

## Contract Rush Yet To Fully Filter Through Bid Protest System

By **Daniel Wilson**

*Law360 (May 7, 2020, 7:48 PM EDT)* -- A spate of urgent procurements in response to the ongoing pandemic means that the bid protest system could be tested if there is an increase in the number of challenges to the way contractors are being chosen.

As the federal government has worked to keep cash flowing to suppliers and prevent critical programs from being disrupted — especially at the U.S. Department of Defense — federal contractors and their attorneys have been increasingly busy, Crowell & Moring LLP counsel Christian Curran said.

That hasn't necessarily translated to new protests being filed in response just yet. Curran said that he had seen an uptick in protests in his practice since the pandemic began, but a Wiley Rein LLP tracker for cases filed at the U.S. Government Accountability Office shows that the volume of bid protests filed last month were the lowest for April since at least 2016, dropping from the previous April by about 25%.

Kenneth Patton, the GAO's managing associate general counsel for procurement law, said that the GAO doesn't provide partial or interim data about its bid protest numbers ahead of its annual report, usually released in November, but noted that "the numbers throughout the year fluctuate, and they do that for every year."

What remains to be seen is the impact of the wave of new emergency acquisitions — new contracts issued directly in response to COVID-19, rather than unrelated existing procurements that are being sped up to get cash flowing — which are yet to start filtering through the bid protest system.

The urgency in getting pandemic-related contracts out the door could see agencies cutting corners they wouldn't otherwise have cut, which comes along with the increased potential for procurement errors — and therefore protests, according to Morrison & Foerster LLP associate James Tucker.

Tucker noted that the GAO moved its filing process exclusively to a paperless online system several years ago and only rarely holds hearings in normal circumstances anyway, both of which have helped to minimize the impacts to bid protests from COVID-19.

"GAO attorneys are going to be used to this, and the outside counsel who are handling the protests ... likely have the wherewithal to handle the technical side," he said.

Even emergency deals that are as thorough as possible in the limited time frame available will often still

require contracting officers to use the type of contracting tools that invite protests, Crowell & Moring's Curran noted.

"Those acquisitions are just hitting their full stride, but as you can imagine, there's going to be all sorts of impacts there, like agencies overriding [Competition in Contracting Act] stays more frequently, and the increased use of sole-source procurement and circumvention of full and open competition," he said. "So we would expect to see some protest activity in that area soon and as the year progresses."

But potential protesters may also let things slide that they would protest in normal times, given the unusual circumstances posed by the pandemic, according to Paul Khoury, co-chair of Wiley Rein LLP's government contracts practice.

"This is just my sense, but it really doesn't make sense to slow down the government from buying what it needs to deal with this crisis," Khoury said. "The last thing any company wants to be perceived as is somebody who's preventing the government from quickly doing what it needs to do to help us through this crisis."

For now, the GAO, Court of Federal Claims and agency appeal boards appear to be unaffected by the difficulties that the pandemic has posed for some courts, such as technical struggles for those unused to online filing or telephone conferences.

The GAO, which handles the vast majority of federal bid protests, recovered quickly after some initial slowness in responses to filings when federal employees first began working from home in March, Tucker said.

Even in the rare instances where the GAO needs to host a telephone conference, case participants are being mindful of the unusual circumstances and that everyone is in the same boat, according to Curran.

"You lose something intangible when you're not there in front of the adjudicator and the witness, but I think parties are being respectful of one another in terms of telephonic protocols, and as long as that's the case, those things tend to work pretty well," he said.

Patton said that from the GAO's perspective, the transition to the majority of its Washington, D.C.-based staff teleworking had also been smooth.

"We are all trying to keep track of the daily news with regard to what the rest of the country is doing to manage in the pandemic, but as far as GAO's bid protest forum goes, I don't believe we've had any problems that will impede our ability to resolve protests within 100 calendar days," he said.

The GAO has only missed that 100 calendar day deadline during government shutdowns and Patton noted that the agency still resolved delayed protests within the mandated 100 days not including the days relevant parts of the government were shut down, and believes it has never missed its statutory deadline.

For the Armed Services and Civilian boards of contract appeal, which like the GAO rely largely on documents filed in their dockets, cutting out hearings might even help with more timely decisions, Tucker said.

"It'll be interesting to see for appeals where all the papers have been submitted already whether the

lack of hearings, or at least the lack of in-person hearings, will free up time," he said. "We may even see a speed-up in resolution of board of appeals cases that are proceeding just on the papers."

The bid protest venue most affected by social distancing requirements is the Court of Federal Claims, where in-person hearings and oral arguments are a standard part of proceedings. Some judges have seemed uncomfortable with holding hearings over the phone, and have tried to punt scheduled hearings to the future, anticipating being able to hold hearings in person again.

But for the claims court judges who have decided to push forward with phone conferences, technical issues have been minor, mostly limited to parties falling off of the line mid-call or the court's phone lines getting jammed.

Also, protests at the claims court naturally move slower than GAO protests anyway, so any delays caused by COVID-19 don't seem to have had a measurable impact so far on how quickly protests are being resolved, Fox Rothschild LLP partner Nicholas Solosky said.

Instead, the biggest challenge for bid protest practitioners has been the inability to read the room, and more importantly, the judge.

"The judges have continued to intervene as necessary during arguments ... but it's a little bit harder to read a judge or adjudicator when you're not in the room with them," Curran said.

--Editing by Breda Lund.