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Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments

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SUMMARY

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Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments

In FY2017, the federal government obligated approximately $500 billion to procure goods and services. Federal procurement statutes and regulations—notably the Competition in Contracting Act of 1984 (CICA) and the Federal Acquisition Regulation (FAR), the government-wide regulation that generally applies to acquisitions by executive branch agencies—establish largely uniform policies and procedures for how federal executive agencies acquire goods and services. The purpose of these standards is to guide the acquisition system "to deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives," such as the promotion of competition. In an effort to advance the transparency, fairness, and integrity of the procurement system, federal law provides mechanisms for contractors to "protest" (i.e., object to) contract awards and solicitations for failing to comply with federal law.

Generally, a bid protest is a written objection to the conduct of a government agency in acquiring supplies and services for its direct use or benefit. Among other things, the challenged conduct can include violations of law or regulation in the way in which an agency solicits offers for a contract, cancels such a solicitation, awards a contract, or cancels a contract.

Congress authorizes bid protests in three separate forums: (1) the procuring agency, (2) the Government Accountability Office (GAO), or (3) the U.S. Court of Federal Claims (COFC). The three forums share some common features. For example, they each utilize the same definition of "interested party" to govern who may file a valid protest. However, the applicable legal procedures and available remedies vary considerably under each forum. Parties generally consider these distinctions when choosing the forum or forums in which to file a protest. These distinctions arguably seek to further Congress's desire to maintain balance between an efficient and timely, yet fair and transparent, procurement system.

Generally, protests before the procuring agency and GAO tend to be resolved faster and less expensively than challenges before the COFC because they are subject to specific resolution timetables and less formal procedures. Additionally, parties that file a protest with either the procuring agency or GAO generally gain the benefit of an "automatic stay" that bars an agency from awarding or implementing a contract while a protest is pending. In contrast, while filing a protest with the COFC is frequently more time-consuming and expensive and does not trigger an automatic stay, protests before the COFC have the potential to result in legally binding and conclusive judicial decisions and orders. Procuring agency decisions and GAO bid protest recommendations, on the other hand, are not legally binding. Furthermore, interested parties that disagree with GAO or procuring agency decisions generally can still bring claims before the COFC, whereas the reverse route is generally not permitted.

Another important distinction among the forums is that the scope of discovery is potentially broader in a protest before the COFC because the court generally reviews the entire administrative record of a procurement. In contrast, neither GAO nor the procuring agency hearing a bid protest typically compels a procuring agency to produce documents, and GAO typically reviews only those documents that are relevant to the particular protest. Furthermore, while GAO and the procuring agency are limited to a finite list of statutorily authorized remedies, the COFC may "award any relief that the court considers proper" with the exception of certain monetary relief.

Some in Congress have expressed a need for procurement reform, generally, and bid protest procedural reform, specifically. In recent years, Congress has passed several provisions intended to address concerns with the bid protest process, such as Section 822 of the FY2019 John S. McCain National Defense Authorization Act (NDAA), which largely have been focused on increasing Congress's understanding of how legislative amendments to bid protest procedures could enhance the efficiency of the procurement process, discourage unwarranted protests, and generally improve procurement outcomes for the federal government.

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Introduction

In FY2017, the federal government obligated approximately $500 billion to procure goods and services.[1] Federal procurement statutes and regulations—notably the Competition in Contracting Act of 1984 (CICA)[2] and the Federal Acquisition Regulation (FAR),[3] the government-wide regulation that generally applies to acquisitions by executive branch agencies—establish largely uniform policies and procedures for how federal executive agencies acquire goods and services. The purpose of these standards is to guide the acquisition system "to deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives,"[4] such as the promotion of competition.[5] In an effort to advance the transparency, fairness, and integrity of the procurement system, federal law provides mechanisms for contractors to "protest" (i.e., object to) contract awards and solicitations for failing to comply with federal law.[6] However, empowering contractors to protest procurement decisions has the potential to delay agency acquisitions of goods and services.[7] In recent years, Congress has paid increasing attention to achieving and maintaining the appropriate balance between these competing interests, particularly regarding defense acquisition.[8] For example, the FY2017 National Defense Authorization Act (NDAA) required the Department of Defense (DOD) to contract for a comprehensive study on the impact of bid protests on acquisitions, which was released in December 2017.[9]

Congress authorizes bid protests in three separate forums: (1) the procuring agency, (2) the Government Accountability Office (GAO), or (3) the U.S. Court of Federal Claims (COFC).[10] This report briefly analyzes the varying legal procedures applicable to bid protests under each forum, which may be relevant to Congress as it assesses potential reforms to the bid protest process. First, the report provides an overview of bid protests generally and the legal procedures applicable to bid protests made in each forum. Next, the report analyzes the legal distinctions among these forums. Finally, the report discusses recent legislative developments affecting bid protest procedures and potential considerations for Congress.

Background

Generally, a bid protest is a written objection to the conduct of a government agency in acquiring supplies and services for its direct use or benefit.[11] Among other things, this conduct can include

[1] CRS search of Fed. Procurement Data Sys., https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited Nov. 20, 2018).

[2] CICA was originally enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2701-2753, 98 Stat. 494, 1175-1203 (1984) (codified as amended in scattered sections throughout the U.S.C.; *see, in particular,* 10 U.S.C. § 2304 and 41 U.S.C. § 3301).

[3] 48 C.F.R. §§ 1.000-9905.506-63 (2017).

[4] 48 C.F.R. § 1.102 (2017).

[5] *See, e.g.,* 10 U.S.C. § 2304.

[6] 28 U.S.C. § 1491(b) (COFC); 31 U.S.C. §§ 3551-57 (GAO); 48 C.F.R. §§ 33.102-03 (2017) (contracting agency).

[7] *See, e.g.,* discussion of the automatic stay, *infra* "Analysis of the Legal Distinctions Among the Forums" section.

[8] *See infra* "Considerations for Congress and Recent Legislation" section.

[9] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885, 130 Stat. 2000, 2319 (2016).

[10] 41 U.S.C. § 1303; 10 U.S.C. §§ 2301-39; 51 U.S.C. § 20113 (procuring agency); 31 U.S.C. §§ 3551-57 (GAO); 28 U.S.C. § 1491(b) (COFC).

[11] *See, e.g.,* 31 U.S.C. § 3551(1)(A)-(E).

violations of law or regulation in the way in which an agency solicits offers for a contract, cancels such a solicitation, awards a contract, or cancels a contract.[12]

As previously mentioned, bid protests can be filed with the procuring agency, GAO, or the COFC.[13] The three forums share some common features. For example, they each utilize the same definition of "interested party" to govern who may file a valid protest.[14] However, as discussed in more detail below, the applicable legal procedures and available remedies vary considerably under each forum.[15] Parties generally consider these distinctions when choosing the forum or forums in which to file a protest, and as a result, often begin a protest in one of the nonjudicial forums.[16] In addition, contractors may request, and for certain procurements procuring agencies must provide, pre-award and post-award "debriefings" through which the contractor may acquire certain information about how the agency decided to make an award or to eliminate the contractor from competition for a contract prior to the award decision.[17] Debriefings can help inform an interested party's decision on whether to initiate a protest and through which forum or forums to raise claims.[18]

Although there are scant reliable data on the number of protests filed with procuring agencies, public data demonstrate that substantially more protests are filed with GAO on average each year than with the COFC.[19] Parties that disagree with the outcome of a bid protest before a procuring agency or GAO often can still bring claims before the COFC, but the reverse route (filing a protest with a procuring agency or GAO after an adverse COFC decision) is generally not permitted.[20] For example, GAO generally dismisses protests that are currently pending before or have been previously resolved by the COFC.[21]

Protests Before the Procuring Agency

Provisions of the FAR, which were implemented pursuant to a 1995 Executive Order[22] and several broad procurement-related statutory authorities,[23] require executive branch procuring agencies to "provide for inexpensive, informal, procedurally simple, and expeditious resolution of

[12] *Id*.

[13] 41 U.S.C. § 1303; 10 U.S.C. §§ 2301-39; 51 U.S.C. § 20113 (procuring agency); 31 U.S.C. §§ 3551-57 (GAO); 28 U.S.C. § 1491(b) (COFC).

[14] 31 U.S.C. § 3551(2) (GAO); 48 C.F.R. § 33.103(d)(4) (2017) (procuring agency); Bilfinger Berger AG Sede Secondaria Italiana v. United States, 97 Fed. Cl. 96, 134 (Fed. Cl. 2010) (COFC).

[15] *See infra* "Analysis of the Legal Distinctions Among the Forums" section.

[16] Dave Nadler, *Top Ten Things Every Government Contractor Should Know About Bid Protests*, ACC (Nov. 7, 2013), http://www.acc.com/legalresources/publications/topten/ttegcskabp.cfm.

[17] 48 C.F.R. § 15.505 (2017) (pre-award); *Id*. § 15.506 (2017) (post-award).

[18] *Id*. *See also* Office of Fed. Procurement Policy, Memorandum on "Myth-busting 3" Further Improving Industry Communication with Effective Debriefings, at 2 (Jan. 5, 2017) ("Debriefings afford offerors on a competitive solicitation an explanation of the evaluation process, an assessment of their proposal in relation to the evaluation criteria, a general understanding of the basis of the award decision, and the rationale for exclusion from the competition."); Daniel Chudd & James Tucker, *Debriefings (Post-Award Protest Primer #2)*, GOV'T CONTRACTS INSIGHTS (July 6, 2017), http://govcon.mofo.com/protests-litigation/post-award-protest-primer-part-2/.

[19] Mark V. Arena, ET AL, ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS, RAND CORP., fig. 4.1 (GAO) and fig. 5.2 (COFC), Dec. 21, 2017, https://www.rand.org/pubs/research_reports/RR2356.html.

[20] Nadler, *supra* note 16.

[21] 4 C.F.R. § 21.11 (2017).

[22] Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (Oct. 25, 1995).

[23] *See, e.g.*, 41 U.S.C. § 1303; 10 U.S.C. §§ 2301-39; 51 U.S.C. § 20113.

protests."[24] There are no comprehensive publicly available data on protests before procuring agencies;[25] agency protest decisions are not published;[26] and the relevant FAR provisions, which stress speed and simplicity, provide limited guidance for how agencies are expected to implement these "informal" protest procedures.[27] Given the dearth of publicly available data, it is difficult to draw firm conclusions regarding the consistencies and differences of procuring agency protest processes across the government.[28]

The relevant FAR provisions provide some standard procedures applicable to agencies hearing a bid protest.[29] For example, only an "interested party" may file a valid protest with a procuring agency.[30] The term "interested party" is defined 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 award the contract."[31] Interested parties that file a protest with a procuring agency generally do not have a legal right to compel discovery from the procuring agency, although agencies could voluntarily share certain information.[32] In addition, agencies are expected to resolve a protest within 35 days of its receipt.[33]

When a procuring agency receives a protest from an interested party, the agency must halt (i.e., "stay") the award or implementation of the relevant contract until the protest is resolved, unless the agency concludes that there are "urgent and compelling reasons" or where moving forward with the contract is "in the best interest of the Government."[34] The purpose of this "automatic stay" is to ensure that agencies have sufficient opportunity to remedy legal violations before the contract moves forward.[35]

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[24] 48 C.F.R. § 33.103(c) (2017).

[25] *See generally* Arena, *supra* note 19 ("The data from each of the protest venues—GAO and COFC—were generally more comprehensive. We also requested data on agency-level protests, but none of the services tracked these protests centrally.").

[26] James Tucker, *A Road Less Traveled: Agency-Level Protests*, GOV'T CONTRACT INSIGHTS (Sept. 26, 2016), http://govcon.mofo.com/protests-litigation/agency-level-protests/.

[27] 48 C.F.R. § 33.103 (2017).

[28] *See generally* Tucker, *supra* note 26 ("Because agencies do not publish their own protest decisions, it is difficult to say what the majority approach is. At the end of the day, questions of 'jurisdiction' are largely academic if an agency agrees with the protester on the merits, given the agency's discretion *sua sponte* to correct perceived procurement errors. If an agency does not want to act on a protest, however, it can dismiss the protest outright—with the same result as if it had denied the protest on the merits.").

[29] 48 C.F.R. §§ 33.102-03 (2017).

[30] *Id*. § 33.103(d)(4) (2017) ("Interested parties may request an independent review of their protest at a level above the contracting officer.")

[31] *Id*. § 33.101 (2017). *See also* 31 U.S.C. § 3551(2). A citizen who is merely concerned about government spending generally cannot qualify as an "interested party" because she lacks a "direct economic interest" in a procurement decision.

[32] 48 C.F.R. § 33.103(g) ("To the extent permitted by law and regulation, the parties *may* exchange relevant information.) (emphasis added). *See also* Office of Fed. Procurement Policy, Memorandum on "Myth-busting 3" Further Improving Industry Communication with Effective Debriefings, at 6 (Jan. 5, 2017); Nadler, *supra* note 16.

[33] 48 C.F.R. § 33.103(g).

[34] *Id*. § 33.103(f).

[35] *See generally* H.R. REP. NO. 98-1157, at 24 (1984) (report that accompanied the bill that would become CICA) (stating: "[A] cardinal failing of this bid protest process [is that] GAO has no power to stop a contract award or contract performance while a protest is pending. As a result, agencies usually proceed with their contracts, knowing that they will preclude any possibility of relief simply by delaying the bid protest process.").

Procuring agencies are expected to provide parties a "well-reasoned" explanation of the agency's protest decision.[36] Procuring agencies may provide the same relief that GAO is authorized by law to recommend,[37] which, as discussed below,[38] includes canceling or reissuing a contract or solicitation.[39] The primary recourse for parties that are unsatisfied with how the procuring agency resolved the protest generally is to file a protest with either GAO or the COFC.[40]

Under certain limited circumstances, protests also can be filed with specialized agencies.[41] For example, small business size certification determinations can be protested with the Small Business Administration.[42]

Protests Before GAO

GAO has been a forum for resolving protests for nearly a century and is the only agency with the authority to hear protests from across the federal government.[43] Federal law, primarily through CICA, authorizes "interested parties" to file a protest with GAO regarding a federal agency's procurement contract solicitation or award.[44] More specifically, federal law provides that these parties can argue that a federal agency violated a statute or regulation in the way in which the agency defined who may be eligible for a contract in the solicitation, canceled a contract solicitation, or determined who is awarded a contract.[45]

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[36] 48 C.F.R. § 33.103(h) (2017).

[37] 48 C.F.R. § 33.102(b) (2017).

[38] *See infra* notes 65-67 and surrounding text.

[39] *See* 31 U.S.C. § 3554(b).

[40] *Id.* § 33.102(e) ("An interested party wishing to protest is encouraged to seek resolution within the agency before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations." (citations omitted)). Some agencies may allow parties to request review of a protest by a higher ranking official within the agency. *See* Tucker, *supra* note 26. Generally, an interested party who files a protest with the procuring agency has ten days after an adverse decision to file a protest with GAO. 48 C.F.R. §§ 21.2(a)(2), 3; *see, e.g.*, RTI Technologies, LLC, B-401075, 2009 WL 1033792 (Comp. Gen. Apr. 15, 2009) ("[A] debriefing, required or not, does not toll the requirement that a protest be filed within 10 days of adverse action on an agency-level protest. Because [the challenging party] did not learn any more information at the debriefing, given that the basis on which it has challenged the agency's action is essentially the same as that in its agency-level protest, its protest to our Office is untimely filed under our Bid Protest Regulations.).

[41] 48 C.F.R. § 33.102(a) (2017) ("*See* [*Id.* §] 19.302 for protests of small business status, [*Id.* §] 19.305 for protests of disadvantaged business status, [*Id.* §] 19.306 for protests of HUBZone small business status, [*Id.* §] 19.307 for protests of service-disabled veteran-owned small business status, and [*Id.* §] 19.308 for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.").

[42] *See generally* SIZE, PROTESTS, SIZE DETERMINATIONS APPEALS, SMALL BUS. ADMIN., https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/size-protests-size-determinations-appeals (last visited Nov. 20, 2018).

[43] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE, 10th ed., at 4 (2018) (hereinafter *GAO Bid Protest Guide*).

[44] 31 U.S.C. § 3551(2).

[45] *Id.* § 3551(1) (defining the term "protest" to mean "a written objection by an interested party to any of the following: (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services. (B) The cancellation of such a solicitation or other request. (C) An award or proposed award of such a contract. (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. (E) Conversion of a function that is being performed by Federal employees to private sector performance.").

The term "interested party" has the same meaning for the purposes of a GAO bid protest as it does for a protest before the procuring agency, i.e., the contractor must be "an actual or prospective bidder" with "a direct economic interest" in the challenged procurement action.[46] Thus, contractors who simply desire to bid for a contract can qualify as an "interested party" when they challenge a pre-award solicitation.[47] However, GAO often will limit post-award protests to parties that both bid on the contract and were next in line to win the contract, unless the challenging party raises a claim that, if ultimately successful, would allow it to jump ahead of multiple parties.[48] Additionally, potential subcontractors generally do not qualify as interested parties because they are not "actual or prospective bidder[s] or offeror[s]."[49]

Federal law generally requires protests before GAO to be "inexpensive and expeditious"[50] and establishes time limits for filings by the parties and for rulings by GAO that are shorter than those that are applicable to a typical judicial process, but longer than those applicable to protests before a procuring agency.[51] GAO protests normally must be filed within 10 days of the time in which the violation "is known or should have been known."[52] Absent extenuating circumstances, GAO dismisses untimely protests.[53] GAO also must inform the relevant agency of a protest within one day of the protest being filed.[54] This notice typically triggers a 30-day window for the procuring agency to respond,[55] unless GAO provides an extension.[56] The procuring agency generally must provide GAO and the protestor all documents "relevant" to the protest for GAO's consideration.[57] GAO generally has 100 days from the day on which the protest was originally filed to issue a recommendation in a matter, although GAO may also consider protests pursuant to an "express" proceeding for cases that GAO determines may be feasibly resolved within 65 days.[58]

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[46] *Id*. § 3551(2) (defining the term "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 award the contract."). *See also* 48 C.F.R. § 33.101 (2017).

[47] *GAO Bid Protest Guide*, *supra* note 43, at 6.

[48] *Id*. *See also* Pan Am World Servs., Inc.; Base Maintenance Support Group; Holmes & Narver Servs., Inc., B-231840, B-231840.3, B-231840.2, 1988 WL 228112, at 4 (Comp. Gen. Nov 7, 1988).

[49] Homeport Assocs.- Request for Reconsideration, B-237600, 1989 WL 241491 (Comp. Gen. Dec. 19, 1989). Similarly, a regular citizen who is merely concerned about government spending would not qualify as an "interested party."

[50] 31 U.S.C. § 3554(a)(1).

[51] *Compare id*. § 3553 *with* FED. CL. R. App'x C and 48 C.F.R. §33.103 (2017).

[52] 4 C.F.R. § 21.2(a)(2) (2017). As of May 18, 2018, all GAO bid protests must be filed electronically through GAO's Electronic Protest Docketing System. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 83 Fed. Reg. 13,817, 13, 823 (Apr. 2, 2018) (to be codified at 4 C.F.R. pt. 20).

[53] 4 C.F.R. § 21.2(b) (2017).

[54] *Id*. § 21.3(a).

[55] *Id*. § 21.3(c).

[56] *Id*. § 21.3(f).

[57] *Id*. § 21.3(d) ("The report shall include the contracting officer's statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency's possession."). *See also* 4 C.F.R. § 21.3 (2017) and *GAO Bid Protest Guide*, *supra* note 43, at 19-21.

[58] 31 U.S.C. § 3554(a)(1). GAO must inform Congress of any instances in which GAO fails to resolve a protest within

Upon receiving notice from GAO, the procuring agency typically must implement an automatic stay, thus halting the award or performance of a contract until GAO issues a recommendation on the protest.[59] By statute, the procuring agency generally may only lift, or "override," the automatic stay prior to GAO's recommendation for a limited number of reasons, such as if "performance of the contract is in the best interests of the United States" or there are "urgent and compelling circumstances which significantly affect interests of the United States [that] will not permit waiting for the decision of [GAO]."[60] Agencies that override an automatic stay must justify the decision in writing and provide notice to GAO.[61] GAO does not have legal authority to reverse an automatic stay override or to review the decision.[62] However, the COFC, upon a motion from an interested party, can review an agency's decision to override the stay.[63] The COFC may reverse the agency's decision to override the stay through the issuance of a temporary restraining order or preliminary injunction that requires an agency to halt performance of the contract.[64]

After considering the legal basis for the protest, GAO may issue a decision either denying the protest and recommending that the agency move forward with the award or performance of the contract, or sustaining the protest and recommending further action by the procuring agency.[65] In the latter scenario, GAO may recommend that agencies reissue a solicitation, rebid a contract,

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the 100-day window. *Id*. at § 3554(e)(2). On its own volition or at the request of an interested party, GAO may also consider protests pursuant to an "express" proceeding for cases that GAO determines may be feasibly resolved within 65 days. *Id*. § 3554(a)(2); 4 C.F.R. § 21.10 (2017).

[59] 31 U.S.C. § 3553(c)-(d).

[60] *Id*.

[61] *Id*. §§ 3553(c)(2), (d)(2).

[62] *GAO Bid Protest Guide*, *supra* note 43, at 14 ("GAO does not review agency decisions in this regard. GAO will not consider a protest challenging an agency's decision that the stay does not apply to the protest, or a decision to override a stay."). If GAO were statutorily authorized to impose a legally binding stay on an executive agency, the statute would likely raise constitutional concerns. *See, e.g.*, Lear Siegler, Energy Products Div. v. Lehman, 842 F.2d 1102, 1111 (9th Cir. 1988) ("Were the Comptroller General thus able to stay a procurement contract indefinitely, a serious issue of his control over procurement would be raised. But the statute addresses this problem by granting the procuring agency the power to override the stay by issuing a written finding that 'urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the decision of the Comptroller General.' [31 U.S.C.] § 3553(c)(2). This provision lodges ultimate authority over the timing of the contracts with the executive branch and obviates the problem of an indefinite stay. Because the stay provisions do not vest the Comptroller General with ultimate control over the executive and other persons outside the legislative branch, they are not unconstitutional under [INS v. Chadha, 462 U.S. 919 (1983)] and [Bowsher v. Synar, 478 U.S. 714 (1986)]." (*rev'd on other grounds*, Lear Siegler, Energy Products Div. v. Lehman, 893 F.2d 205 (1989)).

[63] Superior Helicopter LLC v. United States, 78 Fed. Cl. 181, 186-87 (Fed. Cl. 2007). *See generally* Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides Are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 A.F. L. Rev. 91, 92 (2006) ("As a result, a protester (frequently the incumbent) often turns to the only avenue of relief available and files suit in federal court alleging a violation of CICA.").

[64] *Superior Helicopter*, 78 Fed. Cl. at 186-87 ("This court has subject-matter jurisdiction under 28 U.S.C. § 1491(b)(1) to review the Forest Service's override of the automatic stay. . . . Judicial review in this override case is governed by a provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. . . . The court's review under the APA is limited to an evaluation of whether the agency's 'decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . If a protestor succeeds in making these showings, the court 'may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.' 28 U.S.C. § 1491(b)(2).). *See infra* notes 77-79 and the surrounding text for a more detailed discussion of the COFC's APA review of final agency actions and notes 83-87 and the surrounding text for a more detailed discussion of preliminary injunctions and temporary restraining orders.

[65] 31 U.S.C. § 3554(b).

cancel a contract, or take certain other steps outlined in Section 3554(b) of Title 31.[66] If GAO concludes that an agency failed to comply with a procurement law or regulation, GAO may recommend that the agency pay the challenging party's attorneys' fees and certain other costs associated with filing the protest.[67]

Although GAO recommendations are explicitly established by statute as non-legally binding on the procuring agency,[68] GAO must "promptly" inform Congress of any instance in which a federal agency does not comply with a GAO bid protest recommendation.[69] GAO must further advise Congress whether it believes the noncompliance warrants a congressional investigation or some other legislative response "in order to correct an inequity or to preserve the integrity of the procurement process."[70] In practice, executive agencies almost always implement GAO recommendations, and the COFC, while not bound by GAO interpretations of law, "gives due weight and deference to GAO recommendations" when assessing challenges from parties unhappy with the outcome of a GAO bid protest.[71]

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[66] *Id*. The provision states in relevant part:

> If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—
>
> (A) refrain from exercising any of its options under the contract;
>
> (B) recompete the contract immediately;
>
> (C) cancel the solicitation issued pursuant to the public-private competition conducted under Office of Management and Budget Circular A–76 or any successor circular;
>
> (D) issue a new solicitation;
>
> (E) terminate the contract;
>
> (F) award a contract consistent with the requirements of such statute and regulation;
>
> (G) implement any combination of recommendations under clauses (A), (B), (C), (D), (E), and (F); or
>
> (H) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

Id. § 3554(b)(1).

[67] *Id*. § 3554(c).

[68] *Id.* § 3554(e)(1). GAO bid protest recommendations are explicitly established by statute as nonbinding on the procuring agency. *Id*. A statute that authorized GAO, a legislative branch entity, to issue legally binding decisions as to an executive agency would likely raise constitutional concerns. *See, e.g.,* Ameron, Inc. v. United States, 809 F.2d 979, 995-98 (3rd Cir. 1986). ("'[T]he executive is free to ignore the Comptroller General's recommendation on the merits of the protest. CICA therefore does not authorize the Comptroller General to execute the procurement laws. . . . Rather than concentrating power in the legislative branch, CICA diffuses and divides power, giving final control over procurement decisions to the executive but permitting meaningful oversight by an agent of Congress. Like other political mechanisms built on the basis of the doctrine of separation of powers, CICA encourages the branches to work together without enabling either branch to bind or compel the other. That is the way a government of divided and separated powers is supposed to work."). *See also* Bowsher v. Synar, 478 U.S. 714, 715 (1986) ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.") and Lear Siegler, Energy Products Div. v. Lehman, 842 F.2d 1102, 1111 (9th Cir. 1988).

[69] 31 U.S.C. § 3554(e)(1).

[70] *Id.*

[71] CMS Contract Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1385 (Fed. Cir. 2014) ("An agency's decision to disregard a GAO recommendation is exceedingly rare. The Court of Federal Claims has explained that it 'give[s] due weight and deference' to GAO recommendations 'given the GAO's long experience and special expertise in such bid protest matters.'") (*quoting* Baird Corp. v. United States, 1 Cl. Ct. 662, 668 (1983)). It should be noted that

Protests Before the COFC

The COFC is the only judicial forum authorized by Congress to hear bid protests.[72] Parties to protests filed with the COFC must comply with the court's rules of practice (Rules of the Court of Federal Claims (RCFC)), which are modeled after the Federal Rules of Civil Procedure.[73] Additionally, the challenging party must demonstrate that it qualifies as an "interested party."[74] The COFC and its appellate court, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), have interpreted the term "interested party" consistent with the CICA definition of the term discussed above.[75]

The COFC reviews final agency procurement actions[76] in accordance with the Administrative Procedure Act (APA)[77] and will only set aside an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[78] The COFC generally requires the procuring agency to provide the full administrative record associated with the protested procurement, including all of the agency's correspondence with the protestor and the contractor that won the procurement contract as well as internal evaluations of contract offers.[79] The COFC "may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."[80] COFC-issued remedies are legally binding and may be enforced through contempt of court, among other legal powers.[81]

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deference to GAO recommendations is not without limits. *See, e.g.*, Geo-Seis Helicopters, Inc. v. United States, 77 Fed. Cl. 633, 646 (2007) ("Although GAO decisions support the government's position as to the *nunc pro tunc* effect of *post-hoc* amendments, those GAO precedents reflect 'one of those Comptroller-General-created rules that is not reflected in the FAR'. . . . In short, the court will apply the FAR as written, not as the government and Presidential [sic] urge that it should have been written.) (citations omitted)).

[72] Advanced Sys. Tech., Inc. v. Barrito, 2005 U.S. Dist. LEXIS 39703, *14 (D.D.C. 2005) ("[T]he federal court decisions that have addressed the very question presented here [] have uniformly concluded that the [Administrative Dispute Resolution Act] ADRA's sunset provision precludes district court jurisdiction over contract procurement disputes arising after January 1, 2001.").

[73] FED. CL. R., App'x C.

[74] *Bilfinger Berger*, 97 Fed. Cl. at 133-34.

[75] *Id*. at 134 ("The [Federal Circuit] has construed the term 'interested party' as synonymous with the term 'interested party' defined in the Competition in Contracting Act of 1984 ('CICA').") (*citing* Am. Fed. of Gov't Emps., AFL-CIO, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).

[76] 28 U.S.C. § 1491(b)(1); Sys. Application & Techs. v. United States, 691 F.3d 1374, 1384 (Fed. Cir. 2012).

[77] 28 U.S.C. § 1491(b)(4). The APA is codified at 5 U.S.C. §§ 500-808; the APA provisions particularly relevant to COFC review of final agency actions are codified at 5 U.S.C. §§ 704, 706.

[78] *Bilfinger Berger AG*, 97 Fed. Cl. at 132. *See also* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001) ("Under the APA standards that are applied . . . , a bid award may be set aside if either: (1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure.").

[79] FED. CL. R. App'x C, 8.

[80] 28 U.S.C. § 1491(b)(2).

[81] *Id*. § 2521(b)(3) ("The United States Court of Federal Claims shall have power to punish by fine or imprisonment . . . disobedience or resistance to its lawful writ, process, order, rule, decree, or command."). *See also* Pyramid Real Estate Servs., LLC v. United States, 95 Fed Cl. 613, 617 (Fed. Cl. 2010) ("Several sources of authority enable the court to impose sanctions or remedies on a party who does not comply with its orders. The three sources of authority relevant in the context of a breach of a protective order are RCFC 16(f), which governs the breach of pretrial orders, 28 U.S.C. § 2521(b)(3) (2006), which grants the court power to hold parties in civil contempt, and the court's inherent authority to sanction a party or attorney who willfully disobeys its orders. *See generally* Pac. Gas & Elec. v. United States (PG&E II), 82 Fed. Cl. 474 (2008).")

Parties may file bid protest lawsuits with the COFC before or after filing protests with the procuring agency or GAO.[82] In contrast to the processes applicable to the two nonjudicial forums, parties that initiate a bid protest through the COFC do not gain the benefit of an automatic stay.[83] Instead, parties may request that the procuring agency voluntarily impose a stay, or they may petition the court to issue a preliminary injunction or temporary restraining order.[84] These "extraordinary remed[ies]"[85] generally enjoin or restrain a party from taking certain actions, and, thus, can provide similar protections as an automatic stay. Nevertheless, the COFC will only issue these remedies "in extremely limited circumstances"[86] where a petitioner is able to meet exacting standards, including demonstrating that the petitioner will likely suffer irreparable harm in the absence of such relief and succeed on the merits of its claims.[87]

Subsequent to a 2007 opinion of the Federal Circuit Court of Appeals, the COFC generally reviews protests based on solicitations in the same time frame as that applicable to GAO.[88] However, in contrast to the 10-day filing deadlines applicable to GAO post-award protests discussed above, post-award protests at the COFC generally are not subject to specific initial filing deadlines other than potentially the general six-year statute of limitations applicable to claims against the federal government.[89] In practice, however, procurement decisions typically are

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[82] Nadler, *supra* note 16; Arena, *supra* note 19.

[83] Adam K. Lasky, *Choosing the Best Forum for Filing Your Bid Protest – GAO vs. Court of Federal Claims*, THE PROCUREMENT PLAYBOOK (Feb. 2, 2017), https://www.procurementplaybook.com/2017/02/choosing-the-best-forum-for-filing-your-bid-protest-gao-vs-court-of-federal-claims/.

[84] *Id*.

[85] Mansanto Co. v. Geerston Seed Farms, 561 U.S. 139, 142 (2010) ("[A]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.") (citation omitted).

[86] Banknote Corp. of Am., Inc. v. United States, 56 Fed. Cl. 377, 380 (2003).

[87] United States Ass'n of Imps. of Textiles & Apparel, 413 F.3d 1344, 1346 (Fed. Cir. 2005) ("Four factors are weighed in considering a motion for a preliminary injunction: (1) immediate and irreparable injury to the movant; (2) the movant's likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all the parties."); Cont'l Servs. Grp., Inc. v. United States, 130 Fed. Cl. 798, 800 (Fed. Cl. 2017) ("On a motion for temporary injunctive relief, the court must weigh four factors: (1) immediate and irreparable injury to the movant; (2) the movant's likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all the parties." (internal quotations omitted)).

[88] Blue & Gold, Fleet, L.P. v. United States, 492 F.3d 1308, 1313-15 (2007) ("We also hold that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.

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"We find further support, first, in the GAO's adoption of a similar rule in its bid protest regulations. Specifically, 4 C.F.R. § 21.2(a)(1) requires that '[p]rotests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.'

"We note that several decisions of the Court of Federal Claims have recognized the utility of the GAO timeliness regulation and concluded that where there is a 'deficiency or problem in a solicitation . . . the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise the objection in a timely fashion.'" (internal citations omitted)).

[89] 28 U.S.C. § 2501. *Compare* L-3 Commc'ns Integrated Sys., L.P. v. United States, 79 Fed. Cl. 453, 455 (Fed. Cl. 2007) ("This matter comes before the Court on Defendant's and Intervenor's motions to dismiss this action as untimely under the applicable six-year statute of limitations, 28 U.S.C. § 2501, on the ground that the challenged award was made in 1999, more than six years before L-3 filed suit. Because this protest is challenging Druyun's alleged improper manipulation of the evaluation and selection process to favor Lockheed Martin in the C-5 AMP procurement, Plaintiff could not have known of Druyun's alleged illegal conduct until this conduct was revealed in the IG [Inspector General] Report in February of 2006. As such, L-3's cause of action accrued at that time, and this action is timely.") *with* CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559, 569 (Fed. Cl. 2004) ("Jurisdiction of Counts I and II is based on 28

made well before the end of this six-year period, and the COFC can bar claims on equitable grounds (e.g., laches, equitable estoppel)[90] when, for instance, a "protester's delay in filing was unreasonable and prejudicial to the agency or other parties."[91] COFC bid protest opinions also do not have to be issued within a specific time frame like those before the procuring agency and GAO.[92] Consequently, the COFC often takes longer to issue a ruling on the merits of a protest than the procuring agency and GAO.[93] COFC rulings, like TROs and similar remedies discussed above, are legally enforceable,[94] and they may be appealed to the Federal Circuit.[95]

Analysis of the Legal Distinctions Among the Forums

As the foregoing indicates, although the three bid protest forums share some common features, the legal processes applicable to and remedies available under the forums vary considerably. These distinctions arguably seek to further Congress's desire to maintain balance between an efficient and timely, yet fair and transparent, procurement system. Congress may consider the unique aspects of each forum and how each contributes to that balance when evaluating potential reforms to the bid protest process.

Generally, protests before the procuring agency and GAO tend to be resolved faster and less expensively than challenges before the COFC because they are subject to specific resolution timetables and less formal procedures.[96] Additionally, parties that file a protest with either the procuring agency or GAO generally gain the benefit of an automatic stay that bars an agency from awarding or implementing a contract while a protest is pending.[97] In contrast, while filing a protest with the COFC is frequently more time-consuming and expensive and does not trigger an

U.S.C. § 1491(b), which does not limit the time in which a bid protest action may be brought. Had Congress wanted to set a statute of limitations on bid protest actions, it would have done so. Because Congress did not so limit the jurisdiction of this Court to hear such actions, we would be reluctant to invoke laches except under extraordinary circumstances that are not present in this case."). *See also* David T. Ralston and Frank S. Murray, Jr., Government Contracts: COFC Bid Protests, THOMSON REUTERS PRACTICAL LAW 3 (2016), https://www.foley.com/files/Publication/b01ceb8b-0d66-4b8a-aac2-8e1d34bfa793/Presentation/PublicationAttachment/93e66c2e-7d3f-43c3-b2ee-93f03fbe151b/COFC%20Bid%20Protests%20-%203%20March%202017.pdf. ("The general six-year statute of limitations applicable to most COFC actions presumably applies (28 U.S.C. § 2501), but in practice is not relevant because the procurement activity being protested almost always will have long since moved on.").

[90] "Laches" is defined as "the equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." BLACK'S LAW DICTIONARY (10th ed. 2014). "Equitable estoppel" is defined as "A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Id*. *See, e.g.*, Wit Assocs., Inc. v. United States, 62 Fed. Cl. 657, 662 n. 5 (2004) ("[I]n some cases, serious delay in raising a claim may impact the equities in determining whether an injunction should issue or lead to the imposition of laches.").

[91] Ralston and Murray, *supra* note 89, at 3.

[92] Nadler, *supra* note 16.

[93] *Id*.

[94] *See supra* note 81.

[95] 28 U.S.C. § 1295(a)(3).

[96] Nadler, *supra* note 16.

[97] 48 C.F.R. § 33.103(f) (2017) (contracting agency); 31 U.S.C. § 3553(c) (GAO).

automatic stay,[98] protests before the COFC have the potential to result in legally binding and conclusive judicial decisions and orders.[99] Procuring agency decisions and GAO bid protest recommendations, on the other hand, are not legally binding.[100] Furthermore, interested parties that disagree with GAO or procuring agency decisions generally can still bring claims before the COFC, whereas the reverse route is generally not permitted.[101]

Another important distinction among the forums is that the scope of discovery is potentially broader in a protest before the COFC because the court generally reviews the entire administrative record of a procurement.[102] In contrast, procuring agencies generally are not compelled to produce documents,[103] and GAO typically reviews only those documents that are relevant to the particular protest.[104] Furthermore, while GAO and the procuring agency are limited to a finite list of statutorily authorized remedies, the COFC may "award any relief that the court considers proper" with the exception of certain monetary relief.[105]

Considerations for Congress and Recent Legislation

Congress likely intended to further a number of objectives by statutorily authorizing contractors to challenge federal procurement solicitations and awards through the bid protest process described above.[106] Allowing protests can help ensure that procuring agencies comply with federal law and, consequently, advance congressional prerogatives.[107] The bid protest system also can help promote fairness and transparency in the procurement process, which arguably encourages participation and increases competition for federal procurement awards.[108] This, in turn, has the potential to improve the quality and reduce the costs of goods and services purchased by the government.[109] Similarly, the absence of a protest system might undermine public confidence that contract award decisions are based on merit and in compliance with the law, which could discourage participation by qualified and reputable parties and result in wasteful government spending.[110]

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[98] Nadler, *supra* note 16.

[99] *See supra* notes 80-87 and surrounding text.

[100] *Compare supra* note 81 and surrounding text *with* 31 U.S.C. § 3554(e) (GAO) and 48 C.F.R. § 33.103(f) (2017) (procuring agency). In practice, procuring agencies usually comply with, and the COFC gives certain deference to, GAO recommendations. *See supra* note 71.

[101] Nadler, *supra* note 16. *See also* 4 C.F.R. § 21.11(b) (2017); 48 C.F.R. § 33.102(e) (2017).

[102] FED. CL. R. App'x C, 8.

[103] 48 C.F.R. § 33.103(g) (2017).

[104] 4 C.F.R. § 21.3(d) (2017). *See also* Lasky, *supra* note 83.

[105] *Compare* 31 U.S.C. § 3554(b)(1)(A)-(H) and 48 C.F.R. § 33.102(b) (2017) *with* 28 U.S.C. § 1491(b)(2) (The COFC "may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs."). *See also* Ralston and Murray *supra* note 89 at 6.

[106] GAO Bid Protest Guide, *supra* note 43, at 1. *See also* Ameron, Inc. v. United States, 809 F.2d 979, 984 (3rd Cir. 1986) ("Finally, the bid protest resolution process created by CICA is also intended to inform Congress of the operation of existing procurement laws, and to use the pressure of publicity to enforce compliance with those laws.").

[107] *Id*.

[108] *GAO Bid Protest Guide*, *supra* note 43, at 1.

[109] Arena, *supra* note 19.

[110] *Id*.

Although few are likely to argue with these general benefits, protests arguably may impede the timely acquisition of goods and services, at least in certain circumstances.[111] In particular, some commentators have expressed concern that contractors are filing protests that are highly unlikely to be successful, if not entirely baseless, as a way to harm competitors or extend the performance of existing contracts.[112] Even if these protests ultimately prove to be unsuccessful, they often force procuring agencies to expend time and money defending their actions and can hold up the agency's ability to acquire goods and services needed to implement their congressionally mandated operations.[113] Furthermore, the expectation of protests might drive up the administrative costs of soliciting and awarding contracts as agencies defensively go beyond their legal requirements to ensure that their procurement decisions are sufficiently documented and justified.[114]

According to a congressionally mandated report, some stakeholders believe that, while the potential for a bid protest generally does not have a significant effect on an agency's overall operations, it could cause an agency to fail to meet programmatic deadlines, which might lead to a loss of appropriations.[115] Some have also noted that the fear of a potential protest can impact an agency's procurement contract decision making by, for instance, causing acquisition personnel to prioritize price over quality.[116]

In light of the competing interests discussed above, some in Congress have expressed a need for procurement reform, generally, and bid protest procedural reform, specifically.[117] In recent years, Congress has passed several provisions intended to address concerns with the bid protest process, which largely have been focused on increasing Congress's understanding of how legislative amendments to bid protest procedures could enhance the efficiency of the procurement process, discourage unwarranted protests, and generally improve procurement outcomes for the federal government.[118]

Most of these recently enacted procurement protest reform provisions have been related specifically to defense acquisition enacted through annual NDAAs.[119] For example, Section 822

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[111] *See, e.g.,* discussion of the automatic stay in *supra* "Protests Before the Procuring Agency" and "Protests Before GAO" sections.

[112] *See, e.g.,* Bruce Tsai, *Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision*, 13 J. OF CONTRACT MANAGEMENT 125, 130 (Fall 2015).

[113] *Id*. at 132.

[114] *Id*. at 134; Arena *supra* note 19, at 17 (DOD personnel noted "that possible bid protests also affect the scrutiny that source-selection documentation receives from legal counsel, as well as the amount of time required to award the contract.")

[115] Arena *supra* note 19, at 17 (DOD personnel "stated that the potential for a bid protest did not affect their ability to meet operational and warfighting requirements. . . . However, some contracting officers indicated that they were concerned that a bid protest would delay their ability to meet program contracting milestones and risk program funding reductions if they could not meet obligation and expenditure benchmarks.").

[116] *Id*. ("[DOD] contracting officers also noted that the possibility of a bid protest did affect the type of contract or contract vehicle they selected—usually prompting them to favor a price-related choice or existing task/delivery order–type contract if appropriate.").

[117] *See, e.g.,* Stuart W. Turner, ET AL., *House and Senate Propose Alternative Visions Of Bid Protest Reform*, ARNOLD & PORTER ADVISORY (May 26, 2016), https://www.apks.com/en/perspectives/publications/2016/05/house-senate-propose-alternative-visions-bid.

[118] *See infra* notes 119-125.

[119] The late, former Senate Armed Services Committee Chairman McCain, for example, has explained:

> Acquisition reform is one of the most important—and frustrating—topics this Committee addresses. For years, we have been warned that America is losing its technological advantage. . .

of the FY2019 NDAA requires DOD to study and report on (1) the establishment of "an expedited bid protest process" for defense procurement contracts valued under $100,000; and (2) "the frequency and effects of bid protests involving the same contract award or proposed award that have been filed at both [GAO and COFC]."[120] The FY2018 NDAA established a three-year pilot program, to begin in December 2019, to assess and issue a report on "the effectiveness of requiring [certain] contractors to reimburse the Department of Defense for costs incurred in processing covered protests" that are denied by GAO.[121] Additionally, Section 818 of FY2018 NDAA enhanced debriefing rights for prospective DOD contractors by allowing them to submit debriefing questions and receive written responses to those questions from the procuring agency.[122] Section 818 also authorizes prospective DOD contractors to file bid protests with GAO up to five days after they receive DOD's written responses to submitted debriefing questions.[123]

Of relevance to the procurement system, generally, a provision of the FY2013 NDAA requires GAO to include in its annual report to Congress a summary of the most common grounds for sustaining protests during the year.[124] GAO has included this information in each annual report it has submitted to Congress beginning in FY2013.[125]

Congress might utilize the information gained from these studies, reports, and pilot programs to inform its consideration of substantive legislative reforms to the bid protest system. For instance, reforms could include implementation of certain recommendations in the RAND report or making permanent, expanding, or eliminating the pilot program that requires certain contractors to reimburse the government for the costs associated with adjudicating unsuccessful protests.

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> This is why [DOD] needs acquisition reform—not just for efficiency or to save money. Simply put, we will not be able to address the threats facing this nation with the system of organized irresponsibility that the defense acquisition enterprise has become.

Opening Statement by SASC Chairman John McCain at Hearing on DOD Acquisition Reform, Sen. John McCain, Press Release, Dec. 7, 2017, https://www.mccain.senate.gov/public/index.cfm/2017/12/opening-statement-by-sasc-chairman-john-mccain-at-hearing-on-dod-acquisition-reform.

[120] John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 § 822 (2018).

[121] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 827, 131 Stat. 1283 (2017).

[122] 10 U.S.C. § 2305(b)(5)(B)(vii) as amended by the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 818(b), 131 Stat. 1463 (2018), *See also* OFF. OF THE UNDERSEC'Y OF DEF., GUIDANCE ON CLASS DEVIATION—ENHANCED POSTAWARD DEBRIEFING RIGHTS 1-2 (2018).

[123] 31 U.S.C. § 3553(d)(4)(B) as amended by the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 § 818(c), 131 Stat. 1464 (2018), *See also* OFF. OF THE UNDERSEC'Y OF DEF., GUIDANCE ON CLASS DEVIATION—ENHANCED POSTAWARD DEBRIEFING RIGHTS 1-2 (2018).

[124] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112–239, § 867, 126 Stat. 1632, 1862 (2013).

[125] *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFF., GAO 18-237SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2017 (2017).

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