A NEW APPEALS BOARD: PROVIDING CONSISTENCY AND CLARITY IN THE GROWING WORLD OF GRANTS AND COOPERATIVE AGREEMENTS

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I. INTRODUCTION

In April 2009, the Department of Energy (DOE, or the Department) solicited proposals for a research and development project concerning energy-related technologies.[1] The DOE decided to fund the selected applicant through a grant, a cooperative agreement, or a technology investment agreement.[2] Although contractor Phillip Ozdemir submitted his proposal for the project, the Department refused to accept it because Mr. Ozdemir requested an application control number after the deadline.[3] Unable to resolve the dispute within the DOE, Mr. Ozdemir filed a complaint in the Court of Federal Claims (CoFC).[4]

At first glance, Mr. Ozdemir's case does not involve complicated questions of government contract law. Perhaps if the Government had defended its actions on the merits, the court could have avoided delving into the murky laws governing grants and cooperative agreements (GCAs).[5] Instead, the Government challenged the court's jurisdiction over the dispute.[6] The Department of Justice (DoJ) argued that the CoFC did not have jurisdiction over the suit because the funding instrument at issue was not a procurement contract.[7]

The CoFC rejected the DoJ's position, opening the door to a debate that has been in the making for years about the proper venue for judicial review of GCAs. In *Ozdemir*, the CoFC held that it had jurisdiction based on (1) the Tucker Act's statutory construction[8] and (2) the fact that the term "contract" encompasses GCAs under the Tucker Act.[9] Few prior cases had directly addressed which forum has jurisdiction over disputes arising from the award or performance of a GCA.[10] Even if the U.S. Court of Appeals for the Federal Circuit decides *Ozdemir* on appeal in the near future, the very existence of this case indicates that laws governing GCAs need clarification.

While the Federal Government has increasingly relied on GCAs to fund public projects over the last few decades,[11] current laws and regulations do

1. Ozdemir v. United States, 89 Fed. Cl. 631, 632–33 (2009).
2. *Id.* at 633.
3. *Id.*
4. *Id.*
5. Procurement contracts are used to "acquire … property or services for the direct benefit or use of the United States Government," whereas GCAs "transfer a thing of value to the … recipient to carry out a public purpose." 31 U.S.C. § 6303–6305 (2006). *See* discussion *infra* Part II.B.
6. *Ozdemir*, 89 Fed. Cl. at 633.
7. *Id.*
8. *Id.* at 634–37.
9. *Id.* at 639.
10. *See Pro Se Plaintiff Wins in Claims Court*, FEDERALGRANTSLAW.COM GROUP (Mar. 8, 2010), http://www.federalgrantslaw.net/Blog/2010/03/08/Pro-Se-Plaintiff-Wins-in-Claims-Court ("It is comforting, though, to know that the court doors are opening to grantees, which previously were only open to government contractors.").
11. *See, e.g.*, Ralph C. Nash Jr. & John Cibinic Jr., *Cooperative Agreements: Many Things to Many People*, 9 NASH & CIBINIC REP. ¶ 39 (July 1995) [hereinafter Nash & Cibinic, *Cooperative Agreements*] ("Cooperative agreements are one of the fastest growing techniques in government contracting.").

not provide a single, consistent forum for those who have a dispute with an agency about the award or administration of a GCA.[12] The lack of a clear governing body of regulations, like the Federal Acquisition Regulation (FAR), for GCAs exacerbates the problem.[13] Although some agencies use internal procedures to handle GCA disputes, these institutions provide vastly different avenues of recourse to disgruntled appellants and they inconsistently interpret the few government-wide regulations that do apply to GCAs.[14]

Individuals and organizations in dispute with a federal agency over a GCA need a single forum to adjudicate those disagreements. Part II of this Note addresses the growing role of GCAs in government spending. Part III examines the abilities of existing forums, such as the CoFC and GAO, to adjudicate GCA disputes. Finding these options lacking, Part IV proposes the implementation of a GCA Appeals Board to resolve all grievances pertaining to grants and cooperative agreements.

II. BACKGROUND: WHAT ARE GCAS, AND WHY ARE THEY IMPORTANT?

A. *The Growing Importance of GCAs*

GCAs continue to play an increasingly important role in the Government's acquisition of various services.[15] In fiscal year (FY) 2010 alone, the Federal Government spent roughly $573 billion[16] to purchase services with grants.[17] According to recent estimates, as illustrated in the chart below, federal grant spending has nearly tripled over the past twenty years.[18]

12. *Cf. id.* ("Yet there is little in the way of published authority regulating the award and performance of cooperative agreements.").

13. *See id.* ("[T]here is no government-wide regulation concerning the use of cooperative agreements even though the FGCAA provides for the issuance of such a regulation in 31 U.S.C. § 6307.").

14. *See* discussion *infra* Part III.B.4.

15. Nash & Cibinic, *Cooperative Agreements*, *supra* note 11.

16. USASPENDING.GOV (last visited Aug. 29, 2011).

17. *Id.* The $556 billion figure from 2010 includes $265 billion provided by the Department of Health and Human Services (HHS) to Centers for Medicare & Medicaid Services. *Prime Award Spending Data*, USASPENDING.GOV, http://www.usaspending.gov/explore?&tab=By+Agency&overridecook=yes&&carryfilters=on&grants=Y&val=&maj_contracting_agency=75&fiscal_year=2010 (last visited Aug. 29, 2011). Although one may not colloquially associate Medicare and Medicaid services with the term "grant," aid for both programs fits within that term's statutory definition. *See* 31 U.S.C § 6304 (2006) (discussing grants as "legal instrument[s] reflecting a relationship between the [U.S.] and a State, a local government, or other recipient when (1) the principal purpose of the relationship is to transfer a thing of value … to carry out a public purpose of support or stimulation authorized by a law … and (2) substantial involvement is not expected [by] the [grantee] … when carrying out the activity contemplated in the agreement").

18. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, 2010 CENSUS, FEDERAL GOVERNMENT FINANCES AND EMPLOYMENT (Federal Budget Outlays by Type: 1990 to 2010) at 311 tbl. 469, *available at* http://www.census.gov/prod/2011pubs/11statab/fedgov.pdf (last visited Aug. 29, 2011). The dollar values were calculated by adding the "grants to state and local governments" values to the "all other grants" amounts from the "Constant (2005) dollar outlays" section of Table 469. *See id.*

Agencies use GCAs to pay for services ranging from scientific research to social services to education. In FY 2010, the agencies that spent the most on grants included the Department of Health and Human Services (HHS) ($368.7 billion), the Department of Transportation (DOT) ($51.6 billion), the Department of Education (ED) ($43.7 billion), the Department of Housing and Urban Development (HUD) ($19 billion), and DOE ($17.8 billion).[19] The American Recovery and Reinvestment Act of 2009 (the Recovery Act) in particular has used grants for many government-funded projects. In December 2010, for instance, HUD reported that grants from the Recovery Act played a significant role in protecting nearly four thousand children from lead paint hazards.[20] The Recovery Act also allowed the DOT to provide Dallas with a $23 million grant for the Downtown Dallas Streetcar Project, which will provide transportation from residential neighborhoods to major employment areas in the city.[21] In addition, the Federal Government through the ED has provided universities with multimillion-dollar grants for research and construction.[22]

Although many people associate the term "grant" with nonprofit organizations, an increasing number of commercial organizations are also applying for and receiving grants and cooperative agreements.[23] One example of this trend is the Small Business Administration's recent announcement of a pilot program in which $5 million will be disbursed in grants to small firms.[24] As these examples make clear, the Government is using GCAs at a growing rate to fund both commercial and nonprofit endeavors, and these funding instruments will continue to play an important role in government spending.[25]

19. *Federal Contract and Assistance Awards by Contracting Agency*, USASPENDING.GOV, http://www.usaspending.gov/trends?carryfilters=on&trendreport=cont_agency&viewreport=yes&grants=Y&maj_contracting_agency=&pop_state=&pop_cd=&vendor_state=&vendor_cd=&psccat=&graphview=list&Go.x=Go (last visited Aug. 23, 2011).

20. Press Release, U.S. Dep't of Hous. & Urban Dev., HUD Secretary Donovan Announces That Recovery Act Funding Has Removed Home Health and Safety Risks for over 3,800 Children (Dec. 22, 2010), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-270.

21. Press Release, U.S. Dep't of Transp., U.S. Transportation Secretary LaHood Announces $23 Million Recovery Act Grant Agreement for Downtown Dallas Streetcar Project (Jan. 20, 2011), http://www.dot.gov/affairs/2011/fta0211.htm.

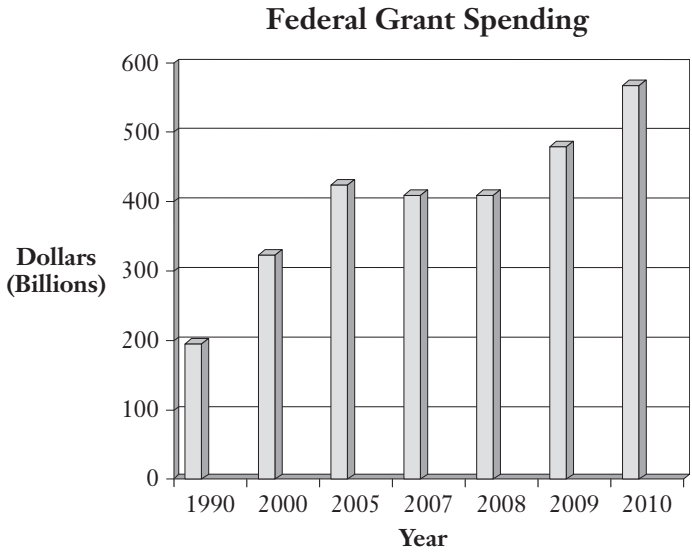
22. *See, e.g.*, *Duke Tops $200M in Stimulus Grants*, WRAL.COM (Oct. 12, 2010), http://www.wral.com/news/local/noteworthy/story/8440522 ("The 360 research and construction grants through the [Recovery Act] total $202 million. More than 80 percent of the funding has come from the National Institutes of Health, with the School of Medicine and School of Nursing accounting for $166.3 million of the total received.").

23. Ralph C. Nash Jr. & John Cibinic Jr., *Postscript: Cooperative Agreements*, 9 NASH & CIBINIC REP. ¶ 53 (Oct. 1995) [hereinafter Nash & Cibinic, *Postscript*].

24. Robert Brodsky, *Pilot Program Will Help Small Businesses Compete for Large Contracts*, GOVEXEC.COM (Jan. 12, 2011), http://www.govexec.com/story_page.cfm?articleid=46864&dcn=e_gve.

25. For instance, the *Nash and Cibinic Report* speculated that agencies use financial instruments such as cooperative agreements to avoid procurement regulations. *See* Nash & Cibinic, *Postscript*, *supra* note 23.

Figure 1:



Before considering the implications of this growth, however, it is important to understand the foundation of GCAs.

B. *Statutory Establishment of GCAs*

Starting in the 1950s, Congress began to appropriate funding for research projects outside the limitations of procurement contract laws.[26] In 1972, however, Congress became concerned that the blurring line between procurement contracts and GCAs had "led to both the inappropriate use of grants to avoid the requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants."[27] To clarify when agencies should use procurement contracts rather than GCAs, Congress passed the Federal Grant and Cooperative Agreement Act of 1977 (FGCAA).[28]

The FGCAA created three categories of governmental funding instruments: procurement contracts, grants, and cooperative agreements.[29] According to the statute, executive agencies "shall use" procurement contracts to "acquire … property or services for the direct benefit or use of the United

26. Andreas Baltatzis, Note, *The Changing Relationship Between Federal Grants and Federal Contracts*, 32 PUB. CONT. L.J. 611, 612 (2003).
27. *See generally* S. REP. NO. 95-449, at 6 (1977); Baltatzis, *supra* note 26, at 612.
28. Baltatzis, *supra* note 26, at 612–13.
29. 31 U.S.C. §§ 6303–6305 (2006).

States Government."[30] In contrast, GCAs shall be used to "transfer a thing of value to the … recipient to carry out a public purpose of support or stimulation."[31] The difference between grants and cooperative agreements within the GCA category is the anticipated level of governmental involvement in the project. When an agency does not expect to be "substantially involved" in a funded project, it must use a grant.[32] On the other hand, an agency should use a cooperative agreement if it anticipates it will be substantially involved in the endeavor.[33]

C. *GCAs Versus Procurement Contracts: Should the Distinction Be Blurred for Purposes of Jurisdiction?*

The FGCAA clearly distinguishes GCAs from procurement contracts. Therefore, regulations governing procurement contracts generally do not apply to GCAs;[34] however, whether GCAs can be *construed* as procurement contracts for purposes of jurisdiction remains debated.[35] If courts interpret GCAs as they would procurement contracts, then disgruntled GCA applicants or recipients can use the same avenues for litigation available to government contractors. For instance, pursuant to the Tucker Act, a GCA applicant could challenge in the CoFC an agency's decision to award funding to a particular organization.[36] The appeal of an agency's decision regarding the performance of a GCA would fall within the jurisdiction of the appropriate board of contract appeals[37] or the CoFC.[38]

Court opinions and scholarly articles, however, reveal a continuing debate as to whether GCAs can be construed as procurement contracts.[39] In *Trauma Service Group, Ltd. v. United States*, the CoFC held that an agreement between a federal agency and a private company did not constitute a procurement contract under the FGCAA.[40] The CoFC reasoned that the agreement involved "mutual assistance in carrying out the purposes" of a federal program and did not provide a direct benefit to the Government, thus not qualifying as a procurement contract under the FGCAA.[41]

On appeal, the Federal Circuit "criticized the Court of Federal Claims' statement that a cooperative agreement or assistance agreement did not act as a contract,"[42] holding that "*any agreement can be a contract* within the

30. *Id.* § 6303.
31. *Id.* §§ 6304–6305.
32. *Id.* § 6304.
33. *Id.* § 6305.
34. *See* Jeffrey C. Walker, Note, *Enforcing Grants and Cooperative Agreements as Contracts Under the Tucker Act*, 26 PUB. CONT. L.J. 683, 686 (1997).
35. *See id.* at 692.
36. 28 U.S.C. § 1491(b)(1) (2006).
37. 41 U.S.C. § 607(d) (2006).
38. *Id.* § 609(a)(1).
39. *See generally* Walker, *supra* note 34.
40. 33 Fed. Cl. 426, 429 (1995).
41. *Id.*
42. Baltatzis, *supra* note 26, at 616.

meaning of the Tucker Act" as long as it involved the fundamental elements of a contract such as offer and acceptance.[43] Therefore, although the Federal Circuit did not outright reverse the CoFC's holding, it implied that the line between GCAs and procurement contracts may be blurred to allow the CoFC jurisdiction over a GCA disagreement.[44]

In *Thermalon Industries, Ltd. v. United States*, the CoFC concluded that it had jurisdiction over a dispute regarding a federal research grant, reasoning that the FGCAA did not preclude the enforcement of GCAs under the Tucker Act.[45] The court also noted that "grant agreements that satisfy all of the ordinary requirements for a government contract" can still be classified as an enforceable contract under the Tucker Act.[46] Therefore, *Thermalon Industries* supports the proposition that the CoFC can adjudicate GCA disputes by categorizing GCAs as procurement contracts for jurisdictional purposes.[47]

Blurring the line between contracts and GCAs, however, threatens to undermine the legislative intent of the FGCAA.[48] Congress passed the Act to stop the "inappropriate use of grants to avoid the requirements of the procurement system."[49] While some argue GCAs can be construed as contracts,[50] it is inappropriate to adopt a construction that would render clear statutory distinctions meaningless.[51]

III. THE PROBLEM: THE LACK OF A SINGLE AND CONSISTENT FORUM FOR GCAS

Part II established that while GCAs technically differ from procurement contracts, it remains unclear whether courts can enforce GCAs as procurement contracts for litigation purposes.[52] As illustrated by *Trauma Services Group* and *Thermalon Industries*, significant jurisdictional questions result from the absence of a clear and consistent forum for GCA disputes.[53]

The few government-wide regulations for GCAs that exist today provide little or no detail regarding the award and administration of these funding instruments. Although the FAR and the Competition in Contracting Act (CICA) provide an abundance of guidance regarding procurement contracts, they do not apply to GCAs because the latter constitute "assistance relation-

43. Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (emphasis added).
44. *Cf.* Baltatzis, *supra* note 26, at 616.
45. 34 Fed. Cl. 411, 417 (1995).
46. *Id.*
47. *See* Baltatzis, *supra* note 26, at 618.
48. *See id.* at 633.
49. *Id.* at 612 (quoting S. REP. NO. 95-449, at 6 (1977)).
50. *See* Walker, *supra* note 34, at 707.
51. *See* Baltatzis, *supra* note 26, at 634.
52. *See* Walker, *supra* note 34, at 692.
53. *See id.*

ships" rather than "acquisitions of property or services."[54] Accordingly, GCA applicants and recipients do not need to conform to the many federal procurement laws and regulations governing procurement contracts.[55]

The Office of Management and Budget (OMB) implemented Circulars A-102 and A-110 in an attempt to fill in some of these gaps. As discussed *infra*, however, these measures neither provide a uniform appellate process for rejected GCA applicants nor establish a clear avenue of recourse for GCA recipients who disagree with an agency's actions during performance of a GCA.

A. *The OMB Circulars*

The OMB has promulgated binding guidelines governing GCAs in the form of "circulars."[56] The two main circulars serving this purpose are A-102, which governs GCAs with state and local governments,[57] and A-110, which provides guidelines for GCAs with higher educational institutions, hospitals, and other nonprofit organizations.[58] Both circulars include provisions for the award and administration of GCAs. For instance, Circular A-102 specifies cash management and site visit requirements,[59] and Circular A-110 describes appropriate payment methods for GCAs.[60]

Neither circular, however, describes the specific procedures to be employed if a recipient wishes to protest the Government's decision about a GCA. Circular A-102 does not specify what appellate procedure, if any, should be provided to rejected GCA applicants or dissatisfied GCA recipients.[61] Circular A-110 is similarly discretionary and leaves open the possibility for multiple appellate forums depending on the agency. For example, sec-

54. *See* Kurt M. Rylander, Scanwell *Plus: Challenging the Propriety of a Federal Agency's Decision to Use a Federal Grant and Cooperative Agreement*, 28 PUB. CONT. L.J. 69, 70 (1998).

55. *See* Walker, *supra* note 34, at 686.

56. *See* Nash & Cibinic, *Postcript*, *supra* note 23.

57. *See* Memorandum for the Record on the Recompilation of Circular A-102 from Norwood J. Jackson, Deputy Controller at the Office of Federal Fin. Mgmt. (Aug. 29, 1997), http://www.whitehouse.gov/omb/circulars_a102 [hereinafter Jackson Circular A-102 Memorandum].

58. *See generally* 2 C.F.R. § 215 (2011).

59. *See* Jackson Circular A-102 Memorandum, *supra* note 57. A *Nash & Cibinic Report* notes that "[o]n March 3, 1988, OMB revised Circular A-102 to prescribe requirements applicable 'solely to federal agencies,' 53 Fed. Reg. 8028. Simultaneously, the agencies adopted a 'common rule' that codified requirements imposed on governmental recipients under the regulations of each agency, 53 Fed. Reg. 8034. Neither Circular A-102 nor the common rule applies to direct assistance to commercial organizations." Nash & Cibinic, *Postscript*, *supra* note 23. In contrast, agencies prevented the OMB from applying the common rule principle to Circular A-110, and they were instead "directed to publish the standards applicable to assistance recipients as codified regulations." *Id.*

60. 2 C.F.R. § 215.22 (2011).

61. Any appellate procedure under A-102 is at the discretion of the agencies, which have codified the circular's provisions as a "common rule." *See* Nash & Cibinic, *Postscript*, *supra* note 23. The OMB website provides a comprehensive list of where in the Code of Federal Regulations each agency has codified the common rule and any discretionary additions or changes. *Codification of Governmentwide Grants Requirements by Department*, U.S. OFFICE OF MGMT. AND BUDGET, http://www.whitehouse.gov/omb/grants_chart/. For instance, in addition to the generic provisions of Circular A-102, the Environmental Protection Agency (EPA) has added a "Disputes"

tion 215.62(a) of Circular A-110 explains, in detail, an *agency's* options if a recipient violates the terms of an award.[62] Although section 215.62(b) provides recipients with the right to a hearing regarding an agency's decision, the Circular does not specify the requirements of the appellate procedure.[63]

Even if section 215.61 of Circular A-110 provided clear guidance in what policies to implement for GCAs, A-110 does not apply to many situations. For instance, the Circular states that "[f]ederal agencies *may* apply the provisions of … this [Circular] to commercial organizations, foreign governments, organizations under the jurisdiction of foreign governments, and international organizations."[64] Therefore, whereas a nonprofit organization may use section 215.61 to appeal an agency's decision, that provision does not apply to commercial organizations or other entities.

The above analysis illustrates that while the OMB circulars provide agencies with general principles in awarding and administering GCAs, they do not provide GCA applicants or recipients with a clear appellate process. The lack of a single appellate forum leaves GCA applicants and recipients vulnerable to unpredictable interpretations of regulations and outcomes in GCA disputes.

B. *The Inadequacies of Current Forums to Resolve GCA Disputes*

The CoFC, GAO, federal district courts, and agencies are all potential candidates to resolve GCA grievances. These forums, however, either lack strong grounds on which to assert jurisdiction over GCA disputes or are ill-equipped to adjudicate those matters. The shortcomings pertaining to each forum are described below.

1. CoFC

The CoFC has clear statutory jurisdiction over disagreements arising out of the award[65] and administration[66] of procurement contracts. As illustrated above by the *Ozdemir* case, however, the CoFC's jurisdiction over GCA disputes remains questionable.[67]

Although the *Ozdemir* court ruled that the CoFC has jurisdiction over GCAs, it failed to rebut adequately a line of cases supporting a contrary out-

subpart to its regulations that describes the procedure a grant-holder should follow if a disagreement arises with the EPA. *See* 40 C.F.R. § 31.70 (2010).

62. 2 C.F.R. § 215.62(a)(1) (2011).

63. *See id.* § 215.62(b) (2011); *see generally id.* § 215 (2011).

64. *Id.* § 215.0(b)(4) (2011) (emphasis added).

65. 28 U.S.C. § 1491(b)(1) (2006) ("The United States Court of Federal Claims … shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals….").

66. 41 U.S.C. § 609(a)(1) (2006)("[A] contractor may bring an action directly on the claim in the United States Court of Federal Claims….").

67. *See*, *e.g.*, *Pro Se Plaintiff Wins in Claims Court*, *supra* note 10 ("It remains to be seen whether this newly found legal basis for grantees and recipients to challenge agency solicitations and awards of grants, cooperative agreements, and other types of governmental agreements will spur more challenges to agency actions.").

come. In *Rick's Mushroom Service, Inc. v. United States*, the CoFC ruled that it lacked jurisdiction over the agreement in dispute because it was a cooperative agreement and not a procurement contract.[68] The *Ozdemir* court attempted to distinguish *Rick's Mushroom Service*, stating that the case was "irrelevant [to the issue of jurisdiction] because the issue in that case was whether a cooperative agreement qualifies as a procurement contract."[69] The *Ozdemir* court, however, overlooked a portion of the *Rick's Mushroom Service* decision, which also noted that the court's jurisdiction "is limited to express or implied contracts for the *procurement of services and property*."[70] The procurement of services and property is more consistent with the definition of a procurement contract (involving the *acquisition* of goods or services) rather than that of a GCA (involving the *transfer* of a thing of value to carry out a public purpose).[71] Contrary to the *Ozdemir* court's contention, therefore, *Rick's Mushroom Service* indirectly addressed the question of its jurisdiction over GCA cases and found no such jurisdiction.

The *Ozdemir* court also attempted to differentiate *Catholic University of America v. United States*, wherein the CoFC held that the Tucker Act governs the "procurement process."[72] The court in *Catholic University* determined that Congress intended for the Tucker Act to grant the CoFC bid protest jurisdiction over "any pre-award challenge to the Government's conduct of a solicitation or contract award irrespective of whether the Government was engaged in the acquisition or the disposition of property."[73] The *Ozdemir* decision found that the word "procurement" does not merely refer to "the Government's acquisition of supplies or services, but rather [i]s a more general reference to the process by which the Government endeavors to fulfill any of its needs."[74]

The *Ozdemir* court, however, failed to acknowledge that *Catholic University of America* involved the disposition of land.[75] The development and sale of real estate fall more within the definition of a procurement contract, which discusses the acquisition of property, than of a GCA, which discusses the transfer of a thing of value to carry out a public purpose.[76] Because the disposition of land more closely resembles a procurement contract than a GCA, no one would dispute that the CoFC could assert its jurisdiction in a case like *Catholic University of America*.

In addition to the cases that contradict *Ozdemir*'s reasoning, public policy dictates against giving the CoFC jurisdiction over GCA cases. The CoFC could only exercise jurisdiction by construing GCAs as procurement con-

68. Rick's Mushroom Serv., Inc. v. United States, 76 Fed. Cl. 250, 258 (2007).
69. Ozdemir v. United States, 89 Fed. Cl. 631, 635 (2009).
70. *Rick's Mushroom Serv., Inc.*, 76 Fed. Cl. at 258.
71. *See* 31 U.S.C. §§ 6303–6305 (2006).
72. 49 Fed. Cl. 795, 799 (2001).
73. *Id.* at 800.
74. *Ozdemir*, 89 Fed. Cl. at 635 (quoting *Catholic Univ. of Am.*, 49 Fed. Cl. at 800).
75. *Catholic Univ. of Am.*, 49 Fed. Cl. at 796.
76. 31 U.S.C. §§ 6303–6305 (2006).

tracts, or by contradicting previous CoFC cases such as *Rick's Mushroom Service*. Conflating procurement contracts and GCAs for purposes of dispute resolution poses a significant danger, as discussed above.[77] Most obviously, blurring the line between procurement contracts and GCAs would render their statutory definitions meaningless.[78]

Even if the CoFC could cite principles of statutory construction or case law to establish its jurisdiction in GCA cases, that court likely does not possess the necessary expertise to adjudicate GCA cases. For example, although the CoFC interprets the FAR to resolve *procurement contract* disputes,[79] it would be less familiar with how a specific agency has interpreted government-wide regulations, such as the OMB circulars, than would agency officials actually in charge of handling the vast majority of GCA disputes.[80] In sum, the Tucker Act's statutory construction, past precedent, and the CoFC's lack of expertise in GCAs disfavor allowing that court to exercise jurisdiction over GCA cases.

2. GAO

The GAO may seem like an obvious forum to adjudicate GCA disputes because CICA already provides it with jurisdiction over procurement contract bid protests.[81] Yet the GAO has repeatedly refused to review the award of cooperative agreements because cooperative agreements do not involve the award of a contract as defined by the FGCAA.[82] Presumably the same would be true of grants, as the Act also defines them separately from procurement contracts.[83] The fact that the GAO avoids adjudicating the award or administration of a GCA should allay any concern that it would object to having another forum resolve GCA disputes.

Even if the GAO asserted jurisdiction over GCA disputes, it would not be equipped to decide cases involving the administration of GCAs. Although

77. Baltatzis, *supra* note 26, at 633 ("The Government faces the possibility of returning to the previous bad effects that Congress was trying to ameliorate with the passage of the FGCAA.").

78. *Id.* at 634.

79. *See* Walker, *supra* note 34, at 686 n.19 (observing that GCAs, unlike procurement contracts, do not have to comply with the FAR).

80. For more information on internal agency appellate processes, see discussion *infra* Part III.B.4.

81. *See* 31 U.S.C. § 3554 (2006).

82. *See, e.g.*, Sprint Commc'ns Co., B-256586, 94-1 CPD ¶ 300, at 2 (Comp. Gen. May 9, 1994) (holding that GAO does "not review protests of the award, or solicitations for the award, of cooperative agreements because they do not involve the award of a 'contract' " as defined by the Federal Grant and Cooperative Agreement Act).

83. *See* Exploration Partners, LLC, B-298804, 2006 CPD ¶ 201, at 53 (Comp. Gen. Dec. 19, 2006) (emphasis added) ("[O]ur Office's bid protest review authority d[oes] not generally extend to cooperative agreements *and other non-procurement instruments*."). The GCA-related cases that the GAO has heard usually involve a party who opposes the use of a GCA because the purpose and terms of the funding arrangement are more consistent with those of a procurement contract than a GCA. *Id.* (noting that the GAO "will review, however, a timely protest that an agency is improperly using a cooperative agreement or other non-procurement instrument … where a procurement contract is required").

the GAO currently hears cases concerning the *award* of procurement contracts, only the CoFC[84] and agency boards of contract appeals[85] resolve *performance disputes* arising from procurement contracts. Therefore, while the GAO may have sufficient knowledge regarding the award of GCAs, another entity would need to adjudicate disputes regarding the administration of a GCA. For purposes of simplicity and efficiency, however, only one forum should hear all legal actions pertaining to GCAs.

Moreover, the GAO would encounter difficulty even if it limited its jurisdiction to award-related GCA cases because the award processes are completely different from those of procurement contracts.[86] For example, the GAO is accustomed to interpreting the FAR, which governs in detail many aspects of procurement contracts.[87] With respect to GCAs, however, no clear body of regulations exists to guide the GAO.[88] In the absence of this statutory direction, and given the GAO's lack of expertise with regard to GCAs and the administration of government funding instruments in general, the GAO is not equipped to handle GCA disagreements.

3. Federal District Courts

The federal district courts are also weak candidates to resolve GCA grievances. Although district courts previously had the authority to adjudicate disputes over the award of a procurement contract,[89] Congress effectively eliminated that jurisdiction in 1996. That year, Congress amended the Tucker Act to include a provision that gave the CoFC and federal district courts concurrent jurisdiction over procurement contract bid protests.[90] The provision also provided that unless Congress extended the district courts' jurisdiction over bid protests, it would expire on January 1, 2001.[91] Congress failed to renew the district courts' jurisdiction before the January 2001 deadline, and as a result it expired at the end of 2000.[92] This legislative history of the Tucker Act reveals that federal district courts do not have jurisdiction over GCA cases.

84. 41 U.S.C. § 609 (2006).

85. 41 U.S.C. § 607(a) (2006).

86. *See* Walker, *supra* note 34, at 686 n.19 (observing that GCAs, unlike procurement contracts, do not have to comply with the FAR).

87. *See, e.g.*, Delex Sys., Inc., B-400403, 2008 CPD ¶ 181, at 7 (Comp. Gen. Oct. 8, 2008).

88. *See* Nash & Cibinic, *Postscript*, *supra* note 23.

89. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 868–69 (D.C. Cir. 1970) (holding that under the Administrative Procedure Act, where "*there is a prima facie showing of arbitrariness on the part of Government officials in regulatory action taken by them, sufficient to threaten substantial injury to the party affected, the injured party is entitled to be heard*" in federal court).

90. Am. Bar Ass'n Section of Pub. Contract Law, Comments Regarding U.S. General Accounting Office (Study of Concurrent Protest Jurisdiction) 8–9 (1999), *available at* http://www.ogc.doc.gov/ogc/contracts/cld/papers/scanwell.pdf (last visited Aug. 23, 2011).

91. *See* Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3875 (1996).

92. *See* Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1080 (Fed. Cir. 2001) ("Consequently, it is clear that the Court of Federal Claims is the only judicial forum to bring any governmental contract procurement protest.").

Providing all federal courts with jurisdiction over GCA disputes would impede efforts toward uniformity and consistency. The legislative history of the Tucker Act's 1996 amendments admittedly reveals that some members of Congress opposed the use of only one forum (such as the CoFC) to adjudicate procurement disputes because they feared this would force litigants to travel to a particular location.[93] Ultimately, Congress did not extend the district courts' jurisdiction provided in the Tucker Act before 2001,[94] and Congress has failed in the years since then to reinstate concurrent jurisdiction. Congressional intent in 1996, therefore, does not provide a strong basis for extending the district courts' jurisdiction to GCA disputes.

Finally, even if Congress could attain the political will to reinstate district court jurisdiction over procurement contract disputes, district courts lack the expertise necessary to handle the unique nature of GCAs.[95] As discussed in Part IV below, agency officials who already handle GCA disputes have the most expertise regarding the appellate procedures and policies of agencies.

4. Internal Appellate Boards of Agencies

As the Federal Government began to use grants extensively in the 1960s, Congress acknowledged that grant dispute resolution procedures were needed.[96] Congress passed various statutes that provided prospective grantees with rights to adjudicatory hearings.[97] In addition, multiple agencies implemented internal grant appeal procedures[98] and provided details to supplement the vague terms of the OMB Circulars.[99]

These procedures, however, vary from one agency to another, leaving GCA applicants and recipients vulnerable to different interpretations of government-wide GCA regulations. For example, the Department of Health and Human Services and the National Science Foundation have adopted entirely different internal procedures for disputes regarding GCAs.[100] More-

93. *See* 142 Cong. Rec. H12277 (daily ed. Oct. 4, 1996) (statement of Rep. Carolyn Maloney) ("Federal district court jurisdiction, commonly known as Scanwell jurisdiction, has been an important safeguard to our constituents back home, ensuring that they have a local forum to appeal decisions on [g]overnment contracts. Eliminating Scanwell would have put burdens on our businesses, both large and small, to litigate their claims long-distance.").

94. *See Emery Worldwide Airlines*, 264 F.3d at 1080.

95. *See* Jacob W. Scott, *Getting Their Money's Worth: Allowing States into the Court of Federal Claims to Recover Grant Application Proposal Costs*, 37 PUB. CONT. L.J. 109, 125–26 (2007) (arguing that the federal district courts should not hear cases because, unlike the CoFC, they lack the expertise required to interpret "the nuances of federal relationships with nonfederal parties"). Scott also argues that Reading First grant recipients should be allowed to seek relief in the COFC. *Id.* at 126. This Note takes the opposite position, however, based on the various arguments against invocation of CoFC jurisdiction discussed *supra* Part III.B.1. Moreover, Scott asserts that the CoFC should extend its jurisdiction by construing grants as contracts, a proposal that this Note rejected in Part II.

96. JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 53.02 (2011).

97. *See*, *e.g.*, 20 U.S.C. § 1234a (2006); *see also* STEIN ET AL., *supra* note 96, § 53.04.

98. *See infra* Part IV.B for an analysis of the grant appeals procedures of two agencies.

99. *See*, *e.g.*, 40 C.F.R. § 31.70 (2011).

100. *See infra* Part IV.B.

over, not all agencies have provided detailed avenues of recourse for disgruntled GCA-holders or seekers. The Federal Aviation Administration (FAA), for instance, allows an individual or organization to appeal a Contracting Officer's decision to the FAA's Office of Dispute Resolution;[101] however, the FAA explicitly precludes protests regarding GCAs.[102] Therefore, not only do the avenues of appeal depend on the agency that awarded the GCA, but some agencies altogether preclude challenges to GCA-related decisions.

C. *Has the Lack of an Identifiable and Consistent Forum for GCAs Created a Real Problem?*

Given that no existing forum appears suitable to adjudicate GCA disputes, some may argue no such forum is needed. The *Ozdemir* case was unique, given that challenges to the award of a GCA rarely occur.[103] The infrequency of GCA lawsuits in the past, however, does not prove that applicants and recipients would decline to challenge an agency's GCA decision if the Government provided them with an easily identifiable and consistent appellate forum to do so.

At least some GCA applicants and recipients use the appellate procedures that agencies have implemented, despite the fact that these procedures lead to varying results.[104] Current practitioners lament the lack of a single forum to interpret federal statutes and regulations in a uniform manner. A DC-based government grants attorney noted that interpretations of government-wide regulations vary by grant specialist, grant officer, federal auditor, program within an agency, and, of course, across different funding agencies.[105] She observed that, based on her experience advising grantees, many of her clients are at great risk because no single forum exists to provide a consistent and publicly available interpretation of these regulations.[106]

Some attorneys do not necessarily believe that a single appellate forum is necessary but admit that grantees become confused as to where they can seek a remedy. One attorney who advises federal grantees observed that rejected grant applicants experience frustration and uncertainty because no

101. Fed. Aviation Admin., *Resolution of Protests and Contract Disputes* (§ 3.9.3.2.2.1), FED. AVIATION ADMIN., *available at* http://fast.faa.gov/archive/v799/ams/ams3-9.htm#393212 (last visited Aug. 15, 2011).

102. *Id.* § 3.9.3.2.1.5.

103. *Cf. Pro Se Plaintiff Wins in Claims Court*, *supra* note 10 ("It remains to be seen whether this newly found legal basis for grantees and recipients to challenge agency solicitations and awards of grants, cooperative agreements, and other types of governmental agreements will spur more challenges to agency actions.").

104. *See, e.g.*, *About DAB*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/dab/about/index.html#mission (last visited Aug. 12, 2011).

105. E-mail interview with Stacia Le Blanc, Esq. (Mar. 28, 2011). Ms. Le Blanc has over twenty years' experience in federal grants and recently established her own company known as My Grant Lawyer, PLLC.

106. *Id.*

clear avenue of recourse exists.[107] As a government contracts practitioner, he often advises rejected grant applicants that the jurisdiction of the CoFC remains unclear, that an action in district court would require proving an abuse of discretion under the Administrative Procedure Act, and that different agencies have varying levels of appellate recourse.[108]

The fact that very few GCA cases reach federal courts or the GAO evidences that a clear appellate forum for such disputes does not exist. The current situation with GCAs is similar to what recently confronted government contractors. Before a legal framework was implemented to address disputes regarding procurement contracts, the Government did not have a firm statutory basis to hear bid protests.[109] The increase in procurement contract challenges can be attributed to the development of a clear course of remedy for contractors.[110] James F. Nagle observes that Congress passed the CICA to promote competition in procurement, and since its passage "disgruntled competitors" now litigate agency decisions.[111] In turn, providing contractors with a clear avenue of recourse resulted in a higher number of protests filed with the GAO.[112]

The same logic could apply to GCAs. If the Federal Government provided a single appellate forum that applied uniform regulations governing GCA decisions, those who sought or received GCA funding would more likely protest an agency's decision. The fact that the Department of Health and Human Services' Departmental Appeals Board alone adjudicated $1 billion in grants in a single year[113] further supports the notion that recipients would take advantage of a consistent and identifiable appellate forum.

IV. A SOLUTION: A GRANT AND COOPERATIVE AGREEMENT APPEALS BOARD

Part III illustrated why the CoFC, GAO, federal district courts, and agencies are ill-equipped to resolve GCA disputes. The CoFC, GAO, and district courts lack familiarity with agency-specific procedures and government-wide regulations pertaining to GCAs. The GAO does not have the expertise to handle disagreements regarding the administration of GCAs. Finally, the appellate procedures within agencies also possess shortcomings because each agency has a different mechanism for appeals, or none at all.

To fill this void, a new GCA Appeals Board should be established to adjudicate GCA disputes with *all government agencies*.[114] The proposed board

107. Interview with a government contracts attorney at a D.C. law firm (Feb. 25, 2011).
108. *Id.*
109. *See* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 497 (2d ed. 1999).
110. S*ee id.*
111. *Id.*
112. *Cf. id.*
113. *About DAB*, *supra* note 104.
114. The Armed Services Board of Contract Appeals, and not the Civilian Board of Contract Appeals, hears disputes pertaining to the administration of procurement contracts for the

would have authority to interpret existing government-wide regulations that pertain to GCAs, such as the OMB Circulars. This single forum for all GCA disputes would (1) provide a clear, streamlined appeals process for both denied GCA applicants and dissatisfied recipients and (2) ensure uniformity in the interpretation of regulations pertaining to GCAs.

A. *The Civilian Board of Contract Appeals: A Model*

The Civilian Board of Contract Appeals (CBCA) represents a model for consolidating boards of appeals into a single appellate forum. Until 2007, federal agencies had internal boards of contract appeals to hear disputes regarding the administration of procurement contracts.[115] In 2006, however, the General Services Administration (GSA) announced the creation of the CBCA.[116] The CBCA was formed throughout the following year within the GSA to "consolidate existing boards of contract appeals for the General Services Administration and the departments of Agriculture, Energy, Housing and Urban Development, Interior, Transportation, and Veterans Affairs."[117] Rather than recruiting new judges, the judges on the previous boards of contract appeals simply moved to the CBCA.[118]

Proponents of the new CBCA argued that the board would make appellate procedures easier by "providing a single set of rules for all Contract Disputes Act appeals involving civilian agencies."[119] Supporters also emphasized that the board would streamline and ease the process for smaller businesses that lacked the resources to conform to a burdensome appeals process.[120]

As a result of the many problems that exist in GCA administration today, the Federal Government should replicate the creation of the CBCA and

Department of Defense (DoD), National Aeronautics and Space Administration (NASA), Central Intelligence Agency (CIA), and "other entities with whom the ASBCA has entered into agreements to provide services." *Welcome*, ARMED SERVS. BD. OF CONTRACT APPEALS, http://www.asbca.mil/ (last visited Aug. 31, 2011). The proposed board, however, should have authority to adjudicate GCA cases in both *civilian and military* agencies to ensure government-wide uniformity in interpreting GCA regulations. Just as members of Congress recognized a need for the CoFC to hear all bid protest disputes to promote uniformity in adjudicating procurement contract bid protests, *see* 142 Cong. Rec. S11848 (daily ed. Sept. 30, 1996) (statement of Sen. Cohen), uniformity should be prioritized in the interpretation of GCA regulations.

Some military-oriented agencies have already incorporated government-wide regulations that govern GCAs. For instance, the DoD codified the common rule of Circular A-102 (*see* 32 C.F.R. § 33 (2011)) and implemented provisions of Circular A-110 (*see* 32 C.F.R. § 32 (2011)). Because the few existing regulations governing GCAs do not create as clear a divide between military and civilian agencies as do regulations governing procurement contracts, there is less reason to separate GCA appeals between military and civilian agencies.

115. 41 U.S.C. § 606 (2006) ("Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.").

116. *Boards of Contract Appeals: GSA Announces Official Launch Date for New Civilian Board of Contract Appeals*, 86 Fed. Cont. Rep. (BNA) 473 (Nov. 14, 2006).

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 PUB. CONT. L.J. 505, 506–07 (2004).

consolidate the existing internal agency forums that adjudicate GCA cases into one board. While such a task may appear daunting, the process can be simplified by incorporating mechanisms of existing forums into the new board. Two candidate forums for consolidation are discussed below.

B. *Building on Existing Grant Appeals Boards*

The Department of Health and Human Services (HHS) and the National Science Foundation (NSF) represent two different appellate mechanisms for GCA grievances. The HHS Departmental Appeals Board (DAB) provides extensive appellate procedures and hearing rights, and publishes binding decisions on the agency's website.[121] The DAB's jurisdiction encompasses disputes regarding large public assistance grants (e.g., Medicaid), "discretionary grant programs," and "civil money penalties and exclusions imposed under a wide range of fraud and abuse authorities."[122] The DAB is accustomed to interpreting agency regulations because it hears a wide array of GCA disputes.[123] In *Away From Home, Inc.*, for instance, the DAB applied HHS regulations to uphold the Administration of Children and Families' decision to terminate funding for the plaintiff's cooperative agreement.[124]

In sharp contrast, the NSF Award and Administration Guide provides details regarding appellate procedures for post-award grant disputes but does not mention the opportunity for a hearing for GCA recipients.[125] The agency's website describes its prescribed actions leading up to termination or suspension if the grantee does not comply with a term of the agreement.[126] If the grantee wishes to challenge a decision of the NSF, including termination, the NSF requires the grantee to submit a letter to the director of the agency's Division of Grants and Agreements.[127] Unlike the HHS, however, the NSF does not have a formal board to adjudicate disputes over the administration or award of a grant,[128] and it does not publish its opinions.

C. *Benefits of a GCA Appeals Board*

The creation of a new GCA Appeals Board would provide multiple benefits to those applying for, administering, awarding, and receiving GCAs.

121. *See generally* 45 C.F.R. § 16 (2011); *About DAB*, *supra* note 104.

122. *About DAB*, *supra* note 104.

123. *See, e.g.*, Away From Home, Inc., No. A-07-116, at 19 (U.S. Dep't of Health & Human Servs. Mar. 21, 2008), *available at* http://www.hhs.gov/dab/decisions/DAB2162.pdf.

124. *Id.*

125. *See, generally*, NAT'L SCI. FOUND., *Grant Administration Disputes and Misconduct*, *in* AWARD AND ADMINISTRATION GUIDE at ch. VII (Jan. 1, 2010), *available at* http://www.nsf.gov/pubs/policydocs/pappguide/nsf10_1/aag_7.jsp#VIIA4.

126. *Id.*

127. *Id.*

128. *See* NAT'L SCI. FOUND., *Non-Award Decisions and Transactions*, *in* GRANT PROPOSAL GUIDE at ch. IV (Jan. 1, 2010), *available at* http://www.nsf.gov/pubs/policydocs/pappguide/nsf10_1/gpg_4.jsp ("Award of NSF assistance is discretionary and reconsideration is not an adversarial process. A formal hearing, therefore, is not provided.").

First, the members of the proposed board would have the requisite expertise to adjudicate GCA cases because the board would merely consolidate the existing mechanisms for GCA disputes of each agency. Filling positions on the board with those who currently adjudicate GCA disagreements would eliminate the need for extensive training about GCAs because each board member would have the necessary expertise regarding his/her agency's approach to GCA complaints.

The proposed board would also streamline the appellate process for GCA disagreements and make it more efficient. In 2002, when President George W. Bush proposed the consolidation of the boards of contract appeals into the CBCA, scholars cited efficiency as a major argument in favor of President Bush's proposal.[129] The GCA Appeals Board could impose a uniform set of procedures for applicants or recipients to follow when appealing any agency's decision regarding GCAs. In addition, having a centralized location for those challenging an agency's decision regarding GCAs would eradicate the need for multiple locations and minimize spending on duplicative resources.[130]

The GCA Appeals Board would also provide GCA applicants and recipients with a consistent interpretation of federal regulations. Many recipients who receive GCA funding would benefit from having a single decision maker to interpret broad provisions of OMB Circulars A-110 and A-102. The proposed board could interpret government-wide provisions particularly for agencies that currently have no specified appellate procedures beyond those explained vaguely in the OMB Circulars. In sum, the proposed consolidated board would use the expertise of current agency officials to streamline the appellate process for GCA disputes and provide a consistent interpretation of government-wide GCA regulations.

D. *Why Not Refer GCA Cases to the CBCA?*

At first glance, the CBCA could serve as a more viable forum for GCA disputes than the proposed board because it has already consolidated the contract appeals boards of multiple agencies. The use of the CBCA for GCA-related disagreements, however, would result in two problems. First, the Armed Services Board of Contract Appeals (ASBCA), and not the CBCA, decides post-award contract disputes pertaining to agencies such as the DoD.[131] The GCA Appeals Board would provide a forum for all GCA disputes, whether the GCA was obtained from a military agency or a civilian agency.[132] Second, the former agency officials who constitute the proposed

129. *See* Lees, *supra* note 120, at 519 (observing that the creation of the CBCA "would be economical in eliminating the need for eight separate physical locations, and in reducing the multiple administrative staffing pools for the boards").

130. *Cf. id.*

131. *Welcome*, *supra* note 114.

132. Although agencies such as DoD may not use GCAs as much as others, the DoD does appear to use them for various projects. Under the American Recovery and Reinvestment Act,

GCA Appeals Board would have more expertise in GCAs than CBCA officials because while the CBCA occasionally decides cases involving GCAs,[133] it does not specialize in them. The proposed GCA Appeals Board would be much better positioned to adjudicate cases in a way that is consistent with agencies' previous decisions.

E. *Counterarguments*

1. Ensuring That Agencies Retain Discretion over GCA Decisions

An agency's need for discretion in awarding and administering GCAs presents a potential argument against the creation of a GCA Appeals Board. Agency discretion is necessary for many types of GCAs to fulfill a wide variety of the Government's needs.[134] Yet the preference for agency discretion hardly justifies an opaque and inconsistent decision-making process. The fact that agencies have implemented different appellate mechanisms illustrates the need to ensure that GCA decisions are merit-based and not the result of an abuse of discretion.[135]

This Note does not recommend that the proposed board eliminate the discretion of agencies with regards to GCAs. Rather, the proposed board would provide a uniform set of procedures and ensure an applicant's or recipient's right to be heard during an appeal. Such procedural uniformity does not undercut agency discretion, but rather balances it with neutral and consistent rules. Particularly because few agencies provide an elaborate appeals process similar to that of the HHS, a one-stop shop for all GCA disputes would provide more consistency and certainty in GCA appeals. The board would only interpret government-wide regulations for the benefit of all agencies in the event that such regulations provide no guidance at all, and do not include a case-by-case exception provision. If the proposed board decided that an agency should be allowed to deviate from the norm, future GCA applicants and recipients would at least have a uniform precedent of cases regarding when a case-by-case exception is appropriate.

2. Maintaining the Unique Perspective of Each Agency

The proposal recognizes the concerns that a single forum would not consider the unique needs of each agency. To ease this concern, the board's

for instance, the Department spent millions of dollars on cooperative agreements in February 2011. *See generally Financial and Activity Report, Week of 2/11/2011*, DEP'T OF DEF., *available at* http://www.defense.gov/recovery/plans_reports/2011/Feb/021111.pdf (last visited Aug. 31, 2011).

133. *See, e.g.*, Bay St. Louis-Waveland Sch. Dist. v. FEMA, CBCA No. 1739-FEMA, *available at* http://www.cbca.gsa.gov/2009FEMA/BORWICK_02-01-10_1739-FEMA_BAY_ST._LOUIS-WAVELAND_SCHOOL_DISTRICT.pdf (ruling that FEMA should have provided more funding in grant assistance for damage caused by Hurricane Katrina).

134. *See* STEIN ET AL., *supra* note 96, § 53.04 (observing that certain types of grants provide agencies with a significant amount of discretion in deciding which projects to fund).

135. The Tucker Act requires federal courts to review an agency's decision using an abuse of discretion standard. *See* 28 U.S.C. § 1491(b)(4) (2006) (citing 5 U.S.C. § 706(2) (2006)).

members would include individuals who currently handle GCA disputes, such as members of established agency appellate panels or designated individuals who address informal GCA disputes. Just as the CBCA's members include individuals who served on former boards of contract appeals,[136] the membership of the proposed board would include individuals who understand the unique perspectives of each agency.

3. Concerns About Independence and Bias

Some may react to the proposed board with unease if its members have former ties to agencies; however, various precautions can limit any potential for bias. For instance, each panel of board members that hears a GCA case could include at least one person who has no affiliation with the particular agency. The new board would provide a more independent decision-making process than the current system, in which officials *within specific agencies* often resolve disputes pertaining to those agencies themselves.[137]

The GCA Appeals Board could also apply principles found in federal statutes that require a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[138] Similarly, the GCA Appeals Board could incorporate recusal procedures to ensure that any potential conflict of interest would not affect the board's decisions.

V. CONCLUSION

As agencies increasingly rely on GCAs to fund projects, the Government will likely observe an increase in GCA disputes. Recipients currently lack the ability to predict how their disputes will be adjudicated or where they can seek relief. In addition, GCA applicants and recipients remain vulnerable to inconsistent appellate forums and procedures. Unlike procurement contractors, GCA applicants and recipients cannot depend on uniform procedures and interpretations of government-wide regulations to resolve their grievances. A GCA Appeals Board would eliminate this confusion and unpredictability by creating an identifiable appellate forum.

136. Current CBCA members previously served on the General Services Board of Contract Appeals and the boards of contract appeals for the following departments: Transportation, Housing and Urban Development, Energy, Agriculture, and Veterans Affairs. *Civilian Board of Contract Appeals Judges*, CIVILIAN BD. OF CONTRACT APPEALS, http://www.cbca.gsa.gov (last visited Aug. 12, 2011).

137. Richard B. Clifford Jr., Alan R. Yuspeh & Lucy G. Gies, *Government Contract Cases Before the United States Court of Appeals for the Federal Circuit*, 43 AM. U. L. REV. 1417, 1428 (1994) ("These tribunals [courts and boards of contract appeals] are reluctant to second-guess an agency's source selection decision and, with rare exception, will not overturn an agency evaluation shown to be reasonably based.").

138. 28 U.S.C. § 455 (2006).