

# Section 809 Panel Installment One: Expanding Agency Procurement Discretion, Narrowing Contractors' Bid Protest Rights Recommended

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[Meghan Doherty](#), [Alexander Ginsberg](#), [Toghrul Shukurly](#), [Robert Starling](#)  
[Pillsbury Winthrop Shaw Pittman LLP](#)

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Pillsbury Winthrop Shaw Pittman LLP

**Several of the “Section 809” Panel’s recommendations would change the procurement landscape by significantly curtailing the bid protest process and limiting judicial review of procurement decisions.**

## Takeaways

- The Section 809 Panel recommends that contractors no longer be allowed to protest the same Department of Defense (DoD) procurement at both the Government Accountability Office (GAO) and the Court of Federal Claims (COFC).

- The Panel makes a number of recommendations that, if implemented, would diminish contractors' rights and increase agency discretion in connection with DoD procurements.
- Certain Panel recommendations appear to be based on incomplete data and require further study.

Section 809 of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 directed the Secretary of Defense to establish a panel to study DoD's procurement practices and recommend legislative and other changes aimed at modernizing them. The Panel has released the third volume of its final report, making a total of 58 new recommendations. As we noted in our [overview of Volume 3 of the Panel's report](#), a number of the recommendations relate to bid protests of DoD procurements. Some recommendations may be viewed as innocuous changes that will promote transparency in DoD's procurement practices. Other recommendations, however, may be viewed as efforts to streamline DoD's acquisition practices—not by promoting transparency and accountability, but by eliminating avenues of relief for aggrieved offerors. We discuss Recommendations 66–69 and 76 in detail below.

## **Establishing a Purpose Statement for Bid Protests in the Procurement System**

According to the Panel, most of the stakeholders agree that the purpose of providing for a review of DoD's procurement actions is to ensure compliance with applicable laws and regulations and to protect public funds. The Panel states that a “vocal minority” also is concerned about protecting the rights of disappointed offerors. Accordingly, Recommendation 66 recommends that DoD officially define the purpose of the bid protest process as “enhance[ing] confidence in [DoD's] contracting process.”

The Panel's discussion of this issue inaccurately suggests that the dual purposes of ensuring compliance with laws and regulations and protecting the rights of disappointed offerors are at odds with one another. A framework of procurement laws that ensures the fair treatment of offerors in DoD's public procurement market is essential to enhancing confidence in DoD's procurement practices, in turn guaranteeing robust competition among contractors. The Panel's recommendation, if implemented, would result in defining the purpose of the bid protest system too narrowly, in a way that overlooks the rights of contractors. The practical import of Recommendation 66 remains unclear, but to the extent DoD plans to issue a statement of purpose, contractors should ensure that it

is complete—particularly in light of the recommendations below, which propose to expand agency discretion at the expense of contractors’ rights.

### **Eliminating the Opportunity to File a Protest with the COFC after Filing at the GAO and Requiring the COFC to Issue a Decision within 100 Days of Delaying a Procurement**

Recommendation 67, if implemented, would prevent protesters from filing substantially similar protests at both the GAO and the COFC. To achieve this, the Panel recommends placing protest filing timeliness rules on the COFC that mirror those applicable at the GAO, *i.e.* a 10-day filing deadline. Recommendation 67, if implemented, also would require the COFC to decide DoD protest actions within 100 days whenever the court orders a suspension of or the parties agree to suspend contract award or performance while the protest action is being litigated. The Panel believes that this timeliness rule would enable the COFC to focus resources on resolving those cases for which performance has been stayed.

This recommendation would require contractors to carefully consider their choice of venue before filing a protest. Assuming that many protesters still opt to file at the GAO because of its other statutory and regulatory benefits (for example, a protest timely filed at the GAO automatically triggers an automatic stay of performance of the protested contract.), Recommendation 67 ultimately would prevent these protesters from seeking judicial review of the procurement following a GAO decision. The recommendation may be viewed as part of a trend whereby Congress has sought to limit the COFC’s jurisdiction over DoD procurement protests.

The GAO is an administrative arm of Congress whose attorneys are charged with handling over 2,000 bid protests every year and “recommending” to agencies whether and how to correct errors in their procurement decisions. GAO’s review is limited, as are the scope and force of any relief it grants to a protester. Cases filed at the COFC, by contrast, are heard by federal judges appointed by the President, who may grant more expansive relief and can compel the actions of federal agencies. The Panel’s recommendation to eliminate contractors’ “second bite at the apple” at the COFC if they first protest to the GAO would eliminate this additional check on agency procurement actions. The COFC already lacks jurisdiction (*see* The Federal Acquisition Streamlining Act (FASA), 10 U.S.C. § 2304c(e)), in most instances, over protests of task and delivery orders issued under indefinite delivery/indefinite quantity (IDIQ) contracts, which are many agencies’ pre-

ferred acquisition vehicles and represent billions of dollars in federal spending. This recommendation would further limit the pool of procurement decisions reviewable by the court.

It is not clear that Recommendation 67 is supported by reliable data. Although it is true that some protesters who lose at the GAO go on to file a second protest at the COFC, the Panel has not demonstrated the frequency of this occurrence. While the RAND study cited by the Panel asserts that there has been an increase in the number of protests filed at both the GAO and the COFC, this conclusion apparently is based on the number of COFC protests that contain any reference to the GAO, a standard that is unreliably over-inclusive as it also captures any protest at the COFC that simply *cites* to GAO decisions for their persuasive value. Additionally, as noted in [an earlier alert](#), Section 811 of the 2019 NDAA specifically directed DoD to study this issue, and determine exactly how many protests are filed at both the GAO and the COFC. Congress and the DoD should await the results of this study before implementing Recommendation 67.

Recommendation 67, like the preceding Recommendation 66, reflects the Panel's apparent goal of streamlining DoD's procurement practices at the expense of disappointed offerors' rights.

### **Limiting the Jurisdiction of GAO and COFC to Protests Exceeding \$75,000**

The Panel also recommends limiting GAO and COFC protest jurisdiction to protests exceeding \$75,000 in value (Recommendation 68). The Panel states that costly protests filed in conjunction with relatively small-value contract awards may not be worth the value of the transparency and accountability associated with such protests. The data, however, raise the question of whether this Recommendation is necessary. The RAND study cited by the Panel found that only 7.9 percent of all GAO protests and 3.5 percent of all COFC protests are associated with procurements valued less than \$100,000. Additionally, other than anecdotal reports, there appear to be no data indicating how many protests of procurements under \$75,000 actually are filed at either the COFC or the GAO. Given the percentages discussed above, it is likely that only a very small number of protests are filed in connection with procurements valued under \$75,000. Moreover, as discussed in our earlier [alert](#), Congress already has tasked DoD with studying the issue of low-value procurement protests and developing expedited bid protest procedures for procurements valued under \$100,000. Congress should await the results of this study before further reducing accountability and offerors' ability to seek relief.

## **Requiring Certain Evaluation Information to be Provided as Part of the Debriefing**

Contractors and other stakeholders should welcome Recommendation 69, as it builds on previous developments that are aimed at transforming the debriefing process from being adversarial to being informative. Specifically, Recommendation 69 recommends providing, as part of all required debriefings, a redacted source-selection decision document and the technical evaluation of the contractor receiving the debriefing. The Panel predicts that providing more information to disappointed bidders through debriefings will lead to fewer protests and more confidence in the procurement process.

## **Better Defining Part 16 Procedures and Requiring their Use**

Recommendation 76 observes that, while fair opportunity procedures under Part 16 of the FAR—which governs IDIQ contract procurements—afford contracting officers more flexibility in placing task and delivery orders, contracting officers often in Part 16 procurements choose to follow Part 15 procedures instead. According to the Panel, Part 16 procedures are not as well defined as those in Part 15, a situation that leads contracting officers to use Part 15 procedures as a way of injecting certainty into their procurement decisions. The Panel concludes that the use of Part 15 procedures in Part 16 procurements results in inefficiencies, as more resources are expended on procurements that otherwise could be conducted under Part 16 with less effort by the government. To eliminate these inefficiencies, the Panel recommends that Part 16 procedures be better defined, that DoD issue more guidance on how contracting officers can implement Part 16 procedures, and that contracting officers generally be required to use the streamlined procedures of Part 16 when placing orders under IDIQ contracts. FAR Part 15 procedures are well-understood by the contracting community and generally afford contractors fair treatment. If new procedures are prepared for FAR Part 16 procurements, they should be adequately constructed and sufficiently detailed so as to protect the integrity of the task and delivery order procurement process.

## **Conclusion**

The Panel recommends some significant changes to procurement laws and regulations in the area of DoD bid protests. Overall, the recommendations would have the effect of streamlining acquisitions, but at the expense of reducing, sometimes even eliminating, avenues for relief for disappointed offerors.

We will continue to review the Section 809 Panel's Report and issue client alerts covering other key areas of interest to government contractors.

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*Written by:*

[Pillsbury Winthrop Shaw Pittman LLP](#)

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