

Bid Protest Successes Counter Agencies' Frivolity Concerns

By **Daniel Wilson**

Law360 (November 14, 2019, 9:20 PM EST) -- The continued high success rate for federal contract protests at the Government Accountability Office over the last five years, as shown in a recent GAO report, belies lawmaker and agency concerns about frivolous protests.

GAO protests were considered "effective" 44% of the time in fiscal year 2019, leading to either a sustained protest or corrective action by an agency, according to the GAO's recent annual bid protest report. That is the exact same percentage as in 2018, and the effectiveness rate has varied by only a few percentage points across each of the past five years, the GAO noted.

Among other barriers in the way of a successful protest, protesters bear the burden of proof, often have less access to relevant information than agencies, and face tight deadlines for filing, so 44% is an "incredibly high" effectiveness rate, said Covington & Burling LLP partner Jay Carey, whose practice focuses on bid protests.

The fact that the effectiveness rate of GAO protests has remained both high and stable over time should disprove many of the concerns raised in recent years by contracting officials in the U.S. Department of Defense and other agencies, who have argued that bid protests are too frequent and too often frivolous, according to Carey.

"That, to me, says that protesters are doing a pretty good job of identifying protests where it makes sense to raise a concern," he said.

There have been a number of moves in recent years by both agencies and Congress — acting on agencies' concerns — to head off bid protests. For example, lawmakers in the 2017 National Defense Authorization Act raised the threshold to challenge defense agency task orders from a minimum \$10 million order value to \$25 million.

And the DOD — albeit with some congressional blowback — has over time increased its use of the lowest price technically acceptable, or LPTA, model for contracting, which focuses mostly on price.

Attorneys and contractors have long argued that LPTA has been used inappropriately at times as a way for the DOD to preemptively stave off protests, rather than because it is the most appropriate contracting model.

And the high effectiveness rate for GAO protests suggests that those legislative and agency moves are driven by "a limited number of anecdotes that have an outsize effect on the perception" of frivolity, according to Blank Rome LLP partner Luke Meier, a vice chair of the American Bar Association's Bid Protest Committee.

"Because when you look at the total numbers, it certainly doesn't look like a system that has a lot of frivolous protests," he said.

Not all figures in the GAO report lend themselves as easily to conclusions, however, with a sharp drop in the number of GAO protests filed in fiscal 2019 particularly open to interpretation, according to Carey, Meier and Bradley Arant Boult Cummings LLP partner Aron Beezley, also an ABA Bid Protest Committee vice chair.

The number of protests hovered around 2,600 for three of the past four years — 2016 was an outlier, with 2,789 cases filed — but there were only 2,198 new cases filed in 2019, a 16% drop from 2018.

One factor that could have contributed to the drop was the 35-day government shutdown in December 2018 and January 2019, Carey said, which may have dissuaded some protests, even though the GAO remained open for filings.

And the GAO in 2018 implemented a new electronic filing system that includes a \$350 filing fee for new cases, Carey noted.

Although intended to help pay for upkeep of the filing system, the new fee also added a new "gating mechanism" to the filing process, which may have prompted some potential protesters — particularly smaller companies — to more carefully consider whether a protest makes sense, Carey suggested.

"I don't want to dismiss the value of \$350, but in the big scheme of things, it's pretty modest," he said. "But it's probably enough to make people think about whether it's really worthwhile [to protest]."

For Meier, another possible explanation for the drop in new cases, at least in part, is the increased \$25 million threshold for defense task order protests, combined with a broader trend in recent years of agencies moving their acquisitions to task orders issued under overarching indefinite-delivery contracts, rather than using discrete contracts.

And Beezley said bid protest numbers are up at the U.S. Court of Federal Claims, suggesting that more protesters may be headed straight to the court without filing a GAO protest first.

Although the GAO has long been perceived as a quick — cases are, with very rare exceptions, decided within 100 days — and relatively inexpensive way to pursue a protest, the claims court's case law on some issues differs in ways that some protesters may view as advantageous, Beezley said.

Also, federal agencies have recently been more open to voluntarily staying contracts while claims court cases play out, reducing the incentive provided by the automatic stay on contract performance that comes from a GAO protest, Beezley noted.

The new enhanced debriefing process required by a clause in the 2018 NDAA that makes it mandatory for the DOD to give post-award debriefings for all contracts valued at more than \$100 million — or \$10 million for small business and "nontraditional" contracts — may also be contributing to the reduction in

new cases, according to Beezley.

The process takes longer, which inherently provides a "cooling-off period" in which a company may decide not to protest, Beezley said. And it serves to cut down on protests filed simply to glean more information from an agency about why a company wasn't considered for a particular deal, both Beezley and Meier noted.

"I think it is true that when you get a really opaque debriefing, you sometimes have to file a protest just so somebody can figure out what happened," Meier said. "And the enhanced debriefing can leave offerers disappointed, but satisfied that they understand why they lost."

--Editing by Breda Lund and Alanna Weissman.