

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

December 29, 1999

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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.¹ 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

¹ 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.

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.

- 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)² 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).³ 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.*

² 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.

³ The Section understands that the deadline for submission of GAO's study has been extended to March 2000.

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.

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.⁴ *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.⁵ 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

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

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

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.

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.⁶ 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.

⁶ *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.)

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.⁷ 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.⁸

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.

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.⁹ This would probably entail some degree of travel and

⁷ 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 (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.

⁸ 28 U.S.C. §§ 84, 112, 124.

⁹ 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.

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.¹⁰ 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.¹¹

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.¹²

¹⁰ 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.

¹¹ Cong. Rec. H12276-77 (Oct. 4, 1996).

¹² 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

(Continued...)

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 protests¹³ 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.¹⁴ This option frequently has been offered in rebuttal to concerns regarding hardships posed by limiting judicial protests to the COFC.¹⁵ The Section is not aware, however, of any significant use of this option in general¹⁶ and only two instances¹⁷ since the ADRA was enacted. Besides an 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

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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).

¹³ 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.

¹⁴ 28 U.S.C. § 173.

¹⁵ *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).

¹⁶ *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.)

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

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,¹⁸ 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.¹⁹ In addition, under

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

¹⁹ *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.

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the doctrine of sovereign immunity, the Government 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.²⁰ 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.²¹ Protests thus make up

(...Continued)

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).

²⁰ 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).

²¹ *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 (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.)

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.²²

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.²³ 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.

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

²³ 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.

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)²⁴ and twelve regional court of appeals create the risk of conflicting opinions on procurement issues. *Report of the Acquisition Law Advisory Panel to the United States Congress*, I-262-264 (Jan. 1993).²⁵ 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).²⁶ As discussed below, however, a closer look at the

²⁴ This figure incorrectly represents the number of district courts, which number only 94.

²⁵ 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.

²⁶ 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).

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 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.²⁷ 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*

²⁷ 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.)

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.

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.²⁸ The

²⁸ 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 f° 142 (declaring that GAO will no longer follow its prior decisions regarding whether

(Continued...)

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.²⁹

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.³⁰ 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 when it enacted the ADRA, which affirmatively granted pre-award and post-award protest jurisdiction to both the COFC and the district courts.³¹

(...Continued)

federal agencies are exempt from the requirement to comply with local solid waste management regulations).

²⁹ 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).

³⁰ 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).

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

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.³² 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.³³ 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)

³² 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).

³³ *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 protests³⁴ 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,

³⁴ 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).

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 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 United³⁵ 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

³⁵ So in original.

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 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 nonresponsible. *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, 1997.³⁶ 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 sunset on January 1, 2001. Again, litigation would be required to resolve the status of the district courts jurisdiction following the sunset date.

³⁶ 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.

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.

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