



Request for Proposals—June 27, 2019

Agency Bid Protests

The Administrative Conference is seeking proposals by potential consultants to undertake a research project that will study ways to improve the procedures by which agencies resolve agency-level bid protests.

Proposals are due by 5:00 p.m. Eastern Time on July 18, 2019.

Background.

Agencies often solicit bids from contractors to provide them goods and services. After an agency awards a contract, a disappointed bidder may file a protest alleging illegalities or improprieties in the contract award. The protester may file a bid protest with the procuring agency, the Government Accountability Office (“GAO”), or the Court of Federal Claims.¹ The GAO is the most common forum, hearing over 2,000 cases annually since 2010,² and the quantity of protests has increased over time. From 2008 to 2017, the number of protests filed before the GAO increased by over 50 percent.³ Similarly, the quantity of bid protests filed with the Court of Federal Claims has been steadily rising.⁴ These increasing bid protests have raised concerns that some protests may be frivolous⁵ and might delay vital acquisition programs, imposing additional administrative, litigation, and other costs.⁶

Though recent proposals have focused on improving GAO procedures, little attention has been given to agency-level bid protest procedures. Agency-level protests are intended to be inexpensive, informal, and efficient.⁷ Available data suggest that agencies with robust agency-level protest procedures can resolve up to half of their bid protests internally, which eliminates the need to incur the considerably greater costs associated with litigating the protests before the

¹ 48 C.F.R. §§ 33.103–.105. Recommendation 95-5 addresses initial jurisdiction to review bid protests. Admin. Conf. of the U.S., Recommendation 95-5, *Government Contract Bid Protests*, 60 Fed. Reg. 43,113 (Aug. 18, 1995).

² MOSHE SCHWARTZ & KATE MANUEL, CONG. RESEARCH SERV., R40227, *GAO BID PROTESTS: TRENDS AND ANALYSIS* 3–4 (2015).

³ *See id.* at 4 (approximately 1,600 bid protests filed with the GAO in 2008); U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-18-237SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2017* 4 (2017) (nearly 2,600 bid protests filed with the GAO in 2017).

⁴ MARK V. ARENA ET AL., RAND CORP., *ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS* 43–44 (2018).

⁵ Eric S. Underwood, Note, *Tackling Meritless Bid Protests: The Case for Rebalancing Protest Costs in the Federal Procurement Arena*, 52 TULSA L. REV. 367, 377–80 (2017) (identifying complaints).

⁶ *See, e.g.,* Otto Kreisher, *General Bemoans Glut of Air Force Contract Protests*, GOV’T EXECUTIVE, Feb. 13, 2008.

⁷ Exec. Order No. 12,979, § 1(b), 60 Fed. Reg. 55,171, 55,171 (Oct. 27, 1995).



GAO.⁸ Many agencies have adopted their own regulations and policies governing agency protest procedures, which vary considerably depending upon the agencies' specific needs.⁹ A study of the various regulations and policies can identify the array of available options for streamlining protest procedures and reducing costs in resolving bid protests.

Project Description.

The Conference seeks proposals for a study that will analyze existing agency-level bid protest procedures to identify opportunities for improvement. The consultant will study the Federal Acquisition Regulation and agency-specific bid protest regulations and will perform in-depth studies of bid protest procedures of selected agencies. The consultant will analyze and compare these regulations and procedures to determine which features work well and how they improve the bid protest process. The project will offer a series of options for bid protest procedures, examining the benefits of each and recommending to agencies when certain procedures may be appropriate for adoption, considering agencies' specific needs and institutional missions. The study will also compile data regarding agency-level bid protests, which will be of interest to Congress,¹⁰ and can aid in the development of future bid protest policy.

How to Submit a Proposal.

Proposals are invited from qualified persons who would like to serve as a research consultant on this project. Joint proposals from multiple individuals will also be considered. All responses will be considered by the Conference staff.

A consultant's study should result in a report that is delivered first for review by the Conference staff and then forwarded to a committee of the Conference membership for consideration. The report should provide proposed recommendations. The consultant works with Conference staff and the committee to refine and further shape the report and may work with Conference staff to revise the recommendations. Recommendations approved by the committee are then forwarded to the Council of the Conference for consideration, and the Council forwards the recommendations (with its views) to the full Conference membership meeting in plenary session. If approved at the plenary session, a recommendation becomes an official recommendation of the

⁸ See Erik A. Troff, Agency-Level Bid Protest Reform: Time for a Little *Less* Efficiency? 1 n.4 (Apr. 26, 2005) (unpublished manuscript) (compiling data demonstrating that the Army Corps of Engineers' agency-level protests accounted for approximately 50 percent of its agency-level and GAO protest case load from 1999 through 2004).

⁹ Compare 48 C.F.R. § 333.103 (HHS), with 48 C.F.R. § 933.103 (DOE).

¹⁰ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885, 130 Stat. 2000, 2319 (2016).



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Administrative Conference. (For a general understanding of how the Conference is organized and operates, see 5 U.S.C. §§ 591-596, and <http://www.acus.gov>.)

The Conference will provide a consulting fee of \$25,000.00 for this study, plus a budget for related expenses. The Conference also typically encourages its consultants to publish the results of their studies in journals or other publications. Thus, working as a Conference consultant provides some compensation, a publication opportunity, and the opportunity to work with Conference members from federal agencies, academia, the private sector, and public interest organizations to help shape and improve administrative law, procedure, and practice. Those submitting proposals should understand that, in addition to the work involved in researching and writing the consultant's report, the consultant will (in most cases) need to work with Conference staff and committees as the Conference develops a recommendation based on the report. The consulting fee is not designed to match a consultant's normal consulting rates. It is a significant public service to serve as a consultant to the Conference.

To submit a proposal to serve as the Conference's consultant on this project, you must:

- Send an e-mail to Attorney Advisor Alexandria Tindall Webb, at atindallwebb@acus.gov. Proposals must be submitted by e-mail; and
- Include the phrase "ACUS Project Proposal" in the subject line of your e-mail.

In the body of your e-mail or in an attachment, please:

- State the name of the project for which you are submitting a proposal: "Agency Bid Protests."
- Explain why you would be well qualified to work on the project. Include your curriculum vitae or other summary of relevant experience.
- Explain your research methodology and how you would develop recommendations based on the research. There is no required format, and 2-4 pages should probably be sufficient.
- Propose a schedule for the project deliverables. This project requires submission of a project outline, a draft report, and a final report. Multiple draft reports may be necessary based on input from the Chairman, staff, or committee; nonetheless, the draft report should be substantially complete. The timeline for deliverables should substantially adhere to the schedule below, but high-quality research leading to a well-written report will be the prime consideration.



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Deliverable	Due Date
Project Outline	Contract Award + 45 Days
Draft Report	Final Project Outline + 120 Days
Final Report	Draft Final Report + 60 Days

A February 2020 submission date for the draft report is preferred, so that a committee recommendation, if any, can be targeted for completion at a plenary session of the Conference held in June 2020.

Submit your proposal by 5:00 p.m. Eastern Time on July 18, 2019. Only proposals submitted by the stated deadline are guaranteed to receive consideration. Proposals may also be submitted or amended at any time until the award of the contract, and the Conference may consider any proposals or amended proposals received at any time before the award of the contract.

Proposals will be evaluated based on:

- The qualifications and experience of the researcher(s) and knowledge of literature in the field (if applicable);
- The quality and clarity of the proposal;
- The timeline of the proposal and the ability of the researcher(s) to perform the research in a timely manner; and
- The likelihood that the research will contribute to greater understanding of the subject matter studied and lead to an Administrative Conference recommendation that will improve administrative procedures in the federal government.

Failure to follow the above instructions may result in your proposal not being considered.