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Procurement as Risk Management: AIRC Debarment and Bid Protest Studies

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David Drabkin and Christopher Yukins (George Washington University Law School)

Co-Principal Investigators

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- Introductions –
 - David Drabkin, drabkind@gmail.com
 - Christopher Yukins, cyukins@law.gwu.edu
- Study: Mandatory Debarments for U.S. Labor Violations
- Study: Department of Defense Bid Protests
- Common theme: Risk management in procurement
- Questions and Conclusion

Figure 2.2. The risk management cycle





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AIRC Debarment Study



US Federal Debarment Process

- Each Federal Agency with independent procurement authority has a Suspension/Debarment Official (SDO).
- SDO's may initiate a suspension or debarment action "sua sponte" based on information that comes to her/his attention
- Normally, suspension/debarment actions are initiated based on referral from contracting officers, Inspector Generals, or a criminal investigative organization
 - Most SDOs do not have their own investigators
- Initiation of a Suspension/Debarment proceeding other than a "Show Cause," results in the placement of the contractor or individual on the Excluded Parties List (EPLS) now incorporated into www.sam.gov
- Contracting officers and grant officers are required to check the System for Award Management (SAM.gov) to determine whether potential awardee is currently debarred or suspended
- An award can be made to a party on the list under certain circumstances requiring approval at the highest levels in the agency



US Federal Debarment Process

Placement on the “list” means no contracts may be awarded to the party.

- For proposed debarments the length of time lasts until the proposal is resolved.
- Where a decision to suspend or debar is final the exclusion from government contracting lasts for the period of time indicated by the decision
- Note: Many State and Local government use the federal government list, federal prime and subcontractors must use the list, all institutions and nonprofits choose to use the list

Contractors/individuals proposed for suspension/debarment have the right to respond to the proposal of debarment

- Parties are afforded “Administrative Due Process” notice and an opportunity to be heard.
- The normal process is conducted on “paper”
- On occasion contractors/individuals may meet with the SDO to present matters for consideration
- Decisions to suspend/debar a contractor/individual are made in writing and delivered to the party.

Parties may be suspended/debarred for an appropriate period of time, normally 3 years.

- The object of the exercise is to ensure that the party makes the appropriate efforts to become “responsible”

Parties may seek review of a suspension/debarment in a Federal District Court under the Administrative Procedure Act

Question for report:
Should certain U.S.
labor law violations
be an automatic
basis for
debarment?

Congressionally Mandated Study on Contractor Debarments for Violations of U.S. Labor Laws

David Drabkin, Christopher Yukins, Sharjeel Chaudhry, William Dawson, and Brandon Hancock, and Jonathan O'Connell
AIRC, Stevens Institute of Technology

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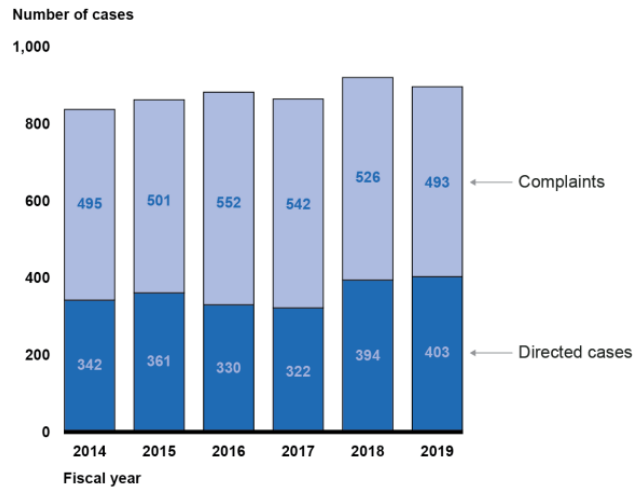
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Statutory (“Mandatory”) Debarments – Labor Violations

Figure 3: Number of Service Contract Act Cases by Fiscal Year and Source of Case



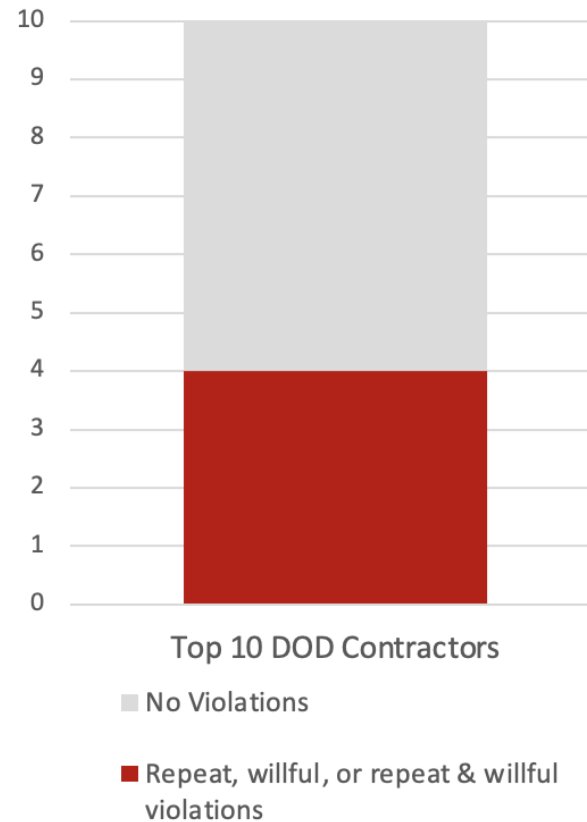
Source: GAO analysis of data from the U.S. Department of Labor. | GAO-21-11

Statute	FY2020	FY2021
Davis-Bacon Act	9	10
Service Contract Act	8	7

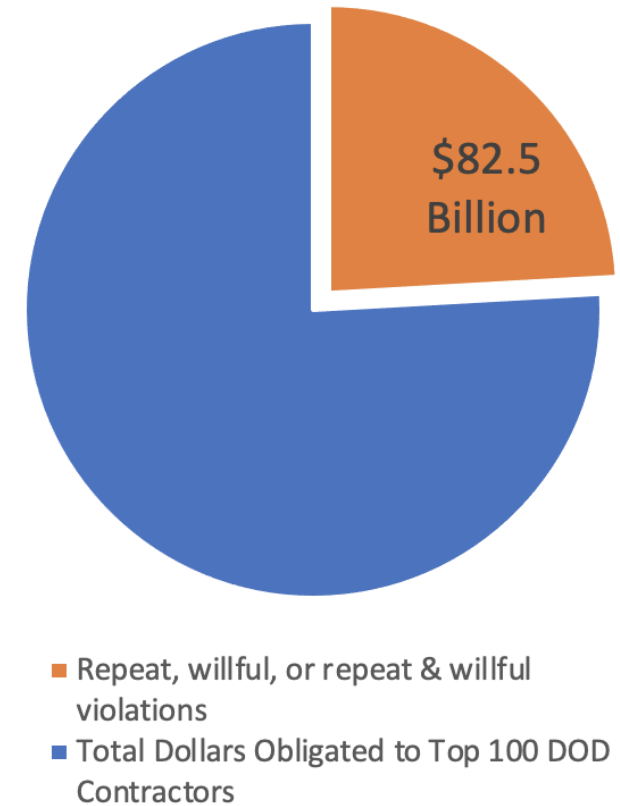
- In practice, the Labor Department does **not impose** statutory debarment upon federal contractors in the **vast majority of cases** of non-compliance with statutes that **mandate** debarment.

Potential Impact of Mandatory Debarment for FLSA Labor Violations on DoD Industrial Base

Four of the Top 10 DOD Contractors had Repeat, Willful, or Repeat & Willful violations



Repeat, Willful, or Repeat & Willful Violators comprise 1/4 of total dollars obligated to the Top 100 DoD Contractors

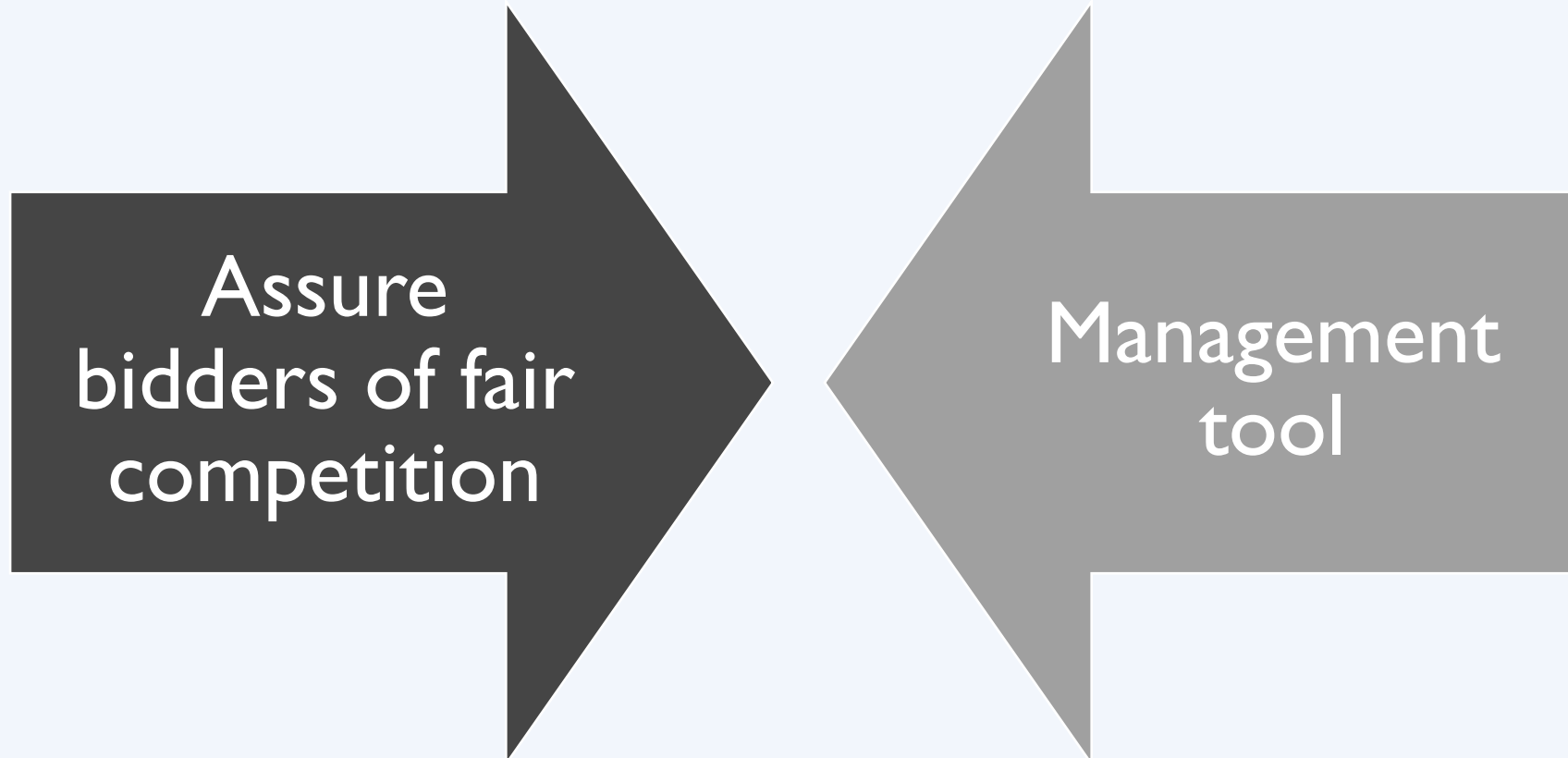




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AIRC Bid Protest Study

Background Question: Do Bid Protests Serve Two Roles?



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What Are Agency-Level Protests—And Why Are They Important to Management?



Recommendations: Strengthen Agency-Level Bid Protests by Using Best Practices Evolved Across Government

1. **Formalize the role of an “Agency Protest Official”** to oversee agency-level protest procedures at the agencies.
2. **Confirm that agencies have broad authority to hear agency-level protests**, so that agencies have the flexibility to address new problems in novel procurement methods, such as procurements using other transaction authority.
3. **Leave the standard for standing flexibly bound** to that used by GAO and the courts, to allow agency-level protests to evolve with other protest fora to accommodate new kinds of “whistleblowers” (protesters) in the acquisition system.
4. **Clarify the decision-making process in agency-level protests**, perhaps by reshaping it to more closely resemble the tiered decisionmaking called for by the Contract Disputes Act for contract administration claims.
5. **Specify the record necessary** for agency-level bid protests, to ensure that the issues raised can be fully addressed on the administrative record.
6. **Maximize the record shared with agency-level protesters** to encourage rapid resolution of issues.
7. **Rationalize the stay of performance in the event of an agency-level protest**, so that the protester remains confident that the protester’s key goal having an opportunity to re-compete fairly for the contract is not lost to delay.
8. **Publish data on agency-level protests**, including, potentially, the decisions themselves to reinforce regularity and confidence in the acquisition system.



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 airc@acqirc.org

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David Drabkin: drabkind@gmail.com

Christopher Yukins: cyukins@law.gwu.edu