

Is Protesting Worth It?

By

Latest GAO report suggests it's a decent bet.

Each year, the U.S. Government Accountability Office (“GAO”) submits a report to Congress reviewing its bid protest data. While succinct, the report nonetheless provides a useful window into the volume of protests, the rates of success, and the different grounds that form the basis of protests. This year’s report , released on November 27, 2018, offers key insights for government contractors considering whether to file a protest in relation to a particular procurement.

GAO received 2,474 protests during the 2018 fiscal year, and it closed 2,505 protest cases (some of which may have been carried over from the prior year). These numbers do not include cost claims and requests for reconsideration, which number roughly 135 matters. The data tell us that despite occasional allegations that protests have become rampant, in reality the number of protests files has remained remarkably consistent over the years. A chart enclosed with the GAO report showing the number of cases filed each year since FY2014 confirms this.

Perhaps most notably, GAO’s report indicates an “Effectiveness Rate” of 44% in 2018, meaning that protesters obtained some form of relief, whether due to GAO sustaining the protest or the relevant federal agency voluntarily undertaking some corrective action in response to the protest, almost *half* the time. This statistic has also stayed remarkably since FY2014.

Those odds are rather exceptional when compared to, say, statistics for plaintiffs filing civil suits in court. While only 15% of protests resolved on the merits in FY2018 were sustained, that figure does not include the many cases in which a protester benefited from corrective action by an agency before the GAO could rule on the merits of the protest. Of the 2,642 cases closed in FY2018, only 622 -- or less than a quarter -- were decided on the merits. That percentage is also quite consistent since FY2014. While the report does not contain data reflecting the reasons why an agency decides to take corrective action in a particular case, contractors weighing whether to protest a procurement decision by an agency should consider that almost half of all protests result in some sort of relief.

Another important consideration is what grounds are most prevalent in sustaining protests. GAO is required by federal law to include this information in its annual report. GAO explained that “the most prevalent reasons for sustaining protests during the 2018 fiscal year were: (1) unreasonable technical evaluation; (2) unreasonable cost or price evaluation; (3) flawed selection decision.” Accordingly, while each case is different and there are no guarantees, these are statistically the “best” grounds for having a protest sustained on the merits. This does not mean that protests based on other grounds would not succeed, particularly if the agency voluntarily takes corrective action rather than having to litigate the protest, but it is another factor informing a contractor’s decision whether to file a protest.

The report also reflects the relative success rate of alternative dispute resolution (“ADR”) processes in resolving cases without a formal GAO decision. While only 86 cases used ADR in FY2018, 77% of them were resolved through ADR. That is a decrease in the percentage from the last couple years. In FY2017, 81 cases used ADR with a 90% success rate, and in FY2016, 69 cases used ADR with an 84% success rate. But the 77% rate in FY2018 is still rather good, and it is worth noting that there was a higher number of cases using ADR in FY2018. However, “success” in ADR is defined as resolution of the case, which does not necessarily mean that the protester received significant relief. Cases using ADR also represent a small fraction of the total cases -- about 3% of all cases closed in FY2018.

The number of cases in which GAO conducted a hearing also continued its steady trend of decreasing year over year, though the percentage of cases in which a hearing is held has been quite small for years. In FY2014, 42 cases, or 4.7% of all fully developed cases closed that year, had a hearing. By FY2017, it was only 17 cases, or 1.7%. In FY2018, it was only 5 cases, or 0.51% of all fully developed cases closed this past fiscal year. Protesters should expect that a hearing in their case is highly unlikely. This trend could be beneficial if a hearing is not really necessary and the paper record is sufficient, and it keeps the

legal costs of a protest down. But it also means that protesters do not have the opportunity to present their case in person or cross-examine witnesses the way they would in a courtroom.

When evaluating whether to file a protest with GAO, businesses should consult knowledgeable government contracts counsel in order to properly weigh the potential benefits and risks, as each case is different. But generally speaking, the data in GAO's latest annual report on bid protests suggests that the chances of obtaining some sort of relief continue to be pretty decent.