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# TACKLING MERITLESS BID PROTESTS: THE CASE FOR REBALANCING PROTEST COSTS IN THE FEDERAL PROCUREMENT ARENA

Eric S. Underwood\*

## I. INTRODUCTION

Green Bay might not have had any time left in its season if not for referee Gene Steratore's decision. Dez Bryant's leaping, bobbling [thirty-one]-yard catch at the Packers [one] on a fourth-and-[two] play was challenged by Green Bay coach Mike McCarthy. Instead of first-and-goal for Dallas . . . the ball went over to the Packers.<sup>1</sup>

The Official Playing Rules of the National Football League (NFL) afford each team two opportunities per game to challenge various rulings on the field (the Coaches' Challenge Rule).<sup>2</sup> To challenge an official ruling, a coach simply throws a red flag onto the field from the sideline.<sup>3</sup> Each challenge triggers an instant replay of the previous play.<sup>4</sup> After review, the presiding official either confirms or reverses the challenged ruling on the field.<sup>5</sup>

On January 11, 2015, Green Bay Packers Head Coach Mike McCarthy used one of his challenges after Dallas Cowboys wide receiver Dez Bryant appeared to have completed a catch at the Packers' one-yard line.<sup>6</sup> With four minutes and six seconds left in the fourth quarter and the Cowboys then leading the game by one point, Coach McCarthy knew that if the Cowboys scored a touchdown, his team's chances of a victory were slim to none.<sup>7</sup> "That was such an impactful play," McCarthy exclaimed after the game.<sup>8</sup> "You have to challenge that," he continued.<sup>9</sup>

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\* J.D. Candidate, The University of Tulsa College of Law, 2017. First and foremost, I thank my wife, Taylor, for her unwavering love, support, and confidence in me. I also thank my *Tulsa Law Review* colleagues for their constructive feedback and their exceptional efforts to refine this article into a finished product.

1. David Purdum, Associated Press, *Two Second-Half TDs Help Packers Rally vs. Cowboys*, ESPN.COM (Jan. 11, 2015), <http://espn.go.com/nfl/recap?gameId=400749518>.

2. ROGER GOODELL, OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 63 (2015), available at <http://operations.nfl.com/the-rules/2015-nfl-rulebook>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Vic Ketchman, *McCarthy's Challenge Saves the Day*, PACKERS.COM (Jan. 11, 2015), <http://www.packers.com/news-and-events/article-game-recap/article-1/McCarthy-challenge-saves-the-day/e3599c4d-da8f-430c-8dbb-5f05643d18ca>.

7. Purdum, *supra* note 1.

8. Ketchman, *supra* note 6.

9. *Id.*

Fortunately for the Packers, Coach McCarthy's judicious use of a challenge convinced referee Gene Steratore to reverse the previous ruling on the field that Bryant made the catch.<sup>10</sup> The reversed call elicited a turnover on downs and a significant momentum shift in favor of the Packers, who went on to defeat the Cowboys 26-21 and earned themselves a chance to play the Seattle Seahawks for the 2014 National Football Conference title.<sup>11</sup>

While a successful Coaches' Challenge—especially on a crucial play—can contribute significantly to a victory for the challenging team, it does not guarantee a victory.<sup>12</sup> Indeed, the Coaches' Challenge Rule cuts both ways.<sup>13</sup> For example, in 2014, Kansas City Chiefs Head Coach Andy Reid challenged an official's ruling that San Francisco 49ers quarterback Colin Kaepernick scrambled for a first down on a key third-down play.<sup>14</sup> Reid had a clear, up-close look at the play and was confident that his opponent did not pick up the first down; so he tossed his red flag onto the field, initiating an instant replay.<sup>15</sup> After review, the official confirmed the ruling on the field.<sup>16</sup> The 49ers retained possession of the ball and subsequently scored the winning touchdown in their 22-17 victory against the Chiefs.<sup>17</sup>

Just as NFL coaches can challenge an official ruling on the field, in the arena of federal procurement, contractors enjoy similar opportunities to challenge the government's contracting decisions.<sup>18</sup> Filing a protest in one of three venues is the "red flag" that initiates such a challenge.<sup>19</sup> Additionally, like a Coaches' Challenge, which does not guarantee the challenging team a victory even if the challenge is successful, a successful protest does not guarantee that the protestor will ultimately win a government contract.<sup>20</sup> In fact, it is extremely rare for a protestor to win a contract subsequent to a successful protest.<sup>21</sup>

To illustrate this rarity, in fiscal year 2010 (FY10), out of roughly 1,500 protests filed with the Government Accountability Office (GAO), the GAO sustained merely forty-five protests.<sup>22</sup> Of those sustained protests, only eight resulted in a favorable contract award for the protestor.<sup>23</sup> Notwithstanding this statistical improbability, between FY01 and FY14, the frequency of protests to the GAO increased by roughly 125% (from 1,146 in FY01 to 2,561 in FY14).<sup>24</sup> Conversely, during the same period,

10. *Id.*

11. *Id.*

12. See, e.g., Randy Covitz, *Chiefs' Reid is Up to the Challenge When it's Time to Throw the Red Flag*, KAN. CITY STAR (Oct. 10, 2014), available at <http://www.kansascity.com/sports/nfl/kansas-city-chiefs/article2669622.html/> (discussing Kansas City Chiefs Coach Andy Reid's unsuccessful challenge during the Chiefs' game against San Francisco).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Covitz, *supra* Note 12.

18. See generally FAR 33 (2016).

19. *Id.* 33.103-105.

20. MOSHE SCHWARTZ & KATE M. MANUEL, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R40227, GAO PROTESTS: TRENDS AND ANALYSIS 9 (July 21, 2015), available at <https://www.fas.org/sgp/crs/misc/R40227.pdf>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 3, 4 fig. 1.

the frequency of sustained protests as a percentage of protests filed decreased by over fifty percent (from 6% in FY01 to 2.9% in FY14).<sup>25</sup>

The increasing frequency of federal procurement protests to the GAO is subject to vigorous debate among government officials, end users of federal acquisitions, and academics.<sup>26</sup> On one hand, protests empower contractors to hold the government accountable for its business decisions.<sup>27</sup> On the other hand, protests increase the government's cost of doing business.<sup>28</sup>

While there are several debates over whether the benefits of protests outweigh the costs, one thing is certain: the government, as opposed to its private sector counterparts, bears the majority of costs that arise out of procurement protests.<sup>29</sup> Of the several factors that contribute to this phenomenon, one is especially intriguing—that an interested party who does not win a government contract has little more to lose by protesting the award in a misguided attempt to increase his chances of ultimately getting a contract.<sup>30</sup>

Beyond the administrative costs of preparing the protest, as former Under Secretary of Defense for Acquisition, Technology, and Logistics, Dr. Jacques Gansler, once put it, an offeror can essentially protest “for the price of a stamp.”<sup>31</sup> In stark contrast, upon receipt of a protest, the federal contracting agency must stay performance of the awarded contract, address each aspect of the procurement with which the offeror takes issue, seek legal counsel, file a response, and wait for the respective agency or the GAO to resolve the protest.<sup>32</sup> If the GAO sustains the protest, the government may become further obligated to pay the protestor's costs—exclusive of profit—of filing the protest, including reasonable attorney, consultant, and expert witness fees, as well as bid and proposal preparation costs.<sup>33</sup> If the GAO dismisses or denies the protest, however, the protestor is not similarly obligated to reimburse the government's costs to resolve the protest.<sup>34</sup>

25. SCHWARTZ & MANUEL, *supra* note 20, at 8 fig. 5.

26. See, e.g., Andy Medici & Jim McElhatton, *How Bid Protests are Slowing Down Procurements*, FED. TIMES, Jul. 21, 2013, <http://www.federaltimes.com/article/20130721/ACQUISITION03/307210001> (discussing various costs associated with bid protests); see also Daniel I. Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489 (2013) (analyzing well-recognized costs and benefits that protests impose on federal procurements).

27. KATE M. MANUEL & MOSHE SCHWARTZ, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 3 (Jan. 19, 2016), available at <https://www.fas.org/sgp/crs/misc/R40228.pdf>.

28. *Id.* at 3-4.

29. See generally Gordon, *supra* note 26; FAR 33.104 (2016) (enumerating the procuring agency's responsibilities and costs that arise out of a protest).

30. Eric S. Crusius, *Acquisition 101: When a Bargain Isn't a Bargain*, GOV'T EXEC. (Jan. 12, 2015), <http://www.govexec.com/contracting/2015/01/acquisition-101-when-bargain-isnt-bargain/102672>; see also SCHWARTZ & MANUEL, *supra* note 20, at 9 (illustrating the low probability that a successful protest results in the protestor ultimately getting a contract).

31. JACQUES S. GANSLER, AFFORDING DEFENSE 191 (1991); but see 4 C.F.R. § 21(f) (2016) (the current regulation permits offerors to submit protests via hand delivery, mail, commercial carrier, facsimile, or email).

32. See generally FAR 33.104 (2016) (enumerating the procuring agency's responsibilities in response to a protest).

33. *Id.* 33.104(h).

34. *Id.* (There is no requirement for an interested party whose protest is dismissed to reimburse the government's costs of addressing the protest).

The objectives of this article are (1) to highlight the imbalance in which protest costs are borne between the government and its private sector counterparts and (2) to explore potential solutions to more equitably balance protest costs—especially those associated with dismissed protests—in order to reduce the burden protests impose on government programs and, ultimately, taxpayers.<sup>35</sup> In response to this analysis, Congress should amend protest regulations to require protestors to include a bond with their protest equal to a percentage of the total contract value in an effort to (1) suppress the apparent “What do we have to lose?” mentality that the current protest system perpetuates and (2) to decrease the frequency of meritless protests.

Part II of this article clarifies the issue at hand with a brief overview of the federal acquisition system, including a discussion that defines “protest” and identifies who may protest, reasons one might file a protest, and the mechanics of filing a protest.<sup>36</sup> Part III evaluates the costs and benefits that protests impose on the federal procurement system and accepts, for the sake of argument, that the overarching benefits of protests justify the costs.<sup>37</sup> Part IV posits that, due to the inverse relationship between the frequency of protests and the number of sustained protests, the question should not be whether the benefits of protests outweigh the costs, but whether opportunities exist to decrease meritless protests and the government’s administrative costs associated with resolving them.<sup>38</sup> Part IV also explores historically proposed solutions to address this issue and offers a new solution inspired by existing state procurement laws as well as previously unmentioned intricacies of the NFL’s Coaches’ Challenge Rule.<sup>39</sup>

## II. BACKGROUND

### A. Overview of the Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR) codifies the processes and procedures by which the federal government acquires goods and services for executive agencies.<sup>40</sup> The overarching purpose of the FAR is to “deliver . . . the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives.”<sup>41</sup> To that end, the FAR aims to “satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service”; “minimize administrative operating costs”; and “conduct business with integrity, fairness, and openness.”<sup>42</sup> Inherent in these principles is the objective to promote competition for government contracts.<sup>43</sup>

35. See discussion *infra* Parts III & IV.

36. See discussion *infra* Part II.

37. See discussion *infra* Part III.

38. See discussion *infra* Part IV.

39. See discussion *infra* Part IV.

40. FAR 1.1 (2016).

41. *Id.* 1.102(a).

42. *Id.* 1.102(b).

43. *Id.* 1.102(b)(1)(iii).

## B. *Protesting Government Procurement Actions*

### 1. “Protest” Defined

A “protest” is “a written objection by an interested party” to: (1) a solicitation or request for offers for a procurement, (2) the cancellation of a solicitation, (3) a contract award or proposed contract award, or (4) a contract termination.<sup>44</sup> For simplicity, one can classify protests into two categories: “pre-award” and “post-award.”<sup>45</sup> By contrast, the GAO may not consider—among several enumerated issues—contract administration concerns, contracting officer determinations of contractor responsibility, untimely protests, protests that lack sufficient legal or factual grounds, or subcontract protests.<sup>46</sup>

### 2. Who may Protest

Only interested parties may file a protest.<sup>47</sup> An interested party is “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or . . . failure to award a contract.”<sup>48</sup> Typically, prior to contract award, any prospective bidder qualifies as an interested party.<sup>49</sup> Conversely, after contract award, offerors who actually submitted bids or proposals are interested parties, as only those offerors were eligible for award.<sup>50</sup> Naturally, the “focus upon direct economic interest in determining who is an interested party means that a larger number of contractors can generally bring pre-award protests than can bring post-award protests.”<sup>51</sup> Concerned citizens and subcontractors usually lack standing to file a protest because they have no *direct* economic interest in the procurement outcome.<sup>52</sup>

### 3. Reasons to Protest

Offerors protest federal contracting actions for a variety of reasons.<sup>53</sup> First, protests often stem from an offeror’s belief that the government made a material error during the bidding process.<sup>54</sup> Commonly cited errors include “poorly written or vague contract requirements, failure to follow the process or [evaluation] criteria laid out in the request for proposals, and failure to adequately document government

44. *Id.* 33.101.

45. *See, e.g.*, FAR 15.507(a) (2016) (advising that “[u]se of agency protest procedures that incorporate the alternative dispute resolution provisions of Executive Order 12979 is encouraged for both *preaward* and *postaward* protests.”) (emphasis added).

46. 4 C.F.R. § 21.5 (2016) (Nor may the GAO hear protests related to Small Business Administration issues, procurement integrity, procurements by non-federal agencies, suspensions and debarments, competitive range determinations, or decisions to file a protest on behalf of federal employees).

47. U.S. GOV’T ACCOUNTABILITY OFFICE, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* 6 (9th ed. 2009), available at <http://www.gao.gov/decisions/bidpro/bid/d09417sp.pdf>.

48. FAR 33.101 (2016).

49. MANUEL & SCHWARTZ, *supra* note 27, at 6.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* discussion *infra* Part II.B.3.

54. SCHWARTZ & MANUEL, *supra* note 20, at 11.

findings.”<sup>55</sup> An unsuccessful offeror might also protest if the procuring agency did not debrief the offeror after contract award.<sup>56</sup> This can create the perception that the procuring agency treated the contractor unfairly during the award process and, as a result, often invites offerors to protest simply to gain access to information that would otherwise become known during a debriefing.<sup>57</sup> Notably, however, the government is only required to provide a debriefing upon an unsuccessful offeror’s timely request, so the onus to initiate a debriefing is on the offeror.<sup>58</sup>

As further motivation to file a protest, analysts cite “the increase in value of individual contracts, longer periods of contract performance, policy trends to in-source more work, and decreased defense spending.”<sup>59</sup> These factors increase contractors’ appetite for work and consequently make them more likely to protest unfavorable contract awards.<sup>60</sup> This is especially true for incumbent contractors who do not win a follow-on contract after their current contract expires.<sup>61</sup> Since a GAO protest prevents the procuring agency from awarding a contract until the protest is resolved, incumbent contractors in this situation may be able to squeeze a few more months—and additional revenue—out of their current contracts.<sup>62</sup>

Another economic incentive to protest especially exists within the realm of major defense acquisitions.<sup>63</sup> In this “high-stakes, winner-take-all world . . . the winner secures future revenue for decades.”<sup>64</sup> As one government contracts attorney acknowledged, “For the winner, it’s going to be worth billions of dollars over the next 20 years. For the loser, they go home.”<sup>65</sup> Aside from major defense acquisitions, but on a related note, federal agencies are increasingly relying on strategic sourcing for routine commodities and services in order to maximize the government’s buying power.<sup>66</sup> While strategic sourcing may secure better deals for the government, it also limits opportunities to compete for government contracts.<sup>67</sup> Thus, prospective contractors are willing to go to great lengths to win a contract, which may include filing a protest.<sup>68</sup>

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55. *Id.*

56. *Id.*

57. *Id.*; see also FAR 15.505(e), 15.506(d) (2016) (identifying the information an unsuccessful offeror may request upon elimination from the competition).

58. FAR 15.505(a)(1), 15.506(a)(1) (2016). Accordingly, in most cases, if an unsuccessful offeror did not receive a debriefing, it is because it did not request one.

59. SCHWARTZ & MANUEL, *supra* note 20, at 11.

60. *Id.*

61. *Id.* at 11-12.

62. *Id.*

63. See, e.g., TOMMY M. GATES, THIRD-PARTY PROTEST REGIME AND GAO PROTEST STATISTICS: DOD VS. OTHER FEDERAL AGENCIES 15 (Apr. 2009), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a539659.pdf> (discussing economic interests in protesting major defense acquisitions).

64. *Id.*

65. *Id.* at 15-16 (citing Richard Lardner, *Do Defense Contractors Protest Too Much?*, USA TODAY, May 24, 2008, [http://usatoday30.usatoday.com/news/washington/2008-05-23-3339653735\\_x.htm](http://usatoday30.usatoday.com/news/washington/2008-05-23-3339653735_x.htm)).

66. GATES, *supra* note 63, at 16.

67. *Id.*

68. *Id.*

In addition to these glaring economic incentives, some contractors protest in an attempt to influence procurement agency behavior in future competitions.<sup>69</sup> Moreover, a contractor might protest to demonstrate to its shareholders and senior leadership that it exhausted all available strategies to secure work.<sup>70</sup> Protests also enable contractors to potentially stifle their competition by delaying a contract award.<sup>71</sup>

Finally, and perhaps most significantly, the costs to file a protest are extremely minimal.<sup>72</sup> Thus, the marginal cost to file a protest beyond the time and expense a contractor incurs to prepare a contract proposal essentially promotes a “What do we have to lose?” mentality among contractors whose proposals do not result in a contract award.<sup>73</sup>

#### 4. The Mechanics of a Protest

An interested party may file a protest with the procuring agency, the GAO, or the Court of Federal Claims.<sup>74</sup> The GAO, however, hears more protests than the Court of Federal Claims.<sup>75</sup> Moreover, statistics are not readily available to analyze protests across all federal agencies.<sup>76</sup> Accordingly, the scope of this article is limited to protests to the GAO.<sup>77</sup>

A protest to the GAO begins when an interested party timely submits a notice to the GAO that: (1) identifies the contracting agency and the solicitation or contract number; (2) lists the legal and factual grounds of protest; (3) establishes that the protestor is an interested party; and (4) states the relief requested (*e.g.*, termination or re-competition of a contract).<sup>78</sup> Beyond these requirements, “[n]o formal briefs or other technical forms of pleading or motion are required.”<sup>79</sup> A pre-award protest is timely if the procuring agency receives it prior to the deadline to submit proposals.<sup>80</sup> A post-award protest, on the other hand, is timely if the procuring agency receives it “not later than [ten] days after the basis of protest is known or should have been known (whichever is earlier).”<sup>81</sup>

69. SCHWARTZ & MANUEL, *supra* note 20, at 12.

70. *Id.*

71. *Id.*

72. See 4 C.F.R. § 21.1(c), (f) (2016) (outlining the requirements to file a protest).

73. Defense Industry Daily Staff, *How the US GAO's Bid Protest Process Works and Why Defense Contractors Abuse It*, DEFENSE INDUSTRY DAILY (April 22, 2010, 7:51 PM), <http://www.defenseindustrydaily.com/gao-protests-defense-programs-06269>.

74. FAR 33.103-105 (2016).

75. MANUEL & SCHWARTZ, *supra* note 27, at 1.

76. *Id.*

77. See discussion *infra* Parts I-V.

78. 4 C.F.R. § 21.1(c) (2016).

79. *Id.* § 21.1(f).

80. *Id.* § 21.2(a)(1).

81. *Id.* § 21.2(a)(2); *but see id.* §§ 21.2(a)(2)-(3), 21.2(c) (providing the following exceptions to this rule: First, “with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protestor, but shall be filed not later than 10 days after the date on which the debriefing is held.” Additionally, “[i]f a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action will be considered . . . .” Finally, the GAO may consider an untimely protest “for good cause shown, or where it determines that a protest raises issues significant to the procurement system.”).

Upon receipt of a protest, the GAO must notify the procuring agency of the protest within one business day.<sup>82</sup> The agency then relays the protest to the contract awardee if the agency awarded a contract.<sup>83</sup> If the agency did not award a contract, it must send the protest to all offerors eligible to receive a contract.<sup>84</sup> Once a procuring agency becomes aware of a pre-award protest, it may not award a contract until the GAO resolves the protest, unless the head of the contracting activity determines that “[u]rgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO.”<sup>85</sup> In federal procurement lingo, a protest elicits an “automatic stay”—also referred to as a “Competition in Contracting Act (CICA) stay”—on contract award.<sup>86</sup>

Similarly, upon notice of a post-award protest, “the contracting officer shall immediately suspend performance or terminate the awarded contract” until the GAO decides the protest.<sup>87</sup> In addition to the “urgent and compelling circumstances” exception, the procuring agency may also proceed to award a contract if the head of the contracting activity determines that “[c]ontract performance will be in the best interests of the United States.”<sup>88</sup>

Along with an automatic stay of contract award or performance, notice of a GAO protest triggers the procuring agency’s duty to respond to the protest.<sup>89</sup> Specifically, within thirty days of being notified of the protest, the procuring agency must submit to the GAO:

[T]he contracting officer’s statement of the relevant facts, including a best estimate of the contract value, a memorandum of law, and a list and a copy of all relevant documents, or portions of documents, not previously produced, including, as appropriate: the protest; the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents. In appropriate cases, a party may request that another party produce relevant documents, or portions of documents, that are not in the agency’s possession.<sup>90</sup>

The protestor must comment on the agency’s report and submit its comments to the GAO within ten calendar days after the GAO receives the agency’s report.<sup>91</sup>

82. *Id.* § 21.3(a).

83. 4 C.F.R. § 21.3(a) (2016).

84. *Id.*

85. FAR 33.104(b)(1) (2016).

86. *See, e.g.,* MANUEL & SCHWARTZ, *supra* note 27, at 11.

87. FAR 33.104(c)(1)-(2) (2016); *see also* *EOD Tech., Inc. v. United States*, 82 Fed. Cl. 12 (2008) (upholding the Army’s override of an automatic stay in a procurement for canine services for the Army Special Forces due to the “urgent and compelling” need to mitigate the high risk of security breaches on military installations in Afghanistan); *see also* *TEAC Am. v. United States Dep’t of the Navy*, 876 F. Supp. 289 (D.D.C. 1995) (holding that the Navy’s override of a protest regarding a contract for a cockpit video recording system for the F/A-18 aircraft was in the “best interest of the United States” because failure to override would interfere with the aircraft’s deployment to Bosnia and troop training and the public interest required that the troops be well equipped).

88. FAR 33.104(c)(2) (2016).

89. 4 C.F.R. § 21.3(c) (2016).

90. *Id.* § 21.3(d).

91. *Id.* § 21.3(f).

Subject to few exceptions, the GAO will dismiss the protest if the protestor fails to submit comments within the ten-day period.<sup>92</sup> Generally, the GAO must decide the protest within one hundred days of the filing date.<sup>93</sup> In FY14, the GAO resolved protests on average within thirty-nine days.<sup>94</sup>

The GAO may dismiss, deny, or sustain a protest.<sup>95</sup> The GAO ordinarily dismisses protests containing procedural defects such as (1) failure to address all requirements of 4 C.F.R. § 21.1 or (2) untimely filing.<sup>96</sup> Similarly, if the GAO finds that the procuring agency complied with procurement statutes or regulations, it denies the protest.<sup>97</sup> In either case, the procuring agency may proceed with its procurement once the GAO announces its decision.<sup>98</sup> Conversely, if the GAO determines that the procuring agency violated procurement regulations, it sustains the protest and recommends that the agency implement one or more of several available remedies.<sup>99</sup> Additionally, the GAO may recommend that the procuring agency reimburse the protestor for its costs of “(1) [f]iling and pursuing the protest, including attorneys’ fees and consultant and expert witness fees; and (2) [b]id and proposal preparation.”<sup>100</sup>

Interestingly, GAO decisions and recommendations are not legally binding upon procuring agencies since “GAO is a legislative . . . agency and cannot constitutionally compel executive . . . agencies to implement its recommendations because of the separation of powers doctrine.”<sup>101</sup> Nevertheless, procuring agencies usually implement GAO recommendations.<sup>102</sup>

### III. PROTEST COSTS AND BENEFITS

Without question, protests promote integrity within the procurement system and enable interested parties to hold the government accountable for its business decisions.<sup>103</sup> These benefits, however, do not come without a cost.<sup>104</sup> On the con-

92. *Id.*

93. 31 U.S.C. § 3554(a)(1) (2012); *but see id.* § 3554(a)(2) (under the “express option,” the GAO must decide a protest within 65 days from the filing date).

94. SCHWARTZ & MANUEL, *supra* note 20, at 14. The authors note that the GAO provided this data; however, they acknowledge that it may be somewhat unreliable.

95. *See* FAR 33.104(a)(2) (2016) (mentioning that the GAO may deny a protest); *see also id.* 33.104(a)(3)(i)(A) (identifying that the GAO may dismiss a protest); *see also id.* 33.104(h)(8) (outlining a situation in which the GAO might sustain a protest).

96. 4 C.F.R. §§ 21.1(i), 21.2(b) (2016).

97. MANUEL & SCHWARTZ, *supra* note 27, at 15.

98. *Id.*

99. 4 C.F.R. § 21.8(a) (2016). The available remedies are: (1) refrain from exercising options under the contract; (2) terminate the contract; (3) re-compete the contract; (4) issue a new solicitation; (5) award a contract consistent with statute or regulation; or such other recommendation(s) as GAO determines necessary to promote compliance.

100. *Id.* § 21.8(d).

101. MANUEL & SCHWARTZ, *supra* note 27, at 16 (citing *Ameron, Inc. v. United States Army Corps of Eng’rs*, 809 F.2d 979, 986 (3d Cir. 1986)).

102. *Id.* at 16-17. Between FY01 and FY14, only in forty-two cases did a procuring agency decline to fully adopt the GAO’s recommendations.

103. SCHWARTZ & MANUEL, *supra* note 20, at 2.

104. MANUEL & SCHWARTZ, *supra* note 27, at 3-4.

trary, protests impose costs on the federal procurement system that impact the government, contractors, and taxpayers.<sup>105</sup> Whether these benefits outweigh the costs is subject to vigorous debate.<sup>106</sup> For example, in response to the 39% increase in Defense Department protests between 2001 and 2008, former acting Under Secretary of Defense for Acquisition, Technology, and Logistics, John Young Jr., asserted that “[p]rotests are extremely detrimental to the warfighter and the taxpayer” and observed that “protest actions consume vast amounts of time for acquisition, legal[,] and requirements team members; delay program initiation and the delivery of capability; strain relations with our industry partners and stakeholders; and create misperceptions among American citizens.”<sup>107</sup> One of Young’s industry counterparts at Boeing similarly expressed, “At the end of the day, [protests] really slow[] down the process of getting hardware and services to the warfighter.”<sup>108</sup>

Those at the other end of the spectrum applaud the protest system’s emphases on transparency and accountability and downplay the costs borne by federal procurement stakeholders.<sup>109</sup> The holders of this viewpoint remain steadfast that the benefits of the protest system outweigh its costs.<sup>110</sup> Moreover, some argue that the government’s costs to address protests “are often misunderstood and therefore overstated, in terms of the frequency of protests, the length of time that they last, and the risk that the agency’s choice of contractor will be overturned in the process.”<sup>111</sup>

This article by no means attempts to resolve the tension between the social, economic, political, and practical undertones of these opposing viewpoints.<sup>112</sup> To fully appreciate the forthcoming recommendation, however, requires a brief discussion of the well-recognized costs and benefits of federal procurement protests.<sup>113</sup>

#### A. Protest Costs

Protests levy direct and indirect costs on the federal procurement system.<sup>114</sup> The vast majority of direct costs come in the form of procurement delays and admin-

105. Robert Brodsky, *Bidders Bite Back*, GOV’T EXEC. (Feb. 1, 2011), <http://www.govexec.com/magazine/features/2011/02/bidders-bite-back/33195>.

106. See generally *id.* (discussing several opposing viewpoints—including those of industry executives and federal procurement officials—on protest benefits and costs); see also Gordon, *supra* note 26 (discussing the costs and benefits of protests in federal procurement).

107. Brodsky, *supra* note 105.

108. *Id.* (quoting Daniel Beck, spokesman for The Boeing Company).

109. See, e.g., Gordon, *supra* note 26, at 510 (asserting that “[w]hatever costs protests impose on the procurement system are outweighed . . . by the benefits that protests bring, in terms of transparency, accountability, education, and protection of the integrity of the U.S. federal acquisition system.”); see also Brodsky, *supra* note 105 (quoting Ralph White, GAO’s Managing Associate General Counsel for Procurement Law, “What you get [via the protest system] is a lot more transparency, integrity, or accountability than in other places . . . It’s a system I would hate to walk away from and think about what it would mean to provide no opportunity for a redress when people think that something was unfair.”).

110. Gordon, *supra* note 26, at 510; Brodsky, *supra* note 105.

111. Gordon, *supra* note 26, at 510.

112. See discussion *infra* Parts I-V.

113. See discussion *infra* Part III.

114. See discussion *infra* Part III.A.

istrative costs, whereas indirect costs stem largely from behavioral effects that protests—or, perhaps more accurately, the fear of protests—have on federal procurement officials.<sup>115</sup>

### 1. Procurement Delays

Within the context of procurement delays, the CICA stay is the most obvious delay that protests generate.<sup>116</sup> Subject to the exceptions discussed above, under CICA, a procuring agency may not award a contract in the midst of a pending pre-award protest to the GAO.<sup>117</sup> Similarly, in the case of a post-award protest, the contracting agency must suspend contract performance until the GAO resolves the protest.<sup>118</sup> In either case, a CICA stay commences after a contractor files a timely protest and the GAO subsequently notifies the respective contracting agency.<sup>119</sup>

In theory, a CICA stay may last as long as one hundred days—the number of days in which the GAO must typically resolve a protest.<sup>120</sup> Thus, unless the agency overrides the CICA stay or extends the period of performance of an existing contract (via a “bridge contract”) to continue service during the stay, the end user of the procurement may suffer mission delays lasting as long as one hundred days.<sup>121</sup> Ironically, to override a CICA stay or award a bridge contract also involves intense bureaucratic scrutiny that may contribute to additional delays within the existing one hundred day window.<sup>122</sup> Moreover, a protestor may appeal a CICA stay override to the United States Court of Federal Claims, which, if successful, reinstates the automatic stay.<sup>123</sup> Another unfortunate consequence of the CICA stay is it creates the presumptive perception that the contracting agency violated procurement regulations.<sup>124</sup>

In addition to the CICA stay, further mission delays may result if the procuring agency takes corrective action in response to a GAO protest.<sup>125</sup> That is, after it receives a protest, the procuring agency perceives that it may have erred during the bidding process and voluntarily corrects its mistake.<sup>126</sup> Of course, “[s]uch voluntary action by an agency could indicate that the agency believes that a given protest has merit,” which renders this cost outside the scope of the issues this article intends to

115. *See id.*

116. MANUEL & SCHWARTZ, *supra* note 27, at 11.

117. 31 U.S.C. § 3553(c)(1) (2012).

118. *Id.* § 3553(d)(3)(a).

119. *Id.* § 3553(d)(3), (4).

120. *Id.* § 3554(a)(1); *but see id.* § 3554(a)(2) (discussing the sixty-five day time frame under the “express option”).

121. *Id.* § 3553(c)(2)(A), (d)(3)(C); *see also* Kevin J. Wilkinson & John M. Page, *CICA Stays Revisited: Keys to Successful Overrides*, 66 A.F. L. REV. 135, 152-54 (2010) (discussing the use of “bridge contracts” to alleviate mission impacts associated with automatic CICA stays).

122. *See* Wilkinson & Page, *supra* note 121, at 155 (observing that “decisions to override CICA stays must be made judiciously and are subject to intense scrutiny” and that “bridge contracts are plausible alternatives to overrides provided they are tailored appropriately to bridge gaps in necessary services and do not circumvent federal procurement law.”).

123. MANUEL & SCHWARTZ, *supra* note 27, at 13 n. 95 (observing that, “[s]ince *Ramcor Servs. Group, Inc. v. United States*, 183 F.3d 1286 (Fed. Cir. 1999), all such suits have been brought in the Court of Federal Claims.”).

124. GATES, *supra* note 63, at 23.

125. Gordon, *supra* note 26, at 502 (citing SCHWARTZ & MANUEL, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS, ANALYSIS, AND OPTIONS FOR CONGRESS 10 (2011)).

126. SCHWARTZ & MANUEL, *supra* note 125, at 5.

address.<sup>127</sup> Nevertheless, corrective action can significantly delay an acquisition.<sup>128</sup> For example, if an agency decides to take corrective action, a typical remedy is to re-compete the requirement, which can easily exceed one hundred days.<sup>129</sup>

Similarly, the most significant delays ordinarily occur when the GAO “sustain[s] a protest and the agency implements the GAO’s recommendation . . . .”<sup>130</sup> As with corrective action, the agency often re-competes at least part of the competition, which can also exceed delays associated with a CICA stay.<sup>131</sup>

## 2. Administrative Costs

Protests also increase the administrative costs of the federal procurement system.<sup>132</sup> Most notably, upon receipt of a protest, the procuring agency must address each aspect of the procurement with which the offeror takes issue, seek legal counsel, file a response, and wait for the respective agency or the GAO to resolve the protest.<sup>133</sup> While the costs associated with these activities are difficult to quantify—as every acquisition is unique in its own right—one can confidently speculate that significant cost drivers include the complexity of the acquisition, the number of offers received, and the value (or estimated value) of the contract award.<sup>134</sup>

Additionally, if the GAO sustains a protest, it may recommend that the contracting agency reimburse the protestor’s costs—exclusive of profit—of filing the protest, including reasonable attorney, consultant, and expert witness fees, as well as bid and proposal preparation costs.<sup>135</sup> Like the costs discussed above, these costs are difficult to quantify and vary from one acquisition to the next; however, similar factors likely influence these costs.<sup>136</sup> Also inherent in this situation is the GAO’s determination that a protest has merit, which likewise renders these costs outside those

127. *Id.* While the objective of this article is tailored more towards *meritless* protests, the fact that corrective action occasionally occurs in response to a protest is mentioned to identify it as another source of protest-related procurement delays.

128. *Id.* at 10.

129. *Id.*

130. Gordon, *supra* note 26, at 503.

131. *Id.*

132. *See, e.g.,* Lardner, *supra* note 65 (observing that in 2008, Comptroller General Gene Dodaro sought a forty million dollar (roughly eight percent) increase to the GAO’s budget to accommodate the steadily growing number of contract protests).

133. *See generally* FAR 33.104 (2016) (enumerating the procuring agency’s responsibilities in response to a protest).

134. *See, e.g., id.* 15.404-1(a)(1) (“The Contracting Officer is responsible for evaluating the reasonableness of the offered prices. The analytical techniques and procedures described in this section may be used, singly or in combination with others, to ensure that the final price is fair and reasonable. The *complexity* and circumstances of each acquisition should determine the level of detail of the analysis required.”) (emphasis added); *see also* U.S. DEPT OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REGULATION SUPPLEMENT MANDATORY PROCEDURES [hereinafter AFFARS MP] pt. 5333.104(c) (2015), available at <https://farsite.hill.af.mil> (follow “AFFARS” hyperlink; then follow “MP TOC” hyperlink; then follow “MP5333.104 Protests to GAO” hyperlink) (outlining required contents of the Agency Report, which include source selection evaluation documents. These documents become more lengthy and complex based upon the number of offers received); *see also* AFFARS MP 5315.3(1.4.1.1) (illustrating that the layers of review required for contract actions increase as complexity and contract value increase).

135. FAR 33.104(h)(1) (2016).

136. *Id.* 15.404-1(a)(1); AFFARS MP, *supra* note 134, pts. 5333.104(c), 5315.3(1.4.1.1); *but see* 31 U.S.C. § 3554(c)(2)(B) (2012) (under CICA, with the exception of small businesses, reimbursement of attorneys’ fees may not exceed \$150 per hour).

upon which this article is primarily focused.<sup>137</sup> What *is* of concern, however, is the one-sided nature of this remedy, as offerors who protest and lose are not equally obligated to reimburse the government's costs to resolve the protest.<sup>138</sup>

A third source of administrative costs is the fact that “[protests] have become so common that agencies expect them, build them into their contracting timelines, and regularly train their procurement staffs on how to minimize them.”<sup>139</sup> While it may be prudent to expect protests and prepare procurement personnel to respond appropriately to them, the corresponding expense is increased acquisition lead times and potentially reduced productivity due to overtraining.<sup>140</sup>

### 3. Indirect Costs

Protests also indirectly impact the federal acquisition system, as the fear of protests may negatively influence contracting officers' business decisions.<sup>141</sup> The prime example analysts cite is preference to certain source selection procedures (*i.e.* proposal evaluation methods) over others.<sup>142</sup> Additionally, some contracting officers are reluctant to communicate with their industry counterparts during pre-award procurement stages due to the concern that doing so may invite a protest.<sup>143</sup> These behavioral trends work against contracting officers' efforts to secure best value solutions for the government.<sup>144</sup>

Specifically, some contracting officers prefer to employ a lowest price technically acceptable (LPTA) source selection process—even when allowing a tradeoff for non-cost factors (*e.g.* performance, schedule, or technical capability) more appropriately suits their acquisition—based on the perception that an LPTA approach lowers their protest risk.<sup>145</sup> Statistically, however, offers are no more likely to protest LPTA source selections than source selections that allow for a tradeoff.<sup>146</sup> Even if they were, using LPTA evaluation criteria does not guarantee that an offeror will not file a protest.<sup>147</sup>

Additionally, the fear of protests appears to motivate some contracting officers to award contracts based on initial proposals instead of taking advantage of the op-

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137. Gordon, *supra* note 26, at 503.

138. FAR 33.104(h) (2016). There is no requirement for an interested party whose protest is dismissed to reimburse the government's costs of addressing the protest.

139. Medici & McElhatton, *supra* note 26.

140. *Id.*

141. Gordon, *supra* note 26, at 506.

142. *Id.*

143. *Id.*

144. *Id.* at 506-07.

145. *Id.* at 506; *see also* FAR 15.101-1(a) (2016) (“A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.”); *see also id.* 15.101-2(a) (“The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price.”).

146. Gordon, *supra* note 26, at 507.

147. *Id.*

portunity to conduct discussions (*i.e.* negotiations) with offerors, which the FAR expressly permits in order to maximize the government's ability to obtain best value.<sup>148</sup> Contracting officers who succumb to this perceived risk contend, "[D]iscussions with offerors are a legal minefield, such that conducting discussions will increase the likelihood of a bid protest and improve the protestor's chances of prevailing if a protest is filed."<sup>149</sup> Just as using an LPTA source selection process does not eliminate protest risk, however, it is impossible for a contracting officer to completely "protest-proof" an acquisition by foregoing the opportunity to conduct discussions.<sup>150</sup>

### B. Protest Benefits

While GAO protests impose several costs on the federal acquisition system, they also generate several benefits for federal procurement stakeholders—especially accountability and transparency.<sup>151</sup> Moreover, published GAO decisions enable procurement agencies to intelligently predict the likelihood that the GAO would sustain a protest, which motivates such agencies to police themselves to a certain degree and take corrective action where appropriate.<sup>152</sup>

#### 1. Protests are a Low-Cost Form of Accountability

Protests offer a relatively low-cost mechanism to bring accountability into the acquisition system "by providing disgruntled participants a forum for airing their complaints."<sup>153</sup> Arguably, the fact that the GAO investigates issues raised by non-government parties adds more value to the procurement system in terms of accountability than internal government audits.<sup>154</sup> After all, "if no one is dissatisfied with the way the Government conducted a procurement, then it may not be a wise use of auditors' time to investigate it."<sup>155</sup>

#### 2. Protests Increase Confidence in the Procurement System

Additionally, protests tend to increase overall confidence in the procurement system.<sup>156</sup> "[B]y being directly responsive to participants' complaints, protests can increase potential bidders' confidence in the integrity of the procurement process, and thereby lead more players to participate, thus increasing competition. Increased competition, in turn, can motivate bidders to offer lower prices, higher quality, or

148. *Id.* at 506; *see also* FAR 15.306(d) (2016) ("Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.").

149. Gordon, *supra* note 26, at 506.

150. *Id.* at 507.

151. *See* discussion *infra* Part 3.B.

152. *Id.*

153. Gordon, *supra* note 26, at 507.

154. *Id.* at 507-08.

155. *Id.* at 508.

156. *Id.*

both, to contracting agencies.”<sup>157</sup> Indeed, “absent such mechanisms, entities might be less willing to do business with the government, which could diminish competition for government contracts and drive up prices.”<sup>158</sup>

Protests also increase the public’s confidence in the system.<sup>159</sup>

While the public only rarely focuses on public contracting, having a protest process mentioned in the press—as happened when The Boeing Company successfully protested the Air Force’s award of a tanker contract to Northrup Grumman—may raise the public’s trust in the fairness of the Government’s acquisition system and the way it spends taxpayer funds.<sup>160</sup>

Moreover, protests mitigate the risk that public suspicions about the procurement system remain either unaddressed or uncorrected.<sup>161</sup>

### 3. Protest Risk Empowers Contracting Officers to Stand their Ground

The risk of a successful protest also affords contracting officers a tactful means to withstand potential undue influence from their leadership.<sup>162</sup> For example, if pressured to award a sole-source contract when market conditions clearly support a competitive source selection, “the [c]ontracting [o]fficer, who may lack the bureaucratic clout to resist the pressure, could point to the risk of a successful protest as one additional reason to follow the statutory and regulatory requirements for competition.”<sup>163</sup>

### 4. GAO Decisions Provide Guidance

Finally, the GAO widely publishes its protest decisions.<sup>164</sup> Accordingly, attorneys on both sides of a protest are better able to advise clients on the strengths and weaknesses of their respective positions.<sup>165</sup> One notable example is that “any corporate counsel who follows GAO bid protest decisions knows how strictly the GAO applies the ‘late is late’ rule, so that counsel will ensure that their client appreciates the importance of submitting bids on time.”<sup>166</sup>

Likewise, the increasing predictability of GAO opinions can motivate a procurement agency to voluntarily take corrective action in response to a protest that it believes the GAO would sustain (*i.e.* the protest has merit).<sup>167</sup> Accordingly, when an

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157. *Id.*

158. MANUEL & SCHWARTZ, *supra* note 27, at 3.

159. Gordon, *supra* note 26, at 508.

160. *Id.*

161. MANUEL & SCHWARTZ, *supra* note 27, at 3.

162. Gordon, *supra* note 26, at 508.

163. *Id.*

164. U.S. GOV’T ACCOUNTABILITY OFFICE, *Are You Waiting for a Bid Protest Decision?*, GAO.GOV, <http://www.gao.gov/legal/are-you-waiting-for-a-bid-protest-decision/about> (last visited Feb. 1, 2016). GAO does not publish dismissed protests, however.

165. Gordon, *supra* note 26, at 508-10.

166. *Id.* at 510.

167. SCHWARTZ & MANUEL, *supra* note 20, at 5.

agency elects to take corrective action, it thereby mitigates some of the delays triggered by the protest and accelerates its acquisition timeline to deliver the respective product or service to the end user.<sup>168</sup>

### C. *The Argument that the Benefits Outweigh the Costs*

Without accepting them as absolute, several compelling arguments exist that the benefits of GAO protests outweigh the costs.<sup>169</sup> Certainly, protests inject “transparency, accountability, and education” into the federal acquisition system and promote the integrity of the same.<sup>170</sup> Additionally, the ability to protest may reduce any public perception that the acquisition system is “corrupt or ineffective.”<sup>171</sup> Finally, “Congress has . . . historically viewed the benefits of protests as outweighing [their] costs.”<sup>172</sup> On balance of the opposing viewpoints and factors discussed above, the overarching benefits of protests probably do outweigh the costs.<sup>173</sup>

## IV. THE CASE FOR REBALANCING PROTEST COSTS

Even if one subscribes to the theory that the benefits of protests outweigh their costs, the fact remains that the frequency of GAO protests continues to increase while the number of sustained protests continues to decrease.<sup>174</sup> As a result, the government suffers the increasing administrative burden to address protests that the GAO ultimately dismisses for lack of merit.<sup>175</sup> In light of this circumstance, perhaps the proper question is not whether the benefits of protests outweigh the costs, but whether opportunities exist to decrease meritless protests and the government’s costs to resolve them.<sup>176</sup> Requiring protestors to submit a bond with their protest equal to a percentage of the contract value would likely achieve these objectives.<sup>177</sup>

### A. *Clarifying “Meritless Protest”*

To properly analyze potential solutions to reduce meritless protests first requires an understanding of what constitutes a “meritless protest.”<sup>178</sup> In the majority of cases, one of three events ends a protest: the GAO dismisses the protest; the protestor withdraws the protest; or the agency and the protestor settle the protest prior to the GAO’s decision.<sup>179</sup> This indicates that a protestor can obtain relief in ways

168. *Id.*; see also discussion *supra* Part III.A.1 (highlighting common procurement delays associated with protests).

169. See discussion *infra* Part III.C.

170. Gordon, *supra* note 26, at 510.

171. MANUEL & SCHWARTZ, *supra* note 27, at 3.

172. *Id.* at 4.

173. See discussion *supra* Part III.

174. See discussion *supra* Part I.

175. *Id.*

176. See discussion *infra* Part IV.

177. See discussion *infra* Part IV.

178. See discussion *infra* Part IV.A.

179. SCHWARTZ & MANUEL, *supra* note 20, at 4.

that do not require the GAO to sustain a protest.<sup>180</sup> How, then, is one to determine whether a protest has merit?<sup>181</sup>

One model considers a protest “effective” if either of two events transpires: (1) the GAO sustains the protest or (2) the procurement agency voluntarily takes corrective action in response to the protest.<sup>182</sup> Using historical data, one can calculate an “effectiveness rate” by dividing the sum of GAO-sustained protests and protests where an agency takes corrective action by the total number of protests filed during a given time period.<sup>183</sup> Based on this model, “the effectiveness rate is a rough measure of the number of protests that have actual or potential merit.”<sup>184</sup> The average effectiveness rate of GAO protests over the last five years is forty-two percent.<sup>185</sup> Expanding this analysis to FY14, out of the 2,561 GAO protests filed, roughly 1,076 actually had merit and the remaining 1,485 did not.<sup>186</sup> To be clear, the costs the government bears as a result of protests in the latter category constitute the source of contention in this article.<sup>187</sup>

An important distinction exists between protests that lack merit and those that are frivolous.<sup>188</sup> A protest is frivolous if “a [protestor] grounds its case on arguments or issues ‘that are beyond the reasonable contemplation of fair-minded people, and no basis for [the party’s position] in law or fact can be or is even arguably shown.’”<sup>189</sup> Moreover, “a legal action found to be without merit is not necessarily frivolous.”<sup>190</sup> It accordingly follows that all frivolous protests lack merit, but not all meritless protests are frivolous.<sup>191</sup> Nevertheless, the solutions discussed below apply equally to meritless and frivolous protests.<sup>192</sup>

#### B. *Historically Proposed Solutions*

As previously discussed, due to the one-sided nature of the costs assumed by the government upon receipt of a protest, a contractor who bids for a government contract and loses has little more to lose by protesting the award in an effort to increase its chances of ultimately winning a contract.<sup>193</sup> Largely for this reason, critics of the current protest system urge that this discrepancy begs a remedy to reduce the

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180. *Id.*

181. *See id.* (describing one model to determine whether a protest has merit).

182. *Id.*

183. *Id.*

184. SCHWARTZ & MANUEL, *supra* note 20, at 5.

185. *Id.*

186. *See id.* at 3, 5. 1,076 is forty-two percent of 2,561.

187. *See* discussion *infra* Part IV.

188. Letter from Gary L. Kepplinger, General Counsel, U.S. Gov’t Accountability Office, to Committee on Armed Services, United States Senate, and Committee on Armed Services, House of Representatives, U.S. Gov’t Accountability Office (Apr. 9, 2009), available at <http://www.gao.gov/decisions/bidpro/401197.htm>.

189. *Id.* (citing *Abbs v. Principi*, 237 F.3d 1342, 1345 (Fed. Cir. 2001)).

190. *Id.*

191. *Id.*

192. *See* discussion *infra* Part IV.

193. *See* discussion *supra* Part I.

government's costs that arise out of meritless protests.<sup>194</sup> Historically proposed solutions include sanctioning frivolous protests and allowing procuring agencies to consider an offeror's protest history during past performance evaluations.<sup>195</sup>

### 1. Sanctions

In the face of budget constraints during the 1990s, Congress and the Clinton administration endeavored to decrease the government's procurement transaction costs.<sup>196</sup> Pursuant to that objective, the Acquisition Law Advisory Panel recommended, among several items, that the administration impose sanctions on frivolous protests.<sup>197</sup> This remedy "would have required protestors who file baseless protests to reimburse the [g]overnment for its legal fees and costs associated with defending the procurement decision."<sup>198</sup> Congress proposed this idea in the Federal Acquisition Improvement Act of 1995; however, it ultimately did not enact the proposal.<sup>199</sup> Notwithstanding the proposal's failure, Senator John Glenn acknowledged that it was an important step in "tackl[ing] the controversial, highly charged issue of reform of the protest system by attempting to streamline it and reduce the number of protests filed."<sup>200</sup>

The notion of imposing sanctions on frivolous protests continues to surface within the acquisition community.<sup>201</sup> For example, between 2006 and 2009, the Air Force received several GAO protests during its efforts to award a contract for a new combat search-and-rescue helicopter (CSAR-X).<sup>202</sup> Eventually, "[d]ue to adverse findings by [a] Pentagon audit, Defense Secretary Gates decided to cancel the program 'for convenience' . . ."<sup>203</sup> In response, Air Force General Bruce Carlson—who commanded Air Force Material Command at the time—exclaimed that the CSAR-X protests delayed vital military programs and estimated that they cost the government 800 million dollars.<sup>204</sup> General Carlson attributed these costs to the ease at which unsuccessful offerors can protest and advocated that the government penalize losing protestors as a disincentive to file frivolous protests.<sup>205</sup>

194. See, e.g., Otto Kreisher, *General Bemoans Glut of Air Force Contract Protests*, GOV'T EXEC. (Feb. 13, 2008), <http://www.govexec.com/defense/2008/02/general-bemoans-glut-of-air-force-contract-protests/26297> (expressing United States Air Force General Bruce Carlson's view that protests are so frequent because there are no penalties for a losing bidder to protest).

195. See *id.*; GATES, *supra* note 63, at 24 (citing Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 697 (2001)).

196. Jonathan R. Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155, 169-70, 172 (1997) (citing William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. Am. U. 461, 464 (1995)).

197. *Id.* at 170.

198. *Id.* at 172.

199. *Id.* (citing S. 669, §§ 1202, 1435, 104th Cong. (1995); H.R. 1388, §§ 1202, 1435 (1995)).

200. 141 CONG. REC. S5, 147 (daily ed. Apr. 4, 1995).

201. See, e.g., Defense Industry Daily Staff, *supra* note 73 (discussing Air Force General Bruce Carlson's reaction to protests on the CSAR-X program).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

The problem with sanctions, however, turns on “fundamental questions of fairness and the right of access to judicial and administrative forums.”<sup>206</sup> After all, according to one critic:

A successful contract award can help a small business grow substantially. If a business[] mistakenly challenges the [g]overnment on the assumption that the [g]overnment erroneously granted the contract to a competitor, subjecting the business to further sanctions for the error is improper. Although [sanctions] might help make a more streamlined protest system by reducing the number of protests, [they have] the unfortunate consequence of chilling the rights of contractors who do business with the [g]overnment.<sup>207</sup>

This observation makes an important point about the role of small businesses in federal procurement.<sup>208</sup> Based on a related study, “[s]maller companies generate most of the protests and larger companies protest more strategically.”<sup>209</sup> This intuitively makes sense, as small businesses generally rely on fewer revenue sources than large businesses, which typically enjoy numerous and well-diversified revenue sources.<sup>210</sup> Thus, small businesses arguably have more at stake in bidding for government contracts than large businesses, and thereby have an increased incentive to protest an unfavorable contract award.<sup>211</sup>

The same study revealed that “larger companies achieve more sustained protests [than smaller companies] . . .”<sup>212</sup> Perhaps this is because larger companies can better afford to invest in sophisticated resources to make more informed decisions on when filing a protest makes good business sense.<sup>213</sup> Whatever the reason, this is a significant finding, as Congress strives to maximize small business participation in federal acquisitions.<sup>214</sup> Accordingly, any proposal that seeks to decrease meritless protests must consider the proposal’s impact on small businesses.<sup>215</sup>

In addition to these concerns, although the FAR does not specifically label this remedy as a “sanction,” Congress apparently has already determined and codified what constitutes sanctionable conduct in the context of federal procurement.<sup>216</sup> FAR 33.102(b)(3), for example, provides that the head of the procurement agency may “[r]equire the awardee to reimburse the Government’s costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee’s *intentional*

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206. Cantor, *supra* note 196, at 176.

207. *Id.*

208. *Id.*

209. STEVEN M. MASER, IMPROVING GOVERNMENT CONTRACTING: LESSONS FROM BID PROTESTS OF DEPARTMENT OF DEFENSE SOURCE SELECTIONS at 21 (2012), available at <http://www.businessofgovernment.org/report/improving-government-contracting-lessons-bid-protests-department-defense-source-selections>.

210. *Id.* at 21-22.

211. *Id.* at 22.

212. *Id.*

213. *Id.* at 21-22.

214. FAR 19.201(a) (2016) (“It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business . . .”).

215. *Acord id.*

216. *Id.* 33.102(b)(3).

or negligent misstatement, misrepresentation, or miscertification.”<sup>217</sup> Moreover, the GAO contends that sanctions may produce “the unintended consequence of harming the federal procurement system by discouraging participation in federal contracting and, in turn, limiting competition.”<sup>218</sup> For these reasons, sanctions are an inappropriate means to resolve the issue at hand.<sup>219</sup>

## 2. Past Performance Evaluations

In addition to sanctions, some critics of the protest system advocate that the government should consider an offeror’s protest history during past performance evaluations.<sup>220</sup> The FAR enumerates past performance as “one indicator of an offeror’s ability to perform [a] contract successfully.”<sup>221</sup> If a procuring agency elects to evaluate past performance, it must consider “[t]he currency and relevance of the information, source of the information, context of the data, and general trends in contractors’ performance.”<sup>222</sup>

Just as with sanctions, however, the GAO is concerned that considering protest history in past performance evaluations would yield unintended consequences—especially decreased competition—that outweigh any perceived gains in efficiency.<sup>223</sup> “Importantly, any system that imposes penalties on contractors for filing frivolous protests would require adequate due process protections to avoid punishing a company for filing a good-faith but unmeritorious protest.”<sup>224</sup> Most significantly, however, an offeror’s protest history most likely has no bearing on the “offeror’s ability to perform [a] contract successfully.”<sup>225</sup> Evaluating an offeror’s protest history, then, would controvert the FAR’s requirement to consider *relevant* past performance.<sup>226</sup> Thus, evaluating protest history is also an inappropriate means to reduce meritless protests.<sup>227</sup>

### C. Inspiration from State Procurement Regulations and the NFL

Instead of punishing contractors for filing meritless protests, a better strategy to decrease meritless protests, as well as the government’s costs to resolve them, is to require protestors to submit a bond with their protest equal to a percentage of the total contract value.<sup>228</sup> In the event the GAO sustains a protest or the procuring

217. *Id.* (emphasis added).

218. Letter from Gary L. Keplinger to Committee on Armed Services, United States Senate, and Committee on Armed Services, House of Representatives, *supra* note 188, at 12.

219. See discussion *infra* Part IV.B.1.

220. See, e.g., Letter from Gary L. Keplinger to Committee on Armed Services, United States Senate, and Committee on Armed Services, House of Representatives, *supra* note 188, at 13 (identifying various suggestions to disincentivize frivolous protests).

221. FAR 15.305(a)(2)(i) (2016).

222. *Id.*

223. Letter from Gary L. Keplinger to Committee on Armed Services, United States Senate, and Committee on Armed Services, House of Representatives, *supra* note 188, at 13.

224. *Id.*

225. FAR 15.305(a)(2)(i) (2016).

226. *Id.*

227. See discussion *supra* Part IV.B.2.

228. See discussion *infra* Part IV.C.

agency takes corrective action, the GAO or the procuring agency, respectively, would return the protest bond to the protestor.<sup>229</sup> If the GAO dismisses the protest, however, the government would retain the bond to offset its administrative costs to resolve the protest.<sup>230</sup> This proposed solution quells the punitive undertones of sanctions and negative past performance evaluations and adopts a more equitable approach to address the issue of meritless protests.<sup>231</sup> At least four states currently employ a variation of this approach, as does the NFL via the Coaches' Challenge Rule.<sup>232</sup>

### 1. State Procurement Regulations

For example, in Florida, protestors must submit a bond with their protest equal to one percent of the estimated contract value.<sup>233</sup> If the procuring agency prevails against the protest, it recovers its costs—except attorney's fees—through the protest bond and returns the remainder to the protestor.<sup>234</sup> Equally, if the protestor prevails on its protest, the procuring agency (1) returns the bond to the protestor and (2) pays the protestor's costs and charges—excluding attorney's fees—to pursue the protest.<sup>235</sup>

Hawaii employs a similar approach with a slight variation.<sup>236</sup> Instead of requiring a bond equal to one percent of the estimated contract value, Hawaii requires a \$1,000 bond for contracts valued at less than \$500,000; a \$2,000 bond for contracts valued between \$500,001 and \$1,000,000; and a bond equal to one-half per cent of the estimated contract value if that value is greater than \$1,000,000.<sup>237</sup> In no event, however, may a protest bond exceed \$10,000.<sup>238</sup> As in Florida, Hawaii's protest regulation requires the procuring agency to return the bond to a successful protestor.<sup>239</sup> Unlike Florida's regulations, however—where the state returns the remainder of the protest bond to the protestor after assessing the state's costs to resolve the protest—the protestor forfeits the entire bond to the state if it protests unsuccessfully.<sup>240</sup>

In Nevada, a protestor must submit a bond with its protest equal to 25% of the successful bid.<sup>241</sup> If the protest succeeds, the state returns the bond to the protestor.<sup>242</sup> If the procuring agency sustains the protest, Nevada's Department of Administration holds a hearing to assess the costs involved in resolving the protest.<sup>243</sup> The

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. FLA. STAT. ANN. § 287.042(2)(c) (West 2016).

234. *Id.*

235. *Id.*

236. HAW. REV. STAT. § 103D-709(e) (West 2015).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. NEV. REV. STAT. ANN. §§ 333.370(2)-(3) (West 2015).

242. *Id.* § 333.370(10).

243. *Id.*

state then recoups its incurred costs from the bond and returns the remainder to the protestor.<sup>244</sup>

Finally, within its Department of Transportation, Tennessee requires a protestor to submit a bond with its protest equal to 5% of the estimated total project cost.<sup>245</sup> The state, however, only retains the bond if the Department commissioner determines (1) that the protestor pursued the protest in bad faith, or (2) if “the protest does not state on its face a valid basis for protest.”<sup>246</sup> If the commissioner makes either one of these findings, he must notify the protestor in writing of the decision to retain the protest bond.<sup>247</sup>

According to the National Association of State Procurement Officials (NASPO), there is insufficient data to confirm the degree to which protest bonds discourage frivolous protests.<sup>248</sup> In spite of this sparse data, what is more clear is that the rationale for protest bonds is to minimize meritless protests and to allow a state to reduce its administrative costs to resolve protests.<sup>249</sup> Moreover, a protest bond undoubtedly changes an unsuccessful offeror’s mindset when it comes to the decision of whether to file a protest.<sup>250</sup> Instead of asking what they have to lose by protesting, unsuccessful offerors subject to a protest bond requirement must evaluate whether the time to acquire a bond and the risk of losing it justify protesting in the first place.<sup>251</sup>

## 2. The NFL’s Coaches’ Challenge Rule

The NFL’s Coaches’ Challenge Rule further clarifies the wisdom behind protest bonds.<sup>252</sup> As previously discussed, the NFL’s Coaches’ Challenge Rule affords a team two opportunities per game to challenge various rulings on the field.<sup>253</sup> To initiate a challenge, a coach simply throws a red flag onto the field from the sideline after the previous play and before the next play begins.<sup>254</sup> A previously unmentioned caveat to rule, however, is that a team must use a timeout for each challenge.<sup>255</sup> If the official upholds the challenge, the Rule reinstates the timeout.<sup>256</sup> If the official overrules the challenge, however, the challenging team forfeits its timeout.<sup>257</sup>

244. *Id.*

245. TENN. CODE ANN. § 54-1-505(b)(3) (West 2016).

246. *Id.* § 54-1-505(b)(6).

247. *Id.*

248. DEAN STOTLER ET AL., STATE BID PROTESTS, NATIONAL ASSOCIATION OF STATE PROCUREMENT OFFICIALS 4 (Apr. 2013), available at [http://www.naspo.org/dnn/portals/16/documents/FINAL\\_NASPO\\_BidProtests\\_Research\\_Brief\\_042413.pdf](http://www.naspo.org/dnn/portals/16/documents/FINAL_NASPO_BidProtests_Research_Brief_042413.pdf).

249. *Id.*

250. *Id.*

251. *See* Defense Industry Daily Staff, *supra* note 73 (highlighting General Carlson’s view that the current protest system encourages protests because bidders have nothing to lose by filing them); *see also* STOTLER ET AL., *supra* note 248, at 4 (describing the rationale for protest bonds among the states that use them).

252. *See* GOODELL, *supra* note 2, at 63 (requiring a coach to put a timeout at stake before challenging any ruling on the field).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. GOODELL, *supra* note 2, at 63

By requiring a team to put a timeout at stake, this provision prevents the Coaches' Challenge from being a mere roll of the dice and equitably balances each team's interest in fair rulings with the officials' interest in minimizing game delays.<sup>258</sup> Undeniably, "challenges are part of game management, because they are directly linked to timeouts and can cause the loss of time on the clock, putting [a] team in a bad situation."<sup>259</sup> A coach must accordingly analyze the costs and benefits of a challenge to his team before he throws his red flag.<sup>260</sup> Emphatically, "[u]nless the evidence is clear-cut, a rational decision must be made, not an emotional one."<sup>261</sup>

Just as state protest bond requirements impose an additional analytical component on the decision to protest, the Coaches' Challenge Rule illustrates the principle that, in order to prevent abuse of a protest system, the protestor must have skin in the game.<sup>262</sup> Conceivably, if the Coaches' Challenge Rule did not require a team to use a timeout in order to challenge a ruling on the field, coaches would have no incentive to use their challenges judiciously.<sup>263</sup> The same holds true if the Rule did not limit the number of challenges a team may use per game.<sup>264</sup>

Based on GAO protest statistics, the current federal procurement protest scheme is akin to a coaches challenge rule that does not require a team to use a timeout prior to a challenge.<sup>265</sup> That is, the increased frequency of protests to the GAO, coupled with the simultaneous decrease in the number of sustained protests, suggest that unsuccessful offerors are abusing the system.<sup>266</sup> Consequently, the government bears significant costs to address meritless protests.<sup>267</sup>

### 3. Integrating Protest Bonds into Federal Procurement Regulations

Based on the state protest regulations discussed above and the intricacies of the NFL's Coaches' Challenge Rule, there are a variety of potential approaches to integrate protest bonds into federal procurement regulations to discourage meritless protests and equitably distribute protest costs between the protestor and the government.<sup>268</sup> The simplest—and arguably most cost-effective—solution would closely mirror Hawaii's protest regulation and the Coaches' Challenge Rule.<sup>269</sup> That is, require a protestor to submit a bond with its protest equal to a certain percentage of

258. See, e.g., Lombardi, *McCarthy's Challenge Raises Red Flag, Costs Packers Chance*, NFL NETWORK (Sept. 28, 2010, 9:40 PM; last updated Aug. 3, 2012, 10:23 AM), available at <http://www.nfl.com/news/story/09000d5d81aebdfb/article/mccarthys-challenge-raises-red-flag-costs-packers-chance/> (discussing the Coaches' Challenge Rule as part of game management).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. GOODELL, *supra* note 2, at 63.

264. *Id.*

265. See, e.g., SCHWARTZ & MANUEL, *supra* note 20, at 6-8 (illustrating the increasing frequency of protests and the decreasing frequency of sustained protests as a percentage of total protests filed).

266. *Id.*

267. See discussion *supra* Introduction.

268. See discussion *supra* Part IV.C.1-2.

269. HAW. REV. STAT. § 103D-709(e) (West 2015); GOODELL, *supra* note 2, at 63.

estimated contract value.<sup>270</sup> If the protestor wins, the government would return the bond to the protestor in full.<sup>271</sup> If the protestor loses, the government would retain the full amount of the bond.<sup>272</sup> Intuitively, this all-or-nothing approach would be simple to administer.<sup>273</sup> The downside, however, is that it might not produce the most “fair” result in every case.<sup>274</sup>

Alternatively, Congress could implement a protest bond scheme similar to Nevada’s.<sup>275</sup> Under this approach, a protestor would submit a bond in the amount of a certain percentage of the estimated contract value.<sup>276</sup> If the protestor is successful, the government would return the entire bond to the protestor.<sup>277</sup> If the protestor is unsuccessful, however, the government would retain the value of its costs to resolve the protest and return the remainder to the protestor.<sup>278</sup> This approach is likely more administratively burdensome than Hawaii’s, as the government in this case would have to track its costs to resolve a protest.<sup>279</sup> At the same time, however, this approach appears to more equitably balance the costs involved to address a protest by returning any unused portion of the protest bond to the protestor.<sup>280</sup>

A third source of variation among state protest regulations is the amount of the protest bond.<sup>281</sup> For example, some states impose a fixed protest bond when the estimated contract value falls within a certain dollar range.<sup>282</sup> Other states base protest bond requirements on a percentage of contract value.<sup>283</sup> One potential issue with this approach is that, once contract value exceeds a certain threshold, the required bond will dwarf the government’s costs to address the protest.<sup>284</sup> An equitable approach to deter meritless protests should not result in a windfall for the government in the event a protestor loses a protest.<sup>285</sup> One way to mitigate this risk would be to

270. *See, e.g.*, HAW. REV. STAT. § 103D-709(c) (West 2015) (requiring the protestor to submit a bond that varies with the estimated contract amount); *see also* GOODELL, *supra* note 2, at 63 (requiring a coach to use a timeout in order to exercise a challenge).

271. *See, e.g.*, HAW. REV. STAT. § 103D-709(c) (West 2015) (the government returns the bond to the protestor if the protestor is successful); *see also* GOODELL, *supra* note 2, at 63 (a team recovers its timeout if it successfully challenges an official ruling on the field).

272. *See, e.g.*, HAW. REV. STAT. § 103D-709(c) (West 2015) (the government retains the bond if the protestor is unsuccessful); *see also* GOODELL, *supra* note 2, at 63 (a team loses its timeout if it unsuccessfully challenges an official ruling on the field).

273. *See* discussion *supra* Part IV.C.3.

274. *See, e.g.*, 4 C.F.R. § 21.2(b) (2016) (discussing that untimely protests may be dismissed). It may not seem “fair” for the government to retain the entire amount of a protest bond if it immediately dismisses a protest as untimely, as little time and effort is required on the government’s part to justify retaining the entire bond amount.

275. *See* NEV. REV. STAT. § 333.370(2)-(3), (10) (West 2015).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *See* NEV. REV. STAT. § 333.370(2)-(3), (10) (West 2015).

281. *See* FLA. STAT. ANN § 287.042(2)(c) (West 2015); HAW. REV. STAT. § 103D-709(c) (West 2015); NEV. REV. STAT. §§ 333.370(2)-(3), (10) (West 2015); TENN. CODE ANN. § 54-1-505 (West 2015).

282. *See, e.g.*, HAW. REV. STAT. § 103D-709(c) (West 2015) (imposing fixed protest bond requirements within certain contract value ranges).

283. FLA. STAT. ANN § 287.042(2)(c) (West 2015); NEV. REV. STAT. §§ 333.370(2)-(3) (West 2015).

284. *See, e.g.*, NEV. REV. STAT. §§ 333.370(2)-(3) (West 2015). For example, if the state of Nevada awarded a two billion dollar contract, to protest the award would require the unsuccessful offeror to post a bond in the amount of five hundred million dollars.

285. *Acord* Cantor, *supra* note 196, at 169-70, 172 (discussing reasons why sanctions are an improper means to

establish a maximum value for a protest bond.<sup>286</sup> In any event, to establish a suitable protest bond requirement at the federal level, legislators should consider that the bond must be large enough to deter meritless protests, but not so great as to resemble a punitive remedy.<sup>287</sup>

Ultimately, the decision to integrate protest bonds into the federal procurement system belongs to Congress, which must consider several factors in its analysis.<sup>288</sup> At a minimum, a protest bond requirement must preserve “fairness and the right of access to . . . administrative forums.”<sup>289</sup> Inherent in this principle is the importance of considering potential impacts on small businesses.<sup>290</sup> One way to address this issue is to establish separate protest bond requirements for large and small businesses.<sup>291</sup> Congress must also ensure that the details of a protest bond requirement are otherwise compatible with related regulations like CICA and the Small Business Act.<sup>292</sup> Notwithstanding this non-exhaustive list of challenges, incorporating a protest bond requirement into federal procurement regulations is certainly feasible.<sup>293</sup> Based on the foregoing analysis, Congress should integrate a protest bond requirement into federal procurement regulations in an effort to (1) suppress the apparent “What do we have to lose?” mentality that the current system perpetuates and (2) to decrease the frequency of meritless protests.<sup>294</sup>

## V. CONCLUSION

Statistically, the frequency of bid protests to the GAO continues to increase while the percentage of sustained protests continues to decrease.<sup>295</sup> Moreover, with a current average effectiveness rate of 42%—which accounts for sustained protests and protests where an agency voluntarily takes corrective action—roughly 60% of protests filed with the GAO lack merit.<sup>296</sup> As a result, the government suffers the increasing administrative burden to address protests that the GAO ultimately dismisses or denies.<sup>297</sup> Although the overarching benefits of protests probably outweigh

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reduce the number of protests filed). Similarly, a requirement that a protestor submit a bond equal to a percentage of contract value could have equally chilling effects if the estimated contract value exceeds a certain dollar threshold.

286. *See, e.g.*, HAW. REV. STAT. § 103D-709(e) (West 2015) (establishing a maximum protest bond value of \$10,000).

287. *See, e.g.*, Cantor, *supra* note 196, at 176 (discussing that sanctions “raise[] fundamental questions of fairness and the right of access to judicial and administrative forums.”). Accordingly, legislators must be careful to select a bond value that does not raise such concerns.

288. KATE M. MANUEL ET AL., CONGRESSIONAL RESEARCH SERVICE, PUB. NO. R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 20-21 (Feb. 3, 2015), available at <https://www.fas.org/sgp/crs/misc/R42826.pdf/>; *see* Cantor, *supra* note 196, at 169-70, 172 (discussing considerations that led Congress to reject sanctions as a means to deter frivolous protests).

289. Cantor, *supra* note 196, at 176.

290. *Id.*

291. *See* FAR 19.102 (2016). A procurement agency can readily make objective small business determinations based on size standards established by the Small Business Administration. Thus, this proposed solution would be simple to implement.

292. 10 U.S.C § 2304 (2012); 15 U.S.C.A §§ 631-657s (2012).

293. *See* discussion *supra* Part IV.

294. *See* discussion *supra* Introduction.

295. *Id.*

296. *See* discussion *supra* Part IV.A.

297. *See* discussion *supra* Part IV.

the costs, this circumstance raises the question of whether opportunities exist to decrease meritless protests and the government's administrative costs to resolve them.<sup>298</sup>

At least four states have confronted this issue by requiring protestors to submit a bond with their protest equal to a certain percentage of estimated contract value.<sup>299</sup> Instead of asking what they have to lose by protesting unfavorable procurement actions, protestors in these states must first assess whether the time and expense of submitting a bond justifies their protest.<sup>300</sup>

The NFL has also tackled this issue by adopting the Coaches' Challenge Rule.<sup>301</sup> By requiring a team to use a timeout in order to challenge a ruling on the field, a coach must analyze the costs and benefits of a challenge to his team before he throws his red flag.<sup>302</sup> Moreover, the Rule requires Coaches to challenge based principally on reason rather than emotion.<sup>303</sup>

To date, Congress has unsuccessfully resolved the issue at hand.<sup>304</sup> It has contemplated imposing sanctions on frivolous protests and permitting procuring agencies to consider an offeror's protest record during past performance evaluations.<sup>305</sup> Both proposals failed, however, due to their punitive nature.<sup>306</sup> Unlike these historically proposed solutions, a protest bond requirement would exude less punitive characteristics and would more equitably balance the administrative costs to address protests between procurement agencies and their private sector counterparts.<sup>307</sup> Accordingly, Congress should consider amending federal bid protest regulations to require protestors to include a bond with their protest equal to a percentage of total contract value in an effort to (1) suppress the apparent "What do we have to lose?" mentality that the current protest system perpetuates and (2) to decrease the frequency of meritless protests.

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298. *Id.*

299. *See* discussion *supra* Part IV.C.1.

300. *Id.*

301. *See* discussion *supra* Part IV.C.2.

302. *Id.*

303. *Id.*

304. *See* discussion *supra* IV.B.

305. *Id.*

306. *Id.*

307. *See* discussion *supra* Part IV.C.