

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

GOVERNMENT CONTRACTING

2016 GAO Bid Protest Annual Report: Sustain Rate Hits Nine Year High, Up More Than 10% from 2015

By Megan Connor



GAO recently released its annual report to Congress, which included data concerning its protest filings for Fiscal Year 2016. Based on the data, 2016 was an historic year. GAO not only decided more cases on the merits in 2016 than in any prior year, dating back to 2001, but it also sustained more cases in 2016 than in any year during that same period.

It is important to note that since 2001, the annual number of cases received by GAO has grown from approximately 1,000 to nearly 3,000. In 2016, GAO received 2,789 cases, of which 2,621 were protests, as opposed to cost claims and requests for reconsideration. Among the cases that were closed in 2016, a little over 22% were decided on the merits. Therefore, the vast majority of protests filed are dismissed before GAO adjudicates the merits, based on jurisdictional grounds, alternative dispute resolution, or because the agency voluntarily takes corrective action rather than defending the protest.

Indeed, it is noteworthy that, between October 1, 2016, and December 31, 2016, GAO did not have jurisdiction over protests of civilian agency task and delivery orders placed under indefinite-delivery/indefinite-quantity contracts valued at more than \$10 million, due to a sunset provision in 41 U.S.C. § 4106(f)(1)(B). Therefore, protests of these task or delivery orders filed during in this time period were dismissed by GAO for lack of jurisdiction. The National Defense Authorization Act for Fiscal Year

2017 reinstated GAO's jurisdiction over these protests.

Of the protests GAO received in 2016, it reached a decision on the merits in 616 cases and, of these, **139 protests were sustained**, which is more than twice the number GAO sustained in 2015. According to GAO, the most prevalent grounds for sustaining protests during the 2016 fiscal year were: (1) unreasonable technical evaluation; (2) unreasonable past performance evaluation; (3) unreasonable cost or price evaluation; and (4) flawed selection decision. These grounds overlap with the most prevalent grounds for sustaining protests in 2015, demonstrating a consistency of analysis at GAO.

Where GAO decided a protest on the merits, it sustained the protest 22.5% of the time. To put this figure in context, GAO's sustain rate for cases decided on the merits has not reached 20% since 2008. Moreover, the last time GAO's sustain rate surpassed 23% was in 2007, when it sustained 27% of cases decided on the merits. However, bear in mind that in 2007, GAO only resolved 335 cases on the merits, or approximately half the 2016 total. GAO's 2016 sustain rate is also significant because it represents a marked increase from 2015. Last year, GAO sustained protests decided on the merits only 12% of the time—the lowest sustain rate in any year, dating back to 2001.

Still, of all the protests filed this past year, only approximately 5% were sustained by GAO. Consequently, the majority of protests are often resolved earlier in the process, without a decision on the merits. Overall, the effectiveness rate of protests in 2016 was 46%, reflecting instances where a protester receives some form of relief, either through corrective action or a decision on the

Continued on page 2



ANNUAL REPORT.....Continued from page 1

merits. The 2016 effectiveness rate is higher than any previous year, dating back to 2001.

Based on these trends, agencies and offerors alike should assume a protest may be filed after award. In particular, an unsuccessful offeror should look for evidence of an unreasonable technical evaluation, past performance evaluation, or cost or price evaluation when it receives its notice of award and debriefing. And if there is any indication that such an error occurred, the offeror should consider protesting to GAO. While the overall chance of success on the merits may not be high, agencies are increasingly taking corrective action to avoid defending a protest altogether.

If you do not receive an award and want to know what your options for protest are, immediately contact your legal counsel to make sure you timely assert your rights.

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