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Bid Protests

The bid protest process is not broken. Concerns can be addressed through modest tweaks to the current system.

Six Modest Reforms for the Bid Protest Process

BY JOHN R. PRAIRIE AND J. RYAN FRAZEE

Bid protest reform is again a focal point of discussion in the government contracts community and on Capitol Hill. Although most agree the bid protest process plays a vital role in ensuring a fair and transparent acquisition process, many feel protests are too common, unnecessarily delay the procurement life cycle, and often lack merit.

Recent proposed reforms have sought to reduce the number of procurements subject to protest (i.e., raising the dollar threshold for protests of task orders issued under Defense Department contracts), shortening the protest timeline (i.e., requiring the Government Accountability Office to issue decisions in protests of DOD procurements in 70 days instead of 100), and discouraging frivolous protests (e.g., loser pays GAO's costs, incumbent forfeits bridge contract profits). The Section 809 Panel, tasked with making recommendations to streamline and simplify the defense acquisition process, has put other ideas on the table. The panel has discussed shortening the GAO protest period to 45 days, limiting protest remedies to bid and proposal costs and attorneys' fees, and creating a new forum with exclusive jurisdiction over protests.

Some of these proposed reforms have merit; others seem unnecessary. We think the current process works quite well. Only a fraction of procurements are protested, and many awards (i.e., small-dollar task orders) cannot be protested except on limited grounds. The GAO, where most protests are filed, issues decisions within 100 days — lightning fast by normal litigation standards. And fewer than one-quarter of GAO protests result in a merits decision — the rest are resolved through corrective action, dismissal, or withdrawal. So most of the clearly meritorious and *un*meritorious protests are resolved quickly.

However, critics raise valid points. Protests at the GAO have steadily increased over the past decade. A three-month delay in a procurement can be significant. And, for better or worse, some incumbents file protests

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These are the personal views of John Prairie and Ryan Frazee and not the views of Wiley Rein.

 ISSN 0014-9063

understanding they will make more money in 100 days of extended performance than they will spend on a protest.

In our view, concerns about the bid protest process can be addressed through modest tweaks to the current system. Our first three proposed reforms are practical steps agencies can take to reduce the number of protests filed, and would not require changes to current law. The other three recommendations propose minor changes to the GAO's protest process, which would help resolve protests more quickly.

1. Improve Pre-Proposal Communications With Industry

Some agencies are making strides in this area, but others are still hesitant to engage in frank pre-proposal dialogue with contractors about what they want and how much they expect to pay. Agencies must adhere to procurement integrity laws and ensure that they are not favoring one contractor over others. But when agencies are vague about what they want, contractors sometimes have to guess and submit proposals for contracts for which they simply aren't a good fit. Often these contractors feel burned, or ''pot committed,'' and protest out of frustration, having made a significant investment in the proposal.

Agencies can reduce these protests by having more open communications with industry about what they want and who is right for the job. This could include one-on-one pre-proposal discussions to provide candid feedback about an offeror's chances for award. Where possible, agencies should share more freely their estimated price range. This will result in better proposals that are more tailored to the agency's needs, and reduce protests. Further, if the agency announces an expected price range, it is difficult for a protester to challenge the awarded price as unreasonably high or unrealistically low.

2. Waive Minor Errors and Use Clarifications More Liberally

Agencies have significant discretion to waive minor informalities and use clarifications to resolve minor or clerical errors. They should use it. The procurement system does not benefit when an agency kicks out an offeror because its proposal was five minutes late or because of a mathematical error in its pricing. Disqualification on nonsubstantive grounds is difficult to accept. A protest often follows.

Agencies are reluctant to waive minor errors or allow clarification of a proposal out of fear of holding ''discussions'' with only one offeror. These fears are overblown. Agencies have this discretion and can do a lot through clarifications without crossing into ''discussions.'' In any event, a competitor would not learn of the agency's actions unless it already filed a protest. Agencies should avoid protests over these minor issues by exercising their discretion to waive minor errors and allow offerors to clarify minor issues in their proposal.

3. Provide More Expansive Debriefings

Agencies often provide the bare minimum amount of information during debriefings for fear of revealing protest grounds. They should fight this instinct. It does not reduce the number of protests and often does the opposite: Contractors protest to find out why they lost. That reaction is understandable. If an agency won't explain the rationale for its award decision, it's natural to wonder whether the evaluation was above board.

Section 821 of the Senate's fiscal 2018 National Defense Authorization Act would require ''enhanced'' debriefings for DOD procurements. It would require the DOD to ''provide detailed and comprehensive statements of the agency's rating for each evaluation criteria and of the agency's overall award decision'' and ''encourage the release to the company of all information that otherwise would be releasable in the course of a bid protest challenge to an award,'' including source selection documents.

The Senate is on the right track. More transparency benefits the procurement system, and cuts down on protests filed solely to understand the rationale for award. Agencies don't need a change in the law; they can offer more fulsome debriefings now. Although they cannot disclose confidential and proprietary information, agencies can explain in detail how they evaluated a contractor's proposal and why it was not selected. Agencies can also provide redacted copies of evaluation reports and source selection decision documents. In our experience, this ''open kimono'' approach results in fewer protests.

4. Turn Over the Whole Record at GAO

When a protest is filed at GAO, agencies must produce only those documents relevant to the protest grounds. This often results in fights about which documents are ''relevant'' and which portions of documents can be redacted. It can also lead to piecemeal production of the record and supplemental protests several weeks after the initial agency report (AR) is filed. This is an inefficient process.

At the U.S. Court of Federal Claims, the agency must produce the entire record. The rule should be the same at the GAO. Agencies should stand behind their award decisions and subject the entire evaluation record to scrutiny if a protest is filed, regardless of the forum. Transparency benefits the system.

Producing the entire record at the GAO has other benefits. It would reduce the workload of government personnel, who would not spend time deciding which documents to produce, preparing redactions, and engaging in document disputes. It would also cut down on ''second bite'' protests at the Court of Federal Claims. If protesters got the full record at the GAO, a second protest at the Court of Federal Claims on the same record holds less appeal.

5. Shorten GAO's Decision Deadline to 70 Days

Requiring agencies to produce the entire record would also allow for truncating the protest process at the GAO to 70 days without overburdening the parties or the GAO. Under the current system, it takes approximately 60 days to fully brief all protest grounds in a typical protest (e.g., documents/AR on Day 30, comments/supplemental protest on Day 40, supplemental AR on Day 50, comments on supplemental AR on Day 60). If the agency produces the entire record early, say 10 days after a protest is filed, this briefing schedule could be reduced to 35 days (e.g., documents on Day 10, supplemental protest on Day 20, AR on Day 30, comments on AR on Day 35). On a 70-day decision deadline, this would still leave the GAO 35 days (in-

  FCR ISSN 0014-9063

stead of the current 40 days) to allow further briefing, if necessary, and write a decision.

Shortening the protest process at the GAO to 70 days would reduce the disruption and allow agencies to start performance under new contracts more quickly. While it would place some additional burden on the GAO, if our final recommendation is adopted, the GAO would write far fewer decisions.

6. Make 'Outcome Prediction' ADR Mandatory

The GAO's rules allow it to ''use flexible alternative procedures to promptly and fairly resolve a protest, including alternative dispute resolution.'' This often takes the form of ''outcome prediction'' ADR, where the GAO advises the parties of the likely outcome of the protest, allowing the likely unsuccessful party to take appropriate action to resolve the protest without a written decision. The GAO often does not have to issue a merits decision after engaging in outcome prediction ADR because either the agency takes corrective action or the protester withdraws.

Outcome prediction ADR should be mandatory in all protests at the GAO. Under the truncated briefing schedule laid out above, this could occur 40 to 50 days after a protest is filed. If it results in corrective action or withdrawal, as is typical, the GAO will write fewer decisions and most protests at GAO will be resolved in less than half the current 100-day protest period. Although we think it is unnecessary, to further incentivize the expeditious resolution of protests, contractors that do not withdraw a protest after learning their protest will likely be denied could be required to pay the GAO's costs of processing the protest (or writing the decision).

The bid protest process is not broken. It continues to serve a critical role in ensuring a fair acquisition process and that contracting agencies spend U.S. taxpayer dollars wisely. With these modest reforms, the process could be streamlined to avoid unnecessary disruption to the procurement cycle.