

Perspectives of a SAI Unauthorized to Impose Sanctions: The Experience of the U.S. Government Accountability Office

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**Phillip Herr
Managing Director, Physical Infrastructure Team
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Introduction

- GAO does not have authority to impose sanctions on the federal agencies it audits or to enforce the legal decisions it issues on the use of appropriated funds or the award of contracts.
- There are other means, however, inherent in the system of the U.S. federal government that provide pressure and incentives for federal agencies to implement GAO recommendations.

Legal Framework of the United States Government

- To understand GAO's role in the federal government and its authority and influence on federal agencies, we start with the legal framework of the U.S. government as established by the Constitution.
 - The U.S. Constitution established three branches of government with a separation of powers.
 - This system avoids having all the powers vested in the same branch.
 - It relies upon checks and balances between the branches.

Role of the Legislative Branch

- The Legislative Branch has authority to pass laws, conduct investigations, and appropriate funds. These powers are carried out by the Congress, consisting of the Senate and House of Representatives.
- The congressional “power of the purse” refers to the power of Congress to:
 - appropriate funds
 - prescribe the conditions governing the use of those funds.

Role of the Executive and Judicial Branches

- The Executive Branch has the authority to execute the laws.
- The President is the head of the Executive Branch and the Commander in Chief of the military.
- The Judicial Branch, through the Supreme Court and federal courts established by Congress, interprets the laws.

The Legislative Powers: The Power of the Purse

- The Constitution gives the Congress the responsibility for determining when and how the government can spend funds:
 - “No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.” U.S. Constitution, Article 1, sec. 9, cl. 7
 - This sentence in the Constitution ensures that (1) agencies remain dependent on the Congress for funds and thus accountable to the Congress and, ultimately, the people and (2) the Congress has the power of the purse.

Legislative Oversight of the Executive Branch

- Congress has the authority to conduct oversight of the Executive Branch. Oversight occurs in a variety of ways, ranging from:
 - formal committee hearings to informal member contacts with executive officials
 - work conducted by GAO and other legislative branch agencies
 - work conducted by congressional staff and committees
 - commissions created by statute
 - reporting to Congress by the Inspectors General.

GAO's Role in the Legislative Branch

- GAO is part of the legislative branch of government. The head of GAO, the Comptroller General, is nominated by the President, subject to the advice and consent of the Senate, for a 15 year term.
- GAO was created by the Budget and Accounting Act in 1921 as “an establishment of the Government . . . independent of the executive departments.”
- GAO's legal authority is to:
 - “investigate all matters related to the receipt, disbursement, and use of public money” 31 U.S.C § 712
 - “evaluate the results of a program or activity the Government carries out under existing law” 31 U.S.C. § 717

The Role of GAO in the Legislative Branch

- GAO's mission:
 - support Congress in meeting its constitutional responsibilities
 - help improve the federal government's performance and ensure its accountability for the benefit of the American people.
- GAO's work provides a basis for Congressional hearings and legislative proposals.

GAO Supports Congressional Oversight

- GAO supports congressional oversight by auditing agency operations to determine whether federal funds are being spent efficiently and effectively;
 - Investigating allegations of illegal and improper activities
 - Reporting on how well government programs and policies are meeting their objectives
 - Performing policy analyses and outlining options for congressional consideration
 - Issuing legal decisions and opinions on bid protests and appropriations law issues.

GAO's Bid Protest Role

- GAO's Office of General Counsel is a key player in the world of federal government contracting which accounts for over \$500 billion dollars in spending each year.
- For over 80 years, GAO has provided an objective, independent, and impartial forum for the resolution of disputes concerning the award of federal contracts.
- These decisions, called bid protest decisions, have resulted in a uniform body of law regarding the federal procurement process upon which Congress, the courts, federal agencies and the public rely.

GAO's Bid Protest Role

- Under the Competition in Contracting Act, GAO has statutory authority to decide disputes over the award of government contracts.
- The laws and regulations that govern federal government contracting are designed to ensure that federal procurements are conducted fairly. Disputes—called bid protests—involve allegations that a federal contract has been improperly awarded.
- Advantages to filing a protest with GAO include:
 - Bid protesters do not have to pay a filing fee.
 - GAO must complete its decisions within 100 days, which can save costs of lengthy litigation.



GAO's Bid Protest Role

- When a bid protest is filed, the agency issuing the contract generally suspends the award of the contract pending the issuance of the decision.
- An agency can also take a voluntary decision to address an issue in response to a protest—referred to as a corrective action.
- Corrective action can occur at any time during the protest and may involve re-evaluating bid proposals, a new award decision, or other actions.
- GAO will typically dismiss the protest if an agency takes a corrective action that resolves protest arguments or provides the relief sought by the protester.



GAO's Bid Protest Role

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- A bid protest is an adjudicative process; it is not an audit conducted by GAO's audit team in accordance with generally accepted government audit standards.
 - Unlike GAO audit reports, a GAO bid protest decision does not address broad programmatic issues, such as whether a program is being managed effectively.
 - A GAO bid protest decision does not evaluate which company's proposal is better.

GAO's Bid Protest Role

- The parties to the protest, including the federal agency, submit written reports and documents for the record.
- GAO may also schedule a hearing where witnesses can testify to resolve factual and legal issues raised by the parties. After the record is complete, GAO will consider the facts and legal issues and issue a decision that either sustains or denies the protest.
- A decision to sustain the protest means that GAO found that the agency violated a procurement statute or regulation and the violation prejudiced the protester.
- A decision to deny the protest means that GAO found the agency's award was consistent with procurement statutes and regulations and permits the award to proceed.



GAO's Bid Protest Role

- GAO's Office of General Counsel has 34 attorneys responsible for resolving bid protests who apply federal statutes and regulations to the specific facts and allegations raised in each protest.
- In Fiscal Year 2011, 2,353 bid protests were filed with GAO.
 - GAO issued 417 full decisions on the merits, either sustaining or denying the protest.
 - Other protests were dismissed due to procedural or jurisdictional issues or were denied without further review.



GAO's Bid Protest Role

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- GAO's bid protest decisions are not binding upon the Executive Branch.
 - If agencies fail to implement GAO recommendations within 60 days of receiving them, the agency must report such failure to GAO not later than 5 days after the 60 day period.
 - GAO, in turn, reports this to relevant Congressional committees and recommends whether Congress should consider legislation, legislative cancellation of the funds, further investigation by Congress, or other action.
 - Federal agencies generally follow GAO's recommendations in a bid protest decision.
 - For example, in fiscal year 2011, all of GAO's bid protest decisions were followed by the federal agencies.

GAO's Role in Appropriations Law

- The Comptroller General, through the Office of General Counsel, provides opinions to Members and Committees of Congress, and decisions to certain agency officials, on questions involving the use of, and accountability for, appropriated funds.
- GAO decisions form an extensive body of law that is relied upon by Congress, the courts, federal agencies, and the public.
- In addition to issuing decisions, GAO publishes 'Principles of Federal Appropriations Law' (known as the Red Book).
- GAO also teaches appropriations law classes across the federal government and provides informal advice to federal agencies on these issues.

GAO's Role in Appropriations Law

- GAO's appropriations decisions address matters such as whether an agency's use of funds is within the purposes authorized by law.
 - And, whether an agency's use of funds violates statutory restrictions.
- One significant restriction in law, known as the Antideficiency Act, prohibits agencies from obligating or expending funds in excess of amounts provided by law or before the funds are appropriated by Congress.

GAO's Role in Appropriations Law

- Appropriation decisions are not binding upon the Executive Branch, but are binding upon GAO when the issues are raised in the context of an audit.
- Congress may use GAO's appropriations decisions as the basis for:
 - requiring agencies to take action on the issues through the legislative process
 - or in appropriations requirements or restrictions.

GAO Coordination with Federal, State, and Local Audit Organizations

- GAO also works with federal and state and local governments to coordinate its work.
- For example, the Executive Branch has officials who conduct audits and investigations within the departments and agencies—the Inspectors General (IGs).
 - IGs undertake investigations and reports deemed necessary and report directly to Congress.
 - The IGs have the duty to inform the Attorney General of suspected violations of federal criminal law. IGs have authority to compel witness testimony or production of documents for its investigations.
- GAO and the IGs have similar authority and they coordinate their work. While GAO does not have the same authority to compel witness testimony for its investigations, GAO does have statutory authority to obtain information and documents.
- GAO works with agencies to identify the appropriate agency officials to be interviewed in the course of its work.

Pressure and Incentives to Follow GAO Recommendations

- GAO assists Congress in carrying out its oversight functions.
- GAO issues reports to the Congress, not the President or the Executive Branch.
- The authority to implement and enforce decisions resides with Congress, not GAO.
- GAO work provides a basis for congressional hearings and legislative proposals. GAO provides assistance in drafting and reviewing legislative bills.

Pressure and Incentives to Follow GAO Recommendations

- GAO makes recommendations to agencies and submits Matters for Congressional Consideration to Congress in its reports.
- As part of the audit process, agencies are given the opportunity to officially comment on GAO's report and recommendations. These comments often take the form of a letter in which the agency agrees or disagrees with the recommendations.
- By law, the head of an agency has 60 days to report to specific committees of the Congress on the actions the agency has taken on GAO's recommendations.
- GAO tracks the status of its recommendations and generally follows up on those recommendations in subsequent work.

Pressure and Incentives to Follow GAO Recommendations

- Congress can enact requirements or restrictions on agencies stemming from GAO recommendations.
 - The power of the purse has been described as “the most important single curb in the Constitution on Presidential power.”
- Congress has used the power of the purse to require agencies to implement policies, recommendations by GAO, or to prohibit use of funds until GAO has reviewed agency actions.
- Congress also uses appropriations to prohibit agencies from carrying out certain functions or spending funds for certain purposes.
 - For example, the Department of Homeland Security’s (DHS) fiscal year 2010 appropriations prohibited DHS from using any appropriated funds to begin a specific program until DHS certified that the program complied with all existing laws, privacy, and civil liberties standards
 - The Comptroller General also had to notify the Committees on Appropriations that GAO had reviewed such certification.

Pressure and Incentives to Follow GAO Recommendations

- Other ways that GAO influences agency actions include:
 - establishing professional standards such as Government Auditing Standards, or the Yellow Book
 - establishing internal control standards
 - establishing accounting standards in its participation in the Federal Accounting Standards Advisory Board
 - developing and sharing methodologies, best practices and benchmarking information across the federal government and with state and local governments.

GAO on the Web

Web site: <http://www.gao.gov/>

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