THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Nathaniel E. Castellano

SEPTEMBER 2025 | VOLUME 39 | ISSUE 9

¶ 55 BID PROTEST REFORM: *Storm The Bastille!*

Vernon J. Edwards

Addendum by Ralph C. Nash

Bid protests are complaints by disappointed offerors that they were not treated fairly by an agency during a contractor selection process. They allege that an agency violated some statute or regulation, whether due to incompetence, favoritism, or corruption. At least one authority has claimed that the bid protesters are, in effect, whistleblowers, keeping Government agencies on the straight and narrow. The Government Accountability Office, which handles most protests, sustains about 20% of them. A reading of the GAO's sustained decisions suggests that the agencies are more often incompetent than corrupt. Probably the best example of that was the GAO's stunning decision in the matter of *The Boeing Company*, Comp. Gen. Dec. B-311344, 2008 CPD ¶ 114, 2008 WL 251417, 50 GC ¶ 230, regarding the award of the Air Force tanker contract. See Edwards, *Feature Comment: Boeing Versus the Air Force—The KC-45 Tanker Protest and the Future of Major System Source Selections*, 50 GC ¶ 230. Some say that protests arise from obscure rules, like the late electronic proposal rule in Federal Acquisition Regulation 52.215-1(c), a suggestion supported by occasional differences of opinion and outcome among the GAO, the U.S. Court of Federal Claims (COFC), and the U.S. Court of Appeals for the Federal Circuit.

Advocates of the bid protest system admit that protests are disruptive, but assert that while they are costly, they are worth it, and that they have been effective, usually without providing supporting data. How costly? Worth what? Effective at what and how? Effective at forcing an agency source selection do-over? How often do successful protesters go on to win the contract? According to one oft-cited source, not often. See Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*:

> The GAO reports a "sustain" rate (that is, the rate at which the GAO rules in favor of the protester and sustains the protest) that has ranged, between 2007 and 2011, from 16% to 27%. That sounds like protesters do fairly well, but the full picture is not so favorable to protesters. First, the sustain rate has been dropping nearly consistently, falling from 27% in FY 2007 to 16% in FY 2011. Second, the sustain rate is calculated only among the cases for which the GAO issues a decision on the merits, as the GAO's annual reports demonstrate. That means that, in FY 2010, for example, the GAO did not sustain 19% of 2,299 cases; rather, it sustained 19% of 441 decisions on the merits (the 441 figure being based on the GAO's protest overview report of 2011). Third, that percentage is distorted by the methodology of counting multiple B numbers separately because, in the author's experience, protests that are sustained typically have more B numbers than protests that are denied. For example, in FY 2010, the GAO reported 441 decisions on the merits, of which 82 were reported as sustained protests. But a count of actual decisions (counting each decision as one, even if it resolves two or more B numbers) reveals that there were actually 282 decisions on the merits, rather than 441, and that of these only 45 decisions sustained the 82 protests that the GAO reported as having been sustained. That represents a 16% sustain rate, rather than the 19% rate that the GAO reported.
>
> Thus far, this analysis means that, among the hundreds of thousands of federal procurements that occurred in FY 2010, there were

> only forty-five procurements for which the GAO sustained bid protests. The next stage, though, offers even worse news for protesters, and it is surprising how little is reported about it. What happened in those forty-five procurements, after the GAO sustained the protests? Did the protester that was successful in the GAO litigation succeed in obtaining the contract? The answer: rarely. The FY 2010 numbers have been selected here for further study because enough time should have passed for final actions in the underlying procurements to be available. That said, discovering the final action on a contract can be challenging because information on what ultimately happened after each one of the sustained protests is not readily available. Enough is known, however, to give a fairly clear picture of protesters winning at the GAO but nonetheless not receiving the contested contracts. In four of the forty-five decisions, the GAO did not recommend any corrective action in the protested procurement, either because the contract had already been performed or for other reasons. In an additional three decisions, the GAO did recommend corrective action in the procurement, but the agency declined to follow the GAO's recommendation. In twenty-three additional decisions, the GAO recommended corrective action and the agency followed the GAO's recommendation, but the agency then confirmed award to the same company as before or took some other action that did not award to the protester, such as awarding to a third company or canceling the requirement entirely. In only eight cases identified to date did the protester apparently obtain the contested contract, and in one additional case, the agency did commit to resoliciting using the size standard sought by the protester. While the ultimate outcome has yet to be determined in the procurements covered by the remaining six decisions, this much is clear: winning a protest is far from ensuring that a protester will win the contract that it seeks. [Footnotes omitted.]

42 Pub. Cont. L.J. 489, 499 (Spring 2013).

Given that analysis, and given the costs of the bid protest system in terms of disrupted and delayed contract awards, delayed contract performance, and litigation costs, why do we maintain such a system? Why doesn't the law simply allow unsuccessful offerors who feel cheated file claims for recovery of bid and proposal costs and lost profits? We would still get the benefit of "whistleblowing," but without the direct and collateral disruptive effects of bid protests.

We have asserted that protests allow disappointed bidders to blow off steam, which, under our system of government, is necessary, because most disappointed bidders and their disappointed employees are also disappointed voters. So, yes, yes, yes, we need some form of "transparency" in procurement decisionmaking, but even the system for providing it could be better or, even better, different.

What is not always acknowledged by protest advocates is that the system has affected the leeway that contractor selection and contract formation are regulated, planned, and managed. Bid protest decisions and concerns about bid protests have prompted agencies to resort to tedious and time-consuming strategies and procedures, resulting in dubious processes in which, for example, complex "negotiated" contracts are awarded without "discussions" (madness!) in order to avoid competitive range and discussion protests. See Miller, *When Recommendations Become Requirements: How the GAO's "Non-Binding" Bid Protest Decisions Create Unofficial Procurement Rules Contracting Officers Are Expected To Follow,* 53 Pub. Cont. L.J. 523 (Spring 2024).

Bid protests require Government acquisition personnel to study sometimes lengthy missives from the temples of mysterious instructions about things like the distinction between clarifications and discussions and about exactly when electronically submitted proposals are "late." It has also been said to have led to tactical protests by incumbent contractors seeking to reap the benefits of a delay in the award of a new contract to a competitor. Maybe so. After all, why not?

And goodness knows, we must have proper *legal procedure* in order to keep the scribes employed. The system encourages plenty of it, permitting sometimes costly and time-consuming de facto appeals from an agency protest decision to the GAO, to the Court of Federal Claims, and thence to the Federal Circuit, even to the U.S. Supreme Court. In one instance, the Department of Defense Joint Enterprise Defense Initiative (JEDI) acquisition prompted such costly lawfare the DOD canceled the program acquisition. (Just wait for the AI-inspired protests of information technology acquisitions, which are already conducted in a protest-rich environment.) Ultimately, the taxpayers are footing the bill for all this.

Perhaps one of the best illustrations of how nutty the bid protest system can be is the confusion it has caused over the proper interpretation of the 213-word late proposal rule in FAR 52.215-1(c)(3)(ii)(A):

> (3) Submission, modification, revision, and withdrawal of proposals.
>
> (i) Offerors are responsible for submitting proposals, and any modifications or revisions, so as to reach the Government office

> designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.
>
> (ii) (A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and—
>
> *(1)* If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
>
> *(2)* There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or
>
> *(3)* It is the only proposal received.

The GAO first interpreted that passage in a three-page decision, *Sea Box, Inc*. Comp. Gen. Dec. B-291056, Comp. Gen. Dec. B-291056, 2002 CPD ¶ 181, 2002 WL 31445297, 44 GC ¶ 442, and denied the protest. The decision was based on the GAO's interpretation of the text of the regulation. A decade later, in *Watterson Construction Co. v. U.S.*, 98 Fed. Cl. 84 (2011), a 15-page decision, the COFC decided that the GAO's interpretation and the interpretation in an earlier COFC decision were wrong based on an analysis of regulatory history, casting doubt as to how the FAR provision is to be properly interpreted. See *Postscript: Electronic Bids and Proposals*, 25 N&CR ¶ 28, in which we said:

> [A] problem is that our two protest tribunals work like Scylla and Charybdis. The GAO makes up rules of its own, see *Postscript: The Rules of the Competitive Negotiation Game*, 14 N&CR ¶ 48, but at least it is more predictable than the COFC. A CO cannot be sure what will happen in the COFC, what with judges who disagree with the GAO and with each other. Why do we need two protest tribunals? I asked that question at our December 2010 *Roundtable*, but I did not get what I consider to be a straight answer. Our panelists, from the GAO and the court, commented on the merits of having two forums—neither being willing to say that the other should go—but I think we would be better off with the GAO alone. It is quick, it is relatively inexpensive, its staff are reasonably knowledgeable of acquisition rules and processes, and they are reasonably fair. The GAO cannot order agencies to comply with its recommendations, but agencies comply in most cases. At the very least, Congress should stop protesters from filing first with the GAO and then with the COFC if they do not like GAO's decision. The disagreements between the GAO and the court, and among the judges, and the second bites at the apple are costly nuisances that do not make the system work better. Protesters should have to choose one forum or the other and live with their choice.

The GAO/COFC split on the proper interpretation of the late electronic proposal rule has been discussed in 46 Westlaw® secondary sources.

Oh, well. People may respect umpires, but few love them. Bid protest reform has been a topic for at least 30 years. See Coburn, *Bid Protests: A Reply to the Kelman Proposals*, and *Miller Testifies On Bid Protests Before House Committees*, 30. No. 4 The Procurement Lawyer (1995). But what Congress, the GAO, and the federal courts have given us is an ever more complicated and time-consuming system and process. We wouldn't mind so much if it didn't hamper the conduct of the main business of buying what the Government needs in an efficient and timely manner.

I do not believe that the current bid protest system can be reformed in a way that serves the purpose of improving the acquisition process. It does not make sense to me for companies to try to litigate their way *into* contractual relationships. I think the current system can be replaced, and I have recommended a replacement approach, which is to convert bid protests into claims for compensation. See *Postscript: The Protest Process*, 38 NCRNL ¶ 37. Claimants could still be considered whistleblowers, and agency personnel could still be held to account for incompetence, favoritism, and corruption. But it's probably too radical a departure from tradition to get any traction. "And so we beat on, boats against the current, borne back ceaselessly into the past." *VJE*

ADDENDUM

Vern got me thinking about the protest system and, while I agree with much of his assessment, my take is somewhat different. I believe the system is too legalistic. Long ago it was modeled on the Administrative Procedure Act where a key issue is whether the plaintiff has standing to bring the action. Thus, the initial focus of the suit is on the plaintiff not the merits of the complaint. This has carried over into the protest world into whether a protester is an "interested party" in Government Ac-

countability Office parlance or whether a plaintiff has "standing" in U.S. Court of Federal Claims parlance. In addition, in both fora, the protester must show that it was prejudiced. Only when these tests are met will a protester win on the merits. Otherwise, the case will be dismissed without regard to whether its contention on the merits of the protest was valid.

I believe we have gotten it backward. If a protest system is intended to uncover flaws in a procurement and force them to be corrected, the focus should be to address the merits of the protest not the status of the protester. If Vern reads a solicitation and sees that it violates a statute or regulation, why shouldn't that be a viable protest?

Perhaps we should have modeled the protest system on the qui tam provisions of the False Claims Act where we reward bounty hunters for disclosing fraudulent practices. A protest system following this model would have no stay provisions holding up a procurement and bar temporary restraining orders or preliminary injunctions at the court. It would allow anyone to file a protest (following a first-to-file logic), but the protest would have to be filed initially with the contracting agency. If the agency fixed the problem through corrective action, it would be required to pay the protester a relatively small statutory bounty. If the agency took no action, the protester could litigate the case, at either the GAO or the Court of Federal Claims (not both). If the protester won, the agency would have to pay a larger statutory bounty plus legal fees and would have to terminate a contract that had been awarded in the face of the protest. In addition, Contracting Officers that did not take corrective action in response to a winning protest would be subject to sanctions.

I will leave it to Congress to specify the size of the bounties but they should be sufficient to induce bounty hunters to go for it. Perhaps they should depend on the size of the procurement and increase based on the rate of inflation.

I realize this is highly speculative but if we are going to debate the merits of the current protest system, let's try to go to the root of the problem and look for a system that focuses on whether an agency has conducted a procurement in accordance with the rules of the game (no matter what they are) rather than on the status of the protester. And let's seek a system that allows agencies to go forward with their procurements without interruption while the protest is being decided. Then we would have a system that we could tout to the rest of the world. *RCN*