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ESTABLISHING THE RECORD IN COURT OF FEDERAL CLAIMS BID PROTESTS

By Jonathan D. Shaffer, Mary Pat Buckenmeyer, and Zachary D. Prince

Bid protests at the U.S. Court of Federal Claims are usually resolved based on cross motions for judgment on the administrative record. As a result, the composition of the administrative record is a critical factor in resolution of the protest. The U.S. Court of Appeals for the Federal Circuit has ruled that the administrative record should include all information necessary for effective judicial review.¹ Under that standard, supplementation is frequently denied unless exclusion will “preclude” effective judicial review.

In *Axiom Resource Management, Inc. v. United States*, the Federal Circuit found that the COFC had abused its discretion by allowing the administrative record to be supplemented without evaluating the sufficiency of the record before the agency and whether that record was sufficient to permit judicial review.² In other words, the COFC established the administrative record too broadly. The Federal Circuit held that the administrative record should be limited to those materials necessary for effective judicial review.³

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In bid protests at the COFC, the administrative record is prepared by the administrative agency and submitted to the court through the U.S. Department of Justice. The plaintiff protester or any party to the COFC protest may file a motion to supplement the administrative record. Typically, the administrative record includes the relevant documents from the contemporaneous

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procurement process depending on the protest grounds, such as the solicitation, offerors' proposals if relevant, the evaluation reports, any analysis made to determine which offeror will be chosen for award, and the award decision.⁴

Before the Federal Circuit's *Axiom* decision, the COFC followed a "flexible approach" to the introduction of extra-record materials.⁵ The COFC almost uniformly followed the considerations outlined in *Esch v. Yeutter*,⁶ a decision of the U.S. Court of Appeals for the District of Columbia Circuit.⁷ In *Esch*, the D.C. Circuit identified eight factors making supplementation of the administrative record generally appropriate.⁸ *Axiom*, however, repudiated the *Esch* factors, and since the *Axiom* decision, the judges of the COFC have generally adopted a more restrictive approach to supplementing the administrative record.⁹

While the post-*Axiom* COFC generally analyzes each motion to supplement the record on a case-by-case, fact-specific basis,¹⁰ the decisions show some areas where the COFC is generally more permissive in allowing materials into the record, including but not limited to the following:

(1) *Prior GAO protest*—In a COFC protest that follows a Government Accountability Office protest proceeding, some COFC judges have been more willing to allow materials into the record that have been made part of the record before the GAO.¹¹

(2) *Materials "too close at hand to ignore"*—Where the agency failed to include materials in the administrative record that the Contracting Officer had seen, or should have seen (materials that were "too close at hand to ignore"), the court often considers the inclusion of such materi-

als as completing the court record, rather than supplementing the record.¹²

(3) *Bad faith or bias*—Where the protester alleges bad faith or bias on the part of the agency, materials evidencing such bad faith or bias may be allowed, at least, as part of the court's record.¹³

(4) *Elements necessary to establish injunctive relief*—Materials that are used to establish the elements necessary to obtain injunctive relief can be submitted to the COFC, although such materials are typically viewed as part of the court record, rather than the administrative record.¹⁴

(5) *Esch factors*—Some judges still consider the *Esch* factors, although those judges who do so typically also conduct a further analysis of whether the materials are necessary for effective judicial review.¹⁵

(6) *Technical or complex issues*—A protester may be allowed to submit information to the COFC that allows the court to address technical or complex issues.¹⁶

This BRIEFING PAPER (a) discusses the importance of the administrative record in COFC bid protests, (b) examines how the COFC established the administrative record before *Axiom*, (c) provides a brief discussion of the Federal Circuit's *Axiom* decision, (d) presents an overview of the principal changes arising from *Axiom*, and (e) provides guidance on developing an effective administrative record in COFC bid protests.

The Significance Of The Administrative Record In Bid Protests

The COFC has "jurisdiction to render judgment on an action by an interested party objecting to

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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 violations of statute or regulation in connection with a procurement or proposed procurement.¹⁷ Bid protests at the COFC are typically resolved through cross motions for judgment on the administrative record.¹⁸ In addressing bid protests, the trial court makes finding of facts weighing the evidence in the administrative record.¹⁹

In a bid protest, the COFC reviews any agency procurement decisions under the standard set forth in the Administrative Procedure Act.²⁰ Specifically, the COFC may set aside an agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²¹ Under this standard, “a bid 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.”²² A court evaluating a challenge on the first ground must determine “whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion.”²³ “When a challenge is brought on the second ground, the disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations.”²⁴

The Administrative Record Before *Axiom*

Before *Axiom*, the COFC generally considered supplementation of the administrative record under the factors identified in *Esch v. Yeutter*, a case that did not involve a bid protest.²⁵ As a decision of the D.C. Circuit, *Esch* was not binding precedent on the COFC. Numerous COFC pre-*Axiom* decisions, however, relied on the *Esch* factors to evaluate the scope of the administrative record in bid protests.²⁶

In *Esch*, the D.C. Circuit Court identified the following eight factors to consider in supplementing the administrative record:²⁷

- (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to

understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

The courts considered these eight factors on a case-by-case basis.²⁸ Pre-*Axiom*, however, the COFC reviewed the issues raised by a protester through “the prism of the administrative record,” broadly allowing in materials not considered by the contracting agency at the time if the materials otherwise fit within the *Esch* factors.²⁹

The COFC observed that the parties should be permitted, in appropriate cases, to supplement the administrative record since in most bid protests, “the ‘administrative record’ is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review.”³⁰ The COFC concluded that supplementation was frequently appropriate in the context of bid protest cases because agencies tended to hastily and retroactively create the administrative record that was subsequently filed with the court for review, thereby delineating a “scope of review [that] may preclude the ‘substantial inquiry’ and ‘thorough, probing, in-depth review’ the court must perform to determine whether the agency’s action was arbitrary and capricious.”³¹

For example, in *Pikes Peak Family Housing, LLC v. United States*, the COFC noted that effective judicial review of an agency’s discretion “is irreconcilably at odds with the notion that the reviewing court’s inquiry must be confined to an administrative record that is likewise the product of the agency’s sole discretion.”³² There, a disappointed bidder filed a preaward protest against the agency’s proposed award. The protester sought discovery to supplement the record with information about the agency’s conduct during the solicitation and evaluation that was not adequately explained in the administrative record. After reviewing the *Esch* factors, the COFC found that supplementation of the administrative record was warranted because the “[u]nexplained irregularities...clearly and justifiably ma[de] out a prima facie case for supplementation of the administrative record.”³³

Cubic Applications, Inc. v. United States was often cited as the leading case adopting the *Esch* factors. In *Cubic*, the plaintiff protested a defect in the solicitation and the Government's alleged failure to properly evaluate the awardee's proposal for technical risk, staffing, contract management, and past performance.³⁴ The Government sought to supplement the record with an affidavit of the CO. In allowing supplementation, the COFC observed that in a contract award context an agency exercises judgment in furnishing the record to the court, and to preserve meaningful judicial review, "the parties must be able to suggest the need for other evidence, and possibly limited discovery, aimed at determining, for example, whether other materials were considered, or whether the record provides an adequate explanation to the protester or the court as to the basis of the agency action."³⁵

Subsequent COFC decisions often followed the *Cubic* court's *Esch* analysis. For example, in *GraphicData, LLC v. United States*, the COFC noted that while the COFC is generally limited in its review to the facts before the agency at the time the protested action was taken, the COFC does not apply "an iron-clad rule automatically limiting its review to the administrative record."³⁶ The plaintiff in this case protested the award of a contract for printing patents, alleging that the agency improperly provided the awardee with Government-furnished property in the form of an electronic file that was not listed in the invitation for bids.³⁷ The COFC determined that in order to rule on the protester's request for temporary injunctive relief, the court had to inquire about the usefulness of the electronic file that was not listed in the IFB.³⁸ As part of its analysis, the COFC noted that "[n]o reason exists to presume that Congress, in granting the Court of Federal Claims jurisdiction to entertain post-award bid protest actions, intended to impose upon the court an absolute rule limiting review to the administrative record."³⁹ In making this determination that the COFC needed more information than what was in the administrative record, the *GraphicData* court reviewed the *Esch/Cubic* factors. The *GraphicData* court determined that by limiting the COFC to the administrative record, the COFC would be prevented from determining whether the agency's actions were arbitrary or not in accordance with law.⁴⁰

In *Myers Investigative & Security Services v. United States*, the court allowed the record to be supplemented with affidavits from the protester's owner and president about the agency's actions and from the individual who prepared the protester's price estimate. The motion to supplement also included several documents, including market research, a market survey, and information from the internet that the agency knew of but failed to consider.⁴¹ The COFC, citing to its *Cubic I* decision, analyzed each of the proffered documents under the *Esch* factors and included a majority of the documents, finding that much of the information was relied on by the agency when making its award determination and that the record was incomplete based on the *Esch* factors as further outlined in *Cubic*.⁴²

In *Aero Corp. v. United States*, the plaintiff brought a preaward protest challenging its removal from the competitive range and sought to compel discovery to supplement the record.⁴³ The protester sought, in part, to depose 11 of the agency's employees who were involved in the competitive range determination and to supplement the administrative record with that information in order to "afford a full understanding of defendant's decision to exclude plaintiff's proposal from the competitive range."⁴⁴ The COFC, citing in part to *Cubic*, noted that in limited circumstances, the COFC may compel contracting officials participating in procurement decisions to give testimony to explain their actions. However, the COFC also noted that "inquiry into the mental processes of administrative decisionmakers is generally to be avoided."⁴⁵ The COFC rejected a majority of the depositions sought by the protester, finding that much of the testimony would address the mental processes of those who participated in the evaluation and the record already contains contemporaneous explanations for the agency's conclusions. However, the COFC reached a different conclusion as to the source selection authority and the CO. The COFC granted the protester's request to depose these two agency officials because the record of the evaluation processes was not self-explanatory and the significance of certain documents to the SSA's determination was not addressed in the record. Similarly, in granting a limited deposition of the CO, the COFC found it needed clarification of the CO's statement in

response to protester's assertion that the agency improperly compared its proposal with that of other offerors.⁴⁶

Even before *Axiom*, however, the courts that followed *Esch* did not generally grant protesters carte blanche to supplement the administrative record. In *Benchmark Knife Co. v. United States*, the protester moved to supplement the record with a memorandum issued about eight months after the agency's award decision, with two documents relating to a prior GAO protest, and with three affidavits that described knife testing that took place *after* the agency's award decision.⁴⁷ The COFC, citing in part to *Cubic I*, found that the documents should not be included in the record because the documents were not "core documents" and had no bearing on the agency's award decision and were not necessary to "improve [the COFC's] understanding of the issues in this case."⁴⁸ Even under *Esch* and *Cubic*, the record would not be supplemented with post hoc analyses attempting to supplement or overwrite the contemporaneous materials.⁴⁹

The Federal Circuit's *Axiom* Decision

The COFC's approach changed significantly in 2009 when the Federal Circuit reviewed the COFC's decision in *Axiom*.⁵⁰ In *Axiom*, the Federal Circuit ruled that the COFC had established the administrative record too broadly. The Federal Circuit held that the administrative record should only include information "necessary for effective judicial review."⁵¹ The *Axiom* court looked to decisions of the U.S. Supreme Court that addressed the administrative record in APA cases generally and noted that the Court has stated that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."⁵² The Federal Circuit observed that the Supreme Court had held that "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."⁵³

The Federal Circuit *Axiom* court found that "[t]he purpose of limiting review to the record actually before the agency is to guard against

courts using new evidence to 'convert the 'arbitrary and capricious' standard into effectively de novo review.'"⁵⁴ Thus, the *Axiom* court held that "supplementation of the record should be limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'"⁵⁵

The protester in *Axiom* had filed a series of bid protests before the GAO asserting that a contract award was improper because of the awardee's alleged unmitigated organizational conflict of interest. The agency took multiple corrective actions in which the agency determined that an "unequal access to information" OCI might arise in the future if the awardee were to submit a proposal for purchased care requirements, but any potential conflict was resolved by the awardee's mitigation plan that prohibited it from bidding on these requirements in the future. After the GAO denied the protester's third protest, it filed a new protest at the COFC.⁵⁶ Under established case law at the COFC, the COFC reviews the agency's procurement decisions, not the independent decision of the GAO itself. Thus, the COFC does not sit as an appellate body for the GAO.⁵⁷

Before the COFC, the protester alleged that the Government violated Federal Acquisition Regulation Subpart 9.5, which provides rules and procedures for identifying, evaluating, and resolving OCIs, and acted arbitrarily and capriciously in awarding the contract to the awardee.⁵⁸ During the course of the protest before the COFC, the protester sought to supplement the administrative record with legal pleadings before the GAO, declarations of its employees, and declarations from consultants retained as part of the litigation. During a telephone conference, the COFC encouraged the parties to include a broad range of materials in the administrative record, stating: "My practice...since I've been on the Court is to allow everybody to put...whatever they want to put into the record in trial and even in an administrative record to supplement."⁵⁹ Further, "[j]ust because it's in the record doesn't mean I'm going to rely on it for any reason. I may never even bother to do anything with it, but I do think it's better to get it in there."⁶⁰ The COFC noted that if the case were appealed to the Federal Circuit, by allowing supplementation, the appellate court would have the full record "and the parties have put in

everything that they feel they need to have to put forward their best argument.”⁶¹ The COFC *Axiom* court concluded that there was no prejudice to the Government in allowing supplementation because “you don’t know what I’m going to do one way or the other with any of the stuff. The same thing for the Plaintiff. If they want to put it in, I’ll put it in.”⁶²

The Federal Circuit *Axiom* court observed that the COFC had made it clear that “it would freely allow the parties to supplement the record ‘with whatever they want,’ and, by so doing, failed to make the required threshold determination of whether additional evidence was necessary.”⁶³ The Federal Circuit found that relying on *Esch* to permit supplementation of the record was “problematic” since “*Esch*’s vitality even within the D.C. Circuit is questionable in light of more recent opinions by that court which demonstrate a more restrictive approach to extra-record evidence.”⁶⁴

Thus, *Esch* was not only “heavily in tension” with existing precedent,⁶⁵ but some of its exceptions were “so broadly-worded as to risk being incompatible with the limited nature of arbitrary and capricious review, particularly if construed to allow the introduction of new evidence or theories not presented to the deciding agency.”⁶⁶ The Federal Circuit held that “[f]or these reasons, insofar as *Esch* departs from fundamental principles of administrative law as articulated by the Supreme Court in [*Camp. v.*] *Pitts* and *Florida Power & Light [Co. v. Lorion]*, it is not the law of [the Federal Circuit].”⁶⁷

In *Axiom*, the Federal Circuit was influenced by a post-*Esch* decision of the D.C. Circuit, *IMS, P.C. v. Alvarez*.⁶⁸ In that case, the D.C. Circuit only identified four instances in which accepting the plaintiff’s extra-record evidence would be appropriate: when “the agency failed [1] to examine all relevant factors or [2] to adequately explain its grounds for decision, or [where] the agency [3] acted in bad faith or [4] engaged in improper behavior in reaching its decision.”⁶⁹

The Federal Circuit noted further reasons not to follow *Esch*, stating that the eight exceptions listed in *Esch* were dicta and of limited “probative value.”⁷⁰ The Federal Circuit thus concluded:

“The focus of judicial review of agency action remains the administrative record, which should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the APA.”⁷¹ The Federal Circuit also found that the COFC “should have determined whether supplementation of the record was necessary in order not ‘to frustrate effective judicial review.’”⁷² The Federal Circuit then held that the COFC had abused its discretion by admitting the protester’s extra-record evidence without making such a determination.⁷³

An underlying principle from *Axiom* is that the COFC should review bid protest actions based on the administrative record and should not conduct a de novo review. The COFC reviews the reasonableness of the agency’s decision, and it should not be supplanting its own judgment for that of the agency.⁷⁴ The administrative record “is not a documentary record maintained contemporaneously with the events or actions included in it. Rather, it is a convenient vehicle for bringing the decision of an administrative body before a reviewing agency or a court.”⁷⁵ The COFC’s review is of the agency’s actions, not a determination of what the court believes should be the final decision.⁷⁶

Thus, in *Contracting Consulting Engineering, LLC v. United States*, the COFC, wary of conducting a de novo review, observed that it could not allow a protester “to introduce facts that effectively substitute [the protester’s] opinion for that of the [technical evaluation panel’s] determination of the technical acceptability of the proposals.”⁷⁷ The same court observed that the protester should be permitted to supplement the record with information calling into question the agency’s analysis. “If this type of information [declarations with evidence addressing technical evaluation panel assumptions] were not allowed, a protester would be foreclosed from disputing, as a matter of fact, that the evaluation panel irrationally employed an analytical tool that bore no relationship to the experience on which the evaluators purported to rely.”⁷⁸

On the other hand, in *MG Altus Apache Co. v. United States*, the COFC cautioned that “the administrative record of a protested procurement

submitted by the agency involved is not always a complete record of documentary materials generated during the procurement and maintained contemporaneously with the occurrence of the salient events or actions associated with the procurement. When the record submitted by the agency is not complete, a motion to correct or supplement the record is appropriate.”⁷⁹

Thus, even under *Axiom*, the COFC may nonetheless require supplementation when the record is incomplete. Moreover, the administrative record “is not limited to information that is ‘not duplicative.’”⁸⁰ In *MG Altus Apache*, the court observed that “it is not appropriate for the Government to selectively include some documents in the [administrative record] and omit others on the ground that essentially the same information is summarized elsewhere in the record.” Rather, the administrative record “should contain all relevant information on which the agency relied or allegedly should have relied in making the challenged decision.”⁸¹

The Administrative Record Post-Axiom

Since *Axiom* was decided, the COFC has generally adopted a more restrictive approach when determining the scope of the administrative record in a bid protest. Thus, parties to the protest need to carefully consider what materials are necessary to resolve the protest and whether those materials fit within the COFC’s post-*Axiom* standards. A party must be prepared to demonstrate that omission of the extra-record evidence precludes effective judicial review.

The following section of the BRIEFING PAPER addresses how the COFC develops the administrative record post-*Axiom* for GAO materials, information that was too close at hand to ignore, evidence of bad faith or bias, expert testimony, opinion testimony, and evidence to support the request for injunctive relief.

■ GAO Materials

It is not unusual for a protest at the COFC to originate in a protest first brought to the GAO. This may occur when a protester loses at the GAO and files a new protest challenging the

same procurement action at the court⁸² or, where the protest is granted by the GAO, the original awardee challenges the agency decision to follow the GAO recommendation at the court.⁸³ There are also cases where the agency decides to take voluntary corrective action (either independently or as a result of an informal recommendation from the GAO) and the original awardee then challenges the agency decision to take corrective action.⁸⁴

There is a disagreement among some judges of the COFC as to whether the administrative record includes materials that were before the GAO in a preceding protest. 31 U.S.C.A. § 3556 provides that the agency report(s) required by statute submitted to the GAO as part of the bid protest proceeding and the GAO decision will be considered part of the agency record subject to review by the COFC. Specifically, the statute states:⁸⁵

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the [COFC]. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by [31 U.S.C.A.] sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

This statute, however, only refers to the agency report(s) and the GAO decision or recommendation, not to all of the documents that were before the GAO in reaching the decision. As discussed below, there are numerous documents outside the agency report that the GAO frequently considers in making its recommendation.

Appendix C of the Rules of the COFC provides some further limited guidance. Appendix C describes the standard practices in protest cases and supplements the RCFC. Appendix C, Section VII addresses the content and filing of the administrative record. Specifically, paragraph 22 provides that “[e]arly production of relevant core documents may expedite final resolution of the case. The core documents relevant to a

protest case may include, as appropriate....” The paragraph then lists twenty-two categories of documents, including subparagraph (u) that includes “the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.”

Subparagraph (u) raises the question whether the COFC should include in the administrative record documents that were included in the record before the GAO or other bid protest fora. This question is significant because the GAO record is not as limited as the administrative record under *Axiom*. As reflected in the GAO’s descriptive guide,⁸⁶ the GAO’s procedures provide for a prompt and inexpensive resolution of bid protests. The Federal Rules of Evidence are not binding on the GAO and the GAO does not have extensive procedural rules governing the record. The GAO generally permits submission of after-the-fact declarations and other materials that were not available to the agency decisionmaker at the time of decision with the weight given to the materials determined by the individual GAO attorney. This is a significantly more relaxed standard than the *Axiom* standard that applies to the COFC.

The GAO record frequently includes declarations from company officials, agency personnel and third parties, as well as reports and other materials that were not considered during the contemporaneous procurement period but were submitted to the GAO as part of the GAO protest proceeding. The GAO does not have a formal process to establish the record and does not make formal evidentiary or procedural determinations regarding the inclusion or exclusion of documents from the record.

The COFC views such protests of agency action following a GAO protest as independent challenges to the procuring agency’s actions, not an “appeal” from the GAO. In these cases at the court, there is a question whether the administrative record will include materials from the GAO proceeding.

Some judges on the COFC have relied on RCFC Appendix C, ¶ 22(u) to support the proposition that any materials submitted to the GAO are part

of the administrative record.⁸⁷ The court’s decision to allow in all materials that were before the GAO makes strong sense when the agency changes its decision pursuant to the GAO recommendation.⁸⁸ In those cases, the COFC is reviewing whether the agency’s decision to follow the GAO decision was rational, which implicitly calls into question the GAO decision and the materials relied on by the GAO to reach that decision.

On the other hand, some judges have concluded that Appendix C must be considered strictly in the more recent context of *Axiom*. Those judges, following a strict interpretation of Appendix C, only permit supplementation from the GAO proceeding with the GAO’s formal decision (if any) and the formal agency report(s).⁸⁹ Other materials from the GAO proceeding will only be included if exclusion would preclude effective judicial review.

Even those judges that permit supplementation based on Appendix C, paragraph 22(u), have been careful to explain that, while such materials are to be included in the record, such materials will not necessarily be relied on.⁹⁰ The COFC is especially suspicious of materials that express post hoc rationalizations of agency actions or materials that otherwise appear unnecessary.⁹¹

For example, in *Holloway & Co., PLLC v. United States*, the protester sought to include in the court record the protester’s filings before the GAO, including its comments to the GAO on the agency report, response to an agency supplemental memorandum of law, and correspondence with the CO in connection with its entitlement to reasonable protest costs.⁹² The Government opposed supplementation of the record, contending that these materials were never before the agency at any time before the contract award decision and did not play any role in the agency’s decisionmaking process.⁹³ The court granted the protester’s motion to supplement finding that the materials were properly included in the administrative record before the court pursuant to RCFC Appendix C, ¶ 22(u).⁹⁴

In *Holloway*, the COFC noted that RCFC Appendix C, ¶ 22(u) might be viewed as inconsistent with the record-review task with which the COFC is charged.⁹⁵ The GAO typically considers

argumentative extra-record evidence and evidentiary submissions from both the agency and the protester that were not before the agency decisionmaker at the time of the decision.⁹⁶

The *Holloway* court noted that a reviewing court must be wary of such situations but that such a skeptical role is not unusual for the COFC.⁹⁷ The GAO record may provide a framework for an agency's actions particularly where the agency has reconsidered its position during the course of a GAO protest.⁹⁸ Thus, the *Holloway* court viewed RCFC Appendix C, ¶ 22(u) as ensuring that the full record of all proceedings related to the procurement be before the COFC for review even if parts might be of limited utility.⁹⁹ The court observed that "it would be strange for this court to be addressing a protest on a more truncated record than that which had been before GAO."¹⁰⁰ This approach has been followed by several judges of the COFC.

In *Vanguard Recovery Assistance v. United States*, decided by the same judge, the COFC ruled that "whatever materials were before GAO shall also be incorporated into the administrative record before the Court."¹⁰¹ This decision was based on 31 U.S.C.A. § 3556 and RCFC Appendix C, ¶ 22(u). However, the *Vanguard* court was careful to note, "That is not to say, however, that all such GAO-related materials will be given credence."¹⁰² Thus, the court stated that it would discount or disregard post hoc declarations and arguments given the context of the Court's review standard.¹⁰³ The *Vanguard* court noted that other judges of the COFC had indicated that "the administrative record should not include 'materials created or obtained subsequent to the agency's decision.'"¹⁰⁴ But, "[t]his difference in approach may have no practical effect because the same result would likely occur with either mode of proceeding."¹⁰⁵

On the other hand, other judges of the court have disagreed with the *Holloway* approach.¹⁰⁶ While acknowledging the reasoning of the court in *Holloway*, in *RhinoCorps Ltd. Co. v. United States*, the COFC concluded from *Axiom* that post-agency decision submissions from the GAO record should not be considered part of the agency decision on review. Thus, the *RhinoCorps* court concluded, "It would be strange if the Court of Federal Claims

would allow supplementation with the type of informal post-hoc statements that the GAO allows. Materials generated in an administrative protest always can be cited in a judicial proceeding as admissions or inconsistent positions, but they do not 'supplement' the administrative record."¹⁰⁷ Similarly, in *Allied Technology Group, Inc. v. United States*, the COFC noted, "Inclusion of documents in the record of a GAO protest is not an automatic ticket that the same documents will be added to the administrative record before the [COFC]."¹⁰⁸

In *Orion Technology, Inc. v. United States*, the court ruled that a declaration offered by the protester that was part of the record before the GAO was not required to be made a part of the administrative record. Among other things, the court noted "there is no evidence that the GAO considered the declaration in denying the plaintiff's protest, as it was not cited in the GAO's decision."¹⁰⁹ The court concluded that consideration of the expert declaration would not assist the court in providing meaningful judicial review.¹¹⁰ The *Orion* court noted further that "if the [COFC] cannot substitute its judgment for that of the agency, it would be nonsensical for it to consider or adopt an opinion from a putative expert attempting to accomplish the same thing, namely, substituting his judgment for that agency."¹¹¹

Given this dispute, parties before the COFC must give substantial consideration to the use of materials from any prior GAO proceeding. It is not certain whether the COFC will include such materials in the administrative record and, if included in the record, whether the materials will be discounted or disregarded.¹¹² Given the *Axiom* limitations, the parties should expect the court to be skeptical of including materials that constitute post hoc analyses or are otherwise not necessary for effective judicial review.

■ Information Too Close At Hand To Ignore

The administrative record must, at a minimum, include any information upon which the agency relied when making its decision. Some judges have found that effective judicial review is limited where the record is incomplete. Those judges have permitted parties to supplement (or rather, complete) the record with omitted materials.¹¹³

Additionally, “the administrative record may be supplemented when the agency allegedly failed to consider information relevant to its final decision.”¹¹⁴ Thus, another method of determining if the administrative record is incomplete is through “application of the ‘too close at hand to ignore’ doctrine, where a court may well have to look outside the agency record to determine tentatively what, if anything, the agency had in hand but did not consider.”¹¹⁵ Such information is properly added to the administrative record when it was in the possession of the agency, and the agency had a legal obligation to consider such information; under these circumstances, the information is undoubtedly too close at hand to ignore.¹¹⁶

As the COFC explained in *Allied Technology Group*, it may be necessary to supplement the administrative record “when the record compiled by the agency does not include all materials referenced by the contracting officer,”¹¹⁷ or “when the agency may have failed to consider certain documents in making its decision.”¹¹⁸ In this case, the protester sought to supplement the administrative record with internet materials pertaining to the intervenor’s past security breaches. The court granted the request to supplement because a member of the technical evaluation panel had reviewed those materials.¹¹⁹ The protester also sought to include additional internet materials and agency memoranda. The COFC granted the request to supplement because those materials “were available to and probably should have been reviewed by the agency in making its award decision.”¹²⁰

Similarly, the COFC explained in *Vanguard Recovery* that the administrative record submitted by the agency does not always represent a “complete record of documentary materials generated during the procurement and maintained contemporaneously with the occurrence of the salient events or actions associated with the procurement.”¹²¹ Therefore, “[w]hen the record submitted by the agency is not complete, a motion to correct or supplement the record is appropriate.”¹²²

“It is well established that ‘the administrative record may be supplemented when the agency allegedly failed to consider information relevant

to its final decision.’”¹²³ This can even be as basic as information that was included in the solicitation, but that is omitted from the administrative record tendered by the agency to the COFC.¹²⁴

The “too close at hand to ignore” doctrine is most often invoked where the agency fails to consider information relating to past performance or responsibility. In such instances, where the agency was required to review past performance but failed to use materials in its possession to adequately do so, protesters have been allowed to supplement the administrative record. The evidence of a contractor’s past performance that was allegedly improperly ignored by the agency must be included in the record under the *Axiom* standard because it is necessary for the court to effectively review the reasonableness of the agency’s actions.¹²⁵

For example, in *Seattle Security Services v. United States*, the COFC held that the CO acted unreasonably in failing to consider the protester’s past performance on a prior contract for which she had also been the CO.¹²⁶ The information “was simply too relevant and close at hand to ignore.”¹²⁷ Similarly, in *MG Altus Apache Co. v. United States*, the protester claimed that “the [agency’s] responsibility determination was unreasonable because the contracting officer did not consider all relevant information available to her.” The court concluded that the administrative record should be supplemented because the agency allegedly failed to consider relevant information that was close at hand.¹²⁸

In *MG Altus Apache*, the court noted further that supplementation of the administrative record with past performance information must be considered in the context of the solicitation requirements.¹²⁹ For example, in *Northeast Military Sales, Inc. v. United States*, the court granted supplementation with past performance information about the awardee contained in pricing surveys, an internal agency quality control check list, and an internal Inspector General’s report, finding that the solicitation stated that in evaluating past performance information, the agency would consider “all in-house information” and that past performance would be assessed based on “consideration of all relevant facts and

circumstances.”¹³⁰ Thus, “where ‘the Solicitation indicates that the agency will consider all materials of a particular type in its evaluation of offers, the Administrative Record is not complete if it omitted any such materials.’”¹³¹

In addition, in *MG Altus Apache*, the court granted the protester’s request to supplement the administrative record with the protester’s response to various agency correspondence during the incumbent contract that was relevant to the agency’s responsibility determination that included review of past performance issues. The *MG Altus Apache* court followed *Vanguard*, finding that “a court may well have to look outside the agency record to determine tentatively what, if anything, the agency had in hand but did not consider.”¹³²

■ Bad Faith Or Bias

The COFC may allow protesters to introduce evidence that can be used to evaluate claims of bad faith or bias, subject to certain restrictions.¹³³ Assuming the supplementation is allowed, a party may also be permitted limited discovery, which may include deposing Government officials.¹³⁴

Government officials are presumed to act in good faith and the courts have imposed a heavy burden to establish bad faith or bias in a bid protest.¹³⁵ On the other hand, “while a protester must establish clear and convincing evidence of bad faith or bias to prevail on the merits, a lesser showing suffices—that the allegations ‘appear to be sufficiently well grounded’—to warrant supplementation of the administrative record.”¹³⁶

Thus, “[t]he burden of proof required for supplementing the administrative record is lower than that required for demonstrating bad faith or bias on the merits.”¹³⁷ “The test for supplementation is whether there are sufficient well-grounded allegations of bias to support an inquiry and supplementation; the [protester] need not make a showing of clear and convincing evidence of bias on the merits.”¹³⁸

The COFC has adopted a more relaxed test to determine whether a protester may supplement the record to establish bad faith or bias. For purposes of supplementing the record the test

is whether there are “sufficient well-grounded allegations of bias to support” the protester’s assertion, and the protester “need not make a showing of clear and convincing evidence of bias on the merits.”¹³⁹ In other words, the standard is different and less stringent because a protester need not meet the higher standard required to demonstrate bad faith on the merits to allow supplementing the record.¹⁴⁰

Broadly speaking, to supplement the record based on an assertion of bad faith or bias, a protester must demonstrate the existence of some reason or evidence that supports its position. The protester “must: (1) make a threshold showing of either a motivation for the government employee to have acted in bad faith or of conduct that is hard to explain absent bad faith; and (2) persuade the court that discovery could lead to evidence that would provide the level of proof sufficient to overcome the presumption of regularity and good faith.”¹⁴¹

For example, in *Pitney Bowes Government Solutions, Inc. v. United States*, the protester was allowed limited discovery to develop its allegations of bad faith.¹⁴² The protester had proffered several affidavits to the court that tended to show some manner of collaboration between an agency employee and the ultimate recipient of the contract at issue.¹⁴³ The court found that such materials were sufficient to establish the type of threshold showing of bad faith necessary to allow the record to be supplemented, despite the Government’s attempt to offer alternate reasons for the behavior.¹⁴⁴ *Pitney Bowes* demonstrates that the requisite demonstration of bad faith to allow supplementation is a lower threshold than the requirement for the merits decision.

In *Tech Systems, Inc. v. United States*, the protester sought to supplement the administrative record with six declarations of its officers and employees to show bias on the part of the agency in its award to the protester’s competitor.¹⁴⁵ The protester, who was providing the services under an interim or bridge contract, alleged that the agency’s facility manager was biased against it and favored the awardee. The protester sought to add a declaration that included statements and actions of the facility manager in support

of its allegations of bad faith and bias.¹⁴⁶ The COFC noted that, in these types of cases, the initial administrative record is often insufficient because the most critical information is “relevant information that by its very nature would not be found in an agency record—such as evidence of bad faith, information relied upon but omitted from the paper record, or the content of conversations.”¹⁴⁷ The Government had asserted that the declarations should not be admitted because the agency’s facility manager played no role in the source selection decision. The COFC rejected the Government’s argument, noting that the Government’s assertions were matters “best left to the merits determination” and this case presented “the unusual circumstance in which an agency official is heard to make statements expressing a desire that one competitor lose a contract, and indicating that he had some information about or influence concerning the evaluation process.”¹⁴⁸ The court granted the protester’s motion to supplement.

■ Expert Submissions Regarding Technical Or Complex Matters

The COFC has permitted, in some cases, expert statements relevant to technical or complex issues.¹⁴⁹ The COFC’s willingness to accept expert testimony is based on the conclusion that “when [such testimony] is necessary for a full and complete understanding of the issues,” effective judicial review cannot be accomplished in the absence of such testimony.¹⁵⁰ The COFC has recognized that effective judicial review can be impeded where technical aspects of the procurement process remain unexplained, which prevents the parties “from engaging in informed advocacy” and the COFC “from developing a full judicial record and accurate context for its decision.”¹⁵¹

The COFC has permitted supplementation of the record in a bid protest with expert testimony when necessary for the court to understand technical or complex information involved in the challenged procurement.¹⁵² However, the judges of the COFC are quite capable of understanding complicated materials; as such, motions to supplement the record with materials explaining an ostensibly “highly technical” matter are unlikely to be granted when such submissions comprise

mere opinions concerning technical superiority or merely offer expert opinion directed at the propriety of an agency’s decision.¹⁵³

The court has looked to Federal Rule of Evidence 702 for guidance on the use of expert testimony. Federal Rule of Evidence 702 provides that a witness who qualifies as an expert by knowledge, skill, experience, training, or education may testify and proffer an opinion if:¹⁵⁴

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Expert testimony has been permitted in bid protests to address technical issues regarding the nature of electronic formats and zip files, an agency’s email and network architecture, industry practice surrounding the use of compressed or zip files, and the difference between audit-supporting federal financial management system services and mission and administrative support information technology services.¹⁵⁵

However, the COFC has recognized that there is a fine line between allowing expert testimony for effective judicial review and excluding testimony to avoid converting the court’s review into a *de novo* review. For example, in *Orion Technology, Inc. v. United States*, the COFC observed that its review of the agency’s decision to exclude the protester from the competition was limited to determining whether the agency’s decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.¹⁵⁶ In *Orion*, the protester sought to include a declaration from its consulting expert that was part of the record before the GAO in which the expert opined on the propriety of the agency’s rejection of the protester’s proposal.¹⁵⁷ The COFC noted the risk in considering an expert’s testimony, stating, “Consideration of an expert opinion directed solely at the propriety of the Army’s decision, like the expert opinion here, risks improperly converting

the court's more deferential undertaking into a de novo review."¹⁵⁸

■ Lay Witness Opinion Testimony

When the proffered supplemental materials include declarations or other statements from lay witnesses, admissibility may be further limited by Rule 701 of the Federal Rules of Evidence. Rule 701 draws a distinction between fact and opinion with the premise that, generally, lay witnesses should testify to facts.¹⁵⁹ A lay witness may generally testify about facts within his or her range of generalized knowledge, experience, and perception. Rule 701 permits lay opinion testimony based on relevant historical or narrative facts that the witness has perceived that will help the fact finder to determine the matter at issue. The court has some latitude in permitting a witness to state his conclusions based upon common knowledge or experience.¹⁶⁰

When a party seeks to include in the record declarations or other statements from lay witnesses, there may be an objection that the statements are an improper attempt to submit an expert or other opinion improperly through a lay witness.

The Federal Rules of Evidence Advisory Committee notes that lay testimony "results from a process of reasoning familiar in everyday life," and expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." Implicit in Rule 701 is the distinction between fact and opinion. For example, the COFC permitted supplementing the record with declarations of fact witnesses in *Global Computer Enterprises, Inc. v. United States*, noting that all of the proffered opinions were "based upon circumstances they have observed or encountered within the industry and reflect a general knowledge of their work."¹⁶¹

Generally, Federal Rule of Evidence 701 permits lay witnesses to testify to facts.¹⁶² In other words, to be admissible, lay opinion testimony must be based on the witness's personal perceptions. The COFC permits lay opinion testimony when it is helpful to understand a fact in issue, as long as the opinion is based on the declarant's perceptions rather than technical expertise.¹⁶³ Application of this rule provides that a lay witness may testify

about facts within his or her range of generalized knowledge, experience, and perception.¹⁶⁴

■ The Esch Factors May Still Offer Viable Considerations

The Federal Circuit in *Axiom* heavily criticized the common practice of relying on the *Esch* factors to allow a party to supplement the administrative record in a bid protest.¹⁶⁵ However, despite the express disapproval of *Esch* by the Federal Circuit, *Esch* has continued to be cited by some judges on the COFC.¹⁶⁶ Despite the court's understanding that certain of the *Esch* exceptions are still viable, no court has subsequently relied solely on *Esch* to allow a party to supplement the record.¹⁶⁷ As demonstrated above, *Esch* outlined eight situations where supplementing the administrative record may be appropriate: (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors that are relevant to its final decision; (3) when an agency considered evidence that it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.¹⁶⁸

While a protester is no longer permitted to simply cite *Esch* and provide no further analysis, the *Esch* factors, for the most part, present areas where supplementing the record may be necessary for effective judicial review. For example, the following categories are within the *Esch* factors and may also be appropriate under *Axiom*: (a) an agency needs to submit a complete record to the court that accurately reflects its reasoning process; (b) an agency needs to consider all the factors that it is legally obligated to consider, and materials that were "too close at hand to ignore" may be included in the record; (c) the agency must include all information that it considered in making its decision; (d) the record may be supplemented to allow the court to understand technical or complex issues; and (e) evidence

relating to injunctive relief may be considered.¹⁶⁹ Thus, while *Esch* is not definitive, the *Esch* factors still generally represent legitimate considerations in assessing whether supplementing the administrative record is necessary for effective judicial review.

■ Information Necessary To Establish Injunctive Relief

The COFC also recognizes that materials relating to the type of relief sought, i.e., injunctive relief, can be submitted to the court.¹⁷⁰ However, most COFC judges who have considered the issue have found that such materials do not supplement the administrative record, but rather, supplement the court's record.¹⁷¹ Thus, materials relevant to injunctive relief may be submitted to the court without meeting the *Axiom* standards.

To establish a right to injunctive relief, the court must consider whether the protester has shown that (1) it has, or has a reasonable likelihood, of succeeding on the merits, (2) it will suffer irreparable harm if the court withholds injunctive relief, (3) the balance of hardships to the respective parties favors the grant of injunctive relief, and (4) it is in the public interest to grant injunctive relief.¹⁷² A protester typically requires outside evidence to establish the last three elements, such as declarations from personnel regarding harm. Such information relating to the three elements will typically be considered by the court in some fashion.

Some judges of the COFC have concluded that evidentiary submissions regarding the final three injunctive relief factors should be included in the court record but not the administrative record.¹⁷³

In bid protests, the “court record” generally refers to evidence outside the administrative record that is considered by the court in deciding issues *other than the merits of the protest*, such as jurisdiction and harm to the plaintiff, public interest, and harm to the Government.¹⁷⁴ Thus, the court record consists of separate “evidentiary submissions that go to the prospective relief sought in this court,” such as harm.¹⁷⁵

The reason for the distinction between the administrative record and the court record is that evidence regarding the injunctive relief factors is not always a part of the agency record underlying the procurement.¹⁷⁶ Thus, the COFC has found that “[i]t is the responsibility of this [c]ourt, not the administrative agency, to provide for factual proceedings directed toward, and to find facts relevant to, irreparability of harms or prejudice to any party or to the public interest through grant or denial of injunctive relief.”¹⁷⁷

Conclusion

The *Axiom* decision has significantly limited the scope of the administrative record in bid protests before the COFC. Parties can no longer assume, if they ever truly could, that all materials presented will be available for use in motions for judgment on the administrative record. While certain categories have developed in which the COFC is more likely to grant motions to supplement, those categories are narrow, limited, and are decided on a case-by-case basis. Before seeking to supplement the record, a party must develop arguments to demonstrate that the materials are needed for effective judicial review.

GUIDELINES

These *Guidelines* are designed to help you determine the impact of *Axiom* on bid protests before the COFC. They are not, however, a substitute for professional representation in any specific situations.

1. Recognize that the Federal Circuit has adopted a more restrictive approach to the administrative record. If you are aware during the procurement of critical information that you

may need in the event of a subsequent protest, make sure the information is provided to the CO during the procurement.

2. Be aware that some judges permit including in the administrative record the entire record before the GAO, while other judges limit the administrative record to the GAO decision and formal agency report. As a result, be prepared to explain why materials from the GAO record

are necessary for effective judicial review before the COFC.

3. Keep in mind that the court may need to look outside the administrative record to determine if the agency had information in hand but failed to consider it. The administrative record must, at a minimum, include any information the agency relied on when making its decision and should include the information that the agency failed to consider but should have.

4. Remember that information about bad faith and bias should be added to the administrative record where the protester shows well-grounded allegations of bias supporting the protester's assertions. This showing need not rise to the level of clear and convincing evidence, as required on the merits.

5. Bear in mind that in certain limited situations, expert testimony is essential for the resolution

of the protest because effective judicial review is impeded where highly complex or technical aspects of a procurement go unexplained. The COFC often relies on Federal Rule of Evidence 702 to admit expert testimony.

6. Be aware that the COFC may allow lay witnesses to testify under Federal Rule of Evidence 701 where those opinions have a rational connection to the facts within the witness's range of general knowledge, experience, and perception and are not based on scientific, technical, or other specialized knowledge.

7. Recognize that the COFC generally maintains a distinction between the court record and the administrative record. The "court record" generally refers to evidence outside the administrative record that is considered by the court in deciding issues *other than the merits of the protest*, such as jurisdiction and harm to the plaintiff, public interest, and harm to the Government.

★ REFERENCES ★

- 1/ *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), 51 GC ¶ 202.
- 2/ 564 F.3d at 1380–81.
- 3/ 564 F.3d at 1380–81.
- 4/ See RCFC App. C, § VII.
- 5/ See *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (1997), 39 GC ¶ 106 (Cubic II) (noting that "the 'administrative record' is something of a fiction," and therefore, "[i]t follows that discovery as well as the breadth of the court's review has to be tailored in each case").
- 6/ *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989).
- 7/ See, e.g., *Wackenhut Servs., Inc. v. United States*, 85 Fed. Cl. 273, 305–06 (2008); *E-Mgmt. Consultants, Inc. v. United States*, 84 Fed. Cl. 1, 11 (2008); *Savantage Fin. Servs., Inc. v. United States*, 81 Fed. Cl. 300, 310 (2008), 50 GC ¶ 187, *aff'd*, 595 F.3d 1282 (Fed. Cir. 2010), 52 GC ¶ 130.
- 8/ *Esch*, 876 F.2d at 991.
- 9/ See *Joint Venture of Comint Sys. Corp. v. United States*, 100 Fed. Cl. 159, 165–66 (2011) ("[S]upplementation of the administrative record ultimately 'must be extremely limited,' lest the admission of evidence not considered by the agency below and its consideration by the court convert the 'arbitrary and capricious' standard into effectively de novo review."). The court now usually denies motions to include materials that represent solely post hoc analysis of the agency's decision. See, e.g., *L-3 Commc'ns EOTech Inc. v. United States*, 87 Fed. Cl. 656, 672 (2009).
- 10/ See, e.g., *Allied Tech. Group, Inc. v. United States*, 92 Fed. Cl. 226, 230 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220.
- 11/ See RCFC App. C, § VII; see also *Holloway & Co., PLLC v. United States*, 87 Fed. Cl. 381, 391–92 (2009), 51 GC ¶ 203 (announcing RCFC App. C principles); see, e.g., *Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 102 (2011) (citing *Holloway* with approval); *Academy Facilities Mgmt. v. United States*, 87 Fed. Cl. 441, 454–55 (2009) (same); *DataPath, Inc. v. United States*, 87 Fed. Cl. 162, 166 n.3 (2009) (same).
- 12/ See, e.g., *MG Altus Apache Co. v. United States*, 102 Fed. Cl. 744, 751 (2012)
- (allowing the protester to submit a letter written to, and received by, the CO); *Vanguard Recovery*, 99 Fed. Cl. at 100 n.19 (noting that the record may require further development if the court determines the agency had information in hand but failed to consider it).
- 13/ See, e.g., *East West, Inc. v. United States*, 100 Fed. Cl. 53 (2011) (allowing plaintiff to submit declaration for the purposes of determining prejudice); *L-3 Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45 (2011); *Pitney Bowes Gov't Solutions, Inc. v. United States*, 93 Fed. Cl. 327, 333 (2010), 52 GC ¶ 256.
- 14/ See, e.g., *East West*, 100 Fed. Cl. at 57–58; *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 366–67 (2009).
- 15/ See *Totolo/King v. United States*, 87 Fed. Cl. 680, 692–93 (2009) (holding that several of the Esch rules may still be applied); *Acrow Corp. of Am. v. United States*, 96 Fed. Cl. 270, 275 (2010), 53 GC ¶ 57 ("As certain of the Esch exceptions have guided the conduct of bid protests in the Court of Federal Claims since the passage of the Administrative Dispute Resolution Act of 1996...this court understands that the following exceptions are still viable and that the administrative record may be supplemented").

- 16/ See *Global Computer Enters., Inc. v. United States*, 88 Fed. Cl. 52, 62–63 (2009) (granting plaintiff's motion to supplement the record with information pertaining to the specific market at issue because without it the court would be evaluating information "in a vacuum").
- 17/ 28 U.S.C.A. § 1491(b). See generally Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008); McCullough, Pollack & Alerding, "Bid Protest Practice in the Court of Federal Claims," Briefing Papers No. 00-10 (Sept. 2000).
- 18/ RCFC 52.1.
- 19/ See *Bannum, Inc. v. United States*, 404 F.3d 1346, 1355 (Fed. Cir. 2005), 47 GC ¶ 266.
- 20/ 5 U.S.C.A. § 706; 28 U.S.C.A. § 1491(b)(4); see also *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009), 51 GC ¶ 202; *Ala. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1373 (Fed. Cir. 2009), 52 GC ¶ 25.
- 21/ 5 U.S.C.A. § 706(2)(A).
- 22/ *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001), 43 GC ¶ 29.
- 23/ 238 F.3d at 1333 (internal citation and quotation marks omitted).
- 24/ 238 F.3d at 1333 (internal citations and quotation marks omitted).
- 25/ *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).
- 26/ See, e.g., *Pikes Peak Family Housing, LLC v. United States*, 40 Fed. Cl. 673, 677 (1998), 40 GC ¶ 380 (citing *Esch* and permitting discovery); *Aero Corp., S.A. v. United States*, 38 Fed. Cl. 408, 411 (1997), 39 GC ¶ 474 (applying the *Esch* standard and permitting supplementation).
- 27/ *Esch*, 876 F.2d at 991.
- 28/ See, e.g., *Stapp Towing, Inc. v. United States*, 34 Fed. Cl. 300, 307–08 (1995) (finding supplementation was not warranted after evaluating under the *Esch* factors); *IMCO, Inc. v. United States*, 33 Fed. Cl. 312, 317–18 (1995) (finding supplementation of the record was not warranted after reviewing under the *Esch* factors); *Bradley v. United States*, 26 Cl. Ct. 699, 701 (1992) (permitting a supplementary evidentiary hearing); *Simons v. United States*, 25 Cl. Ct. 685, 694 n.17 (1992) (determining that supplementation was not warranted after evaluating under the *Esch* factors).
- 29/ *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 33 (2006), 48 GC ¶ 280; *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997) (*Cubic I*).
- 30/ *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (1997), 39 GC ¶ 106, (*Cubic II*); see also *Advanced Sys. Dev.*, 72 Fed. Cl. at 33 (citing *Cubic II*, but noting while this is true in the contract award context, it is not true in the narrow context of statutory compliance with the automatic CICA stay provisions because the agency either complied with those requirements or it did not).
- 31/ *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 288, 293 (2000) (citing *Mike Hooks, Inc. v. United States*, 39 Fed. Cl. 147, 156 (1997)); see also *Eracent, Inc. v. United States*, 79 Fed. Cl. 427, 428 (2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 708 (2006).
- 32/ *Pikes Peak Family Housing, LLC v. United States*, 40 Fed. Cl. 673, 677 (1998), 40 GC ¶ 380.
- 33/ 40 Fed. Cl. at 679.
- 34/ *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 342 (1997) (quoting *Esch*) (*Cubic I*); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. at 349 (*Cubic II*, following the standard of analysis articulated in *Cubic I*).
- 35/ 37 Fed. Cl. at 350.
- 36/ *GraphicData, LLC v. United States*, 37 Fed. Cl. 771, 779 (1997), 39 GC ¶ 442.
- 37/ 37 Fed. Cl. at 773.
- 38/ 37 Fed. Cl. at 780.
- 39/ 37 Fed. Cl. at 779.
- 40/ 37 Fed. Cl. at 780 (citing *Cubic II*, 37 Fed. Cl. at 349).
- 41/ *Myers Investigative & Sec. Servs., Inc. v. United States*, 47 Fed. Cl. 288, 295–97 (2000).
- 42/ 47 Fed. Cl. at 297.
- 43/ *Aero Corp., S.A. v. United States*, 38 Fed. Cl. 408 (1997), 39 GC ¶ 474.
- 44/ 38 Fed. Cl. at 410.
- 45/ 38 Fed. Cl. at 412 (citing *Cubic I*, 37 Fed. Cl. at 344–45; *United States v. Morgan*, 313 U.S. 409, 422 (1941)).
- 46/ 38 Fed. Cl. at 412–14.
- 47/ *Benchmark Knife Co. v. United States*, 79 Fed. Cl. 731, 736–37 (2007).
- 48/ 79 Fed. Cl. at 736–37.
- 49/ 79 Fed. Cl. at 736 (citing *Cubic I*, 37 Fed. Cl. at 342).
- 50/ *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009), 51 GC ¶ 202, rev'g 80 Fed. Cl. 530 (2008).
- 51/ 564 F.3d at 1380–81.
- 52/ 564 F.3d at 1379 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).
- 53/ 564 F.3d at 1379–80 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44, (1985)) (emphasis in original).
- 54/ 564 F.3d at 1380 (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).
- 55/ 564 F.3d at 1380 (quoting *Murakami*, 46 Fed. Cl. at 735).
- 56/ 564 F.3d at 1377–78.
- 57/ See *Univ. Research Co., LLC v. United States*, 65 Fed. Cl. 500, 501 (2005) (citing *Arch Chems., Inc. v. United States*, 64 Fed. Cl. 380, 383 n.4 (2005), 47 GC ¶ 189; *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 339, 343 (1997) (*Cubic I*)). See generally Schaengold, Guiffre & Gill, "Choice of Forum for Bid Protests," Briefing Papers No. 08-11 (Oct. 2008).
- 58/ *Axiom*, 564 F.3d at 1378.
- 59/ 564 F.3d at 1379.
- 60/ 564 F.3d at 1379.
- 61/ 564 F.3d at 1379.

- 62/ 564 F.3d at 1379.
- 63/ 564 F.3d at 1380.
- 64/ 564 F.3d at 1380 (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997) (affirming the district court's decision to strike affidavits not in the agency record based on the appellant's failure to show that "the agency failed to examine all relevant factors or to adequately explain its grounds for decision, or that the agency acted in bad faith or engaged in improper behavior"); *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457–58 (D.C. Cir. 1994) (explaining that additional administrative discovery is permissible only if necessary "for effective judicial review" or if the existing "record cannot be trusted"))).
- 65/ 564 F.3d at 1380 (quoting *ARINC Eng'g Servs. LLC v. United States*, 77 Fed. Cl. 196, 201 n.5 (2007)).
- 66/ 564 F.3d at 1380–81 (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 n.4 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)).
- 67/ 564 F.3d at 1381 (citing *Camp v. Pitts*, 411 U.S. 138 (1973); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985)).
- 68/ *IMS, P.C. v. Alvarez*, 129 F.3d 618 (D.C. Cir. 1997).
- 69/ 129 F.3d at 624; see also *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012) (noting that the D.C. Circuit has narrowed the eight Esch exceptions to four); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 116 (D.D.C. 2009) (D.C. Circuit has appeared to narrow the Esch exceptions to four); *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39 (D.D.C. 2009) (noting that the D.C. Circuit has more recently only identified four exceptions, not the eight noted in Esch and otherwise reading Esch narrowly).
- 70/ *Axiom*, 564 F.3d at 1380 n.3 (quoting *Peterson Farms I v. Espy*, 15 F.3d 1160 (Table), 1994 WL 26331, at *3 (D.C. Cir. Jan. 25, 1994)).
- 71/ 564 F.3d at 1381.
- 72/ 564 F.3d at 1381 (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)).
- 73/ 564 F.3d at 1381.
- 74/ *Joint Venture of ComintSys. Corp. v. United States*, 100 Fed. Cl. 159, 165–66 (2011) (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005)) ("[S]upplementation of the administrative record ultimately 'must be extremely limited,' lest the admission of evidence not considered by the agency below and its consideration by the court convert the 'arbitrary and capricious' standard into effectively de novo review.").
- 75/ 100 Fed. Cl. at 165 (quoting *Tech Sys., Inc. v. United States*, 50 Fed. Cl. 216, 222 (2001)).
- 76/ *Blue & Gold Fleet, LP v. United States*, 70 Fed. Cl. 487, 493, *aff'd*, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320 ("The court must not substitute its judgment for that of the agency, but, instead, should defer to the agency's analysis so long as it has substantial basis in fact.") (citing *CCL Serv. Corp. v. United States*, 48 Fed. Cl. 113, 120 (2000)).
- 77/ *Contracting Consulting Eng'g LLC v. United States*, 104 Fed. Cl. 36, 40 (2012).
- 78/ 104 Fed. Cl. at 40.
- 79/ *MG Altus Apache Co. v. United States*, 102 Fed. Cl. 744, 750 (2012) (quoting *Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 92 (2011)).
- 80/ 102 Fed. Cl. at 752.
- 81/ 102 Fed. Cl. at 752.
- 82/ See, e.g., *GEO Group v. United States*, 100 Fed. Cl. 223 (2011); *Univ. Res. Co., LLC v. United States*, 65 Fed. Cl. 500 (2005).
- 83/ See, e.g., *Centech Group, Inc. v. United States*, 79 Fed. Cl. 562 (2007), 50 GC ¶ 8, *aff'd*, 554 F.3d 1029 (Fed. Cir. 2009), 51 GC ¶ 93.
- 84/ See, e.g., *Turner Constr. Co. v. United States*, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245.
- 85/ 31 U.S.C.A. § 3556.
- 86/ GAO, *Bid Protests at GAO: A Descriptive Guide* (GAO-09-471SP, 9th ed. 2009), available at <http://www.gao.gov/assets/210/203631.pdf>; see 4 C.F.R. pt. 21.
- 87/ *Holloway & Co., PLLC v. United States*, 87 Fed. Cl. 381, 391–92 (2009), 51 GC ¶ 203 (relying on RCFC Appendix C, ¶ 22(u) to allow materials that had been submitted to the GAO); *DataPath, Inc. v. United States*, 87 Fed. Cl. 162, 166 n.3 (2009) ("The Axiom panel also may have misunderstood that the trial court did not 'supplement' the Administrative Record, because RCFC Appendix C, ¶ 22(u) provides that declarations filed in a prior protest before the [Government] Accountability Office are part of the Administrative Record."); *Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 102–03 (2011) ("RCFC Appendix C, ¶ 22(u) 'ensur[es] that the full record of all proceedings related to the procurement is before the court for review'" which in a follow-on bid protest implicitly includes materials submitted to the GAO) (alterations in original) (quoting *Holloway*, 87 Fed. Cl. at 392).
- 88/ See *Vanguard Recovery*, 99 Fed. Cl. at 102 n.21.
- 89/ *RhinoCorps Ltd. Co. v. United States*, 87 Fed. Cl. 261 at 276 n.18 (2009), 51 GC ¶ 233; *Allied Tech. Group, Inc. v. United States*, 92 Fed. Cl. 226, 230 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220; *Orion Tech., Inc. v. United States*, 101 Fed. Cl. 492, 496 (2011).
- 90/ *Vanguard Recovery*, 99 Fed. Cl. at 103 ("Post hoc declarations and arguments will be discounted or disregarded."); *Holloway*, 87 Fed. Cl. at 392.
- 91/ See, e.g., *Allied Tech. Group*, 92 Fed. Cl. at 230–31 ("Moreover, Appendix C, ¶ 22(u) employs the words 'may' and 'as appropriate,' leaving it to the Court's reasoned discretion to determine when materials should be added to the administrative record. Inclusion of documents in the record of a GAO protest is not an automatic ticket that the same documents will be added to the administrative record before the Court.").
- 92/ *Holloway*, 87 Fed. Cl. at 391.
- 93/ 87 Fed. Cl. at 391.
- 94/ 87 Fed. Cl. at 392.
- 95/ 87 Fed. Cl. at 392.
- 96/ 87 Fed. Cl. at 392.
- 97/ 87 Fed. Cl. at 392.
- 98/ 87 Fed. Cl. at 392.

- 99/ 87 Fed. Cl. at 392.
- 100/ 87 Fed. Cl. at 392.
- 101/ Vanguard Recovery Assistance v. United States, 99 Fed. Cl. 81, 102 (2011).
- 102/ 99 Fed. Cl. at 102.
- 103/ 99 Fed. Cl. at 102 (citing PGBA, LLC v. United States, 60 Fed. Cl. 196, 204 (2004)).
- 104/ 99 Fed. Cl. at 102 n.21 (citing Allied Tech. Group, Inc. v. United States, 92 Fed. Cl. 226, 229–30 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220).
- 105/ 99 Fed. Cl. at 102 n.21; see also Banum, Inc. v. United States, 89 Fed. Cl. 184, 188–89 (“Materials considered by the GAO should, therefore, also be part of the record reviewed by this Court.”); Acrow Corp. of Am. v. United States, 96 Fed. Cl. 270, 279 (2010), 53 GC ¶ 57 (excluding CO’s statement of facts from the court administrative record even though included in the GAO record, following RhinoCorps Ltd. Co. v. United States, 87 Fed. Cl. 261 (2009), 51 GC ¶ 233).
- 106/ RhinoCorps, 87 Fed. Cl. at 276 n.18.
- 107/ 87 Fed. Cl. at 276 n.18 (questioning the presence of emails included in the administrative record that did not appear relevant to the sources sought synopsis to determine whether a follow-on contract was needed but not appearing to exclude them.).
- 108/ Allied Tech. Group, 92 Fed. Cl. at 230–31.
- 109/ Orion Tech., Inc. v. United States, 101 Fed. Cl. 492, 496 (2011).
- 110/ 101 Fed. Cl. at 496.
- 111/ 101 Fed. Cl. at 497 (citing Citizens To Preserve Overton Park, Inc. v. Volte, 401 U.S. 402, 416 (1971)).
- 112/ See, e.g., Vanguard Recovery Assistance v. United States, 99 Fed. Cl. 81, 103 (2011); Acrow Corp. of Am. v. United States, 96 Fed. Cl. 270, 281 (2010), 53 GC ¶ 57.
- 113/ See, e.g., Vanguard Recovery, 99 Fed. Cl. at 92 (“When the record submitted by the agency is not complete, a motion to correct or supplement the record is appropriate.”); Joint Venture of Comint Sys. Corp. v. United States, 100 Fed. Cl. 159, 167 (2011) (collecting cases); Linc Gov’t Servs., LLC v. United States, 95 Fed. Cl. 155, 158 (2010) (“A procuring agency’s initial submission to the court may omit information that is properly part of the administrative record because it served as a basis for the agency’s award decision. In such instances, subsequent admission of the omitted information is appropriate not to supplement the record, but to complete it.”) (internal citations omitted); NEQ, LLC v. United States, 86 Fed. Cl. 592, 593 (2009) (explaining that the court viewed the addition of two electronic messages that were before the agency when it rendered its award decision “as not supplementing the administrative record...but merely as ensuring the completeness of the record”).
- 114/ Diversified Maint. Sys., Inc. v. United States, 93 Fed. Cl. 794, 801 (2010) (collecting cases); Allied Tech. Group, Inc. v. United States, 92 Fed. Cl. 226, 231 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220; Totolo/King v. United States, 87 Fed. Cl. 680, 692 (2009); see also Seattle Sec. Servs. v. United States, 45 Fed. Cl. 560, 568–69 (1999), 42 GC ¶ 51 (CO acted unreasonably in failing to consider the plaintiff’s past performance on a prior contract for which she had also been the CO; such information was simply “too relevant and too close at hand to be ignored”).
- 115/ Vanguard Recovery, 99 Fed. Cl. at 100 n.19.
- 116/ See Vanguard Recovery, 99 Fed. Cl. at 95–96; Linc Gov’t Servs., LLC v. United States, 96 Fed. Cl. 672, 695, 698–700 (2010) (finding, among other things, that plaintiff had pled a plausible claim in part because the source selection authority excluded from consideration allegedly negative past performance by other offerors).
- 117/ Allied Tech. Group, 92 Fed. Cl. at 231 (citing NEQ, 86 Fed. Cl. at 593).
- 118/ 92 Fed. Cl. at 231 (citing Savantage Fin. Servs., Inc. v. United States, 81 Fed. Cl. 300, 311 (2008)).
- 119/ 92 Fed. Cl. at 231.
- 120/ 92 Fed. Cl. at 231.
- 121/ Vanguard Recovery, 99 Fed. Cl. at 92.
- 122/ 99 Fed. Cl. at 92.
- 123/ MG Altus Apache Co. v. United States, 102 Fed. Cl. 744, 752 (2012) (quoting Diversified Maint. Sys., Inc. v. United States, 93 Fed. Cl. 794, 801 (2010)).
- 124/ Ne. Military Sales, Inc. v. United States, 100 Fed. Cl. 96, 97 (2011) (“Where, as here, the Solicitation indicates that the agency will consider all materials of a particular type in its evaluation of offers, the Administrative Record is not complete if it omitted any such materials.”).
- 125/ See, e.g., Vanguard Recovery, 99 Fed. Cl. at 95–96; Linc Gov’t Servs., LLC v. United States, 96 Fed. Cl. 672, 695, 698–700 (2010).
- 126/ Seattle Sec. Servs. v. United States, 45 Fed. Cl. 560, 568–69 (1999), 42 GC ¶ 51.
- 127/ 45 Fed. Cl. at 568–69.
- 128/ MG Altus Apache, 102 Fed. Cl. at 752; see also Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy, 680 F.3d 819, 824 (D.C. Cir. 2012) (Government argument that the agency decisionmaker “may, like an ostrich, put his head in the sand...so long as he is unaware of any information that questions [the existing plan]” is “farfetched, almost absurd”).
- 129/ MG Altus Apache, 102 Fed. Cl. at 751.
- 130/ Ne. Military Sales, 100 Fed. Cl. at 97, quoted in MG Altus Apache, 102 Fed. Cl. at 751.
- 131/ MG Altus Apache, 102 Fed. Cl. at 751 (quoting Ne. Military Sales, 100 Fed. Cl. at 97).
- 132/ 102 Fed. Cl. at 750 (quoting Vanguard Recovery, 99 Fed. Cl. at 100 n.19).
- 133/ See, e.g., L-3 Commc’ns Integrated Sys., L.P. v. United States, 91 Fed. Cl. 347, 355 (2010), amended on recons., in part, 98 Fed. Cl. 45 (2011) (allowing plaintiff to supplement the record with evidence of agency’s bad faith); Ala. Aircraft Indus., Inc. v. United States, 82 Fed. Cl. 757, 766 (2008) (holding that the court will permit discovery when there has been a strong showing of bad faith or improper behavior such that without discovery the administrative record cannot be trusted).
- 134/ See Pitney Bowes Gov’t Solutions, Inc. v. United States, 93 Fed. Cl. 327, 336 (2010), 52 GC ¶ 256 (allowing deposition of CO).

- 135/ Galen Med. Assocs. v. United States, 369 F.3d 1324, 1330, 1337 (Fed. Cir. 2004), 46 GC ¶ 293.
- 136/ L-3 Commc'ns, 91 Fed. Cl. at 355.
- 137/ Pitney Bowes, 93 Fed. Cl. at 333.
- 138/ 93 Fed. Cl. at 332–33.
- 139/ L-3 Commc'ns, 98 Fed. Cl. at 50–51 (citing test as reaffirmed in Pitney Bowes, 93 Fed. Cl. at 332).
- 140/ Pitney Bowes, 93 Fed. Cl. at 332–33.
- 141/ DataMill, Inc. v. United States, 91 Fed. Cl. 722, 730–31 (2010) (citing Beta Analytics Int'l, Inc. v. United States, 61 Fed. Cl. 223, 226 (2004)); see also Pitney Bowes, 93 Fed. Cl. at 332 (“Although ‘the agency decision is entitled to a presumption of regularity,’ Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1338 (Fed. Cir. 2001), this presumption may be rebutted by an appropriate factual predicate. OTI Am., Inc. v. United States, 68 Fed. Cl. 108, 118 (2005).”).
- 142/ Pitney Bowes, 93 Fed. Cl. at 332.
- 143/ 93 Fed. Cl. at 332.
- 144/ 93 Fed. Cl. at 332.
- 145/ Tech Sys., Inc. v. United States, 97 Fed. Cl. 262 (2011).
- 146/ 97 Fed. Cl. at 263.
- 147/ 97 Fed. Cl. at 265 (quoting Orion Int'l Techs. v. United States, 60 Fed. Cl. 338, 343–44 (2004)) (noting that allegations of bad faith and bias must rest on “hard facts,” not simply suspicion or innuendo).
- 148/ 97 Fed. Cl. at 266.
- 149/ See, e.g., Guzar Mirbachakot Transp. v. United States, 104 Fed. Cl. 53, 61 (2012) (allowing testimony about the technical nature of zip drive compression); Global Computer Enters., Inc. v. United States, 88 Fed. Cl. 52, 62–63 (2009) (allowing protester to supplement with information related to the existence of, and its participation in, a niche market providing audit-supporting federal financial management services); Mike Hooks, Inc. v. United States, 39 Fed. Cl. 147, 158 (1997) (considering evidence supplementing the record because it “help[s] explain the highly technical nature of the issues”).
- 150/ Guzar Mirbachakot, 104 Fed. Cl. at 63; Blue & Gold Fleet, LP v. United States, 70 Fed. Cl. 487, 494, aff'd, 492 F.3d 1308 (Fed. Cir. 2007), 49 GC ¶ 320.
- 151/ See, e.g., Guzar Mirbachakot, 104 Fed. Cl. at 63 (allowing testimony about zip drive compression); Global Computer, 88 Fed. Cl. at 62–63 (allowing testimony about audit-supporting federal financial management services).
- 152/ Guzar Mirbachakot, 104 Fed. Cl. at 63 (collecting cases).
- 153/ See Allied Tech. Group, Inc. v. United States, 92 Fed. Cl. 226, 231 (2010), aff'd, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220 (rejecting both protester and defendant-intervenor’s submissions because, in the court’s words, “the administrative record is not too long or too complicated for review, and the declarations do not constitute ‘evidence without which the [C]ourt cannot fully understand the issues.’”) (internal citations omitted); Orion Tech., Inc. v. United States, 101 Fed. Cl. 492, 499 (2011) (“Consideration of an expert opinion directed solely at the pro-

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16. Publication of Statement of Ownership <input checked="" type="checkbox"/> Publication required. Will be printed in the <u>October 2012</u> issue of this publication. <input type="checkbox"/> Publication not required.																																																							
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- privity of the [the agency's] decision, like the expert opinion here, risks improperly converting the court's more deferential undertaking into a de novo review").
- 154/** Fed. R. Evid. 702.
- 155/** *Guzar Mirbachakot*, 104 Fed. Cl. at 64 (permitting expert testimony regarding the nature of electronic file formats and zip files, the Army's email network architecture, and common trade practice surrounding the use of compressed or zipped files); *East West, Inc. v. United States*, 100 Fed. Cl. 53, 57 (2011); *Mori Assoc., Inc. v. United States*, 98 Fed. Cl. 572, 575 (2011) (noting the record may be supplemented with information generally known in an industry or discipline); *Global Computer*, 88 Fed. Cl. at 67 (finding declarations necessary to understand the difference between "audit-supporting federal financial management system services" and "mission and administrative support IT services"); *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 272 (2004) (allowing supplementation of the record with expert testimony to "assist the Court in understanding the financing of the project"); *Mike Hooks*, 39 Fed. Cl. at 158 (determining that supplementation was appropriate in order for the Court to understand technical solicitation language regarding "minimum production rates" for shoal dredging).
- 156/** *Orion Tech., Inc. v. United States*, 101 Fed. Cl. 492, 496–97 (2011) (citing *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1350 (Fed. Cir. 2004), 46 GC ¶ 203).
- 157/** 101 Fed. Cl. at 496.
- 158/** 101 Fed. Cl. at 497 (citing *Allied Tech. Group, Inc. v. United States*, 92 Fed. Cl. 226, 231 (2010), *aff'd*, 649 F.3d 1320 (Fed. Cir. 2011), 53 GC ¶ 220; *PlanetSpace, Inc. v. United States*, 90 Fed. Cl. 1, 6 (2009), 52 GC ¶ 37).
- 159/** *Global Computer*, 88 Fed. Cl. at 65–66.
- 160/** *Global Computer*, 88 Fed. Cl. at 66.
- 161/** 88 Fed. Cl. at 67.
- 162/** See *McCormick on Evidence* § 10 (Broun, et al. eds., 2006 ("[T]he law prefers that a witness testify to facts, based on personal knowledge, rather than opinions inferred from such facts.")).
- 163/** *Global Computer*, 88 Fed. Cl. at 67 (citing *United States v. Espino*, 317 F.3d 788, 797 (8th Cir. 2003) (noting that the court "may rightly exercise a certain amount of latitude in permitting a witness to state his conclusions based upon common knowledge or experience"))).
- 164/** 88 Fed. Cl. at 67 (citing *Union Pacific Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 693 (Fed. Cir. 2001) (noting lay opinion testimony based upon extensive industry experience is admissible under Rule 701) (subsequently disfavored on other grounds)).
- 165/** *Axiom Resource Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380–81 (Fed. Cir. 2009), 51 GC ¶ 202 (noting that reliance on *Esch* is problematic for three reasons: (1) *Esch* itself relied on a law review article published before the U.S. Supreme Court decided *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), which is the current precedent establishing how administrative actions are to be conducted; (2) the vitality of *Esch* within the D.C. Circuit is itself suspect; and (3) *Esch* had already been questioned by Federal Circuit precedent, see *Murakami v. United States*, 46 Fed. Cl. 731, 735 n.4 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005) (noting that some of the *Esch* exceptions "are so broadly-worded as to risk being incompatible with the limited nature of arbitrary and capricious review, particularly if construed to allow the introduction of new evidence or theories not presented to the deciding agency"))).
- 166/** See, e.g., *Global Computer*, 88 Fed. Cl. at 61–62 (court asserted that *Axiom* was unique in its extreme disapproval of *Esch* because the trial judge in *Axiom* had allowed the protester to supplement the record without conducting any evaluation of whether the record needed to be supplemented and court further noted that a careful use of the *Esch* factors, simultaneous with an analysis of the necessity of the material for effective judicial review, would still be permitted); See also *Totolo/King v. United States*, 87 Fed. Cl. 680, 692 (2009); *Acrow Corp. of Am. v. United States*, 96 Fed. Cl. 270, 275 (2010), 53 GC ¶ 57.
- 167/** See *Totolo/King*, 87 Fed. Cl. at 693 (determining that the court is incapable of effectively judging a plaintiff's charge that the CO failed to consider required information without learning what was omitted); *Acrow*, 96 Fed. Cl. at 280 (granting in part and denying in part plaintiff's motion to supplement based on an analysis of whether the material is necessary to properly evaluate plaintiff's claim).
- 168/** *Esch*, 876 F.2d at 991 (citing *Stark & Wald*, "The Failed Attempts To Limit the Record in Review of Administrative Action," 36 Admin. L. Rev. 333, 345 (1984)).
- 169/** See *DataMill, Inc. v. United States*, 91 Fed. Cl. 722, 729–30 (2010) (noting that while *Esch* has been overtly disavowed by the Federal Circuit, certain principles that it espoused have clearly been adopted as precedential by the Federal Circuit).
- 170/** See *East West, Inc. v. United States*, 100 Fed. Cl. 53, 55–56 (2011) (citing *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 366–67 (2009) (allowing materials related to injunctive relief to be submitted and noting that such materials would not be used to evaluate the merits of the protest); *PlanetSpace, Inc. v. United States*, 90 Fed. Cl. 1, 5 (2009), 52 GC ¶ 37 (allowing the inclusion of materials related to relief)); see also *Solomson*, "The Keys to the Kingdom: Obtaining Injunctive Relief in Bid Protest Cases Before the U.S. Court of Federal Claims," Briefing Papers No. 08-13 (Dec. 2008).
- 171/** *East West*, 100 Fed. Cl. at 55 (noting that while such materials were once regularly allowed into the administrative record, such an approach would be incompatible with *Axiom*; therefore, the court now treats materials related to relief as part of the court's record).
- 172/** *Centech Group, Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009), 51 GC ¶ 93.
- 173/** Compare *PlanetSpace*, 90 Fed. Cl. at 5 (admitting evidence of harm and prejudice into the court record, not the administrative record); *AshBritt*, 87 Fed. Cl. at 366–67 (same), with *Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 272 (2004) (allowing supplementation of administrative record with evidence of harm); *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 649 (2003) (same).
- 174/** See, e.g., *L-3 Commc'ns Corp. v. United States*, 99 Fed. Cl. 283, 289 n.4 (2011); *PlanetSpace*, 90 Fed. Cl. at 5.
- 175/** *PlanetSpace*, 90 Fed. Cl. at 5; see also *Holloway & Co., PLLC v. United States*, 87 Fed. Cl. 381, 391 n.12 (2009), 51 GC ¶ 203 (same).
- 176/** *East West*, 100 Fed. Cl. at 55 (citing *PlanetSpace*, 90 Fed. Cl. at 5; *AshBritt*, 87 Fed. Cl. at 367).
- 177/** *PlanetSpace*, 90 Fed. Cl. at 5 (quoting *PGBA*, 60 Fed. Cl. 567, 568 n.1 (2004)).