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DoD Bid Protests

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Abstract

Improvements to the Agency Level Bid Protest Process in the DoD could lead to greater participation by companies in the marketplace, thus resulting in delivery of greater capability to the warfighter inside the turn of near peer competitors and nonstate actors. This paper addresses Congressional questions concerning the DoD Bid Protest process, in particular the Agency Level Bid Protest Process. It is based upon a report to Congress, *DoD Bid Protests*, September 2022 (n.d.). The Report to Congress was based on literature research, data analysis, and surveys and interviews of DoD, GAO, and U.S. Court of Federal Claims personnel.

Introduction

In the words of the Section 809 Panel, “At the end of the day, it’s all about delivering capability to the warfighter inside the turn of our Nation’s near peer competitors and nonstate actors.”

This paper is taken from the report to Congress, *DoD Bid Protests*, September 2022 (Report; n.d.). This paper, in addressing questions posed by Congress on the DoD’s Bid Protest Process, offers eight suggestions for improving the DoD Bid Protest Process to improve the DoD’s ability to deliver capability to the warfighter inside the turn of its near peer competitors and nonstate actors and to provide greater transparency into the bid protest process to allow Senior Procurement Executives greater visibility into issues impacting the procurement process.

Background

Section 886 of the conference report that accompanied the [National Defense Authorization Act \(NDAA\) for Fiscal Year \(FY\) 2021](#) directed the Defense Department to launch a new study of bid protests. The conference report directed a study of bid protests to follow up on an earlier congressionally mandated 2018 [RAND report, *Assessing Bid Protests of U.S. Department of Defense Procurements*](#). The conferees noted that they “continue to support efforts to improve the handling of bid protests,” and directed the “Secretary of Defense to undertake a study through the . . . [Acquisition Innovation Research Center](#) . . . to examine elements . . . for which the RAND National Defense Research Institute was unable to obtain full and complete data during its analysis.”

Section 885 of the conference report that accompanied the NDAA for FY2017 called for a study (undertaken by RAND) on “the extent and manner in which the bid protest



system affects or is perceived to affect . . . the development of a procurement to avoid protests rather than improve acquisition” and for detailed statistical data on bid protests.

The 2017 RAND study concluded:

- Although there had been an increase in the number of bid protests filed, their numbers remained relatively small—less than .3% of contracts awarded.
- While DoD personnel “were concerned that the process incentivized protests, potentially preventing the timely award of contracts,” the private sector “viewed bid protests as a way to hold the government accountable” and as a way to “provide information on how the contract award or source selection was made.”
- The DoD should improve post-award debriefings to stem bid protests, should maintain the timelines for resolving normal protests, and should sustain its standards for task-and-delivery order (T&D) protests.
- There should be an expedited process to resolve protests regarding the smallest contracts and changes to reduce protests by small businesses.
- The DoD should consider additional data and recordkeeping of protests to facilitate future studies and improve procurement policy decision-making.

The RAND study did not conduct an analysis of data relating to protests’ effects on procurement, protests’ costs to the government, or of protest trends, in part because the DoD did not collect the data at the time, and RAND did not undertake to identify and collect the data.

Responding to perceived areas for inquiry identified from the RAND report, in a more recent conference report Congress called for a new study to address:

- The rate at which protesters are awarded the contract that was the subject of the bid protest;
- The time it takes the DoD to implement corrective actions after a ruling or decision, the percentage of those corrective actions that are subsequently protested, and the outcomes of those protests;
- Analysis of the time spent at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action in response to a protest, including the efficacy of any actions attempted to prevent the occurrence of a protest; and
- Analysis of the number and disposition of protests filed within the DoD.

The conferees also emphasized “the potential benefits of a robust agency-level bid protest process” and called for the study to evaluate the following for agency-level bid protests: “prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such [agency-level bid] protest processes.” The conferees said that the study “should review existing law, the Federal Acquisition Regulation, and agency policies and procedures,” and should “solicit input from across the DOD and industry stakeholders.”

The conference report called attention to a recent academic study on agency-level bid protests led by Professor Christopher Yukins that the Administrative Conference of the United States (ACUS) commissioned as part of an initiative to reform agency-level protests. The conferees directed the Defense Department “to consider these recommendations” from



the ACUS-sponsored study “among those it might make to improve the expediency, timeliness, transparency, and consistency of agency-level bid protests.”

Bid Protests in the Federal Government

A bid protest is a formal objection to an acquisition decision. The Federal Acquisition Regulation (FAR) establishes a range of grounds under which vendors can file a protest:

- 1) A Solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- 2) The cancellation of the solicitation or other request.
- 3) An award or proposed award of the contract.
- 4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

There is no corollary to the bid protest process in the commercial market. Although bid protest systems are well-established in nations around the world, and are called for by the United Nations Convention Against Corruption, not all State or local governments have adopted a “protest” process. The American Bar Association (ABA) has developed a model procurement code that includes a “protest” process. The history of the federal bid protest system provides a backdrop for the federal procurement system generally and reflects Congress’ intent to create an integrated acquisition system with oversight, accountability, and potential remedies for government contractors.

The federal government has in place many laws designed to “ensure that federal procurements are conducted fairly,” including provisions which allow vendors to seek review of a contracting official’s decision through a bid protest. “The right to seek independent review of award decisions is something that distinguishes federal contracting from the commercial sector.” The Government Accounting Office (now the Government Accountability Office [GAO]) heard the first bid protest in the U.S. system roughly 60 years before Congress first explicitly granted any forum the statutory authority to do so. The current system is supposed to resolve protests quickly and fairly without disrupting the procurement process. Currently there are three jurisdictions where a protest against a procurement action may be filed: (1) the contracting agency, (2) the GAO, (3) the U.S. Court of Federal Claims (COFC).

A vendor in the U.S. federal procurement system has multiple options when it objects to a federal agency’s procurement decision; it can:

- 1) Decide to take no action, and accept the decision of the agency;
- 2) Protest to the agency;
- 3) File a protest with the GAO; or
- 4) File a protest before COFC.

If an agency denies a protest, the contractor may seek relief at the GAO or COFC; if the GAO denies a protest, the protester may renew its protest at COFC. There is no administrative exhaustion requirement, but there are rules of preclusion limiting protests; for example, a vendor may not simultaneously protest the same matter at both COFC and the GAO. As Figure 1 reflects, protesters may appeal a decision by COFC in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), and from there to the U.S. Supreme Court.



Elements of an Effective Bid Protest System

The history of the U.S. bid protest system stretches over approximately 100 years. During that time, however, Congress has not defined the purpose of a bid protest. More specifically, Congress has not confirmed whether it intends that protests provide a remedy for a disappointed offeror or that protests serve as a management tool for government oversight of the federal procurement system. To address that gap, the Section 809 Panel proposed that Congress state the bid protest system's purpose in order to provide a standard against which to measure the system's effectiveness.

The precise measures of an "effective" system remain largely unaddressed, but the factors determining an effective bid protest system start with the goals of both the procurement system and the system's process for adjudicating bid protests.

General Goals of the Procurement System

Competition is the heart of the procurement system, and thus, Congress emphasized facilitating "full and open" competition in the Competition in Contracting Act (CICA), the same legislation which codified the GAO's authority to hear bid protests. When the government maximizes full and open competition, the government naturally receives the best value from the procurement, but efficiency is essential to *maximize* full and open competition. At the same time, public procurement, as a function of government, must accommodate a wide array of socioeconomic goals. Taken in sum, an efficient acquisition system is one that reduces costs and time to delivery while ensuring users' satisfaction, and an effective bid protest system is one that furthers those goals. Uniform regulations, such as the FAR, can improve efficiency by reducing costs for officials and competitors.

While "full and open" competition is indeed the heart of the procurement system, and bid protests advance competition by assuring bidders of a fair and lawful system, the bid protest system also functions as an anti-corruption tool. In this role, an effective system ensures that government procurements transcend bribery, favoritism, and unethical behavior. The government's notification system, where agencies post procurement opportunities, awards, and other activities, maintain the system's integrity and transparency. The same system, the System for Award Management (SAM), hosts contractor qualification information, including lists of suspended and debarred parties.

Thus, the goals of the government procurement system generally include: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) socioeconomic opportunity; (8) risk avoidance; and (9) uniformity. The systems that define the procurement process—including the bid protest system—are in place to promote and advance these goals.

Goals of the Protest System

The Section 809 Panel suggested that the goal of the protest regime is to ensure an efficient and transparent procurement system. In general, the protest process should balance "the desire to exhaustively investigate any complaint" and "the need to let the procurement process move forward." Moreover, the process must produce "fair and equitable decisions based on consideration of all parties' arguments on a fully developed record." In other words, if a key purpose of the protest system is to provide a remedy to an unsuccessful offeror, the protest system should strive to provide meaningful reviews and remedies to the protester, while moving the procurement forward with speed and fairness.

The standard of integrity for any system that uses public funding should be higher than mere fairness. As such, the government strives to ensure that a process allocating funds adheres to the highest degree of integrity and transparency, and the protest system,



as an instrument of that process, should “deter and punish ineptitude, sloth, or corruption of public purchasing officials.”

The elements discussed above, taken in sum, suggest that the efficacy of a bid protest system turns on the following elements:

Table 1. Elements of an Effective Bid Protest System

Element	Description
Integration	A simplified and integrated process is more efficient and requires fewer resources, saving protesters from expending resources determining which rules to follow or at which forums to present their claims. Without integrated rules and forums, effectiveness of review may suffer.
Meaningful Review	Meaningful review depends on an adequate scope of standing (i.e., who may protest) and an independent arbiter. Bid protester standing is not uniform across the U.S. system. Independent review ensures the integrity and strength of the bid protest system because, without an independent review, protesters could be hesitant to bring bid challenges.
Transparency	Vendors and other interested parties should be able to access and understand the processes and rules under which contracts are awarded. Governments can do this by publishing information such as decisions, regulations, and procedures in a readily accessible public place. Because the bid protest system is largely self-enforced, making the relevant documents used during each procurement decision public increases the effectiveness in the bid protest system.
Speed	Public procurement is a process that needs to move forward with speed. Resolution of protests, therefore, should also move quickly to avoid interruptions to fulfilling the requiring activities’ needs.
Meaningful Remedies	The primary remedy of any bid protest is the correction of the government’s error and the opportunity for the protester to form a contract with the government, but other meaningful relief also promotes overall effectiveness of bid protest system. Depending on the governing law, remedies may include damages and attorney’s fees, as well as a “stay” provision and other necessary protections for the protesting bidder, to promote effectiveness of the overall procurement system.

History of Legislative Action on Federal Bid Protests

For an in-depth history of Federal Bid Protests, see the Report.

Opportunities to Improve Agency-Level Protests

Agency-level bid protests, which allow vendors and agencies to resolve their differences quickly and efficiently, are a lost opportunity for most agencies. Although agency-level bid protests are typically much less disruptive than protests brought at the other fora, vendors seldom resort to them because many perceive them as biased, opaque, and procedurally risky. But agency-level bid protests, when effective, afford protesters a quick and inexpensive forum where even the smallest business can challenge an agency’s procurement errors. If well-administered, agency-level protests can dramatically reduce the time and attention agencies must devote to bid protests, for they allow agencies to handle procurement failures internally, quickly, and with minimum disruption. Making agency-level bid protests an effective alternative means of resolving vendor challenges would benefit



federal agencies and bidders by reducing the costs and delays normally caused by bid protests.

The earlier ACUS study recommended that agencies initially hear all bid protests in an administrative forum independent of the agency conducting the procurement—a recommendation overtaken by President Clinton’s executive order of that same year, which called for rules formalizing agency-level bid protests. The 1995 ACUS recommendations also suggested that the Federal Circuit be assigned all appeals from administrative bid protest decisions. The complementary ACUS recommendation that all administrative authority over bid protests be consolidated in one forum was included in an early version of the defense authorization act for fiscal year 1996, which would have consolidated that authority in the GAO. The final version of the defense authorization bill, however, dropped that reform. Finally, the earlier ACUS recommendation urged Congress to mandate empirical assessments of the effects of the bid protest process, for example, between agencies. An ACUS study from 2019–2020 revisited the potential role that agency-level protests can play in the procurement system and provided an updated overview of the current agency-level bid protest systems.

The Protest Forum

The 2019–2020 ACUS study relied heavily upon an analytical structure for bid protests put forward by Daniel Gordon in 2006. The first element of Gordon’s analytical structure goes to where in the government (or here, where in the agency) the bid protest function is located. Agency-level protests’ origins lie in the contracting officials’ inherent authority to review and correct their own procurement decisions. In fact, the model law developed through the United Nations (and relied upon internationally) explicitly treats these types of protests as a form of self-correction by contracting agencies. FAR 33.103 allows vendors to seek that type of review by the contracting officer herself, but also allows for a higher-level review. This section focuses on the latter question—the higher-level review—and draws on emerging agency practices to assess how that might best be structured.

Current Practices Regarding Placement of Agency Protests

Currently agencies have significant discretion to decide where the agency-level protest function is located and how it should be structured. FAR 33.103 states that: (1) agency-level protests will be resolved by the contracting officer or an official designated to receive protests; (2) interested parties may request an independent review of their protests at a level above the contracting officer, by officials designated by the agency; and (3) if practicable, an official who conducts an independent review should not have had previous personal involvement in the procurement. Agencies’ varying approaches show that these basic requirements can be met in a number of ways.

When an agency allows the protester to choose between filing a protest with the contracting officer or an independent review authority, the two choices generally are treated as alternatives and protesters are prohibited from appealing internally from the agency decision. An exception is the Department of Veterans Affairs, which allows for the appeal of a contracting officer’s decision within the agency. Additionally, when an agency allows a choice of agency forum, generally if the protest is silent on the protester’s choice of forum, then by default the contracting officer will decide the protest.

Vendors will sometimes choose to protest directly to the contracting officer rather than a higher agency authority in order to avoid embarrassing the contracting officer (vendors often have long-standing relationships with the contracting officers, as agency customers), or to encourage the contracting officer to focus on and resolve a recurring issue



in the procurements she oversees (again, because both the contracting officer and the vendor are repeat players in a cyclical procurement process).

Another potential reason *not* to file an agency-level protest with a contracting officer is that if the contracting officer denies the protest, an appeal for higher-level review within the agency (if available) will not suspend the GAO's timeliness requirements. Any protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action, and an adverse decision by a contracting officer is an initial adverse agency action. Once the contracting officer's decision is issued, the vendor may be forced to choose between appealing to a higher level in the agency or preserving a timely protest at the GAO. Worse yet, it may be unclear whether the agency has taken adverse action, for (as discussed below) under the GAO's bid protest regulations, any vendor knowledge of adverse agency action, actual or constructive, may trigger the GAO filing deadline. Because protesting to the contracting officer may put the vendor into this uncertain tactical "box," many vendors will simply forgo an agency-level protest.

Scope of Agency-Level Bid Protest Jurisdiction

The next element in Gordon's analysis looked at the question of subject matter jurisdiction, and specifically at how broadly that jurisdiction swept for a bid protest function. As the discussion below reflects, agencies have taken divergent and ad hoc approaches to defining the scope of jurisdiction in their agency-level bid protest functions. Because most limits on jurisdiction are at the margins of the procurement system (one agency, for example, bars agency-level protests regarding subcontracts), this might not seem a critical issue for reform. But because new methods of procurement are emerging which may fall outside the authority of the traditional bid protest venues (the GAO and COFC), agencies may wish to take an expansive approach to agency-level bid protest jurisdiction to ensure oversight and accountability (and thus contain agencies' risks) regarding new procurement methods.

Current Practices Regarding Jurisdiction

The FAR is silent on the limits of the jurisdiction of agency-level protests, and some agencies (discussed below) have exercised their discretion to set their own limits on jurisdiction. When asked in interviews for the ACUS report whether the jurisdiction of agency-level bid protests should be limited, some agency counsel said no because they considered agency-level protests as tools to resolve problems which logically could emerge in any aspect of an agency's procurement functions.

Agencies' ad hoc approaches to jurisdiction in agency-level protests have created a patchwork of rules, for example regarding task-and delivery-order protests under IDIQ contracts. That patchwork of rules undercuts the effectiveness of agency-level bid protests for agencies, for the sometimes conflicting jurisdictional rules create risks and uncertainties for vendors, who are less likely to turn to agency-level bid protests as a result.

Some agencies, such as the United States Agency for International Development (USAID) and the VA, bar agency-level protests on issues of contract administration, small business status, and responsibility determinations. The Marine Corps has argued that only the GAO has jurisdiction over task or delivery order protests, and the Army Materiel Command (AMC) refuses to hear agency-level protests under "the GAO's \$25 million jurisdictional threshold to protests of task and delivery orders issued under [DOD] procurements." In contrast, at least one other agency has decided an agency-level protest on a task or delivery order where the GAO apparently lacked bid protest jurisdiction.



Standing to Protest

The FAR requires that the protester in an agency-level protest be an interested party in the procurement. The FAR defines an interested party as “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” Agencies generally adopt this definition to define standing to bring agency-level bid protests, with a few agencies incorporating language from the definition into the agencies’ FAR supplements. Some agencies also explicitly prohibit subcontractors from filing protests.

Time Limits at the Forum

As Daniel Gordon explained, there are actually two separate time constraints to be considered in ordering a bid protest system: how soon a vendor must file its protest, and how long the deciding forum has to decide the protest. Both time limits relate back to a core concern for any bid protest system: how to minimize the disruption to the procurement cycle—here, the time required to complete that cycle—caused by a protest system. Both issues of time are acutely important to agency-level bid protests, which must accommodate users’ demands that the services and goods they need be purchased as rapidly as possible.

Uniform Deadlines for Filing, Varying Deadlines for Concluding Protest Review

The FAR’s most basic time limit on vendors—the deadline for filing an agency-level bid protest—has not been altered by the agencies in implementing the basic rule. In important ways, FAR 33.103 follows the same timeliness requirements as apply at the GAO: agency-level protests must be filed at the agency within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request, whichever is later. After the agency initially decides the protest, if an internal “appeal” is available, the vendor must decide if it will appeal the agency-level protest within the agency, which the protester generally must do within 10 days. Alternatively, the protester may file a protest anew with the GAO, which the vendor also must do within 10 days.

Unlike the deadlines for filing protests (which have been borrowed largely intact from the GAO process), the timelines for deciding agency-level protests have been reworked by many agencies over the years. Under the FAR, the basic rule is that agencies must make their best efforts to resolve agency-level protests within 35 days after a party files a protest. Different agencies have adopted different deadlines for resolving agency-level bid protests, ranging from the basic rule’s maximum 35 days to as few as 20 days. Some agencies also require the deciding official to meet other milestones, such as conducting a scheduling conference with the parties within 5 days after the protest is filed.

Sufficiency of Evidence to Reach Its Decision

The next issue in the analysis, regarding the record in the protest, breaks into two parts. The first part looks at the standards for compiling the administrative record for the agency’s consideration when deciding an agency-level protest. The second part considers what access a protester should have to that record.

Agency Record for Protest

The current FAR rule provides almost no guidance on what record is to be compiled by the contracting agency in order to resolve an agency-level protest. FAR 4.803 includes an extensive list of the materials to be included in a contract file, but those materials stretch beyond the documents relevant to contract award and include many documents that would be irrelevant to a bid protest. GAO Bid Protest Regulation 21.3 calls for the following documents to be included with the agency’s report to the GAO on a bid protest: “all relevant documents . . . including, as appropriate: the bid or proposal submitted by the protester; the



bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.” A more detailed list of documents potentially relevant to a bid protest is included in Appendix C to the Rules of the U.S. Court of Federal Claims (RCFC), which, in paragraph 22, list nearly two dozen categories of documents that, if relevant to a bid protest before the court, should be compiled by the agency. Those documents range from the source selection plan to records of prior proceedings. The court’s detailed list of the documents that might be considered in a bid protest highlight the gaps in the FAR provision governing agency-level protests—specifically, the failure of FAR 33.103 to specify the documents that should be before the agency in deciding an agency-level protest.

Access to the Agency Record

Even if a complete record is compiled for review during the agency-level bid protest, there is no current mechanism for sharing that record with the protester—which is a major reason cited by vendors’ counsel for not using agency-level bid protests. In a protest before the GAO or COFC, protesters’ counsel normally will gain access to a substantial administrative record, usually under a protective order. A protester typically will use that administrative record to support and explain its protest grounds, and a protester often will identify additional protest grounds in the record. Not having access to that record is a severe disadvantage in an agency-level protest, but it may not be practically possible, absent very significant changes to the agency-level bid protest process or other advances in open government initiatives, to afford protesters access to sensitive materials in the agency procurement record.

Remedies to Define the Record and Grant Protesters Access

The current FAR rule leaves agencies wide discretion in deciding what to include in the administrative record that will be considered by the deciding official. FAR 33.103(d) calls for the protester to submit “relevant documents” with the protest itself, but beyond that, the rule says nothing about what documents (or other evidence) the deciding official should consider.

Some agencies have developed their own procedures for gathering and considering the record during an agency-level protest. The agency-level protest rule does not allow the protester discovery from the administrative record, and some agencies call for the deciding official to rule upon the protest based upon the documents provided by the protester and the agency. Other agencies, such as the Department of Labor, encourage scheduling conferences to establish plans for creating an appropriate record for the agency-level protest. Still other agencies, such as the Department of Energy (DOE), require the contracting officer to create a protest report to be used by an official at a level above the contracting officer.

Although FAR 33.103 says that to the “extent permitted by law and regulation, the parties may exchange relevant information,” nothing in the rule mandates that the agency provide the protester with relevant record information. In fact, as agency counsel explained in interviews, agencies generally do not provide protesters with any documents or other evidence in an agency-level protest. None of the agency counsel interviewed said that agency documents are regularly provided to protesters in the agency-level protest process. That leaves vendors with very few ready sources for documentation to support agency-level protests. Probably the most important documentation that a vendor will receive, then, is the



debriefing that offerors (both successful and not) are entitled to request from the awarding agency.

An ideal reviewing official doesn't need to supervise the contract officer; in fact, it is better if the independent reviewer does not have a connection to the protested procurement. At a debriefing, the agency will tell the offeror of the weaknesses in the offeror's proposal and answer relevant questions as to whether the source selection procedure conformed to the solicitation and applicable law. Debriefings may be done in writing, orally, or by any other acceptable method.

In recent years, the scope of debriefings has expanded for larger procurements. Section 818 of the NDAA for FY2018 provided for enhanced debriefings at the DoD. Section 818 required the DoD to respond to additional questions from disappointed offerors, and the DoD has implemented that requirement by a change to the Defense Federal Acquisition Regulation Supplement (DFARS). Section 818 also called for Defense agencies to produce a redacted version of the source selection determination in awards worth over \$100 million and to make the same disclosure in smaller procurements (\$10–100 million) if asked to do so by a small business or a nontraditional contractor.

In principle, information from the administrative record should also be available to a disappointed offeror through the Freedom of Information Act (FOIA) and under expanding requirements regarding "open government" (i.e., ready public access to and use of government data). In practical terms, however, it is unlikely an agency will respond to a FOIA request from a vendor in time to support a protest, and federal implementation of open government obligations remains in its infancy.

Putting the Procurement on Hold

The next element of Gordon's analysis looks at whether the procurement is "put on hold" pending the agency-level protest. While this seems an administrative nicety, it is at the heart of a healthy protest system in the U.S. government. Unlike bid challenge procedures in some other countries, the U.S. federal bid protest system generally does not award expectancy damages (i.e., lost profits) to protesters. Although successful protesters may be able to recover some or all of their bid-and-proposal costs and attorney fees from the agency, the prospect of those damages typically does not drive the protest decision—vendors instead protest in order to have an opportunity to compete fairly for the contract. Keeping that contract award available as a "bounty" for protesters by staying award or contract performance during the protest is thus essential to the health of the federal protest system. Agencies, for their part, have a collateral but important shared interest in the stay: If award or performance proceeds during the protest and ultimately the protest succeeds in reopening the competition, an agency may bear damages and transaction costs in undoing the original award and performance. Making the stay effective is, therefore, in the interests of both agencies and vendors.

Current Practices: An Uncertain Stay

Currently, FAR 33.103 requires that if an agency-level protest is timely filed, the contract will not be awarded (if the protest is before award) or performance will be stayed (if post-award). To preserve agencies' operational flexibility, the agency may "override" the stay; most agencies require the head of the contracting activity to make the determination when urgent and compelling reasons justify such a decision.

Even if the agency will not override it, the stay of award can present a tactically difficult question for the vendor. If the vendor is considering a pre-award agency-level protest (typically to the terms of the solicitation), the stay presents a less acute problem



because even if the agency-level protest is denied, if due to the protest the bidding deadline (and thus the protest deadline) has been extended by the agency (which is often the case), the vendor can file anew at the GAO before that extended deadline to maintain the stay on the procurement. An agency-level bid protest thus may allow a vendor to preserve the status quo (to stay the contract performance) by bringing a new GAO protest before the newly extended bidding deadline.

The same is not true for post-award protests, however, for after award, the statutory deadline for obtaining a stay at the GAO runs from the award decision or the debriefing which follows award. An agency-level protest does not affect the deadline for filing at the GAO to trigger an automatic statutory stay. If an agency denies an agency-level protest brought after award, by that time the statutory deadline for filing a GAO protest to trigger an automatic stay almost certainly will have passed. The agency may agree informally to a temporary suspension, but that raises substantial uncertainty and risk for the vendor. The vendor's only recourse—if the contract is to be preserved with some legal certainty—will be to file suit in COFC and seek an injunction during the pendency of the protest. The court, however, may refuse to enjoin the agency.

According to vendors' counsel, the lack of a durable stay makes agency-level protests far less appealing. Vendors may not want to risk losing a possible stay at the GAO (viewed as a more robust forum) by filing an agency-level protest first, even if the agency-level protest is a quicker and more efficient option. As a result, vendors often will file directly with the GAO to avoid losing the stay of the procurement while the GAO considers the protest.

Difficulty for the Protester to Win

The last element in Gordon's analysis asks how difficult it is for a protester to prevail in a given protest system. This statistic, as noted, is vitally important to stakeholders — the likelihood of success informs protesters' willingness to use the protest system. Under current practice, because almost no data are available on agency-level protest outcomes, the process is a "black box," which discourages vendors from using agency-level protests. From both vendor and agency vantage points, therefore, improved transparency regarding the agency-level protests is important.

Hidden Outcomes

FAR 33.103 currently requires that an agency protest decision be well-reasoned and explain the agency's position. The FAR also requires that the protest decision be provided to the protester using a method that provides evidence of receipt. If the agency-level protest is sustained by the agency deciding official, some agencies define the following available remedies: (1) terminating the contract; (2) recompeting the requirement; (3) amending the solicitation; (4) refraining from exercising contract options; (5) award of contract consistent with statute, regulation, and terms of solicitation; or (6) other action that the deciding official determines is appropriate.

Because almost no statistics on outcomes in agency-level bid protests are captured or published, in interviews, this simple question was put to agency counsel: How often do agency-level bid protests succeed at your agency? The responses highlighted the fact that "success" in agency-level bid protests can take many forms, because the vendor and the agency typically seek a constructive outcome—not a mere "win" in the administrative process. One government counsel said agency-level protests are almost never sustained at his agency, but he hastened to explain that, because an agency-level protest is a management tool—an opportunity for the agency to identify and correct its own error—a meritorious agency protest is typically resolved through corrective action rather than a formal



decision. The government counsel stressed that because the agency prefers to resolve these issues itself, informally and quickly and through corrective action, if necessary, his agency prefers that vendors pursue agency-level bid protests, rather than more cumbersome GAO and COFC protests. As experienced agency counsel acknowledged, agencies have a stake in an improved agency-level bid protest system, as agencies and vendors share an interest in an effective system.

To keep the agency-level bid protest system vital, it is important that prospective protesters know that they have a reasonable chance of success. Almost inevitably, that requires published statistics on protest outcomes. Publication means resolving the following questions, building on the current rule and agency best practices:

1. What is the essential data to be used for assessing agencies' internal bid protest systems?
2. What information should the agency publish—agency protest decisions, for example, or simply statistics on protests and outcomes?
3. How will agencies and regulators measure outcomes? Will only decisions sustaining a protest "count" as protest victories, or will agencies also tally corrective actions as "wins"?
4. Who in the agency should gather and publish information and statistics on agency bid protests, and how can the public confirm those reports?

These questions are reviewed below, in an assessment of how FAR 33.103 might be improved to reflect agency best practices in gathering and publishing information on protest outcomes.

Agency Protest Requirements

In 1995, President Clinton issued Executive Order No. 12,979 which required executive agencies to create alternative dispute resolution (ADR) systems for bid protests. The Executive Order also requires that agency heads make a system that is "inexpensive, informal, procedurally simple and expeditious" for bid protest resolution. FAR 33.103(d) states that the goal of an effective agency protest must: (1) resolve agency protests effectively, (2) increase confidence in the federal procurement system, and (3) reduce protests in the GAO and COFC spheres.

FAR 33.103(g) requires that an agency make "their best efforts" to resolve a protest within 35 days after the protest has been filed. During the resolution of the protest, the agency and protester may provide information regarding the protest. It is also required that the agency decision is "well-reasoned" and "provide sufficient factual detail explaining the agency position." The agency must submit a copy of the decision to the protester in any manner of which the agency can verify receipt.

The chief practical issue presented by this study is how to accomplish Congress' goals—how to leverage bid protests in Defense Department procurement to reduce systemic risk, while minimizing the disruption that bid protests can bring to delivering capability to the warfighter inside the turn of near peer competitors and nonstate actors. One ready answer is to encourage the use of agency-level bid protests. As a recent study published by ACUS noted, agency-level bid protests offer a more efficient, less disruptive alternative to GAO protests or protests brought before COFC.

The question, then, is how agency-level bid protests might be structured in order to make them more effective. The recent ACUS study cited a number of problems in the



current agency-level bid protest rules structure, including a lack of an administrative record and transparency—problems which have impeded widespread use of agency-level bid protests. The report recommended a number of reforms to make agency-level bid protests more effective. Relatively modest reforms proposed by the ACUS report—most drawn directly from agency best practices that have evolved since the rule was first published a quarter-century ago—could substantially improve the transparency and validity of the agency-level bid protest process. These reforms would allow vendors to rely more on agency-level bid protests, a step forward that would improve procurement processes for agencies, which generally prefer to resolve bid challenges internally, quickly, and efficiently. For a greater discussion of the ACUS report recommendations, see Report to Congress.

As the discussion below reflects, the proposed reforms put forward in the ACUS report generally would be well within best practices already used in the DoD, as the AMC already uses many of these strategies in its agency-level bid protest system. Implementing these reforms, as the AMC's example below shows, could be done within the existing legislative and regulatory structure, though the more forward-looking reforms (such as gathering and publishing data on agency-level protests) could require changes to regulations and guidance within the Defense Department.

Army Materiel Command: A Model Agency-Level Bid Protest System

As noted, a potential model for reform already exists in the Defense Department: the Army Materiel Command agency-level bid protest system. As LT COL Bruce L. Mayeaux pointed out in a research paper recently published in the *Military Law Review*, the AMC agency-level bid protest system could provide a model for other components of the Defense Department that seek to use agency-level bid protests as a risk management tool. From a historical perspective, this is not surprising because the AMC agency-level bid protest system was itself the model for President Clinton's government-wide executive order which endorsed agency-level protests in 1995.

Mayeaux suggests that the DoD should model the DoD agency-level bid protest system after AMC's current program. Mayeaux outlines that the AMC agency-level bid protest system incorporates many crucial elements:

- 1) AMC has an established, independent APO.
- 2) AMC's system can accommodate agency-level bid protests relating to all possible procurements.
- 3) AMC's system aligns with the GAO's legal "standing" rules.
- 4) AMC has a formalized process similar to that used for disputes under the Contract Disputes Act of 1978.
- 5) AMC's system generates administrative reports similar to the GAO's merits decisions.
- 6) AMC's system facilitates sharing the report with protesters.
- 7) AMC employs a consistent regulatory stay of award or performance.
- 8) AMC compiles agency-level bid protest data to analyze and manage risk.

As LT COL Mayeaux explains, the AMC agency-level bid protest system already reflects many of the reforms that the ACUS report recommended to advance the agency-level bid protest system as an effective risk management tool and as an alternative to the more cumbersome and expensive bid protests systems at the GAO and in the courts. See the Report for a more in-depth discussion of the AMC process.



Analysis of Bid Protest Data

For a discussion on analysis of DoD data on bid protests, see the Report.

Findings: Answers to Congress

Congress identified four issues for the study that resulted in the Report.

Issue 1: The Rate Protesters Win the Contract

The first question Congress presented asks for the rate at which protesters ultimately win the contested contract. This study showed that the majority of responding agencies within the Defense Department do not actively track the rate at which protesters are awarded the contract that was the subject of a bid protest. The agencies that do not track this information stated as justifications for not doing so: the lack of protests, the ease of manually retrieving protest information from the relevant files when necessary, and the burden of adding an additional task to the contracting process.

If implemented, the data extraction processes set forth in the 2021 article, *Data Scarcity in Bid Protests*, would make determining the rate at which protesters are awarded the protested contracts relatively simple. The awardee's information presumably would be in the final contract which would be on file, and the protester's information would be in their protest filing. The program could extract that information and output it, for example to a single row in a spreadsheet or a report.

One of the data points that such a program would record is the protester and ultimate contract awardee's Unique Entity Identifier (UEI). These could then be cross-referenced and answer in a binary "yes" or "no" as to whether the original awardee ultimately retained the contract (by matching UEIs). Assuming that the UEIs could be reliably identified programmatically (which would depend, in turn, on the fidelity of the submitted data), automatically collecting the protester's UEI should be straightforward. An alternative, though suboptimal, approach, as discussed above, is that the protester's UEI is copy-pasted manually from the relevant documentation.

The data referenced in this Report illustrate both the costs and benefits of *not* integrating bid protests into a broader automated acquisition system. Data scientists collected the data for this study by programmatically extracting solicitation PIIDs from GAO merits decisions and some GAO docket information, spanning 2008 to 2022, from GAO.gov. The data scientists then paired the PIIDs to USASpending.gov contract data by matching the "solicitation_identifier" field in the USASpending data. The data scientists paired the bid protest information and USASpending contract data and then analyzed it to render the referenced data. Using this methodology, data scientists were able to gather data on 2,015 protests from 2008 to July 2022. These data, and the results, did *not* reflect all GAO cases from this period, nor do they include agency-level or court bid protest decisions.

Amongst other insights, the available data showed that the protester was eventually awarded the contract 5.56% of the time. (Because this finding is based on GAO merits decisions, it does not capture cases where, for example, a protester was able to negotiate an alternative solution with the agency, or where a protest resulted in early corrective action by the agency resolving the problems raised by the protest.) Where the protest was sustained, the protester was awarded the contract 10.92% of the time, and where the protest was not sustained (encompassing withdrawals, denials, and dismissals), the protester was awarded the contract 5.05% of the time. This quasi-manual process was computationally intensive (the net time for a personal computer to run the processing programs was approximately 30 hours) and required substantial effort to clean, process, and



initially analyze the data. This makes it far less efficient than the proposed automated process would be.

Barring the adoption of the recommendations in this paper, one simple but critical improvement to the system would be to make the entry of the solicitation identifier mandatory in the Federal Procurement Data System (FPDS; which is then mirrored into USASpending data), thus allowing this process to capture data on all of the bid protests. It is unclear at this time why the FPDS fields captured in the PDS XML data are not all automatically uploaded to FPDS, as it would not take additional time and would greatly improve data collection. The XML data would, definitionally, be reflective of the information written into the contract, so validation should not be a concern.

Issue 2: Corrective Action Relative to Protests

Congress next asked for information on agencies' responses to corrective action, which typically results in dismissal of a protest. None of the agencies surveyed within the DoD tracks the time that it takes to implement corrective action after a decision, nor do most agencies track the percentage of protests where corrective action is taken that the corrective action is protested. While all of the agencies track the final outcomes of protests, the agencies' records of the final outcome do not generally show any affiliation with corrective action.

The Defense Department's automated acquisition systems are evolving very rapidly, and it is only possible to speculate on what information may be specifically available to study corrective actions and how to leverage what is currently being recorded to gain more insights. The only data point on corrective actions currently available was derived from protest awardee data discussed above, which showed that protesters whose protests were not sustained still ended up being awarded the contract roughly 5% of the time, indicating that agencies took voluntary corrective actions at least that frequently. Given that the same data analysis suggested that sustained protests resulted in the protester being awarded the contract only roughly 11% of the time, it is likely that corrective actions occur far more frequently, given that corrective actions do not automatically result in the protester being awarded a contract. In an improved data reporting system, a range of fields could be implemented to aggregate data on corrective actions, depending on what specific aspects of the corrective action were of most interest.

How to determine the time it takes the DoD to implement corrective actions after a ruling or decision?

Congress also asked for information on the time required for DoD agencies to implement corrective actions after a ruling (by the GAO for example) or an internal agency decision to correct an apparent mistake. The survey of DoD agencies showed that this data is not broadly available from the agencies. If the only datapoint being sought when tracking corrective actions is the gap in time between the rendering of a decision in response to a protest and the solicitation or contract becoming active again, the time it takes could be calculated by comparing the two relevant dates. Where the GAO renders a written merits decision, and the solicitation is reissued, or otherwise formally restarted, the dates could be extracted from those two documents. As discussed above, where there is a protest decision not formatted for programmatic processing, it needs some manual data entry. If more benchmarks are required, more information would be required, but it would be equally straightforward to accommodate them.

As demonstrated by the gaps in USASpending Data and the DoD's Protest Tracker data (an internal compendium of partial bid protest data), requiring personnel to enter data invariably results in incomplete datasets. Reducing the amount to be manually entered to 3–



4 cells per contract, and potentially automating these processes in the future, would enhance the likelihood the data would be entered correctly and would be a significant improvement over the status quo. Once such an integrated approach to data gathering were implemented, answering questions (such as on the time required to implement corrective action) would become much faster and easier, and results could be reported nearly in real-time or in annual reports as required.

What percentage of the corrective actions taken by the DoD are subsequently protested, and what are the outcomes of those protests?

Congress asked what followed after DoD agencies take corrective action in response to protests. The survey of DoD agencies confirmed that this is a difficult question to answer because of a lack of insight into the data currently within the DoD. The solution for tracking corrective action protests would likely mirror the data entered for initial protests. Where the data were already collected, there could be automation options, but at present, the DoD's data structures are too new (and still evolving) to articulate what specific options exist. As discussed above, if a program creates XML files for solicitations, it would be a significant step in mapping the outcomes of various agency corrections.

Speaking in generalities, the approach for tracking protests through the lifecycle of a procurement effort could function nearly identically, whether tracking initial protests or protests against corrective actions. Any subsequent protest actions would appear in the dataset under the same PIIDs, allowing all related protests to be associated with each other. Because contract modifications occur on a form which is different from the form used to create the initial contract, it would be straightforward for software to delineate between the two document types and properly output the data on corrective actions as relating back to a prior protest.

One significant hurdle to complete automation arises in instances where a protest results in a completely novel solicitation or contract being issued, severing the link between the original PIID pairing discussed in the above paragraph. In such an event, the Contracting Officer managing the procurement would have to associate the new PIID with the original PIIDs by entering the relevant PIIDs in an assigned cell, to be propagated across the relevant data-rows.

Issue 3: Time Spent on Protests During Procurement

Congress also asked how much time is lost to actual or potential bid protests. This study showed, however, that none of the responding agencies analyzes the time spent attempting to prevent, address, or resolve a protest or the efficacy of any actions attempted to prevent the occurrence of a protest. Contracting Officers do, however, retain experience from the protest process that they then may implement in new procurements.

While Professor Tim Hawkins of the University of North Texas has done some work on the time-cost of protest avoidance during the formation and solicitation stages, he largely found that there was insufficient data to make detailed observations. To properly pursue the question, a targeted survey would have to be developed and submitted to a statistically relevant number (at least 1,000) of randomly selected contracting officers to satisfy scientific rigor and render statistically reliable results.

The data collection and reporting methods proposed here, and in the 2021 article *Data Scarcity*, would, if implemented, allow for improved targeting of such efforts. The data could be used (for example) to focus the research on specifically chosen contracting offices which receive above average, average, and below average numbers of sustained protests to be targeted for the surveys. This would allow for information to be collected about the



time-costs of avoiding bid protests generally and would also provide insights into what differentiated the outcomes across contracting offices of various performance quality.

The research methods described above have allowed research scientists to associate approximately 2,000 GAO protests with the underlying contracts, contracting offices, and resulting protest. Because this dataset represents approximately 8% of all protests received in the relevant timeframe, it is useful for trend analysis, but outliers within the set should not be seen as representative.

Issue 4: Rates and Outcomes of DoD Protests

Finally, Congress asked that this study assess the number and disposition of protests filed regarding DoD procurements. While procurement personnel in some DoD agencies regularly review protest policies or review protest data for accuracy, no agencies reported that they conduct any analysis of protest data. Only a few of the agencies even track whether the protester ultimately wins the award of the protested contract. Senior DoD officials noted that in key cases (such as those involving major weapon systems), the agency may conduct an “after-action” review to assess lessons learned from bid protests.

For the most part, however—and again, because the Department’s evolving acquisition data are largely divorced from the bid protest system—the Department lacks reliable data on the number and disposition of protests filed. On this point, however, this study was able to gather and assess data, using the methodology developed for the 2021 article discussed. The available GAO merits decisions were assayed to identify the types of matters protested and the dispositions of the protests. The results are set forth in Appendix B to this report. While these results are necessarily incomplete and derivative—they are based on a limited number of published decisions and reflect only the information in those decisions—the results do suggest that better information on bid protests is very likely to result in better management decisions at the DoD.

Conclusion

In its conclusion, the Section 809 Panel observed that the mission of the DoD’s acquisition system “is to deliver lethality to warfighters by providing innovative products and services that allow warfighters to obtain and maintain technological superiority over near-peer competitors and nonstate actors.” In order to achieve that goal, the companies that seek to do business with the DoD must perceive that the acquisition process is competitive and fair.

The goal of the federal bid protest system, as part of the federal procurement system, is to facilitate full and open competition and to improve outcomes in the acquisition process. With a more open and accessible market, costs decrease and quality increases as more vendors can compete to fulfill the users’ needs. Participants in the federal procurement system want assurances that it will be fair and provide timely resolution of disputes.

The U.S. bid protest system has been under development for nearly a century. The trend to move more protests from the courts to alternative fora—for example, to the GAO and to agencies—demonstrates Congress’ intent to increase the procurement system’s efficiency. However, giving contractors multiple venues to bring protests has led to procedural differences with possible substantive effects on protest outcomes. For example, the varying standards in producing the administrative record for a GAO protest and a COFC protest cause protesters to consider carefully which avenue to take in filing a protest, a question that also turns on the issues in their particular matter. Relative costs of proceeding in the fora may also drive decisions about which forum protesters choose.



Furthermore, as contracting methods continue to evolve, such as task or delivery orders and other transaction agreements, new considerations arise in terms of which fora to choose. By specifying standards as to what constitutes the administrative record in all fora, increasing transparency of bid protests and clarifying the agency's jurisdiction over bid protests, for example might increase use of the agency level bid protests. Anecdotally, it appears that the lack of transparency in agency level bid protests drives companies to the GAO or COFC, where it is clear what information will be made available to them. Greater transparency at the agency level bid protest level may also result in sharing innovation and lessons learned across the DoD and all agencies.

In this regard, observers have suggested that agencies could make significant improvements to agency-level bid protests without additional legislative authority by following established best practices from agencies such as the Army Materiel Command. A key goal in promoting agency-level bid protests is to resolve disputes quickly with the least disruption to delivering capability to the warfighter. The current agency-level bid protest process presents potential issues for contractors, which may steer them towards the GAO or the courts instead. For example, at least in the case of post-award protests, the agency protest timeline erodes protesters' opportunity to file a protest at the GAO, leaving them with the sole option, if they want to stop the procurement, of seeking an injunction at COFC, which may require the protester to overcome a stringent standard for preliminary injunctive relief.

To address these types of issues, this study recommends a number of reforms to agency-level protests, reforms which were endorsed by ACUS, and which are already largely reflected in AMC's agency-level bid protest system:

1. Formalize the role of an "Agency Protest Official" to oversee agency-level protest procedures at the agencies.
2. Confirm that agencies have broad authority to hear agency-level protests, so that agencies have the flexibility to address new problems in novel procurement methods, such as procurements using other transaction authority.
3. Leave the standard for standing flexibly bound to that used by the GAO and the courts, to allow agency-level protests to evolve with other protest fora to accommodate new kinds of "whistleblowers" (protesters) in the acquisition system.
4. Clarify the decision-making process in agency-level protests, perhaps by reshaping it to more closely resemble the tiered decision-making called for by the Contract Disputes Act for contract administration claims.
5. Specify the record necessary for agency-level bid protests, to ensure that the issues raised can be fully addressed on the administrative record.
6. Maximize the record shared with agency-level protesters to encourage rapid resolution of issues.
7. Rationalize the stay of performance in the event of an agency-level protest, so that the protester remains confident that the protester's key goal—having an opportunity to recompete fairly for the contract—is not lost to delay.
8. Publish data on agency-level protests, including, potentially, the decisions themselves to reinforce regularity and confidence in the acquisition system.

Resolving these open issues would increase vendors' incentives to file their initial protests at the agency level while preserving their opportunity to file follow-on protests at the GAO and/or COFC if needed.



Congress also asked that this study report on data on bid protests, in part to draw lessons from bid protests as a management tool—as a means of assessing the policy issues that come to the surface in a bid protest. The ability to use protests as a management tool to improve an agency’s procurement outcomes is hampered by the lack of data generally on bid protests. This data deficit is not unique to the DoD. What data exists appears to be manually generated and appears to be dependent on the activity within the DoD. Manually collecting such data adds additional burdens to contracting officers and their supporting counsel, allows for data reentry errors, and results in inconsistent data across the DoD. The issue with data impacts other areas of the federal procurement process as well.

This study shows that many of these gaps in data—the inability to identify problems in the acquisition system, or to discern possible solutions—could be resolved by a more integrated and comprehensive “digitalized” acquisition system at the Defense Department, which has been called for by over two decades. While the study was able to address key questions put forward by Congress (such as the numbers and types of decisions that were subject to protest, at least at the GAO), those findings were bounded by the strict limits on the available data.

Methods which could be integrated with the DoD’s automated acquisition system are readily available and would significantly improve data reporting on bid protests and other aspects of the acquisition process. There are various options available which could provide varying levels of continuously available, improved data. Additional funding would need to be provided.

Finally, the investigators of this Report identified improvements to integrate the multiple databases that host procurement information. The DoD has a great deal of data; most of it is not easily accessible. Through integration, data analysis could empower Congress, and the policy makers in the DoD, to have a better understanding of what is actually occurring in the procurement system and to empower Contracting Officers to have the confidence to be more proactive in pursuing the CICA mandate to be more creative to better serve their end customers.

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