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Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and James F. Nagle

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¶ 52 BID PROTEST REMEDIES AND REMANDS: New Guidance From The Supreme Court

A special column by Nathaniel E. Castellano and Scott E. Whitman, colleagues in the government contracts practice at Jenner & Block LLP. Nathan previously served as a judicial law clerk to the Honorable Jimmie V. Reyna at the U.S. Court of Appeals for the Federal Circuit; Scott clerked for the Honorable Matthew H. Solomson at the U.S. Court of Federal Claims. The ideas presented here, particularly those that may prove to be in error, are the authors' own and should not be attributed to any other.

While the U.S. Supreme Court rarely grants *certiorari* in bid protests, its general administrative law decisions do impact protest practice. Two recent Supreme Court decisions carry significant implications for a typical bid protest remedy: remand. This article describes the current legal landscape for bid protest remedies and discusses the mechanics of remand considering the Court's recent guidance.

Bid Protest Remedies

It has been more than a quarter century since Congress passed the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, vesting the U.S. Court of Federal Claims (COFC) with jurisdiction to resolve bid protests using the same standard of review that applies to most administrative law cases. See 28 USCA § 1491(b). In that time, many important substantive and procedural aspects of protest law have developed and matured. That is particularly true where the U.S. Court of Appeals for the Federal Circuit has been willing and able to provide binding precedent. Given the Federal Circuit's exclusive, nationwide jurisdiction over procurement protests, the court is uniquely positioned to provide uniformity without the need for Supreme Court review. See *U.S. v. Hohri*, 482 U.S. 64, 71–72 (1987) (a "motivating concern of Congress in creating the Federal Circuit was the special need for uniformity in certain areas of the law," and the court "was designed to provide a prompt, definitive answer to legal questions in these areas" (internal quotations omitted)).

Despite the theoretical ease through which the Federal Circuit might provide a unifying legal framework, it is surprising how many aspects of bid protest law remain unsettled. Particularly glaring is the lack of binding precedent to dictate one of the most important issues of all: *remedy*.

The Federal Circuit confirmed in 2004 that even where the COFC finds prejudicial error in a procurement the court still retains discretion to determine the appropriate remedy and is not required to issue an injunction. *PGBA, LLC v. U.S.*, 389 F.3d 1219 (Fed. Cir. 2004), 46 GC ¶ 489. In 2011 the Federal Circuit confirmed that the COFC has broad discretion to " 'award *any relief* that the court considers proper, including declaratory and injunctive relief.' " *Turner Construction Co. v. U.S.*, 645 F.3d 1377 (Fed. Cir. 2011), 53 GC ¶ 245 (quoting 28 USCA § 1491(b)(2)). That is all nice to know, but serious questions remain: What is the full menu of bid protest remedies, and what standards apply when selecting and crafting the remedy in any specific case?

There are countless COFC decisions discussing and granting remedies in bid protests. There is no doubt as to the four-factor tests for preliminary and permanent injunctive relief. Almost any party can find a quote, or two, to suit its needs. But COFC decisions are not binding. And reading between the string cites, many opinions leave the impression that the remedy follows the merits: Although not automatic, if the court finds that the protester has shown prejudicial error, the court typically issues an injunction. Relatively few cases discuss remedies other than injunction.

The lack of meaningful precedent relating to bid protest remedies is often matched by a lack of meaningful briefing. (We leave the chicken-or-egg debate for another venue.) Protesters frequently ask the court to halt hundred-million and multibillion-dollar procurement programs with significant national security and public policy implications. Yet, despite submitting opening briefs weighing in at 50 pages (if not far more), it is not uncommon for the parties to devote only a few (mostly boilerplate) pages to remedy. Even then, the briefs typically only address the single remedy of permanent injunction, leaving other options unmentioned.

Judge Solomson's recent opinion in *IAP Worldwide Services, Inc. v. U.S.*, 160 Fed. Cl. 57 (2022), provides a detailed analysis of available bid protest remedies, ranging from declaratory relief, remand (with and without vacatur), injunctive relief, and bid and proposal costs. While COFC decisions typically focus on permanent injunctions that compel an agency to take or forgo certain actions, *IAP Worldwide* highlights the less coercive equitable remedy of remand. Through remand, once the court identifies prejudicial error in an agency action, the court sends the matter back to the agency with a degree of discretion to decide how to proceed. The court may or may not vacate the flawed decision pending remand and may order additional injunctive relief as appropriate in each case.

As discussed in a recent *Guest Appearance*, remand is an important aspect of the remedy that follows most successful protests before the Government Accountability Office and the COFC: "When a protester succeeds in establishing prejudicial error, the result is almost always that the agency is directed back to the drawing board to decide its next move," as neither forum will "usurp the agency's procurement function by dictating in the first instance how an agency should write its solicitation or which company should receive a contract award." Castellano, *Corrective Action and Voluntary Remand: Recent Developments at the GAO and the COFC*, 36 NCRNL ¶ 23. Remand is particularly common in protests due to the prevalence of "corrective action," where an agency invites remand to preemptively address protest allegations rather than investing resources to defend the litigation. 36 NCRNL ¶ 23.

But what are the rules for remand? If the court finds error in an agency's initial action, is the agency allowed to (or required to) take different action on remand? Can the agency repeat essentially the same action based on new justifications? What procedures apply? These are critical questions for agencies hoping to survive judicial review after remand, and for protesters concerned that an agency may use remand to simply write a better essay justifying its initial action. Conveniently, two recent decisions from the Supreme Court provide important answers to these questions.

Supreme Court Guidance On Remand

Two terms ago, the Court issued its decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), explaining that when a court finds an agency's explanation for its actions inadequate, the court may remand the matter back to the agency to either (1) provide a better explanation for its initial action or (2) take a new action altogether. The Court explained that, if the agency on remand chooses to stand by its initial action, the agency must stick to the reasons provided at the time of that action; if the agency takes a new action, the agency can provide new reasons, but must satisfy the procedural requirements needed to take that new agency action, emphasizing at 1907–08 (cleaned up):

> It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action. If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer a fuller explanation of the agency's reasoning at the time of the agency action. This route has important limitations. When an agency's initial explanation indicates the determinative reason for the final action taken, the agency may elaborate later on that reason (or reasons) but may not provide new ones. Alternatively, the agency can deal with the problem afresh by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

Regents involved the Department of Homeland Security's attempt to rescind an immigration program known as Deferred Action for Childhood Arrivals (DACA). Initially, DHS's decision to rescind DACA was memorialized in a 2017 memorandum issued by then-Acting Secretary of DHS, Elaine Duke (the “Duke Memorandum”). In the litigation that followed, one district court found the Duke memorandum inadequate and gave DHS the opportunity to take a new agency action with a better explanation. Instead of taking new action, DHS Secretary Nielsen, Duke's successor, issued another memorandum (the “Nielsen Memorandum”) providing new rationales for the actions of her predecessor. Accordingly, the Supreme Court rejected the Nielsen Memorandum as impermissible *post hoc* rationalization.

The outcome in *Regents* contrasts with the Court's decision this term in *Texas v. Biden*, 142 S. Ct. 2528 (2022). That case involved a challenge to the DHS decision to suspend the Migrant Protection Protocols (MPP) that provided for the return to Mexico of non-Mexican noncitizens who had been detained attempting to enter the United States illegally from Mexico. DHS suspended the MPP through a June 1, 2021 memorandum. Texas sued to challenge the suspension, and the district court vacated and remanded the decision memorialized in the June 1 memorandum, holding that it inadequately explained the decision to rescind MPP. Here, DHS chose the second path described in *Regents*, rescinding the June 1 memorandum and taking a new agency action to rescind MPP through two memoranda dated October 29, 2021. Although the October 29 memoranda adopted essentially the same policy as the rescinded June 1 decision, the October 29 memoranda identified new rationales for doing so, specifically addressing the issues that the district court had identified in the June 1 memo.

The Supreme Court upheld the October 29 DHS decision, distinguishing *Regents* and confirming that because DHS chose to take new action on remand, there was no problem with the introduction of new justifications, 142 S. Ct. at 2544–46 (cleaned up):

> [T]he Secretary selected the second option from *Regents*: He accepted the District Court's vacatur and dealt with the problem afresh. The October 29 Memoranda made that clear by its own terms, in which the Secretary stated: "I am hereby terminating [the program]. Effective immediately, I hereby supersede and rescind the June 1 memorandum." And consistent with that approach, the October 29 Memoranda offered several new reasons absent from the June 1 Memorandum, including an examination of the considerations that the District Court determined were insufficiently addressed in the June 1 memo.
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> [R]espondents characterized the October 29 Memoranda as *post hoc* rationalizations of the June 1 Memorandum under our decision in *Regents*.…
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> The prohibition on *post hoc* rationalization applies only when the agency proceeds by the first option from *Regents*.… By contrast, as noted above, the Secretary here chose the second option from *Regents*, and dealt with the problem afresh by taking new agency action. That second option can be more procedurally onerous than the first—the agency must comply with the procedural requirements for new agency action—but the benefit is that the agency is not limited to its prior reasons in justifying its decision. Indeed, the entire purpose of the October 29 Memoranda was for the Secretary to issue a new rescission bolstered by new reasons absent from the June 1 Memorandum—reasons that he hoped would answer the District Court's concerns from the first go-round. Having returned to the drawing table and taken new action, therefore, the Secretary was not subject to the charge of *post hoc* rationalization.

These opinions have several important implications for bid protest practice.

Implications

First, taken together, *Regents* and *Biden* confirm that remand is appropriately included in the menu of remedies available in administrative law cases—like bid protests. On the heels of these decisions and *IAP Worldwide*, protest counsel should carefully consider the appropriate type and scope of remedy in each case. Although remand may not be adequate or appropriate in every case, as Justice Kavanaugh noted in his concurrence and partial dissent in *Regents*, at 1934: "the ordinary judicial remedy for an agency's insufficient explanation is to remand for further explanation by the relevant agency personnel."

Second, on remand, it is critically important whether an agency chooses to (1) provide further explanation for its initial action, or (2) takes a new action. For an agency that chooses to truly change course, the second route is likely necessary. Where an agency uses remand to reaffirm its initial position, the distinction is more significant. For some procurement decisions, there may be no additional administrative burden in taking the second path. For example, if a decision is vested within the sole discretion of a Contracting Officer, it may be relatively easy for an agency on remand to bolster its initial position by having the CO document a new decision that introduces new rationales. However, some procurement decisions may entail significant procedural requirements, for example, if the solicitation dictates specific procedures to accompany a certain decision. In those cases, the agency will have to decide whether the administrative burden of following those requirements is worth the additional flexibility provided taking new action.

Finally, don't hesitate to look beyond COFC and Federal Circuit precedent when analyzing remedy—or any issue of administrative law that arises in bid protest practice. As demonstrated in *IAP Worldwide*, there is a wealth of relevant out-of-circuit precedent available to assist the parties and the court in this regard. And, as shown by *Regents* and *Biden*, the protest bar should not neglect the Supreme Court's docket. When the next question of bid protest remedy is inevitably appealed (or any issue of general administrative law), the Federal Circuit may be more interested in aligning with the Supreme Court and its sister circuits than accommodating any protest-unique practices that have developed at the COFC over the past quarter-century. *Nathaniel E. Castellano and Scott E. Whitman*

