



2006

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Recommended Citation

Daniel I. Gordon, Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make, 35 Pub. Cont. L. J. (2006).

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Constructing a Bid Protest Process: The Choices That Every Procurement Challenge System Must Make

Daniel I. Gordon¹

Over the years, many public procurement systems, both within the United States and in other countries, have established systems for allowing vendors to challenge the conduct of procurement processes.² Especially in light of the significant percentage of countries' government budgets spent on procurements, providing an effective domestic review mechanism for vendors who believe that government procurement officials have not conducted an acquisition lawfully brings an important measure of transparency and accountability to public procurement systems.³ This article discusses the goals of these bid protest systems, and then presents key choices that must be made in crafting such a system. The goal of this article is not to describe an ideal bid protest system, but rather to present the decisions that need to be made when constructing a bid protest system.

Labels and Definitions: Protests, challenges, complaint, review

What distinguishes a protest from other complaints about the procurement process is who is complaining and the stage of the procurement process when the complaint arises: a protest can be defined as a complaint by a would-be contractor regarding the formation stage of the procurement process.⁴ The complaint may relate to the conduct of the procurement prior to the selection of a winner—in which case it typically alleges that the

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² A wealth of resources, primary and secondary, is available on protest systems, although, for the sake of brevity, this article contains few citations to them, except in this footnote. Among the primary sources, see, e.g., 31 U.S.C. §§ 3551-3556 (2000) (GAO); 28 U.S.C. § 1491 (2000) (Court of Federal Claims); United Nations Commission On International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services (1994) ch. VI; World Trade Organization (WTO) Agreement on Government Procurement (1993) art. XX; North American Free Trade Agreement (NAFTA) art. 1017; United Republic of Tanzania, The Public Procurement Act (2004). For descriptions of some of the protest systems, see, e.g., Canadian International Trade Tribunal, Procurement Review Process: A Descriptive Guide (Mar. 2004); Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) (European Union); Daniel J. Mitterhoff, New Rules for Supplier Bid Challenges Take Effect in China, *International Government Contractor*, vol. 1, No. 5 ¶ 38 (2004); Kadir Akin Gözel, Ensuring Transparency and Fair Competition in Government Procurement in Turkey, vol. 2, No. 8 ¶ 66 (2005) at 4-5; Ministry of Economy and European Integration of Ukraine, *Legal and Practical Aspects of Public Procurement: Methodological Guide* (2003), ch. 7, "Handling of Complaints." For an excellent comparative overview, see Susan L. Arrowsmith, John Linarelli, and Don Wallace, Jr., *Regulating Public Procurement* (2000), ch. 12, "Enforcement and Remedies."

³ See Guide to Enactment of United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, ¶ 30 (ensuring that "suppliers and contractors have the right to seek review of actions by the procuring entity in violation of those rules" is widely viewed today as "an important safeguard of proper adherence to procurement rules").

⁴ This discussion assumes that the protester is a private-sector vendor. As discussed below, systems may allow other entities to protest, whether legislators, trade associations, nongovernmental organizations, potential subcontractors, or others.

ground rules of the procurement are unfair to the complainant—or it may relate to the selection of the winner. A typical “pre-award” protest might argue that some aspect of a solicitation will disadvantage the protesting company in the competition for a contract—for example, the solicitation for laser printers sets a minimum number of pages per minute that the complaining vendor’s printers cannot meet.⁵ A typical award challenge alleges that the government’s non-selection of the protesting vendor was improper—either the ground rules for the competition were allegedly not followed, or the government otherwise acted improperly or unreasonably. Technically, of course, those protests are almost always “post-award,” in the sense that they are filed after the contract is awarded.⁶ Those award challenges are properly viewed as protests—indeed, protests of awards are, in the author’s experience, more common than protests challenging the ground rules of a procurement.

Complaints that arise after contract award are not protests, however, where the complainant is the vendor that won the contract and the complaint concerns some aspect of performance of the contract: for example, where a company wins a contract and then, during performance, it comes to believe that the government should pay it more than the agreed contract price (because, for instance, the contractor learns of a condition at the government work site that will make performance more expensive than anticipated), that disagreement is not a protest. A protest is always between the government and a vendor that wants—but does not have—a contract (a “disappointed bidder,” as it is often called).

Unfortunately, there is no uniform label for protests. While in the United States, the most common term is “bid protest,” the term used by the United Nations Commission on International Trade Law (UNCITRAL) is “review,” and elsewhere one sees reference to “domestic review mechanisms.” The World Trade Organization’s Agreement on Government Procurement refers to “challenges.” In some countries, they are referred to as appeals or complaints. As long as it is understood that the reference is to complaints by disappointed bidders unhappy with the contract formation process, the label does not matter, and for the sake of simplicity, we will refer to them as protests henceforth in this article.

It is worth highlighting the differences between a protest system and the other methods for policing a procurement system: audits, investigations, and criminal prosecutions. Because the key feature of protests is that they are raised by disappointed bidders, those

⁵ Pre-award protests are generally assumed to be complaints alleging that the competition for the contract is being unduly restrictive, so that the protester is seeking more competition, rather than less. Consider, to continue with the laser printer example, the situation of Company AA, which sells very high-speed printers (say, 50 pages per minute). If a solicitation were issued with a relatively low required speed (say, 10 pages per minute), one can imagine that Company AA would prefer that the solicitation be changed to set a higher minimum, since that would presumably make it impossible for some of Company AA’s rivals to compete, and would thus give Company AA an advantage. At least some protest systems, however, will decline to hear protests alleging that a solicitation should be made more restrictive of competition.

⁶ The procurement system may work in a way that ensures that the losing competitors learn of the intended winner before the contract is actually signed, so that the award challenge may actually be filed before the award is formalized. This will be most common in systems whose legal approach would make the award decision irreversible once the contract has actually been signed.

bidders serve as “private attorneys general,” in that they “direct” the government to investigate certain procurements (and certain aspects of those procurements) through their protests.⁷ The contrast with the alternatives is stark: where a system relies on audits, or inspectors general, or criminal prosecution, government officials are the ones deciding which procurements to review, and what aspects of those procurements. While it may seem wasteful to let private sector vendors decide where the government should spend its investigative resources, that approach has advantages. There are so many procurements, large and small, and each procurement has so many aspects, that deciding which aspects of which procurements to review may be a major task, with a significant risk of spending resources on unnecessary investigations. Of course, there remains a role for non-protest investigations, whether by auditors, inspectors general, or criminal investigators, since even non-protested procurements may be tainted—indeed, where collusion is widespread, no bidder may have an interest in protesting. Yet where vendors are willing to protest, letting them decide which procurements to investigate may reassure potential bidders, the press, the business community, and the public that the government is really committed to hearing, and fairly considering, complaints, and to policing the integrity of the system. As stated in the Guide to Enactment of UNCITRAL’s model procurement law, “a review process . . . helps to make [a procurement law system] to an important degree self-policing and self-enforcing, since it provides an avenue for review to suppliers and contractors, who have a natural interest in monitoring compliance by procuring entities with the provisions of the [procurement law].”⁸

Competing goals of every protest system

Any protest system serves multiple purposes, and there is inevitably conflict among them. These competing goals, like the competing “desiderata” of a procurement system overall, lead to tradeoffs, since one or more goals can be met only at the expense of others.⁹ In a protest system, the overarching tension can be viewed as the tension between the desire to exhaustively investigate any complaint, on the one hand, and the need to let the procurement process move forward, on the other. This can be viewed as tension between support for the right to protest and opposition to that right, although the opposition may be couched as concern about limiting the disruption caused by the protest process.

The support for allowing disappointed bidders to protest comes from multiple sources, serving multiple—and not necessarily consistent—goals. From the point of view of the disappointed bidders, a protest system provides a forum for them to air their complaints and—at least as important to the disappointed bidders—to obtain relief. Supporters of this goal will focus on what the disappointed bidders may view as “due process” rights: do they—or their representatives—have the opportunity to see the procurement file? do they have the right to a hearing? do they have a realistic chance of obtaining meaningful relief?

⁷ See *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C.Cir.1970).

⁸ Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services, ¶ 30.

⁹ See Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002).

From the point of view of those focused on good government, a protest system serves to enhance the accountability of procurement officials and government agencies. A variant of this goal may be at issue where there is an effort to improve a system's reputation—which may be the case, for instance, where a developing country is seeking increased participation in its procurement system by multinational firms, or recognition of the adequacy of its procurement system from the international development banks. Supporters of this goal may focus on the number of protests filed, and the thoroughness of the investigative aspects of the protest system, and the issue of whether government funds have been wisely spent through the challenged procurement decisions may be a key one. Publishing protest decisions, while it may be of little interest to the individual protesters, is important to those concerned about good government, including in the press.¹⁰

Closely related to the promotion of good government is the goal of protecting the integrity of the procurement system. Those focused on this goal may also be trying to increase competition by encouraging companies to sell to the government, and they want to reduce the barrier to entry that the perception of corruption and a lack of integrity and transparency creates. The presence of a robust protest system can serve as a deterrent to improper conduct, and those who value that aspect of a protest system will underscore the need for transparency in the process, so that contracting personnel and the private sector can have confidence in the robustness of the system. Rules that limit access to the protest system (such as timeliness and standing rules) will often be viewed as detrimental and overly rigid. Those seeking to further this goal will tend to focus on the fight against corruption, so that bid rigging, misrepresentation, and other impropriety on the part of bidders may be just as significant a concern as the actions of government officials.

All of these goals tend to lead to a more lengthy and more costly protest process. If these were a system's only goals, it might hear anyone's protest (even from a private citizen with no stake in the procurement) at any time (even years after a contract been awarded), and unlimited discovery would be allowed, with depositions and hearings in every case.

Weighing against goals is the competing goal of having the procurement system efficiently and promptly complete its central role, the acquisition of goods or services that the government needs. Those focusing on this goal will be concerned about avoiding unnecessary costs to the government and limiting the delay and disruption of procurements during the protest process. They will argue for narrowing standing and setting strict time limits for filing protests and for deciding them. They will argue that frivolous protesters should have to pay fines, and that the filing of a protest should not force the government to suspend the procurement while the protest is resolved.¹¹

¹⁰ In some systems, a protest system can also help clarify and even shape procurement law through published case law. Even where the protest forum lacks the power to mold procurement law, published decisions can at least alert those who do have that power to aspects of the law that need improvement.

¹¹ Opponents of the protest process sometimes say that protests engender damage that cannot be mitigated by tight time limits and fines for frivolous protests. They point to instances where contracting officials try to conduct procurements so as to make them "protest-proof," in ways that do not improve the procurements. Examples might be a decision to purchase from a contract vehicle immune from protest (if

There will always be tension between the first cluster of goals and the goal of avoiding undue disruption to the procurement system. The relative importance a nation, state, or other procuring entity gives to the competing demands will drive the trade-offs made in defining the structure of its protest system. In the choices that must be made in constructing a protest system, consideration must be given to the overall situation in the system—concern about corruption, willingness of bidders to protest, the efficiency and independence of potential forums for resolving protests, and so forth. Even in one system, the ordering of priorities among the competing goals of the protest mechanism may change over time, which could lead to changes in the way the protest process is structured.

Challenges That Every Protest System Faces

There are certain challenges that every protest system faces, whether at the national or local level, and it is important to keep these in mind in crafting the system. A cluster of important challenges pertain to the cooperation that will—or will not—be forthcoming from the contracting agencies when their procurement actions are challenged in protests. In particular, the contracting agencies may not be willing to explain their procurement actions, or they may not want to turn over relevant documents (not even to the protest forum, and certainly not to the protester). If the procurement function is lodged in a powerful government institution, such as the ministry of finance, and the protest forum is in a weak one, the forum may find itself unable to obtain enough cooperation from the procuring agency to perform a meaningful review. Further, however thorough the review, there is the question of the protest forum's authority to direct compliance with its decisions.

A completely different cluster of challenges revolves around the conduct of potential and actual protesters. One that often captures the attention of government officials is the concern that companies will abuse the protest system to file frivolous protests, either simply out of malice or for tactical reasons. The risk of abuse can be cited as a reason to charge high filing fees, or to punish vendors that file frivolous protests.

The reverse concern also arises, and in many contexts it may be more significant: that is the possibility that dissatisfied bidders will not protest out of concern that they would be wasting their time (and potentially their money as well) by protesting, because the protest will not be fairly considered or, even if it is found to be justified, the protester will not be awarded the contract. More troubling is the phenomenon where disappointed bidders are deterred from protesting by fear that the contracting agency will retaliate against protesting vendors in competitions for future contracts. Concern that disappointed bidders may be unwilling to protest weighs in favor of providing due process and ensuring that the protest forum is seen to be fair and to be willing and able to provide meaningful relief, and that protesters will not be subject to retaliation.

such exists) or overly cautious or conservative conduct on the part of contracting personnel, in order to avoid any actions viewed as likely to trigger protests.

Key Decisions Regarding a Protest Forum

With this background, eight key questions regarding a protest forum can be set out, the answers to which will shape the protest system. Various lesser issues are addressed as well in the analysis below. There is no right or wrong response to any of these decision points, and there are often advantages and disadvantages to alternative responses. Of particular interest may be the impact of a system's decision regarding one issue on possible decisions in other areas. Some of these decisions can be made by the protest forum itself; others, by their nature, will be made at a higher level of the government.

1. Where in the government is the protest forum located?

A protest forum cannot itself decide where it will be located in the government; instead, that decision will be made for it by others. Broadly, it can be said that there are three places in the governmental structure that a protest forum can be located: in the contracting agency itself, in an independent administrative entity, and in a court.

Having the contracting agency whose procurement is being protested decide the protest has the advantage of efficiency: because the information about the procurement resides within the contracting agency, typically the agency can decide the protest faster and at lower expense than either an independent body or a court. Another advantage to this approach is that, as a bureaucratic matter, the contracting agency may wish to be allowed to decide the protest (at the least, the agency may wish to serve as the first place where a protest is to be filed).

The disadvantage of protests going to the contracting agency is the appearance (and perhaps the reality) of a lack of independence and impartiality—a significant problem for a function that is essentially quasi-judicial. Protesting vendors may fear that the contracting agency will not be willing to admit that the procurement was not handled properly.

Two refinements are used in some systems to address the latter concerns. First, protests can be directed to some person or group within the contracting agency outside (and possibly above) the office that handled the procurement. A second variant, which addresses the bureaucratic sensitivity of the contracting agency, is to require that protests first be filed with that agency, but to allow vendors that are dissatisfied with the result of that review to then pursue their protest at either an independent administrative forum or a court. Allowing such “sequential” protests complicates the question of interim relief, as noted below.

Setting up an independent administrative entity to resolve protests appears to be the current trend. Turkey, Norway, and Tanzania are among the countries that have recently established such entities. Quasi-judicial administrative entities have the great advantage of an appearance of independence, which can be reassuring to vendors thinking of filing protests. If the administrative entity is “dedicated” to procurement, in the sense that it

has no responsibilities other than for procurement matters, it may bring expertise to protest resolution that allows it to be efficient and respected.¹²

Administrative entities do, however, have disadvantages as well. They add to the cost of government (and of the procurement system) if they are created solely to hear protests. Also, there is a risk that non-judicial bodies outside the contracting agencies will be weaker in the bureaucratic struggle than the contracting agencies they are meant to supervise, which may make it difficult for them to gather the documents and facts they need to resolve protests, or to enforce decisions reached if they are adverse to the contracting agencies. One solution can be to establish an administrative forum inside (or under the aegis of) a powerful agency; in some countries, locating the protest forum within the ministry of finance or the supreme audit institution may serve this purpose.

If protests are decided by a court, that may have the advantage, depending on the context, a forum that is both independent and able to enforce its decisions. Court procedures can, however, be slow and expensive. Also, a court of general jurisdiction may have little expertise in procurement matters, which may impair or slow up its resolution of protests (in addition to burdening a docket already full civil and/or criminal cases).

If the system contains more than one forum for hearing protests (typically, the contracting agency itself, an independent administrative forum, and a court), rules need to be established regarding multiple protests. An “exhaustion” requirement would require a bidder to first protest to the agency before a protest to the independent forum or court would be permitted. If both an independent administrative forum and a court are available, the system may treat these as alternatives, so that the disappointed bidder could file a protest at either one (but not both, even sequentially), or as an appeal process, potentially creating a different exhaustion requirement: a vendor could go to court only if the administrative forum ruled against the protest first. In crafting these rules, the system will make a series of tradeoffs: allowing sequential protests increases accountability and “due process,” but also increases the cost and time spent resolving the challenge. Also, if multiple, sequential protests are permitted, the system will need rules on whether interim relief continues throughout what may be a lengthy protest process.

2. *How broad is the forum’s jurisdiction?*

The scope of the forum’s jurisdiction can be measured in two different dimensions. Viewed vertically, protest jurisdiction may cover all, or fewer than all, of the levels of government. Viewed horizontally, the jurisdiction may reach all, or fewer than all, of agencies on one level of government, and all, or fewer than all, of the procurements of the agencies that are within the forum’s reach.

¹² A variant is to have the protest function performed by an entity with responsibility for developing and implementing procurement law or policy. That combination may afford the entity more insights into the procurement system and may mean that it has the authority to change the procurement system when protests uncover systemic problems. It may, however, give rise to a confusion of roles that may undermine the quasi-judicial character of the protest function or even lead to a loss of independence or the appearance of a conflict of interest.

There are reasons that weigh in favor of restricting the forum's jurisdiction. First, as to "vertical" jurisdiction, it may be impractical in some systems to bring all procurement at multiple levels of government within one body's jurisdiction. For example, the different levels of government may have different legal systems (as the individual states do in the United States), so that it would be hard for one protest forum to serve multiple levels of government. In terms of "horizontal" jurisdiction, certain agencies may be so different from the others, or so resistant to outside influence, that putting their procurements within the jurisdiction of an "external" agency may not be feasible. Quasi-public entities may be examples of the former; the ministry of defense, at least in some countries, would be an example of the latter. Limiting the forum's jurisdiction to formation disputes (that is, protests), and leaving performance disputes to another forum may represent a sensible division of labor with concomitant development of specialized knowledge. Also, for practical or policy reasons (usually attributed to a desire to increase efficiency), a system may decide to prohibit protests for small purchases, or for procurements where consideration is limited to multiple contractors holding framework agreements or what in the United States are called task or delivery orders under multiple-award indefinite-delivery, indefinite-quantity (ID/IQ) contracts.

Nonetheless, there are several advantages in a forum's having jurisdiction that reaches both "deep" and "wide." The forum can develop both expertise and a reputation for expertise, so that it is more likely to be respected if it is the government-wide forum for resolving procurement disputes (this would support including post-award disputes within the forum's jurisdiction). Moreover, having the forum hear protests of all public procurements may facilitate uniformity in the system's procurement, and ensure that the transparency that a protest system can bring reaches all of the system's procurements.¹³ Giving one forum broad jurisdiction creates uniformity of process for vendors wishing to protest, and that uniformity itself facilitates the process (potential protesters do not need to learn, for example, different timeliness rules for multiple forums). In any event, ban on protests on small purchases would seem unnecessary, since disappointed bidders would presumably refrain from protesting in light of the fact that the cost of protesting would generally outweigh the value of the small contract at issue. A ban on protests involving task or delivery order under ID/IQ contracts risks creating an accountability gap in the procurement system, which would be of increasing concern as the value of the task or delivery orders at issue increased.

3. *Who has standing to protest?*

In this section, we will begin with standing to protest, but then turn to consider intervention and representation as well. Standing is a key question, because it determines who has the right to call on the forum for investigation and relief. The central question with regard to standing is how limited it should be. Allowing only the vendor who

¹³ Similarly, the goal of transparency weighs in favor of extending jurisdiction to include challenges to any aspect of a procurement, although concern for limiting the disruption associated with protests may lead to a prohibition of protests regarding, for example, the procurement method used or the cancellation of a solicitation.

claims it should have won the disputed contract to protest has logic to it: only an aggrieved vendor, it could be argued, can reasonably demand the due process – and the disruption to the procurement process – that a protest entails.

There are drawbacks to this approach. Moreover, even if it has appeal, drawing the line strictly at the vendor that can establish that it should have received the contract risks requiring the system to litigate the merits of the protest (and potentially then redoing the procurement) in order to determine whether a vendor has standing to protest – circular analysis that may prove wasteful of limited government resources. In any event, the narrow definition of standing has implications for the protest system overall: if protests help protect the integrity of the procurement process and hold agencies accountable for the way they spend public funds, it could be argued that anyone who believes that an agency acted improperly should be listened to, whether it be a potential contractor or potential subcontractor, a trade association or union, a member of the press, or a legislator or civil servant.

Separate from the question of standing to initiate a protest, protest systems need to decide whether any competitor other than the protesting vendor should be allowed to take part in the protest proceedings – for example, by submitting written arguments to the protest forum. The most important of those other competitors is the “awardee,” the vendor that actually won the competition and received the contract – if a winner has been selected. That vendor has an obvious interest in defending the government’s decision to award it a contract, and, if concerns of due process can justify allowing vendors to protest and have their complaints heard, similar concerns weigh in favor of letting the awardee defend its interests. There is even logic in requiring the awardee to take part in the protest, since as to some issues, at least, it may be the party with the most information. Nonetheless, allowing (or requiring) the awardee to “intervene” in the protest risks making the protest process more adversarial and potentially more complicated and lengthy.

A few words on the role of lawyers: in some systems, protesting vendors typically rely on attorneys; in others, lawyers have little or no role in the system. Increasing the role of attorneys may increase the cost of the protest system. However, allowing attorneys to represent protesters may (particularly if the attorneys are procurement law experts) provide a knowledgeable advocate who can see through weak agency defenses, and may help the forum by furnishing coherent, focused arguments on the protester’s behalf. If the system allows protective orders as a way to enable a representative of the protester to see the entire procurement record (a matter discussed below), the role of attorneys may be critical. Attorney involvement on the contracting agency’s behalf may also be helpful: if the agency is represented by counsel familiar with both procurement law and the facts of the case, that counsel may be able to persuade the contracting agency that the protester is correct (where that is the case), and may be best placed to persuasively argue the agency’s case to the forum, where the agency concludes that the protester is not correct.

4. *What are the time limits at the forum?*

Promptness is a virtue in life, but in the world of bid protests, rules requiring promptness constrict different parties, and their impact on the system overall varies as well. The two key time limits are the window for filing protests, and the time that the forum has to resolve them. A third, less important issue relates to the amount of time that the contracting agency has to explain its challenged actions.

There are significant implications to the length of time allowed for vendors to file protests. The advantage of flexible and generous timeliness rules is that they allow the system to hear complaints, as long as they are raised within a reasonable time – perhaps a few months of becoming known. Put another way: if timeliness rules are too strict, significant defects in the procurement system may escape oversight, so that accountability and transparency are reduced.

But while potential protesters generally want generous timeliness rules, that generosity comes at a cost that others must pay. Protests delay finality in the procurement process, at a potentially high cost to the agencies' procurements, and allowing protests to be filed months after protesters learn of problems extends the disruption that protests inevitably bring. In addition, allowing delayed protests can make crafting a meaningful remedy later, where protests are found to have merit, difficult and expensive. (Of course, that can be "solved" by denying meaningful relief to protesters who succeed in proving that the procurement system acted improperly – not a happy solution either for them or for the procurement system.)

There are other dimensions to timeliness rules, in addition to the generous vs. strict continuum. Timeliness rules can be firm or flexible; they can be uniform or varied. Each approach has advantages and disadvantages, and, as with all the issues discussed in this article, a protest system needs to make choices, recognizing the implications that one choice has on others.

Timeliness rules that are firm have the benefit of predictability. If there is an inflexible 10-day window for filing protests, disappointed bidders know the ground rules and will have to act accordingly. If, in contrast, protests raising significant issues are allowed a more generous filing period than protests that do not, a disappointed bidder may not know (until potentially too late) whether its protest qualifies for the longer filing period.

Uniform timeliness rules have the further advantage of simplicity. Yet there is appeal to having varied time limits – for example, setting one time limit for challenges to the ground rules for a procurement (typically challenges to the terms of a solicitation) – requiring filing some time before bids are due, and a different time limit for post-award challenges. Having even those two rules, however, reduces simplicity and risks creating problems: some protesters will inevitably confuse the rules, and the forum risks finding itself resolving disputes about which rule applies in particular circumstances.

Once the protest is timely filed, two other timeliness issues remain. The key one is how much time the forum has to resolve the protest. Having no time limit allows the forum to be as thorough as it deems necessary, and that flexibility might permit the forum to spend many months investigating complicated procurements. Fixing a time limit for the forum has the advantage, however, that all the players know that there is a limit to how long the forum will take to decide the system. This raises the critical link between the availability of interim relief and the amount of time that the forum has to resolve the protest. If the procurement is suspended while the protest is pending (that is, if there is interim relief), the procurement system overall will probably find it intolerable to have an open-ended period for the forum to resolve the protest. Indeed, the more meaningful the interim relief, the more likely it is that the forum will have a strictly limited period of time to decide protests. Conversely, if there is no possibility of interim relief (or if it can easily be circumvented or overridden), the contracting agencies may not object to the forum being slow to decide protests – but the protesters presumably will.

It is not self-evident that a protest system will need to impose a time limit on the contracting agency to respond to the protest (although if the forum has a limited amount of time to decide the protest, some means must exist to force the contracting agency to provide the forum information and documents promptly). If there is no requirement that the agency explain its actions to the protest forum within a defined period of time, there is a risk of delay, particularly if the contracting agency can continue with the procurement in the meantime.

5. *What evidence does the forum have before it in reaching its decisions?*

When a forum receives a protest, it must gather enough evidence to decide whether the protester's complaint is well founded and, if so, what steps should be taken. Particularly for systems that are just setting up a protest forum, creating adequate mechanisms for the forum to obtain evidence can be critical to capacity building within the forum. If the forum lacks the ability to gather evidence so that it can learn what happened in the challenged procurement, it cannot meaningfully review it.

The key source of all evidence in virtually every protest will be the contracting agency. Since its procurement action is being criticized by the protester, and the forum is acting in an oversight capacity, the contracting agency may be disinclined to furnish documents or to let individuals provide oral information, which would make it well nigh impossible for the forum to fulfill its mission. The question thus becomes: who will persuade or compel the contracting agency to give documents or individuals' oral statements to the reviewing forum? If the forum is a court with the power to compel the contracting agency to furnish documents and oral statements, the problem may be easier to solve. If the forum lacks that kind of power over the contracting agency, the challenge may be greater.

The relevant evidence can be categorized by the form the evidence takes (written or oral), when it was created (before or after the protest), and who holds it (the contracting agency, the protester, or another competitor). A forum needs to make decisions, either

uniformly or on a case-by-case basis, about which documents and which oral statements should be furnished to the forum. The more extensive the list, the more thorough the forum's review can be – but that also increases the burden on the contracting agency, and probably increases the cost and length of time entailed. As a general matter, the forum will need to decide whether deciding which documents to turn over is left to the initiative of the parties (with the forum available, presumably, if one side feels the other is acting unreasonably in this “discovery” process), having the forum decide the extent of discovery separately in each protest, or having the extent of discovery governed by some fixed legal guidance.

In terms of post-protest documents, there may be an inclination to reject them, since whatever the agency wrote in response to the protest could be viewed as self-serving and therefore unreliable. Yet the protest may offer the agency the first time to explain its actions, so that the agency's response may be useful to the forum. A common pattern, not surprisingly, is for contracting agencies to prefer to turn over as few as possible of their pre-protest documents, but to be quite happy for the forum to “enlarge the record” by considering the agency's post-protest explanations.

With respect to oral statements or testimony, the forum needs to decide whether they will be permitted (or required). There may be situations in which the agency is willing to put employees forward to provide statements; in other situations, the agency may resist a protester's request to interview (or depose) agency employees. Permitting such interviews entails time and money; litigating in each case whether to permit interviews adds yet another layer of time and expense to the process.

The form of the oral statements also makes a difference. Allowing depositions may be burdensome on the parties, but not on the forum. Gathering testimony through hearings is expensive for all, including the forum, and yet it may give the forum the best opportunity to discover what actually happened in the procurement. A hearing also provides the protester the sense of having a “day in court,” an important element in the transparency of the process. The protester will be particularly anxious to be able to cross-examine agency employees involved in the procurement. For that reason, agencies will probably be unenthusiastic at the prospect of allowing hearings, particularly if the protester is permitted to participate.

Along those lines, another key decision is whether to have the forum alone receive this evidence (written or oral), or to share it with the protester (or the protester's attorney or other representative) and potentially with the awardee and other competitors as well. If only the forum receives the evidence, the protester's perception of fairness and transparency may suffer, as the forum's decision-making process will be shrouded in secrecy. For this and other reasons, sharing the information has important advantages. In addition to making the process more transparent, it provides the protester the opportunity to mine the record to find further support for its protest (and, potentially, to find support for additional grounds of protest).

Sharing the information, however, again adds time and expense to the protest process, even if only in photocopying costs. More importantly, many of the agency's documents (and the oral statements as well) may include information that is not public, from the agency's internal deliberations (such as the details of the evaluation of proposals) to the competitors' trade secrets. Even where a way can be found to fairly share that information with the protester (or the protester's attorney), there will be a risk that the information will be leaked to others, which risks damaging the integrity of the entire procurement process.

There may be little problem in sharing nonpublic information that relates to the protester with that company – for example, the agency's internal documents discussing and evaluating the protester's bid may be information that can be shared with the protester, even if it is not public and cannot be shared with anyone else. The protester cannot be allowed to see other nonpublic information (such as confidential business information contained in competitors' bids), however, so that if any representative of a protester is to be allowed to see that information, that representative will presumably have to agree never to disclose the information – not even to the protester.

The only way to permit such an arrangement would appear to involve some version of a “protective order”: these are effectively nondisclosure agreements that protester representatives sign. The forum screens individuals and decides whether each individual is suitable to be “admitted” to the protective order. Criteria are likely to be the individual's record of being trustworthy (or not); the involvement of the individual in the protester's (and, potentially, its competitors') internal decision-making; and the forum's ability to police the individual's behavior and impose a meaningful sanction in case of a violation of the protective order. Protective order admissions are generally limited to attorneys (and to consultants working for the attorneys), so that their availability may turn on the degree of involvement of lawyers in the protest process.

While the protester and other competitors are generally not the custodians of much information needed by the forum to resolve the protest, they may have important documents (or have people who could provide important oral evidence). For example, if a protest alleges that the vendor was misled at a debriefing, the forum may want to see any notes that the protester's representatives present at the debriefing took at the time. If those notes were inconsistent with the argument in the protest, that would certainly help the forum resolve the protest, and one could therefore imagine an agency, or awardee/intervenor, trying to persuade the forum to force the protester to turn any such notes over. While the forum may be comfortable directing the contracting agency to turn over written or oral evidence, it may be somewhat more hesitant to direct the protester to turn over such evidence, and much more reluctant to force the awardee (or another company not participating in the protest) to hand over documents or produce witnesses.

6. *Is the procurement put “on hold” during the protest?*

One of the most important decisions that needs to be made with regard to any protest system is the availability of what is often called interim relief. This refers to the

procurement being put “on hold,” or suspended, while the protest is pending before the forum. Deciding whether interim relief is ever available is typically not a decision the forum itself makes. Instead, that decision is usually made above the level of the forum, whether in statute, regulation, or directive.

If the decision is to never make interim relief available—that is, procurements will go forward regardless of protests pending before the forum—protests may cause minimal disruption to the procurement system. There is, however, a real risk that, by the time the forum resolves the protest, it will be too late to provide any relief at all to the protester, even if the forum concludes that the protester is correct in contending that the procurement was improperly conducted: either the procurement will be complete (if it involves a simple acquisition of supplies, for example) or it may be so far along that reversing course would be prohibitively expensive (if construction of a building is at issue, for example). In that context, the system will be faced with a choice between offering the successful protester no relief; offering only monetary relief, such as lost profits; and causing substantial disruption to the procurement (either re-opening the competition or shifting the contract to the protester). All three options are problematic and risk causing a high level of dissatisfaction on the part of the protester (under the first option), or the contracting agency (under the third option), or both (potentially the case under the second option).

An alternative course is to make interim relief on a case-by-case basis. Under that approach, the protester will presumably need to persuade the forum that the procurement should be suspended while the protest is pending. In court systems, the protester will be seeking to obtain some version of a temporary restraining order or preliminary injunction. A key factor in the decision about granting interim relief may be the forum’s judgment about whether the protester is likely to ultimately prevail in the protest. Because public procurements are at issue, another criterion may be the urgency of the government’s need for the goods or services being procured, and the availability (or not) of alternative ways for the government to procure them.

A third approach is to make interim relief automatic. This avoids the need for litigation of whether to grant interim relief on a case-by-case basis, but that comes at the cost of disruption in every procurement that is protested. This is probably too burdensome for any procurement system, unless there is a way—typically through a process of having a high-level official confirm that this is necessary—for the contracting agency to end the suspension and move forward with the procurement. Another, additional way of limiting the disruption caused by the automatic suspension would be for the forum to resolve as many protests as possible very promptly.

The automatic granting of interim relief invites abuse by a protester that knows that it will be asked to provide the needed goods or services, if a suspension is put in place. This is most likely in a situation where the vendor that has been providing services loses the competition for the follow-on contract, and hopes to be asked to continue providing the services during consideration of the protest, if the contracting agency is barred by interim relief from having the winner of the new contract begin performance.

As noted above, there are connections, both in logic and in practice, between the availability of interim relief and the length of time that the forum takes to resolve the protest. Where a forum decides protests very quickly (for example, in less than 15 calendar days), the granting of automatic interim relief may be viewed as not imposing too heavy a burden on the procurement system; where the forum takes much longer, automatic interim relief in every protest may be viewed as intolerably disruptive to the procurement system. In such a system, balancing elements will probably be needed to limit this disruption.

7. *How difficult is it for a protester to win?*

Protesters may not have strong views on where within the government the protest forum should be located and how the protest process should be structured, but they will certainly pay attention to two final questions: how difficult is it for a protester to win, and does winning a protest bring any meaningful relief to the protester?

The difficulty of winning can be divided into two components: the difficulty for a protester to be heard at all, and the difficulty of ultimately winning the protest. The difficulty of being heard is tied to issues discussed above that restrict access to the forum, such as the strictness of the forum's timeliness and standing rules. More substantively, the forum may summarily dismiss protests unless they provide a level of specificity or meet a burden of proof so high that few protests will ever survive initial review. While the forum may label the dismissed protests "frivolous" (a label that many contracting officials will endorse), the reality may be that, until a protesting company (or its representative) is allowed to see some key documents, the company may be unable to point to specific support for its protest. The disappointed bidder is caught in a trap: if it can gain access to key documents from the procurement, it may be able to prove that the agency acted improperly—but it will not be allowed access to those documents unless it can first prove (or at least make out a *prima facie* case) that the agency acted improperly.

Where the protest survives initial screening, the critical question, other than the protester's access to the agency's documents (discussed above), will be the standard of proof that must be met for the forum to rule in the protester's favor (in GAO's parlance, before the forum will "sustain" the protest). The obstacles to the protester's success typically arise from the forum's approach to (1) deference to the contracting agency and (2) "prejudice."

Where the forum shows great deference to contracting agencies, it may be extremely reluctant to sustain protests, in order to avoid "second-guessing" the agencies. For example, the forum may be unwilling to consider protests challenging the specifications that an agency has put in a solicitation, or challenging the agency's determination that the protester's bid was unacceptable. The opposite extreme would arise where, for instance, a protest forum was willing to decide whether challenged specifications are needed to meet the agency's requirements or whether the protester's bid would, in fact, satisfy the agency's needs. Indeed, where a forum shows little deference to the contracting

agencies, it may be willing to substitute its own judgment for theirs regarding the value offered by competing offers. While there may be variation among systems or between different protest forums within one procurement system, deference to agencies will typically be highest where safety or national security is at issue, and lowest where the agency's compliance with clear, objective rules (in statute, regulation, or the solicitation) are challenged.

Legal formulations regarding the level of deference shown may be less meaningful than a review of statistics. Were a forum to sustain 80 percent of protests, that would suggest a very low degree of deference to agencies. (Of course, there could be a variety of other explanations, such as a procurement system riddled with illegal behavior, or great restraint causing protesters not to file protests unless they were nearly sure to win.) Conversely, were a forum to only rarely ever sustain a protest, it would suggest a very high level of deference. (Again, there could be other explanations, such as an unwillingness of disappointed bidders to file meritorious protests or a high level of abuse of the system by vendors filing frivolous protests.)

The issue of "prejudice" becomes the central issue once a protester has convinced the forum that the agency acted improperly. Prejudice refers to the harm that the protester has suffered from the agency's improper action. A forum's handling of the question of prejudice may range from giving it no weight, in which case the forum will sustain any protest where the protester has established that the agency acted improperly, to a very strict view on prejudice, in which case the protest will be denied unless the forum is persuaded that the protesting vendor would have won the competition for a contract if the agency had acted properly. The latter approach can be frustrating for protesters, when their meritorious protests are denied "for lack of prejudice," while the former approach leaves agencies complaining that protests are sustained on "technicalities" that had no impact on the selection of the contractor. From the point of view of the system, sustaining protests only if the protester was prejudiced ensures that agencies will not be told to redo procurements because of immaterial errors—but a very strict approach to prejudice could unfairly force protesters to prove what in many circumstances may be unprovable, namely, that they would have won the competition but for the agency's action.

8. *What power does the forum have to provide meaningful relief, if it finds that the protest is justified?*

While the preceding section addresses the ability of the protesting vendor to win the protest, even more important for most protesting companies is whether the forum will provide meaningful relief, when it does rule in favor of the protester. Otherwise, a decision stating that the protester was correct in contending that the agency had acted unlawfully is of little value to the protester. In some legal systems, the forum may have authority to issue binding orders to the contracting agencies; in others, the forum may be able to do no more than recommend action—in which case the question of the forum's political environment may be critical in terms of whether the recommendations are usually followed.

In terms of the nature of the relief ordered or recommended, the protester's preference would presumably be to receive the contested contract; less desirable might be receipt of the lost profits that were anticipated; and less desirable still, although presumably of some value, would be another opportunity to compete for the contract. In many legal systems, once the contract has been entered into, it is too late for a reviewing forum to order its re-competition; in those systems, the availability of meaningful relief may therefore turn on whether the protest was filed before the contract was entered into and whether interim relief prevented that occurring after the protest was filed. A separate issue is associated with the considerable money that the protester may have spent litigating the protest (particularly if it was paying attorneys to do that), so that a protester who succeeds in proving to the forum that the contracting agency acted improperly will want to know if the forum can direct the agency (or another entity in the government) to reimburse the protester's costs incurred in litigating.

A number of collateral points are worth mentioning briefly. The forum needs to decide whether to publish its decisions. Because decisions may discuss nonpublic information (at the least, they may discuss the contents of the protester's offer), there may be a need to "redact" (edit out) that information from the version of the decisions that are published. As a general matter, publishing decisions increases transparency and extends the benefits of the protest system to a wider public.

Finally, there is the question of an appeal. The forum's decisions may be final, or an unhappy party may be allowed to seek reversal. If the protest forum is an administrative entity, recourse to a court may be available. In a judicial system, there may be the possibility of requesting a rehearing or appealing to a higher court.

Conclusion

With the establishment of protest systems in more and more countries, the idea that a disappointed bidder should be able to trigger a review of a government agency's conduct is neither novel nor controversial. Nonetheless, deciding to establish a protest system is merely the first step. Every procurement system that is to have a protest mechanism needs to craft a mechanism to reach the balance appropriate for that system. As one reviews protest systems in different nations and different parts of the world, the same core elements and issues emerge, again and again. Indeed, the points of commonality among protest systems are ultimately more prominent than the differences.

These pronounced similarities suggest a few points. First, bid protests play a central, fundamental role in protecting the integrity of the procurement system. Neglecting, or crippling, an effective protest system will lead to a loss of transparency, and the shared experience of many procurement systems is that, when transparency is decreased, corruption and related problems increase. Second, because the fundamental mechanics of bid protest systems are so similar, the challenges faced by bid protest systems – the political repercussions of delayed procurements, for example – are predictable. Fortunately, the ways to balance the systems to deal with these challenges, and the ways

that one aspect of a bid protest system interacts with other aspects are known as well—such as the connection between the availability of interim relief and the amount of time the forum has to resolve the protest. This leads to the final point: the striking similarities in the challenges and benefits of various bid protest systems mean that there are rich opportunities for comparative review. Indeed, we will be remiss if we do not learn as much we can about others’ successes and failures in their own protest systems.