

# FOR FEAR OF PROTEST

The PRICE of pushing DHS procurement innovation. By Stephen L. Bacon

**P**resident Biden recently signed the Promoting Rigorous and Innovative Cost Efficiencies for Federal Procurement and Acquisitions (PRICE) Act.<sup>1</sup> The PRICE Act seeks to expand the use of innovative acquisition techniques that have been implemented in recent years by the Department of Homeland Security's (DHS) Procurement Innovation Lab (PIL). These methods are intended to provide faster delivery, better solutions, and superior value.

Many acquisition officials are reluctant to adopt these strategies due to fear they will lead to more protests. Those fears appear to be well-founded, at least based on the data available for recent PIL procurements. The data also indicate, however, that the techniques

implemented by the PIL may be less vulnerable to protest risk in certain areas because they are inherently more difficult for protesters to challenge.

As agencies test new source selection methods, they are likely to experience some bid protest growing pains that come with adopting new processes and procedures. At the same time, contractors may find it more challenging to contest procurement decisions that use techniques specifically designed to make contract awards protest-proof.

Many of the PIL techniques are not new. Rather, they are acquisition methods that have been available but historically underutilized, such as oral presentations. As a result, some of these techniques have been scrutinized in prior bid protest decisions.

## The PIL Protest Record

The PIL was established in 2015 to test innovative acquisition strategies. It has implemented a variety of techniques including multiphased evaluations, oral presentations, demonstrations, confidence ratings as opposed to traditional adjectival ratings, and streamlined documentation, among others.

Between fiscal 2015 and 2020, DHS used PIL techniques in 89 procurements and nearly 25% of them were protested.<sup>2</sup> By comparison, a 2018 report published by the RAND Corporation found that less than 0.3% of all Department of Defense contracts were protested.<sup>3</sup>

While the protest rate for PIL procurements was significantly higher than average, the effectiveness

rate was well below average. The Government Accountability Office (GAO) reports an effectiveness rate that comprises protests sustained by GAO and protests where the agency takes voluntary corrective action before GAO renders a decision.<sup>4</sup> Although the GAO protest effectiveness rate hovers near 50% every year, the protest effectiveness rate for PIL procurements is only 18%.<sup>5</sup>

The PIL dataset is relatively small and may not fully represent the various types of procurements that face bid protests. But the general trend suggests that protests will likely be more prevalent when agencies begin to experiment with the innovative techniques adopted by the PIL. At the same time, these award decisions may be less vulnerable to protests.

### Documentation of Oral Presentations

Many PIL procurements have used oral presentations to speed up the acquisition cycle by eliminating or reducing the need for evaluators to review written proposals. The adequacy of evaluation documentation is frequently a bid protest issue when agencies utilize oral presentations. The extent of documentation required depends on the type of procurement involved.

A record of oral presentations is required in negotiated procurements under FAR Part 15.<sup>6</sup> The method of documentation and the level of detail is generally left to agency discretion. GAO has held that “the principle of government accountability dictates

that an agency maintains a record adequate to permit meaningful review.”<sup>7</sup> As a result, GAO has sustained protests where, for example, the agency’s record of oral presentations includes “notes [that] are sparse and cannot be characterized as an adequate record of oral presentations.”<sup>8</sup>

GAO has recognized that documentation requirements are less onerous for oral presentations conducted in Federal Supply Schedule (FSS) procurements under FAR Subpart 8.4.<sup>9</sup> Specifically, GAO has confirmed that “apart from documenting evaluation judgments, Subpart 8.4 does not expressly require an agency to record or otherwise transcribe the content of the vendors’ oral presentation.”<sup>10</sup>

The difference in documentation requirements for FSS and negotiated procurements has important implications for bid protests. In general, it is more difficult for protesters to challenge the evaluation of an oral presentation in an FSS procurement because the protester may have no record of what its competitor presented to the agency’s evaluators.

### Interactive Dialogue

Agencies also permit interactive dialogue during or after an oral presentation. The use of on-the-spot questions permits the agency to seek clarification from the offeror and test the offeror’s knowledge of its proposed approach.

But there is the possibility that exchanges between the evaluators and offerors could unintentionally veer into discussions. In a FAR Part 15

procurement, some “dialogue among the parties” is expected during oral presentations.<sup>11</sup> When the evaluators speak, however, their remarks may constitute discussions if they permit the offeror to modify or revise its proposal.

In the context of interactive dialogue, it may be difficult to identify where clarifications end and discussions begin. If discussions are held with one offeror, the agency must conduct meaningful discussions with all competitive range offerors.<sup>12</sup> An award is vulnerable to protest if the agency does not fulfill this obligation.

### Technical Demonstrations

Technical demonstrations allow the agency’s evaluators to see and test the offeror’s proposed product. The use of this technique can expose agencies to certain unique protest risks if there are glitches in the demonstrations or gaps in the agency’s documentation of the evaluation.

The potential problems associated with technical demonstrations were on display in the \$1.5 billion Flexible Agile Support for the Homeland (“FLASH”) procurement, a high-profile PIL acquisition. The FLASH solicitation was canceled in response to protests after DHS acknowledged “significant errors and missteps in the procurement process.”<sup>13</sup>

Those errors included “the failure to capture high-quality video of technical demonstrations from offerors.”<sup>14</sup> The FLASH experience illustrates that source selection decisions are vulnerable to protest

risks where the demonstration process is somehow flawed or yields unequal results among offerors.

Similarly, demonstrations are exposed to protest risks if the results are not adequately documented.<sup>15</sup> As with oral presentations, it may be difficult for agencies to properly document the offerors' performance during a demonstration if it is not recorded and accurately portrayed in the evaluation record.

### Confidence Ratings vs. Adjectival Ratings

The PIL has encouraged the use of confidence ratings instead of traditional adjectival ratings to evaluate proposals. This is because the confidence ratings technique can afford evaluators more discretion. Adjectival ratings are typically accompanied by specific evaluation criteria that must be met to obtain a given rating.

In contrast, the definitions for confidence ratings are more general and may give the agency greater flexibility in the evaluation. Rather than documenting specifically defined strengths and weaknesses, agencies simply develop holistic confidence assessments. This is typically done by recording a bullet-point list of items that increase or decrease confidence in the offeror's proposal.

Although agencies are afforded deference in technical evaluations, they have even more room for discretion when confidence ratings are used because the evaluation factors often lack specific criteria. Thus, an evaluation that uses confidence ratings may be less susceptible to an argument that the agency deviated from the terms of the solicitation.

### Protest Uptick

The PRICE Act tasks the DHS undersecretary for management with developing guidance and providing training to acquisition officials on when and how to use innovative procurement techniques. Moreover, the law establishes a council chaired by the administrator for federal procurement policy to examine best practices for acquisition innovation including small business contracting. The council must submit a report to Congress within a year.

The work of the council and the DHS undersecretary is likely to accelerate the adoption of innovative acquisition techniques in the next several years. Over time, these efforts should improve procurement outcomes for the government and industry. But until both sides have sufficient training and experience with these methods, there may be an uptick in protests as agencies and contractors learn how to adapt to the new techniques. **CM**

*The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients.*

**Stephen L. Bacon** is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, investigations, and suspension and debarment proceedings. He frequently litigates cases at the Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small

Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

### ENDNOTES

- 1 Public Law 117-88.
- 2 See PIL Yearbook 2020 at 7, available at [https://www.dhs.gov/sites/default/files/publications/pil\\_yearbook\\_-\\_fy\\_2020.pdf](https://www.dhs.gov/sites/default/files/publications/pil_yearbook_-_fy_2020.pdf).
- 3 See Mark V. Arena, Brian Persons, Irv Blickstein, Mary E. Chenoweth, Gordon T. Lee, David Luckey, Abby Schendt, Assessing Bid Protests of U.S. Department of Defense Procurements, Santa Monica, California: RAND Corporation, RR-2356-OSD, at xiii.
- 4 GAO Bid Protest Annual Report to Congress for Fiscal Year 2021, available at <https://www.gao.gov/products/gao-22-900379>.
- 5 Of the 22 PIL procurements protested, 4 obtained some form of relief because the agency took voluntary corrective action (3) or canceled the solicitation in response to the protest (1).
- 6 FAR 15.102(e).
- 7 HomeSafe Alliance, LLC, et al., B-418266.5, et al., Oct. 21, 2020, 2020 CDP ¶ 350 at 20.
- 8 Id.
- 9 Blueprint Consulting Services, LLC, et al., B-420190, et al., Dec. 30, 2021, 2022 CPD ¶ at 12.
- 10 Id.
- 11 FAR 15.102(a).
- 12 See, e.g., Companion Data Services, LLC, B-410022, B-410022.2, Oct 9, 2014, 2014 CPD ¶ 300 (determining that the offeror's responses to follow-up questions during oral presentations did not constitute "discussions."). Meaningful discussion requires the agency to address, at a minimum, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not previously had an opportunity to respond. See FAR 15.306(d)(3).
- 13 Mark Rockwell, DHS execs own FLASH fail, FCW, available at <https://fcw.com/acquisition/2017/06/dhs-execs-own-flash-fail/227921/>.
- 14 Id.
- 15 See, e.g., Swets Information Services, B-410078, Oct. 20, 2014, 2014 CPD ¶ 311 (sustaining protest where GAO could not determine the reasonableness of the evaluation of the vendors' product demonstrations due to inadequate documentation); Apptis, Inc., B- 299457, et al., May 23, 2007, 2008 CDP ¶ 49 (sustaining protest where there was no record kept of the problems the agency allegedly experienced during the protester's "proof of concept" demonstration).



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