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PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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Victoria Prussen Spears

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

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 the first part of the article, which appeared in the May 2018 issue of Pratt's Government Contracting Law Report, *the authors discussed the Competition in Contracting Act. This second half of the article discusses reform proposals that look beyond convenient scapegoats.*

"REFORMERS" SEARCH FOR—AND FIND—SCAPEGOATS

As the debates over CICA—and CICA's fundamental purpose—recede into the past, the debate has grown over the relative costs and benefits of GAO bid protests as a mechanism to provide oversight during the acquisition process. This debate has reached new heights in the past several years, but criticism of the GAO process—and the concept of significantly empowering disappointed bidders at all—has continued to draw criticism from different quarters. Indeed, in the wake of CICA, various major protest disputes from the empowered GAO began to affect operations of the procurement market more profoundly (*e.g.* the

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Footnotes are continued from Part I of this article, which appeared in the May 2018 issue of *Pratt's Government Contracting Law Report*.

expanded diligence obligations related to organizational conflicts of interest arising from the *Aetna* decision;[11] the series of reversals arising from the Druyun scandal;[12] the reversal of the award of the K-10 tanker contract to Northrop,[13] and many more). The GAO came to symbolize for some an unelected entity imposing a new layer of compliance upon federal procurement and forcing procurement officials to explore various "protest proofing" measures in composing their solicitations.

In the late 1990s and early 2000's Professor Kelman of Harvard and Professor Schooner of the George Washington University Law School published arguments debating the value of an empowered bid protest forum. Professor Kelman took the position that the bid protest system was the antithesis of "business-like government":

> What's wrong with bid protests? They are time-consuming and expensive. To add insult to injury, when agencies lost appeals they had to pay huge vendor lawyer bills out of the taxpayer's pockets. But it is a big mistake just to focus on the direct time and cost of bid protests, because the most serious problems they create are different ones. For example, if an agency loses a bid protest, it is a blot on the career of a civil servant, and even when the government wins, the prospect of being deposed as a civil servant by high-priced legal talent trying to destroy you is harrowing, to say the least. In addition, bid protests opened up to some companies the potential of winning business not by satisfying their customers but through litigation, a spectacle contrary to the principles by which commercial business operates. These features of bid protests produced pernicious effects. First, bid protests made agencies excessively risk-averse, bureaucratic and slow in source selection, seeking redundant documentation and objectification of every decision to be able to defend themselves in the event of protest. Better choose the wrong vendor, many appeared to believe, than to choose the right one based on "subjective" or less than exhaustively documented grounds. Second, bid protests had a devastating effect on a spirit of partnership between government and vendors, because efforts at partnership appeared to create grounds for protest based on "favoritism" and because the system forced agencies into business relationships

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[11] *See Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129.

[12] *See, e.g.*, *Lockheed Martin Aeronautics Co., et al.*, B-295401 et al., Feb. 24, 2005, 2005 CPD ¶ 41.

[13] *See The Boeing Co.*, B-311344 et al., June 18, 2008, 2008 CPD ¶ 114.

with companies who sued at every occasion.[14]

Professor Kelman's concerns were largely misdirected—GAO has never provided for depositions,[15] and considering that GAO almost never recommends award to any particular company, the prospect of "winning business not by satisfying . . . customers but through litigation" is dim.[16] But true or not, these myths die hard. Professor Kelman's remarks were not rooted in the reality of protest practice, but these same shibboleths praising a more or less imaginary "businesslike government" ideal while attacking actual businesses for avaricious litigation nevertheless rouse the protest critics of today.[17]

The past several years have seen a greater chorus seeking reexamination of the GAO process. In a 2013 article, former administrator for the Office of Federal Procurement Policy Daniel Gordon raised questions regarding whether bid protests were effective in eventually securing the challenged contract for the protester. Gordon asserted that protesters rarely obtained the awards they sought to overturn, but acknowledged that his data set did not extend far enough to include the many unpublished protest resolutions that could alter

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[14] Steven Kelman, *Silence of Protesters' Bark Signals New Era*, Fed. Computer Wk. at 21 (Feb. 22, 1999).

[15] Even if possible testimony at GAO hearings is included, such proceedings take place in a very small percentage of protests. For example, in 2017, GAO held hearings in 1.7 percent of its cases. *GAO Bid Protest Annual Report to Congress for Fiscal Year 2017* at 4, *available at* www.gao.gov/assets/690/688362.pdf. At COFC, strict rules limiting supplementation of the administrative record also render depositions or live testimony exceedingly rare.

[16] Additionally, Kelman's warning of a wave of "protests based on 'favoritism' " was similarly misdirected, as neither GAO or COFC sustain protests based on a mere appearance of favoritism, but have, since long before the passage of CICA, dismissed any protest of bias not based on clear evidence. *See, e.g.*, *Newsun, Inc. d/b/a Internal Computer Servs.*, B-409582, June 17, 2014, 2014 CPD ¶ 183; *Harmonia Holdings Grp., LLC v. United States*, 132 Fed. Cl. 129, 143 (2017) (rejecting bid protest alleging favoritism, confirming that allegations of bias require "clear and convincing evidence of some specific intent to injure the protestor").

[17] In response to Professor Kelman, Professor Schooner responded that the "private attorney general" system created by the bid protest regime was cost efficient means of providing much needed government oversight: "From a policy standpoint, Professor Kelman should welcome private attorneys general. In economic terms, the protest and disputes regimes are a bargain. Whether a handful of law firms thrive on the practice is irrelevant. Opponents of litigation are hard pressed to demonstrate a more cost effective, less intrusive compliance regime. An increased Inspector General presence, or other labor-intensive mechanisms would please no one. . . . In a government of the people, where the governed share responsibility with those who govern, public trust is key. For centuries, people have asked "who watches the watchmen?," and the question remains vital today." Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U.L. Rev. 627, 681–85 (2001).

that conclusion.[18] Gordon's analysis was nevertheless publicly interpreted as an assault on the protest system.[19] Practitioners stepped forward to point out gaps in Gordon's analysis, but concern regarding "frivolous protests" continued.[20] Commenters began to recommend drastic changes to combat such protests, even with very little—or no—statistical or research findings supporting their broad claims.

For example, in 2015, NASA contracting officer Bruce Tsai advanced an aggressive proposal to combat the rise of "frivolous" protests by eliminating CICA's automatic stay provision for any development contract award over $10 million or service contract award over $50 million.[21] Tsai claimed that GAO was seeing an increase in "frivolous" protests, arguing that "frivolous protest[ers] are exploiting the protest mechanism to impede competition," and citing Professor Kelman's opinion that protests are "time-consuming and expensive"—the twin specters of delay and avaricious contractors again.[22] Tsai's evidence for this supposed epidemic was the fact that the number of filed protests had gone up since 2008, while the number of written sustain decisions had remained the same, implying that a lower percentage of the protests filed had merit.[23] Of course, the increase in protests was almost entirely ascribable to the grant to the GAO of jurisdiction over task order protests in 2008. More important, Tsai simply ignored the fact that the *effectiveness rate* of GAO protests—a far more salient statistic that includes all positive protestor outcomes, including instances where the agency takes "corrective action" in response to a protest before a

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[18] *See* Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489 (2013).

[19] *See* Kathleen Miller, *Protests rarely results in U.S. contract reversals, study shows*, Washington Post, March 11, 2013 ("Formal protests of U.S. government contracts rarely help companies with a reversal of those awards, according to a study by President Obama's former procurement chief.").

[20] *See* Papson, Carey and Meier, *FEATURE COMMENT: The Odds Of Winning A Contract After Protesting Are Higher Than You Think,* The Government Contractor, Vol 55, No. 16 (April 24, 2013) ("An article by Professor Dan Gordon provided a fresh perspective on the costs and benefits of bid protests at the Government Accountability Office. Some media reports, however, misinterpreted the article's findings concerning a protester's likelihood of "ultimate" success. Contrary to those reports, Gordon's article does not suggest that protesters almost never succeed in winning the contract that is the subject of their protest.").

[21] Bruce Tsai, "Targeting Frivolous Bid Protests By Revisiting The Competition In Contracting Act's Automatic Stay Provision," 13 J. Cont. Mgmt. 125 (Fall 2015).

[22] *Id.* at 125.

[23] *Id.* at 125–126.

written decision is issued[24]—has steadily *increased*, from 34 percent in 2004, to 42 percent in 2008 to 45 percent in 2015 when Tsai wrote the article, and 47 percent today.[25] This steady rise strongly suggests that protests have become progressively more legitimate and less frivolous as the GAO forum and the market for its services continues to mature.[26] The "effectiveness" statistic was published in the same reports Tsai cited for his allegations of "frivolous protests," but he ignored it, presumably because it cuts against his call to rein in the greedy contractor and end delays to the operations of a businesslike government. Press articles repeating this same fallacy about increasing protests and falling sustain rates continue to this day, and continue to set the tone of the debate over bid protest reform.[27]

This same scapegoating characterized some of the debate in 2016 over the 2017 NDAA, which served as a stage for both the House and Senate Armed Services Committees ("HASC" and "SASC") to debate GAO bid protest reform. The rhetoric directed at protests was heated and aggressive, with staffers from Senator John McCain's office attacking "serial protesters," and proposing an array of punitive measures directed at incumbent contractors that protest the

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[24] "Corrective action" in this context denotes a statement by the protested agency to the GAO that it intends to take some action to address the issues raised by the protest. GAO will typically permit the agency to determine what action is appropriate, and will dismiss the protest as academic. If the protester believes that the agency's corrective action fails to meaningfully address the problems, or otherwise prejudices the protester, the protester may file new objections and restart the protest. *See*, *e.g.*, *Castro & Co., LLC.*, B-415508.4 (Feb. 13, 2018) (sustaining supplemental protest where agency's limitations on scope of proposal revisions following corrective action unreasonably prohibited protester from revising all aspects of proposal materially impacted by corrective action).

[25] *See GAO Bid Protest Annual Report to Congress for Fiscal Year 2008*, at 2, *available at* www.gao.gov/assets/100/95920.pdf (including rates for 2004–2008); *GAO Bid Protest Annual Report to Congress for Fiscal Year 2017* at 4, *available at* www.gao.gov/assets/690/688362.pdf (including rates from 2013–2017).

[26] It should be noted that these effectiveness numbers were likely calculated including the "hundreds of protests" filed by Latvian Connection, LLC, the overwhelming majority of which GAO dismissed as frivolous and abusive of the GAO process. *See Latvian Connection LLC-Reconsideration*, B-415043.3, Nov. 29, 2017, 2017 CPD ¶ 354. If those protests were removed from the number of total cases filed, the effective rate would improve still further.

[27] *See*, *e.g.* Carten Cordell, "Drowning in protests: Can agencies stem the rising tide?," Federal Times, July 28, 2017, *available at* www.federaltimes.com/acquisition/2017/07/28/drowning-in-protests-can-agencies-stem-the-rising-tide/ ("But while number of protests filed have increased more than 12 percent from fiscal 2012 to fiscal 2016, according a Government Accountability Office report, only a fraction of them are deemed to have merit. An even smaller portion, some 22.56 percent, are sustained in favor of the contractor who filed the protests.").

loss of contracts they currently hold.[28] Again, delay to the Government and supposed greed by contractors were cited, with no specific examples. Most extraordinary, the SASC proposed that incumbent protesters that lose at GAO should be forced to turn over payments earned on interim "bridge" contracts to the protest victors.[29] Whether this transfer of funds earned by one company to its direct competitor was workable, or even legal, was not explored. What was clear was that the hunt was on again for the old villains.

Finally, the Section 809 Panel ("the Panel"), named after the provision of the 2016 NDAA that established it, has been working on its broad portfolio of procurement reform topics, and has begun to issue its final reports. The first volume of the Panel's final report, issued in January 2018, did not substantively address protest reform, but promised that future volumes would do so.[30] In 2017, members of the Panel convened several public meetings to discuss potential recommendations for proposed bid protest reform.

In various emails seeking comment from the government contracts bar, and at several public sessions, Panel members have floated multiple "reforms" to the protest process defined in CICA as applied to the DOD. Members have proposed shortening the GAO protest period to 10 days; enshrining the presumption that unsuccessful protests merit punishment by a range of "loser pays" penalties; removing discretion from GAO to recommend overturning an existing award (*i.e.* limiting remedies at GAO to bid and proposal costs and lawyer fees); and eliminating GAO jurisdiction over DOD protests altogether in favor of proceedings before a bespoke entity within the executive branch. The Panel may also seek to alter the COFC's jurisdiction over protests at § 1491(b) of the Tucker Act. All of these changes are directed at curtailing the extent or depth of procurement review and granting more unexamined discretion to government officials. The 809 Panel has assigned a talismanic importance to speed, and its recommendations are based on automatic deference to government officials and disincentives to protesters, as if all the problems in the procurement system could be cured by unleashing the former and punishing the latter.

In this sense, the proposals of the 809 Panel are a conscious attempt to wind back the clock to the time before CICA when procurement officials had little

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[28] *See* Connor O'Brien, "Senate NDAA pushes 'loser pays' on bid protests," Politico, May 16, 2016 (subscription only).

[29] *See* S. 2943 at 493–94.

[30] Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. 1, Jan. 2018, *available at* https://section809panel.org/wp-content/uploads/2018/01/Sec809Panel_Vol1-Report_Jan18_FINAL.pdf, at 10.

to fear from a deferent, largely supine GAO. For example, the Panel has mentioned the possibility of eliminating pre-award protests, thus adopting a presumption of correctness to all DOD procurement planning, small business, and sole-source award determinations. Arresting the flood of unexamined sole-source awards, as discussed previously, was one of the animating purposes behind the drafting and passage of CICA in the first place. The Panel has not released its complete set of final recommendations, but it is likely that some will be taken from those listed above.[31] While called "reform," these proposed measures should be recognized for what they are — repeal of critical elements of CICA.

RECENT ACTION IN CONGRESS AND ELSEWHERE

In the 2016 debate between the HASC and SASC, the HASC was relatively reticent, proposing only that the U.S. Department of Defense ("DOD") engage "an independent entity with appropriate expertise" to study the duration and impact of bid protests by incumbent contractors.[32] The SASC, on the other hand, led by Senator McCain, proposed a panoply of reforms to the existing GAO bid protest framework that assumed the existence of "serial protesters," *i.e.* incumbent contractors protesting out of financial interest alone, in order to cling to existing business during the automatic GAO stay.[33] To punish these supposed nefarious "serial protesters," as noted above, the SASC proposed several dramatic reforms, including the imposition of costs against losing protesters, largely eliminating GAO's jurisdiction to hear task order protests, and the extraordinary rule that where a "bridge" contract is issued to an incumbent during the pendency of the incumbent's GAO bid protest, the government must hold in escrow all payments issued in excess of actual costs incurred, to be transferred to the awardee of the protested contract if the incumbent contractor loses the protest.[34]

Luckily, the HASC approach largely prevailed—with the 2017 NDAA ultimately calling for DOD to commission "an independent research entity . . . with appropriate expertise and analytical capability to carry out a comprehensive study on the prevalence and impact of bid protests on

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[31] The Panel is at least considering recommending a revision to CICA itself, as its full-Panel meeting to discuss protest issues in 2017, convened by Emeritus Professor of the George Washington University Law School Ralph Nash, was entitled "Protests and Modernizing CICA." *Id.* at A-9.

[32] *See* H. Rep. 114-537 at 195 (Sec. 831).

[33] *See* Connor O'Brien, "Senate NDAA pushes 'loser pays' on bid protests," Politico, May 16, 2016 (subscription only).

[34] *See* S. 2943 at 493–94.

Department of Defense acquisitions, including protests filed with contracting agencies, the Government Accountability Office, and the Court of Federal Claims" before taking any drastic measures.[35] The RAND National Defense Research Institute ("RAND") was selected to conduct the study called for by Congress. The results of that study were delivered to Congress by report in December 2017, and contained no good news for the anti-protest movement.

In its report, RAND presented its quantitative examination of several elements of the bid protest process in DOD procurements.[36] RAND emphasized what many in the industry already know to be true: that "bid protests are exceedingly uncommon for DoD procurements."[37] RAND noted that while there has been an upward trend in the number of protests from 2008 through 2016, protest activity overall has gone down since the late 1980s and 1990s.[38] Indeed, RAND found that "the overall percentage of DoD contracts protested was very small—less than 0.3 percent."[39] This means that 99.7 percent of DOD contracts are not even subject to the bid protest process. Equally important, RAND demonstrated that in the 0.3 percent of DOD contracts protested, protests were effective over 40 percent of the time, resulting in "in some change to the initial procurement decision or terms."[40]

Among RAND's broad conclusions was the simple but critical proposition that the prospects of a protest are directly related to its merit—"*the details of a protest case matter in terms of outcome*."[41] In other words, when a protest has merit, it sparks a response from the awarding agency to correct what had been a procurement error. Unavoidably, this may delay or disrupt the progress of a procurement. This is only what should be expected from an effective enforcement and oversight procedure.

What the RAND report recommended for addressing cited concerns about the bid protest process is equally enlightening. RAND told Congress that task order protests are actually more effective than protests of contract awards, suggesting that these protests are exceedingly important, contrary to SASC's

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[35] NDAA for FY 2017, Pub. L. 114-328 (Sec. 885).

[36] Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers, RAND Corporation (Dec. 17, 2017), *available at* www.rand.org/pubs/research_reports/RR2356.html.

[37] *Id.* at xv.

[38] *Id.* at 25–26.

[39] *Id.* at 26.

[40] *Id.* at 32.

[41] *Id*. at 34 (emphasis in original).

proposal to largely eliminate GAO's task order jurisdiction.[42] RAND also cautioned Congress against reducing GAO's 100-day protest timeline, noting that while most protests are in fact resolved in less than 60 days, certain complex proposals may require additional time (as does GAO during "protest season" at the end of the fiscal year).[43]

Importantly, RAND also recommended that DOD improve the quality of post-award debriefings, a suggestion that comports with some new debriefing requirements imposed by the 2018 NDAA. The 2018 NDAA requires certain "Enhanced Post-Award Debriefing Rights" to be provided to disappointed bidders for DOD contracts.[44] Specifically, all debriefings after contract awards valued at over $100 million dollars must include a redacted copy of the agency's written source selection award document, and offerors may extend their debriefings (and toll the due date for a protest) by submitting additional questions in writing within two days of an in-person debriefing.[45]

While making debriefings slightly more fulsome and interactive takes a step towards empowering the "private attorneys general" critical to the bid protest system, the 2018 NDAA took two steps back by implementing a "pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests."[46] Under this program, a large contractor whose protest is denied in a written decision by GAO must "reimburse the Department of Defense for costs incurred in processing covered protests."[47] Before this program is implemented, DOD must develop rules and define what is included in "costs."[48]

This policy cuts directly against the incentive system erected by CICA, and assumes that a protester that does not prevail in a protest has somehow been found culpable of a frivolous act, and should be punished. Not every protest case which appears meritorious is successful, and redefining "unsuccessful" as "frivolous" simply ignores the significant costs and effort of pursuing protests, and the power held and exercised by GAO to dismiss the very few frivolous

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[42] *Id.* at xvii; 29–30.

[43] *Id.*

[44] NDAA of FY 2018, Pub. L. 115-91 (Sec. 818), *available at* www.congress.gov/bill/115th-congress/house-bill/2810/text#toc-H027ACB12EF3E49B0824FC6168D518F22.

[45] *Id.* at Sec. 818(a), (b).

[46] *Id.* at Sec. 827.

[47] *Id.* at Sec. 827(a).

[48] The 2018 NDAA program at least corrects the problem of the 2016 SASC proposal that would have assessed such costs against any protest that did not result in a written sustain decision.

protests it receives. The effect of this act will be to deter protests generally (and without regard for merit), consequently permitting serious improprieties and unreasonable determinations to pass by unexamined. This is not a reform of CICA, it is a revision of its basic tenets under the guise of reform. No data supports the purported justification that that there is a wave of frivolous protests that requires this type of aggressive intervention, or the far more aggressive dismantling under contemplation by the Section 809 Panel.

BEYOND THE PROTEST SCAPEGOAT

While academics, contractors, and government personnel may have legitimate grievances with the procurement process, when calls for reform reach Congress, bid protests are an appealing target. But many other elements of the procurement process prolong contract formation long before the initiation of a bid protest, including: uncertainty in the legislative authorization and appropriation processes; competing interests in the executive budget; various layers of internal review in the Pentagon or other procuring agencies; the acquisition planning and market research requirements; tension and disconnects between acquisition personnel and the programs and users they serve; and public notice and competition requirements.

Bid protests enter the equation at the end of an often otherwise lengthy acquisition timeline that may take years before an award is ever announced (or, in some cases, before a solicitation is issued). Requirements must be determined and approved, the agency needs to develop an acquisition strategy, that strategy needs to be translated into a solicitation, and proposals need to be evaluated. All along the way, there are review and approval processes that alone hinder efficiency. For major weapon systems program, for instance, approvals are required not only from the particular military service procuring the system, but also from the DOD. Even for smaller programs, there are often layers of internal approval required to move forward. The time needed for a program to run through these processes often dwarfs the delay caused by the bid protest system, and as such is a target-rich environment for reforms that could truly speed up the procurement process. Reform of unnecessarily attenuated and bureaucratic procurement procedures can address the delay that is touted as a key reason for limiting access to GAO bid protests, without undercutting CICA's fundamental purpose. Reforms targeted at increasing a disappointed offeror's visibility into the agency's award decisions would similarly improve efficiency in a manner that is consistent with the CICA, by affording contractors the opportunity to make more informed decisions regarding the potential merits of a protest before it is filed.

The 2018 NDAA's efforts to increase information available during a debriefing are a good start. Certain agencies already go much farther. Some give

fulsome debriefings already, providing debriefed competitors with redacted versions of all relevant evaluation documents (*e.g.* evaluation reports from factor teams or the Source Selection Evaluation Board, cost evaluations, government cost estimates, and the like). Disclosure of these materials, properly redacted, allows disappointed bidders to gain a much better understanding of the agency's evaluation approach and judgment, and experience shows that such disclosures deter more protests than they inspire.

Programs such as the U.S. Air Force's "Extended Debriefing" program have put this idea into even more expansive practice with success. Under the program, outside counsel for a disappointed bidder are given access, under a non-disclosure agreement that protects confidential information, to the same unredacted record that they would receive after filing a protest. As the Air Force explains, "[b]y putting the discovery cart before the horse—that is by offering up the agency record before a GAO bid protest can be filed—an offeror's outside counsel is provided with enough information from which to ascertain that the evaluation process was fair and impartial and, consequently, can communicate to the unsuccessful offeror that the award decision is rationally based. Thus far, it has been the Air Force's experience that extended debriefings frequently result in the offeror's counsel dissuading the offeror from filing a protest."[50] As the Alternative Dispute Resolution Committee of the American Bar Association's Section of Public Contract Law concluded: "The use of extended debriefings has demonstrated success."[51]

It follows that so-called reformers should stop caricaturing and seeking to punish the participants in the bid protest process, and should instead focus on true protest reforms to address purported concerns regarding the efficiency and efficacy of the procurement process. CICA was designed to permit interested parties to expend resources reviewing the details of a government procurement, and to hold the government to a high standard of integrity. Rather than implement a cadre of program auditors policing every award, CICA intentionally trusted and empowered this market to leverage self-interest to drive oversight. Like any market, the oversight market created by CICA can be distorted and ultimately robbed of its vitality. If these "reforms" impose

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[50] *See* The Air Force Extended Debriefing Program, *available at* www.adr.gov/adrguide/Extended-Debriefings.docx; *see also* New U.S. Air Force Debriefings for Losing Contractors Target Protests, Aviation Week, June 24, 2014, *available at* http://aviationweek.com/awin-only/new-us-air-force-debriefings-losing-contractors-target-protests.

[51] ADR Roundtable, American Bar Association Annual Meeting, August 9, 2014, *available at* https://www.americanbar.org/content/dam/aba/events/dispute_resolution/PublicCL.authcheckdam.pdf.

penalties upon good faith participants; if they curtail information available to one class of participants (the protesters) while granting full access to another (the government); if they artificially accelerate deadlines past the point of efficient operation or impose other arbitrary limitations, the market will fall short of its potential.

The government has sought in recent years to broaden participation in public procurement and encourage new or non-traditional players to enter the government market.[52] Actions which lessen accountability and oversight of such procurements cut directly against that goal, and against CICA's fundamental purpose of increasing competition in public procurement. Bid protests are a market-based oversight mechanism empowered by CICA. If the incentives to participate in that process are hampered or removed, improper procurement actions will pass unexamined, and the inefficient, closed public procurement system that CICA targeted will be more likely to return.

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[52] Recent Defense Federal Acquisition Regulation Supplement ("DFARS") revisions permit contracting officers to treat new entrants into DoD contracting as commercial item contractors, in order to "create incentive for nontraditional defense contractors to do business with DoD." 83 Fed. Reg. 4431, 4442 (Jan. 31, 2018). The Section 809 Panel in the first volume of its final report proposed revisions to data rights rules and establishment of a "DoD Nontraditional Technology Partner Initiative," to create similar incentives. *See* Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Vol. 1, Jan. 2018, *available at* https://section809panel.org/wp-content/uploads/2018/01/Sec809Panel_Vol1-Report_Jan18_FINAL.pdf, at 46–47, 194.