



Government Contracts Update

December 2018

GAO Releases Bid Protest Annual Report for FY 2018; Effectiveness Rate Is 44 Percent

The U.S. Government Accountability Office has released its [GAO Bid Protest Annual Report to Congress for Fiscal Year 2018](#), which, compared to the report for FY 2017, shows a fairly steady rate of protests filed and protests sustained, and a fairly steady effectiveness rate of 44 percent, which decreased slightly from last year's record high of 47 percent.

In its November 27, 2018, Annual Report, GAO stated that during the 2018 fiscal year, it received 2,607 cases filed (a slight increase from FY 2017), including 2,474 protests, 55 cost claims and 78 requests for reconsideration. Of the protests resolved on the merits, GAO sustained 15 percent, or 92 protests out of 622 protests resolved by decisions on the merits (sustained and denied). The 15 percent sustained rate is a slight decrease from 2017, when the sustained rate was 17 percent, and is close to the average for the past five years.

GAO stated that its review shows that the most prevalent reasons for sustaining protests during FY 2018 were: "(1) unreasonable technical evaluation; (2) unreasonable cost or price evaluation; and (3) flawed selection decision."

This list again demonstrates that while GAO will not sustain a protest based on "mere disagreement" with an agency evaluation, it will fairly consider a protester's arguments based on an unreasonably flawed evaluation, including, as most frequently sustained last year according to GAO's report, an unreasonable technical evaluation.

The most important number in the annual report may be the effectiveness rate, which GAO notes is "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."

GAO also noted that "this figure is a percentage of all protests closed this fiscal year." With 2,505 protests closed in FY 2018, the reported effectiveness rate of 44 percent means that GAO protesters received corrective action (or a sustained decision) in about 1,100 protest cases.

The recent effectiveness rates (46, 47 and 44 percent over the last three years) indicate that, including agency corrective actions and sustained decisions, a GAO bid protest has a significant chance of resulting in some kind of relief for the protester. As always, GAO notes that many protests do not reach a decision on the merits due to voluntary corrective action by agencies, and that "agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action."

The effectiveness rate has slowly increased from 33 percent in FY 2001, the first year for which GAO reported the statistic, to the record highs of 46 percent in FY 2016 and 47 percent in FY 2017, reflecting the combination of corrective action and sustained decisions, and highlighting the importance of corrective action as a potential remedy.

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, permit revised proposals or reinstate a proposal into a competitive range) than a sustained decision. 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. Thus, protesters should pursue their arguments with potential corrective action remedies in mind.

FOR MORE INFORMATION

For more information, please contact:

Joseph R. Berger

202.263.4193

Joseph.Berger@ThompsonHine.com

Tom Mason

202.263.4168

Thomas.Mason@ThompsonHine.com

Francis E. Purcell, Jr.

202.263.4118

Chip.Purcell@ThompsonHine.com

Ray McCann

202.263.4152

Ray.McCann@ThompsonHine.com

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel. This document may be considered attorney advertising in some jurisdictions.

© 2018 THOMPSON HINE LLP. ALL RIGHTS RESERVED.