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Closing the Bid Protest Case Law Knowledge Gap The Contract Protest Diagnostic Tool (CPDT)TM

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Abstract

Federal contract formation is governed by three main types of legal authorities: statutory, regulatory, and decisional. Contracting officers have easy access to statutory and regulatory authorities but do not have easy access to decisional authorities (bid protest decisions). Most federal contracting officers do not have subscriptions to expensive legal research tools such as LexisNexis or Westlaw and are forced to research bid protest information through myriad ways ranging from Google searches to government contracting blogs. Despite this lack of access to published bid protest decisions, the Federal Acquisition Regulation (FAR) 1.602-1 mandates that “no contract shall be entered into unless the contracting officer ensures that all requirements of law ... have been met.” Some of those “requirements of law” are created through published protest decisions from the Government Accountability Office, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit. In response to this access and knowledge gap, the MITRE Corporation has created a “Contract Protest Diagnostic Tool” (CPDT)TM. It is currently being sponsored by the Office of the Director of National Intelligence (ODNI). This paper explains this problem and how the CPDT delivers bid protest information to the federal acquisition workforce.

Introduction

In FY2023, the federal acquisition workforce obligated over \$765B in federal funds through thousands of contracting actions (Edwards, 2024). In executing this massive mission, contracting officers are responsible for ensuring all these contract awards fully comply with applicable procurement laws (FAR 1.602-1(b)). Further, the laws governing contract formation are comprised of statutes, regulations, executive orders, and decisional authorities (e.g., bid protest case law). Contracting officers have easy online access to all these sources of law—except for the *decisional* authorities. This lack of access to protest case law is a longstanding and well-known problem for the procurement community. The MITRE Corporation has developed an innovative tool to close this knowledge gap. It is called the Contract Protest Diagnostic Tool. This paper explains the need for this tool and its capabilities.

The Importance of Federal Contracts to Agency Operations

The Federal Government relies heavily on contracts to keep it running daily. These contracts provide critical supplies and services necessary to perform a broad range of Government functions and support all federal agencies and programs. This spans everything from low-dollar supplies to multi-billion-dollar weapons systems. The Department of Defense (DoD) annually obligates more money on federal contracts than all other federal agencies



combined (Peters, 2023), as shown in the GAO¹ FY2022 chart below depicting federal contract obligations by federal department.

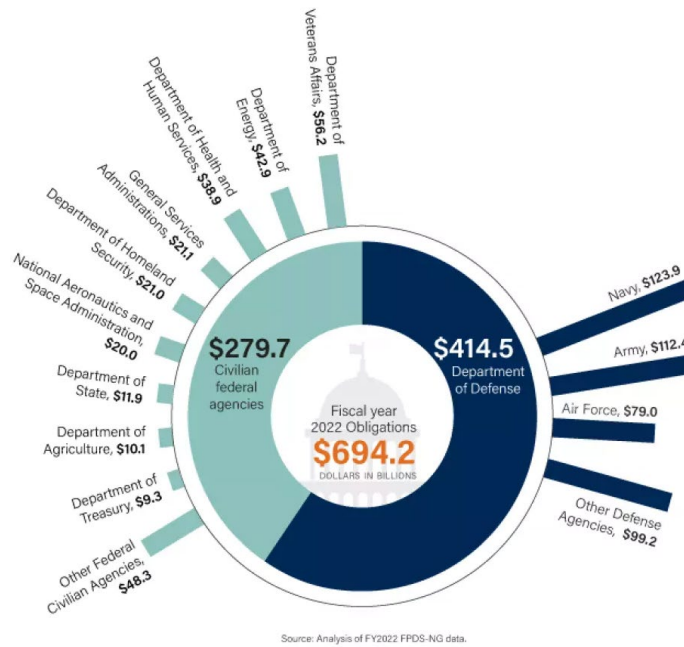


Figure 1. High-Level Overview of FY2022 Contract Obligations by Agency

The Statutes, Executive Orders, and Regulations Governing Federal Contracting

Federal contracts are awarded and administered according to well-defined statutory authorities established by Congress. These statutes are mainly codified in the U.S. Code at Title 10 (Armed Forces) and 41 (Public Contracts). They are readily accessible to the public through several online sources, including the House of Representatives Office of the Law Revision Counsel’s website.² Executive orders are likewise well-organized and easily accessible online through the Code of Federal Regulations (CFR) website.³

These statutory authorities and executive orders are implemented in regulation through the federal rulemaking process. The Federal Acquisition Regulation (FAR) is the central government-wide regulation that executive agencies follow when awarding contracts. The FAR is codified in Title 48 of the Code of Federal Regulations and is easily searchable through the Federal Government’s acquisition.gov website.⁴ Agency supplements to the FAR, such as the Defense FAR Supplement (DFARS), are also found on that site. Procurement-adjacent regulations, such as those promulgated by the Small Business Administration, are also easily searchable through the Government’s eCFR website.⁵

¹ See GAO Blog (2023, August 15), *A Snapshot of Government-Wide Contracting for FY 2022*. [A Snapshot of Government-Wide Contracting for FY 2022 | U.S. GAO](#)

² See: [OLRC Home \(house.gov\)](#)

³ See: [Federal Register :: Executive Orders](#)

⁴ The FAR, and its supplements, is most easily searchable through the Federal Government’s acquisition.gov website: [FAR | Acquisition.GOV](#)

⁵ See e.g., the SBA’s “Government Contracting Programs” regulations at 13 C.F.R. Part 125. [eCFR :: 13 CFR Part 125 -- Government Contracting Programs](#)



The Decisional Authorities Governing Federal Contract Awards

In addition to the statutes, regulations, and executive orders discussed above, bid protest decisions are essential to the law governing federal contract formation. These decisions explain the protest forums' application of the laws to various fact patterns. In some cases, these decisions *create* legal rules not evident from a plain reading of the statutes and regulations.

There are three protest forums: (1) the awarding agency, (2) the Government Accountability Office (GAO), and (3) the Court of Federal Claims (COFC). All three of these forums must issue a written decision on the protest. Unlike agency decisions, GAO and COFC protest decisions are *published*, creating precedent that contracting officers must follow to avoid a sustained protest. Further, the Court of Appeals for the Federal Circuit (CAFC) publishes important protest decisions following appeals from the COFC's protest decisions.

This paper is focused on the protest decisions issued by the GAO, the COFC, and the CAFC. These three forums (combined) publish an average of 400 protest decisions per year. The GAO publishes the most (around 300 published decisions annually), followed by the COFC (around 100 protest decisions).⁶ The CAFC, by contrast, only publishes a few (albeit important) protest decisions each year (ranging between five to fifteen protest decisions in recent years). These decisions are added to thousands of existing protest decisions that span decades. These decisions are critically important to the law governing contract formation, yet unlike statutes and regulations, they are much more difficult to access and understand.

Lack of Access to Protest Decisions

As stated, contracting officers have easy online access to all procurement authorities *except* decisional authorities. Most contracting officers do not have a paid subscription to legal research services such as Lexis-Nexis or Westlaw. As a result, contracting officers are left to toggle through various websites when researching bid protest decisions relevant to their contracting action. Compounding this problem is that experienced procurement attorneys are an extremely limited resource within most federal agencies. Accordingly, contracting officers often rely on their own case law research to resolve day-to-day contract formation issues.

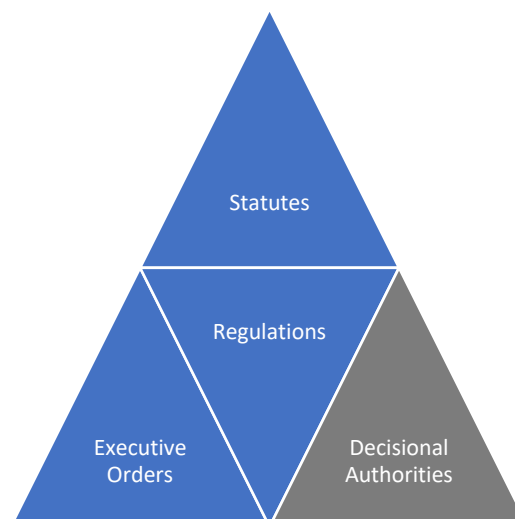


Figure 2. Laws and Regulations Governing Contract Formation

⁶ A review of published protest decisions shows that in FY2023 alone, there were 289 decisions published by the GAO, 100 decisions published by the COFC, and three decisions published by the CAFC.

No single government-wide website pulls these decisions together in one easily searchable location. This makes it difficult for contracting officers to carry out their responsibilities and heightens the risk that they will unknowingly make a procurement error that is noticed for the first time during protest litigation. In other words, the important rules that emerge from these decisions are not being effectively or efficiently communicated to the federal acquisition workforce.

Unlike statutes, executive orders, and regulations, researching bid protest case law is not simply a “click, read, and understand” process. Rather, these decisions are often nuanced and require significant research and study to apply accurately. This lack of access to (and understanding of) bid protest decisions creates a significant knowledge gap that places federal contract awards at unnecessary risk of either a sustained protest or the agency having to take voluntary corrective action.

A few examples of common bid protest pitfalls include the following:

- Misapplication of pass/fail evaluation factors.
- Misapplication of a “price realism” analysis.
- Awarding GSA schedule contracts that are not within the scope of the underlying schedule.
- Not understanding the impact of the offeror’s lapsed SAM.gov registration.
- Errors made when performing multi-step evaluations or a down-select procedure.
- Accepting (or rejecting) a late proposal.
- Misapplying the rules for mentor–protégé joint ventures in source selections.
- Conducting oral presentations that trigger the “discussions” rules under FAR Part 15.

Protest decisions from the GAO, the COFC, and the CAFC have established certain red lines that agencies must be aware of during the contract formation process. If these red lines are crossed, the agency risks losing a protest. The challenge is translating these red lines into the same “click, read, and understand” format that defines all the other sources of law governing contract formation.

Further, there are thousands of bid protest decisions—dating back decades—that contracting officers need to be aware of as they move through the contract formation process. Although some protest decisions involve a straightforward application of the facts to the Federal Acquisition Regulation (FAR) to the facts, other decisions *create* rules that are not evident from the plain text of the FAR. Finally, new protest decisions are published daily, challenging even the most experienced contracting professional to stay current.

Finding on-point case law is challenging for the acquisition workforce. When relevant bid protest case law is identified and available, contracting officers often find it difficult to quickly extract and apply those rules to their contracting action. The protest decisions are factually and legally dense—with some of the more complex COFC decisions exceeding 100 pages.⁷ It is unrealistic to expect that the average overworked and understaffed contracting team will be able to spend many hours poring over such decisions. Additionally, most protest decisions, especially those rendered by the COFC or CAFC, are composed in formal legal language, commonly described by laypeople as “legalese.” For example, these decisions often start with many pages explaining the Court’s technical ruling on complex jurisdictional issues that must be decided before addressing the protest’s substance. The vast majority of the acquisition workforce does not have a Juris Doctor degree, and it is often difficult for this workforce to efficiently extract the pragmatic rules formed by these lengthy and complex decisions. A capability is needed to

⁷ See e.g., *Palantir USG, Inc. v. United States*, 129 Fed. Cl. 218 (Fed. Cl. November 3, 2016)



translate the “legalese” from these protest decisions into “plain English” for the acquisition workforce charged with abiding by such decisions.

Why Do We Need to Fix this Problem?

Some commentators have argued that bid protests are an exaggerated problem when compared to the many thousands of contracting actions that pass through annually without a protest (Gordon, 2013). Regardless of their relative infrequency, however, there is no denying that protests pose a significant risk to most procurements. This includes large, high-dollar procurements. In the last few years, the large CIO-SP4 contract awarded by the National Institutes of Health has experienced over 350 protests. As any contracting officer who has received a protest knows, they are incredibly disruptive events. The compressed time frames for bid protest litigation require an overtasked contracting officer to suddenly drop everything else to focus on assembling the administrative report (or agency record) and various other legal filings in short order.

Disruption to Mission

As any seasoned government contracting officer or program manager knows, bid protests can significantly disrupt the execution of a complex procurement. Even meritless protests can lead to costly delays to the contract schedule and often require the contracting officer to scramble to get a “bridge contract” in place. Further, protests quickly absorb the one resource that most contracting officers do not have—time. If the protest has merit, it worsens the problem because it forces the agency to take corrective action or risk receiving a sustained protest from the GAO or the Courts. Even a protest that the GAO denies can be filed anew at the COFC. Further, the Court of Appeals for the Federal Circuit (CAFC) can overrule a COFC decision that denied the protest.

These protests, particularly if meritorious, trigger a cascade of negative repercussions for federal agencies, including:

- Immediate stoppage of contract award or performance.
- Protracted delays in the contract schedule.
- Funding complications—particularly when using one-year appropriations.
- The necessity of costly bridge contracts.
- Diverting constrained contracting office resources to focus on protest litigation.
- Dissatisfied government customers.

This situation invariably leads to mission disruption. The risk can be reduced or prevented if the acquisition team is more knowledgeable and better equipped with decision support tools while building their contract. By identifying protest risks in advance, the team can work to mitigate those vulnerabilities before contract award.

Avoiding Recurring Procurement Errors

Every fiscal year, the GAO submits a “Bid Protest Annual Report” to Congress. That report summarizes bid protest activities for the prior fiscal year (*GAO Bid Protest, 2023*). As required by the Competition in Contracting Act (CICA), the report includes a summary of the “most prevalent grounds for sustaining protests.” Almost every annual report lists the following as the most prevalent sustained protest grounds: (1) unreasonable technical evaluation, (2) flawed selection decision, and (3) unreasonable cost or price evaluation. The fact that the same sustained protest grounds are listed yearly reflects that the Federal Government is not learning the lessons from previous mistakes. A capability is needed to deliver these lessons learned to the acquisition workforce to enable the Federal Government to improve on the whole and avoid making the same mistakes repeatedly.



Workforce Development.

Within most contracting offices, several high-performing employees proactively seek to improve their knowledge by continuously reading contracting articles, scanning protest decisions, following contracting blogs, and attending conferences, webinars, and other training. The absence of readily accessible bid protest information impedes these motivated workers and constrains their professional growth. The Contract Protest Diagnostic Tool (CPDT) provides these individuals with a capability that they can use to further their technical expertise, which is then shared with other professionals in that office.

Answering the Most Challenging Contracting Questions.

Often, the most complex contracting questions cannot be resolved through statutes, regulations, or established best practices alone. Contracting officers frequently encounter unique issues not covered by existing statutes, regulations, or best practice guides. Instead, the answers to these nuanced questions are often found in a bid protest decision. Such challenging issues include (1) Determining the threshold between in-scope and out-of-scope modifications to contracts, (2) Understanding the fine line between “clarifications” and “discussions,” or (3) Understanding the impacts of “bait and switch” situations involving a vendor’s key personnel. In these situations, contracting officers must be capable of conducting advanced research independently and swiftly. The CPDT is focused on providing this capability.

Lack of Information Suppresses Smart Innovation.

FAR § 1.102(d) is often cited when discussing innovation in Federal Contracting. It states:

The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer’s needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

This language is important because it emphasizes that what is not expressly prohibited is permitted, granting contracting officers significant leeway to innovate within the procurement process. However, this freedom is not absolute; it obligates contracting officers to be well-versed in what constitutes prohibited actions, particularly bid protest case law. To innovate effectively and responsibly, contracting officers must have easy access to the rules formed through bid protest decisions. This knowledge is crucial for developing informed acquisition strategies and integrating innovative solutions successfully.

A Proposed Solution – The Contract Protest Diagnostic Tool (CPDT)™

In response to this challenge, the MITRE Corporation, in partnership with the Office of the Director of National Intelligence (ODNI) and the Naval Postgraduate School (NPS), created an innovative capability called the “Contract Protest Diagnostic Tool” or “CPDT.” The CPDT is a 100% free online tool that distills the most common bid protest grounds into nine main “categories” comprised of 64 separate “subcategories.” The CPDT further breaks the subcategories into “Hot Spots,” which alert users to risky protest areas. Underneath each “Hot Spot,” the user can click on the protest decisions that inform the “plain English” explanation in the Hot Spot. The goal is to allow users to quickly cut through the fog and zero in on their protest topic and its corresponding decisions.



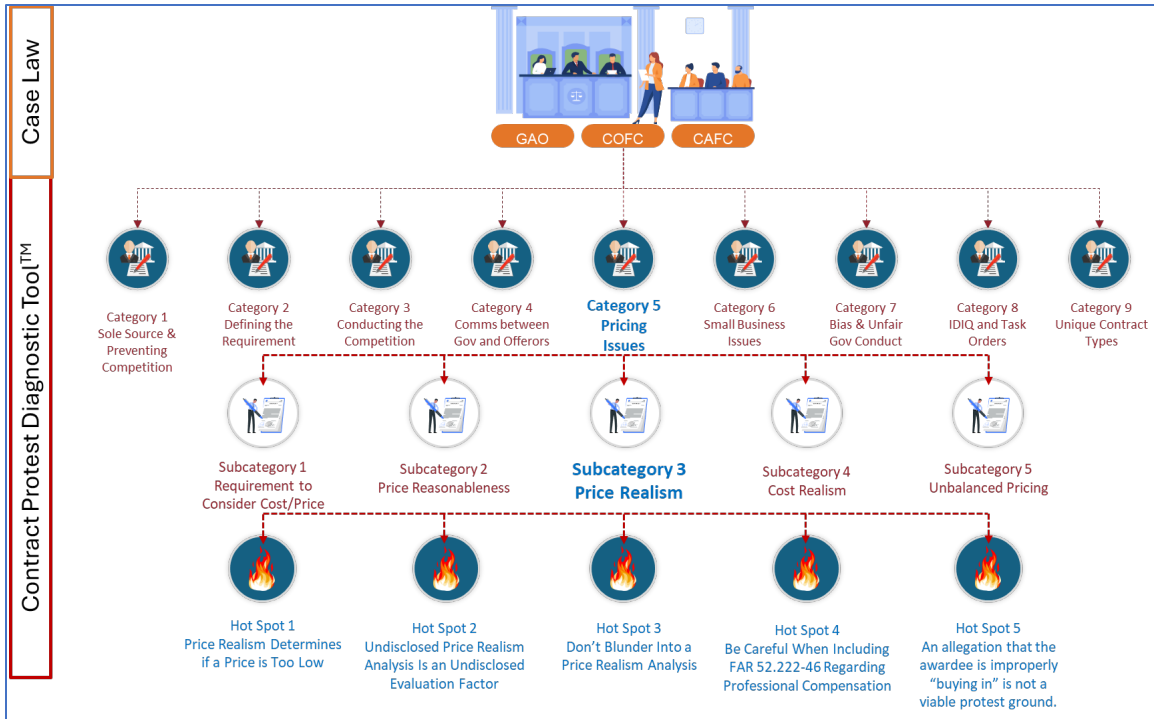


Figure 3. CPDT Breakdown of Protest Case Law

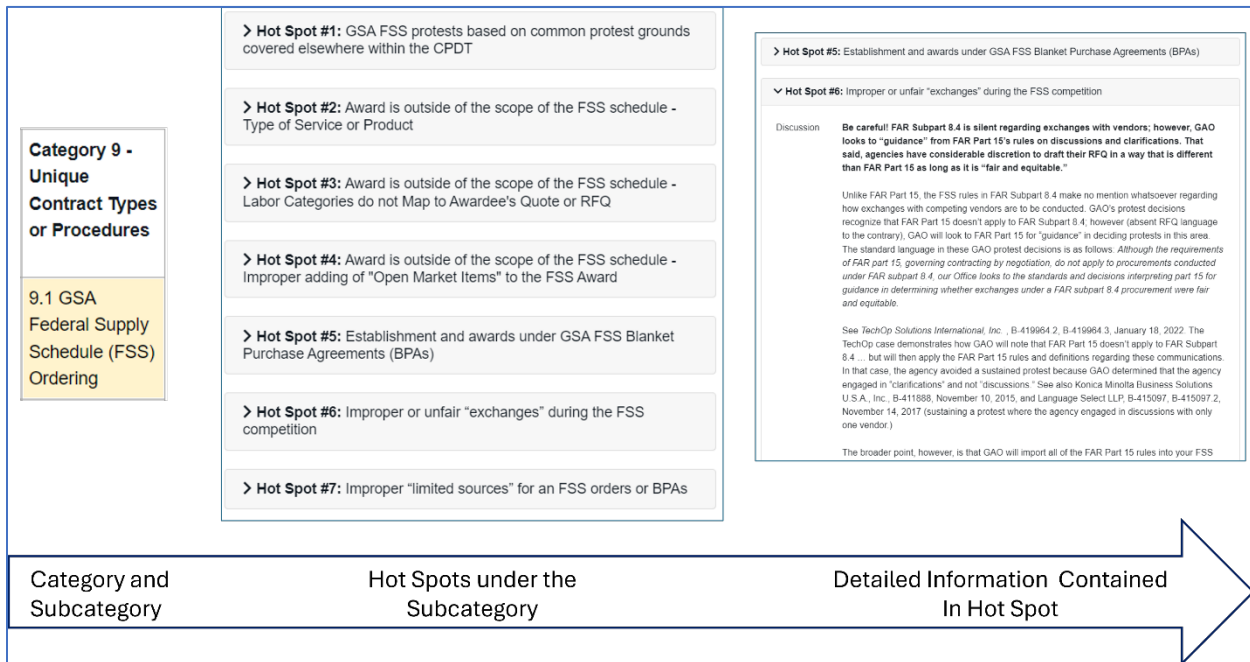


Figure 4. CPDT Example of the Flow of Information from Category to Hot Spot

The CPDT also has a questionnaire-based functionality, allowing users to plug in information from real-world contracting actions to identify the applicable protest rules/decisions at play. The user can apply the questionnaire to the entire contracting action (a "deep dive") or to just the subcategories that a contracting professional is worried about (a "quick dive"). Finally, the CPDT includes a "Protest Knowledge Center" that gathers publicly available protest information (including blog posts and news feeds) into one centralized location.



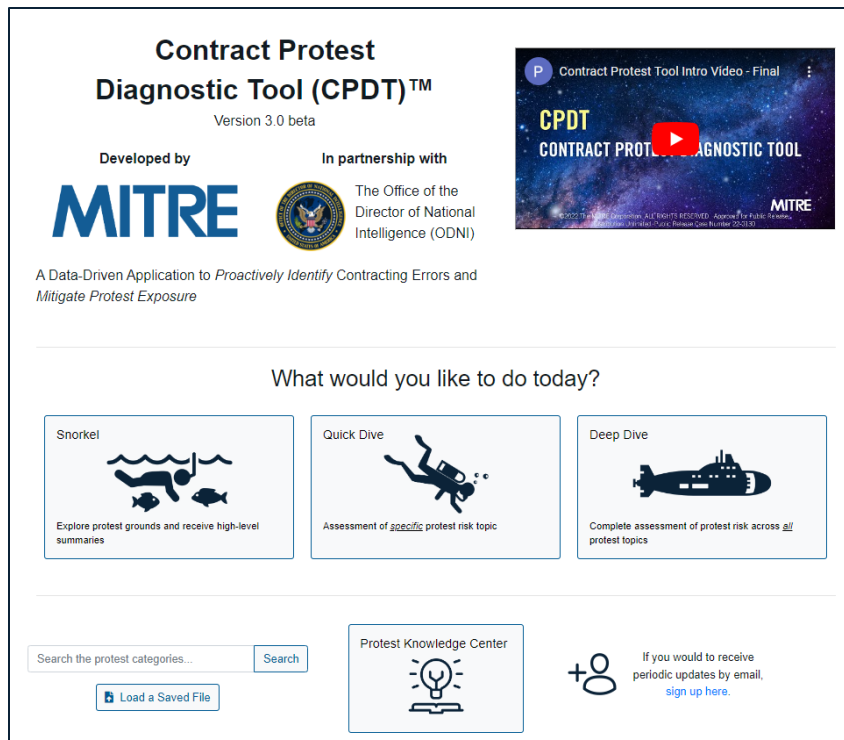


Figure 5. Home Screen of the Contract Protest Diagnostic Tool

This tool is designed to benefit the federal acquisition workforce by providing pragmatic and meaningful explanations of protest-related issues in a proactive, easy-to-search, and easy-to-understand way. The goal is to enable the Government to avoid potential protest pitfalls and execute the contracting process correctly. This, in turn, allows vendors to have greater confidence that the contract award process was conducted fairly and in accordance with the terms of the solicitation, regulations, and laws (including case law).

Under the terms of MITRE’s Federally Funded Research and Development Corporation (FFRDC) sponsoring agreement, the Federal Government possesses full Government Purpose Rights for use. This tool was deployed in April 2023 and is freely accessible to the public via MITRE’s Acquisition in the Digital Age (AiDA) website at <https://aida.mitre.org/protest-tool/>. A short 3-minute introductory video can be viewed on YouTube at https://www.youtube.com/watch?v=tFWG-n_qlpw.

The CPDT is still technically a prototype (with some categories under construction), but it contains valuable information and analysis to help the contracting community today. Further, it tackles complicated areas such as “Price Realism,” “GSA Schedule Contracting,” and “Self-Scoring.” The goal is to complete all “under construction” areas by the end of the 2024 calendar year.



Category 1 - Sole Source & Preventing Competition	Category 2 - Defining of the Requirement	Category 3 - Conduct of the Competition	Category 4 - Communications Between the Government & Offerors	Category 5 - Pricing Issues	Category 6 - Small Business Issues	Category 7 - Bias & Unfair Government Conduct	Category 8 - IDIQ and Task Orders	Category 9 - Unique Contract Types or Procedures
1.1 Lack of Advance Planning	2.1 Writing the Specifications	3.1 Commercial Products and Services	4.1 Clarifications	5.1 Requirement to Consider Cost or Price	6.1 Bundling and Consolidation (Research Ongoing)	7.1 Availability of Solicitations (Research Ongoing)	8.1 Protests against base IDIQ contract awards	9.1 GSA Federal Supply Schedule (FSS) Ordering
1.2.1 Sole Source - Only One Responsible Source Exception	2.2 Improper Use of "Brand Name or Equal" Descriptions	3.2 Responsibility Determinations	4.2 Discussions	5.2 Price Reasonableness	6.2 Limitations on Subcontracting	7.2 Organizational Conflicts of Interest (OCIs)	8.2 Protestability of Task/Delivery Orders	9.2 Reserved
1.2.2 Sole Source - Unusual and Compelling Urgency	2.3 Ambiguities in the Solicitation	3.3 Negotiated Procurements: Tradeoff Process	4.3 Debriefings	5.3 Price Realism	6.3 HUBZone Contracting Procedures (Research Ongoing)	7.3 Offeror's Responsibility to Obtain Solicitation Documents (Research Ongoing)	8.3 Pre Award Protests of IDIQ Task/Delivery Orders	9.4 Simplified Acquisition Procedures (SAPs) (Research Ongoing)
1.2.3 Sole Source - Other Exceptions to Competition	2.4 Unduly Restrictive Specifications	3.4 Competitive Range	4.4 Oral Presentations and Demonstrations	5.4 Cost Realism	6.4 Certificate of Competency	7.4 Government Independence and Alleged Bias	8.4 Post-Award Protests of IDIQ Task/Delivery Orders	9.5 Other Transaction Authority (OTA)
1.3 Contract Was Modified Beyond the Scope	2.5 Changed Requirements & Solicitation Amendments	3.5 Evaluation in Strict Accordance with the Solicitation		5.5 Unbalanced Pricing	6.5 SBA's 8(a) Program (Research Ongoing)	7.5 Proposal Compliance with the Terms of the Solicitation	8.5 Self-Scoring	9.6 Basic Ordering Agreements (BOAs) (Research Ongoing)

Figure 6. Partial List of Protest Grounds Provided in the CPDT

Proposed Path Forward

As discussed above, the prototype is fully operational, much of the protest research has been completed, and the federal acquisition workforce is currently using the CPDT. In other words, much of the hard work has been completed. What remains is to establish a process and resources for completing the remaining research topics and provide updates and sustainment to keep the information current and accurate.

MITRE and the Government have made significant investments in developing and operationalizing this much-needed capability to fill this critical gap in protest-related information and guidance for the federal acquisition workforce. Currently, the solution is ready to transition to the federal government. The authors propose that the CPDT can be sustained for a very low annual cost at the Simplified Acquisition Threshold (currently set at \$250K), which seems insignificant considering the \$765B the Federal Government spends annually via the contracting process.

Conclusion

Although acquisition professionals have easy access to statutes and regulations (e.g., the FAR), they lack that same level of access to bid protest decisions. These decisions are important because they form part of the law governing contract formation. The absence of a readily available resource for accessing and understanding them increases the risk that agencies will inadvertently fall into a protest pitfall. On the other end of the spectrum, this knowledge gap can lead to agencies taking overly risk-averse decisions based on perceived protest risks that may not be warranted. The CPDT provides a sensible and practical solution to bridge this knowledge gap.

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