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COMMENTARY

Senate attempt to reduce protests misses the point

By Stan Soloway Jul 25, 2017

When it comes to federal procurement, the frequency and expectation of protests has had a palpable, costly, and sometimes deleterious effect on the process and those competing in it. Most companies now add an extra six to 12 months to their revenue projections in order to account for possible protests.

There is good reason to believe (including surveys) that "low price/technically acceptable" (LPTA) procurement strategies are, with some frequency, driven by a desire to avoid protests, since protesting such procurements is near impossible.

And, of course, there have been cases where incumbents, having lost a re-competition, submit a protest and, as a result, effectively get a contract extension while the protest is decided.

All of these represent unintended and undesirable impacts of the protest process. As a result, many have believed for some time that significant remedial action is needed. This includes the Senate Armed Services Committee, which, for the second year in a row, has included provisions in the defense authorization bill that would require losing protestors to reimburse the government for the costs of a protest when none of the plaintiff's allegations are sustained.

The legislation would also require the withholding of all profits from incumbent contractors who lose a recompetition and file a protest. The funds would only then be released if some portion of the protest is sustained. If it is fully rejected, the money would be paid to the company that won the competition over which the

protest was filed.

Some, including my friend and former federal procurement administrator Steve Kelman would go even further. He has at times argued we should consider doing away with protests altogether since no such equivalent exists in the commercial sector. Unfortunately, sympathetic as I am to the issues driving these views, we are putting the cart before the horse.

First and foremost, we have to remember that protests exist principally to ensure that the outcome of a procurement is in the best interests of the taxpayer. Hence, when mistakes are made, it is in the government's, and taxpayer's, interest to take corrective action.

Second, the federal acquisition regulation makes clear that all bidders on a federal procurement must be treated fairly. To the extent the government fails to follow its own rules or stated procurement strategy, remediation is required. There is no such requirement in the commercial world.

Third, even if a protest is dismissed in its entirety one cannot make the leap to assuming nefarious intent on the part of the protestor. That's like saying everyone who loses a lawsuit was being frivolous in filing it. Obviously that's not always the case.

For these reasons, and more, the Senate language is the wrong answer. But that does not mean a problem doesn't exist and that some meaningful action is not possible. Quite the contrary.

Ironically, the proposed legislation includes a crucial part of the answer. In addition to the provisions cited above, it would also mandate quality, detailed debriefings for all significant procurements.

We learned in the 1990s that good debriefings result in far fewer protests. In fact, the data is clear that many companies use the protest process as a means of discovery; of trying to understand why they lost a given competition. In the years immediately following the added emphasis on debriefings, the number of protests

dropped significantly.

As but one good example, the IRS had a policy of sharing in a debriefing all information that might otherwise be released during a formal protest (with appropriate redactions). And they executed numerous, significant procurements without a single protest. To its credit, the Senate committee would require that the IRS's debriefing policy become the norm.

The bill would also require release of the government's internal, written source selection criteria, which could and should be done anyway. Taken together, these two important steps toward greater transparency could have a very substantial effect. It should also be noted that the IRS was also particularly good in its pre-award communications to bidders, which undoubtedly also facilitated effective and credible competitions. Yet, such communications remain all too inconsistent.

Assigning motive is always a slippery slope. And much of what we think we know remains based on presumption rather than good data. Thus, it would also be helpful if there were better data on the frequency and nature of incumbent protests. How often are they actually sustained, in whole or in part? Is it possible to measure the frequency with which incumbents file protests focused on issues that, while valid, are so minor they would not result in a changed outcome?

There are things that can be done to reduce the negative effects and frequency of protests. And they start with enhanced transparency—before, during and after award.

But the current Senate proposal fails to consider protests in the context of the broader procurement regime and its innumerable government-unique requirements. Yes, it could reduce the number of protests. But it might well do so for the wrong reasons and based on the wrong assumptions.