

Predicting Bid Protests: What Should Acquisition Teams (Not) Do?

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Background

Purpose & Research Question

Theoretical Framework

Methodology

Results

Implications

- Bid protests are increasing
 - Protests as a % of protest opportunities (i.e., awarded contract actions) increased from .16% in 2008 to .26% in 2016
- Bid protests are effective
 - Only 17% sustained, but an average of 42% of all protest cases were effective from 2009-2014
- Bid protest increase transaction costs in:
 - Prevention
 - Adjudication
- Congressional and Executive actions to thwart protests:
 - 1 May 2018, \$350 filing fee to GAO (for EPDS)
 - Temporarily banned prolific protestor – Latvian Connection
 - DOD Pilot ('19-'22): LB (rev > \$250M) protestors to pay legal fees if unsuccessful
 - *DOD's Enhanced* debriefings (> \$100M, > \$10M for SB) includes SSDD and follow-up questions
 - Sponsored research (e.g., RAND)

- Measures taken to avoid protests:
 - (1) added layers of reviewers and legal counsel to scrutinize every document,
 - (2) added procurement lead time,
 - (3) additional discussions to allow offerors an opportunity to rectify weaknesses and deficiencies (technical leveling),
 - (4) [unnecessarily] retaining offerors in the competitive range,
 - (5) awarding more contracts than intended,
 - (6) modifying existing contracts vs. new competitions,
 - (7) shopping requirements to existing IDIQ contracts,
 - (8) LPTA rather than full trade-off,
 - (9) larger acquisition team, and
 - (10) more extensive debriefings.

Purpose:

- To better understand why bid protests are lodged by interested parties.
 - identify meso-level decisions and actions of buy-side acquisition teams that affect the receipt of a bid protest.

Research Questions:

1. What characteristics of a procurement affect whether a bid protest is received?
2. What acquisition strategy variables/decisions affect whether a bid protest is received?
3. What human factors contribute to receipt of a bid protest?
4. Are the pertinent theories surrounding inter-organizational exchange complete, and if not, what extensions should be considered?

Model

Procurement Characteristics

- Dollar value of the proposed contract
- Criticality of the requirement
- Type of value procured (e.g., services)
- Protest risk

Acquisition Strategy

- Sufficiency of planned procurement lead time
- Source selection method appropriateness
- LPTA Source selection method
- Small business set-aside
- Acquisition strategy appropriateness
- Compromised technical evaluation
- Intent to award without discussions
- Discussions
- Oral presentations
- Quantity of evaluation document revisions
- Increased contracts awarded
- Contract type
- Transaction costs

Human Factors

- Fear of protest
- Experience

Protest

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graph LR; A[Procurement Characteristics] --> D[Protest]; B[Acquisition Strategy] --> D; C[Human Factors] --> D;
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- Backward stepwise logistic regression
- Unit of analysis = FAR Part 15 source selection
- $n = 240$
- Original data collected via survey of USN contracting personnel

Results

| Independent Variables | B | S.E. | Wald | Sig. | Exp(B) |
|------------------------------|-------|------|-------|-------------|--------|
| Criticality | .18 | .09 | 4.58 | .03 | 1.20 |
| Service | .89 | .44 | 3.99 | .05 | 2.43 |
| Oral presentations | -1.65 | .85 | 3.76 | .05 | .19 |
| Cost reimbursement contract | .71 | .41 | 2.92 | .09 | 2.03 |
| Protest fear | .13 | .04 | 12.99 | .001 | 1.14 |
| Protest experience | .09 | .05 | 3.98 | .05 | 1.09 |
| Sustained protest experience | 1.16 | .51 | 5.16 | .02 | 3.19 |

Results

| Type | Count | % |
|---|-------|-----|
| Intended to award without discussions | 190 | 79 |
| Inappropriate to award without discussions | 92 | 38 |
| Held discussions | 143 | 60 |
| Dissatisfied with discussions | 43 | 18 |
| Oral presentations used | 20 | 8.3 |
| Oral presentations appropriate | 57 | 24 |
| Oral presentations appropriate and not used | 50 | 88 |
| Small business set-aside | 102 | 43 |
| Protests | 43 | 18 |
| Inappropriate source selection method used | 17 | 7 |
| LPTA used but inappropriate | 12 | 17 |
| Awarded more contracts than intended | 12 | 5 |

Results

| | Average | Std Dev | Min | Max |
|---|-----------|-----------|----------|-------------|
| Team Members | 10.3 | 4.3 | 3 | 21 |
| Transaction Costs | \$243,390 | \$300,415 | \$700 | \$3,551,944 |
| Transaction Costs/Contract Dollar | \$.066 | \$.203 | \$.00005 | \$1.77 |
| Document Revisions: | | | | |
| SSDD | 3.43 | 6.74 | 0 | 99 |
| Comparative Assessment/Proposal Analysis Report | 3.20 | 6.67 | 0 | 99 |
| Evaluation Notices | 13.94 | 98.63 | 0 | 1200 |
| Source Selection Plan | 3.10 | 2.778 | 0 | 30 |
| Debriefing Scripts | 2.43 | 3.56 | 0 | 27 |
| Technical Evaluations | 5.55 | 9.07 | 0 | 99 |
| Past Performance Evaluations | 4.22 | 8.65 | 0 | 99 |
| Cost/price Analysis | 3.06 | 4.77 | 0 | 60 |
| Rating Charts | 1.45 | 2.08 | 0 | 21 |
| Evaluation Briefing Charts | 1.87 | 1.81 | 0 | 10 |
| TOTAL | 42.2 | | | |

Strategies to Avoid a Protest

| Type | Average Times per User | Total Times Used – All Respondents | Min | Max |
|--------------------------|---------------------------|--|-----|-----|
| Task/delivery order | 43.5 | 2,308 | 0 | 300 |
| Sole source | 14.2 | 624 | 0 | 100 |
| Modify existing contract | 15.4 | 737 | 0 | 114 |

Managerial Implications

- Since source selections for services lend themselves to protests, more caution should be exercised in their design and execution.
 - Reconsider the part-time, ad hoc approach to staffing source selection efforts.
 - (1) strategic sourcing, and
 - (2) mobile source selection centers of excellence.
- Acquisition leaders should gauge the criticality of each requirement
 - Assign more resources such as PALT and experienced personnel

- Oral presentations appear to be underutilized
 - Appropriate for the situation in 57 (24%) of the source selections, they were only used in 7 of those (~12%).
 - Explore ways to broaden their use.
 - Revisit the prudence of conducting oral presentations without discussions.
- Apply more personnel to source selections involving cost reimbursement contracts. Additional training should be provided for the most vulnerable actions mandated by cost reimbursement contracts, such as cost realism analysis.
- Listen to the contracting officer's intuition as a gauge for protest propensity
- Source selection teams do not appear to be learning organizations.
- LPTA source selection method is sometimes used to source requirements that are inappropriate to the buying situation. Nevertheless, its use showed no statistical effect on mitigating protests.
- Awarding more contracts than intended has also been mentioned as a strategy to avoid protests – no statistical effect on mitigating protests.

Managerial Implications

- Confirms the deliberate use of acquisition vehicles in order to circumvent the more stringent, protest-prone FAR Part 15 source selections.
 - Be cognizant of effects on competition and SB
- Transaction costs of source selections is alarmingly high, averaging \$243K each, or 6.6% of contract spend – higher than many surcharges
 - Transaction costs did not reduce the odds of a protest.

- Shines light on an overlooked corner of justice theory – communications during relationship formation (i.e., source selection). This is important; much of the precedent of relational norms are established during the interactions during supplier selection.
 - Oral presentations, in some way, thwart bid protests
- Whose justice takes priority? At what point does the cost of justice become unjust?

Future Research Directions:

- A better understanding of how oral presentations are conducted and whether such characteristics are meaningful in terms of contract outcomes and bid protests.
- Explore lack of learning from protest experience
- Is the procedural justice afforded by protests worth the high transaction costs of source selections.
- Any lingering impact of extreme or otherwise influential (in)justices in the past and how those (in)justices manifest themselves in future interactions, decisions, and behaviors.

Limitations

- Response rate from original survey
- Variables available in the data set do not include all possible causes of a protest (e.g., errors)
- Only 43 protests (of 240) - unbalanced DV