

RAND CORPORATION REVIEWS BID PROTESTS AND CONCLUDES THAT MAJOR CHANGES ARE NOT APPROPRIATE

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The RAND Corporation, at the request of the Congress in the 2017 National Defense Authorization Act (“NDAA”) recently completed a study titled, “Assessing Bid Protests of U.S. Department of Defense Procurements—Identifying Issues, Trends and Drivers” by M. Arena, B. Persons, I. Blickstein, M. Chenoweth, G. Lee, D. Luckey and A. Schendt, January 2018. The study includes a wealth of information on bid protests at both the Governmental Accountability Office (“GAO”) and the Court of Federal Claims (“COFC”). However, the general conclusion of the assessment is that the system is working well and major changes in bid protests are not appropriate.

Major Findings:

- (1) DOD personnel are generally dissatisfied with the current bid protest system, believing that contractors have an unfair advantage in that they are able to impede timely awards with bid protests, and can do so with “weak allegations.”
- (2) Private sector companies, trade associations and law firms view bid protests as a healthy component of a transparent acquisition process that keeps government accountable.
- (3) Private sector companies believe that post-award debriefings are sometimes skimpy, evasive or fail to provide required reasonable responses to relevant questions.
- (4) The overall percentage of contracts protested is very small – less than 0.3 percent.
- (5) Small businesses accounted for more than half the protest actions at the GAO and COFC.
- (6) The stability of the bid protest effectiveness rate (i.e. where the protester got some relief, even if the protest was not fully adjudicated) at the GAO over time—despite the fact that protest numbers have increased—suggests that firms are not likely to protest without merit.
- (7) Task order protests have a slightly higher effectiveness rate than any other types of protests.
- (8) The number of protesters and protest actions tends to grow with a contract’s value.
- (9) At both the GAO and the COFC, in 4-8 percent of the cases (a significant number), the contract value is less than \$0.1 million.

The RAND Corporation made the following recommendations for policymakers and DOD leadership. RAND advised that “these recommendations are intended to inform future changes

to the bid protest system. There is likely value in using the same or similar approaches across other departments and agencies of the U.S. government. In implementing these recommendations, there should be some consideration of costs and benefits, as some changes will require additional time or resources to implement.”

Recommendations

- 1. Enhance the quality of post-award debriefings.** The Army and Air Force have initiatives to improve the quality of the debriefings, which might serve as models. Section 818 of the FY 2018 NDAA has provisions for improving debriefings as well.
- 2. Be careful in considering any potential reduction to GAO’s decision timeline.** While 70 percent of cases at GAO are resolved in less than 60 days, it may be challenging to shorten the GAO decision timeline for all cases given that (1) protests are more frequently filed at the end of the fiscal year and (2) complex cases that go to decision usually take 90–100 days.
- 3. Be careful in considering any restrictions on task-order bid protests at GAO.** Task-order protests have a slightly higher effectiveness rate than the rest of the protest population. This higher rate suggests that there may be more challenges with these awards and that task-order protests fill an important role in improving the fairness of DoD procurements.
- 4. Consider implementing an expedited process for adjudicating bid protests of procurement contracts with values under \$0.1 million.** One possible option is a process analogous to how traffic tickets are adjudicated in traffic court or how cases are adjudicated in small-claims court. A different approach would likely be needed for each venue. For example, COFC could “rule from the bench” on such smaller-value protests and not be required to generate written decisions. (This would limit the protester’s ability to appeal, however.) Another option is to require alternative dispute resolution for such small-value protests at GAO. Some discussion with each venue would be necessary to develop the most appropriate approach. Another but perhaps less desirable approach from a fairness perspective would be to restrict such low-value procurement protests to the agency level. Our recommendation is to come up with a quick way to resolve these cases commensurate with their value while preserving the right to an independent protest.
- 5. Consider approaches to reduce and improve protests from small businesses, such as improving debriefings, requiring protests to be filed by legal counsel, or providing legal assistance in filing.**
- 6. Consider collecting additional data and making other changes to bid protest records to facilitate future research and decision-making.** Some examples include tracking cases that appear at COFC with a prior history at GAO, recording companies’ DUNS numbers, tracking corrective action at COFC, collecting and

summarizing the reasons for corrective action, and generating annual reports of agency-level protest activity.

The Takeaway: RAND does not recommend major changes at this time. Improvements in post-award debriefings have been included in the 2018 NDAA, but a more radical proposal that was included in that legislation, to charge large businesses for denied protests, was not recommended by RAND.

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