

Presentation Purpose

- ❑ Information and opinions presented are that of the presenter and do not represent an official government or company position.
- ❑ This presentation contains information and research originally published by James W. Nelson, USA Judge Advocate, in the Public Contract Law Journal, Volume 43, Number 4, Summer 2014.

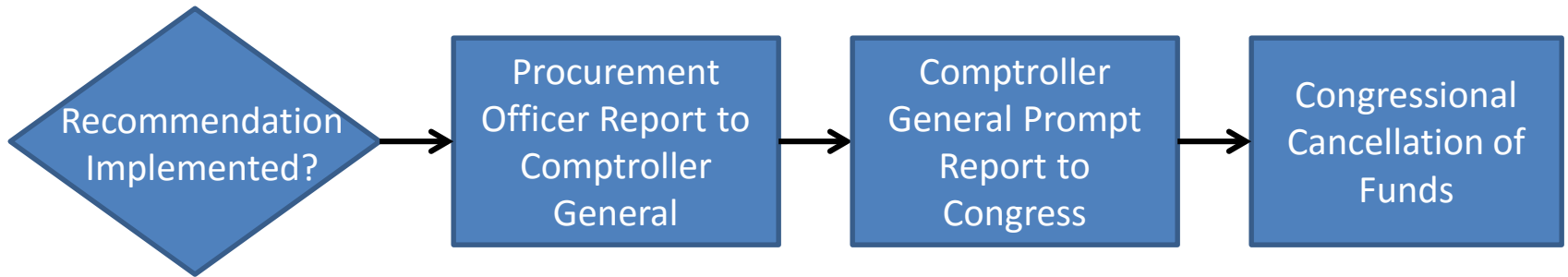
- ❑ Reforms whittled protest fora (outside the contracting agency) down from four to two by the end of 2001:
 - Government Accountability Office (GAO)
 - Court of Federal Claims (COFC)
- ❑ Critics cited lack of “efficiency” as reason of reshaping bid protest fora because of differences in jurisdiction, standards of review and remedies available.

Does the current bid protest fora still create inefficiency in procurement and therefore not fully serve competition?

- ❑ Congress statutorily granted protest jurisdiction to the GAO when it enacted the Competition in Contracting Act (CICA, 1984).
- ❑ GAO decides whether a federal agency's solicitation, proposed contract award or award of a contract complies with federal statute and regulation.
- ❑ GAO dismisses, denies or sustains a protest.
- ❑ Sustainment includes agency recommendation for corrective action.

GAO recommendations in bid protest decisions are not binding!

❑ Teeth are found in the CICA reporting requirements.



If the federal agency fails to implement the GAO recommendation within 60 days of receiving the recommendation, the head procurement official of the federal agency must report the failure to the Comptroller General.

Comptroller General must “Promptly Notify” Congress of the agency’s failure to implement the decision and make a recommendation.

In order to preserve the integrity of the procurement process Congress will consider legislative rescission or cancellation of funds.

- ❑ Protest must be filed by an “interested party”.
- ❑ A protest **must** be filed no later than 10 days after the basis for the protest is known or should have been known.
- ❑ Most protests challenge the acceptance or rejection of a bid or proposal, and the award or proposed award of a contract.
- ❑ Defective solicitations may also be the basis for a protest.
- ❑ Termination of a contract may be protested.

You can protest the bid, you can protest an award, and you can protest termination of a contract.

- ❑ Protesters must file pre-award protests in those instances where protester's allegations are based on alleged improprieties in a solicitation.
- ❑ Protesters must file post-award protests where protesters allegations are based on the procurement official's decision involving a contract award.
- ❑ The GAO may dismiss any protest a protester fails to establish as timely.

You have a right to protest a bid or an award both before and after the award of a contract.

- Contract administration
- Small business issues
- Bidder or offeror is incapable of performing a contract
- Procurement integrity
- Protests not filed within time limits
- Protests which lack a detailed statement of the legal and factual grounds of protest
- Procurements by agencies other than Federal agencies
- Subcontract protests
- Suspensions and debarments.
- Competitive range
- Decision whether or not to file a protest on behalf of Federal employees

- Statistically preferred forum for disappointed offerers
- Automatic stay
- Prompt resolution
- No fee
- Formal briefs not required and relatively informal proceedings
- Minimal document production, limited to relevancy
- Overwhelming majority of decisions are decided without a hearing
- GAO's Procurement Law Group's primary job is to decide bid protests

GAO is most often chosen forum when a protester desires less costly and prompt resolution of its protest.

- ❑ Does not have strict timeliness rules because Congress prescribed none
- ❑ Statutorily vested with authority to entertain protests “without regard to whether suit is instituted before or after the contract is awarded”
- ❑ Obtaining a temporary restraining order or a preliminary injunction at the COFC is a high hurdle for protesters. They must satisfy a four-part test:
 - Succeeded on the merits of the case
 - The plaintiff will suffer irreparable harm
 - Balance of hardship favors relief
 - Is it in the public interest?

- ❑ Article 1 court, imbued with all benefits of traditional judicial body
- ❑ Formal court proceedings
- ❑ Judges subjected to the appointment process
- ❑ Rulings that are appealable
- ❑ Judgments that have the full force and effect of the law

COFC is most often chosen forum when a protester desires the benefits of a judicial forum, i.e. formality and finality, coupled with the right of appeal.

Bid protests serve to legitimize the procurement system and although the U.S. government needs a transparent system with accountability, it also needs procurement challenges resolved promptly.

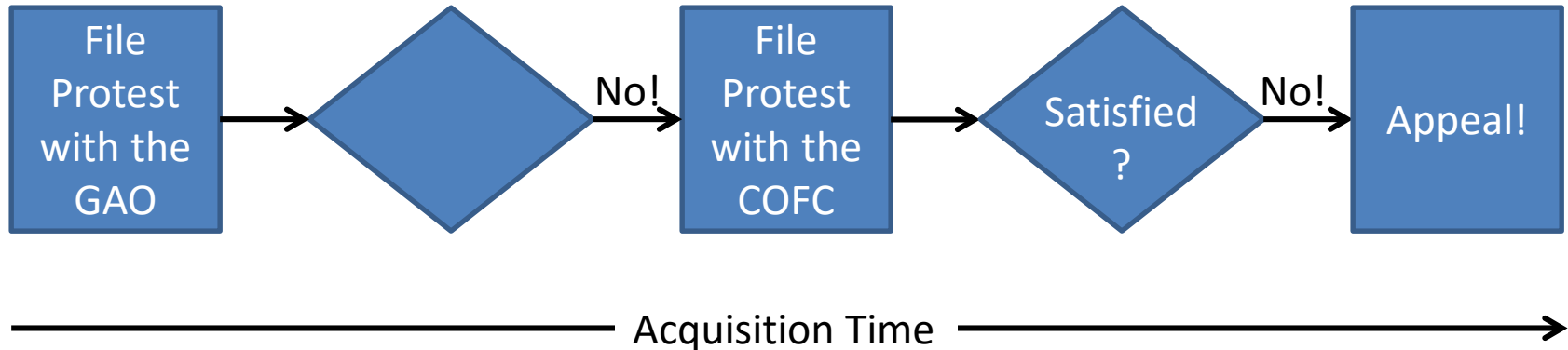
- Some contend that concurrent bid protest fora detract from that goal.
- Serial protests unnecessarily prolong the procurement period and add complexity to the procurement process.
- Second guesses undermine agency voluntary remedy of procurement errors.

- ❑ Serial protests exist as a viable avenue for additional agency oversight because of the difference in the fora's timeliness rules.
- ❑ The protest period is significantly extended.
- ❑ Outcome may remain unchanged.
- ❑ Outcome may change with unforeseen consequences for the procurement process.

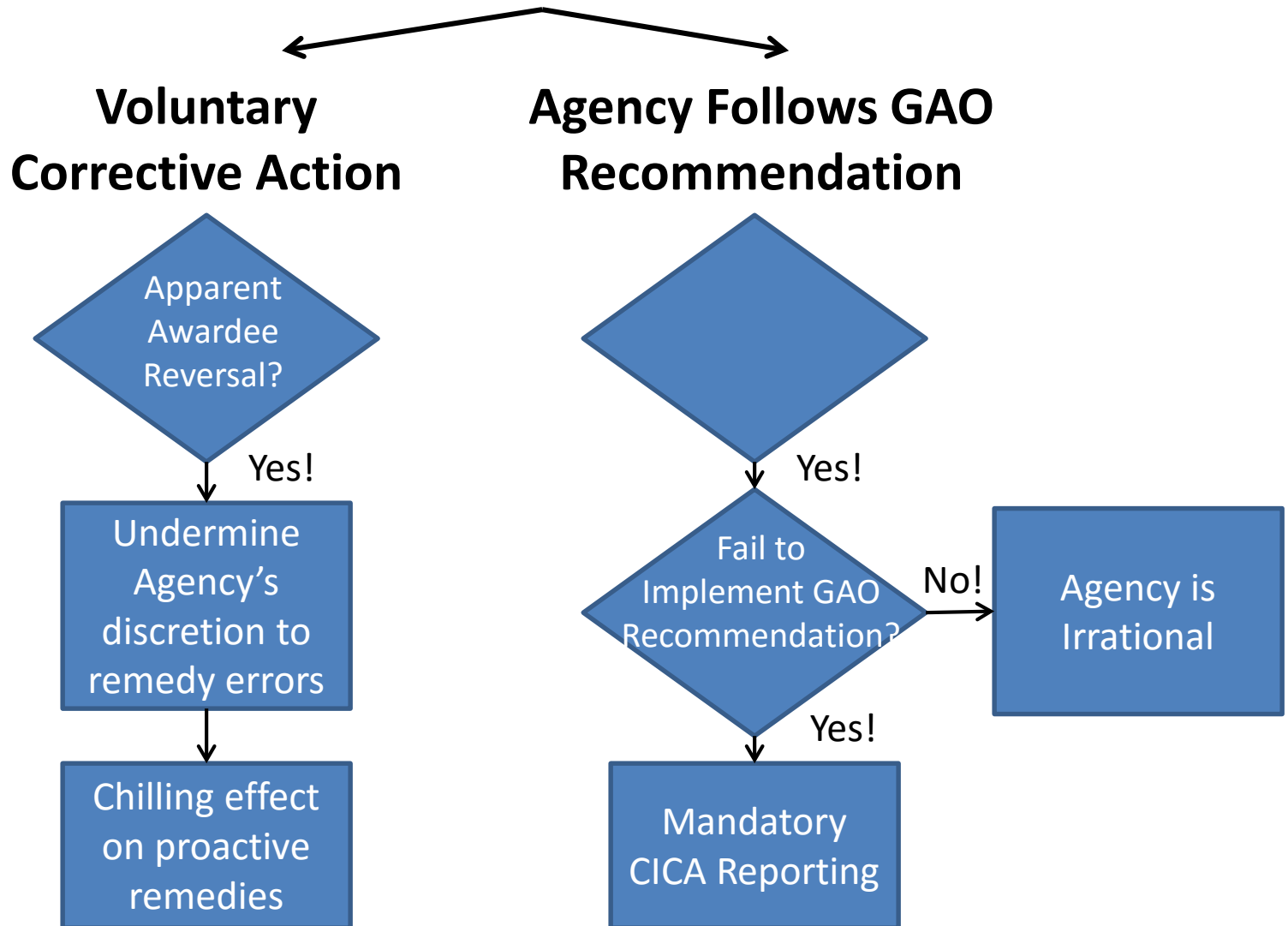
Does the additional oversight afforded by serial protests add value to the process or does it mainly add delays and confusion?

Serial Protests

The legitimacy of the bid protest function is integral to the U.S. federal procurement system. It provides transparency, integrity, and accountability.



- ❑ The COFC's ability to second guess a GAO recommended corrective action results in the other party, the apparent awardee, to initiate litigation.
- ❑ Corrective action includes those instances where an agency chooses to voluntarily take corrective action based on allegations in a GAO protest or when the agency chooses to follow the GAOs recommendation in a sustained protest.
- ❑ In either case the apparent awardee becomes the aggrieved party seeking relief at the COFC



Analysis

- ❑ Not disputed that concurrent bid protest jurisdiction provides an avenue for a protester to re-litigate its protest anew at the COFC.
- ❑ The current scheme provides an avenue for an apparent awardee to challenge the rationale of an agency's voluntary corrective action.
- ❑ When the COFC reaches a different decision than the GAO, the disparity leads to more questions than answers regarding the current state of the law.

A “second bite at the apple” and “second guessing” do in fact prolong the resolution of protests.

By the Numbers

GAO FY11/FY12 Bid Protest Statistics

	Cases Filed	Cases Closed	Merit (Sustain + Deny) Decisions	Number of Sustains	Sustain Rate
FY11	2,353 (up 2%)	2,292	417	67	16.0%
FY12	2,475 (up 5%)	2,495	570	106	18.6%

Analysis of CY 11 / CY 12 COFC Bid Protests

	Number of Bid Protests	Number of Protests That Originated at GAO	Number of Serial Protests	Number of "Second Guess" Protests
FY11	88	13	10 / 2	3 / 2
FY12	83	12	8 / 0	4 / 1

By the Numbers (Cont'd.)

- ❑ Concurrent bid protest jurisdiction resulted in 25 procurements that were subject to both administrative and judicial review.
- ❑ In 18 of those procurements, protesters who were disappointed with the GAO's recommendation filed a subsequent protest at the COFC.
- ❑ Of those 18, the COFC reached a different result than the GAO only twice.
- ❑ There were only seven occasions where the corrective action subsequent to the initial GAO protest was challenged at the COFC.
- ❑ On 3 occasions the COFC determined that either it was irrational to follow the GAO's recommendation or the agency's proposed corrective action in response was unreasonable.

By the Numbers Summary

- ❑ For CY 11 / CY 12 only 25 of the nearly 5000 bid protests filed at the GAO and COFC were subjected to both fora's jurisdiction.
- ❑ Statistically speaking those 25 protests are inconsequential to the procurement process.
- ❑ The insignificance is further amplified when considered in light of the total number of goods and services the federal government procures each year (# of procurements > 200K).
- ❑ Serial and second guess protests are therefore rare events.

Concurrent jurisdiction is minimally disruptive to the procurement system but also satisfies the inherent need to have a system that is transparent, fair and also provides a venue for judicial adjudication.

Tactical Decision

- ❑ For the protester, each forum's benefits make the choice of forum, GAO or COFC, a tactical one.
- ❑ If a protester is most concerned about cost and certainty of a quick resolution, he should choose the GAO.
- ❑ If the protester desires a formal process, binding decision and prospect of appellate review then he should choose the COFC.

Conclusions

- ❑ Concurrent bid protest jurisdiction legitimizes the federal procurement system by creating accountability between the two fora.
- ❑ Protests that result in serial protest or second guessing are relatively infrequent.
- ❑ Two fora are not too many.

Recap

GAO-COFC Concurrent Bid Protest Jurisdiction