

By: Matthew Schoonover | January 23, 2019

Section 809 Panel Recommends Eliminating COFC's Ability to Consider Protests After GAO's Resolution

Among its suggestions to streamline the acquisition process, the Section 809 Panel has proposed to eliminate the ability to file a protest at GAO *and* the Court of Federal Claims. Instead, the Panel would require protesters to choose between filing at GAO *or* the Court.

Let's take a look.

By way of background, a disappointed offeror can file a bid protest in [three potential forums](#): the agency itself, GAO, or the Court of Federal Claims (COFC). Depending on the forum first selected, the protester might have other bites at the apple if it is unsuccessful. For example, a protester can first file at the agency and, if unsuccessful, file at GAO. If the protest still isn't successful at GAO, the protester can then take its challenge to court. But this progression doesn't work in reverse—for example, a protester can't first file at GAO and then try to challenge at the agency, or first file at the Court of Federal Claims and then file at GAO.

Considering ways to improve the acquisition process, the Section 809 Panel believed this multiple-forum approach to be too inefficient:

Allowing protesters to litigate a protest at GAO and, if not satisfied with the GAO decision, file the same or a refined version of the protest at COFC undermines one of the critical aspects of GAO's jurisdictional mandate: "providing for the inexpensive and expeditious resolution of protests." In the current system, GAO cannot conclusively resolve a protest. The option remains to relitigate that very same protest at COFC. For GAO to achieve its statutory purpose, the opportunity for a second protest opportunity at COFC must be eliminated.

Overall, the effect of this proposed change would be to force would-be protesters to choose their only path for relief. As the Panel said, "[p]rotesters would be able to make

the choice of protest forum based on the perceived advantages and disadvantages of the different options, and nothing would prevent a protester from first filing a protest with the agency.” In this regard, the Panel noted its belief that “the vast majority of protesters would choose the more affordable, predictable, and efficient GAO forum. This recommendation protects the rights to choose the forum that will hear their protest, eliminates the potential for extraordinary delays that result from relitigating protests at separate forums, and ensures GAO achieves its statutory purpose.”

Frankly, I'm not wild about this proposed change. For starters, I think the proposed solution doesn't match the supposed problem. I don't see how allowing protesters to file a separate COFC protest following the resolution of a GAO protest impacts GAO's ability to meet its own mandate. So long as GAO is timely resolving the protests on its docket, it is meeting its statutory purpose—even if a protester later chooses to then file a protest in a different forum.

Beyond that, the ability to file subsequently at COFC helps ensure that protesters will receive relief. As part of the Legislative Branch, GAO cannot technically order an agency to undertake any action as part of its resolution of a bid protest. Instead, GAO simply makes recommendations, and the agency has the discretion to follow those recommendations (or not). Though agencies follow these recommendations most of the time, they sometimes don't. As it currently stands, a protester's recourse would be to file a separate protest at COFC and seek an *order* directing the agency to take a certain action. If COFC's ability to consider protests that were previously heard by GAO was removed, an agency would, in theory, be free to disregard GAO's recommendation, and a protester would be left without any recourse. I struggle to see how such an approach would help to [ensure confidence in the acquisition system](#).

Neither am I convinced that allowing an offeror to file a bid protest at COFC after previously filing at GAO is the cause of “extraordinary delays” in the acquisition process, as the Panel alleges. Indeed, the Report acknowledges that COFC protests currently take, on average, 133 days to resolve. That's not that bad, considering the complicated questions considered by COFC. Even still, most of the delays caused in COFC protests are attributable to the agency itself, in two respects.

First, unlike at GAO, a protester at COFC isn't entitled to an automatic stay of performance if it files its protest within a certain timeframe. Instead, the protester must move for a preliminary injunction to prevent any action on the contract while the protest is

being heard. But as the Panel notes, “[i]n practice, the need for a stay is often agreed to by the parties at the outset of the litigation and does not require a formal motion.”

Because agencies often agree to these stays, it’s unreasonable to pin the blame for any delays on the fact of the protest itself.

Second, the Panel acknowledges that the agency’s own conduct in the COFC protest is a primary driver in the time it takes to resolve the protest. Until the agency produces the administrative record, not much can happen. On average, the Panel found that this takes approximately 37 days at COFC—a week more than an agency is allowed at GAO. To its credit, the Panel noted that the agency’s “inability to provide the administrative record” is a direct cause of the COFC’s extended timelines.

Reforming the bid protest process is a laudable goal. But in my mind, removing an offeror’s ability to seek review from GAO *and* COFC isn’t a reasonable proposal, as it would eliminate important protections for disappointed offerors. Instead, reform efforts should first focus on the [agency’s own role in the protest process](#)—including through [continuing efforts to improve](#) the [debriefing process](#). In the end, I hope this proposed recommendation isn’t adopted.