

## Key Takeaways and Trends from the Government Accountability Office's Annual Bid Protest Report to Congress for FY 2024

Litigation Alert

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- **Despite the reported decrease in GAO cases, protests are on the rise**
- **GAO's 16 percent sustain rate in FY 2024 returned to pre-FY 2023 levels**
- **GAO issued fewer merit decisions than in the previous 15 fiscal years**
- **Hearings hit an historic low going back 23 fiscal years**

Every fall, the Government Accountability Office (GAO) fulfills its obligations under the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(e)(2) (CICA) and reports to Congress the number of bid protests that were filed in the previous fiscal year (FY). GAO's annual report also identifies each instance in which (1) a federal agency did not fully implement a recommendation made by GAO in connection with a bid protest during the prior year, and (2) each instance in which a final decision in a protest was not rendered within 100 days after the date the protest was submitted to the Comptroller General. Additionally, GAO advises Congress what the "most prevalent grounds for sustaining protests" were during the preceding fiscal year. 31 U.S.C. § 3554(e)(2). GAO's report also provides government contractors insight into the likelihood of securing some relief from an agency mistake or error in a procurement. [GAO's report for FY 2024](#) does not disappoint and demonstrates that 17 percent of all merit decisions over the last 10 FYs resulted in some relief to contractors after the issuance of sustain merit decision. Furthermore, 52 percent of all resolved protests resulted in some form of relief to protesters (Effectiveness Rate), usually through voluntary agency corrective action. However, FY 2024 also showed a continued decline in GAO hearings and the use of alternative dispute resolution (ADR) procedures leaving protesters with only a limited agency record to pursue relief at GAO. GAO issued fewer merit decisions indicating a possible increase in dismissals, including dismissals resulting from agency corrective actions. Despite this, FY 2024 data indicates GAO likely broke its multi-year decline in filed protests.

### A Downward Trend in the Number of Protests Filed at GAO Ended in FY2024

From FY 2019-2022, GAO experienced a steady decline in the number of protests filed against agency procurements. While FY 2023 broke that pattern, the protest count was significantly inflated by a group of approximately 357 protests related to a single Department of Health and Human Services (HHS) Chief Information Officer-Solutions and Partners 4 (CIO-SP4) procurement. When adjusting for this aberration, the number of protests filed at GAO in FY 2024 (1,740) appears to have actually increased when compared to the adjusted FY 2023 and considering the 1,595 protests filed in FY 2022. Simply, the reported 11 percent decrease in cases filed at GAO in FY 2024 does not tell the real story and GAO's protest count appears to be on the upswing. This upward trend at GAO, when combined with anecdotal reports<sup>1</sup> of a significant increase in protests filed at the U.S. Court of Federal Claims (COFC), indicates that government contractors are protesting more to remedy perceived errors in agency procurements. If you are the selected awardee in a procurement, this also means you are more likely to need to defend the agency's award decision – and potentially the agency's evaluation of your proposal – as an intervenor. Either way, the GAO protest process was alive and well in FY 2024 and may be insulated from any increase – or decrease – in government spending as contractors fight more for future opportunities.

### Merits Decisions Sharply Declined to Pre-FY 2010 Levels

GAO can either dismiss, deny, or sustain a protest ground. When it denies or sustains a protest, GAO will issue a written digested merit decision within 100 days of the protest filing. In FY 2024, GAO issued 387 merit decisions, which represents 23.7 percent

of the protests closed (1,635) this past fiscal year. This was substantially fewer than the merit decisions it issued in FY 2023 (608) or FY 2022 (455). In fact, it has been 15 years since GAO issued fewer merit decisions – when it issued 315 merit decisions in FY 2009. Other than the slight uptick in GAO's Effectiveness Rate, there is no clear explanation in the report for this significant departure in merit decisions and further analysis is warranted to understand this significant decrease.

## Protests Attributable to Task Order Procurements Remained Steady

Congress vested GAO with exclusive jurisdiction to hear protests of the issuance or proposed issuance of certain task and delivery orders under indefinite-delivery/indefinite-quantity (IDIQ) contracts issued by civilian agencies, as well as by the Department of Defense (DoD), the Coast Guard, and the National Aeronautics and Space Administration (NASA). GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 1340 Stat. 1361; National Defense Authorization Act (NDAA) for FY 2013, Pub. L. No. 112-239, § 830, 126 Stat. 1842. The minimum value required to adjudicate a civilian agency task order is \$10 million and \$25 million for a task order issued by the DoD. *See* 10 U.S.C. 2304c(e) and 41 U.S.C. 4106(f). In FY 2024, only 20 percent (346 of 1,706) of cases closed by GAO involved task order procurements. In FY 2023, 18 percent (368 of 2,041) of cases closed were associated with task order procurements. Similarly, in FY 2022 (344 of 1,655), FY 2021 (401 of 2,017), and FY 2020 (417 of 2,137), only 20 percent of cases closed involved task order procurements. While agencies may prefer to raise the minimum thresholds to protest task orders, the GAO report provides no data suggesting task order protests have disproportionately increased over the last five FYs.

## GAO's Sustain Rate Decreased Sharply But Don't Be Fooled – Its Consistent

In FY 2024, GAO issued 61 sustain decisions which provided contractors some relief on one or more protest grounds raised by the protest. The fact that the sustain rate dipped back down to 16 percent in FY 2024 from a high of 31 percent in FY 2023 is statistically meaningless. Again, FY 2023 saw inflated statistics primarily due to the previously mentioned HHS grouping of protests and the sustain rate for FYs 2020-2022 was consistently between 13 and 15 percent. Over the last 10 FYs, GAO recommended relief to contractors in 17 percent of all merit decisions. Considering GAO's modest 52 percent Effectiveness Rate and a more than nominal sustain rate when protests go to a merit decision, contractors may increasingly find a valid business case to pursue a protest when it appears an agency committed an error. Of course, winning a protest or getting the agency to take corrective action does not mean winning the procurement. Both GAO sustain decisions and voluntary agency corrective actions lead to corrections by an agency, but neither guarantees a different result.

## Hearings Dipped to a 23-FY Low, Yet Relief Increased in FY 2024

Despite the passage of time since the end of the COVID-19 pandemic lockdown, GAO conducted 100 percent fewer hearings (virtual or in-person) in FY 2024 when it conducted only one hearing or in 0.2 percent of cases that were fully developed. In fact, GAO conducted fewer hearings in FY 2024 than in the last 23 FYs. Despite this lack of face-to-face due process, GAO's Effectiveness Rate – where protesters received some form of relief – marginally increased to 52 percent compared to FYs 2019-2022. However, there can be unseen benefits for contractors with fewer hearings. First, the record speaks for itself, which can prove beneficial in certain cases. This is especially true when personalities conflict and testimony can jade underlying and relevant facts. Second, legal costs associated with hearings can be substantial.

## Most Prevalent Protest Grounds

Most useful for practitioners and government contractors is GAO's identification of the most prevalent reasons for sustaining protests during FY 2024. Last fiscal year, the most common reasons GAO sustained protest allegations included: (1) an unreasonable technical evaluation; (2) a flawed source selection decision; and/or (3) an unreasonable cost or price evaluation. The reasons for sustaining a protest are not unique to FY 2024 and are common across every FY. Agencies and contractors should review these common issues when reviewing source selection decisions and agency debriefings.

## Only One Agency Declined to Follow GAO's Recommendation in FY 2024

Since GAO is not a court, its merit decisions result in non-binding recommendations to agencies. 31 U.S.C. § 3554(e)(2). Thus, agencies are "free" to disregard GAO recommendations, but there is a catch. Congress has the power of the purse and GAO's annual report requirement demands the express identification of any agency which fails to fully implement a GAO protest recommendation in each FY. This FY, the Department of State (State) was the sole federal agency which chose not to follow GAO's recommendation in a merit decision sustaining a protest. The protest involved State's implementation of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 and the requirements under the Federal Acquisition Regulation (FAR) related to registration of a joint venture in the System for Award Management (SAM). In its report, GAO recommended that Congress pass legislation that directs State to revise its Security Act implementing regulations.

## Conclusion

The decrease in reported cases filed at GAO in FY 2024 does not tell the whole story. The number of protests filed, when adjusted for a large group of related cases in FY 2023, increased in FY 2024 reflecting a slight overall bump in protested procurements. However, an historic decrease in hearings and significant decrease in issued merit decisions raise questions whether GAO saw a true increase in protest activity or productivity in FY 2024. Further analysis which considers protest statistics from the COFC will help any objective analysis of protest trends for FY 2024. However, contractors should find some comfort in the rate of corrective actions and sustain decisions from the GAO.

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For more information, please contact:

Scott N. Flesch, [sflesch@milchev.com](mailto:sflesch@milchev.com), 202-626-1584

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<sup>1</sup>Reliable, but unofficial, reports indicate protest related filings (*i.e.*, complaints) nearly doubled at the COFC in FY 2024. When COFC's annual report for FY 2024 is released later this year, a more detailed analysis is warranted to compare the two protest fora and the reasons for increase in the number of filed protests.

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