

**The Karenina Principle and the Pathology of Administrative Appeals:  
A Chiropractic Approach to Improving DOD Acquisitions**

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## **Abstract**

### **The Karenina Principle and the Pathology of Administrative Appeals:**

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What do appeals of administrative decisions tell us about the processes that give rise to them? Bid protests of Department of Defense source selections are illustrative. Rejected bidders can appeal to the Government Accountability Office. GAO sustains protests—few, but costly and growing—on grounds of procedural irregularity. Applying concepts from organizational economics, conflict management, and dispute systems design, we explore misalignments among management practices within agencies that can contribute to procedural errors and, thereby, to appeals. A conflict management audit, including interviews with participants in the process and analysis of GAO’s bid protest decisions, identifies sources of conflict in misalignments among strategy, structure, human resources, policies and procedures, and monitoring. Strategically adjusting the decisions to contract out, expanding authority and responsibility for risk management, creating professional development opportunities, revisiting policies on bundling and duration of contracts, and using performance information to incentivize the workforce can mitigate bid protests.

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**I. Introduction**

During the last quarter of 2009 and the first quarter of 2010, I interviewed attorneys at the Government Accountability Office (GAO); executives and in-house counsel at four large prime contractors; four outside bid protest counsel; government contract managers at two small companies, typically subcontractors; 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 industry trade associations such as the Aerospace Industries Association, the National Contract Management Association, the Professional Services Council, and TechAmerica.<sup>1</sup> Why? The process by which Federal agencies obtain goods and services includes opportunities for bidders to protest contracting decisions. We want to understand better why protests occur, what happens when they do, and what bid protests tell us about the administrative processes through which contracts are let.

According to the Congressional Research Service, the number of bid protests against DOD has increased from about 600 in FY2001 to 840 in FY2008, a miniscule number compared to the number of protestable contracts—and most protests are dismissed, withdrawn, or settled prior to GAO issuing an opinion (Schwartz and Manuel 2009 p.12-13). GAO sustains 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 draw attention from the media and

Congress, as do high profile DOD protests such as the KC-Tanker. Congress has expanded GAO's jurisdiction. The availability of GAO decisions and information on the Internet has triggered blogs. Despite the well-intentioned efforts of contracting commands, errors, real or perceived, occur in the source selection process. The effectiveness rate, which combines sustains with agency corrective actions that give a protestor some relief, has increased to about 45%.

The costs of a bid protest include the resources 1) an agency expends responding, 2) the protestor expends on protesting; 3) a winner can expend supporting the contracting agency, and 4) the GAO expends deciding. In addition, once a protest has been filed, new work ceases until GAO issues its decision; 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.

In theory, allowing protests produces more competitive and accountable procurements (Report of the Committee on Homeland Security and Governmental Affairs 2007, p. 12). It safeguards against government opportunism in source selections, the possibility of the government opportunistically changing the rules to its benefit at a vendor's expense (Spiller 2008), inducing more contractors to bid. They bring the best expertise to bear; efficient, low-cost production should result.

However, government procurement, given its publicness, relies upon interested third parties, those who do not win contracts for which they competed, to monitor the source solicitation process through the bid protest process. This admits third party opportunism: protests lodged for reasons other than obtaining corrective actions, benefiting the protestor at the government's expense (Spiller 2008). Our interviews confirm the results of an informal survey of

contractors conducted ten years ago (Roemerman 1998). Protesting to win, to seek justice after an agency erred, and to obtain information to improve their 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, and to improve their chances of winning subsequent contracts are costly side effects of competition. As an attorney described it, “a bid protest is a conflict exacerbated by commercial rivalry.”

Reducing the risks of government opportunism by 1) imposing procurement rules that make administrative processes complex and 2) allowing bid protests increases the risk of third party opportunism. These risks become real, rather than theoretical constructs, in the set of practices employed by agencies to manage source selections. We posit that misalignments in these practices generate unproductive conflicts that become protests. We approached the problem by conducting a conflict management audit of the source selection process to identify the sources of conflict (Ury, Brett, and Goldberg 1988). In addition to interviewing participants in the process, we analyzed bid protests posted on the GAO’s website. We coded all digested 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 Engineer Corps, which operates under different Federal appropriations statutes.

Given the bid protests we studied and the multiplicity of administrative processes we observed at contracting commands, it appears at first look that the Karenina Principle applies. To wit: happy commands—commands with few or no protests—are all alike; every unhappy command is unhappy in its own way (Diamond 1997; from Tolstoy 1877). However, different management practices contribute to persistent performance differences (Epstein 2010; Gibbons

2009). If bid protests are symptoms of misalignments within agency management practices, then on second look we can identify a pathology of bid protests. This chiropractic perspective can inform adjustments to mitigate the symptoms. In sum, we study outcomes—bid protests—to understand and improve the processes (See also Mayer and Khademian 1996).

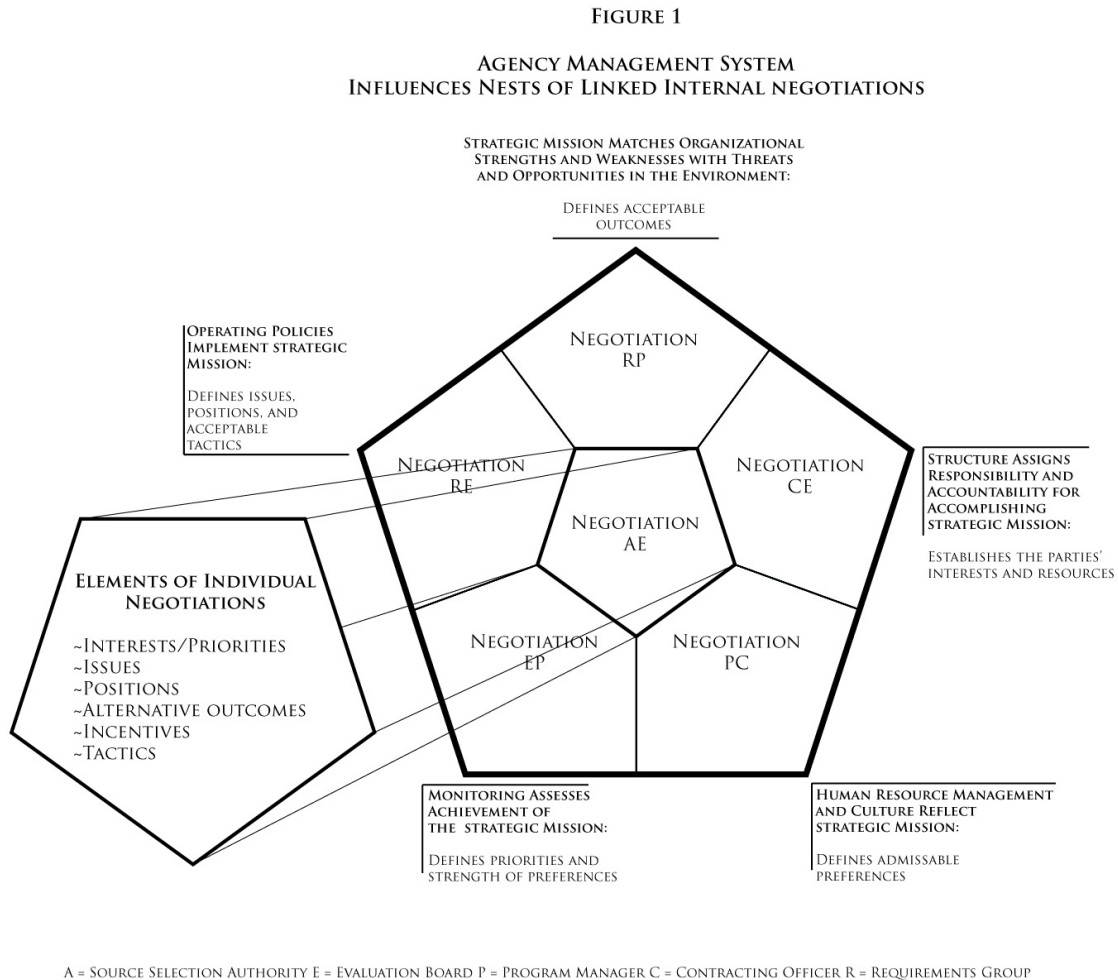
The paper continues in three sections. In Section II, we describe organizational processes as negotiations and the conditions under which they can fail (Heckathorn and Maser 1990; Maser 1998). In Section III, we apply methods and concepts from dispute systems design to explain how management practices align the elements of those negotiations (Costantino and Merchant 1996). Traditionally, this informs the design of an alternative mechanism for mitigating and resolving them (Fisher, Ury, and Goldberg 1988; Slaikeu and Hasson 1998; Stitt 1998; Lynch 2001; Conbere, 2001; Lipsky, Seeber, and Finch 2003; Shariff 2003; Bordone 2008). Rather than design an alternative, we treat the principal organization as a dispute resolution mechanism and identify misalignments in its workings. In Section IV, we prescribe adjustments.

## **II. The origins of conflict in source selection**

The source selection process includes identifying a need, specifying requirements and evaluation criteria, ensuring that bidders understand the requirements and meet the criteria, and then evaluating the bids and reaching a decision. Each of these activities resolve problems that arise from information deficiencies. They involve a series of linked negotiations among parties seeking mandates and the resources to fulfill them (Lax and Sebenius 1986). The configuration of each negotiation includes the parties; their interests, priorities, and resources; the issues to be resolved; the range of acceptable tactics and outcomes; and procedural constraints. Legitimate bid protests invariably reflect a failure in the process, such as excluding an interested party; not incorporating appropriate interests or priorities; ignoring relevant issues or treating them

ambiguously; or violating procedural understandings. Hence, the bid protest mechanism is supposed to motivate agencies to design and operate source selection processes that are fair and transparent and that minimize the error of selecting an inappropriate vendor.

In Figure 1, we depict a set of five generic practices employed by contracting agencies to manage the process, conveniently outlining a pentagon (Herbert 1979, p. 123). In this model,



aligning management practices means aligning ten interactions. Each practice represented by a point on the border of the pentagon is connected not only to two immediately adjacent but also to the two across from it. Strategy, for example, should align with structure and policies; it should align with human resource management and monitoring, as well. Any single or combination of practices misaligned sets the stage for dysfunction, which is why ineffective agencies can appear

to be ineffective in their own ways.

Within the agency lie nests of linked negotiations, also depicted as pentagons. The members of a requirements group, typically from different organizational and professional backgrounds, engage in joint problem solving negotiations. They negotiate with the contracting officer. Members of evaluation boards negotiate with each other. They negotiate with the contracting officer. And so on. Since the buck starts and stops with the Source Selection Authority (SSA), we put it in the center to indicate its primacy.

Securing cooperation in each negotiation brings the elements to bear on resolving three problems: coordination, division and enforcement. The solutions reflect values and tradeoffs among them with a long history in public administration: accountability, fairness, and efficiency (Stillman 1996; Cooper 2003; Brown, Potoski and Van Slyke 2006). Every group has within it a finite stock of resources, called endogenous transaction resources, which facilitate cooperation. Consider a decision to acquire a new helicopter. Decision makers must conclude that the net benefit from designing and delivering the new equipment is positive. Information about the need for the helicopter has to come from war fighters in the field and be channeled into the acquisition process, or from war fighters who transfer into positions within the acquisitions process and have the authority to influence decisions, or from an analysis of military performance that identifies a gap. Multiple parties will have to agree upon the purposes to be served by the new helicopter and that those purposes are not being served cost-effectively by other equipment, either. This is the coordination problem.

It is in everyone's interest to collaborate and to agree on the outcomes because they have a common interest in serving the war fighter, but stakeholders also bring different individual interests, priorities, and resources to the negotiation. The prerequisite resources for coordinating

include knowledge about established norms, communication channels, and signaling mechanisms, all features found in source selections. Endogenous resources expended on defining the market, crafting requirements, informing the industry, and discussions with firms safeguard against the uncertainty of incoordination and infeasibility.

Decision-makers also must decide whether the new helicopter has a higher priority, given limited budgets, than competing initiatives. More detailed decisions about the equipment's performance characteristics and requirements—carrying capacity, weaponry, fuel capacity, speed, maneuvering ability, durability under different conditions, etc.—raise issues on which different stakeholders with different priorities will take different positions. Engineers will have one perspective; financial analysts another; operation and maintenance personnel a third; and so on. Parties setting requirements will have to agree on them, given the multiple performance expectations of products and services and the technical tradeoffs required among them. This is the division problem.

The prerequisites for resolving division problems include independent sources of pertinent information with which to assess competing claims. The endogenous stock of transaction resources that people can expend on division problems include their technical and managerial expertise. For example, larger companies have sufficient knowledge about their industry to divine from the requirements which company helped shape them; they can tell that only a subset of companies will qualify. Vendors expecting to bid may use a variety of tactics to shape solicitations, in part because contracting agencies resolve their search problems by soliciting input from companies with expertise. Agencies adopt procedures to safeguard against, for example, decisions that inappropriately favor one platform versus another, or operational versus maintenance requirements.

Finally, decision-makers must conclude that the winner will fulfill its proposal. Within the source selection process, individuals will have to translate requirements into the criteria by which proposals will be evaluated, then conduct the evaluation as the basis for making a recommendation to the SSA. The prerequisites for enforcing contracts include the ability to monitor compliance and to sanction noncompliance. The process is fraught with uncertainty about whether parties will default. Again, the parties have a stock of endogenous transaction resources with which to safeguard against failures to comply. This is the enforcement problem.

The parties often have sufficient transaction resources among themselves to secure cooperation. This would include interactions between industry representatives and agencies about requirements and agency levels protest where a contractor can make a case for an error in the process and the agency takes corrective action. When the parties exhaust their transaction resources, they call in a third party such as GAO. The example would include cases where an offeror is not awarded the contract, finds the explanation at the debriefing to be unsatisfactory, and files a formal protest. Even third party resources can be exhausted. Here, the parties expend considerable resources and the problem persists, perhaps for years, without resolution. One finds examples in major contracts cancelled by the Secretary of Defense or the KC-Tanker.

This analysis tells us three things. First, as uncertainty increases, exhausting transaction resources more quickly, the likelihood of errors and, hence, bid protests, increases. Factors that stress endogenous resources as they increase include: the number of parties involved in the decision; the heterogeneity of their interests, higher with multiple missions or services; the level of performance risk, higher in the design stage than production; the cost of measuring performance, higher with services than products; the tolerance for risk, higher with non-weapons

than weapons; workforce instability, higher with turnover; and the duration of the contract, higher with longer periods (See Maser, Subbotin, and Thompson 2010).

Second, gathering information to safeguard against the risk of incoordination tends to be less costly than gathering information to safeguard against the risk of unfair division, which is less costly than gathering information to safeguard against the risk of nonperformance. Specifying requirements and searching the market for suppliers—among the first stages of source solicitation—arguably have lower information costs and, hence, lower risk of error than translating requirements into evaluation criteria, which in turn appears to entail lower information cost and risk of error than applying the criteria to proposals. The information costs and decision difficulty facing a contracting agency will increase through the stages, increasing the likelihood of errors and bid protests. Indeed, pre-award protests are less frequent than post-award protests.

Third, errors and protests are inevitable. Aside from opportunistic protests, a protestor might fail to understand the source solicitation process and file a protest believing the agency erred when, in fact, the protestor erred. The objective in designing source selection and bid protest processes is to minimize the sum of the costs of uncertainty—errors and protestable decisions—and the costs of avoiding it—endogenous resources expended on information (see Calabresi and Melamed 1972; Greenstein 1993; Weimer and Vining 2010, Ch 8). Within every contracting command, management practices influence this balance. So do GAO's standards of materiality of protests and reasonableness of agency decisions. Sustaining protests signals agencies to adjust their management practices.

### **III. Do management practices influence the configuration of conflicts?**

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).

Splitting decision-making authority between finance and engineering departments increases returns to personnel policies that recruit financial analysts and engineers with skills matched to their departments' mandates. For substitutes, implementing one reduces the attractiveness of the other. If introducing performance pay gives incentives for good behavior, then the value of monitoring to enforce the good behavior declines; less should be done. Multiple combinations of management practices can be coherent but a best combination exists, maximizing complementarity maximizes performance.

When properly implemented, management practices promote productive negotiations. Parties communicate openly and share information about their real needs and priorities. They identify all of the issues relevant to the organization's strategy and cooperate to create maximum value. *Ceteris paribus*, the opportunity for individual gains from coordinated action increases relative to the opportunity for individuals pursuing their own ends at the expense of their joint interest. People also tend to avoid taking risks to protect a certain gain; they will take more risk to avoid a certain loss, which means they will be willing to make concessions to reach agreements and to follow through on them when management practices align. In source selection, this minimizes the potential for unproductive conflicts and the likelihood of protestable errors.

When misaligned, management practices generate unproductive negotiations. Parties withhold relevant information and pursue priorities and issues that are inconsistent with the agency's strategy. Parties neglect relevant issues and fail to follow through on their commitments. Disconnects foretell losses and losses encourage risk-taking. In source selection, this increases the likelihood of unproductive conflicts and protestable errors. Current and former agency officials agree with industry executives: what agencies do to create good source selection processes also mitigates protests.

Expanding on Figure 1, Table 1 outlines the impact of management practices on the configuration of negotiations. An agency'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 the organization's capabilities and weaknesses with the opportunities and threats in its environment. It frames individual conflicts by coordinating expectations within an organization, creating common interests among employees, and thereby reduces the range of acceptable alternatives and outcomes. This establishes the organization's priorities, constraining the agreements that can arise within the nest of individual negotiations. If the agency'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.

Acquisition strategy changes (Rogers and Birmingham 2004). At least since 1993 with the National Performance Review, strategy focused on simplicity, relying upon commercial markets, reducing regulatory burdens, and increasing the use of technology in the field. In the mid-90's, the government facilitated mergers and the consolidation of the industrial base, focusing on reducing costs and the war fighter as customer. Toward the late 90's, the buzzwords were re-engineering, consolidation, and elimination. By 2000, lowering total ownership costs and reducing overhead took primacy. 2001 brought a renewed emphasis on strengthening the industrial base and increasing the use of commercial technology.

With this came reallocation of the defense budget from overhead to war fighting capability. The Defense of Department wanted the capability to respond to multiple, less predictable threats. Partly as a consequence, the size of the acquisitions workforce held constant as defense contracting increased. Performance measures took primacy over design standards. In terms of operating policy, a shift occurred from a DOD-centric technology—developed for and

## MANAGEMENT PRACTICES AND CONFLICT MANAGEMENT

MANAGEMENT PRACTICE			IMPACT ON LINKED NEGOTIATIONS	
ELEMENT	DEFINES	TO MATCH	FRAMES CONFLICT BY	RISKING
Strategy	Priorities	Opportunities with the organization's capabilities	Targeting alternatives Coordinating expectations and interests	Missed opportunities
Structure	Paths for making decisions	Discretionary authority with responsibilities (Expertise)	Precluding alternatives and affected parties from decisions Assigning resources, interests	Inconsistent decisions
Human Resource Management	Functional capabilities	Responsibilities with employee skills	Delimiting interests, preferences, and positions	Judgment errors
Operating Policies and Procedures	Responses to operating variances	Employee decisions with conditions	Defining acceptable agreements Arbitrating conflicts	Inequity Inefficiency
Monitoring System	Information to support decision-making	Employee performance with organizational expectations	Weighting interests Delimiting tactics	Perverse incentives Biased information

**Table 1**

within the DOD military-industrial base—to commercial-centric technology development. This induced a shift from cost plus, multi-year contracts to performance contracts with milestone development. In terms of structure, the series 5000 DOD Directions and Instructions implicitly decentralized decision-making to the maximum extent possible while minimizing reporting requirements, which meant less monitoring (Dillard 2005).

From a dispute systems design perspective, this has three implications. First, each strategic thrust refocuses the interests of contracting commands. Second, eliminating in-house production as an alternative reduces the leverage the contracting commands have when negotiating with contractors. Third, decentralized decision-making generates more conflict 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 2006; 239).

If “government owned and operated” means designing, producing, and delivering products and services, conflicts would occur but bid protests would not. Consider, again, 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. This has implications not only for a tradeoff between price and life-cycle operating cost, but also for where the helicopters should be based and who will maintain them, which impacts the units that operate them and the units that maintain

them. If the military produced the helicopters internally, the resulting pattern of negotiations would be concluded internally.

If multiple private companies can bid on a contract to produce the helicopters, the transparency of the process and the rules governing resolutions of the division problem make conflict with one of them almost inevitable. Each 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 requirements for the helicopter are specified so as to favor its ability to be transported by both types of transport planes, a vendor who builds the model that can only fit in the larger plane might protest that the requirements favor its competitor(s). If the requirements are specified so the helicopter can be transported only in the larger plane, the company whose helicopter has smaller blades can protest on the same grounds. Conflict in resolving this division problem is unavoidable.

Finally, agencies and companies have different risk preferences, which can underlie their conflicts and generate protests. A contracting agency official drew an analogy between buying a glove and buying a weapon. Two companies produce gloves and sell them through retailers by convincing the consumer that its glove fits best; the consumer should live with a tighter glove or looser glove because that's what the producer produces. Bidders will say that their products are custom produced for the military but their plan is to diversify their product line, modifying an existing product to fit, then try to convince the military to take their product because it fits "best." But the military doesn't want the "best" fit. Dealing with matters of life and death, it wants a "fit." It will not accept as much performance risk as retail consumers and the offerors.

The agency's **structure** matches decision-making authority with responsibility and resources to execute the strategy. Through differentiation and specialization, functional or otherwise, the structure creates interdependence, which is the precondition for negotiation. It defines who may participate in making decisions, their interests, the issues they care about, and their access to resources such as authority, information, budget, and personnel. Nothing is more important to successfully resolving conflicts than identifying who may participate in resolving them (Lax and Sebenius 2006). Different participants generate different outcomes. The risks of misalignment include, for example, conflicts among parties over who has the authority and responsibility to decide; conflicts rooted not in a difference of interests but in parties having different information or capacities to make the decision; or conflicts arising from conflicting policies.

From a 30,000-foot level, a Senate staffer described a structural misalignment:

The management and strategy people come up with a great idea and chuck it to acquisitions to implement without sufficient attention to whether the idea is feasible. Acquisitions people are not involved in strategic decision-making.

Historically, contracting was seen as mechanical and boring.

At ground level, 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.

For example, 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 acquisitions 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 process. The original customer, especially under time pressure, wants a product, and leaves the acquisition agency “on the ropes,” exposing itself to a bid protest no matter what it does. In effect, a misalignment of structure—who decides—with operating policies—how to decide—and strategy—decide in favor of contracting out —exposes the agency to a protest because people with information key to the decision were not involved at the appropriate points.

**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, what its employees can do. Human resource practices frame individual conflicts through the personalities, preferences and intellectual resources that become part of and are developed within the organization. A risk of misalignment in these practices is that parties do not have the knowledge, skills and aptitudes to make the required judgments.

Respondent comments took several forms but describe recruitment, training, and promotion practices that do not align with structure. Asked about the acquisitions workforce, many interviewees cite the 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.”

Anticipating an increase in the acquisitions 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 FARs isn’t sufficient.

With as few as one week of training in business skills, technical professionals are handicapped in setting criteria, which is where protests often arise. In organizations where the engineers and scientists dominate the culture, the criteria may be so generic as to allow any bidder to qualify. The source selection workforce needs legal, financial, and engineering knowledge to be conversant with the major stakeholders in the process (see also Brown, Potoski, and Van Slyke 2008).

People who get hands-on experience in a major acquisition often choose not to do another. First, the experience is intense, especially on high value source selections. Team members work full-time, long hours: days, nights, weekends. Second, 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.

Matching people with positions is a challenge even at senior levels. People rising through the ranks of combat commands move to acquisitions. Can good operational officers be good managers? According to John Young, a former Deputy Secretary at DOD, military operators disrespect the acquisition side.

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 acquisitions, 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.

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 records will reflect performance in that domain. Even for a contract specialist on temporary assignment to a source selection, performance on the source selection is part of a performance review. To be promoted within the 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, acknowledging that performance appraisal with respect to source selection is challenging, made more so by the dismantling of National Security Personnel System (NSPS). If source selection activity is a significant part of an employee's responsibilities, it can be called out as an appraisal element. However, few people beyond the employee and supervisor see the performance appraisal; it is not used in merit promotion. A supervisor can always use good work in a solicitation as the basis for performance award nomination, but this is discretionary, not systematic.

Agency C recruits members informally to be on each of its source selection teams. Until very recently, personnel records made no mention of that. The agency had no useful tracking system to help match knowledge, skills and aptitudes with responsibilities. Good performance on a successful solicitation might garner a letter of commendation but nothing permanent in an employee's file. It looks good on a resume but basically has no recognized impact on an individual's career. The agency relies on a sense of professional duty to staff its solicitations.

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 them. One command is entrepreneurial; another is traditional and "by the book." Vendors try to learn cultural differences from experience or from recruiting government decision-makers. Absent that learning, bidders

might craft proposals that do not serve the agencies. Cultural misunderstandings underlie the ensuing protests.

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 is acceptable. Policies influence the configuration of individual conflicts by establishing the issues that are negotiable, the range of permissible positions, acceptable tactics, and the resources that employees may apply to resolve conflicts. The risk of misaligned operating policies is that parties make decisions inappropriate for the problems presented to them, resulting in inefficient and inequitable outcomes.

In theory, FARs, DFARs, and other statutes define much of the operating policies and procedures for the acquisition process. In practice, agencies view them differently. According to a Senate staffer, some agencies see FAR's as rules to be abided by. Others see them as guidelines. Others see them as suggestions. This might be due in part to the cultures within the agencies. It raises the question, though, of whether potential offerors understand the differences. If they do not, the conditions are ripe for a protest.

The multiplicity of policies, however valid each one may be, can be problematic. A legal practitioner says about the FARs and DFARs, "They're so complicated that a good protest lawyer can always find grounds to protest." The converse is that an agency official can always find a defense. Some agency officials disagree, believing the FARs are so specific that GAO will likely go against a contracting officer if there is any question about whether or not he or she followed the rules. The feeling is, "We're guilty

until proven innocent.” If these perceptions reflect reality, they validate the prediction that complexity combined with rigidity increases conflicts (Spiller 2008, p. 15).

Agencies expect to realize economies of scale, as do contractors, by implementing a policy of bundling 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.

Longer contracts, meaning five years or more, attract more protests than shorter ones. In a dynamic acknowledged by vendors and bid protest counsel, 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.” As a business, 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. From this perspective, the investment of resources in a bid protest, or at least a threat of one, appears to be cost-effective.

Longer contracts require greater commitments from both the government and the contractor; the 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 becomes more costly, which creates incentives for agencies to invest more in crafting *ex ante* contractual

safeguards, such as specifying the experience and skills of personnel assigned to contract performance. The multiplicity and complexity of the requirements increases the likelihood of protests of either the requirements or their evaluation (Snider and Walkner 2001).

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. Since people can only make decisions based on the information available to them, the monitoring system frames the way individuals perceive conflicts and their alternatives. Because individuals respond to the measures used to assess their performance, the information and monitoring system influences the priorities that individuals bring into their relationships and the strength of their preferences over potential outcomes. The risk of monitoring misaligned with other management practices is conflict resulting from behavior responsive to performance measures but perverse in terms of the organization's strategy and policies.

At the agency level, people debate measures of performance. Some officials 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 the monitoring mechanism with the strategy.

At the ground level, past performance is an evaluation criterion that appears to be inherently complex and ambiguous, leading to increased 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 met performance goals in the past, an agency should select similar contracts. 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 to be ripe for protests.

Using more objective evaluation criteria might mitigate protests but it reduces the incentives for contractors to exceed requirements. It could lead to binary decisions in evaluations based purely on numbers. If so, it might "trash the subjective use of best-value," a policy some people believe has worked to support acquisitions strategy.

### **Recommendations and Conclusions:**

Contracting out will continue. The bid protest system helps agencies find their mistakes and correct them while attempting to treat contractors fairly and consistently. It puts the decision to identify errors in the hands of parties who are appropriately motivated and are best informed. An alternative is to increase resources to inspectors

general. Both options are subject to the same weakness: damage has already been done. Better to improve the source selection process to mitigate unproductive conflicts.

We propose applying principles of management and dispute systems design to address recurring appeals of administrative decisions. The key word is “systems.” Anticipate the interactive effects of management practices; plan for their impacts upon the configurations of conflict that comprise organizational life; identify misalignments and make adjustments.

In the case of bid protests, from the perspective of **strategy**, moving to market-based purchases may have gone too far. The planned addition of twenty thousand acquisition professionals might be a signal of the real costs of competitive outsourcing. Consolidation in the industry exacerbates the problem. The optimal solution could include a combination of government ownership of specialized equipment and human assets, or, indeed, of the means of production. It is not sufficient to reassess the appropriate role of government. It requires reassessing the effective and efficient organization of the means of production, given the role that government decides to undertake and the full costs of production, transaction costs taken into account.

A strategy of contracting out presumes that all vendors are equally capable bidders. They are not. Firms with fewer than 500 employees generate the majority of protests, and the great majority of these are not sustained. 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. Those who participate in source solicitations and bid protests need the knowledge, skills, and aptitudes appropriate

to their responsibilities. If voluntary participation in government or trade association educational programs is insufficient, government contractors could be required to have staff certified in source selection, qualified to participate in bidding and in a decision to protest. This is analogous on the source selection side of acquisitions to the expectation on the program side that government and contractors have certified project managers.

From the perspective of **structure**, contracting 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 its various operating units. The different structures entail different resources and engage people with different knowledge, skills and aptitudes who likely will interact differently with each other and with potential contractors. Employee performance management systems and incentives are easier to implement when employees specialize. Among our respondents, agency A had a better reputation for “having its act together” in source selection than agency B. Indeed, agency B has been studying agency A’s operations. When scale allows it, specialization within structures improves alignment of the management practices.

Another structural solution is to create a position with responsibility for identifying the risks in each solicitation and with authority to manage and mitigate them. 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. The term “source selection” never appears. While it claims to apply to the entire acquisition process, it focuses more on contracting and contract execution after source selection. No one is responsible for managing all of the risks in source selection, only evaluation risk.

The source solicitation process adds unique risks for an agency, including reputational, political, Congressional appropriation, sustainment, and bid protest. The idea is to create a counterpart to the chief risk officer in a private company, a person or set of people within each command who focus on source selection risks, asking how the agency is conducting itself and whether the agency is doing it correctly. All of the members of a trade association such as the Professional Services Council have Chief Risk Officers. If SSA's or SSAC's already identify and manage evaluation risk, then the definition of risks for them to manage should be expanded.

From the perspective of **policies and procedures**, disclosure is key. Draft RFP's have proven to be helpful; pre-solicitation conferences less so because they only allow bidders to see who else is bidding. In the debriefing, agencies should supply the rejected offeror the same information provided to the SSA to the level of detail where specifics about the winner must be redacted. Assume the rejected offeror will protest and supply in the de-briefing the same level of detail that the agency would provide in responding to a protest.

A related recommendation is to mitigate the adversarial tone in a debriefing. Rather than explaining how the rejected offeror erred and would have to change so as to help the agency, describe what the offeror would have to do better to help itself. The offeror knows his or her company best, of course, so debriefing officers must leave it to the offeror to improve its proposal preparation. Focusing less on the rejected offeror's apparent failures and more on ways that it might have improved relative to the RFP, agencies reduce their exposure to firms who are "fishing" for reasons to protest and shift

the burden of proof back to the bidder. Framing the feedback influences behavior (Thompson 2009, p. 165).

From a **human resource management** perspective, increase training and development opportunities for people engaged in source selection. The kinds of mistakes leading to bid protests are mistakes that can be mitigated by experience, which is part of the reason that DOD peer review teams use people who average twice the experience of people conducting acquisitions. DOD appears to be addressing turnover by experienced members of the workforce. Acquisition policy now requires program managers to sign tenure agreements so their tenure corresponds to the next major acquisition milestone review closest to four years (Francis 2009). This can be applied to other key members of the source solicitation teams, especially for complex products and services. Simulations, despite their limitations, provide opportunities to gain experience other than through on-the-job training when a mistake might become the basis for a bid protest. 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 to use them, surely simulations can be used to train people who acquire the products and services the war fighters use.

Finally, employees should 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 selection activities, creating a database to support decisions contracting officers make when putting together source selection teams.

From the perspective of **monitoring**, measuring the success of a source selection will be challenging but possible. Good practice is to have multiple measures when the manager does not have control over all of the variables affecting performance. Asked how he knows whether a source selection was successful, a contracting officer said, “I wouldn’t have a professor asking me what I do and why I do it.” However intangible that might be, worse measures exist. Compliance with a proposed source selection schedule and completing the source selection on budget could be others.

The mantra: “If you don’t measure it, you can’t manage it,” applies. DOD and Congress can improve upon the data they are collecting 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 amend or reissue a request for proposal and complete the solicitation (Schwartz and Manuel 2009). Track the number and dollar volume of protestable contract actions, as well as corrective actions and protester reasons for withdrawing protests. This 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 sustaining protests (Schwartz and Manuel 2009 p.15). Tracking this information will allow decision-makers to understand the dynamics of the system and to try to improve it. It also will induce decision-makers to manage to the measures being monitored.

Another recommendation is to create checklists, preferably based on best practices, at key stages of the source selection process. Pilots use them before taking off. Hospitals use them before, during and after surgery. While there is no intent to intrude upon the exercise of competent discretion by acquisition professionals, the solicitation

process has sufficiently routine sources of errors that checklists to mitigate protestable errors could prove to be cost-effective. This expands upon Snider and Walkner's call for periodically promulgating and updating best practices with respect to using past performance, supplementing the FARs and GAO decisions (2001).

Agencies should request feedback on the quality of the source selection process from winners and rejected offerors. As a former company official put it, "if we win, lots of ills are washed over...unless a losing company protests." Information about errors committed during a successful solicitation can, if put in the right hands, prevent an unsuccessful one. 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.

In sum, misalignments among management practices generate unproductive conflicts in administrative processes, 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? Practitioners can use the chiropractic approach employed here to mitigate unproductive conflicts by adjusting the management practices within their control.

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<sup>i</sup> We do not claim that our interviewees constitute a representative sample of the acquisitions community. They comprise a network initiated through people we knew professionally 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.