Why Not Bring a Bid Protest in the GSBCA-- or in the ASBCA, for that Matter?

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Congress recently removed the GSBCA's jurisdiction to hear bid protests concerning computer and telecommunications procurements.[1] But what Congress took away with the right hand, it might have given back in larger measure with the left. In its recent amendment of the Tucker Act, and, in particular, section 1491 of the Judicial Code,[2] Congress may have unwittingly granted general bid protest jurisdiction, not just to the GSBCA, but to every board of contract appeals.

"Exclusive Jurisdiction" Under the FCIA

Congress in section 133(a) of the Federal Courts Improvement Act of 1982 (FCIA) granted the United States Claims Court jurisdiction over bid protest actions. Section 133(a) provided as follows:

> To afford complete relief on any contract claims brought before the contract is awarded, the court shall have *exclusive jurisdiction* to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. . . .[3]

By this grant of jurisdiction, Congress intended the Claims Court (now the Court of Federal Claims[4]) to apply the substantive law as developed in federal district courts in *Scanwell Laboratories, Inc. v. Shaffer*[5] and its progeny.[6] At the same time, Congress in 1982 did not desire to grant the newly organized Claims Court injunctive and declaratory jurisdiction in "traditional" contract cases, *i.e.*, those cases in which the claimant was suing on a contract it already had with the government.[7]

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1 Congress in section 2713 of the Competition in Contracting Act, Pub. L. No. 98-369, *codified at* 40 U.S.C. § 759(h) (1988), granted bid protest jurisdiction in some automatic data processing procurements to the GSBCA. That authority was repealed by the National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, Div. E, Title LI, § 5101, 110 Stat. 680 (1996).

2 28 U.S.C.A. § 1491(b) (Supp. 1997), *as amended by* Administrative Dispute Resolution Act of 1996, § 12(a), Pub. L. No. 104-320, 110 Stat. 3870. This provision repealed previous subsection (a)(3), 28 U.S.C. § 1491(a)(3) (1994).

3 Pub. L. No. 97-164, 96 Stat. 25, *codified at* 28 U.S.C. § 1491(a)(3) (1982) (emphasis added).

4 The name of the United States Claims Court was changed to the United States Court of Federal Claims in the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Title IX, § 902(a), 106 Stat. 4516.

5 424 F.2d 859 (D.C. Cir. 1970).

6 *See* H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43 (1981); S. Rep. No. 97-275, 97th Cong., 1st Sess. 23, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 33; *see also* Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1057 (1st Cir. 1987).

7 Congress retreated from a comprehensive grant of equitable powers to the Claims Court in all of its cases in the face of concerns expressed by the Justice Department that such a grant could lead to "serious and untoward disruption" in the "administration of government contracts." *Court of Appeals for the Federal Circuit--1981, Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 212 (1981) (letter from Acting Assistant Attorney General Dolan to Rep. Rodino). *See generally* Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 Pub. Contract L.J. 1, 3-6 (1991).

Congress was also concerned that it not grant equitable remedies to the boards of contract appeals by virtue of granting such jurisdiction to the Claims Court. In section 8(d) of the Contract Disputes Act (CDA), Congress had granted the boards of contract appeals the same remedial powers available to the Claims Court: "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court."[8] Congress in 1982 reasoned that, without some proviso excepting the boards from its grant of jurisdiction to the Claims Court in the FCIA, the boards would acquire concurrent *Scanwell* jurisdiction under the express terms of that CDA provision. Thus, Congress specified that the Claims Court's jurisdiction in *Scanwell* cases was "exclusive":

> This enlarged authority [of the Claims Court to grant declaratory and equitable relief] is exclusive of the Board [*sic*] of Contract Appeals and not to the exclusion of the district courts.[9]
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> . . . .
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> Since the court is granted jurisdiction in this [*Scanwell*] area, boards of contract appeals would not possess comparable authority pursuant to the last sentence of section 8(d) of the Contract Disputes Act.[10]

Congress, then, in 1982 deliberately inserted the "exclusive jurisdiction" language in what became section 1491(a)(3) in order to withhold what it believed would otherwise have been a correlative grant of equitable powers to the boards of contract appeals in bid protest cases. This congressional purpose was recognized by the First,[11] Third,[12] and Federal Circuits,[13] among other courts.[14] The Third Circuit in *Coco Brothers Inc. v. United States* observed as follows:

> The House Report leaves no doubt that the jurisdiction of the district courts was not to be disturbed. The Senate Report, although not as specific, is consistent. . . . We

read the Senate Report to evince the same intention disclosed in the House Report — to grant the Claims Court equitable jurisdiction exclusive of agency boards [of contract appeals] but not the district courts.[15]

"Exclusive" No Longer — Amendment by the ADRA

The "exclusive jurisdiction" provision as provided in the FCIA and codified in section 1491(a)(3) caused much litigation over whether the Claims Court (and subsequently the Court of Federal Claims) had pre-award bid protest jurisdiction to the exclusion of the federal district courts. The circuit courts split

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8 41 U.S.C. § 607(d) (1982).

9 H.R. Rep. No. 97-312, *supra* note 6, at 43.

10 S. Rep. No. 97-275, *supra* note 6, at 23, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 33.

11 *See In re* Smith & Wesson, 757 F.2d 431, 434 (1st Cir. 1985).

12 *See* Coco Bros., Inc. v. United States, 741 F.2d 675, 678-79 (3rd Cir. 1984).

13 *See* United States v. John C. Grimberg Co., 702 F.2d 1362, 1374-75 (Fed. Cir. 1983) (en banc).

14 *See, e.g.*, Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991).

15 741 F.2d at 678-79.

down the middle on this issue,[16] and Congress resolved the matter in the Administrative Dispute Resolution Act of 1996 (ADRA).[17] Congress in the ADRA replaced section 1491(a)(3) with new section 1491(b), which reads in relevant part as follows:

> (1) Both the United States Court of Federal Claims and the district courts of the United States shall have [bid protest] jurisdiction. . . . 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 a suit is instituted before or after the contract is awarded.
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> (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.[18]

Congress has now made clear that the Court of Federal Claims and the district courts have concurrent jurisdiction in *Scanwell* cases. However, unlike under the FCIA, in new section 1491(b)(1) Congress did not make that jurisdiction *exclusive*. Thus, it could be argued that the boards of contract appeals, pursuant to section 8(d) of the CDA,[19] which remains substantively unchanged from how it read in 1982,[20] have acquired bid protest jurisdiction and can grant injunctive, declaratory, and other relief in such cases.

Such an argument would probably be advanced along the following lines:

(1) Congress in the FCIA, as codified in former section 1491(a)(3), made *Scanwell* jurisdiction "exclusive" in the Claims Court/Court of Federal Claims because it knew that, unless it specified that the jurisdiction was "exclusive," the boards of contract appeals would be able to grant the same remedies as the court pursuant to section 8(d) of the CDA.

(2) This conclusion is required, but not solely based on, a facial reading of the statutes. Congress expressly recognized in the legislative history of the FCIA that the reason for use of the term "*exclusive* jurisdiction" was to negate the operation of section 8(d) of the CDA and to deprive bid protest jurisdiction to the boards — jurisdiction that otherwise would have vested automatically in the boards under the CDA.

(3) Judicial interpretations of the "exclusive jurisdiction" language of former section 1491(a)(3) recognized this as the purpose of the provision. Those cases that found the jurisdiction of the Claims Court/Court of Federal Claims to be exclusive of that of the district courts also recognized the relevant

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16 The First and Third Circuits held that district courts had concurrent jurisdiction with the Claims Court/Court of Federal Claims to consider bid protest actions brought before an award is made under the challenged solicitation. *See In re* Smith & Wesson, 757 F.2d 431, 433-35 (1st Cir. 1985); Coco Bros. v. Pierce, 741 F.2d 675, 677-79 (3rd Cir. 1994). The Sixth and Federal Circuits agreed with that view in dicta. *See* Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991); United States v. John C. Grimberg Co., 702 F.2d 1362, 1376 (Fed. Cir. 1983) (en banc). The Fourth and Ninth Circuits found that the Claims Court/Court of Federal Claims had jurisdiction exclusive of the district courts in such situations. *See* Rex Sys., Inc. v. Holliday, 814 F.2d 994, 997-98 (4th Cir. 1987); J. P. Francis & Assocs., Inc. v. United States, 902 F.2d 740, 741-42 (9th Cir. 1990). The Second Circuit aligned itself with that view in dicta. *See* B.K. Instrument Co. v. United States, 715 F.2d 713, 721 & n.4 (2d Cir. 1983). *See generally* Claybrook, *supra* note 7, at 11-16.

17 Pub. L. No. 104-320, 110 Stat. 3870.

18 *Id.* § 12(a), 110 Stat. at 3874-75, *codified at* 28 U.S.C.A. § 1491(b) (Supp. 1997).

19 41 U.S.C. § 607(d) (1994).

20 *See* note 23 *infra* and accompanying text.

legislative history and implicitly agreed that the "exclusive jurisdiction" language was necessary to divest the boards of *Scanwell* jurisdiction (whether or not they agreed it also divested the district courts of jurisdiction).[21]

(4) Congress when dealing with this issue in the ADRA omitted the "*exclusive* jurisdiction" language. Congress must be presumed both (a) to have intended that exclusion and (b) to have taken cognizance of the FCIA's legislative history and the judicial interpretation of the "exclusive jurisdiction" language of former section 1491(a)(3).

(5) Thus, it can be concluded that the boards of contract appeals now have injunctive and declaratory powers in bid protest cases. New section 1491(b) grants the Court of Federal Claims injunctive remedies, and section 8(d) of the CDA grants any remedial powers the court possesses to the boards as well.

Legal and Practical Problems — "Exclusive" Jurisdiction Still?

A protester to assert successfully that the boards of contract appeals have protest jurisdiction would have to surmount significant legal hurdles. In addition, the practicalities are such that it is unlikely the attempt will ever be made.

Despite the force of the argument sketched out above for the conclusion that the boards have *Scanwell* jurisdiction under new section 1491(b) through the CDA, there are two principal legal hurdles to reaching that conclusion. First, when it amended section 1491 in the ADRA, Congress gave no indication in the legislative history of that act that it intended to vest the boards with injunctive and declaratory remedies in bid protest cases. Indeed, consistent with the demise of the Brooks Act, Congress had earlier that term decided that the one board that had previously possessed limited jurisdiction in that area, the GSBCA, should no longer hear bid protests.[22]

Second, an effective argument can be made that section 8(d) of the CDA does not cut as broadly as Congress feared it might when it enacted the FCIA. Section 8(d) presently reads in full as follows:

> **Jurisdiction**. Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. *In exercising this jurisdiction,* the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.[23]

Focusing on the provision's italicized phrase, *"[i]n exercising this jurisdiction*," one could argue that the boards could not exercise declaratory and injunctive remedial powers in bid protest cases unless it is in a case involving what the section refers to as "this jurisdiction." Further, it could be argued that the term "this jurisdiction" in the italicized phrase only applies to what is specified in the first sentence of section 8(d) as an "appeal from a decision of a contracting officer,"[24] which in turn refers to a decision on a claim submitted under section 6(a) of the CDA.[25] To conclude the argument, one would contend that a

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21 *See, e.g.*, J.P. Francis & Assocs., Inc. v. United States, 902 F.2d 740, 742 (9th Cir. 1990).

22 See note 1 *supra*.

23 41 U.S.C. § 607(d) (1994) (emphasis added). In 1982, section 8(d) read the same as quoted in the text except for the name of the court.

24 *Id.*

25 *Id.* § 605(a).

protester in pursuing a bid protest would not be asserting a claim "relating to a contract" under section 6(a) of the CDA or a "contract claim" under section 8(d) because a protester does not have a contract until one is awarded to it. However, this final assertion logically would require repudiation of the Federal Circuit's ruling in *United States v. John C. Grimberg Co.*[26] that the bid protest provision of section 1491 is not a jurisdiction-granting provision but only a remedy-granting provision, with jurisdiction being founded in section 1491(a)(1) under an implied contract to consider a bidder's offer fairly and honestly.[27]

The practical problems are even more serious and likely insurmountable. Like the legal hurdles, there are principally two-fold.

First, a bid protest in almost every instance requires prompt attention, or performance under the disputed contract will moot the dispute. Bringing a protest action in a board of contract appeals would undoubtedly spawn a spirited jurisdictional challenge, which will probably have to be overcome prior to the board granting any significant injunctive relief. If the board were to find ultimately that it lacked jurisdiction to entertain the case, precious time spent on the jurisdictional issue would have been lost, when the action could have been brought in the first instance without jurisdictional challenge in either the Court of Federal Claims or a district court.[28]

Second, even if a board of contract appeals determined it does have jurisdiction to hear a bid protest case under section 1491 and the CDA, it might hold that such jurisdiction is only perfected when a claim has been submitted to a contracting officer for decision and such a decision has been rendered. While a litigant might argue that the relevant contracting officer decision in a bid protest case is either a decision to deny it a contract award or a denial of an agency protest, such contractor "claims" and contracting officer "decisions" do not include the formalities normally required by law for a final decision to be appealable under the CDA.[29] Nor can a *Scanwell* litigant ordinarily tolerate the 60 or more days given to a contracting officer to issue a final decision on a claim.[30]

Less exigencies would be associated with a claim by disappointed bidder for bid preparation costs. In that situation, the disappointed bidder can request of the agency a monetary recovery without seeking declaratory or injunctive relief. The contracting officer would then issue a final decision either granting or denying the claim, which could then be taken either to the appropriate board or the Court of Federal Claims for adjudication. That again raises the question, however, of why, if the board has jurisdiction to grant the disappointed bidder monetary relief on a breach of the implied contract to consider a bid fairly and equally, it does not also have jurisdiction to grant injunctive and declaratory relief in such

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26 702 F.2d 1362 (Fed. Cir. 1983) (en banc).

27 *Id.* at 1366-68; *see also* Keco Indus., Inc. v. United States, 428 F.2d 1233, 1237-40 (Ct. Cl. 1970); TRW, Inc. v. United States, 28 Fed. Cl. 155, 157-62 (1993). The Federal Circuit reached this conclusion despite the use of the term "jurisdiction" in former section 1491(a)(3), which is carried over in new subsection (b)(1). *See generally* Claybrook, *supra* note 7, at 16-19 (criticizing the court's rationale). If *Grimberg*'s rationale is continued to be applied to new section 1491(b)(1), *see, e.g.,* Cincom Sys. Inc. v. United States, 37 Fed. Cl. 663, 671 (1997), then the case is much stronger that, in a bid protest case, "a litigant [would be] asserting a contract claim" in the Court of Federal Claims, 41 U.S.C. § 607(d) (1994), and, thus, the boards can grant the same relief. If new section 1491(b) is determined to be a free-standing grant of jurisdiction itself, it could be much more forcefully argued that the bid protest jurisdiction of section 1491(b) is independent of the jurisdiction of section 1491(a) for claims "founded . . . upon any express or implied contract" and, consequently, a litigant asserting a bid protest is not "asserting a contract claim" for purposes of section 8(d) of the CDA.

28 Of course, bid protests can also be brought in the GAO, and such protests have the advantage of an automatic statutory stay which may only be overridden by the agency in limited circumstances. *See* 31 U.S.C. § 3553; FAR, pt. 33; 4 C.F.R. § 21.6.

29 *See, e.g.*, 41 U.S.C. §§ 605(c) (certification and timeliness requirements for claim), 605(a) (final decision formalities).

30 *See id.* § 605(c). Arguably, the boards would have jurisdiction to grant equitable relief pending a final decision by the contracting officer, pursuant to both sections 8(d) and 6(c)(4) of the CDA. *Id.* §§ 607(d), 605(c)(4) ("A contractor may request the . . . board . . . to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.").

cases, as the boards have been given under the CDA the same remedial powers as the Court of Federal Claims.[31]

Conclusion

Congress in removing in the ADRA the "*exclusive* jurisdiction" language of former section 1491(a)(3) relating to bid protest jurisdiction arguably has granted the various boards of contract appeals bid protest jurisdiction and the power to grant equitable remedies related to all procurements of their respective agencies. However, this was not a stated purpose of Congress when it amended section 1491, and it is unlikely that the exigencies of bid protest cases will allow a litigant to test whether or not such authority has been granted to the boards of contract appeals.

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[31] Along these lines, the litigant could argue that the second sentence of section 8(d) of the CDA operates independently to grant the boards bid protest jurisdiction, see note 27 *supra*, and that a formal, section 6(a) contracting officer decision is no more required at the board than it is in the Court of Federal Claims in a bid protest case.