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GAO Bid Protests: Trends and Analysis

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Summary

Bid protests on federal government contracts filed with the Government Accountability Office (GAO) have received congressional scrutiny due to protests of high-profile awards and reports that the number of protests is increasing. Concerns over delays in contract award or performance triggered by a GAO protest, coupled with the increasing number of GAO protests, have prompted concerns about the potential impact of protests upon government agency operations, especially in the Department of Defense (DOD). Both the House- and Senate- passed versions of the FY2016 National Defense Authorization Act call for a report on the bid protest process.

There has been a significant shift in bid protest trends over the last six years. When compared to the rate of government spending, bid protests decreased from FY2001-FY2008, and increased from FY2008-FY2014. From FY2008-FY2014, total government spending, adjusted for inflation, decreased 25% while total protests increased 45%.

The rate at which GAO sustains protests has also seen a significant shift in recent years. From FY2001-FY2008 GAO sustained protests in 22% of their opinions; from FY2009-FY2014 that number dropped to 17%. These numbers suggest that while companies are more likely to file a bid protest, they are somewhat less likely to win a bid protest.

In addition to GAO sustaining a protest, contracting agencies may voluntarily act to correct the allegation charged in the protest. The percentage of protesters obtaining relief—either through a protest being sustained or voluntary action taken by an agency—is called the effectiveness rate. Over the last five fiscal years the effectiveness rate has remained relatively stable, averaging 42%. Some observers believe that the increase in the effectiveness rate is a result of the predictable nature of GAO opinions. When agencies can determine how GAO will rule in a given situation, they are more likely to voluntarily take corrective action. Under this theory, the effectiveness rate is a rough measure of the number of protests that have merit. Others believe that voluntary action by agencies is often a result of a risk-averse culture that seeks to avoid even the potential of a protest being sustained. These observers could argue that the high likelihood of protests being resolved through voluntary agency action encourages companies to file protests.

Analysts believe that protests are sometimes the result of poor communication between government and industry, poorly written requirements, and agencies not adequately debriefing losing bidders after an award. When agencies do not adequately debrief bidders, companies may file a protest to determine why they lost a competition. If poor communication results in bid protests, improving agency communication, clarity, and debriefs could result in fewer protests.

The specter of a company filing a protest can influence agency behavior—sometimes positively and sometimes negatively. Fear of a protest may motivate agency officials to conduct more rigorous market research, hold a competition instead of using sole-source awards, or conduct a more thorough and fair competition. Fear of a protest could also prompt officials to try to structure a contract in a manner they deem less likely to be protested, such as using lowest price technically acceptable as an award criteria instead of a best-value competition (when best value may be more appropriate).

DOD contracts are less likely to be protested, and when protested, less likely to be sustained than civilian agency contracts. Protests against civilian agencies are also growing at a faster rate than protests against DOD.

Contents

Introduction 1
Background 1
GAO Bid Protests 2
Number of Bid Protest Cases Filed With GAO 3
Number of Government Procurements Protested 6
Number of Bid Protests Sustained by GAO 6
Changing Trends in GAO Protests: Comparing Rate of Protests to Rate of Obligations 8
Why Companies File Bid Protests 10
Does the Threat of a Protest Drive Agency Behavior? 11
Common Grounds for GAO Sustaining Bid Protests 12
Are Bid Protests Delaying Contracts? 13
DOD Contracts and Bid Protests 14

Figures

Figure 1. Number of Bid Protest Cases Filed With GAO 4
Figure 2. Effectiveness Rate of Protests 5
Figure 3. Number of Procurements Protested 6
Figure 4. Number of Protests Sustained by GAO 7
Figure 5. Percentage of Protests Sustained by GAO 7
Figure 6. Comparison of Contract Obligations to Bid Protests Filed 8
Figure 7. Comparison of Protests Filed to Rate of Decisions Sustained 9
Figure 8. Number of Bid Protest Cases Filed with GAO 10
Figure 9. Number of Bid Protests Against DOD 15
Figure 10. DOD Contract Obligations 16
Figure 11. Percentage of Protests Against DOD Sustained by GAO 16
Figure 12. DOD Share of All Federal Contract Spending and Bid Protests 17

Tables

Table 1. Growth Rate of Number of Protest Filed Against DOD vs. Civilian Agencies 17

Table A-1. Bid Protests Against DOD 18
Table A-2. Comparison of Protests Closed Against DOD vs. Civilian Agencies 20

Appendixes

Appendix. Bid Protests Filed Against DOD 18

Contacts

Author Information..... 21

Introduction

Bid protests of federal government contracts filed with the Government Accountability Office (GAO) have received congressional scrutiny due to high-profile protests of awards, including protests filed against a $1.6 billion Department of Defense (DOD) contract for cloud services (protested by Amazon, Citrix Systems, and other companies); a contract to provide security background checks for the Department of Homeland Security (protested by US Investigations Services), and a NASA contract to develop crew space transportation capability (protested by Sierra Nevada Corp.).[1] The increasing number of protests and the impact protests can have in delaying contract award or performance have raised concerns regarding the impact of protests on agency operations, especially in DOD. Both the House- and Senate- passed versions of the FY2016 National Defense Authorization Act seek to require a report on the GAO bid protest process.[2]

This report is one of two providing Congress with background on the GAO bid-protest process. It analyzes (1) trends in bid protests filed with GAO, (2) why companies protest, (3) the impact bid protests have on acquisitions, (4) the most common grounds for GAO to sustain a protest, and (5) trends in bid protests filed against DOD. Its companion report, archived CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, provides background and an overview of the time frames and procedures in a GAO bid protest.

Background

The Federal Acquisition Regulation (FAR) regulates how the federal government acquires goods and services by implementing statutes and codifying uniform policies and procedures for the executive branch.[3] The intent of the FAR is to help guide the federal acquisition system to "deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives."[4] One of the guiding principles of the FAR, as set forth in the Competition in Contracting Act (P.L. 98-369), is to promote competition for government contracts.[5]

In an effort to protect the integrity of the procurement system, the FAR and federal law provide mechanisms for contractors to object to (protest) contract awards. Generally, any interested party

[1] Bid protests are formal, written objections to an agency's solicitation for bids or offers; cancellation of a solicitation; or award or proposed award of a contract. See 31 U.S.C. § 3551(1)(A)-(D).

For the protest against DOD, see file Number: B-411150 (protests dismissed Mar 12, 2015). For the USIS protest see file number B-410454.2, Matter of: US Investigations Services, Professional Services Division, Inc, January 15, 2015. For the Sierra Nevada protest see file numbers B-410485, B-410485.2, B-410485.3, Matter of: Sierra Nevada Corporation, January 5, 2015.

[2] See S. 1376 (§ 880), which calls for GAO to submit "a report on the prevalence and impact of bid protests on Department of Defense acquisitions over the previous 10 years" and H.R. 1735, which calls for an independent research entity to conduct "a comprehensive study of factors leading to the filing of bid protests." The 110th Congress held hearings on a protested procurement and considered legislation that would have precluded government agencies from making a contested award. See, Air Force Aerial Refueling Tanker Replacement: Hearing before the House Committee on Armed Services, July 10, 2008; KC-X Tanker Recompete Act, H.R. 6426, 110th Congress, at § 2(a).

[3] The FAR is issued and maintained jointly by the Secretary of Defense, Administrator of General Services, and the Administrator, National Aeronautics and Space Administration. The official FAR appears in the Code of Federal Regulations at 48 CFR Chapter 1. For more information, see http://acquisition.gov/far/index.html.

[4] FAR 1.102.

[5] Ibid.

who believes that a contract has been awarded unlawfully can seek relief and contest the award by filing a protest.[6] GAO has been a forum for resolving protests for 90 years and is the only administrative institution with the authority to hear protests across the federal government; the Court of Federal Claims (COFC) is the only judicial forum for hearing such protests.[7] Companies can also file a protest with the agency awarding the contract, and under certain circumstances, with specialized entities, such as the Small Business Administration or the Bureau of Indian Affairs.[8] GAO, however, is the primary location for resolving government contract protests.[9]

GAO Bid Protests

GAO may generally hear protests alleging illegalities or improprieties in solicitations, cancellations of solicitations, awards, or proposed awards of contracts. The procedures for bringing and conducting GAO protests are designed to ensure "the inexpensive and expeditious resolution of [bid] protests" to "the maximum extent practicable."[10] Protesters need not file formal briefs or technical pleadings,[11] can represent themselves,[12] and can have protests decided without hearings.[13] All protests are required to be resolved within 100 calendar days of being filed.[14] The filing of a GAO protest often results in an automatic stay of contract award or performance that can interrupt agencies' procurements for as long as the protest is pending.[15]

GAO may dismiss, deny, or sustain a protest. A dismissal or denial allows the agency to proceed with the challenged procurement. A sustained decision, in contrast, generally disrupts the procurement because GAO will issue recommendations to the agency about the challenged procurement—such as re-competing the contract or amending the existing solicitation.[16] GAO's

[6] A protest is a written objection to a procurement by an interested party. See FAR 33.101. An interested party is "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." See FAR 33.101.

[7] Historically, a protest could be filed in a number of forums, including the General Services Board of Contract Appeals and the U.S. district courts. By 2001, Congress had removed bid protest jurisdiction from the General Services Board of Contract Appeals and the U.S. district courts. See Clinger-Cohen Act of 1996, P.L. 104-106, 110 Stat. 679 (1996) and Administrative Dispute Resolution Act of 1996, P.L. 104-320, 110 Stat. 3870 (1996). See also W. Noel Keyes, *Government Contracts Under the Federal Acquisition Regulation*, 3rd ed. (West Publishing, 2003), p. 734. See 31 U.S.C. § 3556 for the authority of the awarding agency, GAO, and COFC to hear bid protests.

[8] See FAR Subpart 19.3.

[9] See Daniel I. Gordon, "Bid Protests: The Costs Are Real, but the Benefits Outweigh Them," *The Public Contract Law Journal*, Spring 2013, p. 17. GAO was established in 1921 as an independent auditor of government agencies and activities by the Budget and Accounting Act of 1921 (42 Stat. 23). Today, GAO provides a variety of services to Congress that extend beyond its original functions and duties, including oversight, investigation, review, and evaluation of executive programs, operations, and activities. For more information on the GAO, see http://www.gao.gov.

[10] 31 U.S.C. § 3554(a)(1).

[11] 4 C.F.R. § 21.1(f).

[12] GAO, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide*, 8th ed. (2006), "Background," 1, *available at* http://www.gao.gov/special.pubs/og96024.htm.

[13] 4 C.F.R. § 21.7(a).

[14] 31 U.S.C. § 3554(a)(1). The GAO must also resolve timely supplemental or amended protests within this timeframe, if possible. 4 C.F.R. § 21.9(c).

[15] 31 U.S.C. § 3553(c)-(d). However, in certain circumstances, a timely protest will not result in an automatic stay. For more information see archived CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*.

[16] 31 U.S.C. § 3554(b)(1)(A)-(G). GAO can also sustain protests and issue opinions to the agency in pre-award protests (which often involve challenges to the terms of the solicitation). In such protests, the statutory stay does not stop agency activities leading to award of the contract, but only the award itself.

recommendations are not legally binding upon the agency, but the agency must notify GAO if it does not fully implement GAO's recommendations.[17] Agencies almost always comply with GAO recommendations on protested procurements.[18] Protesters who are disappointed with GAO's decision can seek reconsideration[19] or effectively appeal GAO's decision by filing a protest with the Court of Federal Claims.[20]

Number of Bid Protest Cases Filed With GAO

In FY2014, GAO received 2,561 cases, an increase of 5% over the previous year and an increase of almost 125% since FY2001.[21] In FY2007, Congress expanded GAO's jurisdiction to include protests of some task/delivery orders,[22] A-76 contracts,[23] and Transportation Security Administration contracts.[24] Excluding protests from expanded jurisdiction, from FY2001 to FY2014, protests increased by almost 100% (see **Figure 1**).[25] However, over the last four years, the number of protests has remained relatively constant (2,206 in FY2011 vs. 2,269 in FY2014).

[17] 31 U.S.C. § 3554(b)(3).

[18] Based on CRS analysis of GAO annual reports to Congress for FY2001-FY2014.

[19] 4 C.F.R. § 21.14(a). For more information regarding the GAO bid protest process, see archived CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*.

[20] 31 U.S.C. § 3556.

[21] CRS analysis of data contained in GAO's annual reports to Congress.

[22] A task or delivery order contract is a contract that does not procure or specify a specific quantity of services or goods (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks or deliveries during the period of the contract. See FAR 16.501-1.

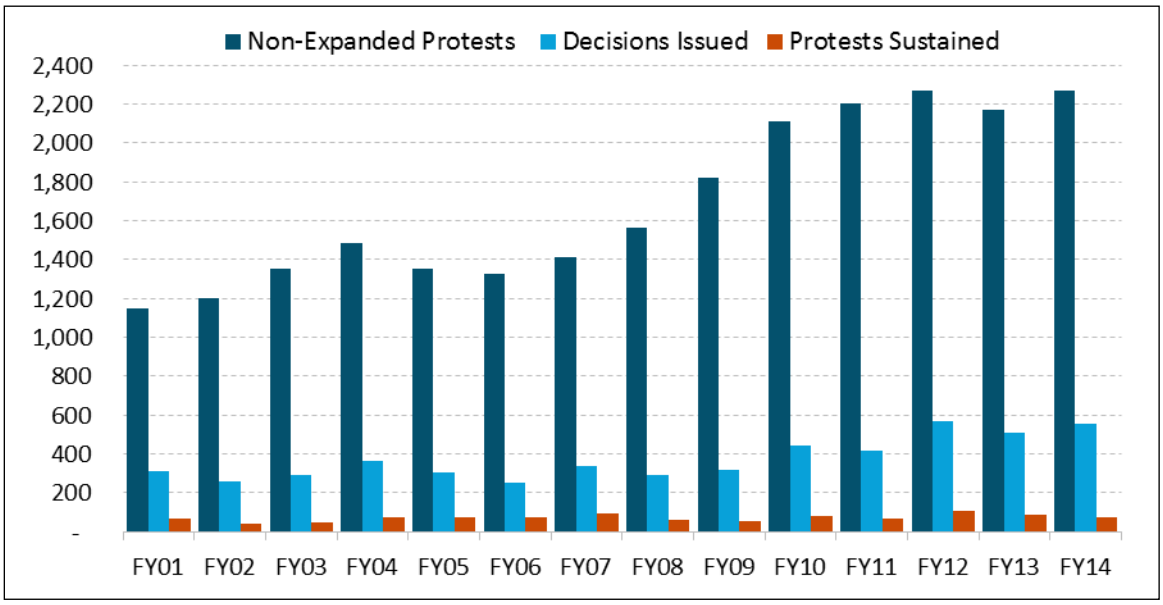
[23] An A-76 contract refers to OMB Circular A-76, which outlines the process for managing public-private competitions to perform functions for the federal government. For more information on GAO jurisdiction for A-76 contracts, see *GAO Bid Protests: An Overview of Time Frames and Procedures*.

[24] The expanded jurisdiction for all three categories took effect during FY2008 (see Government Accountability Office, "Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts," 73 *Federal Register* 32427, June 9, 2008). For more information on GAO's expanded jurisdiction, see *GAO Bid Protests: An Overview of Its Timeframes and Procedures*.

[25] In FY2014, more than 290 protests were filed as a result of expanded jurisdiction.

Figure 1. Number of Bid Protest Cases Filed With GAO

FY2001-FY2014



Source: CRS analysis of Comptroller General annual reports to Congress for FY2001-FY2014. See http://www.gao.gov/decisions/bidproan.htm for copies of the reports. Number of cases in expanded jurisdiction based on filed protests through FY2012 and on closed protests for FY2013 and FY2014.

Notes: Data excludes bid protests filed since FY2008 as a result of GAO's expanded jurisdiction over task orders, A-76 protests, and Transportation Security Administration protests.

Most protests are dismissed, withdrawn by the protester, or settled prior to GAO issuing an opinion. Since FY2001, on average, GAO issued an opinion on 22% of cases. When GAO issued an opinion, on average, the protest was sustained 20% of the time. As a result, from FY2001 to FY2014, approximately 4% of all protests filed were sustained (see **Figure 5**). However, this data may overstate the number of procurements with sustained protests, as a single procurement can have multiple protests sustained (see below, "Number of Government Procurements Protested").[26]

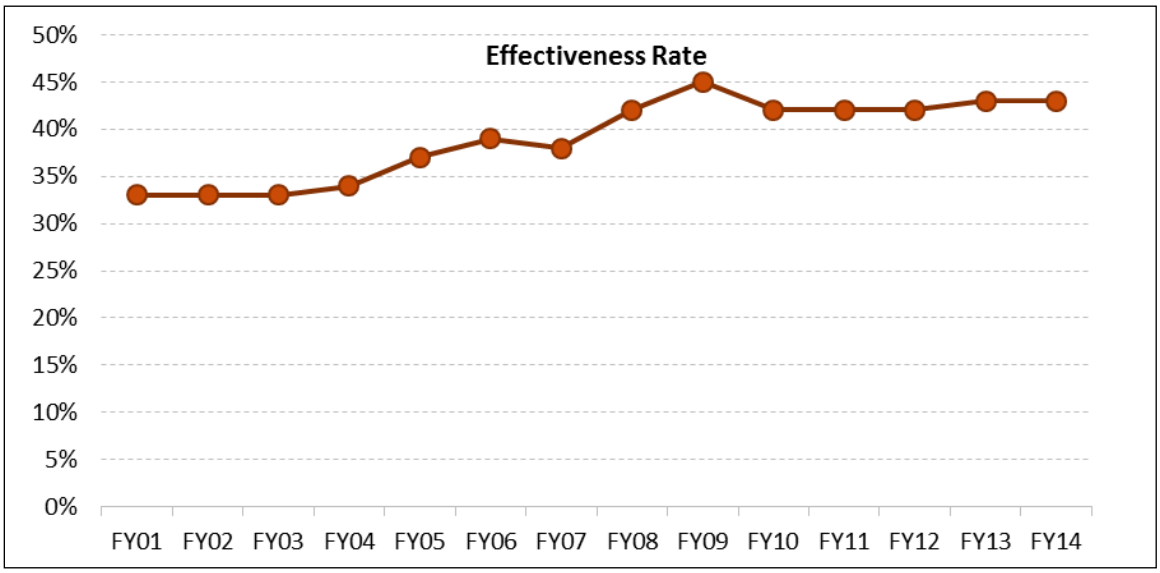
In addition to GAO sustaining a protest, protesters can also obtain relief when a contracting agency voluntarily acts to correct the allegation charged in the protest. For example, if a protester claims that a request for proposal did not accurately describe the contract requirements, the agency could voluntarily amend the request for proposal. Many analysts consider the increasing willingness of agencies to voluntarily take corrective action as one of the most significant trends in bid protests. In many cases, voluntary action by an agency could indicate that the agency believes that a given protest has merit. However, there may be instances when an agency takes corrective action even when it believes that the procurement was done properly (for example, meeting with the protesting party to clarify why the protester lost the competition could be corrective action).

The percentage of protesters obtaining relief—either through a protest being sustained or voluntary action taken by an agency—is called the effectiveness rate. From FY2001 to FY2014, the effectiveness rate of GAO protests grew from 33% to 43% (see **Figure 2**). Over the last five fiscal years the effectiveness rate has remained relatively stable, averaging 42%.

[26] For a more extensive discussion, see Daniel I. Gordon, "Bid Protests: The Costs Are Real, but the Benefits Outweigh Them," *The Public Contract Law Journal*, Spring 2013.

Figure 2. Effectiveness Rate of Protests

FY2001-FY2014



Source: CRS analysis of GAO annual reports to Congress for FY2001–FY2014.

Note: Based on a protester obtaining some form of relief from the agency, as reported to GAO.

Some observers believe that the increase in the effectiveness rate is a result of the predictable nature of GAO opinions. If GAO decisions are sufficiently predictable to allow agencies to determine how GAO will rule in a given situation, agencies may be more likely to voluntarily take corrective action than wait for GAO to sustain a protest. Under this theory, the effectiveness rate is a rough measure of the number of protests that have actual or potential merit.

Some government officials and analysts have suggested that agencies usually take corrective action when GAO has indicated its intent to sustain a protest. The data does not support this contention. According to GAO

> The vast majority of agency corrective action occurs before agencies have submitted their reports responding to the merits of the protest. Prior to receipt of the agency report, GAO attorneys are unable to assess the merits of a protest and therefore do not provide parties with outcome prediction alternative dispute resolution. Accordingly, where the vast majority of agency corrective action is occurring prior to the submission of the agency report, the corrective action is self-initiated by the agencies, without GAO prompting or involvement.[27]

Others believe that corrective action often reflects agencies' risk-averse efforts to avoid even the potential of a protest being sustained. These observers could argue that the high likelihood of protests being resolved through voluntary agency corrective actions encourages companies to file protests. These analysts could also argue that if agencies allowed more cases to be decided on the merits (only taking voluntary corrective action where there is clear precedent that GAO would sustain the protest), companies might be less inclined to file protests.

[27] Email received by CRS from GAO officials, July 6, 2015.

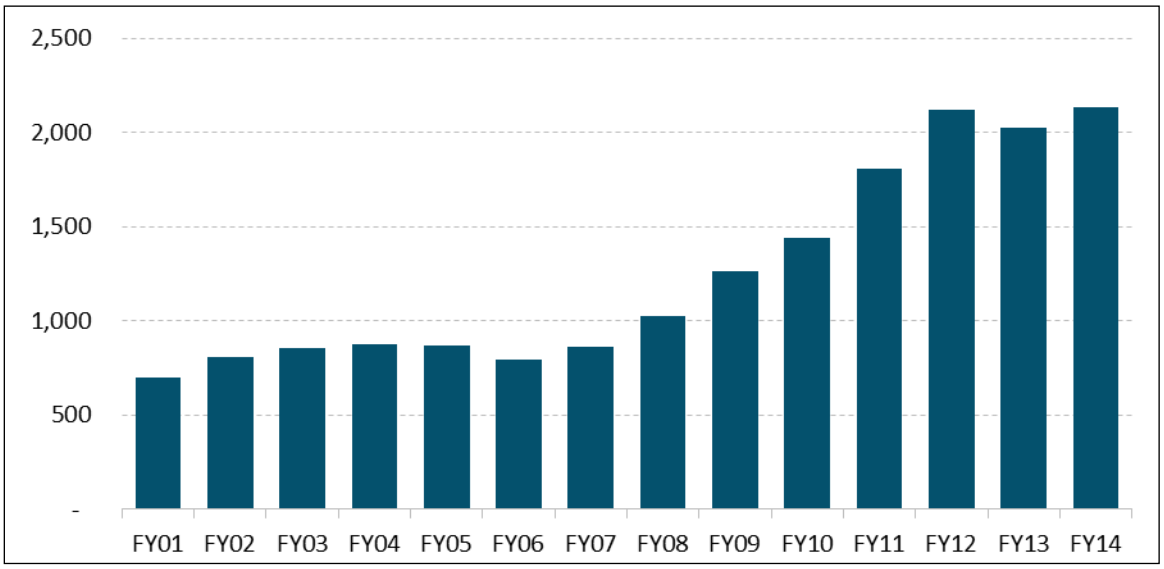
Number of Government Procurements Protested

Bid protest data reported to Congress, while an accurate reflection of the *work load* assumed by GAO in its function as a forum for bid protests, over-represents the *number* of procurements protested. In instances where more than one protest is filed in connection to a single procurement, each protest is counted separately and assigned a distinct tracking number. The data GAO provides to Congress also includes cost claims and requests for reconsiderations.[28]

Adjusting for cost claims, requests for reconsideration, multiple filings on a single procurement, and expanded jurisdiction, in FY2014, GAO's workload consisted of 2,269 filings, but only 2,135 procurements were protested. From FY2001-FY2014, the number of procurements protested tripled, from some 700 to over 2,100 (see **Figure 3**).[29]

Figure 3. Number of Procurements Protested

FY2001-FY2014



Source: GAO data provided to CRS.

Number of Bid Protests Sustained by GAO

In recent years, as the number of protests has increased, the number of bid protests sustained by GAO has trended higher (see **Figure 4**).[30] However, the percentage of overall protests sustained by GAO has trended lower (see **Figure 5**). This data seems to indicate that the increase in the

[28] Cost claims are GAO recommendations for reimbursement of costs incurred by protesters. See 4 C.F.R. § 21.8(f)(1). A request for reconsideration is when a party involved in the protest requests reconsideration of a bid protest decision. See 4 C.F.R. § 21.14 for more information GAO Bid Protests: An Overview of Time Frames and Procedures.

Between FY2001 and FY2014, GAO received over 1,000 requests for reconsideration, which are essentially petitions to reconsider a ruling that it just issued on a bid protest. According to GAO, in only one instance was a request for reconsideration granted, essentially reversing its prior ruling. See Matter of Construction Solutions, Inc.-Protest and Reconsideration, File B-405288; B-405288.2, October 11, 2011.

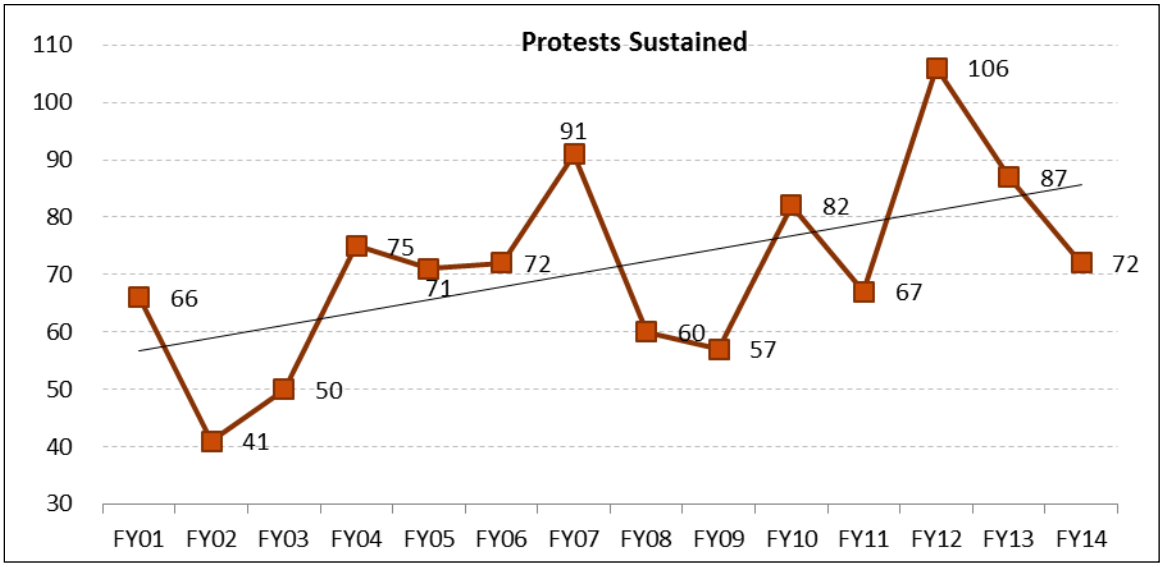
[29] Based on data provided by GAO.

[30] Data on protests sustained includes protests emanating from GAO expanded jurisdiction. CRS does not have a breakdown of protests sustained in the expanded jurisdiction cases and therefore cannot adjust the data.

number of protests sustained is a reflection of the increased number of protests filed, not an increase in the rate of government error.

Figure 4. Number of Protests Sustained by GAO

FY2001-FY2014

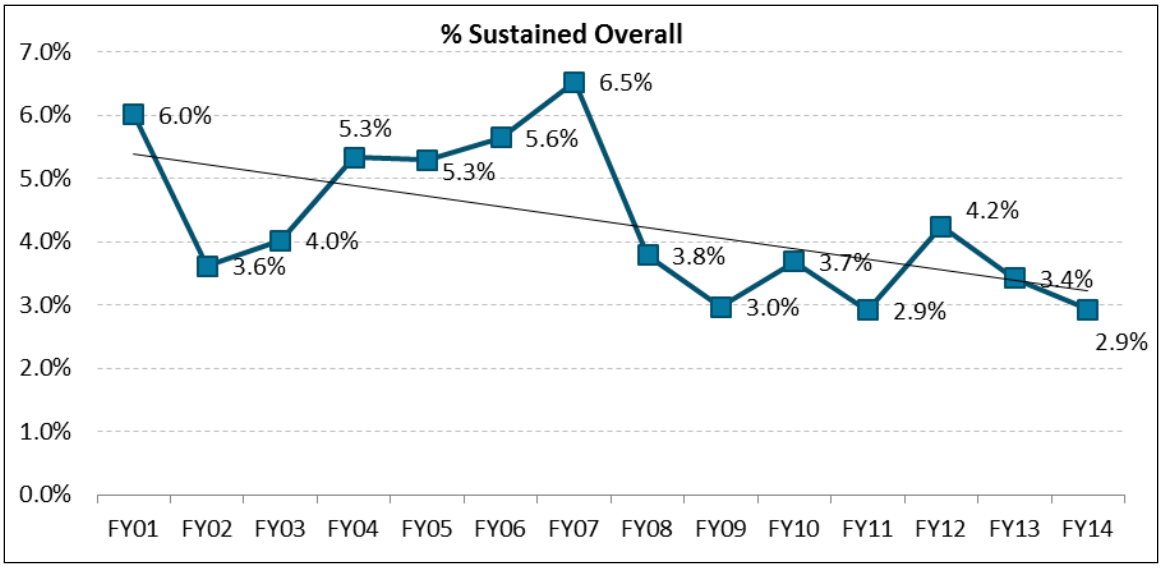


Source: CRS analysis of Comptroller General annual reports to Congress for FY2001-FY2014.

Note: Data does not adjust for multiple filings in single procurement.

Figure 5. Percentage of Protests Sustained by GAO

FY2001-FY2014



Source: GAO data provided to CRS.

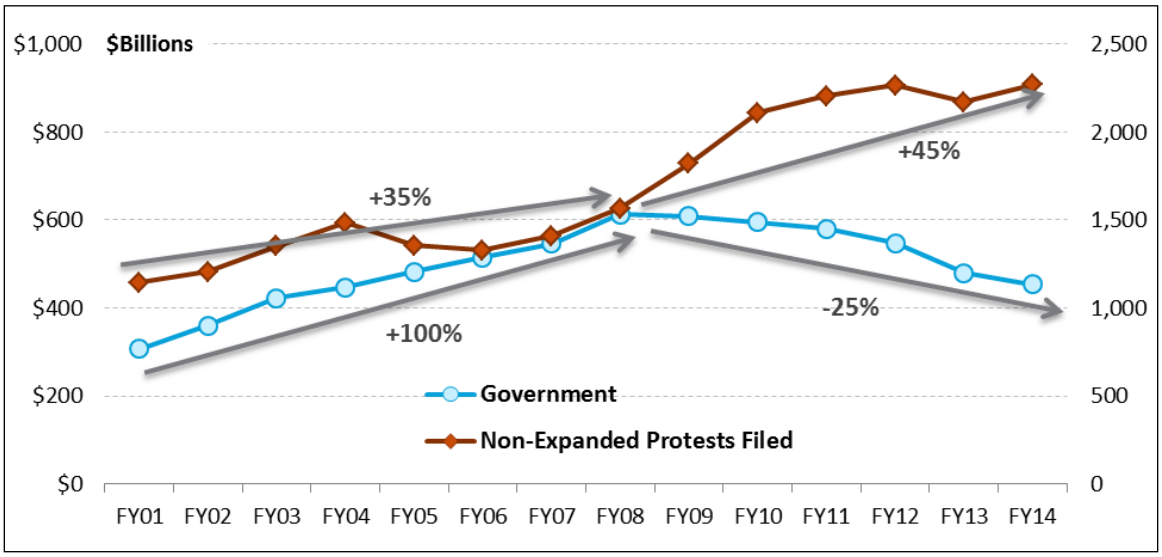
Note: Data does not adjust for multiple filings in single procurement. Based on cases closed.

Changing Trends in GAO Protests: Comparing Rate of Protests to Rate of Obligations

A closer look at the data indicates a significant shift in bid protest trends over the last six years (see **Figure 6**). From FY2001-FY2008, total government procurement spending, adjusted for inflation, increased at a faster rate (over 100%) than the number of protests filed (35%). This trend reversed itself in FY2008: from FY2008-FY2014 total government spending, adjusted for inflation, decreased 25% while total protests increased 45%. This data indicates that, when compared to the rate of government spending, bid protests decreased from FY2001-FY2008, and increased from FY2008-FY2014.

Figure 6. Comparison of Contract Obligations to Bid Protests Filed

(FY2015 dollars)



Source: CRS analysis of data provided by GAO.

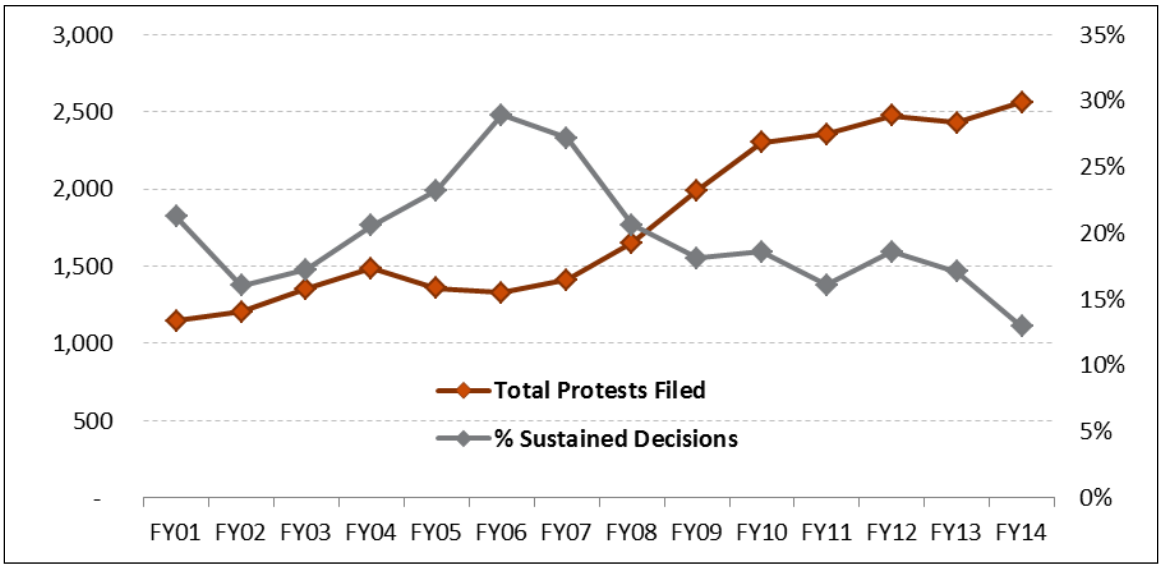
The rate at which GAO sustains protests has also seen a significant shift in recent years. From FY2001-FY2008 GAO sustained protests in 22% of their opinions; from FY2009-FY2014 that number dropped to 17% (see **Figure 7**). In FY2014, 13% of protests filed were sustained, the lowest rate since before 2001. This data seems to indicate that while companies are more likely to file a bid protest, they are somewhat less likely to win a bid protest.

Even when GAO sustains a protest, the protesting company is not guaranteed to win the contract in question. According to one analysis, out of some 1,500 procurements protested in FY2010, GAO sustained a protest in 45 procurements; out of those 45 procurements, in 8 instances the protesting party went on to win the contract.[31] In other words, of the original 1,500 procurements protested, GAO sustained a protest and the protesting party went on to win the contract 0.5% of the time. However, this figure does not account for cases where the agency took corrective action prior to GAO issuing an opinion. Taking into account agency corrective action, one observer

[31] At the time the analysis was published, a final outcome had not been determined in seven cases. In the remaining 30 cases the contract was awarded to a company other than the protesting party. Daniel I. Gordon, "Bid Protests: The Costs are Real, But the Benefits Outweigh Them," *The Public Contract Law Journal*, Spring 2013, p. 22-24.

estimated that a "protester has a 12% chance of ultimately winning a contract award as a result of its protest."[32]

Figure 7. Comparison of Protests Filed to Rate of Decisions Sustained



Source: CRS analysis of data provided by GAO. Data includes protests from expanded jurisdiction.

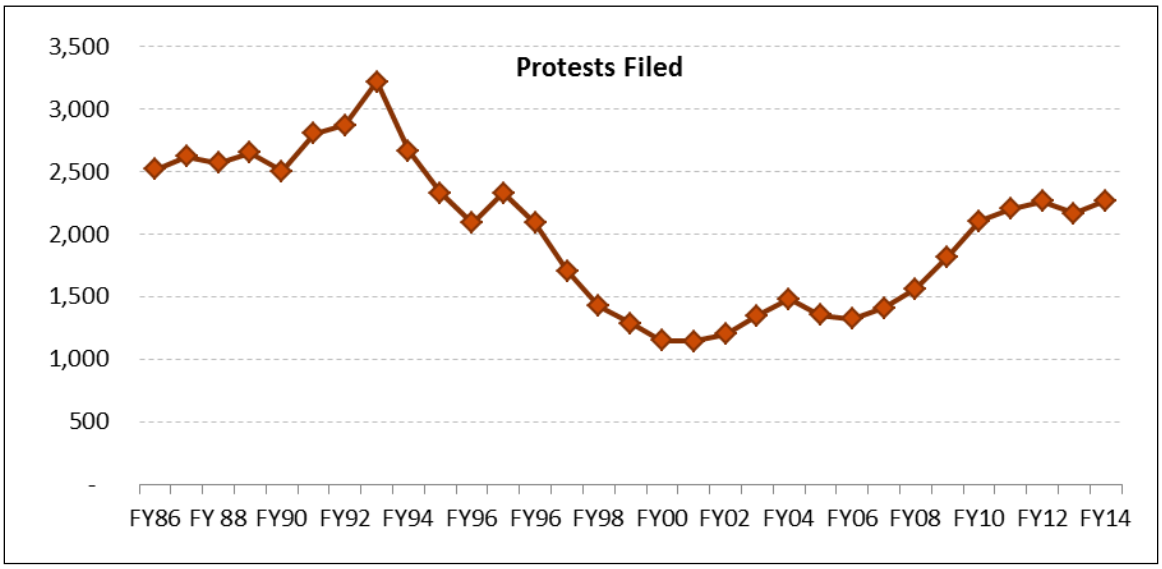
Even though protests have increased significantly over the last few years, the number of protests filed in FY2014 was not very high by historical standards (see **Figure 8**). From FY1986-FY2000, GAO received on average over 2,200 protests annually.[33]

[32] Thomas Papson, Jason Carey, and Luke Meier, "The Odds of Winning a Contract After Protesting Are Higher Than You Think," *The Government Contractor*, vol. 55, no. 16 (April 24, 2013).

[33] See Richard D. Lieberman, "Bid Protests at the Court of Federal Claims and the General Accounting Office," *Federal Contracts Report*, March 31, 1997, and GAO annual report to Congress.

Figure 8. Number of Bid Protest Cases Filed with GAO

FY1986-FY2014



Source: CRS analysis of Comptroller General annual reports to Congress for FY1986-FY2014. Data excludes protests from expanded jurisdiction.

Notes: FY2008-FY2014 data excludes bid protests filed as a result of GAO's expanded jurisdiction over task and delivery orders, A-76 protests, and Transportation Security Administration protests. CRS has not ascertained what precipitated the decrease in bid protests from FY1992-2000.

Why Companies File Bid Protests

Media reports discussing the increase in bid protests over the last few years have fueled the debate over why the number of protests is rising.[34] Generally, companies file a bid protest based on the belief that the government has made a material error in the bidding process. According to analysts, the most common government errors cited in protests are poorly written or vague contract requirements, failure to follow the process or criteria laid out in the request for proposals, and failure to adequately document government findings.[35] Some analysts have attributed these errors to an inexperienced or insufficiently trained acquisition workforce.[36]

In contracts that are complex, have elaborate requests for proposals, or have poorly written requirements, contractors may not always understand the basis upon which awards were made.

[34] See Jack Moore, "Bid Protests Increase in 2012, Nearing 15-Year High," *FederalNewsRadio.com*, December 17, 2012; Jim McElhatton, "As Budgets Tighten, Contract Attorneys Expect Uptick in Bid Protests," *federaltimes.com*, April 3, 2013; Mary-Louise Hoffman, "GAO: Bid Protests Up 5% in Fiscal 2014," *ExecutiveGov*, November 24, 2014.

[35] Steve Roemerman, "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do," *Defense AT&L*, November/December 2010, pp. 10-11; Steven M. Maser, Vladimir Subbotin, and Fred Thompson, "The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" (Atkinson Graduate School of Management), pp. 1, 9.

[36] Steve Roemerman, "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do," *Defense AT&L*, November/December 2010, pp. 9-12; Steven M. Maser, Vladimir Subbotin, and Fred Thompson, "The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" (Atkinson Graduate School of Management), pp. 9-10; Discussions at the "What's the Value of a GAO Protest?" conference, George Washington University Law School, Washington, DC, June 4, 2013.

Not understanding the award criteria can lead contractors to think they were treated unfairly or that an error was made in the award process.[37] A number of analysts and government acquisition officials have attributed confusion on behalf of contractors, in part, to poor communication between government and industry, including agencies not adequately debriefing losing bidders after a contract award. When agencies do not adequately debrief losing bidders, the losing companies may file a protest to determine why they lost the competition.[38] To the extent that poor communication between government and agencies result in bid protests, improving agency communication, clarity, and debriefs could result in fewer protests.[39]

Many analysts have argued that the increase in the value of individual contracts, longer periods of contract performance, policy trends to insource more work, and decreased defense spending make contractors more desperate to win each contract—and more willing to protest an award. For example, an incumbent contractor might file a protest with GAO to trigger an automatic stay of award.[40] If a stay of award is granted, the incumbent may get a temporary bridge contract, thereby extending the time it has to work on the contract and generate revenue. Other reasons companies may protest include hoping to influence the outcome of future competitions (akin to "yelling at the referee"); proving to shareholders and executive managers that they are doing everything they can to win contracts; or even seeking to hurt the competition by delaying a contract award.[41] To the extent that decreased defense spending and consolidation of contracts drives protests, as defense spending and the industry landscape stabilize, the number of protests may begin to decrease in the future.

Does the Threat of a Protest Drive Agency Behavior?

The specter of a company filing a bid protest appears to influence agency behavior—sometimes positively and sometimes negatively. Fear of protests may motivate agency officials to conduct more rigorous market research, hold a competition instead of awarding a sole-source contract, or conduct a more thorough and fair competition. Fear of a protest could also prompt officials to try to structure a contract in a manner they deem less likely to be protested, such as using lowest price technically acceptable (LPTA) as an award criteria instead of a best-value competition (when best value may be more appropriate).

According to a survey of acquisition professionals conducted by Lone Star Analysis,[42] government procurement officials often spend significant time and effort to avoid protests,

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[37] Steven M. Maser, Vladimir Subbotin, and Fred Thompson, "The Bid-Protest Mechanism: Effectiveness and Fairness in Defense Acquisitions?" (Atkinson Graduate School of Management), pp. 9-10.

[38] According to Gary Allen, Senior Attorney, Procurement Law Division, Office of the General Counsel U.S. Government Accountability Office, "Often, agencies give to brief a debriefing... and therefore a lot of times you will have protests to find out information." See https://dap.dau.mil/daustream/Pages/AssetList.aspx?Asset-id=2070351 at the 2:30 mark.

[39] William Keating and Peter McDonald, "How to Reduce the Growing Number of Bid Protests," *DefenseOne.com*, August 12, 2013.

[40] Daniel I. Gordon, "Bid Protests: The Costs Are Real, but the Benefits Outweigh Them," *The Public Contract Law Journal*, Spring 2013, p. 34; Defense Industry Daily Staff, "I Beg to Differ: The U.S. GAO's Bid Protest Process," *Defense Industry Daily*, April 22, 2010.

[41] Steve Roemerman, "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do," *Defense AT&L*, November/December 2010, pp. 9-12; Defense Industry Daily Staff, "I Beg to Differ: The U.S. GAO's Bid Protest Process," *Defense Industry Daily*, April 22, 2010.

[42] Lone Star Analysis, *Summary of Protest Research, Modeling & Simulations*, January 13, 2015. For information on Lone Star, see http://www.lone-star.com/. According to Lone Star, the survey consisted of 297 respondents with complete or nearly complete surveys (of 373 total).

resulting in procurements that are more complex, cost more (to both the government and bidders), and take longer to award. A majority of respondents to the Lone Star survey believes that in most acquisitions

- Stringent rules restrict procurement package preparation to avoid protest, rather than improve acquisition;
- Pre-proposal discussions are curtailed to avoid the appearance of improper discussions;
- Post selection debriefings are "dumbed down" to avoid protest;
- Both Lowest Price Technically Acceptable and Multiple Award contracts are used to avoid protests;
- Legitimate sole source providers are re-competed to avoid protests; and
- Important requirements are not used as award criteria to avoid protests.

Common Grounds for GAO Sustaining Bid Protests

Knowing what aspect of the contracting process most often results in bid protests being sustained could help agencies focus on improving those aspects of contracting. Such improvements could help reduce the number of protests being filed and sustained. According to GAO, in FY2014, the most common grounds for sustaining protests were a result of agencies[43]

- not adhering to established evaluation criteria,
- issuing flawed selection decisions,
- making unreasonable technical evaluations, and
- not treating all bidders equally.

Another common ground for sustaining protests is agencies failing to maintain adequate documentation. According to Gary Allen, a Senior Attorney in GAO's Procurement Law Division, Office of the General Counsel,

> One of the big issues that we have at GAO are documented records. Our responsibility or review of protests is not to reevaluate a procurement but is to see... whether the contracting office or whoever the source selection authority is, is reasonable in their decision and the only way we can make that determination is when there is a documented record.[44]

- 194 said they had "never been involved with government contracting."
- 22 gave conflicting responses on their experience and were used only for comparative purposes
- 81 indicated acquisition experience (Average respondent had personally witnessed 4 protests)
  - 53 were most familiar with DOD
  - 53 were had experience as contractors
  - 12 were most familiar with other Federal Agencies
  - 15 were most familiar with states
  - 29 had experience in a Federal procurement organization or program office.

[43] See GAO's FY2014 annual report to Congress. In Section 867 of the FY2013 National Defense Authorization Act (P.L. 112-239), Congress required GAO to include in its annual report the most common ground for sustaining protests.

[44] See https://dap.dau.mil/daustream/Pages/AssetList.aspx?Asset-id=2070351 at 1:30 mark, August, 20 2014.

Are Bid Protests Delaying Contracts?

Under the Competition in Contracting Act (CICA), the mere filing of a bid protest with GAO may result in an automatic stay, or postponement, of contract award or performance.[45] When a protest is filed prior to award, an agency may not award a contract until the protest has been resolved.[46] Similarly, when a protest is filed after award, the agency must withhold authorization of performance under the contract while the protest is pending.[47] If performance has begun, the agency must "immediately direct the contractor to cease performance under the contract" until the protest is resolved.[48]

Congress mandated the stay of award in 1984 to ensure that in cases where GAO found that procurement law or regulation was violated there would be sufficient opportunity for agencies to remedy the violation. As the report of the House Committee on Government Operations stated in 1984, Congress believed

> a cardinal failing of this bid protest process [is that] GAO has no power to stop a contract award or contract performance while a protesting is pending. As a result, agencies usually proceed with their contracts knowing that they will preclude any possibility of relief simply by delaying the bid protest process.[49]

If an agency believes that delaying a contract will have severe consequences, CICA provides grounds for agency overrides of automatic bid-protest stays. According to CICA, agencies may override stays when there are "urgent and compelling circumstances" that impact the interests of the United States and when performing the contract is in "the best interests of the United States."[50]

To ensure timely resolution of protests, Congress required GAO to resolve protest within 100 calendar days of the protest being filed. According to GAO officials, GAO has never failed to complete its work within the required time period. In many cases the protest is resolved much earlier, most often as a result of the protesting party withdrawing the case or GAO dismissing the protest. In addition, GAO can dismiss protests that do not meet filing guidelines and can issue a summary decision on a protest at any time.

According to GAO, in FY2014, protests were resolved on average within 39 days. More than half of all protests were resolved before an agency filed a report with GAO responding to the protest

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[45] CICA was enacted as part of the Deficit Reduction Act of 1984, P.L. 98-369, §§ 2701-2753, 98 Stat. 1175 (1984) (codified, in part, at 31 U.S.C. § 3556).

[46] 31 U.S.C. § 3553(c)(1).

[47] 31 U.S.C. § 3553(d)(1).

[48] 31 U.S.C. 3553(c) and (d).

[49] U.S. Congress, House Committee on Government Operations, *Competition in Contracting Act of 1984*, 98th Cong., 2nd sess., October 10, 1984, H.Rept. 98-1157 (Washington: GPO, 1984), p. 24. See also, p. 61, Memorandum from the Office of the Clerk, House of Representatives, which states

> In essence, based on years of investigations of improper procurement awards, Congress decided that it was better to let bid protesters to stay alleged illegal awards before they occurred so that the matter could be looked into immediately, than to leave it to agencies to give out awards and then, maybe, rectify the legalities later.

See also, U.S. Congress, The Committee of Conference, Deficit Reduction Act of 1984, Conference Report to Accompany H.R. 4170, 98th Cong., June 23, 1984, H.Rept. 98-861 (Washington: GPO, 1984), p. 1436.

[50] According to data provided by GAO, in FY2012, agencies sought to override CICA stays in 33 procurements (2% of procurement protests).

(through the case being dismissed or withdrawn by the protester). These cases were resolved on average in 21 days. This data, however, can be somewhat misleading.

Much of the impact a protest can have on a program's schedule occurs outside of the period between when a protest is filed and the case is closed by GAO. Agency actions to address the complaint in a protest—either through voluntary action or because a protest was sustained—can delay contract awards for weeks or months, costing millions of dollars and delaying delivery of goods and services.[51] The Next-Generation Jammer technology development contract was reportedly delayed by six months when GAO sustained a protest and recommended that the Navy re-evaluate proposals.[52]

DOD Contracts and Bid Protests

The number of bid protest cases against DOD has increased from approximately 600 in FY2001 to 1,200 in FY2014, an increase of 100% (see **Figure 9**).[53] Most protests against DOD were dismissed, withdrawn by the protester, or resolved prior to GAO issuing an opinion. GAO issued an opinion on 23% of protests.[54] In cases where GAO issued an opinion, protests were sustained 11% of the time. From FY2001 to FY2014, on average 4% of protests filed against DOD were sustained by GAO (see **Table A-1** for protests filed and sustained, by service).

[51] In an August 2007 memorandum, John Young, then Acting Under Secretary of Defense for Acquisition, Technology and Logistics, wrote that DOD "has experienced a significant increase in the number of competitive source selection decisions which are protested by industry. Protests are extremely detrimental to the warfighter and the taxpayer. These protest actions consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of capability."

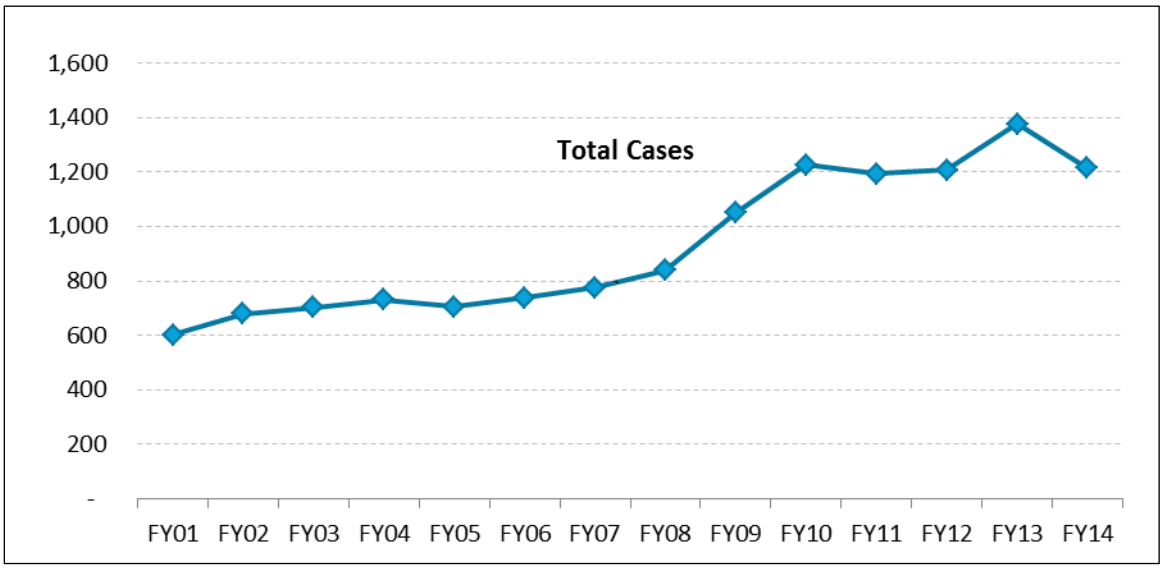
[52] Colin Clark, "The $10B Next Generation Jammer Is 'On Track, On Schedule'," *Breaking Defense*, July 14, 2014, at http://breakingdefense.com/2014/07/the-10b-next-generation-jammer-is-on-track-on-schedule/.

[53] Data based on protests closed in a fiscal year and not on protests filed in a fiscal year. Data also includes protests from expanded jurisdiction. Some protests can be filed in 1 year and closed in the following year; this data does not reconcile with information contained in GAO's annual report to Congress because the annual report to Congress reports on protests filed in a given year and not on the number of protests closed.

[54] Data provided by GAO.

Figure 9. Number of Bid Protests Against DOD

FY2001-FY2014



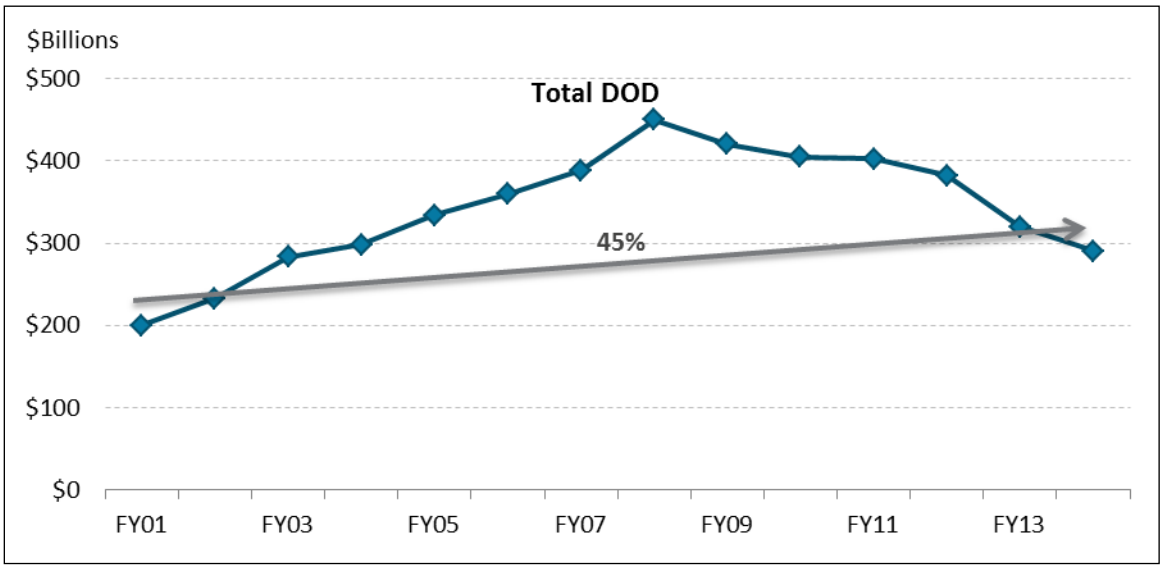
Source: CRS analysis of GAO data. Based on number of protests closed.

Just as the number of protests filed against DOD has increased, the number—and value—of contract actions signed by DOD has also increased (see **Figure 10**).[55] According to the Federal Procurement Data System, between FY2001 and FY2014, after adjusting for inflation, the value of total DOD contract obligations increased 45% compared to an increase of 100% in the number of protests filed in the same period.

[55] Deflators for converting into constant dollars derived from Office of the Under Secretary of Defense (Comptroller), Department of Defense, National Defense Budget Estimates, Department of Defense Deflators—TOA, "Total Non-Pay." CRS was unable to ascertain whether the average dollar value of a contract increased, decreased, or remained constant. Such information would help evaluate more precisely the correlation between the increase in bid protests and the increase in contract spending.

Figure 10. DOD Contract Obligations

(FY2014 Dollars)

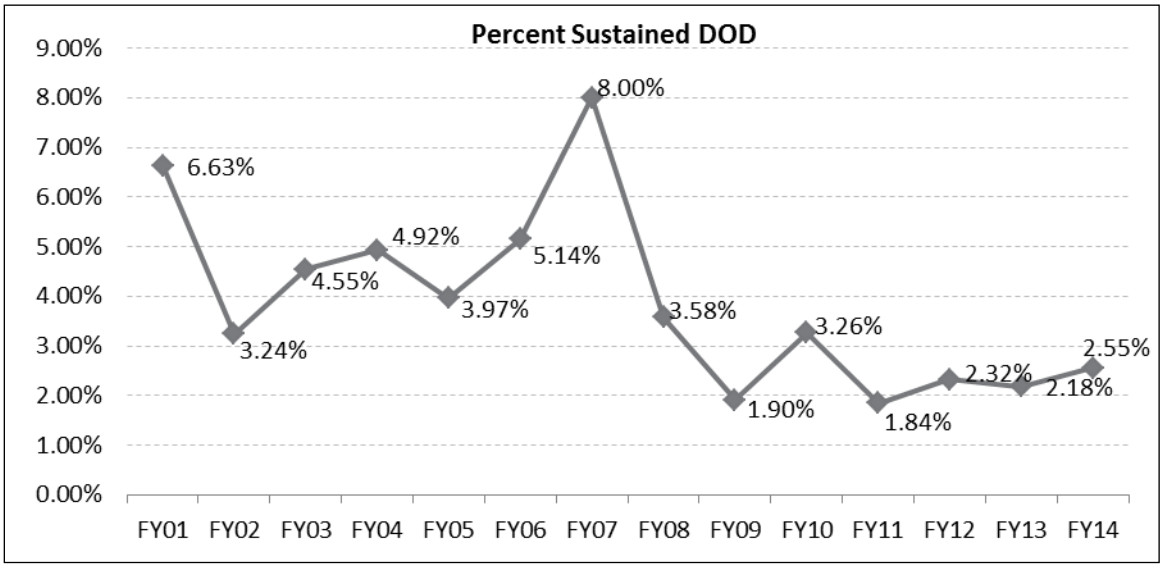


Source: CRS analysis of data from FPDS.

In recent years, the percentage of protests sustained against DOD has decreased (see **Figure 11**). From FY2001-FY2008, GAO sustained on average more than 5% of all protests filed; from FY2009-FY2014, GAO sustained approximately 2% of all protests filed.

Figure 11. Percentage of Protests Against DOD Sustained by GAO

FY2001-FY2014

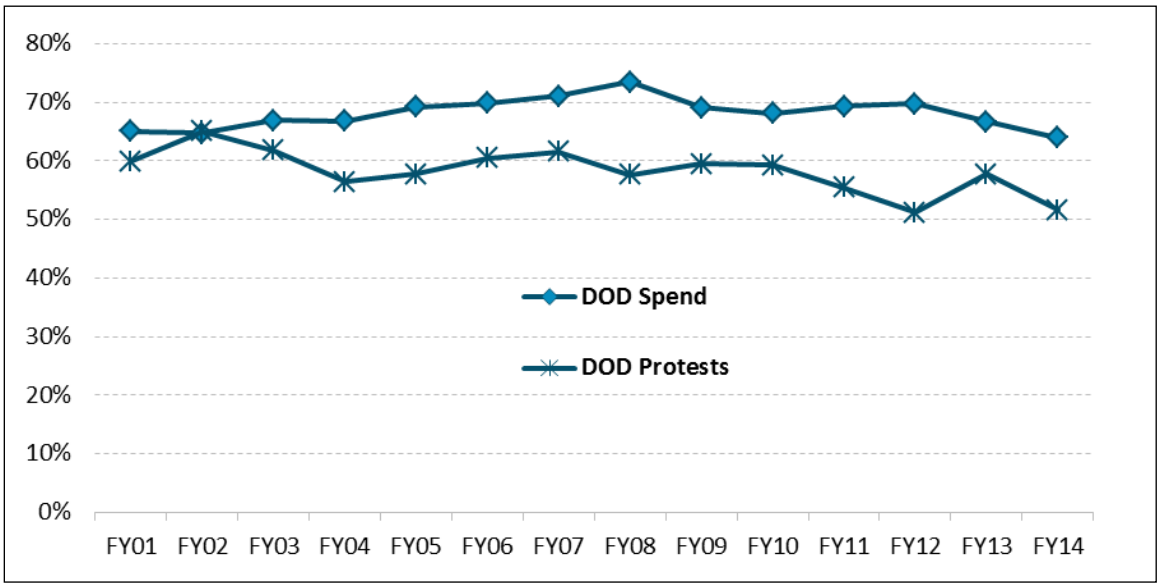


Source: Data provided by GAO. Based on number of protests closed.

DOD procurements are less likely to be protested than those of the rest of government. From FY2008 to FY2014, on average, DOD accounted for almost 70% of total government contract obligations but about55% of total protests against the federal government (see **Figure 12**).

Figure 12. DOD Share of All Federal Contract Spending and Bid Protests

FY2001-FY2014



Source: Spending data obtained from FPDS. Protest data obtained from GAO. Based on protests closed.

Protests against DOD are also sustained at a lower rate than the rest of government. From FY2008-FY2014, 2.5% of all protests against DOD were sustained by GAO, compared to over 5.0% of all protests against federal civilian agencies. Protests against civilian agencies are also growing at a faster rate than protests against DOD. From FY2001-FY2014, the number of DOD procurements that were protested increased 170% (from 421 to 1,138) compared to an increase of 260% (from 279-997) for civilian agencies (see **Table 1**).

Table 1. Growth Rate of Number of Protest Filed Against DOD vs. Civilian Agencies

	DOD	Civilian Agencies
FY2001-2014	170%	260%
FY2008-2014	85%	140%

Source: Data provided by GAO.

Appendix. Bid Protests Filed Against DOD

Table A-1. Bid Protests Against DOD

Based on Cases Closed

	Total Cases	Protests Sustained	Percent sustained	Total Cases	Protests Sustained	Percent sustained
	Air Force			**Army**		
FY2001	145	5	3%	224	12	5%
FY2002	136	4	3%	254	11	4%
FY2003	154	2	1%	229	20	9%
FY2004	132	3	2%	324	18	6%
FY2005	127	13	10%	282	7	2%
FY2006	148	13	9%	334	12	4%
FY2007	136	16	12%	323	22	7%
FY2008	154	9	6%	396	9	2%
FY2009	189	3	2%	503	7	1%
FY2010	205	2	1%	566	23	4%
FY2011	180	1	1%	547	10	2%
FY2012	253	4	2%	530	17	3%
FY2013	237	3	1%	606	3	<1%
FY2014	207	5	2%	514	12	2%
Average	172	6	4%	402	13	4%
	Marines			**Navy**		
FY2001	25	6	24%	116	7	6%
FY2002	16	-	0%	120	5	4%
FY2003	20	-	0%	148	1	1%
FY2004	14	3	21%	112	11	10%
FY2005	12	1	8%	135	5	4%
FY2006	32	1	3%	101	4	4%
FY2007	20	-	0%	129	8	6%
FY2008	22	2	9%	126	9	7%
FY2009	43	2	5%	149	3	2%
FY2010	30	-	0%	182	6	3%
FY2011	37	-	0%	179	3	2%
FY2012	34	-	0%	179	5	3%
FY2013	39	1	3%	209	12	6%
FY2014	25	-	0%	213	6	3%

	Total Cases	Protests Sustained	Percent sustained	Total Cases	Protests Sustained	Percent sustained
Average	26	1	5%	150	6	4%
	Defense Logistics Agency			**DOD (Misc)**		
FY2001	80	3	4%	13	7	54%
FY2002	119	-	0%	35	2	6%
FY2003	107	1	1%	46	8	17%
FY2004	115	1	1%	34	-	0%
FY2005	121	-	0%	29	2	7%
FY2006	70	3	4%	54	5	9%
FY2007	97	-	0%	70	16	23%
FY2008	87	1	1%	53	-	0%
FY2009	127	3	2%	39	2	5%
FY2010	171	3	2%	72	6	8%
FY2011	174	3	2%	76	5	7%
FY2012	119	-	0%	92	2	2%
FY2013	136	3	2%	149	8	5%
FY2014	147	-	0%	108	8	7%
Average	119	2	1%	62	5	11%

Source: CRS analysis of data provided by GAO.

Notes: Data is based on closed cases and does not include requests for reconsideration; therefore data may not reconcile with information contained in GAO's annual report to Congress. GAO data may not be consistent with data compiled by the military services based on differing tracking methodologies.

Table A-2. Comparison of Protests Closed Against DOD vs. Civilian Agencies

	Civilian		DOD		Civilian + DOD					
	Total Cases	Decisions Sustained	Total Cases	Decisions Sustained	Total Cases	Total Sustained	Percent Sustained Civilian	Percent Sustained DOD	% Cases from DOD	% Sustain from DOD
FY2001	404	26	603	40	1,007	66	6%	7%	60%	61%
FY2002	365	19	680	22	1,032	41	5%	3%	65%	54%
FY2003	435	18	704	32	1,139	50	4%	4.5%	62%	64%
FY2004	565	39	731	36	1,296	75	7%	5%	56%	48%
FY2005	517	43	706	28	1,223	71	8%	4%	58%	39%
FY2006	483	34	739	38	1,222	72	7%	5%	60%	53%
FY2007	483	29	775	62	1,258	91	6%	8%	62%	68%
FY2008	616	30	838	30	1,454	60	5%	4%	58%	50%
FY2009	716	37	1050	20	1,766	57	5%	2%	59%	35%
FY2010	841	42	1,226	40	2,067	82	5%	3%	59%	49%
FY2011	957	45	1,193	22	2,150	67	5%	2%	55%	33%
FY2012	1,151	78	1,207	28	2,358	106	7%	2%	51%	26%
FY2013	1,009	57	1,376	30	2,385	87	6%	2%	58%	34%
FY2014	1,138	41	1,214	31	2,352	72	4%	3%	52%	43%

Source: CRS Analysis of data provided by GAO.

Notes: Data based on protests closed in a fiscal year and not on protests filed in a fiscal year. Some protests can be filed in one year and closed in the following year; this data does not reconcile with information contained in GAO's annual report to Congress because the annual report to Congress reports on protests filed in a given year and not on the number of protests closed.

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