

Recommendation 82: Provide Armed Services Board of Contract Appeals authority to require filing of contract appeals through an electronic case management system.

Problem

The Armed Services Board of Contract Appeal (ASBCA) would benefit from clarity on authorities related to its forthcoming electronic case management system (ECMS) to facilitate implementation of that system.

Background

ASBCA is an independent, quasijudicial DoD agency. ASBCA's mission is to provide impartial, informal, expeditious, and inexpensive resolution of disputes arising out of or related to contracts entered into by DoD, including the Military Services, the National Aeronautics and Space Administration (NASA), and other departments and agencies as permitted by law.

ASBCA provides the primary forum to resolve DoD contract disputes between DoD agencies and contractors under DoD contracts, which makes it a critical part of the DoD acquisition system. Most Board appeals involve monetary claims, but ASBCA also adjudicates contract interpretation claims, certain contractor claims regarding performance ratings, and other nonmonetary claims.

DoD contractors have a choice to appeal adverse contracting officers' final decisions either to the COFC, within a year, or to ASBCA within 90 days. ASBCA is the forum for the vast majority of DoD contract disputes, particularly for small businesses.

To manage increasing caseloads and facilitate ASBCA operations, ASBCA has been pursuing an ECMS, similar to those used by all federal courts, and the vast majority of state courts, to allow electronic filing and offer some sort of electronic case management and docketing capabilities. ECMS will facilitate the day-to-day operations of the board. ASBCA expects to award a contract for an ECMS sometime before the end of 2018, and to have the system online within a year to 18 months of contract award.

Discussion

The ASBCA caseload has about doubled from 532 in 2009. In the last 3 fiscal years, the number of cases pending has ranged from 1,087 (at the end of FY 2015) to 970 (at the end of FY 2017). Cases before ASBCA range in size from small cases of less than \$10,000 to appeals of \$100 million or more. There are nine currently pending cases. At least two cases before ASBCA have exceeded \$2 billion. The number of cases filed, the dollar amounts at issue, and the relative complexity of the cases have all steadily increased over the last decade.

Document filings at ASBCA include pleadings, motions, briefs, and evidence submitted to the presiding judges. All federal, and the vast majority of state, courts currently allow electronic filing and offer some sort of electronic case management/docketing capabilities. Board members frequently travel to hear cases, requiring ASBCA to ship hundreds of paper documents. The ability to review these files electronically, including the use of keyword searches, facilitates the decision-making process. In an effort to avoid undue burden on administrative staff, ASBCA would like to ensure mandatory use of the new system.

On May 1, 2018, the GAO implemented a mandatory web-based electronic filing and document dissemination system for the procurement protest system. The system was required by Congress in 31 U.S.C. § 355(c), as amended by Section 1501 of the Legislative Branch Appropriations Act, 2014 (Div. I of Pub. L. No. 113–76). Under this statute, GAO is also allowed to collect filing fees to offset the costs of the electronic filing system. ASBCA would welcome similar language from Congress to require establishment and operation of a mandatory electronic case management system that includes electronic filing and document management, as well as internal case tracking software. Congress should also provide ASBCA the discretionary authority to collect fees to offset the costs of operating and maintaining the system without obligation to use it, in case collection of these fees becomes feasible in the future.

Because many of the companies doing business with DoD also do business with other agencies of the federal government, these authorities should apply to all agency boards as defined by 41 U.S.C. § 7101.

Conclusions

Using ECMS will facilitate ASBCA’s day-to-day operations. Revising Title 41 to ensure mandatory contractor and contracting officer use of the system—in line with the statutory authority granted to GAO when it adopted a similar system—will facilitate adoption of the electronic case management system and ease administrative burden. The Defense Acquisition Regulations (DAR) Council should coordinate regulatory implementation at the FAR level. The new processes that will come on line with the system will ultimately increase ASBCA productivity.

Implementation

Legislative Branch

- Revise Title 41 to facilitate establishment of a case management system at the Armed Services Board of Contract Appeals.

Executive Branch

- There are no regulatory changes required for this recommendation.

Implications for Other Agencies

- The recommendation stated here has implications for other federal agency Board of Contract Appeals (BCAs); the FAR Council should revise FAR Part 33.2, Disputes and Appeals, to align with the recommended statutory revision to authorize the establishment of case management systems and corresponding fee structures at the relevant BCAs.

RECOMMENDED REPORT LANGUAGE

SEC. ____. ELECTRONIC CASE MANAGEMENT SYSTEMS FOR BOARDS OF CONTRACT APPEALS.

This section would amend section 7105, title 41, United States Code, to facilitate establishment of an electronic case management system at agency Boards of Contract Appeals.

The committee is aware that the Government Accountability Office (GAO) recently implemented a mandatory web-based electronic filing and document dissemination system for the procurement protest system, as required by Section 1501 of the Legislative Branch Appropriations Act, 2014 (Public Law 113–76). Under this statute, GAO is allowed to collect filing fees to offset the costs of the electronic filing system. The committee notes that providing similar authority to the Boards, including authority to collect fees to offset the costs of operating and maintaining the system, would facilitate establishment of electronic case management systems, ease administrative burdens, and improve the Boards' productivity.

1 **SEC. ____ . ELECTRONIC CASE MANAGEMENT SYSTEMS FOR BOARDS OF**
2 **CONTRACT APPEALS.**

3 Section 7105 of title 41, United States Code, is amended by adding at the end the
4 following new subsection:

5 “(h) ELECTRONIC CASE MANAGEMENT SYSTEM.—

6 “(1) IN GENERAL.—An agency board may establish and operate an electronic case
7 management system for submission, document dissemination, and processing of appeals
8 under subsection (e)(1) under which, in accordance with the procedures prescribed by the
9 agency board—

10 “(A) a contractor submitting an appeal to the agency board may be
11 required to submit the appeal through the electronic case management system;
12 and

13 “(B) all documents and information required with respect to an appeal
14 may be disseminated and made available to the contractor and the contracting
15 officer through the electronic case management system.

16 “(2) WAIVERS.—The chairman of an agency board may waive a requirement
17 under subparagraph (A) or (B) of paragraph (1) when compliance with such requirement
18 is determined to place an undue burden on the contractor, the Federal Government, or the
19 agency board.

20 “(3) IMPOSITION OF FEES.—An agency board may require any contractor who
21 submits an appeal to the board to pay a fee to support the establishment and operation of
22 the electronic system of the board under this subsection, without regard to whether or not

1 the contractor uses the system with respect to the appeal. The amount of the fee shall be
2 established in the rules of the agency board.

3 “(4) TREATMENT OF AMOUNTS COLLECTED.—

4 “(A) If the Armed Services Board exercises the authority under paragraph
5 (3) to impose a fee on contractors submitting appeals to it, the Secretary of
6 Defense shall establish a separate account among the accounts of the Department
7 of Defense for the electronic system of the Armed Services Board under this
8 subsection, and all amounts received by the Armed Services Board as fees under
9 paragraph (3) shall be deposited into the account and shall be available as
10 provided in subparagraph (E).

11 “(B) If the Civilian Board exercises the authority under paragraph (3) to
12 impose a fee on contractors submitting appeals to it, the Administrator of General
13 Services shall establish a separate account among the accounts of the General
14 Services Administration for the electronic system of the Civilian Board under this
15 subsection, and all amounts received by the Civilian Board as fees under
16 paragraph (3) shall be deposited into the account and shall be available as
17 provided in subparagraph (E).

18 “(C) If the board of contract appeals of the Tennessee Valley Authority
19 exercises the authority under paragraph (3) to impose a fee on contractors
20 submitting appeals to it, the Board of Directors of the Tennessee Valley Authority
21 shall establish a separate account among the accounts of the Tennessee Valley
22 Authority for the electronic system of the board of contract appeals of the
23 Tennessee Valley Authority under this subsection, and all amounts received by

1 that board as fees under paragraph (3) shall be deposited into the account and
2 shall be available as provided in subparagraph (E).

3 “(D) If the Postal Service Board of Contract Appeals exercises the
4 authority under paragraph (3) to impose a fee on contractors submitting appeals to
5 it, the Postmaster General shall establish a separate account among the accounts
6 of the Postal Service for the electronic system of the Postal Service Board of
7 Contract Appeals under this subsection, and all amounts received by the that
8 board as fees under paragraph (3) shall be deposited into the account and shall be
9 available as provided in subparagraph (E).

10 “(E) Amounts in the accounts established under this paragraph shall be
11 available to the respective agency boards, without fiscal year limitation, solely to
12 establish and operate their respective electronic systems under this subsection.”.
