

Anticipating How GAO Pleading Standards May Shift

By **Lucas Hanback and Timothy Wieroniey** (January 17, 2025)

On Dec. 23, 2024, President Joe Biden signed the fiscal year 2025 National Defense Authorization Act into law, which includes a provision that requires the U.S. Government Accountability Office to develop a proposal to apply enhanced pleading standards in protests challenging U.S. Department of Defense procurements.[1]

This could alter the choice of forum for DOD protests moving forward.

DOD bid protests are generally handled either by the GAO or the U.S. Court of Federal Claims. The vast majority of bid protests are currently filed at the GAO because filing at GAO provides a few distinct advantages.

First, a protest at the GAO provides an automatic stay of the contract award under the Competition in Contracting Act.[2] Second, GAO protests tend to be less costly and resolve more expeditiously.[3] Third, the GAO's fee provision allows for the GAO to recommend that the agency pay a successful bidder's costs if the agency changes its position as a result of a protest.[4]

The new mandate to create an enhanced pleading standard, however, may change the calculus for filing at the GAO when challenging a DOD procurement. This article explores what the enhanced pleading standards could look like and the impact on bid protest strategy.

Current Pleading Standards for GAO Protests

GAO protests have no specific format, absent a written requirement, but should "be concise and logically arranged, and should clearly state legally sufficient grounds of protest," according to statute.[5]

The GAO also imposes a requirement of factual sufficiency.[6] A protestor alleges a legally or factually sufficient ground of protest when it provides allegations or evidence sufficient for the GAO to reasonably conclude that a violation of statute or regulation has occurred.[7] Mere speculation is insufficient and will result in the dismissal of the protest.[8]

Currently, an initial DOD protest at the GAO is typically based on information that is either publicly available, known to the protestor, or provided as part of the debriefing information.[9] This information is almost always incomplete.

Before this new mandate, a protestor needed only to provide enough information to state a legally and factually sufficient protest and get to the agency report, which provides a more complete record of the agency's decision-making. This streamlined process tends to be more cost-effective than a protest at the Court of Federal Claims, in part because the GAO would hear factually and legally sufficient protests and issue a decision within 100 days as required by statute. But this may be about to change with the fiscal year 2025 NDAA.



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GAO's New Mandate

Section 885 of the 2025 NDAA directs the comptroller general, in coordination with the secretary of defense, to submit a proposal within 180 days that provides a process for "enhanced pleadings standards." [10]

The NDAA states,

the Comptroller General shall apply enhanced pleading standards ... to an interested party with respect to a covered protest submitted by such interested party for which such interested party is seeking access to administrative records of the Department of Defense, prior to making a determination with respect to such access. [11]

Coupled with that requirement are provisions that would award costs to the agency and lost profits to the awardee should the protest fail and an increase in the bar on the GAO's task order jurisdictional threshold from \$25 million to \$35 million for DOD procurements.

The impetus behind establishing new GAO pleading standards may be to ensure that it continues to uphold Congress' intent in CICA that the agency "shall provide for the inexpensive and expeditious resolution of protests." [12] But, this mandate signals an intention that DOD protests are disfavored.

Bid protests, however, help protect the public fisc. This function is sometimes in tension with the desire to rapidly procure goods and services that are critical to the nation's defense infrastructure. But, ultimately, bid protests have a negligible impact on that goal, while adequately protecting the integrity of the procurement system. [13]

Potential Impact

Though at this stage, the NDAA only requires the GAO to submit a proposal for enhanced pleading standards within 180 days, it is a clear signal Congress desires change in the current bid protest environment. As a result, the GAO may soon apply greater scrutiny to initial protest filings. [14]

This could be problematic for protestors because initial protests are virtually always based on incomplete information, with the agency withholding significant portions of the rationale for the decision. Right now, the GAO can defer ruling on a dismissal request until after the release of the agency report. But Section 885's mandate will, if fully implemented, apply enhanced pleading standards "prior to making a determination with respect to" access to the administrative records of the DOD. [15]

Such enhanced pleading standards will increase opportunities for intervenors and the agency to request dismissal, which may be more generously granted. This could render the GAO a less favorable forum for disappointed bidders in DOD procurements.

DOD Bid Protest Strategies Going Forward

In light of this potential shift in policy, the most beneficial tactic for a protestor will likely soon be filing at the Court of Federal Claims in the first instance to avoid the GAO's new enhanced pleading standards.

The biggest advantage for protesters at the Court of Federal Claims under this new paradigm could be the court's scheduling orders. At the court, it is possible to have the

administrative record released prior to briefing on motions to dismiss for failure to state a claim, and those motions themselves are decided under a standard where the court must construe the allegations favorably to the pleader.[16]

The court's rules require the production and certification of a fulsome and certified record and mandate holding an initial status conference where it sets a date for production of the record "as soon as practicable after the filing of the complaint." [17] Court of Federal Claims precedent requires the agency to produce the full record.

In past decisions, the court has indicated an unwillingness to dismiss where the record is not complete.[18] As a result, protestors can ensure they have access to the whole administrative record,[19] not just the documents that the agency chooses to release as is practice at the GAO.

There is already the potential opportunity for a protestor to file with the Court of Federal Claims in areas where the court has construed the law on protest grounds more favorably in the past than the GAO.

Another benefit of filing a protest at the court is the availability of oral arguments. Whereas the GAO held a hearing in one case in 2024,[20] the court readily holds oral arguments in bid protests. In these DOD procurements, especially those with complex technical evaluations, it can be critically helpful to be able to have the time to explain more thoroughly the impact the allegedly flawed evaluation had on the ultimate procurement decision for a protestor.[21]

Now instead of filing discrete challenges to procurements at the GAO, protestors may file Court of Federal Claims complaints with broader allegations of misconduct by the agency.[22] This is not necessarily advantageous to the DOD as the court does not have a hard 100-day deadline to decide protests, and it requires fulsome production of an agency record. This could ultimately slow down DOD's ability to award contracts and have the opposite impact than the NDAA provision intends.

Conclusion

It remains to be seen what the GAO's proposed enhanced pleading standards will look like. But harsh enhanced pleading standards will likely shift protests to the Court of Federal Claims. DOD contractors should closely monitor any developments and adapt their bid protest filing calculus in response.

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[1] See Servicemember Quality of Life Improvement Act and National Defense Authorization Act for Fiscal Year

2025, https://docs.house.gov/billsthisweek/20241209/RCP_HR5009_xml%5b89%5d.pdf (hereinafter "NDAA Language") at 601.

[2] R. Metzger & D. Lyons, A Critical Reassessment of the GAO Bid-Protest Mechanism, 2007 Wisc. L. Rev. 1225, 1237.

[3] Id.

[4] Id. n. 66.

[5] 4 C.F.R. § 21.1.

[6] 4 C.F.R. § 21.5(f).

[7] "[A] protest allegation must provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that we will find improper agency action." *MacAulay-Brown, Inc.*, B-413311, B-413311.2, 2016 CPR ¶ 279 (Comp. Gen. 2016).

[8] 4 C.F.R. § 21.5(f). See e.g. *Harrington, Moran, Barksdale, Inc.*, B-401934.2, B-401934.3, 2010 CPD ¶ 231 at 7 (Comp. Gen. 2010).

[9] As discussed below, DoD has an enhanced debriefing mechanism which statutorily requires certain information to be disclosed.

[10] NDAA Language at 601.

[11] Id. at 601-602.

[12] 31 U.S.C. § 3554.

[13] See generally *Arena et. al, Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation (2018) https://www.rand.org/pubs/research_reports/RR2356.html.

[14] Such an enhanced pleading standard could mirror the so-called *Iqbal* standard applied to civil cases filed in federal court. It remains unclear how many protests would be filtered out by such an enhanced pleading standard.

[15] See NDAA Language at 601-602.

[16] See, e.g., *iAccess Techs., Inc. v. United States*, 143 Fed. Cl. 521, 527 (2019).

[17] Rules of the United States Court of Federal Claims ("RCFC"), App'x C at IV and VII.

[18] See, e.g., *Hager Dev. Gp., LLC v. United States*, No. 20-819, 2020 WL 4529817 at *5 (Fed. Cl. Aug. 5, 2020) (refusing to dismiss or grant motion for judgment where the administrative record was not complete); cf also *Kinometrics, Inc. v. United States*, 155 Fed. Cl. 777, 788 (2021) (considering motion to dismiss and observing that "Ordinarily, the materials provided, although key to the procurement, would not suffice because the record is not complete and is not certified" but considering motion because the parties consented).

[19] See RCFC, App'x C at VII; see also *Trace Systems, Inc. v. United States*, 160 Fed. Cl.

691, 694 (2023) ("The whole administrative record . . . is not necessarily those documents that the agency have compiled and submit as the administrative record; rather, the whole administrative record consists of all documents and materials directly or indirectly considered by agency decision makers including evidence contrary to the agency's position." (cleaned up)).

[20] See GAO Bid Protest Annual Report to Congress for Fiscal Year 2024, B-158766, (Nov. 14, 2024) (hereinafter "GAO Report").

[21] This benefits also flows to the relevant agency, represented by DOJ, and any potential intervenor.

[22] The number of protest filings at GAO has generally been in decline. In 2020, 2,149 cases were filed at GAO, whereas in 2024, there were only 1,803. See GAO-25-900611, GAO Bid Protest Annual Report to Congress for Fiscal Year 2024.