

# ***International Stability Operations Association***

## ***White Paper***

### **A Brief Analysis of the 2018 and 2019 National Defense Authorization Acts (NDAA) Bid Protest Provisions<sup>1</sup>**

October 2018

#### **POSITIONS**

- (1) ISOA supports the continued efforts to enhance the debriefing process reflected in Section 818 of the 2018 NDAA;
- (2) ISOA opposes efforts to artificially disincentivize oversight of the procurement system through the bid protest process by shifting government costs onto contractors, reflected in Section 827 of the 2018 NDAA;
- (3) ISOA supports data collection and reporting requirements regarding protests filed with both the Government Accountability Office (GAO) and the United States Court of Federal Claims (COFC), and the establishment of an expedited protest process for smaller value procurements, reflected in Section 822 of the 2019 NDAA.

#### **BACKGROUND**

The 2018 NDAA, signed into law on December 12, 2017, included two sections significantly affecting the bid protest process for Department of Defense (DoD) contractors: Section 818 “Enhanced Post-Award Debriefing Rights” and Section 827 “Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests.” The 2019 NDAA, signed into law on August 14, 2018, included Section 822, “Department of Defense Contracting Dispute Matters,” which directed the Secretary of Defense to carry out a study of the frequency and effects of bid protests involving the same contract award or proposed award that have been filed at both the Government Accountability Office and the United States Court of Federal Claims. These three Sections of the law will be discussed and analyzed below as they may affect contractors supporting stability operations.

As an initial matter, ISOA notes that Section 818 is consistent with the later-released RAND Report<sup>2</sup> commissioned by DoD pursuant to Section 885 of the NDAA for FY2017. The RAND

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<sup>1</sup> Bid protests (or simply “protests”) challenge the terms and conditions of a solicitation, an award decision, or a decision to cancel a solicitation or award. For a review of bid protest venues and their differences, *see* Michael J. Schaengold, Michael Guiffre, and Elizabeth M. Gill, “Choice of Forum for Federal Government Contract Bid Protests,” *Federal Circuit Bar Journal*, Vol. 18, No. 243, 2009. *See also* William E. Kovacic, “Procurement Reform and the Choice of Forum in Bid Protest Disputes,” *Administrative Law Journal of American University*, Vol. 9, 1995.

<sup>2</sup> “Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends and Drivers,” RAND Report RR2356, 2018 (hereinafter “RAND Report”).

Report provided a data-driven analysis of protests of DoD procurements, data that had been unavailable before Congress directed DoD to commission the Report. The RAND Report determined that only a tiny fraction of DoD procurements go through the bid protest process and of those that do, that the overwhelming majority of protests are resolved quickly. In addition, the RAND Report found that there is no hard data to support the common misperceptions that bid protests are frivolous or pervasive. Rather, RAND concluded that “firms are not likely to protest without merit”<sup>3</sup> and that “the overall percentage of contracts protested is very small—less than 0.3 percent.”<sup>4</sup> The RAND Report recommended that Congress and DoD policymakers focus on enhancing the quality of post-award debriefings.<sup>5</sup> Section 818 does so.

ISOA notes also that Section 827 is not consistent with the RAND Report, perhaps because Congress enacted Section 827 before the RAND Report was issued. Section 827 seeks to artificially disincentivize large defense contractors from filing GAO protests by requiring them to pay not only their own protest costs but also those of the DoD in cases that are denied. However, RAND specifically found that large defense contractors file fewer protests and that those protests are more often successful than small businesses, indicating that there is no need for such penalty. Although unclear from the legislative history, it is possible that Section 827 grew out of DoD personnel attitudes toward contractors generally, and therefore toward the bid protest process specifically, which RAND characterized as suffering from a “lack of trust.”<sup>6</sup> Though many defense contractor personnel come from the military community and, especially within ISOA membership, work in direct support of the U.S. military mission in dangerous areas of the world and their remains a stigma in which they are regarded with suspicion. Despite these misperceptions, the RAND Report found that there is no data evidencing that bid protests are adversely affecting DoD procurements.<sup>7</sup>

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<sup>3</sup> RAND Report, p. xvi. Indeed, RAND found that the GAO does not categorize or track protests as “frivolous” and GAO has expressly rebuffed the notion that protests it has denied were “frivolous.” While courts have defined “frivolous” as either “frivolous as filed”—where a plaintiff or appellant grounds its case on arguments or issues “that are beyond reasonable;” or “frivolous as argued”—when a plaintiff or appellant has not dealt fairly with the court and has significantly misrepresented facts or the law, neither of these two definitions have been applied by the GAO to label protests as frivolous.

<sup>4</sup> RAND Report, p. xiii-xvii. The FY2004 to FY2008 timeframe showed a similar increase in bid protests that was best correlated with an increase in procurement dollar amounts. See Government Accountability Office Report to Congress, B-401197, pp.9-10. Note that a similar finding was reported to ISOA by Department of State officials at their Professional Forum on July 13, 2018.

<sup>5</sup> RAND Report, pp. xvii-xviii.

<sup>6</sup> RAND Report, p. xvi.

<sup>7</sup> RAND Report, p. xvi.

The 2019 NDAA demonstrates that Congress paid attention to the RAND Report. Consistent with that Report, Section 822 directs DoD to collect and study data related to protests filed at both the Government Accountability Office (“GAO”) and the Court of Federal Claims (“COFC”). ISOA supports efforts to improve data collection and the rejection of DoD efforts to restrict protest fora. Section 822 also directs DoD to establish an expedited protest process for procurements valued less than \$100,000. While ISOA generally supports an expedited small-value protest process, ISOA recognizes that these procurements are vital to the businesses competing for them and urges that the DoD ensure due process and an impartial review. Until ISOA reviews the details of this new process, ISOA reserves its full endorsement.

## ANALYSIS

### **2018 NDAA SECTION 818: “Enhanced Post-Award Debriefing Rights”**

Section 818 contains two significant enhancements to the DoD debriefing process. Subsection (a) directs the Secretary of Defense to revise the DFARS by June 10, 2018 to require that all post-award debriefings include, at a minimum: disclosure of the agency’s written Source Selection Decision Document (SSDD) (redacted, if necessary) for awards greater than \$100 million, with an option for small business and nontraditional contractors to request SSDDs for awards between \$10 million and \$100 million; and a written or oral debriefing for all contract awards and task or delivery orders valued at \$10 million or higher. As of the date of this White Paper, the DFARS has not yet been so revised.<sup>8</sup>

Subsection (b) immediately amended Section 2305(b)(5) of title 10, United States Code, to: require all DoD post-award debriefings to allow an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing; require the agency to respond in writing to any such questions within five business days; and keep the debriefing open until the agency delivers its written responses. Importantly, subsection (b) also immediately amended Section 3553(d)(4) of title 31, United States Code, to make explicit that the 5-day period to obtain a “CICA Stay” of contract performance does not commence until the agency delivers its written responses pursuant to 10 U.S.C. § 2305(b)(5)(B)(vii). DoD implemented subsection (b) through a class deviation dated March 22, 2018.<sup>9</sup>

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<sup>8</sup> The Defense Acquisition Regulation (“DAR”) Council discussed a draft proposed rule on September 12, 2018. *See* table of open DFARS cases on the Defense Procurement and Acquisition Policy website at: <https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf>

<sup>9</sup> Memo from the Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, “Class Deviation—Enhanced Postaward Debriefing Rights,” March 22, 2018.

ISOA supports the enhanced debriefing rights under Section 818. We view enhanced debriefings as a key ingredient to improving the relationship between the Department of Defense and its contractor partners as well as potentially preventing otherwise unnecessary protest actions. Proper DoD implementation—consistent with the Congressional intent for more open communication—will be of critical importance to the success of this new process. While we understand and respect the need to protect proprietary business information, we support continued efforts to encourage more robust communication, and we are wary of implementation that would frustrate Congressional intent by, for example, overly redacting the source selection decision document (SSDD) or providing only cursory responses to post-debriefing questions. Accordingly, ISOA encourages Congress to consider providing a mechanism for contractors to voice concerns with the quality of DoD debriefings.<sup>10</sup>

### **2018 NDAA SECTION 827: “Pilot Program on Payment of Costs for Denied Government Accountability Office Bid Protests”**

Section 827, commonly referred to as the “loser pays” provision, directs the Secretary of Defense to “carry out a pilot program to determine the effectiveness of requiring contractors to reimburse the Department of Defense for costs incurred in processing covered protests.” A “covered protest” is defined as a bid protest filed from October 1, 2019 through September 30, 2022 by a contractor with revenues exceeding \$250 million the previous year that is denied in an opinion issued by the GAO. The pilot program is set to begin on December 12, 2019 and end three years later, to be followed 90 days later by a report from DoD to Congress “assessing the feasibility of making permanent such pilot program.”

Notably, although the stated reason for the pilot program is to determine the “effectiveness” of requiring contractors to pay not only their own protest costs but also to reimburse DoD’s costs, the statute does not define what “effectiveness” means. There are no metrics identified for the pilot program to measure. The only clue within the statute is that Congress required DoD to report only one thing following this pilot program: the feasibility of making the program permanent. Accordingly, neither the purpose nor the eventual output of the pilot program is clear from the language in the NDAA. Given the current hostile atmosphere toward the bid protest system, a reasonable assumption is that Congress intended “effectiveness” to mean a reduction in bid protests. DoD’s implementation of this pilot program has not yet been made public.

ISOA does not support the loser pays program under section 827.<sup>11</sup> ISOA recognizes the bid protest system as a necessary and cost effective method of providing critical oversight of the

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<sup>10</sup> GAO currently will not consider protests challenging the adequacy of an agency’s debriefing. *See, e.g., InGenesis, Inc.*, B-412967.3, B-412967.4, Sept. 26, 2017, 2017 CPD ¶ 336 at n.3.

<sup>11</sup> The GAO is likewise wary of attempts to artificially affect the bid protest numbers. *See, e.g., Government Accountability Office Report B-401197*, “Report to Congress on Bid Protests Involving Defense Procurements,” April 9, 2009 (“GAO Report B-401197”), p.12.

procurement system.<sup>12</sup> As such, changes to the system—particularly those intended to limit the oversight provided by protests—should be implemented only when supported by sound evidence and aimed at substantive improvements to the integrity of procurements, such as the enhanced debriefing provisions discussed above. Here, the loser pays provision lacks both. As demonstrated by the RAND Report, the data available show that there is no factual basis to claim that contractors are filing frivolous protests or otherwise misusing the protest system.<sup>13</sup> The RAND Report shows that the largest defense contractors, those that would be subject to the loser pays program, generally file few protests and have a higher than average success rate. Moreover, disincentivizing contractors from filing protests by adding the threat of doubling an already expensive business decision does nothing to further the integrity of the underlying procurements. Instead, it further insulates agency procurement actions from potential oversight, which historically has led to poor contracting decisions and bad value for the government.

### **2019 NDAA SECTION 822: “Department of Defense Contracting Dispute Matters”**

Section 822 contains two significant directions to DoD regarding bid protests. Subsections (a) thru (c) direct the Secretary of Defense to conduct and report to Congress on a “study of the frequency and effects of bid protests involving the same contract award or proposed award that have been filed at both the” GAO and the COFC, and to establish a continuing process to collect the same data. This provision appears to be a direct result of the RAND Report recommendation that Congress consider collecting this type of data.<sup>14</sup> As stated above, ISOA supports efforts to improve the data available regarding bid protests. Too often in the past, seen as recently as Section 827, process changes have been implemented without adequate data to support the change. To be clear, ISOA does not anticipate that the data will support curtailing the protest jurisdiction of the COFC as DoD has repeatedly pushed Congress to do; but at the very least the data must be collected and analyzed before any changes should be contemplated. ISOA supports the rejection of DoD’s haste in this regard.

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<sup>12</sup> See Gordon, *Bid Protests: The Cost Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489 (2013).

<sup>13</sup> To be sure, a small number of protesters may qualify as nuisances and file protests that could reasonably be described by an outside observer as frivolous (although GAO does not generally characterize protest filings as frivolous). However, these nuisance protesters do not provide factual support for the loser pays pilot program for at least two reasons. First, DoD and GAO already have mechanisms with which to quickly and efficiently dispatch these protests. See, e.g., GAO Report B-401197 at 4, 10-16; *Latvian Connection LLC*, B-415043.3, Nov. 29, 2017, 2017 CPD ¶ 354; *Latvian Connection LLC*, B-413442, Aug. 18, 2016, 2016 CPD ¶ 194. Second, these nuisance protesters do not file “covered protests” because they do not meet the revenue thresholds, and therefore the loser pays provision will not affect those filings.

<sup>14</sup> RAND Report, p. xviii.

Subsection (d) directs the Secretary of Defense by December 1, 2019 to “develop a plan and schedule for an expedited bid protest process for [DoD] contracts with a value of less than \$100,000” and to report on that plan and schedule to Congress by May 1, 2019. This too appears to be a direct result of the RAND Report finding that nearly 8% of GAO protests challenged procurements valued under \$100,000 and its recommendation that Congress consider implementing an expedited protest process for these small-value procurements.<sup>15</sup> ISOA supports conceptually an expedited process for these procurements, but remains concerned that the process developed ensure that these protesters are afforded adequate due process including review by an impartial entity. Precisely because of their lower value, these procurements tend to be completed by less-experienced contracting personnel and without legal or other compliance review, and further removing oversight may lead to increased waste, fraud, abuse, and other noncompliance with statutory and regulatory obligations.

### **SUMMARY**

ISOA will continue to monitor the processes and outcomes of the recent changes to the bid protest process in both the NDAA FY2018 and NDAA FY2019. While ISOA recognizes Congress’s need to investigate the bid protest process, ISOA does not support NDAA 2018 Section 827 directed pilot program focused on testing the efficacy of financial punishments for companies that have protested unsuccessfully. ISOA supports enhanced debriefing rights directed under NDAA 2018 Section 818 and the data collection and, at least provisionally, the “small claims” bid protest process under NDAA 2019 Section 822.

ISOA will continue to monitor the processes and effects of these new laws on contractors in support of stability operations.

Finally, ISOA notes that although the Department of State (DOS) has not made changes to its own bid protest regulation (14 FAM 200), officials have commented that their agency would be reluctant to “limit the rights of contractors to protest,” are “interested in building a better bid process with industry,” and support “full disclosure of bid protest documents.”<sup>16</sup>

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<sup>15</sup> RAND Report, pp. xv, xvii.

<sup>16</sup> ISOA Professional Forum, July 13, 2018.