



GW Law Faculty Publications & Other Works

Faculty Scholarship

2000

Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the Cofc and the District Courts

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications

 Part of the [Law Commons](#)

Recommended Citation

42 The Government Contractor Sec. 108 (March 22, 2000)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

THE GOVERNMENT CONTRACTOR



Information and Analysis on Legal Aspects of Procurement

Vol. 42, No. 12

March 22, 2000

Focus

¶ 108

FEATURE COMMENT • Watching The Sunset: Anticipating GAO's Study Of Concurrent Bid Protest Jurisdiction In The COFC And The District Courts

The 1970 ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), 12 GC ¶ 64—finding a forum in the federal District Courts for award-related challenges to federal procurement decisions—and congressional tinkering with bid protest jurisdiction at the U.S. Court of Federal Claims (COFC) and its predecessor (the Claims Court), have turned the issue of bid protest jurisdiction into a legal experiment. That experiment essentially has allowed bid protest litigation to proceed in two different and independent judicial fora for the last 30 years. The pending sunset of statutory District Court jurisdiction over bid protest actions—pursuant to the terms of the Administrative Dispute Resolution Act of 1996—has created an opportunity to judge the success or failure of this experiment. To assist in its determination of whether to preserve concurrent judicial jurisdiction over bid protests, Congress directed the General Accounting Office (GAO) to undertake a comprehensive study of the need for concurrent bid protest jurisdiction.

In anticipation of GAO's report (expected to be released later this spring), this FEATURE COMMENT introduces the history leading up the ADRA's provisions regarding (1) District Court jurisdiction to resolve protest matters and (2) GAO's mandate to study the impact of these provisions upon small businesses. The COMMENT discusses how the current protest regime helps ensure procurement integrity. The COMMENT then critiques the

scope and methodology of the soon-to-be-completed GAO study. In doing so, the COMMENT highlights a number of significant issues expected to remain unaddressed at the conclusion of GAO's endeavors. The COMMENT then turns to the study's gravamen, arguing that GAO must conclude that the elimination of District Court jurisdiction would hinder the opportunity of small businesses to challenge violations of federal procurement law.

Setting the Stage—This 30-year tale begins with a (somewhat delayed) judicial reaction to the Administrative Procedure Act (APA), 5 USC § 701 et seq. (1946). That reaction came in the form of the D.C. Circuit's decision in *Scanwell*, wherein the Court opted to exercise jurisdiction under the APA over suits brought by disappointed offerors, likening those contractors that initiate bid protests to private attorneys general (AGs). The Court suggested that protesters—intent upon ensuring agencies' adherence to procurement statutes and regulations—help keep the Government honest while pursuing their own business interests.

Scanwell triggered sporadic development of *judicial* disappointed offeror litigation to coexist with the more popular administrative forum at GAO (i.e., the Comptroller General's office, part of the legislative branch). Arguably, the Government has since relied heavily upon these private AGs to justify its minimal oversight of the contract award process. In theory, these prospective contractors, who depend on a fair procurement process to obtain new business, effectively deter and ferret out errors and improprieties in the process.

Twelve years after *Scanwell*, in the Federal Courts Improvement Act (FCIA) of 1982, P.L. 97-164, 96 Stat. 25, Congress granted the Claims Court a statutory share of bid protest litigation. In

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

the FCIA, Congress assigned the Claims Court “exclusive” jurisdiction over protest actions preceding the award of a Federal Government contract. In the wake of the FCIA, the nation’s federal Appellate Courts split over the issue of whether the District Courts properly could exercise preaward and postaward jurisdiction over bid protest matters. Confusion reigned and Congress watched, yet provided no answer. In the protest community, however, these developments were overshadowed by Congress’s decision to grant to the General Services Administration Board of Contract Appeals (GSBCA) jurisdiction over protests concerning the award of contracts for automatic data processing equipment (ADPE) and information technology (IT). This forum was tremendously popular, yet lasted only from 1985–1994.

The late 1990s saw GAO expand its quasi-judicial protest services and Congress’ repeal of its grant of bid protest jurisdiction to the GSBCA. Moreover, the procurement reform wave that characterized the end of the decade also led to changes in bid protest litigation. Confusion still existed as to which forum—the COFC or the District Courts—was the “exclusive” arbiter of preaward and postaward bid protests; Congress temporarily resolved that confusion by enacting the ADRA, P.L. 104-320, 110 Stat. 3870 (1996). In the ADRA, Congress expressly granted the District Courts and the COFC concurrent preaward and postaward jurisdiction, to expire on December 31, 2000, unless Congress acted to extend District Court jurisdiction. At the same time, Congress tasked GAO to study the need for concurrent jurisdiction and to report on this issue by the end of 1999.

Concurrent Jurisdiction Helps Preserve Procurement Integrity—Taking a step back, it is apparent even to the casual observer that elimination of District Court protest jurisdiction would reduce the volume of disappointed offeror litigation. The extent of that reduction, however, is difficult to predict. Moreover, given what currently is known about GAO’s study, GAO will not be able to predict either how much the “sunset” will decrease bid protest filings or how this reduction will affect the procurement process as a whole. The obvious effects are a likely increase in the COFC’s caseload and further disruption to its processes, a tiny boost to the D.C.-area economy from increased

law firm billings and additional witness travel, and the consolidation of Justice Department expertise and litigation burdens in a single forum. The end of statutory District Court protest jurisdiction thus would please certain policy makers, procurement executives, Contracting Officers, some D.C.-area private practitioners, and a number of Government attorneys. But this view is short-sighted.

The *Scanwell* Court, viewing disappointed offerors as a motivated and self-interested corps of private AGs, thought that a robust protest regime would serve the Government and the public by providing a valuable oversight function. Unfortunately, the previous decade’s procurement reforms have complicated exercise of that private AG function and, indeed, have reduced oversight opportunities on various levels.

Head in the Sand Oversight: Stripping away the layers of rhetoric touting the efficiencies to be gained from the reform of Federal Government procurement, one finds that the Government has adopted an ostrich-like approach to procurement oversight. In the last decade, caught up in a spirit of eliminating red tape that borders on irrational exuberance, numerous policies have hampered the application of existing controls upon the procurement system. While each reform initiative or event has merits, and most serve important purposes, the cumulative effect is a weakened oversight function. Consider the following:

- (1) The confluence of micro-purchase authority and purchase cards has rendered tens of millions of smaller transactions (which soon will account for 10% of the procurement budget) immune from competition requirements and meaningful procurement oversight.
- (2) The rapid growth of multiple-award task and delivery order contracts permits billions of dollars in IT to be procured without meaningful competition at the task order level; moreover, these procurements are not subject to protest.
- (3) More than 10 million purchases each year above \$2,500 but below the simplified acquisition

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

threshold of \$100,000 can be awarded based upon three phone calls. (More than 95% of federal procurement actions in Fiscal Year 1998 were below \$25,000.) Absent the standard *Commerce Business Daily* notice of these procurement actions, contractors have no knowledge when they are denied an opportunity to compete and, accordingly, lack meaningful protest rights.

(4) The volume of protest activity at GAO has plummeted during the last seven years; while GAO received some 3,300 protests in 1993, it expects to see fewer than 1,500 this year.

(5) The GSBCA's authority to adjudicate IT protests was eliminated.

(6) Congress has aggressively downsized the acquisition and support workforce, particularly within the Department of Defense, which reports a 55% reduction in acquisition personnel from FY 1989 to FY 2001.

Against this backdrop of reduced oversight, GAO's study takes on added significance.

The Study, Missing the Mark?—The statutory deadline for submission of the GAO report passed quietly, lost, no doubt, in the furor surrounding the successful defeat of the Y2K bug. Congress envisioned a one-year study, commencing “[n]o earlier than 2 years after the effective date of this section [Dec. 31, 1996]” (on or around January 1999) and concluding “no later than December 31, 1999.” Although GAO originally anticipated issuing a draft for comment in January, this draft now appears slated for mid-March release. Agencies then will have 30 days to respond, after which GAO will analyze comments and, where appropriate, incorporate them into the final report, slated for issuance in late spring.

Unfortunately, it is becoming clear that GAO has not tackled the broader questions implicated by Congress' mandate and may not be able to reconcile its study methodology with Congress' explicit directions. Section 12(c) of the ADRA required GAO to “undertake a study regarding the concurrent jurisdiction” of the District Courts and the COFC as to bid protest litigation “to determine whether concurrent jurisdiction is *necessary*” (emphasis added). Aside from that general charge, the only specific direction Congress gave was that GAO “shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement

law.” But despite this direction, it now appears that the GAO study has not polled the proper participants to enable it to render an opinion about the potential effects of sunset on small businesses. For this and other reasons, GAO is in no position to address the fundamental question of whether the retention of District Court jurisdiction is “necessary.” In this respect, and others mentioned below, the study methodology appears flawed.

Flawed Methodology. GAO got a late start on the study, which was further complicated by its decision to staff the effort with personnel largely unfamiliar with the nuances of Government contracting. Apparently, concerns about possible conflicts of interest led GAO to exclude its most knowledgeable personnel (the General Counsel's office attorneys who adjudicate bid protests filed before the Comptroller General). GAO reasoned that, to the extent that District Courts “compete” with the Comptroller General for bid protest “business,” it would be inappropriate for GAO bid protest attorneys to comment on the need for another bid protest forum. Moreover, despite GAO's initial efforts to meet with, and solicit input from, the organized bar and certain affected government agencies, GAO eventually abandoned its open-ended approach. GAO's failure to enlist the aid of the most knowledgeable public and private sector individuals raises serious questions regarding the credibility of its study results.

Based upon its quasi-public meetings and statements, it is clear that GAO's methodology has shifted over the last few months, apparently at the behest of the staffs of the Senate Governmental Affairs and Armed Services Committees. More than six months into the study period, the primary focus of the GAO study dramatically changed from a broad investigation of issues relevant to judicial bid protest litigation to a more limited examination of the specific characteristics of the relatively small number of bid protest cases filed since the ADRA. See 41 GC ¶ 352. As a result, the sources from whom GAO sought input

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

were limited to Government attorneys and private practitioners involved in litigation of post-ADRA bid protest actions. GAO thus will likely fail to answer the two most significant questions implied in the congressional mandate: First, what happens if Congress does nothing? Second, what *should* Congress do?

Other Key Issues Ignored: Moreover, the GAO study ignored a host of larger legal, policy, and practical issues. Some of these issues have been identified and discussed by other Government contracts professionals. For example, the American Bar Association's submission to GAO (available at <http://www.abanet.org/contract/federal/bidpro/scanwell.pdf>) identified several common-sense issues that GAO should consider, including (a) the success to date of concurrent jurisdiction, (b) the benefits or detriments that derive from concurrent jurisdiction, and (c) the benefits or detriments that would flow from eliminating District Court jurisdiction. Both the ABA and the Federal Bar Association attempted to enlighten the GAO on these larger issues. (The FBA paper is available at <http://www.contracts.ogc.doc.gov/cld/papers/fbasunset.pdf>.)

In its submission, the ABA implored Congress to "ensure" that the District Courts are not divested of their jurisdiction in bid protest cases. The FBA's report was more tentative (likely due to its working group's more balanced private-government mix) and offered three basic conclusions: (1) District Court jurisdiction "may be desirable for a number of reasons," (2) "no clearly significant benefits" would derive from eliminating District Court jurisdiction, and (3) "none of the factors examined is so grave as to compel the conclusion that [District Court] jurisdiction is *absolutely* necessary" (emphasis added).

What the GAO Study Won't Discuss—It appears that GAO's study methodology will lack straightforward recommendations on the basic issue of whether to continue concurrent judicial jurisdiction over bid protests. Nor will the forthcoming report adequately address how the sunset of the ADRA grant of jurisdiction to District Courts will affect small businesses. Moreover, the study may fail to even discuss at least four other significant issues: (a) the advantages and disadvantages of a single, specialized judicial forum; (b) the likelihood that poor legislative drafting of the ADRA's

sunset provision will prompt litigation, confusion, and uncertainty; (c) the potential for forum shopping and precedent fragmentation; and (d) the appropriate allocation of judicial resources.

A Single, Specialized Forum: The COFC, a specialized court, arguably offers greater expertise (as compared to District Courts) in resolving protest matters. COFC Chief Judge Loren Smith consistently disputes the premise that the COFC is a specialized forum, arguing that the court is "neither specialized nor general." (*Alan E. Peterson Lecture: The Role of the Courts—What Would Sherlock Holmes Say?*, 34 PROC. LAW. 1, 28 (Winter 1999)). Yet even if we labeled the COFC a hybrid specialized court (see, e.g., Richard Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990)), for the purposes of concurrent jurisdiction, there is little choice but to regard the COFC as a "specialized" court in comparison to the District Courts, which exercise more general jurisdiction.

Professor Rochelle Dreyfuss has suggested a three-factor analysis to determine whether specialized adjudication has been successful: (1) the quality of decisionmaking, (2) efficiency, and (3) the appearance of due process. See *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes* 61 BROOK. L. REV. 1 (1995). Professor Jeffrey Stempel, meanwhile, articulates five advantages to specialized jurisdiction: (a) improved precision and predictability of adjudication; (b) more accurate adjudication; (c) more coherent articulation of legal standards; (d) greater expertise of the bench; and (e) economies of scale that flow from division of labor, particularly including speed, reduced costs, and greater efficiency through streamlining of repetitive tasks and wasted motions. See *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995). These and other relevant factors should inform GAO's deliberations.

While few doubt that the COFC is more familiar with federal procurement statutes, regulations,

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

and policies, the District Courts have far greater expertise in resolving matters brought pursuant to the APA, just as they are more familiar with motions seeking injunctive relief. This issue bears examination; while most COFC judges refer to the correct APA standard of review (mandated by the ADRA) in protest cases, as a practical matter, they manage these cases based upon years of instincts (such as inclinations to grant discovery) honed in *de novo* contract dispute proceedings.

Moreover, limiting the debate to choosing between two judicial fora—one general, one specialized—obscures a significant point. With the Comptroller General’s office, protestors already have access to a D.C.-based specialized forum. How valuable is it to then maintain two specialized fora—albeit one administrative and one judicial? If only two fora will remain, it seems that the broadest number of interests are served by maintaining a specialized *administrative* forum (GAO) and a *judicial* forum of general jurisdiction located in every state.

In terms of a specialized forum, therefore, the Comptroller General could, with some statutory and/or regulatory modifications to its jurisdiction, satisfy most of the goals that motivated Congress to grant to the COFC “exclusive” jurisdiction over preaward bid protests in the FCIA. The Comptroller General’s office provides disappointed offerors extensive Government contracts expertise, uniform precedent, timely decision-making, the convenience of the automatic stay under the Competition in Contracting Act, and relatively reasonable protest costs. Of these benefits, the latter three are of particular utility to small businesses, the group that Congress specifically directed GAO to consider. As the oldest administrative protest forum, with relatively clear procedural guidance, the Comptroller General’s authority conceivably could be modified to provide the sole protest forum, with appeals to a judicial body, such as the COFC or the Federal Circuit. The Comptroller General’s protest jurisdiction might require amendment to address certain issues (e.g., recommendations versus binding decisions) that could implicate separation of powers concerns, allow GAO (or some other forum) to address certain issues that the GAO currently does not handle, and provide broader discovery opportunities for protesters. At the very

least, however, GAO should consider whether small business interests could be met by such an arrangement.

Unnecessary Confusion and Litigation: Ambiguous language in the ADRA’s sunset provision may prompt protracted, unnecessary, and expensive litigation leading to confusion and uncertainty in the procurement marketplace. For example, after the FCIA and prior to the ADRA, federal Appellate Courts split on the meaning of the word “exclusive” (in relation to the COFC’s preaward protest jurisdiction) and, accordingly, on the issue of whether District Courts could resolve protest matters filed before an agency awarded a contract. Many predict that confusion will again arise if Congress permits a sunset of statutory (ADRA-granted) District Court bid protest jurisdiction. Notwithstanding the statutory sunset, District Courts might continue to exercise protest jurisdiction pursuant to *Scanwell* (citing the APA) because the ADRA failed to expressly eliminate that jurisdiction developed by 30 years of judicial precedent.

The Justice Department, of course, expects that if Congress allows the sunset, *Scanwell* jurisdiction will end. There is some support in the legislative history of the ADRA, however, for the argument that APA-based *Scanwell* jurisdiction will survive the ADRA’s sunset provisions. The Senate’s original version of the text eliminated *Scanwell* jurisdiction, but the House refused to pass this version. A compromise was struck, leaving the statute silent as to *Scanwell* jurisdiction. (142 CONG. REC., S6, 155–57 (daily ed. June 12, 1996).) The statute’s silence may support a legitimate argument that *Scanwell* jurisdiction—exercised pursuant to the APA—could continue irrespective of the sunset of the specific grant of jurisdiction in the ADRA.

Forum Shopping, Precedent Fragmentation: Critics assert that maintaining concurrent jurisdiction could promote forum shopping and precedent fragmentation. With isolated exceptions,

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

these fears appear unfounded based upon experience with concurrent jurisdiction to date. Both the District Courts and the COFC typically remain cognizant and respectful of the Comptroller General's more developed and broader-based precedent in protest matters. As a result, the District Courts and the COFC have generated precedent reasonably consistent with that of the Comptroller General's office. As for the isolated instances of precedent fragmentation, the District Courts pose no greater threat in this regard than the COFC's individual judges, who are not bound by, and at times disagree with, their colleagues' decisions. Further, existing venue and procedural rules ensure that bid protest cases pose forum shopping problems that are no worse than in other matters in which the Government waives its sovereign immunity.

Allocating Judicial Resources: While it may be true that concurrent jurisdiction increases the burden on an overwhelmed District Court judiciary, relatively speaking (and spread across the entire federal District court judiciary), that burden is insignificant. Conversely, at the COFC, the addition of as few as four dozen protests each year—the rough annual average of District Court protests during FYs 1997–99—would prove highly disruptive. At its current staffing levels—including an unusually large group of senior judges—such an increase could require that each judge handle two additional injunctive matters each year. Moreover, the GSBCA's experience with protest litigation demonstrated that even small increases in protest filings come at a price to other litigants. Resolution of pending matters deemed less time-sensitive, such as Contract Disputes Act appeals, will be delayed.

Any increased burden at the COFC, however, assumes that contractors perceive the COFC as a perfect substitute for District Courts and that *all* contractors that previously pursued District Court protest remedies would litigate willingly in the COFC. As discussed below, such a conclusion is misguided. Some contractors, particularly small businesses, will decline to pursue remedies before the COFC, but the precise number of contractors who will be frustrated in this manner is unknown. But quantifying, extrapolating, and predicting small businesses' willingness to file bid protests absent a District Court option was, of course,

GAO's original statutory assignment. GAO's efforts clearly have fallen fall short of this congressional mandate.

Limited Investigation Produces A Data Set of Limited Utility—While GAO's efforts to interview the attorneys involved in recent court protest actions may produce some interesting anecdotal information, this methodology is of limited empirical value for a number of reasons.

Recent Increase in Filing of Judicial Protests: After the *Scanwell* case was decided, the numbers of bid protest suits filed in the District Courts were insignificant. After the ADRA, however, both the District Courts and the COFC experienced a sharp increase in the volume of protest litigation. The COFC averaged only about one dozen protests per year in the decade preceding the ADRA. Since the ADRA, the COFC received more than three dozen protests in FY 1997, more than 40 protests in FY 1998, and about 60 protests in FY 1999. District Courts seem to have been handling a similar volume of protest cases—i.e., almost 30 in FY 1997, 40 in FY 1998, and almost 60 in FY 1999.

According to Department of Justice statistics on bid protests filed since the ADRA, only a small number of contractors have filed more than one protest. Accordingly, it is reasonable to conclude that, if there is further increase in protest activity, it will come from contractors that have not filed a protest during the last three years. This almost unlimited pool of potential protestors fails to appear on GAO's radar screen at all, and their views therefore are not considered in GAO's study. Given GAO's methodology, it will be nearly impossible to draw conclusions on how the sunset of District Court bid protest jurisdiction will affect protest activity.

Fox Guarding the Henhouse?: A preliminary questionnaire prepared by GAO for District Court protestors and their counsel specifically asked whether the loss of District Court jurisdiction would affect counsels' ability to bring future bid

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

protest cases. While the questionnaire may have asked some valuable questions, the data generated is skewed by a disproportionate share of responses from private attorneys practicing before the COFC and/or the three District Courts located in the Washington, DC-area. Because of the availability of the COFC and GAO, however, these firms and the interests of their clients (whether large or small) would be *least* affected if District Court protest jurisdiction ceases.

For the same reason, the FBA's conclusion that the COFC offers a viable substitute for District Court protest jurisdiction also should be taken with a grain of salt. This position assumes (without empirical support) that, in the absence of District Court protest jurisdiction, *all* matters that contractors *would have pursued* in District Courts will be filed in the COFC. If this theory holds water—if for example, litigants have *no preference whatsoever* for courts of general jurisdiction—it likely is true primarily with regard to contractors already represented by DC-based attorneys because the costs associated with DC-based litigation are neutral.

Similarly, GAO's initiative to discuss with numerous Assistant U.S. Attorneys (AUSAs) the individual protest actions in which they defended the Government seems irrelevant. By analogy, would interviewing prosecutors give unique insight into predicting criminal behavior? Disappointed offerors—and not the Government—choose the protest forum. Moreover, only an infinitesimal percentage of AUSAs have sufficient familiarity with the COFC to be able to offer comparative experience. For a typical AUSA, a disappointed offeror suit represents a time-sensitive (short-fuse) matter in a field with which he or she likely is unfamiliar. It thus would be shocking if AUSAs did *not* favor elimination of concurrent jurisdiction. Similarly, the Justice Department, which is on record favoring an exclusive judicial protest remedy in the COFC, now must defend protest actions in both judicial fora. From DOJ's standpoint, it is easier to manage litigation in a single forum, therefore, its attorneys see no utility in maintaining District Court jurisdiction over protest matters.

Of equally questionable value are the comments GAO is gathering on its draft report from various agencies. With the exception of the Small Business Administration, which should be upset at GAO's failure to properly address the effect on

small businesses of the sunset of District Court bid protest jurisdiction, Executive Branch agencies likely will present a united front against continuing District Court bid protest jurisdiction. Prior to the ADRA, DOD and DOJ advocated elimination of *Scanwell* jurisdiction; their post-ADRA positions on this issue are unlikely to change. Moreover, individual agencies and buying commands generally perceive protests as an interference with their mission, a drain on their resources, and a painful nuisance imposed upon their personnel.

This view was shared by former Office of Federal Procurement Policy Administrator Steve Kelman, the official most credited for procurement reform. During his tenure at OFPP, Professor Kelman routinely criticized the current protest regime, stating that it (1) was time-consuming and expensive, (2) exposed agencies to huge vendor lawyer bills, (3) compromised civil servants' careers, (4) caused public servants to fear deposition by high-priced legal talent, (5) rendered agencies excessively risk-averse and unduly focused upon documenting their decisions, and (6) decreased goodwill and a spirit of partnership between the Government and its contractors.

These criticisms arguably are the very reasons Congress directed GAO to undertake the study. That it now appears that the study has failed to address these and other issues—including the paramount issue of how the elimination of *Scanwell* jurisdiction would affect small businesses—is a disappointment; GAO has squandered an opportunity to add to the body of bid protest knowledge and to educate Congress on some vital details concerning award-related Government contract litigation.

Squandered Opportunity: GAO's cavalier attitude with regard to obtaining a broad cross-section of small business views is startling. The Federal Procurement Data System (FPDS) reports that during FY 1998, small businesses captured 5.75 million contracts worth more than \$42.5 billion. This amount accounts for more than 23% of

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

the total dollars awarded (excluding, among other things, micro-purchases and foreign military sales). Even more significantly, during the same year, the Government contracted with 7,678 *new* women-owned or small disadvantaged businesses. Although not reported by the FPDS, the total number of new small businesses doing business with the Government must be far greater.

Moreover, GAO has access to the raw data necessary to accumulate statistics on the number of small businesses pursuing protests in the District Courts and the COFC. A preliminary GAO questionnaire for counsel filing protests at these courts posed questions to assess each contractor's small business size status. While these questions may help identify the number of small businesses pursuing protests recently, it does nothing to assess future protest practice. To get at this issue, GAO could have polled small businesses or small business industry leaders on their bid protest forum preferences. This inquiry need not have entailed a Herculean effort. In fact, through the SBA's PRO-Net Internet website, <http://pro-net.sba.gov/>, the Government has ready access to more than 170,000 small, small disadvantaged, 8(a), and women-owned businesses interested in or currently doing business with the Federal Government. GAO need only have asked, and small businesses certainly would have provided their forum preferences.

Clothing Small Business Interests With The Emperor's New Apparel—Given the statutory mandate, it is difficult to see how GAO could conclude that the elimination of District Court jurisdiction would not adversely affect the ability of small businesses to challenge violations of federal procurement law. Nevertheless, early indicators are that GAO will not opine whether District Court bid protest jurisdiction is necessary or desirable from *any* perspective. In any event, GAO's data appears heavily influenced by input from those least sympathetic to the concerns of small businesses, particularly the increased costs—both monetary and otherwise—of litigating in Washington, DC.

Convenience and Comfort Level: The long-standing argument for maintaining bid protest jurisdiction in the District Courts is that the broad-based District Court system increases disappointed bidders' access to decisionmakers. Dis-

trict Courts provide protesters with a convenient judicial forum in which to challenge perceived improprieties during individual procurements—a function consistent with the private AG's role in maintaining the public's trust in the integrity of the procurement system. In the past, industry advocates stressed the importance of local fora for protesters in general and small businesses in particular. Small business lobbyists have argued that the financial burdens associated with travel to Washington, DC are significant for large businesses, and almost impossible for small businesses. See 38 GC ¶ 392.

Bid protest cases are one of the rare instances in which the public contracts bar confronts fast-paced litigation, including temporary restraining orders and preliminary injunctions. To many small businesses, travel is an unnecessary obstacle that can affect the outcome of cases. Indeed, even the FBA working group (whose members are Washington, DC-based) concluded that it is “unquestionably” more convenient for contractors far from DC “to have access to their own district courts.” Yet at times, the organized bar exhibits a tin ear on this issue. A disproportionate percentage of the public contracts bar is based in the Washington, DC area, which offers proximity to Congress, the COFC, GAO, agency boards of contract appeals (BCAs), relevant policy-makers, and regulatory experts. Moreover, experienced Government contract practitioners in CDA matters (e.g., contract performance disputes, as opposed to preaward and postaward contests relating to the award of such contracts) have grown accustomed to well-traveled, accommodating adjudicators. Judges of the COFC (and its predecessor courts) and administrative judges of the BCAs routinely travel and hold hearings in CDA disputes at the parties' convenience. Judges even bifurcate trials, hearing evidence in multiple cities, if justified by witnesses' geographical dispersion.

This level of customer service, unfortunately, is out the question in disappointed offeror litigation.

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

tion. Although the COFC has the statutory authority to travel to hold protest hearings, in practice the Court rarely does so. Nor is the COFC's bench *capable* of traveling to handle all injunctive relief actions (a problem that would become more acute if the COFC absorbed District Courts' protest dockets).

Moreover, it seems unlikely that GAO recognizes any other potential chilling effects associated with eliminating District Court jurisdiction. Exclusive COFC protest jurisdiction sends a not-so-subtle message to small business that protests are a game played only *inside the beltway*. It is a far cry from the logic of *Scanwell* to suggest that small businesses are welcomed, in the role as private AGs, to assist the Government with procurement oversight, *but they must travel to Washington, DC to do so*. Many small businesses pride themselves on their independence and view any proceeding in Washington with great skepticism. Accordingly, lacking the opportunity to seek relief in their local federal District Court, at least some small businesses will conclude that protests just are not worth the effort.

Concerns About Money And Quality of Representation: In protest matters, the two most significant expenses—travel and attorneys' fees—are inter-related. Nevertheless, despite the opportunity to interview counsel, GAO made no attempt to quantify either the increased expenses associated with out-of-town litigation (such as witness travel and lodging) or the disparities in billing rates between the attorneys located in the Washington, DC metropolitan area and in other areas of the country. (On this latter issue, the FBA suggests that these increased costs could be ameliorated by liberalizing the fee recovery provisions of the Equal Access to Justice Act. While this suggestion might appeal to Rube Goldberg and his acolytes, it fails to address costs associated with contractor personnel travel and, more importantly, merely masks the larger issue.)

It lies somewhere between arrogant and naive to conclude that the potential for increased travel costs or attorneys' fees associated with litigation exclusively in Washington, DC constitutes an acceptable risk of doing business with the Government. While such a risk may be borne willingly by large defense contractors, no procurement policy supports it, and such a risk should not be part of

doing business with the Government.

GAO cannot in good faith suggest that contractors' (particularly small businesses') decisions to litigate in the COFC are completely unrelated to the cost of that litigation—they are. While a small business's inclination to sue is not *perfectly elastic* (small increases in litigation costs do not necessarily trigger large changes the volume of litigation), anticipated costs constitute a key ingredient in a contractor's litigation decisions. These decisions include whether to litigate in the first place and also whether and, if so, for how much to settle. GAO's data cannot dispel the obviously inverse relationship between increased litigation costs and small businesses' willingness to litigate. (If GAO *could* do so, it would warrant the immediate repeal of the EAJA.)

Even if GAO had attempted to quantify the increased costs associated with travel and attorneys' fees, the issue of "cost" goes beyond these monetary concerns to the substantive issue of quality of representation. Many contractors are more comfortable using familiar in-house or local counsel in protest matters. Working with DC-based counsel for the first time increases the costs of legal representation in that counsel must quickly become familiar with the contractor's business practices and personnel, as well as with the disputed procurement. In addition to the added expense, the time constraints inherent in disappointed offeror litigation exacerbate the difficulties associated with distant, unfamiliar counsel. (Conversely, the DC-area bar's efficiency in litigating these matters, derived from their legal expertise and practical experience, may ameliorate the effects of their higher rates. However, neither GAO nor the bar possesses empirical data to support such a claim.)

What's At Stake?—Given the trend towards reduced oversight of the procurement process, the importance of maintaining convenient, efficient, and economical protest fora is obvious. Viewed as a vehicle for ensuring compliance with the

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.

Government's procurement laws, regulations, and policies, therefore, the protest regime is a bargain. Opponents of protests have neither suggested, nor attempted to demonstrate, a more cost-effective, less intrusive oversight regime. An increased Inspector General presence, or other labor-intensive surveillance mechanisms, would please no one.

In a government of the people, where procurement professionals annually spend \$200 billion in taxpayer funds, public trust is key. The age-old query, "who watches the watchmen?" remains vital today. The Government's contractors, and those that seek the Government's procurement dollars—including numerous small businesses—have long played a vital role in monitoring the procurement process. But after a decade of acquisition reform in a remarkably strong economy, these same contractors appear complacent, if not passive, and consistently nonchalant regarding any responsibility related to policing the procurement system. Meanwhile, acquisition reforms continue to eliminate or dilute existing oversight mechanisms. If these trends continue, the procurement system will suffer. If contractors cannot easily serve their own interests, and in doing so, ensure the procurement system's integrity on a solicitation-by-solicitation basis, alternative oversight mechanisms must be considered.

The costs associated with District Court protest jurisdiction are so minute that they defy quantification. The potential benefits—validating the role of protestors as private AGs and invigorating the contracting community to fulfil its oversight role—are enormous. It's time for some common sense. Let's hope GAO proves me wrong, recognizes what's at stake, and recommends continued District Court jurisdiction over preaward and postaward bid protests.



This FEATURE COMMENT was written for the GOVERNMENT CONTRACTOR by Steven L. Schooner, Associate Professor of Government Contracts Law at the George Washington University Law School, and a member of THE GOVERNMENT CONTRACTOR Advisory Board. Much of this work derives from a seminar at the GW Law School. Major contributors included Karen E. Da Ponte, Anthony L. Steadman, Scott E. Lind, Patricia A. Freeman-Ford, Derek D. Crick, and

Robert Malyszek. Other contributors included Stephanie Stinson, Daniel Forbes, and Laurie Herbert. Professor Schooner also thanks Fred Lees and Heidi Schooner for their helpful comments. For an extensive bibliography related to disappointed offeror litigation, visit Professor Schooner's Government Contract Law Web Site at <http://www.law.gwu.edu/facweb/sschooner/BIBLprot.html>

This material from The Government Contractor has been reproduced with the permission of the publisher, Federal Publications—A West Group Co. (901 15th St., N.W., Suite 1010, Washington, D.C. 20005, phone 202-337-7000). Further use without permission of the publisher is prohibited.