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# HOFSTRA LAW REVIEW

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## THE PRIVATE ATTORNEY GENERAL MEETS PUBLIC CONTRACT LAW: PROCUREMENT OVERSIGHT BY PROTEST

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INTRODUCTION

In this Article, protests are analyzed, from both an economic and legal perspective, as a decentralized mechanism for oversight of the competitive procurement process. Attention focuses on the protest process at the General Services Administration Board of Contract Appeals (hereinafter “the Board” or “GSBCA”). It is argued that protests are an effective means of deterring and correcting agency problems among procurement personnel and, consequently, accomplishing the procurement objectives of the government. Drawbacks of the protest process are identified, explanations are offered for the existence of these negative side effects, and solutions are proposed. In addition, protests are compared to centralized oversight methods, i.e.,

audits. Furthermore, we assess the trade-offs between granting greater decision-making discretion to procurement personnel and controlling agency problems.

### I. DECENTRALIZED PROCUREMENT OVERSIGHT

Despite the enormous significance of government procurement of goods and services in the American economy,<sup>1</sup> public contract law has received relatively little attention from law and economics scholars.<sup>2</sup> We take a small step toward filling this gap by offering an analysis of public contract awards and decentralized oversight. We argue that a primary purpose of oversight is to control the discretion of government officials who make contract awards, since their incentives are often poorly aligned with the interests of taxpayers.<sup>3</sup> Oversight induces procurement officials (hereinafter "POs") with distorted incentives to make purchase decisions that are more consistent with the objectives of the government.

The term "decentralized" is used to connote a regulatory scheme that relies on private enforcement. In contrast, "centralized" regulatory activity relies on government officials. Our attention in this Article is divided between the general question of the efficacy of decentralized oversight of public contract awards and the particular question of the efficacy of the General Services Administration Board of Contract Appeals bid protest process, as applied to federal computer and telecommunications procurements.<sup>4</sup> The GSBICA bid protest process represents a major innovation in procurement oversight. Prospective or actual bidders with a direct economic interest in a contract award are permitted to challenge the actions of a procurement official before a quasi-judicial body with substantial powers to remedy violations of procurement statutes and regulations.<sup>5</sup>

Economic analysis of decentralized procurement oversight is

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1. All levels of government procurement account for about 10% of the GNP or approximately \$450 billion per year. STEVEN KELMAN, *PROCUREMENT AND PUBLIC MANAGEMENT* (1990).

2. For example, law and economics textbooks that devote at least one chapter to private contract law are entirely silent on the subject of public contract law. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1986); WERNER ZUI HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* (1988); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1989).

3. *See infra* Section I.B. and accompanying notes (discussing barriers to the implementation of efficient procurement).

4. *See* 40 U.S.C. § 759(f) (1991).

5. *See infra* Section II.C. and accompanying notes (discussing the protest process).

facilitated by the recognition that it is an example of enforcement by a private attorney general. The notion that private parties should be encouraged to litigate to advance public goals that coincide with their private interests has long been recognized in areas such as antitrust, securities law and derivative actions.<sup>6</sup> The courts have affirmed the utility of private attorneys general in the procurement context<sup>7</sup> and Congress consciously chose to bolster computer procurement oversight by creating a forum for private attorneys general at the GSBICA.<sup>8</sup> Legal scholars, while recognizing the deterrent and corrective value of private enforcement, have been critical of its use for several reasons.<sup>9</sup> They have complained of the tendency for excessive litigation,<sup>10</sup> nuisance suits<sup>11</sup> and strategic misuse of the courts.<sup>12</sup> Similar problems afflict the protest process, but we argue that these negative side effects can be minimized through appropriate intervention.

Critics of decentralized oversight must defend the alternatives of no regulation or centralized regulation. The absence of oversight of the contract award process seems unpalatable because of the tendency of procurement officials to respond to inappropriate incentives and to make inefficient awards.<sup>13</sup> Traditional centralized oversight relies on

6. See John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

7. See, e.g., *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The *Scanwell* court believed that agencies had to be responsible for their actions when awarding contracts. "The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'" *Id.* at 864.

8. See *Julie Research Lab., Inc.*, GSBICA No. 8070-P-R, 86-2 B.C.A., (CCH) ¶ 18,881 (1986) (stating that "the legislative history of Section 2713 of the CICA [Competition in Contracting Act] makes it very clear that the intent of Congress in this provision was to encourage private enforcement of the laws and regulations mandating the acquisition of general purpose automatic data processing equipment and services through full and open competition . . .").

9. See Coffee, *supra* note 6, at 670 (noting that criticism of private enforcement has increased over the last decade).

10. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982); Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 (1986).

11. See D. Rosenberg & S. Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985); Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988).

12. William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

13. See *infra* Section I.B. and accompanying notes (discussing barriers to the implemen-

an auditor who is "distant" from the regulated activity. This "distance" has two implications. First, the auditor is poorly informed. Second, the auditor lacks the keen motivation of profits, which drives the behavior of the protester.

One key problem with the current protest process at the GSBICA is the fact that unsupervised settlements are possible. Certainly, settlements that involve socially beneficial revisions of a bid solicitation do not need to be monitored, but cash payments by a procuring agency or named awardee to a protesting firm are problematic. Since taxpayers are not represented at the settlement negotiation, many flawed procurements are currently left unaltered when a cash settlement occurs. Outside of circumventing the private attorney general role of the protester, the possibility of unregulated cash settlements greatly enhances the organization and maintenance of collusive agreements and bidder conspiracies.

This Article is organized in three parts. The first part presents a theoretical analysis of private attorneys general as overseers of the procurement process. We identify factors that create a need for oversight, describe the costs and benefits of oversight by protests and compare it to the alternative of audits. In the second part, we explore the implementation of the decentralized oversight in the federal computer market. The issues addressed in this section include settlements, bidder collusion, the role of intervenors and standing. In addition, we assess the trade-offs between granting greater decision-making discretion to procurement personnel and controlling agency problems. In the third part, we examine specific policy issues, including proposals recently put forward by the Office of Federal Procurement Policy and the Department of the Treasury for revision of the protest process, and offer recommendations for intervention.

#### A. *What is a Good Procurement?*

The history of federal procurement law demonstrates a concern for three policy goals, namely: equity (in the sense of fair access of bidders to the procurement); integrity (i.e., no corruption); and efficiency (meaning the selection of a vendor who offers the greatest difference between gross value and cost).<sup>14</sup> In response to the corruption and favoritism marking negotiated contracts early in the 19th

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tation of efficient procurement).

14. See KELMAN, *supra* note 1, at 11.

century, Congress, in 1845, required the use of sealed bidding.<sup>15</sup> In the 1940s, a court commenting on procurement law noted that “the purpose of these statutes . . . is to give all persons equal right to compete for Government Contracts; to prevent unjust favoritism, or collusion or fraud [in awarding government contracts]; and thus to secure for the Government the benefits which arise from competition.”<sup>16</sup>

Our concern in this Article is primarily with the efficiency goal.<sup>17</sup> The issues of integrity and equity are discussed only to the extent that they overlap with efficiency concerns. We suspect that careful analysis would show that in the case of government procurement there is little tension between the three goals. To help the reader better understand the economics of procurement, the rest of this section is devoted to a procurement catechism. To be concrete, we will illustrate this discussion with the case of a federal computer procurement, which will be analyzed in detail in Part II.

What is the government’s efficiency goal? When a federal agency solicits bids for a new computer system, a number of vendors will typically submit bids that provide a description of their products, the cost to the government and other important information (e.g., warranties and delivery dates). With all but the simplest of procurements the government is not concerned solely with cost. The reason is that each of the different products is differentially suited to accomplish the computational tasks of the procuring agency. Some products may be fast. Others may be slower but more reliable. Based upon the demand for computational services of the procuring agency, a monetary “value” can be placed on each bundle of products offered by each firm. Clearly, the government does not necessarily want the procuring agency to select the firm offering the highest value, since this firm’s bid might come with an extremely high price.

What criterion does the government want a federal agency to use in selecting an awardee? The simplest possible criterion that captures

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15. See FRANK M. ALSTON ET AL., *CONTRACTING WITH THE FEDERAL GOVERNMENT* 59 (2d ed. 1988).

16. *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

17. The primacy of maximizing value of a procurement for the government is reflected by the following comment by the Board. “[T]he purpose of the protest process is to assure that in federal agency procurements, not only are vendors treated fairly, but also—of greater importance in crafting relief—that the agency ultimately makes an award against the bid or proposal that is most advantageous to the United States.” *SMS Data Prods. Group, Inc. GSBGA No. 10864-P, 91-1 B.C.A., (CCH) ¶ 23,464*, at 117,718 (1990).

many of the most important issues associated with any procurement is to select the firm offering the highest "surplus." The surplus to the government in a particular firm's bid is the difference between the value of the products offered by that firm and the cost to the government for the firm to provide those products. The complicated part of evaluating the surplus offered by a given firm in its bid is the determination of the value of the products that the firm will provide if it is selected as the awardee. Compared to value, cost is trivial to ascertain.

Are factors other than surplus relevant in designing an optimal procurement process? Yes, the government must also consider the more pedestrian issues of the administrative cost of the award process and the cost of oversight.

How should the government design the award process? In most cases, competitive sealed bidding<sup>18</sup> is the preferred method<sup>19</sup> of government procurement.<sup>20</sup> Ideally, bids should be evaluated by a method of scoring the various attributes of the proposed computer system and weighing the technical merit of a proposal against its cost. The firm achieving the highest score should be awarded the contract.

Should federal procurement practices diverge from private sector practices? Critics of government procurement by competitive bidding argue that such practices are much less common in the private sector and, therefore, government reliance on competitive procurements is suspect.<sup>21</sup> There are two factors that account for our advocacy of competitive procurements. First, compared to their private sector counterparts, government buyers are often not well informed about the product that they are buying. This is because government personnel

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18. See R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LITERATURE 699 (surveying the economic literature on auctions).

19. There are situations in which sole source procurements are unavoidable, such as when purchasing from a monopoly or when purchasing under extreme urgency, as in war time.

20. In the economics literature, there has been extensive discussion of what type of auction (oral or sealed bid, ascending or descending, etc.) is optimal in various circumstances. See, e.g., Paul R. Milgrom & Robert J. Weber, *A Theory of Auctions and Competitive Bidding*, 50 ECONOMETRICA 1089, 1122 (1982) (discussing auction design with affiliated bidder valuations and bidder risk aversion); Daniel A. Graham & Robert C. Marshall, *Collusive Bidder Behavior at Single-Object Second-Price and English Auctions*, 95 J. POL. ECON. 1217, 1239 (1987) (discussing auction design with colluding bidders). We gloss over this difficult issue here because, whatever its resolution, the following analysis will almost certainly not be significantly affected.

21. See, e.g., KELMAN, *supra* note 1, at 62.



are less experienced and because many government purchases involve idiosyncratic goods that are infrequently purchased. Competitive procurements help overcome the relative ignorance of buyers since informed sellers must compete against one another. Second, the formality of a competitive procurement is helpful in limiting the use of relatively uninformed discretion by government officials. In the public sector, the lack of profit incentives and various institutional constraints limit the power of incentive contracts to align the interests of a procurement official closely with those of the government. In such an environment, a competitive procurement is an appropriate device for alleviating the problem of abuse of discretion.

How can the government best exploit its monopsony power? Since the government is often the only or the largest buyer in a particular market, it has a greater ability to bargain for a high surplus procurement than do smaller buyers. One way to utilize that power in sealed bidding is to post a reserve or, in other words, credibly threaten not to purchase from any vendor.<sup>22</sup> A reserve policy establishes a minimum level of surplus or score that the best proposal must offer in order to receive an award. Simply put, beating the reserve is a necessary condition for winning an award. The effect of the reserve is to force vendors to bid more aggressively to ensure that they exceed the reserve.<sup>23</sup> When a reserve has been optimally set, the potential *ex post* inefficiency from making no award is more than offset, in an expected sense, by the higher surplus generated from more aggressive bidding. The intuition in support of a reserve policy is encapsulated in the following bromide: If you've never walked away from a deal that could have been made, you're not bargaining hard enough.

Should the government restrict competition when it is trying to buy a product? Normally, the answer is no. As the number of bidders rises, competition increases and the purchase price falls. Nevertheless, there are often products in the relevant market that poorly match the preferences of a procuring agency. It is a waste of resources for ill-

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22. The government may cancel when no bidder has offered a reasonable price. 48 C.F.R. § 15.608(b)(1) (1990). One way to accomplish this is through the use of a reserve price as discussed in the auction/procurement theory literature. See Milgrom & Weber, *supra* note 20. However, it has been demonstrated that in certain environments the use of a reserve can be counterproductive. See, e.g., R. Preston McAfee & John McMillan, *Auctions with Entry*, 23 *ECON. LETTERS* 343, 347 (1987).

23. A reserve is particularly effective when there are a small number of bidders. This is typically the case in computer procurement. In the nine cases studied by Kelman there were 38 bidders or an average of 4.2 bidders per procurement. See KELMAN, *supra* note 1, at 109-83.

matched firms to prepare bids<sup>24</sup> and for procurement personnel to spend time evaluating these bids.<sup>25</sup> For example, if a federal agency wants a local area network of PCs for word processing, it does not make much sense to invite or allow bids from a vendor offering electric typewriters.<sup>26</sup>

What criterion should the government want to use in restricting participation in a procurement? Theoretically, the government should consider all possible permutations of bidders to exclude and then only include the set of bidders that maximizes expected surplus. Roughly speaking, if the expected surplus that a firm could offer the government is insufficient to cover the costs of preparing and evaluating the bid, then it should be excluded.<sup>27</sup>

How should the bidders be compensated?<sup>28</sup> An optimal sealed bid mechanism would compensate all bidders for their bid preparation costs,<sup>29</sup> compensate the winner for production costs, and provide the winner with a profit related to its advantage over its next best rival. The profit earned by the winner should depend on the gap between its bid and the second best bid because that would provide an incen-

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24. The preparation of a bid proposal may cost a vendor more than one million dollars. See KELMAN, *supra* note 1, at 22. Benchmark tests are expensive for bidders. The Navy has experimented with reimbursing vendors for benchmark testing expenses. See Jerome S. Gabig & Richard C. Bean, *A Primer on Federal Information Systems Acquisitions: Part Two of a Two-Part Article*, 17 PUB. CONT. L.J. 553, 580 (1987).

25. In an Army procurement for an item costing \$11,000, the agency spent \$5,000 handling the over 100 bidders that responded to the IFB (Invitation for Bids). See JACQUES S. GANSLER, *AFFORDING DEFENSE* 182 n.94 (1989). Evaluation also takes a lot of time and energy for procurement personnel. See KELMAN, *supra* note 1, at 24.

26. A second reason for restricting competition is to reward investments in product development by bidders. The government often cannot directly measure or reward the effort of bidders who do research and development to tailor a product to the government's specifications. See GANSLER, *supra* note 25, at 181 (stating that restricting the number of bidders in a procurement may raise the government's surplus because the smaller number of bidders are likely to produce higher quality proposals).

27. The typical mechanism for exclusion is the mandatory specifications in the RFP (Request for Proposals) or IFB. See *infra* Section II.B. and accompanying notes. Such a method of generating exclusions is a coarser filter than the theoretical ideal, but it achieves the basic goal.

28. The analysis here draws from the work of Robert C. Marshall et al., *Delegated Procurement and the Protest Process*, Duke University mimeo (1990), the framework of which modifies the work of Roger B. Myerson, *Optimal Auction Design*, 6 MATHEMATICS OF OPERATIONS RES. 58 (1981), to a procurement setting that permits the incorporation of agency problems in the objective function of the POs.

29. Compensation for bid preparation costs should be limited to "reasonable" expenditures, just as is done in cases in which attorneys' fees are awarded. This limitation would deter excessive expenditures on bid preparations.

tive for the winner to bid more aggressively and to provide a higher surplus product.<sup>30</sup> The requirement that all bidders be compensated for their bid preparation costs may seem surprising.<sup>31</sup> If preparation costs are not reimbursed, the entry decision by a firm is based upon a comparison of expected profit and entry cost.<sup>32</sup> From the government's perspective, the decision should be based on a comparison of the increase in expected surplus that the firm will generate to the bid preparation and handling cost. The government should follow this policy to gain control over the number of bidders participating in a procurement and promote participation by more bidders when that is appropriate.

*B. Barriers to the Implementation of Efficient Procurement (with an Example)*

The optimal procurement mechanism described in Section I.A relies on sealed bidding to remove discretion from procurement officials that derives from an unstructured purchasing process. In the case of relatively homogeneous commodities, it is successful.<sup>33</sup> In contrast, an optimal procurement mechanism for heterogeneous goods allows procurement officials to retain discretion to determine optimal exclusions, to formulate a method of scoring product attributes, and to evaluate the products. It cannot be properly implemented unless procurement personnel are competent and are provided the correct incentives by their agencies. While we believe that procurement officials are generally honest and well-meaning, the training that they receive is often inadequate, and serious incentive problems are created by the

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30. If no other bidder beats the reserve, then the winner's profit depends on its advantage over the reserve.

31. The Department of Defense [hereinafter "DOD"] is authorized to bear the cost of testing and evaluation for small businesses where the Government anticipates savings through competition. See Gabig & Bean, *supra* note 24, at 581. Benchmark testing is expensive for the vendors, and some government agencies have experimented with reimbursing vendors. See *id.* at 580.

32. Shane Greenstein, *The Market for Bids: Determining Procedures in Federal Mainframe Computer Procurement 4* (June 1990) (unpublished manuscript, available at the University of Illinois Department of Economics).

33. Although abuse of discretion in the award process is not a problem with homogeneous goods, collusion and improper specification of the government's needs are still problems. See, e.g., William Kovacic, *The Antitrust Government Contracts Handbook 32-34* (Oct. 1989) (unpublished manuscript) (discussing bid rigging in highway construction contracts); Mary K. Marvel & Howard P. Marvel, *Contracting Problems and Public Sector Organization 9-12* (Sept. 1990) (unpublished manuscript) (discussing unreasonable specifications in government cafeteria contracts).

delegation of procurement authority to agencies. In this section we describe these incentive problems and the ways in which they are manifested through the exercise of discretion by agency procurement personnel.

Oversight of the procurement process is needed because, for various reasons, the government's objectives are not shared by the procuring agency or the procurement personnel who administer the process. In the vernacular of economics, there is a "principal-agent" problem.<sup>34</sup> The government (the principal) wants the procurement official (its agent) to undertake a task on its behalf. The problem stems from the fact that the agent does not have the same objectives as the principal, and some aspects of the agent's behavior cannot be monitored.<sup>35</sup> Throughout the text, we will refer to this misalignment of objectives as the "agency problem." The most serious problem is reward systems that do not induce high levels of effort. There are also incentive problems relating to favoritism and a bias toward excessively sophisticated technology in procurement decisions.

The first step in the analysis of these problems is to understand who makes procurement decisions. The decision-making methods are quite similar across civilian and defense agencies. There are two lines of authority<sup>36</sup> in the procurement process, represented by the contracting officer and the technical (or program or project) officer. The technical officer is responsible for assessing an agency's needs and writing the technical portion of the solicitation. He or she also assists in negotiations and performs the technical evaluation of proposals.

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34. For an introductory discussion, see JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 35-39 (1988). For analyses of agency problems in governmental settings, see Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Policy Control*, 3 J. L. ECON. & ORGANIZATION 243, 247 (1988) (stating that the problems affecting agencies are shirking, favoritism (capture), and the problem of oligarchy, which the authors describe as a situation in which "the peculiar political preferences of the agency override democratic preferences"); see also Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 764 (1984) (stating that the problems affecting agencies are adverse selection and moral hazards); SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978) (stating that the government's objectives are being undermined by the corruption of agents possessing discretionary authority).

35. See Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) (discussing the role of investigative oversight in curbing agency problems).

36. The contracting officer and the technical officer respond to two completely separate chains of command. Gary Bliss, staff member of the Economic Analysis and Resource Planning Division of Program Analysis and Evaluation in the Office of the Secretary of Defense, Comments at the Conference on "Procurement Oversight" at the American Enterprise Institute (July 1990).

The contracting officer focuses on the contracting process, determining the non-technical features of a solicitation. The contracting officer has primary responsibility for negotiations, evaluation, award and administration of a contract.<sup>37</sup>

Technical officers are motivated to buy the best technology available, given the budget,<sup>38</sup> while contracting officers want to assure compliance with regulations and get the procurement done quickly.<sup>39</sup> Both groups receive meager, if any, rewards for the quality of their business judgment. In the design of a solicitation, these parties often act as adversaries, with the technical people pushing for higher technology and the contracting people pushing for more competition.<sup>40</sup> The resulting specifications and evaluation criteria emerge from a bargain between the technical and contracting staff.<sup>41</sup> The subjects of the bargain are issues such as how much weight to give cost versus technical factors in the scoring function and whether to use physical or functional specifications.<sup>42</sup>

It appears that the technical staff often has the upper hand in structuring the solicitation and that they often bias procurement choices in favor of high-tech items.<sup>43</sup> In other words, the award process seems to place a greater weight on value and a lower weight on cost than would be dictated by surplus maximization.<sup>44</sup> Why this occurs

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37. The technical representative, or project officer, is the individual responsible for oversight of the contractor's technical performance. See GAO, CIVILIAN AGENCY PROCUREMENT: IMPROVEMENTS NEEDED IN CONTRACTING AND CONTRACT ADMINISTRATION 1, 9 (Sept. 5, 1989). The contracting officer reviews the specifications, negotiates the price structure and modifies and enforces the contract. See *id.* at 10. The contract officer makes the final choice after the technical experts have evaluated quality. See KELMAN, *supra* note 1, at 22.

38. Major Chip Mather, assigned to the Operational Contracting Division of the Air Force's Deputy Assistant Secretary for Acquisition, Comments at the Conference on "Procurement Oversight" at the American Enterprise Institute (July 1990).

39. Rex Bolton, Chief of the Authorizations and Review Office of the U.S. Army Information Service Systems Selection and Acquisition Agency, Comments at the Conference on "Procurement Oversight" at the American Enterprise Institute (July 1990).

40. The adversarial nature of the system is accentuated by the requirement, contained in the Competition in Contracting Act (hereinafter "CICA"), that each agency have a "competition advocate" with the responsibility of challenging barriers to competition in agency procurements. See 48 C.F.R. §§ 6.501, 6.502 (1990).

41. The contracting officer prefers functional specifications and the technical officer prefers physical specifications. See Mather, *supra* note 38.

42. The contract officer and the technical officer bargain over the weight to give cost versus quality. See generally KELMAN, *supra* note 1, at 115-72.

43. For an economic analysis of the technology bias in the Department of Defense, see William P. Rogerson, *Quality versus Quantity in Military Procurement*, 80 AM. ECON. REV. 83 (1990).

44. See Shane Greenstein, *Did Installed Base Give an Incumbent any (Measurable)*

is an open issue. In the Department of Defense (hereinafter "DOD"), there is a mind-set that, since human lives are at stake in military conflicts, any expense is justified in acquiring the latest and best technology.<sup>45</sup> Whether this view is correct on the battlefield is debatable,<sup>46</sup> but it is certainly troublesome when applied to the quartermaster corps. In both civilian and defense agencies, the technology bias might also be explained by risk aversion. Technical officers choose higher quality technology because they are sure it will get the job done.<sup>47</sup> Our goal in this Article is not to explain this phenomenon, but to examine its implications for efficient procurement. Consequently, we will not distinguish between the incentives and decisions of technical officers and those of contracting officers. We simply aggregate these personnel and treat them as if they are embodied in a single "procurement official."

Besides the technology bias, POs often demonstrate a preference for a familiar product or an incumbent firm.<sup>48</sup> This kind of firm-

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Advantages in Federal Computer Procurement? 6 (April 1990) (unpublished manuscript, available at the University of Illinois Department of Economics) [hereinafter Greenstein, Federal Computer Procurement]; Shane Greenstein, Going by the Book: The Costs and Benefits of Procedural Rules in Federal Computer Procurement 7 (Dec. 1990) (unpublished mimeo, available at the University of Illinois Department of Economics) (stating that the capital budget for an ADPTE (automated data processing and telecommunication equipment) purchase cannot be used for other projects, hence the marginal valuation of a dollar in the budget is apt to be lower for an agency than for taxpayers. This affects the agency incentive to cost minimize and exacerbates the technology bias.).

45. RICHARD A. STUBBING & RICHARD A. MENDEL, THE DEFENSE GAME: AN INSIDER EXPLORES THE ASTONISHING REALITIES OF AMERICA'S DEFENSE ESTABLISHMENT 155 (1986) (stating that "[i]n most cases, the added capability is indeed 'nice to have,' but the key question, too often ignored, is whether it is necessary when a marginally less effective system can be bought at a far lower price.").

46. See GANSLER, *supra* note 25, at 43 (perhaps less so in light of the success of high-tech weapon systems in the Gulf War).

47. JAMES Q. WILSON, THE POLITICS OF REGULATION 375-76 (1980) (suggesting that many bureaucrats who identify their careers with particular agencies tend to be risk averse and are primarily concerned with avoiding scandal and maintaining a quiet life). Susan Rose-Ackerman, the author of CORRUPTION: A STUDY IN POLITICAL ECONOMY, *supra* note 34, commented to one of the authors of this Article that risk aversion could also work against the choice of high-tech items if they are new and unproven.

48. A paper studying the implications of favoritism for the design of the procurement process is Jean-Jacques Laffont & Jean Tirole, *Auction Design and Favoritism*, 9 INT'L J. INDUS. ORGANIZATION 9 (1991) (discussing conditions under which an IFB would be preferred to an RFP even if vendors offered variable quality). Protests can be used to curb the effect of favoritism, as reported by firms who participated in a recent survey by the American Bar Association. "Several respondents said they would protest a procurement that was important for other reasons, such as entry into a new market or where it is important to dislodge an incumbent contractor." Bid Protest Committee Rep., *The Protest Experience Under*

specific favoritism is well known in procurement circles and has led to such expressions as, "No one was ever fired for buying from IBM."<sup>49</sup> Favoritism is generated in many ways—some benign and others pernicious. An expectation of future employment<sup>50</sup> with a particular firm or friendship with the marketing representatives of a firm lead to favoritism. So do the idiosyncratic preferences of the technical staff for a particular product. Alternatively, a PO who is satisfied with a particular product or vendor may find evaluation of alternatives to be costly in terms of effort, while realizing little, if any, of the gains from the inclusion of other firms in the procurement. The consequent lack of evaluation of new products will lead the PO to select an awardee from a strict subset (the favored firms) of all the bidders that could have feasibly participated. Finally, favoritism may be the product of corrupt or unethical behavior, such as accepting bribes or entertaining job offers from bidders. Although this latter kind of behavior receives considerable attention from the press (e.g., Operation Ill-Wind),<sup>51</sup> in our opinion, it is a relatively insignificant problem.<sup>52</sup>

A third incentive problem, which we call the "appropriability problem," arises when a PO is not fully compensated at the margin for the cost of his or her effort and, in addition, the effort is not easily monitored. A PO managing a computer procurement does not have the proper incentives to exert the socially optimal level of effort. For example, including extra bidders in a procurement means more work for a PO, but it also means lower expected cost for the govern-

*the Competition in Contracting Act*, A.B.A. SEC. PUB. CONT. L. 63 (1989).

49. See Jerome S. Gabig, *A Primer on Federal Information Systems Acquisitions*, 17 PUB. CONT. L.J. 31, 74 (1987). A GAO report indicated that after Best and Final Offers [hereinafter "BAFOs"], a "late night meeting" occurred between IBM and INS personnel, and IBM was allowed to adjust its bid and, consequently, won the award. *Id.*

50. During the conduct of the procurement, the PO may not discuss future employment opportunities. Furthermore, there is a two-year bar, after leaving the government, from working on the same contract in which one participated while in the government. See 41 U.S.C. § 401 (1991). See generally Roger G. Darley, *New 'Revolving Door' Issues for Federal Officials Under the OFPP Policy Act Amendments of 1988: A Quick Overview*, 18 PUB. CONT. L.J. 432 (1989).

51. Influence and information were peddled in the Teledyne case. A consultant was able to exercise influence to keep an aircraft ID system from being designated as a small business set aside, and to eliminate a competitor for technical reasons. In addition, information was obtained on a rival's price. *United States v. Sullivan*, Nos. 89-5414 & 89-5415, 1991 WL at \*2-3 (4th Cir. May 8, 1990).

52. See William E. Kovacic, *Antitrust Analysis of Joint Ventures and Teaming Arrangements Involving Government Contractors*, 58 ANTITRUST L.J. 1059 (1990). Especially of interest is the discussion of attempts to control corruption in procurement. See *id.* at 1076-77.

ment. Unfortunately, the cost savings do not redound to the benefit of the PO, undercutting the incentive to conduct an efficient procurement.<sup>53</sup> Effort may also be under-provided in tasks such as testing products, becoming familiar with new vendors, or learning about different technical solutions to an agency's computing problems. In the private sector, the appropriability problem is counteracted by the linkage of opportunities for promotion to managerial effort. The ability to create this incentive in the public sector is limited by Civil Service rules.<sup>54</sup>

There is yet another incentive problem that is observationally equivalent to the appropriability problem discussed above, but that stems from a different source. Managers of agencies are often more concerned with current year budgets and expenditures than taxpayers would want them to be. This high discount rate arises because intertemporal substitution of funds is very constrained in federal agencies. In addition, many agency managers view their current employment as a stepping stone to better opportunities, either within government or in the private sector. Consequently, their planning horizon is shorter than taxpayers would like. As a result, the procurement offices in many federal agencies are excessively constrained in terms of resources. Typically, short-handed personnel are asked to complete a task in a relatively short period of time, where the measure of a job well done are the costs incurred in running the procurement and the speed with which the final product is brought through the front door.<sup>55</sup> The result is that diligent POs may respond to these exces-

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53. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1989) (suggesting that effort is hard to measure in government agencies).

54. "The civil service system puts extreme limits on the discretion of managers to hire and fire employees. The corpus of rules regulating such decisions is embodied in statutes and in 6000 pages of personnel regulations." STEVEN KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* 180 (1987). Managers do have some flexibility in making promotion decisions, *see id.* at 182, but they have trouble controlling the appropriability problem because it is difficult to fire people. *See id.* at 184. The problem is compounded by a lack of performance measures. *See id.* at 187.

55. A high-ranking official at the Department of the Treasury recently made the following statement: "The internal costs of increased staff hours [from efforts to avert protests] may not be immediately noticeable in the Government's budget, but it does become noticeable when the attention and energy of the IRM staffs are diverted from implementing quality systems to merely managing the process." Steven W. Broadbent, *Urgent Need for ADP Procurement Reform*, GOV'T WORKPLACE PRODUCTS AND SERVICES REP. (Fall 1990) (Broadbent is the Deputy Assistant Secretary for Information Services at the Department of the Treasury). This complaint is symptomatic of an appropriability problem. Specifically, the author is very concerned about the cost of running the procurement as opposed to the benefits to taxpayers that are derived from enhanced competition.



sive constraints and distortionary incentives by excessively reducing the number of firms that can participate in a procurement—certainly five bids can be evaluated at lower cost than ten bids, and certainly benchmark tests are more cheaply applied when biased toward a single firm than when objectively applied to all bidders. Too little effort is exerted by the procuring agency in running the procurement, not because the POs have opted to shirk, but because dedicated POs simply are not allocated the resources to do the high quality work that taxpayers want them to do. The cause of this problem is the agency problem of the POs' superiors, but it results in the same kind of appropriability problem discussed in the preceding paragraph. For simplicity, we lump these two problems together and attribute them to the PO.

All three of the incentive problems may result in the inappropriate exclusion of bidders by biased or overly restrictive solicitations. Furthermore, the technology bias and favoritism may be manifest at any of the other stages of the award process. For example, a scoring function can be constructed so that an award is made to a firm offering a fast machine of small capacity when a slow machine of larger capacity would provide the government with greater surplus, or the benchmark test of how long a laptop's battery will hold a charge can be conducted in such a way that a favored product passes the test.<sup>56</sup>

Compounding the incentive problems is the fact that the quality of decision making is sometimes deficient. The government has difficulty retaining personnel because salaries are often low compared to private sector alternatives.<sup>57</sup> In addition, personnel may be rotated through a particular procurement activity fairly quickly.<sup>58</sup> A lack of experience and technical sophistication makes POs dependent on vendors for assistance in drafting solicitations.<sup>59</sup> Naturally, this cre-

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56. Many readers will recognize from personal experience the same agency problems manifest in the activity of procuring reimbursed air travel. The reader should categorize the following distortions from efficient decision-making: calling a single airline for fare information; choosing an airline based on the quality of meals or in-flight movies; neglecting advance purchase discounts or selecting first class seating; and choosing an airline to accumulate frequent flier miles.

57. See Key-suk Kim & Mark A. Zupan, *The Role of Vendor Past Performance in Defense Contract Awards: Some Empirical Evidence* 10 (Dec. 1990) (unpublished manuscript, available at the USC School of Business).

58. In the military, "ticket punching," or rotation through certain positions, is required for advancement. Notions of fairness require inefficiently frequent rotation of officers. See WILSON, *supra* note 47. A three-year tour is typical for contracting officers. See Comments of Bolton, *supra* note 39.

59. Firms send representatives to information management groups within agencies on a

ates opportunities for firms to gain an unfair advantage in a procurement.<sup>60</sup>

### *An Illustrative Hypothetical Example*

In this section, we pose an example in which six firms can potentially bid to supply a vendor with a commodity. Five of the vendors will bid new products. The PO has no prior beliefs regarding these five firms or their products that would lead him to be able, *ex ante*, to distinguish among them—all produce high quality products. However, the sixth firm supplies used products that have been reconditioned. A quality index  $r$  describes how this firm's product falls on the continuum between high quality and low quality. Specifically,  $q_6 = r \cdot q_H + (1 - r) \cdot q_L$  and  $q_i = q_H$  for  $i = 1, \dots, 5$ . The number of firms,  $q_H$ ,  $q_L$ , and  $r$  are all common knowledge amongst the players. Firms will be assessed on the surplus that they offer the procuring agency—the firm that offers the highest difference between gross value and cost will win.<sup>61</sup> The PO will incur a positive bid evaluation cost of  $C_e$  for each and every bid that is submitted. The issue is whether or not it is appropriate for the PO to write a bid solicitation that excludes the sixth firm. To make the issue interesting, we will assume that both  $C_e$  and  $q_H - q_L$  are large enough that exclusion is appropriate when  $r = 0$ , but inclusion is appropriate when  $r = 1$ . We also assume that  $C_e$  is small enough that inclusion of firms one through five is always appropriate.

The decision to include or exclude is depicted in Figure 1. The straight line depicts the net benefits to taxpayers from *ex ante* inclusion of only the five firms, denoted  $U(1, \dots, 5)$ . The convex locus depicts the net benefits from inclusion of all six firms in the procurement, denoted  $U(1, \dots, 6)$ . The locus is convex since, as  $r$  increases, the other five firms must bid more aggressively to fend off the ever

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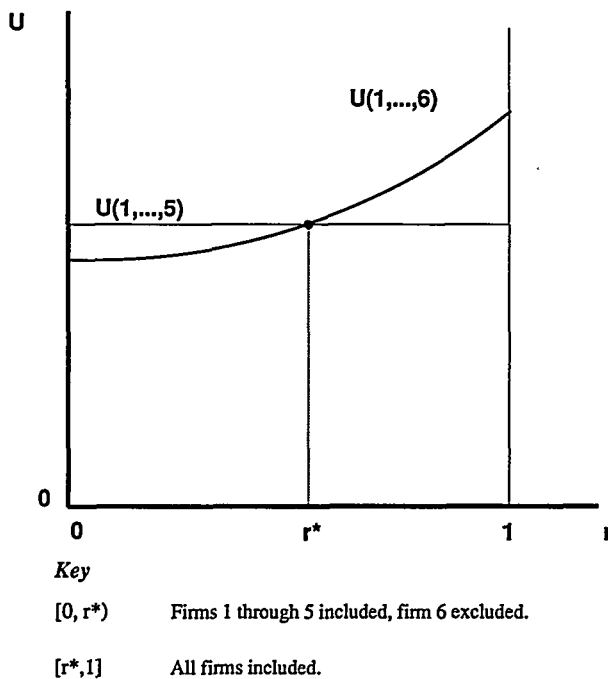
regular basis. Jeff Stollman, Conference on "Procurement Oversight," Comments at the American Enterprise Institute (July 1990) (Jeff Stollman is the owner of Rocky Mountain Trading Corp. Systems and specializes in selling microcomputer equipment to the federal government.).

60. A PO will take a spec sheet from a major vendor to create the specifications in an RFP and unintentionally include irrelevant specifications that are exclusionary. *See id.*

61. It may seem that the sixth firm should be naturally excluded. However, if each of the five firms bidding new products is expected to provide a gross value of one million dollars at a cost of eight hundred thousand dollars, while the sixth firm is expected to provide gross value of five hundred thousand dollars at a cost of one hundred thousand dollars, then it is clearly advantageous, in terms of surplus maximization, to include the sixth firm.

increasing threat that firm six will win the procurement. The value of  $r$  where the curves cross,  $r^*$ , is the point at which taxpayers are indifferent between inclusion and exclusion of the sixth firm. At  $r^*$  the marginal gains attained from the increased competition resulting from inclusion of the sixth firm are exactly equal to the marginal costs of including the sixth firm in the procurement (namely,  $C_6$ ). For values of  $r$  less than  $r^*$  the marginal cost exceeds the marginal benefits so exclusion is appropriate, whereas for values of  $r$  greater than  $r^*$ , the marginal benefit exceeds the marginal cost so inclusion is appropriate.

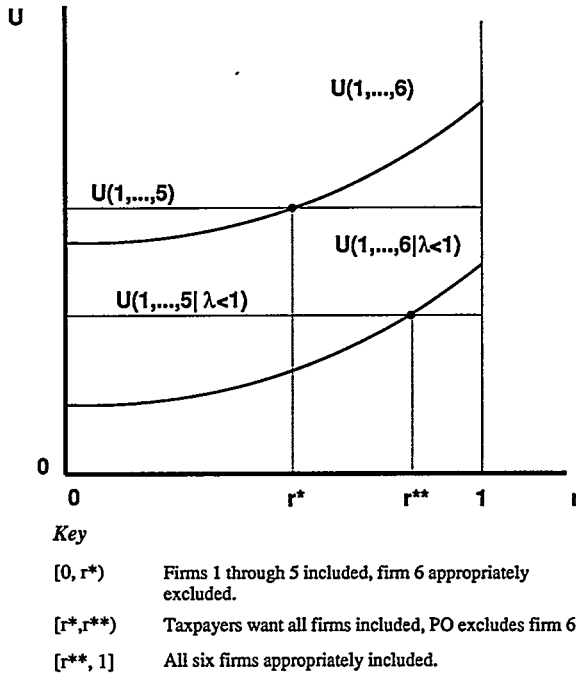
Figure 1  
Optimal Pre-Bid Inclusion and Exclusion



How does the PO view this world? If he has no agency problem, then he sees the world exactly as depicted in Figure 1. His bid solicitation will be appropriately restrictive. However, suppose he suffers from an appropriability problem. We represent the appropriability problem with a parameter  $\lambda$ , which lies in the unit interval where  $\lambda = 1$  represents no appropriability problem and the appropriability worsens as  $\lambda$  decreases. This case is depicted in Figure 2. In Figure 2, we have reproduced the curves from Figure 1. But, in addition, we have

added two other curves that reflect the net benefit to a PO who suffers from an appropriability problem from inclusion of five firms<sup>62</sup> (denoted by  $U(1, \dots, 5 | \lambda < 1)$ ) and inclusion of six firms (denoted by  $U(1, \dots, 6 | \lambda < 1)$ ).

Figure 2  
Pre-Bid Inclusion and Exclusion With and Without an Appropriability Problem



Two points about Figure 2 deserve mention. First, the curves that represent the PO's net benefit when he suffers from an appropriability problem lie below the corresponding curves for the government (or the case where the PO has no appropriability problem). This is intuitively sensible. With an appropriability problem, the PO incurs all the costs of running the procurement (e.g., evaluating bids), but receives only a small percentage of the gross benefits from so doing. Therefore, net benefits are smaller for the PO than they are for the government. Second, the curves reflecting the PO's appropriability

62. We suppose here that, despite the appropriability problem, the PO will continue to include the first five firms. If the problem is severe enough, however, some of those will also be excluded.

problem cross at  $r^{**}$ , which is greater than  $r^*$ .<sup>63</sup> The intuition is straightforward. Consider the indifference point  $r^*$ . As the appropriability problem begins to take hold, the PO still incurs the full cost of product evaluation, but does not get the full gross benefits from the inclusion decision. Therefore, the PO will no longer be indifferent as between inclusion and exclusion of the sixth firm at  $r^*$ —he or she will prefer exclusion. For the PO to be indifferent as between inclusion and exclusion  $r$  must rise to  $r^{**}$ .

The punch-line of these simple analytics is straightforward—as the appropriability problem grows, the bid solicitation becomes excessively restrictive. If the sixth firm falls between  $r^*$  and  $r^{**}$ , then taxpayers will want the firm included (i.e., inclusion maximizes surplus), but the PO with the appropriability problem ( $\lambda < 1$ ) will exclude the firm.

### C. *The Benefits and Costs of Protest Oversight*

The pros and cons of a protest process depend to a great extent on its governing rules. Does the protester have access to the standard means of discovery? Is the standard of review arbitrary and capricious or *de novo*? Do the judges simply offer recommendations or do they render decisions that have bite? The GSBICA protest process is characterized by rigorous discovery and extensive remedial powers.<sup>64</sup> Protests concerning non-computer contract awards are entertained at other forums that adopt circumspect review standards,<sup>65</sup> and have limited remedial power<sup>66</sup> or limited discovery.<sup>67</sup> In the ensuing parts of this section, we will analyze protest oversight in general. When necessary, we will explicitly identify arguments that are contingent on, say, the corrective measures available to the judges or hearing officers.

#### 1. The Benefits of Protest Oversight

The theoretical basis of decentralizing oversight has been considered in other settings<sup>68</sup> under the rubric of enforcement by private

63. This result can be demonstrated analytically. See Marshall et al., *supra* note 28.

64. See *infra* Section II.C. and accompanying notes.

65. The Federal District and Claims Courts use an arbitrary or capricious standard in reviewing agency contract awards. See *infra* notes 140-52 and accompanying text.

66. See *infra* note 158 and accompanying text.

67. Outside of computer and telecommunication procurement GAO discovery is quite limited. See *infra* note 157 and accompanying text.

68. See, e.g., *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (holding that, because the

attorneys general.<sup>69</sup> Protesters may be characterized as private attorneys general because they have incentives to detect and prosecute actions by procurement officials that are contrary to the public interest. The private nature of this enforcement activity gives it advantages and disadvantages quite different from typical centralized enforcement activity.

As we argued in Section I.B., oversight is necessary because procurement officials have incentives to manage the award process in a manner that may conflict with taxpayers' interests. When products like staple food items are being procured, simply requiring competitive bidding is effective in combatting incentive problems. The procurement official has little discretion, and an attempt to award a contract to a firm other than the lowest bidder would be easily detected.

In the case of heterogeneous commodities, such as computer systems, evaluating bids only on a cost basis is no solution. Simply put, lowest cost does not necessarily imply highest surplus in such cases. It is a difficult task to verify that an awardee offers the best combination of price and quality or that the technology described in the specifications is appropriate—hence the need for more sophisticated oversight.

The threat of protest has valuable regulatory effects: it both deters and corrects inappropriate awards that are contrary to the objective of surplus maximization. Take, for example, a PO who suffers from a technology bias. Without the protest process, this PO may inappropriately exclude low-tech firms (that can potentially offer low cost and high surplus) from the procurement or bias the scoring function to favor a high-tech firm. The costs and penalties inflicted upon POs and their procuring agencies, given a successful protest, will deter POs, at the margin, from acting on their technology bias. Society benefits from the corrective impact of protests when POs, who would otherwise be undeterred, are forced to alter inappropriate procurement practices.<sup>70</sup>

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settlement of a patent validity dispute has implications for the public, normal rules favoring settlement may not always apply); E.T. SULLIVAN ET AL., *ANTITRUST LAW, POLICY, AND PROCEDURE* 77 (1989).

69. See generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrol vs. Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); A. Mitchell Polinsky, *Private versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980); David Friedman, *Efficient Institutions for the Private Enforcement of Law*, 13 J. LEGAL STUD. 379 (1984); Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988).

70. The seminal economic work on deterrence is Gary S. Becker, *Crime and Punish-*

Besides its deterrent and corrective powers, the protest process also reduces the incentives for firms to exercise inappropriate influence over procurement personnel. Federal computer firms are in constant contact with agency officials in order to influence the specifications contained in upcoming procurements. These marketing activities are generally licit and helpful, but sometimes extend to implicit promises of future employment or even bribery.<sup>71</sup> A firm that is successful in gaining influence has the procurement proposal written in such a way as to exclude potential competitors or raise their cost of supplying the government. This has the two effects of raising the probability that the influence-wielding firm will win the contract and, in addition, increasing the expected price. Allowing competitors to protest the terms of a proposal offers a check against illicit influence.

The protest mechanism reduces the rents from influence activities in two ways. First, a successful protest deprives the influence-using firm of a contract and forces it to pay protest costs. Second, a settlement forces the winner to share part of the profit from improper influence. The reduction in expected rents causes the investment in influence to fall; therefore, the probability of an inefficient award falls. Society also garners the direct benefit of reduced investment in wasteful rent-seeking activities.

A final benefit of the protest process is its ability to produce product information that is beneficial to the PO. In addition to disciplining POs who suffer from distorted incentives, protests allow an appropriately excluded firm to gain entry into a procurement when this would be desirable. In a world without agency problems or protests, certain firms or products are appropriately excluded from a procurement because they are unlikely to be a good match with government needs.<sup>72</sup> In the case in which a firm offering a good match has been excluded, it can avail itself of the protest process to reverse its exclusion.

Suppose, for example, that a hardware procurement is restricted to new products because the PO has a prior belief that used products are generally unreliable.<sup>73</sup> A vendor offering used equipment that was acceptable for a particular application has the protest process as a

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ment; *An Economic Approach*, 6 J. POL. ECON. 169 (1968).

71. KELMAN, *supra* note 1, at 71 (stressing the helpful nature of such communication).

72. *See supra* notes 24-27 and accompanying text for a discussion of optimal exclusion.

73. *See, e.g.*, Computer Mktg. Corp., GSBGA No. 8131-P-R, 86-1 B.C.A. (CCH) ¶ 18,592 (1985).

means of credibly demonstrating that its product is acceptable. Protests can be more efficient than testing since protests occur only when a firm knows that its product is acceptable, while testing would be used all of the time by the less informed PO.

## 2. The Costs of Protest Oversight<sup>74</sup>

There are several potential limitations and drawbacks to oversight by protest, such as imperfect deterrence, inappropriate settlements, inappropriate inclusions and awards, and poor decisions by POs that were not in the interest of potential protesters to flag.<sup>75</sup> Of course, procurement oversight of any kind is bound to be costly.<sup>76</sup> The costs are naturally lower for weaker protest forums (e.g., no discovery, arbitrary and capricious review standard, no enforcement powers), but so are the benefits. We discuss methods of alleviating these costs in the context of the GSBCA in Section II.E.1.

### *Imperfect Deterrence*

An unsurprising friction in the protest process is that deterrence is imperfect. As a result, resources are consumed in hearing protests and correcting decisions by POs. It is often difficult for potential protesters to know whether the PO has made a specific award decision because of an agency problem or because the awardee's product is truly superior to the protester's product. The uncertainty of success for a protester, along with the substantial costs associated with an

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74. Much of the discussion in this section is based upon the results in Robert C. Marshall et al., *Curbing Agency Problems in the Procurement Process by Protest Oversight*, (1990) (Duke University mimeo).

75. Below, we discuss in detail what we perceive to be the most serious shortcomings of the current protest process. We take a moment here to mention two other complaints that have been voiced. First is the possibility that firms will use the protest process to raise their rivals' costs. Kovacic notes this problem and suggests that there is possible antitrust control of protest harassment of a competitor. See William E. Kovacic, *Antitrust Government Contracts Handbook* 49-50 (Oct 10, 1989) (unpublished). Second, protests allegedly have a chilling effect on communications between a PO and the industry, making it difficult for the government to learn which ADPTE best suits its needs. See Bolton, *supra* note 39; see also Bert Rosecan, President of SMS Date Products, Comments at the Conference on "Procurement Oversight" at the AEI (July 1990).

76. Even in the private sector, ADPTE procurement is quite contentious. See Gabig, *supra* note 49, at 32 (stating that one out of ten transactions involving ADP products or services results in a lawsuit) (citing B. BRICKMAN, *LEGAL ASPECTS: ACQUIRING AND PROTECTING SOFTWARE* 9 (1984)). This fraction is comparable to the rate of protests in federal computer procurements.



unsuccessful protest, will inhibit firms from protesting every questionable exclusion or award decision.<sup>77</sup> POs recognize this fact and take advantage of it by making exclusion and award decisions that are inconsistent with surplus maximization. They are willing to risk an adverse protest judgment because there is a significant probability that their inappropriate action will not be detected.<sup>78</sup>

### Settlements

The second shortcoming of the protest process concerns settlements. Settlement can be divided into two categories—"inappropriate" and "appropriate." A settlement is appropriate when it is consistent with the objective of maximizing surplus for taxpayers. Otherwise, a settlement is inappropriate. Two kinds of appropriate settlements occur when (1) an excessively exclusionary bid solicitation is rewritten to include potential bidders<sup>79</sup> or (2) product evaluations that were biased are re-conducted in an unbiased manner. In either (1) or (2), it might be the case that the procuring agency voluntarily pays cash to a protester of an amount not in excess of the costs incurred by the protester in bringing the deficiencies of the procurement to its attention. This kind of cash settlement is not inappropriate. Since almost all other cash settlements are inappropriate,<sup>80</sup> whether they are paid by the procuring agency or a firm, we will use the term "cash settlement" to denote an inappropriate cash settlement. If a firm pays a cash settlement, it is typically one that has been named as awardee by the procuring agency pending the outcome of the protest, although it is possible that a firm that is highly favored by an excessively restrictive request for proposals (hereinafter "RFP") could settle in cash with a pre-award protester. An in-kind settlement involves a sharing of the award, via a subcontract, between the named awardee

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77. A firm that is likely to deal repeatedly with a PO or agency is also inhibited from protests because of a concern that it will be treated badly in future procurements. However, the reputation issue cuts both ways. A PO may be more solicitous of a firm that has a reputation as a protester, heightening the deterrent effect of protests.

78. See Marshall et al., *supra* note 74.

79. See, e.g., Government Sys. Integration Corp., GSBICA No. 8685-P B.C.A. (CCH) (1986).

80. They lead to the continuation of an overly restrictive procurement or an award that is inconsistent with surplus maximization. The analysis of bribery and public versus private enforcement covers similar ground. See generally Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *supra* note 10; Friedman, *supra* note 69.

and the protester in exchange for withdrawal of the protest. All in-kind settlements are inappropriate.<sup>81</sup>

Inappropriate settlements subvert the private attorney general role of the protester.<sup>82</sup> When the protest process allows for discovery, many protests are withdrawn after discovery due either to lack of cause or to settlement. This is normal in any type of dispute; the vast majority of conflicts in our legal system are settled rather than litigated. One difficulty in operating the protest process is the conflict between encouraging good faith settlements that conserve judicial resources and preventing or deterring inappropriate settlements.

To understand an inappropriate settlement, consider the case of a protester who has been inappropriately excluded from a procurement because the PO suffers from an appropriability problem. The protester accepts a cash settlement from the procuring agency. This compensates the protester for its foregone expected profits, net of protest costs, from participation in the procurement were it run properly. However, all remaining firms in the procurement will bid less aggressively than if the protesting firm were included. This is a natural by-product of diminished competition. The diminished competition results in lower expected surplus from the procurement for the government. In agreeing to the settlement, the protesting firm does not consider the costs imposed on taxpayers from a procurement that will be conducted with diminished competition and, in addition, the PO is concerned only with some fraction of this cost. In other words, cash or in-kind settlements may produce a negative externality for taxpayers that defeat the private attorney general role of protesters—despite being alerted to the fact that the procurement is not consistent with surplus maximization, the outcome is (1) no increase in the number of firms participating in the procurement and (2) the payment of a transfer (by the PO and, consequently, by taxpayers) so that an excessively restrictive procurement can continue.

Unfortunately, if the PO's agency problem is severe, the threat of protest does not deter bad decisions but, instead, induces the PO (or awardee) to offer a cash or in-kind settlement to protesters.<sup>83</sup> We

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81. This does not mean that all subcontracts are inappropriate. There are often efficiency justifications for subcontracts.

82. The private attorney general function of protesters was noted by the Board in Bedford Computer Corp. GSBCE No. 9837-C (9742-P) B.C.A. (CCH) ¶ 22,377 (1989) (stating that a fedmail payment is possible).

83. Kelman describes a case that may be interpreted as a buy-off settlement organized by the awardee by means of a subcontract. In a procurement with two bidders, IBM won the

refer to such settlement as “buy-off” settlements.<sup>84</sup> If the necessary “buy-off” payment to gain settlement would be too large, then the PO might still insist on an inappropriate exclusion and refuse to entertain settlement discussions. In such a case, the PO tries to “bluff” the excluded firm into believing that its exclusion is justified.

The fact that the PO and the procuring agency face costs associated with successfully defending themselves against a protest leads to two potentially undesirable outcomes. The first is another variety of inappropriate settlement. It arises when POs make appropriate decisions that are challenged by protesters. In such cases, they face a choice—settle with the protester or incur the costs associated with a successful defense. Often times the POs (or awardees) will opt for a cash settlement. In fact, the press has devoted much attention to these kinds of protests, referring to them as “fedmail.”<sup>85</sup> Supposedly, a subset of the new entrants to the federal computers market are engaged, to an extent, in this activity.<sup>86</sup>

### *Overdeterrence*

Besides fedmail, the costs incurred by a PO as a result of a successful protest defense may lead to “overdeterrence.” Overdeterrence occurs when a PO who would make an appropriate decision in the absence of protests makes an inappropriate decision in order to minimize expected protest costs. The problem is manifest in the over-inclusion of bidders in the procurement<sup>87</sup> and in bad award

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award. EDS protested and the procuring agency, INS, settled the post-award protest by changing the award to EDS, which subcontracted with IBM. See KELMAN, *supra* note 1, at 140; see also *infra* text accompanying notes 209-13.

84. See, e.g., Systemhouse Fed. Sys., Inc., GSBICA No. 9936-P, 89-2 B.C.A. (CCH) ¶ 21,743 (1989) (in which the Navy and a protester reached a settlement in which the parties stated that they disagreed on the interpretation of the evaluation criteria and the Navy paid the protester \$190,000 for its expenses).

85. A recent GAO report, *ADP Bid Protests*, GAO/GGD-90-13 (March 1990), investigates fedmail in light of a cash settlement paid by the Bureau of the Census to three protesters for \$1.1 million dollars. The GAO does not find fedmail to be a substantial problem. See *id.* at 4.

86. Although fedmail is not common, see *id.*, our perspective on the protest mechanism as a substitute for auditing rationalizes its practices. Firms that are on the periphery of procurement award contests—that profit from frequent protests and rarely win procurement awards—play a socially useful role as “auditors,” by deterring inappropriate procurement decisions.

87. A marginal bidder wants to get out of a procurement and learn that he has no

decisions. In the latter case, overdeterrence hinges on a difference between bidders in their propensity to protest. For example, an incumbent may be less likely to protest because it assumes that the PO is likely to be biased in its favor. Perversely, the PO may deny an incumbent an entitled award in order to avoid incurring protest costs from more litigious non-incumbent bidders.<sup>88</sup>

### *Taxpayers Can Be Harmed When Potential Protesters Are Not.*

A final difficulty with the protest process is that certain inappropriate procurement decisions are harmful to taxpayers but not harmful enough to any firm to generate a protest. For example, the over-inclusion phenomenon that we attribute to overdeterrence does not generate protests because of free-riding. A properly included firm that might protest would gain little from the exclusion of one rival and would rather wait for some other firm to protest. The result may be no protest at all. As a second example, recall that the purpose of a reserve in a competitive procurement is to induce aggressive bidding and lower acquisition costs. But a reserve also creates a possibility that no award will be made under the current solicitation. POs suffering from a technology bias might decline to set a reserve because they are less concerned about cost than about the prospect of procuring a high-tech product. In such circumstances the bidders are apt to support the POs decision unanimously. The only party that suffers is the government.

### 3. An Example

We now return to the hypothetical example of section I.B. to illustrate the deterrent power of protests as well as buy-off settlements. Within the context of this example, consider the creation of a protest forum. The judges or hearing officers of the protest forum can

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chance, but CICA encourages POs to leave firms in the competitive range to avoid protest. See Gabig & Bean, *supra* note 24, at 570 (stating that the GAO will "scrupulously review an agency's decision to leave a single offeror in the competitive range because such an action is repugnant to the statutory preference for competition.").

88. Related to the notion of overdeterrence is the possibility that POs eliminate subjective (but useful) data from evaluation criteria or that they are too permissive in establishing specifications and making inclusion decisions. These practices could result from fear of protest. For example, government buyers often have previous experience with a vendor, but cannot use this information as an evaluation criterion. A survey of government computer managers revealed that 59% of them find vendor selected references at other sites to provide information that is either not candid or not useful. See KELMAN, *supra* note 1, at 48.

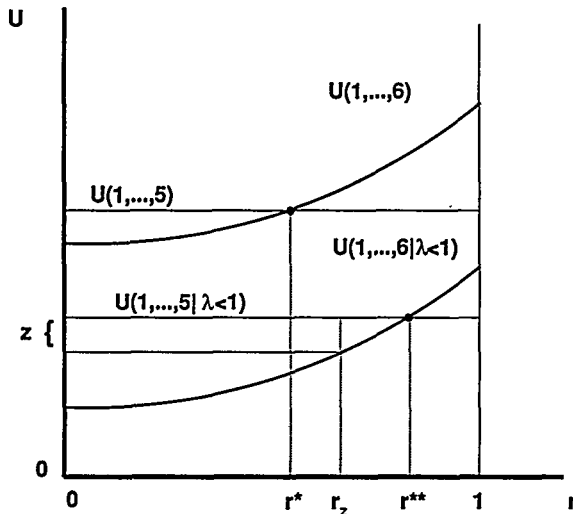
order the procuring agency to include an inappropriately excluded firm. If the sixth firm protests, the PO will incur a cost,  $\pi$  (meant to represent procurement delays, legal expenses, etc.). In this simple model,  $\pi > 0$  ensures that the PO will either include the sixth firm or settle—no protests will actually occur.<sup>89</sup> The sixth firm will accept a settlement payment from the PO of  $z$  and agree to drop its protest. None of the other firms have any conceivable grounds for protest—they will all be included and treated symmetrically since they are *ex ante* homogeneous. This example is depicted in Figure 3. We assume that

$$U^*(1, \dots, 5 | r^*, \lambda < 1) - U^*(1, \dots, 6 | r^*, \lambda < 1) > z$$

At the point  $r_z$  the above inequality is an equality.

Figure 3

Settlement and Deterrence Induced by the Threat of Protest  
For a PO with an Appropriability Problem



Key

- [0,  $r^*$ ) No protests, only firms 1 through 5 included.
- [ $r^*$ ,  $r_z$ ) Buyoff settlement of amount  $z$  paid to firm 6, only firms 1 through 5 included.
- [ $r_z$ ,  $r^{**}$ ) Deterrence, all six firms included where only firms 1 through 5 would be included without protests.
- [ $r^{**}$ , 1] All six firms included even without protests.

89. All the players in this game know  $r$ ,  $q_H$ ,  $q_L$  and how bids will be evaluated, and they all know that they know, etc. Also, we assume that the protest forum is free of potential mistakes. Simply put, there is no source of uncertainty in this model. Consequently, no litigation will be observed in equilibrium.

What behavior would be observed in the context of this model and why? For values of  $r$  below  $r^*$  and above  $r^{**}$  the PO and the judges of the protest forum are in complete agreement—above  $r^{**}$ , all six firms should be included and below  $r^*$ , the sixth firm should be excluded. Between  $r^*$  and  $r^{**}$ , the PO wants to exclude the sixth firm, but taxpayers want inclusion. The judges' criterion is identical to that of the taxpayers. Consequently, between  $r^*$  and  $r_z$ , the PO will offer a buy-off settlement of  $z$  to the sixth firm in order not to incur a protest. The payment of  $z$  is acceptable to the sixth firm and making such a payment leaves the PO better off—the net loss to the PO from including the sixth firm for values of  $r$  between  $r^*$  and  $r_z$  exceeds the cost of settlement,  $z$ . However, between  $r_z$  and  $r^{**}$  this is no longer true. The PO finds that the settlement payment exceeds the net loss derived from exclusion. Realizing that the sixth firm will protest and prevail, the PO is deterred from the inappropriate exclusion and, instead, includes the sixth firm between  $r_z$  and  $r^{**}$ .<sup>90</sup>

#### D. *Protests versus Audits*

In this section, we contrast protest oversight with the standard and more centralized approach to oversight. We imprecisely refer to centralized oversight as auditing. This label is intended to encompass review of procurements by the General Accounting Office (hereinafter "GAO") or Congressional staff, coupled with sanctions like bad publicity, funding cuts by Congressional oversight committees or sanctions by the Executive branch.

Despite uncovering occasional sensational procurement blunders in the realm of federal procurement, audits, as currently implemented, do not systematically constrain the discretion of POs. A major factor is the limited enforcement power available to auditors.<sup>91</sup> POs cannot be deterred from abuse of discretion if sanctions are insubstantial and

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90. In other work, we have posed models that explain fedmail, overdeterrence and bluffing as well. Unfortunately, these models are far more complicated and, therefore, inappropriate for presentation here. See Marshall et al., *supra* note 74.

91. Congress has the ability to monitor agency procurement decisions closely and to punish violators. Appropriation and re-authorization bills provide an opportunity to reward or punish an agency. See McCubbins et al., *supra* note 34, at 244; see also WILSON, *supra* note 53 (stating that annual authorization for expenditure is required in addition to appropriation). The powers are rarely used because of information problems faced by Congress and the conflicting incentives generated by pork barrel politics. See generally WILSON, *supra* note 47. Consequently, oversight schemes that rely on the activities of a Congressional committee are plagued by problems in establishing credible enforcement threats. See generally McCubbins et al., *supra* note 34.

improbable.<sup>92</sup> The fact of procurement blunders and scandals is itself evidence that deterrence is failing. By contrast, the GSBCA<sup>93</sup> has substantial enforcement powers.<sup>94</sup>

Even if audits were supported by sanctions comparable to protests, audits have less deterrent power because auditors are not profit motivated and are likely to be at an informational disadvantage as compared to protesters because they come to a procurement as outsiders. The informational advantages of protests mean that violations of procurement law are detected more effectively, and the profit incentive of the protesters assures more vigorous prosecution of violators.

Although audits are less potent in deterring inappropriate behavior by POs, they avoid many of the pitfalls of protests. The problem of buy-off and fedmail settlements is obviously eliminated. In addition, the problem of overdeterrence is less likely under audits for two reasons. First, the cost of an audit to a compliant PO is apt to be small. Second, the imprecision of audits in selecting cases for review undermines the logic that leads to the overdeterrence strategy. In other words, a PO does not have the assurance that specific decisions are safe from audit. Finally, there are circumstances in which no bidder will have a profit incentive to protest. In contrast, audits can correct problems such as the absence of a reserve or the over-inclusion of firms.

A different, but faulty, perspective for comparison of audits and protests is based on the observation that protests, by their very nature, are a way of regulating the input phase of the procurement process rather than the output phase. Audits can evaluate both phases and, thus, may be superior. In the private sector, if products are purchased

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92. Ironically, ADPTE procurement has seen some effective monitoring by Congress. We believe that the circumstances producing these results are unique and do not make a sufficient case for sanctions implemented by Congress directly. See KELMAN, *supra* note 1, at 141 (noting that, after criticism from the GAO, Congress cut appropriations and the INS redid a computer procurement in which the agency had settled post-award by switching the award to the protester who subcontracted with the original awardee); see also Gabig, *supra* note 49, at 37 (stating that the House Government Operations Committee has gotten 30 acquisitions suspended at its request over a four year period, even though it has no statutory authority, due, in large part, to the activities of Congressman Jack Brooks of Texas).

93. The GSBCA has been successfully insulated from the distributive politics that plague Congressional oversight. See Gabig, *supra* note 49, at 42-43 (stating that the GSBCA has broad jurisdiction and a strengthened Congressional mandate in dealing with other federal agencies. It has the authority to determine whether a procurement is subject to its jurisdiction. The Office of Management and Budget (hereinafter "OMB") cannot override GSBCA decisions concerning its jurisdiction).

94. See *infra* Section I.I.C. and accompanying notes.

that lead to diminished profitability relative to an alternative, then, regardless of the procedures used, the procurement will be deemed a failure. By analogy, it could be argued that we need to find some output-based measure like profits to assess procurement performance in the public sector, and that we should not be concerned about input-based evaluation. This argument suffers from a number of limitations. First, if a PO in the private sector was found to favor unjustly a particular vendor in a procurement, then, regardless of the ultimate profitability of the procured items, this PO would face serious penalties from his employer. Second, how does one measure output in a public sector procurement? In the private sector, if American Airlines buys a new computer system for handling bookings and reservations, it is likely to increase profits. Nevertheless, the procurement personnel who handled the acquisition might be fired since their counterparts at United Airlines bought a system for similar expense that was significantly more profitable. Since the federal government is largely engaged in the monopolistic production of public goods, there do not exist good comparative ways to assess the output performance of commodities procured by agencies. In addition, any attempts to measure output performance in a non-comparative way is likely to be subject to manipulation and misrepresentation by the procuring agency. Third, in the private sector, compensation for procurement personnel can easily be tied to the profitability of procurements—Civil Service rules are far less flexible in terms of accommodating contingent rewards for employees.

Our comparison of protests and audits suggests that protests are a more powerful oversight mechanism, but that they have more adverse side effects. Audits are apt to result in the review of more properly conducted procurements. But protests result in fedmail, buy-offs and overdeterrence.

It is also important to observe that the stylized descriptions of protests and audits do not capture possible hybrid oversight mechanisms.<sup>95</sup> We argue in section II.E.1. that supervision of protest settle-

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95. *Qui tam* suits and antitrust litigation are decentralized, share many of the advantages of protests and can be applied to cases of illegal conduct. A conspiracy between a winning bidder and a government entity or employee violates the antitrust laws, while a party aware of improprieties in a procurement generating false claims against the government may initiate a *qui tam* suit. See, e.g., *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053 (1986); *F. Buddie Contracting Inc. v. Seawright*, 595 F. Supp. 422 (N.D. Ohio 1984); *Municipality of Anchorage v. Hitachi Cable Ltd.*, 547 F. Supp. 633 (D. Alaska 1982). Attempts to influence POs to buy certain products may be anti-



ment reduces the harm from buy-offs and fedmail. Similarly, the poor selection of cases by audit could be improved by making the auditor responsive to complaints by bidders.<sup>96</sup> Finally, it may be appropriate to use audits and protest simultaneously. The auditor could minimize the side effects from the protest process by reversing inappropriate settlements, over-inclusion and the lack of use of a reserve.

## II. THE PROTEST EXPERIENCE IN THE FEDERAL COMPUTER MARKET

### A. Introduction

In 1984 the Competition in Contracting Act (hereinafter "CICA")<sup>97</sup> was passed. It provided aggrieved firms in federal

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trust violations. *See, e.g.*, *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981); *George Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). A violation of a federal or state antitrust law creates grounds for debarment. *See* 48 C.F.R. § 9.406-2(a)(2) (1988). Protests may have limited success in correcting and punishing corruption, *see supra* text accompanying notes 51-52, since award and exclusion decisions that are motivated by corruption are likely to result in a protest. However, the use of whistleblowers is likely to be more effective because employees of the offending firms will have better information than a firm's competitors. Reports to the Inspector General or the Justice Department by consultants or employees of the firm making an unethical offer seem to be the most effective means to correct this type of procurement problem and to punish those involved. *See Kovacic, supra* note 75, at 7-8. Companies implicated in Operation Ill Wind must submit a Competitive Information Certificate to the DOD before the award of new contracts over \$100,000. They must promise not to discuss prices with competitors. Bribery is prohibited by 18 U.S.C. section 201(b) and procurement fraud by 18 U.S.C. section 1031. The government has tried to create incentives for individuals to act as whistleblowers by providing financial incentives for them to file *qui tam* suits via the False Claims Act of 1986. *See United States ex. rel. Butenkoff v. Industrial Tectonics, Inc.*, 52 Fed. Cont. Rep. (BNA) 8 (E.D. Mich. 1989) (a *qui tam* plaintiff received \$1,427,900 when the government settled a claim with a defense subcontractor who had overcharged the government). The amount is 10% of the government's settlement with the firm. *See Kovacic, supra* note 75, at 14. *Qui tam* actions arise under the False Claims Act, 31 U.S.C. § 3729. The government can intervene and assume responsibility for prosecuting the action, in which case the citizen gets 15-25% of all funds recovered. If there is no intervention, the citizen gets 25-30% of the funds recovered. *See id.* at 14.

96. The auditor cannot rely on reports by losing or excluded bidders without some mechanism in place to deter frivolous complaints. One possibility is to have firms post bonds with the auditor when they want an investigation. If the auditor finds that the procurement has been conducted in a manner consistent with surplus maximization, then the bonds would be forfeited to the government. Otherwise, the procurement would be revised in light of the problems discovered by the auditor, and the bond would be returned to the firm that posted it. Such a scheme has three clear advantages. First, it exploits the inside information possessed by firms that are involved with a procurement. Second, it eliminates the possibility of fedmail since, presumably, the auditor will not accept cash payments to suspend an investigation. Third, it eliminates the possibility of buy-off settlements by the procuring agency or named awardee.

97. 41 U.S.C. § 403 (1988).

procurements of automated data processing and telecommunication equipment (hereinafter "ADPTE") the right to protest decisions of the procuring agency to the General Services Administration Board of Contract Appeals (hereinafter "GSBCA").<sup>98</sup> The protest process at the GSBCA has had a significant impact on ADPTE procurements over the past eight years. The Request for Proposals (hereinafter "RFPs") and Invitation for Bids (hereinafter "IFBs") that are issued now for federal ADPTE procurements are far less restrictive than they were eight years ago, permitting larger numbers of firms to participate.<sup>99</sup> Questionable practices of POs, such as favoring particular vendors or biasing product evaluation towards excessively high technology items, have been both deterred and corrected by the GSBCA protest process.<sup>100</sup> In addition, GSBCA protests have provided the makers of new or unique products, whose exclusion from federal ADPTE procurements was often a *fait accompli*, a means to gain access into the federal ADPTE market.<sup>101</sup>

In Part II of this Article, we provide evidence that decentralized oversight has been successful in the case of federal computer procurement. In sections II.B., II.C. and II.D., we discuss the relevant procurement and protest law and the actual impact of protests. In section II.E., we evaluate four issues in protest law and make recommendations informed by the theoretical analysis in Part I. The issues concern alleviation of protest costs, bidder collusion, standing to protest and the role of intervenors in the protest process. The role of protest cost allocation is shown to be significant in minimizing the problems of overdeterrence and fedmail, and in achieving an optimal level of deterrence. Furthermore, the regulation of protest settlements is analyzed as a tool for decreasing buy-offs. We analyze the GSBCA protest process as a mechanism for facilitating bidder collusion and argue that it might provide a means for punishing deviant behavior within a bidder coalition or a legal means to make cash side-payments within a cartel. A second issue is the recent decision by the

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98. Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2713, 98 Stat. 494, 1182-84 (1984).

99. Sandra Sugawara & Elizabeth Tucker, *Companies' Contract Appeals Clog Government Purchasing*, WASH. POST, Jul. 16, 1988, at A10 (stating that "[protests] allow[] small businesses to compete on equal ground [with large ones].").

100. Bruce Adkins & Jack Daley, *Strategies for Business Development in the Federal Marketplace*, 31 IEEE TRANSACTIONS ON PROF. COMM. 57 (1988). "[T]he process of getting business and remaining an incumbent is getting more difficult." *Id.* at 59.

101. See Sugawara & Tucker, *supra* note 99.

Federal Circuit to restrict standing in certain GSBICA protests to only second-ranked firms.<sup>102</sup> We find that this ruling is not sensible outside of a very restrictive setting that is unlikely to hold in practice. Furthermore, the negative aspects of this ruling are wide ranging and potentially severe. For example, it encourages a particular kind of bidder collusion that could effectively defeat protests as a mechanism of procurement oversight. Lastly, we find that allowing multiple protesters plays a positive role in facilitating procurement oversight by inhibiting cash and in-kind settlement. The presence of intervenors in a protest is more likely to result in settlements that involve corrections in the procurement. In section II.F., we address the concern that protests stifle the legitimate use of good business judgment by POs.

### B. Procurement Law

Guiding an ADPTE procurement from its inception to contract award is a daunting task for federal contracting offers. The procurement process is hedged in by a dense thicket of statutes and regulations.<sup>103</sup> To impress upon the reader the complexity of ADPTE procurement law, we provide a brief guide to its main features.<sup>104</sup>

Basic federal procurement law has its genesis in the Armed Services Procurement Act of 1947<sup>105</sup> and the Federal Property and Administration Services Act (hereinafter "FPASA").<sup>106</sup> These statutes authorize the various methods used to procure ADPTE. All procurements must also comply with the Federal Acquisition Regulations (hereinafter "FAR")<sup>107</sup> and relevant ancillary regulations such as the Defense Federal Acquisition Regulations Supplement (hereinafter "DFARS").

Besides these general procurement provisions, federal computer procurement is governed by a variety of special statutes and regula-

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102. See *United States v. International Business Machs. Corp.*, 892 F.2d 1006 (Fed. Cir. 1989).

103. The government has recognized the difficulty of computer procurement and has embraced a Wild West metaphor by establishing the Trial Boss program to train ADPTE procurement specialties. Kelman, *supra* note 1, at 91.

104. For a more thorough treatment of this subject, see RALPH C. NASH & JOHN CIBINIC, *FORMATION OF GOVERNMENT CONTRACTS* (2d ed. 1986).

105. 10 U.S.C. § 2301 (1988).

106. 41 U.S.C. § 302 (1988).

107. The FAR covers all phases of procurement. For our purposes we are particularly interested in its rules governing competitive negotiations, the primary method of procuring ADPTE. For a description of competitive negotiations see *infra* notes 122-27 and accompanying text.

tions. The Brooks Act, enacted in 1965 as an amendment to the FPASA, was passed to assure the "economic and efficient" procurement of ADPTE by federal agencies.<sup>108</sup> All computer supplies and services, as well as telecommunications equipment, fall into the ADPTE category.<sup>109</sup> Under the Brooks Act, the General Services Administration (hereinafter "GSA") has sole authority to procure ADPTE for government agencies.<sup>110</sup> The GSA may procure the ADPTE directly or grant the authority back to the individual agencies at its discretion.<sup>111</sup>

The Brooks Act has undergone several adjustments in its twenty-five year history, the most important of which involved the ability for certain agencies to exempt themselves from the ADPTE purchasing requirements. The Warner Amendment, passed in 1981, exempted certain Defense Department purchases from the Brooks Act provisions.<sup>112</sup> Only DOD procurements "critical to the direct fulfillment of military or intelligence missions" of the United States, or in which the ADPTE exists as "an integral part of a weapon or weapons system," are exempt.<sup>113</sup>

In addition to the Brooks Act, ADPTE procurements are subject to the Federal Information Resources Management Regulations (hereinafter "FIRMR"). "The FIRMR system is established to publish and codify uniform policies and procedures pertaining to information resources activities by Federal or executive agencies (as applicable), and by Government contractors as directed by agencies."<sup>114</sup> Yet, because large segments of ADPTE procurements are not specifically addressed by the FIRMR, the general FAR system and its supplements still exist as the primary body of regulations covering ADPTE

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108. Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified at 40 U.S.C. § 759(a) (1982)). The Brooks Act was created mainly because different agencies had been purchasing non-compatible equipment, and the government wanted to ensure compatibility and lower costs for the increased business of buying expensive ADPTE. See PETER S. LATHAM, *GOVERNMENT CONTRACT DISPUTES* 3 (2d ed. 1986).

109. See Gabig, *supra* note 49, at 34.

110. The GSA was also given power to provide the government with adequate management information, to achieve optimal utilization through shared use of equipment, and to gain economic advantages through volume purchasing of the expensive computer machinery and software. See LATHAM, *supra* note 108, at 20-22.

111. *Id.* at 3.

112. See, e.g., 10 U.S.C. § 2314 (1988).

113. See *id.* § 2315(a). In 1986, the exclusions granted to the DOD via the Warner Amendment were also interpreted to prevent GSBICA bid protest jurisdiction over those exempted activities. See 40 U.S.C. § 759(a)(2)(A)-(3)(D) (1988).

114. 41 C.F.R. § 201-1.101(b) (1991).

procurement.

A recent statutory addition to procurement law is the Competition in Contracting Act. Following scandals in defense procurement uncovered in Congressional hearings,<sup>115</sup> CICA was introduced to encourage "full and open competition" in federal procurement.

In the case of ADPTE procurement, CICA created a protest forum at the GSBCA that has effectively guaranteed the promise of open competition.<sup>116</sup> CICA gave the GSBCA jurisdiction to hear and decide protests involving procurements attained under the Brooks Act, 40 U.S.C. section 759(h).<sup>117</sup> As indicated by the legislative history, Congress recognized that CICA's grant of bid protest jurisdiction to the GSBCA "provide[s] a unique and innovative method of handling protests of a highly technical and complex nature."<sup>118</sup> Congress also believed that "the Board is well equipped to provide timely resolution of conflicts between the procuring agency and the supplier of computer products and services."<sup>119</sup>

To implement a particular ADPTE procurement, an agency must secure funds from Congress and permission from the GSA. That permission is granted as a delegated procurement authority, and is referred to as a DPA. Next, the procuring agency identifies its demand for computational or telecommunication services and chooses a procurement method. Two methods about which we have relatively little to say in this Article are purchases from the GSA schedule and sole source procurement. For small and routine procurements, an agency can order ADPTE from a vendor at a price listed in a schedule maintained by the GSA.<sup>120</sup> At the other extreme, certain highly special-

115. In the House Hearings on the Competition Act of 1984, Representative Horton questioned a DOD official about a \$13 allen wrench for which DOD was billed \$9,606.

116. See *infra* Section II.D. and accompanying notes.

117. This grant of authority was a three-year test program due to expire in 1988, but the GSBCA's authority over these protests has now been permanently granted. See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500 § 831, 100 Stat. 1783-335 (1986).

118. H.R. REP. NO. 861, 98th Cong., 2d Sess. 1431, *reprinted in* 1984 U.S.C.C.A.N. 1445, 2119.

119. *Id.*

120.

GSA schedule prices characteristically are lower than the vendor's published commercial catalogue prices. In fact, private sector customers frequently use GSA schedule prices as a desired target price when negotiating with the respective vendor. In recent years, the GSA has become increasingly aggressive about obtaining 'most favored customer' prices from vendors.

Gabig, *supra* note 49, at 48. It is appropriate for an agency to place multiple orders on the schedule to evade the maximum order limitation and CICA requirements. See *id.* at 49.

ized and often expensive ADPTE items are procured in sole source negotiations because of the availability of only a single potential supplier.<sup>121</sup> The decision to implement sole source procurement or to buy from the GSA schedule can be protested,<sup>122</sup> but most protests involve the implementation of a procurement rather than the choice of method. Thus, for our purposes, in studying the protest of award decisions, we are most concerned with competitive procurement conducted as Invitations for Bids or Requests for Proposals.<sup>123</sup>

An IFB (also known as sealed bidding or advertising) begins with an announcement of mandatory specifications that must be satisfied by the ADPTE offered in a bid. Bidders must restate each specification and explain how the proposed equipment and services meet the needs outlined in the solicitation.<sup>124</sup> An award is then made to the vendor offering the lowest price in a sealed bid competition and satisfying the specifications. IFBs are used when the items to be procured may be evaluated on just price-related factors. Furthermore, specifications must be sufficiently clear that discussions and clarifications are unnecessary.<sup>125</sup> Finally, more than one bid must be reasonably expected.<sup>126</sup>

The standard form for the more complex and higher-valued negotiated procurement is the RFP (also called competitive negotiation).<sup>127</sup> As with IFBs, the government announces mandatory speci-

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121. Other procurement options exist. The FAA procurement of mainframe computers for air traffic control consisted of a design competition followed by price bids as directed by OMB Circular A-109. See KELMAN, *supra* note 1. Another alternative is the Request for Quotations [hereinafter "RFQ"]. See *id.*

122. CICA has been successful in discouraging inappropriate sole source procurement. See *supra* Section I.C.1. and accompanying notes.

123. Before CICA, there was a presumption in favor of sealed bidding, but under CICA, only an IFB or RFP constitutes full and open procurement. See KELMAN, *supra* note 1, at 17.

124. Every characteristic of the proposed equipment must be documented, either with specifications sheets, product brochures or manuals.

125. In *Federal Sys. Group, Inc.*, GSBICA No. 9548-P B.C.A. (CCH) ¶ 93,454 (1988), the GSBICA ruled that the contracting officer may waive minor informalities in a winning bid as long as it is fully responsive to the IFB. This reduces the burden of the "no discussion" requirement.

126. Regulations call for an IFB (1) when time permits, (2) when the award is made on price and price-related data, (3) when no need to discuss the bids exists, and (4) when the government has a reasonable expectation of receiving more than one bid. See Steven W. Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions*, 17 PUB. CONT. L.J. 211, 216 (1987).

127. Most ADPTE procurement is conducted via RFPs. See Gabig & Bean, *supra* note 24, at 553-68.

fications for the ADPTE and potential vendors submit bids. Unlike a response to an IFB, a proposal submitted by a firm is not necessarily its final bid.<sup>128</sup> Often, the agency conducts written or oral negotiations with all responsible offerors within a competitive range that is determined by the procurement official.<sup>129</sup> During this time, the procurement official gives the bidders an opportunity to correct deficiencies and clarify ambiguities.<sup>130</sup> Firms in the competitive range revise their bids and submit their Best and Final Offers (hereinafter "BAFO"s).

In RFPs, bids are usually evaluated on quality as well as cost measures.<sup>131</sup> Typically, the RFP will enumerate certain desirable specifications and assign points to offers containing those features. A winning bid is often determined by summing the points received by each proposal for technical merit and then choosing the proposal offering the best value in terms of cost and quality.<sup>132</sup> Our description of these evaluation criteria is necessarily vague because the FAR allows a fair amount of discretion in creating them. We will refer to a common evaluation procedure that specifies precise weights for cost and different quality attributes as a scoring function.<sup>133</sup>

The formulation of the specifications in both IFBs and RFPs is a difficult process, often requiring substantial communication between potential bidders and the agency. Vendors approach the procurement

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128. The information in these offers is kept secret by the PO. See Feldman, *supra* note 126, at 218.

129. Bidders outside the competitive range are notified of rejection. See *id.*

130. The agency is specifically precluded from giving any information about competitors' bids in these negotiations, including the current rank of the bids. See ALSTON, *supra* note 15, at 59. The PO is prevented from engaging in "auctioning" during negotiations. This means that he can neither indicate to the vendor that a certain cost or price must be offered to obtain further consideration of the vendor's proposal nor disclose a vendor's relative price standing. See Gabig & Bean, *supra* note 24, at 575.

131. Federal Acquisition Regulation, 48 C.F.R. §§ 15.406 and 15.605 describe binary and value RFPs. In the binary case, the low bid wins, while in the value case, highest surplus wins. In less complex RFPs, a bidder states both price or cost and assent to the government specifications, then ordinarily the contract is awarded to the low bidder. See ALSTON, *supra* note 15, at 217.

132. See Joseph J. Petrillo, *Cost Loses Heavyweight Status in Decisions*, 10 GOV'T COMPUTER NEWS 62 (1991) (stating that the GSA once required scoring functions to assign 70% of the weight to cost, but that this requirement has been dropped, and the importance of cost among award criteria has been declining).

133. Point scoring is not required by the FAR and, if it is used, exact weights are not required. However, the evaluation criteria had exact weights on cost versus quality in six of Kelman's nine case studies. In the other three, exact weights were provided on the attributes determining quality, but not on cost versus quality. See KELMAN, *supra* note 1, at 56.

officials at the agency in an attempt to inform them about their products and demonstrate the quality of the match between their products and the agency's demand for computational services. Vendors also contact the POs at the procuring agency to ask clarifying questions regarding the RFP or IFB. If the questions indicate an unanticipated problem with the procurement, alterations are made to the RFP or IFB. These changes are announced publicly by the procuring agency. If a potential bidder determines that the solicitation contains specifications that hurt its chances of success, it may petition the contracting officer to relax the specifications. The firms may submit as many questions about the solicitation as they wish, as long as the contracting officer receives them before the due date. Usually, the contracting officer will provide copies of all questions and answers to all prospective bidders and, often, these questions result in amendments to the solicitation.

POs exercise substantial discretion in determining specifications and evaluation criteria. The specifications announced in an RFP or IFB have a crucial impact on the economic efficiency of a procurement. By establishing mandatory specifications, the government induces a minimal list of attributes that a viable vendor must offer in a proposal. The more rigorous the specifications, the smaller the number of potential bidders. Furthermore, the specifications, as a reflection of the PO's perception of the government's needs, establish the cost-quality trade-off that the government is willing to make.

Despite the apparent rigidity of the award process where a scoring function is used, POs have a fair amount of latitude at the evaluation stage. Quality assessments may be subjective when attributes such as user-friendliness are being considered. Furthermore, the benchmark testing that is often used to evaluate the technical claims of vendors may be quite subjective.<sup>134</sup>

### C. *The Protest Process*

In this section, we describe protest law with an eye toward the use of protest as an oversight mechanism designed to rein in agency problems. The first avenue for relief for the aggrieved bidder exists through an informal protest to the contracting officer.<sup>135</sup> In-house

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134. A PO may test just the winning bidder or all bidders in the competitive range. See Gabig & Bean, *supra* note 24, at 578-79.

135. Few agencies have enacted formal protest procedures. Usually, a protester files a grievance with a contracting officer who then advises all parties relevant to the matter and



protests before the contract award are relatively easy to process and resolve; in most instances, specific regulations exist to correct mistakes and biases in the award process.<sup>136</sup> Often, a protest brought informally to the agency can achieve greater results than any of the formal protest mechanisms.<sup>137</sup> As Professors Nash and Cibinic write:

One of the advantages of protesting within the agency is that the matter is usually reviewed at a level higher than the contracting officer. In addition a legal review normally occurs so that decisions based upon improper interpretation of statutes or regulations can be corrected. Generally, there are no restrictions preventing the agency from granting requested relief following such review.<sup>138</sup>

If the aggrieved bidder decides to pursue the matter through more established forums, three formal alternatives exist: the federal courts; the GAO; or the GSBICA. We first examine the opportunities to protest in the federal courts at the Claims Court and in the district courts. The Claims Court is available for pre-award protests and the district courts for post-award protests.<sup>139</sup> Neither are very satisfactory as oversight tools because of conservative standards of review and narrow standing rules.

Although the Court of Claims was responsible for hearing disputes between the federal government and its contractors, it was not hospitable to bid protest claims. So, in 1982, Congress enacted the Federal Courts Improvement Act (hereinafter "FCIA"),<sup>140</sup> which opened the door a crack to bid protest cases at the successor to the Court of Claims.<sup>141</sup> FCIA created the new Claims Court and gave

receives responses to the facts of the award and the protest. Upon resolution of these informal procedures, the contracting officer can either decide the matter, forward the case to his or her superiors within the agency or refer it to the GAO and the Comptroller General.

136. See, e.g., Federal Acquisition Regulation, 48 C.F.R. § 33.103 (1990).

137. Normally, a protest should begin informally at the agency level. This has the advantage of reducing ill-will and avoiding the red tape of a formal protest. See Gabig, *supra* note 49, at 38.

138. NASH & CIBINIC, *supra* note 104, at 1008.

139. There is no standing to challenge lock-out specifications in federal district court before an award. See *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir. 1981). To get equitable relief in the Claims Court, a party must file before an award to have standing. See Gregg A. Day, *The Bid Protest Jurisdiction of the United States Claims Court: A Proposal for Resolving Ambiguities*, 15 PUB. CONT. L.J. 325 (1984).

140. Pub. L. No. 97-164, 96 Stat. 25 (1982).

141. Courts initially allowed the waiver of sovereign immunity only for monetary damages through section 1491(a)(1). In *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956), the court allowed preparation costs to unsuccessful bidders upon showing of improprieties and bad faith by the government; see also *Keco Indus., Inc. v. United States*,

the forum sovereign immunity for cases under its jurisdiction and the ability to grant equitable relief under limited circumstances.<sup>142</sup> Claims Court jurisdiction has been given to those standing in a contractual relationship with the government: "Jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . . ."<sup>143</sup> The scope of section 1491(a)(3) was quickly delineated by the circuit court in *United States v. John C. Grimberg Co.*<sup>144</sup> Chief Judge Markey stated that the term "contract claim" in subsection (a)(3) (of the FCIA) "indicates reliance on an implied contract to have the involved bids fairly and honestly considered . . . ."<sup>145</sup> Thus, a bid protest action could now be entertained in the Claims Court if an implied-in-fact contract existed between the government and the unsuccessful bidder, despite previous standing problems.

The FCIA and *Grimberg* represent minimal progress in creating an effective bid protest forum at the Claims Court. Compared to the GSBICA protest process,<sup>146</sup> both standing<sup>147</sup> and remedies<sup>148</sup> are limited. More importantly, review is restricted by the arbitrary or capricious standard.<sup>149</sup>

492 F.2d 1200 (Ct. Cl. 1975). Yet, before 1982, section 1491(a)(1) did not waive sovereign immunity for equitable relief. See *United States v. King*, 395 U.S. 1, 4-5 (1969). Thus, the bid protest action, which calls for equitable adjustment, was not allowed in the Court of Claims despite the existence of a contractual relationship between the parties.

142. 28 U.S.C. section 1491(a)(3) (1983) empowered the new court with "exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief."

143. 28 U.S.C. § 1491(a)(1) (Supp. V 1981).

144. 702 F.2d 1362 (Fed. Cir. 1983).

145. *Id.* at 1367.

146. See *supra* notes 110-24 and accompanying text.

147. The Claims Court has elaborated on the Federal Circuit's *Grimberg* analysis and enunciated several prerequisites for an equitable claim that arises out of the contractual nature of relief contemplated by the FCIA. For example, the plaintiff must have actually bid on the proposed project, see *Indian Wells Valley Metal Trades Council v. United States*, 1 Cl. Ct. 43 (1982), the bid must actually be submitted to the government to complete the implicit contractual relationship, see *Hero, Inc. v. United States*, 3 Cl. Ct. 413 (1983) (holding that mere expenditure of effort and money in preparation for a bid without actual submission will not suffice), and the submitted bid must be in response and must conform to the essential requirements of the solicitation. *Yachts America v. United States*, 3 Cl. Ct. 447 (1983); see also Coburn, *The Decline of the Bid Protest Remedy in the Federal Courts Since the Federal Courts Improvement Act of 1982*, 19 NAT'L CONT. MGMT. J. 1,6 (1985) (footnote omitted) (reprinted in 23 Y.B. PROCUREMENT ARTICLES 285-93 (1986)).

148. The Claims Court will not direct an award as a remedy. See *Day*, *supra* note 139, at 325.

149. The Claims Court does not have jurisdiction when the issue is whether or not the

The district courts have implemented a broader interpretation of standing requirements for bid protest actions than has the Claims Court. In these courts, any person adversely affected or aggrieved by an agency action may sue for equitable relief. The jurisdictional basis for determining who may sue in the district court falls under the Administrative Procedure Act.<sup>150</sup> Although standing is more broadly guaranteed by the district courts,<sup>151</sup> the same deferential standard of review used by the Court of Claims applies to the district courts.<sup>152</sup>

The General Accounting Office (hereinafter "GAO"), created in 1921 by the Budget and Accounting Act,<sup>153</sup> functions to review and control expenditures by the Executive branch.<sup>154</sup> Based on this mandate the Comptroller had inferred the authority of the GAO to consider bid protests. Uncertainty regarding the GAO's bid protest authority continued until 1984, when specific authority was codified by the passage of CICA.<sup>155</sup> Although CICA strengthened the GAO as a pro-

solicitation was written fairly. *See* *Ingersoll-Rand Co. v. United States*, 2 Cl. Ct. 373 (1983) (holding that "[t]he jurisdiction of the court under section 1491(a)(3) is limited to situations where a bid complies with the terms of a bid invitation but is, nevertheless, not fully or fairly considered . . . . Since our injunctive authority turns upon the existence of a contractual authority . . . a duty owed by virtue of statute or regulation cannot . . . justify the exercise of that authority."); *see also* *Hero, Inc. v. United States*, 3 Cl. Ct. 413 (1983) (non-bidder challenged an IFB that failed to comply with statutes and regulations, but the Claims Court found no jurisdiction).

150. 5 U.S.C. § 702 (1991). In the landmark case of *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), an unsuccessful contractor who lost an award had jurisdiction for the first time to seek equitable relief through judicial channels. The *Scanwell* court avoided infringing on the Claims Court's turf by noting that "[t]he 'exclusive jurisdiction' vested in the Claims Court applies only to actions founded upon a 'contract claim.' *Scanwell* actions are not based on such claims; rather, they are founded upon an alleged violation of Section 10 of the Administrative Procedure Act." Richard A. Smith, *Government Contracts: Contesting the Federal Government's Award Decision*, 20 NEW ENG. L. REV. 31, 35 (1984-85) (footnotes omitted) (reprinted in 22 Y.B. PROCUREMENT ARTICLES 443-71 (1985)); *see also* *Spectrum Leasing Corp. v. United States*, 764 F.2d 891 (D.C. Cir. 1985) (holding that, in contract actions, the APA cannot confer jurisdiction on the district courts where the claim falls outside concurrent jurisdiction). Thus, the district courts, through the elaboration of the *Scanwell* analysis, have allowed only equitable relief through permanent injunctions or declaratory judgments as the proper remedies for aggrieved bidders.

151. Recall that district court jurisdiction is limited to agency acts during the evaluation and award process.

152. *See* *Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

153. 31 U.S.C. §§ 711-20 (1991). The Act authorizes the Comptroller General to settle all claims and accounts of the United States and to determine the legality of expenditures for a variety of contracts entered into by the government.

154. *See id.*

155. Under CICA, the GAO retained most of its previous jurisdictional power, but remained limited to pursuing claims and accounts within its express settlement authority and to bid protest involving federal agencies. CICA halted the gradual erosion of GAO's power

test forum, it also created a rival forum in the GSBCA. The new rival has been successful in displacing the GAO as the main forum for ADPTE protests. Several factors militate against GAO forum selection, most notably the success rate for protests,<sup>156</sup> the informal procedures utilized for protest actions<sup>157</sup> and the limited remedial power derived only through advisory opinions.<sup>158</sup>

CICA provided aggrieved firms participating in federal procurements of ADPTE with the right to protest decisions of the procuring agency to the GSBCA.<sup>159</sup> Unlike the GAO or in-house protest forums, the GSBCA has discovery procedures and significant enforcement powers. Furthermore, the method of review at the GSBCA is *de novo*,<sup>160</sup> while the other forums typically view the discretionary decisions of procurement personnel as exempt from challenge.<sup>161</sup>

The standing rules at the GSBCA are more permissive than those at other protest forums. CICA allows any interested party to file its protest against an award of an ADPTE contract to the GSBCA. The Board has proved to be much more liberal than the GAO in the interpretation of an "interested party." In the GSBCA case 9338-P,<sup>162</sup> the board allowed a protest by a bidder in less than second-

in government contract claims to the individual boards of appeal.

156. Cancellation was rarely used by the GAO. In 1981, it heard 613 post-award protests and ordered cancellation only ten times. *See Day, supra* note 139, at 365. Based on fiscal year 1983 decisions rendered on their merits, protestors had a success rate of 14.4% before the GAO. Post-CICA, in fiscal year 1985, the GAO protester success rate was 18.7%. *See Gabig, supra* note 49, at 39.

157. Richard J. Webber, *Bid Protests and Agency Discretion: Where and Why do the GSBCA and GAO Part Company?*, 18 PUB. CONT. L.J. 1, 22 (1988) (contending that, "[p]rocedurally, the ability of a protester in the Board [GSBCA] to utilize the various avenues of discovery—interrogatories, production of documents, depositions and admissions—greatly improves the chances of success [relative to the GAO].").

158. *See W. NOEL KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL* 269 (1990).

159. Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2713, 98 Stat. 1175, 1182 (1984).

160. Lanier Business Products, Inc., 85-2 BCA ¶ 18,033 at 90,946; *see also* Webber, *supra* note 157, at 3-4.

161. As noted by the GSBCA in its first decision, "presumptions of agency correctness as sometimes applied at the GAO in the course of deciding protests cannot be permitted here." Lanier Business Prods., Inc., GSBCA No. 7702-P, 85-2 B.C.A. (CCH) ¶ 18,033 at 90,466 (1985); *see also* John R. Tolle, *A Review of the First Year of ADP Bid Protests at the GSBCA*, 16 PUB. CONT. L.J. 120, 136 (1986) (stating that the Board determines *de novo* whether an agency has violated a statute, regulation or DPA by a preponderance of the evidence. The GAO, district courts, and the Claims Court uphold agency decisions unless there is an abuse of discretion.).

162. ATs, Inc., GSBCA No. 9338-P, 88-1 B.C.A. (CCH) ¶ 20,467 at 92,900 (1988).

place standing, while in GAO case B-229836,<sup>163</sup> a protest by a third-place bidder was not permitted.<sup>164</sup>

The timing of protests is strictly controlled by the Board. Protests concerning the restrictiveness of specifications, the nature of the scoring function or other issues concerning the method of procurement must be filed within ten working days from when they become apparent.<sup>165</sup> Of course, protests addressing the evaluation and award process must occur post-award. There are important legal and economic differences, as we note below, between pre- and post-award protests.

In addition to filing a protest, any interested party can intervene on the side of the protester or on the side of the government. In post-award protests, awardees will often intervene on the side of the agency to protect their award. Any offeror that intervenes on the side of the protester and that has the same basis as the protester for involvement is entitled to the same benefits from a successful protest as the original protester.<sup>166</sup>

The remedies available to protesters at the GSBICA are varied and substantial. Once a protest is filed with the GSBICA, the procurement is suspended<sup>167</sup> upon the timely request of the protester until the Board reaches a decision (less than 45 days) or the case is withdrawn.<sup>168</sup> If a protest is not withdrawn and goes to the Board for a decision, a number of results are possible. The Board can dismiss the protest, finding in favor of the procuring agency. If the Board upholds the protest, the protester will often be reimbursed for bid prepara-

163. System-Analytics Group Corp., Comp. Gen. B-229836, Gov't Cont. Rep. (CCH) ¶ 101,819 (1988).

164. The standing rules at the Board have been narrowed recently by decisions of the Federal Circuit. See *infra* Section II.E.3.

165. See Tolle, *supra* note 161, at 128 (pointing to the fact that Board Rule 5(b)(3)(i) states that "a protest based on solicitation improprieties must be filed before the closing date for initial proposals.").

166. See LEONARD SUCHANEK & JOSEPH VERGILIO, PROTESTS AT THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS 18 (1989).

167. See Steven W. Feldman, *Interim Suspension Authority of the General Services Board of Contract Appeals in Automatic Data Protests: Legal and Practical Considerations*, 17 PUB. CONT. L.J. 1, 12 (1987) (stating that the GSBICA will impose a suspension of the procurement for a pre-award protest unless the government can show that a vital national interest is at stake; mere showing of expense and delay is not enough). Thus, the GSBICA has the power to suspend contracts temporarily, unless the government can show "urgent and compelling circumstances" that significantly affect the interests of the United States. See LATHAM, *supra* note 108, at 20-24.

168. See SUCHANEK & VERGILIO, *supra* note 166, at 3.

ration expenses and legal fees from the Permanent Indefinite Judgment Fund (hereinafter "PIJF").<sup>169</sup> In addition, the Board can order that the RFP or IFB be altered to bring it into compliance with procurement statutes and regulations.<sup>170</sup> In the case of a post-award protest, the Board can direct the award to the protester, or it can order the procuring agency to set aside the award decision and start the evaluation of the bids anew.<sup>171</sup> Even if the government cancels a procurement, the Board can order a re-solicitation and still judge the protest.<sup>172</sup> Alternatively, the Board can declare the procurement to be so seriously flawed that it must be restarted from scratch.<sup>173</sup> With respect to the procuring agency, the Board may or may not require it to reimburse the PIJF for payments made to a successful protester.<sup>174</sup> While the GSBICA does not have contempt power to enforce its rulings, the GSA has authority over all Brooks Act procurements. If the Board deems that the procuring agency has consciously acted in a manner that is counter to the interests of taxpayers (and procurement law), then it will often suspend the Delegated Procurement Authority (DPA) of the agency, requiring the agency to obtain pre-authorization of all procurement decisions from the GSA.<sup>175</sup>

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169. See *id.* at 8; see also *Federal Data Corp. v. SMS Data Prods. Groups*, 819 F.2d 277 (Fed. Cir. 1987) (stating that the Board does not award bid preparation costs unless the government's action caused the firm to incur the costs unnecessarily); *Bedford Computer Corp.*, GSBICA No. 9837-C (9742-P), 90-1 B.C.A. (CCH) ¶ 22,377 (1989) (stating that "[c]osts are not appropriate in cases involving minor technicalities.").

170. See *Memorex Corp.*, GSBICA No. 7927-P, 85-3 B.C.A. (CCH) ¶ 18,289 (1985); *Genasys Corp.*, GSBICA No. 8734-P, 87-1 B.C.A. (CCH) ¶ 19,556 (1986). The Board can also compel an agency to rewrite a specification or cancel a procurement and begin anew. See *Sugawara & Tucker*, *supra* note 99.

171. See *Computer Data Sys.*, GSBICA No. 9217-P, 88-1 B.C.A. (CCH) ¶ 20,400 (1987) (stating that "directed awards are an exceptional form of relief . . ."); see also *SMS Data Prods. Group, Inc.*, GSBICA No. 10864-P, 91-1 B.C.A. (CCH) ¶ 23,464 (1990). The Board will direct awards only where there are two competitors and the protester would have received the award but for the violation. See *id.*

172. See *Tolle*, *supra* note 161, at 126.

173. See *Memorex Corp.*, GSBICA No. 7927-P, 85-3 B.C.A. (CCH) ¶ 18,289 (1985).

174. 40 U.S.C. § 759 (f)(5)(1988). See, e.g., *Rocky Mountain Trading Co.-Sys. Div.*, GSBICA No. 10047-C (10027-P), 91-2 B.C.A. (CCH) ¶ 23,796 (1991) (Agency's DPA revised to require it to reimburse the PIJF).

175. See *Computer Mktg. Corp.*, GSBICA No. 8131-P, 86-1 B.C.A. (CCH) ¶ 18,592 (1985); see also *Tolle*, *supra* note 161, at 153 (stating that after an agency cancelled a procurement, the Board modified the DPA for the following year. If the agency wanted to purchase ADPTE, it would have to get special permission from the GSA.). See *Gabig*, *supra* note 49, at 36 (stating that the DPA gives the GSA considerable power over agency procurements; therefore, threats of revocation are taken seriously).

#### D. *The Impact of Protests*

In this section, we bring together our analysis of agency problems, knowledge of the ADPTE procurement process, and evidence of changes in that process since 1984 to evaluate the success of protests. We examine different stages of the procurement process at which POs exercise discretion and indicate which agency problems might compromise that discretion. We then look to the cases and other evidence to see when protests are successful in correcting or deterring malfeasance.

At the very outset of the procurement process, an agency determines, and Congress ratifies, a strategy for satisfying an agency's demand for ADPTE services. For example, in *Masstor Systems Corp.*, NASA decided that it needed a "mass storage system to be used as a node on [a] local area network . . . ."<sup>176</sup> This sort of judgment is beyond the scope of the protest process.<sup>177</sup> Unfortunately, however, the quantity and variety of ADPTE products that an agency will purchase may be affected by a technology bias. Taxpayers must look to Congress and the Administration to oversee these global budget decisions.

Once the purpose of the acquisition has been determined, the contracting and technical officers draft an RFP (or other solicitation) stating mandatory specifications. This is the first stage at which protests become relevant. All three of the agency problems may lead to overly restrictive specifications. In the case of favoritism, the terms "wired" or "lock-out" are used to describe specifications that are written to favor a particular firm.<sup>178</sup> Given the complexity of ADPTE, a PO<sup>179</sup> operating with a technology bias or appropriability

176. *Masstor Sys. Corp.* GSBGA No. 8669-P, 87-1 B.C.A. (CCH) ¶ 19,435 (1986).

177. In *Data Gen. Corp. v. United States*, 915 F.2d 1544 (Fed. Cir. 1990), *cert. denied sub nom.* *SMS Data Prods. Group, Inc.*, 111 S.Ct 2011 (1991), the Federal Circuit overruled the Board's attempt to preclude a USGS computer award. The Board found that the award was tainted by a technology bias. It described the agency's specifications as "incredibly stupid" and questioned whether the agency wanted to be charged inevitably higher prices for software packages that would rarely be used. The Federal Circuit refuted the Board's claims that the specifications were irrational and warned the Board that section 759(e) of the Brooks Act specifically prohibits the Board from imposing its views about ADPTE needs on the agency. *See id.*

178. This appears to have been the case in *Motorola Computer Sys.*, GSBGA No. 8596-P, 86-3 B.C.A. (CCH) ¶ 19,309 (1986) (stating that the exclusionary requirement that the display of the field number be on the status line, as opposed to elsewhere on the screen was held to be incompatible with minimum needs).

179. Recall that our "PO" is actually a composite of contract and technical officers. The

problem can include design specifications that can be met only by a single firm or a small number of firms.<sup>180</sup>

In *Masstor*, a protester challenged the requirement that an optical rather than magnetic storage system be provided.<sup>181</sup> Such a restriction could be the result of a bias in favor of the more sophisticated technology embodied in the optical system. The Board studied the agency's purpose in procuring the equipment and concluded that the restriction was not improper.<sup>182</sup> This finding is significant for two reasons. First, it shows that the Board is willing to review the type of judgments that are most likely to effectuate a technology bias.<sup>183</sup> Second, it should alert the reader to a difficult boundary issue concerning the Board's jurisdiction. One could argue that the decision to use optical storage was the determination of the variety of ADPTE to procure and not simply one of many specifications necessary to implement plans to procure a mass storage system.<sup>184</sup>

The protester in *Masstor* won the protest on the grounds of organizational conflict of interest.<sup>185</sup> The conflict arose because NASA hired Lockheed to assist in the development of the solicitation.

threat of protests is felt acutely by contract officers, but is rather remote from the interest of technical officers. Thus, the deterrent effect of protests is successful to the extent that contract officers, in their negotiations with the technical officers, succeed in obtaining specifications and scoring functions that are consistent with CICA. Protests also work to deter contract officers from making inappropriate evaluation assessments. Deterrence is most likely to fail with regard to those aspects of benchmark testing and bid evaluation performed by technical officers that are outside the expertise or control of contract officers.

180. POs can choose from many types of specifications: functional; equipment performances; plug-to-plug compatible; brand name or equal; or make and model. *See* Federal Information Resources Management Regulations (hereinafter "FIRMR"), 41 C.F.R. § 201-30.013 (1990) (listing, in descending order of preference, the types of specifications that may be used). In theory, agencies should be prepared to justify using other than functional specifications, since federal regulations express a preference for them. *See* Gabig, *supra* note 49, at 56. But before CICA, this preference was honored mostly in the breach. *Id.*

181. *Masstor Sys. Corp.*, GSBCEA No. 7927-8, 85-3 B.C.A. (CCH) ¶ 19,435 (1986).

182. *Id.*

183. Whether the Board made the correct judgment in this case is beyond our expertise, but the evidence below shows the aggregate favorable impact of Board decisions.

184. *See Masstor Sys. Corp.*, GSBCEA No. 8669-P, 87-1 B.C.A. (CCH) ¶ 19,435 (1986) (LaBella, J., concurring). As a second example, consider a PO afflicted by a technology bias who is intent on procuring a minicomputer. If the PO makes the false claim that the agency's duties require complex analysis of engineering problems, then an RFP excluding work stations and PCs would not be challenged by the GSBCEA. However, the PO would not be successful in claiming that minicomputers are necessary for the agency's word processing requirements. The difference is that in the second case the specifications are too restrictive in light of the stated need.

185. *See id.*



Lockheed, in turn, permitted Filetek, a subcontractor, to draft proposal specifications. NASA adopted these specifications with little change. Although thirty-five firms requested copies of the solicitation, only one submitted a bid—Filetek. The GSBCA granted the protest and barred an award to Filetek under the original solicitation.<sup>186</sup>

In addition to mandatory specifications, the solicitation contains evaluation criteria constituting what we have called a scoring function. The weights in the scoring function can be selected to reflect the PO's personal preferences over product attributes, to favor a particular vendor, or to reflect a bias toward high technology. An abuse of discretion in this area is difficult for the Board to detect. Thus, the Board has stated that it will not challenge the weight placed on cost versus technical attributes in a scoring function.

Although protest cannot reach this problem, other features of CICA have had an impact. CICA's introduction of "competition advocates" into agencies and its praise of "full and open competition" has had an impact in diminishing the technology bias. The GAO reports that even in non-ADPTE areas (where there are no GSBCA protests), CICA has given contract officers "more authority of influence"<sup>187</sup> by making cost considerations more important in contract awards.<sup>188</sup> Recall from the discussion in Section I.B.<sup>189</sup> that the contract officer is paired with a technical officer in a bargain over the weight to give cost in the scoring function. Thus, there is some control over the technology bias that manifests itself in the scoring function.<sup>190</sup>

The third important source of discretion in managing an ADPTE procurement is product testing and evaluation. Evaluations may involve fuzzy technical judgments about the merits of differing solu-

186. Examples of other GSBCA cases that were based upon overly restrictive specifications are: North Am. Automated Sys. Co., GSBCA No. 7967-P, 85-3 B.C.A. (CCH) ¶ 18,290; International Sys. Mktg., Inc., GSBCA No. 7948-P, 85-3 B.C.A. (CCH) ¶ 18,196 (1985); Computer Mktg. Corp., GSBCA No. 8131-P-R, 86-1 B.C.A. (CCH) ¶ 18,592 (1986); Vanguard Technologies Corp., GSBCA No. 8885-P, 87-2 B.C.A. (CCH) ¶ 19,814 (1987); and Tetra Industries, Inc., GSBCA No. 8168-P, 86-1 B.C.A. (CCH) ¶ 18,591 (1985). These cases are discussed in SUCHANEK & VERGILIO, *supra* note 166.

187. See GAO Report, *Procurement: Better Compliance with the Competition in Contracting Act is Needed*, GAO/NSIAD-87-145, at 72 (1987).

188. *Id.*

189. See *supra* notes 36-47 and accompanying text.

190. Our analysis in this section makes it clear that protests are less effective in subduing the technology bias as compared to favoritism or the appropriability problem. Although a PO may be thwarted from giving effect to the bias through mandatory specifications, evaluations or testing, there may still be plenty of room to give effect to the bias in the formulation of procurement demands or the formulation of weights in the scoring function.

tions to information management problems.<sup>191</sup> In the evaluation of the bids and/or products described in the bids, the PO could take actions that are contrary to those that are described in the RFP or IFB.<sup>192</sup> For example, the RFP may indicate that volume discounts are a very important part of the bid, yet the PO places little weight on them when "scoring" the bids.<sup>193</sup> Alternatively, products tests, as described in the RFP, may be applied or considered selectively in order that the PO's preferred product will be chosen.<sup>194</sup> Bias evaluations invariably stem from a technology bias or favoritism.<sup>195</sup>

Looking at the process generally, we perceive a significant impact on ADPTE procurements over the past eight years.<sup>196</sup> The RFPs and IFBs that are issued now for federal ADPTE procurements are far less restrictive than they were eight years ago, permitting

191. In *Contel Fed. Sys., Inc.*, GSBGA No. 9743-P, 89-1 B.C.A. (CCH) ¶ 21,458 (1988), an RFP that gave only modest weight to user-friendliness in word processing software resulted in an award to a product that was very unfriendly. To prevent that product from being chosen, the PO altered the weight in the RFP. The GSBGA nullified the contract award. In *International Sys. Mktg., Inc.*, GSBGA No. 7860-P, 85-2 B.C.A. (CCH) ¶ 18,102 (1985), a brand name or equivalent monitor was specified. The brand name had higher resolution in text display mode than that of the protester, but they had equally good graphics resolution. The government claimed that it wanted high text resolution and disqualified the lower priced protester. The GSBGA reinstated the protester, stating that the government should have specified text resolution if that is what it wanted. The Board rescinded the purchase authority and told the agency that it could purchase from the protester if it wanted to purchase at all.

192. See, e.g., *Systemhouse Fed. Sys.* GSBGA No. 9313-P, 88-2 B.C.A. (CCH) ¶ 20,603 (1988); *Compuware Corp.*, GSBGA No. 8869-P, 87-2 B.C.A. (CCH) ¶ 19,781 (1987); *Genasys Corp.*, GSBGA No. 8734-P, 87-1 B.C.A. (CCH) ¶ 19,556 (1986); *Computervision Corp.*, GSBGA No. 8744-P, 87-1 B.C.A. (CCH) ¶ 19,553 (1986). Detailed discussions of these cases can be found in SUCHANEK & VERGILIO, *supra* note 156.

193. See, e.g., *Pacific Bell v. United States*, 865 F.2d 269 (Fed. Cir. 1988) (affirming *Pacific Bell*, GSBGA No. 9252-P and GSBGA No. 9488-P (9280-P)).

194. See, e.g., *Storage Technology Corp.*, GSBGA No. 8691-P, 87-2 B.C.A. (CCH) ¶ 19,953 (1987).

195. See *Laffont & Tirole*, *supra* note 48.

196. There is evidence that CICA has increased competition across all federal procurement, not just ADPTE. See GAO Report, *supra* note 187, at 3-5. (CICA has contributed to an increase in the percentage of contracts awarded competitively.) POs have commented that CICA made the process "more competitive and reduced potential procurement abuses." *Id.* at 72. In the area of ADPTE, the effect of CICA is most pronounced. One-third of recent major ADPTE contracts have been protested. See KELMAN, *supra* note 1, at 22. At GAO, the success rate for protesters is about 10%, while at GSBGA, the success rate has been about 50%. *Id.* at 24. We believe that this protest activity is a factor responsible for the fact that profit margins in private sector computer businesses are higher than in government businesses, *id.* at 84, and 65% of major government contracts are awarded to the lowest price vendor, as compared to 41% in the private sector. *Id.* at 60. These cost savings apparently have not been achieved by resorting to primitive technology.

larger numbers of firms to participate.<sup>197</sup> Questionable practices of POs, such as favoring particular vendors<sup>198</sup> or biasing product evaluations towards excessively high technology items, have been both deterred and corrected by the GSBCA protest process.<sup>199</sup> In addition, GSBCA protests have provided the makers of new or unique products, whose exclusion from federal ADPTE procurements was often a *fait accompli*, a means to gain access into the federal ADPTE market.<sup>200</sup>

### E. Issues in Protest Law

Most of the issues discussed in this section arise either directly or indirectly from the occurrence of inappropriate settlements.

#### 1. Alleviating Protest Problems

In this section, we return to the problems with the protest process as discussed in Section I.C.2., and show that they can be substantially alleviated by appropriate policy design. The policy tools that we consider are the allocation of protest costs and the control of protest settlement.

The phenomena of fedmail and overdeterrence are susceptible to a policy of reducing the cost of protest to a successful PO. Ideally, this cost should be zero. If it is, then a PO could never be dissuaded from making an appropriate award or induced to agree to a fedmail settlement because of the fear of a costly protest. Practically, agencies could be reimbursed for legal costs but it would be difficult to compensate them for the delay associated with a protest. Fortunately, the

197. "The increase in the frequency of protests induced the EPA to move in the direction of specifying all weights in an RFP because disappointed bidders are less likely to protest." KELMAN, *supra* note 1, at 170; *see also* Gabig, *supra* note 49, at 43 (stating that "[t]he ominous threat of a GSBCA protest has had a prophylactic impact on the acquisition process. Federal agencies have become more conscientious about properly conducting procurements for information systems."); Sugawara & Tucker, *supra* note 99, at A-1 (stating that protests allow small firms to compete on equal grounds with large ones).

198. *See* KELMAN, *supra* note 1, at 8 (stating that IBM's share among *Fortune* 1000 firms is 76%, compared to 34% in the federal government).

199. *See* Bruce Adkins & Jack Daley, *Strategies for Business Development in the Federal Marketplace*, 31 IEEE TRANSACTIONS ON PROFESSIONAL COMM. 57 (1988) (stating that "the process of getting business and remaining an incumbent is getting more difficult."); *see also* KELMAN, *supra* note 1, at 7-8 (78% of recent major contracts in the private sector went to incumbent firms, as compared to 58% in federal procurement); *id.* at 8 (28% of procurements in the private sector were sole source, while none of the procurements in the government in Kelman's survey of computer managers were sole source).

200. *See supra* note 48.

brief time limits imposed on the protest process keep delay costs down.

The probability of deterrence and bluffing can also be controlled through protest cost allocation. Successful protesters are compensated for their bid preparation and protest costs in order to enhance the deterrent power of protests. Greater deterrence could also be achieved by sanctioning agencies responsible for repeated or egregious violations of procurement law.<sup>201</sup>

Lastly, we argue that inappropriate settlements<sup>202</sup> can be diminished by control of protest settlements. From a theoretical point of view, the ideal solution would be to include a taxpayer representative in any settlement bargain. Practically, abuses of the protest process might be best handled by requiring GSBICA supervision of protest settlement.<sup>203</sup>

The idea of regulating a mutually beneficial exchange seems counter to both good legal practice and the concept of efficiency from basic microeconomics. Consider a typical suit in which one party has been harmed. If the two parties can reach a mutually beneficial cash settlement prior to trial, then they are both better off because litigation costs are avoided. The difference in the case of protests is that the taxpayer is an unrepresented party to the bargain. In other words, there is a negative externality from the settlement.

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201. The impact of this latter measure is attenuated, though, because it would be accompanied by a reduction in the probability of protest. This reduction would result because firms would become more pessimistic about their chances of winning protests. They would reason that sanctions imposed on violators would deter most POs from making a bad award and, thereby, reduce the profitability of protests.

202. In Section I.C.2., we provided definitions of appropriate versus inappropriate cash settlements. See *supra* notes 78-81 and accompanying text.

203. Currently, the ability of the Board to supervise settlements is severely limited. See *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987). In that case, the parties reached a settlement after the GSBICA granted a protest. The settlement allowed continued illegal activity and the Board refused to dismiss the protest. See *SMS Data Prods. Group*, GSBICA No. 8589-P, 87-1 B.C.A. (CCH) ¶ 19,637 (1987). The Court of Appeals for the Federal Circuit reversed, arguing that promotion of settlements is a good idea. See *Federal Data Corp.*, 819 F.2d at 277. However, the board retains control over the protest cost decision. See *Bedford Computer Corp.*, GSBICA No. 9837-C (9742-P), 89-2 B.C.A. (CCH) ¶ 21,827 (1989). In this case, a protest was dismissed without prejudice following settlement between the Army and the protestor. Bedford sought compensation for its bid preparation and protest costs from the Permanent Indefinite Judgment Fund (PIJF), 31 U.S.C. § 1304. The Army failed to notify Bedford of its exclusion from the competitive range. The Board felt that it could not let the Army use PIJF as an alternative to correcting improprieties. *Id.* at 5. If a government settlement admits a violation or provides a benefit promoting full and open competition, then protest costs may be awarded. *Id.*

The externality problem present in the protest scenario has been addressed by the Supreme Court in another area of the law. In the case of *Lear, Inc. v. Adkins*,<sup>204</sup> the Court established a policy designed to discourage settlements when the issue of patent validity was in contention. The settlement of a patent dispute may enrich the party seeking to invalidate a patent, but it subverts the public policy in favor of testing the validity of questionable monopoly-producing patent grants. Likewise, inappropriate settlements of procurement protests should be discouraged in order to foster the private attorney general role of protesters.

Regulation of cash settlements by procuring agencies is simple and desirable. In fact, the negative publicity from the cash settlement made by the Bureau of the Census to three protesters in 1988 has effectively eliminated explicit inappropriate cash settlements by procuring agencies.<sup>205</sup> However, there is little inhibiting the procuring agencies from shifting the burden of inappropriate settlements onto the awardee (with implicit compensation during the course of the contract).

To stop such circumvention by procuring agencies, inter-firm cash and in-kind settlements should also be regulated.<sup>206</sup> Enforcement would be more difficult than with agency cash settlements. If the awardee and protester have other business dealings, e.g., a joint venture or subcontracting relationship, they may be able to disguise the settlement transfer. An obvious but critical feature of GSBCA regulation of the settlement process is that the judges have access to the information obtained in discovery. Approval of a settlement would be granted only upon a finding that the taxpayers' interests would be promoted—or at least not harmed.

## 2. Collusion

The intent of the protest process is to oversee procurement. However, the objective of the firms that instigate protests is not sur-

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204. 395 U.S. 653 (1969).

205. See *supra* note 85.

206. This proposal gains further support in light of the dangers of collusion discussed in section II.E.2. An example of both agency participation in settlements and using a named awardee to disburse payments in order to avoid public scrutiny is provided by Department of Justice's Project Eagle procurement. The Department paid \$200,000 to the named awardee (Tisoft, Inc.) to facilitate settlements. The settlement payments by Tisoft, Inc. to the three protesters were estimated by the House Judiciary Committee to be in excess of \$6 million. DEFICIENCIES IN THE DEPARTMENT OF JUSTICE AWARD AND MANAGEMENT OF ITS PROJECT EAGLE ADP PROCUREMENT, H.R. REP. NO. 393, 102d Cong., 1st Sess. (1991).

plus maximization to the government but, rather, their own profit maximization. Sometimes increasing the profits of a firm coincides with surplus maximization for the government. In such circumstances the protest process is functioning at its best. Unfortunately, profit maximization can lead firms to undertake protests for reasons that are substantially different from, and fundamentally opposed to, surplus maximization for the government. Inappropriate settlement and overdeterrence are examples that we have already discussed. Another possibility exists when firms use the protest process to facilitate bidder collusion.<sup>207</sup> Colluding bidders would attempt to both raise the price paid by the government for a commodity and lower the quality and quantity offered at a given price. Clearly, neither of these objectives of a bidder coalition are consistent with surplus maximization for the government.

What actions would a coalition of bidders take at a federal procurement? Loosely put, they must decide what bid to submit and how to divide the gain from collusive behavior among their members.<sup>208</sup> Suppose that Firms A, B and C collude. Based upon some criterion, which we will not try to specify here, they decide that Firm A will submit the best bid from among the three of them. Dividing the collusive gain could be accomplished in a number of ways. In a repeated procurement setting, we could see "winner-takes-all," with a rotation established among the three firms for being the highest surplus bidder on a sequence of procurements (along the lines of the "phases of the moon" conspiracy).<sup>209</sup> Alternatively, the difference between Firm A's bid and what Firm A would have bid had it acted

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207. Federal procurement rules, statutes and the FAR direct agencies to contact the Attorney General regarding evidence of antitrust violations in bids. *See, e.g.*, 10 U.S.C. § 2305(b)(5) (1988); 41 U.S.C. § 253b(e) (1988); 48 C.F.R. § 3.303(a) (1988); 48 C.F.R. § 3.301(b) (1988); *see also* KOVACIC, *supra* note 75, at 8 (stating that the prime contractor is forbidden to enter into an agreement with a subcontractor that unreasonably restricts direct sales by the subcontractor to the government).

208. For a discussion of the economics of bidder collusion at second price and English auctions, see generally Daniel A. Graham & Robert C. Marshall, *Collusive Bidder Behavior at Single-Object Second-Price and English Auctions*, 95 J. POL. ECON. 1217 (1987); Daniel A. Graham et al., *Differential Payments Within a Bidder Coalition and the Shapley Value*, 80 AM. ECON. REV. 493 (1990); George J. Mailath & Peter Zemsky, *Collusion in Second Price Auctions with Heterogeneous Bidders*, 3 GAMES AND ECONOMIC BEHAVIOR 467 (1991). For a discussion of the economics of bidder collusion at first price auctions, see generally R. Preston McAfee & John McMillan, *Bidding Rings*, University of Western Ontario, Department of Economics Working Paper (1988).

209. Bid rotation plans are sometimes facilitated by side-payments or subcontracts. *See, e.g.*, *United States v. David E. Thompson, Inc.*, 621 F.2d 1147, 1149 (1st Cir. 1980).

non-cooperatively could be divided, perhaps equally, amongst the three firms. However, problems exist with arrangements like these. First, with a “winner-takes-all” bid rotation conspiracy, Firm B might try to cheat by submitting a bid that is slightly better than Firm A’s collusive bid and win the contract for itself outright. In other words, Firm B might find it profitable to not wait its turn. With side-payments among the colluding firms, the possibility of this occurring is greatly diminished. However, explicit side-payments are not desirable in an environment with active antitrust enforcement, since they leave a paper trail. This argues in favor of “winner-takes-all” collusive arrangements in which the members rotate in winning contracts—an inherently unstable kind of collusion relative to one where (1) side-payments are made and, consequently, (2) there is less need (or even no need) for members to “take turns” in winning contracts.

From the perspective of a bidder coalition, the protest process provides legal mechanisms for conducting business and thereby enhances their stability. Side-payments among members of the coalition are possible with protests, re-labelled as settlements to protesters and intervenors, with the full approval of the judicial system. In addition, members of a bidder coalition need not wait until the next procurement to punish a deviant member who over-bid the designated high bidder (in terms of surplus) of the coalition to win a procurement. The members can protest the award decision and, at a minimum, impose significant costs on the deviant firm.<sup>210</sup> In other words, the protest process provides a coalition with an immediate means by which to deter, or at least partially correct, breakdowns in the collusive agreement.

Perhaps the most troubling feature of the protest process with respect to bidder collusion is that it can encourage collusion among bidders who would have acted non-cooperatively in the absence of the process. Consider the following scenarios.

1. Assume that protests are not possible. Firms A, B and C are participating in a procurement as bidders. Acting non-cooperatively, firm A would submit a bid that provided the government with a surplus of

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210. Cf. Leslie Cauley, *Cygnets Accuses Defense Firm of Bait-and-Switch*, BALTIMORE SUN, Sept. 9, 1989, at B17. Cygnet was a subcontractor to General Dynamics, who was the awardee on an Air Force computer contract. Cygnet was replaced by another subcontractor and complained to the Air Force and GAO and sent a letter to a post-award protester, arguing that the new subcontractor did not meet the specifications.

$S_A$ . Acting collusively with Firms B and C, where Firm A is the designated bidder for the coalition, Firm A would submit a bid providing the government with surplus  $\Sigma_A$  where  $\Sigma_A < S_A$ . The collusive gain would be shared among the three, with Firms B and C receiving cash payments from Firm A of  $P_B$  and  $P_C$ , respectively.

2. Next, assume that protests are possible. Now there is no communication among the three firms. However, Firm A exerts influence on the PO so that the product evaluations in the last stage of the procurement process favor Firm A. Firms B and C observe and take note of this influential activity. Firm A would have submitted a bid yielding the government a surplus of  $S_A$  if the evaluation process were unbiased, but now, with the guarantee of biased evaluations, submits a bid yielding  $\Sigma_A$ . After the award is made to Firm A, Firms B and C protest on the grounds that the product evaluation phase of the procurement favored Firm A. Firm A settles with Firms B and C, making payments to them of  $P_B$  and  $P_C$ , respectively.

There is no difference between the two scenarios in terms of the winner, the winning bid, or the payments made to losing firms by the winner. However, collusion does not need to be formally organized when protests exist. In fact, almost any outsider to this procurement would view the second scenario as an illustration of the success of the protest process. Perhaps the Department of Justice can argue that tacit collusion exists in the second scenario. But how is this case made? Did firms B and C act suspiciously by not attempting to bias the evaluation process in their favor?

It is important to note that cash and/or in-kind settlements provide the key for facilitating collusion. If the only settlement available involved an unbiased reevaluation of the products, then the protest process would provide far less to bidders as a means of coordinating collusion.

### *An Intriguing Procurement and Disturbing Settlement*

A controversial ADPTE was conducted by the Department of Justice in 1985-86 to acquire computer equipment for the Immigration and Naturalization Service (hereinafter "INS").<sup>211</sup> The procurement

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211. For a case study of this procurement see KELMAN, *supra* note 1, at 132-42.



was plagued by charges that the RFP was unfairly biased toward IBM and IBM-compatible machines, and that the evaluation criteria were vague and confusing.<sup>212</sup> The solicitation attracted only two bidders: IBM, who was the named awardee, and EDS, who protested on both of these grounds.

Following the EDS protest, the situation began to deteriorate rapidly. When a judge issued a temporary injunction to enjoin INS from implementing the contract until the EDS protest could be heard, Murray [PO at the Department of Justice] panicked. The Department of Justice lawyers told him that the litigation could take over a year, and he saw his fast track mired in mud. He took the lead in negotiating an out-of-court settlement with EDS, whereby EDS was chosen as the vendor but would supply the solution (and the hardware) that IBM had bid.<sup>213</sup>

Thus, the procuring agency circumvented the private attorney general role of the protester by arranging an in-kind settlement between the protester and the named awardee. But this is only half of the matter. The procuring agency did not seem to understand that instructing two competitors to work out their differences was synonymous with instructing them to collude.

Murray thought at the time of the agreement that the out-of-court settlement would be no more expensive to INS than the IBM bid was. IBM agreed to supply its products to EDS at prices even lower than they had bid in their proposal, and the price structure EDS offered appeared to be favorable. But once the agreement was implemented, INS technical people came to feel that INS had been misled; the prices INS ultimately paid for IBM equipment were considerably higher than IBM would have charged, although EDS committed to keeping the total present value price of the contract unchanged, by lowering prices for hardware and maintenance in the contract's outyears. In fact, the prices were so high that implementation of the contract was very slow because INS could not afford the equipment. EDS also insisted on supplying various management personnel that had been stipulated in the original RFP but which, in INS's view, turned out to be unnecessary.<sup>214</sup>

This case study illustrates the essential need for regulation of the settlement process by the GSBICA. Simply put, in the settlement

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212. *Id.* at 134, 137.

213. *Id.* at 140.

214. *Id.* at 140-41.

process, IBM and EDS openly discussed and agreed on how to allocate resources to the INS. These discussions between competitive bidders were instigated by the Department of Justice. Perhaps it is mind-boggling that the Department of Justice would implicitly ask competitive bidders to act collusively. Perhaps it is even more mind-boggling that, *ex post facto*, the Department of Justice could be surprised that the prices paid for the procured commodities were so high (i.e., the Department was surprised that the two firms reached a solution that maximized their joint profit).<sup>215</sup> However, in our opinion, the fact that the Department of Justice both instigated and was a willing accomplice to a bidder conspiracy reflects not only the grave nature of agency problems in the federal government but, in addition, a blind commitment to the benefits of settlement in segments of the legal community.

### 3. Standing

The determination of an optimal standing rule requires a difficult balancing between the benefits of deterrence and the various costs of protests. Liberal standing rules enhance both the deterrent power and the costs of protests. Suppose a large number of firms are participating in a procurement. Firm 1 is the named awardee, Firm 2 finished second, Firm 3 finished third, etc. Should Firm 3 be granted standing as a protester? For many procurements, the Federal Circuit has ruled that only Firm 2 has standing as protester.<sup>216</sup> Presumably, the logic behind the decision is as follows: Firm 2 has the most to gain from a successful protest. In fact, if Firm 2 does not protest, then Firm 3 has nothing to gain since Firm 2 will be the new awardee if the protest is upheld. Consequently, Firm 3 does not have standing as a protester (at least not until Firm 1 has been eliminated through a successful

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215. Ultimately, Congress intervened in the procurement after a critical GAO report, and ordered the procurement cancelled. *Id.* at 141.

216. See *United States v. IBM*, 892 F.2d 1006 (Fed. Cir. 1989). Only the second lowest bidder may challenge the award of ADP when the solicitation is not in dispute, the only material difference between the bids is price, and the second lowest bid is responsive. The prospect that a solicitation might be canceled is insufficient to give the requisite economic interest for standing. Under influence of this decision, the Board has moved to restrict standing in a recent case. See *MCI Telecommunications Corp.*, GSBCA No. 9926-P, 89-2 B.C.A. (CCH) ¶ 21,650 (1989). In this case, MCI was denied standing to challenge an FTS2000 award to AT&T. The majority said that the Board would not order the GSA to reopen the solicitation to new offers (MCI had not made an offer) and, therefore, there was no standing. The dissent stated that the Board should examine only status as offeror or potential offeror. *Id.*

protest by Firm 2, at which time Firm 3 takes on the role of Firm 2).

A critical point in assessing this logic is that the ranking of the firms is determined by the procuring agency. If procurement officials suffer from distorted incentives that lead to an inappropriate selection of an awardee, then it is likely that these incentives will affect the ranking of non-winning firms as well. For example, a bias toward high technology items will typically lead to a different ranking of all firms in a procurement from what would emerge from undistorted surplus maximization. It is trivial to generate examples where a firm ranked, say, tenth by undistorted surplus maximization would be ranked second by a procurement official who suffered from a bias toward high technology items.<sup>217</sup> Most importantly, these rankings might be based upon information held privately by the procurement official. In other words, it might not be possible for the GSBGA to determine the "true" second ranked firm (i.e., by undistorted surplus maximization) without discovery. This argument suggests that granting standing to only Firm 2 is inconsistent with a central objective of procurement oversight—to deter and correct agency problems.

Only in the simplest of procurements is it sensible to argue that a procurement official cannot distort the ranking of firms. For example, suppose the bids of firms are distinguishable only on the basis of cost (i.e., a homogenous product is to be purchased in an indivisible lump from one of a large number of competing firms). Given that all of the information that is relevant to rank the firms is easily verified by a court, it might seem appropriate to grant standing only to Firm 2. After all, Firm 5, for example, has nothing to gain from a protest except, possibly, a settlement from the procuring agency or Firm 1. The courts should not grant standing to firms whose sole potential purpose is to use the costs and delays inherent in the judicial process for gain. However, this argument presumes that all firms act non-cooperatively. It ignores the incentives created for collusive bidding by such rules of standing.

Consider a firm that will participate in a procurement where only the second ranked firm will be granted standing as a protester. This firm will have an incentive to take actions, *ex ante*, to prevent a protest in the event that it is named as awardee. This could be accomplished by entering into an agreement with another firm whereby the conspirator submits a bid that is slightly smaller than, but arbi-

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217. Such an example could easily be produced within the framework of section II.D. See Marshall et al., *supra* note 28.

trarily close to, the bid of the awardee firm. If the first firm wins, then the conspirator is ranked second. The threat of protest has been eliminated, and procurement oversight has been dismantled. Perhaps of even greater concern is the possibility that a procuring agency would encourage such conspiratorial behavior by firms in order to select, with impunity, a favored firm as awardee.

The potential for this kind of collusive behavior by firms is well recognized in the federal government. We have been informed that a certain federal agency uses a "rule of three" when selling a particular commodity.<sup>218</sup> The "rule of three" requires that at least three bids be obtained for every sale. This federal agency devotes significant resources to determining if two particular bidders have acted in unison on a sale to generate a "third" bid that is insincere and noncompetitive and, therefore, effectively defeats the "rule of three." In other words, this federal agency is concerned about the possibility of "shill" bids to defeat a rule that was designed to enhance competition. Part of our concern with granting standing to only second ranked firms in federal procurements is the possibility that "shill" bids will be used to defeat a mechanism of procurement oversight that exists to enhance competition. It is important to note that the federal agency that administers the sales discussed above is not a direct beneficiary of these sales. Consequently, it is reasonable to assume that the administrators of this federal agency would never encourage collusion among bidders. On the other hand, procurement personnel recognize the costs that will be borne by their agency in the event of a protest. Furthermore, protests might deter them from naming their preferred firm as awardee, especially if they realize that this firm could never survive as an awardee in the event of a protest. Simply put, the procuring agency might foresee large potential gains from disabling the protest process and, therefore, it might encourage collusive bidding by firms, along the lines discussed above, when only Firm 2 has standing as a protester. To deny the existence of such incentives is to deny a fundamental purpose of procurement oversight—to deter and correct agency problems.

Suppose that "shill" bids cannot occur, that the award to Firm 1 is inappropriate for whatever reason, and that Firm 2 protests the award decision. If Firm 1 offers a cash settlement to Firm 2 that is acceptable, the Federal Circuit would not allow Firm 3 to protest the

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218. In providing us with this information, a high level manager of this agency asked us not to identify the agency in this Article.

award decision even if it knows that the award is inappropriate. This scenario raises three points. First, as noted earlier, except in extreme cases, cash settlements defeat the private attorney general role of protesters. Granting standing to firms other than Firm 2 leads to fewer settlements since the cost of settling increases with the number of additional firms that join the protest. Second, there is no reason to believe that Firm 2 has any greater knowledge about problems with the procurement than any other firm that participated. In fact, it seems reasonable to assume that a firm's knowledge of problems with a procurement is independent of, or only partially correlated with, their rank as a bidder. A settlement with Firm 2 prevents Firm 3 (and others) from revealing their privately held information regarding the procurement. Third, if only Firm 2 has standing, then it may prefer settlement to being named awardee, especially if being named awardee gives Firm 3 standing to protest the newly directed award. Again, creating incentives for settlement strips away the power of the protest process as a mechanism for procurement oversight.

Perhaps the argument in favor of granting standing to only Firm 2 stems from the costs associated with "insincere" protests. Suppose Firm 5 wants to file a protest. The fact that it wants to do this implies that Firm 5 foresees greater profits from protesting than from not protesting. Perhaps the source of these enhanced profits is solely the increased chance of being named awardee. If this is the case, the government should definitely grant standing to firms other than Firm 2. However, Firm 5 might see enhanced profits from a potential settlement with the procuring agency or Firm 1. If the award to Firm 1 is appropriate, a settlement might still occur with the procuring agency or the named awardee to avoid incurring the costs associated with protest defense and procurement delay. This case seems to represent the only drawback associated with granting standing to Firm 5 (i.e., those other than Firm 2). However, in light of our previous points, this is more of an argument for compensating procuring agencies that win protests than for limiting standing to a single firm.

#### 4. Multiple Protesters and Intervenors

When a protest is filed, interested parties<sup>219</sup> may intervene either on the side of the protester or on the side of the agency. To qualify as an intervenor, a party must meet the same "direct economic

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219. To qualify as an intervenor of right, one must be an interested party. See *Vanguard Technologies Corp.*, GSBGA No. 10127-P, 89-3 B.C.A. (CCH) ¶ 22,042 (1989).

interest” test<sup>220</sup> imposed for protester standing, and must have similar protest grounds as the protester.<sup>221</sup> Although named awardees often intervene on the side of the agency, we are concerned only with the policy implications of intervention on the side of the protester, and we will use the term “intervenor” accordingly.

In general, being an intervenor has three major advantages relative to being the original protester. First, the intervenor incurs lower legal expenses. Second, the intervenor has access to all of the same information from discovery that is available to the original protester. Third, it is difficult for a protester to enter into a cash or in-kind settlement with the awardee or procuring agency without including the intervenor in the settlement. Furthermore, should a change occur in the procurement, by means of either settlement or court order, the change will be more likely to address the interests of both the protester and the intervenor than would be the case if the latter had not joined in the protest. Finally, it is important to note that an intervenor on a protest can also file a protest of its own regarding separate issues.

The cost differential between taking the role of lead protester and being an intervenor might create some hesitancy on the part of a firm to file a protest when, instead, it can possibly wait to be an intervenor. This hesitancy, which is an increasing function of the cost differential, might result in a diminished propensity for firms to file protests and, thus, impair the effectiveness of the protest process for deterring and correcting procurement problems.<sup>222</sup> This “free rider”

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220. See *United States v. IBM*, 892 F.2d 1006, 1011 (citing to *Julie Research Lab., Inc.*, GSBGA No. 8070-P-R, 86-2 B.C.A. (CCH) ¶ 18,881 at 95,237 (1986), where the GSBGA stated that “it is not enough that a citizen seeks to proceed here as a private attorney general enforcing the public interest in the proper application of the procurement statutes and regulations.” He must have a “direct economic interest.”). A bidder who was not in the competitive range and could not benefit from a favorable finding was ruled not to have a direct economic interest. See *ATS, Inc.*, GSBGA No. 9338-P, 88-1 B.C.A. (CCH) ¶ 20,467 (1988). The mere possibility that a procurement may be re-solicited is not enough to give a bidder a direct economic interest. See *MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed. Cir. 1989); *Federal Computer Corp.*, GSBGA No. 11113-P, 91-2 B.C.A. (CCH) ¶ 23,855 (1991).

221. See *Vanguard Technologies Corp.*, GSBGA No. 10127-P, 89-3 B.C.A. (CCH) ¶ 22,042 (1989).

222. The “free rider” problem may also be aggravated by liberal standing rules. For example, a pre-award protest that results in revisions of an RFP may benefit several firms. Our view is that the problem is diminished by protest cost reimbursement and the advantages of liberal standing rules, as stated above. For related issues, see Christopher Bliss & Barry Nalebuff, *Dragon-Slaying and Ballroom Dancing: The Private Supply of a Public Good*, 25 J. PUB. ECON. 1 (1984).

problem is mitigated by the practice of compensating successful protesters and intervenors for legal expenses and bid preparation costs.

In addition, the problem is offset by the fact that multiple litigants strengthen the protest process in a number of ways. First, they decrease the occurrence of cash and in-kind settlements.<sup>223</sup> Suppose, for example, that there is one protester and two intervenors. In this circumstance, the cost of a cash settlement for an awardee or procuring agency may be three times what it would be if there were no intervenors. Consequently, fewer cash or in-kind settlements will be offered. Second, procuring agencies will be more likely to change the procurement as a means of settlement. This point relates to the first one mentioned. Suppose that, by relaxing a restrictive specification, the procuring agency can include all three firms. With a single protester, the procuring agency might prefer a cash settlement to such a change. However, with two intervenors and a consequent three-fold increase in the settlement, the procuring agency might now find the procurement change to be more advantageous. Third, it is much more difficult to use the protest mechanism as a means of coordinating collusion among bidders when non-colluding bidders can freely intervene in a protest by forming a coalition. The cash settlements that constitute side-payments among members of the coalition must now be paid to individuals who contributed nothing to the collusively obtained gain. This "leakage" of the collusive gain to outsiders reduces the profitability of membership in a coalition and, consequently, inhibits their formation.

Currently, when two or more firms simultaneously file a protest on a given procurement, their cases are typically consolidated. They tend to share equally in legal expenses. This leads to a natural question: would it be beneficial to eliminate intervention? In other words, would it be beneficial to eliminate a process in which litigants incurred asymmetric costs and the decision to litigate was made sequentially rather than simultaneously? The cost asymmetry has both an up and a down side. The down side has been mentioned earlier—a waiting game can arise among potential protesters as firms try to take the role of intervenor rather than the more expensive role of lead protester. However, given that a protest has been filed, reduced fees for intervenors mean that more litigants will join the case, with the bene-

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223. In response to a questionnaire sent to eighteen agency counsel by the American Bar Association, "[a] few agency counsel stated a perception that intervenors had the ability to 'torpedo' a settlement." See A.B.A., *supra* note 48, at 61.

fits and costs of multiple litigants as described above. The ability to join a protest as an intervenor *after* an initial filing by a lead protester has a potential direct benefit and an indirect negative side effect. Suppose one bidder understands the restrictiveness of a product evaluation test in a bid solicitation better than any other bidder. If intervention is not permitted, then only this bidder will appear as a protester. If intervention is permitted, then relatively uninformed firms can take advantage of the lead protester's better information by attaching themselves to the protest. The indirect negative side effect is that the lead protester will have a diminished incentive to invest in the acquisition of information about the restrictiveness of a procurement if the returns to the acquisition of such information will be distributed to uninformed intervenors. Overall, multiple litigants offer significant benefits to taxpayers; however, we cannot put forward a definitive recommendation for altering the current manner in which multiple litigants are handled at the Board.

#### F. Discretion and Oversight

In an analysis of federal computer procurements, Steven Kelman<sup>224</sup> argues that the process suffers, as compared to private sector procurement, because POs lack discretion<sup>225</sup> to use their business judgment. He believes that federal procurement policy embodied in the rigid IFB or RFP process impedes efforts by POs to mimic private sector practices.<sup>226</sup> He attributes this rigidity to an unwarranted fear by members of Congress of discretionary decision-making in federal agencies,<sup>227</sup> and sees the protest process as abetting these undesirable tendencies.<sup>228</sup>

According to Kelman, limits on discretion are costly because aspects of quality that are difficult to measure<sup>229</sup> play little role in source selection. As a consequence, firms are reluctant to make agency-specific investments toward educating the POs or to assist them in obtaining solutions to their problems.<sup>230</sup> The private sector combats these problems by relying on firms' reputations when making a

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224. KELMAN, *supra* note 1.

225. Kelman acknowledges that the limits on discretion are a part of the procurement culture rather than a legal mandate. *See id.* at 21.

226. *Id.* at 10.

227. *Id.* at 14.

228. *Id.* at 24.

229. *See generally id.*

230. *Id.* at 10.



source selection. POs, however, are reluctant to depend upon such criteria for fear of protest. Kelman also points to what we have called overdeterrence as a problem in contract awards. Incumbents, particularly IBM, receive too few awards in the federal market.<sup>231</sup> He believes this problem is caused partly by an overzealous application of CICA.

There is a tension between the arguments advanced in this paper and those in Kelman's work with respect to the role of discretion in the procurement process. The fundamental issue is that, in many cases, inappropriate discretion is not distinguishable from appropriate discretion, at least not without the intervention of an oversight mechanism such as a protest. To illustrate this point, consider a procurement in which the RFP clearly favors IBM. Perhaps IBM has provided excellent service on previous contracts, or has posed an innovative solution to a problem confronted by the procuring agency. Alternatively, the PO may suffer from an appropriability problem. In such situations, how can good discretion be disentangled from bad discretion? This identification issue is not trivial since a PO who is accused of an appropriability problem will naturally plead his case in terms of arguments that reflect sound business concerns. In the current environment, through *de novo* review, the GSBICA attempts to disentangle bad discretion from good discretion by requiring the PO to provide explicit justification for all challenged decisions. This is not, however, inconsistent with Kelman's two main proposals for reform of the procurement system—written justification for all procurement-related decisions and multi-member evaluation panels.<sup>232</sup>

The general concern that the protest process has over-corrected alleged favoritism toward IBM is not supported by recent empirical work.<sup>233</sup> Compared to the private sector, the government has an extensive investment in the old IBM 1400 series that cannot be easily upgraded.<sup>234</sup> When IBM has a newer 360/370 mainframe at a federal site, a substantial incumbency advantage exists.<sup>235</sup>

So, how exactly do protests inhibit the use of discretion? Kelman

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231. Seventy-eight percent of recent major contracts in the private sector went to incumbent firms, compared to fifty-eight percent in federal procurement; IBM received seventy-six percent of contract awards from *Fortune* 1000 firms, compared to thirty-four percent in the federal government. *See id.* at 7-8.

232. *See id.* at 92.

233. Greenstein, *Federal Computer Procurement*, *supra* note 44, at 28.

234. *Id.* at 9-10.

235. *Id.*

discusses the *Contel Federal System, Inc.* case,<sup>236</sup> in which a PO learned during the product evaluation stage that he had given too little weight to the user-friendliness of a software package.<sup>237</sup> When the agency changed the evaluation criteria in selecting an awardee, a protest was filed that was upheld by the Board.<sup>238</sup> Obviously, user-friendliness is important. Obviously, a PO should be allowed to give it significant weight. Obviously, good business practices that would be perfectly acceptable in the private sector should not be condemned in the public sector.

*Contel* illustrates three general points. First, although the PO claimed that the issue was the user-friendliness of a software package, how can taxpayers be reasonably sure that an agency problem did not lead to the change in evaluation criteria? If decisions like this can go unchallenged, then POs can award to any vendor they please, for any reason they want, by claiming that they discovered, at the last moment, that their evaluation criteria were inadequate or unbalanced. Again, appropriate discretion is very difficult to distinguish from inappropriate discretion. In this context, it is important to note that the FAR permits the PO to notify the vendors of minor changes in evaluation criteria and to allow them a reasonable period of time to submit new bids.

Second, firms that participated in the procurement as bidders did so in good faith. Namely, they that believed the RFP represented the computational service demands of the agency. Many firms that could have bid user-friendly software did not do so because they thought it to be unimportant to the agency. Not providing these firms with an opportunity to revise their bids in light of the change in the agency's evaluation criteria would greatly reduce the gains from competition. Furthermore, the willingness of vendors to participate in future procurements or to make agency-specific investments would be diminished when unannounced changes in evaluation criteria are permitted.

Third, in *Contel* it appears that the POs discovered the problem of unfriendly software on their own. Kelman argues that part of the

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236. *Contel Fed. Sys., Inc.*, GSBGA No. 9743-P, 89-1 B.C.A. (CCH) ¶ 21,458 (1988).

237. KELMAN, *supra* note 1, at 60.

238. *Id.* at 60 n.44. In this case, Xerox was the named awardee and Contel was the protester (EDS was a third bidder, but had submitted a relatively uncompetitive bid). The Board directed the award to Contel since Xerox had a non-compliant bid. In its decision the Board informed the Air Force that nothing prohibited it from engaging in *ex post* award negotiations with Contel in order to greatly enhance the friendliness of the word-processing software.

problem with lack of discretion is that vendors do not make agency-specific investments—in this case the vendors did not notify the agency of the problem *ex ante* because there were insufficient rewards for doing so. This raises a more fundamental tension. Increased competition reduces the rents for a winning vendor and, thereby, reduces the willingness of any vendor to assist an agency in understanding how its demand for computational services maps into hardware. However, when the agency knows this mapping, reduced rents for the winning vendor means more surplus for the government. Implicit in Kelman's argument is that the gains from increased competition are outweighed by the gains from agency-specific investments that vendors would make in the face of reduced competition or even sole source procurements. There are three issues here. First, for agency-specific investments to be of high value, the vendor must have substantial private information. But the mere fact that it has such information means that the procuring agency is at a serious disadvantage in bargaining with it. So, how can the vendors's bargaining power be restrained while still inducing agency-specific investments? The answer is competition. If it is important to leave rents available to induce such investments, then the competition should be appropriately restricted. The words "full and open" do not imply that competition should be extended to the detriment of taxpayers when restrictiveness is important to obtain maximal surplus. Second, a commitment to "full and open competition" also has the benefit of removing entry barriers that keep new firms out of the federal ADPTE market. Casual observation suggests that the new firms in the marketplace, such as SUN and Convex, are the technological innovators that can put state-of-the-art computing power and computing solutions into federal agencies. Third, federal agency personnel have punitive measures at their disposal if they are dissatisfied with the performance of a vendor (e.g., if the vendor's investment in agency-specific computational issues is too low). POs can use the threat of contract termination to assure that vendors provide promised support services and upgrades. Most large hardware contracts are indefinite-delivery, indefinite-quantity contracts that allow different offices within an agency to evaluate product quality, and the experience of other offices, before making a purchase.<sup>239</sup> Various agencies have exercised contract options or threatened to default to improve vendor services.<sup>240</sup>

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239. See Gabig, *supra* note 49, at 52; KELMAN, *supra* note 1, at 143, 147 (reporting that, after Customs purchased a network, agencies in the Treasury added to the network).

240. See KELMAN, *supra* note 1, at 129 (discussing a case in which a threat by Customs

Finally, to the extent that protests are a successful method of oversight, it should be possible to relax the strictures of the FAR.<sup>241</sup> Different agencies may devise different procurement schemes that yield efficient procurement selections. The need for uniformity is diminished with protest oversight. Furthermore, the displacement of audits by protest almost certainly creates incentives for the increased use of discretion by POs. Accusations of malfeasance by an Inspector General are more chilling on the use of discretion because there are no formal channels of appeal.<sup>242</sup> In contrast, protests provide POs an opportunity to be heard and their agencies the opportunity to appeal.

### III. CURRENT POLICY ISSUES AND RECOMMENDATIONS

#### A. *Recent Proposal for GSBCA Protest Revisions from the Office of Federal Procurement Policy and the Department of the Treasury*

The Office of Federal Procurement Policy and the Department of the Treasury have recently engaged in a joint effort to suggest rule changes at the GSBCA.<sup>243</sup> Four proposals have emerged.

1. *Filing Deadlines.* This proposal would reduce the window for pre-award protest to thirty days after issuance of the bid solicitation rather than maintain the current system, in which a pre-award protest can be filed up to the deadline for receipt of bids.
2. *Good Faith Standard of Conduct.* This proposal would seek penalties for frivolous protests.
3. *Motions for Summary Relief.* This proposal would make explicit in the rules that summary relief is available to protesters.
4. *Motion Hearings.* Again, this proposal would make it explicit in

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to default led to better service); *id.* at 151-52 (discussing a case in which the VA threatened to default and the vendor responded with improved service).

241. In fact, at least one commentator believes that the GSA allows too much discretion in the DPAs that it issues. *See* Petrillo, *supra* note 132, at 62 (stating that the threat of protests has led POs to make greater use of subjective evaluation criteria).

242. This point was made to us by Leonard Suchanek, Chairman and Chief Judge of the GSBCA.

243. Proposed Revisions to the Rules of the General Services Administration Board of Contract Appeals, 48 C.F.R. § 6101 (1990).

the rules that motion hearings can be conducted at the discretion of the Board.

Motion for summary relief and motion hearings are current practices at the Board. These two proposals are innocuous as stated. The first two proposals, however, are not innocuous. Consider the proposal regarding filing deadlines. There are two arguments in favor of pre-award filing deadlines. First, it is socially wasteful to have vendors construct bid proposals in good faith only to find out, at the last conceivable moment, that a major problem exists with the bid solicitation. A thirty-day window would permit bidders to "shoot at a stationary target." Presumably, they would have greater incentives to invest in the preparation of their bids, knowing that no last-minute alterations could occur. Second, incumbent suppliers that fear losing a contract with a procuring agency in the current competitive bidding can protest at the last moment in an attempt to delay award to a new firm and, thereby, continue as the monopoly supplier to the agency for an additional period of time.

However, there are strong arguments against the proposal for a thirty-day window on filing deadlines. First, in many cases it may not be obvious that components of a bid solicitation are jointly incompatible or excessively restrictive until the vendor actually begins construction of the bid proposal. Thirty days may not allow sufficient time for the vendor community to recognize excessive restrictiveness. Second, a thirty-day window for filing at the Board would force many vendors to litigate rather than to seek informal resolution of problems with bid solicitations at the procuring agency. Creating impediments to the resolution of honest mistakes and errors is contrary to the efficiency goal of the procurement process.

The second proposal recommends penalties for frivolous protesters. If it were possible to clearly distinguish frivolous protests from "good" losing protests, then this would be a socially beneficial proposal. Frivolous protests might arise as firms strategically use the delays in the protest process to their advantage. For example, an incumbent supplier may protest, knowing that it has no just cause for doing so, only to delay the award of a new contract to a competitor. However, it is not conceivable that a clear line can be drawn between frivolous and "good" losing protests. To penalize protests simply because they happen to lose would greatly impair the deterrent effect of protests. Furthermore, the establishment of penalties for frivolous protests gives procuring agencies a threatening weapon that they can

use against protesting firms. Even if an agency recognizes that a losing protest was not frivolous, it may seek, through the courts, to label the protest as frivolous. If significant costs are incurred by the protester in its defense, then, even if the agency does not prevail, future protests against the agency's procurements will be deterred by the threat of such costly legal action.

Overall, the last two OFPP/Treasury proposals are innocuous. The proposal on filing deadlines has arguments in support of it, but there are sufficient arguments against it for us to suggest that it not be implemented, at least until empirical investigations have been completed to assess the relevant trade-offs. The proposal on penalizing frivolous protesters should be rejected. It will diminish the deterrent effect of the protest process.

### *B. Other Current Policy Issues and Recommendations*

By deterring and correcting agency problems, the GSBICA protest goes a long way toward accomplishing the taxpayers' objective of maximizing surplus. However, there is some room for improvement in the process.

1. All cash or in-kind settlements should be contingent on the approval of a review board that has access to the information revealed in discovery. The natural choice would be the GSBICA. Enforcing such a review process on cash or in-kind settlements would be difficult. However, the illegality of such settlements without Board approval would prohibit firms from entering into legally binding agreements in which cash or subcontracts were exchanged for a withdrawal of the protest with prejudice.<sup>244</sup>

2. In the event that a protest is upheld by the GSBICA, the procuring agency should face stiffer penalties. An increase in the penalties would enhance the deterrent power of protests. Firms would recognize this increased deterrence and correctly believe that fewer procurements were flawed; consequently, fewer protests would be filed. In addition,

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244. In a recent study of the protest process, the A.B.A. recommended that cash settlements between firms and procuring agencies be prohibited, but that the GSBICA should continue to build in appropriated settlement opportunities. A.B.A., *supra* note 48, at 72-73. As noted in this Article, facilitating cash or in-kind settlements between firms would undermine the protest process as a method of procurement oversight. However, facilitating settlements that involve rewriting the bid solicitation or allowing greater objectivity with product evaluation is obviously beneficial to taxpayers.

there would be a diminished number of buy-off settlements.<sup>245</sup>

3. Overdeterrence and fedmail result primarily from the fact that the procuring agency faces significant protest costs even when it successfully defends itself. Both overdeterrence and fedmail can be reduced by compensating procuring agencies for the costs incurred in a protest when it is found that they have conducted procurements that are consistent with surplus maximization.

4. The narrow definition of "interested party," formulated by the Federal Circuit to limit standing, should be overruled by Congress. All firms that participated in a procurement should have standing as protesters and should be able to associate themselves with protests as intervenors. The increased administrative costs would be small compared to the gains in deterrence and the tendency to undermine collusion.

There are three features of the protest process that are frequently mentioned as candidates for change that we believe should not be altered.

- a. It could be argued by procuring agencies that the costs of protesting for firms are too low and, as a result, there are too many protests. While it is true that increasing the cost of protesting for firms would result in fewer protests, it would also result in a diminished deterrent effect. Since deterrence inhibits POs from implementing their own objectives, rather than those of taxpayers, it would be natural for POs to advocate this change in the process. In our opinion, the deterrent effect of protests should be strengthened, not by lowering the cost of protests to firms, but by the means described in suggestion 2 above.
- b. It could be argued that the "role and jurisdiction of the GSBICA must be narrowed to allow the focus of the project manager's decisions to be on

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245. This finding emerges from the formal analysis in the paper by Marshall et al., *supra* note 74.

quality and the creation of value for the taxpayers, not on minimizing the possibility or risks of protests by competing vendors."<sup>246</sup> However, this argument appears to have no basis. If a procuring agency attempts to maximize the surplus of taxpayers, then protesting firms will always be turned away by the GSBCA. If an agency spends its time attempting to minimize protests, and this activity has nothing to do with "creating value" for taxpayers, then there seems to be an obvious conclusion to draw—the agency wants to accomplish a goal that is different from surplus maximization for taxpayers. But distorted objectives of procuring agencies are a primary motivation for the existence of procurement oversight by protest. In other words, the argument contained in the quotation above is a non sequitur.

- c. Finally, it has been suggested that subcontractors on bids should have the right to protest at the Board. There is no reason to believe that a subcontractor would have better information about the problems with a procurement than the prime contractor. In other words, a subcontractor is not more qualified than a prime contractor as a private attorney general. In addition, the subcontractor and prime contractor can negotiate, *ex ante*, how protests will be handled. If the prime contractor will not contract with the subcontractor to file a protest on its behalf, then the subcontractor can choose to attach itself to a prime contractor that is willing to grant that concession. Furthermore, granting subcontractors access to the GSBCA would certainly increase the quantity of litigation with few, if any, apparent benefits for taxpayers. Overall, there seems to be no valid reason to recommend granting subcontractors the right to file protests.

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246. See *supra* note 55 and accompanying text.



