2018

Section 809 and "E-Portal" Proposals, by Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption

Christopher R. Yukins
George Washington University Law School, cyukins@law.gwu.edu

Daniel Ramish
The George Washington University Law School

Recommended Citation

Yukins, Christopher R. and Ramish, Dan, Section 809 and "E-Portal" Proposals, by Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption (2018). Christopher Yukins & Daniel Ramish, Section 809 and "e-Portal" Proposals, By Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption, 60 GOV'T CONTRACTOR ¶ 138 (2018).; GWU Law School Public Law Research Paper No. 2018-26; GWU Legal Studies Research Paper No. 2018-26. Available at SSRN: https://ssrn.com/abstract=3176223

THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 60, No. 17 **May 2, 2018**

Focus

¶ 138

FEATURE COMMENT: Section 809 And 'e-Portal' Proposals, By Cutting Bid Protests In Federal Procurement, Could Breach International Agreements And Raise New Risks Of Corruption

Bid protests—vendors' challenges to contracting officials' errors, either before or after award—have been an established part of federal procurement for at least a century. Protests (sometimes called "challenges" or "remedies proceedings" abroad) are a recognized bulwark against corruption in the U.S., and have become a standard part of procurement systems around the world, often at the urging of the U.S.

But new proposals being considered for U.S. Government procurement in practice could dramatically limit bid protests in the name of streamlining the procurement process. This drastic change to U.S. procurement practices could violate international agreements under which the U.S. has agreed to maintain an effective bid protest system, and could raise new risks of corruption in procurement.

Bid Protests: Part of U.S. Procurement for Nearly a Century—Bid protests have been part of federal procurement since at least 1926, when what is now the Government Accountability Office sustained a vendor's challenge to overly restrictive specifications for the procurement of trucks. See Gordon, "Annals of Accountability: The First Published Bid Protest Decision," 39 PROCUREMENT LAW. 11 (2004). By the 1970s, the federal courts had become established alternative channels for protests. Early bid protests were brought in federal district court under the Administrative Procedure Act, but modern bid protests are brought under a statute that specifically allows the U.S. Court of Federal Claims to review procurement decisions, 28 USCA § 1491(b). See Cibinic, Jr., Nash, Jr. and Yukins, *Formation of Government Contracts*, 1673–74 (4th ed. 2011).

GAO currently handles roughly 2,500 protests every year, see "GAO Bid Protest Annual Report to the Congress for Fiscal Year 2017" (GAO-18-237SP), available at *www.gao.gov/assets/690/688362.pdf*, and the COFC hears about 100 protests annually, see, e.g., COFC, "Statistical Report for the Fiscal Year October 1, 2016–September 30, 2017," available at *www.uscfc.uscourts.gov/sites/default/files/FY17 stats for website.pdf*. (Although protests may be brought directly to the contracting agency as well, per Federal Acquisition Regulation 33.103, these "agency-level" protests are commonly viewed as ineffective and are seldom used in practice.)

There are generally two kinds of federal protests: pre-award protests, and postaward protests asserting that agency officials made an error in the award of a contract. See generally Cibinic et al., supra, at 1673–74. Pre-award protests allow vendors to challenge, for example, terms in a solicitation that are overly restrictive and thus unreasonably anticompetitive. Pre-award protests are an important tool in international trade because they allow foreign vendors (including U.S. vendors competing abroad) to challenge unfair and anticompetitive requirements. Protests after award are equally important: They allow disappointed bidders to complain of errors in the process and to point out corruption that may have infected the procurement.

Bid Protests Have Been Adopted Nationally and Internationally—Because of the important protections they provide against error and corruption, bid protests have been adopted across the U.S., and indeed around the world. See, e.g., Gordon, "Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make," 35 Pub. Cont. L.J. 427 (2006); Conway, "State and Local Procurement Law," ch. 9 (ABA

2012) (reviewing state and local protest systems). The European Union requires its member states to maintain effective bid challenge systems, see EU Remedies Directive 89/665/EEC, and Directive 92/13/EEC, as amended through Directive 2007/66/EC, and the United Nations Commission on International Trade Law (UNCITRAL) model procurement law, in chapter VIII, calls for bid protest systems.

A key international instrument that recognizes bid protests' role in fighting corruption is the United Nations Convention Against Corruption. It has been adopted by the vast majority of nations, including the U.S.—which played a leading role in developing the Convention. See UN Office of Drugs and Crime (UNODC), "United Nations Convention Against Corruption Signature & Ratification Status as of 3 October 2017," available at *www.unodc.org/unodc/en/treaties/CAC/signatories.html*. The Convention's Article 9 was written to call specifically for effective bid protest systems as a means of discouraging corruption in procurement. See, e.g., UNODC, "Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption" 23–24 (2013); UNODC, "Travaux Preparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Corruption" (2010), available at *www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf*.

U.S. Trade Agreements Call for Bid Protest Protections: As noted, bid protests are also an important part of international trade agreements because they give vendors competing in international procurement markets a means of challenging unfair barriers to competition. Following in part the example of the U.S., the leading international agreement on opening procurement markets, the World Trade Organization (WTO) Agreement on Government Procurement (GPA), includes provisions requiring bid protest systems in member states. See WTO, Revised Agreement on Government Procurement, Art. XVIII, April 2, 2012, available at *www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf*. Those bid protest systems mandated by the GPA give "suppliers believing that a procurement has been handled inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal." WTO, "Overview of the Agreement on Government Procurement," available at *www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm*.

The U.S. has also agreed to include bid protest measures in many other international agreements, particularly in free trade agreements (FTAs) that open procurement markets internationally for U.S. exporters. See Office of the U.S. Trade Representative, Free Trade Agreements, available at *ustr.gov/trade-agreements/free-trade-agreements* (links to FTAs); U.S.-Australia FTA, Art. 15.11(2) ("Each Party shall maintain at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review challenges that suppliers submit, in accordance with the Party's law, relating to a covered procurement."); U.S.-Bahrain FTA, Art. 9.11(1) ("Each Party shall provide timely, effective, transparent, and predictable means for a supplier to challenge the conduct of a covered procurement ...."); U.S.-Dominican Republic-Central America FTA (CAFTA-DR), Art. 9.15(1) ("Each Party shall establish or designate at least one impartial administrative or judicial Authority ... to receive and review challenges that suppliers submit relating to the obligations of the Party and its entities under this Chapter ...."); U.S.-Chile FTA, Art. 9.13(1) ("Each Party shall establish or designate at least one impartial administrative or judicial authority ... to receive and review challenges that suppliers submit relating to the Party's measures implementing this Chapter in connection with a procurement covered by this Chapter ...."); U.S.-Colombia FTA, Art. 9.11(1) ("Each Party shall establish or designate at least one impartial administrative or judicial authority that is independent from its procuring entities to receive and review challenges that suppliers submit relating to the application by a procuring entity of a Party's measures implementing this Chapter ...."); U.S.-Korea FTA, Art. 17.3 (incorporating by reference GPA challenge provisions); U.S.-Morocco FTA, Art. 9.12(1) ("Each Party shall permit a supplier to challenge a Party's compliance with its measures implementing this Chapter ...."); North American Free Trade Agreement, Art. 1017 ("In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following ... (a) each Party shall allow suppliers to submit bid challenges concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through the contract award ...."); U.S.-Oman FTA, Art. 9.11(1) ("Each Party shall provide timely, effective, transparent, and predictable means for a supplier to challenge the conduct of a cov-

ered procurement ...."); U.S.-Panama FTA, Art. 9.15(1) (same as U.S.-CAFTA FTA); U.S.-Peru FTA, Art. 9.11(1) (same as U.S.-Colombia FTA); U.S.-Singapore FTA, Art. 13.3(1) (incorporating by reference GPA provisions).

Reciprocal Defense Procurement Agreements Call for Bid Protest Protections: Provisions guaranteeing a right of access to bid protests have also been included in the U.S.' many reciprocal defense procurement agreements with its allies. See *www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html* (U.S. reciprocal defense procurement agreements). Defense FAR Supplement 225.003 (listing qualifying countries); DFARS Subpt. 225.8 (implementing provisions).

To ensure open markets, reciprocal defense procurement agreements guarantee, for example, that both parties "will have and maintain published procedures regarding the filing and review of complaints arising in connection with any phase of the procurement process," to ensure that "foreign suppliers shall be treated the same as domestic suppliers." "Memorandum of Understanding Between the Federal Minister of Defense of the Federal Republic of Germany and the Secretary of Defense of the United States of America Concerning the Principles Governing Mutual Cooperation in the Research and Development, Production, Procurement and Logistic Support of Defense Equipment," annex 7 § 6, Oct. 17, 1978, available at *www.acq.osd.mil/dpap/Docs/mou-germany.pdf*; see also "Memorandum of Understanding Between the Government of the United States of America and the Government of the French Republic Concerning the Principles Governing Reciprocal Purchases of Defense Equipment," annex iv, art. 6, May 22, 1978 (parties commit to maintaining complaints procedures), available at *www.acq.osd.mil/dpap/Docs/mou-france.pdf*; "Memorandum of Understanding Between the Department of Defense of the United States of America and the Ministry of Defense of Japan Concerning Reciprocal Defense Procurement," § 5, ¶ 6, June 4, 2016 (parties commit to maintaining complaint procedures regarding any phase of defense procurement), available at *www.acq.osd.mil/dpap/Docs/EON for Japan. EON for US. US Japan RDP MOU 1.pdf*; "Memorandum of Understanding Between the Government of Australia and the Government of the United States Concerning Reciprocal Defense Procurement," art. 5 § 6, April 19, 1995 (complaints procedures should ensure equitable consideration), available at *www.acq.osd.mil/dpap/Docs/mou-australia.pdf*; "Memorandum of Understanding Between the Government of the United States of America and the Government of the Kingdom of Sweden Relating to the Principles Governing Mutual Cooperation In the Defense Procurement Area," annex 1, art. III § 5, June 11, 1987 (calling for hearing procedures to review complaints at any phase of procurement), available at *www.acq.osd.mil/dpap/Docs/mou-sweden.pdf*; "Memorandum of Understanding Between the Department of Defense of the United States of America and the Secretary of State for Defence of the United Kingdom of Great Britain and Northern Ireland Concerning Reciprocal Defense Procurement," § 5, ¶ 5, Dec. 22, 2017 (each party commits to maintaining complaints procedures), available at *www.acq.osd.mil/dpap/Docs/paic/US-UK RDP MOU signed 22 Dec 2017 USA003826-17.pdf*.

Through the reciprocal defense procurement agreements, the U.S. and its military allies have agreed to allow protesting vendors—who serve, in essence, as "whistleblowers" regarding unfair Government actions—to enforce these broad agreements to open defense markets. These agreements go beyond mere trade arrangements and are intended to facilitate cooperation and interoperability among allies. See, e.g., Miller, "Is It Time to Reform Reciprocal Defense Procurement Agreements?," 39 Pub. Cont. L.J. 93, 94 (2009). Vendors' bid protests are, in this light, part of a comprehensive security strategy by the U.S. and its allies, because they promote contractor participation in integrated defense procurements of military allies.

Recognizing the broader benefits of bid protests, both in opening trade and in discouraging corruption, various international organizations have embraced bid protests in recent years. See, e.g., Anderson and Müller, "The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development," 48 Geo. J. Int'l L. 949, 993 (2018) (noting importance of bid protest systems in checking corruption internationally). For example, when the World Bank recently revamped the procurement framework used for its borrower nations, it expanded its procurement-related complaint procedures—an informal sort of bid challenge—through which vendors may bring irregularities and corruption to the Bank's attention. See, e.g., World Bank, "World Bank Procurement Regulations for IPF Borrowers," ¶¶ 3.26–3.31 and Annex

III (rev. 2017), available at *policies.worldbank.org/sites/ppf3/PPFDocuments/7ab37ad5cb6e4f4c9c07555d23cc0c42.pdf*; World Bank, "Procurement-Related Complaints" (2017), available at *pubdocs.worldbank.org/en/975671478891365829/Complaints-Guidance-FINAL-Revised.pdf*. These types of reforms, often inspired or encouraged by the U.S. and its business community, reflect an accelerating international consensus in favor of bid protest regimes.

Pending Proposals Could Curtail Bid Protests—Despite the growing international support for bid protests, and despite the U.S.' central role in fostering bid protests worldwide, two pending policy proposals could dramatically reduce the scope of bid protests available in U.S. federal procurement. The first, per § 846 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018, P.L. 115-91, would launch a pilot program to allow federal officials to buy directly from electronic portals. This initiative could—depending on its implementation—allow procurements to bypass the normal public solicitation process, and foreclose pre-award protests. The second set of proposals, from the Section 809 blue-ribbon panel assessing defense procurement reforms, might radically streamline off-the-shelf purchasing, which again could make pre-award protests practically impossible.

Section 846 e-Commerce Portals: Section 846 of the FY 2018 NDAA proposes to allow federal purchasing under the simplified acquisition threshold to be conducted through commercial e-commerce portals. This initiative could (depending on how it is implemented) curtail pre-award bid protests if it permits federal purchasers to bypass the normal pre-award publication on which most pre-award protests are based.

In § 846, Congress tasked the Office of Management and Budget and the General Services Administration with studying how federal agencies could purchase from commercially available e-commerce portals. See, e.g., H. Rep. No. 5-4, 115th Cong., 1st Sess. (Nov. 9, 2017) (conference report). Per Congress' mandate, OMB and GSA March 16 published an initial report suggesting three possible models for implementing § 846: an "e-commerce" model, under which vendors sell products electronically; an "e-marketplace" model, through which federal buyers could access goods and services through a commercial online marketplace; and an "e-procurement" model, in which a buying organization would purchase electronic marketplace services and use those services, in turn, to buy from contracted vendors. See GSA, "Procurement Through Commercial e-Commerce Portals: Implementation Plan" at 6 (2018), available at *interact.gsa.gov/sites/default/files/Commercial%20Platform%20Implementation%20Plan.pdf*; GSA, "GSA and OMB Finalize Joint Implementation Plan for Commercial e-Commerce Portal Program" (March 16, 2018), available at *www.gsa.gov/about-us/newsroom/news-releases/gsa-and-omb-finalize-joint-implementation-plan-for-commercial-ecommerce-portal-program*.

If the § 846 initiative results in direct purchases from electronic portals (thus in practice exempting an entire phase of procurement from protest), these changes would make it easier for officials to indulge in pre-award discrimination and could pose serious questions under the trade agreements discussed above. Plurilateral, regional and bilateral trade agreements typically require (as noted) that vendors be allowed to protest any "covered" procurement, such as any supply acquisitions over (approximately) $200,000; electronic portals implemented under § 846 could breach that promise by making pre-award protests impossible.

The reciprocal defense agreements discussed above similarly guarantee that protests will be available for "any phase" of a defense procurement; that guarantee could be breached if large numbers of online purchases by the Department of Defense were, in practice, exempt from bid protest. The agencies tasked with implementing § 846, GSA and OMB, seemed to recognize these trade concerns in their initial report, which cited potential issues regarding "[e]xisting trade laws and treaties relevant to implementing commercial e-commerce." "Implementation Plan," supra, at 8.

If the U.S. Government, in implementing § 846, chooses to allow rapid direct purchases through a commercial portal, that radical change in procurement processes—which traditionally call for public notice before award—could make pre-award protests impossible, or nearly so. This would have profound implications under international agreements, as this article discusses, and it also could affect other initiatives, such as socioeconomic and sustainability requirements, which rely on a transparent, accountable notice process to ensure that ancillary Government goals are met in any given procurement. See, e.g., GSA, Procurement

Through Commercial e-Commerce Portals: Public Meeting (Jan. 9, 2018), transcript at 54 (discussing need to meet socioeconomic requirements in portals); 71–74 (unresolved issues regarding allocations of risk and responsibilities); 79–85 (concerns raised regarding domestic preferences and treaty compliance, and accountability through bid protests); 90–91 (concerns regarding compliance with socioeconomic requirements); 102–103 (open Trade Agreements Act (TAA) compliance issues); 130–31, 216–17 (special statutory obligations must be met, such as the TAA, which bars purchases from China and other countries not members of trade agreements); 226–27 (statutory requirements should not be bypassed by portals), available at *interact.gsa.gov/sites/default/files/Transcript%20Comml%20Portal%20Public%20Meeting%20%281092018%29.pdf*. Allowing officials to purchase directly through electronic portals, bypassing public notice of the pending procurement, thus has implications that may carry far beyond the international agreements that are our focus here.

Section 809 Panel Proposals: The second, parallel group of proposals, which may well be integrated with the first, has been put forward by the Section 809 panel, a blue-ribbon commission which was tasked by Congress, through § 809 of the FY 2016 NDAA, P.L. 114-92, to propose reforms to defense procurement rules. See, e.g., 60 GC ¶ 46.

The panel's work is proceeding in phases. In volume one of the panel's report, published on January 31, the panel suggested that officials be allowed to procure commercially available goods and services—of any value—in a streamlined manner. "Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel)," Vol. 1, at 9–10 (Jan. 2018), available at *section809panel.org/wp-content/uploads/2018/01/Sec809Panel_Vol1-Report_Jan18_FINAL.pdf*.

In practice, this may mean eliminating pre-award protests for such commercial items, which (the Section 809 panel reports) represented 18 percent of DOD purchases by dollar value in FY 2017. Id. at 17. The panel's parallel recommendation that bid protests be largely eliminated for Small Business Innovation Research program awards, see id. at 193, suggests that the panel is quite serious in contemplating new restrictions on bid protests, as part of its broader recommendations to streamline the procurement process.

Notably, the policy reasons put forward by the panel for limiting bid protests—concerns about disruptive bid protests brought by contractors strategically seeking information, see id. at 10, were largely rebutted by a RAND Corp. report, which was also called for by Congress. RAND found that defense awards are seldom protested, that the process is structured to minimize protests' disruption, and that major contractors are unlikely to use protests as strategic tools. See Arena et al., RAND Corp., "Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers," xi–xviii (2018), available at *www.rand.org/pubs/research_reports/RR2356.html*; Stanley, "More Than Half Of GAO Protests Resolved In Under 30 Days," Law360 (April 13, 2018) (public presentation by RAND researcher and senior GAO officials), available at *www.law360.com/articles/1033506/more-than-half-of-gao-protests-resolved-in-under-30-days*; "RAND Study Finds More DOD Protests, But No Flood Of Frivolous Protests," 60 GC ¶ 18. The Section 809 panel's concern that contractors bring protests merely to understand awards they have lost was also addressed, at least in part, by § 813 of the FY 2018 NDAA, which calls for agencies to make more detailed disclosures when they debrief offerors on major awards.

Conclusion—As a practical matter, if either initiative—the "electronic portals" initiative under § 846, or the Section 809 panel proposals—ultimately means that federal officials will be allowed to purchase commercially available goods and services directly from commercial electronic marketplaces without the prior publication normally required by FAR pt. 5, that streamlined procedure could exempt billions of procurement dollars from accountability in the bid protest process. That, in turn, could have serious consequences, only some of which are fully foreseeable.

For the reasons outlined above, sharply reducing bid protests could prove harmful. Whether through the "electronic portals" contemplated by § 846 or through the Section 809 panel's proposed reforms, exempting billions of dollars of procurement from pre-award protests would run counter to a tradition of accountability in federal procurement, and could raise new risks of corruption in federal procurement.

Efforts to curb bid protests could run afoul of the international agreements discussed above, both the FTAs (including the GPA) and the reciprocal defense

procurement agreements with U.S. allies. Trading partners might demand that their agreements with the U.S. be rolled back to shield portions of their own civilian and defense markets from protests, at least by U.S. vendors; those changes could hurt U.S. exporters facing unfair trade practices abroad, and open new risks of corruption in foreign markets. More specifically, reopening negotiations on the reciprocal defense procurement agreements to exempt certain defense procurements from protest could have national security implications if foreign allies insisted on reducing other forms of cooperation to offset reduced bid protest protections. The U.S. business community could be further damaged if developing nations, taking their cue from the U.S., exempted major portions of their growing procurement markets from bid protests.

Finally, and least predictably, frustrated vendors seeking to challenge errors or corruption in procurement might seek out other forms of legal relief, such as investor-state disputes under bilateral investment treaties which broadly guarantee foreign investors equitable treatment. See, e.g., Transparency International, "Anti-Corruption and Transparency Provisions in Trade Agreements" 11–12 (2017) (surveying literature on potential investor-state disputes regarding procurement under bilateral investment treaties), available at *www.transparency.org/whatwedo/answer/anti_corruption_and_transparency_provisions_in_trade_agreements*. By streamlining procurement to erase pre-award protests, the proposed reforms could launch new and disruptive forms of legal challenges.

Proposals to streamline procurement by eliminating steps of the traditional procurement process are not new; they arose, for example, when the Federal Government first considered allowing officials to buy using purchase cards, and more broadly when FAR pt. 13 was rewritten to permit more flexible procedures for relatively small procurements. As the waves of prior reform have shown, however, because traditional protections have evolved organically over time, their benefits are often not understood and the costs of dismantling them can be unforeseen and severe. Before the Government moves forward with proposals that would reduce bid protests, careful consideration should be given to the potentially serious costs of abandoning the protections afforded by protests—protections which have evolved over nearly a century, and which are now a central and guaranteed part of procurement systems, here and abroad.

✦

This Feature Comment was written for The Government Contractor by **Christopher Yukins** ***and*** **Daniel Ramish.** ***Christopher Yukins is the Lynn David Research Professor in Government Procurement Law at George Washington University Law School. Daniel Ramish is an LLM candidate in that program, scheduled to graduate in August 2018.***