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Antecedents and Consequences of Federal Bid Protests

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Antecedents and Consequences of Federal Bid Protests

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Abstract

The fear of receiving a bid protest is said to affect acquisition strategies, yet it has not been empirically explored. Based on the Public Value Framework and interviews with contracting personnel, this research tests a model of antecedents to and consequences of the fear of a protest. Survey data was obtained from a sample of 350 contracting personnel. The fear of protest is mitigated by having sufficient procurement lead time and by source selection competence, and increased by protest risk. Fear of protest increases compromised technical evaluations, added procurement lead time, and transaction costs, while it decreases contracting officer authority and is associated with source selection method inappropriateness. Compromised technical evaluations, in turn, decrease contractor performance while contracting officer authority increases contractor performance. Thus, findings suggest that fear of protests affect acquisition strategy decisions, which, in turn, affect contractor performance. The research concludes with several managerial implications, study limitations, and future research directions.

Research Issue

Seemingly, the rate of errors in acquisition procedures is increasing since the quantity of bid protests received each year is increasing. In 2009, 1,989 protest cases were filed across the federal government. Of those protest cases that made it to a decision (i.e.,



the few that were not dismissed, settled, or withdrawn), only 18% were sustained, but 45% of all protest cases were effective (either sustained or resulted in corrective action by the agency prior to decision). In 2013, 2,429 protest cases were filed; 17% were sustained, and 43% were effective. When accounting for the number of contract actions awarded (i.e., the protest opportunity), the number of protests increased from 2011 to 2013 (from 0.014% to 0.018% of contract actions including delivery orders).

Bid protests come with monetary and non-monetary costs. An agency must incur costs to prevent a potential bid protest (e.g., thoroughly documenting and substantiating proposal evaluations and trade-off decisions), to defend against an actual protest lodged, and to take corrective actions. The end users bear costs as well, since their requirements are delayed or go unfulfilled.

The Department of Defense (DoD) acquisition workforce seemingly believes that it is important to avoid protests. This desire to avoid a protest is the driving force behind acquisition decisions, internal and external policies, and resources applied to mitigate the threat of a protest. Evidence suggests that agencies sometimes change their acquisition strategies due to fear of protests. For example, fear of a protest could prompt officials to try to structure a contract in a manner they deem less likely to be protested, such as using a lowest-price, technically-acceptable (LPTA) source selection method instead of a full tradeoff (Schwartz et al., 2013). Other reactions include awarding more contracts than intended to avoid a protest (e.g., Littoral Combat Ship). While scholars and the Government Accountability Office (GAO) have identified these deleterious effects of bid protests on the government (Gordon, 2013), no research to date has quantified them. Specifically, we do not know the magnitude of fear of protests. Neither do we know the extent that fear of a protest affects acquisition strategies nor the lengths that acquisition professionals will go to avoid a protest.

Purpose and Research Questions

The purpose of this research is to quantify the magnitude of protest fear, and to explore the antecedents and consequences of protest fear. The research questions addressed include the following:

- Do bid protests lead to sub-optimal acquisition strategy decisions?
- Do bid protests affect source selections?
- If yes, does contractor performance suffer?
- How are contracting officers' authorities affected?

Theoretical Frameworks

Fear of a protest is understandable. Significant time is consumed addressing a protest. High dollar contracts, in particular, hold great interest to media and elected officials. A protest would reflect negatively on the contracting official as well as the contracting and program offices. There may be an element of shame if a source selection is protested, particularly if there is a notion that management would not support the contracting officers and that the protest may reflect poorly on them. With these concerns in the back of a contracting officer's mind, there can be a tendency to take measures in order to avoid a protest that can sub-optimize source selection decisions and outcomes. For example, the contracting officer may rely too heavily on the LPTA method rather than utilizing a full tradeoff approach. The motivations and reactions to fear of protest can be better understood by applying the public value framework (PVF).



Public Value Framework

PVF was introduced by Harvard professor Mark H. Moore and has been used to evaluate and identify value in, mainly, the public sector. Value in the public sector is much different than it is in the private sector. Often in the private sector, industry uses shareholder value as a means of evaluating itself. The public sector, however, is much different. The PVF has been utilized to “get public managers thinking about what is most valuable in the service that they run and to consider how effective management can make the service the best that it can be” (Coats & Passmore, 2008, p. 4).

The PVF can be explained by the strategic triangle (Heymann, 1987; Moore, 1995). The three elements are public value, legitimacy support, and operational capability. In contrast to private sector operations, the government’s strategy does not revolve around a specific bottom line, such as shareholder wealth. Contracting professionals are often satisfying multiple stakeholders such as regulatory requirements (e.g., the FAR), internal customers, the private sector, and the taxpaying public. The first element, public value, “directs managerial attention to the value proposition that guides the organization. For an enterprise to succeed in producing value, the leaders of the enterprise have to have a story, or an account, of what value or purposes that the organization is pursuing. They need a reason for the organization’s existence, a claim about the way in which the world would be made better through the operations of the enterprise” (Moore, 2000, p. 197). In essence, value in a governmental organization equates to mission. Contracting officers add value by connecting capable suppliers to internal organizations in need of quality goods and services.

Legitimacy and support “directs managerial attention to the question of where the support for pursuing the value will come from. It is not enough that an entrepreneurial leader judges some purposes to be valuable. Others, who provide the necessary financial resources and authorization, have to agree with that judgment. In government, those others include citizens, elected representatives, interest groups, and the media, which has been called the “authorizing environment” of the organization (Moore, 2000, p. 198).

Finally, operational capacity

focuses attention on the question of whether sufficient know-how and capability exist to achieve the desired results. Often, this capability lies entirely in the organization that the manager leads. However, sometimes it lies outside the organization’s boundary, and the organization has to find ways to engage capacities beyond its own to achieve the desired result by creating partnerships of various kinds. (Moore, 2000, p. 198)

Contracting professionals add value by helping to meet the operational needs of the government and, at the same time, provide fairness and address the various public policy issues that are required by law and regulation. When these align, customers receive what they require at a fair and reasonable price, and this satisfies the requirements of governing policies. Through this, government contracting professionals add value to all of their stakeholders. Contracting officers sometimes take steps throughout the acquisition process to avoid a protest, such as minimizing discussions or even employing an LPTA source selection process when a full tradeoff method is more appropriate (Gordon, 2013, pp. 36–37). When this occurs, the contracting system is not optimizing its value.

Contracting officers are also accountable to provide fairness to commercial entities with which they contract for goods and services. Often, though, a fear of a bid protest will result in awarding more contracts than would have been awarded if there was no fear of a bid protest. In multiple-award contracts, there is a minimum dollar value that the government is obligated to pay (as consideration). This results in increased spending of taxpayer money



that could have been more efficiently spent by awarding to fewer, more competitive contractors. For example, the DoD Inspector General (DoDIG; 2009a) found that under the Navy's Seaport-E program, the Navy awarded 1,279 contracts for professional services, yet 975 (75.6%) never received a task order. Each of these contracts required either a \$10,000 or \$2,500 minimum obligation. Added contracts also create extra work for the contracting officer to administer, duplicate inventory, can increase transportation costs, result in non-optimal use of taxpayer money, and often upset contractors who never get an award under a multiple award contract. Although a reduced risk of a protest is accomplished, ultimately less value is added by the contracting process. What this does not accomplish is a best option for the customer or the taxpayer, nor does it provide fairness to the stronger contractors.

Antecedents to Fear of Protest

Sufficiency of Planned Procurement Administrative Lead Time:

Sufficient planned procurement administrative lead time (PALT) represents the extent to which adequate time is allotted to accomplish a source selection. Insufficient PALT is often the result of funding constraints that occur toward the end of the fiscal year. Expedited requirements and poor planning are common reasons that can lead to insufficient PALT. Failure to allocate sufficient lead time to properly define requirements (Hawkins et al., 2011)—evaluation criteria, and instructions to offerors; train the technical evaluators; evaluate proposals; document evaluations and tradeoffs; and prepare for and brief decision-makers—makes protestable errors more likely to occur. Sufficient time bolsters acquisition team capability to perform a source selection: “Time has become a major variable in the typical buyer’s decision process of choosing a supplier” (Hansen, 2009, p. 234).

PVF’s operational capability experiences a positive relationship with sufficient procurement time. Time affords the ability for acquisition teams to apply their knowledge and skills; absent sufficient time, operational capability is constrained. Therefore, it is posited that

H1: Insufficient PALT is positively related to fear of protest.

Contracting Officer Competence:

PVF holds that operational capability is necessary in order for government activities to deliver value. Operational capability represents the requisite knowledge, skills, and abilities—all of which develops with experience. The more experience a contracting officer has, the less concern of a protest there should be since the individual has acquired more knowledge in techniques and practices to prevent bid protests and prevail in the event of a protest. Buyer experience has been found to affect government procurement processes (Hawkins & Muir, 2014).

Time spent in a competency correlates strongly with self-reported proficiency levels in that competency (Federal Acquisition Institute [FAI], 2012). Econom (2006) argued that federal agencies must consider contract management as a core competency because the functions performed by third-party contractors are often essential in successfully achieving organizational goals. She concluded that the success of acquisition organizations is largely dependent on hiring personnel who possess the right mix of skills, abilities, experience, and training. Other studies have also found that the right mix of experience and competency is critical to achieving contract performance outcomes (United States Merit Systems Protection Board, 2005). Therefore, it is hypothesized that

H2: The greater a contracting officer’s competence, the lower the fear of protest.



Consequences of Fear of Protest

Compromised Technical Evaluation: Evaluation factors and significant sub-factors must (1) represent the key areas of importance and emphasis to be considered in the source selection decision; and (2) support meaningful comparison and discrimination between and among competing proposals (Federal Acquisition Regulation [FAR], 15.304(b)). Agencies must evaluate the proposals and assess their relative qualities based only on the factors and sub-factors specified in the request for proposal (RFP; Rumbaugh, 2010). Deviations from the strict language defining the meaning of factors and sub-factors can invite protests. Technical evaluators often do not understand or appreciate this constraint. In the PVF terms, poorly trained or technical evaluators unknowledgeable in source selections inhibit the agency's operational capability. Exacerbating this problem are cases in which evaluators assessing proposals are not the same individuals who defined the meaning of the factors and sub-factors, leading technical evaluators to develop their own interpretation or agenda.

For these reasons, the contracting officer, legal advisor, and contracts committee advisors often require numerous, meticulous changes to precise wording of evaluations. Definitions of the factors or sub-factors may not account for meaningful distinctions, or evaluators are constrained on what they can say in the evaluation even though the point otherwise intended may make a meaningful distinction between offers. Additionally, often this phenomenon reflects a lack of foresight—sometimes preventable, sometimes not. Sometimes, only upon evaluation of proposals is the distinction illuminated. At this point, the source selection team must weigh a delay in the schedule with the benefit of changing the definition of factors or sub-factors to account for the meaningful distinction, and allow offerors time to revise their proposals. Often, however, the customer is not willing to delay the source selection, and the sub-factors are not revised. Therefore, it is posited that

H3: Fear of protest is positively related to compromised technical evaluations.

Source Selection Method Appropriateness:

Competitive formal source selections may follow one of several methods—lowest-price, technically-acceptable (LPTA), price-performance tradeoff (PPT), or a full tradeoff. According to FAR 15.101-2, the LPTA source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price. There are many reasons why a contracting officer might opt for the LPTA method. One major benefit of this strategy is that the agency can greatly shorten the evaluation process because once the low price proposal has been found to be technically acceptable, there is no need to evaluate the acceptability of any other proposals (Cibinic et al., 2011, p. 680). The source selection method appropriateness depends on the requirement and the buying situation. Generally, the greater the performance risk, criticality of the requirement's successful delivery to the agency's mission, dollar value, environmental dynamism, uncertain requirements, and complexity, the more important contractor performance becomes and the less critical cost/price become. In these cases, an agency may decide that the best-value offer is determined by a full tradeoff of price and non-price factors. A full tradeoff process is appropriate when it may be in the best interest of the government to consider an award to a company other than the lowest-priced offeror or other than the highest technically rated offeror (FAR 15.101-1).

But, agencies may not select the source selection method that is best suited to the requirement and the buying situation. Today's budget-constrained environment may influence managers to prefer LPTA over a full tradeoff. Managers may also wish to avoid a protest, in which case the LPTA method is clearly the lower-risk alternative. In fact, Air Force



acquisition leaders, following several bid protests and failed attempts to acquire a new tanker aircraft, seriously considered an LPTA method for a multi-billion-dollar weapon system (Pocock, 2009). Finally, quite often managers prioritize the contract award date (i.e., PALT) over due diligence in contractor selection (Hawkins, 2012). Therefore, we posit that

H4: Fear of protest is negatively related to source selection method appropriateness.

Added PALT:

Naturally, as the concern over a protest grows, acquisition teams take added measures to prevent them. This is often manifested in increased reviews resulting in increased iterations of source selection documents such as source selection plans, requests for proposals, technical evaluations, small business strategy, comparative analyses, briefing charts, source selection decision documents, and evaluation notices to offerors—just to name a few. These revisions consume time during the source selection. Additionally, a conservative stance may result in added rounds of discussions to clear up all proposal deficiencies and weaknesses—a concept referred to as *technical leveling*. Conservatism may also result in retaining otherwise non-competitive offerors in the competitive range, adding time to negotiate with and to evaluate another offer. Therefore, it is hypothesized that

H5: There is a direct positive relationship between fear of protest and the added PALT.

Contracting Officer Authority:

Contracting officers uniquely hold authority to enter into, administer, and terminate contracts. They are the only individuals authorized to bind the U.S. government. Contracting officers are responsible for (1) ensuring that all the necessary actions for effective contracting are accomplished, (2) ensuring compliance with the terms of the contract, and (3) safeguarding the interests of the U.S. government in its contractual relationships. In terms of the Public Value Framework, the role of the contracting officer is to exercise his or her authority, thereby protecting the various stakeholders' interests (e.g., taxpayer, contractor, government, internal customers). In this capacity, the contracting officer reinforces legitimacy support.

While contracting officers must request and consider the advice of specialists (e.g., law, engineering, finance, etc.), ultimately, decisions within their purview are their responsibility (FAR 1.602-2). Upon receipt of a protest, legal counsel must divert time and effort to defend the agency's actions. Thus, legal counsel reviews the many iterations of the multitude of source selection documents to ensure legal sufficiency, compliance to regulations and policies, and to mitigate the risks of protests. With the consequences at stake, such as setting precedent, reputation, and invested time, legal counsel is typically conservative in attempting to prevent a bid protest. Since legal counsel brings their own unique legal authority and professional expertise, contracting officers and acquisition managers rely heavily on its opinions and recommendations. One interviewee shared, "We almost never move forward unless they [legal] give us their okay. It would be very, very hard—very challenging." This comment alludes to the influence of legal counsel on acquisition and unit leaders. Contracting officers are likely to yield their decision-making discretion (e.g., removing an offeror from the competitive range) when legal counsel disagrees with them. Thus, legal counsel, in its advisory role, subtly, yet strongly, affects the contracting officer's authority through its opinions and recommendations.

Other parties impose a similar phenomenon on contracting officers' decision authority. For example, higher ranking contracts committee members and leaders may also



hold opinions on a particular source selection matter that are contrary to that of the contracting officer. In such cases, contracting officers may perceive unwritten career implications to making contrarian decisions. Thus, although certain statutory authority resides with the contracting officer, the reality is that such authority is yielded in practice. As protest risk—and thus, fear of a protest—grows, so does the involvement of legal counsel, other reviewing parties, and acquisition leaders. Increased involvement likely reduces the contracting officer's perception of decision latitude. In some instances, contracting officers indicate that legal counsel would not allow them to make decisions—creating the organizational norm that legal has the final decision, not the contracting officer. Thus, we posit that

H6: There is a negative relationship between fear of protest and the contracting officer's perceived authority.

Transaction Costs:

The DoD

has experienced a significant increase in the number of competitive source selection decisions which are protested by industry. Protests are extremely detrimental to the warfighter and the taxpayer. These protest actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability. (Young, 2007, p. 1)

Transaction costs reflect the monetary costs of resources devoted to executing a formal source selection—largely comprised of labor costs of the different acquisition professionals involved (contracting officer, contracting specialist, technical evaluator, legal, cost/price analyst, past performance team, program manager, Small Business Administration representative, and consultants). Transaction costs could be considered an opportunity cost of resources not devoted to other work requirements (e.g., contract and program administration). As the risk of a protest increases, and the fear of a protest, more personnel are involved and they allocate more of their time and effort to defending against a potential bid protest. Thus,

H7: There is a direct positive relationship between fear of protest and transaction costs.

Contractor Performance:

A central aspect of the Public Value Framework is providing value through the organization's mission. An organization's mission is increasingly performed or supported via outsourced contracts. Thus, in order for the government to attain mission success, contractors must be successful. They must perform well under the obligations of their contract. The source selection process can affect the level of performance ultimately received.

When the government utilizes a best-value source selection method, technical evaluators apply evaluation factors and sub-factors to proposals to determine the best-value offer. This process helps the government to hedge against substandard and/or non-performance by weeding out the less-capable firms (or teams of firms). The premise of source selection is that by applying the evaluation factors and sub-factors, a very capable contractor has higher odds of being deemed the best-value offer. Nonetheless, the government struggles in its efforts to select and sufficiently define high-quality technical factors and sub-factors such that they can make meaningful distinctions between offers (Rumbaugh, 2010). Once weaknesses in evaluation factors are realized, particularly after



receipt of proposals, acquisition teams are reluctant to fix the factors by amending the RFP and inviting revised proposals since these actions delay the acquisition milestones. Additionally, conservative evaluators (and their advisors), for fear of protest, often engage in multiple rounds of discussions that essentially level the playing field of competitors, and often they retain mediocre offerors in the competitive range for fear of receiving a bid protest. Had the evaluation criteria been better able to distinguish amongst the firms, the propensity to retain mediocre firms within the competitive range would be diminished. Together, therefore, it is expected that

H8: There is a negative relationship between compromised technical evaluation and contractor performance.

Contracting officers are generally more cognizant of and empathetic to the effects of contractor performance on the requiring organization's mission attainment than are risk-averse advisors—such as legal counsel. Thus, contracting officers may prioritize mission performance over protest risk in making key decisions during a source selection. For example, they may be more apt to remove a less-competitive or less-capable offeror from the competitive range, assign a lower proposal rating, and not engage in added rounds of discussions solely to mitigate protest risk (thereby mitigating technical leveling). In some cases, contracting officers may also be more apt to choose a full tradeoff rather than a LPTA source selection method as the most appropriate means to attain the best-value contractor. The full tradeoff method allows the government the flexibility to pay more for superior capability and/or past performance when warranted. But, this method also requires more effort, invites more error, and thus, protest risk, since the procedures are so nuanced. These actions reduce the odds of having to award a contract to a less-capable contractor, for example, in the case of a LPTA source selection method. Therefore, it is hypothesized that

H9: There is a positive relationship between source selection method appropriateness and contractor performance.

When an individual holds decision-making authority coupled with accountability for the results of decisions (e.g., a contracting officer), he or she tends not to defer decisions entirely to others. This is not to say, however, that others are not consulted. In public contracting, similar to input from advisors on source selection method choices, advisors review all of the written technical evaluations with respect to the evaluation criteria published in the request for proposals. They screen for errors, omissions, consistency, and other matters of compliance with laws, regulations, and policies in an effort to mitigate the odds of receiving a bid protest. In doing so, advisors often limit what the technical evaluators can say. Such scrutiny can make difficult the ability to meaningfully discriminate between proposals. Similar to the previously discussed rationale, while contracting officers also review the technical evaluations for errors, they are more apt to accept more risk. Thus, it is posited that

H10: Contracting officer authority is negatively related to compromised technical evaluations.

Taken together, then, it is expected that a contracting officer with decision-making authority—and who does not defer that authority to others—will make decisions that accept more risk yet does not impede the selection of the best-suited contractor for the task at hand. When the selection is not constrained by procedures, greater decision latitude results in a better match between the offeror's capabilities and the contractual requirements. This better match should facilitate better performance. Examining the troubled U.S. defense acquisition system, the Defense Business Board concluded, "Of the eight findings, three of them concern the acquisition workforce, a large group of dedicated public servants who



work diligently, but ultimately struggle within a broken system that is focused on avoiding mistakes rather than producing more, in less time, at less cost” (Punaro, 2012). Therefore, it is posited that

H11: There is a positive relationship between contracting officer authority and contractor performance.

The relationships posited above are visually depicted in Figure 1. Fear of protest can also be affected by the criticality of the requirement and by protest risk. Therefore, these constructs are shown as control variables.

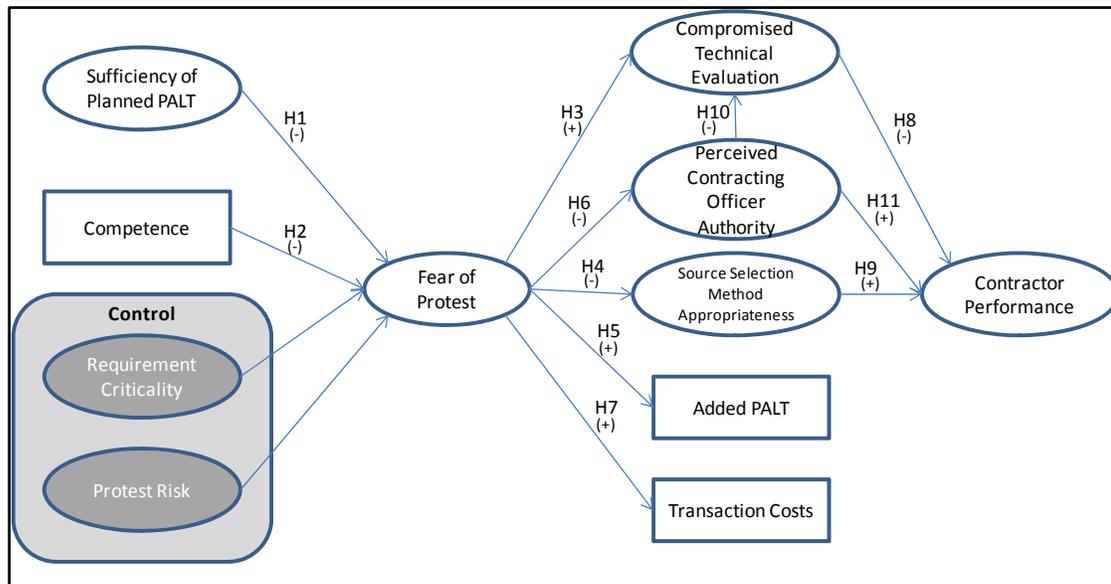


Figure 1. Conceptual Model of Fear of Protest

Methodology

This study employed a mixed design (Creswell, 2003) of qualitative and quantitative analysis. The qualitative work involved discussions with academicians and interviews with practitioners to ensure face validity and construct validity, to construct and validate a conceptual model, and to develop survey items to measure the constructs—many of which did not previously exist. Next, the research employed structural equation models using cross-sectional survey data. The remainder of this section details the qualitative design, interviews, survey development, sample, data collection, and reliability and validity.

Interviews

Contracting officers at two military organizations were chosen for interviews due to (a) proximity, (b) a willingness to support the research, and (c) the availability of a wide variety of contract types and contracted goods and services for wide generalizability (e.g., external validity). A series of questions was asked to each participant (Appendix A).

Eighteen individuals were interviewed over two days. Demographics of each respondent can be found in Table 1. Each interview was recorded and transcribed. The average interview lasted 26 minutes. The interviews resulted transcribed into 229 pages. Informants were given a copy of the conceptual model during the interview and asked whether they agreed with the independent variables being used. They were also asked if they would add or omit any. One respondent stated, “Okay. This is good. I don’t see

anything that I need to add.” Another contracting officer stated, “I think this is a great research that you are doing because this is a bigger and bigger issue. I think you are right on.” Other statements that validated the model were, “I think I like the model. For the most part it says everything.”

Table 1. Informant Demographics

Rank/ Grade	Gender	Duty Title	Yrs. Exp	# Source Selections (within 2 yrs)	# Bid Protests (within 2 yrs)
GS-14	F	Supv. Contracting Officer	29	12	0
GS-13	M	Contracting Officer	26	9	3
GS-13	M	Contracting Officer	18	6	1
GS-14	M	Supv. Contracting Officer	36	1	0
GS-13	F	Contracting Officer	6	4	0
GS-14	F	Supv. Contracting Officer	32	3	0
GS-12	M	Contract Specialist	4	0	0
GS-13	M	Contracting Officer	6	6	0
GS-12	M	Contract Specialist	7	4	2
GS-13	M	Contracting Officer	21	1	0
GS-13	F	Contracting Officer	30	4	0
GS-13	M	Contracting Officer	22	5	0
GS-13	F	Contracting Officer	15	5	1
GS-13	M	Contracting Officer	26	20	1

Questionnaire Design and Construct Measurement

All scales measuring latent constructs used a Likert-type scale. Fear of protest is a term used for this research to identify the level of apprehension a contracting professional has about receiving a bid protest. No previously validated scales were available to measure the fear of protest; thus, scale items were developed from the interview data (Appendix B). The contracting officer authority construct described how empowered the contracting officer is to make final decisions during the source selection process. Similarly, there were no previously validated scales available for this construct. A three-question scale was used to measure the sufficiency of planned PALT in the milestones and allocated by the acquisition team and its managers to conduct the source selection (Hawkins & Muir, 2014). Compromised technical evaluation assessed the extent to which technical evaluators



complained about the limitations imposed on the wording of their written technical evaluations. Contractor performance is a measure of the contractor's performance levels and the degree to which requirements were satisfied. The scale was adapted from Fawcett, Smith, and Cooper (1997), Cannon, Achrol, and Gundlach (2000), and Prahinski and Benton (2004). Source selection method appropriateness is the perceived extent that the chosen source selection method fits the requirement, the goals of the source selection, the commercial market, and the acquisition situation. There were no previously validated scales available for this construct. Source selection experience was measured as the number of source selections the respondent previously experienced. This could include FAR Part 15 (i.e., formal) and non-FAR Part 15 (e.g., simplified) source selections. It could also include those source selections to which the respondent served as the procuring contracting officer as well as those to which the respondent served as an advisor or reviewer. Added PALT objectively measured the difference between the planned PALT and the actual PALT. Transaction costs attempted to quantify the personnel costs based on amount of time spent on the source selection by each member of the team.

Survey Pretest

Six industry practitioners and academicians tested the initial survey. Feedback received was used to refine questions and limit survey length. As a result, one construct was removed, and the order of the survey questions was structured to reduce bias among scale items by mixing questions across constructs with like scales and scale anchors.

Sample

The population for this study consisted of civilian and military contracting personnel who had executed a FAR Part 15 formal source selection (i.e., a dollar amount greater than \$150,000). This excluded simplified procurements that are generally less susceptible to bid protests. A list of e-mail addresses was generated using data extracted from the Federal Procurement Data System-Next Generation (FPDS-NG) database to encompass all transactions that fit the criteria previously stated.

The unit of analysis for this survey was a source selection. Since nearly all bid protests stem from a protestable action (e.g., a proposal rating, rating justification, or basis of a tradeoff analysis) associated with a source selection, this is the proper unit of analysis for the study. Respondents were instructed to answer the survey questions using their experience from their most recently completed FAR Part 15 source selection. The most recent source selection was required to serve as the basis of reference in order to prevent respondents' self-selection bias.

Results

The fear of protest was empirically validated. To examine fear of protest, a structural equation model of its antecedents and consequences was tested and found to exhibit good fit to a sample of data from 350 FAR Part 15 source selections.

The less sufficient the planned procurement lead-time is thought to be, the level of fear of a protest increases. When acquisition personnel have less time than they believe is necessary to properly conduct the source selection, there are greater odds of making a mistake that could be protested. Additionally, a contracting officer's competence—in terms of the number of source selections experienced—lowers the level of fear of bid protests.

As a result of protest fear, technical evaluations appear to be somewhat compromised. This is important since compromised technical evaluations also decrease contractor performance. While a fear of protest did not affect perceived source selection method appropriateness, protest fear was associated with the inappropriate use of the LPTA



source selection method. In turn, LPTA inappropriateness negatively affects contractor performance.

The fear of protest diminishes a contracting officer's perceived authority (i.e., discretion in making decisions). This is important since diminished contracting officer perceived authority was found to decrease contractor performance directly. Contracting officer's perceived authority also affects contractor performance indirectly by decreasing compromise technical evaluations.

The fear of protest is positively related to an increase in transaction costs. Costs were assessed in terms of the number of personnel involved in a source selection and their allocated time. The average cost per source selection was \$235,236 (median = \$165,832) with a standard deviation of \$291,620. Notably, these costs are understated by considering direct salaries only; they exclude the fully burdened cost of a government employee. An average of 9 different people worked on a given source selection team in the various roles (an average of 3.5 full-time equivalents). Post hoc analysis showed that as the fear of protest increases, the number of personnel and the actual procurement lead time increase.

Implications

The more insufficient the planned procurement lead-time is thought to be, the level of fear of a protest increases. When acquisition personnel have less time than they believe is necessary to properly conduct the source selection, there are greater odds of making a mistake that could be protested. Interestingly, when they are rushed, contractual documents (e.g., statements of work) and pre-award communications (e.g., negotiations) could be compromised, which may, in turn, decrease contractor performance (Hawkins et al., 2011). Shortcuts could preclude the selection of the best contractor or result in selecting a contractor that does not fully understand the requirements. Thus, acquisitions should not be hastened short of the time thought to be adequate by the contracting officer. To prevent rushed acquisitions, standard lead times by type of source selection and by complexity of the requirement could be established.

A contracting officer's competence—in terms of the number of source selections experienced—lowers the level of fear of bid protests. Therefore, efforts should be made to increase the number of source selections experienced by contracting officers. Of the 350 survey respondents, the average number of source selections experienced over a career was 36.7. That is just under 2.8 source selections per year. Note that this seemingly high number of source selections likely includes simplified buys and experience in a variety of roles such as a peer or committee reviewer as well as a contracting officer. There is no equal alternative to on-the-job-training (OJT), but source selection simulations and scenario-based training could be utilized as an alternative and as a supplement to OJT. If the acquisition community is relying solely on OJT, it can take a contracting officer and technical evaluators far too long to gain an adequate level of competence with FAR Part 15 source selections.

As a result of protest fear, technical evaluations appear to be somewhat compromised. This is important since compromised technical evaluations also decrease contractor performance. This construct assessed phenomena such as (1) technical evaluators not being allowed to say what needs to be said in a technical evaluation, (2) constraints imposed on the evaluations impeding the ability to write a meaningful evaluation, and (3) upon evaluation of proposals, a technical evaluator recognizing a need to change at least one evaluation criterion or its definition. Additional training for the technical evaluators could help increase their level of competence within the evaluation process. The evaluation process involves many people that are not necessarily familiar with the case law and pitfalls,



giving rise to bid protests. Additionally, the technical individuals that determine and define the evaluation criteria should be the same individuals that evaluate proposals (i.e., apply the criteria). Current, detailed, and standardized training for technical evaluators should result in better-defined evaluation criteria and better application of them to proposals.

While a fear of protest did not affect *perceived source selection method appropriateness*, protest fear was associated with the inappropriate use of the LPTA source selection method. In turn, LPTA inappropriateness negatively affects contractor performance. While these effects have been anecdotally espoused by practitioners, this research is the first to quantitatively test the postulates. There were 23 respondents (7.5%) that revealed that the source selection method used was to some degree inappropriate. While this proportion appears small, it can be argued that any single instance of an inappropriate source selection method gives room for pause. LPTA could be inappropriately used since (1) evaluations can generally be accomplished more quickly and easily when evaluated as pass/fail rather than by a subjective rating; (2) the government's recent increased focus on low price; and (3) the lower odds of receiving a bid protest compared to arduous and mistake-prone procedures of a full tradeoff method. Further research should confirm reasons why inappropriate source selection methods are employed, then acquisition leaders should seek ways to mitigate those factors. Perhaps contracting officers should be able to tap an independent panel of contracting professionals when they encounter leaders or reviewers who will only approve a source selection method that does not correspond well to the buying situation. This anonymous panel would then insert its documented opinion into the contract file.

These findings are also germane to contractors. When a buying office concocts an acquisition strategy that appears ill-suited to the buying situation (e.g., LPTA versus full tradeoff for a highly complex requirement), it may be due to the fear of a bid protest. Prospective offerors may misinterpret the use of LPTA as an added emphasis on price. Their bid strategy, then, may be influenced by reducing costs and price, thereby putting high performance at risk. Whereas, the agency may not actually be terribly concerned about price.

The fear of protest diminishes a contracting officer's perceived authority (i.e., discretion in making decisions). This is important since diminished contracting officer perceived authority was found to decrease contractor performance directly. Contracting officer's perceived authority also affects contractor performance indirectly by decreasing compromised technical evaluations. Many decisions and source selection documents receive scrutiny via a litany of outside reviews (e.g., supervisors, peer review, contracts committees, legal). Often, legal and committee advisors will conservatively require wording changes to documents, changes to ratings, amendments to the request for proposals, further discussions to clear up any uncertainty in evaluations, and retain offerors in the competitive range—just to name a few. This level of oversight is another signal of the importance the government places in avoiding a bid protest. Admittedly, it also coincides with a less competent acquisition workforce (Punaro, 2012). Rather than treating the problem, however, the symptoms gain the attention. Fixing the problems of contracting officer competence and a cumbersome source selection process is difficult and lengthy. Adding oversight is quick and simple. The implications are clear; better training is needed for contracting personnel and technical evaluators to develop the requisite competence in source selections, then oversight and reviews should be curtailed. Some protest risk must be accepted for the sake of efficiency and better decision-making (i.e., negotiations and award determination) leading to higher contractor performance.



This research confirmed the presence of outside influence on acquisition strategy decisions, and these influences carry associated implications for contracting. One interview informant commented, “I will tell you, legal pushes the LPTA. They push it a lot.” One survey respondent offered, “At this juncture, there are too many hands in the soup, and the procuring contracting officer (PCO) authority has been diminished. Attorneys need to resume the role of counselors again.” Since the source selection method is not a matter of legal sufficiency, attorney influence is curious. Selecting the source selection method is a contracting officer’s decision based on experience, knowledge, and professional judgment. Otherwise, government agencies may employ a costly professional contracting workforce with a high degree of accountability but diminished authority. If not capable, trusted, and empowered to make the necessary decisions, procurement clerks (e.g., Series 1105) would be much less costly than contracting professionals (e.g., Series 1102).

The fear of protest is positively related to an increase in transaction costs. Costs were assessed in terms of the number of personnel involved in a sources selection and their allocated time. The average cost per source selection was \$235,236 (median = \$165,832) with a standard deviation of \$291,620. Notably, these costs are understated by considering direct salaries only; they exclude the true burdened cost of a government employee. An average of 9 different people worked on a given source selection team in the various roles (an average of 3.5 full-time equivalents). As a percentage of the total contract price, the transaction costs averaged 7.7% (median 1.2%). Compared to common interagency surcharges for contracting services (that cover post-award administration costs in addition to sourcing costs) of 1%–8%, these sourcing-only costs seem excessive. Thus, agencies may be operating at costs well above their collected fees, and these costs can be traced to fear of protests.

Post hoc analysis showed that as the fear of protest increases, the number of personnel and the actual procurement lead time increase. From the data, the average planned PALT was 183 days. The average actual PALT was 237 days. The difference, 54 days, constitutes added transaction costs. Thus, efficiency is compromised with greater fear of protest. While these salary costs may be dismissed as sunk costs, certainly excess personnel could accomplish other pertinent work if not serving on the source selection team for an extended time. These opportunity costs should not be ignored—particularly given the ubiquitous, persistent failures in other areas of acquisition such as contract administration (DoDIG, 2009b). If measures can be taken that reduce the fear of protest, transaction costs can be decreased. Likewise, if evaluation, negotiation, internal reviews, and documentation processes can be streamlined and if agencies can accept more protest risk, perhaps lead time can be saved, resulting in reduced transaction costs. Given today’s budget constraints and highly-leveraged financing, the significant transaction costs associated with source selections should not continue to be ignored. A first step would be to capture the quantified resources required to execute a source selection in a contract action reporting database (e.g., FPDS-NG). Agencies could also follow the for-profit sector’s lead by assessing and publishing key metrics such as total spend per sourcing full-time equivalent (CAPS Research, 2011).

These results surrounding transaction costs raise questions concerning the acquisition process in general. For instance, the single criterion for new case law—and hence, new reactive policies and regulations—is fairness, with no regard for efficiency. Is there a ceiling cost on fairness? Is there a point at which fairness is too costly? Additionally, the high amount of transaction costs suggests that the drivers of those costs be considered. Can policies, procedures, laws, case law, and regulations be reexamined and streamlined



without compromising fairness? Is government procurement at the point of a source selection overhaul with a keen eye toward efficiency?

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