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DOD BID PROTESTS

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OFFICE OF PREPUBLICATION AND SECURITY REVIEW

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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Executive Summary

As required by the conference report that accompanied the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, and in conjunction with the Acquisition Innovation Research Center (AIRC), this study presents an analysis of information on bid protests stemming from Department of Defense (DOD) procurement activities. This report also responds to additional direction from the conferees, regarding agency-level protests in the Joint Explanatory Statement for the NDAA for FY22.

The study is based in part on interviews and written survey responses with senior DOD program and procurement personnel, senior DOD procurement attorneys, representatives of industry, and members of the procurement bar.

The study presents the following findings:

- The majority of responding agencies within the Defense Department do not actively track the rate at which agencies award protesters the contract that was the subject of a bid protest.
- None of the agencies within DOD tracks the time that it takes to implement corrective action after a decision, nor do most agencies track the percentage of corrective actions that are subsequently protested. Agencies' records of protests' final dispositions do not generally show any correlation with corrective action.
- 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. This is partly because contracting officials view these steps as part of the normal pre-award process.
- There is no requirement that agencies gather or submit agency-level protest data. Some agencies have internal policies that call for gathering agency-level protest data, while other agencies submit data only on request.
- There is no uniform mechanism to link related solicitations, bid protests, contracts, and corrective actions. While there are manual processes available to extract data from publicly available contract information, the process is labor intensive and yields information on less than 10% of all procurements.
- It is technically feasible and of low time and economic cost, to integrate data collection processes to offer substantive insights and meaningfully inform procurement policy.

This study concludes with recommendations on how to improve the expediency, timeliness, transparency, and consistency of bid protests at DOD, including agency-level bid protests, based on the input from stakeholders and the DOD contracting community. The study sets forth ways in which bid protests are used by DOD units as a management tool, and reviews demonstrated strategies for using bid protests to strengthen the Department's acquisition system.

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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.¹ 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*](#).² The conferees noted that they “continue to support efforts to improve the handling of bid protests,”³ 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.”⁴

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.⁵

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 percent 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.”
- 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.⁶

The RAND study did not conduct an analysis of data relating to protests’ effects on

¹ H.R. REP. NO. 116-617, at 1708 (2020) (Conf. Rep.) (referencing Section 886 of the NDAA).

² MARK V. ARENA ET AL., *ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS, IDENTIFYING ISSUES, TRENDS, AND DRIVERS*, RAND CORP. (2017).

³ H.R. Rep. No. 116-617, at 1708.

⁴ *Id.*

⁵ H.R. REP. NO. 114-840, at 322-323 (2016) (Conf. Rep.).

⁶ ARENA, *supra* note 2.

procurement, protests' costs to the government, or of protest trends, in part because DOD did not collect the data at the time, and RAND did not undertake to identify and collect the data.⁷

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 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 DOD.⁸

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.”⁹ 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.”

⁷ See *id.*, at xii.

⁸ H.R. REP. NO. 116-617, at 1708.

⁹ *Id.*

The conference report called attention to a recent academic study on agency-level bid protests led by Professor Christopher Yukins¹⁰ that the Administrative Conference of the United States (ACUS) commissioned as part of an initiative to reform agency-level protests.¹¹ 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.”¹²

This report responds to Congress’ direct inquiries and proceeds with the following sections:

- An introduction to the federal bid protest system;
- An explanation of measuring an effective bid protest system;
- A history of legislative action on the federal bid protest system;
- A discussion of opportunities to improve agency-level bid protests;
- A review of the U.S. Army Materiel Command’s agency-level bid protest process as a model protest program;
- An analysis of publicly available data on DOD bid protests;
- The investigation’s findings;
- Concluding remarks;
- Supplemental information regarding bid protests and acquisition data, in the accompanying appendices.

¹⁰ Professor Yukins, the Lynn David Research Professor in Government Procurement Law at the George Washington University Law School, is a co-principal investigator for the present study.

¹¹ See Christopher Yukins, *Stepping Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government*, 50 PUB. CONT. L. J. 197 (2020). Professor Yukins originally wrote this article for ACUS as a study of federal agencies’ bid protest systems..

¹² H.R. REP. NO. 116-617, at 1708.

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.¹³

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,¹⁴ and are called for by the United Nations Convention Against Corruption,¹⁵ not all State or local governments have adopted a “protest” process.¹⁶ The American Bar Association (ABA) has developed a model procurement code that includes a “protest” process.¹⁷ 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.¹⁸

The federal government has in place many laws designed to “ensure that federal procurements are conducted fairly,”¹⁹ 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.”²⁰ The Government Accounting Office (now the Government Accountability Office (GAO)) heard the first bid protest in the U.S. system

¹³ FAR 33.101 (defining “protest venue”).

¹⁴ See, e.g., Ian Hargreaves, *Understanding the Standards of Bid Protest Standing: A Comparative Analysis of Bid Protest Standing Rights and Requirements Across Ninety-Eight Countries and the European Union*, 51 PUB. CONT. L.J. 227 (2022).

¹⁵ U.N. Convention Against Corruption, art. 9, Dec. 10-11, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 42146 (entered into force Dec. 14, 2005). The U.S. ratified the convention on Oct. 30, 2006.

¹⁶ NAT’L ASS’N OF STATE PROCUREMENT OFFS., STATE BID PROTESTS RESEARCH BRIEF 2 (2013); Zachary F. Jacobson, *The Features of Bid Protest Systems and Their Adoption Across the United States*, PUB. PROCUREMENT INT’L, <https://publicprocurementinternational.com/wp-content/uploads/2022/07/Zach-Jacobson-Research-Paper-Survey-State-Bid-Protests-Final.pdf> (last visited Sept. 23, 2022).

¹⁷ MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS, art. 9 (A.B.A. 2000).

¹⁸ See, e.g., Clinger-Cohen Act of 1996, Pub. L. No. 104-106, §§ 4001-5703, 110 Stat. 682.

¹⁹ U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 1 (2018).

²⁰ JOHN T. JONES, JR., GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS, ch. 19 (4th ed. 2017).

roughly sixty years before²¹ Congress first explicitly granted any forum the statutory authority to do so.²² The current system is supposed to resolve protests quickly and fairly without disrupting the procurement process.²³ Currently there are three jurisdictions where a protest against a procurement action may be filed: (1) the contracting agency, (2) GAO, (3) the United States Court of Federal Claims (COFC).²⁴

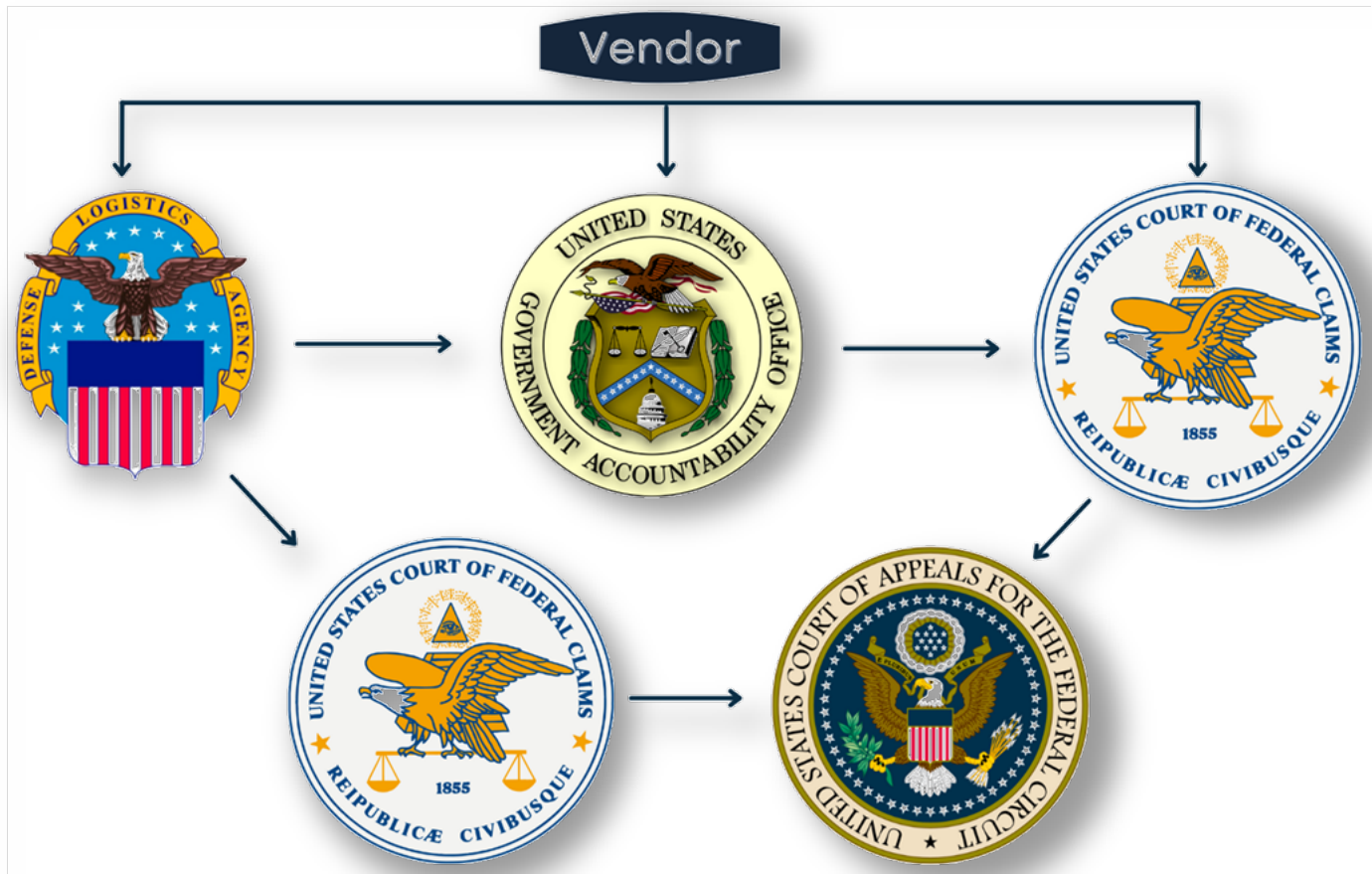


Figure 1. Options where a vendor may protest an agency procurement action.²⁵

²¹ See Daniel I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office*, 13 PUB. PROCUREMENT L. REV. 5 (2004).

²² The Competition in Contracting Act of 1984 codified GAO's authority over bid protests, and the Administrative Dispute Resolution Act of 1996 granted the federal courts jurisdiction to decide bid protests. See discussion *infra* pp. 17, 20.

²³ DataVault Corp., B-249054, Aug. 27, 1992, 92-2 CPD ¶ 133; see FAR Subpart 33.1. Appendix A provides further discussion and comparison of the available bid protest fora.

²⁴ FAR 33.101 (defining "protest venue").

²⁵ Adapted from Jones, *supra* note 20.

As Figure 1 reflects, a vendor in the U.S. federal procurement system has multiple options when it objects to a federal agency's procurement decision; it can:²⁶

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

If an agency denies a protest, the contractor may seek relief at GAO or COFC; if 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 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 System²⁷

The history of the United States bid protest system stretches over approximately 100 years. During that time, however, Congress has not defined the purpose of a bid protest.²⁸ 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.²⁹ To address that gap, the Section 809 Panel³⁰ proposed that Congress state the bid protest system's purpose in order to provide a standard against which to measure the system's effectiveness.³¹

²⁶ *Id.*, at ch. 19, IV Choice of Forum; Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243 (2008).

²⁷ The following discussion of an effective bid protest system's elements is drawn in part from Jung Hyoun (Jane) Han, *Finding an Effective Bid Protest System: Identifying Important Elements in the U.S. Bid Protest System Through Comparative Analysis* (essay prepared for the George Washington University Law School) (on file, used with permission).

²⁸ See, e.g., Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103 (2002) (citing John Wm. Whelan & Edwin C. Pearson, *Underlying Values in Government Contracts*, 10 J. PUB. L. 298 (1962)) (explaining that the federal government has made little effort to define the function of government contracts).

²⁹ Daniel Schoeni & Christopher R. Yukins, *Principles of Public Contracts in the United States of America*, IUS PUBLICUM NETWORK REVIEW (2021), <https://ssrn.com/abstract=3986240> or <http://dx.doi.org/10.2139/ssrn.3986240>.

³⁰ Congress established the Section 809 Panel to streamline DOD acquisition regulations. See National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889 (2015). David Drabkin, the Section 809 Panel's chairperson, is a co-principal investigator for the present study.

³¹ See, e.g., 3 DAVID A. DRABKIN ET AL., REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS EX-7 (2019).

The precise measures of an “effective” system remain largely unaddressed,³² 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.³³

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 GAO’s authority to hear bid protests.³⁴ When the government maximizes full and open competition, the government naturally receives the best value from the procurement,³⁵ but efficiency is essential to *maximize* full and open competition.³⁶ At the same time, public procurement, as a function of government, must accommodate a wide array of socioeconomic goals.³⁷ 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.³⁸ Uniform regulations, such as the FAR, can improve efficiency by reducing costs for officials and competitors.³⁹

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.⁴⁰ In this role, an effective system ensures that government procurements transcend bribery, favoritism, and unethical behavior.⁴¹ The government’s notification system, where agencies post procurement opportunities, awards, and other activities, maintain the system’s integrity

³² The “effectiveness” of a bid protest system (also called “bid remedies” or “bid challenges”) is an internationally recognized concept. See, e.g., U.N. Convention Against Corruption, *supra* note 15 (“Each State Party shall . . . take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems . . . shall address, inter alia: . . . An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed. . . .”).

³³ Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L. L. 225, 232 (2012) (noting that goals can be broken down into subfactors, which help to facilitate precise understanding of the bigger goals).

³⁴ See 41 U.S.C. § 3301(a)(1) (stating that “an executive agency in conducting a procurement for property or services shall obtain *full and open competition* through the use of competitive procedures”) (emphasis added). The requirement for “full and open competition” appeared in Subtitle A of CICA, which, in Subtitle D, codified GAO’s authority to hear bid protests. See discussion *infra* p. 17.

³⁵ See Schooner, *supra* note 28; FAR 1.102(b); U.N. Comm’n on Int’l Trade L. [UNCITRAL], MODEL LAW ON PUBLIC PROCUREMENT 3 (2014).

³⁶ See, e.g., DRABKIN, *supra* note 31.

³⁷ See, e.g., JOHN CIBINIC, JR., RALPH C. NASH, JR. & CHRISTOPHER R. YUKINS, FORMATION OF GOVERNMENT CONTRACTS ch. 11 Collateral Policies (4th ed. 2011); CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE ch. 1 (2007).

³⁸ DAVID E. OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 22, 354 (1992) (illustrating how effectiveness should be measured in social aspects).

³⁹ ADB/OECD Anti-Corruption Initiative for Asia and the Pac., *Curbing Corruption in Public Procurement in Asia and the Pacific*, at 13 (2006).

⁴⁰ *Id.*

⁴¹ *Id.*; see also 18 U.S.C. § 201.

and transparency.⁴² 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.⁴³ 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.⁴⁴ In general, the protest process should balance “the desire to exhaustively investigate any complaint” and “the need to let the procurement process move forward.”⁴⁵ Moreover, the process must produce “fair and equitable decisions based on consideration of all parties’ arguments on a fully developed record.”⁴⁶ 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.⁴⁷

The standard of integrity for any system that uses public funding should be higher than mere fairness.⁴⁸ 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.”⁴⁹

⁴² See FAR Subpart 4.11. The government recently integrated the notice system with SAM, accessible at <https://www.sam.gov/content/home>.

⁴³ Schooner, *supra* note 28.

⁴⁴ DRABKIN, *supra* note 31.

⁴⁵ See e.g., Daniel I. Gordon, *Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 430 (2006); see also, Shany, *supra* note 33, at 251-52 (noting that through the lens of an international perspective, common goals of the courts are to keep the following elements in place: legal powers, personnel capacity, resources, structural independence, usage potential, reputation, and relations with other institutions).

⁴⁶ Dep’t of the Army, B-419150.2, 2021 CPD ¶ 133 (Comp. Gen. Mar. 31, 2021).

⁴⁷ Gordon, *supra* note 45 (emphasizing a protest system that provides due process rights to the protesters).

⁴⁸ See e.g., ARENA, *supra* note 2, at 12.

⁴⁹ *Id.* (quoting William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 469 (1995)).

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, ⁵⁰ saving protesters from expending resources determining which rules to follow or at which forums to present their claims. ⁵¹ Without integrated rules and forums, effectiveness of review may suffer. ⁵²
Meaningful Review	Meaningful review depends on an adequate scope of standing (i.e., who may protest) and an independent arbiter. ⁵³ Bid protester standing is not uniform across the U.S. system. ⁵⁴ 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. ⁵⁵
Speed	Public procurement is a process that needs to move forward with speed. ⁵⁶ 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. ⁵⁷ 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. ⁵⁸

⁵⁰ See Schooner, *supra* note 28, at draft p. 10 (stating that "a procurement system is efficient when it spends the least amount of resources in the *process* of purchasing what is needed").

⁵¹ See Gordon, *supra* note 45, at 435 (noting that there are "reasons that weigh in favor of restricting the forum's jurisdiction"); see also, S. Wood Piedmont Co., B-194380, 79-2 CPD ¶ 357, 1 (Comp. Gen. Nov. 16, 1979) (holding that parties may not protest the same issue in two different forums).

⁵² ORG. FOR ECON. COOP. AND DEV., OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT 127 (2009) (stating that the "[g]overnment should provide potential suppliers and contractors with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible").

⁵³ See, e.g., YUKINS, *supra* note 11, at 28 (stating that "[b]y continuing to link the standard for standing in agency level protests to the evolving 'interested party' standard in the other bid protest fora, agencies' procedures will be better able to keep pace with an evolving understanding of protests' role in a modern procurement system").

⁵⁴ See Hargreaves, *supra* note 14.

⁵⁵ See, e.g., Oak Grove Techs., LLC v. United States, 155 Fed. Cl. 84, 120 (2021).

⁵⁶ See, e.g., Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 123-24 (2005).

⁵⁷ See, e.g., *id.*

⁵⁸ UNCITRAL, *supra* note 35 art. 67 (2014). The model procurement law, for example, notes that compensation "for any loss or damages suffered" may be available to a successful challenger. The remedies awarded in the U.S. federal system are much more limited, most times including only the ability to compete again after the agency remedies its error. See GAO Bid Protest Regulations, 4 C.F.R. § 21.8 Remedies (2018).

History of Legislative Action on Federal Bid Protests

The right to challenge any government action in a court of law requires the government to waive its sovereign immunity.⁵⁹ Congress waived the federal government's immunity for claims founded "upon any express or implied contract with the United States" in the Tucker Act of 1887, though most of these suits were unsuccessful for decades.⁶⁰

Following World War I, Congress, as part of an effort to establish a more integrated system to control government spending, created the General Accounting Office (now GAO).⁶¹ GAO declared its authority to hear bid protests in 1924 based on its "settlement of accounts" authority.⁶² In the matter of *English Construction Company*, GAO determined that the government properly awarded a contract, upholding the award in the face of a "protest" by an unsuccessful offeror.⁶³ Thirty years later, the U. S. Court of Claims issued what was likely its first bid protest decision.⁶⁴ Thus began what became a well-established system for legislative and judicial review of procurement decisions.

Executive branch policy—and not Congressional legislation—governs agency-level bid protests. Until President Clinton issued Executive Order 12979, each agency had its own informal process for what are now known as agency-level bid protests.⁶⁵ Currently, the FAR governs agency-level bid protests, and executive agencies promulgate their respective agency processes and procedures in FAR supplements.⁶⁶

While not articulated in statute or regulation and often not discussed when studying the Federal Procurement Protest System, the Federal Procurement Protest System does serve the purpose of shifting the burden for dealing with constituent concerns involving particular contracting actions from individual members of Congress to the Federal Procurement Protest System. The Federal Procurement Protest System provides a well-defined and proven alternative for constituents who have complaints about how federal government contracting actions are processed and awarded. Congressional members in turn can query the various Executive Branch parties involved and the GAO, a Legislative Branch function, ascertaining facts and the applicable law on behalf of their constituents without becoming involved in individual contract actions. Most members do not want to become involved in trying to resolve individual pre- and post-

⁵⁹ *Schillinger v. United States*, 155 U.S. 163, 167 (1894).

⁶⁰ ARENA, *supra* note 2, at 10.

⁶¹ *Id.*; see also Budget and Accounting Act of 1921, Pub. L. No. 67-13, § 301, 42 Stat. 20, 23 (establishing the General Accounting Office).

⁶² See *id.* § 312(a) ("[t]he Comptroller General shall . . . [make] a report in writing . . . containing recommendations concerning . . . the prompt and accurate rendition and settlement of accounts . . .").

⁶³ The lawyer who represented the unsuccessful offeror in that case used the term "protest" in his objection, and it eventually became the definitive term for objections to government procurement decisions. See Gordon, *supra* note 21.

⁶⁴ See *Heyer Prods. Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956).

⁶⁵ See Jeffrey I. Kessler, Feature Comment, Tips for Agencies in Establishing Protest Procedures, and Factors Potential Protesters Should Consider in Selecting a Forum, 39 GOV'T CONT. ¶ 81, 1 (1997).

⁶⁶ See FAR 33.103.

award award controversies, and the Federal Procurement Protest System achieves that purpose.

As is discussed further below, it is also important to keep in mind that the Congress has divided the responsibility for legislation governing bid protests between two separate spheres of authority in Congress—oversight over the judicial review of bid protests, and, separately, oversight over the processes and procedures for managing bid protests in the executive agencies.

Adjudicating Protests Prior to CICA

The U.S. Supreme Court first reviewed the issue of contractors challenging federal contract awards in 1940 pursuant to the Walsh-Healey Public Contracts Act of 1936.⁶⁷ In the matter of *Perkins v. Lukens Steel Co.*, Justice Black, writing for the Court, found that there was no general authority in the Act that allowed for a challenge to a government contract award. Specifically, the Court explained:

That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government – but not private litigants – can complain.⁶⁸

Lower courts could avoid *Perkins* by letting bidders challenge a procedural element of the procurement, meaning bidders only have a right to procedural fairness from the government when it comes to a procurement.⁶⁹

The Supreme Court's decision in *Perkins* and the exponential growth of government contracting following the New Deal and World War II prompted Congress to start forming the bricks that would build the federal procurement system.⁷⁰ A series of legislation codified critical elements of the bid protest system and culminated with the passage of CICA.

⁶⁷ See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 116-17 (1940).

⁶⁸ *Id.* at 127.

⁶⁹ Jordan Hess, Note, *All's Well that Ends Well: Scanwell Jurisdiction in the Twenty-First Century*, 46 PUB. CONT. L.J. 409, 413 (2017).

⁷⁰ See *generally* BID PROTESTS: A GUIDE TO CHALLENGING FEDERAL PROCUREMENTS ch. 1 (Andrew E. Shipley & Daniel Chudd eds., Am. Bar Ass'n. 2021) (discussing the history of federal bid protest jurisdiction).

Federal Procurement After WWII

Following World War II, Congress established a completely new statutory structure for federal procurement that divided procurement activity as either military⁷¹ or civilian.⁷² Congress thus assigned procurement responsibility to two newly created organizations: DOD and the General Services Administration (GSA). This new scheme also split the location of laws governing federal procurement between Title 10 (DOD) and Title 41 (civilian agencies) of the U.S. code.

Congressional Committee Jurisdiction Over Bid Protests

Because of the divergent defense and civilian contracting legislation, Congress divided the committee jurisdiction⁷³ of federal contracts among six different committees in both the House and the Senate:

- The **Judiciary committees** have primary jurisdiction over bid protests in the courts.
- The **Armed Services** and **Oversight and Government Reform committees** have primary jurisdiction over the Federal Procurement Protest System.
- The **Armed Services** and **Oversight and Government Affairs committees** have primary jurisdiction over both protests in the DOD (Armed Services) and the civilian agencies (Oversight and Government Affairs).

This split in jurisdiction typically works well in practice; in the interest of uniformity, the rules for protests are generally the same for contracts awarded in the DOD and the civilian agencies. There have been some notable exceptions though over the last decade as Congress has approached managing DOD and civilian agency acquisition protests differently.⁷⁴ The differences are, in part, the result of the legislative process. The Armed Services committees prepare a defense authorization bill every year, and these annual authorization acts include changes, additions, and deletions to the procurement process. The Oversight and Government Affairs committees, which oversee the civilian agencies, do not enact annual authorization legislation, so, in

⁷¹ Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21.

⁷² Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471 *et seq.*

⁷³ In this context “jurisdiction” means which committee the Congress assigns primary responsibility for oversight and direction of a particular topic. Congressional jurisdiction over government contracting is shared by at least four committees in Congress: the House and Senate Armed Services committees, the House Oversight and Reform Committee, the Senate Homeland Security Committee, and the House and Senate Government Affairs committees. The Armed Services committees govern contracting in DOD, NASA and the Coast Guard (Title 10). The House Oversight and Senate Homeland Security and Government Affairs Committees oversee contracting in all other Executive Branch activities. The Federal Aviation Administration (FAA) acquisition system is a notable exception to the oversight authority of these committees. See Office of the Chief Counsel, *Congressional Committees*, Federal Aviation Administration, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/legislation/congressional_committees (last visited Sept. 29, 2022).

⁷⁴ See *infra* pp. 23-26.

practice, those committees often use the Armed Services committees' authorization legislation as vehicles to effect reform to the civilian agencies' acquisition programs.⁷⁵

This sometimes bifurcated process has occasionally led to changes being made to statutes applicable to DOD's acquisition programs but not to those statutes applicable to the civilian agencies.⁷⁶ There are legitimate reasons for different rules for doing business with DOD and the civilian agencies, but these sometimes unintended differences have led to differing thresholds for DOD protests, and, on one occasion, even a lapse of authority for contractors to file a protest against civilian agencies.

Early Legislation in the Split Procurement System

Heyer Products Co. v. United States (Heyer) granted COFC the right to review agencies' procurement processes.⁷⁷ In 1956 in the *Heyer* case the Court of Claims utilized its implied in fact contract jurisdiction to sustain a bidder's challenge to the government for rejecting its bid.⁷⁸ In *Heyer* the court held that there was an implied-in-fact contract created when the agency requested proposals.⁷⁹ The government was considered in breach of their implied-in fact contract when they rejected *Heyer's* bid in retaliation against *Heyer's* President who testified before Congress regarding unfair government procurement practices.⁸⁰ *Heyer* remains good law.⁸¹

Congress' next significant piece of federal procurement legislation following *Heyer* was the National Aeronautics and Space Act of 1958 (Space Act) through which Congress created the National Aeronautics and Space Administration (NASA).⁸² The Space Act created "other transactions"⁸³ among the contracting authorities provided NASA but did not address bid protests in federal contracts.

⁷⁵ For example, Congress called for amendment of FAR 52.215-2(d)(1) pursuant to the NDAA for FY09 to grant all executive agency inspectors general access to contractors' records to allow them to have greater oversight ability to audit funds issued pursuant to the American Recovery and Reinvestment Act of 2009. See 74 Fed. Reg. 14,649, 14,651 (Appendix 8 Interim FAR Rules); see also American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 364–66. The Federal Acquisition Streamlining Act of 1994 (FASA) is a notable exception in the recent history of Congressional oversight over the Federal Procurement System, for it was a major reform initiative that was not carried forward within the annual defense authorization process. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

⁷⁶ Congress passes most changes to federal government contracting provisions as part of the annual defense budget authorization (NDAA), which means that the provisions in Title 10 and Title 41 may not mirror each other. In the area of bid protests, this occurred in the last decade with a difference in the monetary threshold for protesting a task or delivery order under an indefinite-delivery/indefinite-quantity (IDIQ) contract, a difference which Congress remedied in the following fiscal year. See, e.g., discussion *infra* FY 2011 NDAA, p. 21. The monetary threshold issue appears to have been the only significant divergence between defense and civilian agencies' protest-related legislation since Congress codified bid protests.

⁷⁷ *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 409 (Ct. Cl. 1956).

⁷⁸ Hess, *supra* note 69; see *id.*, at 413.

⁷⁹ *Heyer Prods. Co.*, 140 F. Supp., at 413-414.

⁸⁰ *Id.*

⁸¹ Hess, *supra* note 69.

⁸² National Aeronautics and Space Act of 1958, 42 U.S.C. § 2473 *et seq.*

⁸³ "Other transactions" are largely exempt from normal federal procurement requirements; their goal is to make it easier for the federal government to acquire emerging technologies. Whether, and if so how, "other transactions" are

Then in 1965, Congress passed the Brooks Automatic Data Processing Act (Brooks ADP Act), which gave the General Services Administration Board of Contract Appeals (GSBCA) authority to hear bid protests related to procurements of automated data processing equipment (ADPE).⁸⁴

Soon after, in 1970, the U.S. courts of general jurisdiction issued several decisions regarding the courts' authority to hear bid protest claims.⁸⁵ For instance, in *Scanwell Laboratories v. Schaffer* (*Scanwell*) the U.S. Court of Appeals for the District of Columbia Circuit ruled that disappointed bidders could challenge awards of government contracts, pursuant to a right of review under the Administrative Procedure Act (APA).⁸⁶ The court in *Scanwell* noted that the APA, 5 U.S.C. § 702, stated “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁸⁷

The D.C. Circuit acknowledged *Perkins* in *Scanwell* by holding that procurement regulations and law exist for the public benefit and that a disappointed bidder served as a “private Attorney General . . . to enforce procurement laws.”⁸⁸ The Court held that “a contractor who makes a prima facie showing of [an arbitrary or capricious abuse of discretion] on the part of an agency or contracting officer [when considering a bid] has standing to sue under the APA.”⁸⁹ As Jordan Hess pointed out in Note, *All's Well that Ends Well*, “*Scanwell*’s legal theory permits a wide spectrum of claims because it employs the APA’s waiver of sovereign immunity and a generous jurisdictional grant.”⁹⁰

Congress again changed the bid protest process through the Federal Courts Improvement Act of 1982 (FCIA), which created COFC and the Federal Circuit.⁹¹

to be subject to bid protests remains unresolved and are outside the scope of this report. See, e.g., *Hydraulics Int'l, Inc. v. United States*, No. 22-364, 2022 WL 3150517, at *5 (Fed. Cl. Aug. 8, 2022).

⁸⁴ See Michael J. Schaengold et. al, *Choice of Forum for Federal Government Contract Bid Protest*, 18 FED. CIR. B.J. 243, 249 (2008); see also John Tolle & James Duffy, *GSBCA Bid Protests*, Briefing Papers No. 87-4 (1987) at 1. Congress withdrew the GSBCA’s bid protest authority in 1996, partly because of a concern that the GSBCA’s *de novo* review was disrupting information technology procurements. See, e.g., Jonathan R. Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155, 172 (1997). The modern term for ADPE is now “information technology.”

⁸⁵ See Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 PUB. CONT. L.J. 539, 540 (2010).

⁸⁶ See *Scanwell Labs., Inc. v. Schaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970).

⁸⁷ *Id.*, at 865 (quoting 5 U.S.C. § 702 (1966)).

⁸⁸ *Id.*, at 866.

⁸⁹ Hess, *supra* note 69, at 4 (internal quotations omitted).

⁹⁰ *Id.*

⁹¹ See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

Competition in Contracting Act of 1984

In 1984, Congress, for the first time, established a bid protest system for federal contracts through CICA.⁹² CICA defined a protest as:

[A] written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract.⁹³

And CICA defined an interested party who may file a protest as:

[A]n actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract⁹⁴

CICA, for the first time in statute, designated GAO as one forum to decide bid protests, though GAO's authority was not exclusive. For example, the FCIA created authority for—what is today—COFC to hear bid protests, and district courts, following the decision in *Scanwell*, exercised jurisdiction over bid protests under the authority of the APA.⁹⁵

CICA also created what is now known as the “automatic stay,” which freezes a procurement or halts performance of the contested contract. CICA's automatic stay does not apply to protests filed with the courts, and CICA grants agencies the authority to “lift” the “automatic stay” where it is in the best interests of the United States or there are urgent and compelling circumstances.⁹⁶ In the event an agency does lift the automatic stay, it must submit documentation of its reasoning to GAO.⁹⁷

Notably, CICA, while setting forth various rules for administration of the Federal Procurement Protest System, does not define the purpose for which Congress created the protest system. Absent a stated purpose, it is difficult, when reviewing the performance of the system, to determine whether the protest system is achieving the outcomes Congress intended. The Section 809 Panel recommended that Congress add a “purpose statement” for the protest system, so that Congress may evaluate whether the protest system is achieving the purposes intended, and if not, how to improve the system to make it effective.⁹⁸

While data on activity within the bid protest system reflect the numbers of protests, the length of time to resolve protests, and the final dispositions of protests, it is unclear

⁹² Competition in Contracting Act of 1984, 31 U.S.C.A. § 3551 *et seq.*

⁹³ 31 U.S.C. § 3551.

⁹⁴ *Id.* The FAR incorporated CICA's definitions into the implementing regulations. FAR 33.101.

⁹⁵ See generally R. Anthony Howard, Note, *Federal Courts Improvement Act of 1982: No Relief for the Disappointed Bidder*, 11 J. LEGIS. 403 (1984) (discussing the potentially overlapping jurisdictions of the courts to hear bid protests in the wake of the FCIA).

⁹⁶ 31 U.S.C. §§ 3553(c), (d); FAR 33.104.

⁹⁷ 31 U.S.C. §§ 3553(d)(3)(C).

⁹⁸ DRABKIN, *supra* note 31.

whether the Federal Procurement Protest System is “effective.” The available data do not frequently show, for example, whether the protester in a particular matter ultimately received the contract at issue, whether contracting activities improved their processes in response to issues uncovered in the protest, or whether (following a successful protest) government acquisition officials received any necessary remedial training or disciplinary action. Resolving these questions—leveraging the lessons learned from bid protests—is essential to improving management of the Federal Acquisition System and to reducing waste, fraud, and abuse.

Federal Acquisition Streamlining Act of 1994

The Section 800 Panel⁹⁹ submitted a report in January 1993, which recommended changes to the Federal Procurement Protest System to improve competition, consolidate protest fora, and reduce procurement delays due to protests.¹⁰⁰

The Federal Acquisition Streamlining Act of 1994 (FASA) addressed a number of issues regarding bid protests that arose since CICA and incorporated some of the Section 800 Panel’s recommendations. FASA:

- Limited protests of task or delivery orders under the newly established indefinite-delivery/indefinite-quantity (IDIQ) contract type, to instances in which the order increased the scope, period performance of the IDIQ, or the maximum value of the IDIQ.¹⁰¹
- Required the creation of a protest file and identified what was to be included in that file and provided to the Comptroller General.¹⁰²
- Authorized the head of an agency to take corrective actions in response to a protest and to pay costs associated with any corrective actions taken. While agencies always had the inherent authority to take corrective action, they had not had clear authority to pay costs for corrective actions taken subsequent to an agency level protest.¹⁰³
- Redefined “protest” as an interested party’s written objection to:
 - (A) A solicitation or other request by a federal agency for offers for a contract for the procurement of property or services.
 - (B) The cancellation of such a solicitation or other request.

⁹⁹ Section 800 of the FY91 NDAA directed the Secretary of Defense to establish an advisory panel on streamlining and codifying acquisition laws. National Defense Authorization Act for FY 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1587 (1990).

¹⁰⁰ W.L. Vincent et al., Streamlining Defense Acquisition Laws: Report of the DOD Acquisition Law Advisory Panel 41-42 (1993).

¹⁰¹ 10 U.S.C.A. § 3401.

¹⁰² 10 U.S.C.A. § 2305 (repealed by Pub. L. No. 116-283, § 1881(a), 134 Stat. 4293 (2021)).

¹⁰³ *Id.*

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a 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.¹⁰⁴

- Established time limits for filing a protest.¹⁰⁵
- Established time limits for GAO recommendations on protests.¹⁰⁶
- Provided the GSBCA with specific authority to dismiss those protests which were frivolous, filed in bad faith or did not state a valid basis for protest.¹⁰⁷

Information Technology Management Reform Act of 1996

Two years later, as part of a larger package of reforms, Congress passed the Information Technology Management Reform Act (the Clinger-Cohen Act) which repealed the Brooks ADP Act, and with it, the authority of the GSBCA to hear and decide bid protests.¹⁰⁸ Data presented to Congress demonstrated that, since Congress had given the GSBCA jurisdiction to hear bid protests, contractors frequently protested many larger ADPE contracts multiple times, which delayed the government's ability to acquire ADPE quickly and increased ADPE procurement costs.¹⁰⁹

¹⁰⁴ 31 U.S.C.A. § 3551.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Note that GAO does not issue "decisions" on protests in the traditional sense of court-issued decisions. GAO instead resolves protests by issuing a recommendation to the agency defending the protested activity. The agency may accept or reject the GAO recommendation. While the agency is free to reject a GAO recommendation on a particular protest, the agency must submit a report to Congress explaining its basis for rejecting the GAO recommendation. The protester has no recourse if the agency rejects the recommendation, but the protester may file a protest with COFC for review *de novo*.

¹⁰⁷ 40 U.S.C. § 759(f)(4) (repealed by Pub. L. No. 104-106, § 5101, 110 Stat. 680 (1996)).

¹⁰⁸ Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 682.

¹⁰⁹ See William S. Cohen, Senate Committee on Governmental Affairs, Minority Staff of the Subcommittee on Oversight of Government Management, Computer Chaos: Billions Wasted Buying Federal Computer Systems 22-23 (1994). Some of the DOD's ADPE contracts were not subject to the GSBCA's jurisdiction due to a "national security" exception in the Brooks ADP Act.

Administrative Dispute Resolution Act of 1996

The Administrative Dispute Resolution Act of 1996 (ADRA) essentially codified the court's decision in *Scanwell* by making explicit the federal courts' jurisdiction to hear bid protests.¹¹⁰ To improve the system for resolving bid protests, Congress consolidated bid protest jurisdiction within the federal courts by transitioning exclusive jurisdiction to COFC by the end of 2000.¹¹¹ COFC subsequently developed and adopted Appendix C to its rules to govern bid protests before the court.¹¹²

Services Acquisition Reform Act of 2003

Although it did not address protests specifically, Congress set the stage for future reform with the Services Acquisition Reform Act of 2003 (SARA). SARA, among other things, required the Office of Federal Procurement Policy (OFPP) to establish a panel to review potential reforms of the federal acquisition system.¹¹³

OFPP established the Acquisition Advisory Panel on February 9, 2005, and the Panel completed its report in January 2007. The Panel's report addressed protests. The Panel believed that a healthy competitive environment in federal contracts required changing the prohibition of protests of task or delivery orders under IDIQ contracts.¹¹⁴ The Panel recommended allowing protests of task and delivery orders over \$5 million.¹¹⁵

FY 2005 NDAA

Congress next addressed protests in relation to OMB Circular A-76, *Performance of Commercial Activities*. (A-76).¹¹⁶ The A-76 process provides rules for both "contracting out" (a form of competitive outsourcing) of government services that are not inherently governmental and bringing back into the government, commonly referred to as "reverse A-76, services that were contracted out but determined to be better performed by the government and are not "inherently governmental."¹¹⁷ The A-76 process did not permit government employees to protest contracting out actions (known as tenders).¹¹⁸ To provide government employees a way to challenge outsourcing, the NDAA for FY05 granted federal employees the right to file "protests" of tenders under the A-76 process.¹¹⁹

¹¹⁰ Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b) (2022).

¹¹¹ 142 CONG. REC. 11,450-51; *id.*

¹¹² FED. CL. R. App. C Procedure in Procurement Protest Cases Pursuant to 28 U.S.C. § 1491(b).

¹¹³ Services Acquisition Reform Act of 2003, Pub. L. No. 108-136, § 1423, 117 Stat. 1663, 1669.

¹¹⁴ Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement and the United States Congress 108 (2007).

¹¹⁵ *Id.*

¹¹⁶ Valerie Ann Bailey Grasso, Cong. Rsch. Serv., R40854, Circular A-76 and the Moratorium on DOD Competitions: Background and Issues for Congress 1-2 (2013).

¹¹⁷ OFF. OF MGMT. & BUDGET, Circular No. A-76 Rev., attach. B (2003).

¹¹⁸ *Id.*

¹¹⁹ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848.

FY 2008 NDAA

In the FY08 NDAA, Congress provided additional guidance on who may file a protest of an A-76 competition and the time within which such protests must be resolved.¹²⁰

Congress also adopted, with modification, the recommendation of the SARA Panel to authorize protests of task and delivery orders under IDIQ contracts of a value of \$10 million or more.¹²¹ Congress granted the Comptroller General exclusive jurisdiction to hear such protests. Congress also created a 3-year sunset provision for protests of task or delivery orders.¹²²

FY 2010 NDAA

In the FY10 NDAA, Congress made additional changes to protests of public-private competitions pursuant to OMB Circular A-76. Congress directed that the time taken to address a protest was to be deducted from the period of time to conduct an A-76 action.¹²³ The time to be deducted started with the filing of the protest and concluded when a protest decision or recommendation becomes final. The NDAA also authorized agencies to cancel competitions following the sustainment of a protest.¹²⁴

FY 2011 NDAA

Congress addressed several issues involving protests in the NDAA for FY11. Specifically, the NDAA:

- Prohibited protests of DOD determinations of “Supply Chain Risks,”¹²⁵
- Extended the sunset provisions for protests of task or delivery orders under IDIQ contracts established in the FY08 NDAA until September 30, 2016. This amendment only impacted protests of DOD task or delivery orders pursuant to the authority in Title 10. The authority to protest task or delivery orders under IDIQ contracts for civilian agencies pursuant to Title 41 lapsed on April 28, 2011.¹²⁶
- Directed annual performance assessments addressing, inter alia, “the number of bid protests, the extent to which such bid protests were successful, and the reasons for such success.”¹²⁷

¹²⁰ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 326, 122 Stat. 3, 62-63.

¹²¹ § 843, 122 Stat., at 236-38.

¹²² § 843(e)(3), 122 Stat., at 237.

¹²³ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 322(a), 123 Stat. 2190, 2251 (2009).

¹²⁴ § 327(c), 123 Stat., at 2255.

¹²⁵ Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 806(d)(1), 124 Stat. 4137, 4261 (2011).

¹²⁶ § 825, 124 Stat., at 4270.

¹²⁷ 10 U.S.C. § 3105(b)(2)(A)(v).

FY 2012 NDAA

Congress addressed several issues with regard to bid protests in the FY12 NDAA. Specifically, Congress:

- Directed agencies to omit delays resulting from protests from status reports on Automated Information System or Information Technology Investment reports.¹²⁸
- Extended the sunset provisions of protests for all bid protests of task or delivery orders under IDIQ contracts by amending Title 41, bringing the threshold to \$10 million.¹²⁹
- Eliminated the jurisdiction of US District Courts to hear protests of maritime contracts.¹³⁰

FY 2013 NDAA

In the FY13 NDAA, Congress took two actions regarding bid protests: (1) it repealed the sunset provision for task or delivery orders effectively making the \$10 million threshold permanent,¹³¹ and (2) Congress added a requirement that the Comptroller General's annual reports include information on common grounds for sustaining bid protests.¹³²

FY 2017 NDAA

The FY17 NDAA included several provisions applicable to bid protests. In the legislation Congress:

- Increased the threshold for DOD task or delivery order IDIQ contract protests to \$25 million. This threshold increase did not apply to civilian agencies; their threshold remained at \$10 million.¹³³
- Directed the Secretary of Defense to enter into a contract for a study on the prevalence and impact of bid protests involving DOD contracts at agencies, GAO, and COFC. The report was to specifically address:
 - 1) Contracting officials' rationale for planning decisions relative to bid protests;
 - 2) Effects of the protest system on bidders'/offerors' decisions to participate in a procurement;
 - 3) Trends on bid protests at agencies, GAO, and COFC;
 - 4) An analysis of bid protests filed by incumbent contractors;

¹²⁸ National Defense Authorization Act for Fiscal Year 2012, 10 U.S.C. § 2445c(d)(2)(A) (repealed by Pub. L. No. 114-328, § 846(1), 130 Stat. 2292 (2016)).

¹²⁹ 41 U.S.C. § 4106(f)(3) (repealed by GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 130 Stat. 1361).

¹³⁰ 28 U.S.C. § 1491(b)(1).

¹³¹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 830, 126 Stat. 1632, 1842.

¹³² 31 U.S.C. § 3554(e)(2).

¹³³ 10 U.S.C. § 3406(f)(1)(B).

- 5) A comparison of bid protests by contract type, pre- versus post- award protests, and single award protests;
- 6) An analysis of the number and disposition of protests filed with the contracting agency.
- 7) A summary of the results of protests in which the contracting agencies took unilateral corrective action;
- 8) An analysis of the effect of the quantity and quality of debriefings on the frequency of bid protests.
- 9) The most common grounds for sustaining protests.¹³⁴

The conference report which accompanied the NDAA addressed the creation of two thresholds for protests of orders under IDIQ contracts, one for the civilian agencies and one for DOD.¹³⁵ The conference report addressed the requirement for a report on bid protests in Section 885, and the inclusion of a requirement to review the burdens which bid protests create for contracting officers and contractors. The conference report also addressed Section 889's requirement calling for additional information in GAO's annual reports to Congress on bid protests.¹³⁶

FY 2019 NDAA

The FY 2019 NDAA included two provisions regarding bid protests. Congress directed the Secretary of Defense to study the frequency and effects of bid protests involving the same contract award or proposed award that were filed at both the GAO and COFC.¹³⁷

The NDAA required the report to include at a minimum:

- (1) the number of protests that have been filed with both tribunals and results;
- (2) the number of such protests where the tribunals differed in denying or sustaining the action;
- (3) the length of time, in average time and median time—
 - (A) from initial filing at the Government Accountability Office to decision in the United States Court of Federal Claims;
 - (B) from filing with each tribunal to decision by such tribunal;
 - (C) from the time at which the basis of the protest is known to the time of filing in each tribunal; and
 - (D) in the case of an appeal from a decision of the United States Court of Federal Claims, from the date of the initial filing of the appeal to decision in the appeal;
- (4) the number of protests where performance was stayed or enjoined and for how long;

¹³⁴ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885, 130 Stat. 2000, 2319-21 (2016).

¹³⁵ H. R. REP. NO. 114-840, at 1103 (2016) (Conf. Rep.).

¹³⁶ *Id.*, at 1118.

¹³⁷ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 822, 132 Stat. 1636, 1853-54 (2018).

- (5) if performance was stayed or enjoined, whether the requirement was obtained in the interim through another vehicle or in-house, or whether during the period of the stay or enjoining the requirement went unfulfilled;
- (6) separately for each tribunal, the number of protests where performance was stayed or enjoined and monetary damages were awarded, which shall include for how long performance was stayed or enjoined and the amount of monetary damages;
- (7) whether the protester was a large or small business; and
- (8) whether the protester was the incumbent in a prior contract for the same or similar product or service.¹³⁸

The NDAA also:

- Required ongoing data collection of protests at both GAO and COFC.¹³⁹
- Required the Secretary of Defense to develop an expedited bid protest process for contracts of a value of less than \$100,000 and submit a report to the congressional defense committees on the development of the expedited protest process by May 1, 2019.¹⁴⁰
- Made permanent the GAO and federal district courts' lack of jurisdiction to hear a bid protest over use of the DOD's "Permanent Supply Chain Risk Management Authority."¹⁴¹

FY 2021 NDAA

The Conference Report, discussing Section 886, directed the Secretary of Defense to undertake a study through AIRC.¹⁴²

The study was to include:

- (1) The rate at which protesters are awarded the contract that was the subject of the bid protest;
- (2) A description of the time it takes the 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;
- (3) 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

¹³⁸ § 822(a)(3).

¹³⁹ § 822(c).

¹⁴⁰ § 822(d).

¹⁴¹ § 881, 132 Stat., at 1910-13. The DOD's Permanent Supply Chain Risk Management Authority is now at 10 U.S.C. § 3252.

¹⁴² H.R. REP. NO. 116-617, at 1708.

(4) Analysis of the number and disposition of protests filed within the Department.¹⁴³

Section 886 directed AIRC to review in its study the law pertaining to bid protests, the Federal Acquisition Regulation, and agency policies and procedures as well as to solicit input from across the DOD and industry stakeholders with regard to agency level bid protests, addressing:

- a) prevalence,
- b) timeliness,
- c) outcomes,
- d) availability,
- e) reliability of data on protest activities,
- f) consistency of protest processes among the military services, and
- g) any other challenges that affect the expediency of such protest processes.¹⁴⁴

FY 2022 NDAA

The FY22 NDAA contained two provisions relating to bid protests regarding size status protests at the Small Business Administration (SBA). Congress directed the SBA to:

- Require the business's information in the System for Award Management (SAM) within 2 days of a determination that the business's status changed.
- Change a business's size status in the System for Award Management if the business does not make the change within 2 days.
- Require businesses whose status is changed to notify a contracting officer for each contract with respect to which such business has an offer or bid pending of the determination if the concern finds, in good faith, that such determination affects the eligibility of the concern to perform such a contract.¹⁴⁵
- Consolidate appeals of HUBZone status protests in the SBA's Office of Hearing and Appeals.¹⁴⁶

The Joint Explanatory Statement for the FY22 NDAA describes the changes agreed to in conference.¹⁴⁷

As the discussion above reflects, following the initial lead of the courts in recognizing bid protests, Congress has made a series of changes to federal bid protests and has called for a number of studies (including this one) to improve bid protests in the federal acquisition system. As the history of legislative reforms reflects, generally, the

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 863, 135 Stat. 1541, 1852 (2021).

¹⁴⁶ § 864, 135 Stat., at 1852-53.

¹⁴⁷ H. COMM. ON ARMED SERVS. & S. COMM. ON ARMED SERVS., 117TH CONG., J. EXPL. STATEMENT TO ACCOMPANY THE NAT'L DEF. AUTH. ACT FOR FISCAL YEAR 2022 1084-85 (Comm. Print 2021).

participants in the Federal Procurement Protest System view it as protecting competition by ensuring all of the participants comply with the procurement rules and providing transparency through publication and notification systems.

Many governments' procurement systems across the nation and around the globe echo elements of the Federal Procurement Protest System.¹⁴⁸ Notably, other systems also employ the three different types of bid protests (sometimes called "bid challenges" or "remedies" abroad) allowed in the federal system—agency-level protests, protests before an independent administrative agency (such as GAO), and bid protests before the courts.¹⁴⁹ In part because the focus of reform in Congress had been on protests before GAO and the courts, in 2019 ACUS¹⁵⁰ commissioned a study of agency-level bid protests, ultimately led by one of the co-principal investigators of this report.¹⁵¹ The ACUS report showed that many agencies, including several agencies across the Defense Department, had made important advances in improving their agency-level bid protest systems in the years since the 1995 executive order from President Clinton required government-wide use of agency-level bid protests. Congress called for an assessment of agency-level bid protests in this report, and the following discussion of potential improvements of the agency-level bid protest system, which cites important models for reform of agency-level bid protests across the federal government, draws in substantial part on the ACUS study.

¹⁴⁸ See Christopher R. Yukins, *Rethinking Discretionary Bid Protests*, REGUL. REV. (May 27, 2021), <https://www.theregreview.org/2021/05/27/yukins-bid-protests/>.

¹⁴⁹ See UNCITRAL, GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT 296 (2014).

¹⁵⁰ ACUS is an independent executive agency that Congress established "to provide for the continuous improvement of the administrative procedure of [f]ederal agencies . . . to insure maximum efficiency and fairness." Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964).

¹⁵¹ See Admin. Conf. of the U.S., *Request for Proposals—June 27, 2019: Agency Bid Protests*, <https://www.acus.gov/sites/default/files/documents/Bid%20Protest%20Draft%20RFP%20v4.pdf>.

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.¹⁵² 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.¹⁵³ 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.¹⁵⁴ The 1995 ACUS recommendations also suggested that the Federal Circuit be assigned all appeals from administrative bid protest decisions.¹⁵⁵ 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 GAO.¹⁵⁶ The final version of the defense authorization bill, however, dropped that reform.¹⁵⁷ Finally, the earlier ACUS recommendation urged Congress to mandate empirical assessments of the effects of

¹⁵² See, e.g., Troff, *supra* note 56, at 148 (“[I]n the United States, agency-level systems have been relegated to a position of low esteem in the eyes of many in the public procurement community because of one intrinsic shortcoming: their relative lack of independence, or the perception thereof.”).

¹⁵³ *Infra* app. C question 21. In response to a survey for this study, one agency noted that it has over 10 agency-level protests for every one GAO protest, which demonstrates that bidders on this agency's procurements believe that agency-level protests are an effective and efficient way to address and resolve issues and save costs for both the agency and the protester.

¹⁵⁴ See ACUS Adoption of Recommendations, 60 Fed. Reg. 43,108 (Aug. 18, 1995). A summary of ACUS' Recommendation 95-5 explains:

The recommendation urges that jurisdiction over bid protests . . . be streamlined by providing that all protests be heard initially in an administrative forum, with judicial review available exclusively in the U.S. Court of Appeals for the Federal Circuit. Should Congress not wish to consider exclusive appellate-level jurisdiction, the Conference alternatively proposes eliminating district court jurisdiction in favor of consolidated jurisdiction in the Court of Federal Claims. In addition, Recommendation 95-5 urges Congress to mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine whether it has improved the quality or reduced the cost of public procurement.

See *also* Exec. Order 12979, 60 Fed. Reg. 12979 (Oct. 25, 1995).

¹⁵⁵ ACUS Adoption of Recommendations, 60 Fed. Reg., at 43,114.

¹⁵⁶ H.R. 1530 Engrossed Amendment S., 104th Cong. § 4503 (Sept. 6, 1995).

¹⁵⁷ See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §§ 5501-02, 110 Stat. 186, 698-99 (1995). The section giving GAO exclusive authority over protests appeared in the engrossed Senate bill at Title XLV alongside the other two sections here, which relate to the timing for GAO protests.

the bid protest process, for example, between agencies.¹⁵⁸ 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.¹⁵⁹

The Protest Forum¹⁶⁰

The 2019-2020 ACUS study relied heavily upon an analytical structure for bid protests put forward by Daniel Gordon in 2006.¹⁶¹ 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.¹⁶² 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.¹⁶³ Agencies' varying approaches show that these basic requirements can be met in a number of ways.

¹⁵⁸ ACUS Adoption of Recommendation, 60 Fed. Reg., at 43,114.

¹⁵⁹ Yukins, *supra* note 11.

¹⁶⁰ The following sections were adapted from, Yukins, *supra* note 11. The study commissioned by ACUS is available on the ACUS website and was republished in the ABA Public Contract Law Journal.

¹⁶¹ Gordon, *supra* note 45. Daniel Gordon headed GAO's bid protest system, served as the Administrator of the OFPP, and served as an associate dean at the George Washington University Law School.

¹⁶² UNCITRAL, *supra* note 139, at p. 295-96.

¹⁶³ FAR 33.103(d)(3)-(4). The rules states, in relevant part:

- (3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.
- (4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency

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.¹⁶⁴ An exception is the Department of Veteran Affairs, which allows for the appeal of a contracting officer's decision within the agency.¹⁶⁵ 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.¹⁶⁶

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 GAO's timeliness requirements.¹⁶⁷ Any protest to GAO must be filed within ten days of knowledge of initial adverse agency action, and an adverse decision by a contracting officer is an initial adverse agency action.¹⁶⁸ 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 GAO. Worse yet, it may be unclear whether the agency has taken adverse action, for (as discussed below) under GAO's bid protest regulations any vendor knowledge of adverse agency action, actual or constructive, may trigger the GAO filing deadline.¹⁶⁹ Because protesting to the contracting officer may put the vendor into this uncertain tactical "box," many vendors will simply forgo an agency-level protest.

appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements.

¹⁶⁴ *E.g.*, Def. Logistics Acquis. Directive [DLAD] Subpart 33.1 Protests § L06 (rev. Aug. 30, 2022); Federal Acquisition Regulations System, 48 C.F.R. §§ 533.103-1(a), 1833.103 (e)(4), 2833.103(g), 2933.103(c) (2022).

¹⁶⁵ 48 C.F.R. § 833.103-70(a).

¹⁶⁶ *E.g.*, DLAD, *supra* note 164; 48 C.F.R. §§ 533.103-1(a), 1833.103 (d)(4), 2833.103(d)(3).

¹⁶⁷ FAR 33.103 (d)(4).

¹⁶⁸ Government Accountability Office General Procedures, 4 C.F.R. § 21.2(a)(3).

¹⁶⁹ 4 C.F.R. § 21.2(a)(3) ("If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with . . . this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control.").

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.¹⁷⁰ 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 (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.¹⁷¹ 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.¹⁷² The Marine Corps has argued that only GAO has jurisdiction over task or delivery order protests,¹⁷³ 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."¹⁷⁴ In contrast, at least one other agency has decided an agency-

¹⁷⁰ As noted, this portion of the report is drawn in part from the ACUS 2019-2020 study. See Yukins, *supra* note 11, at 218.

¹⁷¹ See generally FAR 33.103. Some agencies also may dismiss a protest if a protest on the same or similar basis is filed with a protest forum outside of the agency. 48 C.F.R. §§ 733.103-73, 533.103-1(g), 833.103-70 (b), 2933.103(n), 2833.103(m), 1833.103(e). This seems more like a matter of enforcing an election of remedies, rather than an imposed limitation on agencies' jurisdiction to review internal procurement failures.

¹⁷² 48 C.F.R. §§ 733.103-73, 833.103-70(b).

¹⁷³ Logis-Tech, Inc., B-407687, 2013 CPD ¶ 41, at 3-4 (Comp. Gen. Jan. 24, 2013).

¹⁷⁴ U.S. Army Materiel Command [AMC], HQ AMC-Level Protest Procedures Program (last visited Sept. 30, 2022), <https://www.amc.army.mil/Connect/Legal-Resources/>.

level protest on a task or delivery order where GAO apparently lacked bid protest jurisdiction.¹⁷⁵

Standing to Protest

The FAR requires that the protester in an agency-level protest be an interested party in the procurement.¹⁷⁶ 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.”¹⁷⁷ 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.¹⁷⁸ Some agencies also explicitly prohibit subcontractors from filing protests.¹⁷⁹

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 ten days after contract award or within five days after a debriefing date offered to the protester under a timely debriefing request, whichever is later.¹⁸⁰ 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 ten days.¹⁸¹

¹⁷⁵ See, *Kevcon, Inc.*, B-406418, 2012 CPD ¶ 108 (Comp. Gen. Mar. 7, 2012) (affirming the VA’s denial of an agency-level bid protest of the agency’s finding that the contractor was ineligible to receive rewards under an IDIQ contract and dismissing the protest for lack of subject matter jurisdiction because the value of the task order was less than the \$10 million (at the time of the order) threshold).

¹⁷⁶ See FAR 33.101 (defining “protest” as “a written objection to an interested party”).

¹⁷⁷ *Id.*

¹⁷⁸ *E.g.*, 48 C.F.R. §§ 433.103(a), 2933.103(b), 2833.101(c).

¹⁷⁹ 48 C.F.R. §§ 733.103-73(f), 833.103-70(b)(7).

¹⁸⁰ FAR 33.103(f)(3).

¹⁸¹ 48 C.F.R. §§ 1533.103, 2433.103(d)(4)(i), 833.103-70(d)(1).

Alternatively, the protester may file a protest anew with GAO, which the vendor also must do within ten days.¹⁸²

Unlike the deadlines for filing protests (which have been borrowed largely intact from the GAO process),¹⁸³ 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 best efforts to resolve agency-level protests within 35 days after a party files a protest.¹⁸⁴ 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.¹⁸⁵ Some agencies also require the deciding official to meet other milestones, such as conducting a scheduling conference with the parties within five days after the protest is filed.¹⁸⁶

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 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."¹⁸⁷ 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),¹⁸⁸

¹⁸² FAR 33.103(d)(4); 4 C.F.R. § 21.2(a)(3).

¹⁸³ In fact, the GAO rules expressly apply the GAO's timelines to agency-level protests. FAR 33.103(a)(3) provides:

- (3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section [which set deadlines for GAO protests], unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

¹⁸⁴ FAR 33.103(g).

¹⁸⁵ Compare, e.g., 48 C.F.R. § 933.103(k) with § 2933.103(j).

¹⁸⁶ E.g., 48 C.F.R. § 2933.103(d).

¹⁸⁷ 4 C.F.R. § 21.3(d).

¹⁸⁸ FED. CL. R. App. C ¶ 22.

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 GAO or COFC, protesters' counsel normally will gain access to a substantial administrative record, usually under a protective order.¹⁸⁹ 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.¹⁹⁰ Other agencies, such as the Department of Labor, encourage scheduling conferences to establish plans for creating an appropriate record for the agency-level protest.¹⁹¹ Still other agencies, such as the Department of Energy

¹⁸⁹ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-613SP, Guide to GAO Protective Orders 2, 6 (2019) (“GAO may issue a protective order to allow limited access to such ‘protected’ information to attorneys, or consultants retained by attorneys, who meet certain requirements.”); *id.*, at ¶ 16-18.

¹⁹⁰ 48 C.F.R. § 2933.103(f) (“Department of Labor procedures do not provide for any discovery. The deciding official has discretion to request additional information from either the agency or the protester. However, the deciding official will normally decide protests on the basis of information provided by the protester and the agency.”); §§ 533.103-1(e)(1-3), 2833.103(h).

¹⁹¹ See 48 C.F.R. § 2933.103(d).

(DOE), require the contracting officer to create a protest report to be used by an official at a level above the contracting officer.¹⁹²

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.¹⁹³

An ideal reviewing official doesn’t need to be supervising the contract officer, in fact it is better if the independent reviewer does not have a connection to the protested procurement.¹⁹⁴ 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.¹⁹⁵ Debriefings may be done in writing, orally, or by any other acceptable method.¹⁹⁶

In recent years, the scope of debriefings has expanded for larger procurements. Section 818 of the NDAA for FY2018 provided for enhanced debriefings at DOD.¹⁹⁷ Section 818 required DOD to respond to additional questions from disappointed offerors, and DOD has implemented that requirement by a change to the Defense Federal Acquisition Regulation Supplement (DFARS).¹⁹⁸ 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.¹⁹⁹

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,”²⁰⁰ i.e., ready public access to and use of government data. In practical terms, however, it is unlikely an agency will

¹⁹² 48 C.F.R. § 933.103(k).

¹⁹³ See, e.g., FAR 15.506.

¹⁹⁴ See FAR 33.103(d)(4).

¹⁹⁵ FAR 15.506(d).

¹⁹⁶ FAR 15.506(b).

¹⁹⁷ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 818, 131 Stat. 1283, 1463-64 (2017).

¹⁹⁸ 48 C.F.R. § 215.506-70.

¹⁹⁹ § 818(a)(1), 131 Stat. at 1463.

²⁰⁰ See, e.g., Jessica Yabsley, *President Signs Government-wide Open Data Bill*, DATA COALITION (Jan. 14, 2019, 6:04 PM), <https://www.datacoalition.org/press-releases/12849074> (“the Open, Public, Electronic and Necessary (OPEN) Government Data Act . . . passed Congress on Monday, December 31, 2018. The OPEN Government Data Act requires all non-sensitive government data to be made available in open and machine-readable formats by default”).

respond to a FOIA request from a vendor in time to support a protest,²⁰¹ and federal implementation of open government obligations remains in its infancy.²⁰²

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,²⁰³ the U.S. federal bid protest system generally does not award expectancy damages (i.e., lost profits) to protesters.²⁰⁴ 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.²⁰⁵ 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.

²⁰¹ The average number of days to process simple FOIA requests in FY 2020 ranged from 16 to 71 days. Simple requests are those that require minimal review, usually because the volume of records in the request is low and the substance of the records is simple. U.S. Gov't Accountability Off., GAO-22-105040, Freedom of Information Act Requests: Selected Agencies Adapted to the COVID-19 Pandemic but Face Ongoing Challenges and Backlogs 9, 66-72 (2022). Protesters have a maximum of 10 days to file an agency-level protest. See FAR 33.103(e).

²⁰² See OPEN GOV'T P'SHIP, FOURTH OPEN GOVERNMENT NATIONAL ACTION PLAN FOR THE UNITED STATES 6 (2019).

²⁰³ WBG, BENCHMARKING PUBLIC PROCUREMENT 2017: ASSESSING PUBLIC PROCUREMENT REGULATORY SYSTEMS IN 180 ECONOMIES 41-43 (2016).

²⁰⁴ See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19, at 28.

²⁰⁵ Yukins, *supra* note 11, at 237.

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).²⁰⁶ 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.²⁰⁷

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)²⁰⁸ has been extended by the agency (which is often the case), the vendor can file anew at 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 GAO runs from the award decision or the debriefing which follows award.²⁰⁹ An agency-level protest does not affect the deadline for filing at GAO to trigger an automatic statutory stay.²¹⁰ 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,²¹¹ 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 GAO (viewed as a more robust forum) by filing an agency-level protest first, even if the agency-level

²⁰⁶ See FAR 33.103 (f)(1, 3). FAR 33.103(f) describes the stay during an agency-level bid protest as follows:

(f) *Action upon receipt of protest.*

- (1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. . . .
- (3) Upon receipt of a [timely] protest . . . the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government.

²⁰⁷ FAR 33.103(f)(1). Although the agencies must report agency-level protest information to GAO, GAO stopped reporting to Congress on the number of stay overrides reported by agencies to GAO in 2003. See KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RSCH. SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 13 n.94 (2016).

²⁰⁸ Pre-award protests in U.S. procurement are generally due before the time that bids/proposals are due. See, e.g., MANUEL & SCHWARTZ, *supra* note 207, at 10.

²⁰⁹ 31 U.S.C. § 3553(d)(4).

²¹⁰ FAR 33.103(f)(4).

²¹¹ *Id.* (The FAR states that an agency may include "a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO").

protest is a quicker and more efficient option. As a result, vendors often will file directly with GAO to avoid losing the stay of the procurement while 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.²¹² 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.²¹³

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

²¹² FAR 33.103(h).

²¹³ *E.g.*, AMC, *supra* note 174.

requires published statistics on protest outcomes. Publication means resolving the following questions, building on the current rule and agency best practices:

- What is the essential data to be used for assessing agencies' internal bid protest systems?
- What information should the agency publish—agency protest decisions, for example, or simply statistics on protests and outcomes?
- 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”?
- 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.²¹⁴ The Executive Order also requires that agency heads make a system that is “inexpensive, informal, procedurally simple and expeditious” for bid protest resolution.²¹⁵ 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.²¹⁶

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.²¹⁷ During the resolution of the protest the agency and protester may provide information regarding the protest.²¹⁸ It is also required that the agency decision is “well-reasoned” and “provide sufficient factual detail explaining the agency position.”²¹⁹ The agency must submit a copy of the decision to the protester in any manner of which the agency can verify receipt.²²⁰

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

²¹⁴ 60 Fed. Reg., at 55,171.

²¹⁵ *Id.*

²¹⁶ FAR 33.103(d).

²¹⁷ FAR 33.103(g).

²¹⁸ *Id.*

²¹⁹ FAR 33.103(h).

²²⁰ *Id.*

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.²²¹

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. To effect these reforms, the ACUS report²²² recommends that the government-wide rule for agency-level protests, FAR 33.103, or agencies' own rules and guidance, be amended as follows:

1. **Formalize the Role of the “Agency Protest Official”:** Under the current rule, a vendor that brings a protest to the contracting agency may protest to either a contracting officer or a “higher level” official. A number of agencies have successfully made the “higher level” official an “Agency Protest Official” (APO). Formalizing the APO's role would make the function more visible and accountable and would help the APO coordinate other reforms outlined below.
2. **Confirm Agencies' Broad Jurisdiction to Hear Agency-Level Protests:** The current FAR provision does not define the scope of agencies' jurisdiction to hear bid protests. A FAR amendment which presumptively gave agencies authority to hear any protest regarding their procurement decisions would afford agencies (and vendors) the leeway to address emerging issues in new procurement methods. Agencies could always narrow the scope of their jurisdiction by amending their rules.
3. **Leave Standing for Agency-Level Protests Tied to “Interested Party” Standard:** FAR 33.103 currently says that any “interested party” may bring an agency-level protest. Although it seems counterintuitive, reform here may mean simply preserving the status quo. A recent decision by the Federal Circuit expanded the concept of standing for an interested party (in certain circumstances) to include a firm likely to encounter the same problem in future procurement,²²³ and this may portend a shift towards seeing protesters more as

²²¹ See Yukins, *supra* note 11, at 206.

²²² ACUS, Adoption of Recommendations, 86 Fed. Reg. 6612, 6619-23 (Jan. 22, 2021). The report prepared for ACUS, which is our focus here, was distilled into ACUS Recommendation 2020-4, which reflected expert input from many of the nation's leading administrative law experts.

²²³ *Acetris Health*, 949 F.3d 719 (Fed. Circ. 2020).

whistleblowers rather than as claimants. By linking standing for agency-level protests to the “interested party” standard used at GAO and the Court of Federal Claims, the rule will make it easier for the concept of standing in agency-level protests to evolve through published decisions from those alternative fora.

4. **Clarify Decision Process:** The process for agency-level protests should be made more rigorous, possibly by drawing from other, parallel procedures under the FAR. For example, although the current FAR rule calls for agencies to make best efforts to resolve agency-level protests within 35 days, experience in some agencies shows that it might be possible to narrow that time, say to 20 days. Doing so, however, could require substantial agency resources and would not address vendors’ core complaint that the decision-making process is opaque and uncertain. To resolve this uncertainty, and to make plain when a vendor must proceed to a GAO protest to preserve its rights, FAR 33.103 could be amended to incorporate rigorous procedures and deadlines, akin to those used for deciding claims under the Contract Disputes Act, per the provision at FAR 33.211. This would give vendors clarity as to how an agency-level protest is proceeding and would help ensure that any adverse agency action—the trigger for a GAO protest—is noticed in writing to the protesting vendor. At the same time, the agencies might consider other enhancements to the decision-making process, such as adopting procedural milestones (e.g., an early status conference) which some agencies have used to make agency-level protests more effective.
5. **Specify Record Necessary for Agency-Level Protest:** The current FAR rule does not specify the record that an agency should compile for an agency-level protest, raising the risk that the deciding official in the agency will not have complete information before her. To fill this gap in the rule, the requirements of the “sister” provision in FAR 33.104, which specify the record to be compiled for GAO protests, could be incorporated in the provision on agency-level protests, FAR 33.103.
6. **Maximize the Record Shared with Protesters:** One of the chief complaints from vendors’ counsel regarding agency-level bid protests is that vendors have no access to the agency record, once compiled. The ACUS report noted that agency counsel strongly objected to the most obvious means of affording access—protective orders, much like those used at GAO in the Court of Federal Claims to allow vendors’ counsel access to sensitive materials in the administrative record. There are, however, alternative means to broaden vendors’ access to the administrative record: enhanced debriefings, or confidentiality agreements between vendors and agencies using alternative dispute resolution techniques to resolve protests. These measures are likely to evolve over time as technology makes it easier to share information. Ultimately, principles of “open government” may overtake the process and flip the presumption to make the procurement record generally available, subject to special protections for private, commercially sensitive and internal government information. For now, however, agencies may want to consider employing

enhanced debriefings or making greater use of confidentiality agreements to disseminate important parts of the record.

7. **Enhancing the Stay of Performance:** The current FAR provision already calls for a stay of the procurement pending an agency-level protest. Reform, therefore, means addressing particular issues that have arisen in practice. At the start of the protest, the agency should promptly and in writing acknowledge receipt of the protest and start of the stay, to eliminate the uncertainty that can surround the start of an agency-level protest today. As the agency-level protest ends, the vendor should be able to continue the stay pending the resolution of a follow-on protest, say at GAO. A number of small but critical changes would be needed to preserve the stay, which is critical precisely because the protester in the U.S. system protests not for damages, but for an opportunity to compete fairly for the contract requirements. Those changes could include a temporary extension to the stay after a final decision in any agency-level protest, a change to the statute governing GAO protests to trigger a stay if a GAO protest is timely filed after an agency-level protest is decided, and a willingness at GAO to handle follow-on protests there on an “express” basis so as to minimize disruption at the procuring agencies.
8. **Publish Data on Agency-Level Protests:** Under the current rule, almost no data is published or otherwise available on agency-level protests. This creates uncertainty for vendors, for whom agency-level protests are a “black box.” To make vendors more comfortable with what is, in fact, a long-established (but largely invisible) agency-level bid protest system, data should be gathered and published on the numbers of agency-level protests sustained and on corrective action taken. As the experience at GAO has shown, publishing this sort of “effectiveness rate” data (comparing sustained protests and corrective action to total protests filed) has been critically important to establishing GAO’s reputation as a credible bid protest forum. The same should be true of agency-level protests.

As the discussion below reflects, these reforms put forward in the ACUS report generally would be well within best practices already used in DOD, as the AMC already uses many of these strategies in its agency-level bid protest system. Implementing these reforms, as 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.²²⁴ As LT COL Bruce L. Mayeaux pointed out in a research paper recently published in the *Military Law Review*,²²⁵ 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 1995.²²⁶

Mayeaux suggests that the DOD should model the DOD agency-level bid protest system after the 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 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 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 GAO and in the courts.

Protest Forum Location

First, the AMC system has an established Agency Protest Official (APO) with authority to hear all protests that are filed above the contracting officer.²²⁷ The U.S. Army's

²²⁴ This section draws upon a work published by LT COL Bruce L. Mayeaux, *It Is All About Risk: The Department of Defense Should Use the Army Materiel Command's Agency-Level Bid Protest Program As Its New Risk Management Tool*, 229 MIL. L. REV. 519 (2021) (with permission). This section uses the phrase "AMC agency-level bid protest program" throughout. Unless indicated otherwise, that phrase consists of both the upper-level Headquarters (HQ) AMC agency-level bid protest program and the lower-level contracting officer agency-level bid protest program.

²²⁵ For a discussion of the history of agency-level protests, including AMC's role in the development of the current approach under FAR 33.103, see Eric Troff, *Agency-Level Bid Protest Reform: Time for a Little Less Efficiency?* (Apr. 2005) (essay prepared for the George Washington University Law School) (on file, used with permission), <https://publicprocurementinternational.com/agency-level-bid-protests/>.

²²⁶ Yukins, *supra* note 11, at 201.

²²⁷ See GEN. SERVS. ADMIN. & DEP'T OF THE ARMY, ARMY FEDERAL ACQUISITION REGULATION SUPPLEMENT § 5133.103(d)(4) (2022) [hereinafter AFARS]; Mayeaux, *supra* note 224, at 555.

acquisition regulation establishes an APO who is designated to receive the protests.²²⁸ A protester has the opportunity to file a protest with the contracting officer and request a higher-level review or file directly with the higher level.²²⁹ AMC contract solicitations mention the option for potential protesters to exercise the higher-level bid protest option.²³⁰ Mayeaux explains that the provision makes it clear to potential protesters that there is a higher level program with an established APO available to them.

Scope of Jurisdiction

Second, the AMC agency-level protest system affords broad protest jurisdiction. The AMC program also follows many of the same procedural principles as the GAO protest system.²³¹ Mayeaux explains this means that the AMC “will hear any bid protest concerning alleged violations of procurement statutes or regulations . . . in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards.”²³² This means the program has jurisdiction over procurement contracts that are governed by the FAR. The Army Federal Acquisition Regulation Supplement also requires language referencing the agency-level bid protest system in all AMC contract solicitations,²³³ much as the FAR more generally requires a reference to potential GAO bid protests.²³⁴ This ensures that small businesses and those new to the acquisition system—an important part of the Defense Department’s industrial base—are on fair notice of available bid protest options, should problems arise.

Standing to Protest

Third, the AMC’s protest manual ties the definition of standing to protest (the question of *who* may protest) to GAO’s definition and will evolve alongside any changes to standing at GAO. This is because the AMC program uses many of GAO’s procedures and precedents.²³⁵ As Mayeaux explains, this allows legal concepts such as standing to mature with GAO concepts. Because bid protests are in some sense a “whistleblower” system—protesters alert the government to failures in the acquisition system—the scope of *who* may protest (which vendors have standing to protest, for example) can evolve over time. Mayeaux explains that the AMC agency-level bid protest system’s approach, looking to GAO for guidance on these and other procedural matters, encourages consistency with GAO’s formal, written decision process and provides protesters advanced notice of the rules the agency will apply when deciding agency-level bid protests.

²²⁸ See AFARS § 5133.103(d)(4)(i).

²²⁹ Mayeaux, *supra* note 224, at 555.

²³⁰ AFARS § 5152.233-4002 (providing a clause for AMC solicitations informing offerors of the AMC agency-level protest program).

²³¹ Mayeaux, *supra* note 224, at 556-57.

²³² *Id.*, at 557 (internal quotations omitted).

²³³ AFARS § 5152.233-4002.

²³⁴ FAR 33.106 (requiring solicitations to include clauses found in FAR 52.233-2 Service of Protest and 52.233-3 Protest after Award).

²³⁵ Mayeaux, *supra* note 224, at 558.

Forum Limits

Fourth, the AMC agency-level bid protest system is formal and clear, which provides a trigger for the GAO timeliness clock. The procedure broadly follows the structured claims process used for claims under the Contract Disputes Act, which outlines a formalized procedure and final decision standard for deciding claims.²³⁶ Mayeaux outlines that this AMC procedure requires “issuance of a formal, written decision at the conclusion of the bid protest, similar to a contracting officer’s final decision (KOFD) on a claim.”²³⁷ In the AMC process, an attorney examines bid protest decisions, and the APO, also an attorney, writes the decisions.²³⁸ If the protest is only at the contracting officer level, the contracting officer writes the decision with advice from legal counsel.²³⁹ These written decisions recite the facts of the claim, reference relevant solicitation terms, and analyze the claim based on existing authorities.²⁴⁰ The contracting officer usually submits her decision to the protester no later than 45 days after the filing.²⁴¹ If the decision will take longer, AMC requires that the protester receive written notice regarding the delay.²⁴² This matches the ACUS recommendation that the government clarify its decision process in agency-level bid protests, so that the lack of clarity does not discourage prospective protesters from using the agency-level process.²⁴³

Evidence for Decision

Fifth, AMC bid protest rules outline the record that its subordinate contracting endeavors must record for the APO or, at the lower level, for the contracting officer’s consideration. This means that the AMC requires its contracting personnel to compile an “administrative report” to forward to the APO or the contracting officer upon which they shall base their decision.²⁴⁴ The APO and contracting officer understand this to be the same as an “agency report” under GAO rules.²⁴⁵ Mayeaux explains that this administrative record could be more clearly defined to mirror the GAO agency report, but, overall, the AMC approach is consistent with the ACUS report recommendations, since it offers a complete description of the agency process at issue.²⁴⁶

Administrative Report

Sixth, the AMC rules allow for the protester to receive the administrative report in certain instances. Usually, a protester with AMC does not receive a copy of the administrative report.²⁴⁷ But, if the APO or contracting officer requires comments from the protester,

²³⁶ FAR 33.211(a).

²³⁷ Mayeaux, *supra* note 224, at 558-59.

²³⁸ *Id.*; see FAR 33.211(a)(2) (requiring a contracting officer to obtain legal advice before issuing a final decision).

²³⁹ Mayeaux, *supra* note 224, at 559.

²⁴⁰ See FAR 33.211(a)(4).

²⁴¹ Mayeaux, *supra* note 224, at 559.

²⁴² *Id.*

²⁴³ Yukins, *supra* note 11, at 226.

²⁴⁴ Mayeaux, *supra* note 224, at 560.

²⁴⁵ *Id.*

²⁴⁶ Yukins, *supra* note 11, at 233-34.

²⁴⁷ Mayeaux, *supra* note 224, at 560-61.

this may in turn require distributing portions of the administrative report.²⁴⁸ This gives the protester the opportunity to comment on the administrative report if requested.²⁴⁹ While this approach is not as broad as GAO's approach, the AMC approach lays useful groundwork for policymakers, as they consider how best to share the administrative record with protesters in the agency-level bid protest system. As a practical matter, consideration of the government's need for transparency in the procurement system in general may overtake many of these policy discussions regarding the availability of the administrative record, driven by the government's need for more transparency, accountability and interoperability with the private sector.

Protest Regulatory Stay

Seventh, the AMC agency-level bid protest system employs a durable regulatory stay that it immediately applies whenever a vendor files a timely agency-level bid protest. In general, if AMC headquarters or the contracting officer receives a protest that is timely under GAO rules the regulatory stay is imposed.²⁵⁰ This regulatory stay is strictly enforced and followed.²⁵¹ Mayeaux explains that the enforcement is immediate and difficult to override. AMC's approach is consistent with the ACUS report which recommended that the government clarify the regulatory stays to afford prospective protesters assurance that what is typically their central goal in a protest—having an opportunity to compete fairly for a requirement—will remain available during the pending protest.²⁵²

²⁴⁸ *Id.*

²⁴⁹ See 4 C.F.R. § 21.3(i).

²⁵⁰ Mayeaux, *supra* note 224, at 561-62.

²⁵¹ *Id.*

²⁵² *Id.*

Data Collection

Lastly, Mayeaux notes that “the Army already collects and compiles agency-level bid protest data that it can analyze and use to manage its risk.”²⁵³ This data is collected and compiled in an annual report for the Office of the Deputy Assistant Secretary of the Army (Procurement) (ODASA-P).²⁵⁴ The AFARS requires the report to include:

- a) The number of protests received during the reporting period, to include their disposition;
- b) An assessment of the causes of the most frequently recurring issues . . . ;
- c) The distribution of protests by subordinate contracting offices; and
- d) Any additional information considered necessary to a full understanding of the efficiency and effectiveness of the activity’s agency protest procedures.²⁵⁵

Data from the report comes from multiple sources: (1) legal offices collected data (submitted within five working days of initial protest including administrative data like contract number, award date, and “lessons learned”) and (2) consolidated data generated throughout the year.²⁵⁶

The AMC system thus mirrors the broader recommendations in the ACUS report, and this report, that the Defense Department use data from bid protests as a management tool—a management approach which our interviews confirmed is already used for larger mission-critical acquisitions in the Department.

Mayeaux suggests that, in practice, AMC’s agency-level bid protest program, in many ways, reflects the ACUS report’s recommendations. Mayeaux recommends that the DOD look to incorporate the AMC program’s features as a risk management tool based on the reflection of the ACUS report’s recommendations in the AMC’s agency-level bid protest program. Mayeaux also suggests that using the AMC agency-level bid protest model more broadly across the DOD will make it easier for DOD managers to switch perspectives to see bid protests, not as a risk unto themselves, but rather as a risk management tool.

²⁵³ *Id.*, at 563.

²⁵⁴ AFARS § 5133.103-90.

²⁵⁵ *Id.*

²⁵⁶ Mayeaux, *supra* note 224, at 563-64.

Analysis of Bid Protest Data

As the discussion above reflects, bid protests (whether before an agency, GAO, or COFC) serve at least two important purposes: as a means of ensuring the integrity of the acquisition process (and providing a remedy to bidders), and as a management tool to allow those in the acquisition system to recognize emerging points of failure in the system. To serve the latter goal—for bid protests to be effective management tools for the Defense Department—the acquisition community must have ready access to reliable data on bid protests, their causes and their outcomes.

This study confirmed that, in general, the federal bid protest system suffers from a lack of actionable data regarding bid protests.²⁵⁷ To identify trends in bid protests, rather than only relying on data from a comprehensive acquisition data system such as the Federal Procurement Data System (FPDS) or USASpending,²⁵⁸ granular information must be extracted from each protest, matched to its associated acquisitions, and logged into a unified dataset. That protests can be heard across a range of forums creates further data aggregation problems as the data available from the different bid protest venues (agencies, GAO, and COFC) can vary enormously in quality, focus, and format.

Because there is a lack of continuous oversight—both over the bid protest system in general, and in efforts to leverage bid protest data for management purposes—creating clear data collection standards is critical. Without well-leveraged data, such oversight would be severely hampered, as the RAND report demonstrates.²⁵⁹ While this study's recommendations focus on the four questions Congress set forth, the potential resolution for all four questions lies in the integration of a unified process: applying a software-based approach to automated data collection that delivers a robust and reliable dataset compatible across agencies and databases.

Automating the collection and entry of bid protest data (whether as a stand-alone initiative or integrated to become part of the DOD's electronic acquisition records) would overcome two core weaknesses of the current DOD protest data collection process. First, automation would increase consistency across the data gathered on bid protests. Because the current bid protest data collection efforts within the DOD are voluntary, the information is statistically biased,²⁶⁰ as it apparently contains only data entered by the personnel who decide to participate. Second, automation would help address gaps in

²⁵⁷ See Will Dawson, *Data Scarcity in Bid Protests: Problems and Proposed Solutions*, 51 PUB. CONT. L.J. 131, 133 (2021); Timothy G. Hawkins et al., *Federal Bid Protests: Is the Tail Wagging the Dog?*, 16 J. OF PUB. PROCUREMENT 152, 181 (2016); Ralph C. Nash, *The Protest Process: Does it Need Repair?*, 32 NASH & CIBINIC REP. NL ¶ 5, 1 (2018). The move to use data as a management tool in procurement is part of a much broader evolution towards integrated and (where appropriate) open data in government and globally towards what is referred to as the "digitalization" of procurement. See, e.g., Foundations for Evidence-Based Policymaking Act of 2018, 44 U.S.C. § 3504(b); Albert Sanchez-Graells, *Revisiting the Promise: A Feasibility Boundary for Digital Procurement Governance* (Sept. 29, 2022) (forthcoming).

²⁵⁸ In this study, "USASpending data" refers to the contract data aggregated by FPDS and reported through the USASpending.gov website. While the data originated from FPDS, they are referred to as USASpending data because that is where the aggregate fiscal year reports analyzed in this report were sourced from.

²⁵⁹ See Arena, *supra* note 2.

²⁶⁰ This is not to suggest there is a conscious bias towards a distinct outcome by personnel who more conscientiously data enter more data into the available records system, but the unevenness in reporting does create non-random selection pressure.

the data. For example, in one bid protest system reviewed for this study, even where DOD personnel had taken the time to enter data, data were entered into only roughly half (50.46%) of the available cells per row, on average. By comparison, more general procurement information in USASpending data cells (some of which are mandatory and some optional) are empty only 18.59% of the time. These inconsistencies demonstrate the value of automation creating more of a consistent dataset.

The fundamental weakness in any manual data collection scheme is mental fatigue. This is exacerbated where the person entering data has other work tasks which they are likely to prioritize. Obliging contracting officers to enter a high volume of complex data leads inevitably to boredom, ambivalence, and mistakes. One potential solution to this would be automating the data entry, perhaps by integrating the data into a broader automated acquisition system. Automation improves reliability and efficiency, while reducing mental fatigue. Automation (as noted) could be focused on bid protest data alone (for example, gathering data as the study discussed below did), or could be integrated into broader efforts to digitalize the DOD's acquisition system. Where manual entry is still necessary, the data to be manually entered should be as simple as possible. Innovations of the Uniform Contract Format and standardization of GAO protest decisions have made it possible to automate (at least in part) the data collection process for merits decisions at GAO.²⁶¹ Those efforts highlight the potential benefits of integrating bid protest data into the DOD's evolving electronic acquisition systems.

This study confirmed that the Defense Department's current practices already may be able to support a highly automated analysis of contracting data—an advance that could include analyses of bid protests as a management tool, based on the Department's own procurement data. Currently, the DOD Procurement Data Standard (PDS) stipulates that an XML file²⁶² be output concurrently with each contract, which is created when using the current contract writing software.²⁶³ These XML files are automatically generated when the contracting officer writes a contract, requiring no extra input. The XML format maximizes computer legibility and could serve as a very valuable resource, as XML files should contain acquisition information (including potentially bid protest information) in a manner that can be extracted and input into regular management reports automatically. Our study indicated that currently, XML data are output only for contracts and not solicitations, due to the variations in the format of solicitations between different contracting vehicles. Reportedly, the necessary data standard to create XML files from solicitations has been developed, but that standard has not yet been fully implemented. Generating XML data for solicitations would allow bid protest data to be integrated with the solicitations which frame every acquisition, and thus would be a valuable tool in gathering bid protest data as part of a broader management effort.

²⁶¹ FAR 15.204-1. Over time, GAO merits decisions have become more and more consistently formatted, allowing for the programmatic extraction of data. See Dawson, *supra* note 257.

²⁶² The Extensible Markup Language (XML) standard marks "start" and "end" references around each piece of information and nests them hierarchically, so each piece of information is reliably discoverable.

²⁶³ NORTHROP GRUMMAN SPACE AND MISSION SYSTEMS CORPORATION, PROCUREMENT DATA STANDARD (PDS) BUSINESS RULES 2 (2010). Information on the PDS can be found here: <https://www.acq.osd.mil/asda/dpc/ce/ds/procurement-data-standard.html>. Information on XML files can be found here: https://www.fpds.gov/downloads/fpds-des-sdd-xml_data_extracts_content_usage_old.doc.

To make effective use of the procurement data related to bid protests, the data must be presented in a way that is easy to interrogate. Prior efforts to assess the federal bid protest system without robust data proved challenging, though extensive efforts were made. In 2013, Daniel Gordon published the results of a manual review of bid protests, in which he tracked forty-four sustained bid protests, to see whether, in each instance, the protester was awarded the contract in the end.²⁶⁴ Gordon's paper cited the paucity of data on bid protests as significantly hampering analytical efforts, as well as the challenge of contextualizing the number of protests against the denominator of total number of procurements. USASpending.gov was not launched until the following year so readily accessible contract-specific information was not available to support Gordon's study. Gordon had a research assistant who helped in the manual review, and they had relatively robust access to information from the protests studied. Although his analysis was as thorough as possible at the time, due to the inefficiencies of manual review he was able to correlate and analyze only forty-four bid protests to their eventual contract awards.²⁶⁵

Five years later, the RAND Corporation issued its own report on bid protests.²⁶⁶ Even with a Congressional mandate, RAND could not accomplish a number of its research goals because of a lack of readily available acquisition data.²⁶⁷ While the XML contract data in general could have helped RAND answer some of the unresolved questions, if XML data were generated for solicitations in particular, that data, which could be correlated to specific protests and acquisitions, could have been an even more powerful tool for the RAND researchers.²⁶⁸

In 2021, Will Dawson published an article on automated data extraction from GAO merits decisions.²⁶⁹ The 2021 article did not attempt to perform the depth of analyses as Gordon and RAND. The 2021 article instead focused on accessing and collating a broader dataset of published GAO merits decisions, rather than analyzing that dataset. The 2021 inquiry (which, as noted below, has been extended for this report) did demonstrate how useful data analysis could be, to transform data on bid protests into a management tool.

While data availability has improved since Gordon's study, the available data are not well organized and are incomplete, as noted above. Those deficiencies hamper analysis by requiring researchers to spend a disproportionate amount of time merely cleaning the data prior to interrogating it. Extracting and cleaning the data for this report took an average of three to four days to process to a point sufficient for analysis.²⁷⁰ However, once stabilized, extracting the data to create deliverable insights took only a few hours,

²⁶⁴ Daniel I. Gordon, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 500 (2013). At the time of his research, Gordon had extensive experience in GAO's protest system, as he had served in the Office of General Counsel and led the GAO protest program. At the time of the study, Gordon, an experienced bid protest attorney, was an associate dean at the George Washington University Law School.

²⁶⁵ *Id.*

²⁶⁶ See discussion *infra* pp. 3-4.

²⁶⁷ See Arena, *supra* note 2, at 3-5, Table 1.1.

²⁶⁸ See *id.* (XML contract data could have supported the RAND Report's interrogation of issues surrounding the ultimate contract (Study Elements 2, 4, 5, 7 and 9)).

²⁶⁹ Dawson, *supra* note 257. Will Dawson is one of the research scientists for the present study.

²⁷⁰ See *infra* App. B.

which demonstrates the value of outputting consistently reliable data (e.g., XML data) removing the time costs incurred the cleaning and processing steps.

While time intensive data collection and cleaning are manageable for one-off reports such as this, they constrain the analysis and mean, in practice, that the data output will likely render heavily qualified results. The ease with which specific insights are extracted once the data are stabilized points to the value of a well-organized and consistent data-collection system, allowing for expedited, accurate, and well-tailored reports at any time. The time-intensive nature of manual data-extraction would be eliminated if the XML data were more widely available, again perhaps by including bid protest data in a more integrated and automated acquisition data system.

The key to extracting meaningful data on bid protests relies on collating data on the protest and the underlying solicitation and contract. This process is straightforward, since Procurement Instrument Identifiers (PIIDs) create unique serial numbers for each solicitation or contract issued,²⁷¹ so long as: (1) the PIID of the solicitation and contract are paired; (2) the relevant PIIDs are demarcated in the protest materials; and, (3) the XML file for each relevant contract and solicitation is available.²⁷² Consolidation across databases could be achieved without significant cross-agency system integration, so long as PIIDs are consistently made available within documents. If the Contracting Officer managing the procurement uploaded the relevant documentation into a simple application, similar to the one proposed in the 2021 *Data Scarcity* article, which then extrapolated the data from all the relevant source documentation at once, that data could then be directed in real time to a database which could (among other things) offer reports on bid protest trends across the DOD at any time.

An example demonstrates the potential power of bid protest and acquisition data that are compiled and readily accessible for statistical analysis. Recently, the Senate passed the “Preventing Organizational Conflicts of Interest in Federal Acquisition Act” (Preventing OCIs Act), a bill which would order the FAR Council to improve the FAR’s guidance on organizational conflicts of interest (OCI).²⁷³ The analytical problem the Preventing OCIs Act raises is similar to Section 827 of the 2018 NDAA: Congress has identified a significant legal and policy issue to address but has few concrete data points available to identify specific solutions (to identify, for example, where and when OCIs are most likely to arise). Without detailed data, policymakers drafting legislation to address c OCIs (and members of the public assessing the Act’s potential impact) can propose only generalized guidance rather than data-supported solutions.

While cross-agency data collection is generally challenging, pre-existing reporting requirements relating to bid protests (for example, as part of an integrated contract writing system) could be used to capture the necessary data. In this scenario, the

²⁷¹ While not all solicitations use the traditional PIID format, each solicitation does have its own unique identifier of some sort. requiring the use of the traditional PIID format in all solicitations across the DOD would be a significant help for data-tracking, but may have unforeseen consequences, as most solicitations that do not use PIIDs avoid them because of the nature of the specific contracting vehicle (e.g., various multiple award style contracts, wherein many solicitations are issued for specific goods under umbrella contracts). Before advising such a large policy shift, further research would be required.

²⁷² FAR 4.1601, 4.1603(a)(3).

²⁷³ S. 3905, 117th Cong. § 2(a) (2022) (as passed by Senate Aug. 1, 2022).

integrated software would automatically notify DOD that a vendor has filed a protest at GAO, which creates a point in the process at which the Contracting Officer could collect the relevant data.²⁷⁴ Once the link between the PIID of the protested procurement and the solicitation is established, information based on the protest's docket information could be cross-referenced against the contract information.

One way to accomplish this might be to integrate a universal portal into the federal contract management software for all protesters filing protests against executive branch agencies. The protester could be required to enter the relevant information instead of a contracting officer. As this example illustrates, automation could shift a large portion of the data-entry burden to individual protesters instead of government personnel, an efficient reallocation of burdens to those parties with the most acute interest in ensuring that specific information is properly entered.

Ideally, this protest data system could be directly integrated into the larger DOD Contract Writing System. When the Standard Procurement System is retired in 2023, a new contract writing system will be implemented.²⁷⁵ The development of this program is being carried out by the Defense Logistics Agency (DLA) under the J6 Enterprise Tech Services Multiple Award, IDIQ contract for the Enterprise Contract Writing Module.²⁷⁶ While the initial efforts to launch a new product floundered,²⁷⁷ a protest tracking system such as the one proposed in this study reportedly could be integrated into the system in one to two months, to further improve the breadth and reliability of data being reported out. Integration of a bid protest module into such a program would make the process all the more streamlined by integrating the data collection process as a freestanding subroutine. If XML data for solicitations is collected, the barrier to integration and collection would be quite low. If such integration was not pursued, more data from the XML sheets could be made more widely available but would be significantly less efficient than publishing the materials together.

The aggregation of a robust and uniform dataset will be a powerful tool for the government and DOD for at least three key reasons: (1) This data will help empower Congress and policy makers within the DOD to have a better understanding of what is actually occurring with bid protests; (2) The collected data will 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; and, (3) the collected data will help set performance benchmarks for different contracting offices which hope to improve their performance over time.

The strategies discussed above can broadly be categorized into three approaches: (1) XML files are the most reliable, but may require integration into contract drafting software to be effective; (2) Automated extraction and entry, as proposed in the 2021 article and performed for this study, are more efficient than manual extraction and entry,

²⁷⁴ 4 C.F.R. § 21.3(a) (stating the requirements for notice of a bid protest at GAO).

²⁷⁵ RFQ No. SP4709-21-Q-1053; Oracle America, Inc., B-420136 et al., 2021 WL 58223024, 1 (Comp. Gen. Nov. 30, 2021) (solicitation and contract data on this initiative were not generally available, but this protest decision describes the scope of the solicitation).

²⁷⁶ See *id.*

²⁷⁷ See, e.g., Jason Miller, *Navy Pauses Work with CGI on Troubled Contract Writing System*, FEDERAL NEWS NETWORK (July 9, 2021, 12:35 PM), <https://federalnewsnetwork.com/acquisition/2021/07/navy-pauses-work-with-cgi-on-troubled-contract-writing-system/>.

but less reliable; (3) Manual entry would be the most flexible, because a human is manually reviewing material, but it is also the slowest and the most prone to inconsistencies. The XML-based system for gathering bid protest data could be integrated into the solicitation data collection process, leaving only the parsing of the actual protest information to automated extraction and entry. Because of the potential for human error and increased time costs, manual extraction and entry should be largely avoided, though it is a useful resource when all else fails. As recommended above, structuring the automated system to have individual protesters, to the maximum reasonable extent, enter the protest data which needs to be entered manually would be ideal, as it would collateralize their own self-interest to enter the data properly and would distribute the workload.

As the foregoing reflects, the questions put forward by Congress cannot, on presently available data, be fully answered. The agency surveys completed for this study (Appendix C) showed that DOD agencies do not currently gather the data needed to respond fully to Congress' questions. Some manually gathered data is available, but it is too fragmentary to provide reliable answers to the questions put by Congress. Analyses were also prepared using secondary data (GAO merits decisions correlated to contract award data, for example), but those too were limited by the available data (and deficiencies in that data). The study showed, however, that it may soon be possible to assess bid protest data as part of an integrated DOD automated acquisition system, which is currently evolving. It will require affirmative efforts (and resources) to integrate bid protests into that broader DOD system but doing so would make it simpler and easier to use bid protest information as a management tool, to improve acquisition across the Department.

Findings: Answers to Congress

Congress launched this study by asking for more detailed information on DOD bid protests and their impacts. Because bid protests are such a small fraction of all DOD procurement activity and the Defense Department has no mandatory reporting system, there is no uniform system for tracking protest information. Only some Defense Department agencies maintain informal internal systems of tracking and collecting data on agency-level protests, which is usually accessible by only a limited number of contracting personnel and acquisition attorneys. Other agencies with a low number of protests do not maintain any consolidated records of protest data outside the contract file.

Most agencies that do maintain data on protests, update protest data periodically during the protest process, while a small number update the data upon completion of the protest. There is no requirement that agencies submit agency-level protest data. Some agencies have internal policies that appoint the responsibility to submit agency-level protest data, while other agencies submit data only on request.

However, through surveys, interviews with personnel from over a dozen Defense Department agencies and industry groups, and an analysis of publicly available protest data, the investigators present the following findings.

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.²⁷⁸ 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.²⁷⁹

One of the data points that such a program would record is the protester and ultimate contract awardee's Unique Entity Identifier (UEI).²⁸⁰ 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

²⁷⁸ See *infra* App. C.

²⁷⁹ See Dawson, *supra* note 257238, at 151-52.

²⁸⁰ The Unique Entity Identifier system replaced the previous DUNS number standard on April 4, 2022. Susan Spenader, *Unique Entity ID (UEI) Replaces DUNS Number*, USCFR BLOG (Apr. 21, 2022, 2:15 PM), <https://blogs.uscfr.com/unique-entity-id-replaces-duns-number>.

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.²⁸¹ Data scientists collected the data for this study by programmatically extracting solicitation PIIDs²⁸² 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 data²⁸³ 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 of 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 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

²⁸¹ See *infra* App. C.

²⁸² Solicitation and RFP reference numbers were generally represented by either "traditional" or "non-traditional" reference numbers in the Merits Decisions. "Traditional" reference numbers are defined as those adhering to the structure described in FAR 4.1603(a)(5) (a 13-16 character string, structured as follows: a six-digit character string representing the issuing contracting office (the AAC number); two digits referencing the solicitation year; a letter delineating the contracting instrument type; then the sub-agency's internal serial number). "Non-traditional" reference numbers are any other identifying serial numbers which do not adhere to that structure.

²⁸³ Retrieved from https://www.usaspending.gov/download_center/award_data_archive.

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 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.²⁸⁴ 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 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.²⁸⁵ 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 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

²⁸⁴ See *infra* App. C.

²⁸⁵ See *id.*

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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ To properly pursue the question, a targeted survey would have to be developed and

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ See Hawkins, *supra* note 257.

submitted to a statistically relevant number (at least 1,000) 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.²⁸⁹ Because this dataset represents approximately 8% of all protests received in the relevant timeframe,²⁹⁰ 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.²⁹¹ Only a few of the agencies even track whether the protester ultimately wins 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

²⁸⁹ To quantify the number and disposition of protests filed against the DOD, data from USASpending was able to be paired, using PIIDs, with 2,015 out of 5,250 GAO merits decisions collected since 2008. Of the 2,000 protests paired with USASpending data, 1,521 of the protests originated with the DOD. The DOD contracts had a sustain rate of 7.15%, compared to the average sustain rate in the larger dataset of 8.64%. Both of these figures are below the actual reported overall sustain rate of 16.27% during the time period (2008-2022). This is partially explained by the fact that our current dataset has a sustain rate of 13.39%, indicating some bias in the number we captured. We have 5,993 of 7,218 merits decisions. The drop from 13.39% to 8.64% is significant enough to indicate some level of further bias. The uniform difference may suggest that for some reason, denied GAO merits decisions tend to include PIIDs in the written material significantly more than sustained merits decisions. Why that is the case is more a curiosity than material to the research question. There is no way to know whether the similarity in figures is causally related or a coincidence. That said, adjusting based on that offset, the total number of protests received by DOD from 2008 to 2022 can be extrapolated out to approximately 4,925, with a sustain rate of approximately 16.89%. Bid protests should be of particular importance to the DOD as, according to these figures, the DOD receives over 75% of all bid protests filed with the GAO.

²⁹⁰ As the data summarized in Appendix B show, 2,000 protests were able to be paired with their eventual contract from 2008-2022. This is a randomized cross section of the merits decisions published by GAO. As such, it is a good cross section, since there is no selective pressure that would obfuscate the outcomes (except for factors that lead to merits decisions). As such the information must be considered as being representative but also incomplete.

²⁹¹ See *infra* App. C.

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 DOD.

Conclusion

In its conclusion, the Section 809 Panel observed that the mission of 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."²⁹² In order to achieve that goal the companies that seek to do business with 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 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 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 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 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 GAO, leaving them with the sole option, if they want to stop the procurement,

²⁹² DRABKIN, *supra* note 31, at 523.

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 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 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 DOD. What data exists appears to be manually generated and appears to be dependent on the activity within 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 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.²⁹³ 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 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. 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.

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.

²⁹³ In 2000, the Procurement Executive Council, then chaired by Dee Lee, Administrator of the Office of Federal Procurement Policy, recommended the creation of an end-to-end software tool beginning with requirements generation and ending with contract closeout and final payment. It would/could include financial, property protests, claims, as well as other disciplines that are part of the procurement process. Such a system would harvest data as it is generated (enter once use many times) and make it available to authorized users for, among other purposes, to identify issues in either individual contracting activities or the overall procurement system.

Appendix A. Protest Forums

Table 2. Bid Protest Characteristics by Forum

	Agency	GAO	COFC
Forum	Filed with the Contracting Officer or Agency Protest Official.	GAO, an arm of Congress, hears protests as an independent administrative forum.	The COFC sits in Washington D.C. and may hold trial at any location that is convenient for the parties. Cases before the COFC are to be heard before and decided by one judge.
Subject Matter Jurisdiction	Protest means a written objection by an interested party to (1) a solicitation or other request, (2) the cancellation of the solicitation or other request, (3) an award or proposed award of the contract, or (4) a termination or cancellation of an award based in whole or in part on improprieties concerning the award of the contract.	GAO may hear protests filed against federal agencies' procurement actions. GAO's authority arises under the Competition in Contracting Act of 1984.	The COFC is authorized to hear money claims founded upon the Constitution, federal statutes, contracts, executive regulations and bid protests. The ADRA granted it original jurisdiction over bid protests.
Standing	Interested party for the purpose of filing a protest means 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.	GAO's rules afford standing to "interested parties," much as in agency-level protests.	"Interested parties" may bring protests in the COFC under standards much like those in agency-level and GAO protests.
Standard of Review	FAR 33.103 requires only that decisions in agency-level protests be well-reasoned and explain the agency's position.	GAO reviews agency actions for "reasonableness, and to ensure, consistent with the solicitation, compliance with procurement statutes and regulations."	COFC has a standard of review grounded in the APA: COFC must "hold unlawful and set aside agency action findings, and conclusions found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"
Timeliness	If the protest results from an amendment to the solicitation a protester must file before the next due date for revised proposals. If a disappointed offeror wants to file a protest they cannot file until after the debriefing, and they have until 10 days after the debriefing to do so.	A protester has 10 days after the adverse agency decision to file a protest. According to the CICA Stay (Automatic Stay) an agency cannot award a contract once they have received notification of a proper protest. If the contract has already been awarded the contracting officer must suspend performance.	COFC does not have a specific statute of limitations. Any serious delays in filing may harm the protester's case or cause a dismissal. COFC requires 24-hours' advance notice from a protester filing the case.
Administrative Record	Not defined.	The agency must only produce documents relevant to its decision.	COFC Rules Appendix C broadly defines categories of record materials agency must produce.
"Put on Hold"	At the agency's discretion.	Automatic Stay	There is no automatic stay, but a protester may seek an injunction to keep the agency from moving forward with the procurement pending the outcome of the litigation.
Difficulty for the Protester to Win	Data not available.	Of the received protest filings, the GAO sustained 15 % in the FY 2020, and sustained 13 % of in the FY 2019. According to GAO, the effectiveness rate for the FY 2020 marked 51%. Effectiveness rate measures are based on a protester obtaining some form of relief from the agency, as reported to the GAO, either as a result of corrective action or a sustained protest.	The COFC may, if it considers it proper, award both declaratory and injunctive relief. The COFC will usually not tell the agency to award the contract to a protester even if the protester is successful. If a party wishes to appeal the COFC decision the appeal must be filed 60 days after the entry of judgment and taken to the Federal Circuit.

To facilitate assessment of potential reforms, this appendix reviews the salient aspects of the three bid protest forums available in the U.S. federal government's acquisition system.

GAO Bid Protests

While agency-level protests offer a fast and inexpensive means of addressing concerns regarding contract formation, in practice they are seldom used in the federal system. In contrast, far more protests are filed every year before the Government Accountability Office (GAO), which offers an independent, well-regarded forum for vendors seeking to challenge a federal procurement decision.²⁹⁴ As the discussion below reflects, the GAO procedures in many ways parallel both the agency-level and Court of Federal Claims' (COFC) bid protest procedures.

Forum

Congress established the General Accounting Office (now the Government Accountability Office) in 1921 as an oversight agency within the legislative branch to control government spending.²⁹⁵ For several years, GAO was the only forum available for a vendor to challenge a federal procurement decision.²⁹⁶ In 1924, companies began complaining to GAO that agencies had not awarded their contracts properly.²⁹⁷ After careful consideration, GAO ultimately decided that it could hear bid protests under GAO's responsibility to manage funds appropriated by Congress, i.e., GAO's "account settlement function."²⁹⁸ Since then, GAO has served as a model for independent administrative review of procurement decisions, both across the United States and around the world.

Breadth of Jurisdiction

Today, GAO's statutory authority to hear bid protests of federal agency procurements derives from the Competition in Contracting Act of 1984 (CICA), which granted GAO authority to publish its own bid protest regulations.²⁹⁹ Procurements are supplies or services that the federal government procures by contract with appropriated funds.³⁰⁰

A bidder or offeror may protest a violation of a procurement statute or regulation at GAO.³⁰¹ GAO must also accept protests that are about errors in a solicitation that are apparent on its face, like patent ambiguities or defects.³⁰² GAO's jurisdiction under statutory authority depends on the status of the agency that's conducting the procurement and the nature of the transaction at issue.³⁰³ The term "federal agency"

²⁹⁴ GAO's regulations for bid protests are located at 4 C.F.R. Part 21.

²⁹⁵ § 301, 42 Stat., at 23.

²⁹⁶ CIBINIC ET AL., *supra* note 37, ch. 12.

²⁹⁷ Gordon, *supra* note 21, at 147, 154-62.

²⁹⁸ *Id.* at 148.

²⁹⁹ 31 U.S.C. § 3551(a) (now at § 3552(a)).

³⁰⁰ FAR 2.101 (defining procurement and acquisition).

³⁰¹ See 31 U.S.C. § 3552(a).

³⁰² See 4 C.F.R. § 21.2(a).

³⁰³ See *generally* CIBINIC ET AL., *supra* note 37, ch. 12.

covers essentially all government agencies that use appropriated funds.³⁰⁴ GAO does not rely on the procurement's use or funding source to define jurisdiction; instead, the key factor is that a federal agency is conducting the procurement.³⁰⁵ GAO will only hear a protest regarding non-appropriated funds when it is acting as a conduit for an agency.³⁰⁶

Standing to Protest

According to GAO's protest regulations, only an interested party, i.e., "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award [or failure] to award the contract," may file a bid protest with GAO.³⁰⁷ If bidding has not opened yet or the proposal submission date has not been reached, a vendor must establish that it has an interest in participating in the competition for it to be a prospective bidder.³⁰⁸ Once bidding has opened or submission of proposals have been fulfilled the protester generally must be a bidder which—if its protest grounds were sustained—would be in line for award.³⁰⁹ A higher-priced bidder can challenge the award decision if they successfully demonstrate that the lower-priced bidders would not be able to complete performance of the contract.³¹⁰

In negotiated procurement, GAO must determine if a protester qualifies as an interested party by the most likely outcome if the protest is successful.³¹¹ GAO may still consider a vendor not actively competing for the award as an interested party if the vendor would have the opportunity to compete if GAO recommends that the agency recompile the solicitation.³¹²

³⁰⁴ *Id.*

³⁰⁵ CPT Text-Computer GmbH, B-222037, 86-2 CPD ¶ 29 at 3 (Comp. Gen. July 3, 1986) ("our jurisdiction under CICA extends to bid protests challenging procurements conducted by any federal agency; our jurisdiction does not depend on the intended use of the items being acquired or the source of the funds for the acquisition"); Artisan Builders, B-220804, 86-1 CPD ¶ 85 at 1 (Comp. Gen. Jan. 24, 1986).

³⁰⁶ Premiere Vending, 73 Comp. Gen. 213, 215 (1994) ("where the protester asserts that a NAFL [nonappropriated fund instrumentality] is acting as a mere conduit for the agency in order to circumvent the CICA mandate for full and open competition, we will review the protest").

³⁰⁷ 4 C.F.R. § 21.0(a)(1).

³⁰⁸ *E.g.*, Total Procurement Servs., Inc., B-272343 et al., 96-2 CPD ¶ 92 at 3 (Comp. Gen. Aug. 29, 1996) ("the protester generally must show that it intends to compete under the solicitation, and, where appropriate, that it has the necessary capacity and experience to compete; that it has competed in the past on similar projects; or that it has performed similar projects in the past"); D.J. Findley, Inc., B-221096, F86-1 CPD ¶ 121 at 1 (Comp. Gen. Feb. 3, 1986) (finding that the protester is an interested party even though, during the solicitation period, it indicated to the procuring agency that it was not interested in competing for the contract).

³⁰⁹ Int'l Data Prods. Corp., B-274654 et al., 97-1 CPD ¶ 34 at 3 (Comp. Gen. Dec. 26, 1996).

³¹⁰ Pro. Med. Prods., Inc., B-231743, 88-2 CPD ¶ 2 at 1 (Comp. Gen. July 1, 1988) ("we consistently have refused to consider the merits of a protest where the protester was other than the next lowest bidder [and] failed to challenge all bids that stood between the protester and the award").

³¹¹ *See, e.g.*, Allied Tech. Grp., B-402135 et al., 2010 CPD ¶ 152 at 9 (Comp. Gen. Jan. 21, 2010) (denying a protest, in part, because the agency found the protester's quotation unacceptable, the protester was ineligible to protest other aspects of the procurement).

³¹² Teltara, Inc., B-245806, 92-1 CPD ¶ 128 at 1 (Comp. Gen. Jan. 30, 1992) ("Protester is an interested party to protest the adequacy of specifications of the invitation for bids, despite the presence of intervening bids, because the appropriate remedy (if the protest were sustained) would be resolicitation."); Remtech, Inc., 70 Comp. Gen. 165, 166-67 (1991).

Limits of the Forum

GAO's regulations list several types of protests that GAO will not consider, to include:³¹³

- A subcontractor protest except by the procuring agency's request or when the government substantively directs the subcontract;³¹⁴
- A protest that a court has dismissed with prejudice;³¹⁵ or
- A protest regarding the suspension or debarment of a contractor.³¹⁶

The Federal Acquisition Streamlining Act of 1994 (FASA) precludes protests concerning task or delivery orders under IDIQ contracts unless the protest rests on the claim that the order has increased the "scope, period or maximum value of the contract under which the order is issued"³¹⁷ or the task or delivery order's price exceeds \$10 million (civilian agencies)³¹⁸ or \$25 million (defense agencies).³¹⁹

Agencies could possibly issue different or separate task orders to avoid the \$10 million threshold requirement because GAO will not aggregate separate task orders to reach the jurisdictional threshold.³²⁰ Agencies may be specially exempted from GAO's protest

³¹³ 4 C.F.R. § 21.5.

³¹⁴ 4 C.F.R. § 21.5(h). As GAO explained:

Under the Competition in Contracting Act of 1984 (CICA), our Office has jurisdiction to resolve bid protests concerning solicitations and contract awards that are issued "by a Federal agency[]" . . . where, as a result of the government's involvement in the award process, or the contractual relationship between the prime contractor and the government, the subcontract in effect was awarded on behalf of--i.e., "by or for"--the government, and federal procurement laws and regulations otherwise would apply. . . . [I]t now is our view that our jurisdiction generally does not extend to awards made by others but "for" the government; we therefore no longer review protests of such subcontract awards where, as here, the agency involved has not requested in writing that we do so.

RGB Display Corp., B-284699, 2000 CPD ¶ 80 at 2 (Comp. Gen. May 17, 2000).

³¹⁵ Cecile Indus., Inc., B-211475, 83-2 CPD ¶ 367 at 1 (Comp. Gen. Sept. 23, 1983) ("Dismissal with prejudice of a complaint filed in court constitutes a final adjudication on the merits, barring further action by the General Accounting Office on a protest involving the same issue.").

³¹⁶ 4 C.F.R. § 21.5(i) ("Challenges to the suspension or debarment of contractors will not be reviewed by GAO. Such matters are for review by the agency in accordance with the applicable provisions of the Federal Acquisition Regulation.").

³¹⁷ 10 U.S.C. § 2304c(d) (now 10 U.S.C. § 3406(f)); 41 U.S.C. § 251(e) (now 41 U.S.C. § 4106(f)).

³¹⁸ § 843, 122 Stat., at 236-38; The MayaTech Corp., B-419313, 2020 CPD ¶ 366 at 3 (Comp. Gen. Nov. 9, 2020) ("Under the Federal Acquisition and Streamlining Act of 1994, as modified by the National Defense Authorization Act for Fiscal Year 2017, our Office is authorized to hear protests of task orders that are issued under multiple-award contracts established within civilian agencies (or protests of the solicitations for those task orders) where the task order is valued in excess of \$10 million, or where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is issued.").

³¹⁹ 10 U.S.C. § 3406(f); 4 C.F.R. § 21.5(l); U.S. Info. Techs. Corp., B-419265, 2020 CPD ¶ 382 at 2 (Comp. Gen. Nov. 17, 2020) ("Under the Federal Acquisition and Streamlining Act of 1994, as modified by the National Defense Authorization Act for Fiscal Year 2017, our Office is authorized to hear protests of task orders that are issued under multiple-award contracts established within defense agencies (or protests of the solicitations for those task orders) where the task order is valued in excess of \$25 million, or where the protester asserts that the task order increases the scope, period, or maximum value of the contract under which the order is issued.").

³²⁰ Armorworks Enters., LLC, B-401671.3, 2009 CPD ¶ 225 at 2 (Comp. Gen. Nov. 6, 2009) (denying a protest of several delivery orders for the same item with a combined value of \$21 million because the individual orders did not reach the \$10 million threshold).

jurisdiction; for example, the Postal Service is exempt from laws regarding public and federal contracts.³²¹

Standard of Review

GAO does not review federal agency procurement activity *de novo*. Rather, GAO reviews agency actions for reasonableness, compliance with the solicitation, and compliance with procurement statutes and regulations.³²² The burden generally is on the protester to show that the agency's decision was unreasonable.³²³ GAO will consider the entire record, including statements and arguments that succeed the protest, so long as the statements are credible.³²⁴ During review, GAO is also willing to investigate factual allegations regarding agency award decisions.³²⁵ GAO presumes, to a high degree, that agencies act reasonably, so the protester must closely support any allegations of bad faith that the protester makes against that presumption.³²⁶ It is also up to the protester to prove that their protest was timely.³²⁷

Timeliness

If the protest results from an amendment to the solicitation, a protester must file its protest at GAO before the next due date for proposals.³²⁸ When the agency offers unsuccessful offerors a debriefing, the offeror has 10 days after the debriefing to file a protest.³²⁹ In the event the agency excludes an offeror from the competitive range early in the procurement, the government may choose to delay a debriefing until after

³²¹ 39 U.S.C. § 410(a) (1982) ("the Postal Service is specifically exempted from any 'Federal law dealing with public or Federal contracts,' except for those laws enumerated in 39 U.S.C. § 410(b); CICA is not included in the list of statutes made applicable to the Postal Service by 39 U.S.C. § 410(b).").

³²² Philips Med. Sys. N. Am. Co., B-293945.2, 2004 CPD ¶ 129 at 2 (Comp. Gen. June 17, 2004) ("In reviewing a protest against an agency's proposal evaluation, our role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations.").

³²³ See NCI Info. Sys., Inc. B-417752 et al., 2019 CPD ¶ 363 at 5 (Comp. Gen. Oct. 17 2019).

³²⁴ E.g., Management Sys. Int'l Inc., B-409415 et al., 2014 CPD ¶ 117 at 4, 6 (Comp. Gen. Apr. 2 2014); AT&T Corp., B-260447, 96-1 CPD ¶ 200 at 5 (Comp. Gen. Mar. 4, 1996) ("In reviewing a selection decision, we look to the entire record, including statements and arguments made in response to a protest, so that we can determine whether the selection decision is supportable; we do not limit our review to the question of whether the agency determination was properly documented at the time it was made." (citing Burnside-Ott Aviation Training Ctr., Inc., B-233113 et al., 89-1 CPD ¶ 158 (Comp. Gen. Feb. 15, 1989))).

³²⁵ See Redstone Tech. Servs., B-259222, 95-1 CPD ¶ 181 at 1 (Comp. Gen. Mar. 17, 1995) ("Contracting officer's cost/technical tradeoff decisions resulting in awards to higher technically rated (based on adjectival ratings), significantly higher evaluated cost offerors are unreasonable where the contracting officer mechanically applied the solicitations' evaluation methodology and the purported reasons for his decisions are not supported by the contemporaneous evaluation and source selection documentation.").

³²⁶ Union Nat. Gas Co.-Recon., B-224607, Apr. 9, 1987, 87-1 CPD ¶ 390 at 1 (Comp. Gen. Apr. 9, 1987) ("Showing of bad faith requires undeniable proof that procuring activity had a malicious and specific intent to injure the party alleging bad faith . . .").

³²⁷ 4 C.F.R. §§ 21.1(c)(6), 21.2(b).

³²⁸ 4 C.F.R. § 21.2(a).

³²⁹ 4 C.F.R. § 21.2(a)(2).

awarding the contract if it is in the government's best interests.³³⁰ The delay then proportionately extends the offeror's deadline to file a protest.³³¹

When a protester initially filed a protest with the agency then seeks to renew its protest at GAO, the protester has up to 10 days after the initial adverse agency decision to submit its protest.³³² It is the protester's responsibility to use due diligence to gather information in relation to their protest.³³³

Per the "CICA stay", an agency cannot award a contract once it has received notification of a protest at GAO.³³⁴ If the contract has already been awarded, the contracting officer must suspend performance.³³⁵ But, an automatic stay is triggered only by notice from GAO.³³⁶

Difficulty/Likelihood of Success

GAO submits annual statistics regarding bid protests to Congress.³³⁷ From FY 2000 to FY 2020, the number of bid protests GAO received almost doubled.³³⁸ In a 2009 report to Congress, GAO explained why, in GAO's view, bid protests at GAO do not cause an unwarranted disruption in DOD procurements:

The GAO bid protest process significantly reduces potential disruptions to DOD procurements as a result of three factors:

- GAO consistently closes more than 50 percent of all protests involving DOD procurements within 30 days of filing;

³³⁰ FAR 15.505(a)(2); *see also id.*; *Fumigadora Popular, S.A.*, B-276676 Apr. 21, 1997, 97-1 CPD ¶ 151 (Comp. Gen. Apr. 21, 1997). The timeline to qualify for a statutory stay—the deadline which must be met after a debriefing in order to trigger an automatic stay of the procurement proceedings under CICA—is generally shorter. *E.g.*, *NIKA Techs., Inc. v. United States*, 987 F.3d 1025, 1028 (Fed. Cir. 2021) ("One statutory incentive for bid protestors to file claims at the GAO rather than the Court of Federal Claims is that a bid protester is entitled to invoke a stay on procurement for the duration of the GAO proceedings. To invoke this stay, the protester must file at the GAO quickly, before one of two deadlines: within ten days of the contract award or within five days of the debriefing date offered for a required debriefing. These deadlines are codified in 31 U.S.C. § 3553(d), the statute at issue here We hold that the plain meaning of the statute is that the deadline in 31 U.S.C. § 3553(d)(4)(A)(ii) is five days after receipt of debriefing.").

³³¹ 31 U.S.C. § 3553(d)(4)(b).

³³² 4 C.F.R. § 21.2(a)(3).

³³³ *Automated Med. Prods. Corp.*, B-275835, 97-1 CPD ¶ 52 at 2 (Comp. Gen. Feb. 3, 1997) ("a protester may not passively await the receipt of information providing a basis for protest; rather, the protester has an affirmative obligation to diligently pursue information which may form a basis for protest. . . . When information is obtainable through alternative means, a protester's failure to utilize the most expeditious approach may constitute a failure to diligently pursue that information."); *Prods. for Indus.*, B-257463, 94-2 CPD ¶ 128 at 3 (Comp. Gen. Oct. 6, 1991); *Adrian Supply Co.-Recon.*, B-242819 et al., 91-2 CPD ¶ 321 at 2 (Comp. Gen. Oct. 9, 1991) ("if a protester seeks a document that is not relevant to the protest [and so not available under GAO's protest rules], the protester . . . must instead pursue the document under FOIA.").

³³⁴ 31 U.S.C. §§ 3553(c), (d); 4 C.F.R. § 21.6.

³³⁵ 31 U.S.C. § 3553(d); 4 C.F.R. § 21.6.

³³⁶ 31 U.S.C. § 3553(c).

³³⁷ 31 U.S.C. § 3554(e)(2).

³³⁸ GAO received 1,152 bid protest filings in FY 2000 and 2,149 in FY 2020. U.S. GOV'T ACCOUNTABILITY OFF., B-158766, REPORT TO CONGRESS ON BID PROTEST DATA FOR FISCAL YEAR 2000 (2000); U.S. GOV'T ACCOUNTABILITY OFF., B-158766, REPORT TO CONGRESS ON BID PROTEST DATA FOR FISCAL YEAR 2020 (2020).

- The remaining DOD protests must be, and are, resolved within 100 days of filing; and
- CICA permits agencies to proceed with contract performance even before a protest is resolved when the goods or services are urgently needed, or when proceeding is in the best interests of the United States.

GAO's regulations and procedures currently provide GAO the ability to promptly close protests that do not merit further development. GAO does not need to determine that a protest is "frivolous" to promptly close it, and, in our view, making such a determination could add substantial costs to the protest process and have the unintended consequence of discouraging participation in federal contracting and, in turn, limiting competition.³³⁹

The effectiveness rate for GAO bid protests for FY 2020 was 51%.³⁴⁰ A protest is "effective" when the protestor obtains "some form of relief from the agency, as reported to the GAO, either as a result of voluntary agency corrective action or [GAO] sustaining the protest."³⁴¹ This is a significant increase from previous years, which saw an effectiveness rate in the lower 40% range.³⁴²

COFC Bid Protests

While the GAO hears far more protests than courts every year, COFC is becoming an increasingly important part of the federal bid protest regime. COFC has original jurisdiction to hear bid protests, but it can also hear protests previously brought at an agency or GAO. COFC, at least functionally, hears "appeals" to GAO protests, although the Court is not formally or legally an appellate forum. The Court's procedures mirror procedures at the agencies and GAO in many ways, although the Court's bid protest procedures (which largely derive from traditional administrative litigation under the Federal Rules of Civil Procedure) tend to be more formal and structured.

³³⁹ U.S. GOV'T ACCOUNTABILITY OFF., B-401197, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS (2009).

³⁴⁰ U.S. GOV'T ACCOUNTABILITY OFF., B-158766, REPORT TO CONGRESS ON BID PROTEST DATA FOR FISCAL YEAR 2020 (2020).

³⁴¹ *Id.*

³⁴² *Id.*

Forum

The COFC sits in Washington D.C. and may hold trial at any convenient location.³⁴³ A single judge hears and decides a case brought before the COFC.³⁴⁴ The court's up to sixteen judges, appointed by the President and Senate-confirmed, sit on the court for fifteen years.³⁴⁵ Because COFC's decisions are non-precedential, the Federal Circuit resolves conflicts in the bid protest decisions issued by individual judges of the COFC.³⁴⁶ The COFC's rules derive from the Federal Rules of Civil Procedure.³⁴⁷

Breadth of Jurisdiction

The Tucker Act provides the COFC authority “to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States.”³⁴⁸ The Court of Claims (the COFC's predecessor court) interpreted this language from the Tucker Act to mean that the government had an implied-in-fact contract to treat bids fairly when it publishes a solicitation.³⁴⁹ The Federal Courts Improvement Act (FCIA) granted what is today the COFC (as the successor court to the Court of Claims) authority “to afford complete relief on any contract claim brought before the contract is awarded.”³⁵⁰ The Administrative Dispute Resolution Act clarified that the COFC has jurisdiction to resolve pre-award and post-award protests.³⁵¹ The COFC shares jurisdiction with the U.S. District courts to hear claims under \$10,000, under the “Little Tucker Act.”³⁵² Following passage of the ADRA, district courts retained concurrent jurisdiction with the COFC over protests that do not involve procurement

³⁴³ 28 U.S.C. § 173 (“The principal office of the United States Court of Federal Claims shall be in the District of Columbia, but the Court of Federal Claims may hold court at such times and in such places as it may fix by rule of court. The times and places of the sessions of the Court of Federal Claims shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Court of Federal Claims with as little inconvenience and expense to citizens as is practicable.”).

³⁴⁴ 28 U.S.C. § 174.

³⁴⁵ 28 U.S.C. § 172 (“Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years. . . . Each judge shall receive a salary at the rate of pay, and in the same manner, as judges of the district courts of the United States.”).

³⁴⁶ The COFC is bound by the precedent of the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, and the COFC's predecessor court, the United States Court of Claims. See, e.g., *Kaetz v. United States*, 159 Fed. Cl. 378, 380 (2022), appeal dismissed, No. 2022-1812, 2022 WL 2898954 (Fed. Cir. July 22, 2022).

³⁴⁷ The COFC has issued a special set of rules governing bid protests brought before the court, Appendix C to the Rules of the U.S. Court of Federal Claims. Reference materials regarding protests brought before the COFC are published on the COFC website: <https://www.uscfc.uscourts.gov/bid-protest-info>.

³⁴⁸ 28 U.S.C. § 1491

³⁴⁹ *Keco Indus., Inc., v. United States*, 428 F.2d 1233, 1236 (Ct. Cl. 1970).

³⁵⁰ 96 Stat. 25, 40 (1982) (“To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.”); see also *Safeguard Base Operations, LLC v. United States*, 989 F.3d 1326, 1343 (Fed. Cir. 2021) (we construe [28 U.S.C.] § 1491(b)(1) to provide the Claims Court with jurisdiction over implied-in-fact contract claims in the procurement context and construe § 1491(a) to govern all other implied-in-fact contract claims. Section 1491(b)(2) explicitly authorizes the Claims Court to grant the relief historically associated with implied contract bid protest claims in the procurement context—‘monetary relief limited to bid preparation and proposal costs’ while also permitting other forms of relief . . .”).

³⁵¹ 110 Stat. 3870 (1996).

³⁵² 28 U.S.C. § 1346 (the “district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . . Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States”).

(such as a protest related to a solicitation involving the lease of a government property).³⁵³

The COFC has authority to award declaratory and injunctive relief at its discretion.³⁵⁴ If a party in a matter before COFC would like to appeal a decision of the COFC, an appeal must be taken to the Federal Circuit within 60 days of entry of judgment before the COFC to do so.³⁵⁵

As noted, an agency may issue an override of the “automatic” stay imposed by the Competition in Contracting Act, to proceed with the contracting action. The affected protester may then seek relief in the COFC, and the COFC may issue an injunction barring the agency from proceeding with the contract, pending the protest at GAO.³⁵⁶ If a protester thus successfully challenges an override, the COFC may issue declaratory relief that in effect keeps the CICA stay in place pending the protest.³⁵⁷

Standing to Protest

Under the ADRA, the COFC has jurisdiction “to render judgment on an action by an *interested party* objecting to a solicitation . . . for bids or proposals[,] for a proposed contract or to a proposed award[, or for] the award of a contract or any alleged violation of statute or regulation in connection with a procurement.”³⁵⁸ The statutory definition of federal agency for purposes of the COFC’s jurisdiction is broader than that of GAO,³⁵⁹ and includes any department or independent establishment of the United States or any corporation in which the United States has proprietary interest.³⁶⁰

An interested party is someone who has is “an actual or prospective bidder” and “whose direct economic interest would be affected by the award of the contract or by failure to

³⁵³ In *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238, 1246 (Fed. Cir. 2010), the Federal Circuit explained:

Congress did not intend to alter or restrict the Court of Federal Claims’ existing jurisdiction in cases not covered by the new statute [the ADRA]. Similarly, the repeal of district court jurisdiction over bid protests in the ADRA made clear that the district court jurisdiction was repealed only where the new jurisdiction was substituted. Section 12(d) of the Act provided that “the jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code . . . shall terminate on January 1, 2001 unless extended by Congress.” ADRA § 12(d), 110 Stat. at 3874–76.12 We conclude that the [COFC’s] implied-in-fact jurisdiction over nonprocurement solicitations survived the enactment of 1491(b)(1).

Admittedly, dividing jurisdiction between the Court of Federal Claims and the district courts for nonprocurement bid protests may lead to similar problems that led to the enactment of 1491(b)(1). However, if the statute is to be amended to solve this problem, that amendment must be undertaken by Congress and not this court.

Id. at 1246.

³⁵⁴ 28 U.S.C. § 1491(b)(2).

³⁵⁵ 28 U.S.C. § 1295(a)(3); Fed. R. App. P. 4(a)(1)(B).

³⁵⁶ *Reilly’s Wholesale Produce v. United States*, 73 Fed. Cl. 705, 711 (2006).

³⁵⁷ See *Supreme Foodservice GmbH v. United States*, 109 Fed. Cl. 369, 369-97 (2013) (“the Court concludes that its declaration that the override decision dated December 21, 2012, was issued arbitrarily and in violation of 31 U.S.C. § 3553(d)(3)(C)(i), is sufficient to reimpose the stay of contract performance”).

³⁵⁸ 28 U.S.C. § 1491(b)(1).

³⁵⁹ 4 C.F.R. § 21.0; *Emery Worldwide Airlines, Inc. v. United States*, 264 F. 3d 1071, 1080 (Fed. Cir. 2001).

³⁶⁰ 28 U.S.C. § 451.

award the contract.”³⁶¹ This means that a protester must have been participating in or have been eligible to participate in the procurement and receive the contract.³⁶² The protester must also show that were it not for the mistake of the agency, the protester would have had a substantial chance of receiving the award.³⁶³

Limits of Forum

If a new procurement is not genuinely at issue, the COFC may refuse to exercise jurisdiction under the ADRA to enjoin termination of a contract or to enjoin a resolicitation.³⁶⁴ COFC has similarly declined to exercise jurisdiction in matters involving contract administration.³⁶⁵ As at GAO, the Federal Acquisition Streamlining Act (FASA) bars protests at the COFC “in connection with the issuance or proposed issuance of a task or delivery order” under an IDIQ contract unless the order “increases the scope, period, or maximum value of the contract under which the order is issued.”³⁶⁶ FASA does not, however, raise a similar bar against protests of task or delivery orders placed under the General Services Administration’s Multiple Award Schedule (MAS) contracts - those protests can still be brought at the COFC.³⁶⁷

³⁶¹ Am. Fed’n Gov’t Employees, AFL-CIO v. United States, 258 F.3d 1294, 1299, 1302 (Fed. Cir. 2001).

³⁶² Rex Serv. Corp. v. United States, 448 F.3d 1305, 1308 (Fed. Cir. 2006) (“Here, because Rex could have bid, but chose not to, it cannot be considered a prospective bidder. . . . It is not relevant to Rex’s status that it filed a pre-award agency protest, or that it alleges department ‘illegalities’ prejudiced its ability to bid. It ‘could have [bid] for the contract award . . . and could have utilized the protest procedures available to an interested party to correct [the] deficiencies it perceived in the procurement process.’”); CGI Fed. Inc. v. United States, 779 F.3d 1346 (Fed. Cir. 2015).

³⁶³ Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581-82 (Fed. Cir. 1996) (“A protester must show not simply a significant error in the procurement process, but also that the error was prejudicial, if it is to prevail in a bid protest. . . . To establish competitive prejudice, a protester must demonstrate that but for the alleged error, there was a ‘substantial chance that [it] would receive an award—that it was within the zone of active consideration.’”).

³⁶⁴ Data Monitor Sys., Inc. (DMS) v. United States, 74 Fed. Cl. 66 (2006).

³⁶⁵ Gonzalez McCaulley Inv. Group, Inc. v. United States, 93 Fed. Cl. 710 (2010); Griffy’s Landscape Maint. LLC v. United States, 51 Fed. Cl. 667 (2001); Control Data Sys., Inc. v. United States, 32 Fed. Cl. 520 (1994); see, e.g., Kellogg Brown & Root Servs., Inc. v. United States, 117 Fed. Cl. 764, 768-70 (2014); Gov’t Tech Servs. LLC v. United States, 90 Fed. Cl. 522, 527, 529-31 (2009).

³⁶⁶ 41 U.S.C. § 4106(f); 10 U.S.C. § 2304(e); SRA Int’l Inc. v. United States, 766 F.3d 1409, 1413. The SRA Int’l decision explained:

The statutory language of FASA is clear and gives the court no room to exercise jurisdiction over claims made “in connection with the issuance or proposed issuance of a task or delivery order.” Even if the protestor points to an alleged violation of statute or regulation . . . the court still has no jurisdiction to hear the case if the protest is in connection with the issuance of a task order. We acknowledge that this statute is somewhat unusual in that it effectively eliminates all judicial review for protests made in connection with a procurement designated as a task order—perhaps even in the event of an agency’s egregious, or even criminal, conduct. Yet Congress’s intent to ban protests on the issuance of task orders is clear from FASA’s unambiguous language.

Additionally, we note that Congress has enacted multiple amendments to FASA that indicate Congress’s reaffirmed intent to bar protests on the issuance of task orders. . . . In each instance, Congress left the general ban on protesting the issuance of task orders undisturbed.

Id. at 1413.

³⁶⁷ See, e.g., Idea Int’l Inc. v. United States, 74 Fed. Cl. 129, 135-36 (2006).

Standard of Review

Per the ADRA, the COFC reviews federal agencies' procurement decisions under the standard set forth in the Administrative Procedures Act. COFC must "hold unlawful and set aside agency action findings, and conclusions found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"³⁶⁸

After a protester files a protest, COFC typically schedules a status conference with the parties shortly after an action has begun, to address, among other things, the content and timeline for filing the administrative record.³⁶⁹ Appendix C to the COFC's rules provides an extensive list of documents the agency shall include in the administrative record.³⁷⁰

Timeliness

There is no statute of limitations for filing a bid protest at COFC, though the farther in time from the negative agency action that a party files a protest, the more harm the delay does to the protester's case, for the protest may be dismissed under the doctrine of laches.³⁷¹ The COFC requires 24-hours' advance notice from a protester filing the

³⁶⁸ 28 U.S.C. § 1491(b) (cross-referencing standard of review under 5 U.S.C. § 706).

³⁶⁹ Rules of the Court of Federal Claims (RCFC), App'x C ¶ 8.

³⁷⁰ *Id.* ¶¶ 21-24.

³⁷¹ See *COMINT Sys. Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012); *Ne. Constr. Inc. v. United States*, 119 Fed. Cl. 596, 611 (2015). In his dissent in *Insero Corp. v. United States*, 961 F.3d 1343, 1353–54 (Fed. Cir. 2020), Judge Reyna of the Federal Circuit explained why he believed the Supreme Court has in effect destroyed the laches doctrine barring tardy protests:

First, the majority's opinion turns on the so-called Blue & Gold "waiver rule," a hard-and-fast rule that this court created. This rule runs afoul of the separation of powers principle articulated in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, — U.S. —, 137 S. Ct. 954, 197 L.Ed.2d 292, and for this and other reasons should not be the deciding factor in this case.

In *Blue & Gold*, we created a "waiver rule" for claims filed at the United States Court of Federal Claims ("Claims Court") challenging a patent error in a solicitation for a government contract. *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007). Although we called it a "waiver rule," this is a misnomer. Waiver is an equitable defense, the application of which is left to the trial court's discretion. *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019 (Fed. Cir. 2008). To prove waiver, the defendant must show that the plaintiff intentionally relinquished its right. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Given the draconian effect of waiver, "[t]he determination of whether there has been an intelligent waiver of right . . . must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id.* The *Blue & Gold* waiver rule does not fit this definition. A court applying this rule gives no regard to the protestor's intent and is afforded no discretion in its application. These are not the marks of true waiver.

Rather, the *Blue & Gold* "waiver rule," in theory and in practice, is a judicially created time bar. See *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1316–17 (Fed. Cir. 2016) (Reyna J., concurring) (noting that under the *Blue & Gold* "timeliness bar" "[d]ismissal is mandatory, not discretionary" (internal citations omitted)); . . . The bar is triggered solely by the timing of a protestor's challenge. Specifically, if a protestor files a claim challenging a patent error in a solicitation prior to the close of the bidding process, the protestor's claim is deemed timely. *Blue & Gold*, 492 F.3d at 1313. If, however, the protestor files such a claim after the close of bidding, without having previously objected to such an error, the protestor's claim is untimely and will be dismissed. *Id.* at 1315; *Bannum*, 779 F.3d at 1380; see Maj. Op. at 1348–49. There are no exceptions to this rule; its application is hard and fast. See *Per Aarsleff*, 829 F.3d at 1316.1 The *Blue & Gold* "waiver rule" therefore poses as a rule of equitable waiver but is in fact a timeliness rule.

In *SCA Hygiene*, the Supreme Court clarified that: "[w]hen Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to

case.³⁷² The stage in the procurement process implicates different timelines for the protest.³⁷³ If a vendor objects to a procurement decision prior to contract award, the objecting party must file a protest prior to the close of bidding.³⁷⁴ If the defect occurs after the initial submission of proposals, then the protester is responsible for filing before the deadline to submit revised proposals or prior to contract award. Finally, a protester that wishes to challenge a defect in relation to corrective action must file before the agency completes the corrective action.³⁷⁵

Difficulty/Likelihood of Success

The primary focus of COFC review in bid protests is the administrative record that the agency used when it made the procurement decision.³⁷⁶ The agency must certify and file the administrative record that supports the agency's decision.³⁷⁷ The COFC may order limited discovery, such as deposing the contracting officer, to ensure that the court has sufficient information so as "not to frustrate effective judicial review" in making its decision.³⁷⁸ In practice, the COFC decides many bid protests on motions for judgment on the administrative record.³⁷⁹

The COFC may, if it considers it proper, award declaratory relief, injunctive relief, monetary relief or all three.³⁸⁰ The COFC applies the same test for injunctive relief as it would in any other case. The four-part test evaluates (1) the protester's likelihood of success on the merits; (2) if the protester will suffer irreparable harm without the injunction; (3) the balance of harms and (4) the public interest.³⁸¹ The rules of the Court of Federal Claims also requires the movant to "give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."³⁸² The COFC will usually not direct the agency to award the contract to a protester even if the protester is successful. The COFC may

permit relief." *SCA Hygiene*, 137 S. Ct. at 960 (emphasis added). Specifically, the Supreme Court "stressed" that "courts are not at liberty to jettison Congress' judgment on the timeliness of suit," even if the statute of limitations gives rise to "undesirable" "policy outcomes." *Id.* at 960, 961 n.4 (internal quotation marks omitted) (emphasis added). Relying on this principle, the Supreme Court held that a court cannot rely on the doctrine of laches, an equitable doctrine primarily focused on the timelines of a claim, to preclude a claim for damages incurred within the Patent Act's statute of limitations. *Id.* at 967; *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685, 134 S.Ct. 1962, 188 L.Ed.2d 979 (2014) ("For laches, timeliness is the essential element."). Yet this is precisely what we are doing in this case.

³⁷² RCFC, App'x C, ¶ 2.

³⁷³ 28 U.S.C. § 1491(b).

³⁷⁴ *Blue & Gold Fleet, L.P. v. United States*, 492 F. 3d 1308, 1313 (Fed. Cir. 2007) ("We also hold that a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.").

³⁷⁵ *See NVE, Inc. v. United States*, 121 Fed. Cl. 169, 179 (2015) ("A party who participates in a second round of proposal submissions rather than protesting cannot subsequently challenge an agency's decision to reopen discussions or reevaluate proposals.").

³⁷⁶ *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009).

³⁷⁷ RCFC 52.1(a); RCFC, App. C, ¶ 21.

³⁷⁸ *E.g., Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001).

³⁷⁹ *See generally* BID PROTESTS: A GUIDE TO CHALLENGING FEDERAL PROCUREMENTS at 31 (Andrew E. Shipley & Daniel E. Chudd, Principal Authors & Editors) (Am. Bar Ass'n 2021).

³⁸⁰ 28 U.S.C. § 1491(b)(2)

³⁸¹ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

³⁸² RCFC 65(c).

award monetary relief if the protester can establish three conditions³⁸³: (1) the agency while conducting procurement has committed a prejudicial error; (2) error caused a protester to incur unnecessary bid and proposal costs; (3) the costs are reasonable and incurred for the contract in question.³⁸⁴

As noted, an element unique to procurement cases before the court is that COFC must “give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”³⁸⁵

Agency-Level Bid Protests

Agency-level bid protest are, by their nature, simple. The goal is to provide offerors and bidders an “inexpensive, informal, procedurally simple, and expeditious” process for review of agency procurement actions.³⁸⁶

Forum

While choosing among available forums is an essential step in federal bid protests, for agency-level protests, this question narrows: what level in the agency will hear an agency-level bid protest? As discussed, agencies have two levels—upper and lower—at which they may hear protests. Generally, an agency-level protester files its protest with either the Contracting Officer or a higher-level designated official, perhaps an Agency Protest Official (APO) (if one has been named by the agency).³⁸⁷ Because of the informal nature of agency-level protests, communications with the agency which the vendor did not intend to serve as a formal protest may sometimes still be construed as a protest, and may trigger a filing deadline which could preclude a protest to GAO.³⁸⁸ This lack of formality can be advantageous to protesters because “as a forum for protesting, agencies offer a cheaper, faster, and more direct route to decisions than either GAO or COFC.”³⁸⁹

³⁸³ 28 U.S.C. § 1491(b)(2).

³⁸⁴ *Insight Sys. Corp. v. United States*, 115 Fed. CL. 734, 738-39 (2014).

³⁸⁵ 28 U.S.C. § 1491(b)(3).

³⁸⁶ FAR 33.103(d)(3)-(4).

³⁸⁷ See FAR 33.103(d) (“All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests. . . . In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer.”).

³⁸⁸ *E.g.*, *Coulson Aviation, Inc.*, B-411525, Aug. 14, 2015, 2015 ¶ 272 (“Our Bid Protest Regulations contain strict rules for the timely submission of protests. . . . They specifically require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals are required to be filed before that time. . . . A limited exception to this rule exists when a protester has filed a timely agency-level challenge to a solicitation, and receives an unfavorable answer. . . . In such instances, any subsequent protest on the same issue to our Office will be considered if it is filed within 10 days of actual or constructive knowledge of initial adverse agency action.”).

³⁸⁹ BID PROTESTS: A GUIDE TO CHALLENGING FEDERAL PROCUREMENTS, *supra* note 379, at 14.

Breadth of Jurisdiction

For agency-level bid protests, this seems a relatively straightforward question: logically the scope of the agency's contracting work defines the agency's jurisdictional boundaries. In practice, however, the question can be more difficult — should, for example, the protest forum hear any challenge involving procurement, or should its jurisdiction exclude special classes of acquisition?

Standing to Protest

In agency-level bid protests, as in protests before GAO and COFC, standing is limited to interested parties, i.e., injured bidders with a direct economic interest in the outcome of the procurement.³⁹⁰ There is a practical logic behind this circumscribed concept of standing: if the protester is to serve in effect as a “whistleblower” for procurement failures, only the “most invested” whistleblower (i.e., the bidder with a direct economic interest in a corrected procedure) should be allowed to protest.

Limits of Forum

Because the same parties involved with the challenged acquisition decision are usually also involved in the agency-level protest program—i.e., the deciding officials in an agency-level decision are being asked to rule against themselves or their colleagues—the vendors' abiding concern that a proceeding within the agency would be unfair may deter disappointed bidders from filing a protest with the procuring agency. Furthermore, potential protesters may view the lack of access to the agency record—a central problem in most agency-level bid protests—as a systemic failure of transparency and choose to file their protest elsewhere or not at all.

Standard of Review

The agency must first compile the agency record, upon which it shall base its protest decision. The decision only must be well-reasoned and explain the agency's position.³⁹¹

Timeliness

The time allowed for filing an agency-level bid protest generally parallels the filing deadlines at GAO.³⁹² Under the rule, agencies must “make their best efforts to resolve agency protests within 35 days after the protester files a protest.”

Executive Order 12979, in establishing agency-level protests, called for a stay of contract award or protest while an agency-level protest is pending “except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States.” The FAR adopted the same position, and accordingly requires a stay of the procurement during an agency-level protest.

³⁹⁰ FAR 33.103.

³⁹¹ FAR 33.103.

³⁹² *Id.*

Difficulty/Likelihood of Success

Because data on agency-level protests is generally not available, it is typically impossible to calculate, objectively speaking, the likelihood that an agency will sustain or deny an agency-level protest.

Appendix B. Supplemental Data from AIRC Study

The information below was extracted by members of the AIRC Research Group based on public data collected and analyzed privately, for the most part prior to the establishment of this group.

Data cited here demonstrate the potential power of data collection, which can be done on an *ad hoc* basis, can be derived by cross-referencing existing sources, and can be generated as an integral part of an ongoing business function. The data used for these purposes fall in the second category, for these data were collected by cross-referencing published GAO decisions on the merits of protests. These “merits decisions” consistently identified the relevant and unique Procurement Instrument Identifiers (PIIDs) for each procurement at issue, which could generally be correlated with the “Solicitation Identifier” section in USASpending.gov’s Award Data Archive records, for that database contains a Solicitation PIID field.³⁹³ The study also demonstrated weaknesses in the system, however, for current Federal Procurement Data System (FPDS) data-entry guidance (the source of the USASpending data) states that the entry of the solicitation identifier information is optional, meaning that solicitations (and therefore protests) can only be only matched to their contract when the data enterer (generally a contracting official) decides to make the extra effort. Because USASpending’s records are imperfect, data on only 2,015 of 6,000 available merits decisions were collected. This is a large enough sample size to be informative, and likely representative of the unavailable merits decisions, but the incompleteness cannot be ignored and impairs more granular insights which could be extrapolated from a complete data set.

An automated data collection program (such as one which created a structured data set for each solicitation) would be more thorough, more consistent, and empower more efficient access to actionable information, would facilitate feedback between agencies, and maximize the database’s value to contracting officers, managers, and policy makers.

Currently, there are only a handful of available federal databases on bid protests, many of which are inaccessible to other parts of the government and are wholly unavailable to the research community. The RAND Corporation, for example, reportedly compiled background data for its 2017 study, but there is no evidence or reason to suspect that the database is being updated, and it has never been made publicly available. The DOD has the records from its Protest Tracker pilot program, but it has suffered from low engagement, is sparsely populated, as discussed above (see page 1), and is not public.

Finally, and perhaps most importantly, the Defense Department reportedly is developing a repository of all the XML (structured and accessible) data on awarded contracts, which would provide insight into eventual protest outcomes. This data set may be generated as part of future improvements to the Defense Department’s contract writing system. Based on discussions with individuals involved in developing the contracting

³⁹³ The USASpending Data was downloaded from the consolidated fiscal year reports from 2008-2021 and 2022 through July, which are found at https://www.usaspending.gov/download_center/award_data_archive.

writing system, in principle it could be possible to integrate bid protests into the evolving data sets. Unlike the *ad hoc* protest data gathered in the past, or the data analysis discussed below which is based on a necessarily incomplete comparison of GAO merits decision and awards data, the XML data generated organically by the Defense Department's contract writing system potentially could provide important insights on emerging management challenges in the federal acquisition system, including those highlighted by bid protests.

Because a comprehensive data set on the mechanics of federal procurements (a database which could show, for example, the time it takes to make an award after a protest decision) is not yet available, the analysis below relies on more limited cross-referencing assessment. The data used for this research, which was compiled (s noted) by correlating GAO merits decisions to publicly available data on awards, was prepared by some of the members of the research group involved in this project, but it remains in private hands.

While there are references within this data to specific contracting offices (and other key individuals involved in the acquisition and protest processes), here they have not been named explicitly, in part because (as discussed) the analysis is necessarily only partial. As discussed, because it is derived from GAO bid protest merits decisions (a small minority of GAO cases), this dataset reflects data derived from only approximately 8% of all protests. While it is a representative sample, specific contracting offices' net statistics may be significantly different in total, and so should not be identified until at least a majority of protests can be analyzed. NAICS code data was released since it is more broadly applicable and reflective of trends.

Set Aside Contracts

- Set aside contracts received 49.8% of all protests, versus non-set aside contracts, which received 50.2% of protests.
- Set aside contracts were sustained 5.98% of the time, versus non-set aside contracts, which sustained 9.39% of the time.

Contracting Offices Data

- The average sustain rate for contracting offices with more than 5 protests was 10.04%.
- Of 538 contracting offices whose protests were included in the data, 110 received more than 5 protests.
- Out of the offices that received more than 5 protests, the average amount of protests received was 13.75; and 28 contracting offices received more than that average.
- Six contracting offices received more than the average number of protests (13.75)³⁹⁴ and never had a protest sustained.
- The five highest sustain rates of all contracting offices which received more than 13.75 protests (13.75 protests being the average number of protests received across all Contracting Offices which were protested more than five times) were: (1) 46.15%; (2) 38.46%; (3) 22.58%; (4) 21.43%, and (5) 21.05%.

³⁹⁴ 13.75 represents the average number of protests received by contracting offices which received more than five protests overall, this is an arbitrary but useful cutoff to avoid mis-weighted figures.

NAICS Code Data

- The average sustain rate per NAICS code, with more than five protests, is 9.95%.
- The five most protested NAICS codes are:
 - R499 – Support – Professional: Other – Protests Received: 101 – Protests Sustained: 10 (9.90%).
 - R425 – Support – Professional: Engineering/Technical – Protests Received: 78 – Protests Sustained: 4 (5.13%).
 - R408 – Program Management/Support Services – Protests Received: 64 – Protests Sustained: 7 (10.94%).
 - D399 – IT and Telecom – Other IT and Telecommunications – Protests Received: 49 – Protests Sustained: 5 (10.20%).
 - S216 – Housekeeping – Facilities Operations Support – Protests Received: 43 – Protests Sustained: 7 (16.28%).
- The most sustained NAICS codes with more than 13.75 protests³⁹⁵ were:
 - S206 – Housekeeping- Guard – Total Contracts: 20 – Sustained Protests: 4 (20.00%).
 - Q999 – Medical- Other – Total Contracts: 15 – Sustained Protests: 3 (20.00%).
 - U009 – Education/Training- General – Total Contracts: 15 – Sustained Protests: 3 (20.00%).
 - D302 – It And Telecom- Systems Development – Total Contracts: 33 – Sustained Protests: 6 (18.18%).
 - J015 – Maint/Repair/Rebuild Of Equipment- Aircraft And Airframe Structural Components – Total Contracts: 33 – Sustained Protests: 6 (18.18%).
- The following NAICS codes with 13.75 or more protests³⁹⁶ had zero sustained protests:
 - 6515 – Medical And Surgical Instruments – Total Contracts: 24 – Zero Sustained Protests.
 - U099 – Other Ed & Trng Svcs – Total Contracts: 23 – Zero Sustained Protests
 - D301 – It And Telecom- Facility Operation And Maintenance – Total Contracts: 20 – Zero Sustained Protests.
 - 9140 – Fuel Oils – Total Contracts: 19 – Zero Sustained Protests.
 - S203 – Housekeeping- Food – Total Contracts: 16 – Zero Sustained Protests.
 - Z1AA – Maintenance of Office Buildings – Total Contracts: 16 – Zero Sustained Protests.
 - 7030 – ADP Software – Total Contracts: 15 – Zero Sustained Protests.

³⁹⁵ See *infra* note 394.

³⁹⁶ *Id.*

Protested Contract Value

- Protests which were sustained were 532.75% more expensive than the average denied protest (Average Sustain Contract Value: \$677,597,331.06; Average Denied Contract Value \$127,188,557.22).

Small Business and Other Than Small Business Contracts

- The average Small Business (SB) contract was \$46,633,808.43 and the average Other Than Small Business (OTSB) contract was only \$400,364,533.43.
- SB Contracts had a sustain rate of 7.69%, OTSB Contracts had a sustain rate of 10.21%.

Contracts Awarded to Protesters

- The Protester was awarded the contract 112 times (5.56% of all protests analyzed) in our data set, with an average contract value of \$310,047,110.03.
- When the protest was sustained, the Protester was awarded the contract 19 times (10.92% of all protests sustained) in our data set, with an average contract value of \$30,361,284.69.
- When the protest was not sustained, the Protester was awarded the contract 93 times (5.05% of all protests analyzed) in our data set, with an average contract value of \$363,685,487.49.
- Note: This is a good example of where a great deal more information is needed to solidly derive information from this. While the larger dataset is large enough to be reliable, to have usable statistics on this point, researchers would need 750-1,000 instances of contract awards to protesters to begin to make reliable findings. Furthermore, this is a good example of something where a study doing a closer review of each instance in which the protester received an award (especially where the protest was denied, and the protester still received the award) would pay dividends.

Organizational Conflicts of Interest

- Of the 6,000 protests examined, 360 involved organizational conflicts of interest (OCI), 46 of which were sustained for reasons related to OCI's. This represents a sustain rate of 12.78% for OCI claims, noticeably below the general sustain rate of 16.23%.
- Institutional Conflicts of Interest involving an Awardee represented 66.7% of all sustained OCI protests.
- Personal Conflicts of Interest represented 20% of all sustained OCI Protests (this figure includes personal conflicts on the Government / evaluation side).
- Protesters were addressing Awardee OCI's 66.7% [sic – same amount as institutional OCI's] of the time and were challenging their own exclusion by the contracting officer on OCI grounds 11.1% of the time.
- Contracting officials were found to have improperly analyzed an OCI issue in 9% of the cases.

Appendix C. DOD Agency Survey Responses

These are the anonymized responses of all the DOD agencies that provided feedback for this study. DOD agencies that participated in this study include the Washington Headquarters Service, the Defense Logistics Agency, Defense Information Systems Agency, the Defense Intelligence Agency, U.S. Transportation Command, U.S. Special Operations Command, Defense Contract Management Agency, Defense Commissary Agency, Defense Health Agency, Defense Advanced Research Projects Agency, Defense Microelectronics Activity, Defense Counterintelligence and Security Agency, Defense Human Resources Activity, and the Missile Defense Agency.

Question 1

Does your office track the rate at which protesters within your Service/Agency/Unit are awarded the contract that was the subject of the bid protest? Yes: 3 No: 8
Other:

- We do not actively track the rate at which protesters are awarded the contract that was the subject of the bid protest. We have the ability to obtain the information on an 'as needed' basis which requires less resources to complete than adding another administrative tracking and monitoring task.
- Our office does not track the rate at which protesters are eventually awarded a protested contract. [] processes so few protests, such data is easily retrieved simply by perusing the relevant files.
- [] does not have any bid protests to date. However, [] does track the acquisition timeline of each contract action to support this effort, should a protest be filed.

Question 2

Does your office track the time it takes your Service/Agency/Unit to implement corrective actions after a ruling or decision? Yes: 1 No: 9
Other:

- Not specifically, but in our Decision Summary it states the corrective actions that were taken.
- We currently only track the dates the protest was received and resolved.
- Our office has never taken longer than 100 days to implement corrective action.
- [] does not have any bid protests to date, therefore no ruling or decision from a bid protest has initiated the need to implement a corrective action at this point.

Question 3

Does your office track the percentage of those corrective actions taken by your Service/Agency/Unit that are subsequently protested? Yes: 1 No: 13

Question 4

Does your office track the final outcomes of those protests? Yes: 6 No: 2
Other:

- We track the outcome of all protests but do not track based on an affiliation with corrective action.
- This information is provided in the quarterly Bid Protest Reports.
- A: We track the final resolution of all protests to include those that require corrective action.
- [] processes so few protests, such data is easily retrieved simply by perusing the relevant files.
- No; however, []'s Office of General Counsel (GC) does maintain a historical log of known U.S. Court of Federal Claims (COFC), GAO, and agency-level protests, and their final disposition, in GC's litigation tracking spreadsheet.
- [] does not have any bid protests to date. However, should [] received any protests, it will be carefully tracked by the Sr. Leaders at []

Question 5

Does your office analyze the time spent at each phase of the procurement process attempting to:

(i) Prevent a protest? Yes: 0 No: 12

Other:

- No, the focus of our contracting workforce is to complete a thorough, accurate and compliant procurement with a focus on the needs of the Warfighter and the Government, not preventing a protest.
- Each acquisition is different, which requires a different level of discussion during the source selection phase of the procurement process to consider the steps needed to minimize risks of protests. Each individual contractual action is followed and analyzed to consider best practices and uniformity to consider and implement in future acquisitions.

(ii) Addressing a protest? Yes: 0 No: 14

(iii) Taking corrective action in response to a protest? Yes: 1 No: 13

(iv) Including the efficacy of any actions attempted to prevent the occurrence of a protest? Yes: 0 No: 13

Other:

- No, not formally. However, we do have an institutional memory of what worked and what did not, and we use that knowledge to guide us on procurements.

Question 6

Does your office analyze the number and disposition of protests filed within your Service/Agency/Unit?

Yes: 4 No: 4

Other:

- No. The [] Office of General Counsel keeps statistics on the number of dispositions of GAO bid protests and has some data on the number of Agency-level bid protests that were reviewed by [] counsel. [] does not analyze the information.
- Only if there is a significant change in the number of protests from one year to another or the number of protests for a specific action type or area/division seems to be indicative of a possible systemic issue that we need to address.
- Yes. In accordance with the [] Federal Acquisition Regulation Supplement ([]FARS) Part [] and Desktop Contracting Guide (DCG) Part 33, we track all protests. This tracking includes both the date the protest was received and when the protest was resolved.
- Yes, historical records are used in this process.
- No. However, []'s Office of General Counsel (GC) does maintain a historical log of known COFC, GAO, and agency-level protests, and their disposition, within GC's litigation tracking spreadsheet.
- [] has not received a bid protest to date and does not have any data to provide.

Question 7

Does your office review the policies/procedures for agency-level bid protests within your Service/Agency/Unit?

Yes: 8 No: 1

Other:

- Yes. []'s Acquisition Directorate periodically reviews the information in the [] Directive [] and makes updates as appropriate. The [directive] is available at the acquisition.gov website.
- Yes, we have an Agency regulation supplement that addresses agency-level bid protests.
- Yes. The []FARS and DCG Part 33 provide guidance on protests. These parts are reviewed during our normal analysis of contract policy.
- []'s Acquisition Policy & Analysis Branch has responsibility for determining and reviewing the policies/procedures for agency-level bid protests for [].
- [] does not have formal policy/procedure. [] has only had three agency level protests (two in the last five years).

Question 8

If your office doesn't review the policies/procedures for agency-level bid protests, which office within your Service/Agency/Unit does? N/A: 11

Other:

- The [] is responsible for developing, managing, and maintaining local acquisition policies and procedures.
- Business Support and Policy Division, [] Acquisition Directorate.
- [] does not have formal policy/procedure.

Question 9

Does your office maintain a database that captures data on agency-level bid protests? Yes: 5 No: 2

Other:

- Yes, though technically it's a spreadsheet document and not a database file.
- We capture the Procurement Center protests.
- []'s Acquisition Directorate does not have a database that captures such data. []'s Office of General Counsel has a database that captures some data on agency-level bid protests that [] counsel has reviewed.
- No. Bid protest data is collected and maintained in electronic folders in a shared drive.
- Yes – by use of Spreadsheet (it's not an automated system).
- No but we do have historical records for all agency-level bid protests.
- NO; [] has not received a bid protest to date and does not have any data to provide.

Question 10

Does your office collect data on agency-level bid protests within your Service/Agency/Unit? Yes: 8 No: 2

Other:

- []'s Acquisition Directorate does not collect agency-level protest data. []'s Office of General Counsel collects some data on agency-level bid protests that [] counsel has reviewed.
- While []'s Contract Management Office (CMO) [] system provides the capability to collect protest data, there is no tracking or characterization of the level of protest (e.g., agency-level, GAO, or COFC bid protest).
- No, [] has not received a bid protest to date and does not have any data to provide
- No, but this information is collected by our General Counsel office.

Question 11

If so, does the data track

(i) Identity of the protesters?	Yes: 13	No: 0
(ii) Prevalence/frequency of protests?	Yes: 4	No: 6

Other:

- The spreadsheet shows the dates the protests were filed, by which one can deduce prevalence/frequency information.
- Yes (from the standpoint of identification of the number by Fiscal Year).
- Yes, our historical records include the dates of all protests.

(iii) Timeliness of protest process (decisions achieved within agency timelines)	Yes: 6	No: 5
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Other:

- Yes (in regards to identification of due dates and submission).
- Timelines are tracked, but there are no policy timelines per Procurement Directive 33-01 Rev 001.

Question 12

Does your database on bid protests track

(i) The outcomes of bid protests?

Yes: 8

No: 0

Other:

- The [] Office of General Counsel database has some data for some agency-level protests reviewed by counsel; for some protests, the outcome is indicated. The database is not used to track bid protests or their outcomes.
- We maintain historical records but due to the low number of protests filed against the agency we have do not have the need to use a database. The historical records we maintain do contain the outcomes of protested actions, to include the number of dismissals, reconsiderations, award to protesters, and other information as needed.
- No, []'s CMO [] system does not track outcomes, but this system contains the final disposition documentation. However, []'s GC litigation tracking spreadsheet does track outcomes.

(ii) Dismissals?

Yes: 7

No: 6

(iii) Reconsiderations?

Yes: 4

No: 9

(iv) Award to protesters?

Yes: 3

No: 11

(v) Other data (please identify):

- [] File Name (product or service); Date of the Protest; Protester; Description of Events; Agency or GAO Protest; GAO Decision Number; Date of the Decision; and an Abbreviated Decision Summary.
- Corrective Action (yes/no), link to the contract file, overall basis for the protest.
- The other information that may be collected in the [] Office of General Counsel database includes, in some cases, the solicitation number, the contracting activity within [], the [] Supply Chain, the NSN, the estimated dollar value of the procurement, and whether it is pre or post award. Not all information is entered for all protests. Not all agency-level protests are entered into the database.
- The number of second-bite protests filed with the Court of Federal Claims.
- There is space for additional description/comments if/as needed.
- Withdrawals.
- File date and decision date.

Question 13

Does your office track the time protests take, from filing to resolution, in your Service/Agency/Unit?

Yes: 6

No: 3

Other:

- Just the Date of the Protest to the Date of the Decision.
- We capture the protest date and the date concluded.
- It's calculable.
- No, but we do track the deadlines established by GAO and the COFC.

Question 14

Availability —

(i) In your Service/Agency/Unit, is there a single point of oversight entry for agency level bid protests?

Yes: 3

No: 4

Other:

- In the [] Agency, agency-level bid protests are submitted to the contracting officer undertaking the acquisition.
- In accordance with current Agency procedures, all agency-level protests are to be reported to [] General Counsel for consultation and resolution. Additionally, for any agency-level bid protests for which the protester requests an independent review at a level above the contracting officer, the Director of Contracting is the official responsible for conducting the independent review.
- Yes, the Deputy Director of Procurement, [] HQ [].
- No, there is not a formally identified single point of oversight entry.

(ii) Are there multiple points of oversight entry for agency-level bid protests? If so, where are they identified and monitored?

Yes: 1

No: 6

Other:

- Yes – Procurement Center Director, Procurement Division Director, AQP Policy, ☐ Legal, Executive Director Contracts (HCA) all are notified and review. Protests are published on the AQP Policy 360 Site.
- Yes. Business Support and Policy Division, ☐ Acquisition Directorate
- They are identified and monitored by the Contracting Officer and Contracting Specialist of the Contracting Office, and the attorneys and paralegals of the Legal Office.
- This guidance is published (for internal use) in the ☐ Agency Acquisition Regulation Supplement ☐ Part ☐ and ☐.
- ☐ has not received a bid protest to date. ☐ does not currently have a set process. However, ☐ Contracting (Contracting Officer, Branch Chief, and Division Chief), as well as ☐ Legal Counsel and ☐ Directorate would be consulted.
- Yes, there are multiple points of entry but only one entity that tracks, Policy & Oversight (P&O).
- No, there are no formally identified multiple points of oversight entry.

Question 15

Who is responsible for submitting the data on agency-level protests within (DOD)?

- An individual within the Acquisition Directorate's Policy Office.
- AQP Policy
- The contracting officer for the protested procurement is responsible for entering the information into the database.
- There is no requirement for the submission of agency-level protest data to DOD or within DOD.
- Attorneys and Paralegals of the Legal Office.
- It depends on the nature of the request. For requests regarding specific protests, information/data might be provided by the cognizant Contracting Officer, Office of General Counsel, the Contract Policy Office, or the Director of Acquisition Management. Responses to general protest data requests would likely be prepared and submitted by the Contract Policy Office.
- Nobody has such responsibility.
- Enterprise Mission Support Division, ☐, HQ ☐.
- The briefing required by DFARS PGI 233.170 is conducted by the SPE or his/her designee.
- ☐ has not been notified of any such reporting requirement within DOD.
- ☐ has not received a bid protest to. However, should ☐ receive one, The Contracting Division Chief would be responsible for submitting the data on agency-level protests.
- The P&O group under the direction of the Chief, Acquisition Management & Strategy.
- The office responsible for submitting data will depend on the origin of the request.

Question 16

When is data required to be submitted in your Service/Agency/Unit? During the protest or at the conclusion of the protest?

During the protest: 3 At the conclusion: 1

Other:

- Neither; once annually after the close of the fiscal year.
- Periodically during the protest process – protests are to be reported to the Office of General Counsel (as well as the Director of Contracting if an independent review at a level above the Contracting Officer is requested) as soon as practicable after receipt. These are the primary submission requirements.
- Upon completion of the protest process – information is sometimes reported to the Contract Policy Office after completion.
- Periodically during the protest process. The HQ ☐ DoP assigns a DoP Liaison Officer (LNO) to each ☐ Headquarters Contracting Division (HCD) and Field Contracting Office (FCO). Upon receiving notification of a protest, and in accordance with Part 33 of the ☐ DCG, the LNO to the ☐ Contracting Office responsible for the protested action enters the basic information in the protest log located on the DoP portal. After that, the Chief of the responsible HCD/FCO ensures information for the protest is current in the protest log. The responsible Chief HCD/FCO may delegate this task to the Contracting Officer for the contract/solicitation under protest.
- Periodically during the protest process. Compliance with DFARS PGI 233.170 requires briefing DPC within 10 days of the protest being filed.

Question 17

If the data is required to be submitted after the protest process is completed in your Service/Agency/Unit, how long after the protest's completion is the data required to be submitted?

- There is no requirement to submit data to DOD.
- Initially submitted upon notice of protest and updated as/when needed to remain current.
- 10 days.
- The agency does not have a formal requirement for data to be submitted.

Question 18

Who is responsible for adding the data to the database, your office, the submitter or other?

- AQP Policy
- The contracting officer for the protested procurement.
- There is no requirement to submit data to DOD.
- This is not specified within our Agency; however, the Contract Policy Office is generally the office that maintains protest information when provided.
- OGC
- Initially the HQ ☐ DoP LNO, then the Chief HCD/FCO, or Contracting Officer if delegated.
- The attorneys that defend the protest are responsible for adding data to the historical records that are maintained.
- Data is periodically entered into the ☐ CMO ☐ system during the protest process by acquisition personnel. The ☐ GC litigation tracking spreadsheet is updated by GC personnel upon protest completion.
- P&O is responsible for adding and updating the agency's protest tracker.
- The submitter coordinates with General Counsel and data is maintained by General Counsel.

Question 19

Is the data reviewed for accuracy by your Service/Agency/Unit?

Yes: 8

No: 1

Other:

- Yes (informally, particularly in preparation for an internal or DOD Procurement Management Review or other information request).

Question 20

Who may access the database your office maintains?

- Selected AQ Personnel Only
- ☐ Contracting personnel and Acquisition attorneys only.
- The Office of General Counsel database, which has some information on agency-level protests, can only be accessed by that office.
- Contract Policy personnel and senior leadership within the Acquisition Management Directorate.
- OGC Staff.
- Anyone who has access to the HQ ☐ DoP portal, which is where the protest log is located. DoP restricts access to the portal to those having a need to know (e.g., contracting personnel across the ☐ Enterprise, their acquisition attorneys). Others must request permission from DoP for access to the DoP portal.
- Attorneys and contracting personnel have access to historical protest records.
- Access to the ☐ CMO ☐ system is controlled by an approved user's role. The GC spreadsheet is limited access to GC personnel only.
- Anyone in Acquisition and Contracting and the Office of General Counsel can obtain access to the database upon request to P&O.
- Only those authorized by the office of General Counsel.

Question 21

What questions didn't we ask that we should have about bid protests within your Service/Agency/Unit?

- What percentage of protests are from an incumbent contractor being unseated? What percentage of unsuccessful protests are filed in a second venue (GAO/COFC and vice versa), and how many of those are successful?

Additional Comments

- In FY 2021, according to [] Office of General Counsel data, [] closed 112 GAO bid protests (including claims for costs and reconsiderations) and closed 9 Court of Federal Claims bid protests. The large majority of []'s bid protests are at the agency level. []'s Office of General Counsel data reflects that in FY 2021, 1,229 agency level protests that counsel reviewed were closed. [] has no records regarding how often a protester ultimately wins a contract award, how long it takes for corrective action to be implemented, or how much time [] personnel spend on various actions relating to protests. [] believes that agency-level protests are an effective and efficient way to address and resolve protest issues and concerns without the costs to both the agency and protesters of a formal GAO or Court protest. The fact that there are over 10 agency-level protests in [] for every one GAO protest indicates that bidders and prospective bidders on [] procurements concur in this assessment.
- PLEASE NOTE: The [] has a Memorandum of Agreement with the [] Agency [] Division regarding litigation support. Pursuant to that MOA, [] serves as lead Agency Counsel in bid protests against [] actions filed at the GAO and serves as Co-Agency Counsel with [] Counsel in protests against [] actions filed at the U.S. Court of Federal Claims. The responses [] address []'s collection of data pertaining to protests but do not account for any data regarding [] protests that may be collected or maintained by [].

Acronyms and Abbreviations

ABA	American Bar Association	GAO	Government Accountability Office
ACUS	Administrative Conference of the United States	GPE	Government-wide Point of Entry
ADPE	Automated Data Processing Equipment	GSA	General Services Administration
ADR	Alternative Dispute Resolution	GSBCA	General Services Administration Board of Contract Appeals
ADRA	Administrative Dispute Resolutions Act	IDIQ	Indefinite-Delivery/Indefinite-Quantity
AFARS	Army Federal Acquisition Regulation Supplement	NASA	National Aeronautics and Space Administration
AIRC	Acquisition Innovation Research Center	NDAA	National Defense Authorization Act
AMC	Army Materiel Command	OCI	Organizational Conflict of Interest
APA	Administrative Procedures Act	OFPP	Office of Federal Procurement Policy
APO	Agency Protest Official	OMB	Office of Management and Budget
BPA	Blanket Purchase Agreement	OTSB	Other than Small Business
CICA	Competition in Contracting Act	PDS	Procurement Data Standard
COFC	Court of Federal Claims	PIID	Procurement Instrument Identifier
DFARS	Defense Federal Acquisition Regulation Supplement	RCFC	Rules of the United States Court of Federal Claims
DLA	Defense Logistics Agency	SAM	System for Award Management
DOD	Department of Defense	SARA	Services Acquisition Reform Act
DOE	Department of Energy	SB	Small Business
FAR	Federal Acquisition Regulation	T&D	Task-and-Delivery
FASA	Federal Acquisition Streamlining Act	UEI	Unique Entity Identifier
FCIA	Federal Courts Improvement Act	XML	Extensible Markup Language
FOIA	Freedom of Information Act		
FPDS	Federal Procurement Data System		
FY	Fiscal Year		