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DOD Proposes a Legislative 'Fix' for Something That Isn't Broken

BY KEN WECKSTEIN AND TAMMY HOPKINS

Another year, another legislative proposal to Congress from the Department of Defense to amend the Tucker Act to eliminate the jurisdiction of the U.S. Court of Federal Claims (''COFC'') over so-called ''second-bite'' protests—those first heard at the Government Accountability Office.[1] The DOD floated a similar proposal last year in connection with the National Defense Authorization Act (''NDAA'') for fiscal year 2013, but to no avail.[2] This year, the proposal appears to be headed for the same fate, at least as far as the NDAA for FY 2014 (''2014 NDAA'') is concerned.[3]

Under the current bid protest regime, a disappointed bidder in a federal government procurement can, subject to certain timeliness rules, file a bid protest before the GAO. If the protester is not satisfied with the resolution at the GAO, the protester can pursue a bid protest before the COFC regarding the same procurement. This COFC case is not an appeal of the GAO decision. Rather, it is a fresh look at the agency decision. That COFC decision can, in turn, be appealed to the U.S. Court of Appeals for the Federal Circuit.

The legislative proposal would make protests before the COFC subject to same timeliness rules that apply at GAO. DOD also would add the following language to the Tucker Act: ''Under no circumstances may the [COFC] consider a protest that is untimely because it was first filed with the [GAO].''[4] Basically, the legislative proposal would give protesters a choice: file at GAO or court. Lawsuits in court after a GAO protest would be verboten.

DOD's legislative proposal aims to solve a ''problem'' that appears to be significantly overstated: ''second bite'' protests that supposedly interfere with federal procurements. The DOD explains:

> The expeditious resolution of protests is greatly hindered by the ability of a protester to seek redress at GAO and, faced with a negative outcome, then seek another review of the agency's actions by filing a protest at the COFC.''[5]

But riddle me this: How many ''second-bite'' protests are there? Are we talking massive numbers? And how many second bite protests are sustained? The proposal is silent.

In reality, there just aren't that many second bite protests. Indeed, Daniel Gordon, formerly in charge of GAO's bid protest unit, suggests in a recent article that protests are relatively rare overall, when considered in the context of the number of federal procurements that

[1] *See* DOD's Proposed 2014 NDAA, § 805 (Sent to Congress on April 26, 2013), at: http://www.dod.gov/dodgc/olc/legispro14.html.

[2] *See* DOD's Sixth Package of Legislative Proposals for NDAA for Fiscal Year 2013, at § 817 (Sent to Congress on April 25, 2012), at: http://www.dod.mil/dodgc/olc/legispro13.html.

[3] H.R. 1960 passed the House on June 14, 2013, and S.1197 was introduced in the Senate on June 20, 2013, without DOD's proposed changes to COFC's jurisdiction. (But, DOD's proposal was in S.1034 introduced in May 2013).

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[4] *See* DOD's Proposed 2014 NDAA – Bill Text, § 805(a)(2)(D).

[5] *See* DOD's Proposed 2014 NDAA, Section-by-Section Analysis at 139.

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are not protested.[6] In that article, Mr. Gordon characterizes the evidence of substantial procurement delays caused by COFC ''second-bite'' protests as ''so thin . . . that this cannot legitimately be seen as a significant cost of the bid protest system.''[7]

Potential Downside. Moreover, forcing protesters to choose between GAO and the COFC can have a downside. While the proposal assumes that eliminating the opportunity for COFC review after a GAO protest will reduce the time and cost spent resolving protests, that result is far from clear. Under DOD's proposed approach, protesters that selected GAO as a forum would have to be content with GAO's non-binding recommendation to the agency, with no additional recourse. Faced with that option, more protesters may elect to go to the COFC, which offers an avenue for appellate review, but unlike GAO, does not offer an automatic stay and is not subject to a 100-day deadline for protest resolution.

The result could be a more crowded docket at the COFC, the need for more resources from the Department of Justice to defend protests, and longer periods before (and perhaps greater disruption upon) final protest resolution—all while sacrificing the valuable role that GAO plays in the procurement system. GAO's procurement attorneys are experts who focus exclusively on procurement issues. Protests often are resolved at GAO in less than 100 days by an agency's voluntary decision to take corrective action, a protester's decision to withdraw its protest after early document production and/or the agency report is made available, or by GAO's use of ADR-type procedures to steer agencies and protestors to a proper result without a full-blown litigation. Those benefits would be lost if protesters are forced to elect to file protests at the COFC to avoid giving up their ''appeal'' rights.

Additionally, no one, including GAO itself, would argue that its decisions are always right. The concept of eliminating a right of further review/appeal—the so-called ''second bite'' protest—is foreign to due process and our procurement system.

DOD does not like any protests. We get that. But the integrity of the procurement system is enhanced by the current system of GAO and, in some cases, COFC review.

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[6] Daniel I. Gordon, ''Bid Protests: The Costs are Real, but the Benefits Outweigh Them,'' 42 Pub. Contract L.J. 489, 506 (Spring 2013).

[7] *See* n.6.

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