 4; CourtSmart Digital Sys., Inc.—Costs, Comp. Gen. Dec. B-292995.7, Mar. 18, 2005, 2005 CPD ¶ 47, at 2, 47 GC ¶ 166.
- 70/ Pub. Commc’ns Servs. Inc.—Costs, Comp. Gen. Dec. B-400058.4, June 25, 2009, 2009 CPD ¶ 131, at 2.
- 71/ 31 U.S.C.A. § 3554(c)(2)(B).
- 72/ 31 U.S.C.A. § 3554(c)(2)(B).

- 73/ See Dep't of the Army—Costs, Comp. Gen. Dec. B-296783.4 et al., Apr. 26, 2006, 2006 CPD ¶ 72, at 2–3; see also CPI-U index, available, at <http://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.
- 74/ Core Tech Int'l Corp.—Costs, Comp. Gen. Dec. B-400047.3, June 2, 2009, 2009 CPD ¶ 121, at 3 (emphasis added).
- 75/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 41, 45 GC ¶ 330.
- 76/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 38, 42–43 n.34, 45 GC ¶ 330 (noting that the index amount for that month was 153.7).
- 77/ See Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 42–43, 45 GC ¶ 330.
- 78/ See Pub. Commc'ns Servs. Inc.—Costs, Comp. Gen. Dec. B-400058.4, June 25, 2009, 2009 CPD ¶ 131, at 14–15; Pulau Elecs. Corp.—Costs, Comp. Gen. Dec. B-280048.11, July 31, 2000, 2000 CPD ¶ 122, at 10, 42 GC ¶ 326.
- 79/ Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 9, 45 GC ¶ 330.
- 80/ Celadon Labs., Inc.—Costs, Comp. Gen. Dec. B-298533.2, Nov. 7, 2008, 2008 CPD ¶ 208, at 7.
- 81/ See Data Based Decisions, Inc.—Claim for Costs, Comp. Gen. Dec. B-232663, 89-2 CPD ¶ 538, at 5.
- 82/ Data Based Decisions, Inc.—Claim for Costs, Comp. Gen. Dec. B-232663 et al., 89-2 CPD ¶ 538, at 5 (“There is no requirement that a protester produce contemporaneous records to establish entitlement to the award of costs....”).
- 83/ Celadon Labs., Inc.—Costs, Comp. Gen. Dec. B-298533.2, Nov. 7, 2008, 2008 CPD ¶ 208, at 6–7 (reducing recovery due to lack of contemporaneous records); see also Int'l Program Group, Inc.—Costs, Comp. Gen. Dec. B-400278.4 et al., June 22, 2009, 2009 CPD ¶ 128, at 4 (disallowing recovery of all costs because protester's evidence could not easily be disaggregated into allowable and unallowable costs).
- 84/ See Sodexho Mgmt., Inc.—Costs, Comp. Gen. Dec. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136, at 18, 26–27, 45 GC ¶ 330 (discussing recovery of consultant costs and out-of-pocket expenses).
- 85/ 31 U.S.C.A. § 3554(c)(2)(A).
- 86/ 31 U.S.C.A. § 3554(c)(2)(A).
- 87/ FAR 33.104(h)(5)(i); see Dep't of the Army, Comp. Gen. Dec. B-296783.4 et al., Apr. 26, 2006, 2006 CPD ¶ 72, at 3–5 (adopting the FAR standard).
- 88/ Dep't of the Army, Comp. Gen. Dec. B-296783.4 et al., Apr. 26, 2006, 2006 CPD ¶ 72, at 5.
- 89/ See TSquare Logistics Servs. Corp.—Costs, Comp. Gen. Dec. B-297790.6, June 7, 2007, 2007 CPD ¶ 108, at 10, 11 n.13 (“Costs incurred after a decision on a protest has been issued on a protest can be reimbursable protest costs.”).
- 90/ See Tri-Tool, Inc.—Entitlement to Costs, Comp. Gen. Dec. B-265649.4, Sept. 9, 1997, 97-2 CPD ¶ 69, at 3, 39 GC ¶ 508.
- 91/ Tri-Tool, Inc.—Entitlement to Costs, Comp. Gen. Dec. B-265649.4, Sept. 9, 1997, 97-2 CPD ¶ 69, at 3, 39 GC ¶ 508.
- 92/ 28 U.S.C.A. § 1491.
- 93/ See *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1078 (Fed. Cir. 2001), 43 GC ¶ 351 (“Prior to 1982, Court of Federal Claims review was narrow and an aggrieved party was typically limited to monetary relief.”).
- 94/ See *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 413–14 (Ct. Cl. 1956) (“Among these rights is the right to have his bid honestly considered. The Government is under the obligation to honestly consider it and not to wantonly disregard it. If this obligation is breached and plaintiff is put to needless expense in preparing its bid, it is entitled to recover such expenses.”); see also *Keco Indus., Inc. v. United States*, 428 F.2d 1233, 1240 (Ct. Cl. 1970).
- 95/ See *Heyer Prods. Co.*, 140 F. Supp. at 413–14; see also *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331 (Fed. Cir. 2001) (discussing that the Court of Claims' jurisdiction over protests was premised on a theory “that the government made an implied contract with prospective bidders to fairly assess their bids”). See generally McCullough, Pollack & Alerding, “Bid Protest Practice in the Court of Federal Claims,” Briefing Papers No. 00-10 (Sept. 2000).
- 96/ *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).
- 97/ *Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 621 (11th Cir. 1985) (directing trial court to award contract to protester where the protester would have been awarded the contract absent the agency's violation of law); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 204 (D.C. Cir. 1984) (Scalia, J.) (“It follows that a court may not order the award of a contract unless it is clear that, but for the illegal behavior of the agency, the contract would have been awarded to the party asking the court to order the award.”); *Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969). The COFC under its post-ADRA jurisdiction has also effectively directed award of a contract by enjoining the agency from awarding the contract to any offeror other than the protester. See *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1368 (Fed. Cir. 1999), 41 GC ¶ 212 (concluding that protester—the only “irrefutably compliant” and “irrefutably competent” supplier—was prejudiced by award to another noncompliant offeror), on remand, 47 Fed. Cl. 305, 310, 315 (2000) (enjoining the agency from awarding contract to any offeror other than protester based on Federal Circuit's conclusion that protester was the only compliant offeror).
- 98/ See 28 U.S.C.A. § 1346(a)(2).
- 99/ See *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402, 403 (9th Cir. 1975) (affirming award of bid preparation and proposal costs under the Little Tucker Act); see also *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 846 n.2 (D.C. Cir. 1982).
- 100/ See *William F. Wilke, Inc. v. Dep't of the Army*, 485 F.2d 180, 182 (4th Cir. 1973) (affirming district court's award of declaratory but not injunctive relief, but also noting that bid preparation and proposal costs were available).
- 101/ See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982) (adding the now superseded 28 U.S.C.A. § 1491(a)(3)); see also *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331 (Fed. Cir. 2001), 43 GC ¶ 29.
- 102/ Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982); see also *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1369 (Fed. Cir. 1983).
- 103/ See generally *Coflexip & Servs., Inc. v. United States*, 961 F.2d 951, 951–52 (Fed. Cir. 1992), 34 GC ¶ 306; *TRW, Inc. v. United States*, 28 Fed. Cl. 155, 157 (1993); *La Strada Inn, Inc. v. United States*, 12 Cl. Ct. 110, 115 (1987).

- 104/** See *Concept Automation, Inc. v. United States*, 41 Fed. Cl. 361, 370 (1996), 40 GC ¶ 492 (awarding protest costs, including attorneys' fees); *Crux Computer Corp. v. United States*, 24 Cl. Ct. 223, 226 (1991) ("Therefore, the court holds that it does have jurisdiction to grant bid protest costs as well as bid preparation costs."). *Contra Grumman Data Sys. Corp. v. United States*, 28 Fed. Cl. 803, 810–12 (1993) (concluding that the COFC lacked jurisdiction to award protest costs).
- 105/** See *Impresa Construzioni*, 238 F.3d at 1332.
- 106/** See ADRA, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996); see also Schooner, "Feature Comment: Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts," 42 GC ¶ 108 (Mar. 22, 2000). But see Verchinski, "Are District Courts Still A Viable Forum for Bid Protests?," 32 Pub. Cont. L.J. 393 (2003) (arguing that district courts might still have bid protest jurisdiction after January 1, 2001).
- 107/** ADRA, Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3874–75 (1996) (codified at 28 U.S.C.A. § 1491(b)(2)).
- 108/** See, e.g., 28 U.S.C.A. § 1491(b)(4) (incorporating review standards from 5 U.S.C.A. § 706); *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009), 51 GC ¶ 303.
- 109/** See *E.W. Bliss Co. v. United States*, 77 F.3d 445, 447 (Fed. Cir. 1996), 38 GC ¶ 172 ("[A] losing competitor may recover the costs of preparing its unsuccessful proposal if it can establish that the Government's consideration of the proposals submitted was arbitrary or capricious.") (quoting *Lincoln Servs., Ltd. v. United States*, 678 F.2d 157, 158 (Ct. Cl. 1982)).
- 110/** *PGBA, LLC v. United States*, 389 F.3d 1219, 1226 (Fed. Cir. 2004), 46 GC ¶ 489 (stating that 28 U.S.C.A. § 1491(b)(2)'s "use of the permissive 'may,' provides the Court of Federal Claims with discretion in fashioning relief").
- 111/** *S.K.J. & Assocs., Inc. v. United States*, 67 Fed. Cl. 218, 225 (2005) ("Because the Tucker Act only allows recovery for bid preparation and proposal costs, see 28 U.S.C.A. § 1491(b)(2), this court does not have jurisdiction to entertain plaintiffs' request for bid protest costs."); *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 629, 631 (2002), 44 GC ¶ 245 ("A disappointed bidder thus can no longer recover bid protest costs as part of a successful bid protest action").
- 112/** 28 U.S.C.A. § 2412; *Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 76 (2007), 49 GC ¶ 441. See generally Richmond, "Eligibility Under the Equal Access to Justice Act in Government Contracts Litigation," 1995 Army Law. 17 (Mar. 1995); Whalen, "Equal Access to Justice Act: Recent Developments," Briefing Papers No. 02-5 (Apr. 2005); Tobin & Stiffler, "Recovering Legal Fees Under EAJA/Edition II," Briefing Papers No. 91-7 (June 1991).
- 113/** *Geo-Seis Helicopters*, 79 Fed. Cl. at 76–77; 28 U.S.C.A. § 2412(d).
- 114/** *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 940 (Fed. Cir. 2007), 49 GC ¶ 276.
- 115/** *Dynacs Eng'g, Co. v. United States*, 48 Fed. Cl. 614, 621 (2001); *MVM, Inc. v. United States*, 47 Fed. Cl. 361, 367 (2000).
- 116/** RCFC App. of Forms, Form 4, "Bill of Costs."
- 117/** *CNA Corp. v. United States*, 83 Fed. Cl. 1, 10–11 (2008) (awarding both injunctive and monetary relief), aff'd, 332 Fed. Appx. 638 (Fed. Cir. 2009); *Ashbritt, Inc. v. United States*, 87 Fed. Cl. 344, 379–80 (2009) (recognizing the power of the COFC to award both injunctive and monetary relief but declining to do so), clarified by, 87 Fed. Cl. 654 (2009).
- 118/** See *Red River Holdings, Inc. v. United States*, 87 Fed. Cl. 768, 792–93 (2009); *Alabama Aircraft Indus., Inc.—Birmingham v. United States*, 85 Fed. Cl. 558, 562–65 (2009), 51 GC ¶ 86, rev'd on other grounds, 586 F.3d 1372 (Fed. Cir. 2009); *CNA Corp.*, 83 Fed. Cl. at 10–11; *Beta Analytics Int'l, Inc. v. United States*, 75 Fed. Cl. 155, 157 (2007); *Geo-Seis Helicopters*, 77 Fed. Cl. at 650; *United Payors & Providers Health Servs., Inc. v. United States*, 55 Fed. Cl. 323, 334 (2003); *MVM*, 47 Fed. Cl. at 366; *Seattle Security Servs., Inc. v. United States*, 45 Fed. Cl. 560, 573 (2000), 42 GC ¶ 51.
- 119/** See, e.g., *Red River Holdings*, 87 Fed. Cl. at 792–93; *Beta Analytics*, 75 Fed. Cl. at 157; *Seattle Security Servs.*, 45 Fed. Cl. at 573.
- 120/** *CNA Corp.*, 83 Fed. Cl. at 1.
- 121/** *MVM*, 47 Fed. Cl. at 363.
- 122/** *United Payors*, 55 Fed. Cl. at 334.
- 123/** *Geo-Seis Helicopters*, 77 Fed. Cl. at 650–51.
- 124/** U.S. Attorneys' Manual, Civil Resource Manual, tit. 4, § 71 available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00071.htm (emphasis added).
- 125/** See Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11, at 26 (Oct. 2008).
- 126/** See 4 C.F.R. § 21.8(f)(1); FAR 33.104(h)(2).
- 127/** See RCFC 54; *CNA Corp. v. United States*, 83 Fed. Cl. 1, 5–6 (2008), aff'd, 332 Fed. Appx. 638 (Fed. Cir. 2009).
- 128/** See 28 U.S.C.A. § 1292(c)(1).
- 129/** See, e.g., *Planning Research Corp. v. United States*, 971 F.2d 736, 741–42 (Fed. Cir. 1992), 34 GC ¶ 545 (looking at whether awardee materially misrepresented its proposal to the agency and improperly committed a bait-and-switch).
- 130/** See *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379–80 (Fed. Cir. 2009), 51 GC ¶ 202 (discussing the process of establishing the administrative record in a bid protest).
- 131/** RCFC 26(a)(1)(A)(iii).
- 132/** *CNA Corp.*, 83 Fed. Cl. at 6.
- 133/** See *Dynacs Eng'g, Co. v. United States*, 48 Fed. Cl. 614, 621 (2001).
- 134/** See RCFC 52.2(a); *Centech Group, Inc. v. United States*, 79 Fed. Cl. 562, 578 (2007), 50 GC ¶ 8, aff'd, 554 F.3d 1029 (Fed. Cir. 2009), 51 GC ¶ 93.
- 135/** See *Red River Holdings, Inc. v. United States*, 87 Fed. Cl. 768, 798 (2009); *CNA Corp.* at 11–12; *CSE Constr. Co. v. United States*, 58 Fed. Cl. 230, 263 (2003).
- 136/** *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 629, 630–31 (2002).
- 137/** See *Beta Analytics Int'l, Inc. v. United States*, 75 Fed. Cl. 155, 157–58 (2007).
- 138/** *Coflexip & Servs., Inc. v. United States*, 961 F.2d 951, 953–54 (Fed. Cir. 1992), 34 GC ¶ 306; *Geo-Seis Helicopters, Inc. v. United States*, 79 Fed. Cl. 74, 80 (2007), 49 GC ¶ 441; *Lion Raisins*, 52 Fed. Cl. at 630–31.
- 139/** See *Beta Analytics*, 75 Fed. Cl. at 159–60 (noting that the court will look to the FAR for guidance but stating "the Court does not see how FAR provisions concerning allowable costs can control the determination of proper monetary relief under the ADRA").

- 140/** FAR 31.205-18. For an in-depth analysis of this cost principle, see Manos, "FAR 31.205-18, Independent Research & Development & Bid & Proposal Costs," Briefing Papers No. 03-12 (Nov. 2003).
- 141/** FAR 31.205-18(a).
- 142/** Lion Raisins, 52 Fed. Cl. at 630–31 (citing FAR 31.205-18(c)); see also Beta Analytics, 75 Fed. Cl. at 160.
- 143/** Beta Analytics, 75 Fed. Cl. at 160 (interpreting the definition of allocability in the costs principles) (quoting FAR 31.201-4).
- 144/** Coflexip & Servs., Inc. v. United States, 961 F.2d 951, 953–54 (Fed. Cir. 1992), 34 GC ¶ 306.
- 145/** Naplesyacht.com, Inc. v. United States, No. 04-252C, 2005 WL 6112642, at *2 (Fed. Cl. Mar. 31, 2005) ("Although costs must support an initial or revised proposal, there is no requirement that a solicitation be issued before costs may be recovered as bid and proposal costs.").
- 146/** See Naplesyacht.com, Inc., 2005 WL 6112642, at *2.
- 147/** FAR 31.201-3(a).
- 148/** See Beta Analytics, 75 Fed. Cl. at 160 ("[W]hen viewed as a percentage of the proposal amount, the total amount of costs on its face does not appear to be unreasonable.").
- 149/** See Beta Analytics, 75 Fed. Cl. at 157–58 (discussing documentation submitted in initial application and reply brief); CNA Corp. v. United States, 83 Fed. Cl. 1, 11–12 (2008) ("CNAC submitted hundreds of pages documenting and outlining its bid preparation and proposal costs. This documentation may be sufficient to establish a quantum damage award."), *aff'd*, 332 Fed. Appx. 638 (Fed. Cir. 2009).
- 150/** See Beta Analytics, 75 Fed. Cl. at 163 ("Despite the government's claims to the contrary, there simply is no requirement that an applicant for bid preparation and proposal costs support its application with contemporaneous documents akin to a lawyer's billing records.").
- 151/** See Geo-Seis Helicopters, Inc. v. United States, 79 Fed. Cl. 74, 80 (2007), 49 GC ¶ 441.
- 152/** See Geo-Seis Helicopters, 79 Fed. Cl. at 80; see also Gentex Corp. v. United States, 61 Fed. Cl. 49, 54 (2004), 46 GC ¶ 263 ("[B]id proposal costs must be based upon actual rates of compensation, plus reasonable overhead and fringe benefits, and not market rates.") (internal citations, quotation, and emphasis omitted).
- 153/** See Beta Analytics, 75 Fed. Cl. at 160–61 (noting that protester used its approved burdened rates).
- 154/** Gentex Corp., 61 Fed. Cl. at 54.
- 155/** See Beta Analytics, 75 Fed. Cl. at 166–70.
- 156/** Beta Analytics, 75 Fed. Cl. at 166–68.
- 157/** See Geo-Seis Helicopters, 79 Fed. Cl. at 80–81 (discussing the recovery of direct costs).
- 158/** Gentex Corp., 61 Fed. Cl. at 53.
- 159/** Gentex Corp., 61 Fed. Cl. at 53.
- 160/** 28 U.S.C.A. § 2517; 31 U.S.C.A. § 1304. See generally Vacketta & Kantor, "Obtaining Payment From the Government's 'Judgment Fund,'" Briefing Papers No. 97-3 (Feb. 1997).
- 161/** See 31 C.F.R. pt. 256.
- 162/** See Digicomp Research Corp., Comp. Gen. Dec. B-262139, Dec. 1, 1995, 95-2 CPD ¶ 246; P.G. Electronics, Inc., Comp. Gen. Dec. B-261883, Nov. 1, 1995, 95-2 CPD ¶ 202; Finley v. United States, 31 Fed. Cl. 704 (1994), appeal dismissed, 50 F.3d 21 (Fed. Cir. 1995) (unpub. tbl. decision); Aerolease Long Beach v. United States, 31 Fed. Cl. 342 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994) (unpub. tbl. decision).
- 163/** See H.R. Rep. No. 104-475, pt. 1, at 30 (1996).
- 164/** See Department of Transportation & Related Agencies Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-50, § 348, 109 Stat. 436, 460–61 (1995) (codified at 49 U.S.C.A. § 40110(d)(2)); see also Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 224(b), 117 Stat. 2490, 2528 (2003) (codified at 49 U.S.C.A. § 40110(d)(4)). For additional discussion of ODRA's history and bases of authority, see Palladino, Collins & Kelly, "The FAA's Unique Disputes Process: A Primer," 22 No. 1 Air & Space Law. 17 (2008); Palladino, Collins & Kelly, "The FAA ODRA: A Tenth Anniversary Report," 43 Procrmt. Law. 1 (Spring 2008); Clancy, "FAA Protest & Contract Dispute Resolution Procedures," Briefing Papers No. 99-7 (June 1999).
- 165/** 49 U.S.C.A. § 40110(d)(1).
- 166/** FAA Acquisition Management System (rev'd Jan. 2010), at <http://fast/faa/gov/>.
- 167/** 49 U.S.C.A. § 46102(a).
- 168/** 14 C.F.R. § 17.5(a).
- 169/** See 14 C.F.R. pt. 17 ("Procedures for Protests and Contracts Disputes"); 14 C.F.R. pt. 14 ("Rules Implementing the Equal Access to Justice Act of 1980"); see also AMS 3.9.4.
- 170/** See 49 U.S.C.A. § 40110(d)(4).
- 171/** See AMS 3.2.2.3.1.2.1 ("The purpose of the SIR is to obtain information, which will ultimately allow the FAA to identify the offeror that provides the best value, make a selection decision, and award the contract to conclude the competitive process. A SIR is a request by the FAA for documentation, information, presentations, proposals, or binding offers."). ODRA also had exclusive jurisdiction over protests of Transportation Security Administration procurements covered by solicitations issued prior to June 23, 2008. See Carahsoft Technologies Corp., Comp. Gen. Dec. B-400405, Aug. 4, 2008, 2008 CPD ¶ 153 (discussing the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007); 73 Fed. Reg. 30,317 (May 27, 2008) (making TSA procurements subject to the FAR and other federal acquisition laws); and 73 Fed. Reg. 32,427, 32,429 (June 9, 2008) (providing notice that GAO would exercise jurisdiction over protests of TSA procurements covered by solicitations issued on or after June 23, 2008)).
- 172/** See Consolidated Protests of HyperNet Solutions, Inc. and Essential Administrative Servs., LLC, 07-ODRA-00416 & 07-ODRA-00418, at 60, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/agc70/CaseFiles/view/docs/07_434fr.pdf ("It is well established that the ODRA has broad discretion to recommend remedies for a successful protest—and that in determining the appropriate recommendation, the ODRA may choose to construct a remedy appropriate to the Agency's needs and which takes into account the likely impact on the parties.") (internal citations omitted).
- 173/** AMS 3.9.3.2.2.4; March 10, 2004 FAA Administrator's Delegation of Authority, available at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/delegations/view/FAA2004DelegationA.pdf.
- 174/** 14 C.F.R. § 17.21(a)(1)–(6).
- 175/** 14 C.F.R. § 17.21(a)(7).
- 176/** 14 C.F.R. § 17.21(c); see 5 U.S.C.A. § 504.

- 177/** Order Regarding the Equal Access to Justice Act Application of IBEX Group, Inc., FAA Order No. ODR-98-2 EAJA, 96-ODRA-0037 EAJA (Apr. 9, 1998), available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_2eadm.pdf.
- 178/** See Vision 100—Century of Aviation Reauthorization Act of 2003, Pub. L. No. 108-176, § 224(b), 117 Stat. 2490, 2528 (2003) (codified as amended at 49 U.S.C. § 40110(d)(4)).
- 179/** See Recommendation Regarding the Equal Access to Justice Act Application of IBEX Group, Inc., 96-ODRA-0037 EAJA, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_2earm.pdf (rejecting protester's argument that ODR should adopt a fee recovery system similar to the GAO's system pursuant to the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 198 Stat. 3243 (1994) because FAA acquisitions are exempt from FASA and CICA).
- 180/** See 14 C.F.R. Part 14; see also Weather Experts, Inc., Findings and Recommendations Regarding the Equal Access to Justice Act, 96-ODR-00013 EAJA (Mar. 31, 1998), available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_1earm.pdf.
- 181/** Recommendation Regarding the Equal Access to Justice Act Application of IBEX Group, Inc., 96-ODRA-0037 EAJA, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_2earm.pdf.
- 182/** 14 C.F.R. § 17.21(b)(7).
- 183/** Haworth, Inc., 98-ODRA-00075, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_74dro.pdf; see 14 C.F.R. § 17.21(b); see also 31 U.S.C.A. § 3554(b)(2).
- 184/** Transgroup Express, 00-ODRA-00157, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/00_154dr.pdf (citing FCS Constr. Servs., Inc., Comp. Gen. Dec. B-283726.2, Jan. 3, 2000, 99-2 CPD ¶ 115, 42 GC ¶ 38).
- 185/** Haworth, Inc., 98-ODRA-00075, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_74dro.pdf; Martin Resnik Constr. Co., 98-ODRA-00061, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_61DRO.pdf.
- 186/** Weather Experts, Inc., FAA Order No. ODR-97-25 (July 18, 1997), available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/97_25ADM.pdf.
- 187/** Haworth, Inc., 98-ODRA-00075, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_74dro.pdf.
- 188/** Weather Experts, Inc., FAA Order No. ODR-97-25 (July 18, 1997), available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/97_25ADM.pdf.
- 189/** Martin Resnik Constr. Co., 98-ODRA-00061, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_61DRO.pdf.
- 190/** 14 C.F.R. § 17.21(a).
- 191/** See J. Schouten Constr., Inc., 98-ODRA-00064, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_66dro.pdf; Martin Resnik Constr. Co., 98-ODRA-00061, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_61DRO.pdf.
- 192/** Danko Office Imaging Co., 98-ODRA-00099, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/98_98dro.pdf.
- 193/** Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf (citing Patio Pools of Sierra Vista, Inc.—Claim for Costs, Comp. Gen. Dec. B-228187 et al., Apr. 12, 1989, 89-1 CPD ¶ 374).
- 194/** See Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf.
- 195/** See Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf.
- 196/** See Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf (concluding that the protester could recover bid and proposal costs beginning from the date the agency published the pre-SIR notice in the Commerce Business Daily and rejecting the FAA's contention that the later date of when the agency actually released the SIR was the appropriate beginning point for measuring recoverable costs).
- 198/** See Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf (denying claim for costs incurred after submission of response to SIR where the protester was excluded from the second round of competition, and, therefore, did not submit a detailed proposal in response to the second competitive round).
- 199/** See Martin Resnik Constr. Co., Findings and Recommendations on Claim for Bid and Proposal Costs, 99-ODRA-00126, available at http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/pol%5Fadjudication/AGC70/CaseFiles/view/docs/99_121od.pdf.

BRIEFING PAPERS