

## Top Gov't Contracts Cases from the 2nd Half of 2018

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Franklin C. Turner

Courts have handed down a number of important decisions for federal contractors in the second half of 2018, with the Federal Circuit having been particularly busy, addressing issues ranging from an important federal preference law to how specific agency corrective action must be.

#### **Agencies Have Broad Discretion When Taking Corrective Action**

In October, the Federal Circuit backed the U.S. Army's broad corrective action for its \$5 billion Army Desktop Mobile and Computing procurement, a program to buy commercial off-the-shelf computer hardware.

The Army had faced a raft of protests from unsuccessful bidders, with only nine of 58 bidders considered to have made technically acceptable bids. The excluded bidders argued that they had misunderstood the requirements for filling out Army-provided spreadsheets, and that the Army should have conducted pre-award discussions to offer additional guidance.

In response, the Army effectively issued a resolicitation allowing for new proposals with new pricing, which then prompted new protests from the originally successful bidders, including a unit of computer hardware giant Dell. Those bidders argued that because their pricing had already been publicly revealed, they would be put at a competitive disadvantage in the new round of bidding. The corrective action should have been much narrower, the bidders said.

But the "narrowly targeted" standard used by the claims court was too strict, the Federal Circuit ruled, saying the Army's corrective action only had to be "rationally related" to fixing its mistakes.

Franklin Turner, co-leader of McCarter & English LLP's government contracts practice group, said that although the shift may be notable, the practical difference may be small.

Whatever the articulated standard, agencies have always had broad discretion to fashion corrective action, as long as they can show a reasonable nexus between a procurement defect and the intended correction, he claimed.

"This just rubber stamps what most bid protest lawyers will tell you — protests about corrective action are always a long walk uphill, in the snow, without any shoes," Turner said.

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