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**Discretion, Oversight and the Culture of Compliance**

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1. - Administrative and Judicial Oversight – U.S. Federal Procurement System

The U.S. federal procurement[[1]](#footnote-2) system promotes the use of discretion by agency officials at all phases of the acquisition process. While such discretion is not unlimited, it is generally promoted under the notion that an agency is in the best position to know how best to meet its needs in pursuing its mission. The use of discretion was expanded during the major acquisition reforms of the 1990s. Professor Steven Kelman, who was Administrator of the Office of Federal Procurement Policy at that time, advocated a discretion-based, rather than a rules-based procurement system. S. Kelman believed that an overly rules-based system was outdated and ill-suited to more complex procurements. Although the present U.S. federal system includes numerous rules, agency officials retain broad discretion in certain activities throughout the acquisition cycle. This exercise of discretion, which is reflected in the procurement regulations, has been recognized and reinforced by the courts[[2]](#footnote-3).

The emphasis on the exercise of discretion and judgment by agency procurement officials requires a robust system of oversight to ensure that such discretion is not abused. The U.S. federal procurement system, like any other procurement system, is susceptible to corruption. Over the years, in response to various procurement scandals, a multitude of laws and regulations have been established to promote the integrity of the U.S. federal procurement system. All participants in the procurement process, including agencies and contractors, are subject to numerous compliance and reporting requirements.

2. - Protests and Disputes

A fundamental element of oversight in the U.S. federal procurement system is the protest and disputes process. The laws and regulations governing the U.S. federal procurement system, cover the entire procurement cycle, from pre-award activity through contract award, administration and closeout. Therefore, the federal procurement system distinguishes between challenges involving activity related to the *award* of a contract and challenges involving activity related to the *administration* of a contract agreement between an agency and contractor. Challenges related to the *award* of a contract, including objections to the terms of a solicitation/tender document, and challenges to an award decision, are referred to as “protests”[[3]](#footnote-4). Post-award disagreements involving the *administration* of a contract, which involve material disagreements between an agency and the contractor performing under a contract, are known as “disputes”.

2.1. - *Who May Protest*

The U.S. federal procurement system strictly limits the parties who may bring an action challenging agency action under a procurement. Regardless of the forum chosen, to be eligible to file a protest, a party must meet the definition of “interested party” which means “an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or the failure to award a contract”[[4]](#footnote-5). For a challenge to the terms of a tender document/solicitation, a protester is an interested party, where, if its protest were sustained, it would have an opportunity to compete under a revised solicitation[[5]](#footnote-6). For a challenge to an award decision, a protester is a party that has a “direct economic interest” where there is a reasonable possibility that its offer would be in line for award if its protest were sustained.[[6]](#footnote-7)

Certain parties, such as the awardee where an award has been made, may be allowed to intervene in a bid protest to protect their interests. The rules for intervention vary depending on the bid protest forum, and are discussed in more detail below.

2.2. - *Protest Forums*

Three forums are available for protests: 1) “agency-level” protests[[7]](#footnote-8) which are filed with the agency issuing the procurement; 2) the U.S. Government Accountability Office (GAO)[[8]](#footnote-9); and 3) the U.S. Court of Federal Claims (COFC)[[9]](#footnote-10). A protester may choose any of the forums, but not more than one simultaneously. For example, if a protester initially files a protest at the agency-level, it would need to receive a decision from the agency before pursuing an action in one of the other forums[[10]](#footnote-11). In addition, GAO will not consider a protest where the matter involved is the subject of litigation before, or has been decided on the merits by, a court of competent jurisdiction[[11]](#footnote-12). Therefore, if a protester has an action pending at the COFC, or if the court has issued a decision, GAO will not consider a protest related to the same matter. Protesters dissatisfied with a decision by GAO may file an action with the COFC. While in some cases, the COFC reviews a GAO decision to determine if is arbitrary or capricious[[12]](#footnote-13), the COFC is not an appellate forum for reviewing GAO decisions.

2.2.1. - *Agency-Level Protests*

Agency-level protests are intended to provide an inexpensive, informal, procedurally simple and expeditious means of resolving a challenge regarding a procurement[[13]](#footnote-14). Guidance on agency-level protests is provided in the Federal Acquisition Regulation (FAR)[[14]](#footnote-15). The FAR is available online and in printed format[[15]](#footnote-16). The FAR encourages “all parties to use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions”[[16]](#footnote-17). Protesters filing an agency-level protest may request an independent review of their protest at a level above the contracting officer[[17]](#footnote-18). Some agencies include additional guidance on their particular procedures governing agency-level protests[[18]](#footnote-19). Such guidance must be consistent with the FAR provisions.

* + - 1. *Intervening in an Agency-Level Protest*

The regulations governing agency-level bid protests do not address intervention by other parties and a party may be permitted to intervene in a protest at the discretion of the contracting officer.

* + - 1. *Timeliness Requirements*

The U.S. federal procurement system does not provide for a standstill period prior to the signing of a contract. Contract awards may be challenged after the contract has been signed. However, to minimize disruption of the procurement process, agency-level and GAO protests must meet strict timeliness requirements or they are subject to dismissal. Agency-level protests based on alleged apparent improprieties or defects in a solicitation must be filed before bid opening or the closing date for receipt of proposals[[19]](#footnote-20). In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier[[20]](#footnote-21).

2.2.1.3. **“***CICA Stay”*

For protests filed within certain timeframes, the statutes and regulations governing bid protests provide for an automatic stay of award or the suspension of contract performance, often referred to as the “CICA Stay”. If an agency-level protest is filed before award, the agency may not proceed with the award, pending its resolution of the protest[[21]](#footnote-22). Where the contract has been awarded, performance is automatically suspended if the protest if filed within 10 days after award or within 5 days after a debriefing, where such debriefing is required[[22]](#footnote-23). Agencies may override the automatic stay where they justify in writing the urgent and compelling reasons award is necessary or where the agency determines in writing that proceeding with the award is in the best interests of the government[[23]](#footnote-24). An agency’s override decision is subject to review by the COFC[[24]](#footnote-25). The COFC will review an agency’s override decision to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[[25]](#footnote-26).

2.2.1.4 *Standard of Review*

Consideration of a protest by the agency, including at a higher level than those involved in the procurement, may lack the independence of the other forums. Nevertheless, it offers contractors an opportunity to present their case directly to the agency and may offer the opportunity to negotiate a solution. While agencies have discretion in issuing a protest decision, the FAR requires that such decisions “be well-reasoned, and explain the agency position”[[26]](#footnote-27). Where an agency-level protest is sustained, the remedies would typically involve corrective action by the agency to address its errors in conducting the procurement. Agency-level bid protest decisions are not published, therefore, limited information is available regarding the outcomes and bases for these decisions. The FAR requires agencies to “make their best efforts to resolve agency protests within 35 days after the protest is filed”[[27]](#footnote-28).

2.2.1.5 *Remedies*

An agency may sustain or deny a protest. When an agency sustains a protest, the remedies would typically involve correcting the errors in the procurement that were the subject of the protest, or otherwise address the concerns of the protester.

2.2.1.6 *Fees*

There are no fees charged by an agency for the filing of an agency-level protest. Contractors may represent themselves pro se before the agency.

2.2.2. *Protests at GAO*

Most protests involving federal procurements are filed at GAO[[28]](#footnote-29). GAO’s status as a protest forum is somewhat unique. GAO, is an independent, nonpartisan agency that works for Congress[[29]](#footnote-30). A primary function of GAO is to investigate how the federal agencies spend federal funds[[30]](#footnote-31). As the investigative arm of Congress, GAO is part of the legislative branch, which is not normally involved in resolving disputes involving the executive branch. However, GAO began reviewing bid protests in the 1920s as part of its authority to settle and adjust all claims and demands against the United States[[31]](#footnote-32). Over the years, GAO became recognized for its bid protest expertise and in 1984, Congress formally granted GAO bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA)[[32]](#footnote-33). As GAO is not a judicial forum, its protest decisions are “recommendations” rather than orders, as issued by a court. As such, agencies are not required to follow GAO protest recommendations. However, in most cases an agency will follow a GAO recommendation issued in response to a protest. Federal agencies have an incentive to follow GAO bid protest recommendations, as GAO’s annual bid protest report to Congress identifies any instances of a refusal to follow a recommendation. Congress, which appropriates funding to federal agencies, may then ask the agency to explain its refusal to follow GAO’s recommendation or take legislative action to compel the agency to comply with the recommendation[[33]](#footnote-34).

* + - 1. *Intervening in a Protest at GAO*

GAO’s bid protest regulations define an intervenor as an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial chance of receiving an award if the protest is denied.[[34]](#footnote-35) Awardees of procurements that are subject to protest at GAO routinely intervene in such protests and typically cooperate with the agency in defending the award decision. After admission to any protective order issued under a protest, counsel for an awardee/intervenor will be granted access to the agency report prepared in response to the protest and file comments on the report with GAO.

* + - 1. *Timeliness Requirements*

The timeliness requirements for agency-level protests also apply to protests at GAO. Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals must be filed prior to bid opening or the time set for receipt of initial proposals.[[35]](#footnote-36) Protests not involving a challenge to the terms of a solicitation must be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier).[[36]](#footnote-37) However, for procurements conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest must not be filed before the debriefing date offered to the protester, but must be filed not later than 10 days after the date on which the debriefing is held.[[37]](#footnote-38)

* + - 1. “*CICA Stay”*

As discussed under agency-level protests, if a protester seeks a suspension of contract performance, generally referred to as the “CICA stay”, the protest must be filed within 10 days of award, or where a required debriefing is held, within 5 days after the date of the debriefing.[[38]](#footnote-39) For protests filed prior to contract award, the agency may not proceed with the award after it receives notice of the protest from GAO. However, as under an agency-level protest, should an agency have an urgent and compelling need for the requirement that is the subject of a CICA stay, it may issue an override of the stay.[[39]](#footnote-40)

2.2.2.4 *Standard of Review*

In reviewing bid protests, “GAO considers whether federal agencies have complied with statutes and regulations controlling government procurements”[[40]](#footnote-41). GAO applies a “reasonable basis” standard when reviewing bid protests. The “reasonable basis” standard means agencies must create a documented record sufficient for GAO to review. If a record is insufficient GAO may sustain a protest where the record prevents a meaningful review of the agency’s decision[[41]](#footnote-42). GAO’s bid protest decisions thus reinforce the need for agencies to adequately document the source selection process and provide a rationale for an award decision, particularly those involving the use of discretion[[42]](#footnote-43).

* + - 1. *Challenges to the Terms of a Solicitation*

Agencies have broad discretion in preparing the terms and conditions of a solicitation[[43]](#footnote-44). However, a solicitation must be written in a manner that promotes competition. Thus, agencies may only include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency[[44]](#footnote-45). Protests challenging the terms of a solicitation may involve objections that the specifications as written favor a particular offeror/bidder or preclude a bidder from competing. GAO will sustain a protest where it finds that a restrictive provision that has the effect of limiting competition, is in fact not needed by the agency[[45]](#footnote-46).

Agency discretion in preparing a solicitation also extends to its selection of the criteria upon which offeror proposals will be evaluated. Agencies must select evaluation factors that represent key areas of importance in the award decision[[46]](#footnote-47). In addition, such factors must facilitate meaningful comparison and discrimination between and among competing proposals[[47]](#footnote-48). While evaluation factors must meet certain requirements, the FAR expressly states that agencies have broad discretion in selecting the particular factors that apply to a procurement[[48]](#footnote-49). However, in evaluating proposals agencies must follow the solicitation’s evaluation factors[[49]](#footnote-50).

* + - 1. *Challenges to an Evaluation or Award Decision*

As with the preparation of a solicitation, agencies have discretion in the award decision, particularly “best value” procurements where agencies may consider factors other than low price when selecting the awardee. In fact, the regulation governing the award decision under a “best value” procurement requires the Source Selection Authority (SSA), the individual with responsibility for making the award decision, to exercise “independent judgment” in that decision[[50]](#footnote-51). This exercise of discretion and independent judgment will be upheld where the decision is rationale and adequately explained[[51]](#footnote-52).

Protests challenging an evaluation or award decision may argue that the evaluation of proposals failed to follow the solicitation’s evaluation criteria, or that the evaluation was erroneous. As noted above, agencies must evaluate proposals in a manner that is consistent with the terms of the solicitation[[52]](#footnote-53). GAO will sustain a protest where the record establishes that the agency’s decision-making was inconsistent with the terms of the solicitation[[53]](#footnote-54).

* + - 1. *Remedies*

GAO may dismiss, deny or sustain a bid protest[[54]](#footnote-55). A protest may be dismissed if it fails to include the required information.[[55]](#footnote-56) GAO may also dismiss a protest that involves a matter not subject to its review, such as matters involving the administration of a contract[[56]](#footnote-57). Protests may also be dismissed that fail to meet GAO’s timeliness requirements[[57]](#footnote-58). A protest will be denied by GAO where the protester fails to establish that the agency action was improper, or where it fails to demonstrate that it was prejudiced by an improper agency action[[58]](#footnote-59).

GAO will sustain a protest when it determines that an agency violated procurement statutes or regulations, unless, as noted above, it determines that the violation did not prejudice the protester[[59]](#footnote-60). When a protest is sustained, GAO will recommend that the agency take corrective action to address the identified procurement errors[[60]](#footnote-61). The nature of GAO’s recommendation will depend on the procurement errors and whether performance has begun. For example, where the contract has not yet been awarded, GAO may recommend a reevaluation of proposals. In cases where the award has been made, GAO may recommend that the agency terminate an improper contract award, or where that is not practical, GAO may recommend that the agency not exercise any options under the contract[[61]](#footnote-62).

In addition to the recommendations issued by GAO, in many cases, an agency may choose to take corrective action in advance of a decision by GAO where the record clearly establishes errors in the procurement.

* + - 1. *Fees*

GAO does not charge fees for the filing of a bid protest. However, adequate representation before GAO typically involves the hiring of outside counsel. To preserve the integrity of the procurement process, source selection information, which includes information regarding an agency’s evaluation of proposals as well as offeror/bidder proposal information, may not be disclosed[[62]](#footnote-63). Access to the Agency Report prepared in response to a bid protest requires admission to a protective order issued by GAO. Individuals involved in the competitive decision-making process, typically those contractor personnel involved in preparing a proposal in response to a procurement, may not be admitted to a protective order. Therefore, in most cases, a contractor filing a bid protest at GAO will obtain outside counsel to represent them. The attorneys’ fees associated with more complex bid protests can easily exceed $100,000, although successful protesters may recover some of these costs upon the recommendation of GAO[[63]](#footnote-64).

2.2.3. *Protests at the U.S. Court of Federal Claims*

As noted above, in addition federal agencies and GAO, the third forum for bid protests involving federal procurements is the COFC, which has been the sole judicial forum for bid protests since the authority of federal district courts to consider bid protests expired in 2001[[64]](#footnote-65). Prior to 1996, the COFC had authorization to consider only pre-award protests, those involving solicitation-related issues prior to the award of a contract. This limited jurisdiction of the COFC prior to 1996 reinforced GAO’s primary role as a bid protest forum[[65]](#footnote-66). The Administrative Dispute Resolution Act of 1996 (ADRA), granted the COFC authority to consider both pre and post award bid protests[[66]](#footnote-67).

The COFC includes 16 active judges, who are nominated by the President and confirmed by the U.S. Senate. COFC judges serve 15-year terms. Although not a requirement, most COFC judges have significant experience in bid protests involving public procurement.

2.2.3.1. *Intervening in a Protest at the COFC*

The COFC rules provide for intervention in a bid protest where a party demonstrates that: 1) its interests relates to a property or transaction that is the subject of the proceedings; and 2) its interests are so situated that disposition of the action may impair or even impede its ability to protect that interest[[67]](#footnote-68). Decisions of the court construe the rules in favor of intervention and hold that “[a]n applicant need only make well-pled allegations for the court to accept them as valid”[[68]](#footnote-69).

* + - 1. *Timeliness Requirements*

Unlike protests filed with an agency or GAO, there are no specific time limits for filing a protest at the COFC. However, the Court has held that pre-award protests objecting to errors apparent on the face of a solicitation must be protested prior to the time set for receipt of proposals[[69]](#footnote-70). With regard to post award protests, again, the COFC has no specific time limits, but the Court holds that serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches[[70]](#footnote-71).

* + - 1. *Stay of Award/Performance*

The automatic CICA stay does not apply to protests filed with the COFC. To obtain a suspension of the award or contract performance, the protester must meet the standards for a preliminary injunction: 1) it is likely to succeed on the merits of the protest; 2) it will suffer irreparable harm unless the injunction is granted; 3) the preliminary injunction will not harm the public interest; and 4) the balance of hardships tips in the protester’s favor[[71]](#footnote-72).

* + - 1. *Standard of Review*

The COFC reviews bid protests under the standards of the Administrative Procedure Act (APA), which permits the COFC to set aside procurement decisions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[[72]](#footnote-73). The COFC holds that under the APA, a procurement decision may be set aside if it lacks a rational basis or if the agency's decision-making involves a clear and prejudicial violation of statute, regulation or procedure[[73]](#footnote-74). The arbitrary and capricious standard applied is highly deferential[[74]](#footnote-75). This deferential standard means that minor errors do not justify relief, and the protester has the burden of proving that a significant error marred the procurement in question[[75]](#footnote-76). In reviewing procurement decisions under the APA, the court will not substitute its judgment for that of the agency and will intervene only where it is clearly determined that the agency’s decisions were clearly irrational or unreasonable[[76]](#footnote-77).

* + - 1. *Challenges to the Terms of a Solicitation*

As discussed above under the GAO protest forum, agencies have broad discretion in preparing the terms of a solicitation. However, as noted, the terms of a solicitation must reflect the agency’s actual needs, promote competition and provide a common basis for the preparation and evaluation of proposals.

* + - 1. *Publication of Protest Procedures*

The procedures for filing a protest at the agency level or with GAO are described in the Federal Acquisition Regulation (FAR)[[77]](#footnote-78). Official versions of the FAR are publicly available online[[78]](#footnote-79). GAO also publishes its protest regulations online[[79]](#footnote-80). The FAR also notes that protests may be filed at the U.S. Court of Federal Claims and includes a link to the Court’s rules.[[80]](#footnote-81) Federal agencies may also provide procedures for filing bid protests which may be included with their regulations that supplement the FAR[[81]](#footnote-82).

1. - Disputes

3.1. - *Claims under the Contracts Disputes Act of 1978*

As noted previously, under the U.S. Federal procurement system, disputes involving the performance phase of a contract are governed by the Contract Disputes Act of 1978 (CDA)[[82]](#footnote-83). The CDA and its implementing regulations[[83]](#footnote-84) provide a process for resolving disputes between contractor and agency while facilitating continued contract performance.

* 1. - *Alternate Dispute Resolution*

With regard to disputes, the government’s policy is to try to resolve all contractual issues in controversy by mutual agreement between the contractor and agency contracting officer, including through the use of Alternate Dispute Resolution (ADR)[[84]](#footnote-85). The FAR defines ADR as:

“any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen”[[85]](#footnote-86).

The Administrative Disputes Resolution Act of 1996 (ADRA)[[86]](#footnote-87), which amended the CDA, provides federal agencies with additional dispute resolution authority, including separate authority for the use of binding arbitration, when all parties consent[[87]](#footnote-88). Under the ADRA, a “neutral” is a person who serves as a conciliator, facilitator, or mediator at the will of the parties[[88]](#footnote-89). A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding[[89]](#footnote-90). A neutral must have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve[[90]](#footnote-91). Neutrals may be used in all types of ADR, including binding arbitration.

Binding arbitration is distinguished from ADR generally in that the arbitrator has authority to: 1) regulate the course and conduct of arbitral hearings; the proceedings; 2) administers oaths and affirmations; 3) compel attendance and witnesses and production of evidence at the hearing; and 4) make awards[[91]](#footnote-92). Arbitration proceedings are to be conducted expeditiously and in an informal manner[[92]](#footnote-93). During an arbitration proceeding, parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses[[93]](#footnote-94). Arbitration hearings may be conducted via telephone, television, computer, or other electronic means, if each party has an opportunity to participate. The arbitrator must interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives[[94]](#footnote-95). With limited exceptions, an arbitrator’s decision is due within 30 days of the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator[[95]](#footnote-96).

A decision by an agency to use or not to use ADR is committed to the discretion of the agency and is not be subject to judicial review[[96]](#footnote-97). However, a person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under the ADRA may bring an action for review of such award[[97]](#footnote-98).

* 1. - *Contract Claims*

Where resolution by mutual agreement is not possible, the Disputes clause[[98]](#footnote-99) provides that either party (agency or contractor) may file a claim under the contract for “the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract”[[99]](#footnote-100). The disputes clause covers all disputes arising under or relating to the contract[[100]](#footnote-101). A contractor claim must be submitted to the agency within 6 years after accrual of the claim for a decision by the contracting officer[[101]](#footnote-102). If the amount of a claim exceeds $100,000, it must be certified by the contractor as to its accuracy and completeness[[102]](#footnote-103). For contractor claims of $100,000 or less, the contracting officer must, if requested in writing by the contractor, render a decision within sixty (60) days of the request[[103]](#footnote-104). For contractor-certified claims over $100,000, the contracting officer must, within sixty (60) days, decide the claim or notify the contractor of the date by which the decision will be made[[104]](#footnote-105). Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim[[105]](#footnote-106). The Disputes clause requires the contractor to “proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer”[[106]](#footnote-107).

As noted, the language of the disputes clause is worded broadly to cover all matters arising under or related to a contract. Prior to enactment of the CDA, disputes could be resolved by a board or court only if the contract included a remedy-granting clause that related to the contractor’s claim[[107]](#footnote-108). Thus, the language of the CDA and Disputes clause covers both claim addressed by a remedy-granting clause and those that are not[[108]](#footnote-109). For the contractor, a claim may involve, for example, defective government specifications, improper government inspections, government-caused delays, matters of contract interpretation, constructive changes to the contract, and improper termination for default. A subcontractor performing under a federal contract, does not have privity of contract with the government, so any claim it wishes to pursue must be sponsored by the prime contractor. Because of this lack of privity, third parties other than subcontractors are not typically involved in contract disputes. However, a third party contractor may challenge a contract modification when it alleges that the modification exceeds the scope of the contract. However, this action constitutes a bid protest rather than a contractual dispute[[109]](#footnote-110).

Government claims against the contractor may involve issues such as defective contractor pricing, excess reprocurement costs under a termination for default, overpayments, and recovery of unallowable costs.

* 1. **-** *Forum for contract disputes*

Once the contracting officer issues a decision on the claim, it is considered the final agency action on the claim. If the contractor disagrees with the decision, it may file an appeal with the appropriate board of contract appeals or with the COFC[[110]](#footnote-111). The appeal must be filed within ninety (90) days of the date the contractor receives the decision[[111]](#footnote-112).

3.4.1. *Boards of Contract Appeals*

Dating back to World War I, the federal government, including what was then known as the War Department, established and dissolved various boards of appeal to review contract disputes. This effort continued during World War II. In 1947, the National Security Act merged the War Department with the Navy Department to create the Department of Defense (DoD). At that time separate boards existed for the Army and Air Force contracts. In 1949, a joint directive of the Secretaries of the Army, Navy and Air Force merged the separate boards to create the Armed Services Board of Contract Appeals (ASBCA), which continues to exist today. During the late 1940s and early 1950s, the civilian agencies created a number of boards of contract appeals, with sixteen (16) separate boards of contract appeals existing in 1966. By the late in 1960s it was generally recognized that the existing disputes resolution process needed improvement. A Commission on Government Procurement was established in 1969. The Commission issued a report in 1972 that identified a number of shortcomings in the existing disputes resolution process. The Commission’s summary of findings noted that the boards in many cases, lacked independence from the agency and often failed to provide the procedural safeguards and other elements of due process that should be the right of litigants[[112]](#footnote-113). The Commission’s recommendations were ultimately incorporated into the CDA in 1978.

After enactment of the CDA, the ASBCA continued as an appeal forum for disputes under DoD contracts. The twelve existing civilian boards of contract appeals continued as forums for appeals involving civilian agency contract disputes. The civilian boards drafted the Uniform Rules of Procedure for Boards of Contract Appeals to create procedural uniformity among the boards. Initial efforts to consolidate the 12 civilian boards into a single board of contract appeals were unsuccessful. However, the separate civilian boards were ultimately consolidated into a single Civilian Board of Contract Appeals (CBCA) under the National Defense Authorization Act of 2006. The CBCA is authorized to review contract disputes for all agencies other than the DoD, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority[[113]](#footnote-114).

The mission of the boards is to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes[[114]](#footnote-115). The boards are authorized to issue a decision in writing or take other appropriate action on each appeal submitted[[115]](#footnote-116). The boards may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims[[116]](#footnote-117), which are typically money damages, and in certain cases reformation or rescission. However, the board is not authorized to grant specific performance or injunctive relief under a contract claim[[117]](#footnote-118). The board will find a contract void *ab initio* where the award was tainted by fraud or wrongdoing[[118]](#footnote-119).

3.4.2. *U.S. Court of Federal Claims*

The predecessor of the COFC, the U.S. Court of Claims, was established in the 1850s to consider private bills for compensation submitted to Congress. The Court of Claims jurisdiction was expanded over the next 30 years, and in 1887, the Court had authority to consider most monetary claims submitted against the government[[119]](#footnote-120). The Federal Courts Improvement Act of 1982 established the U.S. Claims Court, which inherited the jurisdiction of the U.S. Court of Federal Claims. A decade later, the Federal Courts Administration Act of 1992 was enacted. This 1992 Act changed the name of the U.S. Claims Court to the U.S. Court of Federal Claims, and expanded the COFCs' jurisdiction to include *nonmonetary* Government contract disputes. This change resulted in essentially identical contract disputes jurisdiction for the COFC and the boards under the CDA[[120]](#footnote-121).

In addition to the CDA, the COFC has jurisdiction to consider contract claims under the Tucker Act, which provides a limited waiver of sovereign immunity jurisdiction to the COFC under, express and implied-in-fact contracts with the United States[[121]](#footnote-122).

Like the boards of contract appeals, the COFC will find a contract that is tainted from its inception by fraud is void *ab initio*[[122]](#footnote-123)*.*

* 1. *- Appeal of Contract Claims before the COFC and Boards of Contract Appeals*

3.5.1. - *Recognition of Discretion*

As noted at the outset, the federal procurement system grants agencies and authorized contracting officers broad discretion in many aspects of the procurement process. The COFC and boards recognize this discretion and will generally uphold agency decisions related to the administration of a contract unless contractor establishes that the contracting officer acted in bad faith, abused his/her discretion or acted in an arbitrary or capricious manner[[123]](#footnote-124).

3.5.2. - *Motions For Summary Judgment*

Claims before the COFC and boards are often decided on a motion for summary judgment. The COFC and boards will grant a motion for summary judgment when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Normally, under summary judgment procedures, the nonmoving party will be provided an opportunity for discovery, and board will generally not grant summary judgment where the nonmovant has been denied the chance to discover information essential to its opposition[[124]](#footnote-125). The moving party has the burden of establishing that no facts are in dispute[[125]](#footnote-126). A successful motion for summary judgment must set forth sufficient facts, shown by specific citation to the record, to establish that the moving party is entitled to judgment as a matter of law[[126]](#footnote-127). For a contractor seeking to recover costs under claim it must establish the reasonableness of the costs claimed and their causal connection to the event on which the claim is based[[127]](#footnote-128).

* + 1. - *Contract Changes*

Changes are governed by the Changes clause (FAR 52.243-4), which entitles the government to make changes to the general scope of the contract via oral or written change orders, and gives the contractor the right to an equitable adjustment in costs and time required for performance. Contract claims often involve an assertion by the contractor that a change has occurred, entitling the contractor to an equitable adjustment in terms cost, schedule, or both. As noted, the contractor bears the burden of establishing its costs to justify an equitable adjustment[[128]](#footnote-129).

3.5.4 - *Delays in Performance*

Certain changes under a contract may result in delays in contract performance. Issues frequently addressed by the COFC and boards under a contract claim include matters such as delays in contract performance. A delay in contract performance that was beyond the control and without the fault or negligence of the contractor is referred to an “excusable delay”, meaning the contractor is not liable for the delay. In cases where a delay was caused by the government, it is referred to as a “compensable delay”, where the contractor would be entitled to an equitable adjustment in time and/or cost[[129]](#footnote-130). If a contractor fails to provide sufficient evidence to substantiate allegations that it incurred additional costs or was delayed by the government, it will not meet its burden of proof and will not be entitled to payment[[130]](#footnote-131).

The Default clause[[131]](#footnote-132) also addresses delays in performance that are caused by the contractor. The Default clause gives the government the right to terminate a contractor for: 1) failing to make deliveries within required timeframes; 2) make progress so as to endanger performance; and 3) perform any other provisions of the contract[[132]](#footnote-133). The Government bears the burden of proof to show that the contractor was in default at the time of termination. As noted earlier, the Default clause further provides that the contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the contractor[[133]](#footnote-134). Where a contractor challenges a default based on a failure to make timely deliveries, it may argue that the delay was “excusable”, e.g., beyond its control or caused by the government’s actions. The COFC and boards will find a default termination improper where the delay was beyond the contractor’s control[[134]](#footnote-135). Similarly, where a contractor’s failure to perform was in fact caused by the actions of the government, a termination for default will be overturned[[135]](#footnote-136).

* + 1. - *Termination for Convenience*

In addition to terminations for default, the federal government has a fundamental right to terminate a contract for its convenience. Terminations for convenience are governed by the various versions of the Termination for Convenience clause[[136]](#footnote-137). Under the termination clause, the government may terminate performance of work under a contract in whole or, from time to time, in part if the contracting officer determines that a termination is in the Government’s interest. The courts and boards have interpreted the preceding provision to give the government broad discretion in terminating a contract for convenience. Absent a finding of bad faith, most challenges to a government decision to terminate a contract for convenience are denied[[137]](#footnote-138).

* + 1. **-** *Principles of Contract Interpretation*

In reviewing issues of contract interpretation, the boards and COFC consistently apply the fundamental rules governing the interpretation of contracts. These include the principle that contract interpretation begins with the language of the written agreement[[138]](#footnote-139). A contract is read in accordance with its express terms and their plain meaning and these terms are accorded their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning[[139]](#footnote-140). In addition, in interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract[[140]](#footnote-141).

* + 1. **-** *Statutory and Regulatory Changes*

With regard to changes in laws and regulations affecting a contract, such laws and regulations generally apply prospectively, that is, they generally apply to contracts entered into after the effective date of the law/regulation[[141]](#footnote-142). In some cases a law or regulation will indicate that it applies to existing contracts. In this case, the contract will be modified to reflect the changes in the law/regulation.

1. - Conclusion on Protests and Disputes

The preceding discussion of protest and disputes in the U.S. federal procurement system highlights the importance of remedies in promoting the use of discretion while also encouraging sound decision-making in the contracting process. The cases used in discussing the protest and disputes processes are examples of the extensive body of case law reviewing agency actions throughout the acquisition cycle. These decisions assist in interpreting the laws and regulations; and assist in establishing standards for the proper exercise of discretion. The body of case law reinforces some essential rules regarding the use of discretion: to defend any challenge to the exercise of discretion, agency procurement officials must:

* Demonstrate that the rules applicable to the agency action have been followed; and
* Provide a documented explanation establishing that the action had a reasonable/rational basis.

1. - Administrative Oversight of Federal Government Contracts

The U.S. federal procurement system utilizes multiple mechanisms in the oversight of the contracting process, which generally apply throughout the procurement process, during both the award and contract administration phases. While the U.S. does not have a supreme audit institution as in many countries, various organizations play a key role in the oversight of contracts and related activity, including: agency inspectors general, the U.S. Department of Justice, the Defense Contract Audit Agency (DCAA) and GAO, which as discussed previously, also serves as a forum for bid protests.

5.1. - *Oversight by Agency Inspectors General*

The Inspector General Act of 1978 established federal inspectors general (IGs) as permanent, nonpartisan, independent offices in more than 70 federal agencies. Agency Offices of Inspector General (OIGs) are authorized to “conduct and supervise independent audits and investigations; recommend policies to promote economy, efficiency, and effectiveness; and prevent and detect fraud and abuse in their departments' and agencies' programs and operations”[[142]](#footnote-143). As summarized in a Congressional Research Service report, OIGs play a prominent role in the oversight of federal agency activity, which extends beyond public procurement:

Federal OIGs date back to the mid-1970s. Since their establishment, they have been granted substantial independence and powers to audit, investigate, and evaluate federal programs and agencies to assist Congress in its oversight duties. In most cases, OIGs produce reports, often made available to the public, that provide findings and recommendations to their affiliated agencies. Often these recommendations find ways to increase federal efficiency or examine allegations of employee misconduct. OIGs are predominantly located in executive branch agencies, but several legislative branch entities—for example, the Library of Congress, the Government Accountability Office, and the Government Printing Office—are also overseen by IGs[[143]](#footnote-144).

With regard to oversight of procurement, OIGs conduct investigates involving potential misconduct and fraud, as well as procurement practices generally to identify areas in need of improvement. Agency OIG will conduct investigations and prepare reports dealing with issues of fraud, waste and abuse under specific contracts[[144]](#footnote-145). OIGs will also examine procurement practices and make recommendations for improvement[[145]](#footnote-146).

Given the extensive procurement activities occurring during the wars in Iraq and Afghanistan and enhanced risk of fraud, waste and abuse in a wartime setting, Congress created special inspectors general for contract oversight in both Iraq and Afghanistan. The Office of Special Inspector General for Iraq Reconstruction (SIGIR) was the successor to the Coalition Provisional Authority Office of Inspector General (CPA-IG) established in 2003 to provide oversight and promote transparency on the use of funds for the Iraq reconstruction effort[[146]](#footnote-147). SIGIR was created by Congress in October 2004 following the dissolution of the CPA[[147]](#footnote-148). SIGIR continued the oversight that CPA-IG had established for Iraq reconstruction programs and operations. Specifically, Congress authorized SIGIR with the oversight responsibility of the use, and potential misuse, of the Iraq Relief and Reconstruction Fund (IRRF) and all obligations, expenditures, and revenues associated with reconstruction and rehabilitation activities in Iraq. During its existence, SIGIR conducted over 200 audits, 170 inspections, issued 36 quarterly reports and issued 9 “lessons learned” studies. SIGIR found that the reconstruction effort in Iraq was subject to a broad range of fraud waste and abuse. SIGIR’s efforts led to 90 convictions for illegal activity, 106 contractor suspensions and 139 contractor debarments. SIGIR’s efforts also led to the recovery of $1.61 billion from audits and over $191 million from investigations[[148]](#footnote-149).

Similar to SIGIR, Congress created the Office of the Special Inspector General for Afghanistan Reconstruction (SIGAR) to provide independent and objective oversight of Afghanistan reconstruction projects and activities[[149]](#footnote-150). SIGAR conducts audits and investigations to: 1) promote efficiency and effectiveness of reconstruction programs and 2) detect and prevent waste, fraud, and abuse[[150]](#footnote-151). SIGAR's audit range from assessments of program direction to narrower examinations of specific contracts or aspects of contract and program management. In addition, SIGAR conducts criminal and civil investigations relating to programs and operations supported with U.S. reconstruction dollars[[151]](#footnote-152). It prevents and detects waste, fraud, and abuse through criminal prosecutions, civil actions, forfeitures, monetary recoveries, and suspensions and debarments. SIGAR submits quarterly reports to Congress that summarize SIGAR's audits and investigative activities[[152]](#footnote-153).

* 1. - *Oversight by the Government Accountability Office*

As noted previously, GAO serves as an independent organization that investigates the executive branch on behalf of Congress. In addition to its bid protest function, GAO: audits agency operations to determine whether federal funds are being spent efficiently and effectively; investigating allegations of illegal and improper activities; reporting on how well government programs and policies are meeting their objectives; performing policy analyses and outlining options for congressional consideration[[153]](#footnote-154). GAO’s reports are publicly available[[154]](#footnote-155). GAO’s reports and recommendations frequently result in changes in agency procurement practices and new legislation to correct identified deficiencies in the procurement process.

* 1. - *Oversight by the Defense Contract Audit Agency*

The Defense Contract Audit Agency (DCAA) provides audit and financial advisory services to the DoD and other federal entities responsible for acquisition and contract administration. DCAA primarily conducts contract audits. DCAA describes these contract audits as independent, professional compliance examinations of assertions (i.e., proposals, claims, or submissions) made by defense contractors[[155]](#footnote-156). DCAA plays a key role in the oversight of contract costs to ensure that such costs are consistent with the laws and regulations related to contract costs, including the cost principles and cost accounting standards[[156]](#footnote-157). DCAA’s audit finding may result in the disallowance of certain contractor costs under a contract[[157]](#footnote-158).

* 1. **-** *Oversight by the U.S. Department of Justice*

The U.S. Department of Justice (DOJ) is another agency involved in the oversight of federal government contracts. DOJ’s role in contract oversight relates to civil and criminal misconduct, primarily in the administration of government contracts. DOJ has responsibility for enforcing the False Claims Act (FCA)[[158]](#footnote-159). A person violates the FCA when it knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government[[159]](#footnote-160).

Under the FCA, a claim includes a demand for payment under a government contract. As discussed in more detail below, the U.S. federal procurement system requires contractors to play an important role in contract oversight and to establish internal systems to detect and disclose misconduct. Consistent with this process, the FCA allows a private person, including contract employees, to file suit for violations of the FCA on behalf of the government. A suit filed by an individual on behalf of the government is known as a “*qui tam*” action, and the person bringing the action is referred to as a “relator.” To qualify as a relator, a person must be the original source of the information related to the false claim. The FCA provides a financial incentive for private persons to bring false claims actions. If the government intervenes in the *qui tam* action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government through the *qui tam* action. The FCA has been a highly effective tool in assisting the government in identifying false claims under government contracts and in facilitating the recovery payments made due to fraud. Most FCA actions filed in court are ultimately settled in negotiations between the contractor and DOJ[[160]](#footnote-161). DOJ describes the FCA as:

“the government’s primary civil remedy to redress false claims for government funds and property under government contracts, including national security and defense contracts, as well as under government programs as varied as Medicare, veterans’ benefits, federally insured loans and mortgages, transportation and research grants, agricultural supports, school lunches and disaster assistance”[[161]](#footnote-162).

* 1. **-** *Oversight by Government Contractors*

In addition to the oversight organizations previously noted, the U.S. federal procurement system also requires government contractors to play a critical role in the oversight of government contracts. Public procurement in the US is heavily regulated, with an emphasis on compliance. Special rules apply to contractors that do business, directly or indirectly, with a public procurement entity, including:

* Criminal prosecution and conviction against company and individuals
* Suspension/debarment from future government prime and subcontracts against company and individuals
* Civil judgment (fines and penalties)
* Termination of contracts for default
* Elimination from a competition
* Reputational harm to company and individuals even if subsequently exonerated.

Past procurement scandals, dating back to the 1980s placed an emphasis on the need for improvements in the ethics and integrity of public procurements. A commission appointed by President Reagan made numerous recommendations, including the creation of a system to permit contractors to voluntarily disclose misconduct to the Government[[162]](#footnote-163). In 1986 DoD established the Voluntary Disclosure Program (VDP) “to afford contractors the means to report self-policing activities” and to create “a framework for Government verification of the matters voluntarily disclosed and an additional means for a coordinated evaluation of administrative, civil, and criminal actions appropriate to the situation.” A key feature of “voluntary disclosure” was that Contractors participating in the DoD VDP generally received more favorable treatment when reporting misconduct. Many of the large defense contractors also took a proactive role and drafted the principles known as the Defense Industry Initiative on Business Ethics and Conduct. These principles provided that contractors would:

* Have and adhere to written Codes of Conduct;
* Train employees in those Codes;
* Encourage internal reporting of violations of the Code, within an atmosphere free of fear of retribution;
* Practice self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities;
* Share with other firms their best practices in implementing the principles, and participate annually in “Best Practices Forums”; and
* Be accountable to the public.

Another wave of procurement scandals in the mid-2000s led to additional oversight measures and a transition from “voluntary” contractor disclosures of misconduct, to “mandatory” disclosure. Since December 2008, the FAR has *required* contractors receiving contract awards over $5 million to institute and adhere to a compliance program and a set of internal controls that will prevent or detect illegal or improper conduct by the contractor or its employees[[163]](#footnote-164).

As can be seen from the preceding discussion, contractors have various incentives to promote ethical conduct within their organizations, including during the performance phase of a contract. Contractors desire to avoid the various penalties, including FCA actions, contract termination, suspension and debarment. As noted, contractors also benefit from more favorable treatment from the authorities when they have a system in place that is designed to: promote ethical conduct, detect and disclose misconduct if it occurs and take corrective measures to address any deficiencies in the internal compliance system. Thus, while the various oversight mechanisms cannot eliminate fraud, waste and abuse, they successful in promoting sound procurement practices and ethical conduct throughout the entire acquisition cycle, including contract performance.

1. - Conclusion

The U.S. federal procurement system is large and complex with many moving parts. The multiple judicial and administrative oversight mechanisms reflect the procurement system’s complexity. A key feature of the oversight systems is the important role played by the various participants, from bidders seeking to protect their interests in a pending procurement, to contractor employees acting as relators in a “qui tam” action under the FCA. In addition the routine review of agency contracting decisions through protests, disputes, audits and investigations promotes continuous improvement in the system. While this routine review cannot eliminate misconduct and improper decision-making, it generally promotes sound contracting practices and, for both contractors and procurement officials, it promotes compliance with the applicable procurement laws and regulations.

1. See also J. SCHWARTZ, Chapter on United States, in R. NOGUELLOU and U. STELKENS, Droit comparé des contrats publics - *Comparative Law of Public Contracts*, Bruylant, 2010, p. 694. [↑](#footnote-ref-2)
2. See for example, *Impresa Construzioni Geom. Domenico Garufi v. U.S*., 238 F.3d 1324, 1332 (Fed. Cir. 2001), “the courts have recognized that contracting officers are entitled to exercise discretion upon a broad range of issues confronting them in the procurement process.” [↑](#footnote-ref-3)
3. The Federal Acquisition Regulation (FAR) defines a “protest” as a written objection by an interested party to any of the following: (1) a solicitation or other request by an agency for offers for a contract for the procurement of property or services; (2) the cancellation of the solicitation or other request; (3) an award or proposed award of the contract; (4) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. FAR 33.101; 31 U.S.C. § 3551. [↑](#footnote-ref-4)
4. FAR 33.101; 4 C.F.R. § 21.0(a)(1). [↑](#footnote-ref-5)
5. *McRae Industries, Inc*., B-287609.2, Jul, 20, 2001, 2001 CPD ¶ 127. [↑](#footnote-ref-6)
6. *Joint Mgmt. & Tech. Servs*., B-294229, B-294229.2, Sep. 22, 2004, 2004 CPD ¶ 208. See also *Infrastructure Defense Technologies, LLC v. U.S*., 81 Fed.Cl. 375 (2008) “interested party” standing threshold has two parts - protestor must establish that it (1) is an actual or prospective bidder [or offeror], and (2) possesses the requisite direct economic interest. [↑](#footnote-ref-7)
7. Authority for agency-level protest arises from Executive Order (E.O.) 12979, Agency Procurement Protests, Oct. 25, 1995, issued by President Clinton to “ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts . . .” Consistent with the E.O., agencies are encouraged to provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. FAR 33.103(c). [↑](#footnote-ref-8)
8. GAO has authority to review protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556. Prior to July 7, 2004, GAO was known as the General Accounting Office. [↑](#footnote-ref-9)
9. The U.S. Court of Federal Claims has authority to review protests under the Tucker Act, 28 U.S.C. § 1491(b). U.S. federal district courts previously had authority to consider bid protests, but under the Administrative Dispute Resolution Act of 1996, that authority expired in 2001 and was not renewed by Congress. [↑](#footnote-ref-10)
10. For example, GAO’s protest regulations provide that if a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered. 4 C.F.R. § 21.2(a)(3). [↑](#footnote-ref-11)
11. 4 C.F.R. § 21.11, Effect of judicial proceedings. [↑](#footnote-ref-12)
12. In *Amazon Web Services, Inc. v. U.S.*, 113 Fed. Cl. 102 (2013), GAO sustained the protest of an award to Amazon, filed by IBM U.S. Federal. In sustaining the protest, GAO recommended that the agency take certain corrective action to address errors in the award process, including reopening the competition and amending the solicitation. In a subsequent action before the COFC, the Court reviewed GAO’s recommendations to the agency to determine whether the agency’s corrective action was proper. The Court found GAO’s recommendation overly broad and prejudicial to Amazon and thus arbitrary and capricious. The Court therefore permitted Amazon to resume performance of its contract. [↑](#footnote-ref-13)
13. FAR 33.103(c). [↑](#footnote-ref-14)
14. FAR 33.103. [↑](#footnote-ref-15)
15. Official versions of the FAR are available from multiple sources, including: <https://www.acquisition.gov> and <http://farsite.hil.af.mil/>. [↑](#footnote-ref-16)
16. FAR 33.103(b). [↑](#footnote-ref-17)
17. FAR 33.103(d) (4). [↑](#footnote-ref-18)
18. See for example the Department of Energy’s regulations on agency-level protests at: 48 C.F.R. § 933.103, Protests to the agency. [↑](#footnote-ref-19)
19. FAR 33.103(e). [↑](#footnote-ref-20)
20. *Id.* [↑](#footnote-ref-21)
21. 31 U.S.C. § 3553(c) (1); FAR 33.103(f) (1). [↑](#footnote-ref-22)
22. FAR 33.103(f)(3). [↑](#footnote-ref-23)
23. FAR 33.103(f)(1). [↑](#footnote-ref-24)
24. 28 U.S.C. § 1491(b)(1). [↑](#footnote-ref-25)
25. 28 U.S.C. § 1491(b)(4); *Keeton Corrections, Inc. v. U.S*., 59 Fed.Cl. 753, 755 (2004). [↑](#footnote-ref-26)
26. FAR 33.103(h). [↑](#footnote-ref-27)
27. FAR 33.103(g). [↑](#footnote-ref-28)
28. In recent years, GAO has typically received over 2000 protest filings annually, while the COFC reviews less than 100 bid protests actions each year. Statistics are generally not recorded for agency-level protests. [↑](#footnote-ref-29)
29. See <http://www.gao.gov/about/index.html>. [↑](#footnote-ref-30)
30. *Id.*  [↑](#footnote-ref-31)
31. *GAO Bid Protests: An Overview of Time Frames and Procedures*, Congressional Research Service Report, December 2, 2014 at 2. [↑](#footnote-ref-32)
32. GAO was effectively the only forum for bid protests until a 1976 decision of the U.S. Court of Appeals for the District of Columbia Circuit, *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1976), which held that bid protests could be filed in district courts. See also Daniel I. GORDON, *Bid Protests: The Costs are real, but the Benefits Outweigh Them*, 42:3 Pub. Contract L.J. (Spring 2013). [↑](#footnote-ref-33)
33. *Id.* at 18. [↑](#footnote-ref-34)
34. 4 C.F.R. § 21.0(b)(1). [↑](#footnote-ref-35)
35. 4 C.F.R. § 21.2(a)(1). [↑](#footnote-ref-36)
36. 4 C.F.R. § 21.2(a)(2). [↑](#footnote-ref-37)
37. *Id.* [↑](#footnote-ref-38)
38. 31 U.S.C. § 3553(d)(4). [↑](#footnote-ref-39)
39. 31 U.S.C. § 3553(c)(2). The agency must prepare a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of GAO*. Id.* [↑](#footnote-ref-40)
40. *Bid Protests At GAO: A Descriptive Guide*, 2009, GAO-09-471SP at 6. [↑](#footnote-ref-41)
41. *Solers.Inc*., B-404032.3; B-404032.4, Apr, 6, 2011 (protest challenging the evaluation of the offerors' past performance sustained where the record did not permit a meaningful review of whether the agency's evaluation was reasonable). [↑](#footnote-ref-42)
42. *Radiation Oncology Group of WNY, PC*, B-310354.2; B-310354.3, Sep. 18, 2008, 2009 CPD ¶ 136 (protest sustained where contracting officer's conclusion that protester's and awardee's proposals were technically equal was unreasonable, and determination lacked adequate supporting explanation or documentation). [↑](#footnote-ref-43)
43. GAO Report No. GAO/GGD-00-203, (2000) at 2, “While federal legislation and regulations prescribe various steps to be taken and factors to be considered in establishing contract requirements and selecting contractors, agencies have broad discretion in establishing the scope of work and requirements for prospective contractors.” [↑](#footnote-ref-44)
44. FAR 11.002. [↑](#footnote-ref-45)
45. See *CardioMetrix*, B-259736, Apr. 28, 1995, 95-1 CPD ¶ 223, where a requirement that contractors performing clinical laboratory testing services must be a qualified laboratory was found unduly restrictive where the agency failed to establish that the requirement was reasonably necessary to meet its minimum needs. [↑](#footnote-ref-46)
46. FAR 15.304(b). [↑](#footnote-ref-47)
47. *Id.* [↑](#footnote-ref-48)
48. FAR 15.304(c). [↑](#footnote-ref-49)
49. *Hattal & Associates*, B-243357; B-243357.2, Jul. 25, 1991, 91-2 CPD ¶ 90 (protest sustained where solicitation provided that technical factors were more important than cost and agency made award to low-cost, technically acceptable offer without properly assessing relative technical merit). [↑](#footnote-ref-50)
50. See FAR 15.308, which states in part: “While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA’s independent judgment.” [↑](#footnote-ref-51)
51. *Halfaker & Assocs., LLC*, B-407919, B-407919.2, Apr. 10, 2013, 2013 CPD ¶ 98 at 6 “ . . . a source selection official may disagree with the evaluation ratings of lower-level evaluators, and may make an independent evaluation judgment, provided that the basis for that judgment is reasonable and documented in the contemporaneous record.” See also, *TruLogic, Inc*., B-297252.3, Jan. 30, 2006, 2006 CPD ¶ 29, source selection authority's disagreement with the majority of the evaluators and acceptance of the minority's recommendation that the awardee be selected for award was unobjectionable where SSA reached a reasoned conclusion, supported by the record. [↑](#footnote-ref-52)
52. See *Tantus Technologies, Inc*., B-411608; B-411608.3, Sep. 14, 2015, where GAO stated: “It is a fundamental principle that that an agency must evaluate proposals consistent with the terms of the solicitation and, while the evaluation of offerors’ proposals generally is a matter within the procuring agency’s discretion, our Office will question an agency’s evaluation where it is unreasonable, inconsistent with the solicitation’s stated evaluation criteria, or undocumented.” [↑](#footnote-ref-53)
53. See *Emergence Group*, B-404844.7, Feb. 29, 2012, 2012 CPD ¶ 133 at 7. “It is well-established that contracting agencies do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another. . . . Once offerors are informed of the criteria against which proposals will be evaluated, the agency must adhere to those criteria in evaluating proposals and making its award decision, or inform all offerors of any significant changes made in the evaluation scheme.” [↑](#footnote-ref-54)
54. *Bid Protests at GAO: A Descriptive Guide*, GAO-09-471SP, April 3, 2009 at 28. [↑](#footnote-ref-55)
55. 4 C.F.R. § 21.1. [↑](#footnote-ref-56)
56. 4 C.F.R. § 21.5. [↑](#footnote-ref-57)
57. 4 C.F.R. § 21.2. [↑](#footnote-ref-58)
58. *Bart & Associates, Inc*., B-407996.5; 407996.6; 407996.7, Jan.5, 2015 (protest denied where agency’s actions were reasonable, complied with applicable regulations and were consistent with terms of solicitation; *Nextira Federal, LLC*, B-290820, B-290820.2, Oct. 4, 2002, 2002 CPD ¶ 170 (protest denied where correction of pricing evaluation errors would not impact award decision). [↑](#footnote-ref-59)
59. *Bid Protests at GAO: A Descriptive Guide*, supra. [↑](#footnote-ref-60)
60. As previously noted, the GAO is not a judicial forum and is therefore, not authorized to issue an injunction enjoining an agency action. [↑](#footnote-ref-61)
61. *Bid Protests at GAO: A Descriptive Guide*, supra. [↑](#footnote-ref-62)
62. FAR 3.104-4. [↑](#footnote-ref-63)
63. If a protest is sustained GAO typically recommends that the protester be reimbursed the costs of filing and pursuing the protest, including attorneys' and consultant fees. Occasionally, GAO may recommend that a protester be entitled to recover its bid and proposal preparation costs, if no other remedy is available. [↑](#footnote-ref-64)
64. The Administrative Dispute Resolution Act of 1996, Pub.L. No. 104-320, § 12 (d), 110 Stat. 3870, 3875 (codified at 28 U.S.C. § 1491(b), provided that district court authority to consider bid protests would expire on January 1, 2001, unless extended by Congress. Such an extension did not occur. [↑](#footnote-ref-65)
65. *Bid Protest Practice In The Court of Federal Claims*, James J. McCullough, Catherine E. Pollack, Steven A. Alerding,00-10 Briefing Papers 1 (2000). [↑](#footnote-ref-66)
66. Under the ADRA, codified at 28 U.S.C. § 1491(b)(1), the COFC has “jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” [↑](#footnote-ref-67)
67. U.S. Court of Federal Claims Rule 24(a). [↑](#footnote-ref-68)
68. *Emerald Coast Finest Produce Co., Inc. v. U.S*., 74 Fed. Cl. 679, 680 (2006) (awardee’s motion to intervene granted where it represented that as successful awardee, it was an interested party whose economic well-being would be affected by the case and proceedings). [↑](#footnote-ref-69)
69. *Blue & Gold Fleet v. U.S*., 492 F.3rd 1308, 1313 (2007). [↑](#footnote-ref-70)
70. *Blue & Gold Fleet v. U.S*. at 1315. Laches is an equitable doctrine that bars a claimant from receiving relief where the claimant’s delay in pursuing the claim has harmed the opposing party. See *Wit Associates, Inc. v. U.S*., 62 Fed. Cl. 657 (2004). In *Reilly v. U.S*., 104 Fed. Cl.. 69 (2012), the contractor’s bid protest was barred by laches where the protest was not filed until nine months after the contractor learned of the basis for the protest and the Court ruled that by virtue of the delay, the government would be required to incur costs it otherwise could have avoided. [↑](#footnote-ref-71)
71. See *Alion Science and Technology Corp. v. U.S*., 74 Fed.Cl. 372 (2006). [↑](#footnote-ref-72)
72. 5 U.S.C. § 706(2)(A). [↑](#footnote-ref-73)
73. *Aircraft Charter Solutions, Inc. v. United States*,109 Fed.Cl. 398, 406 (2013). [↑](#footnote-ref-74)
74. *Id.* at 407. [↑](#footnote-ref-75)
75. *Id.* [↑](#footnote-ref-76)
76. *Myers Investigative and Security Services, Inc. v. U.S.*, 47 Fed.Cl. 605 (2000). [↑](#footnote-ref-77)
77. See FAR Subpart 33.1, Protests. [↑](#footnote-ref-78)
78. See for example, <https://www.acquisition.gov/> and <http://farsite.hill.af.mil/>. [↑](#footnote-ref-79)
79. See <http://www.gao.gov/legal/bid-protest-regulations/about>. [↑](#footnote-ref-80)
80. FAR 33.105. [↑](#footnote-ref-81)
81. See for example the Department of Energy’s regulations on agency-level protests at: 48 C.F.R. § 933.103, Protests to the agency. [↑](#footnote-ref-82)
82. 41 U.S.C. §§ 7101-7109. [↑](#footnote-ref-83)
83. FAR Subpart 33.2, Disputes and Appeals. [↑](#footnote-ref-84)
84. FAR 33.204. [↑](#footnote-ref-85)
85. FAR 33.201. [↑](#footnote-ref-86)
86. Public Law 104-320, 5 U.S.C. §§ 571-584. The ADRA imposes certain limits on an agency’s use of arbitration, including 1) a requirement that each agreement to arbitrate specify a maximum/ceiling on the amount the arbitrator can award; 2) the agency official offering to use arbitration must have proper authority to enter into a settlement concerning the matter; and 3) an agency head must issue guidance on the use of arbitration and settlement authority of agency officer and employees before entering into binding arbitration. The statute and regulations also recognize that the use of ADR may not be appropriate in certain circumstances, such as when a definitive authoritative decision is needed, or when the matter involves significant government policy and the ADR will not assist the development of government policy. 5 U.S.C. § 576 (b). [↑](#footnote-ref-87)
87. The ADRA authorizes agencies to use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding. 5 U.S.C. § 572 (a). [↑](#footnote-ref-88)
88. 5 U.S.C. § 573(b). [↑](#footnote-ref-89)
89. 5 U.S.C. § 573(a). [↑](#footnote-ref-90)
90. *Id.* [↑](#footnote-ref-91)
91. 5 U.S.C. § 578. [↑](#footnote-ref-92)
92. 5 U.S.C. § 579(c) (3). [↑](#footnote-ref-93)
93. 5 U.S.C. § 597(c) (1). [↑](#footnote-ref-94)
94. 5 U.S.C. § 579(c) (5). [↑](#footnote-ref-95)
95. 5 U.S.C. § 579 (e). [↑](#footnote-ref-96)
96. 5 U.S.C. § 581(b). [↑](#footnote-ref-97)
97. The United States district court for the district wherein an arbitration award was made that under 5 U.S.C. § 580 may vacate the award upon the application of a third party who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in 5 U.S.C. § 572. [↑](#footnote-ref-98)
98. FAR 52.233-1, Disputes. [↑](#footnote-ref-99)
99. *Id*. at paragraph (c) defining a “claim”. [↑](#footnote-ref-100)
100. FAR 52.233-1(b). [↑](#footnote-ref-101)
101. FAR 52.233-1(d) (1). FAR 33.201 defines “accrual of a claim” as “the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.” [↑](#footnote-ref-102)
102. FAR 52.233-1(d )(2)(iii). The required certification language is as follows: “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor.” If the contracting officer suspects a contractor’s claim is fraudulent, the matter must be referred to the agency official responsible for investigating fraud. See FAR 33.209, Suspected fraudulent claims. [↑](#footnote-ref-103)
103. FAR 52.233-1(e). [↑](#footnote-ref-104)
104. *Id.* [↑](#footnote-ref-105)
105. FAR 33.211(g). [↑](#footnote-ref-106)
106. FAR 52.233-1(i). [↑](#footnote-ref-107)
107. John Cibinic, Jr., Ralph C. Nash. Jr., *Administration of Government Contracts*, 3rd Ed., George Washington University (1995) at 1244. The FAR includes a number of remedy-granting clauses, including for example, 52.243-1, Changes--Fixed Price; 52.236-2, Differing Site Conditions; and 52.246-2, Inspection of Services--Fixed Price. *Id.* [↑](#footnote-ref-108)
108. *Id.* [↑](#footnote-ref-109)
109. GAO’s bid protest regulations state that GAO will not consider protests involving matters of contract administration, noting that between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. In *Chase Supply, Inc*., B-411528.2, B-411529.2, Dec. 7, 2015, 2015 CPD ¶ 384, GAO noted the exception to its rule about reviewing modifications to a contract is where it is alleged that the modification is outside the scope of the contract originally awarded. GAO added that such out-of -scope modifications would otherwise be subject to the statutory requirement for competition, absent a valid determination that the work is appropriate for procurement on a sole-source basis. [↑](#footnote-ref-110)
110. 41 U.S.C. § 7104. [↑](#footnote-ref-111)
111. FAR 33.211. In cases where the government materially breaches the contract, the contractor may be excused from continuing with contract performance. See *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988), *modified* 857 F.2d 787 (Fed. Cir. 1988); *Cities Serv. Helex, Inc. v. United States*, 543 F.2d 1306 (Ct.Cl. 222 1976). [↑](#footnote-ref-112)
112. House Report No. 95-1556, Contract Disputes Act of 1978, September 8, 1978. [↑](#footnote-ref-113)
113. Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3392 (2006). [↑](#footnote-ref-114)
114. 41 U.S.C. § 7105(g)(1). [↑](#footnote-ref-115)
115. 41 U.S.C. § 7105(g)(2). [↑](#footnote-ref-116)
116. 41 U.S.C. § 7105(e)(2). [↑](#footnote-ref-117)
117. *General Electric Automated Systems Div*., ASBCA No. 36214, 89-1 BCA ¶ 21195. [↑](#footnote-ref-118)
118. *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13 BCA ¶ 35279, citing *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993). In *Servicios y Obras Isetan S.L.*, the board noted that for a contract voidable, three requirements must be met in addition to the requirement that there must have been a misrepresentation: (1) the misrepresentation must have been either fraudulent or material; (2) the misrepresentation must have induced the recipient to make the contract; and (3) the recipient must have been justified in relying on the misrepresentation. [↑](#footnote-ref-119)
119. E.WALLACE FLEMING, *Practice in the Court of Federal Claims*, 35-SPG Procurement Law. 3 (2000). [↑](#footnote-ref-120)
120. M. J. SCHAENGOLD, R. S. BRAMS, Ch. LERNER, *Choice of Forum for Contract Disputes: Court vs. Board*, 92-12 Briefing Papers 1 (1992). [↑](#footnote-ref-121)
121. 28 U.S.C. § 1346. [↑](#footnote-ref-122)
122. *Kellogg Brown & Root Services, Inc. v. U.S*., 99 Fed.Cl. 488, 514 (2011), citing *J.E.T.S., Inc. v. U.S*., 838 F.2d 1196 (Fed Cir. 1988). [↑](#footnote-ref-123)
123. Government officials are presumed act in good faith and the courts and boards require clear evidence to the contrary to overcome the presumption in favor of the government. *See Am-Pro Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1239 (2002). *In re IMS Engineers-Architects, P.C*., 06-1 BCA ¶ 33,231 (contracting officer reasonably exercised his broad discretion in deciding not to exercise contract options). See generally, *Myers Investigative and Security Services, Inc. v. U.S*., 47 Fed.Cl. 605, (2000), where the COFC stated: “the court cannot substitute its judgment for that of the agency, even if reasonable minds could reach differing conclusions. (…) but should intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable”. [↑](#footnote-ref-124)
124. *Dillingham Construction PacificBasin, Ltd.,* ASBCA Nos. 53284, 53414, 03-1 BCA ¶ 32,098. [↑](#footnote-ref-125)
125. *The Swanson Group, Inc*., ASBCA No. 52109, 01-1 BCA 31,164 [↑](#footnote-ref-126)
126. *ITT Defense Communications Division,* ASBCA No. 44791, 94-2 BCA ¶ 26,931. [↑](#footnote-ref-127)
127. *Metric* *Constructors, Inc.,* ASBCA No. 46279, 94-1 BCA ¶ 26,532, *motion for reconsid. denied,* 94-2 BCA ¶ 26,827. [↑](#footnote-ref-128)
128. *Daly Construction, Inc. v. Garrett*, 5 F.3d 520, 522 (Fed. Cir. 1993). [↑](#footnote-ref-129)
129. *Edge Const. Co. v. United States*, 95 Fed. Cl. 407 (2010). [↑](#footnote-ref-130)
130. *American Mechanical, Inc*., ASBCA No. 52033, 03-1 BCA ¶ 32,134. [↑](#footnote-ref-131)
131. FAR 52.249-8. [↑](#footnote-ref-132)
132. FAR 52.249-1(a). [↑](#footnote-ref-133)
133. FAR 52.249-1(c). This provision does not excuse a contractor for defaults caused by a subcontractor. [↑](#footnote-ref-134)
134. In *Martin Const., Inc. v. U.S*., 102 Fed.Cl. 562 (2011), a default termination was improper where the contractor’s delay in constructing a marina was caused by defective government specifications. [↑](#footnote-ref-135)
135. *Marshall Associated Contractors, Inc., & Columbia Excavating, Inc., (J.V.)*, IBCA Nos. 1091, 3433, 3434, 3435, 01-1 BCA ¶ 31248 (contracting officer abused his discretion in terminating a contractor for default where the government-provided specifications were defective and the reprocurement contractor received relaxed treatment). [↑](#footnote-ref-136)
136. See for example, FAR 52.249-2, Termination for Convenience of the Government (Fixed Price); FAR 52.249-6, Termination (Cost Reimbursement). [↑](#footnote-ref-137)
137. *Krygoski Construction Co., Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996) (where court found no evidence that agency intended from the outset to void its promises under the contract, the contracting officer did not abuse his discretion, act arbitrarily or capriciously or in bad faith in terminating the contract for the Government’s convenience). *Gulf Group General Enterprises Co. W.L.L. v. U.S*., 114 Fed. Cl. 258 (2013) involves a rare case where the government was found to have abused its discretion in terminating a contract for convenience. In that case, the court determined that the government lacked a reasonable basis for terminating a dumpster and latrine services contract where it continued to have a need for such services. [↑](#footnote-ref-138)
138. *Enron Fed. Solutions, Inc. v. U.S*., 80 Fed.Cl. 382, 393 (2008). [↑](#footnote-ref-139)
139. *U.S. Sur. Co. v. United States*, 83 Fed. Cl. 306, 311 (2008); Harris v. Dept. of Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998). [↑](#footnote-ref-140)
140. *Parkview Engraving LLC*, CBCA 1564, 10-1 BCA ¶ 34372. *See also Mass. Bay Transp. Auth. v. United States*, 129 F.3d 1226, 1231 (Fed. Cir. 1997) (“It is a fundamental rule of contract interpretation that the provisions are viewed in the way that gives meaning to all parts of the contract, and that avoids conflict, redundancy, and surplusage among the contract provisions.”). [↑](#footnote-ref-141)
141. “The normal rule is for legislation and regulations to be applied prospectively to events and agreements which occur later.... This is particularly true of directives dealing with the substantive aspects of contracts; it would be a rare regulation which would even seek to modify, to the contractor’s detriment, substantive rights in an agreement already consummated.” *Lockheed Aircraft Corp. v. U.S.*, 192 Ct.Cl. 36, 46, 426 F.rd 322, 327-28 (1970); see also *BearingPoint, Inc. v. U.S*., 77 Fed.Cl. 189, 195 (2007). [↑](#footnote-ref-142)
142. *INSPECTORS GENERAL: Oversight of Small Federal Agencies and the Role of the Inspectors General,* Statement of Beryl H. DAVIS, Director Financial Management and Assurance, April 10, 2014, GAO-14-503T. [↑](#footnote-ref-143)
143. *Federal Inspectors General: History, Characteristics, and Recent Congressional Actions*, Wendy Ginsberg and Michael Greene, Dec. 8, 2014, Congressional Research Service. [↑](#footnote-ref-144)
144. Reports involving specific contracts are often not released to the public until the matter is resolved. [↑](#footnote-ref-145)
145. See for example, *Commercial Multimodal Cargo Procedures in Dubai Were Generally Effective, but Contract Oversight Could Be Improved*, Report No. DODIG-2014-058, April 11, 2014. [↑](#footnote-ref-146)
146. See *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, Congressional Research Service, L. Elaine Halchin, June 6, 2005. [↑](#footnote-ref-147)
147. http://cybercemetery.unt.edu/archive/sigir/20131001084048/http://www.sigir.mil/about/index.html [↑](#footnote-ref-148)
148. *Learning From Iraq: A Final A Final Report from the Special Inspector General for Iraq Reconstruction*, March 2013. [↑](#footnote-ref-149)
149. See: https://www.sigar.mil/about/index.aspx?SSR=1. [↑](#footnote-ref-150)
150. *Id.* [↑](#footnote-ref-151)
151. *Id.* [↑](#footnote-ref-152)
152. *Id.* [↑](#footnote-ref-153)
153. See: http://www.gao.gov/about/index.html. [↑](#footnote-ref-154)
154. See: http://www.gao.gov/browse/date/week. [↑](#footnote-ref-155)
155. See: http://www.dcaa.mil/services.html. [↑](#footnote-ref-156)
156. See FAR Part 31, Contract Cost Principles and Procedures and 48 C.F.R. Chapter 99. [↑](#footnote-ref-157)
157. DCAA maintains the DCAA Contract Audit Manual, which prescribes auditing policies and procedures and furnishes guidance in auditing techniques. The Contract Audit Manual also provides useful guidance on the regulations governing contract costs. See: http://www.dcaa.mil/cam.html. [↑](#footnote-ref-158)
158. 31 U.S.C. §§ 3729 - 3733. [↑](#footnote-ref-159)
159. 31 U.S.C. §§ 3729(a). [↑](#footnote-ref-160)
160. See: http://www.justice.gov/civil/civil-division-press-room. [↑](#footnote-ref-161)
161. See DOJ press release dated November 30, 2014: *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014.* [↑](#footnote-ref-162)
162. The commission was known as the Packard Commission. [↑](#footnote-ref-163)
163. FAR 52.203-13. [↑](#footnote-ref-164)