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PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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Pursuing Self-Interest While Achieving Oversight: GAO Protest Reform Should Look To Process, Not Politics—Part I

By Stuart W. Turner, Charles A. Blanchard, Sonia Tabriz, and Nathan Castellano*

Ostensible concern over delay and contractors manipulating the system are frequently cited as reasons justifying the need for procurement reform. Politicians often choose as their target the U.S. Government Accountability Office bid protest process, and claim that greedy contractors filing frivolous protests seize up the wheels of efficient government. The authors of this article do not believe there is an epidemic of frivolous protests and believe that most of the "reforms" that have been proposed actually undermine the purpose and effect of the Competition in Contracting Act. In this first part of the article, the authors discuss the Competition in Contracting Act. The second half of the article, which will appear in Pratt's Government Contracting Law Report, *addresses recent reform proposals, and discusses reform proposals that look beyond convenient scapegoats.*

Procurement is a critical government function, and making it work better is a perennial and laudable goal. It is also an evergreen political issue that provides politicians of all stripes a safe target of criticism in politically complex times. Any system so large and variegated as the U.S. federal acquisition system inevitably experiences long delays, overspending, inefficiency, and a multitude of other plagues and imperfections, and these issues can easily be picked up as causes for "reform."

Ostensible concern over delay and contractors manipulating the system are frequently cited as reasons justifying the need for procurement reform. Politicians often choose as their target the U.S. Government Accountability Office ("GAO") bid protest process, and claim that greedy contractors filing

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frivolous protests seize up the wheels of efficient government. Such claims have gained momentum and success in recent years, including the passage in the 2018 National Defense Authorization Act ("NDAA") of an anti-protester "loser pays" rule. Such penalties are only the tip of the iceberg, as multiple academics, politicians, government personnel, and, most recently, the so-called "Section 809 panel," have recommended many additional measures, including limits on access to agency records, restricting automatic injunctive relief for protesters, increasing agency discretion to issue sole-source contracts, and more.

But these are not "reforms." Rather, they represent a *repeal* of critical elements of the Competition in Contracting Act ("CICA") that established the modern GAO protest regime in 1984. True protest reform consistent with the animating purpose of CICA must connect to the underlying purpose of the bid protest system, *i.e.* to leverage the self-interest of contractors against the inefficiencies and anti-competitive practices that arise when the procurement system is unexamined. Notwithstanding the knee-jerk, anti-protester timbre of the current conversation, some recent developments from Congress expanding the reach of post-award debriefings suggest that such real protest reform is possible.

It is not surprising that protests bear the brunt of criticism about procurement inefficiency. It is politically difficult for members of Congress to blame inefficient acquisition on themselves, the president, or the Pentagon. It is harder still for Pentagon or other agency officials to argue that their own role within a multi-step procurement process should be disempowered or eliminated. But there is almost no consequence to anyone for blaming protests. There is perhaps no better scapegoat than a disappointed incumbent contractor, and it is easy to dismiss criticisms of aggressive bid protest reform when the loudest, and perhaps only, voices heard in opposition are those of the scapegoat's lawyers.

Regardless of the messenger, the reality is clear: there is no epidemic of frivolous protests; GAO's effectiveness has been rising, not falling; flawed and illegal procurements *should* be delayed or halted, and the system of "private attorneys general," pursuing self-interest while achieving oversight, should be preserved.

CICA WAS NOT INTENDED TO ELIMINATE GOVERNMENT PROCUREMENT DELAYS

It is ironic that modern critics of GAO bid protests so often cite increased delays as an argument for disempowering or jettisoning the protest forum. The original founders of the modern GAO protest process (*i.e.* the Congress that wrote and passed CICA in the first place) were very clear that procurement delay was an acceptable consequence—indeed a positive benefit—of the system they established. At a 1984 hearing of the House Committee on Government

Oversight to discuss CICA's new rules establishing and further defining the GAO protest process, then-Comptroller General Bowsher stated that GAO was against including a strict automatic stay for post-award protests in CICA, because it might gum up the works and increase costs due to frivolous protests.[1] Jack Brooks of Texas, chairman of the Committee on Government Operations and an original co-sponsor of CICA, vehemently disagreed. In response, Mr. Brooks stated:

> I just want to observe that over the years the best way to run a real fandango through the Government is to set up an emergency. That's the way some agencies operate. Any need that they have, they build into an emergency. They say it is critical and vital and essential, and they want it right now. They have no more time. That is the way they set them up with the big emergency. If the Congress questions the procedure for a specific contract, the agency says we can't go out for bid now. Everything will go to pot, we won't be able to operate. It has been going on for years. However, I am just not convinced. *I think you must get them by the chain and jerk them good. Tell them to stop and not spend another dime until they justify it. It will hurt, but this country will save an awful lot of money*. [. . .] I think we ought to just tell agencies, "Well, let's wait until tomorrow. Let's check. I think we would save a lot of money." It would add to the efficiency with which this Government runs.[2]

The architects of CICA found that competition was fostered by effective enforcement of procurement rules, even if such safeguards led to delays and interruptions of programs that fell short. The pre-CICA operations of GAO, the Committee found, were hamstrung by lack of meaningful enforcement provisions and a system that permitted agencies to produce only such documents as they chose, and prevail in protests simply by denying the allegations of the protester:

> [GAO] has been hesitant to challenge any but the most blatant agency actions. As a consequence, the current bid protest process does not provide an adequate remedy to those wrongly excluded from procurements.

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[1] Legislative History of the Competition in Contracting Act of 1984: P.L. 98-369: 98 Stat. 494, 1175: July 18, 1984 (1984) at 44–46 ("We are just not sure if you bring the procurement process to a halt-in other words, say a person can file a letter of protest and get literally the injunction power practically on the process whether that might not cause quite a bit of additional costs.").

[2] Legislative History of the Competition in Contracting Act of 1984: P.L. 98-369: 98 Stat. 494, 1175: July 18, 1984 (1984) at 45–46 (emphasis added).

> [. . .] Under GAO procedures, an agency need only deny that a protester's statement of facts is correct. In nine cases out of ten, the agency's denial will carry the day.[3]

Before CICA, protests took too long, and often the duration precluded meaningful relief. Agencies routinely delayed responding to protests until performance by the selected contractor was comfortably underway, and then argued to GAO that performance was too far along to be stopped efficiently.[4] Thus, CICA intentionally added obstacles to the uninterrupted progress of procurements and the duration of protests. Congress instituted both a fixed period for GAO to conduct the protest, and a mandatory stay to ensure that there would still be meaningful relief available when it was done.[5]

The goal of these new strictures was to place meaningful enforcement tools in the hands of those motivated by self-interest to use them—the contractors participating in government procurements. Congress included strong provisions to "insure the availability of information needed not only by the comptroller general to make determinations in procurement protests, but also by interested parties to identify, and initiate action against, solicitations and awards which they believe are unlawful."[6]

The right of a company or individual to challenge an unreasonable or illegal procurement action was not created by any bid protest forum, and no bid protest forum was created to ensure efficiency in government procurement. *Bid protests are a mechanism of enforcement and oversight,* animated by the right of citizens to object to the harm to themselves caused by an unreasonable or unlawful government action. This right is manifested in various forms, but from the most basic as enshrined in the Administrative Procedure Act ("APA"), to the more specialized procedures utilized at GAO, the interest remains the same.

CICA's establishment of an explicit statutory basis for GAO's bid protest jurisdiction did not expand these rights, it narrowed them, and provided a

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[3] H. Rep. 98-1157, Oct. 10, 1984, at 23–24 (quoting A.G.W. Biddle.).

[4] *Id.* at 24 ("cases like this . . . point out a cardinal failing of this bid protest process. GAO has no power to stop a contract award or contract performance while a protest is pending. As a result, agencies usually proceed with their contracts, knowing that they will preclude any possibility of relief simply by delaying the protest process.").

[5] *Id.* at 24–25 ("[CICA] contains several new requirements to enhance the effectiveness and timeliness of the process[:] it establishes an enforcement mechanism which prohibits the award or performance of a contract while a protest is pending [and] establishes specific time frames for deciding protests [and] for submitting agency protest responses to GAO.").

[6] H.R. Conf. Rep. 98-861, 1435, 1984 U.S.C.C.A.N. 1445, 2123.

specific forum for a proscribed group of constituents. CICA specifically restricted the definition of an "interested party" to include only parties with actual economic interest in a procurement decision, *i.e.* potential winners of a competition.[7] Should aggressive, anti-protester reforms further limit the pool of eligible protesters, or introduce disincentives and punishments directed at participants before GAO, this will not extinguish the right of such parties to seek relief. Such parties will seek relief at the U.S. Court of Federal Claims ("COFC"), with its somewhat broader jurisdiction based on the Tucker Act, which itself specifically cites the APA as the source of its bid protest standards.[8]

Finally, should the avatars of reform turn their fire on the Tucker Act, and seek Congressional action to close the door at COFC, this will simply result in the clock winding back to 1970, as disappointed bidders may seek to rely upon the original broad remit to the Article III courts granted under the APA by the U.S. Court of Appeals for the D.C. Circuit in *Scanwell Labs., Inc. v. Shaffer*:[9]

> the essential thrust of [a protester's] claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The 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, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'

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[7] *See RRRS Enters., Inc.—Recon.*, B-241512.3, June 10, 1991, 91-1 CPD ¶ 551 (denying standing to a contractor technically unqualified to perform the solicited work, rejecting the APA's broad "zone of interest" testing and noting that CICA narrowed the range of potential protesters.).

[8] 28 U.S.C. 1491 ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.").

[9] 424 F.2d 859, 864 (D.C. Cir. 1970). *Scanwell* jurisdiction was granted formal recognition under the Administrative Disputes Resolution Act ("ADRA") of 1996, and is largely viewed as having been terminated by the sunset of the specific ADRA jurisdictional grant in 2001. *See, e.g.*, *Rothe Dev. Inc. v. U.S. Dep't of Def.*, 666 F.3d 336, 339 (5th Cir. 2001) (per curiam). However, ADRA only formalized and sunsetted jurisdiction over bid protests subject to the Tucker Act (which grants jurisdiction over almost all protest cases as currently defined). Some commenters and cases have argued that *Scanwell* jurisdiction over cases not possible under the Tucker Act (current examples include protests of treaty-based procurements or *de facto* debarment) must therefore persist, given ADRA's specific limits. *See* Hess, J., "All's Well That Ends Well: *Scanwell* Jurisdiction In The Twenty-first Century", 46 Pub. Cont. L. J. 40 at 422–34. If Congress acts to narrow or terminate GAO and Tucker Act protest jurisdiction, recourse to the District Courts under this doctrine of persistent *Scanwell* jurisdiction will be appealing, and will certainly be tried.

The basic insight has always been the same—allow interested parties the right and forum to flush out instances where the government is falling short of its commitment to equal and reasonable procurement decisions.[10]

Theoretically, the pendulum could swing so far as to see some new law curtailing the protest right altogether and exempting disappointed bidders or potential bidders from the APA itself. That status would only last until another procurement scandal roiled the headlines, at which time Congressional champions of curtailing waste, fraud and abuse will insist that government procurement be exposed to greater scrutiny and openness. To save money, instead of simply hiring hundreds of new employees to staff the Offices of Inspector General and audit every procurement, politicians will suggest that some kind of forum be created allowing affected contractors to identify and bring (and pay for) the challenges themselves. And the pendulum will swing again.

Whether proposed GAO reform seeks to penalize incumbent contractors protesting a lost contract, delete the automatic stay provisions enshrined in CICA, or remove GAO jurisdiction over task orders, these reforms are directed at a straw target. Reforms designed to demonize GAO bid protests as fostering inefficiency and delay fail to acknowledge the purpose of GAO as an efficient, streamlined forum. GAO moves quickly, but it cannot be judged as good or bad based on whether or not it disrupts or delays government procurements. *Of course it does, and if it didn't, it would not be doing its job.* Such disruption or delay is part of why GAO's bid protest forum was strengthened and empowered by CICA. The 100-day clock for decisions goes hand-in-hand with the 100-day automatic stay. The point of these mutually supporting restrictions is to allow GAO to either act quickly to clear the path for a proper procurement, or to act quickly to fundamentally disrupt an improper one.

* * *

The second half of this article, which will appear in *Pratt's Government Contracting Law Report*, addresses the specific reforms that have been proposed in recent years. These reforms range from provisions in the 2017 NDAA such as "loser pays" penalties for unsuccessful protesters, to genuinely radical changes floated by the "Section 809 panel," such as stripping GAO of bid protest jurisdiction over Dept. of Defense procurements, curtailing the time available for protests, and eliminating the mandatory CICA stay. The article concludes by identifying some proposed and enacted reforms that, consistent with CICA,

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[10] *See*, Marcia Madsen, David Dowd and Roger Abbott, The Latest Bid Protest 'Reform' Should Be Repealed, Law360, Jan. 16, 2018 at 2–3.

seek to render procurements better (not merely faster), and are focused on improving the system, rather than finding scapegoats to blame for its shortcomings.