



FEDERAL CONTRACTS

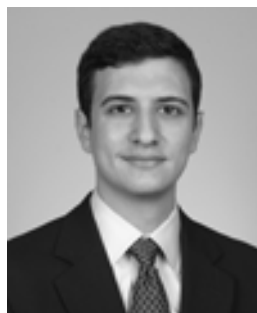


REPORT

Reproduced with permission from Federal Contracts Report, 95 FCR 242, 3/1/2011. Copyright © 2011 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Bid Protests

Axioms for Supplementing the Administrative Record



BY ALAN PEMBERTON, SARAH WILSON, AND
MATTHEW KRAUSS

Alan Pemberton heads the Government Contracts practice group at Covington & Burling LLP. Sarah L. Wilson is a litigation partner at Covington & Burling LLP who previously served as a judge on the U.S. Court of Federal Claims, where she adjudicated numerous bid protests. Matthew Krauss is an associate at Covington & Burling LLP and is a member of the firm's Litigation and Energy Practice Groups.

I. INTRODUCTION.

In 2009, the United States Court of Appeals for the Federal Circuit issued a major decision in *Axiom Resource Management, Inc. v. United States*¹ that established a new standard for supplementation of the administrative record in bid protest cases. Eschewing a discrete list of circumstances under which supplementation previously had been considered appropriate, the court held that extrinsic evidence is permissible only when “necessary in order not ‘to frustrate effective judicial review.’”² In the wake of this decision, several

¹ 564 F.3d 1374 (Fed. Cir. 2009) [hereinafter *Axiom*].

² *Id.* at 1381 (quoting *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973)).

Court of Federal Claims (CFC) judges — including the trial judge reversed in *Axiom* — have applied the Federal Circuit’s supplementation standard in bid protests. This bevy of post-*Axiom* trial court decisions reflects disagreement over the standard’s substantive scope and application, which is likely to be the subject of continued interpretive debate on the CFC.

Pursuant to the Tucker Act, the CFC reviews bid protest cases under an Administrative Procedure Act standard of review, which requires review based on the procuring agency’s administrative record.³ Courts have recognized that the scope of an administrative record is discretionary and variable. While it serves as “a convenient vehicle for bringing the decision of an administrative body before a reviewing agency or a court,” the CFC has noted,⁴ its contents “cannot be wholly contingent.”⁵ Parties in bid protests often seek to supplement the record. Prior to *Axiom*, however, the CFC had little binding precedent to apply in deciding such motions.

II. BACKGROUND. *Axiom* involved the protest of an award for military health care support services.⁶ *Axiom*, the incumbent contractor, claimed that its successor, Lockheed Martin Federal Health Care, Inc., had an unmitigated organizational conflict of interest (OCI) resulting from access to non-public information.⁷ The Government Accountability Office twice ordered corrective action before denying a third protest, after which *Axiom* filed suit in the CFC.

Noting that it was her “practice . . . to allow everybody to put . . . whatever they want to put into the record in trial and even in an administrative record to supplement,”⁸ Judge Braden permitted *Axiom* to supplement the record with “legal pleadings filed before the GAO, declarations of [its] employees, and declarations from consultants retained for litigation.”⁹ In allowing supplementation, Judge Braden relied on the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Esch v. Yeutter*,¹⁰ which identified eight conditions under which supplementation is appropriate.¹¹ Following supplementation of the

record, Judge Braden ruled for *Axiom* on the merits, finding that the contracting officer had violated applicable regulations by failing to develop an adequate mitigation plan for Lockheed’s OCI,¹² and subsequently set aside an option to continue the contract.¹³

The Federal Circuit reversed, holding that Judge Braden had erred in allowing supplementation of the record, that she had applied an improper standard of review, and that the mitigation plan was appropriate.¹⁴ Relying on the Supreme Court’s decisions in *Florida Power & Light Co. v. Lorion*¹⁵ and *Camp v. Pitts*,¹⁶ the Federal Circuit concluded that “supplementation of the record should be limited to cases in which ‘the omission of extra-record evidence precludes effective judicial review.’”¹⁷ The court emphasized that the purpose of this limitation “is to guard against courts using new evidence to ‘convert the “arbitrary and capricious” standard into *de novo* review.’”¹⁸

The Federal Circuit rejected the CFC’s reliance on *Esch* expressly, noting that the case derived its rationale from a law review article predating *Florida Power & Light* and that it had been discredited by subsequent decisions in the D.C. Circuit.¹⁹ Thus, the court concluded, “insofar as *Esch* departs from fundamental principles of administrative law as articulated by the Supreme Court in *Pitts* and *Florida Power & Light*, it is not the law of this circuit.”²⁰ In its place, *Axiom* did not articulate an alternate set of factors, but rather adopted a standard permitting supplementation only when the court determines that it is “necessary in order not ‘to frustrate effective judicial review.’”²¹ Since Judge Braden had made no such determination before supplementing the record in *Axiom*, the Federal Circuit held that she had abused her discretion.²²

III. POST-AXIOM CFC DECISIONS.

A. *Axiom*’s Scope.

In the wake of *Axiom*, several CFC judges have issued decisions applying the new standard to specific facts. Although the Federal Circuit signaled the adoption of a “more restrictive approach to extra-record evidence,”²³ it did not address whether any specific supplementation of the record was proper. Instead, the court ruled on the narrower ground that the CFC had failed to make an affirmative determination that the materials were necessary prior to allowing supplementation. Thus, *Axiom* dispensed with indiscriminate

³ See 5 U.S.C. § 706; 28 U.S.C. § 1491(b)(4).

⁴ *CCL Serv. Corp. v. United States*, 48 Fed. Cl. 113, 118 (2000).

⁵ *PlanetSpace Inc. v. United States*, 90 Fed. Cl. 1, 4 (2009).

⁶ 564 F.3d at 1376-77.

⁷ *Id.* at 1376-78.

⁸ *Id.* at 1379; see also *Axiom Res. Mgmt. v. United States*, 78 Fed. Cl. 576, 585-86 & n.10 (2007) [hereinafter *Axiom I*] (discussing decision to supplement).

⁹ *Axiom*, 564 F.3d at 1379.

¹⁰ 876 F.2d 976 (D.C. Cir. 1989); see also *Axiom I*, 78 Fed. Cl. at 586 n.10.

¹¹ *Esch* identified the following exceptions:

(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 records; (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.

876 F.2d at 991 & n.166 (citing Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record*

in *Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984)).

¹² *Axiom I*, 78 Fed. Cl. at 600.

¹³ *Axiom Res. Mgmt. v. United States*, 80 Fed. Cl. 530, 539 (2008).

¹⁴ *Axiom*, 564 F.3d at 1381-84.

¹⁵ 470 U.S. 729 (1985).

¹⁶ 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

¹⁷ 564 F.3d at 1380 (quoting *Murakami v. United States*, 46 Fed. Cl. 731, 735 (2000), *aff’d*, 398 F.3d 1342 (Fed. Cir. 2005)).

¹⁸ *Id.* (quoting *Murakami*, 46 Fed. Cl. at 735).

¹⁹ *Id.* (citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997), and *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 457-58 (D.C. Cir. 1994)).

²⁰ *Id.* at 1381.

²¹ *Id.* (quoting *Pitts*, 411 U.S. at 142-43) (emphasis added).

²² 564 F.3d at 1381.

²³ *Id.* at 1380.

supplementation of the record, but did not provide specific parameters for permissible supplementation. Following the Federal Circuit's decision in *Axiom*, the CFC has developed differing interpretations of the decision and its implications.

Most of the CFC judges who have applied *Axiom* have agreed that "the *Axiom* panel adopted a restrictive standard for supplementation of the administrative record in a bid protest," and have concluded, therefore, that they "must exercise restraint when considering whether or not to supplement the administrative record in a bid protest."²⁴ Judges Christine Miller and Sweeney, however, have articulated a minority view that *Axiom* effected no real change in "the trial court's practice, other than to emphasize restraint and adherence to precedent."²⁵ In their view, *Axiom* merely replaced *Esch* with a simpler but vaguer standard.²⁶

Furthermore, these judges have held that *Esch* is still viable in limited respects. In *Totolo/King v. United States*,²⁷ Judge Miller opined that supplementation remains appropriate in four of the circumstances listed in *Esch*:

- (1) when the 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; . . . [and]
- (8) in cases where relief is at issue, especially at the preliminary injunction stage.²⁸

Judge Sweeney has opined similarly that *Axiom*'s impact on *Esch* is limited.²⁹

These more limited readings of *Axiom*, however, represent a minority view. Judge Block noted his frequent reliance on *Esch* in *PlanetSpace Inc. v. United States*³⁰ and reasoned that "[r]ather than helping to discipline the court's adoption of [*Cubic Applications, Inc. v. United States*]"³¹ 'flexible approach,' *Esch* may have led

the court to stray too far from 'fundamental principles of administrative law.'"³² Judge Allegra has gone even further and stated outright that "any court in this circuit that relies upon *Esch* to supplement the administrative record . . . does so at peril of reversal."³³ Nevertheless, if a majority of courts to address *Axiom* have interpreted the decision as tightening the standard for supplementing the administrative record, the application of that standard remains fluid.³⁴

B. What is "necessary" for "effective" review?

Few cases, if any, have attempted to define *Axiom*'s conceptual touchstones—"effective" and "necessary"—or even to consider them seriously.³⁵ Some judges have used language suggesting a more lenient view of what constitutes "effective" judicial review. In *Academy Facilities Management v. United States*,³⁶ the court allowed supplementation with an affidavit, the omission of which "would result in less effective judicial review."³⁷ Likewise, the court in *Bannum, Inc. v. United States*³⁸ reasoned that, without proffered documents relating to the plaintiff's performance on a past contract, it "may not have a complete understanding of the issues before it"³⁹

Similarly, none of the CFC judges to apply *Axiom* has discussed the quantum of value that extrinsic material must have to be "necessary" for effective review. Recent decisions, however, suggest that this bar may be somewhat lower in practice, at least for several judges, than *Axiom*'s language suggests. Of course, judges have permitted supplementation of the administrative record in circumstances where doing so truly has been necessary to provide effective review. For example, Judge Williams allowed supplementation in several cases to resolve serious inaccuracies in the record.⁴⁰ Judge Lettow did so in a particularly egregious case where the contracting officer deliberately destroyed individual bidders' rating sheets.⁴¹

²⁴ *Office Depot, Inc. v. United States*, 94 Fed. Cl. 294, 296 (2010) (Bush, J.); accord *PlanetSpace*, 90 Fed. Cl. at 5 ("Axiom clearly signaled the Federal Circuit's adoption of a 'more restrictive' view of the permissible scope for supplementation of the administrative record in a bid protest.") (quoting *Axiom*, 564 F.3d at 1380-81); Richard J. Webber, *Litigating Government Contract Disputes: Recent Trends and Proven Strategies*, 2010 WL 3628962, at *1 (Aspatore Sept. 2010).

²⁵ *Totolo/King v. United States*, 87 Fed. Cl. 680, 693 (2009) (C. Miller, J.); accord *RhinoCorps Ltd. Co. v. United States*, 87 Fed. Cl. 261, 273 n.13 (2009) (C. Miller, J.) (same).

²⁶ *Global Computer Enters. v. United States*, 88 Fed. Cl. 52, 62 (2009) (Sweeney, J.) (noting that the pre-*Axiom* principles of flexible analysis of the relevant body of evidence "remain viable, even after the Federal Circuit eschewed reliance upon the specific, broad exceptions enunciated by the *Esch* court under the circumstances presented in *Axiom*") (emphasis added).

²⁷ 87 Fed. Cl. 680 (2009)

²⁸ *Id.* at 692-93 (quoting *Esch*, 876 F.2d at 991).

²⁹ *Global Computer Enters.*, 88 Fed. Cl. at 61 (noting that while the Federal Circuit had disdained *Esch*, it had done so under circumstances specific to the case before it, "in which the trial court . . . 'add[ed] . . . documents to the record without evaluating whether the record before the agency was sufficient to permit meaningful judicial review.'") (quoting *Axiom*, 564 F.3d at 1380) (emphasis and alterations in original).

³⁰ 90 Fed. Cl. 1 (2009).

³¹ 37 Fed. Cl. 345, 350 (1997).

³² 90 Fed. Cl. at 5 (quoting *Axiom*, 564 F.3d at 1380-81).

³³ *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 47 n.6 (2009); accord *Elec. Data Sys., LLC v. United States*, 93 Fed. Cl. 416, 429 n.11 (2009) (same).

³⁴ See, e.g., *Terry v. United States*, No. 09-454 C, 2010 WL 5097776, at *7 (Fed. Cl. Dec. 15, 2010) (noting, in one of the most recent applications of *Axiom*, that "it remains unclear how the Federal Circuit's decision will be interpreted.")

³⁵ For helpful summaries of early post-*Axiom* case law, see Stuart B. Nibley & Amba M. Datta, *The Protest Record—What Should Be In; What Should Be Out?*, 52 No. 24 GOV'T CONTRACTOR ¶ 211 (June 2010); Daniel P. Graham et al., *2009 Government Contract Law Decisions of the Federal Circuit*, 59 AM. U. L. REV. 991, 997-1002 (2010).

³⁶ 87 Fed. Cl. 441 (2009) (Horn, J.).

³⁷ *Id.* at 455 (emphasis added).

³⁸ 89 Fed. Cl. 184 (2009) (Wheeler, J.).

³⁹ *Id.* at 189.

⁴⁰ *Diversified Maint. Sys., Inc. v. United States*, 93 Fed. Cl. 794, 802-04 (2010) (ordering discovery where record contained numerous inconsistencies on key points); *Ashbritt, Inc. v. United States*, 87 Fed. Cl. 344, 366, *opinion clarified by*, 87 Fed. Cl. 654 (2009) (noting important clerical errors in the record and concluding that "standing uncorrected, the AR is erroneous and misleading. Allowing a protest to be decided upon an AR which does not reflect what actually transpired would perpetuate error and impede and frustrate effective judicial review.")

⁴¹ *Pitney Bowes Gov't Solutions, Inc. v. United States*, 93 Fed. Cl. 327, 334-36 (2010).

The CFC also has acknowledged a related distinction between “supplementing” and “completing” the record. In *Kerr Contractors, Inc. v. United States*,⁴² the court reasoned that effective APA review requires both the record upon which the agency relied “as well as documentation of the agency’s decision-making process,” concluding that it was necessary to supplement with a declaration “which should have been included in the administrative record in this case.”⁴³ Subsequent decisions have permitted such “completion” of the record, in some cases without considering *Axiom* expressly.⁴⁴

When not dealing with gaps or flaws in the record, however, several CFC judges have relied on *Axiom* to permit supplementation to illuminate complex issues. For example, *Academy Facilities Management* involved an affidavit intended to confirm the procuring agency’s interpretation of key terms that were not clear on the record alone.⁴⁵ Several recent cases have continued to rely on a string of pre-*Axiom* decisions permitting supplementation “when it is necessary for a full and complete understanding of the issues.”⁴⁶ In *Global Computer Enterprises v. United States*,⁴⁷ the court relied on *Esch* to determine that “supplementation is warranted . . . given the multiplicity of issues presented with respect both to jurisdiction and the merits”⁴⁸

These rulings suggest that some judges have been willing to supplement the record for the sake of evidence that better facilitates review of complex issues, even if doing so is not strictly “necessary”. In one example, Judge Block reasoned that several extra-record declarations contained “enough technical data . . . to be useful,” but were duplicative of material already in the record.⁴⁹ Indeed, it is telling that, when supplementation motions have been denied under *Axiom*, many judges have done so not because the materials at issue were unnecessary for effective review, but rather because they were redundant or irrelevant.⁵⁰

⁴² 89 Fed. Cl. 312 (2009) (Bush, J.).

⁴³ *Id.* at 335 (emphasis added).

⁴⁴ *Allied Tech. Group, Inc.*, 92 Fed. Cl. 226, 231 (2010) (Wheeler, J.) (permitting inclusion of documents that were “available to and probably should have been reviewed by the agency” without discussing their necessity (citing *NEQ, LLC*, 86 Fed. Cl. at 593)); *Linc Gov’t Servs., LLC v. United States*, 95 Fed. Cl. 155, 158 (2010) (Block, J.) (“[S]ubsequent admission of the omitted information is appropriate not to supplement the record, but to complete it.”); see also *Bannum*, 89 Fed. Cl. at 189 (admitting documents that were before the agency, although not referring to “completion” of the record).

⁴⁵ 87 Fed. Cl. at 455.

⁴⁶ *Blue & Gold Fleet, LP v. United States*, 70 Fed. Cl. 487, 494 (2006), *aff’d*, 492 F.3d 1308 (Fed. Cir. 2007); accord *Al Ghanim Combine Grp. Co. Gen. Trade & Cont. W.L.L. v. United States*, 56 Fed. Cl. 502, 508 (2003) (permitting supplementation “when necessary to prove that evidence not in the record is evidence without which the court cannot fully understand the issues”); *Mike Hooks, Inc. v. United States*, 39 Fed. Cl. 147, 158 (1997) (permitting supplementation where it “help[s] explain the highly technical nature of the issues”).

⁴⁷ 88 Fed. Cl. 52 (2009).

⁴⁸ *Id.* at 63 (citing *Esch*, 876 F.2d at 991).

⁴⁹ *PlanetSpace*, 90 Fed. Cl. at 9 (emphasis added).

⁵⁰ See, e.g., *Homesource Real Estate Servs. v. United States*, 94 Fed. Cl. 466, 480 (2010) (Hewitt, C.J.) (denying motion to supplement with publicly available information where record already contained adequate information on relevant points); *Kerr Contractors*, 89 Fed. Cl. at 335; *L-3 Commc’ns*

C. Exceptions to *Axiom*

1. Records before the GAO. The CFC has created exceptions to the *Axiom* rule. Several judges have debated supplementation of the administrative record with GAO materials. Judge Lettow first addressed this issue in *Holloway & Co., PLLC v. United States*,⁵¹ only days after the Federal Circuit decided *Axiom*. Judge Lettow noted that the CFC’s rules permit the inclusion “of any previous administrative or judicial proceedings relating to the procurement, including the record of any other protest of the procurement.”⁵² Acknowledging the tension between the Court’s rules and *Axiom*, Judge Lettow nevertheless permitted supplementation, reasoning that “[i]t would be strange for this court to be addressing a protest on a more truncated record than that which had been before GAO.”⁵³

Other judges have agreed with this approach, including Judge Braden herself.⁵⁴ Ironically, Judge Christine Miller has rejected Judge Lettow’s reasoning in *Holloway* most explicitly. In *RhinoCorps Ltd. Co. v. United States*,⁵⁵ Judge Miller noted, “[i]t would be strange if the [CFC] would allow supplementation with the type of informal post-hoc statements that the GAO allows. Materials demonstrated 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.”⁵⁶

Subsequent cases have tended to permit supplementation with GAO materials where they serve a discrete purpose or otherwise facilitate effective judicial review, but not as a matter of course.⁵⁷ Even those courts that appear to follow *Holloway* consider whether the GAO materials in question will facilitate effective review. For example, in *Academy Facilities Management*, the court explained that, under *Holloway*’s reasoning, “the affidavit of the Source Selection Authority, which was part of the agency report for the bid protest at GAO, would be admitted”⁵⁸ The court continued on to explain that the document provided necessary clarification of

EOTech, Inc. v. United States, 87 Fed. Cl. 656, 672 (2009) (Bush, J.) (reasoning that proffered documents were irrelevant where plaintiff offered its own declaration commenting on the bidding process, as well as documents relating to test scores that court had already determined were inaccurate); *Linc Gov’t Servs.*, 95 Fed. Cl. at 159 (“Because the proffered emails duplicate evidence already in the record and otherwise fail to support the argument for which they were proffered, their omission would not preclude effective judicial review.” (citing *Axiom*, 564 F.3d at 1380)).

⁵¹ 87 Fed. Cl. 381, 392 (2009).

⁵² RCFC Appendix C, ¶ 22(u); see also *Holloway*, 87 Fed. Cl. at 391.

⁵³ 87 Fed. Cl. at 392.

⁵⁴ See, e.g., *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 General Accountability Office are part of the Administrative Record.”). *But cf. Coastal Int’l. Sec., Inc. v. United States*, 93 Fed. Cl. 502, 523-24 (2010) (Braden, J.) (finding that GAO records were not necessary for effective review).

⁵⁵ 87 Fed. Cl. 261 (2009).

⁵⁶ *Id.* at 276 n.18.

⁵⁷ See *Red River Holdings, LLC v. United States*, 87 Fed. Cl. 768, 788 n.28 (2009) (Merow, S.J.) (discussing this evolution).

⁵⁸ 87 Fed. Cl. at 454-55.

important points.⁵⁹ Similarly, in *Bannum*, the court concluded that “*Axiom* . . . does not undermine the Court’s rules for determining the content of the administrative record,” but then evaluated the proffer to assess its contribution to effective review.⁶⁰ While the Federal Circuit has not addressed this issue, the approach in *Bannum* seems more likely to survive than the more automatically inclusive rule in *Holloway*, particularly since the RCFC “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.”⁶¹

2. Bias. Few post-*Axiom* decisions have addressed requests to supplement the record in order to show bad faith or bias by a procurement official. *L-3 Communications Integrated Systems, L.P. v. United States*,⁶² the first such case, reasoned that the record may be supplemented with evidence of bias and bad faith, which by its nature typically would not appear in the administrative record.⁶³ The CFC has long held that such information remains subject to “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.”⁶⁴ Although courts evaluating evidence of bias generally have acknowledged *Axiom*, they have not applied it to their supplementation determination. Rather, judges excluding purported evidence of bias usually have done so not because the materials fail to satisfy *Axiom* (at least explicitly), but rather because they do not meet the traditional threshold showing for bias.⁶⁵

⁵⁹ *Id.* at 455 (citing *Axiom*, 564 F.3d at 1380-81).

⁶⁰ 89 Fed. Cl. at 188-89; accord *Allied Tech. Group*, 92 Fed. Cl. at 230 (noting that, “in light of *Axiom*, the Court must exercise caution prior to incorporating whatever documents were before the GAO without considering whether such documents aid its review,” and finding “[a]fter due consideration” that the proffered declarations were “not necessary for an effective judicial review”); cf. *CRAssociates, Inc. v. United States*, 95 Fed. Cl. 357, 378 n.18 (2010) (Allegra, J.) (noting in a similar context “the independent nature of the protest review in this court—that the review is neither of the GAO decision nor dependent thereupon . . .”).

⁶¹ *Allied Tech. Group*, 92 Fed. Cl. at 230; see also Ralph Nash, *Protests Before the Court of Federal Claims: What Evidence Can Be Considered?*, 23 No. 8 NASH & CIBINC REP. ¶ 41 (Aug. 2009) (noting that *Axiom* “certainly didn’t give any indication of agreement” with this position).

⁶² 91 Fed. Cl. 347 (2010) (Williams, J.).

⁶³ *Id.* at 354 (citing *Int’l Res. Recovery Inc. v. United States*, 61 Fed. Cl. 38, 41-42 (2004)); accord *Orion Int’l Techs. v. United States*, 60 Fed. Cl. 338, 343 (2004).

⁶⁴ *L-3 Commc’ns Integrated Sys.*, 91 Fed. Cl. at 355 (citing *Beta Analytics Intl., Inc. v. United States*, 61 Fed. Cl. 223, 226 (2004) (indicating that the proponent also must “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.”)).

⁶⁵ See, e.g., *Madison Servs. v. United States*, 92 Fed. Cl. 120, 130 (Block, J.), *mot. for relief from judgment den. by*, 94 Fed. Cl. 501 (2010); cf. *Office Depot*, 94 Fed. Cl. at 299 (determining that the threshold for bias had not been met, and then

3. Remedies and Reliance. In *Axiom*, the Federal Circuit noted that the CFC had relied heavily on extrinsic documents. Several subsequent cases have sought to avoid the rule in *Axiom* explicitly by declaring that they did not rely on certain challenged materials.⁶⁶ The question of reliance also becomes important as CFC judges continue to elaborate *Axiom*’s limits in assessing the issues of relief and prejudice, which, by their nature, are not part of the administrative record.⁶⁷ As one commentator has noted, judges must take care with the evidence they cite and rely upon in assessing whether the agency decision was flawed versus that used for such other purposes.⁶⁸

IV. CONCLUSION. *Axiom* has perhaps raised more questions than it has answered regarding the circumstances under which supplementation of the administrative record is permissible. This lack of clarity is mirrored in other circuits, which also have struggled to provide consistent guidance on the supplementation of administrative records.⁶⁹ Acknowledging the complexity of the relevant case law, Judge Christine Miller even suggested recently that “[t]he peripheral motions practice concerning supplementation . . . could be curtailed if the decisional law uniformly recognized” reliance only on documents that (1) were considered by the contracting officer; (2) were before the contracting officer and *should* have been considered; or (3) show bias or conflict of interest.⁷⁰ Judge Miller also suggested postponing motions regarding which documents may be considered and resolving them together with the substantive motions for preliminary injunction or judgment on the administrative record, by which time the court is better positioned “to understand exactly what role the documents should have played in the challenged procurement decision.”⁷¹ While this methodology may offer a simpler process, confusion and disagreement over *Axiom*’s proper scope and application seem likely to persist until the Federal Circuit further develops decisional law on the scope and substance of supplementation necessary to promote effective judicial review.

concluding that the relevant information did not satisfy *Axiom* when offered on the merits).

⁶⁶ *FAS Support Servs. v. United States*, 93 Fed. Cl. 687, 699 (2010) (denying motion to strike supplemental document where court did not rely upon it); *Totolo/King*, 87 Fed. Cl. at 693 n.7 (“[T]his case is distinguishable from *Axiom*. . . . [T]he court is not relying on the proffered affidavit as support for this decision.”).

⁶⁷ See *PlanetSpace*, 90 Fed. Cl. at 5 (excluding from the *Axiom* regime “submissions that go to the prospective relief sought in this court”); *Ashbritt, Inc.*, 87 Fed. Cl. at 366-67 (“Evidence directed at prejudice and remedy necessarily would not be before an agency decisionmaker effecting a procurement decision such as a source selection award.”).

⁶⁸ Nash, *supra* note 61.

⁶⁹ See, e.g., *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1278-79 & nn.13-14 (D. Colo. 2010) (recognizing inconsistency among the Tenth Circuit’s holdings and noting that such confusion is not limited to that jurisdiction).

⁷⁰ *Acrow Corp. of Am. v. United States*, No. 10-682C, 2010 WL 5153440, at *1 (Fed. Cl. Dec. 17, 2010).

⁷¹ *Id.*