

## POSITION PAPER

**ISSUE: What Authority is There for AMC to Pay Bid Preparation Costs?**

**DISCUSSION: There is Authority for a Bidder to Recover Bid and Proposal Preparation Costs if the Government's Review of its Bid was Arbitrary and Capricious.**

A bidder that incurs substantial costs in preparing a response to a solicitation may seek to recover bid and proposal preparation (B&P) costs if it contends that the Government did not fairly and honestly consider its bid. Keco Industries, Inc. v. U.S., 203 Ct.Cl. 566, 492 F.2d 1200, 1203, 16 G.C. ¶ 104 (1974); 31 U.S.C. 3554(c)(1)(B)(2000); FAR 33.102(b), 33.104 (h). Protesters may request B&P costs by filing a protest with the agency, General Accounting Office (GAO), or the United States Court of Federal Claims (COFC). *Id.*; ES-KO, Inc. v. United States, 44 Fed Cl.Ct. 429 (1999); Miller Elevator Service Company, B-284870.3, Aug. 3, 2000, 2000 C.P.D. ¶ 126. California Marine Cleaning v. United States, 42 Fed. Cl. 281 (1998). The Government's policy, however, is to try to resolve all conflicts by mutual agreement at the contracting officer's level through open and frank discussions. FAR @ 33.102(e), 33.103(b), 33.204. Hence, prior to submitting a protest, the parties are encouraged to try to mutually resolve the conflict. *Id.*; Dock Express Contractors, Inc., B-223966, Mar. 4, 1987, 87-1 CPD ¶ 243. If the parties are unable to resolve the conflict through open and frank discussions, the protestor may file a protest with the agency or GAO, or appeal to the COFC. ES-KO, Inc. v. United States, *supra*; Miller Elevator Service Company, *supra*; California Marine Cleaning v. United States, *supra*. Likewise, if an agency protest is filed and the conflict is not resolved, the protestor may file a protest with the GAO, or appeal to the COFC. Chas. H. Tompkins Company v. United States, 43 Fed. Cl. 716 (1999); FAR @ 33.102. A protestor that is not satisfied with GAO's recommendation may seek judicial review of the agency's action through the COFC under the Administrative Procedures Act (APA). *Id.*; Shoals American Indus. Inc. v. United States, 877 F.2d 883 (11<sup>th</sup> Cir. 1989).

### Agency Action

A bidder may recover its B&P costs from a government agency, if a timely bid protest is filed with the contacting officer. FAR

33.102(b)(1). Furthermore, in some situations, a bidder that files an untimely bid protest with an agency may recover B&P costs from the agency. FAR 33.103(4)(e). The decision regarding whether to pay a protester's B&P costs should be based on an assessment of the risk and cost of litigating an issue, and, the likelihood that the protester will prevail on the issue if a protest/appeal is subsequently filed with GAO or the COFC. The assessment should be completed using the standard that both GAO and COFC have adopted for determining whether protesters are entitled to be paid B&P costs. That standard is fully discussed in the discussion of Protests to GAO.

If the assessment leads the contracting officer to believe that the protester would most likely be awarded B&P costs by GAO and COFC, and it is in the Government's best interest to pay the claimant's claim for B&P costs, the contracting officer should strongly consider settling the matter. The payment of B&P costs should be charged to the agency's procurement appropriations. 31 U.S.C. @ 3554(c). If the contracting officer elects not to pay the B&P costs, or the protester is not happy with the proposed resolution, the protester may file a protest with GAO, or appeal with the COFC, for payment of the claim. ES-KO, Inc. v. United States, supra; Miller Elevator Service Company, supra; California Marine Cleaning v. United States, supra. The claimant may also appeal the contracting officer's decision to the COFC. FAR § 33.211(a)(4)(v)

### ***Protests to the Agency***

Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests. ES-KO, Inc. v. United States, supra; FAR @ 33.103(a); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). An agency protest is a written objection, by an interested party, filed directly with the contracting officer or other cognizant official within the agency regarding a solicitation, proposed award, or award. ES-KO, Inc. v. United States, supra; Mammoth Firewood Company, B-223705, Sep. 4, 1986, 86-2 CPD ¶ 261; FAR @ 33.101(b)(2), 33.103(b), 33.103(d)(3), 33.204. The written objection must convey dissatisfaction and request corrective action. Mammoth Firewood Company, supra.

If the agency head determines that, as a result of a protest<sup>1</sup>, a solicitation, proposed award, or award is improper, he may take any action the GAO could have recommended had the contractor filed the protest with GAO. FAR @ 33.102(b)(1). Thus, the agency must be familiar with GAO's standards for recommending the payment of B&P costs, and understand when B&P costs can be awarded<sup>2</sup>. Since GAO can recommend the agency pay B&P costs, the agency head can pay B&P costs if, as a result of a protest, he determines that a solicitation, proposed award or award is improper. FAR @ 33.102(b), 33.104(h). The agency must use funds available for the procurement to pay the costs awarded. FAR @ 33.104(h); 31 U.S.C. 3554(c)(2)(2000).

Agency protests are filed directly with the contracting officer. ES-KO, Inc. v. United States, *supra*. The contracting officer must consider and seek legal advice for all agency protests. FAR 33.102(a). However, in accordance with agency policy, protesters may request an independent review of their protest at a level above the contracting officer. ES-KO, Inc. v. United States, *supra*; FAR @ 33.103(d)(4). Agency procedures and solicitations must advise potential bidders and offerors of this right. *Id.* Executive Order 12979 directs agency heads to create a system "to the maximum extent possible," that allows for the "inexpensive, informal, procedurally simple, and expeditious resolution of protests." DataVault Corp., B-249054.2, Aug. 27, 1992, 92-2 CPD ¶ 133; 31 U.S.C. @ 3554 (2000); FAR @ 33.103(c); Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995). The use of alternative dispute resolution (ADR) techniques, third party neutrals, and another agency's personnel are acceptable agency protest resolution methods. FAR @ 33.103(c). Established procedures for effectively resolving agency protests are stated in FAR 33.103(d)<sup>3</sup>. The purpose of these procedures is to effectively resolve agency protests, build confidence in the Government's acquisition system, and reduce protests outside of the agency. *Id.* Protestors must comply with these procedures, as well as the timelines for filing protests. *Id.*; FAR 33.102(f), 33.103(e); 4 C.F.R. § 21.2(a)(3)(1996); Canadian Commercial Corporation, B-222515, July 16, 1986, 86-2 C.P.D. ¶ 73. Consolidated Management Services, B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76.

Agency protests must generally be filed within the same time restrictions applicable to GAO protests, unless the agency has

<sup>1</sup> "[A]s a result of a protest" means the agency head is limited to taking this action only after a protest (a written objection by an interested party) has been made.

<sup>2</sup> GAO's standards for recommending the payment of B&P costs, and the issue of when B&P costs can be awarded are discussed below in the subsection pertaining to "Protests to GAO."

<sup>3</sup> This paper does not discuss these procedures in detail.

established more restrictive time frames. 4 C.F.R. § 21.2(a)(3)(1996); Orbit Advanced Techs., Inc., B-275046, Dec. 10, 1996, 96-2 CPD ¶ 228; IBP, Inc., B-275259, Nov. 4, 1996, 96-2 CPD ¶ 169. Bid Protests, based upon improprieties in a solicitation, must be filed prior to the time set for receipt of initial proposals. 4 C.F.R. @ 21.2(a)(1)(2000); Pemco Aeroplex, Inc., B-280397, Sep. 25, 1998, 98-2 CPD ¶ 79. On the other hand, bid protests based on matters other than alleged solicitation improprieties, must be filed with the contracting officer no later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier. FAR 33.103(d)(4); 4 C.F.R @ 21.2(a)(2); g. Marathon LeTourneau Sales & Services Co., B-254258, Aug 3, 1993, 93-2 CPD ¶ 77; Davidson Company, Inc., B-249331, Jul. 14, 1992, 92-2 CPD ¶ 21; WildCard Associates, B-241295, 241300, Oct. 19, 1990, 90-2 CPD ¶ 321. Agencies are required to attempt to resolve agency protests within 35 days after the protest is filed. *Id.*; FAR @ 33.103(g). If the agency protest does not resolve the conflict, interested parties may file a protest with GAO or the COFC. Chas. H. Tompkins Company v. United States, *supra*. These timelines are important because bid protests are serious matters that can adversely impact on the procurement system, unless effective and equitable standards exist. Dock Express Contractors, *supra*. These timelines ensure that all parties have a fair opportunity to present their cases, and protests are resolved in a reasonably speedy manner without unduly disrupting the government's procurement process. *Id.*

#### **Agency Resolution without a Bid Protest**

No authority has been found, which allows the agency or contracting officer to resolve any conflict they deem should be resolved. Likewise, no specific authority has been found, which authorizes the contracting officer to pay B&P costs to a contractor that has not filed a bid protest. Although the Armed Services Board of Contract Appeals (ASBCA) previously professed jurisdiction over bid protests for B&P costs based on an implied contract theory, case law is clear that the ASBCA does not have jurisdiction to hear bid protest cases, and no implied contract exists based on these types of cases. Apex Management Services, ASBCA No. 27341, 86-3 BCA ¶ 19,167; Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318. Hence, the agency, GAO and COFC are the proper entities to resolve bid protests. FAR 33.103, 33.104, Shoals American Indus. Inc. v. United States, *supra*.

Previously, the Armed Services Board of Contract Appeals (ASBCA) believed it had jurisdiction to award B&P costs for a claim filed regarding a non-award and cancelled procurement or solicitation. Hi-Tech Electronics Corp., ASBCA No. 25968, 81-2 BCA ¶ 15,360; Consumers Packing Company, ASBCA No. 27092, 82-2 BCA ¶ 15,996. The Board rationalized that its jurisdiction under the CDA clearly depended upon the existence of a contract; and, the CDA applied to any express or implied contract (including those of the nonappropriated fund activities. Hi-Tech Electronics Corp., *supra*. The Board further rationalized that allegations that the contracting officer failed to give honest consideration to contractors' bids provided a "colorable factual situation within the purview of the implied contract." *Id.* Thus, the Board concluded that its jurisdiction was established by the existence of an implied contract, which authorized it to grant the same remedy that the COFC declared to be available for a breach. *Id.* However, the findings of jurisdiction in those cases were ultimately overruled by the Federal Circuit in Coastal Corporation, Moss Bluff Storage Venture and New Jersey Strategic Reserve v. United States, 713 F.2d 728 (U.S. App. 1983); James M. Smith, Inc., ASBCA No. 81-251-1, 83-2 BCA ¶ 16,866; Ammon Circuits Research, *supra*.

In Coastal Corporation, *supra*, Appellant claimed it should be awarded B&P costs under the theory of implied contract because the Government improperly cancelled a solicitation. The court vacated the decision rendered by the Energy Board of Contract Appeals and stated as follows:

The theory upon which a contractor may recover bid preparation costs is that the government had breached an

implied contract, obligating it "to treat a bid honestly and fairly," because its "conduct was arbitrary and capricious toward the bidder-claimant." . . . That implied contract, which defines the way the government must deal with bids in the process of selecting a contractor, is not a contract for the procurement of goods under section 3(a) of the Act. The implied contract to give bids "fair and honest consideration" . . . that the appellants assert the government breached, was preliminary and ancillary to any contract, express or implied, the government might enter into for goods or services. It was not itself such a contract, however.

*Id.* The court further quoted United States v. John C. Grimberg, 702 F.2d 1362, 1368 (Fed. Cir. 1983), which stated that "Congress explicitly specified the types of contracts that it intended the Act to cover. An implied contract to treat bids honestly and fairly is not one of them. The [Act] deals with contractors, not with disappointed bidders . . ." *Id.* These statements have been restated in ASBCA cases. Ammon Circuits Research, supra; LaBarge Products, ASBCA No. 33593, 91-3 BCA ¶ 21,110; Fil-Coil Company, Inc., ASBCA No. 27216,82-2 BCA ¶ 16,125. Since Coastal Corporation, supra, the ASBCA has held that it does not have jurisdiction to hear bid protest issues. Zero Manufacturing Company, ASBCA No. 16,850, 83-2 BCA ¶ 16,850; Wendel Lockard Construction Co., ASBCA No. 33896, 87-3 BCA ¶ 20,055; E.M. Scott & Associates, ASBCA No. 45869, 94-1 BCA ¶ 26,258; Apex Management Services, supra. In fact, in Wendel Lockard Construction Co., supra, the ASBCA concluded that "[u]nder the Contract Disputes Act, the Board has jurisdiction over claims relating to contracts. Bid protests - whether concerning awards to other offerors or cancellation of solicitations - do not relate to contracts. Boards of contract appeals lack jurisdiction to consider such matters." *Id.*

Based on the above stated discussion, requests to the agency for B&P costs are to be resolved by the protestor's filing of a protest with the agency. If the protestor fails to file a protest with the agency within the mandated timeline, in most cases, its only recourse for resolution of the issue is to file a claim with the COFC. In some cases, however, the agency may consider the merits of an untimely protest. FAR 33.103(4) (e). FAR 33.103(4)(e) states that "the agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed." Marathon LeTourneau Sales &

Services Co., supra. Good cause is defined as a compelling reason beyond the protester's control that prevented it from filing a timely protest. Central Texas College, B-245233, Feb. 6, 1992, 92-1 CPD ¶ 151. NPF Services, Inc., B-236841.2, Jan. 3, 1990, 90-1 CPD ¶9. On the other hand, issues significant to the agency's acquisition system are protests that raise issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. System Dynamics International, Inc., B-253957, Nov. 8, 1993, 93-2 CPD ¶ 274; Davidson Company, Inc., supra.

Government agencies have considered untimely protests on the merits. WildCard Associates, supra; East West Research, Inc., B-235031, B-235032, Jul. 6, 1989, 89-2 CPD ¶ 20. Thus, in accordance with FAR 33.103(4)(e) and case precedence, if a protestor fails to file a timely protest for B&P costs, the Government may consider an untimely bid protest for good cause, or for issues significant to the agency's acquisition system. GAO, however, has stated that the fact that an agency considers an untimely protest on the merits does not alter the fact that it is untimely filed, and GAO's timeliness regulations are not waived by the contracting officer's consideration of the untimely protest. WildCard Associates, supra; East West Research, Inc., supra. Therefore, if the agency considers an untimely bid protest for B&P costs and the protester is not satisfied with the results, GAO may conclude that no good cause or significant issue exists for it to consider the case on its merits, although the protester may still file a claim with the COFC.

### Protests to GAO

A bid protester may recover B&P costs by filing a protest with GAO. The Competition in Contracting Act (CICA), Pub.L.No. 98-369 (1984), 31 U.S.C. §§ 3551-56 (2000), was enacted to promote competition in the government's procurement of goods and services. United States v. Instruments, S.A., Inc., D.D.C., 807 F.Supp. 811 (1992); Virginia Electric and Power Co., Baltimore Gas & Electric Co., B-285209, Aug. 2, 2000, 2000 Comp. Gen. Proc. Dec. ¶ 134. Under CICA, GAO has jurisdiction to resolve bid protests concerning solicitations and contract awards issued by a federal agency. Compugen, Ltd., B-261769, Sep. 5, 1995, 95-2 CPD ¶ 103. CICA provides that the Comptroller General shall decide protests "concerning an alleged violation of a procurement statute or regulation." Department of the Air Force; Defense Contract Audit Agency; Canadian Commercial Corporation/Heroux, Inc., B-253278,

253278, 253278, Apr. 7, 1994, 94-1 CPD ¶ 247. Hence, under CICA, GAO's authority to allow the recovery of B&P costs is predicated on a determination that a solicitation, proposed award, or award does not comply with a statute or regulation. EAI Corporation, B-252748, Jul. 26, 1993, 93-2 CPD ¶ 56; 31 U.S.C. @ 3554(c)(1); 4 C.F.R. @ 21.6(d).

The protest system established by CICA and implemented by GAO Bid Protest Regulations is designed for the expeditious resolution of protests with only minimal disruption to the procurement process. DataVault Corp, *supra*; AAA Engineering & Drafting, Inc., B-236034.3, Apr. 6, 1993, 93-1 CPD ¶ 295; 31 U.S.C. @ 3554 (2000). GAO's bid protest procedures are set forth at 4 C.F.R. Part 21 (1996). Additionally, several agency FAR supplements contain other procedures governing GAO bid protests. DFARS 233.1, AFARS 33.104, AFFARS 5333.104, NAPS 5233.104. DLAAR 33.104.

Bid protests to GAO, not based on alleged solicitation improprieties, must be filed within 10 working days after the basis for protest is known, or should have been known. Davidson Co., Inc., *supra*; 4 C.F.R. @ 21.2(a)(2)(2000). If a protest is first filed with the contracting agency, a subsequent protest to GAO must be filed within 10 days of the date the protester learns of the initial adverse agency action on the agency-level protest, but only if the initial protest was timely. *Id*; 4 C.F.R. @ 21.2(a)(3)(2000); WildCard Associates, *supra*. However, an untimely protest may be considered for good cause, or, if a significant issue raises issues of widespread interest to the procurement community, and which have not been considered on the merits in a previous decision. 4 C.F.R. @ 21.2(a)(3)(c)(2000); Marathon LeTourneau Sales and Service Co., *supra*; Davidson Co., Inc., *supra*.

GAO recommends the payment of B&P costs on a case-by-case basis. Propulsion Controls Engineering, B-244619.2, Mar. 25, 1992, 92-1 CPD ¶ 306; Kime Enterprises, Inc., B-241996.5, Dec. 9, 1991, 91-2 CPD ¶ 523; 4 C.F.R. § 21-6(e)(1996). B&P costs must be reasonable, and anticipatory profits are not recoverable. Rockwell International Corp. v. United States, 8 Cl.Ct. 662 (1985); Compubahn, Inc. v. United States, 33 Fed. Cl. 677 (1995). The recovery of B&P costs is based on the theory that the government, when issuing a solicitation, enters into an implied contract with the bidders or offerors that their bids or proposals will be fairly and honestly considered. Ultra Publicaciones, S.A., B-200676, Mar. 11, 1981, 81-1 CPD 190, citing Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956).

The standard adopted for recovery of B&P costs by both the GAO and the United States Claims Court was set out in Keco Industries, Inc. v. U.S., *supra*; Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. United States, *supra*. The Keco standard is whether the Government's conduct was arbitrary and capricious. *Id.* The court in Keco refers to the terms "arbitrary" and "capricious" as joined conjunctively, and not as used in a disjunctive sense. In determining whether the government's actions are sufficiently capricious to warrant reimbursement of these costs, GAO has held that it is not enough that a claimant can establish that the actions complained of appear arbitrary in retrospect. Base Information Systems, Inc., B-186932, Mar. 22, 1979, 79-1 CPD ¶ 196. It must appear that the action was motivated by caprice or constructive bad faith, the evidence showing that those involved knew, or should have known, that what they were doing was arbitrary. *Id.* The claimant need not show actual ill will on the part of government officials but must show that under the circumstances, procuring officials should be held responsible for at least not having recognized the nature of what they did. *Id.* The claimant must demonstrate that the action complained of was taken without reason. *Id.* Furthermore, to be arbitrary and capricious, the government action must result from something more than "ordinary" or "mere" negligence. Ultra Publicaciones, S.A., *supra*, citing Groton Piping Corp. and Thames Elec. Co. (Joint Venture), B-185755, Jun. 3, 1977, 77-1 CPD 389 and Morgan Business Ass., B-188387, May 16, 1977, 77-1 CPD 344. The court has not held that the Government warrants that procurements will be wholly free of error, and the Government is not required to indemnify offerors if a mistake is made. Base Information Systems, Inc., *supra*. The possibility of error is a risk of doing business with the Government. *Id.*

The criteria for determining whether the Government's actions were arbitrary and capricious are as follows:

- (1) There was bad faith on the part of the procuring officials;
- (2) There was no reasonable basis for the administrative decision depriving the bidder of fair consideration of its proposal;
- (3) The degree of proof of error necessary for recovery is related to the amount of discretion entrusted to the officials by applicable statutes and regulations; and

Proven violation of pertinent statutes and regulations can, but need not necessarily be grounds for recovery.

- (4) Proven violation of pertinent statutes or regulations can, but need not necessarily, be grounds for recovery.

Keco Industries, Inc. v. U.S., *supra*; Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. United States, *supra*. A protester is not entitled to compensation for every irregularity that occurs during the solicitation/bid process. Kinetic Structures, 6 Cl.Ct. 387, 26 G.C. ¶ 316, 318 (1984); Ultra Publicaciones, S.A., *supra*, citing Keco Industries, Inc. v. U.S., *supra*. Hence, although a determination that a solicitation, proposed award, or award of a contract does not comply with a statute or regulation may be a basis for recommending an award of B&P costs, statutory or regulatory violations are not always grounds for recovery of B&P costs. Dynalectron Corp. v. U.S., 4 Cl. Ct. 424, 429 (1984); Decision Sciences Corp., B-196100, Oct. 20, 1980, 80-2 CPD ¶ 298; Base Information Systems, Inc., *supra*.

The GAO set forth its initial standard for recovery of B&P costs in Discount Machinery & Equipment, Inc., B-220949, Feb. 25, 1986, 86-1 CPD ¶ 290. In that case, the Comptroller found that the contractor was entitled to recover its protest costs, since GAO was unable to recommend contract award to the protester. Recovery of B&P costs was deemed allowable when the agency unreasonably excluded the protester from the procurement, and no other remedy or corrective action was appropriate. The decision in Discount Machinery, *supra*, illustrates the rigid standards in 4 C.F.R. @ 21.6(e), initially applied by GAO for recovery of B&P costs. Previously, GAO allowed recovery of B&P costs only when the protester was unreasonably excluded from the procurement, **unless** some other remedy was deemed appropriate. However, after the 1987 amendments, GAO ceased to adhere to those standards, having found that its use of that practice did not always lead to a just result. 52 Fed. Reg. 46,448 (1987). Therefore, the 1987 amendments totally deleted 4 C.F.R. @ 21.6(e). *Id.*

If an agency promptly initiates remedial action in response to a bid protest, the GAO generally will not award B&P costs. Tidewater Marine, Inc., B-270602, Aug. 21, 1996, 96-2 CPD ¶ 81; Cantu Services, Inc., B-250592.2, Feb. 23, 1993, 93-1 CPD ¶ 390. However, if the agency decides to take corrective action in response to a protest, but unreasonably delays the corrective action, GAO generally will recommend that the agency pay B&P

costs. Miller Elevator Service Company, supra; Griner's-A-One Pipeline Services, B-255078, July 22, 1994, 94-2 CPD ¶ 41: 4 C.F.R. § 21.8(F)(1)(1996). The protester is required to file its request for declaration of entitlement to B&P costs within 15 days after notification of the agency's decision to take corrective action. 4 C.F.R. § 21.8(e)(1996); Moon Engineering, B-247053, Aug. 27, 1992, 92-2 CPD ¶ 129.

If GAO recommends the agency pay the protester B&P costs, the protester is required to file its claim for costs with the contracting agency within 60 days after receipt of GAO's recommendation. 4 C.F.R. § 21.8(f)(1)(1996); FAR 33.104 (h)(2). Miller Elevator Service Company, supra. Failure to file the claim within that timeframe may result in forfeiture of the protester's right to recover its B&P costs. *Id.* The parties must attempt to agree on the amount of costs to be paid. Diverco, Inc., supra; FAR 33.104(h)(3); 4 C.F.R. § 21.8(f)(1) (1996). If the parties cannot reach an agreement within a reasonable time, GAO may recommend the amount to be paid. *Id.* GAO may also recommend the agency pay the costs of pursuing the claim for costs before the GAO. York Building Services, Inc., Olympus building Services, Inc., B-282887, Aug. 29, 2000, 2000 CPD ¶ 141.

The agency must promptly pay the costs, or promptly report to GAO its reason(s) for not following the recommendation. York Building Services, Inc., supra. The agency has 60 days to notify the GAO of its response to GAO's recommendation of the amount of B&P costs to be paid to the protestor. 4 C.F.R. § 21.8(f)(3)(1996); FAR 33.104 (h)(4). However, agency personnel should consult legal counsel before paying a recommended award. FAR 33.104 (h)(6). As previously stated, under the APA, a protestor that is dissatisfied with GAO's recommendation may seek judicial review of the agency's action through the COFC. Hawpe Construction, Inc. v. United States, 46 Fed. Cl. 571 (2000).

### **United States Claims Court**

A dissatisfied bidder may recover B&P costs by a filing a claim with the COFC. The Tucker Act grants the COFC jurisdiction to render judgment upon any claim for damages against the United States based on the Constitution, an Act of Congress, agency regulation, or express or implied-in-fact contract. ES-KO, Inc. v. United States, supra; 28 U.S.C. § 1491 (2000). The Federal Court Improvement Act of 1982 grants the COFC the authority to grant complete relief on any contract claim filed before contract

award, including declaratory judgments, or other equitable and extraordinary relief it deems proper. Pub.L.No. 97-164, § 133(a), 96 Stat. 25, 40 (1982), 28 U.S.C. § 1491(a)(3)(2000). Additionally, the Administrative Dispute Resolution Act of 1996 (ADR Act) amended the Tucker Act and provides the COFC with federal procurement post-award bid protest jurisdiction, concurrent with that of federal district courts, thereby giving it the jurisdiction to hear pre-award and post-award bid protests. Allied Technology Group, Inc. v. United States, 39 Fed. Cl. 125 (1997); Pub.L.No. 104-320 § 12, 110 Stat. 3870, 3874 (1996). Hence, the ADR Act extended the COFC's jurisdiction in pre-award and post-award bid protests, specifically giving the COFC jurisdiction to hear protests by interested parties objecting to a solicitation, proposed award, or alleged statute violation. *Id.*; 28 U.S.C. § 1491(b)(1)(2000). Likewise, the ADR Act gives the COFC the express authority to award successful protesters monetary relief in the form of B&P costs. Allied Technology Group, Inc. v. United States; *supra*.

The scope of the COFC jurisdiction to award B&P costs is founded on the implied contract theory. Kinetic Structures Corp. v. United States, *supra*. When the government solicits bids on a contract, it automatically enters into an implied-in-fact contract to treat the bidders fairly. Hawpe Construction, Inc., *supra*; IMS Services, Inc., 33 Fed. Cl. 167, 178 (1995). This implied-in-fact contract requires the government to fully and fairly consider all bids submitted in accordance with an invitation for bids. *Id.* Thus, in order to recover B&P costs, a plaintiff is required to show that the Government breached its implied-in-fact contractual obligation to fully and fairly consider the plaintiff's bid. *Id.* As previously stated, the standard adopted for recovery of B&P costs was set out in Keco Industries, Inc. v. U.S., *supra*. Hence, the Government is said to have breached the implied-in-fact contract if its consideration of offers is found to be arbitrary and capricious toward the protestor. *Id.* Furthermore, the court has applied the stringent standards required of bidders seeking injunctions to protesters seeking to recover B&P costs. Blackwell v. U.S., 4 Cl. Ct. 424, 429 (1984). The bidder is not only required to show that a breach of the contractual obligation of fair consideration occurred, but must also show that (1) its bid was responsive, (2) the bid was within the zone of active consideration, and (3) there is substantial chance of receiving award. *Id.* Contrary to GAO, the COFC currently has no specific timeliness requirement for filing an action. However, actions should be quickly filed after the protestor becomes aware of the conflict, and actions for B&P costs must be completed within 6

years of the date the right of action first accrues. 28 U.S.C. § 2401(a)(2000).

**CONCLUSION:**

There is clear authority for bidders to recover B&P costs from the agency, GAO, or the COFC, if a timely bid protest or proper claim is filed. Likewise, under certain circumstances, specific authority exists to recover B&P costs from the agency or GAO, when an untimely bid protest is filed. However, there is no specific authority for agencies to resolve a bidder's request for B&P costs when the bidder has not filed a bid protest requesting said costs. Hence, the conclusion must be that if a bidder fails to file a timely agency bid protest for B&P costs, AMC can only pay these costs if it determines that a good cause or significant issue exists for AMC to consider an untimely bid protest on the merits. In that case, the bidder should be advised to submit its untimely bid protest for action. If no good cause or significant issue exists, then the bidder must file a claim with the COFC to recover these costs.

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