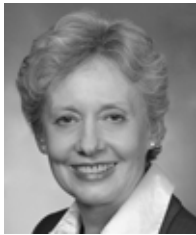


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Bid Protests

Deja Review: The Standard of Review of GAO Decisions at the Federal Circuit and the Court of Federal Claims—Part I



BY MARCIA G. MADSEN, CAMERON S. HAMRICK,
AND MICHELLE E. LITTEKEN

Bidders and Offerors involved in federal procurements have long had the right to contest agency conduct at the Government Accountability Office (“GAO”) under certain circumstances, and also have had the right to file certain types of protests at the United States Court of Federal Claims¹ following decisions by the GAO. The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (“ADRA”), substantially broadened the court’s bid protest jurisdiction, which in turn expanded the ability to seek relief at the court after a GAO protest.

Protests at the court following a GAO decision have become a hot topic in recent years, in part because of

¹ Unless otherwise specified, “Court” refers to the United States Court of Federal Claims.

Marcia G. Madsen is a partner in Mayer Brown’s Washington, D.C. office and chair of the firm’s government contracts practice. Cameron S. Hamrick is a partner in Mayer Brown’s Washington, D.C. office, and focuses his practice on government contracts. Michelle E. Litteken is an associate in Mayer Brown’s Washington, D.C. office, and focuses her practice on government contracts.

certain high-profile decisions by the court and the Federal Circuit. In addition, in 2012 and 2013, the Department of Defense (“DOD”) asked Congress for legislation intended to force protesters to choose between the GAO and the Court of Federal Claims. Further, in 2012 and 2013, Senator Levin introduced legislation as part of Defense Authorization Acts designed to implement DOD’s requests. National Defense Authorization Act for Fiscal Year 2014, S. 1034, 113th Cong. § 805 (2013); National Defense Authorization Act for Fiscal Year 2013, S. 2467, 112th Cong. § 817 (2012). Both bills sought to accomplish this goal by providing that a protest that was previously filed with the Comptroller General may not be reviewed by the Court of Federal Claims. S. 1034, 113th Cong. § 805(a)(2)(A) (2013); S. 2467, 112th Cong. § 817(a)(2)(A) (2012). The bills further stated: “Under no circumstances may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the Government Accountability Office.” S. 1034, 113th Cong. § 805(a)(2)(D) (2013); S. 2467, 112th Cong. § 817(a)(2)(D) (2012). Both bills were introduced and referred to the Committee on Armed Services.

DOD’s requests and the proposed legislation necessarily place a spotlight on the current jurisdictional framework for bid protests. However, some have argued that the proposed legislation is a solution in search of a problem. First, very few protests filed at GAO are subsequently brought to the court. Second, DOD’s proposals fail to appreciate that GAO is an alternative to – but not a replacement of – a judicial bid pro-

test. The fact that Congress provided government contractors with an informal expedited forum to resolve bid protests is an asset to the procurement system. GAO hears thousands of bid protests a year – 2,298 in FY 2013 – and the court hears approximately 100 each year. GAO is able to hear a significant number of protests because of its unique procedures and its focus on bid protests. Third, DOD’s requests fail to acknowledge that disappointed offerors have had a judicial remedy for over half a century.

As part of the current bid protest framework, when the GAO denies a protest, the protester can seek relief at the court. In those situations, the GAO decision usually is not relevant to the court’s analysis. However, when GAO sustains a protest and recommends that the agency take corrective action, the awardee can seek relief at the court. In that situation, the GAO’s decision is relevant to the court’s analysis. Complex questions have arisen in connection with the court’s review of GAO decisions and agency responses to GAO decisions, including questions concerning the proper standard of review. The purpose of this article is to provide an assessment of the state of the law at the Federal Circuit and the court in this area. A necessary part of this assessment is a description of the historical context in which the law has developed – the roots of the current law extend to the pre-ADRA era.

Because of the long history relevant to this topic and associated complexities, we have divided the article into three parts. The other two parts, which focus on the passage of the ADRA, and on the Federal Circuit’s and the Court of Federal Claims’ efforts to clarify standards applicable in cases that occur after GAO protests, will be published in the near future.

II. The Pre-ADRA Landscape. While the ADRA expanded the court’s bid protest jurisdiction and specified its protest standard of review, post-ADRA decisions continue to cite pre-ADRA decisions in connection with protests that follow a GAO decision. As such, review of certain pre-ADRA decisions provides part of the foundation for the legal principles applicable in the post-ADRA world.

A. Judicial Review of Bid Protests. In *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), the D.C. Circuit Court of Appeals held that the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (“APA”), standard of review applied to post-award bid protests. In that case, a disappointed offeror challenged the award of a Federal Aviation Administration (“FAA”) contract for instrument landing systems. The plaintiff argued that the awardee’s bid was nonresponsive, and that the FAA violated the APA in making the award. The government argued that the plaintiff lacked standing to challenge the award, and that the award was not subject to judicial review because it was a matter of agency discretion. The D.C. Circuit rejected both arguments. With respect to standing, the *Scanwell* Court stated:

When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests, while at the same time furthering the public interest.

Id. at 864. Furthermore, the court found that the APA and cases brought under it demonstrated that judicial

review of final agency actions will not be limited unless Congress limits it. *Id.* at 865. The Court analyzed the legislative history of the Public Contracts Act, 41 U.S.C. § 43a (1964), and determined that it evidenced an affirmative intent of Congress to grant review in circumstances that warrant it. *Id.* at 868. In fact, in the amendments to the Public Contracts Act, Congress had specifically applied the APA to agency actions related to public contracts. *Id.* Additionally, with respect to agency discretion, the court stated:

It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties. It is also incontestable that that discretion may not be abused. Surely there are criteria to be taken into consideration other than price; contracting officers may properly evaluate those criteria and base their final decisions upon the result of their analysis. They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the Administrative Procedure Act.

Id. at 869. Finally, the court addressed the argument that a plaintiff was required to first file a claim at GAO. The Court rejected this argument, stating that although pursuing a claim at GAO “may serve as a useful alternative procedure under certain circumstances,” a disappointed offeror is not required to first bring a claim there. *Id.* at 876.

Practice Tips

■ When GAO sustains a protest and recommends that the agency take corrective action, the awardee can seek relief at the court and the GAO decision is relevant to the court’s analysis. In reviewing case law concerning the proper standard of review, practitioners should not ignore pre-ADRA decisions, as the relevance of many such decisions has been affirmed by post-ADRA decisions – as discussed above, the roots of the current law extend to the pre-ADRA era.

■ The pre-ADRA case law includes the Federal Circuit’s decision in *Honeywell*, where the Circuit specified that the controlling question in deciding whether an agency can justifiably follow a GAO recommendation is whether GAO’s decision was irrational, and further explained that the court should not undertake its own independent *de novo* review.

■ Practitioners should be prepared to address the proper standard of review the court should afford the GAO decision. Practitioners challenging GAO corrective action recommendations can rely on Court precedent criticizing GAO decisions as being conclusory, and for failing to follow the solicitation and/or applicable law. Intervenor at the court can rely on *Honeywell* and other decisions to show that the court owes some deference to GAO decisions, and also for language concerning GAO’s important role in procurement disputes.

As discussed below, Congress established that the APA standard applies to protests at the Court of Federal

Claims in 1996. However, some decisions cited *Scanwell* and applied the APA standard before then. See *Int'l Graphics, Div. of Moore Bus. Forms, Inc. v. United States*, 4 Cl. Ct. 186, 193 (1983) (“[T]he court adopted the holding of *Scanwell* permitting judicial review over all agency actions that are arbitrary and capricious – i.e., those that ‘exceed the legal perimeters’ of agency discretion”).

B. The Court’s Pre-Award Protest Jurisdiction. Prior to 1982, disappointed bidders who competed for government contracts were able to bring actions in the court only on a limited basis under a theory that the government made an implied contract with prospective bidders to consider their bids fairly, and an aggrieved party typically was limited to monetary relief.² See *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1078 (Fed. Cir. 2001); see also *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331 (Fed. Cir. 2001) (aggrieved bidder was typically limited to monetary relief such as bid preparation costs); *Heyer Prods. Co. v. United States*, 135 Ct. Cl. 63 (1956). In 1982, Congress passed the Federal Courts Improvement Act of 1982, which granted the court jurisdiction to provide declaratory and injunctive relief. However, in 1983, the Federal Circuit’s decision in *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1372 (Fed. Cir. 1983) (en banc), limited the court’s jurisdiction in government procurement actions to pre-award cases. *Emery Worldwide Airlines*, 264 F.3d at 1078.

Following passage of the Federal Courts Improvement Act of 1982 and the *John C. Grimberg* decision, the court had exclusive jurisdiction to grant declaratory and injunctive relief in pre-award contract controversies pursuant to 28 U.S.C. § 1491(a)(3), which provided in part: “To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.” See *Commercial Energies, Inc. v. United States*, 20 Cl. Ct. 140, 144 (1990); *John C. Grimberg*, 702 F.2d at 1372. As with cases brought prior to 1982, pre-award claims under § 1491(a)(3) were based on an implied-in-fact contract that arose by virtue of the bid solicitation process that obligated the government to consider offers fairly and honestly. See *Carothers Constr. Inc. v. United States*, 18 Cl. Ct. 745, 748 (1989).³ As explained by the court in *Firth Construction Co., v. United States*, 36 Fed. Cl. 268, 271 (1996):

The court has jurisdiction over contract disputes pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994). The response to an invitation for bids by a bidder forms an im-

² The Court of Federal Claims was called the United States Claims Court prior to enactment of the Federal Courts Administration Act of 1992, Pub.L. No. 102-572, § 902(a), 106 Stat. 4506, 4516. The Claims Court was called the United States Court of Claims prior to the enactment of the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, § 133(a), 96 Stat. 25, 40.

³ Because district courts had jurisdiction to review post-award bid protests under *Scanwell*, 424 F.2d 859, for a period, both the district courts and the Court of Claims exercised jurisdiction over different types of bid protests using two separate theories. *Res. Conservation Grp-Group LLC v. United States*, 597 F.3d 1238, 1242 (Fed. Cir. 2010).

plied contract, the terms of which require the government to fairly and honestly consider an offeror’s bid. Once jurisdiction over the implied contract attaches, the court has authority to enjoin award of the contemplated procurement contract. 28 U.S.C. § 1491(a)(3).

(Internal citations omitted).

C. The Pre-ADRA Standard of Review. The standard of review in protests at the court prior to passage of the ADRA focused on whether the government’s consideration of proposals was arbitrary or capricious. See *Commercial Energies, supra*, 20 Cl. Ct. at 144-45 (specifying arbitrary and capricious standard in suit for injunctive relief); *Keco Indus., Inc. v. United States*, 203 Ct. Cl. 566, 574 (1974) (in suit for bid preparation costs, Court stated that “[t]he ultimate standard is . . . whether the government’s conduct was arbitrary and capricious toward the bidder-claimant.”)⁴; *Keco Indus., Inc. v. United States*, 192 Ct. Cl. 773, 784 (1970) (standard of proof in cases where arbitrary and capricious action is charged should be high). The Court in *Commercial Energies* also noted that “courts should not substitute their judgments for pre-award procurement decisions unless the agency clearly acted irrationally or unreasonably.” 20 Cl. Ct. at 145. See also *IMS Servs.*, 33 Fed. Cl. at 178 (in suit for declaratory and injunctive relief, Court must consider whether Navy acted arbitrarily, capriciously, or not in accordance with law).

D. Pre-ADRA Protests Following GAO Decisions. The Court has addressed protests filed after decisions at the GAO for decades, long before the Federal Courts Improvement Act of 1982. A historic perspective is necessary to understand fully the present state of the law because decisions issued by the court prior to the ADRA are still relevant today.

1. John Reiner, Burroughs, and Honeywell. A trio of pre-ADRA cases presented holdings and rationales that have continued to resonate in post-ADRA cases filed after GAO protests.

a. John Reiner & Co. v. United States. In 1963, the Court of Claims grappled with issues arising from a case filed after a GAO decision. In *John Reiner & Co. v. United States*, 163 Ct. Cl. 381 (1963), the United States Army Corps of Engineers (“Corps”) awarded a contract

⁴ In addition, the court in *Keco Industries.*, listed four subsidiary criteria:

One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. A second is that proof that there was “no reasonable basis” for the administrative decision will also suffice, at least in many situations. The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily be a ground for recovery. The application of these four general principles may well depend on (1) the type of error or dereliction committed by the government, and (2) whether the error or dereliction occurred with respect to the claimant’s own bid or that of a competitor.

492 F.2d at 1203-04 (citations omitted); see also *IMS Servs.*, 33 Fed. Cl. 167, 181 (1995) (Court referenced *Keco*’s four factors in suit for declaratory and injunctive relief).

to plaintiff John Reiner, which subsequently learned that an unsuccessful bidder had prevailed upon GAO to rule that the award was improper and should be cancelled. The Contracting Officer (“CO”) informed the plaintiff that in compliance with GAO’s ruling, the contract was cancelled. John Reiner brought suit for breach of contract. The Court found that GAO’s views could be largely effectuated through the use of the termination for convenience clause to stop performance. *Id.* at 387 n.3.

In focusing on the nature of the cancellation resulting from GAO’s ruling and the issue of damages, the court provided the following explanation:

Here, termination would have been invoked in deference to the Comptroller General’s declaration that the contract should be cancelled. The contracting officer did not agree with that opinion, but it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the [GAO] with respect to competitive bidding. That Office, as we have pointed out, has special concern with, and supervision over, that aspect of procurement. It would be entirely justifiable for the [CO] to follow the general policy of acceding to the views of [GAO] in this area even though he had another position on the particular issue of legality or propriety.

Id. at 390. This language touches on certain themes that appear in later cases involving agency responses to GAO decisions.

b. *Burroughs Corp. v. United States.* The Court of Claims used less benign language towards GAO in *Burroughs Corp. v. United States*, 223 Ct. Cl. 53 (1980), which involved a suit for proposal preparation costs by a disappointed offeror. There, the CO determined that an offer submitted by Honeywell was acceptable, awarded the contract to Honeywell, and Burroughs protested to the GAO. GAO sustained the protest and recommended a recompetition. The agency subsequently indicated that it wanted to engage in a new, fully competitive procurement to meet its expanding needs, and GAO withdrew its recommendation.

Burroughs filed suit in the Court of Claims. The Court indicated that before analyzing the relevant factors for recovery of costs, it needed to “clarify the impact the Comptroller General’s findings and conclusions have on the question before us. *The Court of Claims is not bound by the views of the Comptroller General nor do they operate as a legal or judicial determination of the rights of the parties.*” *Id.* at 63 (emphasis added). The Court further noted that because the parties did not dispute the Comptroller General’s factual conclusions, there was no reason for the court not to accept those facts. With respect to the Comptroller General’s legal conclusion that the contract award was illegal, the court explained that “[t]he questions of legal error in a procurement, and entitlement to ‘bid’ or ‘proposal’ preparation costs are therefore quite distinct. The Comptroller General decided the former question, not the latter; we have only the *latter* before us.” *Id.* Accordingly, while the court decided a different legal issue than the one decided by GAO, the court felt compelled to explain that it was “not bound by the views of the Comptroller General.”

c. *Honeywell, Inc. v. United States.* Another significant case involving consideration of a GAO decision in the pre-ADRA era is *Honeywell, Inc. v. United States*,

870 F.2d 644 (Fed. Cir. 1989). In that case, Haz-Tad submitted the lowest bid in response to an Army solicitation and Honeywell submitted the second lowest bid. After the bids were opened, Honeywell filed a GAO protest alleging that Haz-Tad’s bid was non-responsive. Haz-Tad responded that its bid was submitted on behalf of a joint venture, but the CO rejected Haz-Tad’s bid after the protest was filed because it was unclear whether the entity that submitted the bid was Haz-Tad acting as a separate entity or as part of a joint venture with Hazeltine and Tadiran. Haz-Tad, Hazeltine, and Tadiran then filed a protest at GAO, which found that Haz-Tad’s bid was responsive, and the Army notified the parties that it intended to follow GAO’s recommendation and award the contract to Haz-Tad. *Id.* at 645-46. Honeywell filed a complaint in the Claims Court seeking to enjoin the award. The Claims Court held that the Army had improperly followed the GAO recommendation and enjoined the Army from awarding the contract to Haz-Tad or any combination of Haz-Tad, Hazeltine, and Tadiran. *Id.* at 647.

On appeal, the Federal Circuit provided a lengthy discussion of why the Claims Court was wrong. The Federal Circuit began by stating that the question before the Claims Court was whether the Army justifiably followed GAO’s recommendation, and that the Claims Court recognized that the “controlling inquiry in deciding that question was whether the GAO’s decision was a rational one.” *Id.* The Federal Circuit nonetheless characterized the lower court as having paid “lip service to that standard” and impermissibly undertaking “what can fairly be characterized only as its own independent *de novo* determination of whether the bid documents identified Haz-Tad as the bidder.” *Id.* The Federal Circuit concluded that GAO’s decision was rational and that the Army did not act arbitrarily or capriciously in following GAO’s recommendation. *Id.*

In reaching these conclusions, the Federal Circuit engaged in an extended discussion concerning GAO, beginning with the statement that “GAO plays an important role in the resolution of contested procurement decisions.” *Id.* Echoing *John Reiner*, the court noted that agencies have deferred to GAO recommendations, and as a general policy have acceded to GAO’s views even when those views conflicted with the agency’s original position. *See id.* at 647-48. Next, the court noted that in the Competition in Contracting Act, 31 U.S.C. §§ 3551-3556 (Supp. IV 1986) (“CICA”), “Congress recognized and strengthened the GAO’s involvement in the procurement process.” *Id.* at 648. The Court discussed several CICA provisions, including a provision indicating that the agency head must report to the Comptroller General if the agency has not fully implemented the Comptroller General’s recommendations within 60 days (31 U.S.C. § 3554(e)(1)), and that “in a subsequent judicial action relating to the procurement, the Comptroller General’s recommendation and the agency’s report of its noncompliance ‘shall be considered to be part of the agency record subject to review’ (31 U.S.C. § 3556).” *Honeywell*, 870 F.2d at 648. The Court then provided the following analysis:

These provisions show that Congress contemplated and intended that procurement agencies normally would follow the Comptroller General’s recommendation. Congress viewed an agency’s failure to do so as sufficiently unusual as to require the agency to report such noncompliance to the Comptroller General and to

require the latter annually to inform Congress of any instances of noncompliance. In these circumstances, a procurement agency's decision to follow the Comptroller General's recommendation, even though that recommendation differed from the [CO's] initial decision, was proper unless the Comptroller General's decision itself was irrational. "If the court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations."

Id. (citing *M. Steintal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971)).

Thus, the Federal Circuit in *Honeywell* specified that the controlling question in deciding whether an agency can justifiably follow a GAO recommendation is whether GAO's decision was irrational. However, the Circuit provided context for this standard. First, the Circuit explained that the court should not undertake its own independent *de novo* review, which suggests that some level of deference should be afforded to GAO's decision. Indeed, the court stated that agencies traditionally have deferred to GAO recommendations, and as a general policy have acceded to the GAO's views even when those views conflicted with the agency's original position. 870 F.2d at 647. Second, the Circuit paid homage to GAO's important role in procurement disputes and noted that Congress intended that agencies normally would follow GAO's recommendation. *Id.* at 647-48.

d. Analysis of *Honeywell* and *Burroughs* – *E.W. Bliss Co. v. United States*. In 1995, one year before passage of the ADRA, a Court of Federal Claims decision sought to clarify *Honeywell* in light of *Burroughs*. *E.W. Bliss Co. v. United States*, 33 Fed. Cl. 123 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996), involved the issue of whether a contract award was arbitrary and capricious because, *inter alia*, the agency accepted an allegedly non-responsive technical proposal. *Id.* at 125. The plaintiff filed a protest at GAO, which denied the protest. *Id.* at 132. The plaintiff then filed a complaint at the court seeking bid preparation costs and attorneys' fees based on an allegedly unlawful award. *Id.* at 132-33. The Court denied the plaintiff's protest. *Id.* at 144.

E.W. Bliss thus did not involve a situation where a protester prevailed before GAO and the awardee sought relief at the court. Instead, the court – like GAO – denied the plaintiff's protest. The Court nonetheless repeatedly referenced and even criticized the GAO's decision in analyzing the plaintiff's allegations. *See, e.g., id.* at 135 ("The Comptroller General's sole comment on the issue is conclusory."); *id.* at 139 ("The Comptroller General's conclusion . . . glosses over the fact that . . .").

Moreover, before analyzing the plaintiff's individual claims, the court offered a detailed analysis of the relationship between the GAO and the court. Citing *John Reiner*, the court acknowledged that GAO decisions traditionally have been accorded a "high degree of deference" by courts in bid protests. Citing *Burroughs*, however, the court noted that it "is not bound by the views of the Comptroller General nor do they operate as a legal or judicial determination of the rights of the parties . . ." *Id.* at 134. Next, the court summarized *Honeywell* and then observed: "[t]he Federal Circuit's application

of a rational basis standard in *Honeywell* appears inconsistent with the standard governing review of GAO decisions articulated in *Burroughs*." *Id.* at 134-35.

The *E.W. Bliss* Court attempted to clarify this apparent inconsistency, explaining that *Honeywell* was specifically crafted to deal with the lower court's analysis, which focused on whether GAO's decision had a rational basis. The Court noted that the Federal Circuit in *Honeywell* criticized the lower court for "undertaking an independent *de novo* analysis of the responsiveness of the bid documents," which was "improper because the appropriate focus is on the reasonableness, or rationality, of the procurement official's determination." *Id.* at 135 (citation omitted). Thus, according to the court in *E.W. Bliss*,

Honeywell cannot be read to supplant *Burroughs*, nor to confer on the GAO a degree of deference beyond that delimited in *Burroughs*. The weight of precedent instructs that, although the review is not *de novo* and the GAO's decision is accorded deference, the court is to answer the question whether the agency's procurement decision or the GAO's decision on the protest was reasonable based on the record before the contracting officer or the GAO.

Id.

The Court's conclusion that *Honeywell* cannot be read "to confer on GAO a degree of deference beyond that delimited in *Burroughs*" is problematic in part because the relevant portion of *Burroughs* did not specify a degree of deference conferred on GAO. Instead, the court in *Burroughs* noted that there was no dispute concerning GAO's factual conclusions (and thus no reason for the court not to accept those facts), and the legal issue decided by GAO was different from the legal issue before the court. 617 F.2d at 597. Further, *Burroughs* did not reference the language in *John Reiner* discussed above, that "it is the usual policy, if not the obligation, of the procuring departments to accommodate themselves to positions formally taken by the [General Accounting Office] with respect to competitive bidding." 325 F.2d at 442. Indeed, the court in *E.W. Bliss* acknowledged that GAO decisions traditionally have been accorded a "high degree of deference by the courts." 33 Fed. Cl. at 134. In short, despite its detailed analysis, *E.W. Bliss* did not provide definitive guidance concerning the treatment of GAO decisions in protests at the court.

2. Additional Pre-ADRA Commentary Concerning *Honeywell*. Other pre-ADRA decisions have provided additional commentary on *Honeywell*. For example, *Carothers Construction* involved (1) a GAO recommendation that a bid was timely, (2) the agency's decision to adopt that recommendation, and (3) the plaintiff's action at the court alleging that the bid was untimely. Citing *Honeywell*, the court stated that the issue was whether the agency could justifiably follow GAO's recommendation, and the dispositive inquiry in deciding that question was whether GAO's decision was rational. The Court held that a rational basis existed for GAO's decision. 18 Cl. Ct. at 749. In addition, the court noted that GAO recommendations are accorded "due weight and deference" by the court given GAO's long experience and special expertise in bid protests, *id.* (citing *Baird Corp. v. United States*, 1 Cl. Ct. 662, 668 (1983)), and that agencies normally will follow GAO decisions because GAO has such an important role in resolving con-

tested procurement matters. 18 Cl. Ct. at 749 (citing *Honeywell*, 870 F.2d at 647).

In *IMS Services*, an agency decided to reopen competition on a solicitation in response to a GAO decision, and the contract awardee filed suit at the court. The Court cited *Honeywell* at length, and noted that “GAO’s expertise in procurement matters is respected and acknowledged by the federal courts.” 33 Fed. Cl. at 183-84. However, the court also noted that the existence of a GAO decision does not limit the court “to a review of that decision. Being by its very nature an advisory opinion, the GAO decision is not controlling on the parties or on this court.” *Id.* at 184. In addition, the court placed substantial responsibility on the procuring agency:

Although noncompliance with a GAO recommendation may not be the preferred action of the agency, it may be the correct action. Therefore, it is the agency’s responsibility to fully and independently evaluate all recommendations given by the GAO. While this court recognizes that a procurement agency normally will accept the advice of the GAO, it is imperative that the agency perform its own evaluation of the procurement process before making final decisions. If, in its own expertise, the procurement agency determines that the GAO’s recommendation is misguided, it has a responsibility to make up its own mind and to act on its own advice. . . . Ultimately, this court must determine whether the Navy acted properly and was not arbitrary and capricious during the procurement, including a review of the agency decision to follow the GAO recommendation

Id.; but see *Turner Constr. Co., v. United States*, 94 Fed. Cl. 561, 583 (2010) (“Precedent does not support plaintiff’s argument that an agency must go through a separate evaluation process when considering whether

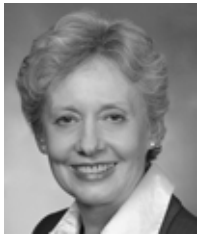
to implement the GAO’s recommendation.”), *aff’d* 645 F.3d 1377 (Fed. Cir. 2011).

In another case decided after a GAO decision, *Firth Construction Co.*, GAO sustained a protest by the apparent low bidder after the Army concluded that the bidder’s submission was non-responsive. The agency announced its intention to follow GAO’s recommendation and award the contract to that bidder, and Firth Construction, which had submitted the second lowest bid, filed an action at the court. 36 Fed. Cl. at 271. Citing *Honeywell*, the court indicated that “[t]o the extent that the agency chooses to follow the advice of the GAO, the courts should only intervene if the advice the agency receives is ‘irrational.’” *Id.* at 272. The Court further indicated that “if the GAO’s advice is rational, it is not arbitrary or capricious to follow it,” and that this analysis had been applied to GAO advice on “matters of law, on the theory that GAO’s interpretation of procurement regulations is entitled to deference.” *Id.* (citing *Shoals Am. Indus., Inc. v. United States*, 877 F.2d 883, 888 (11th Cir. 1989)) The Court concluded that GAO’s recommendation was irrational because the apparent low-bidder’s submission was non-responsive. *Id.* at 272-76. The Court reached that conclusion despite acknowledging that it “is obliged to give deference to the GAO decision.” *Id.* at 275. The Court explained that it could only give deference to the extent GAO’s analysis can be followed and expresses a principle that can be applied elsewhere. *Id.* See also *Commercial Energies*, 20 Cl. Ct. at 145, 147 (citing *Honeywell* in concluding that court “shall not upset” agency decision to rely on GAO conclusions absent showing that GAO acted unreasonably, before concluding that GAO did not follow law and regulations governing small disadvantaged business preferences, and thus was irrational).

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Deja Review: The Standard of Review of GAO Decisions at the Federal Circuit and the Court of Federal Claims—Part II



BY MARCIA G. MADSEN, CAMERON S. HAMRICK,
AND MICHELLE E. LITTEKEN

This is a continuation of an article covering the review by the U.S. Court of Federal Claims of GAO recommendations. The first part of the article focused primarily on cases decided prior to passage of the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (“ADRA”) (101 FCR 593, 5/20/14). A third and final part of the article, which continues discussing efforts to clarify standards appli-

cable in cases that occur after GAO protests, will be published in the near future.¹

The Post-ADRA Landscape

A. Passage of the ADRA Significantly Expanded the Court’s Bid Protest Jurisdiction. The Court of Federal Claims’ bid protest authority changed fundamentally with the passage of the ADRA. As discussed above, prior to the ADRA, the Court had exclusive jurisdiction to grant declaratory and injunctive relief in pre-award contract controversies pursuant to 28 U.S.C. § 1491(a)(3), while U.S. district courts had jurisdiction to review post-award bid protests. The legislative history of the ADRA indicates that “the enactment [sic] § 1491(b)(1) [protest provision added by ADRA and discussed below] was motivated by a concern with forum shopping and fragmentation of government contract law.” See *Res. Conservation*, 597 F.3d at 1243.

Enactment of the ADRA significantly broadened the Court’s bid protest jurisdiction to include post-award bid protests. The Act eliminated the pre-award provision at § 1491(a)(3), redesignated subsection (b) as subsection (c), and added a new provision at § 1491(b). Pub. L. No. 104-320, § 12(a), 110 Stat. at 3874. The new

Marcia G. Madsen is a partner in Mayer Brown’s Washington, D.C. office and chair of the firm’s government contracts practice. Cameron S. Hamrick is a partner in Mayer Brown’s Washington, D.C. office, and focuses his practice on government contracts. Michelle E. Litteken is an associate in Mayer Brown’s Washington, D.C. office, and focuses her practice on government contracts.

¹ Knowledge of Part I of this article is presumed for purposes of this Part II (e.g., full citations to cases in Part I are not repeated in Part II).

provision at § 1491(b)(1) provides the heart of the Court's expanded jurisdiction:

Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

The ADRA gave the Court "jurisdiction to review 'the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims.'" *Res. Conservation*, 597 F.3d at 1243 (quoting H.R. Rep. No. 104-841, at 10 (1996) (Conf. Rep.)).² The Court now has jurisdiction under § 1491(b)(1) "over actions by an 'interested party' objecting to: (1) a solicitation by a federal agency for bids or proposals for a proposed contract; (2) a proposed award or the award of a contract; or (3) any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement." *RhinoCorps Ltd. v. United States*, 87 Fed. Cl. 261, 271 (2009) (citations omitted). Also, under § 1491(b)(2), "[t]he court may 'award any relief that the court considers proper, including declaratory and injunctive relief.'" *Id.*

B. The ADRA Included a Statutory Protest Standard of Review. In addition to expanding the Court of Federal Claims' bid protest jurisdiction, the ADRA established a statutory standard of review for bid protest cases. The ADRA specifically made the APA standard applicable to all bid protest actions through the new § 1491(b)(4), which states: "In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5." While APA § 706 contains various standards of review, "the proper standard to be applied in bid protest cases is provided by 5 U.S.C. § 706(2)(A): a reviewing court shall set aside the agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350 (Fed. Cir. 2004) (citation omitted).

The Federal Circuit indicated in *Banknote* that in bid protests, the Court implements the APA standard "by applying the standard as previously interpreted by the district courts in the so-called *Scanwell* lines of cases, referring to the 1970 case upholding district court APA review of Government procurement decisions." *Id.* at 1351 (citation omitted). Under the APA standards applied in the *Scanwell* cases, an award may be set aside if either (1) the procurement official's decision lacked a rational basis, or (2) the procurement procedure involved a violation of regulation or procedure. *Impresa*,

² As the Federal Circuit noted in *Resource Conservation*, for a period, the ADRA allowed both Federal district courts and the Court of Federal Claims to hear "the full range of cases previously subject to review in either system," but a sunset provision ended the district courts' jurisdiction in 2001, "eventually channeling all judicial review of procurement protests to the United States Court of Federal Claims." 597 F.3d at 1243 n.8 (citations omitted).

Practice Tips

- The ADRA significantly broadened the Court's bid protest jurisdiction to include post-award bid protests. Practitioners should be aware that the ADRA also specifically made the APA standard of review applicable to all bid protest actions; the reviewing court must set aside the agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

- Practitioners should be familiar with the Federal Circuit's decisions in *Centech* and *Turner Construction*. In *Centech*, the Circuit relied on *Honeywell* for the premise that an agency's decision to follow a GAO recommendation even though the recommendation differed from the contracting officer's initial decision was proper unless the GAO decision was irrational. The Federal Circuit held that GAO's corrective action recommendation was rational because the protester's proposal on its face did not comply with a solicitation clause. In *Turner Construction*, the Circuit was highly critical of a GAO decision. Among other criticisms, the Federal Circuit explained that GAO failed to give any deference to the CO's fact-finding and analysis. Notably, however, neither *Centech* nor *Turner Construction* discussed the amount of deference to be afforded to GAO decisions.

238 F.3d at 1332 (citations omitted).³ With respect to a challenge brought on the first ground, courts have recognized that COs are entitled to exercise discretion on a broad range of issues confronting them in the procurement process. Thus, the test for a reviewing court is to determine whether the agency provided a coherent and reasonable explanation of its exercise of discretion. With respect to a challenge brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations. *Id.* at 1332-33 (citations omitted); see also *Banknote*, 365 F.3d at 1351.

In *Axiom Resource Management v. United States*, 564 F.3d 1374, 1381-82 (Fed. Cir. 2009), the Federal Circuit elaborated on the proper standard of review. In that case, which involved organizational conflict of interest ("OCI") allegations, the Court of Federal Claims concluded that "reasonableness" is the proper standard of review under the APA's "arbitrary and capricious" prong, but not where the record contains substantial evidence that one or more FAR provisions have been violated. *Id.* at 1381. The Federal Circuit disagreed, holding that the Court of Federal Claims erred by not reviewing the CO's decision under the "arbitrary and capricious" standard. The Federal Circuit explained that "[i]n light of the discretion given to COs, we cannot agree with the Court of Federal Claims that the CO in this case 'violated' FAR § 9.504 in such a way as to warrant de novo review of 'whether or not there may be [a] potential violation of law' and if so, whether 'the

³ The *Impresa* Court indicated: "This case presents an issue that has not been fully addressed by this court – the standard for reviewing decisions of contracting officers under the [ADRA]." 238 F.3d at 1327.

mitigation proposal [is] an actual remedy.’” *Id.* at 1382 (alteration in original) (citation omitted).

An important element in reviewing an agency decision is the degree of judicial deference to be given to the decision. In *PAI Corp. v. United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010), the Federal Circuit explained that because COs are entitled to exercise discretion on a broad range of issues, procurement decisions are subject to a highly deferential rational basis review. The Circuit further noted that “[a]pplying this highly deferential standard, the court must sustain an agency action unless the action does not ‘evinced[] rational reasoning and consideration of relevant factors.’” *Id.* (alteration in original) (citation omitted); see also *Rhino Corps*, 87 Fed. Cl. at 272 (rational basis requires agency to provide coherent and reasonable explanation of its exercise of discretion). In *Turner Construction Co. v. United States*, 645 F.3d 1377, at 1383 (Fed. Cir. 2011), the Federal Circuit noted that COs have broad discretion in evaluation of bids, and that when a CO’s decision is reasonable, neither a court nor GAO may substitute its judgment for that of agency. See also *Analytical & Research Tech., Inc. v. United States*, 39 Fed. Cl. 34, 42 (1997) (strong presumption exists that government officials act correctly, honestly, and in good faith when considering bids, and thus Court cannot substitute its judgment for that of agency if reasonable minds could reach differing conclusions, but must give deference to agency findings and conclusions).

C. The Standard of Review under 28 U.S.C. § 1491(b)(4) Differs from the Standard of Review in GAO Protests. As discussed above, the standard of review in protests at the Court is based on 28 U.S.C. § 1491(b)(4) and the APA, and requires the Court to set aside an agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. GAO, however, follows a different standard of review. Pursuant to 31 U.S.C. § 3554(b)(1), GAO may determine whether a solicitation, proposed award, or award *complies with statute and regulation*, and must make one of several types of recommendations upon determining non-compliance with a statute or regulation. See also *Sys. Application & Techs., Inc. v. United States*, 100 Fed. Cl. 687, 716 n.21 (2011) (while GAO is charged with determining whether agency has violated statute or regulation, Court must determine whether agency’s action was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law) (citing 31 U.S.C. § 3554(b)(1) and 4 C.F.R. § 21.8(a)), *aff’d*, 691 F.3d 1374 (Fed. Cir. 2012).⁴

These different standards of review do not prevent the Federal Circuit and the Court from generally relying on GAO precedent. As the Federal Circuit indicated in *Allied Technology Group v. United States*, 649 F.3d 1320, 1331 (Fed. Cir. 2011), “though GAO opinions are

not binding on this court, Congress has ‘empowered [the Comptroller General] to determine whether the solicitation, proposed award, or award complies with statute and regulation,’ and this court may draw on GAO’s opinions for its application of this expertise.” (Quoting *Honeywell*, 870 F.2d at 648) (alteration in original) (internal citation omitted). In *Hawaiian Dredging Constr. Co. v. United States*, 59 Fed. Cl. 305, 311 (2004), the Court indicated that courts have traditionally accorded a high degree of deference to GAO decisions, which may be considered as expert opinions that “the court should prudently consider.”⁵ (Citations omitted). See also *Banknote*, 365 F.3d at 1356 (noting that while court was not bound by certain GAO decisions, the decisions provided a reasonable interpretation of a solicitation that does not explicitly state relative weights of technical and price factors); *All Seasons Constr.*, 55 Fed. Cl. at 175 (CO was justified in relying on GAO decisions to reject bid as nonresponsive).

D. The Federal Circuit’s and Court of Federal Claims’ Efforts to Clarify the Standards Applicable in Cases that Occur after GAO Protests. While the ADRA fundamentally changed the Court’s bid protest authority, easy answers have not been consistently forthcoming with respect to a category of protests that posed difficulties prior to the ADRA—those that take place following a GAO protest. These types of protests can arrive at the Court in different circumstances and can add complexity to the Court’s standard of review, including the extent of any deference to be given a GAO decision.

1. Pre-ADRA Cases in the Post-ADRA World. Passage of the ADRA did not make pre-ADRA protests that occurred after a GAO protest irrelevant. For example, in a decision reflecting a bridge between pre- and post-ADRA precedent, the Court in *SP Sys., Inc. v. United States*, 86 Fed. Cl. 1 (2009), rejected an argument that *Honeywell* did not survive passage of the ADRA. In that case, following an award by NASA to plaintiff SP Systems, ASRC Research and Technology Solutions, Inc. (“ARTS”) filed a GAO protest. GAO sustained the protest and recommended that NASA conduct a re-evaluation. NASA did so, resulting in an award to ARTS, followed by SP Systems’ action at the Court.

Citing *Burroughs*, the Court explained that it was not bound by GAO’s views. *Id.* at 12-13. However, the Court further explained that “another pertinent principle appears in [*Honeywell*] . . . [.]” noting that the Court should not conduct a *de novo* review of issues decided by GAO, “but instead may only inquire whether the GAO decision was rational and the agency justifiably relied upon it.” *Id.* at 13 (citing *Honeywell*, 870 F.2d at 647). SP Systems argued that the *Honeywell* standard of review did not survive passage of the ADRA. In support, SP Systems relied primarily on *IMS Services*, citing language from that decision that while an agency normally will accept the advice of GAO, it is imperative that the agency perform its own evaluation before making final decisions. The Court in *SP Systems* did not view the language cited from *IMS Services* as supporting SP Systems’ argument, and also did not “regard

⁴ In *All Seasons Construction v. United States*, 55 Fed. Cl. 175 (2003), the Court identified another difference between protest reviews by the GAO and the Court. There, the GAO denied a protest and upheld the CO’s decision to reject the protester’s bid. The protester then filed an action at the Court. The Court observed that GAO upheld the agency’s decision on grounds not asserted by the CO and explained that, by contrast, “this Court lacks authority to uphold an agency action on grounds not considered by the agency.” *Id.* at 177 n.1 (citation omitted). Accordingly, the Court confined its review to the CO’s actual conclusion. *Id.*

⁵ The Court added that “[a]s a general proposition, if the court finds that underlying GAO decisions present a reasonable interpretation of the law and factual record, then persuasive weight shall be accorded to their rationale.” *Hawaiian Dredging Constr.*, 59 Fed. Cl. at 311.

Honeywell, Burroughs and the ADRA as inconsistent with one another. The cases continue to reaffirm the viability of *Honeywell* long after the passage of the ADRA.” *Id.* at 14 (citing *Centech Group v. United States*, 554 F.3d 1029, 1039 (Fed. Cir. 2009)).⁶

The Court then built upon its discussion of precedent and provided a framework for considering the agency’s decision to follow GAO’s recommendation:

While *Honeywell* remains viable and applicable precedent, the Court does not agree with defendant’s argument that in the present case, the “award can only be overturned if the GAO’s decision is irrational.” The question presented is whether the agency’s procurement decision was reasonable based upon the record before it, and the GAO decision is only part of that record. If the GAO makes a rational recommendation and the agency simply implements that recommendation, then the agency action itself has a rational basis. In the rare instance where the agency considers a GAO decision to be so thoroughly wrong as to be irrational (or the court later concludes the GAO decision is irrational), then the agency is not justified in relying upon the decision. Thus, inquiring after the rationality *vel non* of the GAO decision is, where the agency action is solely based upon that decision, examining whether there exists a rational basis for the agency’s acts. In this case, however, there exist both the GAO decision and further analysis by NASA subsequent to the GAO decision that involved data that had not been before the GAO; the GAO decision and that subsequent analysis together constitute the record upon which the second source selection decision was made.

Id. at 14. The Court denied SP Systems’ protest, holding in part that the GAO recommendation was rational and the agency had a reasonable basis for its second source selection decision. *Id.* at 22.

As discussed further below, the Federal Circuit confirmed the post-ADRA viability of the *Honeywell* “irrational” standard of review in *Turner Construction*, 645 F.3d at 1384. Further, several Court of Federal Claims decisions rendered on the heels of GAO protests have relied on pre-ADRA cases, including *Honeywell*. *See, e.g., Sys. Application & Techs.*, 100 Fed. Cl. at 712 (citing *Honeywell* and *John Reiner*); *SP Sys.*, 86 Fed. Cl. at 12-13 (citing *Burroughs, Honeywell*, and *E.W. Bliss*); *Lyons Sec. Servs., Inc. v. United States*, 38 Fed. Cl. 783, 785-86 (1997) (citing *Honeywell* and *Firth Constr.*); and *Analytical & Research Tech.*, 39 Fed. Cl. at 41 n.7 (citing *Honeywell* and *IMS Servs.*).

2. Federal Circuit Decisions. In the post-ADRA era, the Federal Circuit has issued notable decisions involving judicial review of GAO recommendations in *Centech* and *Turner Construction*. In *Centech*, the plaintiff challenged the Air Force’s decision to rescind its services contract, reopen discussions, and resolicit proposals after the GAO sustained a protest based on the Air Force’s failure to comply with a regulation governing

the use of subcontractors in a small business set-aside solicitation. 554 F.3d at 1035. At issue in the protest was the Limitation on Subcontracting (“LOS”) Clause, which required the small business offeror to agree that at least 50% of its personnel costs would be borne by its own employees. *Id.* at 1031. Centech proposed that its employees would perform 43.2% of the total cost of contract personnel, and work performed by employees of small business subcontractors would bring the total amount of work performed by small businesses to at least 50%. *Id.* at 1032. The Air Force awarded Centech the contract, and the GAO protest ensued. After the protest was filed, Centech submitted documents showing it would meet the 50% threshold using its own employees. Nonetheless, the GAO sustained the protest and in doing so, disagreed with a Small Business Administration conclusion that Centech would comply with the LOS clause and was a responsible contractor. *Id.* at 1034. The Air Force followed the GAO’s recommendation and requested revised proposals. *Id.* at 1035.

Centech then filed suit at the Court, seeking reinstatement of the award and a declaration that the Air Force’s decision to follow the GAO’s recommendation was arbitrary and capricious. *Id.* The Court rejected Centech’s arguments, finding that the GAO was correct in determining that Centech failed to comply with the LOS clause, a material requirement in the solicitation, and the Federal Circuit affirmed. *Id.* at 1040. In its decision, the Federal Circuit relied on *Honeywell* for the premise that “ ‘a procurement agency’s decision to follow [GAO’s] recommendation even though that recommendation differed from the contracting officer’s initial decision was proper unless GAO’s decision itself was irrational.’ ” *Id.* at 1039 (quoting *Honeywell*, 870 F.2d at 648). The Federal Circuit concluded that the GAO’s recommendation that the Air Force solicit revised proposals was rational because Centech’s proposal on its face did not comply with the LOS clause. *Id.* The Court of Federal Claims, therefore, was correct in finding that the GAO and the Air Force acted rationally. *Id.* at 1040. In reaching its holding, the Circuit did not discuss either the extent of any deference that should be afforded GAO decisions or (unlike *Honeywell*) the importance of GAO in the resolution of procurement disputes.

Two years later, the Federal Circuit affirmed a Court of Federal Claims ruling that the Army’s decision to follow a GAO recommendation and re-compete a contract was unreasonable. In *Turner Construction*, the GAO sustained a protest when it found that the Army lacked a reasonable basis for finding that there was no OCI. 645 F.3d at 1382-83. Turner filed a protest at the Court, and the Court found numerous flaws in the GAO decision, including that the GAO had failed to “confront the agency’s decision in any meaningful way,” failed to meaningfully consider the CO’s detailed factual findings, improperly substituted its judgment for that of the CO’s, and relied on mere “suspicion or innuendo” rather than identifying “hard facts” showing an appearance of impropriety. *Id.* at 1383 (discussing *Turner Constr.*, 94 Fed. Cl. at 581). At the Federal Circuit, a rival offeror argued that the Court improperly engaged in *de novo* review of the GAO decision. The Federal Circuit rejected this argument, noting that the Court correctly articulated and applied the *Honeywell* standard, and “emphasized that it cannot conduct its ‘own independent *de novo* assessment.’ ” *Id.* at 1384 (quoting *Turner Constr.*, 94 Fed. Cl. at 572). The Circuit assessed

⁶ While relying on *Honeywell*, the Court also cited *E.W. Bliss* for the proposition that “*Honeywell* cannot be read to supplant *Burroughs*, nor to confer on the GAO a degree of deference beyond that delimited in *Burroughs*.” *SP*, 86 Fed. Cl. at 13 (citing *E.W. Bliss*, 33 Fed. Cl. at 134-35). *See also MTB Group v. United States*, 65 Fed. Cl. 516, 525 (2005) (“*Honeywell* and *Burroughs* are different cases, and the former does not replace the rule of the latter. The Federal Circuit in *Honeywell* merely criticized *de novo* review Instead the trial court’s proper task, like its predecessor’s task, is to determine whether the procurement official’s decision was reasonable or in accordance with regulation.”) (internal citation omitted).

whether GAO's decision was rational and concluded that it was not. *Id.*

In reaching its holding, the Federal Circuit was notably unsympathetic to the GAO decision. For example, the Circuit explained that it was the GAO, not the Court, that applied the wrong standard of review because the GAO failed to give any deference to the CO's fact-finding and analysis. *Id.* Also, the Circuit noted: "The GAO's conclusory, three-page analysis of whether an unequal access OCI existed focused on the potential for access to nonpublic information, rather than on whether AECOM or EB personnel actually obtained access to competitively useful, nonpublic information." *Id.* 1382. Moreover, the Circuit criticized GAO's decision by citing several criticisms in the lower Court's decision:

- "The court acknowledged that rational basis review is not a particularly demanding standard, but it nonetheless concluded that the GAO's decision failed to withstand even that level of scrutiny." *Id.* at 1383.

- "The court noted that the GAO's cursory inquiry was a departure from prior GAO decisions." *Id.* at 1385.

- "Reiterating that the GAO's task was to review the agency's decision for reasonableness, the Court of Federal Claims noted that the GAO 'failed to address this OCI decision; in fact, the GAO decision on a biased ground rules OCI does not even cite the agency decision that it was tasked with reviewing.'" *Id.* (quoting *Turner Constr.*, 94 Fed. Cl. at 580).

Even in the background section, the Circuit built its case against the GAO decision, noting that "[t]he relationship underlying the potential OCI is an attenuated one" *Id.* at 1379.

In short, far from deferring to GAO, the Circuit carved up the GAO decision in concluding that the agency acted arbitrarily and capriciously by following "GAO's irrational recommendation." *Id.* at 1388.

Both *Centech* and *Turner Construction* cited *Honeywell* for the proposition that an agency's decision to fol-

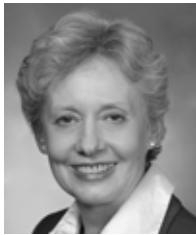
low a GAO recommendation is proper unless the GAO decision was irrational. See *Centech*, 554 F.3d at 1039; *Turner Constr.*, 645 F.3d at 1383. Yet neither *Centech* nor *Turner Construction* discussed deference to GAO decisions, including the amount of deference to be afforded to GAO decisions. Nor did either case discuss the importance of GAO in the resolution of procurement disputes, as the Circuit did in *Honeywell*. It is possible that, in *Centech* and *Turner Construction*, there was no need to discuss these topics because the Circuit had no problem reaching a decision. In *Centech*, the Circuit easily found that the proposal at issue failed on its face to comply with the solicitation. And in *Turner Construction*, the Circuit affirmed the trial court's multiple reasons why the GAO decision was irrational.

As such, *Centech* and *Turner Construction* stand for the proposition that the Court cannot engage in an independent *de novo* review, and the standard of review is whether the GAO decision is irrational. These cases provide no specific guidance on the amount of deference the Court should pay to GAO decisions. Indeed, in *Turner Construction*, the Circuit turned the tables and concluded that "[b]ecause the GAO improperly substituted its own judgment for that of the CO, it was the GAO – not the Court of Federal Claims – that failed to apply the proper deference in conducting its review." 645 F.3d at 1384. As such, these decisions are silent on the statement in *Honeywell* that "Congress contemplated and intended that procurement agencies normally would follow the Comptroller General's recommendation." 870 F.2d at 648. Nor do these decisions comment on deference language from other cases, such as *E.W. Bliss*, where the Court acknowledged that GAO decisions traditionally have been accorded a "high degree of deference" by courts in bid protests. 33 Fed. Cl. at 134. See also *Carothers Constr.*, 18 Cl. Ct. at 749 (stating that GAO recommendations are accorded due weight and deference given GAO's long experience and special expertise in bid protests).

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Bid Protests

Deja Review: The Standard of Review of GAO Decisions at the Federal Circuit and the Court of Federal Claims—Part III



BY MARCIA G. MADSEN, CAMERON S. HAMRICK,
AND MICHELLE E. LITTEKEN

This is the third article in a series covering the review by the U.S. Court of Federal Claims of GAO recommendations. The first article (101 FCR 593, 5/20/14) focused primarily on cases decided prior to passage of the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (“ADRA”). The second article (101 FCR 627, 5/27/14) focused on the passage of the ADRA, and on the Federal Circuit’s and Court of Federal Claims’ efforts to clarify standards applicable in cases that occur after GAO protests – specifically, on (1) pre-ADRA cases in the post-ADRA world, and (2) a pair of important Federal Circuit decisions, *Centech Group v. United States*, 554 F.3d 1029 (Fed. Cir. 2009), and *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011). This article continues discussing efforts to clarify stan-

dards applicable in cases that occur after GAO protests and provides additional information.¹

1. Elaboration on the Honeywell Standard As discussed previously, both *Centech* and *Turner Construction* relied on *Honeywell*. In the post-ADRA world, other decisions have elaborated on the *Honeywell* standard concerning the role of GAO decisions.

a. The Jacobs Technology Decisions. A pair of decisions in the same case, *Jacobs Technology Inc. v. United States*, shed further light on the *Honeywell* standard. The first decision was issued shortly before the Federal Circuit’s decision in *Turner Construction*, while the second decision was issued shortly after *Turner Construction*.

In the first decision, *Jacobs Technology Inc. v. United States*, 100 Fed. Cl. 186, 189 (2011) (“*Jacobs Tech. I*”), *Jacobs Technology* protested the award of an Information Technology Service Management (“ITSM”) contract to IBM Global Business Services (“IBM”) by DOD United States Special Operations Command (“USSOCOM”) after GAO had sustained IBM’s protest and recommended that the agency revise the RFP and allow offerors to submit new proposals. At the GAO, IBM had argued that the agency evaluated proposals using an unstated evaluation factor and that the offerors did not

Marcia G. Madsen is a partner in Mayer Brown’s Washington, D.C. office and chair of the firm’s government contracts practice. Cameron S. Hamrick is a partner in Mayer Brown’s Washington, D.C. office, and focuses his practice on government contracts. Michelle E. Litteken is an associate in Mayer Brown’s Washington, D.C. office, and focuses her practice on government contracts.

¹ Knowledge of Parts I and II is presumed for purposes of this Part III (e.g., full citations to cases in Parts I and II are not repeated in Part III).

have adequate information to compete on an equal basis. *Id.* Jacobs Technology filed a protest at the court, arguing that it was irrational for USSOCOM to adopt the GAO's recommendations.

At the outset, the court addressed the parties' dispute over the standard of review to apply when reviewing a GAO decision. The court indicated that according to *Honeywell*, the court must give "appropriate deference" to a GAO decision and not undertake a *de novo* review of issues decided by GAO. The court did not elaborate on what constitutes "appropriate deference." The court next explained that "the analysis of this Court is not whether a review of the record would support a different conclusion, but whether GAO's decision was rational." *Id.* at 190 (citing *Honeywell*, 870 F.2d at 647).

The court went on to state:

The court's review of GAO's decision is necessarily a limited one. First, the court has jurisdiction to review an agency's procurement action, *see* 28 U.S.C. § 1491(b)(1); the court does not review GAO's decision as if it were a decision of a lower court subject to appellate review. Second, the review of GAO's decision is only in the context of the agency's decision to take corrective action for a procurement issue that was the subject of GAO's decision. Thus, the focus of this Court is on the procurement issue – whether GAO's determination of the impropriety of the agency's procurement decision and the resulting recommended action were reasonable under the circumstances.

100 Fed. Cl. at 190 (footnote omitted). The court denied the plaintiff's motion and held that GAO's decision was reasonable, rational, and supported, and it was therefore rational for USSOCOM to adopt GAO's recommendation. *Id.* at 197-98.

Jacobs Technology, Inc. v. United States, 100 Fed. Cl. 198 (2011) ("*Jacobs Technology II*"), was issued 15 days after the Federal Circuit's opinion in *Turner Construction*.² *Jacobs Technology II* involved a situation where, according to the court, the agency did not take sufficient action after GAO sustained a protest. At GAO, IBM alleged that Jacobs Technology had an unequal access to information OCI, that there was a violation of the Procurement Integrity Act, and that USSOCOM failed to mitigate or avoid the actual OCIs and identify the potential OCIs. *Id.* at 203. During the procurement and before awarding the contract, USSOCOM conducted two OCI analyses and determined there were no OCIs present and there were measures in place to avoid OCIs. GAO sustained two protest grounds – finding that the agency used an unstated evaluation criteria and that the offerors had unequal access to information – but concluded that there was nothing in the record to suggest that Jacobs had an OCI. *Id.* at 203. USSOCOM adopted GAO's recommendations, amended the solicitation, and requested offerors to submit revised proposals. USSOCOM did not conduct further OCI analysis for the reprourement.

Jacobs Technology filed a protest at the court challenging the agency's decision to follow the GAO's recommendations. IBM then filed a protest at the court challenging both the initial award and the reprourement, and the court consolidated the actions. *Id.* at 204. The court indicated that its focus was on the reprocure-

ment and various alleged reprourement flaws pressed by IBM. As such, "the Court's inquiry [was] on the rationality of the agency's actions or inactions regarding the reprourement."³ *Id.* at 206. The court discussed the role of the GAO decision as follows:

The GAO decision is only relevant insofar as the GAO has made recommendations regarding the reprourement and the agency has followed them. The court may then examine the rationality of the GAO's recommendations, and, if it finds them to be rational, it follows that the agency's compliance with the GAO's recommendations has a rational basis. *See Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989). Where the GAO has not made a recommendation or where the GAO has not even opined on a matter, the court obviously has nothing to examine.

Id. (footnote omitted). In addition, the court explained that GAO's findings on the initial procurement were relevant in assessing the rationality of USSOCOM's reprourement decisions because they were part of the record before the agency when it was faced with decisions in the reprourement. *Id.* Unlike the decision in *Jacobs Technology I*, *Jacobs Technology II* does not indicate that the court must give "appropriate deference" to the specific GAO decision issued as part of the parties' dispute prior to an action at the court.⁴

The court agreed with IBM that it was arbitrary and capricious for the agency not to conduct additional OCI analysis in the reprourement, in part based on the findings and conclusions in GAO's decision on the initial procurement. Because GAO had found that Jacobs Technology had unequal access to information that gave it a competitive advantage, the court reasoned that GAO had effectively determined by implication that an unequal access to information OCI existed. *Id.* at 204. Faced with GAO's decision (and IBM's request for a further OCI analysis), "a reasonably prudent contracting officer would re-examine his/her OCI analysis to make sure that, at a minimum, there were no other instances of unequal access to information." The court therefore enjoined the agency from awarding the contract until it conducted further OCI analysis. *Id.* at 210.

The court noted that its OCI analysis was different from GAO's. Specifically, GAO had focused on whether there was an OCI in the initial procurement, and the court asked "whether, in light of the whole GAO decision and the allegations of IBM, whether further OCI analysis is required." *Id.* at 212 n.15. The court's approach and holding are significant in part because GAO did not recommend that the agency conduct a further OCI analysis, and GAO did not expressly sustain the protest based on IBM's OCI allegation. The court analyzed GAO's decision, concluded that GAO implicitly found that an OCI existed, concluded that the agency should have recognized that, and ordered further agency action based on those findings.

³ The court found that IBM's challenges to the initial procurement were moot because the court denied Jacobs' motion seeking to reinstate the award. *Jacobs Tech. II*, 100 Fed. Cl. at 207.

⁴ The court in *Jacobs Technology II* did indicate that, with respect to GAO precedent generally, "[t]his Court is not bound by GAO's decisions but gives deference to GAO as an independent expert tribunal, recognizing GAO's experience with issues such as PIA [Procurement Integrity Act] violations and OCIs." *Id.* at 216 n.20.

² The court in *Jacobs Technology II* acknowledged the Federal Circuit's decision in *Turner Construction*. *See* 100 Fed. Cl. at 210 n.14.

b. Sys. Application & Technologies, Inc. v. United States – Analysis of Corrective Action Based on a GAO E-mail. In another interesting decision issued after the Federal Circuit’s decision in *Turner Construction*, the court in *Sys. Application & Technologies*, 100 Fed. Cl. 687, assessed an agency’s corrective action based not on a formal GAO decision, but on an email from the GAO. In that case, the Army awarded a contract to Systems Application & Technologies, Inc. (“SA-TECH”) for operation and maintenance services, and Kratos Defense & Security Solutions, Inc. (the incumbent) filed a protest at the GAO. Following production of the agency report and a supplemental protest, GAO sent the parties an email addressing the supplemental protest, stating that GAO likely would sustain the protest on a particular ground. The Army then informed GAO that it intended to take corrective action that would include an amended solicitation and opportunity for offerors to revise their proposals. *Id.* at 701. GAO dismissed the protest, and SA-TECH filed a protest at the court, contending in part that the proposed corrective action lacked a rational basis and involved a violation of law, regulation, or procedure. *Id.* at 702.

In particular, SA-TECH asserted that the Army’s decision to take corrective action was arbitrary, capricious, and unreasonable because it was based on an email from a GAO attorney that was itself unreasonable. *Id.* at 711. The court, citing *Honeywell*, stated that there was no question that it could review the rationality of a GAO decision. *Id.* at 712. However, the court raised the question as to whether it was empowered to review the email for rationality in the same way it can review a formal GAO decision recommending corrective action, which appeared to be an issue of first impression. The court observed that the decisional law reflects that courts have generally reviewed GAO recommendations only when they were included in a GAO decision, but stated:

[T]he Court has a broad mandate to entertain bid protests and review government procurement decisions. If a procuring agency takes an action that is challenged in this court, this court has the responsibility to examine the basis for the agency’s action, regardless of what that basis might be. In other words, when determining the propriety of a procuring agency’s decision to take corrective action, the court may review the rationality of, as appropriate, the underlying formal GAO decision containing a recommendation that the agency take such action or the underlying informal suggestion by the GAO, or any other entity or individual, that such action might be proper.

Id. at 713. The court therefore concluded that it could review the email “to determine whether it was rational.” *Id.*

Turning to the merits, the court found that the conclusions in the email were irrational. The first conclusion was that GAO did not have to resolve the issue of whether the protester timely challenged the Army’s evaluation of proposals. *Id.* The court found that statement contrary to the statutory mandate that GAO not entertain untimely protests, adding that “[w]hen the GAO acts in violation of the law, the act lacks a rational basis.” *Id.* at 714. The second conclusion in the email was that GAO likely would sustain the protest due to deficiencies in the source selection decision. *Id.* at 713. The court noted in part that “[t]he GAO attorney did not afford the proper deference to the Army’s source selection decision. In fact, his electronic-mail message

demonstrates that he completely misread the decision.” *Id.* at 714. As a result, to the extent the Army’s corrective action decision was based on the email, the court concluded it lacked a rational basis and therefore was arbitrary, capricious, and an abuse of discretion.⁵

Thus, as in the Federal Circuit’s decision in *Turner Construction*, the court in *Systems Application & Technologies* mentioned deference by focusing not on any deference the court owed the GAO decision, but on the deference GAO owed the agency’s decision. *See also id.* at 715 (“All of these errors suggest that instead of applying the necessary amount of deference, the GAO attorney was substituting his judgment for that of the Army. He may not do so.”) (citing *Turner Constr.*, 645 F.3d at 1383).

c. Amazon Web Services, Inc. v. United States – Analysis of a Protest Decision and the Corrective Action Recommended. *Amazon Web Services, Inc. v. United States*, 113 Fed. Cl. 102 (2013), is a recent case concerning the court’s review of a GAO decision. In that case, IBM U.S. Federal (“IBM”) filed a protest at GAO against the award of a contract for cloud computing services to Amazon Web Services, Inc. (“AWS”) by the Central Intelligence Agency (“CIA”). IBM challenged various aspects of the procurement, including that the CIA did not use a common basis to evaluate the offerors’ Scenario 5 prices and that the CIA relaxed a requirement for AWS. *Id.* at 106. GAO sustained the protest in part and recommended that the CIA reopen negotiations, amend the solicitation, and make a new award decision. *Id.* at 105. The CIA followed GAO’s recommendation, and AWS filed suit at the court.

The court cited and quoted *Turner Construction* for the premise that the review of an agency decision to follow a GAO recommendation turns on the rationality of the GAO’s decision. *Id.* at 106; *see also id.* at 110. The court had no difficulty concluding that the GAO’s decision was irrational, explaining:

While the court disagrees with the GAO’s substantive treatment of the discrete procurement issues presented, the essential finding underlying this decision is that the GAO completely overlooked the question of whether IBM suffered any prejudice and had standing to bring the protest in the first place. As a threshold matter, IBM lacked any chance of winning a competition with AWS for this C2S contract, and therefore IBM could not show any prejudice from either of the two grounds on which the GAO sustained IBM’s protest. The GAO’s decision does not even mention the existence of any “prejudice” to IBM, thus indicating that the GAO did not apply any “prejudice” requirement to IBM’s protest.

Id. at 106. *See also id.* at 113 (“[O]ther than the GAO’s unexplained acceptance of IBM’s speculation

⁵ The court also stated: “To the extent that the Army did not rely on the electronic-mail message, the court analyzes the Army’s decision to take corrective action as it would any other procurement decision and determines whether the decision to take corrective action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 100 Fed. Cl. at 715. The court noted that it afforded the Army’s decision to take corrective action deference, but concluded that the corrective action decision lacked a rational basis. As part of its analysis, the court indicated that the Army’s decision to take corrective action was set forth in a single letter to GAO, and thus the court’s review of the decision was limited to the rationale in that letter. *Id.* at 716.

that it had suffered prejudice, the GAO made no mention of prejudice to IBM at all. Such a ‘fail[ure] to consider an important aspect of the problem’ is, by itself, sufficient to render the GAO’s decision arbitrary and capricious.” (citations omitted).

The court also found GAO’s recommended corrective action to be overbroad and irrational. *Id.* at 115. The court explained that corrective action should “narrowly target the defects it is intended to remedy.” *Id.* (citing *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 153 (2010)). GAO had recommended that the CIA reopen the competition, and the court stated that was unnecessary because the CIA could have simply addressed the purported flaws in the procurement by revising the Scenario 5 price evaluation and waiving the requirement at issue for all offerors. Because the GAO’s recommendation was irrational, the CIA’s decision to follow it was irrational. *Id.*

Amazon Web Services resembles the Federal Circuit’s decision in *Turner Construction*, in that both decisions use language that is sharply critical of a GAO decision, do not discuss deference to GAO decisions, and in fact focus on GAO’s deference to agency decisions. As the court in *Amazon Web Services* noted: “‘When an officer’s decision is reasonable, neither a court nor the GAO may substitute its judgment for that of the agency.’” *Id.* at 110 (quoting *Turner Constr.*, 645 F.3d at 1383). And the *Amazon Web Services* court stated the focus is on the reasonableness of the agency’s decision to follow GAO’s recommendation. *Id.* (“Where the issue is ‘an agency’s decision to follow a GAO recommendation . . . [the] agency’s decision lacks a rational basis if it implements a GAO recommendation that is itself irrational.’”) (quoting *Turner Constr.*, 645 F.3d at 1383).

2. Deference on Questions of Law. When the court reviews agency conduct that relies on a GAO recommendation, the court may face the question of what, if any deference, it should pay the GAO decision concerning questions of law. In *Firth Construction*, the court stated that “if the GAO’s advice is rational, it is not arbitrary or capricious to follow it. This analysis has been applied to the GAO’s advice on matters of law, on the theory that the GAO’s interpretation of procurement regulations is entitled to deference.” 36 Fed. Cl. at 272 (citing *Shoals Am. Indus.*, 877 F.2d at 888).

The court in *Grunley-Walsh International, LLC v. United States*, 78 Fed. Cl. 35 (2007), took a different view. That case involved an opportunity to bid on ten contracts to construct embassies around the world as part of a Department of State (“DOS”) 2007 New Embassy Compound (“NEC”) Program. The DOS issued a solicitation for certain information to pre-qualify to bid on the embassy projects, and informed Grunley-Walsh that it had been pre-qualified. Caddell Construction filed a GAO protest involving the 2006 NEC Program, and GAO issued an opinion interpreting a statute that GAO decided was ambiguous. GAO afforded no deference to a previous DOS interpretation of the statute, under which the Grunley-Walsh had pre-qualified for the 2006 and 2007 NEC Programs. As a result of GAO’s interpretation, the DOS withdrew Grunley-Walsh’s pre-qualification, and Grunley-Walsh filed an action at the court. *Id.* at 37-38.

The court held that the DOS’s withdrawal of the plaintiff’s pre-qualification was irrational, arbitrary and

capricious, and not in accordance with law. In reaching that holding, the court explained that while GAO decisions are “traditionally treated with a high degree of deference,” when the “issue is a question of law, it is for the court to decide, and no deference need be given to the decision at the GAO.” *Id.* at 39.

The government argued that the DOS’s adoption of GAO’s recommendation constituted a new agency interpretation and thus should have been entitled to judicial deference. The court rejected that argument, noting that it “would effectively strip this court of any real review in any case where the agency followed a recommendation of the GAO on an interpretation of a statute or regulation.” *Id.* at 43-44. The government cited *Honeywell*, which the court indicated stands for the proposition that an agency’s decision to follow a GAO recommendation is proper unless the GAO decision itself was irrational. The court further indicated that in order to review agency conduct based on a GAO recommendation, it is necessary to examine the underlying GAO decision, adding: “Put another way, an agency action is not insulated from meaningful review simply because the GAO recommended it.” *Id.* at 44. The court disagreed with GAO’s interpretation of the relevant statute, and stated that “the DOS’s adoption of the GAO’s recommended interpretation is afforded no deference because it is plainly lacking a reasonable basis and is thus arbitrary and capricious.” *Id.*; see also *Metcalf Constr. Co., v. United States*, 53 Fed. Cl. 617, 626 n.17 (2002) (court did not defer to GAO decision in part because the required contract interpretation issue was question of law for court to decide); cf. *Cal. Indus. Facilities Res., Inc. v. United States*, 104 Fed. Cl. 589, 597 n.11 (2012) (“[E]ven if the court accepted plaintiff’s argument that the GAO had expressly held that the contracts were limited to supplying equipment to support special operations missions, the GAO’s interpretation of the contract could not overcome the contract’s plain language”); *Lyons Sec. Servs.*, 38 Fed. Cl. at 785-86 (while defendant contended that deference applies to GAO advice on matters of law, the court explained that where GAO precedent can be viewed as inconsistent, “we attach no deference to GAO’s ruling”).

Finally, in *CBY Design Builders v. United States*, 105 Fed. Cl. 303 (2012) (“CBY”), another post-*Turner Construction* decision, the court addressed the level of deference the GAO should be afforded in the interpretation of a solicitation – a question of law. In *CBY*, the plaintiff filed a protest challenging the Corps’ decision to implement corrective action in accordance with a GAO recommendation after GAO sustained a protest based on a potential OCI, a finding that offerors were misled, and a determination that the Corps failed to properly evaluate the offerors’ designs. After a hearing on the parties’ motions, the court ordered briefing on certain issues, including whether and how much deference may be given to GAO opinions on questions of law, such as the interpretation of a solicitation. *Id.* at 325. The court engaged in a lengthy analysis of whether deference given to GAO decisions includes deference on questions of law. Leading up to that analysis, the court suggested that some deference is owed to GAO decisions concerning facts: “[T]he Court requested supplemental briefing to address whether the GAO should receive the same deference for its interpretation of solicitation terms that it gets when it applies that interpretation to the facts found.” *Id.* at 338. However, the court also indicated

that no “special” amount of deference is owed to GAO decisions concerning questions of law or the ultimate decision being reviewed:

Since the amount of deference given to an agency decision under the “arbitrary and capricious” standard of review does not change when the GAO denies a protest of the decision or when the GAO sustains a protest but its recommendation is not followed, it is hard to see how this deference would be altered by an agency’s decision to follow a GAO recommendation. No “special” amount of deference, covering questions of law as well as the ultimate decision being reviewed, can be gleaned from the three Federal Circuit precedents concerning the review of such corrective actions. See *Turner Constr. Co. v. United States*, 645 F.3d 1377, 1383-87 (Fed. Cir. 2011); *Centech Grp.*, 554 F.3d at 1036-40; *Honeywell*, 870 F.2d at 647-49.

Id. at 340.

The court then engaged in a detailed analysis of several cases, including *Honeywell*, *Centech*, *Turner Construction*, and *John Reiner*, in addressing the question of whether the court owes GAO decisions deference on questions of law. *Id.* at 340-41. For example, the court took aim at GAO’s policymaking role and role in the procurement process:

Any deference based on the GAO’s policymaking role would not seem to survive the Federal Circuit’s determination that the office cannot “substitute its judgment for that of the agency” in bid protests. *Turner Constr.*, 645 F.3d at 1383. And the decision of Congress, through CICA, to codify the GAO’s role in the procurement process, see *Honeywell*, 870 F.2d at 648, has since been matched by its decision, in the ADRA, to give our court exclusive trial court jurisdiction over procurement bid protests – which we have now exercised for more than eleven years. See *Banknote Corp.*, 365 F.3d at 1350. Thus, while we may still find the opinions of the GAO to be persuasive, given its important role and considerable expertise in this area, our court has also developed expertise in the government procurement field.

Id. at 341-42. The court ultimately concluded that “it has the duty to determine independently any questions of law, such as the correct interpretation of a solicitation, that must be addressed in bid protests.” *Id.* at 342.

While the government and intervenors – who had argued that the standard for reviewing GAO decisions on questions of law was not *de novo* – lost the battle on that issue, they prevailed on another issue. The court concluded that GAO rationally determined that the Corps failed to properly evaluate CBY’s foundation design (and, by implication, all offerors’ technical proposals) by not reviewing certain drawings and calculations. Therefore, it was rational for the Corps to follow the GAO recommendation that the Corps conduct discussions with respect to certain technical issues if necessary, accept and evaluate revised proposals, and make a new source selection decision consistent with the GAO decision. *CBY Design Builders*, 105 Fed. Cl. at 350-51.

3. Commentary in Cases Where GAO has Denied Protests. The court generally has little need to discuss the substance of GAO decisions where GAO denies a protest. In *Navarro Research and Engineering, Inc. v. United States*, 106 Fed. Cl. 386, 404 (2012), the court explained:

When a disappointed bidder files a protest in this court following an unsuccessful protest to GAO, the court essentially ignores that earlier protest. But when a contract

awardee files a protest in this court challenging a corrective action recommended by GAO pursuant to a successful protest by a disappointed bidder, this court must review the rationality of the GAO decision because it is the only basis upon which to evaluate the rationality of the procuring agency’s decision to proceed with the recommended corrective action.

While the court may have little basis or need to comment on GAO denials of protests, the court has occasionally ventured into this area to explain appropriate standards. In *MTB Group*, an action brought after GAO denied the plaintiff’s protest, the government argued that an agency is required to consider a GAO decision when making determinations, and thus the reasonableness of the agency’s decision to follow the GAO decision should “set the metes and bounds for judicial review.” 65 Fed. Cl. at 524. The court rejected “[t]his latest approach to limiting [its] exercise of its bid protest jurisdiction,” explaining that “[i]f such were the scope of review, then any agency action based on a GAO decision would qualify as rational based solely on the GAO decision.” *Id.* The court added that while “the Court of Federal Claims affords deference to a GAO decision and does not conduct review *de novo*, the court’s charge is to determine, based on the record before the [CO], whether an agency’s procurement decision was reasonable.” *Id.* (citing *E.W. Bliss*, 33 Fed. Cl. at 134-35) (footnote omitted). Finally, the court explained that its scope of review did not start on the date of the GAO’s decision:

The court has afforded the GAO’s February 23, 2005 decision [denying the protest] due consideration and gives proper deference to it insofar as it discusses the merits of plaintiff’s claim. Unlike defendant apparently suggests, however, the court does not review HUD’s action solely from the date of the GAO Decision – in essence, only reviewing HUD’s actions from February 23, 2005, onward – but, rather, will review the entirety of the administrative record generated by HUD.

Id. at 525.

In *Analytical & Research Technology*, the plaintiff filed an action at the court after GAO denied its protest. The court noted that the case was not like *Honeywell*, where the agency changed its conduct in response to a GAO recommendation. The court explained that in protests like the one before the court, the agency’s decision, and not the GAO decision, is the subject of judicial review. The court noted, however, that:

GAO’s advisory decision is made a part of the administrative record before this Court, and, “in view of the expertise of the GAO in procurement matters, this court may rely upon such a decision for general guidance to the extent it is reasonable and persuasive in light of the administrative record.”

39 Fed. Cl. at 41-42 (citations omitted).

When a protest is filed at the court after a GAO bid protest, the record before the GAO is usually filed with the court, a situation addressed in *Nilson Van & Storage, Inc. v. United States*, No. 10-716C, 2011 WL 477704 (Fed. Cl. Feb. 7, 2011). *Nilson Van & Storage* had previously filed a protest with GAO, which denied the protest. *Nilson* then filed suit at the court. Much of *Nilson*’s complaint focused on alleged errors by GAO. The court agreed with the government that the court lacked subject-matter jurisdiction to review GAO’s decisions, noting that it considers protests independently of any prior protests before an agency or GAO. The court

nonetheless stated that such prior protests are not ignored by the court – Appendix C to the court’s rules provides that core documents relevant to a protest may include the record of any other protest. The court stated: “Indeed, by statute, certain documents concerning a protest before GAO are required to be submitted as part of the administrative record subject to review by this court.” *Id.* at *1-2 (citing 31 U.S.C. § 3556 (2006)). The court added that, in rendering its decision on a protest, the court “takes any prior GAO decision into account but does not accord it weight apart from its power to persuade.” *Id.* at *2. In *Acrow Corp. of America v. United States*, 96 Fed. Cl. 270, 281 (2010), a case the plaintiff filed after GAO denied its prior protest, the court noted that “[o]ne explanation for the statutory requirement that the GAO decision be included as part of the agency action subject to review is that Congress was prescient that a GAO decision might shed light on what documents or other written information should have been considered by the [CO].”

Conclusion. Stepping back from the trees to look at the forest, the Court of Federal Claims clearly is not bound by GAO decisions. Just as clearly, the court cannot conduct its own independent *de novo* review of GAO corrective action recommendations. Significantly, the *Honeywell* “irrational” standard of review remains viable in the post-ADRA era. A case from last year effectively paraphrased the *Honeywell* “irrational” standard of review as follows:

Here, the court need not address – at least not directly – the rationality or legality of the contract award to Navarro. Nor is the court required – or allowed – to determine whether, in its opinion, GAO reached the correct decision in sustaining the bid protests challenging that award. Rather, the sole issue before this court is whether the GAO decision was irrational.

Navarro Research & Eng’g, 106 Fed. Cl. at 405.

Focusing on whether a GAO decision is “irrational” necessarily raises questions concerning where the boundaries between rational and irrational should be drawn. There is, of course, no fixed set of guidelines concerning what constitutes an “irrational” GAO decision, nor should there be with a term as broad as “irrational.” However, the court has provided guidance on this issue in numerous cases. The court has found GAO decisions to be irrational for several reasons, including that a decision was contrary to statute (*Sys. Application & Techs., Inc. v. United States*); did not afford proper

deference to an agency’s source selection decision (*id.*); substituted GAO’s judgment for the judgment of the agency (*id.*; see also *Turner Constr. Co., Inc. v. United States*, 645 F.3d 1377); was contrary to precedent (*Turner Constr. Co., Inc. v. United States*, 94 Fed. Cl. 561 (2010)); failed to meaningfully engage with the agency decision (*id.*); did not follow law and regulations (*Commercial Energies, Inc. v. United States*); lacked analysis or explanation (*Firth Constr. Co., Inc. v. United States*); acted beyond GAO’s CICA mandate because it did not find the contract award violated statute or regulation (*Lyons Sec. Servs., Inc. v. United States*); and overlooked the issue of prejudice (*Amazon Web Services, Inc. v. United States*).

While it is well-settled that the court should not engage in a *de novo* review, and the issue is whether the GAO decision is irrational, the question concerning the amount of any deference owed to GAO decisions is less clear. The Federal Circuit confirmed the *Honeywell* “irrational” standard two years ago in *Turner Construction*. The circuit did not discuss the extent of any deference owed by the court to GAO decisions, and instead focused on GAO’s deference to agency decisions.⁶ Also, the forceful denunciation of the GAO decision by the Court of Federal Claims and the Federal Circuit in the *Turner Construction* decisions raised the question of whether those decisions would increase the likelihood that the court would find particular GAO decisions to be irrational. In addition to severely criticizing the GAO decision, the circuit reaffirmed the *Honeywell* irrational standard without repeating the significant facts offered in *Honeywell* to support the conclusion that “[t]he GAO plays an important role in the resolution of contested procurement decisions.” *Honeywell*, 870 F.2d at 647. Cases decided after *Turner Construction* have not established a clear trend demonstrating that the court is more likely to criticize GAO decisions. As such, it remains to be seen whether *Turner Construction* will be interpreted as limited to its particular facts or will have a broader impact. In any event, the court and the circuit undoubtedly will continue to grapple with—and hopefully provide further clarification on—the standard of review of GAO decisions that recommend corrective action.

⁶ As noted previously, the circuit may have had no need to discuss deference owed to GAO decisions because the circuit had no problem reaching a decision.