

# Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals

Major Eugene Y. Kim\*

*The surest way to be late is to have plenty of time.*<sup>1</sup>

## I. Introduction

One of the unique aspects of litigating contract disputes before the Government Accountability Office (GAO)<sup>2</sup> is its iron-clad adherence to the timeliness rules contained in its bid protest regulations.<sup>3</sup> Under the Competition in Contracting Act (CICA) of 1984, the GAO has 100 days to resolve bid protests.<sup>4</sup> This statutory requirement (known as the “100 Day Rule”<sup>5</sup>) has yielded a significant body of case law that upholds what has been referred to as the “golden rule”<sup>6</sup> of the GAO: “late is late!”<sup>7</sup>

The CICA’s 100 Day Rule, coupled with the GAO’s strict enforcement of this requirement, strongly promotes the timely disposition of bid protests.<sup>8</sup> Very often, significant litigation resources can be saved if the litigator is aware of the rules and applicable decisions of the Comptroller General regarding the timeliness of bid protests and related submissions. When presented with a motion to dismiss for lack of timeliness that is factually sufficient, the GAO will, in all likelihood, grant the request, thereby allowing the acquisition process to continue without the delay that would be required by litigation.<sup>9</sup>

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\* Judge Advocate, U.S. Army. Presently assigned as Chief, Contract and Fiscal Law Division, Office of the Staff Judge Advocate, Multi-National Security Transition Command – Iraq. LL.M., 2007, The Judge Advocate General’s Legal Center & School (TJAGCLS), Charlottesville, Va; J.D., 1997, The Catholic University of America; B.S., 1993, New York University. Previous assignments include Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency, Arlington, Va, 2004-2006; Recruiting Officer, U.S. Army Judge Advocate Recruiting Office, Rosslyn, Va, 2002-2004; Deputy Commander and Chief, Military Claims Division, U.S. Armed Forces Claims Service, Korea, Yongsan Army Garrison, Republic of Korea, 2001-2002; Operational Law Attorney, Office of the Judge Advocate, U.N. Command, U.S. Forces Korea, and Eighth U.S. Army, Yongsan Army Garrison, Republic of Korea, 2000-2001; Administrative Law Attorney, Trial Counsel and Labor Counselor, Office of the Staff Judge Advocate, U.S. Army Japan and 9th Theater Army Area Command, Camp Zama, Japan, 1998-2000. Member of the bars of the District of Columbia, Maryland, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course. The author wishes to express his sincere appreciation to Lieutenant Colonel Ralph Tremaglio, who provided invaluable guidance and encouragement during the drafting process. The author dedicates this article to his wife, Jeannie, and their daughter, Deborah.

<sup>1</sup> Leo Kennedy, QuoteWorld.org, [http://www.quoteworld.org/category/time/author/leo\\_kennedy](http://www.quoteworld.org/category/time/author/leo_kennedy) (last visited Dec. 13, 2007).

<sup>2</sup> See generally GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (renaming the General Accounting Office to the Government Accountability Office).

<sup>3</sup> See, e.g., *Edron, Inc.—Reconsideration*, Comp. Gen. B-207353.2, Sept. 8, 1982, 82-2 CPD ¶ 207 (dismissing protest as untimely when protest was filed seven days late). In *Edron*, the GAO provided a concise yet illuminating justification on why it strictly enforces the timeliness provisions of its bid protest rules:

Although the rule may seem harsh . . . we do not regard our timeliness standards as mere technicalities. To raise a legal objection to the award of a Government contract is a serious matter. At stake are not only the rights and interests of the protester, but those of the contracting agency and other interested parties. Effective and equitable procedural standards are necessary so that parties have a fair opportunity to present their case and so that protests can be resolved in a reasonably speedy manner. Accordingly, the rules on timeliness impose strict time standards that we enforce strictly.

*Id.*

<sup>4</sup> Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 [hereinafter CICA 1984], amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, § 5501(2)(A) [hereinafter NDAA 1996].

<sup>5</sup> See, e.g., Roseanne Gerin & Mary Mosquera, *Qwest, Northrop Grumman Protest \$1 Billion TCE Award*, WASH. TECH., Dec. 13, 2004, available at [http://www.washingtontechnology.com/news/1\\_1/industry/25153-1.html](http://www.washingtontechnology.com/news/1_1/industry/25153-1.html).

<sup>6</sup> See, e.g., GAO: “Late is Late” Doesn’t Apply Just to Receipt of Bids, ARMY LAW., Jan. 2000, at 1, 48.

<sup>7</sup> See, e.g., *id.* n.476 (“The phrase ‘late is late’ is used frequently by practitioners to refer to the GAO’s stringent timeline that a protester must meet in filing its protest.”).

<sup>8</sup> See Ralph O. White & Kenneth L. Kilgour, *Agency ‘Corrective Action’ in the Face of a GAO Bid Protest: An Increasingly Likely Outcome for Protesters?*, 86 FED. CONT. REP. (BNA) 411 (Oct. 24, 2006) (“[CICA] ensures the expeditious handling of protests by requiring that GAO resolve all protests within 100 calendar days of the date filed.”).

<sup>9</sup> See, e.g., Raith Eng’g & Mfg. Co., W.L.L., Comp. Gen. B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 (dismissing protest as untimely because agency-level protest was untimely); Advanced Fed. Servs. Corp., Comp. Gen. B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 (dismissing protest issues raised against a negotiated procurement, when the issues were based on information contained in the agency report and protester failed to raise the issues within ten days after receipt of the agency report); Buckley & Kaldenbach, Inc., Comp. Gen. B-298572, Oct. 4, 2006, 2006 CPD ¶ 138 (dismissing as untimely a protest challenge to an agency’s refusal to set-aside procurement for small-business, because protester failed to raise the issue before bid opening).

The speedy and economical nature of litigation before the GAO stands in stark contrast to the “complex, slow, expensive, inefficient, processing-oriented system”<sup>10</sup> that is in place at the boards of contract appeals. The boards are tasked with reviewing contractor claims filed under the Contract Disputes Act (CDA) of 1978.<sup>11</sup> Although both the CICA and CDA provide for alternative, non-judicial forums that resolve disputes related to government procurements, the CDA lacked a key feature that the CICA possessed: a specific and strict deadline for the resolution of cases.<sup>12</sup> In the absence of a CICA-like legislative mandate to review and decide cases within an established timeframe, “[c]oncerns . . . related to the (apparent, or at least perceived) decrease in speed of board resolution are not new.”<sup>13</sup> This is particularly true in the case of the Armed Services Board of Contract Appeals (ASBCA), the largest of the boards of contract appeals.<sup>14</sup>

This article is premised upon the following thesis: the ASBCA should adopt a modified version of the 100 Day Rule in order to achieve the administrative efficiencies originally envisioned by the CDA. This thesis will be advanced from four vantage points. First, the GAO’s bid protest rules on timeliness (as formulated in the CICA and implemented by the GAO’s Bid Protest Regulations and decisions of the Comptroller General) will be examined.<sup>15</sup> Second, the CDA’s provisions on timely contract appeals will be summarized in concert with the ASBCA’s rules of procedure. Third, the case load statistics for the GAO and the ASBCA will be reviewed. Fourth and finally, a variant of the 100 Day Rule for the ASBCA will be proposed, so that the ASBCA may replicate the success the GAO enjoys in its expeditious and equitable processing of bid protests.

## II. The Timeliness Provisions of the GAO’s Bid Protest Regulations

Bid protests generally involve disputes concerning the award of a federal contract.<sup>16</sup> Under the CICA, the Comptroller General is authorized to review bid protests and issue recommendations on the merits.<sup>17</sup> The GAO’s Bid Protest Regulations, codified in Title 4, Part 21 of the Code of Federal Regulations (C.F.R.), provide the regulatory foundation upon which the bid protest process is based.<sup>18</sup> Originally promulgated in 1985 (one year after the enactment of the CICA), the GAO’s Bid Protest Regulations implement the requirements of the CICA and provide “the rules concerning where and how to file a protest, what to expect in the way of subsequent actions, and the time frames established for completion of those actions.”<sup>19</sup> Parties to a bid protest are considered to have constructive knowledge of the contents of the GAO’s Bid Protest Regulations because the regulations are published in the Federal Register.<sup>20</sup>

In addition to the GAO’s Bid Protest Regulations, bid protest decisions have been issued by the Comptroller General that expressly recognize and rigidly uphold the timeliness requirements contained in these regulations.<sup>21</sup> The GAO recognizes relatively few exceptions to its timeliness rule, and these exceptions have high substantive thresholds, making their successful

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<sup>10</sup> Steven L. Schooner, *What Next? A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978*, 28 PUB. CONT. L.J. 635 (1999).

<sup>11</sup> See generally Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 [hereinafter CDA 1978].

<sup>12</sup> Compare *id.*, with CICA 1984, *supra* note 4.

<sup>13</sup> Schooner, *supra* note 10, at 650.

<sup>14</sup> See generally Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 PUB. CONT. L.J. 505, 527 (2004).

<sup>15</sup> It is not the intent of this article to conduct a recitation and/or comparison of the full spectrum of rules and regulations that govern the litigation of bid protest and contract appeals. This article will instead focus only on those rules and regulations that impact the timely submission and prosecution of bid protests under the CICA and contract appeals under the CDA.

<sup>16</sup> See 31 U.S.C. § 3551(1) (2000).

<sup>17</sup> CICA 1984, *supra* note 4. The Budget and Accounting Act of 1921 established both “the position of Comptroller General of the United States and the office he heads, the General Accounting Office.” 1 JOHN C. MCBRIDE & THOMAS J. TOUHEY, *GOV’T CONTRACTS: LAW, ADMIN. & PROCEDURES* § 7.10 (2007). See also Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

<sup>18</sup> 4 C.F.R. pt. 21 (2007). See also U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-06-797SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* 40 (8th ed. 2006) [hereinafter GAO GUIDE].

<sup>19</sup> GAO GUIDE, *supra* note 18, at 5. See also CICA 1984, *supra* note 4.

<sup>20</sup> GAO GUIDE, *supra* note 18, at 6.

<sup>21</sup> *Id.* at 11 (“Because bid protests may delay the procurement of needed goods and services, GAO, except under limited circumstances, strictly enforces these timeliness requirements.”). See, e.g., *CBMC, Inc., Comp. Gen. B-295586*, Jan. 6, 2005, 2005 CPD ¶ 2 (dismissing as untimely a protest that was received by GAO less than four hours after the deadline established by 4 C.F.R. § 21.0(g)).

use a rare occurrence.<sup>22</sup> As a consequence, the GAO has been able to maintain the integrity of the bid protest process while still providing a forum for protesters where their grievances can be reviewed in a fair, economical, and speedy manner.<sup>23</sup>

#### A. The Competition in Contracting Act of 1984 and the 100 Day Rule

On 18 July 1984, President Ronald Reagan signed the CICA into law.<sup>24</sup> The CICA represented the first statutory codification of the GAO's bid protest review authority, a power it had been exercising since 1926.<sup>25</sup> Prior to the passage of the CICA, a major deficiency in the bid protest process was the amount of time that elapsed before the GAO was able to resolve a protest.<sup>26</sup> To solve this problem, and to "strengthen the bid protest function currently in operation"<sup>27</sup> at the GAO, the CICA amended Title 31 of the United States Code (31 U.S.C.) by adding Subchapter V, Procurement Protest System.<sup>28</sup> In addition to granting express (although not exclusive) authority to the Comptroller General to review bid protests, the CICA also provided the framework against which the GAO's Bid Protest Regulations are based.<sup>29</sup>

As originally enacted under the CICA, 31 U.S.C. § 3554(a)(1) required the Comptroller General to "issue a final decision concerning a protest within 90 working days from the date the protest is submitted . . ."<sup>30</sup> The Comptroller General could issue a final decision on a bid protest after the 90 working-day requirement had expired upon issuance of written justification for the additional time; however, this authority was for "unique circumstances only."<sup>31</sup> In 1988, a revision to 31 U.S.C. § 3554(a)(1) stripped the Comptroller General of his authority to extend the period for issuing his decision on a bid protest.<sup>32</sup> In 1994, the decision deadline changed from "90 working days"<sup>33</sup> to "125 days."<sup>34</sup> In 1996, 31 U.S.C. § 3554(a)(1) was amended again; under the revised statute, the Comptroller General was allotted 100 days<sup>35</sup> to render a decision on a bid protest.<sup>36</sup> The GAO has expressly recognized its obligation to adhere to the stringent bid protest timelines established by Congress:

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<sup>22</sup> See, e.g., *R&K Contractors, Inc.*, B-292287, 2003 U.S. Comp. Gen. LEXIS 139, at \*12 (July 23, 2003) (dismissing as untimely a protest that did not fall within the scope of "the significant issue or good cause exceptions to the timeliness requirements of [the GAO's] Bid Protest Regulations, 4 C.F.R. § 21.2(c).").

<sup>23</sup> See *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107, at \*6 ("In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used.").

<sup>24</sup> Statement of President Ronald W. Reagan on Signing the Deficit Reduction Act of 1984, 2 PUB. PAPERS 1053 (July 18, 1984), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=40166>. Although there was no apparent disharmony between the legislative and executive branches over the bid protest timeliness provisions contained in the CICA, President Reagan used his signing statement to express his strong opposition to the CICA provision that enabled the Comptroller General to stay the award of a federal contract:

I am today signing H.R. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.

*Id.* See also *MCBRIDE & TOUHEY*, *supra* note 17, § 7.10.

<sup>25</sup> *The Effort to Increase Competition in Procurement: A Twenty-Year Perspective*, 42 FED. CONT. REP. (BNA) 1045 (Dec. 24, 1984) [hereinafter *CICA Twenty-Year Perspective*]. Prior to the enactment of the CICA, the GAO invoked "the Budget and Accounting Act of 1921 as authority . . . to decide bid protests." *Id.*; see also *GAO GUIDE*, *supra* note 18, at 5.

<sup>26</sup> *CICA Twenty-Year Perspective*, *supra* note 25.

<sup>27</sup> *Conf. Rep. on Competition and Protest Provisions in H.R. 4170, The Tax/Deficit Reduction Bill*, 42 FED. CONT. REP. (BNA) 28 (July 2, 1984) [hereinafter *CICA Conference Report*].

<sup>28</sup> CICA 1984, *supra* note 4, § 2741(a). See also *CICA Twenty-Year Perspective*, *supra* note 25.

<sup>29</sup> § 2741(a). See also *CICA Conference Report*, *supra* note 27; *MCBRIDE & TOUHEY*, *supra* note 17, § 7.10. Although the statutory genesis of the GAO's Bid Protest Regulations can be traced directly to the CICA, the GAO did have regulations on its bid protest function as early as 1966. See *CICA Twenty-Year Perspective*, *supra* note 27.

<sup>30</sup> § 2741(a).

<sup>31</sup> *CICA Conference Report*, *supra* note 27; see also CICA 1984, *supra* note 4, § 2741(a).

<sup>32</sup> Department of Defense Appropriations Act of 1989, Pub. L. No. 100-463, 102 Stat. 2270, § 8139 (1988).

<sup>33</sup> *Id.*

<sup>34</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, § 1403(a)(1).

<sup>35</sup> NDAA 1966, *supra* note 4, § 5501(2)(A).

<sup>36</sup> *Id.*; see also 31 U.S.C. § 3554(a)(1) (2000).

The Competition in Contract Act of 1984 (CICA), as amended, requires our Office to complete its review of bid protests within 100 calendar days—a deadline consistently met—to minimize the disruption that protests necessarily engender. 31 U.S.C. § 3554(a)(1) (2000). Congress decided that, in the event that a protest qualifies for a stay of performance under the terms of the [Competition in Contracting] Act, the 100-day timeframe strikes an appropriate balance between agency needs and the need to preserve the possibility of meaningful relief for contractors whose protests are vindicated upon review.<sup>37</sup>

## B. Key GAO Definitions Regarding Timeliness

Since the bid protest process has the potential to be dominated (if not ultimately determined) by issues related to the timeliness of filings, the GAO's Bid Protest Regulations include definitions for three basic, yet crucial, terms that are used throughout its timeliness provisions: "days," "filed," and "adverse agency action."<sup>38</sup> The GAO's definition for these terms can be the decisive factor in resolving a timeliness issue; therefore, a summary review of these terms is appropriate.<sup>39</sup>

Pursuant to 4 C.F.R. § 21.0(e), days are defined as "calendar days."<sup>40</sup> The calculation of time periods during the bid protest process is subject to three conditions: (1) the day upon which a triggering event takes place is excluded; (2) if the final day for timeliness purposes is a Saturday, Sunday, or federal holiday, then the deadline is extended to the next day that is not one of the aforementioned days; and (3) if the GAO is closed on the day when a filing is due, the deadline for submission becomes the day that the GAO re-opens.<sup>41</sup> Under 4 C.F.R. § 21.0(g), a document is considered to be filed in a timely manner with the GAO if it is received on the final day of timeliness "by 5:30 p.m., eastern time."<sup>42</sup> In choosing a method for transmitting protest documents (e.g., regular mail, electronic mail, or facsimile), "the protester assumes the risk that the protest will not be received at [the GAO] in a timely manner."<sup>43</sup> An agency action (or lack thereof) is considered to be adverse under 4 C.F.R. § 21.0(f) if it is "prejudicial to the position taken in a protest with the agency . . ."<sup>44</sup>

## C. Timeliness of Bid Protests Filed with the GAO

Under the GAO's Bid Protest Regulations, the question of when to file a bid protest is generally determined by the substantive arguments that are advanced in the protest, and the forum within which the protester chooses to obtain relief.<sup>45</sup>

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<sup>37</sup> SMF Sys. Tech. Corp., Comp. Gen. B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203, at \*11–\*12.

<sup>38</sup> See 4 C.F.R. § 21.0 (2007).

<sup>39</sup> See, e.g., Lifecare Mgmt. Partners, Comp. Gen. B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 (dismissing protest issue as untimely, following analysis of the GAO's definition of "adverse agency action"); Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186 (Sept. 16, 2004) (dismissing protest issue as untimely, following analysis of the GAO's definition of "days"); Koehlke Components, Inc.—Reconsideration, B-243248.2, 1991 U.S. Comp. Gen. LEXIS 512 (Apr. 8, 1991) (affirming dismissal of untimely protest, following analysis of the GAO's definition of the term "filed").

<sup>40</sup> 4 C.F.R. § 21.0(e).

<sup>41</sup> *Id.*; see also Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186, at \*5 (Sept. 16, 2004) ("While we recognize that our Regulations define the term "days" as "calendar days," 4 CFR § 21.0(e), the clear intent behind the Regulations, read as a whole, is that documents may be, and are considered, filed only on days when our Office is open for business.").

<sup>42</sup> 4 C.F.R. § 21.0(g). When the GAO receives a protest-related document, it will mark the document with a date and time stamp. See GAO GUIDE, *supra* note 18, at 16. However, the presumed accuracy of the GAO's own date and time stamp can be overcome "where other evidence clearly establishes the time that the protest arrived at" the GAO. Guam Shipyard, B-294287, 2004 U.S. Comp. Gen. LEXIS 186, at \*3–\*4 (Sept. 16, 2004) ("While we rely upon our time/date stamp to determine the timeliness of protest filings with our Office where other evidence clearly establishing the time that the protest arrived is absent . . . we will not rely upon the stamp where other acceptable evidence of earlier receipt is available . . ."). *Id.* at \*4. Protest-related documents that are transmitted to GAO via electronic mail or facsimile after 5:30 p.m. eastern time are considered "filed as of the opening of business on the following business day." *Id.* at \*5. This distinction is important in cases "where the bid opening or due date is to take place in an office located in another time zone and is scheduled right before or after a weekend or holiday." *Id.* at \*6 n.2.

<sup>43</sup> GAO GUIDE, *supra* note 18, at 17; see also Peacock, Myers & Adams, B-279327, 1998 U.S. Comp. Gen. LEXIS 102, at \*7 (Mar. 24, 1994) ("[GAO's] timeliness rules may seem harsh in some cases" and that "a protester's inability to successfully send a fax to our Office shortly before closing does not provide a basis for waiving our timeliness rules.").

<sup>44</sup> 4 C.F.R. § 21.0(f).

<sup>45</sup> See *id.* § 21.2(a)(1)–(3).

The resolution of these two issues will determine which timeliness provisions are applicable, and can make the difference between a summary dismissal of a protest, or a decision on the merits.<sup>46</sup>

### 1. *The Substantive Arguments*

The timeliness provisions of the GAO's Bid Protest Regulations contemplate two basic types of substantive arguments that can be advanced in protests: arguments that allege the presence of defects in a solicitation (i.e., "improprieties in a solicitation"), and arguments that allege other defects in the procurement process (i.e., "all other cases").<sup>47</sup> In order to be considered on the merits, each protest argument "must independently satisfy GAO's timeliness requirements."<sup>48</sup>

#### a. *"Improprieties in a Solicitation"*<sup>49</sup>

As a general rule, a protest that alleges a defect in a solicitation must be filed with the GAO prior to the deadline for the opening of bids, or before the deadline for the submission of initial proposals, if the defect is apparent on its face.<sup>50</sup> If a defect in a solicitation does not become apparent until after bids are opened or initial proposals are submitted, a protest must be filed with the GAO within ten days "after the defect became apparent."<sup>51</sup> In the case of a solicitation for a negotiated procurement, a protest against a defect contained in an amendment to the solicitation must be filed with the GAO "before the next closing time established for submitting proposals."<sup>52</sup>

#### b. *"All Other Cases"*<sup>53</sup>

A protester who wishes to challenge a solicitation based on an argument that does not fall within the scope of 4 C.F.R. 21.2(a)(1) must raise the issue with the GAO within ten days of the date that the protester became aware of or should have become aware of the issue, whichever state of knowledge occurs earlier.<sup>54</sup> The basis for a protest can be a protester's actual

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<sup>46</sup> See *id.* § 21.2(b) ("Protests untimely on their face may be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester will not be permitted to introduce for the first time in a request for reconsideration information necessary to establish that the protest was timely.").

<sup>47</sup> GAO GUIDE, *supra* note 18, at 9, 12 ("Although most protests challenge the acceptance or rejection of a bid or proposal and the award or proposed award of a contract, GAO considers protests of defective solicitations, . . . as well as certain other procurement actions . . ."); see 4 C.F.R. § 21.2(a)(1).

<sup>48</sup> GAO GUIDE, *supra* note 18, at 15; see also *Haworth Inc.*, B-297053.4, 2006 U.S. Comp. Gen. LEXIS 90, at \*7 (June 7, 2006) ("Further, where, after filing a timely protest, the protester later supplements it with new protest grounds, the later-raised grounds must independently satisfy our timeliness requirements."); *Bristol Group, Inc.—Union Station Venture*, B-298086, B-298086.3, 2006 U.S. Comp. Gen. LEXIS 96, at \*3 (May 30, 2006) ("Further, where a protester initially files a timely protest, either with our Office or at the agency, and later supplements it with independent grounds of protest, the later-raised allegations must independently satisfy the timeliness requirements." (emphasis added)).

<sup>49</sup> 4 C.F.R. § 21.2(a)(1).

<sup>50</sup> *Id.* § 21.2(a)(1); GAO GUIDE, *supra* note 18, at 11. See, e.g., *Buckley & Kaldenbach, Inc.*, Comp. Gen. B-298572, Oct. 4, 2006, 2006 CPD ¶ 138 (dismissing as untimely a protest challenge to an agency's refusal to set-aside procurement for small-business, because protester failed to raise the issue before bid opening); *Advanced Tech. Sys., Inc.*, Comp. Gen. B-296493.5, Sept. 26, 2006, 2006 CPD ¶ 147, at \*53 (dismissing as untimely a protest issue that "essentially argues that the solicitation was defective"); *Brian X. Scott*, Comp. Gen. B-298370, B-298490, Aug. 18, 2006, 2006 CPD ¶ 125 (dismissing as untimely protest issues related to defects in the solicitation, after protester initially raised the issues in his comments to the agency report); *Morgan-Keller, Inc.*, Comp. Gen. B-298076.2, Aug. 1, 2006, 2006 CPD ¶ 116 (dismissing as untimely a protest challenge to a request for proposals, after protester failed to raise the issue before the deadline for receipt of proposals); *SI Int'l, SEIT, Inc.*, Comp. Gen. B-297381.5, B-297381.6, July 19, 2006, 2006 CPD ¶ 114 (dismissing as untimely a protest challenge to agency's decision to limit discussions, because protester failed to raise the issue before the deadline for receipt of revised proposals); *King Constr. Co., Inc.*, Comp. Gen. B-298276, July 17, 2006, 2006 CPD ¶ 110 (dismissing as untimely protest issue alleging that a solicitation prevented small business from effectively competing, because protester failed to raise the issue before the deadline for receipt of proposals).

<sup>51</sup> GAO GUIDE, *supra* note 18, at 11; see also 4 C.F.R. § 21.2(a)(1).

<sup>52</sup> GAO GUIDE, *supra* note 18, at 12 (citing 4 C.F.R. § 21.2(a)(1)).

<sup>53</sup> GAO GUIDE, *supra* note 18, at 12.

<sup>54</sup> *Id.* See, e.g., *Advanced Fed. Servs. Corp.*, Comp. Gen. B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 (dismissing protest issues raised against a negotiated procurement, when the issues were based on information contained in the agency report and protester failed to raise the issues within ten days after receipt of the agency report); *Gen. Injectables & Vaccines, Inc.*, Comp. Gen. B-298590 et. al., Nov. 15, 2006, 2006 CPD ¶ 173 (dismissing protest issue raised against a negotiated procurement, where the protester was placed on notice of an error in the agency's competitive range determination, and failed to raise the issue within ten days); *DeTekion Sec. Sys., Inc.*, Comp. Gen. B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 (dismissing protest issue involving a negotiated procurement, where the protester failed to raise the issue (challenge to the agency's affirmative responsibility determination) within ten days after the protester learned about the agency's award decision); *Am. Floor Consultants, Inc.*, B-294530.7, 2006 U.S. Comp. Gen. LEXIS 101 (June 15, 2006)

or constructive knowledge.<sup>55</sup> Absence of actual and constructive knowledge of a protest issue will toll the timeliness provisions of the Bid Protest Regulations.<sup>56</sup> In addition, in the case of a negotiated procurement in which a debriefing is requested by the protester (and required by law), the protester has ten days to file a protest based on issues raised by the debriefing, but may not file a protest prior to the debriefing date offered by the agency.<sup>57</sup> A protest issue that runs afoul of the special timeliness provisions for negotiated procurements involving a debriefing is subject to summary dismissal by the GAO.<sup>58</sup>

## 2. Agency-level Protests

The timeliness provisions of the GAO's Bid Protest Regulations impose special rules for the submission of protests that are initially filed with procuring agencies, and later filed with the GAO.<sup>59</sup> In order for an agency-level protest to be timely, it must be filed within the timeframes established by 4 C.F.R. 21.2(a)(1) and (a)(2) (the same provisions that govern the timely filing of protests with the GAO), unless the agency has stricter filing rules, in which case the agency's rules are controlling.<sup>60</sup> An untimely agency-level protest that is filed later with the GAO will also be considered untimely.<sup>61</sup> A protest that was initially filed in a timely manner with the agency and subsequently filed with the GAO must be submitted "within 10 days of actual or constructive knowledge of initial adverse agency action."<sup>62</sup> An adverse agency action is not limited to a formal denial of an agency-level protest.<sup>63</sup>

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(dismissing protest issue raised against a negotiated procurement, where the protester failed to challenge the responsiveness of the awardee's price proposal within ten days of becoming aware of the issue).

<sup>55</sup> See, e.g., Int'l Marine Prods., Inc., Comp. Gen. B-296127, June 13, 2005, 2005 CPD ¶ 119 ("The time period for filing a protest with our Office commences with a protester's actual or constructive knowledge of initial adverse agency action."). If a protester receives notice of the basis for a protest on a non-business day and does not read the notice on the day of receipt, the protester will be deemed to have constructive knowledge of the notice on the next business day. See *id.* Although protesters "have a duty to diligently pursue their bases for protest," due diligence does not include "conducting business outside of ordinary business hours (for example, a weekend)." *Id.* "In contrast, actual knowledge of adverse agency action, even when received on a non-business day, commences the time for filing a protest" with the GAO. *Id.*

<sup>56</sup> See, e.g., Lockheed Martin Corp., Comp. Gen. B-295402, Feb. 18, 2005, 2005 CPD ¶ 24 (sustaining protest issue as timely, where the issue was based on events occurring between 2001 and 2003, and the issue was based on information contained in documents publicly disclosed in 2004 that the protester "had no reason to previously know"); WorldWide Language Res., Inc.; SOS Int'l Ltd., Comp. Gen. B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 (sustaining protest issue as timely, where the announcement of a sole-source award on DefenseLink (the official website of the Department of Defense) failed to provide constructive notice to the protester).

<sup>57</sup> 4 C.F.R. § 21.2(a)(2). See GAO GUIDE, *supra* note 18, at 12 ("The purpose of the exception to the timeliness rules for negotiated procurements where debriefings are required by law is to encourage vendors to seek, and contracting agencies to give, early and meaningful debriefings prior to the vendor's deciding whether or not to file a protest."). The procedures for conducting a "statutorily required debriefing" (which are limited to negotiated procurements) are promulgated in Part 15 of the Federal Acquisition Regulation. *Id.* at 14.

<sup>58</sup> See, e.g., Sealift, Inc., Comp. Gen. B-298588, Oct. 13, 2006, 2006 CPD ¶ 162 (dismissing protest issue first raised in protester's comments to the agency report, when the protester first learned of the issue during a debriefing and failed to raise the issue with the GAO within ten days); PAI Corp., Comp. Gen. B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 (dismissing protest issues "disclosed at the debriefing," when the protester failed to raise the issue with the GAO within ten days); Sw. Educ. Dev. Lab., Comp. Gen. B-298259, July 10, 2006, 2006 CPD ¶ 105 (dismissing protest issue as untimely when the issue was based on information provided in a debriefing, and protester subsequently failed to raise the issue in its agency-level protest); Nicholson/Soletanche Joint Venture, Comp. Gen. B-297011.3, B-297011.4, Apr. 20, 2006, 2006 CPD ¶ 70 (dismissing protest issue as untimely where the issue was based on information contained in a post-award written debriefing, but not raised by the protester until he filed a supplemental protest). Upon notification by an agency that a debriefing date has been offered, the GAO may dismiss a protest without prejudice if the protest is filed before the debriefing date. See GAO GUIDE, *supra* note 18, at 13.

<sup>59</sup> See 4 C.F.R. § 21.2(a)(3); see also GAO GUIDE, *supra* note 18, at 12.

<sup>60</sup> 4 C.F.R. § 21.2(a)(3).

<sup>61</sup> GAO GUIDE, *supra* note 18, at 13; Lifecare Mgmt. Partners, Comp. Gen. B-297078, B-297078.2, Nov. 21, 2005, 2006 CPD ¶ 8 (dismissing protest issue as untimely, when the protester failed to raise the issue within ten days after learning of adverse agency action on agency-level protest); ABF Freight Sys., Inc., Comp. Gen. B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 (dismissing protest issue as untimely, since the issue was not contained in the protester's agency-level protest); King Nutronics Corp., Comp. Gen. B-228596, Nov. 5, 1987, 87-2 CPD ¶ 453 (dismissing protest as untimely, because protester's agency-level protest was untimely).

<sup>62</sup> 4 C.F.R. § 21.2(a)(3).

<sup>63</sup> See GAO GUIDE, *supra* note 18, at 12 ("GAO views as adverse agency action any action that makes clear that the agency is denying the agency-level protest."). The GAO has recognized a wide range of conduct that it deems to constitute adverse agency action, including "the agency's proceeding with bid opening or the receipt of proposals, the rejection of a bid or proposal, or the award of a contract despite the agency-level protest." *Id.* at 12-13.

### 3. Exceptions

The GAO's Bid Protest Regulations recognize only two circumstances under which an otherwise untimely protest may still be considered: protests that are untimely for good cause, and protests that "present novel or significant issues of interest to the procurement community."<sup>64</sup> In order to successfully invoke the good cause exception, a protester must demonstrate that it "faced an extremely limited timeframe within which to challenge the solicitation provisions at issue."<sup>65</sup> Consistent with the GAO's traditionally strict interpretation of its timeliness regulations, the Comptroller General has narrowly defined the duration of the aforementioned period to one day or less.<sup>66</sup> In order to successfully invoke the novel or significant issue exception, a protester must demonstrate that a protest ground satisfies two criteria: (1) the issue has not already been reviewed by the GAO, and (2) the issue is "of widespread interest to the procurement community."<sup>67</sup> The GAO will not apply the novel or significant issue exception in cases where the applicable law is settled and the GAO's decision "would be limited to the facts of that particular case and of primary interest only to the parties involved."<sup>68</sup> The determination of whether a protest raises a novel or significant issue is fact-specific and will be made by the GAO on a case-by-case basis.<sup>69</sup> The GAO will apply the good cause and novel or significant issue exceptions only "sparingly."<sup>70</sup> The GAO's strong

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<sup>64</sup> GAO GUIDE, *supra* note 18, at 13. See also 4 C.F.R. § 21.2(c) ("GAO, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider an untimely protest."). In addition to the "good cause shown" and "novel or significant issue" exceptions, the GAO will also afford "full treaty rights" to a party filing a protest pursuant to the provisions of the North American Free Trade Agreement (NAFTA). GAO GUIDE, *supra* note 18, at 13. This accommodation is based on the GAO's recognition that NAFTA "contains a 10-working day timeliness requirement, which is inconsistent with GAO's timeliness rules." *Id.* See also North American Free Trade Agreement, U.S.-Can.-Mex., art. 1017(1)(f), Dec. 17, 1992, 32 I.L.M. 289 (1993) ("[A] Party may limit the period within which a supplier may initiate a bid challenge, but in no case shall the period be less than 10 working days from the time when the basis of the complaint became known or reasonably should have become known to the supplier . . ."). The scope of a protester's "full treaty rights" as they pertain to when to file a protest under NAFTA is unclear, and the author could find no decisions issued by the Comptroller General that addressed the timeliness of a NAFTA-based protest.

<sup>65</sup> *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107 (dismissing protest as untimely, where protester was on notice for four days (which included two working days) of alleged solicitation improprieties and failed to file its protest before the due date for proposals). In reaching its conclusion in *WareOnEarth Communications, Inc.*, the GAO expressly declined to follow the earlier precedent it had established in *Morrison Knudsen Corp.*, Comp. Gen. B-247160, Jan. 7, 1992, 92-1 CPD ¶ 35, in which a five-day-period (which included three working days) was deemed insufficient to afford the protester a reasonable opportunity to protest the solicitation prior to the due date for receipt of proposals. *WareOnEarth Commc'ns, Inc.*, Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107.

<sup>66</sup> *Id.* (citing *Dube Travel Agency & Tours, Inc.*; *Garber Travel, Comp. Gen. B-270438, B-270438.2, Mar. 6, 1996, 96-1 CPD ¶ 141* (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *Skyline Indus., Inc.*, Comp. Gen. B-257340, Sept. 22, 1994, 94-2 CPD ¶ 111 (finding due date for receipt of proposals was "practically simultaneous with the solicitation itself"); *Ling Dynamic Sys., Inc.*, Comp. Gen. B-252091, May 24, 1993, 93-1 CPD ¶ 407 (finding protest issue timely, where protester was on notice of protest grounds only two hours prior to bid opening); *G. Davidson Co., Inc.*, Comp. Gen. B-249331, July 14, 1992, 92-2 CPD ¶ 21 (finding protest issue timely, where it was determined that the time available to file a protest (less than three hours) was unreasonable); *Bardes Servs., Inc.*, Comp. Gen. B-242581, Apr. 29, 1991, 91-1 CPD ¶ 419 (finding protest issue timely, where protester was on notice of the grounds for protest only one day before proposals due); *ImageMatrix, Inc.*, Comp. Gen. B-243170, Mar. 11, 1991, 91-1 CPD ¶ 270 (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *The Big Picture Co.*, Comp. Gen. B-210535, Feb. 17, 1983, 83-1 CPD ¶ 166 (finding protest issue timely, where protester did not receive solicitation amendment until one day before the due date for receipt of proposals); *Ampex Corp.*, Comp. Gen. B-190529, Mar. 16, 1978, 78-1 CPD ¶ 212 (finding protest issue timely, where "the time for receipt of proposals was practically simultaneous with the solicitation, the entire process apparently taking only 10 minutes").

<sup>67</sup> *Celadon Labs., Inc.*, Comp. Gen. B-298533, Nov. 1, 2006, 2006 CPD ¶ 158 (finding "significant issue" exception applicable for a protest issue that had not been previously decided by the GAO (the issue involved "the application of conflict of interest regulations to peer review evaluators in SBIR procurements")).

<sup>68</sup> *Ingenieria y Construcciones Omega—Request for Reconsideration*, Comp. Gen. B-237430.2, Dec. 21, 1989, 89-2 CPD ¶ 580 (affirming dismissal of untimely protest where the protest ground (involving the agency's determination that the protester was non-responsible) was not "a novel issue and would be principally of concern only to the protester . . .").

<sup>69</sup> *Id.* See also *Sys. Plus, Inc.*, Comp. Gen. B-297215, B-297215.2, B-297215.3, B-297215.4, Dec. 16, 2005, 2006 CPD ¶ 10 (dismissing protest issue as untimely, because the issue (challenging the adequacy of evaluation terms in a Federal Supply Schedule (FSS) procurement) has been previously reviewed by the GAO); *Sys. Automation Corp.*, Comp. Gen. B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493 (dismissing protest issue as untimely, because the issue of whether or not an agency conducted meaningful discussions "has been considered frequently" by the GAO); *Santa Fe Eng'rs, Inc.*, Comp. Gen. B-218268, June 3, 1985, 85-1 CPD ¶ 631 (dismissing protest issue as untimely, because the propriety of prequalification procedures is an issue that has been previously considered by the GAO); *Cal Capital Exps.*, 62 Comp. Gen. 345, 83-1 CPD ¶ 439 (finding protest issue timely where the issue (involving the evaluation of "nonqualifying offers competing against partial domestic bids" under Defense Acquisition Regulation § 6-104.4) was "a novel issue which has not previously been considered" by the GAO); *Stanley & Rack*, Comp. Gen. B-204565, Mar. 9, 1982, 82-1 CPD ¶ 217 (finding protest issue timely where the issue (involving agency's decision to make award to an FSS vendor whose price included both FSS and non-FSS items) raised "a novel issue of widespread interest concerning the use of the FSS"); *Access Corp.*, B-189661, 1978 U.S. Comp. Gen. LEXIS 2827 (Feb. 3, 1978) (finding protest issue timely where the issue (involving the use of the two-step formally advertised procurement procedure) was a "matter of widespread interest" because the GAO had "never addressed the issue raised before" and because of the "frequent use" of the procedure).

<sup>70</sup> GAO GUIDE, *supra* note 18, at 13. See, e.g., *Ball Aerospace & Techs. Corp.*, Comp. Gen. B-298522, Aug. 11, 2006, 2006 CPD ¶ 113 (dismissing protest as untimely, because the protest "does not provide novel issues that have not been previously considered by [the GAO]"); *R&K Contractors, Inc.*, B-292287, 2003 U.S. Comp. Gen. LEXIS 139 (July 23, 2003) (dismissing protest issues as untimely, finding that neither the protester's "pressing work schedule" nor the matters raised by the protest issues constituted sufficient justification to invoke either the good cause shown or significant issue exceptions to the timeliness rules).

disinclination to review untimely protests was re-emphasized in a recent decision by the Comptroller General, in which the GAO refused to recognize the alleged complexity of the protest grounds at issue or the protester's status as a small business as sufficient grounds upon which to justify waiving its timeliness rules:

Giving weight to such considerations would undermine the bright-line nature of our timeliness rules, which serve as a predictable guide to the procurement community and, as noted above, strike an appropriate balance between two principal goals of our bid protest forum, giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process.<sup>71</sup>

#### D. Timeliness Provisions Impacting Post-Filing Litigation at the GAO

In addition to strictly adhering to its rules on the timely filing of bid protests, the GAO also vigorously enforces its rules on the timely litigation of bid protests.<sup>72</sup> These procedural rules primarily impact the discovery phase of litigation, which has led at least one commentator to claim that “discovery is severely limited”<sup>73</sup> at the GAO. However, it bears repeating that the GAO's Bid Protest Regulations are intended to ensure that it will be able to “comply with the [CICA] mandate that [it] resolve bid protests expeditiously.”<sup>74</sup>

Following receipt of telephonic notification from the GAO that it received a bid protest against a particular procurement, the procuring agency has thirty days to submit an agency report to the GAO.<sup>75</sup> The agency report typically includes “a statement of the relevant facts (and an estimate of the contract value) signed by the contracting officer, a memorandum of law explaining the agency's position in terms of procurement law, and a list of copies of all relevant documents, or portions of documents not previously furnished.”<sup>76</sup> Although the thirty day deadline for the submission of agency reports places an enormous strain on government personnel and resources, this short-lived negative impact is substantially outweighed by the fact that the agency report process dramatically accelerates the discovery process. Although protesters are able to request specific documents both before and after an agency report is submitted, protesters are usually afforded only two days to make such requests.<sup>77</sup> The procuring activity, in turn, has only two days to produce documents that are requested by the protester.<sup>78</sup> Since the discovery phase in other litigation forums has the potential to take months or even years to complete (a luxury that the CICA does not provide to the GAO), the “GAO expects parties initially to attempt to resolve document disputes themselves.”<sup>79</sup> If a dispute cannot be resolved, there is little room for doubt as to what will follow next: “GAO will resolve the matter.”<sup>80</sup>

<sup>71</sup> WareOnEarth Commc'ns, Inc., Comp. Gen. B-298408, July 11, 2006, 2006 CPD ¶ 107.

<sup>72</sup> See, e.g., 4 C.F.R. § 21.3(c) (2005) (requiring procuring agency to submit a “report on the protest” (i.e., the agency report) within thirty days of receipt of notification of the protest from the GAO); *id.* § 21.3(g) (requiring protesters to submit additional document requests within two days “after their existence or relevance is known or should have been known, whichever is earlier”); *id.* § 21.3(i) (requiring protester to submit comments on the agency report within ten days of receipt, and allowing for dismissal of protest if protester comments are not submitted); *id.* § 21.14(b)-(c) (requiring protesters to submit requests for reconsideration within ten days “after the basis for reconsideration is known or should have been known, whichever is earlier,” and allowing for summary dismissal of untimely requests).

<sup>73</sup> Richard D. Lieberman, *Bid Protests at the Court of Federal Claims and the General Accounting Office*, 67 FED. CONT. REP. (BNA) 13 (Mar. 31, 1997).

<sup>74</sup> Fisons Instruments—Reconsideration, Comp. Gen. B-254939.2, Dec. 8, 1993, 93-2 CPD ¶ 310 (affirming dismissal of protest following protester's failure to submit timely comments on the agency report).

<sup>75</sup> 4 C.F.R. § 21.3(c). The agency report is submitted to the GAO, the protester, and any intervenors. *Id.*

<sup>76</sup> GAO GUIDE, *supra* note 18, at 26. See also 4 C.F.R. § 21.3(d).

<sup>77</sup> 4 C.F.R. § 21.3(c). If a protester makes a specific request for documents prior to the submission of an agency report, the procuring activity is required to provide the GAO, the protester, and any intervenors with “a list of those documents, or portions of documents, that it has previously released or intends to produce in [the agency] report, and of the documents it intends to withhold and the reasons for the proposed withholding.” GAO GUIDE, *supra* note 18, at 27. See also 4 C.F.R. § 21.3(c). Upon receipt of this list (which must be provided at least five days prior to the due date for the agency report), a protester has two days to notify all parties of any “[o]bjections to the scope of the agency's proposed disclosure or nondisclosure of documents.” GAO GUIDE, *supra* note 18, at 28. See also 4 C.F.R. § 21.3(c). A protester may also submit a request for additional documents within two days of learning “of the existence or relevance of additional documents that it believes GAO needs to consider in deciding the protest.” GAO GUIDE, *supra* note 18, at 28; see also 4 C.F.R. § 21.3(g). In this regard, the two-day “clock” generally starts when the protester receives the agency report. See GAO GUIDE, *supra* note 18, at 29.

<sup>78</sup> 4 C.F.R. § 21.3(g).

<sup>79</sup> GAO GUIDE, *supra* note 18, at 28.

<sup>80</sup> *Id.*

Following submission of the agency report, a protester has ten days to respond with written comments.<sup>81</sup> In the absence of contrary notice from the protester, the GAO will assume that the protester received the agency report on the date that it was due.<sup>82</sup> Therefore, even if it is undisputed that a procuring activity failed to provide the agency report to a protester in a timely manner, the protester still maintains the burden of demonstrating that the GAO was provided with (and received) written notification of this circumstance before the due date for the protester's comments.<sup>83</sup> In addition, comments will be considered insufficient if they consist "solely of general statements requesting that GAO review the protest on the existing record."<sup>84</sup> The GAO can shorten or lengthen the deadline for submission of the protester's comments on a case-by-case basis.<sup>85</sup> If a protester fails to comply with the ten day response requirement, the GAO can (and frequently does) exercise its authority to summarily dismiss the protest.<sup>86</sup>

The GAO resolves the majority of its bid protest cases without a hearing.<sup>87</sup> However, when the GAO determines that a hearing is necessary, parties to the protest must be prepared for not-too-distant hearing dates, and even shorter periods in which to submit post-hearing comments. Unless the GAO stipulates otherwise, parties to a protest must submit their post-hearing comments within five days of the conclusion of the hearing.<sup>88</sup> If a protester fails to submit timely post-hearing comments, the GAO will summarily dismiss the protest.<sup>89</sup>

From the commencement to the conclusion of a bid protest, the specter of summary dismissal serves as a constant shadow for protesters who (willfully or not) violate the timeliness provisions of the GAO's Bid Protest Regulations. Although the GAO's strict enforcement of its timeliness rules may sometimes appear to be a "harsh"<sup>90</sup> sanction for protesters, the GAO's actions are justified for a single, simple reason: Congress wants bid protests resolved within 100 days.<sup>91</sup> Since the GAO is directly accountable "to Congress and the American people,"<sup>92</sup> it can hardly be faulted for its steadfast adherence to its statutory responsibilities.

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<sup>81</sup> 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 29.

<sup>82</sup> *See* GAO GUIDE, *supra* note 18, at 29.

<sup>83</sup> *See* Unicorn Servs., Inc.—Reconsideration, Comp. Gen. B-252429.3, May 28, 1993, 93-1 CPD ¶ 425 (affirming dismissal of protest for failure to timely submit comments, where the protester failed to establish that the GAO was provided with (and had received) written notification of the protester's late receipt of the agency report).

<sup>84</sup> GAO GUIDE, *supra* note 18, at 30.

<sup>85</sup> 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 29.

<sup>86</sup> 4 C.F.R. § 21.3(i); *see also* GAO GUIDE, *supra* note 18, at 30; Keymiaee Aero-Tech, Inc.—Reconsideration, Comp. Gen. B-274803.3, Apr. 29, 1997, 97-1 CPD ¶ 163 (affirming dismissal of protest following protester's failure to submit timely comments on the agency report); Carmon Constr., Inc.—Reconsideration, Comp. Gen. B-271316.2, June 28, 1996, 96-2 CPD ¶ 3 (affirming dismissal of protest for failure to submit timely comments, where protester's failure "to respond to the [agency] report at all" resulted in a proper dismissal); MCC Devices—Request for Reconsideration, Comp. Gen. B-256007.2, June 28, 1994, 94-1 CPD ¶ 390 (affirming dismissal of protest for failure to submit timely comments, where the protester had failed to demonstrate timely notification of its late receipt of the agency report).

<sup>87</sup> *See, e.g.*, Letter from Gary L. Kepplinger, General Counsel, U.S. Government Accountability Office, to Dennis J. Hastert, Speaker of the U.S. House of Representatives (Nov. 15, 2006) [hereinafter GAO FY 2006 Bid Protest Report] (on file with author). During FY 2006, the GAO conducted hearings for fifty-one cases, which constituted approximately 11% of its docket. *Id.*; *see also* GAO GUIDE, *supra* note 18, at 31 ("Because hearings increase the costs and burdens of protests, GAO holds hearings only when necessary.").

<sup>88</sup> 4 C.F.R. § 21.3(g). *See also* GAO GUIDE, *supra* note 18, at 33.

<sup>89</sup> 4 C.F.R. § 21.3(g).

<sup>90</sup> *See* Peacock, Myers & Adams, B-279327, 1998 U.S. Comp. Gen. LEXIS 102 (Mar. 24, 1998).

While our timeliness rules may seem harsh in some cases, they reflect the dual requirements of giving all parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process [*citing* Mead Data Central, 70 Comp. Gen. 371, B-242598, 91-1 CPD ¶ 330, \*3]. Application of the timeliness requirement here establishes a readily discernible rule, which results in fair and equal treatment of all protesters.

*Id.* at \*7.

<sup>91</sup> CICA 1984, *supra* note 4, amended by NDAA 1996, *supra* note 4, § 5501(2)(A). It should be noted that, under 31 U.S.C. § 3554(a)(2) (as implemented by 21 C.F.R. §§ 21.9(b) and 21.10), protesters may request an "express option" that allows for an expedited review of bid protests. 31 U.S.C. § 3554(a)(2); 21 C.F.R. §§ 21.9(b), 21.10. Under the "express option," the GAO has sixty-five days to issue its decision. 31 U.S.C. § 3554(a)(2); 21 C.F.R. § 21.9(b).

<sup>92</sup> David M. Walker, *GAO Answers the Question: What's In a Name?*, ROLL CALL, July 19, 2004, available at <http://www.gao.gov/about/rollcall/07192004.pdf>.

### III. The Timeliness Provisions of the ASBCA Rules

In contrast to bid protests filed under the CICA (which normally deal with disputes related to the award of a federal contract), appeals filed pursuant to the CDA generally involve claims related to the administration of a federal contract.<sup>93</sup> The CDA empowers boards of contract appeals to serve as the primary administrative forum for the litigation of CDA appeals.<sup>94</sup> The ASBCA is authorized to review and issue decisions on CDA appeals filed against contracts administered by the DOD.<sup>95</sup> The ASBCA is the largest board of contract appeals and is a DOD activity.<sup>96</sup> The Charter of the ASBCA, codified in Appendix A of the Defense Federal Acquisition Regulation Supplement (DFARS), authorizes the ASBCA to “adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions.”<sup>97</sup> The ASBCA Rules, also codified in Appendix A of the DFARS, implement the procedural requirements of the CDA and Title 41 of the United States Code, Sections 601 through 613.<sup>98</sup>

#### A. The Contract Disputes Act of 1978<sup>99</sup>

On 1 November 1978, President Jimmy Carter signed the Contract Disputes Act of 1978 into law.<sup>100</sup> The CDA provided legislative recognition to the boards of contract appeals (established earlier by various departments within the executive branch) by conferring jurisdiction to these boards over appeals arising from a contracting officer’s final decision.<sup>101</sup> Under the CDA, such jurisdiction would attach if an appellant submitted an appeal within ninety days of the date on which the appellant received the contracting officer’s final decision.<sup>102</sup> The Federal Acquisition Streamlining Act of 1994 imposed a six-year statute of limitations on CDA appeals against contracts that were awarded on or after 1 October 1995.<sup>103</sup> The ninety-day appeal window and the six-year statute of limitations are the most significant timeliness requirements imposed by the CDA and, since they are statutory mandates, they cannot be waived by the boards of contract appeals.<sup>104</sup> Unlike the CICA, the CDA does not require the boards of contract appeals to issue decisions within a specific period of time.<sup>105</sup> Rather, the

<sup>93</sup> Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11.

<sup>94</sup> CDA 1978, *supra* note 11.

<sup>95</sup> *Id.*, amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, § 847. The “present” ASBCA was chartered in 1949. MCBRIDE & TOUHEY, *supra* note 17, § 6.100. For an excellent recitation of the genesis and development of the ASBCA, the author recommends Nicholas P. Reston & Craig S. Clarke, *Overjudicialization of the Contract Dispute Process—Fact or Fiction?*, 28 PUB. CONT. L.J. 613, 614 (1999).

<sup>96</sup> Lees, *supra* note 14, at 527.

<sup>97</sup> U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. app. A, pt. 1, A-2, para. 5 (1998, revised June 27, 2000). The ASBCA’s authority to prescribe its rules is “[s]ubject to the approval of the Undersecretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement.” *Id.*

<sup>98</sup> *Id.* at app. A, pt. 1, A-4 [hereinafter ASBCA RULES]; 41 U.S.C. §§ 601–13.

<sup>99</sup> CDA 1978, *supra* note 11.

<sup>100</sup> Statement of President James E. Carter on Signing the Contract Disputes Act of 1978, 2 PUB. PAPERS 1922 (Nov. 1, 1978), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30092>. When President Carter signed the CDA into law, he issued a signing statement that indicated the high expectations generated by the legislation:

[I]t provides the first time a uniform statutory base for the resolution of claims and disputes arising in connection with Federal contracts. The previous process was a mass of confusing and sometimes conflicting agency regulations, judicial decisions, decisions of agency boards of contract appeals, and statutes. This act will provide a much more logical and flexible means of resolving contract disputes. It should lead to savings for federal agencies and their contractors.

*Id.*

<sup>101</sup> CDA 1978, *supra* note 11, at sec. 8(d). See also MCBRIDE & TOUHEY, *supra* note 17, § 6.100(2)(a).

<sup>102</sup> CDA 1978, *supra* note 11, at sec. 7.

<sup>103</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; 41 U.S.C. § 605. The six-year statute of limitations does not apply to claims filed by the government alleging fraud by the contractor. *Id.*; see also Dual, Inc., ASBCA Nos. 53827, 53889, 2006-1 BCA ¶ 33,243 (finding that CDA’s six year statute of limitations inapplicable to a contract awarded in 1994).

<sup>104</sup> MCBRIDE & TOUHEY, *supra* note 17, § 6.100(4) (citing Sur. Roofing Contractors, ASBCA No. 37894, 89-2 BCA ¶ 21,730; Aqua-Aire Prods., Inc., ASBCA No. 28588, 84-1 BCA ¶ 16,955; Bechtel Nat’l, Inc., ASBCA No. 31945, 86-2 BCA ¶ 18,977; Universal Elevator Co., VABCA No. 2008, 84-3 BCA ¶ 17,588; Denver Pump Co., IBCA No. 1725-9-83, 84-1 BCA ¶ 16,922).

<sup>105</sup> Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11. Appellants with CDA claims of \$100,000 or less may elect to have their appeals decided upon within either 120 days (for claims of \$50,000 or less) or 180 days (for claims over \$50,000 but not in excess of \$100,000). CDA 1978, *supra* note 11, § 8(f), amended by Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, § 2351(c)-(d). A recent statutory revision to the CDA permits small businesses to elect either the 120-day or 180-day processing option if their CDA claim is \$150,000 or less. See John Warner

CDA requires the boards to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.”<sup>106</sup>

## B. Key ASBCA Definitions Regarding Timeliness

The difference in the regulatory tenor between the GAO and the ASBCA on the need to expeditiously resolve disputes is most evident in ASBCA Rule 33, Time, Computation, and Extensions.<sup>107</sup> Under ASBCA Rule 33(a), requests for “extensions of time *will* be granted”<sup>108</sup> when such requests are “appropriate and justified.”<sup>109</sup> In addition, unlike the GAO’s Bid Protest Regulations, the ASBCA Rules do not provide express definitions of key timeliness-related terms such as “days” or “filed.” However, ASBCA Rule 33(b) does provide a formula for “computing any period of time” that essentially mirrors the formula utilized by the GAO.<sup>110</sup>

## C. Timeliness of Appeals filed with the ASBCA

The ASBCA’s Rule 1(a) implements the CDA’s requirement that a notice of appeal be filed within ninety days of the date that the appellant’s receipt of the contracting officer’s final decision.<sup>111</sup> Under ASBCA Rule 1(b), in cases where the amount in dispute is \$100,000 or less and the appellant requests a contracting officer’s final decision within sixty days, the appellant may file his appeal with the ASBCA if and when a final decision is not issued within the time requested.<sup>112</sup> Under ASBCA Rule 1(c), in cases where the amount in dispute exceeds \$100,000, or if the dispute “presently involves no monetary amount pursuant to the Disputes clause” of the contract, the appellant may file his appeal with the ASBCA if the contracting officer does not provide his final decision “within a reasonable time, taking into account such factors as the size and complexity of the claim.”<sup>113</sup>

Under ASBCA Rule 1, the key event that initiates the period in which an appellant may seek redress with the ASBCA is the issuance (or non-issuance) of a contracting officer’s final decision.<sup>114</sup> In analyzing whether an appellant has submitted a timely appeal under the CDA, it is important to note that the rendering of a final decision by a contracting officer can open the appeal window even if an appellant did not expressly request such a decision.<sup>115</sup> Since a motion to dismiss for lack of timeliness under the CDA calls into question the ASBCA’s jurisdictional authority, a party can file such a motion at any time under ASBCA Rule 5(a) so long as the motion is “promptly filed.”<sup>116</sup> The government must affirmatively establish (using “objective indicia”<sup>117</sup>) the date on which the contracting officer’s final decision was served on either appellant or a person

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National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083, 2349. In contrast with 31 U.S.C. § 3554(a)(1) (under which the Comptroller General “shall issue a final decision . . . within 100 days”), the time limits imposed by 41 U.S.C. §§ 607 and 608 are not automatically imposed and need only be adhered to “whenever possible.” Compare 31 U.S.C. § 3554(a)(1), with 41 U.S.C. §§ 607(f) and 608(c).

<sup>106</sup> CDA 1978, *supra* note 11, at sec. 8(e).

<sup>107</sup> See ASBCA RULES, *supra* note 98, at A-18.

<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> *Id.*

<sup>110</sup> Compare ASBCA RULES, *supra* note 98, at A-18, with 4 CFR § 21.0(e) (2005).

<sup>111</sup> CDA 1978, *supra* note 11; ASBCA RULES, *supra* note 98, at A-5.

<sup>112</sup> ASBCA RULES, *supra* note 98, at A-5.

<sup>113</sup> *Id.*

<sup>114</sup> See CDA 1978, *supra* note 11, at secs. 6(c)(5), 7.

<sup>115</sup> Env’tl. Safety Consultants, Inc., ASBCA No. 54995, 2006-2 BCA ¶ 33,321 (finding that appellant’s repeated requests for equitable adjustments “impliedly requested a [contracting officer’s] decision and was a proper CDA claim.”).

<sup>116</sup> See *Cosmic Constr. Co.*, ASBCA No. 26537, 82-1 BCA ¶ 15,541, *aff’d*, *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390 (1982) (holding that the CDA’s ninety-day filing requirement is “part of a statute waiving sovereign immunity, which must be strictly construed, . . . and which defines the jurisdiction of the tribunal, here the board.”) In *Cosmic Construction Co.*, the appellant asserted that the ASBCA abused its discretion by refusing to waive the CDA’s ninety-day filing requirement. 697 F.2d at 1390. The U.S. Court of Appeals for the Federal Circuit disagreed, noting that, “The board cannot abuse a discretion it doesn’t have.” *Id.* at 1391; see also ASBCA RULES, *supra* note 98, at A-6 to A-7.

<sup>117</sup> *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460 (denying government motion to dismiss for lack of timeliness, where the government failed to prove that it mailed the contracting officer’s final decision to an individual authorized to receive service), *citing* *Riley & Ephriam Constr. Co. v. United States*, 408 F.3d 1369, 1372 (Fed. Cir. 2005).

empowered by appellant to receive service.<sup>118</sup> In the alternative, the government must prove that the contracting officer's final decision was "received at the location designated by a contractor for receipt of project-related correspondence."<sup>119</sup> Receipt of a contracting officer's final decision occurs upon "actual physical receipt of that decision by the contractor."<sup>120</sup>

If the government is able to make a prima facie case that an appeal is untimely, the evidentiary burden shifts to the appellant, who must demonstrate that he transmitted the notice of appeal within the prescribed period.<sup>121</sup> In contrast to filing a bid protest or related documents with the GAO (where timeliness is determined by when the GAO receives a filing), the ASBCA will consider an appeal to be timely if it was mailed on or before the ninetieth day of the filing window.<sup>122</sup> The ASBCA has "long held that the date of filing of an appeal is the date of transfer to [the] U.S. Postal Service (i.e., the postmark date)."<sup>123</sup> Interestingly, the ASBCA recently recognized an exception to this general rule that, in essence, negates the presumption of reliability of a U.S. Postal Service post-mark.<sup>124</sup> Declaring a postmark to be only "prima facie evidence that transfer had occurred by that date,"<sup>125</sup> the ASBCA held that "a sworn statement or testimony to the effect that the transfer occurred on an earlier date is credible evidence"<sup>126</sup> that can establish an earlier mailing date (and therefore a timely appeal).<sup>127</sup>

Another interesting facet of the ASBCA's views on the timely submission of appeals is its interpretation of the proper place to file a notice of appeal.<sup>128</sup> Both the CDA and 41 U.S.C. § 606 expressly address this issue: "Within ninety days from the date of receipt of a contract officer's decision . . . the contractor may appeal such decision to an *agency board of contract appeals* . . . ."<sup>129</sup> Neither the CDA nor 41 U.S.C. § 606 expressly authorize any other activity to receive appeals on behalf of a board of contract appeals.<sup>130</sup> However, if an appellant mails an otherwise properly constituted appeal to the responsible contracting officer (instead of the ASBCA), the ASBCA will consider the filing to be "tantamount to filing an appeal with this board."<sup>131</sup> This holding is in line with the ASBCA's "practice of liberally construing appeal notices."<sup>132</sup> In contrast, an appellant who mails his notice of appeal to the wrong board of contract appeals runs the risk of rendering his appeal

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<sup>118</sup> *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460. See also *MCBRIDE & TOUHEY*, *supra* note 18, § 6.100(4) (citing *Structural Fishing, Inc. v. United States*, 14 Cl. Ct. 447, 450 (1988); *Nexus Constr. Inc.*, ASBCA No. 31070, 85-3 BCA ¶ 18,476; *Brooks E. Cook*, GSBCA No. 1350, 86-1 BCA ¶ 18,724).

<sup>119</sup> *Kamp Sys., Inc.*, ASBCA No. 55,317, 2007-1 BCA ¶ 33,460 (citing *Brinderson Corp.*, ASBCA No. 31831, 86-1 BCA ¶ 18,616, *aff'd on recons.*, 86-2 BCA ¶ 18,905).

<sup>120</sup> *Id.*

<sup>121</sup> See *MCBRIDE & TOUHEY*, *supra* note 17, § 6.100(4) (citing *Dawson Constr. Co., Inc.*, ASBCA No. 29447, 85-1 BCA ¶ 17,862; *Universal Elevator Co., VABCA* 2008, 84-3 BCA ¶ 17,588; *Micrographic Tech., Inc.*, ASBCA No. 25577, 81-2 BCA ¶ 15,357; *Lockport Mills, Inc.*, ASBCA No. 9151, 64 BCA ¶ 9151).

<sup>122</sup> See *MCBRIDE & TOUHEY*, *supra* note 17, § 6.100(4). The GAO will accept a bid protests transmitted via mail, fax, or e-mail. 4 C.F.R. § 21.0(g) (2005); GAO GUIDE, *supra* note 17, at 15. The ASBCA will accept appeals transmitted via mail or fax, but not e-mail. See *GSBCA Solicits Vendor Input on Facilitating E-filings*, Fed. Con. Daily, Feb. 27, 2002 (noting that, according to ASBCA Chairman Paul Williams, e-filings at the ASBCA are "a long way off").

<sup>123</sup> *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232; see also *Hugo Auchter GmbH*, ASBCA No. 39642, 91-2 BCA ¶ 23,777.

<sup>124</sup> See *Premier Consulting & Mgmt. Servs.*, ASBCA No. 54691, 2005-1 BCA ¶ 32,949 (holding that an affidavit asserting a mailing date earlier than that indicate on the postmark to be sufficient to establish the earlier mailing date).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (denying motion to dismiss where the contracting officer received a timely copy of the notice of appeal). In *Thompson*, appellant mailed the notice of appeal to both the ASBCA and the contracting officer. *Id.* Although the contracting officer received the appeal in a timely manner, the ASBCA "refused to accept the letter containing Thompson's [notice of appeal] because \$1.35 postage was due." *Id.*

<sup>129</sup> 41 U.S.C. § 606 (2000) (emphasis added). See also CDA, *supra* note 11.

<sup>130</sup> *But see ASBCA RULES*, *supra* note 98, at A-5. The ASBCA's Rule 1(a) provides that a copy of a notice of appeal "shall be furnished to the contracting officer from whose decision the appeal is taken." *Id.* However, an appellant's failure to furnish a copy of the notice of appeal to the contracting officer will not invalidate the appeal. *Rex Sys., Inc.*, ASBCA No. 50456, 98-2 BCA ¶ 29,956 (1998).

<sup>131</sup> *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (quoting *McNamara-Lunz Vans & Warehouses, Inc.*, ASBCA No. 38057, 89-2 BCA ¶ 21,636 (1989)); see also *Hellenic Enters.*, ASBCA No. 47129, 94-3 BCA ¶ 27,189; *Yankee Telecomm. Labs., Inc.*, ASBCA No. 25240, 82-1 BCA ¶ 15,515; *I.T.S. Corp.*, ASBCA No. 31993, 86-1 BCA ¶ 18,678.

<sup>132</sup> *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (citing *AIW-Alton, Inc.*, ASBCA No. 46917, 94-3 BCA ¶ 27,279) ("Historically this Board has interpreted contractor's communications liberally in deciding whether a notice of appeal is effective.").

untimely, as his error will not toll the ninety-day submission requirement.<sup>133</sup> Appeals that are dismissed as untimely under 41 U.S.C. § 606 are generally disposed of “without prejudice.”<sup>134</sup> Therefore, an untimely ASBCA appellant may still have the opportunity to obtain relief from the U.S. Court of Federal Claims (COFC), the designated judicial forum for CDA appeals.<sup>135</sup>

Although the ASBCA Rules do not expressly address the six-year statute of limitations on CDA appeals filed against federal contracts awarded after 1 October 1995, when litigants raise the issue, the ASBCA considers the matter to be an affirmative defense that does not impact the board’s jurisdiction.<sup>136</sup> As a consequence, the ASBCA can review and act upon non-jurisdictional motions under ASBCA Rule 5(b), which provides no further procedural guidance or deadlines.<sup>137</sup> The ASBCA will treat a government motion to dismiss based on the statute of limitations as a de facto motion for summary judgment with a high substantive threshold, and will grant such a motion “only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”<sup>138</sup> Since the statute of limitations commences with “the accrual of the claim,”<sup>139</sup> the ASBCA will focus on when “all events, which fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known.”<sup>140</sup>

#### D. Timeliness Provisions Impacting Post-Filing Litigation at the ASBCA

Although the ASBCA Rules provide some time limitations on the filing of motions, pleadings and the conduct of discovery, these limits are relatively generous and subject to extension.<sup>141</sup> For example, ASBCA Rule 4(a) requires the contracting officer to prepare “an appeal file consisting of all documents pertaining to the appeal . . . .”<sup>142</sup> This submission (commonly referred to as the “Rule 4 file”<sup>143</sup>) can be reasonably viewed as the ASBCA’s version of the agency report required by the GAO during a bid protest; in fact, both submissions have a thirty-day deadline.<sup>144</sup> However, whereas the GAO places very short and strict deadlines for supplementing the agency report, ASBCA Rule 4(b) provides appellants with thirty days to supplement the appeal file.<sup>145</sup> In the absence of a statutory requirement to resolve CDA appeals within a specified period of time, the boards of contract appeals are able to provide parties with more time to develop their cases. At the same time, however, the possibility for protracted litigation is also increased.

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<sup>133</sup> See *Interaction Research Inst., Inc.*, ASBCA No. 55198, 2006-1 BCA ¶ 33,189 (dismissing appeal as untimely, where appellant failed to file his appeal to the ASBCA within the ninety-day submission period). The appellant initially filed his appeal with the General Services Board of Contract Appeals (GSBCA). *Id.* The appellant later withdrew his appeal from the GSBCA after that board questioned its jurisdiction over the appeal. *Id.* The appellant subsequently re-filed his appeal with the ASBCA, after the ninety-day submission period had elapsed. *Id.* The ASBCA determined that the erroneous filing with the GSBCA did not toll the ninety-day submission period, because the appellant had not initially appealed “to the board of contracting appeals ‘servicing the agency that issued the final decision,’ viz. the ASBCA.” *Id.*

<sup>134</sup> See *Dick Pacific/GHEMM JV*, ASBCA Nos. 55562, 55563, 2007-2 BCA ¶ 33,469 (dismissing untimely appeal under 41 U.S.C. § 606 without prejudice). In *Dick Pacific/GHEMM JV*, the ASBCA clarified its holding in *Grand Service, Inc.*, ASBCA No. 42448, 9103 BCA ¶ 24,164, in which an untimely appeal under 41 U.S.C. § 606 was dismissed with prejudice. *Id.* at \*4. In *Dick Pacific/GHEMM JV*, the ASBCA held that an untimely appeal under 41 U.S.C. § 606 was dismissed “with prejudice to re-filing at the Board,” but was otherwise dismissed without prejudice for purposes of re-filing with the U.S. Court of Federal Claims. *Id.*

<sup>135</sup> See *id.* (“Nevertheless, any appeals to the Court of Federal Claims from the final decisions at issue must be made within twelve months from the date appellant received them.”); see also CDA, *supra* note 11.

<sup>136</sup> *Woodside Summit Group, Inc.*, ASBCA No. 54554, 2005-2 BCA ¶ 33,113 (citing *Do-Well Mach. Shop v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989)).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; 41 U.S.C. § 605 (2000).

<sup>140</sup> *Woodside Summit Group, Inc.*, ASBCA No. 54554, 2005-2 BCA ¶ 33,113; see also *Gray Personnel*, ASBCA No. 54652, 2006-2 BCA ¶ 33,378.

<sup>141</sup> See, e.g., ASBCA RULES, *supra* note 98, at A-5 (Rule 4, Preparation, Content, Organization, Forwarding, and Status of Appeal File), A-7 (Rule 6, Pleadings), A-12 (Rule 15, Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents).

<sup>142</sup> *Id.* at A-6.

<sup>143</sup> See, e.g., *Astor Bolden Enters., Inc.*, ASBCA No. 52377, 2000-2 BCA ¶ 31,115.

<sup>144</sup> See 4 C.F.R. § 21.3(c) (2005); ASBCA RULES, *supra* note 98, at A-5.

<sup>145</sup> Compare 4 C.F.R. § 21.3(g), with ASBCA RULES, *supra* note 98, at A-6.

Under ASBCA Rule 6(a), when an appellant files his notice of appeal, he then has thirty days to file his complaint, which should contain “simple, concise and direct statements of each of its claims,”<sup>146</sup> as well as “the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known.”<sup>147</sup> Generally, the Government’s Rule 4 file and the appellant’s complaint are filed with the ASBCA on the same day. However, if an appellant fails to submit a complaint, the ASBCA may deem either the appellant’s notice of appeal or a claim that is based upon the contracting officer’s final decision as the functional equivalent of the complaint.<sup>148</sup> Under ASBCA Rule 6(b), upon receipt of the complaint, the Government has thirty days to submit an answer to the claims contained in the complaint.<sup>149</sup> The ASBCA may dismiss an appeal if the appellant fails to file a complaint and otherwise fails to prosecute the appeal.<sup>150</sup>

Following receipt of the appellant’s complaint and the Government’s answer, the discovery phase of the appeal normally commences.<sup>151</sup> Under ASBCA Rule 15, a party to an appeal may serve written interrogatories and requests for production of documents.<sup>152</sup> The opposing party must provide written responses to these discovery requests within forty-five days of receipt.<sup>153</sup> If an extension is needed, the requesting party will normally have to obtain the concurrence of the opposing party before the ASBCA will consider extending the deadline under ASBCA Rule 33.<sup>154</sup> Failure to adhere to the forty-five-day response requirement may prompt the ASBCA (either sua sponte or upon motion) to invoke its sanction authority under ASBCA Rule 35.<sup>155</sup> The severity of the sanction normally depends on the duration of a party’s non-responsiveness to a discovery request, although there is a certain degree of uncertainty in this equation.<sup>156</sup> For example, in *Appeal of Graham International*, the Government moved to dismiss the appeal based on the appellant’s repeated failure to respond to the ASBCA’s request for an election on whether to proceed with or without a hearing.<sup>157</sup> The ASBCA acknowledged that, “[o]ver the next year, the Board made numerous attempts to obtain an election from appellant”<sup>158</sup> and “that much, if not all, of the mail sent to appellant from June 1997 through June 1998 could not be delivered to the addresses provided by appellant.”<sup>159</sup> In February of 1998, the Government submitted its motion to dismiss for failure to prosecute; in December of 2000, the ASBCA denied the motion.<sup>160</sup> The ASBCA determined that “[d]espite appellant’s long periods of inattention,”<sup>161</sup> the appellant made a constructive election in correspondence submitted to the ASBCA approximately seven months after the Government filed its motion to dismiss.<sup>162</sup> The ASBCA’s decision in *Graham International* stands in contrast to its decision two years later in *Generator Technologies, Inc.*<sup>163</sup> Faced with an appellant that disregarded a show-cause order, two motions,

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<sup>146</sup> ASBCA RULES, *supra* note 98, at A-7.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Sun Tech. Servs., Inc., ASBCA No. 48788, 96-1 BCA ¶ 28,075.

<sup>151</sup> See generally ASBCA RULES, *supra* note 98, at A-11, A-12. The discovery schedule for an appeal is normally determined during a conference call between the ASBCA administrative law judge and the parties; this exchange typically occurs after the submission of the appellant’s complaint and the Government’s answer and is conducted pursuant to ASBCA Rule 10. See generally *id.* at A-8. During this conference call, various administrative issues are addressed, including whether the parties desire to proceed with or without a hearing (under ASBCA Rules 11, and 17 through 25, respectively), and whether pre-hearing briefs will be required. See generally *id.*

<sup>152</sup> *Id.* at A-12. In addition to written interrogatories and requests for production of documents, the taking of depositions is permitted under ASBCA Rule 14. *Id.* at A-11, A-12. The only timeliness requirement under Rule 14 with respect to depositions is that they be taken only after the appellant’s complaint and the government’s answer have been submitted. *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> This is an unwritten requirement that the author regularly encountered while litigating appeals before the ASBCA.

<sup>155</sup> ASBCA RULES, *supra* note 98, at A-12, A-18.

<sup>156</sup> Compare, e.g., *Graham Int’l*, ASBCA No. 50360, 2001-1 BCA ¶ 31,222 (denying the government’s motion to dismiss for failure to prosecute, after the appellant evidenced an intent to prosecute its appeal in correspondence submitted seven months after the government filed its motion), with *Generator Techs., Inc.*, ASBCA No. 53206, 2003-1 BCA ¶ 32,058 (granting the government’s motion to dismiss for failure to prosecute, after the appellant repeatedly failed to respond to discovery requests submitted by the government and a show-cause order issued by the ASBCA).

<sup>157</sup> *Graham Int’l*, ASBCA No. 50360, 2001-1 BCA ¶ 31,222.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Generator Techs., Inc.*, ASBCA No. 53206, 2003-1 BCA ¶ 32,058.

and two discovery requests (which had been awaiting a response for almost eleven months), the Government moved to dismiss the appeal for failure to prosecute in April of 2002.<sup>164</sup> Six months later, the ASBCA granted the Government's motion and invoked its sanctions authority under ASBCA Rule 35 to dismiss the appeal with prejudice under ASBCA Rule 31.<sup>165</sup> Although the outcomes in *Graham International* and *Generator Technologies, Inc.* differed, both cases lend credence to the perception that the ASBCA will, in all likelihood, exercise a much greater degree of procedural patience with an appellant than the GAO would accord a bid protester.

The ASBCA's Rules regarding the conduct of hearings, the filing of post-hearing briefs, and the issuance of decisions contain virtually no firm deadlines.<sup>166</sup> However, ASBCA Rule 29 does impose a thirty-day filing deadline for parties who, following receipt of the ASBCA's decision, desire reconsideration of their appeal.<sup>167</sup> Although appellants have sought to invoke the extension authority available to the ASBCA under ASBCA Rule 33, the Board has noted that this rule is limited to procedural actions, and that "motions for reconsideration are not merely procedural."<sup>168</sup> The ASBCA "generally strictly"<sup>169</sup> enforces Rule 29 and denies motions even where prejudice to the opposing party is not established.<sup>170</sup> However, even when in receipt of a facially untimely motion for reconsideration, the Board reviewed the circumstances underlying "the apparent tardiness of the motion."<sup>171</sup>

When dismissing an appeal, the ASBCA will generally articulate whether the dismissal is undertaken pursuant to either ASBCA Rules 30 or 31.<sup>172</sup> The difference is crucial from a timeliness perspective, because an appeal that is dismissed under ASBCA Rule 30 has already been placed in a "suspense status"<sup>173</sup> by the Board due to its inability "to proceed with disposition thereof for reasons not within the control of the Board."<sup>174</sup> A dismissal under ASBCA Rule 30 permits an appellant to re-file his appeal without prejudice for a three-year period, thereby sustaining the life of the appeal and the need for continued commitment of government personnel and resources to monitor the status of the appeal.<sup>175</sup> An ASBCA Rule 30 dismissal automatically converts to a prejudicial dismissal after the three year re-filing period has expired, and the Board is not required to take additional affirmative action.<sup>176</sup> Conversely, if the ASBCA dismisses an appeal under ASBCA Rule 31, the dismissal is with prejudice.<sup>177</sup> The ASBCA will generally invoke ASBCA Rule 31 when it dismisses appeals that are either untimely or that manifest a failure to prosecute.<sup>178</sup> In addition to barring the subsequent re-filing of an appeal with the ASBCA, a dismissal under ASBCA Rule 31 "acts as an adjudication on the merits."<sup>179</sup> As a consequence, the ASBCA

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See generally ASBCA RULES, *supra* note 98, at A-12 through A-17. Although the ASBCA Rules provide a wide degree of latitude in the scheduling of hearings, the filing of post-hearing briefs, and the issuance of decisions, there are two notable exceptions: ASBCA Rule 18 (requiring fifteen days advance notice of a hearing date) and ASBCA Rule 21(c) (establishing deadlines for requesting subpoenas). *Id.* at A-13, A-14.

<sup>167</sup> *Id.* at A-17.

<sup>168</sup> Performance Constr., Inc., ASBCA No. 53575, 2006-2 BCA ¶ 33,372 (dismissing motion for reconsideration after finding "no grounds for excusing appellant's failure to comply with Rule 29") (citing AEC Corp., ASBCA No. 42920, 2003-1 BCA ¶ 32,139).

<sup>169</sup> *Id.*

<sup>170</sup> Buckner & Moore, Inc., ASBCA No. 44113, 93-3 BCA ¶ 26,085.

<sup>171</sup> Performance Constr., Inc., ASBCA No. 53575, 2006-2 BCA ¶ 33,372.

<sup>172</sup> See, e.g., Phoenix Petroleum Co., ASBCA No. 45414, 2002-1 BCA ¶ 31,835 (affirming earlier dismissal of appeal under ASBCA Rule 30); Env'tl Safety Consultants, Inc., ASBCA No. 54995, 2006-1 BCA ¶ 33,230 (dismissing appeal as untimely under ASBCA Rule 31). See also ASBCA RULES, *supra* note 98, at A-17, A-18.

<sup>173</sup> See generally ASBCA RULES, *supra* note 98, at A-17.

<sup>174</sup> *Id.*

<sup>175</sup> See generally *id.*

<sup>176</sup> See, Phoenix Petroleum Co., ASBCA No. 45414, 2002-1 BCA ¶ 31,835; see also ASBCA RULES, *supra* note 98, at A-17.

<sup>177</sup> See ASBCA RULES, *supra* note 98, at A-18.

<sup>178</sup> See, e.g., Env'tl Safety Consultants, Inc., ASBCA No. 54995, 2006-1 BCA ¶ 33,230; Airborne Indus., Inc., ASBCA Nos. 45491, 45492, 45524, 45525, 45979, 46185, 46441, 46442, 46443, 46444, 95-1 BCA ¶ 27,496 (dismissing appeal under ASBCA Rule 31 for failure to prosecute).

<sup>179</sup> Gov't Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774, at \*6 (dismissing protest under ASBCA Rule 31 due to appellant's repeated failure to comply with discovery requests and orders from the ASBCA).

generally will issue a “show cause”<sup>180</sup> order under ASBCA Rule 31, to provide an appellant with “the opportunity to explain the circumstances surrounding its failure to move the appeal forward before it is dismissed.”<sup>181</sup>

#### IV. The GAO and ASBCA Case Loads and Processing Times

It can reasonably be argued that comparing a bid protest under the CICA and a contract dispute under the CDA is an unfair comparison of apples and oranges, because the degree of administrative and substantive complexity underlying a bid protest may not equal that of a CDA appeal. Under this logic, it would be unreasonable to compare the case loads of the GAO and the ASBCA. However, the statutes that established these systems shared a common goal: the development of alternative, non-judicial forums that would *expeditiously* resolve contract disputes while simultaneously preserving the due process rights of the parties concerned.<sup>182</sup> One unscientific method of determining whether or not this goal has been achieved is through comparing the number of cases, and the types of dispositions, that the GAO and the ASBCA have processed for fiscal years (FYs) 2001 through 2006.

Table 1: The GAO’s Bid Protest Case Load in FYs 2001 through 2006<sup>183</sup>

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001
Cases Filed During the Fiscal Year	1327	1356	1485	1352	1204	1146
Cases Closed During the Fiscal Year	1274	1341	1405	1244	1133	1098
Decisions on the Merits (Sustain + Deny)	249	307	365	290	256	311
Number of Cases Dismissed	1025	1035	1040	954	877	787
Number of Cases Denied	177	236	290	240	215	245
Number of Cases Sustained	72	71	75	50	41	66
Percentage of Cases Sustained	29%	23%	21%	17%	16%	21%

<sup>180</sup> ASBCA RULES, *supra* note 98, at A-18. See also Gov’t Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774; Generator Techs., Inc., ASBCA No. 53206, 2003-1 BCA ¶ 32,058.

<sup>181</sup> Gov’t Therapy Servs., Inc., ASBCA No. 53972, 2004-2 BCA ¶ 32,774 (citing Scorpio Piping Co., ASBCA No. 34073, 89-2 BCA ¶ 21,813).

<sup>182</sup> See generally CICA Conference Report, *supra* note 27; Thomas C. Wheeler, *Let’s Make the Choice of Forum Meaningful*, 28 PUB. CONT. L.J. 655, 656 (1999) (citing S. REP. NO. 95-1118, at 12–13 (1978), reprinted in 1978 U.S.C.C.A.N. 5235, 5239).

<sup>183</sup> GAO FY 2006 Bid Protest Report, *supra* note 87; Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gov’t Accountability Office, to Dennis J. Hastert, Speaker of the U.S. House of Representatives (Jan. 12, 2006) [hereinafter GAO FY 2005 Bid Protest Report] (on file with author). The GAO FY 2006 Bid Protest Report includes pertinent caseload data from FYs 2002 through 2006. The GAO FY 2005 Bid Protest Report includes pertinent caseload data from FYs 2001 through 2005.

Table 2: The ASBCA's Case Load in FYs 2001 through 2006<sup>184</sup>

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001
Cases Filed During the FY	438	476	461	429	435	539
Cases Closed During the FY	530	484	481	539	559	721
Decisions on the Merits (Sustain + Deny)	137	150	159	182	205	271
Number of Cases Dismissed	393	334	322	357	354	450
Number of Cases Denied	51	63	49	65	75	114
Number of Cases Sustained	86	87	110	117	130	157
Percentage of Cases Sustained	18%	18%	23%	22%	23%	22%

#### A. The GAO's Case Load

Although the number of new bid protest filings at the GAO fluctuated during FY 2001 through 2006, the GAO's average case load for this period was almost three times the size of the ASBCA's case load.<sup>185</sup> During the aforementioned period, the average number of new bid protests filed with the GAOs exceeded 1300 (or approximately five new bid protests per working day in a single year).<sup>186</sup> In light of this statistic, it would appear to be virtually impossible (at least from the administrative standpoint) to process such a large caseload in an orderly and equitable manner within 100 days. However, the data reveals two compelling statistics that strongly support the conclusion that the GAO is able to successfully overcome this seemingly insurmountable burden.

The first compelling statistic is the average percentage of difference between the number of new cases filed with the GAO and the number of cases disposed of by the GAO: this figure was less than 5%.<sup>187</sup> Viewed from a different perspective, over 95% of the bid protests that the GAO receives in a single FY are either dismissed, denied, or sustained in the same FY.<sup>188</sup> The second compelling statistic is the number of bid protests that are sustained by the GAO: for the period encompassing FYs 2001 through 2006, the GAO sustained on average less than 22% of the bid protests it reviewed on the merits.<sup>189</sup> During the same period, the ASBCA also sustained on average less than 22% of the appeals it considered.<sup>190</sup> These statistics clearly support the argument that the CICA's 100 Day Rule and the GAO's strict compliance with this rule facilitates both the expeditious processing of bid protests, and the equitable review of bid protests that are ripe for either a review on the merits, or for summary dismissal.

<sup>184</sup> Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2006 (31 Oct. 2006) [hereinafter ASBCA FY 2006 Report] (on file with author); Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2005 (8 Nov. 2005) [hereinafter ASBCA FY 2005 Report] (on file with author). The ASBCA FY 2006 Report includes pertinent caseload data from FYs 2002 through 2006. The ASBCA FY 2005 Report includes pertinent caseload data from FYs 2001 through 2005.

<sup>185</sup> See GAO FY 2006 Bid Protest Report, *supra* note 87; ASBCA FY 2006 Report, *supra* note 184; GAO FY 2005 Bid Protest Report, *supra* note 183; ASBCA FY 2005 Report, *supra* note 184.

<sup>186</sup> See GAO FY 2006 Bid Protest Report, *supra* note 87; GAO FY 2005 Bid Protest Report, *supra* note 183.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

## B. The ASBCA's Case Load

In FY 1990, the ASBCA docketed 2218 new CDA appeals; by FY 2006, the number of newly docketed CDA appeals before the ASBCA had shrunk by over 80%, to 438.<sup>191</sup> For the period encompassing FYs 2001 through 2006, the ASBCA closed more appeals than it docketed.<sup>192</sup> Despite these promising statistics, however, the ASBCA continues to be burdened with a backlog of appeals that has outnumbered its newly docketed appeals for each year of the period examined.<sup>193</sup> The ASBCA's backlog of appeals could possibly be reduced or even eliminated if more stringent procedural and timeliness rules were in place and enforced to expeditiously dispose of those appeals that merit summary dismissal. Of the cases that the ASBCA closed in FY 2005, 69% were appeals that were dismissed.<sup>194</sup> Although the data does not provide the reasons for these dismissals, this statistic nevertheless supports the argument that a majority of the ASBCA's appeals might have the potential to be disposed of in a speedy manner. It is also possible that a significant number of these cases could be eligible for review using the "expedited"<sup>195</sup> and "accelerated"<sup>196</sup> procedures of ASBCA Rule 12; in FY 2006, thirty-three appeals were disposed of under this rule.<sup>197</sup>

The ASBCA's backlog of appeals could also be lessened if a greater emphasis was placed on expeditiously reviewing appeals.<sup>198</sup> The ASBCA's annual report on its case load for FY 1995 was the last such report that included statistics on the average time required to resolve an appeal, i.e., the number of days that elapsed "from date of docketing to date of decision."<sup>199</sup> In FY 1995, it took an average of 528 days to resolve an appeal (the median was 389 days).<sup>200</sup> Although this data is more than ten years old, the ASBCA's backlog of appeals in 2006 suggests that its current processing times may not be that far removed from what they were in 1995.<sup>201</sup>

## V. Applying a One-Year Rule to the ASBCA

After comparing the timeliness provisions of the GAO's Bid Protest Regulations and the ASBCA's Rules, and after analyzing the caseloads and processing times of both of these forums, it is clear that timeliness requirements contained in the CICA have enabled the GAO to process disputes in an efficient and equitable manner.<sup>202</sup> Unfortunately, the same cannot be said of the CDA and the ASBCA, which is ironic given the fact that the original intent underlying the boards of contract appeals was "to provide a swift, inexpensive method of resolving contract disputes."<sup>203</sup> The need to reform the timeliness rules under which the ASBCA and other boards of contract appeals work has been courageously illuminated by one private

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<sup>191</sup> Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1990 (31 Oct. 1990) (on file with author); ASBCA FY 2006 Report, *supra* note 185; ASBCA 2005 Report, *supra* note 184. See also Lees, *supra* note 14, at 526-27 ("There can be no question that CDA litigation before agency boards of contract appeals has declined consistently and significantly in the past fifteen years.").

<sup>192</sup> ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

<sup>193</sup> See *id.* In FY 2006, the ASBCA docketed 438 new appeals, disposed of 530 appeals, and carried a backlog of 552 appeals (a net reduction of ninety-two appeals from the previous FY).

<sup>194</sup> ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

<sup>195</sup> ASBCA RULES, *supra* note 98, at A-9.

<sup>196</sup> *Id.*

<sup>197</sup> ASBCA FY 2005 Report, *supra* note 184.

<sup>198</sup> The ASBCA currently has twenty-eight administrative law judges. Armed Services Board of Contract Appeals, <http://docs.law.gwu.edu/asbca/biog.htm> (last visited Mar. 15, 2007). John Howell, a private practitioner, has commented that the productivity of "[board of contract appeals] administrative judges vary greatly." John A. Howell, *The Role of the Office of Federal Procurement Policy in the Management of Boards of Contract Appeals: From Great Expectations to Paradise Lost?*, 28 PUB. CONT. L.J. 559, 566 (1999). The author includes this comment for informational purposes only, and advances no opinion on the validity (or lack thereof) of the aforementioned comment.

<sup>199</sup> Memorandum, Paul Williams, ASBCA Chairman, to the Secretary of Defense et al., subject: Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1995 (1 Oct. 1995) (on file with author).

<sup>200</sup> *Id.*

<sup>201</sup> The ASBCA's annual reports after FY 1995 do not contain statistics on its appeal processing times. See e-mail from the ASBCA to Major Eugene Kim (Jan. 24, 2007, 17:37 EST) (on file with author).

<sup>202</sup> See generally White & Kilgour, *supra* note 8.

<sup>203</sup> Wheeler, *supra* note 182, at 657 (citing S. REP. NO. 95-1118, at 12-13 (1978)).

practitioner: “This statement may shock some, but it is an open secret in the government contracts bar, and indeed in the Government, that some appeals take too long to reach decision.”<sup>204</sup>

Developing a solution that would preserve a contractor’s ability to have his grievance properly addressed, while at the same time facilitate the speedy resolution of CDA appeals is an extremely difficult task.<sup>205</sup> This challenge was expressly recognized while the CDA was being legislated: “The dictates of justice in these disputes have emphasized thoroughness and due process at the expense of both speed and cost, and the procedures of the boards have thus become increasingly formalized through demands by contractors and their counsel that further safeguards be afforded them.”<sup>206</sup> As a practical matter, Appellants and their counsel would vigorously defend the current CDA appeals system, since it provides litigants with extensive due process rights at the expense of administrative efficiency.<sup>207</sup> Therefore, any meaningful reform of the CDA appeals system should “streamline or expedite the administrative board process while still offering the litigants procedural fairness.”<sup>208</sup> In response to these concerns, at least one prominent commentator raises the possibility of imposing time limitations on the processing of CDA appeals.<sup>209</sup> Thanks to the CICA and the GAO, we have an example of an instance where Congress provided clear and firm deadlines for when it wanted something accomplished, and where the affected agency utilized this mandate to develop and enforce implementing rules that allowed it to comply with its statutory obligation.<sup>210</sup>

#### A. The Mechanics of the One Year Rule

In light of the successful precedent established by the CICA and the GAO, a modified version of the 100 Day Rule should be created by congressional legislation and enforced by the ASBCA so that it may overcome the challenges it currently faces with its backlog of appeals and extended processing times.<sup>211</sup> Under this proposed new timeliness requirement, the ASBCA would have 365 calendar days from the date an appeal is docketed to conduct its review and issue a decision on the merits. The longer review and decision period afforded under this proposed One Year Rule would be in recognition of the prevailing presumption that CDA appeals are more administratively and substantively complex than bid protests. As is the case with the 100 Day Rule, the One Year Rule would contain no statutory exception that would permit an extension of the review and decision period. In addition, the “expedited”<sup>212</sup> and “accelerated”<sup>213</sup> procedures contained in ASBCA Rule 12 would be applied automatically (instead of upon election by the appellant) for cases that meet the current rule’s eligibility criteria.<sup>214</sup>

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<sup>204</sup> Howell, *supra* note 198, at 564.

<sup>205</sup> *See id.*

<sup>206</sup> *See Wheeler, supra* note 182, at 657 (citing CDA Senate Report, *supra* note 182, at 12–13).

<sup>207</sup> *See generally id.* at 656 (noting that the boards of contract appeals “gradually have yielded to due process pressures over the years and have become heavily ‘judicialized’ in efforts to afford their litigants fair procedures”).

<sup>208</sup> *Id.* at 657.

<sup>209</sup> *See Schooner, supra* note 10, at 651. In brainstorming perceived problems with the CDA and possible solutions, Professor Schooner brings to light a key concern of stakeholders in the CDA appeal process:

Are there obvious solutions responsive to the period complaints – by contractors, the bar, government agencies, and private industry – regarding the length of time certain appeals languish at [boards of contract appeals]? Is it appropriate to set – whether by statute or administrative rule – maximum time periods for decision after filing or, at the very least, the time at which hearings and briefings have concluded and the decision is “ready to write?”

*Id.*

<sup>210</sup> *See generally* CICA 1984, *supra* note 4, amended by NDAA 1996, *supra* note 4, § 5501(2)(A); 4 C.F.R. pt. 21 (2007); GAO Guide, *supra* note 18, at 5.

<sup>211</sup> Pursuant to the National Defense Authorization Act for Fiscal Year 2006, the boards of contract appeals for eight federal agencies were merged into a new Civilian Board of Contract Appeals (CBCA). National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3391. The merger did not include the ASBCA, the Postal Service Board of Contract Appeals, or the Tennessee Valley Authority Board of Contract Appeals. *Id.* at 3392. The CBCA was formally established on 6 January 2007 and issued its first decision on 18 January 2007. *See New Civilian BCA Decides First CDA Case; Holdings of Predecessors Will Be Binding*, FED. CONT. DAILY, Feb. 14, 2007. Due to the CBCA’s nascent status, this article has focused on the ASBCA and its procedural rules to highlight the need for a One Year Rule for the processing of CDA appeals at all of the boards of contract appeals.

<sup>212</sup> ASBCA RULES, *supra* note 98, at A-9.

<sup>213</sup> *Id.*

<sup>214</sup> *See generally id.*

As proposed, the One Year Rule would be enacted through legislation so that the rule would enjoy the executive deference it would require in order to ensure compliance. In the alternative, the One Year Rule could be imposed on the ASBCA through one of three executive actions: a joint directive issued by the Secretary of Defense and the heads of the other federal agencies serviced by the ASBCA; a directive issued by the Administrator of the Office of Federal Procurement Policy, which has oversight responsibility over the boards of contract appeals; or by Executive Order.<sup>215</sup>

In order to adhere to the One Year Rule, the ASBCA would have to extensively modify its rules so that both litigants and the ASBCA's administrative law judges would have sufficient time to accomplish their respective responsibilities. For example, the current version of ASBCA Rule 6(a) essentially provides appellants up to 120 days to submit their complaint: ninety days are provided under Rule 1 to submit a notice of appeal (a requirement that can be satisfied by a simple written declaration of an intent to appeal), and an additional thirty days are provided under Rule 6(a) to submit the complaint.<sup>216</sup> In order to streamline the procedure for initiating an appeal, ASBCA Rules 1 and 6(a) should be revised by eliminating the notice of appeal requirement, and substituting it with a requirement that the complaint be filed within ninety days of receipt of the contracting officer's final decision.<sup>217</sup> Once the complaint is received by the ASBCA, the One Year Rule clock would start.

Under the current versions of ASBCA Rules 4(a) and 6(a), the appellant's submission of the complaint generally coincides with the government's submission of the Rule 4 file.<sup>218</sup> Afterwards, the government and appellant can request that documents be added to or removed from the Rule 4 file throughout the discovery phase and up to (and even during) a hearing pursuant to ASBCA Rules 4(e) and 20(a).<sup>219</sup> Under the One Year Rule, upon receipt of the complaint from the ASBCA, the government would have ninety days to prepare the Rule 4 file and its answer to the appellant's complaint (under the current ASBCA Rule 6(b), the answer is due within thirty days of receipt of the complaint).<sup>220</sup> Although contracting officers and government attorneys might argue that ninety days is insufficient time to prepare a Rule 4 file, it is important to note that, by the time litigation at the ASBCA commences, the government should have already conducted internal document discovery in order to prepare the contracting officer's final decision.<sup>221</sup> The ninety days afforded to the government to prepare the Rule 4 file and its answer would strike a fair and appropriate balance with the ninety days afforded to the appellant to prepare his complaint, and should obviate the need for extensions on either side.

Implementation of the One Year Rule would also require the ASBCA to amend its rules on discovery. For example, ASBCA Rules 14 and 15 would have to be amended to include express deadlines for conducting discovery (e.g., depositions, interrogatories, and document discovery).<sup>222</sup> These amendments would dramatically reduce the length and breadth of discovery, which is normally the root cause for the protracted nature of many appeals.<sup>223</sup> Similar types of deadlines would need to be included with ASBCA Rules 17 through 25 in order to expedite the conduct of hearings and the submission of post-hearing briefs, which at times have also been sources for longer processing times.<sup>224</sup> All of these new deadlines would support the objective of a revised ASBCA Rule 28 which, as amended, would reflect the intent of the ASBCA to issue a decision on an appeal within 365 calendar days from the date of docketing.<sup>225</sup>

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<sup>215</sup> See 41 U.S.C. § 607(h) (2000) ("The [Office of Federal Procurement Policy] Administrator is authorized . . . to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for the board established by the Tennessee Valley Authority)."); Howell, *supra* note 198, at 559.

<sup>216</sup> See generally ASBCA RULES, *supra* note 98, at A-5, A-7.

<sup>217</sup> See generally Wheeler, *supra* note 182, at 658 (noting that the notice of appeal "serves no purpose in a board proceeding" and recommending its abolishment).

<sup>218</sup> See generally ASBCA RULES, *supra* note 98, at A-6, A-7.

<sup>219</sup> See generally *id.* at A-6, A-13.

<sup>220</sup> See generally *id.* at A-7.

<sup>221</sup> Interview with Lieutenant Colonel Ralph Tremaglio, Professor and Chair, Contract and Fiscal Law Department, TJAGLCS, U.S. Army, in Charlottesville, Va. (Feb. 27, 2007) [hereinafter Tremaglio Interview].

<sup>222</sup> See generally ASBCA RULES, *supra* note 98, at A-11 to A-12.

<sup>223</sup> Howell, *supra* note 198, at 564 n.20 ("In BCA practice, discovery and case presentation ordinarily absorb a substantial majority of the time from filing of an appeal to the disposition of the appeal.")

<sup>224</sup> See, e.g., Grumman Aerospace Corp., ASBCA Nos. 46834, 48006, 51526, 2003-1 BCA ¶ 32,203. In the *Grumman* case, the ASBCA conducted a hearing "covering 77 trial days over a one year period." *Id.*

<sup>225</sup> See generally ASBCA RULES, *supra* note 98, at A-17.

## B. The Impact of the One Year Rule on Appellants and the Government

An argument can be made that the One Year Rule would dramatically reduce the amount of time available for both appellants and the government to develop their cases and defenses. This would be especially detrimental for appeals that are large, complex, and/or present issues of first impression.<sup>226</sup> This argument implicates the balancing test that every administrative adjudicatory system must apply: the desire for efficiency versus the need to provide aggrieved parties with a fair and equitable forum.<sup>227</sup>

Appellants who oppose the One Year Rule would most likely argue that the rule would deprive them of their due process rights because the generous discovery entitlements contained in the current ASBCA rules would have to be curtailed in order for the ASBCA to comply with the One Year Rule.<sup>228</sup> It is true that the One Year Rule would significantly reduce the length and breadth of discovery for CDA appeals. However, a reasonable counter-argument can be made that, in the case of small and/or uncomplicated appeals (i.e., the type of appeals the CDA envisioned the ASBCA would hear), appellants do not need to conduct extensive discovery to substantiate their appeal.<sup>229</sup> It can also be reasonably counter-argued that, in the case of appellants with large, complex, and/or novel claims, the CDA provides a solution when more time is needed for discovery: appellants can file their cases with the COFC.<sup>230</sup> Congress originally intended for the boards of appeals “to hear most of the routine contract appeals”<sup>231</sup> while the COFC (which has a one-year filing deadline for CDA appeals) would “hear the more complex, large-dollar cases and cases involving landmark issues of law.”<sup>232</sup> This is consistent with Congress’ original desire for the boards of contract appeals to provide “expeditious, less formal, less expensive resolution of government contract claims.”<sup>233</sup> Since the firm time constraints contained in the One Year Rule would dissuade appellants with large, complex, and/or novel claims from filing their appeals with the ASBCA, the rule would promote the forum selection methodology that the CDA intended to establish.<sup>234</sup> This, in turn, would result in the filing of fewer, smaller, and less complex appeals at the ASBCA, which would then be able to more efficiently employ its resources to address both its current and backlog caseload.

Government attorneys and contracting officers who oppose the One Year Rule would most likely argue that the rule would deny them the necessary time to properly re-construct, review, and assess a disputed contract’s pre-and post-award history.<sup>235</sup> This is a valid concern, since CDA appeals can, on occasion, involve contracts that were performed many years prior to the start of litigation.<sup>236</sup> Under these circumstances, government attorneys and contracting officers face the daunting and time-consuming tasks of locating and retrieving archived contract files and identifying, finding, and interviewing government witnesses who have often either retired or been reassigned.<sup>237</sup> The One Year Rule actually alleviates these burdens in two ways: first, it increases the amount of time the government has to prepare the Rule 4 file and its answer; and second, it encourages government attorneys and contracting officers to develop and apply litigation risk management and mitigation techniques for contracts they suspect will eventually be the subject of a future CDA appeal.

In addition, the One Year Rule would provide a significant financial benefit to both appellants and the government. Contract disputes that are litigated in the streamlined manner contemplated by the One Year Rule would reduce the amount of appellant’s attorney fees and lower the administrative overhead that appellants would incur as a result of devoting its personnel and resources to the prosecution of an appeal. The One Year Rule would also enable the government to realize significant cost savings because its personnel would be engaged in litigation of more limited duration which, in turn, would allow these resources to be more quickly committed elsewhere.

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<sup>226</sup> See generally Tremaglio Interview, *supra* note 221.

<sup>227</sup> See generally Howell, *supra* note 198, at 559.

<sup>228</sup> See generally Tremaglio Interview, *supra* note 221.

<sup>229</sup> See generally Wheeler, *supra* note 182, at 655.

<sup>230</sup> See CDA 1978, *supra* note 11, at sec. 10(a)(1).

<sup>231</sup> Wheeler, *supra* note 182, at 655.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (quoting S. REP. NO. 95-1118, at 12–13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5239).

<sup>234</sup> See generally *id.*

<sup>235</sup> See generally Tremaglio Interview, *supra* note 221.

<sup>236</sup> See, e.g., Guarino Corp., ASBCA No. 55015, 55028, 2006-2 BCA ¶ 33,426 (dismissing an appeal from a contracting officer’s final decision issued in 2005 for a services contract that was awarded in 1985 and substantially completed by 1986).

<sup>237</sup> See generally Tremaglio Interview, *supra* note 221.

## VI. Conclusion

Thanks to the 100 Day Rule and the GAO's unwavering compliance with this requirement, allegations of errors or deficiencies in government procurement actions can be reviewed and, if necessary, corrected in an expeditious manner.<sup>238</sup> The 100 Day Rule and its regulatory progeny, i.e., the GAO's Bid Protest Regulations and the decisions of the Comptroller General, have enabled the GAO to provide a model administrative forum that resolves bid protests in an "easy and inexpensive"<sup>239</sup> manner and "more quickly . . . than by court litigation."<sup>240</sup> Unfortunately, the ASBCA has been unable to follow the GAO's example. Even though the ASBCA's caseload of CDA appeals has significantly decreased in the last fifteen years, the ASBCA continues to carry a backlog of cases that hinders its ability to provide prompt decisions on appeals.<sup>241</sup> This circumstance can be attributed, at least in part, to the CDA's lack of a CICA-like legislative requirement to resolve appeals within a definite period of time.<sup>242</sup>

Although the CDA was enacted almost thirty years ago, the act has been described as an "adolescent"<sup>243</sup> and its evolution akin to "a parent watching a teenager become an adult."<sup>244</sup> Building upon this analogy, the protracted and complex nature of CDA litigation can be described as one of the CDA's more visible growing pains. Despite the intent of the CDA's drafters to develop an administrative system that would review and resolve contract disputes in a timely and economical manner, "the CDA today stands as a structured adversarial disputes resolution edifice"<sup>245</sup> under which "[l]itigation, ever more complex and formal, is the statute's keystone and legacy."<sup>246</sup> Nevertheless, although the world of federal contracting and dispute resolution has changed significantly since the birth of the CDA, one core principal remains unchanged: "the foundation of our entire federal procurement system demands that contract disputes be resolved swiftly and efficiently."<sup>247</sup>

As a consequence, the legislative and executive branches should consider whether the current challenges facing the ASBCA with respect to its processing times and backlog of cases merit the adoption of new, definite, and strict litigation deadlines akin to those in the CICA. If the ASBCA were required to review and decide upon CDA appeals within 365 calendar days as proposed, and if the ASBCA were to embrace a One Year Rule in the same way that the GAO has done so in the case of the 100 Day Rule, then the CDA litigation landscape would be dramatically altered for the better. Processing times for CDA appeals would be reduced, the ASBCA's backlog of cases could be eliminated, and appellants and the government would incur substantially lower litigation costs. Adoption of a One Year Rule would therefore allow the ASBCA to become what the drafters of the CDA intended: "the least expensive, most expeditious forum available to the contractor."<sup>248</sup>

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<sup>238</sup> See generally White & Kilgour, *supra* note 8, at 411.

<sup>239</sup> GAO GUIDE, *supra* note 18, at 5.

<sup>240</sup> *Id.*

<sup>241</sup> See ASBCA FY 2006 Report, *supra* note 184; ASBCA FY 2005 Report, *supra* note 184.

<sup>242</sup> Compare CICA 1984, *supra* note 4, with CDA 1978, *supra* note 11.

<sup>243</sup> Wheeler, *supra* note 182, at 664.

<sup>244</sup> *Id.*

<sup>245</sup> Schooner, *supra* note 10, at 638.

<sup>246</sup> *Id.*; see also Wheeler, *supra* note 182, at 655 (citing S. REP. NO. 95-1118, at 12-13 (1978), reprinted in 1978 U.S.C.A.N. 5235, 5239).

<sup>247</sup> Wheeler, *supra* note 182, at 657.

<sup>248</sup> *Id.* at 655 (citing S. REP. NO. 95-1118, at 12-13 (1978)).