
**STEPPING STONES TO REFORM:
MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE
FOR AGENCIES AND BIDDERS BY BUILDING ON BEST
PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT**

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

Dedication

This study is dedicated with fond gratitude to the memory of Jerry Walz (1936-2016).¹ Jerry was an exemplary public servant and member of the U.S. public procurement bar, and an early and dedicated supporter of agency-level bid protests. We miss him greatly.

¹ *Jerry Walz*, WASH. POST (Apr. 23, 2017), <https://www.legacy.com/obituaries/washingtonpost/obituary.aspx?n=jerry-walz&pid=185178952>.

TABLE OF CONTENTS

Executive Summary	5
I. Introduction	7
II. Bid Protests in U.S. Federal Procurement.....	9
III. Key Elements of a Bid Protest System.....	15
IV. Assessing Potential Gains for Agencies in Reforms of Agency-Level Protests	20
V. Potential Points of Reform for Agency-Level Protests.....	20
A. Where Is the Protest Forum Located?.....	21
i. Current Practices Regarding Placement of Agency Protests.....	21
ii. Best Practices and Potential Reforms Regarding Placement and Structure of the Agency-Level Protest Function.....	23
B. How Broad Is the Agency-Level Bid Protest Jurisdiction?	26
i. Current Practices Regarding Jurisdiction.....	26
ii. Emerging Best Practices: Flexible Jurisdiction.....	27
C. Who Has Standing to Protest?.....	28
i. Current Practices: FAR Defines Standing.....	28
ii. Maintaining Link to General Principles of Protest Standing	28
D. What Are the Time Limits at the Forum?.....	29
i. Current Practices: Uniform Deadlines for Filing, Varying Deadlines for Concluding Protest Review	29
ii. Potential Reforms Regarding the Timeline for Decision	30
E. What Evidence Does the Forum Have Before It in Reaching Its Decision?.....	36
i. Current Practices: Administrative Record Undefined, and Protesters Have Little or No Access to That Record.....	37
ii. Potential Reforms – Affording Access to the Administrative Record.....	39
F. Is the Procurement “Put on Hold” During the Protest?	43
i. Current Practices: An Uncertain Stay	43
ii. Emerging Best Practices and Potential Reforms: Resolving Uncertainties at the Protest’s Onset and Conclusion.....	45
G. How Difficult Is It for the Protester to Win?.....	48

i. Current Practices: Hidden Outcomes	48
ii. Emerging Best Practices and Potential Reform: Making Outcomes Clear in Agency-Level Bid Protests	49
VI. Conclusion and Recommendations	51

Executive Summary

Agency-level bid protests, one of the ways vendors may challenge agency errors in a federal procurement, need reform. Although agency-level bid protests have been a formal part of the government's procurement system for almost 25 years, vendors seldom resort to agency-level protests, which are generally feared to be biased, non-transparent, and procedurally risky. But agency-level bid protests, when effective, afford protesters a quick and inexpensive forum where even the smallest business can challenge an agency's procurement errors. If well-administered, agency-level protests can dramatically reduce the time and attention agencies must devote to bid protests, for they allow agencies to handle procurement failures internally, quickly, and with minimum disruption. Making agency-level bid protests an effective alternative means of resolving vendor challenges would thus benefit federal agencies, by reducing the costs and delays normally caused by bid protests.

This study analyzes various agencies' procedures for agency-level protests, as outlined in the agencies' supplements to the Federal Acquisition Regulation (FAR), which have evolved since President Clinton first officially authorized agency-level protests in 1995. Drawing on the best practices developed by agencies, the report's author interviewed agency and private-sector attorneys active in bid protests on potential areas of reform. Based on their comments and an examination of agencies' best practices regarding agency-level bid protests, this report recommends a suite of reforms to agency-level protests. These reforms could be undertaken as amendments to the FAR provision governing agency-level protests, FAR 33.103, or could be adopted by agencies across the federal government, to make agency-level protests work better for both vendors and the agencies they serve.

The report recommends that:

- **The government formalize the role of an “Agency Protest Official”** in the agencies, so that official can make the agency-level bid protest function more accountable and coordinate other reforms;
- **The government clarify the jurisdiction of agency-level protests**, to make it clear that an agency (and its vendors) presumptively can address any type of procurement failure in the agency;
- **The standard for standing in agency-level protests remain tied to the “interested party” standard** at the U.S. Government Accountability Office (GAO) and in the U.S. Court of Federal Claims (and its appellate court, the U.S. Court of Appeals for the Federal Circuit), so that, as the concept of standing evolves in published decisions at those other fora, standing to bring agency-level protests can evolve as well;
- **The government clarify the decision-making process for agency-level protests**, so that there is clear notice from an agency when an agency-level protest begins and ends — which could be done, in important part, by importing the contracting officer's process for addressing contract disputes under FAR 33.211 into the agency-level bid protest process;

- **The record required for deciding agency-level protests should be clarified**, which can be done simply by importing the record elements required for GAO bid protests from FAR 33.104;
- **Agencies should maximize the administrative record shared with protesters**, to make it easier for vendors and agencies to resolve contentious and potentially disruptive issues quickly and efficiently through agency-level bid protests;
- **Stays of contract performance pending an agency-level protest should be clarified**, by giving clear notice at the outset of a protest and by facilitating a continued stay, should the vendor opt to bring a follow-on protest at GAO – subject, of course, to existing protections which ensure that agency procurements are not endlessly delayed by a chain of protests; and,
- **Agencies should publish data on agency-level protest outcomes, including corrective action**, to enhance vendor confidence in agency-level protests.

As the interviews across government and the private bar confirmed, agency-level protests are an underutilized resource for agencies. The reforms outlined above, many of which are already reflected in individual agencies' best practices, would make agency-level protests a much more effective channel for resolving the challenges that inevitably arise in the relationship between government agencies and their bidders. By making agency-level bid protests work better, these reforms would encourage vendors to bring protests directly to the agencies themselves, thus decreasing the disruption that can be caused by protests at GAO and the Court of Federal Claims, the alternative fora open to disappointed offerors.

Report to the Administrative Conference of the United States

Stepping-Stones to Reform: Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices From Across the Federal Government

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Disclaimer: The views expressed in this report are those of the author alone and do not necessarily reflect the views of the Administrative Conference of the United States.

I. Introduction

Agency-level bid protests, which allow vendors and agencies to resolve their differences quickly and efficiently, are a lost opportunity for agencies. Although agency-level bid protests are typically much less disruptive than protests brought at the other fora, vendors seldom resort to them because many perceive them as biased, opaque, and procedurally risky.³ But agency-level bid protests, when effective, afford protesters a quick and inexpensive forum where even the smallest business can challenge an agency's procurement errors. If well-administered, agency-level protests can dramatically reduce the time and attention agencies must devote to bid protests, for they allow agencies to handle procurement failures internally, quickly, and with minimum disruption. Making agency-level bid protests an effective alternative means of resolving vendor challenges would benefit federal agencies and bidders by reducing the costs and delays normally caused by bid protests. This study analyzes various agencies' procedures

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³ See, e.g., 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, 148 (2005) (“[I]n the United States, agency-level systems have been relegated to a position of low esteem in the eyes of many in the public procurement community because of one intrinsic shortcoming: their relative lack of independence, or the perception thereof.”).

for agency-level protests, as outlined in the agencies' supplements to the Federal Acquisition Regulation (FAR).⁴ Drawing on the best practices developed by agencies, private-sector and government attorneys active in bid protests were interviewed regarding potential areas of reform. Based on their comments and an examination of agency best practices and the literature, this report recommends a suite of reforms to agency-level protests, which could be adopted as amendments to FAR 33.103, which governs agency-level protests, or by individual agencies across the federal government. Either approach would make agency-level protests work better for both agencies and bidders.

Agencies have been hearing agency-level protests since before President Clinton formalized agency-level protests in 1995,⁵ and, indeed, this study follows on a study by the Administrative Conference of the United States (ACUS) of federal bid protests in general, published that same year.⁶ The earlier ACUS study recommended that all bid protests be heard initially in an administrative forum independent of the agency conducting the procurement — a recommendation overtaken by President Clinton's executive order of that same year, which called for rules formalizing agency-level bid protests.⁷ The 1995 ACUS recommendations also suggested that the U.S. Court of Appeals for the Federal Circuit be assigned all appeals from

⁴ Protests asking a contracting officer to reconsider his award decision probably have existed since the dawn of procurement, and “higher-level” agency-level protests – protests to an official at a higher level in the agency – were available in the federal system long before the 1995 executive order. See Jeffrey I. Kessler, *Feature Comment: Tips for Agencies in Establishing Protest Procedures, and Factors Potential Protesters Should Consider in Selecting a Forum*, 39 GOV'T CONTRACTOR ¶ 81, Feb. 19, 1997 (“Higher level agency protests have been in existence in both civilian and military executive agencies for at least a decade.”).

⁵ In 1984, for example, GAO published a decision in a protest that was originally brought as an “agency protest,” *System Dev. Corp.*, B-213726, 84-1 CPD ¶ 605 (Comp. Gen. June 6, 1984). When President Clinton issued an executive order in 1995 formalizing agency-level bid protests on a government-wide basis, Exec. Order 12979, 60 Fed. Reg. 12979 (Oct. 25, 1995), the new government-wide initiative was based in important part on a prior, successful agency-level bid protest system at the Army Materiel Command. See Kessler, *supra* note 4.

⁶ See ACUS Recommendation 95-5, *Government Contract Bid Protests* (1995), 60 Fed. Reg. 43,108 (Aug. 18, 1995), <https://fall.law.fsu.edu/admin/acus/305955.html>. The ACUS recommendation was summarized as follows:

Recommendation 95–5, “Government Contract Bid Protests,” proposes reexamination of the current jurisdictional arrangements for hearing the protests of disappointed seekers of government contracts. The recommendation urges that jurisdiction over bid protests, now available in four different forums (including the General Accounting Office, the General Services Board of Contract Appeals (for contracts involving information technology), the federal district courts, and the Court of Federal Claims) be streamlined by providing that all protests be heard initially in an administrative forum, with judicial review available exclusively in the U.S. Court of Appeals for the Federal Circuit. Should Congress not wish to consider exclusive appellate-level jurisdiction, the Conference alternatively proposes eliminating district court jurisdiction in favor of consolidated jurisdiction in the Court of Federal Claims. In addition, Recommendation 95–5 urges Congress to mandate empirical testing of the effect of the bid protest process to analyze the costs and benefits of that process and to determine whether it has improved the quality or reduced the cost of public procurement; the recommendation suggests several different approaches to such a study, among them a pilot study under which an agency or agencies would be permitted to conduct some or all procurement free of protest controls for a period of years, with the results to be compared to procurement conducted under protest controls.

60 Fed. Reg. at 43,108.

⁷ Exec. Order 12979, *supra* note 5.

administrative bid protest decisions.⁸ The complementary ACUS recommendation that all administrative authority over bid protests be consolidated in one forum was included in an early version of the defense authorization act for fiscal year 1996,⁹ which would have consolidated that authority in GAO.¹⁰ The final version of the defense authorization bill, however, dropped that reform.¹¹ Finally, the earlier ACUS recommendation urged Congress to mandate empirical assessments of the effects of the bid protest process, between agencies, fora, etc.¹² That broad-ranging study was never undertaken, but even the more focused study presented here strongly suggests that the government would benefit from an updated agency-level protest regulatory structure.

This study is based upon extensive interviews and meetings with experienced procurement attorneys from the private bar who represent contractors in bid protest litigation, and with government counsel who represent the procuring agencies. Interviews were also held with agency officials who regularly decide agency-level protests, and with senior attorneys from GAO who have extensive experience in bid protest litigation. A widely publicized meeting was held to discuss the study and potential reforms with the American Bar Association (ABA) Public Contract Law Section's Bid Protest Committee.¹³ A videotape of that ABA meeting, and many of the agency-specific rules and authorities discussed below, can be accessed at a website maintained by the author of this report.¹⁴

II. Bid Protests in U.S. Federal Procurement

The U.S. federal government has the largest, most sophisticated procurement system in the world. The government procures roughly \$500 billion per year in goods and services,¹⁵ under a regulatory structure that has been built over nearly 250 years, since the Revolutionary War.¹⁶ The bulk of procurement in the U.S. government is done by the Department of Defense, though some civilian agencies – most prominently the General Services Administration – also participate in billions of dollars in purchases every year.

⁸ 60 Fed. Reg. at 43114.

⁹ Introduced by Senator Thurmond on July 12, 1995.

¹⁰ National Defense Authorization Act for Fiscal Year 1996, S. 1026, 104th Cong., tit. XLV (1st Sess. 1995).

¹¹ National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995) [hereinafter “NDAA for FY 1996”].

¹² ACUS Recommendation 95-5, *supra* note 6; 60 Fed. Reg. at 43,114.

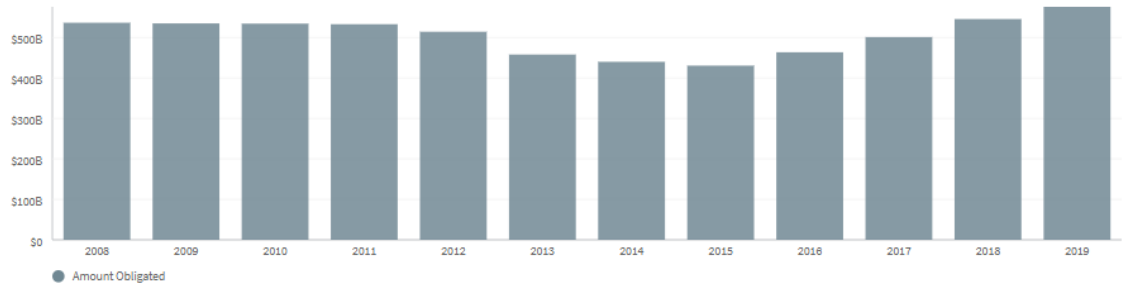
¹³ Direct interviews were conducted with approximately 15 attorneys: agency counsel and protest officials (from both the Defense Department and civilian agencies), and attorneys who regularly represent contractors. Direct interviews were also conducted with senior attorneys at the Government Accountability Office who handle bid protests there. Roughly two dozen attorneys from the private and public sectors participated in a public meeting held at the George Washington University Law School with the ABA Bid Protest Committee to discuss this study and potential reforms to the agency-level bid protest system.

¹⁴ *Public Meeting*, Public Procurement International: Agency-Level Bid Protests (Mar. 13, 2020), <https://publicprocurementinternational.com/agency-level-bid-protests/>.

¹⁵ Detailed procurement statistics are available through USAspending.gov. USAspending.gov, www.usaspending.gov (last visited Mar. 13, 2020).

¹⁶ *See, e.g.*, Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction*, 2017 UPPHANDLINGSRÄTTSLIG TIDSKRIFT 69 (PROCUREMENT L. J.) (Sweden), <https://ssrn.com/abstract=3063559>; JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING (2d ed. 1999).

Figure 1 Federal Contract Spending, FY08-19 – Source USASpending.gov

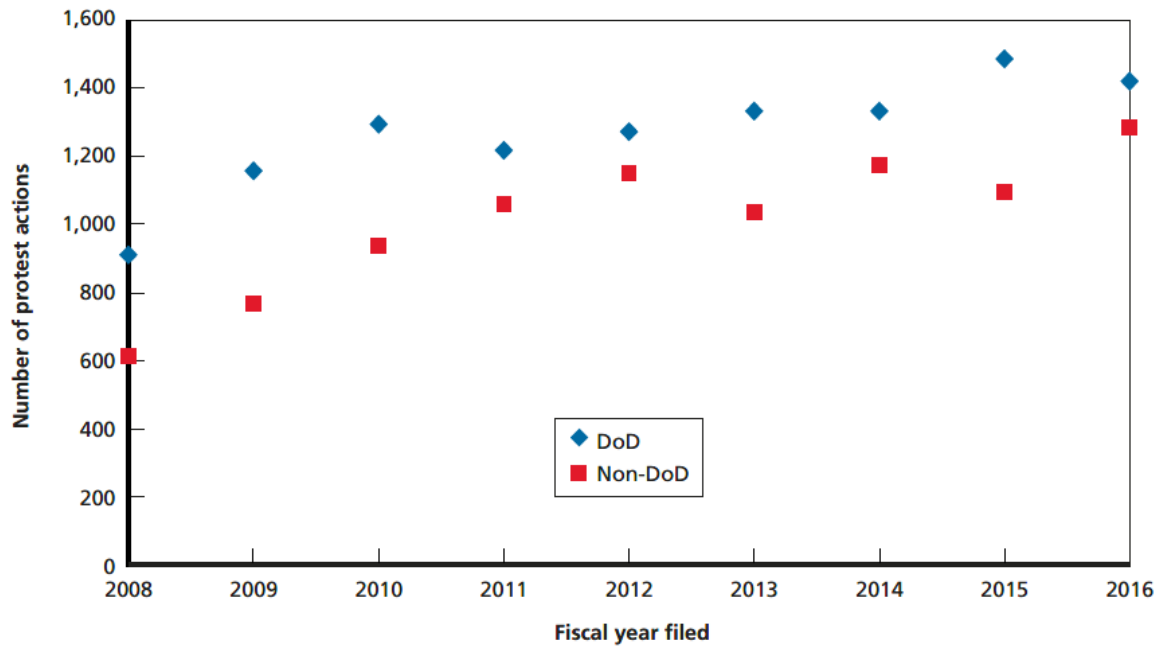


As the federal procurement system matured, a process for challenging agencies' procurement decisions – a bid protest process – grew to be an integral part of the procurement structure. Protests at GAO emerged in the 1920's,¹⁷ and by the end of the twentieth century the Court of Federal Claims had developed its own well-established bid protest process.¹⁸ At the same time, building on agencies' experience in handling complaints directly from vendors, agencies were developing their own procedures for handling bid challenges internally.

¹⁷ Moshe Schwartz & Kate M. Manuel, Cong. Res. Serv. Rep. R40227, *GAO Bid Protests: Trends and Analysis*, (2015) (recounting history of GAO bid protests), <https://fas.org/sgp/crs/misc/R40227.pdf>.

¹⁸ See generally Adam Lasky, *Roadmap to Bid Protests at the U.S. Court of Federal Claims*, 38 Constr. Law. No. 1 (Winter 2018), https://www.oles.com/wp-content/uploads/2018/02/AKL_Roadmap-to-Bid-Protests_ABA-Construction-Lawyer_winter2018.pdf.

Protest Actions at GAO, FYs 2008–2016



SOURCE: RAND analysis of GAO data.
 RAND RR2356-4.1

This long experience in the U.S. government confirms that the procurement system relies heavily on vendors’ objections to bring system failures (including corruption) to light.¹⁹ Vendors in the U.S. federal procurement system may challenge the terms of a solicitation before bids or proposals are due (for example, because the solicitation improperly restricts competition), and may challenge an award as arbitrary, unlawful or at odds with the terms of the solicitation. Vendors in the federal system (much as in other procurement systems around the world)²⁰ may bring their protests to at least three different forums available to vendors seeking to challenge (or “protest”) the terms of a solicitation (pre-award) or the award of a public contract:

¹⁹ Based in part on the experience in the U.S. government, bid protests are now used widely by governments around the world. *See, e.g.*, International Bank for Reconstruction & Development, World Bank Group, BENCHMARKING PUBLIC PROCUREMENT 2017: ASSESSING PUBLIC PROCUREMENT REGULATORY SYSTEMS IN 180 ECONOMIES, at 38-43 (2016), <http://documents.worldbank.org/curated/en/121001523554026106/Benchmarking-Public-Procurement-2017-Assessing-Public-Procurement-Regulatory-Systems-in-180-Economies.pdf>. Article 9 of the United Nations Convention Against Corruption (UNCAC), which sets basic benchmarks for fighting corruption, calls for signatory nations (including the United States) to have “effective” bid challenge systems in place to combat corruption. *See* U.N. Convention Against Corruption, art. 9.1(d) (calling for “an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies”).

²⁰ *See, e.g.*, United Nations Commission on International Trade Law (UNCITRAL), MODEL LAW ON PUBLIC PROCUREMENT, Ch. VIII (2011), available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf>; *see also* ABA, MODEL PROCUREMENT CODE, Art. 9 (2000) (discussing protests to agencies), available at <http://publicprocurementinternational.com/aba-mpc/>

- **Agency-Level Bid Protests:** A vendor may bring a challenge at the procuring agency itself, in what is known in the federal system as an “agency-level bid protest.” These types of protests were formalized during the Clinton administration under Executive Order 12,979 (1995). The procedures for agency-level protests are described in Federal Acquisition Regulation (FAR) 33.103,²¹ agency supplements to the FAR (discussed below),²² and through agency-specific guidance. Data on agency-level bid protests are extremely difficult to gather,²³ but anecdotal evidence and the interviews conducted for this report suggest that agency-level bid protests are relatively rarely used by disappointed vendors today.²⁴
- **Independent Governmental Entity Protests:** Alternatively, a vendor may bring a challenge in an independent entity charged with review of bid protests. In the U.S. government, that independent entity is GAO, which is an independent, nonpartisan audit agency (the United States’ supreme audit authority) that is an arm of Congress, under the Comptroller General.²⁵ This is by far the most popular channel for bid protests in the U.S. federal system, and GAO receives on average roughly 2,500 protests per year (see figure above, from a RAND Corporation study).²⁶
- **Judicial Protests:** Finally, a vendor may seek a remedy in court; in the U.S. government, those challenges generally are brought at the U.S. Court of Federal Claims.²⁷ The bid protest proceedings at the Court of Federal Claims typically take longer and are more complex and expensive than protests at GAO.²⁸ Substantially fewer protests are brought each year at the Court of Federal Claims than at GAO (see figure below, from a RAND Corporation study).²⁹

²¹ 48 C.F.R. § 33.103 (2020).

²² The agency supplements to the FAR (and their acronyms) are listed in Appendix A to this report.

²³ See, e.g., David Carpenter & Moshe Schwartz, Cong. Research Service, Report No. R45080, GOVERNMENT CONTRACT BID PROTESTS: ANALYSIS OF LEGAL PROCESSES AND RECENT DEVELOPMENTS, 2-4 (2018).

²⁴ See, e.g., Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. Bar J. 243, 254-55 (2009), <https://publicprocurementinternational.com/wp-content/uploads/2019/11/Michael-J-Schaengold-Greenberg-Traurig-Forum-Choice1.pdf>. In a July 2019 piece, two practitioners suggested that a filing fee (of \$350) recently instituted by GAO could encourage vendors to use agency-level protests instead of GAO protests. See Merle M. DeLancey Jr. & Michael Joseph Montalbano, *Agency Protests: An Emerging Tool and Potential Threat for Contractors* (2019), <https://governmentcontractsnavigator.com/2019/07/15/agency-protests-an-emerging-tool-and-potential-threat-for-contractors/>.

²⁵ See www.gao.gov.

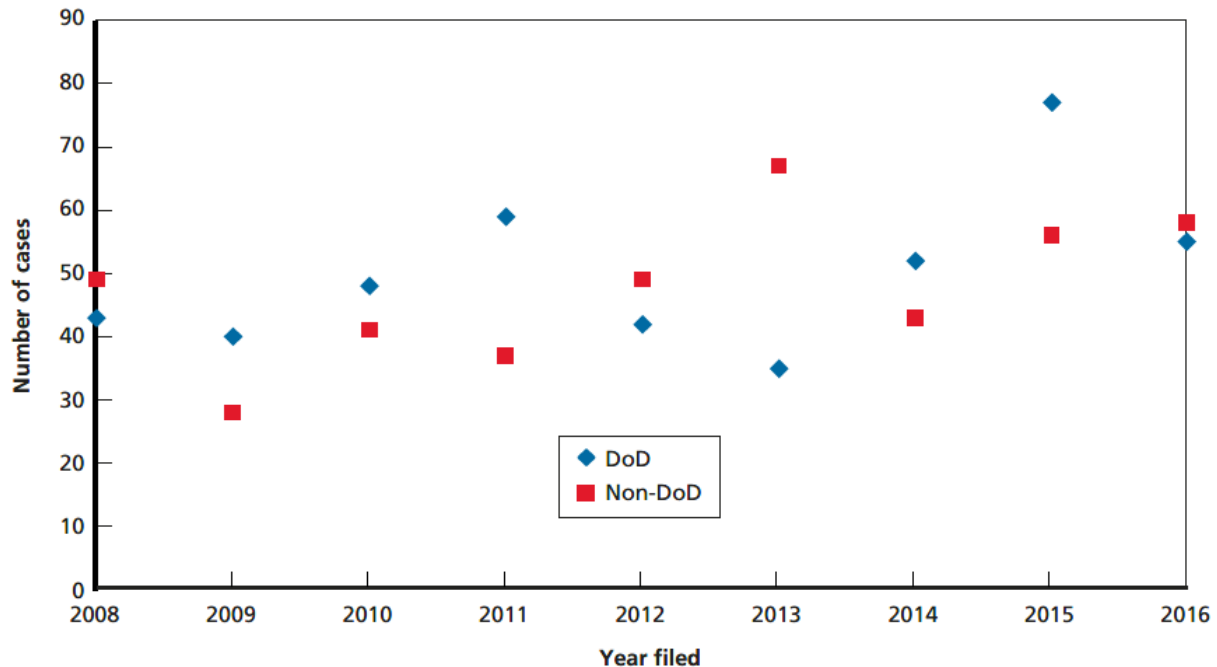
²⁶ Mark V. Arena *et al.*, *Assessing Bid Protests of U.S. Department of Defense Procurements* 25 (RAND Corporation 2018), https://www.rand.org/pubs/research_reports/RR2356.html; see, e.g., U.S. Government Accountability Office, GAO-19-248SP, GAO BID PROTEST REPORT TO CONGRESS FOR FISCAL YEAR 2018 (2018), <https://www.gao.gov/products/GAO-19-248SP>.

²⁷ See 28 U.S.C. § 1491(b) (2012).

²⁸ This observation is based in part on the author’s experience; he has been litigating bid protests, both inside and outside the federal government, for almost 30 years. See also Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *supra* note 24, at 297 (“In general, a protester will incur lower costs by pursuing a protest at the GAO rather than at the COFC, largely due to the GAO’s less formal procedures.”).

²⁹ Mark V. Arena *et al.*, *supra* note 26, at 44; see Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *supra* note 24, at 255-60.

Protest Cases at COFC, DoD Versus Non-DoD, CYs 2008–2016



SOURCE: RAND analysis of COFC data.

RAND RR2356-5.2

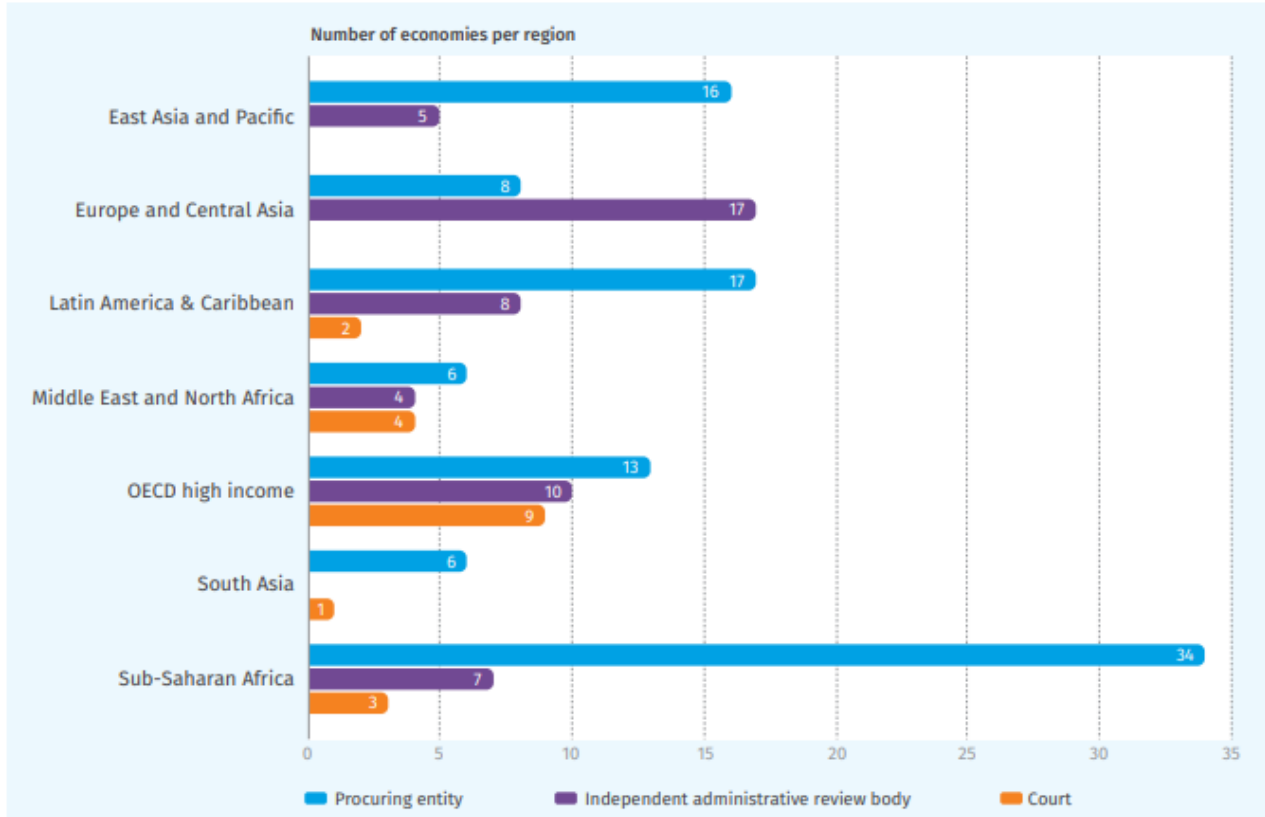
Although agency-level bid protests (challenges brought at the “procuring entity,” as they are sometimes known internationally) are by far the leading means of handling vendor complaints internationally (see figure from a World Bank study, below), agency-level bid protests have apparently declined in use in the U.S. government over the decades since President Clinton signed the 1995 executive order. Agency-level bid protests need not preclude a vendor from bringing the same issues to GAO or the Court of Federal Claims, if necessary, and yet agency-level bid protests are seldom used. The view commonly held among many experienced members of the U.S. procurement bar is that agency-level protests are too uncertain and opaque to recommend as an option for potential protesters. This decline in agency-level bid protests is unfortunate because there are many voices within government calling for more efficient and less disruptive bid protests,³⁰ and agency-level bid protests generally take less time, and cause far less disruption, than protests brought at GAO or the U.S. Court of Federal Claims.³¹ Even if the

³⁰ See, e.g., *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations* [Section 809 Panel], Vol. 3, at 340 (Jan. 2019) (calling for extensive cuts to the federal bid protest system), <https://section809panel.org/media/updates/>. But cf. Mark V. Arena *et al.*, *supra* note 26, Chap. 4 (2018) (assessing objections by procurement officials to bid protests).

³¹ See, e.g., Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, *supra* note 24, at 270-71 (“Typically, agency-level protests are the least expensive, least formal, and the simplest and quickest, method for resolving a bid protest. The agency-level protest review may (and, ideally, should) be (1) conducted by experienced procurement professionals, and (2) less (or even non-) adversarial in nature. . . . As discussed above, resolution of agency-level

reforms to agency-level protests outlined below are implemented, however, agencies — which have the strongest interest in diverting protests to their own protest systems — will still have to convince vendors that agency-level bid protests have been made sound and fair.³²

Figure 2.10 Procuring entities are the most common review fora in most regions



Source: Benchmarking Public Procurement 2017 database.

2: From the World Bank's "Benchmarking Public Procurement" Report³³

protests is designed to be substantially quicker and more efficient than the GAO or COFC protests and may succeed in resolving the issue without the need of resorting to a more expensive, adversarial, and time-consuming GAO and/or COFC protest. Furthermore, an agency override of the automatic stay [a decision to proceed with the procurement pending the protest] should very rarely, if ever, occur in an agency-level protest—as compared to an override involving a GAO protest—because of the short time period allowed for issuing protest decisions.” (citations omitted).

³² See Kessler, *supra* note 4 (“[W]ith a well-planned approach to promoting a higher level agency protest program, a significant proportion of bid protests can be diverted from outside forums. However, while these methods can bring law firms or contractors to the forum in one protest, it is only the fairness of the program, both in fact and as perceived by the litigant, that results in repeat customers and referral of others to the program.”).

³³ Int’l Bank for Reconstruction & Development, *supra* note 19, Fig. 2.10.

III. Key Elements of a Bid Protest System

Making agency-level bid protests more useful means addressing two points: (1) the core elements of an agency-level bid protest system; and (2) in the context of federal procurement, how those core elements might be improved. A 2007 study by the SIGMA research group at the Organization for Economic Cooperation and Development (OECD) adopted this general approach and so helped frame subsequent reform of European member states' bid protest ("remedies") systems.³⁴

The core elements of any bid protest system were identified by Daniel Gordon (former head of GAO's bid protest unit, acting general counsel at GAO, Administrator of the Office of Federal Procurement Policy in the Obama administration, and an associate dean with George Washington University's law school before his retirement) in a groundbreaking article he published in 2006, titled *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*.³⁵ The article explained that any bid protest system must resolve the following questions, which for the purposes here can be focused on the issues presented by agency-level bid protests:

- *Where in the Government Is the Protest Forum Located?* For agency-level protests, this question narrows: where in the agency should agency-level bid protests be heard? Some have recommended that agency-level bid protests be moved outside the contracting officer's chain of supervisors. For example the General Services Administration (GSA) vests its Agency Protest Official (discussed below) with special authority to hear agency-level bid protests. A related question is how much uniformity there should be between agencies in the rules and procedures governing agency-level bid protests. Experience since the current initiative was launched in 1995 suggests that diversity and experimentation in agency procedures serve as a kind of "laboratory" for reform. At the same time, though, differences between agencies can cause additional costs and uncertainty for vendors, and thus deter vendors from using the agency-level bid protest process.
- *How Broad Is the Forum's Jurisdiction?* For agency-level bid protests, this seems a relatively straightforward question: logically the boundaries of jurisdiction would be defined by the scope of the agency's contracting work. In practice, however, the question can be more difficult — should, for example, the protest forum hear *any* challenge involving procurement, or should its jurisdiction exclude special classes of acquisition (such as agreements outside the traditional procurement regulatory regime)?³⁶

³⁴ See Organization for Economic Cooperation & Development, SIGMA PAPER NO. 41, PUBLIC PROCUREMENT REVIEW AND REMEDIES SYSTEMS IN THE EUROPEAN UNION, (2007), available at www.oecd.org [hereinafter "SIGMA"].

³⁵ 35 Pub. Cont. L.J. 427 (2006), <https://ssrn.com/abstract=892781>.

³⁶ One potentially contentious category of agreements are those entered into under what is known as "Other Transaction" authority. "Other Transaction" agreements are exempt from most federal procurement laws, and are subject to only limited protest review at GAO or the Court of Federal Claims. See, e.g., Moshe Schwartz & Heidi Peters, CONG. RESEARCH SERV., R45521, DEPARTMENT OF DEFENSE USE OF OTHER TRANSACTION AUTHORITY: BACKGROUND, ANALYSIS, AND ISSUES FOR CONGRESS, 5 (, 2019). A separate but related question goes to

- *Who Has Standing to Protest?* In agency-level bid protests, as in protests before GAO and the Court of Federal Claims, standing is limited to certain interested parties, *i.e.*, those injured bidders with a direct economic interest in the outcome of the procurement.³⁷ There is a practical logic behind this circumscribed concept of standing: if the protester is to serve in effect as a “whistleblower” for procurement failures, only the “most invested” whistleblower (*i.e.*, the bidder with a direct economic interest in a corrected procedure) should be allowed to protest. As procurement systems continue to evolve with advancing technology, however — as the administrative record becomes more immediately available, for example, under an advancing concept of open data in government — agencies may decide to take a broader approach to standing, to encourage input (at lower transaction costs) from a larger field of stakeholders.³⁸
- *What Are the Time Limits at the Forum?* As Gordon stressed in his article, there are two key questions regarding timeliness in a bid protest process: how soon the protest must be filed, and how soon the protest must be resolved.³⁹ Bid protests are part of a broader procurement system, and it is generally acknowledged that protests must be promptly resolved in order to minimize any disruptive impact on the underlying procurement. Because the time allowed for *filing* an agency-level bid protest generally parallels the filing deadlines at GAO, the deadline for filing is unlikely to be controversial. The FAR’s looser requirements regarding the time for *agency review* — agencies are to “make their best efforts to resolve agency protests within 35 days after the protest is filed” — merit further assessment, as some of our interviewees from the private bar have argued that this open-ended “best efforts” standard in effect discourages agency-level protests. Protesting vendors are acutely sensitive to costs, and uncertain administrative deadlines pose risks of open-ended litigation costs, as well. As a practical matter, protesters will favor a forum with clearly defined timelines (such as GAO), and will tend

administrative *exhaustion* and *exclusivity*. As is discussed further below, in the U.S. federal system, although there is no exhaustion requirement (*i.e.*, a vendor is not required to bring a protest first to the agency before proceeding to GAO or the Court of Federal Claims), a vendor that protests first at the agency level may have difficulty pursuing a further protest at GAO. Nor, by the same token, are agency-level protests *exclusive* (an agency-level protest does not preclude a subsequent protest at GAO or the Court of Federal Claims); as is also discussed below, however, an agency-level protest may not be brought at the same time as a protest on the same matter at GAO or the Court of Federal Claims. There was no support, in the interviews for this study or in agencies’ rules on agency-level protests, for instituting new requirements as to exhaustion or exclusivity.

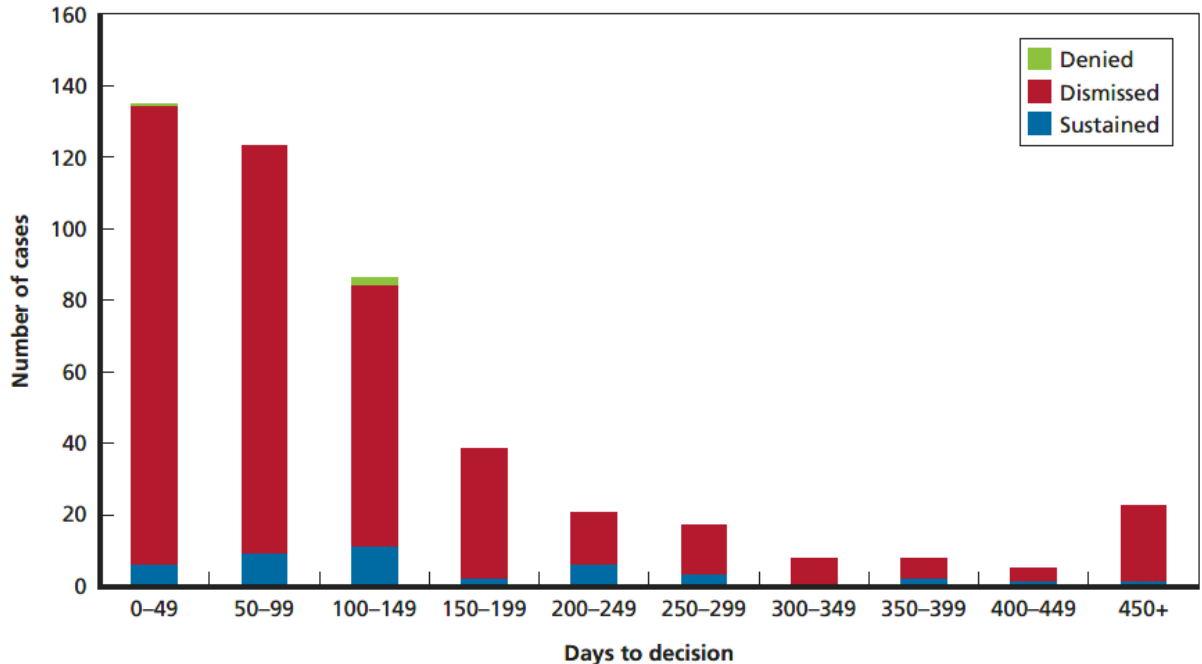
³⁷ See, *e.g.*, FAR 33.101 (“*Interested party for the purpose of filing a protest* means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”). The U.S. Court of Appeals for the Federal Circuit recently appeared to take a more liberal approach to standing in bid protests, when it ruled that a bidder need not be next in line for award to have standing. Under the Federal Circuit’s decision, it is enough to frame constitutional and statutory standing as an “interested party” at the Court of Federal Claims for the vendor to show that the same protest issues are likely to arise in other procurements in which the vendor intends to bid in the near future. *Acetris Health, LLC v. United States*, 949 F.3d 719, 727-728 (Fed. Cir. 2020), http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/18-2399.Opinion.2-10-2020_1529718.pdf.

³⁸ In the nation of Georgia, for example, all users in the electronic procurement system (in essence, anyone who signs up online) have standing to protest the procurements posted online. See, *e.g.*, Mathias Huter & Giorgi Chanturia, *How Georgia Is Handling Procurement Transparency* (Feb. 3, 2014), https://www.open-contracting.org/2014/02/03/how_georgia_is_handling_procurement_transparency/.

³⁹ See Gordon, *supra* note 35, at 437.

to avoid a forum with loosely defined deadlines for action (such as the Court of Federal Claims). (The figure below, from a RAND Corporation study,⁴⁰ shows that the protests at the Court regularly take longer to close than the 100 days allowed by statute for GAO protests.)

Number of Days to Close Cases with COFC, CYs 2008–2017



SOURCE: RAND analysis of COFC data.
 NOTE: Data cover the period through May 2017.
 RAND RR2356-5.10

- What Evidence Does the Forum Have Before It in Reaching Its Decision:* This question really goes to the administrative record provided to the protester, because that is the record the protester relies upon in making its protest arguments. FAR 33.103 does not require that the protester be afforded *any* access to the agency record. FAR 33.103 says only that, to “the extent permitted by law and regulation, the parties may exchange relevant information.” GAO, in contrast, does require agencies to produce the relevant record.⁴¹ Although the Court of Federal Claims’ rules define a more narrowly circumscribed administrative record for the agency to produce than at GAO,⁴² in practice the Court of Federal Claims may afford broader access to discovery against the agency if needed to resolve the issues in the protest.⁴³ Ready access to the administrative record at

⁴⁰ Mark V. Arena *et al.*, *supra* note 26, at 54.

⁴¹ GAO Bid Protest Regulation 21.3; 4 C.F.R. § 21.3 (2020).

⁴² Compare GAO Bid Protest Regulation 21.3, 4 C.F.R. § 21.3 (calling for production of all “relevant” documents in a GAO protest) with U.S. Ct. of Fed. Claims R., Appendix C, Sec. VII (describing specific categories of documents from procurement file to be produced).

⁴³ See, e.g., Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, *supra* note 24, at 305-08 (detailed review of Court of Federal Claims’ precedents regarding supplementation of the record in bid protests).

GAO and the Court of Federal Claims is made easier through the protective orders they issue, whereas there is no clear authority for protective orders in agency-level bid protests.⁴⁴ The rights of vendors to access explanations for an award through debriefings — access rights that are grounded in the procurement rules, and not in protest proceedings — have expanded significantly since 1995.⁴⁵ Over time, the rules have given vendors broader rights to information when they are told why they lost (or won) a particular bid, in a post-award debriefing by agency officials. These expanding rights to information in debriefings, afforded as a matter of course under the procurement rules, highlight the relative lack of information provided in an agency-level protest. A vendor will be less likely to resort to an agency-level bid protest if the administrative record is not available there, especially given the ready alternatives of protests at GAO or the Court of Federal Claims.⁴⁶

- *Is the Procurement “Put on Hold” During the Protest?* The next element looks to whether a procurement under protest will be stayed during the pendency of the protest proceedings. A timely protest at GAO will trigger a statutory stay of the procurement during the pendency of the protest, and the government routinely accedes to a voluntary stay during the pendency of protests at the Court of Federal Claims. If the government refuses a voluntary stay, the Court of Federal Claims can enter an injunction staying the procurement. In 1995, Executive Order 12979 endorsing agency-level protests called for stay of contract award or protest while an agency-level protest is pending, “except where immediate contract award or performance is justified for urgent and compelling reasons or is determined to be in the best interest of the United States.” The implementing FAR provision accordingly requires a stay of the procurement during an agency-level protest. But because of the lack of transparency surrounding many agency-level bid protests, many vendors remain deeply uncertain that the procurement will, in fact, be stayed while

⁴⁴ See, e.g., Kessler, *supra* note 4 (“The most controversial issue regarding release of documents in the agency level protest process is the potential use of ‘protective orders’ to permit release of a full administrative report to a protester’s counsel. One practical reason against this is simply the time factor. However, even apart from the time factor, it is recommended that those desiring full release under a protective order currently have viable protest forums (GAO and the courts) where they can obtain a protective order and litigate their issues at the more leisurely pace that full disclosure of documents demands. Those forums also have a wider range of sanctions available for violations of a protective order. (It is questionable whether agencies truly have any viable sanctions available for such violations.)”).

⁴⁵ See, e.g., FAR 15.506 (post-award debriefing). The rights of debriefed offerors were further expanded by Section 818 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, which provided for enhanced debriefing rights. See Memorandum from the Office of the Under Secretary of Defense -- Class Deviation (Mar. 22, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf>. Section 818 also provided that, in “the case of a contract award in excess of \$100,000,000,” Defense agencies must disclose the agency’s “written source selection award determination, redacted to protect the confidential and proprietary information of other offerors for the contract award, and, in the case of a contract award in excess of \$10,000,000 and not in excess of \$100,000,000 with a small business or nontraditional contractor, an option for the small business or nontraditional contractor to request such disclosure.”

⁴⁶ See, e.g., Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, *supra* note 24, at 273 (“Perhaps the major disadvantage to filing an agency-level protest is that, unlike a GAO or COFC protest, the protester has no right to discovery.”).

an agency-level protest is pending decision.⁴⁷ That uncertainty — which discourages use of agency-level bid protests — is deepened by the terms of FAR 33.103(f)(4), which is explicit that the statutory stay at GAO may be lost if a vendor first brings an agency-level bid protest. Vendors’ uncertainty regarding a stay of the underlying contract is important, because the “carrot” used to bring a vendor to protest (against its agency customer) is the prospect of an award of the contract.⁴⁸ The situation is further complicated by the practical reality, which Gordon confirmed through empirical research, that a vendor often does not actually want to “win” the protest, but wants an opportunity to compete fairly for the contract.⁴⁹ The protester typically wants to convince the customer agency to take corrective action early in the protest process, so that the agency will reopen a new, fairer competition.⁵⁰

- *How Difficult Is It for the Protester To Win?* Gordon’s groundbreaking 2006 article was written in part for an international readership, and so he duly noted that the standard of review is important and may vary in different protest systems. As a practical matter, however, here the legal standard of review in agency-level protests is likely to match that applied in GAO and Court of Federal Claims protests. Although FAR 33.103 does not set forth a standard of review in agency-level protests, the leading treatise on formations of federal contracts concluded that the standard of review which will be applied by agencies will parallel that applied by GAO and the Court of Federal Claims.⁵¹ That said, as Gordon pointed out in his article, the *stated* standard of review may not be as important as the *actual* intensity of review — which, experience shows, can vary enormously from one forum to another.⁵² To assess that “intensity” of review, however, requires detailed, public data on agency-level protests. As a practical matter, that data is generally not available.⁵³

⁴⁷ While some practitioners have suggested that the agency and the protester should negotiate a continued stay if, after the agency-level protest is concluded, the vendor goes on to protest at GAO, other commentators have questioned the wisdom of negotiating a stay agreement that may not be enforceable against the agency. See Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, *supra* note 24, at 273-74.

⁴⁸ See, e.g., Daniel I. Gordon, *Bid Protests: The Costs are Real, but the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489 (2013), <https://ssrn.com/abstract=2228748>. The European Union has recognized the need to maintain the status quo, and has instituted an automatic stay (a “standstill”) of *all* procurements before award, to allow time for a challenge. See European Commission, *Remedies Directive*, https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/remedies-directives_en.

⁴⁹ See Daniel I. Gordon, *Feature Comment: Dissecting GAO’s Bid Protest “Effectiveness” Rate*, 56 Gov’t Contractor ¶ 25 (2014).

⁵⁰ See *id.*

⁵¹ See John Cibinic, Jr., Ralph C. Nash, Jr. & Christopher R. Yukins, *Formations of Government Contracts* 1646 (4th ed. 2011).

⁵² For example, the General Services Board of Contract Appeals lost its limited protest jurisdiction in 1996 in part because some members of Congress and many in the agencies were convinced that the Board was applying too stringent a standard of review to information technology awards. See, e.g., NDAA for FY 1996, *supra* note 11; Joseph J. Petrillo, *GSBCA Opponents Use Flawed Ideas To Do Away with Board*, Gov. Computer News, Feb. 5, 1996, <https://gen.com/articles/1996/02/05/gsbcas-opponents-use-flawed-ideas-to-do-away-with-board.aspx>.

⁵³ See, e.g., Erik A. Troff, *Agency-Level Bid Protest Reform: Time for a Little Less Efficiency*, at 4 (2005) (unpublished thesis with data on agency-level bid protests), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a433545.pdf>. Whether, and how, agencies will publish data on their decisions in agency-level protests, including potentially the decisions themselves, will be an important point of discussion below.

Having identified the key elements of agency-level bid protests in the broader context of the U.S. procurement system, the next step, reviewed below, is to assess how agency-level bid protests might be improved.

IV. Assessing Potential Gains for Agencies in Reforms of Agency-Level Protests

Agency-level protests, as currently framed by the FAR, represent a large missed opportunity for agencies. As noted, statistics are not available for agency-level bid protests across the government (a possible point of reform discussed below), but statistics *are* available from the GAO for protests filed there. Every year, GAO publishes data on the protests it hears, including those protests GAO sustains (grants). A review done specially for this study found that of the 46 protests GAO sustained (granted) for the 2018 fiscal year, a substantial portion — at least 6 (or 13%) of the protests — began as agency-level bid protests.⁵⁴ Additionally, at least 46 of the 446 protests (10%) decided by GAO that year originated as (were preceded by) agency-level protests.⁵⁵ These statistics suggest that serious procurement errors are put before federal agencies in agency-level bid protests, and that agencies could benefit — both by resolving the errors early, and by avoiding the further delay and disruption of GAO protests — by using a more robust process for agency-level protests.

The findings below combine Gordon’s proposed analytical structure (discussed above) with best practices which have emerged in federal agencies’ internal bid protest processes since 1995. The agencies’ best practices reflect the agencies’ own efforts to improve agency-level protests, to make them more effective and reliable for both agencies and their vendors. As noted, the findings below reflect extensive discussions with lawyers and procurement professionals with deep backgrounds in agency-level bid protests — discussions that were, for the most part, held on background.⁵⁶ In interviews,⁵⁷ the members of the procurement community gave invaluable insights on the current state of agency-level protests, and on whether the practices adopted by some agencies should, in fact, be applied to government-wide. As the discussion below shows, the experience and input from experts in the community were extremely helpful.

V. Potential Points of Reform for Agency-Level Protests

For each element of Gordon’s conceptual structure, this study assesses the current practices in agency-level bid protests, then reviews whether the best practices developed at certain agencies might be applied government-wide, presumably through a revised FAR provision but perhaps also through agencies’ amendments of their bid protest procedures.

⁵⁴ These figures were obtained by searching within WestLaw’s “Comptroller General Decisions - Sustained” Database. Initially all cases in the date range 10/01/2017 to 09/30/2018 were reviewed, to identify decisions for 46 GAO sustained protests in fiscal year 2018. Next, the cases in this date range were narrowed by searching for the term “agency level” within the published decisions. Searching for “agency level” within the results rendered 6 cases that originated as agency-level protests.

⁵⁵ This portion of the empirical study drew upon the wider WestLaw “Comptroller General Decisions” database.

⁵⁶ See *supra* note 13 and accompanying text.

⁵⁷ The briefing used for the interviews is at <https://publicprocurementinternational.com/agency-level-bid-protests/>.

A. Where Is the Protest Forum Located?

The first element of Gordon’s analytical structure goes to where in the government (here, more specifically, where in the agency) the bid protest function is located. As noted, agency-level protests existed long before the executive order of 1995. Their origins likely lie in contracting officials’ inherent discretion to review and correct their own procurement decisions. In fact, the model law developed through the United Nations (and relied upon internationally) explicitly treats these types of protests as a form of self-correction by contracting agencies.⁵⁸ FAR 33.103 allows vendors to seek that type of review by the contracting officer herself, but also allows for a higher-level review. This section focuses on the latter question — the higher-level review — and draws on emerging agency practices to assess how that might best be structured.

i. Current Practices Regarding Placement of Agency Protests

Currently agencies have significant discretion to decide where the agency-level protest function is located and how it should be structured. FAR 33.103 states that: (1) agency-level protests will be resolved by the contracting officer or an official designated to receive protests; (2) interested parties *may* request an independent review of their protests at a level above the contracting officer, by officials designated by the agency; and (3) if practicable, an official who conducts an independent review should not have had previous personal involvement in the procurement.⁵⁹ Agencies’ varying approaches show that these basic requirements can be met in a number of ways.

In implementing the basic requirements of FAR 33.103, agencies generally adopt one of three approaches:

⁵⁸ UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT, *supra* note 20, art. 66 (2011).

⁵⁹ FAR 33.103(d)(3)-(4) (emphasis added). The rule states, in relevant part:

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

- (1) In some agencies, the vendor may file a protest with either (a) the contracting officer, *or* (b) an independent review authority (sometimes called the “Agency Protest Official”). The vendor must choose one path or the other.⁶⁰
- (2) In another agency approach, if the vendor protests first to the contracting officer, the contracting officer’s initial decision may be “appealed” to a higher-level agency official, sometimes the head of the contracting activity (HCA) or another official at a level above the contracting officer.⁶¹
- (3) Finally, some agencies require that an agency-level protest be decided first by the contracting officer, in a sort of exhaustion requirement, before an independent review may be sought at a level above the contracting officer.⁶² Some agencies specify where in the hierarchy of the agency — how high in the procurement organization, for example — the independent review must be conducted.⁶³

When an agency allows the protester to choose between filing a protest with the contracting officer and an independent review authority, the two choices generally are treated as alternatives and protesters are prohibited from appealing internally from the agency decision.⁶⁴ An exception is the Department of Veteran Affairs, which allows for the appeal of a contracting officer’s decision within the agency.⁶⁵ Additionally, when an agency allows a choice of agency forum, generally if the protest is silent on the protestor’s choice of forum then by default the contracting officer will decide the protest.⁶⁶

Vendors will sometimes choose to protest directly to the contracting officer rather than a higher agency authority in order to avoid embarrassing the contracting officer (vendors often have longstanding relationships with the contracting officers, as agency customers), or to encourage the contracting officer to focus on and resolve a recurring issue in the procurements she oversees (again, because both the contracting officer and the vendor are repeat players in a cyclical procurement process).

On the other hand, in interviews and meetings held for this study, some counsel for vendors reported that they are wary of an agency-level protest when the contracting officer

⁶⁰ See DLADS 33.103(d)(4); CAR 1352.233-70 (a); DOLAR 2933.103 (a)(2); DOSAR 633.103(d)(4); AGAR 433.103(a); GSAM 533.103-1 (a); JAR 2833.101(b); JAR 2833.101(b); NFS 1833.103 (d)(4); VAAR 833.103-70 (a). The references here are to agency supplements to the Federal Acquisition Regulation; in Appendix A to this report, there is a list of acronyms identifying the agencies cited.

⁶¹ DARS 33.103(f)(1); AGAR 433.12(b); AIDAR 733.103-71(a); DEAR 933.103(i); HHSAR 333.102(g)(2).

⁶² AFARS 5133.103 (d)(3); SOFARS 5633.103 (d)(3); EPAAR 1533.103; HUDAR 2433.103 (d)(4)(ii); NRCAR 2033.103; DIAR 1433.103.

⁶³ See AFARS 5133.103(d)(4); CAR 1333.101; DOLAR 2933.103(a)(2); DOSAR 633.103(d)(4); JAR 2833.101 (a); NFS 1833.103 (d)(4); NMCARS 5233.103 (d)(4); SOFARS 5633.209.

⁶⁴ See DLADS L06 Agency Protests (DEC 2016); GSAM 533.103-1(a); DOLAR 2933.103(c); JAR 2833.103(d); NFS 1833.103 (e)(4).

⁶⁵ VAAR 833.103-70

⁶⁶ See DLADS L06 Agency Protests (DEC 2016); GSAM 533.103-1(a); JAR 2833.102(d)(1)(ii); NFS 1833.103 (d)(4).

decides the protest. Some vendor attorneys feared inherent bias when the contracting officer decides an agency-level protest that challenges that contracting officer's own decision, especially compared to an independent review authority with no previous involvement in the procurement.

Another potential reason *not* to file an agency-level protest with a contracting officer is that, if the contracting officer denies the protest, an appeal for higher-level review within the agency (if available) will not suspend GAO's timeliness requirements.⁶⁷ Any protest to GAO must be filed within ten days of knowledge of initial adverse agency action, and an adverse decision by a contracting officer is an initial adverse agency action.⁶⁸ Once the contracting officer's decision is issued, the vendor may be forced to choose between appealing to a higher level in the agency or preserving a timely protest at GAO. Worse yet, it may be unclear whether the agency has taken adverse action, for (as discussed below) under GAO's bid protest regulations *any* vendor knowledge of adverse agency action, actual or constructive, may trigger the filing deadline.⁶⁹ Because protesting to the contracting officer may put the vendor into this uncertain tactical "box," many vendors will simply forego an agency-level protest.

ii. Best Practices and Potential Reforms Regarding Placement and Structure of the Agency-Level Protest Function

Because of the structure of the current rule governing agency-level bid protests, FAR 33.103, there are two levels of best practices to consider here: best practices for the contracting officer (if she is asked to decide the protest), and for the higher-level official (if the protester goes there).

Agencies have generally done little to confine contracting officers' discretion over agency-level bid protests filed with them. The Air Force, for example, allows contracting officers to dismiss agency-level protests summarily,⁷⁰ though it requires contracting officers to consult with counsel before *sustaining* a protest.⁷¹ The Air Force has, however, instituted an important best practice in requiring contracting officers to report to what it calls "focal points" (which an Air Force interviewee described for this study as internal tracking systems for protests) on ongoing protests, and to register all protests on a centralized database.⁷² As an Air Force attorney explained in our interview, this allows higher-level officials to exercise oversight over protests — to see patterns in protests (including agency-level protests), and to take

⁶⁷ See FAR 33.103 (d)(4).

⁶⁸ FAR 33.103 (d)(4); 4 C.F.R. 21.2(a)(3).

⁶⁹ 4 C.F.R. § 21.2(a)(3)(2020) ("If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, provided the agency-level protest was filed in accordance with . . . this section, unless the agency imposes a more stringent time for filing, in which case the agency's time for filing will control.").

⁷⁰ AFICC PGI 5333.103.

⁷¹ AFFARS 5333.103.

⁷² See, e.g., AFICC PGI 5333.102-90. The RAND Corporation in 2012 recommended that the Air Force track GAO protests closely, to assess costs and outcomes. See Frank Camm *et al.*, *Government Accountability Office Bid Protests in Air Force Source Selections Evidence and Options— Executive Summary*, RAND Corporation, ch. 2 (2012), available at https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1077.pdf.

appropriate measures in management and training to ameliorate recurring problems in Air Force procurement.

Interviews with attorneys in the military services suggested that centralizing oversight within the agencies over agency-level protests would enhance the function, because centralization would give managers and attorneys more information on problems emerging in the procurement system. In some agencies, at the higher tier of agency-level protests¹⁰³ the authority over agency-level bid protests has been centralized in an “Agency Protest Official” (APO). A number of agencies have done this in order to improve the effectiveness of agency-level bid protests, including GSA (the leading federal centralized purchasing agency), the Department of Labor (DOL), and the Department of Justice (DOJ), each of which has named an APO as the official centrally responsible for hearing higher-level agency-level bid protests.⁷³

An APO is an official who is specifically designated within an agency to decide agency-level protests.⁷⁴ Naming an APO within each agency would codify an emerging best practice, one that lends authority, accountability and potentially some measure of uniformity to the agency-level bid protest process, since all higher-level agency protests would be channeled to one official.⁷⁵ An APO also would lend legitimacy and perceived fairness to the process, because the agency could separate the APO from the procurement process (compared to the head of the contracting activity or the general counsel, both of whom are part of the procurement decision making process). As the Air Force example shows, by centralizing oversight over agency-level protests, agencies would be better able to draw on lessons learned from agency protests, to improve management and training.

In a 1997 article recommending agency reforms to implement the 1995 executive order on agency-level protests, Jeffrey Kessler, a civilian bid protest attorney for the Department of the Army, described the ideal qualifications for a higher-level protest authority — what today could be called an APO. Drawing on many years of agency experience with agency-level protests before the 1995 executive order, he described the role of this higher-level protest authority within an agency:

[T]here is no regulatory reason why an appropriate person outside of the CO's chain should not be designated as the protest decision authority. However, whoever acts as the protest decision authority must not only have experience in the field of Government contracting (although not necessarily as a CO [contracting officer]) and knowledge of the FAR, but also knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in

⁷³ DOLAR 2933.103(a)(2); GSAM 533.103-1(a); JAR 2833.103(c)(3).

⁷⁴ See DOLAR 2933.103(a)(2); GSAM 533.101; JAR 2833.101(a).

⁷⁵ See DLADS 33.103(d)(4); CAR 1352.233-70 (a); DOLAR 2933.103 (a)(2); DOSAR 633.103(d)(4); (AGAR 433.103(a); GSAM 533.103-1 (a); JAR 2833.101(b); JAR 2833.101(b); NFS 1833.103 (d)(4); VAAR 833.103-70 (a); DARS 33.103(f)(1); AGAR 433.12(b); AIDAR 733.103-71 (a); DEAR 933.103(i); HHSAR 333.102(g)(2).

which this person typically acts. No matter who is selected as the protest decision authority, it is important for that person to receive some form of legal assistance.⁷⁶

Kessler also described possible candidates for higher-level protest officials (what in 1997 he called a “protest decision authority” and today (as noted) might be called an APO). He explained that a senior legal officer or an ombudsman with substantial authority could take on the role:

There are two primary candidates for protest decision authority other than someone in the CO's chain of command. One is the agency chief counsel, senior procurement attorney, or other high level legal officer with significant procurement and protest experience. Their legal experience is invaluable in making sure that the higher level agency protest is decided in accordance with both the facts and the law. The second alternative is an ombudsman that is at a sufficiently high level to enforce agency compliance with a sustained protest. The ombudsman's expertise is in the resolution of problems, and a protest is simply a specific kind of procurement problem in need of resolution, albeit an essentially legal one. The ombudsman, like the higher level procurement person, should use the assistance of experienced counsel for the formal resolution of a higher level bid protest.⁷⁷

“No matter who is selected as the protest decision authority,” Kessler stressed, “the bottom line is this: that person must wield sufficient clout within the bureaucracy to be able to sustain a meritorious protest, an action which is likely to be resisted by the CO and his chain. That person must also have the authority to make sure that any recommended corrective action in a sustained protest is properly implemented in the field.”⁷⁸

When asked in interviews for this study about requiring every agency to appoint an APO, some agency counsel objected that this would add cost and complexity to a relatively simple and streamlined agency-level bid protest system and that this would make it difficult for smaller agencies to appoint APOs. There are, however, other independent positions related to the procurement function which are staffed by many agencies — the suspension and debarment official who must be named under FAR Subpart 9.4, for example, and the competition advocate called for by FAR 6.501.⁷⁹ Agencies often ask officials to “dual-hat” — that is, to handle these various functions. GSA, for example, has its suspension and debarment official act as the agency's APO as well. This sort of “dual-hatting” would reduce some of the administrative burdens of establishing an APO — burdens that otherwise weighed against establishing the APO position, in the eyes of some agency counsel.

⁷⁶ Kessler, *supra* note 4.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ FAR 6.501 (“As required by 41 U.S.C. 1705 , the head of each executive agency shall designate an advocate for competition for the agency and for each procuring activity of the agency.”).

Another approach would be to share the APO function among several agencies, much as the Civilian Board of Contract Appeals handles disputes for many civilian agencies. This would be appropriate under the 1995 executive order which created the agency-bid protest system, for the order specifically contemplated the use of “another agency’s personnel” to address agency-level protests.⁸⁰

B. How Broad Is the Agency-Level Bid Protest Jurisdiction?

The next element in Gordon’s analysis looked to the question of subject matter jurisdiction, and specifically at how broadly that jurisdiction swept for a bid protest function. As the discussion below reflects, agencies have taken divergent and ad hoc approaches to defining the scope of jurisdiction in their agency-level bid protest functions. Because most limits on jurisdiction are at the margins of the procurement system (one agency, for example, bars agency-level protests regarding subcontracts), this might not seem a critical issue for reform. But because new methods of procurement are emerging which may fall outside the authority of the traditional bid protest fora (GAO and the Court of Federal Claims), agencies may wish to take an expansive approach to agency-level bid protest jurisdiction, to ensure oversight and accountability (and thus contain agencies’ risks) regarding new procurement methods.

i. Current Practices Regarding Jurisdiction

The FAR is silent on the limits of the jurisdiction of agency-level protests, and some agencies (discussed below) have exercised their discretion to set their own limits on jurisdiction.⁸¹ When asked in interviews for this report whether the jurisdiction of agency-level bid protests should be limited, some agency counsel said no, because they considered agency-level protests as tools to resolve problems which logically could emerge in any quarter of an agency’s procurement functions.

Agencies’ ad hoc approaches to jurisdiction in agency-level protests have created a patchwork of rules, for example regarding task- and delivery-order protests under indefinite-delivery/indefinite-quantity (IDIQ) contracts. (As is discussed below, these are protests of purchase orders issued under standing “catalog” contracts.) That patchwork of rules undercuts the effectiveness of agency-level bid protests for agencies, for the sometimes conflicting jurisdictional rules create risks and uncertainties for vendors, which are less likely to turn to agency-level bid protests as a result.

Some agencies, such as the United States Agency for International Development (USAID) and the Department of Veteran Affairs (VA), bar agency-level protests on issues of

⁸⁰ Exec. Order No. 12979(b).

⁸¹ See generally FAR 33.103. Some agencies also may dismiss a protest if a protest on the same or similar basis is filed with a protest forum outside of the agency. AIDAR 733.103-73; GSAM 533.103-1(g); VAAR 833.103-70(b)(8); DOLAR 2933.103(n); JAR 2833.103(n); NFS 1833.103(e) This seems more like a matter of enforcing an election of remedies, rather than an imposed limitation on agencies’ jurisdiction to review internal procurement failures.

contract administration, small business status, and responsibility determinations.⁸² The Marine Corps has argued that only GAO has jurisdiction over task-order protests,⁸³ and the Army Materiel Command refuses to hear agency-level protests under “the GAO’s \$25 million jurisdictional threshold to protests of task and delivery orders issued under Department of Defense (DoD) procurements.”⁸⁴ In contrast, at least one other Defense Department agency has decided an agency-level protests on a task or delivery order where GAO apparently lacked bid protest jurisdiction.⁸⁵

ii. Emerging Best Practices: Flexible Jurisdiction

As noted, the patchwork of rules regarding agencies’ subject-matter jurisdiction is traceable (at least in part) to conflicting rules regarding the protestability of orders under certain standing agreements. The agreements at issue — the Multiple Award Schedules (MAS) contracts sponsored by the General Services Administration (GSA) and the IDIQ contracts sponsored by GSA and other agencies — operate in broadly similar ways⁸⁶ and play a major role in the federal procurement market. Under these agreements, master contracts are awarded to multiple contractors, and then orders (“task” and “delivery” orders) are awarded under those master contracts by customer agencies, typically after a streamlined competition among the master contract holders. Orders under the GSA MAS master agreements may always be protested at GAO,⁸⁷ but protests of orders under IDIQ contracts are strictly limited by dollar thresholds.⁸⁸

One approach to the patchwork of rules regarding jurisdiction would be to clarify an expansive jurisdiction for agency-level protests, presumptively to cover (as the Court of Federal Claims’ Tucker Act jurisdiction covers) any protest to “a solicitation by [the] agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.”⁸⁹ Within that broad presumptive jurisdiction, agencies still could carve out exceptions.

⁸² AIDAR 733.103-73 (a-i); VAAR 833.103-70(b)(1-6)).

⁸³ See, *Logis-Tech, Inc.*, B-407687, 2013 CPD ¶ 41, at 4 (Comp. Gen. Jan. 24, 2013) (finding that the Marines initially rejected the protest for lack of jurisdiction because the protest was for a task and delivery order).

⁸⁴ Army Materiel Command, HQ AMC-LEVEL PROTEST PROCEDURES PROGRAM, <https://www.amc.army.mil/Connect/Legal-Resources/> [hereinafter “AMC”]; see also FAR 16.505(a)(10) (jurisdictional threshold amount for protests of orders at GAO).

⁸⁵ See, *Kevcon, Inc.*, B-406418, 2012 CPD ¶ 108 (Comp. Gen. Mar. 7, 2012) (noting that the Department of Veteran Affairs issued a decision on a protest of a task and delivery order valued less than \$10 million).

⁸⁶ Although the GSA MAS agreements are regulated under FAR Part 8 and the IDIQ agreements under FAR Subpart 16.5, most in the procurement community recognize that the agreements function in generally similar ways.

⁸⁷ See, e.g., *Severn Cos., Inc.*, Comp. Gen. B-275717, 97-1 CPD ¶ 181 (Comp. Gen. April 28, 1997).

⁸⁸ For a practitioners’ summary of limits on protests of task and delivery orders, see Richard B. Oliver et. al *.Differing GAO Task Order Protest Thresholds* (, Jan. 3, 2017), <https://www.pillsburylaw.com/en/news-and-insights/differing-gao-task-order-protest-thresholds.html>.

⁸⁹ 28 U.S.C. § 1491(b).

A broad statement of jurisdiction would leave agency officials with clearer authority to address novel issues that emerge in a rapidly evolving procurement system, such as misuse of task order purchasing authorities, or problems relating to the new “electronic marketplaces” (commercial online marketplaces) being opened to user purchases by GSA.⁹⁰

C. Who Has Standing to Protest?

i. Current Practices: FAR Defines Standing

The FAR requires that the protester in an agency-level protest be an interested party in the procurement.⁹¹ The FAR defines an interested party as “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”⁹² Agencies generally adopt this definition to define standing to bring agency-level bid protests, with a few agencies incorporating language from the definition into the agencies’ FAR supplements.⁹³ Some agencies also explicitly prohibit subcontractors from filing protests.⁹⁴

ii. Maintaining Link to General Principles of Protest Standing

The soundest course appears to maintain the status quo: to continue to link standing for purposes of agency-level bid protests to general principles of standing at GAO and the Court of Federal Claims. As noted, agencies use the same “interested party” standard as GAO and the Court of Federal Claims.⁹⁵ While other jurisdictions around the world use other measures of standing for protests,⁹⁶ the “interested party” standard is well-established in U.S. federal practice. Recent precedents show that the meaning of “interested party” may continue to evolve and even expand,⁹⁷ perhaps out of a growing sense that protesters are arguably more whistleblowers (who some believe should be afforded special protections and rights) than claimants (who presumably must show actual injury for standing). By continuing to link the standard for standing in agency-level protests to the evolving “interested party” standard in the other bid protest fora, agencies’ procedures will be better able to keep pace with an evolving understanding of protests’ role in a modern procurement system.

⁹⁰ See, e.g., Christopher R. Yukins, *U.S. Government to Award Billions of Dollars in Contracts to Open Electronic Marketplaces to Government Customers—Though Serious Questions Remain*, 61 GOV. CONTRACTOR. ¶ 303, Oct. 16, 2019, <https://ssrn.com/abstract=3471405>.

⁹¹ FAR 33.103(d)(4).

⁹² FAR 33.101.

⁹³ See AGAR 433.103(a); DOLAR 2933.101(e); JAR 2833.101(c); NFS 1833.103.

⁹⁴ See AIDAR 733.103-73; (VAAR 833.103-70(b)(7)).

⁹⁵ See 28 U.S.C. §1491(b)(1)(2012) (Court of Federal Claims protest standing requirement); 4 C.F.R. §21.0 (GAO protest standing requirement).

⁹⁶ See SIGMA, *supra* note 34, at 26-27.

⁹⁷ See *Acetris Health, LLC*, 949 F.3d at 727-28.

D. What Are the Time Limits at the Forum?

As Gordon explained, there are actually two separate time constraints to be considered in ordering a bid protest system: how soon a vendor must *file* its protest, and how long the deciding forum has to *decide* the protest. Both time limits relate back to a core concern for any bid protest system: how to minimize the disruption to the procurement cycle — here, the *time* required to complete that cycle — caused by a protest system. Both issues of time are acutely important to agency-level bid protests, which must accommodate users’ demands that the services and goods they need be purchased as rapidly as possible.

i. Current Practices: Uniform Deadlines for Filing, Varying Deadlines for Concluding Protest Review

The FAR’s most basic time limit on vendors — the deadline for filing an agency-level bid protest — has not been altered by the agencies in implementing the basic rule. In important ways, FAR 33.103 follows the same timeliness requirements as apply at the GAO: agency-level protests must be filed at the agency within ten days after contract award or within five days after a debriefing date offered to the protester under a timely debriefing request, whichever is later.⁹⁸ After the protest is initially decided within the agency, if an internal “appeal” is available the vendor must decide if it will appeal the agency-level protest within the agency, which the protester generally must do within ten days.⁹⁹ Alternatively, the protester may file a protest anew with GAO, which the vendor also must do within ten days.¹⁰⁰

Unlike the deadlines for *filing* protests (which have been borrowed largely intact from the GAO process),¹⁰¹ the timelines for *deciding* agency-level protests have been reworked by many agencies over the years. Under the FAR, the basic rule is that agencies must make *best efforts* to resolve agency-level protests within 35 days after the protest is filed.¹⁰² Different agencies have adopted different deadlines for resolving an agency-level bid protests, ranging from the basic rule’s 35 days to as few as 20 days.¹⁰³ Some agencies also require the deciding official to meet

⁹⁸ FAR 33.103 (f)(3).

⁹⁹ See EPAAR 1533.103); HUDAR 2433.103(d)(4)(i); VAAR 833.103-70 (d)(1).

¹⁰⁰ See FAR 33.103 (d)(4); see also 4 C.F.R. 21.2(a)(3).

¹⁰¹ In fact, the GAO rules expressly apply the GAO’s timelines to agency-level protests. FAR 33.103(a)3) provides (with emphasis added):

(3) If a timely agency-level protest was previously filed, any subsequent protest to GAO must be filed within 10 days of actual or constructive knowledge of initial adverse agency action, *provided the agency-level protest was filed in accordance with paragraphs (a)(1) and (2) of this section [which set deadlines for GAO protests]*, unless the agency imposes a more stringent time for filing, in which case the agency’s time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to an agency, any subsequent protest to GAO will be considered timely if filed within the 10-day period provided by this paragraph, even if filed after bid opening or the closing time for receipt of proposals.

¹⁰² FAR 33.103 (g) (emphasis added).

¹⁰³ Compare DEAR 933.103(k) with DOLAR 2933.103(j).

other milestones, such as conducting a scheduling conference with the parties within five days after the protest is filed.¹⁰⁴

ii. Potential Reforms Regarding the Timeline for Decision

For the reasons outlined above, any reforms regarding timeliness in agency-level bid protests are unlikely to touch on *when* the protest must be filed, and are more likely to address *how quickly* the protest is to be completed. Reform might come in a shorter timeline for protests, or (more likely) in the *certainty and transparency* with which agency-level protests are promptly concluded.

Any reform to shorten the time for an agency-level bid protest should be understood against the backdrop of broader pressures to shorten the procurement cycle, as markets move ever faster.¹⁰⁵ Furthermore, any reform regarding the time needed for agency-level bid protests should recognize that, unlike GAO or Court of Federal Claims protests, it is not uncommon for agency-level protests to be resolved without disrupting the planned timeline for a procurement.¹⁰⁶ Shortening the deadline to 20 days, for example, from the current 35 days, could further reduce the disruption a protest may cause the agency procurement process.

Another potential reform would be to adopt the procedural milestones that some agencies have instituted to help ensure that the agency-level protest moves forward in a timely manner, with adequate due process. GSA, for example, uses an early status conference to frame the schedule for agency-level protests, and the GSA APO can there direct that appropriate documentation be produced.¹⁰⁷

Interviews conducted for this study showed, however, that the real problem in the agency-level protest process is the *uncertainties* in when, and how, the protests are completed under the current rule. In our discussions, counsel for private vendors in particular identified at least three problems with the current process:

- **Protest Decisions Delayed:** Vendors' counsel complained that agencies sometimes fail to meet the loose deadline which requires agencies to make "best efforts" to

¹⁰⁴ DOLAR 2933.103(d); JAR 2833.103(e).

¹⁰⁵ See, e.g., U.S. Department of Defense, PROCUREMENT TOOLBOX: PALT, <https://dodprocurementtoolbox.com/site-pages/palt>. (last visited Mar. 13, 2020) (discussing tools and legal requirements to address Procurement Acquisition Lead Time (PALT)).

¹⁰⁶ Jeffrey Kessler, the Army attorney who wrote on agency-level bid protests in 1997, pointed to many prior years of experience in resolving agency-level bid protests within the 20-day deadline set by the Army Materiel Command to argue that agency-level bid protests can be completed quickly and without disrupting the underlying procurement:

The AMC higher level agency protest program has an even shorter period for decision--20 working days. Based on available statistics, AMC has handled the highest number of higher level agency protests of any agency to date, and it has issued no overrides in almost 400 protest cases. There has been no acquisition which could not wait for the extremely short turn-around involved in AMC protest decisions.

See, e.g., Kessler, *supra* note 4.

¹⁰⁷ GSAM 533.103-2.

complete their reviews within 35 days. These delays (which can extend well beyond the regulatory deadline, sometimes for weeks or months) raise costs for the protesters, which are typically repeat government contractors that will pass at least some of those costs back to the government in higher pricing. A delay beyond the regulatory deadline also raises uncertainties for the protesting vendor, which (interviews confirmed) must sometimes wait in a “black box” for the protest outcome, with no information on the protest status. This delay and lack of transparency contrast sharply with protests at GAO, which has a fixed and transparent statutory deadline for concluding a bid protest; the uncertainties are another reason for vendors to avoid the agency-level bid protest process.

- **Protests Ignored Entirely:** Vendors’ attorneys also complained that some agency-level bid protests are simply ignored altogether by the receiving agency. This leaves the protesting vendor in a sort of procedural limbo, uncertain whether and when it should bring a potentially costly and disruptive new protest at GAO or the Court of Federal Claims.
- **Procedural “Sandtrap” Before Protesting at GAO:** The uncertainty in the timeline for resolving protests can raise significant procedural dangers for vendors, which (as was discussed above) risk waiving a protest ground if the vendor does not timely file a follow-on protest to GAO when the agency has taken any “adverse agency action” — which can include any prejudicial action *or inaction* by the agency.¹⁰⁸ Vendors’ counsel complained that because it is difficult to discern whether any agency action (or inaction, which is a remarkable legal benchmark) while a protest is pending should be considered a “prejudicial” action or inaction, vendors face real risk that they will miss a triggering event and thus may be foreclosed from raising the protest grounds at GAO again in the future.¹⁰⁹

¹⁰⁸ 4 C.F.R. § 21.0(e). The full paragraph defining “adverse agency action” states:

(e) Adverse agency action is any action or inaction by an agency that is prejudicial to the position taken in a protest filed with the agency, including a decision on the merits of a protest; the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest; or contracting agency acquiescence in continued and substantial contract performance.

Id.

¹⁰⁹ One practitioner explained the practical problems with GAO’s rule using any “adverse agency action” as a trigger for the filing deadline at GAO:

“Adverse action” is similarly fuzzy: It may be a written protest denial or simply some action or oral statement inconsistent with what the protester requested. In the *American Material* case, for example, the adverse action was the agency opening the bids after receipt of the protester’s fax, thus giving the protester 10 days in which to file its pre-award protest with the GAO. In *W.D. McCullough Constr. Co. & M&A Equipment and Constructors Inc., a Joint Venture—Recon.*, B-238460.2, Mar. 5, 1990, 90-1 CPD ¶ 252, the GAO found the adverse action to be a meeting with the contracting officer, during which the contracting officer orally informed an offeror with a pending agency-level protest that he “was abiding by

These problems are central to vendors’ reluctance to use the agency-level bid protest process. Taking these problems in sum, three measures might mitigate these uncertainties, costs, and risks, and thereby enhance the legitimacy of the process: (1) a *firm* deadline for a timely decision; (2) a *deemed denial* if no timely decision is issued; and, (3) a requirement that *any adverse agency action* be conveyed clearly to the vendor in *writing*.

These are not radical reforms — they track almost exactly to the process that is already used by contracting officers when deciding claims under the Contract Disputes Act (CDA).¹¹⁰ The CDA offers a statutorily prescribed framework for deciding contractor claims that arise under federal contracts. Under the CDA, as under agency-level protests, the contracting officer must act as an objective arbiter and decide on the contractor’s claim. But under the CDA procedures set forth in FAR Part 33 (the same part that governs agency-level protests), the contracting officer must adhere to much more clearly defined timelines in a well-structured process.¹¹¹ The FAR requires the contracting officer to:

- Prepare and deliver a well-reasoned decision on the contractor claim, which affords the contractor a clear statement of its procedural rights;
- Coordinate with other specially authorized officials in the agency;
- Disregard the claim if it is jurisdictionally deficient (i.e., if it is not properly certified), so long as notice is given the contractor;
- Issue a decision within a set deadline – and if that deadline is missed, the contractor’s claim may be “deemed denied,” which opens rights of appeal to the contractor.

It should be stressed that agency-level protests and final decisions on CDA claims are in many ways very similar. An agency-level protest generally involves a vendor’s request for relief to the agency before award; a CDA final decision, the contractor’s request for relief after award. Agency-level protests ask the contracting officer (or higher official) to act as an objective arbiter, judging the agency’s own decisions in contract awards; CDA claims ask the contracting officer to act as an objective arbiter in making a final decision that will judge the agency’s contract administration. In both cases, the deciding official in the procurement function ideally should coordinate with other agency officials (such as agency counsel) and give the vendor/contractor clear notice of its rights and the agency’s decision, under a clearly defined timetable. Given these important parallels between the two procedures, there seems little reason for the comparative gaps left in the rule governing agency-level protest procedures – especially since many implementing agencies have themselves tried to fill those gaps by supplementing the agency-level protest rule with procedural detail since it was issued a quarter-century ago.

his initial decision.” Because the protester did not make it to the GAO within 10 days of that conversation, the GAO found its subsequent GAO protest to be untimely.

James Tucker, *A Road Less Traveled: Agency-Level Protests* (Sept. 26, 2016), <https://govcon.mofo.com/protests-litigation/agency-level-protests/>.

¹¹⁰ See 41 U.S.C. § 7101 *et seq.* (2012).

¹¹¹ See FAR 33.211 (describing the process for a contracting officer’s decision on a CDA claim).

To a remarkable extent, the FAR provision governing contracting officers' final decisions under the CDA (FAR 33.211) — a sister provision to that governing agency-level bid protest — thus would address many of the problems that have emerged in agency-level protests:

- Unlike the agency-level protest rule, the rule governing CDA claims clearly describes what the final decision is to address, including a statement of the contractor's rights.
- Again unlike the agency-level protest rule, the CDA rule explicitly calls for contracting officials to coordinate with others in the agency before issuing a final decision; interviewees reported that agency-level protests, in contrast, may be decided by contracting officers with no coordination.
- The CDA final-decision rule, unlike its agency-level protest counterpart, explicitly requires the contracting officer to notify the contractor if its claim is jurisdictionally deficient. A similar requirement might reduce those instances when deficient agency-level protests are simply ignored by contracting officials, which undermines the legitimacy of the process and opens serious risks for vendors.
- The CDA rule sets firm deadlines, unlike the agency-level protest rule which allows agencies to make "best efforts" to issue a decision within 35 days. The CDA rule allows contracting officers to extend the time to issue a final decision, but only with notice to the contractor, and only under appropriate circumstances. If the contracting officer fails to comply with these timeliness requirements the claim will be "deemed denied," and the contractor can seek relief elsewhere. As the discussion above reflected, applying similarly clear deadlines to agency-level protests would enhance the clarity and legitimacy (and thus effectiveness) of the agency-level bid protest process.

Applying the rigor of the CDA-type process to agency-level protests should not increase agencies' costs or burdens in any material way. Agencies are already required to make best efforts to deliver a "well-reasoned" opinions on agency-level protests within 35 days.¹¹² Interviewees for this study (including agency counsel) confirmed that framing agencies' obligations to respond to agency-level protests within a more rigorous structure, based on the CDA claims process, would bring certainty and legitimacy to the agency-level protest process. That, in turn, would encourage more vendors to use agency-level protests, which should reduce costs and disruption for agencies overall.

A separate question relates to the procedural milestones that might be marked out in the agency-level process. Those milestones might include, for example, a status conference after the

¹¹² FAR 33.103(g)-(h) ("Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information. . . . Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.").

protest is filed,¹¹³ a requirement for a detailed report from the contracting officer,¹¹⁴ or an internal deadline for a report to the agency's deciding official.¹¹⁵

In interviews, vendors' counsel (and some agency officials) applauded the procedural milestones that some agencies have written into their rules. Proponents from both groups believed that these milestones make the officials hearing the protest more accountable and can make their actions more transparent, and yet they leave discretion for officials to craft procedures more flexibly shaped to the needs of a particular protest. Some in government, however, believed that imposing additional procedural milestones could complicate what is supposed to be a relatively simple agency-level bid protest process. It would be important, therefore, to ensure that any government-wide reform which included new procedural milestones could be accommodated by agencies of different sizes and capacities, at minimal cost.

Proposed Changes: In sum, implementing some version of the following would improve the FAR provision governing agency-level bid protests, following the example of the process governing CDA claims and best practices in the agencies:

- **Clear Deadlines for Decision:** The FAR should set clear deadlines for decisions in agency-level protests.¹¹⁶ Practices in some agencies indicate that the deadline might be less than the current target of 35 days. DOJ and DOL rules, for example, demonstrate that it is possible to decide agency-level protests within 20 days.¹¹⁷ The amended rule could leave the agency discretion to extend those deadlines, under defined circumstances.¹¹⁸

¹¹³ A scheduling conference is commonly used to establish a plan for developing an appropriate record. *See, e.g.,* GSAM 533.103-2(a)(2). The Justice Department, GSA and the Department of Labor all require their Agency Protest Officials to conduct scheduling conferences during each agency-level protest. *See* DOLAR 2933.103(d); GSAM 533.103-2(a)(2); JAR 2833.103(e). Scheduling conferences may take place either by telephone or in person. *See, e.g.,* GSAM 533.103-2(a)(2); JAR 2833.103(e). The deciding officials also may ask the parties to participate in an oral presentation, which can (on request) be supplemented by written documents. *See* GSAM 533.103-2(a)(2); JAR 2833.103(e). These types of procedural requirements formalize the agency-level bid protest system, and help make transparent which evidence the protest deciding official will use during the course of the agency-level bid protest.

¹¹⁴ In agency-level protests above the contracting officer, the Department of Energy (DOE) requires contracting officer to create reports that match the requirements for agency reports in GAO protests. DEARS 933.103(k). Additionally, GSA requires that the agency must provide the protestor with a copy of the agency response on the same day that it is filed the protest response with deciding official. GSAM 533.103-1(e)(5).

¹¹⁵ *E.g.,* DEARS 933.103(k).

¹¹⁶ *See* DOLAR 2933.103(j) (requiring that the deciding official must decide protests within 20 days of receiving the protest); JAR 2833.103(k) (requiring that the deciding official must decide protests within 20 days of receiving the protest); *see also* AIDAR 733.103-72(a) (requiring the agency to decide the protest 30 days after the protest is filed).

¹¹⁷ *See* DOLAR 2933.103(j); JAR 2833.103(k).

¹¹⁸ The AMC, for example, clearly states that agency-level bid protests will be resolved within 45 days (despite the FAR's admonition to make "best efforts" to finish within 35 days), and AMC states that if "circumstances require a longer time period to issue a written decision on a protest, the protester will be notified in writing concerning any extension." AMC, *supra* note 84.

- **“Deemed Denial” If Deadlines Not Met:** FAR 33.103 should provide that if the deadlines for decision are not met, the agency-level protest will be “deemed denied.” This will make it clear to vendors when they must seek alternative relief.
- **Written Notice of Adverse Agency Action:** The FAR should require the agency to give the protester explicit written notice of any adverse action on the protest.¹¹⁹ This will remedy the ambiguity in the GAO bid protest regulations, which state that any “adverse agency action” — including any *inaction* by the agency — triggers the ten-day filing deadline at GAO.¹²⁰ Since notice of “adverse agency actions” can, per the GAO regulation, go beyond a decision on the merits of the protest and encompass *any* apparently adverse agency response to the protest, including “the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid or proposal despite a pending protest,”¹²¹ the GAO regulation opens substantial risk that a vendor protesting at an agency might overlook an “adverse agency action” and thus miss its opportunity to protest at GAO.¹²² To eliminate that risk — to close the ambiguity in the GAO rule which undermines certainty in the agency-level protest process — the FAR should be amended to require that any adverse agency action on a pending agency-level protest must be conveyed in writing to the protester.
- **Coordinate with Other Agency Officials:** The FAR should require that the contracting officer coordinate with appropriate officials before issuing a decision in an agency-level protest. Coordination on a CDA claim typically includes notice of a proposed disposition, and, where appropriate, a legal or record review by coordinating officials. Interviews with agency counsel confirmed that agency-level protests would gain coherence by having the same type of coordination. The coordinating officials might include agency counsel or a higher-level official (such as an APO) tasked with coordinating and overseeing the agency’s responses to agency-level protests.

¹¹⁹ This might mean changing the following sentence in FAR 33.103(d)(4), from:

Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 C.F.R. § 21.2(a)(3)).

to:

Any initial adverse agency action must be conveyed in writing to the protester, and that writing must give notice that any subsequent protest to the GAO must be filed within 10 days of the written notice from the agency of that initial adverse agency action (4 CFR 21.2(a)(3)).

¹²⁰ FAR 33.103 (d)(4).

¹²¹ 4 C.F.R. § 21.0(e) (2020).

¹²² See, e.g., *Mls-Multinational Logistic Servs., Ltd.*, B-415782, 2018 CPD ¶ 105 (Comp. Gen. Mar. 7, 2018) (“[O]nce the contracting activity proceeds with receipt of proposals, the protester is on notice that the contracting activity will not undertake the requested corrective action; consequently, timeliness is measured from this point rather than from the receipt of a subsequent formal denial of the agency-level protest.”) (citing *Ann Riley & Assocs., Ltd.*, B-237365, 89-2 CPD ¶ 463, at 2 (Comp. Gen. Nov. 15, 1989); *Consolidated Indus. Skills Corp.*, B-231669.2, 88-2 CPD ¶ 58, at 1-2 (Comp. Gen. July 15, 1988)).

- **Clear Notice to Protester of Deficient and Denied Protests:** The FAR rule should require officials to give a protester written notice if its protest is jurisdictionally deficient (or otherwise can be dismissed out of hand). Similarly, the FAR rule governing agency-level protests should detail what must be set forth in an agency-level protest decision, including a statement (perhaps a standard statement, as in the CDA rule) of the protester’s further procedural rights.

FAR 33.103 also might be amended to recommend procedural milestones during an agency-level protest, such as an early status conference, which would improve the efficiency of the process. Because agencies differ in their capacities to field more complex agency-level bid protest processes, the amended FAR might leave it to agencies to develop their own procedural steps, drawing upon the agency best practices which continue to evolve.

E. What Evidence Does the Forum Have Before It in Reaching Its Decision?

The next issue in the analysis, regarding the record in the protest, breaks into two parts. The first part looks to the administrative record to be considered by the agency in deciding an agency-level protest. The second part considers what access a protester should have to that record.

Record for Protest: The current FAR rule provides almost no guidance on what record is to be compiled by the contracting agency in order to resolve an agency-level protest. FAR 4.803 includes an extensive list of the materials to be included in a contract file, but those materials stretch beyond the documents relevant to contract award, and include many documents that would be irrelevant to a bid protest. GAO Bid Protest Regulation 21.3 calls for the following documents to be included with the agency’s report to GAO on a bid protest: “all relevant documents . . . including, as appropriate: the bid or proposal submitted by the protester; the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested; all evaluation documents; the solicitation, including the specifications; the abstract of bids or offers; and any other relevant documents.”¹²³ A more detailed list of documents potentially relevant to a bid protest is included in Appendix C to the Rules of the U.S. Court of Federal Claims,¹²⁴ which, in paragraph 22, list nearly two dozen categories of documents that, if relevant to a bid protest before the court, should be compiled by the agency. Those documents range from the source selection plan to records of prior proceedings. The court’s detailed list of the documents that might be considered in a bid protest highlight the gaps in the FAR provision governing agency-level protests — specifically, the failure of FAR 33.103 to specify the documents that should be before the agency in deciding an agency-level protest.

Access to Record: Even if a complete record is compiled for review during the agency-level bid protest, there is no current mechanism for sharing that record with the protester — which is a major reason cited by vendors’ counsel for *not* using agency-level bid protests. In a

¹²³ 4 C.F.R. § 21.3(d).

¹²⁴ U.S. Ct. Fed. Claims R, Appx. C, ¶ 22, <http://www.cofc.uscourts.gov/sites/default/files/Appendix%20C.pdf>.

protest before GAO or the Court of Federal Claims, protester’s counsel normally will gain access to a substantial administrative record, usually under a protective order.¹²⁵ A protester typically will use that administrative record to support and explain its protest grounds, and a protester often will identify additional protest grounds in the record. Not having access to that record is a severe disadvantage in an agency-level protest, but it may not be practically possible, absent very significant changes to the agency-level bid protest process or other advances in open government initiatives, to afford protesters access to sensitive materials in the agency procurement record.

i. Current Practices: Administrative Record Undefined, and Protesters Have Little or No Access to That Record

The current FAR rule leaves agencies wide discretion in deciding what to include in the administrative record that will be considered by the deciding official. FAR 33.103(d) calls for the protester to submit “relevant documents” with the protest itself, but beyond that the rule says nothing about what documents (or other evidence) the deciding official should consider.

Some agencies have developed their own procedures for gathering and considering the record during an agency-level protest. The agency-level protest rule does not allow the protester discovery from the administrative record, and some agencies call for the deciding official to rule upon the protest based upon the documents provided by the protester and the agency.¹²⁶ Other agencies, such as GSA, require scheduling conferences to establish plans for creating an appropriate record for the agency-level protest.¹²⁷ Still other agencies, such as the Department of Energy (DOE), require the contracting officer to create a protest report to be used by an official at a level above the contracting officer.¹²⁸

Although FAR 33.103(e) says that to the “extent permitted by law and regulation, the parties may exchange relevant information,” nothing in the rule *mandates* that the agency provide the protester with relevant record information. In fact, as agency counsel explained in interviews, agencies generally do not provide protesters with *any* documents or other evidence in an agency-level protest. None of the agency counsel interviewed said that agency documents are regularly provided to protesters in the agency-level protest process.

That leaves vendors with very few ready sources for documentation to support agency-level protests. Probably the most important documentation that a vendor will receive, then, is the debriefing that offerors (both successful and not) are entitled to request from the awarding

¹²⁵ See, e.g., U.S. Government Accountability Office, GAO-19-613SP-, GUIDE TO GAO PROTECTIVE ORDERS 2 (2019) [hereinafter “GAO Protective Orders”] (“GAO may issue a protective order to allow limited access to such “protected” information to attorneys, or consultants retained by attorneys, who meet certain requirements. 31 U.S.C. § 3553(f)(2)(2012); 4 C.F.R. § 21.4.”), available at <https://www.gao.gov/assets/700/699422.pdf>; Rules of the U.S. Court of Federal Claims, App. C, Sec. VI.

¹²⁶ See DOLAR 2933.103(f) (“Department of Labor procedures do not provide for any discovery. The deciding official has discretion to request additional information from either the agency or the protestor. However, the deciding official will normally decide protests on the basis of information provided by the protestor and the agency.”); GSAM 533.103-1 (e)(1); JAR 2833.103(g).

¹²⁷ See GSAM 533.103-2(a)(2); JAR 2833.103(e); DOLAR 2933.103(d).

¹²⁸ DEAR 933.103(k).

agency.¹²⁹ A disappointed offeror may request a debriefing (depending on the circumstances, either before or after award) to obtain information on why the agency excluded the offeror from the procurement.¹³⁰ At a debriefing, the agency will tell the offeror of the weaknesses in the offeror's proposal and answer relevant questions as to whether the source selection procedure conformed to the solicitation and applicable law.¹³¹ Debriefings may be done in writing, orally, or by any other acceptable method.¹³²

In recent years, the scope of debriefings has expanded for larger procurements. Section 818 of the National Defense Authorization Act for Fiscal Year 2018¹³³ provided for enhanced debriefings at DoD. Section 818 required DoD to respond to additional questions from disappointed offerors, and DoD has implemented that requirement by internal guidance (pending a change to the Defense Federal Acquisition Regulation Supplement (DFARS)).¹³⁴ Section 818 also called for Defense agencies to produce a redacted version of the source selection determination in awards worth over \$100 million, and to make the same disclosure in smaller procurements (\$10–100 million) if asked to do so by a small business or a nontraditional contractor.¹³⁵

In principle, information from the administrative record should also be available to a disappointed offeror through the Freedom of Information Act (FOIA) and under expanding requirements regarding “open government,”¹³⁶ *i.e.*, ready public access to and use of government data. In practical terms, however, it is unlikely an agency will respond to a FOIA request from a vendor in time to support a protest,¹³⁷ and federal implementation of open government obligations remains in its infancy.¹³⁸

¹²⁹ See, e.g., FAR 15.506.

¹³⁰ See FAR 15.505; FAR 15.506; see also 10 U.S.C. 2305(b)(6)(A); 41 U.S.C. 3705.

¹³¹ FAR 15.506 (d).

¹³² FAR 15.506 (b).

¹³³ Public Law No. 115-91, 131 Stat. 1283 (Dec. 12, 2017).

¹³⁴ OFFICE OF THE UNDER SECRETARY OF DEFENSE – ACQUISITION & SUSTAINMENT (OUSD (A&S)), CLASS DEVIATION – ENHANCED POSTAWARD DEBRIEFING RIGHTS (Mar. 22, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf>.

¹³⁵ As of this writing, the enhanced debriefings required by Section 818 had not yet been implemented through a change to the DFARS. See U.S. Department of Defense, OPEN DFARS CASES AS OF FEBRUARY 28, 2020, 2018-D009 at 14, available at <https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf>; Office of Information & Regulatory Affairs, U.S. Office of Management & Budget, RIN 0750-AJ73, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0750-AJ73>.

¹³⁶ See, e.g., Jessica Yabsley, , *President Signs Government-wide Open Data Bill* DATA COALITION (Jan. 14, 2019) (“Today, President Trump signed into law the Foundations for Evidence-Based Policymaking (FEBP) Act (H.R. 4174, S. 2046), which includes the Open, Public, Electronic and Necessary (OPEN) Government Data Act (Title II). The package passed Congress on Monday, December 31, 2018. . . . The OPEN Government Data Act requires all non-sensitive government data to be made available in open and machine-readable formats by default”), <https://www.datacoalition.org/press-releases/president-signs-government-wide-open-data-bill/>.

¹³⁷ See, e.g., Heather Heindel, *FOIA and Open Records Requests – Friends or Foes?* 1 (2013) <https://www.kilpatricktownsend.com/~media/Files/Case%20Summary/2013/FOIA%20Article.ashx> (“bid protest rights can lapse while waiting on the government agency to respond to open records and FOIA requests.”).

¹³⁸ See, e.g., OPEN GOV'T P'SHIP, *Fourth Open Government National Action Plan for the United States* (Feb. 2019), <https://open.usa.gov/assets/files/NAP4-fourth-open-government-national-action-plan.pdf>.

ii. Potential Reforms — Affording Access to the Administrative Record

In our interviews, vendors’ counsel repeatedly pointed to the lack of access to the administrative record as one of the chief weaknesses in agency-level bid protests. Whereas the bid protest procedures at GAO and the Court of Federal Claims define the record to be compiled by the agency in detail and afford the protester much broader access to that administrative record, in agency-level bid protests the protesting vendor receives almost no information from the administrative record. This means, in practice, that protesters at the agency level typically have a harder time prevailing, and they will remain blind to agency errors that are buried in the agency record. In practical terms, the protesting vendor usually will know only of errors that emerge in the agency’s requests for bids or proposals, the agency planning and competitive process, or in the debriefing — the aspects of the procurement process disclosed as a matter of course to bidders and offerors.¹³⁹ Vendors’ counsel argued that this lack of transparency makes agency-level protests much less attractive to vendors. Agency counsel, however, warned that there is no legal authority for affording protesters access to sensitive materials from the administrative record, and that erecting a legal infrastructure to allow that access (under a congressionally authorized protective order, for example) would cause significant administrative burdens for agencies.

Logically the first issue — the need to define the record for an agency-level bid protests under FAR 33.103 — is relatively easy to resolve. The “sister” FAR provision governing bid protests at GAO, FAR 33.104, defines the record to be submitted by the agency to GAO.¹⁴⁰ That FAR provision is flexible (calling for records “as appropriate”), which affords contracting officials the discretion to present different records under different circumstances (e.g., in a pre-award protest). FAR 33.103, governing agency-level protests, could simply refer to the record

¹³⁹ This has the practical effect of limiting the rounds of protester briefing in an agency-level protest. While a protester will typically make a number of submissions in a GAO protest—the protest, a response to the agency report (which includes the administrative record), and possibly a supplemental protest based on the administrative record—because the protester in an agency-level protest gains no access to further record evidence after the protest is submitted, generally the protester is limited to that initial protest submission.

¹⁴⁰ FAR 33.104(a)(3) states, in relevant part:

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. . . . Information exempt from disclosure under 5 U.S.C.552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate-

- (A) The protest;
- (B) The offer submitted by the protester;
- (C) The offer being considered for award or being protested;
- (D) All relevant evaluation documents;
- (E) The solicitation, including the specifications or portions relevant to the protest;
- (F) The abstract of offers or relevant portions; and
- (G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

called for by FAR 33.104. The record gathered during the agency-level protest normally is not apparent to the protesting vendor. But if the agency protest procedures define the required record clearly, and it later emerges during a protest at GAO or the Court of Federal Claims that the official deciding the agency-level protest did not have an adequate record before her, then the decision at the agency level may lose any persuasive force. Referencing clear guidelines for the agency protest record from FAR 33.104 thus will encourage the agency to confirm that the record is complete and will help ensure that the agency official deciding the agency-level protest has all necessary information before her.

One possible solution to the second issue — the protester’s lack of access to the administrative record — would be to match the practices at GAO and the Court of Federal Claims by allowing agency-level protesters free access to the administrative record under a protective order.¹⁴¹ Absent some other procedural device to protect the sensitive information that invariably emerges in an agency record, a protective order is essential to shield sensitive commercial (bid and proposal) and internal agency (source selection) information in the record during the bid protest. Without such a protective order, production of the agency record may be legally impossible.

But when asked about the option of improving agency-level bid protests by allowing for protective orders (perhaps through a statutory authorization akin to GAO’s¹⁴²), agency counsel strongly objected. Although a study by the RAND Corporation reported that some in DoD support using protective orders to facilitate the exchange of information in agency-level protests,¹⁴³ and the Air Force uses confidentiality agreements with vendors to negotiate post-award challenges informally,¹⁴⁴ agency counsel argued forcefully that establishing a protective order in agency-level protests would raise a host of practical difficulties and substantially complicate the process. Agency counsel pointed out that there is no statutory or regulatory authority yet for such a protective order, nor is it clear how a protective order in agency-level protests would be administered or enforced. (For instance, would the protective order be issued and enforced by the agency? And if so, would failures to enforce the protective order breach the agency’s statutory obligations to protect sensitive information under the Procurement Integrity Act?)

Agency counsel noted that other means of protecting sensitive information if the record is shared — such as the confidentiality agreements used by the Air Force in informal efforts to

¹⁴¹ See GAO Protective Orders, *supra* note 125.

¹⁴² See *id.*

¹⁴³ See Mark V. Arena *et al.*, *supra* note 26, at 65.

¹⁴⁴ Under AFFARS 5333.214, U.S. Air Force counsel are to use alternative dispute resolution techniques to resolve bid protests to the maximum extent practicable. See U.S. Depart. of the Air Force, ALTERNATIVE DISPUTE RESOLUTION DESKBOOK FOR ACQUISITION PROFESSIONALS 3 (2nd ed. 2016). The Statement of Principles set out in the U.S. Air Force Deskbook states, “[i]f it is necessary for the parties to protect information during the ADR process, the parties will enter into a confidentiality agreement sufficient to maintain such information in confidence to the extent permitted by law, including the Trade Secrets Act, 18 U.S.C. § 1905, and the Procurement Integrity Act, 41 U.S.C. § 423.” *Id.* at 20–21.

resolve potential protests¹⁴⁵ — also could also be difficult to enforce and unreliable, given the enormous range of potential protesters before the government. In light of these practical and administrative objections, it is unlikely that protective orders (or other procedural devices to protect bid-and-proposal and source selection materials) will become part of the agency-level protest process.

If instituting a protective order process is unlikely in agency-level protests, it will be difficult to give protesters full access to the administrative record, and vendors will be less likely to resort to agency-level protests. To reinforce the transparency and legitimacy of agency-level protests, the most attractive alternative is to draw upon record information available *outside* the protest process — chiefly through debriefings.

Congress, as noted, has called upon DoD to provide enhanced debriefings, primarily in larger procurements,¹⁴⁶ and a number of agencies have procedures in place to provide better debriefings.¹⁴⁷ In 2018, a RAND Corporation study similarly recommended that agencies provide offerors with redacted source selection materials and other relevant information.¹⁴⁸ A blue ribbon panel which was commissioned to report on ways to improve procurement in general, known as the “Section 809 Panel,”¹⁴⁹ also recommended that a redacted source-selection decision be provided with a debriefing.¹⁵⁰ As private and agency attorneys noted in our interviews, protests too often are the result of a lack of information, and all of these moves to enhance debriefings seek to close that informational gap for potential protesters.

Agency-level protests are a logical extension of these initiatives to enhance debriefings: after the debriefing explaining the award, a disappointed offeror can respond in an agency-level protest with its own concerns regarding the award, and the agency’s decision on the protest closes out the dialogue, hopefully addressing the losing offeror’s concerns. The structured dialogue, framed as a debriefing, a protest, and a decision, helps both sides close the

¹⁴⁵ *Id.*

¹⁴⁶ 10 U.S.C. § 2305(5)(C) (2019).

¹⁴⁷ NASA, the U.S. Air Force, and GSA all have procedures that provide the offeror with detailed documents that explain the contracting officer’s decision prior to the debriefing. *See* NASA PROCUREMENT DEBRIEFING GUIDE (May 2012), <https://www.hq.nasa.gov/office/procurement/NASADebriefingGuide.pdf>; *see AF Extended Debriefings*, INTERAGENCY ALT. DISPUTE RESOLUTION WORKING GRP., <https://www.adr.gov/adrguide/08-afedp.html> (last visited March 12, 2020); *see generally* Jeff Koses, *Focusing on Healthy and Productive Industry Relationships - INFORM Post-Award Feedback Pilot*, GSA BLOG (Feb. 7, 2019), <https://www.gsa.gov/blog/2019/02/07/focusing-on-healthy-and-productive-industry-relationships-inform-post-award-feedback-pilot> (discussing GSA’s In-Depth Feedback through Open Reporting Methods (INFORM) pilot program).

¹⁴⁸ *See* Mark V. Arena *et al.*, *supra* note 26.

¹⁴⁹ *See Section 809 Panel*, DEF. TECH. INFO. CTR. (“[t]he Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) was created in Section 809 of the FY 2016 National Defense Authorization Act (Public Law 114-92). The panel consisted of 16 members required to be recognized experts in acquisition and procurement policy with diverse experiences from the public and private sectors. The panel was charged to deliver recommendations that could transform the defense acquisition system to meet the threats and demands of the 21st century.”), <https://discover.dtic.mil/section-809-panel/>.

¹⁵⁰ Section 809 Panel, Vol. 3, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations* 358–60 (2019), available at <https://discover.dtic.mil/section-809-panel/>.

informational gap that can otherwise lead to much more disruptive protest litigation at GAO or the Court of Federal Claims. Because agencies' interests are aligned here with vendors' – both seek to resolve their differences efficiently within the agency-level protest process — both vendors and agencies should support improved debriefings to make agency-level protests work better.

There are other considerations regarding the scope of information to be provided vendors in debriefings, however, which are largely unrelated to the agency protest process itself. One is transaction costs: agency personnel voiced concern in interviews that, without a protective order in place to shield sensitive information, enormous redaction efforts would be needed to provide source-selection and bid-and-proposal materials to disappointed vendors. As a practical matter, when materials from the procurement record (whether from bidders or the agency itself) are to be provided to a debriefed party, the agency will redact those materials to “black out” sensitive information. Agency counsel explained that redaction is a complicated, resource-intensive process because some agency personnel, concerned about legal liability for exposing sensitive information and reluctant to provide disappointed vendors with information that might be used against the agency in a protest, may tend to over-redact sensitive documents. Other agency personnel, conscious of transparency's benefits and its importance in reinforcing the agency's legitimacy, will press for lighter redaction. The resulting push-and-pull debate within the agency can take time and divert resources, which helps explain why agencies have been reluctant to provide more of the agency record at debriefings.

That said, the open government movement (here and around the world) suggests that the arc of progress bends toward transparency,¹⁵¹ in no small part because technology makes transparency easier — if not unavoidable. Technology will also make it easier to identify and protect specifically identified sensitive information in an agency record, such as personally identifiable information (PII)¹⁵² and commercially sensitive information not subject to disclosure under FOIA.¹⁵³ While it would be practically impossible today to force agencies to disclose all of their records in any given complex procurement (identifying and protecting sensitive information in the record would take too long for the information to be useful in a bid protest), regulators should recognize that in time presumptively complete disclosure may become the norm.¹⁵⁴ When that happens — when the law and technology advance to make agency procurement records readily available to all stakeholders — the agency-level protest process

¹⁵¹ Borrowing here from the Reverend Martin Luther King, Jr., who, drawing inspiration from a 19th-century abolitionist minister, Theodore Parker, said that the “arc of the moral universe is long, but it bends toward justice.” *All Things Considered: Theodore Parker and the 'Moral Universe,'* NAT'L PUB. RADIO (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461>.

¹⁵² See, e.g., FAR Subpart 24.1 (implementing the Privacy Act).

¹⁵³ See, e.g., *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2359 (2019) (revisiting Exemption 4 protections for commercially sensitive information under FOIA).

¹⁵⁴ The Open Contracting Partnership, originally a World Bank initiative, gathers case studies and develops standards to facilitate governments' disclosure of public procurement records. *Our Vision*, OPEN CONTRACTING PARTNERSHIP, <https://www.open-contracting.org/about/> (last visited March 13, 2020).

likely will become much more vital and important.¹⁵⁵ In many ways, this study is a stepping-stone to that future.

F. Is the Procurement “Put on Hold” During the Protest?

The next element of Gordon’s analysis looks to whether the procurement is “put on hold” pending the agency-level protest. While this seems an administrative nicety, it is at the heart of a healthy protest system in the U.S. government. Unlike bid challenge procedures in some other countries,¹⁵⁶ the U.S. federal bid protest system generally does not award expectancy damages (*i.e.*, lost profits) to protesters.¹⁵⁷ Although successful protesters may be able to recover some or all of their bid-and-proposal costs and attorney fees from the agency, the prospect of those damages typically does not drive the protest decision — vendors instead protest in order to have an opportunity to compete fairly for the contract.¹⁵⁸ Keeping that contract award available as a “bounty” for protesters by staying award or contract performance during the protest is thus essential to the health of the federal protest system. Agencies, for their part, have a collateral but important shared interest in the stay: if award or performance proceeds during the protest and ultimately the protest succeeds in reopening the competition, an agency may bear damages and transaction costs in undoing the original award and performance. Making the stay effective is, therefore, in the interests of both agencies and vendors.

i. Current Practices: An Uncertain Stay

Currently, FAR 33.103 requires that if an agency-level protest is timely filed, the contract will not be awarded (if the protest is before award) or performance will be stayed (if post-award).¹⁵⁹ To preserve agencies’ operational flexibility, the agency may “override” the stay;

¹⁵⁵ For a discussion of how governments use transparency and sanctions (including, arguably, bid protests) to check officials’ errors in a procurement process, see Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63 (2010), <https://ssrn.com/abstract=1776295>.

¹⁵⁶ See, e.g., Int’l Bank for Reconstruction & Dev., *supra* note 19, at 42.

¹⁵⁷ See, e.g., U.S. Government Accountability Office, GAO-18-510SP, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 28* (2018), <https://www.gao.gov/assets/700/691596.pdf>.

¹⁵⁸ Conversely, the prospect of *paying* bid-or-proposal costs or attorney fees to a successful protester *does* help drive agencies to take early corrective action. Agencies know that if they delay corrective action until late in the GAO protest process, after agency reports are due, GAO is more likely to award costs or fees to the successful protester. See *id.* (“ . . . GAO does not contemplate reimbursement of protest costs in every case in which an agency takes corrective action, but rather, only where an agency unduly delays taking corrective action (*i.e.*, corrective action is taken after the due date for the submission of the agency report) in the face of a clearly meritorious protest, that is, a protest that is not a close question.”).

¹⁵⁹ See FAR 33.103 (f)(1, 3). FAR 33.103(f) describes the stay during an agency-level bid protest as follows:

(f) *Action upon receipt of protest.*

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. . . .

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. . . .

most agencies require the head of the contracting activity to make the determination whether making award or continuing performance is justified for urgent and compelling reasons.¹⁶⁰

Even if the agency will not override it, the stay of award can present a tactically difficult question for the vendor. If the vendor is considering a pre-award agency-level protest (typically to the terms of the solicitation), the stay presents a less acute problem because even if the agency-level protest is denied, if due to the protest the bidding deadline (and thus the protest deadline)¹⁶¹ has been extended by the agency (which is often the case), the vendor can file anew at GAO before that extended deadline to maintain the stay on the procurement. An agency-level bid protest thus may allow a vendor to preserve the status quo (to stay the contract performance) by bringing a new GAO protest before the newly extended bidding deadline.

The same is not true for post-award protests, however, for after award the statutory deadline for obtaining a stay at GAO runs from the award decision or the debriefing which follows award.¹⁶² An agency-level protest does not affect the deadline for filing at GAO to trigger an automatic statutory stay.¹⁶³ If an agency denies an agency-level protest brought after award, by that time the statutory deadline for filing a GAO protest to trigger an automatic stay almost certainly will have passed. The agency may agree informally to a temporary suspension (discussed below),¹⁶⁴ but that raises substantial uncertainty and risk for the vendor. The vendor's only recourse — if the contract is to be preserved with some legal certainty— will be to sue at the Court of Federal Claims and seek an injunction during the pendency of the protest. The court, however, may refuse to enjoin the agency.

According to vendors' counsel, the lack of a durable stay makes agency-level protests far less appealing. Vendors may not want to risk losing a possible stay at GAO (viewed as a more robust forum) by filing an agency-level protest first, even if the agency-level protest is a quicker

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency, including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. . . .

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

¹⁶⁰ See FAR 33.103(f)(2); see also DOLAR 2933.103(i); DOSAR 633.103(f)(1, 3); EDAR 3433.1(f)(3); GSAM 533.10-2(c); HHSAR 33.103; HUDAR 2433.103(f)(1, 3); JAR 2833.103(j); NFS 1833.103(f)(1); SOFARS 5633.103(f)(1). According to a 2016 report by the Congressional Research Service, in 2003 GAO stopped reporting to Congress on the number of stay overrides reported by agencies to GAO. See Kate M. Manuel & Moshe Schwartz, CONG. RESEARCH SERV., R40228 GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 13 n.94 (2016).

¹⁶¹ Pre-award protests in U.S. procurement are generally due before the time that bids/proposals are due. See, e.g. Manuel & Schwartz, *supra* note 160, at 10.

¹⁶² 31 U.S.C. § 3553.

¹⁶³ FAR 33.103(f)(4).

¹⁶⁴ The FAR states that an agency *may* include “a voluntary suspension period when agency protests are denied and the protestor subsequently files at GAO.” FAR 33.103(f)(4) (emphasis added).

and more efficient option. As a result, vendors often will file directly with GAO to avoid losing the stay on the procurement while GAO considers the protest.

ii. **Emerging Best Practices and Potential Reforms: Resolving Uncertainties at the Protest’s Onset and Conclusion**

The risks and uncertainties that surround the stay cause stubborn problems at the beginning and end of an agency-level bid protest. At the start of the protest process, as vendors’ counsel point out, it may be unclear whether an agency-level bid protest has actually been filed, and thus whether the agency will respond and stay the procurement.¹⁶⁵ And at the conclusion of an agency protest, under the current rule it is often unclear whether the stay will continue during a follow-on protest — and, concomitantly, how disruption and delay in the procurement will be minimized during any follow-on protest.

Proposed Reform: Acknowledgement of the Protest: One straightforward solution to the uncertainties at the *beginning* of the protest would be to require the agency to provide the vendor with a writing acknowledging receipt of a protest. This is normal good practice between vendors and contracting officials. The acknowledgement could be standardized through an amendment to FAR 33.103, and the acknowledgement also could note a stay of the procurement pending the protest in accordance with the rule, absent an override, a decision on the merits, or withdrawal of the protest. This would significantly improve transparency and certainty at the start of the protest.

Copies of the acknowledgement of protest could be provided to other bidders and offerors, which would resolve one of the lingering complaints about agency-level protests: that other bidders and offerors may not know whether the agency is adjudicating an agency-level bid protest which may affect their rights as well. While the current rule requires agencies to tell other bidders or offerors of an agency-level protest if their “offers might become eligible for

¹⁶⁵ One practitioner described the confusion surrounding this basic question—whether a vendor has in fact lodged an agency-level bid protest, or is simply complaining to the contracting officer—as follows:

[I]t is not always clear when there has been an agency-level protest. This uncertainty poses great risks given the effect of a prior agency-level protest on GAO protest timelines, and it is entirely possible for an offeror to trigger a protest clock “accidentally” without realizing it. The GAO has long held that an agency-level protest is a (1) written communication to the agency, (2) specifically expressing dissatisfaction, and (3) requesting corrective action. . . . A writing may be a protest even if it is not expressly labeled as such. . . . A request for agency action without a corresponding expression of dissatisfaction, however, is not a protest. . . . And an expression of dissatisfaction coupled with a mere . . . hope or expectation of certain agency action is not an agency-level protest. . . . But it is not always clear what the GAO will deem to be an expression of dissatisfaction or a request for corrective action. In one remarkable case, the GAO found an agency-level protest was filed when a bidder faxed a handwritten note to the agency on the day of bid opening, stating that the specifications seemed to be written around another vendor’s product (deemed to be an expression of dissatisfaction) and asking the agency to “[p]lease advise me” (deemed to be a request for corrective action).

Tucker, *supra* note 109 (citations omitted).

award of the contract,” and if necessary to seek an extension of time for acceptance of bids or offers,¹⁶⁶ in practice other offerors may not receive direct word of an agency-level protest brought by a competitor.¹⁶⁷ This lack of transparency can undermine the perceived legitimacy of the procurement process.

Resolving Uncertainties at the Protest’s Conclusion: There are several ways to deal with the uncertainties that dog the *conclusion* of an agency-level protest, which stem largely from the need to balance the vendor’s need for a continued stay against the agency’s need to proceed as quickly as possible with the underlying procurement. These issues relate primarily to *post-award* protests, for (as was discussed above) a stay may remain in place before award so long as the vendor can file a timely follow-on protest, after the agency-level protest. To avoid the potential disruption that an agency might cause if it rushed to award immediately after an agency-level protest was decided, the FAR could be amended to adopt DOL’s practice of staying award for an additional five days after the agency-level protest decision is issued,¹⁶⁸ to allow the vendor to proceed to GAO or the Court of Federal Claims.

That leaves, then, the question of how to maintain the status quo after a *post-award* agency-level protest is denied and the vendor timely files a follow-on protest at GAO. One solution would be to amend the statute which triggers a stay when a timely protest is filed at GAO,¹⁶⁹ to provide that a procurement will be stayed if a protest is timely filed after award, a debriefing *or* a timely agency-level bid protest. The statutory stay would thus be triggered if the vendor, having lost an agency-level protest, timely files at GAO. No similar change would be needed with regard to the Court of Federal Claims, because if the court enjoins a procurement after an agency-level bid protest is concluded, the court may do so under its existing equitable powers.¹⁷⁰

Another approach would be administrative, not statutory: to amend FAR 33.103 to provide that the agency, having stayed the procurement in response to an agency-level bid protests, may not proceed with contract performance if an agency-level protest has been denied

¹⁶⁶ FAR 33.103(f)(2).

¹⁶⁷ James Tucker, a bid protest practitioner, described this lack of transparency to other offerors:

Unlike protests at the GAO or the court, agency-level protests do not have intervenors. This means your competitors ordinarily will not have the opportunity to weigh in on the merits of your protest or to supply the agency with ammunition to shoot it down. Indeed, unless the agency has to stay performance of an awarded contract or ask offerors to hold open their offers, other offerors are often completely unaware that an agency-level protest has even been filed. This may be attractive to protesters interested in keeping a dispute one-on-one with the agency.

Tucker, *supra* note 109.

¹⁶⁸ See DOLAR 2933.103(m).

¹⁶⁹ 31 U.S.C. § 3553(d)(4) currently provides that filing a protest at GAO will trigger a stay of the procurement if the protest is filed within ten days after the date of award, or within five days after the date of a required debriefing (whichever is later).

¹⁷⁰ 28 U.S.C. § 1491(b)(2) (“To afford relief in [a bid protest] action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.”).

and the vendor then files a timely protest at GAO. DOL has taken a first step towards this solution: as noted, the Department’s FAR supplement allows a protester before the agency an additional five-day stay, after a protest is denied, to bring a follow-on protest to GAO or the Court of Federal Claims.¹⁷¹ During that five-day interregnum, the contracting officer is to consider allowing the stay to remain in effect pending the resolution of the follow-on protest.¹⁷²

When asked about the DOL rule, other agency counsel acknowledged that the rule made sense – that it is, in essence, a self-protective measure for an agency, which (as noted) does not want to launch contract performance when a follow-on protest could disrupt that performance (and cause additional costs and delay). The reform suggested here — a rule extending the stay of award or performance during a follow-on protest — would be a logical step beyond DOL’s innovation, one that would meet all stakeholders’ shared interest in preserving the status quo without blocking agencies from proceeding with a procurement if circumstances demand, as discussed below.

Protecting Agencies from Undue Delay: While these are *ideal* solutions to protect the status quo during follow-on protests, when this issue was raised with agency counsel they countered with a very *practical* concern: extending the stay through a chain of protests would hurt agencies that needed to proceed with the procurement. Agency counsel also were concerned that incumbent contractors, faced with a potential loss of a follow-on contract, would launch a string of bid protests to prolong their contract work. As a practical matter, however, there would be several ways to mitigate these potential harms to agencies.

First, agencies could always override the stay during a follow-on protest. Whether the procurement were stayed under an amended FAR (which extended the administrative stay to cover the period of a follow-on protest at GAO) or under an amended 31 U.S.C. § 3553 (which would trigger a stay during a follow-on GAO protest), the agencies would retain discretion to “override” a stay if circumstances warrant.¹⁷³

Any harm from an extended stay during a follow-on protest at GAO could also be limited by resorting to “express” procedures at GAO — if GAO agreed. Under GAO’s bid protest regulations, 4 C.F.R. § 21.10, at the beginning of a GAO protest any party may ask that the protest be handled using GAO’s “express” procedures, which aim to conclude a protest within 65 days, or GAO itself may assign the protest to an express process. Express procedures, if allowed by GAO, require the agency to file the agency report (including the administrative record) within 20 days of notice that the express option will be used, and will require the other parties to file

¹⁷¹ See DOLAR 2933.103(m).

¹⁷² *Id.*

¹⁷³ An agency’s decision to override the stay could still be challenged at the U.S. Court of Federal Claims, under an Administrative Procedure Act-type standard of review. See *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1290 (Fed. Cir. 1999); *Safeguard Base Operations, LLC v. United States*, 140 Fed. Cl. 670, 693 (2018); *Beechcraft Def. Co., LLC v. United States*, 111 Fed. Cl. 24, 31 (2013).

their comments on the agency report within five days (rather than the normal ten days) of the agency report. These express procedures are among GAO’s many tools to expedite bid protests.

If the express procedures were used in a GAO protest which followed an agency-level bid protest that was resolved (as FAR 33.103 suggests) within 35 days, the additional 65 days for the “express” GAO protest would total 100 days of protest procedures — the normal duration of a GAO protest. Thus if GAO used the “express” procedures, a follow-on protest after an agency-level protest would not need to delay the underlying procurement more than a traditional GAO bid protest would.

G. How Difficult Is It for the Protester to Win?

The last element in Gordon’s analysis asks how difficult it is for a protester to prevail in a given protest system. This statistic, as noted, is vitally important to stakeholders — the likelihood of success informs protesters’ willingness to use the protest system. Under current practice, because almost no data is available on agency-level protest outcomes, the process is a “black box,” which discourages vendors from using the agency-level protests. Conversely, if in the absence of data a perception grows that too many protests are sustained (won) in the agency-level protest system, stakeholders within government may decide to dismantle the protest system, much as Congress dismantled the General Services Board of Contract Appeals (GSBCA) bid protest jurisdiction because of a perception, bolstered by research, that a markedly large percentage of protests brought at the board were sustained.¹⁷⁴ From both vendor and agency vantage points, therefore, improved transparency regarding the agency-level protests is important.

i. Current Practices: Hidden Outcomes

FAR 33.103 currently requires that an agency protest decision be well-reasoned and explain the agency’s position. The FAR also requires that the protest decision be provided to the protester using a method that provides evidence of receipt. If the agency-level protest is sustained by the agency deciding official, some agencies define the following available remedies: (1) terminating the contract; (2) recompeting the requirement; (3) amending the solicitation; (4) refraining from exercising contract options; (5) award of contract consistent with statute, regulation, and terms of solicitation; or, (6) other action that the deciding official determines is appropriate.¹⁷⁵

Because almost no statistics on outcomes in agency-level bid protests are published, in interviews this simple question was put to agency counsel: How often do agency-level bid protests succeed at your agency? The responses highlighted the fact that “success” in agency-

¹⁷⁴ A 1991 study concluded at least 45% of protests that went to hearing on the merits at the GSBCA were sustained. David L. Garrard, *An Analysis of the General Services Administration Board of Contract Appeals Bid Protest Decisions and the Effect on Automated Data Processing Equipment/Federal Information Processing Resources Requirements* 103 (Dec. 1991) (unpublished Master’s thesis, Naval Postgraduate School).

¹⁷⁵ See, e.g., AMC, *supra* note 118.

level bid protests can take many forms, because the vendor and the agency typically seek a constructive outcome — not a mere “win” in the administrative process. One government counsel said agency-level protests are almost never sustained at his agency, but he hastened to explain that, because an agency-level protest is a management tool — an opportunity for the agency to identify and correct its own error — a meritorious agency protest is typically resolved through corrective action, rather than a formal decision. The government counsel stressed that because the agency prefers to resolve these issues itself, informally and quickly and through corrective action if necessary, his agency prefers that vendors pursue agency-level bid protests, rather than more cumbersome GAO and Court of Federal Claims protests. As experienced agency counsel acknowledged, agencies have a stake in an improved agency-level bid protest system, as agencies and vendors share an interest in an effective system.

To keep the agency-level bid protest system vital, it is important that prospective protesters know that they have a reasonable chance of success. Almost inevitably, that requires published statistics on protest outcomes. Publication means resolving the following questions, building on the current rule and agency best practices:

- What is the essential data to be used for assessing agencies’ internal bid protest systems?
- What should be published — agency protest decisions, for example, or simply statistics on protests and outcomes?
- How will agency outcomes be measured? Will only decisions sustaining a protest “count” as protest victories, or will agency corrective actions also be tallied as “wins”?
- Who in an agency should gather and publish information and statistics on agency bid protests, and can those reports be confirmed?

These questions are reviewed below, in an assessment of how FAR 33.103 might be improved to reflect agency best practices in gathering and publishing information on protest outcomes.

ii. Emerging Best Practices and Potential Reform: Making Outcomes Clear in Agency-Level Bid Protests

The first step in reform would be identifying the core data that is to be used to measure outcomes. Although the FAR requires a well-reasoned agency decision when protests are sustained, because many agency-level protests are resolved through corrective action a simpler, more comprehensive means of measuring outcomes is needed.

One building block to this reform is an emerging best practice in the agencies, which requires that protesters be provided written explanations of the agency protest’s outcome. (The need for written decisions was discussed above, with regard to the need for more transparency in the process.) GSA, DOL, and DOJ all require the deciding official to send the protesting vendor a confirmation letter explaining the rationale for the protest decision.¹⁷⁶ The Defense

¹⁷⁶ GSAM 533.103-2(f); DOLAR 2933.103(k); JAR 2833.103(k)(1).

Intelligence Agency goes one step further and calls for the written explanation, *with supporting documents*, to be sent to the protester.¹⁷⁷

It is worth noting that the agency supplemental rules might not require the deciding official to explain whether corrective action was taken. DOJ, for example, requires the deciding official to send a confirming letter within three days after the decision which states “whether the protest was denied, sustained or dismissed.”¹⁷⁸

To make an adequate report to the protester, and for the broader administrative record, it may not be enough to note whether the protest was denied, sustained, or dismissed. Dismissal may be due to a jurisdictional failure, for example, or it may be due to corrective action that the agency has taken without ever sustaining the protest. The report to the protester, and the administrative record, should explain any corrective action.

Compiling a record of corrective action is important for at least two reasons:

- First, as agency counsel explained in our interviews, compiling data on failures in procurements allows management to redirect resources and training to correct those failures in future procurements.
- Second, the data on corrective actions can be rolled into the broader assessment of success and failure in the agency protest system. GAO (a useful example here) does not report mere sustains and denials; instead, it combines sustained decisions and corrective actions, and then compares those to the overall number of protests lodged at GAO, to calculate an annual “effectiveness rate.”¹⁷⁹ Reasonably enough, GAO’s working assumption is that both successful protests and agency corrective actions reflect a vital, effective protest system. Agencies could take the same course and derive their own “effectiveness rate” for agency-level protests that resulted in affirmative decisions or in corrective action.

Amending the FAR to build upon these agency best practices could increase the transparency of the agency-level protest system and instill more trust in vendors to use the system. A FAR requirement for written decisions on outcomes need not make the decisions binding precedent — there was general (and sometimes strong) opposition in our interviews to giving agency bid protest decisions precedential weight — but publicly available data on outcomes would better inform the public and the protester on the agency’s decision.

With the data on agency protests standardized and gathered, the final step (and one which was broadly favored by vendors’ counsel and agency counsel) would be to publish an annual

¹⁷⁷ DARS 33.103 (S-90).

¹⁷⁸ JAR 2833.103(k)(1).

¹⁷⁹ U.S. Government Accountability Office, GAO-20-220SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2019 5 n.5 (2019) (discussing how effectiveness rate calculated).

agency-level bid protest report, much like GAO’s annual report to Congress.¹⁸⁰ This reform would build upon the Department of the Army’s existing practice: the Army requires the heads of its contracting activities to prepare annual reports on agency bid protests.¹⁸¹ It requires that the report include: (1) the number of protests received during the reporting period, to include their disposition; (2) an assessment of the causes of the most frequent recurring issues; (3) the distribution of protest by subordinate contracting offices; and (4) any additional information considered necessary to a full understanding of the efficiency and effectiveness of the activity’s agency protest procedure.¹⁸²

The logical extension of the Army’s best practice would be to reform the FAR to call for each agency to publish an annual report on agency-level bid protests, which could include the information called for by the Army regulation and an “effectiveness” rate for the agency which paralleled that reported by GAO (discussed above). This report would help establish agency-level bid protests as a transparent and reliable channel for review.

VI. Conclusion and Recommendations

Relatively modest reforms — most drawn directly from agency best practices that have evolved since the rule was first published a quarter-century ago — would substantially improve the transparency and validity of the agency-level bid protest process. These reforms would allow vendors to rely more on agency-level bid protests, a step forward that would improve procurement processes for agencies, which generally prefer to resolve bid challenges internally, quickly, and efficiently. To effect these reforms, this study recommends that the government-wide rule for agency-level protests, FAR 33.103, or agencies’ own rules and guidance, be amended as follows.¹⁸³

1. **Formalize the Role of the “Agency Protest Official”:** Under the current rule, a vendor that brings a protest to the contracting agency may protest to either a contracting officer or a “higher level” official. A number of agencies have successfully made the “higher level” official an “Agency Protest Official” (APO). Formalizing the APO’s role would make the function more visible and accountable and would help the APO coordinate other reforms outlined below.
2. **Confirm Agencies’ Broad Jurisdiction to Hear Agency-Level Protests:** The current FAR provision does not define the scope of agencies’ jurisdiction to hear bid protests. A FAR amendment which presumptively gave agencies authority to hear any protest regarding their procurement decisions would afford agencies (and vendors) the leeway to address emerging issues in new procurement methods.

¹⁸⁰ See, e.g., U.S. Government Accountability Office, GAO-19-248SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2018 4 n.4 (2018).

¹⁸¹ AFARS 5133.103-90.

¹⁸² *Id.*

¹⁸³ Alternatively, these reforms could be adopted by individual agencies, either through amendments to the agencies’ FAR supplements or through standard contract provisions, which reflected the agencies’ enhanced agency-level bid protest processes.

Agencies could always narrow the scope of their jurisdiction by amending their rules.

3. **Leave Standing for Agency-Level Protests Tied to “Interested Party”**

Standard: FAR 33.103 currently says that any “interested party” may bring an agency-level protest. Although it seems counterintuitive, reform here may mean simply preserving the status quo. A recent decision by the Federal Circuit, *Acetris Health*, expands the concept of standing for an interested party, and this may portend a shift towards seeing protesters more as whistleblowers rather than as claimants. By linking standing for agency-level protests to the “interested party” standard used at GAO and the Court of Federal Claims, the rule will make it easier for the concept of standing in agency-level protests to evolve through published decisions from those alternative fora.

4. **Clarify Decision Process:** The process for agency-level protests should be made more rigorous, possibly by drawing from other, parallel procedures under the FAR. For example, although the current FAR rule calls for agencies to make best efforts to resolve agency-level protests within 35 days, experience in some agencies shows that it might be possible to narrow that time, say to 20 days. Doing so, however, could require substantial agency resources and would not address vendors’ core complaint that the decision-making process is opaque and uncertain. To resolve this uncertainty, and to make plain when a vendor must proceed to a GAO protest to preserve its rights, FAR 33.103 should be amended to incorporate rigorous procedures and deadlines, akin to those used for deciding claims under the Contract Disputes Act, per the provision at FAR 33.211. This would give vendors clarity as to how an agency-level protest is proceeding and would help ensure that any adverse agency action — the trigger for a GAO protest — is noticed in writing to the protesting vendor. At the same time, the agencies might consider other enhancements to the decision-making process, such as adopting procedural milestones (e.g., an early status conference) which some agencies have used to make agency-level protests more effective.

5. **Specify Record Necessary for Agency-Level Protest:** The current FAR rule does not specify the record that an agency should compile for an agency-level protest, raising the risk that the deciding official in the agency will not have complete information before her. To fill this gap in the rule, the requirements of the “sister” provision in FAR 33.104, which specify the record to be compiled for GAO protests, should be incorporated in the provision on agency-level protests, FAR 33.103.

6. **Maximize the Record Shared with Protesters:** One of the chief complaints from vendors’ counsel regarding agency-level bid protests is that vendors have no access to the agency record, once compiled. Agency counsel strongly objected to the most obvious means of affording access — protective orders, much like those used at GAO in the Court of Federal Claims to allow vendors’ counsel access to sensitive materials in the administrative record. There are, however, alternative

means to broaden vendors' access to the administrative record: enhanced debriefings, or confidentiality agreements between vendors and agencies using alternative dispute resolution techniques to resolve protests. These measures are likely to evolve over time as technology makes it easier to share information. Ultimately, principles of "open government" may overtake the process, and flip the presumption to make the procurement record generally available, subject to special protections for private, commercially sensitive and internal government information. For now, however, agencies may want to consider employing enhanced debriefings or making greater use of confidentiality agreements to disseminate important parts of the record.

7. **Enhancing the Stay of Performance:** The current FAR provision already calls for a stay of the procurement pending an agency-level protest. Reform, therefore, means addressing particular issues that have arisen in practice. At the start of the protest, the agency should promptly and in writing acknowledge receipt of the protest and start of the stay, to eliminate the uncertainty that can surround the start of an agency-level protest today. As the agency-level protest ends, the vendor should be able to continue the stay pending the resolution of a follow-on protest, say at GAO. A number of small but critical changes would be needed to preserve the stay, which is critical precisely because the protester in the U.S. system protests not for damages, but for an opportunity to compete fairly for the contract requirements. Those changes could include a temporary extension to the stay after a final decision in any agency-level protest, a change to the statute governing GAO protests to trigger a stay if a GAO protest is timely filed after an agency-level protest is decided, and a willingness at GAO to handle follow-on protests there on an "express" basis so as to minimize disruption at the procuring agencies.
8. **Publish Data on Agency-Level Protests:** Under the current rule, almost no data is published or otherwise available on agency-level protests. This creates uncertainty for vendors, for whom agency-level protests are a "black box." To make vendors more comfortable with what is, in fact, a long-established (but largely invisible) agency-level bid protest system, data should be gathered and published on the numbers of agency-level protests sustained and on corrective action taken. As the experience at GAO has shown, publishing this sort of "effectiveness rate" data (comparing sustained protests and corrective action to total protests filed) has been critically important to establishing GAO's reputation as a credible bid protest forum. The same should be true of agency-level protests.

APPENDIX A

Agency Supplemental Rules on Agency-Level Protests

Links compiled at:

<https://publicprocurementinternational.com/agency-level-bid-protests/>

- [Agency for International Development \(USAID\)](#)
- [Department of Agriculture \(USDA\)](#)
- [Department of Commerce](#)
- [Department of Defense](#)
 - [Air Force](#)
 - [Army \(USA\)](#)
 - [Army Materiel Command \(AMC\)](#)
 - [Defense Information Systems Agency \(DISA\)](#)
 - [Defense Logistics Agency \(DLA\)](#)
 - [Navy – Marine Corps](#)
 - [Special Operations Command \(SOCOM\)](#)
- [Department of Education \(DOE\)](#)
- [Department of Energy \(DOE\)](#)
- [Department of Health & Human Services \(HHS\)](#)
- [Department of Housing & Urban Development \(HUD\)](#)
- [Department of Justice \(DOJ\)](#)
- [Department of Labor \(DOL\)](#)
- [Department of State](#)
- [Department of Veterans Affairs \(VA\)](#)
- [Environmental Protection Agency \(EPA\)](#)
- [General Services Administration \(GSA\)](#)
- [National Aeronautics and Space Administration \(NASA\)](#)
- [Nuclear Regulatory Commission \(NRC\)](#)