



GAO Protests Reach New High In 2011 Despite Slower Growth

By **Dietrich Knauth**

Law360, New York (March 14, 2012, 8:51 PM ET) -- The number of protests filed in the U.S. Government Accountability Office continued to rise in 2011, reaching a new high of 2,353 protests despite slower growth than in recent years, according to statistics published Tuesday.

After sharp increases of 16 to 20 percent every year from 2008 to 2010, the number of protests filed increased by just 2 percent between 2010 and 2011. Government contracts attorneys credited at least some of the rapid increases between 2008 and 2010 to a law that gave the GAO exclusive jurisdiction over protests based on task orders worth \$5 million or more.

And in the face of federal budget cuts, contractors are more and more likely to file protests in order to keep their share of a shrinking number of opportunities, according to attorneys.

"Even beyond the task order protests, I think more and more people are seeing the benefits of bringing protests in GAO," said Dan Herzfeld of Pillsbury Winthrop Shaw Pittman LLP's government contract and disputes practice.

The slowing growth could be "just be a one-year blip, or it could be that it's just reached a saturation point," he said.

John Chierichella, a partner in Sheppard Mullin Richter & Hampton LLP's government contracts practice, also said that one year does not make a trend. With tepid economic growth and the projected decrease in contracting opportunities, Chierichella said he would be shocked if 2012 didn't see an even further increase.

Crowell & Moring LLP partner Dan Forman said that the leveling off of the GAO's numbers was more than offset by rapid increases in the number of bid protests heard in the U.S. Court of Federal Claims. There were 98 protests filed in the COFC in 2011, up from 68 in 2005, and the court published 73 decisions in 2011.

"One of the reasons that GAO's numbers are leveling off a little bit may be that parties are taking advantage of the [COFC]," Forman said. "As much as the GAO's numbers are high, the court's numbers are starting to spike."

Forman said that he's seen an increasing trend of contracting going to the COFC after being unsatisfied with GAO decisions, often winning cases that they initially lost. Because of the successes there, Forman said he expects that trend to continue as companies seek to copy those legal successes.

The GAO itself has become more friendly for contractors in at least one way by loosening its former outlook on when contractors should be disqualified because of organizational conflicts of interest, Chierichella said.

In two 2011 decisions, *In the Matter of Raytheon Co.*, file number B-404998, and *In the Matter of VSE Corp.*, file number B-404833.4, the GAO required "hard facts" to back up allegations that conflicts tainted a procurement, rather than merely creating the appearance of impropriety.

In the Raytheon case, decided in July, the GAO dismissed a protest that a contract awardee had "unequal access to information" after finding that the agency conducted an investigation and reasonably concluded that the awardee did not have access to nonpublic information that would provide it a competitive advantage in the procurement.

In the VSE case, the GAO sustained a protest of a contract cancellation, ruling that the record did not support a contracting officer's determination that an appearance of impropriety had been created by the protester's hiring of a former government employee as a consultant.

The GAO seems more willing to engage with contractors and look at the facts behind alleged OCIs rather than using the appearance of impropriety to automatically disqualify contractors, according to Chierichella.

"I think that's a positive impact — you shouldn't have the award being upset based on supposition," he said.

The GAO also reported that the percentage of protests that it sustained, resulting in favorable written decisions for contractors, dropped from 27 percent in 2007 to 16 percent in 2011. But while the sustainment rate dropped, the GAO's effectiveness rate, which includes both outright wins and other contractor relief, reached through settlement or alternative dispute resolution, actually rose slightly over the same period, from 38 percent in 2007 to 42 percent in 2011.

"ADR often persuades agencies to take corrective action, which can be effective, without requiring GAO to issue a written decision sustaining the protest," Chierichella said. "The number of cases in which contractors get some form of relief has been pretty steady."

--Editing by Andrew Park.

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