

**ORGANIZATIONAL ECONOMICS AND LESSONS FROM ADMINISTRATIVE APPEALS IN U.S.
DEPARTMENT OF DEFENSE CONTRACTING**

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ABSTRACT

When government agencies make decisions that may be appealed, the agencies have incentives to design decision-making processes that are efficient and effective. An appeal can provide a window into the administrative processes that gave rise to it. To illustrate, we apply the economic theory of organizations to contracting at the U.S. Department of Defense, the largest procurement agency in the world. The topic is important because government contracting has increased globally, raising questions about its transparency, equity, efficiency and best practices. The methodological approach combines statistical analysis of data on bid protests with interviews of participants in the acquisitions community.

I. INTRODUCTION

Government agencies around the world make administrative decisions that are appealable by parties who are subject to them, often citizens and businesses. It might go too far to say that every appeal, like every complaint, is a gift (Barlow and Moller 1996) because everyone involved bears a cost. It is not going too far to say that every appeal is an opportunity to improve.

Random errors occur, of course. Administrative processes are created and implemented by humans. Humans are fallible. Episodic appeals result. It is in everyone's interests to identify and correct these informally and expeditiously.

Patterns of recurring appeals, which arise from processes as diverse as municipal land use through workers compensation to government procurement, are different. The reasons for them may be systemic. Although formal appeal processes create incentives for appellants to behave opportunistically (Spiller 2008), an appeal process that finds a claim to be legitimate and sustains it, meaning that an agency erred and must provide a remedy, sheds light on the administrative decision-making that gave rise to it.

One reason for this—at least in the United States—is that public law, especially in the area of government acquisitions, is affirmative law: an agency is accountable for doing what it says it will do. If it does not, then its decisions are protestable. A business or citizen must do what the agency requires it to do. It cannot be denied benefits or opportunities to participate in business with the government because it failed to do something it was not asked to do. If it is, then the agency's decision is protestable. Under most statutes governing administrative decision-making, decisions may be appealed only on procedural rather than on substantive grounds.¹

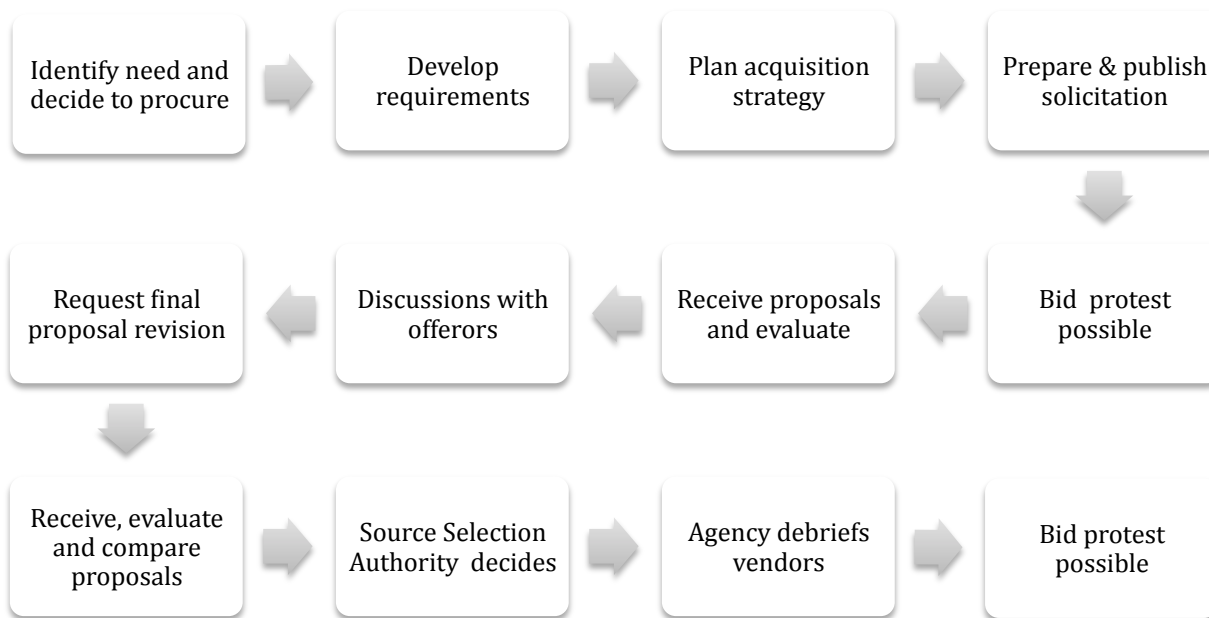
We define an agency's decision-making procedures broadly to be its management system. By a management system, we refer to five interdependent practices: setting a strategy (establishing a mission and objective); designing and implementing a structure (who has authority to decide how to pursue the mission); human resources (selecting, developing and incentivizing people to fill positions in the structure); defining policies and procedures (giving those people directions about what to do); and monitoring (assessing progress toward the mission to support operational adjustments). This is a parsimonious model, one that informs the audits of organizational efficiency and effectiveness conducted by the U.S. Government Accountability Office (Herbert 1979, p. 123). More complex

models of management systems exist, such as McKinsey’s 7-S Framework (Peters and Waterman 2006, p. 10) and Tushman and O’Reilly’s Congruence Model (1997, p. 59). The key word, however, is “system:” the components are interdependent, and, arguably, necessary and sufficient. Change one and the impact of another changes. Their interactions create conditions where administrators can err.

Administrators might not know or understand their mission. If they do, they might not know how they are supposed to achieve it. Policies and procedures might not exist. If policies and procedures exist, they might be unclear. If they are clear, they might conflict. Selection and professional development practices might not prepare people to apply policies and exercise judgment. The people capable of making the judgments might not be the ones tasked with making them. If they know how to exercise judgment and have the responsibility for doing so, they might not have the requisite information to inform their judgments. If they have the information, they might not have the incentive to use it. If errors occur, they might not know about and learn from them. If any of these conditions exist, the likelihood of error increases and with it the likelihood of appeals, complaints or protests.

To illustrate, we use the U.S. Department of Defense, the largest procurement agency in the world. Government contracting is a sequence of activities: procurement planning, solicitation planning, solicitation, source selection, contract administration, and contract closeout (Rendon 2008, p.164). A stylized depiction of a source selection process appears in Diagram 1. It presumes a decision to satisfy a need by procuring a product or service. A major acquisition, like a major weapon systems, involves more steps with more decision-makers. A minor acquisition, like paving roads at a military base, involves fewer. In either case, similar types of decisions must be made.

Diagram 1: Overview of the Source Selection Process at DOD



The process includes opportunities for bidders to protest source selection decisions. A protest can occur when an offeror perceives that the agency did not follow the procedures it established to make these decisions. Only decisions associated with solicitation, such as defining the requirements and evaluation criteria for a product or service, or source selection, such as applying the evaluation criteria to a proposal, are protestable. For example, after an agency issues a solicitation, a potential offeror has an opportunity to protest the inclusion of a requirement that it believes to be inappropriate or will bias the decision to award a contract. Or, after an agency awards the contract, a rejected offeror has an opportunity to protest the application of an evaluation criterion to its proposal.

If the agency disagrees, the conflict may be resolved by a third-party, such as the U.S Government Accountability Office or the Court of Federal Claims. We focus on GAO decisions because it is the more popular venue. According to the Congressional Research Service, the number of bid protests against DOD increased from about 600 in FY2001 to 840 in FY2008, a miniscule number compared to the number of protestable contracts. Most protests are dismissed, withdrawn, or settled prior to GAO issuing an opinion (Schwartz and Manuel 2009 p.12-13). GAO upholds on average about 25% of bid protests and the rate has been decreasing. During a period when the number of protests filed with GAO increased 39%, federal contract spending increased an inflation-adjusted dollar volume of 80%.

However, an upward trend in the number of protests draws attention from the media and Congress, as do high profile DOD protests such as the KC-Tanker. Congress has expanded GAO's jurisdiction. Despite the well-intentioned efforts of people at contracting agencies, errors, real or perceived, occur. The effectiveness rate, which combines the rate at which GAO upholds protests with the rate at which agencies take corrective actions that give a protestor some relief prior to GAO issuing its decision, has increased to about 45%. From a potential protestor's perspective, the odds of success might not look bad.

The question addressed in this paper is: Can information generated by appeals be used to improve agency management? In Section II of the paper, we answer the question affirmatively. We combine the logic of the economics of organization with the theory of organizational design, especially dispute systems design. The economics of organizations shows that different management practices contribute to persistent performance differences (Roberts 2004; Epstein 2010; Gibbons 2009; see also de Waal 2010, Frazier 2008): aligned management practices reinforce each other, enhancing performance, and misaligned management practices weaken each other, undermining performance. Dispute systems design provides a methodology for diagnosing misalignments conducive to error, treating recurring appeals as symptoms of management problems (Fisher, Ury, and Goldberg 1988; Costantino and Merchant 1996; Slaikeu and Hasson 1998; Stitt 1998; Lynch 2001; Lipsky, Seeber, and Finch 2003; Shariff 2003; Bordone 2008). In Section III, we explain the connection between management practices and protestable errors. In Section IV, we derive recommendations from the analysis and draw conclusions. The question we address is important because demands for transparency, equity, and efficiency are increasing globally for government in general and procurement in particular (Arrowsmith, Linorelli, and Wallace 2000).

II. AN ECONOMIC ANALYSIS OF MANAGEMENT AND APPEALS PROCESSES

In theory, allowing protests has multiple benefits. It discourages errors and produces more competitive and accountable procurements (Report of the Committee on Homeland Security and Governmental Affairs 2007, p. 12). It safeguards against government opportunism: the possibility of the government opportunistically changing the rules to its benefit at a vendor's expense (Spiller 2008). This induces more contractors to bid, drawing the best expertise, products, and services into the acquisition process. Efficient, low-cost production should result. It puts responsibility for identifying errors one-by-one into the hands of those seeking government contracts, the parties who are most appropriately motivated and best informed. Most importantly for our purposes, creating a formal appeals process gives an agency an incentive to design and implement efficient and effective decision-making processes so as to minimize appealable errors. It also helps agencies correct their mistakes while attempting to treat contractors fairly and consistently.

However, the costs of allowing bid protests are not trivial. A partial accounting would include the resources 1) an agency expends in anticipation of potential protests, even those that do not happen, or in responding to those that do, 2) an offeror expends in anticipation of or actually protesting, 3) a winner expends supporting the contracting agency, and 4) a third party expends deciding. GAO, which hears most protests, has 100 days to issue its decision once a protest has been filed but new work ceases until then. Waivers to start work for national security reasons are rare. Delay has consequences for the cost of the contract, defense policy, and national security. If the protestor prevails, the remedy may create additional costs for the parties. Business and government organizations have human and financial capital in limbo pending resolution of the protest and corrective action, which might include a new solicitation.

By relying upon interested parties—those who do not win contracts for which they competed—to monitor the solicitation and source selection stages, the protest process admits opportunism: protests lodged for reasons other than obtaining corrective actions. These protests benefit the protestor at the government’s expense (Spiller 2008). Protesting to win, to seek justice after an agency erred, and to obtain information to improve future bids serves a public purpose. Protesting to obtain competitive intelligence, to hurt the winner by delaying the award, to retain a revenue stream for the duration of the protest, to demonstrate resolve to company board members and senior executives, to be granted a portion of the work under the contract, or to improve their chances of winning subsequent contracts (Roemeran 1998) are costly side effects of the strategic decision to source by contracting out, and then to monitor sourcing by relying rejected parties. Opportunism in this sense is a cost of the appeals system.

From an economic perspective, an objective in designing source selection processes, including bid protests, should be to minimize the sum of the costs of errors and the costs of avoiding them (see Calabresi and Melamed 1972; Greenstein 1993; Weimer and Vining 2010, Ch 8). Thinking systemically, the conditions that give rise to protestable decisions can originate with decisions that are not protestable. The strategic decision to acquire a product with particular operating characteristics is a programmatic decision; it is not protestable. Translating the operating characteristics into requirements with criteria for evaluating proposals is a contracting decision; it is protestable. The source of a protest might be traced to the way in which an agency manages programmatic or contracting decision-making, or both. The challenge in achieving the objective of minimizing the sum of the cost of errors and of avoiding them involves not only designing an appeals process but also designing and implementing agency management practices that give rise to appealable errors.

Aligned management practices are complements: implementing one increases returns to the other; the whole is greater than the sum of its parts (Roberts 2004, Ch 2; Thompson 1993). For example, dividing decision-making authority between finance and engineering departments—a decision about structure—complements a decision to recruit financial analysts and engineers with skills matched to their department’s mandates—a decision about human resources; aligning structure with human resources practices increases returns to both. For substitutes, implementing one reduces the attractiveness of the other. For example, providing incentives to employees by compensating them for their productivity substitutes for monitoring employee behavior to detect and deter unproductive behavior; investing in one practice implies less investment in the other.

When aligned, management practices induce employees to communicate openly, to share information about their needs and priorities, and to identify the issues in a decision that are relevant to the organization’s strategy. The gains associated with aligned practices are like grease, allowing the system to operate fluidly. In theory, this reduces the likelihood of errors in general and protestable errors in particular.

When misaligned, management practices induce employees to withhold relevant information from each other and pursue priorities and issues that may be inconsistent with an agency’s strategy. Employees might not know relevant policies or issues; those who ought to be engaged in making decisions are not, so follow through fails. Disconnects foretell losses and losses encourage risk-taking. Disconnects are like friction, generating heat and dissipating energy. In theory, this increases the likelihood of errors in general and protestable errors in particular.

Current and former agency officials agree with industry executives: what agencies do to create good source selection processes also mitigates protests. Both in theory and by implication from these observations, recurring protests are symptoms of misalignment among management practices. When a conflict over procedure reaches GAO and GAO upholds a protest, it signals agencies to review and adjust their management practices.

Using information about patterns and substance of bid protests, as well as from interviewing people engaged in the process, we can identify misalignments within the management system that might trigger errors, then recommend realignments to improve performance and, thereby, mitigate—but not eliminate—the errors and appeals. We conducted a conflict management audit (Ury, Brett, and Goldberg 1988) of source selections, including GAO’s decision-making on protests. The audit seeks to answer three sets of questions. First, what kinds of conflicts arise: what are the issues; who are the parties; what are their motivations; and how often do the disputes occur? Second, how are they handled by the agency or, if they evolve into bid protests, by GAO: what procedures are employed; what are the costs and benefits of these procedures; who decides; on what grounds, and with what consequences? Third, what generates the conflicts, particularly conflicts over procedure?

Miscommunications and misperceptions underlie many conflicts. Differences in management practices—within different units of the same agencies, across agencies who must collaborate to achieve a larger departmental objective, or between agencies and external stakeholders such as vendors—influence who has what information and the incentives to use it. Therefore, we asked respondents to characterize 1) their agency’s decision-making culture, its informal norms; 2) their perceptions of their agency’s strategy; 3) who does what: the structure governing decision-making; 4) policies and procedures that are helpful or impediments to them in doing their work; 5) the criteria for success and failure in the agency, how its system recognizes it, and whether rewards or sanctions follow; and 6) and whether they have the information they need to perform their jobs and, if not, what information they would like to have.

Interviews during the last quarter of 2009 and the first quarter of 2010 included attorneys at the Government Accountability Office (GAO); executives and attorneys at four large prime contractors; four attorneys at law firms that handle bid protests for contractors; government contract managers at two small companies; current and former officials in the Office of the Secretary of Defense (OSD); officials and in house attorneys at three military commands: Air Force Material Command, Naval Air Systems Command, and the Defense Logistics Agency; Senate Committee staff; and executives—typically, former DOD contracting officers—with professional or industry trade associations such as the National Contract Management Association, the Aerospace Industries Association, the Professional Services Council, and TechAmerica. This is not a representative sample of the acquisition community. It is a network initiated through professional contacts and expanded as respondents recommended others who could share different perspectives. They offered their perceptions as individuals in the system, not as representatives of the organizations with which they are associated. Their insights are suggestive, not definitive.

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In addition to interviewing participants in the process, we analyzed bid protests posted on the GAO’s website. We coded all decisions issued between 2001 and 2009 using search criteria supplied by GAO. This gave us protests involving the Air Force, Army, Marines, Navy and the Department of Defense, not including the Army Corps of Engineers, which operates under different Federal appropriations statutes.

III. THE RISKS OF ERROR ARISING FROM MANAGEMENT PRACTICES

In theory, Federal Acquisition Regulation (FAR) and the Defense Acquisition Regulation Supplement (DFARS) govern agency contracting and define the bases for protesting. In practice, agencies implement them differently. Some agencies see the FAR as rules to be abided. Some see them as guidelines. Some see them as suggestions. The multiplicity of rules, however valid each one may be, can be problematic. They can be so complicated that a good lawyer can find grounds to protest and an agency official can find grounds for a defense. Inconsistency across agencies confuses vendors who do business with several of them. The point is that administrative rules are neither definitive nor decisive. Administrators exercise judgment; management systems coordinate how that happens.

Table 1 elaborates our model of management practices and the risks of error associated with using them. An organization’s **strategy** establishes what it wants to do, what it does not want to do, and why it’s worth it. Strategy and mission match its capabilities and weaknesses with the opportunities and threats in its environment. If an organization’s strategy is misaligned with its environment, it risks misdirecting the organization from relevant opportunities and threats, setting the stage for conflicts within the organization and between its employees and external parties.

As a strategic matter, government could design, produce, and deliver products and services in-house. Errors could occur but bid protests, obviously, would not. Consider a decision to provide new helicopters. Transport planes will deliver the helicopters to wherever they are needed. The military has multiple transport planes that differ in the size of the openings for loading cargo. The helicopters can be designed with folding rotors. With rotors designed one way, the helicopters fit the transport plane with the largest opening. Designed another, more expensive way, the rotors can fit into more types of transport planes. If the military produced the helicopters internally, the conflict about this would be resolved internally.

A SYSTEM OF MANAGEMENT PRACTICES

PRACTICE	DEFINES	ALIGNS	RISKS OF ERROR
Strategy	Priorities	Opportunities and threats with capabilities	Missed opportunities Realized threats
Structure	Who makes which decisions	Decision making authority with responsibilities	Poorly resourced and implemented decisions
Human Resource Management	Employee functional capabilities	Responsibilities with employee skills	Misjudgments
Operating Policies and Procedures	What to do	Employee skills with operating conditions	Inequitable and inefficient decisions
Monitoring System	Information for decision-making	Employee performance with organizational priorities	Disincentives for correct decisions

Table 1

If multiple private companies can bid on a contract to produce the helicopters, however, the transparency of the process and the rules make a protest by one of them almost inevitable. Every company wants to leverage its existing product line to reap both additional value from its intellectual capital and economies of scale from its production facilities. If the agency specifies requirements for the helicopter so as to favor its ability to be transported by both types of transport planes, a vendor who builds the model that fits only within the larger plane might protest that the requirements favor its competitor(s). If the agency specifies requirements so the helicopter can be transported in the larger plane, the company whose helicopter has smaller blades might protest. In this example, no error generates a protest, unless one considers it an error 1) to design a transport plane without anticipating every conceivable contingency, which is unrealistic, or 2) to contract out.

Changes in strategy (Rogers and Birmingham 2004) introduce the potential for errors. First, at least during a transition period, the likelihood of error increases as decision-makers adapt and realign management practices. Consider changes since 1993, starting with a strategy focused on simplicity, relying upon competitive markets, reducing regulatory burdens, and increasing the use of technology in the field. In the mid-90's, the government instead began to facilitate mergers and consolidate the industrial base to reduce costs and focus on the war fighter as customer. By the late 90's, re-engineering, consolidation, and elimination became the focus, shifting by 2000 to lowering total ownership costs and reducing overhead. 2001 brought a renewed emphasis on strengthening the industrial base and increasing the use of commercial technology. Each change entails new expectations for performance, new policies, new skill sets, and perhaps even new structural arrangements.

Second, decentralization generates more opportunities for errors unless aligned with 1) a strategy that has a narrow scope, 2) human resource policies that increase staffing and provide professional development opportunities for employees to learn to collaborate, and 3) heightened monitoring to coordinate behavior (Roberts 2004; 239). Yet as DOD reallocated its budget from overhead to war fighting after 2001, the size of the acquisition workforce held constant while defense contracting increased. The 5000-series of DOD Directives and Instructions implicitly decentralized decision-making to the maximum extent possible while minimizing reporting requirements, which meant reducing monitoring (Dillard 2005).

Third, out-sourcing brings potential offerors into the contracting system. Presuming that all offerors are equally knowledgeable is risky. Firms with fewer than 500 employees generate the majority of protests, and the great majority of these are not upheld. Despite efforts by government agencies to facilitate access to procurement opportunities, to simplify contracting procedures, and to educate potential bidders, smaller firms may not have

sufficient understanding of the contracting and bid protest processes. The risk associated with their perceiving, if not contributing to, procedural errors makes some protests inevitable and is a risk to be anticipated and managed.

An organization's **structure** matches decision-making authority with the responsibility and resources to execute the strategy. Through differentiation and specialization, functional or otherwise, the structure creates interdependence. It defines who may participate in making decisions, the issues they care about, and their access to resources such as authority, information, budget, and personnel. Different decision-makers generate different outcomes. The risks of misalignment include, for example, procedural errors rooted in parties taking responsibility for making decisions but not having the resources to implement them.

For example, across operating units who participate in acquisition decisions, a senior contracting command official said,

We're more effective if we're brought in early [setting requirements]. Often, we're presented with a solution in search of a problem... Sometimes we struggle to get the outcome to fit the acquisition strategy and, in that context, seams can gap and maybe generate a protest.

A field operation knew the product it wanted, specified the company to make it, selected that company's design, started to purchase it—a good product but expensive and manufactured overseas—and handed it to the contracting agency to buy. The contracting agency could not do a sole source contract without justification. It was put in the position of reverse engineering the product or doing a competitive procurement. The field operation, probably under time pressure, wanted a product and left the acquisition agency “on the ropes,” exposed to a bid protest no matter what it did. Here, a misalignment of structure—who decides—with operating policies—how to decide—and strategy—decide in favor of contracting out—exposed the agency to a protest because people key to the decision were not involved at the appropriate points.

Contracting agencies structure themselves differently with different outcomes. Agency A has a group of professionals with a dedicated responsibility for setting requirements and writing evaluation criteria while agency B forms temporary teams of professionals drawn from across its operating units. The different structural arrangements entail different human resource practices and different ways of handling similar information. Among our respondents, agency A had a better reputation for “having its act together” in source selection than agency B, which means in part that agency A experienced fewer bid protests.

Finally, we found no one structurally responsible for managing all of the risks in source selection, only evaluation risk: comparing key program documents to ensure that they are consistent with one another. Yet, a source selection entails unique risks for an agency, including reputational, political, Congressional appropriation, and bid protest. While DOD has a methodology for risk management, lodging responsibility with the program manager (*Risk Management Guide for DOD Acquisitions* 2006), it focuses on three risks: performance, cost and schedule. While it claims to apply to the entire acquisition process and in theory it does, the terms “procurement planning,” “solicitation” and “source selection” never appear. The word “risk” appears hundreds of times in the FAR and DFAR, typically associated with contract performance and preceded by words like technical, cost, or schedule. The paucity of policies and procedures for managing risk in source selection likely reflects the structural separation of program management and contract management. In our analysis this represents a distinction conducive to procedural errors.

Human resource management in an organization matches the knowledge, skills and aptitudes of individuals with the responsibilities assigned to them. Different responsibilities require different capabilities, experience, and education. Organizations select people, train them, and create rewards and sanctions to align individual self-interests with the organization's interests. These choices define the functional capabilities in the organization based upon what its employees can do. A risk of misalignment is misjudgment: people lacking the requisite knowledge, skills, or aptitudes commit a protestable error.

At the Department of Defense, training, and promotion practices do not always align with structural arrangements. First, many interviewees cited reports showing that the number of procurement personnel remained unchanged while the dollar volume of purchases increased. An agency official described “over promotion” as the

response to insufficient hiring: “Over promotion leads to poor judgments being made. You can’t create enough rules to deal with poor judgment.”

Second, anticipating an increase in the acquisition workforce, another contracting official said:

My office can’t do with more people. We need more expertise. If I could hire twenty more people tomorrow, I wouldn’t do it. I can’t absorb them. I have no source selection expert pool to select from. I’d love to have a team leader. I’d love to have people with backgrounds in systems engineering. I have to teach them source selection, even for some team leaders. We need experience. Just knowing the FAR isn’t sufficient.

With as little as one week of training in business skills, technical professionals are handicapped in setting evaluation criteria, which is where protests often arise. The source selection workforce needs legal, financial, and engineering knowledge to deal with the major stakeholders in the process (see also Brown, Potoski, and Van Slyke 2008; Feeny and Smith 2008).

Third, people who get hands-on experience in a major acquisition often choose not to do another. The experience is intense, especially on high value source selections. Team members work full-time, long hours: days, nights, weekends. While knowledge they gain about the process might be transferable in theory, it might not be in practice, so it is not an opportunity for professional development. Evaluating different bids in terms of how well the offeror’s products or services perform a particular function does not necessarily transfer to evaluations of other projects. Contracting agencies that, as a management practice, recruit employees to staff an acquisition team on a temporary basis confront a higher risk of error resulting from insufficiently trained decision-makers than agencies that have staff dedicated full-time to source selection.

Fourth, aligning people with positions is a challenge even at senior levels. People rising through the ranks of combat commands move to acquisition. Can good operations officers be good acquisition managers? According to John Young, a former Under Secretary at DOD, line officers look down on acquisition specialists.

Military operators think they’re born leaders. The military believes that if it just puts contracting professionals around the military operator who is assigned to run acquisition, that will work. The army has over the years had a handful of acquisition flag officers. Military operators who do not think much of acquisition officers control promotion boards. Until you show acquisition people that they have a good vertical potential, you won’t get the best people in acquisitions.

A Navy three-star officer once told Young that people in acquisitions are people who could not “make it” in operations and moved out.

Fifth, the incentives for participating in source selections do not always align with the strategic importance of the activity. At Agency A, the contracting officer is assigned full-time to source selection, at least for big projects, so his or her personnel record will reflect performance in that activity. Even for contract specialists on temporary assignment to source selection, how well they performed on the source selection is part of their performance reviews. To be promoted within this agency, a contracting official said,

...it helps to have a competition under your belt...You can’t get promoted to a senior position in contracting [at this agency] without having been on a source selection team or managed a competition. When you apply for a more senior position with fifty others, you have to distinguish yourself. So, serving on a source selection team or managing a competition is something you want to do if you’re ambitious. Hence, we tend to get our best and brightest on our teams.

Agency B strikes a middle ground. If the activity is a significant part of an employee’s responsibilities, it may be stressed in his or her appraisal. However, few people aside from the employee and the supervisor see the performance appraisal; it has no bearing on merit promotion. A supervisor can cite good work on a solicitation as the basis for a performance award nomination, but this is a discretionary matter.

Agency C recruits members informally for its source selection teams. Until recently, service on such teams was not a part of its personnel records. Indeed, it had no tracking system to help match knowledge, skills and aptitudes with responsibilities. Good performance on a successful solicitation might garner a letter of commendation but otherwise nothing permanent in an employee's file. Service on a source selection team might look good on a resume but is basically irrelevant to an individual's career opportunities. The agency relies on a sense of professional duty to staff its source selections.

Finally, human resource management shapes an agency's culture, its shared attitudes, values and beliefs. Within a single contracting command, different units have different cultures: blue collar vs. white collar, engineering versus administration. The command depends upon cooperation among these units. Cultural misunderstandings can underlie internal conflicts that give rise to procedural errors and the ensuing protests. In sum, human resource practices can make agencies more or less prone to err.

An organization's **operating policies and procedures** implement its strategy. Policies provide standard operating procedures. When operating conditions deviate from normal, which they invariably will, policies inform and set boundaries on employee decisions, defining what actions are acceptable. The risk of misaligned operating policies is that parties make decisions inappropriate for the problems presented to them, resulting in inefficient and inequitable outcomes that can provide the basis for a protest.

Consider, first, alignment problems associated with specific contracting policies, such as bundling and increasing the duration of contracts. Agencies expect to realize economies of scale, as do contractors, by combining smaller, related contracts and administering them over a longer period of time. Fewer small contracts imply fewer contracts to protest. However, bundling produces contracts with larger dollar values that have bigger impacts on individual companies. Not surprisingly, the largest number of protests is from rejected offerors when the total value of the contract exceeds one hundred percent of the companies' annual revenue. Of course, larger companies are more likely to have multiple contracts and, so, to protest more strategically than smaller ones (See Maser, Subbotin, and Thompson 2010 for more detailed statistical analysis).

Longer contracts—five years or more—attract more protests than shorter ones. In a dynamic acknowledged by vendors and attorneys who specialize in bid protests, the disappointed offeror will not be able to participate in the government segment of the market for the good or service, perhaps for a decade, a phenomenon called "lock out." The rejected offeror, possibly an incumbent supplier, may find it too costly to mothball people, capital, and other resources awaiting another opportunity to win DOD business. The contract need not be large for fear of a lockout to encourage a protest if it is delivered in a smaller geographic area where alternative government contracts are not available. The investment of resources in a bid protest, or at least a threat of one, can appear to be cost-effective.

Here again, management decisions about policies are not protestable. If the policies do not take into account the competitive environments in which companies operate, agencies will then make contracting decisions that are protestable, and are protested, if only as a result of third party opportunism. In this example, contracting policies that reduce contracting opportunities do not necessarily align with the strategy of commercial sourcing to increase them.

Second, a policy of creating longer contracts also requires greater commitments from both the government and the contractor. Uncertainties associated with performance increase. Both sides know that the agency does not have the option to switch easily to another vendor if the quality of output from the award recipient declines. Ensuring compliance calls for investing more in monitoring to align with the policy of creating longer contracts. However, as monitoring becomes more costly, agencies instead invest in crafting *ex ante* contractual safeguards, such as requirements specifying the experience and skills of personnel assigned to contract performance. The multiplicity and complexity of requirements increases the likelihood of errors and, hence, protests either of the requirements or of their evaluation (Snider and Walkner 2001).

Third, once an agency awards a contract, it has discretion over its policies for debriefing rejected offerors. Some agencies supply the same information provided to the Source Selection Authority, the party responsible for making the selection decision, to the level of detail where specifics about the winner must be redacted. That is

essentially the same level of detail that the agency would provide in responding to a protest at GAO. Other agencies provide one or two Powerpoints and read a script prepared by in-house attorneys because they fear that firms are “fishing” for reasons to protest. The minimalist procedure misaligns with the strategy of contracting out. It does not improve the ability of offerors to be responsive, provoking protests.

Finally, an organization **monitors performance** toward achieving its mission and executing its strategy. Accounting, budgets, administrative controls, activity reports and audits channel information to decision-makers. The monitoring system ensures that individuals have the information they require to make decisions for which they are responsible. It matches their performance with organizational expectations. The risk of monitoring misaligned with other management practices is behavior responsive to performance measures but perverse in terms of the organization’s strategy and policies, so that evidence-informed governance goes awry (see also Julnes 2007).

Measuring the success of a source selection as a process is challenging. At the agency management level, officials debate the appropriateness of different measures of performance. Some say, “We don’t do any good if we don’t survive a protest. So, we ought to manage to minimize protests.” Others say, “That’s terrible. Our job is to [deliver warships, fly planes, transport soldiers] and to protect the country, not to avoid protests.” In this we hear the risk of misaligning measures to be monitored and managed—protests—with strategy.

At the individual source selection level, contractor past performance illustrates an inherently complex and ambiguous evaluation criterion, leading to more bid protests (Snider and Walker 2001), but it matters. According to an executive at a prime contractor:

If you’re close on technical merit and close on price, past performance can be decisive, especially if your past performance is better than others. I can’t recall a protest sustained simply on the basis of how an agency handled past performance. But for every protest I’ve been in, a piece of the spaghetti thrown on the wall is a claim about past performance.

To make appropriate comparisons and inferences about whether a company has met performance goals, an agency should select contracts similar to those under consideration. It should consider extraneous factors that influence performance. The data has to be trustworthy. Not surprisingly, bid protestors, contractors, and agency officials find past performance as an evaluation criterion to provide fertile ground for protests.

Using more objective, quantitative criteria to evaluate contracts might mitigate protests but reduce the incentives for contractors to exceed requirements. It could lead to binary decisions in evaluations based purely on numbers, like least cost. If so, it might undermine subjective use of best value as a criterion, a policy some people believe has worked better than “least cost” to support an acquisition strategy reliant upon commercial production.

IV. RECOMMENDATIONS AND CONCLUSIONS

First, improve system alignment. Outsourcing as a strategy might merit reconsideration. An optimal solution might combine government ownership of the means of production, including specialized equipment and human assets, with outsourcing. The costs of managing outsourcing have been underestimated. The planned addition of twenty thousand acquisition professionals to government service hints at the size of the underestimate. To further align contracting policies and procedures with its strategy, government could require contractors to have staff certified in source selection, and, thereby, qualified to participate in bidding and in protesting. This is analogous in source selection to the expectation in program execution that government and contractors have certified project managers. Creating a culture of enterprise risk management (Hardy 2010) mitigates procedural errors, especially when agencies create specialized operating units. One approach creates a counterpart to the chief risk officer in a private company, a person or set of people within each contracting command who focuses on source selection risks, asking how the agency is conducting itself and whether the agency is doing it correctly. If Source Selection Authorities or Source Selection Advisory Committees already identify and manage evaluation risk, then the definition of risks for them to manage could be expanded beyond budget, schedule, and technology.

Second, improve human resources. Increasing training and development opportunities for people engaged in source selection should reduce procedural errors. The kinds of mistakes leading to bid protests are mistakes that can be mitigated by experience, which is one reason that DOD created peer review teams for source selections using people who average twice the experience of people conducting them. Simulations, despite their limitations, provide opportunities to gain experience other than through on-the-job training where a mistake might be protestable. The Department of Defense uses simulations of battles, wars, budgeting, and logistics, some from its Modeling and Simulation Information Analysis Center. If simulations can be used for designing weapons and training war fighters, simulations can be used to train people who acquire the products and services the war fighters use. Finally, employees can be incentivized to work on source selections. At minimum, recognition programs could distinguish performance of acquisition versus technical professionals. A related initiative would track employee participation in source selections, creating a database to support decisions contracting officers make when composing source selection teams.

Third, improve system monitoring. DOD and Congress can collect better data to monitor performance of the acquisition process from specification of need through contract award, taking into account bid protests or COFC lawsuits, as well as the time required for an agency to take corrective action and complete the solicitation (Schwartz and Manuel 2009). Agencies can request feedback on the quality of the source selection process from winners as well as rejected offerors. Information about errors committed during a successful solicitation can, if put in the right hands, prevent an unsuccessful one (Poister and Thomas 2009). Tracking the number and dollar volume of protestable contract actions, as well as corrective actions and protester reasons for withdrawing protests, expands a recommendation offered by the Congressional Research Service to require GAO to include in its annual report to Congress the most common grounds for upholding protests (Schwartz and Manuel 2009 p.15). A Source Selection Joint Action Team in the Office of the Secretary of Defense is looking at the inconsistency of debriefings, for example. To improve consistency, OSD could collect data systematically on the quality of the debriefings to compare performance with expectations. Data analytics demonstrably improve program performance (Davenport, Harris and Morison 2010; Frazier 2008).

As a conceptual matter, a conflict management approach provides different insights into administrative processes than performance management, program management, contract management, or strategic management. It adds to our tools. Misalignments among management practices can create conditions conducive to procedural errors, undermining organizational performance and producing appeals of decisions. Given the plethora of appealable administrative decisions within Federal, state and local agencies, interesting and researchable questions include: are misalignments of management practices equally probable? Do they occur in predictable patterns? Do conflicts with different characteristics map onto different misalignments? Are rates of procedural and substantive errors different with different management practices? Practitioners can use the approach employed here to mitigate procedural errors by adjusting the management practices within their control.

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ⁱ The First Amendment of the U.S. Constitution protects the right of people—and for these purposes, a business is a person—“to petition Government for a redress of grievances.” Subsequent judicial actions extended that right to state and local governments.