

Client Alert: Government Contractors Obtain Relief in More than Half of GAO Bid Protests

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Yesterday, the Government Accountability Office (GAO) released its Bid Protest Annual Report to Congress for Fiscal Year 2022. The statutorily mandated report contains an array of information about GAO's bid protest forum over the prior fiscal year, including the most prevalent reasons GAO sustained protests along with a variety of statistical data. The big news is that while the number of bid protests filed continued to decline, GAO's "Effectiveness Rate" held steady.

According to the report, contractors filed 1,658 protests, cost claims, and requests for reconsideration this past fiscal year, which reflects a 12% drop from the prior fiscal year and the lowest number of protests filed since 2008 (1,652). Protest filings are down more than 40% since the recent high-water mark of 2,789 filings in fiscal year 2016. When considering these numbers, it is important to remember that multiple cases can be associated with a single solicitation, either because of supplemental protests or multiple protesters, so the number of procurements challenged are materially fewer than the numbers indicate.

GAO resolved the merits of the protest in 455 of the 1,658 cases filed; the remainder of cases were dismissed by GAO or withdrawn by the protester. GAO sustained 59 (13%) protests—the fewest number of sustain decisions since 2009. Despite these notable decreases and downward trends, GAO's Effectiveness Rate held relatively steady at 51%. The Effectiveness Rate reflects the percent of cases in which the protester obtained some form of relief, either through voluntary corrective action or a GAO decision sustaining the protest. In other words, in more than half of the cases GAO resolved in fiscal year 2022, the bid protest forum was an effective avenue for the protester to obtain at least some relief.

Surprisingly, GAO held only two hearings in fiscal year 2022, the lowest number in at least 20 years (and far less than the 13 hearings held during 2021). This continues a downward trend in the number of hearings held, although deciding cases through alternative dispute resolution (ADR) remains popular and useful. GAO turned to ADR in 74 protests, and 68 of these ADRs were successful (i.e., the protest was resolved without the need for a written decision on the merits).

Finally, GAO reports that the most prevalent reasons for sustaining bid protests during fiscal year 2022 were: (1) unreasonable technical evaluation; (2) flawed selection decision; and (3) flawed

solicitation.

Jenner & Block’s Government Contracts and Grants Practice has extensive bid protest experience in all relevant bid protest forums, to include GAO. The protest team includes a former supervising bid protest hearing officer at GAO, former Court of Federal Claims clerks, and former Federal Circuit clerks. The team stands ready to assist with bid protests and interventions.

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