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BID PROTESTS: The RAND Study of DOD Protests at the GAO and the COFC

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THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from
professors ralph c. nash and john cibinic

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DISPUTES & LITIGATION

¶ 10 BID PROTESTS: The RAND Study Of DOD Protests At The GAO And The COFC

Steven L. Schooner

We were anxious to read the recent “assessment of the prevalence and impact of bid protests on U.S. Department of Defense acquisitions” that RAND Corporation delivered to the DOD in late December 2017 and publicly released early in 2018. In their report, Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers* (Dec. 2017), https://www.rand.org/pubs/research_reports/RR2356.html, the authors are transparent from the start, noting that the purpose of this congressionally mandated study was to “inform Congress and U.S. defense leaders about the effectiveness of current procurement policies and processes to reduce bid protests.” (Emphasis added.) See § 885 of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, requiring a report on a study of bid protests. While the RAND report does not appear to be what Congress was hoping for, it’s worth a look, offering plenty of interesting data, observations, and insights.

As a general rule, we welcome these types of research efforts, particularly to the extent that they facilitate decisionmaking based on data and facts rather than anecdotes, perceptions, and urban myths. Most of our readers are cognizant of the Government Accountability Office’s terse but informative annual reports to Congress. And this isn’t the first deep dive into the bid protest data, and it won’t be the last. See, e.g., Howe, *Feature Comment: Darwinian Selection Headlines Again—An Analysis of GAO’s 2015 Bid Protest Statistics*, 58 GC ¶ 1; CRS *Surveys GAO Bid Protest Trends, Effectiveness Rate*, 57 GC ¶ 235; Howe, *Feature Comment: Agency Corrective Action Remains The Dominant Theme—An Analysis of GAO’s Bid Protest Statistics*, 56 GC ¶ 385; Gordon, *Bid Protests: The Cost Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489 (2013); Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714 (2003); Schooner, *Feature Comment: Watching the Sunset: Anticipating GAO’s Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*, 42 GC ¶ 108. Nevertheless, by almost any standard, this is one of the most significant analyses of bid protest activity we’ve seen, if only because the GAO and the Court of Federal Claims granted RAND greater access than previous researchers enjoyed.

The report and its underlying research effort evidence a high degree of professionalism and independence, and reflect a serious, careful, and—most importantly—objective analysis of some frequently polarizing issues. Even so, the report did not fully respond to Congress’ broad mandate. For example, due to a lack of data (and, implicitly, time constraints and lack of resources), the report did not address the effects of protests on procurements, the time and cost to the Government to handle protests, the frequency with which protesters actually receive an award (but we know it’s low), or agency-level protest trends. Even though it’s a lengthy, dense, and data-intensive report, it’s easy to read and chock full of nuggets for anyone interested in the world of bid protests. And maybe the report will attract more widespread attention to the extent RAND features prominently in Steven Spielberg’s recently released, well-cast, and critically acclaimed historical drama, *The Post* (2017).

After an introductory section, a brief historical overview, and some helpful references to prior research, the report proceeds to: describe stakeholder perspectives on the bid protest system; chronicle bid protest volume through quantitative analysis of bid protests over the last decade, separately reporting on bid protest activity at GAO and the COFC since 2008; provide supplemental data on discrete aspects of the data set (such as protests by incumbents and bridge contracts); and offer a half-dozen recommendations, all of which seem inherently logical to us.

The report frequently confirms—based upon empirical data—a number of characteristics of the bid protest system that experienced practitioners already know, consider obvious, or, at a minimum, assume to be true. For example:

- The fiscal year drives the protest cycle, and “filings peak around the end of the fiscal year and then drop sharply in November, December, and January.” Our readers will not be surprised that protest activity begins to rise sharply in August, then increases through September and October.
- Protest volume at GAO, while still below its historical high (in 1993), has steadily increased (until last year) over the last decade; “between FY 2008 and FY 2016,...protest activity for both DOD and non-DOD agencies approximately doubled.”
- The DOD rarely overrides GAO automatic stays. Indeed, “DoD [agencies issue] a stay override—for less than 2 percent of procurements.” (Actually, RAND’s data demonstrate that the DOD overrides the stay in less than 1.5% of relevant procurements.) Given the complaints frequently heard from Government officials, RAND mused: “If bid protests substantially affect the procurement of urgently needed goods and services, one might expect this percentage to be higher.... Further research in this area might help determine why these rates are low.”
- Reconsiderations rarely succeed. RAND found only one successful reconsideration case in a data sample of 20,000 plus filings.
- “Pre-award protests have a slightly higher effectiveness rate but lower sustained rate, implying that most relief takes the form of corrective action.” It’s not surprising that it’s easier to fix mistakes or remedy poor decisions earlier in the process; just as agencies are more willing to amend solicitations before, as opposed to after, submission of offers.
- RAND shed some light on the “commonly held belief” that incumbents are more likely to protest because they can extend their current income stream through a bridge contract. RAND found that protests by incumbents represent a quarter of GAO’s protests, but the rate was twice as high for task-order protests. RAND explained that the “difference is statistically significant and suggests—but does not prove—that incumbents are more likely to protest task orders when it may be to their economic advantage if they get a bridge contract during the [Competition in Contracting Act] stay.” RAND clarified, “however, that incumbents have good reasons to protest task orders” to the extent that “when the incumbent protests a task order, the effectiveness rate is approximately 70 percent, which is much higher than average and statistically significant. Thus, while incumbents may protest task orders more frequently, incumbents are also much more likely to be successful.”
- While we have no doubt that protest avoidance—and risk avoidance, generally—is in the back of experienced procurement professionals’ minds, we were pleased by RAND’s finding that DOD procurement personnel typically don’t develop or draft their Requests for Proposals primarily around protest avoidance. The RAND team specifically asked the DOD personnel the extent to which the specter of a bid protest influenced how RFPs were structured and evaluated. The short answer was that the DOD, generally, and its Contracting Officers, specifically, did not consider the prospect of receiving a bid protest to be a top priority as they developed their RFPs. Rather—and this should surprise no one reading the REPORT—the RFP structure and evaluation mechanisms derive primarily from innumerable congressional mandates (e.g., the Competition in Contracting Act, the Federal Acquisition Streamlining Act, the Small Business Act, the Buy American Act, and, of course, the steady stream of NDAA provisions).
- Our readers won’t be surprised that RAND noted that the acquisition workforce, cut massively in the 1990s and still rebuilding, was insufficiently staffed and could benefit from additional training.

Perception, Perspective, Transparency, And Trust

But we expect the broader findings will garner more attention. One of the most compelling passages summarized the extent to which perspectives on the bid protest system varied greatly between DOD personnel and the private sector:

DoD personnel expressed a general dissatisfaction with the current bid protest system. They believed that contractors have an unfair advantage in the contracting process in that they are able to impede timely awards with bid protests....[P]rotest rules encouraged this behavior by allowing protesters to make an excessive number of “weak” allegations, by permitting contractors too much time to protest, and by virtue of the amount of time it takes to resolve cases. [Among DoD personnel,]...there was a commonly held belief that a contractor is more likely to file a bid protest if it is an incumbent that has lost in a follow-on competition....

...[R]epresentatives from private-sector companies, trade associations, and private law firms...[generally view] bid protests as a healthy component of a transparent acquisition process, because these protests hold the government accountable and provide information on how the contract award or source selection was made.

We think that sums up the dichotomy quite nicely. RAND made clear that “[p]olicymakers should be aware that the perspectives of the bid protest system held by DoD personnel and by the private sector vary greatly and that there is a *lack of trust* on each side.” (Emphasis added.) Indeed, we can’t think of a better anecdote than the one RAND highlighted, inferring a link between poor debriefings and protests: “The worst debriefings were characterized as skimpy, adversarial, evasive, or failing to provide required reasonable responses to relevant questions. *It became clear over the course of our study that too little information or debriefings that are evasive or adversarial may lead to a bid protest.*” (Emphasis added.)

RAND went a step further, making improved debriefings its first recommendation. RAND pointed to § 818 of the 2018 NDAA, Pub. L. No. 115–91, which provides for enhanced postaward debriefing rights, and noted that some agencies, particularly the Army and Air Force, were already improving the quality of their debriefings. RAND specifically highlighted the Air Force’s extended debriefing program. This is no minor point. Tasked by Congress to figure out how to reduce the number of bid protests, RAND figured out that, if the DOD fulfills its statutory mandates, acts in a transparent manner and communicates effectively with disappointed offerors—and, implicitly, respects the importance and value of the private sector’s bid and proposal costs—the DOD should expect fewer protests. That sounds right to us and, indeed, we long have ridden this bandwagon. See *The Protest Process: Does It Need Repair?*, 32 NCRNL ¶ 5 (“There appears to be a broad consensus that better debriefings can reduce the number of protests and that there has been some deterioration of the quality of debriefings in some agencies.”). As a reminder that not everything is new under the sun, see also *Protests & Debriefings: A Tangled Web*, 11 NCR ¶ 47; *Debriefing: Congress Has Now Spoken*, 9 NCR ¶ 3; *Air Force Materiel Command Plans Expanded Debriefing Process*, 35 GC ¶ 460(which coincides with the all-time peak of GAO protest activity); *Debriefing: Tell It Like It Is*, 4 NCR ¶ 43.

Task Orders Require Scrutiny

RAND singled out and “recommend[ed] caution in considering any further restrictions on task-order bid protests.” More significant than the recommendation itself was the empirical justification that “task-order protests are generally more likely to be sustained or have corrective action compared with other types of protests. This result suggests that task-order protests fill an important role in improving the fairness of DoD procurements.” We’re assuming that isn’t what the DOD wanted to hear, but we think it’s a welcome and important dose of reality. We concede that task and delivery order contracting practices have improved as their use has exploded since the mid-to-late 1990’s, but it’s also fair to say that nothing over the last 20 years suggests that lack of oversight—in particular, exemption from the bid protest process—is justified or prudent.

Protests Represent A Serious Business Decision

We also applaud RAND for letting the air out of the balloon and dispelling some of the urban myths and horror stories that sometimes animate broad, unsophisticated, knee-jerk opposition to protests. First, bid protests remain relatively rare, even if the DOD is experiencing a temporary surge. RAND concluded that “it is important to note that the overall percentage of contracts protested is...less than 0.3 percent. This small value implies that bid protests are exceedingly uncommon for DoD procurements.” And, of course, concerns over the recent growth in protest activity (e.g., with 2,789 actions filed in FY 2016, up from 1,411 in FY 2007) rarely reference the 1993 filing peak, when more than 3,300 protests were filed at GAO.

One significant take-away from the study is that, although disappointed offerors do not always win their bid protests, they appear to protest, by and large, for legitimate business reasons—including, as noted above, poor agency debriefings. In other words, RAND seemed mostly unpersuaded by complaints that a disproportionate number of protests were predatory, vexatious, or frivolous. A contributing factor may be that RAND appears to have rejected the over-simplified or binary view of protests—in which there are only winners and losers—and instead accepted the increasingly common, and arguably more nuanced, perspective that protesters’ “effectiveness rate” is more significant than GAO’s “sustain rate,” noting that “roughly 40 percent of all protest actions result in some change to the initial procurement decision or terms.” See generally Gordon, *Feature Comment: Dissecting GAO’s Bid Protest “Effectiveness Rate,”* 56 GC ¶ 25; Papson et al., *Feature Comment: The Odds Of Winning a Contract After Protesting Are Higher Than You Think*, 55 GC ¶ 126; Howe, *supra*, 58 GC ¶ 1 and 56 GC ¶ 385. Moreover, RAND pointed out that “the stability (or slight increase) in the effectiveness rate while the number of protests is increasing refutes the claim that meritless (some use the term *frivolous*) protests account for those increases.” (Emphasis in original.)

The report also recognized that, with regard to protests, the devil is in the details. RAND highlighted “an important broad observation about the bid protest system, which many stakeholders and participants stated... during the course of this study: *The details of a protest case matter in terms of outcome.* It is not possible to predict the outcome of any case based on its general characteristics (e.g., the agency involved, the value of the procurement).” (Emphasis in original.)

The Largest Defense Contractors Don’t Protest To The COFC

One finding that we would not have thought to quantify caught our attention. RAND reported that the largest defense contractors (in terms of revenue) *almost never* bring their protests to the COFC. Protests from these firms were so rare that RAND concluded “protests at COFC are not part of standard business practice for these firms.” We found the numbers jarring.

RAND focused on the 11 firms that received the most revenue from the DOD in FY 2016. These familiar players—Lockheed Martin, Boeing, Raytheon, General Dynamics, Northrop Grumman, United Technologies, BAE Systems, L3 Technologies, Huntington Ingalls, Humana, and Bechtel—represented more than 42% of the DOD’s total obligated procurement dollars in FY 2016. For that group, RAND reported that, between calendar year 2008 and CY 2016, *all 11 of those firms filed a total of just 10 protest cases* in the COFC. (By comparison, over the same period, these 11 firms, as a group, filed at least 10—and typically in the neighborhood of 20 to 30—protests *each year* at the GAO.) And even that statistic understates the infrequency with which the largest firms protest at the court. RAND noted that *seven of the ten* cases were filed by one firm, L3 Technologies (albeit different divisions), and three of those cases were related. That means that *only three* COFC protest actions were initiated by 10 of the 11 most successful defense contractors over the course of nearly a decade.

Small Businesses And Small Contracts

We’re curious to learn how the small business community reacts to the study. When RAND observed that protests brought by small businesses “are less likely to be effective and more likely to be dismissed for legal insufficiency[.]” that made sense. We assume, however, that the knowledge, skill, and experience of protest *counsel* are more likely to determine the outcome of a protest than the size of the disappointed *offeror*. RAND later appeared to acknowledge as much, firing a warning volley at prospective *pro se* protest filers: “This result suggests that when small businesses are forced to use legal counsel, their protest sustained rates are similar to those of larger firms.” Or, quite simply, “more protests filed by small businesses might be successful with better legal representation.” We’re curious to know if the same data might be more critically analyzed with an eye towards correlating results with the qualifications and experience of protest *counsel*, rather than characteristics of the contractors themselves—but that was beyond the scope of the study.

We can’t imagine that anyone expected the report to generate empirically based promotional materials for the firms that specialize in bid protests to market their services to the (apparently) under-represented-to-their-own-detriment small business community. As we understand it, there’s no ongoing obligation for RAND to continue its research, but it would be fascinating to see if, over the next few years, the small business community gets the message (or if, for example, the Small Business Administration includes this important information in their training and business development literature).

The RAND researchers also expressed surprise that firms initiated a non-negligible number of protests over contract op-

portunities worth less than \$100,000. RAND found that approximately 8% of the DOD-related GAO protest actions (something approaching 200 protests each year) involved procurements with declared values under \$100,000. The RAND team also found nearly 4% of protest cases at the COFC involved similarly small matters, but we do not consider that volume—cases you can count on the fingers of one hand—significant. (Our math suggests that 4% of 475 DOD-related protest cases filed at the COFC over nine years, or around 50 cases each year, is only two or three cases per year.)

Nonetheless, for RAND, that raised an interesting policy question: if the costs to the Government to adjudicate these protests exceed the value of the procurements themselves, might the costs of such protests also outweigh their benefits? In terms of transaction costs, RAND has a point. And many of the modern-era, streamlined, and commercial practices that have altered the procurement landscape since the acquisition reforms of the 1990s derived from this calculus. From micro-purchase authority and widespread use of Government charge cards, to ever-increasing simplified acquisition authorities and the explosion of schedule and interagency purchasing, federal procurement has been streamlined and simplified for the large volume of relatively small dollar purchases the Government routinely makes. See, e.g., *Dateline January 2018*, 32 NCRNL DATE JAN (FY2018 NDAA § 805 increased the simplified acquisition threshold in 41 USCA § 134 from \$100,000 to \$250,000).

Ultimately, RAND recommended that streamlined processes be considered for protests challenging procurements under \$100,000 (or some other suitably low value), perhaps employing processes analogous to adjudications in traffic or small claims courts. (Rather than \$100,000, we suggest that any such pilot or policy be pegged to the new simplified acquisition threshold, \$250,000.) It seems reasonable to ask whether GAO should offer an option like the boards of contract appeals, which, since the Contract Disputes Act of 1978, provide for accelerated and small claims (expedited, non-precedential) procedures with decisions rendered within 180 or 120 days, respectively. While we appreciate the sentiment, we're hesitant to encourage ratcheting up the time pressure GAO currently faces. The GAO already manages its docket against rather Draconian deadlines, and we don't see Congress clamoring to increase the GAO's bid protest operating budget. (To the contrary, the GAO's impending filing fee, expected this year, was allegedly deemed necessary to cover the costs of its new electronic protest docket system. See 81 Fed. Reg. 22197 (Apr. 15, 2016)).

Conclusion

Our sense is that the RAND report provides robust, empirical evidence that corroborates the long-time intuitions of experienced practitioners about the bid protest system. The report does not appear to provide support for any of the common critiques of our bid protest regime, and it does not contradict the underlying concept that bid protests make sense in public procurement even though, in the private sector, it would be highly irregular to sue a potential customer over a lost opportunity. We are also relieved that the report does not provide ammunition for a legislative dilution of the bid protest system. Our system, warts and all, has become a frequently referenced model around the world as rights for disappointed offerors in public procurements have become not only a global norm and best practice, but a common element of successful, credible public procurement regimes. See generally *GAO Compares Free Trade Agreements*, 58 GC ¶ 356; GAO, *International Trade: Government Procurement Agreements Contain Similar Provisions, But Market Access Commitments Vary*, GAO-16-727 (Sept. 27, 2016), <https://www.gao.gov/assets/690/680044.pdf>. (“All of the agreements we examined outline procedures for resolving challenges raised by suppliers regarding procuring government entities’ implementation of the procurement process, granting suppliers a mechanism by which to resolve these concerns.... While the specifics vary among the agreements, the parties generally must designate an impartial authority to review supplier challenges.”); World Trade Organization, Revised Agreement on Government Procurement, Article XVIII—Domestic Review Procedures (2012), https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleXVIII; Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 PUB. CONT. L. J. 427 (2006).

At this point, there's no need to speculate whether the proponents of the report were disappointed with the report's findings. That's water over the dam. With the report, RAND, and, of course, Congress, have performed a valuable public service. (Conversely, Congress rushed ahead with its “loser pays” provision without waiting for the RAND study results, but you can't have everything.) We hope to see more serious congressionally mandated studies of important policy issues—rather than legislation by anecdote and perception—in the future. *SLS*