

Everything Changes, Except That Which Stays the Same: GAO's Bid Protest Annual Report to Congress

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It is that time of year again when the U.S. Government Accountability Office ("GAO") submits its bid protest statistics to Congress as mandated under the Competition in Contracting Act of 1984, 31 U.S.C. §3554(e)(2). On November 16, 2021, the GAO released its [Bid Protest Annual Report to Congress for Fiscal Year 2020](#). It has been a year of ups and downs, but, importantly, the chances of winning have stayed the same.

Down is the number of cases that were filed. In fact, it is a five-year low, down from the 2,149 cases in 2020 to 1,897 in 2021, a 12 percent decrease. Of these 1,897 cases, there were 1,816 protests, 38 reconsideration requests, and 43 cost claims. The "effectiveness rate" for these cases, which represents instances where the protester obtains relief, at least to some extent, is also down from 51 percent in 2020, to 48 percent in 2021. GAO also closed fewer cases in 2021, closing 2,017 cases versus the 2020 number of 2,137. Of the cases closed, 1,931 were protests, 41 reconsideration requests, and 45 cost claims. Task order protests accounted for approximately 20 percent of the cases; so there clearly has not been a flood of task order protests as some in the Government feared. Finally, the use of Alternative Dispute Resolution ("ADR") markedly decreased from a five year high of 124 cases in 2020, to 76 in 2021 – a nearly 40% drop.

On the flip side, the GAO issued more decisions addressing the merits of the filed cases: 581 in 2021, versus 545 in 2020. These decisions included 85 in which the GAO agreed with the protester and sustained the protest, about a 15 percent sustain rate. The "prevalent reasons" for siding with the protester dealt with technical and cost evaluations that were deemed to be unreasonable evaluations, failure to conduct discussions properly, and disparate treatment of offerors. On the ADR front, while GAO conducted fewer ADRs, the process was a bit more successful in 2021, with a success rate of 84 percent versus the 2020 rate of 82 percent. Finally, although the GAO conducted more hearings – 13 in 2021 versus 9 in 2020 – it still provided hearings in only 1 percent of the filed cases and, based on history, that is not likely to rise significantly in the future.

So, in the end, although some of the numbers have changed, the key statistic from my perspective, is the sustain rate, which, over the past five years averages at 15 percent. An important fact to consider when pursuing future protests.

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