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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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Majority of Recent Protests Found Some Success at GAO

*By Luke W. Meier and Scott Arnold**

The authors of this article analyze the Government Accountability Office's Annual Report to Congress summarizing bid protest activity for fiscal year 2020.

The Government Accountability Office (“GAO”) has released its Annual Report to Congress summarizing bid protest activity for fiscal year (“FY”) 2020.¹ The report shows that, in a unique year where COVID-19 altered procurement practices and priorities, protest activity at GAO was remarkably stable. Of note, GAO’s “effectiveness rate” this year topped 50 percent, meaning most protests resulted in some form of relief. The number of task order protests continues to increase, despite a modest dip in overall protests. Unsurprisingly, again there were very few hearings.

* Luke W. Meier is a partner at Blank Rome LLP practicing government procurement law, with a focus on contract disputes and claims, bid protests, and False Claims Act litigation. Scott Arnold is a partner at the firm concentrating his practice in all areas of government contracts law, including litigation and counseling matters. The authors may be reached at lmeier@blankrome.com and sarnold@blankrome.com, respectively.

¹ GAO-21-281SP, *available at* https://www.gao.gov/products/GAO-21-281SP?utm_campaign=usgao_email&utm_content=gcdecisions&utm_medium=email&utm_source=govdelivery#mt=e-report.

PROTEST STATISTICS

The chart below summarizes the GAO protest statistics from FY 2015 to FY 2020.

	FY2020	FY2019	FY2018	FY2017	FY2016	FY2015
Cases Filed	2149	2198	2607	2596	2789	2639
Merits Decisions	545	587	622	581	616	587
Sustains	84	77	92	99	139	68
Sustain Rate	15%	13%	15%	17%	23%	12%
Effectiveness Rate	51%	44%	44%	47%	46%	45%
Hearings	9	21	5	17	27	31

FOUR KEY TAKEAWAYS

Here are four key takeaways from the latest report.

#1: Majority of GAO Protests Found Some Success

In a year of modest change, one noteworthy milestone is that GAO’s “effectiveness rate” this year was more than 50 percent, meaning most GAO protests resulted in some form of relief (see takeaway #2 for further discussion). This reflects a long-running trend where the effectiveness rate has generally increased year-to-year, resulting in a significant long-term increase over the past 16 years—from around one-third to slightly over one-half of GAO protests yielding some form of relief.

Year	Effectiveness Rate
FY2004	34%
FY2005	37%
FY2006	39%
FY2007	38%
FY2008	42%
FY2009	45%
FY2010	42%
FY2011	42%
FY2012	42%

Year	Effectiveness Rate
FY2013	43%
FY2014	43%
FY2015	45%
FY2016	46%
FY2017	47%
FY2018	44%
FY2019	44%
FY2020	51%

While the milestone was foreseeable, it is nevertheless remarkable. Despite continued complaints in some quarters that the U.S. procurement system permits too many frivolous protests, GAO saw a year where, more often than not, agencies ultimately determined—or were told by GAO—that they should take corrective action.

#2: More Than Ever, Success Is Coming through Voluntary Corrective Action

Also, more striking than ever is the means by which protesters reached an effective outcome. In a small percentage of cases, this was achieved when GAO sustained a protest on the merits. Far more often, the protest found success because the agency elected to take corrective action without a GAO decision recommending relief.

While this continues a recent trend, the numbers this year are particularly striking: out of approximately 1,090 successful protest in FY 2020 (51 percent of the 2137 protests GAO “closed”), just 84 involved a favorable GAO decision.

In other words, more than 90 percent of successful GAO protests last year (1,006 out of 1,090) came without a decision on the merits.

This is a critical fact to keep in mind for protesters, and perhaps even more so for intervenors. If an intervenor is going to “lose” a protest, it probably will not be at the hands of GAO. Coordination with and support of an agency’s efforts defending a protest are paramount—particularly in the time leading up to the initial agency report, by which time most corrective action has already occurred.

#3: Task Order Protests Are Up

Despite a modest overall drop-off in protests, the number of task order (“TO”) protests increased again in FY 2020 to a record high of 417 (see summary chart).

	FY2020	FY2019	FY2018	FY2017	FY2016	FY2015	FY2014	FY2013
TO or DO protests	417	373	356	256	375	335	292	259

The numbers indicate that significantly more procurements are being conducted as task order or delivery order (“DO”) awards. Notably, the increasing number of task order protests in recent years comes despite the May 2018 increase in the threshold for GAO protests of task or delivery orders under Department of Defense (“DoD”) multiple award contracts, from \$10 million to \$25 million. Even though fewer task order awards are protestable, the numbers continue to rise.

#4: Hearings Return to Hiatus

Last year saw a slight resurgence in GAO protest hearings (21 in FY 2019, compared to just five in FY 2018). With COVID-19 disrupting seven of the 12 months in FY 2020, it is understandable to see that GAO conducted hearings in just nine cases.