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As budgets tighten, contract attorneys expect uptick in bid protests

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There is speculation that sequestration may lead to more contract disputes and bid protests. ()

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Two weeks after sequestration began, contract lawyer Bill Spriggs got a call from a vendor client upset that a federal contracting official had just ordered it to cut its price by 10 percent for “sequestration-related cuts” without a change in service levels.

Spriggs declined to name the contractor or agency, but said the dispute involved a non-defense civilian agency and a commercial item contract where changes can’t occur unless by mutual agreement.

“It’s the first time I’ve seen something like that,” said Spriggs, who runs the Spriggs Law Group in Virginia.

While lawyers sort out the dispute, the larger question is whether the incident was just an anomaly or perhaps an early sign that the sequester will bring about more contract disputes and bid protests.

“I have not seen sequestration-related incidents just yet,” Spriggs said. “But all of us lawyers in the private bar are expecting things to happen such as terminations, changes, options not being exercised and work going back in house instead of being procured out.”

So far, that hasn’t happened. Ralph White, managing associate

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general counsel for procurement law at the Government Accountability Office, said protest filings this year remain comparable to last year.

GAO figures show that last year saw the most bid protests since at least 2008. There was a 5-percent increase in overall cases from fiscal 2011 to 2012, from 2,353 to 2,475. The number of sustained protests rose from 67 cases in 2011 to 106 last year, figures show.

Still, some industry officials are bracing for even more protests.

Government contractor L-3 Communications, for instance, has told investors that it's expecting more competition due to uncertainty surrounding the future of defense budgets.

"Furthermore, the current competitive environment has resulted in an increase of bid protests from unsuccessful bidders, which typically extends the time until work on a contract can begin," the company said in its most recent annual report filed with the Securities and Exchange Commission.

Martha Boyd, a lawyer with the Baker Donelson law firm specializing in contracts, said vendors with existing contracts should follow some basic steps, including trying to bolster business through more local, state or international contracting opportunities.

"This is not the time to sit and wait," she said. "First, try to make sure you deliver. This is not the time to stand out to your contracting officer as a problem."

And while it hasn't happened yet, she said she expects to see an increase in bid protests.

"With less money to go out, it's inevitable," she said.

Marshall Moorhead, an attorney who has litigated bid protests and contract claims, said agencies also are likely to move from cost reimbursement to fixed-price contracts as budgets get tighter. He also said that as vendors compete for a limited number of contracts, there's likely to be an increase this year in bid protests.

"It's going to produce a new status quo," Moorhead said of the sequester's impact on contractors. "It's going to be more cut-throat. There's going to be more litigation and bid protests, and you don't want to be that contract left standing alone when the music stops."

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