Recommendation 68: Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000.

Problem

Proponents of the U.S. bid protest model have defended the system as necessary for ensuring fairness, accountability, and transparency in government procurement. They point to the relatively small number of protests that are filed each year and the relative speed with which the vast majority are adjudicated, to argue that the existing process is not overly burdensome. Even the limited number of protests filed each year, however, cost taxpayers, DoD, and contractors who file protests substantial amounts of time and resources and more importantly slow delivery of technology and lethality to the warfighter. When costly protests are filed in conjunction with relatively small-value contract awards, it brings into question whether the value of the transparency and accountability is worth it.

Background

RAND found in its analysis of DoD protests filed at GAO and COFC that a nontrivial number of protests filed are related to contract actions valued at less than $100,000.[1] A little more than 10 percent of the procurements that were subject to a protest at GAO were valued at less than $100,000 and approximately 4 percent of the procurements subject to protest at COFC were valued at less than $100,000.[2] RAND questions "whether the costs to the government to adjudicate these protests [at GAO and COFC] exceeds the value of the procurement themselves and thus are not cost-effective."[3]

RAND's report does not make many substantive recommendations, but one recommendation is to "consider implementing an expeditious process for adjudicating bid protests of procurements valued under $0.1 Million."[4] The recommendation suggests potentially having COFC *rule from the bench* or GAO require alternative dispute resolution (ADR) for all smaller-value protests.[5] RAND suggests restricting such smaller-value protests to the agency level as another potential option but describes it as "perhaps less desirable…from a fairness perspective."[6] Ultimately RAND's recommendation is to "come up with a quick way to resolve these cases commensurate with their value while preserving the right to an independent protest."[7]

As discussed above, the United States is signatory to a number of multilateral and bilateral trade agreements that require the signatories to maintain certain public procurement processes, including a protest/challenge process. The WTO's 1994 GPA requires parties to provide a process for suppliers

[1] Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements,* RAND Corporation, December 2017, 59, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.
[2] Ibid, 52.
[3] Ibid, 71.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Ibid, xviii.

who have, or have had, an interest in a procurement to challenge alleged breaches of the Agreement.[8] The revised GPA has a similar requirement.[9] The United States is among 47 nations that are parties to the revised GPA. In addition, many of the multiple bilateral free-trade agreements to which the United States is a party contain similar provisions. These provisions require a challenge process, but all have applicability thresholds for which the requirements of the agreement do not apply to procurements valued below that threshold.[10] FAR 25.204 contains a table depicting all of the thresholds associated with each of the free trade agreements. A number of agreements that require a protest process apply to all supply and service contracts valued above $80,317.[11] This threshold is the lowest above which the United States must provide a process for challenging decisions of procurement officials.

Discussion

Agencies face protests of procurements at GAO that are at times valued just over the micro-purchase threshold and must litigate at COFC procurements valued well below $100,000. One recent example of a GAO protest was based on an $8,000 contract award. It is difficult to understand how the value, in terms of transparency, outweighs the cost of resolving them. Congress, in Section 822(d) of the FY 2019 NDAA attempted to address this problem by directing the Secretary of Defense to develop a policy for expeditiously resolving protests related to contracts valued less than $100,000, but this policy could only affect agency-level protests. Legislative changes to GAO and COFC's jurisdiction are necessary to ensure this policy is effective.

The first two potential changes proposed by RAND, to mandate ADR at GAO and for COFC to issue bench rulings for protests of small-value contracts would be challenging to implement, would still sacrifice transparency if written opinions were not issued, and could still be very costly for all parties. RAND's final suggestion, to restrict protests below a certain dollar threshold to the agency level, could be implemented immediately, would enable the policy resulting from Section 822(d) to be effective, and

[8] Agreement on Government Procurement, World Trade Organization, as approved by Congress in the Uruguay Round Agreements Act (Pub. L. No. 103-465). Agreement on Government Procurement, Article XX: Challenge Procedures, paragraph 2, 26, World Trade Organization (1994), accessed November 27, 2018, https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.
[9] See Revised Agreement on Government Procurement, Article XVIII: Domestic Review Procedures, paragraph 1, 23, World Trade Organization, accessed November 27, 2018, https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf.
[10] See for example: United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. No. 108-286) (19 U.S.C. 3805 note); United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. No. 109-169) (19 U.S.C. 3805 note); Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. No. 109-53) (19 U.S.C. 4001 note); United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act of 1993 (Pub. L. No. 108-77); United States–Colombia Trade Promotion Agreement Implementation Act (Pub. L. No. 112-42) (19 U.S.C. 3805 note); U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note); United States–Korea Free Trade Agreement Implementation Act (Pub. L. No. 112-41) (19 U.S.C. 3805); United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. No. 108-302) (19 U.S.C. 3805 note); United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. No. 109-283) (19 U.S.C. 3805 note); United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. No. 110-138) (19 U.S.C. 3805 note); United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. No. 112-43) (19 U.S.C. 3805 note); and United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. No. 108-78) (19 U.S.C. 3805 note).
[11] See FAR 25.402.

would make it less likely that the agencies would spend more taxpayer dollars processing and defending a protest than a procurement is worth.

Conclusions

Congress should limit the jurisdiction of GAO and COFC to protests of DoD procurements valued above $75,000 or expected to be valued above $75,000. This threshold is consistent with the Section 809 Panel's recommendation for raising the public advertising threshold discussed in the *Volume 2 Report*, and ensures that the U.S. protest process remains consistent with existing free trade agreement obligations.[12] This threshold is below the value RAND used for its analysis and will likely effect an even smaller percentage of protests than the percentage identified by RAND; however, it would prevent future protests of $8,000 procurements at GAO or COFC which consume time, resources, and taxpayer dollars that could be reinvested in delivering capability to warfighters.

Implementation

Legislative Branch

- Amend 31 U.S.C. § 3552 and 28 U.S.C. § 1491 to limit the jurisdiction of GAO and COFC to post-award protests of procurements valued above $75,000 and preaward protests of procurements with an expected value above $75,000.

Executive Branch

- There are no regulatory changes required for this recommendation.

Implications for Other Agencies

- This change only applies to DoD but could be expanded to apply to all federal government agencies.

[12] Section 809 Panel, *Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations: Volume 2 of 3,* Section 3: Simplified Commercial Source Selection, 107-109 (2018).The Panel is not commenting on whether an agency-level protest meets the requirements found in the various free trade agreements, though it appears that an agency-level protest would most likely satisfy those requirements.

RECOMMENDED REPORT LANGUAGE

SEC. ___. THRESHOLD FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND CAUSES OF ACTION BEFORE THE UNITED STATES COURT OF FEDERAL CLAIMS.

This section would amend section 1491 of title 28, United States Code, and section 3552 of title 31, United States Code. These sections, as amended, would allow companies to protest only the award of Department of Defense procurements at or above $75,000 in expected value to the Government Accountability Office or the United States Court of Federal Claims. Protests of procurements below this amount would be addressed solely at the procuring agency level. The committee expects these amendments to mitigate the problem identified by a 2018 Department of Defense-funded study finding that agencies often spend more taxpayer dollars processing and defending a protest than the actual value of the procurement.

SEC. ___. THRESHOLD FOR REVIEW OF PROCUREMENT ACTIONS OF THE DEPARTMENT OF DEFENSE THROUGH THE GENERAL ACCOUNTING OFFICE PROCUREMENT PROTEST SYSTEM AND CAUSES OF ACTION BEFORE THE UNITES STATES COURT OF FEDERAL CLAIMS.

(a) GAO BID PROTESTS.—Section 3552(a) of title 31, United States Code, is amended by adding at the end the following new sentence: "A protest may not be filed under this subchapter with respect to an action of the Department of Defense unless the value (or anticipated value) of the contract or proposed contract (or other matter in question) is greater than $75,000.".

(b) JUDICIAL ACTIONS.—Section 1491(b) of title 28, United States Code, is amended by adding at the end the following new paragraph:

"(7) There is jurisdiction over an action described in paragraph (1) in the case of a proposed contract, or a proposed award or the award of a contract, or of a procurement or proposed procurement of the Department of Defense only if the value (or anticipated value) of the matter in question is greater than $75,000.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to any protest or cause of action filed after the end of the 120-day period beginning on the date of the enactment of this Act.

Changes to Existing Law: This proposal would amend section 3556 of title 31, United States Code, and section 1491(b) of title 28, United States Code, as follows:

TITLE 31, UNITED STATES CODE

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§3552. Protests by interested parties concerning procurement actions

(a) A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter. **A protest may not be filed under this subchapter with respect to an action of the Department of Defense unless the value (or anticipated value) of the contract or proposed contract (or other matter in question) is greater than $75,000.**

(b) ***

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TITLE 28, UNITED STATES CODE

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§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a) ***

(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency 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. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded

(2) ***

* * * * * * *

(7) There is jurisdiction over an action described in paragraph (1) in the case of a proposed contract, or a proposed award or the award of a contract, or of a procurement or proposed procurement of the Department of Defense only if the value (or anticipated value) of the matter in question is greater than $75,000.
