

103^D CONGRESS
1ST SESSION

S. 555

To amend the Federal Property and Administrative Services Act of 1949 to clarify procurement protest procedures, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 10 (legislative day, MARCH 3), 1993

Mr. GLENN (for himself, Mr. PRYOR, and Mr. COHEN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To amend the Federal Property and Administrative Services Act of 1949 to clarify procurement protest procedures, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Procurement Protest
5 Clarification Act of 1993”.

1 **SEC. 2. SHORT TITLES OF CERTAIN PROVISIONS OF FED-**
2 **ERAL PROPERTY AND ADMINISTRATIVE**
3 **SERVICES ACT OF 1949.**

4 (a) AUTOMATIC DATA PROCESSING EQUIPMENT
5 PROVISIONS.—Section 111 of the Federal Property and
6 Administrative Services Act of 1949 (40 U.S.C. 759) is
7 amended by adding at the end the following new sub-
8 section:

9 “(i) This section may be cited as the ‘Brooks Auto-
10 matic Data Processing Act’.”

11 (b) ARCHITECTURAL AND ENGINEERING SERVICES
12 PROVISIONS.—Title IX of the Federal Property and Ad-
13 ministrative Services Act of 1949 (40 U.S.C. 541–544)
14 is amended by adding at the end the following new section:
15 **“SEC. 905. SHORT TITLE.**

16 “This title may be cited as the ‘Brooks Architect-En-
17 gineers Act’.”

18 **SEC. 3. REVOCATION OF DELEGATION.**

19 Section 111(b)(3) of the Federal Property and Ad-
20 ministrative Services Act of 1949 (40 U.S.C. 759(b)(3))
21 is amended in the third sentence by striking out the period
22 and inserting in lieu thereof the following: “, whether be-
23 fore or after award of a contract. The authority of the
24 Administrator to revoke a delegation after a contract
25 award is limited to those circumstances where there is a
26 finding of a violation of law or regulation.”

1 **SEC. 4. AUTHORITY OF BOARD.**

2 The first sentence of section 111(f)(1) of the Federal
3 Property and Administrative Services Act of 1949 (40
4 U.S.C. 759(f)(1)) is amended to read as follows: “Upon
5 request of an interested party in connection with any pro-
6 curement that is subject to this section (including any
7 such procurement that is subject to delegation of procure-
8 ment authority), the board of contract appeals of the Gen-
9 eral Services Administration (hereinafter in this sub-
10 section referred to as the ‘board’) shall review, as provided
11 in this subsection, any decision by a Federal agency that
12 is alleged to violate a statute, a regulation, or the condi-
13 tions of any delegation of procurement authority.”.

14 **SEC. 5. DISMISSAL; AWARD OF COSTS.**

15 Section 111(f)(4) of the Federal Property and Ad-
16 ministrative Services Act of 1949 (40 U.S.C. 759(f)(4))
17 is amended by striking subparagraph (C) and inserting
18 the following:

19 “(C) The board may dismiss a protest that the board
20 determines—

21 “(i) is frivolous,

22 “(ii) has been brought in bad faith, or

23 “(iii) on its face does not state a valid basis for
24 protest.

25 “(D) If a party violates or fails to comply in good
26 faith with, or causes a violation of or failure to comply

1 in good faith with, an order or decision of the board, the
2 board may construe the open facts of the case related to
3 the violation against such party.”.

4 **SEC. 6. ENTITLEMENT TO COSTS.**

5 Section 111(f)(5)(C) of the Federal Property and Ad-
6 ministrative Services Act of 1949 (40 U.S.C.
7 759(f)(5)(C)) is amended by striking out “interested” and
8 inserting in lieu thereof “prevailing”.

9 **SEC. 7. DISMISSALS.**

10 Section 111(f)(5) of the Federal Property and Ad-
11 ministrative Services Act of 1949 (40 U.S.C. 759(f)(5))
12 is amended by adding at the end the following new sub-
13 paragraphs:

14 “(D) Any agreement that provides for or con-
15 templates the dismissal of a protest, and involves the di-
16 rect or indirect expenditure of appropriated funds, shall
17 be submitted to the board and, subject to board protective
18 order, made a part of the public record before dismissal
19 of the protest. Where an agency is a party to a settlement
20 agreement, the agreement submitted to the board shall be
21 accompanied by a memorandum, signed by the contracting
22 officer, describing in detail the procurement; the grounds
23 for protest; the Government’s position regarding the
24 grounds for protest; the terms of the settlement; and the

1 agency's position regarding the propriety of the award or
2 proposed award of the contract at issue in the protest.

3 “(E) Payment of amounts due from an agency under
4 subparagraph (C) or under the terms of a settlement
5 agreement under subparagraph (D) shall be made from
6 the appropriation made by section 1304 of title 31, United
7 States Code, for the payment of judgments, and the agen-
8 cy shall reimburse that appropriation account out of funds
9 available for the procurement.”.

10 **SEC. 8. DEFINITIONS.**

11 (a) PROTEST.—Section 111(f)(9)(A) of the Federal
12 Property and Administrative Services Act of 1949 (40
13 U.S.C. 759(f)(9)(A)) is amended to read as follows:

14 “(A) the term ‘protest’ means a written objec-
15 tion by an interested party—

16 “(i) to a solicitation or other request by a
17 Federal agency for bids, proposals, or offers for
18 a contract for the procurement of property or
19 services;

20 “(ii) to the cancellation of such a solicita-
21 tion or other request;

22 “(iii) to an award or proposed award of
23 such a contract; or

24 “(iv) to a termination or cancellation of an
25 award of such a contract, if that termination or

1 cancellation was in whole or in part based on
2 actual or alleged improprieties concerning the
3 award of the contract;”.

4 (b) INTERESTED PARTY.—(1) Section 111(f)(9)(B)
5 of the Federal Property and Administrative Services Act
6 of 1949 (40 U.S.C. 759(f)(9)(B)) is amended to read as
7 follows:

8 “(B) the term ‘interested party’ means—

9 “(i) with respect to a contract or proposed
10 contract described in subparagraph (A), an ac-
11 tual or prospective bidder or offeror for that
12 particular contract or proposed contract, includ-
13 ing a contract awardee as intervenor, whose
14 economic interest would be affected, as deter-
15 mined by the board—

16 “(I) by the action which is the subject
17 of the protest; and

18 “(II) by any relief that the board may
19 order; or

20 “(ii) with respect to a solicitation or other
21 request by a Federal agency for bids, proposals
22 or offers described in subparagraph (A), a ven-
23 dor whose economic interest would be affected,
24 as determined by the board, by specifications in
25 the solicitation or other request for bids, pro-

1 posals, or offers that are alleged to be restric-
2 tive of competition; and”.

3 (2)(A) Section 111(f)(9)(B)(ii) of the Federal Prop-
4 erty and Administrative Services Act of 1949, as added
5 by paragraph (1) of this subsection (relating to the defini-
6 tion of an interested party) is amended to read as follows:

7 “(ii) with respect to a solicitation or other re-
8 quest by a Federal agency for bids, proposals or of-
9 fers described in subparagraph (A), a prospective
10 bidder or offeror whose economic interest would be
11 affected, as determined by the board, by specifica-
12 tions in the solicitation or other requests for bids,
13 proposals, or offers that are alleged to be restrictive
14 of competition; and”.

15 (B) The amendment made by subparagraph (A) shall
16 be effective on and after the date occurring 3 years after
17 the date of the enactment of this Act.

18 (3) No later than 42 months after the date of the
19 enactment of this Act, the Comptroller General shall con-
20 duct a study and submit a report to the Committee on
21 Governmental Affairs of the Senate and the Committee
22 of Government Operations of the House of Representa-
23 tives on the experiences of the Board of Contract Appeals
24 of the General Services Administration in applying the
25 provisions of section 111(f)(9)(B)(ii) of the Federal Prop-

erty and Administrative Services Act of 1949. The com-
ments of such board shall be included in such report.

(c) PREVAILING PARTY.—Section 111(f)(9) of the
Federal Property and Administrative Services Act of 1949
is further amended by adding at the end thereof the fol-
lowing new subparagraph:

“(C) the term ‘prevailing party’ means a party
which succeeds in demonstrating that a challenged
agency action violates a statute or regulation or the
conditions of any delegation of procurement author-
ity issued pursuant to this section, thereby resulting
in a determination by the board under paragraph
(5)(B).”.

**SEC. 9. OVERSIGHT OF ACQUISITION OF AUTOMATIC DATA
PROCESSING EQUIPMENT BY FEDERAL
AGENCIES.**

Section 111 of the Federal Property and Administra-
tive Services Act of 1949 (40 U.S.C. 759), as amended
by this Act, is further amended by inserting after sub-
section (g) the following new subsection:

“(h)(1) The Administrator shall collect and compile
data regarding the procurement of automatic data proc-
essing equipment under this section. That data shall in-
clude, at a minimum, with regard to each procurement—

“(A) the procuring agency;

1 “(B) the contractor;

2 “(C) the automatic data processing equipment
3 and services procured;

4 “(D) the manufacturer of the equipment pro-
5 cured;

6 “(E) the amount of the contract to the extent
7 that the amount is not proprietary information;

8 “(F) the type of contract used;

9 “(G) the extent of competition for award;

10 “(H) compatibility restrictions;

11 “(I) significant modifications of the contract;

12 and

13 “(J) contract price to the extent that the price
14 is not proprietary information.

15 “(2) The head of each Federal agency shall report
16 to the Administrator in accordance with regulations issued
17 by the Administrator all information required to be com-
18 piled by the Administrator under paragraph (1).

19 “(3) The Administrator shall—

20 “(A) carry out a systematic review and conduct
21 periodic audits of information received under this
22 subsection;

23 “(B) use such information as appropriate to de-
24 termine the compliance of Federal agencies with the
25 requirements of this section; and

1 “(C) have the option to suspend the delegation
2 to an agency of authority to lease and purchase
3 automatic data processing equipment upon any fail-
4 ure by the head of the agency to report to the Ad-
5 ministrator in accordance with this subsection.”.

6 **SEC. 10. POST-AWARD DEBRIEFINGS.**

7 (a) AMENDMENT TO OFFICE OF FEDERAL PROCURE-
8 MENT POLICY ACT.—The Office of Federal Procurement
9 Policy Act (41 U.S.C. 401 et seq.) is amended by adding
10 at the end thereof the following new section:

11 **“SEC. 29. POST-AWARD DEBRIEFINGS.**

12 “(a) DEBRIEFING.—When a contract is awarded on
13 a basis other than price alone, unsuccessful offerors, upon
14 their written request, shall be debriefed and furnished the
15 basis for the selection decision and contract award. Unsuc-
16 cessful offerors shall request such debriefing within 10
17 days after the contract award. Agencies shall debrief such
18 offerors within 10 days of such a request. Where such an
19 offeror requests such a debriefing, the time period for a
20 protesting party to obtain a suspension of the Administra-
21 tor’s procurement authority or delegation of procurement
22 authority under section 111(f)(2) of the Federal Property
23 and Administrative Services Act of 1949 (40 U.S.C.
24 759(f)(2)) shall be deemed to commence with the conduct
25 of the debriefing.

1 “(b) INFORMATION PROVIDED.—A debriefing under
2 subsection (a) shall provide to the offeror requesting the
3 debriefing—

4 “(1) the Government’s evaluation of the signifi-
5 cant weak or deficient factors in the offeror’s pro-
6 posal;

7 “(2) the overall evaluated cost of the awardee
8 and of the debriefed offeror;

9 “(3) the overall ranking of all offerors, and the
10 total technical and cost scores of all offerors;

11 “(4) a synopsis of the rationale for the award;

12 “(5) in the case of a proposal that incorporates
13 commercially available equipment, the make and
14 model of commercially available equipment incor-
15 porated in the proposal of the awardee; and

16 “(6) reasonable responses to questions posed by
17 the debriefed offeror as to whether source selection
18 procedures set forth in the solicitation, the source
19 selection plan, applicable regulations, and other ap-
20 plicable authorities were followed by the Govern-
21 ment.

22 “(c) INFORMATION NOT PROVIDED.—A debriefing
23 under subsection (a) shall not make point-by-point com-
24 parisons with other offerors’ proposals and shall not dis-
25 close any information that is not subject to disclosure

1 under section 552 of title 5, United States Code, including
2 information relating to—

3 “(1) trade secrets;

4 “(2) privileged or confidential manufacturing
5 processes and techniques; and

6 “(3) commercial and financial information that
7 is privileged or confidential, including cost break-
8 downs, profit, indirect cost rates, and similar infor-
9 mation.

10 “(d) NOTIFICATION OF DISCLOSURE.—Each solicita-
11 tion shall notify participating offerors that the categories
12 of information described in subsection (b) may be dis-
13 closed by the Government in post-award debriefings.

14 “(e) POST-AWARD INFORMATION.—If, within 12
15 months after an award, as a result of a successful procure-
16 ment protest or otherwise, the agency seeks to fulfill the
17 requirement under the awarded contract through either a
18 new round of proposals or best and final offers from
19 among the original offerors, the agency shall provide to
20 each such offeror—

21 “(1) all information provided in debriefings
22 under this section regarding the winning vendor’s
23 proposal; and

24 “(2) all comparable information with respect to
25 those offerors.

1 “(f) CONTRACT FILE.—The contracting officer shall
2 include a summary of the debriefing in the contract file.”.

3 (b) EFFECTIVE DATE.—The amendment made by
4 subsection (a) shall take effect 270 days after the date
5 of the enactment of this Act.

6 **SEC. 11. EFFECTIVE DATE.**

7 Except as otherwise provided in this Act, the amend-
8 ments made by this Act shall take effect 90 days after
9 the date of the enactment of this Act.

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