

The Features of Bid Protest Systems and Their Adoption Across the United States

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Abstract

State governments across the United States will potentially award an unprecedented number of contracts over the next decade as federal funds from the Infrastructure Investment and Jobs Act become available through grants and other programs. Bid protests remain a critical component of public procurement because they enable contractors to act on the public's behalf as private attorneys general to ensure that acquisition officials and other contractors adhere to procurement law and comply with source selection procedures. Bid protests have a long history in the United States as part of federal procurement. However, a 2013 report released by the National Association of State Procurement Officials reveals that no two states had adopted the same bid protest procedures. Reducing bid protest systems to their key features facilitates comparisons of bid protest systems across all states, the District of Columbia, and Puerto Rico, to determine to what degree different jurisdictions incorporate bid protests into their procurement systems. This survey reveals a spectrum of systems, across which some states maintain robust bid protest procedures comparable to the federal system and others rely on informal exchanges between contractors and agencies, or on the courts, to "resolve" complaints. The degree of variation among jurisdictions reveals that the benefits of a bid protest system remain an open question at the state level, and that further study may reveal what financial (and political) costs states incur because of adopting robust or minimal bid protest procedures.

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I. Introduction

The United States may find itself on the cusp of a period of unprecedented public procurement activity at the state and local level. President Biden signed the Infrastructure Investment and Jobs Act into law on November 15, 2021, which authorizes \$1.2 trillion for infrastructure spending in transportation, energy, water, broadband, and more.¹ The United States intends to allocate \$550 billion of that trillion-dollar figure towards “new” investments and programs, which will likely occur at the state and local level.² State and local governments stand to receive tremendous funding through various grant programs, which governments will primarily spend through contracting. At the state level alone, this entails more than 50 different procurement systems awarding an historic number of contracts under their unique procedures.

Bid protests will likely play a critical role in ensuring that state governments spend these funds in accordance with the law and applicable procurement procedures. In anticipation of the potential growth of bid protest activity, this paper discusses the policies behind bid protest systems and describes key features. Next, this paper introduces the American Bar Association 2000 Model Procurement Code and compares its bid protest procedure with the latest survey of state bid protest systems. Then, this paper surveys the current state of bid protests across 52 different jurisdictions to compare the key features of these bid protest systems. Finally, this paper recommends future areas of inquiry where additional research and analysis could help identify targeted areas of improvement within state protest procedures. Although no two bid protest systems are the same, a pathway to challenge a contract award exists in all jurisdictions.

¹ THE WHITE HOUSE, FACT SHEET: THE BIPARTISAN INFRASTRUCTURE DEAL (2021).

² GOVERNMENT FINANCE OFFICERS ASSOCIATION, INFRASTRUCTURE INVESTMENT AND JOBS ACT IMPLEMENTATION RESOURCES, <https://www.gfoa.org/the-infrastructure-investment-and-jobs-act-iija-was> (June. 15, 2022).

II. The Fundamentals of a Protest System

Rather than a rule-to-rule or taxonomic comparison, this paper compares state bid protest system features to highlight the policy choices behind the adopted procedures. As discussed below, bid protest systems result from decisions by procurement policymakers and lawmakers in response to several competing concerns. These choices manifest in different fundamental features, such as the establishment of a bid protest forum or rules requiring a delay in awarding a protested contract. This section introduces those features as applied to the survey.

A. What is a Bid Protest?

Bid protest systems facilitate vendor challenges to acquisition officials' procurement decisions.³ Typically, vendors may challenge an aspect of the procurement prior to contract award (a "pre-award" bid protest) or challenge the contract award itself (a "post-award" bid protest).⁴ In these challenges, protesters generally allege that a government official failed to follow a procurement law or regulation, or that the official otherwise acted improperly or unreasonably.⁵ Protesters thus advance the public interest as private attorneys general by exposing "an agency's failure to conduct a procurement in accordance with law and regulation."⁶ Bid protests perform an oversight function for agencies by correcting errors and providing ongoing deterrence of improper and unreasonable conduct,⁷ and for other contractors by reducing the incentives to exercise improper influence on the government.⁸ Outsourcing oversight to the private sector reduces the burden on government compliance regimes and

³ Daniel I. Gordon, *Constructing A Bid Protest Process: The Choices That Make Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 428 (2002).

⁴ *Id.*

⁵ *Id.*

⁶ *Armour of Am., Inc.-Claim for Costs*, 71 Comp. Gen. 293, 297 (1992).

⁷ Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 118 (2005).

⁸ Robert C. Marshall, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 HOFSTRA L. REV. 1, 22 (1991).

investigative offices, and reassures the business community and the public that the government takes vendor complaints and the integrity of public procurement seriously.⁹

Congress recognized that bid protests would enforce federal procurement law. The conference report for the Competition In Contracting Act (“CICA”) explained that “[t]he conferees believe that a strong enforcement mechanism is necessary to insure [sic] that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief.”¹⁰ At the federal level, a bid protest challenges an aspect of the solicitation¹¹ or the award of a contract.¹² Vendors can file bid protests with the contracting agency itself (*i.e.*, an “agency-level protest”), with an independent administrative agency called the Government Accountability Office (“GAO”), or in federal court at the Court of Federal Claims (“COFC”).¹³ The Federal Acquisition Regulation promulgates agency-level protest procedures, under which agencies endeavor to resolve protests within 35 days and may suspend contract award.¹⁴ For bid protests filed at GAO, the law¹⁵ mandates that GAO render a decision within 100 days,¹⁶ and that the agency suspend award and performance.¹⁷ Notably,

⁹ Gordon, *supra* note 3, at 429.

¹⁰ H.R. Rep. No. 98-861, at 1435 (1984) (Conf. Rep.).

¹¹ This paper uses the term solicitation as defined in the Federal Acquisition regulations, which states “Solicitation means any request from the government to industry to submit offers, bids, or quotations to fulfill the government’s requested supplies, services, or construction. Solicitations under sealed bid procedures are called “invitations for bids.” Solicitations under negotiated procedures are called “requests for proposals.” Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer.” *See* Federal Acquisition Regulation (“FAR”) Subpart 2.1 – Definitions.

¹² U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-510-SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 7 (10th ed. 2018), <https://www.gao.gov/assets/700/691596.pdf>.

¹³ James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora a Too Many?* 43 PUB. CONT. L.J. 587, 611 (2014).

¹⁴ *See* FAR 33.103.

¹⁵ 31 U.S.C. §§ 3551-3557.

¹⁶ 31 U.S.C. § 3554(a)(1).

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

GAO cannot order the agency to comply with its decision, but the agencies rarely disregard a GAO decision.¹⁸

Effective protest systems balance investigating irregularities in the procurement process with limiting the disruption to government business caused by bid protests. From the perspective of disappointed bidders, bid protest systems provide a forum to file complaints and seek relief.¹⁹ From the perspective of the government, bid protest systems promote the accountability of procurement officials and the integrity of the procurement process.²⁰ However, bid protests can add months to the procurement process and substantially increase procurement costs.²¹

Critics and proponents of bid protests tend to focus on the tension between accountability and efficiency. Critics argue commercial contractors generally have no legal recourse if their proposals are rejected, even if they are treated unfairly, so government contractors should receive similar treatment.²² Critics also argue that bid protests exact significant costs on the government.²³ Bid protests purportedly distort the procurement process by driving contracting officers to make decisions calculated to avoid bid protests rather than considering what will produce the best value for the government.²⁴ However, looking only at the costs of maintaining the system ignores the larger savings derived from promoting market competition.²⁵ Moreover, protesters have a financial incentive to avoid frivolous protests, because they self-fund their bid

¹⁸ 31 U.S.C. §§ 3554(b)(3); 3554(e).

¹⁹ Gordon, *supra* note 3, at 430-31.

²⁰ Gordon, *supra* note 3, at 431.

²¹ Gordon, *supra* note 3, at 431.

²² William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 466 (1995).

²³ Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 501 (2013).

²⁴ MOSHE SCHWARTZ & KATE M. MANUEL, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS, ANALYSIS 12-13 (2015).

²⁵ Daniel H. Ramish, *Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function*, 48 PUB. CONT. L.J. 35 at 43, 44.

protests and only receive a remedy if they prevail.²⁶ This incentivizes protesters to use private resources efficiently and thereby better fulfilling their role as private attorneys general.

B. Key Features of a Bid Protest System

Striking the balance between efficiency and accountability falls to lawmakers and policymakers. Reviewing the features of bid protest systems reveal the choices governments make regarding what level of scrutiny the private sector can apply to public procurement decisions. While the following do not amount to an exhaustive list of all the different aspects of a bid protest system, these key features can distinguish more robust systems that lean more towards promoting accountability from more minimal systems that heavily favor efficiency.

1. An Independent Tribunal

Broadly speaking, vendors can file bid protests with the contracting agency, an independent administrative entity, and/or in court.²⁷ While most jurisdictions across the United States permit filing bid protests with the contracting agency, only the more robust bid protest systems also provide an independent administrative forum.²⁸ Limiting bid protests to the agency-level carries the perception and process concerns of requesting that officials review their own procurement actions.²⁹ Some jurisdictions mitigate this issue by directing bid protests to a senior official within the contracting agency or to a higher-level office within the state.³⁰ But agency-level protests have inherent accountability limitations that independent forums avoid.

The independent administrative entity staffed by officials dedicated to resolving contract formations issues eases the accountability concerns.³¹ Decisions by the tribunal over time create

²⁶ Marshall, *supra* note 8, at 22.

²⁷ Gordon, *supra* note 3, at 433.

²⁸ See discussion *infra* Section IV.A..

²⁹ Gordon, *supra* note 3, at 433.

³⁰ See discussion *infra* Section IV.C.

³¹ Gordon, *supra* note 3, at 434.

a body of state government contract law that improves consistency and uniform adherence to procurement laws and regulations in future procurements. However, the forum's decisions must be followed by the state's contracting agencies, or the contracting agencies must follow them voluntarily (much as federal agencies regularly comply with GAO's recommendations). Protesters and the public can rest assured that challenges alleging improper contractor influence will receive a thorough, public review. However, staffing and maintaining such an entity is expensive, potentially prohibitively so for smaller states. The independent review also adds time to the procurement process, although strict filing and decision deadlines can mitigate the length of delay. Nevertheless, the decision to incorporate a bid protest forum represents a tradeoff between favoring accountability over efficiency.

2. Pre-Award Bid Protests

Pre-award bid protests can improve the source selection process by ensuring that the terms of the solicitation and the government's conduct comport with law and regulation. An example of a pre-award bid protest ground is challenging solicitation terms as unnecessarily restricting competition.³² However, pre-award bid protests offer another opportunity for a vendor to add time to the procurement process. Each procurement could potentially face two protests: one of the solicitation terms and another of the subsequent award. Thirty U.S. jurisdictions permit pre-award bid protests.³³ In those jurisdictions, protesters must file the bid protest before their bid or proposal due date and within a certain number of days of knowing (or

³² See, e.g., *Navajo Nation Oil & Gas Co.*, B-261329, Sept. 14, 1995, 95-2 CPD ¶ 133 at 6-8 (solicitation requiring specific experience applicable only to fuel dealers, and not refiners or manufacturers found unduly restrictive); *Keeson, Inc., Ingram Demolition, Inc.*, B-245625; B-245655, Jan. 24, 1992, 92-1 CPD ¶ 108 at 5-6 (solicitation requiring five completed asbestos abatement projects within the previous three years and have five years' experience as an established asbestos abatement business found unduly restrictive); .

³³ See discussion *infra* Section IV.

should have known) the bid protest basis. This limitation mitigates the loss of efficiency concerns.

3. Automatic Stay

The ability to stop the contracting agency from awarding a contested contract or from allowing the awarded contract to proceed is one of the most critical features of a bid protest system. Called a “stay” of award in the federal system, pausing the procurement enables the government to cancel and restart the procurement process if the protester succeeds. Thus, protesters have the financial incentive of potentially winning the contract if they prevail. Jurisdictions either never permit interim relief, offer interim relief on a case-by-case basis, or automatically grant interim relief.³⁴ This variation reflects different states’ calculations in the tradeoff between efficiency and accountability. States have an efficiency interest in awarding contracts to acquire the goods or services needed to fulfill public service objectives without delay. However, if a bid protest has no impact on the procurement itself, then the protester loses a significant financial incentive to file a bid protest at all, and the accountability function of the bid protest system diminishes.

4. Filing Fee or Bonding Requirement

Most jurisdictions do not require fees or bonds to access their bid protest systems. Commentators have considered such costs as undermining the purpose of the protest system to provide efficient oversight of government procurement decisions.³⁵ Florida, Hawaii, Nevada, and Tennessee require a bond with the submission of a protest, and California requires a bond

³⁴ See sources cited *infra* State Bid Protest Summary (25 jurisdictions automatically stay the procurement).

³⁵ Ramish, *supra* note 26, at 75 (“Such reforms reduce the number of protests, and perhaps the attendant inconvenience to the agency, but do so by impeding, denying, or deterring redress for procurement errors.”).

under its alternative protest process.³⁶ Other states require bonding at the appellate stage.³⁷ Officials appear divided on whether the bond requirement reduces frivolous protests.³⁸

5. Remedies

Bid protests offer little value if contracting agencies can ignore them, so, at a minimum, a bid protest system must have the ability to direct or influence a contracting agency to correct the procurement violation.³⁹ This makes permanent the interim relief protesters receive under a stay. Bid protests can be expensive, all-consuming endeavors for protesters that could impact their future business with the contracting agency. At the federal level, successful protesters have long been eligible to recover protest costs, including attorney's fees.⁴⁰ Such recovery is in recognition of the public benefit of meritorious bid protests⁴¹ brought by contractors acting as private attorneys general.⁴² Across the United States, bid challenge remedies typically may include receiving the contested contract, another opportunity to compete for the contested contract, proposal costs, and/or protest costs.⁴³

6. Appeals and Judicial Review

In addition to relief, another bid protest system feature is the ability to appeal unfavorable protest decisions or to seek relief at a different forum. Throughout the United States, from the federal protest system down, most final review falls to the courts. GAO, for example, does not

³⁶ NATIONAL ASSOCIATION OF STATE PROCUREMENT OFFICIALS (NASPO), STATE BID PROTESTS (2013) at 4.

³⁷ See, e.g., discussion *infra* Section IV.A-B.

³⁸ NASPO, *supra* note 42, at 4.

³⁹ Gordon, *supra* note 3, at 444.

⁴⁰ 31 U.S.C. § 3554(c).

⁴¹ See, e.g., *Armour of Am., Inc.-Claim for Costs*, 71 Comp. Gen. 293, 297 (1992) (“The underlying purpose of CICA’s provisions relating to the entitlement to bid protest costs is to relieve protesters of the financial burden of vindicating the public interest as defined by Congress in the Act.”).

⁴² *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (“The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity ... acting essentially as a ‘private attorney general.’”).

⁴³ See Remedies listed at the conclusion of this paper *infra* in State Bid Protest Summary.

have an appeal process, although a disappointed protester may file a request for reconsideration or bring the same challenge to the U.S. Court of Federal Claims.⁴⁴ Some jurisdictions allow protesters to choose going to court or going to an administrative process, as the federal system does.⁴⁵ Others require the protester to exhaust all administrative remedies before seeking judicial review. Depending on the state, courts may have limited jurisdiction to review protests, or, in some instances, may not have the authority to hear them at all.⁴⁶ Court procedures, moreover, can be slow and expensive, and 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 of civil and/or criminal cases).⁴⁷ In almost every jurisdiction reviewed, the courts will hear a challenge to a source selection decision, but the jurisdiction, standard of review, and available remedies vary widely.

III. The Model Procurement Code and State Bid Protest Systems

Many states have enacted laws and published regulations on public procurement, but these laws and regulations are not uniform.⁴⁸ The American Bar Association's 2000 Model Procurement Code ("MPC") provides a "model" rather than a "uniform" procurement code in recognition of the diversity among state governing bodies and their procurement needs.⁴⁹ It provides a model for states to implement within their unique statutory frameworks.⁵⁰

⁴⁴ 4 C.F.R. § 21.9.

⁴⁵ See, e.g., discussion *infra* Section IV.A.

⁴⁶ See, e.g., discussion *infra* Section IV.D.

⁴⁷ Gordon, *supra* note 3, at 435.

⁴⁸ DANIELLE M. CONWAY, STATE AND LOCAL GOVERNMENT PROCUREMENT 2 (2012).

⁴⁹ AMERICAN BAR ASS'N, THE 2000 MODEL PROCUREMENT CODE xi. (2000).

⁵⁰ *Id.*

A. Bid Protests Under The Model Procurement Code

The MPC recommends a robust bid protest system. Article 9 provides the MPC's bid protest procedure, which envisions two bid protest fora: at the agency and at an independent appeals board.⁵¹ These fora would hear both pre- and post-award bid protests.⁵² Agency regulations would govern agency-level protests and the appeals board would follow its own rules to offer informal, expeditious, and inexpensive procedures to resolve bid protests and to advance the development of state procurement law precedent.⁵³ The appeals board offers both an original forum and provides *de novo* appellate review of denied agency-level protests.⁵⁴

The MPC provides for an automatic stay of the procurement in the event of a timely protest unless a substantial state interest compels a stay override.⁵⁵ The MPC provides for remedies following a successful pre-award and post-award protest. If a successful protest was submitted prior to award, the MPC would have the solicitation cancelled or revised.⁵⁶ If after award, the MPC offers ratification or termination of award with compensation for actual expenses incurred to the awardee, or, in the event of fraud, the contract declared null and void.⁵⁷ The MPC also establishes entitlement to bid or proposal costs if the successful protester will not receive the contract.⁵⁸ The MPC also provides ability to appeal adverse decisions to the courts.⁵⁹ Even only adopting some of these features would create a substantial bid protest system enabling disappointed bidders or offerors to ensure accountability and contribute towards a fairer, more efficient public procurement system.

⁵¹ AMERICAN BAR ASS'N, *supra* note 57, at §§ 9-101, 9-506.

⁵² AMERICAN BAR ASS'N, *supra* note 57, at §§ 9-101, 9-505.

⁵³ AMERICAN BAR ASS'N, *supra* note 57, at § 9-501, Commentary (1)

⁵⁴ AMERICAN BAR ASS'N, *supra* note 57, at § 9-505(a)

⁵⁵ AMERICAN BAR ASS'N, *supra* note 57, at § 9-101(6); Commentary (4).

⁵⁶ AMERICAN BAR ASS'N, *supra* note 57, at § 9-202.

⁵⁷ AMERICAN BAR ASS'N, *supra* note 57, at § 9-203.

⁵⁸ AMERICAN BAR ASS'N, *supra* note 57, at § 9-101(7).

⁵⁹ AMERICAN BAR ASS'N, *supra* note 57, at § 9-510(1)

B. The State of State Bid Protest Systems

In April of 2013, the National Association of State Procurement Officials (“NASPO”) released a research brief on state bid protests.⁶⁰ The brief examined bid protest policies and practices in state central procurement offices across the United States, drawing heavily on survey responses from 42 states.⁶¹ The NASPO survey revealed that most states have some type of bid protest process in place.⁶² The definition of “protest” varies from one jurisdiction to the next, but generally most procurement systems incorporating a bid protest system provide a process by which a vendor can file an objection to the award or intended award of a contract.⁶³ Although the deadlines may vary widely, most states impose timeliness rules on protesters and responding purchasing agencies.⁶⁴ Many states do not impose an automatic stay of contract award or performance upon receipt of filing of a bid protest, and those that do appear to permit a “stay override” in the event of a compelling state interest.⁶⁵ The NASPO report also noted that state-level protests appear to have increased, although the report did not have supporting data available.⁶⁶

IV. The Spectrum of Bid Protest Systems

The NASPO research brief revealed that most jurisdictions did not adopt the MPC bid protest procedures. The State Bid Protest Summary chart at the conclusion of this paper contains the results of a review of 50 state bid protest systems plus Puerto Rico and the District of

⁶⁰ See NASPO, *supra* note 42.

⁶¹ NASPO, *supra* note 42, at 1.

⁶² NASPO, *supra* note 42, at 2.

⁶³ NASPO, *supra* note 42, at Appendix I.

⁶⁴ NASPO, *supra* note 42, at 2.

⁶⁵ NASPO, *supra* note 42, at 2.

⁶⁶ NASPO, *supra* note 42, at 1.

Columbia.⁶⁷ This survey seeks to identify which features state bid protest systems incorporated. The bid protest system features from all the states reveals a spectrum of systems from robust (all features present), to substantial (most features present), to moderate (half of all features present), to minimal (less than half to none of the features present).

Most states incorporate at least half of the regular features of a bid protest system, but only a minority incorporate more than four. 12 jurisdictions offered some form of an independent bid protest tribunal. 30 jurisdictions allow both pre-award and post-award protests. 32 jurisdictions impose a stay in the event of a timely-filed bid protest, but only 26 of them automatically. Only seven jurisdictions require bonding or a fee. Only nine offer remedies other than injunctive relief. 20 jurisdictions do not provide administrative appeals. All but two jurisdictions allow judicial review of unsuccessful bid protests, and 14 permit bringing the bid protest action in court directly or as a taxpayer suit. Less than half have adopted or partially adopted the MPC. Examples from each category follow below.

A. Robust Bid Protest Systems

The primary indicator of whether a bid protest system could be considered robust is the creation of a bid protest tribunal. The District of Columbia has established a multi-part bid protest system which in many ways resembles the federal system. In the District of Columbia, vendors may file pre-award or post-award bid protests with the contracting agency, the Contract Appeals Board (“CAB”), or the Superior Court of the District of Columbia.⁶⁸ The CAB is a three-member board of administrative judges appointed by the Mayor.⁶⁹ If filed timely, the CAB

⁶⁷ See *infra* State Bid Protest Summary; see also, CAROLYN A. WOLF, GUIDE TO STATE PROCUREMENT (American Bar Ass’n, 2d ed. 2016) (this comprehensive guide provides references and links to each jurisdiction’s laws, regulations, and pertinent case law relating to public procurement, which facilitated collecting the data populating the chart).

⁶⁸ D.C. CODE § 2-360.08 (2011).

⁶⁹ D.C. CODE § 2-360.03 (2011).

will notify the contracting agency, which must stay award or suspend work (absent urgent and compelling circumstances, which mean performance must continue; the decision must be made in writing).⁷⁰ For remedies, the CAB can direct cancelation of a solicitation or of an award and determine whether the displaced contractor is entitled to costs actually incurred.⁷¹ CAB decisions, which have precedential value, are searchable on Westlaw and Lexis and published in the DC Register and on the CAB’s website.⁷² CAB protest decisions may not be appealed to the District of Columbia Court of Appeals because appellate jurisdiction is limited to contested cases by contractors or agencies, not by disappointed bidders.⁷³

The state of Maryland also has a bid protest tribunal, the Maryland State Board of Contract Appeals (“MSBCA”), where protesters may appeal timely filed pre-award or post-award protests that were denied by the contracting officer.⁷⁴ Contract award or performance must be stayed unless the Board of Public works or delegated agency determines that award is necessary to protect substantial state interests.⁷⁵ The MSBCA’s decisions may be appealed for judicial review as a “contested case” under the Maryland Administrative Procedure Act.⁷⁶

Like Maryland, South Carolina provides a Procurement Review Panel (the “Panel”) to which timely filed agency-level pre-award and post-award protests may be appealed.⁷⁷ Protesters must file a \$250 filing fee with their appeal.⁷⁸ The Panel provides a *de novo* administrative review of the contracting agency’s decision.⁷⁹ The Panel, which is not governed

⁷⁰ D.C. CODE § 2-360.08 (2011).

⁷¹ *Id.*

⁷² D.C. CODE § 2-360.04 (2011).

⁷³ D.C. CODE § 2-360.05 (2011).

⁷⁴ MD. CODE ANN., *State Fin. & Proc.* §§ 15-201, *et seq.* (2004).

⁷⁵ MD. CODE ANN., *State Fin. & Proc.* § 12-101 (2022).

⁷⁶ MD. CODE ANN., *State Gov’t* § 10-201, *et seq.* (2022).

⁷⁷ S.C. CODE ANN. § 11-35-4210 (1997).

⁷⁸ *Id.*

⁷⁹ *Id.*

by the State's Administrative Procedures Act, has no formal rules of procedure. An automatic stay of award or performance remains in effect until 10 days after the agency-level protest decision is posted or, in the event of a timely appeal to the Procurement Review Panel, until a decision is rendered by the panel.⁸⁰ Available remedies include cancellation of the procurement or the contract, with payment of damages available to the awardee, and bid preparation costs.⁸¹ All appeals from the Panel go to a trial court of general jurisdiction.⁸²

B. Substantial Bid Protest Systems

Many jurisdictions offer some administrative appeals procedures or non-specialized review boards to review bid protests denied by the contracting agency. In Arizona, protesters can appeal pre-award or post-award agency-level bid protests decisions to the Director of Department of Administration, who will review an agency report from the contracting officer and a response from the protester.⁸³ The Director has the discretion to dismiss or decide the bid protest appeal, or to assign it to an administrative law judge for a hearing.⁸⁴ Protesters can challenge a denied appeal in state court, where either party may request an evidentiary hearing and a trial by jury.⁸⁵ The protester's remedies are limited to enjoining the contracting agency.⁸⁶

Similarly, in Florida if the contracting agency and the contractor cannot resolve the protest by mutual agreement within seven days, then the protest is resolved by either informal administrative hearing or by the Division of Administrative Hearings (“DOAH”).⁸⁷ Absent emergency circumstances, the contracting agency must stop the solicitation or the contract until

⁸⁰ *Id.*

⁸¹ S.C. CODE ANN. § 11-35-4310 (1997).

⁸² ARIZ. REV. STAT. § 41-2611 (2022).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ ARIZ. REV. STAT. § 41-2641 (2022).

⁸⁶ ARIZ. REV. STAT. § 41-2615 (2022).

⁸⁷ *Id.*

protest has been resolved.⁸⁸ Some state agencies have unique filing rules and bonding requirements, but generally all protesters must secure a protest bond at 1% of the contract amount.⁸⁹ DOAH issues a recommended order to the agency, which the agency can adopt, reject, or modify.⁹⁰ Protesters may appeal the agency's order to a District Court of Appeals in Florida.

Utah requires that a designated protest officer decide the initial bid protest, which the protester can appeal to an administrative board. Vendors file pre- or post-award bid protests with the protest officer, who must follow the procedures in the Utah Procurement Code.⁹¹ Timely filed protests result in an automatic stay of award or performance.⁹² The protest officer has the discretion to decide whether to hold a hearing, but the hearing has no formal rules of evidence.⁹³ Protesters may appeal adverse decisions from the protest officer to the Utah State Procurement Policy Board (the "Board").⁹⁴ The Board consists of 15 voting members and a non-voting secretary, out of which a procurement panel appointed by the Chair of the Board is assembled to hear bid protest appeals.⁹⁵ The panel consists of at least three Board members or their designees, who cannot include a person employed by the contracting agency responsible for the solicitation or award under protest.⁹⁶ The protester must pay a fee or post a bond to appeal.⁹⁷

The panel reviews the protest officer's decision, the administrative record, and the hearing record, if held, to determine if the protest officer's decision was arbitrary and capricious

⁸⁸ FLA. STAT. § 120.57 (2021).

⁸⁹ FLA. STAT. § 287.042 (2021).

⁹⁰ *Id.*

⁹¹ UTAH ADMIN. CODE § 63G-6a-1603 (2020).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ UTAH ADMIN. CODE § 63G-6a-1702 (2017).

⁹⁵ Jack W. Reed, *Utah Procurement Rules and Regulations*, GUIDE TO STATE PROCUREMENT 1274, 1299 (American Bar Ass'n 2 ed. 2016).

⁹⁶ UTAH ADMIN. CODE § 63G-6a-1702 (2017).

⁹⁷ UTAH ADMIN. CODE § 63G-6a-1703 (2017).

or clearly erroneous.⁹⁸ Utah generally limits remedies to injunctive relief, with the notable exception of successful post-award protesters, who can recover both bid/proposal costs and protest costs, plus other equitable relief.⁹⁹ However, unsuccessful protesters must reimburse the contracting agency for all protest expenses, including attorneys' fees.¹⁰⁰ An adverse decision may be appealed to the Utah Court of Appeals by either party.¹⁰¹

C. Moderate Bid Protest Systems

Many jurisdictions rely on contracting agencies to adjudicate bid protests, and many do without formal procedures or meaningful review. For example, in New Jersey, vendors can only file pre- and post-award bid protests with the Director of Purchase and Property (the "DPP").¹⁰² The DPP must stay contract award or performance until rendering a final decision.¹⁰³ Final decisions of bid protests are appealable to the Superior Court Appellate Division.¹⁰⁴ Although the court will review the bid protest, the contract award "will not be disturbed absent a showing of bad faith, corruption, fraud or gross abuse of discretion."¹⁰⁵

The state of California permits agency-level pre- or post-award protests for certain types of procurements by certain agencies subject to agency-specific procedures.¹⁰⁶ Generally, only certain types of bid protests will result in a stay of award.¹⁰⁷ The protester files a notice of protest with the agency and a "full protest" with the State Board of Control, unless different

⁹⁸ UTAH ADMIN. CODE § 63G-6a-1702 (2017).

⁹⁹ UTAH ADMIN. CODE § 63G-6a-1904 (2015).

¹⁰⁰ UTAH ADMIN. CODE § 63G-6a-1904 (2015).

¹⁰¹ UTAH ADMIN. CODE § 63G-6a-1802 (2017).

¹⁰² N.J. ADMIN. CODE § 17:12-3.2 (2022).

¹⁰³ *Id.*

¹⁰⁴ N.J. ADMIN. CODE 17:12-3.1(b) (2022).

¹⁰⁵ *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 619 (App. Div. 2006) (citing *Comm. Cleaning.*, 47 N.J. at 549).

¹⁰⁶ Kimberly C. Welch, *California Procurement Rules and Regulations*, GUIDE TO STATE PROCUREMENT 115, 120-24 (American Bar Ass'n 2 ed. 2016).

¹⁰⁷ *Id.*

procedures apply.¹⁰⁸ Regardless of which protest process applies, protesters can seek judicial review under an arbitrary and capricious standard by filing a petition for writ of mandamus.¹⁰⁹

Oklahoma only permits the filing of post-award protests to either the State Purchasing Director or to the Construction Administrator.¹¹⁰ The protester may appeal an adverse decision to the Director of the Office of Management and Enterprise Services (OMES).¹¹¹ The Director of OMES has the discretion to hear the bid protest or to assign it to an administrative law judge.¹¹² The administrative law judge, if appointed, makes a recommendation to the OMES Director whether to cancel or ratify the contract.¹¹³ The protester may appeal in district court.¹¹⁴

D. Minimal Bid Protest Systems

Finally, the largest category of jurisdictions provides no bid protest process at all, and protesters must turn to the courts or the inspector general if the bid protest cannot be resolved informally. Massachusetts has no bid protest process and directs vendors to bring bid protests to the Office of Inspector General, because contracts entered in violation of law are invalid and payment is prohibited.¹¹⁵ A civil action filed by the Inspector General to enjoin the award and performance of a contract is the primary enforcement mechanism.¹¹⁶ The Commonwealth has waived sovereign immunity for bid protest claims brought in state court, but not federal court.¹¹⁷

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Ferris J. Barger, *et al.*, *Oklahoma Procurement Rules and Regulations*, GUIDE TO STATE PROCUREMENT 960, 984 (American Bar Ass'n 2 ed. 2016).

¹¹¹ *Id.* at 986.

¹¹² *Id.* 986-87.

¹¹³ *Id.* 987-88.

¹¹⁴ *Id.* at 989.

¹¹⁵ MASS. GEN. LAWS ch. 30B, §17(b) (2022).

¹¹⁶ *Id.*

¹¹⁷ *McGuigan v. Conte*, 629 F.Supp.2d 76, 83 (D. Mass. 2009)

Minnesota similarly has no bid protest system, and so to prevent a contract from being erroneously awarded, a protester must file a motion for an injunction in state court.¹¹⁸ A court may set aside the contract award if it is arbitrary, capricious, and unreasonable under all the facts and circumstances.¹¹⁹ However, recovery for the protester is limited to bid preparation costs.¹²⁰ The contracting agency has the discretion to include agency-level bid protest procedures in solicitations that will only apply to that procurement.¹²¹

The state of Nebraska requires that any vendor “grievances” related to a contract action be filed in writing with the Administrator of the Materiel Division.¹²² The Administrator will respond in writing, and the vendor then may request a meeting with the Administrator and with the Director of the Department of Administrative Services.¹²³ This meeting will result in a final decision, which cannot be reviewed administratively or judicially.¹²⁴

In Washington State, each agency establishes protest procedures through regulations or solicitation documents.¹²⁵ However, once the agency awards the contract, a disappointed bidder cannot obtain damages or force termination of the contract.¹²⁶ Thus, protesters must seek injunctive relief in court prior to contract award to prevent the agency from awarding the contract to another vendor.¹²⁷ Agencies must wait two days before awarding the contract in

¹¹⁸ MINN. STAT. § 3.751 (2021).

¹¹⁹ See *R.E. Short Co. v. City of Minneapolis*, 269 N.W.2d 331, 337-38 (Minn. 1978).

¹²⁰ *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. Ct. App. 1999), review denied; see also *Telephone Associates, Inc.*, 364 N.W.2d 378, 383 (Minn. 1985) (awarding bid preparation costs and reasonable attorney’s fees following a successful protest of a municipal board’s contract award. Although superseded by statute at the municipal level, recovery against the state may still be possible. See Minn. Stat. § 471.345(14) (2015)),

¹²¹ Jeff H. Eckland, *Minnesota Procurement Rules and Regulations*, in GUIDE TO STATE PROCUREMENT 650, 674-75 (American Bar Ass’n, 2d ed. 2016).

¹²² 9 NEB. ADMIN. CODE § 4-004.03 (2021).

¹²³ William T. Foley and Adam B. Kuenning, *Nebraska Procurement Rules and Regulations*, in GUIDE TO STATE PROCUREMENT 735, 746-47 (American Bar Ass’n, 2d ed. 2016).

¹²⁴ *Id.*

¹²⁵ Ronald J. English, *Washington Procurement Rules and Regulations*, in GUIDE TO STATE PROCUREMENT 1369, 1396-97 (American Bar Ass’n, 2d ed. 2016).

¹²⁶ See *Peerless Food Prods. v. State*, 119 Wash. 2d 584, 835 P.2d 1012, 1015-16 (1992).

¹²⁷ *Dick Enters., Inc. v. Metropolitan King County*, 83 Wash. App. 566, 922 P.2d 184 (1996)

order to allow protesters an opportunity to seek an injunction.¹²⁸ The standard of judicial review for a bid protest is whether the agency was arbitrary, capricious, or contrary to law.¹²⁹

V. Conclusion

Tremendous variety exists among state bid protest systems. The bid protest systems do not appear to correlate with whether the state has adopted other parts of the MPC.¹³⁰ Generally, more states have adopted minimal systems than robust systems. A state-by-state analysis of percentage of procurements awarded competitively, a survey of transaction costs for purchasers and vendors, and a granular code-by-code comparison could generate data that would help states determine whether more robust bid protest procedures would improve their procurement systems. Also, the MPC commentary notes that the North American Free Trade Agreement (now the U.S.-Mexico-Canada Agreement) and the World Trade Organization Government Procurement Agreement, require “sub-units” of national government (*i.e.*, state and local governments) to have a bid protest system.¹³¹ Moreover, the infrastructure funding that state and local governments will receive through grants will attach federal rules, under which non-federal entity grantees are responsible for all contractual and administrative issues arising out of procurements, which include “source evaluation, protests, disputes, and claims.”¹³² While the grants rules have less direct impact on the state governments than on other federal grantees, the grants rules, and many states’ failures to implement robust bid protest systems, may trigger broader concerns regarding obligations to have effective bid protest systems in place when using federal grant funding for procurements. .

¹²⁸ WASH. REV. CODE §39.04.105 (2019).

¹²⁹ *Equitable Shipyards, Inc. v. State*, 93 Wash. 2d 465, 611 P.2d 396 (1980)

¹³⁰ See *infra* State Bid Protest Summary.

¹³¹ ABA, MPC, *supra* note 57 at Art. 9, Commentary (1).

¹³² 2 C.F.R. § 200.318(k).

| <u>Jurisdiction</u> | <u>Independent Tribunal</u> | <u>Pre-Award Protests</u> | <u>Automatic Stay</u> | <u>Bond or Deposit</u> | <u>Remedies</u> | <u>Appeal</u> | <u>Judicial Review</u> | <u>MPC</u> |
|---------------------|-----------------------------|---------------------------|-----------------------|------------------------|--|----------------|------------------------|------------|
| Alabama | No | No | Yes | No | Injunctive | No | Yes | No |
| Alaska | No | Yes | Discretionary | No | Injunctive + Bid/Proposal Costs | Yes | Yes | Yes |
| Arizona | Discretionary | Yes | Yes | No | Injunctive + Protest Costs | Yes | Yes+ | Yes |
| Arkansas | On Appeal | Yes | Yes | No | Injunctive + Bid Costs + Protest Costs | Yes | Yes | Yes |
| California | No | Yes | Yes | No | Injunctive | No | Yes | No |
| Colorado | No | Yes | No | No | Bid Costs | Yes | Yes+ | Yes |
| Connecticut | No | No | No | No | None | No | Yes+ | No |
| Delaware | No | No | No | No | None | No | Yes+ | No |
| DC | Yes | Yes | Yes | No | Injunctive + Performance Costs | Yes | Yes+ | Yes |
| Florida | On Appeal | Yes | Yes | Yes | Injunctive | Yes | Yes | No |
| Georgia | No | Yes | Yes | No | Injunctive | Yes | Yes | Yes |
| Hawaii | No | Yes | Yes | No | Injunctive | Yes | Yes | Yes |
| Idaho | No | Yes | Yes | No | Injunctive | No | Yes | No |
| Illinois | On Appeal | Yes | Yes | No | Injunctive | Yes | Yes | No |
| Indiana | No | Yes | No | No | Injunctive | No | Yes+ | Yes |
| Iowa | No | No | Yes | Yes | Injunctive | Yes | Yes | No |
| Kansas | On Appeal | No | Discretionary | No | Injunctive | Yes | Yes+ | No |
| Kentucky | No | Yes | Yes | No | Injunctive | No | Yes | No |
| Louisiana | No | Yes | Yes | No | Injunctive + Bid Costs | Yes | Yes | Yes |
| Maine | No | No | Discretionary | No | Injunctive | Yes | Yes | Yes |
| Maryland | On Appeal | Yes | Yes | No | Injunctive | Yes | Yes | Yes |
| Massachusetts | No | No | No | No | None | No | Yes+ | Yes |
| Michigan | No | Yes | Yes | No | Injunctive | No | Yes | No |
| Minnesota | No | No | No | No | None | No | Yes+ | No |
| Mississippi | No | No | No | No | None | No | Limited | No |
| Missouri | No | No | No | No | None | No | Limited | No |
| Montana | No | Yes | No | No | Injunctive | No | Limited | No |
| Nebraska | No | No | No | No | Injunctive | Yes | No | No |
| Nevada | On Appeal | No | Yes | Yes | Injunctive | Yes | No | No |
| New Hampshire | No | No | Discretionary | No | Injunctive | Yes | Yes | Yes |
| New Jersey | No | Yes | Yes | No | Injunctive | Yes | Yes | No |
| New Mexico | No | Yes | Yes | No | Injunctive | Yes | Yes | Yes |
| New York | No | Yes | No | No | Injunctive | Yes | Yes | Yes |
| North Carolina | On Appeal | No | No | No | Injunctive | Yes | Yes | No |
| North Dakota | No | No | Yes | No | Injunctive | Yes | Yes+ | No |
| Ohio | No | No | No | No | Injunctive + Bid Costs | No | Yes+ | No |
| Oklahoma | On Appeal (Discretionary) | No | No | No | Injunctive | Yes (Advisory) | Yes | No |
| Oregon | No | Yes | Yes | No | Injunctive + Protest Costs | No | Yes | Yes |
| Pennsylvania | No | Yes | Yes | No | Injunctive | No | Yes+ | Yes |
| Puerto Rico | No | No | No | No | Injunctive | No | Yes | No |
| Rhode Island | No | Yes | No | No | Injunctive | No | Yes+ | Yes |
| South Carolina | On Appeal | Yes | Yes | Yes | Injunctive | Yes | Yes | ? |
| South Dakota | No | Yes | No | No | Injunctive | No | Yes+ | No |
| Tennessee | On Appeal | Yes | Yes | Yes | Injunctive | Yes | Limited | No |
| Texas | No | Yes | Yes | No | Injunctive | Yes | Yes* | No |
| Utah | No | Yes | Yes | Yes | Injunctive, Costs | Yes | Yes | No |
| Vermont | No | No | No | No | None | No | Yes | No |
| Virginia | No | No | Discretionary | Yes | Injunctive, Partial Performance | Yes | Yes | Yes |
| Washington | No | No | Injunction | No | Injunctive | No* | Yes | No |
| West Virginia | No | Yes | Discretionary | No | Injunctive | Yes | Yes | No |
| Wisconsin | No | Yes | Yes | No | Injunctive | Yes | Yes | No |
| Wyoming | No | No | Discretionary | No | Injunctive | Yes | Yes | No |

“On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.”

/s/ Zachary F. Jacobson