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The 809 Panel's Bid Protest Reform Recommendations

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In 2016, Congress instructed the U.S. Department of Defense to convene a panel of procurement professionals from inside and outside government to review every regulation governing DOD procurement and recommend whether each one should be preserved, amended, or repealed. In an effort to "streamlin[e] and improve[e] the efficiency and effectiveness of the defense acquisition process,"

[1] the 809 Panel has released a series of reports detailing its findings and specific recommendations for Congress, the third and final of which was published on Jan. 15, 2019.[2]

This final volume covers, among other topics, one of the most hotly debated areas of government procurement: Bid protest reform. The report makes four recommendations for reforming the bid protest system:

- Enact a bid protest purpose statement;
- Eliminate "Second Bite" protests at the U.S. Court of Federal Claims and impose U.S. Government Accountability Office timelines on the COFC;
- Eliminate the GAO and the COFC protest for procurements valued below $75,000; and
- Provide enhanced post-award debriefings.[3]

Each recommendation would require new legislation to implement.

While Congress and the DOD certainly do not have to accept the 809 Panel's recommendations, these proposals will likely influence future fiscal years' National Defense Authorization Act deliberations in Congress, as well as procurement reform generally. The recommendations, while not as radical as some of those the panel contemplated earlier in its deliberations, would change several salient features of the bid protest landscape and would affect the options – and information – available to unsuccessful bidders contemplating a protest.

Enact a Purpose Statement for Bid Protests

The 809 Panel's first recommendation is its least impactful. The panel identifies several purportedly contradictory interests at work in the protest system, i.e. should bid protest reformers seek to "ensure accountability" from the government or simply make protests move more quickly?

[4] And, are protests themselves for the purpose of informing government of its mistakes, or providing recourse to bidders impacted by such mistakes?[5] The 809 Panel claims that these contradictions make it difficult to determine effective reform measures and believes that the problem arises from a lack of policy guidance in the statutes governing the protest process.[6]

After a survey of various statements from international and model code sources, the report recommends that Congress adopt the following purpose statement in Title 10 of the United States Code:

The purpose of Congress in providing for review of procurement action of the Department of Defense … was to enhance confidence in the Department of Defense contracting process by providing a means … for identification of violations of procurement statutes and regulations in a timely, transparent, and effective manner; and a means for timely, transparent, and effective resolution of any such violation.

[7]

Thus, the 809 Panel, concerned with the competing interests at play in bid protests, crafted a position statement that endorses all of them: Protests should enhance bidder confidence, identify and inform the DOD of violations and resolve such violations quickly and effectively.

The recommendation does not resolve the contradictions the panel invokes, but does define what is at stake in any reform of a bid protest system. Certainly any reform effort should be concerned with timeliness, transparency and effectiveness, and any protest system that is effective at identifying and remedying government violations of procurement statutes will foster confidence in the marketplace. It is not entirely clear, however, why Congress needs to enact this provision, which seems to amount only to a post hoc assertion of legislative intent. Whether Congress adopts the purpose statement, or simply uses the panel's recommendation as a guide post for future reform efforts, it will be interesting to see how previously enacted pilot programs – like loser-pays provisions,

[8] under which certain unsuccessful protesters would be liable for the government's costs incurred defending against the protest – measure up in light of this newly stated goal.

Eliminate "Second Bite" Protests at the COFC and Impose the GAO Timelines On COFC Protests

At present, the GAO and the COFC maintain separate, independent bid protest jurisdictions. If a protester is unsuccessful at the GAO, they may file again at the COFC, not as an appeal, but as a new protest under the COFC's more forgiving timeliness rules. The 809 Panel's second recommendation is to eliminate this option for unsuccessful GAO protesters, and to force protesters to make a binding choice between the GAO and the COFC for their initial filing.

[9] The 809 Panel identified this "two-bites-at-the-apple" option that protesters currently hold as problematic, and recommends Congress impose GAO's strict protest timeliness rules on COFC protests involving DOD procurements.[10] Harmonizing the timeliness rules between the forums will largely cut off the option to refile a post-award protest at the COFC after a GAO loss, but the panel further recommends an explicit prohibition on any protest filing at COFC where a previous protest was filed at GAO.[11]

The report describes similar reforms proposed by the DOD and considered in relation to the fiscal year 2019 NDAA, but notes that Congress opted for a less drastic approach.

[12] Congress directed the DOD to conduct a 180-day study of protests filed at both the GAO and the COFC, including any procurement delays resulting from such protests.[13] Although the study is still underway, the 809 Panel nevertheless states that the study is unnecessary, as expeditious resolution of protests "cannot happen" if unsuccessful GAO protesters can immediately refile at the COFC, and concludes that second-bite protests provide "no added value to the system."[14]

The panel recommends adding significant new language as subparagraph (B) to what is now 28 U.S.C. Section 1491(b)(3).

[15] There are several notable aspects of this proposed legislation. First, the proposed provisions would only apply to DOD procurements, creating different statutory frameworks for civilian agency and DOD protests at the COFC.[16]

Second, the legislation would prohibit filing a COFC protest "if the interested party had previously filed a bid protest with the comptroller general based on substantially the same objection."

[17] This seems to leave open several scenarios where the same procurement can be protested before both the GAO and the COFC. For example, the proposed language does not specify that the barred protester must have lost at the GAO. Thus, if a protester wins at the GAO, and the agency re-awards to the same awardee after writing a new award decision, would a challenge by the same protester to the new award be barred from the COFC? We expect that, if Congress does adopt this language, significant procedural litigation will be needed to clarify the practical meaning of "substantially the same."

Third, the proposed legislation would deprive the COFC of jurisdiction over challenges to a DOD solicitation "that is not instituted before bid opening or the time set … for receipt of proposals."

[18] This is facially similar to the existing Federal Circuit precedent regarding the timeliness of protests challenging patent solicitation defects and ambiguities, which already applies to all the COFC protests. However, the proposed legislation appears to make no exception for latent ambiguities and solicitation defects, or solicitation defects and ambiguities that arise due to amendments issued after the proposal submission deadline.

Fourth, the proposed legislation would require the COFC to issue a decision within 100 days after it orders – or the parties agree to – a stay, but the proposed legislation does not explain the consequences of exceeding that deadline. Further, if there is no initial stay of award, the COFC would seem to retain jurisdiction to issue the full range of injunctive and declaratory relief after award. In other words – if there is no stay of performance or award during the protest proceedings, the COFC could still issue a decision beyond 100 days that permanently enjoins the agency from continuing under the challenged solicitation or contract award at issue.

Fifth, while these provisions serve to eliminate or narrow COFC jurisdiction over procurement protests in several circumstances, they do not revoke Congress' waiver of sovereign immunity over procurement-related agency actions. It will be interesting to see whether district courts are willing to exercise Scanwell jurisdiction under the Administrative Procedure Act over protests arising from procurements that the 809 Panel would have carved out of the COFC's jurisdiction. At least one circuit has indicated that Scanwell jurisdiction survives for challenges to contract award decisions that are not covered by the Administrative Disputes Resolution Act.

[19]

Eliminate GAO or COFC Protests for Procurements Valued Below $75,000

The 809 Panel's third recommendation is that the GAO and the COFC should only have jurisdiction to hear protests of DOD procurements valued at greater than $75,000.

[20] This would eliminate nearly 10 percent of the protests at the GAO and 4 percent of the protests at the COFC, with the greatest effect likely on small businesses.[21]

In 2017, the Rand Corporation published a study that assessed bid protests of DOD procurements. The study found that a "non-trivial" number of protests are related to contract actions valued at less than $100,000.

[22] The 809 Panel dismisses such low-dollar protests as insignificant, stating: "It is difficult to understand how the value, in terms of transparency, outweighs the cost of resolving them."[23] While Section 822(d) of the fiscal year 2019 NDAA attempts to resolve the problem by directing the secretary of defense to develop a policy for expeditiously resolving such protests, the 809 Panel believes that changes to the GAO's and the COFC's jurisdiction are necessary – the decision to not set the threshold at $100,000 appears to be linked to the United States' obligations under various international agreements.

In addition, the 809 Panel's proposals in other areas of the report will have an impact upon protest options. The first and second volumes of the 809 Panel report discussed a proposed expansion of the DOD's authority to obtain products or services that require no specific customization by the vendor and can be ordered by the DOD as is, or with defined, priced-optional features. New procedures for purchasing such readily available products, or RAPs, valued under $15 million would encompass and replace existing commercial item rules for such products. The 809 Panel proposes to eliminate all pre-award protests of RAP procurements under $15 million, and limit post-award protests of such awards to "complaints filed with the competition advocate for the contracting activity" that the agency had misapplied the RAP label or failed to perform sufficient market research.

[24]

If adopted, these measures will create potential escape hatches for the DOD to avoid protest scrutiny by dividing procurements into smaller segments and seeking to fit as many procurements as possible under the RAP umbrella. If these limitations and exclusions on protest rights are enacted, it will be interesting to see – given the potential survival of Scanwell jurisdiction over protests excluded from traditional protest fora discussed above – whether any district courts will be willing to take on lower-value protests excluded from protest jurisdiction by this rule.

Provide Enhanced Debriefings for All

The 809 Panel's fourth and final recommendation would provide for enhanced post-award debriefings, based upon testimony from inside and outside the government indicating that access to more complete information regarding the reasons for an award decision can end a significant number of bid protests before they ever begin.

[25]

The 809 Panel states that many DOD contracting personnel are suspicious of providing fulsome debriefings to disappointed offerors, believing that "the more information that is provided at a debriefing, the more likely a disappointed offeror will use the information to file a protest."

[26] The 809 Panel, however, reports that in its discussions with corporate counsel and the private bar, this impression is simply wrong. In fact, it is "evasive and confrontational debriefing[s]" that more often raise questions and spark interest in a bid protest by a disappointed bidder, because such debriefings give the impression that an agency is pushing a bad decision under the rug or that the agency "could not adequately support its decision."[27]

Section 818 of the FY 2018 NDAA requires the DOD to provide a redacted source selection decision as part of the debriefing for all contract awards in excess of $100 million, or in excess of $10 million when requested by a non-traditional or small business. The 809 Panel, building upon this Congressional mandate, recommends that Congress expand the mandate to all required debriefings by the DOD and expand the requirement to disclosure of not only the formal source selection decision, but also the "written technical evaluation" of the debriefed vendor.

[28]

Such documents are not commonly given in debriefings, and would provide significant insight into the basis for an award decision to a debriefed offeror. Of course, questions remain, such as the extent to which the DOD would be permitted to redact the disclosed materials, and whether "written technical evaluation" encompasses written evaluations of all non-price factors – including often-critical factors designated as "management," "staffing," or "past performance" – or only factors explicitly designated as "technical." Importantly, the proposed rule change does not address the consequences for any failure to meet these new requirements, which may leave it up to the DOD to answer these questions as it sees fit, given that neither the GAO or the COFC hear protests of agency failure to comply with debriefing requirements.

[29]

Conclusion

The recommendations advanced by the 809 Panel regarding bid protests overall are modest compared to the more radical proposals that panel members raised as possibilities during the panel's deliberations, which included wholesale changes such as shortening the GAO protest period to 10 days, limiting remedies at the GAO to money damages, eliminating pre-award protests altogether and more.

[30] It is likely that the panel's zeal for such far-reaching measures was dampened by the release of the RAND report finding that protests were not the obstacle to efficient procurement that many critics, including the 809 Panel, said they were.[31] Nevertheless, the more limited set of recommendations in the report are directed at efficiency and cutting back on bid protest dockets, and would impact how protests are contemplated by bidders and conducted by both the GAO and the COFC.

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Section 809 of the National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, as amended.

The Volume 3 Report.

Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Volume 3 at 340–60 (Jan. 2019) {hereinafter "Report"}.

Id. at 341.

Id.

Id.

Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Implementation Details, Recommendation 66 at 3 (Jan. 2019).

See Section 827 of the National Defense Authorization Act for Fiscal Year 2018, Public Law 115-91.

Report at 345.

Id. at 345–46.

Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Implementation Details, Recommendation 67 at 6 (Jan. 2019).

Report at 354.

See Section 822 of the National Defense Authorization Act for Fiscal Year 2019, Public Law 115-232.

Report at 354.

Report, Implementation Details, Recommendation 67 at 3-4.

(3)(A) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(B) In the case of a procurement action of the Department of Defense, the following limitations apply to actions before the United States Court of Federal Claims:

(i) The Court does not have jurisdiction over an action objecting to a solicitation by the Department of Defense for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement by the Department of Defense if the interested party had previously filed a bid protest with the Comptroller General based on substantially the same objection to a solicitation, proposed award, or award of a contract or alleged violation of a statute or regulation.

(ii) The Court does not have jurisdiction over an action objecting to a Department of Defense solicitation for bids or proposals that is not instituted before bid opening or the time set by the Department of Defense for receipt of proposals.

(iii) The Court does not have jurisdiction over an action objecting to a proposed award or award of a Department of Defense contract or an alleged violation of statute or regulation in connection with a procurement or proposed procurement action that is not instituted within 10 days of the interested party becoming aware, or should have become aware, of the basis for the action. In a case in which a debriefing is required, an objection was first

submitted to the agency as an agency level protest, or both, the interested party may file an action at the Court within 10 days of the agency's action on the protest or completion of the debriefing, whichever is later.

(iv) In any action under this subsection with respect to a procurement action of the Department of Defense, the Court shall render judgement within 100 days of the Court ordering, or the parties agreeing, that performance of the contract that is the subject of the action be suspended or that award of the contract that is the subject of the action be suspended.

Id.

Id.

Id.

Now codified at 28 U.S.C. Section 1491(b). See City of Albuquerque, (379 F.3d 901, 906-12 (10th Cir. 2001)("{W}e conclude the Administrative Dispute Resolution Act only waives sovereign immunity for a suit in the Federal Court of Claims when the suit is brought by an actual or prospective bidder. Because the City in this case is not an actual or prospective bidder, its case does not fall within the ambit of the Administrative Dispute Resolution Act or the subject matter jurisdiction of the Court of Federal Claims. . . . In sum, we conclude the Administrative Dispute Resolution Act did not affect the district court's ability to hear cases challenging the government's contract procurement process so long as the case is brought by someone other than an actual or potential bidder. The district court retains subject matter jurisdiction over cases brought by non-bidders under 28 U.S.C. § 1331 and the waiver of sovereign immunity in the Administrative Procedure Act."); see also Jordan Hess, All's Well That Ends Well: Scanwell Jurisdiction In The Twenty-First Century, 46 Pub. Cont. L.J. 409 (2017).

Report at 355.

Id. at 355–56.

Id.

Id. at 357.

Id.at 23, 35, 46.

Id. at 358-59.

Id.

Id.

Report, Volume 3, Section 6, Rec. 69, Implementation Details at 4.

Software Engineering Servs. Corp., B–411739, Oct. 8, 2015, 2015 CPD ¶315; ACC Const. Co. v. United States, No. 10-720C, 2011 U.S. Claims LEXIS 2493 (Fed Cl Dec. 29, 2011, No. 10-720C), 2011 WL 7102301, at *2 (Fed. Cl. Dec. 29, 2011).

See S. Turner, C. Blanchard, S. Tabriz, and N. Castellano, Pursuing Self-Interest While Achieving Oversight: GAO Protest Reform Should Look To Process, Not Politics—Part II, Pratt's Government Contracting Law Report, Vol. 4, No. 6 at 192-193.

It is clear that the panel closely reviewed, and was influenced by, the RAND report – the panel's bid protest reform discussion discusses RAND's findings at length and cites the report throughout (28 of 100 footnotes in the bid protest sections are to the RAND study).

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