Via Email to sec809@dau.mil

Section 809 Panel
Mr. David Drabkin, Chair, Commissioner, Team 4 Leader
1400 Key Blvd.
Suite 210
Rosslyn, VA 22209

Re: Comments to Section 809 Panel; Proposed Changes to Procurement System and Bid Protests; Overall Comments

Dear Mr. Drabkin:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on points raised on and proposed changes to the procurement system and bid protests in a March 23, 2018 meeting. 1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA. 2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Contract Formation & Bid Protests.”
I. INTRODUCTION

The Section 809 Panel was established pursuant to Section 809 of the National Defense Authorization Act of Fiscal Year (“FY”) 2016, as amended. The Section 809 Panel established nine teams to address its stated aim of “making recommendations, including actionable changes to regulatory and statutory language, to improve the acquisition process of the Department of Defense” (“DoD”).

The Section is pleased to have the opportunity to provide input on the Section 809 Panel’s consideration of proposed changes to the procurement system and bid protests. Below are the Section’s comments on the historical evolution and purpose of federal bid protests, the effects of the proposed changes on addressing these purposes, and the need to promote efficiency in DoD procurements while improving the significant participation of current and future businesses in DoD procurements to maintain technological advantage.

The Section has concerns about what it has understood the Panel’s proposals to be for the following reasons:

- The proposals rest on flawed premises. Recommending changes to jurisdiction based on Perkins v. Lukens Steel Co. ignores decades of subsequent decisions and legislation that have shaped the widely accepted modern bid protest jurisdiction. Also, detailed studies and other public data show that DoD procurements are rarely protested and that the protests themselves are resolved quickly and efficiently—rebutting any broad-brush arguments that there are “too many” protests or protests take “too long.”

- The proposals ignore the Government’s actual experience when bid protest jurisdiction is curtailed and independent procurement oversight is correspondingly reduced.

- The proposals seek to change bid protest jurisdiction but rely for models on fora that by structure or practice lack the capacity to manage the current volume of bid protests or the specialized knowledge to resolve them consistent with the Government’s best interests.

- The proposals seek to compress time for pursuing and resolving bid protests to the point that meaningful review will be impractical in any forum.

- The proposals also gut the substantive bases of protest and substitute in inadequate remedies, converting bid protests into a litigation lottery played by firms lacking interest in either the actual procurements or the stewardship of taxpayer resources.

Overall, bid protests serve as time-, resource-, and cost-effective means of overseeing DoD’s procurement functions. Curtailing them based on anecdotal complaints and outdated caselaw would undermine, not support, the objectives Congress set out for the Section 809 Panel.
II. HISTORICAL CONTEXT FOR BID PROTEST REFORM

A. Introduction

Citing Perkins v. Lukens Steel Co., the Section 809 Panel has indicated an interest in revising the bid protest system to eliminate protest jurisdiction at the U.S. Government Accountability Office (“GAO”) and possibly the U.S. Court of Federal Claims (“COFC”). The Panel appears interested in moving jurisdiction to the Armed Services Board of Contract Appeals (“ASBCA”) or a stand-alone entity at DoD, and in revising protest jurisdiction and timing to speed protests up and focus them on meeting DoD’s needs.

Any attempt to improve the bid protest system should consider prior protest reform efforts and legislation that followed. This history shows that many, if not all, questions raised by the Section 809 Panel in this area have been studied, debated, scrutinized, and resolved deliberately by Congress when establishing the system we have today. Congress designed the protest process established by the Competition in Contracting Act of 1984 (“CICA”) and refined by the Administrative Dispute Resolution Act (“ADRA”) to serve the public interest, not the interests of any one agency or contractor.

The present system reflects Congress’s balancing concerns about procurement delays against concerns about documented waste, fraud, and abuse that occurs without a robust protest process affording meaningful relief. When presented with concerns that the initial protest processes were weak and inefficient, Congress codified the notion that disappointed offerors, acting as private attorneys-general, are best suited to protect the public interest in ensuring agency compliance with procurement laws. Congress mandated that all protested procurements be temporarily stayed pending GAO review absent affirmative override by the procuring agency. When faced with concerns about protests’ being decided by GAO—a forum in the legislative branch that over decades has developed experience and expertise adjudicating protests—Congress rejected those concerns. Indeed, when later presented with the express recommendation to eliminate GAO’s protest jurisdiction and consolidate all protest jurisdiction into a single executive forum, Congress rejected that option as well.

The history below establishes that the Section 809 Panel’s focus on a 1940 Supreme Court decision is misplaced because it fails to consider the congressional and judicial action that followed. Moreover, many of the Panel’s suggestions for protest reform are not only inconsistent with the public interest served by the current protest process, but have already been proposed to and rejected by Congress. In response to claims that specific protest doctrines have overburdened procurement officials, those doctrines are best addressed directly by amending relevant statutes and regulations, not by making changes that restrict or eliminate the protest process and that frustrate the important public interests the process serves.

3 310 U.S. 113 (1940).
B. In the Beginning: Organic Development of the Protest Process

The initial protest process evolved organically within agencies, GAO, and the federal courts, resulting in inconsistent jurisdictional and substantive standards, undue delay, and inadequate remedies.

1. GAO’s Initial Protest Authority

GAO issued its first bid protest decision in 1925, after a private company, Autocar, lodged a “protest” against the acquisition of motor vehicles relating to work on the Panama Canal. GAO considered the protest under its statutory responsibility to ensure that funds appropriated by Congress are lawfully spent, also known as GAO’s account settlement function. But beyond an informal suggestion that the agency should correct the procurement, Autocar presumably received neither interim nor permanent relief, as GAO lacked any such authority. For the next sixty years, GAO continued to resolve bid protests lodged by private parties pursuant to its account settlement authority and gradually evolved into a respected protest forum for such disputes. Recognizing this expertise, Congress, through CICA, provided the separate statutory authority under which GAO currently resolves bid protests.

2. Protests in Federal Court

Judicial review of procurement contract awards appeared unlikely at first. In the 1940 Perkins v. Lukens Steel Co. decision, the Supreme Court held that a disappointed contractor lacked standing to obtain judicial review of an agency’s award decision. Justice Black’s opinion turned on the premise that the Public Contract Act did not provide private litigants any right to sue the federal government:

[The Public Contract] Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.

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7 310 U.S. 113 (1940).
8 Id. at 127.
Then, times changed. Six years after Perkins, Congress enacted the Administrative Procedure Act (“APA”), which broadly waived the federal government’s sovereign immunity as related to judicial review of administrative matters and created a baseline presumption that district courts could enjoin any final agency action found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.\footnote{5 U.S.C. § 706.}

It is now well settled that “Congress rarely intends to prevent courts from enforcing its directive to federal agencies,” and the Supreme Court “applies a strong presumption favoring judicial review of administrative action.”\footnote{Mach Mining, LLC \textit{v. E.E.O.C.}, 135 S. Ct. 1645, 1651 (2015) (internal quotation omitted).} This is consistent with clear legislative pronouncements at the time of passing the APA.\footnote{“It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.” S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). Likewise: “The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.” H.R.Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946 at 1195.}

This APA administrative review process was first applied to a bid protest in 1970. In \textit{Scanwell Laboratories, Inc. v. Shaffer}, the Court of Appeals for the District of Columbia Circuit held that Congress, in enacting the APA, had changed the premise underlying Perkins and provided a disappointed offeror standing to challenge the award of a government contract.\footnote{424 F.2d 859 (D.C. Cir. 1970).} The D.C. Circuit recognized the strong public interest in allowing disappointed offerors to act as private attorneys-general to police the procurement process:

It must be remembered that Perkins was decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act. . . . Professor Davis has very discerningly seen the fallacy of the Court’s thinking in this decision and has devised a more logical and more consistent basis for viewing such situations:

What the court did not inquire into in the \textit{Lukens} opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what ‘the Government’ may do in making contracts; a more refined view would be that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government’s proprietary functions, and that the most practicable way to keep the government’s contracting officers
within their statutory powers is by letting complainants like those in the *Lukens* case obtain judicial review of the officers’ action.

This is a powerful argument for allowing the plaintiff in the current case the requisite standing to challenge the governmental action of which it complains. Regardless of the merits of plaintiff’s case, it should be granted the right, if possible, to make a prima facie showing that the government’s agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of the contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? . . .

Shortly after *Scanwell*, in *Keco Industries, Inc. v. United States*, the U.S. Court of Claims (predecessor to the U.S. Claims Court, reorganized into the COFC and the U.S. Court of Appeals for the Federal Circuit) found that it also had jurisdiction over bid protests through the procuring agency’s “implied contract to fairly and honestly consider and evaluate plaintiff’s bid.” But COFC judges varied in applying this protest jurisdiction.

Thus, after 1970, there were four prospective bid protest fora: the contracting agencies themselves, GAO, the COFC, and federal district courts under *Scanwell*. Each suffered from certain inadequacies. First, protests within an agency were viewed as unlikely to be given meaningful consideration and independent review. Second, GAO lacked express statutory authority to decide protests, relying solely on its account settlement authority, and could not provide meaningful relief. Third, the Court of Claims (and later the COFC) lacked some tools needed to craft effective remedies for certain protests, such as injunctive relief, such that a successful protester was limited to recovering proposal costs. And fourth, the federal district courts acting under *Scanwell* jurisdiction lacked the expertise in procurement law to effectively adjudicate bid protests. These district court actions produced inconsistent decisions, increasing the opportunity and likelihood for forum shopping.

**C. Deliberate Reform: Crafting the Current Protest System**

These protest fora’s inadequacies were first addressed by the 1969 Report by the Commission on Government Procurement (“Commission”), which Congress appointed to

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13 Id. at 866–67; see also Phillip M. Kannan, *Perkins v. Lukens Steel Company: Fifty-Two and Counting*, 22 Pub. Cont. L.J. 463, 472 (1992) (“To understand what of *Lukens Steel* continues today as part of the law of standing, one must keep in mind three facts involved in the case that are essential, although often ignored: (1) the plaintiffs’ attempt to assert rights of the entire steel industry, not a disappointed bidder; (2) the prayer for relief included a request for injunctive relief against all government agencies, not a particular procuring agency; and (3) the injunction sought in the prayer for relief was to include all steel procurements, not one particular procurement.”).

14 428 F.2d 1233, 1236 (Ct. Cl. 1970).

examine all federal government procurement processes and procedures. CICA later incorporated some of the Commission’s recommendations related to bid protests, such as firmly establishing GAO’s statutory authority to decide protests and requiring an automatic stay of award and performance pending resolution of a timely filed protest.

In 1991, the Department of Defense Acquisition Law Advisory Panel, the so called “800 Panel,” reviewed the protest process. Ultimately, ADRA transferred district court Scanwell protest jurisdiction to the COFC and gave it the authority to grant injunctive relief in both pre-award and post-award protests.

These legislative changes show that Congress understands how the bid protest procedures at GAO and the COFC serve important public interests. Through these legislative initiatives, Congress has not only expanded and strengthened the GAO and COFC protest functions, it has also rejected recommendations to replace GAO and COFC jurisdiction with a single forum within the executive branch. Congress has made its position clear: executive spending should be subject to oversight from outside that branch; all final agency action is presumed subject to judicial review; and disappointed offerors acting as private attorneys-general are the most efficient and reliable means of ensuring agency compliance with procurement laws.

1. **CICA: GAO Protest Reform**

The 1969 Commission Report focused on procurement dispute resolution processes, providing recommendations that would ultimately be enacted through CICA such as the “CICA stay.” As a starting point, the Commission understood that a robust protest system was a vital component of a successful procurement system:

The value of the award protest system is that it provides a means of subjecting administrative decision-making to review and thereby acts to assure that Government officers follow the procedures that have been established in the statutes and regulations governing the procurement process. It also serves to protect the contractor’s right to be bargained with fairly and, in turn, to be provided a remedy when its rights are infringed. A system that will not assure a

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16 The Commission’s recommendations also led to enactment of the Contract Disputes Act and creation of the Federal Acquisition Regulation (“FAR”).


19 Notably, as a part of these protest reform processes, Congress withdrew protest authority from the one executive agency judicial forum that previously had limited exclusive protest authority, the GSBCA. National Defense Authorization Act for 1996 § 5101, Pub. L. No. 104-106.
protester an adequate remedy unnecessarily creates a lack of confidence in the integrity of the methods by which Government contracts are awarded.

. . . .

Public interests require the efficient, economical, and timely acquisition of goods and services. This strong public interest, it is contended, often overrides the personal interests of the protestor when to dispense a remedy would unduly delay or increase the cost of a procurement. Overlooked, however, is the greater overall benefit that can be gained by dealing fairly with contractors and encouraging them to deal with the Government in the future.

. . . .

If rules are to be effective . . . there must be some way of making those who are governed by them adhere to them. . . . [F]ailure to adjudicate legitimate protests may not only unjustly deprive the rightful recipient of their economic opportunities, it may lessen future business interest in bidding on Government contracts. 20

The Commission took issue with several aspects of the initial protest disputes system, particularly: (1) an absence of procedures and remedies that would assure fairness in the treatment of protesters; (2) delay in processing protests through the administrative fora; and (3) the lack of an effective plan for reducing the number of protests. 21 The Commission expressed concern that no statute or solicitation provision provided a right to protest. 22

To remedy these perceived shortcomings, the 1969 Commission Report recommended changes to codify and strengthen GAO protests. 23 Among these recommendations were to (1) create mandatory timelines for agency submission of information to GAO to ensure timely protest resolution; and (2) provide for a mandatory stay of award or performance pending resolution of the protest by GAO, except if a high level agency official determined a stay would not serve the best interest of the Government or the agency had urgent and compelling needs. 24 These recommendations were driven by concerns that agencies often rendered protests moot by delaying their participation until contract performance had already begun. 25

20 1969 Report, supra note 15, Vol IV, Part G, at 7 (first two quoted paragraphs); id. at 36-37 (last quoted paragraph).
21 Id. at 7.
22 Id. at 5-6.
23 Id. at 8.
24 Id. at 41-45.
25 Id. As part of the Commission’s affirmative plan to reduce the number of protests, the Report recommended improved debriefing procedures based on an unpublished Department of the Air Force study from 1971 indicating that a certain portion of award protests were made unnecessarily because they were “based on incomplete or
In response to the suggestions by at least one Commissioner that protest authority be moved to an entity within the executive branch, such as the Department of Justice ("DOJ"), the 1969 Report emphasized the importance of vesting protest jurisdiction within GAO:

Adjudication of award protests by GAO serves several important functions in the procurement process. GAO’s separation from the contracting agencies assures contractors that their complaints are considered free from any bias toward individual agency policies and thus promotes the confidence of both private enterprise and the general public that Government business is conducted with integrity. Such separation from the daily concerns of the contracting agencies also allows GAO to frame and solve problems in terms of the overall best interests of the Government. The award protest decisions issued by the Comptroller General within the past five decades form a cogent body of Government contract law that is useful for guidance in solving individual problems occurring in the contract award process and provide a basis for development of more generally applicable procurement regulations. GAO’s establishment as an administrative forum potentially allows it to afford a speedier resolution of disputes than would be possible if Federal courts were the only arbiter. 26

Congress did not disagree. 27 Instead, Congress affirmatively strengthened GAO’s role as a protest forum. Legislative hearings before CICA’s passage focused on GAO’s inability to stop an agency from awarding a contract or beginning performance after a protest, preventing any meaningful corrective action even in the face of a flawed procurement:

[GAO] makes every effort to give agencies discretion in how and in what timeframe they respond to a protest, and has been hesitant to challenge any but the most blatant agency actions. As a consequence, the current bid protest process does not provide an adequate remedy to those wrongly excluded from procurements.

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Another major concern about the current bid protest process is that protests often do not produce corrective actions even when the protester overcomes the enormous burdens imposed by the system. Frequently, agencies ignore GAO’s recommendations in order to avoid recompeting contracts.

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erroneous information concerning the rationale for making the administrative decisions on which those protests are based” and “[o]ften, after full information is available, the protests are withdrawn.” Id. at 48.

26 Id. at 41.

27 Id. at 41.
The Committee is also concerned about the amount of time consumed in deciding bid protests. The time delays in the process are due in part to the fact that agencies drag out the process for their own purposes... [Over the last three fiscal years], on average, it took more than six months to render these decisions, with about one-third of that time consumed by the agencies. In some cases, however, decisions were pending for more than a year. 28

Following these proceedings, CICA codified GAO’s bid protest function, created the CICA stay, and established mandatory timeframes for agencies to respond to the protester’s allegations and for GAO to issue its decision. 29 This combination makes sense. For a protest to protect the protester's interest in the award and prevent potentially unlawful procurement practices from going uncorrected, agencies must not be permitted to continue with contract award or performance in a manner that would render GAO’s decision academic. At the same time, to ensure the CICA stay does not unreasonably burden the acquisition process, GAO must decide protests within CICA’s strict deadlines, and agencies must be able to override a CICA stay when necessary.

2.  ADRA: Reform of Federal Court Protest Process

The next major protest reform was triggered by the 800 Panel’s report released in March 1993. The 800 Panel reviewed all four non-agency protest fora then available: GAO, General Services Board of Contract Appeals (“GSBCA”), the COFC, and district courts. 30 The Panel’s immediate recommendation—and the one that actually gained interest in Congress—was to consolidate federal court protest jurisdiction into the COFC by sunsetting Scanwell district court jurisdiction and providing the COFC authority to issue post-award injunctive relief. 31 The Panel also recommended that “Congress consider a more far-reaching reform by replacing the four existing bid protest forums with a single bid protest forum in the executive branch,” but also


29 Section 2741, Pub. L. No. 98-369, July 18, 1984, 98 Stat. 1199. During the CICA debate, DOJ expressed concern with the constitutionality of GAO, a legislative entity, overseeing executive purchasing decisions. See H. Rep 98-1157, Competition in Contracting Act of 1984, to Accompany H.R. 5184, Oct. 10, 1984, at 62-63 (Brooks). These concerns were fully considered and rejected by the 98th Congress and the federal courts. See id. DOJ’s challenge to the notion that GAO could constitutionally oversee executive spending weighed against a lengthy history, as GAO’s role was cemented by the First Congress upon recommendation of James Madison, indicating that the Constitution’s drafters saw no threat to separation of powers in an independent entity overseeing the use of public funds. Id. Moreover, any real doubt as to the constitutionality of GAO’s exercising independent oversight over the executive branch has long since been extinguished by a series of federal court decisions. See Buckley v. Valeo, 424 U.S. 1, 128 n.165 (1986) (distinguishing Comptroller General from general officers of House and Senate because the Comptroller is “appointed by the President in conformity with the Appointments Clause”); see also Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979 (3d Cir. 1986) (upholding constitutionality of CICA’s stay provisions in light of the Supreme Court’s holding in Bowsher v. Synar, 487 U.S. 714 (1986)).


31 Id. at 42-43.
recognized that “it would be premature to implement this far-reaching reform without considerably more analysis and debate.” Congress never accepted that far-reaching recommendation.

Although the recommendation to consolidate all protest authority into a single executive entity gained little traction, Congress did act through ADRA to consolidate district court Scanwell jurisdiction into the COFC’s jurisdiction. ADRA made express the COFC’s jurisdiction to hear and provide injunctive relief in pre-award and post-award protests, and provided a “sunset clause” through which district court jurisdiction under Scanwell would be extinguished in 2001. The Congressional Record shows that ADRA was implementing certain recommendations of the 800 Panel, while confirming that Congress was not limiting GAO’s protest jurisdiction.

DOJ supported ADRA’s consolidation of protest jurisdiction within the COFC, in contrast to its earlier objections to CICA. DOJ’s letter of support for consolidated protest jurisdiction urged one administrative and one judicial protest forum:

The Administration supports your efforts to enact legislation that would make one small but vital improvement to the handling of bid protests arising from the award of Federal contracts—the elimination of district court jurisdiction over bid protests . . . . In disputes between an agency and a contractor after the award of a contract, Congress has previously recognized the need for a uniform national body of law to guide both Federal procurement officials and Federal contractors. The same need for nationwide uniformity exists for bid protests . . . .

By eliminating the authority of the General Services Board of Contract Appeals to entertain bid protests of the award of information technology contracts the recently enacted defense authorization bill for fiscal year 1996 (Pub. L. No. 104-106) took a significant step forward in the handling of bid protests by leaving the General Accounting Office as the sole remaining extra-agency administrative forum. The process of procurement reform should continue by eliminating Scanwell jurisdiction, and by creating a single judicial forum to govern all bid protest litigation, both prior to and after award . . . .

\[32\] Id. at 40.

\[33\] Notably, ADRA was sponsored by Senator Grassley—now chairman of the Judiciary Committee—who likely will be involved in any effort to amend protest jurisdiction of federal courts.

\[34\] 28 U.S.C. § 1491(b).

Legislation should . . . achieve a uniform and consistent precedent governing bid protests, by providing interested parties with a choice of only one administrative and only one judicial forum for the resolution of bid protests.\(^{36}\)

DOJ’s position, coupled with Congress’s declining to act on the Section 800 Panel’s recommendation to consolidate protest jurisdiction into one forum and the jurisprudential shift that accompanied the APA, show that Congress’s concerns for legislative oversight of executive spending and judicial review of agency action outweighed any perceived marginal benefits in procurement efficiency that might have been gained by eliminating either GAO or COFC protest jurisdiction.

D. The Importance of Accountability: Life Without Protests

History also shows problems when protest jurisdiction is removed, such as with task order protests. The Federal Acquisition Streamlining Act (“FASA”) barred protests filed in connection with military and civilian agency task and delivery orders issued under multiple-award indefinite-delivery indefinite-quantity (“IDIQ”) contracts, except for protests alleging that an order increased the scope, period, or maximum value of an underlying IDIQ contract.\(^{37}\)

But as noted by two DoD Inspector General (“IG”) reports, this lifting of protest jurisdiction led to a spike in sole-source awards with little consideration of price. One report reviewed 124 task orders and found that 66 (53 percent) were awarded on a sole-source or directed-source basis “without providing other contractors a fair opportunity to be considered.”\(^{38}\) The DoD IG also found that orders frequently were placed under such contracts without regard to price, even though price should have been considered.

A follow-on report found that improper ordering practices had not only continued but may have become even more prevalent.\(^{39}\) The DoD IG reviewed 423 task orders and found that 304 (72 percent) were awarded on a sole-source or directed-source basis. Of the 304 sole-source or directed-source awards, 264 were improperly supported.

Since Congress restored task-order protest jurisdiction, these problems have greatly diminished because competitors under multiple award vehicles generally object when agencies violate these types of procurement rules. Bid protest jurisdiction serves an important government purpose—to assure that the procurement rules are followed.

\(^{36}\) See id.


E. Outside the Beltway: What Do States and Localities Do?

During our meeting with the Section 809 Panel, questions arose about whether a federal bid protest vehicle similar to state or local procurement protests could achieve faster and more efficient resolution of protests. We have briefly surveyed the protest experience in state jurisdictions. Just like Congress, states see protests as providing transparency, protecting against improper collusion and favoritism, and ensuring fair competition among bidders. Examples from seven jurisdictions are set out in an appendix to this letter.

III. BID PROTEST PROCESS FOR DOD PROCUREMENTS

A. Tribunal

The Section understands that the Section 809 Panel might recommend moving bid protest jurisdiction from GAO and the COFC to an entirely new tribunal. The Section 809 Panel has advised that it is considering creating a new forum akin to the Office of Dispute Resolution for Acquisition (“ODRA”), the statutorily designated sole tribunal for contract disputes and protests under the Federal Aviation Administration’s (“FAA”) Acquisition Management System. According to the Section 809 Panel, creating a similar forum—a procurement “rocket docket,” perhaps housed within the ASBCA or as a stand-alone entity within DoD—would advance the Section 809 Panel’s goal of obtaining fast decisions in bid protests.

The Section submits that there is no need to create a new tribunal; protests are already resolved quickly at GAO and the COFC. As the Section 809 Panel is aware, GAO is statutorily required to issue a decision within 100 days of a protest’s filing. And most protests do not take that long. Indeed, GAO resolved approximately 50% of all protests filed in FYs 2008 through 2016 within 30 days, and 70% within 60 days. The COFC likewise resolves protests efficiently. Although the COFC is not subject to the same statutory mandate, it still decides protests on an expedited basis—typically on a schedule the parties propose. Indeed, over the same nine-year period, the COFC resolved more than half of all protests within 87 days.

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40 If the Section 809 Panel is recommending a new tribunal out of concern about precedent—e.g., the body of law that has developed around organizational conflicts of interest (“OCI”) at GAO and the COFC—it can simply recommend that the relevant regulations be revised. For example, the Panel could urge the FAR Council to issue the final, revised OCI regulations contemplated in FAR Case No. 2011-001. See 76 Fed. Reg. 23236 (Apr. 26, 2011) (Proposed Rule).


43 See RAND Report at 53.
The Section urges the Section 809 Panel to compile and analyze data on case disposition timing at each of the fora it points to as a potential model for a future protest forum. As discussed below, even the limited data already available shows that ODRA, the ASBCA, and courts typically viewed as “rocket dockets” are, by and large, slower at issuing decisions than GAO and the COFC.

I. ODRA

Before the Panel recommends dismantling the current protest system at GAO and the COFC in favor of ODRA, or an “ODRA-like” forum, we urge the Panel to better understand the ODRA process and analyze more data about ODRA’s caseload and turnaround times. Although ODRA tends to release less data than other fora, even the limited publicly available information reveals cause for concern about an ODRA-like forum’s ability to manage the volume of bid protests across DoD.

In the 20 years since its inception, ODRA has received fewer than 600 protests.44 By contrast, there were approximately 1,400 protests of DoD procurements just in 2016.45 Despite the emphasis in its rules on alternative dispute resolution (“ADR”) processes, ODRA issued a final decision in 34% of all protests, which is approximately 50% higher than the rate of final decisions at GAO.46 In contrast, the Section’s experience indicates that GAO uses formal ADR proceedings much less often than ODRA, yet still resolves nearly 50% more protests without issuing a final decision when compared to ODRA.

ODRA’s average time to resolve protests is not available, but the most recent decisions published on its website show that ODRA can take much longer to resolve matters than GAO does for cases of comparable or greater complexity—all of which are resolved within 100 days. For example, ODRA’s most recent decision, Protest of Leader Communications, Inc.,47 resolved “the eighth [protest] in a series of Protests of the same underlying acquisition dating back to 2014.”48 This eighth protest was filed around June 1, 2017, after the protester was eliminated from the competition for using “a substantial amount of smaller-than-12-point text.”49 The protester ultimately filed two additional supplemental protests; ODRA took six months to issue a

45 See RAND Report at 25 (Figure 4.1, Protest Actions at GAO, FYs 2008-2016, showing approximately 1,400 DoD protest actions at GAO in FY2016).
48 Id. at 3.
49 Id. at 5.
That is nearly twice the time Congress allows GAO to resolve even the most complex multibillion-dollar protests relating to major DoD weapons systems.

These longer timeframes are driven in large part by ODRA’s processes. Unlike GAO’s rules, which map out the entire process from initial filing to a final decision in no more than 100 days, ODRA’s rules call for the forum to schedule each protest individually. Each time it receives a new protest, ODRA must “convene an initial status conference for the purpose of scheduling proceedings.” During this status conference, the parties must collectively decide whether to first attempt ADR or instead to proceed through the adjudicative process. If the parties choose ADR, then ODRA must designate potential neutrals, which can include ODRA Dispute Resolution Officers (“DROs”), outside neutrals, or special masters; then the parties must agree on a neutral; and, finally, the parties must negotiate, execute, and file a written ADR agreement.

If the parties choose the adjudicative process, or if the ADR process fails to resolve the dispute, there are separate procedures; only then will ODRA assign a separate DRO or special master. Once the adjudicative process begins, ODRA’s rules provide additional steps that GAO’s more streamlined process avoids. ODRA’s rules allow the parties to engage in discovery with each other and with non-parties to obtain information relevant to the protest allegations. The DRO or special master must “manage the discovery process” and “establish schedules and deadlines for discovery.” Discovery can include depositions and interrogatories, and the parties may also request subpoenas. After the parties develop the record and complete their submissions, the DRO or special master must then prepare and submit findings and recommendations to ODRA, which the ODRA Director then uses to issue a final order.

Comparing the two fora’s staffing highlights this contrast in protest-specific procedures. To resolve the 29 protests received on average each year, ODRA employs four administrative

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51 14 C.F.R. §§ 17.13(d), § 17.17(b) (requiring ODRA to hold this conference within five business days of receiving the protest).

52 Id. § 17.13(d).

53 Id. §§ 17.17(e) and 17.17(d).

54 Id. §§ 17.13(e), 17.21(a).

55 Id. § 17.21(i).

56 Id. § 17.21(i)(1).

57 Id. § 17.21(i)(3) – (5).

judges: a Director and three DROs.\textsuperscript{59} That equates to about seven protests per administrative judge each year, without factoring in the additional special masters. GAO, by contrast, resolved 2,471 protests in FY 2017 with a staff of approximately 30 attorneys, which equates to just over 82 protests per attorney. Although active COFC judges resolve a similar number of protests each year as the ODRA judges, for the COFC, those protests account for less than 7\% of its total caseload.\textsuperscript{60} 

2. \textit{The ASBCA}

For similar reasons, the Section advises against vesting protest jurisdiction in the ASBCA, which has a significant backlog of cases and takes substantially longer than 100 days to issue decisions.

The ASBCA’s Quarterly and Annual Reports to Congress show that the ASBCA resolves roughly 600 cases a year but has a significant and consistent backlog of nearly 1,000 cases each year. Indeed, the ASBCA’s FY 2017 Annual Report (“Report”) shows that as of October 1, 2017, 970 were appeals pending there. Although the ASBCA closed 678 cases in FY 2017 and decreased its docket by a net 107 cases, the Report reveals that most were resolved by dismissal (539), and that “[i]n the majority of cases, a dismissal reflects that the parties . . . reached a settlement.”\textsuperscript{61}

These concerns are compounded by how long the ASBCA takes to resolve cases on the merits. Although the ASBCA has not published data on the average time taken to resolve appeals, anecdotal evidence suggests that dispositive motions often take \textit{years} to be decided. The ASBCA is simply not equipped to handle an additional 1,200 to 1,400 cases, which it would have to do if DoD protests are moved to that forum.\textsuperscript{62}

\textsuperscript{59} FAA Office of Dispute Resolution for Acquisition, Resolving and Avoiding Procurement Disputes at the FAA (Sep. 2016) at 4, available at https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/agc70/odra_process/.

\textsuperscript{60} In FY 2017, the COFC resolved 133 bid protests out of 1,934 cases. Court of Federal Claims, Statistical Report for the Fiscal Year October 1, 2016 – September 30, 2017, available at https://www.uscfc.uscourts.gov/sites/default/files/FY17%20stats%20for%20website.pdf.

\textsuperscript{61} ASBCA Memorandum, Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 2017, available at http://www.asbca.mil/Reports/FY2017%20Reports/FY2017_annual.pdf. It is also worth mentioning that the ASBCA is accustomed to trials—not the type of fast-paced bid protest litigation currently conducted before GAO and the COFC. In that regard, current contract disputes litigation before the ASBCA resembles traditional litigation instead of protest practice before GAO or the COFC, complete with 30+ day filing deadlines, full discovery, and discretionary pre-trial, trial, and post-trial briefing schedules. To be sure, the ASBCA has “expedited” and “accelerated” procedures for certain small claims, but those cases concern much smaller contracts than those at issue in the typical DoD protest filed at GAO or the COFC, and, in any event, are rendered within 120 days and 180 days, respectively—still longer than GAO’s 100-day deadline. See ASBCA Rule 12.1(a) (discussing expedited procedures in disputes for the amount in dispute is $50,000 or less); ASBCA Rule 12.1(b) (same for $100,000 or less).

\textsuperscript{62} See RAND Report at 25 (Figure 4.1, Protest Actions at GAO, FYs 2008-2016, showing approximately 1,400 DoD protest actions at GAO in FY2016); \textit{see also id. at} 31 (Table 4.2, DoD Bid Protest Characteristics at GAO, FYs
And the Section does not believe creating a new protest division within the ASBCA, possibly staffed with current GAO attorneys, is necessary (or desirable). As now structured, GAO is a constitutionally acceptable forum that has proven efficient and effective; there is no need to create a new forum. See History Section II.C, supra. If anything, the Section 809 Panel’s suggestion that GAO be dismantled only to be recreated at the ASBCA underscores the Section’s point that GAO is a completely functional forum. Creating a new forum just for DoD procurements would be inefficient, as it would duplicate the existing structure for protests at GAO, which would still hear protests from the remaining executive branch agencies.

3. “Rocket Dockets”

The Section also believes that because of their body of case law, processes, and experience, GAO and the COFC resolve protests faster than current federal court “rocket dockets.” We recommend that the Section 809 Panel also review available data on how quickly U.S. district courts resolve cases. Reviewing the time from filing to disposition in federal district courts nationwide shows that even the fastest “rocket dockets” require longer than GAO’s 100-day timeline. The U.S. Courts Judicial Business Report for 2017 shows that the median time interval for case resolution across all jurisdictions is 9.9 months: when no court action is needed, the median time drops to 4.9 months; when cases are terminated during or after pretrial proceedings, the time interval jumps to 12.9 or even 25.2 months.63

The disposition rates at the Eastern District of Virginia—known for its significantly below-average disposition times—are instructive. The Reporter to the Civil Justice Reform Act Advisory Committee for the Eastern District of Virginia has noted that even in that court, trials are set approximately four to six months (roughly 120 to 180 days) after the filing date:

Civil cases filed in the Eastern District of Virginia are usually set for trial no longer than six months after the filing date, and most cases are tried approximately four to five months after filing.64

The Judicial Business Report data from 2017 confirm this description. When no court action was necessary, the median time interval from case filing to disposition was 4.3 months—approximately 129 days. The number increased to 4.4 months when cases were closed before pretrial proceedings, 7.8 months when closed during or after pretrial proceedings, and 12.3 months when cases were closed during trial.

2008-2016, showing a total of 11,459 DoD protests at GAO over nine years, for an average of over 1,200 DoD protests per year).


Ultimately, in seeking to decrease the time in which bid protests are decided, the Section 809 Panel should not throw out the fora proven to be the most effective and efficient. If the Section 809 Panel is interested in examining other fora as potential models for bid protests, the Section recommends that the Section 809 Panel compile and analyze actual data on their turnaround times and not act based on perceived efficiencies of other fora over GAO or the COFC. Available data certainly suggest that neither ODRA nor the ASBCA provides a more expeditious model for case resolution, and that not even the Eastern District of Virginia resolves cases faster than GAO or the COFC resolve protests.

Rather than scrapping GAO and COFC protest jurisdiction entirely, the Section 809 Panel might consider whether more targeted changes can reduce protest time at both GAO and the COFC.

B. Timing

The Section further understands that the Section 809 Panel plans to recommend that some or all protests be decided within 10 days of filing. Although we appreciate the Section 809 Panel’s goal of shortening procurement delays due to protests, the Section submits that, as we believe the Section 809 Panel recognizes, while some protests may be susceptible to such rapid resolution, it is an unrealistic time period for resolution of all protests.

The Section 809 Panel should first reconsider its premise that GAO and the COFC are too slow. Even though GAO must resolve protests within 100 days of filing, data collected over nine years show that over 50% of protests are decided within 30 days, and 70% within 60 days.65 And the COFC is similarly efficient.

In any event, if the Section 809 Panel continues pursuing shorter protest times, we suggest it consider efficiencies that might be achieved through substantive reform efforts—such as the enhanced debriefings now being implemented in DoD procurements, or the Section 809 Panel’s idea of publishing the complete contract file at the time of contract award.66 Protest timing is generally driven by three factors: (1) the contracting agency’s effort to compile procurement documents, negotiate discovery disputes, and draft the agency report; (2) briefing by the protester and possibly an intervenor or intervenors; and (3) GAO’s and the COFC’s review, analysis, and drafting of a decision. Providing disappointed offerors part or all of the

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65 See Process Section I above. GAO has informed Congress that it cannot shorten the process below 100 days without affecting the quality and efficiency of the protest process; moreover, GAO has advised that a shorter protest period might actually force DoD agencies to expend far greater effort as they would have to default to formal responses in all protests to make deadlines, where longer periods of time allow DoD more opportunity to resolve protests without submitting formal reports. See Letter from Gene A. Dodaro, Comptroller General, to Hon. John McCain et al., Sept. 7, 2017.

66 The FY 2018 National Defense Authorization Act, Pub. L. No. 115-91, required enhanced post-award debriefings for disappointed offerors in certain DoD procurements, including the right to receive a redacted copy of the agency’s written source selection and the right to ask follow-up questions within two business days of receiving a post-award debriefing. In suggesting more robust disclosure of the contract file and debriefings, the Section would still preserve the protection of offerors’ proprietary information, as well as other information that is to be protected under established Freedom of Information Act exemptions at 5 U.S.C. § 552.
evaluation record up front could significantly decrease or eliminate the time currently taken for compiling the record, resolving discovery disputes, and briefing for supplemental protests. Indeed, with this additional information, disappointed offerors may forgo protesting altogether. But even if they do protest, the record will already be complete, and the parties will be able to brief all the issues immediately, which means that GAO or the COFC can begin drafting the decision sooner.67

If the Section 809 Panel desires even further reductions, we urge the Panel to consider where efficiencies could be achieved without sacrificing quality of review and oversight. Reducing the time in which protests are resolved necessarily reduces the time one or more of the stakeholders—protesters, intervenors, contracting agencies, and the protest forum—have to meaningfully review the record and determine whether the procuring agency’s decisions were reasonable and in accordance with law and regulation. The Section 809 Panel should thus research and consider the ramifications of any further reductions. Questions to consider include whether contracting agencies can compile the record faster; if so, realistically, how much faster; the extent of briefing parties can pursue; whether reducing briefing would sacrifice due process and/or a key aspect of oversight, namely protesters’ role as private attorneys-general; and how long the adjudicating forum (GAO, the COFC, or otherwise) realistically needs to review arguments and the record, and issue an opinion that not only resolves the protest but also provides meaningful guidance for stakeholders in future procurements.

C. Grounds for Consideration in a Protest

The Section understands that the Section 809 Panel might recommend constraining or transforming the grounds that a DoD protest tribunal could consider. Our recent discussions with the Section 809 Panel have centered on limiting grounds to whether the source selection represents a “good business decision.” Such a limited standard could shield many important violations of procurement law and arbitrary evaluations from scrutiny, however, while also undoing the carefully balanced deference that DoD enjoys for its discretionary business judgments.


To understand why protest grounds should not be curtailed, we first note the protest grounds considered by GAO and those not considered. For pre-award protests, protest grounds can be generally categorized as follows:

67 We respectfully disagree with the Section 809 Panel’s suggestion that requiring the new protest forum to issue a brief ruling (i.e., a simple “sustain” or “deny”) on the tenth day, to be followed by a written decision at some later date, would reduce the time needed to resolve protests. The time needed to write a decision—and whether that period should be truncated or eliminated—is not the issue; the issue is that protest fora need enough time to analyze the record and consider meaningful input from the parties in order to reach a decision in the first instance. And as discussed in the Remedies section below, without a stay of contract performance and with only financial incentives as a remedy, there would be no particular urgency warranting such a decision deadline.

68 In this regard, the Section may in the future submit separate comments on what should be included in the contract file, and what should be provided in debriefings.
• Omission or inclusion of solicitation provision violates procurement statute or regulation;
• Solicitation provision is unduly restrictive of competition; and
• Solicitation evaluation criteria are ambiguous or prevent a common basis of understanding for competition.

The following pre-award protest grounds are specifically prohibited from consideration at GAO, either by regulation or case law:

• Issues committed to the Small Business Administration, such as NAICS code disputes and the decision to procure under Section 8(a) of the Small Business Act;
• Subcontract solicitation defects;
• Arguments that a solicitation allows too much competition; and
• Violations of statutes or regulations unrelated to procurement law (such as appropriations).

While cognizable allegations of unreasonable or unlawful agency action are more varied for post-award protests filed at GAO, they generally can be categorized as follows:

• Failure to follow evaluation criteria or use of unstated evaluation criteria;
• Unreasonable evaluation findings (i.e., technical, past performance, cost/price);
• Inadequate documentation of findings;
• Unequal or disparate treatment of offerors;
• Inadequate, unequal, or misleading discussions;
• Unreasonable selection decisions; and
• Other violations of procurement statutes or regulations in the conduct of an evaluation or source selection.

As with pre-award protests, GAO has refused to hear many post-award protest grounds, either through regulation or case law, including:

• Issues committed to the Small Business Administration, such as the size or socioeconomic status of the awardee;
• Affirmative determinations of responsibility, with limited exceptions;
• Matters of contract administration subject to the Contract Disputes Act;
• Untimely Procurement Integrity Act violation allegations;
• Subcontract award issues;
• Suspensions and debarments; and
• Evaluation and source selection defects related to alleged violation of non-procurement statutes or regulations (i.e., appropriations and programmatic statutes).

In addition, GAO refuses to hear any protest ground that is untimely unless the allegation represents a matter of significant importance to the procurement system, namely a matter of first
impression, and it refuses to hear a protest ground that lacks a sufficiently detailed statement of the legal and factual basis of protest or that sets forth legally insufficient grounds.

The Section believes that GAO, through decades of decisional law and rulemaking, has developed these grounds for consideration (and not for consideration) by carefully balancing the need to provide oversight with the need for DoD to timely procure needed goods and services. The Section cautions against further limiting these grounds for consideration without a clear public policy case for doing so. As shown in Process Section II above, this portfolio of cognizable grounds can be considered in a timely fashion without unduly delaying the delivery of goods and services to DoD.

2. **Current Protest Grounds – The COFC**

The grounds for consideration at the COFC are potentially broader than at GAO due to differences in the COFC’s jurisdictional mandate. This forum can review, in addition to a solicitation defect or an award or proposed award, any “alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”\(^{69}\) In rare instances, this authority has led the COFC to review insourcing decisions, subcontract awards, and other actions that might otherwise not be reviewed at GAO.

At the same time, there are limits on the types of agency decisions that the COFC will review. First, the COFC follows similar, but not identical, standing rules (i.e., the definition of “interested party”) as those followed at GAO.\(^{70}\) Second, the COFC under the *Blue & Gold Fleet* doctrine follows a similar pre-award timeliness standard as GAO, preventing protests of solicitation defects after proposals are submitted.\(^{71}\) Third, the Federal Circuit has recently reiterated that violations of law unrelated to procurement statutes and regulations, such as appropriations and internal-management statute violations, are not cognizable under the COFC’s bid protest jurisdiction.\(^{72}\)

Thus, in the vast majority of protests at the COFC, the protest grounds for consideration under its “arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law” standard of review closely resemble those at GAO, despite the different wording to fit the COFC’s standard of review. This is unsurprising given that an increasing number of the COFC protests are continuations of protests previously decided or filed at GAO.\(^{73}\)

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\(^{69}\) 28 U.S.C. § 1491(b)(1).


\(^{71}\) *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007).

\(^{72}\) *See Cleveland Assets, LLC v. United States*, 883 F.3d 1378, 1381-82 (Fed. Cir. 2018).

\(^{73}\) RAND Report at 54.

The Section urges caution to the Section 809 Panel before recommending elimination of any current protest ground from consideration during a DoD bid protest. With protest grounds limited to those alleging a failure to make a “good business decision,” DoD could fail to correct violations of several procurement statutes and policies that are in the Government’s interest to identify, such as:

- Procurement Integrity Act violations;
- Significant personal or organizational conflicts of interest;
- Undue restrictions of competition (which could inflate prices paid by DoD);
- Failure of the awardee to provide technically compliant products; and
- Awards to companies with severe, yet unrecognized, adverse past performance.

In addition, requiring consideration of whether DoD made a “good business decision” would eliminate much of the deference DoD enjoys at both GAO and the COFC. GAO has repeatedly stated that it will not reevaluate technical proposals or substitute its own business judgments about best value or cost-technical tradeoffs for the views of the agency. Rather, GAO defers to the agency and sustains a protest only when the agency’s business judgments are irrational or inconsistent with a solicitation’s stated evaluation criteria and procurement statutes and regulations. GAO has also repeatedly ruled that a protester’s mere disagreement with an agency’s reasonable and well-documented business judgments is insufficient to sustain a protest, even if that disagreement is itself reasonably based.

The COFC has similarly and repeatedly ruled that under the “arbitrary, capricious, or abuse of discretion” standard of review, an agency enjoys considerable deference when making procurement decisions, and that such deference is heightened for discretionary business judgments in negotiated procurements. One judge has even held that technical evaluations in negotiated procurements deserve a “triple whammy” of deference. Moving to a “good business decision” standard of review may actually cause a tribunal to substitute its own decision-making de novo instead of allowing DoD the considerable deference it now enjoys.

D. Judicial Review

The Section understands that the Section 809 Panel might recommend eliminating the COFC’s trial-level bid protest jurisdiction and placing jurisdiction exclusively in a DoD tribunal. Judicial review would be limited to review of the DoD tribunal’s administrative decision by the Federal Circuit. The Section urges caution before eliminating the COFC’s role as a trier of fact.

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74 The Section urges caution to the Section 809 Panel before making significant changes to the FAR regulations governing OCIs. Enforcing OCI mitigation, avoidance and neutralization requirements ensures that DoD gets objective advice from its suppliers, and ensures full and open competition, which in turns leads to lower prices and higher quality goods and services for the warfighter.

for two main reasons: the experience, function, and efficiency of COFC judges; and the possibility of unintended consequences from jurisdictional tinkering.

Eliminating the COFC’s jurisdiction would remove another layer of experienced, specialized procurement oversight that is resident outside of DoD. COFC judges play a unique role in providing oversight of DoD procurements. COFC judges build specialized experience in developing the record in bid protests during a 15-year (or longer) term of service with a limited and specialized jurisdiction. And some COFC judges join the bench with decades of procurement- and administrative-law experience. Eliminating the COFC’s role in bid protests will further decrease the availability of truly DoD-independent bid protest decisions—indeed, it will leave no independent forum if GAO’s jurisdiction is also eliminated.76 This change also could further hurt the efficiency of the bid protest process; many of the COFC’s cases are decided within GAO’s 100-day window or much sooner, the median time being 87 days.

E. Standing

The Section understands that the Section 809 Panel might recommend revising the definition of an “interested party” with standing to protest a particular purchase. Especially in Procurement Lanes 1 and 2, which might not even require a published solicitation, there would not be any opportunity for a pre-award challenge to the ground rules of a procurement. The Section recommends exercising caution before redefining interested parties so as to avoid unintended consequences that run counter to the purposes and healthy functioning of the protest system.

GAO’s rules define an “interested party” as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.77 GAO applies this definition to both pre-award and post-award protests. For protests after award at the COFC, a very similar definition applies. To qualify as an “interested party,” a protestor must establish that: (1) it was an actual or prospective bidder or offeror; and (2) it had a direct economic interest in the procurement or proposed procurement.78 For pre-award protests at the COFC, the Federal Circuit has relaxed this test’s second prong. To show an economic interest, the protester need only show “a non-trivial competitive injury which can be redressed by judicial relief.”79

Interested-party standing requirements limit how many parties can protest while ensuring that all with a valid stake can raise valid concerns. For example, if an offeror chooses not to participate in a procurement, and does not raise a pre-award protest, it generally forfeits any opportunity to protest post-award. Limiting protests to actual or prospective offerors who can

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76 Although the Federal Circuit might retain appellate jurisdiction, that forum would not be developing the records as the COFC does. Also, although Federal Circuit judges are highly capable and distinguished jurists, they are drawn more from the patent and trademark bar.

77 4 CFR § 21.0.

78 See Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

79 Weeks Marine, 575 F.3d at 1359.
show a direct economic interest (or at least a non-trivial competitive injury) contributes to an efficient protest system. It ensures that only companies with a vested interest in a competition can challenge the outcome, and it protects the Government from further straining protest and procurement systems.

The Section 809 Panel’s proposed monetary-bounty system would depart from a fundamental premise that disappointed actual or prospective offerors have the most intrinsic motivation to police the integrity of a particular procurement. By severing that link, the protest system could encourage private litigants to find fault in any procurement whether or not the identified error harmed that protester. Even worse, eliminating all but the first protester to file, or awarding a bounty only to the first protester, would start a race to protest rather than a reasoned development of thoughtful protest grounds that help improve the procurement system. Under current definitions, a protest may be filed only by an entity that has submitted an offer, or plans to, and can show an economic interest in the procurement’s outcome. This current definition appropriately links interested-party status to the ability to protest and should be retained.

If the Section 809 Panel proceeds with other recommendations, then applying the current definition of “interested party” could mean that an interested party in Lane 1 and 2 purchases is anyone offering the same goods or services online in sufficient quantities. This preserves the important link between an interest in the procurement and standing to protest, and we do not see a reason to change it. Changing the definition of interested party—while undoubtedly well-intentioned—might have unintended consequences. For example, broadening the definition would reward bounty hunting by protesters lacking a connection to the procurement; limit tribunals’ ability to deter uninvested nuisance actors; and permit competitor gamesmanship with statutory and voluntary stays of award and performance.

The two key elements of interested-party standing—being an actual or prospective offeror and having a direct economic interest—not only encourage those with a vested interest in the procurement to police its integrity but also supports an efficient protest system that prevents fraud, waste, and abuse. The Section believes revising the definition of interested party risks severing that important link.

F. Remedies

The Section understands that the Section 809 Panel might recommend severely curtailing the remedies available to protesters, including:

(1) In Lanes 1 and 2, eliminating the CICA stay and limiting a protester’s remedy to a monetary bounty calculated as a percentage of the procurement value. This change would eliminate the prospect of corrective action leading to reevaluation, reinstatement, or other important relief currently available;

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80 The Federal Circuit has explicitly found that interested-party standing is narrower than the standing requirement under Article III. Id. (discussing “more stringent standing requirements than Article III”) (citing Am. Fed’n of Gov. Employees v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).
(2) In Lanes 3 and 4, eliminating or limiting the CICA stay; and

(3) Extending DoD’s pending “loser pays” pilot program under Section 827 of the FY 2018 National Defense Authorization Act from very large contractors to all contractors and for all lanes of procurement.

If implemented, these changes would substantially reduce the important role that protests play in promoting transparency and providing oversight and feedback in the procurement system. The opportunity to compete fairly and potentially win the contract is of primary importance to the vast majority of protesters. If that opportunity were removed from the available remedies (either directly or indirectly), disappointed offerors would have little incentive to bring a protest—even if the Government has made a major procurement error to its own detriment. And a “loser pays” penalty would further reduce or eliminate incentives to bring even a legitimate protest. Without the oversight and feedback loop that meritorious protests provide, agencies and taxpayers will ultimately pay for worse procurement outcomes. And potential offerors will be less likely to trust, and less likely to invest in, the procurement process. These developments, in turn, could lead to a less efficient defense procurement system and ultimately weaken DoD’s buying power.

1. **Effect of Bounty System on Effectiveness of Protest System**

   Eliminating potential remedies such as corrective action, recompetition, and the possibility of award could undermine the purpose of the Section 809 Panel’s recommendations: to make procurements more efficient and productive. If the only remedy is a bounty, many disappointed offerors would routinely forgo meritorious protests. Most protesters’ primary goal is to obtain an opportunity to compete fairly for the contract at issue—not to obtain some alternative monetary relief. Three considerations illustrate the Section’s perspective.

   First, in the current system, recovering bid and proposal costs is already available as an alternative remedy to corrective action. But protesters rarely seek bid and proposal costs in lieu of corrective action, even though those costs can exceed $1 million or more. In fact, protesters often strive to avoid being limited to bid and proposal costs: protesters routinely meet filing deadlines to trigger an automatic stay that are shorter and more onerous than the deadlines for timely filing (i.e., five days post-debriefing for an automatic stay of performance vs. ten days post-debriefing for timeliness at GAO). And when protesters cannot obtain the stay, they often forgo protesting even though they might recover bid and proposal costs, due to the expense of litigating protests and the distraction from other pressing business goals. The consistent lack of interest in bid and proposal costs portends a similar lack of interest in a “bounty.”

   Second, even in the current system, disappointed offerors often forgo valid protests when they conclude that the relief would not be meaningful. For example, an offeror may have a strong argument that the agency’s evaluation was flawed, but the circumstances indicate that the remedy would not include an opportunity to revise proposals. In many cases, that offeror will find a re-evaluation likely to yield the same result and will forgo a protest for that reason. If offerors cannot seek a remedy that gives them a chance of fair competition and award, they will
likely forgo the protest, with a resulting loss of oversight of and feedback to the federal procurement process.

Third, most offerors have existing and long-term relationships with federal agencies. When such companies consider protesting, they consider not only the procurement at issue, but also their existing contracts and future opportunities with the agency. Many companies view protests as, in effect, “suing their customer,” and are conservative about doing so, even to the point of forgoing valid protests. It is one thing to protest to seek a fair opportunity to compete; it is entirely another to sue a customer for a monetary bounty. If the only remedy is a bounty, then many contractors will likely forgo valid protests to avoid any risk that their customer agencies view them as acting solely out of avarice.

There are other problems with limiting remedies to a bounty. The bounty will almost certainly be too small to compensate the offeror for the lost business; indeed, it will likely be too small to compensate the offeror for its bid and proposal costs and its protest costs. But offering large bounties would harm taxpayers by diverting money from other, better needs and uses. The Government would have less money to procure goods and services, and less money to carry out its functions.

Finally, not only will disappointed offerors be unlikely to protest under this proposed system, but companies will be discouraged from submitting proposals in the first place. Why devote resources to a competition if there is no assurance (or mechanism to ensure) that the process will be fair and reasonable? Fewer offerors means less competition, and less competition means worse outcomes for the Government. Protests that can produce a fair competition as a remedy build transparency and trust in the system. That promotes robust competition, to the Government’s benefit.

2. **Bounties Benefit the Wrong Type of Protester**

The Section 809 Panel has suggested that bounties might be available beyond the actual offerors. Under such a system, many protests may be brought by “bounty hunters”—people who have no stake in the system, its health, or its fairness; people who are simply looking for a payday, akin to professional *qui tam* relators and patent trolls. Such litigants might establish a minimal online business presence to meet the (revised) interested party threshold, but because they would not actually be agency contractors, they would have no incentive to act reasonably, take agency needs into account, and maintain good relationships with agencies. The number of protests could well skyrocket, with their quality plummeting.\(^{81}\) At the same time, they will become harder to resolve. These bounty hunters will know little about the goods or services being procured—or the Government’s needs—and will make every theoretical protest argument in every single protest on the chance of winning a bounty.

\(^{81}\) This increase will likely exceed the reduction in legitimate protests discussed above. But even if these changes offset each other, the Government will have exchanged protests beneficial to oversight for those providing no such benefits.
3. **Bounties Fail to Encourage Proper Government Conduct**

In the current system, a meritorious protest requires agency procurement personnel to address the identified error in the vast majority of cases, thanks to the automatic stay or preliminary injunctive relief. That effort naturally encourages procurement personnel to take reasonable care to avoid future errors.

A bounty would not have the same effect. Bounties would be paid by the Government—and ultimately by taxpayers—and not by the agency procurement personnel. That remedy would have no direct effect on procurement personnel and, as a result, it would likely have limited if any value as an incentive to fix current errors or avoid future ones. The procurement system would suffer, and the Government would face worse procurement outcomes. By requiring the same personnel, office, or activity to fix the error, rather than have some other part of the agency (or the Treasury) pay a bounty, positive bureaucratic behavior is reinforced.

It also seems likely, given bureaucratic nature, that agency personnel would begin budgeting the cost of a bounty into the cost of the procurement to prevent overruns. That would cause additional harm to taxpayers, and reduce or eliminate any incentive to correct or avoid errors. It might also promote litigation by bounty hunters, because it might make agencies more willing to make financial settlements as a means of dealing with bounty-driven protests in an effort to preserve performance schedules.

Under the current system, protests serve the function of protecting the public fisc and the integrity of the procurement process. Establishing a bounty as the only remedy seems unlikely to support or further those goals.

4. **The Effect of Eliminating the Automatic Stay of Performance**

As discussed above, a primary goal of most protesters is to obtain, as a remedy, the opportunity to fairly compete for the contract. Under the current system, protesters take pains to file in time to obtain the automatic stay in order to preserve that remedy. If performance is allowed to continue (or award can be made) during a protest, and the protest is sustained, agencies would then argue that performance is too far along to terminate the contract. Agencies often make this argument successfully at the COFC when there has been no preliminary injunction entered in the protest.

If protesters cannot obtain a fair competition as a remedy, they will likely forgo valid and meritorious protests, reducing the oversight and feedback that protests provide. The rare pursuit of bid and proposal costs under the current system is evidence that offerors do not view such a monetary recovery as a significant reason to protest (or an adequate substitute for a fair chance to compete for a government contract). Eliminating the automatic stay would also result in the Government’s proceeding with flawed awards that do not, in fact, provide the best value for the Government and U.S. taxpayers.

Under the current system, agencies can override the automatic stay if there is an urgent and compelling need, or if doing so is in the Government’s best interests. That allows agencies to
move forward despite a protest in appropriate circumstances, including those involving urgent and compelling national security concerns. If the Section 809 Panel is concerned about agency personnel being reluctant to invoke a stay override, it could develop mandatory contract file documentation requirements when an override is not invoked. This would prevent a perception that not considering an override will lead to less paperwork.

5. The Wisdom of the “Loser Pays” Pilot Program

The Section understands that the Section 809 Panel might recommend expanding the “loser pays” pilot program mandated by Section 827 of the FY 2018 National Defense Authorization Act for very large contractors to apply to all contractors, including small business concerns, for all procurement lanes. This recommendation, if enacted, could substantially chill valid and meritorious protests—particularly if combined with a limitation of remedies. Many offerors would see little to no gain from protesting when balanced with the potential for a significant monetary loss. In addition, expansion of the “loser pays” program would reduce the oversight and feedback mechanism that valid protests provide under the current system. It is also possible that “loser pays” provisions could have a particularly harsh effect on small and disadvantaged businesses with limited resources.

Furthermore, “loser pays” suggests a fundamental misperception that all losing protests are frivolous and should therefore be subject to monetary sanctions. To the contrary, while a protest may, on rare occasions, represent a strategic grab for an extra 100 days of revenue, the vast majority of protests are filed by businesses that believe in good faith that their product or service represents the best value. Punishing businesses for lodging their good faith concerns runs counter to the values of our legal system as well as our procurement system.

IV. CONCLUSION

The Section continues to work towards addressing points raised by the Section 809 Panel at our last meeting and hopes to provide further comments in the coming weeks. The Section welcomes the opportunity to meet again with the Section 809 Panel to discuss the above and any additional proposals being considered by the Section 809 Panel.

Sincerely,

Aaron Silberman
Chair, Section of Public Contract Law

cc: Kara M. Sacilotto

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82 GAO, B-401197, Report to Congress on Bid Protests Involving Defense Procurements 11-12, 15 (Apr. 9, 2009) (noting that “meritless” protests should not be confused as “frivolous”, and recommending against additional legislation to combat “frivolous” protests).
Linda Maramba
Susan Warshaw Ebner
Annejanette Heckman Pickens
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Acquisition Reform and Emerging Issues Committee
Chairs and Vice Chairs, Bid Protest Committee
Craig Smith
Samantha S. Lee

Appendix follows
Appendix – Survey of State Protest Practices

1. Florida

In Florida, protests are filed first with the awarding agency. If a resolution is not reached with the agency, a protest is filed with the Department of Administrative Hearings, which assigns the matter to an administrative law judge. The decision of the administrative law judge is appealable to the district court of appeal where the agency maintains its headquarters or where a party resides. The expressed purposes and policies furthered by the protest process in Florida are to (1) secure fair competition on equal terms; (2) secure the best values at the lowest possible expenses; (3) provide an opportunity for an exact comparison of bids; and (4) assure that the most responsive bid is accepted. 83

2. Tennessee

In Tennessee, protests are filed first with the chief procurement officer (“CPO”). The CPO’s decisions are appealable to the Protest Committee, which is then appealable to the Chancery Court under a common law writ of certiorari. Permissible grounds for a protest include that (i) the contract award was arbitrary, capricious, an abuse of discretion or exceeded the authority of the CPO or the state agency; (ii) the procurement was conducted contrary to a constitutional, statutory, or regulatory provision; (iii) the CPO or the state agency did not follow the procurement rules in the solicitation, and such failure to follow the rules of the procurement materially affected the contract award; (iv) the procurement involved responses that were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or (v) the contract award was the result of a technical or mathematical mistake or error during the evaluation. 84 The expressed purposes and policies furthered by the public contracting process in Tennessee are to (1) secure fair competition on equal terms; (2) secure the best values at the lowest possible expenses; (3) provide an opportunity for an exact comparison of bids; and (4) assure that the most responsive bid is accepted. 85

3. Colorado

Last year, the Colorado legislature revised the state’s Procurement Code to better serve its stated purposes, which include: (i) promoting public confidence in the procedures followed in

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83 See Wester v. Belote, 138 So. 721 (Fla. 1931) (explaining that public bid statutes “serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers’ expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated”); see also Liberty Cnty. v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982) (explaining the purpose of Florida’s public bid statutes by referring to the above quote from Wester v. Belote).

84 Tenn. Comp. R. & Reg. 0690-03-01-.12(2)(a)(3).

public procurement; (ii) ensuring the fair and equitable treatment of all persons who deal with the state’s procurement system; and (iii) fostering effective broad-based competition within the free enterprise system. One key 2017 revision expanded the pool of potential protesters by granting the right to protest a state contract award decision to “[a]ny aggrieved party,”\(^{86}\) instead of “[a]ny actual or prospective bidder, offeror, or contractor who is aggrieved.”\(^{87}\)

4. **Louisiana**

In Louisiana, protests of contract awards are adjudged initially by the CPO.\(^{88}\) Protests can be filed by “[a]ny person who is aggrieved in connection with the solicitation of an award of a contract.”\(^{89}\) Timely filed protests result in an automatic stay of the procurement unless the CPO determines in writing that awarding the contract without delay is necessary to protect the state’s substantial interest. The CPO’s protest decision can be appealed to the Commissioner of Administration.\(^{90}\) From there, the aggrieved party may proceed to court for review of the agency’s decision.\(^{91}\) The express purpose and policies of the Louisiana Procurement Code include: “provid[ing] for increased public confidence in the procedures following in public procurement”; “ensur[ing] the fair and equitable treatment of all persons who deal with the procurement system of this state”; “provid[ing] increased economy in state procurement activities by fostering effective competition”; and “provid[ing] safeguards for the maintenance of a procurement system of quality and integrity.”\(^{92}\)

5. **District of Columbia**

Most procurements are conducted by the D.C. Office of Contracting and Procurement, under the CPO, unless an exception applies. Any protest of a solicitation or award of a contract under the CPO’s authority is within the exclusive jurisdiction of the District of Columbia Contract Appeals Board (“DC CAB”).\(^{93}\) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may file a protest at

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\(^{89}\) *Id.*


\(^{92}\) La. Rev. Stat. 39:1552; see also *Alexander & Alexander, Inc. v. State*, 596 So. 2d 822, 826 (La. App. 1 Cir. 1991) (citing La. Rev. Stat. 39:1552); *Haughton Elevator Div. v. State*, 367 So. 2d 1161, 1164 (La. 1979) (stating that Louisiana’s Public Bid Law “was enacted in the interest of the taxpaying citizen and has for its purpose their protection against contracts of public officials entered into because of favoritism and possibly involving exorbitant and extortionate prices”).

\(^{93}\) D.C. Code § 2-360.03.
the DC CAB.\textsuperscript{94} Permissible grounds for a protest include procurement deficiencies; prejudice to other bidders; and a lack of integrity in the procurement system.\textsuperscript{95}

After the protest is initiated, the procuring agency must provide an agency report within 20 days; the protester has seven business days to respond to the information provided in the agency report; and thereafter the DC CAB may seek further filings, or a hearing, depending on areas that may require further factual or legal development. Generally, a protest lasts 90 to 120 days, with the occasional protest lasting longer. DC CAB’s mission includes: (i) obtaining full and open competition by providing that contractors are given adequate opportunities to bid; (ii) ensuring the fair and equitable treatment of all persons who deal with the procurement system of the District government; (iii) increasing public confidence in the procedures followed in public procurement; (iv) continued development of procurement laws, policies, and practices; and (v) improving the understanding of procurement laws and policies within the District government by organizations and individuals doing business with the District government.\textsuperscript{96}

\section{Maryland}

In Maryland, procurement is generally conducted under the authority of the Board of Public Works, which consists of the Governor, State Comptroller, and State Treasurer, and is supported by a Procurement Advisor and staff. In Maryland, the procuring agency is typically the initial protest forum, and administrative appeals go to the Maryland State Board of Contract Appeals ("MSBCA") after the agency has rendered a final decision.\textsuperscript{97} But the MSBCA’s jurisdiction may not extend to exempted or independent agencies. In such a case, the only administrative protest available may be at the agency level, according to rules published in the relevant solicitation and/or the agency’s regulations.

On receipt of the initial protest, the Procurement Officer must immediately notify the Office of the Attorney General. The Procurement Officer may then request additional information from the protester to support the protest. The decision “shall be made by the procurement officer in writing as expeditiously as possible after receiving all relevant, requested information[,]” and must be approved by the agency Reviewing Authority.\textsuperscript{98} Once a decision is final, an appeal to the MSBCA “shall be filed within 10 [calendar] days of receipt of notice of the final procurement agency action[,]” except that the appeal will “not be considered unless it was sent by registered or certified mail not later than the fifth day before the final date for filing an appeal . . . .”\textsuperscript{99}

\textsuperscript{94} Id.
\textsuperscript{95} See D.C. Code § 2-360.08.
\textsuperscript{97} See COMAR 21.10.02.02 ("An interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract . . . .").
\textsuperscript{98} COMAR 21.10.02.09.
\textsuperscript{99} COMAR 21.10.02.10.
At the MSCBA, the procuring agency must provide an agency report within 15 working days; the protester and any intervenor have ten days to make comments on the agency report; and party rebuttals are due five days later. Further factual development may also occur through a hearing. If needed, the MSBCA may issue a subpoena, which can be enforced by a Maryland court. An MSBCA protest appeal must be decided “expeditiously,” with most lasting 90 to 120 days. The Maryland protest process’s purposes include: providing for increased confidence in state procurement; ensuring fair and equitable treatment of all persons who deal with the state procurement system; providing safeguards for maintaining a state procurement system of quality and integrity; fostering effective broad-based competition in the state through support of the free enterprise system; and allowing the continued development of procurement regulations, policies, and practices in the state.

7. Virginia

In the Commonwealth of Virginia, bid protests are subject to the Virginia Public Procurement Act (“VPPA”). Any bidder or offeror who submitted a bid or a proposal in response to a solicitation may protest the public body’s award of a contract or decision to award a contract to another bidder or offeror. A protest is initially considered by the head of the procuring agency, who must issue a written decision within ten days of receiving the protest. The decision is final unless the protester appeals within ten days. If the agency has established a procedure for hearing appeals, the appealing party may choose to invoke the administrative appeal process.

In an administrative appeal, the aggrieved party advocate before a person or a panel of individuals who are not employees of the procuring agency. After the administrative appeal, a dissatisfied party may proceed with an action in state court within 30 days of receiving the administrative appeal decision. The Virginia General Assembly’s stated purposes in enacting the VPPA include: “all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded.”

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103 Id.
104 Id.
105 Id. § 2.2-4365(A).
106 Id. § 2.2-4365(B).
107 Id. § 2.2-4300.