

Study Rebutts Bid Protest Concerns But May Not Halt Critics

By **Daniel Wilson**

Law360, Nashville (January 9, 2018, 10:06 PM EST) -- A much-anticipated report on defense contract bid protests recently issued by the RAND Corp. offers a strong rebuttal to concerns that protests are rampant and often frivolous, but it is uncertain whether the report will prompt any long-term shift in attitudes toward the protest system, attorneys said.

Congress had commissioned the report, made public on Jan. 4, as part of the National Defense Authorization Act, to assess the impact of bid protests on U.S. Department of Defense procurements. The request came amid a perception held by some acquisition officials, and embraced by some lawmakers, that bid protests are rampant and unnecessarily hold up acquisitions, particularly major deals, and that many are frivolous.

But RAND's extensive report largely contradicts that perception, noting that while bid protests at both the U.S. Government Accountability Office and U.S. Court of Federal Claims have roughly doubled between 2008 and 2016, still only a "very small" portion — about 0.3 percent — of DOD contracts are protested. Such protests are "exceedingly uncommon," and are filed at levels well below the peak of protest activity in the late 1980s and early 1990s, RAND said.

Also, while the sustain rate for protests at the claims court has dropped over time, the effectiveness of bid protests at the GAO has remained largely steady at around 40 percent — a figure that includes not only sustained protests, but those that lead to corrective action from the relevant agency — and has even increased slightly over time, RAND noted.

"This suggests that firms are generally not filing protests without merit ... [and] refutes the claim that meritless — some use the term frivolous — protests account for those increases [in filings]," it said.

That finding backed the frequent claims of both government contractors and attorneys, who have long argued that perceptions of abuse in the bid protest system are overblown, with contractors typically loath to bring a protest unless they truly feel they have been wronged, attorneys told Law360.

"[The report] rebutted a lot of the rumor and innuendo about how disruptive the protest process is and it highlighted the value of the process, which I think is extremely important," Crowell & Moring LLP partner John McCarthy said. "In my view, the protest system is one of the things that sets our procurement system apart from others around the world; it's what keeps everyone honest, to be perfectly frank."

RAND further noted that 53 percent of DOD protests are brought by small businesses — a disproportionate amount compared to the around 15 percent of DOD contract dollars they draw each year — and that although the largest contracts tend to draw the most protests, there are only a few protests each year involving either the largest DOD contracts or the department’s largest contractors.

It therefore urged lawmakers to avoid “drawing overall conclusions or assumptions about trends from one case” — in particular, big, headline-grabbing protests — while also noting that much of the belief that the bid protest system is being abused comes from mismatches in both perception and missions between agencies and protesters, leading to a “lack of trust on each side.”

Mismatch in Views on What Protests Mean

DOD personnel, who want to move forward swiftly with procurements, were concerned that the process incentivizes protests, for example by incumbent contractors seeking to stall a follow-up contract to milk more money from bridge contract work in the meantime, and that protests are often backed by “weak allegations,” with disputes taking too long to resolve, according to the report.

But contractors often believe they have not been given enough information on how a contract award decision was made, and they view the protest process as a way of holding the government accountable for providing that information and adding needed transparency to the process, according to the report.

Without protests, companies would likely make fewer contract bids, RAND noted, potentially depriving the government of the ability to achieve best pricing. It also noted that the effectiveness rate when incumbents protest, at least for task orders, is 70 percent, a figure that suggests such protests are driven by legitimate concerns.

“The report puts the protest system into a better context, which shows that most protests are not frivolous and that the system is needed,” Thompson Hine LLP counsel Joe Berger said.

To help alleviate the tension between agencies and bidders — and to cut down on purported protests, or those that are perceived to be meritless — RAND suggested that post-award debriefings be improved, giving disappointed bidders a better understanding as to why they lost.

The worst debriefings, characterized by protesters as being “skimpy, adversarial, evasive or failing to provide required reasonable responses,” have served as a driver of bid protests that could have been avoided, according to the report.

The suggestion for better debriefings was strongly welcomed by attorneys, who backed RAND’s argument that providing more information often avoids protests.

“If you get more fulsome debriefings; if the contractors understand what happened and that they lost fair and square, then most of them are not going to be interested in protesting,” McCarthy said. “But if they don’t know what happened ... people tend to go to a dark place, and suspect the worst.”

Congress had already taken steps toward addressing that issue, putting “enhanced” debriefing requirements in place in the 2018 NDAA for DOD deals worth more than \$100 million, or \$10 million for deals involving small business or “nontraditional” contractors, and the report could perhaps spur more changes in that area.

RAND also suggested implementing an expedited process for protests involving contracts worth under \$100,000, which make up about 8 percent of protests at the GAO and 4 percent at the Court of Federal Claims, not only to help clear protest dockets more quickly, but also to avoid protests that cost more than the value of the protested procurement, which it said was an issue under the current system.

The report urged Congress to consider ways to reduce protests by small businesses, which are more likely to be dismissed than those brought by larger businesses, such as through a legal assistance program to help them determine the validity of their cases and intended arguments before filing.

Support for small business protesters would be welcome, attorneys said, noting that such protests can often be highly charged because they regularly mean the difference between a small business surviving or not.

“What I saw from [the report] is that small businesses need the protest system to preserve their own rights as small businesses,” Berger said. “They need the protest system to guard their interests in the procurement system. And so if there’s any way to improve the system — or them — that could be helpful for the system as a whole.”

Bradley Arant Boult Cummings LLP partner Aron Beezley noted, however, that while the idea of helping small businesses improve their protests is a solid one, actual solutions are harder to come by.

“In terms of concrete, viable solutions to that perceived issue, I still don’t think we have very good options, and I think the report at least passively recognizes that,” he said.

No Need for an Overhaul

At the same time as it made recommendations, RAND in large part urged lawmakers not to attempt to fix a system that isn’t actually broken, arguing for example that the 100-day statutory timeline for the GAO to resolve bid protests should not be shortened, as has been suggested.

While most protests are resolved within 60 days, complex decisions typically take until right up to the deadline to resolve, as do decisions during the peak period around the end of a fiscal year, RAND said. By typical litigation standards, even 100 days is lightning-fast, attorneys noted.

And any moves to further restrict task or delivery order protests, after a recent increase in the threshold for DOD task order protests from \$10 million to \$25 million, should be carefully considered, according to the report. Task order protests are more likely to be sustained or lead to corrective action than other types of protests, so “they may fill an important role in improving the fairness of DOD procurements,” RAND said.

Ultimately, Beezley said he believed that “the message in this report will be heard loud and clear by Congress — the concerns voiced by some DOD acquisition professionals were not necessarily based on hard evidence and statistics. ... [It] flat-out discredits and debunks any notion that bid protests are pervasive or that frivolous bid protests are a legitimate issue in the scheme of things.”

But the report is still unlikely to be a panacea that will resolve all differences of perception and opinion regarding the bid protest system, McCarthy argued.

“I think this will be effective at addressing these concerns in the short term, but memories fade, and I’m sure this [issue] is going to come back,” he said.

Berger similarly said that he believed Congress would continue to mull potential changes to the bid protest system in the future.

In the meantime, the legacy of lawmakers’ approach to bid protests over the past several years will linger through a pilot program, mandated by the 2018 NDAA, that is scheduled to kick in in fiscal year 2020.

The three-year pilot, already unpopular among contractors before the RAND report, will trial a “loser pays” system in place for GAO protests filed by companies with \$250 million or more in federal revenue, and Congress should keep a close eye on whether it is even necessary, attorneys said.

“There should be a lot of attention paid to that and to the fairness of it in the next few years while the DOD prepares to implement it,” Berger said.

--Editing by Pamela Wilkinson and Breda Lund.