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GAO

Inside the Numbers: A Look at Bid Protest Statistics for Fiscal Year 2011



By **KENNETH WECKSTEIN** AND **MICHAEL MALONEY**

As we all know, there currently are three avenues for filing a bid protest: (1) at the agency that conducted the procurement under Federal Acquisition Regulation 33.103; (2) at the Court of Federal Claims under the Tucker Act and Alternative Dispute Resolution Act; and (3) at the Government Accountability Office pursuant to the Competition in Contracting Act of 1984 and under Federal Acquisition Regulation 33.104 and 4 CFR 21, et seq. Although each of these avenues has its pros and cons, bid protest statistics for fiscal year 2011 show that GAO is the clear favorite—for good reasons.

Agency protests might be an efficient and effective way for contractors to raise concerns about agency pro-

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curement actions, but who can tell? To our knowledge, there are no published statistics relating to agency protests. But based on our survey of one (us), agency protests are not the first choice among attorneys who choose to file protests. And think about it. If an agency goes through a lengthy evaluation and selection process and awards a contract to your competitor, what are the odds that the agency will change its mind if you file a protest challenging award? Agency protests work if you have a slam-dunk case, are protesting a solicitation, or are concerned about customer relations. Otherwise, prudent protesters look elsewhere.

The Court of Federal Claims can serve as an effective platform for a bid protest. However, going the court route can be a little more intimidating and a little more expensive. And then there is the automatic CICA stay versus injunction issue. To stop an award at the Court of Federal Claims, you must persuade the court to issue an injunction. That's not the easiest assignment. At GAO, if done right, a protest automatically stops the agency in its tracks under CICA. The relatively low number of protest filings at the Court of Federal Claims shows that it is not the most favored forum for protests. According to the Administrative Office of the U.S. Courts, there were only 97 bid protests filed at the Court of Federal Claims in fiscal year 2011.¹ See U.S.

¹ The 2011 total includes "contract pre-award bid protest injunction cases." Judicial Business of the United States

Courts Report, at 291. That total marks an increase over 2010 when 89 cases were filed and 2009 when 69 cases were filed.²

As discussed below, most of the protest action is at GAO.

Courts, 2011 Annual Report of the Director (“U.S. Courts Report”), at 291.

² The 2010 and 2009 totals include “contract pre-award and post-award bid protest injunction cases.” *Id.* at Table G-2A.

GAO Statistics

Every year, GAO publishes bid protest statistics. The following chart shows GAO’s published bid protest statistics for fiscal years 2007-2011:

Bid Protest Statistics^(a) for Fiscal Years 2007-2011

	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007
Cases Filed ^(b)	2,353 (up 2 percent ^(c))	2,299 (up 16 percent)	1,989 (up 20 percent)	1,652 (up 17 percent)	1,411 (up 6 percent)
Cases Closed	2,292	2,226	1,920	1,582	1,394
Merit (Sustain + Deny) Decisions	417	441	315	291	335
Number of Sustains	67	82	57	60	91
Sustain Rate	16 percent	19 percent	18 percent	21 percent	27 percent
Effectiveness Rate ^(d)	42 percent	42 percent	45 percent	42 percent	38 percent
ADR (cases used) ^(e)	140	159	149	78	62
ADR Success Rate ^(f)	82 percent	80 percent	93 percent	78 percent	85 percent
Hearings ^(g)	8 percent (46 cases)	10 percent (61 cases)	12 percent (65 cases)	6 percent (32 cases)	8 percent (41 cases)

^(a) All entries in this chart are counted in terms of the docket numbers (“B” numbers) assigned by our Office, not the number of procurements challenged. Where a protester files a supplemental protest or multiple parties protest the same procurement action, multiple iterations of the same “B” number are assigned (i.e., .2, .3). Each of these numbers is deemed a separate case for purposes of this chart.

^(b) Of the 2,353 cases filed in FY 2011, 147 are attributable to GAO’s recently-expanded bid protest jurisdiction over task orders.

^(c) From the prior fiscal year.

^(d) Based on a protester obtaining some form of relief from the agency, as reported to GAO.

^(e) Alternative Dispute Resolution.

^(f) Percentage of cases resolved without a formal GAO decision after ADR.

^(g) Percentage of fully-developed cases in which GAO conducted a hearing; not all fully-developed cases result in a merit decision.

The latest publication showed a 2 percent increase in the number of protests filed at GAO in 2011 to 2,353 from 2010’s 2,299. (That’s about 24 times the number of protests filed at the Court of Federal Claims.) Although this was a modest increase, this past year marked the fifth consecutive year of increased protest filings at GAO. Protest filings in 2007 increased by 6 percent over the previous year; filings in 2008 increased 17 percent; filings in 2009 increased 20 percent; and filings in 2010 increased 16 percent. Since 2007, protest filings at GAO have risen by 67 percent from 1,411 to 2,353. Business at GAO is good.

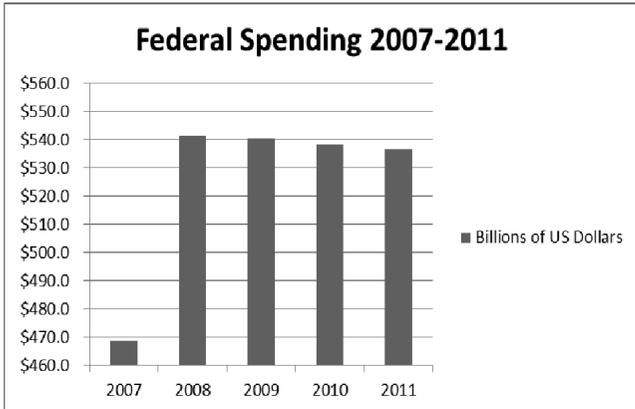
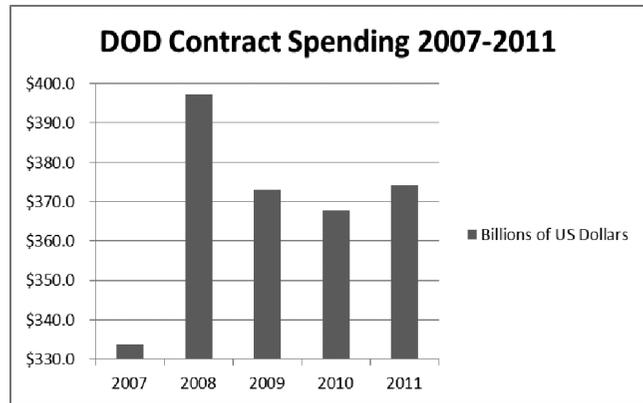
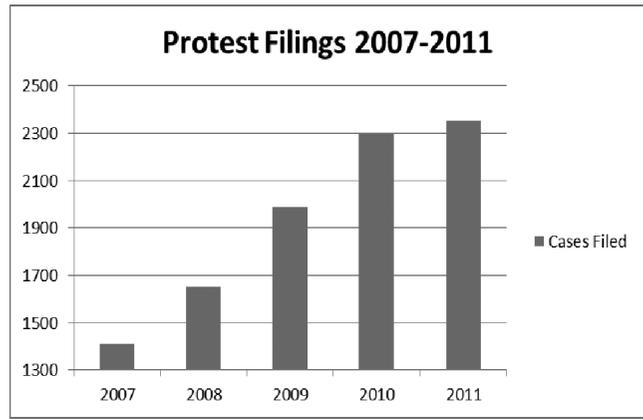
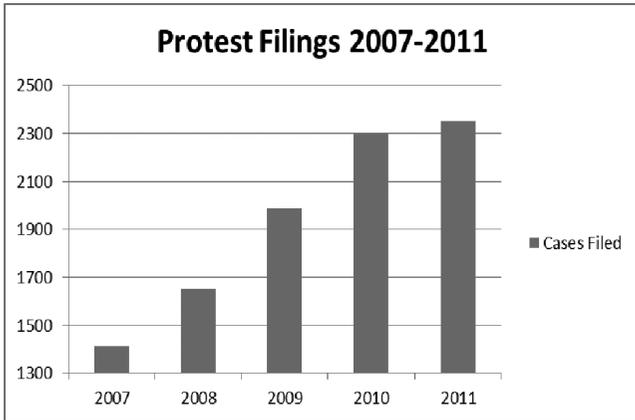
What Do the Numbers Mean? So why did protest filings increase in 2011, and why is there an upward trend? To make sense of the numbers, the first challenge is to determine whether the statistics compare apples to apples. According to GAO, the “cases filed” numbers—and all entries in the GAO chart—“are counted in terms of the docket numbers (‘B’ numbers) assigned by [GAO], not the number of procurements challenged.” So there can be one, five, 10, 15 or more “cases filed” in the protest numbers for the same procurement. And those multiple protests for the same procurement can be filed by the same company. But while that can pump up the total numbers, it does not explain the upward trend. Going back at least as far as its fiscal year 2008 report, GAO has counted cases and included entries in

its charts on the same basis. At least on the level of what “cases” are counted, the GAO numbers appear to compare apples to apples.

A couple of the usual suspects that are considered to have an impact on case filings in any forum are spending and economic conditions. The hypothesis varies: less spending means fewer opportunities and contractors are more likely to protest when there is less business to chase; or in tough economic times, contractors are more likely to file a protest to keep or obtain business. But is there any comparable trend in spending that matches the increase in case filings? And is there any correlation between the state of the economy and the number of protest filings?

The Office of Management and Budget’s website that tracks and reports on federal spending, <http://www.USAspending.gov>, shows that federal government contract spending for fiscal year 2011 was \$536.7 billion, and the comparable number for 2010 was \$538.4 billion. So, federal spending decreased slightly during the one year period during which bid protest filings increased by 2 percent, making it difficult to draw any meaningful conclusions. Expanding the sample size could yield valuable information. According to GAO, protest filings increased by 16 percent in 2010. According to the OMB data, federal contract spending in 2010 again was down a little compared to the prior year (\$538.4 billion in 2010 and \$540.5 billion in 2009). Pro-

test filings in 2009 increased by 20 percent over the prior year, while contract spending in 2009 remained relatively flat over the prior year (\$540.5 billion vs. \$541.5 billion). And there was a 17 percent increase in protests in 2008 over 2007, while there was a \$72.8 billion (or 15 percent) increase in federal spending over the same time frame (\$468.7 billion to \$541.5 billion). So while protest filings increased each year in 2007, 2008, 2009, 2010, and 2011, over the comparable period, federal contract spending only increased in 2008 and decreased slightly or remained relatively flat between 2009 and 2011. The following graphs show these trends:



increased by 19 percent. So increased spending by the federal government in general and DOD in particular might have had an impact on the number of protests filed in 2008, but the trends and data for 2009 through 2011 show no direct correlation between spending and protest filings.

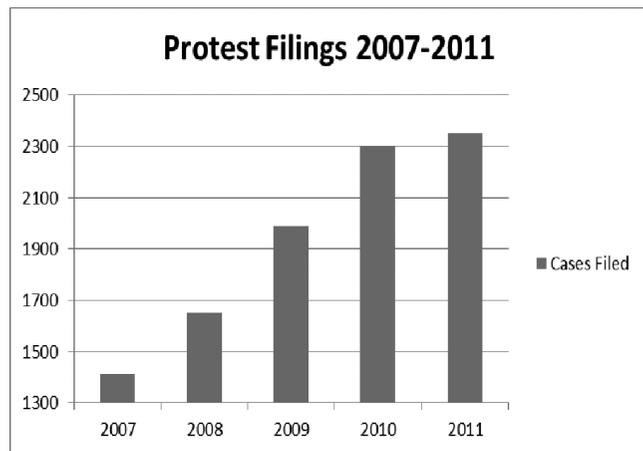
What about trends in the overall economy as measured by economic growth? Is there any correlation?

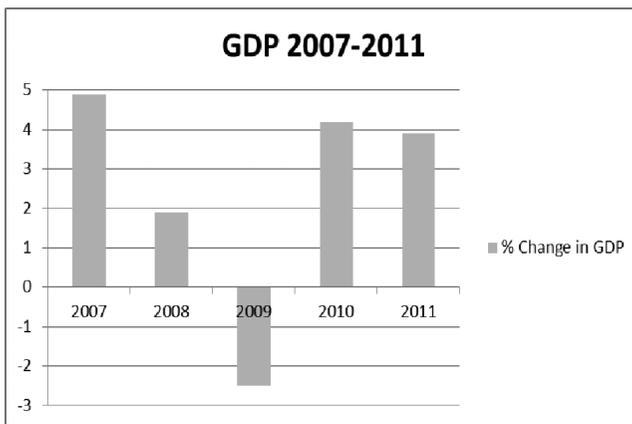
Looking at the U.S. economy in 2011, the Commerce Department's Bureau of Economic Analysis reports that percent change in U.S. Gross Domestic Product ("GDP") has fluctuated over the past few years: 4.9 percent in 2007; 1.9 percent in 2008; -2.5 percent in 2009, 4.2 percent in 2010, and 3.9 percent in 2011. (The reports can be found at: <http://www.bea.gov/national/index.htm#gdp>). The following graphs compare protest filings and GDP trends:

Other than the increase in 2008, there does not appear to be any direct correlation between federal contract spending increases and bid protest filings. But is there any direct correlation between defense spending and protest filings? While defense spending is the biggest subcategory of federal spending, a review of defense spending does not really inform our analysis. While protest filings were on the rise between 2008 and 2011, defense spending fluctuated during that time frame. Defense spending in 2007 amounted to \$333.7 billion and increased by 19 percent to \$397.2 billion in 2008. DOD spending was \$373.0 billion in 2009, \$367.8 billion in 2010, and \$374.2 billion in 2011.

The following graphs compare DOD contract spending and protest filings:

There is almost a direct correlation between spending for fiscal year 2008—at the overall federal level and by DOD—and same year protest filings. In 2008, total protest filings increased by 17 percent. In 2008, federal spending increased by 15 percent and DOD spending





Because bid protest case filings increased during these time periods, it is difficult to draw any conclusions from the up and down GDP data standing alone. Take 2009 as an example. Given the steep decline in the economy, you might expect to see a sharp drop (or rise) in protest filings. Instead, the trend in 2009 continued on a steady track. Thus, there do not appear to be any direct correlation between the fluctuations in growth and the increases in protest filings.

If year-to-year fluctuations in federal spending and general economic conditions cannot account for the current slight 2 percent increase in protest filings in 2011 and the increased filings in 2009 and 2010, maybe the answer lies elsewhere within the GAO statistics. Significantly, of the 2,353 case filings in 2011, GAO reports that 147 “are attributable to GAO’s recently-expanded bid protest jurisdiction over task orders.”³ That more than accounts for the increase of 54 cases in 2011 over 2010. In fact, absent the expansion of GAO protest jurisdiction, there would have been a decrease in protest filings in 2011 of 93 cases, or a 4 percent decrease. Therefore, for 2011, the increase in protest filings appears to be related to GAO’s expanded jurisdiction over task order protests. This expansion of jurisdiction appears to have had an impact on case filings in prior years as well.

For example, in 2010, GAO reported a 16-percent increase in filings. There were 310 more protest cases filed in 2010 than in 2009. And GAO noted that there were 189 cases “attributable to GAO’s recently expanded bid protest jurisdiction over task orders.” GAO explained the context: “These 189 filings represent 61 percent of the total increase in filings from FY 2009 to FY 2010 (310 filings).” So for fiscal year 2010, it appears that the bulk of the increase in filings was related to expanded GAO jurisdiction. Similarly, in 2009, GAO reported a 20 percent increase in protest filings. There

³ In 1994, Congress passed the Federal Acquisition Streamlining Act (“FASA”) to, among other things, eliminate GAO’s jurisdiction over protests of most task order awards. See 41 U.S.C. § 253j(e) (1994). In 2008, Congress amended FASA and expanded GAO’s jurisdiction to include protests of task orders over \$10 million. See 41 U.S.C. § 4106(f). That law had a sunset provision that was due to expire in May 2011. However, GAO interpreted the expired provision to wash away not just the 2008 expansion of jurisdiction, but the 1994 limitation on GAO jurisdiction. Thus, GAO essentially found that it has jurisdiction over all task order protests. See *Technatomy Corp.*, B-405130 (June 14, 2011). So, since at least 2008, GAO’s jurisdiction has been “expanded.”

were 1,989 protests filed at GAO in 2009, reflecting an increase of 337 cases. One-half of that increase related to filings of protests that fell within GAO’s expanded jurisdiction. GAO reported in 2009 that 168 cases were “attributable to GAO’s recently expanded bid protest jurisdiction over task orders (139 filings), A-76 protests (16 filings), and Transportation Security Administration protests (13 filings).” GAO concluded: “These 168 filings represent 50 percent of the total increase in filings from FY 2008 to FY 2009 (337 filings).”

GAO’s report for 2008 also attributes some of the increase in filings to jurisdictional expansion. In 2008, there was a 17 percent increase in filings at GAO, from 1,411 in 2007 to 1,652 in 2008. GAO reported that in 2008, 87 filings were “attributable to expanded bid protest jurisdiction over task orders (49 filings), A-76 protests (30 filings), and Transportation Security Administration protests (eight filings).” The 87 filings of “expanded jurisdiction protests” accounted for 36 percent of the overall increase in filings in 2008.

The numbers show rising protest filings over the past five years. Some of that rise can be ascribed to GAO’s doors being opened to new protest matters. Of course, that also makes sense. But perhaps some of that rise—particularly the rise in 2008—also can be chalked up to rising federal and DOD spending. Any more definitive conclusions about economic impacts cannot be supported, at least based on the limitations of the GAO statistics.

Do More Filings Lead to Delayed Resolution? Do more protest filings lead to delayed protest resolution? The answer is no. The CICA sets specific deadlines for GAO decisions on protests. In most cases, GAO must render a decision within 100 days after a protest is filed. See 31 U.S.C. § 3554(a)(1). The statute also requires GAO to report to Congress in every instance where a decision has not been reached within the 100 day deadline. 31 U.S.C. § 3554(e)(2). According to GAO, it has never had to file such a report with Congress. GAO Report to Congress on Bid Protests Involving Defense Procurements, B-401197, April 9, 2009 at 2. Therefore, although more cases have been filed with GAO, there has been no corresponding delay in resolution of cases, which is just what Congress had in mind. When it gave GAO jurisdiction over bid protests, Congress said: “the Comptroller General shall provide for the inexpensive and expeditious resolution of protests.” 31 U.S.C. § 3554(a)(1).

What is the “Sustain Rate” and What Does it Show? Government contract lawyers talk a lot about the very low “sustain rate” at GAO, and GAO’s statistics include a category for that. The sustain rate reported for last year was 16 percent, down from 19 percent in the prior year. But what does that mean? First, the 16 percent sustain rate does not mean that 16 percent of all cases filed were sustained by GAO. In fact, the sustain rate measures a much smaller sub-category of case filings—only those that resulted in a “merit decision.” Presumably, a merit decision is just that, a final GAO decision on the merits where the result was either a “sustain” or a “deny.” According to GAO, of the 2,353 cases filed in 2011, only 417 (or 18 percent) ended with a merit decision. And of those merit decisions, there were only 67 cases where GAO sustained the protest. That is the source of the 16 percent sustain rate: 67 sustains out of 417 merit decisions. That rate is consistent with every year from 2008 to 2010. In contrast, 2007 looks like the

Golden Year of protests with a sustain rate of 27 percent — 91 sustains out of 335 merit decisions. So the sustain rate describes the percentage of merit decisions that were sustained. When you hear a government contracts lawyer discussing the sustain rate at GAO, he or she is not talking about the protester “win” or “success” rate. The sustain rate does not measure the chances of success on filing. It goes to actual success of only those cases that were resolved by merit decisions.

GAO’s Effectiveness Rate. If the sustain rate addresses only the 18 percent of cases that end with a merit decision, where does that leave the other 82 percent of cases that are not resolved that way? And what do the statistics say about those 1,936 cases from 2011 in terms of chances of success? Cases at GAO that are not resolved by a merit decision are either dismissed or withdrawn. Dismissals can be procedural or jurisdictional and may result from untimely protests or from protests that are filed by parties that do not have standing (only interested parties have standing to file protests at GAO). Protests that challenge agency actions that are not subject to GAO jurisdiction include cases concerning contract administration issues, Small Business Administration issues, procurement integrity issues and other issues. See 4 CFR 21.5. In any of these cases, a protest can be dismissed, and there usually will be no merit decision resolving such protests.

GAO also may dismiss a protest that has become moot. A protest could be moot if the procuring agency decides to take corrective action after the protest has been filed. Agencies make the decision to take corrective action for different reasons and at different times. Some decisions are made as soon as a protest is filed revealing potentially improper agency action. Some decisions are made during preparation of or after filing the agency report. Decisions to take corrective action can be made during the alternative dispute resolution (“ADR”) process when the GAO attorney provides outcome prediction or other assistance to the parties. Al-

though GAO does not report cases that have been dismissed due to an agency’s commitment to take corrective action, the statistics show an “effectiveness rate” that is “[b]ased on a protester obtaining some form of relief from the agency, as reported to GAO.” For 2011, the reported effectiveness rate was 42 percent. That rate is consistent with prior years, where the rate ranged from 38-45 percent.

The effectiveness rate is more important than the sustain rate because it can be used to gauge a protester’s chances of success. The bottom line is that historically 38-45 percent of cases are resolved in a manner in which the protester obtains “some form of relief”. That relief may not get a contractor an award of a contract. But it could give the contractor an opportunity to get an award.

Hearings and Fully Developed Cases at GAO. The GAO statistics show that the number of hearings held in 2011 decreased to 8 percent, or 46 cases of all cases that were “fully developed.” (Presumably, a fully developed case is one where an agency report has been filed and supporting documents have been provided by the procuring agency and protester and interested parties’ comments have been filed.) That means there were 575 cases that were “fully developed” at GAO last year.⁴ The statistics for prior years show the following: 2010, 10 percent, 61 hearings, 610 fully developed cases; 2009, 12 percent, 65 hearings, 541 fully developed cases; 2008, 6 percent, 32 hearings, 533 cases fully developed; and 2007, 8 percent, 41 hearings, 512 fully developed cases. The following chart shows the data on fully developed cases and hearings at GAO:

⁴ The fact that there were 575 fully developed cases and 417 merit decisions suggests that after cases were fully developed and before the merits decision, 158 cases were resolved without a decision. In those cases either the agency surrendered or the protester cried “uncle”.

	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007
Number of fully-developed cases	575	610	541	533	512
Percentage of fully-developed cases where hearing was held	8 percent	10 percent	12 percent	6 percent	8 percent
Number of hearings	46	61	65	32	41

So over the past five years, the number of hearings conducted has ranged from 32 to 65, and the number of fully developed cases has ranged between 512 and 610 cases. At first glance, this appears counterintuitive. How could there be fewer hearings when more protest cases were filed? The simple answer is that a hearing only is conducted when a case is fully developed. While the rise in number of fully developed cases did not match the rise in case filings, the percentage of hearings conducted is in such a narrow range (6-12 percent) that the numbers make sense. Each year GAO held

hearings in 6-12 percent of cases that were fully developed. Also, the downward trend in hearings is *de minimis*. Nevertheless, for protesters who go to GAO expecting a hearing to air their grievances, the statistics show that hearings are conducted in only a small minority of cases. That could be a product of the number of attorneys available at GAO to conduct hearings, the total case load, and GAO’s promise to provide an inexpensive process. More likely, it is a product of whether GAO believes a hearing is necessary to resolve the particular protest.

GAO's ADR Process. There were 140 cases that utilized GAO's ADR process last year. Of those 140 cases, GAO reported that 82 percent, or 112 cases, were successfully resolved without the need for a GAO decision. That incredibly high success rate contrasts with rates of ADR programs of other fora—and with good reason. GAO attorneys hearing the case typically conduct the ADR sessions. This contrasts sharply with ADR at other fora where ADR is conducted by a neutral party other than the judge that is deciding the case. When a GAO attorney conducts an ADR, he or she often tells the agency or the protester that if the case goes to a merit decision, GAO is likely to sustain or deny. And the GAO attorney offers the basis for that position. Faced with a statement from the almost ultimate decision-maker that you likely will win or lose, that advice is seriously considered by the parties. The result is a very high success rate for ADR at GAO.

The Bottom Line. The data do not support any conclusions about contractor behavior or decision-making, especially when it comes to a business decision that is as

complex as whether to file a protest. For example, there are no firm answers to questions about whether the downturn in the economy has led more contractors to challenge agency award decisions by making more protest filings. Some part of the recent uptick in filings surely can be attributed to expansion of GAO's jurisdiction. And, as noted above, GAO's doors remain open—particularly to protests of task order awards.

GAO's bid protest statistics do provide some useful information for government contractors and potential government contractors. Significantly, protestors at GAO have about a 40 percent chance of obtaining some form of relief, or success, from the procuring agency. And the numbers show that a substantial percentage of protest cases are resolved before they are “fully developed.” That means contractors get a resolution, one way or the other, before incurring the added expenses of proceeding through the entire GAO bid protest process. Clearly, more and more contractors are taking GAO up on its promise to provide an expeditious and inexpensive forum for resolution of protests. And that is a good thing for our procurement system.