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NEWSLETTER

Section 809 Panel Recommends Bid Protest Reforms, Restricting Protests in Some Areas While Encouraging Transparency in Others

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On January 15, 2019, the Section 809 Panel (the Panel) released Volume Three of its Final Report, featuring 58 new recommendations aimed at streamlining the Department of Defense's (DOD or the Department) acquisition system. Several recommendations focused on streamlining the bid protest process. Although some recommendations would increase transparency, others would establish limits on protests that may curtail contractors' protest rights. The Panel's recommendations span from limiting the types of protest actions contractors may bring to requiring enhanced debriefings for disappointed offerors. Contractors and trade associations concerned about the potential breadth and impact of these recommendations should have a plan for voicing their views to Congress, as each Section 809 panel recommendation is accompanied by draft legislation to implement it.

Restricting Protests for Procurements of "Readily Available" Items

One of the most drastic changes the Panel recommended relates to how the Department approaches commercial buying. The Panel's Marketplace Framework, Recommendation 35, upends the current commercial items procurement structure by streamlining procedures for buying products that are "readily available." The putative threshold for such purchases is $15 million, but the Panel anticipates that this threshold would be flexible, allowing the Department internally to approve the use of readily-available item procedures on procurements with a higher dollar value than $15 million.

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The Panel also recommends extending streamlined procedures to bid protests in the context of readily-available product procurements. The new scheme proposes that commercial item protests be limited to agency-level protests only. This means protesters may protest readily-available procurements only at DOD and cannot take their grievances to the Government Accountability Office (GAO) or the Court of Federal Claims (COFC). In addition, although the contracting officer may issue "a short award decision document when a decision was based on factors other than low price," protesters would be allowed to protest the award under two grounds only: (1) "the product or service that was procured using the readily available procedures was not readily available" or (2) "the contracting officer did not conduct market research consistent with these procedures." Thus, a disappointed offeror apparently could not protest the reasonableness of a decision based on factors other than low price, except if that protest related to the two aforementioned grounds.

These recommendations, if adopted, would obviously limit a contractor's right to file protests relating to readily-available items and place a premium on monitoring contract award decisions. Readily-available item procurements under the $15 million threshold would not require public advertising. Rather, the DOD contracting official, like any private buyer, would conduct market research (e.g. conduct an internet search), select an awardee, and post the conclusions and award online. The Panel's protest recommendations would thus eliminate any pre-award protests where DOD uses these "market research" procedures and would severely limit what a potential protester can challenge post-award.

For items that are "readily available with customization," the Panel proposes a hybrid protest process. For procurements in which the contracting officer publicly posts an RFP or RFQ, GAO and COFC would have jurisdiction over any pre-award or post-award protest. The process for "readily-available" procurements would apply when the contracting officer uses market-based competition, which he or she may use for "readily available with customization" procurements under the $15 million threshold. The post-award publication of the contract award, the market research documentation, and a redacted source selection decision document would be required any time a solicitation is not publicly posted. Presumably, protesters would be able to raise the two protest grounds discussed above. The Panel also states, however, that procurement actions that are not adequately documented will "draw scrutiny" from industry, public interest groups, and Congress, although it is unclear what action could be taken based on that scrutiny.

The Marketplace Framework is plainly a new concept intending to mimic the commercial marketplace. Being untested, it may be better to pump the breaks and not simultaneously change purchasing processes fundamentally *and* curtail the transparency and accountability of those new processes by drastically restricting, or in many cases eliminating, the protest process. If DOD wants contractors to use the Marketplace, contractors need to trust it. Likewise, with such significant taxpayer resources at stake, the public needs to have confidence in the system and the decisions rendered as well. Especially if DOD can internally increase the $15 million threshold, Congress may wish to include more meaningful transparency, accountability, and oversight into the system, certainly at the outset at a minimum.

Establishing a Bid Protest Purpose Statement

In Recommendation 66, the Panel recommends adopting a purpose statement for bid protests. The recommended statement defines the purpose of bid protests as a tool to "enhance confidence in the Department of Defense contracting process by providing a means . . . for [raising and resolving] violations of procurement statutes and regulations in a timely, transparent, and effective manner."

The Panel reasoned that it is difficult to measure the effectiveness of protests because Congress has never defined their purpose. After surveying key stakeholders and conducting research on the history and development of protests, the Panel found that most stakeholders viewed the protest process as a compliance check, or tool to ensure the Government followed applicable laws and regulations and protect taxpayer money. Other stakeholders also raised concerns over protecting the rights of disappointed bidders and ensuring "the procurement process remains effective and efficient."

Although defining an official purpose for protests may seem like an innocuous recommendation, the Panel states the reason for creating this purpose statement is to "to help guide adjudicative bodies in resolving protests consistent with said purpose." But GAO and the COFC have been deciding protests for decades against a well-established and consistent standard of review. Although some Government stakeholders may disagree with some of the current bid protest laws and processes, the Panel does not identify any disagreement or problem with the standards that have been in place for years. The Panel's recommendation also seems to exclude a protest that the Agency's decision was not consistent with the terms of the underlying solicitation or was otherwise arbitrary and capricious. These are valid grounds for bringing a protest and the concept that agency action should not be arbitrary and capricious is well-ingrained in our legal system. At bottom, standards for review have been working. If this part of the protest process is not "broken," should Congress try to "fix" it?

Requiring Contractors to Choose a Single Protest Forum

The Panel also recommends eliminating the opportunity for protesters to have "two bites at the apple," requiring protesters to choose one protest forum (GAO or COFC) (Recommendation 67). The Panel also recommends amending statutes governing COFC's jurisdiction to include timeliness of filing requirements and a 100-day decision date, modeled on GAO rules. The Panel explained it sought to reduce processing time of bid protests and prevent "extraordinary delays" in resolution.

Despite this recommendation, the Panel cites the RAND Corporation study on bid protests directed by Congress in Section 885 of the FY 2017 NDAA[1] (RAND Study", stating that the average time it takes COFC to resolve a protest is 133 days, with a few outliers. The RAND Study also found that there were far fewer protests filed at COFC than GAO, but the Study provided no accurate picture of the number of "pure" "second bite" cases, where a protester at GAO loses and then raises the same issues at COFC. In part to get better data on the perceived issues, Congress directed DOD to further study this issue in Section 822 of the FY19 NDAA. Regardless, the Panel concluded that such a study is "unnecessary."

There are several differences between GAO and COFC that counsel for letting DOD conduct and conclude its study.

- First, DOD may generate better data on how many GAO protests are actually relitigated at the Court and any differences in the results.
- Second, there are structural and systemic differences between GAO and COFC. GAO Procurement Law attorneys hear only bid protests; the judges on COFC hear a variety of cases, of which, according to the Panel, only 20 percent are protests. Moreover, unlike GAO, the President of the United States, upon the advice and consent of the U.S. Senate, appoints judges to the Court. The Court is already understaffed, and it cannot "automatically" adjust its bench to accommodate the potential for more protests being filed there and a hard deadline for deciding them—currently, there are only five active judges (in addition to ten senior judges), and the Senate has not confirmed any new judges since 2014.
- Third, GAO and the Court currently have different rules of procedure, as the Panel recognized. To accommodate the filing deadlines and 100-day decision deadline, the Court would have to substantially change its rules of procedure.
- Fourth, and relatedly, GAO's rules provide that if a protest is filed at COFC, GAO will dismiss any protests of the same matter that are before it. *See* 4 C.F.R. 21.11(d). This rule typically comes into play when one offeror files a protest at the COFC after another offeror has already filed a protest involving the same procurement at GAO. Without carefully drafted rules, a protester in that situation who timely filed its protest at GAO could be foreclosed from re-filing at COFC and be left without any forum for review.
- Fifth, if this recommendation were adopted, agency attorneys and the Department of Justice would have to operate under stricter deadlines as well.
- Sixth, the Panel recommends that only those protests in which there is a stay be subject to the 100-day decisional deadline; those that are not stayed could take longer. If implemented, then, the Court and GAO would not operate similarly with respect to a stay, which is automatic if the protest is timely filed at GAO. As the Panel also notes, parties at the Court today often agree on a voluntary stay of performance. A change to how quickly a protest would be processed may change that dynamic.
- Finally, an important (not mentioned) reason why some protesters file their protest at COFC after receiving an unfavorable decision at GAO is that under current rules, the protester can obtain a more fulsome record at the COFC. In fact, the difference in the *Palantir* case identified by the Panel can, in part, be attributed to the more extensive record before COFC. If parties are going to be forced to choose between forums, then will the Panel also require GAO to provide the equivalent record that a protester would receive at the Court? (As an aside, the Federal Circuit affirmed COFC's *Palantir* decision, finding that the Army had not followed the relevant procurement statute requirements and that its decision was arbitrary and capricious. *Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018). Thus, this "second bite" protest was found to be meritorious.)

In the end, there is still not enough information to assess accurately the impact of "second bite" protests. DOD is still studying the issue. Thus, it may make more sense to find out if there is really a problem, and a problem that we would want to solve by eliminating a "second bite" protest, before undertaking the significant overhaul that would be required to implement the Panel's recommendation.

Limiting GAO and COFC Jurisdiction

In Recommendation 68, the Panel proposes limiting "the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000." The Panel reasoned that the costs of adjudicating protests valued under $100,000 in most instances exceeded the value of the procurement itself. The Panel chose a $75,000 jurisdictional threshold to comply with international agreements and ensure the protest process is consistent with other Panel recommendations. The Panel does discuss other solutions considered in the RAND Study, including creating an ADR process for low-dollar value procurements or restricting protests below the threshold to agency-level. Although the Panel makes no final recommendations on these solutions, the Panel noted that DOD could implement an agency-level protest requirement immediately.

This recommendation is unclear. According to the Panel's discussion of the RAND Study findings, a relatively small number of protests—less than 10% of protests filed at GAO and less than 4% filed at COFC—relate to awards under $100,000. But, recent NDAAs have raised the jurisdictional bar for GAO protests of DOD task orders from $10 million (the civilian agency limit today) to $25 million. Would the $75,000 limit apply to task order protests which, after all, are DOD procurements? And, if trade agreements counsel for a threshold of $75,000, wouldn't that threshold also need to apply to protests of civilian agency awards? Contractors may be substantially impacted by how, if it all, this recommendation is changed, refined, or implemented and again may want to offer their views to the appropriate legislative bodies.

Increasing Contractor Debriefing Rights

Finally, the Panel recommends increasing contractor debriefing rights in all procurements where a debriefing is required. Under Recommendation 69, the Panel proposes requiring DOD to produce a redacted source selection decision document and the offeror's technical evaluation during the debriefing. This recommendation builds on the requirement in Section 818 of the FY 2019 NDAA that contractors are entitled to "enhanced" post-award debriefings, including receiving a redacted version of the source selection decision document, for procurements valued above $100 million. If implemented, the Panel's recommendation would further increase transparency for significantly more procurements and provide contractors access to evaluation documents that DOD usually only releases under protective orders. Recommendation 69 will thus afford contractors the opportunity to review their own evaluation in detail, as well the source selection authority's rationale for the award. Because the Panel received feedback from many stakeholders suggesting that many protests are filed for informational purposes, the Panel hopes that the additional transparency will help decrease the number of protests filed.

Contractors should welcome this recommendation. Access to these important source selection documents can help contractors understand the reasoning behind source selection decisions and help contractors to understand the Government's needs in the future.

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1 *Mark V. Arena et al.*, Assessing Bid Protests of U.S. Department of Defense Procurements, RAND Corporation, December 2017, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.