



Revising The Tucker Act: Changes For The Better?

Law360, New York (June 07, 2012, 12:48 PM ET) -- On April 25, 2012, the U.S. Department of Defense submitted proposed legislation to the House Armed Services Committee for consideration in the 2013 National Defense Authorization Act that would dramatically amend the Tucker Act, 28 U.S.C. § 1491(b), by importing essentially all of the U.S. Government Accountability Office's rigid timeliness rules with regard to bid protest actions and applying them to protests filed before the U.S. Court of Federal Claims.

Among the GAO timeliness rules currently contained in 4 C.F.R. § 21 that the DOD proposed to be added to the Tucker Act and apply to the COFC are:

- the absolute rule that pre-award solicitation challenges must be filed before the submission date for proposals;
- the rule that any post-award protest must be filed within 10 days of when an offeror knows or should have known of the basis for protest, unless subject to a mandatory debriefing, in which case the protest must be filed within 10 days of that debriefing, and;
- in the event that an agency protest has been filed, the rule that a COFC protest must be filed within 10 days of when the offeror knew or should have known of the adverse decision in the agency protest.

Moreover, there is no provision which would toll the time to file a COFC protest until after the completion of GAO litigation. Instead, prospective protesters will be forced to pick one forum or the other and will not have the opportunity for a "second bite at the apple."

Legislative Rationale

The stated purpose of this provision is to put an end to the practice of a contractor litigating a protest at GAO and then going to the Court of Federal Claims for a second bite at the apple. According to the rationale supporting the proposed legislation, the status quo creates delay and conflicting precedent which creates chaos for procuring agencies:

Under the existing statutory arrangement, a protester may file a GAO protest, litigate it fully, and if disappointed, commence the entire process anew before the COFC. There, because of different procedural rules and a different standard of review, a protester may obtain the success that eluded it before the GAO. 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. This plays havoc with the predictability of the procurement system because GAO decisions have precedential value, while the decision any individual COFC 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 validity of this rationale is questionable. First, the bill's primary focus on addressing the proliferation of conflicting precedent seems barely furthered by amending the COFC's timeliness rules. While it may be true that GAO and the COFC will have fewer occasions on which to reach opposing conclusions in decisions on the same protest argument in the same procurement, nothing in the proposed timeliness rules lessens the likelihood of the GAO and the COFC reaching substantially different — or even conflicting — legal conclusions in similar cases. Agencies will still have to contend with the challenges presented by having two independent forums with concurrent jurisdiction. Forum shopping on an issue-by-issue basis cannot be avoided by tweaking timeliness rules.

Second, the proposed revisions to the Tucker Act do not fully address the “second bite at the apple” concern because they do not cover the growing number of circumstances in which an initial awardee who loses at the GAO turns around and files a COFC protest challenging the procuring agency's decision to abide by the GAO recommendation. Recent decisions in *Turner Construction Co. v. United States*, 94 Fed. Cl. 561 (2010), *aff'd*, 645 F.3d 1377 (Fed. Cir. 2011), and *Jacobs Technology Inc. v. United States*, 100 Fed. Cl. 198 (2011), are two such cases.

In both, GAO sustained a protest and then the initial awardee whose award was disrupted by the GAO decision attacked the procuring agency's adherence to the GAO recommendation in a new COFC action. As COFC protesters in cases like these have not filed a prior GAO action and are challenging a separate procurement action from the initial awards, their right to protest would not be affected by the fact that the GAO had heard another part of the case previously.

Likelihood of Passage

It is difficult to speculate with any precision about the chances of final passage. Although the DOD proposed that the Tucker Act amendment be included in the committee mark version of the 2013 NDAA, the provision was ultimately not included. One possible basis for this is because title 28 statutes, such as the Tucker Act, are within the purview of the Judiciary Committee, not the Armed Services Committee. It is unclear at this time if and when the Judiciary Committee will consider the proposed legislation and in what form it might find its way into a future bill.

Potential Impact If Passed

In addition to the stated legislative purpose, if passed, the proposed amendments to the Tucker Act could have a number of potential impacts. Whether these impacts are intended or not is up for debate.

First, by altering the Tucker Act to effectively create a 10-day statute of limitations on bid protest actions, the proposed legislation will eliminate an entire class of protests entirely. Sometimes contractors — particularly those without prior protest experience — will either not make the decision to litigate until after the 10 days has passed or will be slow to recognize the significance of information in their possession. For these litigants, the GAO's timeliness rules have always foreclosed one avenue of protest, but the six-year statute of limitations of the Tucker Act afforded a second option. Under the new rules, which are nominally aimed at eliminating “second bite at the apple” protests, many prospective protesters will be denied a “first bite.”

Second, some commentators have speculated that these amendments will have a significant effect on the respective case loads of the GAO and the COFC. But there are likely too many variables to make such predictions with any confidence. Even with its more flexible timeliness rules currently in place, there were only 98 protests filed at the COFC in 2011, as opposed to 2,353 at the GAO.

While the barring of “second bite at the apple” protests would have eliminated many, if not most, of the 98 COFC protests in 2011, surely some of the protesters that filed at the GAO and received a successful outcome (thereby eliminating the need for a “second bite” at the COFC), if forced to make an either/or decision, would have chosen to initiate their protest at the COFC over the GAO because of the right of appeal promised by the COFC. Thus, the COFC will lose one group of protests but stands to gain another. The exact sizes of these groups is difficult to project. Ultimately, however, it is unlikely that masses of protesters will chose the COFC over the GAO because the proposed legislation will not affect the GAO’s advantages of being the less-expensive and less-formal forum.

Third, there has been some speculation, including within the GAO, that the amended Tucker Act would cause a shift in the types of cases that end up at the COFC. The theory goes that most large-scale protests would end up at the COFC because of the benefit of an appeal option to the Federal Circuit, while the GAO would become the forum for smaller protests because of cost, flexibility, and the increased chance for recovery of fees. But this seems somewhat unlikely. the GAO still maintains the key advantage of the automatic stay of performance guaranteed by the Competition in Contracting Act, 31 U.S.C. § 3553.

The “CICA stay” preserves the equities automatically and can only be overridden in exceptional cases, whereas the procedural equivalent at the COFC, a preliminary injunction, is only granted in “exceptional” circumstances. The CICA stay is important to all protesters because of its effect of preserving the equities, but it is particularly vital to incumbent contractors protesting the loss of a follow-on contract, because it generally ensures 100 days of additional contract performance, and the profits that come with it.

Beyond the CICA stay, another factor that will dissuade protests of large-scale procurements from abandoning the GAO is the difference in procedural rules and policies at the two forums. The COFC tends to operate within a rigid framework of rules designed for general litigation rather than bid protests. COFC briefs are usually subject to tight page-limit requirements, while GAO briefs are not.

Moreover, the COFC almost never conducts factual hearings and has rigid policies about supplementation of the administrative record with testimonial evidence. On the other hand, the GAO routinely conducts hearings when deemed necessary and considers a wide array of evidence not within the “administrative record,” narrowly defined.

While the COFC is more than capable of handling large, multi-issue, factually complex protests if certain rules and restrictions are either waived or relaxed, the procedural decisions necessary to assure a comprehensive review are made on a case-by-case basis after a complaint has been filed. For many prospective protesters, the risk of being denied the flexibility necessary to fully develop a broad slate of protest issues at the COFC will act as a powerful deterrent and, concomitantly, a draw toward the GAO.

Conclusion

At bottom, the proposed legislation seems poorly suited to accomplish many of its stated goals. While it will substantially reduce the number of COFC protests filed in reaction to a GAO decision, it will not eliminate all of them. Moreover, these “second bite at the apple” protests represent such a small portion of the overall bid protest docket — maybe 2 or 3 percent — that the cost savings to the government will be limited. The legislation will do nothing to remedy the DOD’s concern about conflicting precedent, but will have the seemingly unintended consequence of closing the door to certain protesters entirely.

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