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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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GAO's Bid Protest Annual Report Shows Record High Effectiveness Rate While NDAA Calls for New Comprehensive Study of the Bid Protest System

*By Joseph R. Berger and Daniel M. Haymond**

The authors of this article discuss the U.S. Government Accountability Office's Bid Protest Annual Report to Congress and newly enacted laws pertaining to civilian task order awards and the bid protest system.

The federal bid protest system saw a number of developments at the close of 2016 that government contractors should keep in mind as they consider potential bid protests this year. In December, the U.S. Government Accountability Office ("GAO") released its Bid Protest Annual Report to Congress for Fiscal Year 2016, showing a higher number of total cases filed since the previous year, a significant increase in sustained protests, and a record high effectiveness rate of 46 percent.

THE NUMBERS

Perhaps the most important number in GAO's Annual Report is the effectiveness rate, which includes corrective action, and which rose one percentage point from the prior year. Including corrective actions, the effectiveness rate in this most recent Annual Report shows that a protest may have, roughly speaking, almost a 50/50 chance of resulting in some kind of relief for the protester. Of course, depending on the agency's actions taken during corrective action and on the final result, the protester might not consider the ultimate outcome to be a victory—but a protest resulting in corrective action does give the protester a chance to have its arguments heard, and often, its proposal reconsidered by the agency.

The trend of increasing protests reflected in the recent Annual Report continues a steady increase since 2001 (when spending on government contracts also began a steady increase). The total number of cases filed, 2,789, rose six percent from the prior year. In fiscal year ("FY") 2006, cases filed were 1,327, less than half the number in FY 2016, and in FY 2001, there were only

* Joseph R. Berger is counsel in the Government Contracts and Construction practice groups at Thompson Hine LLP, focusing on all aspects of government contract disputes. Daniel M. Haymond is a partner in the firm's Construction practice group focusing on the litigation of disputes in courts and arbitrations. The authors may be reached at joseph.berger@thompsonhine.com and dan.haymond@thompsonhine.com, respectively.

1,146 cases filed. The number of sustained protests in FY 2016 increased to 139 from 68 the prior year, and the “sustain rate” (sustained decisions as a percentage of decisions on the merits) increased to 22.56 percent from 12 percent. The sustain rate for FY 2016 was higher than in recent years, but similar to the sustain rate in FY 2001 (21 percent) and to the average since then (about 18.5 percent).

The effectiveness rate has slowly increased from 33 percent in FY 2001, the first year for which the statistic was reported by GAO, to the record high 46 percent this year, reflecting a combination of corrective action and sustained decisions, and highlighting the importance of corrective action. When pursuing a protest, contractors are more likely to receive relief through corrective action (for example, an agency’s decision to re-evaluate a proposal, to permit revised proposals, or to reinstate a proposal into a competitive range) than a sustained decision.

GAO’s Annual Report to Congress also included GAO’s summary of the most prevalent grounds for sustaining protests during the preceding year. The most prevalent reasons for sustained protests during the 2016 fiscal year were:

- (1) unreasonable technical evaluations;
- (2) unreasonable past performance evaluations;
- (3) unreasonable cost or price evaluations; and
- (4) flawed selection decisions.

This list shows that while GAO will not sustain a protest based on “mere disagreement” with an agency evaluation, GAO will fairly consider the protester’s arguments based on an unreasonably flawed evaluation, including, as most frequently sustained, an unreasonable technical evaluation. The Annual Report also noted that a significant number of protests do not reach a decision because agencies voluntarily take corrective action, and that agencies do not report the reasons for decisions to take corrective action.

NEWLY ENACTED LAWS

Contractors should also keep in mind that laws newly enacted in December 2016 both (1) revive GAO’s jurisdiction over task order awards valued at over \$10 million issued by civilian agencies (which had lapsed in September 2016), and (2) increase the jurisdictional threshold from \$10 million to \$25 million for task order awards issued by the Department of Defense (“DOD”). According to the Annual Report, in FY 2016 GAO closed 375 protests that concerned task orders. The change to GAO’s jurisdiction for DOD task orders, which is contained in the 2017 National Defense Authorization Act (“NDAA”), is clearly intended to reduce protests against DOD task order awards.

The 2017 NDAA, among its many provisions addressing procurement issues, also adopted a requirement for a comprehensive and far-reaching study of the bid protest system as it affects DOD, to be conducted by an outside entity. The NDAA included almost 90 sections relating to discrete acquisition policy and management reforms, some of which may in turn impact future bid protests. For example, the NDAA includes a limitation on the DOD's use of the lowest price, technically acceptable source selection process. This provision may increase DOD's use of best value competitions, which in turn may be subject to a greater number of potential protest grounds.

Section 885 of the NDAA requires the far-reaching new study of the bid protest system as it impacts DOD contracting, including protests filed with agencies, GAO and the U.S. Court of Federal Claims, and listing numerous specific issues to be analyzed by the report. The statute requires the DOD to enter into a contract with an independent research entity "with appropriate expertise and analytical capability to carry out a comprehensive study on the prevalence and impact of bid protests" on DOD acquisitions. Within one year of the NDAA's enactment, the independent entity must provide to the Secretary of Defense and the congressional defense committees a report on the results of the study, along with any related recommendations. The report may reveal some drawbacks to DOD, but may also illuminate benefits of the bid protest process, which promotes the integrity of the overall procurement system. The NDAA's requirement for the report also appears to foreshadow future reforms.

CONCLUSION

Notwithstanding the concerns expressed by Congress via its enactment of the requirement for a comprehensive report on the bid protest system, GAO's Annual Report to Congress confirms the longstanding trend of increasing protests that has continued since 2001, with cases filed more than doubling since FY 2006. Given the continuing trend of increasing protests and Congress' enduring interest in reforming the bid protest system, contractors can expect future reforms to the protest process in addition to the myriad annual reforms to the underlying procurement system that occur each year through the NDAA. With an effectiveness rate of close to 50 percent, contractors can also expect that bid protests will remain an integral and pervasive element of the procurement system during 2017, and in future years.