

Unpacking GAO's FY 2023 Bid Protest Report

By **Aron Beezley and Patrick Quigley** (November 7, 2023)

The U.S. Government Accountability Office's recently issued annual bid protest report is noteworthy because it shows that 31% of bid protests were sustained — more than double the rate for prior years — and that protesters received some form of relief from the procuring agency in more than half of the protests filed with the GAO in fiscal year 2023.[1]

In addition, the report shows that the number of GAO bid protest filings increased by 22% in fiscal year 2023 after a multiyear period of decline.

Highlights of the 2023 Report

The GAO reports annually to Congress on a number of bid protest issues and uses those reports to provide "data concerning [its] overall protest filings for the fiscal year." The highlight of this year's report is that protesters received some type of relief in 57% of the protests closed at the GAO in fiscal year 2023 — well over half and now getting close to two-thirds of protests.

The GAO reports this statistic as an "effectiveness rate" — i.e., the percentage of protests where the protester obtained "some form of relief from the agency ... either as a result of voluntary agency corrective action or [the GAO] sustaining the protest." As the following chart from the GAO's report thus shows, this marks the fourth year in a row that the effectiveness rate has been at approximately 50% or higher.[2]



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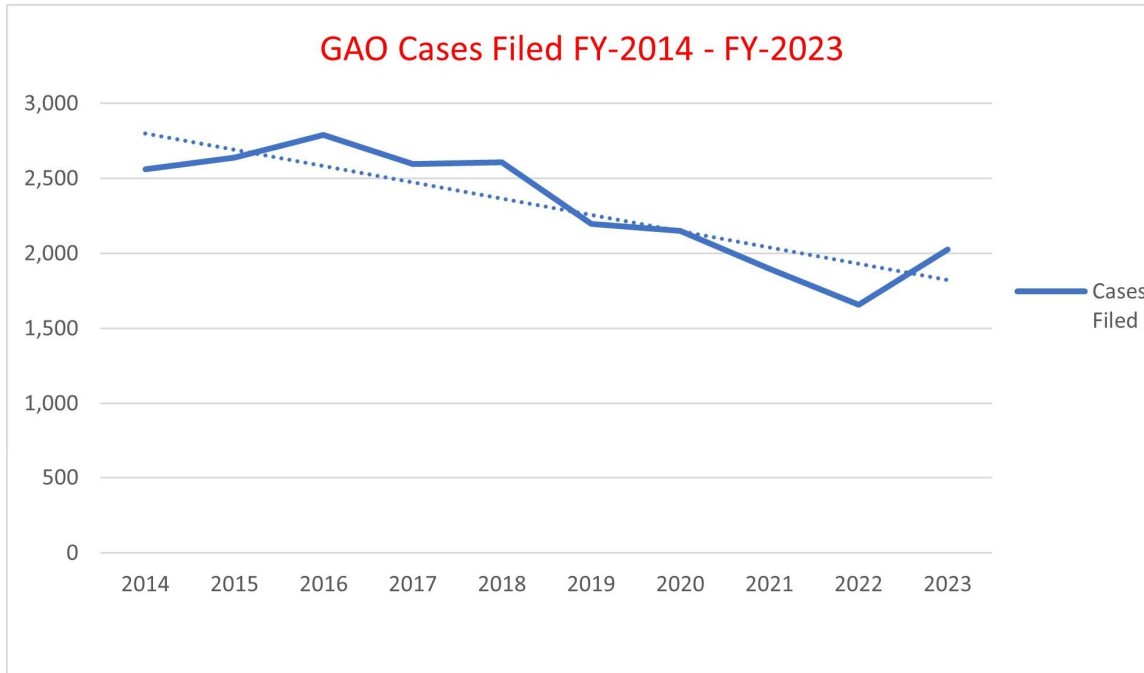


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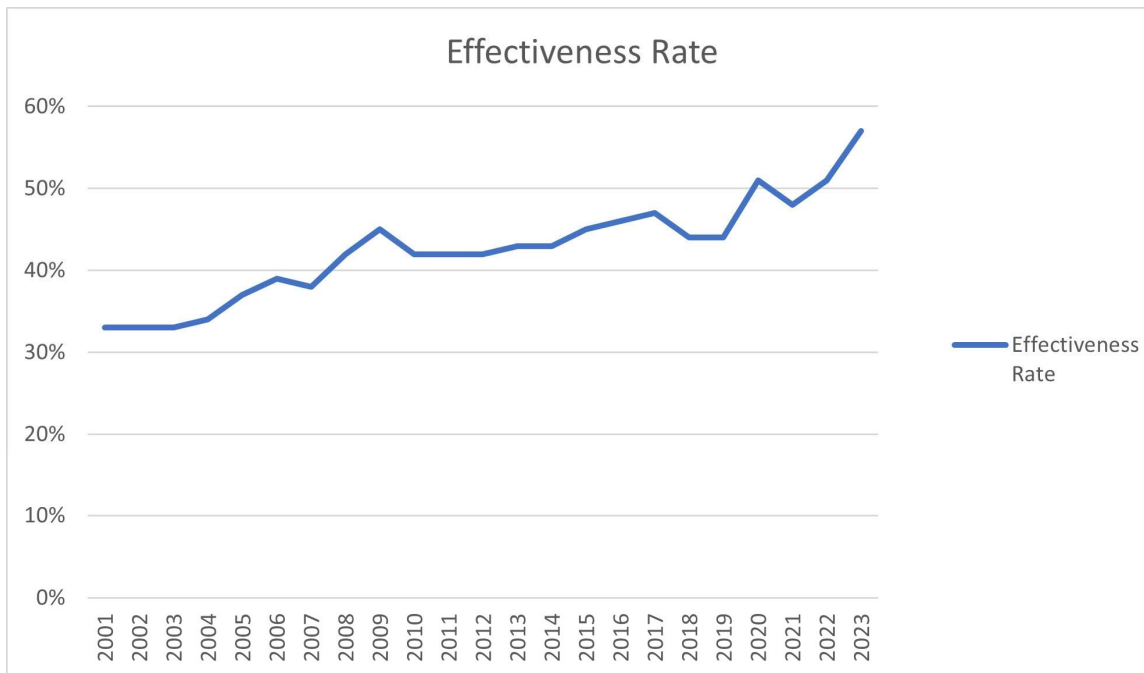
Bid Protest Statistics for Fiscal Years 2019-2023

	FY23	FY22	FY21	FY20	FY19
Cases Filed	2025 (up 22%)	1658 (down 12%)	1897 (down 12%)	2149 (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%	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	2% (22 cases)	0.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)

The other noteworthy data point is that the number of protest filings increased after several years of decline.



While the total number of protests filed has decreased, the effectiveness rate — i.e., sustained protests or agency corrective action — has risen because the raw number of cases where a protester received some form of relief has remained roughly steady, although it spiked up last year.[3]



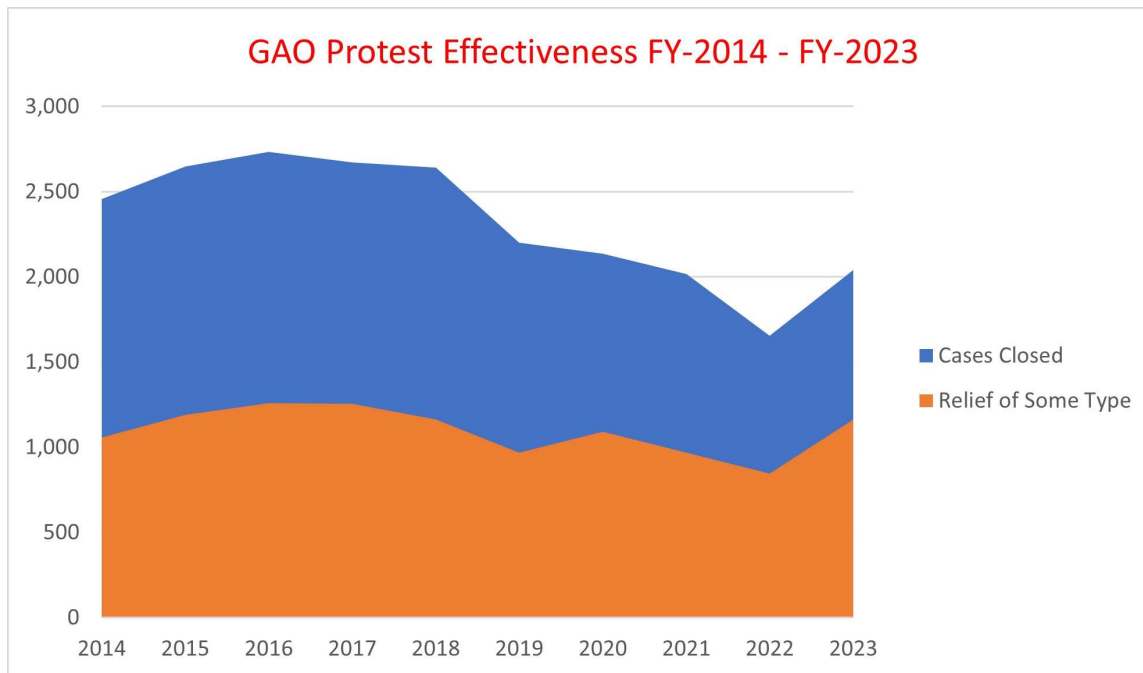
On its face, this year's effectiveness rate figure might suggest that there is little reason not to file a bid protest.

Indeed, the odds of success are the same as — or better than — a coin toss that the

procuring agency will either decide to take some sort of corrective action because of a contract award decision with litigation risk or that the GAO will see merit in the protest, especially since the effectiveness rate jumped significantly this year.

That conclusion, however, does not tell the whole story.

For one thing, protesters have had at least a one-in-three chance of success for as long as the GAO has been providing effectiveness rate figures.



By any measure, those are pretty good odds for a protester and sufficient incentive to try a protest, all other factors being equal.

For this past year, however, the GAO report attributes at least some of the increased number of protests to its "resolution of an unusually high number of protests challenging a single procurement." This refers to the U.S. Department of Health and Human Services' award of the Chief Information Officer-Solutions and Partners 4, or CIO-SP4, governmentwide acquisition contracts, which was a single procurement for the award of hundreds of information technology services contracts.

The raw numbers support that conclusion. The GAO report shows that there were 367 more protests filed this year than last. The GAO's online case docket also shows that there were more than 300 file numbers and docket entries associated with the CIO-SP4 procurement for fiscal year 2023, indicating more than 300 protests and supplemental protests were filed for that period.[4]

This is what one would expect when there are hundreds of disappointed offerors in a massive, multiple-award governmentwide acquisition contract like CIO-SP4. Thus, the evaluation and award timeline for a governmentwide acquisition contract of this type can have an outsized, but isolated, effect on the total protest figures in a given year — as appears to have been the case here.

Similarly, when the GAO adjudicates the merits of numerous protests of such a large procurement, or when an agency decides to take corrective action in such a scenario, one should expect an outsized effect on the effectiveness rate overall.

As an example, Footnote 1 in the GAO report indicates that the GAO sustained at least 119 protests and supplemental protests involving the CIO-SP4 procurement.[5] The result of these sustained protests was for HHS to take corrective action.[6] This, of course, follows an initial round of 119 CIO-SP4 protests in November 2022, resulting in agency corrective action last December.[7]

Because the GAO's effectiveness rate derives from voluntary agency corrective action or the GAO sustaining a protest, according to Footnote 4 to the bid protest statistics chart in the GAO report, these sustained protests and the voluntary agency corrective action doubtless affected the effectiveness rate.

Nevertheless, the fact remains that, in general, the number of protests has been declining while the effectiveness rate has been increasing over the past several years. The reasons for this likely have to do with protesters bringing more meritorious protests and agencies becoming better at identifying litigation risk.

The Most Prevalent Reasons for Sustaining Protests

As for the substance of successful protests, the GAO report states that the most prevalent reasons for sustaining protests during fiscal year 2023 were: (1) unreasonable technical evaluation, (2) flawed selection decision, and (3) unreasonable cost or price evaluation.[8]

Based on the foregoing, one might conclude that protest challenges to an agency's technical evaluation and source-selection decision have the best chance of success when compared to other types of protest arguments.

But a more likely explanation for why "unreasonable technical evaluation" and "flawed selection decision" continue to be among the most commonly sustained protest grounds is that challenges to an agency's technical evaluation and selection decision are the most commonly raised protest grounds — and, accordingly, they are the most commonly sustained protest grounds year after year.

Key Takeaways

Based on last year's data and the trends over the past several years, many disappointed offerors and their bid protest lawyers will continue to conclude that there are few good reasons to refrain from protesting an agency award decision, especially in large procurements.

Perhaps a long-term effect of this trend will be for agencies to rely less on massive governmentwide acquisition contracts, given the likelihood of protest success regarding such vehicles. Failing that, it may be the case that protest filings bottomed out in 2022, and will only increase from now on.

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[1] GAO Bid Protest Annual Report to Congress for Fiscal Year 2023 (Oct. 26, 2023), available at <https://www.gao.gov/products/gao-24-900538>.

[2] The chart is slightly reformatted for clarity with footnotes omitted.

[3] The numbers here of cases where relief of some type was granted are calculated by multiplying the effectiveness rate by the number of cases closed.

[4] As explained in Footnote 1 to the bid protest statistics chart in the GAO report, the GAO bases the numbers in its report on the docket numbers that it assigns to protest filings. These docket numbers include individual protests by different parties of the same procurement. In a multiple-award governmentwide acquisition contracts like CIO-SP4, one would expect many of these types of protests, all sharing the same main docket number, distinguished by a numerical suffix, but all counted individually as "protests" in the GAO's total annual numbers. In addition, the GAO's numbering scheme includes supplemental protest filings for the same party. In other words, when a protester develops additional information during a protest, and amends its protest filing, similar to amending a complaint, the GAO includes those numbers in its totals, too, as "protests."

[5] See *Sys. Plus, Inc., et al., B-419956.184, et al.*, 2023 CPD ¶ 163 (Comp. Gen. June 29, 2023), revised on July 13, 2023; see also *Phoenix Data Sec., Inc., et al., B-419956.200, et al.*, 2023 CPD ¶ 172 (Comp. Gen. July 10, 2023).

[6] Jason Miller, NITAAC to take corrective action on CIO-SP4 after the GAO sustains 125 protests, Fed. News Network (July 11, 2023), available at <https://federalnewsnetwork.com/contractsawards/2023/07/nitaac-to-take-corrective-action-on-cio-sp4-after-gao-sustains-125-protests/>.

[7] Jason Miller, NITAAC to take corrective action on CIO-SP4 after 119 protests, Fed. News Network (Dec. 1, 2022), available at <https://federalnewsnetwork.com/contractsawards/2022/12/nitaac-to-take-corrective-action-on-cio-sp4-after-119-protests/>.

[8] As a point of comparison, the most prevalent reasons for sustaining protests during FY 2022 were: (1) unreasonable technical evaluation; (2) flawed selection decision; and (3) flawed solicitation. See GAO Bid Protest Annual Report to Congress for FY 2021 (Nov. 1, 2022), available at <https://www.gao.gov/products/gao-23-900462>.