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A Look at GAO Bid Protests in 2015 as the Government's Fiscal Year End Approaches and The General Boundaries of an Agency's Corrective Action

By: Christine V. Williams
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As government contractors expect to see the usual uptick in Federal Fiscal Year ("FY") end spending, it may be helpful to look back at the trends from 2011 to 2015 in making the decision on whether or not to file a bid protest in front of the GAO. This update will also examine the general parameters of an agency's corrective action in response to a bid protest-keeping in mind that bid protests are factually intensive- so, these should just serve as basic understandings of what an agency can do.

Roughly half the GAO protests filed are dismissed within 30 days of filing. This is due, in large part, to the agency taking corrective action that addresses the ground(s) for protest. Thus, both the statistics for protests and how they are resolved as well as the basic ground rules for corrective action should be evaluated before a protest is filed. As protests are fact specific, a company may need legal advice to help match its facts to sustainable grounds for protest or agency corrective action, but the fundamental rule set, which has evolved in the last several years, as set forth below, should help a company with understanding the basics. The GAO chart with statistics is found in full on the next page.

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Below is a chart taken directly from the GAO’s annual report dated December 10, 2015.
Bid Protest Statistics for Fiscal Years 2011-2015

	FY2015	FY2014	FY 2013	FY 2012	FY 2011
Cases Filed ¹	2,639 (up 3%) ²	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)
Cases Closed ³	2,647	2,458	2,538	2,495	2,292
Merit (Sustain + Deny) Decisions	587	556	509	570	417
Number of Sustains	68	72	87	106	67
Sustain Rate	12%	13%	17%	18.6%	16%
Effectiveness Rate ⁴	45%	43%	43%	42%	42%
ADR ⁵ (cases used)	103	96	145	106	140
ADR Success Rate ⁶	70%	83	86%	80%	82%
Hearings ⁷	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)

An Agency’s Corrective Action

Fewer bid protests are going to full resolution without agencies taking corrective actions in response to and in an effort to resolve a bid protest dispute, which begs the question on what are the parameters of an agency action, regardless of the forum. An extremely broad summary of the rules of an agency’s corrective action is: (1) agencies are coming under more scrutiny for corrective action, which itself may be protested; (2) the agency’s corrective action must be narrowly targeted to remedy the defect it is intended to correct; (3) BUT the agency’s action may not be so narrow so as to restrict the competition (*i.e.*, applying the fix in a restricted way so only certain portions of the proposal could be revised-some of which the agency characterized as a “clarification;” (4) in some cases, the corrective action may be more expansive than the subject

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of the defect as long as there is a reasonable (*i.e.*, within an agency's/contracting officer's broad discretion) nexus between the expansion and the defect; and (5) there is a distinction between what an agency MUST correct and MAY correct, which is a factual determination with broad discretion given to the agency.

Conclusion

As the agencies begin the FY end uptick in spending, it is likely that bid protests may also rise. It makes good sense to evaluate the trend in the GAO protests as well as how bid protests are resolved, including the basic ground rules for an agency's corrective action (in forums including but not limited to the GAO) when a company is contemplating a bid protest. If you have any questions or comments, please contact the author.