

## Double Your Pleasure: GAO's Annual Protest Report Shows Sustain Rate Almost Doubled, Effectiveness Rate Remained Flat

---

Wednesday, January 4, 2017

In mid-December, **GAO** issued its [Bid Protest Annual Report to Congress for Fiscal Year 2016](#). The report reveals, among other things, that GAO's protest sustain rate for this past fiscal year ("FY") was 22.56%, almost double that of FY 2015. While this is perhaps the most notable data point, the report once again provides a wealth of interesting information for the contractor community.

The **Competition in Contracting Act** requires that GAO report to **Congress** certain data concerning GAO's handling of bid protests, including the number of protest filings and a summary of the most relevant grounds for sustaining protests.<sup>[1]</sup> Unpacking this data provides helpful insight to contractors considering whether or not to challenge a procurement award via a bid protest at GAO. The report includes a chart comparing the statistics over the last five fiscal years; below we summarize some of the highlights for FY 2016:

- GAO received 2,789 cases, which is a 6% increase from FY 2015, and continues a year-to-year increase in cases filed at GAO since FY 2013. This number includes 2,621 protests, 80 claims for costs, and 88 requests for reconsideration.
- GAO closed 2,734 cases in FY 2016, which includes 2,586 protests, 61 claims for costs, and 87 requests for reconsideration.
- GAO issued 616 merit decisions (either a sustain or deny), meaning 22.5% of all the cases closed resulted in a merit decision.
- GAO issued 139 sustains, for a 22.56% sustain rate when compared to the number of merit decisions issued. This number is more than double the number of sustains in FY 2015 (68) and represents the highest number of sustains in the past five fiscal years.
- GAO's effectiveness rate, which is based on a protestor obtaining some form of relief from the agency such as corrective action or GAO sustaining a protest, was 46% (1,190 of all protests filed and closed this fiscal year). This rate is a percentage of all protests closed in FY 2016 and represents a 1% increase from FY 2015. In fact, the effectiveness rate has remained relatively stable over the past five fiscal years, measuring between 42-46% from FY 2012 to FY 2016.

While the sustain rate represents a significant increase from last fiscal year — and good news for protestors — the effectiveness rate tells a more accurate story of whether a protestor was able to obtain some relief as a result of a bid protest. At 46%, contractors have good reason to consider filing a protest with GAO where they may be able to obtain some relief almost half of the time. Of course, that relief may not result in the protestor ultimately winning the contract. For example, agency corrective action or GAO's recommendation on a sustain may be limited, such as a re-evaluation of proposals with no opportunity to submit revised proposals. Nevertheless, obtaining a sustain or pushing the agency into taking corrective action gives the contractor a chance at winning the contract it otherwise would not have had without filing the protest.

COVINGTON

Article By [John W. Sorrenti](#)  
[Scott A. Freling](#) Covington & Burling LLP  
[Inside Government Contracts](#)

[Government Contracts, Maritime &  
Military Law](#)  
[All Federal](#)

In the annual reports, GAO also identifies the most prevalent reasons for sustaining protests for each fiscal year. These reasons give some insight into what arguments have been successful at GAO. The following chart lists the most prevalent reasons for sustaining protests that GAO reported in FYs 2016, 2015, and 2014:

FY 2016	FY 2015	FY 2014
<ul style="list-style-type: none"> <li>• Unreasonable technical evaluation;</li> <li>• Unreasonable past performance evaluation;</li> <li>• Unreasonable cost or price evaluation;</li> <li>• Flawed selection decision.</li> </ul>	<ul style="list-style-type: none"> <li>• Unreasonable cost or price evaluation;</li> <li>• Unreasonable past performance evaluation;</li> <li>• Failure to follow evaluation criteria;</li> <li>• Inadequate documentation of the record;</li> <li>• Unreasonable technical evaluation.</li> </ul>	<ul style="list-style-type: none"> <li>• Failure to follow evaluation criteria;</li> <li>• Flawed selection decision;</li> <li>• Unreasonable technical evaluation;</li> <li>• Unequal treatment.</li> </ul>

The chart provides some, albeit limited, guidance to potential protestors on which arguments they may want to pursue when filing a protest at GAO.

\* \* \*

The FY 2016 GAO annual report shows that GAO continues to be a popular forum for challenging procurement decisions. With an increased sustain rate, and a steady efficiency rate hovering around 42-46% the last five fiscal years, potential protestors should be encouraged that they have a better chance at obtaining some relief than they otherwise may think.

---

[1] GAO also must report each instance in which a federal agency did not fully implement a recommendation made by GAO in connection with a bid protest, and each instance in which a final decision in a protest was not rendered within 100 days after the date the protest was filed. See 31 U.S.C. § 3554(e)(2). GAO reported no such occurrences during FY 2016.

© 2019 Covington & Burling LLP

**Source URL:** <https://www.natlawreview.com/article/double-your-pleasure-gao-s-annual-protest-report-shows-sustain-rate-almost-doubled>