THE NASH & CIBINIC REPORT
government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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¶ 37 POSTSCRIPT: THE PROTEST PROCESS

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In February, Ralph asked what purpose the protest process served. See *The Protest Process: What Purpose Does It Serve?*, 38 NCRNL ¶ 10. In this *Postscript*, I ask what damage it does. My answer is that it is a drag on an essential activity of our Government, the procurement of goods and services. Our Government relies on contracts and contractors and the goods and services they provide, and the protest system is an impediment. It impedes procurement in three ways. First, protests are expensive from the standpoint of total system cost. Second, protests delay procurements, which affects agency operations. Third, fear of protests and attention to protest "case law" stupefies the procurement workforce and encourages them to adopt inefficient procurement practices.

Expense

The GAO processes thousands of protests every year and the U.S. Court of Federal Claims handles somewhat more than 100. See, e.g., *Dateline December 2023*, 37 NCRNL DATE DEC, discussing the GAO's bid protest statistics for fiscal year 2023. No one seems to know the total annual costs of the system, including litigation costs, executive, legislative (the GAO), and judicial branch administrative costs, and agency operations costs. In a 2013 article entitled, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489 (Spring 2013), Daniel Gordon, former head of the GAO's protest office and Administrator of Federal Procurement Policy, claimed that the benefits of the system are worth the costs. He counted the benefits as (1) a low cost form of accountability, (2) increasing bidders' confidence in the integrity of the procurement system, (3) increasing the public's confidence in the integrity of the system, (4) taking pressure off contracting officials to act improperly, and (5) providing "a high level of transparency" into the system. Gordon seems to have considered only direct litigation costs of protests. He did not estimate them, and he did not monetize the benefits, so it is not clear how he reached the conclusion that the benefits "outweigh" them. He artfully characterized the costs as "real." Well, of course they are, but that is not the issue.

We have not seen any accounting or estimate of the total costs incurred due to bid protests and we have few facts, but we guesstimate that the total annual cost of the protest system—including litigation cost, the immediate and collateral effects on agency mission operation costs, and the associ-

ated executive and judicial branch administrative costs, and the direct and indirect costs to industry—comes to more than $100 million a year. That seems like a lot, too much, for a system under which, on annual average, only about 20% of all protests are sustained and not every successful protester goes on to win a contract, winning only "corrective action."

Delayed Procurements

Delay is built into the system in the form of "CICA stays" and preliminary injunctions. The delays range from months to years. See *Longer Than World War II: When Do You Know a Procurement System Is in Trouble?*, 31 NCRNL ¶ 32; *Pathologies of the Protest System: Recommendations for a Cure*, 25 N&CR ¶ 32; and *Award Protests: The Tunnel at the End of the Light*, 1 N&CR ¶ 25. The U.S. Army Transportation Command struggled for years in the face of protests against the award of a contract for the transport of personnel household goods. The Defense Health Agency struggled for years to award a contract for health care services. Each case involved serial protests at the GAO and the Court of Federal Claims. Then there was the Department of Defense's Joint Enterprise Defense Infrastructure (JEDI) procurement, which we discussed at length in *The Sad and Dangerous State of Our Acquisition System: A Ponderous Competition Process and Workforce Problem*, 35 NCRNL ¶ 36.

The DOD eventually canceled the JEDI procurement in the face of further litigation. See Conger and Sanger, *Pentagon Cancels a Disputed $100 Billion Technology Contract*, N.Y. Times, July 6, 2021:

> The Pentagon statement made for a quiet end to years of legal wrangling and dueling technology claims over what many considered to be the marquee contract for providing cloud-computing services to the federal government.
>
> A senior administration official said that soon after the Biden administration took office, it began a review that quickly concluded that the costly arguments over JEDI had been so lengthy that the system would be outdated as soon as it was deployed.

Simply put, that kind of thing would not happen in a sane procurement system.

Fear Of Protests

In his article, Gordon said that protests are rare and sustained protests are even rarer, and that contracting personnel should not fear them. In response, we said:

> In any event, if protests are rare, so are EF5 tornadoes. In the minds of some contracting officials, protests are like tornadoes, and the prospect of a protest to the Court of Federal Claims after denial at the GAO is like an EF5. Point of view is everything, and the point of view of an attorney being paid to handle a protest is very different from that of a Contracting Officer who is potentially on the receiving end of one. It is the potential impact, not the relative frequency of occurrence, that worries COs. Indeed, the system counts on COs to take the possibility of protests into account before acting and deciding. COs are supposed to be afraid of protests. Protests are meant not only to be a corrective measure but also to be a deterrent, and fear is an essential element of deterrence. See Marshall, Meurer & Richard, *The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest*, 20 Hofstra L. Rev. 1 (Fall 1991), which declares the deterrent effect as a key benefit of the protest system: "The threat of protest has valuable regulatory effects; it both deters and corrects inappropriate awards. …" Congress certainly had the deterrent effect in mind when it changed the law to permit protests of task and delivery order awards. COs use the threat of them as an aid to persuasion when dealing with agency technical personnel. The effect of protests is much greater than their frequency and outcomes might suggest. That is the very idea, else the protest system has failed.

Postscript: Pathologies of the Protest System, 27 NCRNL ¶ 38.

As for benefits, we have seen no evidence that protests have improved the procurement system. What they have done is tie the system in knots. For example, fear of protests about the conduct of discussions during source selection, driven by years of the GAO's complex and ludicrous case law, has all but eliminated real communication and bargaining from competitive negotiated procurement. See *Repeal the Discussions Law: It's Preventing Discussions*, 35 NCRNL ¶ 35; *Contract Formation Without Conversation: How Do You Do That? Why Would You Want To?*, 31 NCRNL ¶ 20; and *Simplified Acquisition: Avoiding the GAO's Clarifications/Discussions Mess*, 26 N&CR ¶ 21.

We think significant improvement of procurement can only be had through better workforce education and training, fewer rules, and better general management. And the notion that the protest system gives the public confidence in the integrity of procurement is a laugh considering the amount of attention the media gives to corruption like the Fat Leonard scandal. See Schooner, *Feature Comment: Ethics, Compliance, and the Dispiriting Saga of Craig Whitlock's Fat Leonard*, 66 GC ¶ 118 (May 8, 2024). We haven't seen many glowing stories about bid protest decisions.

With rumors of wars being whispered on distant horizons, with the needs of so many supplicant nations constantly being laid at our feet, and with the possibility of environmental crises and damage and another plague lurking in the air, we need a procurement system that works and works efficiently, expeditiously, and effectively. Thus, the procurement protest system we have has become a costly indulgence, a drag on the system, and a potentially serious obstacle to our national success and survival.

What To Do? Replace The Protest System.

The bid protest system is broken and it cannot be reformed. It must be replaced. But replaced with what?

Companies that object to the terms of a solicitation on grounds that they violate procurement laws or regulations should be required to complain to the GAO. The GAO should be required to advise the head of the agency that issued the solicitation, investigate, and, if appropriate, make a recommendation for corrective action within 30 days of receipt of a company's complaint. Agency heads should be required to respond to any GAO recommendation within 15 days after receipt and then proceed as they think best. The GAO should be required to report the agency head's response to Congress within 10 days after its receipt and assessment of the agency head's response. That's it. The President and Congress can take action if they so desire. No double-dip protests to the GAO and the Court of Federal Claims. No appeals. The Court of Federal Claims and district courts should be cut out of the loop.

Protests against the evaluation of bids and proposals and contractor selection decisions should be eliminated entirely. Instead, Congress should amend the Contract Disputes Act to permit disappointed offerors to submit claims to the Contracting Officer for bid or proposal preparation costs (no anticipatory profits) based on breach of an implied contract to consider and evaluate all bids and proposals in compliance with law, regulation, and the terms of the solicitation. CO final decisions on such claims should be appealable to the cognizant board of contract appeals or to the Court of Federal Claims and further appealable to the U.S. Court of Appeals for the Federal Circuit like any other claim.

If desired or need be, agencies could appoint special COs to decide such claims. Any payments

ultimately found due from an agency would be paid out of the agency's program funds. Agencies would be required to submit an annual report of amounts paid for such claims to Congress, the press, and the public. No more CICA stays or preliminary injunctions. The GAO would be out of the preaward and postaward protest business. The Court of Federal Claims and the Federal Circuit would participate only as avenues of appeal from a CO's final decision.

The goal would be to allow procurements to proceed without the current protest litigation delays and the annual costs of the thousands of protests now being filed with the GAO and the Court of Federal Claims and the cost of the attendant procurement delays. The elimination of such protests might make Government contracts more appealing to companies that do not now want to be bothered. Agency heads should be held to account for their actions and decisions by the President and Congress.

Our Government is operating in challenging times. It needs a procurement system that functions effectively and expeditiously. That being the case, the protest system we have is a costly luxury we can no longer afford. *VJE*