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FEATURE COMMENT: Developments Affecting DOD Bid Protests

Developments from 2018 and 2019 relating to Government contract law and litigation continue to affect the Department of Defense in particular, including its bid protests. Discussed below are several developments affecting DOD bid protests to keep watch on in this evolving legal arena, including trends concerning corrective action; the Section 809 Panel recommendations; and current, pending and proposed debriefing reforms.

The January 2019 Volume 3 Report of the Section 809 Advisory Panel on Streamlining and Codifying Acquisition Regulations (the Section 809 report) included several recommendations relating directly to the federal bid protest system. According to the Section 809 report's introduction to its recommendations 66–69 concerning bid protests:

> Although many nations continue to base their [bid protest] challenge system on the U.S. bid protest system, it is difficult to determine how effective the U.S. model is at providing transparency and accountability relative to the procurement delays and added costs that result from nearly all protests. One certainty is that a bid protest, or the threat of a protest, does delay and add costs to DoD procurement, disrupting the delivery of needed products and services to warfighters.

Accordingly, recommendation 66 is to establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies. Recommendation 67 is to eliminate the opportunity to file a protest at the U.S. Court of Federal Claims after filing at the Government Accountability Office, and to require the COFC to issue a decision within 100 days of ordering a procurement to be delayed. Recommendation 68 is to limit the jurisdiction of GAO and the COFC to procurements with a value expected to exceed $75,000. And recommendation 69 is to expand the information required to be disclosed in DOD debriefings.

These recommendations are separate from the Section 809 report's broader proposed reforms, including new proposed procedures for "readily available" products and services, which would eliminate most protests for these DOD procurements below a $15 million threshold. Recommendations 66 and 68 are narrower and relatively straightforward, and recommendation 69, as discussed below, has the potential to further improve debriefings in DOD procurements.

But recommendation 67, to the extent it precludes protests at the COFC and review by the U.S. Court of Appeals for the Federal Circuit, would reduce the role of the federal courts in the bid protest system, as well as their effectiveness as a critical element in the checks and balances provided by that system. This aspect of the recommendation is discussed below, in the context of the role of corrective action in the bid protest system.

The Bid Protest System and Corrective Action—If a disappointed (or potential) bidder decides that it has legitimate grounds to protest, it will have a statistically meaningful chance of corrective action in response to protests filed at GAO. The effectiveness rate for fiscal year 2018 was 44 percent, a slight decrease from the prior year's record high of 47 percent, according to GAO's annual reports to Congress for FY 2018 and FY 2017, which showed similar rates of protests filed and sustained, and a fairly steady effectiveness rate.

While GAO does not break down its numbers by agency, according to the Section 809 report, in FY 2017, 55 percent of GAO protests were defense-related. In the separate report on DOD bid protests that the Rand Corporation submitted to Congress in December 2017, Rand found that protest actions

associated with DOD agencies accounted for about 60 percent of total GAO protests during its period of study. The Section 809 report also noted the Rand report finding that 95 percent of DOD protests were filed at GAO. Thus, the GAO protest effectiveness rate has an impact on DOD procurements.

In its annual report, GAO stated that during FY 2018, 2,607 cases were filed (a slight increase from FY 2017), including 2,474 protests. Of the protests resolved on the merits, GAO sustained 15 percent, or 92 out of 622 protests resolved by written decisions. The 15-percent sustained rate is close to the average for the last five years.

By my count, the 92 B-numbered protests sustained were accounted for by about 46 published written decisions (each reflecting an individual competition). Of the 46 sustained GAO decisions, only about 18 involved DOD. The small number of GAO sustained decisions involving DOD are not necessarily DOD's primary concern when it comes to potential protest reforms. Instead, the bigger concerns likely include the time and effort it takes DOD personnel to "protest-proof" any procurements that might be protested, as well as the delays necessitated by corrective action, and the disparate delays and impacts that may affect individual high-value procurements in particular.

The effectiveness rate has slowly increased from 33 percent in FY 2001, the first year for which GAO reported the statistic, to record highs of 46 percent and 47 percent in FYs 2016 and 2017, reflecting the combination of corrective actions and sustained decisions, and highlighting the importance of corrective action as a potential remedy. The recent effectiveness rates (on average, 45.6 percent over the last three years) indicate that a GAO bid protest has a significant chance of resulting in some kind of relief for the protester, which in turn may result in additional delays for DOD and other agencies. But the GAO effectiveness rates also reflect the positive effects of protests on the procurement system, and demonstrate that protests may illuminate problems directly to agency officials, who in turn may take corrective actions to address them.

In last year's decision in *Dell Fed. Sys. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018); 60 GC ¶ 323, a case involving an Army procurement of commercial information technology hardware, the Federal Circuit, while reversing the COFC, clarified the standard that must be applied to the COFC's review of agency corrective action. Under *Dell Federal Systems*, the COFC must take a more deferential approach to agency discretion; thus, protesters may face higher hurdles challenging agency corrective action at the COFC and agencies may be more willing to take corrective action because of that greater deference.

Dell Federal Systems follows a line of decisions reviewing agencies' corrective actions under the Administrative Procedure Act's "highly deferential," "rational basis" standard. This precedent preserves or increases the deference the courts must afford to DOD discretionary decisions when taking actions in response to bid protests. In light of this deference, it remains to be seen whether DOD and other agencies will become more likely to take corrective action, even if it causes delays to a particular procurement. While this may bring delays to the procurement system generally and to individual procurements (subject to DOD's discretion), the ultimate result of agency corrective actions should, in many cases, be improvements to the competition and evaluation process, and increased transparency and accountability to the system.

Proposed Reforms and the Role of the Federal Courts—The protest system remains of key interest to DOD and Congress. The FY 2018 National Defense Authorization Act (NDAA) § 827 included a "loser pays" pilot program addressing payment of costs for denied GAO bid protests, which will apply to DOD-related protests filed on or after Oct. 1, 2019. It will go into effect in December and last for three years. This program may encourage protesters to withdraw protests, before GAO issues a decision, and/or to file at the COFC instead.

The FY 2019 NDAA included § 822, "DOD contracting dispute matters," which called for further study of the bid protest system, in particular the relationship between protests at GAO and the COFC, including the so-called "second bite at the apple" protests filed consecutively at each, to be addressed in a DOD report to Congress. According to the Section 809 report, "relitigating a protest at [COFC] after an unsuccessful protest outcome at GAO is what is often referred to as two bites." The discussion in the Section 809 report is concerned primarily with the time associated with court review, rather than the 100-day time frame for a GAO decision.

The Section 809 report noted that "the DoD legislative proposal that resulted in [FY 2019 NDAA § 822] lists a number of cases for which a protest was

adjudicated by GAO, then the protester filed suit at [the COFC,] delaying each procurement by between 12 months and nearly 24 months." The DOD proposal listed three such cases, each of which ended in review by the Federal Circuit, and each with a decision by that court in 2009.

To address the panel's concern about delays to protested DOD procurements caused by court review, the Section 809 report includes in recommendation 67 (among other, broader proposed reforms that would also affect bid protests) the proposal to reduce bid protest processing time by "eliminating the opportunity to file a protest with the [COFC] after filing at the GAO." The report states that "these changes [would] only apply to DoD protests, but could be expanded to cover protests of national security related procurements at federal government agencies."

Although this recommendation may be intended to improve efficiencies for DOD procurements, it would have the problematic and counterproductive effect of precluding appropriate reviews by the COFC and Federal Circuit, as took place in numerous important protest decisions in 2018, leading to new precedent that only the federal courts could set.

For example, in two decisions involving Army procurements that were first protested at GAO, the Federal Circuit issued significant new precedent in *Palantir USG v. U.S.,* 904 F.3d 980 (Fed. Cir. 2018); 60 GC ¶ 287, reinforcing the statutory preference for commercial-item contracting; and in *Dell Federal Systems*, clarifying the standard of review for agency corrective action. These cases illustrate the importance of the COFC and the Federal Circuit to the bid protest and federal procurement systems.

According to the Section 809 report, in FY 2017 only 132 bid protests were filed at the COFC, compared to 2,596 cases filed at GAO (which included 2,433 protests). More recently, the COFC's calendar year statistics for 2018 show 179 protests filed, a sharp increase from the year before, but still less than one-tenth the volume of annual protests at GAO in recent years. Of the protests filed at the COFC, not all relate to DOD, and not all were preceded by protests at GAO.

As noted in the Section 809 report, the Rand study found that from January 2008 to May 2017, protesters filed 475 DOD procurement-related cases at the COFC, but only nine percent were sustained, and only 12 percent were appealed to the Federal Circuit. In a 10-year period, those are relatively low numbers.

As also noted in the Section 809 report, there is "no path to an appellate review at a court" from a GAO decision. A protest must be filed at the COFC to create the possibility of review by the Federal Circuit. Nevertheless, as discussed above, the Section 809 report recommends, among other reforms, eliminating the possibility of filing a DOD-related protest with the COFC after filing at GAO—which would also preclude, for those protests, the opportunity for further review by the Federal Circuit. Conversely, for the relatively small number of DOD protests currently filed at the COFC each year, this recommendation would eliminate a potential GAO protest and decision beforehand, a process that could assist the COFC in resolving the issues in the case.

The Section 809 report reasons that under its recommendation, a protester could choose its forum—GAO or the COFC, but not both—and thus could consider the availability of Federal Circuit review when making that choice. However, the election of the GAO forum would result in the majority of protesters losing access to the Federal Circuit at the outset of the case, before they have the opportunity to understand what the issues are that might reasonably be subject to and appropriate for appeal.

While it is true that review by the COFC, and by the Federal Circuit, can lengthen the bid protest process for any one challenged procurement, the availability of review by these courts enhances, and may be necessary for, the effectiveness and accountability of the bid protest system. Foreclosing or limiting the availability of that review for DOD could negatively affect the greater procurement system, in terms of accountability, transparency and the appropriate participation of the judicial branch in the system of checks and balances. When acting on the Section 809 report's recommendations, Congress may give consideration to not unnecessarily limiting or undermining the role of the federal judiciary as a critical authority in the bid protest system, available only by the review of these federal courts.

DOD Enhanced Post-Award Debriefing Rights—With new debriefing procedures and other potential future improvements, DOD may be leading the way toward better debriefings Government-wide. In § 818(a) of the FY 2018 NDAA, Congress directed DOD to revise the Defense Federal Acquisition Regulation Supplement to require, "at a minimum," post-award debriefings for all awards valued at $10 million or more, and to require the disclosure of a redacted

source selection determination for all contract awards in excess of $100 million, and, if requested by a non-traditional or small business, for awards in excess of $10 million. These requirements are currently subject to a pending DFARS case and draft proposed rule, which will incorporate the statutory requirements into regulations.

The Section 809 report includes in recommendation 69 the proposal to broaden the requirement for disclosure of the redacted award decision to "all procurements where a debriefing is required," in addition to providing the "technical evaluation" of the bidder receiving the debriefing. The report proposes that Congress implement this recommendation by amending § 818, which would be implemented by DOD regulations. According to the report, "the combination of a redacted source selection decision document and the technical evaluation of the contractor requesting the debriefing, should provide disappointed offerors with adequate information to improve future proposals and understand the rationale behind DoD's award decision."

The Section 809 Panel found that the quality of debriefings varies across DOD, and according to the report, "providing this additional transparency should minimize the likelihood contractors will file protests because of a lack of information." To the extent these debriefing measures are implemented, transparency of the procurement system will be improved, although the effects on the bid protest system remain to be seen.

By my review of the 46 sustained decisions issued by GAO in FY 2018, at least two-thirds involved a sustained ground relating to common proposal evaluation issues concerning an evaluation factor such as technical, past performance or corporate experience, cost/price, or a similar factor. At least 11 of these decisions also discussed, in the summary of a sustained ground, a lack of adequate documentation, or whether the record adequately or meaningfully supported the decision; and at least eight decisions discussed, also in the summary of a sustained ground, the best-value trade-off or the source selection authority decision. These common protest issues can be meaningfully addressed by the disclosure of the redacted award determination during the debriefing, in a manner that could improve both the protest system and the procurement system.

Other "enhanced post-award debriefing rights" under § 818 have been implemented through a DOD memorandum and DFARS class deviation issued in March 2018. The DOD memo addresses § 818 ¶¶ (b) (opportunity for follow-up questions) and (c) (commencement of post-briefing period), which are statutory amendments that provide for answers to questions following the debriefing, and amend the related timelines for an automatic suspension of performance. Unsuccessful offerors have an opportunity to submit additional questions within two business days after receiving the debriefing, and the DOD agency must respond within five business days.

Unsuccessful offerors on contracts with DOD can use the newly adopted procedures to obtain valuable and necessary information to help them better understand the agency's reasoning and decision, why they lost the competition and how they can improve their proposals, and whether there is a valid basis for a bid protest. These procedures may be improved and become more effective once DOD adopts regulations to implement the remainder of § 818 requirements.

Although the NDAA statutory debriefing reforms currently apply to DOD, other agencies have begun to adopt their own related initiatives, and the DOD requirements, if they prove successful, may eventually be extended to civilian agencies. In the meantime, DOD is leading the way toward better debriefings, and future changes to the current debriefing procedures and statutory requirements may be expected in future NDAAs.

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Joseph R. Berger, *attorney in the Government contracts practice at Thompson Hine LLP and a former clerk at the U.S. Court of Federal Claims. The views expressed herein are solely those of the author.