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ADMINISTRATIVE LAW — BID PROTESTS — FEDERAL CIRCUIT HOLDS THAT AGENCY WAS ARBITRARY AND CAPRICIOUS IN FOLLOWING A GOVERNMENT ACCOUNTABILITY OFFICE RECOMMENDATION. — *Turner Construction Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011).

The Competition in Contracting Act of 1984<sup>1</sup> formalized the role of the Government Accountability Office (GAO) as an alternative, independent,<sup>2</sup> and nonjudicial forum for resolving protests alleging agency violations of federal procurement laws.<sup>3</sup> Losing bidders that seek to dispute an agency's selection of the winning contractor have "overwhelmingly preferred" the GAO to other bid-protest forums, such as courts, due partly to the GAO's procurement expertise, lax procedural requirements, and speed.<sup>4</sup> Despite the fact that the GAO's decisions in bid protests are merely nonbinding recommendations,<sup>5</sup> agencies almost always follow them,<sup>6</sup> to such an extent that one might believe GAO decisions are treated as having the de facto force of law.<sup>7</sup> This status is in part due to the significant, though not absolute, deference traditionally afforded GAO recommendations by courts — a deference currently embodied in the Federal Circuit's decision in *Honeywell, Inc. v. United States*.<sup>8</sup>

It may be concerning that the GAO — a body that possesses expertise about the process of government contracting but not necessarily the substance of what is being contracted for<sup>9</sup> — is given such defer-

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<sup>1</sup> 31 U.S.C. §§ 3551–3556 (2006).

<sup>2</sup> The GAO is an independent agency under Congress — not the executive, *see id.* §§ 702(a), 703(e)(1)(B) — that is charged with investigating and analyzing issues associated with the receipt and expenditure of public money. *See id.* § 712. The Comptroller General is the head of the GAO. *Id.* § 702(b).

<sup>3</sup> *Id.* § 3552(a).

<sup>4</sup> *See* Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1234.

<sup>5</sup> *See* 31 U.S.C. § 3554(b)–(c).

<sup>6</sup> *See* Metzger & Lyons, *supra* note 4, at 1255 (stating that agencies "almost universally adopt" GAO recommendations, with only six instances of agency refusals to comply with bid protest recommendations from 1995 to 2007).

<sup>7</sup> *See* *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989) (noting that agencies have traditionally deferred to the GAO, even in cases of disagreement); Metzger & Lyons, *supra* note 4, at 1270 (noting that the GAO is extended "a largely unquestioned deference").

<sup>8</sup> 870 F.2d 644; *see id.* at 647 ("[T]he controlling inquiry . . . [is] whether the GAO's decision was a rational one."). Although lower courts have, in some instances, used the *Honeywell* standard to find that an agency acted arbitrarily and capriciously by following an irrational GAO recommendation, *see, e.g.*, *Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 44 (2007); *Firth Constr. Co. v. United States*, 36 Fed. Cl. 268, 276–77 (1996), *Honeywell* seemed to indicate that review of GAO recommendation rationality should be extremely deferential. *See* 870 F.2d at 648.

<sup>9</sup> *See* Metzger & Lyons, *supra* note 4, at 1234 (referring to the "GAO's accumulated expertise in procurement law"); *id.* at 1245 ("The GAO . . . has procurement experience confined to the . . . subfield of bid protests.").

ence by courts and by agencies with substantive expertise. Recently, in *Turner Construction Co. v. United States*,<sup>10</sup> the Federal Circuit held that the U.S. Army should not have followed the GAO's recommendation that the Army reverse a contract award decision and exclude the original winner from further consideration due to perceived organizational conflict of interest (OCI) issues.<sup>11</sup> This decision will have the counterintuitive but beneficial result of incentivizing the development of expertise within acquisition agencies and the GAO.

In June 2007, the Army contracted with a subsidiary of AECOM Technology Corporation (AECOM) to prepare the specifications for the construction of a government hospital<sup>12</sup> and to provide advice during the Army's procurement and proposal-selection process.<sup>13</sup> In June 2008, the Army began its solicitation of construction contractors,<sup>14</sup> eventually selecting Turner Construction's proposal from a field of three competing bidders.<sup>15</sup>

During the solicitation process, one of Turner's minor subcontractors, Ellerbe Becket (EB),<sup>16</sup> was in off-and-on confidential merger talks with AECOM<sup>17</sup> — creating a potential OCI given AECOM's role in advising the Army about whether to select a proposal that included EB as a subcontractor. The announcement of a consummated merger two months after the award decision<sup>18</sup> prompted the losing bidders to file bid protests at the GAO alleging that the award to Turner was invalid due to OCI issues.<sup>19</sup> Although prior to the contract award the Army's Contracting Officer had not conducted a comprehensive investigation into the existence of OCIs, upon the filing of the bid protest the officer conducted and submitted a thorough investigation finding that no OCIs existed prior to the contract award.<sup>20</sup>

Despite the Army's OCI findings, the GAO sustained the bid protest based on its own finding of OCI issues and recommended that the Army recompet the contract while excluding Turner/EB from further consideration.<sup>21</sup> The GAO based its OCI conclusion primarily on a lack of process undertaken by AECOM to prevent an unfair ad-

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<sup>10</sup> 645 F.3d 1377 (Fed. Cir. 2011).

<sup>11</sup> See *id.* at 1379.

<sup>12</sup> *Id.* at 1379–80.

<sup>13</sup> See *id.* at 1380.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> EB's work on the hospital contract constituted just 1.5% of Turner's proposal. *Id.*

<sup>17</sup> *Id.* at 1380–81.

<sup>18</sup> See *id.*

<sup>19</sup> *Id.* at 1381.

<sup>20</sup> *Id.* at 1381–82.

<sup>21</sup> B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69, at 11 (Comp. Gen. Feb. 16, 2010).

vantage from accruing to Turner/EB — rather than on any finding that Turner/EB actually received an unfair advantage.<sup>22</sup> The Army subsequently announced that it would accept the GAO's recommendation and terminate Turner's contract.<sup>23</sup>

Turner then filed its own protest in the Court of Federal Claims seeking an injunction to force the Army to reinstate its hospital contract.<sup>24</sup> The court found that "the Army was arbitrary and capricious in implementing the GAO's decision" and ordered the Army to restore Turner's contract.<sup>25</sup> The court found that the GAO's decision lacked a rational basis<sup>26</sup> and "emphasized that the GAO failed to meaningfully consider the [agency's] detailed factual findings and improperly substituted its own judgment for that of the [agency]."<sup>27</sup>

The Federal Circuit affirmed. Writing for the panel, Judge Prost<sup>28</sup> stated that when an agency's contract award decision is "reasonable, neither a court nor the GAO may substitute its judgment for that of the agency."<sup>29</sup> Here, based on the court's *Honeywell* standard, the Army's decision to follow the GAO recommendation would be arbitrary and capricious "if it implements a GAO recommendation that is itself irrational."<sup>30</sup>

The court first addressed the losing bidders' allegation that the Court of Federal Claims "improperly engaged in a de novo review of the GAO's decision rather than giving it proper deference."<sup>31</sup> Judge Prost found that the Court of Federal Claims correctly acknowledged that the proper standard of review was "whether the GAO's decision was a rational one"<sup>32</sup> and that it then correctly applied that standard in finding that the GAO's conclusion lacked a rational basis because it failed to engage the Army's OCI findings and the record.<sup>33</sup> The Federal Circuit affirmed the Court of Federal Claims' findings that the GAO "failed to cite any hard facts"<sup>34</sup> and instead relied on only "vague allegations" to support its OCI findings.<sup>35</sup>

Judge Prost also rejected the losing bidders' other arguments, which did not directly address issues of deference. She held that the

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<sup>22</sup> See *id.* at 7–11.

<sup>23</sup> *Turner*, 645 F.3d at 1383.

<sup>24</sup> *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 585 (2010).

<sup>25</sup> *Id.* at 586.

<sup>26</sup> *Id.* at 579–83.

<sup>27</sup> *Turner*, 645 F.3d at 1383; see *Turner*, 94 Fed. Cl. at 580–81.

<sup>28</sup> Judge Prost was joined by Judges Clevenger and Bryson.

<sup>29</sup> *Turner*, 645 F.3d at 1383.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1384.

<sup>32</sup> *Id.* (quoting *Turner*, 94 Fed. Cl. at 572) (internal quotation mark omitted).

<sup>33</sup> See *id.* at 1385.

<sup>34</sup> *Id.* (quoting *Turner*, 94 Fed. Cl. at 582) (internal quotation marks omitted).

<sup>35</sup> *Id.* (quoting *Turner*, 94 Fed. Cl. at 582) (internal quotation mark omitted).

Court of Federal Claims did not err in considering the Army's post-award OCI investigation and report in determining that the GAO's decision was irrational.<sup>36</sup> Similarly, she rejected the claim that the Court of Federal Claims erroneously required "hard facts" to show an actual OCI rather than a potential OCI<sup>37</sup> and confirmed that the Court of Federal Claims did not exceed its equitable powers when it ordered the Army to reinstate Turner's contract.<sup>38</sup>

Although the Federal Circuit in *Turner* ostensibly relied on the *Honeywell* standard of review, the court seemed to signal that both agencies and courts should afford GAO decisions less deference. Given this development, *Turner* not only will encourage acquisition agencies to exercise increased discretion, but also will increase the costs associated with the GAO's exercise of its oversight function. Contemporary scholarship suggests that these effects may have the unexpected benefits of increasing the expertise of both the acquisition agencies and the GAO.

It is important first to clarify the deference dynamics operating in this case. The GAO itself reviews the agency's solicitation and award decision under a "reasonableness"<sup>39</sup> standard that commentators have noted is somewhat less deferential than arbitrary and capricious review and may allow the GAO to substitute its judgment for the agency's.<sup>40</sup> When an agency decides to adopt a GAO recommendation sustaining a bid protest — as it almost always does — courts review that decision under an arbitrary and capricious standard,<sup>41</sup> which (per *Honeywell*) looks to whether the GAO decision itself was rational.<sup>42</sup> A necessary condition of such rationality is that the GAO credit the agency's factfinding and refrain from substituting its judgment for the agency's.<sup>43</sup> The inherent tension between the GAO's standard of review, which seemingly allows for substitution of judgment, and the court's, which does not, is a product of the court's limited review: it reviews

<sup>36</sup> *Id.* at 1385–87.

<sup>37</sup> *Id.* at 1387.

<sup>38</sup> *Id.* at 1387–88.

<sup>39</sup> When the GAO decides a bid protest, it reviews whether the agency's decision was "reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations." *Forest City Military Cmtys., LLC*, B-299577, 2007 CPD ¶ 128, at 7 (Comp. Gen. June 29, 2007) (citing *Shumaker Trucking & Excavating Contractors, Inc.*, B-290732, 2002 CPD ¶ 169, at 3 (Comp. Gen. Sept. 25, 2002)).

<sup>40</sup> See Metzger & Lyons, *supra* note 4, at 1264–65 (noting that the difference between the "reasonableness" standard of the GAO and the "rationality" standard of courts is "subtle but important," as the GAO standard "leaves more room for the examining officer's personal values and preferences to affect the choice of the 'fair' or 'right' answer").

<sup>41</sup> *Turner*, 645 F.3d at 1383.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 1383–84.

only the acquisition agency's decision to accept the GAO's recommendation, not the GAO's decision or precedent.<sup>44</sup>

In this context, there are two reasons to think that *Turner* will decrease agency deference to the GAO and thereby increase agency discretion. First, the Federal Circuit enunciated the *Honeywell* standard in the context of *affirming* an agency's decision to follow a GAO recommendation.<sup>45</sup> *Turner* is the first Federal Circuit ruling to *reject* such a decision and find that an agency was arbitrary and capricious in following a GAO recommendation. Even though the court did not create a new standard, its ruling should send a strong signal to acquisition agencies to critically evaluate and potentially ignore GAO recommendations. Given its tone and decisional context, *Honeywell* itself did not send such a strong message. Indeed, the court's willingness to send this signal now, as compared to when *Honeywell* was announced, likely stems from its confidence that the Court of Federal Claims has accumulated sufficient expertise in government contracts law to be an adjudicatory forum superior to the GAO.<sup>46</sup>

Second, in reviewing agency action taken pursuant to a GAO recommendation, courts have traditionally given GAO recommendations considerable deference in light of the GAO's expertise in procurement law<sup>47</sup> — to such an extent that GAO recommendations have appeared to have the de facto force of law.<sup>48</sup> *Honeywell* signaled that GAO recommendations were to be afforded an especially large degree of deference: “[I]t 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.”<sup>49</sup> This statement stands in stark contrast to the statement in *Turner* that when an agency's award decision is reasonable, “neither a court nor the GAO may substitute its judgment for that of the agency.”<sup>50</sup> Indeed, the court appears to have stretched its own precedent in saying that the GAO may not substitute its judgment for the agency's.<sup>51</sup> This shift in tone and

<sup>44</sup> See *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 341 (1997).

<sup>45</sup> See *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989).

<sup>46</sup> Cf. *Metzger & Lyons*, *supra* note 4, at 1225–26, 1234–35 (explaining that the Court of Federal Claims has been the exclusive and specialized judicial forum for bid protests only since 1996 and that during that time, as the Court of Federal Claims has developed its expertise in government contracts, it has been increasingly willing to challenge the GAO's decisions).

<sup>47</sup> See, e.g., *Idea Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 136 n.11 (2006) (citing *PHT Supply Corp. v. United States*, 71 Fed. Cl. 1, 9 n.6 (2006)); *Metzger & Lyons*, *supra* note 4, at 1249, 1259.

<sup>48</sup> See *Honeywell*, 870 F.2d at 647; *Metzger & Lyons*, *supra* note 4, at 1255, 1270.

<sup>49</sup> *Honeywell*, 870 F.2d at 648 (emphasis added) (quoting *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963)).

<sup>50</sup> *Turner*, 645 F.3d at 1383.

<sup>51</sup> The court cited *R & W Flammann GmbH v. United States*, 339 F.3d 1320, 1322 (Fed. Cir. 2003), for the proposition that “neither a court nor the GAO may substitute its judgment for that

extension of precedent will encourage agencies to critically evaluate and potentially reject GAO recommendations that sustain bid protests.

Comparing the standard of review courts apply to award decisions to the standard the GAO applies also demonstrates an increase in the acquisition agency's discretion. Courts apply arbitrary and capricious review under the Administrative Procedure Act.<sup>52</sup> The GAO, however, applies a seemingly less deferential "reasonableness" review,<sup>53</sup> which conceptually allows the GAO to substitute its judgment for an agency's with respect to an award decision.<sup>54</sup> Thus, when agencies take advantage of their newly encouraged ability to ignore GAO decisions, reviewing courts will afford them the more deferential standard.

*Turner* will thus increase acquisition agencies' discretion by enabling them more frequently to pursue their chosen course of action — instead of the course recommended by the GAO.<sup>55</sup> According to political science literature stemming largely from the work of Professors Philippe Aghion and Jean Tirole, increasing an agent's discretion increases its incentive to acquire information and expertise.<sup>56</sup> When a principal utilizes an agent to collect information about and implement one of many potential projects, an increase in the principal's effort to become informed (in case it must apply its judgment over the agent's) reduces the impact of the agent's efforts.<sup>57</sup> This, in turn, reduces the agent's incentive to acquire information.<sup>58</sup> By the same token, delegating authority to the agent amplifies the effects of its expertise and encourages the agent to become informed.<sup>59</sup>

These results apply in the government acquisition context. By increasing the deference afforded an acquisition agency when it chooses among competing offerings, courts effectively increase the agency's authority — that is, they increase the impact of the agency's choice on

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of the agency." See *Turner*, 645 F.3d at 1383. *Flammann*, however, never even mentioned the GAO. See 339 F.3d at 1322.

<sup>52</sup> 5 U.S.C. §§ 551–559, 701–706 (2006); see, e.g., *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009) (citing 5 U.S.C. § 706).

<sup>53</sup> See *supra* note 39.

<sup>54</sup> See Metzger & Lyons, *supra* note 4, at 1264–65.

<sup>55</sup> Cf. Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 2 (1997) ("Authority may . . . result from an explicit or implicit contract allocating the right to decide on specified matters to a member or group of members of [an] organization.").

<sup>56</sup> See *id.* at 27 (concluding that the delegation of authority to a subordinate will "foster his incentive to acquire relevant information about the corresponding activities"); Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 472 (2007) [hereinafter Stephenson, *Bureaucratic Decision Costs*] (summarizing relevant literature); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1483 (2011) ("One can raise an agent's research payoff by expanding her discretion and autonomy . . .").

<sup>57</sup> See Aghion & Tirole, *supra* note 55, at 1–3, 5–12.

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 3.

the final outcome. Since it is now less likely that the agency's efforts to acquire information that enables it to select the best contractor (based on the agency's preferences) will be rendered useless by the GAO's sustaining a bid protest, the agency's incentives to acquire expertise are increased. Indeed, the more information the agency gathers, the more constrained the GAO will be in its review, since *Turner* discourages the GAO from ignoring acquisition agencies' factual findings. Thus, by encouraging the use of discretion, *Turner* incentivizes the development of expertise within acquisition agencies.

Encouraging an acquisition agency to critically evaluate and potentially ignore the decision of an oversight agency like the GAO can, under circumstances similar to those in *Turner*, encourage the development of expertise within the oversight agency as well. Professor Matthew Stephenson has shown that increasing the cost of agency action under circumstances in which an uninformed agency would disturb the status quo (by regulating, for example) incentivizes an agency to invest in information, thus enhancing its expertise.<sup>60</sup> Increasing the cost of such an agency's actions moves its regulatory bias closer to a neutral point.<sup>61</sup> Information is more valuable to an agency whose regulatory bias is neutral because neutral agencies are the most uncertain *ex ante* of the best course of action.<sup>62</sup> Thus, the effect *Turner* will have on the GAO's incentives to acquire expertise depends on two conditions: whether *Turner* increases the cost of GAO action and whether the GAO is the sort of agency that typically changes the status quo (by sustaining bid protests) without first completely informing itself.

Both of these conditions are met. First, *Turner* will on average increase the cost of the GAO's sustaining a bid protest because when an agency chooses not to follow a GAO recommendation, the Competition in Contracting Act requires the Comptroller General to file a report with Congress containing a comprehensive review of the bid protest and a recommendation of the remedy Congress should impose.<sup>63</sup> Given that *Turner*'s likely effect will be to increase the number of GAO recommendations that are not followed by agencies, one can infer that the average cost of a GAO decision to sustain a bid protest will increase, as the GAO will more likely be obliged to report to Congress.

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<sup>60</sup> See Stephenson, *Bureaucratic Decision Costs*, *supra* note 56, at 477. The GAO seeks to change the status quo when it sustains a bid protest and thereby disrupts the normal course of acquisition agency decisionmaking.

<sup>61</sup> See *id.* at 471.

<sup>62</sup> See *id.* at 477.

<sup>63</sup> 31 U.S.C. § 3554(e)(1) (2006). It is unlikely that this additional congressional exposure would force additional costs on agencies given that source-selection decisions seem unlikely to become priorities for members of Congress. Cf. Metzger & Lyons, *supra* note 4, at 1255–56 (noting that Congress has compelled compliance in only one of six instances where an agency had declined to follow a GAO bid-protest decision).

Next, it is plausible to classify the GAO as the sort of agency that would choose to change the status quo despite not completely informing itself. The GAO's decision in *Turner* lends support to this classification. The GAO sustained the losing bidders' protest, based not on findings that actual prejudice existed against the losing bidders but on a presumption that prejudice existed when certain procedures and formalities were not followed.<sup>64</sup> According to the court, the GAO relied on "suspicion and innuendo" instead of "hard facts" and "fail[ed] to meaningfully engage" with the agency's findings.<sup>65</sup> It seems unlikely that the GAO's decision in *Turner* was merely an exceptionally bad decision that was especially worthy of condemnation. The GAO firmly grounded its decision in its own precedent,<sup>66</sup> indicating systemic problems with the GAO's reasoning and presumptions.<sup>67</sup>

More generally, commentators have noted that the GAO's expedited and informal procedures<sup>68</sup> produce less accurate results compared to outcomes reached in judicial forums.<sup>69</sup> Disturbing the status quo through speedy and informal procedures at the cost of accuracy is a hallmark of an agency that is prone to acting without becoming fully informed. Thus, Stephenson's two conditions for incentivizing the development of expertise appear to be met.

The Federal Circuit's decision in *Turner* may therefore encourage the development of expertise within both acquisition agencies and the GAO. This effect arises in the case of an acquisition agency by encouraging increased use of discretion, and in the case of the GAO by increasing the average cost of sustaining a bid protest. Although increasing an agency's discretion can come at the cost of reduced control by a politically accountable branch,<sup>70</sup> in this instance such concerns are mitigated by the GAO's congressional reporting obligations when an agency chooses to ignore the GAO's recommendation. Thus, *Turner* will serve to increase effectiveness in government contracting decisions.

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<sup>64</sup> See B.L. Harbert-Brasfield & Gorrie, JV, B-402229, 2010 CPD ¶ 69, at 6–11 (Comp. Gen. Feb. 16, 2010) (applying GAO precedent to the facts and noting presumptions).

<sup>65</sup> *Turner*, 645 F.3d at 1385 (quoting *Turner Constr. Co. v. United States*, 94 Fed. Cl. 561, 580–81 (2010)) (internal quotation marks omitted).

<sup>66</sup> See *Harbert-Brasfield*, 2010 CPD ¶ 69, at 6–10.

<sup>67</sup> There is an additional reason to believe that the Federal Circuit's decision in *Turner* represents something more than a response to an exceptionally poor GAO decision: *Turner* may be viewed as the Federal Circuit's expression of confidence that the Court of Federal Claims has attained a level of competence with government contracts that is at least equivalent to the GAO's. See Metzger & Lyons, *supra* note 4, at 1225–26, 1234–35.

<sup>68</sup> See *id.* at 1230–34.

<sup>69</sup> See *id.* at 1266.

<sup>70</sup> See, e.g., Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995) ("By delegating policy decisions to the bureaucracy, Congress creates a control problem for itself.").