

TARGETING FRIVOLOUS BID PROTESTS BY REVISITING THE COMPETITION
IN CONTRACTING ACT'S AUTOMATIC STAY PROVISION

by
Bruce Tsai

A capstone submitted to Johns Hopkins University in conformity with the requirements
for the degree of Master of Arts in Public Management

Baltimore, Maryland
December 2014

© 2014 Bruce Tsai
All Rights Reserved

Contents

I.	Action Forcing Event.....	1
II.	Statement of Problem.....	1
III.	History	3
IV.	Background.....	15
	Facts and Data.....	15
	Political/Policy Actors	15
V.	Description of Policy Proposal	20
	Policy Solution.....	20
	Policy Authorizing Tool	22
VI.	Policy Analysis	24
	Effectiveness.....	24
	Efficiency.....	26
	Equity.....	30
	Administrative Capacity	32
VII.	Political Analysis	32
	Obama Administration.....	32
	Legislation: Following the Bipartisan Footsteps of FASA.....	34
	Affected Party – Industry.....	36
	Affected Party – Agencies	37
VIII.	Recommendation	38
IX.	Curriculum Vitae	39

To: Administrator, Office of Federal Procurement Policy
From: Bruce Tsai
Subject: Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision

I. Action Forcing Event

A Government Accountability Office (GAO) report earlier this year highlights that bid protests (hereafter known as “protests”) filed to the GAO have increased by over 71% from Fiscal Year (FY) 2004 to FY 2013.^{1 2}

II. Statement of Problem

Conceptually, protests provide external oversight to Government procurements. Within the GAO, the Comptroller General has supported protests by stating the integrity of the award process outweighs any advantage the Government may receive from an improper award.³ However, frivolous protests are a problem. While legitimate protests test the integrity of the award process, frivolous protests only test the litigious will of the Government and successful contractors.

When contractors submit frivolous protests they are exploiting the protest mechanism to impede competition.⁴ Former Office of Procurement Policy (OFPP) Administrator Steven Kelman was a critic of this exploitation. He found that protests were time-consuming and

¹ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2009-2013 (GAO-14-276SP)*. January 2, 2014.

² Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2004-2008 (GAO-09-251R)*. December 22, 2008.

³ Dembling, Paul. "The Commission Recommendations: The GAO as a Bid Protest Forum." *George Washington Law Review* 42, no. 2 (1974), 5.

⁴ William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 489.

expensive, rendered agencies excessively risk-averse, and decreased goodwill and partnership.⁵ In other words, protests disrupt the Government-contractor relationship.

In the modern era which Ronald Moe and Robert Gilmour label the Entrepreneurial Governing Approach,⁶ contractors are paramount to the execution of Government. As of 2006, Paul Light (New York University and The Brookings Institute) estimated 10.5 million federal contractors and grantees versus 1.9 million civil servants in the federal government.⁷ Protests have the potential to disrupt the work of all 10.5 million federal contractors and grantees. This disruption should at least come with the positive attributes of external oversight. A proper protest mechanism should protect the contractor's interest to hold the Government accountable while respecting the agency's interest to minimize disruption to the mission.⁸

Data provided by the GAO supports the notion that there is an increase in frivolous protests. In the last decade, the number of protests increased substantially while the percentage of sustained protests⁹ decreased. If we trust the GAO as an impartial arbiter, a reduced sustain rate connotes a decrease in the quality of protests.

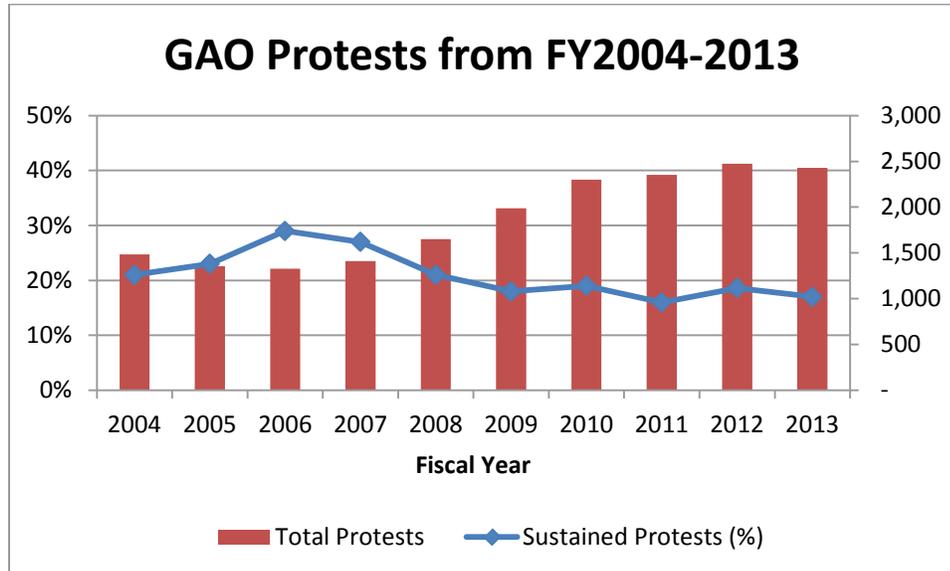
⁵ Steven Schooner, *Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*. (working paper no. 146, The George Washington University Law School, 2000), 108.

⁶ Lori Anderson, *The Meaning of Inherently Governmental in OMB Circular A-76 from 1966 to 2003: A Change in Governing Approaches*. (dissertation. Virginia Polytechnic Institute and State University, 2008), 9.

⁷ Lee, Christopher. "Big Government Gets Bigger." *Washington Post*, October 6, 2006. <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/05/AR2006100501782.html>.

⁸ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 6.

⁹ A sustained bid protest is a bid protest that goes to hearing and ruled in favor of the aggrieved contractor



10 11

III. History

Protests became disruptive when the Government came to rely on contractors to function. The potential for protests naturally increases as the amount of contract work increases. In response, the Government passed a series of legislation in the 1980s and 1990s to streamline protest adjudication. First, this section will explore how and why the Government came to rely on contractors. Next, this section will look at two major pieces of legislation during this time period that addressed the growing number of protests. The first piece of legislation is the Competition in Contracting Act of 1984 which formalized the GAO protest mechanism. The second piece of legislation is the Federal Acquisition Streamlining Act of 1994 which brought efficiency to Government procurements.

¹⁰ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2009-2013 (GAO-14-276SP)*. January 2, 2014.

¹¹ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2004-2008 (GAO-09-251R)*. December 22, 2008.

Government by Contract, “The Product of Design, not Bureaucratic Happenstance”

In the second half of the 20th century, Moe and Gilmour describe a governance shift from Constitutional values such as: “democratic, political, and administrative”¹² to economic values: Is the taxpayer getting their money’s worth of services from the Government? This new economic outlook provides the backdrop for the growth of contractors in the Government. When the Executive Branch’s priorities shift to cost and quality, the Executive Branch must turn to the private market to “improve services provided by a monopolistic bureaucracy.”¹³ Daniel Guttman calls this growth, “the product of design, not bureaucratic happenstance.” During the 1950s, the Government used the contractor workforce to respond to both an external threat (Soviet Union) and internal fear (Centralized Government) of the Cold War. The Government used the contractors’ military and scientific expertise to countervail the Soviet machine without growing the size of the US central Government.¹⁴

The modern growth in contractors would take off under Reagan. Reagan believed that the Executive branch was encumbered with bureaucracy and unable to efficiently serve the American people. Reagan was able to contract out services in tandem with his “ideas of slenderizing the bureaucracy and cutting federal personnel... The Reagan era set the base for what later became labeled the New Public Management philosophy, including the continuing attack on the public sector, the prevalence of ideas compatible with economic theory... as measures of Government success.”¹⁵

Clinton continued the contracting trend under the auspice of a more efficient Government. On September 14, 1993, Clinton issued Executive Order 12862, “Setting Customer

¹² Lori Anderson, *The Meaning of Inherently Governmental in OMB Circular A-76 from 1966 to 2003: A Change in Governing Approaches*. (dissertation. Virginia Polytechnic Institute and State University, 2008), 163

¹³ Paul Verkuil, *Public Law Limitations on Privatization of Government Functions*. (working paper., Cardozo Law School, Yeshiva University, 2005), 3.

¹⁴ Thomas Stanton, and Daniel Guttman, *Meeting the Challenge of 9/11: Blueprints for More Effective Government*, (M.E. Sharpe, 2006), chap. 10, 4.

¹⁵ Larkin Dudley, *Need for Balance? Publicness in the Inherently Governmental Dialogue*. (working paper., Virginia Polytechnic Institute and State University, 2008), 8.

Service Standards,” which enjoined that “the Federal Government provides the highest quality service possible to the American people.”¹⁶ Shortly after, Clinton tasked Vice-President Gore with the National Performance Review (NPR) which studied the operations of America’s best businesses. NPR’s goal was to incorporate these operations into a businesslike Government.¹⁷

Under businesslike Government, the contractor workforce became increasingly necessary. The easiest way to adopt businesslike Government is to put business in Government. As a result, Gore would lead reforms to streamline the purchase of supplies and services. In 1994 and 1996 respectively, Congress passed the Federal Acquisition Streamlining Act and the Clinger-Cohen Act which provided, “greater purchaser discretion” and “less... bureaucratic constraint” to the acquisition process.¹⁸

George W. Bush took contracting even further when he revised the Office of Management and Budget (OMB) Circular A-76 to allow direct competition between the Federal Government and private industry for work not deemed “inherently governmental.” As a result, George W. Bush directed a competition for half of the 850,000 positions identified.¹⁹ The 20th Century had completed its evolution to Government by contract.

Formalizing the GAO Protest Mechanism: The Competition in Contracting Act of 1984

As the Government became reliant on contractors, protests turned from a nuisance to a threat to governance itself. In response, the Government formalized the GAO protest forum in the Competition in Contracting Act (CICA) of 1984. While protest forums exist in the Executive and Judicial branches, a 1972 Commission on Government Procurement found that a GAO hegemony exists by “(a) providing an independent and objective forum; (b) providing an administrative

¹⁶ Exec. Order No. 12862, 58 FR 48257

¹⁷ Albert Gore, *Businesslike Government: Lessons Learned from America's Best Companies*, National Performance Review, (DIANE Publishing, 1997).

¹⁸ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 8-9.

¹⁹ Valerie Grasso, *Defense Outsourcing: The OMB Circular A-76 Policy*. (working paper., Congressional Research Service, 2005), 14-16.

forum...faster than either the courts or boards of contract appeals; (c) developing a comprehensive body of award protest law that applies to the government as a whole.”²⁰

Recent data shows that the GAO caseload is far heavier than the Court of Federal Claims’ (COFC) caseload.²¹ In addition, a GAO Study in 2000 found that the COFC caseload is far heavier than the District Courts’ caseload.²²

Caseload						
	2010	2009	2008	2007	2006	2005
GAO (Fiscal Year)	2,299	1,989	1,652	1,411	1,326	1,356
Court of Federal Claims (Calendar Year)	88	74	79	81	64	68
District Court	No Centralized Repository, but fewer than Court of Federal Claims					
Agency-Level	No Centralized Repository					
Executive Branch Boards’	No Centralized Repository					

Therefore, any attempt to address the volume of protests has to occur in the GAO forum. The goal of CICA was to create a GAO forum that enables legitimate protests, streamlines legitimate protests, and discourages frivolous protests.

²⁰ Dembling, Paul. "The Commission Recommendations: The GAO as a Bid Protest Forum." *George Washington Law Review* 42, no. 2 (1974), 284.

²¹ Daniel Forman, Peter Eyre, and Puja Satiani, *Bid Protests: Trends and Developments*. (lecture, Ounce of Prevention Seminar (OOPS), 2011)

²² General Accounting Office, Rep No. GAO/GGD/OGC-00-72, *Bid Protests: Characteristics of Cases Filed in Federal Courts* (2000)

Enabling Legitimate Protests through Independence and Objectivity

CICA enables legitimate protests by preserving a GAO already rooted in independence and objectivity. The genesis of GAO's independence and objectivity is found with its navigation of Supreme Court decisions *Buckley v. Valeo* and *Immigration and Naturalization Service v. Chadha*. Under *Buckley*, the Supreme Court found that Congress could not retain power to appoint members of an administrative agency (i.e. Federal Election Committee). Under *Chadha*, the Supreme Court found that Congress' attempt to over-ride the Attorney General's suspension of a deportation was a "trial by legislature" without adequate due process and a "legislative veto" violating the Constitution's Presentment Clause.^{23 24}

When Reagan signed CICA, he expressed reservations over the Comptroller General over-stepping separation of powers. However, CICA addresses this concern by maintaining a GAO structure that functions and performs more like an independent agency and less like a legislative agency. The Supreme Court has found that the status of an agency can be determined by the function it performs²⁵ rather than its physical address. The GAO maintains this independent structure in compliance with both *Buckley* and *Chadha*. To comply with *Buckley*, the Comptroller General is appointed for fifteen years in accordance with the Appointments Clause and requires a joint resolution²⁶ to remove.²⁷ To comply with *Chadha*, GAO decisions are recommendations which lack an official bite. As such, GAO decisions provide the oversight of an independent agency without a "trial by legislature" or "legislative veto." The consequence of an agency disregarding a GAO decision is a report to Congress.

²³ Weitzel, Jr., James. "GAO Bid Protest Procedures under the Competition in Contracting Act: Constitutional Implications after Buckley and Chadha." *Catholic University Law Review* 34 (1985), 507.

²⁴ Presentment Clause (US Constitution, Article I, Section 7, Clauses 2 and 3), "Every Bill shall have passed the House of Representatives and the Senate, shall before it become a Law, be presented to the President of the United States."

²⁵ Weitzel, Jr., James. "GAO Bid Protest Procedures under the Competition in Contracting Act: Constitutional Implications after Buckley and Chadha." *Catholic University Law Review* 34 (1985), 519.

²⁶ Joint resolution requires a Presidential signature or an override by a Congressional super-majority

²⁷ Weitzel, Jr., James. "GAO Bid Protest Procedures under the Competition in Contracting Act: Constitutional Implications after Buckley and Chadha." *Catholic University Law Review* 34 (1985), 520.

Enabling Legitimate Protests through Expertise

The GAO forum enables legitimate protests through its comprehensive body of protest law gained from a high volume of cases.²⁸ In comparison, Steven Schooner (former Associate Administrator for Law & Legislation in the OFPP) suggests that the COFC has such a “hodge-podge” jurisdiction that it cannot be a master of procurement law.²⁹ This level of competence bodes even worse for the lesser-utilized protest forums.

Enabling Protests through Meaningful Relief

CICA gives GAO a generous selection of remedies that encourage both legitimate and frivolous protests. The GAO’s remedies include: cancelling or reissuing a solicitation, terminating an award, changing restrictive specifications,³⁰ curing defects in the evaluation,³¹ and granting bid and proposal costs as well as attorney’s fees.³² Even though a remedy is only realized if the protest is sustained, the wide-selection of remedies combined with the low cost to protest³³ encourages any unsuccessful offeror³⁴ to try.

Enabling Protests through Automatic Stay Provision

Prior to CICA, agencies would commence performance during a protest to erode any meaningful relief for the unsuccessful offeror.³⁵ Therefore, CICA institutes an automatic stay of performance unless an agency determines that there is an “urgent and compelling” circumstance

²⁸ William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 484.

²⁹ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1235

³⁰ John Tieder, Jr. and John Tracy. "Forums and Remedies for Disappointed Bidders on Federal Government Contracts." *Public Contract Law Journal* 10 (1978), 103.

³¹ Weitzel, Jr., James. "GAO Bid Protest Procedures under the Competition in Contracting Act: Constitutional Implications after Buckley and Chadha." *Catholic University Law Review* 34 (1985), 498.

³² William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 468.

³³ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1237.

³⁴ Federal Acquisition Regulation (FAR) 2.101 states, ““offeror “ means offeror or bidder.”

³⁵ Cho, Young. "Judicial Review of "The Best Interest of the United States" Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?" *Public Contract Law Journal* 34, no. 2 (2005), 340.

to proceed with the contract.³⁶ The purpose of the automatic stay is to preserve all options for relief during protest adjudication. However, there is a concern that the cost of the automatic stay could outweigh the benefits,³⁷ especially in cases where the incumbent contractor has lost a re-competition. An incumbent can use the automatic stay to prolong their current contract whether the protest has merit or not.

Streamlining Legitimate Protests

GAO's non-binding decisions allow it to meet CICA's 100 day rule for adjudication. This 100 day rule not only minimizes disruption to the Government, but also saves the unsuccessful offeror costs from drawn-out litigation. The 100 day rule is very rigid with its deadlines for both the unsuccessful offeror and the Government; a missed deadline often renders a case inadmissible. These deadlines extend beyond the GAO: Agency-level protests are bound by CICA's rules for timeliness unless the agency has stricter rules.³⁸ The 100 day rule can be waived when the need for oversight trumps efficiency as defined by cases which "present(s) novel or significant issues of interest to the procurement community."³⁹

Streamlining Protests and the loss of Discovery and De Novo Review

The drawback to efficiency is that GAO operates without many safeguards of the courts⁴⁰ such as full discovery⁴¹ and de novo review.⁴² The 100 day rule does not provide time for full discovery. Discovery usually comes down to the limited documents that can be produced during

³⁶ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1231.

³⁷ Ibid 1240

³⁸ Kim, Eugene. "Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals." *Army Law* 30 (2007), 35

³⁹ Ibid 36

⁴⁰ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1227.

⁴¹ Kim, Eugene. "Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals." *Army Law* 30 (2007), 37.

⁴² Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*. (working paper., The George Washington University School of Law, 1998), 177.

CICA's short deadlines. If a document dispute exists, "GAO will resolve the matter,"⁴³ which entails making a quick judgment call. In 1990, the GAO proposed amending CICA to provide full discovery⁴⁴, but this was never adopted to protect efficiency.⁴⁵ The 100 day rule also does not allow for De Novo review. The GAO defaults towards the agency's judgment when ruling in each case. De Novo review would force the GAO to hear the case objectively without deference to the agency's judgment.⁴⁶ This expanded standard of review⁴⁷ compromises efficiency. There has never been an attempt to add de novo review to the GAO forum. The Administrative Dispute Resolution Act of 1996 which amended the Tucker Act attempts to address the lack of safeguards by allowing protesters seeking the full judicial experience (i.e. full discovery and de novo review) to re-file with the COFC.⁴⁸

Discouraging Frivolous Protests

CICA has two mechanisms to reduce the number of ostensibly frivolous protests: the prejudice standard and definition of an interested party. Regarding the prejudice standard, an unsuccessful offeror must "demonstrate a reasonable possibility that it was prejudiced..." In other words, "But for the agency's actions... (the unsuccessful offeror) would have had a substantial chance of receiving award."⁴⁹ In this case, the GAO is only interested in violations that affect the outcome of a procurement. GAO provides no remediation for all other violations.

CICA officially defines an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to

⁴³ Kim, Eugene. "Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals." *Army Law* 30 (2007), 37

⁴⁴ McAvoy, Roger. "Bid Protest - Balancing Public and Private Interests." *The Air Force Law Review* 34 (1991), 229

⁴⁵ John Tieder, Jr. and John Tracy. "Forums and Remedies for Disappointed Bidders on Federal Government Contracts." *Public Contract Law Journal* 10 (1978), 102.

⁴⁶ Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*. (working paper., The George Washington University School of Law, 1998), 167: De Novo defined in the context of the General Services Board of Contract Appeals (GSBCA).

⁴⁷ Ibid 168

⁴⁸ Frederick Claybrook, Jr. *Standing, Prejudice, and Prejudging in Bid Protest Cases*. (working paper., Crowell & Moring, LLP., 2004), 535.

⁴⁹ Ibid 547.

award the contract.”⁵⁰ This means an “interested party” is defined as whoever was next in line for contract award, unless the protestor is challenging a solicitation.⁵¹ In this case, the GAO is only interested in overseeing violations that affect a narrowly-defined complainant. Others who might be affected (e.g. subcontractors) are not considered interested parties and not worthy of remediation.

Streamlining Federal Procurements: The Federal Acquisition Streamlining Act of 1994 and Progeny

Despite CICA’s modest effort to curtail frivolous protests, CICA may have created a GAO protest forum that was too efficient with too few barriers to entry. In the decade after CICA, the number of GAO protests grew annually until it reached around 3,300 in FY1993.⁵² The Executive Branch would strike back under Vice President Gore’s NPR initiative. The OFPP administrator at the time, Steven Kelman, began a campaign to streamline federal procurements which culminated in the Federal Acquisition Streamlining Act (FASA) of 1994 and progeny (e.g. Clinger-Cohen Act of 1996). FASA affected the number of protests by codifying wider discretion for Government personnel which led to fewer areas of challenge⁵³ and building trust through increased dialogue between the Government and contractors. Under the rubric of FASA, the Government even visited the idea of sanctioning frivolous protests.

⁵⁰ Ibid 537

⁵¹ Alexander Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*. (working paper., McKenna & Cuneo, 1993), 640-641.

⁵² Steven Schooner, *Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*. (working paper no. 146, The George Washington University Law School, 2000), 108.

⁵³ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 36.

Wider Discretion for Government Personnel

When protests increase, federal agencies protect themselves with policies and training to build “protest-proof” contract files⁵⁴ FASA supported this defensive strategy through procurement reforms that reduced external oversight (i.e. protests) through greater purchaser discretion.⁵⁵ Kelman detested protests as an impediment to efficiency.⁵⁶ Therefore, it is reasonable to expect that these reforms sought to reduce or were out rightly hostile towards protests. These reforms introduced and re-defined a new class of acquisitions including:

1. Micro-Purchase procurements (\$3,000 or less) – the contracting official can award a procurement without competition.
2. Simplified Acquisitions from (\$3,000 to \$30,000) – the contracting official can award a procurement by calling three vendors.
3. Simplified Acquisitions from (\$30,000 to \$150,000) – the contracting official uses his/her best judgment to make a best value determination.
4. Commercial Acquisition – the contracting official can use the simplified acquisition process to order a commercial item. The definition for commercial items is very broad. Once an item is determined commercial, the Government can describe how it intends to use the product rather than generating formal specifications.⁵⁷
5. IDIQ Contracts – the contracting official can issue an IDIQ contract to a pool of vendors. An IDIQ contract allows the Government to compete work issued through task/delivery orders among the pool of IDIQ vendors. Ultimately, the contracting official is the authority of which companies receive the task/delivery orders.

⁵⁴ Erik Troff, *Agency-Level Bid Protest Reform: Time For a Little Less Efficiency?*. (The Department of Air Force through the George Washington University, 2005), 4.

⁵⁵ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 2,3,8, and 9.

⁵⁶ *Ibid* 45

⁵⁷ Linda Lebowitz. *Bid Protest Issues Arising in Commercial Item Acquisitions*. working paper., United States General Accounting Office, 1998, 430-431, 440.

This new class of acquisitions affords the contracting official greater latitude and authority in procurement decisions thereby replacing layers of bureaucracy with employee empowerment. The result was “the Clinton Administration... would give public purchasing officials more discretion and increase their ability to defeat challenges by disappointed offerors.”⁵⁸ By replacing regulation with discretion, the new class of acquisitions eliminates avenues for protests.

Discretion comes down to the best judgment of the contracting official. Compounding this arbitrary metric, the best judgment of the contracting official can be called into question based on the decimation of the Government’s Acquisition workforce in the 1990s. From 1989 to 2001, the acquisition workforce in the Government has shrunk substantially; the Department of Defense reported a reduction of approximately 55%.⁵⁹ An increase in empowerment concurrent with a reduction in acquisition workforce equates to fewer protests when oversight may be needed the most.

Increased Dialogue

The second strategy FASA employed to reduce protests was increased dialogue. The Government’s lack of disclosure had caused a high level of distrust in the contractor community. When a contractor loses a competitive procurement and the Government provides insufficient rationale, the contractor is more likely to file a protest.⁶⁰ FASA addresses this concern by increasing debriefing requirements. Federal Acquisition Regulation (FAR) 15.1006(d) requires that the Government “disclose much more information not only on how the Government

⁵⁸ William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 464.

⁵⁹ Steven Schooner, *Watching the Sunset: Anticipating GAO’s Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*. (working paper no. 146, The George Washington University Law School, 2000), 3.

⁶⁰ David Thomas, *An Examination of the Effects of The Federal Acquisition Streamlining Act of 1994 on the Post-Award Debriefing Process and Bid Protest Frequency*. (master\., Air Force Institute of Technology, 1997), 7.

evaluators viewed proposals, but also on the evaluation process itself.”⁶¹ The increase in disclosure aimed to fix the trust issue and avoid unnecessary protests.

Proposal to Sanction Frivolous Protests

During the FASA time-period, a blue ribbon commission known as the Acquisition Law Advisory Panel (“Section 800 Committee”) recommended stronger sanctions to frivolous protests.⁶² In response, President Clinton endorsed sanctions, which included reimbursing the Government’s costs for defending the protest, in the Federal Acquisition Improvement Act of 1995.⁶³ Ultimately, this bill died and was the last time the Government seriously considered sanctions.

A Reduction of Protests in the 1990s

In the 1990s, the Government experienced a drop in GAO protests which ultimately reached 1,146 cases in 2001. Steven Schooner, Kelman’s former colleague and occasional critic, ascribed the drop in protests to FASA and other streamlining efforts. Schooner extols the protest as a form of external oversight, “in this context, litigation as a form of external monitoring initiated by private attorneys... is a public good.”⁶⁴ Consequently, he found the drop in protests troubling. However, Schooner may have placed too much blame on FASA because this downward trend would not continue.

⁶¹ Rand Allen, *FASA, FARA, & ITMRA. Course Manual*. (manuscript., Acquisition Streamlining Institute, 1997), 15.

⁶² William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 492.

⁶³ H.R.1388 – Federal Acquisition Improvement Act of 1995

⁶⁴ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 3.

IV. Background

Facts and Data

The lull in protests came to an end around FY2008. In the last 10 years (FY2004 to FY2013), GAO protests grew from approximately 1,400 to 2,400, a 71% increase.

Number of Protests filed with the GAO from FY 2004 through FY 2013

	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009
Cases Filed ¹	2429 (down 2% ²)	2,475 (up 5%)	2,353 (up 2%)	2,299 (up 16%)	1,989 (up 20%)

⁶⁵

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004
Cases Filed ¹	1,652 ² (up 17% ³)	1,411 (up 6%)	1,327 (down 2%)	1,356 (down 9%)	1,485

⁶⁶

The Government's response to the increase in protests was minimal, an overt backlash to the streamlining efforts of the past two decades.

Political/Policy Actors

President Obama Appoints OFPP Administrator Daniel Gordon

The locus of procurement policy resides at the OFPP within the OMB. The OFPP underwent a major ideology change with the Obama administration. The Clinton and George W. Bush administrations prioritized efficiency and appointed OFPP administrators that led acquisition streamlining initiatives which culminated in FASA and OMB A-76 reforms (i.e. public-private competitions) respectively. The Obama administration swung the pendulum to the opposite end of the spectrum by appointing Dan Gordon as OFPP administrator in 2009.

⁶⁵ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2009-2013 (GAO-14-276SP)*. January 2, 2014.

⁶⁶ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2004-2008 (GAO-09-251R)*. December 22, 2008.

Gordon's ideology placed a greater emphasis on oversight even if the cost was a lot less efficiency. This meant valuing protests regardless of their disruption to governance.

After leaving office in 2011, Dan Gordon defends his ideology in a paper titled, "Bid Protests: The Costs are Real, but the Benefits Outweigh Them." Dan Gordon's paper is structured as follows: 1. A critique of his predecessors (e.g. Steven Kelman) who claimed that protests are expensive and disruptive; 2. Protests are not as common as we are led to believe; 3. Protest costs associated with litigation and disruption are not fully experienced; and 4. Protest benefits far outweigh costs in both the monetary (e.g. increased competition) and non-monetary (e.g. accountability, equity, transparency, etc...) sense.⁶⁷

To protect his ideology, Gordon's positions often resort to selective data and subjective measures. For example, when trivializing the impact of protests, Gordon states that in "FY 2006... there were approximately 1.92 protests for each billion (dollars) while in FY 2011, there were 2.74 protests per billion (dollars)."⁶⁸ It is not an accurate characterization to compare quantity of protests to total procurement dollars. A more meaningful assessment would compare protested procurement dollars to total procurement dollars.

The impact of protests is not just about overall quantity, but also the size of the procurements. If one of those protests was the \$35B Air Force tanker protest in 2008⁶⁹ or the \$6.8B NASA "Space Taxi" protest in 2014⁷⁰, the impact from a single protest is significant. Gordon even concedes that, "very high-dollar procurements are much more likely to be protested," but offers the consolation "that does not change the overall picture, however, that bid

⁶⁷ Gordon, Daniel. "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them." *Public Contract Law Journal* 42, no. 3 (2013).

⁶⁸ Ibid 19

⁶⁹ "Boeing Wins \$35B Air Force Tanker Contract." *AP Online*, February 25, 2011. Accessed October 16, 2014. <http://www.highbeam.com/doc/1A1-e8543584e1ea4bc68e8ddc7f20bb2468.html?>

⁷⁰ Pasztor, Andy. "Sierra Nevada Steps up Legal Battle Over NASA 'Space Taxi' Competition." *Wall Street Journal*, October 16, 2014. Accessed October 16, 2014. <http://online.wsj.com/articles/sierra-nevada-steps-up-legal-battle-over-nasa-space-taxi-competition-1413420919>.

protests are rare.⁷¹ But it does change the overall picture. One rare protest valued at \$35B is equivalent to 233,333 protests valued at \$150,000 (this value is chosen because it is the maximum threshold for a simplified acquisition purchase order, therefore the smallest likely contract).⁷²

While Gordon does not cite the disruption of the tanker contract on the cost side of his ledger, he does account for it under the benefits side as an increase to public trust in the fair disbursement of taxpayer dollars.⁷³ Where numbers are not convenient, Gordon supports his argument by citing the “author’s experience,” which he refers to 5 times verbatim as well as other “just trust me” allusions. While Gordon has impressive credentials both at the GAO and OFPP, the numerous arguments supported by the “author’s experience” and its derivatives do not engender much confidence in objectivity. Driven by a parochial need for oversight, Gordon may have missed the opportunity to grow oversight while preserving some efficiency.

Congress

Based on GAO’s annual report, Congress was well aware that protests increased by around 71% over the last ten years.⁷⁴ However, Congress mostly follows OFPP’s lead when it comes to procurement policy, which at that time prioritized the protest oversight function. Consequently, Congress required GAO to begin reporting common agency improprieties in sustained protests and expanded the reach of protests to cover IDIQ task orders exceeding \$10M. Congress did institute a protest filing fee, but it was clear that the intent of this fee was administrative only without a deterrence objective.

⁷¹ Gordon, Daniel. "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them." *Public Contract Law Journal* 42, no. 3 (2013), 18.

⁷² FAR Part 13.003(b)(1)

⁷³ Gordon, Daniel. "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them." *Public Contract Law Journal* 42, no. 3 (2013), 42.

⁷⁴ See notes 67 and 68

1. Reporting Agency Improprieties

Congress required GAO, in FY2013, to report the “most prevalent grounds for sustaining protests” in which the GAO found: “(1) failure to follow the solicitation evaluation criteria; (2) inadequate documentation of the record, (3) unequal treatment of offerors; and (4) unreasonable price or cost evaluation.”⁷⁵ This exercise indicates that Congress intends to address the growth of protests by correcting agency improprieties. The shortcoming to this approach is that protests have increased as sustain rates have fallen.⁷⁶ In other words, the quantity of protests is declining, not the quality of agency processes.

2. Expanding Protest Authority to IDIQ task orders exceeding \$10M

In 1994, FASA created an environment where IDIQ task orders and delivery orders⁷⁷ can only be protested if “the order increases the scope, period or maximum value of the contract under which the order is issued.”⁷⁸ Since IDIQ orders rarely meet the aforementioned criteria, these orders were exempt from protests. As IDIQ contracts grew in popularity, Congress began considering protests for certain IDIQ orders.

In the National Defense Authorization Act (NDAA) of FY 2008, Congress granted authority to protest IDIQ orders in excess of \$10M effective for 3 years beginning 120 days after the passage of the NDAA.⁷⁹ Despite some deliberations and ambiguity in the 2011 time-period, Congress extended the authority through September 30, 2016 with the NDAA of FY 2012.⁸⁰ The Government does not have a good count of how many procurement actions this affects since agencies often fail to report IDIQ orders to federal tracking systems, such as the Federal

⁷⁵ Government Accountability Office. *Bid Protest Statistics for Fiscal Years 2009-2013 (GAO-14-276SP)*. January 2, 2014.

⁷⁶ See notes 10 and 11

⁷⁷ According to FAR 2.101, ““Task order” means an order for services placed against an established contract or with Government sources” and ““Delivery order” means an order for supplies placed against an established contract or with Government sources.”

⁷⁸ 41 U.S.C. § 253j(e) (1994).

⁷⁹ H.R. 1585 National Defense Authorization Act for FY 2008, Section 843(e) resulting in 41 U.S.C. § 253j(e) (2008)

⁸⁰ H.R. 1540 National Defense Authorization Act for FY 2012, Section 813(e) resulting in 41 U.S.C. § 253j(e) (2012)

Procurement Data System – Next Generation (FPDS-NG). However, the number is not insignificant.

The purpose of this legislation is to ensure that agencies maintain a level of fairness and thoroughness in awarding IDIQ orders over \$10M. However, this puts the agency under scrutiny from potential protests twice, once when awarding an IDIQ contract and another time when awarding a task order or delivery order against that contract. The unintended consequence is two opportunities to interrupt an agency's mission rather than just one. Furthermore, this legislation did not provide any additional criteria in assessing the merits of an IDIQ order protest.

3. Instituting Modest Filing Fee

In the 2014 Appropriations Act, Congress permitted GAO to charge a filing fee for protests.⁸¹ However, Congress limited this fee to sustaining the GAO's bid protest filing system. GAO has floated around a fee amount of \$240 which is clearly for administration and not deterrence.⁸² If this fee existed in FY2013, this fee would have offset \$582,960 (\$240 * 2,429 cases) in costs to the Government.

Affected Party – Industry

Industry will submit a protest whenever the benefits outweigh costs. Industry has indicated the following benefits to protest: gain relief, send message to agency even if they are not likely to win, obtain information for future bids, obtain competitive intelligence, hurt the winner by delaying award, retain revenue stream from a current contract if they are an incumbent that lost a re-compete, and demonstrate to corporate management that they are trying their best to win work.⁸³ On the cost side, protests erode good-will with Government officials and provoke retaliation from competitors. The increase in frivolous protests indicates benefits currently exceed costs to litigation. If the Government does not consider decreasing benefits or adding costs

⁸¹ H.R. 3547 Sec. 1501 Section 3555 of title 31, United States Code (c)(2)

⁸² Hornyak, Joseph. "Congress Authorizes GAO to Charge Bid Protest Filing Fees." Holland & Knight Government Contracts Blog. January 27, 2014

⁸³ Maser, Steven, Vladimir Subbotin, and Fred Thompson. "The GAO's Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" 2010, 6-7.

(monetary and/or non-monetary) to protest, frivolous protests will continue as a weapon in corporate warfare.

Affected Party – Agencies

In the post-FASA environment, federal agencies are equipped to prioritize streamlining initiatives over public trust.⁸⁴ Therefore business-oriented values such as: cost, schedule, and technical performance trump public trust values such as: equity, transparency, and oversight. In this context, the goal of federal agencies remains to minimize the number of protests filed and defeat existing protests as quickly as possible. Agencies work to stymie all protests, not just frivolous protests. It appears as though they are not given the regulatory tools or the incentive to discriminate between the two.

V. Description of Policy Proposal

Policy Solution

In general, the Government can reduce the number of protests and/or the disruption per protest in three ways: 1. Improve agency procurement processes; 2. Increase barriers to protest; and 3. Decrease incentives to protest. The recent efforts at the OMB and Congress seek to reduce protests by improving agency procurement processes. This entails targeting agency improprieties as the source of protests. In fact, Congress has even decreased barriers to protest such as expanding protest jurisdiction to IDIQ task orders exceeding \$10M. Targeting agency improprieties has its limitations because it can only reduce legitimate protests. The decrease in protest sustain rates over the past decade suggests an increase in frivolous protests. The Government needs to address these frivolous protests by either erecting barriers or decreasing incentives.

⁸⁴ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 81-89.

The undersigned proposes to remove an incentive to frivolously protest by eliminating the automatic stay on large contracts. In the post-award context, if an unsuccessful offeror files a protest within 10 days of contract award or 5 days after a de-briefing date, there is an automatic stay of performance on the contested contract. The head of an agency may override the automatic stay by justifying that performance of the contract is in the best interest of the Government or required under an urgent and compelling circumstance.⁸⁵ If there is no override, the automatic stay concludes if/when the GAO dismisses the protest. Under current law, a protest disrupts the agency by default unless the agency takes action. This proposal will allow an agency to decide whether the merits of a protest warrant an immediate disruption.

Since it is important to protect relief for small contracts, this proposal only removes the automatic stay for large contracts as defined by the Department of Defense's (DOD) acquisition plan criteria: \$10M for development (as defined by FAR 35.001) or \$50M for production or services.⁸⁶ The DOD has determined that acquisition plans are required on procurements large enough to warrant the attention of senior leadership. Therefore the acquisition plan criteria serve as a good dividing line between small and large contracts. The undersigned defines the criteria further by including contract options in the value of the procurement.

⁸⁵ 31 U.S.C. § 3553(d)(3) and 31 U.S.C. § 3553(d)(4)

⁸⁶ Defense Federal Acquisition Regulation Supplement (DFARS) Section 207.103

Policy Authorizing Tool

The policy authorizing tool will require a legislative change to CICA's automatic stay provision codified in 31 U.S.C. § 3553(d). The change highlighted in red below will limit the automatic stay to protests below \$10M for development or \$50M for production and services. The stay will become an agency prerogative for protests exceeding this threshold.

31 U.S.C. § 3553(d) with Proposed Change

(3)(A) If the Federal agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4) **and the procurement does not exceed \$10M for development or \$50M for production or services, inclusive of contract options. "Development," as used in this part, means the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new product or service (or of an improvement in an existing product or service) to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing; it excludes subcontracted technical effort that is for the sole purpose of developing an additional source for an existing product.—**

(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

- (C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—
- (i) upon a written finding that—
 - (I) performance of the contract is in the best interests of the United States; or
 - (II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and
 - (ii) after the Comptroller General is notified of that finding.

VI. Policy Analysis

Effectiveness

Agency Decision (Advantage)

This proposal removes the automatic stay for large contracts thereby allowing an agency to make the stay determination. The remaining CICA language allows an agency to decide whether to stay a contract based on whether “a protest is likely to be filed” and “the immediate performance of the contract is not in the best interest of the United States.”⁸⁷ In other words, an agency can voluntarily stay contract performance if it believes that a protest has legitimate grounds and is likely to be sustained. This proposal allows an agency to balance cost and schedule risk of proceeding against the merits of a protest rather than disrupt work by default.

Targets Frivolous Protests (Advantage)

This proposal targets frivolous protests only. Historically, the GAO dismisses two-thirds of the protests on its docket.⁸⁸ Among these dismissed protests, there are contractors who believe that their case has merit, and those that intend to impede competition only. By removing the automatic stay, there is no avenue to stop performance without merit. Legitimate protests will continue to disrupt performance when the agency chooses to voluntarily stay performance or the protest prevails. If an unsuccessful offeror disagrees with an agency’s choice to continue performance during a protest, it can protest to the COFC and seek a preliminary injunction. However, a preliminary injunction requires that an unsuccessful offeror demonstrate: likelihood of success, irreparable harm, a balance of hardships, or public interest.⁸⁹

⁸⁷ 31 U.S.C. § 3553(d)(2)

⁸⁸ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1237.

⁸⁹ *Ibid* 1239.

Frivolous protests include incumbent contractors who have lost and are seeking to stay a follow-on contract in order to force an agency to extend the legacy contract until protest resolution. Bloomberg conducted a study that shows the incumbent win-rate for procurements over \$100 million as:

	2012	2013
Defense	52%	65%
Civilian	56%	49%

90

Each incumbent loss is a potential protest. This policy will remove the incentive for incumbents to protest if their only goal is to stay the follow-on contract.

Loss of Legitimate Protests (Disadvantage)

This proposal may run the risk of discouraging legitimate protests. Agency personnel have always supported disincentives to frivolously protest. However, it is tricky to craft legislation that discourages frivolous protests without also discouraging legitimate protests. If legislation is too draconian, it may discourage participation in Government contracting altogether thereby decreasing competition.⁹¹

Schooner cites the False Claims Act as an example of a disincentive gone too far. Schooner believes that the False Claims Act drove contractors to “abandon... or settle claims rather than risk the audit, examination, and scrutiny associated with litigating those claims.” According to Schooner, the False Claims Act allows a simple dispute between the Government and contractor to expose the contractor to criminal charges from a misstatement, misrepresentation, etc... Although Schooner concedes that his assertion is largely anecdotal and

⁹⁰ Bloomberg Government. "2013 Annual Review of Government Contracting." *Government Executive*, June 19, 2014, 14.

⁹¹ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 67.

has “limited empirical evidence.”⁹² Gordon agrees that sanctions would limit competition and even adds that sanctions would require the GAO to add new layer of litigation to determine frivolity.⁹³

This proposal may very well discourage some legitimate protests. However this proposal is the removal of an incentive rather than the addition of a penalty and cannot be viewed as harsh as the False Claims Act. Furthermore, this proposal will not require a new layer of litigation because the contractor will determine whether to file based on the merits of a protest.

Efficiency

Covers a Small Portion of Actions, but a Large Portion of Dollars (Advantage)

This proposal removes automatic stays for large contracts defined as follows: \$10M for development or \$50M for production or services, inclusive of contract options. Since the Government uses a few large contracts to cover a substantial portion of work, this proposal will affect a small portion of procurement actions, but a large portion of procurement dollars.

⁹² Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 40-42.

⁹³ Gordon, Daniel. "Bid Protests: The Costs Are Real, But the Benefits Outweigh Them." *Public Contract Law Journal* 42, no. 3 (2013), 33.

In FY2013, the Top 100 Contractors (excluding FedEX) accounted for 4.6% of procurement actions and 55.6% of procurement dollars.

Procurement Actions versus Procurement Dollars (FY2013)		
Category	Number of Procurement Actions (%)	Procurement Dollars (%)
Top 100 Contractors (Excluding FedEX)	615,083 (4.6%)	\$254.7B (55.6%)
FedEX	6,870,949 (50.8%)	\$0.9B (0.2%)
Remaining Contractors	6,032,297 (44.6%)	\$202.1B (44.2%)
Total	13,518,329 (100%)	\$457.7B (100%)

⁹⁴

The closer you get to the top, the higher the concentration of procurement dollars. In the same year (FY2013), the Top 10 Contractors accounted for 1.0% of procurement actions and 28.7% of procurement dollars.

Procurement Actions versus Procurement Dollars (FY2013)		
Category	Number of Procurement Actions (%)	Procurement Dollars (%)
Top 10 Contractors	140,560 (1.0%)	\$131.3B (28.7%)
Remaining Contractors	13,377,769 (99%)	\$326.4 (71.3%)
Total	13,518,329 (100%)	\$457.7B (100%)

⁹⁴ Chart derived from "Federal Procurement Data System - Next Generation." Federal Procurement Report. Accessed October 27, 2014. Available: https://www.fpds.gov/fpdsng_cms/index.php/en/reports.html

Among the top 10 contractors and their top 10 contracts, all 100 contracts exceeded the \$50M threshold and are subject to this proposal.

Top 10 Contractors and the Range of their Top 10 Contracts (FY2013)	
Contractor	Dollar Range of Top 10 Contracts
Lockheed Martin Corporation	\$564.1M to \$3405.4M
The Boeing Company	\$296.0M to \$2042.0M
Raytheon Company	\$200.5M to \$315.6M
General Dynamics Corporation	\$162.1M to \$2375M
SAIC Inc.	\$62.3M to \$196.9M
Huntington Ingalls Industries, Inc.	\$102.8M to \$1413.2M
L3 Communications Holdings, Inc.	\$59.6M to \$95.1M
United Technologies, Inc.	\$133.9M to \$804.4M
BAE Systems, PLC	\$49.4M* to \$169.5M
Northrop Grumman Corporation	\$84M to \$617M

⁹⁵

*Including options, this contract is \$61M instead of \$49.4M.⁹⁶

⁹⁵ Ibid

⁹⁶ "BAE Systems Norfolk Wins \$49.4 Mln USS Porter Deal." *World Maritime News*, May 1, 2013.

Limited Savings Per Protest (Disadvantage)

Currently, a GAO protest will trigger an automatic stay until the resolution of the protest, which is up to 100 days. Even though the GAO can take longer than 100 days to resolve protests that “present novel or significant issues of interest to the procurement community,”⁹⁷ this almost never occurs. In a recent case, GAO denied an exception to the 100-day rule stating that doing so would “undermine the bright-line nature of our timeliness rules...” and the GAO’s priority is to resolve “protests expeditiously without unduly disrupting or delaying the procurement process.”⁹⁸ Therefore, the standard time for a protest resolution at the GAO is 100 days. Since this proposal only eliminates the automatic stay at the GAO, it will only save about 100 days of disruption per contested contract.

The savings are even further limited by the fact that the GAO can dismiss a protest if the protest “lacks “a detailed statement of the legal and factual grounds of protests” or which fails “to clearly state legally sufficient grounds of protest.””⁹⁹ ¹⁰⁰ If GAO increases the use of this authority and makes a determination in a timely fashion, then eliminating the automatic stay for large contracts yields trivial savings. However, there is no evidence that GAO has used this authority commonly which leads to the supposition that GAO hesitates to invoke this authority except in the most egregious cases.

⁹⁷ Kim, Eugene. "Late Is Late: The GAO Bid Protest Timeliness Rules, and How They Can Be a Model for Boards of Contract Appeals." *Army Law* 30 (2007), 30, 36.

⁹⁸ *Ibid* 37

⁹⁹ 4 C.F.R. § 21.5(f) (2007)

¹⁰⁰ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1268.

Standard Protest Timeline:



101

Equity

Preserves Meaningful Relief (Advantage)

In the Pre-CICA days, industry alleged that agencies would intentionally erode meaningful relief by commencing performance.¹⁰² In response, the current version of CICA protects relief by enacting an automatic stay on all contested procurements. CICA leaves room for the head of the procuring authority to override an automatic stay for “urgent and compelling circumstances” in “the best interest of the United States,”¹⁰³ but this override is rare. If the agency overrides an automatic stay and the GAO sustains the protest for work that has “substantially been completed,” the GAO will recommend that the agency reimburse “the protestor its legal fees as well as its bid and proposal costs.”¹⁰⁴

This proposal assumes that an automatic stay on large contracts is unnecessary because a legitimate protestor will eventually find meaningful relief through voluntary agency action or successful arbitration. Due to the size of the contract, meaningful relief cannot be eroded during the 100 day protest period. However, this is not true for small contracts. Therefore this proposal

¹⁰¹ "Timeline of a Bid Protest." US Government Accountability Office. Accessed October 30, 2014.

¹⁰² See note 37

¹⁰³ FAR Part 33.103 and 33.104 as well as 31 U.S.C. § 3553(c) and (d)

¹⁰⁴ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 11.

continues the automatic stay for small contracts to protect meaningful relief. In both large and small contracts, the GAO will retain the right to reward legal fees and bid and proposal costs in circumstances where work has “substantially been complete.”

Untested Dollar Thresholds (Disadvantage)

This proposal assumes that the thresholds of \$10M for development or \$50M for production and services is a good dividing line between small and large contracts. As previously stated, this proposal believes that meaningful relief can be preserved at any value exceeding these thresholds. In reality, these dollar thresholds are untested and based on the Department of Defense’s threshold for acquisition plans (i.e. requiring senior leadership review). This proposal assumed that the Department of Defense went through extensive deliberation to formulate these dollar thresholds. However, these cutoffs may prove to be arbitrary over time and the Government has to be willing to re-visit them.

Judicial Branch Remains Unaffected and Hostile towards Frivolity (Advantage)

This proposal will not change the litigation route through the judicial branch. The most recent significant change to the courts occurred in the Administrative Dispute Resolution Act (ADRA) of 1996 which contained a murky 2001 sunset of district court protest jurisdiction, but reaffirmed the COFC’s protest jurisdiction.¹⁰⁵ There is much debate over the existence of concurrent jurisdiction between district courts and the COFC and this proposal will not affect the controversy one way or another. Despite the controversy, the COFC, in the least, will remain a full litigation option for the unsuccessful offeror.

The judicial branch remains a hostile environment towards frivolous protests due to: 1. Fewer Incentives – An injunction is much more difficult than an automatic stay;¹⁰⁶ 2. Additional Disincentives – A court trial is costlier than GAO arbitration due to expanded discovery and de

¹⁰⁵ Peter Verchinski, *Are District Courts Still a Viable Forum for Bid Protests*. (working paper, The George Washington University School of Law, 2003), 393.

¹⁰⁶ See note 89

novo¹⁰⁷ and the COFC sanctions frivolity;¹⁰⁸ and 3. Deference to the GAO – Schooner states, “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.”¹⁰⁹ Another example of the courts’ deference to the GAO is in the Federal Court’s adoption of the CICA definition for “interested party.”¹¹⁰

Administrative Capacity

Reduction to Government Personnel (Advantage)

The reduction in frivolous protests will free up the GAO’s arbitration staff and the agency’s contracting staff to pursue more productive endeavors. The GAO’s freed resources will be due to fewer cases. The agency’s freed resources will be due to fewer personnel managing stopgap measures such as extending legacy contracts¹¹¹ or issuing bridge contracts (i.e. contracts that fill a gap in services), and fewer personnel defending protests.

VII. Political Analysis

Obama Administration

This proposal will be a complicated sale to the Obama administration. On March 4, 2009, shortly after taking office, Obama released a memorandum outlining his contracting objectives: 1. Reduce sole source and other limited-competition contracts; 2. Reduce Cost-Reimbursement and other high-risk contract types; 3. Increase the capacity and ability of the acquisition workforce; 4.

¹⁰⁷ See note 48

¹⁰⁸ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 68.

¹⁰⁹ Steven Schooner, *Watching the Sunset: Anticipating GAO’s Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*. (working paper no. 146, The George Washington University Law School, 2000), 6.

¹¹⁰ Frederick Claybrook, Jr. *Standing, Prejudice, and Prejudging in Bid Protest Cases*. (working paper., Crowell & Moring, LLP., 2004), 536.

¹¹¹ Robert Metzger, and Daniel Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*. (working paper., Georgetown University Law Center, 1977), 1237.

Curtail public-private competitions conducted under OMB Circular A-76.¹¹² This proposal can be viewed as antithetical to Obama's first objective. The administration may view this proposal as limiting competition by removing an incentive to participate in the competitive process.

However, in the same memorandum, Obama stated that his over-arching objective is for Government contracting to perform "efficiently and effectively" resulting in the "best value for the taxpayer."¹¹³ If achieving the "best value for the taxpayer" is the underlying goal, Obama's contracting objectives only address improvements to the Government-side of the acquisition process, namely selecting better contract types and improving the acquisition workforce. This proposal will broaden his strategy to include improvements to contractor practices, namely ensuring that contractors only submit protests that provide meaningful oversight to Government contracting.

Obama will need to get comfortable with the idea that the Government can target frivolous protests without discouraging legitimate protests. This could be difficult for an administration that appointed Dan Gordon as its initial OFPP administrator. As stated previously, Gordon believes that the disruption caused by protests is overstated and policies aimed at reducing protests (even frivolous protests) are not worth the risk of reduced oversight.

However, if Obama is looking for bipartisan legislation to build good-will with Republican leaders in Congress, efficient contracting is a good place to start. Obama can continue the bipartisan roadmap set forth by Clinton which resulted in legislation that significantly overhauled Government Contracting (e.g. FASA of 1994, Clinger-Cohen Act of 1996). FASA and progeny were championed by the NPR efforts of Vice-President Gore and OFPP

¹¹² Obama, Barack. "Memorandum for the Heads of Executive Departments and Agencies." Subject: Government Contracting. March 4, 2009. Accessed November 14, 2014. http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

¹¹³ Ibid 1

Administrator Kelman.¹¹⁴ This proposal will also require leadership from the White House and OFPP.

Legislation: Following the Bipartisan Footsteps of FASA

The opportunity for bipartisan legislation exists because the Clinton roadmap is incomplete. While FASA and progeny overhauled government contracting, FASA “left the essential architecture of the protest mechanism undisturbed.”¹¹⁵ The Section 800 committee, a committee chartered by Congress to promote efficient contracting,¹¹⁶ would eventually recommend reforms to the judicial and executive protest mechanisms. Under recommendations from the Section 800 committee, Congress consolidated the courts under ADRA of 1996 and eliminated the Executive Branch’s GSBCA forum.¹¹⁷ The only forum that did not see substantial changes was the GAO forum.

In fact, the GAO forum remains largely unchanged from CICA’s original passage in 1984. An outdated CICA is not only problematic for the GAO forum itself, but also the courts, which often use CICA standards for judgment (e.g. CICA’s “interested parties” definition.)¹¹⁸ It does not make sense that the Government would implement new procurement rules under FASA without revisiting the arbitration of these rules under CICA.

In addition, the Section 800 committee recommended sanctions to frivolous protests. These sanctions were introduced in the failed Federal Acquisition Improvement Act of 1995.¹¹⁹ Despite the bill’s failure, Senator John Glenn did not want sanctions to be forgotten and noted for

¹¹⁴ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 8.

¹¹⁵ See note 62 and William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 464.

¹¹⁶ Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

¹¹⁷ Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*. (working paper., The George Washington University School of Law, 1998), 170-171.

¹¹⁸ Frederick Claybrook, Jr. *Standing, Prejudice, and Prejudging in Bid Protest Cases*. (working paper., Crowell & Moring, LLP., 2004), 537. See Federal Circuit Court Decision in *American Federation of Government Employees v. United States*

¹¹⁹ See note 63

the record that sanctions “tackle the controversial, highly charged issue of reform of the protest system by attempting to streamline it and reduce the number of protests filed.”¹²⁰

This proposal will both update the GAO forum and target frivolous protests, without the use of sanctions. Instead, this proposal will remove an incentive to protest (i.e. the automatic stay). As stipulated by the COFC’s process for sanctions (Rule 11), a sanction requires time for due process to “avoid punishing a company for filing a good-faith but unmeritorious protest.”¹²¹ The GAO 100 day rule does not have time for due process. Therefore, removing an incentive is the most expeditious stick available.

This proposal will follow its bipartisan predecessors by avoiding the third rail topic of “what” gets contracted and instead focuses on “how” to improve the contracting process. Historically, the latter is more palatable. The difference can be demonstrated by comparing George W. Bush’s OMB Circular A-76 revisions and Clinton’s FASA. The OMB Circular A-76 revisions expanded public-private competitions that determined “what” work should be contracted. Under the A-76 revisions, civil servants and contractors competed against each other for half of the 850,000 positions identified by the FAIR Act as “non-inherently Governmental.”¹²² Needless to say, this was a politically charged issue. Upon taking office, Obama repudiated these public-private competitions.¹²³ On the other hand, FASA focused on “how” to improve the contracting process and experienced bipartisan support from President Clinton and the Republican Congress. This proposal is firmly in the category of “how” to improve the contracting process and should see support from both President Obama and his Republican Congress.

¹²⁰ 141 CONG. REC. S5, 147 (daily ed. Apr. 4, 1995)

¹²¹ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 68.

¹²² See note 19

¹²³ See note 111

Affected Party – Industry

Among industry, large businesses will likely adapt to this proposal without objection. Large businesses dominate the market and consequently take turns as both the victim and perpetrator of baseless litigation. The market is becoming even more concentrated as large businesses increase their share of the market while consolidating into a smaller pool of companies. In a 2014 article, the Washington Post purported that within defense contracting, “by 2000, the top 10 companies controlled 60 percent of the market... Of the top 100 companies in 1991, only 19 still exist today.”¹²⁴ While a business strategy has always included impeding “the ability of rival offerors to do business with the government,”¹²⁵ removing a tool of impedance will be a neutral change within this exclusive club.

Small businesses will view this proposal as another barrier to wresting contracts away from large businesses. With a murky district court jurisdiction (i.e. ADRA’s ambiguous sunset) and the elimination of the GSBCA, avenues for low-cost litigation are limited for small businesses.¹²⁶ The GAO is one of few remaining “independent forum(s)... without the expense and formalities of judicial review.”¹²⁷ As such, the GAO should not entertain any real barriers to protest legitimately. Small businesses often feel that sanctions serve as a barrier to all protests.¹²⁸ A way to ameliorate the objections of small businesses will be to convince them that this proposal is not a sanction, but the removal of an incentive to frivolously protest. Also, this proposal only removes the automatic stay on contracts large enough where meaningful relief will not be

¹²⁴ Censer, Marjorie. "Defense Companies Brace for a Different Kind of Consolidation This Time around (Posted 2014-01-13 00:58:51)." *The Washington Post*, January 13, 2014. Accessed November 21, 2014. http://www.washingtonpost.com/business/capitalbusiness/defense-companies-brace-for-a-different-kind-of-consolidation-this-time-around/2014/01/10/a38e5152-5dec-11e3-bc56-c6ca94801fac_story.html.

¹²⁵ William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*. (working paper., George Mason University School of Law, 1996), 489.

¹²⁶ Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*. (working paper., The George Washington University School of Law, 1998), 176

¹²⁷ McAvoy, Roger. "Bid Protest - Balancing Public and Private Interests." *The Air Force Law Review* 34 (1991), 228.

¹²⁸ Jonathan Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*. (working paper., The George Washington University School of Law, 1998), 176.

compromised. However, this explanation may not be sufficient to allay the concern of critics who claim that the GAO forum must uphold the “statutory award criteria that were implemented to ensure that all competitors can compete equally.”¹²⁹

Affected Party – Agencies

Agencies will accept this proposal because it discourages frivolous protests without requiring action on the agencies’ part. Agencies maintain a defensive posture towards protests, but are reticent when it comes to official action. Kelman describes the agency sentiment towards protests as “external monitoring by private attorneys general”¹³⁰ which are time-consuming and expensive, expose agencies to huge vendor lawyer bills, compromise civil servant’s careers, cause public servants to fear deposition by high-priced lawyers, render agencies excessively risk-averse, and decrease goodwill and partnership.¹³¹

When defending against protests, agencies typically employ a passive strategy. Agencies do not exchange volleys with a vendor in overt conflict. It can be surmised that agencies avoid official action to avoid the corresponding scrutiny. A study conducted by Benishek and Sheinmen confirmed that agencies would rather “insulate their procurement decisions from outside reviews than avoid protests.” The former being a more passive strategy. Even when a protest occurs, agencies prefer not to directly attack the bidder. For example, an agency will often allow an automatic stay to run the entire 100 day course even though case law has shown that an agency can override an automatic stay with relative impunity.¹³² “However agencies are also reluctant to

¹²⁹ Ibid 176

¹³⁰ Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*. (working paper no. 022, The George Washington University Law School, 2001), 45.

¹³¹ See note 5

¹³² Cho, Young. "Judicial Review of "The Best Interest of the United States" Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?" *Public Contract Law Journal* 34, no. 2 (2005), 348. *Topgallant Group, Inc. v. United States (1988)* – This court decision made challenging an agency override of the automatic stay virtually “untouchable” or at least a significant undertaking for the contractor.

end protests by rewarding protesters with direct contract awards. This provides a disincentive to protesters seeking an easy contract through litigation.”¹³³

This proposal fits into the agency strategy of combating protests while avoiding litigious scrutiny. Since this proposal uses CICA to drive the reduction in protests, agencies will now experience the benefits of fewer protests without exposing their civil servants to the risks that come with decision-making.

VIII. Recommendation

The undersigned recommends amending CICA’s automatic stay provision codified in 31 U.S.C. § 3553(d) to remove the automatic stay for large contracts (i.e. exceeding \$10M for development or \$50M for production and services). This proposal is one step towards efficiency while preserving meaningful oversight. The removal of the automatic stay on large contracts removes the incentive to protest without merit. The protection of the automatic stay for small contracts prevents an agency from eroding meaningful relief by commencing performance.

The GAO forum is supposed to be efficient and the COFC is supposed to provide the full judicial experience. This proposal returns some efficiency to the GAO forum. The GAO process should not encumber governance without good reason. There is no good reason to automatically halt performance on every GAO protest.

This proposal shifts some responsibility back to the contractor in determining whether to proceed with a protest based on its merits. Although this proposal has limited savings and the dollar thresholds may need adjustment, it is the first serious step in restructuring the GAO forum. CICA formalized the GAO forum in 1984 and since that time, procurement law has undergone significant changes, the largest being FASA in 1994. The need to update the GAO forum is overdue. If President Obama is looking for bipartisan legislation, he can continue the legacy of FASA through a corresponding update to CICA.

¹³³ Paul Benishek, and Benjamin Sheinman, *Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests*. (working paper., Naval Postgraduate School, 2009), 27.

IX. Curriculum Vitae

Bruce Tsai

Education

June 2011 – December 2014

Johns Hopkins University

Master of Arts in Public Management

August 2001 – April 2005

Georgia Institute of Technology

Bachelor of Science in Management

Experience

August 2006 – Present

NASA Goddard Space Flight Center

Contracting Officer

April 2010 – November 2010

NASA Headquarters (Detailee)

Procurement Analyst

August 2005 – August 2006

NASA Langley Research Center

Contract Specialist

Federal Acquisition Certification (FAC-C) Level III Certified