

ALERT

GAO Report on Bid Protest Statistics for 2012

November 14, 2012

On November 13, 2012, the Government Accountability Office (GAO) released its annual compilation of bid protest statistics. In brief, the figures for Fiscal Year (FY) 2012 reveal that the overall number of protests increased slightly over the previous year, as did the number of closed cases and written decisions issued by GAO. GAO also identified a series of protests where an agency declined to follow GAO's recommendation. These disputes highlight a continued rift between GAO and the Department of Veterans Affairs (VA) over preferences for veteran-owned small businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB).

According to GAO's report, contractors filed 2,475 protests, a 5% increase over FY 2011. This figure includes 209 task order protests, up from 147 in FY 2011. Overall, this marks the sixth straight year in which protest filings have increased at GAO and reflects a 75% increase in filings over FY 2007. The report also reflects that GAO continues to diligently manage its bid protest docket, notwithstanding the spike in new filings. GAO closed a total of 2,495 cases this year, 20 more cases than were filed. The number of written decisions issued by GAO also rose substantially, from 417 in FY 2011 to 570 in FY 2012.

Following a year in which it sustained protests that went all the way to a written decision at its lowest rate since FY 2002 (16% in FY 2011), GAO's sustain rate for FY 2012 climbed back up to 18.6%, a level comparable with its historical average. GAO sustained 106 protests in FY 2012, 39 more than in FY 2011. Despite the increased number of sustained decisions, the number of cases in which protesters obtained some form of favorable relief remained constant at 42%, the same rate as in each of the past two years.

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The use of alternative dispute resolution (ADR) played less of a role than in prior years. Protests were referred to ADR 106 times in FY 2012, 34 fewer times than in FY 2011 and 53 fewer times than in FY 2010. The number of disputes referred to ADR that were resolved without a formal decision from GAO continued to hover around 80%.

GAO must report to Congress whenever an agency rejects GAO's recommendations, which occurred in a total of 18 protests in FY 2012. All of those protests challenged the VA's failure to consider whether two or more VOSB or SDVOSB concerns were capable of meeting the agency's requirements at a reasonable price before using General Service Administration Federal Supply Schedule (FSS) procedures. In all of those protests, GAO held that the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Veterans Benefit Act) required the VA to conduct market research to determine whether procurements should be set aside for VOSB and SDVOSB concerns before fulfilling its needs through FSS procedures on a full-and-open basis. The Veterans Benefit Act provides in part:

(d) Use of restricted competition.—Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Pub. L. No. 109-461 § 502, 120 Stat. 3403 (codified at 38 U.S.C. § 8127(d)). In a letter to GAO on January 4, 2012, the VA took the position that the Veterans Benefit Act requires the VA to consider VOSB and SDVOSB set-asides only in connection with attaining the agency's small business contracting goals. The VA also argued that a VOSB or SDVOSB concern is not entitled to any preference under the Veterans Benefit Act when FSS procedures are used and the small business is not an FSS contract holder.

GAO sustained three protests raising this issue between December 2011 and March 2012. On March 30, 2012, GAO notified Congress that the VA refused to implement GAO's recommendation in all three protests. Since then, an additional 15 protests have been filed by the same two small business concerns, all of which were sustained by GAO. In each instance, the VA has declined to implement GAO's recommendation. GAO noted in its report that this issue has been raised in a protest currently pending at the U.S. Court of Federal Claims and that it intends to sustain any similar protests that may be filed in FY 2013.