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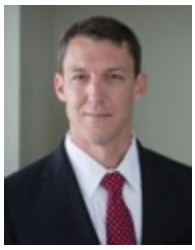
Section 809 Panel Proposes Significant Curtailing of Pre-Award and GAO/COFC Protest Process for Commercial-Item Acquisitions

By **Mark Ries**, **Anuj Vohra**, **Christian Curran** & **Meredith Parnell** on March 14, 2019




Much that has been written about the bid protest reforms in the Section 809 Panel's **final report** has focused on Recommendations 66-69, which expressly address (and propose changes to) the protest process at the U.S. Government Accountability Office ("GAO") and the Court of Federal Claims ("COFC"). But the 809 Panel's most impactful recommended changes to the protest process actually may be contained in Recommendation 35 ("Rec. 35"). There, in the context of a discussion of "updating" the Department of Defense's ("DoD") process for the acquisition of commercial and related items and services, the 809 Panel proposes to eliminate entirely GAO/COFC protests for such acquisitions valued at less than $15 million (and likely many above that threshold as well).

As discussed further below, the implementation of Rec. 35 may have unstated consequences that could ripple across both DoD and civilian agency acquisitions.

A. Recommendation 35: An Entirely Different Protest Process for Acquisitions of "Readily Available" Goods and Services

Rec. 35 proposes that DoD "[r]eplace commercial buying and existing simplified acquisition procedures and thresholds with simplified, readily available procedures for procuring readily available products and services and readily available products and services with customization." The recommendation stems from the 809 Panel's belief that to operate effectively, DoD must be able to procure readily available items and services as would a private sector company, without the current FAR-based constraints.[1]

In Rec. 35, the 809 Panel proposes replacing DoD's current commercial-buying framework with two newly-defined categories of products and services: "readily available" ("RA") and "readily available with customization" ("RAC"). These two categories would greatly expand the concept of "commercial items." The 809 Panel defines RA products and services as those "that require no customization by the vendor and can be ordered directly by customers, to include products and services that only governments buy." RAC products and services are defined as those "sold in the private sector, including to other public-sector customers, for which customization or manufacturing that is consistent with existing private-sector practices is necessary to meet DoD's needs." The only acquisitions not covered under these two categories are those for which "DoD finance[s] development . . . to provide a defense-unique capability."

The breadth of these definitions is important given the 809 Panel's recommendations for acquiring these goods and services and, significant here, challenging those acquisitions:

- No Advance Public Notice. Procurements for RA goods or services—whether customized or not—valued at less than $15 million would have no public

solicitation or bidding process. Instead, a DoD contracting officer would need only to conduct sufficient market research to confirm that the goods and services being acquired were, in fact, readily available.[2] The lack of public notice or solicitation precludes the possibility of pre-award protests. And following award in such procurements, the procuring agency would need only post a notice of the award, and make the contracting file publicly available.[3]

- Limited Award Challenges. GAO and the COFC would no longer have jurisdiction to consider protests arising out of RA procurements—customized or not—below the $15 million threshold. Instead, contractors wishing to challenge an award would be able to file only a post-award, agency-level protest, limited only to the question of whether the agency conducted adequate market research and reasonably concluded that the goods or services in question were readily available. (Procurements where a traditional solicitation is issued would generally remain subject to the GAO's and COFC's bid protest jurisdiction (subject to other recommendations contained in the 809 Report).

B. Impact of Recommendation

By their very terms, the procedures proposed in Rec. 35 would drastically change the way commercial items are procured. And given the expansive definitions of RA and RAC, there are few things—beyond major defense acquisition programs—that would ***not*** qualify. Indeed, the 809 Panel acknowledges that under these broad definitions in the report, "nearly all of the services DoD procures should meet the definition of readily available with customization." Moreover, because the 809 Panel proposes that DoD may use the RA procedures for procurements in excess of the $15 million threshold with only authorization at the local level by the "chief of the contracting office," DoD could use these procedures for procurements well in excess of $15 million with minimal, if any, transparency.

If implemented, these procedures also could have a ripple effect across DoD procurements in a variety of ways, and affect non-DoD procurements as well.

First, the new acquisition procedures would eliminate pre-award public scrutiny—and protests—of RA and RAC procurements where there is no public solicitation. This could stifle opportunity for small businesses and nontraditional contractors to access DoD procurements in favor large, traditional contractors with deep connections to DoD. This also would allow DoD to operate a huge swath of its expenditure of taxpayer funds unchecked at the pre-award stage, precluding both public scrutiny and eliminating potential offerors' ability to challenge the ground rules of the procurement where the agency's procurement may unduly restrict competition, improperly favor one offeror over another, or otherwise violate procurement law or regulation.

Second, the new procedures would significantly circumscribe the post-award protest process. The procedures completely remove oversight outside of DoD itself by eliminating GAO/COFC jurisdiction and leaving only agency-level protests. And even what is left within DoD can hardly be described as a protest. By limiting agency-level protests to the question of whether an agency conducted sufficient market research to determine commercial availability, Rec. 35 removes all other traditional grounds of protest—*i.e.*, equal treatment of offerors, realism of proposed pricing, sufficient consideration of apparent organizational conflicts of interest, rationality of award decision, etc.

The ability to bring these types of traditional protest grounds serve not only to protect the investment of individual offerors in a given procurement, but to safeguard the integrity of the procurement system. Under the 809 Panel's proposal, for the acquisition of RA products/services—with or without customization—where a solicitation is not issued, there would be nearly zero outside oversight of DoD procurement decisions. And although the 809 Panel asserts that releasing the "contract file" would increase transparency, even if true, that transparency is offset by the minimal information that would be included in the file and the lack of a viable mechanism to act on it.

Third, the limitation of protests proposed by the 809 Panel would also call into question the decades of legal precedent at GAO and COFC that contractors and agencies rely upon when planning acquisitions and bidding on procurements. And this uncertainty would likely have a severe impact on agency and contractor productivity and efficiency when it comes to planning and executing a procurement. Without a process to incentivize compliance, DoD agencies using RA procedures may choose to ignore established decisional law, adversely affecting an offeror's ability to understand the legal boundaries of the agency's procurement process.

Moreover, the proposed changes in Rec. 35 (and others) will create separate procurement and protest systems for the DoD and civilian agencies. Historically, this bifurcated approach created significant confusion, inefficiency, especially among the contractor community and particularly for those companies who operate in both the DoD and civilian spaces. These concerns eventually prompted the departure from the old Armed Services Procurement Regulation ("ASPR")/Federal Procurement Regulation ("FPR") split and the development of unified procedures under the FAR. Rather than propelling procurement to the future, the 809 Panel essentially seeks to revert to bygone days. As such, contractors once again will have to adapt not only to the new DoD processes, but also to the different, civilian agency procurement process.

All of these issues demonstrate that the RA procedures proposed by the 809 Panel may create significant upheaval in the DoD procurement community that could dramatically change how contractors will need to operate with regard to DoD procurements. But despite its "bold" proposals, the 809 Panel cites to very little by way of studies or research to support the benefits—much less the necessity—of these recommendations. Indeed, just last year the RAND Corporation released a **comprehensive study** of DoD procurements that found that bid protests were not a significant impediment to the procurement process. Thus the drastic revisions to the DoD protest process appear to be simply change for change sake, at best a solution in search of a problem.

Although improvements to the procurement process are always worth considering, the drastic measures called for in Rec. 35 threaten to upend decades of established legal principles in the procurement arena, and make the process less, not more, transparent for the public and for contractors. Contractors should take heed when examining their positions on these important issues and continue to monitor congressional activity in this area going forward as these reforms likely will dramatically impact many defense contractors' business.

[1] In putting forward its belief that drastic changes are needed, the 809 Panel makes no distinction between the procurement of cutting-edge technology advancements from nontraditional businesses and the procurement of office supplies or custodial services for a support agency office.

[2] Although the report identifies a $15 million maximum for use of its new market research process, it also authorizes the process for RA and RAC procurements ***of any value in excess of $15 million*** if the "chief of the contracting office" authorizes use of the process in writing. No criteria govern use of this authority. The 809 Panel references FAR subpart 2.1, Definitions, for the definition of "chief of the contracting office," but that term is not defined in the FAR. The term "contracting office" is defined essentially as any "office that awards or executes a contract."

[3] Publicly posted contracting files would include identification of the products/services procured and the price paid, the contracting officer's market research, and a "short award decision document" when the awardee was chosen based on factors other than price.