

Recommendation 66: Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.

Problem

Currently none of the statutes governing the protest process, nor those waiving sovereign immunity and allowing protests, discuss a purpose for protests as part of the procurement process. The current lack of an established purpose, makes it difficult to evaluate the effectiveness of the current protest process and produces reform efforts intent on resolving discreet perceived problems rather than ensuring the process achieves the desired outcome.¹ Protest reform efforts are difficult enough in that they must balance two competing policy goals: “(1) ensuring accountability in the procurement process while at the same time (2) expeditiously resolving protests.”²

Professors Ralph Nash and John Cibinic raised the issue of a lack of a congressionally stated purpose for protests shortly after the adoption of CICA and codification of the GAO’s bid protest jurisdiction:³

before legislation is adopted it must be determined what purpose is to be served by an award protest system: Should its purpose be to grant monetary and injunctive relief to disappointed parties as a matter of right, or should it be primarily a technique for review of agency compliance with statutes and regulations?”⁴

Nash and Cibinic’s concern focuses on a desire for CICA to provide adequate guidance to GAO and potential protest litigants as to the purpose of protests, rather than providing a standard to gauge reform efforts. The adjudicative bodies responsible for deciding protests and those who participate in filing and defending protests could also benefit from congressional direction as to the purpose of bid protests in the federal procurement system.

Background

A bid protest is defined as a written objection to the following:

- 1) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.*
- 2) The cancellation of such a solicitation or other request.*
- 3) An award or proposed award of such a contract.*

¹ See, for example, the “loser pays” provision Sec. 827 of the FY 2018 NDAA, Pub. L. No. 115-91 (2017).

² Raymond M. Saunders and Patrick Butler, “A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims,” *Public Contract Law Journal*, Vol.39, No. 3 (2010), 539.

³ Competition in Contracting Act of 1984, Pub. L. No. 98-369 §§ 2701-2753 (1984).

⁴ Ralph C. Nash and John Cibinic, Award Protests: The Tunnel at the End of the Light, Nash & Cibinic Report, 1 No. 3 Nash & Cibinic Rep. ¶ 25 (March 1987).

4) *A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.*

5) *Conversion of a function that is being performed by Federal employees to private sector performance.*⁵

An interested party, with respect to a contract or a solicitation is “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by the failure to award the contract.”⁶

Prior to Congress granting interested parties authority to challenge agency decisions related to procurement actions in court, Justice Hugo Black opined the following in *Perkins v. Lukens Steel*:

*Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions on which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone.*⁷ [emphasis added]

Clearly the Court believed that the longstanding purpose of government procurement law was to protect the procurement process and was not intended to provide benefit to individual litigants. The right to challenge government procurement actions has been granted to private litigants by Congress since the Court’s decision in *Perkins v. Lukens Steel*, which is discussed as part of the narrative for Recommendation 67. Congress, in the legislation passed subsequent to the Court’s decision in *Perkins*, did not indicate whether that right to challenge government procurement was for protecting the procurement system or making aggrieved litigants whole.⁸

Discussion

Although Congress has not legislated the purpose for bid protests at GAO or COFC, the conference report for CICA states:

*The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief. To accomplish this, the conference...codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO).*⁹

⁵ Definitions, 31 U.S.C. § 3551(1). FAR 33.101 contains the same definition except that it does not include the fifth basis for protests.

⁶ Definitions, 31 U.S.C. § 3551(2).

⁷ *Perkins v. Lukens Steel, Inc.*, 310 U.S. 113, 128 (April 29, 1940), accessed November 9, 2018, <https://supreme.justia.com/cases/federal/us/310/113/>.

⁸ See the Contract Disputes Act of 1978, Pub. L. No. 95-563 (1978), the Competition in Contracting Act of 1984, Pub. L. No. 98-369 §§ 2701-2753 (1984), and the Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320 (1996). The conference report to the Competition in Contracting Act indicates that Congress intended to override Justice Black’s opinion.

⁹ H. Report 98-861, Deficit Reduction Act of 1984, Conference Report to accompany H.R. 4170, Section 2751–Procurement Protest System, 1435, accessed November 9, 2018, <https://www.finance.senate.gov/imo/media/doc/Conf-98-861.pdf>.

Congress has emphasized the desire to resolve protests in an expeditious manner. For example, 31 U.S.C. § 3554(a)(1) states, “the Comptroller General shall provide for the inexpensive and expeditious resolution of protests” and 28 U.S.C. § 1491(b)(3) requires COFC to “give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.”

The Executive Order (EO) that establishes agency protests also provides insight into the purpose for agency protests. The EO establishes agency level protests to “ensure effective and efficient expenditure of public funds.”¹⁰ In the absence of a clearly articulated purpose for protests, stakeholders across the acquisition community express differing opinions. Those opinions center primarily on ensuring transparency and accountability, but also include ensuring fairness and providing offerors who feel they have been harmed by an agency’s action a means to seek redress. In addition, various international free-trade agreements the United States has acceded to and existing model public procurement codes published by the United Nations and the American Bar Association (ABA) provide insight into what the purpose of protests should be.

The United States has entered into multiple international free-trade agreements that obligate it to maintain a *challenge* or *review* process. *Challenge* and *review* are the terms of art the rest of the world uses to describe protests. For instance, NAFTA¹¹ states: “In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement.”¹² This statement articulates a fairly clear purpose for the challenge/protest process: to promote fair, open, and impartial procurement procedures. The recently negotiated United States–Mexico–Canada Agreement similarly requires an independent domestic review authority to “review, in a non-discriminatory, timely, transparent and effective manner, a challenge or complaint...by a supplier.”¹³

Similar to the trade agreements, but not binding on the government, are the model procurement codes developed by groups of international and domestic experts. These model procurement codes may be useful in defining a purpose for the protest process and the goals it should be tailored to achieve.

Two model procurement codes—the United Nations Commission on International Trade Law (UNCITRAL) and the ABA Model Procurement Code for State and Local Governments—recommend adopting a challenge/protest process and provide insight into the purpose of a protest or challenge system. Of note is that these procurement codes were modelled in whole or in part on the U.S. public procurement process.

¹⁰ Executive Order 12979 of October 25, 1995, Agency Procurement Protests, Fed. Reg. Vol. 60, No. 208 (Oct. 27, 1995).

¹¹ North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. No. 103-182) (19 U.S.C. § 3301 note).

¹² North American Free Trade Agreement, Section C, Article 1017: Bid Challenge, accessed November 26, 2018, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=2#A1016>.

¹³ United-States-Mexico-Canada Agreement, Chapter 13: Government Procurement, Article 13.18(1), 13-21, accessed November 26, 2018, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/13%20Government%20Procurement.pdf>.

UNCITRAL provides for protests/challenges. The enactment guide provides the following purpose for challenges/protests:

A key feature of an effective procurement system is the existence of mechanisms to monitor that the system's rules are followed and to enforce them if necessary. Such mechanisms include not only audits and investigations, and prosecutions for criminal offences, but also challenge procedures, in which suppliers and contractors are given the right to challenge decisions and actions of the procuring entity that they allege are not in compliance with the rules contained in the applicable procurement legislation.”¹⁴

ABA Model Procurement Code for State and Local Governments provides a similar rationale for the purpose of protests, arguing for adoption of the *private Attorneys General* concept. The commentary to the authorizing language for protests states,

(1) It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision.¹⁵

Under this theory, aggrieved private entities with an interest in a given procurement are recognized as being well situated to identify and raise alleged violations of procurement laws and regulations.

Conclusions

The Section 809 Panel gathered data from representatives of academia, industry, the private bar, COFC, and GAO. The panel interviewed the procurement executives and members of the offices of general counsel for the Military Services on the issue of protests. Additionally, practitioners in the acquisition community at all levels, from both industry and government, participated in stakeholder meetings, providing input to the panel.

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 vocal minority were also concerned about protecting the rights of disappointed offerors. What Congress, the Executive Branch, UNCITRAL, and ABA have said regarding the purpose of protests indicates that the purpose for granting aggrieved persons the ability to protest is to ensure the procurement process remains effective and efficient while maintaining the confidence of participants in the system.

Because there is no corollary for protests in the private sector, there is no guidance to draw on in determining a purpose for protests. While there is no general consensus as to the purpose of protests, the vast majority agree that there is a need for a protest process to protect the integrity of DoD's procurement system. Congress should adopt the following purpose statement in Title 10, and it may be

¹⁴ United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, UNCITRAL (2014), accessed November 26, 2018, <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>.

¹⁵ Model Procurement Code for State and Local Governments, §9-101, ABA (2000).

worthwhile to incorporate a tailored version of this purpose statement in Titles 28 and 31, for bid protests:

The purpose of Congress in providing for review of procurement action of the Department of Defense through the procurement protest system under subchapter V of chapter 35 of title 31 and through causes of action under section 1491(b) of title 28 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.

Implementation

Legislative Branch

- Amend Title 10 to include the following purpose statement for bid protests:
 - The purpose of Congress in providing for review of procurement actions of DoD through the procurement protest system under subchapter V of chapter 35 of title 31 and through causes of action under section 1491(b) of title 28 is 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.

Executive Branch

- Incorporate a modified version of the above statutory purpose statement for protests into DFARS 233.102.

Implications for Other Agencies

- This purpose statement would govern protests filed in response to procurement decisions made by all federal government agencies.