



Recommendation 95-5

Government Contract Bid Protests

(Adopted June 15, 1995)

In contrast to the private contracting system, which relies mainly on profit maximization and reputation to constrain the discretion of private purchasers in dealing with potential sellers, United States law provides a variety of opportunities for disappointed seekers of government contracts to air their grievances against the contracting process and its results. In addition to pursuing redress within the purchasing agency, a disappointed offeror can challenge the government's conduct in one of four protest forums: the General Accounting Office (GAO), the General Services Board of Contract Appeals (GSBCA) (for contracts involving automated data processing and telecommunications equipment), the federal district courts, and the Court of Federal Claims. In no other area of public administration have Congress and the courts provided so large and diverse an array of avenues for challenging the decisions of government officials.

This complex system evolved in a number of steps over the last 75 years. Soon after its creation in 1921, GAO began accepting bid protests under its authority to settle and adjust claims involving the United States and to issue advisory decisions concerning questions of payment by the government. In a series of court opinions from the mid-1950's to 1970 [most notably the 1970 decision in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970)], the federal district courts took on an expanded role in oversight of bid protests, and Congress extended authority to grant equitable relief in pre-award bid protest cases to the Claims Court (now the Court of Federal Claims) in the Federal Courts Improvement Act of 1982. The Competition in Contracting Act of 1984 (CICA) completed the foundation for the modern bid protest structure. CICA reflected a strong congressional presumption that government purchasing agencies should use competitive procurement techniques to increase opportunities for firms to compete for contract awards. It bolstered the bid protest mechanism and increased the ability of complaining offerors to gain access to information about the government's decision making process.

The eleven years that have passed since enactment of that legislation provide a basis for reexamination of the Act's premises and its impact. In addition, the government procurement process has been the subject of much recent study by scholars, professional associations, and blue ribbon commissions including the Acquisition Law Advisory Panel and the National



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Performance Review. Congress has also given extensive recent consideration to procurement reform. Severe budget pressures have inspired several congressional committees to consider statutory changes that would reduce procurement transaction costs and induce a broader array of firms to compete for government contracts. The Federal Acquisition Streamlining Act of 1994, enacted last fall, changed many features of procurement regulation and signaled a new congressional receptivity to proposals for restructuring the procurement process, although it did not significantly change the structure of the bid protest process. Legislation introduced this spring and supported by the Clinton Administration would, among other things, establish a uniform arbitrary-and-capricious standard of review for all bid protests and eliminate the jurisdiction of the federal district courts. Other legislative initiatives are in development.

Proposals for reorganizing the bid protest process have been numerous and varied, including suggestions for a single administrative bid protest forum (one of the existing forums or a new entity), as well as for different combinations of existing or new forums. Issues such as the appropriate standard of review, available discovery, formality of procedure, and availability of a stay of the procurement pending the proceedings have also prompted widely varying suggested alternatives. Although much attention has been devoted to the bid protest process, however, it has been largely theoretical. Without additional, currently unavailable empirical information, the Administrative Conference does not believe it can recommend a specific design for an ideal forum or combination of forums to process bid protests.

Certain streamlining modifications to the existing system of alternatives, however, seem clearly appropriate without further study. In particular, the Conference sees no persuasive justification for preserving direct court jurisdiction over bid protests. The administrative options for hearing bid protests today are considerably more substantial than those that existed when *Scanwell* was decided or when Congress granted protest jurisdiction to the Court of Federal Claims. Moreover, the factual and legal issues involved in these cases are well within the competence of an administrative forum. Provision for direct judicial review of administrative protest decisions in the Court of Appeals for the Federal Circuit should adequately protect the rights of litigants (provided the administrative decision includes clearly stated reasons, so there will be a record adequate for judicial review) and promote the development of a consistent body of law related to protests.

Even if Congress decides to preserve direct recourse to the courts, there is no longer a need for initial district court jurisdiction. The Court of Federal Claims provides a satisfactory forum for court consideration of these cases. The caseload in question is not large enough to



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burden that court unduly, and through travel and, when appropriate, telecommunications, the Court of Federal Claims adequately meets the needs of litigants outside of Washington, DC.

To make wise decisions about the exact type of administrative forum (or forums) that should hear bid protests, however, requires empirical data on the impact of bid protests on government procurement that is not now available. Moreover, these issues raise questions about the basic premises underlying the bid protest system. Current law, and many of the debates about the number and nature of forums for review of bid protests, assume that a robust protest mechanism improves government procurement performance by spurring savings-generating competition for government contracts and by monitoring the performance of government officials who may not exercise discretion to the benefit of taxpayers. But there is scant empirical evidence for judging whether public purchasing officials are more prone to shirk their responsibility to maximize taxpayer interests than private purchasing officials are to shirk their responsibility to maximize shareholder interests, or what net effect the modern system of protest controls, including CICA and related protest reforms, has had on procurement outcomes.

Fundamental questions about the bid protest process—whether it is effective in increasing the efficiency and fairness of government procurement, what remedies it should provide to disappointed offerors, or what standard of review oversight tribunals (regardless of their number or location) should apply—are being debated in this empirical void. The Administrative Conference believes that informed decisions on these issues require a foundation of detailed empirical research that cannot adequately be conducted without Congressional authorization. In particular, Congress might pass legislation allowing selected government purchasing agencies to conduct business free from protest oversight for a period of time, with the results to be compared with those at agencies operating under traditional protest controls.¹ Additional avenues of research, including comparison of pre- and post-Competition in Contracting Act agency procurement, detailed study of the impact of GAO or GSBCA review on specific agency procurement, examination of state and local approaches to procurement and bid protests, or comparison of the procurement activity and results of a major government purchasing agency and a major private company purchasing department,

¹ The pending legislation would authorize the Administrator of the Office of Federal Procurement Policy to “waive any provision of law, rule or regulation necessary” to assist agencies in conducting test programs to evaluate specific changes in acquisition policies or procedures. S.669, Title V, Section 5001, amending section 15 of the Office of Federal Procurement Policy Act (41 USC § 413). This broad provision might be read to include authority to waive laws requiring the availability of protest mechanisms.



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would be aided significantly by legislative authorization to collect data and funding support. With the successful completion of such research, Congress and other policy makers would be able to make better informed judgments about the need for extensive protest oversight of government procurement activity and the proper forum and standard of review for any such protest oversight.

Recommendation

I. Initial Jurisdiction to Review Bid Protests

Congress should streamline the system for handling bid protests by reducing the alternatives available for initial jurisdiction over bid protests.

A. All bid protests should be heard initially in some administrative forum independent of the agency office conducting the procurement.² To achieve this end, Congress should eliminate the direct jurisdiction of the Court of Federal Claims and of the federal district courts over bid protests. The United States Court of Appeals for the Federal Circuit should be given exclusive jurisdiction over all appeals from administrative bid protest decisions.

B. If Congress decides, notwithstanding Recommendation I(A), that the courts should retain direct jurisdiction over bid protests, then such initial court jurisdiction should be consolidated in the Court of Federal Claims for both pre-award and post-award protests.

II. Testing Bid Protest Systems

Congress should mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine whether it has improved the quality or reduced the cost of public procurement. This analysis should include evaluation of the impact of the bid protest process (and any alternatives under consideration) on existing and prospective bidders for government contracts as well as on the government. It should involve

² The Administrative Conference takes no position in this recommendation on the preferred structure of, or standard of review to be applied by, such administrative forum(s). The Conference notes, however, that if GAO continues to be involved in handling bid protests and such cases are directly reviewable in the Court of Appeals for the Federal Circuit, the reviewing court would effectively review the contracting agency's decision on the procurement, as informed by the GAO opinion; to facilitate this process, agencies should conclude action on a procurement that has been reviewed by the GAO by issuing a clear statement of the agency's final determination and the reasons for it.



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consideration of the potential impact of adjustments to the bid protest process (such as application of different standards of review of agency procurement decisions and imposition of sanctions for the filing of frivolous bid protests) as well as examination of the premises underlying the bid protest system as a whole. Specific approaches Congress should consider supporting include:

A. Cross-agency comparison—a pilot study in which one or more federal agencies that conduct a substantial amount of procurement activity would be permitted to conduct procurement with respect to some discrete type or types of contracts (e.g., computer or telephone equipment contracts) free of most or all bid protest controls for a specific period of years (e.g., five years), with the agencies' performance to be compared with their own performance before the beginning of the pilot and/or on bid protest-controlled contracts during the pilot period and with that of agencies continuing to operate under the existing bid protest system;

B. Competition in Contracting Act comparison—a comparison of the pre- and post-Competition in Contracting Act procurement experience of major government purchasing agencies to identify changes in agency behavior and procurement results;

C. GAO/GSBCA comparison—an examination of specific major procurement to determine whether GAO and GSBCA bid protest determinations (including the specific procedures available and standards of review applied in these forums) have produced desirable outcomes in particular procurement and to assess the impact of GAO and GSBCA rulings on purchasing agency conduct;

D. Government/private sector comparison—a comparison between the procurement experience of a major government purchasing organization and that of a major private company purchasing department to determine differences in the outcomes of efforts to purchase comparable goods or services over time;

E. Federal/state comparison—a comparison of federal government procurement experience with that of state and local governments that may employ procurement oversight mechanisms different in kind or degree from those at the federal level.

In pursuing any of these options or other studies of the procurement system, Congress should assign responsibility for research and evaluation to an independent body that is not directly involved in conducting major procurement or resolving bid protests. In the case of a



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pilot study, Congress should provide for regular collection of appropriate data during the pilot period to permit adequate evaluation.

Citations:

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