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Unpacking the Numbers from GAO's FY2023 Annual Bid Protest Report

Client Alert

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The U.S. Government Accountability Office ("GAO") recently issued its Annual Report to Congress, as required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2), on bid protest statistics for fiscal year 2023.

As included in the Report, below is a table setting out FY 2023's critical statistics and those for the prior 4 fiscal years:

FY2023

FY2022

FY2021

FY2020

FY2019

Cases Filed

2025

(increase of 22%)

1658

(down 12%)

1897

(down 12%)

2149

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(down 2%)

2198

(down 16%)

Cases Closed

2041

1655

2017

2137

2200

Merit (Sustain + Deny) Decisions

608

455

581

545

587

Number of Sustains

188

59

85

84

77

Sustain Rate

31%

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13%

15%

15%

13%

Effectiveness Rate

57%

51%

48%

51%

44%

ADR (cases used)

69

74

76

124

40

ADR Success Rate

90%

92%

84%

82%

90%

Hearings

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2%

(22 cases)

.27%

(2 cases)

1%

(13 cases)

1%

(9 cases)

2%

(21 cases)

Upon initial glance, what jumps off the page is an apparently paradigm-altering increase in the sustain rate. Indeed, such an increase, to almost a third of protests filed in FY 2023, would represent a welcome departure for bid protest practitioners and contractors, who have grown accustomed to a sustain rate hovering around the mid-teens for the last decade or so. However, the devil is in the details.

As the Report itself notes, the FY 2023 statistics are skewed by GAO's "resolution of an unusually high number of protests challenging a single procurement"—in this case, a DHHS procurement in connection with its Chief Information Officer-Solutions and Partners 4 ("CIO-SP4") government-wide procurement vehicle, under which hundreds of IT services contracts were to be awarded, and challenges to which resulted in 100+ sustained protests.¹

At this point, the impact of this single procurement on the FY 2023 statistics becomes clear. For example, after removing all 348 individual protests filed in connection with the CIO-SP4 procurement from "Cases Filed" (as GAO calculates that metric, i.e., individual docket number assigned by GAO), there are only 1677 cases for FY 2023. That represents just a small jump in the 1658 filings for FY 2022.

Similarly, removing the 119 sustains for the CIO-SP4 procurement from the statistics for "Merit (Sustain + Deny) Decisions," "Number of Sustains," and "Sustain Rate" brings the numbers much more in line with recent years, as the number of sustains would sit at only 69, reflecting a sustain rate of just over 14%, which is well within the range of recent historical trends.

Putting the aforementioned anomaly to the side, the Report, on the whole, tends to line up with recent patterns. Encouragingly, the Effectiveness Rate remains over 50 percent. This is perhaps the key metric for prospective protesters, as the rate represents the percentage of instances that the protester

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obtains any relief from the Agency, whether as a result of a sustained protest or voluntary agency corrective action taken before GAO reaches a decision on the merits. That the rate continues to remain so high is a positive sign.

Also, of interest, GAO ranks the most frequent bases for GAO sustaining protests:

- Of the protests resolved on the merits during fiscal year 2023, our Office sustained 31 percent of those protests. Our review shows that the most prevalent reasons for sustaining protests during the 2023 fiscal year were: (1) unreasonable technical evaluation; (2) flawed selection decision; and (3) unreasonable cost or price evaluation. It is important to note that a significant number of protests filed with our Office do not reach a decision on the merits because agencies voluntarily take corrective action in response to the protest rather than defend the protest on the merits. Agencies need not, and do not, report any of the myriad reasons they decide to take voluntary corrective action.

This probably covers the most widely raised grounds for post-award protests, which grounds are thrown into almost any challenge to an award made at GAO. That they all seem to be relatively fertile ground for sustains suggests that protesters take a comprehensive approach—as opposed to, for example, relying solely on narrow grounds such as improper or unequal discussions or challenges to past performance—when seeking relief from GAO.

Members of the Butzel Aerospace and Defense Team have significant experience with bid protests at not only GAO but also at the Court of Federal Claims and at the agency level. Please contact a Team member if your company needs to consult regarding Federal bid protests.

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1 *Systems Plus, Inc. et al.*, B-419956.184 *et al.*, June 29, 2023, 2023 CPD ¶ 163; (93 sustains); *Phoenix Data Security, Inc. et al.*, B-419956.200 *et al.*, July 10, 2023, 2023 CPD ¶ 172 (26 sustains).