By: Steven Koprince | January 23, 2019

Section 809 Panel Recommends Changing "Once 8(a), Always 8(a)" Rule

Under the so-called "once 8(a), always 8(a)" rule set forth in the FAR and SBA regulations, when a procurement has been accepted by the SBA for inclusion in the 8(a) Program, any follow-on contract generally must remain in the 8(a) Program, unless the SBA agrees to release it for non-8(a) competition.

Now, the Section 809 Panel has proposed a modest, but potentially important change to the "once 8(a), always 8(a)" rule–a change that would allow for acquisitions to be removed from the 8(a) Program without the SBA's explicit consent.

To remove an acquisition from the 8(a) Program, a Contracting Officer must make a formal request to the SBA. However, as the Section 809 Panel writes, "there is no prescribed timeframe" for the SBA's response.

This "prevents contracting officers from soliciting performance outside the 8(a) program and causes unnecessary delays waiting for the SBA's response." One procurement official told the Section 809 Panel that his office had waited as long as 90 days for the SBA to respond to a request for removal (although the same official noted that on another occasion, the SBA responded in just three days).

The Section 809 Panel proposes giving SBA officials a hard deadline for responding to removal requests:

SBA should be allowed 15 working days after receipt of the contracting officer's written request, described at FAR 19.815(b), to respond with a determination whether to release a requirement from the 8(a) program. If SBA does not provide the requesting contracting officer with a determination within that period, release from the 8(a) pro-

gram should be presumed and the contracting officer should be authorized to proceed with award outside the 8(a) program.

To implement this proposed change, the Section 809 Panel recommends that the FAR Council revise FAR 19.815 "to allow for tacit release for non-8(a) competition by the SBA if no response has been received by the SBA after 15 working days."

Now, while I am not saying that I oppose the change, I have a few concerns.

First, from the report, it's unclear whether delayed SBA responses are a widespread problem–or have ever been a problem for anyone other than one person (the guy whose office once waited 90 days for a response). The *only* evidence the Section 809 Panel provides of this supposed problem is a single email from this individual. The Panel doesn't offer any statistics about average SBA response times, or even statements from other contracting officials who may have experienced delayed responses to 8(a) Program removal requests.

I don't think one person's anecdotal experience is a particularly strong basis to be monkeying with the FAR. As is the case with bid protest "reforms," math, not limited anecdotal experiences, should be central to figuring out whether there is a real problem in need of solving.

Second, the Section 809 Panel doesn't offer any reasonable justification for its choice of 15 business days. The Panel mentions that the SBA has 10 business days to decide whether to accept most new requirements into the 8(a) Program (although the SBA may request extensions). But removing a requirement from the 8(a) Program is a different process, and requires the SBA to consider, among other things, "[w]hether the requirement is critical to the business development of the 8(a) Participant that is currently performing it."

Can the SBA effectively perform this analysis in 15 business days? Maybe, or maybe not. Strikingly, the Panel doesn't seem to have done the obvious thing: ask the SBA. Suffice it to say, getting the SBA's input seems like a wise move before imposing a hard deadline, no matter the length.

Third, the Panel's recommendation–amending the FAR–arguably would create a conflict between FAR 19.815 and the SBA's regulation at 13 C.F.R. 124.504(d), which also implements the "once 8(a), always 8(a)" rule. The SBA's regulation doesn't include a time frame, and if the SBA takes the position that it isn't bound by the 15-day period, the dispute would inevitably lead to legal action.

I, for one, think it's important hear from the SBA before adopting the Panel's recommendation, because the Panel leaves a lot of important unanswered questions. How long does the SBA typically take to respond to a removal request? Does the SBA think that a 15-day clock is reasonable? Does the SBA need some flexibility for unusual cases (like, say, government shutdowns?) Can the SBA ask the Contracting Officer for an extension? Will the SBA be willing to amend 13 C.F.R. 124.504 to impose the same deadline established by the FAR?

Buried in the middle of of the Section 809 Panel's lengthy final report, the recommendation on "once 8(a), always 8(a)" may not get much attention. But for Contracting Officers and 8(a) contractors alike, it's a potentially important change, and hopefully one that won't be made without SBA's input.

My colleagues and I will keep you posted.