

# Government Contracts Blog

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## **GAO's Bid Protest Annual Report to the Congress for Fiscal Year 2009 - Another Busy Year for GAO, Another Good Year for Protestors**

On January 8, 2010, the Government Accountability Office (“GAO”) submitted its Bid Protest Annual Report to the Congress for Fiscal Year 2009. Overall, the Report reflects that FY 2009 was a busier year for GAO, and a more successful year for protestors, than FY 2008.

### *More Protests*

According to the Report, protestors filed 1,989 protests in FY 2009. This represents a 20% increase over the 1,652 protests filed in FY 2008. The Report attributes half of this increase to GAO’s expanded jurisdiction over task order protests, A-76 filings, and Transportation Security Administration (“TSA”) procurements.

Interestingly, the Report indicates that only 139 task order protests were filed in FY 2009. This represents roughly 7% of GAO’s docket – a far cry from the deluge of protests predicted by the critics of GAO’s expanded task order jurisdiction.

### *More Hearings*

Given the overall increase in bid protest filings, it comes as no surprise that GAO issued more decisions on the merits in FY 2009 (315) than it did in FY 2008 (291). What does come as somewhat of a surprise is that the percentage of cases in which GAO held hearings doubled from 6% in FY 2008 to 12% in FY 2009.

On balance, this increase in the number of hearings is good news for protestors. It reflects more intense GAO scrutiny of agency source selections, since GAO generally does not conduct a hearing unless there is at least some possibility of sustaining the protest. Moreover, we have been involved in several protests where witness testimony was essential to GAO’s understanding of the import of the flaws in the agency’s evaluation and source selection decision.

On the other hand, hearings provide an agency with an opportunity to explain away gaps in the contemporaneous record. They also increase the cost of litigation for protestors and intervenors alike, a fact that we encourage our clients to take into account when considering a protest.

### *Higher Protest Effectiveness Rate*

The Report indicates that GAO's sustain rate for FY 2009 was 18%, a slight decrease from the 21% rate experienced in FY 2008. This is consistent with the downward trend in GAO's sustain rate, which has decreased each year since FY 2006, when it peaked at 29%.

Protestors should not be discouraged by this trend. The goal of a protest is to obtain corrective action from the agency. It does not matter whether the corrective action results from a sustained protest or is taken on the agency's own initiative. Thus, a far more important consideration than the sustain rate is the protest effectiveness rate, measured as the percentage of cases in which the protestor obtains some form of relief.

Notwithstanding the lower sustain rate, the Report reflects an increase in the protest effectiveness rate. According to the Report, the protest effectiveness rate for FY 2009 was 45%, compared to only 42% in FY 2008 and only 37% in FY 2005.

This increase in the protest effectiveness rate is encouraging for protestors. First, and most obviously, it means that protestors are more likely to obtain relief. Second, a higher protest effectiveness rate, combined with a lower sustain rate, indicates that agencies have become more likely to take corrective action, rather than allowing a meritorious protest to go to a final decision. The result – a higher probability of success and the potential for lower litigation costs – is a win-win scenario for protestors.

### *Increased Utilization and Effectiveness of Alternative Dispute Resolution*

The Report indicates that a total of 149 protests were referred to alternative dispute resolution ("ADR") in FY 2009 – nearly double the 78 protests referred to ADR in FY 2008. The ADR success rate, measured as the percentage of cases referred to ADR that do not require a formal GAO decision, also increased significantly, from 78% in FY 2008 to 93% in FY 2009. This is good news for protestors and intervenors, since ADR frequently reduces the cost of pursuing and defending protests.

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