

# Client Alert: Government Contractors Obtain Relief in More than Half of GAO Bid Protests; Annual Statistics Skewed by CIO-SP4 Protests

## Publications

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By: Noah B. Bleicher, Moshe B. Broder, Aime J. Joo

Late last week, the Government Accountability Office (GAO) released its Bid Protest Annual Report to Congress for Fiscal Year 2023. 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 report shows that both the number of bid protests filed and GAO's "effectiveness rate" increased this past fiscal year, but these statistics were largely inflated by hundreds of protests emanating from one procurement.

According to the report, contractors filed 2,025 protests, cost claims, and requests for reconsideration in fiscal year 2023, which reflects a 22% increase from the prior fiscal year and the highest number of protests filed since 2020 (2,149). Still, protest filings are down more than 27% 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GAO resolved the merits of the protest in 608 of the 2,025 cases filed; the remainder of cases were dismissed by GAO or withdrawn by the protester. GAO sustained 188 protests (approx. 31%)—more than double the sustain rate in 2022. Along with these notable increasing and rebounding trends, GAO's effectiveness rate increased to 57%. The effectiveness rate reflects the percentage 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 2023, the bid protest forum was an effective avenue for the protester to obtain at least some relief.*

Additionally, GAO held 22 hearings in fiscal year 2023, which is the highest number of hearings in the last five years (20 more than the two hearings GAO held in 2022). This, again, depicts a rebound from the 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 69 protests,

and 62 of these ADRs were successful (*i.e.*, the protest was resolved without the need for a written decision on the merits).

While the overall numbers reflect a rebound and increase in GAO usage trends, the statistics alone do not tell the full story. In this respect, a substantial number of protests filed and resolved in 2023 related to the Department of Health and Human Services, National Institutes of Health's, award of the Chief Information Officer–Solutions and Partners 4 (CIO-SP4) procurement. CIO-SP4 resulted in hundreds of contract awards and hundreds of protests filed in response, and of the 2,025 protests filed in 2023, 318 (nearly 16%) of them related to CIO-SP4. When these protests are removed from the overall statistics, there would have only been 1,707 protests filed, which would have reflected a little less than a 3% increase in protests from 2022, consistent with the overarching decline in GAO protests since the recent high point in 2016. What is more, GAO sustained 119 of those protests this past summer (in two, consolidated decisions), thus inflating the number of protests sustained and GAO's effectiveness rate.

Finally, GAO reports that the most prevalent reasons for sustaining bid protests during fiscal year 2023 were: (1) unreasonable technical evaluation; (2) flawed selection decision; and (3) unreasonable cost or price evaluation. Last year's inclusion of "flawed solicitation" on this list likely reflected the CIO-SP4 protests that were sustained on that basis last fiscal year.

Jenner & Block's Government Contracts lawyers have extensive bid protest experience, including prior service as a supervising bid protest hearing officer at GAO, and stand ready to support any challenges to the award of a government contract or the terms of a government solicitation.

## Related Attorneys



**Noah B. Bleicher**

Partner

[nbleicher@jenner.com](mailto:nbleicher@jenner.com)

+1 202 639 6063



**Moshe B. Broder**

Partner

[mbroder@jenner.com](mailto:mbroder@jenner.com)

+1 202 637 6334



**Aime J. Joo**

Associate

[ajoo@jenner.com](mailto:ajoo@jenner.com)

+1 202 639 6010

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Government Contractor Litigation and Compliance

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