

## Pentagon Seeks to Shake Up Bid Protest Jurisdiction

By Dietrich Knauth

*Law360, New York (May 15, 2012, 8:10 PM ET)* -- The Defense Department is pushing for legislation that would force contractors to choose between the U.S. Government Accountability Office and the Court of Federal Claims in bid protests, rather than allowing them to approach the court after getting an unfavorable decision from the GAO.

The Department of Defense included the proposal in its April 25 legislative requests for the 2013 National Defense Authorization Act, which is being considered by the full House of Representatives this week. The proposal would amend the Tucker Act by applying the GAO's timeliness rules for filing protests to the Court of Federal Claims — giving contractors just 10 days to file a protest in either forum after discovering grounds to protest a contract award.

The change would also make clear that "under no circumstances may the Court of Federal Claims consider a protest that is untimely because it was first filed with the Government Accountability Office."

The DOD argued that allowing protests to proceed first in the GAO then again in the court leads to duplicative litigation and disrupts GAO precedent by submitting it to review by individual judges in the court.

"While this process favors few fortunate protesters, it is increasingly the case that COFC decisions are issued that are at odds with longstanding GAO precedent," the Pentagon said in the request. "This plays havoc with the predictability of the procurement system because [GAO's] decisions have precedential value, while the decision of any individual COFC [judge] does not. Also, this chaotic process greatly lengthens the time required to resolve a protest, which translates into increased costs for the procuring agency."

The change was not included in the House Armed Services Committee's markup of the bill, perhaps because changes to jurisdiction under the Tucker Act are within the purview of the Judiciary Committee, not the Armed Services Committee, according to James G. Peyster of Crowell & Moring LLP, who wrote about the request for the law firm's government contracts blog.

While the request faces an uphill battle to make it into law, the issue is not dead, and the DOD proposal shows someone in the military is concerned about high-profile cases protestors lost at GAO and won at COFC, according to Jason A. Carey, a partner in McKenna Long & Aldridge LLP's government contracts practice.

It is relatively rare for a protester to lose at GAO then go to the Court of Federal Claims, and the DOD over-reacted in trying to completely overhaul a protest system that's been in place for decades, Carey said.

"I think that the rationale from DOD vastly overstates the problem, if there even is a problem to begin with," Carey said. "The DOD is trying to kill a gnat with a sledgehammer."

One recent high-profile decision in which the COFC reached a different ruling from the GAO, *Turner Construction v. US*, shows that a contrary COFC decision will not lead to a split in GAO and COFC precedent, because GAO started taking a new look at its organizational conflict of interest rulings after the Turner decision, according to Carey. That case also would not be directly addressed by the proposed changes, because the Court of Federal Claims case was initiated not by a losing protestor, but by the original contract winner, who protested the agency's decision to follow GAO's advice.

In its legislative proposal, the DOD expressed concerns about the delays caused when agencies must deal with repeated protests of the same contract award, but the changes also could delay resolution of awards by forcing more cases into the Court of Federal Claims, Carey said.

The GAO has an automatic stay for protested contract awards and resolves cases within 100 days, while protests in the COFC generally take four to six months, Carey said. In addition, increasing the Court's workload could bog down its dockets and exacerbate the delays, he added.

Contractors filed 2,355 protests with GAO in 2011, versus 98 in the COFC, in part because of the GAO's faster resolution and streamlined procedures.

While 10 days is long enough for contractors to prepare a protest in GAO, which generally requires submission of a protest letter by email, it is an "incredibly short time" to develop an argument and draft a complaint for the more formal COFC, Carey said. Without an automatic stay, a contractor also would have to rush to prepare a motion to enjoin a contract award, with supporting legal briefs.

"The court is much more procedurally complex," Carey said.

The Army estimated that it would save \$2 million a year if the protest rules are changed, based on what it spent in cases that were protested in both the GAO and COFC over the past three years.

--Editing by Richard McVay.