

## 29TH ANNUAL OUNCE OF PREVENTION SEMINAR

Weathering the  
Rough Seas of  
Regulation



# Bid Protests: Trends and Developments

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# GAO Protest Statistics

<b>Fiscal Year</b>	<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
Cases Filed	2,475	2,353	2,299	1989	1652	1411	1326
Cases Closed	2,495	2,292	2,226	1920	1582	1394	1275
Merits Decision	570	417	441	315	291	335	251
Sustains	106	67	82	57	60	91	72
Sustain Rate	18.6%	16%	19%	18%	21%	27%	29%
Effectiveness Rate (reported)	42%	42%	42%	45%	42%	38%	39%
ADR (cases used)	106	140	159	149	78	62	91
ADR Success Rate	80%	82%	80%	93%	78%	85%	96%
Hearings	6.17% (56)	8% (46)	10% (61)	12% (65)	6% (32)	8% (41)	11% (51)

# COFC Protest Statistics

<b>Calendar Year</b>	<b>2012</b>	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>	<b>2006</b>
Protests Filed	99	98	88	74	79	81	64
<i>Pre-award</i>	42	29	19	22	23	18	9
<i>Post-award</i>	57	69	69	52	56	63	55
Protest Decisions	78	82	71	57	39	53	74
<i>Published</i>	66	73	64	50	38	50	55
<i>Un-published</i>	12	9	7	7	1	3	19

# Bid Protest Statistics

- Number of GAO protests filed continued at record levels, up 5% from last year
- GAO Sustain Rate inches up, but remains far below highs from 2006-2007
  - Effectiveness Rate remains constant
- Large increase in GAO decisions on the merits
  - Possible slowing of agency corrective actions?
- Minimal increase in COFC protests over past year
  - Percentage of pre-award protests has increased relative to post-award protests
- Potential effects of Sequestration on future statistics

# OCI

- Eroding Viability of OCI Protests
  - *AT&T Government Solutions*, B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45
    - After finding during ADR that Agency failed to meaningfully consider impaired objectivity and unequal access OCIs, and 3 days before 100-day deadline, Agency issued OCI waiver and GAO dismissed as academic without further consideration.
  - *McTech Corp.*, B-406100, B-406100.2, Feb. 8, 2012, 2012 CPD ¶ 97
    - Citing COFC decision in *Turner Construction*, GAO finds that Agency can introduce post-hoc analysis to defend contemporaneous OCI conclusions.

# OCI (cont'd)

- But not yet a free pass for the Government
  - *NikSoft Sys. Corp.*, B-406179, Feb. 29, 2012, 2012 CPD ¶ 104
    - Agency moves to dismiss for lack of standing on ground that protester has an OCI problem. GAO rejects argument finding that Agency OCI argument not based on “hard facts.”

# OCI (cont'd)

- Timeliness of OCI Protests – Pre- or Post-Award?
  - *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698 (2012), aff'd per curiam, *CRAssociates, Inc. v. United States*, 475 F.App'x 341 (Fed. Cir. 2012)
    - Dismissing as untimely post-award protest that awardee had unequal access OCI where Agency rejected protesters request during competition to amend Solicitation to resolve unfair advantage.
  - *Guident Technologies, Inc.*, B-405112.3, Jun. 4, 2012, 2012 CPD ¶ 166
    - Finding impaired objectivity OCI timely and distinguishing *CRAssociates* on basis that COFC case challenged fairness of ground rules whereas *Guident* was challenging award decision.



# Discussions

- Nature of Discussions
  - *Tipton Textile Rental, Inc.*, B-406372, May 9, 2012, 2012 CPD ¶ 156
    - Requests for additional information during phone calls, site visit, and follow-up emails constituted discussions and therefore had to be meaningful.
  - *Metropolitan Interpreters and Translators, Inc.*, B-403912.4, et al., May 31, 2011, 2012 CPD ¶ 130
    - Agency's discussions with, and receipt of a FPR from, one offeror as part of corrective action, without allowing other offerors the same opportunity, violated FAR requirement for a common cut-off date but did not prejudice protester.
  - *Booz Allen Hamilton, Inc.*, B-405993, B-405993.2, Jan. 19, 2012, 2012 CPD ¶ 30
    - DCAA's post-FPR exchanges with awardee during rate verification audits, during which the awardee provided additional cost data, constituted clarifications, not discussions. Therefore, Agency did not conduct unequal discussions. But see *ERIE Strayer Co.*, B-406131, Feb. 21, 2012, 2012 CPD ¶ 101.

# Discussions

- Award Without Discussions
  - *ITT Systems Corp.*, B-405865, B-405865.2, Jan. 6, 2012, 2012 CPD ¶ 44
    - GAO confirms that it generally will not review an agency's decision not to hold discussions.

# Challenges to GAO Sustains and to Agency Corrective Actions

- Jurisdiction
  - *Systems Application & Techs., Inc. v United States*, 691 F.3d 1374 (Fed. Cir. 2012)
    - Upholding COFC's exercise of jurisdiction over an awardee's protest of a proposed corrective action to terminate the award, amend the solicitation, and recompet the contract, under the Tucker Act. Rejecting the Government's argument that the protest by the original awardee was not ripe.
- GAO Sustains
  - Reviewed based on agency decision to follow the recommendation
  - Standard is whether the GAO decision is irrational
  - *CBY Design Builders v. United States*, 105 Fed. Cl. 303 (2012)
    - Lengthy discussion of nature of COFC review
    - Found one aspect of GAO decision irrational, but upheld the corrective action
- Agency Corrective Actions
  - *CBY Design Builders v. United States*, 105 Fed. Cl. 303 (2012)
    - Allowing Agency to take broader-than-necessary corrective action. Also upholding Agency's decision to address another issue, which had been raised at GAO but not sustained.
  - *Sierra Nevada Corp. v. United States*, No. 12-375C, 2012 WL 5378163 (Fed. Cl. Nov. 1, 2012)
    - Rejecting the narrow standard for reviewing the propriety of corrective action as targeted to the identified defect (propounded in *Sheridan Corp. v. United States*). Instead, examined the Agency's corrective action under a "reasonable in all circumstances" standard.

# Past Performance

- “Too Close at Hand” Doctrine
  - *FN Manufacturing LLC*, B-407936 et al., Apr. 19, 2013, 2013 WL 1802013
    - GAO refuses to extend doctrine to information that an offeror failed to include in its proposal

# Questions?

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