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It's that Time Of Year Again – GAO Reports Its Annual Bid Protest Statistics for FY 2019

As we have reported over the past several years, the U.S. Government Accountability Office ("GAO") is a legislative agency which is empowered with jurisdiction to hear certain bid protests (in addition to agencies themselves and the U.S. Court of Federal Claims). As a component of the legislature, GAO must annually report to Congress as a matter of statute on its bid protest decisions and the outcomes related thereto. See, The Competition in Contracting Act, 31 U.S.C. §3554(e)(2). As GAO goes, we too report to you on these statistics and provide some anecdotal perspectives. It is that time once again.

Issued on November 5, 2019, GAO's Annual Bid Protest Report (GAO-20-220SP) (https://www.gao.gov/assets/710/702551.pdf), reports that GAO met on 100% of occasions the statutory 100-day decision time frame. Interestingly, the Report briefly discusses the limited impact that the lengthy 35 calendar day government shutdown which occurred in December 2018 and January 2019 had on bid protests, finding that the partial shutdown did not impact GAO or the time for protesters to file protests, but that certain agencies were impacted in responding to protests, forcing GAO to extend only eight bid protest filing deadlines. The GAO's report summarizes its other statistics as follows:

Bid Protest Statistics for Fiscal Years 2015-2019

	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed[1]	2198 (down 16%)[2]	2607 (less than 1% increase)[3]	2596 (down 7%)	2789 (up 6%)	2639 (up 3%)
Cases Closed[4]	2200	2642	2672	2734	2647
Merit (Sustain + Deny) Decisions	587	622	581	616	587
Number of Sustains	77	92	99	139	68
Sustain Rate	13%	15%	17%	23%	12%
Effectiveness Rate[5]	44%	44%	47%	46%	45%
ADR[6] (cases used)	40	86	81	69	103
ADR Success Rate[7]	90%	77%	90%	84%	70%
Hearings[8]	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)

[1] All entries in this chart are counted in terms of the docket numbers ("B" numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same "B" number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate case for purposes of this chart. Cases include protests, cost claims, and requests for reconsideration.

[2] From the prior fiscal year.

[3] From the prior fiscal year.

[4] Of the 2,200 cases closed in FY 2019, 373 are attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity contracts.

[5] Based on a protester obtaining some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest. This figure is a percentage of all protests closed this fiscal year.

[6] Alternative Dispute Resolution.

[7] Percentage of cases resolved without a formal GAO decision after ADR.

[8] Percentage of fully developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.

Report, Encl. II at 5.

So what do these statistics indicate? First and foremost, there was a *substantial* decrease in the number of bid protests filed in FY 2019, representing a remarkable 16% reduction from the prior fiscal year (note that the Federal Fiscal Year runs from October 1st in a given year to September 30th of the following year). This reduction had a commensurate reduction in the number of cases to which a "merit decision" (a decision to sustain or deny a protest) occurred. Most critically, as the last four years show, the number of "sustained" protest continues to erode. Also of some interest is the significant reduction in ADR cases (an over 50% reduction) and an increase in the number of hearings from .51% to 2%. While a small number, this represents an interesting, albeit, small trend.

The most important trend in these numbers is the continuing sliding over the past four years of "sustained" protests. Down to 13%, this number returns GAO to a low sustain rate, after a "pop" to 23% in FY2016. In other words, the likelihood of a protest being sustained is even lower than in prior recent years, only 13% of those protests that get to a formal decision.

Finally, there is an upward trend in task order-specific protests. Task orders and IDIQ (indefinite delivery/indefinite quantity) contracts have (anecdotally) seen a continuing rise in use by agencies. These vehicles allow an agency to pre-qualify a limited number of contractors who then compete on task orders among those who are prequalified. This increase provides a number of benefits to agencies, including reduced procurement time lines and a reduction in the likelihood of bid protests. GAO's jurisdiction on task orders is limited to task orders that exceed $25 million for Defense Department procurements and $10 million for all civilian agencies. A task order at a value less than that generally precludes the ability to protest to the GAO, subject to certain limited carve outs. In FY 2019 there were 373 task order bid protests, up from 356 in FY 2018 and 256 in FY 2017.This is likely due to the fact that more task orders are being issued and the jurisdiction questions surrounding GAO bid protests are now much more solidly decided.

So what does this mean? The numbers above, show an on-going trend in which GAO continues to defer to the agencies in their procurement decisions. Our government contracts team has seen this trend in action through the bid protests we have handled.

Anecdotally, we also continue to see many protests at GAO resolved by the Agency seeking to take corrective action, in which they try to correct the items giving rise to the protest, thereby mooting the protest. While not a formal, final decision, obtaining corrective action can be seen by the protester as a "win", as they are generally back in the competition and have another chance of correcting any previously perceived shortcomings.

At the GAO, bid protests are intense, short-term (100 days) administrative procedures which can be beneficial to disappointed offerors. That being said, the Government has a "house" advantage as demonstrated in the statistics. Having experienced counsel and understanding the tight timeframes is vital to shifting some of that advantage and having any real shot at succeeding before the GAO. Understanding the reason, and proper bases, for bid protests will allow parties to best protect their interests on a bid-by-bid, proposal-by-proposal basis.