Independent Review of Procurements Is Worth It: There Is No Support for Hamstringing the GAO Bid Protest Process

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Note from the Editor:

This article criticizes a recent change to the GAO bid protest process. A new rule requires bidders whose protests in large procurements fail to pay DoD's costs of processing the protest. The article argues that this cost-shifting provision is out of step with the APA's goals of promoting effectiveness and integrity in agency actions, including government contracting.

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• David H. Carpenter & Moshe Schwartz, *Government Contract Bid Protests In Brief: Analysis of Legal Processes and Recent Developments*, Congressional Research Service (Jan. 19, 2018), https://fas.org/sgp/crs/misc/R45080.pdf.

• Moshe Schwartz & Kate M. Manuel, *GAO Bid Protests: Trends and Analysis*, Congressional Research Service (July 21, 2015), https://fas.org/sgp/crs/misc/R40227.pdf.

• Sandra I. Erwin, *Proposed Legislation to Penalize Pentagon Contractors That Game the Bid Protest System*, Federal Small Biz Savvy (July 6, 2016), http://blog.federalsmallbizsavvy.com/sba-legislative/proposed-legislation-to-penalize-pentagon-contractors-that-game-the-bid-protest-system/.

• Carten Cordell, *Drowning in protests: Can agencies stem the rising tide?*, Federal Times: Acquisition (July 28, 2017), https://www.federaltimes.com/acquisition/2017/07/28/drowning-in-protests-can-agencies-stem-the-rising-tide/.

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Over the past two years, critics from the Department of Defense (DoD) and Congress have claimed that frivolous or unnecessary bid protests are impairing the procurement process, especially the ability of DoD to obtain weapons systems and services in a timely manner. In response to these complaints, the Senate Armed Services Committee (SASC) considered changes to the Government Accountability Office (GAO) bid protest process. One of the changes the SASC considered was to penalize contractors that file unsuccessful bid protests at GAO involving large defense procurements by requiring them to pay DoD's costs of processing the protests. This loser pays proposal was included in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 as Section 827.[1] The provision is an unwarranted effort to undermine independent review of agency procurement actions.

This cost-shifting provision reflects a basic failure to appreciate the importance of independent review of government procurement decisions. Contract awards are agency decisions that involve billions of dollars in taxpayer funds. The new loser pays provision—an English-style cost-shifting rule—violates basic principles of administrative law enshrined in the Administrative Procedure Act (APA), which was designed to protect against arbitrary, capricious, and illegal government action. Notably, efforts by private sector defendants to impose a similar cost-shifting approach have been largely rejected, even though they are not subject to the same constitutional restrictions as government agencies.[2] This type of rule penalizes citizens for attempting to vindicate their rights by seeking review of government decisions, which no other agency review process does. As explained below, the government already enjoys a deferential standard of review in bid protests. Shifting the costs of litigation to unsuccessful protesters sends a very clear message to contractors: DoD's largest procurements are not for review. This message is inconsistent with the right of citizens to seek independent review of government actions.

Additionally, the asserted basis for restricting review is without factual support. At the time Section 827 was proposed and enacted, there was relatively little data on bid protests. The existing data was largely limited to the statistics published by GAO and the Court of Federal Claims (CFC). These reports did not provide granular information on issues of concern, such as the

1 Pub. L. No. 115-91 (Sec. 827).

2 Since the late 18th century, the United States has rejected the loser pays "English Rule" and generally requires each party to bear its own litigation expenses (an approach known as the "American Rule"). Although a number of exceptions to this rule have emerged since the turn of the 20th century, these exceptions have been narrowly tailored to shift costs in favor of successful plaintiffs rather than the defendant, as here. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 Ind. Int'l & Comp. L. Rev. 583, 584–89 (2005) (noting that fee-shifting is available for successful plaintiffs in four categories of cases: civil rights suits, consumer protection suits, employment suits, and environmental protection suits).

number of procurement actions (including task orders[3]) versus the number of protests filed, or the prevalence of bid protests by incumbent contractors. There was no data supporting the notion that protests of large acquisitions are hampering procurement efforts, and certainly not to an extent that would justify restricting normal rights of citizens to seek review of government action. The RAND Corporation was tasked by Congress with developing data for a study.[4] The RAND report, which was issued to Congress on December 21, 2017, refutes the notion that protests are a problem.[5] Significantly, RAND was not asked to review whether changing the bid protest process would restrict citizens' right to petition for review of government action.

Finally, and curiously, limiting or reducing review of major defense procurement decisions is incompatible with DoD's stated aim of improving competition and eliminating corrupt agency behavior. As it stands, fewer than 50% of DoD acquisitions are competitively sourced.[6] Any change that discourages independent review of agency procurement decisions will impair the government's ability to promote competition and minimize corruption.

I. Bid Protests Provide an Important Vehicle, Firmly Rooted in the APA, for Ensuring That Agencies Act Lawfully

Although discussions about possible changes and reforms tend to focus very heavily on public contract laws and regulations, the award and administration of government contracts is—in practice—agency decisionmaking involving billions of dollars in taxpayer funds. Administrative law principles are therefore an important consideration in the regulation of agency procurements. Agency decisions of all types, including government contracting, are broadly governed by the APA,[7] which "creates the framework for regulating executive agencies"[8] by, among other things, providing for independent review of agency decisions to counterbalance the power of large government agencies like DoD.

A. The APA Sets the Framework for Review of the Exercise of Power by Government Agencies

The APA created the framework for regulating the modern administrative state. The APA was enacted in 1946 in response to the expansion and centralization of federal power under the New Deal, which had resulted in the proliferation of enormously powerful administrative agencies.[9] As one scholar put it, the APA "established the fundamental relationship between regulatory agencies and those whom they regulate. . . . The balance that the APA struck between promoting individuals' rights and maintaining agencies' policymaking flexibility has continued in force, with only minor modifications, until the present."[10]

Following the flurry of legislation in 1933, President Roosevelt's New Deal coalition eventually began to falter. Concerned by the dangers posed by the rapid centralization of power as exhibited in Germany, members of Congress launched a campaign for administrative reform.[11] This effort culminated in the Walter-Logan administrative reform bill, which was passed by Congress and vetoed by Roosevelt in 1940. The reforms proposed in Walter-Logan[12] were much more restrictive than those in the later APA. Among other things, Walter-Logan included much more thoroughgoing provisions for judicial review than the APA (including a very broad standard for standing), required notice and public *hearings* (rather than just notice and comment) for all new rules or rule changes, and even required that agencies enact any regulations pursuant to their enabling statutes within one year of the passage of those statutes.[13]

Even with Roosevelt's veto of Walter-Logan, reform efforts continued unabated and became even more active following Roosevelt's death. Both parties eventually settled on the APA as a compromise measure that would, over time, protect the advances made by the regulatory state while giving citizens and businesses tools to check the arbitrary exercise of power by agencies. The

3 The threshold for protesting DoD task orders is currently $25 million. 10 U.S.C. § 2304c(e)(1)(B). The threshold for protesting civilian task orders, or DoD task orders issued by a civilian agency, is $10 million. 41 U.S.C. § 4106(f)(3). HP Enterprise Services, LLC, B-413382.2, Nov. 30, 2016, 2016 CPD ¶ 343 (holding that the jurisdictional threshold for civilian task orders applies to DoD task orders issued by civilian agencies, like the GSA).

4 NDAA for FY 2017, Conference Report to accompany S. 2943, sec. 885.

5 *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers*, RAND Corp., Dec. 21, 2017, at 31-33 (released to the public Jan. 2, 2018).

6 Defense Procurement Acquisition Policy publishes quarterly competition scorecards regarding DoD acquisitions. In the first and second quarters of FY 2017, the percentage of procurements that were sourced competitively was 47% and 49%, respectively. *See* http://www.acq.osd.mil/dpap/cpic/cp/competition.html.

7 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 500 et seq.).

8 David S. Black, Gregory R. Hallmark, *Procedural Approaches to Filling Gaps in the Administrative Record in Bid Protests Before the U.S. Court of Federal Claims*, 43 Pub. Cont. L.J. 213, 221 (2014).

9 In a 1937 message to Congress, President Roosevelt noted that "[t]here are over 100 separate departments, boards, commissions, corporations, authorities, agencies, and activities through which the work of the Government is being carried on." Franklin D. Roosevelt, *Message from the President of the United States* (Jan. 12, 1937) *in* The President's Committee on Administrative Management, Report of the President's Committee on Administrative Management iii-iv (1937).

10 George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1558 (1996).

11 *Id.* at 1581-87.

12 Walter-Logan was introduced in the Senate by Sen. Mills Logan as S. 915, 76th Cong., 1st Sess. (1939). A slightly modified version was introduced by Rep. Francis Walter as H.R. 6324, 76th Cong., 3d Sess. (1939).

13 *See* Shepherd, *supra* note 10 at 1598-1601.

balance struck by this hard-fought compromise is reflected in the bid protest process.

B. The Bid Protest Process Provides a Check on the Administrative State

According to the Attorney General's Manual on the Administrative Procedure Act, the APA seeks to balance the requirements of due process and sound administration in the following four ways: (1) by "requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules"; (2) by "provid[ing] for public participation in the rulemaking process"; (3) by "prescrib[ing] uniform standards for the conduct of formal rulemaking and adjudicatory proceedings"; and (4) by defining the scope of judicial review in the context of the administrative state.[14]

Of particular relevance here, the APA confers a broad right of judicial review to parties directly affected by agency conduct. Pursuant to Section 10 of the APA, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[15] The precise scope of judicial review is found in Section 706 of the Act. Among other things, Section 706 authorizes the courts to decide questions of law and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[16] In *Motor Vehicle Manufacturers Association*, the Supreme Court clarified that:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[17]

In 1970, in the landmark *Scanwell Laboratories, Inc. v. Shaffer* case,[18] the D.C. Circuit held that the protections afforded by the APA against arbitrary action by agencies apply to agency procurements. The court explained that the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action'" and held that Section 10 confers standing on disappointed offerors to sue the agency in federal court.[19] Although the D.C. Circuit acknowledged that "the ultimate grant of a contract must be left to the discretion of a government agency," the court held that it is:

> [I]ncontestable that that discretion may not be abused. . . . [Contracting officers] may not base decisions on arbitrary or capricious abuses of discretion . . . and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under section 10 of the [APA].[20]

The D.C. Circuit made plain that arbitrary and capricious action by an agency includes violating the terms of the solicitation and failing to comply with procurement laws and regulations.[21] The loser pays provision of the 2018 NDAA is inconsistent with the APA's presumption of judicial review for a citizen who suffers legal wrong because of agency action. There is no basis for penalizing citizens for trying to challenge arbitrary and capricious agency conduct.

Although the standard of review applied by GAO in evaluating agency conduct is not governed by the APA or defined by statute or regulation, the GAO applies the same *Scanwell* standard in its approach to review. In an advisory opinion made at the request of the federal district court for the District of Columbia, GAO noted that its "standard of review comports with the [D.C. Circuit's] standard that provides deference to the decisions of procurement officials; an agency's procurement decision will only be disturbed where it involves 'a clear and prejudicial violation of applicable statutes or regulations' or 'had no rational basis.'"[22]

II. GAO's Bid Protest Process is Rooted in APA Concepts

A. The Evolution of GAO into an Effective Bid Protest Forum

Although the bid protest process at all tribunals is rooted in concepts underlying the APA, this section focuses on the GAO, as the GAO in particular has been the target of recent reform efforts. The GAO has been an active administrative forum for bid protests for nearly 100 years. Due to its informal and expeditious process, GAO handles a large number of protests every year without resort to the courts.[23] The GAO, headed by the Comptroller General of the United States, began as the General Accounting Office, and was established through the Budget and Accounting Act of 1921.[24] Among other things, GAO considered whether public

14 Dep't of Justice, Att'y Gen.'s Manual on the Admin. Procedure Act 9 (1947).

15 5 U.S.C. § 702.

16 5 U.S.C. § 706(2)(A).

17 Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

18 424 F.2d 859 (D.C. Cir. 1970).

19 *Id.* at 866.

20 *Id.* at 869.

21 *Id.* at 874 ("When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review").

22 Florida Prof'l Review Org., Inc.—Advisory Opinion, B-253908, Jan. 10, 1994, 94-1 CPD ¶ 17 n. 20.

23 According to GAO's annual bid protest reports to Congress, 2,433 bid protests were filed in FY 2017, 2,586 in FY 2016, 2,496 in FY 2015, 2,445 in FY 2014, 2,298 in FY 2013, and 2,339 in FY 2012, for an average of 2,433 protests filed per year. NB: these figures are slightly lower than the number of "cases filed" for each year, as they exclude cost claims and requests for reconsideration. These reports are available at https://www.gao.gov/legal/bid-protest-annual-reports/about.

24 Budget and Accounting Act, 1921, Pub. L. No. 67-13, § 301, 42 Stat. 20, 23. Effective July 7, 2004, the legal name of the General Accounting Office changed to the Government Accountability Office. *See* GAO

funds spent by agencies had been appropriated by Congress, and it was directed to report to Congress "every . . . contract made by any department in any year in violation of law."[25]

Several years after its formation, GAO began to consider bid protests from disappointed bidders as an adjunct of its authority to settle and adjust claims by and against the United States.[26] GAO was the only forum for bid protests until 1956, when the Court of Claims[27] asserted jurisdiction to hear such protests, based on the theory that the Tucker Act granted disappointed offerors standing to claim damages when the government violated its implicit contractual duty to evaluate bids in good faith.[28] But GAO's effectiveness as a bid protest forum was severely compromised by its inability to grant enforceable relief. Until the introduction of the automatic stay in 1984, agencies "frequently responded to the filing of a bid protest, or other form of Congressional concern over how certain resources were being purchased, by rushing to award a contract and begin its execution."[29] As a result, "most procurements became *faits accomplis* before they could be reviewed."[30] Once awarded, even a contract that was the product of a material failure to comply with legal requirements was a done deal.

To remedy this "major loophole," when Congress enacted the Competition in Contracting Act of 1984 (CICA),[31] it enhanced the effectiveness of GAO by providing a short and temporary automatic stay of a contract award and a suspension of ongoing performance during the pendency of the protest if the protest was timely[32] filed with GAO (time periods for filing are short and strictly enforced). Pursuant to CICA, "a contract may not be awarded in any procurement after the Federal agency [conducting the procurement] has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending."[33] An agency that believes it cannot wait the 100 days can override the stay by making a written finding that "urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO" and reporting this finding to GAO.[34] The Court of Federal Claims now has exclusive jurisdiction over CICA override challenges.[35] The number of overrides historically is small.

Although the GAO's recommendations are not binding on agencies, unlike judgments made by the Court of Federal Claims, as a practical matter, agencies almost always follow GAO recommendations. For instance, in both FY 2016[36] and FY 2017,[37] the agencies uniformly followed all GAO recommendations, and in FY 2015,[38] only one GAO recommendation was disregarded by an agency. As a result, most bid protests are resolved without resort to the courts.[39]

B. Complaints about GAO Bid Protests and Proposed Changes

Notwithstanding the availability of stay overrides and the fact that GAO is required to resolve bid protests within 100 days, critics from DoD have expressed concerns about the state of the bid protest system. They argue, among other things, that major procurements are routinely bottled up by "frivolous protests." These critiques are not new.[40]

Although the SASC considered several changes to the bid protest process to address these critiques during its markup in 2016 of the NDAA for FY 2017,[41] these proposals were ultimately rejected by the Conference Committee in favor of a proposal to have "an independent research entity . . . with appropriate

Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814.

25 *Id*. at sec. 312(c).

26 Ameron, Inc. v. U.S. Army Corps of Engineers (*Ameron I*), 787 F.2d 875, 878 (3d Cir.), *on reh'g*, 809 F.2d 979 (3d Cir. 1986).

27 The U.S. Court of Claims, which was created in 1855, was organized into appellate and trial divisions in 1925. The trial division evolved into the Claims Court in 1982, which was renamed the U.S. Court of Federal Claims in 1992, an appellation that is still in use today. The appellate division of the old Court of Claims was abolished in 1982 and merged into the modern day U.S. Court of Appeals for the Federal Circuit. *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. U. 461, 467 n.20 (1995).

28 Heyer Products Co. v. United States, 140 F. Supp. 409, 412 (Ct. Cl. 1956), modified, 177 F. Supp. 2651 (Ct. Cl. 1959) ("It was an implied condition of the request for offers that each of them would be honestly considered.").

29 Ameron, Inc. v. U.S. Army Corps of Engineers (*Ameron II*), 809 F.2d 979, 985 (3d Cir. 1986).

30 *Ameron I*, 787 F.2d at 879.

31 Pub. L. No. 98-369, 98 Stat. 1175, 1182 (1984) (codified as amended at 10 U.S.C. § 2304 and 41 U.S.C. §§ 3301-3311).

32 The automatic stay is triggered when the Agency receives notice of the protest from GAO. Agencies are required to stay the award and withhold performance if they receive notice from GAO within ten calendar days of the contract award date or within five days of a required debriefing. FAR 33.104(c).

33 31 U.S.C. § 3553(c)(1); *see also* FAR 33.104(b)(1).

34 31 U.S.C. § 3553(c)(2)-(3); *see also* FAR 33.104(b)(1).

35 The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874-75 (1996), amended the Tucker Act by giving the Court of Federal Claims exclusive judicial jurisdiction over bid protest and CICA override claims following after January 1, 2001; *see* Ramcor Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1288-90 (Fed. Cir. 1999) (holding that the ADRA gave the CFC jurisdiction over stay override).

36 GAO Bid Protest Report to Congress for FY 2016, Dec. 15, 2016, at 1, *available at* https://www.gao.gov/products/GAO-17-314SP.

37 GAO Bid Protest Report to Congress for FY 2017, Nov. 13, 2017, at 1, *available at* https://www.gao.gov/assets/690/688362.pdf.

38 GAO Bid Protest Report to Congress for FY 2015, Dec. 10, 2015, at 1, *available at* https://www.gao.gov/products/GAO-16-270SP.

39 For example, in FY 2017, the GAO resolved 2,433 bid protests. In contrast, the Court of Federal Claims resolved 133 bid protests.

40 *See, e.g.*, Kovacic, *supra* note 27 at 489–91.

41 SASC inserted a so-called "loser pays" provision, which would have "require[d] a large contractor filing a bid protest on a defense contract with GAO to cover the cost of processing the protest if all of the elements in the protest are denied in an opinion issued by GAO." Report of the SASC on the NDAA for FY 2017 at Title VIII Sec. 821. SASC also included other provisions, such as a measure to discourage incumbent protests. *Id*.

expertise" perform a "report on bid protests."[42] This report, which was presented to Congress on Dec. 21, 2017, was to include:

- An analysis of "the extent and manner in which the bid protest system affects or is perceived to affect" various aspects of the procurement process, including the use of discussions and decision to use sole source award methods;
- An examination of bid protest trends, including the number of protests filed in each forum, the overall ratio of protests to procurements, and the overall effectiveness of protests at different forums; and
- "[A]n analysis of bid protests filed by incumbent contractors" inquiring into all sorts of factors, including the rate at which such protests are filed, the delay caused by these protests, how often these protests are sustained, and how often protesters are ultimately awarded the contract that is subject to the protest.

Notwithstanding the impending report on bid protests, Congress proceeded to include a variant of the loser pays provision in the NDAA for FY 2018. Section 827 requires DoD to establish a pilot program within two years of passage of the bill, to "require[] contractors to reimburse [DoD] for costs incurred in processing covered protests," which include those filed by companies with revenue in excess of $250 million that are denied by GAO.[43]

As discussed below, the newly released RAND study does not provide any evidence supporting the loser pays provision. Regardless, this measure contradicts the fundamental concept behind the APA—that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to review."[44]

There are more reasons the measure is irrational. For one thing, disappointed bidders do not even have access to any part of the administrative record until 30 days *after* the protest has been filed;[45] they must decide whether to protest based on the information provided by the agency in the debriefing (if there is one) or notice of award, which is very limited. Furthermore, the deadline to file a bid protest is stringent, which decreases the likelihood of frivolous protests; in order to avail themselves of the automatic stay, disappointed bidders must file a protest within five calendar days after a required debriefing, if there is one, or within 10 days after the date of contract award.[46] Finally, the fact that GAO declines to sustain a protest does not establish that it was unreasonable to file the protest. Agencies are entitled under the APA to substantial deference in review of their actions. The reasonableness of agency action can only be examined once the record is produced. Just because a protester ultimately cannot overcome the deferential standard does not mean that the allegations lacked merit. Indeed, the substantial "effectiveness" rate at GAO (approximately 45% of protests are either sustained or subject to agency corrective action prior to decision) demonstrates that there is substantial merit perceived by agencies in many cases. Furthermore, cases that are denied on a written opinion frequently reflect a close call on the merits.

In short, discouraging bid protests is contrary to the basic principle behind the APA—that independent review of agency decisionmaking is necessary to counterbalance the accretion of power by administrative agencies. Additionally, as explained below in Part III.C, this provision frustrates DoD's own stated objectives of encouraging competition and preventing corruption in government contracting.

III. The Purpose and Benefits of a Meaningful Review of Agency Procurement Actions

A. A Critical Oversight Role: Protests Help Ensure that Agencies Act in Accordance with the Law

1. Public Contracting is Fundamentally Different from Commercial Contracting

Government contracting is different in many fundamental respects from commercial contracting. Since government contracts are financed using funds from the public fisc, government contracts are highly regulated; in addition to the Federal Acquisition Regulation (FAR), there are numerous agency FAR supplements. Contractors are subject to a number of government-unique enforcement statutes and regulations, including the Truth in Negotiations Act,[47] the False Claims Act,[48] various anti-kickback[49] and anti-bribery statutes,[50] domestic preference statutes such as the Buy American Act,[51] and various

42 NDAA for FY 2018, Pub. L. 115-91 (Sec. 827).

43 NDAA for FY 2017, Pub. L. 114–328 (Sec. 885).

44 5 U.S.C. § 702.

45 31 U.S.C. § 3553(b)(2) (setting a 30-day deadline for a normal, non-expedited protest, and a 20-day deadline for an expedited protest).

46 31 U.S.C. § 3553(d)(4).

47 The Truth in Negotiations Act requires certain contractors (in negotiated, or non-commercial, procurement actions exceeding $750,000) to disclose "cost or pricing data," certify the data is accurate, complete, and current, and lower their prices to reflect any price increase caused by a defective disclosure. 10 U.S.C. § 2306a. This requirement applies to all contracts that are priced or performed on the basis of cost.

48 Pursuant to the False Claims Act, any "person" who "knowingly presents, or causes to be presented" a "false or fraudulent claim" to the U.S. Government is liable for treble damages and civil penalties. 31 U.S.C. § 3729(a).

49 The Anti-Kickback Act of 1986 prohibits government contractors from accepting or soliciting bribes or "kickbacks" from businesses seeking a subcontracting contract. 41 U.S.C. §§ 8701-07 (formerly codified as 41 U.S.C. §§ 51-58).

50 For instance, federal law prohibits any person, such as a contractor, from directly or indirectly giving, offering, or promising anything of value to agency officials for or because of any official act performed or to be performed by such official. 18 U.S.C. § 201(c)(1)(a).

51 The Buy American Act requires that the U.S. Government purchase only "manufactured articles, materials, and supplies" that "have been mined or produced in the United States" and such "manufactured articles, materials, and supplies" that have been manufactured in the United States "substantially all" from U.S. components, unless doing so is "inconsistent with the public interest" or would result in "unreasonable" cost. 41 U.S.C. §§ 8301-8305 (formerly codified at 41 U.S.C. §§ 10a – d).

regulations prohibiting the use of foreign counterfeit parts,[52] human trafficking,[53] and more.

Because they spend taxpayer funds, agencies face a number of restrictions as buyers that do not affect buyers in the commercial sector. First and foremost, authority for government contracts must be provided by Congress in order to be lawful. Additionally, agencies must conduct procurements using taxpayer funds in accordance with a number of laws, such as the Competition in Contracting Act, which require agencies to open up procurements to competition and deal fairly with offerors.[54] More broadly, agencies are under a general obligation to conduct procurements in a reasonable manner and to avoid acting arbitrarily and capriciously. This fundamental requirement is found not only in procurement laws but also in the APA, which broadly governs the conduct of agencies.[55] This is in marked contrast to commercial buyers, who are not spending taxpayer money and can make sourcing decisions unconstrained by regulation—they can make non-competitive contracts for reasons other than the merit of the product or service offered, for example. The only limits to such private behavior are set by the market.

2. GAO Protests Provide Effective and Efficient Oversight

GAO bid protests effectively subject agencies to scrutiny by exposing their decisionmaking (as reflected in the agency record) to real time review within 100 calendar days. Although relatively few procurements are actually protested, the possibility of a protest encourages agency officials to act lawfully and provides a remedy for unlawful conduct. Protesters, as private attorneys general, are better situated to know the circumstances of procurements in which they participate than other sources of after-the-fact oversight, such as agency inspectors general or prosecutors.

Contrary to assertions that too many protests are filed, in FY 2012 through 2017, an average of 2433 bid protests[56] were filed each year at GAO—one protest for every $192 million in procurement spending.[57] Against that backdrop, GAO sustains a relatively small number of protests each year. For instance, in FY 2017, GAO sustained 99 protests, or 17% of all GAO decisions made on the merits. "[T]he most prevalent reasons for sustaining protests during the 2017 fiscal year were: (1) unreasonable technical evaluation; (2) unreasonable past performance evaluation; (3) unreasonable cost or price evaluation; (4) inadequate documentation of the record; and (5) flawed selection decision."[58] This data is consistent with the findings of the RAND study, which are discussed below.

Additionally, as GAO points out, numerous protests that are not sustained are nonetheless "effective" because they spur agencies to review the matter internally and to take corrective action before GAO issues an opinion. Thus, in addition to publishing a "sustain" rate, GAO includes an "effectiveness rate" in its reports to Congress, which describes the frequency with which the protester receives "some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or [GAO] sustaining the protest."[59] Notably, the effectiveness rate has largely held constant over the past ten years despite the increasing number of protests. The effectiveness rate for FY 2017 was 47%.[60]

GAO sustains protests due to some flaw in the evaluation process. But aside from encouraging agency compliance, GAO protests occasionally help forestall potentially catastrophic mistakes by agencies. For instance, in *PCCP Constructors*,[61] the U.S. Army Corps of Engineers issued a solicitation for the design-build of permanent canal closures and pumps along three outfall canals at or near Lake Pontchartrain, Louisiana.[62] In the event of severe flooding, such as that induced by Hurricane Katrina, the pumps help move water out of New Orleans and into the outfall canals, where the excess water can be diverted. In the protest that followed the initial award, the protester argued, among other things, that the pumping stations outlined in the awardee's designs were unable to withstand pressure from flood water, and that the agency had failed to detect these defects because it had accepted the awardee's blanket statements at face value without properly scrutinizing the technical proposals, as required by the RFP. The chair of the technical evaluation team conceded that, despite the potential for catastrophe, his team considered an important aspect of the awardee's technical design for less than five minutes. GAO found that the agency had failed to meaningfully evaluate the awardee's technical proposal and sustained the protest on this ground. GAO also sustained the protester's organizational conflict of interest protest ground, finding that the agency had failed to consider the impact of the awardee's hiring the agency's

52 DoD procurement regulations require government contractors to obtain electronic parts from the original manufacturer or an authorized aftermarket manufacturer, if possible. The rule requires contractors to vet contractor-approved suppliers and to "assume[] responsibility for the authenticity of the parts provided" by them. *See* DFARS Case 2014-D005 (codified in part in DFARS 252.246–7008 Sources of Electronic Parts).

53 Government contractors must also comply with federal legislation and regulations designed to combat human trafficking. *See* FAR Subpart 22.17 and FAR 52.222-50.

54 For instance, CICA generally requires federal agencies to engage in "full and open competition" to obtain needed supplies and services—i.e., the Government must provide all interested parties the opportunity to submit a bid or proposal for the contract. 10 U.S.C. § 2302(3) (covering DoD procurements); 41 U.S.C. § 107 (covering civilian procurements); *see also* FAR 6.003.

55 *See infra* section III.A.2.

56 As explained above in footnote 23, this average includes only bid protests, and excludes both cost claims and requests for reconsideration.

57 The most recent fiscal year for which bid protest data is available is FY 2017. *See supra* note 23. The total outlay of government contracts in each fiscal year is available on USASpending.gov. In FY 2012 through 2017, the average annual outlay on government contracts was $467,989,537,132. *See* https://www.usaspending.gov/Pages/TextView.aspx?data=OverviewOfAwardsByFiscalYearTextView.

58 GAO Annual Bid Protest Report to Congress for FY 2017, at 1-2.

59 *Id.* at 2.

60 U.S. Gov't Accountability Office, B-401197, *Report to Congress on Bid Protests Involving Defense Procurements* 10 (2009).

61 PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036, Aug. 4, 2011, 2011 CPD ¶ 156.

62 *Id.*

Chief of Program Execution of the Hurricane Protection Office, who had supervised the direction of this very procurement until his retirement from government service.

The facts in this particular case are striking. The solicitation for this $700 million procurement was developed over the course of *two years*, and the agency's failure to consider a critical feature of the awardee's technical proposal for more than *five minutes* could have had disastrous consequences for the city of New Orleans. But for the bid protests in this case—which were resolved within a fraction of the two years it took the agency just to issue the solicitation, a fatal flaw in the awardee's proposal might never have been discovered. This case also highlights the potential danger posed by organizational conflicts of interest, which can impair the objectivity of the evaluation team or give an offeror with inside knowledge or agency connections an unfair competitive advantage.

B. Concerns about Frivolous Protests or Abusive Litigation by Incumbents Are Unfounded

Critics of the GAO bid protest system point out that the number of nominal protests has steadily increased since 2007, with the number of bid protests filed rising from 1,411 in FY 2007 to 2,353 in FY 2011 to 2,538 in FY 2013 to 2,734 in FY 2016.[63] Notably, the nominal number of protests filed in FY 2017 dropped to 2,596, the lowest number since FY 2013. In any event, these raw numbers can be misleading, as GAO's docketing process counts every supplemental submission rather than each protested procurement. GAO's statistics represent the total number of docket numbers ("B" numbers), not actual protests.[64] Daniel I. Gordon, former Administrator for Federal Procurement Policy, estimates that approximately 1.6 docket numbers are assigned per protested procurement.[65] Moreover, this nominal increase obscures the fact that only a miniscule percentage of government procurements are protested. Gordon estimates that in recent years, well over 200,000 contracts and protestable task orders are awarded each year. Of these, approximately 99.3% and 99.5% of procurements are not protested.[66] The increase in the number of protests also reflects the statutory expansion of GAO's bid protest jurisdiction in 2008 to encompass protests concerning task or delivery orders valued at more than $10 million.[67] (In its report, RAND noted that the sustain rate for Task Order protests is higher than it is for other procurements, suggesting those procurements are at greater risk for competition violations.)

Admittedly, the largest DoD contracts are protested at a higher rate: "the higher the dollar value, the greater the likelihood of a protest. For a company that loses the competition for a $100 million contract, with all the bid and proposal costs that competing entails, the additional cost of filing a protest may seem minimal," particularly if the loss of the contract is not clearly on the merits.[68] Nonetheless, the overall picture is that bid protests are very rare. And it is reasonable that extremely large acquisitions should be subject to a higher degree of scrutiny.

These statistics are consistent with the findings of the RAND report. The study concluded that "bid protests are exceedingly uncommon for DoD procurements—less than 0.3% of DoD procurements are protested.[69] RAND also undermined the notion that incumbent protesters file meritless protests in order to profit from bridge contracts. Although RAND found that incumbent protesters were slightly more likely to protest an award than non-incumbents, it also noted that the effectiveness rate of protests filed by incumbents is at least as high as those filed by non-incumbent contractors. In fact, RAND found that incumbent protests of task order awards have a significantly higher effectiveness rate than those filed by non-incumbents. For instance, the overall effectiveness rate for FYs 2015-2016 was 45.5% for all procurements, 47% in the case of non-incumbents protesting task orders, and 71% for incumbents protesting task orders.[70]

Additionally, RAND directly refuted the notion that large defense contractors are disproportionately slowing down the procurement process by filing meritless protests. This concern was the basis for the Section 827 pilot program, which only focuses on large defense contractors. To the contrary, RAND's data shows that "the largest 11 [government contracting] firms have remained relatively constant and may be slightly declining." What is more, "[t]he top 11 firms have higher effectiveness and sustained rates than the rest of the sample [though these rates are declining over time]—suggesting that they are possibly more selective in the protests they file and spend more resources developing their cases."[71] Rather, RAND suggests that the rise in bid protests is driven by small businesses. RAND found it "striking" that 58% of procurement protests were filed by small businesses, which in FY 2016, cumulatively comprised only 15% of DoD contract dollars.[72] RAND suggests that the increasing incidence of protests

63 *See supra* note 23.

64 For instance, requests for reconsideration and requests by successful protestors for reimbursement of costs are all given separate case numbers. After eliminating such supplemental filings, the number of cases filed is 1,276 for FY 2007, 2,214 for FY 2011, 2,298 for FY 2013, 2,586 for FY 2016, and 2,433 for FY 2017. *See id.*

65 Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh them*, 42 Pub. Cont. L.J. 489, 496 (2013).

66 *Id.* at 495.

67 The NDAA for FY 2008 amended the Federal Acquisition Streamlining Act to grant GAO jurisdiction to hear protests concerning task or delivery orders valued at more than $10 million. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 843, 122 Stat. 3, 237-39 (codified as amended at 41 U.S.C. § 4106(f)). Although the jurisdictional grant over civilian task orders was initially limited to three years, it was extended in 2011 and eventually made permanent under the GAO Civilian Task and Delivery Order Protest Authority Act of 2016. The current thresholds for protests are $10 million for civilian task orders and $25 million for DoD task orders. *See supra* note 3.

68 Gordon, *supra* note 65, at 497.

69 *Assessing Bid Protests of U.S. Department of Defense Procurements*, *supra* note 5, at 31.

70 *Id.* at 64-65.

71 *Id.* at 33-34. These 11 firms cumulatively comprise nearly 42% of total obligated DoD dollars in FY 2016. *Id.* at 33.

72 *Id.* at 36.

by small business can be addressed by improving post-award debriefings.[73]

RAND also performed a qualitative analysis of the perspectives of bid protest stakeholders and reported that "the perspectives of the bid protest system from DoD personnel and the private sector varied greatly." On the one hand, DoD personnel expressed "general dissatisfaction with the current bid protest system"; on the other hand, private-sector representatives "strongly supported the bid protest system."[74] Although the armed services "reported that they did not track or collect data on whether companies are more or less likely to file a bid protest as a normal course of their business strategy,"[75] they all expressed concern that contractors who lose follow-on awards are much more likely to protest a procurement than non-incumbents, that contractors file too many "weak" protests, and that "contractors have an unfair advantage in the contracting process by impeding timely awards with bid protests."[76] In light of the absence of any data supporting these concerns, this apparent hostility to the bid protest process appears to merely reflect opposition to subjecting agency procurement decisions to independent review.

Not only are protests rare, the delay they cause is minimized by the statutory requirement that GAO resolve protests within 100 days.[77] Moreover, GAO "consistently close[s] more than half of all [DOD] protests within 30 days."[78] Although critics point out that procurements can be further delayed if the GAO denies a protest and the protester files again in the CFC, this does not happen often.[79]

Some have speculated that incumbents file frivolous protests in order to continue working during the pendency of the CICA automatic stay. This was one of the primary concerns motivating recent efforts by the Senate Armed Services Committee. However, in the 2009 GAO Report, GAO noted that the last protest described by GAO as frivolous was filed in 1996.[80] Additionally, GAO emphasized that it is authorized to dismiss frivolous protests *sua sponte*.[81]

Given the paucity of bid protests relative to the total number of DoD or federal procurements, the dollar value and importance of many DoD procurements, and the fact that DoD agencies often take several years just to design and implement solicitations for major defense acquisitions, it seems doubtful that the 100-day maximum for resolving a GAO bid protest is too long to wait. And even on the rare occasion in which time really is of the essence, the agency always retains the authority to override the automatic stay.[82]

C. Bid Protests Benefit the Government and the Public by Enhancing Competition and Protecting the Integrity of Public Procurements

1. Bid Protests Enhance Competition in Public Contracts

Competition in public contracting benefits the government and the public by encouraging economy and innovation and by promoting integrity in the procurement process. The Senate Report for the Competition in Contracting Act of 1984 describes these benefits:

> Competitive procurement, whether formally advertised or negotiated, is beneficial to the government. First, competition in contracting saves money. . . . In addition to potential cost savings, agencies have been able to promote significant innovative and technical changes through negotiated competition for contract awards. . . . Lastly, and possibly the most important benefit of competition, is its inherent appeal of "fair play." Competition maintains integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.[83]

As explained in a report by DoD's Office of Procurement Policy, "[t]he premise that underlies this strong preference for 'full and open competition' is the economic premise that has long been recognized by the courts as the basis for a free market economic system—that competition brings consumers the widest variety of choices and the lowest possible prices."[84] The federal government has long recognized the benefits of competition. The principle that

73 *Id.* at 82.

74 *Id.* at 25.

75 *Id.* at 18.

76 *Id.* at 21.

77 The GAO has always done so, except in a few cases on account of the 16-day government shutdown of 2013. *See* GAO Bid Protest Annual Report to Congress for FY 2014, Nov. 18, 2014, at 2, http://www.gao.gov/assets/670/667024.pdf.

78 U.S. Gov't Accountability Office, B-401197, *Report to Congress on Bid Protests Involving Defense Procurements* 10 (2009).

79 Pursuant to 31 U.S.C. 3556, GAO and CFC protests are nonexclusive: "This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Claims Court." But CFC published only 105 bid protest-related opinions in FY 2016; of these, 57 concerned procurements in which there was an initial protest in GAO.

80 U.S. Gov't Accountability Office, B-401197, Report to Congress on Bid Protests Involving Defense Procurements 10 (2009). GAO on occasion bars vexatious contractors from filing suit. For instance, in 2016, GAO suspended Latvian Connection LLC from filing bid protests at GAO for one year. Among other things, Latvian had submitted 150 bid protests in a one year period. GAO also dismissed the last protest for abuse of process. *See* Latvian Connection LLC, B-413442, Aug. 18, 2016, 2016 CPD ¶ 194. Nonetheless, GAO did not describe the protest as "frivolous." As GAO explained, the word "frivolous," in the judicial context, has a very narrow, technical meaning, which does not apply here. *See* U.S. Gov't Accountability Office, B-401197, Report to Congress on Bid Protests Involving Defense Procurements 10 (2009).

81 *Id.* at 11-12.

82 For FY 2002, the last year in which GAO included information on overrides in its annual report on protests, GAO reported that with respect to the 1,101 protests filed that year, the agency used its override authority on only 65 occasions. U.S. Gov't Accountability Office, GAO-03-427R, Bid Protest Annual to Congress for FY 2002, at 3, 4 (2003).

83 Report of the Comm. On Governmental Affairs to Accompany S. 2127, S. Rep. No. 97-665 at 3 (1982).

84 Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (OFPP Report), Jan. 2007, at 62-63, *available at* https://www.acquisition.gov/sites/default/

agencies should manage procurements competitively whenever possible is enshrined in both the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, which still govern the conduct of military and civilian procurements, respectively.

Nonetheless, by the late 1970s, many in Congress and the policy community became concerned that existing procurement statutes were inadequate in promoting competition. Among other things,[85] the authors of the CICA conference report in 1984 stated that "a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief."[86] To promote competition, CICA made a number of significant changes to procurement law. CICA established "full and open competition"[87] as the standard for federal procurements, prohibited non-competitive negotiations except in narrowly-defined circumstances,[88] added specific planning and publication requirements,[89] and—of particular relevance here—empowered GAO to act as a forum for bid protests.[90] For the first time, GAO was explicitly granted independent statutory authority to hear protests. In so doing, Congress formally recognized the importance of GAO bid protests in promoting competition and enhanced GAO's ability to act as an effective arbiter through the limited 100-day automatic stay provision. Since the passage of CICA, Congress has looked periodically at changing CICA's mandate for "full and open" competition, and has declined to do so.[91] In August 2014, DoD published *Guidelines for Creating and Maintaining a Competitive Environment*[92] and again promoted the benefits of "[c]ompetition [a]s the most valuable means we have to motivate industry to deliver effective and efficient solutions for the [DoD]. When we create and maintain a competitive environment, we are able to spur innovation, improve quality and performance, and lower costs for the supplies and services we acquire."[93]

DoD has also recognized the need to run procurements more competitively. For example, in 2014, DoD issued guidelines aimed at maximizing direct and indirect competition in its contract solicitation and awards process. The creation of the guidelines followed DoD's recognition that it had been experiencing a declining competition rate and had not met its competition goals during the previous four years.[94] In addition, Under Secretary of Defense Frank Kendall's *Better Buying Power 3.0* memorandum advocates removing barriers to commercial technology utilization, noting in part that "the Department can do a much more effective job of accessing and employing commercial technologies."[95] Notwithstanding these efforts, DoD Competition Scorecards indicate that fewer than 50% of DoD acquisitions are competitively sourced.[96] The push to discourage bid protests is inconsistent with DoD's policy of encouraging competition and innovation in contracting.

2. Bid Protests Help Preserve the Integrity of the Procurement Process

The U.S. government is the single largest buyer in the world. In FY 2017, federal agencies spent $383 billion on a wide range of goods and services to meet their mission needs.[97] Given the vast amount of money at stake, the risks posed by potential corruption are very real. Notwithstanding the "presumption of regularity" that the courts apply when scrutinizing the conduct of agency contracting officials,[98] it is hardly surprising that the government in general—and DoD in particular—has been beset by numerous procurement scandals. Bid protest scrutiny helps preserve the integrity of the competitive process. "Competition curbs fraud by creating opportunities to re-assess sources of goods and services reinforcing the public trust and confidence in the *transparency* of the Defense Acquisition System."[99]

Examples of corruption in federal public contracting abound. For instance, the FBI's Operation III Wind, conducted between

files/page_file_uploads/ACQUISITION-ADVISORY-PANEL-2007-Report_final.pdf.

85 The Senate Government Affairs Committee identified a number of other inadequacies, including the overuse of sole source contracts. *See* Report of the Comm. on Governmental Affairs to Accompany S. 338, S. Rep. No. 98-50 at 9 (1983).

86 H.R. Conf. Rep. No. 98-861, at 1435 (1984).

87 Pub. L. No. 98-369, Sec. 2711, 2723, 2732(b)(2). CICA defines "full and open competition" to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." *Id*. at Sec. 2731 (codified at 41 U.S.C. 403(6).

88 *Id*. at Sec. 2711, 2723.

89 *Id*.

90 *Id*. at Sec. 2713, 2741.

91 For instance, during the debate preceding the passage of the Federal Acquisition Reform Act of 1996, Congress considered replacing the "full and open competition" standard with "efficient competition," but ultimately declined to do so. OFPP Report, *supra* note 84 at 66.

92 Guidelines For Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, August 2014, at http://bbp.dau.mil/docs/BBP%202-0%20Competition%20Guidelines%20(Published%2022%20Aug%202014).pdf.

93 Memorandum of the Under Secretary of Defense, Actions to Improve Department of Defense Competition, August 21, 2014, at http://www.defenseinnovationmarketplace.mil/resources/2014_8_DOD_MemoCompetitiveness.pdf.

94 Frank Kendall, Memorandum, Actions to Improve Department of Defense Acquisition, August 21, 2014, http://www.acq.osd.mil/dpap/policy/policyvault/USA004313-14-ATL.pdf.

95 Frank Kendall, Memorandum, Implementation Directive for Better Buying Power 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation, April 9, 2015, p. 9, at http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf.

96 *See supra* note 6.

97 *See supra* note 57.

98 *See, e.g.*, Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1338 (Fed. Cir. 2001) ("[T]he agency decision is entitled to a presumption of regularity," which can be "rebutted by record evidence suggesting that the agency decision is arbitrary and capricious.").

99 Guidelines For Creating and Maintaining a Competitive Environment for Supplies and Services in the Department of Defense, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, Dec.

1986 and 1988, was one of the largest procurement fraud investigations in U.S. history, and resulted in the prosecution of over 60 contractors, consultants, and government officials. The investigation ensnared a number of high-ranking officials, including an Assistant Secretary of the Navy, who was found to have accepted hundreds of thousands of dollars in bribes and illegal gratuities.[100] According to the FBI website, this scandal "so shocked the nation that just five months after the case became public, new rules governing federal procurement were put into place," including the Procurement Integrity Act of 1988.[101]

In June 2003, a colonel who had been the commander of the U.S. Army's Contracting Command Korea, a position in which he oversaw the approval of more than $300 million in contracts a year, was sentenced to four and a half years of prison for accepting $900,000 in bribes from South Korean construction companies.[102] According to the original indictment, the defendant rigged $150 million worth of military service contracts in South Korea.[103] Furthermore:

> One witness testified that he provided the men with prostitutes at a government conference in the U.S. Virgin Islands in exchange for contracts worth $1.4 million, according to a report published on Morningstar.com, a news and information service on financial markets. Another witness also said he provided prostitutes for the men and paid for a 1997 trip to Las Vegas to see a heavyweight title fight between Mike Tyson and Evander Holyfield.[104]

In August 2004, the former chief of Plans, Requirements and Acquisitions for the Defense Information Systems Agency, was indicted for conspiracy to defraud the United States, receiving illegal gratuities, wire fraud, money laundering, conflict of interest, conspiracy to conceal records, obstruction of justice, and suborning perjury.[105]

One of the more notable scandals in recent years centers around Darlene Druyun, who served for years as the senior career civilian procurement officer for the U.S. Air Force (USAF), second only to the Assistant Secretary of the Air Force for Acquisition. Druyun developed a reputation for her take-no-prisoners, risk-taking approach to managing a series of complex, multi-billion-dollar deals, and was known within the industry as "The Dragon Lady."[106]

During her tenure, Druyun pushed a number of initiatives to discourage disappointed offerors from seeking independent review of Air Force award decisions. For instance, on April 23, 1999, the Air Force announced a "Lightning Bolt" acquisition reform initiative that required all major USAF programs to have a program-level alternative dispute resolution (ADR) mechanism. To that end, the USAF signed corporate agreements with more than 40 of the largest defense contractors, which required them to use ADR.[107] While ADR is widely used and helpful in many circumstances, the result with respect to protests was to shield agency decisions from outside review. Similarly, on April 17, 2001, USAF announced that internal guidance would be amended to include "issue identification and resolution" as a criterion for evaluating contractor past performance under the Contractor Performance Assessment Reporting System to incentivize use of ADR. This change would allow contracting officers to downgrade the past performance ratings of contractors that failed—in the agency's view—to act proactively in identifying and resolving disputes.[108] This effort was eventually blocked by both the General Services Administration[109] and the Office of Federal Procurement Policy.[110] Although the Air Force ADR program is well regarded, this particular effort was problematic as it limited the availability of *independent,* outside review of agency decisions.

In the late 1990s, Druyun began negotiating a deal to lease one hundred KC767A tankers from Boeing. Druyun's retirement from government service in November 2002, and her new $250,000 a year job as vice president of Boeing, created a firestorm of controversy.[111] The ensuing investigation eventually revealed that while Druyun was negotiating several contracts with Boeing in her capacity as a senior procurement official, she was simultaneously negotiating jobs at Boeing for herself, her daughter, and her daughter's fiancé, in violation of federal

2014, p. 2, at http://www.acq.osd.mil/dpap/cpic/cp/docs/BBP_2-0_Comp_Guidelines_Update_(3_Dec_2014).pdf.

100 Christopher Marquis, *M. R. Paisley, 77, Dies; Bid-Rigging Figure*, N.Y. Times, Dec. 26, 2001, http://www.nytimes.com/2001/12/26/us/m-r-paisley-77-dies-bid-rigging-figure.html?pagewanted=1.

101 FBI History, Operation Illwind, https://www.fbi.gov/history/famous-cases/operation-illwind.

102 Jeremy Kirk, *Colonel gets 4½ years for bribe scam in S. Korea*, Stars and Stripes, June 13, 2003, https://www.stripes.com/news/colonel-gets-4-years-for-bribe-scam-in-s-korea-1.6523#.WcpWmEzMxBw.

103 Monte Morin, *Colonel, O.C. Man Accused in Bribe Scam*, L.A. Times, July 4, 2002, http://articles.latimes.com/2002/jul/04/local/me-bribe4.

104 *Id.*

105 Press Release, Department of Justice, *Senior Government Official, Local Attorney and Others Charged in Defense Procurement Fraud Case*, August 18, 2004, http://www.dodig.mil/iginformation/iginformationreleases/PR-Marlowe8_18_04.pdf.

106 Renae Merle, *Air Force-Boeing Negotiator Criticized: Close Relationship Questioned on Hill*, Washington Post, Oct. 27, 2003, at http://www.washingtonpost.com/wp-dyn/articles/A21519-2003Oct26.html.

107 *See* Report of the Interagency Alternative Dispute Resolution (ADR) Working Group, May 2000, available at https://www.adr.gov/presi-report.htm.

108 Martha A. Matthews, *Air Force Revising CPARS to Urge Contractors to Resolve Disputes, Avoid Litigation*, 76 BNA Fed. Cont. Rep. 12 (Oct. 2, 2001).

109 Martha A. Matthews, *GSA Policy Forbids Downgrading Contractor for Filing Claims, Refusing to Use ADR*, 77 BNA Fed. Cont. Rep. 10 (Mar. 12, 2002); Exercise of Legal Rights May Not Affect Past Performance Evaluations, GSA Says, 44 Gov't Contractor 8 (Feb. 27, 2002).

110 Martha A. Matthews, *OFPP: Protests, Claims, Use of ADR Can't Be Factors in Evaluation Source Selection*, 77 BNA Fed. Cont. Rep. 14 (Apr. 9, 2002).

111 Rebecca Leung, *Cashing in for Profit?* CBS News, Jan. 4, 2004, https://www.cbsnews.com/news/cashing-in-for-profit/.

conflict of interest laws.[112] Although she initially denied that this conflict of interest influenced her actions as procurement official, she eventually admitted that the conflict did influence her judgment on several procurements, including the KC767A tanker lease, the Small Diameter Bomb procurement, and a contract dispute over the C-17 H22 procurement.[113]

Shortly after Druyun made these admissions in her criminal proceedings, other offerors for the contract to modernize the C-130 filed bid protests before the GAO. The protesters alleged that the proposals had not been evaluated in a fair and unbiased manner, and that the agency had violated conflict of interest laws. Although filed over three years after the award had been made, the GAO treated the protests as timely on the ground that the protesters had no reason to know the information disclosed in Druyun's admissions. GAO sustained the protests:

> [W]here, as here, the record establishes that a procurement official was biased in favor of one offeror, and was a significant participant in agency activities that culminated in the decisions forming the basis for protest, we believe that the need to maintain the integrity of the procurement process requires that we sustain the protest unless there is compelling evidence that the protester was not prejudiced.[114]

A subsequent protest against the Air Force's award to Boeing in connection to the development of the small diameter bomb was also sustained on similar grounds.[115]

Finally, the U.S. Navy is currently embroiled in the "Fat Leonard" corruption investigation, which has been described as "the worst corruption scandal in Navy history."[116] In January 2015, defense contractor Leonard Glenn Francis pled guilty to bribery and fraud charges, and agreed to forfeit $35 million to the government.[117] Francis bribed officers of the Seventh Fleet with prostitutes, money, and vacation in exchange for being allowed to overcharge the Navy for fuel, tugboats, barges, sewage removal, and other services, as well as food and water. The ensuing investigation was recently expanded to include over 60 admirals and hundreds of other U.S. naval officers.[118]

In short, given the vast amounts of money being spent on federal contracting, and the fact that these outlays are likely to increase over time, oversight of agency officials will continue to be an ongoing challenge for the government. Any reform that discourages the independent review of agency decisions increases the prospect that contracts awarded in such circumstances will not be addressed and will continue undisturbed.

IV. Conclusion

Today, the U.S. Government is the largest buyer in the world and is controlled, not by market forces, but by an enormous bureaucracy with thousands of employees. Accountability is at the heart of the post-war compromise that resulted in the APA, and it is essential for the legitimacy of the modern administrative state. The current bid protest system subjects agency actions involving billions of dollars to real time review—with an expeditious process that resolves disputes within 100 days. Because of the short stay during the protest, it is possible to timely correct abuses and errors. Given that significant procurements take years to germinate to the point of a solicitation and award, agency complaints about delays attributable to protests are simply not credible. Without protests, any review would take place years after the fact under an IG or through a False Claims Act lawsuit, and no remedy could undo the damage already done by an irrational or illegal procurement decision. Moreover, companies looking at entering the federal market would hesitate when they realize that they have no real remedy if they are disadvantaged by insider deals or otherwise flawed procurements.

The recently enacted change to the bid protest process should be repealed, as it discourages disappointed offerors from filing bid protests and exercising their right to challenge the actions of large bureaucracies. No evidence suggests that such a constraint on review of agency action will be beneficial—indeed, there are no facts at all that suggest bid protests are being abused. If implemented, the loser pays provision will severely compromise the competitive procurement process. This provision will discourage competition and hinder the effectiveness of the bid protest mechanism in promoting integrity and fairness in contracting. Many commercial companies already regard federal procurement as "inside baseball," which should concern proponents of attracting more commercial technology companies to the federal marketplace. Undermining meaningful review of agency actions is a step in the wrong direction for the future of federal contracting.

112 *Id.*

113 Lockheed Martin Corp., B-295402, Feb. 18, 2005, 2005 CPD ¶ 24.

114 Lockheed Martin Aeronautics Company; L-3 Communications Integrated Systems L.P.; BAE Systems Integrated Defense Solutions, Inc., B-295401, 2005 WL 502840 (Comp. Gen. 2005).

115 Lockheed Martin Corp., Comp. Gen. Dec. B-295402, Feb. 18, 2005, 2005 CPD 24.

116 Craig Whitlock, "*Fat Leonard" Probe expands to ensnare more than 60 admirals*, Washington Post, Nov. 5, 2017, at https://www.washingtonpost.com/investigations/fat-leonard-scandal-expands-to-ensnare-more-than-60-admirals/2017/11/05/f6a12678-be5d-11e7-97d9-bdab5a0ab381_story.html?utm_term=.528075f68ddb.

117 Greg Moran, *How "Fat Leonard" fleeced the fleet*, San Diego Tribune, Nov. 14, 2015, at http://www.sandiegouniontribune.com/news/watchdog/sdut-fat-leonard-seventh-fleet-2015nov14-htmlstory.html.

118 *See* Craig Whitlock, "*Fat Leonard" Probe expands to ensnare more than 60 admirals*, *supra* note 116.