APPENDIX C
PROCEDURE IN PROCUREMENT PROTEST CASES PURSUANT TO 28 U.S.C. § 1491(b)

I. INTRODUCTION

1. This Appendix describes standard practices in protest cases filed pursuant to 28 U.S.C. § 1491(b) and supplements the Rules of the United States Court of Federal Claims, which are otherwise fully applicable to these cases.

II. REQUIREMENT FOR PRE-FILING NOTIFICATION

2. To expedite proceedings, plaintiff's counsel must (except in exceptional circumstances to be described in moving papers) provide advance notice of filing a protest case to:

(a) the Department of Justice, Commercial Litigation Branch, Civil Division;

(b) the clerk, United States Court of Federal Claims;

(c) the procuring agency's contracting officer; and

(d) the apparently successful bidder/offeror (in cases where there has been an award and plaintiff has received notice of the identity of the awardee).

Such notice must be provided at least 1 day—but no earlier than 5 days—in advance of filing a protest case, not including Saturdays, Sundays, and legal holidays as defined in RCFC 6(a)(6). (The contacts for the clerk and the Department of Justice are posted on the court's website—www.uscfc.uscourts.gov.) The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis and to permit the court to ensure the availability of appropriate court resources. Failure to provide timely pre-filing notification will impede both the clerk's ability to notify the judges of an incoming protest case and the assigned judge's ability to initiate proceedings in the case, including the scheduling of the initial status conference. *See* paragraph 8, below. Plaintiff's counsel must provide an updated notice to the above entities highlighting any material change in respect to the timing of or the intent to file a protest. If, after filing a pre-filing notice, plaintiff's counsel determines that the protest case will not be filed, counsel must notify the above entities that the notice is withdrawn.

3. The pre-filing notice must include:

(a) a statement consistent with the disclosure requirements called for in RCFC 7.1(a); and

(b) the following additional information:

(1) the name of the procuring agency and the number of the solicitation in the contested procurement;

(2) the name and telephone number of the contracting officer responsible for the procurement;

(3) the name and telephone number of the principal agency attorney, if known, who represented the agency in any prior protest of the same procurement;

(4) whether plaintiff contemplates requesting temporary or preliminary injunctive relief pursuant to RCFC 65;

(5) whether plaintiff has discussed the need for temporary or preliminary injunctive relief with Department of Justice counsel and the response, if any;

(6) whether the action was preceded by the filing of a protest before the Government Accountability Office (GAO) and if so, the "B-" number of the protest and whether a decision was issued;

(7) whether the action is directly related to any known pending or previously filed case(s) before the court; and

(8) whether plaintiff contemplates the need for the court to enter a protective order.

III. FILING UNDER SEAL

4. In the event plaintiff believes its complaint, or any related material filed at the same time, contains confidential or proprietary information and plaintiff seeks to protect that information from public scrutiny, plaintiff must

file a motion together with the complaint for leave to file the complaint under seal. When a complaint or any related material is filed with an accompanying motion for leave to file under seal, the complaint or related material will be treated as though filed under seal while the motion is pending.

5. When filing documents under seal, a party must follow the procedures described in RCFC 5.5(d).

6. A complaint or any related material filed together with the complaint that is to be filed under seal must be:

(a) marked or highlighted in such a way that confidential or proprietary information is indicated; and

(b) accompanied by a proposed redacted version of the pleading (i.e., a version that omits confidential or proprietary information). The proposed redacted version will be made available to the public subsequent to the completion of the procedures specified in paragraph 12 of the sample protective order found at Appendix of Forms, Form 8. Failure to file a proposed redacted version may result in denial of the motion for leave to file under seal.

7. To the extent the complaint or any related material filed together with the complaint contains classified information, the filing must conform to the requirements of the classifying agency.

IV. INITIAL STATUS CONFERENCE

8. The court will schedule an initial status conference with the parties to address relevant issues including, but not limited to, the following:

(a) identification of interested parties;

(b) admission of any successful offeror as an intervenor;

(c) any request for temporary or preliminary injunctive relief (*see* paragraph 15, below);

(d) the content of a protective order, if requested by one or more of the parties, and the requirement for redacted copies;

(e) the content of and time for the service of the administrative record, and the filing of the joint appendix, as set forth in paragraphs 23–28 below;

(f) whether it may be appropriate to supplement the administrative record; and

(g) the nature of and schedule for further proceedings.

This initial status conference will be held as soon as practicable after the filing of the complaint.

V. INJUNCTIVE RELIEF

9. The court's practice is to expedite protest cases to the extent practicable and to conduct hearings on motions for preliminary injunctions at the earliest practicable time. Accordingly, when a plaintiff seeks a preliminary injunction, it may not need to request a temporary restraining order.

10. An application for a temporary restraining order and/or preliminary injunction must be filed together with the complaint with the clerk, unless the complaint has been previously filed. The application must be accompanied by affidavits, supporting memoranda, and any other documents upon which plaintiff intends to rely. The application also must be accompanied by a statement that plaintiff's counsel has provided, by hand delivery, overnight mail, or electronic means, copies of the foregoing documents to the Department of Justice, Commercial Litigation Branch, 8th Floor, 1100 L St. NW, Washington, DC 20530.

11. If the name of the apparently successful bidder/offeror is known (in cases where there has been an award and plaintiff has received notice of the identity of the awardee), plaintiff must state in the application that copies of the foregoing documents have been provided, by hand delivery, overnight mail, or electronic means, to the apparently successful bidder/offeror. If the name of the awardee is unknown, plaintiff must so state.

12. The apparently successful bidder/offeror may enter a notice of appearance at any hearing on the application for a temporary restraining order/preliminary injunction if it advises the court of its intention to move to intervene pursuant to RCFC 24(a)(2) or has moved to intervene before the hearing.

13. The clerk will promptly inform the parties of the judge to whom the case has been assigned and the time and place of any hearing.

14. Except in an emergency, the court will not consider *ex parte* applications for a temporary restraining order.

15. In cases in which plaintiff seeks temporary or preliminary injunctive relief, counsel must be prepared to discuss the following matters at the initial status conference:

(a) whether and to what extent, absent temporary or preliminary injunctive relief, the court's ability to afford effective final relief is likely to be prejudiced;

(b) whether plaintiff has discussed any request it has made for a temporary restraining order in advance with Department of Justice counsel and, if so, defendant's response;

(c) whether the government will agree to withhold award or suspend performance pending a hearing on the motion for preliminary injunction;

(d) whether the government will agree to withhold award or suspend performance pending a final decision on the merits;

(e) an appropriate schedule for completion of the briefing on any motion for a preliminary injunction;

(f) the security requirements of RCFC 65(c) (*See* Appendix of Forms, Forms 11–13); and

(g) whether the hearing on the preliminary injunction should be consolidated with a final hearing on the merits.

VI. PROTECTIVE ORDERS

16. Preliminary Matters.

(a) The principal vehicle relied upon by the court to ensure protection of sensitive information is the protective order. The protective order defines the procedures to be followed to identify protected information, to prepare redacted versions of such information, and to dispose of protected information at the conclusion of the case.

(b) Information a party identifies as protected may be disclosed only to the court and to individuals who have been admitted to the protective order.

(c) Once a protective order is issued by the court, individuals who seek access to protected information must file an appropriate application. If admitted to the protective order, an individual becomes subject to the terms of the order. It is the responsibility of those admitted to the protective order to take the necessary steps to ensure that the information is protected, consistent with the terms of the protective order, while it is under their control (including oversight of support personnel who may have access to protected information).

(d) Court, procuring agency, and Department of Justice personnel are automatically admitted to protective orders when issued and are subject to their terms.

17. Issuance of a Protective Order.

(a) A motion for a protective order must meet the requirements of paragraph 10 above. The court may issue a protective order at its discretion.

(b) A sample protective order is found at Appendix of Forms, Form 8. The parties are cautioned that individual judges and the parties themselves may want to amend the sample protective order to meet the needs of a specific case or their individual preferences. The specific protective order issued in a case governs the treatment of protected information in that case.

18. Application for Admission to the Protective Order.

(a) Each party seeking access to protected information on behalf of an individual must file with the court an appropriate "Application for Access to Information Under Protective Order" (*see* Appendix of Forms, Forms 9 and 10). The application may also be amended by the court in response to individual case needs.

(b) Objections to an application for access must be filed with the court within 2 business days after a party's receipt of the application.

(c) In considering objections to an application for access, the court will consider such factors as the nature and sensitivity of the information at issue, the party's need for access to the information in order to effectively represent its position, the overall number of applications received, and any

other concerns that may affect the risk of inadvertent disclosure.

(d) If the court receives objections to an application, access will only be granted by court order.

19. Designation of Protected Information and Preparation of Redacted Pleadings.

After a protective order is entered, the designation of protected information and the preparation and filing of redacted documents will be governed by the terms of the protective order.

20. Disposition of Material Containing Protected Information.

The specific procedures to be followed in disposing of protected information at the conclusion of the case will be as described in the protective order.

VII. THE CONTENT AND FILING OF THE ADMINISTRATIVE RECORD

21. The United States will be required to identify and provide (or make available for inspection) the administrative record in a protest case by the date(s) established at the initial status conference.

22. Early production of relevant core documents may expedite final resolution of the case. The core documents relevant to a protest case may include, as appropriate,

(a) the agency's procurement request, purchase request, or statement of requirements;

(b) the agency's source selection plan;

(c) the bid abstract or prospectus of bid;

(d) the Commerce Business Daily or other public announcement of the procurement;

(e) the solicitation, including any instructions to offerors, evaluation factors, solicitation amendments, and requests for best and final offers;

(f) documents and information provided to bidders during any pre-bid or pre-proposal conference;

(g) the agency's responses to any questions about or requests for clarification of the solicitation;

(h) the agency's estimates of the cost of performance;

(i) correspondence between the agency and the protester, awardee, or other interested parties relating to the procurement;

(j) records of any discussions, meetings, or telephone conferences between the agency and the protester, awardee, or other interested parties relating to the procurement;

(k) records of the results of any bid opening or oral motion auction in which the protester, awardee, or other interested parties participated;

(*l*) the protester's, awardee's, or other interested parties' offers, proposals, or other responses to the solicitation;

(m) the agency's competitive range determination, including supporting documentation;

(n) the agency's evaluations of the protester's, awardee's, or other interested parties' offers, proposals, or other responses to the solicitation, including supporting documentation;

(o) the agency's source selection decision, including supporting documentation;

(p) pre-award audits, if any, or surveys of the offerors;

(q) notification of contract award and the executed contract;

(r) documents relating to any pre- or post-award debriefing;

(s) documents relating to any stay, suspension, or termination of award or performance pending resolution of the bid protest;

(t) justifications, approvals, determinations, and findings, if any, prepared for the procurement by the agency pursuant to statute or regulation; and

(u) the record of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.

23. On a date ordered by the court at the initial status conference, the United States must transmit or make available the complete administrative record to all parties and to the court via a designated form of electronic transfer (or other means if so ordered). No later than that

same date, the United States must file with the court:

(a) a certified index of the contents of the administrative record; and

(b) a certificate of service in accordance with RCFC 5.3 stating that the administrative record has been served on the parties. The certificate of service must contain the contracting officer's certification attesting to the completeness of the administrative record.

24. The administrative record must be formatted as follows:

(a) The file names of documents in the administrative record must include tab numbers corresponding with the tab numbers in the certified index.

(b) The United States must undertake reasonable efforts to convert all documents to PDF files, paginate the entire record sequentially, and produce the documents in a text-searchable format.

(c) Excel spreadsheets and other files that cannot be converted to legible or usable PDF files must be provided to all parties and to the court in their native format and assigned tab numbers (both listed in the index and contained within the file name).

25. To the extent either party identifies any omissions, errors, or other concerns regarding the administrative record, the parties must meet and confer to address the issue(s) and, upon agreement of the parties, the United States must file a motion for leave:

(a) to produce the corrected record to all parties and to the court; and

(b) to file a corrected certified index to the administrative record and certificate of service, including a new contracting officer's certification.

If the parties are unable to reach an agreement regarding the contents of the administrative record or any related issues—including any identified omissions, errors, or other concerns—any party may file a motion to resolve the disagreement.

26. The United States must file a joint appendix, including an index, at such time as ordered by the court, generally after the close of briefing under RCFC 52.1(c). The court may order the parties to provide the court with one or more paper copies of the joint appendix. In compiling the joint appendix, the parties must confer and, at a minimum, include those portions of the administrative record that the parties have cited in their respective briefs, along with sufficient context for the court to understand the information. Core documents (as agreed upon by the parties), *see* paragraph 22 above, must be included in their entirety.

27. Absent agreement among the parties regarding the contents of the joint appendix, the plaintiff must serve on all parties an initial designation and provide all other parties the opportunity to designate additional portions of the administrative record. Excel spreadsheets and other electronic files that cannot be filed via the court's electronic-filing system must not be filed as part of the joint appendix but must be noted in the index to the joint appendix.

28. Unless otherwise ordered, within 7 days after the entry of final judgment or dismissal, the United States must file with the clerk the complete administrative record, together with a notice of filing, either via the court's electronic-filing system or via a portable storage disc or drive.

VIII. ADMISSION OF COUNSEL

29. In procurement protest cases in which plaintiff's counsel is not a member of the bar of the court and does not have sufficient time to gain admission prior to the filing of the action, the clerk will accept for filing any proper complaint and accompanying pleadings under 28 U.S.C. § 1491(b) from such counsel, conditioned upon counsel's prompt pursuit of admission to practice before the United States Court of Federal Claims pursuant to RCFC 83.1. Failure to pursue such admission within 30 days after the initiation of the action may result in dismissal of the action and possible referral for disciplinary action.

Rules Committee Notes
2002 Revision

This appendix sets forth the procedures applicable to the court's procurement protest jurisdiction. In the main, these procedures reflect those that formerly appeared as General Order No. 38, issued on May 7, 1998. In addition, however, Appendix C now incorporates—in

paragraphs 10 through 14—those provisions of former RCFC 65(f) (titled "Procedures") which enumerated requirements particular to applications for temporary restraining orders and/or motions for preliminary injunction.

Papers and exhibits are often filed under seal in procurement protests. Procedures for unsealing are addressed at RCFC 77.3(d). The standards for granting access to protected information are addressed in decisions such as *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), and *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991).

2005 Amendment

Paragraphs 16(a) and 20 of this appendix address the disposition of material containing protected information after a case has been concluded. Both paragraphs contemplate that a protective order entered in a case involving protected information will set out the obligations of the parties in this regard. Form 8 in the Appendix of Forms, the sample protective order suggested for use in procurement protest cases, has been modified to include a new paragraph 8 which concerns the court's retention and disposition of protected materials filed by the parties. The new paragraph provides that the original version of the administrative record and any other materials filed under seal in such a case will be retained by the court pursuant to RCFC 77.3(d). Copies of such materials filed with the court in addition to the original version may be returned by the court to the parties for appropriate disposition. In a particular case, the parties may propose to the court that other provisions be substituted for this portion of the model protective order.

2007 Amendment

Paragraph 18(a) has been reworded and paragraph 18(b) has been deleted as unnecessary. In addition, paragraph 18(e) has been amended to clarify that issuance of a court order granting access to protected information is required only in those cases where objections to the application have been raised. This clarification confirms the practice spelled out in the court's sample protective order (Appendix of Forms, Form 8). Finally, minor changes (primarily grammatical) have been introduced throughout the Appendix.

2011 Amendment

The information that is to be provided as part of the pre-filing notice required under paragraph 3 has been expanded to include the disclosure statement regarding corporate relationships that must be filed pursuant to RCFC 7.1.

2016 Amendment

Paragraph 2 has been amended to specify that the pre-filing notice must be provided to the listed entities during clerk's office business hours as defined in RCFC 77.1.

Paragraph 6 has been amended to clarify that a proposed redacted version of a pleading is subject to the redaction procedures specified in Form 8 ("Protective Order") in the Appendix of Forms.

2018 Amendment

In the interest of internal consistency, Paragraph 18 has been amended to clarify that objections must be filed with the court within 2 *business* days after a party's receipt of an application for access.

2019 Amendment

Paragraph 2 has been amended to eliminate the references to facsimile transmission.

2021 Amendment

Paragraph 2 has been amended to clarify that the 1-day advance notice requirement does not include weekend and holiday hours and that notice must be provided no earlier than 5 days in advance of filing a protest case. In addition, a requirement has been added for counsel to provide further notice if it is determined that the protest case will not be filed.

2024 Amendment

Paragraph 8(e) has been amended to cross reference paragraphs 23–28 in amended Section VII.

Section VII has been amended to require the United States to provide a complete copy of the administrative record to all parties and to the court via electronic transfer in lieu of filing the record via ECF, and then, within 7 days after the entry of final judgment, to file with the clerk the complete administrative record.

In addition, a requirement has been added in paragraph 26 that the United States, upon agreement of the parties, file a joint appendix that includes, at a minimum, the core documents specified in paragraph 22 of this Appendix and those portions of the administrative record that the parties have cited in their respective briefs.

2026 Amendment

Paragraph 3 has been amended to require that the pre-filing notice include information regarding any known directly related case(s) currently pending or previously filed before the court.

Paragraph 28 has been amended to clarify the filing requirements of the complete administrative record.