

Live Session 4
– 28 July 2021

Post-Award
Grounds for
Protest &
Potential
Future
Reforms



**Free Summer Series -
July 20-29, 2021
Introduction to
U.S. Bid Protests**



The views expressed herein are those of the individual presenters, and should not be ascribed to any agency, company or organization.

Videoconference – please register for link	Guests	Reading (all from ABA Bid Protests text except as noted)	Videos (on YouTube) – please review before videoconference
1. Introduction Tuesday, July 20, 2021, 6-8 pm ET	Craig Holman – Welcome Judge Patricia Campbell-Smith , U.S. Court of Federal Claims Ralph White , U.S. Government Accountability Office (GAO) Andrew Shipley & Daniel Chudd (principal authors, Bid Protests)	Ch. 1 – History Ch. 2 – Forums Optional reading: M. Schaengold, T.M. Guiffre & E. Gill, Choice of Forum for Federal Government Contract Bid Protests , 18 Fed. Cir. B.J. 243 (2009)	By Christopher Yukins: Welcome (3:11) Bid Protests: An Overview (26:43)
2. Procedural Issues Thursday, July 22, 6-8 pm ET	Kendra Perkins Norwood Joshuah Turner	Ch. 3 (Standing, Etc.) Ch. 4 (Stays) Ch. 5 (Protective Orders)	In production – by Victoria Christoff: 2a – Chapter 3 – Standing, Timeliness and Whether to Protest (16:11)
3. Addressing the Merits Tuesday, July 27, 6-8 pm ET	Nathan Castellano Sonia Tabriz	Ch. 1 (procedures) Ch. 6.A (Protest Grounds: Pre-Award)	In production – by Christopher Yukins 3a – Addressing the Merits (15:59)
4. Protest Grounds & Next Steps in Protest Reform Thursday, July 29, 6-8 pm ET	Marcus Childress Kristen Ittig	Ch. 6.B (Protest Grounds: Post-Award)	



Special thanks to
Victoria Christoff,
Government
Procurement Law
Fellow and Visiting
Associate
Professor of Law



Guests –
Kristen Ittig,
Marcus Childress,
Bruce Mayeaux &
David Drabkin



Post-Award Grounds for Protest

A man wearing safety glasses and a blue polo shirt is leaning over a desk, looking at a document. He is holding a pair of orange-handled scissors. The background is slightly blurred, showing a wire shelving unit and a wooden cabinet. The overall scene is dimly lit, with a dark overlay on the image.

Mis-Evaluation

QUESTION: WHY WILL GAO DEFER TO AN AGENCY'S EVALUATION SO LONG AS IT IS REASONABLE AND WELL-DOCUMENTED?

Unstated Evaluation Criteria *or* Waived Requirements

QUESTION: WHY CAN'T AN AGENCY RELY UPON EVALUATION FACTORS THAT ARE NOT REASONABLY RELATED TO THOSE SET FORTH IN THE SOLICITATION?

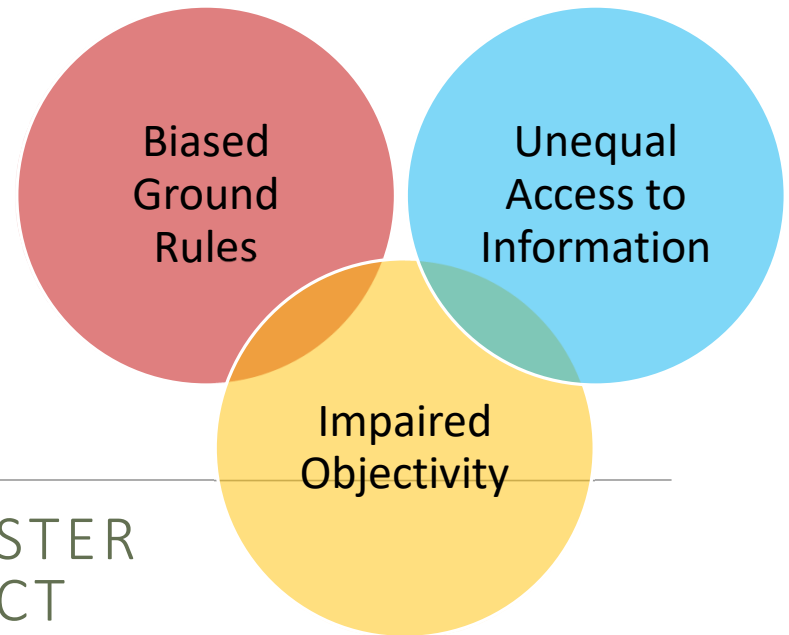




Unequal or Misleading Discussions

QUESTION: WHY MUST AN AGENCY, HAVING OPENED DISCUSSIONS WITH ONE OFFEROR, OPEN DISCUSSIONS WITH ALL?

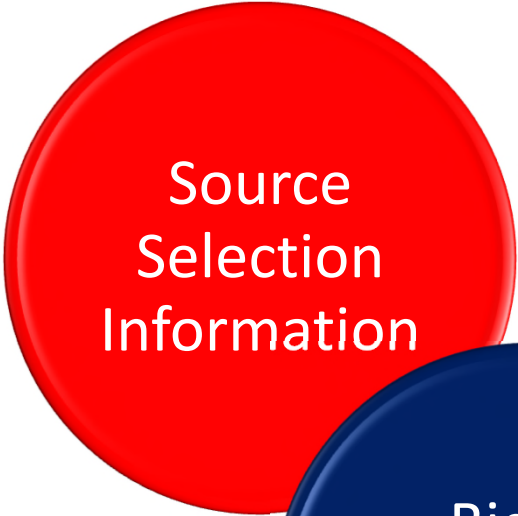
Organizational Conflict of Interest




QUESTION: WHY, IF A PROTESTER SHOWS A *POTENTIAL* CONFLICT OF INTEREST, IS PREJUDICE *PRESUMED*? AND WHY MAY AGENCIES WAIVE OCI'S?

Procurement Integrity Act (PIA) Violation

QUESTION: WHY MUST A
VENDOR GIVE THE AGENCY
NOTICE OF A PIA VIOLATION
TO PRESERVE A POSSIBLE
GROUND FOR PROTEST?



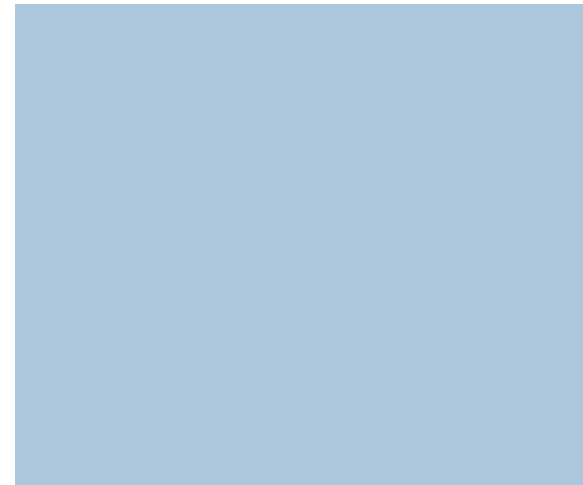
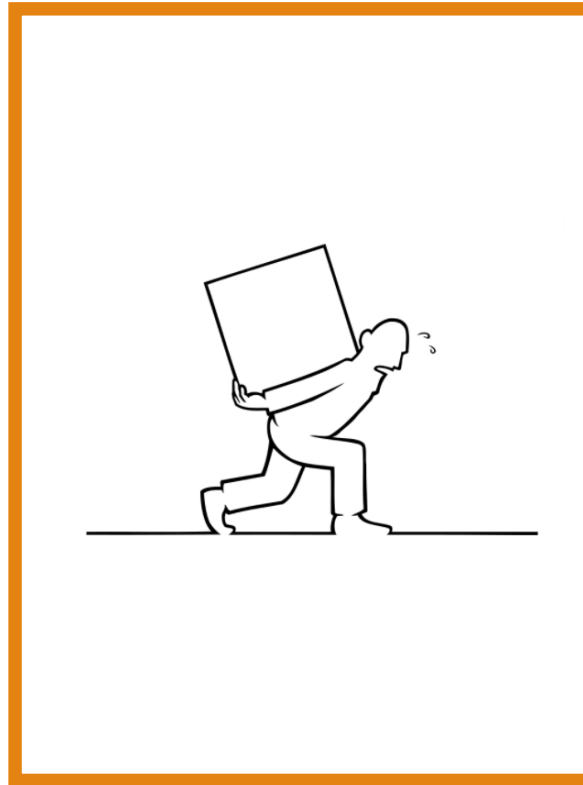
Source
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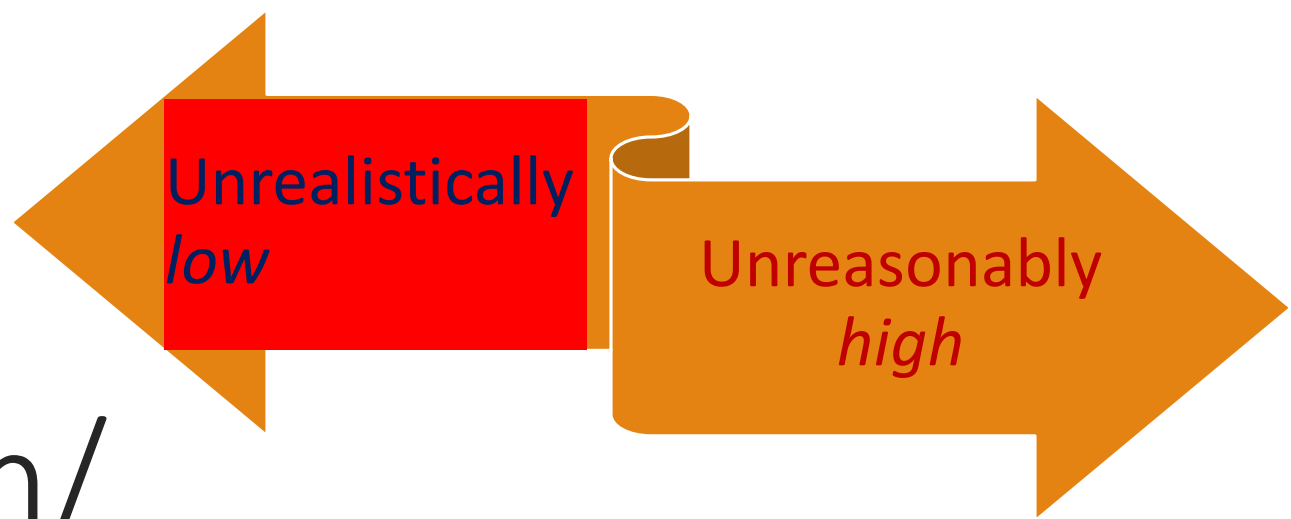


Bid or
Proposal
Information

Bad Faith or Bias

QUESTION: WHY DOES A PROTESTER BEAR A HEAVY BURDEN OF PROOF – WHY MUST IT PRESENT “WELL-NIGH IRREFRAGABLE PROOF” OF AN OFFICIAL’S BAD FAITH?






Realism/ Reasonableness/ Unbalanced Pricing

QUESTION: WHY ARE AGENCIES NOT
REQUIRED TO ASSESS PRICE REALISM IF
THE SOLICITATION IS SILENT?

A woman with glasses is sitting at a desk, looking at a laptop and some papers. The background is slightly blurred, showing a bookshelf and a plant. The text is overlaid on the image.

Flawed Best-Value Tradeoff / Decision

QUESTION: WHY WILL AN AWARD DECISION FAIL
IF IT IS BASED ON PURE MATHEMATICAL SCORING?



mistake

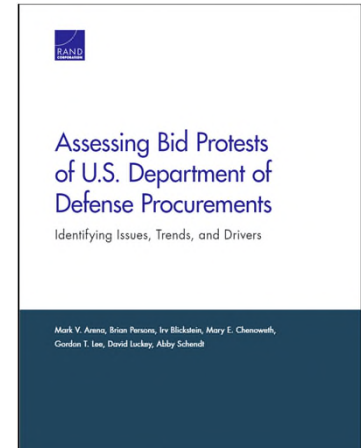
Corrective Action

QUESTION: WHAT ARE THE POSSIBLE PRACTICAL EFFECTS OF THE FEDERAL CIRCUIT'S STANDARD THAT AGENCY CORRECTIVE ACTION NEED ONLY BE "RATIONALLY RELATED" TO PERCEIVED ERRORS – NOT "NARROWLY TAILORED" (DELL FEDERAL SYSTEMS (FED. CIR. 2018))?

Next Steps to Reform

From ABA Text Chapter 7 – What Lies Ahead

- ❑ National Defense Authorization Act (NDAA) For Fiscal Year (FY) 2017, Section 885, called for study of bid protests at the Defense Department
 - ❑ RAND Corporation study (2017) found that while Defense Department officials sharply disliked protests, members of the private sector believed that protests are part of a healthy, transparent and accountable system, and that fewer than .3% of contracts are protested.
- ❑ NDAA FY 2018, Sec. 827, called for pilot program to reduce frivolous protests by “loser pays” requirement if protester had more than \$250m in revenues
- ❑ NDAA FY 2019, Sec. 822, called for:
 - ❑ DoD study of “double-dip” protests at GAO and COFC.
 - ❑ DoD to establish data repository on protests and their impacts
 - ❑ DoD to assess expedited process for protests related to contracts under \$100,000.
- ❑ NDAA FY 2020, Section 874, called for FAR revision so that competitors for certain IDIQ orders (from the Simplified Acquisition Threshold (\$250,000) to \$5.5 million) may request an explanation on why they were unsuccessful



What Lies Ahead – cont'd

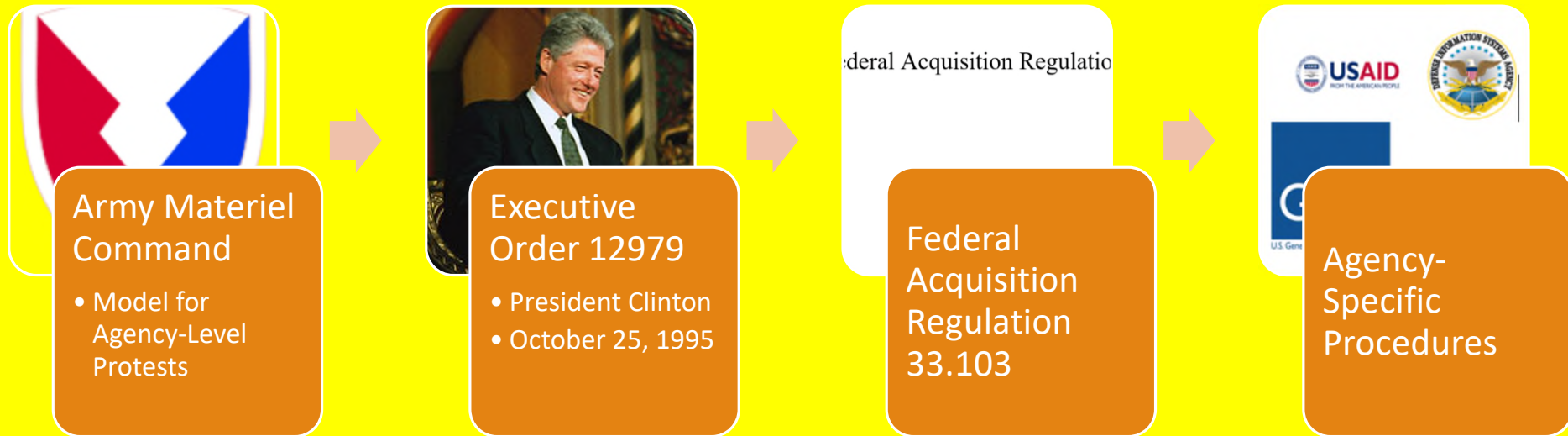
- ❑ NDAA FY 2016, Section 809, established **Section 809 panel** ultimately chaired by David Drabkin. The Section 809 panel report called for:
 - ❑ Recommendation 66: Establish a **purpose statement for bid protests** in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.
 - ❑ Recommendation 67: Reduce potential bid protest processing time by **eliminating the opportunity to file a protest with the COFC** after filing at the GAO and **require the COFC to issue a decision within 100 days** of ordering a procurement be delayed.
 - ❑ Recommendation 68: **Limit the jurisdiction of GAO and COFC** to only those protests of **procurements with a value that exceeds, or are expected to exceed, \$75,000.**
 - ❑ Recommendation 69: Provide as **part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document** and the **technical evaluation** of the vendor receiving the debriefing.





Administrative Conference of the United States Study

Evolution of Agency-Level Protests



Reasons Vendors Do Not Use Agency-Level Protests

- Perceived bias of decisionmakers
- Process viewed as opaque, with uncertain timelines
- No required production of the administrative record
- Too risky – procedural “sandtraps” that may preclude further relief

ACUS Recommendations

- ❑ Identification of Decisions *Not* Subject to Agency-Level Protests
- ❑ Transparency for the Process and Personnel [“Agency Protest Official”] for Agency-Level Protests
- ❑ Notice of the Timeline for Agency-Level Protests (similar to claims under Contract Disputes Act)
- ❑ Compiling the Record and Making It Available
- ❑ Procedures for Apprising Parties of the Status of Agency-Level Protests
- ❑ Protecting Against Adverse Consequences – Clarify Stay – GAO “express” procedures
- ❑ Publishing Data on Agency-Level Bid Protests

Bruce Mayeaux

MAJOR, JUDGE ADVOCATE

CHIEF, TRIAL TEAM III, CONTRACT LITIGATION &
INTELLECTUAL PROPERTY DIVISION, U.S. ARMY LEGAL
SERVICES AGENCY

The Army Materiel Command's Agency-Level Bid Protest Program—A Model Risk Management Tool for DoD

- ❑ DoD's Risk Management Problem.
 - ❑ The problem and the origins of the RAND Study.
- ❑ The Section 827 “Loser Pays” Provision.
- ❑ The Section 885 RAND Study.
- ❑ Congressional Signals in the 2021 NDAA Conference Report.
 - ❑ “Why” DoD should consider using bid protests as a risk management tool.
 - ❑ “How” DoD can use agency-level bid protests as a risk management solution.



The Army Materiel Command's Agency-Level Bid Protest Program—A Model Risk Management Tool for DoD

- ❑ AMC's agency-level bid protest program is a model solution for DoD because—
 - ❑ It has an established Agency Protest Official for all bid protests filed above the contracting officer.
 - ❑ It likely has broad jurisdiction to hear bid protests related to all AMC "contract solicitations"—to include Other Transactions.
 - ❑ The concept of "standing" matures in concert with GAO.
 - ❑ The process is formalized—similar to the process for claims under the Contract Disputes Act of 1978.
 - ❑ The record is implicitly formalized through its rules and common practice.
 - ❑ There is a mechanism to share the record with protesters in some situations.
 - ❑ A certain and durable regulatory stay of performance/award is imposed if a protest is timely under GAO rules.
 - ❑ It collects and compiles agency-level bid protest data that can be used to analyze and manage its risk.





Pending Congressionally Mandated Bid Protest Study

Questions from Congress

- The **rate at which protestors are awarded** the contract that was the subject of the bid protest;
- The **time it takes the Defense Department to implement corrective actions** after a ruling or decision, the **percentage of those corrective actions that are subsequently protested**, and the **outcomes of those protests**;
- Analysis of the **time spent at each phase of the procurement process attempting to prevent a protest, addressing a protest, or taking corrective action** in response to a protest, including the efficacy of any actions attempted to prevent the occurrence of a protest; and
- Analysis of the **number and disposition of protests** filed within the Defense Department.

Additional Direction from Congressional Conferees

“[P]otential benefits of a **robust agency-level bid protest process**”

Study to **evaluate the following for agency-level bid protests**: “prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such [agency-level bid] protest processes.”

- Cited with approval: study by Administrative Conference of the United States (ACUS)

Overall, study “should review existing law, the Federal Acquisition Regulation, and agency policies and procedures,” and should “solicit input from across the DOD and industry stakeholders.”

Next Steps

Interviews and data-gathering, based on congressional direction

Report to address:

- History of bid protests, prior studies and available data
- Questions from Congress
- ACUS study suggested how bid protest reforms can reduce systemic risk in DoD procurement:
 - Formalize “Agency Protest Official”
 - Emphasize agency-level protest option – least disruptive, best management tool
 - Jurisdiction – include *all* procurements?
 - Viewing protester as “whistleblower” – more flexible approach to standing, and need to preserve stay
 - Timing – need for rapid process
 - Evidence – how to make record readily available so problems and lessons can be processed efficiently
 - Publishing data and using protest findings to enhance procurement system

Conclusion
