

**IT IS ALL ABOUT RISK: THE DEPARTMENT OF DEFENSE
SHOULD USE THE ARMY MATERIEL COMMAND'S AGENCY-
LEVEL BID PROTEST PROGRAM AS ITS NEW RISK
MANAGEMENT TOOL**

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I. Introduction

In recent years, the U.S. Department of Defense (DoD) has been intently focused on what it considers abuses in the bid protest process at the Government Accountability Office (GAO) as it tries to manage its risk to its procurement system and the delivery of its critical capabilities. Until its repeal in section 886 of the National Defense Authorization Act (NDAA) for Fiscal Year 2021,¹ Congress seemed to share the DoD's concerns as evidenced through its legislatively created "loser pays" bid protest pilot program, which it enacted in section 827 of the fiscal year 2018 NDAA.² However, likely because of a recent RAND Corporation study³ that suggested many of the DoD's concerns about bid protests at the GAO may not actually amount to abuses, Congress seems to have changed its position

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¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, sec. 886, § 827, 134 Stat. 3387, 3791.

² National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017).

³ See generally RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS: IDENTIFYING ISSUES, TRENDS, AND DRIVERS [hereinafter RAND STUDY].

about whether bid protests are a cause of program performance risk for the DoD.

With its repeal of the “loser pays” provision, the leading questions it is asking the DoD to investigate regarding bid protests in general, and its endorsement of a recent report on agency-level bid protest reforms by the Administrative Conference of the United States (ACUS), Congress seems to be shepherding the DoD to take a different perspective on bid protests. Specifically, Congress now seems to point the DoD away from considering bid protests as causes of risk, toward considering them as a means of risk management with an agency-level bid protest program as the risk management tool. The Army Materiel Command’s (AMC) agency-level bid protest program would be the DoD’s best model to develop a central agency-level bid protest program or to standardize the service programs within its purview, as many of the recommended reforms included in the ACUS report are fully or partially in practice (and those partially in practice can be fully implemented rather easily).

In an effort to explain why and how the DoD can use an agency-level bid protest program as a risk management tool, this article (1) describes the DoD’s current position that bid protest abuses at the GAO are causing increased program performance risk and the history behind Congress’s enactment of the “loser pays” bid protest pilot program to help the DoD manage this risk; (2) explains how data in a recently published RAND study suggests that the DoD’s concerns regarding bid protest abuse at the GAO may not be completely supported and, therefore, likely changed Congress’s view towards bid protests as a cause of the DoD’s risk; (3) explains the likely reasons Congress seems to be shepherding the DoD to consider a bid protest program as a risk management tool in its leading inquiries for the Acquisition Innovation and Research Center (AIRC); (4) explains how Congress’s endorsement of the ACUS report on agency-level bid protest reforms signals to the DoD that it thinks an agency-level bid protest program would be an effective risk management tool; and (5) suggests that the AMC’s agency-level bid protest program would be an effective model for the DoD to use as a risk management tool because many of the ACUS report recommendations are fully or partially in practice.

II. The Department of Defense's Recent Efforts at Program Performance Risk Management Are Intently Focused on Practices It Considers as Abuses in the Bid Protest Process at the GAO

For years, the DoD has intently focused on practices it considers abuses of the GAO's bid protest system instead of its true concern: the bigger picture of managing its program performance risk. Before discussing why the DoD sees the bid protest process at the GAO as an end—rather than a means to an end—an explanation of a bid protest and a Competition in Contracting Act (CICA) stay of award/performance is necessary. The term “bid protest” refers to the written objection by an interested party over a solicitation or award of a contract by the Federal Government.⁴ Currently, three fora are available to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are the Federal agency soliciting the requirement, the Court of Federal Claims (COFC), and the GAO.⁵ Of these fora, the GAO hears the majority of reported bid protests,⁶ likely due to two unique characteristics of a GAO protest: the 100-day decision and the CICA automatic statutory stay of contract award/performance.⁷ The CICA automatic statutory stay of contract award/performance prevents the Government from awarding a contract or proceeding to perform a contract after a party has timely filed a bid protest at the GAO.⁸

The DoD's concerns in the bid protest process, specifically the CICA stay at the GAO, have been issues of controversy in both industry and the DoD for years.⁹ Nonetheless, the DoD—and, until recently, Congress—

⁴ See FAR 33.101 (2019).

⁵ See *id.* 33.103–105; Major James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 611 (2014).

⁶ ANDREW E. SHIPLEY ET AL., *BID PROTESTS: A GUIDE TO CHALLENGING FEDERAL PROCUREMENTS* 14 (2021).

⁷ See Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175; 31 U.S.C. § 3553(c)–(d); FAR 33.104(b)–(c), (f).

⁸ See 31 U.S.C. § 3553(d); FAR 33.104(b)–(c).

⁹ See Marcia G. Madsen et al., *Independent Review of Procurements Is Worth It: There Is No Support for Hamstringing the GAO Bid Protest Process*, 19 FEDERALIST SOC'Y REV. 4, 7 (2018); see also Mila Jasper, *Microsoft President Calls for Bid Protest Reforms*, NEXTGOV (Feb. 23, 2021), <https://www.nextgov.com/cio-briefing/2021/02/microsoft-president-calls-bid-protest-reforms/172248> (statement of Brad Smith, President of Microsoft) (“We all want to ensure fairness, and that includes a fair right to be heard. But we could definitely benefit from an accelerated timeline to do so.”).

especially seems to focus on its concerns with the bid protest process (and arguably bid protests in general) as a major cause of program performance risk.¹⁰ While there are likely many variations of the DoD's concerns as to the bid protest process at the GAO, some of the most prevalent are that (1) generally bid protests at the GAO unreasonably slow down or inhibit the DoD's ability to meet operational or mission needs across the board, (2) there is an increasing amount of frivolous bid protests (i.e., challenges without merit) at the GAO that slow down or inhibit the DoD's ability to meet operational or mission needs, and (3) incumbent contractors file task order bid protests at the GAO as a matter of course—instead of for a valid basis—in order to secure a bridge contract while the procurement is under a CICA stay.¹¹

To combat these practices the DoD considers abuses, Congress has made efforts (albeit in an incongruent fashion) to help the DoD manage its program performance risk in recent years. In 2016, Congress directed the RAND Corporation to conduct a study to “inform Congress and U.S. defense leaders about the effectiveness of current procurement policies and processes to reduce bid protests” in section 885 of the fiscal year 2017 NDAA.¹² The RAND study was likely a deliberate attempt by Congress to determine whether the DoD's concerns in the bid protest process were truly a cause of increased program performance risk for the DoD. In section 827

¹⁰ As used in this article, “program performance risk” means all risk a program faces during its lifetime in delivering the object of the program on time, within budget, and which performs as intended. *See generally* OFF. OF THE DEPUTY ASSISTANT SEC’Y OF DEF. FOR SYS. ENG’G, DEP’T OF DEF., RISK, ISSUE, AND OPPORTUNITY MANAGEMENT GUIDE FOR DEFENSE ACQUISITION PROGRAMS 3 (2017) (“*Risks* are potential future events or conditions that may have a negative effect on achieving program objectives for cost, schedule, and performance.”). It also includes risk that is specifically and generally applicable to the procurement system that effects the risk outlined above.

¹¹ *See generally* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885, 130 Stat. 2000, 2319 (2016); Memorandum from Acting Under Sec’y of Def. for Acquisition, Tech. & Logistics, to Sec’ys of the Mil. Dep’ts et al. (Aug. 24, 2007) [hereinafter Young Memo] (“[P]rotests [sic] actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability; strain relations with our industry partners and stakeholders; and create misperceptions among American citizens.”); *see also* RAND STUDY, *supra* note 3, at 17 (“[S]ome [Department of Defense (DoD)] contracting officers indicated that they were concerned that a bid protest would delay their ability to meet program contracting milestones and risk program funding reductions if they could not meet obligation and expenditure benchmarks.”).

¹² RAND STUDY, *supra* note 3, at iii. *See* Steven L. Schooner, *Bid Protests: The RAND Study of DoD Protests at the GAO and the COFC*, 32 NASH & CIBINIC REP. 26, 27 (2018).

of the fiscal year 2018 NDAA, however, Congress summarily (and abruptly) imposed what was essentially a “loser pays” provision before the RAND study was completed and delivered. The rushed nature of the addition of this provision suggested that Congress was no longer interested in analyzing whether the DoD’s concerns regarding the bid protest process at the GAO were actually a cause of the DoD’s program performance risk problem; rather, Congress summarily decided they were. The background and construct of these efforts provide context for what Congress is likely suggesting the DoD do to manage risk as the “loser pays” provision has been repealed.

A. The Department of Defense’s Risk Problem and the Origins of the RAND Study

For the past couple of years, certain members of Congress and the DoD have primarily maintained that “frivolous or unnecessary bid protests are impairing the procurement process,” thereby unnecessarily delaying the delivery of critical capabilities within the DoD.¹³ While some of these individuals have gone as far as to argue all bid protests are “extremely detrimental” to the DoD’s mission, most allege that the unreasonable delay in capability delivery ostensibly stems from these “unwarranted” or frivolous bid protests at the GAO.¹⁴ These individuals believe that these “frivolous” bid protests at the GAO significantly slow the DoD’s ability procure new weapon systems and services because of the CICA stay.¹⁵

Most of the program performance risk concerns these individuals have seem to originate from their belief that large defense contractors—usually incumbents—file bid protests at the GAO as a matter of course when they fail to receive a contract award in order to trigger the CICA automatic statutory stay.¹⁶ In other words, these contractors are believed to file bid

¹³ See Madsen et al., *supra* note 9; William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 489–91 (1995).

¹⁴ Daniel H. Ramish, *Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function*, 48 PUB. CONT. L.J. 35, 53 (2018) (citing Young Memo, *supra* note 11); Madsen et al., *supra* note 9, at 4–5.

¹⁵ Madsen et al., *supra* note 9, at 4, 7, 11.

¹⁶ E.g., Ramish, *supra* note 14; Christian Davenport, *Senate Proposes Measure to Curb Protests over Pentagon Contract Awards*, WASH. POST (Oct. 8, 2017), <https://www.washingtonpost.com/business/economy/senate-proposes-measure-to-curb-protests->

protests at the GAO for illegitimate business reasons, such as to continue to work a requirement during the pendency of the CICA stay or to simply frustrate the award of a contract to a competitor, regardless of whether there is a valid basis for a bid protest, thereby slowing the DoD's procurement process, needlessly delaying capability delivery, and increasing actual and transactional costs to the DoD.¹⁷

In the 2016 legislative cycle, the Senate Armed Services Committee considered adding a “loser pays” provision to the NDAA for fiscal year 2017 that would change the GAO's bid protest process to indirectly help the DoD manage this specific concern, which the DoD contended increased its program performance risk.¹⁸ This “loser pays” provision would have required “a large contractor filing a bid protest on a defense contract with GAO to cover the cost of processing the protest if all of the elements in the protest are denied in an opinion issued by GAO.”¹⁹ However, this attempt to add a “loser pays” provision failed in the committee; instead, Congress created a requirement for “an independent research entity . . . with appropriate expertise and analytic capability to carry out a comprehensive study on the prevalence and impact of bid protests on [DoD] acquisitions”²⁰ Congress required this study, which became the RAND study, to cover, among other things:

[T]he extent and manner in which the bid protest system affects or is perceived to affect [various aspects of the procurement process];

. . . .

A description of trends in the number of bid protests filed, . . . the effectiveness of each forum for contracts and task or delivery orders, and the rate of such bid protests

over-pentagon-contract-awards/2017/10/08/9cf61060-a842-11e7-b3aa-c0e2e1d41e38_story.html (“The big five defense contractors file a bid protest on autopilot whenever they lose. And this is targeted to help curb that behavior”).

¹⁷ See Madsen et al., *supra* note 9, at 11.

¹⁸ S. REP. NO. 114-255, at 211 (2016).

¹⁹ *Id.*

²⁰ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 885(a), 130 Stat. 2000, 2319 (2016).

compared to contract obligations and the number of contracts[; and]

An analysis of bid protests filed by incumbent contractors, including (A) the rate at which such protesters are awarded bridge contracts or contract extensions over the period that the protest remains unresolved; and (B) an assessment of the cost and schedule impact of successful and unsuccessful bid protests filed by incumbent contractors on [some] contracts²¹

However, before RAND completed its study and presented it to Congress on 21 December 2017, a new “loser pays” pilot program provision was added to section 827 of the fiscal year 2018 NDAA.²²

B. The Section 827 “Loser Pays” Pilot Program

To help the DoD manage its risk, Congress ultimately decided merely to give the DoD a tool to manage its concern that incumbent contractors are abusing the bid protest process at the GAO. In the 2018 legislative cycle, Congress seemingly disregarded the fact that it had recently asked RAND to evaluate the DoD’s concerns regarding abuses of the GAO bid protest process and decided to add a “loser pays” provision to deter what it thought were abusive or frivolous bid protests.²³ As an initial matter, the GAO had warned Congress in the past that a process to determine whether a bid protest was frivolous would be administratively burdensome and would add substantial costs and delay to the protest process.²⁴ Nevertheless, among other considered changes, Congress directed the DoD to craft a pilot program that required large defense contractors that completely lost in their bid protest challenges to reimburse the DoD for costs incurred in litigating

²¹ *Id.* § 885(b).

²² See Madsen et al., *supra* note 9, at 7–8; National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017).

²³ See Madsen et al., *supra* note 9, at 5.

²⁴ U.S. GOV’T ACCOUNTABILITY OFF., B-401197, REPORT TO CONGRESS ON BID PROTESTS INVOLVING DEFENSE PROCUREMENTS 2 (2009) (“[M]aking . . . a determination [that a bid protest is “frivolous”] could add substantial costs to the protest process and have unintended consequences . . .”).

the protest at the GAO.²⁵ This “loser pays” provision was designed to dissuade this perceived automatic (and thus frivolous) bid protest filing practice by the large defense contractors.²⁶

In this most recent “loser pays” provision, found in section 827 of the NDAA for fiscal year 2018, Congress required the DoD to “carry out a pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests.”²⁷ Additionally, Congress directed the DoD to confine this pilot program to bid protests filed at the GAO between 2 October 2019 and 30 September 2022 by parties with revenues in excess of \$250 million the previous year.²⁸

Interestingly, the pilot program’s omissions suggest that the provision might have been rushed and not fully considered. Specifically, it ignored those protests filed at a DoD agency, one of its subordinate military services, or the COFC.²⁹ The pilot program also failed to mention key definitions, such as what costs the DoD could recover should the case arise.³⁰ The hasty addition of this pilot program during the RAND study suggests that Congress may have wanted an easy win by developing something it thought the DoD could use for risk management immediately instead of waiting to craft a long-term and deliberate risk management tool for the DoD that is informed by the RAND study’s results.³¹

By directing the Secretary of Defense to establish this “loser pays” pilot program risk management tool first and subsequently requiring the DoD to produce another report that merely assessed “the feasibility of making permanent [the “loser pays” provision],”³² Congress seemed to be losing sight of its goal: to determine what was truly the cause of the DoD’s program

²⁵ National Defense Authorization Act for Fiscal Year 2018 § 827.

²⁶ See Ramish, *supra* note 14.

²⁷ National Defense Authorization Act for Fiscal Year 2018 § 827(a).

²⁸ *Id.* § 827(d).

²⁹ See generally H.R. REP. NO. 115-404, at 872 (2017) (Conf. Rep.) (focusing solely on protests at the GAO).

³⁰ See Ramish, *supra* note 14.

³¹ See Madsen et al., *supra* note 9, at 4–5 (“At the time Section 827 was proposed and enacted, there was relatively little data on bid protests. . . . There was no data supporting the notion that protests of large acquisitions are hampering procurement efforts . . .”).

³² National Defense Authorization Act for Fiscal Year 2018 § 827(c).

performance risk and to help the DoD manage it. Therefore, it seemed that enactment of the section 827 bid protest pilot program would render the RAND study moot. However, after taking the time to consider the results of the RAND study—and likely industry’s objections to the “loser pays” provision³³—Congress again took drastic action by repealing the bid protest pilot program.

III. A House of Cards Falls—The Likely Effect of the RAND Study on the Section 827 Bid Protest Pilot Program and Congress’s Perception of the Department of Defense’s Risk

The RAND study was likely the impetus behind the repeal of the section 827 “loser pays” bid protest pilot program and Congress’s seeming shift in its view of the effect bid protests have on the DoD’s program performance risk. This is because the RAND study demonstrated that the DoD’s focus on bid protests at the GAO as a major cause of its risk may be misplaced, as the data did not support many of its concerns.

First, RAND found that bid protests at the GAO are not as ubiquitously detrimental to the DoD’s capability delivery as the DoD considered because bid protests are rare. Second, RAND found that the DoD’s low rate of CICA stay overrides was not consistent with the DoD’s assertion that there is an overabundance of “frivolous” bid protests at the GAO. Third, though many incumbents do file bid protests at the GAO, the DoD’s effectiveness rate suggest that those protests are largely filed on meritorious grounds rather than to secure a bridge contract or simply frustrate a competitor. Finally, the DoD did not have the supporting data in four key areas to determine whether bid protests in general—or even just “frivolous” ones—are needlessly increasing its program performance risk. Consequently, likely because of the RAND study, Congress repealed the section 827 “loser pays” bid protest pilot program.

Insofar as the DoD considers they are detrimental to overall capability delivery at the macro level, RAND discovered that bid protests of DoD

³³ *E.g.*, Madsen et al., *supra* note 9; Ramish, *supra* note 14 (“In short, the loser pays provision will not penalize frivolous protests, may deter worthwhile protests, and could actually result in greater cost and delay if it drives large defense contractors to file their bid protests at the Court of Federal Claims.”).

procurements are rare. In its study, RAND evaluated bid protest data at the GAO and the COFC from fiscal year 2008 to fiscal year 2016.³⁴ During this period, the number of procurements the DoD conducted that were protested at the GAO or the COFC was very low.³⁵ Specifically, in raw numbers covering both pre-award and post-award bid protests of DoD procurements, 11,459 bid protests were filed at the GAO and 475 were filed at the COFC.³⁶ While these bid protest numbers seem significant, they amounted to less than 0.3% of all DoD procurements, leading RAND to conclude that bid protests at both the GAO and the COFC are “exceedingly uncommon for DoD procurements.”³⁷ This finding suggested that insofar as the DoD considers bid protests at the GAO as inhibiting its capability delivery—and therefore are needlessly increasing its program performance risk—it is not done systematically, as some officials suggest.³⁸ Therefore, the DoD’s assertion that bid protests in general are increasing its program performance risk at the macro level is likely misplaced.

Next, insofar as the DoD considers frivolous individual bid protests as needlessly inhibiting capability delivery and increasing actual and transactional costs, its uses of CICA stay overrides are rare, which does not support its concern. RAND found that the DoD infrequently issues CICA stay overrides for protests filed at the GAO.³⁹ A CICA stay override is a process in which an agency may decide to continue with the award or performance of a contract that has been timely protested at the GAO.⁴⁰ To justify an override, an agency must make a determination that “urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the [GAO],” or that “performance of the contract is in the best interests of the United States.”⁴¹

Here, if individual frivolous bid protests were needlessly inhibiting the DoD’s vital capabilities or increasing its program performance risk such that Congress needed to act, one would presume that the DoD would use this

³⁴ See RAND STUDY, *supra* note 3, at xv tbl.S.1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 26.

³⁸ See Young Memo, *supra* note 11.

³⁹ See RAND STUDY, *supra* note 3, at 32.

⁴⁰ 31 U.S.C. § 3553(c)(2)(A), (d)(3)(C).

⁴¹ *Id.* § 3553(d)(3)(C)(i); see FAR 33.104(a), (c) (2019).

authority more often.⁴² However, RAND found that the DoD issues a CICA stay override only in 1.5% to 2% of procurements protested at the GAO.⁴³ While the RAND study posited various other questions policymakers within the DoD should consider as to the reason the CICA stay override rate was so low, the low rate is still significant in this context.⁴⁴ Specifically, the rate seems to suggest that it is not apparent on its face that the DoD is actually experiencing substantial amounts of frivolous bid protests at the GAO. Therefore, the facts do not support the assertion that individual frivolous bid protests are needlessly inhibiting capability delivery and increasing costs.

Further, the bid protest effectiveness rates suggest that recent increases in bid protest numbers for the DoD—as well as the higher amount of incumbent contractor task order protests—are due not to frivolous purposes but rather to protesters’ legitimate business decisions.⁴⁵ As an initial matter, RAND noted how the GAO tracks protesters’ success through its sustained and effectiveness rates.⁴⁶ The sustained rate “is the number of actions for which GAO sustains the protester’s claim divided by the number of protest actions that go to decision.”⁴⁷ In contrast, “[t]he effectiveness rate is the number of protest actions that are either sustained or are subject to corrective action relative to all protest actions.”⁴⁸ An agency’s voluntary action to fix a flaw in the procurement before the GAO issued a decision is “corrective action.”⁴⁹

In its analysis of the data from fiscal year 2008 to fiscal year 2016, RAND found that the sustained rate, or the rate capturing the percentage of cases where the protester wins, was very low: 2.6% of all cases and 12.2%

⁴² See RAND STUDY, *supra* note 3, at 32.

⁴³ *Id.* tbl.4.3.

⁴⁴ *Id.*

⁴⁵ See generally Schooner, *supra* note 12, at 29.

⁴⁶ See RAND STUDY, *supra* note 3, at 24.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 21, 24. Corrective action can also occur because of a sustained GAO decision. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 27 (2018) [hereinafter GAO DESCRIPTIVE GUIDE].

for cases that went to a merits decision.⁵⁰ At first blush, these sustained rates would seem to suggest that many bid protests are frivolous, and there is evidence to support such an assertion because protesters are losing at such a high rate: 97.4% and 87.8%, respectively.⁵¹ However, when RAND combined the sustained cases with those that resulted in corrective action, it found that over that same period, 40% of all bid protest actions in the DoD consistently resulted in some change to the “initial procurement decision or terms.”⁵² In other words, RAND discovered that the effectiveness rate of bid protests of DoD procurements from fiscal years 2008 to 2016 was stable at about 40%. The stability of the effectiveness rate seems to refute—insofar as the DoD has experienced increases in amounts of bid protests at the GAO during this timeframe—the DoD’s concerns that those increases were a result of frivolous bid protests.⁵³ That is because if those increases were due to frivolous or baseless bid protest grounds, the effectiveness rate would have decreased, which was not the case.⁵⁴

Additionally, the data does not support the DoD’s concern that incumbent contractors—that are not the anticipated awardees on follow-on task order procurements—file bid protests merely to cause a CICA stay to trigger a bridge contract or to simply frustrate their competitors’ business prospects.⁵⁵ Though RAND found that one quarter of task order bid protest actions were associated with an incumbent and that “incumbents are more likely to protest task orders when it may be to their economic advantage if they get a bridge contract during the CICA stay,” incumbent contractors are also more likely to file bid protests for legitimate business reasons.⁵⁶ In making this assessment, RAND pointed to the 70% effectiveness rate of

⁵⁰ RAND STUDY, *supra* note 3, at 32 tbl.4.3; *see generally* 4 C.F.R. § 21.5 (2019) (implying a merits decision at the GAO is one where the GAO reaches a conclusion on the substance of a protester’s bid protest grounds).

⁵¹ RAND STUDY, *supra* note 3, at 32 tbl.4.3.

⁵² *Id.* at 32.

⁵³ *Id.* at 33.

⁵⁴ *Id.*

⁵⁵ *See generally id.* at 66; Richard B. Oliver & David B. Dixon, *Changes for Bid Protests in FY 2018 NDAA*, PILLSBURY (Nov. 16, 2017), <https://www.pillsburylaw.com/en/news-and-insights/changes-bid-protest-2018-ndaa.html> (noting that the GAO task order bid protest threshold changed—and therefore limited the amount of bid protests that could be brought and analyzed—during the timeframe the data for the study was collected from \$10 million to \$25 million for the DoD).

⁵⁶ RAND STUDY, *supra* note 3, at 60; *see* Schooner, *supra* note 12, at 29.

incumbent contractors that file bid protests on DoD task orders at the GAO.⁵⁷ This effectiveness rate was “much higher than average and statistically significant,” as it demonstrated that “while incumbents may protest task orders more frequently, [they] are also much more likely to be successful.”⁵⁸ As a result, RAND found that the data did not support the DoD’s concern that incumbent contractors’ protests are disproportionately frivolous.⁵⁹

Finally, the DoD could not actually determine whether frivolous bid protests or bid protests generally at the GAO were needlessly increasing its program performance risk because of the lack of data in four areas that the DoD generally considers to affect its procurements. When Congress selected RAND to conduct the study in the NDAA for fiscal year 2017, it set out fourteen elements to evaluate.⁶⁰ These elements were generally considered to encompass “aspects of how the bid protest system affects or is perceived to affect DoD procurements, trends in bid protests, and differences in procurement characteristics.”⁶¹ In other words, those fourteen elements constituted what Congress believed the DoD considered the underlying reasons that all, or just frivolous, bid protests at the GAO were needlessly increasing its program performance risk.

After completing its study, though, RAND found that there was insufficient data on four of the DoD’s concerns to even address them.⁶² These four elements were the effects of protests on procurements, the time and cost to the Government to handle protests, the frequency with which a protester is awarded the disputed contract, and agency-level bid protest trends.⁶³ Without fully analyzing these four key elements, the DoD could not actually determine whether its concerns regarding the effect bid protests at the GAO have on its program performance risk are genuine.⁶⁴

⁵⁷ RAND STUDY, *supra* note 3, at 60.

⁵⁸ *Id.*

⁵⁹ See Schooner, *supra* note 12, at 29.

⁶⁰ RAND STUDY, *supra* note 3, at xii.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See generally Young Memo, *supra* note 11 (implying that the RAND study was unable to assess due to lack of data).

Ultimately, Congress repealed the section 827 bid protest pilot program in section 886 of the fiscal year 2021 NDAA.⁶⁵ While Congress pointed to the small pool size of “bid protests captured by the pilot criteria and lack of cost data” as the reason for the repeal, it is likely that Congress’s decision was based on *post hoc* consideration of the results of the available data the RAND study discusses, as well as the lack of meaningful data in the four key areas.⁶⁶ Nonetheless, while likely lauded by industry, the RAND study and the repeal of the section 827 “loser pays” bid protest pilot program did leave the DoD still in need of a way to manage or assess what is actually causing its program performance risk. However, Congress may have tipped its hand in section 886 as to what it thinks the DoD can use to make the assessment and how it can manage any risk it finds: the agency-level bid protest.

IV. Congress’s Signals and Department of Defense Program Performance Risk Management—Does the ACUS Report on Agency-Level Bid Protests Provide the Roadmap for a Replacement Risk Management Solution for the Department of Defense?

In section 886 of the fiscal year 2021 NDAA, Congress likely signaled that it thinks a type of agency-level bid protest program is the solution to the DoD’s program performance risk management problem. First, potentially inspired by the work of Mr. Dan Gordon, Congress seems to be leading the DoD to the reason it should consider using a bid protest program as a risk management tool and not as a cause of risk in the inquiries it required AIRC to examine. Second, through its direction to the DoD that it should consider the ACUS’s recommendations on agency-level bid protest reform, Congress seems to suggest that the DoD can manage its program performance risk with a modified agency-level bid protest program. In any event, the “congressional perspective” pendulum seems to be swinging back towards viewing bid protests as a solution to, instead of a cause of, risk.

⁶⁵ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, sec. 886, § 827, 134 Stat. 3387, 3791.

⁶⁶ *Id.*; see ACQUISITION REFORM WORKING GRP., 2018 LEGISLATIVE PACKET 24 (2018) (covering a combination of industry’s recommendations relating to the “loser pays” provision based on the RAND study).

As a threshold matter, Congress repealed the section 827 “loser pays” bid protest pilot program in section 886 of the fiscal year 2021 NDAA.⁶⁷ In its place, Congress only posited more questions, which, on its face, has left a risk management tool vacuum for the DoD where the “loser pays” provision once stood. However, through those questions, Congress may be signaling what it thinks would be a pathway to filling that vacuum. Specifically, in the conference report to section 886 of the fiscal year 2021 NDAA, Congress directed the Secretary of Defense “to undertake a study through the [AIRC], to examine elements of Section 885 of the National Defense Authorization Act for Fiscal Year 2018 . . . for which [RAND] was unable to obtain full and complete data during its analysis.”⁶⁸

This new study, the purpose of which is styled as filling the information gaps in the earlier RAND study, is interesting not for what it specifically directs AIRC to investigate, but for the implicit recommendation and explicit direction it provides to the DoD. For example, Congress also directed AIRC to examine the “potential benefits of a robust agency-level bid protest process.”⁶⁹ This is interesting for two reasons. First, most of the questions Congress posited in furtherance of this direction seem to be inspired by the work of Mr. Daniel I. Gordon, a prominent Government procurement scholar and practitioner who, in a rather famous article, explained the key decisions all governments must make if they want an effective bid protest system.⁷⁰ If Congress was indeed inspired by Mr. Gordon’s work in its construction of the AIRC inquiries in section 886, this suggests Congress is changing its perspective on bid protests as they relate to the DoD’s program performance risk. In other words, Congress seems to now want the DoD to consider viewing bid protests as a means to manage—not as a cause of—risk. Second, because Congress is also explicitly directing the DoD to consider reforming its agency-level bid protest programs in section 886, it seems to further signal the DoD to consider the use of agency-

⁶⁷ See discussion *supra* Part III.

⁶⁸ See H.R. REP. NO. 116-617, at 1708 (2020) (Conf. Rep.).

⁶⁹ *Id.*

⁷⁰ See generally Daniel I. Gordon, *Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427 (2006).

level bid protest programs as the risk management tool that will fill the gap left by the repeal of the section 821 “loser pays” bid protest pilot program.⁷¹

A. Congress’s Leading Questions to the Acquisition Innovation and Research Center: “Why” the Department of Defense Should Consider Using Bid Protests as a Risk Management Tool

Apparently inspired by an earlier work by Mr. Daniel Gordon, Congress appears to be signaling why it thinks the DoD should consider the use of bid protests as a program performance risk management tool instead of viewing them as a cause of risk. Among other things, in the conference report on section 886 in the fiscal year 2021 NDAA, Congress directed AIRC to examine the “prevalence, timeliness, outcomes, availability, and reliability of data on protest activities; consistency of protest processes among the military Services; and any other challenges that affect the expediency of such [agency-level bid] protest processes.”⁷² However poignant these AIRC inquires may be, Congress failed to define what it meant by those terms,⁷³ thus seemingly leaving up to AIRC the scope of these inquires. Interestingly, however, most of these AIRC inquires seem to be remarkably similar to the common bid protest forum considerations across government procurement systems that Mr. Gordon, former Administrator for Federal Procurement Policy,⁷⁴ examined in a well-known paper.⁷⁵

In his paper, Mr. Gordon outlines various key decisions governments must make regarding bid protest fora.⁷⁶ While not the primary purpose of the paper, he ostensibly details “why” these fora can be used to manage procurement system risk and by extension program performance risk.⁷⁷ As

⁷¹ See H.R. REP. NO. 116-617, at 1708; see generally CHRISTOPHER YUKINS, STEPPING STONES TO REFORM: MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE FOR AGENCIES AND BIDDERS BY BUILDING ON BEST PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT (2020) [hereinafter ACUS REPORT].

⁷² H.R. REP. NO. 116-617, at 1708.

⁷³ See generally *id.*

⁷⁴ Daniel I. Gordon, OFF. OF MGMT. & BUDGET, https://obamawhitehouse.archives.gov/omb/procurement_bio_gordon (last visited Dec. 20, 2021).

⁷⁵ Gordon, *supra* note 70.

⁷⁶ See generally *id.*

⁷⁷ See generally *id.* (explaining the positive and negative effects each of the key decisions governments make regarding the bid protest system have on a procurement system).

an initial matter, Mr. Gordon posits that overarching all of the key decisions he analyzes are various competing goals of every bid protest system.⁷⁸

On one side of these competing goals, Mr. Gordon suggests, are the enhancement of the accountability of procurement officials and government agencies, as well as the protection of the integrity of the procurement system.⁷⁹ On the other side of this equation is the need for the procurement system to run efficiently so that it can timely procure the goods or services that a government needs.⁸⁰ With this balancing test, Mr. Gordon essentially describes not only a government's need to keep these goals in balance, but the spectrum of how a bid protest system manages its varying types of risk. To accomplish this balance, and therefore effectively manage this risk, Mr. Gordon lays out the various key decisions any government must make regarding its bid protest fora.⁸¹ These key decisions appear to directly inspire the section 886 AIRC inquires. Therefore, Congress is apparently signaling not only to AIRC to use Mr. Gordon's analysis to inform or scope its approach to the inquires, but also to the DoD regarding its approach to bid protests and risk management.

First, the key decision on a "bid protest forum's jurisdiction," or the AIRC inquiry on bid protest "prevalence." In his paper, Mr. Gordon asserts, among other things, that a bid protest forum that has jurisdiction over the challenges to all procurements by an agency it covers "may facilitate uniformity in the system's procurement[s]," which will therefore ensure transparency over all of an agency's procurements.⁸² Mr. Gordon does not suggest that the benefit of this transparency is limited to the public but also includes agency decision-makers. As such, he seems to suggest that an expansive view of a bid protest forum's jurisdiction, which includes all of an agency's procurements, provides oversight and accountability over an agency's procurements. In other words, from a risk management perspective, he suggests that agency management could potentially use this transparency brought on by an expansive view on bid protests with data to

⁷⁸ *Id.* at 429.

⁷⁹ *Id.* at 429–30.

⁸⁰ *See id.* at 430.

⁸¹ *Id.* at 432.

⁸² *See id.* at 433–34.

identify issues and trends to better manage an agency's procurement system and its program performance risk.⁸³

Second, the key decision on a "bid protest forum's time limits," or the AIRC inquiry on bid protest "timeliness." Here, Mr. Gordon suggests that affixing a time limit for bid protests—especially in cases where a stay of award/performance is available—helps agency leadership manage risk because it informs the agency players in a procurement system that there is a limit to "how long the forum will take to decide the [protest]."⁸⁴ The agency can program this time limit into an acquisition planning timeline to account for the potential of a bid protest without causing an unplanned delay.⁸⁵ In other words, Mr. Gordon suggests that this could help to manage program performance risk by providing a means for an agency to backwards plan and to prepare for a bid protest that reduces or eliminates "surprise" delay lengths brought on by flexible bid protest fora timelines to decision.⁸⁶

Third, the key decision on a "bid protest forum's outcomes," or the AIRC inquiry as to a bid protest forum's "ability to provide meaningful relief." While this section of Mr. Gordon's paper primarily explains the benefit a protester could receive insofar as it is successful at a bid protest, what is important from a risk management perspective is how an agency determines success.⁸⁷ Specifically, as Mr. Gordon notes, is that meaningful relief must at a minimum be an opportunity for a contractor (protester) to compete for a contract in a situation where the Government has made some error in the procurement process.⁸⁸

In other words, this minimal meaningful relief serves to facilitate the management of an agency's program performance risk because the grant of

⁸³ See ACUS REPORT, *supra* note 71, at 26 (suggesting expanded agency-level bid protest jurisdiction ensures oversight and accountability and therefore manages an agency's program performance risk when using new procurement methods).

⁸⁴ See Gordon, *supra* note 70, at 438. The term "players" in this context includes contracting officials, agency legal counsel, and agency program/requiring activity decision-makers.

⁸⁵ Interview with Jessica Mayeaux, Cont. Specialist, U.S. Dep't of Def., in Burke, Va. (Mar. 19, 2021) (providing that some period of time can be included in an acquisition timeline to account for bid protests and, to some extent, some agencies already do so).

⁸⁶ See RAND STUDY, *supra* note 3, at 53 (providing that the Court of Federal Claims bid protest timeline to decision is flexible and varied greatly, with an average of 133 days and a median of 87 days); see also Interview with Jessica Mayeaux, *supra* note 85.

⁸⁷ See Gordon, *supra* note 70, at 442–43.

⁸⁸ *Id.* at 443.

relief itself to a protester signals to agency personnel that the integrity of the procurement process has been violated and changes is required to ensure the agency gets its supply/service at the best value to the agency.⁸⁹ Therefore, such a grant of relief upfront during the competition phase of a procurement arguably helps to manage risk by saving an agency time and additional costs in the long term by correcting certain situations such as the use ambiguous terms in a solicitation that could prevent the Government from ultimately getting what it wants, or making an award to a contractor that will deliver sub-optimal supplies or services.⁹⁰ This “meaningful relief”—or corrective action—provides an agency the mechanism to identify and correct errors at a lower actual and transactional cost than would be incurred if a flawed procurement were allowed to continue.

Fourth, the key decision of “standing to protest,” or the AIRC inquiry as to a bid protests forum’s “availability.” In this part of his paper, Mr. Gordon explains that if a bid protest helps to protect the integrity of the procurement process—and, by extension, helps to manage an agency’s program performance risk—standing to protest should be expansive.⁹¹ However, he also implies that such an expansive view may be too disruptive to the procurement process; thus, by providing standing to an aggrieved vendor as it is generally now throughout the U.S. bid protest system—also known as the “interested party” standard—“has logic to it” and provides balance.⁹² A bid protest forum that establishes a minimum level of standing at an actual aggrieved vendor that is flexible and could change as the procurement system changes and evolves serves to also facilitate the management of program performance risk for an agency. This is because as an agency develops new and inventive ways to procure supplies and services, the interested parties will likely also change; therefore, ensuring

⁸⁹ Steven L. Schooner, *Protests Protect Procurement System (Part 2)*, FCW (Mar. 7, 1999), <https://fcw.com/articles/1999/03/07/protests-protect-procurement-system-part-2.aspx>.

⁹⁰ See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 694 (2001).

⁹¹ See Gordon, *supra* note 70, at 435 (defining “standing” generally as having the right to call on the bid protest forum for investigation and relief).

⁹² *Id.*; FAR 33.101 (2019) (defining 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). See also FAR 33.103(d)(2)(vii); 4 CFR § 21.1(a) (2019); 28 U.S.C. § 1491(b)(1) (providing the use of the interested party standard at all three bid protest fora).

a continual balance of external “private attorneys general” are reviewing procurements for errors.⁹³

Finally, the key decision on “publishing of decisions,” or the AIRC inquiry as to the “reliability of data on protests.” Without great detail, Mr. Gordon addresses the effects of publishing bid protest decisions on the procurement system in his analysis. In particular, he provides that, “[a]s a general matter, publishing [bid protest] decisions increases transparency and extends the benefits of the protest system to a wider public.”⁹⁴ In other words, what Mr. Gordon is likely alluding to are two benefits to the publishing of decisions.

First, as he has separately indicated, these bid protest decisions provide guidance to both agency and vendor legal counsel—and their clients—on the application of the procurement laws and rules to the specific facts surrounding a procurement.⁹⁵ This legal guidance facilitates the accurate development of requirements, the responsive preparation of solicitations and offers, the correct understanding of the process in which procurements are conducted, and the reduction of error and litigation instances.⁹⁶ Second, the data those decisions contain help to inform the public, industry, and even other agencies of both the effectiveness of the bid protests and error trends in both Government solicitations and vendor offers/bids/quotes.⁹⁷ Both of these benefits serve as a means to facilitate the management of an agency’s program performance risk through tracking error trends and teaching individuals how to correct the errors before they happen saving both actual and transactional cost and time for an agency.

In section 886 of the fiscal year 2021 NDAA, Congress seems to signal to the DoD that it should consider the use of bid protests as a program performance risk management tool through the leading questions it directed AIRC to investigate. By drafting the AIRC inquires similar to the key decisions that governments must consider when developing their bid protest

⁹³ See ACUS REPORT, *supra* 71, at 28; see also *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (describing the role of “private attorneys general”—or industry—in monitoring compliance with Federal procurement law).

⁹⁴ See Gordon, *supra* note 70, at 443.

⁹⁵ See Dan Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 444–45 (2013).

⁹⁶ See Ross L. Crown, *Legal Insights: What Bid Protests Can Teach Us About Preparing Better Contract Proposals*, PACA PULSE, Winter 2018, at 1.

⁹⁷ ACUS REPORT, *supra* 71, at 51.

fora as discussed by Mr. Gordon, Congress seems to break from the DoD regarding its view on bid protests and shift toward a view that Congress is part of a risk management solution. Nevertheless, Congress does not stop there. Through its endorsement of the ACUS report, it also seems to tip its hand as to which bid protest forum it thinks the DoD should use to manage risk: agency-level bid protests.

B. Congress is Signaling to the Department of Defense “How” It Can Use Agency-Level Bid Protests as a Risk Management Solution

In section 886 of the fiscal year 2021 NDAA, Congress also seems to suggest to the DoD how it can use a reformed agency-level bid protest program to help manage its risk by endorsing the ACUS report on agency-level bid protest reform and by directing the DoD to consider the recommendations contained within it.⁹⁸ At first glance, it may seem that Congress’s endorsement of the ACUS report was meant merely to suggest to the DoD ways it could improve its agency-level bid protest programs’ “expediency, timeliness, transparency, and consistency.”⁹⁹ However, the specific statutory construction of section 886 begs the question, “Why is Congress directing the DoD to examine its agency-level bid protest programs and improvements to those programs in the same section in which it is likely inferring that the DoD should consider bid protests as a risk management tool?” The likely answer is that Congress believes an agency-level bid protest program is the forum it wants the DoD to examine to develop a solution to its risk management problem.¹⁰⁰ This is not surprising, as the ACUS report incorporates and analyzes the data it collected through

⁹⁸ See H.R. REP. NO. 116-617, at 1708 (2020) (Conf. Rep.). The Administrative Conference Act established the Administrative Conference of the United States. 5 U.S.C. §§ 591–596. The Administrative Conference of the United States studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements. *Id.* § 594(1).

⁹⁹ H.R. REP. NO. 116-617, at 1708.

¹⁰⁰ See generally LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2014) (providing that the Supreme Court has generally expressed that “a statute be read as a harmonious whole whenever reasonable”).

the lens of Mr. Gordon's key elements of a bid protest system from an agency-level bid protest perspective.¹⁰¹

The ACUS report analyzed agency-level bid protest trends since the program's inception in 1995 by drawing on best practices across the Federal Government.¹⁰² The George Washington University Law School's Professor Christopher Yukins led the study, which involved interviewing a multitude of Federal agency and private vendor counsel actively involved in bid protests and focused on potential areas of bid protest reform.¹⁰³ The gravamen of the study were eight recommended reforms intended to make agency-level protests procedures "more simple, transparent, and predictable" so they can "work better for both vendors and the agencies they serve."¹⁰⁴

These recommended reforms were: (1) formalize the role of the "agency protest official" (APO); (2) clarify jurisdiction of the agency-level bid protest programs; (3) retain the connection to the GAO's "interested party" standard for standing at the agency fora; (4) clarify and standardize the decision-making process for agency-level bid protests; (5) clarify the record

¹⁰¹ See ACUS REPORT, *supra* note 71, at 15.

¹⁰² *Id.* at 5; see Christopher Yukins, *Agency-Level Bid Protests*, PUB. PROCUREMENT INT'L, <https://publicprocurementinternational.com/agency-level-bid-protests> (last visited Dec. 21, 2021).

¹⁰³ See ACUS REPORT, *supra* note 71, at 5. Professor Yukins currently serves as Co-Director of the Government Procurement Law Program at the George Washington University Law School, where he has taught classes on contract formations and performance issues in public procurement, bid protests and claims litigation, state and local procurement, anti-corruption issues, foreign contracting, procurement reform, and comparative and international law. Christopher R. Yukins, GEO. WASH. UNIV. L. SCH., https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Christopher%20Yukins_CV_2019.pdf (last visited Dec. 21, 2021). He has testified on issues of procurement reform and trade before committees of the U.S. Congress and the European Parliament, and he has spoken as a guest lecturer at institutions around the world. *Id.* He is an active member of both the Public Contract Law Section of the American Bar Association and the Procurement Roundtable, an organization of senior members of the U.S. procurement community. *Id.* He has worked on a wide array of international projects on capacity-building in procurement, and he was an advisor to the U.S. delegation to the working group on reform of the United Nations Commission on International Trade Law. *Id.*

¹⁰⁴ See Emily Bremer, *ACUS Publishing Six New Recommendations and One Statement (ACUS Update)*, YALE J. ON REGUL.: NOTICE & COMMENT (Jan. 21, 2021), <https://www.yalejreg.com/nc/acus-publishing-six-new-recommendations-and-one-statement-acus-update>; ACUS REPORT, *supra* note 71, at 5.

in which an agency-level bid protest will be decided; (6) share that record with protesters; (7) clarify when a regulatory stay of award/performance is put into place and whether it continues to any follow-on GAO protest; and (8) publish data on agency-level protest outcomes, including corrective action.¹⁰⁵ While the ACUS report was written from a reforming agency-level bid protest program perspective, the recommended reforms also provide a list of reasons “how” the DoD could successfully use an agency-level bid protest program as a program performance risk management tool.

First, the formalization of the role of an APO. In the ACUS report, Professor Yukins describes the current two-level decision structure present in most agency-level bid protest programs across the Federal Government: (1) decision at the contracting officer level or (2) decision at a higher-level official or APO.¹⁰⁶ The ACUS report found that some agency legal counsel felt that the ability to exercise oversight over bid protests—specifically regarding agency-level bid protests—at the APO level led to the identification of error trends in procurements and gives “managers and attorneys more information on problems emerging in the procurement system.”¹⁰⁷ The ACUS report goes on to note that emerging best practice among the agency-level bid protest programs shows that “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.”¹⁰⁸

This suggests that the establishment of a central DoD APO—or at least the consistent establishment of a central APO at each of the military services and activities under the DoD—would help the DoD manage its program performance risk. Specifically, the DoD could use an agency-level bid protest program as a mechanism to identify data on weaknesses in procurement techniques, management oversight, and training. The DoD could then use this data to address those weaknesses on a systematic level as opposed to simply relying on a “higher-level official” that is only one level above the procuring contracting officer to identify error trends and make corrections locally. Especially since at some contracting activities

¹⁰⁵ See ACUS REPORT, *supra* note 71, at 5.

¹⁰⁶ *Id.* at 23.

¹⁰⁷ *Id.* at 23–24.

¹⁰⁸ See *id.* at 24.

within the DoD, information is widely disseminated inconsistently, if at all, after a contracting officer agency-level bid protest.¹⁰⁹

Second, the clarification of agency-level bid protest jurisdiction. In the ACUS report, Professor Yukins describes how many Federal agencies have “taken divergent and *ad hoc* approaches to defining the scope of jurisdiction in their agency-level bid protest functions.”¹¹⁰ Specifically, he posited that because it is unclear whether new methods of procurement—such as the DoD’s recently expanded other transaction (OT) prototype authority (OTA)—will be covered by either GAO or COFC bid protest jurisdiction, agencies should “take an expansive approach to agency-level bid protest jurisdiction, to ensure oversight and accountability (and thus contain agencies’ [program performance] risks) regarding new procurement methods.”¹¹¹

Implementation of this recommendation would facilitate the management of program performance risk on those nontraditional procurement methods that would otherwise not have bid protest oversight, such as OTs. In recent years, the DoD’s use of prototyping OTs under 10 U.S.C. § 2371b has exploded, rising 715% from 2015 to 2019.¹¹² Right now, this nontraditional procurement method lacks consistent oversight, as traditional bid protest fora have limited or no jurisdiction to hear bid protests

¹⁰⁹ This assertion is based on the author’s professional experiences as Command Judge Advocate, 409th Contract Support Brigade, June 2018 to August 2020; Branch Chief, Cross Functional Team Legal Support Branch, Army Futures Command Task Force, January 2018 to June 2018; and Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency, June 2016 to January 2018 [hereinafter Professional Experiences] (finding that, in many cases, contracting officers in the Army would report results of lower-level agency-level bid protests to their supervisors and senior technical chain by briefing or using reporting tools, but that that data was not consistently disseminated within the local contracting activity, to other sister contracting activities within the Army, or at any level to sister service contracting activities as lessons learned). *But see* Interview with Senior Agency Legal Couns., U.S. Army (Mar. 17, 2021) (providing that in some contracting activities within the Army, data in the form of lessons learned are shared locally after every agency-level bid protest and that eventually some agency-level bid protest data is shared with the Army acquisition workforce through what are known as “business intelligence reports”).

¹¹⁰ *See* ACUS REPORT, *supra* note 71, at 26.

¹¹¹ *See id.*; 10 U.S.C. § 2371b. This recommendation presumes that there is a tracking system for agency-level bid protest data.

¹¹² *See* Sydney J. Freedberg Jr., *OTAs Soar & Army Leads the Way: CSIS Report*, BREAKING DEF. (Dec. 9, 2020, 4:12 PM), <https://breakingdefense.com/2020/12/otas-soar-army-leads-the-way-csis-report>.

over those actions.¹¹³ Some practitioners, such as Mr. Rick Dunn, the first General Counsel for the Defense Advanced Research Projects Agency, have proffered that clarifying that the DoD’s agency-level bid protest program(s) have jurisdiction over all types of procurements would provide the DoD some level of bid protest oversight on these OTs and other non-traditional contracting methods, and would facilitate the management of its related program performance risk.¹¹⁴ In other words, the DoD could use that oversight to collect data, track trends, and make procurement or programmatic adjustments that could prevent or reduce incidents that could increase its actual or transactional cost or delay, and thus help the DoD manage its risk.¹¹⁵

Third, protecting the “interested party” status quo. Here, in the ACUS report Professor Yukins notes that “[t]he 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.”¹¹⁶ As Mr. Gordon discusses in his paper, the concept of an “interested party,” or what amounts to standing in bid protests, provides the access for a vendor to challenge a procurement error at a bid protest forum.¹¹⁷ Professor Yukins discovered that Federal agencies, to include the DoD, generally have linked this concept to GAO or COFC decisions on “interested party” status.¹¹⁸ In other words, the concept of standing at the DoD’s agency-level bid protest programs would adjust in concert with the concept at the GAO/COFC as those fora would adjust to the U.S. procurement system.

This recommendation would facilitate the management of the DoD’s program performance risk by continuing to allow the concept of standing to evolve on par with the procurement system and future innovative procurement methods—such as OTs in the DoD or the new Electronic

¹¹³ Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018); Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019); MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).

¹¹⁴ GW Law Government Procurement Law Program, *An “Ideas Forum” on Other Transactions (OTs)*, YOUTUBE (Mar. 20, 2021), <https://youtu.be/BCoRnvMqxrY?t=3170>.

¹¹⁵ See ACUS REPORT, *supra* note 71, at 26.

¹¹⁶ *Id.* at 28.

¹¹⁷ FAR 33.101 (2019).

¹¹⁸ See ACUS REPORT, *supra* note 71, at 28.

Marketplace that the General Services Administration manages.¹¹⁹ This recommendation serves to facilitate risk management by allowing an agency-level bid protest program to effectively grow at the speed of innovation without requiring a deliberate action by the DoD and, therefore, would remain a viable risk management tool.

Fourth, clarifying the agency-level bid protest decision-making timeline and process. Under this recommendation, Professor Yukins suggests, among other things, that agencies should establish a certain and transparent timeline in which agency-level bid protests are decided.¹²⁰ To this end, he posits that agencies should adopt procedural milestones and processes similar to those established in Part 33 of the Federal Acquisition Regulation (FAR) for resolving disputes under the Contracts Disputes Act of 1978 (CDA).¹²¹ This would require the DoD to standardize its process and method for deciding bid protests and would require the APO and contracting officer to adhere to these defined timelines.¹²²

In support of his recommendation, Professor Yukins points to the opinions of various agency and venter counsel interviewed for the ACUS report. The consensus was that in framing the agency-level bid protest decision-making process as similar to the CDA dispute process, an agency would “bring certainty and legitimacy to the agency-level protest process.”¹²³ This, Professor Yukins suggests, “would encourage more vendors to use agency-level protests, which should reduce costs and disruption for agencies overall.”¹²⁴ As Professor Yukins notes, the benefit to clarifying the agency-level bid protest decision-making process not only affects protesters, but also agencies. Specifically, clarification would provide a reliable process and timeline on which the DoD could plan and program into its acquisition planning to reduce unplanned delays.¹²⁵ Further, because the agency-level bid protest process should be short—best efforts

¹¹⁹ *Id.* at 28; see Christopher R. Yukins, *U.S. Government to Award Billions of Dollars in Contracts to Open Electronic Marketplaces to Government Customers—Though Serious Questions Remain*, GOV'T CONTRACTOR, Oct. 16, 2019, at 1.

¹²⁰ ACUS REPORT, *supra* note 71, at 30.

¹²¹ *Id.* at 30, 32.

¹²² *See id.* at 32.

¹²³ *See id.* at 33.

¹²⁴ *Id.*

¹²⁵ *See* Interview with Jessica Mayeaux, *supra* note 85 (providing that some agencies in the DoD already account for bid protest delay in acquisition planning).

to achieve decision within thirty-five days of filing, which is less than half of the time the GAO has to decide a bid protest—the DoD’s overall transaction cost for the use of this risk management tool would be lower than what would be “incurred” at the GAO or the COFC.¹²⁶

While some agency counsel are hesitant to support this reform because of potential increased transactional costs related to the establishment and running of such a process, theoretically, the reform would not be overly onerous if the DoD properly staffed for it.¹²⁷ Additionally, this recommendation should not increase the agency’s transaction cost, as “[a]gencies are already required to make best efforts to deliver a [sic] ‘well-reasoned’ opinions on agency-level protests within 35 days.”¹²⁸

Fifth and sixth, the record on which the decision should be made and its disclosure to protesters. When considering these recommendations together, Professor Yukins essentially suggests that agencies formally establish what documents go into the record that the APO or contracting officer will use to arrive at the final decision and that agencies should afford protesters access to that record under what is ostensibly a protective order.¹²⁹ He provides this recommendation because, “[i]n 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.”¹³⁰

Professor Yukins posits that by establishing a consistent definition of what documents are contained in the record on which the decision will be

¹²⁶ See FAR 33.103(g)–(h) (2019); 4 C.F.R. § 21.9(a) (2019) (requiring the GAO to issue a decision on a protest within 100 days after it is filed); *Anatomy of a Protest at the U.S. Court of Federal Claims*, MORRISON & FOSTER (Apr. 10, 2017), <https://govcon.mofo.com/protests-litigation/anatomy-of-a-protest-at-the-u-s-court-of-federal-claims> (providing that timelines to decisions at the Court of Federal Claims can exceed 100 days).

¹²⁷ See Interview with Deputy Chief Couns., 409th Contracting Support Brigade (Mar. 21, 2021) (discussing that lack of personnel available to manage this process could prove too onerous and therefore the DoD would need to staff up to support this recommendation).

¹²⁸ ACUS REPORT, *supra* note 71, at 33.

¹²⁹ *Id.* at 40. The GAO and other fora use protective orders to control access to proprietary or confidential material that is disclosed during a protest that cannot be released publicly. See 4 C.F.R. § 21.3(c) (2019); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-613SP, GUIDE TO GAO PROTECTIVE ORDERS 2 (10th ed. 2019).

¹³⁰ See ACUS REPORT, *supra* note 71, at 39.

made, and by providing protesters access to that record, it would have “the practical effect of limiting the rounds of protester briefing in an agency-level protest.”¹³¹ Alternatively, to the extent the DoD would be concerned with the increased transactional cost that producing the complete record would likely create, it could provide a redacted source selection decision document in post award bid protests to the protester, which is consistent with DoD policy for enhanced debriefings.¹³²

Essentially, Professor Yukins suggests that by providing the protesters some record up front, the DoD will see less rounds in a bid protest that it would otherwise see due to newly discovered protest grounds. In general, this would save the agency time and reduce overall transactional cost, therefore, facilitating the management of program performance risk. Additionally, providing protesters access to a standardized record up front would shine a light on the shadow of suspicion that a lack of transparency casts. Frankly, this would reduce the likelihood of follow-on protests at the GAO or COFC because the protester felt the agency was hiding something.¹³³

Further, insofar as the DoD seeks the “best value” in its procurements, effectuating this recommendation would serve to help identify—quickly, as agency-level bid protests should take around thirty-five days—issues that DoD officials might have missed. By providing the “private attorneys general” a standardized record up front, the DoD could uncover issues that were not caught by either the procuring contracting personnel or, because the value of the procurement fell under a review threshold, by reviewing contracting personnel or agency counsel.¹³⁴ This early identification of issues in a procurement would serve to save the DoD time and reduce

¹³¹ *Id.* n.139.

¹³² *See generally id.* at 38; *see* Interview with Deputy Chief Couns., *supra* note 127.

¹³³ *See* ACUS REPORT, *supra* note 71, at 41 (discussing lack of transparency as the result of poor debriefings, of which agency-level protests are the “logical extension”).

¹³⁴ *E.g.*, Memorandum from Commander, 409th Contracting Support Brigade to 409th Contracting Support Brigade, subject: Legal Services Standard Operating Procedure 6 (May 10, 2017) [hereinafter 409th Legal Policy Document] (providing as an example that legal reviews are conducted on all contracting actions valued at greater than a certain dollar threshold as a matter of course); *see* Interview with Senior Agency Legal Couns., U.S. Army, *supra* note 109 (providing that bid protests can be a tool to uncover issues not caught in the acquisition process for various reasons).

transaction cost up front, as it would allow the DoD to perform corrective action quickly and minimally disturb the acquisition timeline.

Additionally, while some agency counsel have voiced concerns that this recommendation would increase transaction costs too onerously, this recommendation could be structured so it actually would not serve to incur additional transaction costs over what the DoD currently incurs. Specifically, the DoD could give protesters only three days to submit supplemental protests because of errors they find in the record, which is comparable to the peer and legal review timelines already planned into the acquisition timeline.¹³⁵

Seventh, the regulatory stay of award/performance. In the ACUS report, Professor Yukins ostensibly recommends that agencies clarify how and when they will implement a regulatory stay of award/performance.¹³⁶ He further suggests that agencies consider voluntarily extending the regulatory stay of award/performance for a period—ten days—if the protester subsequently seeks to file a bid protest on the same procurement at the GAO and promises to support a request for expedited procedures at the GAO to account for the resulting delay to the procurement.¹³⁷

His reasoning for this recommendation stems from the fact that many protester counsel interviewed for the ACUS report felt that it is consistently unclear whether an agency will stay the procurement during an agency-level bid protest.¹³⁸ Apparently, this lack of clarity pushes many potential protesters away from using the agency-level bid protest process and toward the GAO for three reasons: (1) the fear that the agency will not stay the procurement, (2) the possibility that the protester would lose the chance at a GAO CICA stay by waiting for the agency to indicate whether it will stay, and (3) the concern that the protester would lose the chance for a CICA stay during any follow-on bid protest at the GAO due to confusion as to when an “adverse agency action”—or a decision denying an agency-level bid protest

¹³⁵ See Interview with Jessica Mayeaux, *supra* note 85 (providing that some DoD agency peer and policy office reviews of procurements take between seven and thirty days). Additionally, many legal reviews can take from five to ten days to complete. See, e.g., 409th Legal Policy Document, *supra* note 134, at 4; Professional Experiences, *supra* note 109.

¹³⁶ See ACUS REPORT, *supra* note 71, at 44–46.

¹³⁷ *Id.* at 44, 46.

¹³⁸ See *id.* at 45.

in this context—is “noticed” to the protester.¹³⁹ Because of this lack of clarity on these points, many potential protesters were deciding to forgo the agency-level bid protest process entirely.¹⁴⁰

Adopting this recommendation would serve to facilitate the DoD’s risk management because it would encourage early use of the agency-level bid protest process over going directly to the GAO and would thus serve to “activate” this process as a risk management tool more frequently.¹⁴¹ If coupled with more transparent record access discussed above, this increased use of agency-level bid protest procedures would theoretically also reduce the amount of procurements that would receive follow-on protests at the GAO as a matter of course. Further, should a protester decide to file a follow-on bid protest at the GAO, if a protester promised to support a request for expedited procedures, and the GAO granted the request, the entire bid protest process would be only around 100 days, which is the traditional GAO bid protest time to decision.¹⁴²

Nonetheless, many agency counsel interviewed for the ACUS report did raise concerns about the increased transactional cost and delay that would likely result because of this extended stay.¹⁴³ Arguably, though, the overall actual and transactional cost risk to the DoD would likely be lower with an extended stay period for follow-on protests to the GAO. This is because the contracting personnel would not need to stop the procurement to stay award/performance because of an agency-level bid protest, then restart it after the decision is issued, only to stop the procurement again a couple of days later as the result of a GAO CICA stay. This process would involve additional transactional costs to the DoD and potentially actual costs should it be required to terminate the awarded contract for convenience of the Government because of a sustained bid protest decision at the GAO.

Finally, the collection and publication of data on agency-level bid protest outcomes. Here, Professor Yukins recommends, among other things, publication of an annual agency-level bid protest report similar to the

¹³⁹ *Id.* n.165.

¹⁴⁰ *See id.*

¹⁴¹ *See generally id.* at 47–48.

¹⁴² *Id.* at 48 (providing that the agency-level bid protest would take around thirty-five days, with the express option at the GAO taking an additional sixty-five days).

¹⁴³ *Id.* at 47.

GAO's annual report to Congress.¹⁴⁴ Specifically, he suggests the use of a report similar to what the U.S. Army requires its heads of the contracting activities (HCAs) prepare with data that describes the effectiveness of the agency-level bid protest program.¹⁴⁵ This data would essentially resemble the type of data that would make up the GAO's effectiveness rate.¹⁴⁶ That is, the combined numbers of sustained decisions and corrective actions compared to the overall number of bid protests filed.¹⁴⁷

The effectiveness rate in the agency-level bid protest context would ostensibly communicate how often, because of a protest, protesters successfully demonstrate that there is an error in the procurement, either the contracting officer or the APO agrees, and corrective action ultimately results.¹⁴⁸ Further, this data would communicate "an assessment of the causes of the most frequent recurring issues" that would act as a systematic lynchpin in the use of the agency-level bid protest as a risk management tool for the DoD.¹⁴⁹

Professor Yukins makes this recommendation because it "could increase the transparency of the agency-level protest system and instill more trust in vendors to use the system."¹⁵⁰ Further, this reform would also increase the use of this bid protest forum, as it would "help agency-level bid protests as a transparent and reliable channel for review."¹⁵¹ Finally, as stated above, the DoD could use this data to analyze procurement error trends, predict errors in the procurement process, and proactively address them with

¹⁴⁴ *Id.* at 51.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 50.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* at 51; Interview with Deputy Chief Couns., *supra* note 127 (discussing how one will likely never see a sustained contracting officer agency-level bid protest because of corrective action and that even an APO sustained protest would likely result in corrective action).

¹⁴⁹ *See* ACUS REPORT, *supra* note 71, at 51; E-mail from Major General Paul H. Pardew, Head, Contracting Activity, U.S. Army, to Army Contracting Command Workforce (Apr. 22, 2020, 1:47 PM) (on file with author) ("The purpose of the ACC protest data reporting effort is to establish a Command-wide tool for tracking protests/corrective actions and to identify lessons learned, trends, and systemic issues. Our goal is twofold: to provide AMC and ACC leadership visibility on protest activity and to provide Senior Contracting Officials (SCOs) with information that can help them develop training.").

¹⁵⁰ ACUS REPORT, *supra* note 71, at 50.

¹⁵¹ *Id.* at 51.

training and other tools, thereby serving as the lynchpin to systematic use of the program in management of its program performance risk.

Congress is leading the DoD to use agency-level bid protests to fill the risk management tool void created with the repeal of the section 827 “loser pays” provision. Through the potential of modeling the AIRC inquires and after Mr. Dan Gordon’s key decisions that every government must make regarding a bid protest system, Congress is showing the DoD the reasons it should use bid protests as a risk management tool. Additionally, by endorsing the ACUS report and subsequently directing the DoD to consider its recommended reforms, Congress is pointing to how it thinks the DoD can use an agency-level bid protest program to facilitate with its risk management.

The natural and probable next question is what agency-level bid protest program the DoD should use as a model to develop this replacement to the section 827 bid protest pilot program. The answer? Frankly, go back to the basics and use the first agency-level bid protest program that already incorporates many of the ACUS report reforms as a model: the AMC’s agency-level bid protest program.

V. The Army Materiel Command’s Agency-Level Bid Protest Program is the Solution to the Department of Defense’s Risk Management Problem

The DoD should use AMC’s agency-level bid protest program as a model to fill the risk management void that the repeal of the section 827 “loser pays” bid protest pilot program created. First, AMC’s program was originally used as the model to develop the program for the entire Federal Government and was originally designed to manage risk. Second, AMC’s agency-level bid protest program is a readymade model for the DoD to emulate that already incorporates many of the ACUS report’s recommendations.

As a threshold matter, the Federal procurement system and the rules that govern it were not created simply as a means to provide private litigants a right to sue the Federal Government. Instead, the system was originally designed to regulate itself through its contracting officials. In the famous decision of *Perkins v. Lukens Steel Co.*, the U.S. Supreme Court held that the Walsh-Healey Public Contract Act of 1936 did not provide a means for

a private party to challenge an agency's award decision in the courts.¹⁵² Instead, the procurement laws of the time encouraged the Government itself—not industry or the “private attorneys general”—to run quality control on its procurements, thereby managing and analyzing its own risk.¹⁵³ In the opinion, Justice Black provided:

[The Public Contract] Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. *It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.*¹⁵⁴

While procurement law in this context has significantly changed since *Perkins* to allow GAO and judicial challenges to solicitation and award decisions (i.e., bid protests) with the advent of procurement statutes like CICA and the Administrative Procedure Act, the need for the Government to perform its own quality control and manage its own risk has not.¹⁵⁵ Consistent with Congress's apparent signaling, instead of moving away from bid protests as if they are the cause of its program performance risk, the DoD should consider taking a note from the past and leveraging an

¹⁵² See Letter from Aaron Silberman, Chair, Section of Pub. Cont. L., Am. Bar Ass'n, Section of Public Contract Law, to David Drabkin (May 11, 2018), https://www.americanbar.org/content/dam/aba/administrative/public_contract_law/comments/comments-section-809-bid-protest-overall.pdf.

¹⁵³ See Gordon, *supra* note 95, at 31.

¹⁵⁴ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) (emphasis added).

¹⁵⁵ See H.R. REP. NO. 98-861, at 1435 (1984) (Conf. Rep.) (providing that, although Congress did not legislate the purpose of bid protests, “[t]he conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief.”); see also 3 ADVISORY PANEL ON STREAMLINING & CODIFYING ACQUISITION REGULS., REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS 344 (2019) (“What Congress, the Executive Branch, UNCITRAL, and ABA have said regarding the purpose of protests indicates that the purpose for granting aggrieved persons the ability to protest is to ensure the procurement process remains effective and efficient while maintaining the confidence of participants in the system.”).

efficient agency-level bid protest process to manage and analyze its risk.¹⁵⁶ Before discussing why the Army's agency-level bid protest program is the best program for the DoD to model, it is important to contextualize the reason agency-level bid protest programs were initially created: to serve as a risk management tool.

A. The Birth of the Agency-Level Bid Protest Program as a Risk Management Tool

Today's formal agency-level bid protest programs find their origin in a program designed to manage program performance risk in the 1990s. For many years, disappointed offerors or bidders have raised their complaints regarding the procurement process to a contracting officer for resolution.¹⁵⁷ However, it was not until the mid-1990s that the executive branch created the current construct of agency-level bid protest procedures.¹⁵⁸ This new formalized agency-level bid protest concept was the brainchild of AMC and the result of Al Gore's "Reinventing Government" initiative.¹⁵⁹

The impetus behind former Vice President Gore's initiative was a shared feeling in the U.S. public procurement community in the late 1980s and early 1990s that bid protests were "becoming too confrontational and expensive."¹⁶⁰ Similar to today, contracting officers' view at the time was that bid protests were a source of program performance risk as a result of "needless delay" from protracted bid protest litigation instead of a means to manage the risk.¹⁶¹ The result was contracting officers' shift from focusing on procuring the "best products and services and toward building thoroughly-papered, 'protest-proof' award files" to address this perceived

¹⁵⁶ ACUS REPORT, *supra* note 71, at 49 ("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." (emphasis added)).

¹⁵⁷ See JOHN CIBINIC, JR. ET AL., FORMATION OF GOVERNMENT CONTRACTS 1681 (4th ed. 2011).

¹⁵⁸ See Exec. Order No. 12979, 60 Fed. Reg. 55171 (Oct. 25, 1995).

¹⁵⁹ See Major Erik A. Troff, Agency-Level Bid Protest Reform: Time for a Little *Less* Efficiency? 4 (Apr. 26, 2005), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a433545.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ See *id.*

form of program performance risk.¹⁶² In other words, because the Government viewed bid protests themselves as a source of program performance risk, it moved away from communicating with industry, which resulted in “inefficiency, expense, and a stagnancy in the procurement system.”¹⁶³

In an effort to address the aspects of bid protests at the GAO and courts that it considered created program performance risk, such as needlessly delaying capability delivery, AMC created a formalized agency-level bid protest pilot program in 1991.¹⁶⁴ By the end of its yearlong pilot, AMC discovered that its program had mitigated many of the issues it theorized were inherent to bid protests at the GAO and courts that resulted in increased program performance risk, such as the length of bid protest litigation and delayed capability delivery.¹⁶⁵ Consequently, AMC made its agency-level bid protest program permanent and, in 1995, the Office of Federal Procurement Policy “identified the AMC protest program as one of the ten best practices in the federal government.”¹⁶⁶

Likely not coincidentally, later that same year, the Clinton Administration issued Executive Order 12979, which directed all Federal agencies to “prescribe administrative procedures for the resolution of protests . . . as an alternative to protests in fora outside of the procuring agencies.”¹⁶⁷ In many ways, AMC’s agency-level bid protest program was

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See* HEADQUARTERS, U.S. ARMY MATERIAL COMMAND, FACT SHEET (2020), <https://www.amc.army.mil/Portals/9/Documents/Fact%20Sheets/2020%20Fact%20Sheets/HQAMC-FactSheet-25SEP2020.pdf> (describing the Army Materiel Command (AMC) as “the Army’s primary logistics and sustainment command” and lead materiel integrator responsible for “providing materiel and sustainable readiness” to the entire Army). As the lead materiel integrator, AMC is—and was then—functionally responsible for the Army’s procurement efforts and was in the unique position to develop a global view of the effect bid protests had on program performance risk. *Id.*

¹⁶⁵ *See* Troff, *supra* note 159 (stating that AMC personnel “had resolved bid protests in an average of 16 working days (compared to the GAO’s 76 day average)”).

¹⁶⁶ *Id.* at 5.

¹⁶⁷ Exec. Order No. 12979, 60 Fed. Reg. 55171 (Oct. 25, 1995).

the model for Executive Order 12979 and therefore the father of all agency-level bid protest programs.¹⁶⁸

Two key concepts the Clinton Administration borrowed from the AMC agency-level bid protest program included providing for an agency protest decision official (or at least a protest decision authority at some level above the contracting officer whose decision was being protested) and the creation of the “regulatory stay,” or the prohibition of the award or performance of a contract while a timely filed protest is pending before an agency.¹⁶⁹ The only exceptions to this regulatory stay were when either urgent and compelling reasons or the best interests of the Government would require the procurement to move forward.¹⁷⁰ These concepts, which were smelted in the fires of AMC, are now considered universal concepts in agency-level bid protest programs.¹⁷¹ Frankly, it is unsurprising that AMC currently has many of the ACUS report reforms fully or partially in practice and therefore would be a great model for the DoD to follow.

B. Army Materiel Command’s Agency-Level Bid Protest Program—The Model Program¹⁷²

The DoD should model its agency-level bid protest program after AMC’s existing program. Not only is AMC’s program award winning but it also already fully incorporates many of the ACUS report’s recommendations.¹⁷³ For those recommendations that AMC has only partially implemented, its current framework would support any DoD desire for full implementation. Here, the AMC agency-level bid protest program

¹⁶⁸ See Troff, *supra* note 159, at 5 (discussing the key themes of Executive Order 12979 that originated with AMC’s agency-level bid protest program).

¹⁶⁹ See Exec. Order No. 12979, 60 Fed. Reg. 55171.

¹⁷⁰ *Id.*

¹⁷¹ See generally FAR 33.103(d)(4), (f) (2019).

¹⁷² This section uses the phrase “AMC agency-level bid protest program” throughout. Unless indicated otherwise, that phrase consists of both the upper-level Headquarters (HQ) AMC agency-level bid protest program and the lower-level contracting officer agency-level bid protest program.

¹⁷³ The AMC agency-level bid protest program is one of two upper-level agency-level bid protest programs in the U.S. Army. See AFARS 5133.103(4)(i)–(ii) (2019). The AMC agency-level bid protest program has jurisdiction over procurements handled under AMC’s contracting authority that has been delegated to the Army Contracting Command. *Id.* The U.S. Army Corps of Engineers manages the other upper-level agency-level bid protest program. *Id.* This analysis follows only AMC’s agency-level bid protest program.

(1) has an established agency-level bid protest official; (2) can likely hear bid protests related to all of its procurements; (3) will continue to mature consistently with the GAO, to include the legal concept of “standing,” as it is tied to the GAO’s bid protest decisions; (4) has a formalized process similar to the process to decide a claim submission as described in the Contract Disputes Act of 1978; (5) provides for an administrative report made up of documents consistent with the GAO’s agency report; (6) allows sharing of the administrative report, in meaningful situations, with a protester; (7) has a consistent and durable regulatory stay of award/performance; and (8) already compiles the data it needs to analyze and manage its risk. The AMC agency-level bid protest program already follows the AIRC inquiry and ACUS report roadmap for the DoD to leverage in developing the risk management tool Congress seems to envision.

First, the higher-level program, or the Headquarters (HQ) AMC agency-level bid protest program, has an established APO for all protests filed above the contracting officer.¹⁷⁴ The U.S. Army’s acquisition regulation supplement refers to AMC’s internal agency-level bid protest procedures, which establish the AMC Command Counsel as the “other official” designated to receive protests besides the contracting officer.¹⁷⁵ The AMC Command Counsel delegated this higher-level decision authority to the AMC Deputy Command Counsel in 2013 but has since withheld it.¹⁷⁶ To utilize the HQ AMC agency-level bid protest program, a potential protester considering whether to file an agency-level bid protest above the contracting officer can either file the protest with the contracting officer and ask for a review at a higher level or file it directly with HQ AMC.¹⁷⁷ In an effort to disseminate this information, all AMC contract solicitations include a provision that informs potential protesters of this higher-level agency-level

¹⁷⁴ See AFARS 5133.103(d)(4); see also Memorandum from Command Couns. for Record, U.S. Army Materiel Command, subject: Delegation of Authority No. 2013-11 Delegation of Protest Decision Authority (June 20, 2013) [hereinafter AMC Delegation Memo].

¹⁷⁵ See FAR 33.103(d)(3); AFARS 5133.103(d)(4)(i); see generally U.S. ARMY MATERIEL COMMAND (AMC), AMC BID PROTEST HANDBOOK: OPERATIONS AND PROCEDURES APPLICABLE TO GAO AND AMC PROTESTS 96 (2013) [hereinafter AMC BID PROTEST HANDBOOK]; AMC Delegation Memo, *supra* note 174.

¹⁷⁶ See AMC Delegation Memo, *supra* note 174; Professional Experiences, *supra* note 109; HQ AMC-Level Protest Procedures Program, *supra* note 185.

¹⁷⁷ AMC BID PROTEST HANDBOOK, *supra* note 175.

bid protest option.¹⁷⁸ This locally tailored provision makes clear to disappointed offerors that a higher-level agency-level bid protest program exists and that the program has established an APO consistent with the recommendation in the ACUS report. Further, not only does the locally tailored provision provide notice of the higher-level program but also that the APO's authority at that level covers all AMC procurements.

Second, the AMC agency-level bid protest program likely has broad jurisdiction to hear bid protests related to all AMC procurements. Generally, the AMC agency-level bid protest program applies the same rules—

¹⁷⁸ See AMC BID PROTEST HANDBOOK, *supra* note 175 (referring potential protesters to AMC's online agency-level bid protest rules); 409TH CONTRACTING SUPPORT BRIGADE, U.S. DEP'T OF ARMY, SUPPLEMENT TO THE ARMY CONTRACTING COMMAND ACQUISITION INSTRUCTION 15-16 (2018) (flowing down the AFARS bid protest provision); *see also* AFARS 5152.233-4002 (providing a locally tailored AFARS provision that is inserted into AMC solicitations). Subpart 5152.233-4002 of the AFARS provides:

[I]nset the following provision:

AMC-LEVEL PROTEST PROGRAM (June 2016)

If you have complaints about this procurement, it is preferable that you first attempt to resolve those concerns with the responsible contracting officer. However, you can also protest to Headquarters, AMC. The HQ, AMC-Level Protest Program is intended to encourage interested parties to seek resolution of their concerns within AMC as an Alternative Dispute Resolution forum, rather than filing a protest with the Government Accountability Office or other external forum. Contract award or performance is suspended during the protest to the same extent, and within the same time periods, as if filed at the GAO. The AMC protest decision goal is to resolve protests within 20 working days from filing. To be timely, protests must be filed within the periods specified in FAR 33.103. Send protests (other than protests to the contracting officer) to:

Headquarters U.S. Army Materiel Command Office of Command Counsel
4400 Martin Road, Rm: A6SE040.001 Redstone Arsenal, AL 35898-5000 Fax: (256) 450-8840

The AMC-level protest procedures are found at: <http://www.amc.army.mil/Connect/Legal-Resources>

If Internet access is not available, contact the contracting officer or HQ, AMC to obtain the AMC-Level Protest Procedures.

AFARS 5152.233-4002.

procedurally and substantively—that apply to GAO protests.¹⁷⁹ This means that it will hear any bid protest “concerning alleged violations of procurement statutes or regulations by [AMC contracting activities and/or the individual contracting officers] in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards.”¹⁸⁰ In other words, similar to the GAO, the program has jurisdiction over challenges to the solicitation or award of procurement contracts governed by the FAR. What is not necessarily clear, however, is whether the AMC agency-level bid protest program has jurisdiction to hear non-procurement contract solicitation and award controversies, such as OT contracts awarded under an OTA. Nonetheless, guidance from the DoD may provide that jurisdiction.

In its current OT guide, the DoD provides that its agencies may choose to include language in an OT solicitation describing its agency-level bid protest procedure.¹⁸¹ The guide goes on to provide that, if an agency includes that language in its solicitation, the OT solicitation would be subject to its agency-level bid protest procedure.¹⁸² Here, as discussed above, Army Federal Acquisition Regulation Supplement (AFARS) 5152.233-4002 is required to be included in *all* AMC contract solicitations.¹⁸³ The AMC agency-level bid protest program rules and procedures do not distinguish between a contract in the general sense (which an OT is considered) and a “procurement contract,” as contemplated by CICA and which grants the GAO its bid protest jurisdiction.¹⁸⁴ Therefore, because AFARS 5152.233-4002 must be included in all AMC contract solicitations, to include procurement contracts, those for OTs, and other non-procurement contracts,

¹⁷⁹ See generally AMC BID PROTEST HANDBOOK, *supra* note 175; see also HQ AMC-Level Protest Program, U.S. ARMY OFF. OF GEN. COUNS., <https://ogc.altess.army.mil/ADR/Documents/HQ%20AMC-Level%20Protest%20Program.pdf> (last visited Dec. 21, 2021) (clarifying that AMC has adopted the same rules that apply in GAO protests to include jurisdictional limits).

¹⁸⁰ 31 U.S.C. §§ 3551(a), 3552; 4 C.F.R. § 21.1(a) (2019).

¹⁸¹ See DEP'T OF DEF., OTHER TRANSACTIONS GUIDE, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT 27 (2018) [hereinafter DoD OT GUIDE].

¹⁸² *Id.*

¹⁸³ See AMC BID PROTEST HANDBOOK, *supra* note 175 (referencing AFARS 5152.233-4002).

¹⁸⁴ See generally *id.*; see Oracle America, Inc., B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018) (discussing the limits of the GAO's bid protest jurisdiction to include review of the award or solicitation of procurement contracts under CICA); DoD OT GUIDE, *supra* note 181, at 38 (providing that an OT is a contract).

the AMC agency-level bid protest program's jurisdiction likely covers the vast majority (if not all) of its procurements. Consequently, although the GAO's bid protest jurisdiction relating to non-procurement contracts—specifically OTs—is limited to only reviewing whether an agency is properly using the authority, AMC's agency-level bid protest jurisdiction is broader, which is consistent with the ACUS report's recommendation on clarifying jurisdiction.¹⁸⁵ While the AMC agency-level bid protest program differs from the GAO in this context, it otherwise will remain consistent with the GAO, both procedurally and substantively.

Third, AMC's agency-level bid protest program, to include its definition of "standing," will mature consistently with the GAO, as the program is generally tied to the GAO's decisions. As mentioned above, the AMC program for the most part uses (or is tied to) the procedural and substantive decisions of the GAO.¹⁸⁶ This allows legal concepts at the program, such as interested party status or "standing," to mature alongside the same concepts at the GAO. This provides consistency in application of the "rules" for potential protesters between the two fora and is consistent with the ACUS report's recommendation on protecting the "interested party" status quo.¹⁸⁷ In continuing with the theme of consistency, the formal, written AMC agency-level bid protest decision process provides a protester notice of any adverse agency action.

Fourth, the AMC's agency-level bid protest process is formal (similar to the procedures used for deciding claims under the CDA) and its decisions provide a clear point in time that triggers the GAO timeliness clock. In addition, AMC's agency-level bid protest process and the protest decision issued under it are similar to the formalized procedure and final decision FAR 32.211 requires in deciding claims. The AMC agency-level bid protest procedures require issuance of a formal, written decision at the conclusion of the bid protest, similar to a contracting officer's final decision (KOFD)

¹⁸⁵ See *Oracle America, Inc.*, B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018). The only exception to the AMC agency-level bid protest program's broad jurisdiction is the GAO's \$25 million task and delivery order threshold, which AMC specifically adopts as its own. See *HQ AMC-Level Protest Procedures Program*, ARMY MATERIAL COMMAND, <https://www.amc.army.mil/Connect/Legal-Resources> (last visited Dec. 21, 2021); see also ACUS REPORT, *supra* note 71, at 5.

¹⁸⁶ *HQ AMC-Level Protest Program*, *supra* note 179.

¹⁸⁷ See also ACUS REPORT, *supra* note 71, at 5–6.

on a claim.¹⁸⁸ As an initial matter, an attorney examines each bid protest decision for advice and assistance. At the HQ AMC level, the APO, who is an attorney, writes these decisions.¹⁸⁹ If the protest is at the contracting officer level, normally the contracting officer writes the decision after receiving advice and assistance from local legal counsel.¹⁹⁰

Next, these written bid protest decisions resemble KOFDs and have predictable timelines for completion. These decisions include a facts section that states all of the background facts and the protester's bid protest grounds.¹⁹¹ Further, the written decision references the relevant solicitation terms, applicable legal authority, and the decision authority's analysis on each bid protest ground.¹⁹² Additionally, similar to the CDA's requirement that a contracting officer issue a KOFD within sixty days, the written protest decision is submitted to the protester generally no later than forty-five days from the agency-level protest filing.¹⁹³ Also, the decision signals that it is the APO's decision on the protest, which is similar to how a KOFD signals it is a final decision on a claim.¹⁹⁴

Further, similar to a KOFD, if circumstances surrounding the AMC agency-level bid protest require a longer period to issue a decision, the protester will receive written notice concerning any extension.¹⁹⁵ As a result, the AMC agency-level bid protest program's established process provides

¹⁸⁸ AMC BID PROTEST HANDBOOK, *supra* note 175; *HQ AMC-Level Protest Procedures Program*, *supra* note 185; *see* FAR 33.211(a)(4) (2019).

¹⁸⁹ *See generally* FAR 33.211(a)(2) (requiring a contracting officer to obtain legal advice before issuing a final decision).

¹⁹⁰ 409th Legal Policy Document, *supra* note 134, at 5 (discussing how local policy of AMC's various subordinate contracting activities govern contracting officer-level bid protest legal assistance); *see generally* FAR 33.211(a)(2).

¹⁹¹ *See* FAR 33.211(a)(4); AMC BID PROTEST HANDBOOK, *supra* note 175, at 95 ("The contracting officer's written decision should reflect well researched and reasoned legal advice. Letters should not summarily deny or dismiss protests without providing sufficient factual discussion and legal citation, as applicable. The decision's rationale should contain the same degree of detail as though the contracting officer were attempting to persuade an independent forum such as GAO as to the correctness of the decision.").

¹⁹² AMC BID PROTEST HANDBOOK, *supra* note 175, at 95.

¹⁹³ *See HQ AMC-Level Protest Procedures Program*, *supra* note 185; AMC BID PROTEST HANDBOOK, *supra* note 175; FAR 33.211(c)(1)–(2). The timeline is applied to the contracting officer agency-level bid protests as well.

¹⁹⁴ FAR 33.211(a)(4)(v).

¹⁹⁵ *See* AMC BID PROTEST HANDBOOK, *supra* note 175; FAR 33.211(c)–(d).

clarity to protesters as to how its agency-level bid protest is proceeding at AMC and provides a formal and complete written bid protest decision that clearly marks the point an adverse agency action is made.¹⁹⁶ This is consistent with the ACUS report's recommendation that the Government clarify the decision-making process for agency-level protests.¹⁹⁷ Additionally, the AMC agency-level bid protest program rules provide clarity as to what consists of the record on which the bid protest decision official must rely.

Fifth, AMC agency-level bid protest program rules and, indeed, AMC's common practice, implicitly outline the record that its subordinate contracting activities must compile for the APO or consider at the contracting officer level. The AMC agency-level bid protest process requires that an "administrative report" be compiled for forwarding to the HQ AMC APO or be considered by the contracting officer when deciding on an agency-level bid protest.¹⁹⁸ While the AMC agency-level bid protest program rules do not define the term "administrative report," contracting officers and AMC legal counsel understand it to consist of the same documents as an "agency report" under the GAO's bid protest rules.¹⁹⁹ While AMC should clarify this point in writing, the AMC practitioner commonly understands what is included in the contents of the AMC agency-level bid protest record. This provides surety that the decision official will have a complete picture of the procurement before issuing a decision and is consistent with the ACUS report's recommendation to clarify the record.²⁰⁰ Additionally, in meaningful situations, this record provides a complete picture of the protest to a protester.

Sixth, the AMC agency-level bid protest program rules allow for the protester to receive the administrative report in some situations. Generally, the protester does not receive a copy of the administrative report in an AMC

¹⁹⁶ See generally 4 C.F.R. § 21.2(a)(3) (2019); GAO DESCRIPTIVE GUIDE, *supra* note 49, at 10.

¹⁹⁷ See ACUS REPORT, *supra* note 71 at 5–6.

¹⁹⁸ See HQ AMC-Level Protest Procedures Program, *supra* note 185; AMC BID PROTEST HANDBOOK, *supra* note 175.

¹⁹⁹ See HQ AMC-Level Protest Program, *supra* note 179 ("AMC applies the same rules that apply in GAO protests," both substantive and procedural); see also 4 C.F.R. § 21.3(d) (discussing the contents of the GAO agency report). Further, the AMC community shares this intent in practice. Professional Experiences, *supra* note 109.

²⁰⁰ See ACUS REPORT, *supra* note 71, at 5–6.

agency-level bid protest.²⁰¹ However, when the APO or the contracting officer need comments from the protester to make a decision, “it may require sufficient additional copies or portions of the administrative report [be distributed to] the parties.”²⁰² Ostensibly, comments are the protester’s position on the administrative report.²⁰³ While these comments are required and have both significant procedural and substantive effects on a bid protest at the GAO, they are discretionary in an AMC agency-level bid protest and a protester may submit them only at the request of the appropriate bid protest decision official.²⁰⁴

Here, in cases where the AMC APO or the contracting officer determines that the protester may have useful comments, that person will provide the administrative report to the protester and request comments.²⁰⁵ While not as broad as the GAO, the AMC agency-level bid protest program rules do allow protesters to access the administrative report when it would be useful and would not needlessly delay the procurement.²⁰⁶ Further, while this practice does not fully incorporate the recommendation to share the record with the protester, the existing framework may easily be adjusted to incorporate the sharing of the administrative report with the protesters, if the DoD so desired.²⁰⁷

Seventh, a certain and durable regulatory stay of performance/award is immediately imposed because of any timely agency-level bid protests filed at HQ AMC or with a contracting officer. Generally, a regulatory stay of performance/award is imposed as soon as HQ AMC or a contracting officer receives an agency-level bid protest that would be timely under the GAO’s rules.²⁰⁸ This requirement is enumerated clearly in the AMC agency-level

²⁰¹ AMC BID PROTEST HANDBOOK, *supra* note 175.

²⁰² *Id.*

²⁰³ See 4 C.F.R. § 21.3(i); GAO DESCRIPTIVE GUIDE, *supra* note 49, at 22; see also James F. Nagle & Adam K. Lasky, *A Practitioner’s Road Map to GAO Bid Protests*, 30 CONSTR. LAW. 1, 5 (2010).

²⁰⁴ Nagle & Lasky, *supra* note 203; AMC BID PROTEST HANDBOOK, *supra* note 175.

²⁰⁵ AMC BID PROTEST HANDBOOK, *supra* note 175.

²⁰⁶ ACUS REPORT, *supra* note 71, at 39 (discussing the position of agency attorneys on providing access to the administrative report to protesters).

²⁰⁷ *Id.* at 5–6.

²⁰⁸ See 4 C.F.R. § 21.2(a)(1)–(3); AMC BID PROTEST HANDBOOK, *supra* note 175, at 94, 96; see also KATE MANUEL & MOSHE SCHWARTZ, CONG. RSCH. SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 8 (2016).

bid protest program rules, enforced fiercely by agency counsel, and taken seriously by the override authority: the HCA.²⁰⁹

As an initial point, while the FAR and AFARS (through the internal AMC agency-level bid protest program rules) provide for a stay override process, it is rarely used.²¹⁰ Its use is so rare that the internal AMC agency-level bid protest program rules warn that, “[b]ecause of the rapid decision-making process, *award or lifting of the stop-work order in the face of a HQAMC-Level protest has rarely been granted.*”²¹¹ Further, though the FAR only requires the stay override official be “a level above the contracting officer,” the internal AMC agency-level bid protest program rules withhold that decision to the HCA: the Commanding General of the U.S. Army Contracting Command, which is a major subordinate command of AMC responsible for oversight of many of AMC’s contracting activities.²¹²

This established, immediate, and difficult-to-override stay of performance/award process serves to provide certainty at the start of an AMC agency-level bid protest for both a protester and the agency, in that the protested procurement will be stayed pending the protest. This practice is consistent with the ACUS report’s recommendation that the Government clarify the regulatory stay to protesters.²¹³ Further, insofar as the DoD might want to expand the regulatory stay of award/performance over a procurement in a follow-on bid protest at the GAO, the mechanisms to manage such expansion are in place.

²⁰⁹ See AMC BID PROTEST HANDBOOK, *supra* note 175; see also FAR 2.101 (“Head of the contracting activity means the official who has overall responsibility for managing the contracting activity.”). In practice, significant reminders are sent to, and training is conducted with, the acquisition workforce by agency counsel concerning the stay of performance for timely filed AMC agency-level bid protests. Professional Experiences, *supra* note 109.

²¹⁰ See HQ AMC-Level Protest Procedures Program, *supra* note 185 (providing the head of the contracting activity can override a stay “upon a written finding that contract performance will be in the best interests of the United States; or urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision from the HQAMC protest decision authority.”).

²¹¹ See FAR 33.103(f)(1), (3); AFARS 5133.103(d)(4)(i); AMC BID PROTEST HANDBOOK, *supra* note 175.

²¹² See FAR 33.103(f)(1), (3); AFARS 5133.103(d)(4)(i); AMC BID PROTEST HANDBOOK, *supra* note 175.

²¹³ See ACUS REPORT, *supra* note 71, at 5–6.

Finally, the Army already collects and compiles agency-level bid protest data that it can analyze and use to manage its risk. Specifically, the Army collects data on both its AMC and contracting officer agency-level bid protests, which it compiles in an annual report for the Office of the Deputy Assistant Secretary of the Army (Procurement) (ODASA-P).²¹⁴ The AFARS requires that this report include:

- (a) The number of protests received during the reporting period, to include their disposition;
- (b) An assessment of the causes of the most frequently recurring issues . . . ;
- (c) The distribution of protests by subordinate contracting offices; and
- (d) Any additional information considered necessary to a full understanding of the efficiency and effectiveness of the activity's agency protest procedures.²¹⁵

The data in this report comes from multiple sources. First, at the end of each protest, the various legal offices supporting either the HQ AMC APO or the contracting officer in the context of a contracting officer agency-level protest collect and place the data into a document entitled the "AMC Protest Information Sheet."²¹⁶ For contracting officer agency-level bid protests, this document is submitted—within five working days of initial protest, and again within five working days after decision—through legal support technical channels to AMC for consolidation.²¹⁷ Administrative data about the agency-level bid protest is added to the document, such as the contract number and award date, estimated personnel costs for defending against the protest, total contract award costs, "lessons learned" or important information revealed as a result of the agency-level bid protest (which

²¹⁴ See AFARS 5101.290(b)(1), 5133.103-90; see also *Bid Protests—Agency Level Protests*, WARD & BERRY (Aug. 26, 2020), <https://www.wardberry.com/gov-con/bid-protests-agency-level-protests>.

²¹⁵ AFARS 5133.103-90.

²¹⁶ See Army Materiel Command, AMC Protest Information Sheet (on file with author) [hereinafter AMC Protest Information Sheet]. A nearly identical version of this information sheet is also used to submit data on GAO bid protests to AMC.

²¹⁷ See *id.* at 1.

routinely would include recurring issues), and whether corrective action resulted.²¹⁸

Second, until fiscal year 2019, the various AMC contracting activities would consolidate the data generated throughout the year and submit an AFARS 5133.103-90 report at the end of the fiscal year to AMC, which further consolidated the AFARS 5133.103-90 bid protest data before submitting it to the ODASA-P.²¹⁹ After fiscal year 2019, however, the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) and the Army Vice Chief of Staff mandated that all contracting activities use the Virtual Contracting Enterprise module that is included in the Army's Paperless Contract File system to report the AFARS 5133.103-90 bid protest data among the data from other fora.²²⁰ Now, ODASA-P pulls the AFARS 5133.103-90 data directly from Paperless Contract File.²²¹ While the Army does not publish the data or its bid protest decisions, the framework and substance to implement the ACUS report recommendation on publishing that data is present for the DoD to implement if it so chooses.²²²

Because AMC's agency-level bid protest program already fully or partially incorporates many of the ACUS report's recommendations into its practice, the DoD should look to it as a risk management tool. Insofar as the DoD would want to fully implement the ACUS report's recommendations, the framework and substance already exist in the Army's program to do so.

VI. Conclusion

Policymakers in the DoD should use AMC's agency-level bid protest program as a model if it decides to follow Congress's signals and use a bid

²¹⁸ *Id.* at 1–3; Professional Experiences, *supra* note 109.

²¹⁹ See E-mail from Deputy Chief Couns., 409th Contracting Support Brigade, to author (Feb. 26, 2021, 9:57 AM) (on file with author). This report included both AMC and contracting officer agency-level bid protest data.

²²⁰ See E-mail from Major Gen. Paul H. Pardew, *supra* note 149 (requiring compilation of data from agency-level bid protests, GAO and Court of Federal Claims bid protests, and claims).

²²¹ This system is different from the Department of Defense's section 827 bid protest tracker, which contains data from all three fora but is geared towards the repealed section 827 bid protest elements. See *Protest Tracker*, U.S. DEP'T OF DEF., <https://dodprocurementtoolbox.com/site-pages/protest-tracker> (last visited at Dec. 21, 2021).

²²² See ACUS REPORT, *supra* note 71, at 5–6.

protest program as a risk management tool instead of viewing bid protests as a cause of risk. Either way, the reader is best situated to advise those policymakers as they have been introduced to the DoD's concerns with the GAO bid protest system, and how Congress initially attempted to help the DoD with the section 827 "loser pays" provision, but RAND discovered that those concerns are not be supported by data, and therefore Congress is now signaling to the DoD it should consider using agency-level bid protests as a risk management tool.