

## GAO'S ANNUAL REPORT SHOWS NEARLY HALF OF ALL PROTESTS FILED ARE EFFECTIVE

In its annual report to Congress, the Government Accountability Office (GAO) released its bid protest statistics for fiscal year 2009. The GAO report showed that in nearly half, 45%, of the protests filed, the protester obtained some form of relief from the Agency. This form of relief could be either a decision sustaining the protest by GAO with the Agency complying with GAO's decision or it could be a voluntary corrective action by the Agency prior to a GAO decision that provides some of the relief sought by the protester.

For the fiscal year 2009, GAO reported receiving 1,989 total cases, an amount that includes 64 cost claims and 91 requests for reconsideration. This figure represents a significant increase (up 20%) from 2008 when 1,652 protests were filed, an increase that could be attributable to GAO's recently expanded bid protest jurisdiction over certain task orders, A-76 protests (those filed under Office of Management and Budget Circular A-76), and Transportation Security Administration protests. Of equal significance is the steady growth of these numbers in consecutive years since 2006 when the reported case amount was 1,326. In just two years, since the end of 2007, the amount of cases filed with GAO has risen by 40%.

There was also a significant increase in the number of merits decisions reached by GAO (315 for fiscal year 2009). A merits decision is a protest that was either sustained or denied on the merits of the case. Of these merits decisions, 57 were protests that were successfully sustained, equaling an 18% sustain rate. While the number of cases filed with GAO has been steadily increasing since 2006, the sustain rate has seen a steady decline: FY2006 – 29%, FY2007 – 27%, FY2008 – 21%, FY2009 – 18%. But, the effectiveness rate over the same period has increased from 37% in 2005 to 45% in 2009. The decreasing sustain rate and increasing effectiveness rate indicates that agencies are recognizing the merit of a protest early enough in the process to take prompt corrective action, thus providing the protester with some of the relief requested in the protest. The increase in effectiveness and decrease in sustain rate is also driven by the GAO's use of outcome prediction alternative dispute resolution (ADR), where the GAO attorney assigned to the case provides an informal, non-binding prediction of the end

result of the merits decision. The use of ADR increased by 52% in 2009, up from 78 in the previous year to 149 cases. Nearly all of cases in ADR (93%) were resolved by the parties before a merits decision.

GAO's recently released numbers represent an almost universal "up-tick" in numbers and indicates an increased success rate and, consequently, an increased willingness by government contractors to use GAO's adjudicative proceedings in the high stakes arena of bid protests. If you have any questions about this process, are considering a bid protest of your own, or would like to talk to one of our government contracts attorneys, please contact us at (703) 556-0411 or at [www.generalcounselaw.com](http://www.generalcounselaw.com).