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What's the Purpose of a Bid Protest? Section 809 Panel Suggests An Answer

Counseling clients and prospective clients on a potential bid protest, we often ask: *Why would you like to file this protest?* Of course, the answer inevitably involves the discussion of a flaw (or several) in the evaluation process that, had they not been committed, would have resulted in a different award decision.

In its latest report, the [Section 809 Panel](#) offers another consideration: *Will this protest ensure confidence in the acquisition system?*

Before diving into the recommendations from its [January 2019 report](#), let's first step back and remind ourselves why the Section 809 Panel exists. Named after the section of the 2016 NDAA that brought it into existence, the Panel is tasked with reviewing the acquisition system and, where necessary, making recommendations to ensure that the Department of Defense is able to effectively buy the items needed to best equip its warfighters.

As part of this call, the Panel took an in-depth look at the bid protest process and its impact on DoD's ability to perform its most vital functions. We'll take a look at some of the Panel's other recommendations in future posts but, for now, I wanted to tackle the threshold question asked by the Panel:

What's the point of a bid protest?

According to the Panel, *none* of the statutes governing the bid protest process articulate a purpose for protests. This lack of an established protest, according to the Panel, "makes it difficult to evaluate the effectiveness of the current protest process and produces reform efforts intent on resolving discrete perceived problems rather than ensuring the process achieves the desired outcome."

Reviewing the history of the bid protest process, as well as considering corollary processes from different countries and under the model procurement codes, the Panel noted two different purposes: is the protest process designed to ensure transparency and

accountability in acquisitions, or is it intended to provide redress to offerors that feel they have been harmed by an agency's conduct?

The Section 809 Panel suggested that the former purpose should be emphasized. In its discussions with industry stakeholders, it noted that a "consistent theme of the arguments in favor of a robust protest process is the need for the government to have a means of checking its own performance to ensure compliance with law and regulation and to protect public funds." A minority of persons consulted thought that protecting the rights of disappointed offerors should also be at issue.

The Panel thus recommended that Congress adopt a purpose statement highlighting the need to promote confidence in the acquisition process:

The purpose of Congress in providing for review of procurement action of the Department of Defense through the procurement protest system . . . was to enhance confidence in the Department of Defense contracting process by providing a means, based on protests or actions filed by interested parties, for 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.

This is a laudable purpose. But, with respect to the Panel, I wonder if its adoption will have much of an impact on the perceived inefficiencies caused by protests. After all, every protester thinks that its protest will enhance confidence in the acquisition process and cure a violation of an applicable requirement. By focusing on the micro concern (that is, the unfair evaluation of its particular effort), protesters are helping to solve the macro problem (of maintaining confidence in the acquisition process).

To be sure, understanding the point of a bid protest is a necessary task for agencies and would-be protesters alike. The Section 809 Panel's recommendation is a good reminder that the point should be to maintain confidence in the acquisition system.