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AIRC Report on Defense Department Bid Protests- Agency-Level Bid Protests

Naval Postgraduate School – Acquisition Research Symposium

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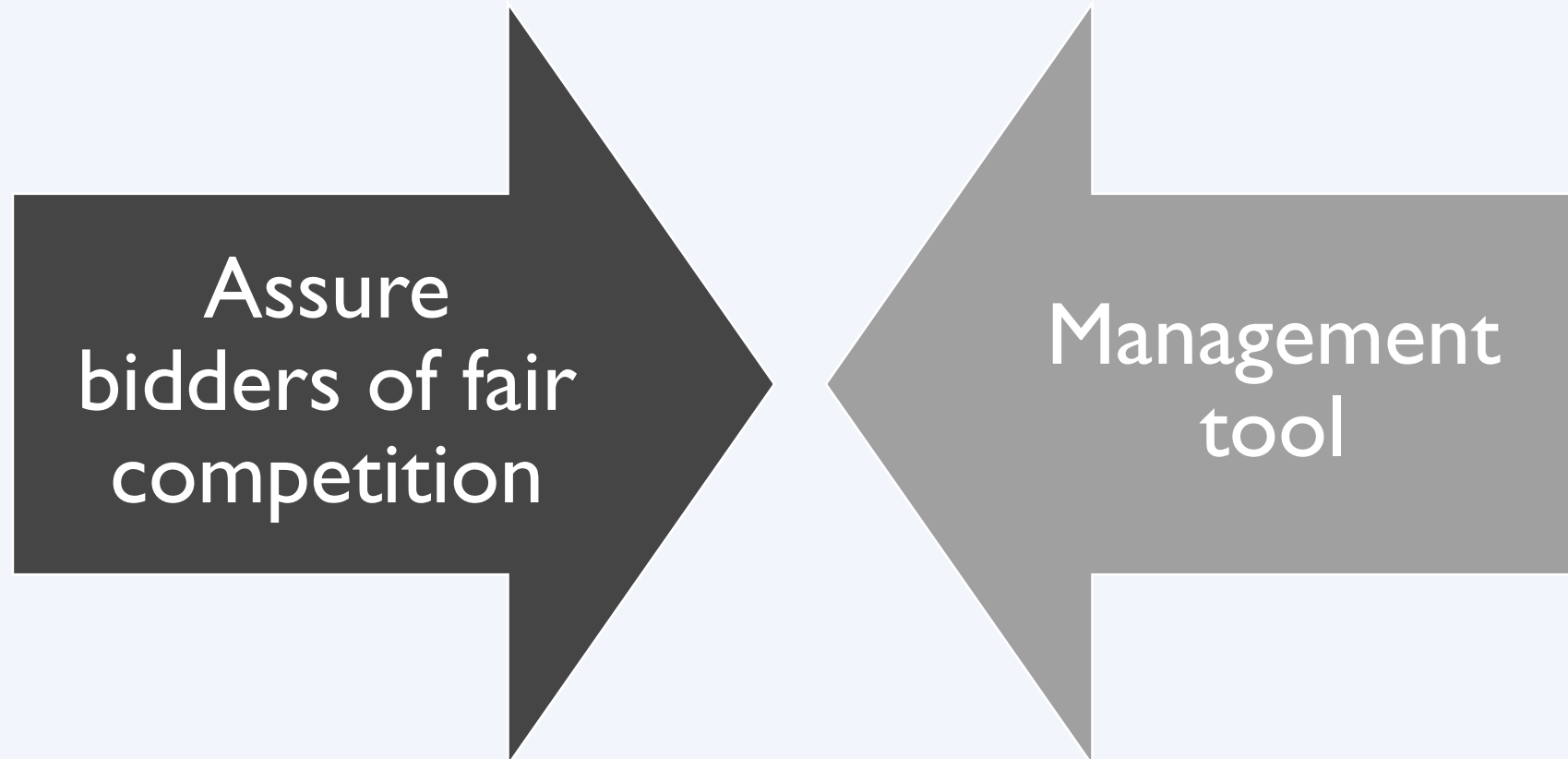
Co-Principal Investigators

Wednesday, May 10, 2023

Research Questions and Methodology- from Congress

- FY21 National Defense Authorization Act (NDAA) Report
 - The rate at which protestors are awarded the contract that was the subject of the bid protest;
 - The time it takes the Defense Department 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 Defense Department.
- FY22 NDAA Report
 - “[P]otential benefits of a robust agency-level bid protest process”
 - 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.”
 - Overall, 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.”

Background Question: Do Bid Protests Serve Two Roles?



What Are Agency-Level Protests—And Why Are They Important to Management?



Reports' Evolution



STEPPING STONES TO REFORM: MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE FOR AGENCIES AND BIDDERS BY BUILDING ON BEST PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT

Draft Report: May 1, 2020

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.



September 2022

DOD BID PROTESTS

In Fulfillment of "Repeal of Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests" in the Joint Explanatory Statement (House Report 116-617) accompanying the William M. (Mac) Thornberry National Defense Authorization Act for FY 2021



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The views, findings, conclusions, and recommendations expressed in this material are solely those of the authors and do not necessarily reflect the views or positions of the United States Government (including the Department of Defense (DOD) and any government personnel) or the Stevens Institute of Technology.

Recommendations re: Agency-Level Bid Protests

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 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.



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