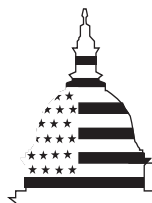


**April 2000**

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**BID PROTESTS****Characteristics of  
Cases Filed in Federal  
Courts****G A O****Accountability \* Integrity \* Reliability**

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GAO

Accountability \* Integrity \* Reliability

United States General Accounting Office  
Washington, D.C. 20548

General Government Division

B-282743

April 17, 2000

The Honorable Fred Thompson  
Chairman  
The Honorable Joseph Lieberman  
Ranking Minority Member  
Committee on Governmental Affairs  
United States Senate

The Honorable John Warner  
Chairman  
The Honorable Carl Levin  
Ranking Minority Member  
Committee on Armed Services  
United States Senate

The Honorable Dan Burton  
Chairman  
The Honorable Henry Waxman  
Ranking Minority Member  
Committee on Government Reform  
House of Representatives

The Honorable Floyd Spence  
Chairman  
The Honorable Ike Skelton  
Ranking Minority Member  
Committee on Armed Services  
House of Representatives

Currently, an eligible person or business may file a protest challenging a federal contract award or the procedure by which the offers were solicited. Protests may be filed before or after the contract is awarded. Under the Administrative Dispute Resolution Act (ADRA) of 1996,<sup>1</sup> the 94 U.S. district courts and the United States Court of Federal Claims (COFC)<sup>2</sup> have the same jurisdiction to decide bid protest cases. In addition, district

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<sup>1</sup> P. L. 104-320, see 28 U.S.C. 1491(b).

<sup>2</sup> The 94 district courts are located in the 50 states; the District of Columbia; the Commonwealth of Puerto Rico; and the U.S. territories of the Virgin Islands, Guam, and the Northern Mariana Islands. COFC is located in Washington, D.C.

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courts and COFC may grant any relief that the court considers appropriate, except that monetary relief is limited to bid preparation and proposal costs. Under ADRA, district court jurisdiction for bid protest cases is scheduled to expire on January 1, 2001. The expiration of district court jurisdiction is supported by some groups and opposed by others.

In response to ADRA, and as agreed with the committees of jurisdiction, this report reviews the cases, particularly small business cases, that have been filed in district courts and COFC since ADRA took effect on December 31, 1996. Our objectives were to (1) identify the number of bid protest cases filed in the U.S. district courts and COFC between January 1, 1997, and April 30, 1999, that were filed by small businesses, the type of agencies involved (civilian or defense), and the amount of the procurement at issue; (2) identify the perceived advantages and disadvantages, particularly for small businesses, of filing bid protest cases in each judicial forum, the district courts and COFC; and (3) obtain available data on the characteristics of district court and COFC bid protest cases, particularly those filed by small businesses, that could be used to assess these perceived advantages and disadvantages.

As agreed with the committees of jurisdiction, we focused our analysis on the characteristics of the bid protest cases filed since concurrent jurisdiction became effective, including the characteristics that may be relevant to assessing the arguments in favor of and opposition to retaining district court jurisdiction. However, our analysis did not address the policy arguments in favor of or opposition to retaining district court jurisdiction—for example, whether it was desirable to retain the district courts as an Article III judicial forum (one in which judges have life tenure) for bid protest cases or to have a more uniform body of procurement case law.<sup>3</sup>

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## Results in Brief

Between January 1, 1997, and April 30, 1999, at least 66 bid protest cases were filed in U.S. district courts.<sup>4</sup> During the period January 1, 1997,

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<sup>3</sup> Although COFC is an Article I court—one in which judges are appointed for a specific number of years—appeals of COFC decisions are heard by the U.S. Court of Appeals for the Federal Circuit, which is an Article III court—one in which judges are appointed for life. Article I and Article III refer to the articles of the U.S. Constitution under which the courts were created.

<sup>4</sup> Although we began with a list of about 94 potential bid protest cases, we did not receive the case files for 10 cases. A review of the remaining 84 case files revealed that 19 of these cases were duplicates or did not involve bid protests. Among the 10 cases we did not receive was a sealed case. However, we were able to review this case file at the district court, and we counted it among the 66 bid protest cases we reviewed.



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through August 1, 1999, 118 bid protest cases were filed in COFC.<sup>5</sup> On the basis of available data, using an inclusive definition of small business,<sup>6</sup> we found that about half of the cases in both district courts (33 of 66) and COFC (61 of 118) were filed by small businesses. Defense procurements were the subject of the majority of small business protests in both district courts (19 of 33) and COFC (40 of 61). For those cases for which the value of the procurement was available, the majority of the small business procurements in district courts (23 of 27) and COFC (27 of 49) were for \$10 million or less.

Those who support the retention of district court jurisdiction for bid protest cases assert that (1) requiring small businesses to file all their protests in COFC, rather than having the option of filing in their local district courts, could make it more expensive for all businesses, particularly small businesses, to file bid protest cases; (2) district courts provide an Article III forum (one in which judges have life tenure) for bid protest issues; (3) COFC judges may be unable to travel on short notice to conduct hearings in bid protest cases; and (4) jurisdictional problems may arise from the sunseting of district court jurisdiction. Those who support COFC as the sole judicial forum for bid protest cases assert that (1) consolidating jurisdiction in COFC will provide the opportunity to develop more uniform procurement case law than is possible among 94 district courts; (2) a single judicial forum for bid protests will eliminate forum shopping (litigants seeking the most favorable judicial forum in which to file their cases); (3) COFC has broad authority to hear issues related to bid protests; (4) COFC judges can travel as necessary. The case data available provide a limited basis for assessing the perceived advantages and disadvantages of retaining district court jurisdiction for bid protest cases; therefore, we draw no conclusions based on these data.

Proponents of retaining district court jurisdiction assert that small businesses may be able to reduce the costs of filing a protest case in federal court by filing in their local district court using counsel from those local districts. Requiring small businesses to file all their judicial protest cases with COFC could raise their protest costs, perhaps prohibitively. We found that more small businesses filed in COFC (61 cases) than filed in district courts (33 cases). Of the 33 small business cases filed in district

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<sup>5</sup> Because COFC tracks bid protest cases as a separate category, we were able to obtain more recent data for COFC from the COFC Clerk of Court.

<sup>6</sup> We considered a bid protester to be a small business if (1) the protester was identified as a small business in the case files, (2) the attorney for the protester indicated that the protester was a small business, or (3) the protester was registered as a small business with the Small Business Administration.

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courts, 18 were filed in the protesters' local district courts. All but 3 of these 18 cases used legal counsel from outside the Washington, D.C., area.<sup>7</sup> However, the legal counsel used were not necessarily located in the districts in which the cases were filed. Of the 15 small business cases that were not filed in the protester's home district, 12 were filed in the D.C. district, and 9 of the 15 cases used counsel from the Washington, D.C., area. In COFC, 15 of the 61 small business cases were filed by counsel located outside the Washington, D.C., area. We had no data on whether the protesters' case costs, including attorney costs, were more or less in those cases in which they filed in their local district courts or filed in COFC and used non-D.C. area counsel.

With regard to potential jurisdictional issues associated with bid protest cases, we found that the legal issues raised in the bid protest cases filed in district courts and COFC fell into the same general categories. In both forums, the issue raised most frequently was the propriety of agency evaluation of proposals. However, COFC did not accept jurisdiction under ADRA in every bid protest case filed in COFC. For example, COFC transferred one case to district court for lack of jurisdiction; and in another case, the U.S. Court of Appeals for the Federal Circuit reversed COFC's ruling that it did not have jurisdiction under ADRA.

With regard to COFC judges ability to travel for bid protest cases, we found that COFC judges' had traveled to hold hearings in two bid protest cases between January 1, 1997, and August 1, 1999. The Chief Judge stated that COFC judges could travel as necessary.

In both district courts and COFC, the results of bid protests were mixed. It was not clear that small businesses were more likely to prevail in district courts than COFC. The courts usually denied injunctive relief to protesters regardless of whether they were small businesses or not. However, in some cases the government voluntarily agreed to stay the performance of its contract until the court ruled. In 30 district court cases and 29 COFC cases, the courts dismissed the cases on the voluntary motion of the protester or the protester and government jointly. In some cases the voluntary dismissal was because the parties had reached a settlement that responded, at least in part, to the protester's claims. In actions other than granting motions for voluntary dismissal, the courts generally ruled against the protester, with only one district court ruling in the protester's favor—a

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<sup>7</sup> Where the attorney's firm had more than one office location, we used the office address of the attorney representing the protester.

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decision that was reversed on appeal. COFC ruled in favor of the protestor in 19 cases, including 11 small business cases.

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## Background

Currently, an eligible person or business may file a protest challenging a federal contract award and the procedure by which the contract offers were solicited in their choice of four forums: (1) the agency whose procurement procedures are being challenged, (2) the U.S. General Accounting Office (GAO), (3) U.S. district court, (4) or COFC. Agency actions taken pursuant to GAO decisions may be reviewed by the U.S. district courts or COFC.

Few bid protest cases were heard in federal district courts prior to 1970, principally because district court jurisdiction over such cases was not clearly established. In 1970 the U.S. Court of Appeals for the District of Columbia Circuit ruled that challenges to contract awards could be filed in district courts under the provisions of the Administrative Procedure Act.<sup>8</sup>

In 1982, Congress authorized COFC to grant equitable relief, including injunctive relief, in preaward protests—that is, cases filed prior to the time the contract was awarded.<sup>9</sup> This statute also granted COFC “exclusive jurisdiction” to grant equitable relief in “any contract claim brought before the contract is awarded.” COFC did not have authority to hear postaward protests.

ADRA provided that effective December 31, 1996, U.S. district courts and COFC would have concurrent jurisdiction for federal bid protest cases—whether filed before or after the agency awarded the contract.<sup>10</sup> The act also mandated that each court review such cases using the standards applicable under the Administrative Procedure Act—the standards that had been applied by the district courts since 1970. Under ADRA, district courts and COFC may award any relief that the court considers appropriate, except that monetary relief is limited to bid preparation and proposal costs. ADRA also provided that federal district court jurisdiction for bid protest cases would expire on January 1, 2001, unless extended by Congress prior to that date.

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<sup>8</sup> Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

<sup>9</sup> Federal Courts Improvement Act of 1982, P.L. 97-164.

<sup>10</sup> Specifically, the concurrent jurisdiction covers “an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or proposed procurement.” (28 U.S.C. 1491(b)(1)).

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## Scope and Methodology

In response to ADRA, and as agreed with the committees of jurisdiction, our objectives were to (1) identify the number of bid protest cases filed in the U.S. district courts and COFC between January 1, 1997, and April 30, 1999, that were filed by small businesses, the type of agencies involved (civilian or defense), and the amount of the procurement at issue; (2) identify the perceived advantages and disadvantages, particularly for small businesses, of filing bid protest cases in each judicial forum—the district courts and COFC; and (3) obtain and review available data on the characteristics of bid protest cases, particularly those filed by small businesses, that could be used to assess these perceived advantages and disadvantages.

We used several sources of information to identify bid protest cases. COFC provided a list of bid protest cases filed in COFC from January 29, 1997, through August 1, 1999.<sup>11</sup> Because district courts do not track bid protest cases as a separate civil case category, we used a variety of sources to identify potential district court cases. These included data from the Department of Justice, American Bar Association, other sources recommended by both, and district court clerks of court. Because there is no definitive list of district court bid protest cases, it is possible that our list of such cases is incomplete. To identify the perceived advantages and disadvantages of permitting district court jurisdiction to expire, we met with representatives from bar associations, contractor associations, other interested groups, and federal agencies; reviewed documents these groups provided; and reviewed the legislative history of ADRA. The COFC Clerk of Court provided a list of 118 bid protest cases—104 during our initial review and 14 additional cases identified during the agency comment period. Our final report includes all 118 cases.

For those potential bid protest cases identified, we obtained copies of documents from the case files from the U.S. district courts or COFC and used a data collection instrument to record a variety of information about each case. We were unable to obtain these case file materials in 10 of the 94 potential district court cases identified.<sup>12</sup> Complaints in 36 of 118 COFC cases were sealed, and in 18 of these 36 cases the complete case file was sealed. Moreover, incomplete or missing data precluded us from determining with certainty how many of the companies that filed bid protest cases in either the district courts or COFC were small businesses. Our analysis of the potential advantages and disadvantages was based on

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<sup>11</sup> No bid protest cases were filed in COFC between January 1, 1997, and January 28, 1997.

<sup>12</sup> Among these 10 cases was a sealed case that we were permitted to review, but not copy, at the clerk of court's office.

an analysis of the data available in the case files of the bid protest cases we identified and attorney interviews. Where possible, we conducted telephone interviews with the attorneys representing the parties in each case to discuss their views regarding the reasons they chose to file in district court or COFC and the advantages and disadvantages of each judicial forum. We also discussed additional information on the dollar amount of the procurement at issue and whether the protester was a small business. For some cases the attorneys for one or more parties in the case did not wish to discuss the case. Due to these data limitations, we cannot generalize to all bid protest cases filed during the period of our review. Additional details on our objectives, scope, and methodology are found in appendix I.

We did our work in Washington, D.C., and Los Angeles, CA, between March 1999 and January 2000 in accordance with generally accepted government auditing standards. We requested comments from the Public Contract Law Section of the American Bar Association, the Federal Bar Association, the Secretary of Defense, the Attorney General, and the Chief Judge of COFC, and their comments are discussed at the end of the letter.

## Characteristics of Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999

We identified a total of 184 bid protest cases filed in the U.S. district courts and COFC since January 1, 1997—66 district court cases in 31 separate districts (through April 30, 1999) and 118 COFC cases (through August 1, 1999). Of this total, 52 of the district court cases had been closed by August 1, 1999; and 111 of the COFC cases had been closed by January 18, 2000. (We were able to continually update our data for COFC cases during our review.) COFC separately tracks bid protest cases, but district courts do not. The protest cases we reviewed are listed in appendixes II (district court) and III (COFC).

We reviewed the case files in each of the identified district court cases and in each of the unsealed COFC cases.<sup>13</sup> Table 1 shows the basic characteristics of the 184 bid protest cases we reviewed. One of the cases was filed in COFC, which maintained that it did not have jurisdiction and transferred the case to district court. Another case was filed first in district court and then in COFC, which dismissed the case because it was pending in district court. We counted both of these cases as filings in each judicial forum. In addition, one protester filed two separate cases in the same district court involving a single solicitation, and another protester filed two

<sup>13</sup> The district court permitted us access to the single sealed district court case. Information for this case is aggregated with the data for all other district court cases.

separate cases in different district courts involving the same solicitation. We counted these as four separate filings.

Complaints were sealed in 36 of the 118 COFC cases, and the entire file was sealed in 18 of these 36 cases. For these 18 cases, no case details were available in the case files, except the docket sheet. Consequently, the COFC data shown in table 1 are based on the 100 unsealed cases we reviewed, case file data available in those 36 cases in which only the complaint was sealed, and data from attorney interviews on sealed cases.

**Table 1: Characteristics of Bid Protest Cases Filed in the U.S. District Courts and Court of Federal Claims During the Period of Our Review**

Case characteristic <sup>a</sup>	U.S. District Courts		COFC	
	Total cases	Small business cases <sup>b</sup>	Total cases	Small business cases <sup>b</sup>
<b>Total cases filed</b>	<b>66</b>	<b>33</b>	<b>118</b>	<b>61</b>
Preaward cases	10	2	26	12
Postaward cases	56	31	78	44
<b>Total cases under seal</b>	<b>1</b>	<b>1</b>	<b>18</b>	<b>5</b>
<b>Total cases closed<sup>c</sup></b>	<b>52</b>	<b>29</b>	<b>111</b>	<b>58</b>
<b>Type of agency procurement:</b>				
Civil	35	13	32	21
Defense	29	19	69	40
Both <sup>d</sup>	2	1	0	0
<b>Dollar range of procurement at issue:<sup>e</sup></b>				
Less than \$1,000,000	8	8	9	7
\$1,000,000 to \$10,000,000	20	15	29	20
\$10,000,001 to \$50,000,000	10	3	37	19
\$50,000,001 to \$100,000,000	1	0	18	2
\$100,000,001 to \$500,000,000	3	0	5	1
\$500,000,001 to \$1 billion	1	0	1	0
More than \$1 billion	2	1	1	0

<sup>a</sup>The numbers in the table include data from unsealed cases; any data available for sealed cases (e.g., docket sheets); and information from attorney interviews (e.g., whether protester was small business).

<sup>b</sup>For 9 of the 66 district court cases it was not clear if the case was filed by a small business. For 5 of the 118 COFC cases, we could not determine from the case files or interviews whether the complaint was filed by a small business.

<sup>c</sup>Totals as of August 1, 1999, for district court cases and January 18, 2000, for COFC cases.

<sup>d</sup>Two cases involved both defense and civilian agency defendants.

<sup>e</sup>Actual or estimated amount available for 45 of 66 district court cases and 100 of 118 COFC cases. For a number of cases the amount of the procurement is based on information from attorney interviews.

Source: GAO analysis of district court and COFC case files and data from attorney interviews.

More total bid protest cases, and more small business bid protest cases, were filed in COFC than were filed in district courts. On the basis of available data, we identified 33 district court cases and 61 COFC cases that were filed by small businesses. We used an inclusive definition of small business. We included a protester as a small business if (1) the protester was identified as a small business in the case files, (2) the attorney for the protester indicated that the protester was a small business, or (3) the protester was registered as a small business with the Small Business Administration.

Ten district court and 26 COFC cases involved preaward protests. The district court cases were divided almost evenly between defense (29) and civilian (35) procurements, and 69 of 100 unsealed COFC cases involved defense procurements. Two of the district court cases included both defense and civilian agency defendants.

In both the district courts and COFC, the amount of the procurement at issue varied widely. The amounts ranged from about \$100,000 to about \$10 billion in the 45 district court cases for which data were available. For the 100 COFC cases for which data were available, the amounts ranged from about \$93,000 to about \$2.7 billion. Whether grouped by total case filings or small business case filings, the amount of the procurement at issue was generally somewhat larger in COFC than in district court cases. About 11 of 45 district court cases involved procurements of no more than \$1 million, and 38 of 45 district court cases involved procurements of no more than \$50 million. In COFC, 9 of 100 cases involved procurements of no more than \$1 million; 75 cases involved procurements of no more than \$50 million. In COFC, 18 cases involved procurements of more than \$50 million but no more than \$100 million; one district court case fell within this range.

## Perceived Advantages and Disadvantages of Permitting District Court Jurisdiction to Expire

Those who believe that Congress should not permit district court bid protest case jurisdiction to expire believe that district courts offer advantages that COFC does not. Similarly, those who believe that COFC should have sole judicial jurisdiction over such cases believe that COFC offers certain advantages that district courts do not.

Arguments in favor of retaining district court jurisdiction over bid protest cases include the following:

- It can be less expensive for small businesses to file bid protest cases in their local district courts. Requiring that all protest cases filed in federal court be filed with COFC in Washington, D.C., raises the cost for all protesters, but especially small businesses. For some small businesses,

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this additional cost may be prohibitive. Proponents state that increased costs could result from (1) travel costs for local counsel to travel to Washington, D.C., for COFC hearings; or (2) the cost of hiring D.C. area counsel, whose rates may be higher than those of local counsel in the district where the protester is located.

- Although COFC has authority to travel to hear bid protest cases, this is not a realistic alternative to filing in local district courts. Those filing bid protest cases generally seek quick action from the courts, and it would be difficult for COFC judges to travel on short notice—for example, to preside over hearings for temporary restraining orders.
- COFC is an Article I, not Article III,<sup>14</sup> court (that is, COFC judges do not have life tenure) and eliminating district court jurisdiction would remove all Article III trial court jurisdiction for bid protest challenges.
- Given the broad jurisdiction granted under ADRA—e.g., any objection by an interested party to an alleged violation of statute or regulation in connection with a procurement or proposed procurement—the sunset of district court jurisdiction has the potential to raise numerous jurisdictional problems.

Arguments in favor of consolidating judicial bid protest jurisdiction in COFC include:

- It would foster a uniform body of law in bid protest cases. A single court, COFC, would decide bid protest cases; and a single court of appeals, the U.S. Court of Appeals for the Federal Circuit, would hear appeals from COFC. In contrast, there are 94 district courts and 12 circuit courts of appeals that hear appeals from district court decisions.<sup>15</sup> Thus, it is possible to have conflicting interpretations of federal procurement law among the 94 districts and 12 circuit courts of appeals.
- It would eliminate forum shopping whereby the protester seeks to select a district court that may best serve its interest.

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<sup>14</sup> This term refers to Article III of the U.S. Constitution. Judges appointed under Article III are appointed to lifetime appointments and may be removed from office only through the impeachment process. Judges appointed under Article I, such as COFC judges, are appointed for a specific number of years, such as 15 years.

<sup>15</sup> District courts are organized into 12 geographic circuits, with a court of appeals for each circuit. Each court of appeals hears appeals from the district courts within its circuit. For example, the Third Circuit Court of Appeals hears cases from district courts in Delaware, Pennsylvania, New Jersey, and the U.S. Virgin Islands.



- COFC can travel to hold hearings throughout the nation, if needed.

Some of the arguments for and against retaining district court jurisdiction are policy arguments that cannot be addressed using data from the case files. Examples would include whether it is desirable to retain an Article III forum for bid protest cases or whether it is desirable to have a more uniform body of procurement case law.

However, data from the cases may shed some light on some of the other arguments. In reviewing the data available on these potential advantages and disadvantages, we focused principally on data that could be obtained from the case files regarding the characteristics of the bid protest cases filed in district courts and COFC since January 1, 1997. This included the (1) number of cases in district courts and COFC that were filed by small businesses, (2) the dollar amount of the procurement at issue, (3) the number of cases small businesses filed in their local district courts, (4) the number of cases in which small businesses used local legal counsel, (5) the legal issues raised in district court and COFC cases, and (6) the general outcomes of small business protest cases filed in district courts and COFC. We supplemented our case file reviews with attorney interviews. However, these data provide a limited basis for assessing the advantages and disadvantages of retaining district court jurisdiction for bid protest cases; therefore, we draw no conclusions based on these data.

## Case Data on Small Business Protesters

Proponents of retaining district court jurisdiction assert that eliminating the jurisdiction will raise costs for companies filing bid protest cases. This would be especially significant for small businesses with limited resources that are located outside the Washington, D.C., area. Such businesses would no longer be able to file cases in the districts in which they are located. Proponents state that it is usually less expensive for small businesses not located in the Washington, D.C., area to file their cases in their local district courts using local counsel. Such counsel, it is argued, would usually be less expensive than Washington, D.C., area counsel.

## Small Business Filings Were Split Between District Courts and COFC

Although we do not know why each case was filed in a particular district court or COFC, we found that more small business cases were filed in COFC than in district courts. About half of the total bid protest cases we reviewed in both COFC (61 of 118) and district courts (33 of 66) were filed by small businesses. As shown in table 2, about half of all district court bid protest cases (31 of 66) and about half of district court small business cases (15 of 33) were filed in just two districts—D.C. and Eastern Virginia. The Eastern Virginia district is adjacent to the D.C. district; three of the

four cases filed in that district were filed in Alexandria, VA, directly across the river from Washington, D.C.<sup>16</sup>

**Table 2: Use of Local and D.C. Area Counsel in District Court Bid Protest Cases Filed Between January 1, 1997, and April 30, 1999**

	Total cases	Small business cases
<b>Cases filed in D.C. or Eastern Virginia districts</b>		
Filed by D.C. area-counsel <sup>a</sup>	31	15
Filed by counsel located outside D.C. area	27	11
<b>Cases filed in other districts</b>		
Filed by D.C.-area counsel	4	4
Filed by counsel located outside D.C. area	35	18
	5	1
	30	17

<sup>a</sup>We defined D.C. area counsel as those whose office addresses were in D.C. or the adjacent Virginia and Maryland counties. Where the attorney's firm had more than one office location, we used the office address of the attorney representing the protester.

Source: GAO analysis of bid protest case files.

## Protesters Who Filed Locally Generally Used Non-D.C.-Area Counsel

Of the 33 district court small business cases we identified, 18 were filed in the protester's local (or home) district, including 3 that were filed in the D.C. or Eastern Virginia districts. In all but 3 of these 18 cases, the protester used counsel from outside the Washington, D.C., area. However, the counsel used was not necessarily located in the districts in which the cases were filed. For example, a case filed in California used counsel from D.C. Of the 15 small business cases that were not filed in the protester's home district, 12 were filed in the D.C. district, and 9 used counsel from the D.C. area. The remaining three cases were filed in the districts of Utah, Northern Illinois, and Southern New York, respectively.

We found that 25 of 117 COFC cases were filed by counsel outside the Washington, D.C., area.<sup>17</sup> Of the 61 COFC cases filed by small businesses, 15 were filed by counsel outside the Washington, D.C., area. We had no data on whether the protesters' case costs, including attorney costs, were more or less in those cases in which protesters filed in their local district courts or COFC and used non-D.C.-area counsel.

## Reasons for Attorneys' Choice of Judicial Forum Varied Widely

We interviewed 27 attorneys who represented plaintiffs in 28 of 66 district cases and 70 attorneys who represented plaintiffs in 104 of 118 bid protest cases. Some attorneys did not wish to discuss their cases. The attorneys' reasons for their choice of judicial forum varied widely. For the 27

<sup>16</sup> Department of Defense headquarters (the Pentagon) is located in the Eastern District of Virginia. The single Eastern District of Virginia bid protest case not filed in Alexandria was filed in Norfolk, Virginia.

<sup>17</sup> Data were not available for one case.

attorneys who filed in district courts, the reasons offered most frequently for choosing district court were cost considerations (eight), time (seven) and familiarity with the district court (six). Among other reasons mentioned were the proximity of the district court; the COFC's lack of jurisdiction over a case; the district court offered greater opportunity for discovery and injunctive relief; and fairness.

Attorney reasons for filing in COFC were too varied to be categorized. Among the reasons mentioned were that COFC had more expertise in complex procurement cases; COFC can move cases more quickly than district courts, particularly compared to district courts with heavy criminal caseloads; COFC has issued a large number of published opinions compared to district courts; and there is less predictability in district court outcomes. However, 45 of the 70 attorneys interviewed said they favored retaining district court jurisdiction, believing that a choice of forum was useful and desirable.

## Legal Issues Raised in Bid Protest Cases Reviewed

We reviewed the legal issues in the 66 district court and 100 unsealed COFC cases (see app. IV). Our analysis was based on a review of documents in the court case files. We found that the legal issues raised in both forums fell into the same general categories. In both the district court and COFC cases, the issue raised most frequently was the propriety of agency evaluation of proposals.

Proponents of retaining district court jurisdiction state that (1) the expiration of district court jurisdiction under ADRA may create jurisdictional questions that could require further litigation to clarify; and (2) if COFC declined jurisdiction, it is possible that some issues could not be raised in any other court.

With regard to jurisdictional issues, COFC held in two cases, for example, that it did not have jurisdiction to hear the dispute under ADRA. In one case, COFC held that it lacked jurisdiction over a maritime bid protest action and transferred the case to the district court for D.C.<sup>18</sup> COFC indicated that although it maintains concurrent jurisdiction with the district courts to consider bid protest actions, jurisdiction over matters arising in admiralty, including maritime contracts, has traditionally been with the federal district courts. In the other case, the U.S. Court of Appeals for the Federal Circuit reversed a COFC determination that it did not have jurisdiction to hear a challenge to an agency's determination to proceed

<sup>18</sup> Bay Ship Management, Inc. v. United States, 43 Fed.Cl. 535 (1999).

with contract award or performance in the face of a GAO protest, under 31 U.S.C. 3553(c)(1).<sup>19</sup>

## Case Outcomes in District Courts and COFC Generally Similar

We also examined the outcomes of district court and COFC cases to examine the outcomes for small businesses in each judicial forum. The results shown in table 3 are broad categories of general case outcomes, and we recognize that they do not capture the subtleties of individual cases. As shown in table 3, in both district courts and COFC, small and non-small business protesters were unlikely to prevail. In both courts, injunctive relief was likely to be denied whether the protester was a small business or not. However, in some cases the court did not rule on the protester's motion for injunctive relief, or the agency voluntarily agreed to stay the performance of the procurement until the court ruled.

**Table 3: General Case Outcomes for Bid Protest Cases Reviewed and Closed**

General case outcome <sup>a</sup>	District courts		COFC	
	Total cases	Small business cases	Total cases	Small business cases
<b>Court rulings on temporary injunctive relief<sup>b</sup></b>				
Granted	7	3	11	6
Denied	34	22	47	26
<b>Subtotal</b>	<b>41</b>	<b>25</b>	<b>58</b>	<b>32</b>
<b>Voluntary dismissals<sup>c</sup></b>				
On motion of protester	15	8	11	5
On joint motion of protester and government	15	7	18	6
<b>Subtotal</b>	<b>30</b>	<b>15</b>	<b>29</b>	<b>11</b>
<b>Court actions other than voluntary dismissals:<sup>d</sup></b>				
Ruled in favor of protester	1	0	19	11
Ruled in favor of government	21	14	60	34
Other <sup>e</sup>	0	0	3	2
<b>Subtotal</b>	<b>22</b>	<b>14</b>	<b>82</b>	<b>47</b>

<sup>a</sup>The data in the table are based on data from unsealed case files; any data available on sealed cases (e.g., docket sheets); and information from attorney interviews (e.g., whether protester was a small business). The sum of the subtotals exceeds the number of cases reviewed because more than one court action may have been occurred in a case. For example, a court may have granted a protester's motion for temporary injunctive relief, and the protester and government subsequently filed a joint motion for voluntary dismissal based on a settlement agreement.

<sup>b</sup>Includes only those cases in which the court ruled on the protester's motion for temporary injunctive relief. In some cases, the court did not rule on the protester's motion for temporary injunctive relief, or the protester withdrew its motion after the agency voluntarily agreed to stay performance of the procurement until the court ruled on the merits of the case.

<sup>19</sup> Ramcor Services Group, Inc. v. United States, 185 F.3d 1286 (Fed.Cir. 1999)

<sup>c</sup>In some cases in which the court dismissed the case upon the motion of the protester or upon a joint motion of the protester and government, the protester obtained some of the relief sought. For example, the government may have agreed to withdraw the solicitation, reconsider the protester's offer, or reconsider its application of a specific criterion used in evaluating the offer.

<sup>d</sup>Generally, these are cases in which the court ruled on motions for summary judgment or motions to dismiss (other than voluntary dismissals).

<sup>e</sup>Includes cases that do not fit the remaining categories, such as one COFC case in which the court ruled that it did not have jurisdiction and transferred the case to district court.

Source: GAO analysis of bid protest case files.

A number of cases were closed with the court granting a motion for voluntary dismissal either by the protester alone or by the protester and government jointly. In some of these cases, the protester may have received some of the relief sought. For example, the government agency may have agreed to reconsider its application of a specific criterion used in evaluating the offers it received. When the court ruled on actions other than motions for voluntary dismissal, both district courts and COFC were likely to rule for the government, although COFC ruled for small businesses in a greater proportion of cases (11 of 47) than did district courts (0 of 14).

Appendixes V (district courts) and VI (COFC) each include case summaries of 10 examples of bid protest cases each—filed by small businesses and 5 that were not filed by small businesses.

## Limited Data on COFC's Judges Ability to Travel

Proponents of retaining district court jurisdiction assert that COFC judges may not be able to travel on short notice to hear bid protest cases filed by businesses outside of the Washington, D.C., area. COFC told us that its judges had traveled twice to hear a bid protest case during the period January 1, 1997, through August 1, 1999. The Chief Judge of COFC said that COFC judges could travel, if necessary, to hear cases.

## Agency Comments and Our Evaluation

We sent a draft of this report for comment to the Public Contract Law Section of the American Bar Association, the Federal Bar Association, the Secretary of Defense, the Attorney General, and the Chief Judge of COFC.

The Attorney General had no comments on the report. In his written comments, the Acting General Counsel of the Department of Defense noted that the report's findings provided support for the Department's position that district court jurisdiction should be allowed to sunset.

The Chief Judge of COFC provided oral comments in a meeting on March 3, 2000. He noted that the report provided useful information on the characteristics of bid protest cases that had not been previously available. In reviewing the list of COFC cases we had reviewed, COFC's Clerk of

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Court identified 14 additional bid protest cases that had not been previously provided to us. The Chief Judge asked that we include an analysis of these additional 14 cases in our final report, and we have done so. As a result, our final report includes an analysis of 118 COFC bid protest cases.

In his written comments, the chair of the American Bar Association's Section of Public Contract Law noted that (1) the report's findings confirmed that U.S. district courts remained an important judicial remedy in bid protest cases, (2) the limited case data available do not provide guidance as to the advantages and disadvantages associated with retaining district court jurisdiction, (3) the case data do not provide a sound basis on which to conclude that district court jurisdiction should be allowed to sunset, and (4) potentially troublesome jurisdictional issues could generate needless litigation should district court jurisdiction be permitted to sunset. The Chair also provided more extensive comments on the issue of allowing district bid protest jurisdiction to sunset that had been previously sent to us. Our report focused on an empirical analysis of the cases that have been filed in district courts and COFC since concurrent jurisdiction for bid protests took effect—data not previously available. With these data we were able to address many of the perceived advantages and disadvantages of filing in each judicial forum. However, as we noted in our report, some of the arguments for and against retaining district court bid protest jurisdiction are policy arguments that cannot be addressed using data from the case files.

The Chair of the Federal Bar Association's Government Contracts Section and the Chair of the Section's Working Group on the Sunset of U.S. District Court Bid Protest Jurisdiction provided as their comments a paper drafted by the Working Group that had previously been provided to us. In those comments, the Working Group concluded that district court bid protest jurisdiction may be desirable for a number of reasons. The Working Group also concluded that there are no clearly significant benefits to termination of the district courts' jurisdiction, but none of the factors it examined was grave enough to compel the conclusion that continued district court jurisdiction is absolutely necessary.

The comments of DOD, the American Bar Association, and the Federal Bar Association are included in appendixes VII, VIII, and IX.

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We are sending copies of this report to Senator Orrin Hatch, Chairman, and Senator Patrick Leahy, Ranking Minority Member, Senate Committee on the Judiciary; Representative Henry Hyde, Chairman, and

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Representative John Conyers, Ranking Minority Member, House Committee on the Judiciary; Senator Fred Thompson, Chairman, and Senator Joseph Lieberman, Ranking Minority Member, Senate Committee on Governmental Affairs; and to Representative Dan Burton, Chairman, and Representative Henry Waxman, Ranking Minority Member, House Committee on Governmental Reform. We also are sending copies of this report to the Honorable Janet Reno, Attorney General; the Honorable Loren Smith, Chief Judge, COFC; the Honorable Leonidas Ralph Mecham, Director, Administration Office of the U.S. Courts; the American Bar Association, Section of Public Contract Law; the Federal Bar Association, Government Contracts Section; and other interested parties. Copies of this report will be made available to others upon request.

Please contact me or William Jenkins on (202) 512-8777 if you or your staff have questions about this report. Major contributors to this report are acknowledged in appendix X.

A handwritten signature in black ink that reads "Richard M. Stana". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Richard M. Stana  
Associate Director  
Administration of Justice Issues

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## Abbreviations

ABA	American Bar Association
ADRA	Administrative Dispute Resolution Act
COFC	U.S. Court of Federal Claims
DOJ	Department of Justice
FBA	Federal Bar Association
FSS	Federal Supply Schedule
GSA	General Services Administration
IFB	Invitation for Bids
INS	Immigration and Naturalization Service
SBA	Small Business Administration

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# Objectives, Scope, and Methodology

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Since December 31, 1996, the United States district courts and the U.S. Court of Federal Claims have had concurrent jurisdiction for federal bid protest cases, whether the case was filed before or after the contract has been awarded. District courts' statutory jurisdiction for bid protest cases is scheduled to expire on January 1, 2001. Our objectives were (1) to identify the number of bid protest cases filed in the United States district courts and the United States Court of Federal Claims (COFC) between January 1, 1997 and April 30, 1999, that were filed by small businesses, the type of agencies involved (civilian or defense), and the amount of the procurement at issue; (2) identify the perceived advantages and disadvantages, particularly for small businesses, of filing bid protest cases in each judicial forum (the district courts and COFC); (3) obtain and review available data on the characteristics of district court and COFC bid protest cases, particularly those filed by small businesses in each forum, that could be used to assess these perceived advantages and disadvantages.

To obtain information on the number of bid protest cases filed in federal district courts and COFC during the period January 1, 1997, through April 30, 1999, we used several sources of information. We obtained data from COFC's clerk of court on the number of bid protest cases filed in COFC during this period. COFC provided data on cases filed through August 1, 1999. The Clerk of Court provided a list of 118 bid protest cases—104 during our initial review and 14 additional cases identified when the draft report was sent to COFC for comment. Our final report includes all 118 cases.

There is no central source of data on the number of bid protest cases filed in the district courts. The federal judiciary does not track bid protest cases as a separate category of civil suit. We obtained information on the number of possible such cases filed in district courts from the Commercial Litigation Branch of the Department of Justice's Civil Division, the Executive Office for U.S. Attorneys, the American Bar Association, other sources recommended by these organizations, and individual U.S. district courts. We cross-checked the data provided by each source to develop a single list. It is possible that there were some bid protest cases filed in district courts during this period that we were unable to identify. We identified 94 possible bid protest cases filed in the district courts between January 1, 1997, and April 30, 1999.

The district courts provided requested documents from the case files for all but 10 of the 94 possible district court bid protest cases we had identified. Of these 10 cases, 1 was sealed (we were permitted to review the file in the clerk's office); 1 was never sent; 5 could not be located by

the local district court based on the data we had about the case; and district courts declined to provide case file documents for 3 cases that were still under appeal or in trial, and considered to be open cases. After reviewing the materials provided, we further determined that 6 of the remaining 84 cases were duplicates of other cases, which left 78 possible bid protest cases. After more detailed review of the materials provided for these 78 possible bid protest cases, we determined that 65 were bid protest cases and 13 were not. After reviewing the sealed case, we increased the total number of bid protest cases to 66. For our definition of “bid protest case,” we used the ADRA definition of “an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. 1491(b)(1).

Of the 66 bid protest cases we identified, 1 had been transferred to the district court by COFC. Another case was filed first in district court and then in COFC, which dismissed the case because it was pending in district court. We counted both of these cases as filings in each judicial forum. In addition, one protester filed two separate cases in the same district court involving a single solicitation, and another protester filed two separate cases in different district courts involving the same solicitation. We counted these as four separate district court case filings.

Table I.1 shows the total number of cases we identified as filed in each court during the period January 1, 1997, through April 30, 1999, for district courts and through August 1, 1999, for COFC.

**Table I.1: Number of Bid Protest Cases Filed in U.S. District Courts and COFC for the Period Covered by Our Review**

Calendar year	District Courts (January 1, 1997 through April 30, 1999)		Court of Federal Claims (January 1, 1997 through August 1, 1999)	
	Filed <sup>a</sup>	Closed	Filed	Closed
1997	24	24	39	39
1998	30	24	47	43
1999	12	4	32	29
<b>Total</b>	<b>66</b>	<b>52</b>	<b>118</b>	<b>111</b>

<sup>a</sup>Case file reviews revealed that not all of the 94 cases originally identified as bid protest cases in district courts were in fact bid protest cases.

Source: GAO analysis of data from federal agencies, COFC, and ABA.

COFC’s clerk of court identified 118 COFC bid protest cases filed between January 1, 1997, and August 1, 1999. Our analysis of COFC cases is based primarily on the 100 unsealed cases we were able to examine. It was not possible to obtain needed documents in all of the COFC cases because 36

of the 118 cases (about 31 percent) included sealed complaints. For 18 of these 36 cases, the entire case file was sealed, and we were not permitted to view sealed documents. For the 18 sealed cases, we reviewed the docket sheets any redacted court orders or opinions. Where possible, we interviewed the attorneys representing the protester. For those 36 cases with sealed complaints, we obtained and reviewed available unsealed case file documents, most of which were redacted in part.

However, we do not know whether the 36 cases in which the complaints were under seal were similar to or different from those 82 cases whose complaints were not under seal. Although we have reviewed the partially redacted opinions and other documents available in the 36 cases with sealed complaints, it is important to note that such documents by their very nature do not generally provide as complete a picture as nonredacted documents. We supplemented our case file review with interviews of attorneys who represented the protesters in COFC cases, including those cases in which the complaint or file was sealed.

To identify the potential advantages and disadvantages of the elimination of the district courts' jurisdiction over bid protest cases—particularly for small businesses—we reviewed the literature regarding the jurisdiction of the district courts and COFC over bid protest cases; interviewed attorneys who had filed bid protest cases in district courts, COFC, or both; interviewed the assistant U.S. attorneys who represented the defendant federal agencies; and interviewed representatives of associations and interest groups whose members had been involved in bid protest cases. These included such organizations as the Chamber of Commerce, Association of General Contractors, Federal Bar Association (FBA), American Bar Association (ABA), Small Business Administration (SBA), Department of Justice's Civil Division, the Defense Logistics Agency, the Department of Commerce, and the National Defense Industrial Association (NDIA). In addition, some organizations, such as ABA and NDIA, provided written comments outlining the potential advantages for small businesses of retaining district court jurisdiction.

To identify what the experience has been for those businesses, particularly small businesses, who had filed bid protest claims in both district courts and COFC, we used several different sources of information. We sought to obtain the following information for each possible bid protest case we identified that had been filed in U.S. District court from January 1, 1997, through April 30, 1999, and for each COFC case filed from January 1, 1997, through August 1, 1999:

- the name of the company filing the protest;
- whether that company was a small business;
- the name of any intervening parties in the case (such as the firm that won the procurement);
- a copy of the complaint, outlining the legal issues raised in the bid protest;
- a copy of any court order or opinion to determine whether the court ruled in whole or in part in favor of the legal claims raised by the bid protester;
- the names and addresses of the attorneys of record for the bid protester;
- the names and addresses of the attorneys of record representing the agency;
- the reasons why the protester chose to file in U.S. district court or COFC.

Using our list of possible bid protest cases filed in district courts, we sent each district court in which at least one case had been filed the name and docket number (if known) of the case(s) filed in that court. We contacted the clerk of court in each of these 37 affected districts to request that the clerk mail us a copy of the complaint, the response to the complaint, and any court order or opinion filed in the case. We obtained these documents for COFC cases directly from COFC in Washington, D.C. For district court cases in the districts of D.C. and the Alexandria division of the Eastern District of Virginia, we copied documents directly from the case files.

From these case file documents, we obtained the names of the businesses filing the cases, the names of the defending agencies, and the names and addresses of the lawyers for both the protesters and agencies. We reviewed the files to identify the nature of the legal issues raised and the outcomes of the cases. Where available in the files, we also obtained information on the size and nature of the procurement and the size and nature of the business that filed the protest (e.g., annual sales, computer services, or other factors).

However, the case files did not always include information on the size and nature of the business filing the protest or the size and nature of the procurement in dispute. Therefore, to identify the number of small businesses who filed protest cases in district courts and COFC, we used several approaches. We compared the names of the companies who filed bid protests with SBA's PRO-Net database. However, small businesses are not required to register with SBA. We also reviewed the case files to determine if the court files indicated that the plaintiff was a small business. In addition, we interviewed the attorneys who represented the businesses that filed protests and asked them whether their clients were small businesses and, if so, the basis for considering the company a small business. If any of these sources indicated that the firm that filed the

protest was a small business, we counted it as a small business. However, not all attorneys were willing to discuss their cases. Given the data limitations, the results should be considered an estimate of the number of small businesses that filed in either district courts or COFC.

To supplement the information in the case files on the dollar amount and nature of the procurement in dispute and to obtain information on why the protester chose to file in district court or COFC, we used a structured interview schedule to interview the attorneys of record for the businesses who filed the protest and the agencies who were the defendants in these cases. However, not all attorneys were willing to discuss their cases, and our data on procurement amounts is based on a portion of the cases reviewed. In some cases, the attorneys interviewed were able to estimate the amount of the procurement but did not know the exact amount of the procurement. Because of these limitations in the data, we have reported only the range of the value of the procurements in dispute.

We interviewed 48 different attorneys in 52 district court cases. (Some attorneys had more than one case.) Of these, 27 were attorneys for the plaintiff (protester) in 28 cases, and 21 were attorneys for the defendant in 24 cases. We briefly spoke with four attorneys—two for the plaintiffs and two for the defendants—but did not conduct an actual interview. For example, one attorney explained that he was not at liberty to discuss the case. We also spoke with a representative of an office that represented a defendant but were unable to conduct an interview. In addition, we spoke with 10 attorneys—two for the plaintiff and 8 for the defendants—in 9 different cases to confirm, in their opinions, that the cases from our original list of 94 cases were not bid protest cases.

For COFC cases, where the case file identified the protester as a small business firm or identified the amount of the disputed procurement, we used the information from the case file. However, the majority of COFC case files did not contain this information. For example, we were able to identify 14 small business protesters from the case files. To supplement our case file interviews, we conducted telephone interviews with 70 attorneys for the plaintiff (protester) in 104 of the 118 bid protest cases filed in COFC between January 1, 1997, and August 1, 1999. (Some attorneys had more than one case.) If the attorney indicated that his or her client was a small business, we counted it as such. We also used the attorney's stated value of the procurement in those cases in which the amount could not be determined from the case file.



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We then analyzed and summarized the information from the case files and interviews to identify the common experiences, if any, of business that had filed bid protest cases in the district courts and COFC during the period of our review. This included categorizing the case outcomes in district courts and COFC. Each of the cases was reviewed by an evaluator, who completed the DCI, and an attorney from our Office of General Counsel, who reviewed the DCIs and case files. Attorneys from our Office of General Counsel also categorized the legal issues raised in the bid protest cases filed in district courts and COFC.

We did our work in Washington, D.C., and Los Angeles between March 1999 and January 2000 in accordance with generally accepted government auditing standards. We obtained written comments on a draft of this report from the Department of Defense, the American Bar Association's Section of Public Contract Law, and the Federal Bar Association's Government Contracts Section. These comments are summarized at the end of the letter and are contained in appendixes VII, VIII, and IX.

# Bid Protest Cases Filed in U.S. District Courts Between January 1, 1997, and April 30, 1999

This appendix lists the 66 district court bid protest cases that we identified as filed between January 1, 1997, and April 30, 1999. The cases are arranged by district and within district by year filed. The table also indicates which cases were filed by small businesses. We counted a case as a small business case if (1) the protestor was identified as a small business in the case file documents; (2) the attorney who represented the protestor said the protestor was a small business, or (3) the protestor had registered with the Small Business Administration.

**Table II.1: District Court Bid Protest Cases Reviewed**

District/case name	Year filed	Small business case
<b>District of Columbia</b>		
Correctional Vendors Association	1997	
Dynamic Decisions, Inc. <sup>a</sup>	1997	•
Dynamic Decisions, Inc. <sup>a</sup>	1997	•
Information Systems & Networks Corp.	1997	
Lake Michigan Contractors, Inc.	1997	•
Syska & Hennessy, Inc.	1997	
TMC Technologies, Inc.	1997	•
United International Investigative Services, Inc.	1997	
United Valve Co.	1997	•
Amfac Resorts, LLC	1998	
Aramark Sports and Entertainment Services, Inc.	1998	
Arthur D. Little, Inc.	1998	
Correctional Vendors Association	1998	
Dayton Granger, Inc.	1998	•
Dillingham Construction International, Inc.	1998	
DSE, Inc. d/b/a Dayron	1998	•
The Iceland Steamship Co., Ltd.—Eimskip	1998	
Information Handling Services, Inc.	1998	
Launch Support Company, LLC	1998	
NWT Inc.	1998	•
Wackenhut Corrections Corp.	1998	
Worcester Brothers Co., Inc.	1998	•
Anadac, Inc.	1999	
Bay Ship Management, Inc.	1999	•
Kira, Inc.	1999	•
Nick Chorak Mowing	1999	Sealed
WRD Venture; NWD Venture	1999	
<b>Eastern District of Virginia</b>		
Groome Transportation, Inc.	1997	•
Hunt Building Corporation	1997	
Marine Hydraulics International, Inc.	1997	•
Omniplex World Services Corporation; MSM Security Services, Inc.	1998	•
<b>Northern District of Alabama</b>		
Pemco Aeroplex, Inc.	1998	

**Appendix II**  
**Bid Protest Cases Filed in U.S. District Courts Between January 1, 1997, and April 30, 1999**

<b>District/case name</b>	<b>Year filed</b>	<b>Small business case</b>
<b>District of Alaska</b>		
John MacDonald and Joyce MacDonald	1998	•
<b>District of Arizona</b>		
Sun Belt Builders, Inc.	1997	•
<b>Eastern District of California</b>		
Lewis C. Nelson and Sons, Inc.	1998	
<b>Northern District of California</b>		
Concord Disposal Service, Inc.	1997	
National Airmotive Corporation	1998	•
<b>Southern District of California</b>		
San Diego Beverage & Kup	1998	•
Maxwell Technologies, Inc.	1998	
<b>Middle District of Florida</b>		
Braswell Services Group, Inc.	1997	•
<b>Northern District of Florida</b>		
Hedgecock Electric, Inc.	1997	•
<b>Middle District of Georgia</b>		
Spectrum Landscape Services, Inc.	1998	
<b>Northern District of Illinois</b>		
Sabbia Corporation	1997	•
Neals Janitorial Service	1997	•
<b>Southern District of Illinois</b>		
Russo & Sons, Inc.	1999	•
<b>District of Kansas</b>		
Lawrence Medical Equipment, Inc.	1998	
<b>Eastern District of Kentucky</b>		
Outdoor Venture Corporation	1998	•
<b>District of Maryland</b>		
MilVets Systems Technology, Inc.	1998	•
<b>District of Massachusetts</b>		
American Science and Engineering, Inc.	1999	
<b>Southern District of Mississippi</b>		
Madison Services, Inc.	1997	•
<b>District of New Mexico</b>		
Peacock, Myers & Adams, P.C.	1998	•
<b>Southern District of New York</b>		
Abner Realty, Inc.	1997	•
<b>Southern District of Ohio</b>		
Waste Control Specialists, LLC <sup>b</sup>	1999	
<b>Western District of Oklahoma</b>		
David Mitchell Construction, Inc.	1999	
<b>Eastern District of Pennsylvania</b>		
United Ammunition Container, Inc.	1997	•
Baltdt, Incorporated	1998	
American Competitiveness Institute	1998	
FCA Holdings, Inc.	1997	
<b>Western District of Pennsylvania</b>		
R.A. Glancy & Sons	1999	

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**Appendix II**  
**Bid Protest Cases Filed in U.S. District Courts Between January 1, 1997, and April 30, 1999**

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District/case name	Year filed	Small business case
<b>District of South Carolina</b>		
South Carolina Military Department	1999	
<b>District of South Dakota</b>		
James N. Danielson	1998	•
<b>Eastern District of Texas</b>		
Walsh Distribution, Inc.	1999	
<b>Northern District of Texas</b>		
Waste Control Specialists, LLC <sup>b</sup>	1997	
<b>District of Utah</b>		
Booth & Associates, Inc.	1997	•
<b>District of Virgin Islands</b>		
HAP Construction, Inc.	1998	•
<b>Western District of Washington</b>		
Sterile Surgical Systems, LLC	1998	

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<sup>a</sup>Both of the Dynamic Decisions filings arose from the same solicitation.

<sup>b</sup>Waste Control filed two suits arising from the same solicitation—one in the Southern District of Ohio and one in the Northern District of Texas.

Sources: District court case files, attorney interviews, Small Business Administration.

# Bid Protest Cases Filed in COFC Between January 1, 1997, and August 1, 1999

This appendix includes a listing of the 118 bid protest cases that COFC's Clerk of Court provided to us. Table III.1 lists the cases and indicates whether the complaint was sealed, the entire case file was sealed, and the case was filed by a small business protestor. We counted a case as a small business case if (1) the case was identified as a small business in the case files, (2) the attorney for the protestor indicated that the protestor was a small business, or (3) the protestor was registered as a small business with the Small Business Administration.

**Table III.1: Bid Protest Cases Filed in COFC, January 1, 1997, through August 1, 1999**

Case name	Docket number	Sealed complaint	Sealed case	Small business case <sup>a</sup>
<b>1997 cases</b>				
Cubic Applications, Inc.	97-29C	•		
Surface Technologies Corp., Inc.	97-30C			
Cincom Systems, Inc.	97-72C			•
Day & Zimmerman	97-90C			
Sabreliner Corporation	97-119C			
Asilomar Management Co.	97-134C			•
Allied Technologies Group, Inc.	97-143C	•		•
Greater Richmond Cleaning, Inc.	97-164C			•
Mike Hooks, Inc.	97-181C			•
Minor Metals, Inc.	97-194C			•
J.C.N. Construction Co., Inc.	97-238C			•
Graphic Data, LLC	97-256C			•
W & D Ships Deck Works, Inc.	97-308C			•
Analytical & Research Technology, Inc.	97-380C			•
ATA Defense Industries, Inc.	97-382C			•
Aero Corporation, S.A.	97-416C	•		
Lyons Security Services, Inc.	97-505C			•
CC Distributors, Inc.	97-517C			•
Redland Genstar, Inc.	97-533C			
Alfa Laval Separation, Inc.	97-536C			
The Famous Construction Co.	97-555C			•
Delbert Wheeler Construction, Inc.	97-586C			•
Alliant Techsystems, Inc.	97-626C			
SmithKline Beecham	97-633C			
Tecom, Inc.	97-663C	•		
HSQ Technology, Inc.	97-667C			•

**Appendix III**  
**Bid Protest Cases Filed in COFC Between January 1, 1997, and August 1, 1999**

<b>Case name</b>	<b>Docket number</b>	<b>Sealed complaint</b>	<b>Sealed case</b>	<b>Small business case<sup>a</sup></b>
Wackenhut International, Inc.	97-680C			
Peirce-Phelps, Inc.	97-683C			•
CCL, Inc.	97-721C			•
Brickwood Contractors, Inc.	97-844C			•
ECDC Environmental	97-723C			
FORE Systems Federal, Inc.	97-731C	•		
The Centech Group	97-740C			•
Clark Construction Group, Inc.	97-749C	•	•	
Roxco, Ltd.	97-768C	•		
Scientech, Inc.	97-824C			
RSL Electronics, Ltd.	97-837C			•
Candle Corp.	97-851C			
Consolidated Services, Inc.	97-855C			
<b>1998 cases</b>				
Informatics Corp.	98-16C			•
Carter Industries, Inc.	98-27C			•
Washington Baltimore Cellular Ltd. Partnership	98-50C			
Meir Dubinsky	98-56C			•
United International Investigative Services, Inc.	98-80C			
Metric Construction, Inc.	98-91C			
Son Broadcasting, Inc.	98-115C			•
CRC Marine Services, Inc.	98-128C			•
Pike's Peak Family Housing, Inc.	98-147C			
Ramcor Services Group, Inc.	98-152C	•		•
United International Investigative Services, Inc.	98-153C			
Modern Technologies, Inc.	98-309C			•
John C. Grimberg Co.	98-338C			
Hewlett-Packard Company	98-406C	•		
Talton Holdings	98-409C	•	•	
FN Manufacturing, Inc.	98-447C	•		•
Sealed case <sup>b</sup>	Sealed case	•	•	
Firearms Training Systems, Inc.	98-476C	•		
Winstar Communica-tions	98-480C			
Advanced Data	98-495C	•		•
MVM Inc.	98-520C			
The Trane Company	98-559C			
Miller Holzworth	98-576C			•
Phoenix Air Group	98-602C			

**Appendix III**  
**Bid Protest Cases Filed in COFC Between January 1, 1997, and August 1, 1999**

<b>Case name</b>	<b>Docket number</b>	<b>Sealed complaint</b>	<b>Sealed case</b>	<b>Small business case<sup>a</sup></b>
Torrington Company	98-613C			
Metric Systems	98-616C			
California Marine Cleaning, Inc.	98-636C			•
CCL Service Corporation	98-664C			•
PCC Federal Systems	98-692C	•	•	•
Adirondack Construction	98-698C			•
United International	98-729C			
ITT Federal Services	98-731C	•	•	
Hewlett-Packard Company	98-738C	•	•	
Data Systems	98-745C			•
Synectics, Inc.	98-746C			•
Anderson Columbia Environmental, Inc.	98-759C			
Institute for Captive Chimpanzee Care and Well-Being, Inc.	98-780C			•
Universal Systems and Technologies, Inc.	98-806C			•
Beautify Professional Cleaning Services, Inc.	98-829C			•
U.S. Investigations Services, Inc.	98-869C			
Input/Output Technology, Inc.	98-836C	•		•
Forestry Surveys	98-844C			•
Meir Dubinsky	98-884C			•
DGS Contract Service, Inc.	98-891C	•		•
Pemco Aeroplex, Inc.	98-899C			
Indiana Chair Frame Company	98-927C	•		
Protec, Inc.	98-932C	•		•
<b>1999 cases</b>				
105 West Adams Building, LLC	99-3C	•	•	•
S.J. Thomas Co., Inc.	99-70C			•
OMV Medical, Inc.	99-74C	•	•	•
OMV Medical, Inc.	99-75C	•	•	•
Envirocare of Utah	99-76C			
Science Applications	99-81C	•		
District of Columbia Parking Associates	99-86C			
Marine Hydraulics International, Inc.	99-107C			
Ryan Company	99-113C			
Chas. H. Tompkins Company	99-122C			

**Appendix III**  
**Bid Protest Cases Filed in COFC Between January 1, 1997, and August 1, 1999**

<b>Case name</b>	<b>Docket number</b>	<b>Sealed complaint</b>	<b>Sealed case</b>	<b>Small business case<sup>a</sup></b>
MVM, Inc.	99-135C	•	•	
MVM, Inc.	99-136C	•	•	
MVM, Inc.	99-137C	•	•	
Seattle Security Services, Inc.	99-139C			•
Cubic Defense System, Inc.	99-144C	•	•	
Akal Security, Inc.	99-149C	•	•	
Kellie W. Tipton Construction Company	99-183C	•	•	•
Bay Ship Management, Inc.	99-184C			•
American Renovation & Construction	99-171C			•
Meir Dubinsky	99-191C			•
MVM, Inc.	99-220C			
Beta Analytics International, Inc.	99-222C			•
Acra, Inc.	99-337C			•
Hewlett-Packard Company	99-358C	•	•	
Brickwood Contractors, Inc.	99-367C			•
Brickwood Contractors, Inc.	99-388C			•
Impresa Construzioni	99-400C	•		•
Stratos Mobile	99-402C	•		
Cubic Defense Systems	99-483C			
J & D Maintenance and Services	99-484C	•	•	•
Unified Architecture and Engineering, Inc.	99-414C			•
ES-KO, Inc.	99-528C	•	•	

<sup>a</sup>Where possible, for sealed cases we attempted through attorney interviews to determine if the protestor was a small business. In cases where we have noted that the case files were sealed and the protestor was a small business, the identification of the protestor as a small business was based on attorney interviews.

<sup>b</sup>The name of the protestor was not available for this case in which the names of the parties were sealed.

Sources: COFC Clerk of Court, case files, and interviews with protestor attorneys.



# Summary of Legal Issues Raised in U.S. District Court and COFC Bid Protest Cases Reviewed

We reviewed the legal issues raised in each of the 65 unsealed bid protest cases filed in U.S. district courts between January 1, 1997, and April 30, 1999, and each of the 100 unsealed COFC cases filed between January 1, 1997, and August 1, 1999. The table below shows the major categories of issues raised.

**Table IV.1: Summary of Legal Issues Raised in District Court and COFC Bid Protest Cases Reviewed**

Legal issue	Number of cases in which issue was raised	
	District Court <sup>a</sup>	COFC <sup>a</sup>
Solicitation issues <sup>b</sup>	24	25
Evaluation and source selection <sup>c</sup>	26	54
Responsibility	2	5
Propriety of discussions	7	19
Bid Rejection <sup>d</sup>	5	9
Procurement integrity <sup>e</sup>	0	5
Override of Competition in Contracting Act		
stay of performance	5	1
Postaward procurement-related actions <sup>f</sup>	7	8
Small business issues <sup>g</sup>	6	5
Other <sup>h</sup>	3	2

<sup>a</sup>Because some cases raised more than one issue, the total of the individual entries exceeds the number of cases reviewed.

<sup>b</sup>Includes specification challenges, bundling of requirements, failure to solicit, sole-source awards, multiple awards, use of sealed bidding versus negotiation, and cancellation of solicitation/resolicitation.

<sup>c</sup>Includes technical or cost proposal evaluation, including evaluation of past performance/experience; waiver of requirements; cost/technical trade-off or best value determinations; exclusion from the competitive range; and favoritism, bias, or unfair treatment in the evaluation of proposals.

<sup>d</sup>Includes responsiveness and late bids.

<sup>e</sup>Includes agency release of information and insider information.

<sup>f</sup>Includes contract modifications, exercise of contract options, and termination of contract.

<sup>g</sup>Includes Standard Industrial Classification code and size determinations, nonresponsibility determinations requiring referral to SBA, and small business preferences.

<sup>h</sup>District court cases include one case that could not be categorized due to a lack of information in the file, and two cases brought against GAO. The two COFC cases involve Equal Access to Justice Act fees related to a protest action.

Source: GAO analysis of bid protest cases.

# Examples of Bid Protest Cases Filed in U.S. District Courts Between January 1, 1997, and April 30, 1999

This appendix includes examples of bid protest cases filed in U.S. District Courts between January 1, 1997, and April 30, 1999. The appendix includes examples of five cases filed by protestors not identified as small businesses and five cases filed by small businesses. The docket numbers are shown in parentheses.

## Cases Not Filed by Small Businesses

### Launch Support Company, LLC v. United States (Case No. 1:98CV02145)

Launch Support Company filed this postaward bid protest case in the U.S. District Court for the District of Columbia in 1998. Launch Support submitted an unsuccessful proposal in response to a joint Air Force/ National Aeronautics and Space Administration (NASA) request for proposals to provide base operation services at Kennedy Space Center, Cape Canaveral Air Station, and Patrick Air Force Base. Launch Support claimed that the government's cost realism analysis of the winning proposal (submitted by Space Gateway) was unreasonable and that its selection decision was improper. In an October 16, 1998, order, the district court granted the defendant's motion for summary judgment and dismissed the complaint. The court found that the agency's cost realism analysis and the agency's selection of Space Gateway was not unreasonable.

### Wackenhut Corrections Corporation v. United States (Case No. 98-1541)

Wackenhut Corrections Corporation filed this postaward bid protest case in U.S. District Court for the District of Columbia in 1998. Wackenhut's proposal was eliminated from the competition for a Bureau of Prisons (BOP) contract to operate a private prison for inmates that were to be transferred from the District of Columbia's Lorton Correctional Institution. One of the requirements in the request for proposal was the demonstration of legal authority to perform the contract. Wackenhut's proposal was rejected because, in BOP's view, the firm had not clearly demonstrated that it had the legal authority to operate a private prison housing federal inmates at the proposed North Carolina site. In a July 10, 1998, order, the district court denied plaintiff's motion for a preliminary injunction. The Court found that Wackenhut had not made a sufficient threshold showing that BOP's decision was arbitrary or capricious, because there were questions about the firm's authority to construct a facility for out-of-state inmates in North Carolina. On December 18, 1998, the plaintiff stipulated to a dismissal of the case with prejudice, which the court granted.

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**Aramark Sports and Entertainment Services, Inc. v. United States** (Case No. 1:98CV01990)

Aramark Sports and Entertainment Services filed this preaward bid protest case in the U.S. District Court for the District of Columbia in 1998. The plaintiff objected to provisions of a prospectus issued by the National Park Service seeking an operator for concession services at the Glen Canyon National Recreation Area for a 15-year period, commencing when the plaintiff's current concessions contract expired. Aramark claimed that the terms of the prospectus forced it to forego statutory rights, including (1) the right of preference in the renewal of the concession contract; (2) the requirement that upon expiration or termination of a concession contract, the prior concessioner must be paid the sound value of its interest in the property used in the performance of the concession contract; and (3) the requirement that any concessioner must be granted a reasonable opportunity to make a profit on its operations as a whole commensurate with the capital invested and the obligations assumed. The agency withdrew the prospectus, and agreed to review the prospectus and resolve various issues raised by the complaint. On February 16, 1999, the parties moved jointly to dismiss the case without prejudice, and the court granted the motion.

**ANADAC, Inc. v. United States** (Case No. 1:99CV00169)

ANADAC filed this postaward bid protest case in the U.S. District Court for the District of Columbia in 1999. The plaintiff objected to the Immigration and Naturalization Service's (INS) award of a contract for live-scan systems designed to capture the fingerprints of naturalization applicants for electronic submission to the Federal Bureau of Investigation (FBI). The plaintiff claimed that (1) the awardee (Digital Biometrics) failed to demonstrate its ability to comply with the technical requirements of the solicitation, (2) the awardee did not have the financial capability to perform, and (3) INS relaxed delivery requirements for the awardee. On February 19, 1999, the district court denied ANADAC's motion for a preliminary injunction, finding that the plaintiff had not demonstrated a substantial likelihood of success on the merits. The court found that ANADAC did not provide any factual basis to demonstrate that the awardee had failed its technical demonstration, that a reasonable basis existed for INS' financial responsibility determination, and that the delivery schedule fell within the statement of work. On March 4, 1999, the plaintiff moved to dismiss the case, and the court granted the motion.

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Lawrence Medical Equipment, Inc. v. United States (Case No. 98-CV-4153)

Lawrence Medical Equipment filed this postaward bid protest case in the U.S. District Court for the District of Kansas in 1998. Lawrence Medical Equipment submitted a proposal to provide in-home oxygen and other respiratory services for veterans or other beneficiaries receiving benefits through Veterans Administration medical centers in Missouri, Kansas, and Illinois and was not selected for award. Lawrence claimed that its proposal offered the lowest price for the locations covered by its proposal and that its technical and past performance qualifications matched, if not exceeded, those of Home Care, the awardee. Lawrence also claimed that Home Care did not meet certain accreditation requirements contained in the solicitation.

On October 6, 1998, the court denied Lawrence's motion for preliminary injunction, finding that although the firm offered the lowest price, its proposal did not receive an acceptable technical/past performance score and that the agency evaluation of the proposals was not unreasonable. The court also found that the awardee was an accredited offeror as required by the solicitation.

On December 14, 1998, Lawrence filed a motion to dismiss the case without prejudice, in order to pursue administrative challenges. Despite government opposition to the dismissal, the Court granted the motion on March 3, 1999.

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## **Small Business Cases**

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Worcester Brothers Co., Inc. v. United States (Case No. 1:98CV01634)

Worcester Brothers Co. filed this postaward bid protest case in the U.S. District Court for the District of Columbia in 1998. The National Park Service had issued a request for proposals for the stabilization and preservation of the Washington Monument. Worcester Brothers, an expert in monument restoration and masonry, claimed that the awardee was given a higher technical rating than it deserved and that the evaluation was not done in accordance with the solicitation requirements. The defendants stated that the awardee's proposal had both the highest overall technical score and the lowest overall total price and, therefore, offered the best value to the government. On July 30, 1998, in an oral bench opinion, the district court granted the National Park Service's motion for summary judgment and ordered the case dismissed.

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Kira, Inc. v. United States (Case No. 1:99CV00930)

Kira, Inc., filed this postaward bid protest case in the U.S. District Court for the District of Columbia in 1999. Kira objected to the award of a contract, under SBA's section 8(a) program, for military family housing maintenance at Keesler Air Force Base in Mississippi. Kira had protested the awardee's size status to SBA, which determined that the awardee was not a small business under the relevant Standard Industrial Classification (SIC) code. Kira filed suit when the Air Force refused to terminate the contract. After the complaint was filed in district court, the Air Force terminated the contract and awarded it to Kira. On May 20, 1999, the plaintiff moved to dismiss the case without prejudice, and the court granted the motion.

Sun Belt Builders, Inc. v. United States (Case No. CV 97-106)

Sun Belt Builders, Inc., filed this case in U.S. District Court for the District of Arizona in 1997. Sun Belt Builders submitted the low bid on a U.S. Army Corps of Engineers invitation for bids (IFB) for construction of the Tucson Diversion Channel Recreational Development in Pima County, Arizona. However, Sun Belt's bid was rejected as nonresponsive because the certificate of authority for the power of attorney attached to the bid bond was not dated, calling into question the enforceability of the bid bond. The IFB required bidders to furnish a bid guarantee at the time of bid submission. Sun Belt claimed that (1) a dated certificate on a power of attorney is not a responsiveness requirement; and (2) if a dated certificate is required, the Corps should have waived or allowed it to cure the deficiency. On May 9, 1997, the district court granted the Corp's motion to dismiss, finding that the bid was nonresponsive and that the Corps' refusal to waive the defect or permit Sun Belt to cure it was not arbitrary.

Braswell Services Group, Inc. v. United States (Case No. 97-1409-Civ-J-10C)

Braswell Services Group filed this postaward bid protest case in the U.S. District Court for the Middle District of Florida in 1997. Braswell stated that it had submitted low offers in response to Navy requests for proposals for three ship repair contracts. However, Braswell claimed that its offers were rejected because of a negative past performance evaluation on another contract, to which the firm claimed the agency had not given it the opportunity to respond. Braswell also claimed that the agency's evaluation was conducted in bad faith and with the specific intent of harming the firm. On December 9, 1997, the district court denied Braswell's motions for

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a temporary restraining order and a preliminary injunction, finding that the firm had not shown a likelihood of success on the merits. On December 10, 1997, Braswell submitted a motion to dismiss the case without prejudice, which the Court granted.

United Valve Co. v. United States (Case No. 97CV00713)

United Valve Company filed this postaward bid protest case in the U.S. District Court for the District of Columbia in 1997. United Valve submitted a proposal to provide air turbine starter kit overhauls for C-130 aircraft at Tinker Air Force Base and was not selected for the award. United Valve filed a complaint in district court, stating that the Air Force had engaged in an impermissible action. United Valve alleged that the Air Force, without informing it, had informed another offeror that the Air Force intended to award the contract to United Valve. The other offeror then submitted a lower offer and was selected for the award. On December 23, 1997, the parties filed a stipulation of settlement in which the Air Force agreed to limit the amount of work performed under the contract and to not exercise the contract's options.

# Examples of U.S. Court of Federal Claims Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999

This appendix includes examples of bid protest cases filed with COFC from January 1, 1997, through August 1, 1999. The appendix includes examples of five cases filed by businesses that were not small businesses and five cases filed by small businesses. The docket numbers are shown in parentheses.

## Cases Not Filed by Small Businesses

### Wackenhut International, Inc. v. United States (No. 97-680C)

This postaward bid protest case was filed by Wackenhut International, Inc., and Wackenhut De Guatemala, S.A., A Joint Venture. The protestor sought injunctive and declaratory relief setting aside the award of the contract by the U.S. Department of State to Inter-Con Security Systems, Inc., for security guard services at the U.S. Embassy in Guatemala. Wackenhut and Inter-Con submitted proposals in response to the solicitation. Wackenhut contended that the agency improperly gave the Inter-Con proposal a 5-point evaluation preference, available to U.S. contractors in guard contracts abroad pursuant to 22 U.S.C. §4864. Wackenhut alleged that Inter-Con was not properly licensed and, thus, its proposal was not entitled to the preference. Wackenhut also contended that the Inter-Con proposal failed to meet the solicitation's subcontracting limitations and that the evaluation of Inter-Con's technical proposal for past performance/experience and key personnel was improper. The government contended that Wackenhut's claims were without merit.

In a January 13, 1998, published decision, the court granted the government's and Inter-Con Security's cross-motions for summary judgment. The court found that licensing was a performance requirement, that the subcontracting limitation challenge was meritless, and that the evaluation was proper. Judgment was entered dismissing the complaint on January 14, 1998.

### Pike's Peak Family Housing, LLC v. United States (No. 98-147C)

This postaward bid protest case, filed by Pike's Peak Family Housing, LLC, involved an Army Corps of Engineers solicitation for privatization of family housing at Fort Carson in Colorado Springs, Colorado. The contract was awarded to Keller/Catellus Fort Carson, LLC, whose proposal received the highest evaluated score. Pike's Peak, which received the sixth highest score, filed suit in COFC protesting the propriety of the agency's evaluation of proposals and discussions.

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On April 27, 1998, the complaint was voluntarily dismissed with prejudice on the basis of a settlement agreement entered between the plaintiff and defendant.

United International Investigative Services, Inc. v. United States (No. 98-153C)

This postaward bid protest case, filed by United International Investigative Services, Inc., concerned a procurement for guard services at federal courthouses in four states and Puerto Rico. After a technical evaluation board's (TEB) initial evaluation of proposals, United International's proposal had the highest average technical score and offered the lowest price. The technical proposals were subsequently rescored by one member of the TEB, after which the technical score of United International's proposal tied for fifth place.

After several additional rounds of best and final offers, United International's proposal still offered the lowest price and received a slightly higher overall point score (including technical and price factors) than the proposal submitted by MVM, Inc., which offered the second lowest price.

Upon further review, the contracting officer ultimately raised the MVM proposal's score by one point for its technical merit, resulting in MVM's proposal receiving the highest overall point score. MVM was awarded the contract. United International filed suit in COFC. United International challenged the evaluation of proposals, contending that because its proposal was substantially technically equal to MVM's, it should have been awarded the contract on the basis of its lower price.

In an October 21, 1998 published decision (reissuance of an order filed under seal on August 3, 1998), the court granted the government's motion for summary judgment, ruling that any errors in this procurement were de minimis, did not prejudice the protestor, and did not warrant overturning the award.

On September 8, 1998, United International appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed COFC's ruling on May 6, 1999, in an unpublished decision.



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**Appendix VI**

**Examples of U.S. Court of Federal Claims Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999**

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Envirocare of Utah, Inc. v. United States (No. 99-76C)

This preaward bid protest case, filed by Envirocare of Utah, Inc., challenged the terms of a solicitation issued by the Army Corps of Engineers for the removal of radioactive and other hazardous wastes at various sites. The Corps contemplated awarding up to 10 indefinite-delivery/indefinite-quantity contracts for a total value of about \$400 million. Awards were to be based on the best value offered to the government.

Among other challenges,<sup>1</sup> Envirocare contended that the solicitation failed to include the Federal Acquisition Regulation (FAR) provisions governing the acquisition of commercial items.

The Corps maintained that disposal of radioactive wastes was not a commercial item acquisition and that the solicitation was not required to include the FAR provisions cited by the protestor.

In a June 11, 1999, published decision (reissuance of a decision filed under seal on May 28, 1999), the court granted the government's motion to dismiss, in part, and entered judgment for the defendant, ruling that (1) the disposal of radioactive waste services did not fall within the FAR definition of commercial items and (2) protestor's remaining challenges lacked merit.

On July 19, 1999, Envirocare appealed to the U.S. Court of Appeals for the Federal Circuit. A decision, without published opinion, was issued by that court on September 21, 1999, dismissing the appeal on the basis of a voluntary dismissal filed by the plaintiff.

Chas. H. Tompkins Company v. United States (No. 99-122C)

This preaward bid protest case filed by Chas. H. Tompkins Company involved a solicitation for construction of three new buildings at the Federal Bureau of Investigation's (FBI) Quantico, VA facility. The solicitation required each bidder to supply at least five references regarding its performance of the same or similar work within the prior 3 years and specified that the projects should be within 10 percent of the bid price.

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<sup>1</sup> Envirocare also challenged the solicitation terms regarding licensing and the evaluation of transportation costs, and the agency's authority to conduct the procurement.

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**Appendix VI**

**Examples of U.S. Court of Federal Claims Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999**

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Bell/BCI, the apparent low bidder, listed at least five prior similar projects. However, the prices for those projects were not within 10 percent of its proposed price for the Quantico work.

Tompkins filed suit in COFC challenging any award to Bell/BCI on the basis that Bell/BCI failed to meet the solicitation's definitive responsibility criteria.

In a May 12, 1999, published decision (reissuance of an unpublished order entered on March 29, 1999), the court found that the cited provision constituted definitive responsibility criteria. The court also found that since the agency did not intend for the provision to do so, the provision was overly restrictive of competition, providing a compelling reason to cancel the solicitation. The court granted, in part, Tompkins' motion for summary judgment.

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## Small Business Cases

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### ATA Defense Industries, Inc. v. United States (No. 97-382C)

This postaward bid protest case, filed by ATA Defense Industries, Inc., challenged the Army's placement of an order for a target range upgrade with a General Services Administration (GSA) Federal Supply Schedule (FSS) contractor even though 35 percent of the system and services sought were not listed on FSS.

The Army wanted to upgrade two target ranges at Fort Stewart, GA. The upgrade was valued at \$673,376. Caswell International, a supplier of target systems, had listed some of its equipment on its FSS contract. The Army found that about 65 percent of the products and services required for the upgrade could be acquired under Caswell's FSS contract; the remaining 35 percent could not.

The contracting officer placed an order with Caswell for the entire upgrade, including the 35 percent of products and services not available on FSS. ATA Defense, a competitor of Caswell, filed a protest of the purchase order. ATA Defense alleged that the Army circumvented the Competition in Contracting Act's requirement for full and open competition in placing the full order with Caswell.

Before placing the order, the contracting officer issued a justification and approval document stating that award should be made to Caswell because it was the only reliable source for the remaining 35 percent of the upgrade products. After the protest was filed at COFC, the contracting officer issued a second justification and approval document based on a

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**Appendix VI****Examples of U.S. Court of Federal Claims Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999**

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determination that unusual and compelling urgency warranted exempting 35 percent of the upgrade products and services from competition.

In a June 27, 1997, published decision, COFC determined that the agency's justifications for the sole-source award of the 35 percent of products and services not listed on FSS were insufficient. The first justification was found to be inadequate because other sources were available. The second justification was made after the award and was considered to be untimely. The court also rejected the Army's argument that the award of the additional non-FSS items should be allowed as incidental to the FSS items ordered. The court granted ATA's motion for a permanent injunction and ordered the Army to suspend performance under, and take necessary steps to terminate, the purchase order.

CRC Marine Services, Inc. v. United States (No. 98-128C)

This postaward bid protest case, filed by CRC Marine Services Inc., challenged the rejection of its lowest priced bids under three Army Military Traffic Management Command transportation solicitations. CRC maintained that it was the subject of an unlawful de facto debarment by the Army based on CRC's prior suspension and disbarment and bad faith on the part of the agency. CRC also protested that one of the awardee's bids was nonresponsive and that the awardee's performance did not comply with the requirements.

In a May 27, 1998, published decision, the court found that the rejections were reasonably based and there was no merit to (1) plaintiff's claim that it was de facto debarred from performance of the requirements or (2) the plaintiff's challenges to the award. The court rejected CRC's claims, denied its motion for a permanent injunction, and dismissed the complaint.

Modern Technologies Corporation v. United States (No. 98-309C)

This postaward bid protest, filed by Modern Technologies Corporation, challenged the Air Force's award of a series of task order contracts for technical services. The plaintiff protested the agency's evaluation of the technical and cost proposals.

The court denied plaintiff's request for declaratory and injunctive relief; entered judgment for defendant; and, in a July 2, 1998, unpublished decision filed under seal, dismissed Modern Technologies' complaint.

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**Appendix VI**

**Examples of U.S. Court of Federal Claims Bid Protest Cases Filed Between January 1, 1997, and August 1, 1999**

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In a December 21, 1998, order, the court reconsidered the terms of a protective order issued in the case and ordered the release of previously protected information it considered to have only minimal current value.

**Adirondack Construction Corporation v. United States** (No. 98-698)

This preaward bid protest case, filed by Adirondack Construction Corporation, concerned the U.S. Army Corps of Engineers' issuance of an invitation for bid to renovate a federal building in Rome, NY. Adirondack's representative submitted the firm's bid late. Adirondack contended that actions by the Corps were the main cause for the late receipt of Adirondack's bid.

In an October 30, 1998, order, the court granted judgment for plaintiff and ordered that Adirondack's bid be treated as received on time. The contract was subsequently awarded to the plaintiff. The court dismissed the action as moot on December 22, 1998.

**American Renovation & Construction Co. v. United States** (No. 99-171C)

This preaward bid protest case filed by the American Renovation & Construction Company challenged the Air Force's rejection of its bid to improve military family housing units as late. American Renovation contended that because its bid was in the possession of the U.S. Postal Service in time for timely delivery, the Air Force's rejection of the bid was improper and contrary to law.

On April 1, 1999, American Renovation & Construction Company moved for voluntarily dismissal of the case. The court dismissed the complaint on the same day.

# Comments From the General Counsel, Department of Defense



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
1600 DEFENSE PENTAGON  
WASHINGTON, D. C. 20301-1600

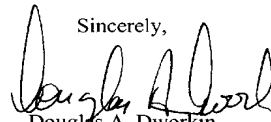
MAR 30 2000

Mr. Richard M. Stana  
Associate Director  
Administration of Justice Issues  
General Government Division  
U.S. General Accounting Office  
Washington, DC 20548

Dear Mr. Stana:

This is the Department of Defense response to the General Accounting Office (GAO) draft report, "Bid Protests: Characteristics of Cases Filed in Federal Courts" dated March 13, 2000. (GAO Code 188647/OSD Case 1968).

We have reviewed the draft report and believe that the data therein support the Department of Defense's position, as articulated in the attached August 5, 1996 letter to the Senate Subcommittee on Oversight of Government Management and the District of Columbia, that federal district court jurisdiction over bid protest cases should expire. The Department appreciates the opportunity to comment on the draft report.

Sincerely,  
  
Douglas A. Dworkin  
Acting General Counsel

Attachment:  
As stated



Appendix VII  
Comments From the General Counsel, Department of Defense



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

WASHINGTON, D.C. 20301-1600

05 AUG 1996

The Honorable William S. Cohen  
Chairman, Subcommittee on Oversight  
of Government Management  
and the District of Columbia  
United States Senate  
Washington, D.C. 20510-6260

Dear Mr. Chairman:

This is to provide you with the views of the Department of Defense on H.R. 2977, 104th Congress, a bill "to reauthorize alternative means of dispute resolution in the Federal administrative process, and for other purposes". The bill includes a provision to divest the district courts of jurisdiction to entertain pre- and post-award protests by disappointed government contract offerors, the so-called "Scanwell" jurisdiction.

The Department of Defense strongly supports the proposed divestiture of federal district court Scanwell jurisdiction, and the consolidation of all federal procurement judicial review in the U.S. Court of Federal Claims.

The proposed legislation would greatly benefit both government and the private sector. It would foster efficiency in government contract dispute resolution by providing one judicial forum with special expertise in federal procurement law. This expertise would increase the likelihood that a judge can act early in a case to facilitate settlement. It would also decrease the time currently spent guiding a district court judge, who might not have substantial procurement law experience, through the intricacies of this unique area of the law, particularly in complex or novel cases. Consolidated jurisdiction would greatly enhance the development of a uniform body of federal procurement case law. Finally, it would also eliminate "forum-shopping" by disappointed bidders seeking a favorable local forum.

Divestiture of Scanwell jurisdiction is a logical follow-on to the improvement of the protest process that has occurred over the past several years, most notably in the elimination of the jurisdiction of the General Services Board of Contract Appeals

(GSBCA) over information technology procurement protests.

We understand that some in the private sector, and in particular in the private bar, have asserted that the proposal would have an adverse impact on the ability of small businesses to readily access a judicial forum because the Court of Federal Claims hears its cases in Washington, D.C. Some have also raised the concern that bid protest judicial review should remain with the district courts because they are Article III courts with lifetime-tenured judges.

We do not believe that the location of the Court of Federal Claims in Washington, D.C. will inhibit the ability of small businesses to access this court. For many years, small businesses have routinely used the General Accounting Office (GAO), which is located in Washington, D.C., to file administrative protests without apparent adverse effect. Further, the Court of Federal Claims regularly conducts much of its preliminary business (including temporary restraining orders and preliminary injunction cases based on affidavits) by telephone conferences to minimize the impact of travel to the Washington, D.C. area on those who are not located there. In addition, the Court of Federal Claims can conduct hearings outside Washington, D.C. in appropriate cases and it is our understanding that it has done so for some bid protests over which it presently has jurisdiction.

In regard to the lifetime-tenure issue, we disagree with the implication that the Court of Federal Claims, as an Article I court, does not provide as evenhanded a review of bid protest cases as a district court. Congress took great care to ensure the independence and impartiality of the Court of Federal Claims judges. It provided that these judges can only be removed during their fifteen year terms by the Court of Appeals for the Federal Circuit. Also, any judge willing to serve another term but that is not reappointed nonetheless receives a lifetime annuity equal to the salary of an active judge (see sections 176 and 178 of Title 28 of the United States Code). Finally, appellate review of Court of Federal Claims decisions rests exclusively with the Court of Appeals for the Federal Circuit, itself an Article III court.

For these reasons, we strongly endorse the provisions in H.R. 2977 that would divest district courts of Scanwell jurisdiction and consolidate judicial bid protest review in the

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**Appendix VII**  
**Comments From the General Counsel, Department of Defense**

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Court of Federal Claims.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,



Judith A. Miller

cc: The Honorable Carl Levin  
Ranking Minority Member



# Comments from the American Bar Association, Section of Public Contract Law

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**Appendix VIII**  
**Comments from the American Bar Association, Section of Public Contract Law**

We appreciate the opportunity to comment on your draft report number GAO/GGD/OGC-00-72, entitled "Bid Protests: Characteristics of Cases Filed in Federal Courts," and we thank you and your colleagues for meeting recently with several of our members regarding its content. The report reflects a diligent and commendable effort to gather and present empirical data regarding bid protest cases in the U.S. courts, information which we know is not readily available and was difficult to obtain.

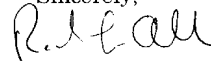
The data assembled confirms that bid protests in the U.S. District Courts remain an important judicial remedy. Despite the concurrent bid protest jurisdiction afforded the U.S. Court of Federal Claims in 1996, nearly 40% of judicial bid protests continued to be filed in District Courts since then.

Unfortunately, as your draft report explains, the limited data available do not provide guidance as to the advantages and disadvantages associated with retaining district court jurisdiction for bid protest cases. Consequently, the numerical information alone does not yield a sound basis on which to conclude whether that jurisdiction should be allowed to "sunset" as currently provided by statute.

In that light, I enclose comments approved by the Public Law Section of the American Bar Association on the question of retaining the U.S. District Courts' bid protest jurisdiction and previously submitted to your Office under separate cover. These comments reflect the considered and much deliberated views of many government contract law practitioners who have both prosecuted and defended countless bid protest cases in all available forums. These thoughts deserve Congressional consideration along with the data you present, particularly the concerns raised over potentially troublesome jurisdictional issues that could generate needless litigation should the "sunset" proceed as presently arranged. Indeed, retaining concurrent jurisdiction will save judicial resources in those cases that contain both bid protest claims and other claims between the awardee and the protester, such as trade secret claims, for which the Court of Federal Claims lacks jurisdiction. See, e.g., *American Science and Eng'g, Inc. v. Kelly*, 69 F. Supp. 2d 227 (D. Mass. 1999).

Thank you again for including us in your efforts to address this important issue.

Sincerely,



Rand L. Allen,  
Chair

Enclosure

cc w/o enclosure: Officers  
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Chair, Legislative Coordinating Committee



AMERICAN BAR ASSOCIATION

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**COMMENTS REGARDING  
U.S. GENERAL ACCOUNTING OFFICE  
STUDY OF CONCURRENT PROTEST JURISDICTION**

December 29, 1999

Fall Meeting • November 4-6, 1999 • Santa Fe, NM  
Midyear Meeting • March 9-11, 2000 • Annapolis, MD  
ABA Annual Meeting • July 8-11, 2000 • New York • July 15-20 • London

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**December 29, 1999**

**AMERICAN BAR ASSOCIATION  
SECTION OF PUBLIC CONTRACT LAW**

**COMMENTS REGARDING U.S. GENERAL ACCOUNTING OFFICE  
STUDY OF CONCURRENT PROTEST JURISDICTION**

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), we are submitting comments on the above-referenced matter. The Section consists of lawyers having an interest and expertise in the area of public procurement both within Government and in the private sector. The members of the Section are all concerned with the fair and efficient operation of the procurement process. The outcome of the "sunset" determination is important to us as lawyers and to those whom we advise and counsel.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the Association as a whole.

**I. EXECUTIVE SUMMARY**

Unless Congress acts before December 31, 2000, the U.S. district court protest jurisdiction under the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 ("ADRA" or "the Act") will end. Reasons typically advanced for eliminating district court jurisdiction and consolidating judicial protest jurisdiction in a single forum include: (i) the burdens of such cases on the district courts; (ii) forum shopping and fragmentation due to multiple courts; and (iii) greater expertise with one specialized forum rather than multiple district courts of general jurisdiction. These reasons do not support consolidation of protest jurisdiction in a single judicial forum, nor establish any need to limit protests to a single forum. For example:

- The number of judicial protests is relatively small. They neither impose a significant burden nor would consolidation yield significant savings.
- Venue and other procedural rules governing district courts make forum shopping no greater a concern for protests than for any other types of actions.

- The published protest decisions do not reflect any significant fragmentation of law among the various courts.<sup>1</sup> Both the U.S. Court of Federal Claims (“COFC”) and district courts rely heavily on precedent from the U.S. General Accounting Office (“GAO”).
- “Expertise” does not clearly favor a single forum. Bid protests review agency action under standards articulated in the Administrative Procedure Act (“APA”). District courts have more experience with such review than the COFC. The COFC, on the other hand, has and is developing greater expertise in the substantive law on formation of government contracts and in bid protest procedures. Finally, protests often involve other substantive areas of law, such as fraud or trade secrets issues, where district courts have more experience than the COFC.

The experience under the ADRA does not indicate problems in these or other areas that appear to require correction.

At the same time, consolidation would raise significant concerns, such as:

- Eliminating district court protest jurisdiction would impose hardships on contractors who may need to travel and/or retain counsel in Washington, D.C.
- Due to the broad jurisdiction granted to district courts under the ADRA, eliminating that district court jurisdiction might have unanticipated adverse consequences by foreclosing review of certain agency actions. For example, challenges to administrative actions by the Small Business Administration or the Department of Labor relating to specific contracts, which historically have been heard by the district courts, may no longer be allowed in that forum. To the extent the COFC declines to take jurisdiction over such non-protest actions, an aggrieved party could be left without any means of judicial review.

<sup>1</sup> Prior to the ADRA, there was a split among the circuit courts regarding whether district courts had jurisdiction to hear protests filed prior to the award of a contract. The ADRA resolved this concern by giving the U.S. Court of Federal Claims and district courts concurrent jurisdiction over pre- and post-award protests.

- Eliminating Article III courts as a protest forum may lead to protracted litigation on a variety of issues, including constitutional concerns.

In light of the questionable benefits and potential adverse consequences of consolidation, the Section recommends that Congress take action to ensure that the district courts are not divested of the jurisdiction granted under the ADRA.

## II. INTRODUCTION

The ADRA was enacted on October 19, 1996. Section 12 of the Act provides that effective December 31, 1996, U.S. district courts and the COFC have concurrent jurisdiction to hear bid protests regarding solicitations for, and awards of, contracts with the U.S. Government. District courts have been hearing such protests for approximately thirty years, since the decision in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Pursuant to the Act, the jurisdiction of U.S. district courts to hear bid protest actions under the Tucker Act (28 U.S.C. § 1491)<sup>2</sup> will terminate or “sunset” on January 1, 2001, unless extended by Congress. Pub. L. No. 104-320, § 12(d). In this same section of the Act, Congress requested GAO to undertake a study “to determine whether concurrent jurisdiction is necessary” and to submit a report to Congress no later than December 31, 1999. *Id.*, § 12(e).<sup>3</sup> The statute does not define the term “necessary,” but requires GAO to consider the effect of “any proposed change on the ability of small businesses to challenge violations of Federal procurement law.” *Id.*

GAO tasked a group earlier this year to undertake the study mandated by the Act. A task force from the Section’s Bid Protest Committee met with the GAO study group and discussed a number of the issues raised by a potential sunset of district court jurisdiction. These comments, which elaborate upon the issues raised during that meeting, are based in part on the experiences of government contract law practitioners as well as published decisions and other available data. In some instances, it has been difficult to gather significant data regarding judicial protests, and thus it has been necessary to rely on the experiences and judgments of practitioners familiar with the protest process.

<sup>2</sup> Although not addressed here, there is an argument that regardless of whether there is a sunset under the ADRA, the district courts will continue to have jurisdiction to hear protests under the APA (5 U.S.C. §§ 701, *et seq.*) and the *Scanwell* doctrine because the ADRA does not specifically address (and thus does not expressly eliminate) that basis for jurisdiction.

<sup>3</sup> The Section understands that the deadline for submission of GAO’s study has been extended to March 2000.



Finally, the Section understands that the GAO study group is in the process of gathering information about the judicial protests filed since the enactment of the ADRA. The Section has assisted GAO in that effort and would be interested in providing further assistance and comment to GAO as its study proceeds.

### III. BACKGROUND REGARDING JUDICIAL PROTESTS

#### A. History Of Judicial Protests

The origins of judicial protests can be traced back to the 1950s, when the then Court of Claims first recognized that a bidder for a government contract enters into an implied contract under which the Government promises to consider its bid fairly and honestly.<sup>4</sup> *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 69 (1956). Although the bidder could sue for breach of that implied contract, the only remedy for such a breach was recovery of bid preparation costs.

The next major development in the expansion of judicial protest remedies came in 1970 with the landmark decision of the United States Court of Appeals for the D.C. Circuit in *Scanwell Laboratories v. Shaffer*, 424 F.2d 859. Before *Scanwell*, contract award decisions had been held to be discretionary and not subject to judicial review in the district courts.<sup>5</sup> In *Scanwell*, however, the court utilized expanding concepts of reviewability of agency action under the APA, 5 U.S.C. § 706, to find that a disappointed bidder, acting as a “private attorney general,” could obtain judicial review of a contract award decision. As with all APA cases under section 706, *Scanwell* jurisdiction arises under the general Federal question statute, 28 U.S.C. § 1331. Unlike the remedy available at the time in the Court of Claims, *Scanwell* review allowed the disappointed bidder to obtain declaratory and injunctive relief, including setting aside the original award and directing the agency to make a new one.

Courts operating under the *Scanwell* doctrine engage in a limited “arbitrary and capricious” standard of review under section 706. The protest review issue is whether there has been a clear and prejudicial violation of applicable procurement laws and regulations or whether the award decision was without a rational basis. Although this question generally is addressed on the existing record, supplementation of the record is permitted in some circumstances. District courts hearing *Scanwell* cases often rely on GAO precedent as the substantive law of contract formation and an authoritative interpretation of the Federal Acquisition Regulation. In fact, using a “primary jurisdiction concept,” district courts sometimes stay the court proceedings and request a GAO opinion.

<sup>4</sup> Although the statute under which GAO currently hears protests is of relatively recent origin, GAO actually has been hearing protests since the 1920s.

<sup>5</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

One reason that disappointed bidders sometimes opted to file protests in a district court rather than at GAO was to obtain a temporary restraining order ("TRO") or preliminary injunction against performance of the contract while the protest was pending. This reason became somewhat less important after the enactment of the Competition in Contracting Act of 1984, which created a new scheme under which parties who file protests at GAO promptly after an award can obtain an automatic stay of performance pending a decision on the protest. 31 U.S.C. § 3553. The statutory stay, however, is subject to agency "override" decisions.

The COFC obtained additional protest authority in the Federal Courts Improvement Act of 1982 when Congress gave the court power to grant equitable relief, including injunctive relief, in pre-award protests, *i.e.*, cases filed prior to the time that the contract is awarded. 28 U.S.C. § 1491(a)(3). The statute granted the court "exclusive jurisdiction" to grant equitable relief on "any contract claim brought before the contract is awarded." *Id.* Under that scheme, the COFC clearly had no authority to hear the typical post-award protest. Relying on the implied-in-fact contract doctrine that preceded the statute, the COFC and Federal Circuit interpreted the new grant of pre-award authority quite narrowly. In addition, there was considerable confusion over the reference to "exclusive jurisdiction," with some courts finding that it meant exclusive of the district courts and others finding that it meant exclusive of the boards of contract appeals.

#### **B. The ADRA Sunset And Sunset Review Provisions**

This was the general state of affairs when Congress enacted the protest provisions of the ADRA in 1996. The Act repealed 28 U.S.C. § 1491(a)(3) and added a new subsection to the Tucker Act, effective December 31, 1996, giving the COFC protest jurisdiction co-extensive with that of the Federal district courts hearing protests under the APA. The Act's operative language states:

(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1). Congress also provided that the courts "shall review the agency's decision pursuant to the standards set forth in Section 706 of Title 5," the APA standard of review already applied in *Scanwell* actions. *Id.*, § 1491(b)(2).

**C. Focus Of GAO Study**

**1. Statutory Focus: Necessity And Impact On Small Businesses**

The ADRA contained a “sunset” provision, under “which the jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress.” Pub. L. No. 104-320, § 12(d), (e), 110 Stat. 3875 (set out as note under 28 U.S.C. § 1491). To assist Congress in considering such an extension, the Act also provided for a GAO study of the new concurrent jurisdiction scheme. The study provision states:

No earlier than 2 years after the effective date of this section [effective 12/31/96], the United States General Accounting Office shall undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary. Such a study shall be completed no later than December 31, 1999, and shall specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

Pub. L. No. 104-320, § 12(c), 110 Stat. 3875 (set out as a note under 28 U.S.C. § 1491).

Thus, GAO is specifically charged with assessing whether concurrent jurisdiction is “necessary” and the impact of any removal of jurisdiction on the ability of small businesses to protest Federal procurement actions.

**2. Issues That Should Be Addressed**

There are additional questions implicit in the congressional request for the GAO study: (a) is the current system of concurrent jurisdiction working reasonably well and are there advantages to that system?; (b) are there any significant disadvantages flowing from continuing to allow protesters a choice of judicial forum?; (c) are there any significant disadvantages that would flow from the elimination of district court jurisdiction?; and (d) are there any advantages that would flow from exclusive COFC jurisdiction? We believe that GAO should address these somewhat broader questions in order to provide useful context for considering the specific congressional requests for information about the necessity of concurrent jurisdiction and the impact of a sunset on small business.

#### IV. ACCESS TO COURTS

##### A. Current Protest Figures

The U.S. Department of Justice ("DOJ") has identified protest cases filed in the district courts and the COFC since the enactment of the ADRA. The cases identified by DOJ number as follows for 1997 and 1998:

	<u>1997</u>	<u>1998</u>
District Courts	29	40
COFC	38	44

As of mid-March 1999, DOJ also had identified 8 district court protests filed to date in 1999.

The Section understands that the GAO study group has been working to identify other district court protests filed since the enactment of the ADRA. Based on a list provided to the Section in late June, the GAO group has identified 3 additional cases in 1997 and 7 additional cases in 1998, which brings the figures to:

	<u>1997</u>	<u>1998</u>
District Courts	32	47
COFC	38	44

Based in part on the DOJ list, the GAO study group has identified a total of 10 district court protests filed in 1999.

These figures may be inaccurate. Due to the difficulties inherent in identifying protest cases among the hundreds of thousands of cases filed each year in the district courts, as well as the fact that many protest decisions are unpublished, the figures set forth above may understate the number of protests filed in the district courts. On the other hand, the lists we have reviewed include a case (docket no. 97-2589 (TAF)) which we understand was brought by an awardee with regard to GAO's handling of a pending protest. Although such a case might be foreclosed by a sunset of district court jurisdiction under the ADRA, it is not a protest *per se*.

The Section is currently trying to ascertain whether additional protests were filed in district courts that are not identified on the DOJ and GAO lists. We are aware of two district

court protests filed in 1999 that were not included on these lists.<sup>6</sup> This brings the 1999 total district court protests identified to date to 12 (compared to 27 protests filed in the COFC as of late July 1999.)

In sum, the current figures indicate comparable use of the COFC and the district courts. It should be noted, of course, that any assessment of the protests filed to date reflects only the views of the subset of contractors who have availed themselves of the district courts and COFC for the relatively brief period following enactment of the ADRA. Accordingly, the filings to date and/or the views of the parties thereto do not necessarily reflect the views of the thousands of companies that seek to contract with the U.S. Government each year.

#### B. District Courts

By statute, Congress has specified the number and location of the district courts. These courts are geographically dispersed. Currently, there are 94 district courts located throughout the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Northern Mariana Islands.<sup>7</sup> There is at least one district court in every state. Some states feature multiple districts and/or divisions. For example, California, New York, and Texas all have four judicial districts.<sup>8</sup>

Since the ADRA became effective, district court protest actions have been geographically dispersed. Approximately 60% of the protests identified by DOJ for 1997 and 1998 were filed in jurisdictions other than the District of Columbia and nearby Eastern District of Virginia, such as Alabama and California. Two district court protests filed since the ADRA was enacted (one in 1998 and one in 1999) were filed in district court in the U.S. Virgin Islands.

<sup>6</sup> *David Mitchell Construction, Inc. v. United States Corps of Engineers*, (CIV-99-659, filed May 14, 1999, W. D. Okla.); *Kira, Inc. v. U.S. Department of the Air Force*, (99CV00930, filed April 13, 1999, D.D.C.)

<sup>7</sup> 28 U.S.C. §§ 81-131; 48 U.S.C. §§ 1424, 1611, 1821; *See also, Understanding the Federal Courts* at [http://www.uscourts.gov/understanding\\_courts/8998.htm](http://www.uscourts.gov/understanding_courts/8998.htm) (visited June 18, 1999). Unlike the other 91 district courts (which were created under Article III of the U.S. Constitution), the three territorial courts (Guam, U.S. Virgin Islands, and the Northern Mariana Islands) are Article I courts.

<sup>8</sup> 28 U.S.C. §§ 84, 112, 124.

C. Geographic Availability And Long-Distance Litigation

The sunset of district court jurisdiction would eliminate access to local courts for contractors located outside Washington, D.C., where the COFC is located. Currently, such contractors may bring judicial protests in their local district court. As noted above, the district courts are spread throughout the 50 states – with at least one in each state – as well as located in other areas, such as Puerto Rico.

In the event of a sunset, therefore, contractors could only bring a judicial protest in Washington, D.C.<sup>9</sup> This would probably entail some degree of travel and retention of Washington counsel (to serve as the contractor's local counsel). Relative to a local district court action brought by local counsel (who may be more familiar with a contractor's business), a COFC action likely would entail greater expense for contractors located outside Washington, D.C., even assuming there are no procedural differences between the district court and COFC actions.<sup>10</sup> Because legal fees (rather than travel expenses) likely would comprise the greatest element of costs, this is particularly true for areas where legal fees are lower than they are in the Washington, D.C. area.

Particularly for small government contractors, limiting judicial remedies to the COFC will pose some hardship. When the ADRA was enacted, Congress indicated some concern about the potential hardship to small businesses. During debate on the House floor, Representative Maloney (D., N.Y.) stated:

Federal district court jurisdiction, commonly known as Scanwell jurisdiction, has been an important safeguard to our constituents back home, ensuring that they have a local forum to appeal decisions on Government contracts. Eliminating Scanwell would have put burdens on our businesses, both large and small, to litigate their claims long-distance.<sup>11</sup>

<sup>9</sup> In terms of administrative fora, a contractor may file a protest with GAO or the contracting agency itself, *i.e.*, an "agency-level" protest. The GAO is located in Washington, D.C. As a result, in the event of a sunset, all fora – judicial and administrative – would be located in Washington, D.C., except for agency-level protests. GAO protests, however, rarely require travel.

<sup>10</sup> To the extent that contractors filing protests already rely on Washington, D.C.-based government contracts counsel, these differences in expense between district court and COFC actions likely would be reduced.

<sup>11</sup> Cong. Rec. H12276-77 (Oct. 4, 1996).

Representative Maloney's comments echoed those of an industry coalition led by the U.S. Chamber of Commerce, which observed in a letter to Congress:

The elimination of district court jurisdiction would impose long distance litigation requirements on businesses located outside of Washington desiring to protest a contract. This is an expensive burden even for big business, but often an impossible option for small business owners.<sup>12</sup>

The experience under the ADRA confirms that the impact of a geographical limitation on judicial protests would be significant. Based on the cases referenced above, at least 60% of district court protests<sup>13</sup> were filed by contractors in their home jurisdictions, often – but not exclusively – employing what appeared to be their local counsel. Elimination of a local forum would pose a hardship for such contractors.

The COFC, it should be noted, has authority to travel to hear protests.<sup>14</sup> This option frequently has been offered in rebuttal to concerns regarding hardships posed by limiting judicial protests to the COFC.<sup>15</sup> The Section is not aware, however, of any significant use of this option in general<sup>16</sup> and only two instances<sup>17</sup> since the ADRA was enacted. Besides an

<sup>12</sup> Letter from Acquisition Reform Working Group, American Subcontractors Association, Computer & Communications Industry Association, Computing Technology Industry Association, the Associated General Contractors of America, and the U.S. Chamber of Commerce to Senator Cohen, Chairman, Senate Subcommittee of Governmental Management and the District of Columbia (Aug. 2, 1996), as quoted in Mason, *Bid Protests and the U.S. District Courts – Why Congress Should Not Allow the Sun to Set on This Effective Relationship*, 26 PUB. CONT. L. J. 567, 593 n.161 (1997).

<sup>13</sup> According to DOJ's list, some (but not all) of the contractors filing in D.C. and the Eastern District of Virginia were located in these areas and thus likewise brought actions in their home jurisdictions.

<sup>14</sup> 28 U.S.C. § 173.

<sup>15</sup> See, e.g., *Report of the Acquisition Law Advisory Panel to the United States Congress*, I-262-264 (Jan. 1993); Letter from Andrew Fois, Assistant Attorney General, to William S. Cohen, Chairman of the Senate Subcommittee on Oversight of Government Management and the District of Columbia (Apr. 12, 1996), reprinted in, 142 CONG. REC. S6156-57 (daily ed. June 12, 1996).

<sup>16</sup> See Mason, *supra* n. 10, at 594, n. 164 (citing conflicting evidence, questioning whether the COFC traveled to hear a protest prior to enactment of the ADRA.)

<sup>17</sup> *HSQ Technology v. United States*, No. 1:97cv0667; *Torrington Co. v. United States*, No. 1:98cv0613.

apparent disinclination of the COFC to travel, reliance on this option as a means to alleviate the hardship posed by a sunset may be problematic for two additional reasons. First, the rapid pace of protest cases makes travel difficult. It is impractical for a COFC judge to travel for a TRO hearing, for status conferences, or for any purpose other than a trial on the merits. For example, a TRO hearing might consume three days: one day to travel to the location for the hearing, an additional day to conduct the hearing, and a third day to return to Washington, D.C., all on very short notice. Other issues, such as the need to identify and obtain appropriate courtroom space on short notice, further reduce the prospect of travel. For a fast-moving case, such as a protest case, there may not be any substitute for a non-traveling judge.

Second, in addition to the complications that travel would pose for the judges' current caseloads, the data indicate that in the event of a sunset the COFC protest caseload might double (assuming the same general number of contractors currently filing district court protests file in the COFC following a sunset). Such an increased caseload would further reduce the prospect that COFC judges would be able to travel to hear protest cases.

**D. Should Protests Be Treated Differently Than Other APA Actions?**

In *Scanwell Laboratories*, 424 F.2d 859, the Court of Appeals for the District of Columbia recognized that a protest case is a standard APA case. In enacting the ADRA, Congress likewise acknowledged that protests are APA cases in ensuring that the APA standard of review would apply.

The elimination of district court jurisdiction raises the question, therefore, whether protests should be treated differently from other APA actions. In other words, should agency actions that are reviewed to determine whether they are arbitrary or capricious be treated differently depending on what type of action is at issue? The types of procurements that are protested in court often involve significant Government expenditures of taxpayer funds as well as considerable proposal preparation expenses on the part of offerors and thus would appear to be equally appropriate candidates for APA review as the many other matters currently redressable under the APA.

Some may argue that treating protests differently from other APA actions is justified in that the Government enters the market as a participant rather than regulator *per se* and that a limitation of remedies is a "cost of doing business" with the Government. Such a rationale often has been advanced, for example, in support of the release of contractor information under the Freedom of Information Act in cases where contractors have opposed release, *i.e.*, "reverse FOIA" actions. See, *e.g.*, *Racal-Milgo Government Systems, Inc. v. Small Business Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981) ("Disclosure of prices charged the Government is a cost of doing business with the Government.") Recently, however, the U.S. Court of Appeals for the District of Columbia Circuit rejected this rationale as a basis to disclose a contractor's proposed prices. See *McDonnell Douglas Corp. v. National Aeronautics and Space Administration*, 1999 U.S. App. LEXIS 14174 at \*8-9 (D.C. Cir. June 25, 1999).



Even if the “doing business” rationale were sound, moreover, it is not properly applicable in the case of protests. A protester is a *prospective* contractor (at least with respect to the particular contract at issue). In other words, with respect to the contract at issue, the protester is not doing business with the Government. There is no business contractual relationship. Rather, a protester challenges an alleged denial of an opportunity to compete on a fair and equal basis, *i.e.*, it alleges that the Government arbitrarily or unlawfully denied it an opportunity to “do business” with the Government. To justify a limitation of remedies on the rationale that a protester is “doing business” with the Government, therefore, is tenuous at best.

Finally, treating protests differently than other APA actions may raise constitutional concerns. The COFC is an Article I forum. See 28 U.S.C. § 171. The U.S. district courts generally are Article III fora,<sup>18</sup> which are courts of broader jurisdiction than Article I courts. The sunset of district court jurisdiction would eliminate access to an Article III forum and leave two Article I fora, the COFC and GAO, which raises the prospect of a constitutional challenge. See *Coco Bros., Inc. v. Pierce*, 741 F.2d 675, 679 n.4 (3d Cir. 1984), citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n. 23 (1982) (“Congress cannot ‘withdraw from [Art. III] judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity or admiralty.’”); see also, Pachter, *The Need For A Comprehensive Judicial Remedy For Bid Protests*, 16 PUB. CONT. L. J. 47, 60-61 (1986).

In passing, the *Coco Bros.* court questioned:

whether Congress may, consistent with the Constitution and separation of powers principles, place exclusive equitable jurisdiction in an Article I court to enjoin and compel activities of the executive branch.

741 F.2d at 679, n. 4. It is unclear whether *Coco Bros.* raises a valid concern. The case upon which *Coco Bros.* relies, *Northern Pipeline*, recognizes that Congress generally may limit recourse to Article III courts for matters that involve “public rights,” *i.e.*, actions against the Government regarding the performance of the constitutional functions of the legislative or executive branches.<sup>19</sup> In addition, under the doctrine of sovereign immunity, the Government

<sup>18</sup> But see *supra* n. 5 (certain district courts are Article I courts).

<sup>19</sup> *Northern Pipeline* distinguishes between “public rights” and matters that are “inherently judicial.” This raises the question whether an effort by a *prospective* contractor to enjoin an executive branch agency from awarding a contract (or to compel termination thereof) based on an alleged illegality might be “inherently judicial.” Compare, *e.g.*, *Bank of America Nat. Trust & Savings Assn. v. United States*, 23 F.3d 380, 386 (Fed. Cir. 1994) (Majer, J., concurring) (terming disputes under government contracts “classic public rights matters” based, at least in part, on contract clauses).

may condition how and where it may be sued. Furthermore, it is possible that the availability of appellate review by an Article III court would satisfy any requirement for Article III review.<sup>20</sup> Nonetheless, *Coco Bros.* raises the prospect of a constitutional challenge in the event of a sunset.

**E. Relative Burdens And Administrative Savings From A Sunset**

In addition to the forum shopping and fragmentation of law concerns discussed below, the administrative convenience of a single judicial protest forum has been discussed as a justification for consolidating judicial protests. Specifically, it has been argued, if protests were consolidated in a single forum, the Government would not be forced to defend actions brought in courts scattered throughout the country. It is difficult to see how this is a true “administrative convenience,” however, since the attorneys who defend such actions (Assistant United States Attorneys) are themselves located in various judicial districts and available to defend the Government in every action in district court.

Although a sunset would alleviate the burden currently imposed on district courts by protest actions, this burden appears relatively insignificant. Based on the cases identified to date (which may understate the number of district court protests, but probably not dramatically), protests number approximately 40 out of more than 250,000 civil cases filed each year in the district courts.<sup>21</sup> Protests thus make up significantly less than 1% (*i.e.*, 0.016%) of the district court docket. As at least one commentator has noted, the protest burden is small and thus little would be alleviated (and few savings would result) if district court protest jurisdiction were eliminated.<sup>22</sup>

<sup>20</sup> See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 455 n.13 (1976) (noting that decisions of administrative tribunal were subject to review in federal courts of appeals and thus the case did not present a question whether Congress could commit adjudication of public rights to an administrative agency without any recourse to court).

<sup>21</sup> *Judicial Business of the United States Courts, 1997*, by the Administrative Office of U.S. Courts, at [http://www.uscourts.gov/judicial\\_business/contents.html](http://www.uscourts.gov/judicial_business/contents.html) (visited June 18, 1999). This report cites 272,027 civil case filings in 1997. In 1997, the United States was a plaintiff or defendant in 60,004 of these cases. *Id.* at 16. See also *1998 Federal Court Management Statistics*, by the Administrative Office of U.S. Courts (citing 256,787 civil case filings in 1998.)

<sup>22</sup> See William E. Kovacic, *Procurement Reform And The Choice Of Forum In Bid Protest Disputes*, 9 ADMIN. L. J. AM. U. 461, 500 (1995).

To the extent a sunset would yield any savings for the district courts, moreover, these must be offset by any increased burdens on the COFC. Assuming that the same general number of protests currently filed in district courts are filed at the COFC following a sunset, the COFC protest caseload essentially will double. As a result, no true savings will result: the cases will merely shift to one forum and/or some prospective contractors, most likely small businesses, will be discouraged from bringing protests. A sunset thus would not yield significant savings.

**F. Access To GAO And Other Administrative Remedies - A Viable Alternative?**

In the event of a sunset, recourse to GAO (and agency-level protests) would remain available as a lower-cost alternative to the COFC. GAO remains the predominant choice of protesters. GAO protests number more than a thousand per year, more than ten times the number of all judicial protests, COFC and district courts combined. Compared to judicial protests, GAO offers a less expensive forum due to the relatively informal procedures and allowability of filing by facsimile transmission. GAO's protest process also enables successful protesters (regardless of size) to recover some of the costs of pursuing a protest.

Notwithstanding, some contractors elect not to pursue protests at GAO.<sup>23</sup> Contractors selecting a judicial remedy (rather than GAO) are opting for more extensive, albeit more expensive, procedures. Although GAO's procedures are relatively informal and inexpensive, a number of special procedural rules, *e.g.*, timeliness rules for filing, may prove problematic for small contractors and/or counsel inexperienced in that forum (typically, non-Washington, D.C. area counsel) and thus discourage greater reliance on the GAO process.

**V. UNIFORMITY OF LAW ISSUES**

"Uniformity of law" issues have been cited as important considerations favoring eliminating district court bid protest jurisdiction and consolidating jurisdiction in the COFC. Such sentiments can be traced to comments made by the Acquisition Law Advisory Panel in its January 1993 report to Congress, in which the Panel contended that the more than 500 district courts (sic)<sup>24</sup> and twelve regional court of appeals create the risk of conflicting opinions on

<sup>23</sup> Judicial protests sometimes involve matters that were pursued initially at the GAO. *See, e.g., Analytical & Research Tech. v. United States*, 39 Fed. Cl. 34 (1997); *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345 (1997). To the extent these cases were brought by the same entity that filed the GAO protest (as opposed to an awardee challenging a GAO decision to sustain a protest), the plaintiffs have selected the courts in addition to, rather than in lieu of, a GAO remedy.

<sup>24</sup> This figure incorrectly represents the number of district courts, which number only 94.

procurement issues. *Report of the Acquisition Law Advisory Panel to the United States Congress*, I-262-264 (Jan. 1993).<sup>25</sup> The Panel also contended that the then-current bid protest system encouraged plaintiffs to engage in “forum shopping” in an effort to select the court that best served the plaintiff’s interests. *Id.* Similar contentions were later made when H.R. 4194 was modified by Amendment No. 5421, which added the district court sunset and GAO study provisions to the ADRA. 142 Cong. Rec. S11848 (Sept. 30, 1996) (Statements of Sen. Cohen).<sup>26</sup> As discussed below, however, a closer look at the subject suggests that uniformity of law issues may not be a significant concern in the context of bid protest law.

**A. Forum Shopping Concerns**

“Forum shopping” has been raised as a concern posed by the availability of alternative protest fora. We understand this term to refer to forum selection based on differences in substantive law in an effort to find favorable law. The term should not be construed to pertain to various considerations that may favor a particular forum for reasons independent of substantive law, such as the size of the matter, location of the parties, and the costs of handling a protest. For example, if a small business were to file a protest at GAO or a local court regarding a relatively small contract in an effort to reduce its protest costs, such an action could not reasonably be considered “forum shopping.”

It has been the Section’s experience that, although plaintiffs properly might choose one forum over another because of differences in cost or procedures and the availability of

<sup>25</sup> The panel was commissioned under Section 800 of the National Defense Authorization Act for Fiscal Year 1991, which directed the Under Secretary of Defense for Acquisition to form an Advisory Panel on Streamlining and Codifying Acquisition Laws. The Panel’s mission included studying and recommending means to streamline and improve the Federal acquisition process.

<sup>26</sup> In introducing Amendment No. 5421, Senator Cohen stated:

It is my belief that having multiple judicial bodies review bid protests of Federal contracts has resulted in forum shopping as litigants search for the most favorable forum. Additionally, the resulting disparate bodies of law between the circuits has created the situation where there is no national uniformity in resolving these disputes. That is why I have included provisions in this amendment for studying the issue of concurrent jurisdiction and have provided for the repeal of the Federal district courts’ Scanwell jurisdiction after the study is complete in 2001.

142 Cong. Rec. S11848 (Sept. 30, 1996).

discovery, bid protest plaintiffs rarely engage in forum shopping among the fora or among the district courts so as to choose the forum or district that applies the relevant substantive law in the most advantageous manner. Indeed, as discussed below, the courts have consistently applied the same substantive law.

Also, with respect to forum shopping within the district court system, the statutory venue provisions greatly restrict a plaintiff's ability to file a suit in whatever district court it chooses.<sup>27</sup> The venue statute applicable to actions against the Government, 28 U.S.C. § 1391(e), restricts the ability of a plaintiff to bring a civil suit against the United States to only those judicial districts where (1) the defendant resides, (2) where a substantial part of the events or omissions giving rise to the subject to the action is situated, or (3) where the plaintiff resides if no real property is involved in the action.

Significantly, the courts strictly construe the place of "residence" when interpreting the statute. In *Davies Precision Machining, Inc. v. Defense Logistics Agency*, 825 F. Supp. 105 (E.D. Pa. 1993), the contractor argued that venue was proper because the Defense Logistics Agency ("DLA") maintained an office in the court's district. Although the DLA administered all contracts performed in the district, the court denied venue, holding that "[t]he mere fact that [the Defense Logistics Agency] maintains offices in this district does not establish venue . . . ." *Id.* at 107. The court ruled that neither 28 U.S.C. § 1391(e) nor its legislative history suggests that Congress sought to allow a Federal agency to be sued wherever it maintained an office; rather, more sufficient contact with the district is required. *Id.* The Court of Appeals for the Seventh Circuit reached a similar conclusion in *Reuben H. Donnelly Corp. v. Federal Trade Commission*, 580 F.2d 264 (7th Cir. 1978). The plaintiff argued that the court had jurisdiction over the case because the defendant, the Federal Trade Commission, maintained offices within the court's district. The court ruled, however, that the mere presence of a Federal agency's offices within the court's district was not enough; rather, the venue statute contemplated meaningful "contact" between the court's district and the suit being filed. *Id.* at 267. The court held that "[t]he venue statute was not intended to permit forum shopping by suing a federal official wherever he could be found, or permitting test cases far from the site of the actual controversy." *Id.*; see also *Bartman v. Cheney*, 827 F. Supp. 1 (D.D.C. 1993) (indicating that an officer or agency head resides where he or she performs a significant amount of his or her official duties).

Thus, the same controls that limit a plaintiff's ability to forum shop in non-bid protest cases apply in bid protest cases.

<sup>27</sup> The substantial limitation imposed by the statutory venue requirement appears to have been overlooked by those who favor eliminating district court jurisdiction. See, e.g., 142 Cong. Rec. S6155-56 (June 12, 1996) (Senator Cohen remarking that eliminating district court jurisdiction "would reverse the decision of the D.C. Circuit in *Scanwell Lab., Inc. v. Shaffer* . . . that permitted bid protests to be filed in any district court in the country.")

**B. Fragmentation/Predictability Of Law**

The fragmentation of law issue relates to the goal of instilling predictability within the bid protest system. If each forum applies the same law, the system runs more predictably and efficiently, and a plaintiff has less incentive to “forum shop.” Within the context of Federal bid protest law, fragmentation of law concerns appear to be minimal: the occasions in which the judges of the Federal courts and the GAO attorneys have issued inconsistent decisions has been infrequent, at most.<sup>28</sup> The relative agreement among the fora as to substantive bid protest law may be explained by the willingness of both the district courts and the COFC to look to and apply the substantive law developed by GAO, a forum with much greater bid protest experience than either the district courts or the COFC.<sup>29</sup>

Significantly, the ADRA eliminated the most significant split in bid protest law – *i.e.*, the jurisdictional issue regarding whether the district courts had preaward bid protest jurisdiction in addition to postaward jurisdiction.<sup>30</sup> The split in authority was a major concern listed in the report issued by the Acquisition Law Advisory Panel to the United States Congress, and apparently was a major consideration for the Panel’s recommendation to eliminate district court jurisdiction. *Report of the Acquisition Law Advisory Panel to the United States Congress* I-262-264 (Jan. 1993). Congress, however, resolved the problem

<sup>28</sup> The few conflicts that do exist have often taken place intra-forum, rather than inter-forum. *See Advanced Seal Tech., Inc. v. Perry*, 873 F. Supp. 1144, 1149 (N.D. Ill. 1995) (disagreeing with those federal district court decisions that suggest economic loss alone constitutes “irreparable harm” for the purposes of obtaining a preliminary injunction); *Anderson Columbia Environmental, Inc. v. United States*, 42 Fed. Cl. 880 (Fed. Cl. 1999) (diverging from numerous COFC decisions in denying contract awardee’s request for intervention); *Red River Serv. Corp.*, B-279250, 98-1 CPD ¶ 142 (declaring that GAO will no longer follow its prior decisions regarding whether federal agencies are exempt from the requirement to comply with local solid waste management regulations).

<sup>29</sup> *See, e.g., Irvin Indus. Canada, LTD. v. United States Air Force*, 924 F.2d 1068, 1077 n.88 (D.C. Cir. 1990) (stating that the courts regard GAO as an expert that the courts should prudently consider); *DGS Contract Serv., Inc. v. United States*, 43 Fed. Cl. 227, 338 (stating that GAO has special expertise that may provide useful guidance).

<sup>30</sup> *Compare J.P. Frances & Assocs., Inc. v. United States*, 902 F.2d 740, 742 (9th Cir. 1990) (holding that the district courts lacked jurisdiction over pre-award protests); *Rex Sys., Inc. v. Holiday*, 814 F.2d 994 (4th Cir. 1987) (holding that the Claims Court had exclusive jurisdiction over pre-award protests), *with, Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1057-58 (1st Cir. 1987) (ruling that district courts possessed jurisdiction over pre-award and post-award protests); *Coco Bros. v. Pierce*, 741 F.2d 675, 679 (holding that district courts may assert jurisdiction over pre-award protests).

when it enacted the ADRA, which affirmatively granted pre-award and post-award protest jurisdiction to both the COFC and the district courts.<sup>31</sup>

### C. Uniformity Of Law As A Viable Goal

As indicated above, our analysis suggests that uniformity of law issues may not be a significant concern within the context of Federal bid protest law. If one were to conclude otherwise, however, a significant issue nonetheless would remain as to whether achieving uniformity through the elimination of one of the bid protest fora might negatively impact the quality of law produced by the bid protest system as a whole.

Under one theory, the interaction and “competition” among the bid protest fora provides for a system that produces better law. Where a conflict between two courts arises, the issue is likely to involve a difficult question, and a “difficult legal question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases than if it is answered finally by the first panel to consider it.”<sup>32</sup> Once a disagreement develops, the courts reviewing the issue for the first time will benefit from analyzing the different approaches taken by the disputing courts. This analysis places the reviewing courts in a better position to resolve the issue, and eventually a consensus emerges.<sup>33</sup> In the long run, interaction among the courts/fora enhances the prospect of an issue being decided correctly. The elimination of district court jurisdiction could negatively affect this developmental process. Furthermore, a sunset would leave only one appellate court with jurisdiction over protest matters, thereby depriving the procurement system of the benefit of other courts’ views, such as the Court of Appeals for the District of Columbia, which have made substantial contributions to the case law. See, e.g., *Delta Data Systems Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984).

<sup>31</sup> In addition, the ADRA requires the COFC and the district courts to apply the same standard of review to bid protests.

<sup>32</sup> Richard Posner, *Will the Federal Courts Survive Until 1984: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 785 (1983).

<sup>33</sup> See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1156-57 (1991); see also, Judge Helen W. Nies, *A Review of Decisions of the United States Court of Appeals for the Federal Circuit: Introduction: Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519 (1996) (emphasizing importance of use of dissents in Federal Circuit opinions to enable Supreme Court to understand differing views)

## VI. EXPERTISE

One of the arguments often used to justify the establishment of specialized courts is that such courts enjoy a particular expertise or a unique capability to address a specific type of case. While the legislative history of the sunset provision does not include any such findings, some have suggested that the COFC has expertise that renders it a more appropriate forum than district courts to handle bid protests. While the COFC clearly does have greater expertise in the area of government contracts generally, and bid protests specifically, that is not justification for permitting the *Scanwell* jurisdiction of district courts to sunset. On the contrary, the more generalized expertise of a district court may be more valuable in some bid protest cases than the COFC's more specialized expertise.

Bid protests are a form of review of agency action under the standards articulated in the APA, 5 U.S.C. § 706. District courts have regularly applied the APA since its passage in 1966. By contrast, the COFC has relatively less experience with APA review. While it is clear that the COFC has and is developing a greater expertise in the substantive law on formation of government contracts and in bid protest procedures, protests often involve other substantive areas, for example, fraud or trade secrets issues, where district courts have a wealth of experience. Moreover, there is an abundance of literature suggesting the benefits of a generalist forum.

### A. APA Review

The ADRA provides that for bid protests, the COFC and the Federal district courts should apply the APA standard of review. 28 U.S.C. § 1491(b)(4). The APA allows courts to set aside agency actions found, *inter alia*, to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence in . . . the record." 5 U.S.C. § 706. The courts' review is based upon the administrative record before the agency when the decision was made. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Federal district courts have been applying the APA standard for decades in reviewing agency actions such as rule makings, adjudications, and, periodically, award decisions challenged under *Scanwell*. Thus, most district courts located where there is any significant Federal agency presence are familiar with and adept at the record review required under the APA, and there is a substantial body of binding precedent in those courts concerning the review process.

The COFC does not have the same breadth of experience with application of the APA standard of review. Prior to the expansion of its jurisdiction under the ADRA, the COFC



reviewed protests<sup>34</sup> to determine if the government's consideration of offers was "arbitrary and capricious." See *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203 (Ct. Cl. 1974). The four factors that the COFC considered in making this determination were similar, but not completely identical, to the APA standards:

1. proven violations of statute or regulation;
2. subjective bad faith on the part of the Government;
3. absence of a reasonable basis for the Government decision; and
4. the amount of discretion afforded to the Government.

*Keco*, 492 F.2d at 1203-04. The COFC did not apply this standard in any of the other types of cases it handled. The COFC applies the *de novo* standard in its Contract Disputes Act cases.

#### **B. Bid Protest Procedures And Substantive Government Contracts Law**

COFC judges generally are likely to have more expertise, or at the very least more resources and readily accessible guidance available to them, in dealing with bid protests than will most district court judges, particularly those not located in the Washington, D.C. metropolitan area. All judges at the COFC know that at least part of their caseload will include bid protests. (Indeed, the six most recently appointed COFC judges attended and participated in a discussion of bid protests sponsored by the Section's Bid Protest Committee before being assigned a case.) Furthermore, the COFC has issued General Order No. 38, which supplements its Rules of Procedure and describes the standard practices to be followed in protest cases. In addition, even if judges or law clerks at the COFC have not had experience in dealing with the particular contract formation issues facing them in a protest, it is likely that one of their colleagues has. Thus, the COFC has at its immediate disposal all of the resources necessary to understand and address the nuances of substantive bid protest precedent.

By contrast, it is often the case that a district court judge faced with a bid protest will never have handled, or perhaps even heard of one prior to that point. There certainly are no special district court procedures designed solely for protests, and often there is little if any binding precedent in the jurisdiction on the government contract formation issues raised.

#### **C. Experience In Other Substantive Areas**

It is often the case that bid protests involve other substantive areas of the law in addition to Government contract formation. For example, protests may involve allegations of

<sup>34</sup> Before the ADRA, the COFC's jurisdiction was limited to granting equitable relief only in pre-award protests and awarding bid and proposal costs. *Grumman Data Systems Corp. v. U.S.*, 28 Fed. Cl. 803 (1993).

fraud or issues concerning violation of trade secrets. District courts regularly handle such matters and may, in certain circumstances, be the most efficient fora to address comprehensively such issues.

For example, a protester who has evidence of possible wrongdoing on the part of a government official in connection with a procurement may choose to file in district court in order to trigger the involvement of both the U.S. Attorney's office and the district court that would also be responsible for adjudicating the underlying alleged improper conduct.

A still-pending protest filed in District Court in Massachusetts is an example of another situation where district courts offer the opportunity for a more efficient resolution of all issues. In *American Science and Engineering v. Kelly*, CA No. 99CV 10365, the protester, AS&E, had previously sued the awardee of a United States Customs contract alleging a violation of trade secrets. AS&E subsequently filed a protest of the contract award on the grounds that the awardee's proposed product violated the protester's trade secrets. The district court consolidated the cases and heard them together. Without the option of filing a protest in district court, AS&E would have been forced to litigate simultaneously a trade secrets act action in District Court in Massachusetts and a bid protest at the COFC revolving around the same factual issues.

#### D. Specialist vs. Generalist Courts

There is a substantial amount of literature on the topic of specialized versus generalist courts. Some scholars have focused on the expertise and efficiency that specialized courts may offer in a particular subject area. See, e.g., *Rochelle C. Drefuss, Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 Brook. L. Rev. 1 (1995). On the other hand, many in academia and the judiciary believe that generalist courts offer more advantages. For example, Justice Scalia has remarked that "the disadvantage of inexperience is often more than made up for by the advantage of a fresh outlook and broad viewpoint." Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, U.P.A.L. Rev. 1111, 1120 (1990); see also Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 331 (1991) ("A primary cost of specialization is loss of the generalist perspective . . . a wider perspective."). Such a generalist perspective will be lost in bid protests if district court jurisdiction is allowed to sunset.

#### VII. POSSIBLE JURISDICTIONAL PROBLEMS

Finally, the sunset of ADRA jurisdiction in the district courts has the potential to raise numerous jurisdictional problems. Because of the way the ADRA jurisdictional provision and sunset provision were drafted, the scope of jurisdiction that is due to expire on January 1, 2001 may be broader than Congress intended. This may result in the unforeseen loss of district court jurisdiction over certain types of actions. Furthermore, it is not clear whether the COFC

will have jurisdiction over some of the types of actions that the district courts may no longer be able to hear. We discuss some of these potential problems below.

**A. Overview Of The Sunset Provision**

To understand the potential unintended impact of the proposed ADRA sunset, it is necessary to review the language of both the ADRA jurisdictional grant and the sunset provision. The ADRA amended the jurisdiction of the district courts as follows:

Both the United<sup>35</sup> States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to [1] a solicitation by a Federal agency for bids or proposals for a proposed contract or [2] a proposed award or the award of a contract or [3] any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. 1491(b)(1). Categories [1] and [2] of this jurisdiction cover the various types of bid protests. Category [3] goes well beyond usual bid protests and creates new causes of action theretofore redressable only in the district courts under the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. All of this jurisdictional grant to the district courts is slated to expire as described in the ADRA's sunset provision:

The jurisdiction of the district courts of the United States *over the actions described in section 1491(b)(1) of title 28, United States Code* [subsec. (b)(1) of this section] (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) [section 12(e) of Pub. L. 104-320, set out as a note under this section] shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection [this note].

Pub. L. No. 104-320, sec. 12(d). Significantly, the sunset provision does not refer to "bid protest actions," "actions alleging violations of procurement law or regulation," or some other narrowly defined category of suit. Rather, the sunset provision covers "the actions described

<sup>35</sup> So in original.

in section 1491(b)(1) of title 28, United States Code. . . .” Those actions thus also include the Category [3] cases of “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1). Read broadly, such alleged violations of statute or regulation would seem to include all challenges to violations of any statute or regulation in connection with a procurement or proposed procurement not covered by Categories [1] and [2]. The breadth of Category [3] is without bright-line limits and would include, for example, challenges to agency protest override decisions under 31 U.S.C. § 3553(c) and (d) to award a contract or continue with contract performance in the face of a GAO protest, challenges to agency debarment type actions, and challenges to agency decisions on competing or refusing to compete employee workload with the private sector. Thus, the sunset provision could have the unintended effect of removing the Category [3] actions from the jurisdiction of the district courts. Furthermore, it is not clear whether the COFC has jurisdiction over some of these actions, as discussed below. Thus, litigants could be left with no forum in which to pursue certain actions after the sunset becomes effective.

#### **B. Legislative History**

The legislative history of the sunset provision suggests that Congress did not intend the sunset to apply to non-bid protest actions. When Senator Cohen presented his proposed legislation, he described the jurisdictional amendment and proposed sunset narrowly in terms of “Scanwell jurisdiction” and “bid protests”:

. . . . Currently, the Court of Federal Claims only has jurisdiction over bid protests which are filed before a contract award is made. My amendment provides for both pre- and post-award jurisdiction. The Federal district courts also have jurisdiction over bid protests. Prior to a 1969 Federal court decision, however, the Federal district courts had no jurisdiction over Federal contract awards. A Federal district court, in *Scanwell Lab., Inc. versus Shaffer*, held that a contractor can challenge a Federal contract award in Federal district court under the Administrative Procedures Act.

It is my belief that having multiple judicial bodies review bid protests of Federal contracts has resulted in forum shopping as litigants search for the most favorable forum. Additionally, the resulting disparate bodies of law between the circuits has created a situation where there is no national uniformity in resolving these disputes. That is why I have included provisions in this amendment for studying the issue of concurrent jurisdiction and have provided for the repeal of the Federal district courts’ Scanwell jurisdiction after the study is complete in 2001.

*Congressional Record*, at S11848 (Sept. 30, 1996) (emphasis added). These remarks by the sponsor of the legislation indicate that the ADRA jurisdictional amendments were meant to grant to the COFC the same post-award protest jurisdiction that the U.S. District Court for the District of Columbia assumed in *Scanwell*, and to divest the district courts of that jurisdiction in January 2001. However, the statutory jurisdictional grant and the sunset provision are not so narrowly drawn. Rather, the Category [3] statutory provision appears to encompass far more than just *Scanwell*-type bid protest actions.

#### C. The Broad Scope Of The Sunset Provision

As noted above, ADRA's Category [3] jurisdictional grant is extremely broad, encompassing "any alleged violation of a statute or regulation in connection with a procurement." 28 U.S.C. § 1491(b)(1). This language appears to include types of suits other than the typical bid protest challenging a solicitation or contract award. For example, a "violation of a statute or regulation in connection with a procurement" could include an agency's failure to suspend contract award or performance in the face of a GAO protest, or an agency's decision to debar a contractor based on a false certification made in a bid. Other examples of alleged violations that could fall under ADRA jurisdiction include challenges to Department of Labor wage determinations, or challenges to Small Business Administration ("SBA") actions such as SBA's failure to issue a Certificate of Competency following a contracting agency determination that a bidder or offeror is nonresponsible. Such matters traditionally have been considered redressable under the APA.

This potentially broad Category [3] jurisdiction stands in sharp contrast to the more narrowly drawn bid protest jurisdiction of the GAO set forth in 31 U.S.C. § 3551, *et seq.* Under this statute, the Comptroller General is authorized to decide protests concerning "an alleged violation of a *procurement* statute or regulation." 31 U.S.C. § 3552 (emphasis added). The GAO bid protest statute further limits GAO's bid protest jurisdiction by defining a "protest" as an objection to any of the following:

- (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of such a solicitation or other request.
- (C) An award or proposed award of such a contract.
- (D) A termination or cancellation of an award of such a contract.

31 U.S.C. § 3551(1).

The difference between the Category [3] jurisdictional language of ADRA and that of the GAO bid protest statute illustrates the potential for jurisdictional uncertainty following the

sunset of ADRA jurisdiction from the district courts. The ADRA does not limit the district courts' jurisdiction to violations of procurement statutes and regulations; in Category [3] it creates an expansive jurisdiction over *any* alleged statutory or regulatory violation *in connection with* a procurement. The district courts' jurisdiction over these actions will expire on January 1, 2001. Thus, the sunset of ADRA jurisdiction from the district courts may foreclose certain Category [3] actions from district courts.

Another view is that the statutory district court jurisdiction defined in the ADRA is separate and distinct from the "*Scanwell*" jurisdiction over bid protests that was created by the district courts, and that only the ADRA district court jurisdiction is scheduled to expire, leaving *Scanwell* jurisdiction intact. As discussed above, however, the legislative history strongly suggests that the ADRA was intended to statutorily define the *Scanwell* jurisdiction already existing in the district courts and to extend that jurisdiction to the COFC. It is the existing district court jurisdiction, which Congress attempted to define in the ADRA, that is set to expire on January 1, 2001. Moreover, as suggested by the recent decision of the U.S. Court of Appeals for the Federal Circuit in *Ramcor Services Group, Inc. v. United States*, No. 98-5147 (Fed. Cir. July 26, 1999), the ADRA jurisdictional language is so broad that it may have the unintended effect of eliminating district court jurisdiction over the non-protest actions described by the Category [3] language.

In *Ramcor*, the Federal Circuit reversed an earlier opinion by the COFC that the COFC does not have jurisdiction to hear a challenge to an agency's determination to proceed with contract award or performance in the face of a GAO protest. In holding that the COFC has jurisdiction to entertain these "override" challenges, the Federal Circuit analyzed the language of the ADRA jurisdictional grant – "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement" – and concluded that "the ADRA, by its terms, provides alternative avenues for judicial review." In particular, the Federal Circuit found that "as long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction." The Court went on to note that the ADRA imported APA standards of review into the COFC's review procedures, so that the COFC is equipped to review challenges to agency actions arising under the APA, as long as the alleged statutory or regulatory violation relates to a procurement. The *Ramcor* decision thus makes clear that the concurrent jurisdiction of the COFC and the district courts extends far beyond the bounds of traditional bid protests. If the district court portion of this broad concurrent jurisdiction is permitted to expire, certain actions that traditionally have been heard in the district courts may no longer be brought there. Moreover, if the COFC declines to take jurisdiction over some of these non-protest actions – as it did initially in the case of CICA stay overrides – aggrieved parties may be left without any forum in which to obtain relief.

**D. Types Of Matters For Which Review May Be Foreclosed By A  
“Silent Sunset”**

Whether district courts would retain jurisdiction over certain types of actions following a sunset of *Scanwell* jurisdiction depends on how broadly the Category [3] jurisdictional language of 28 U.S.C. 1491(b) is interpreted.

**1. Small Business Issues**

One type of procurement-related case that commonly arises in the district courts involves decisions by the SBA concerning such matters as whether a contractor qualifies as a small business concern, or whether a company is entitled to a Certificate of Competency (“COC”) to perform a contract following a contracting agency determination that the contractor is nonresponsive. *See, e.g., DSE, Inc. v. United States*, 20 F. Supp. 2d 25 (D.D.C. 1998); *aff’d*, 169 F.3d 21 (D.C. Cir. 1999) (denying disappointed bidder’s challenge to SBA size determination); *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052 (1st Cir. 1987) (affirming district court’s order invalidating a certificate of competency issued by SBA); *Westernworld Servs., Inc. v. United States*, No. 91-2152-LFO (D.D.C. Feb. 28, 1992) (Mem. Op.), 1992 U.S. Dist. LEXIS 2112 (denying plaintiff’s challenge to SBA failure to issue COC since SBA decision was not arbitrary and capricious). Since these actions relate to specific procurements, allegations that the SBA acted improperly could be construed as “alleged violation[s] of statute or regulation in connection with a procurement or proposed procurement” as described in 28 U.S.C. § 1491(b)(1). Thus, the Government likely will argue for dismissal of such actions from the district courts following the effective date of the sunset. Although it appears that the COFC would be available as an alternative forum for size determination and COC challenges, *see, e.g., Stellacom, Inc. v. United States*, 24 Cl. Ct. 213 (1991) (size determination); *Three S Constructors, Inc. v. United States*, 13 Cl. Ct. 41 (1987) (size determination); *CRC Marine Servs. v. United States*, 41 Fed. Cl. 66 (1998) (denial of COC); *Stapp Towing Inc. v. United States*, 34 Fed. Cl. 300 (1995) (denial of COC), it is not at all clear that Congress intended to divest the district courts of this jurisdiction. Absent a Congressional resolution of this issue, the jurisdictional question will be subject to wasteful litigation.

**2. Labor Law Issues**

Another common procurement-related issue over which district courts historically have taken jurisdiction is that of contractor challenges to Department of Labor (“DOL”) wage determinations. *See, e.g., Fort Hood Barber’s Ass’n v. Herman*, 137 F.3d 302 (5th Cir. 1998) (challenge to Department of Labor wage determination); *see also Emerald Maint. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991) (allegation that DOL wage determination constituted a defective specification). Since a DOL wage determination is issued in connection with a specific procurement, any challenge to the DOL’s action clearly constitutes an alleged “violation of statute or regulation in connection with a procurement” as described in 28 U.S.C.

§ 1491(b)(1). It is doubtful whether the COFC would entertain such a labor law issue. After the ADRA jurisdictional sunset date of January 1, 2001, the Government will have the opportunity to argue for dismissal of Category [3] wage determination challenges in the district courts on the basis that the district courts' jurisdiction over those cases has expired. It is unlikely that Congress intended such litigation over a jurisdictional question that was previously well settled in the district courts, but the language of the ADRA Category [3] jurisdictional grant and the sunset provision is likely to produce exactly such litigation.

### **3. Suspensions And Debarments**

Another area that may raise Category [3] jurisdictional questions is that of agency suspension and debarment actions against Government contractors. Challenges to these actions have usually been brought in the district courts under the judicial review provisions of the APA. Although a suspension or debarment action does not necessarily arise in connection with a particular procurement, sometimes it does. In such a case, an alleged impropriety in connection with an agency suspension or debarment action could be construed as an alleged Category [3] "violation of statute or regulation in connection with a procurement." Accordingly, if such an action were brought in a district court after January 1, 2001, the Government could argue that the district court no longer had jurisdiction over the matter. Furthermore, it is not clear whether the COFC would accept jurisdiction of challenge to suspension or debarment under its ADRA jurisdiction, since no such challenges have been brought in the COFC since January 1, 1997.<sup>36</sup> It does not appear that Congress intended for the district courts' jurisdiction over suspension or debarment actions to sunset along with *Scanwell* bid protest jurisdiction, but in the face of a Government argument to the contrary in a particular case, litigation would be necessary to resolve this jurisdictional question.

### **4. Agency Decisions To Perform Work In House**

Historically, agency decisions to perform work using Government employees – instead of contracting for the work – have been reviewed by the district courts. *See, e.g., C.C. Distributors, Inc. v. United States*, 883 F.2d 146 (D.C. Cir. 1989). However, an alleged violation of law or regulation in connection with such an agency decision arguably is a Category [3] "violation of statute or regulation in connection with a procurement" under 28 U.S.C. § 1491(b)(1). Thus, district court jurisdiction over such agency actions arguably could

<sup>36</sup> Prior to the enactment of the ADRA, the Federal Circuit held that the COFC has jurisdiction over agency suspension and debarment actions in limited circumstances. *See, e.g., ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984). In other cases, however, the Federal Circuit held that the circumstances did not warrant COFC jurisdiction over such actions. *See, e.g., IMCO, Inc. v. United States*, 97 F.3d 1422 (Fed. Cir. 1996). The issue has not arisen since the COFC's ADRA jurisdiction took effect.



sunset on January 1, 2001. Again, litigation would be required to resolve the status of the district courts' jurisdiction following the sunset date.

#### 5. Other Potential Issues

There are myriad other types of cases in which this Category [3] jurisdictional question could arise in connection with the sunset of ADRA jurisdiction. One example is a challenge to the proposed release of information under the Freedom of Information Act, or "reverse FOIA" case, where the case arises in connection with a particular procurement. District courts historically have taken jurisdiction of reverse FOIA actions under their APA jurisdiction. However, the sunset of ADRA jurisdiction would provide agencies with an opportunity to challenge the district courts' jurisdiction over these actions, resulting in increased costs to all parties.

#### E. The Uncertainty Of The Scope Of The Sunset May Have A Chilling Effect On The Filing Of Actions Alleging "Violation Of Statute Or Regulation In Connection With A Procurement Or A Proposed Procurement"

Unless Congress addresses the foregoing jurisdictional issues, litigation will be required to determine what if any Category [3] jurisdiction the district courts will have after January 1, 2001. Although there may be a strong argument that Category [3] actions such as challenges to small business size determinations will still lie in the district courts under the district courts' APA jurisdiction, the Government will likely argue in favor of dismissal of such actions on the theory that the district courts' Category [3] jurisdiction over "any alleged violation of statute or regulation in connection with a procurement" expired on January 1, 2001. Faced with the prospect of a jurisdictional challenge, some potential litigants may elect not to seek a remedy in the Federal courts. This problem is most likely to affect small business concerns, which are less able to afford to litigate jurisdictional issues in connection with a legal action. Where it is not clear whether a court will take jurisdiction over a particular case, the prospective plaintiff may elect not to risk expending resources on an uncertain and unavoidable jurisdictional battle.

#### VIII. CONCLUSION

For the reasons set forth above, the Section recommends that Congress take action to ensure that the district courts are not divested of the jurisdiction granted under the ADRA.

# Comments From the Federal Bar Association, Government Contracts Section



## Federal Bar Association

March 27, 2000

Mr. Richard Stana  
Associate Director  
Administration of Justice Issues  
U.S. General Accounting Office  
441 G Street, NW  
Washington, DC 20548

Re: Sunset of U.S. District Court Bid Protest Jurisdiction

Dear Mr. Stana:

We are pleased to submit the accompanying comments on the draft GAO report "Bid Protests: Characteristics of Cases Filed in Federal Courts." These comments were prepared for the Federal Bar Association's Government Contracts Section by the Section's Working Group on the Sunset of U.S. District Court Bid Protest Jurisdiction.

The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government. The Government Contracts Section of the Federal Bar Association, which consists of attorneys -- both public sector and private sector -- involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit public comments on pending legislation, regulations, and procedures relating to Federal procurement. These comments have been prepared by a Working Group of the Government Contracts Section, with the direction and approval of Section leadership. The views expressed in these comments reflect the position of the Working Group. They have not been considered or ratified by the Federal Bar Association as a whole, or by any federal agency or other organization with which Section or Task Force members are associated through their employment or otherwise.

Please let us know if you have any questions related to this report. In addition, we would appreciate your office's feedback on the report and, more generally, how the Federal Bar Association's Government Contracts Section may be of further service. You can reach us at:

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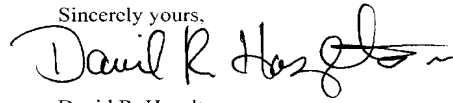
**Appendix IX**  
**Comments From the Federal Bar Association, Government Contracts Section**

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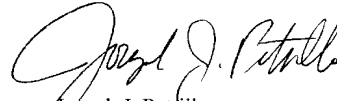
Mr. Stana  
Page 2  
March 27, 2000

On behalf of the Section and the Working Group, we appreciate the General Accounting Office's careful consideration of the accompanying comments.

Sincerely yours,



David R. Hazelton  
Chair, Government Contracts Section



Joseph J. Petrillo  
Chair, Working Group

Enclosure

cc (with enclosure):

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**COMMENTS**  
**OF THE WORKING GROUP**  
**ON THE SUNSET OF U.S. DISTRICT**  
**COURT BID PROTEST JURISDICTION**  
**ON THE DRAFT GAO REPORT**  
**GOVERNMENT CONTRACTS SECTION**  
**FEDERAL BAR ASSOCIATION**

March 27, 2000

**Introduction**

**The Pending Sunset of Jurisdiction**

Pursuant to Administrative Dispute Resolution Act of 1996, Public Law 104-320 (Oct. 19, 1996), the U.S. Court of Federal Claims and the U.S. District Courts were given concurrent jurisdiction over certain actions which are generically called "bid protests." This jurisdiction covers:

an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. [28 U.S.C. § 1491(b)(1)].

Section 12(d) of the Act provides that the jurisdiction of the district courts over such actions will end ("sunset") on January 1, 2001. However, Congress qualified its mandate by requiring a review of the issue before the sunset takes place. Section 12(c) of the Act requires the General Accounting Office to undertake a study "to determine whether concurrent jurisdiction [of the Court of Federal Claims and the district courts] is necessary." GAO is to specifically report on the impact of sunset on "the ability of small businesses to challenge violations of Federal procurement law." *Id.* The Government Contracts Section of the Federal Bar Association convened a Working Group to review these matters and, if appropriate, contribute to the dialogue by providing comment to GAO.

**The Context and Makeup of the Group**

The Federal Bar Association is an association of attorneys who practice in various areas of law relating to the Federal Government. The Government Contracts Section of the Federal Bar Association, which consists of attorneys -- both public sector and private sector -- involved in the practice of Federal procurement law, is authorized by the Constitution of the Federal Bar Association to submit public comments on pending legislation, regulations, and procedures relating to Federal procurement. These comments have been prepared by a Working Group of the Government Contracts Section, with the direction and approval of Section leadership. The views expressed in these comments reflect the position of the Working Group. They have not been considered or ratified by the Federal Bar Association as a whole, or by any Federal agency or other organization with which Section or Task Force members are associated through their employment or otherwise.

The Working Group on the Sunset of District Court Bid Protest Jurisdiction was a balanced group of experienced Government contract attorneys from the public and private sectors. All have had years of experience in the practice of Government contract law and in "bid protest" type disputes. Most are experienced with multiple forums. Five members were from the

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**Appendix IX**  
**Comments From the Federal Bar Association, Government Contracts Section**

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private sector and four from Government.<sup>1</sup> The four Government sector participants were drawn from both military and civilian agencies. The five private sector participants had experience in law firms of differing sizes and degrees of specialization.

The Working Group determined that its methodology would not depend upon surveys and quantified studies, but rather on the accumulated expertise and experience of its members. The members approached this task, not as the representatives of any constituency, but rather as professionals interested in improving the administration of justice. We all recognized, however, that our individual perceptions had been shaped by our experience as advocates for our clients.

Finally, our efforts had no preconceived outcome. We were free to examine any factors, and to reach any conclusions.

**MEMBERS OF THE WORKING GROUP**

Chair: Joseph J. Petrillo  
Petrillo & Powell, PLLC

Seth Binstock  
Social Security Administration

Donald Suica  
Internal Revenue Service

Alan C. Brown  
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Jeff Kessler  
Department of the Army

Richard J. Webber  
Arent Fox Kintner Plotkin & Kahn LLC

Mark Langstein  
Department of Commerce

Donna L. Yesner  
Pepper, Hamilton LLP

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<sup>1</sup> A fifth attorney from the Department of Justice provided technical support and input, but did not consider it appropriate to participate as a member.

**I. CONSIDERATIONS RELEVANT TO THE SUNSET OF DISTRICT COURT BID PROTEST JURISDICTION**

There was a general consensus about the considerations which were relevant to this topic, although there were differing opinions about each of them. In general, we examined (1) the degree of expertise of the forum, (2) the goal of uniformity of the law, (3) the number of cases filed, and (4) the ease of access to each forum. In addition, we attempted to examine an elusive concept, the “quality” of justice available from each forum. Each area is discussed below.

**A. Expertise**

With respect to expertise in the substantive law, the considerations are fairly clear-cut. Today, judges in the Court of Federal Claims (“CFC”) do have repeated and substantial exposure to issues of Government contract law. Prior to the enactment of the Administrative Dispute Resolution Act of 1996, *supra*, the contracts caseload of the CFC consisted overwhelmingly of appeals under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.* Only a few cases each year were filed under the court’s “bid protest” jurisdiction, because cases under that jurisdiction had to be filed before award.

The bid protest caseload has increased since the new and expanded jurisdiction became effective. Moreover, the broad reading given the statute by the Court of Appeals for the Federal Circuit suggests that other cases now filed in district courts can, and will, be filed instead in the CFC. Therefore, the judges of the Court of Federal Claims have developed, and will continue to develop, specialized expertise in Government contract law, both in general, and with respect to bid protest matters.

On the other hand, district court judges adjudicate a much wider variety of controversies. Their caseload includes criminal matters under Federal law, and common-law suits filed under their “diversity” jurisdiction. Accordingly, Federal district court judges are, or quickly become, legal generalists.<sup>2</sup>

In one area of the law -- review of agency action under the Administrative Procedure Act, 5 U.S.C. §§ 706 (“APA”) -- some panel members felt district court judges had superior expertise. The standard of review prescribed by this Act for agency action generally is also the standard of review employed in bid protest suits since their inception in the landmark case of *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (1970). It continues to be the standard of review enshrined in statute.<sup>3</sup>

Some panel members believe that, because Federal district court judges must apply these

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<sup>2</sup> One panel member noted that it may be easier to obtain discovery in district court bid protest suits than at the CFC. This may be a by-product of the need of district court judges to have more explanation of the record than their CFC counterparts.

<sup>3</sup> 28 U.S.C. § 1491(b)(4).

tests to a variety of challenged actions by Federal agencies, they are more comfortable with this function, and have greater competence in it than their counterparts on the CFC. Other panel members, however, believed that the substantive expertise of CFC judges in Government contract concepts, procedures, and legal principles more than made up for any disparity in the area of APA review. These members also point out that the CFC judges are not unfamiliar with APA review, and will doubtless acquire more familiarity with it as they continue to decide bid protest suits.

**B. Uniformity of the Law**

The goal of uniformity of the law is not necessarily an end in itself. As some panel members pointed out, having different forums decide cases — with potentially different results — provides a laboratory in which the law can develop through a diversity of views and opinions.<sup>4</sup> However, there was a general consensus that clarity and certainty in the law are desirable because they enable lawyers to be effective counselors to their clients, and promotes the efficient use of resources.

A number of factors affect the degree of consistency. At first blush, it is logical to presume that terminating the jurisdiction of district courts will lead to greater uniformity, simply because of the reduction in the number of deciding judges. There are over 80 district courts, each with multiple judges. The Court of Federal Claims, however, has only 22 judges. But numbers alone do not tell the full story. Both in the district courts and at the CFC, the decision of one judge is not binding on others. Other than binding precedent from appellate tribunals, there is no guarantee of consistency between or among judges at the trial court level.

However, the decisions of appellate courts, which are binding, do promote consistency. Decisions of the district courts are appealed to twelve different Circuit Courts of Appeals. Decisions of the Court of Federal Claims are appealed only to the Federal Circuit.<sup>5</sup> Therefore, the sunset of district court jurisdiction will tend to increase uniformity, because only one appellate court will be in charge of this area of the law. This effect will only be felt in the long run, however, because of the relatively few bid protest court cases filed, and the even fewer number of appellate decisions in such cases.

Other important factors tend to foster uniformity, in spite of the multiplicity of district courts. First, all courts must interpret the same statutes and regulations in this area. Second, the largest body of case law in the area of award controversies results from decisions of the General Accounting Office. Over a thousand protests are filed at GAO each year, hundreds of which

<sup>4</sup> For instance, after the decision of the Court of Federal Claims in *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997), the General Accounting Office reversed its prior rule authorizing the addition of non-schedule items to orders under the Federal Supply Service. See *Pyxis Corp.*, B-282469, *et al.*, July 15, 1999.

<sup>5</sup> Of course, the U.S. Supreme Court is the ultimate appellate body for all these circuit courts of appeals, but it rarely agrees to hear government contract cases and does so only in the most important areas. See *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).



result in published decisions. Although no court considers such rulings binding, GAO possesses acknowledged expertise in this area, and its rulings have at least a persuasive value. Third, both the district courts and the CFC apply the same standards for interlocutory injunctive relief. Finally, although the Circuit Courts of Appeals are not bound by each other's rulings, they are given some weight in the decisionmaking process.

**C. The Number of Cases Filed.**

One factor which should be considered in connection with the sunset of district court bid protest jurisdiction is the number of cases which might be affected. In considering this factor, we reviewed statistics provided by the Department of Justice. As reported by GAO, there were 66 such suits filed in District Court from January 1, 1997 through April 30, 1999. Almost half of these were filed in two district courts: Washington, D.C. and the Eastern District of Virginia.<sup>6</sup>

For purposes of comparison, GAO found that a total of 104 bid protest cases were filed from January 1, 1997 through August 1, 1999 in the Court of Federal Claims.

There was a consensus among the members of our group that these numbers were fairly insignificant compared with the volume of Federal court litigation generally. Therefore, the sheer number of cases is not a significant factor.<sup>7</sup>

**D. Access to the Forum.**

Unquestionably, it is more convenient for those located far from the Nation's Capital to have access to their own district courts. The sunset of district court litigation will obviate this possibility.

Again, there are considerations which mitigate and detract from this factor. The ability of a bidder to use its local district court depends upon being able to have jurisdiction over the parties. In addition, the district court must be an appropriate venue for the matter.

The Federal Government resides in every district, but it is sometimes desirable, or even necessary, for the plaintiff to bring private parties into the action. This is most notably true for the contract awardee. See *A. & M. Gregos Inc. v. Robertory*, 384 F.Supp. 187, (E.D. Pa. 1974) (successful bidder is a "necessary" party under Rule 19). The plaintiff's local district court might not have personal jurisdiction over the awardee or another interested private party.

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<sup>6</sup> The headquarters of the Department of Defense is located in the Eastern District of Virginia.

<sup>7</sup> The panel was divided on where it was easier to obtain a quick hearing on a motion for interlocutory injunctive relief. One member's experience was that some district court dockets were very crowded, making it difficult to get a prompt hearing on a motion for a preliminary injunction. Another panel member observed that it was easier to get a quick hearing on a motion for a temporary restraining order at district court than at the CFC.

In the case of the Court of Federal Claims, however, jurisdiction is nationwide, so the limitations of local jurisdiction and venue which arise in the case of the district courts are not pertinent.<sup>8</sup> The Court of Federal Claims has made some efforts to accommodate out-of-town counsel, for instance, by holding status conferences telephonically. More can be done in this regard, however, and the Court should consider taking additional steps.<sup>9</sup>

In addition, those seeking to do business with the Federal Government already have an expectation of having to “come to Washington” for certain purposes. The largest bid protest forum, the General Accounting Office, is located in Washington, D.C. Moreover, all fora hearing appeals under the Contract Disputes Act — the various boards of contract appeals<sup>10</sup> and the Court of Federal Claims — are all in the Washington, D.C. area. Finally, a substantial percent of district court bid protest suits are filed in the Washington, D.C. area.

**E. The “Quality of Justice”**

We also considered an elusive factor which we referred to as the “quality of justice.” Specifically, are there tendencies in the district courts and the Court of Federal Claims which affect the ability of these fora to provide an effective adjudication of bid protest issues? In the main the similarities of these fora outweigh their differences. They have very similar procedures, and can grant the same relief. They apply the same substantive law. As discussed below, there appear to be no differences in the scope of their subject-matter jurisdiction.

One notable difference is that, in the district courts, the Government is represented by an Assistant U.S. Attorney, whereas representation before the CFC is centralized in a specialized part of the Department of Justice, the Commercial Litigation Branch of the Civil Division. Assistant U.S. Attorneys, like the court before which they appear, tend to be generalists. Given the low number of Government contract cases adjudicated at the district courts, there seems to be little chance for assistant U.S. attorneys to develop substantive expertise in this area of the law.

On the other hand, lawyers who work in the Commercial Litigation Branch are likely to have a substantial and continuing involvement with Government contract cases. Thus, they either have a good working knowledge of Government contract legal principles, or develop it quickly. Moreover, they work together under common management, which makes it easier to assure uniformity of quality and consistency in matters of policy. It should be noted that some of our group from the private bar perceived a tendency for the lawyers of this office to interpose repetitive and sometimes questionable procedural obstacles for those bringing bid protest suits,

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<sup>8</sup> Contract awardees are generally permitted to intervene in bid protest suits, although it is the practice of one judge to permit them only *amicus* status. This is a matter which the Court of Federal Claims might wish to address in its rules.

<sup>9</sup> These might include videoconferencing, electronic filing, *etc.*

<sup>10</sup> Like the Court of Federal Claims, judges of the boards of contract appeals travel and will conduct hearings away from Washington, D.C. This is not the practice of the General Accounting Office.

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**Appendix IX**  
**Comments From the Federal Bar Association, Government Contracts Section**

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but that was not a unanimous view.

A Working Group member working with the Government pointed out that agency counsel are often located in the Washington, D.C. area, especially for civilian agencies. Thus, it was more convenient and less expensive for the Government to defend a bid protest suit brought there.

Another factor worthy of mention is that the district courts are the only forum established under Article III of the Constitution which can hear and resolve disputes about the procurement process. Unlike their counterparts on the district court, the judges of the Court of Federal Claims do not have lifetime appointments, although their period of tenure is long (15 years).

The purpose of Article III protections, like lifetime appointment, is to have a judiciary which is independent of pressure from either of the other branches. Such independence is most valuable when the matter before a court is a dispute between the sovereign and a citizen. Preserving review of Executive branch action by an Article III court, therefore, is consistent with the design of the Constitution. In the bid protest context, there are two ways to achieve this goal. One is to repeal the sunset of district court jurisdiction. The other is to elevate the judges of the U.S. Court of Federal Claims to Article III status.<sup>11</sup>

Some observers -- including a minority of the Working Group -- believe that they have discerned another difference between the judges of the district courts and those of the CFC. The former are thought to be more responsive to appearances of impropriety, and the latter are said to be less responsive to such arguments, and more interested in resolving cases on "technical" considerations of statute and regulation. If this assertion is true,<sup>12</sup> the reasons for it are difficult to understand.

One factor which the members of the panel thought might have been exaggerated was the supposed favoritism which a district court judge might show a local company. In general, the panel members felt that this was not a significant factor in bid protest litigation. Moreover, restrictions on venue and jurisdiction sometimes make it impractical to file suit in a disappointed bidder's local district court, as noted above.

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<sup>11</sup> One judge of this Court has noted that there is no assumption of reappointment after the expiration of a 15-year term, and that the Justice Department is active in the reappointment process. Therefore, he concluded, "... a judge who wants to remain active must obtain the support of the representative of one of the litigants in all cases before the court, neither a seemly nor desirable situation." Bruggink, E., "A Modest Proposal," 28 *Pub. Cont. L. J.* 529, 541-42 (1999).

<sup>12</sup> No quantitative or other analytical data seems available to confirm or deny this assertion, and it is difficult to imagine how such data could be developed.

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## **Conclusions**

### **If district court jurisdiction “sunsets,” is there a need for further legislation?**

One area of concern is whether the sunset of district court jurisdiction will extinguish the ability of Federal courts generally to review certain procurement-related questions. In other words, will the district courts lose jurisdiction over a type of case or controversy which the Court of Federal Claims cannot hear and resolve? Areas where this might happen include: review of agency decisions to override the automatic statutory stay during GAO protests, debarments and suspensions, decisions to perform work in-house or to “contract-out,” or so-called “reverse” protests.<sup>13</sup>

At first, there was concern that this might be the case. However, a decision of the Court of Appeals for the Federal Circuit has alleviated anxiety on this point. See *Rumcor Services v. United States*, 185 F.3d 1286 (C.A.F.C. 1999). In this opinion, which overturned the ruling below, the appellate court gave a broad reading to the statute conferring jurisdiction of bid protest suits on the Court of Federal Claims. The words “any alleged violation of statute or regulation in connection with a procurement or a proposed procurement” are to be taken literally, and so it is unlikely that the sunset of district court litigation will extinguish any type of suit which can be brought now. Thus, there appears to be no immediate need for further legislation if the district courts lose their jurisdiction over bid protest suits.

### **The impact on small business**

One of the factors which GAO is to consider is the impact of sunset on “the ability of small businesses to challenge violations of Federal procurement law.” Pub. L. No. 104-320, *supra*, section 12(c). As noted above, small businesses now invoke Government contracts fora in the Washington, D.C. area on a regular basis. Moreover, half of the plaintiffs filing bid protest cases before the Court of Federal Claims are small businesses, and more small businesses file such actions in that court than in all district courts combined. To the extent that small businesses might want to be represented by their local counsel, the CFC Rules permit this.<sup>14</sup> Finally, a small business that prevails in its action may seek partial reimbursement of its legal fees under the Equal Access to Justice Act, and will probably recover if the Government’s position is not “substantially justified.” 28 U.S.C. § 2412. On the whole, therefore, it does not seem that the sunset of district court jurisdiction will have a material adverse impact on the ability of small

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<sup>13</sup> These are protests by a bidder whose contract award has been canceled due to a bid protest brought by a competitor.

<sup>14</sup> Rule 81(b)(1) makes an attorney eligible to practice if he or she is “admitted to practice in the Supreme Court of the United States, or the highest court of any state, territory, possession, or the District of Columbia, or the United States Court of Appeals for the Federal Circuit.” Moreover, they can appear *pro se*. Cf. *Meir Dubinsky v. United States*, 43 Fed. Cl. 243 (1999).

businesses to challenge procurement actions.<sup>15</sup>

**Is district court jurisdiction necessary?**

Section 12(c) of Public Law No. 104-320, *supra*, charges the General Accounting Office to undertake a study “to determine whether concurrent jurisdiction [of the Court of Federal Claims and the district courts] is necessary.” The statute poses the question in a way which suggests the answer. As discussed above, the concurrent jurisdiction of the district courts may be desirable for a number of reasons, and there appear to be no clearly significant benefits to termination of that jurisdiction. However, none of the factors examined is so grave as to compel the conclusion that continued jurisdiction is absolutely necessary. And the phrasing of the statute places the burden of proof on those who would continue district court jurisdiction.

Sunset of district court jurisdiction will almost certainly increase the caseload of the Court of Federal Claims in this area. The added responsibility placed on the Court of Federal Claims as the sole judicial forum for such controversies will surely be challenging, but the members of the panel know of no reason why the Court cannot be up to the mark.

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<sup>15</sup> One panel member was concerned that the expense of travel and the possibly higher billing rates of D.C. counsel might make CFC litigation more costly to small businesses. However, it is not necessary to be admitted to the D.C. bar to practice before the CFC. If cost is a problem for small businesses, a better solution might be to liberalize the fee recovery provisions of the Equal Access to Justice Act.

# GAO Contacts and Staff Acknowledgments

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## GAO Contacts

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