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The Latest Bid Protest 'Reform' Should Be Repealed

By **Marcia Madsen, David Dowd and Roger Abbott** (January 16, 2018, 5:58 PM EST)

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The National Defense Authorization Act for Fiscal Year 2018 included a provision that penalizes contractors for filing unsuccessful bid protests involving large defense procurements at the U.S. Government Accountability Office by requiring them to pay the U.S. Department of Defense's costs of processing the protests, regardless of the merit of the allegations.[1] This change was driven by alleged policy concerns that protests by large contractors are impairing the DOD procurement process.

By hamstringing effective and independent review of agency decisions, the new "loser pays" provision violates fundamental principles of administrative law enshrined in the Administrative Procedure Act, which was designed to protect against arbitrary or illegal government action. This rule penalizes citizens for attempting to vindicate their right to review of government decisions, which no other agency review process does.

Additionally, there is no factual basis for restricting review. At the time the loser-pays provision was proposed and enacted, there was relatively little data on bid protests. In fact, in 2016,[2] Congress commissioned an independent report on bid protests, which was delivered to Congress by the RAND Corporation on Dec. 21, 2017 (after enactment of the loser-pays provision).[3] Apparently unconcerned about the evidence, Congress did not take into account the fact that RAND's data, analyses and recommendations refute the notion that protests, including protests by large contractors, are a problem.

Finally, reducing review of major defense procurement decisions is incompatible with the DOD's stated aim of improving competition and eliminating corrupt agency behavior. As it stands, competition scorecards published by the Defense Procurement Acquisition Policy reveal that fewer than 50 percent of DOD acquisitions are competitively sourced. Any "reform" that discourages independent review of agency procurement decisions will impair the government's ability to promote competition and minimize corruption.

Bid Protests Provide an Important Vehicle, Firmly Rooted in APA Concepts, for Ensuring That Agencies Act Lawfully

Although discussions about bid protest reform tend to focus on policy allegations about the intrusiveness of protests, the award and administration of government contracts is — at its root — agency decision-making involving billions of dollars in taxpayer funds. Agency decisions of all types, including government contracting, are broadly governed by the APA,[4] which promotes accountability and protects citizens by, among other things, providing for independent review of agency decisions to counterbalance the power of large government agencies like the DOD.

The APA Created Essential Review of the Exercise of Power by Government Agencies

The APA created the framework for regulating the modern administrative state. It was enacted in 1946 in response to the expansion and centralization of federal power under the New Deal, which had resulted in the proliferation of powerful administrative agencies. Concerned by the dangers posed by the rapid centralization of power as exhibited in Germany, members of Congress launched a campaign for administrative reform.[5] This effort culminated in the Walter-Logan administrative reform bill,[6] which was enacted by Congress and vetoed by President Roosevelt in 1940. The reforms proposed in Walter-Logan were much more restrictive than the APA that was eventually passed in 1946. Among other things, Walter-Logan required that agencies enact any regulations pursuant to their enabling statutes within one year of the passage of those statutes.[7]

Congress eventually settled on the APA as a compromise measure, one that over time protected the advances made by the regulatory state while providing citizens and businesses a series of checks against the arbitrary exercise of power by agencies. As one scholar put it, the APA "established the fundamental relationship between regulatory agencies and those whom they regulate. ... The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present."[8] As discussed below, the balance struck by this hard-fought compromise is reflected in the bid protest process.

The APA Imposes Checks on the Administrative State That Have Long Been Reflected in the Bid Protest Process

Of particular relevance here, the APA confers a broad right of judicial review to parties directly affected by agency conduct. Pursuant to Section 10 of the APA, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[9] The precise scope of judicial review is found in Section 706 of the APA, which authorizes the courts to decide questions of law and set aside agency decisions "found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[10]

In 1970, in the landmark Scanwell Laboratories Inc. v. Shaffer case,[11] the D.C. Circuit acknowledged that the protections afforded by the APA against arbitrary action by agencies apply to agency procurements. The court explained that the APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action'" and held that Section 10 confers standing on disappointed offerors to sue the agency in federal court.[12] Although the D.C. Circuit acknowledged that "the ultimate grant of a contract must be left to the discretion of a government agency," the court held that it is "incontestable that that discretion may not be abused. ... [Contracting officers] may not base decisions on arbitrary or capricious abuses of discretion." The D.C. Circuit made plain that arbitrary and capricious action includes agency violations of the terms of the solicitation, as well as the failure of agencies to comply with procurement laws and regulations.[14] Although the standard of review applied

by the GAO in evaluating agency conduct is not governed by the APA or controlled by any other statute, the GAO applies the same Scanwell standard in its approach to review.[15] The loser pays provision is inconsistent with the APA's principle of judicial review for a citizen who suffers legal wrong because of agency action.

GAO's Protest Process is Firmly Rooted in APA Concepts

The Evolution of GAO into an Effective Bid Protest Forum

Until the introduction of the automatic stay in 1984, the GAO's capacity to provide effective relief was limited by its inability to grant enforceable relief. Agencies "frequently responded to the filing of a bid protest ... by rushing to award a contract and begin its execution."[16] As a result, many procurements became faits accomplis before they could be reviewed.

To remedy this "major loophole," when Congress enacted the Competition in Contracting Act of 1984,[17] it enhanced the effectiveness of the GAO by providing an automatic stay of a contract award and a suspension of ongoing performance during the pendency of the protest, which is capped at 100 calendar days. An agency that believes it cannot wait the 100 days can override the stay if it follows certain procedures.[18]

The New Loser-Pays Pilot Program

Section 827 of the FY 2018 NDAA requires the DOD to establish a pilot program within two years of passage of the bill, to "require[] contractors to reimburse [the DOD] for costs incurred in processing covered protests," which include those filed by companies with revenue in excess of $250 million that are denied by the GAO.[19] This measure contradicts the APA's presumption in favor of review and is irrational, for at least the following reasons:

- Disappointed bidders have little time to consider the legal issues — to avail themselves of the automatic stay, they must file a protest within five calendar days after a required debriefing, if there is one, or within 10 days after the date of contract award.[20]

- Disappointed bidders do not even have access to any part of the administrative record until 30 days after the protest has been filed,[21] but must base their decision whether to protest on the limited information provided by the agency in the debriefing (if there is one) or notice of award.

- The fact that the GAO denies a protest does not establish that it was unreasonably filed. The reasonableness of agency action can only be examined once the record is produced. Just because a protester ultimately cannot overcome the deferential APA standard does not mean that the allegations lacked merit. Indeed, the substantial "effectiveness" rate at the GAO (approximately 47 percent[22] of protests are either sustained or subject to agency corrective action prior to decision) demonstrates that agencies perceive substantial merit in many cases.

The Purpose and Benefits of a Meaningful Review of Agency Procurement Actions

A Critical Oversight Role: Protests Help Ensure That Agencies Act Lawfully

GAO bid protests subject agencies to scrutiny by exposing their decision-making (as reflected in the

administrative record) to real-time review — in an efficient manner with a deadline of 100 calendar days. As RAND points out, although few procurements are actually protested, the possibility of a protest encourages agency officials to act lawfully and provides a remedy for unlawful conduct.[23] Protesters, as "private attorney generals," are best situated to know the circumstances of procurements in which they participate than other sources of after-the-fact oversight, such as agency inspectors general or prosecutors.

Notwithstanding assertions that too many protests are filed, only 2,433 bid protests were filed in 2017[24] — one protest for about $209 million in procurement spending.[25] As RAND points out, "bid protests are exceedingly uncommon for DoD procurements" — less than 0.3 percent of DOD procurements are protested.[26] In addition to occurring rarely, the delay caused by protests is minimized by the statutory requirement that the GAO resolve protests within 100 days.[27] Historically, the majority of all DOD protests are closed "within 30 days."[28]

RAND also undermines the notion that incumbent protesters file meritless protests to profit from bridge contracts. Although RAND found that incumbent protesters were slightly more likely to protest an award than nonincumbents, it also noted that the effectiveness rate of protests filed by incumbents is at least as high as those filed by nonincumbents.[29] In fact, RAND found that incumbent protesters of task order awards have a significantly higher effectiveness rate than nonincumbents. For instance, the overall effectiveness rate in for fiscal years 2015 and 2016 was 45.5 percent for all procurements, and 47 percent in the case of nonincumbents protesting task orders, and 71 percent for incumbents protesting task orders.[30]

RAND directly refutes the notion that large defense contractors are disproportionately slowing down the procurement process by filing meritless protests. This concern was the basis for the Section 827 pilot program, which only focuses on large defense contractors. To the contrary, RAND's data shows that "the largest 11 [government contracting] firms have remained relatively constant and may be slightly declining." What is more, "[t]he top 11 firms have higher effectiveness and sustained rates than the rest of the sample [although these rates are declining over time] — suggesting that they are possibly more selective in the protests they file and spend more resources developing their cases."[31] Rather, RAND suggests that the rise in bid protests is driven by small businesses. RAND finds it "striking" that 58 percent of procurement protests were filed by small businesses, which in FY 2016, cumulatively comprised only 15 percent of DOD contract dollars.[32]

RAND also reports that "the perspectives of the bid protest system from DOD personnel and the private sector varied greatly." On the one hand, private-sector representatives "strongly supported the bid protest system."[33] On the other hand, DOD personnel expressed concern that contractors who lose follow-on awards are much more likely to protest a procurement than nonincumbents, that contractors file too many "weak" protests, and that "contractors have an unfair advantage in the contracting process by impeding timely awards with bid protests."[34] In light of the absence of any data supporting these concerns, this apparent hostility to the bid protest process reflects mere opposition to subjecting agency procurement decisions to independent review. Given the lack of any basis for these concerns, Congress should repeal the loser pays provision before the pilot program takes effect.

Bid Protests Benefit the Government and the Public by Protecting the Integrity of Public Procurements

The U.S. government is the single largest buyer in the world. In FY 2017, federal agencies spent $509 billion on a wide range of goods and services to meet their mission needs.[35] Given the vast amount of money at stake, the risks posed by potential corruption are very real.

Examples of corruption in federal public contracting abound. One of the more notable scandals in recent years centers around Darlene Druyun, who served for years as the senior career civilian procurement officer for the U.S. Air Force, second only to the assistant secretary of the Air Force for acquisition. In 2004, Druyun pled guilty to violating federal conflict of interest laws by negotiating several contracts with The Boeing Co. in her capacity as a senior procurement official, while simultaneously negotiating jobs at Boeing for herself, her daughter, and her daughter's fiancé.[36]

It is notable that during her tenure, Druyun pushed numerous initiatives to discourage bid protests of Air Force award decisions. For instance, on April 23, 1999, the Air Force announced a "Lightning Bolt" acquisition reform initiative that required all major Air Force programs to have a program-level alternative dispute resolution mechanism. To that end, the Air Force signed corporate agreements with more than 40 of the largest defense contractors, which required them to use ADR.[37] Also that month, the Air Force announced that willingness to use ADR would be considered in evaluating contractor past performance under the Contractor Performance Assessment Reporting System.[38] This effort was eventually blocked by both the General Services Administration[39] and the Office of Federal Procurement Policy.[40] Although the Air Force ADR program is well regarded, these efforts were problematic as they limited the availability of independent, outside review of agency decisions.

Conclusion

In the modern era of large, powerful bureaucracies, with hundreds of thousands of employees and multibillion-dollar budgets, agencies cannot duck accountability for their actions. This accountability is at the heart of the post-war compromise that resulted in the APA and is essential for the legitimacy of the modern administrative state. Under the current bid protest system, review of agency actions occurs in real time when it is still possible to meaningfully correct abuses and errors. Without protests, review would take place — if at all — years after the fact under an inspector general or through a False Claims Act lawsuit, and no remedy could undo the damage done by the bad procurement deal.

The recently enacted bid protest reform should be repealed, as it lacks a factual basis. More importantly, it discourages disappointed offerors from exercising their statutory right to challenge the actions of large bureaucracies. This measure, despite being dressed up as a policy/efficiency argument, is a transparent effort to avoid review of government decisions. It will discourage competition and hinder the effectiveness of the bid protest mechanism in promoting integrity and fairness in contracting. Proponents of attracting more commercial technology companies to the federal marketplace should bear in mind the importance of a competitive process with integrity and the ability of bidders to obtain independent review.

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[1] NDAA for FY 2018, Pub. L. 115-91 (Sec. 827).

[2] NDAA for FY 2017, Pub. L. 114–328 (Sec. 885).

[3] RAND Corp., Assessing Bid Protests of U.S. Department of Defense Procurements, Dec. 21, 2017 (RAND Report).

[4] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 500 et seq.).

[5] George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1581-87 (1996).

[6] S. 915, 76th Cong., 1st Sess. (1939).

[7] Shepherd, supra note 5 at 1598-1601.

[8] Id. at 1558.

[9] 5 U.S.C. § 702.

[10] 5 U.S.C. § 706(2)(A).

[11] 424 F.2d 859 (D.C. Cir. 1970).

[12] Id. at 866.

[13] Id. at 869.

[14] Id. at 874 ("When the bounds of discretion give way to the stricter boundaries of law, administrative discretion gives way to judicial review").

[15] Florida Prof'l Review Org., Inc.—Advisory Opinion, B-253908, Jan. 10, 1994, 94-1 CPD ¶ 17 n. 20 (noting that GAO's "standard of review comports with the [D.C. Circuit's] standard").

[16] Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979, 985 (3d Cir. 1986).

[17] Pub. L. No. 98-369, 98 Stat. 1175, 1182 (1984) (codified as amended at 10 U.S.C. § 2304 and 41 U.S.C. §§ 3301-3311).

[18] See 31 U.S.C. § 3553(c)(2)-(3); see also FAR 33.104(b)(1).

[19] NDAA for FY 2018, Pub. L. 115-91 (Sec. 827).

[20] 31 U.S.C. § 3553(d)(4).

[21] 31 U.S.C. § 3553(b)(2) (setting a 30 day deadline for a normal protest, and 20 days for an expedited protest).

[22] See GAO Bid Protest Report to Congress for FY 2017, November 13, 2017 at 4.

[23] RAND Report at 12.

[24] GAO Bid Protest Report to Congress for FY 2017, November 13, 2017 at 4. NB: this figure is slightly lower than the number of "cases filed" for that year, as it excludes cost claims and requests for reconsideration.

[25] The total outlay of government contracts in each fiscal year is available on USASpending.gov. In FY 2017, the outlay on government contracts was $509,027,706,522.

[26] RAND Report, supra note 3, at 31.

[27] The GAO has always done so, except in a few cases on account of the 16-day government shutdown of 2013. See GAO Bid Protest Annual Report to Congress for FY 2014, Nov. 18, 2014, at 2, http://www.gao.gov/assets/670/667024.pdf.

[28] U.S. Gov't Accountability Office, B-401197, Report to Congress on Bid Protests Involving Defense Procurements 10 (2009); see also RAND Report at 44.

[29] RAND Report, supra note 3, at 64-65.

[30] Id. at 64-65.

[31] Id. at 33-34. These 11 firms cumulatively comprise nearly 42 percent of total obligated DoD dollars in FY 2016. Id. at 33.

[32] Id. at 36.

[33] Id. at 25.

[34] Id. at 21

[35] See supra note 25.

[36] Rebecca Leung, Cashing in for Profit? CBS News, Jan. 4, 2004.

[37] See Report of the Interagency Alternative Dispute Resolution (ADR) Working Group, May 2000.

[38] Martha A. Matthews, Air Force Revising CPARS to Urge Contractors to Resolve Disputes, Avoid Litigation, 76 BNA Fed. Cont. Rep. 12 (Oct. 2, 2001).

[39] Exercise of Legal Rights May Not Affect Past Performance Evaluations, GSA Says, 44 GOV'T CONTRACTOR 8 (Feb. 27, 2002).

[40] Martha A. Matthews, OFPP: Protests, Claims, Use of ADR Can't Be Factors in Evaluation Source Selection, 77 BNA Fed. Cont. Rep. 14 (Apr. 9, 2002).