

May 15, 2018

The Honorable John McCain
Chairman
Senate Armed Services Committee

The Honorable Jack Reed
Ranking Member
Senate Armed Services Committee

The Honorable Chuck Grassley
Chairman
Senate Committee on the Judiciary

The Honorable Dianne Feinstein
Ranking Member
Senate Committee on the Judiciary

Dear Chairmen McCain and Grassley, and Ranking Members Reed and Feinstein:

On behalf of the nearly 400 members of the Professional Services Council, I write today to convey our concern regarding a provision in the Department of Defense's fiscal year 2019 legislative package regarding bid protests.

The Defense Department has proposed modifications to the Tucker Act to prohibit so-called "second bite at the apple" protests—the ability of a disappointed offeror to bring a timely protest first at the Government Accountability Office (GAO) and then, after an adverse decision there, to file suit in the U.S. Court of Federal Claims (COFC). This legislative provision would reduce the timeline to submit complaints to COFC and would be applicable government-wide—affecting every federal agency procurement, not just those by the Department of Defense.

PSC opposes this provision for several reasons. First, your Committees properly rejected similar 2013 and 2016 departmental proposals and no circumstances have changed since then. Second, this proposal addresses only one of several significant differences between the processes at GAO and the COFC in both pre-award and post-award bid protests that should be fully and holistically explored before a significant change to only one element of the protest rules is made.

Third, this proposal is premature. Sec. 885 of the Fiscal Year 2017 National Defense Authorization Act required the Secretary to contract with a third party to "carry out a comprehensive study on the prevalence and impact of bid protests on Department of Defense acquisitions, including protests filed with contracting agencies, the Government Accountability Office, and the Court of Federal Claims." This comprehensive, congressionally-mandated report was conducted by the RAND Corporation and provided to Congress in December of last year.¹

The RAND report recommended that Congress consider collecting additional data on a number of issues to facilitate future decision-making and specifically listed "tracking cases that appear at COFC with a prior history at GAO." RAND found that while "data and discussions suggest that the number of COFC cases that previously appeared at GAO may be increasing... this potential trend needs further research." In addition to the numbers, Congress would benefit from a review of the outcomes of COFC cases to determine if the sustained rate reflects the concerns expressed by the Department of Defense. Our own research finds that there are few covered cases that arise in any one year, which does not justify such a significant legislative change.

¹ "Assessing Bid Protests of U.S. Department of Defense Procurements," December 17, 2017, available at: https://www.rand.org/pubs/research_reports/RR2356.html

Finally, we do not believe the Department has provided Congress with sufficient time to consider the proposal's merits in order to act during the Armed Services Committee's markup next week.

For these and other reasons, we oppose the department's legislative proposal and strongly recommend that it not be included in the committee-reported NDAA.

I thank you for your time and consideration of this request and look forward to continuing to work with you. As always, PSC is available at your convenience to respond to any questions or concerns your Committees may have.

Respectfully,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with a large initial "A" and "C".

Alan Chvotkin
Executive Vice President and Counsel