NOVEMBER 15, 2017

Dateline Washington – Some things appear to still be working, albeit not well for government contractors.

As required by the Competition in Contracting Act of 1984, 31 U.S.C. §§3554 *et al.* (CICA), the U.S. Government Accountability Office (GAO) has certain bid protest-related jurisdiction over executive agencies. As part of its duties, the GAO is obligated to annually report to Congress on its prior fiscal year (FY[1]) bid protest statistics relating to, among other things, number of filings, sustain rates, cases resolved though alternative dispute resolution and corrective action. GAO is also obligated to report any outliers or situations where an agency refused to follow GAO's recommendation (*see,* our prior posts on the *Kingdomware Technology* case where the Department of Veterans Affairs refused to follow GAO's recommendations and GAO reported it to Congress. That case ultimately went to the U.S. Supreme Court and we discussed the Supreme Court's decision in detail here.

The following summary table comes from GAO's November 13, 2017 Report to Congress (No. GAO-18-237SP) and organizes the statistics in a comparative manner to the prior four fiscal years:

[1] A Federal fiscal year runs from October 1 of one year to September 20 of the following year

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SOME HIGHLIGHTS:

A few numbers jump out:

- Over the past three years the number of bid protest filings were actually *up* between 3% and 6%, but in FY 2017 they were *down* 7% as compared to FY 2016;
- Likewise, the number of cases closed were *down;*
- Importantly, the number of cases that went to a merit decision (*e.g.,* a final decision) were *down significantly* compared to last year and the number of "Sustains" -- where the GAO upheld and granted the protest is similarly *down* as compared to the prior year -- but *up* as compared to the preceding three fiscal years; and
- ADR was relatively successful in the 81 cases that used it, but overall the 17% sustain rate appears

to be returning to the trend we have seen (excepting FY2016) of GAO denying more and more protests.

A FEW LESSONS TO BE LEARNED:

Protests to the GAO are usually more cost effective and reach resolution faster than protests filed at the Court of Federal Claims. (This is because of CICA's mandate that GAO must decide protests within 100 days of their filing). That being said, GAO bid protests do have a relatively low likelihood of success if adjudicated on the merits.

Of those protests that are sustained, here are most common reasons:

- Unreasonable Technical Evaluation;
- Unreasonable Past Performance and/or Unreasonable Cost/Price Evaluation; and
- Inadequate Record and Flawed Selection Decision.

While these grounds will sound familiar to most government contracting professionals, simply making these allegations will not typically result in a sustained protest. Rather, because each protest is different, it is important to understand how the facts of that given case might fall into these (or other) grounds.

Another important percentage is the effectiveness rate. This is the rate where a protester gets relief either through having a protest sustained *or* through the agency taking corrective action. This rate has consistently been in the 40+-percentage range for the last five years. Indeed, this number is why so many companies continue to protest even in the face of such a low sustain rate. Put differently, a protester may get some relief without having to fight a protest all the way through.

While the numbers will change from year-to-year, one thing is certain: having competent counsel who understands how GAO works and how to best use facts to develop bases of protest is critical to increasing the likelihood of a successful protest.