

# ARTICLES

## PROCUREMENT REFORM AND THE CHOICE OF FORUM IN BID PROTEST DISPUTES

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#### INTRODUCTION

To an observer unfamiliar with dispute resolution in the United States, a reading of the U.S. Code and the Code of Federal Regulations might suggest that the adjudication of complaints by disappointed seekers of government contracts is the preeminent concern of American economic regulation. This perception would reasonably flow from the elaborateness and multiplicity of devices for redress made available to disgruntled offerors. In addition to permitting review within the purchasing agency itself, the "bid protest" system provides four forums in which offerors can contest procurement decisions of federal agencies.<sup>1</sup> No other regime of federal economic regulation provides so large and diverse an array of avenues for challenging the decisions of government officials.

The complexity of the federal bid protest mechanism has inspired periodic calls to simplify the structure of the protest process and to adjust its substantive focus.<sup>2</sup> For a variety of reasons, this is an appropriate time

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1. As described below, these forums do not have identical subject matter jurisdiction. See *infra* Part I (describing and differentiating protest forums). Thus, the number of protest paths available to an offeror depends on the type of goods or services being purchased. *Id.*

2. See JOHN W. WHELAN, UNDERSTANDING FEDERAL GOVERNMENT CONTRACTS 82 (1993):

[F]ederal remedies for bid protesters are complex, sub limine politicized (one suspects strongly) and excruciatingly difficult to understand as a system except for a long-experienced or extraordinarily patient government contracts lawyer. It is in the interest of citizens, contractors, and lawyers alike that these remedies be

to reexamine bid protests. Purchasing agency officials and vendors have had over a decade's experience with the Competition in Contracting Act (CICA)<sup>3</sup> which, more than any other statute, regulation, or judicial decision, laid the foundation for the existing bid protest system.<sup>4</sup> CICA created a strong presumption that government purchasing agencies should use competitive procurement techniques that err on the side of increasing opportunities for firms to compete for contract awards.<sup>5</sup> Among other means for achieving its competition goals, CICA bolstered the bid protest mechanism and increased the ability of complaining offerors to gain access to information (through document requests and depositions of key procurement personnel) about government procurement decisionmaking.<sup>6</sup>

A second reason for reassessment is a recent outpouring of commentary dealing with bid protests. Recent years have featured the emergence of a new body of economically-oriented academic scholarship dealing with the protest process and the incentives that guide public purchasing officials in buying goods and services for government agencies.<sup>7</sup> Bid protests also

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simplified and made more expeditious.

*Id.*

3. Pub. L. No. 98-369, 98 Stat. 1175-1203 (1984) (codified in scattered sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., and 41 U.S.C.).

4. See George M. Coburn, *The New Bid Protest Remedies Created by the Competition in Contracting Act of 1984*, 19 NAT. CONT. MGMT. J. 47 (1985).

5. See 10 U.S.C. § 2304(a)(1)(A) (1994) (requiring purchasing agencies to "obtain full and open competition through the use of competitive procedures"); 10 U.S.C. § 2305(a)(1)(B)(ii) (1994) (stating that specifications in government solicitations should "include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency"); see also William B. Burnett & William E. Kovacic, *Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing*, 6 YALE J. ON REG. 249 (1989) (studying CICA and other competition-oriented procurement reforms of 1980s).

6. See 31 U.S.C. §§ 3551-3556 (1994) (codifying expanded bid protest powers of the General Accounting Office).

7. See Luis Cabral & Shane Greenstein, *Switching Costs and Bidding Parity in Government Procurement of Computer Systems*, 6 J.L. ECON. & ORG. 453 (1990); Shane Greenstein, *Procedural Rules and Procurement Regulations: Complexity Creates Trade-offs*, 9 J.L. ECON. & ORG. 159 (1993); STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* (1990); JEAN-JACQUES LAFFONT & JEAN TIROLE, *A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION* (1993); Robert C. Marshall et al., *Incentive-Based Procurement Oversight by Protest*, in *INCENTIVES IN PROCUREMENT CONTRACTING* 39 (Jim Leitzel & Jean Tirole, eds., 1993); Robert C. Marshall et al., *Curbing Agency Problems in the Procurement Process by Protest Oversight*, 25 RAND J. ECON. 297 (1994); Robert C. Marshall et al., *Litigation Settlement and Collusion*, 109 Q.J. ECON. 213 (1994); Robert C. Marshall et al., *Multiple Litigants with a Public Good Remedy*, 16 RES. L. & ECON. 151

have been the subject of extensive studies by professional associations<sup>8</sup> and blue ribbon commissions, including the Acquisition Law Advisory Panel (the "Section 800 Committee").<sup>9</sup> In addition, the National Performance Review's study of government committed the Clinton Administration to achieving broad procurement reforms that, among other effects, would give public purchasing officials more discretion and increase their ability to defeat challenges by disappointed offerors.<sup>10</sup>

A third significant circumstance is that Congress has recently given extensive consideration to procurement reform. Severe budget pressures have inspired several congressional committees to consider legislation that would reduce procurement transaction costs and induce more firms to compete for government contracts. The most important legislative reform is the Federal Acquisition Streamlining Act of 1994 (FASA),<sup>11</sup> which changed many aspects of procurement regulation, but left the essential architecture of the protest mechanism undisturbed.<sup>12</sup> The Act did not alter the existing framework of protest dispute resolution venues, nor did it change the standards applied by protest tribunals.<sup>13</sup>

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(1994); Robert C. Marshall et al., *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1 (1991); see also William P. Rogerson, *Economic Incentives and the Defense Procurement Process*, 8 J. ECON. PERSPECTIVES 65 (1994) (surveying recent economic literature on procurement issues).

8. See ABA, SECTION OF PUBLIC CONTRACT LAW, THE PROTEST EXPERIENCE UNDER THE COMPETITION IN CONTRACTING ACT (1989).

9. See ACQUISITION LAW ADVISORY PANEL, STREAMLINING DEFENSE ACQUISITION LAWS 1-203 to 1-283 (1993) [hereinafter *Section 800 Committee*].

10. See NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 26-31 (1993).

11. Pub. L. No. 103-355. For a thorough analysis of the 1994 Streamlining Act, see RAND L. ALLEN & JAMES L. GILDEA, COMPLYING WITH FASA: A COMPREHENSIVE GUIDE TO THE FEDERAL ACQUISITION STREAMLINING ACT (1995).

12. See Ralph C. Nash, Jr. & John Cibinic, Jr., *Dateline December 1994*, 8 NASH & CIBINIC REP. 177 (Dec. 1994) (in enacting FASA, "Congress never gave meaningful consideration . . . to any real reform for the resolution of award controversies. All it did was hang a few new gadgets on the clumsy old flivver."). FASA contains some provisions relevant to the protest system. For example, FASA mandates that government agencies promptly disclose to losing offerors the basis for the selection of the winning offeror. Pub. L. 103-355, § 1014 (to be codified at 10 U.S.C. § 2305(b)(5)(A)) and § 1064 (to be codified at 41 U.S.C. § 2536(e)(1)). The availability of a fuller, expeditious "debriefing" may discourage protests by firms which previously had challenged contract award decisions largely to determine why the government had rejected their proposals.

13. The Senate version of the Act (S. 1597) would have consolidated all protest jurisdiction of the federal courts in the Court of Federal Claims. This measure was dropped in conference. See Richard D. Lieberman, *Scorekeeping Bid Protests in Six Forums*, 63 Fed. Cont. Rep. (BNA) 1, 22 (Feb. 27, 1995) (Special Supplement).

The adoption of FASA signals a new congressional receptivity to proposals for restructuring the procurement process. Given the importance, and controversial role, of bid protests in government contracting, the protest dispute resolution mechanism promises to figure prominently in efforts by these and other bodies to retool the procurement system. Congress has given close consideration to measures to reform the protest mechanism,<sup>14</sup> including the elimination of the bid protest jurisdiction of the General Services Board of Contract Appeals (GSBCA). The Clinton Administration also has proposed fundamental adjustments in the structure and operation of the protest system.<sup>15</sup> The Administration's proposals would retrench the protest system by, among other measures, consolidating the protest jurisdiction of the federal courts in the CFC, adopting a single deferential standard of review for all protest forums, and generally curbing the ability of offerors to challenge procurement decisions involving computer and telecommunications equipment.<sup>16</sup>

This Article examines the existing system of bid protest forums and considers approaches for improving the protest mechanism. It treats these topics in four parts. Part I describes the existing protest apparatus. Part II discusses the rationales for relying on an expansive system of third-party monitoring and reviews criticism of this approach. Part III summarizes recent advisory commission and legislative reform proposals and considers the optimal mix of protest forums. This Part also addresses policy issues concerning the wisdom of relying on a robust protest mechanism as an oversight device in public contracting. This Article's conclusion presents recommendations for reform.

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14. See *Conferees Said Close to Agreement on Limiting Competitive Range Based on Efficiency*, 64 Fed. Cont. Rep. (BNA) 435 (Nov. 20, 1995) (reporting emergence of consensus among House and Senate Conferees to eliminate GSBCA protest authority); *ACUS Plenary Session Adopts Recommendations to Change Bid Protest Jurisdiction*, 37 GOVT. CONTRACTOR ¶ 334, at 8-10 (June 21, 1995) (discussing protest reforms contained in H.R. 1670, The Federal Acquisition Reform Act of 1995); see also William S. Cohen, *Computer Chaos: Billions Wasted Buying Federal Computer Systems* 21-24 (Oct. 12, 1994) (report by ranking minority member of the Senate Governmental Affairs Subcommittee on Oversight of Government Management recommending major changes in protest system).

15. See ALLEN & GILDEA, *supra* note 11, at app. 4 (reprinting proposed Federal Acquisition Improvement Act of 1995); Stephen Barr, *Clinton Seeks to Cut Lawsuits Related to \$200 Billion Procurement Process*, WASH. POST, Mar. 1, 1995, at A19 (describing Clinton Administration proposal to retrench bid protest system).

16. See ALLEN & GILDEA, *supra* note 11, at 15-1 to 15-13; Steven Kelman, *Statement Before the Subcommittee on Government Management of the Committee on Government Reform and Oversight of the U.S. House of Representatives* 12-20 (Feb. 28 1995) (testimony by Administrator for Federal Procurement Policy).

## I. DESCRIPTION AND COMPARISON OF EXISTING PROTEST FORUMS

### A. *Private and Public Contracting Compared*

The law of private commercial contracting provides an instructive benchmark for analyzing the public contract regulatory scheme. Assuming that the legal regime for private contracts has evolved over time to increase the efficiency of private commerce (e.g., by reducing the cost of executing transactions),<sup>17</sup> then it is important to question how and why public contract law departs from the private model.

The law of private contracts has no counterpart to the public contract protest system. Under private contract law, disappointed offerors generally have no right to attack the buyer's choice of suppliers. Private contract law usually provides no basis for recovery where the offeror contends that the buyer: (1) defined the specifications of a good or service in a manner that precluded consideration of the offeror's goods, (2) refused to consider the bids of specific offerors, (3) failed to adhere to announced selection criteria, or (4) applied its selection criteria unevenly to individual offerors. A private firm ordinarily has a contractual cause of action to challenge these forms of behavior only if it has contracted previously with the purchaser to require the purchaser to follow desired selection procedures, and the seller can show that the purchaser violated its commitment.<sup>18</sup> The private contract system relies mainly on reputation to constrain the discretion of private purchasers in dealing with potential sellers.<sup>19</sup> A private buyer cannot afford to treat suppliers of inputs too arbitrarily or unfairly, lest sellers refuse to deal with the buyer in the future.

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17. A significant body of commentary supports this assumption. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 251-55 (4th ed. 1992).

18. Cf. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965) (using promissory estoppel to impose contractual liability on franchisor that engaged in long-running negotiations with prospective franchisee); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements*, 87 COLUM. L. REV. 217, 221-43 (1987) (discussing possible applications of doctrine of promissory estoppel to establish contractual liability arising from preliminary agreements).

19. See Douglas W. Allen & Dean Lueck, *The 'Back Forty' on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L. ECON. & ORG. 366 (1992); Victor P. Goldberg, *Relational Exchange: Economics and Complex Contracts*, 23 AM. BEHAVIORAL SCIENTIST 337 (1980); Stewart Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963); Robert D. Cooter, *Market Modernization of Law* (Apr. 1995) (mimeo).

The public contracting process is strikingly different in the protection it affords actual and potential offerors of goods and services. In addition to pursuing redress within the purchasing agency, the disappointed offeror can challenge the government's conduct in one of four protest forums: the General Accounting Office (GAO), the GSBCA (for contracts involving automated data processing and telecommunications equipment), the federal district courts, and the Court of Federal Claims (CFC).<sup>20</sup> In no other area of public administration have Congress and the courts provided so robust and elaborate a system of decentralized oversight.

There are essentially four explanations for why public procurement law gives disappointed offerors expansive protest rights. One hypothesis<sup>21</sup> is that government purchasing agents lack the same incentives as their private sector counterparts to make procurement choices that maximize the interests of their principals (i.e., taxpayers).<sup>22</sup> To surpass their commercial rivals and maximize profits, private firms strive to develop monitoring and incentive schemes that press their purchasing agents to make efficient contracting choices. Some observers have concluded that no comparably effective pressure guides the purchasing decisions of public procurement authorities.<sup>23</sup> Thus, protests may serve to compensate for weaknesses in incentives by giving knowledgeable third parties the ability to challenge deviations from procurement statutes and regulations.<sup>24</sup>

A second hypothesis is that the protest process is a device by which the government signals to firms that it is a suitable partner with which to do business.<sup>25</sup> Contracting with the government requires firms to bear risks

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20. The Federal Courts Improvement Act of 1982 converted the United States Court of Claims into the United States Claims Court. Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in scattered sections of Titles 2, 5, 7, 15, 16, 19, 22, 25, 26 and 28 U.S.C.). The judges of the Claims Court were drawn from the trial division of what had been the United States Court of Claims. The 1982 Improvements Act made the judges of the Appellate Division of the Court of Claims members of the new U.S. Court of Appeals for the Federal Circuit. *Id.* Under the Federal Courts Administration Act of 1992, the Claims Court was renamed the Court of Federal Claims. Pub. L. No. 102-572, 106 Stat. 4506 (1992). On the background of the original Court of Claims, see William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387 (1968). On the creation of the Claims Court, see Philip R. Miller, *The New United States Claims Court*, 32 CLEV. ST. L. REV. 7 (1983).

21. This item discussed more fully in Part II of this Article.

22. See Marshall et al., Private Attorney General *supra* note 7, at 17.

23. See *id.* at 7-8.

24. See *id.* at 20-23 (describing benefits of protest oversight).

25. See Commission on Government Procurement, 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 37 (Dec. 1972) ("Failure to adjudicate legitimate protests may

that they generally need not assume in private commercial transactions. To be eligible to receive a government contract, firms often must make investments (e.g., creating various internal cost allocation controls) that respond to idiosyncratic government requirements and have no use in private contracting.<sup>26</sup> If government purchasing officials in fact have weaker incentives than private buyers to make efficient procurement choices, prospective offerors also may perceive a greater risk that purchasing decisions will be made arbitrarily. The protest system may serve to encourage firms to satisfy idiosyncratic government requirements by signaling that federal agencies will be required to select among offerors on the basis of well-specified price and quality factors. The protest system's remedies—especially the availability of bid and proposal costs and the power to compel government agencies to repeat a procurement—represent credible commitments that the government will indemnify offerors for government-specific transaction investments when public purchasing officials err.<sup>27</sup>

A third explanation is that public procurement regulation seeks to accomplish nonefficiency goals that ordinarily are of little concern to private firms.<sup>28</sup> One aim of the procurement system is to ensure that government purchasing agencies deal "fairly" with actual and prospective suppliers. As discussed here, the fairness objective is distinct from the signaling function mentioned above. The fairness objective stems mainly from the perception that the government's power in the economy and society imposes on public purchasing agencies a higher duty in their dealings with sellers than purely private parties bear in their commercial

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not only unjustly deprive the rightful recipients of their economic opportunities, it may lessen future business interest in bidding on Government contracts.").

26. William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POL'Y SCI. 29 (1992).

27. Lieberman, *supra* note 13, at 23. The availability of bid and proposal costs for disappointed offerors seems to serve the risk allocation function that sometimes is performed by liquidated damages clauses in private contracts. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

28. For a discussion of the procurement system's nonefficiency goals, see William E. Kovacic, *The Sorcerer's Apprentice: Public Regulation of the Weapons Acquisition Process*, in *ARMS, POLITICS, AND THE ECONOMY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 104 (Robert Higgs, ed., 1990).

relationships.<sup>29</sup> Protests serve the fairness objective by ensuring that all vendors have access to the selection process.<sup>30</sup>

A fourth explanation, also rooted in the nonefficiency goals of the procurement process, is that federal acquisition regulation should ensure that the procurement process achieves the highest possible degree of integrity.<sup>31</sup> Government agencies are thought to stand on a different footing because they use public funds. As the conservators of the public trust, government purchasing officials are said to be worthy candidates for more exacting scrutiny than their private purchasing counterparts. Seen in this light, protest controls are one part of a large body of regulatory safeguards that are deemed necessary to deter and punish ineptitude, sloth, or corruption of public purchasing officials.

### B. *The Evolution of the Bid Protest Mechanism*

A second useful perspective on the bid protest process is historical. Examining the history of the bid protest apparatus illuminates important technical features of the current protest mechanism and indicates why the current system of multiple protest dispute resolution forums came into being.

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29. See 4 REPORT ON THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 25, at 36-37.

Because many businesses make Government contracting their sole or principal source of income, the award of a particular contract may be vitally important if follow-on work is obtained. Similarly, a growing dependence on Government contracting for its source of income may cause a business to seek a contract in order to keep its plant facilities operating or its personnel employed. The Government contract, therefore, has for many businessmen a value that must be measure by more than the profit that flows directly to a company as the result of performing a specific contract.

*Id.*

30. Where Congress has expressed, by statute or informal guidance, a preference that purchasing officials give priority to specific groups of vendors, the protest process provides a tool for interested parties to press buyers to fulfill the legislature's desires. The Author is indebted to Jonathan Rose for this point.

31. See S. Kelman, *supra* note 7, at 11-15; see also B-152053, 43 Comp. Gen. 268, 272 (1963) (sustaining integrity of contract award process outweighs any pecuniary benefit that government might gain from improperly awarding a contract). Kenneth B. Weckstein & Michael K. Love, *Bid Protest System Under Review*, LEGAL TIMES, June 12, 1995, S29, S30 (Special Report) ("If those affected by the breach of the rules cannot protest in a meaningful way, the rules have no teeth, and competition is stifled. Without the constraints of bid protests, government contracts will be let based on favoritism, undisclosed evaluation factors, and bribery—as they were before the system was initiated.").

The first and oldest path of redress for a disappointed offeror is to complain to the purchasing agency.<sup>32</sup> For over a century it has been possible for offerors to submit the decisions of contracting officials for internal review by their superiors. Although protests at the agency level sometimes result in an adjustment in procurement outcomes, the traditional concern with agency protests has been that reviewing officials will experience, and ultimately succumb to, strong institutional pressures to slight legitimate protestor objections and vindicate the decisions of the agency's contracting officials.

The framework of protest oversight external to the procuring agency began to take shape in the 1920s following the creation of the GAO with its Office of the Comptroller General. Soon after the GAO was formed as part of the Budget and Accounting Act of 1921,<sup>33</sup> the Comptroller General began accepting bid protests as part of GAO's authority to settle and adjust claims by and against the United States,<sup>34</sup> and to issue advisory decisions to disbursing authorities, certifying officers, and heads of agencies concerning questions of payment by the government.<sup>35</sup> The GAO's views on specific protests were recorded in Comptroller General decisions, and procurement agencies ordinarily heeded the Comptroller's recommendations, even though many commentators questioned GAO's authority to serve as a protest forum.<sup>36</sup>

From the early 1920s until the mid-1950s, the GAO afforded the sole venue for external protest oversight. The GAO's role was magnified by a series of rulings in which the federal courts declined to accept jurisdiction over bid protests.<sup>37</sup> Punctuating this development was the Supreme

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32. See 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 25, at 36-38; see also Federal Acquisition Regulation 33.102(b)(1) (stating that "interested party wishing to protest is encouraged to seek resolution with the agency before filing a protest with GAO or GSBICA").

33. 42 Stat. 20 (1921).

34. 31 U.S.C. §§ 3702, 3526 (1994).

35. 31 U.S.C. § 3529 (1994). See 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 25, at 40-41; JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1006 (2d ed. 1986); Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 HARV. J. ON LEGIS. 399, 402-03 (1992).

36. See John Cibinic, Jr. & Jesse E. Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 372-84 (1970).

37. See *Colorado Paving Co. v. Murphy*, 78 F. 28 (8th Cir.), *appeal dismissed*, 166 U.S. 719 (1897); *O'Brien v. Carney*, 6 F. Supp. 761 (D. Mass. 1934).

Court's decision in 1940 in *Perkins v. Lukens Steel Co.*<sup>38</sup> In *Perkins*, the Court concluded that disappointed offerors lacked standing to challenge the contract award choices of federal officials.<sup>39</sup> The Court explained its ruling in a famous passage, which provides a telling glimpse of prevailing judicial views about the appropriate scope of protest oversight:

Like private individuals and businesses, the [g]overnment enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the [g]overnment may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the [g]overnment alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our [g]overnment to administration by the executive branch of [g]overnment, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the [g]overnment; it is a self-imposed restraint for violation of which the [g]overnment—but not private litigants—can complain.<sup>40</sup>

Although *Perkins* rejected the view that the procurement statutes supplied a foundation for the federal district courts to hear contract award disputes, the decision did not foreclose all paths to judicial redress.<sup>41</sup> In 1956, the Court of Claims in *Heyer Products Co. v. United States*<sup>42</sup> ruled that the Tucker Act<sup>43</sup> conferred standing on a disappointed offeror to seek damages where the government violated its implicit contractual duty to evaluate bids in good faith.<sup>44</sup> The aggrieved offeror's damage recovery was limited to the bid and proposal costs it incurred in responding to the government's solicitation of offers.<sup>45</sup>

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38. 310 U.S. 113 (1940).

39. *Perkins*, 310 U.S. at 132.

40. *Id.* at 127. On *Perkins*' significance in public contract law, see JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 515-16 (1992); Phillip M. Kannan, *Perkins v. Lukens Steel Company: Fifty-two and Counting*, 22 PUB. CONT. L.J. 463 (1993).

41. See Jeffrey M. Villet, *Equitable Jurisdiction in Government Contract 'Bid Protest' Cases: Discerning the Bounds of Equity*, 17 PUB. CONT. L.J. 152 (1987) (discussing development of federal courts' bid protest jurisdiction).

42. 140 F. Supp. 409 (Ct. Cl. 1956), *modified*, 177 F. Supp. 251 (Ct. Cl. 1959).

43. 28 U.S.C. § 1491(a) (1994).

44. See Whelan, *supra* note 2, at 73-74. The Tucker Act gives the Court of Federal Claims (the successor to the Court of Claims in *Heyer*) jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (1994).

45. *Heyer*, 140 F. Supp. at 412.

The philosophical basis for expanding federal judicial oversight of protests beyond the narrow scrutiny entertained by *Heyer* was established in the 1960s. Many commentators pointed out that the post-World War II increase in federal purchasing activity was an important manifestation of a fundamental expansion of the role of the federal government in the economy.<sup>46</sup> As the government's power to influence the economy and the fortunes of individual firms through its purchasing decisions grew, perceptions about the appropriate level of external oversight of procurement decisions changed. No longer was the government seen, as *Perkins* had envisioned it, as a buyer subject to doctrines no more restrictive than those governing contracts between private parties.<sup>47</sup> Rather, access to the procurement process increasingly was depicted as a "right" or "entitlement" to be protected by more exacting procedural safeguards.<sup>48</sup> This perspective was reinforced by the view that, because the expenditure of public funds was at issue, the government should take greater precautions to ensure that taxpayer interests were protected.<sup>49</sup>

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46. See Harold Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A. J. 35 (1966); Arthur S. Miller & W. Theodore Pierson, Jr., *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies*, 29 L. & CONTEMP. PROBS. 277 (1964); Carl F. Stover, *The Government Contract System As A Problem in Public Policy*, 32 GEO. WASH. L. REV. 701 (1964); John W. Whelan, *Law of Public Administration: Need for Legal Study*, 53 GEO. L.J. 953 (1965); John W. Whelan & J.T. Phillips, *Government Contracts: Emphasis on Government*, 29 L. & CONTEMP. PROBS. 315 (1964).

47. *Heyer*, 140 F. Supp. at 412.

48. See *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (reviewing government agency's decision to debar contractor, and observing that *Perkins* "cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts."); cf. *Related Indus., Inc. v. United States*, 2 Cl. Ct. 517, 526 (1983) (discussing application of federal regulations controlling suspension and debarment of offerors, and stating that "the due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of property or the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response.").

49. Notwithstanding *Perkins*' vision of the government as enjoying the same prerogatives as other buyers, some cases extending back to the late 19th century had expressed the view that the expenditure of public funds warranted stronger safeguards against misconduct by public purchasing agencies or their suppliers. See *McMullen v. Hoffman*, 174 U.S. 639, 651 (1899) ("Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids.").

Judicial recognition of these trends in responding to bid protest claims came soon afterward. In 1970, in *Scanwell Laboratories, Inc. v. Shaffer*,<sup>50</sup> the U.S. Court of Appeals for the District of Columbia Circuit dramatically accelerated *Heyer's* tentative extension of the judiciary's protest oversight role. *Scanwell* held that Section 10 of the Administrative Procedure Act (APA)<sup>51</sup> granted disappointed offerors standing to challenge a contract award on the ground that the procuring agency violated statutory or procedural requirements.<sup>52</sup> The APA, which was adopted in 1946, postdated *Perkins* (1940) and supplied an important statutory foundation for the D.C. Circuit's decision.<sup>53</sup> *Scanwell* also displayed a different view of the potential value of protests. The court's conception of protests departed sharply from the perspective of *Perkins*, which emphasized the potential for protests to impose "vexatious and dilatory restraints" on the functioning of the procurement system.<sup>54</sup> The D.C. Circuit said that aggrieved offerors "are the people who will really have the incentive to bring suit" to force "agencies [to] follow the regulations which control government contracting" and that "[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity."<sup>55</sup>

The remaining ingredients of the modern protest system were supplied in the 1980s through legislation specifically designed to modify the procurement process. In the Federal Courts Improvement Act of 1982 (FCIA),<sup>56</sup> Congress gave the Claims Court authority to grant equitable relief in pre-award bid protest suits.<sup>57</sup> In the Competition in Contracting

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50. 424 F.2d 859 (D.C. Cir. 1970).

51. 5 U.S.C. § 702 (1994).

52. *Scanwell*, 424 F.2d at 868-69.

53. *Id.* at 865.

54. *Perkins*, 310 U.S. at 127.

55. *Scanwell*, 424 F.2d at 864. *Scanwell* was one element of a broader judicial trend in the 1960s and early 1970s to increase the "fairness" of government behavior by requiring government agencies to satisfy more rigorous procedures before they could withhold a government-created benefit or privilege. See *Perry v. Sindermann*, 408 U.S. 593, 601-03 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); cf. *M. Steinthal & Co. v. Seaman*, 455 F.2d 1289, 1306 n.50 (D.C. Cir. 1971) ("The application of the rule of law to government procurement is an extension of trends established before *Scanwell* and is responsive to the increasing significance of government procurement in the economic life of our citizens.").

56. Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

57. 28 U.S.C. § 1491(a)(3) (1994).

Act of 1984,<sup>58</sup> Congress codified and augmented the GAO's power to resolve bid protests and established, for a three-year trial period, bid protest jurisdiction in the GSBCA for acquisitions of automatic data processing equipment (ADPE) and telecommunications equipment and services.<sup>59</sup> Finally, in the Paperwork Reduction Reauthorization Act of 1986,<sup>60</sup> Congress made permanent the GSBCA's bid protest jurisdiction.<sup>61</sup>

In the legislative records surrounding the enactment of modern bid protest reforms, and in judicial opinions (such as *Scanwell*) that recognized an expanded jurisdiction for the federal courts to entertain protests, one finds little empirical basis for assessing the appropriate level of protest oversight. No legislatively or judicially mandated expansion of the protest process has been based on a systematic empirical analysis of whether government purchasing officials exercised their discretion to make inferior procurement choices more often than their private sector counterparts.

### C. Protest Forums Compared

There are currently five dispute resolution forums for overseeing challenges to perceived deficiencies in the processes by which federal agencies solicit offers and award contracts: the purchasing agency, the GAO, the GSBCA, the CFC, and the federal district courts.<sup>62</sup> Three of these paths—protesting to the purchasing agency, the GAO, and the GSBCA—are commonly referred to as “administrative” dispute mechanisms, and the remaining two—filing a complaint with the CFC or with a district court—are called the “judicial” protest mechanisms.<sup>63</sup> The

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58. Pub. L. No. 98-369, 98 Stat. 1175-1203 (1984) (codified in scattered sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., and 41 U.S.C.).

59. 40 U.S.C. § 759(f) (1988 & Supp. V 1993).

60. Pub. L. No. 99-500, 100 Stat. 1783-335 (1986).

61. Pub. L. Nos. 99-500, 99-591, §§ 821-25, 831, H.R.J. RES. 738, at 341-45, 99th Cong., 2d Sess. (1986). The decision to create a distinctive protest path (GSBCA) for procurements involving computers and telecommunications equipment reflected congressional dissatisfaction with the GAO's handling of ADPE protests. The CICA's legislative history also displayed the view that the complexity of ADPE and telecommunications equipment procurement had overpowered existing protest procedures and made the government more prone to err in making acquisition choices and addressing protests. See H.R. REP. NO. 98-1157, 98th Cong., 2d Sess. 26 (1984); H.R. REP. NO. 98-861, 98th Cong., 2d Sess. 1430 (1984).

62. The United States Postal Service (USPS) also has its own protest dispute resolution process. The USPS protest system is not treated in this Article.

63. The GSBCA is the only board of contract appeals with authority to issue relief involving bid protest disputes. See Whelan, *supra* note 2, at 75; *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983) (holding that boards of contract appeals lack power

discussion below summarizes differences among these forums.<sup>64</sup> The summary does not examine intra-agency protest methods but instead focuses on the four tribunals (GAO, GSBICA, CFC, and the district courts) that rely on adjudicatory or quasi-adjudicatory processes to resolve contract award disputes.<sup>65</sup>

### *1. Subject Matter Jurisdiction*

The GAO, the CFC, and the district courts have jurisdiction over bid protest disputes without regard to the subject matter of the procurement at issue. The GSBICA's jurisdiction is limited to automatic data processing equipment (ADPE) and telecommunications equipment.<sup>66</sup> Where the GSBICA's jurisdiction overlaps with that of the other three tribunals, claimants cannot maintain a suit before both the GSBICA and another forum; a decision to sue before the GSBICA precludes the claimant from

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to award bid and proposal costs to disappointed offerors).

64. There is a large body of literature describing the characteristics of individual protest venues. Useful treatments include *Section 800 Committee, supra* note 9; SECTION OF PUBLIC CONTRACT LAW, REPORT OF THE AMERICAN BAR ASSOCIATION PUBLIC CONTRACT LAW SECTION BID PROTEST COMMITTEE COURTS SUBCOMMITTEE PROJECT (1991); ABA SECTION OF PUBLIC CONTRACT LAW, PROTEST EXPERIENCE *supra* note 8; CIBINIC & NASH, *supra* note 35, at 1005-46; Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 PUB. CONT. L.J. 1 (1992); David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533 (1991); Jerome S. Gabig, *A Primer on Federal Information Systems Acquisitions: First Part of a Two-Part Article*, 17 PUB. CONT. L.J. 31 (1987); Phillip M. Kannan, *Jurisdiction of District Courts in Cases Involving Government Contracts*, 21 PUB. CONT. L.J. 416 (1992); Villet, *supra* note 41; Richard J. Webber, *Bid Protests and Agency Discretion: Where and Why do the GSBICA and GAO Part Company?*, 18 PUB. CONT. L.J. 1 (1988).

65. This is not to suggest that agency-level protest resolution mechanisms are unimportant. A number of observers have suggested that improvements in agency-level protest procedures could discourage recourse to external protest tribunals. See 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 25, at 37-38.

66. Under the Brooks Act, the General Services Administration (GSA) alone has authority to buy computer and telecommunications equipment and services for federal agencies. Pub. L. No. 89-306, 79 Stat. 1127 (1965). The GSA may procure such equipment directly or grant procurement authority back to individual agencies. The GSA does not have responsibility for Department of Defense ADPE applications for certain intelligence and cryptological functions. 10 U.S.C. § 2315 (1994); 40 U.S.C. § 759(a)(3)(C) (1988 & Supp. V 1993); *Cyberchron Corp. v. United States*, 867 F.2d 1407, 1409 (Fed. Cir. 1989). The GSBICA's bid protest jurisdiction is limited to ADPE procurements undertaken by authority of the Brooks Act. An issue of current debate, treated more fully in Part III, is whether Congress should expand the GSBICA's jurisdiction to encompass all federal purchasing activities, regardless of the subject matter of the procurement.

seeking relief from another forum.<sup>67</sup> Nor may a protester maintain a claim simultaneously in the CFC and the district court.<sup>68</sup> Where the claimant seeks relief before the GAO and either the CFC or the district courts, the CFC and the district courts often will allow the GAO to proceed first and conduct their own review after the GAO has issued an opinion.<sup>69</sup>

## 2. *Standing Requirements*

Though stated in different terms, all four of the adjudicatory forums seek to extend standing to claimants alleging defects in the contract formation process. Consistent with the theory underpinning the *Heyer* decision, standing in the CFC is available to all persons claiming a breach of an implied contract that the government will consider their offers in good faith. Standing in the district courts is delimited by the APA requirement that the claimant show that it has been adversely affected or aggrieved by agency action.<sup>70</sup> Both the GAO and the GSBICA are available to "interested parties."<sup>71</sup>

## 3. *Standard and Scope of Review*

Protest forums have used two distinct screens to determine the claimant's entitlement to relief. The first is the standard of review by which the protest tribunal will evaluate the agency's decisionmaking. Each tribunal requires the claimant to prove that the purchasing agency has violated a statute or regulation, or has provided no rational basis for its exercise of

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67. 40 U.S.C. § 759(f)(1) (1988 & Supp. V 1993). The GAO must dismiss any suit that is also pending with the GSBICA. 31 U.S.C. § 3552 (1994).

68. 28 U.S.C. § 1500 (1994).

69. The GAO ordinarily refuses to consider a protest that is being litigated concurrently before the CFC or a district court. See *Meisel Rohrbau GmbH & Co. Kg., Request for Recons.*, B-228152.3, April 18, 1988, 88-1 CPD ¶ 371. Nor will GAO consider any matter in which a court has decided the issues on the merits. However, GAO will consider a protest and issue a decision upon the request of the CFC or a district court when a protest has been filed with one of the latter tribunals. 4 C.F.R. § 21.3(m)(11) (1994). In a number of cases, the district courts have used the doctrine of primary jurisdiction to refer a protest to the GAO and have enjoined the award or performance of a contract pending receipt of the Comptroller General's views. One example is *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1313-16 (D.C. Cir. 1971).

70. 5 U.S.C. § 702 (1994). See also 28 U.S.C. § 1346(a)(2) (1994) (vesting district courts with jurisdiction over monetary claims for \$10,000 or less involving alleged breaches of government's express or implied contracts).

71. 31 U.S.C. § 3551 (1994); 40 U.S.C. § 759(f)(9) (1988 & Supp. V. 1993).

discretionary procurement authority.<sup>72</sup> However, the decisions of the CFC, GAO, and district courts tend to describe their standard of review more restrictively than does the GSBCA in its opinions, suggesting that the former three tribunals adopt a more permissive approach in reviewing agency action.<sup>73</sup>

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72. See 5 U.S.C. § 706(2) (1994) (APA standard applicable to district court *Scanwell* actions); 28 U.S.C. § 1491(a)(3) (1994) (codifying FCIA standard applicable to CFC protests; directing that, in exercising its pre-award jurisdiction, CFC “shall give due regard to the interests of national defense and national security.”); 31 U.S.C. § 3554 (1994) (GAO standard); 40 U.S.C. § 759(f)(1) and (f)(5)(B) (1988 & Supp. V 1993) (GSBCA standard); see also *Sea-Land Service, Inc. v. Brown*, 600 F.2d 429, 434 (3d Cir. 1979) (holding that contract award decisions should not be disturbed in *Scanwell* suits unless “there [is] no rational basis for the agency’s decision” and “[a] showing of clear illegality is an appropriate standard to impose on an aggrieved bidder who seeks judicial relief.”); *NKF Eng’g, Inc. v. United States*, 805 F.2d 372, 376 (Fed. Cir. 1986) (holding that in actions before Claims Court, breach of government’s implied contract to treat all bids fairly and honestly occurs “if the contracting agency acts in an arbitrary and capricious, i.e., irrational or unreasonable, manner in rejecting the bid.”).

73. The conception of a narrow standard of review is evident in decisions such as *Professional Bldg. Concepts, Inc. v. City of Central Falls*, 974 F.2d 1, 4 (1st Cir. 1992) (rejecting protest where plaintiff “failed to demonstrate that the challenged procurement action either had no rational basis or constituted a clear and prejudicial violation of applicable statutes and regulations.”); *Stay, Inc. v. Cheney*, 940 F.2d 1457, 1463 (11th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992) (emphasizing “the deferential standard of review” exercised by federal courts in *Scanwell* protest actions; endorsing GAO decision to reject protest where purchasing agency failed to comply with regulatory requirement and the agency’s noncompliance was not prejudicial); *United States v. John C. Grimberg, Co., Inc.*, 702 F.2d 1362, 1372 (Fed. Cir. 1983) (asserting that Claims Court should use its protest jurisdiction to interfere with purchasing agency decisions “only in extremely limited circumstances.”); *CACI Field Servs., Inc. v. United States*, 13 Cl. Ct. 718, 725-26 (1987) *aff’d* 854 F.2d 464 (Fed. Cir. 1988) (observing that the standard of review exercised by the Claims Court in bid protest disputes “is extremely limited” and noting that protesters bear “heavy burden of proof” in establishing their entitlement to relief); *M. Steintal & Co., Inc.*, 455 F.2d at 1301 (emphasizing duty of district courts in *Scanwell* actions “to exercise with restraint the power to enjoin a procurement”). By contrast, in its first bid protest decision, the GSBCA stated that “we decline to impose upon protesters the ‘heavy burden’ to show a ‘clear and prejudicial’ violation of law.” *Lanier Business Prods., Inc.*, GSBCA No. 7702-P, 85-2 BCA ¶ 18,033, at 90,496. See also Alexander J. Brittin, *The Comptroller General’s Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636 (1993) (contrasting GAO’s requirement that protesters demonstrate that purchasing agency violations of procurement laws were “prejudicial” with GSBCA’s refusal to sustain protests where agency’s errors were *de minimis*); cf. *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992) (holding that minimal errors in procurement do not compel Board to grant protest).

While all tribunals focus on the existence of a statutory or regulatory violation or arbitrary agency conduct, there is some variation in the *scope* of the protest tribunal's examination into the decisionmaking processes of the purchasing agency. Three forums (the GAO, the CFC, and the district courts) engage in a comparatively narrow inquiry and impose a relatively heavier burden of proof on the protestor. In these forums, the claimant must establish a violation and its entitlement to relief by "clear and convincing evidence" (CFC),<sup>74</sup> by a preponderance of the evidence (district courts), or must overcome a presumption of correctness of the agency's action (GAO).<sup>75</sup> Scrutiny of the purchasing agency's behavior before the federal courts and the GAO ordinarily is limited to the full administrative record that was before the agency decisionmaker at the time the decision was made.<sup>76</sup> By contrast, the GSBCA assigns no presumption of correctness to the agency's actions and engages in a *de novo* determination of the relevant facts, including consideration of information that goes beyond facts contained in the agency's record.<sup>77</sup>

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74. See *Shields Enters. v. United States*, 28 Fed. Cl. 615, 622 (1993) (noting that protester's recovery of bid preparation costs "may be had only upon showing of 'clear and convincing proof' that award of the contract to another was arbitrary and capricious").

75. See *Science Applications Int'l Corp.*, B-238136.2, June 1, 1990, 90-1 CPD ¶ 517.

76. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (review by a federal district court of agency action under the Administrative Procedure Act must be based on "the full administrative record that was before the [agent] at the time he made his decision").

77. See 40 U.S.C. § 759(f)(1) (1988 & Supp. V 1993) (stating that GSBCA protests are "conducted under the standard applicable to review of contracting officer's final decisions by boards of contract appeals"); see also *Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1046-47 (Fed. Cir. 1994) (holding that in protest matters, GSBCA "is not limited to the findings made by the agency or contained in the initial decision . . . Under *de novo* review, a board may consider the analysis developed by the agency, . . . or produce and consider its own analysis."); *Lockheed Eng'g & Sciences Co.*, 94-2 BCA ¶ 26,885, at 133,821 ("We . . . are not ordinarily concerned with the paper trail that the agency created; we make our own record."); *Lanier Business Prods., Inc.*, 85-2 BCA ¶ 18,033, at 90,495 ("[p]resumptions of agency correctness as sometimes applied at the GAO in the course of deciding protests cannot be permitted here"); PROTEST EXPERIENCE, *supra* note 8, at 37 ("Under *de novo* review, the GSBCA is not bound by the findings of the contracting officer, even if supported by the evidence, and can make independent findings of fact, drawing its own conclusions from the evidence. . . *de novo* review permits the introduction of new facts and/or legal theories in support of the protest."); cf. Richard J. Webber, *Bid Protests and Agency Discretion: Where and Why do the GSBCA and GAO Part Company?* 18 PUB. CONT. L.J. 1, 3-7 (1988) (finding little difference between the level of scrutiny applied by the GAO and the GSBCA).

#### 4. Procedural Features

Three of the forums provide claimants with relatively expansive tools for collecting and presenting evidence concerning alleged deviations from procurement statutes and regulations. Protestors proceeding before the CFC, the district courts, and the GSBCA can avail themselves of depositions, interrogatories, requests for admissions, and requests for the production of documents. Each of these tribunals also will issue protective orders by which counsel for the protestor and outside consultants can examine sensitive source selection information, including the winning offeror's proposal.<sup>78</sup> In addition, all three forums provide for the examination and cross-examination of witnesses.

For most of its history as a protest tribunal, the GAO offered the weakest tools for claimants to collect and present relevant data. The GAO relied almost entirely on the submission of written reports by the parties and substantially deferred to the agency's version of the facts.<sup>79</sup> The GAO amended its protest rules in 1988 and again in 1992 to increase the protester's ability to gather data about the agency's decisionmaking processes. Although the GAO might dispute such an interpretation, these adjustments seem consistent with the hypothesis that competition from the GSBCA spurred the GAO to change its procedures. Under its new rules, the GAO has begun to compel the production of documents, to allow examination of sensitive data under protective orders, and to conduct evidentiary hearings.<sup>80</sup> These changes have increased the ability of parties to unearth facts needed to show that the agency acted unreasonably.

There is an evident relationship between the breadth of evidence-gathering and presentation procedures, and the cost of pursuing a protest. Expansive data-collection—particularly the taking of depositions—can be costly, and recourse to the full-blown procedures of the CFC, GSBCA, the district courts, and (more recently) the GAO greatly increases the cost of pursuing a protest. Although it now provides a broader array of discovery tools, the GAO continues to offer an austere protest procedure that allows the Comptroller General to decide the protest chiefly on the basis of written

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78. See Frank K. Peterson, *In-House Counsel and Protective Orders in Bid Protests*, 21 PUB. CONT. L.J. 53 (1991) (discussing availability of protective orders in GAO and GSBCA protests).

79. Snow White Cleaners & Linen Supply, Inc., B-225636, March 26, 1987, 87-1 CPD ¶ 347.

80. See William L. Walsh, Jr. & Thomas J. Madden, *Due Process for Bid Protesters: Are the 1991 GAO Rules Working?*, 2 ACQUISITION ISSUES 1 (Mar. 1992).

presentations by the parties.<sup>81</sup> In its basic features, the GAO's protest process might be said to resemble a form of alternative dispute resolution. By virtue of this austere dispute resolution alternative, the GAO provides the protest option with the lowest litigation costs.

All of the protest forums provide procedures for resolving protest disputes relatively swiftly. Before the CFC and district courts, a claimant can press protests through a motion for a temporary restraining order and a preliminary injunction. Both tribunals use accelerated procedures for deciding such motions. The GAO must decide protests within ninety working days from the filing of protests,<sup>82</sup> and the GSBICA must issue its decisions within forty-five days of the protest. Both agencies routinely dispose of protests within the specified deadlines.

### 5. Remedies

The protest tribunals vary significantly in the remedies afforded claimants. The choice of forum affects the availability of equitable relief, monetary relief, and attorneys' fees. Each of these features of the remedial process is discussed below.

The FCIA authorizes the CFC to order equitable relief in the form of an injunction or a declaratory judgment if the claimant files suit before the agency awards the contract.<sup>83</sup> As interpreted by the Federal Circuit, the FCIA did not give the CFC power to issue post-award equitable relief.<sup>84</sup> The murky language of the FCIA has created confusion about the equitable relief powers of the district courts in bid protest disputes.<sup>85</sup> Courts have uniformly concluded that the FCIA did not intend to divest the district

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81. 4 C.F.R. § 21.1(c)(1)-(6) (1994).

82. Protesters before the GAO also can avail themselves of an "express option" that provides for a decision by the Comptroller General in 45 days. 4 C.F.R. § 21.8(b) (1994).

83. 28 U.S.C. § 1491(a)(3) (1994); see *United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362 (Fed. Cir. 1983) (en banc) (concluding that Congress, in enacting FCIA, intended to limit exercise of Claims Court's equitable powers to claims brought to court before contract is awarded).

84. See *Grimberg*, 702 F.2d at 1366-68.

85. The authority of the district courts to award injunctive and declaratory relief generally is codified in 10 U.S.C. §§ 2201-2202 (1994). On the uncertainties created by the FCIA and *Grimberg* about the roles of the CFC and the district courts, see Joel R. Feidelman & Josephine L. Ursini, *Contract Formation Jurisdiction of the United States Claims Court*, 32 CLEV. ST. L. REV. 41 (1983); John S. Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests*, 16 PUB. CONT. L.J. 47 (1986); Steven R. Sumison, *Injunctive Relief in the United States Claims Court: Does a Bid Protester Have Standing?*, 1985 B.Y.U. L. REV. 803 (1985); Villet, *supra* note 38.

courts of power to grant post-award equitable relief.<sup>86</sup> However, there is a division of authority among the courts of appeals about whether the district courts retain power to issue pre-award injunctions and declaratory judgments.<sup>87</sup>

A claimant who files a protest with the GAO or the GSBCA within ten days of the contract award is entitled to an automatic stay of performance.<sup>88</sup> The availability of an automatic stay stands in sharp contrast to the comparatively demanding standards that a claimant must satisfy to obtain a preliminary injunction before the CFC or a district court.<sup>89</sup> In protests filed with the GAO, the purchasing agency may decide unilaterally to proceed with the procurement if it determines that urgent and compelling circumstances warrant that performance continue.<sup>90</sup> For GSBCA protests,

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86. *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983); *John C. Grimberg Co.*, 702 F.2d at 1362.

87. *Compare In re Smith & Wesson*, 757 F.2d 431, 435 (1st Cir. 1985) (FCIA did not divest district courts of jurisdiction in pre-award bid protest disputes); *Coco Bros., Inc. v. Pierce*, 741 F.2d 675, 678-79 (3d Cir. 1984) (concluding that Congress did not intend in FCIA to divest district courts of jurisdiction in pre-award bid protest disputes) *with* *J.P. Francis & Assocs., Inc. v. United States*, 902 F.2d 740, 742 (9th Cir. 1990) (FCIA divested district courts of pre-award jurisdiction); *Rex Systems, Inc. v. Holiday*, 814 F.2d 994, 997-98 (4th Cir. 1987) (same).

88. *See* 31 U.S.C. § 3553(d)(1) (1994) (providing for GAO post-award automatic stay). CICA also created an automatic stay for pre-award protests. After receiving notice from GAO of a pre-award protest, the purchasing agency must refrain from making an award until the protest is resolved. *See* 31 U.S.C. § 3553(c)(1) (1994). An automatic suspension of the purchasing agency's procurement authority also is available for pre-award protests filed with the GSBCA. *See* 40 U.S.C. § 759(f)(2) (1988 & Supp. V 1993).

89. *See* *We Care, Inc. v. Ultra-Mark, Int'l Corp.*, 930 F.2d 1567, 1570 (Fed. Cir. 1991) (in action for preliminary injunction in pre-award protest, court must consider degree of irreparable harm to plaintiff, degree of harm to party being enjoined, impact of injunction on public policy considerations, and likelihood of plaintiff's success on merits); *see also* Eric L. Lipman & James M. Read, *Summer to Summer: Recent Government Contracts Cases before the United States Claims Court*, 22 PUB. CONT. L.J. 1, 11-12 (1992) (discussing standard for obtaining preliminary injunction before CFC).

90. CICA permits the purchasing agency to override a GAO automatic stay. The district courts are available to review agency decisions to override the automatic stay pursuant to GAO protests. *See* Michael A. Riordan, *Federal Court Actions Challenging Agency Overrides of the CICA Stay*, 23 PUB. CONT. L.J. 397 (1994). Upon a showing of urgent and compelling need, GSBCA may lift the suspension of delegated procurement authority and allow the agency to proceed with performance in GSBCA protests. Fed. Acquisition Reg. 33.105(d); *see* *Advanced Concepts Inc. v. Department of Energy*, GSBCA No. 11707-P, February 25, 1992, 92-2 BCA ¶ 24,846 (refusing to suspend agency's delegated procurement authority where need for continued performance of computer services contract was urgent and compelling).

the suspension is mandatory unless the purchasing agency first persuades the Board that urgent and compelling circumstances dictate that performance proceed.<sup>91</sup>

The GAO can recommend that the purchasing agency repeat a procurement, terminate an existing award, or award the contract to another party. The GAO's views are advisory only. The purchasing agency must report to the GAO within sixty days after receiving the GAO's recommendations if the agency has not complied fully.<sup>92</sup> The GSBICA can order any of these outcomes, and has the power to suspend, revoke, or revise the purchasing agency's procurement authority.<sup>93</sup>

The CFC and the GSBICA can order that the government pay the claimant's bid and proposal costs, and the GAO can recommend that such costs be reimbursed.<sup>94</sup> The district courts also can award bid and proposal costs, but only up to \$10,000.<sup>95</sup> Because recovery of damages is capped at \$10,000, protest suits for damages before the district courts are extremely rare.

Under CICA, the GSBICA can order the payment of the attorneys' fees incurred by prevailing protesters,<sup>96</sup> and the GAO can recommend the payment of such fees.<sup>97</sup> The CFC and the district courts lack power to grant such relief. The availability of attorneys' fees for successful protests before the GAO and the GSBICA has been an important factor accounting for the popularity of these forums. The attorneys' fees provisions also have spurred the creation of a substantial practice area for the private bar.

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91. 40 U.S.C. § 759(f)(3)(B) (1988 & Supp. V 1993). See Steven W. Feldman, *Interim Suspension Authority of the General Services Board of Contract Appeals in Automatic Data Processing Protests: Legal and Practical Considerations*, 17 PUB. CONT. L.J. 1 (1987) (discussing GSBICA's automatic stay powers in bid protests).

92. In January of each year, the GAO must report to Congress about all instances in which agencies have declined to follow its recommendations. 31 U.S.C. § 3554(e)(2) (1994). Owing to the GAO's close relationship to Congress, agencies do not casually decide to ignore the Comptroller General's views.

93. 40 U.S.C. § 759(f)(5)(B) (1988 & Supp. V 1993).

94. See 4 C.F.R. § 21.6(d)(2) (1994) (granting GAO authority to award bid and proposal costs); *AT&T Technologies, Inc. v. United States*, 18 Cl. Ct. 315 (1989) (awarding bid and proposal costs).

95. 28 U.S.C. § 1346(a)(2) (1994).

96. 40 U.S.C. § 759(f)(5)(C) (1988 & Supp. V 1993).

97. 4 C.F.R. § 21.6(d)(1) (1994) (granting GAO authority to award attorney's fees and costs of filing protest).

## 6. Settlements

The parties to a protest often settle contract formation disputes and voluntarily dismiss protests. Settlements typically do not involve oversight by or require the approval of the tribunal with which the protest has been filed. Some observers argue that the lack of authority for protest tribunals to review settlement terms permits purchasing agencies to subvert the protest system's aims by paying protesters "Fedmail" to abandon challenges to procurement decisions that undermine taxpayer interests.<sup>98</sup>

## 7. Appeals

Appeals from the decisions of the CFC and the GSBCA must be taken to the U.S. Court of Appeals for the Federal Circuit.<sup>99</sup> Appeals from protest-related decisions of the district courts are taken to the court of appeals for the circuit in which the district court sits. There is no direct path of appeal from GAO decisions. Protestors who file claims with the GAO retain the right to file subsequent suits before the CFC or the district courts.<sup>100</sup> In reviewing protests previously considered by the GAO, the CFC and the district courts have been admonished by appellate courts to accord substantial deference to the Comptroller General's views.<sup>101</sup>

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98. See Marshall et al., *Multiple Litigants With a Public Good Remedy*, *supra* note 7.

99. The Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982. Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C. and other titles). The Federal Circuit succeeded to major elements of the jurisdiction of the former U.S. Court of Claims. See *supra* note 20 (describing evolution of CFC). The judges of the new Federal Circuit were drawn from the former Court of Claims and the U.S. Court of Customs & Patent Appeals. *Id.*

100. See BID PROTEST EXPERIENCE, *supra* note 8, at 53-54; see also McCarty Corp. v. United States, 499 F.2d 633 (Ct. Cl. 1974) (awarding bid and proposal costs to protestor which unsuccessfully sought GAO opinion recommending termination of contested contract).

101. See, e.g., Honeywell, Inc. v. United States, 870 F.2d 644, 647-48 (Fed. Cir. 1989); *M. Steinthal & Co. Inc.*, 455 F.2d at 1289, 1304-05 (D.C. Cir. 1971); *John Reiner & Co. v. United States*, 325 F.2d 438, 442 (Ct. Cl. 1963) *cert. denied*, 377 U.S. 391 (1964); *cf. Irvin Indus. Canada, Ltd. v. United States Air Force*, 924 F.2d 1068, 1077 n.88 (D.C. Cir. 1990) (stating "We . . . regard the assessment of the GAO as an expert opinion, which we should prudently consider but to which we have no obligation to defer." [citation omitted]).

*D. Substantive Competence of Protest Tribunals  
and Trends in Use and Performance Over Time*

Measured by their grasp of government contract law, the GAO and the GSBICA are generally seen as the most competent of the protest forums. The judges of the CFC hear more government contracts cases than the typical federal district judge and have more familiarity with government procurement issues.<sup>102</sup> Thus, the GAO and GSBICA are overwhelmingly the forums of choice for protesters, with the CFC and district courts ranking third and fourth, respectively. As compiled by the Section 800 Committee, the Table below reliably indicates the relative frequency of use of these forums:<sup>103</sup>

Filings of Bid Protests 1988-1991			
Year	GAO	GSBICA	CFC
1988	2,633	215	8
1989	2,673	283	23
1990	2,489	268	19
1991	2,887	250	17

The Section 800 panel did not compile statistics on filings in the district courts. A LEXIS/WESTLAW search of reported decisions in the 1988-1991 period suggests that filings in the district courts are likely to be fewer than twenty-five cases per year. A separate survey of district court protests for Fiscal Years 1992 through 1994 identified a total of forty-two decisions in that period.<sup>104</sup> Assuming a rough correlation between inputs (filings) and outputs (decisions), these data are consistent with my own findings for the 1988-1991 period.<sup>105</sup> On the whole, it seems safe to

102. As discussed below in Part III, it is difficult to discern from the published opinions of the CFC and the district courts a difference in analytical techniques or sophistication.

103. *Section 800 Committee, supra* note 9 at 1-206.

104. *See Lieberman, supra* note 13, at 9. The Section 800 Committee reported that the Civil Division of the Department of Justice reviews "the vast majority of district court protests" and estimates the number of protests reviewed each year as "far fewer than 100." *Section 800 Committee Report, supra* note 9 at 1-206 n.20.

105. Not all case filings result in observable events that are reported in judicial opinions or trade press accounts of government contracts litigation. Consequently, a search of

assume that protesters turn to the federal district courts roughly as often as—or perhaps slightly more often than—the CFC. An examination of the types of cases that have been filed in the CFC and the district courts suggests that litigants usually resort to these forums when the subject matter does not involve ADPE or telecommunications equipment (thus precluding recourse to the GSBCA), or where there are doubts about the GAO's authority or willingness to review a procurement decision.

In ADPE and telecommunications equipment procurements, the GSBCA has eclipsed the GAO as the preeminent protest forum.<sup>106</sup> The relative attractiveness of the GSBCA to protesters has resulted chiefly from the Board's more critical attitude toward government purchasing agencies and the superior tools it affords protesters to obtain information about the government's decisionmaking processes. Outcomes in protests before the GAO and the GSBCA, respectively, reflect the Board's greater appeal to offerors. Protesters generally have enjoyed a higher success rate before the GSBCA.<sup>107</sup> In recent years the disparity in success rates in protests decided by the GSBCA and the GAO has narrowed.<sup>108</sup> A major reason for the shrinking of the difference between GAO and GSBCA outcomes has been some degree of convergence in the standard and scope of review applied by these bodies. This convergence has flowed mainly from a weakening of the GAO's presumption of agency correctness and a greater hesitation by the GSBCA in recent years to interfere with purchasing agency choices. The expansion of discovery tools available from the GAO also has increased the ability of protesters to obtain information suggesting procurement flaws and to prevail before that body.

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electronic and manual data bases is likely to understate the amount of filings. The magnitude of such an understatement for protests in the district courts is impossible to assess, as the data collection system by which the Administrative Office of the U.S. Courts monitors trends in case filings does not track bid protests.

106. See Webber, *supra* note 72, at 22.

107. See Lieberman, *supra* note 13, at 5 (comparing outcomes at the GAO, the GSBCA, the CFC, the federal district courts, and the United States Postal Service); Richard D. Lieberman, *Winning Bid Protests in Three Forums: A Statistical Analysis at the U.S. Postal Service, the GAO and the GSBCA*, 61 FED. CONT. REP. 1, 5-6 (Jan. 31, 1994) (Special Supp.) (reviewing protest success rates at the GAO and GSBCA); Webber, *supra* note 72, at 22 (comparing GSBCA to GAO, noting that "the Board offers the protester a greater chance of success where the subject matter of the procurement is ADP equipment or services").

108. See Lieberman, *supra* note 13, at 5.

## II. THIRD-PARTY MONITORING

The engine of the modern bid protest mechanism is third-party monitoring.<sup>109</sup> Rather than depend on government agencies to monitor compliance with contract formation rules, (for example, by using auditors), the protest process delegates enforcement authority to third parties—namely, potential or actual offerors—who have a stake in the procurement outcome. Not only does the protest mechanism give interested private parties a central enforcement role, but it also supplies strong incentives to exercise the enforcement function. As indicated above, the protest machinery provides powerful remedies, including the issuance of an injunction to cease performance of a challenged contract and the award of attorneys fees to protestors who obtain relief.

### A. Rationales for Robust Third-Party Monitoring

Three basic theoretical rationales for establishing robust mechanisms support monitoring the contract award decisions of government purchasing officials.<sup>110</sup> This segment of the Article presents these rationales and then describes why some observers conclude that monitoring by interested third parties is the superior mechanism for protest oversight.<sup>111</sup>

The first rationale for expansive monitoring is that government purchasing officials have weaker incentives to make optimal procurement choices than their private sector counterparts.<sup>112</sup> Thus, powerful oversight tools are needed to ensure that government officials make appropriate procurement decisions. In terms commonly used in modern academic commentary about protests, a robust protest system helps cure principal-agent problems that arise in the public procurement system.<sup>113</sup> The protest mechanism helps cure principal-agent problems by increasing the likelihood that deviations by the agent (the purchasing agency) from the

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109. See *Julie Research Lab., Inc.*, GSBGA No. 8070-P-R, 86-02 BCA ¶ 18,881 (1986) (observing that CICA's legislative history concerning GSBGA's protest jurisdiction "makes it very clear that the intent of Congress . . . was to encourage private enforcement of the laws and regulations mandating the acquisition of general purpose automatic data processing equipment and services through full and open competition").

110. Marshall et al., *Private Attorney General*, *supra* note 7, at 7-8.

111. *Id.*

112. *Id.*

113. Greenstein, *supra* note 7, at 164-65; Marshall et al., *Incentive-Based Procurement Oversight*, *supra* note 7, at 46-48.

guidance of the principal (Congress) will be detected and corrected.<sup>114</sup> Protests press government officials to make price and quality choices that maximize benefits for taxpayers.

Several conditions may explain why government purchasing officials tend more often to fail to maximize taxpayer interests than private purchasing officials fail to maximize shareholder interests.<sup>115</sup> Government purchasing officials are often said to place inordinate weight on product quality in the decisionmaking calculus and thus to fail to make appropriate quality-price tradeoffs.<sup>116</sup> This “quality bias” precludes adequate consideration of the products of offerors who could satisfy the government’s genuine needs at a lower price.<sup>117</sup> In other instances, government purchasing officials are said to skew specifications and source selection decisions to favor incumbent suppliers. A further contributing factor is the inability of government purchasing officials to receive adequate rewards for making procurement choices that benefit taxpayers. The lack of means to reward government purchasing officials more generously for efficient procurement decisions causes such officials to underinvest in activities that maximize taxpayer interests.<sup>118</sup>

A second rationale for expansive monitoring is that government purchasing officials, on the whole, are less competent than private sector purchasing agents with comparable responsibilities. The assumption of relatively weaker capability finds some support in the conclusions of blue-ribbon panels that have studied the procurement process. Among these is the Packard Commission on Defense Management, which observed in 1986 that “compared to its industry counterparts, [the Department of Defense

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114. See Greenstein, *supra* note 7, at 164-66; Marshall et al., *Private Attorney General*, *supra* note 7, at 11. The use of interested parties to monitor agency compliance with congressional directives is discussed in Matthew M. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew M. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

115. See Marshall et al., *Incentive-Based Procurement Oversight*, *supra* note 7; Marshall et al., *Private Attorney General*, *supra* note 7.

116. See, e.g., Shane M. Greenstein, *Did Installed Base Give an Incumbent Any (Measurable) Advantages in Federal Computer Procurement?*, 24 RAND J. ECON. 19 (1993) (discussing incentives for government officials to overemphasize quality in buying computers); William P. Rogerson, *Quality versus Quantity in Military Procurement*, 80 AM. ECON. REV. 83 (1990) (discussing technology bias in defense procurement).

117. See Marshall et al., *Curbing Agency Problems*, *supra* note 7.

118. See Marshall et al., *Private Attorney General*, *supra* note 7, at 14-15.

contracting] workforce is undertrained, underpaid, and inexperienced."<sup>119</sup> The protest process (and other forms of government procurement regulation) can be viewed as compensating for deficiencies in the skills of government purchasing personnel by reducing their discretion and subjecting their decisions to more exacting oversight.

A third rationale for close monitoring of purchasing decisions is that protests counteract efforts by purchasing agencies and incumbent suppliers to write specifications that prevent equally or more efficient firms from bidding for new contract awards.<sup>120</sup> Although private purchasing agents also are exposed to efforts by suppliers to distort their judgment against their employers' best interests, lower pay scales and other weaknesses in the incentive systems used to motivate public employees suggest that government officials are more prone to succumb to these temptations.<sup>121</sup>

If one assumes that extensive monitoring of government purchasing decisions is necessary, there remains the question of how such monitoring should take place. Third-party monitoring can be superior to other forms of oversight in motivating purchasing officials to make decisions that maximize taxpayer interests. One alternative to protests is to rely on *ex post* auditing of purchasing agency decisions by external observers (such as the GAO's auditing unit) or by entities within the agency (such as the inspector general, the competition advocate, or the Defense Contract Audit Agency). Following a review of completed purchasing episodes, such authorities could: recommend rewards or punishments for procurement officials; suggest adjustments in acquisition procedures and techniques; or, conceivably, propose a payment of damages (such as bid and proposal costs) to wrongfully excluded offerors.

To advocates of protest oversight, decentralized enforcement is superior because self-interested "private attorneys general" are likely to have better information than auditors about deviations from procurement statutes and regulations.<sup>122</sup> For example, an excluded supplier may be in the best

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119. PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT OF THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT 66 (June 1986); see also Marshall et al., *Private Attorney General*, *supra* note 7, at 7 (noting that "compared to their private sector counterparts, government buyers are often not well informed about the product that they are buying.").

120. See Marshall et al., *Private Attorney General*, *supra* note 7, at 22.

121. *Id.* at 8 (stating that "[i]n the public sector, the lack of profit incentives and various institutional constraints limit the power of incentive contracts to align the interests of a procurement official closely with those of the government.").

122. See *id.* at 29-33 (contrasting protest oversight with a more standardized and centralized approach).

position to determine whether the specifications contained in an agency's solicitation for the purchase of computers is technically justified, given the agency's statement of its needs. Moreover, *ex post* auditing has its own costs, including the employment of auditors and the expense associated with collecting and analyzing information about procurements selected for study.

### B. Disadvantages of Expansive Third-Party Monitoring

Commentators have raised various objections to the existing protest oversight scheme. There are five basic criticisms of robust decentralized private monitoring of government procurement decisions.

The first criticism is that protests can significantly delay a government agency's acquisition of goods and services. The delayed delivery of needed products can impose substantial costs on the agency in the form of reduced productivity and delayed performance of agency functions.<sup>123</sup>

A second objection is that protests force agencies (and private firms) to devote substantial resources to responding to and litigating protests.<sup>124</sup> These resources take the form of time expended by attorneys, as well as procurement decisionmakers within the purchasing agency, and by its vendors. Prosecuting and defending protests can be expensive, particularly when the protest is adjudicated in a forum (such as the GSBICA) which permits expansive discovery.

A third criticism is that the protest process may be prone to strategic misuse by private offerors who are seeking to impede the ability of rival offerors to do business with the government.<sup>125</sup> By filing a protest, an incumbent supplier might delay a contract award or compel the purchasing agency to repeat the competition. Here the protest can force a new (and perhaps thinly capitalized) entrant to spend substantial resources intervening to defeat the protest. The strategic filing of protest actions can be an attractive exclusionary tool because, unlike a predatory pricing campaign, the predator can force the target of the strategy to bear costs that equal or exceed its investment in the predatory tactic.

A fourth criticism is that protests may discourage government purchasing officials from exercising appropriate degrees of discretion (e.g., by relying

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123. Cohen, *supra* note 14, at 21-24.

124. *See id.*, at 22. Senator Cohen's report states that the high cost of opposing protests before the GSBICA sometimes causes agencies to pay "Fedmail" to protestors who "have no chance of winning a contract." *Id.* at 23.

125. *See* Robert E. Lloyd, *Efficiency, Justice, and Rent-seeking in Federal Contract Dispute Resolution*, in CONFLICT RESOLUTION AND PUBLIC POLICY 101 (Miriam K. Mills ed., 1990).

on intangible considerations such as the quality of past performance) in making new contract awards.<sup>126</sup> Particularly for products requiring extensive post-sale services (such as photocopiers, communications systems, and computer networks), it may be impossible for buyers and sellers to specify by contract all dimensions of performance that are important to the buyer. Vendors vary considerably in their responsiveness to user needs and in their willingness to take extra steps to anticipate and solve purchaser problems, especially where the bare terms of the contract would not require such effort.<sup>127</sup> It may be infeasible to draft a contract provision that captures this ingredient of performance, yet the buyer's future purchasing decisions surely depend on her assessment of how often her existing vendor "went the extra mile" to serve her needs. By pressing procurement officials to rely on "objective" criteria, a robust protest process may discourage consideration of admittedly subjective but important variables involving past performance.<sup>128</sup>

The fifth objection is that, unless settlements are subject to close scrutiny by the protest tribunal, the protest process might serve as a vehicle through which competing offerors coordinate their behavior to raise the price that government agencies will pay for goods and services.<sup>129</sup> Participants in a bid-rigging scheme might use the filing of protests and the execution of settlements (including the making of side-payments between vendors) to coordinate their behavior.<sup>130</sup> Bid-rigging on public procurement contracts often takes the form of a "bid rotation" scheme through which a cartel determines which of its members will submit the low, winning bid for each

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126. See Kelman, *supra* note 7, at 21; see also Greenstein, *supra* note 7, at 162 (enforceable procedural rules may not be ideal for regulating complex agency actions such as certain procurement activities).

127. Compare Greenstein, *supra* note 7, at 167 ("If agencies at all lack prescience or precision in their request, or if agencies cannot write a complete contract, then vendors have incentives to shirk in the provision of those dimensions that are undervalued or are not explicitly requested in the RFP.")

128. This raises the issue of the type of data (if any) the purchasing agency will be required to produce to justify decisions based on past performance. Given pervasive, recurring concerns about preserving the integrity of the procurement process and about the incentives and capabilities of government procurement officials, it is unlikely that source selection teams will be permitted to rely simply on undocumented views about the past behavior of rival offerors. Instead, government agencies are likely to be required to create and maintain purchasing agency data bases that accurately assess and record past performance by contractors. In the absence of a reliable data base, judgments about past performance could be largely impressionistic or could be based on faulty data.

129. See Marshall et al., *Incentive-Based Procurement Oversight*, *supra* note 7, at 51.

130. See Marshall et al., *Private Attorney General*, *supra* note 7, at 52-55.

procurement.<sup>131</sup> The protest enables cartel participants to challenge an award to a cartel member who cheats on the collusive agreement by bidding low “out of turn.” Unless it is subject to close scrutiny, the settlement process can facilitate efforts to enforce the original cartel agreement by enabling cartel members to extract a side payment from a maverick participant.

### C. *Summary of the Policy Debate*

The existing system of restraints on government discretion is purposeful and flows from several considerations. It reflects the belief that protests have spurred competition that generates substantial savings to government agencies, and it reflects basic doubts about whether government officials will exercise discretion to the benefit of taxpayers. The existing protest system can be costly, but its adoption reflects the view that the costs of protest controls are less than the costs of relying on alternative monitoring techniques or of simply giving government purchasing officials greater discretion. Advocates of relaxing protest oversight assume that purchasing officials generally will use greater discretion wisely and will make contracting choices that improve the value the government receives for procurement outlays.

Participants in the debate over protests have provided interesting theoretical arguments and anecdotal data to support their competing positions toward protest oversight, yet current decisions about the optimal configuration of the protest system are taking place in a virtual empirical vacuum. There is scant empirical evidence for judging whether public purchasing officials are more prone to “shirk” in maximizing taxpayer interests than private purchasing officials are to shirk in maximizing shareholder interests, or what net effect the modern system of protest controls (especially since CICA in 1984) has had on procurement outcomes.

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131. See William E. Kovacic, *Illegal Agreements with Competitors*, 57 ANTITRUST L.J. 517 (1988).

### III. OPTIMAL FORUM MIX

#### A. Recent Reform Proposals

##### 1. Section 800 Committee

The Section 800 Committee proposed three far-reaching reforms of the protest mechanism. First, the Committee proposed that Congress consolidate all federal court protest jurisdiction in the Court of Federal Claims.<sup>132</sup> Such a move would eliminate *Scanwell* jurisdiction and thus withdraw from the federal district courts the power to review contract formation decisions. Second, the Committee urged Congress to amend the Competition in Contract Act to establish a more permissive standard of review for the GSBCA.<sup>133</sup> The Committee would have eliminated the GSBCA's *de novo* review of the facts and, in effect, would have required the Board to apply the more deferential standard (a presumption of agency correctness) used by the GAO.<sup>134</sup> Third, the Committee proposed that Congress authorize the GAO and the GSBCA to impose stronger sanctions on parties who file "frivolous" protests. The stronger sanctions would include requiring the party filing a baseless protest to reimburse the government for its legal fees and costs associated with defending the government's purchasing decision.

##### 2. Legislative Measures

As noted in the Introduction, the Federal Acquisition Streamlining Act makes few changes that affect the choice of forum in bid protest disputes.<sup>135</sup> In particular, the Act does not alter the existing structure of dispute resolution forums, nor does it adjust the standard or scope of review to be applied by any single forum. The Senate version of the Act embodied the Section 800 Committee recommendation to consolidate federal court protest jurisdiction in the CFC, but the Senate abandoned this position in the conference committee deliberations.

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132. *Section 800 Committee, supra* note 9, at 1-213 to 1-214.

133. *Id.* at 1-210 to 1-211.

134. *Id.*

135. *See supra* notes 11 to 16 and accompanying text (FASA left essential characteristics of protest mechanism relatively undisturbed).

Over the past year, Congress has given attention to various reform proposals that would fundamentally alter the bid protest system.<sup>136</sup> Most consideration has focused on two measures, H.R. 1670 ("Federal Acquisition Reform Act of 1995"), and S. 1026, Division D ("Information Technology Management Reform Act of 1995"). H.R. 1670 would eliminate the GAO's protest jurisdiction and create two boards—one for defense acquisition and one for civilian purchases—to resolve all protests. H.R. 1670 also would limit the discovery techniques available for certain protests. For procurements valued under \$20 million, protesters could use written discovery and could have hearings, but could not use depositions. S. 1026 deals only with information technology and would eliminate the GSBICA's protest jurisdiction.

The Clinton Administration recently proposed significant changes to the protest system, including the consolidation of federal court jurisdiction in the CFC, the elimination of the GSBICA's *de novo* standard of review and the taxing of costs against parties who file frivolous protests.<sup>137</sup> Many elements of the Clinton proposal are contained in H.R. 1388 and S. 669, both of which are titled the "Federal Acquisition Improvement Act."

### *B. Multiplicity and Public Administration: An Overview*

Duplication of federal government activities exists in a variety of contexts. In a number of instances two or more federal agencies bear responsibility for serving specific roles. For example, national intelligence gathering authority is distributed among the Central Intelligence Agency, the Department of State, and various bureaus of the Department of Defense (DOD). The Air Force, the Army, and the Navy compete against each other for funding and programs to fulfill national security missions.<sup>138</sup> Federal antitrust enforcement authority is shared by the Department of Justice and the Federal Trade Commission (FTC), and these two agencies compete to establish preeminence as the leading government bureau for the scrutiny of many forms of business conduct, including mergers.<sup>139</sup> The

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136. For accounts of congressional consideration of protest reforms, see Jeff Ehrlich, *Acquisition Plan Would Ease Rules On Competition*, DEFENSE NEWS, May 22-28, 1995, at 4; *Procurement Reform Legislation: The Section Takes A Stand*, 16 FEDERAL BAR ASSOCIATION GOVERNMENT CONTRACTS SECTION NEWSLETTER 1 (Aug. 1995).

137. See *supra* notes 15-16 and accompanying text (describing proposed changes to the existing protest system).

138. See THOMAS L. MCNAUGHTER, *NEW WEAPONS, OLD POLITICS: AMERICA'S MILITARY PROCUREMENT MUDDLE* 38-48 (1989).

139. See Richard S. Higgins et al., *Dual Enforcement of the Antitrust Law*, in PUBLIC

Securities and Exchange Commission and the Commodities Futures Trading Commission compete for the right to regulate certain segments of the securities industry.<sup>140</sup> Likewise, the protest system is not unique simply because it duplicates adjudication functions. Many federal antitrust claims are subject to adjudication either in the federal district courts or through the administrative procedures of the FTC. What makes the public contract system distinctive is how broadly adjudicatory authority is spread among distinct decisionmaking bodies.

### C. *Rationales for Multiple Protest Forums*

Four basic rationales support the retention of multiple protest forums. One reason for Congress to establish multiple, competing "agents" is to ensure that its policy wishes are executed faithfully. As an alternative strategy, Congress could have bolstered GAO's protest authority and applied more pressure directly to the Comptroller General to adopt a more favorable view of protests. The creation of a second agent, however, and the rivalry it would engender between GAO and the GSBCA may have been seen as a more effective motivational tool. By giving the GSBCA protest jurisdiction that overlapped the protest jurisdiction of the GAO, Congress in effect made the GAO's protest authority "contestable" and spurred the GAO to take a more sympathetic view of protestors' claims (the congressionally preferred outcome) and to adopt discovery procedures that increased the ability of protestors to challenge agency procurement choices.<sup>141</sup> Competition between the GAO and the Board generated the

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CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 154 (Robert J. MacKay, James C. Miller III & Bruce Yandle eds., 1987).

140. See John C. Coffee, Jr., *Competition versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447 (1995).

141. There is some evidence that Congress gave protest jurisdiction to GSBCA as part of a conscious strategy to use competition between the GAO and the GSBCA to gain increased scrutiny of government purchasing agency decisions. Late in 1984, Representative Frank Horton, one of CICA's principal co-sponsors, told a trade association group that CICA "will build into the bid protest system a little competition, which we hope will prompt the GAO to improve its performance." Frank Horton, Remarks Before the Computer and Communications Industry Association (Dec. 13, 1984) (mimeo). It is apparent that Congress perceived the GAO as excessively hostile to protests. A House Committee report on the forerunner of CICA expressed concern that, in fiscal years 1981-83, the GAO had sustained only 7.3 percent of all protests brought before it. H.R. REP. NO. 1157, 98th Cong., 2d Sess. 23-24 (1984). One of CICA's cures for this inadequacy was to bolster GAO's protest authority. But the second approach was to establish a competing institution, the GSBCA.

congressionally-desired outcome—more exacting oversight of purchasing agency decisionmaking.

A second, closely-related rationale for multiplicity is that competition among rival government forums may result in innovation that improves the quality or reduces the cost of the service being provided. The impact of rivalry is evident in the relationship between the GAO and the GSBCA. In many respects, the creation of GSBCA's protest authority is the most interesting modern federal experiment with inter-agency competition as a means of increasing the output and quality of a government service. By the end of the 1980s, the GSBCA had established itself as the preferred forum for vendors protesting procurements involving ADPE or telecommunications products.<sup>142</sup> The perception of this fact arguably prompted the GAO to drastically change its protest "product" to attract disappointed offerors. Thus, rivalry between the GAO and the GSBCA has significantly altered the federal government's provision of protest services.<sup>143</sup>

The impact of competition between the GAO and the GSBCA can be seen in several areas. Since 1984, the GAO and the GSBCA have engaged in procedural innovations to make each forum more attractive to protesters.<sup>144</sup> More than any nominal departure from the GAO's standard of review, it was the GSBCA's more powerful discovery tools that enabled protesters to gain access to relevant data and challenge purchasing agency decisions more effectively. Without the GSBCA's presence in the protest arena, it is doubtful that the GAO would have expanded so extensively the ability of protestors to gather facts needed to demonstrate infirmities in purchasing agency decisions.<sup>145</sup> Rivalry from GSBCA also appears to

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142. See Webber, *supra* note 72, at 2.

143. In comments on an earlier draft of this Article, some GAO officials rejected the view that competition from the GSBCA has influenced the evolution of GAO's procedures or its treatment of protesters. These officials contend that the GSBCA's protest activities in the 1980s and early 1990s had no impact on the content or timing of GAO's own protest reforms.

144. That the GAO and the GSBCA regard each other as rivals, and see each other as competitors for bid protest cases, is evident from public comments by members of both bodies. See Stephen Daniels, *New Directions for the General Services Board of Contract Appeals*, 28 PUB. CONT. NEWSL. 3 (Spring 1993). GSBCA Chairman Daniels noted that: "[t]he GAO continued to acknowledge that the Board's protest procedures work so well that they should be adopted [at least in part] by that competing forum." *Id.*

145. For example, in retooling its protest rules in 1991, the GAO authorized the issuance of protective orders to permit counsel for the protester to have access to proprietary or source selection information. See 4 C.F.R. § 21.3(d) (1994). Doing so was essential if GAO were to match an attractive (to protesters) attribute of GSBCA protest procedure. For a discussion of the GSBCA's use of protective orders in the period preceeding the GAO

have induced GAO to give protestors a more attractive menu of remedies for successful protests.<sup>146</sup> A consolidation of protest jurisdiction that eliminated competition between the GAO and the GSBCA would diminish incentives for these forums to innovate by improving protest procedures.<sup>147</sup>

Competition also has affected the level of scrutiny that the GAO and the GSBCA, respectively, apply in reviewing purchasing agency decisions. At first, GSBCA performed a more probing assessment of agency decisions. The Board's *de novo* inquiry into the facts facilitated a more critical analysis of agency behavior than the GAO's traditional presumption that the agency's version of the facts was correct. More generally, the outcome and tone of many GSBCA decisions initially suggested comparatively greater skepticism about agency purchasing choices.<sup>148</sup>

Recent protest experience has featured some convergence of GAO and GSBCA analysis. GAO has tended to treat agency arguments less deferentially, and the GSBCA has retreated from the more exacting scrutiny it engaged in during the first six years of its protest jurisdiction.<sup>149</sup> As

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rules changes, see Michael A. Hordell & Eric L. Lipman, *The Rise and Use of Protective Orders at the General Services Board of Contract Appeals*, 20 PUB. CONT. L.J. 22 (1990).

146. In 1991, GAO altered its protest rules to enable protestors to recover attorneys' fees and protest costs when the purchasing agency took steps to correct contracting flaws at any time after a protest had been filed. See 4 C.F.R. § 21.6(e) (1994). This precluded purchasing agencies from avoiding such costs by curing deficiencies soon before the GAO issued a protest decision.

147. See, e.g., Daniels, *supra* note 144, at 26 ("[T]here is a considerable disadvantage to having only one protest forum: it would destroy the kinds of competition among forums that we have today—competition to develop the most efficient and effective kinds of practices and procedures for the suits that are filed, and competition to write the best-reasoned, most persuasive legal and factual analyses possible").

148. See Computer Lines, GSBCA No. 8206-P, 86-1 BCA ¶ 18,653; see also Webber, *supra* note 72, at 16 ("despite reliance on a similarly articulated standard of review, the GSBCA has demonstrated a greater willingness than GAO to overturn agency evaluation and selection decisions which are arbitrary or unreasonable").

149. The Federal Circuit has constrained what might be characterized as efforts by GSBCA to increase its attractiveness to protestors. See, e.g., AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205-07 (Fed. Cir. 1993) (reversing GSBCA decision upholding protest by telecommunications firm which alleged that modification to FTS 2000 contract exceeded scope of the original contract and required competitive bidding); Best Power Technology Sales Corp. v. Austin, 984 F.2d 1172, 1176-78 (Fed. Cir. 1993) (ruling that GSBCA lacks jurisdiction under Brooks Act to resolve protest involving uninterruptable power supply units used in connection with ADPE systems); US West Communications Servs., Inc. v. United States, 940 F.2d 622, 627-29 (Fed. Cir. 1991) (ruling that GSBCA lacks jurisdiction to grant bid protest of prospective subcontractor); Data Gen. Corp. v. United States, 915 F.2d 1544, 1551-52 (Fed. Cir. 1990) (ruling that GSBCA lacks authority

one measure of this analytical convergence, protester success rates in recent years before the two forums have been comparable.<sup>150</sup> It is also apparent that each forum is aware of, and has borrowed from, analytical approaches developed by its counterpart.<sup>151</sup>

A third, more imponderable dimension of rivalry deals with the qualitative effect of GAO and GSBCA decisionmaking, respectively. Has rivalry between the two forums improved the quality of protest decisionmaking and, indirectly, spurred improvements in purchasing agency behavior? As suggested below, this question requires a fuller empirical inquiry.<sup>152</sup> The answer to this question depends mainly on one's judgment about the value of external, protest-based oversight of government agency purchasing decisions. Ideally, such judgments would be informed by systematic empirical evaluation of the impact of protests on the quality of government procurement choices.

Although rivalry has altered the behavior of the GAO and the GSBCA, no similar adjustment is evident in the modern protest decisionmaking of either the CFC or the district courts. The GAO and the GSBCA regard protest jurisdiction as desirable, and each agency has strived to attract protest "business." No such institutional desire is apparent from the conduct of the two judicial forums. The post-1980 behavior of the CFC and the district courts reveals no effort by either judicial tribunal to make itself more attractive than its judicial counterpart as a forum for resolving protests. There is no evidence that the CFC and the district courts "compete" in any meaningful way in deciding protests, nor has the conduct

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to "second guess" purchasing agency's assessment of its needs). Without Federal Circuit oversight, it is evident that the deviation in protest outcomes between the GAO and the GSBCA would be more pronounced. *But see* *Birch & Davis Int'l v. Christopher*, 4 F.3d 970, 973-74 (Fed. Cir. 1993) (vacating GSBCA order that upheld contracting officer's reduction of competitive range to a single firm; concluding that GSBCA failed to focus on whether contracting officer made specific findings showing excluded protester had no chance of receiving an award).

150. *See* Lieberman, *supra* note 13, at 5.

151. The GSBCA recently ruled that a purchasing agency may consider the risk associated with vendor proposals when the agency evaluates such proposals, even though the solicitation does not specify risk as an evaluation factor. *See* *US Sprint Communications Co. v. Department of Defense*, GSBCA No. 11769-P, 93-1 BCA ¶ 25,255. In denying Sprint's protest of the award of a contract for a leased communications system, the GSBCA favorably cited GAO opinions that allowed the purchasing agency to consider risk as an inherent part of the evaluation process. *See* *Communications Int'l, Inc.*, B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194.

152. *See infra* Part III.E. (advocating empirical studies of patterns of decisionmaking by agency procurement officials).

of these courts—for example, subtle changes in the articulation or application of the standard or scope of review, or an increase in protester success rates—suggested that the possibility of a diversion of protests to the GAO and the GSBICA mattered to these tribunals.

In sum, in the routine disposition of protests since the FCIA in 1982 and CICA in 1984, the CFC and the district courts have displayed no competitive response from which one could infer that either tribunal regards protests as an attractive element of its jurisdiction. The opinions of the district courts and the courts of appeals other than the Federal Circuit sometimes comment about the “complexity” of procurement legal issues—a pattern mildly suggestive of displeasure in having to address such matters. There is little reason to think that the average district judge or court of appeals judge would complain about the loss of protest jurisdiction. The opinions of the CFC display no inclination to resist encroachment by the district courts, the GAO, or the GSBICA. One might expect the CFC to resist any effort to formally withdraw its protest jurisdiction, however, as such a measure might raise questions about the usefulness of preserving this specialized judicial tribunal.<sup>153</sup>

Protest forums may vary according to how the public perceives their capacity to render fair, impartial rulings in certain types of protest disputes. The judicial protest forums (the CFC and the district courts) may be viewed as more likely to review sensitive procurement program choices using “non-political” criteria, particularly where difficult DOD downsizing decisions are concerned. The availability of protests before the federal courts may increase public perceptions that a neutral arbiter has heard the protester’s arguments. Perceptions of institutional and political neutrality might be lacking if the decision rested with an entity having strong ties to Congress (the GAO) or the executive branch (the GSBICA).

One possible illustration is the disposition of the protest by Tenneco and its Newport News shipyard of the Navy’s decision in 1990 to award the initial development contract for the Seawolf nuclear attack submarine to the Electric Boat Division of General Dynamics.<sup>154</sup> The award of the development contract promised to have a major impact on the economic fortunes of the two companies, and a severe impact upon employment in the communities in which each firm operates. Tenneco filed its protest in Norfolk in the U.S. District Court for the Eastern District of Virginia and

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153. Representatives of the CFC participated in ACUS committee discussions about earlier drafts of this Article and opposed the elimination of the CFC’s protest jurisdiction.

154. See *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d 386 (4th Cir. 1992).

obtained an injunction staying performance of the billion-dollar contract.<sup>155</sup> The Navy persuaded the Fourth Circuit to vacate the injunction and to sustain the contract award to General Dynamics.<sup>156</sup> Current and former Navy officials have suggested that the protest decision by the federal judiciary had credence that a decision by the GAO (the most likely alternative protest venue for a dispute involving a major weapon system) could not provide.<sup>157</sup>

The wide distribution of protest authority and the diversity of protest alternatives makes the protest process more accessible to disappointed bidders. The existing structure of protest forums supplies a mix of low cost (GAO) and higher cost (e.g., GSBCA) options, although a single forum—such as an administrative entity that combined attributes of the GAO and the GSBCA—could offer both austere and elaborate protest options for disappointed vendors. The district court *Scanwell* action provides geographic accessibility that the GAO, the GSBCA, and the CFC lack. GAO and GSBCA proceedings usually take place in Washington, D.C. Although the CFC's jurisdiction is national in scope, and the CFC has power to hold proceedings outside of Washington, D.C., the CFC cannot readily make arrangements in a manner that matches the convenience to a protester of filing a preliminary injunction action in the local district court.

#### D. *Costs of Multiplicity in Protest Forums*

Three basic disadvantages flow from the adjudication of protests through the existing array of forums. One is increased government expenditures for the administration of the protest system. The existing system of diverse alternatives requires the government to bear recurring administrative costs associated with maintaining multiple protest venues and with supporting the protest-related activities of each forum. The GAO and the GSBCA devote

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155. *Newport News Shipbuilding & Dry Dock v. United States Dep't of Navy*, 771 F. Supp. 739 (E.D. Va. 1991).

156. 960 F.2d at 396.

157. To prepare this Article, the Author interviewed current and former representatives of the Navy's Office of the General Counsel who were involved in the *Seawolf* protest litigation. The *Seawolf* litigation also suggests that the federal courts are not wholly apolitical protest tribunals. The decision of the district court in Norfolk to enjoin performance of the *Seawolf* contract may have at least partly reflected the court's concern about the adverse impact of the Navy's decision in the local community. Compare Thomas K. Gump, *Rationalizing the Procurement Dispute Process*, 42 FED. LAW. 20, 22 (Feb. 1995) (noting that federal district judges in bid protest matters have "great opportunity during the initial injunctive proceeding to be influenced by external factors" such as impact of contract award decision on local economy).

substantial resources to resolving protests, but it is not clear that a significant percentage of the protest resources spent by these agencies is duplicative. The most frequently proposed path of consolidation for the GAO and the GSBCA would be to fold their protest operations into a single entity—perhaps by establishing a new executive branch agency that would offer an austere protest path (akin to GAO) and a quasi-judicial protest path (akin to GSBCA).<sup>158</sup> Unless the law were changed to make the prosecution of protests substantially more difficult (thus, reducing the volume of protests), it is likely that the new protest entity would need to employ roughly as many professional staff and support staff as are now engaged in the resolution of protests today at the GAO and the GSBCA combined. The savings to the government in out-of-pocket costs from combining the protest functions of these bodies probably would be trivial.

Curtailing or eliminating the protest jurisdiction of either the CFC or the district courts will generate similarly modest administrative cost savings. The CFC and the district courts hear relatively few protests each year, and it is difficult to imagine that eliminating their protest oversight powers would permit a reduction in personnel. Each CFC judge is assigned an average of barely more than one new protest case per year, and the federal district courts combined probably receive fewer than twenty-five new protest filings annually. For the judicial forums, the incremental administrative cost of resolving protest disputes is minuscule.

The consolidation of the protest system holds out little potential for cutting public expenditures by reducing the size of government. The CFC and the district courts spend relatively few resources to resolve protest disputes. Eliminating their protest authority probably would not allow the government to reduce the workforce in these institutions, although it would permit the federal courts to allocate the small amounts of time now consumed by bid protests to other matters. Assuming that the standards for filing and resolving protests are left unchanged, the administrative savings from combining the operations of the GAO and the GSBCA also are likely to be negligible. The only approach for significantly reducing the number of government resources devoted to the resolution of protests is to fundamentally reduce the scope of protest oversight. Forum consolidation, by itself, is an ineffectual path to this end.

A second disadvantage of multiplicity is the increased cost that private parties and the government must bear to decipher a fragmented protest dispute resolution system. Maintaining numerous dispute resolution venues increases the possibilities for confusion among offerors and government

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158. See *Section 800 Committee*, *supra* note 9, at 1-216 to 1-218.

purchasing agencies as the multiple forums apply differing jurisdictional standards, use varying substantive standards, and generate inconsistent results. Uncertainties about the jurisdiction, powers, and decisionmaking preferences of each forum can cause public and private parties to expend resources to determine where protests should be brought and how they should be prosecuted and defended. The need to assess each protest possibility in light of the distinctive attributes of each protest forum appears to require private actors and public authorities to spend significant resources on legal counsel. An exact calculation of the amount of counseling resources resulting from forum multiplicity is problematic, but interviews with private and public participants in the protest system suggest that they are genuine and substantial.<sup>159</sup>

Some costs of the existing dispute resolution structure could be reduced without forum consolidation. For example, Congress could eliminate a major source of counseling confusion by clarifying the jurisdiction of the CFC and the district courts over pre-award and post-award protests.<sup>160</sup> Counseling expenses also could be diminished by statutory amendments that compel all existing forums to apply the same standard and scope of review (although some interpretational variations would surely continue, even if the same nominal standard governed all forums). Compared to these less sweeping alternatives, consolidation of protest authority would provide a more certain and effective way to reduce counseling costs.

A third disadvantage of forum multiplicity is the increased possibility of aberrant decisionmaking—either in reasoning or outcomes—as judges on tribunals that infrequently address protest questions mishandle issues with which they have little familiarity. The concern about ill-informed reasoning or protest outcomes presumably would be greatest with the district courts, which, compared to the CFC, the GAO, and the GSBCA, address government procurement issues least frequently. However, there is no evidence suggesting that the district courts have displayed a propensity to

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159. To prepare the ACUS report on which this Article is based, the Author interviewed private attorneys who represent parties in the protest process, representatives of government purchasing offices who must anticipate how and where their decisions might be challenged, and government attorneys who defend purchasing agencies in protest actions before administrative and judicial protest forums.

160. Many commentators have called for such a change. See Whelan, *supra* note 2, at 75 (“[T]he desirable result is by way of statutory amendments to grant jurisdiction over preaward and postaward protests to the Claims Court and to authorize district court jurisdiction over both preaward and postaward protest[s] under the Administrative Procedure Act.”).

make aberrant protest decisions or use questionable analytical methodologies.

### *E. Synthesis*

As reflected in the Section 800 Committee's report, most proposals for consolidating protest resolution authority have focused on unifying the federal courts' protest authority in a single forum.<sup>161</sup> A second significant proposal has been to establish a unified administrative forum that would combine features of the GAO and the GSBCA.<sup>162</sup> A third possibility would be to divest the federal courts of all protest jurisdiction and to consolidate all protest authority in a single administrative tribunal. The discussion below considers approaches for consolidating the judicial and administrative protest venues, respectively. Because the desirability of consolidation reforms depends in part upon the value of protest oversight generally, it is also necessary to consider approaches for evaluating the effects of the protest system on the quality of government procurement.

#### *1. The Consolidation of Judicial Protest Forums*

As discussed above, there is no evidence indicating that a perceived need to compete with other forums to maintain (or increase) an existing share of protest cases has moved the CFC or the district courts to change their behavior in protest disputes. This contrasts with the shifts in GAO and GSBCA behavior caused by CICA's creation of rivalry between those forums.<sup>163</sup> Maintaining multiple judicial protest forums cannot be sustained on the ground that multiplicity has generated competition that improves performance. Thus, an assessment of judicial protest forum duplication must rest on other considerations, such as cost, convenience to litigants, comparative analytical advantage, and the availability of review by the GAO or the GSBCA.

The most frequently suggested measure for simplifying the existing structure of protest mechanisms has been to unify federal court protest jurisdiction in the CFC and withdraw such jurisdiction from the federal district courts.<sup>164</sup> The case for consolidation in the CFC rests on four rationales: exploiting the superior CFC expertise in public procurement

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161. See *Section 800 Committee, supra* note 9 at 1-213 to 1-214.

162. *Id.* at 1-214 to 1-218.

163. See *supra* notes 109-22 and accompanying text (discussing the utility and rationale of third party monitoring to supply strong enforcement incentives for private parties).

164. See *Section 800 Committee, supra* note 9, at 1-214 to 1-215.

issues; simplifying post-award dispute administration; avoiding doctrinal inconsistency that could arise as numerous district courts and courts of appeals arrive at different interpretations of the procurement laws; and reducing overhead costs associated with applying bid protest jurisdiction in each forum.<sup>165</sup>

The out-of-pocket savings that the CFC or the district courts would likely realize from an elimination of their protest jurisdiction are exceedingly small. Two further objections might be raised against collapsing all federal court protest jurisdiction into the CFC. First, a comparison of bid protest opinions issued by, respectively, the district courts and the CFC does not suggest that the CFC has an analytical comparative advantage by virtue of its superior experience in government contract matters. Nor is there persuasive evidence suggesting that the Federal Circuit addresses bid protest or other government contract matters with greater skill than the other federal courts of appeals. The superior experience of the CFC and the Federal Circuit in addressing government contracts issues has not manifested itself in analytically superior results in protest disputes.

Second, district court jurisdiction affords easier access to protesters. To make the CFC as readily accessible to protesters as the district courts are today, the CFC's resources would have to be expanded substantially to permit the court to hold more proceedings outside Washington, D.C. However, the CFC has been taking steps to make its processes more accessible to parties located outside of Washington, D.C. A consolidation of judicial protest authority in the CFC might come at the expense of some loss of convenience for protesters,<sup>166</sup> but the loss to protesters would be offset in part by the reduced cost to the government in defending protests outside of Washington, D.C.

As suggested above, consolidation is not obviously necessary to eliminate confusion about the respective pre- and post-award jurisdiction of the CFC and the district courts. A relatively simple legislative clarification of the authority of individual forums would be an appropriate and sufficient cure.

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165. *Id.* at 1-214 to 1-215; see also 55 Fed. Cont. Rep. (BNA) 731, 734 (May 20, 1991) (reporting Justice Department recommendation for consolidating judicial protest authority in CFC; noting Justice Department view that “[t]here is no principled basis for this multiplicity of forums, and there is still confusion over the division” of authority between the CFC and the district courts).

166. See Whelan, *supra* note 2, at 76 (consolidating judicial protest jurisdiction in the CFC “would really ‘Washingtonize’ remedies and have the effect of removing them a geographic step further away from small businesses and other claimants without the resources necessary to fund litigation at such a great remove from their homes (and their ‘home’ district courts)”).

Such a clarification would establish that the federal district courts have power to issue pre-award relief, and would grant the CFC powers parallel to those of the district courts concerning post-award protests.<sup>167</sup> The chief logic for maintaining two judicial forums having the same jurisdiction and applying essentially the same standard of review would be to increase the accessibility of the protest mechanism to offerors.

On balance, there is little to recommend for the maintenance of two judicial forums applying the same standard of review where it is apparent that the forums will not “compete” in ways that improve performance. Redundancy in that context serves mainly to increase vendor accessibility the protest mechanism. However, consolidation that involved nothing more than transferring all federal court protest jurisdiction to the CFC would not necessarily yield net savings in administrative costs if there is some further increase in outlays to permit the CFC to hear matters effectively outside of Washington. Unless one is willing to impose on vendors the cost of prosecuting protests in Washington, additional CFC expenditures will be necessary.

The structuring of federal court protest jurisdiction could take paths other than simply collapsing the protest authority of the CFC and the district courts into a single federal court forum. An additional possibility is to eliminate the protest jurisdiction of the federal courts and to rely entirely on dispute resolution by the GAO and the GSBCA.<sup>168</sup> The recognition by the federal courts of protest jurisdiction in cases such as *Heyer*<sup>169</sup> and *Scanwell*<sup>170</sup> took place at a time when a disappointed offeror’s only recourse was to seek review before the GAO, whose examination of purchasing agency decisions was highly deferential and whose remedial power consisted solely of recommending adjustments in agency purchasing behavior.<sup>171</sup> *Scanwell* in particular may have reflected a judicial view that intervention by the federal courts was necessary to cure weaknesses in the existing framework of administrative protest oversight. The development of the GSBCA as a source of more robust protest scrutiny, along with GAO’s adoption of stronger information gathering tools and a less

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167. See Claybrook, *supra* note 64, at 20-24; Pachter, *supra* note 85, at 61; Villet, *supra* note 44, at 184-85.

168. This possibility would be appropriate particularly if the GSBCA’s protest subject matter jurisdiction were to be expanded to encompass all federal procurement activity.

169. *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 410 (Ct. Cl. 1956).

170. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1969).

171. See *supra* notes 42-45 and notes 50-55 accompanying text (discussing *Scanwell* and *Heyer* decisions, respectively).

deferential attitude toward government buyers, has weakened the need for judicial oversight.

A plan to eliminate federal court protest authority might include expanding the GSBCA's subject matter jurisdiction, making it equal to the GAO's, and increasing the ability of the GAO and the GSBCA to hear protest disputes throughout the country. This approach would force protesters to use the administrative processes of the GAO or the GSBCA. Appeals from GSBCA decisions would still be taken to the Federal Circuit. The treatment of appeals from GAO decisions would complicate efforts to eliminate participation by the district courts and the CFC. These judicial forums currently are available to review GAO protest decisions. Perhaps the best solution would be to limit appeals from GAO decisions to the CFC, thus continuing a small, residual protest role for that court.

Two factors might weigh against eliminating the protest jurisdiction of the federal courts. One concern is that eliminating district court jurisdiction might impose an unacceptable burden on some litigants outside of Washington, D.C. This concern could be addressed by increasing the ability of the GAO or the GSBCA to hear protest disputes outside of Washington. One might also simply tolerate this inconvenience. That the aggregate inconvenience is likely to be minimal is suggested by the paucity of filings each year in the district courts; the relatively minor inconvenience to litigants would be overcome by the benefits from simplification, notably, the reduction in resources spent by private parties and government purchasing agencies to identify and respond to the decisionmaking tendencies of four forums rather than two.

A second concern is the possibility that judicial oversight yields a more neutral, objective review of high profile protests for which the judgment of the GAO and the GSBCA might be skewed by actual or perceived pressures from Congress or the President, respectively. The judiciary enjoys an important measure of independence from such pressures and therefore might provide a superior forum for resolving certain cases. It is difficult to point to many protest disputes for which this insulation from political pressure would be important for ensuring that the protester's complaint receives proper scrutiny.<sup>172</sup> Judicial review by the Federal Circuit of GSBCA decisions provides a check against improper influence.

Concern about vesting all protest authority in bodies that are more responsive to political signals from Congress and the President is not frivolous and could be raised in favor of preserving a protest alternative in

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172. See *supra* notes 155-57 and accompanying text (discussing Newport News protest of Navy's Seawolf development contract award).

the federal courts. However, the risks associated with eliminating the role of the federal courts (except through appellate review of GSBCA decisions by the Federal Circuit, and review of GAO decisions through the CFC and the Federal Circuit) seem minor. Historically, politically sensitive protests for which judicial oversight might be desirable have been especially rare. Moreover, a decision to eliminate federal court jurisdiction would not be irreversible. It would be possible to conduct a limited experiment to test the continuing usefulness of giving federal courts protest jurisdiction. One could use a sunset mechanism that withdrew the federal courts' jurisdiction for a finite period and thereby required a congressional reassessment of the appropriateness of denying protesters recourse to the federal courts. It would be relatively simple to reinstate the protest jurisdiction of either the CFC or the district courts if experience showed that exclusive reliance on the GAO and the GSBCA proved to be the unwise.

## 2. *Consolidation of Administrative Forums*

Competition between the GAO and the GSBCA appears to have been a powerful stimulus for innovation in the administrative resolution of protests. Although there has been some convergence in the nominal legal standards that the GAO and the GSBCA use in protest disputes, there remain important possibilities for continuing procedural innovation and improvements in decisionmaking quality that competition between the two bodies can promote. The formation of a single, two-track administrative protest tribunal—featuring an austere protest path with little discovery and a more elaborate protest channel with comparatively full-blown discovery and trial-like procedures—would permit some reduction in government administrative costs, but such savings are unlikely to be substantial. A more important benefit would be to increase decisionmaking consistency and thereby reduce the costs incurred by private parties and government agencies to assess the probable outcome of a protest in two forums applying different standards. These advantages, however, seem outweighed by the gains from preserving a creative tension between the two forums.

The experience with GAO and GSBCA rivalry to date suggests that it might be useful to expand the Board's protest authority to reach matters beyond computer and telecommunications procurements. There is no significant substantive rationale for conferring distinctive treatment on computer and communications procurements, and the elimination of this restriction on the GSBCA's powers would permit the benefits of forum rivalry to be realized for all protests, regardless of subject matter.

One other option involving administrative dispute resolution deserves mention. All of the boards of contract appeals might be given bid protest

jurisdiction for disputes arising within their agencies. Many existing board of contract appeals judges have expressed apprehension about such an approach, mainly out of concern that the boards might be assigned protest responsibilities without an increase in resources.<sup>173</sup> If greater resources were provided, the boards might find such an adjustment acceptable. If the boards received bid protest jurisdiction, litigation results and analytical techniques across the various boards might diverge. As has been the case with board jurisdiction over performance-related government contract claims, major inconsistencies among the boards would diminish somewhat over time through appellate oversight by the Federal Circuit. On the whole, granting protest authority to all boards inevitably would appear to increase the resources that suppliers spend to identify and respond to differing attitudes and analytical techniques among the boards.

### 3. *The Underlying Policy Issue: Assessing the Value of Protest Oversight*

The foregoing discussion and recommendations assume that a robust protest mechanism improves government procurement performance. Current debate over forum multiplicity obscures two more fundamental issues involving the bid protest process—namely, the correct standard of review that oversight tribunals (regardless of their number or location) should apply, and the remedies that the protest system should provide to disappointed sellers. The answers to these questions depend heavily on judgments about how skillfully government purchasing officials will exercise greater discretion if protest oversight is relaxed.

There is strikingly little empirical basis for answering the ultimate questions about protest oversight.<sup>174</sup> Debate over the wisdom of the

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173. The research for the ACUS study on which this Article is based included interviews with judges on the boards of contract appeals other than the GSBCA.

174. An important exception is Steven Kelman's study of public procurement of computer systems. See Kelman, *supra* note 7. Kelman conducted case studies of nine federal computer contracts issued in fiscal year 1985. *Id.* at 3. The timing of these contracts, issued within a year after enactment of CICA, would have made it difficult to use these procurement episodes to assess the impact of CICA's competition requirements and GSBCA protest oversight of information technology contracting. Kelman also used questionnaires and interviews to survey public sector and private sector procurement managers about their experiences in acquiring computer equipment. *Id.* at 106-08. In addition to Kelman's work, Richard Lieberman has compiled extensive data on success rates in the different protest forums and has studied patterns in the bases on which protests have been upheld. See Lieberman, *supra* note 13. These data are highly useful in analyzing differences in analytical techniques and perspectives among the protest forums, but they do

protest system has proceeded with little systematic effort to determine whether CICA and related protest reforms have improved the performance of government buyers. Filling this empirical void is essential to any sensible effort to determine the optimal content of the protest process. Several approaches would serve this end.

First, it would be extremely useful to conduct detailed studies of purchasing agency activity to determine the impact of modern protest reforms. Possible focal points for analysis would include the following:

- \* Comparison of pre- and post-CICA conduct by government purchasers and suppliers. One could analyze the conduct of major purchasing agencies and private suppliers before and after CICA to identify adjustments in purchaser and supplier behavior and changes in procurement results. Focal points for analysis of the effect of protests on purchaser organizations would include the amount of resources dedicated to personnel training, source selection, and the defense of protests; the time required to purchase and field new goods and services; changes in the price-quality mix obtained by the purchasing agency; and perceptions of users within the agency about the quality of what the agency has bought. Study of the supplier community would attempt to assess the effect of protests on the number and quality of suppliers which choose to seek public contracts, and on the resources spent to obtain government contract awards.
- \* Case studies of protest episodes. One could examine specific protests to assess how skillfully the protest forums—especially the GAO and the GSBCA—have evaluated agency purchasing decisions. Case studies would attempt to determine whether the protest forum correctly understood the facts, properly evaluated the agency's behavior, and chose a remedy that improved the procurement outcome. One way to select protest episodes for examination would be to invite protest advocates and critics to submit illustrations of what they believe to be the greatest successes and failures of protest decisionmaking by existing protest forums.
- \* Comparing public and private purchasers. One could compare government purchasing departments with private sector purchasing departments to determine differences in the outcomes of efforts to buy comparable goods and services over time. For example, a study involving information technology could examine experience in a

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not permit an assessment of how skillfully each forum resolved the protests before it or how protest oversight has affected the quality of purchasing agency decisionmaking.

government purchasing agency and a private purchasing department with similar information technology needs and budgets. The study would attempt to illuminate differences in the resources both organizations spend in designing and executing a procurement, the time needed to obtain new equipment, and the price-quality mix that each organization received

A second evaluation strategy involves experimenting with different levels of protest oversight. To assess the substantive impact of specific oversight mechanisms, it would be useful to permit an individual government purchasing agency, or selected agencies, to operate with austere protest controls (i.e., a permissive regulatory structure) and to evaluate the performance of such bodies over time.<sup>175</sup> For example, a selected government agency might be permitted to operate completely free from protest oversight (save, perhaps, internal agency-level protests)—to operate with the same minimalist contract doctrines that control the exercise of discretion by private purchasing officials with respect to a particular type of good or service, such as computers.

Experimentation would permit a natural, side-by-side comparison of procurement regimes operating with and without extensive protest oversight. Experimentation would permit one to test a number of hypotheses about the protest system. Experiments would facilitate an assessment of whether the strength of protest oversight is correlated with the willingness of buyers to do business with a government agency because strong protest oversight encourages investment in activities that are idiosyncratic to fulfilling government requirements. Experiments would assist in measuring both the delays associated with protest oversight and the improvement in price-quality packages obtained by purchasing agencies. The government's procurement activities are so vast, and its purchasing agencies so numerous, that experimentation with different protest regimes is likely to provide useful insights without endangering taxpayer interests.

Experimentation also could take the form of other efforts to increase the incentives of government purchasing officials to maximize value for taxpayers. Let us assume that a major problem with the existing procurement system is the that the government provides insufficient rewards to purchasing officials who achieve superior procurement results. The lack of sufficient rewards creates an appropriability problem. Purchasing officials

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175. The GSBGA's entry into the protest process was deliberately experimental, as CICA initially limited the Board's protest jurisdiction to three years. On the importance of experimentation in identifying promising paths for procurement reform, see Fred Thompson, *Deregulating Defense Acquisition*, 107 POL. SCI. Q. 727 (Winter 1992-93).

realize that they will not be compensated adequately for investing effort to obtain superior procurement results and therefore devote less effort to achieving such results than taxpayers would prefer. Government agencies could experiment with compensation schemes that give purchasing officials greater rewards for accomplishing exceptional procurement results.

A third component of efforts to assess the efficacy of protest reform is to collect and analyze data concerning the impact of any new adjustments of the protest system. Any legislative or regulatory changes in the protest process, or other ingredients of the procurement system, should include a requirement for *ex post* evaluation of the impact of the protest process on procurement outcomes.<sup>176</sup> Commentary that weighs the efficacy of the existing protest process often presents general evaluative assessments that have little evident basis other than the experience and intuition of the individual commentator.<sup>177</sup> Candidates for conducting the *ex post* evaluations include the Office of Federal Procurement Policy, or a federally-funded research and development center that is not directly involved in conducting procurements.

#### CONCLUSION

Judgments about the appropriate configuration of the protest process depend on the answers we give to three central interrelated questions about government procurement and public administration. First, how much discretion should government procurement officials be given to carry out their responsibilities? Second, by what means should the exercise of a specific level of discretion be monitored? Third, if protests are to be used to monitor the exercise of discretion, by what processes—ranging from austere, expeditious alternative dispute resolution techniques to full-blown

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176. See Gary P. Quigley & Catherine S. Drost, *Defense Contractor Use of Preaward and Postaward Dispute Forums*, 20 PUB. CONT. L.J. 188, 196 (1991). Congress occasionally has recognized the usefulness of *ex post* empirical evaluations in making procurement policy choices. The legislative history of the FCIA stated that Congress would review the wisdom of granting pre-award protest authority to the CFC once the CFC compiled a record in the area. See H.R. REP. NO. 97-312, 97th Cong., 1st Sess. 43 (1981).

177. See, e.g., Thomas Papson, *Bid-Protest System Under Scrutiny*, LEGAL TIMES, Dec. 20, 1993:

Why should disappointed bidders for government contracts have substantially greater rights than their commercial counterparts? Because a strong and effective bid-protest system does in fact protect the public fisc, foster full and open competition, and deter violations of the laws and regulations governing the federal procurement process.

*Id.* at 24.

adjudication—should offerors be permitted to challenge alleged procurement deficiencies?

The most important policy decisions to be made about the protest status quo flow from the answer we give to the first question. The extent and form of protection given to offerors hinges on one's assessment of the incentives that guide purchasing agency officials. To address this fundamental issue we have distressingly weak empirical knowledge. There has been little systematic study about whether the modern protest system has improved the quality or reduced the cost of public procurement. A necessary first step toward evaluating the protest system is to perform empirical tests of the effect of the protest process. Such empirical tests should include an evaluation of past protest effects and experiments with more austere protest oversight.

In the absence of more rigorous empirical inquiry, what can we say about the existing configuration of protest forums? Let us assume that existing protest doctrine—as established in the decisions of the GAO, the GSBCA, and the federal courts—gives government purchasing officials the optimal level of discretion. Would reducing the multiplicity of protest forums reduce the cost of the protest process without changing the incentives faced by procurement officials?

There seem to be modest possibilities for net cost savings from realigning the existing structure of protest forums. The possibilities for savings emerge from asking what the marginal contribution of each forum is to the effectiveness of the protest system. A first place to begin is by looking at the least-used protest forums—the Court of Federal Claims and the federal district courts. The main contribution of the district courts is their geographic accessibility to protesters across the country. The chief value of the CFC is its greater familiarity with government procurement issues and protests, although this familiarity has yet to generate opinions that are notably superior in analysis than those produced by the district courts. And there is no evidence that the CFC and the district courts “compete” in any measurable sense, either between themselves or with the administrative protest forums (GAO and GSBCA).

The most frequently suggested path for judicial consolidation is to place all judicial protest oversight in the CFC. The main benefits of such a move would be modest reductions in the administrative burden faced by the district courts, the reallocation by the districts courts of time now devoted to protests to address other disputes, reduced expenditures of effort by private and public counselors to assess the doctrines and tendencies of another set of decisionmakers, and the concentration of protests in a judicial forum thought to be more expert in government contract law. The costs of

such a move would be reduced convenience to litigants around the country, a somewhat greater administrative burden for the CFC, and the allocation of additional resources for CFC judges to handle disputes that arise outside of Washington, D.C. On the whole, there appear to be modest net savings from consolidating judicial protest authority in the CFC and committing more resources to the CFC to address protests from remote regions of the country.

A more basic question about judicial protest authority is whether it is needed at all. The judiciary entered the protest arena at a time when administrative alternatives were comparatively weak. The bolstering of the GAO's protest processes and the granting of protest authority to the GSBCA has greatly enhanced the attractiveness of administrative protest resolution. With the ascent of GAO and GSBCA, is there a sound reason to preserve any judicial participation in the protest process, except for hearing appeals from the GAO (perhaps by the CFC or the district courts) and the GSBCA (by the Court of Appeals for the Federal Circuit)?

One drawback is the loss of convenience to litigants resulting from the elimination of district court protest jurisdiction. Avoiding this loss of convenience would require some greater expenditure of resources by the GAO and the GSBCA to address disputes outside the Washington, D.C. area. A second potential disadvantage is that litigants whose protests do not involve communications equipment or computers would not have access to the full range of discovery techniques now available in the federal courts. The GSBCA has expansive discovery tools but can hear protests dealing only with communications and computer equipment. The GAO has allowed more liberal discovery in recent years, but its information-gathering tools are weaker than those of the GSBCA and the federal courts. This deficiency could be cured either by establishing in GAO a protest path that offers a full set of discovery mechanisms, by giving GSBCA broader subject matter jurisdiction, or by creating a new administrative protest instrumentality that incorporates the more austere process of the GAO and the fuller adjudication approach of the GSBCA.

With an enhancement of administrative protest mechanism, there would be little reason for continuing the federal courts' protest jurisdiction. Aside from providing a more convenient forum for litigants outside of Washington, the federal courts contribute little to the protest process today above and beyond what the administrative forums currently provide and could supply with adjustments in their authority. The withholding of federal court protest jurisdiction could initially be limited to a five- or ten-year period to permit reevaluation of the usefulness of such a change.

A further issue for consideration is whether maintaining two administrative protest forums is desirable. Consolidation in a single administrative entity would yield a saving in resources that private and public counselors now spend in analyzing two forums, and the administrative agencies could avoid some overhead costs if they were combined in a single entity. On the other hand, competition between the GAO and the GSBCA has stimulated fruitful innovation in the administrative disposition of protests. If one assumes that the current policy of the protest system, with its encouragement of private monitoring, is appropriate, it would be unwise to eliminate such competition. To demonstrate that the existing equilibrium of protest policy warrants adjustment in the powers of the GAO or GSBCA would require the type of empirical testing suggested above.

