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Sour Grapes: Unrestrained Bid Protest Litigation in Rhode Island – *Blue Cross & Blue Shield of Rhode Island v. Najarian*

Brian P. Stern* & Daniel W. Majcher**

The Rhode Island Administrative Procedures Act (APA) does not apply to government procurement bid protest controversies. Judicial review under the APA encompasses matters involving a “contested case,” and provides that “review shall be conducted by the court without a jury and shall be confined to the record.”¹ Additionally, the APA gives the Rhode Island Supreme Court discretion to hear a final administrative appeal through the issuance of a writ of certiorari.² The Rhode Island Purchasing Act (Purchasing Act) is silent on whether an aggrieved party, usually a losing bidder, may be heard in the form of an administrative hearing.³ A

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1. R.I. GEN. LAWS § 42-35-15(f) (Supp. 2004).

2. *Id.* § 42-35-16.

3. The Purchasing Act only provides a losing bidder the opportunity to present a challenge through a bid protest letter, not a hearing. *Id.* § 37-2-52(b). The ABA Model Procurement Code provides an optional hearing review

hearing is necessary for a "contested case" to arise, and, therefore, the APA is rendered inapplicable in the absence of a hearing.⁴ Thus, a lawsuit challenging a government procurement award may be brought without the limitations imposed by the APA. As a result, government resources are wasted, taxpayer dollars are consumed and government officials are placed in a "legalistic straightjacket."⁵

The ability to bring a lawsuit under the Purchasing Act without the procedural limits imposed by the APA creates an interesting paradox. State officials are entitled to a "presumption of correctness" in making procurement decisions.⁶ This presumption means that a decision to award a state contract may not be overturned unless a challenger (usually a losing bidder) has shown that the State official or officials "acted so corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion."⁷ In other words, a party attempting to overturn a government procurement decision faces an extremely difficult burden, more so than the burden faced to overturn a decision made by a government agency under the APA. Despite having a more onerous burden, bid protest litigation lacks any of the procedural constraints imposed by the APA.⁸ Losing bidders may pro-

by a Procurement Review Panel. *See, e.g.*, S.C. CODE ANN. § 11-35-4410(6) (Law. Co-op. Supp. 2004). Rhode Island adopted the Model Code, but did not include the option for a hearing. *See Bradford Assocs. v. R.I. Div. of Purchases*, 772 A.2d 485, 491 (R.I. 2001).

4. The Rhode Island Supreme Court has decided that a hearing is necessary to create a "contested case," and, therefore, the absence of a hearing makes the APA inapplicable. *See Bradford Assocs.*, 772 A.2d at 491; *Prop. Advisory Group, Inc. v. Rylant*, 636 A.2d 317, 318 (R.I. 1994).

5. *Gilbane Bldg. Co. v Bd. of Trs. of State Colls.*, 267 A.2d 396, 400 (R.I. 1970).

6. R.I. GEN. LAWS § 37-2-51 (1997).

7. *Gilbane*, 267 A.2d at 399.

8. Some states have adopted by statute a hearing procedure for bid protests and judicial review may, therefore, fall under the respective state Administrative Procedure Act (APA). *See* S.C. CODE ANN. § 11-35-4410 (5) (Law. Co-op. Supp. 2004); FLA. STAT. ANN. § 120.57(3) (West Supp. 2005); UTAH CODE ANN. § 63-56-57 (2004); VA. CODE ANN. § 2.2-4360 (A) (Michie 2001). Other states, such as Pennsylvania, may provide only the option for a hearing, but regardless place limits on the scope of bid protest litigation. 62 PA. CONS. STAT. ANN. § 1711.1. (West 2004). Other state legislatures have left the decision regarding a hearing and other processes to the state agency. *See* LA. REV. STAT. ANN §§ 39:1671(B), 39:1490 (West 2004); IND. CODE ANN. § 4-13-1-18 (West 2004); ARIZ. REV. STAT. ANN. 41-2614 (2004). In these states, it appears

ceed with an unbridled lawsuit and expensive, time-consuming discovery with a very limited chance of success.⁹ The Purchasing Act should therefore be amended, consistent with the APA, to resolve the disparity between the standard of review and the scope of the lawsuit.¹⁰

The State procurement process, which is largely mandated by the legislature in the Procurement Act, is comprehensive and includes several safeguards. However, on several occasions the superior court has overturned the government's procurement decisions.¹¹ The Rhode Island Supreme Court, applying Rhode Island General Law section 37-2-51, has then overturned the superior court.¹² The recent procurement of the State health care contract and the ensuing litigation between the State and Blue Cross and Blue Shield of Rhode Island (Blue Cross) epitomizes this problematic occurrence. In November 2004, the State awarded the employee health care contract to United Healthcare (United). Blue Cross lost the bid. Blue Cross, with a vast amount of resources¹³ and in an apparent effort to undermine a high pro-

that bid protest litigation would fall under the state APA. At least one state expressly excludes judicial review under the state APA. COLO. REV. STAT. § 24-109-107 (2004). Oregon's statute allows judicial review "only if the suit or writ of review is filed before the opening of bids, proposals or offers." OR. REV. STAT. § 279B.405(7) (2004). However, if a suit in Oregon is filed prior to the opening of bids, the review is conducted *de novo*. *Id.* § 279B.405(10). One thing is clear, however: every state varies slightly in their law, regulation, process and standard of review in regards to bid protest lawsuits.

9. In the recent litigation between Rhode Island and Blue Cross and Blue Shield of Rhode Island (Blue Cross), Blue Cross was allowed to depose seven state officials, including the Director of Administration, Beverly E. Najarian. *See Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1077 n.1 (R.I. 2005).

10. These "procedural judicial review provisions" should include the ability of a superior court judge to hear extrinsic evidence in cases that involve irregularities in procedure. *See R.I. GEN. LAWS* § 42-35-15(f) (1997). Additionally, the supreme court should have the discretion to grant a writ of certiorari to review a superior court decision when the court deems it appropriate. *See Id.* § 42-35-16.

11. *See Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1091 (R.I. 2005); *H.V. Collins Co. V. Tarro*, 696 A.2d 298, 304-05 (R.I. 1997); *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811, 817 (R.I. 1994).

12. *Najarian*, 865 A.2d at 1091; *Collins*, 696 A.2d at 305-06; *Truk Away*, 643 A.2d at 816.

13. Blue Cross is a not-for-profit corporation and is permitted under law to distribute administrative fees, including legal fees, to its policyholders in

file award to a competitor, brought a lawsuit against the State.¹⁴ Blue Cross embarked on a “fishing expedition”¹⁵ and deposed numerous State officials, including a member of the Governor’s cabinet, the Rhode Island Director of Administration.¹⁶ The superior court judge, based on depositions taken by Blue Cross attorneys, granted a preliminary injunction and overturned the decision of State’s Chief Purchasing Officer,¹⁷ contrary to thirty-five years of court precedent.¹⁸

In addition to the burden and expense of defending itself, the State was forced to delay the implementation of its new health care contract.¹⁹ The supreme court ultimately reversed the decision, as it had done on other occasions when a superior court judge improperly interfered with the purchasing process.²⁰ The Chief Purchasing Officer’s initial decision to award the contract to United was upheld.²¹ However, State officials were “shackled” as result of the lawsuit²² and access to health care services for 52,000

the form of a rate increase. *See In re Calderone*, 520 A.2d 696 (R.I. 1987); R.I. GEN. LAWS § 42-62-13 (Supp. 2004).

14. Approximately four years earlier, the shoe was on the other foot when Blue Cross was awarded the health care contract. At that time, United-Healthcare (United) brought a lawsuit against the State. However, after the first stage where United lost in its quest for injunctive relief, United did not pursue the lawsuit further.

15. “An open-ended inquiry or investigation, often undertaken on the pretext of a minor or unrelated matter, whose real purpose is to uncover embarrassing or damaging information, as about a political opponent.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1993).

16. *See Blue Cross & Blue Shield of R.I. v. Najarian*, No. C.A. 04-5942, 2004 WL 2821629, at *3-16 (R.I. Super. Dec. 1, 2004) (recounting hundreds of pages of depositions taken by Blue Cross).

17. The Chief Purchasing Officer is the Director of the Department of Administration. *See* R.I. GEN. LAWS § 37-2-7 (1997).

18. *Najarian*, 2004 WL 2821629, at *24, *rev’d*, 865 A.2d 1074 (R.I. 2005).

19. The superior court overturned the award to United shortly before the expiration of the State’s health care contract on December 31, 2004. *Id.* Blue Cross did not have a contractual obligation to continue to provide health care administration to the State, and the provision of health care services to 52,000 individuals was put in jeopardy. The supreme court subsequently intervened to assure that Blue Cross would continue to provide health care administration throughout the duration of the appeal at the amount of its proposal made in the Request for Proposal (RFP). *See generally Najarian*, 865 A.2d 1074.

20. *See Najarian*, 865 A.2d at 1091.

21. *Id.*

22. *See Gilbane Bldg. Co. v Bd. of Trus. of State Colls.*, 267 A.2d 396, 399 (R.I. 1970).

people²³ was put at risk.²⁴ Limiting the scope of review in bid protest litigation would be consistent with the APA, and would streamline cases brought by disgruntled losing bidders, such as Blue Cross.

This Article discusses the inconsistency between the Purchasing Act and the APA, which has led to continuous bid protest litigation in the Rhode Island Supreme Court and a waste of government resources. Section I provides a background of bid protest litigation to illustrate the extremely high burden required to overturn a government procurement decision, the amount of deference given to purchasing officials by the supreme court, and the frivolousness of bid protest litigation in its current form. Section II discusses the bid process in the context of the recent awarding of the State health care contract to United. Section II also discusses in detail the bid protest controversy between the State and Blue Cross, and the resulting strain placed on the government in defending these lawsuits. Section III provides specific recommendations regarding the Purchasing Act, and concludes that this statute should be amended to limit the scope of review consistent with the APA.

I. BACKGROUND

State officials are entitled to a “presumption of correctness” in awarding state contracts. Rhode Island General Law section 37-2-51 provides:

The decision of any official, board, agent, or other person appointed by the state concerning any controversy arising under or in connection with the solicitation or award of a contract *shall be entitled to a presumption of correctness*. The decision shall not be disturbed unless it was: procured by fraud; in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, pro-

23. The 52,000 included employees, eligible dependants, and retirees. *Najarian*, 865 A.2d at 1076.

24. The State health care contract expired on December 31, 2004, and Blue Cross was not contractually obligated to continue coverage after that date.

bative and substantial evidence on the whole record; arbitrary, capricious; characterized by an abuse of discretion; or clearly unwarranted exercise of discretion.²⁵

A procurement decision may only be reversed if State purchasing officials acted with bad faith, corruption, or a "palpable abuse of discretion."²⁶ The Rhode Island Supreme Court has narrowed this standard by declaring that a "finding of palpable abuse of discretion should be approached with *grave caution* and be based upon much more compelling evidence of arbitrariness or capriciousness than may be found in mere complexity."²⁷

The purpose of such a difficult burden set forth by the legislature in section 37-2-51 is to avoid placing State officials in a "legalistic straightjacket," by having to continually justify their procurement decisions to trial court judges.²⁸ The logic is that los-

25. R.I. GEN. LAWS § 37-2-21 (1997) (emphasis added). Interestingly, the standard of review in the state's APA is extremely similar to that in the Rhode Island Purchasing Act (Purchasing Act), without the procedural limitations. The APA does not include a presumption of correctness, but all the other aspects of the Purchasing Act and APA are consistent. Section 42-35-15(g) of the APA states:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error or law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 42-35-15(g).

26. *H.V. Collins Co. v. Tarro*, 696 A.2d 298, 301 (R.I. 1997); *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811, 816 (R.I. 1994); *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*, 267 A.2d 396, 399 (R.I. 1970); *Goldman, Inc. v. Burns*, 283 A.2d 673, 676 (R.I. 1970).

27. *Truk Away*, 643 A.2d at 816 (emphasis added).

28. *Gilbane*, 267 A.2d at 400. A second reason for discouraging interference with the procurement process is to avoid placing superior court judges in the shoes of purchasing officials. *Id.*

ing bidders may be deterred from filing suit when faced with such a difficult standard. However, despite the “presumption of correctness” mandated by the legislature, losing bidders have continued to challenge procurement decisions in court.²⁹ Amazingly, despite the supreme court’s clear precedent, harsh language and explicit admonitions, superior court judges have continued to interfere with purchasing decisions.³⁰ Public purchasing officials are forced to concentrate their energies on defending their judgment rather than on receiving the best value for the taxpayer’s dollar.

A. *Gilbane and its Progeny*

The seminal case of *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*³¹ was the first in a long line of cases addressing bid protest litigation in Rhode Island. In this 1970 case, the supreme court began to set a clear precedent mandating that the decision of a procurement official should not be disturbed absent bad faith, corruption, or a “palpable abuse of discretion.”³² Unfortunately, superior court justices have failed to abide by the precedent set by *Gilbane* and its progeny.

1. *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*³³

Gilbane Bldg. Company (*Gilbane*) brought a lawsuit challenging a State contract award to *Dimeo Construction Company* (*Dimeo*).³⁴ *Dimeo* was contracted to construct a junior college facility in Warwick, Rhode Island for the sum of \$10,701,000.³⁵ In November 1968, the State’s Purchasing Agent solicited bids for this project. The bid invitation required a complex scheme requiring bidders to submit alternate bids. These alternate bids were for “extras” that the State might include in the project depending on the amount of the base bid.³⁶ *Dimeo*’s initial bid was \$9,675,000

29. See, e.g., *Blue Cross & Blue Shield of R.I. v. Najarian*, No. C.A. 04-5942, 2004 WL 2821629, at *15 (R.I. Super. Dec. 1, 2004). Losing bidders may be concerned more with their public appearance in losing a bid to a competitor than wasting resources in a nearly frivolous lawsuit.

30. *Id.* at *23-24.

31. 267 A.2d 396 (R.I. 1970).

32. *Id.* at 399.

33. 267 A.2d 396 (R.I. 1970).

34. *Id.* at 397

35. *Id.*

36. *Id.* The alternative options included items such as carpeting, folding

and Gilbane's bid was \$11,211,000. Unbeknownst to Dimeo's President, two of the sub-bidders seeking sub-contract work on the project withdrew their bids. When Dimeo's President discovered this oversight, he immediately contacted the State. Dimeo's base bid was subsequently amended to an amount of \$9,937,000. After a decision was made to allow Dimeo to further amend its bid to include the "extras," the State entered into a contract with Dimeo for \$10,701,000 on January 8, 1969.³⁷

On March 14, 1969, Gilbane brought suit challenging the award to Dimeo.³⁸ Gilbane argued that a public official does not have the authority to change the terms of a bid once it is unsealed.³⁹ The court, however, thought differently: "We do not believe that any person charged with the responsibility of safeguarding the public interest should have his discretion shackled once bids are opened."⁴⁰ The *Gilbane* Court upheld the award to Dimeo and espoused the following principle:

The judiciary will interfere with an award only when it is shown that an officer or officers charged with the duty of making a decision has acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion.⁴¹

The court continued: "We do not believe, however, that those whose duty it is to contract for . . . public improvement should be placed in a legalistic straightjacket."⁴² Unfortunately, because the constraints imposed by the APA in challenging agency decisions do not apply to procurement decisions, state officials have been constructively "shackled" and placed in a "legalistic straightjacket" by bid protest litigation.⁴³

partitions, a standby pump and a television system. *Id.*

37. *Id.* at 397-98.

38. *Id.* at 398.

39. *Id.*

40. *Id.* at 399.

41. *Id.*

42. *Id.* at 400.

43. *See id.* at 399-400. The effects of bid protest litigation on the State will be examined below. *See* discussion *infra* Part II.C.4.

2. Paul Goldman, Inc. v. Burns⁴⁴

Shortly after *Gilbane*, the Rhode Island Supreme Court heard another bid protest suit in 1971. In *Goldman*, the City of Pawtucket, had an established provision in its municipal code stating a policy that all bids would be awarded to the "lowest responsible bidder."⁴⁵ The contract at issue was for the purchase of thirteen motor vehicles for use by the Pawtucket Police Department.⁴⁶ After the invitation for bids in August 1970, two bidders responded: Paul Goldman Dodge (Goldman) and Pierce Chevrolet, Inc. (Pierce). Goldman's bid was for thirteen Dodge automobiles at a price of \$39,450.00, while Pierce's bid was \$39,976.98 for thirteen Chevrolets.⁴⁷ These bids were considered a week later by the Pawtucket Purchasing Board (Pawtucket Board) in an executive session.⁴⁸ The Chief of Police was in attendance by invitation.⁴⁹ Despite Goldman's lower price (by \$526.98), the Police Chief recommended the acceptance of Pierce's bid based on the following factors: 1) the existing thirty-three vehicles in the fleet were all Chevrolets and therefore, by awarding the bid to Pierce all the vehicles would be kept uniform; 2) the Chief's experience with the current fleet of Chevrolets was "most satisfactory"; 3) parts and service were more easily attainable for the Chevrolets; and 4) having a different type of vehicle added to the fleet would require the additional expense of stocking different types of parts.⁵⁰ Based on these recommendations, the Pawtucket Board accepted the higher Pierce bid despite the City's stated policy of awarding a bid to the lowest bidder.⁵¹ Goldman brought suit.

The Rhode Island Supreme Court, citing *Gilbane*, held that the Pawtucket Board acted honestly and in good faith in following the Chief's recommendations.⁵² Although the City's policy was to

44. 283 A.2d 673 (R.I. 1971).

45. *Id.* at 675 (citing PAWTUCKET, R.I., CHARTER § 4-1004 (1954)). In this case, there was no argument that either of the companies were irresponsible bidders. *Id.*

46. *Id.* at 674.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 675.

51. *Id.*

52. *Id.* at 676.

accept the lowest bid, the court read the municipal provision as to permit the "awarding authority to exercise a reasonable, good-faith discretion, and does not commit it unqualifiedly to the lowest bid."⁵³ Once again, the court upheld the decision of a purchasing authority; this came however, only after many resources were wasted as Pawtucket defended its decision in the superior and supreme courts.

3. *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*⁵⁴

The next landmark case involving a bid challenge was in 1994.⁵⁵ In *Truk Away*, the Rhode Island Supreme Court addressed a bid controversy where the superior court judge overturned the decision of the purchasing officer.⁵⁶ *Truk Away* involved a dispute over a sanitation contract awarded by a municipality. The trial court in *Truk Away* held that the bid submitted by Macera Bros. of Cranston, Inc. (Macera) did not conform to the bid specifications and, therefore, Macera's bid should not have been considered the lowest responsible bid.⁵⁷ The trial court also found that the bid submitted by Truk Away of Rhode Island, Inc. (Truk Away) did not meet specifications.⁵⁸ As a result, the trial judge granted injunctive relief against the award to Macera and further rejected all bids.⁵⁹ The supreme court accepted all the facts found by the trial court, including the fact that there was no evidence of bad faith or corruption on behalf of city officials.⁶⁰ As a result, the supreme court reversed the lower court and awarded the contract to

53. *Id.* (citing *Mitchell v. Walden Motor Co.*, 177 So. 151 (Ala. 1937); *Hodgeman v. San Diego*, 128 P.2d 412 (Cal. Ct. App. 1942); *McNichols v. City and County of Denver*, 274 P.2d 317 (Colo. 1954); *Eggart v. Westmark*, 45 So.2d 505 (Fla. 1950); *Otter Tail Power Co. v. Elbow Lake*, 49 N.W.2d 197 (Minn. 1951); 10 MCQUILLIN, MUNICIPAL CORPORATIONS § 29.73(a), at 430 (3d ed. 1966)).

54. 643 A.2d 811 (R.I. 1994).

55. The issue of a bid challenge was in the courts on other occasions prior to 1994. *See Patrick J. McKenna Roofing, Inc. v. City of Pawtucket*, No. C.A. 88-3120, 1988 WL 1017215, at *1 (R.I. Super. Sept. 13, 1988); *see also Myberg Janitorial Serv., Inc. v. Cianci*, No. C.A. 82-3405, 1982 WL 609160, at *1 (R.I. Super. Oct. 29, 1982).

56. *Truk Away*, 643 A.2d at 812.

57. *Id.* at 814.

58. *Id.* at 812-13.

59. *Id.* at 812.

60. *Id.* at 816.

Truk Away.⁶¹

In this case, the harsh language used by the supreme court in its decision is indicative of the burden faced by a losing bidder in challenging a contract award. The court stated that a "finding of palpable abuse of discretion should be approached with *grave caution* and be based upon much more compelling evidence of arbitrariness or capriciousness than may be found in mere complexity."⁶² The court's decision explicitly "admonish[ed] all justices of the Superior Court to exercise great care before issuing an injunction vacating an award of either a state or municipal contract."⁶³ In reaffirming the principles set forth in both *Goldman* and *Gilbane*, the court expressed its belief that "government by injunction save the most compelling and unusual circumstances is to be strictly avoided."⁶⁴ Despite these austere warnings, the court again would be forced to hear the same issue three years later, and yet again more recently.⁶⁵

For the first time in *Truk Away*, the court addressed a problem with the procedural construct of a bid protest case. The court recognized that the litigation was introduced by the attorney of an unsuccessful bidder cross-examining members of the city council and other city officials.⁶⁶ The court acknowledged that the "inherent nature of cross-examination is such that it is designed to bring out inconsistencies and to emphasize ambiguities."⁶⁷ Through the ability to cross-examine witnesses, the attorney for the challenging bidder succeeded in "creating a sufficient aura of confusion as to cause the trial justice to vacate the award."⁶⁸ In summary, allowing the cross-examination of government officials not only places them in a "legalistic straightjacket" in the course of defending these suits, but it also provides an inappropriate forum for losing bidders to create confusion in an attempt to show that a competitor should not be awarded a contract.

61. *Id.*

62. *Id.* (emphasis added).

63. *Id.*

64. *Id.*

65. *H.V. Collins Co. v. Tarro*, 696 A.2d 298 (R.I. 1997); *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1091 (R.I. 2005).

66. *Truk Away*, 643 A.2d at 816.

67. *Id.*

68. *Id.*

4. H.V. Collins Co. v. Tarro⁶⁹

Just three years later, the Rhode Island Supreme Court again was obliged to review bid protest litigation by a losing bidder in *H.V. Collins*.⁷⁰ The issue involved a municipal contract awarded to the third lowest bidder.⁷¹ In the spring of 1996, the Barrington School Committee (School Committee) created a building committee to plan a major renovation at Barrington High School.⁷² In September 1996, the School Committee voted to hire a construction manager and issue a request for proposal.⁷³ The lowest bidder was H.V. Collins Company (Collins).⁷⁴ However, the building committee recommended that Gilbane, the third lowest bidder be awarded the contract. The School Committee followed the recommendation and awarded Gilbane the contract.⁷⁵ Collins filed a lawsuit the next day.⁷⁶

The superior court, after a trial, issued a declaratory judgment in favor of Collins. The trial court found that: (1) Collins was the lowest responsive bidder; (2) Gilbane's bid was non-responsive and should have been rejected; (3) the evaluation of bids was "subjective, unfair, and included matters outside the criteria in the RFP"; (4) the conduct by the school committee was unreasonable and constituted a "palpable abuse of discretion."⁷⁷ The School Committee claimed that, among other reasons, it selected Gilbane because Gilbane had the most experience and had completed past

69. 696 A.2d 298 (R.I. 1997).

70. Interestingly the two other bidders involved in this case were Gilbane and Dimeo, the same two parties involved twenty-seven years earlier in *Gilbane*. However, it is not uncommon for the same parties to be on opposite sides of bid protest litigation as these companies are often competing against each other for State contracts. The recent Blue Cross litigation is an example. In November 2004, the State's health care contract was awarded to United, and Blue Cross brought suit. Four years earlier when Blue Cross was awarded the prior health care contract, United brought suit. The superior court did not issue injunctive relief. Hearing Transcript at 93, *United Healthcare, Inc. v. State of Rhode Island* (No. PC/01-6794) (Dec. 28, 2001) [hereinafter *Hearing Transcript*]. After superior court judge Silverstein denied United's injunction, United dropped the matter.

71. *Tarro*, 696 A.2d at 300.

72. *Id.*

73. *Id.*

74. *See id.*

75. *Id.* at 300.

76. *Id.*

77. *Id.*

projects for the School Committee.⁷⁸

The Rhode Island Supreme Court rejected the findings of the trial court, holding that the “award of the contract by the School Committee will not be disturbed.”⁷⁹ The court found the school committee’s actions reflected good faith and the committee used sound discretion.⁸⁰ In overturning the lower court’s decision, the supreme court “reaffirmed the standard set forth in *Gilbane*, *Goldman*, and *Truk Away*, that ‘when public officials in charge of awarding a public works contract have acted fairly and honestly with reasonable exercise of sound discretion, their actions shall not be interfered with by the courts.’”⁸¹ Further, the court forewarned: “To hold otherwise would place the Judiciary in the position of litigating the award of every state and municipal contract and would place public officials in charge of awarding such contracts in the ‘legalistic straightjacket’ that this Court denounced almost twenty-seven years ago.”⁸² For a second time in three years, the supreme court reversed and expressly warned the lower courts to avoid interfering with a purchasing decision except in extreme cases.

The precedent established since *Gilbane* and the express warnings in *Truk Away* and *H.V. Collins* would go unheeded again, just a few years later, in the *Blue Cross* litigation.⁸³ Bid protest cases continue to clog the courts, waste government resources and tie the hands of purchasing officials, all of which ultimately place a burden on the taxpayer. In this major line of cases, the end result was the same: the initial decision of the purchasing authority was sustained, but only after expensive, time-consuming litigation. As demonstrated again in the below discussion of the *Blue Cross* case, the demands of presenting a defense in bid protest litigation – despite the extreme odds of success in these cases – place a significant strain on local government officials. Introduction of limitations on these suits, similar to those in

78. *Id.* at 302.

79. *Id.* at 305.

80. *Id.*

81. *Id.* (quoting *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811, 815 (R.I. 1994)).

82. *Id.* (citing *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*, 267 A.2d 396, 400 (R.I. 1970)).

83. See discussion *infra* Part II.C.2.

the APA, would relieve some of this burden.

B. The APA Does Not Apply to Bid Protest Litigation

In several other states, bid protests fall under the APA for that state.⁸⁴ In Rhode Island, however, the APA does not apply to bid protest litigation. The APA only applies to "contested cases."⁸⁵ If a losing bidder wishes to protest a state contract award, a bid protest letter must be sent to the Chief Purchasing Officer, pursuant to the Purchasing Act.⁸⁶ The Chief Purchasing Officer then responds to the losing bidder's allegations in a bid protest response letter.⁸⁷ The Purchasing Act and the purchasing regulations do not provide for a hearing at the agency level.⁸⁸ The absence of a hearing determines whether the APA applies. The Rhode Island Supreme Court has held that a hearing is required to create a "contested case."⁸⁹ Therefore, the losing bidder can file a lawsuit in superior court free from any constraints imposed by the APA.

This situation creates a paradox: a higher burden exists in a bid protest court challenge of an agency determination than under the APA, yet the same procedural limitations provided under the APA do not apply under a bid protest challenge. Additionally, the process for awarding a contract is extremely comprehensive and may take months.⁹⁰ Allowing such a process to be challenged in courts without the limitation of the APA places a superior court

84. See S.C. CODE ANN. § 11-35-4410 (5) (Law. Co-op. Supp. 2004); FLA. STAT. ANN. § 120.57(3) (West Supp. 2005); UTAH CODE ANN. §§ 63-56-57 (2004); VA. CODE ANN. § 2.2-4360 (A) (Michie 2001).

85. R.I. GEN. LAWS § 42-35-15(a) (Supp. 2004). The APA defines a "contested case" as "a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing . . ." *Id.* § 42-35-1(c) (emphasis added).

86. See R.I. GEN. LAWS § 37-2-52(b) (1997).

87. See *id.* § 37-2-52(c).

88. See *Bradford Assocs. v. R.I. Div. of Purchases*, 772 A.2d 485, 491 (R.I. 2001).

89. *Prop. Advisory Group, Inc. v. Rylant*, 636 A.2d 317, 318 (R.I. 1994) (citing *Barrington School Comm. v. R.I. State Labor Relations Bd.*, 608 A.2d 1126, 1131 (R.I. 1992); *Lynch v. Gontarz*, 386 A.2d 184, 187 (R.I. 1978); *Providence Gas Co. v. Burke*, 380 A.2d 1334, 1342 (R.I. 1977); *Newport Nat'l Bank v. Providence Inst. for Sav.*, 226 A.2d 137, 141 (R.I. 1967)).

90. For example, the process to award the state health care contract began almost six months before the expiration of the current contract. See *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1077 (R.I. 2005).

judge in the position of the Chief Purchasing Officer, rather than in the appropriate role of a court of review. Moreover, the superior court is in a worse position than purchasing officials because the judge is being presented with facts largely through depositions conducted by skillful attorneys on behalf of a losing bidder.⁹¹ The latest award of the State health care contract and the ensuing litigation between Blue Cross and the State provide a prime example of the detrimental effect of bid protest litigation without procedural limitations on judicial review of administrative decisions.

II. STATE HEALTH INSURANCE COVERAGE

A. Background

The State of Rhode Island provides health insurance to all full-time state employees,⁹² their dependents⁹³ and to retirees⁹⁴ (collectively, "eligible employees"). The Director of the Department of Administration (DOA), through its Division of Purchasing, selects a health insurance provider for eligible employees.⁹⁵ As of December 31, 2004, more than 52,000 eligible employees were covered under the State's health care plan.⁹⁶

91. See *Truk Away of R.I. v. Macera Bros. Of Cranston*, 643 A.2d 811, 816 (R.I. 1994).

92. R.I. GEN. LAWS § 36-12-7 (1997). The statutory definition of "employee" is unclear: "Employee" means all persons who are classified employees, as the term 'classified employee' is defined under § 36-3-3, and all persons in the unclassified and non-classified service of the state; provided, however, that the following shall not be included as 'employees' under §§ 36-12-1 – 36-12-14." *Id.* § 36-12-1. Employees with a work week of at least twenty hours are covered under the state's health care plan. *See id.*

93. R.I. GEN. LAWS § 36-12-1(3) (Supp. 2004).

94. *Id.* § 36-12-4.

95. R.I. GEN. LAWS § 36-12-6 (1997). Although the Department of Administration (DOA) can procure a health insurance plan from any plan administrator, *id.* § 36-12-6(b), it may not alter the plan design for unionized employees outside of the collective bargaining process. *Id.* § 36-12-2.

96. The State's health care plan for active employees is a self-insured model, under which the state pays all medical claims and contracts with a third-party administrator to handle the day-to-day operation of the plan. *See Liz Anderson, State Dumps Blue Cross*, PROVIDENCE J., Oct. 7, 2004. The services provided by a third-party administrator may include: the establishment and maintenance of the provider network; negotiation of provider discounts; processing of claims; dispute resolution; and compliance with federal and state laws and regulations. The health care plans for retirees are a combination of self-insured and fully insured plans. Under the fully insured plans, the

During the spring of 2000, the State issued a Request for Proposals (RFP) to procure a self-insured medical insurance plan for eligible employees, and a fully insured medical plan for certain retirees. As opposed to prior health insurance awards by the State where several insurance companies were awarded the contract, this solicitation allowed the award of the entire contract to an individual successful bidder.⁹⁷ Two insurance companies responded to the State's RFP: Blue Cross and United. Each proposal was then evaluated by a subcommittee⁹⁸ which determined that United's bid was non-responsive, and therefore ineligible for consideration. The Architectural, Engineering, and Consultant Services Committee (A & E Committee) voted unanimously to award the health care contract to Blue Cross.⁹⁹ This recommendation was thereafter approved by the Chief Purchasing Officer/Director of the DOA (Director),¹⁰⁰ and the contract was awarded to Blue Cross for a three year period beginning January 1, 2002, through December 31, 2004.¹⁰¹

After the contract was awarded, United filed a bid protest in accordance with Rhode Island General Law section 37-2-52(b), alleging violations of the Purchasing Act. The bid protest was denied by the Director.¹⁰² United then filed a lawsuit in superior court, requesting a temporary restraining order (TRO), to prevent the implementation of the Blue Cross award. After considering the filed briefs and subsequent oral arguments, the superior court denied United's request and allowed the Blue Cross award to be implemented.¹⁰³ United, after this decision, no longer pursued the

State pays a premium to the insurance company which then pays all claims and handles the administration of the medical plan.

97. Awarding a service contract to one company instead of several is known as a "whole case" award.

98. This subcommittee was formed by the Architectural, Engineering, and Consultant Services Committee (A & E Committee).

99. The A & E Committee is statutory in origin. See R.I. GEN. LAWS § 37-2-59 (1997).

100. The process of selecting firms for discussion with the Chief Purchasing Officer is mandated by statute. See *id.* § 37-2-63. The Chief Purchasing Officer is the Director of the DOA.

101. Brief of Appellant app. 4 at 124, *Blue Cross & Blue Shield of R.I. v. Najarian*, No. C.A. 04-5942, 2004 WL 2821629 (R.I. Super. Dec. 1, 2004) [hereinafter Brief of Appellant I] (citing Trial Exhibit B); see also *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1077 (R.I. 2005).

102. R.I. GEN. LAWS § 37-2-52(c) (1997).

103. Judge Silverstein relied heavily on *Gilbane Bldg. Co. v. Trs. of State*

lawsuit filed against the state.

In January 2002, newly elected Governor, Donald L. Carcieri, undertook a comprehensive review of how government services are provided to its citizens. The Governor termed this review "Fiscal Fitness."¹⁰⁴ The purpose of the Governor's Fiscal Fitness program was, and still is, to find ways of providing a more efficient and cost effective government for the taxpayers of Rhode Island.¹⁰⁵ The Fiscal Fitness staff discovered that the State was overpaying for employee health care coverage, and that the structure and costs of the program should be comprehensively examined prior to the expiration of the contract with Blue Cross.¹⁰⁶ The Fiscal Fitness staff also determined that the specialized expertise required for evaluating and drafting a proposal and implementing a new health care plan did not currently exist within state government.¹⁰⁷

Following the Fiscal Fitness recommendation, the State issued an RFP seeking a health care consultant to assist in: 1) evaluating the current health care plan; 2) preparing the health care plan RFP; 3) evaluating the submitted proposals; 4) negotiating the contract; and 5) implementing the new plan.¹⁰⁸ Three consulting firms submitted qualifying bids to become the State's consultant.¹⁰⁹ These bids were evaluated by the State, and the

Colls., 267 A.2d 396 (R.I. 1970), and *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811 (R.I. 1994), and the State's "presumption of correctness" in making his determination. Hearing Transcript, *supra* note 70, at 93-94.

104. The Governor's Fiscal Fitness Program was a result of a cornerstone of the Governor's campaign promise to conduct "The Big Audit" of state government in Rhode Island. See Jack Perry, *Cacieri Unveils "Fiscal Fitness" Program*, PROVIDENCE J., Apr. 22, 2003.

105. See Perry, *supra* note 104.

106. See *Press Release: Governor's "Fiscal Fitness" Audit Details \$180 Million in Potential Savings*, PROVIDENCE J., Feb. 5, 2004 [hereinafter *Press Release*].

107. The Fiscal Fitness staff further decided that the best financial alternative was to retain an outside consultant rather than hire state employees to perform this task. See *Press Release, supra* note 106.

108. Request for Proposal, Employee Benefits and Consulting Services # B03136 at 2, 4 (Nov. 17, 2003) (on file with author).

109. Memorandum from the Technical Review Subcommittee to Peter S. Corr, Chairman of the Architectural, Engineering, and Consultant Services Selection Committee at 1, 3 (Mar. 5, 2004) [hereinafter A & E Memorandum] (on file with author).

evaluation sub-committee¹¹⁰ recommended Hewitt Associates (Hewitt) to the A & E Committee based on a series of economic and non-economic factors.¹¹¹ The A & E Committee unanimously recommended that Hewitt be awarded the contract, and the Director accepted this recommendation.¹¹² Thus, the State acquired the services of a health care consultant to provide an expert and independent voice in selection of a health care provider. With the assistance of Hewitt, the State then undertook a comprehensive process in selecting a health care insurance provider.

B. The Procurement Process for the Current Health Care Contract

A team of State employees from a variety of departments and disciplines,¹¹³ along with representatives from the State Division of Purchasing, was formed by the Director to work with Hewitt to evaluate the current health care contract and to draft the health care RFP.¹¹⁴ The team drafted, and the State issued, a comprehensive RFP of approximately 90 pages.¹¹⁵ The RFP included more than 100 economic and technical criteria for consideration, and a

110. See *Blue Cross & Blue Shield of R.I. v. Najarian*, No. C.A. 04-5942, 2004 WL 2821629, at *3 (R.I. Super. Dec. 1, 2004). The A & E Committee formed the subcommittee. See *id.*

111. See *id.* Six consulting firms submitted bids, but only three bidders were qualified. See A & E Memorandum, *supra* note 109, at 3. Hewitt Associates was the highest cost of the three bidders; however, the subcommittee determined Hewitt to be the most qualified based upon the evaluation criteria. See Minutes of the Architectural, Engineering, and Consultant Services Selection Committee (Mar. 24, 2004) [hereinafter A & E Minutes] (on file with author).

112. See Interoffice Memorandum from Beverly E. Najarian, Director, to Peter S. Corr, Chairman of Architectural, Engineering, and Consultant Services Selection Committee (Mar. 26, 2004) (on file with author); see also A & E Minutes, *supra* note 111, at 1-2.

113. These disciplines included state purchasing, personnel, employee benefits, pharmaceuticals, health, human services, labor relations and budget.

114. The team's goal was to create an RFP that would solicit a bid for a plan containing a similar design as the current health care plan, with some major differences including: (1) administrative fees paid to the provider would be based on a per employee per month calculation rather than percentage of claims; (2) the successful bidder would be required to agree to put certain fees at risk based on specific performance measures; (3) the successful bidder would be requested to offer the same terms to municipalities; and (4) the same or better pharmaceutical benefits must be offered.

115. See generally Trial Exhibit D, *Najarian*, 2004 WL 2821629 at app. 6 (No. C.A. 03-5942).

complex rating system to compare the bid submissions.¹¹⁶ Prior to the bid opening, several vendors attended a pre-bid conference. The pre-bid conference was a forum for potential bidders to ask clarifying questions about the contents of this complex RFP. The creation of an in-depth, comprehensive RFP was the first step in making sure the State would procure the best plan possible.

On August 12, 2004, in response to the RFP, the State received more than 2,000 pages of documents from two bidders, Blue Cross and United, which were opened by Purchasing.¹¹⁷ These proposals were then forwarded to the evaluation committee.¹¹⁸ Hewitt assisted the evaluation committee by performing high level data analysis, verifying representations made by the bidders and applying its proprietary information and data models, which it included in a detailed 120 page analysis of the two proposals.¹¹⁹ After the committee independently evaluated the proposals and reviewed Hewitt's analysis, the evaluation committee reached the conclusion that the technical and cost criteria were close enough in range that the "best and final" economic offers should be requested from each bidder before a final recommendation was submitted to the A & E Committee.¹²⁰

On September 20, 2004 the Director determined that there

116. *Id.*

117. During the evaluation process, a series of written questions were emailed to both bidders clarifying certain portions of each bid. Additionally, the evaluation committee held several tape recorded conference calls with both bidders to further clarify the complex nature of the bids. The superior court judge later inferred, without any evidence, that these communications were of an inappropriate nature. *Najarian*, 2004 WL 2821629, at *21 ("Purchasing Agent] Anderson's email to United, seeking so-called clarification . . . was nothing more than a suggestion to the offeror that United reconsider the additional fee and remove it."). The supreme court clearly recognized this mischaracterization by the lower court: "Upon careful review of the record, we conclude that the trial justice misconceived material evidence and that the State's communication with United was, in fact, a request for clarification, permitted by the act, and indeed an obligation of public officials." *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1089 (R.I. 2005).

118. Anthony Bucci, Joseph Cembrola, Beatrice Frazer, Stephen Johnston, Paul Larrat, Melanie Marcaccio, Jerome Williams, and John Young comprised the evaluation committee. See Brief of Appellant I, *supra* note 101, app. 26 at 774 (citing Trial exhibit X).

119. See Brief of Appellant I, *supra* note 101, app. 23 at 645-765 (citing Trial Exhibit U).

120. R.I. Dep't of Admin., Procurement Regs. § 6.3.4, http://www.rules.state.ri.us/rules/released/pdf/DOA/DOA_539_.pdf.

were no additional funds available from any source to permit the award to the lowest responsive and responsible bidder,¹²¹ and the best interest of the State did not permit a re-bidding.¹²² Both Blue Cross and United submitted "best and final" offers to the State. The evaluation committee reviewed the "best and final" offers and determined, by consensus, that a recommendation awarding the contract to United be sent to the A & E Committee.¹²³ The evaluation committee determined: (1) United's bid was \$8.4 million less in administrative fees during the contract term; (2) United allowed cities and towns to utilize the State contract; (3) United included more favorable performance guarantees; (4) United's offer guaranteed pharmaceutical rebates during the contract term; (5) United pharmaceutical network consisted of all Rhode Island pharmacies; and (6) United offered extensive and in-depth reporting capabilities.¹²⁴ The State exhaustively evaluated both proposals with the intent of acquiring the best plan possible for the taxpayers.

In accordance with statute, the A & E Committee held a public meeting¹²⁵ to consider the report and recommendations of the evaluation committee.¹²⁶ The A & E Committee consisted of an

121. R.I. GEN. LAWS § 37-2-15 (Supp. 2004).

122. R.I. GEN. LAWS § 37-2-23 (1997).

123. Brief of Appellant I, *supra* note 101, app. 26 at 773 (citing Trial Exhibit X). This report concluded that the overall proposal score for United was 81.1 points versus 74.9 points for Blue Cross. *Id.*

124. *Id.* at 776 (citing Trial Exhibit X).

125. See R.I. GEN. LAWS § 42-46-3 (1997).

126. R.I. GEN. LAWS § 37-2-59(b) (Supp. 2004). This provision of the Purchasing Act creates the A & E Committee and states: "Except for architectural, engineering and consultant services which can be solicited and awarded in accordance with the requirements for competitive sealed offers set forth in §§ 37-2-18 – 37-2-19 of this chapter, a selection committee shall select persons or firms to render such professional services." *Id.* This provision is unclear because it does not clearly define which "professional services" fall under "architectural, engineering, and consultant services." See *id.* § 37-2-59(a). This ambiguity has led the State Purchasing Division to often use an A & E Committee in procurements over \$20,000 where it is unclear that the legislature intended for the A & E Committee to be used. See *id.* § 37-2-7(26). In fact, it is unclear whether the State health care contract awarded to United falls under "architectural, engineering, and consultant services" and should have even required a vote by this committee. See *id.* § 37-2-59(b).

Moreover, the law and regulations are unclear on the scope of the A & E Committee's authority. See *id.* § 37-2-59. In many instances, such as in the procurement of health care contract, a subcommittee is formed to do most

acting chairperson,¹²⁷ an agency representative from the DOA¹²⁸ and a designated public member.¹²⁹ During the A & E Committee's hearing, presentations were made by the DOA representative, with the assistance of a representative of the State's consultant, Hewitt.¹³⁰ At the end of the hearing, the A & E Committee voted to recommend to the DOA Director that United be awarded the contract. After considering the recommendation of the A & E Committee, the Director adopted the recommendation¹³¹ and tentatively awarded United the health care contract. Purchasing

of the analysis and provide a recommendation to the three-member A & E Committee. The A & E Committee then reviews the recommendation prior to and during the public hearing, and then immediately votes to either approve or reject the recommendation at the time of the hearing.

Finally, members of the A & E Committee serve on the subcommittee that ultimately makes a recommendation to the three person panel. Because there are only three members, and therefore only three votes, a member acting on both a subcommittee and the committee may cause a conflict. Two possible solutions are to either increase the number of members on the A & E Committee or to exclude the A & E Committee member from serving on the subcommittee.

127. The Purchasing Agent who serves as the Chair, pursuant to R.I. GEN. LAWS § 37-2-59 (Supp. 2004), was on extended leave at the time of the meeting, and William Anderson, Administrator of Purchasing Systems, was designated Acting Chairperson by the Chief Purchasing Officer.

128. Stephen Johnston, Deputy Director of the Department of Administration.

129. Dr. DeTarnowsky, a holdover appointment by Governor Almond in accordance with R.I. GEN. LAWS § 37-2-59 (Supp. 2004). The public member's term runs concurrent with the term of the Governor. *Id.* However, at the time, Governor Carcieri had not yet appointed a new public member and, therefore, Dr. DeTarnowsky continued to serve as a "holdover."

130. During the meeting the public member raised concerns about the evaluation committees' recommendation concerning "stop loss" coverage. Specifically, the public member was concerned that the evaluation committee was not recommending "stop loss" coverage and this was not being communicated to the bidders. ("Stop loss" coverage is a form of insurance purchased by some self-insured health care plans to limit the risk that the self-insured plan will have to bear exposure over a certain monetary amount.) The RFP asked that bidders provide proposals as to the cost of "stop loss" coverage for the State to consider when making the award, but noted that "stop loss" might be carved out of the bid.

When the evaluation committee's recommendation was brought to a vote, the public member voted against the award to United based on the "stop loss" issue. The vote of the A&E Committee was 2-1 in favor of recommending to the Director of Administration that an award be made to United.

131. In the Director's letter adopting the recommendation, she determined that the concerns of the public member were without merit.

subsequently issued a tentative letter of award.¹³²

The evaluation process lasted several months and entailed several layers of review by a diversity of individuals. The State relied heavily on the expertise of Hewitt, although State officials independently reviewed both proposals. The ultimate decision to award the contract to United was not made lightly; however, any significant governmental procurement process, in the hands of an experienced law firm, can be undermined through depositions and cross-examination.¹³³ Blue Cross, as the losing bidder of a mammoth contract to a competitor, officially protested this award.

C. *The Bid Protest and Ensuing Litigation*

In accordance with Rhode Island General Law section 37-2-52, Blue Cross filed a bid protest contesting the State's award to United.¹³⁴ In its bid protest, Blue Cross raised several arguments in support of reversing the tentative award: (1) The cost of the Blue Cross proposal was the lowest; (2) the State compared "mature fees" rather than "immature fees" as stated in the RFP; (3) retirees would pay additional costs under the United bid; (4) Medicare crossover adjudication services were not included in United's bid; and (5) the bid process performed by the State violated the law and requisite procedure.¹³⁵ After evaluating the Blue Cross bid protest, the Director found that the allegations made by Blue Cross were unfounded and did not rise to the level of overturning the award.¹³⁶ A nine page written response was sent to

132. Brief of Appellant app. 30 at 792, *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074 (R.I. 2005) (No. 04-361-A) [hereinafter Brief of Appellant II]. The award was tentative because it required United to submit certain documentation to the state certifying that: (1) it was a responsible bidder in accordance with R.I. GEN. LAWS § 37-2-15(6) (Supp. 2004); (2) obtain the required regulatory approvals; and (3) enter into a contract with the State. *See id.*

133. *See Najarian*, 865 A.2d at 1084 ("We are quite certain that '[a]ny good lawyer can pick lint off any Government Procurement . . .'" quoting *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992)).

134. Prior to filing a formal bid protest, the acting President of Blue Cross sent a letter to Governor Carcieri requesting that he intervene and award the State's health care contract to Blue Cross, or, in the alternative, allow state employees to choose between the Blue Cross and United health care plans. Brief of Appellant II, *supra* note 132, app. 31 at 793. Prior to the Governor responding to the letter, Blue Cross filed a formal bid protest.

135. *Id.* app. 32 at 797-806.

136. Brief of Appellant I, *supra* note 101, app. 34 at 808-16. The Director

Blue Cross.¹³⁷

1. *Blue Cross Files a Complaint and Motion for a TRO and a Permanent Injunction with the Superior Court*

Several days after the Director denied the bid protest, Blue Cross filed a complaint in the superior court seeking to restrain the State from entering into a contract with United and issuing a purchase order.¹³⁸ Although the Director is entitled to a “presumption of correctness”¹³⁹ and may only be reversed by the court in cases of corruption, bad faith or “palpable abuse of discretion,”¹⁴⁰ the Blue Cross complaint alleged that the tentative award should be reversed.¹⁴¹ In support of its application for a TRO, Blue Cross raised the same issues as it did in its bid protest to the Director, including the alleged non-responsive bid, errors in the evaluation of the proposals and violations of the purchasing statute and procedural rules.¹⁴²

Superior court Judge Daniel A. Procaccini granted United’s application to intervene in the litigation, and permitted all parties to file legal briefs and present oral arguments on whether a TRO should be issued. In delivering its oral opinion on the TRO, the court spent a substantial amount of time during its oral decision reciting the statutory provision providing for a “presumption of correctness,” and the strongly worded language within supreme court precedent which cautions the superior court from interfering with a procurement decision.¹⁴³ The court determined that Blue Cross had failed to meet its burden of a “likelihood of success on the merits” of its claim, and denied the request for a TRO.¹⁴⁴ Re-

addressed every issue raised by Blue Cross and denied Blue Cross’s bid protest: “The State acted in good faith, complied with all of the purchasing statutes, regulations, and processes, and fairly awarded [the health care contract] to United Healthcare.” *Id.* at 816. Later, the supreme court agreed with the Director’s assessment. *Najarian*, 865 A.2d at 1091.

137. Brief of Appellant II, *supra* note 132, app. 32 at 808-16.

138. *Id.* app. 37 at 832.

139. R.I. GEN. LAWS § 37-2-51 (1997).

140. *Gilbane Bldg. Co. v. Bd. of Trs. of State Colls.*, 267 A.2d 396, 399 (R.I. 1970).

141. Brief of Appellant II, *supra* note 132, app. 37 at 833.

142. *Id.*

143. *Id.* at 71. The decision on the TRO was oral.

144. *Id.* at 73.

ardless of the State's victory on the TRO, however, a drawn-out legal battle began at the expense of the taxpayer.

2. *Preliminary Injunction and Discovery*

Rhode Island Superior Court Chief Judge Joseph F. Rodgers transferred the entire matter to superior court Judge Nettie C. Vogel.¹⁴⁵ Blue Cross then filed a motion for expedited discovery. Blue Cross requested that the court permit numerous oral depositions of key state employees and consultants, including the Director of the Department of Administration. Judge Vogel allowed the parties to submit legal briefs and oral argument on the issue of whether discovery should be permitted, and, if allowed, the extent of such discovery.

The State argued that no discovery should be permitted because the court already had thousands of pages of detailed records that documented each step of the procurement process, and that no gap in the agency record existed.¹⁴⁶ The rationale behind this argument was that the standard of review in this case was stricter than an appeal under the APA; the review should be limited to the record formed at the agency level, similar to the APA. Without any preliminary showing on the current record by Blue Cross that the State engaged in corruption, bad faith or a palpable abuse of discretion, and in light of the presumption, there was no basis to permit discovery.¹⁴⁷ Additionally, the State argued that allowing discovery would further encourage bid protest litigation by losing bidders.¹⁴⁸ Blue Cross countered that discovery, including depositions, should be permitted notwithstanding the difficult burden and despite the fact that there was no allegation of fraud, corrup-

145. According to the Chief Judge Rodgers, the case was transferred from Judge Daniel A. Procaccini to Judge Nettie C. Vogel because Judge Procaccini did not have available time on his calendar to hear the balance of the matter.

146. Defendant's Objection to Plaintiff's Motion for Expedited Discovery at 5, 7, Blue Cross & Blue Shield of R.I. v. Najarian, 865 A.2d 1074 (R.I. 2005) (No. 04-361-A) [hereinafter Defendant's Objection].

147. Without a showing of corruption, bad faith or a "palpable abuse of discretion," the State contended that allowing discovery would negate its statutory presumption of correctness under R.I. GEN. LAWS § 37-2-51 (1997), and allow every disappointed bidder to use the discovery process when they were unhappy with the result. See Defendant's Objection, *supra* note 146. To allow the use of discovery in this manner would undermine the very broad discretion given to the Chief Purchasing Officer under statute.

148. Defendant's Objection, *supra* note 146, at 8.

tion, or bad faith and in the procurement process. Blue Cross stated that it had the right to conduct depositions to determine whether there had been a palpable abuse of discretion by the State. Blue Cross contended that allowing discovery was critical to determining the rationale behind the State's decision to award the health care contract to United.

The court orally held that the APA does not apply to bid protest litigation, and allowed Blue Cross to take the depositions of the Director, all three members of the A & E Committee, two consultants from Hewitt, and one employee from United.¹⁴⁹ Although the scope of the depositions was limited to the general subject of the health care contract bid, Blue Cross had unlimited permission to depose this topic.¹⁵⁰

149. Specifically, the superior court stated the following:

Having determined that the Plaintiff is entitled to an evidentiary hearing, having determined that the APA does not apply, it would seem that the Court should allow discovery of matters calculated to lead to the discovery of admissible evidence at the evidentiary hearing. . . . I am going to allow the requested discovery.

Brief of Appellant I, *supra* note 101, app. 47 at 18. Blue Cross requested to depose: (1) Beverly Najarian, Chief Purchasing Officer and Director of the Department of Administration; (2) William Anderson, Member of Selection Committee and Administrator of Purchasing Systems; (3) George DeTarnowsky, Member of Selection Committee; (4) Stephen Johnson, Member of Selection Committee and Deputy Director of Administration; (5) Krista Morris, Representative of Hewitt Associates LLC, State's Consultant; (6) Robert Kennedy, Representative of Hewitt Associates LLC, State's Consultant; (7) Patrick O'Brien, United Healthcare of New England Representative; and (8) Sue Robinson, United Healthcare Lead Underwriter. Plaintiff's Identification of Requested Deponents and Subject Matter of Inquiry at 1, Blue Cross & Blue Shield or R.I. v. Najarian, No. C.A. 04-5942, 2004 WL 2821629 (R.I. Super. Dec. 1, 2004) [hereinafter Plaintiff's Identification] (on file with author). Under the current state of the law, the decision that the APA does not apply – and thus discovery is allowed – was, in the authors' view, the legally correct one. Therefore, the primary contention of this paper is that the law should be changed to prevent discovery and a trial during bid protest litigation.

150. See generally Plaintiff's Identification, *supra* note 149. The substance of the inquiry requested by Blue Cross was to ask each deponent "questions regarding his or her role in the procurement process, the documents reviewed and the basis for determinations, recommendations and/or award of the subject request for proposal." *Id.* at 2. The State argued that (1) all of these areas were covered in the thousands of pages of documentation, and (2) Blue Cross was inappropriately attempting to dissect the decision-making process of the State. See Defendant's Objection, *supra* note 146, at 5-10. Over the State's objections, the superior court approved Blue Court's entire list of deponents and all of the topics for questioning.

After the completion of discovery,¹⁵¹ the court conducted a three day hearing on the preliminary injunction. At the conclusion of a three day hearing, the superior court issued a forty-two page decision granting a preliminary injunction enjoining the State from entering into a contract with United, and ordering that the health care contract be re-bid.¹⁵²

Based entirely on the depositions conducted by Blue Cross attorneys, the court drew inferences that the procurement process was characterized by both a palpable and clearly unwarranted abuse of discretion. The court relied critically on the fact, emphasized by the Blue Cross attorneys during a deposition, that one of the State's representatives was unfamiliar with the purchasing regulations.¹⁵³ The court ignored the fact that many experienced State officials who were not deposed were also involved in this process, and were members of the subcommittee primarily charged with evaluating the proposals.¹⁵⁴ Instead, the court chose to focus on the limited facts, drawn out by Blue Cross attorneys, in concluding that overturning the award was justified because certain State officials failed to memorize every line of over one hundred pages of purchasing regulations.

Specifically, the court decided that the State erred by: (1) considering the wrong administrative fee in year one proposed by Blue Cross; (2) improperly modifying the RFP by allowing United

151. The discovery process lasted eight days with depositions scheduled virtually every day.

152. *Najarian*, 2004 WL 2821629, at *24. After the entry of the preliminary injunction, the State requested that the superior court stay its order with respect to the injunction against proceeding with the contract and the order to re-solicit of health care program. The Superior Court denied the application to stay the injunction against proceeding with the contract but stayed its order for immediate re-solicitation. Brief of Appellant I, *supra* note 101, app. 2 at 43-44. Upon agreement of all parties, the superior court converted the preliminary injunction to a permanent injunction and entered a final judgment. *Id.*

153. *Najarian*, 2004 WL 2821629, at *1 ("The purposes of the State Purchasing Act and departmental regulations were thwarted by inexperienced State officials and consultants who approached this important task without bothering to familiarize themselves with the applicable law.").

154. This fact was before the court as part of the thousands of pages documenting the bid process. The State did not have the resources, or the desire, to depose every single person involved with the process to defend itself, especially in light of the presumption of correctness afforded to the State and the consistent supreme court precedent.

to apply a credit to the administrative fee as a form of a rebate guarantee; (3) not finding United's bid non-responsive when United failed to provide certain fees for retirees; (4) penalizing Blue Cross because it is regulated by the State; (5) allowing United to modify its offer after the acceptance of "best and final" offers and; (6) allowing United to modify its bid with respect to crossover services.¹⁵⁵ In essence, the court disagreed with the State on every issue alleged by Blue Cross, regardless of the State's entitlement to a presumption of correctness. The State was forced to appeal this decision to the supreme court, leading to further delay, wasted resources and expenditure of taxpayer dollars.

3. Rhode Island Supreme Court Appeal

The day after the entry of final judgment, the State and United filed an application with the Rhode Island Supreme Court to stay the superior court's decision and to hear an appeal.¹⁵⁶ On January 18, 2005, the court heard oral argument and considered the briefs of the parties. On February 3, 2005 the court issued a unanimous decision reversing the superior court.¹⁵⁷

The court commented on the very high standard a superior court judge must deem satisfied to overturn a public award: "On numerous occasions this court has said that the hurdle to be overcome in overturning a decision made by an awarding authority in the public bid process is very high indeed."¹⁵⁸ Restating law established in a long line of prior cases, the court emphasized once again that the judiciary will only interfere with the award of a State or municipal contract in the event that the awarding authority has "acted corruptly or in bad faith, or so unreasonably or so

155. See *Najarian*, 2004 WL 2821629, at *1-2.

156. Chief Justice Frank J. Williams of the Rhode Island Supreme Court was assigned as intake justice and met immediately with counsel for all parties. The supreme court held a conference on the matter and, after considering the papers filed by all parties, denied to stay the superior court decision with respect to the contract implementation. However, the supreme court granted the State's application to stay the re-solicitation and the court agreed to hear the case in approximately thirty days. The court also set forth an abbreviated and aggressive briefing schedule.

157. *Blue Cross & Blue Shield of R.I. v. Najarian*, 865 A.2d 1074, 1091 (R.I. 2005). Justice Goldberg did not participate in the oral arguments or in the decision. See *id.* at 1074.

158. *Id.* at 1081.

arbitrarily as to be guilty of a palpable abuse of discretion.”¹⁵⁹

The court once again recognized the presumption of correctness afforded to state officials who are “vested with the thorny task of balancing the letter of the law found in the act with the reality of pursuing the best deal for the State.”¹⁶⁰ It also expressed its appreciation for the State’s difficult task in awarding contracts.¹⁶¹ As Blue Cross never alleged bad faith or corruption,¹⁶² the sole issue before the superior court was whether the State’s conduct rose to the level of a “palpable abuse of discretion.”¹⁶³ The supreme court found that, although certain mistakes had been made during a very complicated procurement and evaluation process, these mistakes did not constitute the “palpable abuse of discretion” necessary to overcome the statutory presumption of correctness, and to subsequently overturn this award.¹⁶⁴ The court addressed, in detail, each of the six activities that formed the basis for overturning the State’s award in the lower court. First, although the State compared “mature” fees of the two bidders when the State had actually requested an “immature” fee quotes did not rise to the level of a “palpable abuse of discretion.”¹⁶⁵ Second, the State’s decision to accept a guaranteed pharmacy rebate from United, rather than a higher projected, un-guaranteed rebate from Blue Cross, was an acceptable business decision.¹⁶⁶ Third, by finding that United’s bid was non-responsive because it failed to present certain illustrative, meaningless figures, the lower court erred.¹⁶⁷ Fourth, the trial court erred in finding that the State

159. *Id.*

160. *Id.* at 1082.

161. *Id.* (“Our case law reviewing public procurement contracts has unfolded based on our appreciation for the difficulty in awarding a public contract.”).

162. *Id.* at 1084 & 1085 n.7 (“Counsel for Blue Cross stated on the record: ‘Certainly fraud which we don’t allege here. I want to make that clear on the record. There is nothing on the record, at least in my view, that suggests there was any corruption here. What the record does disclose, however, was a failure to abide by the rules.’”).

163. *Id.* at 1081.

164. *Id.* at 1091. The court also recognized that any government procurement process under the scrutiny of a “good lawyer” will have minor violations of process. *Id.* at 1084.

165. *Id.* at 1086.

166. *Id.* at 1087.

167. *Id.* at 1087-88. The court found that there was no “palpable abuse of discretion” “for declining to assess figures that have no real life bearing on

“wrongfully penalized Blue Cross because the company is subject to state regulation of its Plan 65 Medigap indemnity program.”¹⁶⁸ Fifth, the superior court “wrongfully characterized communications” – related to a twenty-four hour nurse line fee – when it found that the State’s request for a clarification of United’s “best and final offer” was improper.¹⁶⁹ Finally, the superior court erred when it found that crossover services offered by United were improper after the contract was awarded.¹⁷⁰ The court reversed all six findings of the lower court.

The supreme court found that “a fair and open bid process was conducted in good faith.”¹⁷¹ Once again, the court overwhelmingly reversed the decision of a superior court judge who interfered with a government procurement process.¹⁷² The original decision of the Director was reinstated, but not before this litigation impacted State government and the taxpayer.

4. *The Impact of the Litigation on the State*

The Rhode Island Supreme Court fully understood the State faces a “thorny task” with every purchasing decision.¹⁷³ The State is required to “balance the letter of the law found in the act with the realty of pursuing the best deal for the State.”¹⁷⁴ Very few purchasing decisions are made solely on price, but on a variety of other criteria. The State Purchasing Division attempts to evaluate objective criteria from bidders to determine the most responsive and responsible bidder in obtaining the “best value” for the state. Numerous factors are considered, and a decision is made based on

the contract” and that the superior court “improperly substituted [its] own judgment in vacating the State’s presumptively correct decision.” *Id.* at 1088.

168. *Id.* at 1088-89.

169. *Id.* at 1089-90. The supreme court found that “the trial judge misconceived the evidence and wrongly characterized the communications.” *Id.* The court went on to state that “with so many taxpayer dollars at stake it would have been irresponsible for the State not to seek clarification.” *Id.*

170. *Id.* at 1090-91 (“[N]othing prevents a bidder from offering to provide a gratuitous service to the State that was not mentioned in the RFP.”).

171. *Id.* at 1091.

172. *See, e.g.,* *H.V. Collins Co. v. Tarro*, 696 A.2d 298, 305-06 (R.I. 1997); *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811, 817 (R.I. 1994).

173. *Najarian*, 865 A.2d at 1082.

174. *Id.*

the sound business judgment of purchasing officials.¹⁷⁵ The ability of a disgruntled losing bidder to litigate every purchasing decision by asking a court to second guess the business judgment of purchasing officials has unintended consequences, including increased cost for products and services to taxpayers.

These consequences are evident as a result of the Blue Cross litigation. A group of experienced state employees prepared a comprehensive RFP, evaluated two proposals comprised of thousands of pages, and made recommendations to obtain the best value for the taxpayers of Rhode Island.¹⁷⁶ According to the Rhode Island Supreme Court, these state employees acted fairly and honestly, and reasonably exercised sound discretion during the procurement process.¹⁷⁷ Without any showing of corruption, bad faith, or "palpable abuse of discretion,"¹⁷⁸ the superior court allowed Blue Cross to conduct an expensive and time consuming "fishing expedition." In response, the State was forced to dedicate hundreds of hours of employee resources in preparation for seven lengthy depositions and the subsequent litigation, in order to defend a decision that was to be presumed correct.¹⁷⁹ Blue Cross then used a limited sampling of depositions to create an "aura of confusion" by emphasizing inconsistencies in the process in an attempt to convince the superior court to substitute its judgment for that of responsible State purchasing officials.¹⁸⁰ Additionally, the State spent hundreds of thousands of dollars in legal fees, consulting costs, court reporter fees and printing costs to defend its purchasing decision.¹⁸¹

175. See *Gilbane Bldg. Co. v Bd. of Trs. of State Colls.*, 267 A.2d 396, 400 (R.I. 1970).

176. See *Najarian*, 865 A.2d at 1082.

177. *Id.* at 1084, 1091.

178. *Id.* at 1091.

179. Seven of the eight people that Blue Cross requested to be deposed actually were. See *supra* notes 9, 149. The only person not deposed was Krista Morris, Representative for Hewitt. The depositions of Stephen Johnston and Robert Kennedy were the longest, and the transcripts spanned well over a hundred pages. All of the depositions lasted several hours each.

180. See *Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc.*, 643 A.2d 811, 816 (R.I. 1994).

181. The State will attempt to recover hundreds of thousands of dollars in legal fees from the bond posted by Blue Cross. The issue of whether the bond covers the State's legal fees will likely be heard in the future. Regardless of whether the State or Blue Cross pays the legal costs, the Rhode Island taxpayer, or members of the not-for-profit Blue Cross (also Rhode Island taxpay-

As the law presently stands, any disappointed bidder who is not awarded a State contract – even a contract as seemingly insignificant as a five hundred dollar medical supply agreement – and is willing to spend the money and time can demand discovery to uncover the rationale behind the State’s “presumptively proper” decision. The losing bidder can force state officials, evaluation committee members, A & E Committee members, the Director and even the successful bidder to be subjected to lengthy depositions. As a result, bid protest litigation has placed government officials in a “legalistic straightjacket,” despite the supreme court’s efforts to avoid this result.¹⁸² Legislative change is necessary.

III. RECOMMENDATIONS

First, the Purchasing Act should be amended to include procedural limitations similar to those in the APA for lawsuits involving a bid protest.¹⁸³ Second, the Purchasing Act should be amended to include the option for a hearing at the agency level. Finally, the Purchasing Act, like the APA, should place the superior court in the role of a court of review, not that of a trial court. The purpose of these amendments is to maintain the integrity of the purchasing process while simultaneously preventing resources from being wasted during frivolous bid protest litigation.

A. *Confinement of the Record*

The first limitation should include a provision, similar to Rhode Island General Law section 42-35-15(f) of the Rhode Island APA, that confines superior court review to the record created by the agency, without a jury.¹⁸⁴ This limitation, however, is not

ers), will be footing the bill.

182. See *Gilbane Bldg. Co. v Bd. of Trs of State Colls.*, 267 A.2d 396, 400 (R.I. 1970).

183. The authors considered simply including a provision in the Purchasing Act to mandate that courts treat bid protests under the provisions of the APA. Another consideration was to create a hearing process by law or regulation, see *infra* Part III.C, so that a bid protest would become a contested case and then simply fall under the APA. However, because the standard of review in the Purchasing Act is higher than under the APA, and there is well-developed case law interpreting this standard, the better option is to leave these two Acts independent.

184. Pennsylvania includes such a limitation. After the head of the purchasing agency receives and evaluates a bid protest and issues a written de-

without exception: "In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."¹⁸⁵ Under the APA, the court may order the agency to consider additional evidence and, as a result, the agency then may modify its decision.¹⁸⁶ Therefore, if a party challenging a contract award has evidence of fraud, corruption or bad faith, this evidence may be introduced, heard and considered by the superior court and/or the agency.

The purchasing process includes a comprehensive procedure mandated by statute and regulation.¹⁸⁷ This process must be well

cision, the aggrieved party has the right to appeal. PA. STAT. ANN. tit. 62, § 1711.1 (West Supp. 2004). Section 1711.1 states:

(g) Appeal. – Within 15 days of the mailing date of a final determination denying a protest, a protestant may file an appeal with Commonwealth Court. Issues not raised by the protestant before the purchasing agency are deemed waived and may not be raised before the court.

Id. § 1711.1(g). The statute then defines the scope of the record:

(h) Record of determination. – The record of determination for review by the court shall consist of the solicitation or award; the contract, if any; the protest; any response or reply; any additional documents or information considered by the head of the purchasing agency or his designee; the hearing transcript and exhibits, if any; and the final determination.

Id. § 1711.1(h). Finally, the statute clearly defines the scope of the appeal and the standard to be applied:

(i) Standard of review. – The court shall hear the appeal, without a jury, on the record of determination certified by the purchasing agency. The court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law.

Id. § 1711.1(i) (emphasis added).

185. R.I. GEN LAWS § 42-35-15 (f) (1997).

186. The APA provides:

If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

Id. § 42-35-15 (e).

187. See generally *id.* § 37-2-1 et seq.

documented, and it is open for review.¹⁸⁸ Limiting judicial examination to the agency record would make the superior court a court of appeal, similar to its role imposed by the APA in administrative matters. Bid protest litigation would be streamlined; a losing bidder would be prevented from going on a "fishing expedition" for inconsistencies by deposing government officials in an effort to undermine a bid awarded to a competitor.

B. *Writ of Certiorari*

Unlike the APA, every bid protest challenge brought before the superior court is entitled to an appeal before the supreme court.¹⁸⁹ In light of the extremely high standard discussed above, such a review would appear to be unnecessary and, in many instances, frivolous. The State is forced to expend further resources and taxpayer money to defend itself before the supreme court. The Purchasing Act should allow the supreme court discretion to either hear an appeal or require a petition for a writ of certiorari. The parties would have an opportunity to show cause as to why a writ should or should not be granted. Allowing the supreme court to decide whether to accept a case by writ will save resources in two ways: (1) State officials will not have to defend themselves at another level unless warranted; and (2) the supreme court, funded also by taxpayer dollars, will not be forced to hear cases without merit.

C. *An Opportunity to be Heard at the Agency Level*

Similar to a contested case before the APA, a losing bidder or another party (such as a taxpayer) should be allowed to be heard at the agency level if deemed appropriate by the Purchasing Agent.¹⁹⁰ If a hearing is warranted, a hearing officer would consider arguments related to a bid protest and further develop the agency record which could then be considered by the supreme

188. *Id.* § 37-2-54 (i); *see also id.* § 38-2-1. The health care contract award involves mountains of documents, all available for review by either bidder or any other party.

189. *Id.* § 9-24-11.

190. Such a hearing at the agency level should have similar limitations regarding the extent of the record and discovery, as discussed above. *See discussion supra* Part II.C.4. In other words, it is not the authors' intent to simply move the problem of bid protest litigation from the court to the agency.

court.¹⁹¹ Many other states already include some form of hearing for a bid protest.¹⁹² Allowing a hearing at the agency level, if necessary, would provide a losing bidder an opportunity to challenge a contract award in the appropriate forum. Any issues of bad faith, corruption or fraud can then be immediately addressed at the agency level, and would become part of the agency record. Providing for a hearing would also make the Purchasing Act more consistent with the APA.

IV. CONCLUSION

The ability of a losing bidder to bring an unfettered lawsuit involving discovery, a possible trial and automatic review by the supreme court is inconsistent with the burden of proof required to overturn a procurement decision. Government resources and taxpayer dollars are needlessly consumed. Procedural limitations on bid protest lawsuits, similar to the limitations imposed on suits brought under the APA, should be implemented by the legislature to end such needless waste of resources.

191. It is necessary to note that there is an issue concerning the neutrality of hearing officers in Rhode Island because these individuals have an employment relationship with the agency in which they are hearing a case. For a full discussion of this issue, see generally Daniel W. Majcher, *Administrative Injustice: The Rhode Island State Agency Hearing Process and a Recommendation for Change*, 9 ROGER WILLIAMS U. L. REV. 735 (2004).

192. Rhode Island adopted the code without this optional provision. See *supra* note 8 and accompanying text.