TESTIMONY BEFORE THE
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ON

"BID PROTEST REFORM: UNDERSTANDING THE PROBLEM"

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Chairman Sessions, Ranking Member Mfume and members of the Subcommittee, thank you for the opportunity to speak to you on bid protest reform.

My name is Christopher Yukins and I serve as the Lynn David Research Professor in the Government Procurement Law Program at the George Washington University Law School. Our program was launched by Professors Ralph Nash and John Cibinic in the early 1960s, and it is one of the leading programs of its kind in the world. Although I am testifying today in my personal capacity, I am proud to note that all of us testifying before you today are connected with our program at GW Law School – Ken Patton is a member of our Board of Advisors, and Zachary Prince teaches on negotiations in the program.

I have spent over three decades working on bid protests, as an academic and as a lawyer, in federal, state and local forums. I represented the United States in bid protests and appeals as a lawyer in the U.S. Department of Justice, I have worked on several hundred protests as a private lawyer and testifying expert, and I served as an advisor to the U.S. Department of State in a decade-long effort to revamp the model procurement law sponsored by the United Nations Commission on International Trade Law, which included extensive reforms regarding bid protests. I helped author reports for the Administrative Conference of the United States and the Defense Department (at the request of Congress) on bid protest reform. Finally, I serve as the Academic Advisor to the American Bar Association's initiative to revamp the Model Procurement Code, which is used by state and

local governments across our nation; that reform effort will almost certainly lead to improvements to bid protests at the state and local levels here in the United States.[1]

I. Introduction

The good news is that bid protests in the U.S. government are healthy and well-established[2] – indeed, they're a model for the world. The structure of our bid protest system, with protests before the agencies, an independent agency such as GAO, and the courts, is seen in governments around the world.[3] American companies working abroad regularly rely on other countries' bid protest systems, which in many ways track the U.S. model, to ensure they're treated fairly by other governments. Many international trade agreements and conventions which the United States has joined, such as the World Trade Organization's Government Procurement Agreement[4] and the UN Convention Against Corruption,[5] specifically call for effective bid protest systems.

Bid protests have proven effective, nationally and internationally, because they allow those with the best information on procurement failures – typically other bidders – to bring procurement failures to light. Those protesting bidders in essence serve as whistleblowers on fraud, waste and corruption. Impairing protests – in essence, discouraging those whistleblowers – would undermine bid protests' core goals, which are (1) to reinforce

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[1] *See, e.g.,* Keith M. Lusby*, Improving the Effectiveness of State Bid Protest Forums: Going Above and Beyond the Agreement on Government Procurement and Adopting the ABA's Model Procurement Code,* 43 Pub. Cont. L.J. 57 (2013). Materials on the Model Procurement Code are available at https://publicprocurementinternational.com/aba-mpc/.

[2] *See* Daniel I. Gordon, *Annals of Accountability: The First Published Bid Protest Decision*, Procurement Law., Winter 2004, at 11 (first GAO bid protest decision in 1925).

[3] *See, e.g.,* Collin D. Swan*, Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the U.S. Bid Protest and European Procurement Review Systems,* 43 Pub. Cont. L.J. 29, 38 (2013)*;* Ian Hargreaves, *Understanding the Standards of Bid Protest Standing: A Comparative Analysis of Bid Protest Standing Rights and Requirements Across 98 Countries and the European Union*, 51 Pub. Cont. L.J. 227 (2022); United Nations Commission on International Trade Law (UNCITRAL), Guide to Enactment of the UNCITRAL Model Law on Public Procurement 298-99 (2014), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guide-enactment-model-law-public-procurement-e.pdf; *see also* European Commission, *Remedies Directives,* https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en (background on bid protests in the EU member states).

[4] World Trade Organization, *Agreement on Government Procurement,* Art. XVIII, sec. 1 (2012) ("Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure . . . .").

[5] United Nations Convention Against Corruption, Art. 9, para. 1(d) (calling for parties to establish an "effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies"), https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

confidence in the competitive process, and (2) to identify management failures in the procurement system.[6]

Bid protests can be flash-points of contention between agencies and industry, and have long been the focus of reform efforts.[7] Those reform efforts are often quite useful; sometimes, though, they could have serious and negative unintended consequences. I will today address several of those proposals, including on "two-bite" forum shopping, incumbent contractors stalling new contracts, meritless protests, bid protest bonds, protest timetables and pleading standards. I will then speak to promising reforms in agency debriefings and protests.

II. Bid Protest Reform Proposals

A. "Two-Bite" Protests

In the federal procurement system, like many systems around the world, as noted vendors can protest in three different forums: they may protest to (1) the procuring agency, (2) to an independent agency (such as the Government Accountability Office (GAO)), or (3) to the courts (in our system, to the U.S. Court of Federal Claims).

Some have argued that these multiple forums give protesters the opportunity to take "two bites at the apple" – to bring the same protest to multiple forums, which may result in delay and inconsistent rulings.[8]

To unpack this "two-bite protests" problem, at the outset it is important to understand that there are really only two forums at issue – GAO and the Court of Federal Claims – since

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[6] *See, e.g.,* Christopher R. Yukins, *Rethinking Discretionary Bid Protests,* Administrative Conference of the United States blog, https://www.acus.gov/newsroom/administrative-fix-blog/rethinking-discretionary-bid-protests.

[7] *See, e.g.,* Daniel H. Ramish*, Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function,* 48 Pub. Cont. L.J. 35 (2018); Marcia G. Madsen, David F. Dowd & Roger V. Abbott, *Independent Review of Procurements Is Worth It: There Is No Support for Hamstringing the GAO Bid Protest Process*, 19 Federalist Soc' Rev. 4 (2018) (criticizing "loser-pays" reform proposal).

[8] *See, e.g.,* Colonel Eugene Y. Kim*, Reforming Bid Protests, Army Law.,* 2020, at 66, 67; Major T. Aaron Finley, *Once Bitten, Twice Shy: How the Department of Defense Should Finally End Its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests*, Army Law., January 2016, at 6, 6; *see also* Adam Lasky, *Roadmap to Bid Protests at the U.S. Court of Federal Claims*, Constr. Law., Winter 2018, at 22, 24 ("Where the protester fails to obtain its desired relief from GAO, the protester can seek relief by filing a new protest at the COFC. These protests serve as a 'second bite' at the apple. In these cases, the subject of the COFC's review is the agency decision, not the GAO decision. While the COFC, recognizing GAO's 'longstanding expertise in the bid protest area,' will give 'due regard' to GAO's decision, that decision has no binding effect on the COFC and 'is given no deference.' In fact in some cases, where the record at the COFC materially differs from the record before GAO, or where the protest arguments were not fully developed at GAO. the COFC will give little if any weight to GAO's decision." (footnotes omitted).)

vendors so seldom turn to the third forum, agency-level bid protests (a problem addressed below).[9] Even if a vendor did go to an agency-level protest first, by international agreement the vendor would need to have a right to appeal to GAO or the courts.[10] Blocking that right of appeal from agency-level protests could trigger an international trade issue that could complicate the Trump administration's ongoing trade negotiations – in practice, it could give foreign trading partners another card to present against the United States in trade negotiations.

That leaves the "two-bite" protests that go to both GAO and the courts. Between the GAO and the courts, the pathway runs in only one direction because GAO will dismiss a matter that has been brought first to the courts.[11] As a result, the core remaining question is whether vendors should be blocked from protesting first at GAO, then (if they lose) at the Court of Federal Claims.

There are any number of reasons to allow these kinds of "second-bite" protests (which are, as a practical matter, relatively rare[12]). One reason lies in the transparency of the administrative record; in many ways, the bid protest system forces transparency on those corners of the procurement system that need it most, where there are credible doubts about the procurement decisions an agency has made. In an initial protest to GAO the defending agency will essentially control the record to be produced at GAO, under discovery rules that are less demanding than the Court of Federal Claims'.[13] As a result, the vendor may have to pursue a second protest at the Court of Federal Claims to receive the full administrative record. Studies have shown that a more complete record before the Court can lead to very different outcomes on the "second-bite" protest.[14] Allowing second-

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[9] *See, e.g.,* Christopher R. 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* (draft report for the Administrative Conference of the United States, May 1, 2020).

[10] World Trade Organization, Agreement on Government Procurement (2012), Art. XVIII, para. 5 ("Where a body other than [GAO or the U.S. Court of Federal Claims, in the U.S. system] initially reviews a challenge, the Party shall ensure that the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge."), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.

[11] U.S. Government Accountability Office, *GAO Bid Protests: A Descriptive Guide* 29 (10th ed. 2018) ("GAO will not consider a protest or other matter where it is the subject of litigation in, or has been decided on the merits by, a court. 4 C.F.R. § 21.11(b).").

[12] *See* Andrew Ferguson, *The Court of Federal Claims, the Government Accountability Office, and "Two Bites at the Apple" Bid Protests*, 48 U. Dayton L. Rev. 143, 156 (2023).

[13] *Compare* GAO Bid Protest Regulation 21.3 (calling for agency production of "relevant" materials) *with* Rules of the U.S. Court of Federal Claims, App. C, paras. 21-28 (detailing administrative record materials to be produced in any bid protest). *See generally* Major Jason W. Allen*, What Is the Contemporaneous Record in a Bid Protest?,* Army Law., 2019, at 35, 35.

[14] Richard J. Webber, *Bid Protests: Different Outcomes in the Court of Federal Claims and the Government Accountability Office in 2008*, Procurement Law., Spring 2009, at 1.

bite protests at the Court thus helps to ensure a full consideration of the record – especially important in complex and high-value cases[15] – and reinforces confidence in the integrity of the procurement system.[16]

B. Protests by Incumbents

Critics have complained that incumbent protesters file weak protests only in order to be awarded temporary bridge contracts – and thus extend their revenue streams – while the protest is pending. To discourage these protests, critics have suggested that protesting incumbent contractors be forced to forfeit any profits they earn if they lose the "stalling" protest.[17]

There are a number of problems with this suggestion for forcing incumbents to forfeit their profits:

- The proposal may be both too broad (it assumes that *all* incumbent protests are mere exercises in delay) and too narrow (of the minuscule number of awards protested – fewer than one percent of all Defense Department awards, for example – the numbers of incumbent protests will be even smaller).[18]

- While punishing protesting incumbents will not resolve the problems in bid protests, it could worsen problems in the underlying procurement system.

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[15] *See, e.g.,* Robert S. Metzger & Daniel A. Lyons*, A Critical Reassessment of the GAO Bid-Protest Mechanism,* 2007 Wis. L. Rev. 1225 (2007).

[16] James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 Pub. Cont. L.J. 587 (2014) ("concurrent bid protest jurisdiction is not only 'healthy' . . . but necessary to ensure the integrity of the federal procurement system").

[17] *See, e.g.,* House Armed Services Committee, *H.R. 3838 – Streamlining Procurement for Effective Execution and Delivery and National Defense Authorization Act for Fiscal Year 2026 – Chairman's Mark*, at 10 (Section 816 "would require the Secretary of Defense not later than 180 days after the date of the enactment of this Act, to revise the Defense Federal Acquisition Regulation Supplement to establish procedures for a contracting officer to seek disgorgement of certain profits or fees earned by the incumbent contractor if the incumbent filed a bid protest with the Comptroller General of the United States; continued performance on the contract while the protest was pending; and the bid protest was subsequently dismissed because of a lack of reasonable legal or factual basis. This section would also make amendments to section 3553 of title 31, United States Code, to authorize the head of a procuring activity of the Department of Defense to override the stay in the award of a contract during the period of protest if doing so would facilitate the national defense."), https://armedservices.house.gov/uploadedfiles/chairmans_mark.pdf.

[18] Mark V. Arena, Brian Persons, Irv Blickstein, Mary E. Chenoweth, Gordon T. Lee, David Luckey & Abby Schendt, RAND Corporation, *Assessing Bid Protests of U.S. Department of Defense Procurements Identifying Issues, Trends, and Drivers* xiii (2018) ("[I]t is important to note that the overall percentage of contracts protested [at GAO] is very small—less than 0.3 percent. The trends are less clear at COFC, but the rates are an order of magnitude smaller . . . . These small protest rates per contract imply that bid protests are exceedingly uncommon for DoD procurements.").

Sometimes incumbents are the *best* protesters – they have the most experience with the agency requirements, and are in the best position to point out agency mistakes. Targeting them for special discouragement may in effect turn away an important class of whistleblowers.

- Incumbents are not guaranteed a bridge contract if they protest – nothing in the Federal Acquisition Regulation (FAR) says that a bridge contract must be awarded to an incumbent during a protest. The Defense Logistics Agency's supplement to the FAR emphasizes that a bridge contract is an "independent" contract, subject to normal competition and sole-source rules,[19] and the Defense Acquisition University explains how the bridge contract can be competed among other vendors.[20] Agencies could, therefore, simply bypass obstructive incumbent contractors.

- Finally, as the American Bar Association's Public Contract Law Section suggested in a letter to GAO,[21] as the Defense Department confirmed and as GAO agrees, it could prove very inefficient and difficult to effect the suggested remedy – to determine accurately what an incumbent's profits (or the awardee's lost profits) were during the period of the protest.[22] This question almost certainly would lead to collateral litigation, which would spawn more costs and management distraction.

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[19] DLAD 16.191, https://www.acquisition.gov/dlad/16.191-bridge-contracts.

[20] Defense Acquisition University, *Bridge Contracts,* https://www.dau.edu/library/damag/september-october2020/bridge-contracts.

[21] American Bar Association, Public Contract Law Section, *Letter to U.S. Government Accountability Office re: NDAA FY 2025, Section 885 – Response to GAO Data Requests*, at 4-5 (May 9, 2025) (reviewing the difficulties of calculating the intervenor/awardee's lost profits).

[22] In its recent report to Congress in response to Section 885 of the National Defense Authorization Act for FY2025, GAO wrote:

> [C]oncerning a potential requirement for a contract clause that would permit the recoupment of profit or fee from incumbent contractors who file protests that are subsequently dismissed as legally or factually sufficient, DOD noted that, in its view, the costs outweigh the benefits of such a requirement, and that such a provision could also negatively impact competition if contractors decide not to bid due to the requirement.

U.S. Government Accountability Office, *GAO Response to Section 885 of the FY2025 NDAA*, GAO Report No. B-423717, at iii (July 14, 2025), https://www.gao.gov/assets/880/879950.pdf.

C. Meritless Protests

Critics have also complained that vendors may file meritless protests that result in delays and costs for agencies.[23] Some of these critics have suggested that contractors with a demonstrated history of filing meritless protests should not have access to future contracting opportunities.

Both GAO and the Court of Federal Claims have extensive procedural tools at hand to dispose of meritless protests.[24] GAO has made it clear that it has the power to dismiss frivolous protests,[25] and the Court of Federal Claims has similar authority.[26]

As a practical matter, if a vendor obnoxiously submits a series of frivolous and vexatious protests, it faces a risk of being considered non-responsible (of being excluded from future procurements)[27] or receiving poor performance evaluations.[28] The cure, in other words, is already in the law.

There is also a hidden risk here: by barring vendors automatically from future awards, agencies could inadvertently damage their supply chains. A recent report we did for the Department of Defense assessed a similar proposal to automatically exclude contractors with labor law violations.[29] The study (done at the direction of Congress) found that an automatic bar could exclude nearly 10 percent of Defense Department contractors – and it would not be clear in advance which vendors would be struck from the Defense Industrial Base.[30] A rule of automatic exclusion, in other words, raises supply chain risks of its own.

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[23] *See, e.g.,* Eric S. Underwood, *Tackling Meritless Bid Protests: The Case for Rebalancing Protest Costs in the Federal Procurement Arena*, 52 Tulsa L. Rev. 367 (2017).
[24] *See, e.g.,* GAO Bid Protest Regulation 21.10, 4 C.F.R. § 21.10; James F. Nagle & Adam K. Lasky, *A Practitioner's Road Map to Gao Bid Protests, Constr. Law.*, Winter 2010, at 5, 7 (discussing summary dismissals at GAO).
[25] *See* Jason Miller, *2-year suspension for serial protester after continued 'incoherent, irrelevant, derogatory and abusive' filings: GAO wrote a blunt assessment of its decision to ban Latvian Connection from filing complaints for two years* (Dec. 4, 2017), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2017/12/two-year-suspension-for-serial-protester-after-continued-incoherent-irrelevant-derogatory-and-abusive-filings/.
[26] *E.g.,* Rules of the Court of Federal Claims, Rules 11, 12 and 56.
[27] FAR 9.104-1 (a responsible contractor must have "a satisfactory record of integrity and business ethics").
[28] FAR 42.1501(a) (past performance evaluations to consider "[r]easonable and cooperative behavior").
[29] David Drabkin & Christopher Yukins, Acquisition Innovation Research Center (AIRC), *Congressionally Mandated Study on Contractor Debarments for Violations of U.S. Labor Laws* (July 2023), https://acqirc.org/publications/research/congressionally-mandated-study-on-contractor-debarments-for-violations-of-u-s-labor-laws/.
[30] *Id.* at 17.

D. Bonding

Some critics have argued that filing a protest is inexpensive for contractors but may lead to disruption and delay for agencies. They have argued that protesters should be required to file a monetary bond with their protests.

The first problem with this suggestion is that it is based on a false premise – it assumes that protests are inexpensive to file and prosecute. They're not. Members from the ABA's Public Contract Law Section, who regularly handle bid protests, estimated that protests at GAO cost over $100,000 on average for the awardee to defend, and that protests at the Court of Federal Claims cost over $200,000.[31] It is likely to cost even more to bring a protest. Filing a protest is a difficult and costly decision for vendors, especially because they know they have a relatively small chance of actually winning the contract even if they win the protest.[32]

Notably the Court of Federal Claims' rules already contemplate a possible bond when a protester seeks an injunction pending the protest.[33] The only open question, then, is whether GAO should institute a similar bonding requirement.

A bond requirement at GAO would raise serious barriers to small businesses that sought to protest; for them, the financial burden would be much more acute.

Because bonds are essentially unknown in federal bid protests, it's worthwhile looking more globally to assess them. The OECD sponsors a tool used to assess procurement

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[31] American Bar Association, Public Contract Law Section, *supra* note 21, at 2.

[32] *See* Daniel I. Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489, 498 (2013) ("winning a protest is far from ensuring that a protester will win the contract that it seeks"); Eric S. Underwood, *supra* note 23, at 368 ("[I]n fiscal year 2010 (FY10), out of roughly 1,500 protests filed with the Government Accountability Office (GAO), the GAO sustained merely forty-five protests. Of those sustained protests, only eight resulted in a favorable contract award for the protestor." (citing Moshe Schwartz & Kate M. Manuel, Congressional Research Service, Pub. No. R40227, *GAO Protests: Trends and Analysis* 9 (July 21, 2015), https://www.fas.org/sgp/crs/misc/R40227.pdf) (footnotes omitted).).

[33] U.S. Court of Federal Claims Rules, Appendix C, para. 15(f) ("In cases in which plaintiff seeks temporary or preliminary injunctive relief, counsel be prepared to discuss the following matters at the initial status conference: . . . (f) the security requirements of RCFC 65(c) (See Appendix of Forms, Forms 11– 13."). As a practical matter, it appears that bonds are rarely actually required by the Court. For a discussion of the "little precedent" available on point, see Nathaniel E. Castellano & Sierra A. Paskins, *Preliminary Injunction Bonds: An Emerging Bid Protest Issue,* 39 Nash & Cibinic Rep. NL ¶ 14 (Mar. 2025). Requiring a bond is discretionary with the court. While his action was not specifically directed at bid protests, President Trump in March 2025 issued an executive order directing Executive Branch agencies to ask that a court require a bond where (as in a bid protest) the opposing party seeks injunctive relief against the government. *See* The White House, *Fact Sheet: President Donald J. Trump Ensures the Enforcement of Federal Rule of Civil Procedure 65(c)* (Mar. 6, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-ensures-the-enforcement-of-federal-rule-of-civil-procedure-65c/.

system, which is emerging as the "gold standard" for assessment worldwide – the Methodology for Assessment of Procurement Systems, or "MAPS."[34]

The MAPS tool discusses bid protests (which are sometimes known as "appeals," "remedies" or "challenges" outside the United States), to assess whether bid protest systems are "effective" (the measure required by international trade agreements and the UN Convention Against Corruption).[35] The MAPS tool uses "indicators" as benchmarks. To gauge whether an appeals process (a bid protest process) is efficient and effective (Indicator 13), the MAPS tool confirms that the reviewing body (here, GAO) "does not charge fees that inhibit access by concerned parties."[36]

By imposing costs that inhibit access to the bid protest system, a protest bond requirement could, by the MAPS measure, make the GAO bid protest system "ineffective." Protesters – who are, in practical terms, generally self-funded whistleblowers – would face new monetary obstacles in trying to bring to light waste, fraud and abuse.

If the bonding requirement rendered the bid protest process "ineffective," the bonding requirement also could (as was discussed above) throw the U.S. bid protest system out of compliance with the international trade agreements[37] (which call for an "effective" bid protest system) and so raise new issues in ongoing trade negotiations by the Trump administration.

E. Consistent Timelines for Protests

Critics have also complained of inconsistent and unpredictable timelines for the resolution of protests, which can lead to unnecessary delays and uncertainty. They have suggested imposing binding deadlines for the filing and resolution of protests.[38]

The Government Accountability Office already has very clearly defined timelines for filing and resolving protests.[39] The Court of Federal Claims does not have fixed timelines for

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[34] MAPS Initiative, *Methodology for Assessing Procurement Systems,* https://www.mapsinitiative.org/en.html. Notably, GAO itself recently relied on the MAPS assessment tools, in *World Bank Procurement: Risk Monitoring Can be Enhanced as U.S. Businesses Face Challenges Competing,* GAO-24-106718 (Sept. 26, 2024), https://www.gao.gov/products/gao-24-106718, a report in which GAO used the MAPS assessment tools for "internationally recognized leading practices." *Id.* at 3.

[35] *E.g.,* WTO Agreement on Government Procurement, Art. XVIII; UN Convention Against Corruption, Art. 9.

[36] *Methodology for Assessing Procurement Systems*, *supra* note 34, at 49.

[37] *See, e.g.,* U.S.-Mexico-Canada Agreement, ch. 13 ("Each Party shall maintain, establish, or designate at least one impartial administrative or judicial authority (review authority) that is independent of its procuring entities to review, in a non-discriminatory, timely, transparent, and effective manner, a challenge or complaint (complaint) by a supplier . . . .").

[38] *See, e.g.,* 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 (2010).

[39] *See, e.g.,* GAO, *GAO Bid Protests: A Descriptive Guide*, *supra* note 11, at 9-25.

resolving protests,[40] but in principle could do so under its statutory authority to amend its rules per 28 U.S.C. § 2503(b). Finally, as is discussed further below, fixed timelines could be set for agency-level bid protests, probably by an amendment to FAR 33.103, to lend potential protesters confidence that those agency-level protests will be resolved in a timely manner and with a minimum of uncertainty.

F. Heightened Standards

Critics have complained, finally, that "technical" protests – protests based purely on minor defects in procedure – undermine the FAR's goals in efficiency, and that therefore Congress should impose heightened standards for pleading and judgments.

In many ways, this seems to be a problem already resolved.

- Agencies hearing agency-level bid protests are highly unlikely to be swayed by purely "technical" arguments regarding their own procurements.

- GAO is already considering a consolidated, arguably tightened standard of review,[41] studies have shown that GAO typically sustains protests only on serious grounds such as an agency's misapplication of award criteria,[42] and GAO's rules make clear that it will recommend relief only after taking into account the recommendation's practical effect:

> In determining the appropriate recommendation(s), GAO shall, except as specified in paragraph (c) of this section, consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission.[43]

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[40] *See, e.g.,* Scott McCaleb, *Strategies for Litigating Bid Protests: Forum Selection,* 2011 WL 5039650, at *6 ("Once a protest is filed [at the Court of Federal Claims], the litigation schedule will be set largely at the judge's discretion, based on the immediacy of the protest and the judge's and parties' schedules. Together, these factors make the litigation process at the COFC less predictable than at the GAO."); Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Circuit B.J. 243, 309 (2009) ("Unlike GAO and agency-level protest decisions, the COFC has no time limit on the issuance of protest decisions.").

[41] *GAO, supra* note 22, at 11-14.

[42] *See, e.g.,* Will Dawson*, Data Scarcity in Bid Protests: Problems and Proposed Solutions,* 51 Pub. Cont. L.J. 131, 159 (2021).

[43] GAO Bid Protest Regulation 21.8(b), 4 C.F.R. § 21.8(b).

- The Court of Federal Claims also will carefully consider the practical impact of its protest decisions – it will not simply sustain "technical" protests -- as the U.S. Department of Justice has made clear in its own practice guidance.[44] The protester "must show that the Government's error prejudiced it."[45] In a pre-award bid protest, a prospective offeror may establish prejudice by demonstrating it has suffered a "'non-trivial competitive injury which can be redressed by judicial relief.'" To prevail, the protester must show that the agency action "was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[46] To show that an agency's decision lacked a rational basis, according to the Justice Department, the protest must show that "the contracting officer 'entirely failed to consider an important aspect of the problem, offered an explanation for [her] decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[47] According to the Justice Department, the "rational basis" standard is "highly deferential" to purchasing agencies, a "heavy burden," which is "'not met by reliance on [the] pleadings alone, or by conclusory allegations and generalities.'"[48] Finally, argued the Justice Department, "even if the protestor can demonstrate errors in the procurement process, the protestor must then show that it was "significantly prejudiced" by those errors."[49] As a practical matter, the strict standards for pleading and proof mean that "purely technical" bid protests cannot prevail at the Court of Federal Claims, either.

III. Other Reform Proposals: Improving Debriefings and Agency-Level Protests

Beyond the reform proposals reviewed above, two other categories of bid protest reforms are worth bringing to the Subcommittee's attention: enhanced debriefings after award, and comprehensive improvements to agency-level bid protests.

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[44] U.S. Department of Justice, U.S. Attorneys' Manual: Civil Resource Manual (archived), Sec. 71. *Protest Of Contract Awards*, https://www.justice.gov/archives/usam/civil-resource-manual-71-protest-contract-awards
[45] *Id*. (citing *Labatt Food Serv. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009); *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) ("In fact, prejudice (or injury) is a necessary element of standing.")).
[46] *Id*. (citing 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2)(A); *Glenn Defense Marine (Asia) PTE, Ltd. v. United States*, 720 F.3d 901, 907 (Fed. Cir. 2013) ("In a bid protest case, the inquiry is whether the agency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, whether the error is prejudicial"); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977).
[47] *Id*. (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
[48] *Id*. (quoting *Bromley Contracting Co. v. United States*, 15 Cl. Ct. 100, 105 (1988); *see also Campbell v. United States*, 2 Cl. Ct. 247, 249 (1983)).
[49] *Id*.

A. Improved Debriefings

In a debriefing, an agency explains to a vendor why the vendor lost.[50] In the broader debate over bid protest reform, improving debriefings are too often overlooked as an inexpensive means of reducing bid protests. Many practitioners in fact credit the Defense Department's recently enhanced debriefings with lowering the overall number of bid protests. Once a vendor fully understands why it lost, and how it can do better in the next procurement, the vendor is generally less likely to protest.

As experienced bid protest attorneys Nathaniel Castellano and Peter Camp have noted, "the defining feature of an enhanced debriefing is for the agency to provide each disappointed offeror with the *actual evaluation materials* relevant to evaluation and non-selection of that offeror's proposal."[51] That became standard practice for larger Defense Department debriefings after passage of Section 818 of the National Defense Authorization Act for FY 2018, Public Law No. 115-91, which has been implemented through the Defense Federal Acquisition Regulation Supplement (DFARS).[52]

As Castellano and Camp pointed out, enhanced debriefings which provide the agency's evaluation materials (in redacted form to delete sensitive information, such as competitors' prices) "are a readily available tool for improving the protest process, making it more efficient and manageable for all involved." They suggested that civilian agencies adopt enhanced debriefing practices as well. Expanding enhanced debriefing requirements to the civilian agencies could be done through a legislative mandate similar to Section 818 of the National Defense Authorization Act for FY 2018.

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[50] *E.g.,* FAR 15.505 (preaward debriefing); FAR 15.506 (postaward); FAR 8.405-2 (Federal Supply Schedule orders); FAR 16.505 (indefinite-delivery/indefinite-quantity orders).

[51] Nathaniel Castellano & Peter Camp, *Postscript III: Enhanced Debriefings: A Simple Strategy For A More Manageable Protest Process*, 35 Nash & Cibinic Rep. ¶46 (2021).

[52] DFARS 215.506, *Postaward debriefing of offerors*, states in relevant part (with emphasis added):

> (d) In addition to the requirements of FAR 15.506(d), the minimum debriefing information shall include the following:
>
> (i) For award of a *contract in excess of $10 million and not in excess of $100 million* with a small business or nontraditional defense contractor, an *option for the small business or nontraditional defense contractor to request disclosure of the agency's written source selection decision document, redacted* to protect the confidential and proprietary information of other offerors for the contract award.
>
> (ii) For award of a contract in excess of $100 million, *disclosure of the agency's written source selection decision document, redacted* to protect the confidential and proprietary information of other offerors for the contract award.

B. Improved Agency-Level Protests

Another point of potential reform is agency-level protests. As an earlier report to the Administrative Conference of the United States[53] pointed out, agency-level protests – protests brought to the procuring agency itself – are a missed opportunity for federal agencies. Agency-level protests allow the agency to identify and rectify mistakes quickly, to contain risk through a streamlined bid protest procedure that can be quick with little disruption to the procurement process.[54]

But agency-level protests have largely failed since they were regularized at FAR 33.103 in 1994, in part because procedures for these bid protests have not been updated. Our 2023 report on Defense Department bid protests[55] picked up from the ACUS report and recommended that best practices in agency-level bid protests be applied government-wide:[56]

1. **Formalize the Role of the "Agency Protest Official"**: Under the current FAR rule, a vendor that brings an agency-level protest 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 the agency's response to management failures that agency-level protests revealed.

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. Presumptively giving 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, such as "other transactions" agreements.[57]

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[53] Christopher R. 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 (2021).
[54] *See, e.g.,* Major 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).
[55] Christopher Yukins & David Drabkin, Acquisition Innovation Research Center (AIRC), *DoD Bid Protests* (2023), https://acqirc.org/publications/research/dod-bid-protests/.
[56] *Id.* at 20-31.
[57] *See, e.g.,* A. Victoria Christoff*, The Ball Is in Their Court: How the Federal Circuit Can Clarify Bid Protest Jurisdiction for Prototype OT Agreements,* 52 Pub. Cont. L.J. 549 (2023).

3. **Clarify Timelines:** 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. Other agencies take much longer – or sometimes fail to respond at all. To resolve this uncertainty, and to make plain when a vendor must proceed to a GAO protest to preserve its rights, rigorous procedures and deadlines, akin to those used for deciding claims under the Contract Disputes Act (see FAR 33.211), could be applied. This would give vendors clarity as to how an agency-level protest was proceeding and would help ensure that any adverse agency action on the protest would be noticed in writing to the protesting vendor. Further enhancements to the decision-making process might include adopting procedural milestones (*e.g.*, an early status conference) which some agencies have used to make agency-level protests more effective.

4. **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, which raises 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.

5. **Maximize the Record Shared with Protesters:** One of the chief complaints from vendors' regarding agency-level bid protests is that vendors have no access to the agency record, once compiled.[58] The ACUS report pointed out that, in interviews for the report, agency counsel strongly objected to the most obvious means of affording protesters (or their counsel) access to sensitive or proprietary information – under protective orders, much like those used at GAO and 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 which present key elements of the procurement record, or confidentiality

[58] *See, e.g.,* Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *supra* note 40, at 273 ("Perhaps the major disadvantage to filing an agency-level protest is that, unlike a GAO or COFC protest, the protester has no right to discovery.").

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.[59] For now, however, agencies may want to consider employing enhanced debriefings or making greater use of confidentiality agreements in order to share the relevant parts of the record with agency-level protesters.

6. **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 vital changes would be needed to preserve the stay, which is critical precisely because the protester in the U.S. federal 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.

7. **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

[59] Our program at GW Law School is currently co-hosting a webinar series with the Open Contracting Partnership on open contracting practices being applied around the world – a survey of developments in Asia/Oceania, the Americas, and Africa and Europe. https://www.open-contracting.org/events/.

> "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 our study on Defense Department bid protests noted, these reforms generally draw on best practices already used by individual agencies in their respective agency-level bid protest systems.[60] Reform need not be revolutionary, but even incremental reforms across government could make agency-level protests a much more effective tool to ensure fair competition and good management.

IV. Conclusion

As the discussion above reflects, the bid protest reform proposals before the Subcommittee generally have been the subject of many years of debate in the procurement community. Some of those proposals could have untoward, unforeseen effects; others, such as expanded debriefings and reforms of the agency-level bid protest process, could bring welcome improvements to the federal procurement system.

[60] *See* Christopher Yukins & David Drabkin, *supra* note 55.