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WHAT CAN WE DEVINE? – GAO's BID PROTEST YEAR IN REVIEW – GAO Files Annual Bid Protest Statistics Report With Congress

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As another calendar year rapidly comes to a close, the Federal Government Fiscal Year ended on September 30, 2018. As a result, the annual requirement that the U.S. Government Accountability Office ("GAO") files its annual bid protest report with Congress ("Report") has also occurred. A copy of the Report can be found at: https://www.gao.gov/products/GAO-19-248SP. Dated November 27, 2018, what does the Report tell us about the past GAO bid protest year?

The VA & *Kingdomware:*

For readers of our prior Client Alerts, over the past several years there had been an on-going debate between the GAO and the U.S. Department of Veterans Affairs ("VA") on whether the VA was properly setting aside certain contracts for Veteran-Owned Small Businesses. That dispute forced GAO to report to congress over its past several annual reports that the VA had refused to follow the GAO's recommendations in various cases. That dispute has been resolved with the Supreme Court's decision in *Kingdomware Technologies v. U.S.* (*see,* Government Contracts ConneKTion Post at http://blognetwork.kilpatricktownsend.com/governmentcontractsconnektion/2017/06/08/look-out-va-is-the-kingdomware-loop-hole-about-to-end/). Putting that outlier to rest, there are no cases that GAO reports of in which an agency, including the VA, has not followed GAO's recommendation.

FY 2018 Reported Results:

As GAO reports, in FY 2018 it received 2,607 cases, including 2,474 protests, 55 cost claims and 78 requests for reconsideration. Of those, cases, 356 related to GAO's jurisdiction in task order-based bid protests (recognizing that Congress has given GAO broad jurisdiction on TO protests, but limited these protest to only those TOs exceeding $10 million for civilian agencies and $25 million for DOD-related agencies (including NASA). *See, http://blognetwork.kilpatricktownsend.com /governmentcontractsconnektion/2018/06/01/government-contracts-idiq-task-order-jurisdiction-limits-made-permanent/*.

As has been the unfortunate trend over the past several years, GAO's sustain rate on protests continues to diminish. For 2018, only 15% of filed protests were sustained. Of those, the primary bases of such sustainments were the typical bases of protest, including unreasonable technical or cost/price evaluations, and flawed selection decisions (normally inadequate documentation in this Author's experience).

As the following chart (taken directly from GAO's 2018 Report) depicts, and as we have observed first hand, it appears that there is a real "uptick" in bid protests (which trend has continued in our practice into FY 2019/Q4 2018) but that the prior increase in 2016 in sustains was a proverbial blip. While we have received a number of successful outcomes at GAO, in our capacity as Protester's counsel, they typically come in the form of corrective action. What we have seen more of, is that GAO has denied retests in the cases where we are sitting as counsel to Intervenor.

What is also not surprising, is the reduction in hearings. Hearings before the GAO are extremely rare and this trend continues to fall precipitously.

Protest Stat

The other continuing trend is that agencies continue to take corrective action, precluding a decision on the merits. In effect, corrective actions are a method for the agency to state that it will revisit or "correct" the procurement issues about which the Protest was filed, albeit without acting as an admission *per se* that there was an error. Sometimes this results in the agency truly "fixing" the problems, often resulting in a new award; but other times this is used as a means for the agency to paper the file adequately to sustain the prior award.

Conclusions:

So what is a disappointed offeror to do? While one has the ability to protest to three venues, namely the Agency (an agency-level protest), GAO and to the U.S. Court of Federal Claims ("COFC"), the facts and circumstances of each case requires a thorough analysis and understanding *before* one can decide whether a basis of protest exists, and if so, which venue to pursue. One benefit of filing at the GAO is that, as a matter of law, the protest must be decided within 100 days of filing (per the Competition in Contracting Act or CICA). Rare is it in litigation to have a date certain by which a decision must be issued. GAO protests provide that degree of certainty (regardless of the outcome). Likewise, if one is unsuccessful at GAO, then one can refile at the COFC, effectively getting a "second bite at the apple" if the facts and circumstances warrant it. This too, is unusual in the administriave litigation realm.

The bottom line is that GAO continues to do its good work, but that the burden to succeed in a protest at GAO is increasingly difficult. This is a trend that has been observed for many years and the above statistics verify those observations.

Happy holidays and a happy new year.