Better Acquisition Management
Through ADR and Other Best Practices
for Preventing and Resolving Bid Protests

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7th Annual Acquisition Research Symposium to be held May 12-13, 2010 in Monterey, California.
The Complaint:
Fed/DOD Acquisition System Under Siege by Unfair, Frivolous, Costly, Dilatory Protests
The Research Question: Are Federal Procurement Agencies Using Every Tool In the Legal Toolbox to Reduce Costs and Delays from Bid Protests?
In Other Words, Who’s Got the Blinds On in the Bid Protest Process?
The NPS Bid Protest Study

• Stood up with funding from the Office of Assistant Secretary of the Air Force for Acquisition and NPS Acquisition Research Program

• Includes Defense Resource Management Institute (DRMI) and Graduate School of Business & Public Policy (GSBPP)

• Multi-disciplinary perspective (students, faculty, procurement law, engineering, economics, management, contracting)

• Study Output Includes:
  – Analytical Papers;
  – Literature Reviews;
  – Guidance Charts on Most Effective Prevention and Resolution Strategies;
  – Survey of Top Legal and Acquisition Professionals in Civilian and Defense Agencies
The Legal Toolbox for Bid Protest Prevention & Resolution:

- Pre-Protest: Pro-Competition Acquisition Strategies, Thorough Debriefings
- Protests at the Agency Level
- Protests at the GAO: Mandatory Stay Overrides; Bridge Contracts; Motions to Dismiss as Frivolous/Meritless, Early Corrective Action, ADR, Express Option Requests; Declaratory Relief, Protest Costs, Refusal to Exercise Options
- Protests at the COFC: Motions to Dismiss, Opposition to TRO/PI/Perm I; Bonds; Judgment on Administrative Record; National Security Considerations Statute; ADR; Rule 11 Sanctions
ADR: The Requirements

- The Competition in Contracting Act, 31 U.S.C. § 3554 (a)(1) required the GAO to provide “for the inexpensive and expeditious resolution of protests.”

- Executive Order No. 12979 (1995) mandates that agencies “to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative resolution techniques.”

- E.O. also states that these measures were intended “to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts.”

- Federal Acquisition Regulation incorporates the tenets of CICA and E.O. 12979 in Subpart 33.1, Protests (including agency-level protests).
Common Objections to ADR and Other Prevention/Resolution Strategies and Flexibilities

• Mandatory Stay overrides are difficult to obtain
• All Potential Offerors Must Concur on ADR
• Source Selection/Protected Information Required for ADR
• Agency Would Like to Obtain Definitive Outside Seal of Approval for its Acquisition from the GAO
• Agencies Must Follow GAO Recommendations Due to Likely Congressional Sanctions
Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

- Mandatory Stay overrides are difficult to obtain
- A: Court of Federal Claims statute, 28 U.S.C. 1491, requires due regard for interests of national defense and national security. 2010 CRS Report No.R40228 shows this statute does not guarantee vistory for DOD, but often helps avoid interruptions for defense procurements
- All Potential Offerors Must Concur on ADR
- A: Pre-award, choose the most pro-competitive acquisition strategy that meets gov’t needs. Post-award, only offerors with standing (direct economic interest and substantial chance of award) matter
Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

• Agency Would Like to Obtain Definitive Outside Seal of Approval for its Acquisition from the GAO
  
• A: GAO decisions are legally non-binding on anyone
• A: GAO review focuses on better procedure, not legal procedure
• A: Agency leaders must be confident in their decisions and agency needs. COFC will hold agencies in violation of the Administrative Procedure Act for following wrong GAO opinions! See Geo-Seis Helicopters v. United States (2007) and Grunley Walsh International, LLC v. United States (2007)
• A: GAO decision is time-consuming (up to 100 days mandatory stay without override to wait for decision)
• A: GAO decision is costly in agency time and $$$$ fees (can award protester legal fees of $750 per hour, e.g. Public Communications Services, Inc. – Costs, B-400058.4 (2009)). In the Boeing tanker protest, legal fees about $1 million estimated.
Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

• Agencies Must Follow GAO Recommendations Due to Likely Congressional Sanctions
• A: GAO/CRS data since 1995 shows no sanctions against DOD
• In FY 1995-2009, only 2 civilian and 4 military procurements where agency declined to follow GAO
• All procurements were relatively low-dollar service contracts (base logistics, base/plant operations, IT, competitive sourcing)
• Interestingly, no record of DOD refusing to follow in protests involving warfighter equipment or MDAPs
• CRS No. R40228 reports only one threatened Congressional sanction (against Office of Personnel Management); in one other case, Army was supported by Congressional leaders, OMB/OFPP, and DOJ against GAO
Federal Best Practices: AMC Agency-Level Protest Timeline v. GAO

Key Protest Milestones
Time limits calculated in business days.

**AMC**
- Election of AMC Forum (Day 1)
- CO Report Submission (Day 10)
- Final Decision Issued NLT (Day 20)
- Decision Binding on AMC
- Contractor can Appeal to GAO
- Stay

**GAO**
- Protest Submitted (Day 10)
- Agree To Use ADR (Day 11 to 30)
- Oppose Defense Report (Day 40)
- Defense Report Issued (Day 30)
- Express Option (Day 60)
- GAO Decision (Day 100)
Federal Best Practices: FAA Bid Protest Timeline v. GAO
The Survey: Perspective of Top Procurement Law & Acquisition Management Leaders/Experts

• 51 individuals in 22 agencies asked to complete; 21 completed
• Key issues:
  – What strategies or practices are used by agencies to prevent/minimize the impact of bid protests?
  – To what extent are alternative dispute resolution procedures utilized as a means to prevent/minimize the impact of bid protests?
  – What aspects of statute, policy, or regulation preclude the effective resolution of protests in a manner that minimizes their systemic impact?
• Likert scale:
  – 4—Always or With Great Frequency; 3—With Moderate Frequency; 2—in Exceptional Cases or With Rare Frequency; 1—Never
• Mean score of 2.00 commonly used as cut-off for groupings of data
• Survey dealt with leadership understanding or perception of agency practices/policies, not with case management data
Survey Respondents by Professional Community

- Legal: 33%
- Acquisition: 67%
Survey Respondents By Agency

- Department of the Navy (Navy and Marine Corps) 52%
- Department of State 5%
- Department of the Air Force 9%
- Department of Commerce 4%
- Department of Defense (DLA) 5%
- Department of Education 5%
- Department of Energy 5%
- Department of Health and Human Services 5%
- Department of Housing and Urban Development 5%
- Department of Justice 5%
SURVEY PARTS:

• PART I: Use of Prevention and Resolution Strategies; Use of ADR; Obstacles to Effective Prevention and Resolution
• PART II: Civilian v. Military Perspective
• PART III: Legal v. Acquisition Perspective
• PART IV: Comparative Pairings of Data on Problems and Solutions
Part I: Top 10 Defensive and Preventive Strategies Identified

(1) Advance acquisition planning
(2) Thorough market research and engagement with industry
(3) Providing quality mandatory debriefings to offerors
(4) Independent expert reviews of acquisition strategies or award decisions by agency competition advocates and/or task-and-delivery order ombudsmen
(5) Agency procedures to prevent fraud, procurement integrity violations, and/or organizational conflicts of interest
(6) Setting in advance clear and publicly disclosed evaluation criteria and adhering to these criteria during source selections
(7) Thorough protest procedures
(8) Agency-level protest procedures
(9) Taking early corrective actions
(10) Independent expert reviews of acquisition strategies or award decisions by the Small Business Administration or agency Office of Small and Disadvantaged Business Utilization/Office of Small Business Programs
(11) Providing quality non-mandatory debriefings to offerors
(12) Greater training of acquisition workforce
(13) Greater training of acquisition workforce
Part II: Top 10 Least Cited Defensive Strategies and Practices

Respondent Average

- 1.31 Refusal to follow GAO advisory opinions and recommendations where the GAO sustains a protest on apparently wrong grounds
- 1.67 Vigorous objections and requests for sanctions in response to frivolous protests
- 1.67 Taking corrective actions involving direct awards to protesters, instead of re-completions or re-evaluations
- 1.70 Taking express option requests under GAO procedures
- 1.74 Independent expert reviews of acquisition strategies or award decisions by the GAO
- 1.83 Other strategies or practices (please describe below)
- 1.88 Alternative dispute resolution (ADR) procedures with assistance from the GAO or the Court of Federal Claims
- 1.94 Taking corrective actions involving declaratory-type relief, such as changes in agency procurement policies
- 1.94 Alternative dispute resolution (ADR) procedures without assistance from the GAO or the Court of Federal Claims
- 2.00 Seeking overrides of mandatory stays based on best interest of the United States
Part I: The View from Inside the Agencies: Use of ADR to Resolve Bid Protests
Part I: Most Frequently Cited Obstacles to Effective Protest Prevention & Resolution

1. Poor acquisition planning
2. Lack of property-trained acquisition workforce
3. Lack of fiscal disincentives for unjustified protests such as “loser pays” arrangements
4. Frivolous protest filings
5. Failure to maintain adequate documentation of procurement decisions
6. Strategic behavior by disappointed offerors who have no legitimate basis for award in order to recover bid and proposal costs
7. Failure to assure adherence to stated evaluation criteria
8. Delay-seeking strategies by incumbent contractors who have no legitimate basis for renewed awards
9. Poorly designed or executed cost evaluations
Part I: Least Frequently Cited Obstacles to Effective Protest Prevention & Resolution
PART II. Civilian v. Military Perspective: Top Prevention & Resolution Strategies
Part II. Civilian v. Military Perspective: Use of ADR Techniques

Respondent Average

- GAO Negotiation Assistance
- GAO Outcome Prediction
- ADR with the assistance of the Court of Federal Claims
- Mediation
- Conciliation
- Negotiation
- Legislate
- Evaluation by Third-party Neutral(s)
- Summary trial by a Board of Contract Appeals
- Hybrid techniques
- Other techniques (please describe below)

Civ Average | Mil Average
Part II. Civilian v. Military Perspective:
Top Obstacles to Effective Prevention & Resolution

Respondent Average

<table>
<thead>
<tr>
<th>Obstacle</th>
<th>Civ Average</th>
<th>Mil Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of fiscal disincentives for unjustified protests such as “loser pays” arrangements</td>
<td>3.40</td>
<td></td>
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<tr>
<td>Poor acquisition planning</td>
<td>3.10</td>
<td></td>
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<tr>
<td>Lack of properly trained acquisition workforce</td>
<td>3.14</td>
<td></td>
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<tr>
<td>Delay seeking strategies by incumbent contractors who have no legitimate basis for renewed awards</td>
<td>3.00</td>
<td></td>
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<tr>
<td>Strategic behavior by disappointed offerors who have no legitimate basis for award in order to recover bid and proposal costs</td>
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<td></td>
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<td>Poor debriefings</td>
<td>2.86</td>
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</tr>
<tr>
<td>Lack of formal sanctions at GAO for frivolous protests</td>
<td>3.08</td>
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<tr>
<td>Failure to maintain adequate documentation of procurement decisions</td>
<td>2.71</td>
<td></td>
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<tr>
<td>Frivolous protest filings</td>
<td>2.60</td>
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<tr>
<td>Failure to assure adherence to stated evaluation criteria</td>
<td>2.85</td>
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</table>

Legend:
- Civ Average
- Mil Average
Part II. Civilian v. Military Perspective: Least Frequent Obstacles to Effective Prevention & Resolution
Part III. Legal v. Acquisition Perspective: Top Prevention & Resolution Strategies

![Graph showing respondent averages for various strategies in legal and acquisition perspectives.]

Respondent Average

- **(1) Advance acquisition planning**
  - Legal Average: 3.57
  - Acq Average: 3.29

- **(7) Setting in advance clear and publicly disclosed evaluation criteria and adhering to these criteria during source selections**
  - Legal Average: 3.43
  - Acq Average: 3.50

- **(2) Thorough market research and engagement with industry**
  - Legal Average: 3.29
  - Acq Average: 3.21

- **(13) Providing quality debriefings to offerors**
  - Legal Average: 3.17
  - Acq Average: 3.36

- **(8) Agency procedures to prevent fraud, procurement integrity violations, and/or organizational conflicts of interest**
  - Legal Average: 3.00
  - Acq Average: 3.57

- **(19) Taking early corrective actions**
  - Legal Average: 3.00
  - Acq Average: 3.00

- **(3) Greater training for acquisition workforce**
  - Legal Average: 2.86
  - Acq Average: 2.64

- **(15) Agency-level protest procedures**
  - Legal Average: 2.83
  - Acq Average: 3.15

- **(4) Hiring or assigning additional acquisition workforce**
  - Legal Average: 2.71
  - Acq Average: 2.62

- **(20) Awarding extensions or bridge contracts to incumbents protesting re-competitions**
  - Legal Average: 2.71
  - Acq Average: 2.44
Part III. Legal v. Acquisition Perspective: Least Used Prevention & Resolution Strategies
Part III. Legal v. Acquisition Perspective: Use of ADR Procedures
Part III. Legal v. Acquisition Perspective:
Top Obstacles to Effective Prevention & Resolution

Respondent Average

<table>
<thead>
<tr>
<th>Obstacle Description</th>
<th>Legal Average</th>
<th>Rating Average</th>
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</thead>
<tbody>
<tr>
<td>1. Poor acquisition planning</td>
<td>3.29</td>
<td>3.29</td>
</tr>
<tr>
<td>2. Lack of property trained acquisition workforce</td>
<td>3.29</td>
<td>3.29</td>
</tr>
<tr>
<td>3. Failure to maintain adequate documentation</td>
<td>2.85</td>
<td>2.86</td>
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<td>4. Procurement decisions</td>
<td>2.69</td>
<td>2.82</td>
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<td>5. Strategic behavior by disappointed offerors who have no legitimate basis for award in order to recover bid and proposal costs</td>
<td>2.86</td>
<td>3.5</td>
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<tr>
<td>6. Lack of formal sanctions at GAO for frivolous protests</td>
<td>2.71</td>
<td>3.0</td>
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<tr>
<td>7. Frivolous protest filings</td>
<td>2.71</td>
<td>2.91</td>
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<tr>
<td>8. Poorly designed or executed cost evaluations</td>
<td>2.57</td>
<td>2.27</td>
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<td>9. Delay-seeking strategies by incumbent contractors who have no legitimate basis for renewed awards</td>
<td>2.5</td>
<td>2.63</td>
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<tr>
<td>10. Poor debriefings</td>
<td>2.43</td>
<td>2.31</td>
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</table>
Part III. Legal v. Acquisition Perspective: Least Cited Obstacles to Effective Prevention and Resolution

![Bar chart showing respondent averages for various obstacles.](chart.png)
PART IV. Back to the Questions . . .

• Are Frivolous, Costly, Dilatory Bid Protests Besieging the Federal Acquisition System?
• Are Agencies Doing Everything They Can to Reduce Delays and Costs of Bid Protests?
Top Defensive Strategies and Top Challenges for Effective Prevention and Resolution: Is There a Match?
Are Agency Strategies Tailored to Match Agencies’ Problems?
Mostly, NO

- Frivolous protest as a problem: 2.83. Vigorous objections and sanctions: 1.67
- Poor debriefings: 2.35. Quality mandatory debriefings: 3.3.
- Poor acquisition planning: 3.10. Advance acquisition planning: 3.38
- Significant disparities on agency-level protest procedures (versus need), stay overrides (versus need), and assurance of clear and consistent evaluation criteria
How Serious Are Agencies About Fighting Delays to Procurement Programs?
Are Agencies Serious About Reducing Delays to Procurement Programs? Mostly, NO

• Stay overrides, express options, vigorous objections for dismissal, and refusals to follow GAO opinions are not frequent

• Obtaining and following a formal GAO opinion to recompete could mean 100 days of mandatory stay + at least 45 days of procurement administrative lead time (PALT) under FAR Part 5 for advertising + evaluation
How Serious Are Agencies About Reducing Costs from Bid Protests?
Are Agencies About Cutting Costs from Protests? Mostly, NO

• Unless agencies take early corrective action or attempts some negotiation early on, they are unlikely to initiate other ADR procedures or refuse to follow costly GAO recommendations which may involve direct payments to protesters or indirect expenditures.
Top Defensive Strategies to Reduce “Strategic Protests”: Can Federal Procurement Be Protest-Proofed?

(5) Acquisition strategies involving multiple contract awards rather than “winner-takes-all” consolidated acquisitions

(13) Providing quality mandatory debriefings to offerors

(14) Providing quality non-mandatory debriefings to offerors
Insights into Protest-Proofing Agency Contracts

- Avoid winner-take-all strategies; make as many awards as possible to promote competition
- Conduct quality debriefings even if not required
How Can Clear Vision and Control Be Restored to Agency Management of Bid Protests?
Findings and Recommendations for Reform

• Case for sanctions beyond truly frivolous not demonstrated; however, Rule 11-type sanctions should be established at the GAO

• Establish procedures to manage bid protests as business decisions in the procurement process
  – Require written justifications/cost-benefit analysis for failure to seek stay overrides, conduct early corrective actions, use ADR, seek express options, refuse to follow GAO recommendation, etc., and approvals to proceed to formal litigation process and to follow GAO
  – Create an FAA-type requirement for ADR as the first option, and formal litigation as the second option

• Vigorously object and seek sanctions for frivolous protests
• Provide quality debriefings to limit strategic protests
• Create and strengthen agency-level protests at all agencies