

Key takeaways from GAO's annual bid protest report

(January 22, 2021) - Aron Beezley of Bradley Arant Boult Cummings LLP highlights notable findings in the Government Accountability Office's 2020 bid protest report.

The Government Accountability Office (GAO) recently issued to Congress its annual bid protest report.¹

As discussed below, this year's report is noteworthy for multiple reasons, including that it shows that protesters received some form of relief from the procuring agency in *more than half* of the protests filed with the GAO in FY 2020, and the GAO's use of Alternative Dispute Resolution (ADR) increased by 210% in FY 2020.

The report is also noteworthy in that it includes, for the first time, "flawed solicitation" as one of the most prevalent reasons for sustaining protests.

What is GAO's bid protest annual report to Congress?

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(e)(2), requires the Comptroller General to report to Congress each instance in which a federal agency did not fully implement a recommendation made by the GAO in connection with a bid protest decided the prior fiscal year and each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the GAO (there were no such occurrences during FY 2020).

CICA also requires that the GAO include in the annual report a "summary of the most prevalent grounds for sustaining protests" during the preceding year. Moreover, the GAO includes in the report "data concerning [its] overall protest filings for the fiscal year."

What are the highlights of the 2020 report?

First, protesters received some relief in 51% of the protests that were brought before the GAO in FY 2020. The GAO reports this statistic as an "effectiveness rate" — i.e., the percentage of protests where the protester obtained "some form of relief from the agency ... either as a result of voluntary agency corrective action or [the GAO] sustaining the protest."

As the following chart from the GAO's report thus shows, protesters received some form of relief from the agency in *more than half* of the protests filed with the GAO in FY 2020:

Bid Protest Statistics for Fiscal Years 2016-2020

	FY2020	FY2019	FY2018	FY2017	FY2016
Cases Filed ¹	2149 (down 2%) ²	2198 (down 16%)	2607 (less than 1% increase)	2596 (down 7%)	2789 (up 6%)
Cases Closed ³	2137	2200	2642	2672	2734
Merit (Sustain + Deny) Decisions	545	587	622	581	616
Number of Sustains	84	77	92	99	139
Sustain Rate	15%	13%	15%	17%	23%
Effectiveness Rate ⁴	51%	44%	44%	47%	46%
ADR ⁵ (cases used)	124	40	86	81	69
ADR Success Rate ⁶	82%	90%	77%	90%	84%
Hearings ⁷	1% (9 cases)	2% (21 cases)	0.51% (5 cases)	1.70% (17 cases)	2.51% (27 cases)

Second, as the foregoing chart shows, the GAO utilized ADR in 124 protests in FY 2020 compared to just 40 protests in FY 2019.

The report does not provide a reason for this noticeable increase in the GAO's utilization of ADR, and it will be interesting to see if this increase is perhaps a pandemic-related aberration, or rather if this increase represents the "new normal."

What were the most prevalent reasons for sustaining protests?

The report states that the "most prevalent reasons" for sustaining protests during FY 2020 were:

- (1) unreasonable technical evaluation;
- (2) flawed solicitation;
- (3) unreasonable cost or price evaluation; and
- (4) unreasonable past performance evaluation.

Of note, it appears that this is the first time that the GAO has reported that "flawed solicitation" was among the most prevalent reasons for sustaining protests.

As a point of comparison, the most prevalent reasons for sustaining protests during FY 2019 were:

- (1) unreasonable technical evaluation;
- (2) inadequate documentation of the record;

(3) flawed section decision;

(4) unequal treatment; and

(5) unreasonable cost or price evaluation.

Notes

1 <http://bit.ly/2Y59wGM>

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